

**WHO JUDGES THE JUDGES?
JUDICIAL QUALIFICATION AND RECUSAL**

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WHO JUDGES THE JUDGES? JUDICIAL QUALIFICATION AND RECUSAL

By Chris Dove

Obscure yet detailed laws govern judicial conduct, disability, and recusal. There are no easy resources for understanding the federal nor the Texas state systems for judicial disqualification and disability, and yet these systems made nationwide news in recent years as certain judges and justices have defiantly fought against them. It is easy to ask “who judges the judges?” It is difficult to answer.

Nevertheless, litigators need to understand the rules that govern judges. These principles affect every part of the justice system, and become particularly relevant when litigants may have concerns about judges’ actions or disability. They also need to know when and how to ask a judge to recuse herself.

This paper begins by explaining the federal and Texas judicial misconduct and disability systems, both substantively and procedurally. It uses the well-publicized story of Judge Pauline Newman of the Federal Circuit Court of Appeals to demonstrate how the system works (or doesn’t), and then discusses how the United States Supreme Court drew attention to the judicial conduct system by insisting it is immune from it. Texas’s state system avoids many of these problems by constitutionally empowering a state agency, but Texas history shows that some remarkable judges have bucked that system over the years.

The paper then turns to the subject of recusal; it discusses the legal standards requiring judges to recuse themselves and the procedures for getting them to do it. Here too, the federal and state systems are similar but have important distinctions, including Texas’s insistence that “disqualification” and “recusal” are different things.

I. HOW THE JUSTICE SYSTEM PREVENTS JUDICIAL MISCONDUCT AND DISABILITY

To explain how the federal system polices the competence of federal judges, there can be no better illustration than the lengthy, public, and sad story of the Federal Circuit’s efforts to get now-97-year-old Judge Pauline Newman to step down. The saga has been widely reported in the legal press and has even made its way into national newspapers. But to even understand

the news articles about the long-running dispute, one must understand a group of institutions, statutes, and rules that most lawyers would seldom encounter. Fortunately, the United States court system has done good work to make the process understandable, implementing reforms to address earlier complaints that the process was unworkable and opaque. This paper hopes to illustrate how the federal system resolves an allegation of disability by showing how Judge Newman’s alleged disability worked its way through this seldom-discussed system. In many ways, her extraordinary case is the exception that proves the rule.

A. Federal Law Governing Disability And Misconduct Challenges.

1. The Sources of Law

Who judges the judges? In the federal system, the answer is the “judicial council” of each federal circuit, and they use rules adopted in 2008 to enforce a statute enacted in 1980, the “Judicial Conduct and Disability Act of 1980,” 28 U.S.C. §§ 351-364 (“the Act”). In the 2006 report issued by an investigative committee headed by Justice Steven Breyer (“The Breyer Report”), the committee introduced the Act this way:

The Act creates a complex system that, in essence, requires the chief judge of a circuit to consider each complaint and, where appropriate, to appoint a special committee of judges to investigate further and to recommend that the circuit judicial council assess discipline where warranted. In a word, the Act relies upon internal judicial branch investigation of other judges, but it simultaneously insists upon consideration by the chief circuit judge and members of the circuit judicial council, using careful procedures and applying strict statutory standards.¹

The Act allows the judicial councils and Judicial Conference to prescribe rules for handling judicial conduct and disability complaints.² The rules must allow notice to the judge and an opportunity for both the judge and complainant to appear.³ In 1986, a committee of circuit chief judges promulgated the *Illustrative Rules Governing Complaints of Judicial Conduct and Disability*, which were adopted by most of the circuits verbatim.⁴ The Breyer Committee recommended

¹ The Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* (“THE BREYER REPORT”), 239 F.R.D. 116 (Sept. 2006), also available at

<https://www.supremecourt.gov/publicinfo/breyercommitteeerport.pdf>.

² 28 U.S.C. § 358.

³ *Id.*

⁴ BREYER REPORT, 239 F.R.D. at 132.

changes to the Illustrative Rules to prevent some of the problems it had identified.⁵ The Committee on Judicial Conduct and Disability then promulgated rules based on the Illustrative Rules and the Breyer Committee's recommendations.⁶ The Rules for Judicial Conduct and Disability Proceedings ("Rules") are mandatory and supersede previous rules.⁷

2. How the Federal Complaint System Works

a. *Persons and Misconduct Subject to the Act.*

The Act provides a process by which one may lodge a complaint about a "judge." The Act defines a "judge" as a circuit judge, district judge, bankruptcy judge, or magistrate judge⁸—which excludes the justices of the United States Supreme Court. This paper will return to this distinction with some gusto, as it has been the subject of much discussion recently.

Under the Act, any person may allege "that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such judge is unable to discharge all the duties of office by reason of mental or physical disability."⁹ The Act does not define these concepts further.

Fortunately, the Rules provide detailed guidance about what constitutes "misconduct." Rule 4(a)(1) defines "misconduct" to include items already identified in the Code of Conduct for United States Judges,¹⁰ including financial misconduct (like bribery or obtaining special favors), *ex parte* communications, partisan political activity, soliciting funds for organizations, or violating rules pertaining to restrictions on outside income or knowingly violating requirements for financial disclosure.¹¹ A separate provision of Rule 4 specifies that "misconduct" includes abusive or harassing behavior (including sexual harassment, hostile treatment of litigants and attorneys, and a hostile work environment), and intentional discrimination on the basis of a protected status.¹² Yet another part of Rule 4 protects the integrity of the complaint process by defining "misconduct" to include

retaliation against persons for participating in the judicial complaint process, interference with the complaint process, and failure to report judicial misconduct or disability.¹³

The Rules explain that conduct outside of the judge's official duties can be misconduct if it will have a prejudicial effect on the administration of justice.¹⁴ But "misconduct" is defined to exclude ordinary allegations about the merits of a judge's rulings or delay in rendering a decision.¹⁵

The Rules necessarily define "disability" more vaguely. Rule 4 defines "disability" as "a temporary or permanent impairment, physical or mental, rendering a judge unable to discharge the duties of the particular judicial office" and gives as examples substance abuse, the inability to stay awake during court proceedings, or "impairment of cognitive abilities that renders the judge unable to function effectively."¹⁶ The commentary explains that a fact-specific approach would be necessary in all cases of disability.¹⁷

The federal judiciary publishes a table showing the judicial complaints filed in a given year, along with information about the nature of the complaints and how they were ultimately resolved. In the year ending September 30, 2023, there were 1,363 complaints filed against federal judges.¹⁸ Of those complaints:

1,211 complained of the merits of a decision or ruling (which is no "conduct" complaint at all).

172 alleged discrimination based on a protected class.

123 alleged that the judge improperly delayed decision in a case.

64 alleged improper *ex parte* communications.

61 alleged "hostility toward a litigant, attorney, judicial employee, or other."

37 alleged retaliation for participation in the complaint process.

23 alleged a judge sought special treatment for a friend or relative.

⁵ *Id.* at 238-46.

⁶ RULES FOR JUDICIAL CONDUCT AND JUDICIAL DISABILITY PROCEEDINGS ("RULES") at § 320, Commentary on Rule 1, available at https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf

⁷ RULE 2.

⁸ 28 U.S.C. § 351(d)(1).

⁹ 28 U.S.C. § 351(a).

¹⁰ See CODE OF CONDUCT FOR UNITED STATES JUDGES, available at https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf

¹¹ RULE 4(a)(1). All "judicial officers" and "judicial employees" must file financial reports under Title I of the

Ethics in Government Act, 5 U.S.C. § 13101 *et seq.* These obligations are explained further in the *Judiciary Financial Disclosure Regulations*, which were written by the Committee on Financial Disclosure of the Judicial Conference of the United States, available at https://www.uscourts.gov/sites/default/files/guide-vol02d_1.pdf.

¹² RULE 4(a)(2), (3).

¹³ RULE 4(a)(4)-(6).

¹⁴ RULE 4(a)(7).

¹⁵ RULE 4(b).

¹⁶ RULE 4(c).

¹⁷ RULE 4 commentary.

¹⁸ https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2023.pdf.

20 alleged disability.
14 alleged bribery or improper acceptance of a gift.
7 alleged financial disclosure violations.
7 alleged partisan political activity.
6 alleged failure to participate in a complaint proceeding.
6 alleged “unwanted, abusive, or offensive sexual conduct.”¹⁹

Generally speaking, these numbers and proportions are in line with reports from previous years. And before going any further in describing the process, the reader should note that 1,286 of 1,363 complaints were promptly dismissed for fundamental defects such as complaining about the merits of a ruling, making frivolous allegations, or offering insufficient evidence of the alleged conduct.²⁰ Very few meaningful complaints about federal judges are filed each year.

b. How the complaint process begins.

The complainant files a written complaint with the clerk of the circuit court, who will transfer it to the chief judge of the circuit and to the subject of the complaint.²¹ While “any person” may file such a complaint, the court can also police itself *sua sponte*. The chief judge of the circuit may “by written order stating reasons therefor, identify a complaint for purposes of this chapter.”²²

Rules 6 and 7 provide basic guidance for what a complaint should look like and where it should be filed.²³ While the default is that a judge’s home circuit will consider the complaint, Rule 7(b) allows the complaint to be transferred to another circuit if the alleged misconduct occurred while the judge was sitting by designation in that circuit.²⁴

In practice, who files such complaints? The Breyer Report explained that almost all complaints are filed by prisoners or litigants, and allege misconduct instead of disability,²⁵ which remains true today.²⁶ To put the point more bluntly, a clear majority of complaints against federal judges are filed by disappointed litigants who complain about a judge’s rulings on the merits of their

case. In contrast, the proceedings against Judge Newman were begun by the chief judge of the Federal Circuit (rare) based on allegations of disability (also rare).

c. Initial review by the chief judge.

The chief judge must “expeditiously review” the complaint, and may make a limited inquiry to determine if some abbreviated process can resolve the issue—either because the issue has already been resolved through corrective action, or because the complaint is “plainly untrue” or otherwise not the sort of dispute that can be proven through an investigation.²⁷ In this limited inquiry, the chief judge may confer privately with the accused judge and the complainant.²⁸

This process of informal resolution resolves most problems with the judiciary, according to the Breyer Report.²⁹ The main problems addressed through informal efforts were decisional delay, mental and physical disability, and complaints about judicial temperament.³⁰ “Delay, aging, and temperament” were the “primary problems” of the judiciary, one chief judge reported to the Breyer Committee, and “the really thorny problems are dealt with informally.”³¹ Another chief judge reported that he always tried to deal with the disability of an aging judge “with great delicacy, through family members.”³²

The chief judge can dismiss the complaint if she finds it fails to comply with statutory requirements, is “directly related to the merits of a decision or procedural ruling,” or is frivolous or lacking sufficient evidence.³³ The chief judge may also conclude the proceedings if no action is needed in light of corrective action or intervening events.³⁴

The Rules provide additional guidance on how the chief judge exercises this process of initial review. Rule 11 empowers the chief judge to decide whether allegations rise to the level of a “reasonable” dispute requiring an investigation by special committee.³⁵ The chief judge may communicate orally or in writing with the complainant, subject judge, and others, and may obtain and review relevant documents.³⁶ Of particular

¹⁹ https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2023.pdf. There were many others as well. The numbers do not add up to 1,363, presumably because some complaints alleged multiple types of misconduct.

²⁰ *Id.*

²¹ RULE 4(a), (c).

²² 28 U.S.C. § 351(b).

²³ RULES 6 & 7.

²⁴ RULE 7(b).

²⁵ BREYER REPORT, 239 F.R.D. at 123.

²⁶ See, e.g., Table S-22 for the year ending September 2023, available at https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2023.pdf.

²⁷ 28 U.S.C. § 352(a).

²⁸ *Id.*

²⁹ BREYER REPORT, 239 F.R.D. at 201.

³⁰ *Id.*

³¹ *Id.* at 203.

³² *Id.* at 204.

³³ 28 U.S.C. § 352(b)(1).

³⁴ *Id.* at (b)(2).

³⁵ RULE 11(a), (b).

³⁶ *Id.*

note, a commentary to Rule 11 explains that a complaint can be properly dismissed if the only eyewitness to the alleged misconduct refuses to come forward because he is an attorney who practices in federal court (and thus implicitly fears reprisal); this means the chief judge may conclude the allegations are “incapable of being established through investigation.”³⁷ This is both a shocking loophole and a concession to hard reality. The chief judge has four options: dismiss, conclude because of voluntary corrective action, conclude because intervening events have made action unnecessary, or to refer the matter to a special committee for factfinding.³⁸

If the chief judge dismisses or concludes the proceeding, either the complainant or the subject judge can appeal the decision to the entire judicial council.³⁹ Rule 18 then explains how the complainant or subject judge can file a petition for the judicial council to review of the chief judge’s order.⁴⁰ Fans of appellate rulemaking will be interested to note that the petitioner has 42 days to file the petition for review (an uncommon number of days), and must file it *on paper* in a sealed envelope labeled “Misconduct Petition” or “Disability Petition” that does not list the subject judge’s name on it.⁴¹ Rule 19(a) (titled “Rights of Subject Judge”) expressly states that the subject judge may file a response to a petition filed by a complainant (with no particular due date), but does not expressly recognize a complainant’s right to respond to a judge’s petition in the highly unlikely event that a subject judge appeals a chief judge’s decision to conclude the proceeding.⁴² The remainder of Rule 19 explains how the judicial council shall dispose of the petition for review.⁴³ The options include denying the petition, returning the matter to the chief judge with instructions to conduct further inquiry, returning the matter with directions to appoint a special committee, or the judicial council can “in exceptional circumstances, take other action.”⁴⁴ In the year ending 2023, the Chief Judge’s determination was affirmed in

all but one case, in which the Fifth Circuit returned the matter to the chief judge.⁴⁵

The Breyer Report explains that “almost all complaints are dismissed by the chief judge; 88% of the reasons given for dismissal are that the complaint relates to the merits of the proceeding or is unsubstantiated.”⁴⁶ These statistics generally remain true to this day.⁴⁷

One should pause to consider the importance of these statistics. In 2006, the Breyer Report examined how the Act had been implemented and found what it described as an error rate of 2-3%, which it did not view as a *serious* problem, but which nevertheless led the Committee to make recommendations to improve the process.⁴⁸ A majority of those errors were simply that the chief judge dismissed cases that the Committee believed deserved a more thorough investigation, without expressing any opinion about whether the investigation would have changed the outcome.⁴⁹ But the vast majority of cases handled by the complaint system are meritless, a problem that is never covered in the national media. By contrast, the Breyer Report acknowledged an error rate of 30% in those very few cases that had achieved notoriety in the press.⁵⁰ This is, of course, a chicken-and-the-egg problem. One wonders if these cases achieved notoriety because it is such a novelty that a party raises colorable claims of judicial misconduct.

d. Convening a special committee to investigate.

If the chief judge does not reject the complaint after the limited inquiry, she shall promptly convene a special committee consisting of the chief judge and an equal number of circuit and district judges, who shall investigate the allegations.⁵¹ The committee “shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive report thereon with the judicial council of the circuit,” which must recommend a course of action.⁵²

³⁷ RULE 11 commentary.

³⁸ RULE 11(a).

³⁹ 28 U.S.C. § 352(b), (c). If the judicial council denies review, the Act says the complaint cannot be further appealed. *Id.* at (c). But the judicial council can refer the appeal to a panel of five judges. *Id.* at (d).

⁴⁰ RULE 18.

⁴¹ RULE 18(b). Thinking that this reference to a paper filing was surely out of date, I called the Fifth Circuit clerk’s office and spoke to the clerk in charge of handling these petitions. She explained that the process still requires a paper filing in the envelope described in Rule 18, primarily because the vast majority of petitions for review are filed by prisoners who would not have access to ECF anyway. Moreover, the form requires the petitioner to file under penalty of perjury, which the clerk’s office views as requiring a wet-ink signature.

⁴² RULE 19(a).

⁴³ RULE 19.

⁴⁴ *Id.*

⁴⁵ https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2023.pdf.

⁴⁶ BREYER REPORT, 239 F.R.D. at 132. Of the 20 cases (out of 593) the Committee found “problematic” for failure to follow the rules, eleven involved a chief judge’s failure to undertake an adequate inquiry before dismissing the complaint as frivolous. *Id.* at 154-70.

⁴⁷ See, e.g., Table S-22 for the year ending September 2023, available at https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2023.pdf.

⁴⁸ BREYER REPORT at 122. A previous investigation published in 1993 likewise found few instances where complaints were not treated seriously. *Id.* at 128-29.

⁴⁹ *Id.*

⁵⁰ *Id.* at 122.

⁵¹ 28 U.S.C. § 353(a).

⁵² *Id.* at (c).

Rules 13 through 15 provide particular details about how the special committee shall investigate the complaint.⁵³ The special committee has discretion to determine for itself the “appropriate extent and methods” of its investigation.⁵⁴ It has subpoena power, can hold hearings, and must obtain evidence.⁵⁵ The subject judge has the right to counsel.⁵⁶ The judge has the right to receive notice, to present evidence, and to compel the attendance of witnesses and the production of documents.⁵⁷ The judge may also attend any hearings where the special committee receives evidence, but does not have the right to attend other hearings, including hearings where the committee reviews discovery or deliberates on the evidence.⁵⁸

Rule 16 grants the complainant the right to notice and an opportunity to provide evidence and written argument, which is noticeably more circumscribed than the rights afforded to the subject judge.⁵⁹ Rule 17 explains how the special committee must present its written report.⁶⁰ The report must contain the special committee’s findings and recommendations for council action, a statement of the committee’s vote, and any special or dissenting statements from committee members.⁶¹ In addition to being sent to the judicial council, the report must be sent to the Committee on Judicial Conduct and Disability, which monitors allegations of federal judicial misconduct nationwide.⁶² In the year ending 2023, only 9 of 1,363 complaints were referred to a special committee.⁶³

e. Review by the Judicial Council.

Once the special committee’s report has been filed, the judicial council must act on it. The “judicial councils” of the circuits were created by 28 U.S.C. § 332(a). Each circuit’s judicial council consists of the chief judge and an equal number of circuit judges and district judges, with the district judges evenly drawn from each district within the circuit.⁶⁴ The primary

power of the judicial council is that “[e]ach judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit,” including many administrative matters that can be delegated to a circuit executive.⁶⁵ This power also includes duties associated with judicial conduct and disability.

The Act says the judicial council must act on the report.⁶⁶ Rule 20 provides the procedural details.⁶⁷ The subject judge has 21 days to file a written response to the report, and has the right to present argument, “personally or through counsel, written or oral, as determined by the judicial council.”⁶⁸

The judicial council can conduct an additional investigation, dismiss the complaint, or take appropriate action.⁶⁹ The Act explains that the judicial council can take actions including “ordering 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,” a private censure or reprimand, or a public censure or reprimand.⁷⁰ The judicial council can only act through a written order, which should usually be accompanied by a memorandum setting forth any factual findings.⁷¹

When the disability of Article III judges is at issue, the judicial council may ask the judge to voluntarily retire.⁷² Or the judicial council may certify the judge’s disability to the President of the United States,⁷³ who may replace⁷⁴ the judge if he “finds that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business.”⁷⁵ The judicial council *cannot* order an Article III judge removed from office.⁷⁶ However, the judicial council can refer matters to the Judicial Conference of the United States, including recommendations that the situation merits impeachment or (more cryptically) that the matter “is

⁵³ RULES 13-15.

⁵⁴ RULE 13.

⁵⁵ RULE 14(a), (b).

⁵⁶ RULE 14(c) and 15(f).

⁵⁷ RULE 15.

⁵⁸ RULE 15 commentary.

⁵⁹ RULE 16.

⁶⁰ RULE 17.

⁶¹ *Id.*

⁶² *Id.*

⁶³ https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2023.pdf.

⁶⁴ 28 U.S.C. § 332(a)(1), (4). For example, the Judicial Council of the Fifth Circuit has nineteen members and two observers. <https://www.ca5.uscourts.gov/other/judicial-council>.

⁶⁵ 28 U.S.C. § 332(d), (e), (f), (h).

⁶⁶ 28 U.S.C. § 354(a).

⁶⁷ RULE 20.

⁶⁸ *Id.*

⁶⁹ 28 U.S.C. § 354(a)(1).

⁷⁰ 28 U.S.C. § 354(a)(2)(A).

⁷¹ RULE 20(f).

⁷² 28 U.S.C. § 354(a)(2)(B).

⁷³ 28 U.S.C. § 354(a)(2)(B).

⁷⁴ More precisely, the President appoints a second judge to “efficiently dispatch business” while the disabled judge remains alive, and when the disabled judge dies, that vacancy will not be filled. 28 U.S.C. § 372(b). The disabled judge also loses his or her seniority. *Id.* The distinction between appointing a second judge in parallel and simply replacing the first one will no doubt thrill fans of constitutional niceties, because it ensures the Article III judge still enjoys a lifetime appointment.

⁷⁵ 28 U.S.C. § 372(b).

⁷⁶ 28 U.S.C. § 354(a)(3)(A).

not amenable to resolution by the judicial council.”⁷⁷

This process is seldom used. In the year ending 2023, there was only one special committee report to a judicial council—Judge Newman’s.⁷⁸ In the year ending 2024, there will be another special committee report. Judge Roger T. Benitez of the Southern District of California was publicly reprimanded for handcuffing the crying 13-year-old daughter of a defendant in an attempt to scare her away from following her father’s life of drug-related crimes.⁷⁹ The modest penalty of “public reprimand” took into account the fact that Judge Benitez took senior status and would not be assigned any new criminal cases.⁸⁰

f. Final appeal to the Judicial Conference of the United States.

The aggrieved complainant or judge may make a final appeal of the judicial council’s decision to the Judicial Conference of the United States, whose decision shall be final and cannot be reviewed on appeal or otherwise.⁸¹ And if the process was begun by a Chief Judge instead of a filed complaint, the judicial council *automatically* sends its report to the Judicial Conference for further review.⁸²

Who is this court of last resort? The Judicial Conference of the United States consists of the Chief Justice of the Supreme Court, the chief judge of each circuit, the chief judge of the Court of International Trade, and a district judge from each circuit.⁸³ The Judicial Conference of the United States mostly “submit[s] suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business.”⁸⁴ However, the Judicial Conference also has a standing committee to address judicial conduct complaints, called the Committee on Judicial Conduct and Disability (“JC&D Committee”).⁸⁵ In such matters, the Judicial Conference can (by majority vote) refer the

judge to the House of Representatives for impeachment.⁸⁶

Rules 21 and 22 explains this final step of the appeal process, in which the complainant or subject judge files a petition for review to the JC&D Committee.⁸⁷ Again, the petitioner has 42 days to file a petition of 20 pages or less, but this time the petition can be filed electronically.⁸⁸ The JC&D Committee can also act on its own power to review a judicial council order, through a process in which the JC&D Committee invites the judicial council to explain why the JC&D Committee should not appoint a special committee to review the decision.⁸⁹ The JC&D Committee will not conduct an additional investigation “except in extraordinary circumstances.”⁹⁰

The Act and Rule 22 say the JC&D Committee’s decisions are final.⁹¹ The United States Supreme Court has noted, in dictum, that any review of a JC&D Committee decision might present a “knotty jurisdictional problem” because the actions of the Judicial Conference may be considered more “administrative” than “judicial.”⁹²

g. Confidentiality.

