JUDGES DESERVE NEUTRAL DECISIONMAKERS TOO

Sean Keller[*]

ABSTRACT

Judge Pauline Newman's lawsuit against her colleagues on the Federal Circuit has garnered much attention in the press and the legal community. Most of this attention has focused on the seemingly indefinite judicial suspension issued against Judge Newman by the Judicial Council of the Federal Circuit. However, the due process issues underlying this case and the Judicial Conduct and Disability Act are equally pressing. This Article examines several potential due process arguments and concludes that the Judicial Conduct and Disability Act includes at least one fundamental constitutional defect: at least some of the judges on judicial councils improperly review their own decisions. To address this issue, this Article also proposes several minor changes to the Judicial Conduct and Disability Act.

TABLE OF CONTENTS

---

[*] J.D., Texas A&M University School of Law. I would like to thank my friends and family for their support in writing this article. Additionally, I would like to thank the editors of the *Journal of Law and Civil Governance at Texas A&M* for their edits and feedback. The opinion is the author's own and was submitted prior to the author joining Foley & Lardner LLP. The opinion is not representative of the firm's views and does not constitute legal advice.

1. INTRODUCTION

On March 24, 2023, Chief Judge Kimberly Moore of the Court of Appeals for the Federal Circuit entered an order pursuant to Rule 5(a) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings identifying a judicial complaint against her 96-year-old colleague Judge Pauline Newman, the oldest living active federal judge in the United States at the time of writing this Article.[1] Chief Judge Moore issued this order "having found probable cause to believe that Judge Newman 'ha[d] engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts' and/or '[was] unable to discharge all the duties of office by reason of mental

[1] *In re Complaint No. 23-90015: Order*, U.S. CT. APP. FED. CIR., at 1 (Mar. 24, 2023), https://perma.cc/UG8D-CNP3 [hereinafter *March 24 Order*].

or physical disability.'"[2] Accordingly, Chief Judge Moore appointed a special committee ("the Special Committee") to investigate the complaint and prepare a report and recommendation to the Judicial Council of the Federal Circuit, a group tasked with handling judicial misconduct and disability complaints.[3]

The March 24 Order claimed that Judge Newman suffered from health issues that rendered her unable to discharge her duties as an active circuit judge.[4] In particular, judges and staff raised concerns that Judge Newman may suffer from an "impairment of cognitive abilities (i.e., attention, focus, confusion and memory)."[5] Judge Newman's persistent health challenges have led to significant delays in the processing and resolution of cases.[6] Since 2020, Judge Newman participated in far fewer hearings and authored far fewer opinions than her colleagues.[7] Despite reductions in her caseload, Judge Newman's physical condition has allegedly not improved.[8]

After Chief Judge Moore issued the March 24 Order, the Special Committee began interviewing staff and gathering information.[9] The Special Committee ordered Judge Newman to "undergo a neurological examination and full neuro-psychological testing to determine whether she suffered from a disability."[10] Additionally, the Special Committee ordered Judge Newman to produce medical records and participate in an interview with the Committee.[11] In response to these requests, Judge Newman indicated she would be willing to cooperate with the Special Committee if it transferred the

---

2 *Id.* (quoting 28 U.S.C. § 351(a)).

3 *In re Complaint No. 23-90015: Order of the Judicial Council of the Federal Circuit,* U.S. CT. APP. FED. CIR., at 11 (Sept. 20, 2023), https://perma.cc/6TQB-7GWT [hereinafter *Judicial Council Order*].

4 *March 24 Order*, *supra* note 1, at 1.

5 *Id.* at 2.

6 Tobi Raji, *97-Year-Old Judge Loses Lawsuit Challenging Suspension from the Bench*, WASH. POST (July 10, 2024, 5:35 PM), https://perma.cc/QQC6-6H8V.

7 *See March 24 Order*, *supra* note 1, at 2–3.

8 *Id.* at 3.

9 *Judicial Council Order*, *supra* note 3, at 11.

10 *Id.* at 12.

11 *Id.* at 13.

proceeding to another circuit.[12] However, the Special Committee denied this request arguing the matter did not involve "exceptional circumstances."[13]

On May 10, 2023, Judge Newman filed a complaint against the Judicial Council of the Federal Circuit and its members.[14] An amended complaint was subsequently filed on June 27, 2023.[15] Among other things, the complaint alleges that the Special Committee's actions amount to an unconstitutional removal of a civil officer of the United States and a violation of Judge Newman's due process rights.[16] Additionally, the Special Committee's orders allegedly violated Judge Newman's due process rights because "all members of the Judicial Council are either complainants, actual or potential witnesses, interested parties, or all of the above."[17]

However, this complaint did not deter the Special Committee from completing its investigation. On September 20, 2023, the Judicial Council of the Federal Circuit released a report detailing the Special Committee's findings and suspending Judge Newman from hearing any cases for one year subject to a possible renewal if she continued to not comply with the Committee's requests.[18] The Committee on Judicial Conduct and Disability of the Judicial Conference of the United States, a group that reviews decisions from judicial councils, later affirmed this decision.[19]

One year later, Judge Newman remains unsuccessful in challenging this suspension. The U.S. district court hearing Judge Newman's lawsuit dismissed her claims.[20] Additionally, the Judicial Council of the Federal Circuit

---

12 *Id.* at 13–14.

13 *Id.* at 14.

14 *See* Complaint, Newman v. Moore, No. 23-cv-1334, 2024 WL 3338858 (D.D.C. July 18, 2024).

15 *See* First Amended Complaint at 1, Newman v. Moore, No. 23-cv-1334, 2024 WL 3338858 (D.D.C. July 18, 2024).

16 *Id.* at 21, 24–25.

17 *Id.* at 25.

18 *See Judicial Council Order*, *supra* note 3, at 72–73.

19 *See In re Complaint No. 23-90015: Memorandum of Decision*, COMM. ON JUD. CONDUCT & DISABILITY OF THE JUD. CONF. OF THE U.S., at 29 (Feb. 7, 2024), https://perma.cc/B992-VQKD.

20 *See* Newman v. Moore, 717 F. Supp. 3d 43, 67 (D.D.C. 2024); Newman v. Moore, No. 23-cv-01334 (CRC), 2024 WL 3338858, at *7 (D.D.C. July 9, 2024).

recently renewed her suspension for another year.[21] At this time, Judge Newman's fate on the bench rests with the D.C. Circuit.[22]

Judge Newman's case involves a host of issues, but this Article will focus on judicial disqualification because Judge Newman and her supporters have repeatedly insisted that the proceedings need to be transferred to another circuit court.[23] This Article will focus on two aspects of judicial disqualification: (1) constitutional due process and (2) the disqualification standard under the Judicial Conduct and Disability Act.[24] Part II will describe the origins of the Judicial Conduct and Disability Act of 1980 and unique aspects of Federal Circuit procedure under it.[25] Part III will provide a historical analysis of judicial disqualification.[26] Part IV will explore the possible disqualification grounds under the Judicial Conduct and Disability Act and the effects of failing to recuse.[27] Part V will analyze these disqualification grounds in the context of Judge Newman's case.[28] Part VI will discuss changes to the Judicial Conduct and Disability Act that can address due process concerns and improve its disqualification standard.[29]

2. JUDICIAL CONDUCT AND DISABILITY ACT

Judge Newman's complaint against the Judicial Council of the Federal Circuit stems from the Judicial Conduct and Disability Act.[30] The Act has been around for more than 40 years, and it has been the subject of many changes since it first took effect.[31] Notably, the Act is now accompanied by

---

21 *In re Complaint No. 23-90015: Order*, U.S. CT. APP. FED. CIR., at 2 (Sept. 6, 2024), https://perma.cc/5QA6-YHSD.

22 Michael Shapiro, *Newman Appeals Loss in Suit Fighting Federal Circuit Suspension*, BLOOMBERG L. (July 11, 2024, 11:20 AM), https://perma.cc/G474-SQ7T.

23 Paul Michel, *Chief Judge Moore v. Judge Newman: An Unacceptable Breakdown of Court Governance, Collegiality and Procedural Fairness*, IPWATCHDOG (July 9, 2023, 1:15 PM), https://perma.cc/6X2T-FW6T.

24 *See* 28 U.S.C. §§ 351–364.

25 *See infra* Part 2.

26 *See infra* Part 3.

27 *See infra* Part 4.

28 *See infra* Part 5.

29 *See infra* Part 6.

30 *See* Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035.

