No. FC-23-90015

In the Judicial Council of the United States Court of Appeals for the Federal Circuit

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

RULE 20(A) RESPONSE TO THE SPECIAL COMMITTEE'S REPORT AND RECOMMENDATION

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INTRODUCTION[1]

These proceedings began after Chief Judge Kimberly Moore accused her long-time colleague, the longest-serving judge on the Federal Circuit and a "heroine of the patent system,"[2] Circuit Judge Pauline Newman, of being no longer mentally fit to continue her service as an active Court of Appeals judge. Were the committee formed to investigate these baseless allegations actually interested in ascertaining the truth of the matter—that Judge Newman, despite her age, is in no way disabled—it could have done so months ago. Instead, Chief Judge Moore and the committee she appointed have been interested in one thing and one thing only—keeping Judge Newman off the bench via the exercise of raw power unconstrained by statutory requirements, constitutional limits, any notions of due process, conflict of interest rules, or even basic fairness. Yet, even now, if Judge Newman's colleagues who are members of this Judicial Council truly wish to assure themselves of Judge Newman's continued ability to carry out her duties, it is not too late to change course and engage in a process unmarred by factual and procedural errors or the personal animosity that has been plainly evident during these proceedings.

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[1] Judge Newman requests that this matter be set for argument. *See* Rule 20(a). Additionally, pursuant to Rule 23(b)(7), Judge Newman requests that this filing be made publicly available.

[2] Kimberly A. Moore, *Anniversaries and Observations*, 50 AIPLA Q. J., 521, 524-25 (2022).

On March 24, 2023, Chief Judge Moore "identified a complaint," which (as will be further discussed below) was predicated on provable falsehoods. It alleged that Judge Newman was suffering from mental and/or physical disability that is incompatible with continued service as an active circuit judge.

The process that this complaint launched was fatally flawed from the very beginning, given that Judge Newman was sanctioned by being removed from hearing cases even before any investigation began. Over time, the allegations in the complaint have morphed from mental and physical disability to misconduct for refusal to cooperate with the probe, despite Judge Newman's numerous attempts to resolve the issue in a truly cooperative and collaborative fashion. As the nature of the allegations against Judge Newman transmogrified, and despite Judge Newman's numerous attempts at having them addressed, procedural flaws have only mounted, undermining confidence in the integrity of the process and the ability of this Judicial Council to resolve the complaint.

Furthermore, not only do both the process itself and the proposed sanctions run afoul of governing statute, they also violate the Constitution because they usurp Congress's sole power of impeachment.

For these reasons, and the ones that follow, the Council should reject the Special Committee's Report and Recommendation. Moreover, because the process cannot be salvaged by further proceedings before this body, the Council should request that the

Chief Justice transfer this matter to another Circuit. And before proceeding further, Judge Newman reiterates that despite everything that has occurred thus far, while she remains willing to engage in a truly cooperative and collaborative process, pure *submission* will not be forthcoming now, a year from now, nor at any time in the future.

I. FACTUAL AND PROCEDURAL BACKGROUND

This process began before it formally began. On February 14, 2023, the office of the Chief Judge improperly excluded Judge Newman from panel assignments for the April 2023 sitting of the Court. Report and Recommendation of the Special Committee of July 31, 2023 (hereinafter "Report") at 79. At the time, as the Report candidly acknowledges, *id.*, Judge Newman was not behind in her opinions enough to allow her exclusion from panel assignments under previously promulgated rules. Yet, the Chief Judge decided not to assign Judge Newman to the April calendar anyway.[3] This *ultra vires* action was a culmination of involuntary reductions in sittings that Judge Newman experienced during the preceding several months.

During February and March of 2023, Judge Newman sat on panels and authored several opinions. Toward mid-March, the attempt to force Judge Newman off the bench began in earnest.

On March 7, 2023, the Chief Judge held a conversation with Judge Newman

[3] The Report's admission that the "Chief Judge's chambers" was responsible for excluding Judge Newman from the April calendar sitting stands in sharp contrast with the Chief Judge's indignant protestations during the July 13, 2023 hearing, *see post*, that any claim that the Chief Judge decides on

advising her that the Chief Judge had "probable cause to believe" that Judge Newman suffers from a disability. According to the Chief Judge's own words, the basis for this "probable cause to believe" that Judge Newman suffered from a disability was, *inter alia*, statements by other judges on this court relayed to her, *i.e.*, members of this Judicial Council. *See* March 24 Order at 2. Judge Moore offered to resolve the identified issue "informally" by demanding that Judge Newman resign or at least take senior status under 28 U.S.C. § 371. The Chief Judge explained that the requirement to step down from active duty was "non-negotiable."[4] This visit was followed by similar visits from Judge Sharon Prost and Judge Richard Taranto, all of whom were subsequently assigned to sit on the Special Committee.[5]

The next day, *i.e.*, March 8, 2023 (again, *before* any formal or informal proceedings

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panel assignments is "[c]ompletely false" and that "[t]he Chief Judge has no input whatsoever." Tr. of Hearing at 41:23-42:13. Either the Chief Judge does have input, as stated in the Report, or she doesn't as she protested in the hearing. Both statements cannot simultaneously be true.

[4] In recent exchanges, Chief Judge Moore and other members of the Special Committee disputed this account of the meetings in Judge Newman's chambers. Of course, the very existence of a factual dispute going to a key question in the case necessarily precludes those with personal knowledge of disputed facts from serving as adjudicators of the dispute. *See, e.g.*, 28 U.S.C. § 455(b)(1); Code of Conduct for United States Judges, Canon 3(C)(1)(a); ABA Model Code of Judicial Conduct R. 2.11(A)(1), 2.11(A)(6)(c).

[5] On March 9, 2023, Judge [redacted], a member of the Judicial Council, appeared at Judge Newman's residence and also attempted to convince Judge Newman to retire.

against Judge Newman began), the Judicial Council allegedly[6] met and voted to remove Judge Newman from hearing any cases indefinitely. Judge Newman, though herself a member of the Judicial Council, and at the time not subject to an investigation, was not even given notice of this meeting, much less invited to address the Council, participate in deliberations, or vote on an action that was supposedly taken "for the effective and expeditious administration of justice within the circuit." 28 U.S.C. § 332(d)(1). Suspending an active judge from hearing cases indefinitely without first conducting an investigation was unprecedented in the history of the American judiciary, and no statute empowered the Judicial Council to do it.

When Judge Newman refused to resign as demanded by the Chief Judge, the Chief Judge prepared a formal order launching the present investigation. It should be noted that no colleague of Judge Newman ever filed a formal complaint alleging misconduct or incapacity, even though all of Judge Newman's colleagues have worked with her and are aware of her capabilities. Instead, the Chief Judge unilaterally converted these expressions of "concern" from unnamed sources into a formal complaint, while denying that she is the real complainant. The Chief Judge provided a draft of the order "identify[ing] a complaint" to Judge Newman on March 17, 2023.

[6] If a formal meeting occurred, there was no notice of such meeting, nor were any minutes provided to Judge Newman despite repeated requests. The Report now acknowledges that the Council's decision "was not memorialized in a written order." Report at 77.

She then threatened to launch a full-scale investigation unless Judge Newman agreed to an "informal resolution," *see* March 24 Order at 6, so long as such a "resolution" included Judge Newman relinquishing her lifetime appointment as an active-duty Judge. Because Judge Newman continued—and continues—to refuse to be coerced into resignation, on March 24, 2023, the Chief Judge formally entered the order and appointed a "special committee," consisting of herself, Judge Prost, and Judge Taranto, *i.e.*, the very judges who already attempted unsuccessfully to pressure Judge Newman to resign, to investigate the allegations made by Chief Judge Moore herself.

The March 24 Order made at least four baseless factual claims. First, the Order alleged that "in the summer of 2021, Judge Newman, at the age of 94, was "hospitalized after suffering a heart attack." *Id.* at 1. Second, the Order alleged that Judge Newman "under[went] coronary stent surgery." *Id.* Third, the Order stated that "on May 3, 2022, Judge Newman fainted following an argument and was unable to walk without assistance." *Id.* Finally, the Order claimed that as a result of these alleged maladies, Judge Newman's "sittings were reduced compared to her colleagues." Each and every one of these original allegations that ostensibly provided the genesis of the investigation is demonstrably false, and even the Special Committee no longer presses any of them. *See, e.g.*, Report at 81-82. To this day, the Committee has not provided any information as to the basis for the claims made in the March 24 Order, so it appears that these claims

were simply fabricated out of whole cloth.[7]

In short order, and without waiting for any responses, affidavits, and the like, the Chief Judge and the Special Committee entered a slew of new orders. On April 6, 2023, Chief Judge Moore issued a new and virtually unprecedented order expanding the scope of the special committee's investigation into Judge Newman's alleged "disability" and "misconduct" to include questions about internal operations of Judge Newman's chambers. The April 6 Order contained no allegations of harassment or other similar conduct. Rather, the order alleged that Judge Newman failed to maintain confidentiality of an employment dispute between herself and a (now former) staff member. The alleged breach of confidentiality stemmed from Judge Newman using the "[redacted] email list—which includes all judges, chambers staff, and other judicial employees (95 individuals in all)," rather than replying by using each judge's individual email address. April 6 Order at 5-6. No one alleged that the [redacted] email list was used with any malice or purpose of disclosing confidential information, rather than as an honest mistake. For that matter, at the time the email was sent, it was not even conveyed to

[7] The Committee feigns offense at this allegation, *see* Report at 81, but it still steadfastly refuses to disclose any basis for the allegations made in Chief Judge Moore's complaint of a "heart attack" or "cardiac stents" or the rest. Even now, when the Committee has explained it did not mean "heart attack" in a "technical" sense, *see, e.g.*, Tr. of July 31 Hearing at 19:9-13, it has not disclosed the basis for its belief that any "cardiac event" occurred in the relevant time period. Absent such basic information, Judge Newman has no choice but to conclude that the allegation was indeed fabricated.

Judge Newman that a formal confidential Employment Dispute Resolution Process had yet begun.

The April 6 Order is particularly noteworthy because it reproduces an email from Chief Judge Moore to Judge Newman that unequivocally states that Judge Newman has been suspended "pending the results of the investigation into potential disability/misconduct" and that Judge Newman "will not be assigned any new cases until the[] [disciplinary] proceedings are resolved." *Id.* at 4. Although after Judge Newman filed suit[8] challenging the unlawful suspension the reason for suspending Judge Newman was changed, it is important to recognize that Chief Judge Moore's email conceded this unlawful basis for it.

On April 7, 2023, the special committee issued an order directing Judge Newman to undergo neurological and neuropsychological examinations. At this point, the Special Committee had yet to speak to any of Judge Newman's staff (for example, the deposition of her career law clerk occurred on April 12, nearly a week after the April 7 Order, whereas the affidavit by another one of her law clerks was not executed until April 19, 2023). Nor had any of the other episodes which the Special Committee recounts in its Report yet occurred. In other words, as of April 7, 2023 when Judge Newman was ordered to undergo unwanted (and unnecessary) medical testing, the

[8] *Newman v. Moore*, No. 1:23-cv-01334-CRC (D.D.C. filed May 10, 2023).

Committee had *no* objective evidence of disability beyond Judge Newman's alleged delays in publishing her opinions. It is therefore not surprising that the April 7 Order listed no bases whatsoever for its demand. The April 7 Order also provided no explanation as to the scope or means of the proposed testing, the use of the test results, the basis on which the various medical providers were chosen by the special committee, nor the qualifications of these providers.

Furthermore, as the Special Committee was well-aware, Judge Newman was still unrepresented by counsel at that point. Despite this lack of representation, the committee directed Judge Newman to respond to the request "by 3:00 pm on April 11, 2023," (*i.e.*, within *four days* of the issuance of the order) and further threatened that "[r]efusal to comply … may result in the Committee seeking to expand the scope of the investigation to include an inquiry into whether the subject judge's non-cooperation constitutes misconduct …." April 7 Order at 2-3. On April 13, 2023, the special committee made good on its threat, and Chief Judge Moore expanded the investigation into Judge Newman on the basis "that Judge Newman['s] [] fail[ure] to cooperate constitute[d] additional misconduct." April 13 Order at 2.

Following the issuance of these orders, the Special Committee required Judge Newman's chambers staff to appear for interviews, going so far as to subpoena Judge Newman's career law clerk, even though there was absolutely no indication that the law clerk would refuse to appear in response to a simple request. The Special Committee

was aware that Judge Newman and her law clerks had long-standing plans to attend the Thirtieth Annual Intellectual Property Law & Policy Conference that was held at Fordham University School of Law in New York City on April 13-14, 2023. When Judge Newman's staff requested that the Committee accommodate these long-standing commitments and agree to hold the requested interviews upon their return, the Committee refused this simple request. Indeed, the subpoena to Judge Newman's career law clerk was served upon her less than 48 hours before her attendance was demanded. The same lack of basic courtesy and procedural protections was shown to other members of Judge Newman's chambers.

On April 12, 2023, the Committee deposed Judge Newman's career law clerk, but it obtained no additional substantive information, as the law clerk (despite threats from the Chief Judge) repeatedly invoked her Fifth Amendment right against self-incrimination. At about the same time, the Special Committee also interviewed another one of Judge Newman's law clerks, yet, possibly because that law clerk provided no derogatory information about Judge Newman, the Special Committee apparently kept no record of any kind (or at least did not provide one to Judge Newman) of that interview. All members of Judge Newman's staff who were interviewed were expressly told not to share even the very fact of their interview with anyone, *including* Judge Newman. The substance of these formal or informal interviews, as well as the identity of the witnesses that the Committee has spoken to, was not shared with Judge Newman

until *June 1*, 2023.

On April 17, 2023, the Special Committee issued another order, this time directing Judge Newman to "provide hospital records, medical, psychiatric or psychological, and other health-professional records that relate to the" alleged heart attack, cardiac stent placement, and fainting episode that were "described in the second paragraph of the Order dated March 24, 2023." April 17 Order at 1. As was true with the March 24 Order, the April 17 Order did not state a basis for even believing that the alleged episodes even took place (much less that medical records related to these alleged episodes existed). Indeed, as the Special Committee presently admits, *see* Report at 81-82, it has no credible information that the episodes "described in the second paragraph of the Order dated March 24, 2023," *i.e.*, a heart attack, a cardiac stent procedure, and/or a fainting spell ever took place. The April 17 Order also did not offer any explanation for the relevance of these records (assuming their existence) to Judge Newman's (or any other judge's) ability to perform judicial functions, nor did it explain how exactly a committee made up of members of federal judiciary, none of whom have any medical training, were planning to evaluate these records.

In the same order the Special Committee also "require[d] production of hospital records and medical, psychiatric or psychological, or other health-professional records of any treatment or consultation in the last two years regarding attention, focus, confusion, memory loss, fatigue or stamina." April 17 Order at 2. Once more, no

explanation was provided for why a particular timeframe was chosen, what use of these records would be made, or who would be examining them. Finally, the Special Committee "request[ed] that Judge Newman sit down with the Committee for a video-taped interview." *Id.* Neither the scope nor the length nor the purpose of the interview was outlined. The Order directed a response to the outlined requirements by "[b]y 9:00 am Friday, April 21, 2023," (*i.e.*, within *three days* of the issuance of the Order), and it again threatened that "[r]efusal to comply with this Order without good cause shown may result in the Committee seeking to expand the scope of the investigation." *Id.* Again, it is worth noting that, though Judge Newman had retained NCLA just a few days prior, the firm had not yet entered an appearance and was in no way ready to evaluate the propriety of the Special Committee's ever-increasing demands.

On April 20, 2023, Chief Judge Moore issued yet another order, again expanding the scope of the investigation, listing "new matters." The first matter centered on "Judge Newman's alleged conduct toward her chambers staff member." April 20 Order at 1. The Order alleged that Judge Newman "retaliated" against one of her employees because following that employee's complaints to Chief Judge Moore, Judge Newman chose not to include this employee "in chambers' communications, including work-related emails." *Id.* at 2. The second matter "relate[d] to Judge Newman's alleged conduct toward one of her law clerks." *Id.* at 7. In essence, Chief Judge Moore found that "there is probable cause to believe that Judge Newman has engaged in conduct

prejudicial to the effective and expedidious [*sic*] administration of the business of the courts" because she demanded that her law clerk either engage in assignments given to him or resign. *Id.* at 8. With respect to these two matters, no explanation was provided of the legal basis for limiting a judge's complete discretion to decide how work is distributed inside her chambers.

The third matter "relate[d] to Judge Newman's alleged conduct towards the Court's IT Department." *Id.* The Order alleged that in conversation with the IT department "Judge Newman sounded annoyed, agitated, paranoid and upset," and that a phone call with Judge Newman was "bizarre and unnecessarily hostile toward Judge Newman's chambers staff member." *Id.* at 8-9. Even assuming the veracity of these perceptions by IT staff (none of which Judge Newman was ever able to test through cross-examination or otherwise), the incidents referred to occurred on April 17 and 18, *i.e.*, *after* the investigation into Judge Newman began, and *after* a number of confrontational emails from the Chief Judge, thus fully explaining why Judge Newman would sound "annoyed, agitated, … and upset." Perhaps even more importantly, these incidents occurred *after* the Committee entered its orders requiring medical examinations and surrender of medical records; thus, these events did not and could not have served as a basis for the orders of April 7 and April 17, 2023.

On April 21, 2023, Judge Newman, now represented by counsel, responded to the committee's prior orders. In the letter addressed to Chief Judge Moore and copied

to all other members of the Special Committee, Judge Newman raised several objections to the process that had unfolded to that point. Most importantly, Judge Newman pointed out that neither Chief Judge Moore nor the Judicial Council had authority to order an interim suspension of Judge Newman from participating in the work of the Court and on that basis she requested her immediate reinstatement to the argument calendar. Judge Newman also requested that Chief Judge Moore invite the Chief Justice to transfer the matter to a judicial council of a different circuit as contemplated by Rule 26.

On May 3, 2023, the Special Committee responded to Judge Newman's letter, by "reissuing its orders regarding medical evaluation and testing and medical records and establishing new deadlines for compliance."[9] May 3 Order at 2.[10] The Order repeated the various allegations previously described, but again failed to explain the relevance of the medical records requested, the scope or means of the proposed testing, the use of the test results or medical records, the basis on which the various medical providers were chosen by the Special Committee, or the qualification of these providers.

[9] The May 3 Order did not clarify whether resetting the deadlines for compliance also meant that the April 13 Order expanding the investigation into Judge Newman on the basis "that Judge Newman['s] [] fail[ure] to cooperate constitute[d] additional misconduct" was vacated. The Order also omitted a request for a video-taped interview.

[10] Simultaneously, the Special Committee issued a Gag Order forbidding Judge Newman and her counsel from disclosing any information about the investigation. After Judge Newman filed suit, *see Newman v. Moore*, No. 1:23-cv-01334-CRC (D.D.C. filed May 10, 2023), the Committee significantly narrowed the Gag Order. *See* May 16, 2023 Order.

Furthermore, the Order rejected Judge Newman's suggestion that she and the Special Committee "engage in negotiation as to the scope of the requests as provided by the Commentary to Rule 13." *Id.* at 7-8. Finally, the Order denied Judge Newman's request for a transfer "without prejudice to refiling after Judge Newman has complied with the Committee's orders concerning medical evaluation and testing and medical records." *Id.* at 9. The Special Committee did not explain then or at any point in the future up to the present day, why or how the provision of medical records or submission to medical testing would affect its analysis under Rule 26.[11] The Order set a May 10, 2023, 9:00 am deadline for Judge Newman to reply to its demands. *Id.* at 13-14. None of the orders filed on May 3, 2023,[12] acknowledged, much less addressed, Judge Newman's argument that her suspension from judicial office "pending the results of the investigation into potential disability/misconduct" was illegal and not authorized by any statute or rule of procedure. The orders simply ignored her request to be immediately restored to the argument calendar.

[11] On the same date, a third order, in the name of the Judicial Council, also denied, without any explanation, Judge Newman's request to transfer the matter to another judicial council without prejudice to re-filing after Judge Newman has complied with the Special Committee's requests for medical records and the evaluation and testing ordered by the Special Committee.

[12] Although three orders were issued on May 3, *see supra* nn.10-11, the references to the "May 3 Order," except where otherwise noted, are to the Special Committee's Order requiring medical testing and production of records.

On May 9, 2023, Judge Newman responded to the Special Committee.[13] The letter objected to the request for medical records on the basis that the committee did not (and is unlikely to be able to) explain the relevance of the requested records or the scope of their use. May 9 Letter to the Special Committee at 3-4. On similar grounds, Judge Newman objected to the request for medical testing. *Id.* at 4-5.[14] At the same time, Judge Newman indicated that she was willing to discuss the request with the Special Committee in a cooperative manner as contemplated by the commentary to Rule 13(a), which instructs "the Special Committee [to] enter into an agreement with the subject judge as to the scope and use that may be made of the examination results." *Id.* at 4-5. The May 9 Letter renewed the request for the matter to be transferred to the judicial council of another circuit, once again explaining that since Chief Judge Moore was in effect a complainant in this matter and that since all of Judge Newman's colleagues are potential witnesses to her ability to competently carry out her judicial duties, it is inappropriate for any of them to also serve as adjudicators. *Id.* at 5-6. Finally, the May 9 Letter reiterated Judge Newman's demand to be immediately restored to the case assignment calendar. *Id.* at 6.

[13] Due to a glitch in the email system, the letter was not delivered to the Federal Circuit until the morning of May 10, 2023, which was still within the timeframe set by the Committee's May 3 Order.

[14] The May 9 Letter objected to the special committee's gag order on First Amendment grounds and as an alternative, formally requested the public release of various orders and letters pursuant to Rule 23(b)(7) of the Conduct Rules. The Rule 23(b)(7) request was eventually granted on May 16, 2023.

In response to the May 9 Letter, on May 16, 2023, the Special Committee issued an order reiterating the request for medical records, medical testing, and a video-taped interview, and for the first time explained the relevance and the scope of its demands. May 16 Order at 4-6. Nevertheless, the Special Committee again rejected Judge Newman's requests to at the very least participate in the selection of providers or negotiations as to the type and scope of testing. *Id.* at 20-21. The Special Committee again failed to explain on what basis the selected medical providers were chosen or what qualifications they might have that are relevant to their ability to evaluate Judge Newman's mental health. The Special Committee once again denied the request for a transfer and once again entirely ignored Judge Newman's objection to the Judicial Council's unlawful suspension of her pending the outcome of the investigation. *Id.* at 26. The Special Committee set a deadline of 9:00 am on May 23, 2023, to respond to its requests. *Id.* at 25.

On May 20, 2023, Judge Newman requested a short extension of time to respond to the May 16 orders. In support of the request, lead counsel for Judge Newman explained that he was out of the country and visiting Israel until June 1, 2023, in order to attend to family and religious obligations. On May 22, the Special Committee denied the requested extension of time, and instead reset the deadline to 9:00 am on May 26,

2023.[15] On May 25, Judge Newman responded to the Special Committee's May 16 Order, declining the requests but once more offering to resolve the issue in a cooperative, collegial, and collaborative way. Specifically, Judge Newman wrote that she is 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 …." May 25 Letter to Special Committee at 3 (cleaned up).

The following day, "the Committee … requested that the scope of the investigation be expanded to investigate whether Judge Newman has failed to cooperate in violation of the Rules and whether her failure to cooperate constitutes misconduct." May 26 Order at 1. In an order issued the same day, Chief Judge Moore granted the Committee's request and once again ordered the expansion of the investigation. *Id.*

However, less than a week later, on June 1, 2023, the Committee issued a new order narrowing the scope of its investigation. The new order stated that "[i]n light of the practical constraints that Judge Newman's [alleged] refusal to cooperate places on the Committee's ability to proceed" it will not, "at this time" pursue the allegations regarding Judge Newman's mental or physical disability. June 1 Order at 2, 4. Instead,

[15] May 26, 2023, fell on a major Jewish festival of Shavuot ("Feast of Weeks"). In order to avoid a conflict with counsel's religious obligations, Judge Newman had to file a response on May 25, 2023.

the Committee announced that its "investigation will focus on the question whether Judge Newman's refusal to cooperate with the Committee's investigation constitutes misconduct," *id.* at 3, and accordingly directed Judge Newman to, by July 5, 2023, "submit a brief limited to addressing the question whether Judge Newman's refusal to undergo examinations, to provide medical records, and to sit for an interview with the Committee … constitute [*sic*] misconduct and the appropriate remedy if the Committee were to make a finding of misconduct …," *id.* at 6. The Committee scheduled oral argument on the matter for July 13, 2023. On June 1, the Committee, for the first time, provided Judge Newman with various affidavits regarding Judge Newman's behavior, which in its view supported the Committee's decision to require that Judge Newman undergo a mental fitness evaluation. *Id.* at 5. At the same time, the Committee cautioned that because it is narrowing its investigation to the issue of Judge Newman's alleged failure to cooperate with the Committee's investigation, "there are no witnesses who could have relevant testimony bearing on the narrow issue of [the alleged] misconduct," *id.*, and that "additional factual development" is not required, *id.* at 4.

On June 20, 2023, in response to Judge Newman's earlier request for clarification of the June 1 Order, the Committee issued a new order reiterating that "the only subject [Judge Newman] should address in the brief due on July 5 (and at the hearing on July 13) is whether Judge Newman's refusal to comply with the Committee's orders seeking (i) neurological and neuropsychological testing, (ii) medical records, and (iii) an

interview constitutes misconduct." June 20 Order at 4.

Consistent with the Committee's directive, on July 5, Judge Newman filed a letter brief explaining that a) she did not fail to "cooperate," *i.e.*, "work together" to resolve the matter, b) the Committee did not make a *prima facie* case for the need for the evaluations in the first place, c) she had good cause to refuse to meekly submit to the Committee's imperious demands because all of the members of the Committee had not only a risk of bias, but have shown actual bias, and d) no sanctions are warranted for Judge Newman's standing on principle to defend her constitutional guarantees of due process and appointment for life to judicial office.

On July 13, 2023, the Committee held a hearing.[16] Over Judge Newman's objection, the hearing was closed to the public. *See* June 1 Order at 6, June 20 Order at 5-9. During the hearing, and for the *first time*, the Committee members suggested that when the Committee wrote *multiple times* in *multiple orders* that Judge Newman had a "heart attack" it did not really mean a "heart attack" but instead meant something else. The Committee continued to insist that the other nebulous "cardiac event" which the Committee did not define was relevant to determining whether the request for Judge Newman to undergo medical testing was proper. Also for the first time, the Committee

[16] It should not go unsaid that the hearing was conducted in an extraordinarily and uniquely hostile fashion. None of the attorneys appearing at the hearing has ever before experienced such level of hostility and disrespect from any judge at any level of the judiciary.

suggested that the request for a "video-taped interview" was in reality an opportunity for a conversation where Judge Newman could point out the factual errors in the Committee's own documents.

