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)

RESPONSE
TO THE SPECIAL COMMITTEE'S REPORT & RECOMMENDATION
OF JULY 31, 2024

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INTRODUCTION[1]

Judge Newman has now been suspended from her judicial duties and judicial office for over a year. This is the longest such suspension in the history of the country. Indeed, the total suspension from hearing cases for someone not in the midst of an impeachment proceedings is *entirely unprecedented*. Congress did not intend judiciary's self-policing mechanism to become an end-run around the constitutionally-prescribed procedures for removing an Article III judge. The Judicial Council should either bring this matter to a close or, if it believes that Judge Newman's behavior constitutes severe misconduct, refer Judge Newman for impeachment. Alternatively, the Council can take advantage of the avenues that Judge Newman proposed for resolving this matter. What the Council may not do is engage in stealth impeachment—the approach that the Special Committee improperly recommends.

A year-plus into these proceedings, it is apparent that, its claims to the contrary notwithstanding, the Special Committee has no interest in resolving this matter. The Committee has eschewed obvious routes towards answering any lingering questions that it may have. Instead, its approach has only made

[1] Pursuant to Rule 23(b)(7) of Rules for Judicial-Conduct and Judicial-Disability Proceedings, Judge Newman requests and consents to the prompt release of this submission. Judge Newman reminds the Council that the Commentary to Rule 23 states that "[o]nce the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse consent *only* to the extent necessary to protect the confidentiality interests of the complainant or of witnesses." R. 23. Comm. (emphasis added). Because this response does not mention any names not previously made public, there is *no reason* to withhold it from immediate publication or to await its release until the Council issues its own order.

obfuscation, double-speak, and outright illegality more stark. As Judge Newman has explained in numerous prior submissions, she will not give her sanction to such conduct by participating in such proceedings. She will not permit herself to be railroaded by colleagues who themselves act without regard to clear legal constraints. And because there appears to be no desire on the part of the Special Committee to reach a resolution, Judge Newman is left with no choice but to pursue her claims in an Article III court. While it is uncertain whether or not Judge Newman lives long enough to see herself vindicated, what is certain is that these proceedings will leave an indelible stain on the Federal Circuit and its misguided leadership.

In its 2024 Report & Recommendation ("2024 R&R"), the Committee *once again* declined to state that a medical certification of Judge Newman's ability to continue her service would bring this matter to a speedy conclusion. In light of that and the history of factual misstatements, misleading claims, legal errors, and overall hostility and antagonism, Judge Newman can hardly be blamed for reposing little trust in the ability of the Special Committee to fairly adjudicate this matter. Accordingly, she stands fast on her principles—principles which will not permit her to give in to continued bullying.

The 2024 R&R is chock-full of statements that contradict each other, prior orders of the Special Committee, and that read all evidence in the most convoluted way, but all with an anti-Judge Newman bent. As such, it constitutes further

evidence that the Special Committee has had its mind made up and cannot serve as an objective investigator or adjudicator of facts or the law.

And perhaps most importantly, the requests made by the Committee are, in the final accounting, irrelevant to the Committee's (or Council's) power to remove Judge Newman from the bench either *de jure* or *de facto*. Even assuming that the Committee's suspicions regarding Judge Newman's disability are borne out (though, in light of medical opinions, there is no basis to suspect that they would be), the Council would have no power to permanently suspend Judge Newman from hearing cases because the Council's power (to the extent that it can constitutionally exist at all) is limited to temporary suspensions for a defined period. *See* 28 U.S.C. § 354(a)(2)(A)(i); R. 20(b)(1)(D)(ii). The upshot is that the Committee has now recommended continuing an already-unprecedented sanction for no legitimate reason. As a matter of the U.S. Constitution, the Disability Act, and the Rules implementing the same, the outcome of any testing would not change the fundamental fact: absent impeachment, whether or not to leave the bench is a decision reserved *exclusively* to Judge Newman (or Congress) and not to her colleagues.

Accordingly, Judge Newman will not be complying with any of the Committee's unreasonable requests either now or in the future.

I. THE COMMITTEE IGNORED AND/OR IMPROPERLY DISCOUNTED JUDGE NEWMAN'S EVIDENCE OF CONTINUED FITNESS

In her June 28, 2024, submission to the Committee, Judge Newman identifies several facts which shed additional and *objective* light on her ability to continue in office to which she was duly commissioned. The Committee's treatment of these submissions (mischaracterizing some, and altogether ignoring others) further illustrates the Committee's inability to fairly adjudicate the matter at hand.

A. SUPREME COURT'S DECISION IN *RUDISILL* IS HIGHLY RELEVANT

The Judicial Council probably needs no reminder that in April, the Supreme Court, reversing the decision of the Federal Circuit sitting *en banc*, adopted Judge Newman's legal reasoning and rejected that of all but one of her colleagues. *See Rudisill v. McDonough*, 601 U.S. 294 (2024), *reversing Rudisill v. McDonough*, 55 F.4th 879 (Fed. Cir. 2022) (*en banc*). That the Supreme Court agrees with Judge Newman's reasoning is certainly evidence of her continued ability to perform the duties of her judicial office.

The Committee discounts this fact by stating that Judge Newman's opinion was issued eighteen months ago and therefore the Supreme Court's adoption of that opinion supposedly sheds no light on allegedly "erratic" behavior that postdates Judge Newman's dissent. The problem with that syllogism is that the entire investigation into Judge Newman is predicated on allegations that her physical and mental health made her unable to discharge judicial duties beginning in the "summer of 2021." *See* March 24 Order at 1. The original order also alleged that Judge Newman made

comments that allegedly "demonstrate a clear lack of awareness over the issues in the cases." *Id.* at 2. The Supreme Court's opinion in *Rudisill* has put these concerns to rest. Apparently, Judge Newman is not only "aware" of the issues present in cases but is able to resolve them better than many of her colleagues.

What *Rudisill* shows is that the entire basis on which this investigation began was and is unsound. Each and every allegation made in that initial order ("heart attack," "fainting," and now "lack of awareness over the issues in the cases") are and have always been baseless and simply conjured up *ex nihilo*.

