ARTICLES

DECENTRALIZED SELF-REGULATION, ACCOUNTABILITY, AND JUDICIAL INDEPENDENCE UNDER THE FEDERAL JUDICIAL CONDUCT AND DISABILITY ACT OF 1980

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INTRODUCTION

The Judicial Conduct and Disability Act of 1980 (the "Act")¹ was born out of controversy about constitutional means for achieving judicial accountability, preserving independent decision-making powers for Article III judges, and the practical ability of the judicial branch to regulate itself.² The Act embodies a compromise of divergent viewpoints on these issues. As the debate evolved, the primary alternatives considered by Congress were (1) establishing a central body of judges with broad powers to discipline and even remove federal judges³ and (2) formalizing or augmenting the system of decentralized self-regulation already in place by virtue of the general powers of the judicial councils of the respective circuits.⁴ By enacting the 1980 Act, Congress chose the latter option.

Given the magnitude of the values at stake—no less than judicial independence and accountability to the public—it is not surprising that the controversy continues.⁵ What is surprising is that these debates have raged without any systematic empirical examination of the experience of the judiciary in administering the 1980 Act. This Article is intended to provide systematically collected and substantively evaluated empirical data to inform the continuing debate about decentralized judicial self-regulation.

In 1990, Congress created the National Commission on Judicial Discipline and Removal ("NCJDR") "to investigate and study the problems and issues involved in the tenure (including discipline and removal) of an article III judge" and "to evaluate the advisability of proposing alternatives to current arrangements."⁶ This congressio-

¹ Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. § 372(c) (1988 & Supp. IV 1992)).

² See Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 291-300 (1982); Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective*, 76 KY. L.J. 763, 770-73 (1988).

³ See S. 1423, 95th Cong., 1st Sess. (1977) (the Nunn-DeConcini Bill).

⁴ See Burbank, *supra* note 2, at 291-300 (attributing this view to the Judicial Conference of the United States as well as others).

⁵ See, e.g., Carol T. Rieger, *The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges*, 37 EMORY L.J. 45 (1988); Comment, *Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act*, 75 CAL. L. REV. 1071 (1987); Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117 (1985).

⁶ Judicial Improvements Act of 1990, Pub. L. No. 101-650, tit. IV, § 410, 104 Stat.

nal mandate served as the catalyst for the present Article. This project was undertaken in June 1992 primarily to address research questions that the NCJDR identified as important to its work. Specifically, it pursues the questions of whether the Act is working as intended to provide a structure for the filing and review of complaints alleging judicial misconduct or disability and whether sufficient information is available to the public and Congress to permit meaningful oversight of the process.

Part I of the report consists of a description of the circuits' processes for handling conduct and disability matters, including both formal complaints under the Act and informal matters. It begins with an overview of the administration of the Act, proceeds to a statistical overview, and then moves to a discussion of the treatment of complaints by chief judges, special committees, and judicial councils, including both substantive and procedural aspects of the process. Part I then proceeds to look at the extent to which circuits' practices permit public and congressional oversight of the circuits' administration of the complaint mechanism, concluding with an analysis of informal actions taken regarding matters that fall within the potential reach of the Act.

Part II focuses on the effects of the Act, discussing field study data and presenting the views of current and former chief judges. Part II also addresses the benefits the Act affords to complainants, the courts, and the legislative and executive branches of government. The time burdens and other negative effects that the task of administering the Act has imposed on the judiciary are also examined in Part II. Part III assesses the relationships between positive and negative effects, summarizes chief judges' assessments of the value of the Act, and reports suggestions for change.

Data for this report were obtained from three primary sources. First, we conducted interviews ("interview data") with chief judges (in eight circuits), former chief judges (in five of the eight circuits), circuit executives (in six of the eight circuits), and clerks of court (in seven of the eight circuits). We selected circuits to represent a full spectrum of the levels of complaint activity per judicial officer. We also included all circuits that did not submit chief judge orders with statements of reasons to the Federal Judicial Center pursuant to Rule 17(b) of the Illustrative Rules Governing Complaints of Judicial Misconduct and Disability.⁷ Unless otherwise specified, references

to "chief judges" include responses of former chief judges. The interviews were conducted in the District of Columbia, First, Second, Third, Fifth, Eighth, Ninth, and Eleventh Circuits.

Second, we reviewed complaints and orders ("field study data") in the eight circuits listed above. The documents reviewed consisted of (a) all complaints that had not been dismissed by the chief judge (primarily all complaint files in which corrective action was taken or a special committee was appointed); (b) all complaints filed by attorneys or by nonlitigants; and (c) a sample of litigant complaints that had been dismissed by the chief judge.

Third, we reviewed statistical data submitted to the Administrative Office of the U.S. Courts ("AO"). Various staff members in the circuits and national courts submitted these data to the AO on AO form 372,⁸ which does not identify the judge involved. Court staff (generally a deputy clerk or secretary, not a staff attorney) complete a portion of the form at the time the complaint is filed and another portion at the time the complaint is terminated. We used these data primarily as a source of relatively objective information about the complaints filed in all circuits for calendar years 1980-1991.⁹ The Appendix presents the data in tables and graphs, describes the process through which the AO collects the data, and discusses the limits of the data.

The research was conducted with attention to the sensitive nature of the material. Confidentiality was guaranteed to all part-

judge or the judicial council be placed in a publicly accessible file in the office of the clerk of the court of appeals and be submitted to the Federal Judicial Center. See Memorandum from the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States to the Chief Judges of the United States Courts of Appeals, the United States Court of International Trade, and the United States Claims Court 41 (Aug. 15, 1991) [hereinafter *ILLUSTRATIVE RULES*] (on file with authors). The memorandum is a revision of the original rules, drafted in response to the passage of the Judicial Improvements Act of 1990 and circulated to the courts covered by the Act as a guide to modification. See SPECIAL COMM. OF THE CONFERENCE OF CHIEF JUDGES OF THE U.S. COURTS OF APPEAL, *ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY* (1986) (original version of the rules). The revised rules have been adopted, with local modifications, in all of the jurisdictions covered by the Act.

⁸ A sample of AO 372 form is included in the Appendix.

⁹ For the eight circuits in the field study, we "corrected" the AO data to reflect our information or judgment about the file. This produced eight subsets of corrected data, one for each circuit visited. For the most part, however, these corrected data were not used in this report because we had insufficient time to analyze them. Based on our impressions in making those corrections, however, we have limited our use of the AO data to the variables that appear to be objective and reliable.

icipants.¹⁰ As a result, responses to the surveys and quotations of judges cannot be attributed to their sources.

I. THE PROCESS OF REGULATING JUDICIAL CONDUCT

A. *Who Does What About the Complaints in the Initial Stages?*

To gain perspective on one of the central issues in this report, namely, what burdens does the administration of the Act impose on the judicial branch, we address a preliminary question: Who does what to administer the Act? Because the Act defines a central role for the chief judges of the circuit,¹¹ the extent to which a chief judge can delegate those duties becomes an important component of assessing the burden the Act imposes on the judiciary. This discussion relies on interviews conducted in eight circuits with eight chief judges, five former chief judges, and the clerk and/or circuit executive in those circuits. Before examining specific burdens

¹⁰ Form letters requesting the chief judges' participation in the research contained the following acknowledgment:

To insure against any breach of confidentiality, we have incorporated precautions into our research design. Employees of the judicial branch, pledged to hold identifying information confidential, will examine files and gather data about the complaints. Information that might identify the judge, complainant, or any witnesses will be omitted. Aside from information that is contained on AO form 372, the data collection form will be limited to extracting information about the nature of the allegations and their logical and factual relationship to the disposition of the complaint. Further precautions include reporting the data in statistical tables to reduce further any danger that confidential information would be communicated outside the judicial branch. . . . Prior examinations of this kind were conducted with success by [Federal Judicial] Center staff in several circuits to assist the Judicial Conference in preparing the Illustrative Rules, now followed by many circuits.

Letter from William W Schwarzer, Director, Federal Judicial Center, to eight federal circuit chief judges (July 14, 1992) (on file with authors).

¹¹ Chief judges' duties and responsibilities for judicial administration are second only to those of the Chief Justice of the U.S. Supreme Court. *See generally* 28 U.S.C. § 331 (1988 & Supp. IV 1992) (providing that the Chief Justice is the presiding officer of the Judicial Conference of the United States); § 332 (providing that the chief judge of each judicial circuit is the presiding officer of the circuit's judicial council). *See also* § 291(a) (Supp. IV 1992) (providing that the Chief Justice has the responsibility for the temporary intracircuit assignment of circuit judges); § 292 (1988) (dividing responsibility for temporary intercircuit and intracircuit assignment of district judges between the Chief Justice and the chief judge of each circuit depending on the circumstances).

imposed on various actors, we sketch briefly the process for filing and handling a complaint.

The Act provides as follows:

Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge . . . is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.¹²

The Illustrative Rules elaborate on the formalities required for filing complaints. For example, Rule 2 limits a statement of facts to five pages and requires the complaint to be legible, signed, and verified.¹³ The Act directs the clerk to "promptly transmit" the complaint to the chief judge of the circuit and to the judge whose conduct is the subject of the complaint.¹⁴ The Act then directs the chief judge to review the complaint "expeditiously" and take one of three actions: (1) dismiss the complaint on a finding that it is "not in conformity" with the statutory grounds, is "directly related to the merits of a decision or procedural ruling," or is "frivolous,"¹⁵ or (2) conclude the proceeding on a finding that "appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events,"¹⁶ or (3) "appoint himself 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" and report their findings to the judicial council of the circuit.¹⁷ Prior to taking one of the above actions, the chief judge is generally seen as having the option of offering the named judge an opportunity to respond to the

¹² 28 U.S.C. § 372(c)(1) (1988 & Supp. IV 1992).

¹³ See ILLUSTRATIVE RULES, *supra* note 7.

¹⁴ § 372(c)(2).

¹⁵ § 372(c)(3)(A).

¹⁶ § 372(c)(3)(B).

¹⁷ § 372(c)(4). The judicial council of the circuit is the primary governing body for the courts within the circuit and has statutory authority to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." § 332(d)(1). The judicial council consists of an equal number of court of appeals judges and district judges plus the chief judge of the circuit, who presides. See § 332(a)(1).

complaint as a whole or to specified allegations and to otherwise conduct a limited inquiry into the facts.¹⁸

In this statutory and procedural context, a host of functions may need to be performed. Someone may need to review a complaint before filing to determine if it is in the format that complies with the Act and local rules (including the Illustrative Rules); file and docket the complaint; screen the complaint to see if there is any intelligible, nonfrivolous claim of misconduct; decide whether claims of misconduct arguably might be seen to interfere with the effective and expeditious administration of court business; conduct a preliminary inquiry into the accuracy of the facts alleged; decide whether to seek a response from the judge; obtain and evaluate any response from the judge; discuss with the judge whether appropriate action might be taken to correct any problem; and decide whether to appoint a special investigative committee to examine the allegations. Not the least of the functions is to prepare an order communicating the outcome and "stating . . . reasons" for the conclusions, as required by § 372(c)(3). Any of these decisional functions could be supported by a memorandum discussing the options under the statute and analyzing any legal or factual issues the complaint raises.

If a special committee is appointed, another set of functions arises. The chief judge first needs to determine the appropriate membership of the committee. The committee then must decide how to investigate the factual allegations (for example, whether to conduct the investigation in-house or hire outside counsel) and determine procedures for obtaining information (for example, conducting hearings, interviewing witnesses) and for permitting or limiting participation by the judge and the complainant in the proceedings. Arranging for facilities to conduct the special hearing, which is generally confidential, may also demand considerable resources. Finally, drafting a report is likely to demand a high level of judicial effort, perhaps supported by staff.

1. Initial Screening

As will be discussed in greater detail later in this Article,¹⁹ the vast majority of complaints present frivolous allegations. These allegations are also often directly related to the merits of underlying

¹⁸ See ILLUSTRATIVE RULES, *supra* note 7, Rule 4(b).

¹⁹ See *infra* part I.C.1.a.

litigation that may itself be frivolous. One expects that economies will flow from identifying frivolous complaints as early as possible and delegating as many tasks as possible to nonjudges. This would permit the courts to allocate judicial time to complaints that do not warrant dismissal on their face. Although a majority of the circuits studied followed this general model, there were several notable exceptions.

Courts conduct screening as to form and substance. In all circuits, the clerk of the court of appeals or the circuit executive checks complaints for conformity with local rules. In one circuit, the clerk estimates that strict enforcement of the Illustrative Rules and an additional local variation has resulted in returning one complaint for every complaint filed.²⁰ In all circuits, once a complaint complies with the rules, the clerk's office or the circuit executive's office stamps it as filed, assigns it a unique number, opens a file, records activities on a docket sheet, and sends a copy of the complaint to the chief judge and the judge named in the complaint. Clerks may also identify any recusal problems that appear on the face of the complaint or on the surface of the record in the underlying proceedings. The clerk would then bring these problems to the chief judge's attention. If the chief judge decides to recuse, the matter would be passed to the active court of appeals judge with the longest length of service.

2. Screening for Substance

None of the circuits has a formal system of separating the frivolous or unfounded complaints from those that warrant greater attention.²¹ In three of the eight circuits, the chief judge does not delegate any significant part of the process to staff. In three of the other five circuits, the chief judge reads the complaint immediately after filing. Thus, in six of the eight circuits, the chief judge personally reads the complaints shortly after the clerk files them.

²⁰ In that circuit, the clerk considers whether the complaint is verified and legible, has the appropriate number of copies, and contains a statement of facts of less than five pages, with references in the statement of facts to any attached documents.

²¹ Cf. JOE S. CECIL & DONNA STIENSTRA, *FEDERAL JUDICIAL CENTER, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS* (1987) (determining that three screening procedures were used in the circuits studied); DONNA STIENSTRA & JOE S. CECIL, *FEDERAL JUDICIAL CENTER, THE ROLE OF STAFF ATTORNEYS AND FACE-TO-FACE CONFERENCING IN NON-ARGUMENT DECISIONMAKING* (1989) (stating that the Tenth Circuit designed an effective process for screening and deciding nonargument cases by using staff attorneys).

In the other two circuits, the chief judge waits for staff to examine the complaint and the record in the underlying litigation and recommend an order before personally reviewing most complaints. In those circuits, staff are likely to flag those complaints making an arguable claim of judicial misconduct for the chief judge's immediate attention. Moreover, the complainants filing serious complaints often generate media coverage, at least at the local level, which also serves to bring these complaints more quickly to the chief judge's attention. Less serious complaints are first processed by staff prior to chief judge action.²² The three chief judges who do not delegate any substantial part of the review process to staff appear to believe that delegation may compromise the confidentiality of the process.

The Act provides that "all papers, documents, and records of proceedings relating to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding."²³ While this section by its terms applies only to special committee investigations, most chief judges have interpreted it to apply to all stages of the process, including chief judge review of complaints. Indeed, former Chief Judge Wald concluded that the "confidentiality requirements of the Act demand that the number of courthouse personnel who know of the filing of such a complaint be kept to an absolute minimum, usually only the Chief Judge's personal secretary . . . and Clerk of Court and his personal secretary."²⁴ She also stated that it is "not altogether clear whether the Chief Judge may use a law clerk to research the record."²⁵

In most circuits, however, experience with administering the Act appears to have overtaken this view of confidentiality. In circuits with large numbers of filings, use of staff and law clerks has a long history. Some circuits with lesser filings have also found ways of balancing confidentiality and efficient use of scarce judicial resources. Others appear to be reexamining the issues. Clearly the statutory prescription of confidentiality does not absolutely bar any

²² Although there is no rule requiring it, as a practical matter the chief judge has an opportunity to expedite the normal process when the seriousness of the complaint warrants special treatment.

²³ § 372(c)(14).

²⁴ Memorandum from Chief Judge Patricia M. Wald to Judge Elmo B. Hunter, Chairman, Court Administration Committee of the Judicial Conference of the United States 3 (Sept. 25, 1987) [hereinafter Wald Memorandum] (on file with authors).

²⁵ *Id.*

communication with staff about complaints. No one asserts that a chief judge should have to type her own orders or search an entire transcript to identify relevant information.

Professor Geyh addressed issues of delegation in his survey of current and former chief judges.²⁶ With few dissents, the twenty-five chief judges surveyed believed that the Act permits a wide range of delegation, including reviewing the complaint, obtaining the record, investigating the facts, researching precedents, and preparing a draft order. As to each practice, at least two out of three chief judges reported that they had delegated that activity to staff.²⁷

All three circuits in which the chief judge performs all of the functions in administering the Act have expressed serious concerns about confidentiality. In addition to limiting delegation, they have evidenced this concern by limiting the circulation of information about the complaints and orders among staff.²⁸ In one of those circuits, a relatively new chief judge has begun to rethink those concerns in light of the Act's burdens. On hearing that another circuit uses a full-time staff member to work on complaints, the chief judge said, "That's a good idea. I could use that. Up to now I've done it all myself because of the confidentiality rule Any inquiry by the chief judge or investigation by a special committee is confidential. I've got to rethink that." In another of the three circuits in which the chief judge delegates little, the number of complaints has been modest. This chief judge does not use staff except in narrowly defined assignments because "I don't need it. The complaints are not that big a deal. I dictate the order . . . I briefly state what the complaint is about in a little opinion, just two pages." One might thus speculate that the size of the circuit makes a difference. In the larger circuits, the demands of the process almost compel delegation. On the other hand, two circuits with a relatively low level of complaints have also delegated extensively.