One of the most important aspects of the entire process is that the entire resolution process remains confidential—except that the reports of special committees will be made public, as well as the orders implementing a judicial council’s punishment.⁹³ These confidentiality provisions may be waived by the judge being investigated and the chief judge or standing committee.⁹⁴ Portions of the Breyer Report can be maddeningly vague, because the Committee was honoring these strict confidentiality requirements.

The Rules implement this same insistence on confidentiality. Rule 23 ensures the confidentiality of the entire complaint process, and identifies specific circumstances when information may be disclosed to

⁷⁷ *Id.* at (b).

⁷⁸ https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2023.pdf.

⁷⁹ *Memorandum of Decision*, J.C. No. 09-23-90037 (JC&D Committee, Aug. 13, 2024), available at https://www.uscourts.gov/sites/default/files/c.c.d._no._24-01_august_13_2024.pdf.

⁸⁰ *Id.*

⁸¹ 28 U.S.C. § 357.

⁸² RULE 20(f). The commentary explains that this rule was created because there is no “complainant” to petition for review. *Id.* at Commentary. However, it is not self-evident that a system that requires the Chief Judge to file the complaint, prosecute the investigation, and sit in judgment, could not also make the Chief Judge an “appellant” for purposes of a rule governing further review. The better explanation for this sensible rule would be that a process initiated by the Chief

Judge should have at least one layer of review in which the Chief Judge is not intimately involved.

⁸³ 28 U.S.C. § 331.

⁸⁴ *Id.*

⁸⁵ 28 U.S.C. § 331.

⁸⁶ 28 U.S.C. § 355.

⁸⁷ RULE 21.

⁸⁸ RULE 22(a)-(c).

⁸⁹ RULE 21(b)(2).

⁹⁰ RULE 21(d).

⁹¹ 28 U.S.C. § 357(c); RULE 21(a), (g). The entire Judicial Conference can act as a sort of *en banc* court, in its sole discretion, “but a complainant or subject judge does not have a right to this review.” *Id.*

⁹² *Chandler v. Judicial Council*, 398 U.S. 74, 88 & n.10 (1970).

⁹³ 28 U.S.C. § 360.

⁹⁴ *Id.*

further the process of review.⁹⁵ But Rule 24 states that all orders must be made public after final action has been taken, with certain exceptions.⁹⁶ Rule 24 thus requires a broader disclosure than the Act itself, adopting recommendations from the Breyer Report.⁹⁷ The remaining rules handle miscellaneous procedural matters, such as disqualification, transfer, and withdrawal of the complaint.⁹⁸

3. The Saga Of Judge Newman.

These procedures were the battleground on which Judge Newman fought her colleagues on the Federal Circuit Court of Appeals. At virtually every step, the dispute followed the road less traveled—the subject judge rejected an informal process, fought the formal process, went public with her complaints, and even filed a lawsuit to assert her constitutional rights.

Because confidentiality guides the entire process, we can only glimpse the proceedings through certain published documents by the Federal Circuit and certain rhetoric from those who advocate for Judge Newman. The public can find the clearest guidance through the orders published by the Special Committee in July 2023 (“Special Committee Report”),⁹⁹ the Federal Circuit Judicial Council in September 2023 (“Judicial Council Order”)¹⁰⁰ and the Judicial Conduct and Disability Committee in February 2024 (“Memorandum of Decision”).¹⁰¹ Judge Newman’s lawsuit against the

Federal Circuit Judicial Council (“Petition”) provides her view of the same events.¹⁰² For more incisive (and more inflammatory) reporting, one can also consult certain opinion articles written about the process—though they rely on the same facts already made public from other sources.

As befits one of America’s foremost authorities on intellectual property law, Judge Pauline Newman holds a Ph.D. in chemistry from Yale (1952) and an LL.B. from NYU School of Law (1958). She worked as a research scientist for American Cyanamid (the only firm that would hire a woman, Judge Newman says)¹⁰³ before becoming in-house counsel for FMC Corporation.¹⁰⁴ She holds patents of her own,¹⁰⁵ and served as an intellectual property expert for the State Department from 1974 to 1984.¹⁰⁶ She advised President Jimmy Carter on the creation of the Federal Circuit, and then Ronald Reagan named her to that court in 1984.¹⁰⁷ In her forty years of service, she has been famous for her frequent dissents and praised as “the heroine of the patent system.”¹⁰⁸ One reporter described her family life this way: “She never married; she has no grandchildren but many grandclerks.”¹⁰⁹

She is also 97 years old.¹¹⁰ To put that into context, she was a teenager when Joe Biden was born. To put that into a different context, she is not even the oldest federal judge in current service—Senior Judge Leo Glasser is 100.¹¹¹ And her former Federal Circuit colleague Giles

⁹⁵ RULE 23.

⁹⁶ RULE 24.

⁹⁷ RULE 24 commentary.

⁹⁸ RULES 25-28.

⁹⁹ Report and Recommendation of the Special Committee, *In re Complaint No. 23-90015*, July 31, 2023, available at <https://cafc.uscourts.gov/wp-content/uploads/JudicialMisconductOrders/July%202023%20Report%20and%20Recommendation.pdf>.

¹⁰⁰ Order of the Judicial Council of the Federal Circuit, *In re Complaint No. 23-90015*, Sept. 20, 2023, available at <https://cafc.uscourts.gov/wp-content/uploads/JudicialMisconductOrders/September%202023%20Judicial%20Council%20Order.pdf>.

¹⁰¹ Memorandum of Decision, C.C.D. No. 23-01, Feb. 7, 2024, available at https://www.uscourts.gov/sites/default/files/c.c.d._no._23-01_february_7_2024.pdf.

¹⁰² Petition for Declaratory and Injunctive Relief (“PETITION”), *Newman v. Moore*, Case No. 1:23-cv-01334 (D.D.C. May 10, 2023).

¹⁰³ Rachel Weiner, *Colleagues want a 95-year-old judge to retire. She’s suing them instead*, Washington Post (June 6, 2023), available at <https://www.washingtonpost.com/dc-md-va/2023/06/05/newman-federal-circuit-oldest-judge-retirement-fight/>.

¹⁰⁴ <https://cafc.uscourts.gov/home/the-court/judges/judge-biographies/>.

¹⁰⁵ Weiner, *supra*, WASHINGTON POST (June 6, 2023) (“She would later receive her own patents for colorful, dirt-resistant synthetic fabric she helped invent”).

¹⁰⁶ *Id.*

¹⁰⁷ Michael Shapiro, *Newman, Oldest U.S. Judge, Feted Again in Non-Farewell Tour*, BLOOMBERG LAW (Oct. 12, 2023), available at <https://news.bloomberglaw.com/ip-law/newman-oldest-federal-judge-feted-again-in-non-farewell-tour>.

¹⁰⁸ JUDICIAL COUNCIL ORDER at 1, 44; see also, e.g., Andrew Michaels, *Judge Newman’s Recent Dissents Show She Is Fit For Service*, LAW360 (June 6, 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4472679.

¹⁰⁹ Weiner, *supra*, WASHINGTON POST (June 6, 2023).

¹¹⁰ <https://cafc.uscourts.gov/home/the-court/judges/judge-biographies/>; Daryl Lim, *I Dissent: The Federal Circuit’s “Great Dissenter,” Her Influence On The Patent Dialogue, and Why It Matters*, 19 VAND. J. ENT. & TECH. 873 (2017), available at <https://repository.law.uic.edu/facpubs/667/> (“The data confirms that Judge Newman is the Federal Circuit’s most prolific dissenter and that her dissents resonate with the Supreme Court, her colleagues, and academic commentators more than those of any other Federal Circuit judge”).

¹¹¹ Seth Stern & Suzanne Monyak, *Oldest US Judge Marks 100th Birthday, Then It’s Back To Work*, BLOOMBERG LAW (Apr. 4, 2024), available at <https://news.bloomberglaw.com/us-law-week/oldest-us-judge-marks-100th-birthday-then-its-back-to-work>. The oldest judges to serve on the federal bench

Rich was in active service until age 95, having never missed a court session until his final illness.¹¹² Accordingly, her age is extraordinary but not entirely unprecedented.

Objective truth is difficult to come by in this dispute (or indeed in *any* dispute), but it seems fair to say she is physically frail and (in some ways) remains a giant of the legal profession. Her paralegal testified she could not walk from her chambers door to the elevator without sitting down to rest.¹¹³ Yet her former law clerk and a current professor of law at the University of Houston Law School wrote an article praising the incisive brilliance of the opinions she issued in 2022 and 2023.¹¹⁴

Her recent health history has been hotly disputed, and would be none of our business except that they became the starting point of the allegations of her disability. The proceedings originally alleged she had a “heart attack” in the summer of 2021, though her a doctor said it would be more accurately described as a “cardiac event.”¹¹⁵ She also denied an eyewitness report that she “fainted” after an oral argument in 2022.¹¹⁶ She asked that her workload be reduced in 2021, and the court agreed—her caseload was half that of the other active judges, and she did not have to serve on motions panels.¹¹⁷ She still fell far short of these reduced productivity goals.

a. The Informal Procedure.

On March 8, 2023, the Judicial Council met without Judge Newman present to discuss “concerns about her mental fitness” and “her abnormally large backlog in cases.”¹¹⁸ Without issuing a written order, the Council unanimously voted to preclude the assignment of new cases to Judge Newman until she addressed the backlog of cases to which she was already assigned.¹¹⁹ Judge Newman challenged this action as unlawful.¹²⁰ The action was based on the general power conferred on Judicial Councils by 28 U.S.C. § 332(d) (“shall make all

necessary and appropriate orders for the administration of justice within its circuit”), because there was no proceeding yet under the Act.¹²¹ Broadly speaking, no one disputes that a Judicial Council has *some* power to change a judge’s work assignments to address shortfalls in productivity, but Judge Newman challenged the order as *ultra vires* (because she was excluded from the meeting), and excessive in both scope (zero new cases) and duration (indefinite).

On that same date, more than half the judges of the Federal Circuit in active service met with Judge Newman to convey their concern that she was unable to perform the work of an active-service judge.¹²² Still other judges reported that Judge Newman refused to communicate with them in response to their requests to meet.¹²³ Judge Newman met with the chief judge but said she would not retire,¹²⁴ and according to Chief Judge Moore, said instead that “she was the only person who cared about the patent system and innovation policy.”¹²⁵

Though an informal procedure is no doubt wise as a matter of human psychology, Judge Newman’s story demonstrates how it can fail, or even backfire. Indeed, Judge Newman’s later criticisms of the entire complaint process highlight how the “informal process” has no formal protections, at least as applied in her case.

b. The official complaint.

On March 23, 2023, Chief Judge Kimberly Moore took the next step in the process and issued an Order Identifying a Judicial Complaint (“Chief Judge’s Order”).¹²⁶ The Chief Judge’s Order cites past concerns about Judge Newman’s health, and reports of “impairment of her cognitive abilities” including making nonsensical statements from the bench.¹²⁷ But the Chief Judge’s Order primarily relies on statistics proving that Judge Newman was far less productive than other members of the Court.¹²⁸ She wrote about one-fourth as many opinions as the next-least-productive

lived until 104. *Id.* Nevertheless, Judge Newman is the oldest judge in *active* service. Shapiro, *supra*, BLOOMBERG LAW (Oct 12, 2023).

¹¹² Bart Barnes, *Giles S. Rich Dies at 95*, WASHINGTON POST (June 10, 1999), available at <https://www.washingtonpost.com/archive/local/1999/06/11/giles-s-rich-dies-at-95/cef021c8-cddd-40f6-b647-ad37785e131c/>.

¹¹³ JUDICIAL COUNCIL ORDER at Affidavit 1, PDF page 276.

¹¹⁴ Michaels, *supra*, Law360 (June 6, 2023).

¹¹⁵ JUDICIAL COUNCIL ORDER at 57-58.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 4; SPECIAL COMMITTEE REPORT at 105. Judge Newman insisted she was on more panels during this time than most of her colleagues, but even if this is true, the Special Committee’s report provides a wealth of data proving she was far less productive than any other member of the Federal Circuit. *Cf.* Petition at ¶ 18.

¹¹⁸ See Memorandum Opinion and Order at 6, Doc. No. 43, *Newman v. Moore et al.*, No. 1:23-cv-01334-CRC (D.D.C. Feb. 12, 2024).

¹¹⁹ *Id.*; SPECIAL COMMITTEE REPORT at 14.

¹²⁰ *Id.*

¹²¹ Memorandum Opinion and Order at 6, *supra*, Doc. No. 43.

¹²² Order Identifying a Judicial Complaint (“CHIEF JUDGE’S ORDER”), *In re Complaint No. 23-90015*, at 2, 5-6, available at <https://cafc.uscourts.gov/wp-content/uploads/March%2024,%202023%20Order.pdf>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 5.

¹²⁶ *Id.*

¹²⁷ CHIEF JUDGE’S ORDER at 2.

¹²⁸ *Id.* at 3-4.

judges, and was much slower in issuing her votes and opinions.¹²⁹ The Chief Judge also tersely refers to some personnel concerns involving her law clerk and disclosure of sensitive information about another employee.¹³⁰ For these reasons, the Chief Judge's Order explains, Chief Judge Moore took the highly uncommon step of making a complaint and empaneling a Special Committee to investigate these concerns.¹³¹

This process scrupulously followed the rules, but nevertheless was highly out of the ordinary. Recall that while the Act assumes that a complaint will typically be filed by a third party, and normally the Chief Judge performs the initial review of the complaint and thus serves as the first "judge" of the allegations.¹³² But when the chief judge files an Order Identifying a Judicial Complaint, that process of review occurs before any official complaint is filed, and no second party "initially reviews" the chief judge's allegations before sending it to a special committee for further investigation. Judge Newman later criticized this feature of the rules as unfair.

c. The special committee investigation.

As the Rules contemplate, a special committee began its investigation of the chief judge's allegations. As the Act expressly requires,¹³³ Chief Judge Moore appointed herself to the special committee—though Judge Newman later criticized this rule as well, insofar as it meant Chief Judge Moore "selected herself to chair the special committee to investigate her own complaint."¹³⁴

The special committee discovered a variety of concerns about Judge Newman's actions, with each revelation leading the committee to expand the scope of its own investigation. Between March and May 2023, the committee issued several letters making demands of Judge Newman, and Judge Newman retained counsel and responded defiantly.¹³⁵ To summarize the back-and-forth:

- (1) Medical testing. The committee demanded that Judge Newman undergo detailed neurological and neuro-psychological testing and provide medical records.¹³⁶ Judge Newman responded the requests were unclear, she would only consider testing by doctors of her own choice, and would not provide

medical records because they were irrelevant.¹³⁷ Subsequent orders attempted to provide more specifics about what testing would be necessary, but reiterated the insistence on a detailed neurological examination.¹³⁸ Judge Newman insisted on the right to subject the physicians to *voir dire* and *Daubert* review.¹³⁹

- (2) No transfer. Judge Newman demanded that the matter be transferred to another judicial council for decision, but the Judicial Council of the Federal Circuit refused because the Act says such transfers would be only under "extraordinary circumstances."¹⁴⁰ The Judicial Council said it would be willing to reconsider after Judge Newman complied with the orders requiring medical examinations and the production of medical records.¹⁴¹
- (3) Interview. The special committee also asked for a recorded interview with Judge Newman "in part to provide her an opportunity to provide information, 'including correcting any error of fact' in the Committee's orders and to 'clarify these matters.'"¹⁴² Judge Newman refused to comply.¹⁴³
- (4) Mistreatment of employees. The special committee received evidence that Judge Newman mistreated employees such as her judicial assistant, a law clerk, and IT personnel whom she accused of stealing her data.¹⁴⁴ This evidence would dramatically affect the tone of the committee's report.
- (5) Gag order. The Judicial Council and Special Committee seem particularly loath to talk about one aspect of their May 3, 2023 order—it threatened Judge Newman with sanctions if she were to publicly disclose the ongoing investigation.¹⁴⁵ Judge Newman objected, pointing out that she had the right under Rule 23 to consent to disclosure, and that the Rule says the Chief Judge should withhold her consent to disclose "only to the extent necessary to protect the confidentiality interests of the complainant or of

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 5-6.

¹³² 28 U.S.C. § 352; RULE 11.

¹³³ 28 U.S.C. § 353.

¹³⁴ PETITION, *supra*, at ¶ 19.

¹³⁵ See SPECIAL COMMITTEE REPORT at 11-17.

¹³⁶ *Id.* at 12-13.

¹³⁷ *Id.* at 18-19.

¹³⁸ *Id.* at 19-21.

¹³⁹ *Id.* at 22.

¹⁴⁰ JUDICIAL COUNCIL ORDER at 14; SPECIAL COMMITTEE REPORT at 17-18.

¹⁴¹ *Id.* (both citations).

¹⁴² JUDICIAL COUNCIL ORDER at 17.

¹⁴³ *Id.*

¹⁴⁴ SPECIAL COMMITTEE REPORT at 15-16.

¹⁴⁵ PETITION at 10.

witnesses.”¹⁴⁶ Judge Newman made this order—which she described as a “gag order”—part of her lawsuit against the Federal Circuit. (*See infra*.) A May 16 order responded to Judge Newman’s First Amendment concerns by insisting that it had only implemented Rule 23 as written and that the First Amendment’s scope was muted while the investigation was ongoing.¹⁴⁷ The order acknowledged that Judge Newman had the right to waive her confidentiality concerns, but nevertheless reminded her that while she could *make requests* for disclosure, she still could not do so unilaterally. The May 16 order published the prior orders in the case, as Judge Newman requested.¹⁴⁸ The subsequent orders resolving this dispute provide extremely detailed histories yet say nothing about this aspect of the process—and one may draw one’s own conclusions from that conspicuous omission.¹⁴⁹

d. *Judge Newman filed suit.*

Meanwhile, Judge Newman filed a lawsuit against Chief Judge Moore, the special committee, and the Federal Circuit Judicial Council, which brought the dispute into the public eye.

She filed suit in the D.C. District Court on May 10, 2023, represented by the nonprofit New Civil Liberties Alliance.¹⁵⁰ To broadly summarize her allegations, Judge Moore portrayed herself as being railroaded by an unfair process that was overly hasty and fundamentally unfair insofar as it was being managed by her prosecutor, Chief Judge Moore.¹⁵¹ She alleged the Judicial Council violated the separation of powers by refusing to assign new cases to her before the investigation process was concluded, asserted due

process challenges, argued the “gag order” preventing her from exercising the right to waive confidentiality was prior restraint in violation of the First Amendment (though this was dropped when the Judicial Council backed down), and made claims that the Act is unconstitutionally vague because it does not adequately define “disability” or define the proper scope of an investigation, and that Judge Newman’s Fourth Amendment rights were violated through unconstitutional searches.¹⁵²

It is *extremely* uncommon for a judge to respond to a misconduct or disability investigation by filing a lawsuit. Recall the Act expressly says that there shall be no judicial review of judicial council action.¹⁵³ But it is not unprecedented, insofar as the 1995 misconduct proceedings against Judge John McBryde of the Northern District of Texas resulted in a lawsuit and, in 2001, the key circuit court precedent on this issue.¹⁵⁴ The D.C. Circuit held due process allows a judge to file a lawsuit to challenge the *facial* unconstitutionality of the Act, but not the Act *as applied*.¹⁵⁵ As-applied challenges must go through the Act’s process of review, in which the national Judicial Conference has the final word.¹⁵⁶

When Judge Newman made her dispute public, sources outside the current court treated Judge Newman very favorably.¹⁵⁷ Former Chief Judge Paul Michel¹⁵⁸ and former Chief Judge Randall Rader¹⁵⁹ promptly wrote op-ed pieces in Judge Newman’s favor, arguing that Judge Newman was not disabled, the investigation was embarrassing, and that Judge Newman’s request for a transfer should be granted. Earlier this year, the Federalist Society presented a webinar that generally favors her complaints about the unfairness of the

¹⁴⁶ *Id.* at 10–11 (quoting RULE 23 commentary).

¹⁴⁷ May 16, 2023 Order, available at <https://cafc.uscourts.gov/wp-content/uploads/JudicialMisconductOrders/May%2016,%202023%20Order.pdf>.

¹⁴⁸ *Id.*

¹⁴⁹ *Cf.* SPECIAL COMMITTEE REPORT, JUDICIAL COUNCIL ORDER. Additionally, I have been unable to locate the “gag order” among the documents the Federal Circuit has released online. It is described in Judge Newman’s petition and in the Federal Circuit’s May 16, 2023 order.

¹⁵⁰ PETITION at 1.

¹⁵¹ *See generally id.*

¹⁵² *Id.*

¹⁵³ 28 U.S.C. § 357.

¹⁵⁴ *See McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S.*, 264 F.3d 52 (D.C. Cir. 2001).

¹⁵⁵ *Id.* at 58.

¹⁵⁶ *Id.*

¹⁵⁷ *See, e.g.,* Weiner, *supra*, WASHINGTON POST (June 6, 2023) (sympathetically presenting Judge Newman’s view, with some sympathy also toward Chief Judge Moore).

¹⁵⁸ Paul Michel, *Chief Judge Moore v. Judge Newman: An Unacceptable Breakdown of Court Governance, Collegiality and Procedural Fairness*, IPWATCHDOG (July 9, 2023), available at <https://ipwatchdog.com/2023/07/09/chief-judge-moore-v-judge-newman-unacceptable-breakdown-court-governance-collegiality-procedural-fairness/id=163181/>.

¹⁵⁹ Randall Rader, *The Federal Circuit Owes Judge Newman an Apology*, IPWATCHDOG (July 12, 2023), available at <https://ipwatchdog.com/2023/07/12/federal-circuit-owes-judge-newman-apology/id=163404/>. Chief Judge Rader is entitled to his opinion, but his demand that the court apologize to Judge Newman for violating her medical privacy *completely* misapprehends the circumstances of the case. The special committee wanted nothing more than to keep the case completely private; Judge Newman was the one who fought the “gag order” preventing her from publicizing the medical allegations against her, and she would later enter medical evidence in the public record.

process.¹⁶⁰ In particular, interviewer David Lat said his four-hour interview with Judge Newman indicated she was not “disabled in any sense in which we might use the term” and his positive impression of her was “utterly inconsistent with this doddering and totally out-of-it judge that was painted in the special committee report.”¹⁶¹

The Judicial Council could not respond in the media. But in its opinions, it expressed its frustration with Judge Newman’s aggressive response. In its order affirming sanctions against her, the Judicial Council criticized her decision to go public with harsh accusations:

Judge Newman and her counsel have aggressively sought to discredit this entire process by trying their case in the press while conjuring a narrative of “hostile,” “disrespect[ful],” and “appalling” treatment marked by exercises of “raw power,” all borne out of “personal animosity” toward Judge Newman.¹⁶²

e. The critical shift in focus.

