Report

of the National Commission on Judicial Discipline & Removal

August 1993

Ex "A"

After reviewing the actions taken by judicial councils following the report of a special committee and by chief judges in concluding proceedings on the basis of corrective action, and in light of the results of our surveys of judges, the Commission concludes that, as implemented, the Act's substantive standard has not proved to be a serious threat to judicial independence.

Dismissals. Congress anticipated that the great majority of complaints filed under the Act would and should be dismissed as not in conformity with the Act, frivolous, or directly related to the merits of a decision or procedural ruling. Statistics provided to Congress have consistently vindicated the prediction (95 percent of the complaints filed and not withdrawn through 1991 were dismissed by chief judges); yet, prior to the Commission's studies, it was not possible to assess with any confidence whether those dismissals were appropriate.

Because the Commission had access to both dismissal orders and the complaints to which they related, it was able to overcome the major barrier to a rigorous evaluation noted above. It should be recognized, however, that the Act's substantive ambiguity, which results from the breadth of its conduct standard, is itself a barrier. Nonetheless, the Commission is satisfied that the Act's substantive ambiguity has not created a serious problem by permitting the dismissal of complaints that should have been investigated.

Most complaints filed under the Act have been outside the Act's intended jurisdiction, frivolous, or directly related to the merits of a decision or procedural ruling. Most of the troublesome dismissals identified (which as a whole constituted 2.5 percent of the sample reviewed) were the result of precipitous action, the chief judge having dismissed the complaint at a stage when further investigation was warranted. Although many circuits have on occasion been careless in identifying the proper ground for dismissal, very few of the troublesome dismissals could be laid to the elasticity of the Act's substantive standards. Four problem areas warrant specific attention.

Merits-relatedness. As noted in the FJC study, "[o]ne source of confusion in applying the merits-relatedness standard is the interplay between a 'direct relationship' to the merits and the availability of an appellate remedy." The authors then describe "a number of arguably meritorious complaints that were dismissed as merits-related on the ground that some appellate remedy did, or might exist," arguing that

"some inquiry by the chief judge into the factual support for the complaint might have been more appropriate." As an example of a merits-related dismissal the authors deem clearly incorrect, they cite a complaint by a pro se litigant that the docket entries in the case had been falsified; the complaint specified six specific entries. The authors also discuss two complaints that alleged improper ex parte communications and that were dismissed, in whole or part, as merits-related.

The Commission agrees with the authors of the FJC study that, although the availability of appellate review may be "one reason merits-related complaints are not cognizable," "[t]he core reason for excluding . . . [them] is to protect the independence of the judicial officer in making decisions, not to promote or protect the appellate process." The Commission does not believe, however, that the extent of the problem identified (6 troublesome merits-related dismissals out of 469 complaints in the sample) warrants a statutory amendment or revision in the Illustrative Rules, or indeed, that the problem is readily amenable to formal clarification. Many of the troublesome dismissals arising from an arguably over-expansive view of merits-relatedness might have been avoided if the chief judges of two circuits that accounted for most of the problems had more freely availed themselves of assistance in reviewing the complaints and preparing non-standardized dismissal orders. Such dismissals might also have been avoided if reasoned dismissal orders analyzing this ground of dismissal were easily available and if, as a result, a body of interpretive precedents were to develop. Later in this chapter of the Report, the Commission makes recommendations that are addressed to the questions of assistance for chief judges and developing a body of interpretive precedents. If adopted, they may provide procedural solutions to a problem of substantive ambiguity.

Delay. Far more vexing is the question whether, and in what circumstances, judicial delay constitutes an appropriate ground for complaint under the 1980 Act. The Illustrative Rules provide that "the complaint procedure may not be used to force a ruling on a particular motion or other matter that has been before the judge too long. A petition for mandamus can sometimes be used for that purpose." In commentary, however, the rulemakers note "that habitual failure to decide matters in a timely fashion is widely regarded as the proper subject of complaint." Although there is very substantial agreement with the Illustrative Rules' approach in the eight circuits sampled, in seven of which complaints of isolated delay are dismissed as merits-related, testimony before the Commission from lawyers and judges, and surveys

conducted for the Commission, confirm that delay is a difficult issue that deserves attention. The information available also suggests that delay most often lends itself to administrative measures best worked out through informal means and that, therefore, any adjustments in formal mechanisms should be designed primarily as a support for, and backstop to, administrative approaches.