31 *See, e.g.*, Act of Nov. 2, 2002, Pub. L. No. 107-273, § 11042, 116 Stat. 1848.

the Rules for Judicial-Conduct and Judicial-Disability Proceedings, a set of rules promulgated by the Judicial Committee of the United States in response to a report published by the Judicial Conduct and Disability Act Study Committee.[32]

Since the Act first took effect over 40 years ago, several federal judges have levied facial and as-applied constitutional challenges against it in federal court.[33] These include Judge John McBryde of the Northern District of Texas and Judge Alcee Hasting of the Southern District of Florida.[34] In both cases, the district court reached the merits of at least some of the constitutional challenges in each judge's complaint.[35] However, the merits of these claims were generally not addressed on appeal because of procedural deficiencies.[36]

2.1. Overview of the Judicial Conduct and Disability Act

The Judicial Conduct and Disability Act allows the Circuit Court of Appeals to review and adjudicate complaints against federal judges.[37] Any person can file a complaint, but the complaint must allege that the judge has "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or that the judge is "unable to discharge all the duties of office by reason of mental or physical disability."[38] Inmates and litigants file most of the complaints.[39] Alternatively, the chief judge of the circuit may "identify a complaint . . . and thereby dispense with filing of a written complaint" based on available information.[40] Chief circuit judges

---

32 GUIDE TO JUDICIARY POLICY, Vol. 2E, Ch. 3, § 320 (2019) [hereinafter 2019 Rules].

33 *See, e.g.*, McBryde v. Committee to Rev. Cir. Council Conduct, 83 F. Supp. 2d 135, 139 (D.D.C. 1999), *aff'd in part, vacated in part*, 264 F.3d 52 (D.C. Cir. 2001); Hastings v. Jud. Conf. of U.S., 593 F. Supp. 1371, 1373 (D.D.C. 1984), *aff'd in part, vacated in part,* 770 F.2d 1093 (D.C. Cir. 1985).

34 *See McBryde*, 83 F. Supp. 2d at 139; *Hastings*, 593 F. Supp. at 1373.

35 *See McBryde*, 83 F. Supp. 2d at 178; *Hastings*, 593 F. Supp. at 1384–85.

36 *See McBryde*, 264 F.3d at 55; *Hastings*, 770 F.2d at 1095.

37 28 U.S.C. § 352(a).

38 § 351(a).

39 *See Judicial Complaints—Complaints Commenced, Terminated, and Pending with Allegations and Actions Taken Under Authority of 28 U.S.C. 351-364 During the 12-Month Period Ending September 30, 2023*, U.S. CTS., https://perma.cc/HKZ5-R7VH.

40 § 351(b).

identify far fewer complaints.[41] In either case, the chief judge "shall expeditiously review any complaint received under section 351(a) or identified under section 351(b)" and issue an order dismissing the complaint or concluding the proceeding.[42] Although thousands of complaints are filed or identified against judges each year, most are eventually dismissed.[43]

If the chief judge does not enter an order dismissing or concluding the proceeding, the chief judge shall "appoint himself or herself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint."[44] The special committee shall conduct an investigation and file a report that "present[s] both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit."[45] Upon receipt of the report, a judicial council may take any number of actions against the judge whose conduct or disability is the subject of the complaint. Notably, a judicial council may prevent the judge from working on new cases for a certain period.[46] If the subject judge disagrees with the decision, he can appeal the matter to the Committee on Judicial Conduct and Disability of the Judicial Conference ("the Judicial Conference") of the United States for review.[47]

Nevertheless, Congress placed limits on the power of judicial councils. A judicial council may not "order removal from office of any judge appointed to hold office during good behavior."[48] Congress correctly recognized that impeachment was the only means of removing federal judges and wisely rejected the idea of allowing judicial councils to remove federal judges.[49] However, a judicial council may take other actions such as "certifying [the] disability of the judge" or "requesting that the judge voluntarily retire."[50]

---

41 *See Judicial Complaints*, *supra* note 39.

42 § 352(a)–(b).

43 *See Judicial Complaints*, *supra* note 39.

44 § 353(a).

45 *Id.* § 353(c).

46 *See id.* § 354(a)(2)(A)(i).

47 2019 Rules, *supra* note 32, Vol. 2E, Ch. 3, art. VII(21)(a).

48 § 354(a)(3)(A).

49 Arthur D. Hellman, *An Unfinished Dialogue: Congress, the Judiciary, and the Rules for Federal Judicial Misconduct Proceedings*, 32 GEO. J. LEGAL ETHICS 341, 348, 354 (2019).

50 § 354(a)(2)(B)(i)–(ii).

Accordingly, the Congressional Statute allows judicial councils to take a myriad of actions against judges that would encourage the judge to leave office, but the councils cannot remove judges from office.

The rules promulgated by the Judicial Conference of the United States include other details regarding the review and adjudication of complaints.[51] These rules "establish standards and procedures for addressing complaints filed by complainants or identified by chief judges under the Judicial Conduct and Disability Act."[52] Notably, Rule 25 addresses the standard for disqualifying judges from proceedings, and Rule 26 addresses the standard for transferring proceedings to other judicial councils.[53] Rule 25 provides that "[a]ny judge is disqualified from participating in any proceeding[s] . . . if the judge concludes that circumstances warrant disqualification," and Rule 26 provides that "[i]n exceptional circumstances, a chief judge or a judicial council may ask the Chief Justice to transfer a proceeding . . . to the judicial council of another circuit."[54] These rules help ensure the judges whose conduct or disability is the subject of the complaint have neutral decisionmakers.

2.2. The Federal Circuit's Special Committee and Judicial Council

The Federal Circuit's special investigatory committee is different from its counterparts in other circuit courts. Ordinarily, the special committee "must consist of the chief judge [of the circuit court] and [an] equal number[] of circuit and district judges."[55] "If a complaint [involves] a district judge, bankruptcy judge, or magistrate judge . . . the district-judge members of the special committee must be from districts other than the district of the subject judge" whenever possible.[56] However, special committees before the United States Court of Federal Claims, the Court of International Trade, and the Court of Appeals for the Federal Circuit can only consist of judges from

---

51 The Judicial Conduct and Disability Act grants each judicial council and the Judicial Conference the power to prescribe rules for the conduct of proceedings in Chapter 16. *See id.* §§ 331, 358(a).

52 2019 Rules, *supra* note 32, Vol. 2E, Ch. 3, § 320.

53 *Id.* art. VIII(25), (26).

54 *Id.* art. VIII(25)(a), (26).

55 *Id.* art. V(12)(a).

56 *Id.* In this context, "subject judge" refers to the judge who is the subject of the investigation.

the subject judge's court.[57] Pursuant to this rule, Chief Judge Moore appointed herself and her colleagues Judge Sharon Prost and Judge Richard Taranto to the Special Committee.[58]

The composition of the Judicial Council of the Federal Circuit is also different from its counterparts in other circuits. A judicial council usually consists of the chief judge of the circuit and "an equal number of circuit judges and district judges of the circuit, as such number is determined by majority vote of all such judges of the circuit in regular active service."[59] However, the Judicial Council presently consists of all the judges on the Federal Circuit except Judge Newman.[60] Accordingly, the Judicial Council contains the same three judges that investigated the complaint against Judge Newman.

3. HISTORY OF JUDICIAL DISQUALIFICATION

The right to a fair trial is a cornerstone of due process in the American judicial system.[61] At common law, the right to fair trial meant "no man shall be a judge in his own case."[62] In other words, judges could not hear a case in which they had financial interests in the case's outcome.[63] Additionally, common law courts recognized a few other grounds for disqualification.[64] These ideas found their way into American jurisprudence following the ratification of the Constitution. Since then, Congress and the courts have expanded the scope of judicial disqualification.[65]

3.1. Disqualification at Common Law

In England, the concept of judicial disqualification went through several iterations before a settled standard emerged. One of the earliest judicial

---

57 *Id.*

58 *Judicial Council Order*, *supra* note 3, at 11 n.3.

59 28 U.S.C. § 332(a)(1).

60 *Judicial Council*, U.S. CT. OF APPEALS FOR THE FED. CIR., https://perma.cc/9K6T-UAU7.

61 *See* U.S. CONST. amend. VI; 4 WILLIAM BLACKSTONE, COMMENTARIES *343.

62 *See infra* notes 70–72 and accompanying text.

63 *Id.*

64 *See infra* notes 73–75 and accompanying text.

65 *See infra* Section 3.3.

disqualification standards was proposed by the English cleric Henry de Bracton in the 13th century. He believed "[a] justiciary may be refused for good cause, but the only cause for refusal is a suspicion, which arises from many causes."[66] A suspicion of impartiality may arise if the judge is related to a party by blood, the judge is friends with a party, or the judge has served as a lawyer for a party.[67]

By the 17th century, English courts rejected Bracton's idea that bias could form a basis for judicial disqualification. William Blackstone noted that "a judge might be refused for good cause [during the times of Bracton]; but now the law is otherwise, and it is held that judges and justices cannot be challenged. For the law will not suppose the possibility of bias or favor in a judge."[68] Judges are "already sworn to administer impartial justice" and their authority "greatly depends upon that presumption and idea."[69] These judges evidently thought that having personal relationships and friendships with parties before the court would not cloud their judgment.