The only issue with even arguable validity is Judge Newman's alleged delays in resolving cases. But even assuming that that allegation is true (and there is zero evidence that Judge Newman has become any slower in 2020 than she was, for example, in 2018), that simply goes to show that in balancing speed and minimizing the risk of error, Judge Newman values the latter over the former. *See Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 716 (1991) (Scalia, J., dissenting) ("Any adjudication of claims necessarily involves a tradeoff between the speed and the accuracy of adjudication.").

While the Supreme Court's opinion in *Rudisill* may not necessarily shed much light on Judge Newman's state of health *today*, it does show that the entire proceedings against her stem from a comedy (were it not so tragic) of errors. And once the very bases for launching the process disappear (as they ought to in light of having no factual support whatsoever), the only inescapable conclusion is that the process must be brought to an end. To hold otherwise, is to allow any chief judge to make whatever accusations she may choose to make, launch an investigative process based on those accusations (whether they be true or not), hope to uncover something during that process, and then perpetually expand the investigation and the demands associated with it. Whatever Congress may have desired to accomplish when it enacted the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364, it certainly wasn't this.

B. JUDGE NEWMAN'S PARTICIPATION AT CONFERENCES IS HIGHLY RELEVANT

For the same reason that the Supreme Court's decision in *Rudisill* is relevant to evaluating the validity of accusations against Judge Newman, so too is her participation at various conferences and roundtables. First, such participation demonstrates beyond cavil that she does not suffer from a "lack of awareness over the issues" driving the legal debate and that this accusation is without any basis.[2] One would think that if Judge Newman were unable to keep a thread of an issue during

[2] It is worth noting that in a year-plus since this accusation was made not a scintilla of evidence has been produced to support it.

oral argument—a setting during which she can freely communicate with her law clerks via instant messages on her laptop and thus get help—surely she wouldn't be able to keep the thread of a discussion during a panel or individual remarks—a setting where no help from law clerks is available. Yet, the evidence shows that no such problems have arisen in a year-plus that Judge Newman has been appearing on various public panels.

Second, her participation in these events significantly undermines the claims of "memory loss, confusion, lack of comprehension, paranoia, anger, hostility, and severe agitation." Sept. 20 Judicial Council Order at 19. To the contrary, Judge Newman's presentations have been lucid, good-spirited, even-keeled, erudite, and informative. Thus, they provide significant evidence that Judge Newman is fully in control of both her faculties and her emotions.

C. The Committee Improperly (and Preemptively) Discounted the Opinions of Judge Newman's Own Doctors

Judge Newman has represented to the Committee (and has offered to submit affidavits) to the effect that *none* of her own doctors (whether cardiologists, pulmonologists, or any other) have noticed any mental deterioration that would have caused them to recommend further medical and/or psychiatric evaluation. June 28 Response at 8; Or. Arg. Tr. at 34:3-41:9. At oral argument, the Committee suggested that Judge Newman's physicians are not privy to the information that the Committee is privy to. *See* Or. Arg. Tr. at 36:3-38:22. However, this concern is fanciful and trumped up. In order for that concern to have any validity, one would have to believe

that Judge Newman's mental health exhibits Dr. Jekyll and Mr. Hyde qualities, *i.e.*, that she is perfectly stable, courteous, even-keeled, and in control of her memory everywhere, except in and around 717 Madison Place, NW, thus preventing anyone outside the courthouse who interacts with her from perceiving her alleged "paranoia," "agitation," and "confusion." No rational person can or would believe that such a state of affairs exists.

Second, at least some doctors who have evaluated Judge Newman have seen the "evidence" compiled by the Committee, and the Committee's assertion that these physicians did not have access to these data or her prior medical records, *see* 2024 R&R at 13-14, is wrong. Dr. Carney specifically stated that she reviewed Judge Newman's medical records and Dr. Rothstein indicated that he considered Judge Newman's history of (well-treated) sick sinus syndrome. Both Dr. Rothstein and Dr. Carney noted in their evaluations that they have considered the allegations made against Judge Newman, *i.e.*, the very evidence that the Committee has relied on in its medical testing orders. Thus, the Committee's assertions that it isn't "clear that [Drs. Rothstein and Carney] had access to all her medical records" is simply wrong.

The Committee's statement that "Judge Newman's … represent[ation] … that these doctors have not told her that she needs more testing … is not the same as these doctors affirmatively providing a professional opinion that she does not need more testing," is hard to comprehend. Unless the Committee believes that Judge Newman would lie (something that the Chief Judge adamantly claimed not to be the case, *see*

Or. Arg. Tr. at 38:1-38:22), Judge Newman affirmatively stating that neither Dr. Rothstein nor Dr. Carney suggested further testing upon completion of their evaluation coupled with Dr. Rothstein's and Dr. Carney's unambiguous conclusions that Judge Newman is fully capable of performing judicial duties is no different than "these doctors affirmatively providing a professional opinion that she does not need more testing." In any event, such a professional opinion, were the Committee even remotely interested in fairly considering it, can be expeditiously provided.

Finally, to the extent that the opinion of these doctors and Judge Newman's own word are insufficient (because according to the Committee, neither Dr. Rothstein nor Dr. Carney is Judge Newman's treating physician, 2024 R&R at 14), Judge Newman offered to provide affidavits from her *treating* physicians who see her on a *regular* basis. Yet, the Committee preemptively discounts such testimony because "those physicians are not specialists in cognitive disorders and the Committee has already determined that an independent evaluation by such a specialist is necessary to address the Committee's concerns." *Id.* This preemptive rejection of the opinion of medical professionals (on the basis that they "are not specialists in cognitive disorders") is absurd given that no one on the Committee, the Judicial Council, or the Judicial Conference is a "specialist[] in cognitive disorders," and yet the Committee believes that its view that testing is warranted ought to prevail against a considered judgement of *multiple* medical professionals.

The Committee's peremptory refusal to even consider the opinion of physicians who are familiar with Judge Newman's state of health is yet further evidence that the Committee is playing with a stacked deck. It goes without saying that Judge Newman will not participate in such a process.

II. THE COMMITTEE IGNORED TROUBLING ACTIONS BY THE CHIEF JUDGE THAT FURTHER UNDERMINE CONFIDENCE IN THE FAIRNESS OF THE INVESTIGATION

In her June 28 Response to the Show Cause Order, Judge Newman documented problematic actions by the Chief Judge, the Special Committee, and the Judicial Council that cast further doubt on the impartiality of everyone involved. *See* June 28 response at 9-14. The Committee not only ignores these problems but has compounded them. The Chief Judge's and the Special Committee's actions since the Show Cause Order have veered dangerously close to abuse of power.