The special committee then made a strategic pivot that significantly affected how the dispute unfolded.

On June 1, 2023, the special committee determined that Judge Newman’s refusal to cooperate prevented it from making an informed decision about whether she suffers from a disability.¹⁶³ So the Committee decided to “narrow the focus of its investigation”—to focus solely on a new charge that Judge Newman’s refusal to cooperate was *misconduct* under the Act, not *disability*.¹⁶⁴ Because of this decision, the Committee concluded (and Judge Newman agreed) that the issue could be decided on the papers with no need for witness testimony, and a briefing schedule was issued.¹⁶⁵

This order fundamentally changed the tone of the proceeding. It shifted focus away from Judge Newman’s actual condition, such that evidence of her disability would not be judged on the standard “is this true” but instead “is this allegation sufficient to require Judge Newman to be evaluated by a neurologist.” Whether she was actually disabled became legally irrelevant. And at

a more basic level, the allegation was no longer a sympathetic claim of “disability” but a less-sympathetic claim of “misconduct.”

Soon afterward, the Judicial Council reaffirmed its decision to refuse to assign new cases to Judge Newman, which was part of Judge Newman’s complaints in her lawsuit.¹⁶⁶ This new order explained what had not been clear from its earlier, unwritten order—that its decision was based on the judicial council’s general administrative power under 28 U.S.C. § 332, not under the Act.¹⁶⁷ This decision also narrowed the scope of the misconduct proceedings against Judge Newman in a way that made it harder for her to prevail (though perhaps justifiably so).

f. The special committee’s report.

The special committee issued its 111-page report and recommendations on July 31, 2023, in compliance with 28 U.S.C. § 353 and Rule 17. The report begins with a detailed history of its fight with Judge Newman, which helps the reader understand the committee’s view of how the dispute unfolded.¹⁶⁸

The committee first concluded that it had the legal authority to issue an order requiring Judge Newman to participate in a neurological examination.¹⁶⁹ The special committee primarily relies on a 2017 precedent from the Judicial Conduct and Disability Committee, which affirmed that District Judge John R. Adams (of the Northern District of Ohio) committed misconduct when he refused the Sixth Circuit’s order to be evaluated by a psychiatrist.¹⁷⁰ Judicial Councils do not have to yield to the subject judge’s choice of doctor, the committee concluded.¹⁷¹

The committee then concluded that it had obtained sufficient evidence to justify its demand that Judge Newman be evaluated by a neurologist.¹⁷² It drew from three categories of evidence.

First, the committee presented affidavit evidence from court personnel who attested to Judge Newman’s “agitated,” “paranoid,” “bizarre,” and “nonsensical” behavior.¹⁷³ These allegations are incredibly sad, especially to anyone who has ever experienced or studied the medical challenges caused by old age. But they are also upsetting because they focus on the victims

¹⁶⁰ <https://fedsoc.org/events/justice-suspended-an-update-in-the-case-of-judge-pauline-newman>.

¹⁶¹ *Id.* (starting at 16:30). You can see video clips from this interview at <https://davidlat.substack.com/p/6-video-clips-of-judge-pauline-newman> and draw your own impressions. For what it is worth, I would not characterize the Special Committee Report as portraying Judge Newman so negatively.

¹⁶² JUDICIAL COUNCIL ORDER at 2 (quoting from her response to the Special Committee Report).

¹⁶³ SPECIAL COMMITTEE REPORT at 22.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 23.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 11-25.

¹⁶⁹ *Id.* at 26-31.

¹⁷⁰ *Id.* at 26-27 (citing *In re Complaint of Judicial Misconduct*, C.C.D. No. 17-01 (U.S. Jud. Conf. 2017)).

¹⁷¹ *Id.*

¹⁷² *Id.* at 31-60.

¹⁷³ *Id.* at 33-50.

of Judge Newman's behavior, and Judge Newman's only response to these allegations about the victims of her misconduct has been to call the accusations "petty" and unworthy of her time.

- She repeatedly claimed that IT staff were incompetent or that she was being "hacked," when in reality she did not understand how the computer network functioned, and was incapable of passing elementary training sessions on computer security.¹⁷⁴ She accusing the Clerk of Court of stealing her data despite several attempts to explain the distinction between a single laptop computer and the data-storage function of the entire network.¹⁷⁵ IT staff were careful to testify that she was more than capable of understanding the IT infrastructure well into her eighties, and only *recently* began making unreasonable claims out of inability to understand technology.
- Her judicial assistant had to keep repeating the same information about cases during telephone calls, and her staff had to go to great lengths to enable her to function at all due to her lack of stamina.¹⁷⁶
- She did not properly manage a law clerk who was making plainly unreasonable demands on Judge Newman's assistant,¹⁷⁷ engaged in retaliation against employees who complained about mistreatment, and then incompetently managed the court's employee dispute resolution process.¹⁷⁸ A different law clerk repeatedly pleaded the Fifth Amendment to avoid testifying about Judge Newman's potential disability.¹⁷⁹ Judge Newman's consistent defense was that she had the right to run her chambers as she saw fit.

Second, the committee provided detailed data proving that she was incapable of expeditiously carrying out the duties of an active-duty judge.¹⁸⁰ Compared to her peers she wrote fewer opinions and took much

longer to dispose of cases, even considering her reduced workload.¹⁸¹ The committee pointedly rejected some reports in the legal media suggesting her productivity was not materially lower than her colleagues, by pointing to evidence that would not have been in the public domain before this proceeding.¹⁸²

Third, the special committee relied on the opinion of its expert consultant, whose name and opinions have been redacted.¹⁸³ He opined that the recommended neurological testing was reasonable and necessary.¹⁸⁴

The committee then explained its conclusion that Judge Newman had no good cause to refuse to cooperate with its orders.¹⁸⁵ The committee concluded the Act and Rules had given Judge Newman due process.¹⁸⁶ In particular, there was nothing unconstitutional or inappropriate about the Act's presumption that a subject judge's own peers would decide an allegation of misconduct or disability, and the recusal statute did not apply to proceedings of this nature because the Act expressly rejects any obligation for the judge's peers to disqualify themselves because they are the judge's peers.¹⁸⁷ Similarly, the presumption against transfer¹⁸⁸ not only worked against Judge Newman's request for another judicial council to decide her case, but the committee praised it as a laudable design because the members of the judicial council would be familiar with the witnesses and allegations.¹⁸⁹

Most interestingly, the committee specifically rejected the favorable report from a neurologist that Judge Newman submitted.¹⁹⁰ Her physician had done a very short cognitive test instead of the full testing recommended by the committee's retained expert, and even then, had not fully performed the ten-minute test.¹⁹¹ With an attention to detail one would expect from vigorous cross-examination, the special committee pointed out that the physician had not followed the published rules for administration of the test, and that if the rules were followed, Judge Newman would have failed (primarily because of a poor memory).¹⁹²

Judge Newman also did herself no favors, in the

¹⁷⁴ *Id.* In an interview, Judge Newman claimed the committee's finding that she could not complete IT training without the trainer telling her how to answer a multiple-choice test was "a conspicuous, verifiable falsehood" because she never took the test in the first place. <https://davidlat.substack.com/p/6-video-clips-of-judge-pauline-newman>. Though Judge Newman does not provide details, one gets the impression that she could have simply forgotten the experience—not that she remembers the experience clearly and disagrees with the characterization of what happened.

¹⁷⁵ *Id.* at 46-49.

¹⁷⁶ *Id.*

¹⁷⁷ The law clerk called the judicial assistant at 3:00 AM and told him to give her a wake-up call at 6:00 AM. *Id.*

¹⁷⁸ *Id.* at 39-42.

¹⁷⁹ *Id.* at 41.

¹⁸⁰ *Id.* at 50-58.

¹⁸¹ *Id.*

¹⁸² *Id.* at 56-58.

¹⁸³ *Id.* at 58-59.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 60-111.

¹⁸⁶ *Id.* at 64-76.

¹⁸⁷ *Id.*

¹⁸⁸ Not only does the Act restrict transfer to "extraordinary cases," statistics show it is almost never done in practice. *Id.* at 90.

¹⁸⁹ *Id.* at 88-90.

¹⁹⁰ *Id.* at 98-104.

¹⁹¹ *Id.*

¹⁹² *Id.* at 102-03.

committee's estimation, by refusing to even address most of the factual allegations against her.¹⁹³ She described the very troubling allegations by court personnel as “minutiae” and “petty grievances.”¹⁹⁴

The committee ultimately recommended that the judicial council issue a strong sanction to ensure that Judge Newman understood the gravity of the situation.¹⁹⁵ It recommended that she be removed from all case assignments until she complied with the orders.¹⁹⁶

g. *The Judicial Council Order.*

On September 20, 2023, the Federal Circuit Judicial Council issued its Order accepting the special committee's findings and sanctioning Judge Newman.¹⁹⁷ It begins by recounting the evidence against Judge Newman in some detail—and for those interested, the Judicial Council Order is surely the most *readable* discussion of the sad conflict.¹⁹⁸ The Judicial Council rejects Judge Newman's allegations, raised in her response to the Special Committee Report, that she “can run her chambers as she sees fit” and had no opportunity to respond to the allegations against her.¹⁹⁹ It also rejects Judge Newman's renewed request for transfer to another circuit, especially because she bluntly conceded the purpose of the transfer would be to completely restart the process from the beginning.²⁰⁰ A new medical report submitted with Judge Newman's Response was not persuasive because it once again depended on a simple test used “as a screening test for dementia” instead of the complex investigation merited by Judge Newman's conduct.²⁰¹ The test proved that Judge Newman has a sense of humor, in this author's opinion,²⁰² but the committee concluded it was too superficial to prove she was free from disability.²⁰³

The committee's pivot to an investigation of *misconduct* instead of *disability* provided the Judicial Council with a reason to dispose of Judge Newman's criticisms of the way the investigation began.²⁰⁴ All that was in the past (though the Judicial Council admits no error), and the only question now was whether Judge

Newman had good cause to disregard an order that she submit to the detailed neurological testing ordered by the special committee.²⁰⁵

The committee concluded that an appropriate sanction was to suspend her from any new cases on a one-year term, renewable by review at the end of that year, though Judge Newman could terminate that suspension by complying with the committee's order and allowing the committee to complete its investigation of her alleged disability.²⁰⁶ Judge Newman petitioned for review.

h. *The Judicial Conduct and Disability Committee Affirmed.*

On February 7, 2024, the Judicial Conduct and Disability Committee of the Judicial Conference of the United States issued its Memorandum of Decision denying Judge Newman's petition for review.²⁰⁷ The JC&D Committee discussed and accepted the sufficiency of the evidence that her disability justified the need for neurological examination,²⁰⁸ but paid the most attention to the legal issues presented by Judge Newman's appeal.

The JC&D Committee rejected Judge Newman's arguments that the “personal knowledge” of the members of the special committee or Judicial Council required them to disqualify or recuse themselves.²⁰⁹ The system does not typically require disqualification, the recusal rules do not apply, and the committee's decision to narrow its investigation to a *misconduct* allegation instead of a *disability* allegation squelched any concerns that the Council members would be witnesses.²¹⁰

As for Judge Newman's contention that the Judicial Council erred by refusing to transfer her case, the JC&D Committee affirmed that transfers should be considered only in extraordinary circumstances.²¹¹ The current posture of the proceeding—which focuses narrowly on the allegation of misconduct—did not support Judge Newman's argument.²¹² However, if she were to comply and the members of the Judicial Council might be called as witnesses to testify about their personal knowledge of

¹⁹³ *Id.* at 105-06.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 109-11.

¹⁹⁶ *Id.*

¹⁹⁷ See JUDICIAL COUNCIL ORDER.

¹⁹⁸ As befits the opinion of a sort of appellate court instead of the findings and conclusions of the factfinder, it strikes a better balance between detail and narrative readability.

¹⁹⁹ *Id.* at 34-36.

²⁰⁰ *Id.* at 47-50.

²⁰¹ *Id.* at 54.

²⁰² Dementia tests often ask the subject to name the current and former Presidents, and Judge Newman is not a fan of Donald Trump. See *id.* at PDF page 157.

²⁰³ *Id.* at 54.

²⁰⁴ *Id.* at 57-68.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 70-71.

²⁰⁷ Memorandum of Decision, *In re Complaint No. 23-90015*, C.C.D. No. 23-01 (U.S. Jud. Conf. 2017).

²⁰⁸ *Id.* at 21-26.

²⁰⁹ *Id.* at 15-16.

²¹⁰ *Id.*

²¹¹ *Id.* at 18-21.

²¹² *Id.*

her capacity, the Judicial Council should give due consideration to that concern because extraordinary circumstances could include the situation where multiple members of the judicial council were disqualified.²¹³ The reader might see this portion of the opinion as a concession of sorts, or even an enticement for Judge Newman to undergo the necessary neurological evaluation so that she can proceed to the next stage of the process and obtain some of the relief she seeks.

Finally, the JC&D Committee rejected Judge Newman's argument that her suspension was excessive.²¹⁴ A one-year suspension was not out of line with previous penalties, and the fact that the suspension could be renewed annually was counterbalanced by the fact that Judge Newman could end the suspension at any time by submitting to the required testing.²¹⁵ The fact that her suspension precluded her from serving in *en banc* sittings was justified by general language in the Act.²¹⁶

i. The district court dismissed Judge Newman's lawsuit.

A few days after the JC&D Committee affirmed Judge Newman's suspension, the district court issued a Memorandum Opinion and Order in her lawsuit.²¹⁷ The Memorandum Opinion and Order denied Judge Newman's request for a preliminary injunction and granted the defendants' Rule 12(c) motion to dismiss many of her claims on the pleadings.²¹⁸

The court first held that mootness barred Judge Newman's complaints about the Federal Circuit's unwritten order declaring that she would be assigned no new cases until she cleared her backlog of cases, which had been based on the Judicial Council's generic administrative power.²¹⁹ That order was lifted after she cleared the backlog—and it was therefore moot even though it was a Pyrrhic victory because she had already been suspended for misconduct.²²⁰ The court rejected Judge Newman's attempt to plead exceptions to the mootness doctrine, such as “capable of repetition yet

avoiding review,” because Judge Newman had not shown that if she were assigned cases in the future she would be able to resolve them more promptly.²²¹

The court next decided to follow the D.C. Circuit's precedent in *McBryde* holding that a subject judge could only make a facial challenge to the Act, not to the Act as applied.²²² It rejected Judge Newman's argument that *McBryde* was no longer good law in light of the Supreme Court's dim view of agency adjudication of constitutional issues in *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 195 (2023).²²³ The court was required to follow *McBryde*, and at any rate, *McBryde* allowed the very sort of Article III review that *Axon* found necessary.²²⁴ Thus, *McBryde* required the court to dismiss most of Judge Newman's claims.²²⁵

In July 2024, the court granted the defendants' motion for judgment on the pleadings as to Judge Newman's remaining claims, which asserted that the Act facially violates the Fourth Amendment and is unconstitutionally vague.²²⁶ Judge Newman's Fourth Amendment challenge failed under the extremely deferential standards applied to facial constitutional challenges, because she had not shown that the Act was unconstitutional in all its applications, especially when one considers “only applications of the statute in which it actually authorizes or prohibits conduct.”²²⁷

As for Judge Newman's claim that the Act is unconstitutionally vague, the court held that while Judge Newman argues “the statute is subject to multiple interpretations,” nevertheless, “[A] statutory term is not rendered unconstitutionally vague because it do[es] not mean the same thing to all people, all the time, everywhere.”²²⁸ A statute is unconstitutionally vague only when it “specifies no standard of conduct at all,” and not when it presents “an imprecise but comprehensible normative standard, whose satisfaction may vary depending upon whom you ask.”²²⁹

Judge Newman promptly appealed to the D.C. Circuit Court of Appeals, where her appeal was docketed in July 2024.²³⁰

²¹³ *Id.* at 20-21.

²¹⁴ *Id.* at 26-29.

²¹⁵ *Id.* at 28-29.

²¹⁶ *Id.*

²¹⁷ Memorandum Opinion and Order at 6, Doc. No. 43, *Newman v. Moore et al.*, No. 1:23-cv-01334-CRC (D.D.C. Feb. 12, 2024).

²¹⁸ *Id.*

²¹⁹ *Id.* at 11-16.

²²⁰ *Id.*

²²¹ *Id.* at 13-14. The court noted that Judge Newman was not asserting a facial challenge to the Judicial Council's “authority to issue case-backlog rules in the first instance.” *Id.* at 14.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 22-25.

²²⁶ Memorandum Opinion, Doc. No. 50, *Newman v. Moore et al.*, No. 1:23-cv-01334-CRC (D.D.C. July 9, 2024).

²²⁷ *Id.* at 4-5, quoting *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 415, 418 (2015).

²²⁸ *Id.* at 11-12, quoting *United States v. Bronstein*, 849 F.3d 1101, 1107 (D.C. Cir. 2017).

²²⁹ *Id.* at 8, quoting *Bronstein*, 849 F.3d at 1107.

²³⁰ Docket number 24-5173.

j. *Reflecting on Judge Newman's treatment.*

Some libertarians have argued that Judge Newman has been railroaded, and other news organizations have thrilled to print each new development in her story because it is so uncommon and so *public*. The Federal Circuit Judicial Council has repeatedly emphasized its sadness at fulfilling its duty. No one cares what this author thinks, so he is free to offer some observations.

First, after listening to interviews with Judge Newman and reviewing the evidence against her (insofar as it has been made public), I have tremendous compassion for Judge Newman as a person, but absolutely *zero* compassion for her legal filings in the case. A tone of “more in sorrow than in anger” would have served her much better than the furious tone of her pleadings. Her dogged insistence upon dissent has been the hallmark of her four decades on the Federal Circuit, but she did not nimbly make the shift from judge to litigant. Most importantly, the allegations against her are neither “minutiae” or “petty grievances,” as she insists. They are allegations of serious mental decline that caused real harm to actual human beings. If even *one-fourth* of the allegations of her incapacity are true, then she had the moral obligation to retire from the bench immediately. Nevertheless, we must have some compassion for how incapacity can cause a brilliant mind to go so far astray.

Second, I have even less compassion for those who take Judge Newman's position at face value without informing themselves about the disability at issue. Perhaps the most infuriating aspect of the entire case are the opinion pieces from those who believe that Judge Newman cannot possibly be disabled because she can carry on an intelligent conversation about patent law, discuss old times on the Court, or can write an incisive opinion on the issues in a particular case. The tragedy of age-related decline is that a person can retain long-term memories long after serious impairment to their short-term memory, or can perform some tasks at a high level despite a significantly impairment to their mood and temperament.²³¹ For the special committee to present evidence that Judge Newman was unable to pass a simple IT training test after multiple attempts—even though the multiple-choice questions remained the same each time—and for Judge Newman to reject this accusation as completely groundless *because she evidently does not remember it happening*,²³² would be hilarious if it were not so terrifyingly sad.²³³

Third, the process generally demonstrates that in the real world, the Act and Rules do a good job of

judging the judges. Judge Newman's particular situation is far outside the norm; every Chief Judge thanklessly reviews about a hundred meritless allegations a year from disgruntled prisoners or litigants. They do that task diligently, and the system strikes a good balance between transparency and confidentiality. Despite the heated rhetoric of Judge Newman's filings, the Federal Circuit Judicial Council proceeded on the basis of serious evidence and gave Judge Newman every chance to cooperate in a dignified manner.

Fourth, having said all of that, Judge Newman presents an incisive and troubling *structural* criticism, if not a valid case on her own behalf. At every step, the drafters of the Act, the Rules, and the Breyer Committee Report built their system on the assumption that everyone involved is acting in good faith. It makes sense to allow a Chief Judge to use an informal process to try to avoid embarrassment to a respected colleague; it makes sense that a judge should be judged by those who know her work and her interactions with the court's personnel (i.e. her “peers” on the federal bench); it makes sense that concepts like “disability” should be defined in ways that everyone understands but no two people would define in exactly the same way; it makes sense that the process should be shielded from judicial review because it is conducted by judges in the first instance.

And yet—once you go through the looking-glass and see this process through the eyes of someone who fears her accusers are acting in *bad* faith, the system suddenly looks very different. The kindly chief judge who seeks to resolve problems before they start has become prosecutor, witness, and judge. *Certainly*, from a litigator's point of view, it looks like Chief Judge Moore simply outmaneuvered Judge Newman. Consider these aspects of the proceeding:

- Judge Newman was stripped of new cases in an unwritten order issued at a meeting to which she was not invited (despite being a member of the Judicial Council), and then those same peers confronted her in person and urged her to resign, which I am sure felt to her like a coup (or maybe an intervention). When she finally got the chance to challenge that order in court, it was denied as moot because of the passage of time.
- The special committee ordered Judge Newman to keep the proceedings confidential in an order that she characterized as a “gag order,” and after she defiantly filed her lawsuit and drew public

²³¹ Citations on how aging affects short-term memory would fill many pages, Google suggests, and I am no medical expert. I will instead cite fiction: William Shakespeare, *KING LEAR* and Matthew Thomas, *WE ARE NOT OURSELVES* (Simon & Schuster 2015).

²³² See *supra*, <https://davidlat.substack.com/p/6-video-clips-of-judge-pauline-newman>.

²³³ “The world is a comedy to those that think, and a tragedy to those that feel.”—Horace Walpole.

attention to her plight, the committee backed down and omitted this part of the story from its narrative.

- By the time Judge Newman’s legal team could lodge an objection to one order, the special committee had issued another and objections to the prior order were rejected as moot. As one experienced Federal Circuit litigator put it in a recent news story, “It’s a problem Judge Newman resisted having any cognitive testing, and it’s also a problem that the Federal Circuit has flopped about from one justification to another for removing an Article III judge against her will.”²³⁴
- Judge Newman contended her unwillingness to cooperate with the required medical examination was based on her mistrust of how the process had unfolded so far, but by shifting the allegations from *disability* to *misconduct*, the various committees evaluated those prior actions under a more lenient standard (i.e. were the allegations “sufficient” instead of “true”). By analogy, this shift has the air of shifting the inquiry to whether the accused *resisted* arrest, and thus preventing an inquiry whether the police wrongfully initiated the arrest.
- While I understand the reasoning of those authorities that hold that a subject judge cannot file an as-applied challenge to the constitutionality of the Act in court—Congress rejected judicial review in some of the plainest words it has ever written—it still leaves me uneasy to leave any American without a path to asserting her constitutional rights.

Maybe my concerns about the whole sordid story can be summed up this way: one gets the sickening impression that this train could not be stopped *even if* Judge Newman proved it should never have left the station.²³⁵

Having said that, my concerns are structural and I do not criticize Chief Judge Moore or the special committee for using the system. At each step, they honored both the letter and the spirit of the rules. They gathered more than ample evidence to justify both initiating the process and the resolution of that process. And Judge Newman can return to service at any time, if

she is fit. In the words often used to describe the contempt process, the contemnor “holds the keys to the jail in her pocket.” If I think this flawed system nevertheless resulted in justice in this extraordinary case, then surely the system cannot be that flawed. Right?