In place of Bracton's standard, courts adopted a new standard proposed by Lord Edward Coke, the former Chief Justice of the King's Bench. The new standard turned on the idea that "no man shall be a judge in his own case" (*aliquis non debet esse judex in propia causa*).[70] According to Coke, this meant judges could not decide cases where they had a pecuniary interest. In *Dr. Bonham's Case*, for example, Coke explained the Royal College of Physicians could not fine Dr. Bonham for his refusal to secure a license to practice medicine from the College because it stood to receive part of the proceeds from the fine it imposed on him.[71] Accordingly, a panel of adjudicators cannot all simultaneously serve as "judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture."[72]

Although pecuniary interest was the prevailing basis for judicial disqualification at common law, some courts also recognized a few other

---

66 6 HENRY BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 249 (Travers Twiss ed., 1883), *reprinted in* Kraus (1964).

67 *Id.*

68 3 WILLIAM BLACKSTONE, COMMENTARIES *361.

69 *Id.*

70 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND § 212, *141a (1628).

71 Dr. Bonham's Case (1610) 77 Eng. Rep. 646, 652; 8 Co. Rep. 113 b, 118 a.

72 *Id.*

grounds for disqualification. For example, courts also disqualified judges for holding public offices and owning property that was the subject of the dispute.[73] Additionally, courts also recognized that one cannot be a judge and a party in the same case.[74] However, these courts did not disqualify judges from reviewing their decisions on appeal.[75] Much like the rule for pecuniary interests, these rules help judges maintain their independence free from any outside influence.

3.2. Disqualification at the Founding

Many of the Founders echoed Lord Coke's ideas about judicial disqualification. In *Federalist* No. 10, for example, James Madison explained that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."[76] He also noted that "a body of men are unfit to be both judges and parties, at the same time."[77] Both of these statements directly invoke Coke's ideas about judicial disqualification expressed in *Dr. Bonham's Case*.[78]

By contrast, Hamilton appeared to advocate for a broader judicial disqualification standard. In *Federalist* No. 80, Hamilton explained that "[n]o man ought certainly to be a judge in his own cause, *or in any cause in respect to which he has the least interest or bias*."[79] Here, the second half of Hamilton's

---

73 *See, e.g.*, The Case of Foxham Tithing in Com. Wilts (1706) 91 Eng. Rep. 514, 514; 2 Salk. 607, 607 (disqualifying judge who held another public office that was the subject of the case); Anonymous (1698) 91 Eng. Rep. 343, 343; 1 Salk. 396, 396 (laying "by the heels" the Mayor of Hereford for presiding over an ejectment action involving one of his own tenants).

74 Dr. Bonham's Case (1610) 77 Eng. Rep. 646, 652; 8 Co. Rep. 113 b, 118, *accord* City of London v. Wood (1702) 88 Eng. Rep. 1592, 1602; 12 Mod. 669, 687*, see also* Earl of Derby's Case (1614) 77 Eng. Rep. 1390, 1390; 12 Co. Rep. 114, 114 (holding a judge could not preside over a case where he was a party, even if he was the sole judge in the court).

75 *See* David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 662 n.115 (1982) ("[I]n England judges habitually sat in review of their own decisions.").

76 THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961).

77 *Id.*

78 *See supra* notes 71–72 and accompanying text.

79 THE FEDERALIST NO. 80, *supra* note 76, at 538 (Alexander Hamilton) (emphasis added).

statement seems to echo Bracton's idea that a mere suspicion of bias is a sufficient ground for judicial disqualification.[80]

After the colonies ratified the Constitution, Coke and Madison's views seemed to prevail. The first federal disqualification statute required recusal when the judge was "concerned in interest"—that is, a financial interest in the case's outcome—or when he "ha[d] been of counsel for either party."[81] Many state legislatures and state courts followed suit by affirming the common law grounds for judicial disqualification.[82]

However, American judges also deviated from the English common law norms on judicial disqualification during this time, with one notable difference being that some judges could not review their decisions on appeal. The Judiciary Act of 1789 forbade the judges on district courts—the primary courts of original jurisdiction—from reviewing their decisions on appeal, but the Act did not place this same limitation on Supreme Court Justices even though it also required them to serve as judges on circuit courts—the other courts of original jurisdiction during this time—two times each year.[83] Accordingly, the Justices, who at the time mostly heard cases brought for mandatory review on writs of error, only had an informal process for recusing themselves from the cases they heard on the circuit courts.[84] The distinction between district judges and Supreme Court Justices has led some to criticize the Judiciary Act as problematic.[85]

3.3. The Modern Disqualification Standard

The modern judicial disqualification protections contain three components: a statutory component, a judicial ethics component, and a

---

80 BRACTON, *supra* note 66, at 249.

81 Act of May 8, 1792, ch. 37, § 11, 1 Stat. 278–79.

82 *See, e.g.*, Commonwealth v. Worcester, 3 Pick. 462, 471 (Mass. 1826); Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315, 320 (1834); Snedekers v. Allen, 2 N.J.L. 35, 51 (N.J. 1806); Cox v. Breedlove, 10 Tenn. 499, 501 (1831).

83 Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1757–62 (2003).

84 *Id.* at 1762–63. For an example, see Stuart v. Laird, 5 U.S. 299, 307 (1803) (noting that Chief Justice Marshall recused himself from the case because he had "tried the cause in the court below").

85 Glick, *supra* note 83, at 1762.

constitutional component.[86] The statutory and judicial ethics components mirror many of the same concepts addressed in the constitutional component.[87] However, it's important to note that statutory and judicial ethics components afford more protection than the constitutional component.[88]

The statutory component contains two parts: 28 U.S.C. §§ 144, 455. The former provides that a judge must disqualify himself from hearing a case "[w]henever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party."[89] In contrast, the latter provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[90] This includes situations where the judge has "a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding" and situations where the judge serves as a "material witness" to the proceeding.[91]

In addition to these federal disqualification statutes, federal judges must recuse themselves from proceedings in accordance with the American Bar Association's Model Code of Judicial Conduct and the Code of Conduct for United States Judges.[92] Unlike the statutes, the Codes of Conduct do not create a cause of action.[93] However, the disqualification grounds are largely

---

86 *See* Dane Thorley, *The Failure of Judicial Recusal and Disclosure Rules: Evidence from a Field Experiment*, 117 NW. U. L. REV. 1277, 1288 (2023).

87 *See infra* Section 3.3.

88 Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 890 (2009) ("Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution."); *see also* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986) ("The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification . . . .").

89 28 U.S.C. § 144.

90 *Id.* § 455(a).

91 *Id.* § 455(b).

92 MODEL CODE OF JUD. CONDUCT R. 2.11(A) (AM. BAR ASS'N 2020); CODE OF CONDUCT FOR U.S. JUDGES CANON 3(C) (JUD. CONF. OF THE U.S. 2019).

93 *See* Hueter v. Kruse, 576 F. Supp. 3d 743, 775 (D. Haw. 2021).

the same.[94] Judges should disqualify themselves from any "proceeding in which the judge's impartiality might reasonably be questioned."[95] This includes, but is not limited to, situations where "the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding" and situations where the judge was a "material witness."[96]

The Constitution affords litigants similar protections. The earliest Supreme Court cases addressing judicial disqualification held that, as a matter of procedural due process, a judge could not have a pecuniary outcome in the litigation,[97] a judge could not serve as the sole member of a grand jury that brought charges against a defendant when those charges were later adjudicated by the same judge,[98] and a judge could not hear a case where a party levied abuse and criticism against a judge.[99] Seemingly consistent with Hamilton's and Bracton's views on judicial disqualification, the Supreme Court later held that the Constitution's procedural due process rights protect parties against judicial bias.[100] The test for bias focuses on "whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[101]

The Court has found an unconstitutional risk of actual bias in at least two cases. First, the Court in *Caperton v. A.T. Massey Coal Co., Inc.* held that there is "a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[102] Second, the Court in *Williams v. Pennsylvania* held "there is an impermissible risk of actual bias

---

94 *Compare* § 455(a)–(b), *with* MODEL CODE OF JUD. CONDUCT R. 2.11 (AM. BAR ASS'N 2020), *and* CODE OF CONDUCT FOR U.S. JUDGES 3C (JUD. CONF. OF THE U.S. 2019).