On July 31, 2023, the Committee issued its Report and Recommendations. The Report mostly rehashed claims and statements made in prior orders, but also rejected evidence proffered by Judge Newman, including a statement from a qualified neurologist that Judge Newman's "cognitive function is sufficient to continue her participation in her court's proceedings," and a statistical analysis of Court members' productivity conducted by Dr. Ronald Katznelson. Ron D. Katznelson, Ph.D., *Is There a Campaign to Silence Dissent at the Federal Circuit?*, *available at* https://ssrn.com/abstract=4489143.[17]

The Committee publicly released the Report without awaiting Judge Newman's response or seeking Judge Newman's consent on August 4, 2023.[18] On August 14, 2023, once Judge Newman's lead counsel [redacted] (of which the Committee was well aware), he submitted a request to the Committee for: a) release

[17] An updated version of the paper was published on August 28, 2023.

[18] This action stands in sharp contrast with the Committee's treatment of Judge Newman's own request to release her brief which was submitted on July 5, but which the Committee refused to release for a whole month, despite multiple requests to do so. *See* July 5 Brief at 1 n.1; July 12 Letter at 1 n.1; Hearing Tr. at 5:7-13. The Committee appears to believe that one set of rules applies to the Committee and another set to Judge Newman. This is yet further evidence of the Committee's bias when serving as accuser and adjudicator and its failure to adhere to basic norms of due process.

of data regarding Judge Newman's productivity going back to 2018, and b) permission to share the confidential and redacted data with a consulting expert who could verify and test the accuracy of the data on which the Committee relied. On August 17, 2023, the Committee denied the request as "untimely, waived, and unjustified" and ultimately irrelevant to the question of Judge Newman's cooperation. August 17 Order at 4-8. The Committee asserted that the record had "closed," August 17 Order at 6-8, but cited no authority for this odd proposition. The Rules for Judicial Conduct and Judicial Disability Proceedings afford a subject judge an opportunity to "send a written response … [and] to present argument, personally or through counsel," R. 20(a), and nowhere do the rules limit subject judges to the "record" developed by the Committee. Thus, yet again, and as has been the case throughout these proceedings, the Committee is cutting procedural corners and violating Judge Newman's due process rights. The Committee's refusal to permit Judge Newman to put the misleading record it compiled in an appropriate and full light undermines whatever claims of reasonableness the Committee may have had (and, as explained below, it had none) for its demands.

II. AT ALL RELEVANT TIMES THE SPECIAL COMMITTEE LACKED FACTUAL PREDICATES FOR ORDERING MEDICAL EXAMINATION[19]

A. THE FACTUAL RECORD AT THE TIME OF THE FIRST ORDER REQUIRING MEDICAL EXAMINATION DID NOT SUPPORT SUCH A DEMAND

Throughout its Report, the Committee mixed and matched facts and dates in a way that obscures the predetermined outcome at which the Committee (and the Judicial Council) arrived as early as April 7, 2023, if not a month earlier. It is important to be clear as to what evidence was before the Committee, and at what time, in order to determine whether the Committee made even a *prima facie* case that Judge Newman needs to undergo a medical evaluation.

The first order requiring Judge Newman to submit to a medical evaluation was entered on April 7, 2023. At the time, the only information before the Committee was: a) the record of Judge Newman's allegedly "extraordinary delays" and allegedly reduced productivity, b) allegations of a "heart attack," "cardiac stent," and a fainting spell, all of which allegedly resulted in Judge Newman's "sittings [being] reduced compared to her colleagues," and c) ill-defined "direct observations of Judge Newman's behavior," April 7 Order at 1, including by the members of the Committee. None of these "facts,"

[19] Because the Committee conceded that "Judge Newman need not supply such records to the Committee itself but only to the neurologist whom the Committee has selected to conduct an evaluation of Judge Newman," May 16 Order at 6, the propriety of the order to produce the records rises and falls with the propriety of the order to submit to the neurological and neuropsychological examination. Furthermore, it makes no sense to demand non-existent medical records for non-existent events and then deem someone non-cooperative for not providing them.

either alone or in combination, are even remotely adequate to justify a forced medical examination.

1. The Statistical Data Do Not Support the Suspicion That Judge Newman Has Suffered Cognitive Decline

Throughout its investigation the Committee has spent an inordinate amount of time delving into Judge Newman's alleged tardiness in opinion writing, voting, and the like. According to the Committee, *see, e.g.*, Report at 1, 5, these delays can serve as evidence of cognitive decline. But there are two fundamental problems with the data.

First, and most fundamentally, in order to show that the data indicates a *decline* in Judge Newman's cognitive abilities, one necessarily must show that there has been some change between the time when everyone agrees that Judge Newman was not disabled and the present day. If between that earlier point in time and present there is a marked slowdown in productivity as measured either in terms of number of the opinions or their speed, then it *might* raise questions as to why such a slowdown has occurred. In contrast, a snapshot in time without such a comparison tells us nothing about a "decline" in Judge Newman's mental acuity. At most (and only assuming that the data is properly analyzed), it tells us that Judge Newman is simply a slow writer. The Special Committee, whose members have degrees in disciplines like engineering and have engaged in advanced studies of mathematics, surely knows that this is the only correct way to analyze the data. Yet, the Committee merely chose to look at a snapshot

between 2020 and 2023 in order to determine whether further investigation is warranted.

The data that the Committee chose to rely on shows, according to the Committee, that Judge Newman is an outlier in terms of both the number of opinions published, and the speed at which she publishes them. Aside from the fact that a snapshot-in-time does not and cannot show a *decline* in Judge Newman's ability, the data itself doesn't actually show what the Committee purports it shows.

First, the Court's own data, as stated in one of the provided affidavits, shows that between October 1, 2020 and September 30, 2021 (when there were no concerns about Judge Newman's abilities to discharge her duties), it took Judge Newman 249.11 days to publish an opinion.[20] According to the same affidavit, between October 1, 2021 and March 24, 2023 (when concerns about Judge Newman's abilities began to be voiced), it took Judge Newman 198.75 days to publish an opinion. That is an **over 25% increase** in speed during the time that Judge Newman allegedly became *less able* to fulfill the duties of her office. This fact alone is sufficient to refute the allegations leveled against Judge Newman, and, given this fact, any demand for forced medical testing is perforce unreasonable.

[20] The affidavit does not seem to differentiate between majority and separate opinions, even though it is self-evident that a concurring or dissenting opinion, which by definition *responds* to the majority opinion, will take more time to prepare because one must first read the majority opinion.

The Committee rejects this conclusion by arguing that "[t]he obvious reason for the improvement after October 2021 is that [Judge Newman's] caseload was substantially reduced in this period." Report at 105. This, of course is far from *obvious*. As an initial matter, if the Committee is correct and Judge Newman's mental deterioration began sometime around the summer of 2021, *see, e.g.*, March 24 Order at 1, then one would expect that even with a reduced workload, the statistics would show that Judge Newman's productivity continued to deteriorate rather than improve. At the very least, given that in the Committee's account there were two opposing forces affecting Judge Newman's productivity (reduced sittings which should have permitted for faster opinion writing on the one hand, and alleged mental deterioration which ought to have exacerbated delays, on the other hand), there should not have been marked improvement in speed. Yet, the Committee simply pooh-poohs the 25% increase in the pace of opinion production without any statistical or other analysis. It falls into a trap that every first-year law student is taught to avoid—it just calls the conclusion "obvious," as if the adjective alone substitutes for legal or mathematical analysis.

In contrast, data analysis conducted by Dr. Ronald Katznelson and submitted to the Committee by Judge Newman shows that there has been no decrease in Judge Newman's speed between 2018-2020 (*i.e.*, a timeframe during which no one claims that

Judge Newman was disabled) and 2020-2022 (the period on which the Committee is focusing).[21] Katznelson, *supra* at 57.

Second, the data relied on by the Committee simply do not differentiate between majority and dissenting opinions. Even taken at face value, the data show that Judge Newman takes 146 days longer than other judges to issue opinions. However, decisions that include "dissents have an average pendency that is 143 days longer than the average pendency of majority/unanimous opinions." Katznelson at 19. Given that Judge Newman dissents in over half her cases, *see id.* at 4, her delays are in large part explained by the need for the extra time it takes to issue a split decision.

The Committee argues data relied on by Dr. Katznelson does not present the full picture because it doesn't account for: a) the date the case was assigned to a given judge, and instead looks only at the time the briefing was complete; b) the instances of case-reassignments which are not publicly known; and c) *per curiam* opinions which do not have the name of the authoring judge released. Report at 56-58. All three critiques are entirely devoid of merit.

[21] In fact, the average pendency of cases in which Judge Newman authored a majority opinion *decreased* in the latter time period from an average of 612.3 days (as measured from the filing of a case to the circulation of the publication of the opinion) to 534.4 days. However, the decrease was not statistically significant. The point nevertheless remains—Judge Newman's speed of writing has remained steady throughout, and therefore her "excessive delays" (even if they exist) cannot possibly serve as evidence of *deterioration* of her mental state.

With respect to the issue of the appropriate start date to calculate the pendency of the appeal, it should be fairly self-evident that unless Judge Newman gets assigned cases earlier than her colleagues (which is entirely implausible) then whether one begins counting at the time of docketing, the time the briefing is completed, or at any other time up until the dates of assignment to each individual judge, the variation in pendency ought to remain constant.[22] What Dr. Katznelson's expert data analysis shows is that—contrary to the Special Committee's non-expert statistical analysis—Judge Newman is not an outlier.

With respect to case-reassignments, the Special Committee's claim is both baffling and outrageous. The Committee lists three cases which were assigned to Judge Newman and then, after long periods of pendency reassigned to other judges: [redacted] and [redacted]. The Committee's misleading presentation of these cases leaves one with an impression that Judge Newman simply did not produce an opinion

[22] As Dr. Katznelson explains, "for Judge Newman to appear an outlier with longer net authorship time consistent with the data in Figure 3 [which shows her performance to be in the middle of the range of other active judges], the total [administrative] pre-assignment delays for cases later assigned to her should have been disproportionately and materially shorter than those for her colleagues. There is no evidence that the procedures of the Federal Circuit could have resulted in specifically expediting the assignment of cases only to Judge Newman." Katznelson, *supra* at 36. Aware of this explanation, the Committee never answers this simple challenge and does not provide any statistical evidence to the contrary. Nor does it explain how such putative evidence using the "the exact information" available to the Committee in any full statistical analysis of pendency for all active judges, would produce materially different results, somehow establishing Judge Newman's pendency performance as a statistically significant outlier.

in them, resulting in the cases being reassigned to another judge. But that is simply false. In both [redacted] and [redacted], Judge Newman circulated a draft opinion, which was not joined by either of the other two judges on the panel. The opinions were then reassigned because Judge Newman's views could not command a majority, and not because of excessive delays. The same is true regarding two additional cases mentioned in the original March 24 Order—[redacted], where Judge Newman ended up writing a separate opinion concurring in part and dissenting in part and [redacted], where Judge Newman ended up writing a dissent. But the fact that Judge Newman's views may be idiosyncratic is not evidence of any mental or physical disability. It is simply evidence of idiosyncratic views. And such evidence cannot possibly be a basis for ordering a forced medical evaluation.

The Committee also misses the mark with its allegations that Judge Newman does not shoulder her share of the burden when it comes to *per curiam* opinions which, according to the Court's statistics constitute nearly a third of the Court's output.[23] First, as Dr. Katznelson's analysis shows, panels on which Judge Newman served were *least likely* to issue *per curiam* opinions as compared to any other panel of the Court.

[23] The claim that 31.6% of the Court's opinions are *per curiam* seems to be at odds with the publicly available data. According to the publicly available data, between 2016 and 2022, only 19% of decisions were issued *per curiam* and another 26% were summary affirmances without an opinion under Fed. Cir. R. 36. *See* Katznelson, *supra* at 31.

Katznelson, *supra* at 27-28. Because Judge Newman's *panels* are least likely to agree to a *per curiam* disposition, it follows that Judge Newman is likely to write fewer *per curiam* opinions than other judges.[24] Furthermore, data show that panels on which Judge Newman served were *most likely* to resolve cases through a Rule 36 disposition than any other set of panels.[25] Because a Rule 36 disposition results in no opinion at all, it is therefore not surprising that Judge Newman would have fewer opinions overall than other judges.

Finally, the Committee's allegations that Judge Newman has sat on fewer panels than her colleagues is particularly galling for at least two separate reasons. First, the assertion in the March 24 Order that in the summer of 2021 (following an alleged "heart attack") Judge Newman's "sittings were reduced compared to her colleagues," is manifestly false. To the contrary, Judge Newman sat on more panels than any of her colleagues save for two. The Committee attempts to disregard this obvious contradiction between reality and its claims by pointing out that in the summer of 2021

[24] As Dr. Katznelson again explains, "[b]ecause authored dissenting opinions [generally] do not issue in cases that are *per curiam*, the higher the share of dissents among the judge's authored opinions, the fewer panel decisions in which the judge participates can be *per curiam* to begin with. Taken to the limit, a judge that dissents in all panels she serves cannot be the author of any [] *per curiam* opinion—a manifest constraint that has nothing to do with productivity."

[25] In some sense Rule 36 dispositions and non-controversial *per curiam* dispositions are "substitute goods." As a result, it is not surprising that Judge Newman is least likely to be on panels disposing of cases via a *per curiam* opinion and most likely to be on panels utilizing the Rule 36 mechanism, whereas Judge Raymond Chen shows the same pattern in reverse.

arguments were held remotely and telephonically, Report at 53, but one is hard-pressed to understand the relevance of the *mode* of the session in which oral argument was held to the question of how many such sessions Judge Newman participated in. The Committee's allegation was and remains simply false, and therefore it cannot be relied on as a reason for forcing Judge Newman to undergo medical examination.[26]

Second, although Judge Newman's sittings were reduced beginning sometime in 2022, that reduction is attributable entirely to decisions by someone other than Judge Newman. For years, when judges of the Court were asked as to their availability to sit during the next available month, Judge Newman has sent an identical message which reads that she "is available to sit 2-3 days, or as needed."[27] The email is always sent to the Chief Judge's chambers who then "provides to the clerk's office a list of judges that are available for each day of an argument session." Fed. Cir. IOP 3.1.[28] That Judge Newman was not *assigned* to the number of panels which she indicated both willingness and desire to sit on, is an issue that must be rightly taken up with the Chief Judge rather

[26] The Report recasts the March 24 Order which dealt with "reduced sittings" into allegations of lower productivity. Aside from the fact that such a bait-and-switch manner of litigation is highly improper, the number of sittings that any given judge undertakes is controlled by the Chief Judge. *See* Report at 78-79.

[27] A version of such an email is reproduced as Exhibit 7 to the Committee's Report.

[28] In light of the clear language of Internal Operating Procedure 3.1, Chief Judge Moore's assertion that that any claim that the Chief Judge decides on panel assignment is "[c]ompletely false" and that "[t]he Chief Judge has no input whatsoever," Tr. of Hearing at 41:23-42:13, is simply baffling.

than with Judge Newman herself. But the Chief Judge may not decline to assign Judge Newman to equal number of panels as other judges and then turn around and complain that Judge Newman has not served on the same number of panels as other judges.

Thus, the statistical data did not provide any basis for the Committee's April 7, 2023 Order.

2. Baseless Allegations Concerning Judge Newman's Health Issues Cannot Justify a Forced Medical Examination

The April 7 Order demanding that Judge Newman submit to unwanted medical examination also relied on false allegations about Judge Newman's health issues, including a "heart attack" that she allegedly suffered in the summer of 2021, which in turn allegedly necessitated the placement of cardiac stents, as well as an episode of fainting on May 3, 2022. However, neurological and neuropsychiatric exams are not warranted merely because a person has suffered a myocardial infarction—the proper medical term for a "heart attack." To be sure, a myocardial infarction *can* lead to neurological sequelae. *See, e.g.*, Moneera N. Haque and Robert S. Dieter, *Neurologic Complications of Myocardial Infarction*, 119 Handbook of Clinical Neurology 93 (2013). But the mere fact of a prior myocardial infarction would not, in and of itself, form any basis to suspect neurological deficits. In any event, as Judge Newman has represented to the Committee on numerous occasions, the allegations are *not* true. Judge Newman did not have a "heart attack," did not have "cardiac stents," and did not faint on May 3, 2022.

At no point did the Committee even disclose what information led them to believe that Judge Newman suffered these events.[29] There appear to be no factual bases for these allegations. Absent such bases, the allegations cannot possibly serve as a reason to order further medical tests. The Committee seeks to recast its early allegations of a "heart attack" and claims that it referred to a "'cardiac event' that Judge Newman had suffered in the summer of 2021." Report at 82 (citing May 16 Order at 4-5). There are several problems with this belated attempt to prop up a prior baseless allegation.

First, at the time of the April 7 Order, the Committee proceeded on the claim of a non-existent "heart attack" as a basis for ordering medical testing. The question is whether the Committee had a reasonable basis to order such a test. It did not. If the predicates for such an order did not exist at the time, then it follows that the order itself was improper. Second, the Committee did not establish that Judge Newman had a "cardiac event" (whatever that entirely unscientific and medically hollow term happens to mean) in 2021 or at any point thereafter. In fact, as with the original allegation of a "heart attack," the Committee doesn't even disclose any bases for believing that such an event occurred. Instead, the Committee appears to believe that the process contemplated by the Disciplinary Rules allows for baseless allegations to be made,

[29] The source of this information is also important in evaluating other information that that the Committee received subsequent to the April 7 Order. If the source of the information could be so egregiously wrong about such an important fact, then any other information that such a source may have supplied about Judge Newman should be treated with particular suspicion as well.

which it turn trigger an obligation by the subject judge to prove a negative (or at the very least to disclose otherwise private medical information simply because a formal process has been launched). *See* Report at 82 (faulting Judge Newman for "refus[ing] to say whether she suffered any 'cardiac event'" in 2021 in response to the Committee's questions which themselves had no basis). Third, the term "cardiac event" is entirely devoid of meaning and can mean anything from a fatal ventricular fibrillation to transient myocardial ischemia caused by little more than a temporary coronary artery spasm or eating a heavy meal. *See, e.g.*, Nestor Lipovetzky, *Heavy Meals as a Trigger for a First Event of the Acute Coronary Syndrome: A Case-Crossover Study*, 12 Isr. Med. Ass'n J. 728 (2004), https://tinyurl.com/ycyzns2k. Requiring Judge Newman to disprove ill-defined, unfounded claims about her physical condition is improper.

To shore up its claim about Judge Newman's alleged "cardiac event," the Committee latches onto a statement in Dr. Ted Rothstein's report discussing Judge Newman's pacemaker and pre-existing "sick sinus syndrome." Report at 82. The Committee makes much of the fact that "syndrome can result in 'confusion' and 'dizziness or lightheadedness,'" and that it can "lead[] to other organ damage such as brain and kidney function." Report at 96 (internal citations omitted). But the Committee's reliance on this pre-existing condition is misplaced for two reasons.

First, the Committee doesn't seem to understand that sick sinus syndrome can lead to these outcomes *if untreated*. Of course, many conditions, if untreated, can lead to neurological damage. Indeed, a common malady such as "hypertension is a risk factor for cognitive impairment and dementia through multifactorial mechanisms including vascular compromise, cerebral small vessel disease, white matter disease (leukoaraiosis), cerebral microbleeds, cerebral atrophy, amyloid plaque deposition, and neurofibrillary tangles." Devin Loewenstein and Mark Rabbat, *Neurological Complications of Systemic Hypertension*, 177 Handbook of Clinical Neurology 253 (2021). Yet, no one would take seriously the suggestion that the mere fact that an Article III judge has hypertension is sufficient cause to obligate that judge to submit to forced neuropsychological testing.[30] Judge Newman is successfully treating her sick sinus syndrome with a pacemaker, thus avoiding all of the consequences that could befall someone who has not so treated this disease. Accordingly, the mere fact that the condition from which Judge Newman suffers *could, if untreated*, cause "confusion" or other neurological symptoms, is simply insufficient to establish that at any point in time this disease *did* cause Judge Newman to experience these symptoms.

[30] Indeed, given that hypertension is one of the most common conditions affecting Americans, odds are that a number of judges on the Federal Circuit have been diagnosed with hypertension, and have used medication or other interventions to control the disease. The same thing is true about Judge Newman and her reliance on a pacemaker to treat her sick sinus syndrome.

Furthermore, Judge Newman was diagnosed with sick sinus syndrome and had the pacemaker installed *years ago*—long before any allegations of mental decline.[31] Thus, this is not "a matter of parsing terminology rather than relevant substance." Report at 82. To the contrary, the Committee's allegations of a "heart attack" or for that matter any other "cardiac event" in *2021* are entirely unsubstantiated. Absent such substantiation, they cannot be used as a basis for requiring Judge Newman to undergo unwanted medical testing. It is, of course, not Judge Newman's burden to refute various unsubstantiated and baseless allegations. Merely because the Committee asserted that Judge Newman had cardiac problems doesn't obligate Judge Newman to prove the Committee wrong. It is the Committee (or the Chief Judge) that has the initial burden of production, not Judge Newman. It failed to meet that burden.

Because no evidence (either as of April 7, 2023, or even today) suggests that Judge Newman's long-standing and well-managed sick sinus syndrome had any exacerbation or failure in management in 2021, the Committee's attempt to justify the March 24 and April 7 Orders by jerry-rigging the definitions and timings of a "heart attack" (or "cardiac condition") must fail. And absent these allegations, the Committee

[31] It is for this reason that Judge Newman objected to a misleading redaction of the transcript of the July 13 Hearing. Judge Newman does not have a new cardiac condition with an onset or deterioration date of 2021. Rather, she has a long-standing but fully managed cardiac condition that has no impact on either her fitness for the bench or even her daily activities.

was left with nothing at all (save for its own personal, non-expert "observations") to justify requiring Judge Newman to submit to unwanted medical evaluations.

3. Personal "Observations" of Committee Members Do Not Provide Sufficient Basis to Order a Medical Examination

It is not disputed that none of the members of the Committee (or for that matter the Judicial Council) has any training or expertise with neurology, psychiatry, or geriatric medicine. Any "personal observations" by Judge Newman's colleagues (except perhaps in extreme circumstances) cannot serve as a basis for ordering unwanted medical examinations if for no other reason than the recognition that individuals lacking appropriate training are unable to differentiate normal but perhaps unusual behavior from abnormal behavior.

Second, the Committee doesn't even bother to say what those observations were, thus making it impossible to evaluate whether these "observations" would or should suggest to a reasonable observer that further investigation is warranted.

Third, the alleged "personal observations" stand in sharp contrast to what others have observed in the same timeframe. For example, Professor David Hricik of Mercer University School of Law wrote that on March 23-24, *i.e.*, the same month that Chief Judge Moore initiated the present complaint, he "saw Judge Newman (with Judge Lourie and former Judge O'Malley) speak at the USPTO …. Judge Newman was eloquent, coherent, cogent, and spoke passionately about various topics, including

section 101 (which requires a bit of mental agility, I would say)." David Hricik, *An Opinion on Chief Judge Moore's Reported Unprecedented Effort to Remove Judge Newman*, Patently-O.com (April 14, 2023), https://tinyurl.com/2e8sfue8.[32] Others, including law professors, former judges of this Court, and presently serving judges on other courts have reported much the same. *See, e.g.*, Gene Quinn, *Chief Judge Moore Said to Be Petitioning to Oust Judge Newman from Federal Circuit*, IPWatchdog.com (April 12, 2023), https://tinyurl.com/2efyshuc ("Numerous staff and colleagues with knowledge of the complaint filed against Newman have contacted IPWatchdog to both confirm the filing of the complaint and to vehemently oppose the allegations being made about Judge Newman's competence.").

To put it simply, ill-defined, unsubstantiated "feelings" by non-expert observers which are in turn readily contradicted by others who are not nearly as enmeshed in the process cannot justify ordering an unwanted neurological examination. Nor can these "feelings" be combined with other deficient bases in hopes that adding many zeros together will result in a number greater than zero.

In short, at the time the Committee made its first request for neurological and neuropsychological testing, it had no factual support to justify the request. It follows

[32] The video of the remarks is available at https://tinyurl.com/3v8jn7sf.

that Judge Newman had "good cause" to resist the imposition of medical testing when no legitimate basis for such testing existed.

B. The Factual Record at the Time of the Second and Third Orders Requiring Medical Examination also Does Not Support the Orders Requiring Medical Examination

Admittedly, by the time the Committee issued its second (May 3, 2023) and third (May 16, 2023) orders, it was in possession of additional information beyond what has been described above. Nevertheless, at the end of the day these "new" orders suffer from the same basic problem—lack of reasonable basis to support the requirements therein—as did the original order.

Prior to delving into the specifics of these affidavits and depositions, two key points should be noted. First, the Committee's assertions that employees' accounts of events are "not challenged," August 17 Order at 8, is only "true" because Judge Newman was never given any opportunity to challenge them. There was never an opportunity to cross-examine affiants or for that matter present affidavits from other witnesses, including Judge Newman herself. Indeed, the June 1 Order specifically stated that the appropriate course of further actions "can be determined based upon the paper record established by the Committee's orders and Judge Newman's filed responses, along with any legal argument Judge Newman wishes to submit to justify her responses or otherwise establish 'good cause shown' for her actions. There are no percipient fact

witnesses to additional events that are relevant to the misconduct determination." June 1 Order at 4. Thus, the Committee itself foreclosed any avenue to "challenge" the employees' accounts, even though Judge Newman vigorously contests the mischaracterizations contained therein.[33] To now suggest that the evidence is "not challenged" is little more than a sleight of hand unworthy of Article III judges.

Second, the Committee appears not only to discount, but affirmatively hide the information that *would* contradict the accounts on which it relies. Thus, the interview of one of Judge Newman's law clerks, though it took place, is not documented anywhere. The only plausible inference from this must be that the information obtained through that interview did not fit with, but instead undermined the Committee's narrative. *See Tendler v. Jaffe*, 203 F.2d 14, 19 (D.C. Cir. 1953) ("[T]he omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause."). But even absent the information that the Committee did not provide to Judge Newman and chose not to rely on—

[33] Additionally, and as explained in the July 5 Letter Brief, because "[m]ost of the testimony and information gathered by the Committee prior to and in the course of its investigation comes from employees of the Federal Circuit … [whose] ability to continue working in normal conditions depends on their continued good relationship with Chief Judge Moore and other judges of the Court," there is no way to "be sure that the key evidence that is presented to [the Committee and Judicial Council] is in any way reliable, rather than tainted by the allegiances and personal concerns of employees-witnesses." July 5 Letter Brief at 7.

information that presumably is favorable to Judge Newman—the record compiled by the Committee remains woefully inadequate to require unwanted medical testing.