The 1980 Act's substantive conduct standard -- "conduct prejudicial to the effective and expeditious administration of the business of the courts" -- on its face does not exclude delay as a ground for complaint; in fact, it seems to incorporate it. At the same time, it requires little imagination to foresee the potential impact on judicial independence of permitting the routine use of the Act to trigger inquiry concerning delay, let alone its impact on the workload of those responsible for complaint disposition. Even conscientious, efficient judges can get behind. For a chief judge to scrutinize the dockets of fifty or sixty or more district judges in the circuit sufficiently to allocate blame on questions of routine delay would be a daunting prospect. Moreover, a busy district judge has to have leeway to determine docket priorities --- some litigants may have to wait for others. Judges, after all, have no control over whether vacancies are filled or colleagues are taken ill, nor can they control how many lawsuits are brought or ready for trial at one time. Such considerations --- as well, to be sure, as the judge's own ability, efficiency, and work habits --- all play their part in creating delay.

Indeed, although action taken pursuant to the Act may appropriately affect the way in which judicial power is exercised (or whether it is exercised at all) in future cases, the Commission has serious doubts whether a chief judge or a judicial council has the power under the Act to order judicial action in a specific case. Such power is reserved to an Article III court.

The central distinction, then, is that suggested but not fully explained by the Illustrative Rules and commentary. It is not a distinction between isolated and habitual delay but rather one between delay that is an appropriate object of judicial (appellate) as opposed to administrative or disciplinary remedy. Pursuing that distinction, the Commission does not believe that habitual or chronic delay exhausts the universe of situations in which an administrative or disciplinary remedy under the Act may be appropriate. Delay in the decision of a single case or even of a single motion may be a proper ground for complaint if it is founded

on improper animus or prejudice against a litigant -- or if it is so egregious as to constitute a clear dereliction of judicial responsibilities. A judge's refusal to decide because, for reasons unrelated to the case, the judge is biased against the litigant, constitutes conduct "prejudicial to the effective and expeditious administration of the business of the courts." So too does a refusal or persistent failure to decide because a matter is difficult or tedious. The Commission emphatically cautions that a valid complaint would not be made out by mere assertions. Either the specific facts of the situation or the circumstances, or both, must demonstrate judicial impropriety. Delay, even prolonged delay, often occurs for reasons a court cannot control or that fall within the necessarily wide discretion of the court to manage its docket. Remedies under the Act are aimed at conduct falling clearly outside the boundaries of ordinary judicial judgment and discretion.

> ***The Commission recommends that Illustrative Rule 1(e) be revised to provide that the complaint procedure may not be used to force a ruling on a particular motion or other matter that has been before the judge too long; a petition for mandamus can sometimes be used for that purpose. Discipline under the 1980 Act may be appropriate, however, for (1) habitual failure to decide matters in a timely fashion, (2) delay shown to be founded on the judge's improper animus or prejudice against a litigant, or (3) egregious delay constituting a clear dereliction of judicial responsibilities. The Commission also recommends that all councils and the several courts subject to the 1980 Act adopt this Illustrative Rule as revised.***

In making this recommendation, which the judiciary may regard as an invitation to a self-inflicted wound, the Commission recognizes that most of the burden will fall on chief judges and those on whom they rely for assistance in complaint disposition, and that serious complaints could impose substantial burdens on investigating special committees. The Commission would not lightly add to their burdens, but it has concluded that the suggested standard faithfully implements the statute's language and purposes, and that the costs of dismissing complaints of delay that do not satisfy the suggested standard may be outweighed by the standard's benefits.

Chief judges have observed in general that even complaints outside the jurisdiction of the Act may lead to the correction of a problem of judicial administration, and even in circuits that purport to follow the Illustrative Rules' approach to delay, a complaint alleging isolated delay may nonetheless be regarded as an invitation to corrective action. There may be no greater problem of judicial administration today than delay. The Commission hopes that this recommendation, proposing a formal elaboration of the Act's substantive standard, will augment the judiciary's arsenal of informal approaches to deal with delay. In that regard, it may serve as a supplement to a chief judge's power to "identify a complaint" (i.e., dispense with the formal filing of a complaint) of habitual or chronic delay after reviewing reports required by the Civil Justice Reform Act of 1990.

Whatever use chief judges make of CJRA reports, the statutory purposes in requiring the Director of the Administrative Office to prepare semiannual reports that are available to the public and that disclose certain prescribed information for each judicial officer would be better served if the Administrative Office made those reports more readily available to the public. Moreover, the reports themselves should contain the information required by statute (including case names) in a form that permits meaningful public evaluation.

Not in Conformity With the Act. The Commission did identify a handful of complaints within the sample reviewed that may have been inappropriately dismissed as not in conformity with the Act, a ground sometimes referred to as outside the Act's jurisdiction. One subset of the complaints so identified deserves comment.