95 MODEL CODE OF JUD. CONDUCT R. 2.11(A) (AM. BAR ASS'N 2020); CODE OF CONDUCT FOR U.S. JUDGES CANON 3(C)(1) (JUD. CONF. OF THE U.S. 2019).

96 MODEL CODE OF JUD. CONDUCT R. 2.11(A)(1) (AM. BAR ASS'N 2020); CODE OF CONDUCT FOR U.S. JUDGES CANON 3(C)(1)(A)–(B) (JUD. CONF. OF THE U.S. 2019).

97 *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927).

98 *See In re* Murchison, 349 U.S. 133, 137, 139 (1955).

99 *See* Mayberry v. Pennsylvania, 400 U.S. 455, 465–66 (1971).

100 *See* Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 872, 877 (2009).

101 *Id.* at 881.

102 *Id.* at 884.

when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case."[103] In both cases, the Court concluded that the judge in question should have recused himself from the case.[104]

4. JUDICIAL DISQUALIFICATION UNDER THE JUDICIAL CONDUCT AND DISABILITY ACT

This Article focuses on two judicial disqualification grounds under the Judicial Conduct and Disability Act: those that have a constitutional basis and those that do not. The constitutional disqualification grounds stem from the Fifth and Fourteenth Amendments' Due Process Clauses.[105] The other disqualification grounds fall under the disqualification standard in the Rules for Judicial-Conduct and Judicial-Disability Proceedings and the disqualification rules enumerated in the Model Code for Judicial Conduct.[106]

4.1. The Due Process Clause

The Constitution's Fifth and Fourteenth Amendments provide procedural due process protections to all persons, including judges.[107] The Supreme Court has recognized that these protections extend to quasi-judicial hearings.[108] Although the Court has yet to apply the Fifth Amendment Due Process Clause to hearings before a judicial council, some federal courts have applied it when these councils threatened to temporarily suspend judges from hearing new cases.[109] Accordingly, the Due Process Clause is the basis for constitutional judicial disqualification grounds under the Judicial Conduct and Disability Act.

---

103 Williams v. Pennsylvania, 136 S. Ct. 1899, 1905 (2016).

104 *Id.* at 1909; *Caperton*, 556 U.S. at 886.

105 U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law"); *id.* amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

106 2019 Rules, *supra* note 32, Vol. 2E, Ch. 3, art. VIII(25)(a); MODEL CODE OF JUD. CONDUCT R. 2.11 (AM. BAR ASS'N 2020).

107 *See* U.S. CONST. amend. V; *id.* amend. XIV, § 1.

108 *See* Schweiker v. McClure, 456 U.S. 188, 195 (1982).

109 *See infra* note 113 and accompanying text.

This Article identifies three constitutional disqualification grounds under the Judicial Conduct and Disability Act: (1) the judges serve as investigators and adjudicators,[110] (2) the judges render initial decisions that they then review,[111] and (3) the judges serve as accusers and adjudicators.[112] A due process violation on either of these grounds casts doubt on the validity of a Judicial Council's final decision.

4.1.1. Disqualification Grounds

4.1.1.1. Judges as Investigators and Adjudicators

In earlier challenges to the constitutionality of the Judicial Conduct and Disability Act, the courts relied on the Supreme Court's decision in *Withrow v. Larkin* to conclude that vesting adjudicatory and investigatory powers in members of a special committee does not violate a subject judge's procedural due process rights.[113] *Withrow* involved a due process challenge brought by Duane Larkin, a licensed physician whose license was at risk of being revoked by the Wisconsin Medical Examining Board ("the Board") because he had allegedly engaged in "certain proscribed acts."[114]

In the case, Larkin took issue with the investigative and adjudicatory powers of the Board.[115] The Board first conducted an investigation—part of which involved a hearing where witnesses testified—to determine whether Larkin had engaged in "certain proscribed acts."[116] Next, the Board had planned to hold a "contested hearing" where it would determine whether his license should be suspended.[117] However, at the request of Larkin, the district

---

110 28 U.S.C. § 353(c).

111 *Id.* § 352(b)–(c).

112 *Id.* § 352(a).

113 *See* Hastings v. Jud. Conf. of U.S., 593 F. Supp. 1371, 1384 (D.D.C. 1984), *aff'd in part, vacated in part*, 770 F.2d 1093 (D.C. Cir. 1985); McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S., 83 F. Supp. 2d 135, 170 (D.D.C. 1999), *aff'd in part, vacated in part*, 264 F.3d 52 (D.C. Cir. 2001); Hastings v. Jud. Conf. of U.S., 829 F.2d 91, 104–05 (D.C. Cir. 1987).

114 Withrow v. Larkin, 421 U.S. 35, 38–39 (1975).

115 *Id.* at 39.

116 *Id.* at 40.

117 *Id.* at 40–41.

court granted a restraining order that prevented this hearing.[118] In place of this hearing, the Board instead issued a decision in which it found that there was probable cause to believe Larkin had engaged in proscribed conduct that warranted an action to revoke his medical license.[119]

The Court in *Withrow* held that combining adjudicatory and investigative powers in a single decisionmaker does not necessarily run afoul of due process.[120] A challenger will only prevail upon carrying a high burden of persuasion:

> [A challenger] must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.[121]

In the Court's view, disqualifying a judge for holding concurrent adjudicatory and investigative powers was different from other grounds of judicial disqualification.[122] Where a judge or decisionmaker has a pecuniary interest in the outcome of the proceeding or has been the target of personal abuse or criticism from the party before him, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."[123] This approach to bias would later inform the Court's holding in *Caperton*.[124]

The Court's holding in *Withrow* was its attempt to reconcile new grounds for judicial disqualification with the common law grounds for disqualification. The Court correctly recognized that a judge's pecuniary interests in the litigation violate a party's procedural due process rights because the English common law courts had long recognized that such an interest creates a high risk of actual bias on the part of the judge.[125] Accordingly, a

---

118 *Id.* at 41.

119 *Id.*

120 *Id.* at 47.

121 *Id.*

122 *Id.*

123 *Id.*

124 *See generally* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

125 *See Withrow*, 421 U.S. at 47.

judge could only be disqualified from hearing a case if the basis for disqualification presented a similarly high risk of actual bias on the part of the judge. This test is consistent with the standard offered by English courts during the 19th century, in which courts looked at whether there was a real likelihood of bias on the part of the judge if the judge did not have a pecuniary interest in the case.[126]

In the aftermath of *Withrow*, some courts have attempted to differentiate it based on its facts. For example, some courts contend that vesting investigatory and adjudicatory powers in an agency or an adjudicatory board presents less of a due process risk than when these same powers are vested in a single individual.[127] This is especially true when "the individual has had significant prior involvement in the matter in a personal, adversarial nature."[128] However, this argument misreads *Withrow*. The Court makes it clear that the party raising the due process challenge must show that "conferring investigative and adjudicative powers on the *same individuals* poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[129] Accordingly, *Withrow*'s core holding applies to individuals and groups of individuals.[130]

4.1.1.2. Judges That Review Their Initial Decisions

In *Withrow*, the Court distinguished the case from several precedents, including *Morrissey v. Brewer*, a case the district court relied on.[131] *Morrissey* involved two convicted criminal defendants: Morrissey and Booher.[132] After serving part of their sentences, the defendants left custody on parole but

---

126 GRANT HAMMOND, JUDICIAL RECUSAL: PRINCIPLES, PROCESSES AND PROBLEMS 36 (2009).

127 *See* H. David Vaughan II, *In Re Rollins Environmental Services: The Disqualification of an Administrative Agency Decision Maker*, 47 LA. L. REV. 673, 684 nn.83–84 (1987) (collecting cases).

128 *Id.* at 685.

129 *Withrow*, 421 U.S. at 47 (emphasis added).

130 *See* Botsko v. Davenport C.R. Comm'n, 774 N.W.2d 841, 849 (Iowa 2009) ("[T]here is a consensus in the case law that even where *investigative* and *adjudicative* functions are combined in a single individual or group of individuals, there is no due process violation based *solely* upon the overlapping investigatory and adjudicatory roles of agency actors.").

131 *Withrow*, 421 U.S. at 58 & n.25.