²⁶ See Charles G. Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243 app. (1993) (Question 16).

²⁷ See *id.*

²⁸ At the same time, one of the three circuits identifies the named judge in public orders.

3. Conducting Preliminary Inquiries

The nature and extent of preliminary inquiries into the validity of complaints vary considerably among the circuits. The Act does not clearly authorize or forbid any inquiry by the chief judge, but it does direct the chief judge to review the complaint "expeditiously" before making findings relevant to dismissing the complaint or concluding the proceedings based on corrective action or mootness.²⁹

To make the findings specified in § 372(c)(3), the chief judge has to look beyond the four corners of the complaint. For example, to determine whether an allegation is directly related to the merits of a decision or procedural ruling, the chief judge may need to examine the record in the underlying case. To determine whether corrective action has been taken, the chief judge may need to take two steps: decide whether there is any allegation serious enough to warrant correction and, if so, discuss that matter with the named judge.

The extent to which chief judges make inquiries beyond the complaint varies widely among the eight circuits in the field study. Table 1 reports our findings that one circuit conducted an inquiry in 79% of the complaints for which data were available and another circuit did so in only 8% of the complaints. Five of the circuits cluster in a 32 to 48% band:

TABLE 1
*Percentage of Field Study Complaints in Which a
Preliminary Inquiry was Conducted*³⁰

	<i>Circuit</i>							
	A	B	C	D	E	F	G	H
% of Complaints	8%	33%	16%	48%	79%	32%	48%	42%

²⁹ § 372(c)(3).

³⁰ Information obtained from field study review of complaint files and orders in eight circuits. These complaints were selected to include all potentially serious matters and to sample the remaining complaints. We expect them to be skewed toward including most of the complaints in which the seriousness of the charges would call for a preliminary inquiry. We would expect, therefore, that the percentage of complaints in which an inquiry was undertaken would be much smaller if one were to look at the entire universe of complaints.

Other modes of inquiry might include seeking additional information from the complainant, contacting witnesses identified in the complaint, or attempting to corroborate objective allegations in the complaint. We did not undertake to document the frequency of these specific types of inquiry.

The mode of the inquiry also varies considerably. Table 2 shows the percentage of complaints in which the file showed that the record in the underlying case had been examined. As documented below, this task is one that is likely to be delegated to a staff attorney or law clerk who in turn receives assistance from the clerk's office in obtaining the records. Again, the circuits varied widely in their practices, ranging from 0 to 62%.

TABLE 2
*Percentage of Field Study Complaints in Which the
Record was Examined*³¹

	<i>Circuit</i>							
	A	B	C	D	E	F	G	H
% of Complaints	0%	16%	3%	24%	62%	8%	30%	39%

Our interviews showed that even in the three circuits in which the chief judge delegates little, he or she obtains support from the clerk's office. Either the clerk or a senior deputy clerk obtains copies of the docket sheet in the underlying litigation and information about related matters, such as mandamus petitions filed by the complainant or previous complaints filed by the same complainant. These clerks stand ready to respond to further questions about the record. In a circuit with overriding concerns about confidentiality, the clerk sends the request for a fax copy of the docket sheet with other similar requests to avoid alerting the clerk of the district court that a complaint has been filed in relation to that case.

In two of the circuits, attorneys in the circuit executive's office routinely receive a copy of the complaint and examine the record to check its allegations. In one of these circuits, every complaint appears to have been treated this way. In the other, the attorney estimates that for 90% of the complaints, he requests the docket sheet and a transcript of any hearing that may have been involved. He also looks at the district court file. He finds that "after going through dozens of frivolous complaints it would be easy to assume that there's nothing there," but he continues to check because "it is

³¹ Information obtained from field study review of complaint files and orders in eight circuits.

easier and more convincing to dismiss a complaint if the complainant has misstated the record." At the other extreme, two circuits use staff in the process and report that 85 to 95% of the complaints are dismissed on the face of the complaint without additional inquiry into the record. In one of these circuits, the orders exhibit careful attention to each allegation in the complaint. The difference is that the orders in this circuit assume the validity of allegations and primarily address the logical relationship of the allegations to the terms of the Act.

4. Obtaining Responses from Judges

Most chief judges do not expect a response from the judge named in the complaint. In some circuits, the form memo transmitting the complaint from the chief judge includes a statement indicating that a response is not necessary unless the chief judge specifically requests one. This practice eases the burden of responding to complaints that are dismissible on their face as frivolous, directly related to the merits, or not in conformance with the statute. The percentage of complaints in which the chief judge requested a response from the named judge is shown by Table 3.

TABLE 3
*Percentage of Field Study Complaints in Which the
Chief Judge Requested a Response from the
Named Judge³²*

	<i>Circuit</i>							
	A	B	C	D	E	F	G	H
% of Complaints	14%	19%	9%	32%	19%	10%	18%	17%

5. Burden

How does the delegation of tasks relate to the burdens imposed on a chief judge's time? In discussing this question in interviews with the chief judges, we did not obtain clear estimates of the time burdens the Act imposes. We were able, however, to conclude that

³² Information obtained from field study review of complaint files and orders in eight circuits.

there is not always a direct relationship between delegation and relief from the time burdens of complaints. Qualitative factors relating to the type of order issued and quantitative factors relating to the number of formal and informal matters to be handled also influenced the burden.³³ For example, the former chief judge who reported the highest time burden³⁴ did not delegate any facet of the process, was from a circuit with a relatively light load of complaints, and always used form orders to dispose of largely frivolous complaints. In that circuit, the burdens of informal complaints and monitoring information about patterns of delay appeared to outweigh the burdens imposed by the formal process.

The second highest burden was also reported by a former chief judge who examined the records carefully and concluded that all matters relating to the administration of the Act, including rule making, consumed about eleven to fifteen hours per month. This chief judge delegated heavily and appeared to review thoroughly the resulting draft orders and memoranda. Final orders were thorough and the number of complaints in this circuit was high. Another former chief judge reported spending about six to ten hours per month on the process.

In contrast, current chief judges generally did not indicate that the § 372(c) process imposes an undue burden. For example, a chief judge in a circuit with a high number of complaints reported that there is "not much of a burden because of the way I handle it. I delegate the work-up part to excellent people so that I can get through complaints very quickly. Only very few require my further attention." Our interviews suggest that the burden on the chief judge's time may be diminishing as familiarity with the process leads to more routine delegation of supporting tasks.

The relationship between delegation and burden may best be seen by comparing the answers of a former chief judge who delegated only narrowly limited matters and a current chief judge in the same circuit who delegates extensively. The former chief judge spent six to ten hours a month on the process, including

³³ One chief judge, who delegates most other facets of the initial review of the complaints, states flatly that "I don't delegate the function of contacting the judge." We rarely encountered delegation of this function, but in one circuit with a large number of complaints, the chief judge had expressly directed staff to contact the judge for a response in two matters that we reviewed. It appeared that the burden of the large number of complaints was the reason for delegating this function in these matters.

³⁴ Ten percent of that judge's time was spent handling complaints.

inquiries of judges and drafting individualized orders. The current chief judge spends one or two hours, primarily reviewing the work of an attorney. This is not to suggest that one system is better than the other, but simply to observe one quantitative effect of delegation. Qualitative facts like drawing on the experience and wisdom of a chief judge or limiting the opportunities for gossip about complaints may well be worth the additional chief judge time. We return to this issue in Part II.B.1.

B. *How Many Complaints Are Filed, Who Files Them,
Against What Types of Judges Are They Filed,
and What Type of Misconduct Is Alleged?*

1. How Many Complaints Are Filed?

AO data show a total of 2405 complaints filed in the calendar years 1980 through 1991 in the twelve circuit courts of appeals and in the three national courts covered by the Act.³⁵ The number of filings declined in 1987 and 1988 before increasing dramatically in 1989 and continuing to increase in 1990 and 1991.³⁶

³⁵ See *infra* app., tbl. A-1. The three national courts are the U.S. Court of Appeals for the Federal Circuit, the U.S. Claims Court, and the U.S. Court of International Trade. See 28 U.S.C. § 372(c)(18).

³⁶ The reader should exercise caution when reading these figures because they may simply represent increased awareness among litigants about opportunities to file complaints. As is discussed in Part II.B.4, a number of the circuits have experienced multiple filings by individual litigants and have taken steps to curb such filings. Table A-1, in the Appendix, traces the patterns of annual filings in each circuit and enables one to see whether changes in annual filings represent national or local changes. See *infra* app., tbl. A-1. For example, six circuits (the Third, Fourth, Sixth, Eighth, Ninth, and Eleventh) reported an increase in filings of at least ten complaints from 1988 to 1989. Only two circuits (the Fifth and Seventh) reported decreases in filings for that year. See *infra* app., tbl. A-1. This suggests that the increase was a national phenomenon, not a local blip. In contrast, the increase in filings from 1990 to 1991 is composed almost entirely of increases in the Third Circuit (32 additional filings) and the Eleventh Circuit (17 additional filings). See *infra* app., tbl. A-1.

FIGURE 1
*Total Number of Reported § 372(c) Filings, 1980–1991,
Reported by Statistical Year (N=2405)³⁷*

³⁷ Information obtained from § 372(c) forms filed by circuits and national courts with the AO. The data is organized by statistical year ("SY"), which runs from July 1 to June 30. SY 1992 data are incomplete, based on partial returns from July 1 to December 31, 1991.

As of Spring 1992, the AO's Court Directory listed 1489 nonsenior bankruptcy, magistrate, national court, district, and circuit judges in the judicial branch. See Administrative Office of the United States Courts, *United States Court Directory* (1992). In SY 1991, the 346 complaints shown in Figure 1 represent one complaint for every 4.3 nonsenior judicial officers.

Figure 2 shows the distribution of filings among the circuits.

FIGURE 2

*Total Number of Reported § 372(c) Filings for Calendar Years 1980–1991,
by Circuit or Court (N=2405)³⁸*

³⁸ Information obtained from § 372(c) forms filed by circuits and national courts with the AO. Data for 1991 consist of reports filed with the AO on or before December 31, 1991. The Third Circuit indicates that their records show 204 complaints filed during the period.

To account for variations in the size of the circuits, we looked at the ratio of complaints to the number of judicial officers in the circuit and found considerable variation. For example, the Ninth Circuit has by far the largest number of complaints but also has the largest number of judicial officers subject to the Act (266 as of Spring 1992). In 1991, the 52 complaints filed in the Ninth Circuit represented one complaint for every 5.1 judicial officers. In 1991, the Second Circuit had an equal number of complaints, but a smaller number of judicial officers (112 as of Spring 1992). In 1991, the 52 complaints filed in the Second Circuit represented one complaint for every 2.2 judicial officers. For a table showing the ratio of complaints to judicial officers, see Jeffrey N. Barr & Thomas E. Willging, *Administration of the Judicial Conduct and Disability Act of 1980*, in 1 RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 477 app. E, tbl. 2 at 708 (1993) [hereinafter RESEARCH PAPERS].

2. Who Files the Complaints?

Nationally, attorneys filed 135 (6%) of the 2389 complaints that had not been withdrawn and for which information was available.³⁹ Litigants and nonlitigants filed the remaining 2254 complaints (94%). Filings by attorneys varied considerably among the circuits, representing 10% of filings in the First and Fifth Circuits, 9% in the Second Circuit, 2% in the Third and Fourth Circuits, and 4% in the D.C. and Eleventh Circuits.⁴⁰

How did the outcomes for attorneys' complaints compare to outcomes for non-attorneys' complaints? For example, were attorneys more likely than litigants to present complaints that led to corrective actions or special committee investigations? The short answer is "yes." Table 4 compares the number of corrective actions that would be expected for attorneys' complaints, based on their proportion of the total population of complaints, with the actual number reported to the AO.

TABLE 4
*Expected and Actual Corrective Actions Taken in Response to Complaints
Filed by Attorneys and Non-Attorneys, 1980-1991 (N=73)*

	<i>Attorney</i>	<i>Non-Attorney</i>	<i>Total</i>
Expected	4	69	73
Actual	18	55	73

Attorneys' complaints resulted in corrective actions four and one-half times more frequently than would be expected based on their proportion of filings. Attorneys were also far more likely than non-attorneys to succeed in having a special committee appointed to investigate a complaint. Table 5 compares the expected and actual number of special committee investigations (for which data were available) that led to judicial council dispositions.

³⁹ See *infra* app., tbl. A-3.

⁴⁰ See *infra* app., tbl. A-3.

TABLE 5
*Expected and Actual Special Committee Investigations Undertaken
 in Response to Complaints Filed by Attorneys
 and Non-Attorneys, 1980-1991 (N=36)*

	<i>Attorney</i>	<i>Non-Attorney</i>	<i>Total</i>
Expected	2	34	36
Actual	10	26	36

As Table 5 shows, the actual number of special committee investigations that resulted from complaints filed by attorneys was five times greater than would be expected based on the proportion of complaints filed by attorneys. It is important to note, however, that one does not have to be an attorney to persuade a chief judge to appoint a special committee; twenty-six complaints that led to special committee investigations were filed by non-attorneys.

As for dismissals, Table 6 shows that one would expect about twenty-two more dismissals of attorneys' complaints than were actually found.

TABLE 6
*Expected and Actual Dismissals of Complaints Filed by
 Attorneys and Non-Attorneys, 1980-1991 (N=2143)*

	<i>Attorney</i>	<i>Non-Attorney</i>	<i>Total</i>
Expected	120	2023	2143
Actual	98	2045	2143

Although attorneys are more likely than other complainants to present complaints that lead to corrective actions or special committee investigations, the vast majority of their complaints, 77%, result in dismissals by the chief judge. In contrast, 95% of all complaints filed by non-attorneys are dismissed. Nonetheless, non-attorneys filed twenty-six (76%) of the thirty-four complaints that led to special committee investigations.

3. Against What Types of Judges Are Complaints Filed?

Table 7 shows the types of judges against whom complaints were filed. Of the 2405 complaints reported, 1913 were filed against individual judges. Of these, the vast majority (69%) were filed against district judges; 13% were filed against magistrate judges; 9% against bankruptcy judges; 9% against circuit judges; and less than 1% were filed against U.S. Court of Federal Claims judges.

TABLE 7
Types of Respondents Named in Reported § 372(c)
Filings, 1980-1991 (N=2405)⁴¹

<i>Court</i>	<i>Complaints Against Individual Judges</i>						<i>Other Complaints</i>		
	<i>Bank- ruptcy Judge</i>	<i>Cl. Ct. Judge</i>	<i>Circuit Judge</i>	<i>Dist. Ct. Judge</i>	<i>Magis- trate Judge</i>	<i>Ct. Int'l Trade Judge</i>	<i>Non- Judges</i>	<i>More Than One Judge</i>	<i>No Data</i>
1st Cir.	11	0	7	33	4	0	1	48	1
2d Cir.	19	0	41	185	16	0	1	64	4
3d Cir.	8	0	32	130	34	0	0	1	0
4th Cir.	10	1	4	148	27	0	3	33	0
5th Cir.	20	0	11	85	19	0	1	54	0
6th Cir.	12	0	14	137	24	0	3	35	0
7th Cir.	15	0	5	66	7	0	3	21	0
8th Cir.	7	0	10	130	32	0	1	9	0
9th Cir.	36	0	13	187	52	0	13	97	2
10th Cir.	18	0	1	73	17	0	1	14	1
11th Cir.	7	0	12	121	16	0	2	48	4
D.C. Cir.	1	0	4	31	1	0	0	17	1
Fed. Cir.	0	0	9	0	0	0	1	4	0
Int'l Trade	0	0	0	0	0	1	0	0	0
Cl. Ct.	0	9	0	0	0	0	2	2	0
<i>Total</i>	164	10	163	1326	249	1	32	447	13

⁴¹ Information obtained from § 372(c) forms filed by circuits and national courts with the AO. The First Circuit's records show that eleven complaints named bankruptcy judges, eight named circuit judges, thirty-five named district judges, four named magistrate judges, forty-six named a combination of judges, and two named nonjudicial personnel.

4. Types of Allegations

After comparing the observations and judgments made during the field study with data filed with the AO on the nature of the allegations in the complaints, we concluded that field study data allow us to speak more precisely about this variable than AO data would permit. The field study data, however, represent only a small subset of all complaints and should not be viewed as representative of all § 372(c) complaints. In the field study, we focused on arguably meritorious allegations of misconduct. For every claim of judicial misconduct or disability that was arguably nonfrivolous, subject to the Act, and not directly related to the merits of decision or procedural ruling, we identified the nature of the allegation. Table 8 indicates the different kinds of allegations of misconduct that we labeled "arguably meritorious."