1. The Subsequent Orders Are Irreparably Tainted by the Improper April 7 Order

Although by the time the Committee issued its subsequent orders it managed to gather more information (though it should be noted that Judge Newman has not had the opportunity to question any of the witnesses on whose affidavits the Committee has relied), this new information does not cleanse the prior improper order, so subsequent orders are merely an attempt to justify a decision made early on and never reconsidered. In light of the decision that was made early on, and before investigation had even began, to remove (without so much as a notice to her) Judge Newman from the bench, and given that the April 7 Order was entirely devoid of any factual basis, the subsequent orders cannot be taken at face value and must instead be viewed through the prism of earlier improper decisions. It is a well-settled principle of administrative law,[34] that subsequent data can't be used to justify prior decisions. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (setting aside Secretary's decision to add a citizenship question to the decennial census when evidence showed "that the Secretary

[34] It should be remembered that the Judicial Council is an *administrative* and not a judicial body. *See Chandler v. Judicial Council*, 398 U.S. 74, 86 n. 7 (1970) ("We find nothing in the legislative history to suggest that the Judicial Council was intended to be anything other than an administrative body functioning in a very limited area in a narrow sense as a 'board of directors' for the circuit.").

began taking steps to reinstate a citizenship question about a week into his tenure, but it contain[ed] no hint that he was considering VRA enforcement [on which he subsequently relied] in connection with that project," and when "[t]he Secretary's Director of Policy … saw it as his task to 'find the best rationale'" to justify a decision already made.").

The orders of May 3 and May 16 cannot be viewed as new decisions made on the basis of newly available evidence. As an initial matter, the orders themselves state that the Committee is not taking a new action but is merely "reissuing its orders regarding medical evaluation and testing and medical records and establishing new deadlines for compliance." May 3 Order at 2.[35] Next, the allegations of medical issues facing Judge Newman (whether a "heart attack" or a "cardiac condition" or fainting spell) did not become any more true or any better substantiated by May 16, 2023 than they were on March 24 or April 7, 2023. Nor did the data regarding alleged delays become any more complete or reliable, since at no point (up to the present day) did the Committee inquire whether Judge Newman's speed of opinion writing in 2020-23 was in any way materially different than her speed prior to 2020 (*e.g.*, from 2018 to 2020). Thus, all of the deficiencies (both procedural and substantive) of the April 7 Order

[35] The same Order also states that it is being issued not on the basis of any new evidence, but only "in the hope that Judge Newman will now cooperate with its investigation." *Id.*

continued to be present in the two subsequent orders. The additional affidavits from various Court staff on which the Committee chose to rely, do not save the May 3 and May 16 Orders from their patent inadequacies.

2. The Deposition of Judge Newman's Career Law Clerk Is Devoid of Any Facts and Therefore Irrelevant

In issuing its May 3 and May 16 Order, as well as in its Report, the Committee relied in large part on the deposition of Judge Newman's career clerk. *See, e.g.*, May 3 Order at 6, May 16 Order at 3, Report at 5, 41. In the deposition (which itself was conducted with violations of basic norms of due process),[36] the career clerk asserted her Fifth Amendment privilege against self-incrimination. *Id.* The Committee admits that it was unable to obtain *any* useful information from the deposition. *See, e.g.*, May 16 Order at 3 (noting that the career clerk "refuse[d] to answer basic questions about her role and responsibilities in chambers."). Having obtained no useful information from the deposition, the Committee, in a bizarre turnaround, insists that these assertions of privilege, which were made on advice of career clerk's own counsel, *see* Report at 41, are somehow indicative of *Judge Newman's* mental state. *See, e.g.*, Report at 41 ("Further concerns, potentially extending to Judge Newman's case handling and

[36] The deposition is noteworthy for multiple threats directed at the career clerk by Chief Judge Moore to the point that it caused the career clerk's attorney to call attention to that fact and object to such behavior. *See, e.g.*, Deposition Tr. at 11:14-12:3. It is precisely because of such threats (whether explicit or implicit) that the reports of other Court staff cannot be uncritically credited.

functioning more generally, were raised when the Committee sought information from Judge Newman's permanent clerk."). The assertion is self-evidently ludicrous.

As the Committee recognizes, Judge Newman's career clerk was represented by her own counsel and acted on advice of counsel. *See* Report at 41. Judge Newman had no input whatever into the career clerk's testimony and was never asked to direct her career clerk to answer questions in any particular way nor could she do so even if she wanted to because whether properly or improperly, the career clerk was asserting *her own* rather than Judge Newman's rights. Additionally, the Committee *expressly directed* the career clerk not to "talk about this proceeding with others going forward, [because to do so] would be an act of misconduct." Deposition Tr. 26:22-24. *See also id.* at 27:1-29:19. Since the career clerk was not even permitted to share the *fact* of her appearance before the Committee with Judge Newman or anyone else, it is hard to understand how Judge Newman could have affected her career clerk's decision not to provide information to the Committee, and it is equally hard to understand why the career clerk's decision can in any way be construed as raising concerns regarding "Judge Newman's case handling and functioning more generally." Report at 41.[37]

[37] If the Committee thought that the career clerk's assertions of privilege were baseless, it could have sought to compel her to testify. *See* 28 U.S.C. § 356(a); § 332(d)(2). Furthermore, even if Judge Newman could or wished to provide guidance to her career clerk as to how to deal with the Committee's questions, doing so would potentially raise a specter of improper interference with witnesses—something that Judge Newman has no interest in being accused of.

The April 12, 2023 deposition thus adds nothing to the shell of the record that the Committee had on April 7, 2023, so it does not provide any additional support for the requirement that Judge Newman undergo medical testing.

3. Affidavits of Judge Newman's Former Chambers Staff Do Not Provide Any Support for the Committee's Demands

The Committee also relies on two affidavits provided by Judge Newman's former staff members to justify its requirement that Judge Newman submit to medical testing. Neither of the affidavits can actually support the Committee's action.

One of the affidavits is provided by Judge Newman's former law clerk. However, it is entirely devoid of any information that could even remotely shed light on Judge Newman's mental or physical health. Instead, the affidavit suggests that it was the *law clerk* who had experienced mental and physical health problems as a result of the various pressures brought about by the investigation. *See* Law Clerk Affidavit at ¶ 14 (stating that in light of the ongoing investigation he "informed Judge Newman that working in her chambers was hurting [his] ability to complete my work, taking a toll on [his] mental health, and harming [his] relationships at the court."), *id.* ¶ 16 ("I also reiterated that I would still feel uncomfortable given my proximity and potential exposure to matters concerning the investigation.").

It is, of course, not surprising that a young attorney, just at the beginning of his career, and without protections afforded by Article III would "feel uncomfortable" if

he were involved in any way in a sensitive investigation of almost any type. It is also not surprising that such an involvement would "tak[e] a toll on [his] mental health." And these outcomes are even more likely when the person conducting the investigation (here, Chief Judge Moore) has taken a threatening and accusatory tone with anyone who has not provided information that would bolster the Chief Judge's case. *See ante* n.36 (citing Deposition Tr. at 11:14-12:3). But these effects on Judge Newman's law clerk are not a result of Judge Newman's actions, but rather the result of an unpleasant situation (created by Chief Judge Moore) that the law clerk involuntarily found himself enmeshed in.

The Committee also cites two other issues mentioned in this affidavit. First, it notes that the law clerk alleged that "Judge Newman disclosed to [him] and other members of chambers that [redacted] had [redacted]." Law Clerk Affidavit at ¶ 2. Second, the law clerk alleged that because Judge Newman's paralegal "informed the Chief Judge" of this event, *id.*, Judge Newman stated that the paralegal "could not be trusted." *Id.* at ¶ 4. From this the Committee draws an inference regarding Judge Newman's mental state. The inferences are odd to say the least. First off, Judge Newman is under no legal obligation to refrain from disclosing [redacted] about [redacted] to anyone else. She is not her [redacted] provider, it is not a matter of internal judicial deliberations, or the like. True enough, it may make good sense not to speak of such matters, but there is no requirement to avoid

doing so. What is much more inappropriate is for a member of the chambers staff to report these perfectly legal (even if in someone's view, inadvisable) conversations to anyone outside the chambers, including the Chief Judge. And when the intra-chambers confidentiality is breached, it makes perfect sense for the judge to lose trust in the person breaching confidentiality. Second, whether someone does or does not "trust" another person simply does not turn on any legal issue or one's mental state. "Trust" is little more than a "gut feeling" and a judge, like any person, is permitted to lose trust in her staff, attorneys, colleagues, treating physicians, or anyone else. Absent clinical paranoia or similar problems, loss of "trust" is simply not evidence of anything at all beyond the fact that the two people will have a difficult time working together.

The affidavit of Judge Newman's former paralegal is equally devoid of any information that would justify the Committee's orders. Judge Newman's paralegal spends significant time complaining about after-hours phone calls from other chambers staff, and the Committee treats this allegation (which is vigorously disputed) as evidence of Judge Newman's inability to manage her own chambers. *See, e.g.*, Report at 40. However, what the Committee terms "inability to manage staff in her chambers" is, in reality, Judge Newman's choice as to how to run her chambers.[38] It is entirely Judge

[38] The Federal Circuit's own Employment Dispute Resolution Plan, which the Committee repeatedly cites, *see, e.g.*, Report 39-40, only prohibits "*wrongful*" conduct such as "discrimination; sexual, racial, and other discriminatory harassment; abusive conduct; and retaliation." *See Employment Dispute Resolution Plan for the United States Court of Appeals for the Federal Circuit*, ¶ II.A, https://tinyurl.com/8b7nahps (emphasis added). There are no allegations that either Judge Newman

Newman's prerogative to determine when to work and when to expect assistance of her chambers staff. As members of the Committee and Judicial Council know full well, it is the judge's staff that must adjust their schedule to that kept by the judge, and not the other way around. Leaving aside obvious red lines such as criminal activity or sexual harassment, Judge Newman (like the Chief Judge) is free to run her chambers as she sees fit. The fact that Judge Newman's paralegal found the arrangement not to his liking is no one's problem but his own. Like any American when faced with working conditions that are legal but disliked by the employee, he had a choice to quit—a choice by the way, that Judge Newman offered to him. The Chief Judge's interference in Judge Newman's chambers operations is unprecedented and nothing short of outrageous.

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or any of her staff discriminated, harassed, or abused her paralegal. The only complaint is that the schedule within the Judge's chambers was not keyed to a 9-5 workday. Keeping odd work hours, and even requiring one's staff to adhere to those hours, is not "wrongful," nor is it "abusive." The EDR plan explicitly excludes from its definition of "abuse" "duty assignments and changes to duty assignments[, and] office organization." *Id.* ¶ II.D.

Because Judge Newman's paralegal did not complain about any activities covered by the EDR plan, it necessarily follows that he was not retaliated against for his protected disclosures. *See id.* ¶ II.E ("Retaliation is a materially adverse action taken against an Employee for reporting *wrongful* conduct….") (emphasis added). It also follows that there was no call to provide him with any alternative work arrangements. Indeed, the Federal Circuit's EDR plan permits an employee to ask for and the Chief Judge to grant "an alternative work arrangement" only if an "Employee alleges *egregious conduct* by a supervisor, Unit Executive, or Judge that makes it untenable to continue working for that person." *Id.* ¶ IV.B.4 (emphasis added). Even assuming, *arguendo*, that Judge Newman's failure to put a stop to late night phone calls was "wrongful" within the meaning of the EDR plan, or to stop trusting an employee who disclosed intra-chambers communications, it certainly is not "egregious conduct" that would permit the Chief Judge to provide Judge Newman's former paralegal with "an alternative work arrangement," over Judge Newman's objections. That the Chief Judge did so is yet another instance of cutting procedural corners. In turn, Judge Newman's refusal to accept the arrangement that was imposed on her in violation of the strictures provided by the EDR plan, and require that her staff member either report for duty in chambers or resign, was entirely appropriate.

The later attempt to use the difference of opinion as to the best way to operate one's chambers as basis for an unwanted mental health exam is doubly so—especially when the problems were at least partly caused by that interference.

In his affidavit, Judge Newman's former paralegal made a number of other allegations regarding Judge Newman's ability to remember things and organizational capabilities. Suffice it to say that these allegations are not only vigorously disputed, but are supported by *no one else* in Judge Newman's chambers—not even the aforementioned law clerk who resigned from Judge Newman's staff during the course of the investigation. It is worth noting, that the former paralegal's replacement is a person who had previously worked with Judge Newman for years and thus would be in a good position to testify about any changes that may or may not have occurred in Judge Newman's behavior, memory, cognition, and the like. The fact that the new/returning judicial assistant has in no way confirmed the story weaved by Judge Newman's former paralegal speaks volumes. The fact that the Committee has chosen not to seek this information betrays the simple fact that the Committee made its decision regarding the medical examination on April 7, and it has spent subsequent weeks looking for any justification to shore up its predetermined conclusion.

It should also not go unsaid that, as the committee acknowledges, Judge Newman's former paralegal "successfully sought employment at the Court outside

Judge Newman's chambers." Report at 43. Of course, the success or failure of this search depended (in large part) on the Chief Judge. This fact alone counsels caution in taking the affidavit of Judge Newman's former paralegal at face value—not because he committed perjury or the Chief Judge suborned such, as no one is making that allegation—but because it was in his interest to present facts in such a light as to align them with what he may have perceived the Chief Judge to want.[39]

4. Affidavits of Other Court Employees Do Not Show that the Request for Medical Testing Is Reasonably Necessary

The Committee attempts to justify its request for medical testing by referencing several affidavits which recount various staff having had difficulties in dealing with Judge Newman. As with other affidavits relied on by the Committee, there was no opportunity to test the strength or veracity of these allegations, even though there is every reason to doubt them.

As Judge Newman has explained in her previous submission, the testimony and information gathered by the Committee prior to and in the course of its investigation comes from employees of the Federal Circuit. These individuals' ability to continue working in normal conditions depends on their continued good relationship with Chief Judge Moore and other judges of the Court. For example, it is hard to imagine that the

[39] Again, this doesn't mean that the Chief Judge *actually* wanted facts to be presented in a particular way. But it is not an unreasonable concern that Judge Newman's former paralegal may have *thought* that she did and that he needed to act in such a way as to remain in the Chief Judge's good graces.

Clerk of the Court, even if he could not be easily fired, could long continue with his duties were the judges of the Court to lose complete confidence in him. Again, we do not suggest that Chief Judge Moore or other members of the Judicial Council explicitly exerted pressure on any of the witnesses to provide false or misleading testimony. However, it is entirely possible, indeed (given what is known about human psychology) likely, that witnesses may have structured and shaded their testimony to more perfectly align with what they may have perceived their superiors wanted to hear. *See, e.g.*, *Dellums v. Powell*, 660 F.2d 802, 808 (D.C. Cir. 1981) ("In contrast to a witness at trial, a police officer making out-of-court statements is not subject to the rigors of cross-examination or the threat of a perjury conviction. Unlike a judge, a police officer is not insulated from the political process or from pressures to please superiors."); *cf. Chicago & R.I.R. Co. v. Still*, 19 Ill. 499, 507-08 (1858) (a neutral trier of fact must be able "to judge of the effect that bias or prejudice, a fear of losing employment, a desire to avoid censure, a fear of offending or a desire to please employers, or any other circumstances in testimony, operating, in the opinion of the jury, to warp the judgment and pervert the truth, has upon the human mind…."). Thus, one simply cannot be confident that the key evidence that is presented to them is in any way reliable, rather than tainted by the allegiances and personal concerns of employees-witnesses.

The Committee rejects these concerns as "insubstantial." Report at 75. As an initial matter, Judge Newman need not show that the affidavits were *actually* tainted;

rather the test is whether there is a significant possibility that "bias or prejudice, a fear of losing employment, a desire to avoid censure, a fear of offending or a desire to please employers, or any other circumstances in testimony, operating … to warp the judgment and pervert the truth" exists. *Still*, 19 Ill. at 507-08. Second, while dismissing Judge Newman's concerns as "insubstantial," the Committee simultaneously argues that the proximity of the witnesses to the Chief Judge and the Committee members is what allowed these complaints to be brought forward in the first place. *Id.* at 87-89. It is hard to square those two assertions with one another. Either proximity to the Chief Judge does have an effect on one's testimony or it doesn't. Finally, given the incredible difference in treatment between Judge Newman's career clerk who did not provide evidence which would have supported the Committee's agenda and of Judge Newman's former paralegal (*i.e.*, the career clerk was threatened with career-ending consequences, whereas the paralegal was given, on an expedited basis, a new and desirable job at the Court), the message to the rest of the staff could not have been clearer—the Committee appreciates and wishes to receive only specific type of information.

Leaving these concerns aside, the affidavits, even if taken at face value, simply do not suggest that Judge Newman is suffering from any mental decline. At most (and even if taken at face value) they show that Judge Newman may have difficulty adjusting to new technology—a phenomenon entirely unexceptional when older, though fully competent individuals, are asked to adopt new technology, and that she was

extraordinarily frustrated, *as anyone would be*, when the Chief Judge and this Committee launched an entirely unjustified attack on her competence and position as a duly appointed Article III judge.

It bears repeating that the events that the Committee cites as evidence of Judge Newman's inability to comprehend certain matters occurred in the midst of this investigation, during which the Committee has treated Judge Newman in the most appalling manner. It is not surprising and not evidence of any mental problems that Judge Newman may have reacted with more anger, frustration, irritation, or annoyance. But this is an *entirely appropriate* affect in the face of deeply personal, hurtful, and baseless accusations by the very people that Judge Newman has for decades considered to be trusted friends and colleagues. *See, e.g.*, Michael Shapiro, *Doctor Who Examined 96-Year-Old Judge Slams Suspension, Report*, BloombergLaw.com (Aug. 8, 2023) (quoting Dr. Ted Rothstein's view that Judge Newman's behavior is explained by the fact that she "is very anxious and concerned about the way she's been treated [because she believes that] she's been mistreated by the powers that might be."). The Committee may believe that Judge Newman has overreacted or treated some staff more harshly than was necessary.[40] Whether or not that is so, these incidents occurring in the middle of the

[40] At the same time, even assuming that Judge Newman has proven to be a difficult person to work with, and assuming that her behavior has caused "emotional stress and discomfort, including loss of sleep and heightened anxiety," as described in one of the affidavits, that doesn't even approach probable cause to believe that Judge Newman is mentally or physically disabled.

Committee's unjustified actions which have taken an enormous toll on Judge Newman do not provide any evidence of an alleged mental decline that supposedly began around the summer of 2021, *i.e.*, *years* prior to the events complained of. Because Judge Newman's response to the events was, from the psychological perspective, entirely appropriate, there is no reason to suspect any mental health problems or to require psychological testing.[41]

In an utterly bizarre statement, the Committee also attempts to use the submission of Judge Newman's counsel which responded to the various allegations by Court staff as further evidence "that there are reasonable grounds to have concerns about her cognitive state." Report at 106 ("In the Committee's view, the fact that Judge Newman would make such an argument [that concerns raised by staff are little more than "petty grievances"] only confirms that there are reasonable grounds to have concerns about her cognitive state."). Although it is well settled that "each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney, *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962) (internal quotations omitted), the rule does not go so far as to suggest that attorney's choice of argument is indicative of a client's mental state. Making this

[41] To the extent that in her interaction with any Court staff Judge Newman may have, during these extraordinarily stressful times, overstepped some bounds, she is more than willing to meet with any staff, apologize where apology is needed, and work to smooth over any problems that may have arisen.

jump shows that the Committee will twist available facts into a predetermined conclusion.

C. Any Residual Questions Were Resolved by Dr. Rothstein's Examination

Assuming, *arguendo* and *dubitante*, that the Committee did at one point in time have legitimate reasons to request that Judge Newman undergo a neurological and neuropsychological examination, these reasons should have dissipated following Judge Newman's evaluation by Dr. Ted Rothstein—a full Professor of Neurology at the George Washington Medical Center, author of dozens of publications, and an expert in dementia.[42] *See* Attachment A, Declaration of Ted L. Rothstein, M.D.

Following the examination, which revealed no significant cognitive deficits, Dr. Rothstein concluded that Judge Newman's "cognitive function is sufficient to continue her participation in her court's proceedings." The Committee refused to give Dr. Rothstein's report any weight. Report at 98, 104. In doing so, the Committee, composed of individuals with no medical or psychological training whatever,

[42] It is true that at the July 13 hearing, the Committee was told that "the Committee could choose to credit or not credit as it wishes." Report at 98 (quoting Hearing Tr. at 26:15-18). Of course, that is always true. No one can *force* the Committee to credit a particular piece of evidence. And at that point in the proceedings, because the hearing, at the Committee's direction, was meant to focus on Judge Newman's cooperation, rather than the presence of the disability, Dr. Rothstein's report was indeed a "background" matter. *Id.* The Committee's rejection of Dr. Rothstein's report, however, is not based on any contrary medical evidence, but solely on the Committee's own, non-expert and erroneous understanding of Dr. Rothstein's examination and conclusions.

juxtaposed its own Google search with Dr. Rothstein's decades of experience. *Id.* at 99-103. The Committee also blatantly mischaracterized Dr. Rothstein's findings claiming that Judge Newman "failed 80% of the memory questions on the test." As Dr. Rothstein explained this claim is "a distortion" and he objected to the "very inappropriate the way in which [his] opinion was altered to say something [he] didn't say." Shapiro, BloombergLaw.com, *supra*; *see also* Attachment A.

If the Committee were interested in actually assuring itself that Judge Newman is perfectly competent and able to continue in her duties, it could easily have held a hearing under Rule 14, and heard from Dr. Rothstein live. It could have questioned him about the thoroughness of his examination. But the Committee declined to hold any such hearing. *See, e.g.*, June 1 Order at 4-5. Instead, the Committee engaged in guesswork (and guessed wrong) as to the thoroughness of Dr. Rothstein's examination. The Judicial Council should not make the same mistake, and to help it avoid making the same error, Judge Newman is providing an affidavit from Dr. Rothstein that explains his qualifications and his examination of Judge Newman in greater detail. *See* Attachment A.

In light of this *expert* opinion on one hand, and non-expert complaints (however laden they may be with scientific-sounding terms), only one rational conclusion exists—there is no reasonable basis to suspect any mental or physical disability on Judge

Newman's part, much less reason sufficient to require her to submit to unwanted medical examinations.

D. DR. CARNEY'S REPORT FURTHER CONFIRMS THAT JUDGE NEWMAN DOES NOT SUFFER FROM ANY MENTAL DISABILITY

Though Judge Newman does not believe that additional testing is necessary or indicated, in the interest of laying to rest any remaining concerns regarding her abilities to continue in her position, she submitted to an expert evaluation by a forensic psychiatrist—a specialist with a particular expertise of evaluating individuals' "fitness for duty."[43]

Dr. Carney, after having been provided with all of the prior Committee orders along with supporting affidavits, Judge Newman's medical records, description of a position and duties of a federal appellate judge, conducted a full-blown, hours-long examination of Judge Newman.[44] The examination included both qualitative and quantitative components. According to Dr. Carney, Judge Newman "is a fluent,

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[43] Fitness for duty evaluations are traditionally done by psychiatrists. *See, e.g.*, *Ramirez v. Dep't of Homeland Sec.*, 975 F.3d 1342, 1356-57 (Fed. Cir. 2020) (describing mental health component of the fitness for duty examinations conducted by psychiatrists). Yet the Committee, without explaining its reasoning, directed Judge Newman to be examined by a neuropsychologist who is not a physician.

[44] Judge Newman's willingness to undergo this examination, even though there is no evidence of deterioration in the quality of her opinions, or any decrease in the speed of their production, and even though a previous examination already found her to be fully able to continue with her duties, indicates that she is entirely willing to cooperate with a proper process, and that she is not afraid of having her mental acuity tested. This stands in sharp contrast with the position taken by the Committee, which appears to be concerned that if it were to transfer this matter to the judicial council of another circuit, its work might not stand up to independent scrutiny.

engaging, strong-willed, highly accomplished and unusually cognitively intact 96-year-old woman with chronic medical issues that appear well-controlled at the current time, with no evidence of current substantial medical, psychiatric, or cognitive disability." Regina M. Carney, M.D., *Report of Independent Medical Examination of Pauline Newman*, Attachment B at 5. Dr. Carney specifically opined that "Judge Newman demonstrated no substantial emotional, medical, or psychiatric disability that would interfere with continuation of her longstanding duties as a Judge in the U.S. Court of Appeals." *Id.* Dr. Carney's opinion was based on "three-hour clinical evaluation of Judge Newman performed by me on August 25, 2023, including administration of The Modified Mini-Mental State Examination (3-MS)," *id.* at 1, on which Judge Newman scored 98 out of a possible 100 points, *id.* at 5.[45]

In light of the considered opinions of now *two* independent expert practitioners, both of whom have found that Judge Newman is fully competent and entirely capable of continuing in office, the Committee, even if it ever had a legitimate basis to question Judge Newman's competence, has no further basis for requiring additional testing or continuing to question Judge Newman's abilities. Absent such bases, and in the face of

[45] The original 3-MS test score sheet and the Clinical Dementia Rating worksheet are attached to Dr. Carney's report as Exhibit 1.

evidence of Judge Newman's full competency, these proceedings should be brought to a close and Judge Newman restored to the bench.

III. THE COMMITTEE HAD NO BASIS TO REQUEST A VIDEO-TAPED INTERVIEW WITH JUDGE NEWMAN

In its April 17 Order the Committee "request[ed] that Judge Newman sit down with the Committee for a video-taped interview." April 17 Order at 2.[46] No explanation or justification was given for this request (which was made weeks prior to any of the events described in various affidavits which the Committee relied on at later points in time). Nor was the subject matter or the scope of the interview defined in any way. Much like the April 7 Order to submit to an unwanted medical examination, this early order was apparently based solely on evidence of Judge Newman's alleged delays, "personal observations," and baseless claims of prior "heart attack" and a fainting spell. This brief has already discussed why these "facts" are insufficient to make *any* demands of Judge Newman. *See ante* II.A. The April 17 unexplained request for a video-taped interview of indefinite scope, covering unspecified topics, and having no identified purpose lacked any reasonable basis.

