

# PATENTLY-O

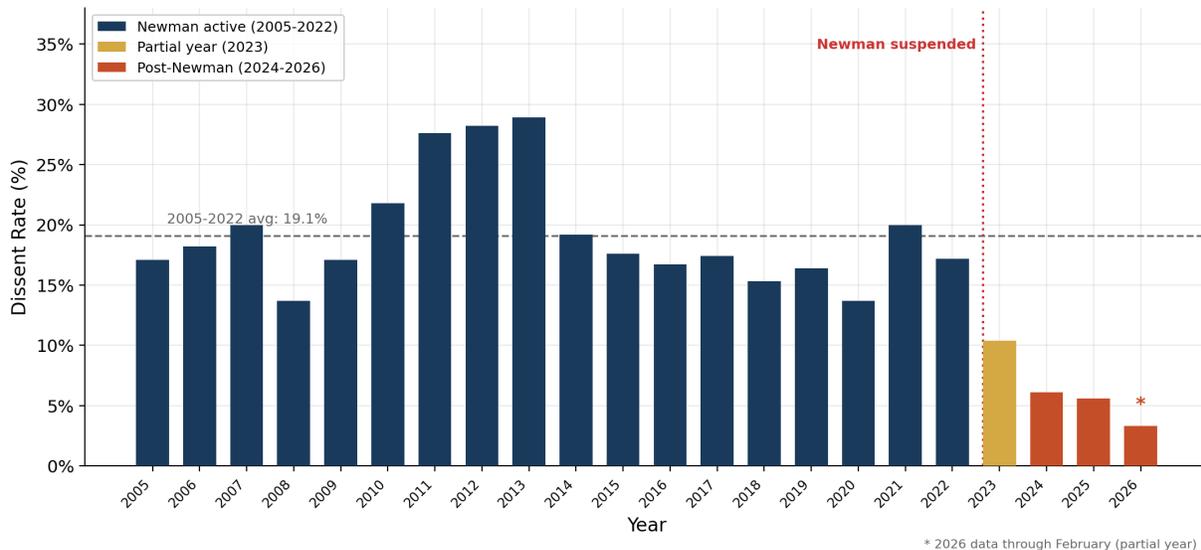
## Federal Circuit Dissent Rates Collapse After Newman's Removal

March 3, 2026 — Dennis Crouch

Justice [John Marshall Harlan](#) earned the title “The Great Dissenter” of the 1800s. Judge Pauline Newman holds that title for the millennium era – with over 300 dissents in precedential cases in just the final two decades of her tenure alone. To an extent that existing scholarship has only begun to capture, Newman’s voice of disagreement defined the Federal Circuit’s internal dialogue on patent law. An empirical analysis of almost 5,000 precedential Federal Circuit opinions issued between 2004 and early 2026 reveals just how dramatically this one judge shaped the court’s culture. We now have two full calendar years of post-Newman data, and the results are striking: in 2024 and 2025, the court’s dissent rate fell dramatically. The Federal Circuit has become, in the space of two years, one of the most consensus-oriented appellate courts in the federal system.

The data tell a straightforward story. From 2005 through 2022, the Federal Circuit’s dissent rate in precedential opinions averaged about 19%. In some years it ran higher: the 2011-2013 period saw rates of >25%, the highest sustained period of disagreement in the dataset, driven by the doctrinal upheaval surrounding both *Alice* and the America Invents Act. In other years the rate dipped to around 13-14%. But it never once fell below double digits. In 2023, the year Newman was suspended from the bench, the rate dropped to 10%. In 2024, it fell to 6%,; and in 2025 the rate was even lower. The Federal Circuit’s dissent rate is settling into a new equilibrium roughly one-third of what it was for the prior two decades.

Federal Circuit Dissent Rate in Precedential Opinions (2005-2026)