TABLE 8
*Types of Allegations in Arguably Meritorious Sampled Complaints
 in Field Study of Eight Circuits, 1980-1991 (N=144)*⁴²

<i>Allegation</i>	<i>Circuit</i>								<i>Total</i>
	A	B	C	D	E	F	G	H	
Mental Disability	0	0	1	1	1	0	0	0	3
Physical Disability	0	0	0	0	1	0	1	0	2
Demeanor	0	0	0	5	2	1	1	1	10
Abuse of Judicial Power	1	7	4	10	10	8	2	9	51
Prejudice/Bias	1	1	2	6	3	1	6	8	28
Conflict of Interest	1	3	0	2	1	0	1	1	9
Bribery or Corruption	1	2	0	1	3	1	4	0	12
Undue Decisional Delay	0	3	0	8	1	7	3	2	24
Incompetence/Neglect	0	2	0	2	1	0	0	1	6
Other	0	0	3	2	1	0	0	0	6
<i>Total</i>	4	18	10	37	24	18	18	22	151

By far the most common type of allegation was for abuse of judicial power, which accounted for about one-third of the arguably meritorious allegations. Examples of this type of allegation include a complaint that a judge gave a political speech promoting a partisan position or that a judge ordered the marshals to take a lawyer into custody for failure to appear at a hearing. Complaints regarding prejudice or bias and undue decisional delay were the only other sizable categories of complaints. Complaints of undue decisional delay tended to cluster in two circuits, both of which had chief judges who indicated in their interview responses that they place great importance on resolving problems involving patterns of delay.⁴³

⁴² Information obtained from field study of complaint files and orders in eight circuits. Some complaints contained more than one type of allegation.

⁴³ It may be that the number of serious complaints on the subject was a product of complainants' knowledge that the chief judge in that circuit would respond to that

C. *What Are the Results of the Chief Judges'
Review of Complaints?*

This Part analyzes the disposition of § 372(c) complaints, identifying problems that relate to the current structure of the Act and problems that appear to relate to questionable interpretations and applications. Ultimately, we found twelve problem matters that appear to be potentially erroneous applications of the Act.⁴⁴ The analysis begins with a look at the dismissal of complaints by chief judges, then at petitions for judicial council review of such dismissals, next at the conclusion of complaints by chief judges on the grounds that appropriate corrective action had been taken, and finally, at special committee and judicial council proceedings which deal with complaints that were not dismissed or concluded by the chief judge.

Table 9 shows the flow of the 2405 complaints through the system. Starting with the total number of complaints, the first column shows the number of complaints that ended in the manner of the outcomes listed. The second column shows the number of complaints remaining after each type of outcome.

type of allegation. We have no data, however, to test this speculation.

⁴⁴ The above data put those problem matters into context, showing that they represent 12 of 469 complaints we reviewed in the field study, or about 2.5%.

TABLE 9
*Reported § 372(c) Filings and Outcomes of Complaints, All Circuits
 and National Courts, 1980-1991 (N=2405)*⁴⁵

<i>Outcome</i>	<i>Number</i>	<i>Balance</i>
Complaint Filed	2405	2405
Withdrawn Before Chief Judge Action	16	2389
Unknown or Incomplete Data	129	2260
Dismissed by Chief Judge	2143	117
Corrective Action Taken	73	44
Action No Longer Necessary	4	40
Judicial Council Dismissal	27	13
Incomplete Data (Judicial Council Level)	4	9
Judge Reprimanded ⁴⁶	5	4
Judge Impeached	1	3
Voluntary Retirement	1	2
Voluntary Retirement & Certification of Disability	2	0

⁴⁵ Information obtained from § 372(c) forms filed by circuit and national courts with the AO.

⁴⁶ In addition to the reprimands listed, we are aware of a public reprimand in the Eleventh Circuit in October, 1990; a public reprimand in the Fifth Circuit in May, 1992 (after the cut-off date for this table); and a private reprimand in the Ninth Circuit in 1982. Four of the five reprimands reported in this table were private (one of which had been converted from public to private by the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders). The remaining reprimand was reported to the AO as both public and private.

1. Dismissals of Complaints

Our analysis of a central issue in this report—what beneficial effects have flowed from the operation of the Act?—is influenced heavily by our study of the dismissals of complaints by chief judges. Because the Act assigns to the chief judge of the circuit the task of determining which complaints will be dismissed and which will be investigated, performing that task well is a crucial step in realizing the benefits of the Act. If chief judges dismiss complaints that should be investigated further, sanctionable misconduct and opportunities for fruitful corrective action might be overlooked. In that event, one might ask to what extent has the judicial council exercised its power to grant a petition for review in order to remedy chief judges' errors in dismissing complaints? If, on the other hand, chief judges appoint special committees to investigate complaints that do not require investigation, the burdens of the Act for the judicial branch could be greatly increased.

A look at the provisions of the Act and the Illustrative Rules relating to the chief judge's authority will provide a framework for that analysis. The Act, as amended in 1990, provides:

After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may—

- (A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or
- (B) conclude the proceeding if he finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events.⁴⁷

The only statutory alternative to dismissal is the appointment of a special committee under § 372(c)(4), which provides:

If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly—

- (A) appoint himself 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;
- (B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

⁴⁷ § 372(c)(3).

(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.⁴⁸

The Illustrative Rules elaborate on these provisions by making it explicit that the chief judge may undertake a limited factual inquiry into the allegations of the complaint before choosing one of the statutory options.⁴⁹ The rules also provide a modest amount of interpretation of the substantive content of the statutory grounds for dismissal.⁵⁰

Rule 1(a) explains that "[t]he law's purpose is essentially forward-looking and not punitive. The emphasis is on correction of conditions that interfere with the proper administration of justice in the courts."⁵¹ Rule 1(b) explains further that the statutory definition of misconduct within the scope of the Act, "conduct prejudicial to the effective and expeditious administration of the business of the courts,"⁵²

is not a precise term. It includes such things as use of the judge's office to obtain special treatment for friends and relatives, acceptance of bribes, improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office. It does not include making wrong decisions—even very wrong decisions—in cases.⁵³

⁴⁸ § 372(c)(4). Under Rule 4(e), "a judge will ordinarily be invited to respond to the complaint before a special committee is appointed." ILLUSTRATIVE RULES, *supra* note 7, commentary at 16.

⁴⁹ Under Rule 4(b),

In determining what action to take, the chief judge may 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. For this purpose, the chief judge may request the judge whose conduct is complained of to file a written response to the complaint. The chief judge may also communicate orally or in writing with the complainant, the judge whose conduct is complained of, and other people who may have knowledge of the matter, and may review any transcripts or other relevant documents. The chief judge will not undertake to make findings of fact about any matter that is reasonably in dispute.

ILLUSTRATIVE RULES, *supra* note 7.

⁵⁰ Rule 4(c)(3) specifies that a complaint may be dismissed as "frivolous," which "includes making charges that are wholly unsupported." *Id.*

⁵¹ *Id.*

⁵² § 372(c)(1).

⁵³ ILLUSTRATIVE RULES, *supra* note 7.

Finally, Rule 1(e) cautions that the Act has only limited application in recusal and delay situations, stating:

The complaint procedure may not be used to have a judge disqualified from sitting on a particular case. A motion for disqualification should be made in the case.

Also, 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.⁵⁴

The commentary to Rule 1 adds:

The use of the complaint procedure is not limited to cases in which a judge has committed an impropriety. The [statutory definition of misconduct] is derived from 28 U.S.C. § 332(d)(1), and we do not understand the phrase to be limited to conduct that is unethical or corrupt. While we have not made an effort to define the phrase with any precision, we note that habitual failure to decide matters in a timely fashion is widely regarded as the proper subject of a complaint.⁵⁵

a. *The Frequency and Bases of Dismissal: A Critical Analysis*

The overwhelming majority of complaints are dismissed by the chief judge without any oral or written response by the judge complained against. Several chief judges and former chief judges have said that over 90%, even up to 99%, of the complaints are merits-related, frivolous, pro forma, or attempts at an appeal.⁵⁶ These estimates are confirmed by our data, which indicate that 95% of all complaints for which data are available result in dismissal under § 372(c)(3)(A), that is, dismissal because the complaint is either not in conformity with the Act, merits-related, or frivolous.⁵⁷ Figure 3 shows the number of dismissals of each type for each circuit and national court. As Figure 3 shows, dismissal orders have invoked all three statutory grounds with a fair degree of frequency, often relying on more than one ground. The single most common ground for dismissal is merits-relatedness.

⁵⁴ *Id.*

⁵⁵ *Id.* commentary at 4.

⁵⁶ One chief judge cautions against jumping to incorrect conclusions from the bare numbers: "When such a high percentage of complaints is frivolous, some onlookers are bound to assume that we're just not taking complaints seriously."

⁵⁷ Complaints dismissed under § 372(c)(3)(a) represented 2143 of 2260 complaints for which information was available and which were not withdrawn before the chief judge took action.

FIGURE 3

Number of § 372(c) Filings Dismissed as Related to the Merits, Frivolous, Not in Conformance, or a Combination Thereof, by Circuit or Court (N=2143)⁵⁸

⁵⁸ Information obtained from § 372(c) forms filed by circuits and national courts with the Administrative Office.

In the course of the field study, we encountered what we termed "problem dispositions" under each of § 372(c)(3)(A)'s three grounds for dismissal. These "problem dispositions" exemplify or illuminate issues about the interpretation of the statutory dismissal standards. We classified as "problems" actions that do not appear to comport with the statutory standards as augmented by the Illustrative Rules and commentary, published decisions, and other sources, such as the Code of Conduct for U.S. Judges.

These varied sources of substantive content for the statutory standards do not, of course, clearly dictate only one obvious course of action in response to all complaints. The sources provide guidance that is much too vague or unelaborated for that. It is left for chief judges to supply content for the statutory standards. Where the sources do suggest a course of action, we identified as a "problem" any matter in which a chief judge chose a different course. In the more common situation where these sources do not clearly point the way, our judgments were based on the accumulated common law throughout the circuits, as we discovered it in the process of poring through hundreds of complaints and orders.⁵⁹ Thus, we also applied our "problem" tag to a disposition whenever we concluded that it was substantially likely that a majority of circuits would have taken a different tack.⁶⁰

With these standards in mind, we will now look at the various grounds for dismissal of a complaint under the Act. For each ground we will look at the typical sorts of matters dismissed, discuss points of interest, and identify all problem dispositions that we encountered in the field study.

⁵⁹ Our understanding of the common law in this context differs from that discussed below in the context of our analysis of whether chief judges and judicial councils have created a common law to which they have collective access. See *infra* part I.C.1.d.

⁶⁰ We should present a caveat to prevent misinterpretations of our evaluations. Our test was an objective one: was there a substantial likelihood that an outside observer reviewing the complaint and the order of dismissal would disagree that the chief judge's dismissal of an allegation at that stage was warranted by the Act and the record? If we thought that disagreement was substantially likely, we identified the matter as a "problem" disposition. Our conclusion that others would disagree with a chief judge's order does not mean that we thought the judicial council should have imposed discipline. In no event could we make a judgment of that magnitude based solely on the written material before us. Nor could we take into account any subjective knowledge or intuitions that might inform the actions of a chief judge or judicial council.

i. Dismissals for Frivolousness

Section 372(c)(3)(A)(iii) of the Act supplies no explanation for the concept of "frivolousness." In practice, a complaint generally has been dismissed as frivolous when, on its face, it lacks adequate factual specification in support of its allegations, or when a limited factual inquiry by the chief judge reveals that its allegations cannot be proven.

Some typical examples of dismissals for frivolousness follow:

- A prison inmate complained that a judge joined in a conspiracy with other judges to issue a host of incorrect rulings and to commit and cover up a host of serious crimes. The complaint provided no factual support. The chief judge dismissed the complaint as frivolous and merits-related.
- A citizen filed a complaint, rambling and partially unintelligible, alleging that a judge had issued incorrect rulings in a number of cases involving Native American parties (none of which apparently involved the complainant) and that these rulings reflected the judge's bias against Native Americans. The chief judge dismissed the complaint as frivolous because it was "vague and conclusory" and did not "contain factual allegations of precise misconduct."

Although these examples are, perhaps, archetypes for dismissal under § 372(c)(3)(A)(iii), there has been some confusion about the application of the Act's frivolousness standard. Occasionally chief judges, apparently uncertain about the precise boundaries of the three statutory grounds for dismissal, will dismiss frivolous complaints on other, seemingly inapplicable, grounds or will dismiss as frivolous complaints that perhaps should have been dismissed on other grounds. This misstep is relatively unimportant when it is clear that dismissal was warranted and the chief judge was merely careless about accurately specifying the ground for dismissal.⁶¹ It would be more important when the finding of frivolousness is the only basis for dismissal.

⁶¹ Use of the term frivolous, however, may be important in the message it conveys. We return to this issue in our discussion of the other grounds for dismissal. See *infra* part I.C.1.a.i.(C).

(A) Precipitous Dismissal Without Inquiry

One common issue in the application of the frivolousness standard involves determining whether the factual allegations in the complaint are sufficiently specific and detailed so as to require a response from the judge complained against or the appointment of a special committee. In the following instances, chief judges did not find adequate factual allegations that we believe others might well have found adequate. Thus, these chief judges made what appear to be credibility determinations in dismissing these complaints without first making any factual inquiry into the complaint's allegations. In most of these matters it seems highly likely that the credibility determination was accurate, but it is at least arguable that some factual inquiry should have been made before dismissal.

- The complainant, a black defendant in a criminal trial, alleged that his attorney had quoted the judge as stating that the judge would never give bail to a black man and was tired of having a black man interrupt the judge's court. The chief judge dismissed the complaint, finding that it had provided only conclusory allegations and "opinions" of the complainant's attorney in support of the charge of racial bias, and that the record in the case did not support the allegations of racially prejudicial statements. In light of the complainant's allegation that his attorney had heard the judge make specific racist statements, it is hard to agree with the chief judge's conclusion that the complainant's allegations were so unsupported as to be dismissible as frivolous. Dismissal seems inappropriate without first questioning the complainant's attorney, and perhaps of the judge as well. After the complainant filed a petition for review, the judicial council did obtain a response from the complainant's attorney, who denied making the alleged statements to the complainant and denied hearing the judge make any racially biased remarks. The council then affirmed the chief judge's dismissal of the complaint, noting that it had made its own inquiry into the matter.
- The complainants, two attorneys, alleged that the judge had engaged in an improper ex parte contact with opposing counsel concerning some discovery matters. Complainants' primary evidence in support of the complaint was the judge's order denying the complainants' motion to recuse. Complainants had raised the matter in the motion to recuse, and the judge's order did not affirmatively deny the ex parte charge, although it could be read to do so implicitly. The chief judge dismissed the allegation as frivolous on the ground that the complainants had failed to provide any affirmative factual support for their charge.

One could argue, however, that the judge's failure to expressly deny the charge when raised was sufficient evidence to preclude dismissal of the complaint without at least some response from the judge.

Once again, the judicial council took a hand in the matter. After some members of the council⁶² suggested that it would be desirable to question the judge, the chief judge sent the judge a letter stating that it would be helpful if the judge would state directly whether or not any *ex parte* contact had occurred. The judge then entered a supplemental order in the case expressly stating that there had been no *ex parte* contact of any nature at any time with opposing counsel. The judge also sent the chief judge a response stating the same. The council then summarily denied the petition for review.

- *Case D-1.* The complainant, an attorney, alleged, *inter alia*, that a district judge's "alertness, [stability], and ability to attend to the case [had] deteriorated noticeably" in a complex case that had lasted many years. As an example of the judge's instability, the complainant cited an incident in which the judge became enraged when counsel gave the name of a case to co-counsel who was engaged in a colloquy with the judge. The chief judge dismissed this allegation as frivolous because it did not allege a pattern of conduct evidencing incapacity, arbitrariness, or neglect of office. It seems, however, that the complainant did allege a pattern of unstable and inattentive conduct suggesting disability, although the complainant cited only one specific example.

There is a strong argument that the chief judge erred in dismissing this allegation as frivolous without at least some inquiry into the matter. It should be noted that the chief judge, after discussion with the district judge, concluded an unrelated allegation of the complaint on the basis of corrective action taken. It may be, therefore, that the dismissal should be viewed as part of an informal, behind-the-scenes process by which the chief judge obtained the judge's agreement to undertake corrective action. The chief judge might have felt—based on personal observation—that the allegation of disability was plainly unfounded, and that calling the allegation of abusive behavior to the judge's attention was adequate to prevent any recurrence of that type of behavior.

The above three complaints notwithstanding, our study does not suggest that assessing the amount of factual support necessary to preclude dismissal for frivolousness has been overly troublesome under the Act. Of the 469 complaints, the above examples were the

⁶² For a description of the judicial council function, see *infra* part I.C.1.e.

only ones dismissed as frivolous which were arguably decided incorrectly. In the first two instances, the judicial council cured any possible error of the chief judge. Thus only the third represents a true "problem."

