



WHO JUDGES THE JUDGES?

JUDICIAL QUALIFICATION AND RECUSAL

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MISCONDUCT AND DISABILITY

DETERMINING WHETHER A JUDGE CAN HOLD OFFICE

It's *creepy* to watch judges fighting.

FEDERAL DISQUALIFICATION / DISABILITY

- **Who judges federal judges?** The “**Judicial Council**” of the circuit.
 - Unless you are on the U.S. Supreme Court, that is.
 - The “Judicial Council” consists of the Chief Judge and a selection of circuit judges and district judges. It mostly serves as an administrative body.
 - Cases *can* be transferred to other circuits in extraordinary cases, but the baseline is that a **judge is judged by her peers** in the same circuit.
- **What law governs the judges?**
 - The Judicial Conduct and Disability Act of 1980.
 - A series of procedural rules adopted in 2008.
 - Statutes requiring financial disclosures and recusal in certain cases.

STARTING THE FEDERAL PROCESS

- The process begins when a person files a **complaint** “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.” The Rules provide a little more detail.
 - The Rules allow the **Chief Judge** to file a complaint, but they seldom do.
- The Chief Judge then begins an “**informal process**” of investigating, in which she has the power to dismiss a complaint for being meritless, or to quietly resolve the situation.
 - There is a deliberately antiquated process of appeal from a dismissal.

USUALLY, THE PROCESS IS A TREMENDOUS WASTE OF TIME

- In 2023, **1,363** complaints were filed nationwide. Among the statistics:
 - 1,211 complained about the judge's decision on the merits of a case, which is not a conduct complaint at all.
 - 172 alleged prejudice against a protected class.
 - 123 alleged improper delay in issuing a decision.
 - 64 alleged ex parte communications.
 - 20 alleged disability.
- **1,286** were promptly dismissed for fundamental defects.
- So here is the first take-away—the Chief Judges diligently maintain an elaborate and expensive system for dismissing the meritless complaints of **disgruntled litigants, mostly prisoners.**

WHAT ABOUT THE RARE CASE THAT ISN'T DISMISSED?

- The Chief Judge convenes a **Special Committee** to investigate and report. The committee has subpoena power, and can hold evidentiary hearings.
 - Of 1,363 complaints in 2023, **nine** required a special committee.
- The **Judicial Council** then reviews the Special Committee's report and votes.
 - It can order the complaint dismissed, or punishment including temporary removal of new cases, public or private censure or reprimand.
 - It cannot order removal from office, but it may refer a case to the Committee on Judicial Conduct & Disability, which can recommend impeachment.
 - In 2023, **one** case made it through the special committee and to the Judicial Council for a vote—Judge Newman's. In 2024, there will be at least one.
- The aggrieved judge can then file a Petition for Review with the **Committee on Judicial Conduct & Disability**, whose decision is final.

THE SAGA OF JUDGE NEWMAN

- This quiet, confidential process came into the media spotlight when the Federal Circuit tried to get Judge Pauline Newman to step down.
- Judge Newman is **97**.
 - She has 89 and 87-year-old colleagues, and a former colleague was in active service until 95.
- Judge Newman is known for her fierce defense of the patent system and her vigorous dissents.
- She remains brilliant. She is physically frail. And she told her esteemed colleagues to get lost.



THE INFORMAL PROCESS DID NOT GO AS EXPECTED

- In 2023, the Federal Circuit Judicial Council voted (without her present) to assign no new cases to Judge Newman, because she was so far behind in her work. They were also concerned about reports she was becoming paranoid and forgetful.
- The same day, a group of her colleagues held what was basically an **intervention**, asking her to take senior status. She refused. Chief Judge Kimberly Moore met with her privately, without success.
- So Chief Judge Moore did what almost never happens—she **filed a complaint** to explain the basis of her concerns that Judge Newman was disabled, and formed a special committee to investigate.

JUDGE NEWMAN FOUGHT BACK

- The committee kept **shifting the scope** of its investigation as it uncovered evidence that Judge Newman was acting paranoid, was mistreating staff, and was unable to do tasks like completing simple IT training. Procedural wrangling ensued. Judge Newman took a **harsh tone**.
- The committee asked her to have a **detailed examination by a neurologist**, and she refused, because she felt she was being railroaded.
- Instead, Judge Newman **filed a lawsuit** challenging the constitutionality of the Act and went public to overcome the committee's "gag order."
- She got **public support** from people who were ignorant of the facts (due to confidentiality of the investigation). These included former Federal Circuit Chief Judges Michel and Rader, and some journalists with a libertarian streak.