Fifth, I wonder how the long-standing case law in this area will hold up to further appellate review. Judge Newman has indicated she will argue that *McBryde*’s deference to the Article III courts’ ability to police themselves as an administrative matter has not survived recent United States Supreme Court cases that have challenged the propriety of agency adjudication. Judge Newman particularly cited *Axon Enter., Inc. v. Fed. Trade Comm’n*,²³⁶ but I wonder whether subsequent cases like *SEC v. Jarkesy*²³⁷ and *Loper Bright Enterprises v. Raimondo*²³⁸ also signal a general distaste for governmental processes that prevent judges from reviewing constitutional rights. Of course, those opinions express distrust of Article I agencies, not the federal judiciary’s ability to police itself. The Supreme Court is part of the Article III club—when it wants to be, that is—and has recently insisted on the virtues of self-policing.²³⁹

It is a curious problem. The Act and the Rules guarantee that federal judges decide the constitutionality of judicial misconduct proceedings, and federal judges regularly decide constitutional challenges. Does it matter that they make that decision in an “administrative” capacity, not a “judicial” capacity? *Why*? Does it matter *which* judges make the decision? Should subject judges be entitled to transfer their cases to a different set of judges than the ones they have known for years? *Why*? Why assume that federal judges will be prejudiced *against* the judge because of their personal knowledge? After all, one would expect the man-on-the-street to believe that the current system encourages favoritism in favor of judges, not mistreatment of them. But it turns out the judiciary can have what one commentator calls a “guild mentality,” in which familiarity leads both to favoritism *and* contempt.²⁴⁰

²³⁴ Michael Shapiro, *97-Year-Old Judge Newman to Appeal Loss in Suspension Suit*, BLOOMBERG LAW (July 9, 2024) (quoting Mitchell Epner of Kudman Trachten Aloe Posner LLP), available at <https://news.bloomberglaw.com/ip-law/judge-axes-newman-suit-seeking-to-end-federal-circuit-suspension>.

²³⁵ See also, e.g., Donald E. Campbell, *Should the Rooster Guard the Henhouse: A Critical Analysis of the Judicial Conduct and Disability Act of 1980*, 28 MISS. C. L. REV. 381 (2009) (presenting a structural criticism of the Act before the issues with Judge Newman ever arose).

²³⁶ 598 U.S. 175, 195 (2023).

²³⁷ 603 U.S. ___, No. 22-859 (June 27, 2024) (holding the SEC could only obtain civil penalties in federal court and not in its own administrative court system, due to the Seventh Amendment’s right of trial by jury).

²³⁸ 603 U.S. ___, No. 22-451 (June 28, 2024) (overruling *Chevron* deference).

²³⁹ On the subject of who judges the Supreme Court, see *infra*.

²⁴⁰ Campbell, 28 MISS. C. L. REV. at 395-98 (noting that in the famous *McBryde* case, Chief Judge Politz warned Judge McBryde that by asking the Judicial Council to review the chief judge’s decision to transfer two cases away from him, Judge McBryde was exposing himself to an investigation of his entire career on the bench, which resulted in a harsh

4. The Supreme Court's Unique Situation.

a. *The Supreme Court Is Not Governed By Existing Codes, But Is That A Good Idea?*

The United States Supreme Court is exempt from the previous discussion. Why?

Congress. Or maybe the Constitution. Depends who you ask.

As mentioned above, the Act does not regulate the Justices of the United States Supreme Court; Congress conspicuously omitted them from the definition of a “judge.”²⁴¹ And the Federal Code of Conduct for United States Judges likewise excludes Supreme Court Justices from its scope, again by omission.²⁴² Until recently, there was literally no code of conduct that even purported to bind the Supreme Court.

Congress is not always “hands off” with the Justices, however. The 1978 Ethics in Government Act includes the Justices among the “judicial officers” who must file financial reports.²⁴³ And the primary recusal statute, 28 U.S.C. § 455, expressly applies to “justices” as well as “judges.”²⁴⁴ But does the Court agree that Congress had the power to include them within the scope of these laws?

In 2011, Chief Justice Roberts politely noted that the justices had never had to *insist* that Congress lacked the power to regulate the Supreme Court, and implied the Justices comply with Congressionally enacted rules only voluntarily. That is, in his 2011 Year-End Report, he observed that “[a]s in the case of financial reporting and gift requirements, the limits of Congress’s power to require recusal have never been tested.”²⁴⁵ He then added, “[t]he Justices follow the same general principles respecting recusal as other federal judges, but the application of those principles can differ due to the unique circumstances of the Supreme Court.”²⁴⁶ While Supreme Court justices consult the rules, he explained, the Court does not second-guess its members’ decisions

whether to recuse themselves, because the Court considers each member irreplaceable due to the Court’s unique role in federal government.²⁴⁷ In this author’s opinion, Chief Justice Roberts may have meant his observations on Congressional power to seem moderate, but they instead resemble America’s position on Taiwanese independence—menacing, vague, and sometimes contradictory.

That studied ambiguity went out the window in 2023 when Justice Alito told the Wall Street Journal editorial page that Congress *can’t* regulate the Supreme Court.²⁴⁸ He said, “no provision in the Constitution gives them the authority to regulate the Supreme Court — period.”²⁴⁹

It is hard to square Justice Alito’s broad opinion with the text of the Constitution. One might argue the Supreme Court has unregulated authority over cases within its original jurisdiction, but that jurisdiction extends only to “Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.”²⁵⁰ As to all other cases that might reach the Supreme Court—that is, the vast majority of them—the Supreme Court “shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, *and under such Regulations as the Congress shall make.*”²⁵¹ Accepting appellate jurisdiction has consequences, surely,²⁵² though general structural concerns about the independence of the branches of government also support Justice Alito’s view.

Justice Alito made his defiant statement in response to a wave of unpleasant publicity that prompted some in Congress to publicly propose imposing ethics rules on the United States Supreme Court.²⁵³ The issue came to public attention in 2022 when Justice Clarence Thomas refused to recuse himself from cases involving the events of January 2021, including Presidential immunity case *United States v. Trump*, despite pressure to do so.²⁵⁴ Yet text messages show his wife advised

sanction based on conduct committed piecemeal over many years).

²⁴¹ 28 U.S.C. § 351(d)(1).

²⁴² Code of Conduct for United States Judges (“This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate Judges”), *available at* https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

²⁴³ 5 U.S.C. § 13101(10) (defining “judicial officer” to include the Chief Justice and Associate Justices of the United States Supreme Court).

²⁴⁴ 28 U.S.C. § 455.

²⁴⁵ 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY, *available at* <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 9.

²⁴⁸ See, e.g., Josh Gerstein, *Alito: Supreme Court can’t regulate Supreme Court ethics*, POLITICO (July 28, 2023), *available at* <https://www.politico.com/news/2023/07/28/alito-congress-supreme-court-ethics-00108830>.

²⁴⁹ *Id.*

²⁵⁰ U.S. CONST., Article III, Section 2.

²⁵¹ *Id.* (emphasis added).

²⁵² An interesting thought experiment: imagine a world in which the Supreme Court refused to accept the appellate jurisdiction conferred by Congress and limited itself to its original jurisdiction to avoid Congressional oversight. One wonders whether it would have some of the same consequences as Texas’s efforts to limit FERC regulation.

²⁵³ See, e.g., <https://www.judiciary.senate.gov/supreme-court-ethics-reform>.

²⁵⁴ See, e.g., <https://hankjohnson.house.gov/sites/evo-subsites/hankjohnson.house.gov/files/evo-media-document/2023.12.15-thomas-letter-final.pdf> (a letter from

Donald Trump's chief of staff to "pursue unrelenting efforts to overturn the 2020 election," among her many other actions favoring the so-called "Stop the Steal" movement.²⁵⁵ Public concern was then amplified in 2023 by the disclosure that donors had paid Justice Clarence Thomas's travel expenses, tuition for a relative, and the price for a home where his mother had lived—and that Justice Thomas had not disclosed any of these gifts on his financial reports.²⁵⁶ Critics realized there was no way to *make* a Supreme Court Justice obey a statute or disqualify himself from a case. And these reports keep coming; in August 2024, the Senate Finance Committee disclosed that its investigations uncovered *still more* undisclosed largesse that Justice Thomas had received but not disclosed on his reports.²⁵⁷

And this year, Justice Alito became the subject of reporting that his homes have displayed flags showing sympathy for the so-called "Stop the Steal"

several liberal United States Representatives urging Justice Thomas to recuse himself, citing news reports of his wife's involvement in the events at issue).

²⁵⁵ Bob Woodward and Robert Costa, *Virginia Thomas urged White House chief to pursue unrelenting efforts to overturn the 2020 election, texts show*, WASHINGTON POST (March 24, 2022), available at <https://www.washingtonpost.com/politics/2022/03/24/virginia-thomas-mark-meadows-texts/>. Virginia Thomas told reporters she did not include Justice Thomas in her political efforts. *Id.*

²⁵⁶ See, e.g., Joshua Kaplan, Justin Elliott, and Alex Mierjeski, *Clarence Thomas and the Billionaire*, ProPublica (Apr. 6, 2023), available at <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow>.

Justice Thomas released a statement that he had followed guidance from "colleagues and others in the judiciary" when omitting these and noted that he would follow the new guidance issued by the Judicial Conference. <https://www.documentcloud.org/documents/23745868-clarence-thomas-statement-4-7-23>. Subsequent investigation by the Senate Committee on the Judiciary indicated that Justice Thomas still had not fully disclosed all the travel he had received as a gift. <https://www.judiciary.senate.gov/press/releases/durbin-reveals-omissions-of-gifted-private-travel-to-justice-clarence-thomas-from-harlan-crow>.

²⁵⁷ Justin Jouvenal, *Sen. Wyden says Thomas took two more undisclosed flights on donor's jet*, WASHINGTON POST (Aug. 5, 2024), available at <https://www.washingtonpost.com/politics/2024/08/05/supreme-court-clarence-thomas-harlan-crow/>.

²⁵⁸ To briefly summarize, and to strategically use the passive voice, an upside-down American flag was flown outside Justice Alito's home during the protests of January 2021, contrary to principles of judicial ethics that advise judges to avoid partisan activities. Jodi Kantor, *At Justice Alito's House, A "Stop The Steal" Symbol On Display*, N.Y. TIMES (May 16, 2024), available at <https://www.nytimes.com/2024/05/16/us/justice-alito-upside-down-flag.html>. Justice Alito said that his wife chose to fly the flag during a fight with a neighbor who displayed a sign opposing President Trump. *Id.* It was soon

movement.²⁵⁸ He rejected calls to recuse himself because of these displays.²⁵⁹ Investigations into undisclosed vacations and travel then expanded to include allegations that Justice Alito failed to disclose a valuable trip that was paid for by an individual who later had case pending before the Court.²⁶⁰

Because the two justices most obviously affected by these scandals are the two most conservative justices on the Court,²⁶¹ proposals to impose an ethics code have taken on a partisan character.²⁶² Yet Justice Sotomayor has also come under attack for using her staff to promote her books through helpful "recommendations" about how many copies public institutions should buy.²⁶³ Reporters recently noted that both Justice Sotomayor and Justice Gorsuch had not recused themselves from cases involving their publishers.²⁶⁴ And for what it's worth, the nonprofit Fix The Court keeps an ongoing tally of cases in which the Supreme Court justices across

revealed that another partisan flag associated with the January 6 protests (the "Appeal to Heaven" flag) flew outside Justice Alito's beach home in 2023. Jodi Kantor, Aric Toler, and Julie Tate, *Another Provocative Flag Was Flown At Justice Alito's Home*, N.Y. TIMES (May 22, 2024), available at <https://www.nytimes.com/2024/05/22/us/justice-alito-flag-appeal-to-heaven.html>. The "Appeal to Heaven" flag is now posted outside the office of House Speaker Mike Johnson. *Id.*

²⁵⁹ See, e.g., <https://www.judiciary.senate.gov/press/releases/durbin-calls-on-justice-alito-to-recuse-himself-from-cases-related-to-the-2020-election-after-a-stop-the-steal-symbol-was-displayed-in-his-yard>.

²⁶⁰ Justin Elliott, Joshua Kaplan, and Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation With GOP Billionaire Who Later Had Cases Before The Court*, PROPUBLICA (June 20, 2023), available at <https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court>.

²⁶¹ Citation needed? Okay: <https://www.axios.com/2023/07/03/supreme-court-justices-political-ideology-chart>.

²⁶² See, e.g., <https://www.judiciary.senate.gov/supreme-court-ethics-reform> (Senator Dick Durbin effusively praising himself for holding hearings about Justice Thomas's finances and a proposed ethics bill).

²⁶³ See, e.g., Brian Slodysko and Eric Tucker, *Supreme Court Justice Sotomayor's staff prodded colleges and libraries to buy her books*, AP NEWS (July 11, 2023), available at <https://apnews.com/article/supreme-court-sotomayor-book-sales-ethics-colleges-b2cb93493f927f995829762cb8338c02>. The Court released a statement defending the actions as coming within judicial ethics guidelines because her staff merely recommended how many copies an institution should buy. <https://www.documentcloud.org/documents/23870397-supreme-court-statement>.

²⁶⁴ Devan Cole, *2 Supreme Court justices did not recuse themselves in cases involving their book publisher*, CNN (May 5, 2023), available at <https://www.cnn.com/2023/05/04/politics/sonia-sotomayor-neil-gorsuch-book-recusal-supreme-court-cases/index.html>.

the political spectrum have not recused themselves despite a potential conflict of interest.²⁶⁵

b. *The Supreme Court's "Statement."*

On April 23, 2023, Chief Justice Roberts sent a letter to Senator Dick Durbin "respectfully declin[ing his] invitation" to testify before the Senate Committee on the Judiciary on the various allegations of unethical conduct at the Court.²⁶⁶ However, Chief Justice Roberts attached a "Statement on Ethics Principles and Practices" to try to address the public concern. The Statement begins by declaring the Justices "reaffirm and restate foundational ethics principles" to "provide new clarity to the bar and to the public."²⁶⁷ So what are these foundational ethics principles?

A self-enforced honor system, it turns out. The Statement asserts the Justices are not subject to the authority of the Judicial Conference of the United States, but that in 1991, the Justices "voluntarily adopted a resolution to follow the substance of the Judicial Conference Regulations."²⁶⁸ That included the (also voluntary) decision to follow the rules on financial disclosure imposed by Congress.²⁶⁹ The Statement then explains the Court's rules for receiving payment for teaching: it follows the regulation allowing compensation for teaching "at an accredited educational institution," through a process by which each Associate Justice asks the Chief Justice for permission, and the Chief Justice asks the entire Court for permission.²⁷⁰

More interesting is the Court's explanation that it takes the position that the application of the recusal statutes "can differ due to the unique institutional setting of the Court,"²⁷¹ a point that Chief Justice Roberts made in 2011. Recusal must be counterbalanced by the concern that the Court cannot easily substitute other judges for a disqualified justice.²⁷² As a result, "Justices have a duty to sit that precludes withdrawal from a case as a matter of convenience or simply to avoid

controversy." The Court then explains that it will maintain a hands-off attitude toward each Justice's decision to recuse:

Individual Justices, rather than the Court, decide recusal issues. If the full Court or any subset of the Court were to review the recusal decisions of individual Justices, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate.²⁷³

Justices may, but need not, explain their reasons for recusing themselves in a particular case.²⁷⁴ In practice, some have done so and others have not.²⁷⁵

c. *The Supreme Court's New Code of Conduct.*

If the Statement was meant to calm the storm, it did not. So the Supreme Court tried again.

In November 2023, the United States Supreme Court issued its own Code of Conduct.²⁷⁶ The preamble explains that the Court has long considered itself guided by "the equivalent of common law ethics rules" drawn from a variety of sources, but issued this Code "to dispel th[e] misunderstanding" that the Justices Court "regard themselves as unrestricted by any ethics rules."²⁷⁷ The Code "represents a codification of principles that we have long regarded as governing our conduct."²⁷⁸ The Code is accompanied by a "Commentary" that is clearly a revised version of the April 25, 2023 Statement with some additions and deletions here and there.

Though the preamble claims the Justices modeled the Code on a sort of "common law," the Code of Conduct closely resembles the Code of Conduct for United States Judges.²⁷⁹ This makes it fairly easy to identify where the Supreme Court made changes, though whether those changes are worrisome (or even

²⁶⁵ <https://fixthecourt.com/2024/05/recent-times-justice-failed-recuse-despite-clear-conflict-interest/>. These errors often are a Justice's failure to recall that they participated in the case at an earlier stage while a circuit judge or as Solicitor General, and failures to discover that they own stock in a corporate parent of a party before the Court that has a different name than the parent. *Id.*

²⁶⁶ STATEMENT ON ETHICS PRINCIPLES AND PRACTICES (Apr. 25, 2023), available at <https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf>.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ See Joe Patrice, *Remember That New Supreme Court Ethics Code? Sam Alito Doesn't*, ABOVE THE LAW (Jan. 17, 2024), available at <https://abovethelaw.com/2024/01/remember-that-new-supreme-court-ethics-code-sam-alito-doesnt/> (noting the difference in the recusal practices of Justices Kagan and Alito recorded in the Court's order list, and conceding that neither practice violates any part of the very lenient Code).

²⁷⁶ CODE OF CONDUCT OF THE UNITED STATES SUPREME COURT, available at https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.

²⁷⁷ *Id.* at 1.

²⁷⁸ *Id.*

²⁷⁹ The Commentary acknowledges its role as the primary source, while noting the Justices adapted the prior Code "to the unique institutional setting of the Supreme Court." Code of Conduct for the Supreme Court, Commentary at 10.

significant) will be in the eye of the beholder.

Consider these possibly superficial distinctions between the two Codes:

Canon 1: The Justices will “maintain and observe” high standards of conduct, but the Code omits any duty to “enforce” those conduct rules on others.

Canon 3: The Justices do not require themselves to “take appropriate action” when they receive “reliable information of misconduct” by another judge or Justice, in contrast to Canon 3(B)(6).

These modest changes appear to reflect an institutional reality: the Justices cannot control each other, and there is no one to whom a Justice could report misconduct.

The section on disqualification amplifies the Justices’ refusal to police each other, and represents the biggest departure from the former Code. Under the Code of Conduct for Federal Judges, a federal judge “shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.”²⁸⁰ The breadth of that standard is self-evident. But the Justices begin from a different starting point: “A Justice is presumed impartial and has an obligation to sit unless disqualified.”²⁸¹ This does not appear in the Code of Conduct for Federal Judges; it was cited in the April 25, 2023 Statement and appears to be drawn from the ABA Model Rules.²⁸² And though the Commentary depicts the rule as merely restating a truism, it has the effect of starting the disqualification section off by distinguishing the Justices from other federal judges.

The Code then builds on that theme by stating that

Justices “*should*”—not “*shall*”—disqualify themselves if their impartiality might reasonably be questioned.²⁸³ The Canon then defines that “reasonably be questioned” standard as “where an unbiased and reasonable person who is aware of all relevant circumstances would doubt that the Justice could fairly discharge his or her duties.”²⁸⁴ This definition appeared in the April 25, 2023 Statement, but the Court has never cited any predecessor for it, and this author cannot find it in prior Codes. It appears to be an aggressive restatement of the Court’s *Liljeberg* test discussed below. Certainly, one cannot help but note that the purpose of the definition seems to be to foreclose the possibility that a Justice would have to disqualify himself to appease someone he regards as ignorant or prejudiced.

The Justices then write, “[t]he rule of necessity may override the rule of disqualification.”²⁸⁵ The Commentary explains this principle is adopted from the ABA Model Code of Judicial Conduct, and takes pains to explain that the “rule of disqualification” applies differently at the Supreme Court.²⁸⁶ The “rule of necessity” is an ancient doctrine holding that sometimes a judge must sit on a case because there is no other judge who can take her place.²⁸⁷ The Court cannot appoint substitutes for disqualified Justices, the Commentary explains.²⁸⁸ And the Court emphasizes that *every single Justice* is indispensable to its function, both because the loss of a Justice would undermine “the fruitful interchange of minds” on the Court and could affect the ultimate vote on a case.²⁸⁹ The message is clear—any Justice can refuse to disqualify him- or herself, and that decision will not be questioned.²⁹⁰ The Commentary makes this explicit, using the same language as the Court’s April 25, 2023 Statement: “Individual Justices, rather than the Court, decide recusal issues.”²⁹¹ However, the Commentary omits the Statement’s

²⁸⁰ CODE OF CONDUCT FOR FEDERAL JUDGES, Canon 3(C)(1).

²⁸¹ CODE OF CONDUCT FOR THE SUPREME COURT, Canon 3(B)(1).

²⁸² See ABA MODEL CODE OF JUDICIAL CONDUCT, Rule 2.7 (“A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.”), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_7responsibilitytodecide/. Nevertheless, the Commentary does not cite this rule as authority.

²⁸³ CODE OF CONDUCT FOR THE SUPREME COURT, Canon 3(B)(1).

²⁸⁴ *Id.*

²⁸⁵ *Id.* at Canon 3(B)(3).

²⁸⁶ *Id.* at Commentary p. 11.

²⁸⁷ *United States v. Will*, 449 U.S. 200, 213-14 (1980) (holding that the rule of necessity required the district judge and the Supreme Court to decide a case affecting all federal judges).

²⁸⁸ CODE OF CONDUCT FOR THE SUPREME COURT, at Commentary p. 11. The Court’s assertion that it has no way of replacing its members is tantalizing precisely because the Court cites *United States v. Will* in the Commentary. *Will* discusses the impact of 28 U.S.C. § 2109, which allows the Chief Justice to remand a case to the court of appeals if there is not a “quorum of qualified justices” to hear a direct appeal. “The original version of this section was designed to ensure that the parties in antitrust and Interstate Commerce Commission cases, which at that time could be appealed directly to this Court, would always have some form of appellate review.” *Will*, 449 U.S. at 212 n.13. Does this mean Congress could authorize a process by which the Court could replace disqualified Justices with other members of the federal judiciary? Would the Supreme Court ever admit that Congress has that power, even if it were exercised?

²⁸⁹ CODE OF CONDUCT FOR THE SUPREME COURT, at Commentary p. 11.