(B) *The Problem of the Unidentified Source*

A related problem arises when the complaint's allegations are supported only by an unidentified source who refuses to come forward:

- The complainant, an attorney, alleged that an unidentified attorney had overheard the judge at a dinner function talking about ex parte contacts with the prosecutor in a case in which the complainant was defense counsel. The judge allegedly described advice he had given to the prosecutor on how to handle the case. The chief judge sent a letter to the complainant asking him to identify the source of this serious allegation and to submit an affidavit from that source. The complainant responded in a letter that the source was unwilling to come forward "because he is a practicing lawyer" and requested that the chief judge ask the judge and the prosecutor about the alleged ex parte contacts. Both the judge and the prosecutor categorically denied the allegations. The judge stated that complainant's case had come up in conversation in a general way at the dinner function, suggesting the possibility of some kind of misunderstanding. The chief judge then advised the complainant that without further evidence, the chief judge might decide to dismiss the complaint. Complainant responded that the source remained unwilling to come forward, and that he had no other evidence. The complainant stated, "I can understand why the chief judge may find that the matter should proceed no further. It is regrettable that the allegation must remain in this uncomfortable posture, but the realities of the law business all too often deter lawyers from publicly coming forward with information critical of judges." The chief judge dismissed the complaint. Since the source refused to come forward, it seems that the chief judge had no alternative.

Another matter, which occurred very early in the life of the Act, is more troubling.

- The complainant, a litigant, alleged, inter alia, that the judge had accepted free trips from the government agency that was the defendant in complainant's case before the judge. The chief judge, without any inquiry into the complaint, appointed a special committee, which sent a letter to the complainant asking for clarification and additional information about this and other

charges. The complainant responded that she was unwilling to reveal her sources of information about this charge unless she could do it in closed session before the special committee without the judge present. The special committee did not accept the complainant's offer, nor did it hold further proceedings. Following receipt of the special committee report, the judicial council dismissed the complaint in a conclusory, three-paragraph form order as "not cognizable under the Act."

The rationale for the council's order is not clear. If the judge had a right to be present at any committee proceeding, then the committee could not have agreed to complainant's offered procedure without violating the judge's rights. The stronger position, however, is that the judge had no right to be present at purely investigative interviews conducted by the committee.⁶³ Thus, the committee may have erred in not agreeing to hear whatever evidence the complainant could marshal in a closed session without the judge present.⁶⁴

(C) *Dismissal as Frivolous After Inquiry*

Another interesting category consists of complaints dismissed as frivolous following some factual inquiry by the chief judge in instances when the complaint's allegations were not frivolous on their face, but were not verified in the record or were conclusively refuted by the judge in question. Examples of such complaints include an allegation that a judge seemed confused during a sentencing proceeding which was found unsupported by the transcript of the proceeding; an allegation that a judge used a racially derogatory term, which was found unsupported when it was not corroborated by any others present, when no others present were familiar with the term, and when the complainant admitted he may have misheard the judge; and an allegation that a judge had treated a black attorney in a discourteous and discriminatory manner, which was found unsupported by the transcript of the proceedings.

⁶³ See ILLUSTRATIVE RULES, *supra* note 7, Rule 12 commentary at 31 (stating that, although the Act requires that judges be permitted to attend certain proceedings conducted by the investigative panel, this requirement does not apply to "meetings at which the committee is engaged in investigative activity").

⁶⁴ The Illustrative Rules recognize this issue. Rule 4(b) authorizes the chief judge to "conduct a limited inquiry for the purpose of determining . . . whether the facts stated in the complaint . . . are incapable of being established through investigation." ILLUSTRATIVE RULES, *supra* note 7.

Because our review of complaints showed that “frivolous” under § 372(c)(3)(A)(iii) has generally been construed to include allegations found factually unsupported after some inquiry, there is nothing inappropriate about any of these rulings. Unfortunately, complainants may more commonly understand the term “frivolous” to refer to complaints that contain insufficient factual allegations to warrant inquiry. A dismissal for frivolousness, therefore, 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 when a complaint raises sensitive, facially nonfrivolous allegations that are found unsupported after inquiry. An example of such a situation might be a complaint alleging ethnic or gender bias. A dismissal as “frivolous” might leave the unseemly impression that allegations of that kind do not concern the judiciary.

It may be desirable to amend the Act to recognize expressly the power of the chief judge to conduct a limited inquiry, and to create a corresponding fourth ground for dismissal, namely, that the chief judge’s limited inquiry demonstrates that the allegations lacked any factual foundation.

(D) *Excessive Chief Judge Inquiry*

As noted earlier, Rule 4(b) discusses the power of the chief judge to conduct a limited inquiry, a matter about which the Act is silent.⁶⁵ We found no complaint in which we concluded that the chief judge may have arguably exceeded the permissible bounds of his or her inquiry power.

ii. Dismissals for Merits-Relatedness

Under § 372(c)(3)(A)(ii), a complaint may be dismissed if it is “directly related to the merits of a decision or procedural ruling.”⁶⁶ Complaints alleging that a judge issued incorrect rulings as to which the complainant may seek appellate review are very common. Some typical dismissals for merits-relatedness follow:

- The complainant, a pro se litigant, alleged that the judge violated the complainant’s due process rights by dismissing his lawsuit.

⁶⁵ See *id.* (discussing the purposes and processes of inquiries by the chief judge).

⁶⁶ § 372(c)(3)(A)(ii).

- The complainant, a litigant, alleged that the judge, considering the case on appeal, failed to redress clear errors committed by the district court.
- The complainants, two prison inmates, alleged that the judge made various errors at their criminal trial and delayed ruling on their habeas petition for more than a year. The complainants had already filed a mandamus petition which had been denied.

(A) *Confusion Between Merits-Relatedness and Frivolousness*

In many circuits, courts dismiss complaints solely as merits-related when dismissal for frivolousness, in whole or in part, seems more appropriate. For example, one litigant filed a conclusory and nearly incomprehensible complaint against nine circuit judges alleging that the judges had issued incorrect rulings as part of a racketeering conspiracy. The chief judge dismissed the complaint as merits-related. Insofar as the complaint alleged a conspiracy, however, the complaint was simply frivolous.

Another example is that of the two inmates who alleged error in the handling of their case, discussed in the previous section. This complaint, though dismissed as merits-related, contained an allegation of racial bias which was not merits-related but was instead factually unsupported. Where dismissal under some other ground is clearly warranted, then of course this error is merely one of labeling and thus an inconsequential lack of precision.⁶⁷ Accordingly, complaints that were clearly subject to dismissal but may have been dismissed on the wrong grounds were not considered problem matters.

Nonetheless, does confusion between these two grounds for dismissal have any important substantive consequences? That is, does this confusion ever result in the dismissal of complaints that arguably ought not to be dismissed? One might fear, for example, that an overly expansive interpretation of merits-relatedness might cause that judge to erroneously dismiss a factually supported complaint as merits-related. Our research data do not permit us to make that causal link.

Although we can only speculate as to the *causes* of any pitfalls in applying the merits-related standard, we can assess whether there have been pitfalls. The following discussion does this by looking at

⁶⁷ It appears that this mistake is less common in those circuits where the chief judge delegates a substantial part of the responsibility for drafting dismissal orders.

problem matters where it is at least arguable that a potentially meritorious complaint was dismissed as merits-related.

(B) *Problematic Dismissals Because of Availability of Appellate Remedy*

One 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. Many chief judges have recognized that the availability of some appellate remedy may not, ipso facto, render a complaint dismissible under the Act. Former Chief Judge Wald made the following statement in a report to the Judicial Conference:

One substantive question is not altogether clear from the Act or the *Illustrative Rules*. If a judge is accused of conduct "prejudicial to the effective and expeditious administration of the courts," which he has allegedly committed in the course of a judicial proceeding, may it nonetheless be a legitimate subject of a complaint, even though it might have been asserted as the subject of an appeal under the broad rubric of lack of due process? So far, we have operated on the assumption that if a complainant had requested and been denied recusal of a judge, that decision could have been appealed in the regular judicial process and so could not form the basis of a complaint. But I gather by reading some decisions in other Circuits, there may indeed be conduct by a judge in the course of proceedings, that while possibly appealable, is still considered a legitimate subject of complaint. Since the vast majority of complaints we receive come out of judicial proceedings, some clarification in this area would be most helpful. Is anything that arose in the course of a proceeding out of bounds for a complaint, or is behavior that might have been appealed as a fundamental deprivation of due process (i.e., the lack of an unbiased judge) still a permissible subject of a complaint?⁶⁸

Another chief judge made a similar statement to us:

[T]here can be matters raised on appeal that are appropriate subjects for discipline. An allegation that a judge's decision was the result of a bribe could come up in both contexts . . . Suppose a judge gave an appearance of impropriety. Both instances raise issues appropriate for appeal on the merits, but the bribe and probably also the appearance of impropriety in some cases could also be a discipline case.

⁶⁸ Wald Memorandum, *supra* note 24, at 6-7.

Despite these concerns, we found a number of arguably meritorious complaints that were dismissed as merits-related on the ground that some appellate remedy did, or might, exist. In these matters some inquiry by the chief judge into the factual support for the complaint might have been more appropriate than a merits-related dismissal.

- *Case D-2.* The complainants, an attorney and a private citizen not involved in the litigation, complained of remarks the judge had made in a case where plaintiffs sought damages related to coerced homosexual activity in a prison. The judge referred to the perpetrators of this activity as “queers.” Although the choice of this term did not seem to relate to the merits or to any legal analysis, the chief judge dismissed the complaint as merits-related. The chief judge ruled that the judge “was expressing strong personal views regarding the propriety of the [prison] guideline” on the subject, and that “the comments expressed antipathy toward permitting homosexual conduct in a jail and total disagreement with” prison policy. The judge’s remarks thus were “comments on the evidence which the parties to the action could have challenged before [the judge] and subjected to appellate review.”

In other circuits, complaints that a judge used terms that the complainant viewed as pejorative appear to have been treated more seriously. The complaints have resulted in corrective actions, such as an apology and a promise to be more sensitive in the future, even where the alleged pejorative statements were arguably less offensive than the term “queers.” In one matter that came to our attention, publicity about a judge’s use of a pejorative term for homosexuals during a case resulted in informal corrective action, including a public apology by the judge, without any need for a complaint.

- *Case D-3.* The complainant was an attorney who alleged that the judge had appointed as an expert an attorney who was divorced from the judge’s secretary and who owed the secretary alimony payments. The complaint asserted that this appointment, which the complainant considered unnecessary, created, at the very least, an appearance of impropriety. The chief judge summarily dismissed the complaint as merits-related, pointing out that “[a]ppeal, not complaint, is the remedy for such actions if they were improper.” One could argue, however, that although the appointment was challengeable on appeal on conflict of interest grounds, such an allegation of ethical violations is nevertheless cognizable under the Act. If both an appeal and a complaint were filed, the chief judge might well decide to stay his or her hand

pending the outcome of the appeal, but that does not necessarily mean that the complaint should be dismissed as merits-related.

- *Case D-4.* The complainant, a pro se litigant, alleged that at least six of the docket entries in complainant's case had been falsified. The chief judge summarily dismissed the complaint as merits-related. This ground for dismissal seems clearly incorrect, since a well-documented claim that a judge had falsified records surely would be cognizable under the Act even if an appellate remedy existed. The real question was whether the allegations had any factual support. Some inquiry by the chief judge may have been appropriate.
- *Case D-5.* Three complaints—two by the same attorney and one by a person on the attorney's staff—were filed against a district judge. The attorney's two complaints alleged that the judge had treated the attorney's application for admission to the bar of the district court differently than other applications. The judge allegedly required personal appearances and issued an order that the attorney show cause why she should be admitted to the bar, or, if admitted, why she should not be suspended or disbarred for (1) filing a civil complaint in the district court before admission, (2) permitting a member of her election campaign staff to publish a political cartoon ridiculing another judge, thereby violating disciplinary rules, (3) making public accusations that a judge and a court reporter had tampered with transcripts, and (4) making false accusations regarding the filing of the political cartoon in the record of a case. The judge followed this extraordinary procedure, the attorney alleged, out of personal animus toward the attorney resulting from the publication of the political cartoon lampooning the judge's colleague.

The chief judge, without seeking a response from the judge, found that the order to show cause was a pending procedural ruling and dismissed the complaints as directly related to the merits of that ruling. Even assuming, as the chief judge did, that an order relating to bar admission is the kind of ruling intended to be included within the merits-related standard, the dismissal for merits-relatedness ignored the central allegation: that the judge followed an extraordinary application procedure for illicit reasons. Since the factual circumstances detailed in these complaints do provide a potential factual foundation for the allegation of illicit motive, dismissal of these complaints without at least a response from the judge seems inappropriate.

The third complaint, filed by a person on the attorney's staff, alleged that the judge, in court, had threatened the attorney and her clients with indictments and had said, "I am going to recuse myself from this case and become your prosecutor." The chief

judge, again without requesting a response from the judge, observed that the case in question had since been remanded to a different district judge and dismissed the complaint as directly related to that remand ruling. Insofar as the complaint did allege conduct arguably constituting at least an appearance of impropriety, however, it is hard to see why the complaint was not cognizable.

One common subset of this category of complaints involves complaints of an improper *ex parte* contact, which in a few instances have been dismissed, arguably inappropriately, as merits-related. We did find that most complaints of *ex parte* contacts were investigated, inquired into, and/or dismissed on appropriate grounds other than merits-relatedness. The problem matters follow:

- *Case D-6.* The complainant, a prison inmate, alleged, *inter alia*, that the judge engaged in an improper *ex parte* contact in complainant's case before the judge. The judge allegedly communicated with the opposition in the case before the judge, and with complainant's counsel in a state criminal matter not before the judge. Both communications were allegedly outside complainant's presence. Attached to the complaint was a copy of the judge's order in the case, which corroborated complainant's allegation. In this order, the judge expressly stated, as a ground for denying complainant's motion for injunctive relief against prison officials, that the judge had held a telephone conference with opposing counsel and complainant's state counsel which revealed that the complainant had been transferred to a different prison.

The chief judge, in a boilerplate form order, dismissed the complaint as merits-related and for failure to allege misconduct to the extent it "involve[d the] demeanor of the magistrate judge and the procedures of the court." Since the complainant provided evidence of a possible *ex parte* contact, the chief judge arguably should have conducted further inquiry even though the incident seemed relatively harmless.

- *Case D-7.* The complainant, a non-litigant, alleged that a bankruptcy judge had engaged in numerous improper *ex parte* contacts with debtor's counsel. The chief judge requested that the complainant supply the source of information. No response from complainant appears in the file, and no subsequent documents refer to a response. The judge, asked to respond, explained that all *ex parte* contacts occurred in the context of negotiations among the parties with the full knowledge and consent of the parties. The chief judge dismissed the allegation as frivolous, since it was based on no more than newspaper accounts, and as merits-related, because parties could raise objections to *ex parte* contacts during

bankruptcy proceedings. The latter ground for dismissal appears dubious: even if the matter were raised on appeal, an improper ex parte contact would violate a specific, non-hortatory provision of the Code of Judicial Conduct.⁶⁹

Five of the above-listed six "problem" dismissals for merits-relatedness arose in two circuits. Although one or two other circuits occasionally have been imprecise in dismissing as merits-related complaints that arguably could more appropriately have been dismissed on other grounds, only these two circuits have applied an arguably over-expansive view of merits-relatedness to dismiss allegations prematurely. Both circuits have a long history of limited delegation by the chief judge of tasks necessary to the disposition of a complaint and of heavy reliance on standard chief judges' orders for dismissing complaints.

(C) *Where Complainant Lacks Standing to Seek an Appellate Remedy*

Another interesting category of complaints consists of complaints dismissed as merits-related even though the complainant had no other recourse, since the complainant lacked standing to seek appellate review of the challenged action. This situation is always presented, of course, when the complainant is a non-litigant private citizen, and is often presented when the complainant is an attorney. The issue also arises in complaints brought by actual or putative expert witnesses, who complained that in the course of denying expert status or reviewing a fee award the judge damaged their professional standing by allegedly making unfair, disparaging remarks about them.

Dismissal in such situations may be appropriate. The statute, after all, speaks of relation to the merits and does not mention the availability of appellate review.⁷⁰ The core reason for excluding merits-related complaints is to protect the independence of the judicial officer in making decisions, not to promote or protect the appellate process. There is no obvious reason why the relationship

⁶⁹ See CODE OF JUDICIAL CONDUCT Canon (3)(A)(4) (1972). Dismissal for frivolousness may have been warranted in light of the judge's explanation, to which the chief judge's order did not refer, and the complaint's lack of contradictory evidence.

⁷⁰ See § 372(c)(3)(A)(ii). It may be that appellate review is available in most merits-related situations, and this availability is one reason merits-related complaints are not cognizable. This need not mean, however, that the occasional allegation that cannot be raised on appeal is thereby any less merits-related.

of the challenged conduct to the merits of the case should depend in any way upon the standing of the particular complainant to seek appellate review. Under this view, it would be nonsensical for the very same conduct to be merits-related, or not, depending on who filed the particular complaint. Indeed, such an approach would encourage litigants to attempt to circumvent the merits-related ground for dismissal by using friends or relatives to file a complaint.