THE SPECIAL COMMITTEE NARROWED ITS CLAIM

- The Special Committee then *narrowed* its investigation and alleged Judge Newman **engaged in misconduct** by refusing the neurological examination.
- The Special Committee's **111-page report** details many reasons justifying the medical examination, and recommended she be suspended from hearing cases until she submitted to the exam.
- The **Judicial Council** accepted the recommendation in another very detailed report, noting that the focus on misconduct instead of disability mooted most of her procedural complaints. It agreed with the suspension.
- The **JC&D Committee** affirmed, and the **district court** dismissed her case. She appealed to the **D.C. Circuit**.

REFLECTING ON JUDGE NEWMAN'S CASE

- The reports tell a very different story than the legal media did. This story is **sad**. People were **hurt** by her diminished capacity.
- So many people **do not understand** this kind of disability. Judge Newman can carry on detailed conversations about patent law, yes. But the reports demonstrate she lost basic short-term memory functions.
- Yet her critique of the system is **not meritless**. Chief Judge Moore acted lawfully at every step, and Judge Newman deserved to be suspended. But Judge Newman felt railroaded by a system where the complainant, prosecutors, and investigators were also her judges.
- Who can complain about mistreatment by federal judges? Who could possibly decide? **It's federal judges all the way down.**

THE SUPREME COURT PLAYS BY DIFFERENT RULES

- **What about the Supreme Court?** Who judges the justices?
- **Each justice judges him- or herself. Period.**
- Can **Congress** make the justices abide by rules?
 - Congress conspicuously omitted the justices from the Act. But the financial disclosure and recusal statutes apply to the justices.
 - In 2011, Chief Justice Roberts politely observed that because the justices comply with these laws *voluntarily*, the issue has never been tested.
 - In 2023 Justice Alito blew it wide open by telling the WSJ that Congress *can't* regulate the Supreme Court.
- The Supreme Court's appellate jurisdiction is "with such Exceptions, and *under such Regulations as the Congress shall make.*"

THE SUPREME COURT ADOPTED A CODE, OF SORTS

- Starting in 2021, **scandals erupted**. We heard about Justice Thomas's finances, and Justice Alito's flags, and Justice Sotomayor's book sales. Could nothing be done? Can no one judge the justices?
- In April 2023, Chief Justice Roberts issued a "statement" on ethics.
- In November the Court adopted a **Code of Conduct**. Notable changes:
 - Justices police themselves and have no duty to monitor each other.
 - Justices *should*—not "shall"—recuse themselves if their impartiality should be questioned. But all justices are irreplaceable and have a duty to hear cases, so the recusal decision will never be questioned.
 - *Amicus* briefs and counsel will never result in disqualification.

NO ENFORCEMENT MECHANISM?

- The Code has **no enforcement mechanism**, short of impeachment. But disability does not lend itself to impeachment, and we the people seem far away from consensus on what constitutes “misconduct.”
- Historically, Congress used **pensions** as a carrot and a stick to manage difficult judges, including Justice Ward Hunt’s stroke in 1878. Modern attempts at **public shaming** have historical precedents.
- Most recent justices retired before becoming disabled. One understood the value of a calculated retirement, one did not.
- Justice Kagan made news recently for suggesting an enforcement mechanism, in the form of a committee of highly respected judges.

TEXAS AVOIDS MOST OF THE TROUBLE

- **Who judges Texas judges?** The **State Commission on Judicial Conduct** judges them. All of them. It's in the Texas Constitution.
- Two other **structural protections** help the Texas system:
 - First, judges are **elected** in Texas, so the voters will surely prevent disqualified or disabled judges from continuing in office.
 - Second, Texas imposes an **age limit of 75**, which helps avoid some of the problems with judicial disability. Voters recently refused to raise the limit.
- The sources of Texas law are the Constitution, Chapter 33 of the Government Code, the Procedural Rules, some stray statutes, and the internal procedures of the Commission. It's very unclear to outsiders.

THE TEXAS PROCESS FOR MISCONDUCT AND DISABILITY

- In Texas, the process begins with a **complaint to the Commission**.
- The Commission investigates, and has broad powers that are explicitly stated (like the power to require a physical or mental examination).
- In this informal process, the Commission can decide to dismiss the complaint, issue a public or private sanction or a suspension, order education, accept a resignation... or begin formal proceedings if it determines it wants to seek the removal or retirement of the judge.
 - **Numbers** are similar to the federal system—both in complaints and disposition.
- If the judge appeals the informal sanction, a **Special Court of Review** is formed. Three court of appeals justices get randomly selected to review the appeal, under the *trial de novo* standard. The Special Court of Review holds a hearing, and its decision cannot be appealed. About **nine** of these a year.