²⁹⁰ *Compare id.*

²⁹¹ *Id.* at Commentary p. 11.

explanation that the rule is necessary to prevent justices from deciding the outcomes of cases by ordering other justices to recuse themselves.²⁹²

The next disqualification provision states that a Justice need not be disqualified because of “the filing of a brief *amicus curiae* nor the participation of counsel for *amicus curiae*.”²⁹³ This is exactly the *opposite* of the rule found in the advisory opinions of the Judicial Conference.²⁹⁴ The Justices’ Commentary explains this is because the Court receives so many amicus briefs, and because it has a permissive practice that does not require *amici* to obtain permission before filing—thus depriving the Justices of other judges’ ability to shield themselves from disqualification by refusing the *amicus* brief.²⁹⁵

Other differences:

- The Justices’ Code of Conduct follows the same rule about public speaking but adds a lengthy list to provide additional guidance.²⁹⁶ For example, Justices may attend fundraising events but “should not knowingly be a speaker, a guest of honor, or featured on the program of such event.”²⁹⁷
- A Justice can allow his name and judicial designation to be on an organization’s letterhead, “including when used for fundraising or soliciting members,” if “comparable information and designations are listed for others.”²⁹⁸
- The Justices deleted the Code’s admonition that “the judge should divest investments and other financial interests that might require frequent disqualification.”²⁹⁹
- The Justices state that “For some time, all Justices have agreed to comply with the statute governing financial disclosure, and the undersigned Members of the Court each individually reaffirm that commitment.”³⁰⁰ The Commentary also explains that the Justices comply with current Judicial Conference regulations regarding financial disclosures.³⁰¹

d. *An enforcement mechanism?*

The Supreme Court’s adoption of a Code of Conduct fills in the gap left by the omission of “Justices” from the Code of Conduct for Federal Judges. But another gap remains—there is no enforcement mechanism. The Act still excludes the Justices, which means that the Rules exclude them as well.

This is no accident. The Justices carefully wrote the Code of Conduct to ensure that no one has the power to judge the Justices; each Justice is judge of him- or herself. As a result, there is no procedure short of impeachment for an outsider to address a Justice’s misconduct. Indeed, articles of impeachment were recently introduced against Justices Thomas and Alito, for whatever that is worth.³⁰² But that requires Congress to determine that a Justice has committed “Treason, Bribery, or other High Crimes and Misdemeanors,”³⁰³ which implements Article III’s admonition that judges will “hold their office during good behavior.”³⁰⁴ That is a higher standard than the Code itself.

And even impeachment is no remedy for a justice’s disability, insofar as it would be difficult to prove that incapacity is a “high crime” or a “misdemeanor.” Historically, this has been a real headache for the nation when a Justice became disabled but declined to retire.³⁰⁵ Early in the nation’s history, federal judges faced with the infirmities of age sometimes declined to retire because they felt they could not give up their salary.³⁰⁶ Congress resolved some early problems by offering particular judges a pension, and eventually enacted a pension for disabled judges who had served a minimum time in office so that they could retire voluntarily and not face financial difficulty.³⁰⁷

The biggest crisis came with the 1878 incapacity of Justice Ward Hunt, who had been appointed to the Court by President Ulysses S Grant.³⁰⁸ Justice Hunt’s situation presented none of the challenges of Judge Newman’s situation—after a stroke, Justice Hunt was almost totally incapacitated and plainly unable to do any functions of his office.³⁰⁹ But Hunt was a protégé of the famous

²⁹² *See id.*

²⁹³ *Id.* at Canon 3(B)(4).

²⁹⁴ *See, e.g.,* Advisory Op. 63 (June 2009), available at <https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02.pdf>.

²⁹⁵ CODE OF CONDUCT FOR THE SUPREME COURT, Commentary at 11-12.

²⁹⁶ *Id.* at Canon 4(A).

²⁹⁷ *Id.* at Canon 4(A)(1)(d).

²⁹⁸ *Id.* at Canon 4(C).

²⁹⁹ CODE OF CONDUCT FOR FEDERAL JUDGES, Canon 4(D)(3).

³⁰⁰ CODE OF CONDUCT FOR THE SUPREME COURT, Canon 4(H).

³⁰¹ *Id.* at Commentary, p. 13.

³⁰² Sarah Fortinsky, *Ocasio-Cortez files impeachment articles against Supreme Court Justices Thomas and Alito*, THE HILL

(July 10, 2024), available at <https://thehill.com/homenews/house/4764398-aoc-articles-of-impeachment-clarence-thomas-samuel-alito/>. In this author’s opinion, Representative Ocasio-Cortez’s articles of impeachment, plus another six dollars, will buy you a coffee at Starbucks.

³⁰³ U.S. CONST. Art. II, Section 4.

³⁰⁴ U.S. CONST. Art. III, Section 1.

³⁰⁵ *See* Judge Glock, *The Politics of Disabled Supreme Court Justices*, 45 J. SUP. CT. HIST. 151 (2020).

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 153.

³⁰⁸ *Id.* at 154-55.

³⁰⁹ *Id.*

politician Roscoe Conkling, and the two men did not trust that President Rutherford B. Hayes would name an acceptable successor.³¹⁰ Hunt continued as an Associate Justice for *four more years*, long enough for the Presidency to shift to Chester A. Arthur in 1881.³¹¹ In 1882 Congress finally forced Hunt to resign by enacting a pension that he could only accept by resigning within thirty days—a bill that passed over Democratic political opposition and general concern that it was unseemly to so directly threaten a Justice of the Supreme Court.³¹² But Hunt took the “offer,” and four days later, President Arthur nominated Roscoe Conkling to the Court.³¹³ Conkling declined, choosing instead to pursue his own political ambitions and a lucrative career as a private lawyer.³¹⁴ President Arthur then nominated Samuel Blatchford, a judge on the Second Circuit and an expert in patent law, who served until 1893.

When Justice William Moody suffered from “rheumatism” in the early 1900s (probably Lou Gehrig’s Disease), a much more friendly effort provided the deeply indebted Moody with a pension, allowing him to cooperate with efforts to get him to retire.³¹⁵ By 1909, some of the rhetoric acknowledged that Moody had given up a successful law career to “get by” on the comparably modest salary of a justice.³¹⁶ Nevertheless, in a private letter President Taft claimed that Justice Moody had brought his illness upon himself through his shocking behavior of trying to remain a judge after the age of seventy.³¹⁷ Times have changed.

Since that time, there has been no meaningful progress on a process to force a reluctant Supreme Court Justice to acknowledge his or her incapacity. An effort during the Franklin D. Roosevelt administration failed, as it became entangled with the President’s so-called

“court-packing” plan.³¹⁸ The administration was successful in creating a new statute that allowed disabled judges to retire and receive a full pension even before they reached the full period of service necessary to retire “normally,” avoiding the piecemeal efforts required for Justices Hunt and Moody.³¹⁹

Several recent Justices retired before the end of their lives—Breyer, Kennedy, O’Connor, Souter, Stevens—thereby avoiding any concern that their capabilities might dim with age. Indeed, some seem to have understood the value of a calculated retirement,³²⁰ while others have been criticized for throwing away that valuable opportunity.³²¹

Justice Kagan recently made nationwide news for commenting on the lack of any Code enforcement mechanism at the Ninth Circuit’s Judicial Conference.³²² She stated, “The thing that can be criticized is, you know, rules usually have enforcement mechanisms attached to them, and this one — this set of rules — does not.”³²³ She proposed that it was her opinion (and *only* her opinion) that “if the chief justice appointed some sort of committee of, you know, highly respected judges with a great deal of experience, with a reputation for fairness, you know, that seems like a good solution to me.”³²⁴ In a subsequent interview, Justice Gorsuch declined to comment on Justice Kagan’s proposal, but in fairness he was reluctant to talk about anything *at all* except his new book.³²⁵

Public shaming seems to be the only other way to challenge the misbehavior of a Justice—and may explain the vitriol of the last two years. Those who are offended by the misbehavior of Justices Thomas and Alito have no other avenue to hold them to account, and appeals to civility will never succeed because they do

³¹⁰ *Id.*

³¹¹ *Id.* at 156-57.

³¹² *Id.*

³¹³ *Id.* at 157.

³¹⁴ *Id.*

³¹⁵ *Id.* at 158.

³¹⁶ *Id.* Justice Hunt had faced public shaming for continuing to accept a salary while bedridden. *See id.*

³¹⁷ *Id.* at 157 (“It is an outrage that the four men on the bench who are over seventy should continue there and thus throw the work and responsibility on the other five. This is the occasion of Moody’s illness.”).

³¹⁸ *Id.* at 160-62.

³¹⁹ *Id.* at 161-62. *See* 28 U.S.C. § 372 (disabled justices who retire without having served ten years receive one-half their salary for the rest of their life, but receive the full salary if they served ten years).

³²⁰ *Cf.* Christopher Cadelago, Nancy Cook, and Andrew Restuccia, *How a private meeting with Kennedy helped Trump get to “yes” on Kavanaugh*, POLITICO (July 9, 2018), available at <https://www.politico.com/story/2018/07/09/brett-kavanaugh-trump-private-meeting-706137>.

³²¹ *Cf.* Joan Biskupic, *U.S. Justice Ginsburg hits back at liberals who want her to retire*, REUTERS (July 31, 2014), available at <https://www.reuters.com/article/world/us-politics/us-justice-ginsburg-hits-back-at-liberals-who-want-her-to-retire-idUSKBN0G12UZ/>.

³²² *See, e.g.,* Justice Elena Kagan says there needs to be a way to enforce the Supreme Court’s ethics code, THE ASSOCIATED PRESS (July 25, 2024), available at <https://www.nbcnews.com/politics/supreme-court/justice-elena-kagan-enforcement-supreme-court-ethics-code-needed-rcna163756>.

³²³ *Id.*

³²⁴ Devan Cole, *Justice Elena Kagan says Supreme Court’s code of conduct needs an enforcement plan*, CNN (July 24, 2024), available at <https://www.cnn.com/2024/07/25/politics/kagan-supreme-court-ethics-sacramento-conference/index.html>.

³²⁵ David French, *Neil Gorsuch Has a Few Thoughts About America Today*, N.Y. TIMES (Aug. 4, 2024), available at <https://www.nytimes.com/2024/08/04/opinion/neil-gorsuch-supreme-court.html>.

not address the core problem—the structural failure that leaves public shaming as the only remedy.

Calls for Supreme Court reform continue, and President Biden and others have proposed that Congress issue a code of conduct and ethics rules that would bind the Justices.³²⁶

B. The Texas System of Disqualification and Disability

In Texas, who judges the judges? The answer is much clearer—the State Commission on Judicial Conduct. Well, unless the judge appeals, in which case the answer is “some justices of the courts of appeals, chosen by lot.” Read on.

1. The Texas Constitution Prevents the Problems that Bedevil the Federal System.

a. *The Texas Constitution Subjects All Judges To A Complaint Process.*

Neither Chief Justice Roberts’s studied ambiguity about separation of powers nor Justice Alito’s brash defiance have any place in the Texas system. We the people of Texas prevented those arguments by amending the Texas Constitution in 1965 to include Article 5, Section 1-a.³²⁷ The Texas Constitution creates a clear system for complaints about judicial disability and misconduct, and submits *all* Texas judges and justices to that system.

The Constitution creates an entity called the State Commission on Judicial Conduct, consisting of thirteen appointed individuals comprised of six judges from across the different types of courts, two members of the bar, and five members of the public.³²⁸ Section 1-a then provides for the removal of “any Justice or Judge” who engages in enumerated types of misconduct, along with other punishments like discipline or censure.³²⁹ It creates a framework for deciding complaints against

judges through the State Commission, and instructs the Texas Supreme Court to promulgate a system of rules to govern those proceedings.³³⁰ And the Constitution expressly states that the Legislature may promulgate laws “in furtherance of this Section that are not inconsistent with its provisions.”³³¹ To that end, Chapter 33 of the Texas Government Code provides further guidance on the creation and operation of the Commission.³³²

All judges in Texas are also subject to being impeached for their misconduct,³³³ but as best this author can tell, it has only happened once. District Judge O.P. Carillo was impeached in 1975 for a variety of fraudulent acts and judicial favoritism, and he spent three years in jail for tax fraud.³³⁴

b. *Texas’s system has additional protections to prevent judicial disability.*

In addition to a constitutional process for challenging and removing judges, certain other structural elements of the Texas system effectively reduce or prevent judicial disability in ways that the federal system cannot.

First, judges in Texas do not hold lifetime appointments, like Article III federal judges do. They must answer to the voters at regular intervals to seek re-election.³³⁵ While I fear the voters do not adequately inform themselves about the candidates who run for judicial office,³³⁶ elective office remains a bulwark against misconduct to *some* degree. Surely the voters would not return a disabled or misbehaving official to office.³³⁷

Second, to the extent that the odds of disability increase with advanced age (as with the allegations against Judge Newman), the Texas system diminishes those concerns by imposing an age limit of seventy-five.³³⁸ The judge cannot thwart this outcome by

³²⁶ See, e.g., <https://www.whitehouse.gov/briefing-room/statements-releases/2024/07/29/fact-sheet-president-biden-announces-bold-plan-to-reform-the-supreme-court-and-ensure-no-president-is-above-the-law/>.

³²⁷ TEXAS CONST. Art. V, Sec. 1-a. Justice Martin Richter helpfully explained the history of the amendments to Section 1-a in a dissenting opinion he wrote in *In re Chacon*, <https://www.scjc.texas.gov/media/8094/inquiry89.pdf>.

³²⁸ *Id.* at Sec. 1-a(2). Judges are appointed by the Texas Supreme Court, lawyers by the Bar, and non-lawyers by the governor, with the advice and consent of the Senate.

³²⁹ TEXAS CONST. Art. V, Sec. 1-a(6).

³³⁰ *Id.* at Sec. 1-a(7)-(11).

³³¹ *Id.* at Sec. 1-a(14).

³³² See TEXAS GOV’T CODE Chapter 33.

³³³ TEXAS CONST. Art. XV, Sec. 2.

³³⁴ See, e.g., *In re Carillo*, 542 S.W.2d 105 (Tex. 1976); Marc Duvoisin, *Texas’ last impeachment trial had a very different ending*, SAN ANTONIO EXPRESS-NEWS (Sept. 18, 2023),

available at <https://www.expressnews.com/news/article/impeachment-south-texas-judge-fraud-favoritism-18126652.php>.

³³⁵ See TEXAS CONST. Art. V, Sec. 2(c), 4, 6(b), 7(c).

³³⁶ This is not a partisan concern, it is borne from studying the election returns and concluding that national party politics play a far greater role in driving judicial election outcomes than the merits of any individual judge. See, e.g., *Editorial: One of the worst Democratic judges just got reelected. So much for accountability.*, HOUSTON CHRONICLE (Nov. 17, 2022), available at <https://www.houstonchronicle.com/opinion/editorials/article/texas-legislature-constitution-bonds-judicial-race-17590613.php>.

³³⁷ Insert your own national-politics joke here.

³³⁸ TEXAS CONST. Art. V, Sec. 1-a(1). To be more precise, there is a formula involving the “expiration of the term” in which the judicial officer reaches 75. *Id.* In 2023, voters rejected a proposed constitutional amendment that would have changed the retirement age to 79. William Melhado and Pooja Salhotra, *Texas voters reject proposal to increase*

refusing to take action or through indifference because the Constitution says “the office of every such Justice and Judge *shall become vacant*.”³³⁹ It is surely possible for a judge to become disabled before age 75, and I am also certain that Texas has lost the benefit of some fine judges who could have continued to serve with excellence after age 75, but this constitutional age limit necessarily prevents many of the disputes that have arisen with elderly federal judges.

2. Sources of Texas Authority On Judicial Misconduct and Disability.

a. *The Texas Code of Judicial Conduct*

As with the federal system, Texas adopted a Code of Judicial Conduct that lays out the foundational rules for judicial conduct.³⁴⁰ The Code applies to all judges in Texas, including the Justices of the Texas Supreme Court.³⁴¹ A 2023 statute applies the Code to candidates for judicial office as well.³⁴²

The Texas Code of Judicial Conduct closely resembles the Code of Conduct for Federal Judges and the ABA Model Code, and like those codes, prohibits all the things that you would expect a judicial code to prohibit. But there are some modest differences, which become more evident when one places them side-by-side:

- Texas generally provides more detail, e.g. by listing types of “bias or prejudice.” Texas also explicitly states that “discussions, votes, positions taken, and writings of appellate judges” are confidential.³⁴³ Because of this added detail, Texas’s Code might

seem somewhat more *wary* than the Code of Conduct for Federal Judges, which is written broadly.

- Texas incorporates the “duty to sit” that the U.S. Supreme Court added to its Code, *see supra*, though it does not draw attention in the same way.³⁴⁴ Texas’s version reads like a truism instead of a defiant “get off my lawn.”
- The Texas Code’s rules for financial activities are more detailed than the vague rules of the federal Code,³⁴⁵ though *less* detailed than all the extensive regulations and opinions that the federal system has issued.
- Obviously, the Texas rules regarding “inappropriate political activity” are quite different from the federal system, because Texas judges are elected officeholders and not the beneficiaries of a lifetime appointment.³⁴⁶ This provision—Canon 5—has been the subject of some controversy in Texas Supreme Court history.³⁴⁷
- The Texas Code has an entire section providing specific instructions and exceptions to adapt the Code for certain types of courts (e.g. allowing justices of the peace more leeway regarding administrative communications).³⁴⁸
- The Texas Code does not have rules about disqualification, as does the federal Code.³⁴⁹ The Constitution already has these provisions in it, and they are implemented through Chapter 33 of the Texas Government Code.

b. *Other sources of legal authority in Texas.*

judges’ retirement ages, TEXAS TRIBUNE (Nov. 7, 2023), available at <https://www.texastribune.org/2023/11/07/texas-judges-retirement-proposition-results/>.

³³⁹ TEXAS CONST. Art. V, Sec. 1-a(1) (emphasis added).

³⁴⁰ TEXAS CODE OF JUDICIAL CONDUCT, available at <https://www.txcourts.gov/media/1457109/texas-code-of-judicial-conduct.pdf>.

³⁴¹ *Id.* at Canon 6.

³⁴² See TEX. GOV’T CODE § 33.02105.

³⁴³ TEXAS CODE OF JUDICIAL CONDUCT at Canon 3(B)(6), (7), (11). There does not seem to be any doubt that such information is confidential in the federal system as well, as evidenced by the brouhaha when Justice Alito some unknown miscreant leaked the Supreme Court’s opinion in *Dobbs v. Jackson Women’s Health Organization*. Amy Howe, *Supreme Court investigators fail to identify who leaked Dobbs opinion*, SCOTUSBLOG (Jan. 19, 2023), available at <https://www.scotusblog.com/2023/01/supreme-court-investigators-fail-to-identify-who-leaked-dobbs-opinion/> (describing how a report of the thorough investigation of Court staff conspicuously did *not* say whether the justices themselves were investigated).

³⁴⁴ *Id.* at Canon 3(B)(1) (“A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.”).

³⁴⁵ *Id.* at Canon 4(D).

³⁴⁶ *Id.* at Canon 5.

³⁴⁷ In 1993, Justice Doggett (joined by Justices Gammage and Spector) wrote a lengthy dissent from a Supreme Court order postponing the adoption of amendments to the rest of the Code so that there could be further discussion on Canon 5. *See* https://txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/93/93-0233.pdf. In that dissent, Justice Doggett claims his colleagues exhibit an “overriding fear that a reform will be adopted that restricts the ability of members of the Texas Supreme Court to solicit contributions from litigants and law firms at the same time as their causes are being decided in this Court.” *Id.* From the perspective of 2024, Justice Doggett’s concerns seem quaint to this author. The current limits on campaign contributions are such that it is hard to imagine a Justice of the Texas Supreme Court selling his or her soul for so little money. *See* https://www.ethics.state.tx.us/resources/judicial/JCOH_guid_e.php.

³⁴⁸ TEXAS CODE OF JUDICIAL CONDUCT at Canon 6.

³⁴⁹ *Cf.* CODE OF CONDUCT FOR FEDERAL JUDGES at Canon 3(C).

The other sources of authority in Texas are Chapter 33 of the Texas Government Code and the Procedural Rules for the Removal and Retirement of Judges,³⁵⁰ both of which are promulgated under the express authority of provisions in the Texas Constitution.³⁵¹ As in the federal system, the Commission publishes opinions that it uses as precedent to guide later cases.³⁵² And insofar as judges are “state officers,” they are subject to the same standards of conduct that apply to all state employees, including the obligation to avoid conflicts of interest.³⁵³ They must also file financial statements as detailed in the Government Code.³⁵⁴

As someone who was previously unfamiliar with the Texas system for judging judges, this author will attest that it is very difficult for a researcher to feel confident he has understood how all the sources of Texas authority work together. Some concepts are explained only in the Texas Constitution itself and not the laws implementing the Constitution (e.g. the implementation of a “special master”), while other concepts require one to cross-reference the Constitution, Chapter 33, and the Procedural Rules to get a full picture. The Commission’s annual reports do a good job of explaining how its staff do their work,³⁵⁵ but in explaining that system, the Commission also reveals certain workaday procedures that are not found anywhere in the rules or statutes. This paper represents the culmination of efforts to cross-reference the various sources of authority.

c. *Alleging a Texas judge engaged in misconduct.*

Chapter 33 of the Texas Government Code explains the procedure for lodging a complaint against a Texas judge. One begins by filing a sworn complaint against the judge.³⁵⁶ The State Commission on Judicial Conduct has an online form that complainants may use.³⁵⁷ The Texas system does not have separate provisions for complaints filed by “ordinary people” and by Chief Judges, like the federal system does. When one judge becomes concerned about the behavior of another judge, she has a duty to report those concerns to the Commission³⁵⁸—but evidently a judge files a sworn complaint like everyone else.³⁵⁹

What behavior is “misconduct” in Texas? The Texas Constitution defines it as “willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice.”³⁶⁰ Chapter 33.001 of the Texas Government Code then helpfully provides further guidance on one of these terms:

For purposes of Section 1-a, Article V, Texas Constitution, “wilful or persistent conduct that is clearly inconsistent with the proper performance of a judge’s duties” includes:

- (1) wilful, persistent, and unjustifiable failure to timely execute the business of the court, considering the quantity and complexity of the business;
- (2) wilful violation of a provision of the Texas penal statutes or the Code of Judicial Conduct;
- (3) persistent or wilful violation of the rules promulgated by the supreme court;
- (4) incompetence in the performance of the duties of the office;
- (5) failure to cooperate with the commission; or
- (6) violation of any provision of a voluntary agreement to resign from judicial office in lieu

³⁵⁰ PROCEDURAL RULES FOR THE REMOVAL AND RETIREMENT OF JUDGES (“PROCEDURAL RULES”), available at https://www.scjc.texas.gov/media/8115/procedure_rules.pdf.

³⁵¹ TEXAS CONST. Art. V, Sec. 1-a(11), (14).

³⁵² <https://www.scjc.texas.gov/opinions/>.

³⁵³ TEXAS GOVERNMENT CODE § 572.051(a).

³⁵⁴ TEXAS GOVERNMENT CODE § 572.021.

³⁵⁵ State Commission on Judicial Conduct Fiscal Year 2023 Annual Report, at 4, available at <https://www.scjc.texas.gov/media/46982/scjc-23-ar-final.pdf>.

³⁵⁶ TEXAS CONST. Art. V, Sec. 1-a(6); TEXAS GOV’T CODE § 33.0211.

³⁵⁷ <https://scjc.texas.gov/media/46893/scjc-complaint-form.pdf>.