(D) *Complaints of Delay*

The Illustrative Rules chart a course for dealing with complaints of undue decisional delay. Rule 1(e) limits the Act's application in delay situations, stating, "[T]he 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."⁷¹ The commentary to Rule 1, however, adds, "we note that habitual failure to decide matters in a timely fashion is widely regarded as the proper subject of a complaint."⁷²

Seven of the eight circuits sampled follow this standard. In these circuits, following the policy of the Illustrative Rules, a complaint of delay is dismissed as merits-related unless it complains of a habitual pattern of delay in several cases. The complainant is generally told that mandamus is the available remedy for allegations of delay falling short of this standard. Few complainants do in fact allege a habitual pattern of delay. Most complainants who raise issues of delay are litigants or attorneys who are in a poor position to know whether the judge is behind in other cases as well.

In one of the seven circuits that follow this standard, the chief judge customarily responds to a complaint of delay in a single case by asking the circuit executive to check the judge's case statistics for any pattern of delay. The chief judge's order then informs the complainant that this has been done and that the judge has exhibited no unreasonable pattern of delay. There were no complaints in which the chief judge stated that he or she attempted to correct an overall pattern of delay discovered when investigating a complaint about delay in a single case. All the circuits, of course, have other administrative methods for dealing with the problem.

⁷¹ ILLUSTRATIVE RULES, *supra* note 7.

⁷² *Id.* at 4.

In the one circuit which follows a different policy, the chief judge apparently inquires into every complaint alleging delay, even if it is brought up in a single case. All of the complaints of delay discovered in this circuit were dismissed, not as merits-related or for failure to allege a habitual pattern of delay, but on the basis of corrective action taken, the judge having acted on the matter alleged to have been delayed.

iii. Dismissals as Not in Conformity with § 372(c)(1) of the Act

Complaints also may be dismissed under § 372(c)(3)(A)(i) as “not in conformity with paragraph (1) of this subsection.” That paragraph, § 372(c)(1), sets out the types of officers and misconduct subject to the Act:

Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.⁷³

(A) *Confusion with Frivolousness*

Chief judges' orders dismissing complaints betray an occasional and understandable confusion about precisely what the contours of this rather broad ground for dismissal may be. In particular, this confusion appears to reflect uncertainty about the distinction between frivolousness and nonconformity within paragraph (1).

For example, one complaint filed by a prison inmate alleged that the judge had committed treason by aiding, abetting, and giving information to the enemy during war. The complaint set out no factual support for this bald allegation. The chief judge dismissed the complaint as not in conformity, even though it alleged conduct that, if factually supported, would be very serious. In a similar instance, a litigant complainant alleged that the judge had deliberately concealed crimes of perjury. The chief judge dismissed the allegation as not in conformity because of the absence of factual allegations to support the charge.

⁷³ § 372(c)(1).

Another complaint, filed by a nonlitigant private citizen, alleged that the judge had appeared in a nonfundraising capacity at an ACLU dinner at which the judge was honored for contributions to civil liberties. The chief judge dismissed the complaint as frivolous on the ground that the judge's appearance at the dinner was proper.

The more common approach among the circuits—and arguably the better approach—is to dismiss as frivolous a complaint that fails to provide any factual foundation for allegations which, if true, would constitute misconduct under § 372(c)(1). Under this approach, a complaint would be dismissed as not in conformity with paragraph (1) if it raised allegations that, even if true, would not constitute misconduct under that paragraph. Acceptance of this interpretation of the two dismissal standards would mean that the wrong dismissal standard was used in each of the matters mentioned above.⁷⁴

(B) *Typical Dismissals for Nonconformity*

Typical instances of dismissal for nonconformity fall into two broad categories: (1) complaints which are not in conformity because they are brought against persons not subject to the Act (commonly clerks of court, opposing attorneys or prosecutors, or prison officials)⁷⁵ and (2) complaints which are not in conformity because they allege conduct that does not meet the statutory definition of misconduct.⁷⁶ The following are some common examples in the latter category:

- The complainant, an attorney, alleged that the judge “made a comment clearly derogatory in tone” about the complainant to the effect that the complainant “is always difficult to understand.” The chief judge dismissed the complaint on the ground that even if the allegation were true, it did not rise to the level of misconduct under the statutory definition. The chief judge added that if the complainant felt that the judge harbored any bias against the complainant, the complainant had the option of filing a motion to recuse.

⁷⁴ Such an error, however, makes no more than a formal difference.

⁷⁵ See § 372(c)(1) (noting that complaints can be brought against a “circuit, district, or bankruptcy judge, or a magistrate”).

⁷⁶ See § 372(c)(7)(B) (noting that if the judicial council determines that a judge has engaged in impeachable conduct, it will certify its finding to the Judicial Conference of the United States).

- The complainant, a spectator at a judicial proceeding, alleged that the judge had cleared the courtroom without informing the spectators why this was being done. The judge responded to the complaint by explaining that the judge held a settlement conference in the courtroom involving confidential and proprietary information. The chief judge dismissed the complaint on the ground that the allegation did not amount to misconduct. The chief judge also directed the clerk to send the judge's response to the complainant to explain the judge's actions.
- The complainant, a litigant, alleged, *inter alia*, that two judges had been apprised of delays in ruling by two other judges (who were also subjects of the complaint) and had failed to act to remedy the situation. The chief judge dismissed the allegation of inaction as not in conformity on the ground that these judges (not chief judges) were under no obligation to act to remedy delays in the rulings of other judges. The chief judge reasoned that a judge's failure to act, where no action was legally required of the judge, did not constitute misconduct under the Act.

Most of the noteworthy matters under this ground for dismissal, as would be expected, involve a judgment as to whether or not the conduct alleged is the sort that meets the statutory definition of misconduct under the Act. With so vague and unelaborated a standard of misconduct, uncertainty about its contours is probably inevitable.

(C) *Allegations of Extra-Judicial Perjury*

Two circuits have held, in roughly similar matters, that the Act does not apply to allegations that a federal judge, while acting as a private citizen, committed perjury in testimony about matters occurring before the judge's appointment to the bench. In the first example of this, the chief judge issued a lengthy order which canvassed the legislative history of the Act and concluded that Congress

intended to limit jurisdiction under the Act to conduct adversely affecting judicial performance in some concrete manner Taken as a whole, the legislative history of both chambers can be harmonized only by interpreting the phrase "prejudicial to the effective and expeditious administration of the business of the courts" according to its plain meaning and requiring complaints to allege conduct affecting the functioning of the courts.

Thus, the chief judge reasoned, conduct that brings the judicial office into disrepute does not fall within the statutory definition of

misconduct in the absence of allegations that the functioning of the courts was adversely affected. Conduct engaged in before the judge's appointment to the federal bench, and unrelated to the effective functioning of the judge's court, was not cognizable under the Act. Also not cognizable were allegations of perjury committed by the judge in testimony, given as a private citizen, concerning alleged criminal misconduct committed before the judge took the bench. Evidence that the alleged perjury currently affected the effective and expeditious administration of the courts' business was necessary to render the allegations cognizable under the Act.

Some years later, another circuit reached precisely the same conclusion in response to a very similar complaint. As in the first case, the complaint alleged that the judge had committed perjury in testimony occurring during the judge's tenure as a judge but relating to matters that had taken place prior to appointment. The judicial council, adopting the recommendation of a special committee, found that the allegations were outside the purview of the Act because "the testimony alleged to be false does not concern any aspect of the judge's judicial duties or any aspect of his conduct during his tenure as a judge. It concerns solely matters occurring before he became a judge." The council cited the chief judge's opinion in the matter discussed above as persuasive authority.

Two other complaints, though factually different, raised similar issues. One was filed by an individual who had been a litigant in a state court proceeding before the judge prior to the judge's elevation to the federal bench. The complainant alleged various misdeeds by the judge in connection with those state proceedings. The chief judge dismissed the allegations as not cognizable because the Act "would not ordinarily seem to apply to conduct of a federal judge before he attained that position. A review of the legislative history of the Act does not support the view that Congress intended it to apply to conduct that occurred before an individual's appointment as a federal judicial officer."

The remaining complaint was dismissed on similar grounds, but involved conduct that occurred while the judge was on the federal bench, albeit many years earlier. A friend of a prison inmate filed the complaint two years after discovering a newspaper article in which the prisoner's lawyer stated that he had lost his idealism in his first federal case when, in the course of a hearing on a motion to suppress evidence, the judge said that the judge did not care that the police had lied. The complaint was filed over ten years after the judge's alleged statement, which occurred five years before the Act

went into effect. The chief judge dismissed the complaint without inquiry, primarily because "there is no indication the alleged misconduct has any present effect on the effective and expeditious administration of the business of the courts," and also because "the lengthy lapse of time would hamper the Council's ability to investigate the complaint, even if there were reason to do so."

(D) *Problem Matters*

The following five examples represent dismissals under the nonconformity standard which we found troublesome for one reason or another. In general, we had doubts about the judgments made in these matters that the alleged misconduct could be said, without further inquiry, to fall outside the statutory definition of misconduct.

- *Case D-8.* The complainant, a public interest group, alleged that the judge engaged in an improper ex parte contact with the mayor of a city that was the defendant in a voting rights case before the judge. The judge responded that the mayor had initiated the contact and that the judge had spoken to the mayor only after receiving the consent of all parties. The chief judge dismissed the complaint on the ground that the judge had not initiated the contact and he "did not consider such ex parte communication in deciding the merits or conducting procedures affecting the merits of any matter pending before him." The chief judge then noted the factual difference between the judge's statement that he had received all the parties' approval, and affidavits from the mayor and city attorney stating that the judge had only sought and received plaintiffs' approval. Curiously, the chief judge passed by this factual conflict without further inquiry, concluding that "the filing of the complaint and the affidavits of the mayor and city attorney, together with the publication of this order, constitute appropriate corrective action."

Subsequently, the same complainant filed another complaint against the same judge, alleging, inter alia, that the judge's response to the previous complaint had been a fabrication and cover-up. The complainant reiterated the conflict between the judge's statement and the affidavits of the mayor and city attorney. The chief judge dismissed the complaint, summarily ruling that the judge's response to the prior complaint—now alleged to be at least partly a fabrication—did not constitute misconduct under the statutory definition. The second complaint appears to allege facts that, if supported, would arguably constitute misconduct under the Act.

- *Case D-9.* The complainant, an attorney, alleged that the district judge ordered sanctions against the complainant, including the removal of the complainant from the court's criminal defense panel, upon finding that the complainant had disregarded the direction of a court security officer to keep a future trial witness out of the courtroom during trial. According to the complainant, the judge's order was factually incorrect, unfair, and a reflection of bias in favor of the court security officer's version of events, since the judge knew the court security officer. The complainant alleged further that the entire incident was racially motivated "based on conversations [complainant has] had with others" about the judge and the court security officer, and the judge's discourteous and disrespectful behavior toward the complainant personally. The chief judge summarily dismissed the complaint, without any inquiry or explanation except for the following statement: "[H]aving reviewed the complaint, [I] find . . . that to the extent this complaint involves demeanor of the judge, the facts as alleged do not constitute 'conduct prejudicial to the effective and expeditious administration of the business of the courts.'"

The complaint arguably called for at least some factual inquiry, and even if not, one wonders about the wisdom and sensitivity of dismissing a sanctioned attorney's complaint of racial bias without mentioning the racism allegation and without stating reasons for the conclusion that the complaint's allegations do not constitute misconduct.

- *Case D-10.* The complaint alleged that the judge made statements in an interview aired on *60 Minutes* that violated ethical canons. Specifically, the judge allegedly expressed fear of the President, indicated that he could not be impartial in certain disputes, and criticized the Chief Justice of the United States as one who would issue ex parte orders instructing chief judges to discipline certain judges. The chief judge dismissed the complaint on the ground that these comments could reasonably be construed as mere individual disagreements with other public officials which did not constitute misconduct under the Act. Upon review, the judicial council affirmed the chief judge's dismissal by a seven-to-six vote, with the dissenters expressing the view that the allegations were cognizable under the Act and merited further investigation.
- *Case D-11.* The complainant, a litigant, alleged that the judge had accepted a bribe from the opposition, and that the opposition had bribed complainant's attorneys as well. Such litigant complaints of bribery are common and are usually dismissed as frivolous because they are without any proffered factual support. In this matter, however, the complainant provided some factual support, stating that he overheard his attorney, in a phone conversation

with the opposition, say, “[b]ring forty thousand dollars and you’ve got the deal.” The next day, trial began, and the judge allegedly “suddenly and for ill reason” recessed the trial. The complainant suspected that the recess was ordered for the purpose of working out and receiving the bribe. After the recess, according to the complainant, complainant’s attorneys lied and misrepresented the facts, and the judge condoned this and issued erroneous rulings. The chief judge stated that the allegations, if proven, should result in drastic sanctions beyond anything that could be ordered under the Act, and that further § 372(c) proceedings should await the outcome of any criminal proceedings that might be brought. The complaint was dismissed “without prejudice to its renewal in the event the outcome of other proceedings indicates a basis for further action.”

Nothing in the file or in the chief judge’s order indicated that any criminal investigation was underway. If one were, then a common procedure would be to hold the complaint in abeyance pending resolution of criminal proceedings.⁷⁷ But it may be a very different proposition—and entirely inappropriate—to dismiss altogether a complaint of criminal activity merely because criminal proceedings are hypothetically possible. Even if, in this particular matter, the chief judge doubted the complainant’s veracity, further inquiry into the complaint’s allegations would seem necessary to confirm those doubts.

- *Case D-12.* The complainant, an attorney, alleged, inter alia, that a district judge had developed a “lack of mental stability and maturity,” as evidenced by the fact that the judge “did unbecomingly abuse me as a person, as a member of the bar and as a man . . . [by] hit[ting] [my] face with some evidence he threw at [me] in open court.” The complainant further stated that another judge who was sitting on the bench with the judge named in the complaint had witnessed the incident. The chief judge dismissed the complaint as frivolous, noting the lack of an allegation that the incident was not isolated or that the judge had intentionally thrown evidence at the complainant. Given the specificity of the complaint’s allegation and the mention of a witness, the dismissal amounted to a dismissal for nonconformity, not frivolousness, on the ground that an isolated, unintentional incident of this nature did not rise to the level of misconduct. One wonders, however, whether the complainant alleged enough facts to warrant at least a request for a response from the judge complained against, and

⁷⁷ As one chief judge stated, “If there’s a complaint of criminal activity, we’re not prosecutors, that’s for the Department of Justice. You let the criminal prosecution run its course, and deal with the § 372(c) complaint after that.”

perhaps some inquiry of the judge who allegedly witnessed the incident.

Two of these five matters are from the same two circuits (one each) that produced all but one of the questionable merits-related dismissals.

iv. Mootness Due to Intervening Events

The 1990 amendments to the Act added a provision that complaints could be concluded if "action on the complaint is no longer necessary because of intervening events."⁷⁸ Even before this change, complaints were dismissed or concluded on essentially the same basis, that is, as moot. Complaints were commonly dismissed on the ground that the judge had left the bench because of death, retirement, or, in the case of a magistrate judge or bankruptcy judge, failure to be reappointed.

The only interesting matter that has arisen under the rubric of mootness or intervening events concerned the question whether a vote of articles of impeachment against a judge rendered a complaint against that judge moot. In this matter, the complainant, an attorney, alleged that the judge had made a partisan political speech just before the 1984 presidential election urging a vote for Walter Mondale. The chief judge appointed a special committee to consider the matter. After holding a one-day hearing, the special committee apparently recommended taking no action on the complaint because prior proceedings against the same judge, involving entirely different allegations, had resulted in a certification by the judicial council that grounds for impeachment might exist. A letter in the file from a judge on the special committee to the chief judge notes that a vote of impeachment would render the complaint moot. Ultimately, the judge was impeached, and then convicted by the Senate. No action was ever taken on the complaint.

Although removal of a judge by the Senate certainly moots a misconduct complaint, a mere vote of impeachment may not render moot a complaint raising allegations different from those leading to impeachment. Surely, a judicial council under § 372(c)(6) could reprimand an impeached judge, or temporarily suspend the assignment of cases to an impeached judge, based on such a complaint.⁷⁹ By refraining from taking any action on grounds of

⁷⁸ § 372(c)(3)(B).

⁷⁹ See § 372(c)(6) (listing the actions that may be taken by the judicial councils so

mootness, a judicial council gives up an opportunity to develop and pass along relevant evidence about that new complaint that might aid the House and Senate proceedings.

v. Summary

In sum, we found twelve problem dispositions among the 469 complaints we sampled in the field study. One of the problem dispositions involved a possibly precipitous dismissal for frivolousness, without inquiry; six involved possibly erroneous dismissals for merits-relatedness; and five involved possibly erroneous dismissals on the ground that the conduct alleged did not constitute misconduct under the Act.

Of the twelve problem matters identified, seven were concentrated in two circuits. In contrast, no problem matters at all were found in one circuit, and there was only one problem matter in each of the other five circuits. Thus six of the eight circuits visited have had no more than one dismissal that we think an outside observer would fairly question. The difference could be that in the two circuits in which the problems were concentrated, the chief judge traditionally did not delegate the review of complaints, and frequently relied on form dismissals that did not articulate the reasons for the conclusions reached therein. On the other hand, a third circuit which did not delegate and which used form orders had only one problem disposition.