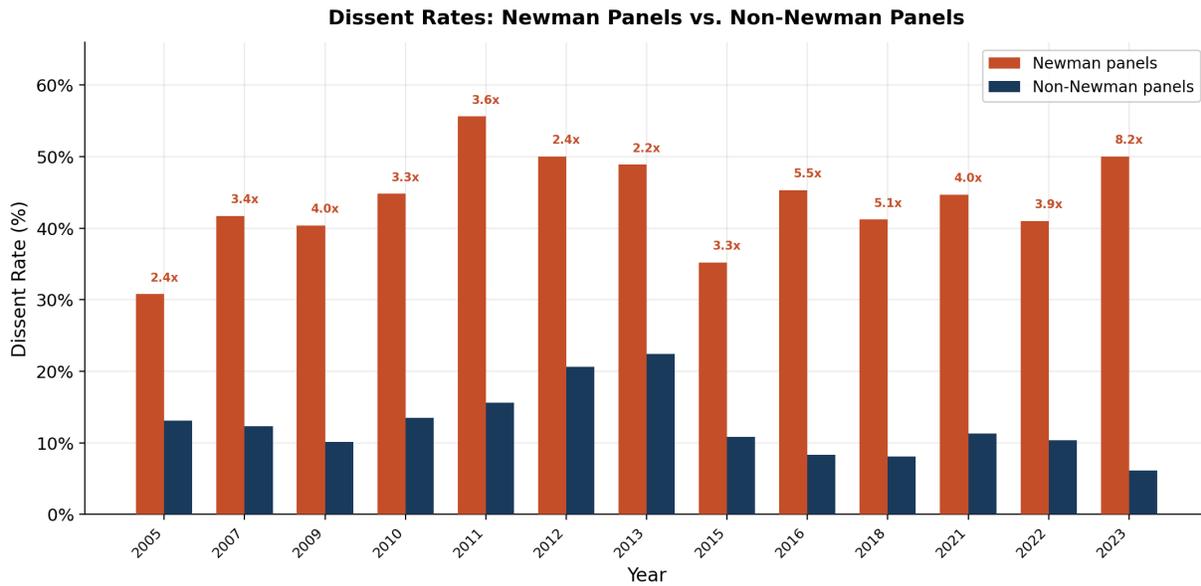


The structural explanation for this decline is not complicated: Judge Newman dissented far more frequently than any of her colleagues, and when she was removed, the dissents left with her. But the magnitude of the effect is actually much greater than what can be accounted for from Newman’s direct impact on panel

opinions. As discussed below, the court's dissent rate has fallen not just by the amount attributable to Newman's own dissents, but to roughly half the historical baseline of even non-Newman panels—suggesting her departure transformed the court's broader culture of disagreement.

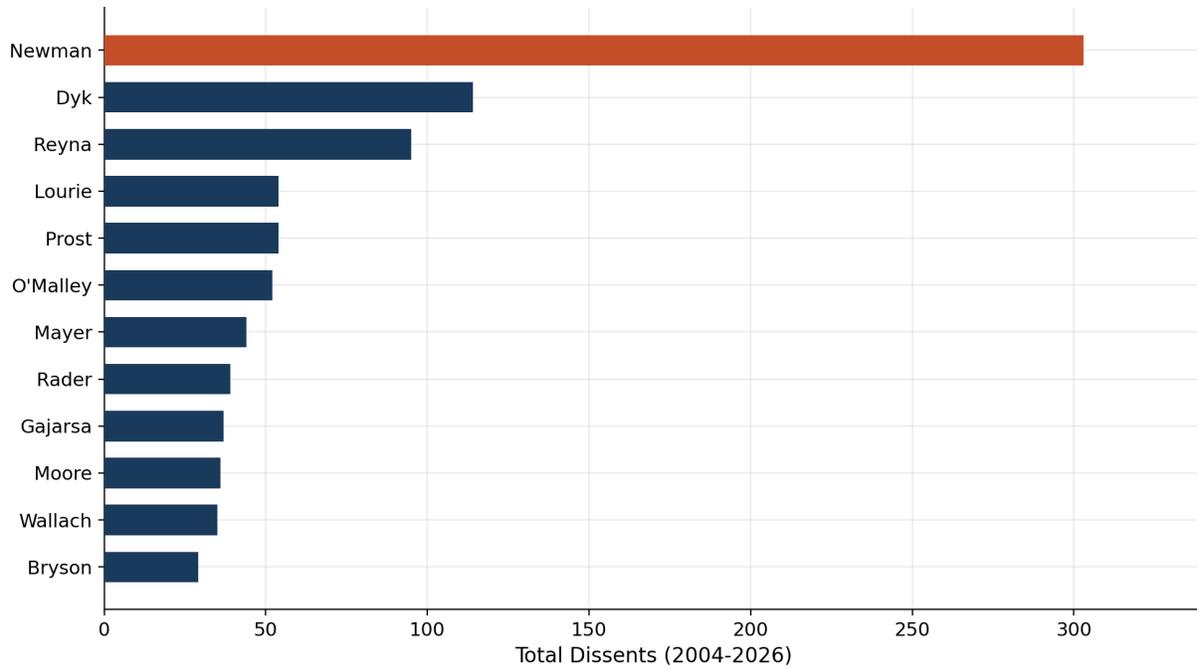
### Newman Panels vs. Non-Newman Panels

The most striking finding in this dataset is what happens when you separate opinions into those decided by panels that included Newman and those that did not. In every year from 2005 through 2023, panels with Newman produced dissents at dramatically higher rates than panels without her. In 2009, for example, 40% of Newman panels had a dissent compared to 10% for non-Newman panels, a 4-to-1 ratio. By 2023, the final year of Newman's participation, the ratio had widened to 8.2x, with half of all her panels producing a dissent versus just 6% for the rest of the court.