[46] NCLA began to represent Judge Newman only days earlier and had not yet made an appearance. The Committee knew that Judge Newman was not yet represented before the Committee, yet it imposed a four-day deadline to respond to its ill-defined request. It should be noted that Judge Newman did respond by April 21, though after the 9:00 am deadline established by the Committee. *See* April 21 Letter (hand delivered to the Court). Yet, the Committee could not resist claiming that "Judge Newman failed to respond." *See* May 3 Order at 3.

The request for the interview was omitted from the May 3 Order, *see* May 3 Order at 13-14; but renewed two weeks later in the May 16 Order, *see* May 16 Order at 23-24, 25. But the May 16 Order was equally short on specifics. Once again, no topics of the interview were specified and no scope of the interview was defined. Furthermore, it was and remains unclear what possible new information the Committee could garner from such an interview. As an initial matter, all three members of the Committee had previously met with Judge Newman right before launching this investigation. *See* March 24 Order at 2. The Committee members thus had ample opportunity to speak with Judge Newman, albeit not on camera. It is hard to understand what additional information the Committee members could have gathered from an interview and what purpose, other than the ratcheting up of antagonism which the Committee has displayed toward Judge Newman (and some of her staff and counsel), it would achieve.

Indeed, the Committee itself (incorrectly, *see post*) argued that a transfer of this matter to another circuit's judicial council is not warranted because of "the relative ignorance of judges in another circuit of local circumstances and personalities" putting those judges "in a poor position to persuade a judge whom they do not know well to take the action they believe is necessary."[47] May 3 Order at 10 (internal quotations

[47] Of course, it does not appear that the local judges' familiarity with local personalities has been of any help in resolving the present dispute and persuading Judge Newman to do what the Committee members believe is necessary. To the contrary, the closeness of everyone to the dispute has appeared to only harden everyone's positions.

omitted). The obvious implication is that the judges of the Federal Circuit are not ignorant of Judge Newman's "circumstances and personalit[y]" and that Judge Newman is "a judge whom [other Federal Circuit judges (including the members of the Committee)] do [] know well." Given this professed knowledge, there is no legitimate need for further interviews especially when the process has, at the hands of the Committee, become so hostile.[48]

IV. THROUGHOUT THE PROCEEDINGS, JUDGE NEWMAN HAS OFFERED TO COOPERATE

Even assuming, contrary to evidence, that the Committee did have reasonable bases to request that Judge Newman submit to the requested medical examination, thus requiring Judge Newman to "cooperate," *see* Rule 4(a)(5), Judge Newman has discharged this duty by offering, on several occasions, to reach mutually acceptable solutions that would address the Committee's concerns regarding her alleged potential disability. After all, *that* is an issue that has to be resolved—is Judge Newman mentally and physically able to continue in office to which she was nominated, confirmed, and duly appointed, and in which she has served with distinction for almost 40 years or isn't she? In order to resolve that one and only question before the Committee, Judge Newman stated that she was willing

[48] Even in its Report, the Committee doesn't actually explain why an interview is "required." It merely claims that it's "advisable." Report at 2. However, the Committee has never explained, even in a cursory fashion *why* the interview is "advisable."

> 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.

May 25 Letter at 3 (emphasis in original). Prior to that offer, Judge Newman wrote that she "will not fail to cooperate with *any* investigation that is conducted consistent with the limits that the Constitution, the Judicial Disability Act of 1980 ["Disability Act"], and the Rules for Judicial Conduct and Judicial Disability Proceedings ["Conduct Rules"] place on such investigations." April 21 Letter at 2 (emphasis added). Of course, proceeding consistent with the Judicial Disability Act, and the Constitution, would require restoring Judge Newman to the bench for the pendency of any investigation. Inexplicably, the Special Committee has preferred to violate the law just to keep Judge Newman from sitting on panels rather than conduct a lawful investigation while she remains on the bench.

Judge Newman has consistently offered, and indeed implored, the Committee (and the Judicial Council) to work in a cooperative, collegial, and collaborative way to resolve any doubts about her competency. From offering to submit to any medical testing if the matter were transferred to another circuit's judicial council, to offering to work with the Committee to mutually agree on providers who would conduct the

testing, *see* April 21 Letter at 2, May 9 Letter at 4-5, May 25 Letter at 3, Judge Newman has sought avenues to resolve this matter in a way that vitiates any concerns about her health (however unfounded those concerns may be), while respecting her due process rights and the overall constitutional structure of the judiciary.

In fact, the reasonableness of Judge Newman's proposal receives significant support from the Committee's and the Judicial Council's own orders. The Committee's May 3 Order denied Judge Newman's request for a transfer, but did so "without prejudice to refiling after Judge Newman has complied with the Committee's orders concerning medical evaluation and testing and medical records." May 3 Order at 10 n.1. That same day, the Judicial Council issued a parallel order to the same effect. May 3 Order of Judicial Council. However, neither the Committee nor the Judicial Council explained how Judge Newman's medical examinations and records could have any relevance to a decision on transferring this investigation. And in fact, nothing about the medical testing or records is relevant to the question of which judicial forum should resolve this matter. So, if it is reasonable for Judge Newman to request a transfer *after* she submits to medical testing, then it is equally reasonable for her to request a transfer *before* she submits to that testing. Accordingly, the Committee's and Judicial Council's *own orders* confirm that Judge Newman's proposals to condition her medical testing on a transfer were entirely reasonable.

The Committee, however, appears to believe that "cooperation" means unquestioned submission and obeisance to its demands. *See* Report at 92-93 (asserting that "cooperation" means acting "in compliance" and "doing what someone asks you to do"); *id.* at 93 ("[N]othing in the Rules requires the Committee to negotiate with Judge Newman to reach a compromise solution on every investigative request the Committee makes. To the contrary, Rule 13 unequivocally states that '[a] Special Committee should determine the appropriate extent and methods of its investigation.'"). Of course the Committee did not attempt to reach *any* compromise on *any* investigative request. Rather, and as discussed above, the Committee made up its mind both on the mode of investigation and the likely outcome thereof early, and from that point on, it used the available information in a way to fit those predetermined conclusions. This, together with the fact that throughout the process the Committee (and the Judicial Council) have been cutting procedural corners, changing rationales to justify its prior actions, and plainly exhibiting barely disguised hostility to Judge Newman, some of her chamber staff, and her counsel, are sufficient reasons to at the very least pause before blindly accepting the Committee's demands. Judge Newman accordingly rejects the proposition that the only way for her to discharge her duties under Rule 4 is to unquestionably comply with any and all of the Committee's demands no matter the factual or legal concerns raised by such mandates. That having been said, Judge Newman always was, and still remains willing to "work together" to bring this

matter to a speedy resolution. Multiple avenues remain open to the Judicial Council to do so. For example, the Judicial Council can accept the results of Dr. Katznelson's statistical analysis that shows that Judge Newman's performance and speed of opinion writing from 2020 on is no different than her performance from 2018 to 2020. If the Judicial Council were to accept this basic fact (a fact that the Committee for reasons unknown chose not to even investigate), it would have to conclude that no factual predicate for the investigation ever existed in the first place. The Judicial Council can also choose to credit *two* independent examinations conducted by qualified experts both of which attest to Judge Newman's continued mental and physical vigor. Or the Judicial Council can choose to request, under Rule 26, that the Chief Justice transfer the matter to a judicial council of another circuit. All of these are plausible *cooperative* ways to resolve the dispute. What the Committee and the Judicial Council cannot do is insist that the only appropriate response from Judge Newman to a demand that she "jump" is to ask "how high."

These offers of cooperation, *even assuming* their insufficiency, make proceedings under Rule 4(a) wholly improper to begin with, because they show that it has always been in the power of the Committee to ensure that Judge Newman underwent appropriate medical examinations. All the Special Committee had to do was transfer this matter to another circuit and permit Judge Newman to hear new cases until that circuit makes its decision about her future. The availability of this option to the

Committee is key because the governing "[r]ules contemplate that judicial councils will not consider commencing proceedings under Rule 4(a)(5) except as necessary *after other means to acquire the information … have been tried or have proven futile*." Rule 4(a)(5), cmt. (emphasis added). Those other means are readily available to this tribunal, and have been for quite some time. The Committee has simply chosen not to avail itself of them in order to keep Judge Newman from returning to the bench. Consequently, the Committee did not even meet the threshold for launching proceedings under Rule 4(a)(5), much less for imposing any sanction on Judge Newman. Because the tribunal has chosen not walk through this open door, Rule 4(a)(5) prohibits it from concluding that Judge Newman failed to cooperate.

V. JUDGE NEWMAN HAD "GOOD CAUSE" NOT TO COOPERATE BECAUSE THIS PROCEEDING VIOLATES HER RIGHT TO DUE PROCESS OF LAW

Rule 4(a)(5) expressly authorizes a judge to refuse to cooperate with an investigation if she has "good cause" for her refusal. Here, good cause exists because this proceeding violates Judge Newman's Fifth Amendment right to due process of law. Contrary to the Committee's protestations, this proceeding is being conducted by judges who have multiple conflicts of interest, and not surprisingly in light of those conflicts, it has been marked by judicial acts that are fundamentally unfair. In several important respects, this proceeding has denied Judge Newman basic procedural protections.

The Commentary to Rule 4 states that "it is not possible to … anticipate all circumstances that might … constitute good cause," but it is established that an improperly constituted tribunal is a sufficient "good cause" for resisting that tribunal's demands. *See, e.g.*, *Axon Enter. v. FTC*, 598 U.S. 175 (2023). As the Supreme Court explained just a few months ago in *Axon*, the harm of "being subjected" to "unconstitutional agency authority" is a "a here-and-now injury." *Id.* at 191 (quoting *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020)).

Judge Newman is suffering just such an injury, because she is being forced to defend herself in a proceeding that is biased and unfair. It is axiomatic that due process requires, at a minimum, a "neutral decisionmaker." *See Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004). This requirement is so fundamental it applies even to enemy combatants. *Id.* (And in all forums including, for example, administrative agencies. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975).) *A fortiori*, it applies to a disability proceeding for an Article III judge. The investigation also violates the statutory command that any judge "*shall* … disqualify himself … [w]here he has … personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1) (emphasis added). In fact, this tribunal has already admitted it is relying in part on its own knowledge of local circumstances and personalities. *See* May 3 Order at 10. These circumstances and personalities are central to the disputed evidentiary facts in this matter. That prior personal knowledge should, therefore, disqualify this panel from hearing this matter.

This requirement for a neutral decisionmaker is part of a broader right to a fair proceeding, *see In re Murchison,* 349 U.S. 133, 139 (1955) (to ensure fairness, "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome"), because '[a] fair trial in a fair tribunal is a basic requirement of due process,'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. at 136). "The Court has stressed that 'any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.'" *Mobility Workx, LLC v. Unified Pats., LLC*, 15 F.4th 1146, 1164 (Fed. Cir. 2021) (Newman, J., concurring-in-part and dissenting-in-part) (quoting *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968)).

As this submission explains, Judge Newman had numerous reasons to conclude that this proceeding violated her right to due process of law. Her conclusion is more than sufficient to provide the required "good cause": Several objective, knowledgeable commentators have stated that, because of the obvious conflicts of interest, this matter should be transferred to another circuit. These observers include two former chief judges of this circuit and a former chief judge from another circuit, all of whom took the unusual step of publishing public criticisms of this Court and expressing the strong view that this investigation should be transferred. *See* Paul Michel, *Chief Judge Moore v. Judge Newman: An Unacceptable Breakdown of Court Governance, Collegiality and Procedural Fairness*, IPWatchdog.com (July 9, 2023), https://tinyurl.com/z2xcb2kk; Randall R.

Rader, *The Federal Circuit Owes Judge Newman an Apology*, IPWatchdog.com (July 12, 2023), https://tinyurl.com/255amrnj; Edith H. Jones, *Federal Judges Deserve Due Process, Too*, Wall St. J. (Aug. 15, 2023). Judge Newman can hardly be deemed guilty of non-cooperation for agreeing with them. To the contrary, she should be relieved from litigating in an unconstitutional tribunal without being forced to litigate in that tribunal to a final decision. *See generally Axon*, 598 U.S. 175.

A. Members of the Judicial Council Suffer from Irreconcilable Conflicts of Interest

As explained above, the March 24 Order that initiated this investigation relies on information provided by judges of this court based on their personal interactions with Judge Newman. The Order states that "*judges* and staff have brought to my attention concerns about Judge Newman's inability to perform the work of an active judge based on their personal experience. *Judges* and staff *have reported* extensive delays in the processing and resolution of cases." March 24 Order at 2 (emphasis added). The Order goes on: "It has been stated that Judge Newman routinely makes statements *in open court and during deliberative proceedings* that demonstrate a clear lack of awareness over the issues in the cases."[49] *Id.* And, it states, "*half of the active judges of the court* hav[e] expressed their concerns about Judge Newman." *Id.* at 5-6.

[49] At no point did the Committee identify even one such statement illustrating Judge Newman's lack of awareness of issues before the court, despite audiotaped oral arguments being readily available.

The Order thus places the personal knowledge of various judges at the foundation of this investigation. In fact, some of the most important information about Judge Newman's ability to decide cases is available *only* from other judges. For instance, information about Judge Newman's conduct during case deliberations is only available to judges because only they are present during those sessions.

The Committee again relied on the personal observations of its members when it issued its April 7 Order, which is at the center of the alleged non-cooperation: It was the first order requiring Judge Newman to obtain additional medical evaluations. One of the express bases for the Order is the Committee's own "direct observations of Judge Newman's behavior." April 7 Order at 1.

Judges of this Court possess unique personal knowledge about other relevant matters as well. For example, each of the three members of the Special Committee had a separate conversation with Judge Newman in March 2023, in which each attempted to persuade her to resign or accept senior status. *See ante.* Whether these conversations occurred in the way Judge Newman describes them or in some other manner is important because it was Judge Newman's refusal to resign or take senior status—that is, her refusal to succumb to threats—that led to the Chief Judge's issuance of the formal order launching this investigation. *See* March 24 Order at 5-6.

The Committee's Report contends that the judges' extensive personal knowledge is not relevant to this investigation, arguing that it "quickly determined that testimony from judges about interactions with Judge Newman—particularly interactions related to the process of deciding cases—should be *excluded* from the Committee's inquiry because that information was unnecessary and because information regarding delays in case processing would be more objective if obtained from the Clerk's Office data." Report at 70 (emphasis in original). The Committee further contends that "there are no witnesses needed in this proceeding as it has been narrowed" to the question of non-cooperation. *Id.* at 75. But the Special Committee did not purge this matter from its reliance (in the March 24 and April 7 Orders) on evidence provided by judges of this Court by recasting this matter as relating solely to whether Judge Newman "cooperated" with the Committee. This investigation remains the fruit of the same tree planted in the March 24 Order, and that tree rested in significant part on evidence provided by these judges. *See Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

1. <u>That Members of the Judicial Council Are Not Likely to Be Actually Called as Witnesses Is Irrelevant</u>

The reason the Committee's explanation doesn't pass muster is two-fold. First, whether the Committee chooses to rely on judges' witness statements is simply irrelevant. Under 28 U.S.C. § 455(b)(1), a judge is obligated to recuse himself whenever he has "personal knowledge of disputed evidentiary facts concerning the proceeding."

The statute does not require that a judge be personally called as a witness, merely that he has *knowledge* of the disputed facts. The Committee itself attests that its own members, as well as other members of the Judicial Council do in fact have such knowledge. *See* March 24 Order at 2, 5-6; April 7 Order at 1. There is good reason for the broad prohibition. The personal knowledge that members of the Judicial Council possess is relevant not only to their roles as actual or potential witnesses, but also to their roles as adjudicators as they already have formed some opinions regarding Judge Newman's abilities that prevent them from giving her a fair hearing. The fact that "half of the active judges of the court" purportedly expressed concern to the Chief Judge means that at least half the members of this Judicial Council have pre-conceived views about this matter based on their own personal knowledge. And given these pre-conceived views, the risk is too high that any new evidence that contradicts those views would be heavily discounted. It is a well-known psychological phenomenon that individuals process new information through the lens of their pre-existing knowledge and biases—effects known as "confirmation bias" and "anchoring bias." *See, e.g.*, *Duncan v. Bonta*, 19 F.4th 1087, 1122 (9th Cir. 2021) (*en banc*) (Berzon, J., concurring), *vacated on other grounds* by 142 S. Ct. 2895 (2022) ("Cognitive biases ranging from confirmation bias to anchoring bias, can cloud a judge's analysis."). Any new data received by Judicial Council members is thus likely to be processed through the lens of

prior knowledge, beliefs, or impressions. This is not a matter of bad intent, but of basic human psychology.

Other judicial councils have recognized this inherent risk. For example, in the *Adams* case, when fellow district judges complained about Judge Adams's behavior, none of his colleagues from the same district participated at the "Special Committee" stage, nor in the final deliberations of the judicial council. *See In re Complaint of Judicial Misconduct*, No. 06-13-90009 (6th Cir. June 27, 2018) at 1 and 3 n.3. Similarly, when a complaint was lodged against a district judge in the Central District of Illinois, the Chief Judge of that district recused herself. *See infra* n.65. And when a district judge in Montana was investigated, even the circuit judge whose chambers were in the same courthouse as the subject judge's chambers, recused himself. *See infra* n.64.

Additionally, since the publication of the Implementation of the Judicial Conduct and Disability Act of 1980, Report to the Chief Justice of the Judicial Conduct and Disability Act Study Committee, 239 F.R.D. 116 (Sept. 2006) ("Breyer Report"), *every single* complaint of misconduct against a circuit judge that was not summarily dismissed has been transferred to another circuit's judicial council for investigation.[50] *See, e.g., In*

[50] The Conduct Rules were adopted in response to the Breyer Report. Prior to the Breyer Report, there was no formal mechanism to request a transfer, though Illustrative Rules did suggest that such a transfer, as well as "intercircuit assignment procedures under 28 U.S.C. § 291(a)" may be available. *See Illustrative Rules Governing Complaints of Judicial Misconduct and Disability*, R. 18(g) (Admin. Office of the Courts, 2000).

re Charges of Judicial Misconduct, No. 21-90142-JM (resolution of the complaint against Circuit Judge William Pryor of the U.S. Court of Appeals for the Eleventh Circuit by the Judicial Council of the Second Circuit); *In re Complaints under the Judicial Conduct and Disability Act*, Nos. 10-18-90038-67, 10-90069-107, 10-90109–122 (resolution of the complaint against Circuit Judge (by then-Justice) Brett M. Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit by the Judicial Council of the Tenth Circuit); *In re Complaint of Judicial Misconduct*, Nos. 18-90204-jm, 18-90205-jm, 18-90206-jm, 18-90210-jm (resolution of the complaint against Circuit Judge Maryann Trump Barry of the U.S. Court of Appeals for the Third Circuit by the Judicial Council of the Second Circuit); *In re Charges of Judicial Misconduct*, No. DC-13-90021 (resolution of the complaint against Circuit Judge Edith Jones of the U.S. Court of Appeals for the Fifth Circuit by the Judicial Council of the District of Columbia Circuit); *In re Charges of Judicial Misconduct*, No. 12-90069-JM (resolution of the complaint against Circuit Judge Boyce F. Martin of the U.S. Court of Appeals for the Sixth Circuit by the Judicial Council of the Second Circuit); *In re Complaint of Judicial Misconduct*, 575 F.3d 279 (2009) (resolution of the complaint against Chief Circuit Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit by the Judicial Council of the Third Circuit). As Professor Arthur Hellman noted, "over the last few years, chief judges have *consistently* followed the practice of requesting a transfer when serious allegations have been raised about a judge of the court of appeals." Arthur D. Hellman, *An Unfinished Dialogue: Congress, the*

Judiciary, and the Rules for Federal Judicial Misconduct Proceedings, 32 Geo. J. Legal Ethics 341, 404 (2019) (emphasis added). *See also* Jones, *supra* ("To obviate unethical conflicts and provide objectivity, the normal application of judicial misconduct rules requires that a matter about a circuit-court judge be transferred to another circuit's chief judge and Judicial Council."). In refusing to seek a transfer of this matter, the Judicial Council for the Federal Circuit stands alone, and it stands athwart Congressional design in crafting the Disability Act.

The Committee rejects this recounting of the precedent, but it is unable to cite a *single* instance where a complaint against a circuit judge was kept within that judge's local judicial council. The best that the Committee can do is state that many complaints were not transferred while acknowledging that the data it relies on simply does not differentiate between "proceedings against district court [and] circuit judges." Report at 90 n.27. But such a differentiation is crucially important, precisely because when it comes to a district judge, there may be no members of that judge's court on the judicial council, or if there are such members, they can easily recuse themselves. *See infra* nn.64-65. But the same isn't true when the judge being investigated is herself a member of the relevant circuit court.

These concerns that apply to all circuits are not the only ones present in this case. As the Katznelson study shows, members of the Judicial Council stand to materially

benefit should Judge Newman be removed from the bench. *See* Katznelson, *supra.* As Dr. Katznelson explains, given Judge Newman's high rate of dissent, were she replaced by a less dissent-prone judge, the work of her colleagues would be reduced by over 5%. It is irrelevant that Judge Newman's colleagues may or may not be purposefully attempting to remove her from the bench for the sole purpose of having to do less work. As the Supreme Court explained, the Due Process Clause abhors procedures that "offer a *possible* temptation to the average man as a judge." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (emphasis added). The Due Process Clause is offended when a decisionmaker has a strong "motive" to reach a particular result. *Id.* at 533-34. And whatever the intentions of the Judicial Council members might be, it cannot be seriously debated that they will have an easier time accomplishing their work if a colleague who forces them to respond to criticism (as dissents always do) were removed from the Court. This "possible temptation" is, in and of itself, sufficient basis for all the members of the Judicial Council to recuse themselves. *See* 28 U.S.C. § 455(a), (b)(4), (b)(5)(iii).

Finally, keeping the investigation in this Circuit not only means overlooking the conflicts that affect at least half the judges on the Judicial Council, it also provides a disincentive for knowledgeable witnesses to come forward if they disagree with the pre-ordained outcome of this matter. The Federal Circuit is a specialized court with a specialized bar. *See* Daniel R. Cahoy & Lynda J. Oswald, *Complexity and Idiosyncrasy at the*

Federal Circuit, 19 Colum. Sci. & Tech. L. Rev. 216, 226 (2018). Many, if not most, of the attorneys who litigate before this Court practice only in the areas that are within this Court's exclusive jurisdiction. In other words, the very livelihood of these attorneys depends on being able to maintain good standing and a trusted reputation with judges of the Court when it comes to representations made in their various cases. Given this reality, attorneys who could serve as witnesses regarding Judge Newman's conduct during oral argument (and perhaps in other settings) are actually placed in a position that is not that different from the Court's employees. In other words, the attorneys who regularly practice before this Court may be reticent about coming forward with their impression of Judge Newman's conduct or opinion quality, which in turn will have the effect of undermining Judge Newman's ability to mount a defense against these unwarranted charges in this forum. This reticence is already evident from the fact that multiple law firms with patent practices declined to be involved in this matter in any capacity citing "conflict of interest." None of this would be a problem were the matter transferred and the investigation conducted by a judicial council of another circuit. Attorneys providing testimony could remain anonymous and thus not worry about whether their involvement in this matter would affect their ability to continue practicing in the Federal Circuit.

The Committee rejects this concern by pointing out that had the matter gone to a hearing under Rule 14, Judge Newman "would have had the benefit of compulsory

process to obtain any critical testimony." Report at 75. But this misses two important points. First, the current reticence of witnesses to come forward puts additional burdens on Judge Newman (including having to submit to unwanted medical examination) that she otherwise would not have had to carry. The same reticence also limits the Committee's ability to see the full picture before deciding whether ordering medical examinations is appropriate. *See* Rule 14, cmt. (requiring the Committee to consider "evidence representing the entire picture."). Second, even if Judge Newman could compel witnesses to appear before the Committee, it is quite likely that the testimony provided by those witnesses, in light of legitimate potential concerns about effects on their careers, would be anything but limited and reluctant.[51]

2. "Narrowing" the Inquiry Does Not Eliminate the Problem of Actual Bias or Risk of Bias

The fact that the investigation has been "narrowed" to the issue of "failure to cooperate" on which "no witnesses [are] needed" does not address whether the Judge

[51] Additionally, any evidence that might contradict one's own pre-existing views is likely to get short shrift. *See Duncan*, 19 F.4th at 1122. Instead of seeing weaknesses and shades of grey in the testimony, in such a situation, the decisionmaker can actually become more entrenched in the initial position. *See, e.g.*, Enide Maegherman, *et al.*, *Law and Order Effects: On Cognitive Dissonance and Belief Perseverance*, 29 Psychiatry, Psychology and L. 33, 34 (2022) ("[J]udges who had been given more incriminating information prior to trial were more likely to convict the defendant than judges who were given the same case file, but less incriminating prior information. Therefore, judges also appear to be prone to belief perseverance despite the need for impartiality."); *id.* ("One way in which people try to escape cognitive dissonance is to adopt, and adhere to, one of the beliefs, while refuting or downplaying the other.").

Newman had "good cause" for any such failure. It is precisely because the present investigation ignores basic norms of due process of law, including failure to recuse by those with "personal knowledge of disputed evidentiary facts," that Judge Newman has taken the position that she has taken. The "narrowing" of the investigation does not obviate the need to confront these issues.

Indeed, the Committee itself spends pages recounting Judge Newman's interactions with Court personnel in order to establish that it had reasonable basis to order medical testing. It also uses the proximity of the personnel to the Committee as a reason to deny transfer. Report at 87-89. Yet, at the same time the Committee's efforts to avoid relying on judges' personal knowledge has led to the conspicuous omission from its Report of the most directly relevant observations of Judge Newman's ability to decide cases. The Committee's Report relies on extensive statements from Court personnel, but entirely ignores the personal knowledge of this Court's judges. Surely judges' observations of Judge Newman's conduct during judicial conferences are more probative about her judicial competence than an IT employee's observation about whether Judge Newman knew she should reboot the fax machine. See Spec. Comm. Report at 86 (citing affidavits). And this information from court personnel adds nothing at all to the question whether Judge Newman has "cooperated" with the Committee. Yet the Report is larded with pages upon pages of observations from court employees about office procedures and Judge Newman's interactions with selected

staff, while it is devoid of any information about judicial conferences or academic events where she actually discussed cases and doctrine. But the Committee cannot simultaneously claim that interactions with Court staff are relevant to its determination while the knowledge of the Court's own members is irrelevant. There can be only one reason for relying on statements by Court staff (all of which post-date the Committee's initial order for a medical examination) but putting the judges' own knowledge off-limits—the Committee's wishes to avoid having judges become witnesses at all to avoid having to transfer this case to another forum.

