

## New Civil Liberties Alliance

May 25, 2023

The Honorable the Members of the Special Committee of the  
Judicial Council for the Federal Circuit  
U.S. Court of Appeals for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439  
**VIA EMAIL**

*Re: In re Complaint No. 23-90015 (Complaint Against Circuit Judge Pauline Newman)*

Your Honors:

This letter responds to the special committee's orders of May 16, 2023, which requested that Judge Pauline Newman agree 1) to medical evaluations by two physicians of the committee's choosing, 2) provide medical records for the committee's review (via a physician chosen by the committee), and 3) make herself available for a video-taped interview with the committee. After denying our request for an extension of time, the committee set the deadline to respond to these requests on May 26, 2023 at 9:00am.<sup>1</sup> The May 16 orders also once again denied our reasonable request to transfer this matter to another circuit's judicial council, and they again completely ignored our request that the Court cease unlawfully barring Judge Newman from hearing new cases before this investigation has concluded.

As we have written previously, the process contemplated by the Rules for Judicial Conduct and Judicial Disability Proceedings ("Conduct Rules") is a cooperative one, *i.e.*, characterized by *all* parties to the process "working or operating *together*." Webster's Second New International Dictionary at 402 (emphasis added). But the process thus far has been anything but cooperative. Instead—and this cannot be emphasized enough—the committee, and/or the Judicial Council of the Federal Circuit ("Judicial Council") has acted *unlawfully* by removing Judge Newman from hearing cases even before the investigation began in earnest. This ongoing action violates Judge Newman's constitutional duty and rights under Article III and the Due Process Clause of the Constitution, her statutory rights under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 351, *et seq.*, and the Conduct Rules.

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<sup>1</sup> We note that May 26, 2023 falls on the Jewish major festival of Shavuot ("Feast of Weeks"). The committee was apprised that Judge Newman's lead counsel is spending this time in Israel with family in order to attend to family and religious obligations. It is particularly disappointing that the committee refused to take these matters into account. In order to avoid a conflict with counsel's religious obligations, we are filing this letter ahead of the deadline, even though doing so has further limited our time to properly consult with Judge Newman and provide a fulsome response to the committee.

But removing her from hearing cases also tramples on the rights of every Federal Circuit litigant with an appeal heard during the time of Judge Newman's unlawful absence from the pool. Such litigants have the right to have their cases heard by a fair draw from the full complement of judges confirmed and appointed to hold judicial office. In all likelihood, some number of disappointed litigants will see fit to raise this objection, as they will stand on their right to have an equal chance of having Circuit Judge Newman sit to hear their cases. The Court should reseal Judge Newman immediately to avert this impending problem that the Court's actions to date have created for itself.

The committee and/or Judicial Council not only maintained this errant, prejudicial course but failed to even acknowledge our repeated attempts to have its errors corrected. Their refusal even to acknowledge the glaring problems counsel has identified would lead any neutral observer to question the committee's and/or the Judicial Council's impartiality in this matter. It is one thing to commit honest errors. It is quite another to persist in them and deliberately disregard repeated attempts to have them corrected. It thus appears that the committee is not interested in "working or operating together" with Judge Newman, but instead insists that Judge Newman merely submit to its unlawful demands.<sup>2</sup>

Additionally, the growing list of demands on Judge Newman is premised in large part on statements that the committee already collected from the employees of the Federal Circuit. These statements were provided to Chief Judge Moore by, *inter alia*, individuals whose very livelihood depends on the Chief Judge (given that the Chief Judge has the power to hire, fire, and reassign employees of the Court, as amply demonstrated by her actions reassigning the employees from Judge Newman's own chambers to other positions). Despite the committee's professed concern that Judge Newman might "intimidate" witnesses by the mere fact that she is a United States Circuit Judge, the same concern does not seem to impress the committee when it comes to interviewing witnesses who work under Chief Judge Moore's authority and supervision. This approach further indicates that the committee is subjecting Judge Newman to double standards and is not taking a cooperative and disinterested approach to resolving this matter.