To be sure, the suggestion of a causal relationship between the practices of nondelegation and reliance on form dismissals, and the presence of an unusually large number of troublesome dismissals is largely impressionistic. One can readily imagine, nevertheless, reasons why such a causal relationship could exist. Much less time is likely to be spent on each complaint if the judge does not delegate the tasks of reviewing insubstantial complaints and preparing draft orders disposing of those complaints. Put simply, overburdened chief judges are unlikely to invest the amount of time in such matters that their staff could. Moreover, the absence of collaboration with staff, coupled with vesting sole responsibility for decisions in a single judge, limits the opportunity for informal review of a draft order by another person to detect potential error. Without fully detailed rationales, there may tend to be less disci-

as to "assure the effective and expeditious administration of the business of the courts").

pline in the chief judge's private formulation of the bases for dismissal. The very process of spelling out nonconclusory responses, in writing, to each allegation may serve to hone a judge's reasoning on the issues and point out subtleties that may not be apparent upon a more cursory examination of the complaint.

b. *Statements of Reasons in Chief Judge Dismissal Orders*

Although the Act states that the chief judge may dismiss a complaint "by written order stating his reasons,"⁸⁰ not all chief judges' orders of dismissal have provided a statement of the allegations of the complaint and the reasons, as opposed to the conclusions, supporting its dismissal. Table 10 shows the numbers and percentages of chief judge dismissal orders in the eight circuits sampled that we deemed nonconclusory, that is, those that stated reasons to support the conclusions reached. If an order provided at least some summary of the complaint's allegations and at least some explanation of the reasons for dismissal, even if the order may have failed to discuss one or more of the complaint's allegations, it was deemed nonconclusory.

TABLE 10
*Percentage of Chief Judges' Orders in Field Study That Respond to Allegations in a Nonconclusory Fashion*⁸¹

	Circuit							
	A	B	C	D	E	F	G	H
% Nonconclusory	67%	29%	83%	98%	99%	42%	84%	26%

As Table 10 shows, while four of the eight circuits have a long and solid record of providing full and generous reasons for dismissal, one has a spotty record, and three have had long-standing practices of issuing conclusory form orders to dispose of insubstantial complaints.

In general, a correlation exists between a chief judge's delegation of some meaningful portion of the tasks involved in preparing an order of dismissal and the fullness and nonconclusory character

⁸⁰ § 372(c)(3).

⁸¹ Information obtained from field study review of complaint files and orders in eight circuits.

of those orders. The three circuits (B, F & H) that have commonly used conclusory form orders are the same three circuits in which chief judges have not delegated some or all of the complaint process to their staff. One can appreciate that overburdened chief judges who do not delegate § 372(c) tasks even in insubstantial matters would be less able to devote the time necessary to draft non-conclusory orders in those matters.⁸²

In those circuits, the practice of issuing form orders did not go entirely unnoticed by complainants. In one instance, the complainant filed a petition for review that complained, *inter alia*, that the chief judge “totally failed and neglected to perform [the judge’s] judicial duty” to prepare a memorandum of dismissal setting forth the complaint’s allegations and the reasons for disposition, as required by local rules. The judicial council in turn issued a conclusory form order affirming the chief judge’s dismissal, which was indisputably correct on the merits.

In circuits that used staff to prepare an initial draft of orders, we were far more likely to find that the chief judge’s orders responded to the allegations of the complaints by stating reasons. Table 11 uses data reported in Table 10, adding our assessment of the delegation practices in each of the eight circuits in the field study. Once again, the pattern seems clear: Circuits that generally delegate the drafting of orders generally produce the highest percentages of nonconclusory orders; circuits that generally do not delegate produce the lowest percentages of such orders; and circuits that have varied their systems over time are in the middle of the range.

⁸² See *supra* part I.C.1.a.iii.(D).

TABLE 11

*Percentage of Field Study Chief Judges' Orders that Respond to Allegations
in a Nonconclusory Fashion as a Function of
Delegation of Drafting to Staff⁸³*

	<i>Circuit</i>							
	A	B	C	D	E	F	G	H
Delegation	Mixed	No	Yes	Yes	Yes	No	Mixed	No
% Nonconclusory	67%	29%	83%	98%	99%	42%	84%	26%

Looking only at arguably meritorious allegations, we examined the extent to which the orders responded to each such allegation in the complaint. This measure differs from the measure of conclusoriness in two ways. First, in looking for responsiveness, we examined each serious allegation separately. The unit of analysis was the allegation. Second, we looked for whether the chief judge restated that allegation and responded to it and whether the chief judge stated conclusions or specific reasons for the conclusions.

TABLE 12

*Percentage of Field Study Chief Judges' Orders that Respond to all
Arguably Meritorious Allegations as a Function of
Delegation of Drafting to Staff⁸⁴*

	<i>Circuit</i>							
	A	B	C	D	E	F	G	H
Delegation	Mixed	No	Yes	Yes	Yes	No	Mixed	No
% Responsive	67%	67%	82%	92%	91%	100%	88%	68%

Table 12 shows that all of the courts responded to all arguably meritorious allegations in the complaints at least two-thirds of the time, and most courts did so 82% of the time or more. With one

⁸³ Information obtained from field study review of complaint files and orders in eight circuits.

⁸⁴ Information obtained from field study review of complaint files and orders in eight circuits.

exception, courts that responded less frequently tended to be courts that relied less on staff for drafting orders. In the one circuit that responded to every significant allegation of every complaint, Circuit F, the chief judges assumed primary responsibility for drafting orders. Note that Table 12 shows Circuit F responding to all arguably meritorious allegations, but Table 11 indicates that chief judges' orders in that circuit often fail to state reasons. Thus, the form of the response in that circuit was likely to be conclusory.

Despite these differences among the circuits, the current chief judges in the eight circuits surveyed seem to agree on the need for a full statement of the reasons for dismissal. As explained by one chief judge whose circuit has long given ample reasons,

[t]he whole point of the process is for the public to understand that you will look at a meritorious complaint. So, if a complaint is not meritorious, you have to explain why you dismiss it, here are the reasons, boom, boom, boom. If you don't do that, then why have the process?

Thus, the present chief judge in one of the three circuits has abandoned the usual practice of issuing conclusory form orders, although the chief judge still does not delegate to a substantial extent. The judge stated,

[t]he former chief judge used a form order, but I don't. I briefly state what the complaint is about in a little opinion, just two pages We owe it to a citizen/taxpayer to give more than a mere conclusion. That provides a benefit to both the complainant and the judiciary. That's what makes the judiciary different from the other branches: we give reasons.

The clerk in that circuit stated that under the former practice, the clerk would receive informal complaints that the § 372(c) complaints were not being considered, but that under the current chief's practice, these informal complaints had stopped.

A chief judge in another of the three circuits indicated a similar change in approach, at least in some cases. Even in the circuit that had the most consistent record of conclusory dismissals, the chief judge is rethinking that circuit's long-standing practice of nondelegation. Greater delegation may well result in fuller articulation of the reasons for dismissal.

It seems then that a new model is emerging. This model might be called a "dual track system," under which staff members review all complaints in the first instance. When a complaint arguably raises a serious allegation, the staff brings that complaint to the

chief judge's attention immediately. Complaints that do not appear to raise any substantial issues remain delegated to the staff for the preparation of a draft order for the chief judge's review. The growing convergence of the circuits in this respect may be a result of the continuing efforts at cross-pollination of ideas between the circuits in administering the Act. Thus, one former chief judge decided to abandon the circuit's former practice of conclusory form orders because the judge "had read the Illustrative Rules carefully and had talked to other chief judges at the Judicial Conference of the U.S."

c. Sources Cited

The overwhelming majority of dismissal orders reviewed (approximately three out of four) cited no authority in support of dismissal except the statute and applicable local rules, which generally reiterated the statute's dismissal standards. As one chief judge said, "[u]sually, the disposition is done just from the papers themselves; you don't have to consult very much. I've had no complaints of substance since becoming chief judge." Another agreed: "ninety-eight percent of complaints are easily disposed of, fit right within the statute."

Still, approximately one in four chief judges' orders did cite at least one precedent under the Act. Most of the precedents cited consisted of a handful of Ninth Circuit dismissal orders published during the early years of the Act for the purpose of laying out some precedent. As one chief judge explained,

[P]ublishing opinions . . . provides something to cite for boilerplate things, that come up over and over again. An opinion without citations is somewhat suspect. And when new people come on board, they can see the published opinions This gives guidance; it's not just ad hoc judgments It's like the whole function of stare decisis; it gives the appearance and reality of regularity and uniformity, deciding the same case the same way.

Another chief judge noted, "It's easier for a lay complainant to accept dismissal if you cite authority in a reasoned disposition."

Only thirteen (3%) of the chief judges' orders sampled have cited the Code of Conduct for U.S. Judges.⁸⁵ By way of compari-

⁸⁵ An amended version of the Code of Conduct for U.S. Judges was adopted by the Judicial Conference of the United States on September 22, 1992. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 62 (1992). The code, modeled on the American

son, thirty-four (7.5%) of the complaints sampled cited the Code. One chief judge explains the lack of frequent reliance on the Code as follows: "I don't recall that I have ever looked at the Code of Conduct or the advisory opinions for § 372(c). I might do so if it was appropriate. The complaints are so merits-related, I haven't had the need to do so."

None of the chief judges spoken to ever had occasion to consult the Committee on the Codes of Conduct of the Judicial Conference of the United States.⁸⁶ One chief judge said, "I would in a case where it would be helpful." But another voiced a very different view: "I've never gone to the ethics committee about a complaint; I don't see that connection. They're giving advisory opinions, I'm implementing a statutory grant of power. I'd like to keep them advisory, not get them involved in § 372(c)." Only two chief judges' orders in the sample cited published advisory opinions of the committee.

d. *Creation of a Common Law Under the Act?*

Rule 17 of the Illustrative Rules calls for circuits and national courts to make orders public both within the circuit and on a national basis.⁸⁷ The chief judges who drafted those rules apparently intended to facilitate the creation of a common law. They included this commentary:

For the most part, the fifteen chief judges with responsibility under this statute have been making decisions about issues under the statute quite unaware of how the same or similar issues have been treated in other circuits and without the benefit that flows from scholarly critique. A body of published precedent can only be helpful to us all.⁸⁸

Bar Associations's Code of Judicial Conduct, provides guidance to federal judges regarding their ethical duties. *See id.*

⁸⁶ The Judicial Conference of the United States has appointed a Committee on the Codes of Conduct and vested authority in that committee to render informal opinions on the application of the Code of Conduct for U.S. Judges to specific situations. During the period from March 1992 to September 1992, the committee received 48 new written inquiries and issued 38 advisory responses. *See id.* The chairman received and responded to 55 telephonic inquiries and individual members of the committee responded to 61 informal inquiries from other judges. *See id.*

⁸⁷ ILLUSTRATIVE RULES, *supra* note 7; *see also infra* part I.D.

⁸⁸ ILLUSTRATIVE RULES, *supra* note 7, Rule 17 commentary at 44.

This commentary recognizes that disseminating decisions to other decision-makers is a central feature of the development of a common law.⁸⁹

Nonetheless, as the data noted in the previous section suggest,⁹⁰ national publication of orders in official reporters has been limited. A search of the electronic data bases for published orders produced a total of fifteen chief judge or judicial council orders during the period from 1980 to 1992.⁹¹ Most of these were

⁸⁹ See *id.*

⁹⁰ See *supra* part I.C.1.c.

⁹¹ This total does not include the considerable number of reported cases concerning the constitutionality of the Act and the legality and constitutionality of procedures relating to the complaints filed against former District Judge Alcee Hastings. These cases were decided by courts, not chief judges or judicial councils, and are outside the scope of this section. See, e.g., *Hastings v. Judicial Conference of the United States*, 829 F.2d 91 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988); *In re Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488 (11th Cir.), *cert. denied*, 477 U.S. 904 (1986); *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093 (D.C. Cir. 1985), *cert. denied*, 477 U.S. 904 (1986); *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261 (11th Cir. 1984).

The United States Claims Court, as it was then named, published three chief judge orders and one order dismissing a petition for review between 1983 and 1987. The chief judge's orders gave reasons for dismissing complaints and articulated basic propositions under the Act. For example, one case dealt with the applicability of the Act to judicial disqualification and elaborated on the meaning of the statutory terms "frivolous" and "directly relate[d] to the merits of a decision or procedural ruling." See *In re Complaint of Judicial Misconduct*, 2 Cl. Ct. 255, 257-58 (1983). Two Claims Court orders, filed in 1983 and reproduced on the same page of the reporter, consisted of one paragraph each concluding that a petition for review was "without merit." *In re Complaint of Judicial Misconduct*, 2 Cl. Ct. 517 (1983).

A Westlaw search of the ALLFEDS database, using the query "(28 +4 372) & Judicial /s Misconduct," uncovered two federal circuit cases. One was a brief denial of authority to entertain a petition for review of an order entered by the chief judge of the Claims Court. See *In re Complaint of Judicial Misconduct by Gleason*, 707 F.2d 1583, 1583 (Fed. Cir. 1983). The other was a summary affirmance of an order of the chief judge of the Federal Circuit. See *In re Complaint of Judicial Misconduct of Orpinuk*, 871 F.2d 1096 (mem.) (Fed. Cir. 1989); 1989 WL 13744 (Fed. Cir. 1989) (text of unpublished disposition).

The Sixth and Eighth Circuits each reported one chief judge dismissal order. See *In re Complaint of Judicial Misconduct*, 858 F.2d 331 (6th Cir. Jud. Council 1988); *In re Petition of Lauer*, 788 F.2d 135, 138 (8th Cir. Jud. Council 1985).

In 1992, the Fifth Circuit published an order of the judicial council of the circuit accepting the recommendation of a special investigative committee that the council dismiss a complaint because it sought disqualification of a district judge, a matter deemed to be directly related to the merits of the underlying litigation. See *In re Complaint of Latimer*, 955 F.2d 1036, 1037 (5th Cir. Jud. Council 1992). That order in turn cited three Ninth Circuit chief judge dismissal orders published between 1979 and 1982 to support the proposition that "[a]n administrative complaint under 28 U.S.C. § 372(c) is not a substitute for judicial processes." *Id.* (citing *In re Charge of*

decided between 1980 and 1985,⁹² and only six of the circuits are represented. In fact, of the fifteen orders, six were decided in the Ninth Circuit between 1980 and 1986.⁹³ Only one § 372(c) opinion has been published since 1990.⁹⁴ Even when they are published, however, the orders do no more than establish the most basic propositions under the Act. For example, one order defined frivolous claims as those "not supported by factual allegations."⁹⁵

With the notable exception of the *Lauer* matter,⁹⁶ published orders have been limited to those that establish basic propositions under the Act and thereby provide a convenient source of reference for future orders. No conflicting interpretations of the Act have been apparent in the published orders. Difficult issues, such as those addressed earlier in this Section, have not been the subject of published orders. For example, differences in the chief judges' treatment of delay do not appear to have been subject to the cross-fertilization that common law development facilitates.⁹⁷ Another example relates to the troublesome issue of whether the Act applies to an allegation of perjury committed by a federal judge in testimony concerning events that occurred before the federal judge's appointment to the bench.⁹⁸ This issue was the subject of two chief judge dismissal orders in different circuits, both of which were unpublished. The later one cited the earlier one, we learned,

Judicial Misconduct, 691 F.2d 924 (9th Cir. Jud. Council 1982); *In re Charge of Judicial Misconduct*, 613 F.2d 768 (9th Cir. Jud. Council 1980); *In re Charge of Judicial Misconduct*, 595 F.2d 517 (9th Cir. Jud. Council 1979)).

⁹² All but three of the orders were published in the 1980-1987 period, and ten of the fifteen were published in the 1980-1985 period.

⁹³ See *In re Charge of Judicial Misconduct*, 782 F.2d 181 (9th Cir. Jud. Council 1986); *In re Charge of Judicial Misconduct*, 691 F.2d 924 (9th Cir. Jud. Council 1982); *In re Charge of Judicial Misconduct*, 691 F.2d 923 (9th Cir. Jud. Council 1982); *In re Charge of Judicial Misconduct*, 685 F.2d 1226 (9th Cir. Jud. Council 1982); *In re Charge of Judicial Misconduct*, 613 F.2d 768 (9th Cir. Jud. Council 1980); *In re Charge of Judicial Misconduct*, 595 F.2d 517 (9th Cir. Jud. Council 1979).

⁹⁴ *Latimer* is the only § 372(c) order to be published during the years 1990, 1991, and 1992. See *In re Complaint of Latimer*, 955 F.2d 1036, 1037 (5th Cir. Jud. Council 1992).

⁹⁵ *In re Charge of Judicial Misconduct*, 691 F.2d 924, 925 (9th Cir. Jud. Council 1982).

⁹⁶ See *In re Lauer*, 788 F.2d 135, 138 (8th Cir. Jud. Council 1985). The Eighth Circuit's order consisted of an analysis of the tension between judicial independence under Article III of the Constitution and judicial accountability for impartial decision-making. See *id.*

⁹⁷ See *supra* part I.C.1.b.