This failure to consider centrally important evidence cannot be squared with the Committee's obligation "to present evidence representing the entire picture," Rule 14, cmt., or with the basic requirements of "the right to a fair hearing as guaranteed by the Due Process Clause." *Gardner v. Fla.*, 428 U.S. 908, 909 (1976).

B. THIS INVESTIGATION HAS BEEN MARKED BY RULINGS THAT ARE UNFAIR, CONTRADICTORY, AND PROVIDE SHIFTING RATIONALES FOR PREVENTING JUDGE NEWMAN FROM HEARING CASES

1. The Chief Judge Improperly Removed Judge Newman from the April 2023 Sitting of the Court

On February 14, 2023, the Chief Judge excluded Judge Newman from panel assignments for the Court's April 2023 sitting. Report at 79. The Chief Judge did not confer or even communicate with Judge Newman before taking this step. According to the Chief Judge, she excluded Judge Newman because Judge Newman was

supposedly in violation of Federal Circuit Clerical Procedure # 3 ¶ 15 (CP #3). Report at 78 79. The Chief Judge did so even though, under the applicable rule, the status of Judge Newman's docket did not preclude her from hearing new cases.

The Committee states that as of February 14, 2023, when the April paneling memorandum was circulated, "Judge Newman had two cases that were over 365 days old. *One was* [redacted], in which the opinion had been assigned to Judge Newman on December [redacted] 2021. … The second case was [redacted], in which the opinion had been assigned to Judge Newman on February [redacted], 2022." Report at 78 79.

With respect to the [redacted], the Committee claims that the case was not "stayed" pending the enactment of Congressional legislation and therefore the entire time between December [redacted], 2021, and the date of opinion circulation is chargeable to Judge Newman. *Id.* at 78. That is a tendentious presentation of the facts. On June [redacted], 2022, the Court received a letter, pursuant to Fed. R. App. 28(j), advising it that [redacted]

[redacted]. The letter [redacted]

[redacted] *Id.* [redacted] While the Court did not formally "stay" the proceedings, it did follow the letter's

suggestion to hold action on the case pending the enactment of the referenced bill. To that end, the Court waited until the President formally signed the bill into law on August [redacted] 2022, [redacted], and then, on August [redacted], 2022, [redacted] The parties submitted requested briefs on September [redacted], 2022. *Id.*, [redacted] It thus follows, that *at a minimum* all of the time between June [redacted], 2022 and September [redacted] 2022 (totaling 87 days) should be excluded from days chargeable to Judge Newman. Doing so, [redacted] would have hit the 365-day mark on March [redacted] 2023, long after the February paneling decisions would have been set.

With respect to [redacted] the Committee's assertions are equally problematic. The Committee asserts that the case was assigned to Judge Newman on February [redacted] 2022, and therefore would have hit the 365-day mark on February [redacted], 2023. But the Committee is misstating facts. [redacted] was not even formally submitted until March [redacted] 2023. True enough, on February [redacted], 2023, Judge Newman *pre*-assigned [redacted] to herself, but the assignment was not finalized and formalized until after the date of submission.[52] Accordingly, [redacted] was not delayed past the 365-day deadline in February 2023.

[52] Indeed, the pre-assignment memorandum acknowledges that it is only effective "absent objection." Attachment C. That no objection was actually made doesn't make the memorandum any less tentative.

However, even assuming that the Committee's timeline is correct and Judge Newman's one is wrong, there was *still* no basis to deny her panel assignments for the April 2023 calendar. As the Committee itself acknowledges, the paneling decisions for the April sitting were made on February 14, 2023, and [redacted] (the case that allegedly put Judge Newman in violation of CP #3) did not hit the 365-day mark until the *next* day. To get around this uncomfortable fact, the Committee Report asserts that "[t]here is no bright line date on which the time periods in CP #3 are applied, and the Chief Judge's chambers appropriately relied on the email from Judge Newman's chambers in concluding that Judge Newman did not anticipate issuing the [redacted] opinion before paneling was finalized and that she was subject to CP #3." Report at 79. This statement is stunning on multiple levels. First, if it is true that there is no "bright line date on which the time periods in CP #3 are applied," then it is not a rule of procedure at all, but a delegation of nearly unfettered authority to the Chief Judge to simply "intuit" whether or not her colleagues will or won't file opinions by some date known only to the Chief Judge. Second, it is simply unbelievable that a judicial officer instead of waiting for an established deadline to pass, simply assumes that a filing will not be timely made and then rules accordingly. This is yet another example of the Chief Judge and/or the Committee attempting to fit data into a predetermined outcome, and therefore yet another example of bias or at the very least risk of bias.

2. The Chief Judge and Other Members of the Committee Predetermined that Judge Newman Must Take Senior Status

As the Chief Judge herself recounts in the March 24 Order, on March 7, 2023, the Chief Judge informed Judge Newman she had "probable cause to believe" that Judge Newman suffers from a cognitive disability. The Chief Judge offered to resolve this concern "informally," demanding that Judge Newman resign or at least take senior status under 28 U.S.C. § 371. March 24 Order at 2, 5. The Chief Judge, and other members of this Committee told Judge Newman it was "non-negotiable" that she step down from active status if she wished to resolve this matter informally. The predetermination that Judge Newman relinquish her judicial office (in whole or in part) infected every subsequent step that followed, and it casts significant doubts on the objectivity of the Committee, as well as any other judges who urged Judge Newman to take senior status.

3. The Judicial Council, in Violation of Basic Procedures, Voted to Preclude Assigning New Cases to Judge Newman

On March 8, the Judicial Council voted "unanimously" to preclude the assignment of new cases to Judge Newman. June 5 Order at 1. This "Order" was highly irregular, resting on a series of procedural violations that are virtually unheard of in a serious judicial process. The basis for the order was thereafter stated in the Chief Judge's email to Judge Newman, which was reproduced in the Chief Judge's Order of April 6, 2023. *See* April 6 Order at 4. In her email, the Chief Judge stated that Judge

Newman has been suspended "pending the results of the investigation into potential disability/misconduct" and that Judge Newman "will not be assigned any new cases until the[] [disciplinary] proceedings are resolved." Neither the Disability Act, nor the Conduct Rules, however, provide for an interim suspension of a judge pending adjudication of the complaint. Though this problem was repeatedly pointed out to the Committee and the Judicial Council, no action was taken until Judge Newman filed suit and sought injunctive relief. *See Newman v. Moore*, *supra*. Furthermore, the March 8 Order, which according to the Chief Judge was entered and would remain in effect "pending the results of the investigation" was actually entered *weeks* before any investigation began.

On June 5, the Judicial Council suddenly changed the justification and explanation for the March 8 Order. Gone were the claims that the order was entered "pending the results of the investigation," and instead the Council claimed that its decisions were made "under the Council's statutory authority to 'make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit.'" June 5 Order at 4-5 (quoting 28 U.S.C. § 332(d)(1)). But even taking this new, retrofitted justification at face value, the March 8 Judicial Council's action *still* shows either actual bias or too high of a risk of bias to permit the continuation of this process within this forum.

To begin with, the Judicial Council did not notify Judge Newman about the vote, even though she was and is a member of the Judicial Council. Nor did it provide her with an opportunity to be heard. The lack of notice and the opportunity to be heard violates the most basic principles of due process of law. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'") (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864)). This exclusion of Judge Newman from a Judicial Council vote also violated governing law. For example, the Disability Act commands that "*[e]ach member* of the council *shall* attend *each council meeting* unless excused by the chief judge of the circuit." 28 U.S.C. § 332(a)(6) (emphasis added). Chief Judge Moore did not excuse Judge Newman from participating in the vote, and no legal basis existed to exclude her from it. The Committee now suggests that "[t]he Judicial Council properly operated on the view that Judge Newman would be recused in any decision on that matter." Report at 79. It cites no authority for the proposition, nor can it because it is triply wrong.[53]

[53] The Committee's attempt to analogize the situation to one covered by Rule 25 of the Conduct Rules fails. Given that the plain language of Rule 25(b) did not apply, no legal basis existed to use "analogy"

First, the decision whether or not to recuse belongs to each judge herself and not to her fellow members of the court or the judicial council. *See, e.g.*, *Miles v. Ryan*, 697 F.3d 1090 (9th Cir. 2012); 28 U.S.C. § 455(a) ("Any justice, judge, or magistrate judge of the United States *shall disqualify himself* in any proceeding in which his impartiality might reasonably be questioned.") (emphasis added). The Judicial Council's assumptions about what Judge Newman would do had no place in the proceedings. Second, as the Judicial Council itself asserted in the June 5 Order, the issue that was considered by the Council was not whether or not Judge Newman ought to be sanctioned, but how to best administer the business of the court. June 5 Order at 5 ("This is not a censure but rather a decision made for the effective and expeditious administration of the business of the court."). But if so, then Judge Newman would not have been "a judge in his own case," but rather, like every other judge at that meeting, a "judge" in the case of her judicial council. Therefore, any comparison to the "analogous situation when a judge is the subject of a misconduct or disability complaint under the Act and the Rules," *id.* at 79, is entirely misplaced. Third, even assuming, *arguendo*, and contrary to the Judicial Council's own orders, that it was the case of Judge

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to deny Judge Newman her clear legal right to notice about the Judicial Committee vote. Indeed, the existence of this Rule 25(b) provision disqualifying a "subject judge" *after* a complaint has been filed against her provides dispositive textual evidence that a judge *cannot* be excluded *before* a complaint has been filed against her. An elementary principle of statutory construction holds, of course, that where a draft includes a provision in one context and excludes the provision when addressing a different context, the provision is not equally applicable in both situations.

Newman (rather than the case of "effective and expeditious administration of the business of the court") that was being considered on March 8, it cannot possibly explain why notice and opportunity to be heard (and indeed post-factum minutes of the meeting) were not provided to Judge Newman. Had she been told about the meeting, Judge Newman might have been able to furnish evidence that claims being made about her to justify the Council's action were erroneous.[54]

In yet another breach of basic procedure, the Judicial Council did not put its resulting "Order" in writing—even though excluding a sitting Article III judge from hearing new cases is as consequential a vote as a Judicial Council can possibly take. Incredibly, it appears that no Judicial Council document memorialized the meeting, the discussion, or the vote that took place. Conducting the business of a judicial council in this manner appears to be entirely unprecedented in history. Finally, in the culmination of this real-life parade of horribles, the Judicial Council did not even tell Judge Newman about its Order until the next month. *See* April 6 Order at 4. In effect, the Judicial Council supposedly issued an "Order" that was unwritten and undisclosed.

[54] It appears that at least some judges have taken on faith information provided to them by the Chief Judge. Thus, Judge [redacted], in his email to Judge Newman which was sent after the March 8 meeting and vote, explicitly stated that though much of the information he has considered about Judge Newman's performance is second hand, he had no reason to doubt it. Perhaps, had Judge [redacted] and other judges been presented with a fuller picture, they would have reason to doubt the information provided by the Chief Judge, and vote accordingly.

The Committee is essentially playing a "heads-I-win, tails-you-lose" game with Judge Newman. It cites Rule 25(b) in an effort to justify keeping Judge Newman in the dark about the March 8 vote both before and after it occurred. At the same time, the Committee denies Judge Newman the procedural protections she should have received if the Disability Act and the Conduct Rules really had applied. The Disability Act would have imposed numerous requirements and limitations on the Judicial Council. To name a few, (i) it would not have authorized the Judicial Council to take any action at all until a formal complaint was initiated, 28 U.S.C. § 353(a); (ii) it would have required the Judicial Council to notify Judge Newman of the complaint against her, 28 U.S.C. § 353(a) & 354(a)(4); and (iii) it would have required the Judicial Council to withhold any conclusion until a special committee conducted an investigation, reached a conclusion, and submitted a report, 28 U.S.C. § 354(a)(1). The same statute also would have restricted the permissible sanction, stating that any restriction on a judge's ability to hear cases must be limited to a "time certain." 28 U.S.C. § 354 (a)(2)(A)(1). Neither the Committee nor the Judicial Council as a whole followed any of these procedures, and they did not limit the sanctions against Judge Newman (even if the Council refuses to term them as such, *see* June 5 Order at 5) to a "time certain." *See generally id.* (failing to state any temporal limit on Judge Newman's suspension). The Report's treatment of the March 8 Order only sows more confusion about the Order's actual basis, and therefore only increases the perception of actual bias or the risk thereof.

4. The March 24 Order Was Procedurally and Substantively Flawed.

As already explained *ante*, the March 24 Order which serves as the basis for this investigation, suffers from significant factual errors. However, it was also improperly issued.

Rule 11(f) of the Conduct Rules requires that the subject judge be given an opportunity "to respond to the complaint either orally or in writing if the judge was not given an opportunity during the limited inquiry." The Committee suggests that such an opportunity "was not required because … Judge Newman had already been provided a copy of the order identifying the complaint on March 17 during the limited inquiry conducted by the Chief Judge." Report at 12, n. 4. But that's plainly wrong. The question was not whether Judge Newman was given *notice* of the impending investigation, but whether she was given an *opportunity to respond* to the charges. No such opportunity was provided. Indeed, the Chief Judge herself recounts that she was only interested in meeting with Judge Newman to resolve the complaint "informally" which only meant through Judge Newman's resignation. A forced resignation is not an "opportunity to respond." Perhaps, had such an opportunity been provided, the March 24 Order could have avoided the factual errors, and there would be no predicate for the investigation in the first place.

5. The Special Committee Improperly Placed the Burden of Investigating the Credentials of Selected Medical Providers on Judge Newman

The Committee ordered Judge Newman to submit to testing by two medical providers without ever disclosing their qualifications or the methods of their selection.[55] The Rules, however, limit the Committee to the "use of appropriate experts." Rule 13(a). Judge Newman continuously objected to submitting to the testing "by providers with unknown qualifications and provenance." July 5 Letter at 14. In other words, Judge Newman objected to the fact that the Committee failed to establish that the experts it selected are "appropriate." In its Report, the Committee argues that Judge Newman was "offered the opportunity to discuss the professionals recommended by" the Committee's consultant, Report at 94, and that she could have "done an internet search with the names of the doctors who were provided to her" so as to assure herself of "their credentials," id. at 94 n.30.

However, it is not Judge Newman's burden to verify that the providers selected by the Committee are appropriate. Rather, it is the Committee's burden to establish that its request is reasonable both in substance and in the mode of execution. It is "an elementary, routine, important, and familiar principle of legal procedure," August 8

[55] The first time the Committee explained how these providers were chosen was in the Report. *See* Report at 93 n.29.

Order at 6, that "the party requesting an order of the tribunal has the burden of persuasion as to the requested order." *Aqua Prod., Inc. v. Matal*, 872 F.3d 1290, 1351 (Fed. Cir. 2017) (*en banc*) (Taranto, J., joined by, *inter alia*, Prost C.J., dissenting from the judgment).

The Committee failed to establish that the experts it selected are "appropriate." It continuously failed to state why the providers were selected in the first place (other than stating that the Committee's consultant—an out-of-the-area physician—recommended them), or why these providers, neither of whom is a psychiatrist, are qualified or even preferred to evaluate Judge Newman. And yet, having failed to meet these elementary burdens of production and persuasion, the Committee blames Judge Newman for failing to blindly follow the Committee's every request. This is yet another improper attempt to vitiate Judge Newman's procedural rights and to shift the burden of proving her continued competence onto Judge Newman, rather than having the Committee carry the burden of establishing Judge Newman's incompetence.

6. <u>The Special Committee's Denial of Judge Newman's Request for Access to Full Data Set Is Another Procedural Irregularity</u>

On August 14, 2023, Judge Newman's counsel submitted a request to the Committee for (a) release of data regarding Judge Newman's productivity going back to 2018, and (b) permission to share the confidential and redacted data with a consulting expert who could verify and test the accuracy of the data on which the Committee

relied. Counsel made this request [redacted], of which the Committee was aware in advance. Following the delay occasioned by the [redacted], counsel began in earnest to craft arguments in response to the Committee's 111-page report.

On August 17, 2023, the Committee denied the requested materials, stating that the request came too late.[56] The Committee asserted, once again, without citing to any authority whatever, that the record had "closed," and added that the requested data was irrelevant to the question of Judge Newman's cooperation. August 17 Order at 4-8.

This order was arbitrary, unfair, and finds no support in the Conduct Rules or the Disability Act. Nothing either in the Conduct Rules or the Disability Act suggests that the "record closes" at the Committee stage. The Committee is not a trial-like tribunal, with the Judicial Council serving as an appellate body. To the contrary, the Judicial Council is the *only* authority that can act on matters of judicial disability in the first instance.[57] Contrary to the Committee's assertion, the Conduct Rules afford a subject judge an opportunity to "send a written response … [and] to present argument,

[56] The Committee noted that the request came after "approximately half the time had expired for Judge Newman to prepare any response" to its Report. It is not clear what relevance this fact may have, as the counsel did not ask the Committee to conduct any analysis on an expedited basis. Counsel was ready to have its own expert do so. Besides which, the first half of the response period was always going to be devoted to [redacted]. That was the reason for the extension request in the first place.

[57] The Rules provide for appellate-like review before the Committee on Judicial Conduct and Disability, and if necessary, the Judicial Conference. *See* R. 20(a).

personally or through counsel," R. 20(a), and nowhere do the rules limit the subject judge to the "record" developed by the Committee.

Moreover, the Order is inconsistent with the Committee's own actions as it itself had continued to add new evidence after the date the Committee appears to treat as the date the record closed, which apparently was May 16, 2023. *See* Report at 23 & 24 n.10 (identifying affidavits added after that date).

The Committee's decision to deny Judge Newman's request (which was made only in response to the Committee's rejection of a proper statistical analysis done by Dr. Katznelson, *see* Report at 58 n. 20) while having no legal basis for such a denial, is yet another instance of procedural corner-cutting in service of arriving at a predetermined conclusion.

7. The Special Committee's Heavy Reliance on Information It Obtained by Questioning Clerks and Other Court Employees Violates Due Process in Several Respects

Although the Special Committee stated in a June 1, 2023 Order that "there are no witnesses who could have relevant testimony bearing on the narrow issue of [the alleged] misconduct," *id.* at 4, its report includes several affidavits from court employees. It cites these affidavits to show Judge Newman has not properly managed employees and did not understand certain IT matters. The Special Committee has never explained—and could not do so if it tried—why this information from court employees is relevant to whether Judge Newman has properly "cooperated" with the investigation.

The Special Committee nonetheless included these affidavits in an effort to prove that Judge Newman suffers cognitive deficiencies that prevent her from properly deciding cases. Notably, the report does not contain any of the evidence that is obviously more relevant to that issue: testimony from the judges who have worked directly with her on deciding cases.

In any event, these affidavits raise several concerns. Some of them do not even support the conclusion that Judge Newman has any cognitive limitations at all. Most conspicuously, this includes the affidavits from the employees who work most closely with Judge Newman—her law clerks. *See ante* II.B.3.

More broadly, not one of the employee statements was subject to cross examination, which the Committee did not permit even though Judge Newman has a right to do so. *See* Rule 15(c) ("The subject judge must be given the opportunity to cross-examine special-committee witnesses, in person or by counsel."). Cross-examination could have been very helpful to a neutral finder of fact. These witnesses had strong incentives to provide statements that would be helpful to their employer, and the record indicates that their employer was quite forceful in its interactions with employees.

To properly interpret the statements from court personnel, it is instructive to begin with the transcript from the only deposition in the record. This is the only information we have about the Committee's interaction with the employees whose

statements it relies on. The transcript is from the deposition of Judge Newman's career law clerk. The Committee set an intimidating tone from the beginning of its interaction with this law clerk. It served her with a subpoena, at a recruiting event for law clerks, in front of dozens of other attorneys and law clerks, and did so even though it had no reason to believe the career clerk would decline a simple request for an interview. The subpoena required the witness to appear for a deposition in only 48 hours. By contrast, Federal Rules of Civil Procedure require "reasonable" notice, Fed. R. Civ. P. 26(b), and identify a presumptive notice period of 14 days. Consistent with this initial procedural gambit, the deposition transcript shows that the Special Committee's questioning during the deposition was unmistakably intimidating, leading even the witness's counsel to object to the questioning by Judges Moore and Prost as "threatening." Dep. Tr. at 12:3. When the witness asserted her Fifth Amendment rights in response to questions, the Chief Judge threatened her with a misconduct charge, warning that "refusing to cooperate with this proceeding could result in a misconduct charge." *Id.* at 11:15-18. The Chief Judge followed up with a threat that the clerk could lose her job—"could be terminated for misconduct." *Id.* at 11:23-12:1. Even when it came to a simple request for the members of the Committee to ask questions one at a time, so as to permit the witness to answer, the Chief Judge refused. *Id.* at 5:11-6:4.

The Special Committee's intimidating approach in this deposition casts some doubt on the reliability of the statements the same Special Committee obtained from

other Court employees. This is significant because the Special Committee's Report relies so heavily on statements from the Court's employees. This concern that court personnel were not comfortable speaking freely is consistent with information indicating that other potential witnesses were too intimidated to speak up at all. Some were willing to speak only to an outside publication, *IP Watch*, which wrote:

> There is a reason why few in the industry are speaking out publicly on behalf of Judge Newman. Everyone I speak with is afraid of retribution, and specifically fearful of retaliation from Chief Judge Moore. There is real fear that anyone who might stand up for Judge Newman would draw the ire of Chief Judge Moore, and every firm that does any form of litigation is prohibiting attorneys from saying anything publicly on this matter.

Gene Quinn, *The Campaign Against Judge Newman Underscores the Downfall of the Federal Circuit*, IPWatchdog.com (May 8, 2023), https://tinyurl.com/2p934ywe.

This concern brings up another defect in the Committee's approach. Although the rule governing the "Conduct of Special Committee Hearings" requires the Special Committee "to present evidence representing the entire picture," Rule 14, cmt., the Committee has failed to acknowledge any evidence that would contradict its conclusion. In fact, it appears that when evidence did not support the foregone conclusion, the Special Committee simply omitted it. As explained *ante* (*see* II.B), the Committee interviewed three of Judge Newman's law clerks, but included only two resulting statements in its Report. The most plausible inference from this omission is that the information obtained through that interview undermined the Committee's chosen

conclusion. *See Tendler*, 203 F.2d at 19.

Moreover, various sources indicate that evidence supporting Judge Newman is abundant. Several experienced observers have attested to Judge Newman's mental sharpness. On April 12, 2023, IPWatchdog.com wrote about this investigation as follows: "Numerous staff and colleagues with knowledge of the complaint filed against Newman have contacted IPWatchdog to both confirm the filing of the complaint and to vehemently oppose the allegations being made about Judge Newman's competence." Gene Quinn, *Chief Judge Moore Said to Be Petitioning to Oust Judge Newman from Federal Circuit* IPWatchdog.com (April 12, 2023). Similar evidence exists from public appearances Judge Newman made this past March and April. The impression of Prof. David Hricik has already been noted, but the members of the Judicial Council are free to listen to the audio recording of the conference for themselves.[58] In the same vein, former Chief Judge Michel noted the "clarity" of a talk Judge Newman gave at a Fordham Law School Conference in April. Nor based on his review of audio recordings of oral arguments did he appreciate any perceptible change in Judge Newman. Michel, *supra*.

Yet the Special Committee's report does not indicate any awareness that witnesses supporting Judge Newman's competence even exist, much less indicate that the Committee interviewed or even sought out any such witnesses. It appears that the

[58] *See supra* n.32.

Committee limited its so-called "investigation" to compiling statements from employees who would support the position of their employer. It did not even attempt to obtain any evidence that might not support its foregone conclusion. This one-sided behavior is yet another reason why the proceedings violate Judge Newman's rights and why a transfer is warranted.

C. The Committee's Arguments Against Transfer Do Not Withstand Scrutiny and Are Devoid of Merit

The Committee's (technically, the Chief Judge's) justification for refusing to transfer this matter rests mostly on the argument that keeping the investigation within the confines of the Federal Circuit is more efficient.

In its May 3 Order, the Committee stated that transfer is inappropriate because judges outside of the Federal Circuit would be "in a poor position to persuade a judge whom they do not know well to take the action they believe is necessary." May 3 Order at 10. The implication is that the Special Committee believes that its job is to persuade Newman to take an action they believe to be necessary. In other words, this very language betrays that the Committee and other members of the Judicial Council have already made up its mind that it's *necessary* for Judge Newman to retire. *See also* March 24 Order at 2 (noting that "[o]n March 9, 2023, another judge [who is not member of the Special Committee] met with Judge Newman to articulate concerns and urged her to consider senior status."). But it's irrelevant whether the Judicial Council members

believe that it is time for Judge Newman to step down. What matters is whether she is sufficiently mentally and physically fit to continue in office which has been entrusted to her. There is no possible relevance that "personalities" have to this clinical question.

The Report also recounts how, because the Committee and the Court staff are co-located, the "Court's staff could raise concerns based on their interactions with Judge Newman in an almost real-time fashion." Report at 89. Even if true, the argument proves nothing. If the matter were transferred, nothing whatsoever would prevent anyone from raising any concerns with the Chief Judge (or other judges) about Judge Newman's behavior "in an almost real-time fashion," and nothing would preclude the Chief Judge (or other judges) from forwarding memoranda of those conversations or affidavits submitted by the staff to whatever judicial council that the Chief Justice would designate to handle the matter. Indeed, the Committee itself stated that "given modern communications methods, the Committee does not believe that a 7-hour time difference presents a substantial barrier" to communications between parties. May 22 Order at 3. But if in the Committee's view Judge Newman and her counsel are not impeded even by a large time difference, it is hard to understand why the Court staff would be impeded if they had to email with any concerns they have not to a cafc.uscourts.gov address, but, instead to a ca2.uscourts.gov address.

Second, it is not at all clear what does ability to lodge a constant stream of complaints has to do with the question of Judge Newman's mental or physical disability.

According to the Committee, as evidenced by the April 7 Order, the alleged delays *alone* are a sufficient probable cause to suspect a disability and request medical examination. If that is so, then additional complaints are irrelevant. In other words, if all physicians agreed that Judge Newman is mentally and physically as agile as ever, surely the fact that certain staffers viewed or continue to view her behavior as unnecessarily hostile would have no bearing on the question of her *disability*.[59]

Furthermore, even assuming that the gathering of the information from the Court staff was necessary to really assure oneself that medical testing is, at this stage, appropriate, the evidence has been gathered and the only question now is the *evaluation* of that evidence. The ability of one to evaluate the mostly written evidence (provided in the form of affidavits) in no way depends on the proximity of the evaluator to the witness.