Two circuits have held that the Act does not cover allegations that a federal judge committed perjury while testifying about matters that occurred before his or her appointment to the federal bench, and two other complaints raised similar issues. Another complaint, alleging that a judge had accepted a bribe from another party and providing some factual support, was dismissed without prejudice to its renewal on the ground that further proceedings under the Act should await the outcome of any criminal prosecution.

Reasonable minds may differ as to whether a federal judge who commits perjury with respect to matters unrelated to the conduct of his or her office nevertheless engages in conduct "prejudicial to the effective and expeditious administration of the business of the courts." It may be

relevant whether such conduct might be an impeachable offense. If so, accepting jurisdiction under the Act in a close case could serve Congress's purpose of enlisting the judiciary's help in easing its impeachment burdens. Moreover, although some criminal conduct by a judge unquestionably does not fall within the Act's jurisdiction, it is useful to recall that the great debates about the scope of that jurisdiction were animated by a concern about overreaching.

No such doubt surrounds the dismissal on this ground (without prejudice) of the complaint alleging bribery in the complainant's case, at least in the absence of any evidence that there was a pending criminal proceeding. Although complaints alleging criminal behavior would also benefit from the development of a body of interpretive precedents, these three matters raise a more pressing concern. In none of them did those dismissing the complaint refer the matter either to federal or state criminal authorities or to the House of Representatives. Granting again that some (non-frivolous) allegations of criminal conduct by a federal judge may be outside the Act's jurisdiction, any such serious allegation should be brought to the attention of other institutions that may have and exercise jurisdiction.

> ***The Commission recommends that a chief judge or circuit council dismissing for lack of jurisdiction non-frivolous allegations of criminal conduct by a federal judge bring those allegations, if serious and credible, to the attention of federal or state criminal authorities and of the House Judiciary Committee. In situations where the chief judge or circuit council believe it inappropriate to act as an intermediary, the Commission recommends that they notify the complainant of the names and addresses of the individuals to whose attention the charges might be brought.***

Frivolousness. A few complaints in the sample were dismissed as frivolous where further inquiry appears to have been warranted or where limited inquiry by the chief judge did not substantiate the complaint's allegations. Council review is available to correct dismissals that are simply precipitous, and in fact such action followed in two of four instances identified. The problem of complaints whose allegations are adequate on their face but cannot be substantiated by factual inquiry is qualitatively different, and it has two aspects. First,

there is some doubt about the power of a chief judge to conduct limited factual inquiry prior to taking action on a complaint. Later in this chapter of the Report, the Commission recommends that the Act be amended specifically to recognize such power. Second, the Commission agrees with the authors of the FJC study that "[a] dismissal for frivolousness . . . could readily be misunderstood as an indication that the chief judge did not take the complaint's allegations seriously. This kind of misperception might prove particularly unfortunate where a complaint raises sensitive, factually nonfrivolous allegations (for example, of ethnic or gender bias) that are found unsupported after inquiry."

> ***The Commission recommends that the 1980 Act be amended to include as an additional ground for dismissal by a chief judge that the allegations in a complaint have been shown to be plainly untrue or incapable of being established through investigation.***

Other Issues. There are two other matters implicating the Act's substantive standards that deserve attention. The first concerns the relationship between those standards and the Code of Conduct for United States Judges and other statutes or rules regulating judicial ethics. The second matter concerns the treatment of complaints that allege judicial bias on the basis of race, sex, sexual orientation, religion, or ethnic or national origin, including complaints alleging sexual harassment.

In light of the indeterminacy of the Act's core substantive conduct standard -- "conduct prejudicial to the effective and expeditious administration of the business of the courts" -- it was to be expected that chief judges and circuit councils would seek more concrete guidance in the Code of Conduct. They have done so frequently in dispositions under the Act. Yet, the Code was not intended as a source of disciplinary rules, and not all of its provisions are appropriately regarded as enforceable under the Act. The same may be true of other statutes and rules establishing ethical norms for federal judges, particularly if they have their own enforcement mechanisms. The Commission believes the subject deserves continuing study and clarification, much of which can be expected to emerge on a case by case basis if dispositions under the Act are circulated and selectively published, as recommended. The Commission can also see room for fruitful study by various committees of the Judicial Conference charged with responsibility for ethics and

lawyers and the public about judicial discipline. The Commission also encourages other institutions, including the organized bar, to take an active interest in the smooth functioning and wise administration of formal and informal mechanisms that address problems of judicial misconduct and disability.

Whether or not an individual is reluctant to file a complaint, a chief judge should not insist that the individual do so when information is available on the basis of which a complaint should be identified and it appears that the matter is capable of being resolved through investigation.

Powers of Chief Judges in Complaint Disposition.