First, the Committee ignores Chief Judge Moore's inaccurate (but never corrected) statements during the 2023 argument regarding the role the Chief Judge plays in assigning judges to panels—statements that are squarely contradicted by this Council's own decision and the filings in the District Court. These statements are highly material to the issue of Judge Newman's disproportionately low sittings (which were used as evidence of her inability to perform the duties of her office) during the period that gave rise to this investigation. That the Chief Judge would make such statements and then fail to correct them raises significant questions about

her ability to impartially investigate or adjudicate this matter. Yet, the Committee does not even bother to address, much less explain or justify the bald misstatements.

Nor has the Committee addressed, much less acknowledged the fact that the Chief Judge is the only witness to the allegation of Judge Newman's supposed fainting on May 3, 2023, and yet despite being the witness to a key episode that served as a basis for launching this investigation has not only steadfastly refused to recuse, but has even refused to acknowledge her status as a witness.

Second, since the May 29 Show Cause Order, the Committee engaged in conduct that is directly contrary to the Rules and Commentary and then blamed Judge Newman for not abiding by the *ultra vires* restrictions that the Committee attempted to impose. Thus, as soon as the Show Cause Order issued, Judge Newman requested (consistent with her prior practice and as permitted by Rule 23(b)(7)) that the Order be made public. The Commentary to the Rule states that "[o]nce the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse consent *only* to the extent necessary *to protect* the confidentiality *interests of the complainant or of witnesses*." R. 23. Comm. (emphasis added). It is undisputed that the Show Cause Order did not list the names of any complainants or witnesses. Yet, Judge Newman's request went unaddressed for weeks, prompting Judge Newman to renew that request on *three separate occasions*. *See* Letter of June 12; Letter of June 28; Letter of July 8. The Committee finally responded on July 8, writing that "[c]onsistent with our past practice,

materials will be released in a batch, not piecemeal or on a document-by-document basis." Order of July 8, 2024.[3] The Committee cited no authority for its refusal to release materials on Judge Newman's request, and such refusal runs directly contrary to the Rules and Commentaries to the same. Finally, after Judge Newman had to resort to exploring the possibility of notifying the District Court of the unjustifiable gag order, and negotiations with the Committee's counsel in the District Court, the Committee released the Show Cause Order and the follow-up Order rescheduling the oral argument.[4] Yet, for unexplained reasons, and citing no authority whatsoever, the Committee chose to redact the time and place of the argument. Not only is this inconsistent with the Rules (as the time and place of argument does not implicate the "confidentiality interests of the complainant or of witnesses"), but it is inconsistent with the Committee's own past practice. *See* Order of June 1, 2023 (listing time and place of argument posted without any redactions at https://tinyurl.com/46addkk8). This refusal to follow the rules and even lack of internal consistency in applying the rules, shows that the Committee is, at best, not "playing it straight," and at worst, is acting arbitrarily.[5] In either case, this provides

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[3] It should be noted that, for reasons unknown, the Committee has failed to release this order, even though Judge Newman requested the release of *all* materials that do not impact "confidentiality *interests of the complainant or of witnesses*."

[4] Judge Newman's counsel appreciates the Committee's accommodation of his pre-arranged travel plans.

[5] The Committee had the *chutzpah* to blame *Judge Newman* for violating the rules when she disclosed the date of the argument to a reporter, apparently taking the

ample justification for Judge Newman's refusal to submit to the Committee's demands (which are baseless in any event).

The Committee did address the allegations of other mistreatment such as exclusion of Judge Newman from email distribution lists, denying Judge Newman's request to hire staff, and not inviting Judge Newman to the Federal Circuit's biannual Judicial Conference. With respect to listserve exclusion, the Committee again merely states that "[c]onsistent with her suspension from hearing cases, Judge Newman was removed only from distribution lists related to Federal Circuit cases." 2024 R&R at 27. But once again there is no citation to any authority for such a removal or even an explanation why such a removal is "consistent with [] suspension from hearing cases." By its own internal rule, the Federal Circuit circulates all proposed precedential opinions to the "full court." Fed.Cir. IOP 10.5 ("When all panel votes are in on a precedential opinion or order, the authoring judge circulates the opinion and any concurring or dissenting opinions, with a transmittal sheet, to the full court."). The circulation is *not* limited to judges in regular active service.[6] Yet, Judge Newman is excluded from this distribution list. Nothing in the Committee's

position that Judge Newman is bound by the Committee's arbitrary, legally unjustified, and ultimately inexplicable decision to censor this information. *See* 2024 R&R at 3.

[6] Only judges in regular active service may place a "hold" on the issuance of the opinion, but *all* judges receive a copy of the opinion. IOP 10.5.

order explains or attempts to justify the Chief Judge's decision to remove Judge Newman from this list.

The Committee also attempts to refute the fact that Judge Newman was not invited to the Federal Circuit's Judicial Conference by pointing to an email that Judge Newman received on April 5, 2024 entitled "Invitation to Federal Circuit Judicial Conference." 2024 R&R, Exh. 1. However, the Committee ignores that the subject-line of the invitation notwithstanding, the email reads: "You are invited to attend the VIP reception that takes place from 11:40 a.m. to 12:30 p.m. in the Penn Avenue Terrace." No invitation to any other event (or even description of them) were included. It is therefore only plausible to conclude that Judge Newman was invited solely to the reception. As with statutes, where "reliance upon headings to determine the meaning of a statute is not a favored method of statutory construction," *Scarborough v. Office of Pers. Mgmt.*, 723 F.2d 801, 811 (11th Cir. 1984), the email invitation is best interpreted by reading the body of the email rather than the (ambiguous) heading. In any event, it is undisputed that despite her status as an active judge, Judge Newman was not invited to *participate* in the Conference.[7]

Next, with respect to Judge Newman's staff, the Committee attempts to justify denial of services to Judge Newman by referencing (yet again) Judge Newman's

[7] The Committee points out that other judges also did not attend or serve on panels. That, of course, sheds no light on whether they were *invited* to do so, and whether Judge Newman was treated differently from her colleagues. Given the Committee's silence on the subject, one can only assume that the answer to that is "yes."

permanent law clerk's exercise of her Fifth Amendment rights when the Committee interviewed her back in 2023.[8] Inexplicably, the Committee attempts to impute the permanent law clerk's choice of legal strategy to Judge Newman even though during the interview the law clerk was explicitly warned not to discuss even the fact of her appearance before the Committee, much less the content of her testimony. It is hard to understand how whatever the permanent law clerk may have said can be attributed to Judge Newman or relevant to *Judge Newman's* needs for the operation of her chambers. The Committee suggests that no additional staff are needed because Judge Newman has no pending responsibilities. But if so, then it necessarily means that Judge Newman has been suspended from her judicial office, making the recommended sanction not only unconstitutional, but also directly contrary to the statute. *See post*, Part VII.