132 Morrissey v. Brewer, 408 U.S. 471, 472–73 (1972).

were later reincarcerated after the parole board determined both defendants had violated the terms of their parole.[133] Neither of the defendants received a preliminary pre-deprivation hearing before the parole board revoked their paroles.[134] The Court found that due process required the police to afford defendants a preliminary pre-deprivation hearing "to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions."[135] Notably, the Court mentioned that due process requires the decisionmaker presiding over the preliminary hearing to be "someone not directly involved in the case" because the person involved in making parole revocation recommendations "cannot always have complete objectivity in evaluating them."[136] The *Withrow* court noted that this stood for the following proposition: "when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review."[137]

Interestingly, the courts in *Morrissey* and *Withrow* do not cite any historical support for this proposition, but this idea nevertheless finds support in the federal judiciary's early recusal practices. During a time when the Supreme Court had to review most appeals brought before it, Congress, animated by concerns about judicial bias,[138] forbade district judges from reviewing their own decisions and the Court informally adopted a similar rule presumably for the same reason.[139] When viewed against this historical practice, the Court's comments in *Morrissey* and *Withrow* may have been motivated by similar concerns about bias in the decision-making process.

When the *Withrow* court addressed *Morrissey*, it also made clear that the case had no bearing on its decision.[140] The statutes at issue in *Withrow* allowed the Wisconsin Medical Examining Board to investigate conduct by persons licensed to practice medicine that is "inimical to the public health,"

---

133 *Id.* at 472–74.

134 *Id.*

135 *Id.* at 485.

136 *Id.* at 485–86.

137 Withrow v. Larkin, 421 U.S. 35, 58 n.25 (1975).

138 Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1505 (1989).

139 Glick, *supra* note 83, at 1762–63, 1834.

140 *Withrow*, 421 U.S. at 58 n.25.

to "warn and [] reprimand [offenders]," and "to institute criminal action or action to revoke license when it finds probable cause therefor under criminal or revocation statute."[141] Accordingly, the Court in dicta concluded that "the Board is at no point called upon to review its own prior decisions."[142] However, this conclusion is perhaps debatable because one of the statutes the Court analyzed allows the Board to temporarily suspend a person licensed to practice medicine subject to a mandatory review.[143]

In the aftermath of *Morrissey* and *Withrow*, one of the unanswered questions was whether *Morrissey* applied to more than just parole hearings. Some have argued that the Supreme Court's decision in *Hortonville* forestalled this conclusion.[144] There, the Court cautioned that the "[g]eneral language about due process" in *Morrissey* was "not a reliable basis for dealing with [a] [s]chool [b]oard's power as an employer to dismiss teachers for cause."[145] Instead, courts must focus on "the nature of the bias" and the "nature of the interests at stake."[146]

However, *Hortonville* does not preclude a broader reading of *Morrissey*. The Court in *Hortonville* failed to recognize that other decisions support its holding in *Morrissey*. Indeed, the Court in *Withrow* cited *Goldberg v. Kelly* in support of the idea that decisionmakers could not review their own decisions.[147] In *Goldberg*, the Court noted that a social service supervisor's involvement in a decision to terminate welfare benefits to welfare recipients rendered the supervisor unfit to review this decision.[148] Several lower court cases also support the idea that *Morrissey* applies to other judicial and quasi-judicial proceedings.[149] For her part, Judge Newman has indicated that

---

141 *Id.* at 37 n.1.

142 *Id.* at 58 n.25.

143 *See id.* at 37 n.1 ("All examining board actions under this subsection shall be subject to review . . . .").

144 *See, e.g.*, Vanelli v. Reynolds Sch. Dist. No. 7, 667 F.2d 773, 780 n.12 (9th Cir. 1982).

145 Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 491 (1976).

146 *Id.*

147 *See Withrow*, 421 U.S. at 58 n.25.

148 *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

149 *See, e.g.*, Brown v. City of Los Angeles, 102 Cal. App. 4th 155, 177–78 (Ct. App. 2002); Gray v. City of Gustine, 224 Cal. App. 3d 621, 631–32 (Ct. App. 1990); Applebaum v. Bd. of Directors, 104 Cal. App. 3d 648, 659–60 (Ct. App. 1980); Crampton v. Michigan Dep't of State, 235 N.W.2d 352, 355–56 (Mich. 1975); Butler v. Oak Creek-Franklin Sch. Dist., 172 F. Supp. 2d 1102, 1116 (E.D. Wis. 2001); Marathon Oil Co. v. E.P.A.,

Morrissey's holding applies in the administrative law context.[150] Accordingly, *Morrissey* should also apply to proceedings under the Judicial Conduct and Disability Act.

Finally, it's also important to note that this reading of *Morrissey* does not threaten to undermine other judicial review mechanisms. A due process issue is only raised if a decisionmaker's review of his initial decision is "mandated."[151] In other words, discretionary review of initial decisions does not raise the same due process concerns. This means that *Morrissey* does not cast doubt on the constitutionality of rehearings, en-banc panels, and other discretionary hearings.

4.1.1.3. Judges as Accusers and Adjudicators

A separate due process issue arises when a special committee judge who later serves on a judicial council takes an adversarial position against the subject judge during the investigative proceedings. The Supreme Court's decision in *Williams v. Pennsylvania* provides support for this proposition.[152] In *Williams*, Chief Justice Castille of the Pennsylvania Supreme Court sat on a panel that heard inmate Terrance Willams's petition for postconviction relief related to a death sentence even though he had previously given approval to seek the death penalty against Williams when he was a district attorney.[153] Williams alleged that Chief Justice Castille violated his due process rights by failing to recuse himself from the panel.[154]

In *Williams*, the Court concluded that the Fourteenth Amendment's Due Process Clause did not allow Chief Justice Castille to serve as an accuser

---

564 F.2d 1253, 1277 (9th Cir. 1977) (Wallace, J., dissenting); Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 499 (1976) (Stewart, J., dissenting). *But see* Morris v. City of Danville, 744 F.2d 1041, 1046 (4th Cir. 1984); Mallinckrodt LLC v. Littell, 616 F. Supp. 2d 128, 143–44 (D. Me. 2009); Vanelli v. Reynolds Sch. Dist. No. 7, 667 F.2d 773, 780 n.12 (9th Cir. 1982).

150 *Cf.* Ethicon Endo-Surgery, Inc. v. Covidien LP, 812 F.3d 1023, 1038–39 (Fed. Cir. 2016) (Newman, J., dissenting).

151 *Withrow*, 421 U.S. at 58 n.25.

152 *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1910 (2016).

153 *Id.* at 1904.

154 *See id.* at 1905.

and adjudicator in Williams's case.[155] Relying on *In re Murchinson*, the Court noted that "[t]he due process guarantee that 'no man can be a judge in his own case' would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision."[156] Accordingly, Chief Justice Castille's personal involvement in the inmate's case "gave rise to an unacceptable risk of actual bias."[157]

Other courts have also referred to accusers as "adversaries" or "prosecutors."[158] Following the *Williams* decision, many of these courts recognized that decisionmakers cannot simultaneously serve as adversaries or prosecutors to the proceedings they adjudicate without running afoul of due process protections.[159] As one court put it, "the primary purpose of separating prosecutorial from adjudicative functions is to screen the decisionmaker from those who have a 'will to win.'"[160] Accordingly, "[t]he ordinary requirement of actual bias or prejudice in separation of functions [due process] challenges does not apply because the risk of impartiality is thought to be too great when an advocate with the 'will to win' also has a role in the adjudication of the dispute."[161]

This conclusion is arguably consistent with the English common law view of judicial disqualification. When a judge is an accuser, prosecutor, or adversary in a case that the judge later adjudicates, the judge acts like a party to the case, something the English common law expressly prohibited.[162] Such a judge is said to have an interest in the outcome of the proceeding and therefore undermines his role as a neutral decisionmaker.

---

155 *See id.* at 1906.

156 *Id.*

157 *Id.* at 1908.

158 *See* cases cited *infra* note 159.

159 *See, e.g.*, Horne v. Polk, 394 P.3d 651, 656–57 (Ariz. 2017); Matter of J.R., 881 S.E.2d 522, 527 (N.C. 2022); Uhrich & Brown Ltd. P'ship v. Middle Republican Nat. Res. Dist., 998 N.W.2d 41, 53–54 (Neb. 2023).

160 Botsko v. Davenport C.R. Comm'n, 774 N.W.2d 841, 849 (Iowa 2009).

161 *Id.* at 850.

162 *See supra* note 74 and accompanying text.

4.1.2. The Remedy

Due process violations stemming from recusal failures call for specific remedies. The Supreme Court has recognized that a multi-member panel's adjudicatory decision must be vacated if the deciding vote is cast by a disqualified panel member.[163] However, the Court has declined to opine on the required remedy when the vote from a disqualified panel member is not the deciding vote, even though some justices have indicated that this situation might vacate the final decision.[164] Most of the circuit courts that have addressed this unanswered question have held that the panel decision must be vacated.[165] Accordingly, a decision by a judicial council would likely be vacated if one of the members of the council was disqualified.