³⁵⁸ TEXAS CODE OF JUDICIAL CONDUCT at Canon 3(D)(1).

³⁵⁹ See, e.g., Public Reprimand of the Honorable Ursula Hall, CJC Nos. 22-0101, 22-1257 & 23-0281, State Comm’n on Judicial Conduct (Apr. 15, 2024), available at <https://www.scjc.texas.gov/media/47024/hall22-010-et-alfinal-pub-rep-signed.pdf> (noting that one of the complaints against Judge Hall was filed by the Chief Justice of the Fourteenth Court of Appeals who explained how Judge Hall’s delays had burdened the First and Fourteenth Courts of Appeals with mandamus proceedings).

³⁶⁰ TEXAS CONST. Art. V, Sec. 1-a(6).

of disciplinary action by the commission.

A criminal conviction makes the process much simpler. Under Chapter 33, a judge is *automatically* removed from office upon conviction or deferred adjudication for a felony or “a misdemeanor involving official conduct.”³⁶¹ Similarly, Procedural Rule 15 allows the Commission to immediately suspend a judge with or without pay “immediately upon being indicted” for such a crime.³⁶² The judge has the right to a hearing to show that he or she should be allowed to continue presiding over cases while the prosecution continues.³⁶³

There is no special definition of “incapacity” or “disability” in Chapter 33, though the statute refers to that concept in several places.³⁶⁴ The Texas Constitution provides only slightly more guidance by stating that a judge can be removed “for disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature.”³⁶⁵ That provision contemplates that a disabled judge will be *involuntarily retired* if eligible for retirement benefits, and *removed* if ineligible for retirement benefits.³⁶⁶

Broad confidentiality rules apply to the entire process, though specific rules require proceedings and certain documents to be made public at certain stages.³⁶⁷ Public hearings and public sanctions are always public, obviously—and the further a subject judge appeals, the more public the process becomes.³⁶⁸

d. *The Commission investigates.*

After a complaint is filed, the Commission’s staff investigate the allegations.³⁶⁹ The staff have 120 days to file a report with each member of the Commission detailing the investigation and recommending action.³⁷⁰

The Commission first performs a preliminary investigation “to determine if the allegation or appearance is unfounded or frivolous.”³⁷¹ If the allegation is frivolous, the commission “shall terminate the investigation.”³⁷² If it is not, the commission “shall conduct a full investigation” and notify the judge.³⁷³ The

commission has the power to order the judge to submit a written response or make an informal appearance,³⁷⁴ and may order depositions or ask the complainant to appear before the commission.³⁷⁵

Note that because misconduct is defined to include “failure to cooperate with the commission,” the Texas system directly resolves the issues presented in Judge Newman’s case. But the Texas system goes much further. Section 33.023 of the Texas Government Code expressly authorizes the Commission to “order the judge to submit to a physical or mental examination by one or more qualified physicians or a mental examination by one or more qualified psychologists selected and paid for by the commission.”³⁷⁶ The judge is given notice of the examination, and the doctor’s report is accepted by the commission and provided to the judge upon request.³⁷⁷ Subsection (d) says “If a judge refuses to submit to a physical or mental examination ordered by the commission under this section, the commission may petition a district court for an order compelling the judge to submit to the physical or mental examination.”³⁷⁸ It is unclear why this provision is needed, insofar as “failure to cooperate with the Commission” is already defined as *per se* misconduct.³⁷⁹ Perhaps the Texas rules prefer to use stronger persuasion before resorting to the harsher methods Judge Newman faced.

Once the staff have made their report, the Commission has 90 days to determine what action to take, if any.³⁸⁰ Options include: “(1) a public sanction; (2) a private sanction; (3) a suspension; (4) an order of education; (5) an acceptance of resignation in lieu of discipline; (6) a dismissal; or (7) an initiation of formal proceedings.”³⁸¹

Though the various rules never explain this point with the clarity one would hope, it appears the Commission initiates a “formal proceeding” when it concludes it should seek the “removal or retirement” of the subject judge.³⁸² The formal proceeding affords the judge the necessary procedural protections for this serious punishment. While the rules allow the

³⁶¹ TEXAS GOV’T CODE § 33.038. The subject judge is suspended without pay while pursuing an appeal of the conviction. TEXAS GOV’T CODE § 33.037.

³⁶² PROCEDURAL RULE 15.

³⁶³ *Id.*

³⁶⁴ *See, e.g.,* TEXAS GOV’T CODE § 33.023.

³⁶⁵ TEXAS CONST. Art. V, Sec. 1-a(6)(B).

³⁶⁶ *Id.*

³⁶⁷ PROCEDURAL RULE 17; TEXAS GOV’T CODE § 33.032.

³⁶⁸ *Id.*

³⁶⁹ TEXAS GOV’T CODE § 33.0212.

³⁷⁰ *Id.* at (a). This date can be extended by the Commission, but not later than the 270th day. *Id.* at (c). In extraordinary circumstances, the executive director can request another 120 days, but such extensions must be reported to the Legislature. *Id.* at (d), (e).

³⁷¹ TEXAS GOV’T CODE § 33.022(b); PROCEDURAL RULE 3.

³⁷² *Id.*

³⁷³ TEXAS GOV’T CODE § 33.022(c); PROCEDURAL RULE 4.

³⁷⁴ TEXAS GOV’T CODE § 33.022(c); PROCEDURAL RULE 6.

³⁷⁵ *Id.* Section 33.022 says the Commission may get a district court order to enforce its subpoenas. *Id.* at (e); *see also id.* at § 33.025.

³⁷⁶ TEXAS GOV’T CODE § 33.023.

³⁷⁷ *Id.* at § 33.023(b), (c).

³⁷⁸ *Id.* at § 33.023(d).

³⁷⁹ A Westlaw search did not turn up any cases applying this law.

³⁸⁰ TEXAS GOV’T CODE § 33.0212(b).

³⁸¹ *Id.*

³⁸² TEXAS CONST. Art. V, Sec. 1-a(8).

Commission to initiate a formal proceeding to seek a lesser sanction, they give the Commission no particular motivation to do so.

If the Commission dismisses the complaint, the complainant may ask the Commission to reconsider.³⁸³ The complainant may seek reconsideration only once, and must provide additional evidence to support the request.³⁸⁴

At this point, the Texas Supreme Court has the power to “suspend the person from office with or without pay, pending final disposition of the charge,” though it must first “consider[] the record of such appearance and the recommendation of the Commission.”³⁸⁵ The Supreme Court has done this in the past, though it appears to be rare (e.g. it happened only three times since 2010).³⁸⁶

e. Formal proceedings to remove or retire a judge.

If the Commission decides to initiate formal proceedings, it puts the complaint on a public docket and provides the judge with notice of the charges and the specific standards contended to be violated.³⁸⁷ The judge may (and certainly should) file an answer.³⁸⁸

The Commission then holds a public hearing at which the Commission members preside.³⁸⁹ The Commission’s staff attorneys “serve as Examiners, or trial counsel, during formal proceedings and on appeals from Commission actions. The Examiner is responsible for all aspects of preparing and presenting a case before the Commission, Special Master, Special Court of Review or Review Tribunal.”³⁹⁰ The subject judge has a wide variety of procedural protections, including the right to confront witnesses and the appointment of a guardian ad litem if he or she has been adjudged insane or incompetent.³⁹¹ The judge may elect to open the hearing to the public, and is not entitled to a jury trial.³⁹²

At the end of the formal proceeding, the Commission may decide to publicly order a censure, reprimand, warning, or admonition, or can dismiss the

proceeding.³⁹³ It may also find good cause to recommend the removal or retirement of the judge, in which case the Commission will ask the Supreme Court to form a Review Tribunal.³⁹⁴ The constitution and rules do not really explain the distinction between “removal” and “retirement” of a judge, except for the potential unspoken implication for the judge’s pension. But one rule seems to contemplate that “involuntary retirement” is what happens to a judge found to be disabled, while “removal” is the consequence of misconduct other than disability.³⁹⁵ In another place, the Texas Constitution draws the distinction that a disabled judge should be *retired* if eligible for retirement benefits and *removed* if not.³⁹⁶

f. Appeal from a sanction other than removal or retirement.

If the Commission issues a sanction against a judge other than removal or retirement, the judge may appeal.³⁹⁷ (A recommendation of removal or retirement automatically leads to a more rigorous “review tribunal” process described below.) Within 30 days, the judge must make a written request to the Chief Justice of the Supreme Court asking for appointment of a Special Court of Review.³⁹⁸ A “Special Court of Review” consists of three justices of the Courts of Appeals that the Chief Justice of the Supreme Court selects by lot—which to a court of appeals justice must seem like being called for jury duty.³⁹⁹ The Special Court of Review will file a charging document and the evidence relied upon by the Commission, thus making the allegations and evidence public.⁴⁰⁰

If the appeal is from an informal proceeding, the Special Court of Review is to conduct a “trial de novo” as that term is understood with relation to the county courts.⁴⁰¹ If the appeal is from a formal proceeding by the Commission, the Special Court of Review reviews the record and can consider additional evidence if it

³⁸³ TEXAS GOV’T CODE § 33.035.

³⁸⁴ *Id.* at (a), (f).

³⁸⁵ TEXAS CONST. Art. V, Sec. 1-a(6).

³⁸⁶ The Supreme Court’s administrative docket lists only a handful of orders suspending judges pending final disposition, most recently in 2017. https://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/02/02913800.pdf. See also, e.g., https://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/93/93-0182.pdf; https://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/02/02913800.pdf.

³⁸⁷ TEXAS GOV’T CODE § 33.022(g)-(i); PROCEDURAL RULE 10.

³⁸⁸ PROCEDURAL RULE 10(b).

³⁸⁹ PROCEDURAL RULE 10(d). At least seven members must be present. *Id.*

³⁹⁰ State Commission on Judicial Conduct Fiscal Year 2023 Annual Report, at 4, available at <https://www.scjc.texas.gov/media/46982/scjc-23-ar-final.pdf>.

³⁹¹ PROCEDURAL RULE 10(g).

³⁹² TEXAS GOV’T CODE § 33.022(j).

³⁹³ PROCEDURAL RULE 10(m).

³⁹⁴ PROCEDURAL RULES 10(m) & 11.

³⁹⁵ PROCEDURAL RULE 12(h).

³⁹⁶ TEXAS CONST. Art. V, Sec. 1-a(6)(B).

³⁹⁷ TEXAS GOV’T CODE § 33.034; PROCEDURAL RULE 9.

³⁹⁸ TEXAS GOV’T CODE § 33.034(b).

³⁹⁹ TEXAS GOV’T CODE § 33.001(a)(11). The statute makes clear that service on a Special Court of Review is one of the duties of a justice and does not merit extra pay. *Id.* § 33.034(c).

⁴⁰⁰ PROCEDURAL RULE 9(b).

⁴⁰¹ TEXAS GOV’T CODE § 33.034(e)(2).

wishes.⁴⁰²

The Special Court of Review then holds a public hearing at which the usual civil rules of law, evidence, and procedure apply.⁴⁰³ It can decide to dismiss the complaint, affirm the Commission's decision, impose a greater or lesser sanction, or order the Commission to begin formal proceedings to remove or retire the judge.⁴⁰⁴ The Special Court of Review can also decide to publish its opinion if it meets enumerated standards for publication (e.g. "establishes a new rule of ethics or law" or "resolves an apparent conflict of authority").⁴⁰⁵

The rules governing Special Courts of Review make clear that appeal is a risky decision for judges. The penalty could be *increased*,⁴⁰⁶ and the entire process becomes much more public.

There is no appeal from the Special Court of Review's decision.⁴⁰⁷ One justice of the peace successfully filed a federal lawsuit to challenge the reprimand issued by a Special Court of Review for a letter he sent to the press complaining about unfair local practices in dismissing traffic tickets.⁴⁰⁸ The federal courts took jurisdiction to address his First Amendment claim and held the sanction was unconstitutional.⁴⁰⁹

The Commission's opinions page provides links to 21 Special Court of Review opinions dating back to 2000.⁴¹⁰ Some of the more noteworthy are *In re Hecht*,⁴¹¹ which held that Chief Justice Hecht did not "endorse" a political candidate by giving interviews to the press in which he talked about the general qualifications of Supreme Court nominee Harriet Miers; and *In re Slaughter*,⁴¹² which held that Judge Michelle Slaughter (then judge of the 405th District Court in Galveston County) did not violate the Code of Judicial Conduct by describing certain public courtroom events

on her Facebook page. In both cases, the Special Court's finding that no misconduct occurred made it unnecessary to reach the First Amendment concerns that would otherwise arise.

g. *Special masters.*

The Texas Constitution allows the Commission to ask the Texas Supreme Court to appoint "a Master to hear and take evidence in the matter, and to report thereon to the Commission."⁴¹³ The special master must be a current or former judge.⁴¹⁴ The special master has all the powers of a district judge "in the enforcement of orders pertaining to witnesses, evidence, and procedure."⁴¹⁵

From the rules and the few opinions discussing the proceedings held by a special master, it appears the special master can take charge of the "full investigation" that would normally be done by the Commission's staff and then let the Commission decide, or can go further and replace the Commission entirely and become the judge in a formal proceeding in which the Commission's attorneys act as prosecutors.⁴¹⁶

h. *The Review Tribunal.*

If the Commission decides to recommend the forced removal or retirement of the subject judge, it asks the Chief Justice of the Supreme Court to form a "review tribunal."⁴¹⁷ "Review tribunals" were first enacted by constitutional amendment in 1984,⁴¹⁸ and they consist of seven justices of the courts of appeals, drawn by lot from a list made by the courts of appeals.⁴¹⁹ The justice whose name is drawn first serves as chairperson.⁴²⁰ The office of the Clerk of the Supreme Court "will serve as the Review Tribunal's staff."⁴²¹

⁴⁰² *Id.* at (e)(1).

⁴⁰³ PROCEDURAL RULE 9(c).

⁴⁰⁴ PROCEDURAL RULE 9(d).

⁴⁰⁵ PROCEDURAL RULE 9(e).

⁴⁰⁶ PROCEDURAL RULE 9(d); *see, e.g., In re Davis*, available at <https://www.scjc.texas.gov/media/7934/In-re-Davis.pdf> (finding that because the subject judge had persistently refused to admit any fault before the Special Court of Review, he should be subjected to the additional sanction of briefly working under the supervision of a mentor judge).

⁴⁰⁷ PROCEDURAL RULE 9(c).

⁴⁰⁸ *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990).

⁴⁰⁹ *Id.* at 213. Judge Garwood dissented because he would hold the court had no jurisdiction to review the proceeding. *Id.* at 214-15.

⁴¹⁰ <https://www.scjc.texas.gov/opinions/>.

⁴¹¹ 213 S.W.3d 547 (Tex. Sp. Ct. of Review Oct. 20, 2006), <https://www.scjc.texas.gov/media/7984/In-re-Hecht.pdf>.

⁴¹² <https://www.scjc.texas.gov/media/34159/In-re-Slaughter.pdf>.

⁴¹³ TEXAS CONST. Art. V, Sec. 1-a(8).

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ TEXAS CONST. Art. V, Sec. 1-a(9); PROCEDURAL RULE 12. This is another quirk of the rules governing judicial conduct—review tribunals are mentioned in TEXAS GOV'T CODE Chapter 33, but the actual process of convening and running a review tribunal process is not described there.

⁴¹⁸ *In re Chacon*, 138 S.W.3d 86, 97 (Tex. Rev. Trib. 2004) (Richter, J., dissenting). Before that, the Supreme Court itself did the work of reviewing a Commission recommendation that a judge be removed or retired. *Id.*

⁴¹⁹ TEXAS CONST. Art. V, Sec. 1-a(9); PROCEDURAL RULE 1(h), 12(a). Unlike the process for selecting a "Special Court of Review," the members of a "review tribunal" are selected from a list of justices in which "[e]ach Court of Appeals shall designate one of its members for inclusion in the list from which the selection is made." *Id.* No justice who serves on the Commission may serve on a Review Tribunal. PROCEDURAL RULE 12(a).

⁴²⁰ PROCEDURAL RULE 12(a).

⁴²¹ PROCEDURAL RULE 12(a).

The Review Tribunal works as an appellate court. “The review tribunal shall review the record of the proceedings on the law and facts and in its discretion may, for good cause shown, permit the introduction of additional evidence.”⁴²² Because of this constitutional provision, review tribunals have concluded they review the Commission’s findings of fact for legal and factual sufficiency of the evidence.⁴²³

In what must surely be one of the most peculiar aspects of Texas’s system, at least on a first reading, the rules automatically form the Review Tribunal but *also* require the subject judge to file a verified petition asking the Review Tribunal to rule in the judge’s favor by rejecting the recommendation for removal or retirement.⁴²⁴ The subject judge has thirty days to do so, or the failure “may be deemed a consent to a determination on the merits based upon the record filed by the Commission.”⁴²⁵ This requirement actually reflects a very sensible distinction. Even if the judge decides not to fight the recommendation of removal, the Review Tribunal must nevertheless review the evidence and decide whether to accept the recommendation.⁴²⁶ By filing a petition, the subject judge (1) declares an intent to keep fighting; (2) presents specific legal arguments that the Review Tribunal can consider; and (3) can address the Review Tribunal’s discretion to accept additional evidence.⁴²⁷ If the subject judge files a petition, the Commission has twenty days to file a response brief.⁴²⁸ The briefs are governed by “Rules 4 and 74 of the Texas Rules of Appellate Procedure,” which is an outdated reference that the Supreme Court should be fix before the next Review Tribunal.⁴²⁹

The subject judge has the right to oral argument, which “shall, upon receipt of the petition, be set on a date not less than thirty days nor more than forty days from the date of receipt thereof.”⁴³⁰ Argument shall “be governed by Rule 172, Texas Rules of Appellate

Procedure,” which is another outdated reference that ought to be fixed.⁴³¹

The Review Tribunal has ninety days to “order public censure, retirement, or removal, as it finds just and proper, or wholly reject the recommendation.”⁴³² If ordering retirement or removal, it can also prohibit the subject judge from holding judicial office in the future.⁴³³ The Review Tribunal can decide to publish its opinion if it meets enumerated standards for being precedential.⁴³⁴

Review Tribunals are rare, and I found no opinion published since 2004. To broadly characterize the very few opinions since 1965⁴³⁵ in which judges have been removed from office:

- Two justices of the peace behaved like tyrants;⁴³⁶
- A justice of the peace failed to keep accounts of the court’s finances to such a mind-boggling degree that it garnered international attention;⁴³⁷
- Two district judges engaged in outrageous sexual harassment;⁴³⁸
- Police caught two judges accepting bribes;⁴³⁹
- A district judge engaged in widespread fraud;⁴⁴⁰
- A justice of the peace failed to engage in the mentor training ordered by the Commission for previous misconduct, then asked his mentor judge to lie to the Commission and say he *had* completed the mentor training, and then engaged in subsequent misconduct where he called a parking lot attendant a racial slur, which the Review Tribunal held was a pattern of misconduct that deserved the extreme penalty of removal from office when viewed collectively.⁴⁴¹

i. *Further Appeal to the Supreme Court.*

The Review Tribunal is not the final step. The

⁴²² TEXAS CONST. Art. V, Sec. 1-a(9).

⁴²³ *In re Thoma*, 873 S.W.2d 477, 484–85 (Tex. Rev. Trib. 1994). A dissenting opinion later criticized the reasoning of *Thoma*, using the history of the constitutional amendments to persuasively argue that the standard should be *de novo*. *In re Chacon*, 138 S.W.3d 86, 97 (Tex. Rev. Trib. 2004) (Richter, J., dissenting).

⁴²⁴ PROCEDURAL RULE 12(c).

⁴²⁵ PROCEDURAL RULE 12(d).

⁴²⁶ TEXAS CONST. Art. V, Sec. 1-a(9).

⁴²⁷ PROCEDURAL RULE 12(c), (f).

⁴²⁸ PROCEDURAL RULE 12(d).

⁴²⁹ PROCEDURAL RULE 12(e). Current Rule 38 on the formatting of briefs was formerly Rule 74, and is surely what was originally intended. But there is now a Rule 74 addressing “Review of Certified State Criminal-Law Questions,” which could be very confusing if someone wanted to be very literal in trying to enforce the rule as currently written.

⁴³⁰ PROCEDURAL RULE 12(g).

⁴³¹ *Id.*

⁴³² PROCEDURAL RULE 12(h).

⁴³³ PROCEDURAL RULE 12(h).

⁴³⁴ PROCEDURAL RULE 12(i).

⁴³⁵ Before 1984, the Supreme Court itself was responsible for doing the work now performed by a Review Tribunal, so two of the opinions are from the Texas Supreme Court itself.

⁴³⁶ *In re Chacon*, 138 S.W.3d 86 (Tex. Rev. Trib. 2004); *In re Bartie*, 138 S.W.3d 81 (Tex. Rev. Trib. 2004).

⁴³⁷ *In re Rose*, 144 S.W.3d 661 (Tex. Rev. Trib. 2004).

⁴³⁸ *In re Barr*, 13 S.W.3d 525 (Tex. Rev. Trib. 1998); *In re Canales*, 113 S.W.3d 56 (Tex. Rev. Trib. 2003).

⁴³⁹ *In re Thoma*, 873 S.W.2d 477 (Tex. Rev. Trib. 1994); *In re Bates*, 555 S.W.2d 420 (Tex. 1977).

⁴⁴⁰ *In re Carillo*, 542 S.W.2d 105 (Tex. 1976). In this remarkable case, Judge Carillo was both impeached by the Texas Senate *and* removed from office through the judicial misconduct system.

⁴⁴¹ *In re Lowery*, 999 S.W.2d 639 (Tex. Rev. Trib. 1998).

Texas Constitution says, “[a] Justice, Judge, Master, or Magistrate may appeal a decision of the review tribunal to the Supreme Court under the substantial evidence rule.”⁴⁴² Procedural Rule 13 says the same thing.⁴⁴³

It is not clear whether anyone has ever resorted to this rule; Westlaw has no record of it, and I did not find any indication in the Court’s administrative docket. It is difficult to imagine a hypothetical situation in which a subject judge might believe the Court would have an appetite to reverse the decision of a Review Tribunal. Perhaps an earnest disagreement over precedents on a constitutional issue.

j. *Motion for Rehearing.*

Procedural Rule 14 allows for a minimal process of seeking rehearing of the Review Tribunal or Supreme Court’s final disposition of the appeal.⁴⁴⁴ The Review Tribunal or Supreme Court can order that no motion for rehearing will be allowed.⁴⁴⁵ But if they do not, the subject judge can present the clerk of the Supreme Court with a motion for rehearing *along with a motion for leave* to seek rehearing.⁴⁴⁶ The tribunal will take “such action as the appropriate body deems proper.”⁴⁴⁷

II. RECUSAL—REMOVING THE JUDGE FROM THIS CASE, NOT THE BENCH.

The previous discussion examined the standards and procedures for asserting that a judge should be removed from *office*. A different process and set of standards apply when one believes the judge should be removed from *this particular case*, but not removed from the bench altogether. This process is called “recusal” in the federal system, but “disqualification” is another term used in the Code of Conduct. In contrast, the Texas system uses the terms “recusal” and “disqualification” to mean slightly different things that have different consequences.