⁹⁸ See *supra* part I.C.1.a.iii.(C) (discussing other problems arising out of allegations of extrajudicial perjury).

because the existence of the first order had become known by word-of-mouth, and staff had obtained a copy directly from the prior circuit.

By itself, filing chief judge orders with the Federal Judicial Center (FJC) does not significantly advance the goal of creating a common law under the Act. Indeed, the purpose of filing such orders on a national basis appears to be to enhance the circuits' accountability to the public, not to make orders accessible to chief judges and judicial councils. Absent a system of indexing or some means of disseminating the contents of the orders, chief judges have no practical access to orders from other circuits or courts.

Research into orders filed with the FJC and publication of the results, as in the instant report and the report of Professor Richard Marcus to the NCJDR,⁹⁹ might advance the development of a common law. These reports afford chief judges and members of their staffs an opportunity to learn about decisions in other circuits or courts. However, publications that occur with such limited frequency, occasioned by the relatively rare occurrence of Congress's perceived need to create a national commission to study judicial conduct, hardly seem sufficient to nurture the growth of a common law of judicial conduct.

In sum, little evidence of the development of a common law under the Act exists. Dissemination of information about interpretations of the Act, a key ingredient of a common law, seems notably absent. Other than the traditional publication of opinions in established case reporters, no structure exists to disseminate such information to the circuits and courts. After a brief start, this effort appears to have waned.

e. *Petitions for Review*

Section 372(c)(10) of the Act provides, "A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof."¹⁰⁰ Reported data on the number of petitions for review appear to be unreliable, perhaps because circuits or national courts fail to report the second stage of a two-step process.¹⁰¹ AO data show a total of 510 petitions for review during the history

⁹⁹ See Richard L. Marcus, *Who Should Discipline Federal Judges, and How?*, 149 F.R.D. 375 (1993).

¹⁰⁰ § 372(c)(10).

¹⁰¹ See *infra* app.

of the Act, an average of about forty-two petitions per circuit, or less than four per circuit per year. This would appear to underestimate the number of petitions actually filed. In response to a table included in a preliminary draft of this report, three circuits reported that they were aware of a total of approximately 152 more petitions than indicated on the table summarizing the AO reports.¹⁰² Both sources nonetheless agree that at least 510 petitions for review have in fact been filed. It also appears safe to estimate that at least 152 additional petitions have been filed, and that a systematic survey of the records of the other twelve circuits and courts would increase the total by some amount.

In the course of the field study, we found only two petitions for review which were granted by the judicial council. In each case, the petitions raised extremely strong grounds for questioning at least some aspect of the chief judge's order. In one matter, the complaint, filed by a litigant, alleged that the judge (1) called one of the complainant's attorneys a "dumb Jew" for filing a motion to recuse the judge [the judge himself was Jewish], (2) stated in open court that complainant's affidavit in support of the recusal motion was perjured, (3) engaged in *ex parte* conversations with individuals named in the recusal motion, (4) told complainant's attorneys that the judge would put them in jail if they did any further investigation to support the allegations of the recusal motion, and (5) called the complainant's attorneys the day after the recusal hearing to threaten them by saying he would have them disbarred and criminally investigated. An acting chief judge dismissed the complaint as merits-related on the ground that it challenged the judge's denial of a motion to recuse, an issue more appropriately raised on appeal. The acting chief judge's order also noted that the complainant had filed a mandamus against the judge which raised some of the same allegations.

After the complainant filed a petition for review, the judge who was the subject of the complaint submitted a response which denied allegations 1 and 4, admitted 2, and explained 3 and 5. The judicial council granted the petition, and vacated and remanded the acting chief judge's dismissal, on the ground that the allegations were not merits-related. The acting chief judge then appointed a special

¹⁰² Due to wide discrepancies among these reports, that table is not included herein.

committee. Ultimately, the judicial council adopted the committee's recommendation that the complaint be dismissed.

In the other matter, a complaint was filed against a judge by five female employees of the court clerk's office. The complainants alleged that the judge had, in a number of specific incidents, engaged in sexual and nonsexual harassment of the complainants, creating intolerable working conditions and disrupting clerk's office functions. The complainants also alleged that the judge had engaged in improper *ex parte* contacts, mistreated attorneys, and unduly delayed rulings in cases. After a response from the judge denying most, but not all, of the allegations, and an extensive inquiry by the chief judge, the chief judge issued an order dismissing the complaint on the basis of corrective action taken. The corrective action essentially involved giving temporary control of the clerk's office to the clerk of another court. The chief judge made no findings regarding, and did not discuss, the sexual harassment allegations or the charges of *ex parte* contacts, abuse toward attorneys, and excessive delays. The complainants filed a petition for review on this basis, stating, "[t]he Order fails to address the allegations in the complaint" because it "completely fails to address the sexual harassment the female employees of the . . . court have been forced to tolerate." The judicial council granted the petition for review in a two-paragraph order which stated, rather opaquely, that the council requested the chief judge to inquire into the "operation and effectiveness" of the chief judge's prior order and that the chief judge was authorized to amend or withdraw the prior order. The chief judge then withdrew the prior order of dismissal and appointed a special committee. Ultimately, the judicial council issued a private reprimand to the judge and undertook monitoring of clerk's office operations.¹⁰³

In several other matters in which the judicial council felt that a chief judge's factual inquiry had been too limited, it has undertaken additional factual inquiry at the petition for review stage.¹⁰⁴ In these matters, the council sought responses to the complaint from the judge and/or witnesses in order to assure itself that the complaint was indeed, as the chief judge had ruled, without factual foundation. In one matter, the council conducted a limited factual

¹⁰³ For a more complete description of this case and its effects, see *infra* part I.C.2.c. (discussing case CA-12).

¹⁰⁴ The judicial council is authorized to conduct additional investigation by § 372(c)(6)(a).

inquiry into an allegation that the chief judge's order had overlooked. The council ultimately affirmed the chief judge's decision in each of these matters.

The overwhelming record of affirmances may suggest that judicial council consideration of a petition for review is largely a meaningless, pro forma exercise. Nothing in this study will permit us to confirm or reject that conclusion. Although we have been told that the amount of time spent by council members on these petitions is generally very small, we have no data to accurately gauge the level of sophisticated attention actually paid to them. The level of affirmances may simply reflect the insubstantial nature of the vast majority of complaints, as well as the relative eagerness of pro se complainants to file petitions for review. Indeed, of the twelve "problem" dismissals identified above,¹⁰⁵ petitions for review were filed in only four. Although this matter was not discussed with most of the chief judges, one chief judge did advocate support for the petition for review process:

It's a good idea to have review. The chief judge could exercise poor judgment. Judges are used to disagreeing with each other; it's not a rubber stamp. The typical complaint is frivolous, so of course dismissal is affirmed. But one can imagine a situation in which that would not be true. And, the review process conveys a greater sense of fairness.

It remains an open question whether the infrequency of judicial council action on review reflects councils' inattentiveness, or a paucity of meritorious petitions for review, or both.

Another source of concern is the apparent lack of citation in the judicial council orders. Of the 127 judicial council orders disposing of petitions for review, only a handful cited any formal authority at all.¹⁰⁶ Moreover, only sixteen of these orders stated reasons for the conclusions reached. The typical order in most of the circuits is a conclusory form order affirming the chief judge's dismissal. Indeed, in six of the circuits, no draft order is circulated to the council members for their review. It is understood, instead, that a council member's vote to affirm is automatically a vote to issue the usual form order.

¹⁰⁵ See *supra* part I.C.1.a.v.

¹⁰⁶ Eight cited local rules; two cited prior orders under § 372(c); one cited the Code of Judicial Conduct; and none cited advisory opinions of the ethics committee.

f. *Summary*

Although the statutory dismissal standards are poorly defined and leave open many questions of interpretation, the overwhelming majority of complaints—more than 90%—are clearly subject to dismissal. Generally, we found a certain lack of precision in most of the circuits concerning the statutory basis cited for dismissal of insubstantial complaints. Five of the eight circuits, however, had addressed only a single complaint in which the dismissal appeared to be even arguably precipitous or incorrect. One circuit had no problem matters. The remaining two circuits produced most of the “problem” matters. Both were circuits with long-standing histories of conclusory form dismissals issued by chief judges who declined to delegate any substantial portion of the task of preparing orders of dismissal.¹⁰⁷

In Part III, we assess the virtues of the “dual track system,” represented by this model, under which complaints raising serious allegations are brought immediately to the chief judge’s attention, but insubstantial complaints are initially prepared by staff for the chief judge’s review.

2. Corrective Actions

The Act provides that a chief judge may conclude proceedings on a complaint filed pursuant to the Act on a finding that “appropriate corrective action has been taken.”¹⁰⁸ How have chief judges used this opportunity to correct alleged misconduct? What types of corrective actions have chief judges and judicial councils viewed as appropriate? How are such actions documented and communicated to complainants, other judges, and the general public? What benefits have complainants received? What lasting effects may be attributable to corrective actions? This section addresses those questions, using interview responses of chief judges,

¹⁰⁷ Four of the eight circuits, by contrast, have long-standing practices of issuing dismissal orders with generous statements of the grounds for dismissal. All of these four circuits, again, have produced few “problem” matters. Recently there has been an apparent gradual move toward this model. This shift is evidenced by some circuits’ modification or reconsideration of their practices regarding non-delegation and the issuance of form orders.

¹⁰⁸ § 372(c)(3)(B). Illustrative Rule 4(d) elaborates slightly on this standard by referring to an action taken “to remedy the problem raised by the complaint.” ILLUSTRATIVE RULES, *supra* note 7. The commentary encourages chief judges to “make every effort to determine whether it is possible to fashion a remedy without the necessity of appointing a special committee.” *Id.* Rule 4 commentary at 14.

data from the review of complaint files in eight circuits, and public orders applying corrective action principles in response to specific misconduct complaints.¹⁰⁹

Several experienced chief judges and former chief judges point to the opportunity for corrective action as a central feature of the Act. They view the Act as remedial legislation, designed primarily to correct aberrant behavior, not to punish judges. Illustrative Rule 1(a) states that the Act's purpose "is essentially forward-looking and not punitive. The emphasis is on correction of conditions that interfere with the proper administration of justice in the courts."¹¹⁰ After noting that, in the absence of the Act, a chief judge has no supervisory or monitoring authority over an individual judge, Judge John C. Godbold, former chief judge of the Fifth and Eleventh Circuits, emphasized that the Act "create[s] a channel of communication between judges about nonadjudicatory matters."¹¹¹ Judge James R. Browning asserted that corrective actions play a central role in the administration of the Act.¹¹² One chief judge noted in an interview that the Act "gives chief judges an excuse to look into any circumstances where a judge is acting in a high-handed way." Another chief judge indicated that the psychological process works this way: "Where the judge has been a little too insensitive about something, or imprudent, the judge usually recognizes it. The judge says, 'I don't know what I was thinking.'"

In one circuit, the self-corrective process is sometimes augmented by an evaluative questionnaire to be administered by the judge and completed by attorneys and litigants. The judge who created this innovation describes it as follows:

If there was a complaint that a judge was mistreating witnesses or lawyers, I'd have the judge come to my chambers and sit and talk. We have a useful device, the self-evaluation questionnaire. Judges often have a perception of things; they think that everyone loves them. We'd say, "Try this, hand out this questionnaire." Our better judges do it every several years. The individual judge does

¹⁰⁹ To the extent that the long-term effects of corrective actions are capable of evaluation within the limits of this study, Part II considers them more fully.

¹¹⁰ ILLUSTRATIVE RULES, *supra* note 7.

¹¹¹ Transcript of Hearings Before the National Commission on Judicial Discipline and Removal 57 (May 1, 1992) [hereinafter NCJDR Hearings] (testimony of John C. Godbold, Senior Circuit Judge, Eleventh Circuit Court of Appeals) (on file with the authors).

¹¹² See *id.* at 129-30 (May 15, 1992) (testimony of James R. Browning, Circuit Judge, Ninth Circuit Court of Appeals).

it for himself; the completed questionnaire doesn't go to anyone else. Almost all judges think they gain something from it. Most responses are laudatory, a positive ego feedback. But judges learn that they're covering their mouth with their hand or picking their nose, and they're glad to learn of it. But the incorrigible judges haven't used the questionnaire. They know better. A number of times the self-evaluation questionnaire was the corrective action. It's very useful, specific, an easy out for the judge. I can't remember the subsequent feedback from those judges in specific complaint cases, but in general the vast majority thought it was useful.¹¹³

Similarly, another chief judge said that the most important thing about the Act is that it "allows me to teach." This chief judge uses the Act to "improve a judge, not punish a judge."

In reviewing complaints, we found at least one significant corrective action matter in each of the eight circuits. The use of corrective action ranged from rare, occasional use in the First and Second Circuits to more frequent use in the Fifth, Ninth, and Eleventh Circuits. Figure 4 shows the percentage of complaints that resulted in corrective action in all circuits up to 1991.

¹¹³ The above quote comes from a chief judge whose circuit is one of the four that have used corrective actions in response to at least five per cent of complaints. See *infra* fig. 4.

FIGURE 4
*Percentage of Total Reported § 372(c) Filings in Which Corrective
 Action was Taken, Calendar Years 1980-1991 (N=73)¹¹⁴*

These variations seem to represent differences in chief judges' approaches to the process as well as differences in opportunities presented for corrective action. A formal, legal analysis of the complaint at the initial stages of the process seems likely to produce a higher rate of dismissals and a lower rate of corrective actions. A less formal approach would involve seeking a response from the named judge whenever a complaint reasonably questions the wisdom of that judge's practices, without regard to whether the complaint states a claim under the Act. When a complaint is only arguably covered by the Act, such as a complaint alleging delay, some chief judges may look at it as an opportunity to discuss the general pattern with the judge. These conversations seem likely to

¹¹⁴ Information obtained from § 372(c) forms filed by circuits and national courts with the AO.

lead to dismissals on the basis of corrective action, sometimes with the chief judge's explicit reservation of the question whether the named judge's conduct constituted misconduct under the Act.

As we saw in Part I.B.1, chief judges typically have multiple options in complaint scenarios. Often, complaints can be dismissed as frivolous, directly related to the merits of the litigation, or as not meeting the statutory requirement that the complaint allege misconduct. For example, a complaint alleging a single instance of delay may be viewed as frivolous and not in conformity with the statute because it does not allege behavior that is "misconduct" within the meaning of the Act and the Illustrative Rules.¹¹⁵ It is hard to imagine a situation in which the matter delayed does not directly relate to the merits of a decision or procedural ruling. In addition, if the judge rules on the underlying matter, the chief judge may conclude the proceeding based on corrective action or on mootness grounds.

In this context, it may seem unnecessary to examine corrective actions separately. Because the outcome—termination of the complaint—remains the same regardless of the chief judge's choice among various applicable grounds, the chief judge's selection may seem unimportant. Reference to the appropriate corrective action grounds, however, generally signals that a complainant received the relief sought, that the judge modified problematic behavior, and that the complaint was a causal factor in producing the outcome. For these reasons, each application of the corrective action approach was deemed important and was included in the study.

a. *Benefit to Complainant*

Given the Act's emphasis on correction, education, and rehabilitation, one might expect that the benefits of corrective actions would be forward-looking and would not necessarily remedy the specific act that led to the complaint. Accordingly, we asked

¹¹⁵ Generally, a single instance of delay is not considered to be misconduct under the Act. See *In re Charge of Judicial Misconduct*, 691 F.2d 924, 925 (9th Cir. 1982) (concluding that "[a] petition for writ of mandamus provides an adequate remedy if a judge fails or refuses to act when circumstances require a ruling. . . . Disciplinary procedures are unavailable when a litigant declines to utilize existing avenues of relief"); ILLUSTRATIVE RULES, *supra* note 7, Rule 1 ("[T]he 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."). But see NCJDR Hearings, *supra* note 111, at 62 (testimony of Judge John C. Godbold stating his "minority view, that failure of a judge to act in some circumstances" amounts to a denial of access to the courts that should be considered misconduct under the Act).

after reading the file, "Did the complainant receive any benefit of the corrective action?" We found that complainants received benefits in forty of the fifty-two complaints (77%) for which there was sufficient information to answer that question. These benefits were generally in the form of an apology, a ruling on a delayed matter, or a correction of the record.

Of course, there were some corrective actions which did not benefit the complainant directly.¹¹⁶ The thrust of the corrective action in these situations was to learn from the situation and prevent its recurrence. Frequently this was done not by focusing on whether there was impropriety in a strict legal sense, but by stressing the need to avoid even the appearance of impropriety. By explaining to the named judge how the judge's actions might appear to an objective viewer, the chief judge could help the judge avoid similar problems in the future.

To illustrate as concretely as possible the various roles that corrective action plays in the administration of the Act, we present capsule summaries of three types of corrective actions: the typical, routine complaint; the systemic complaint, involving issues that may have an impact beyond the individual matter; and the troublesome disposition based on corrective action. The three categories, of course, are not mutually exclusive.

b. *Routine Corrective Action*

A typical corrective action matter concerns delays in ruling. As noted above, a delay in ruling on an individual case is not generally considered misconduct.¹¹⁷ Nonetheless, if the judge rules on the matter, the chief judge has the option of concluding the proceeding on the grounds of corrective action or changed circumstances, or of dismissing the complaint on the grounds of merits-relatedness, frivolousness, or nonconformance with the Act.