4.2. Other Sources of Disqualifications

The Constitution is not the only basis for judicial disqualification under the Judicial Conduct and Disability Act. The Rules for Judicial-Conduct and Judicial-Disability Proceedings ("the Rules") provide a disqualification standard.[166] Additionally, it's possible the disqualification rules in the Model Code of Judicial Conduct also apply in this context.

---

163 *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986).

164 *See id.* at 827 n.4; *id.* at 831 (Brennan, J., concurring) ("[W]hile the influence of any single participant in [a] [deliberative] process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition."); *id.* at 833 (Blackman, J., concurring) ("[Because] the collegial decisionmaking process that is the hallmark of multimember courts . . . occurs in private, a reviewing court may never discover the actual effect a biased judge had on the outcome of a particular case.").

165 *See* Berkshire Emps. Ass'n of Berkshire Knitting Mills v. N.L.R.B., 121 F.2d 235, 239 (3rd Cir. 1941); Cinderella Career & Finishing Schs., Inc. v. Fed. Trade Comm'n, 425 F.2d 583, 592 (D.C. Cir. 1970); Am. Cyanamid Co. v. Fed. Trade Comm'n, 363 F.2d 757, 767–98 (6th Cir. 1966); Antoniu v. Sec. Exch. Comm'n, 877 F.2d 721, 726 (8th Cir. 1989); Stivers v. Pierce, 71 F.3d 732, 748 (9th Cir. 1995).

166 2019 Rules, *supra* note 32, Vol. 2E, Ch. 3, art. VIII(25).

4.2.1. Disqualification Grounds

The Judicial Conduct and Disability Act has its own disqualification standard.[167] The Rules explain that a judge is disqualified from participating in proceedings under the Act if "the judge concludes that circumstances warrant disqualification."[168] The comments note that a judge is not disqualified from participating in the proceedings just "because the subject judge is on the same court."[169] However, a judge may be disqualified when there is "an appearance of bias or prejudice," such as when a judge has a familial relationship with a complaint or a subject judge.[170] If a judge decides not to recuse himself, the Judicial Conference reviews this decision for abuse of discretion.[171]

However, it's less clear whether other disqualification rules apply under the Act. Section 455 defines "proceeding[s]" as "pretrial, trial, appellate review, or other stages of litigation"[172] while Section 144 states that it applies to "proceeding[s] in a district court."[173] The Code of Conduct for United States Judges follows Section 455's definition of "proceeding."[174] In contrast, the Model Code of Judicial Conduct does not define the term "proceeding," leaving open the possibility that the Code applies to more than just traditional judicial proceedings.[175] Accordingly, only the Model Code could apply under the Act.

The Model Code's section on disqualification is a combination of objective standards and per se rules. The main standard provides that "[a] judge shall disqualify himself or herself in any proceeding in which the

---

167 *Id.*

168 *Id.*

169 *Id.* cmt. Rule 25.

170 *Id.*

171 *See, e.g.*, *In re Complaint No. 23-90015: C.C.D. 23-01*, U.S. JUD. CONF., at 15–17 (Feb. 7, 2024), https://perma.cc/7H3N-ZJDT [hereinafter *C.C.D. 23-01*]; *In re Complaint of Judicial Misconduct: C.C.D. 09-01*, U.S. JUD. CONF., at 19–22 (Oct. 26, 2009), https://perma.cc/23XV-5YQS [hereinafter *C.C.D. 09-01*].

172 28 U.S.C. § 455(d)(1).

173 *Id.* § 144.

174 GUIDE TO JUDICIARY POLICY, Vol. 2A, Ch. 2, § 3(C)(3)(d) (2019).

175 The term "proceeding" is not defined in the terminology section. *See* MODEL CODE OF JUD. CONDUCT, PREAMBLE, SCOPE, TERMINOLOGY (AM. BAR ASS'N 2011).

judge's impartiality might reasonably be questioned."[176] Additionally, the Model Code also lists several scenarios where a judge's impartiality would be reasonably questioned, including when the judge harbors bias or prejudice against a party or lawyer, possesses personal knowledge of disputed facts, has an economic interest in the outcome of the controversy, accepted campaign contributions from litigants or their firms, or was substantially involved in a matter before taking the bench.[177]

4.2.2. The Remedy

The Act does not explain the remedy the Judicial Conference should grant when it finds that judges should have recused themselves. The two Judicial Conference matters to address judicial disqualification did not find that the judges who refused to recuse themselves abused their discretion.[178]

5. JUDICIAL DISQUALIFICATION ISSUES IN *NEWMAN V. MOORE*

The proceedings against Judge Newman raise several judicial disqualification issues, some of which have merit while others do not. The judges that were part of the Special Committee and the Judicial Council were not disqualified just because the judges investigated the complaint identified against Judge Newman or because they wielded investigatory and adjudicatory powers. Similarly, these judges were not serving as accusers, prosecutors, or adversaries during the investigatory process and therefore did not need to be disqualified. However, these judges did need to be disqualified from serving on the Judicial Council because they were guaranteed to review the decision they made as members of the Special Committee. Apart from these due process issues, the Rules for Judicial-Conduct and Judicial-Disability Proceedings suggest that there might be additional disqualification grounds, but judges have complete discretion over whether to recuse themselves in these situations.[179]

---

176 *Id.* r. 2.11(A) (AM. BAR ASS'N 2020).

177 *Id.*

178 *See C.C.D. 23-01*, *supra* note 171, at 15–17; *C.C.D. 09-01*, *supra* note 171, at 19–22.

179 2019 Rules, *supra* note 32, Vol. 2E, Ch. 3, art. VIII(25).

5.1. Due Process Grounds

5.1.1. The Special Committee Judges Are Investigators and Adjudicators

The Special Committee correctly recognized that *Withrow* clearly forestalls any arguments that its combined investigatory and adjudicatory powers in Judge Newman's proceedings deprived her of due process.[180]

Investigations are a key component of proceedings under the Judicial Conduct and Disability Act. The Rules for Judicial Conduct and Judicial Disability Proceedings charge the judges on a special committee with investigating whether the subject judge has a disability or has committed any misconduct.[181] The special committee may hold hearings, invoke experts and other professionals, subpoena witnesses, expand or narrow the scope of the investigation, and use any other investigative methods the committee deems appropriate.[182] The findings from the investigation are then compiled in a report that is reviewed by a judicial council.[183]

Once the special committee completes its investigation, the committee and the judicial council exercise adjudicative functions. First, the special committee report to the judicial council includes "the committee's recommendations for necessary and appropriate action . . . of the circuit."[184] Next, the judicial council, upon receiving the report, will either conduct "additional investigation[s]," "dismiss the complaint," or "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit."[185] Under the third option, the judicial council may temporarily suspend the judge from hearing cases or censure or reprimand the subject judge.[186]

---

180 *In re Complaint No. 23-90015*: *Rep. & Recommendation of the Special Comm.*, U.S. CT. APP. FED. CIR., at 66 (July 31, 2023), https://perma.cc/24CV-U9EZ [hereinafter *Rep. & Recommendation*].

181 2019 Rules, *supra* note 32, Vol. 2E, art. V(13).

182 *Id.* art. V(13)–(14), cmt. Rule 13.

183 *See* 28 U.S.C. § 353(c).

184 *Id.*

185 *Id.* § 354(a)(1)(A)–(C).

186 *Id.* § 354(a)(2)(A).

In Judge Newman's case, the Special Committee investigated the complaint identified against Judge Newman by Chief Judge Moore and drafted a report and recommendation while the Judicial Council rendered the final adjudication of the complaint.[187] The Special Committee requested her medical records and her participation in a medical examination, interviewed court staff, consulted medical experts, and held hearings.[188] After the Special Committee completed its investigation, it drafted a report where it concluded that Judge Newman had committed misconduct by failing to comply with the Special Committee's investigation and that this warranted a yearlong suspension from hearing new cases subject to renewal if she continued to not comply.[189] Upon receiving the report, the Judicial Council, by a unanimous vote, fully adopted the findings and recommendations of the Special Committee.[190]

The way the Special Committee judges exercise investigative and adjudicative functions under the Act is very similar to how the Wisconsin Board of Medical Examiners exercised these functions in *Withrow*.[191] The Special Committee and the Board initiated their own investigations, both of which involved hearings and witness testimony.[192] Once the Special Committee finished its investigation, it drafted a report and recommendation that was akin to the probable cause finding in *Withrow*.[193] These initial adjudicatory decisions preceded the final adjudicatory decisions rendered by the Judicial Council and the Board.[194]

Judge Newman's case also does not "pose such a risk of actual bias or prejudgment" such that the Special Committee judges should not be allowed to serve on the Judicial Council, especially considering the "presumption of

---

187 *Rep. & Recommendation*, *supra* note 180, at 1, 10; *Judicial Council Order*, *supra* note 3, at 71–73.