Newman was not merely sitting on contentious panels. She was overwhelmingly the one dissenting. Across her career in the dataset, she was the dissenting judge in roughly 70% of all dissents that occurred on her panels. The next most prolific dissenter during this period, Judge Dyk, authored about 1/3 as many dissents.

### Federal Circuit Dissent Leaders



**Dissent Rates and the Federal Circuit's Unique Structure:** In the regional circuits, doctrinal disagreement among appellate judges often surfaces through "circuit splits," where two or more circuits reach conflicting conclusions on the same legal question. These splits are a primary mechanism for flagging issues for Supreme Court review. Thus, the Fifth Circuit (New Orleans) might disagree with the Ninth Circuit (San Francisco) on some matter of interpretation that then is ultimately resolved by the Supreme Court.

The Federal Circuit occupies a unique position in the federal judiciary: as the sole appellate court for patent cases, it has no sister circuits deciding parallel questions of patent law. Internal dissent therefore plays an outsized role. A Federal Circuit dissent is often the only formal signal that a legal question is contested, that judges disagree about the correct interpretation of patent law. Without dissents, the Supreme Court and Congress lack the doctrinal markers they typically rely on to identify areas of law in need of review or reform.

### The Dissents That Mattered

Newman's prolific rate of disagreement would be a footnote if her dissents were merely contrarian. They were not. A 2017 empirical study by Professor Daryl Lim, which reviewed 1,789 cases and 4,981 law review articles, confirmed that Newman's dissents resonated with the Supreme Court, her colleagues, and academic commentators more than those of any other Federal Circuit judge. Daryl Lim, *[I Dissent: The Federal Circuit's "Great Dissenter," Her Influence on the Patent Dialogue, and Why It Matters](#)*, 19 Vand. J. Ent. & Tech. L. 873 (2017). The Lim study was cited in the D.C. Circuit litigation over Newman's suspension, in amicus briefs filed by the Bar Association of the District of Columbia. As NYU Professor Rochelle Dreyfuss (the Pauline Newman Professor of Law) observed at a dedication in Newman's honor, the Supreme Court took up nine cases in which Newman authored a dissent, and in eight of those cases the Court agreed with her position. *[Rochelle Dreyfuss, Tribute to Judge Pauline Newman, 74 N.Y.U. Ann. Surv. Am. L. 7 \(2018\)](#)*.

One example is *Merck KGaA v. Integra Lifesciences I, Ltd.*, 545 U.S. 193 (2005). The Federal Circuit majority had read the safe harbor provision of 35 U.S.C. § 271(e)(1), which exempts certain activities

“reasonably related” to developing information for FDA regulatory approval, narrowly. Newman dissented, arguing for a broader reading that would protect preclinical research. Supreme Court adopted Newman’s position.

Newman’s dissent in *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371 (Fed. Cir. 2015), was something of a rallying point for critics of the *Mayo/Alice* framework on patent eligibility under 35 U.S.C. § 101. The case involved patents on a method for detecting fetal DNA in maternal blood, a genuine scientific breakthrough that the majority held was directed to a natural phenomenon and therefore ineligible. Newman argued that claims limited to specific practical applications of a discovery should be patent-eligible because they do not “preempt further study of this science, nor the development of additional applications.” Her position has been cited in virtually every subsequent legislative effort to reform § 101, and the underlying tension she identified between the eligibility framework and innovation incentives remains unresolved.

Although not always, Judge Newman has usually taken the side of the patentee.

### **The Jurisprudential Fault Lines**

Newman’s disagreements were not distributed randomly across the court. When she dissented, certain judges were far more likely to have written the majority opinion. Her highest rate of disagreements were particularly with Judges Prost and Dyk where they broke along jurisprudential fault lines on the court — with Judge Newman tended to favor stronger patent protection, greater deference to patent examiners, and skepticism of doctrines that she viewed as undermining the innovation incentive. Dyk and Prost more frequently aligned with positions favoring accused infringers and broader invalidity holdings.

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364, created a mechanism for investigating complaints of judicial misconduct or disability within the federal courts. Under the Act, a chief circuit judge may identify a complaint, appoint a special committee of judges to investigate, and the circuit's judicial council may impose sanctions including temporary suspension of case assignments. The Act does not authorize removal of Article III judges, which under the Constitution can occur only through impeachment by the House and conviction by the Senate. Whether an indefinite suspension from all judicial duties amounts to a de facto removal, and whether such a suspension violates Article III's guarantee that judges "shall hold their Offices during good Behaviour," is the central constitutional question raised by Judge Newman's case.