What the Committee is really objecting to is the fact that a neutral decisionmaker may not agree with its own determinations. Report at 91-92. If, however, the Committee is convinced that its work has been properly conducted, it should welcome confirmation from others and not attempt to shield it from such. The Committee argues that transferring the matter now would be "grossly inefficient," and that its

[59] Of course, if it were found that Judge Newman were abusive to Court staff, a different complaint could be lodged—one that focused on that issue. But at issue here is solely the question of Judge Newman's alleged disability and lack of cooperation with the Special Committee's investigation.

conduct of the investigation, in contra,st was quite "efficient." *Id.* at 87. Leaving aside the dubiousness of the claim given that the Committee has not been able to receive an answer to the question which prompted this investigation—an answer that, as Judge Newman indicated, would have been more readily forthcoming in a more neutral forum—the Committee seems to confuse "efficiency" with due process of law. Soviet courts were extraordinarily efficient, but they can hardly be accused of being procedurally regular. Due process guarantees necessarily mean that there will be some lack of efficiency. As the Supreme Court wrote more than half a century ago:

> Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.
>
> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

Fuentes, 407 U.S. at 92 (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).

When the question at hand is essentially involuntary removal of a duly appointed Article III judge from the functions of her judicial office, some inconvenience and lack

of efficiency is not just to be tolerated, but welcomed. That the Committee sees it differently, is its own separate cause for concern.

D. THE FAILURE TO TRANSFER THIS MATTER PROVIDES SUFFICIENT "GOOD CAUSE" TO RESIST THE COMMITTEE'S DEMANDS

At the end of the day, it is not and never was possible for Judge Newman to receive a fair process from the Judicial Council of the Federal Circuit, *even if* the Judicial Council members attempted their very best to provide such a process. Judge Newman's participation in this process would have simply legitimated, without warrant, proceedings that do not and cannot comport with constitutional and statutory requirements. All of these concerns were ignored when Judge Newman brought them to the Special Committee's attention. In these circumstances, it was and remains entirely justifiable for Judge Newman to decline to submit to the Special Committee's demands. There is no good reason for the Judicial Council to retain this matter, and a host of good reasons to transfer it. As the tribunal is wrongfully constituted, Judge Newman has no choice but to object.

Indeed, submitting to the Special Committee's demands would vitiate Judge Newman's right to avoid a proceeding before a tribunal that is unable to adjudicate the matter consistent with the requirements of the Due Process Clause and statutory commands. *See Will v. Hallock*, 546 U.S. 345 (2006) ("It is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest that counts."); *cf.*

Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Without question, a trial conducted by Article III judges against an Article III judge, but one that would violate both constitutional and statutory commands "would imperil a substantial public interest" in maintaining confidence in the judiciary generally and disciplinary processes in particular, given that "an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case," *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). This, in turn, would "imperil a substantial public interest" in having cases resolved by judges whose character and fitness to serve are not impugned by dubious findings.

Any proceedings that might result in what essentially amounts to a forced retirement of an Article III judge against her will would "imperil a substantial public interest" in judicial independence that is guaranteed by the existence of a *purposefully* difficult constitutional method of removing judges—impeachment by the House of Representatives and conviction by a supermajority in the Senate. *See* U.S. Const. art. I, § 2, cl. 5; *id.* § 3, cl. 6; *id.* art. II, § 4. So, any proceedings that undermine Congress' *sole* role in removing Article III judges from the bench "imperil[s] a substantial public interest" in maintaining the constitutional structure of government.

The good news, however, is that the Judicial Council *still* has an opportunity to fix the problem, as it still can order a transfer of this matter. Should it choose to take that course, it is more likely than not that the issue would be quickly resolved.

VI. THE RECOMMENDED SANCTION IS UNPRECEDENTED, EXCESSIVE, AND CONTRARY TO THE GOVERNING STATUTE

For all of the foregoing reasons, Judge Newman takes the position that she should not be subject to any sanction because a) she was not in violation of the Disability Act or the Conduct Rules, and b) because this Judicial Council should not continue to exercise jurisdiction over the matter. However, even if the Judicial Council disagrees with some or all of the foregoing arguments, it should reject the sanction recommended by the Committee.

The Committee recommended that Judge Newman be subject to a period of suspension for one year at both panel and *en banc* levels, with a possibility of renewing the sanction indefinitely.[60] Report at 109-11. The recommendation is without basis in precedent and violates the statute.

A. THE SANCTION RECOMMENDED BY THE COMMITTEE IS EXCESSIVE AS COMPARED TO SANCTIONS IMPOSED ON OTHER JUDGES FOUND TO HAVE ENGAGED IN MISCONDUCT

Throughout its Report, the Committee cites heavily to the case of Judge John R. Adams of the Northern District of Ohio, who was ordered by the Judicial Council of the Sixth Circuit to submit to a mental health exam. *See generally In re Complaint of Judicial*

[60] The Committee also suggested that it may be willing to lift the sanction sooner "[i]f Judge Newman undergoes the specified medical examinations, produces the specified medical records, and sits for an interview." Report at 110-11. As stated in the beginning of this brief, Judge Newman will not, under any circumstances, submit to these baseless demands, either now or in the future.

Misconduct, No. 06-13-90009 (Judicial Council of the Sixth Circuit Feb. 22, 2016), *aff'd-in-part and vacated-in-part by In re Complaint of Judicial Misconduct*, No. 17-01 (C.C.D. April 14, 2021). On appeal, the Committee on Judicial Conduct and Disability affirmed the Judicial Council's order requiring mental health examination, but vacated the previously imposed sanction and remanded for further proceedings.[61] Despite the affirmance, and following the remand of the case to the Judicial Council of the Sixth Circuit, Judge Adams persisted in his refusal to submit to a forced psychiatric examination. In response, the Special Investigation Committee in that case recommended only a *six-month suspension* from being assigned new cases.[62] The Committee here recommends a sanction that is twice as long (and renewable). Indeed, the length of the sanction understates its severity because in *Adams*, with Judge Adams being a district court judge and, unlike Judge Newman, not having had to endure a suspension *pendente lite*, he would have retained a rather full docket even had the suspension been put into effect. In contrast, Judge Newman who has been precluded from hearing cases *since April 2023*,

[61] Unlike with Judge Newman, Judge Adams was *never* prevented from being assigned cases during the pendency of the dispute.

[62] Ultimately, the Judicial Council of the Sixth Circuit rejected even this short suspension and eventually dismissed the case. The Committee argues that "the circumstances here are not like *Adams* where the behavior that gave rise to the ordered medical examinations abated and eliminated the reasonable basis for ordering them." Report at 109. Although in light of the evaluations by Drs. Rothstein and Carney this statement is incorrect, even if it were taken at face value, the fact remains that the Committee is recommending a sanction that is twice as heavy as the one recommended in the *Adams* case. The Committee never explains *why* it chooses to depart from precedent so drastically.

and is not assigned to hear cases until at least November 2023, *i.e.*, Judge Newman has already been suspended for seven months, and thus, unlike Judge Adams will have no work left at all. Thus, the sanction that the Committee proposes is in actuality *more than twice* as harsh as that which was considered for Judge Adams. The Committee relies heavily on the *Adams* case for the rest of its conclusions (citing it over fifty times in its Report), but it does not bother explaining why such difference in treatment between Judge Adams and Judge Newman is warranted at the sanctions stage.

Nor do other cases where any suspension was imposed support the Committee's recommendation. A search of prior decisions from various other judicial councils revealed only a few instances of suspensions, and all of them were a result of grave misconduct. For example, the Judicial Council of the Fifth Circuit ordered a one-year suspension of District Judge Walter S. Smith, Jr. after concluding that he engaged in "inappropriate and unwanted physical and non-physical sexual advances" coupled with "allow[ing] false factual assertions to be made in response to the complaint." *In re Complaint of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr.*, No. 05-14-90120 at 1 (Judicial Council of the Fifth Circuit, Dec. 3, 2015). Similarly, when the Judicial Conference concluded that District Judge G. Thomas Porteous, among other violations, perjured himself in his criminal proceedings and should be referred to the House of Representatives for an impeachment inquiry, the Judicial Council of the Fifth Circuit precluded Judge Porteous from hearing any cases "for two years … or

until Congress takes final action on the impeachment proceedings, whichever occurs earlier." *In re Complaint of Judicial Misconduct Against United States District Judge G. Thomas Porteous, Jr.*, No. 07-05-351-0085 at 4 (Judicial Council of the Fifth Circuit, Sept. 10, 2008). At the same time, it should be noted that prior to the referral of Judge Porteous for impeachment proceedings, the Judicial Council of the Fifth Circuit only barred him from hearing "bankruptcy cases or appeals or criminal or civil cases to which the United States is a party" but permitted him to "continue [the rest of] his civil docket and administrative duties until it is determined that he must devote his time primarily to his defense." *In re Complaint of Judicial Misconduct Against United States District Judge G. Thomas Porteous, Jr.*, No. 07-05-351-0085 at 6 (Judicial Council of the Fifth Circuit Dec. 20, 2007).[63]

Absent such extraordinarily egregious, bordering on or actually criminal conduct, judicial councils have not resorted to suspensions of such durations. Indeed, even when judges have committed significant and obvious violations of the Canons of Conduct, the maximum punishment appears to be a six-month suspension from having new cases assigned. *See, e.g.*, *In re Complaint of Judicial Misconduct*, No. 12-90026 and 12-90032 (Judicial Council of the Ninth Circuit, Mar. 15, 2013) (ordering that the then-Chief

[63] Only once the impeachment proceedings began did the Judicial Council, in recognition of the fact that Judge Porteous was spending all of his time on that matter, suspend him from hearing cases, but made clear that the suspension would end as soon as the impeachment proceedings ended and will not last more than two years in any event.

District Judge for the District of Montana Richard Cebull be assigned no new cases for 180 days following Judicial Council's finding that Judge Cebull *repeatedly* used the Court's email system to send extraordinarily racist and obviously political messages);[64] *In re Complaint of Judicial Misconduct*, No. 06-13-90009 (6th Cir. June 27, 2018) (recommending a six-month suspension for Judge Adams following his refusal to submit to medical testing). The Judicial Council of the Seventh Circuit took an equally careful approach when it concluded that District Judge Colin S. Bruce of the Central District of Illinois "frequently had ex parte communications with the Office" of the United States Attorney which "involved draft plea agreements, jury instructions, or docketing issues" and other matters regarding pending trials. *See In re Complaints Against District Judge Colin S. Bruce*, Nos. 07-18-90053, 07-18-90067 at 4-6 (Judicial Council of the Seventh Circuit May 8, 2019).[65] Despite the finding that "Judge Bruce … violate[d] Canon 3 and judicial norms" and that his behavior undermined the public's confidence in the judicial system, *id.* at 9-10, the Judicial Council of the Seventh Circuit ordered only a public reprimand and a suspension of only the *criminal* docket (and only that which was handled by the

[64] It should be noted that Circuit Judge Sydney R. Thomas (whose chambers are in Montana) recused himself from participation in this matter. This action is consistent with an argument that Judge Newman has been making throughout these proceedings. *See ante* Part V. (Circuit Judge Richard C. Tallman also recused himself. The reasons for this action are unclear.)

[65] Again, it is worth pointing out that Judge Sara Darrow, who at the time served as a Chief Judge of the Central District of Illinois—the same court on which Judge Bruce sat—recused herself from the matter.

Office of the U.S. Attorney for the Central District of Illinois) for a period of one year, *id.* at 11. Similarly, the Judicial Council of the Fifth Circuit, upon concluding that then-District Judge Samuel G. Kent engaged in "sexual harassment toward an employee of the federal judicial system" accepted his *voluntary* four-month leave of absence, coupled with a public reprimand as an appropriate sanction. *In re Complaint of Judicial Misconduct against United States District Judge Samuel B. Kent*, No. 07-05-351-0086 at 2 (Judicial Council of the Fifth Circuit Sept. 28, 2007).[66]

Indeed, even in extraordinarily serious cases of misconduct, judicial councils of various circuits have eschewed wholesale long-term suspension of judges from their judicial duties. For example, upon finding that then-Judge Carlos Murguia "(1) sexually harass[ed] Judiciary employees; (2) engage[ed] in an extramarital sexual relationship with an individual who had been convicted of felonies in state court and was then on probation; and (3) demonstrate[d] habitual tardiness for court engagements," and "was less than candid with the Special Committee," the Judicial Council of the Tenth Circuit "publicly reprimanded Judge Murguia" and imposed several private restrictions none

[66] When further allegations against Judge Kent came to light, the Judicial Council stayed its hand pending the criminal investigation which ultimately resulted in Judge Kent's criminal conviction. Following the conviction, the Judicial Council referred the matter to the Judicial Conference for its determination as to whether Judge Kent should be referred to the U.S. House of Representatives for impeachment proceedings. *In re Complaint of Judicial Misconduct against United States District Judge Samuel B. Kent*, No. 07-05-351-0086 at 2 (Judicial Council of the Fifth Circuit May 27, 2009). Impeachment was obviated by Judge Kent's resignation from the bench.

of which amounted to removing him from hearing cases. *In re Complaints Under the Judicial Conduct and Disability Act*, No. 19-02 at 5-6 (C.C.D. March 3, 2020).

The Committee's recommendation departs from these precedents where only the most egregious misconduct resulted in suspending judges from hearing some or all of the cases on their docket. The Committee justifies its recommendation by claiming that Judge Newman attempted to "bring the mechanism Congress established for addressing judicial disability to a grinding halt simply by flouting the rules and refusing to cooperate," and "thwart[ed] the Committee's investigation." Report at 110. Nothing could be further from the truth. Judge Newman's prior submissions and offers of cooperation would easily address any questions of judicial disability if only the Committee itself were willing to also act in a cooperative and collaborative manner. Nor did Judge Newman "thwart" the Committee's investigation (which had no basis to begin with). To repeat, the central, and indeed the only question that ultimately needs to be resolved is whether or not Judge Newman is disabled. (She is not). That can be easily accomplished in the hands of a neutral adjudicative body. However, it appears that the Committee is afraid that referring the matter to a neutral body would result in reevaluation of its own work and exposure of its own mistakes. *See* Report at 91 (expressing concern that "a transferee circuit could choose to start the entire process

over.").[67] Thus, the Committee's recommendation has no basis in precedent or fact. Furthermore, even assuming that Judge Newman's behavior *did* "thwart" the Committee's efforts, that finding would *still* be insufficient to impose a year-long suspension. As discussed above, when Judge Adams "thwarted" the investigation into his alleged disability, the committee investigating him recommended only a six-month suspension. Similarly, when investigating the matter of Judge Murguia, the Tenth Circuit Judicial Council concluded that he "was less than candid with the Special Committee," *i.e.*, impeded the Committee's efforts to investigate the allegations, yet, the Judicial Council chose to impose no suspension at all. In short, once again, the Federal Circuit stands alone in its heavy-handed approach to this matter. The Judicial Council should, therefore, reject the Committee's sanction recommendation.

B. The Sanction Recommended Exceeds the Council's Statutory Authority

The Committee recommends that "Judge Newman not be permitted to hear any cases not yet assigned to an authoring judge, at the panel or en banc level" for one year

[67] Of course, such a "do-over" would only be necessary if the transferee circuit were convinced that the proceedings up to this point were marred with impropriety. Furthermore, any "inefficiencies" caused by "a transferee circuit … start[ing] the entire process over" are entirely the Chief Judge's, the Committee's, and the Judicial Council's fault. This matter could have (and should have) been transferred months ago, which would have eliminated the worries about work going to waste.

"subject to consideration of renewal if the refusal to cooperate found here continues after that time." Report at 109. This proposal is unlawful for two separate reasons.

First, the Committee is without authority to bar Judge Newman from participating in the *en banc* sessions of the Court. The governing statute and rules (to the extent they are constitutional, *see infra*) permit the Judicial Council to direct that "on a temporary basis for a time certain, no further cases *be assigned to the judge* whose conduct is the subject of a complaint." 28 U.S.C. § 354(a)(2)(A)(i); *see also* Rule 20(b)(2)(D)(ii). In the Federal Circuit, cases are "assigned" to panels, and judges are assigned to those panels in accordance with the procedures established by statute, Federal Circuit Rules and Internal Operating Procedures. *See* 28 U.S.C. 46(b); Fed. Cir. R. 47.2(b); Fed. Cir. IOP 3.1.

Section 46(b) explicitly explains how judges should be "assigned" to panels, and how cases should be distributed to those panels. In contrast, Section 46(c) explicitly states that "[a] court in banc *shall* consist of *all* circuit judges in regular active service." 28 U.S.C. § 46(c). Thus, at the *en banc* level, the judges are not "assigned" to a particular case, but sit by operation of law. The Judicial Council does not have authority (nor can it be delegated such) to rewrite a statute that explicitly commands a particular result. Thus, at least insofar as the Committee's recommendation concerns Judge Newman's

potential participation (or a prohibition on such participation) in *en banc* matter, it directly contradicts the clear command of 28 U.S.C. § 46(c) and must be rejected.

Second, the Committee is attempting to use the proposed sanction as a tool of coercion rather than as a tool of remediation. Neither the Disability Act not the Misconduct Rules vest such power in the Committee. Rule 20 explicitly states that the Judicial Council is empowered only to "take *remedial action* to ensure the effective and expeditious administration of the business of the courts."

There is a fundamental difference between "coercive" and remedial actions. As the Third Circuit explained,

> Remedial or compensatory actions are essentially backward looking, seeking to compensate the complainant through the payment of money for damages caused by past acts of disobedience. Coercive sanctions, in contrast, look to the future and are designed to aid the plaintiff by bringing a defiant party into compliance with the court order or by assuring that a potentially contumacious party adheres to an injunction by setting forth in advance the penalties the court will impose if the party deviates from the path of obedience.

Latrobe Steel Co. v. United Steelworkers of Am., AFL-CIO, 545 F.2d 1336, 1344 (3d Cir. 1976) (footnotes omitted). *See also* United States v. Dowell, 257 F.3d 694, 699 (7th Cir. 2001) ("Coercive sanctions seek to induce future behavior by attempting to coerce a recalcitrant party or witness to comply with an express court directive. Remedial sanctions, by contrast, are backward-looking and seek to compensate an aggrieved party for losses sustained as a result of the contemnor's disobedience.") (internal citations

and quotations omitted); *In re Bradley*, 588 F.3d 254, 263 (5th Cir. 2009) (differentiating between "coercive" and remedial civil contempt and noting that "remedial civil contempt is backward-looking.").

The sanction proposed by the Committee is not "backward-looking" and targeted at Judge Newman's alleged past misconduct. Rather, the Committee is asking the Judicial Council to endorse a coercive sanction so as "to induce future behavior by attempting to coerce [Judge Newman] to comply with" the Committee's demands. Because the Committee's remit is limited only to sanctioning judges for past conduct, rather than attempting to directly compel some future conduct, the Committee's recommendation that the proposed suspension be subject to renewal must be rejected.

C. THE SANCTION RECOMMENDED IS UNCONSTITUTIONAL

The judicial office to which every Article III judge is appointed consists of more than just an ability to draw life-time salary from the United States Treasury. The appointment to office carries with it the power to exercise the functions of that office. Indeed, the National Commission on Judicial Discipline and Removal, in its 1993 Report, recognized that "[u]nder Article III, federal judicial office has two consequences. First, a judge is legally eligible to exercise judicial power, because the judicial power of the United States is vested in courts made up of judges. Second, a judge is entitled to receive undiminished compensation." National Commission on

Judicial Discipline and Removal, Report, 152 F.R.D. 265, 287 (1993).[68] *See also United States v. United Steelworkers of Am.*, 271 F.2d 676, 680 n.1 (3d Cir.), *aff'd*, 361 U.S. 39 (1959) (distinguishing between "hold[ing] office" and receiving compensation). If the ability to "exercise judicial power" means anything, it must mean the ability to perform routine judicial functions such as hearing cases, and ruling on the controversies brought before the court.

Both historical and modern practices confirm the consistent understanding that, absent impeachment process, judges cannot be suspended from office either as a result of misconduct or disability. Having examined historical precedent and practice, Professor Walter Pratt concluded that "[t]he entire history of good behavior tenure, both in England and in America, denies the possibility of removal for disability." Walter F. Pratt, *Judicial Disability and the Good Behavior Clause*, 85 Yale. L.J. 706, 718 (1976). And while Congress is entitled to create new mechanisms of judicial discipline and/or ways to start an impeachment process, Congress is not free to effect a removal of a judge through means *other than* impeachment.

[68] The Committee concluded that any suspension of a judge's salary or benefits in the absence of impeachment would violate the Constitution. 152 F.R.D. at 354 ("[T]ermination of salary would violate the Constitution absent resignation or removal."). At the same time, despite recognizing that "federal judicial office has two consequences," *id.* at 287, the Committee incongruously concluded that Congress can tread (or authorize judicial councils to tread) on the first of those consequences—ability to "exercise judicial power." The two conclusions are inconsistent with each other and only the former one is correct.

Congress could not, by mere statute, create a mechanism that would divest a President from any of his powers even in the face of obvious disability. Recognizing this limit on its own authority Congress proposed, and the States ratified, the Twenty-Fifth Amendment. *See* S. Rep. 88-1017 at 6-7 (1964). The same limitation applies to Congressional ability to authorize new ways of judicial removal through mere statute because the original Constitution does not differentiate between methods of removing a President and an Article III judge, leaving the impeachment mechanism as a sole option to accomplish either. *See* U.S. Const. art. II, § 4; Federalist 79; Joseph Story, 2 Commentaries on the Constitution of the United States § 790 at 258 (Hilliard, Gray 1833) (Fred B. Rothman & Co reprint ed. 1991) (stating that judicial officers are civil officers within the meaning of Article II).

The understanding that judges cannot be removed from their judicial duties has continued to the present day and is supported by the contemporaneous practices of various judicial councils. As the report of the committee chaired by Associate Justice Stephen Breyer stated, since 1980, when the Disability Act became law, and until 2006, when the report was filed, the committee found "*no instances* in which the council ordered a suspension in the assignment of new cases." Breyer Report, 239 F.R.D. at 143.[69] The fact that in twenty-six years not a single federal judge was involuntarily

[69] The Breyer Committee identified a single case of misconduct where an accused judge, as part of a "settlement" "*agreed* to go on administrative leave for at least six months, during which he would undergo behavioral counseling, and to waive any doctor–patient privilege so that his doctor could

suspended from her judicial functions as punishment for any misconduct strongly suggests that judicial councils uniformly view this option as constitutionally suspect.

The Breyer Report finding is consistent with the understanding of constitutional limitations on judicial discipline that prevailed in Congress prior to the enactment of the Disability Act. Since publication of the Breyer Report, and as discussed above there have been at several instances of Judicial Council suspension or attempted suspension of Article III judges. None of those instances, however, undermine the present argument because in almost all of them, subject judges agreed with the sanction imposed.[70] There appears to be not a single case where a judge was wholly removed from hearing cases when the subject judge opposed such a sanction. The fact that in forty-three years since the passage of the Disability Act years not a single federal judge had been involuntarily suspended from her judicial functions as punishment for any misconduct strongly suggests that judicial councils uniformly view this option as constitutionally suspect. The Judicial Council of the Federal Circuit should not become the first one to impose an involuntary suspension on a member of its court.

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consult with the special committee's expert." 239 F.R.D. at 196. The Breyer Committee noted that this was a "voluntary corrective action." A similar action was taken by Judge Kent when a complaint was lodged against him. *See In re Complaint of Judicial Misconduct against United States District Judge Samuel B. Kent*, No. 07-05-351-0086 at 2.

[70] Indeed, Judge Richard Cebull, *see supra*, initiated a complaint against himself, and though he defended himself against the charges of racism, he did not oppose the imposition of remedial measures including a prohibition on new cases being assigned to him.

D. If the Judicial Council Is to Uphold the Recommendation in Toto, Judge Newman Should Be Credited with the Time She Has Already Served in a Suspended Status

Judge Newman has been suspended from hearing cases since April 2023 and, given the Court's scheduling procedures, she will not be assigned cases until the November 2023 sitting of the Court at the earliest. In other words, Judge Newman has already experienced a suspension of seven months, which in and of itself is longer than almost any other suspension from judicial functions in the history of the United States.

Chief Judge Moore represented to Judge Newman that her suspension began as a result of the vote by the Judicial Council and will last through the entire pendency of the investigation. April 6 Order at 4. Both the Chief Judge and the Judicial Council should be held to their representation that the suspension was and is related to the investigation rather than any other matter. Consequently, this suspension that has always been termed as a disciplinary matter (at least until Judge Newman filed suit in the District Court) should be taken into account in imposing additional discipline on Judge Newman.

CONCLUSION

For all of the foregoing reasons, the Judicial Council should reject the Committee's Report and bring this matter to a speedy conclusion. The reports of two qualified medical professionals put to rest any doubts about Judge Newman's competency. Even if the Judicial Council does not terminate the matter, it should

certainly reject the Committee's recommended sanction as contrary to law and precedent.

In the alternative, the Judicial Council should request that the matter be transferred to another circuit's judicial council. Absent either of these actions, the matter will remain at an impasse, because Judge Newman does not foresee a set of circumstances under which she will submit to the Committee's baseless demands.

Respectfully submitted,

/s/ *Gregory Dolin*
Gregory Dolin
Andrew Morris
John J. Vecchione
Mark Chenoweth
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August 31, 2023

Attachment A

No. FC-23-90015

In the Judicial Council of the United States Court of Appeals for the Federal Circuit

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

DECLARATION OF TED L. ROTHSTEIN, M.D.

August 31, 2023

DECLARATION OF TED L. ROTHSTEIN, M.D.

1. I, Ted J. Rothstein, M.D., am over the age of 18 and make this Declaration in support of Judge Pauline Newman's Response to the Judicial Council in her case before it.

2. I am a Neurologist practicing in Washington D.C. I am affiliated with the George Washington University Hospital. I received a medical degree from Virginia Commonwealth University School of Medicine.

3. I have practiced medicine for more than 30 years. I am Board Certified in Neurology. I served an internship at the Queens Hospital in Honolulu, Hawaii, and completed Residency in Neurology at University of Washington in Seattle, Washington.

4. I became Board Certified in Neurology in 1975 and am both a Fellow of the American Academy of Neurology and Stroke Fellow of the American Heart Association.

5. I have 32 peer reviewed publications in scientific journals and 100 presentations in my field.

6. My most recent publication is *Cortical Grey Matter Depletion Links with Neurological Sequelae in Post COVID-19 "Long Haulers,"* in BMC Neurol. 2023 Jan 17;23(1):22.

7. I make this Declaration based on personal knowledge as to my background, and information gleaned from examining Judge Newman on June 21, 2023. I produced a report based upon that examination on June 21, 2023, and it is attached as Exhibit 1 to this Declaration.