In short, and as described in more detail in Judge Newman's June 28 submission, her treatment at the hands of the Chief Judge, the Committee, and the Judicial Council have and continue to taint the entire process, putting in significant doubt the ability of these individuals and bodies to impartially adjudicate the matter. And, of course, Judge Newman has no interest or intention to submit to a biased process where the outcome seems to be predetermined, nor will she do so.

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[8] At oral argument, the Committee also pressed the undersigned Counsel to justify that law clerk's invocation of her Fifth Amendment rights, despite the fact that the undersigned does not represent, has not consulted with, and has no authority to speak on behalf of that law clerk.

III. REFUSAL TO SIT FOR AN INTERVIEW CANNOT SUBJECT JUDGE NEWMAN TO SANCTIONS

The Committee insists that it needs to conduct an interview with Judge Newman because it "would aid the Committee in understanding the basis of her repeated, general allegations of factual inaccuracies." 2024 R&R at 20.

First of all, Judge Newman's "allegations of factual inaccuracies" are specific and not "general." Judge Newman has repeatedly denied having had a heart attack, having fainted, or having slowed down in the speed of her opinion-writing. There is absolutely no need for an interview, much less a videotaped one, to understand which factual allegations Judge Newman has challenged. Indeed, the Committee and the Judicial Council themselves acknowledged that the allegation of a "heart attack" was baseless.[9] 2023 R&R at 81-82; Sept. 20 Order at 57-56. Similarly, the Committee's continued assertions that Judge Newman necessitated any cardiac stents seems to have been made out of whole cloth. Judge Newman does not need to appear in person to refute seemingly random accusations for which there are no bases to begin with.

In any event, refusal to submit to the interview at this stage cannot possibly subject Judge Newman to sanctions because on the Committee's and Council's own terms, she retains the right to renew her request to transfer the matter to another council after submitting to the medical examination. Thus, any interview would

[9] The only evidence of *any* cardiac event (or any fainting, *see ante*) is an affidavit of Judge Newman's former judicial assistant who testified that he *heard* from an unnamed someone else that such events occurred. This double-hearsay hardly needs to be acknowledged, much less refuted.

occur only *when* and *if* such a request were a) made and b) denied. *See* May 3 Judicial Council Order at 1; May 3 Committee Order at 14; May 16 Order at 26. Since we have not yet arrived at that point, any discussion of an interview is entirely premature, because by virtue of the Committee's and Council's own orders such an interview may never occur.

Finally, because (as explained above), the Committee and the Chief Judge are not "playing it straight," Judge Newman has absolutely no confidence that the Committee will cease twisting facts and statements to serve a pre-determined agenda. Accordingly, Judge Newman will not submit to any interaction with her colleagues except as an equal.

IV. COMMITTEE'S INSISTENCE THAT "COURT STAFF DESERVE TO WORK IN AN ENVIRONMENT FREE FROM ABUSE OR ANGER" IS IRRELEVANT TO WHETHER MENTAL HEALTH TESTING IS NEEDED

The Committee insists that "court staff deserve to work in an environment free from abuse or anger." 2024 R&R at 36. No one disputes that. However, even assuming that allegations (which have never been subject to any sort of cross-examination or verification) of abuse leveled at Judge Newman are true (and she categorically denies any abuse), they do not bear on the question of whether Judge Newman is able to perform her judicial duties for at least three reasons.

As an initial matter, the Committee needs to decide whether it is treating allegations of "abuse" as their own misconduct or merely as evidence of a mental health issue. If these allegations are being treated as a form of misconduct, then

there is no need for any mental health testing to resolve any dispute regarding either the occurrence of the misconduct or the appropriate sanction (if any). Surely, "court staff deserve to work in an environment free from abuse or anger" irrespective of whether the abuse is prompted by a judge's mental problems, difficulties in personal life, a bad hair day, or generally poor social skills. Accordingly, if the Committee is concerned that Judge Newman abused staff, it can investigate that issue and close that chapter without the need of any evidence as to the *cause* of such abuse.

Second, the affidavits of various staff members (none of whom are medical professionals or have any knowledge about mental health) are, at best, only part of the picture. These allegations are outweighed by opinions of actual medical professionals. Additionally, the affidavits, even taken at face value, describe the conduct that occurred *after* baseless and factually false allegations had been leveled at Judge Newman. Thus, they are, at best, indicative of Judge Newman's perhaps overwrought reaction to an unjustified attack, rather than some sort of more permanent break with reality. Indeed, anger at unjustified accusation is a psychologically *normal* response. *See, e.g.*, Katherine A. DeCelles, *et al.*, *Anger Damns the Innocent*, 32 Psych. Sci. 1214, 1214 (2021) ("[A]nger is an invalid cue of guilt and is instead a valid cue of innocence; accused individuals … were angrier when they are falsely relative to accurately accused.").[10] It is highly likely that any other

[10] Studies have also identified other *normal* responses to false accusations including "anxiety," "irritability," and even "paranoia." But these symptoms are not evidence of a mental illness, but rather a normal psychological response to an attack. *See*

member of the Judicial Council would also be angry if accused by colleagues of incompetence.[11] Thus, any accusation of Judge Newman's improper interaction with staff that post-dates the launch of this process (and they all do), should at the very least be viewed through the prism of what a normal response to allegations of incompetence would be.