188 *Rep. & Recommendation*, *supra* note 180, at 2–3.

189 *Id.* at 60–63, 109–111.

190 *See Judicial Council Order*, *supra* note 3, at 71–73.

191 *Id.* at 3; Withrow v. Larkin, 421 U.S. 35, 40 (1975).

192 *See Rep. & Recommendation*, *supra* note 180, at 21; *Withrow*, 421 U.S. at 40.

193 *See Rep. & Recommendation*, *supra* note 180, at 60–63, 109–111; *Withrow*, 421 U.S. at 55–58.

194 *See Judicial Council Order*, *supra* note 3, at 71–73; Larkin v. Withrow, 408 F. Supp. 969, 970 (E.D. Wis. 1975) (allowing the Board to render a final decision regarding the suspension of Larkin's medical license).

honesty and integrity in those serving as adjudicators."[195] The Special Committee's conduct before and during the course of its investigation did not give rise to any serious questions about bias or prejudgment in large part because the Committee limited the scope of its investigation.[196]

5.1.2. The Special Committee Judges Are Accusers and Adjudicators

One might argue that special committee judges are accusers when they file a complaint or when chief judges identify a complaint. In Judge Newman's case, she raised the latter argument.[197] The former scenario does not raise any due process concerns because the Rules disqualify a judge from participating in proceedings under the Act when a judge files the complaint.[198] Similarly, the latter scenario also does not raise any due process concerns. Identifying a complaint allows the chief judge to "conduct an investigation without becoming a party."[199] This type of complaint is "best understood as the chief judge's [sic] concluding that information known to the judge constitutes probable cause to believe that misconduct occurred or a disability exists, whether or not the information is framed as, or intended to be, an accusation."[200]

The Rules also make it clear that special committee judges are not intended to be accusers in other parts of the proceedings. The special committee proceedings are "primarily inquisitorial rather than adversarial."[201] Although the hearings the judges preside over have somewhat of an adversary character, judges are advised to not regard themselves as adjudicators and prosecutors.[202] Instead, the judges should be "impartial seekers of the truth."[203]

---

195 *Withrow*, 421 U.S. at 47.

196 *See Rep. & Recommendation*, *supra* note 180, at 76–83 (discussing the findings that support this conclusion).

197 *Id.* at 65.

198 2019 Rules, *supra* note 32, Vol. 2E, Ch. 3, art. VIII(25).

199 *Id.* art. I, cmt. Rule 3.

200 *Id.*

201 *Id.* art. V, cmt. Rule 14.

202 *Id.*

203 *Id.*

In Judge Newman's case, the Special Committee correctly recognized no evidence showed that they had functioned like accusers.[204] Chief Judge Moore was not motivated by a "will to win" just because she identified the complaint against Judge Newman and participated in the Special Committee's investigation.[205] The proceedings under the Act stand in stark contrast to the procedures agencies like the Securities and Exchange Commission (SEC) follow that arguably allow its Commissioners to act as accusers and adjudicators in enforcement proceedings.[206]

5.1.3. The Special Committee Judges Reviewed Their Report and Recommendation

Although some of the other arguments for why the Judicial Conduct and Disability Act is unconstitutional are unavailing, the Act nevertheless possesses a constitutional defect: The Act violates the due process rights of subject judges because at least some special committee judges must review their own reports and recommendations. Accordingly, "the decisionmaker[s] must be [people] other than the [judges] who made the decision under review."[207]

The Act requires judges to make initial decisions—that is, recommendations—on the misconduct and disability allegations levied against subject judges. The report and recommendation drafted by the Special Committee is an initial adjudicatory decision because it found Judge Newman culpable of misconduct and it recommended suspending Judge Newman from hearing new cases for one year.[208] To be sure, the Rules explain that this recommendation-of-disposition role is characteristically left to juries, judges, or arbitrators, all of whom render decisions.[209]

After a special committee completes this report and recommendation and submits it to the Judicial Conference, the Act requires all of the Federal

---

204 *See Rep. & Recommendation*, *supra* note 180, at 65.

205 The Special Committee could conclude the subject judge did not commit misconduct or possess a disability.

206 For an in-depth discussion of this argument, see Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. MICH. J.L. REFORM 103 (2018).

207 Withrow v. Larkin, 421 U.S. 35, 58 n.25 (1975).

208 *See Rep. & Recommendation*, *supra* note 180, at 60–63, 109–111.

209 2019 Rules, *supra* note 32, Vol. 2E, Ch. 3, art. VIII, cmt. Rule 13.

Circuit judges on the committee to decide, as members of a judicial council, whether to reject or adopt the findings and recommendations of the committee.[210] The judges who made the recommendation should not be allowed to affirm this recommendation as members of a judicial council.[211] The Special Committee judges that recommended suspending Judge Newman from hearing new cases for one year were guaranteed to vote in support of this recommendation as members of the Judicial Council.[212]

Although the Federal Circuit is unique in that it is the only court where all members of a special committee are guaranteed to serve on the court's judicial council, this due process issue is present across other circuit courts as well. A special committee and a judicial council ordinarily consist of the chief judge and an equal number of circuit and district judges.[213] At the very least, the chief judge of the circuit court is guaranteed to serve on the circuit's special committee and its judicial council thereby creating a due process issue for the subject judge.[214]

Even if Congress failed to recognize the due process problems created by the judicial council's review procedure, it appears the drafters of the Rules were aware of potential due process problems elsewhere, namely the process for petitioning review of a complaint disposed by the chief judge. Once a chief judge disposes a complaint filed or identified under the Act, the subject judge is entitled to petition the judicial council for review of the disposition.[215] Notably, the chief judge is disqualified from participating in the council's consideration of the petition, presumably because allowing the chief judge to review his own decision creates a due process issue.[216] If due process demands recusal in this situation, it should also require special committee

---

210 *Id.* art. VI(18).

211 *See* Butler v. Oak Creek-Franklin Sch. Dist., 172 F. Supp. 2d 1102, 1115 (E.D. Wis. 2001) ("[T]he government official charged with recommending a particular decision must not participate in making the actual decision . . . .").

212 *See* Applebaum v. Bd. of Dirs., 163 Cal. Rptr. 831, 838 (Ct. App. 1980) (explaining that the members of an ad hoc committee who recommended suspending the plaintiff's obstetrical privileges violated the plaintiff's due process rights by serving on the executive committee that evaluated the recommendation).

213 2019 Rules, *supra* note 32, Vol. 2E, Ch. 3, art. V(12); 28 U.S.C. § 332(a)(1).

214 2019 Rules, *supra* note 32, Vol. 2E, Ch. 3, art. V(12).

215 *Id.* art. IV(11).

216 *Id.* art. VIII(25).

judges to recuse themselves from serving on a judicial council. But because the Special Committee judges in Judge Newman's case refused to recuse themselves from the Judicial Council, the Council's decision should be vacated.[217]

5.2. Rule 25 Disqualification

Although the Special Committee had the authority to reject Judge Newman's disqualification arguments, the case nevertheless highlights some issues with Rule 25's disqualification standard.

First, the Act's disqualification standard is purely subjective. Judges have complete discretion to decide whether to recuse themselves from the proceedings.[218] To be sure, the comments to Rule 25 only provide an example scenario that *might* require recusal.[219] This means that a judge may refuse to recuse himself even though due process or the Model Rules of Judicial Conduct would ordinarily require recusal. Accordingly, one might argue that a subjective disqualification standard is unconstitutional.[220]

Second, the subjective disqualification standard could lead to inconsistent outcomes. One judge may recuse himself in one scenario, but another judge may decide not to recuse himself in the same scenario. In Judge Newman's case, several current and former circuit judges have argued that the circumstances required the judges involved to recuse themselves from the proceedings.[221]

Third, it is difficult for a subject judge to argue the proceedings are improper based on a judge's failure to recuse. Rule 21 specifies that the

---

217 *See supra* Section 4.1.2.

218 *See* 2019 Rules, *supra* note 32, Vol. 2E, Ch. 3, art. VIII(25); *see also* JUD. CONF. COMM. ON JUD. CONDUCT & DISABILITY, DIGEST OF AUTHORITIES ON THE JUDICIAL CONDUCT AND DISABILITY ACT (DIGEST) 207 (2024), https://perma.cc/7TT6-7KP3 (noting that the disqualification standard under the Judicial Conduct and Disability Act is substantially more discretionary than its counterpart in 28 U.S.C. § 455(a)).

219 *See* 2019 Rules, *supra* note 32, Vol. 2E, Ch. 3, art. VIII, cmt. Rule 25.

