"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

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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.