8. My examination of Judge Newman was, except as to adjust to her then broken wrist, complied in all respects with the Montreal Cognitive Assessment ("MoCa") test that is standard for assessing cognitive function.

9. Before administering the MoCa examination I took an oral medical and neurological history of Judge Newman. I also reviewed the analysis of Professor Andrew Michaels of the University of Houston on her representative opinions. At the time of my examination, she was under investigation by the Judicial Counsel for "medical impairments." My test demonstrated she had the cognitive function to continue to function as a judge in the court's proceedings.

10. It has been suggested that the MoCa test was inconclusive or unscientific because Judge Newman could not draw a clock at a particular time given her broken wrist.

11. The MoCa is a 30-point test and failure to draw a clock does not impede conclusions that can be drawn from the 3 points not testable. Moreover, a variety of elements are tested on MoCa, and spatial orientation is the only one that could not be evaluated on clock drawing.

12. Impaired wrist function does not preclude testing of cognitive function.

I declare under penalty of perjury that the foregoing is true and correct.

Executed On: August 29, 2023

/s/ Ted L. Rothstein
Ted L. Rothstein, M.D.

Exhibit 1
to the Declaration of
Ted L. Rothstein, M.D.

NEUROLOGY
at The GW Medical Faculty Associates

2150 Pennsylvania Avenue, NW, 9th Floor
Washington, DC 20037
phone: 202.741.2700 fax: 202.741.2721

Ms. Pauline Newman is a 96 yo United States Circuit Judge of the US court of Appeals who is here to evaluate her mental status.

She is currently under investigation by her Court for "medical impairments" including having had a heart attack and 2 stents -which she denies having- and being "intellectually compromised" and no longer able to function in her capacity as a federal judge. As a consequence she has been denied access to new cases.

Judge Newman denies having cognitive impairment. Her opinions in the past year have been quantitatively analyzed by Law Professor Andrew Michaels at the University of Houston Law School and found to be exemplary. He did not perceive "a significant drop in the quality or thoroughness of her opinions" over the previous decade.

She believes that she is being unfairly treated by her judicial colleagues. Much of this controversy has been depicted in Washington Post accounts over her being prevented from continuing to hear and write opinions on current cases.

Past medical Hx: She has a prior hx of "sick sinus syndrome" which is treated with a Pacemaker and [redacted]

She is a graduate of Vassar College, received a Master of Arts from Columbia University, a Doctor of Philosophy in Chemistry from Yale University and law degree from NY University School of Law. There is no family hx for memory disorders or dementia.

Judge Newman broke her right wrist one week ago and her R wrist is in a cast. She is unable to write.

Review of systems is otherwise not contributory.

On examination,
Her speech is fluid, with normal content and articulation. She describes her medical history and background with great detail and eloquence.

A partial MoCA examination is performed as she is unable to write and therefore cannot follow trail or draw a cube (each worth one point on the 30 point test). She scores 24/28 failing to remember 4 of 5 words after several minutes. All other aspects of the test were precise and correct.

Her head is normocephalic.
Neck is supple.
Cranial nerves,
Funduscopic examination discloses bilateral cataracts. EOMi. PERRL.
Sensation is intact. Her face is symmetrical with normal smile and eye closure.
Hearing normal to voice.
Tongue protrudes in midline.

Sensory and Motor exam,
Sensation normal over both hands.
Her arm strength is not tested.
Her gait is normal with normal stride, turn and arm swing. Romberg is negative.
Reflexes are 2+ at the knees and ankles.

Impression,
Judge Newman has a slight limitation in immediate memory as reflected in her MoCA evaluation. Her cognition is otherwise completely normal. Her speech is normal and her ability to provide her vocational and medical history is precise and eloquent.

As she has a cardiac pacemaker and therefore she cannot undergo a Brain MRI with NeuroQuant which could have been used to measure volumes of key brain regions important for memory, she could have a more detailed neuropsychological evaluation as part of her neurological assessment..

My findings would support her having cognitive function sufficient to continue her participation in her court's proceedings.

Ted Rothstein MD

Ted L. Rothstein MD
Professor of Neurology
George Washington University
June 21, 2023

Attachment B

Regina Carney, M.D.
1870 SW 52nd Terrace
Plantation, FL 33317
615-636-5792

Independent Medical Examination
In the Matter of: Judge Pauline Newman

Introduction and Reason for Evaluation and Opinion

My name is Dr. Regina Carney. I am an adult forensic psychiatrist employed full-time by the Miami Veteran's Administration Medical Center, and working independently as a consultant on legal cases involving individuals with known or suspected psychiatric conditions. My credentials are more fully described on the curriculum vitae attached hereto as Exhibit 1 I have published the articles and chapters listed on Exhibit "A" hereto, focusing on cognitive disorders including Alzheimer's Disease and other dementias. I have testified as an expert witness during the past 4 years at trial or at deposition in the case listed in Exhibit 1.

I received my B.S. degree in biology from Duke University and my M.D. from Stony Brook University Medical Center in New York. I completed my residency in General Psychiatry at Vanderbilt University Medical Center in Nashville, Tennessee and completed a fellowship in forensic psychiatry at the University of Miami Miller School of Medicine in Miami, Florida. Previously, I served in the following positions: 1) Inpatient Staff Psychiatrist for the Mental Health and Behavioral Science Service at the Bruce W. Carter VA Medical Center; 2) Supervising Attending Physician for the Adult Outpatient Psychiatry Clinic at the University of Miami Miller School of Medicine; 3) Medical Director for the Miami Dade Forensic Alternative Center at the University of Miami Miller School of Medicine; and 4) Assistant Professor at the University of Miami Miller School of Medicine.

I am board-certified in both Adult Psychiatry and Forensic Psychiatry by the American Board of Psychiatry and Neurology. Attached as Exhibit A is my current CV. Dr. Gregory Dolin, a Senior Litigation Counsel with the New Civil Liberties Alliance and an attorney for Judge Newman, retained me to review and evaluate Judge Pauline Newman, a 96-year-old Judge in the Federal Circuit Court of Appeals, who lives in Washington, D.C. The fees for my services are borne by Judge Newman and not NCLA.

The findings of this preliminary report are based in part on a three-hour clinical evaluation of Judge Newman performed by me on August 25, 2023, including administration of The Modified Mini-Mental State Examination (3-MS).

Other records reviewed and considered in the opinion include:

1) Primary Care Medical Records from One Medical Group for Judge Pauline Newman, dated 02/26/2021-06/14/2023

2) (Enclosed within above) Cardiology Medical Records from Scott Shapiro, MD, PhD, including an Echocardiogram performed 05/26/2023

3) Statement of Clinical Impression of Ted L Rothstein, MD, Neurologist, summarizing Clinical Evaluation and Findings from Examination dated 06/21/2023

3) Publicly available proceedings at: https://cafc.uscourts.gov/home/the-court/notices announcements/

4) Law360 Article by Andrew Michaels. "Judge Newman's Recent Dissents Show She Is Fit For Service," (06/06/2023)

5) Social Science Research Network Manuscript by Ron D. Katznelson, Ph.D. "Is There a Campaign to Silence Dissent at the Federal Circuit? (August 28, 2023)."

6) Description of duties of a United States Circuit Judge

Informed Consent

Judge Newman was informed that a confidential doctor-patient relationship did not exist due to the nature of the evaluation process, and that although an opinion would be rendered, medical treatment would not be provided. She agreed to pay the associated fees for this evaluation. The contract and fee structure were reviewed. Notably, Judge Newman carefully considered the contract and autonomously commented on the open-ended nature of the arrangement. She requested and her attorney executed an addendum to ensure costs beyond a reasonable, specific sum would be mutually agreed upon before being incurred. Judge Newman was informed that a report of the results of the evaluation would be provided to the U.S. Court of Appeals for the Federal Circuit in regard to the current investigation. Judge Newman indicated that she understood this information and agreed to undergo the evaluation. She provided written consent for disclosure of information to and from the non-public sources named in the records reviewed.

History of Present Complaint

Judge Newman presented for this evaluation on August 25, 2023 in association with an ongoing complaint and action filed with the U.S. Court of Appeals by Chief Judge Kimberley Moore, under the Judicial Conduct and Disability Act. The complaint filed by Chief Judge Moore states that concerns exists within the court that Judge Newman "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" and/or "is unable to discharge all the duties of office by reason of mental or physical disability." The complaint detailed allegations of decreased work output with significant and habitual delays in "processing and resolution of cases" (resulting in re-assignment of some cases), an episode of fainting during a hearing followed by Judge Newman's inability to ambulate independently, and potential "impairment of cognitive abilities (i.e., attention, focus, confusion and memory) that render Judge Newman unable to function effectively in discharging case- related and administrative duties. It has been stated that Judge Newman routinely makes statements in open court and during deliberative proceedings that demonstrate a clear lack of awareness over the issues in the cases." There was also an allegation of "inappropriate behavior in managing staff" and a disclosure of sensitive medical information to staff.

Judge Newman was suspended from hearing further cases beginning in April of 2023, "pending resolution of this investigation."

Evaluation and Observations

Judge Pauline Newman arrived 30 minutes early for the evaluation. She was professionally dressed, appropriate for the weather (mentioning it was likely to rain), and her grooming and hygiene were unremarkable, with no obvious areas of deficit. Demeanor was calm and cooperative. She had eyeglasses

that she wore for reading tasks but removed in conversation. She spoke fluently and attended well to the interview, handling changes in topic with agility. Her speech was notable for an expanded vocabulary consistent with her lifetime work in law. She was careful to clarify any terms that might have been unfamiliar to the interviewer; for example, she indicated that her judicial assistant functioned "in effect, as my secretary" until the interviewer indicated familiarity with the term "J.A.", whereupon she used that term going forward.

Interactively, Judge Newman warmed to the interview, and provided full and detailed responses. Judge Newman was able to articulate and respond to the concerns raised in a collected manner. She had no specific recollection of a negative event or experience that might have given rise to the complaint. She was aware that her intellectual abilities and personal medical fitness were being questioned, and stated, "If I'm deluding myself, I'd be glad to know that." When the prospect of a voluntary cognitive evaluation during the interview was mentioned, she frowned and opined, "it's totally improper and inappropriate for my colleagues to put me through these tests. When people are being evaluated, you eventually get to questions that cannot be answered. My experience with my colleagues is that whatever the break-point is, then they point out where you could not answer. There is also a totally unscrupulous media that misrepresents the results." The voluntary nature of the cognitive evaluation was reiterated, and the matter was agreed to be re-considered at the end of the interview.

Occupational History and Recent Events

Judge Newman provided a detailed social, educational, and occupational history that is abbreviated here for expediency. She recalled becoming a federal judge in 1984 at the request of President Ronald Reagan, from whom she received a personal phone call offering the role. At the time, she has been working for 30 years in a senior role in the patent system. In regard to the judgeship offer, she stated, "it wasn't what I was looking for, but the court had been formed just a few years before. In regard to the politics, I had no idea. I got a call and said I'd be willing." Judge Newman expressed that she finds her work intellectually and philosophically engaging, and enjoys it immensely. She remarked, "it's an extraordinary position; it's very difficult work, but it's full of satisfaction for doing something for the nation. Doing some justice." She noted, "I do speak out about what I think. I know very well I'm not popular with my peers. I think one of the reasons I'm in trouble is when I think they're wrong, I tell them. The Supreme Court usually then says I'm right - that's a reassurance."

With regard to productivity and quality of her opinions, Judge Newman expressed that she felt "nothing has changed. I'm still learning things." She agreed that human aging was generally associated with some natural slowing of work production and physical skills, particularly at extreme ages. However, she also noted that "the work does not require a 20-year old's peak [performance]. I see some things more clearly due to my experience." She referenced the statistical review of her work output published by Ron Katznelson (listed in records reviewed section of this evaluation) in this vein.

Judge Newman characterized herself as a generally strong-willed and outspoken individual, even when her opinions were not in line with others. She noted, "they are saying I'm grouchy and my staff have been leaving. I've been arguing with the IT staff because they took my [secretary's] computer two or three months ago." She also noted that "all of the affidavits saying my behavior is inappropriate have been in the past few months, since this complaint was filed. I am not physically disabled, and I'm still writing opinions. If I thought I was slipping, I would quit."

Judge Newman expressed understanding that individuals experiencing cognitive decline often exhibit impaired insight into their deficits. She was open to reflection on the particular threat to one's identity when a highly distinguished career—one requiring intellectual prowess and fine attention to detail and context—is brought into question by the prospect of cognitive decline. Unrelated to this discussion, but brought up at a different point in the evaluation, Judge Newman indicated that she was aware that her cataracts were impairing her vision. She noted that she had voluntarily allowed her driver's license to expire as she felt this condition made it unsafe for her to drive.

Medical History

Judge Newman was able to recount her own medical history accurately, including "a pacemaker due to what they call sick sinus syndrome, around 2018," a fractured right wrist a few months ago, [redacted] She stated that outside of the surgery to implant the pacemaker, she has had no other surgeries. [redacted]

She denied episodes of confusion or getting lost. She denied any instances of seizures, traumatic brain injury, or noting loss of memory. She recalled a single event of syncope in April of 2023, "I think of dehydration. I was not admitted."

She denied having balance problems. She explained that she fractured her wrist while sprinting to take a photo of cardinals seen outside her apartment, where she lives alone.

In terms of past psychiatric history, she reported "none! To my amazement, even in this turmoil—well perhaps that's the fatal flaw—it's not getting to me." She stated that her mood remains upbeat ("maybe some good will come of this"), and her sleep is sufficient and restorative. She denies any personal history of anxiety, depression, mania, psychosis, or misuse of alcohol or other substances, and denied any family history of the same. Judge Newman reported that her mother had lived to be well into her late 90s with no cognitive difficulties.

Current Function in Independent Activities of Daily Living

Judge Newman lives alone in a two-story apartment in Washington, D.C. She has no significant other or children, but stays in contact with her sister's family and her friends. She remarked that she has been grateful to be a generally very healthy individual. She walks around the city for transportation. She reported that during the COVID public health emergency, she was advised to avoid large crowds due to her advanced age, and thus requested assistance with getting food. However, she stated that she herself prepares her own food. Since the announcement of the end of the public health emergency she has resumed going to the grocery store.

She stated that she has employed an individual to assist her with cleaning her apartment for many years; "I'm not much of a homemaker." She pays her own bills, and at the initiation of this evaluation, produced a check that she filled out accurately and completely for the retainer fee.

Cognitive Evaluation

Given Judge Newman's advanced educational attainment and exceptional verbal fluency, the possibility of some degree of successful concealment of an underlying cognitive defect was examined. A quantitative examination of cognition was thus performed at the end of the interview. The Modified Mini-Mental Status Exam (3-MS) was administered; this test was chosen specifically to avoid re-testing ("learning") effects related to the recently administered Montreal Cognitive Assessment (MOCA). Having personally administered the 3-MS several hundreds of times to individuals of varying cognitive abilities, my experience is that the examination usually requires 20 to 30 minutes to complete. The 3-MS is given in a highly standardized manner, with scripted prompts for the items. It is scored on a 100-point scale.

Judge Newman was able to read, write with her right hand, and reply appropriately to complete the examination. Judge Newman completed the 3-MS in 11 minutes, with a final score of 98 out of 100. She missed 2 points for generating only eight four-legged animals in 20 seconds, out of a possible 10. She was dismayed to hear of this result and scolded herself for not thinking of barnyard animals as a category. She scored perfectly on the word recall items, retaining all 3 words after both immediate and delayed time periods. The original 3-MS scoresheet is attached as Exhibit 1.

Summary and Opinion:

In summary this is a fluent, engaging, strong-willed, highly accomplished and unusually cognitively intact 96-year-old woman with chronic medical issues that appear well-controlled at the current time, with no evidence of current substantial medical, psychiatric, or cognitive disability. She is ambulatory, provides a complete and accurate personal, social, occupational, and medical history, and is fully oriented to time, place, date, situation and the nature of the current investigation. She reports no history of, or current, psychiatric or cognitive issues including anxiety, depression, or substance use disorders. She appears to show remarkable resilience; while she noted feeling "defensive" about the investigation, she did not note persistently anxious or depressed mood. She expressed a positive worldview, and chatted extemporaneously with the interviewer regarding a recent advance in the treatment of alcoholism that she had read about.

In my medical and professional opinion, Judge Newman demonstrated no substantial emotional, medical, or psychiatric disability that would interfere with continuation of her longstanding duties as a Judge in the U.S. Court of Appeals.

Sincerely,

/s/

Regina Carney, M.D.
Diplomate, American Board of Psychiatry and Neurology
Diplomate, Forensic Psychiatry, American Board of Psychiatry and Neurology
Associate Program Director, Forensic Psychiatry Fellowship
Voluntary Assistant Professor, Department of Psychiatry and Behavioral Sciences
Leonard M. Miller School of Medicine at the University of Miami Adjunct Assistant Professor

Alpha Omega Alpha Teaching Faculty
Herbert Wertheim College of Medicine at Florida International University

Medical Director of Inpatient Psychiatric Services (09/2018-09/2022)
Medical Director of Outpatient Substance Use Disorder Clinic (09/2022-current)
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Miami, FL 33125
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Exhibit 1
to the
Report of Independent Medical Examination of Pauline Newman
by
Regina M. Carney, M.D.

THE MODIFIED MINI-MENTAL STATE EXAMINATION (3MS)

Center:	Family #:	Individual #:	Individual's Name:
			Judge Pauline Newberger-man

Date of Exam:	Examiner:
08/25/2023 (Friday)	Regina Carney, MD

Now, I would like to ask you some questions to check your memory and concentration. Some of the questions may be easy and some will be harder. Take your time if you need to. We can skip over questions if you don't understand them. Just relax and do your best.

START TIME 16 y 07

1.	**Who is the president of the United States now?** RECORD: President Biden	CORRECT ..... (1) INCORRECT ..... 0 REFUSED 7
2.	**Who was the president before him?** transliteration of author's RECORD: The Infamous Trump	CORRECT ..... (1) INCORRECT ..... 0 REFUSED 7
3.	**Who is the Vice President of the United States now?** RECORD: Kamala Harris	CORRECT ..... (1) INCORRECT ..... 0 REFUSED 7
4.	**Who was the Vice President before ~~him?~~** her RECORD: the Infamous Pence	CORRECT ..... (1) INCORRECT ..... 0 REFUSED 7
5.	**Who is the governor of** *(your state)* **now?** we do not have a govn. in DC. RECORD: How about Florida? Ron de Santis	CORRECT ..... (1) INCORRECT ..... 0 REFUSED 7
6.	**There are 3 words on this card that I would like you to remember. Please say the words aloud while you read them. Then I will take the card away, and have you repeat all 3 words.** SHOW WORDS AND HAVE RESPONDENT READ. CORRECT (HIM/HER) IF (HE/SHE) MISREADS. TAKE CARD AWAY. **Now what were those three words?** HAVE RESPONDENT REPEAT. IF THERE ARE ERRORS, CONTINUE WITH ADDITIONAL TRIALS (UP TO 3 TRIALS). SCORE FIRST TRY. REPEAT WORDS FOR THREE TRIALS ONLY.	SCORE (0-3) ..... 3 REFUSED ..... 7 1 **NUMBER OF TRIALS NEEDED**

	TRIAL #1	TRIAL #2	TRIAL #3
SHIRT	✓	✓	✓
NICKEL			
HONESTY			

**** BE SURE TO SAY: **Remember the 3 words because later I will ask you to repeat them.**

☑ **CHECK WHEN REMINDER IS GIVEN**

8 Out of 8

7. **Now please count from 1 to 5.**
ASSIST ONLY ONCE IF NEEDED.

DOES NOT COMPREHEND TASK SCORE 0 ON BACKWARD TASK AND GOTO ITEM 8

RECORD: ✓ 1 ✓ 2 ✓ 3 ✓ 4 ✓ 5

Now I would like you to count backwards from 5 to 1.

RECORD: ✓ 5 ✓ 4 ✓ 3 ✓ 2 ✓ 1

CORRECT.....(2)
1 OR 2 ERRORS.....1
≥3 ERRORS/CAN'T DO.....0
REFUSED.....7

8. **Please spell the word "World."**
ASSIST ONLY ONCE IF NEEDED.

DOES NOT COMPREHEND TASK SCORE 0 ON BACKWARD TASK AND GO TO ITEM 9

RECORD: ✓ W ✓ O ✓ R ✓ L ✓ D

Now please spell "World" backwards.

RECORD: ✓ D ✓ L ✓ R ✓ O ✓ W

SCORE NO. OF LETTERS IN CORRECT POSITION.....5
REFUSED.....7

9. **What were the three words that I asked you to remember?** (SHIRT, NICKEL, HONESTY)
IF THE SUBJECT DOES NOT GIVE ALL CORRECT ANSWERS, PROMPT AS NEEDED:

RECORD: ✓ (SHIRT) ✓ (NICKEL) ✓ (HONESTY)

A) SPONTANEOUS RECALL 3	B) SPONTANEOUS RECALL 3	C) SPONTANEOUS RECALL.....3
1) **One of the words was something you wear.**	1) **One of the words was some money.**	1) **One of the words was a good personal quality or virtue.**
RECORD_____2	RECORD _____2	RECORD_____2
2) SHOW CARD. HAVE S. READ AND MAKE SELECTION. *SHOES, SHIRT, SOCKS* .....1 CIRCLE WORD.	2) SHOW CARD. HAVE S. READ AND MAKE SELECTION. *PENNY, NICKEL, DOLLAR* .....1 CIRCLE WORD.	2) SHOW CARD. HAVE S. READ AND MAKE SELECTION. *HONESTY, CHARITY, MODESTY*.....1 CIRCLE WORD.
3) IF STILL INCORRECT RESPONSE, PROVIDE CORRECT ANSWER **(shirt)**.	3) IF STILL INCORRECT RESPONSE, PROVIDE CORRECT ANSWER **(nickel)**.	3) IF STILL INCORRECT RESPONSE, PROVIDE CORRECT ANSWER **(honesty)**.
NO RECALL/CAN'T DO .....0 REFUSED 7	NO RECALL/CAN'T DO .....0 REFUSED.....7	NO RECALL/CAN'T DO.....0 REFUSED 7

SCORE FOR SHIRT..... 3
SCORE FOR NICKEL..... 3
SCORE FOR HONESTY..... 3

16 Out of 16

ORIENTATION SECTION (ITEMS 10-18)

10. **What year is it?**

RECORD: 2023

CORRECT ..... (3)
MISSED BY 1 YEAR 1
INCORRECT/CAN'T DO 0
REFUSED 7

11. **What is the season of the year?**

RECORD: Summertime

CORRECT WITHIN A WEEK ..... (3)
MISSED BY 1 MONTH 2
INCORRECT BUT NAMES A SEASON 1
INCORRECT/CAN'T DO 0
REFUSED 7

12. **What day of the week is it?**

RECORD: Friday

CORRECT ..... (3)
MISSED BY 1 DAY 1
INCORRECT/CAN'T DO 0
REFUSED 7

13. **What month is it?**

RECORD: August

CORRECT ..... (3)
INCORRECT BUT WITHIN 3 DAYS 2
MISSED BY 1 MONTH 1
INCORRECT/CAN'T DO 0
REFUSED 7

14. **What is today's date?**

RECORD: 25th

CORRECT ..... (3)
MISSED BY 1 OR 2 DAYS 2
MISSED BY 3-5 DAYS 1
INCORRECT/CAN'T DO 0
REFUSED 7

15. **What state are we in?**

RECORD: we are not in a state can you tell me a nearby state? Virginia

CORRECT ..... (2)
INCORRECT/CAN'T DO 0
REFUSED 7

16. **What county are we in?**

RECORD: Can you tell me a nearby county? Montgomery Co, MD

CORRECT ..... (1)
INCORRECT/CAN'T DO 0
REFUSED 7

17. **What town are we in?** Washington DC

IF S. DOES NOT ANSWER, PROMPT AS NEEDED:
What is the nearest town?
What town do you consider to live in?
What is the town on your mailing address?

RECORD: ____

CORRECT ..... (1)
INCORRECT/CAN'T DO 0
REFUSED 7

18. **Are we in a church, a home or an office?**

RECORD: office

CORRECT ..... (1)
INCORRECT/CAN'T DO 0
REFUSED 7

20 Out of 20

IF SUBJECT IS BLIND, TAP SUBJECT FOR ITEMS 19-23, AND SAY **"I am going to tap you and I'd like you to tell me the name of the body part that I tap."**

19. POINT TO YOUR FOREHEAD.
What is this called?

RECORD: forehead

CORRECT.....1
INCORRECT/CAN'T DO.....0
REFUSED.....7

20. POINT TO YOUR CHIN.
What is this called?

RECORD: Chin

CORRECT.....1
INCORRECT/CAN'T DO.....0
REFUSED.....7

21. POINT TO YOUR SHOULDER.
What is this called?

RECORD: elbow

CORRECT.....1
INCORRECT/CAN'T DO.....0
REFUSED.....7

correct-M provider-examiner error R C
Shoulder
move responses down please

22. POINT TO YOUR ELBOW.
What is this called?

RECORD: knuckle

CORRECT.....1
INCORRECT/CAN'T DO.....0
REFUSED.....7

23. POINT TO YOUR KNUCKLE.
What is this called?

RECORD:

CORRECT.....1
INCORRECT/CAN'T DO.....0
REFUSED.....7

24. **Now I am going to give you a category and I want you to name as many things as you can that come from that category. For example, if I said "fruit," you would say "orange, apple, or banana." Can you name another kind of fruit?** RECORD RESPONSE.

grape

Now I have another category and it is animals. Please name as many four-legged animals as you can. You will have 20 seconds. START TIMER. TELL SUBJECT, **"Begin now".** ALLOW 20 SECONDS. IF NO RESPONSE IN 10 SECONDS, REPEAT THE QUESTION ONCE, RECORD; ALLOW ANOTHER 10 SECONDS, THEN GO TO ITEM 25.

SCORE.....(0-10) 08
REFUSED.....97

dog
cat
lion
tiger
panther
rhinoceras
deer
leopard

13 Out of 15

32. HAND S. A PENCIL AND FOLDED SHEET. **Please write a sentence on this page.** ALLOW 1 MINUTE, AND ANOTHER 30 SECONDS AFTER PROMPTING (IF NECESSARY). PROMPT IF S. WRITES INCOMPLETE SENTENCE: **Write the sentence, "The band played and the crowd cheered."**

LEGIBLE, CORRECT SENTENCE ..... (5)
LEGIBLE SENTENCE WITH ERROR(S) 4
LEGIBLE, CORRECT SENTENCE AFTER PROMPT 3
LEGIBLE SENTENCE WITH ERROR(S) AFTER PROMPT 2
WRITES NAME OR LEGIBLE, INCOMPLETE SENTENCE AFTER PROMPT 1
ILLEGIBLE/CAN'T DO 0
REFUSED 7

33. SHOW S. SHEET WITH DRAWING. **Here is a drawing. Please copy the drawing on the same paper.** POINT TO BOTTOM OF THE PAGE BELOW DOTTED LINE. ALLOW 1 MINUTE FOR COPYING.