The substance of the demands themselves, as we have pointed out before, is also highly problematic. The committee has demanded that Judge Newman turn over medical records to, and submit to medical and psychological testing by, physicians whose credentials have not been subject to any examination and whose level of expertise generally or in matters such as the complaint before the committee is entirely unknown to Judge Newman or her attorneys. Neither Judge Newman nor her attorneys know on what basis the committee chose a particular medical consultant and on what basis that particular consultant recommended the physicians who are slated to review Judge Newman's medical records and examine Judge Newman. The expertise of these physicians has not been subject to *voir dire* nor to the analysis required by *Daubert v. Merrell Dow Pharma.*, 509 U.S. 579 (1993). Yet, the committee has rejected, out of hand, the suggestion that the choice of physicians be made jointly by Judge Newman and members of the committee.<sup>3</sup>

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<sup>2</sup> The committee's denial of an entirely reasonable extension request is further evidence of the committee's lack of interest in taking a *cooperative* approach to this matter.

<sup>3</sup> The committee's citation to *In re Complaint of Judicial Misconduct*, No. 06-13-90009 (Judicial Council of the Sixth Circuit Feb. 22, 2016) is entirely misplaced. In that case, when faced with a lawsuit, the Judicial Council for the Sixth Circuit *vacated* the request for a psychological evaluation by an expert of the judicial council's choosing

Next, the committee's request that Judge Newman appear for a video-taped interview is in significant tension with the assurances the committee made in its May 3, 2023 Order that it is intimately familiar with Judge Newman, her work, her behavior, her personality, and any changes in these traits. If the committee is indeed already familiar with these facts, it is hard to understand what additional information it expects to glean from the requested video-taped interview.

Unfortunately, actions taken by this committee against Judge Newman thus far, and the committee's conduct towards Judge Newman over the past two months, have forced Judge Newman to reach a regrettable decision: With the greatest respect for the committee, she cannot in good conscience meet its requests. To assent to the committee's demands while it is unlawfully keeping her from hearing cases would sacrifice the legal principles to which Judge Newman has devoted her entire life and career. Judge Newman has not sat on the federal bench for over thirty-nine years just to sit idly by while due process of law gets thrown to the wind in her own case and unilateral actions are taken in defiance of Congress's unique role in impeaching judges.

Nevertheless, and despite all of the above objections, Judge Newman *does* wish to engage in a truly cooperative process to resolve any doubts or concerns about her physical and mental ability to continue to hold judicial office. To that end, Judge Newman is entirely willing to undergo necessary testing, provide necessary records, and meet with a special committee *provided that she is immediately restored to her rights and duties as a judge and further provided that this matter is promptly transferred to a judicial council of another circuit*, which is unmarred by the prior unlawful decisions and which is willing to "work[] or operat[e] together" with Judge Newman, including on selecting medical providers and setting the appropriate parameters of any examination. Judge Newman commits to making herself available for appropriate appointments at the earliest opportunity in these circumstances.<sup>4</sup>

Regrettable as it may be, should the committee persist in its unlawful actions and demands, Judge Newman will be forced to seek her remedies in federal district court.<sup>5</sup> Even at this late hour, it is our sincere hope that such a development can yet be avoided. The power to do so, however, rests entirely with the special committee and the Judicial Council of the Federal Circuit.<sup>6</sup>

Sincerely,  
/s/ *Gregory Dolin, M.D.*  
Senior Litigation Counsel  
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and vacated all sanctions associated with a refusal to submit to such an unlawful request. We are confident that, if the present matter proceeds to adjudication in the District Court, the outcome will be much the same.

<sup>4</sup> This commitment is made in the spirit of cooperation, but without waiving any rights that Judge Newman may have under the Constitution and the laws of the United States.

<sup>5</sup> See *Newman v. Moore, et al.*, No. 23-cv-01334 (D.D.C. 2023).

<sup>6</sup> Pursuant to Rule 23(b)(7) of the Conduct Rules Judge Newman consents to and requests a public release of this letter.