Third, there is *no evidence* of any improper behavior on the part of Judge Newman towards *anyone* (including court staff) over the course of the last year. This fact both confirms that any prior misbehavior (even assuming it occurred) was merely a normal response to false allegations of incompetence, and further shows that any alleged problems have been corrected.

The Committee has explained[12] that in the case of District Judge John Adams, the request for psychiatric examination was withdrawn because "Judge Adams corrected the behavior that underlay the initial complaints which constituted

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Samantha K. Brooks and Neil Greenberg, *Psychological Impact of Being Wrongfully Accused of Criminal Offences: A Systematic Literature Review*, 61 Med., Sci. & L. 44 (2021).

[11] It may be that Judge Newman's colleagues would be better able to control such anger when dealing with staff members, but such temporary loss of control is hardly evidence of mental disability.

[12] As explained further below, *see post*, Part VII, the Committee's understanding of the *Adams* case is incomplete. But even on the Committee's own terms, Judge Newman's case mirrors that of Judge Adams.

changed circumstances and eliminated the need for any sanction." 2024 R&R at 36. If so, then the same thing is true about Judge Newman.

It is no objection that the reason for lack of "abuse" in the past year is Judge Newman's non-participation in the judicial business of her court. Though Judge Newman may not have been sitting on any panels since the events described in the affidavits, that does not mean she has not had opportunity to interact with court staff. For example, one of her term law clerks, who continued to be employed through March 2024, has not reported any problems with Judge Newman's behavior. Furthermore, Judge Newman (though perhaps less often than other members of the Court) continued to interact with other court staff, including IT, security, payroll, and other departments. There is no evidence that such interactions were anything other than professional. Thus, as in Judge Adams's case, the changes in Judge Newman's behavior (assuming that there was misbehavior previously) "constitute[] changed circumstances and eliminate[] the need for any sanction." *Id.*

For all of the above reasons, the Committee's continued reliance on year-plus-old affidavits alleging improper behavior on the part of Judge Newman is misplaced.

V. COMMITTEE'S RECOMMENDATION IS NOT A SANCTION, BUT AN ATTEMPT TO COERCE COMPLIANCE

It is undisputed that neither the Disability Act nor the Rules give either the Special Committee or the Judicial Council coercive powers. To the contrary, the statute explicitly specifies that if the Committee wishes to compel compliance with its orders it must seek enforcement of its subpoenas in a district court. *See* 28 U.S.C.

§§ 356(a); 332(d)(2). Even the Committee recognizes this fact and attempts its very best to deny that the suspension is anything but a coercive tactic akin to civil contempt. *See* 2024 R&R at 26 n.4 ("Coercion is not even mentioned in the Judicial Council Order, the JC&D Committee Decision, or the Special Committee Report and Recommendation addressing the September 2023 suspension."). But of course, the legal import of a particular order or other legal document does not depend on "magic words," but on the nature and effect of that order or document. *See, e.g., Adenariwo v. Fed. Mar. Comm'n*, 808 F.3d 74, 78 (D.C. Cir. 2015) ("Whether an administrative decision is final is determined not 'by the administrative agency's characterization of its action, but rather by a realistic assessment of the nature and effect of the order sought to be reviewed.'") (quoting *Fidelity Television, Inc. v. FCC*, 502 F.2d 443, 448 (D.C. Cir. 1974)); *Perry v. United States*, 195 F.2d 37, 39 (D.C. Cir. 1952) ("Substance, rather than the language and form, determines the nature and effect of a motion.").

Looking at the *substance* of the sanction against Judge Newman (rather than the mere absence of the word "coercion"), it is clear that the "nature and effect" of the order is coercive and is meant not to *punish* for past misconduct, but to coerce future compliance. This is evident from the fact that the Committee recommends (at least potentially) ending the suspension if Judge Newman does undergo the requested testing and also recommends renewing the suspension if she does not. 2024 R&R at 37-38. The Committee *explicitly* says that its sanction will persist "[u]ntil Judge Newman cooperates …." *Id.* at 37. In other words, the Committee is treating this

matter as one where Judge Newman "possess[es] the keys to the jailhouse." *In re Spanish River Plaza Realty Co., Ltd.*, 155 B.R. 249, 254 (Bankr. S.D. Fla. 1993) (citing *Shillitani v. United States*, 384 U.S. 364 (1966)). This is a quintessential feature of coercive contempt-like proceedings. *See In re Norris*, 192 B.R. 863, 873-74 (Bankr. W.D. La. 1995).

The coercive nature of the sanction is also evident from the fact that the Committee justifies its approach by reasoning that a judge should not be allowed to "wait the committee out." 2024 R&R at 34. In other words, the Committee effectively concedes that the true purpose of the recurrent suspension is not to punish for past misconduct, but to coerce compliance with the Committee's order. And because no such power is conferred on the Committee or the Council, the ongoing suspension is entirely improper.

Nor is it likely to work. In her response to the Show Cause Order, Judge Newman explained that much as sanctions imposed for civil contempt may ultimately prove ineffective and must at that point be abated, so too here. The Committee rejected the analogy, but in doing so, mischaracterized the cases on which Judge Newman relied.

First, the Committee states that the cases cited did not involve "naked adamancy of refusal to do what the individual plainly could do, or the possibility of putting the individual in a position where there was good reason to be concerned

about public and private harm if the sanction were lifted." 2024 R&R at 26. That is plainly false.

In *In re Lawrence*, 279 F.3d 1294, 1297-1300 (11th Cir. 2002), incarceration was imposed precisely because the debtor "adaman[tly] [] refus[ed] to do what the individual plainly could do." And in that case, at failure to comply there was "good reason to be concerned about public and private harm if the sanction were lifted," because refusal to turn over money affected the private rights of the bankrupt's debtors. *Id.* at 1296-97. The Committee also incorrectly claimed that "in each case [cited by Judge Newman], the court actually refused to lift the sanction and instead merely noted the possibility that a further sanction might become futile at some point in the future." 2024 R&R at 25 (emphasis omitted). On remand, the District Court, finding that "there is no realistic possibility that [the contemnor] will comply, and guided by the Eleventh Circuit's statement of the law), did release the contemnor from the contempt citation. *In re Lawrence*, No. 05-20485-CIV, 2006 WL 8436247, at *2 (S.D. Fla. Dec. 13, 2006).