### **Newman’s Departure and the Ongoing Constitutional Dispute**

Judge Newman’s departure from the bench was not voluntary, and the circumstances remain contested. In March 2023, Chief Judge Kimberly Moore initiated proceedings under the Judicial Conduct and Disability Act, citing concerns about Newman’s ability to manage her workload due to alleged health-related impairments. A Special Committee composed of Moore and two other Federal Circuit judges ordered Newman to undergo medical examinations and produce medical records. Newman refused, characterizing the investigation as unlawful and noting that it was the first time in the history of the Act that a complaint against a circuit judge had been kept within the same circuit rather than transferred. The Federal Circuit’s Judicial Council suspended Newman from new case assignments in September 2023, and has renewed the suspension annually since then. She has not sat on a panel since March 2023.

Newman, represented by the New Civil Liberties Alliance, challenged her suspension in the D.C. District Court, raising both statutory and constitutional claims. The central constitutional argument is that an indefinite suspension from all judicial functions amounts to removal of an Article III judge outside the

impeachment process, violating both Article III's tenure protection and the separation of powers. Six retired federal judges, including former Federal Circuit Chief Judges Paul Michel and Randall Rader, filed an amicus brief supporting Newman. As I have covered throughout this litigation, the constitutional questions are serious ones. Dennis Crouch, *Supreme Court Asked to Address Constitutionality of Judge Newman Removal*, Patently-O (Nov. 2024); Dennis Crouch, *Judge Newman's D.C. Lawsuit Against Fellow Judges Dismissed on Jurisdictional Grounds*, Patently-O (Feb. 2024).

In August 2025, the D.C. Circuit affirmed the district court's dismissal. *Newman v. Moore*, No. 24-5173 (D.C. Cir. Aug. 22, 2025). The panel, in an opinion by Judge Garcia joined by Judges Millett and Pillard, held that under *McBryde v. Committee to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the United States*, 264 F.3d 52 (D.C. Cir. 2001), the court lacked jurisdiction over Newman's statutory and as-applied constitutional claims. But the panel took the unusual step of devoting the final section of its opinion to two observations. First, the court noted that "Judge Newman has posed important and serious questions about whether these Judicial Conduct and Disability Act proceedings comport with constitutional due process principles and whether her ongoing suspension comports with the structure of our Constitution." Second, the panel expressed doubt about its own binding precedent, noting "substantial arguments" that *McBryde* was wrongly decided. Newman petitioned for rehearing en banc in September 2025. The D.C. Circuit denied rehearing in December 2025, and a certiorari petition to the Supreme Court is expected.

### **A Transformed Court**

Something interesting is coming from the data from the past two years without judge Newman. The dissent rate has fallen well below what we might have expected. During the Newman years, the non-Newman panel still involved a dissent in over 12% of the cases. Without Newman even on the bench, the average has dropped to around 6%. If Newman's departure simply removed her individual dissents from the count, the rate should have settled somewhere near the historical non-Newman baseline. Instead, it dropped to roughly half that level.

Several explanations may account for this broader decline. The most intuitive is cultural: Newman's persistent willingness to dissent may have emboldened other judges to register their own disagreements, or her dissents may have created doctrinal fault lines that produced disagreement even on panels she did not sit on. With that voice gone, the remaining judges may have settled into patterns of consensus. A related but more troubling possibility (which I believe is unlikely) is that the misconduct proceedings themselves exerted a chilling effect. Watching a colleague's prolific dissenting become entangled with a fitness-for-duty narrative could make any judge think twice before becoming the court's next persistent dissenter. But more likely, the judges who voted to suspend Newman may feel a particular need to present a unified front in the years immediately following that decision.

Other explanations are more structural. The court has experienced significant turnover in recent years, and the newer judges may simply share more common ground on the doctrinal questions that most divided the prior generation; the deep jurisprudential cleavages that separated Newman from judges like Dyk and Prost may not have analogues on the current bench. It is also possible that the law itself has stabilized. The highest dissent years in the dataset coincided with the doctrinal upheaval surrounding Alice and the AIA, and many of those open questions have now hardened into settled precedent. Finally, there may be selection effects at work.

Whatever the explanation, the practical consequences for patent law are real. For practitioners, dissent rates carry information. A dissent signals that a legal question is contested. Those signals have become rare. The Federal Circuit's precedential output increasingly presents a unified front, and it is harder for parties, for the Supreme Court, and for Congress to identify the fault lines in the court's jurisprudence from the opinions themselves.