SCORE EACH PENTAGON

	L	R
5 SIDES	(4)	(4)
1 UNEQUAL SIDE	3	3
OTHER CLOSED FIGURE	2	2
2 OR MORE LINES	1	1
CAN'T DO	0	
REFUSED	7	

INTERSECTION
4CORNERS ..... (2)
NOT A 4 CORNER ENCLOSURE 1
NONE/CAN'T DO 0
REFUSED 7

34. **What were the three words that I asked you to remember** (SHIRT, NICKEL, HONESTY)? IF THE SUBJECT DOES NOT GIVE ALL CORRECT ANSWERS, PROMPT AS NEEDED:

RECORD: ✓ (SHIRT)	✓ (NICKEL)	~ (HONESTY)
A) SPONTANEOUS RECALL ..... (3)	B) SPONTANEOUS RECALL ..... (3)	C) SPONTANEOUS RECALL ..... (3)
1) **One of the words was something you wear.**	1) **One of the words was some money.**	1) **One of the words was a good personal quality or virtue.**
RECORD _____ _____ 2	RECORD _____ 2	RECORD _____ 2
2) SHOW CARD. HAVE S. READ AND MAKE SELECTION. *SHOES, SHIRT, SOCKS* ..... 1 CIRCLE WORD.	2) SHOW CARD. HAVE S. READ AND MAKE SELECTION. *PENNY, NICKEL, DOLLAR* ..... 1 CIRCLE WORD.	2) SHOW CARD. HAVE S. READ AND MAKE SELECTION. *HONESTY, CHARITY, MODESTY* ..... 1 CIRCLE WORD.
3) IF STILL INCORRECT RESPONSE, PROVIDE CORRECT ANSWER (**shirt**).	3) IF STILL INCORRECT RESPONSE, PROVIDE CORRECT ANSWER (**nickel**).	3) IF STILL INCORRECT RESPONSE, PROVIDE CORRECT ANSWER (**honesty**).
NO RECALL/CAN'T DO 0	NO RECALL/CAN'T DO 0	NO RECALL/CAN'T DO 0
REFUSED 7	REFUSED 7	REFUSED 7

SCORE FOR SHIRT ..... ☐
SCORE FOR NICKEL ..... ☐
SCORE FOR HONESTY ..... ☐

END TIME 11:6 2:0

24 Out of 24

NOTES:

Some questions were improvised due to Washington DC (not being located in a state, or having a governor.) Subject was able to transition to state from which examiner traveled, with ease.

Category fluency - 8 of 10 animals listed in 20 seconds.

Cognitive function appears intact based on speed and accuracy of responsive responses, in context of extended qualitative interview given same day.

Ryan Cheung MD

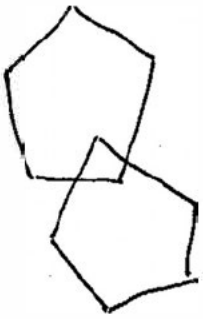
3MS Score	
Page 1 Total:	8 / 8
Page 2 Total:	16 / 16
Page 3 Total:	20 / 20
Page 4 Total:	13 / 15
Page 5 Total:	17 / 17
Page 6 Total:	24 / 24
Total/Raw Score:	98 / 100
Education Adjusted Score:	

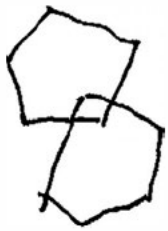
SHIRT

NICKEL

HONESTY

CLOSE YOUR EYES





It looks like rain.

ALZHEIMER DISEASE CLINICAL DEMENTIA RATING (CDR)

Center: | **Family#:** | **Individual#:** | **Individual's name:** Judge Pauline Newman

Exam Date: 08/23/2023 | **Examiner:** Regina Carney, M.D.

Evaluation by: ☑ In Person ☐ Telephone ☑ Medical Records

Reconstructed? ☐ Yes ☑ No ☐ Unknown

	Impairment Level and CDR Score (0, 0.5, 1, 2, 3)					
	None 0	**Questionable 0.5**	**Mild 1**	**Moderate 2**	**Severe 3**	**Score:**
Memory	No memory loss or slight inconsistent forgetfulness	Consistent slight forgetfulness; partial recollection of events; "benign" forgetfulness	Moderate memory loss; more marked for recent events; defect interferes with everyday activities	Severe memory loss; only highly learned material retained; new material rapidly lost	Severe memory loss; only fragments remain	
Orientation	Fully Oriented	Fully oriented except for slight difficulty with time relationships	Moderate difficulty with time relationships; oriented for place at examination; may have geographic disorientation elsewhere	Severe difficulty with time relationships; usually disoriented to time, often to place	Oriented to person only	
Judgment & Problem Solving	Solves everyday problems & handles business & financial affairs well; judgment good in relation to past performance	Slight impairment in solving problems, similarities, & differences not observed	Moderate difficulty in handling problems, similarities, and differences; social judgment usually maintained	Severely impaired in handling problems, similarities, and differences; social judgment usually impaired	Unable to make judgments or solve problems	
Community Affairs	Independent function at usual level in job, shopping, volunteer & social groups	Slight impairment in these activities	Unable to function independently at these activities although may still be engaged in some; appears normal to casual inspection	No pretense of independent function outside home; appears well enough to be taken to functions outside a family home	No pretense of independent function outside home; appears too ill to be taken to functions outside the home	
Home & Hobbies	Life at home, hobbies, and intellectual interests well maintained See: undergraduate	Life at home, hobbies, and intellectual interests impaired slightly forum forensum	Mild but definite impairment of function at home; more difficult chores abandoned; more complicated hobbies and interests abandoned	Only simple chores preserved; very restricted interests, poorly maintained	No significant function in home	
Personal Care	Fully capable of self care well dressed, appropriate grooming	Fully capable of self-care	Needs prompting	Requires assistance in dressing, hygiene, keeping of personal effects	Requires much help with persons care; frequent incontinence	
	and a Hire) asked for restroom				**Global CDR:**	0

Comments:
AOO: not apparent

DEPRESSION/STROKE HISTORY: declines entirely

CHRONOLOGICAL HISTORY OF DECLINE: (PLEASE CONTINUE IN THE BACK) history is per investigators had a wrist fracture (non operative 08/2023)

Form Name: AD CDR
Revised: 6/21/06

Exhibit 2
to the
Report of Independent Medical Examination of Pauline Newman
by
Regina M. Carney, M.D.

REGINA MARIA CARNEY, M.D.
CURRICULUM VITAE

Date Prepared: August 24, 2023

I. PERSONAL

Name:	**REGINA MARIA CARNEY, M.D.**
Personal Phone:	(615) 636-5792
E-mail Address:	rcarney0305@gmail.com
Current Position:	Medical Director, Inpatient Psychiatry

II. HIGHER EDUCATION

Institution:	**Degree:**	**Date:**
Department of Psychiatry and Behavioral Sciences Jackson Health System/ University of Miami Miller School of Medicine Miami, Florida	Fellowship, Forensic Psychiatry	10/2011-08/2012
Department of Psychiatry Vanderbilt University Medical Center Nashville, Tennessee	Residency, General Psychiatry	07/2007-07/2011

Departments of Internal Medicine and Pediatrics Chandler Medical Center University of Kentucky Lexington, Kentucky	Intern, Internal Medicine-Pediatrics	07/2003-12/2003
(Moved to Kentucky, attended resident orientation		06/2003)
Stony Brook University Medical Center Stony Brook, New York	M.D. With Recognition in Research	08/1999-05/2003
Duke University Durham, North Carolina	B.S., Biology Minors in Chemistry and Spanish	08/1994-05/1998
Highland High School Highland, New York	High School Degree With Valedictory Honors	08/1990-06/1994

Medical Licensure and Board Certification Status:

Florida Medical License	01/2012-01/2024
American Board of Psychiatry and Neurology Adult Psychiatry Board Certification	09/2014-12/2024
American Board of Psychiatry and Neurology Forensic Psychiatry Board Certification	09/2017-12/2027
Certified Florida Adult Forensic Examiner (Criminal Court Evaluations)	
Basic Life Support for Healthcare Providers	expires 10/2023

III. EXPERIENCE

09/2022 – present	Medical Director Outpatient Substance Abuse Clinic Medical Director
09/2018 – 09/2022	Medical Director, Acute Inpatient Psychiatric Unit (4AB)
08/2015 – 08/2018	Staff Psychiatrist, Acute Inpatient Psychiatric Unit (4AB) Mental Health and Behavioral Science Service Bruce W. Carter VA Medical Center Miami, Florida
07/2019 – present	Associate Program Training Director Forensic Psychiatry Fellowship Department of Psychiatry and Behavioral Sciences University of Miami Miller School of Medicine Miami, Florida
09/2012 – 08/2015	Assistant Professor Medical Director, Miami Dade Forensic Alternative Center

Supervising Attending Physician, Adult Outpatient Psychiatry Clinic
Department of Psychiatry and Behavioral Sciences
University of Miami Miller School of Medicine
Miami, Florida

07/2011 – 05/2016 *Genomic Convergence in Alzheimer Disease*
Alzheimer Disease Sequencing Project
Associate Scientist
John P. Hussman Institute for Human Genomics
University of Miami Miller School of Medicine
Miami, Florida

07/2009 – 06/2011 *Metabolic Dysregulation in Major Depression: Dyslipidemia, Inflammation, and Oxidative Stress*
Resident Research Project
Faculty Mentor and Primary Investigator: Richard C. Shelton, M.D.
Vanderbilt University Medical Center

01/2004 – 06/2007 *Genomic Convergence in Alzheimer Disease*
Post-doctoral Fellowship
Center for Human Genetics
Duke University Medical Center

06/1998 – 07/1999 *Genetics of Parkinson Disease*
Clinical Research Coordinator
Center for Human Genetics
Duke University Medical Center

IV. PUBLICATIONS

JOURNAL PUBLICATIONS
Refereed Journals:

1. Rajabli F, Benchek P, Tosto G, [**…**], Naj AC. Multi-ancestry genome-wide meta-analysis of 56,241 individuals identifies LRRC4C, LHX5-AS1 and nominates ancestry-specific loci PTPRK, GRB14, and KIAA0825 as novel risk loci for Alzheimer disease: the Alzheimer Disease Genetics Consortium. 2023 July. doi: 10.1101/2023.07.06.23292311.

2. Cukier HN, Duarte CL, Laverde-Paz MJ, Simon SA, Van Booven DJ, Miyares AT, Whitehead PL, Hamilton-Nelson KL, Adams LD, **Carney RM**, Cuccaro ML, Vance JM, Pericak-Vance MA, Griswold AJ, Dykxhoorn DM. An Alzheimer's disease risk variant in TTC3 modifies the actin cytoskeleton organization and the PI3K-Akt signaling pathway in

iPSC-derived forebrain neurons. 2023 July. Neurobiology of Aging. doi: 10.1016/j.neurobiolaging.2023.07.007

3. Heath L, Earls JC, Magis AT, Kornilov SA, Lovejoy JC, Funk CC, Rappaport N, Logsdon BA, Mangravite LM, Kunkle BW, Martin ER, Naj AC, Ertekin-Taner N, Golde TE, Hood L, Price ND, **Alzheimer's Disease Genetics Consortium**. Manifestations of Alzheimer's disease genetic risk in the blood are evident in a multiomic analysis in healthy adults aged 18 to 90. Scientific Reports. 2022 April; 12(1):6117. doi: 10.1038/s41598-022-09825-2

4. Bellenguez C, Küçükali F, Jansen IE, […], Lambert JC. New insights into the genetic etiology of Alzheimer's disease and related dementias. Nature Genetics. 2022 April; 54(4):1-25. doi: 10.1038/s41588-022-01024-z.

5. Kunkle B, Schmidt M, Klein H-U, […],, Kukull WA. Novel Alzheimer Disease Risk Loci and Pathways in African American Individuals Using the African Genome Resources Panel: A Meta-analysis. JAMA Neurology. 2020 October; 78(1). doi: 10.1001/jamaneurol.2020.3536.

6. Reiman EM, Arboleda-Velasquez JF, Quiroz YT, Huentelman MJ, Beach TG, Caselli RJ, Chen Y, Su Y, Myers AJ, Hardy J, Paul Vonsattel J, Younkin SG, Bennett DA, De Jager PL, Larson EB, Crane PK, Keene CD, Kamboh MI, Kofler JK, Duque L, Gilbert JR, Gwirtsman HE, Buxbaum JD, Dickson DW, Frosch MP, Ghetti BF, Lunetta KL, Wang LS, Hyman BT, Kukull WA, Foroud T, Haines JL, Mayeux RP, Pericak-Vance MA, Schneider JA, Trojanowski JQ, Farrer LA, Schellenberg GD, Beecham GW, Montine TJ, Jun GR; **Alzheimer's Disease Genetics Consortium**. Exceptionally low likelihood of Alzheimer's dementia in APOE2 homozygotes from a 5,000-person neuropathological study. Nature Communications. 2020 February; 11(1):667. doi: 10.1038/s41467-019-14279-8.

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61. **Carney RM**, Wolpert CM, Ravan SA, Shahbazian M, Ashley-Koch A, Cuccaro ML, Vance JM, Pericak-Vance MA. Identification of MeCP2 mutations in a series of females with autistic disorder. Pediatr Neurol. 28(3):205-11. 2003.

Non-Refereed Journals:

1. Fernandez C, Levitt EJ, **Carney RM.** Acute onset of psychosis and personality changes in a woman with newly identified lung malignancy and urinary tract infection: A case report. Florida Medical Student Research Journal. 2020 April.

ABSTRACTS:

1. Healey J, Salinas J, Bryant C, Cortes E, Sabbag S, **Carney R**, Padilla V. Severe Adverse Events Committee (SAVE): Findings of a Pilot Project for Resident Safety. 2020 Annual Meeting, American Psychiatric Association, Philadelphia, PA, April 25 – 29, 2020.

2. **Carney RM**, Kunkle BW, Whitehead PL, Vardarajan B, Mayeux RP, Gilbert JR, Haines JL, Pericak-Vance MA. Known and novel mutations in SORL1, PSEN1, and PSEN2 genes are found in multiplex Alzheimer's disease families with varying age of onset and pathological presentations. 12th International Conference on Alzheimer's & Parkinson's Diseases (AD/PD 2015), Nice, France. March 18 – 22, 2015.

3. **Carney RM**, Kohli MA, Kunkle B, Martin ER, Beecham GW, Gilbert J, Pericak-Vance MA. Clinical characteristics of late onset Alzheimer disease in an extended family with a missense variant in TTC3. Alzheimer's Association International Conference on Alzheimer's Disease (AAIC 2014), Copenhagen, Denmark. 2014.

4. Kohli MA, John-Williams K, Rajbhandary R, Naj A, Whitehead P, Hamilton K, **Carney RM**, Wright C, Crocco E, Gwirtzman HE, Lang R, Beecham G, Martin ER, Gilbert J, Benatar M, Small GW, Mash D, Byrd G, Haines JL, Pericak-Vance MA, Züchner S. Large repeat expansions in the C9ORF72 gene contribute to a spectrum of neurodegenerative disorders including Alzheimer disease. American Society of Human Genetics Annual Meeting, San Francisco, CA, 2012.

5. **Carney RM**, Kohli MA, Naj AC, Beecham GW, Hamilton KL, Haines JL, Gilbert JR, Züchner S, Pericak-Vance MA. Parkinsonian symptoms and lack of prominent frontal atrophy in a family with early-onset dementia and the MAPT R406W mutation. Alzheimer's Association International Conference on Alzheimer's Disease (AAIC 2012), Vancouver, British Columbia, Canada. 2012.

6. Beecham GW, Slifer MA, Martin ER, Li Y-J, **Carney RM**, Gilbert JR, Haines JL, Pericak-Vance MA. Genomic convergence of late-onset Alzheimer disease candidate genes. Alzheimer's Association International Conference on Alzheimer's Disease (ICAD 2008), McCormick Place, Chicago, IL. 2008.

7. Beecham G, Martin E, Li Y-J, **Carney RM**, Slifer M, Gilbert J, Haines J, Pericak-Vance MA. Genome-wide association for late-onset Alzheimer disease (LOAD) confirms risk locus on chromosome 12. American Society for Human Genetics Annual Meeting, San Diego, CA. 2007.

8. Turner SD, Liang X, Martin ER, Schnetz-Boutaud N, Bartlett J, Anderson BM, Züchner S, Gwirtsman H, Schmechel D, **Carney R**, Gilbert J, Pericak-Vance MA, Haines JL. Examination of sortilin-related receptor SORL1 in late-onset Alzheimer disease. American Society for Human Genetics Annual Meeting, San Diego, CA. 2007.

9. **Carney RM**, Gaskell PC, Scott WK, Slifer MA, Hulette CM, Welsh-Bohmer KA, Schmechel DE, Vance JM, Pericak-Vance MA. Clinical follow-up of multiplex late-onset Alzheimer disease families. American Society for Human Genetics Annual Meeting, Salt Lake City, UT. 2005.

10. Cuccaro M, Donnelly S, Cope H, Wolpert C, **Carney R**, Abramson R, Hall A, Wright H, Gilbert J, Pericak-Vance MA. Autism in African American (AA) families: phenotypic findings. American Society for Human Genetics Annual Meeting, Salt Lake City, UT. 2005.

11. **Carney RM**, Vance JM, Dancel RD, Wolpert CM, DeLong GR, McClain C, von Wendt L, Gilbert JR, Donelly SL, Ravan SA, Abel HL, Abramson RK, Wright HH, Zoghbi HY, Cuccaro ML, Pericak-Vance MA. Screening for MECP2 mutations in females with autistic disorder. 10th International Congress of Human Genetics, Vienna, Austria. 2001.

12. Ashley-Koch A, **Carney RM**, Dancel RD, Wolpert CM, Delong GR, Donnelly SL, Ravan SA, Abel HL, Abramson RK, Wright HH, Zoghbi HY, Cuccaro ML, Gilbert JR, Vance JM, Pericak-Vance MA, Identification of MECP2 mutations in two females with autistic disorder. International Meeting for Autism Research (IMFAR), San Diego, CA. 2001.

V. PROFESSIONAL

Development Courses:
Virtual Aspiring Supervisors Program (vASP). 12 week course, with didactic, interactive, and reflective modules using the Office of Personnel Management (OPM) Leadership Competency Model and the VA Leadership Development Framework at the First Line Supervisor level. Completed June, 2021.

Media Appearances:
"¿Que Sucede en La Mente de Ariel Castro?" Interview for Expert Commentary, Primer Impacto (Spanish language primetime newshow), Univision, May 15, 2013.

Professional Presentations:
"The Future of Alzheimer: The Role of Genomics." Opening Presentation; Alzheimer's Association, Southeast Florida Chapter; Regional Education Conference, FIU Kovens Conference Center, North Miami, Florida, May 15, 2014.

"Psychiatric and Judicial Collaboration: Working to Address the Overrepresentation of Justice-Involved People with Mental Disorders." Workshop; American Psychiatric Association; 167th Annual Meeting, New York, New York, May 3, 2014.

"Alzheimer's Disease and African-Americans." Presentation and panel; First Annual *Legacy* Black Healthcare Symposium, Miami, Florida, December 3, 2013.

"Identifying Places to Make Connections between the Courts and the Community." Panel; Judicial-Psychiatric Leadership Forum. APA Institute on Psychiatric Services; Judges' Leadership Initiative for Criminal Justice and Behavioral Health/Psychiatric Leadership Group for Criminal Justice, Philadelphia, Pennsylvania, October 13, 2013.

Teaching Achievements and Activities:

Faculty Resident Supervisor to:

2022-2023: Kendyl Stewart, MD (PGY-3)
2021-2022: Jessica Healey, MD (PGY-4), Amy Waters, MD (PGY-4), Kristi Wintermeyer, MD (PGY-5), Natalie Martinez Sosa (PGY-5)
2020-2021: Jessica Healey, MD (PGY-3), Amy Waters, MD (PGY-3), Julie Guzzardi, MD (PGY-5)
2019-2020: Ghaith Shukri, MD (PGY-1), Connie Spelius Perez, MD (PGY-1), Ahmed Valdes, MD (PGY-1), Dennis Valerstain, MD (PGY-1), Mousa Botros, MD (PGY-5), Lisa Oliveri, MD (PGY-5)
2018-2019: Gregory Hutton, MD (PGY-3), Durim Bozhdaraj, MD (PGY-5)
2017-2018: Elizabeth Perkins, MD (PGY-2), Matthew Stark, MD (PGY-2), Francis Smith (PGY-5)
2016-2017: Michelle Benitez, MD (PGY-5), Lance Amols, MD (PGY-5)
2015-2016: Eva Diaz, MD (PGY-3); Sana Qureshi, MD (PGY-5/Forensic Fellow)
2014-2015: Stephanie Friedman, MD (PGY-2)
2013-2014: Aly Diaz de Villegas, MD (PGY-2)
2012-2013: Suraya Kawadry, MD (PGY-2)

Faculty Research Mentor to Dr. Sana Qureshi, PGY-4, Department of Psychiatry and Behavioral Sciences, University of Miami Miller School of Medicine, Miami, Florida. "Outcomes of Treatment at the Miami-Dade Forensic Alternative Center versus State Hospitalization." Winner, Best Resident Research Poster, June 2015.

"Chronic Suicidality." Faculty Discussant with Drs. Shumaia Rahman and Joshua Delaney, PGY-2, Morbidity and Mortality (M&M) Conference, Department of Psychiatry and Behavioral Sciences, University of Miami Miller School of Medicine, Miami, Florida, February 20, 2019.

"ECT—Clinical Use and Legal Issues." Faculty Discussant with Drs. Areej Alfaraj and Elizabeth Perkins, PGY-2, Morbidity and Mortality (M&M) Conference, Department of Psychiatry and Behavioral Sciences, University of Miami Miller School of Medicine, Miami, Florida, February 14, 2018.

"Management of a Patient Making Threats of Mass Murder." Faculty Discussant with Dr. Matthew Stark, PGY-2, Morbidity and Mortality (M&M) Conference, Department of Psychiatry and Behavioral Sciences, University of Miami Miller School of Medicine, Miami, Florida, August 2, 2017.

"Inpatient Assault Against Staff." Faculty Discussant with Dr. Samantha Saltz, PGY-2, Morbidity and Mortality (M&M) Conference, Department of Psychiatry and Behavioral Sciences, University of Miami Miller School of Medicine, Miami, Florida, January 28, 2015.

Faculty Project Advisor to Award Recipient Ms. Shawntira Johnson, University of Miami Miller School of Medicine MS-III, Diverse Medical Scholars Program, United Health Foundation/National Medical Fellowships, for a service project on the Miami-Dade Forensic Alternative Center at Jackson Behavioral Health Hospital, January – May 2014.

"Competency and Capacity." Instructor, PGY-4 Core Curriculum in Forensic Psychiatry, Department of Psychiatry and Behavioral Sciences, University of Miami Miller School of Medicine, Miami, Florida, 2013-present.

"Violence Against Staff by Psychiatric Inpatients." Faculty Discussant, Ethics Rounds, Department of Psychiatry and Behavioral Sciences, University of Miami Miller School of Medicine, Miami, Florida, October 13, 2013.

"Suicide." Instructor, Summer Scholars Program (for Miami area high school students), Coordinated by Ana Campo, MD, through the Department of Psychiatry and Behavioral Sciences, University of Miami Miller School of Medicine, Miami, Florida, 2013-2016.

"Advanced Psychopharmacological Approaches to Mood and Anxiety Disorders: A Consultation Case Series." Grand Rounds, Department of Psychiatry, Vanderbilt University Medical Center, Nashville, Tennessee, June 23, 2011.

Committees:
PGY-1 Milestones and Promotion Committee, Department of Psychiatry and Behavioral Sciences, University of Miami Miller School of Medicine, Miami, Florida, 2015-2022.

PGY-3 Milestones and Promotion Committee, Department of Psychiatry and Behavioral Sciences, University of Miami Miller School of Medicine, Miami, Florida, 2013-2015.

Ad Hoc Committee on Florida Guardianship; Florida Medical Association's Council on Healthy Floridians, March 2013-present.

Honors:
1. Four Time Most Outstanding Faculty Teaching Award: Miami VA Department of Mental Health and Behavioral Sciences. Selected by PGY-1 through PGY-4 Psychiatry Residents, Department of Psychiatry and Behavioral Sciences, University of Miami Miller School of Medicine, Miami, Florida, 2018-2020, 2022.

2. Three-time Award for Excellence in Teaching: Outstanding Voluntary Faculty in an Inpatient Setting. Florida International University Herbert Wertheim College of Medicine, Department of Psychiatry and Behavioral Health. consecutive award winner, 2016-2017, 2022.

3. Travel Fellowship Award, Alzheimer's Association International Conference, July 14-19, 2012, Vancouver, British Columbia, Canada.

4. Fellowship Travel Award, Workshop on Clinical Trials in Psychopharmacology, American Society of Clinical Psychopharmacology, April 27 - 29, 2010, New York, New York.

5. Medical Degree with Distinction in Research, Stony Brook University School of Medicine, 2003.

6. Howard Hughes Undergraduate Research Award, Duke University, 1998.

Attachment C

United States Court of Appeals for the Federal Circuit

February 15, 2022

MEMORANDUM

TO: [redacted]

FROM: Judge Newman

RE: PANEL [redacted] – March [redacted] 2022

Absent objection, the submitted case for March [redacted] 2022, Panel [redacted] is pre-assigned as follows:

Appeal No. [redacted] [redacted] Judge Newman

From: [redacted]
To: [redacted] Court Services
Cc: -PN
Subject: RE: PREASSIGNMENT MEMO-March [redacted]2022-Panel [redacted]
Date: Tuesday, February 15, 2022 4:11:02 PM
Attachments: PREASSIGNMENT MEMO - March [redacted]2022 - Panel [redacted].doc

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Good afternoon,
Attached is the Preassignment memorandum for [redacted], March, [redacted]2022, Panel [redacted]

Best regards,

[redacted]
Paralegal to the Honorable Pauline Newman
U.S. Court of Appeals for the Federal Circuit
717 Madison Place NW, Washington, DC 20439
[redacted] [redacted]