220 *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 881 (2009) (rejecting a subjective judicial disqualification standard).

221 *See, e.g.*, Michel, *supra* note 23; Randall Rader, *The Federal Circuit Owes Judge Newman an Apology*, IPWATCHDOG (July 12, 2023, 12:15 PM), https://perma.cc/TS4B-QPY6; Edith H. Jones, *Federal Judges Deserve Due Process, Too*, WALL ST. J. (Aug. 15, 2023, 2:33 PM), https://perma.cc/5MG4-LQ2V.

Judicial Conference reviews Judicial Council orders for "errors of law, clear errors of fact, or abuse of discretion."[222] In Judge Newman's case, the Judicial Conference gave extraordinary deference to the Special Committee's decision not to recuse themselves from serving on the Judicial Council.[223]

Fourth, as previously discussed, the Act does not explain what the remedy is when the Judicial Conference finds that judges should have recused themselves. In this situation, one might assume that the Judicial Conference would vacate the judicial council's decision. However, it's not clear if a decision to vacate a judicial council's order would, for example, hinge on whether the judges in question participated in a Special Committee's investigation or cast deciding votes as members of a judicial council.

6. Proposed Changes

Parts of the Judicial Conduct and Disability Act should be changed to address due process concerns and inadequacies with the current disqualification standard. Doing so will ensure that subject judges are afforded neutral decisionmakers.

6.1. Due Process

Although allowing judges on a special committee to serve on a judicial council presents a due process problem, this problem is not difficult to address. At a minimum, special committee judges should be excluded from serving on a judicial council. Because most judicial councils contain a mix of district and circuit judges, special committee judges that would otherwise serve on the judicial council—notably, the chief judge of the circuit court where the complaint originated among other judges—can be replaced with other judges if necessary. For example, a judicial council may need to pull from the pool of available judges to create an odd-numbered council panel.

The Federal Circuit presents an interesting wrinkle because its special committees and its judicial council only contain Federal Circuit judges.[224]

---

222 2019 Rules, *supra* note 32, Vol. 2E, Ch. 3, art. VII(21).

223 *C.C.D. 23-01*, *supra* note 171, at 15–17.

224 *See Judicial Council*, U.S. Ct. of Appeals for the Fed. Cir., https://perma.cc/S2PA-C4DM.

This means that the Federal Circuit cannot pull from a pool of judges to replace the disqualified judges. If the Federal Circuit's special committees or its judicial council cannot function without these disqualified judges, a transfer may be warranted.[225] However, another option would be for lower court judges to serve on the judicial council when necessary. The Federal Circuit hears appeals from several lower courts, including the U.S. Court of Federal Claims, U.S. district courts addressing subject matter areas within the exclusive purview of the Court's jurisdiction (such as patent cases), the U.S. Court of International Trade, the U.S. Court of Appeals for Veterans, and a plethora of administrative courts.[226]

To ensure consistency with the other judicial councils, the Federal Circuit's special committees and its judicial council should include judges from the U.S. Court of Federal Claims or the U.S. Court of International Trade. Apart from U.S. district court judges, all of whom are already affiliated with committees and councils in other circuit courts, these are the only two lower courts that have experience with the Judicial Conduct and Disability Act.[227] By integrating these judges into the Federal Circuit's judicial conduct and disability proceedings, the court could then operate similar to how other circuit courts operate: circuit judges disqualified from serving on a judicial council could be replaced with circuit court or lower court judges. Additionally, this system helps bolster public trust in special committee investigations and the judicial council decision-making, especially when, as in Judge Newman's case, some of the judges on these panels personally witness the alleged misconduct or disability.[228]

There are also some advantages to impaneling some lower court judges over others. For example, it is easier for U.S. Court of Federal Claims judges to participate in a special committee investigation because the court is in the same building as the Federal Circuit.[229] On the other hand, it makes

---

225 *See* 2019 Rules, *supra* note 32, Vol. 2E, Ch. 3, art. VIII(26), cmt. Rule 26 (describing the transfer standard).

226 *See Court Jurisdiction*, U.S. CT. OF APPEALS FOR THE FED. CIR., https://perma.cc/WV8C-P99Q.

227 *See Judicial Conduct and Disability*, U.S. CTS., https://perma.cc/7D2T-FNDR.

228 *See Rep. & Recommendation*, *supra* note 180, at 72.

229 *See Visiting the Court*, U.S. CT. OF APPEALS FOR THE FED. CIR., https://perma.cc/T5JG-EHKG; *Hours of Operation and Direction*, U.S. CT. OF FED. CLAIMS, https://perma.cc/89G4-HQL3.

more sense for U.S. Court of International Trade judges to serve on the judicial council because they serve on the bench for life and will therefore help ensure the composition of the council remains consistent.[230]

6.2. Rule 25 Disqualification

Rule 25 should not rely on the current subjective disqualification standard or even an objective disqualification standard. The current standard is similar to the much-criticized 1948 version of 28 U.S.C. § 455, one of the main federal disqualification statutes.[231] Although the federal disqualification statutes and the various codes of judicial conduct now rely on objective standards, these too have been heavily criticized.[232] Accordingly, commentators have proposed various solutions, including increasing the number of disqualification grounds, requiring independent judges to hear recusal motions, mandating written disqualification decisions, allowing parties to preemptively disqualify judges, and modifying the standard of review for recusal motions.[233]

Any of these proposed changes are equally applicable to proceedings under the Judicial Conduct and Disability Act. The right to a fair adjudication transcends traditional courtrooms.[234] Just like courtroom litigants, subject judges are also entitled to neutral decisionmakers. Judges are not immune to bias or an appearance of it just because they are adjudicating their colleagues. Additionally, the interests of subject judges are no less important than the interests of courtroom litigants. A neutral decisionmaker can be especially important in the context of the Act where the subject judge faces suspension from the bench and other penalties.

---

230 *See About the Court*, CT. INT'L TRADE, https://perma.cc/45VQ-7QFF (explaining that judges on the court are Article III judges).

231 RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 24–27 (3d ed. 2017) (noting problems with the 1948 version of § 455 and criticisms of it).

232 *See generally* Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411 (2014) (summarizing criticisms).

233 *See* Gabriel D. Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109, 1143–47 (2011) (discussing these solutions).

234 *See* Schweiker v. McClure, 456 U.S. 188, 195 (1982).

If these proposals prove unsuccessful, Rule 25's disqualification standard should at least reflect the objective standard afforded by due process. This means that the inquiry should focus on "whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[235] If the potential for bias on the part of a judge is too high to be constitutionally tolerable, recusal will be sufficient in most cases. However, if multiple judges are disqualified, the proceedings should be transferred to another judicial council.[236]

Additionally, the Act should at least clarify how the Judicial Conference determines the remedy when a judge improperly fails to recuse himself. One helpful starting point might be the factors courts apply in deciding whether to vacate a judge's decision for violating 28 U.S.C. § 455. These include (1) "the risk of injustice," (2) "the risk that denial of relief will produce injustice in other cases," and (3) "the risk of undermining the public's confidence in the judicial process."[237] The advantage of this approach is the Judicial Conference could analyze how courts have applied these factors to help shape a remedy.[238]

7. CONCLUSION

After Chief Judge Moore initiated a disciplinary proceeding against Judge Newman under the Judicial Conduct and Disability Act, Judge Newman and her supporters repeatedly requested that the Judicial Council of the Federal Circuit transfer the proceedings to another circuit.[239] This request is motivated in part by Judge Newman's belief that her colleagues on the court are not neutral decisionmakers.[240] Although Judge Newman's colleagues may not have been actually biased, a close analysis of the Act shows that it undermines procedural fairness.[241] The Act deprives subject judges of due

---

235 Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 881 (2009).

236 *See* 2019 Rules, *supra* note 32, Vol. 2E, Ch. 3, art. VIII, cmt. Rule 26.

237 Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 864 (1988).

238 *See* CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 104–06 (Kris Markarian ed., 3d ed. 2020) (describing how different circuit courts have applied the *Liljeberg* factors).

239 Michel, *supra* note 23.

240 First Amended Complaint, *supra* note 15, at 25.

241 *See supra* section 5.2.

process because Special Committee judges are allowed to affirm their investigatory conclusions as members of a Judicial Council.[242] Additionally, the Act's subjective disqualification standard makes it more likely the judges will improperly refuse to recuse themselves.[243] Accordingly, parts of the Act should be modified to address these problems.[244]

---

242 *See supra* section 5.1.3.

243 *See* 2019 Rules, *supra* note 32, Vol. 2E, Ch. 3, art. VIII, cmt. Rule 25; *see also supra* Section 5.2.

244 *See supra* Part 6.