Limited Factual Inquiry. Advised that some doubt exists about the power of a chief judge to conduct a limited inquiry into the factual support for a complainant's allegations prior to taking action on a complaint, the Commission decided that such power is necessarily contemplated by the Act's provision authorizing a chief judge to conclude a proceeding. For that and other reasons, the Commission agrees with the Illustrative Rules' treatment of this issue. Illustrative Rule 4(b) authorizes a chief judge to "conduct a limited inquiry for the purpose of determining (1) whether appropriate corrective action has been or can be taken without the necessity for a formal investigation, (2) whether intervening events have made action on the complaint unnecessary, and (3) whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation." It also provides that a chief judge "will not undertake to make findings of fact about any matter that is reasonably in dispute." This represents a sensible accommodation of the policies and interests that are implicated. The existence of such power is, moreover, a necessary predicate for the recommendation earlier in this chapter of the Report that the Act be amended to add as a ground for dismissal by a chief judge "that the allegations in a complaint have been shown to be plainly untrue or incapable of being established through investigation."

The Commission endorses Illustrative Rule 4(b) and recommends that the 1980 Act be amended to provide that a chief judge may conduct a limited inquiry into the factual support for a complainant's allegations but may not make findings of fact about any matter that is reasonably in dispute.

authorized to release information, with appropriate safeguards, to government entities or properly accredited individuals engaged in the study or evaluation of experience under the Act.

> ***The Commission recommends that council rules regarding confidentiality should be nationally uniform. The relevant provisions of the Illustrative Rules should be adopted to that end, but the uniform rules should not provide for automatic transmittal of a copy of complaints to the chief judge of the district court and the chief judge of the bankruptcy court. They should, however, authorize a chief judge to release information, with appropriate safeguards, to government entities or properly accredited individuals engaged in the study or evaluation of experience under the 1980 Act. If action by the judicial councils or the Judicial Conference does not result in national uniformity on the issue within a reasonable period of time, the Commission recommends that the 1980 Act be amended to impose it.***

Chief Judge Orders. The Act requires that a chief judge's written order dismissing a complaint or concluding a proceeding state the chief judge's reasons. Seven of the twelve complaint dismissals identified as troublesome by the Commission's consultants were concentrated in two circuits in which, at least in past years, the chief judge did not delegate and frequently relied on form dismissals that do not articulate reasons for the stated conclusions. Earlier in this chapter of the Report the Commission recommended that chief judges avail themselves of assistance in reviewing complaints and preparing orders disposing of them, in part because of the causal connection suggested in the FJC study. That is another reason (in addition to the Act's requirement) why chief judge orders dismissing complaints or concluding proceedings, or memoranda accompanying them, should include a non-conclusory statement of the allegations of the complaint and the reasons for the disposition. Still another reason is that such a non-conclusory statement may be critical to a complainant's ability to understand the action taken as well as to the understanding of those engaged in oversight or evaluation (whether or not such orders are, as also recommended, uniformly available). The chief judges interviewed expressed no doubt that non-conclusory orders would facilitate evaluation of the integrity and credibility of the judiciary's implementation of the Act.

The Commission recommends that, as provided in Illustrative Rule 4(f), a chief judge who dismisses a complaint or concludes a proceeding should "prepare a supporting memorandum that sets forth the allegations of the complaint and the reasons for the disposition." This memorandum should "not include the name of the complainant or of the judge or magistrate whose conduct was complained of." In the case of an order concluding a proceeding on the basis of corrective action taken, the supporting memorandum's statement of reasons should specifically describe, with due regard to confidentiality and the effectiveness of the corrective action, both the conduct that was corrected and the means of correcting it. If action by the judicial councils or Judicial Conference does not result in national uniformity on the issue within a reasonable period of time, the Commission recommends that the 1980 Act be amended to impose it.

Publication of Orders. As noted earlier, problems arising from the Act's substantive ambiguity might best be addressed through the development of a body of interpretive precedents. The dissemination of some decisions might also help other judges to assess their conduct. At present, even those few orders required by the Act to be publicly available may not be easy to locate. Moreover, assuming the Commission's recommendation that chief judge orders dismissing complaints or concluding proceedings be publicly available is adopted, availability does not guarantee ease of access. Early in the implementation of the Act, some orders were published, but many orders have no precedential value, and publication is not otherwise an unmitigated good. What is needed is a system for the dissemination of information about the resolution of complaints, including selective publication, whether in reporters or computerized information systems.

The Commission recommends that the Judicial Conference devise and monitor a system for the dissemination of information about complaint dispositions to judges and others, with the goals of developing a body of interpretive precedents and enhancing judicial and public education about judicial discipline and judicial ethics.