Similarly, in *U.S. ex rel. Thom v. Jenkins*, the Seventh Circuit obligated the district court to release a contemnor *even where* he continued to "adaman[tly] [] refus[e] to do what the individual plainly could do," and where such refusal affected the private rights of others in bankruptcy. 760 F.2d 736, 740 (7th Cir. 1985). And while the publicly available records (unlike in the *Lawrence* case) shed no light on what happened to the contemnor following the Seventh Circuit's instructions, the

instructions themselves are crystal clear—if the court becomes "convinced that, although [the contemnor] is able to pay he will steadfastly refuse to yield to the coercion of incarceration, the judge would be obligated to release" him, even where the other party goes uncompensated. *Id.*

It should be abundantly clear by now—more than 18 months into these unwarranted proceedings—that Judge Newman "will steadfastly refuse to yield to the coercion of" suspension, meaning the Committee and the Judicial Council has to move on.

Moving on doesn't leave these bodies powerless in the face of what it believes is misconduct. To the contrary. First, it can issue a subpoena and then seek enforcement of that subpoena in a district court. Second, assuming that Judge Newman's refusal to sit for another examination (one that none of her physicians have recommended), and then submit the results of that examination to *this* Committee, is indeed misconduct, then it follows that with each passing day the misconduct increases in severity. Indeed, the Committee appears to believe this to be the case, as its recommendation, if carried out, will make Judge Newman the most severely punished federal judge in the history of the Republic. But if Judge Newman's misconduct and recalcitrance is that severe, the Committee and the Judicial Council can refer Judge Newman for impeachment proceedings. That the Committee has not recommended either of these routes, despite its availability,

shows that it a) knows that it is not powerless, and b) has no confidence that a neutral adjudicator would actually uphold its demands.

VI. THE ONGOING LITIGATION PROVIDES SUFFICIENT REASON TO DECLINE THE COMMITTEE'S REQUESTS

As Judge Newman has explained on numerous occasions, she "is not being obstinate for the sake of being obstinate or merely to spite this Committee. She is defending the very structure of our Constitution." June 28 Response at 2. As Professor Redish explained, "the possibility of the suspension of a judge's caseload … is tantamount to removal from office …. [T]he fact that it is the Judicial Councils, rather than Congress, that impose the loss of tenure should make no difference for purposes of Article III: Both situations give rise to the very threats to judicial independence that Article III's tenure protection was designed to avoid." *See* Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. Cal. L. Rev. 673, 701 (1999). Judge Newman fully intends to press this point in an Article III court, which neither the Judicial Council nor the Judicial Conference is. *See In re Complaint No. 23-90015*, C.C.D. 23-01 (U.S. Jud. Conf. Feb. 7, 2024) ("Misconduct proceedings are administrative, and not judicial, in nature.") (quoting *In re: Complaint of Judicial Misconduct*, C.C.D. 09-01, at 20 (U.S. Jud. Conf. Oct. 26, 2009)).

The Committee seems confused as to why complying with its orders would prevent Judge Newman from "secur[ing] any effective relief in her ongoing litigation," 2024 R&R at 22, even though the logic is self-evident. Complying with the

Committee's orders would a) serve to recognize that there exists a constitutional power to suspend Article III judges from their duties, even though such power is wholly absent and its assertion is noxious to the constitutional structure, and b) would potentially moot Judge Newman's challenge which is meant to protect not just her, but the independence of every single current and future federal judge.

Taking steps that would allow the litigation to take its course is sufficient good cause to decline to comply with the Committee's orders, because to do so, would preclude the courts from resolving a fundamental question of constitutional structure and judicial independence.

This has nothing whatever to do with standards for a stay, but rather the question of whether seeking a *judicial* resolution to a weighty constitutional dispute is sufficient good cause to decline to comply with an *administrative* directive. Without question, it is. *See Reisman v. Caplin*, 375 U.S. 440, 447 (1964) ("[N]oncompliance [with an administrative tax subpoena] is not subject to prosecution thereunder when the summons is attacked in good faith."); *United States v. Reilly Tar & Chem. Corp.*, 606 F. Supp. 412, 418 (D. Minn. 1985) ("*Ex Parte Young* and its progeny also establish that a statute imposing penalties for noncompliance with an administrative order will be constitutional if it is a defense to the imposition of penalties that the party disobeying the administrative order interposed a good faith defense to the validity of the order.").

VII. NO FURTHER SANCTIONS ARE WARRANTED

Even discounting everything that has been said thus far, the Committee's

recommended sanction is clearly excessive. It is undisputed that *already* Judge Newman's suspension is the longest in the history of the Republic, save perhaps for the case of Judge G. Thomas Porteous.[13] Surely, Judge Newman's "misconduct," if that is what it is, does not rise to the same level as that of judges who have been sanctioned for sexual harassment, perjury, mistreatment of litigants, and other severe failings. And, if the Judicial Council believes that the conduct *is* equally severe, then it should refer Judge Newman for constitutionally prescribed impeachment proceedings. Since the Committee does not recommend this route, it appears that it does *not* believe that Judge Newman's conduct rises to the level of an impeachable offense. But if so, then it also does not rise to the level of being met with the harshest sanctions in the history of the federal judiciary.

The Disability Act (to the extent it is constitutional), permits the Council to suspend Judge Newman only "on a temporary basis for a time *certain*," not until "compliance" is achieved. *See* 28 U.S.C. § 354(a)(2)(A)(i). Congress recognized that [s]erious constitutional questions may be raised concerning the power of the Circuit Council to prohibit the assignment of further cases to the judge in question." S. Rep. 96-362, at 10, *reprinted at* 1980 U.S.C.C.A.N. 4315, 4323-24. For that reason "[t]he use of the word 'temporary' [was] designed to convey *the clear intention* of the

[13] As explained in Judge Newman's submission to the Committee, in the case of Judge Porteous, he did not contest the suspension as it was co-extensive with the then-live impeachment proceedings against him. *See* June 28 Response at 19-20 n.12. Thus, Judge Newman's case cannot be compared to his.

committee that this sanction is to be used only on rare occasions and only *as an interim sanction*. For example, the refusal of the council to allow a judge to accept further cases while undergoing treatment for alcoholism or until the reduction of an excess backlog of cases are examples where this sanction may be invoked." *Id.* at 4324 (emphasis added). The Committee, however, is recommending that the Council interpret "temporary" and "time certain" and "of indefinite duration" to permit its sanction, so long as it is imposed in one-year increments.