A. Recusal in the Federal courts.

1. Sources of recusal law in the Federal system.

Two statutes govern the federal system for removing a judge from a case—28 U.S.C. § 144 and § 455. Section 455 broadly applies to a variety of potential issues confronting all federal judges and

justices.⁴⁴⁸ Section 144 is much narrower, because it applies only to the contention that a district judge has an actual personal bias. A third statute, 28 U.S.C. § 47, stands for the limited proposition that an appellate judge may not hear an appeal in a case that he tried as a trial judge.

The Due Process Clause also governs the recusal process in some sense, insofar as the Supreme Court held it provides the “outer boundaries of judicial disqualifications.”⁴⁴⁹ Nevertheless, the Due Process Clause was the *only* basis for requiring recusal in a shocking 2009 case that received national attention, *Caperton v. A.T. Massey Coal Co.*⁴⁵⁰ In that case, the CEO of A.T. Massey Coal Company anticipated an appeal from a \$50 million jury verdict to the Supreme Court of West Virginia, so he spent \$3 million to support the campaign of a candidate who was challenging one of the justices.⁴⁵¹ The candidate, Brent Benjamin, won the election narrowly and then was a swing vote in A.T. Massey’s favor when the case was decided.⁴⁵² Justice Benjamin decided he did not have to recuse himself, but the U.S. Supreme Court held (5-4) that this was the very rare circumstance where the “outer boundaries” of the Due Process Clause itself required Justice Benjamin to recuse himself, even if West Virginia law did not.⁴⁵³ The “probability of bias” was just too great in these extraordinary circumstances.⁴⁵⁴ The dissenting justices would have held the Due Process Clause applies to only those situations where the judge has a direct financial interest in the case, or is sitting in judgment of his own decision to find a litigant in contempt.⁴⁵⁵

2. When must a judge recuse?

Section 455 describes the situations in which a federal judge must recuse, and it tracks Canon 3C of the Code of Conduct for Federal Judges. Plentiful case law interprets these statutory requirements, so instead of reinventing the wheel, any attorney writing a motion to recuse should begin by referring to the detailed discussion in *Federal Practice and Procedure* or the section in *O’Connor’s Federal Rules*.⁴⁵⁶ Having said that, this paper will briefly review the statute and identify some interesting case law explaining the standards.

⁴⁴² TEXAS CONST. Art. V, Sec. 1-a(9).

⁴⁴³ PROCEDURAL RULE 13.

⁴⁴⁴ PROCEDURAL RULE 14.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ Remember that the Justices of the Supreme Court claim they follow Section 455 only voluntarily, and each Justice decides whether he or she shall recuse. *See supra*.

⁴⁴⁹ 556 U.S. 868, 889 (2009) (quoting *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 828 (1986)).

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* at 873.

⁴⁵² *Id.* at 873-74.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* at 887-89.

⁴⁵⁵ *Id.* at 890 (C.J. Roberts, dissenting, joined by Justices Scalia, Thomas, and Alito).

⁴⁵⁶ Wright and Miller et al., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS* (“WRIGHT AND MILLER”) § 3541 *et seq.* (3d ed.).

A federal judge must recuse him- or herself:

- (1) In any case where “his impartiality must reasonably be questioned.”⁴⁵⁷

This standard is obviously vague, and intentionally so. “The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.”⁴⁵⁸

Scienter is not an element of this broad test, and a judge can be required to recuse himself even if he does not know of the circumstances giving rise to the appearance of impropriety.⁴⁵⁹ This may seem impossible, but the Supreme Court explained that this principle can require a judge to vacate prior orders once he finally recognizes the circumstances requiring recusal.⁴⁶⁰

The standard must be applied from the standpoint of a reasonable and well-informed person, not an uninformed critic. The test is “if a reasonable person, *knowing all the circumstances*, would expect that the judge would have actual knowledge.”⁴⁶¹ “The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges.”⁴⁶²

Disqualification under this subsection is the *only* type of disqualification that can be waived by the parties, after full disclosure of the relevant facts.⁴⁶³ The other grounds for disqualification listed below cannot be waived by the parties.⁴⁶⁴

- (2) The judge has a personal bias or prejudice against a party or about the subject matter of the suit.⁴⁶⁵

Courts have held that the bias or prejudice must come from an “extrajudicial source” instead of through information gleaned from the proceeding itself, though in its influential *Liteky* opinion, the Supreme Court took pains to explain that the concept is more subtle than that.⁴⁶⁶ It merely reflects the implication that “bias” and “prejudice” can sometimes be perfectly reasonable (as in the case of a negative view of Adolf Hitler).⁴⁶⁷ In an effort to provide more practical advice, the Court explained that “judicial rulings alone almost never

constitute a valid basis for a bias or partiality motion.”⁴⁶⁸ And “opinions formed by the judge on the basis of” the events in the current proceeding “ordinarily do not support a bias or partiality challenge.”⁴⁶⁹ Opinions developed during the proceedings are only a basis for bias or prejudice if they “display a deep-seated favoritism or antagonism that would make fair judgment impossible.”⁴⁷⁰

- (3) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.⁴⁷¹

To illustrate the fine line this rule can draw, consider *United States v. State of Alabama*.⁴⁷² That case concerned claims of racial discrimination in Alabama’s public higher education system, and it was assigned to Judge U.W. Clemon.⁴⁷³ Some parties demanded that Judge Clemon recuse himself, and the Eleventh Circuit reluctantly held he should have been recused.⁴⁷⁴ The court emphatically rejected the contentions that Judge Clemon was biased because of his long service as an African-American civil rights lawyer or because his children were entitled to attend the public schools; such arguments had no merit and came offensively close to arguing that all minority judges must disqualify themselves from civil rights cases.⁴⁷⁵ But Judge Clemon had personal knowledge about some of the specific, disputed facts about school funding because of his experience as an Alabama state legislator passing school funding bills, and also through his work as an attorney for plaintiffs in a prior school desegregation case.⁴⁷⁶ This was “personal knowledge of disputed evidentiary facts” and disqualified him from serving as judge over this particular dispute.⁴⁷⁷

As with allegations of bias or prejudice, a judge is not disqualified for personal knowledge he gains in the course of the proceeding. For example, a criminal defendant who fights with the marshals in the courtroom cannot then demand the judge recuse himself from his probation revocation hearing because he witnessed the altercation.⁴⁷⁸

- (4) The judge served as a lawyer in the case, or the

⁴⁵⁷ 28 U.S.C. § 455(a).

⁴⁵⁸ *Liljeberg v. Health Svcs. Acq. Corp.*, 486 U.S. 847, 865 (1988) (citing S.Rep. No 93-419, at 5; H.R.Rep. No. 93-1453, at 5).

⁴⁵⁹ *Id.* at 859-60.

⁴⁶⁰ *Id.* at 860-62.

⁴⁶¹ *Sao Paulo State of Fed. Rep. of Brazil v. Am. Tobacco Co.*, 535 U.S. 229, 232-33 (2002) (quoting *Liljeberg*, 486 U.S. at 861) (emphasis in *Sao Paulo*).

⁴⁶² *Liljeberg*, 486 U.S. at 864-65.

⁴⁶³ 28 U.S.C. § 455(e).

⁴⁶⁴ *Id.*

⁴⁶⁵ 28 U.S.C. § 455(b)(1); *see also* 28 U.S.C. § 144.

⁴⁶⁶ *Liteky v. United States*, 510 U.S. 540, 551-52 (1994).

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* at 555.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ 28 U.S.C. § 455(b)(1).

⁴⁷² 828 F.2d 1532 (11th Cir. 1987).

⁴⁷³ *Id.* at 1535.

⁴⁷⁴ *Id.* at 1541-46.

⁴⁷⁵ *Id.* at 1543.

⁴⁷⁶ *Id.* at 1545.

⁴⁷⁷ *Id.*

⁴⁷⁸ *United States v. Melton*, 738 F.3d 903 (8th Cir. 2013).

judge was associated with a lawyer who served as a lawyer in the case during the time the judge was associated with that lawyer, or the judge or lawyer has been a material witness.⁴⁷⁹

A recent Fifth Circuit case presented an interesting dispute under this rule.⁴⁸⁰ In 2022, District Judge Barry Ashe ruled in the defense’s favor on a *Daubert* issue in the longstanding and wide-ranging *Deepwater Horizon* litigation.⁴⁸¹ The unhappy defendants then demanded that Judge Ashe recuse himself because he was a partner at the Stone Pigman law firm when that firm represented a party in the *Deepwater Horizon* morass back in its first phase, in 2012 and 2013.⁴⁸² Judge Ashe denied the motion to disqualify himself, concluding the motions were (1) untimely, and (2) meritless because the issues ten years earlier were distinct from the issues still being tried in 2022.⁴⁸³ The Fifth Circuit affirmed, holding that any failure to recuse was harmless under the facts of the case.⁴⁸⁴ Judge Ashe had not personally worked on the case, and every other judge working on the *Deepwater Horizon* hydra had come to the same conclusion on this particular *Daubert* issue.⁴⁸⁵ Nevertheless, the opinion concludes with an admonition that the appeal “is fair warning to each of us of the importance of assuring the reality and appearance of that impartiality.”⁴⁸⁶

The gap in time can be even greater than that. In *Williams v. Pennsylvania*, a judge was required to recuse himself from an appeal seeking post-conviction relief 26 years after sentencing, because he had been the district attorney who originally sought the death penalty.⁴⁸⁷

- (5) While in government employment, the judge served as counsel, adviser or material witness concerning the proceeding, or expressed an opinion concerning the merits of the particular case in controversy.⁴⁸⁸

This rule created significant headaches for the Supreme Court Justices who joined the Court while serving as Solicitor General—Justices Kagan and Marshall. Because the Solicitor General is listed as

“counsel” in many lawsuits involving the United States government, even if he or she acts in a mostly administrative role, both Kagan and Marshall recused themselves from many lawsuits in their first years on the Court.⁴⁸⁹

Nevertheless, this rule is narrower than other subparts of the statute. It is narrower than the previous rule regarding service as a lawyer, insofar as it requires *personal* involvement and not merely an associational connection.⁴⁹⁰ And unlike the broad prohibition on sitting in a case where the judge has “personal knowledge,” this rule requires involvement with the *proceeding* and not merely the subject matter.⁴⁹¹ For this reason, judges have read the rule very narrowly. For example, while on the D.C. Circuit, Judge Kavanaugh wrote an opinion explaining that he refused to recuse himself from a case despite concerns that he provided policy advice to President Bush on the issue in the case (a lumber dispute with Canada).⁴⁹² Judge Kavanaugh thoughtfully gathered examples to show that federal judges have often presided over cases despite knowledge of certain subjects or statutes gained through their prior governmental service, and cited cases supporting his observation that this subpart of the statute is conspicuously more narrow than other parts.⁴⁹³

Having said that, courts have generally held that the United States Attorney always personally serves “as counsel” on all matters prosecuted during her term of service, even if there is no allegation that she had any personal involvement in the proceeding.⁴⁹⁴ Because that rule arises from the US Attorney’s role as a Presidential appointee, an Assistant United States Attorney is not subject to the same rule and is only disqualified if he was personally involved in the proceeding.⁴⁹⁵

- (6) “He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the

⁴⁷⁹ 28 U.S.C. § 455(b)(2).

⁴⁸⁰ *Street v. BP Exploration & Production, Inc.*, 85 F.4th 466 (5th Cir. 2023).

⁴⁸¹ *Id.* at 270.

⁴⁸² *Id.*

⁴⁸³ *Id.* at 271-72.

⁴⁸⁴ *Id.* at 272-73.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.* at 273.

⁴⁸⁷ 579 U.S. 1 (2016). The decision rested on the Due Process Clause and not Section 455, because Pennsylvania law had applied to the judge’s obligations to recuse. *Id.* Nevertheless, it provides a useful illustration of how these issues can arise after many years.

⁴⁸⁸ 28 U.S.C. § 455(b)(3).

⁴⁸⁹ See Tom Goldstein, *Elena Kagan and Recusal—UPDATED*, SCOTUSBLOG (Apr. 18, 2010), available at <https://www.scotusblog.com/2010/04/elena-kagan-and-recusal/>.

⁴⁹⁰ Compare 28 U.S.C. § 455(b)(2) and (3).

⁴⁹¹ Compare 28 U.S.C. § 455(b)(1) and (3).

⁴⁹² *Baker & Hostetler, LLP v. U.S. Dep’t of Commerce*, 471 F.3d 1355, 1358 (D.C. Cir. 2006).

⁴⁹³ *Id.*

⁴⁹⁴ *United States v. Arnpriester*, 37 F.3d 466 (9th Cir. 1994).

⁴⁹⁵ *United States v. Ruzzano*, 247 F.3d 688 (7th Cir. 2001).

proceeding.”⁴⁹⁶

Section 455 defines a “financial interest” as “ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party.”⁴⁹⁷ However, the same definition excludes interests in investment funds or mutual companies, service as an officer in a civic or charitable organization, or the ownership of government securities (unless the proceedings could substantially affect the value of those securities).⁴⁹⁸ It also contains another provision allowing the judge to divest herself of the financial interest if it came to light after “substantial judicial time has been devoted to the matter.”⁴⁹⁹

Judges’ financial interests are often targeted in news coverage. For example, a 2021 Wall Street Journal investigation claimed that 131 federal judges violated this rule by hearing cases in which they or a family member owned stock.⁵⁰⁰ This seems remarkable; my own experience has been that federal judges quickly (even *eagerly*) recuse themselves based on potential issues arising from stock ownership.⁵⁰¹ Nevertheless, as discussed above, some have criticized Supreme Court Justices for failing to recuse themselves from cases in which they hold a financial interest.⁵⁰²

Others have criticized Section 455 in recent years because it does not require the judge to disqualify himself if one of the parties is his spouse’s client, if the spouse’s work does not *directly* connect to the dispute before the court.⁵⁰³ An advisory opinion explains that the only rule that would apply in such situations is the general rule to avoid the appearance of conflicts of interest.⁵⁰⁴

The judge has an affirmative duty to “inform himself about his personal and fiduciary financial interests,” and must “make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.”⁵⁰⁵

- (7) The judge or his spouse, or a person “within the third degree of relationship to either of them,” or the spouse of such a person, is a party (or officer, director, or trustee of a party), is acting as a lawyer in the proceeding, is known by the judge to have an interest that could be substantially affected by the outcome, or to the judge’s knowledge is likely to be a material witness in the proceeding.⁵⁰⁶

The statute explains that the “civil law system” determines the “third degree of relationship.”⁵⁰⁷ In this system, one makes a “family tree” and then counts the steps up the tree to the nearest common ancestor, and then back down to the individual in question. For example, a judge’s sibling is a relative in the second degree (one step up to their parent, one step down to the sibling), and a judge’s aunt is a relative in the third degree (two steps up to the judge’s grandparent and one step down to the aunt). Federal law lumps spouses together, whereas Texas has a separate rule for “affinity.” *See infra*.

3. Procedure for a Recusal Motion.

a. Filing a Motion.

Under Section 455, judges should monitor their own interests and recuse themselves without being asked. But if there has been some lapse or oversight, a party seeks recusal by filing a motion asking the judge to recuse himself. Though the ordinary rules of motion practice apply, there are two types of motions:

Section 144. Motions under 28 U.S.C. § 144 are limited in scope: they challenge (1) the actual bias or prejudice of (2) a district judge.⁵⁰⁸ Such motions are also subject to strict procedural requirements. The motion must include an affidavit stating the facts and reason for the belief that bias or prejudice exists, and the court must accept the allegations of the affidavit as true.⁵⁰⁹ The attorney must also include a certificate stating that the motion is made in good faith.⁵¹⁰ The motion must be filed at least ten days “before the beginning of the term

⁴⁹⁶ 28 U.S.C. § 455(b)(4).

⁴⁹⁷ 28 U.S.C. § 455(d)(4).

⁴⁹⁸ 28 U.S.C. § 455(d)(4).

⁴⁹⁹ 28 U.S.C. § 455(f).

⁵⁰⁰ James V. Grimaldi, Coulter Jones and Joe Palazzolo, WALL STREET JOURNAL (Sept. 28, 2021), *available at* <https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421>.

⁵⁰¹ I have never found any judge willing to go on the record about the persistent rumor among private-practice litigators that judges deliberately purchase stock in certain companies to avoid having to preside over certain types of cases.

⁵⁰² *See, e.g.*, <https://fixthecourt.com/2024/05/recent-times-justice-failed-recuse-despite-clear-conflict-interest/> (discussing specific instances of recent failures to recuse, including *inter alia*, a possible discrepancy between the way

Justice Jackson and Justices Roberts, Kagan, and Gorsuch viewed the need to recuse due to ownership of an interest in a Charles Schwab fund).

⁵⁰³ *See, e.g.*, Noah Pransky, Brooke Williams and Andrew Botolino, PROPUBLICA (July 16, 2024), *available at* <https://www.propublica.org/article/judges-ethics-codes-recusal-conflict-of-interest-families> (gathering reports of spousal connections that made the news).

⁵⁰⁴ Advisory Opinion 107, Committee on Codes of Conduct, *available at* <https://www.uscourts.gov/sites/default/files/guid-e-vol02b-ch02.pdf>.

⁵⁰⁵ 28 U.S.C. § 455(c).

⁵⁰⁶ 28 U.S.C. § 455(b)(5).

⁵⁰⁷ 28 U.S.C. § 455(d)(2).

⁵⁰⁸ 28 U.S.C. § 144.

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

at which the proceeding is to be heard.”⁵¹¹ A party may only file one Section 144 motion per case.⁵¹²

Section 455. Section 455 is not written in terms of a motion to be filed (as with Section 144), but instead describes the circumstances in which a judge has the obligation to recuse him- or herself. Accordingly, section 455 motions can be filed in any court and on any basis listed above, so they apply in many more situations. They do not require an affidavit or a certificate, but they are permitted, and it would be a good idea to be diligent when alleging the reasons why a federal judge should recuse herself. The judge does not have to accept the truth of the facts alleged in an affidavit offered by a section 455 movant, unlike section 144.⁵¹³

Section 455 does not have any deadline for filing a motion to recuse, and this was an intentional decision by Congress.⁵¹⁴ Nevertheless, most courts have read a vague timeliness requirement into the statute, not unlike the concept of laches, and many courts conclude that a party can waive or forfeit the right to ask a judge to recuse.⁵¹⁵

b. *Deciding the Motion.*

Who decides the recusal motion? The subject judge judges himself, though she can refer the issue to another judge. The procedure differs slightly between Section 144 and Section 455 motions.

In a Section 144 motion, the challenged judge decides the threshold question of whether the motion complies with Section 144’s requirements,⁵¹⁶ and if it does, the challenged judge is immediately recused and “another judge shall be assigned to hear such proceeding.”⁵¹⁷

In a Section 455 motion, the challenged judge decides both the procedural and substantive elements of the motion.⁵¹⁸ The judge may refer the motion to be decided by another judge, but federal law does not require him to do so.⁵¹⁹

c. *Appellate review of the recusal decision.*

The proper procedural mechanism for reviewing a

judge’s decision on a recusal motion is shockingly unsettled, so if the reader needs to appeal an adverse recusal decision, you should carefully review Section 3553 of *Federal Practice and Procedure*.⁵²⁰ That text explains the circuits have split on all the following issues:

- Is it *ever* proper to appeal the judge’s decision to recuse? After all, the litigants suffer no harm from having their case assigned to another federal judge.
- What is the proper procedural vehicle for appeal?
 - Can a litigant ask a judge to certify the decision under Section 1292(b) (i.e. can recusal ever be a “controlling question of law as to which there is substantial ground for difference of opinion” that will “materially advance the ultimate termination of the litigation”)?
 - Can a litigant seek mandamus review? After all, courts ordinarily say the judge has discretion to decide whether to recuse. How deferential should the reviewing court be?
- What is the standard of review, abuse of discretion or *de novo*?
- Can the right to appeal be waived by proceeding to trial?⁵²¹

Because you will be interested in the local rules, the Fifth Circuit acknowledges mandamus as the procedure for reviewing the denial of a disqualification motion, though it remains highly deferential to the challenged judge.⁵²² It has also accepted one appeal from a 1292(b) certification.⁵²³

Some older cases held a judge must not take any action to respond to a petition for writ of mandamus challenging the judge’s refusal to recuse himself, but should remain an inactive party, because the alternative would be to align the judge with some of the parties in

⁵¹¹ *Id.*

⁵¹² *Id.*

⁵¹³ See, e.g., *Phillips v. Joint Committee on Performance and Expenditure Review of the State of Miss.*, 637 F.2d 1014, 1020 n.6 (5th Cir. 1981).

⁵¹⁴ WRIGHT AND MILLER § 3550.

⁵¹⁵ *Id.* See, e.g., *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994) (litigants did not raise potential grounds for disqualification when they were discovered, but instead held them back to use as grounds for a later Rule 60 motion).

⁵¹⁶ WRIGHT AND MILLER § 3551; *Berger v. United States*, 255 U.S. 22, 32 (1921).

⁵¹⁷ 28 U.S.C. § 144.

⁵¹⁸ WRIGHT AND MILLER, § 3550.

⁵¹⁹ *Id.*

⁵²⁰ WRIGHT AND MILLER § 3553.

⁵²¹ See, e.g., *United States v. Glavin*, 580 F. App’x 482, 484 (7th Cir. 2014) (holding the right is waived because the harm is to the judicial system as a whole, not just the litigants).

⁵²² See *In re Chevron, U.S.A., Inc.*, 121 F.3d 163 (5th Cir. 1997).

⁵²³ *Davis v. Bd. of School Comm’rs of Mobile Cty.*, 517 F.2d 1044, 1047 (5th Cir. 1975).

the case.⁵²⁴ These cases appear quaint in light of the historical movement toward judges remaining inactive in mandamus proceedings *generally*. It is hard to imagine a modern case in which a judge would actively participate in drafting the response to a mandamus petition, but that is what happened in the foundational case in the Third Circuit in 1964.⁵²⁵

B. Recusal in Texas state courts.

As with the judicial conduct rules discussed above, the Texas recusal rules resemble the federal system but are more rigorous.

1. Sources of Texas law on recusal and disqualification.

Texas has many laws that govern the recusal or disqualification of its judges. Texas Constitution article 5, section 11 contains some basic rules requiring the disqualification of judges: “No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case.” Rule of Civil Procedure 18b lists many other grounds for recusal.

Rules of Civil Procedure 18a governs the procedure for recusal and disqualification motions in trial courts, and Rule of Appellate Procedure 16 governs procedure in the appellate courts. However, there are exceptions to these procedural rules. Statutory probate courts are governed instead by Texas Government Code chapter 25, justice courts are governed by Rule of Civil Procedure 528, and municipal courts are governed by Texas Government Code chapter 29. Texas Civil Practice & Remedies Code Section 30.016 also imposes certain rules and penalties for the “third and subsequent” motion filed by a party in a case.