FORMAL PROCEEDINGS

- If the Commission begins a **formal proceeding**, it can conclude with the lesser punishments described earlier (which can be appealed to a Special Court of Review which acts as an appellate court).
- If the Commission recommends forced retirement or removal, a **Review Tribunal** is formed—seven randomly chosen court of appeals justices.
- These are **very rare**, and the most recent was in 2004. Reviewing the opinions reveals two tyrants, one case of outrageously bad accounting, two sexual harassment cases, two bribery scandals, a fraud who went to jail for tax evasion, and one case that just snowballed out of control.
- The removed or retired judge can appeal to the Texas Supreme Court.

RECUSAL

WHETHER A JUDGE CAN PRESIDE OVER THIS PARTICULAR CASE

“If you come at the king, you best not miss.” – Omar Little

WHO DECIDES IF THE JUDGE HAS TO RECUSE?



FEDERAL COURT RECUSAL LAWS

- 28 USC § 455 requires judges to recuse themselves, and lists reasons.
 - No special rules, no deadline.
 - The challenged judge decides—he *can* refer the motion, but need not.
- 28 USC § 144 describes a litigant’s procedural challenge to a district judge based on actual bias or prejudice.
 - Strict procedural requirements and proof.
 - The judge decides whether the motion meets minimal standards, and if it does, the judge must refer it to another judge for decision.
- The **Due Process Clause** provides a really low bar.
 - Nevertheless, 2009’s *Caperton* decision managed to trip over it.
- Every aspect of appeal is subject to a major **circuit split**.

COMMON GROUNDS FOR RECUSAL

- **“Where his impartiality might be questioned.”**
 - Deliberately broad and vague, to encompass all possibilities.
 - Scienter not required—meaning yes, time travel *is* required.
 - *Liljeberg* test: “if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge.”
 - This is the only form of disqualification that the parties can waive.
- **Personal bias or prejudice.**
 - *Liteky*: must come from an “extrajudicial source,” which is a subtle concept.
- **Personal knowledge of disputed evidentiary facts.**
 - Again, “extrajudicial source” required.

COMMON GROUNDS FOR RECUSAL

- **Served as a lawyer in the case, or was associated with one.**
 - Interesting recent Fifth Circuit decision arising from the *Deepwater Horizon* litigation—the *Jarndyce v. Jarndyce* of the Fifth Circuit.
- **While in government employment, served as counsel or expressed an opinion on the controversy.**
 - This is why former Solicitors General tend to recuse so often.
 - Limited to *personal* knowledge of *this controversy*, as Judge Kavanaugh explained in his defense of judges who have served in the Executive Branch.
- **Financial interest.**
 - The biggest area of criticism, and a subject of frustration.
 - Does not require a judge to recuse based on a spouse's work for a party.

TEXAS RECUSAL AND DISQUALIFICATION

- Texas uses similar standards, but different procedures.
- **“Disqualification”** arises from the Texas Constitution, and it renders the actions of the judge completely void.
 - Three grounds: judge has an **interest** in the case, a party is a **relative** of the judge, or the judge was **counsel** in the case.
 - Cannot be waived, and mandamus is available.
- **“Recusal”** is everything else listed in Rule 18a (and scattered through the various statutes creating the courts).
 - Can be waived.
 - Appealed from a final judgment, or in very rare cases through mandamus.
- **“Accepted campaign funds”** is a dead end in Texas.

RECUSAL/DISQUALIFICATION MOTIONS IN TEXAS

- **Rule 18a** governs trial courts, and requires a verified motion providing a specific factual basis for recusal.
- **Judges do not judge themselves.** The judge has three days to either grant the motion or refer it to the presiding judge.
 - The motion must be heard promptly, often telephonically.
- On a third or successive motion, the court still refers the motion to the presiding judge, but can otherwise ignore it.
- Appellate courts have **Rule 16.3**, which has no specific requirements.
 - The judge either grants the motion or refers it for decision *en banc*.

POINTS TO TAKE AWAY

- **Valid complaints are rare**, and overrepresented in the media. The courts operate an elaborate system of review to catch less than 1%, because when things go bad, they can go bad *badly*.
- **Understanding** the disqualification and disability system is difficult. Government agencies earnestly try, but don't bring it all together.
- Human frailty is crushingly **sad**.
- Human misconduct is crushingly **predictable**.
- It's **spooky** to watch a judge treat judges as untrustworthy. The whole system assumes that judges can judge judges. The system tries to hide or prevent this.
- It's **unnerving** when a judge says, "Trust me—because there is literally nothing you can do about it." With no system for complaint, people will act out.

QUESTIONS? WAR STORIES? GOSSIP?



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