The Committee attempts to recharacterize the recommended penalty as something imposed not for "past misconduct," but for "continuing misconduct." 2024 R&R at 37. But such mischaracterization changes nothing; in fact, it only shows that the Committee does not intend the sanction to last for a "time certain," but rather to remain in place *indefinitely*, so long as Judge Newman's "misconduct" continues.

It can be safely assumed at this point that Judge Newman will not comply with the Committee's *ultra vires* orders either now or at any point in the future. In other words, her conduct (or misconduct) will be of an indefinite duration. According to the Committee, this can be met with an equally indefinite suspension from hearing cases provided that the ever-lasting suspension is a series of discrete suspensions. The Committee states that this is necessary so as to limit a judge's ability to "wait the committee out, thwart the functioning of the Act, and be free and clear of any consequence." 2024 R&R at 34. Under the Committee's logic, the suspension of cases can last for a year, two, five, ten, twenty, or thirty years. *See* 2024 R&R at 34 (writing

that "[c]ontinued defiance of a special committee's orders can and should be met with a renewed sanction," and without mentioning any limitations on such renewals). It is painfully obvious that this is not what the Act authorizes or what the Constitution permits. *See McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S.*, 264 F.3d 52, 67 n.5 (D.C. Cir. 2001) (noting that "a long-term disqualification from cases could, by its practical effect, affect an unconstitutional 'removal.'"); *Hastings v. Jud. Conf. of U.S.*, 770 F.2d 1093, 1108 (D.C. Cir. 1985) (Edwards, J., concurring) (opining that a long-term suspension is "removal undisguised by another name."). It appears that the only reason the Committee is undaunted by the obvious collision between its chosen tack and the statutory and constitutional limits is its bet that, given Judge Newman's age, nature will take its course before her suspension runs into double digits. But the legality of a long-term suspension does not turn on the subject judge's age. If it is impermissible to suspend a 60-year-old judge for a decade (even if the suspensions are dosed one-year-at-a-time), it is equally impermissible to suspend a 97-year-old judge for that period of time. The Committee and the Council can assume that Judge Newman will not change course and will stay true to her principles *indefinitely*. However, even if the Council is convinced that such behavior is wrongful and violative of the Code of Ethics or even the law, it does not follow that it can respond to indefinite misbehavior with an indefinite suspension. And to repeat, to the extent that the Council believes that such behavior is unlawful and detrimental to the operations of the court or judiciary

as a whole, impeachment remains a viable option to properly remove a lawless judge. Thus, the Committee's concerns that a judge can simply stymie the disciplinary process are overwrought—the Constitution provides an adequate remedy.[14]

The proposed penalty is also inconsistent with sanctions imposed on other judges since the enactment of the Disability Act (and before it as well). Indeed, there are *no* parallels. No judge, save for Judge Porteous, in the history of the country has ever been totally suspended from hearing cases.[15] Judge Samuel Kent who was accused of very serious misconduct and was eventually indicted and entered a plea agreement with respect to same, was suspended (*by agreement*) only from hearing cases where the United States was a party or where sexual misconduct was one of the issues. *See In re Complaint of Judicial Misconduct against United States District Judge Samuel B. Kent*, No. 07-05-351-0086 (5th Cir. Jud. Council Dec 20, 2007). Several other judges were required not to handle particular types of cases for a certain period of time. But no judge has ever been completely suspended from *all*

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[14] Additionally, the Judicial Council, by a majority vote, can certify Judge Newman's disability to the President, who can then appoint a supernumerary judge to the Court. 28 U.S.C. § 372(b). *See post*, pp. 35.

[15] The closest that a judicial council came to an involuntary suspension of a judge from hearing cases was the case of Judge John H. McBryde who was suspended for one year from having *new* cases assigned to him. However, because he had a full docket of pending cases, he continued to exercise judicial power on par with his colleagues. In contrast, Judge Newman has been precluded from exercising *any* judicial power, which is tantamount to an unconstitutional suspension *from office*. *See post*, pp. 34.

judicial duties.

The previously discussed case of Judge Adams (which the Committee again misreads) is illustrative. Much like Judge Newman, Judge Adams was ordered to undergo a psychiatric examination and refused. The Judicial Council of the Sixth Circuit ordered him suspended for two years (though, unlike the this Judicial Council, did not effectuate that order while it was being considered by the Judicial Conference) for alleged mental disability.[16] The JC&D Committee vacated the suspension order because it concluded that there was insufficient proof of mental disability and remanded the matter back to the Judicial Council of the Sixth Circuit to consider whether the testing is still needed and leaving open a possibility of sanctions for any refusal to undergo testing. On remand, the investigating committee did again order testing, which Judge Adams again refused to undergo. The investigating committee

[16] The Committee mischaracterizes that initial order as having been imposed for "non-cooperation with the investigation." 2024 R&R at 34-35. To the contrary, *that* sanction was imposed as a result of the Judicial Council of the Sixth Circuit's conclusion that Judge Adams is not able to discharge his judicial duties. The Judicial Council of the Sixth Circuit specifically described that sanction as not one for failure to comply with the order for testing, but as one that "is necessary to protect the public and the judiciary from the possibility of Judge Adams engaging m inappropriate or embarrassing behavior while the investigation continues." *In re Complaint of Judicial Misconduct*, No. 06-13-90009 at 29 (6th Cir. Jud. Council Feb. 22, 2016). The JC&D vacated the suspension precisely because there was hard evidence of disability. *See In re Complaint of Judicial Misconduct*, C.C.D. 17-01 at 40 (U.S. Jud. Conf. Aug. 14, 2017) ("Because the Judicial Council did not include in its Order any specific findings regarding whether Judge Adams's conduct has adversely affected his ability to discharge the adjudicative duties of his office, we vacate the portion of the Judicial Council's Order that prohibits the assignment of new cases to Judge Adams for two years and transfers Judge Adams's current cases to other judges.").