2. Distinguishing “disqualification” from “recusal.”

Texas recognizes an important distinction between the concepts of “disqualification” and “recusal.”⁵²⁶ This

is not merely nomenclature—it affects the judge’s power and the proper appellate remedy.

Judges are disqualified when they violate one of the three prohibitions in the Texas Constitution: being interested in a case, having been counsel in the case, or being related to a party.⁵²⁷ Their orders are completely void and without effect.⁵²⁸ A party may challenge a judge’s refusal to disqualify herself by seeking a writ of mandamus, and because the issue is a constitutional infirmity, the petitioner need not show he lacks an adequate remedy by appeal.⁵²⁹

Judges are recused under the conditions described in Rule 18b.⁵³⁰ Their orders are not automatically void, and recusal can be waived if not properly raised.⁵³¹ Rule 18a(j) allows a party to appeal an order denying recusal “on appeal from the final judgment,” and prohibits any appeal of any kind from an order granting recusal.⁵³² Because a party has an appeal from the final judgment, the Texas Supreme Court held in 1998 that a litigant cannot seek mandamus review of the denial of a recusal motion,⁵³³ and one can still find cases citing that decision to refuse mandamus relief. However, in 2007 the Texas Supreme Court noted that “our mandamus standards have evolved” since that decision.⁵³⁴ “We now ask whether ‘any benefits to mandamus review are outweighed by the detriments.’”⁵³⁵ So it is theoretically possible to obtain mandamus review in extraordinary circumstances.⁵³⁶ In reality, mandamus relief has issued only in two circumstances. First, mandamus is proper when the court determines the basis for recusal was proven as a matter of law—a truly unusual state of affairs.⁵³⁷ Second, mandamus is proper when the subject judge fails in the ministerial task required by Rule 18a: to either recuse himself or refer the motion to the administrative judge for decision.⁵³⁸

In contrast to the U.S. Supreme Court’s view that its members are irreplaceable, *see supra*, the Texas Constitution expressly empowers the Governor to commission a substitute justice when a Supreme Court justice is disqualified.⁵³⁹ Texas Government Code section 22.005 provides further details. In 2022, the

⁵²⁴ *Rapp v. Van Dusen*, 350 F.2d 806, 813 (3d Cir. 1964) (en banc); *General Tire & Rubber Co. v. Watkins*, 363 F.2d 87, 88-89 (4th Cir. 1966).

⁵²⁵ *Rapp*, 350 F.2d at 813.

⁵²⁶ *In re Union Pacific Resources Co.*, 969 S.W.2d 427, 428 (Tex. 1998).

⁵²⁷ *Id.*

⁵²⁸ *Id.*

⁵²⁹ *Id.*

⁵³⁰ *Id.*

⁵³¹ *Id.*

⁵³² *Id.*; *see also* TEX. R. CIV. P. 18a(j).

⁵³³ *In re Union Pacific Resources Co.*, 969 S.W.2d 427, 428 (Tex. 1998).

⁵³⁴ *In re McKee*, 248 S.W.3d 164, 165 (Tex. 2007).

⁵³⁵ *Id.* (quoting *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004)).

⁵³⁶ *Id.*

⁵³⁷ *DeLeon v. Aguilar*, 127 S.W.3d 1, 5-6 (Tex. Crim. App. 2004); *In re State ex rel. Durden*, 587 S.W.3d 78, 80-81 (Tex. App.—San Antonio 2019, no pet.).

⁵³⁸ *McLeod v. Harris*, 582 S.W.2d 772, 774-75 (Tex. 1979); *In re Thompson*, 330 S.W.3d 411, 417-18 (Tex. App.—Austin 2010, orig. proceeding) (gathering cases); *In re Norman*, 191 S.W.3d 858, 860 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

⁵³⁹ TEX. CONST. art. V, § 11.

Texas Supreme Court rejected the argument that this process of commissioning a substitute justice violated the Due Process Clause by allowing the state to sit in judgment of its own case against other parties.⁵⁴⁰

3. Grounds for Disqualification and Recusal.

The grounds for disqualification and recusal resemble the grounds in the federal system, discussed above. Indeed, in many instances the standards appear to have been modeled on the federal system or on the same model judicial codes that led to the federal rules.

a. Grounds for disqualification.

The Texas Constitution states three reasons for disqualifying a judge, and Rule 18b(a) repeats them with some slight elaborations. They are:

- (1) “The judge has served as a lawyer in the matter in controversy; or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter.”⁵⁴¹

Rule 18a(1) seemingly goes further than the Constitution by requiring “vicarious disqualification” if a former fellow lawyer served as a lawyer on the matter, which is not expressly stated in the Constitution itself. Nevertheless, the Texas Supreme Court held that the Rule “was intended to *expound* rather than *expand* the Constitution,” so Rule 18a(1) is the same thing as the Constitutional text.⁵⁴² “Vicarious disqualification” has limits, though—it only applies if the judge practiced law

with another person who was a lawyer in the case *while they were at the same firm*.⁵⁴³

It does not matter whether the judge remembers serving as a lawyer in the matter; if the record shows that he did, then he is constitutionally disqualified.⁵⁴⁴

- (2) “The judge knows that, individually or as a fiduciary, the judge has an interest in the subject matter in controversy.”⁵⁴⁵

A direct financial or personal interest, “however small,” will disqualify a judge.⁵⁴⁶ However, a disqualifying interest does not include an interest that is the same as any other member of the bar or citizen of Texas.⁵⁴⁷ Obviously, outright bribery is an “interest” in the case that disqualifies the judge.⁵⁴⁸

- (3) “Either of the parties may be related to the judge by affinity or consanguinity within the third degree.”⁵⁴⁹

This concept is explained in the section above on federal recusals. “Affinity” is relationship by marriage, “consanguinity” is relationship by blood.⁵⁵⁰ The Texas Supreme Court held that a judge was not disqualified because his brother was an attorney in the case, reasoning that an attorney is not a “party” for purposes of the Texas Constitution.⁵⁵¹

b. Grounds for recusal.

Rule 18b has many more grounds for recusing a Texas judge, and again, these concepts are nearly

⁵⁴⁰ *State v. Volkswagen Aktiengesellschaft*, ___ S.W.3d ___, 66 Tex. Sup. Ct. J. 82 (Tex. Nov. 18, 2022). The case has not been released for publication, probably because Volkswagen sought an extension of time to appeal to the United States Supreme Court but never actually filed the petition for writ of certiorari.

⁵⁴¹ TEX. R. CIV. P. 18b(a)(1).

⁵⁴² *Tesco Am., Inc. v. Strong Indus., Inc.*, 221 S.W.3d 550, 553 (Tex. 2006) (court of appeals justice was disqualified because she had been at Baker Botts while another attorney at the firm served as counsel in the case). *Tesco American* offers several reasons for this conclusion, which you may or may not find persuasive. I think the holding is somewhat out of step with current dogma about textual interpretation, but the result is very sensible. See *id.* As a side note, O’CONNOR’S TEXAS CIVIL PROCEDURE and McDONALD & CARLSON TEXAS CIVIL PRACTICE both find it significant that one of the court of appeals’ opinions in this case relied on the comment to TRAP 16, which highlighted that the disqualification of appellate judges is governed by the Constitution and not Rule 18b. *F.S. New Products, Inc. v. Strong Industries, Inc.*, 129 S.W.3d 594, 598 (Tex. App.—Houston [1st Dist.] 2003, no pet.). These excellent treatises overlook the fact that when that case finally made its way to the Texas Supreme Court, the Court held there was no way to know whether this change to the rule was

substantive or nonsubstantive. *Tesco Am.*, 221 S.W.3d at 553 n.11.

⁵⁴³ See, e.g., *Denton v. Wiggins*, No. 07-19-00127-CV, 2020 WL 5666948, at *3 (Tex. App.—Amarillo Sept. 23, 2020, no pet.).

⁵⁴⁴ *Williams v. Kirven*, 532 S.W.2d 159, 160-61 (Tex. App.—Austin 1976, writ ref’d n.r.e.) (disqualifying a trial judge who did not recall writing the title opinion on the property at issue in the lawsuit).

⁵⁴⁵ TEX. R. CIV. P. 18b(a)(2).

⁵⁴⁶ *Sun Oil Company v. Whitaker*, 483 S.W.2d 808, 823 (Tex. 1972).

⁵⁴⁷ *Cameron v. Greenhill*, 582 S.W.2d 775 (Tex. 1979).

⁵⁴⁸ *Freedom Comm’ns, Inc. v. Coronado*, 372 S.W.3d 621, 623 (Tex. 2012) (trial judge took bribe of \$8,000 to make favorable rulings, which meant he was disqualified when he denied a summary judgment motion, which meant the order was void, which meant the Texas Supreme Court had no jurisdiction to review that order).

⁵⁴⁹ TEX. R. CIV. P. 18b(a)(3).

⁵⁵⁰ See, e.g., TEXAS GOVERNMENT CODE Chapter 573 (defining these concepts for purposes of the statute prohibiting nepotism). By statute, adoption is the same as a blood relationship. *Id.* at § 573.022(b).

⁵⁵¹ *Winston v. Masterson*, 87 Tex. 200, 27 S.W. 768 (Tex. 1894).

identical to the principles discussed above for federal judges. For that reason, the reader might find more guidance in FEDERAL PRACTICE & PROCEDURE than a Texas hornbook.

The grounds for recusal are:

- (1) “The judge’s impartiality might reasonably be questioned.”

Texas seems to have adopted the “reasonable person” standard from federal law, *see supra*, even if the Texas Supreme Court has not said so. Justice Enoch advocated that standard in an influential concurrence in 1995 in *Rogers v. Bradley*,⁵⁵² and the courts of appeals have generally accepted his reasoning and the United States Supreme Court’s opinion in *Liteky*.⁵⁵³

In a remarkable holding, the Corpus Christi-Edinburg Court of Appeals held that a movant stated a *prima facie* case for recusal by showing that opposing counsel represented the judge in an unrelated matter and was his campaign manager, but because of the reasonable person standard, the movant must nevertheless provide sufficient facts about the nature of these relationships to show that recusal was mandated.⁵⁵⁴

- (2) “The judge has a personal bias or prejudice concerning the subject matter or a party.”

Here too, Texas has adopted the “extrajudicial source” requirement from *Liteky* and federal law, which is to say that the rule is more subtle than simply saying the bias or prejudice must have come from somewhere other than the judicial proceeding itself.⁵⁵⁵ “‘Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion,’ and opinions the judge forms during a trial do not necessitate recusal ‘unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.’”⁵⁵⁶

- (3) “The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.”

Texas follows the “extrajudicial source” rule from *Liteky*, so “personal knowledge” gained during the proceeding does not require a judge to recuse herself.⁵⁵⁷ The question is whether the personal knowledge was

either wrongfully obtained or led to a wrongful disposition of the case.⁵⁵⁸

- (4) “The judge or a lawyer with whom the judge previously practiced law has been a material witness concerning the proceeding.”

- (5) “The judge participated as counsel, advisor, or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service.”

- (6) “The judge knows that the judge, individually or as a fiduciary, or the judge’s spouse or minor child residing in the judge’s household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.”

As with the federal rules, Rule 18b has a special definition of “financial interest” that excludes specific types of interests like ownership in a mutual or investment fund, service in a civic organization, an interest in a mutual company, or ownership of government securities.⁵⁵⁹ And like the federal rules, Rule 18b allows a judge to divest herself of a problematic financial interest if it is discovered “after the judge has devoted substantial time to the matter.”⁵⁶⁰

Despite these narrowing definitions, it is evident that “financial interest” as a ground for recusal in Rule 18b(b) must be broader than “interest” as a ground for disqualification in the Texas Constitution and Rule 18b(a), or else it would be surplusage. The most obvious difference is that the recusal rule applies to the judge’s spouse and minor children, whereas the disqualification rule applies only to the judge. Another difference is that a financial interest the judge shares in common with the public is not disqualifying, but it *can* require the judge to recuse himself.⁵⁶¹

- (7) “The judge or the judge’s spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (A) is a party to the proceeding or an officer, director, or trustee

⁵⁵² 909 S.W.2d 872, 878-84 (Tex. 1995) (Enoch, J., concurring) (responding to Justice Gammage’s decision to recuse himself due to unsavory political advertising).

⁵⁵³ 510 U.S. at 555-56; *see supra*.

⁵⁵⁴ *Lueg v. Lueg*, 976 S.W.2d 308, 311 (Tex. App.—Corpus Christi-Edinburg 1998, pet. denied).

⁵⁵⁵ *Dow Chemical Co. v. Francis*, 46 S.W.3d 237, 240 (Tex. 2001).

⁵⁵⁶ *Id.* (quoting *Liteky*, 510 U.S. at 555).

⁵⁵⁷ *See Kniatt v. State*, 239 S.W.3d 910, 919-20 (Tex. App.—Waco 2007, no pet.) (per curiam).

⁵⁵⁸ *Id.* (quoting *Sommers v. Concepcion*, 20 S.W.3d 27, 43–44 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)).

⁵⁵⁹ TEX. R. CIV. P. 18b(d)(4).

⁵⁶⁰ TEX. R. CIV. P. 18b(f).

⁵⁶¹ *Rio Grande Valley Gas Co. v. City of Pharr*, 962 S.W.2d 631, 638-39 (Tex. App.—Corpus Christi-Edinburg 1997, pet. dismissed w.o.j.) (holding that an order removing a judge from a case must have been based on recusal instead of disqualification, because the alleged interest was that all citizens of his city might enjoy reduced property taxes).

of a party; (B) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or (C) is to the judge's knowledge likely to be a material witness in the proceeding."

This rule appears to go further than other parts of Rule 18b because it applies to relatives of the judge, and also clarifies that the rule applies to those who serve as an "officer, director, or trustee" of a party. One treatise notes that this rule reaches farther than the rule requiring disqualification because it can apply where the judge is separated from the party by two marriages, which would otherwise escape the disqualification rules governing "affinity."⁵⁶² Also, note the rule requires the judge to have knowledge of the situation requiring recusal.

- (8) "The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding."

Here too, the recusal rule is somewhat broader than the disqualification rule. Though an attorney may not be a "party" for the disqualification rule, this rule requires a judge to recuse when his brother is an attorney in the case.⁵⁶³

4. Procedure for recusal and disqualification motions.
a. Procedures in the trial court.

A party seeks recusal or disqualification by filing a motion with the court.⁵⁶⁴ A trial court motion must be verified, state one or more of the grounds for disqualification, must not be based solely on the judge's rulings in the case, and must "state with detail and particularity facts that: (A) are within the affiant's personal knowledge, except that facts may be stated on information and belief if the basis for that belief is specifically stated; (B) would be admissible in evidence; and (C) if proven, would be sufficient to justify recusal or disqualification."⁵⁶⁵

The motion must be filed promptly after learning the basis for recusal or disqualification.⁵⁶⁶ Moreover, a trial court motion to recuse (not disqualify) must not be

filed later than the tenth day before the date set for trial or other hearing, unless the movant either did not know the judge would be presiding, or did not know the basis for the motion.⁵⁶⁷ Any other party may file a response to the motion,⁵⁶⁸ but the judge cannot.⁵⁶⁹

The respondent judge cannot deny a motion to recuse or disqualify. When the motion is filed in a trial court, the clerk must immediately forward it to the respondent judge and to the "presiding judge of the administrative judicial region in which the court is located."⁵⁷⁰ The trial judge then has only *three days* to either (1) recuse or disqualify himself, or (2) sign an order referring the motion to the regional presiding judge.⁵⁷¹ Unlike the federal system, the respondent judge has no power to make a threshold determination that the motion fails to comply with Rule 18a, because the rule says the judge must either grant the motion or refer it "regardless of whether the motion complies with this rule."⁵⁷²

Whether the respondent judge can continue to act depends on the timing of the motion. If the motion is filed before evidence is offered at trial, the respondent judge must take no further action in the case "except for good cause shown stated in writing or on the record."⁵⁷³ If evidence has been offered, the judge may proceed, subject to stay by the presiding regional judge.⁵⁷⁴

Once the motion has been referred, the regional presiding judge must either rule on the motion or assign a judge to rule on it.⁵⁷⁵ Motions to recuse may be summarily denied for noncompliance with Rule 18a, but not motions to disqualify.⁵⁷⁶ The motion must be heard "as soon as practicable" with notice to all parties, and the hearing can be conducted by telephone.⁵⁷⁷ The regional presiding judge can either deny the motion or grant the motion and reassign the case to a new judge.⁵⁷⁸ The regional presiding judge can also order sanctions against the party filing the motion, their attorney, or both, if the judge determines the motion was either groundless and filed in bad faith or for the purpose of harassment, or "clearly brought for unnecessary delay and without sufficient cause."⁵⁷⁹

Appellate review of motions depends on whether

⁵⁶² Roy W. McDonald & Elaine A. Grafton Carlson, MCDONALD & CARLSON TEXAS CIVIL PRACTICE § 3:78 (2d ed.).

⁵⁶³ Cf. *Winston*, 27 S.W. at 768; see MCDONALD & CARLSON TEXAS CIVIL PRACTICE § 3:79.

⁵⁶⁴ TEX. R. CIV. P. 18a(a).

⁵⁶⁵ TEX. R. CIV. P. 18a(a).

⁵⁶⁶ TEX. R. CIV. P. 18a(b)(1)(A).

⁵⁶⁷ TEX. R. CIV. P. 18a(b)(1)(B).

⁵⁶⁸ TEX. R. CIV. P. 18a(c)(1).

⁵⁶⁹ TEX. R. CIV. P. 18a(c)(2).

⁵⁷⁰ TEX. R. CIV. P. 18a(e)(1).

⁵⁷¹ TEX. R. CIV. P. 18a(f)(1).

⁵⁷² See *In re Marshall*, 515 S.W.3d 420, 422 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding).

⁵⁷³ TEX. R. CIV. P. 18a(f)(2)(A).

⁵⁷⁴ TEX. R. CIV. P. 18a(f)(2)(B).

⁵⁷⁵ TEX. R. CIV. P. 18a(g)(1). If the regional presiding judge is the one being challenged, she can assign a judge to decide the motion, or may refer the matter to the Chief Justice for consideration. *Id.*

⁵⁷⁶ TEX. R. CIV. P. 18a(g)(3).

⁵⁷⁷ TEX. R. CIV. P. 18a(g)(6).

⁵⁷⁸ TEX. R. CIV. P. 18a(g)(7).

⁵⁷⁹ TEX. R. CIV. P. 18a(h).

the motion was to recuse or disqualify,⁵⁸⁰ and those options are discussed above. To summarize, a refusal to disqualify can be challenged through mandamus, but the standard is very high. A refusal to recuse can only be challenged through an appeal from the final judgment.

A special set of rules applies when a party files three or more motions to recuse or disqualify a district court or statutory county court judge.⁵⁸¹ A judge challenged by a third or subsequent motion must continue to follow Rule 18a, but can continue to preside over the case as though the motion had never been filed.⁵⁸² If the motion is denied, the judge hearing the motion “shall award reasonable and necessary attorneys’ fees and costs to the party opposing the motion.”⁵⁸³ The movant and his attorney are jointly and severally liable for the award, and it must be paid before the 31st day after the motion is denied, unless superseded.⁵⁸⁴ If the motion is granted, the judge must vacate all orders entered by the respondent judge since the motion was filed.⁵⁸⁵

b. Procedures in the appellate courts.

In the appellate court, a party seeks recusal or disqualification by filing a motion. TRAP 16.3 does not have any specific requirements, unlike TRCP 18a,⁵⁸⁶ but a movant should carefully consider how to state and prove the serious allegations being made. The motion must be filed promptly.⁵⁸⁷

The appellate judge can either (1) grant the motion, or (2) refer the motion to the court for decision *en banc*.⁵⁸⁸ A majority vote will prevail, and the challenged judge must not vote or participate in deliberations.⁵⁸⁹ The respondent judge must not take any action before referring the matter for decision by the court.⁵⁹⁰ A Texas Supreme Court case explains that when a movant asks multiple justices to disqualify themselves, the *en banc* court decides the motion against each justice individually, not as a group.⁵⁹¹ Each challenged justice refrains from the vote regarding the motion to disqualify him personally, but can vote on the motion to disqualify the other justices.⁵⁹²

A decision to recuse or disqualify an appellate justice cannot be reviewed by further appeal. A decision to *deny* the motion can be reviewed,⁵⁹³ though this author was unable to locate any opinion that exercised this power. *O’Connor’s* reasonably hypothesizes that

review would be through a petition for review in the case of a court of appeals justice, or a motion for rehearing in the case of a Supreme Court justice.⁵⁹⁴

If a justice is disqualified after writing the opinion in a case, the opinion and judgment must be vacated—but the remaining members of the panel may proceed to decide the case.⁵⁹⁵

CONCLUSION

This paper attempts to provide a useful procedural guide by gathering together legal resources that are not clearly cross-referenced or well-explained. And it attempts to illustrate the issues by using Judge Newman’s story, as well as some recent drama.

In conclusion, I hope the reader will remember these points:

1. Complaints about judicial misconduct are common, but *valid* complaints are highly uncommon. The court system has developed an elaborate process for dealing with largely meritless objections.
2. There is no easy way to deal with the disability that comes when nature, being oppressed, commands the mind to suffer with the body.
3. The federal judicial misconduct and disability system may have a systemic problem, insofar as it depends on federal judges to police themselves in good faith—but *any* such system would end up depending on federal judges. It’s federal judges all the way down, unless the federal system were to fundamentally change its procedures to match the Texas model.
4. The Texas judicial misconduct and disability system and recusal rules avoid many of the structural problems with the federal system by taking power away from the challenged judges, for good or ill.
5. It really is astonishing what happens when a federal judge doubles down and says, “you can’t make me.” Sometimes you find out that they can, indeed, “make you.” Sometimes nothing happens at all.

⁵⁸⁰ TEX. R. CIV. P. 18a(j).

⁵⁸¹ TEX. CIV. PRAC. & REM. CODE § 30.016.

⁵⁸² *Id.*

⁵⁸³ *Id.*

⁵⁸⁴ *Id.*

⁵⁸⁵ *Id.*

⁵⁸⁶ TEX. R. APP. P. 16.3(a).

⁵⁸⁷ *Id.*

⁵⁸⁸ TEX. R. APP. P. 16.3(a)

⁵⁸⁹ TEX. R. APP. P. 16.3(b).

⁵⁹⁰ *Id.*

⁵⁹¹ *Manges v. Guerra*, 673 S.W.2d 180, 185 (Tex. 1984).

⁵⁹² *Id.*

⁵⁹³ TEX. R. APP. P. 16.3(c).

⁵⁹⁴ Alexandra Ziek Beavers, ed., *O’CONNOR’S TEXAS CIVIL APPEALS*, at Chapter 3-I, § 10.1 (2022 ed.).

⁵⁹⁵ *Tesco Am.*, 221 S.W.3d at 556-57.

