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NCLA Will Appeal Fed. Circuit Judicial Council’s Unlawful Order to Suspend Hon. Pauline Newman

In re Order of the Judicial Council of the Federal Circuit of September 20, 2023

Washington, DC (September 20, 2023) – In a damaging blow to judicial independence, the Judicial Council of the Federal Circuit today ordered the suspension of active circuit judge, the Hon. Pauline Newman, from hearing new cases for at least a year. This suspension comes on top of the six-plus months the Council has already unlawfully suspended her from hearing cases while the investigation was still ongoing, which violates the very Judicial Conduct and Disability Act that the Judicial Council claims to have a solemn obligation to follow.

The New Civil Liberties Alliance, which is honored to represent Judge Newman, is challenging her unlawful pre-investigatory suspension in the U.S. District Court for the District of Columbia. NCLA will also petition the Committee on Judicial Conduct & Disability to review today’s flawed Judicial Council order. The Disability Act, were it being adhered to, calls for keeping Judge Newman hearing cases during the investigation and any appeals.

After Chief Judge Kimberly Moore identified a complaint this past March alleging that Judge Newman was mentally incompetent to fulfill her judicial duties, the Judicial Council indefinitely removed her from hearing new cases before any formal investigation began—an act unprecedented in American judicial history. Only after removing Judge Newman from the bench did the Chief Judge then appoint a Special Committee to investigate. Unlike every other substantive investigation of a federal circuit judge in recent decades, Chief Judge Moore refused to transfer the investigation to another circuit court of appeals—instead leading the investigation herself.

The Special Committee ordered Judge Newman to submit to forced neurological testing by a medical professional whom she was denied any role in selecting—another order unprecedented in American judicial history and inconsistent with the Disability Act. Forcing a federal judge to submit to a forced medical examination to remain on the bench is not consistent with the Constitution, which requires impeachment for removal from judicial office.

Despite the lack of factual predicate for the ordered mental exam, Judge Newman voluntarily submitted to mental health exams by *two* expert medical professionals. She was properly tested. She passed twice. This fact alone should have been enough to end the investigation against Judge Newman. Her vigor and her robust health are obvious in a [video](#) released by NCLA and at an in-person IPWatchdog conference this month, where Judge Newman’s speech received two standing ovations. Oddly, the Judicial Council dismissed the validity of both medical examination reports, substantively mischaracterizing the examinations those experts conducted and substituting their own Google search for the considered opinions of two board-certified medical experts.

The Council upheld a Special Committee’s recommendation, which incorrectly found Judge Newman guilty of misconduct. After three weeks of needless delay, the Judicial Council also belatedly disclosed Judge Newman’s August 31 response opposing the Special Committee’s recommendation. That 100-plus page [document](#) explains the problems with the process and recommendation against her in great detail. The Judicial Council’s decision to muzzle Judge Newman’s ability to reply to the Special Committee’s recommendation and then to delay disclosing her opposition to the Special Committee’s recommendation smacks of bias. Releasing it at the same time as the

Judicial Council’s Order appears to be a self-interested effort to bury her valid responses. The delay is the latest in a long series of deeply regrettable due process abuses infecting this matter.

The Judicial Council’s factually baseless order not only deprives Judge Newman of the constitutional right and obligation to continue in office, but it violates the procedural due process protections built into the statute and rules the Judicial Council is enforcing. The Judicial Council’s sanction against Judge Newman violates her right to exercise judicial power under Article III of the Constitution. It exceeds sanctions imposed on judges who committed serious misconduct, and it oversteps the Judicial Council’s statutory authority.

The Judicial Council’s [Order](#) also moves the goalposts, basing its conclusions on various new grounds to which Judge Newman has never had an opportunity to reply. It is impossible to defend an action where the charges against the defendant keep changing. This is why the judges cannot act simultaneously as judges, prosecutors, and witnesses. For this additional reason, today’s decision resulted from a completely unacceptable process featuring an astounding lack of basic due process of law.

Earlier procedural failures have led to calls for an immediate transfer of the matter. Two former Federal Circuit Chief Judges, the [Hon. Paul R. Michel](#) and the [Hon. Randall R. Rader](#), have independently spoken out against the due process deficits in this case, condemning the disgraceful treatment of Judge Newman throughout this mishandled investigation. The [Hon. Edith Jones](#), an active judge and a former Chief Judge of the U.S. Court of Appeals for the Fifth Circuit, also openly criticized the process.

Throughout these proceedings, Judge Newman offered cooperatively to resolve the question of her mental fitness. She has offered numerous compromises to the Committee, but in turn she was met with demands for blind obedience to the Special Committee’s unreasonable demands. This unacceptable process cannot stand.

NCLA released the following statements:

“Throughout this process, the Special Committee and the Judicial Council have engaged in what can fairly be described as ‘sharp practices.’ The Council faults Judge Newman and NCLA for attempting ‘to discredit this entire process by trying their case in the press.’ But it is not Judge Newman who brought discredit upon this process and the Federal Circuit. It is the lack of due process and the resort to unprecedented actions inconsistent with the governing statute and the Constitution. For her part, Judge Newman will not stop her fight for due process of law and respect for constitutional norms.”

— **Greg Dolin, M.D., Senior Litigation Counsel, NCLA**

“Today is a dark day in the history of the federal judiciary. Judge Pauline Newman is a legal luminary and a living legend. She deserves far better than what her peers have done today. The Federal Circuit Judicial Council should never have tolerated a process this lacking in due process and one so inconsistent with the requirements of the Disability Act. NCLA trusts that wiser heads will prevail at the Committee on Judicial Conduct & Disability.”

— **Mark Chenoweth, President and General Counsel, NCLA**

For more information visit the case page [here](#) or watch the case video [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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