then recommended a six-month suspension from hearing cases *without any possibility of renewal*. This recommendation happened *before* any supposed changes in Judge Adams's behavior or federal court litigation. To repeat, in response to Judge Adams's "naked adamancy of refusal to do what the [he] plainly could do," 2024 R&R at 26, the investigation committee recommended only a *six-month* suspension.[17] Indeed, *this very Judicial Council* previously recognized that the six-month suspension is a relevant benchmark in Judge Newman's case. *See* Sept. 20 Order at 70 ("[W]e conclude that a one-year suspension—in between the original two-year sanction and the later recommended six-month sanction in Adams—is warranted."). Yet now, the Special Committee has taken the position that the history of judicial discipline in other cases is irrelevant and that even though Judge Newman's "misconduct" does not differ materially from Judge Adams's behavior (and is certainly no worse than the behavior of other judges who have been sanctioned under the Act), Judge Newman can be subject to the most severe sanction that has ever been imposed. This is flatly inconsistent with the Judicial Conference's admonition that there should not be "major disparities in sanctions among the various circuits." *In re*

[17] That sanction was ultimately not imposed. Whether it was as a result of federal court litigation or because "Judge Adams corrected the behavior that underlay the initial complaints," 2024 R&R at 35, is irrelevant. The point is that even the *recommended* sanction for non-cooperation with the investigation was for six months with no possibility of renewal. That even that sanction ultimately became unnecessary is not relevant to the question of what an appropriate sanction for a similar refusal to cooperate is.

Complaint No. 05-89097, C.C.D. 08-02 at 12 (U.S. Jud. Conf. Jan. 14, 2008).

Next, the continued suspension only buttresses the already inescapable conclusion that Judge Newman, contrary to both the Constitution and the governing statute, has been suspended *from office*. The Committee's arguments to the contrary are risible. According to the Committee, Judge Newman has not been suspended from her judicial office because she receives emails from the IT department and advice about court closures and has, on occasion, been offered ice cream. 2024 R&R at 27-28. But the consequences of judicial office are not powers to enjoy some Häagen-Dazs or being advised about a new security patch in the email system. Rather, judicial office includes the ability to exercise *judicial power*. *See* National Commission on Judicial Discipline and Removal, Report, 152 F.R.D. 265, 287 (1993) ("Under 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."). By suspending Judge Newman from hearing cases, the Judicial Council would debar her from exercising such power (for a period of time unknown to history), *i.e.*, has taken away the key component of her office. This is no different than reducing her salary for non-compliance.

Finally, there is no dispute that even if the Committee and the Judicial Council were to conclude (with or without testing) that Judge Newman *is* disabled,[18]

[18] Presumably, any mental or physical disability that Judge Newman suffers from (though she doesn't) would be the result of age-related processes. And as Judge Newman, like everyone else, will only get older and not younger, any age-related

it would have no power to suspend her from hearing cases indefinitely. Were the Council to conclude that Judge Newman suffers from a permanent disability it could only 1) certify Judge Newman's disability to the President, who can then appoint a supernumerary judge to the Court, 28 U.S.C. § 372(b)[19], and 2) request that Judge Newman voluntarily retire, 28 U.S.C. § 354(a)(2)B)(ii). With respect to the first option, nothing is stopping the Council from certifying the matter without any medical testing, especially in light of the supposed "overwhelming evidence that Judge Newman may be experiencing significant mental problems including memory loss, lack of comprehension, confusion, and an inability to perform basic tasks." Sept 20 Order at 3. And with respect to the second option, given the significant concerns about bias, lack of objectivity, disregard for the rules of this process, and outright hostility that her colleagues have exhibited, Judge Newman has no intention to take seriously any such request coming from them. The upshot is that with or without testing, Judge Newman will not (nor is she obligated to) accept the conclusions of the Special Committee as to her abilities to perform the functions of her office. Thus, neither any testing by the Committee's handpicked doctors, nor any of the

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problems will only magnify. Thus, any suspension on the basis of disability itself (to the extent constitutional at all) would have to last for life—something clearly unauthorized by statute.

[19] The only consequence of such a certification with respect to the disabled judge is being "treated as junior in commission to the other judges of the circuit, district, or [*sic*] court." 28 U.S.C. § 372(b).

Committee's conclusions made in reliance on such testing—conclusions in which Judge Newman has no confidence—are going to alleviate any "public harm" that the Committee believes flows from Judge Newman's hearing and deciding cases. Accordingly, the entire exercise is futile.[20]

CONCLUSION

By now it should be beyond peradventure that Judge Newman and her colleagues have reached an impasse. On one hand, no amount of additional sanctions will force Judge Newman to retreat from her well-considered and constitutionally sound position. What the Committee requests is not a "small ask," 2024 R&R at 21, because what Judge Newman is being "asked" is not merely to undergo medical testing, but to have the results of that testing evaluated by individuals who have exhibited bias, lack of objectivity, disregard for the rules of this process, and outright hostility to her. That will not happen.

On the other hand, if the Committee and the Judicial Council do wish to actually assure themselves and the public of Judge Newman's continued competence (though, in light of the evidence submitted by Judge Newman, no additional reassurance is needed), there are several avenues proposed by Judge Newman that

[20] Judge Newman *is* committed to following the advice of her own doctors. If and when they advise Judge Newman that her medical condition prevents her from continuing to work, she will retire. Additionally, as Judge Newman stated on more than one occasion, she is willing to rely on the judgment of *neutral* physicians and *neutral* decisionmakers.

will help accomplish that goal. These proposals still remain open to the Committee. At the same time, the "my way or the highway" approach and the bullying tactics will not work. Of course, the Judicial Council is also free to inform Congress that it believes that Judge Newman should be impeached, and have Congress make the ultimate determination, as the Constitution provides.

Should the Council not choose to take either of these options, this matter will have to be resolved in an Article III court.

STATEMENT ON ORAL ARGUMENT

Pursuant to Rule 20(a), Judge Newman requests oral argument before the Judicial Council.[21]

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[21] Judge Newman notes that in the most recent case of Judge Kindred, he was afforded an opportunity to appear and present argument not only before the Special Committee, but before the entire Council. *See In re Complaint of Judicial Misconduct*, No. 22-90121 at 3 (9th Cir. Jud. Council. May 23, 2024) ("The Judicial Council met on April 5, 2024, and Judge Kindred presented oral argument before being questioned by the Council."). Judge Newman deserves no less courtesy or due process.