¹¹⁶ Two examples of this were related matters dealing with a judge's behavior after drinking. One incident allegedly occurred ten years before the complaint was filed, and the other complaint was unrelated to litigation. The judge's promise to abstain from alcohol did not appear to provide any distinct benefit to either of these complainants. Another matter involved the misuse of a judge's statement on the record as a political endorsement. The election was over and the precise subject of the complaint could not be remedied. In another matter, a judge reexamined his recusal policy after the litigation that gave rise to the complaint had proceeded beyond the point at which recusal would serve any purpose.

¹¹⁷ See *supra* note 115.

Other typical corrective actions involve judicial demeanor. A judge may have made an intemperate remark or one that is subject to an unintended interpretation. The chief judge and the implicated judge discuss the matter. As a result of this conversation, the judge recognizes the impact of the remark and pledges not to make the same or similar comments again. An apology to the complainant may or may not be included in the correction.

Some typical situations in which the chief judge terminated the proceedings based on corrective action follow:

- *Case CA-1.* A prison inmate complained that a district judge had seriously delayed deciding motions in a case and that the delay would affect the ability of witnesses to recall facts. The chief judge requested that the judge respond. The judge responded that the clerk had mistakenly marked the case closed and that the judge would order it reopened and promptly decide all pending matters.
- *Case CA-2.* A prison inmate complained that a district judge had delayed five months in acting on a mandate from the court of appeals to appoint counsel to assist in pursuing complainant's habeas corpus case and to schedule an evidentiary hearing. In response to the complaint, the district judge appointed counsel and scheduled a hearing on complainant's claim for injunctive relief. The chief judge concluded that "[e]ven if the judge's delay was conduct prejudicial to the effective and efficient administration of the business of the courts, this presents a record of corrective action taken."
- *Case CA-3.* An attorney complained that in a discrimination trial a judge stated that if one touches "one's breast" the harm was of only a philosophical nature. According to complainant, this remark offended complainant's female client. After the chief judge dismissed the complaint on the grounds that it was too ambiguous (presumably because of the reference to "one's [own] breast" rather than "another's breast") and too isolated to constitute misconduct, the named judge responded in writing that he meant to say "psychological," and not "philosophical," in the context of discussing physical versus psychological injury. The judge, apparently interpreting the complaint to mean "another's breast," indicated that he had been less careful in his language than he should have been, and apologized to complainant's client for any dismay his remark may have caused her, saying he had not intended to cause her any distress. On a petition for review, the judicial council found that the judge's apology, which occurred after the chief judge's dismissal, constituted corrective action.
- *Case CA-4.* A female attorney complained that a male district judge had exhibited gender-based bias against her and her client, evidenced by rulings against her client and sanctions imposed on

her for allegedly disobeying court orders. The only clear gender-related content of any of the judge's statements on the record occurred when discussing the reasonableness of the \$500 fine he had assessed against her personally. She argued that before she would pay, the judge would have to "show that I ha[ve] the ability to pay." He said, "I think that you're a practicing lawyer, . . . that you give every appearance of having at least some funds. You're able to live, exist. You comport yourself in an attractive fashion. I don't think the fine is so unreasonable." The attorney pointed to the "attractive fashion" language as being gender-based. The chief judge, in a public order, reported

discuss[ing] this with the judge. He assures me that he was trying to describe the common-sense evidence available to him as to complainant's ability to pay the sanction; it was not intended as an expression of sexual stereotyping. Of course, the judge appreciates the need for the judiciary to avoid such stereotyping. If the comment by the judge was prejudicial to the effective and efficient administration of the courts, my discussion with the judge presents a record of corrective action taken.

After reviewing the record in the underlying litigation, the chief judge dismissed the balance of the complaint on the grounds that the record did not support the allegations of discriminatory treatment of the complainant or her client.

There are also several examples of routine corrective action administered informally in the absence of a complaint under the Act. One might consider such activity to be enforcement in the shadow of the Act or to be the kind of routine housekeeping that the judiciary has always conducted.¹¹⁸ In either event, the examples of informal activity are essential to a complete picture of the administration of the Act.¹¹⁹

c. *Systemic Corrective Action*

In a significant number of matters the corrective action seemed to have direct implications that reached beyond the immediate litigant or the judge named in the complaint. Many or most of the matters classified as routine may also have had systemic effects by coming to the attention of other judges and serving as guides for

¹¹⁸ See NCJDR Hearings, *supra* note 111, at 121-24 (May 15, 1992) (testimony of Judge James R. Browning) (asserting that during the 40 years following the creation of judicial councils in 1939, these councils have exercised their statutory authority pursuant to 28 U.S.C. § 332 (1988 & Supp. IV 1992) to promote the expeditious administration of justice through an informal, simple, yet generally effective process).

¹¹⁹ These examples are discussed below. See *infra* part I.E.

their conduct in similar situations. In the following examples, the complainant, the chief judge, or the judicial council sought a change in the practices of a judge's chambers or a clerk's office and, perhaps, of a district, circuit, or the entire judicial branch. Many of the complaints in this group were brought by public interest groups or were disposed of in a public order, increasing the likelihood that they were brought to the attention of a wider audience.

- *Case CA-5.* The Bar Association in the jurisdiction in which a federal district court is located filed a complaint against a district judge alleging that the judge publicly advocated a partisan political position on a highly contested local political issue. One of the speeches was given during a naturalization ceremony over which the judge presided, wearing judicial robes. In response to the complaint, the judge indicated to the chief judge that he had not intended to make a political statement in the speeches and that they were intended simply as patriotic remarks. He responded that he now saw how they could be construed as political statements, and pledged in a letter to the chief judge that he would "refrain from making any public statements that might objectively be construed as advocating [a position on the political issue in question]." To "avoid future misunderstandings," the judge also tendered his resignation as the chair of the committee that sponsored the Fourth of July celebration at which he first made the controversial statements. The chief judge dismissed the complaint on the grounds that the letter constituted corrective action and, with the judge's consent, attached a copy of the letter to the public order.
- *Case CA-6.* A public interest group complained that a judge's activities as the chair of a committee of a national bar group constituted partisan political activity and that the judge's activities to solicit lawyers to join that committee amounted to fund-raising on behalf of the organization, both in violation of the Code of Conduct for U.S. Judges.¹²⁰ After researching the ethical issues, the chief judge discussed the complaint with the judge. The judge then submitted a request for an advisory opinion to the Committee on the Codes of Conduct of the Judicial Conference of the U.S. and agreed to abide by the result. That committee advised that the judge's involvement with recruiting efforts should cease, and the judge terminated his involvement with those efforts. The committee also advised the judge to consider specific ethical standards in deciding whether or not to continue as chair of the bar committee.

¹²⁰ See *supra* note 85.

The judge's term as chair expired within weeks of the chief judge's order dismissing the complaint on the grounds that appropriate corrective action had been taken. The complainant filed a petition for the judicial council to review the matter, asserting in part that the judge should have been reprimanded for engaging in partisan political activity. The judicial council denied the petition for review.

- *Case CA-7.* A statewide coalition of at least eight public interest organizations complained that a district judge made statements in imposing a sentence that a female defendant must have been under the hypnotic spell of her male companion and that drugs must have been involved because they lived in a predominantly black city. After communicating with the district judge, the chief judge dismissed the complaint, stating that the judge:

recognizes that certain comments, made while searching for grounds that could justify departure from a sentence he believed to be harsh, are troubling. The judge appreciates the problems his general comments created and assures me that he will avoid such statements in performing his judicial functions. On the basis of the judge's assurance, and upon the basis of his outstanding record over many years of distinguished service on the court, I find that corrective action has been taken.

This matter was likely to be disseminated widely among the bar and the public interest-civil rights community as a natural result of sending copies of the order to the organizational complainants who represented a large number of lawyers and active community representatives. Because the judge's comments were made in the context of a sentencing ruling, this matter raises an issue of interference with judicial independence.¹²¹

- *Case CA-8.* A personal acquaintance of a judge filed a complaint alleging that the judge was mentally disabled and drank to excess. The judge consulted a physician who indicated that the combination of prescribed medication and alcohol could cause the judge to be more irritable and impulsive than usual. The doctor reported that the judge had abstained from alcohol for many months and recommended that he continue to do so. The judge sent a letter to the chief judge indicating his intent to follow the doctor's advice. The judicial council of the circuit dismissed the allegations on the basis of corrective action, concluding that "[b]ased on the judge's physician's representations, coupled with the judge's assurance that he will follow the physician's advice and

¹²¹ See *infra* part II.B.5. (discussing this issue).

his recent record of service to the Court, we conclude that it is unlikely that the conduct leading to this complaint will recur.”

- *Case CA-9.* A pro se litigant complained that a judge was verbally abusive to the complainant during a hearing and that the judge referred to members of several occupational groups, including deputy sheriffs and attorneys, as “idiots.” The chief judge concluded the proceedings on the basis of corrective action and wrote in a public order that the judge “concedes he was verbally abusive. He states he sincerely regrets the occurrence and that it will not occur again. He has volunteered to utilize a judicial evaluation questionnaire to assist him in identifying and correcting any other problem he may have in this area.” This is a typical use of the judicial evaluation questionnaire in this circuit. The questionnaire is designed to provide a systemic means of identifying and remedying related problems for a particular judge.
- *Case CA-10.* A bankruptcy judge accepted waivers of disqualification from creditors in a case involving the judge’s spouse’s financial interest in the creditor. 28 U.S.C. § 455(e) expressly prohibits a waiver of disqualification based on a financial interest of the judge’s spouse.¹²² After the complainant raised a question about the scope of the waiver, the judge ordered his recusal. The chief judge dismissed this portion of the complaint on the grounds that “the judge corrected the problem of the parties’ remittal of disqualification. The judge has considered the problem of remittal in this case. I have talked with the judge and we have carefully examined what, if anything, can be done to prevent a recurrence of such difficulties in the future.”
- *Case CA-11.* The chief judge received an anonymous letter from “a fellow lawyer.” The lawyer alleged that a judge was sitting on a case involving partisan political interests. Any ruling in that case would be likely to affect the outcome in a related case and possibly benefit a close relative of the judge who was counsel in the related case. The chief judge invoked § 372(c)(1), identified the letter as a complaint, and presented it to the judge for a response.¹²³ The

¹²² 28 U.S.C. § 455(b)(4), (e) (1988) (forbidding waivers of disqualification when a judge knows that “his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding”).

¹²³ See § 372(c)(1). The section provides:

In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this subsection and thereby dispense with filing of a written complaint.

judge responded by recusing himself in the litigation that was the subject of the complaint and by instructing his clerk to notify the judge immediately about any case in the district in which a member of the judge's family appeared as counsel.

- *Case CA-12.* Five female employees of a bankruptcy court's clerk's office filed a complaint against a bankruptcy judge, alleging a number of incidents of sexual and nonsexual harassment.¹²⁴ After obtaining a response from the bankruptcy judge and having the circuit executive interview the complainants and study the operation of the clerk's office, the chief judge issued an order giving the clerk of the district court temporary control over the bankruptcy clerk's office, directing the clerk to file monthly progress reports with the circuit executive, and ordering the establishment of a grievance procedure. The order did not address the allegations of sexual harassment or of other improprieties.

The judicial council granted the complainants' petition for review and issued a brief order directing that the chief judge inquire into the operation and effectiveness of the chief judge's prior order. The chief judge withdrew the prior order and appointed a special committee, which hired an attorney-investigator who conducted a five-day investigative evidentiary hearing. The committee's report concluded, and the judicial council found, that:

the judge has been deficient in the manner in which he administered the clerk's office . . . and supervised its employees, and has engaged in undignified and inappropriate behavior by employing vulgar language and recounting off-color stories to court employees and that the judge's behavior contributed to poor morale, inefficiency and low productivity in the clerk's office, and constituted conduct prejudicial to the effective and expeditious administration of the business of the courts.¹²⁵

The council also found, based on the report, that the allegations of overt sexual misconduct and other allegations of improprieties in handling cases and dealing with attorneys were "unproven." The council directed that the chief judge administer a private reprimand by letter, that the council monitor the functioning of

Id.

¹²⁴ For a discussion of this case as an example of judicial council action on a petition for review, see *supra* part I.C.1.e.

¹²⁵ This complaint was filed approximately ten years ago. Some of the above "inappropriate behavior" might now be termed "sexual harassment" that resulted in a hostile work environment.

the office for twelve months, and that the chief judge of the district "take appropriate action on behalf of the council to provide supervision" of the office and make quarterly reports to the council. The term of the order was not specified. The bankruptcy judge's term of office expired after the above orders were entered, and the judge withdrew his application for reappointment. There is good reason to believe that the complaint and orders had a major impact on that decision.¹²⁶

- *Case CA-13*. In a set of complaints that received national publicity, a judge ordered a female attorney to use her married name in proceedings before him. The first complaint came from an ad hoc group of female members of the local bar and was resolved on the basis of corrective action after the judge called a conference of counsel, stated that he was wrong, and offered to declare a mistrial in the litigation (which the parties declined). The second complaint was filed by the female attorney after the judge apologized. She alleged additional instances of sexual harassment and asserted that "[s]ince the judge's conduct may be the result of a mental or physical disability, I am filing this complaint on both grounds available under 28 U.S.C. § 372(c)." The chief judge asked the judge to respond. He did so by stating that he had ceased participating in any judicial work and that he would vacate his chambers within a month (apparently as a result of the two complaints). On that basis the chief judge concluded the second complaint on the basis of corrective action.¹²⁷

Other systemic corrective actions included the following:

- A chief judge instituted a practice of reviewing reports on the timeliness of rulings in the bankruptcy courts, and recommended to the judicial council of the circuit and the AO that procedures be established to supervise the bankruptcy courts' dockets and to set standards for deciding cases within a designated time period.
- A chief district judge promised to discipline a clerk's office employee and otherwise remedy a situation in which the clerk of court failed to call a motion to the attention of a district judge.
- A chief judge called for a district judge to implement "revised staff procedures" to correct a situation in which a law clerk was permitted to postpone hearings until the law clerk's legal research on the matter was completed.

¹²⁶ For further discussion of problematic aspects of this case, see *infra* part I.C.1.e.

¹²⁷ For further discussion of problematic aspects of this case, see *infra* part I.C.2.d.

- Court reporting services were changed after the chief judge and judicial council had difficulty obtaining a transcript relating to a complaint.

d. *Problem Matters*

While matters CA-12 and CA-13 had a significant impact on the administration of justice in their respective circuits and, at least in the case of CA-13, on a national basis, there are aspects of those complaints that might give pause to an objective outside observer. Both were originally concluded on the basis of corrective action taken. Yet in both cases, the chief judge's method of avoiding a more drawn out investigatory process resulted in incomplete assessments of the complaints, and masked more serious, underlying problems.

In CA-13, for example, the original corrective action was an apology on the record from the named judge to those affected. Ordinarily, that might seem sufficient. Indeed, it is hard to imagine that a chief judge would deem a public apology insufficient and convene a special committee to pursue a public or private reprimand in response to a single incident of such misconduct. In this situation, however, the apology was in response to a collective complaint filed by five female attorneys, not by the actual victim. This collective effort apparently dissipated any threat of intimidation or retaliation,¹²⁸ allowing the true victim to file a complaint on her own behalf, it having become clear that her grievances would be taken seriously and that she had the support of other members of the legal community. The second complaint apparently led to permanent change: the retirement of the judge. Only the presence of an assertive complainant kept the chief judge from concluding that the apology was sufficient.

In CA-12, the chief judge issued strong affirmative orders to take control of the administrative apparatus and correct the employment conditions for the future. In the context of that complaint, however, the corrective action appears to have been too prospective and rehabilitative (as opposed to remedial or punitive)

¹²⁸ Lawyers and judges speculate that it is this threat that contributes to the paucity of complaints from lawyers. See NATIONAL COMM'N ON JUDICIAL DISCIPLINE & REMOVAL, REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 100-01 (1993) (reporting the Commission's views on the problems and issues regarding the Act and relating to disciplining and removing federal judges); see also *infra* notes 224-26 and accompanying text.

to satisfy the complainants. The chief judge's actions did not provide a direct remedy for the sexual harassment charges, other than to reduce the opportunity for the judge to control the operation of the clerk's office. The chief judge's order also failed to address other charges: specifically, that the named judge had improperly engaged in *ex parte* contacts, verbally abused attorneys, and unreasonably delayed rulings in cases. After an investigation and five days of hearings, the special committee and the judicial council concluded that these charges were "unproven." That finding may be more palatable to the outside observer than the chief judge's order simply because the process showed that serious attention was given to these charges.¹²⁹

In hindsight, the chief judge's efforts in CA-12 to avoid the time-consuming and expensive special committee/judicial council process may not have resolved the underlying issues as fully as the judicial council subsequently did. This may be due to the fact that the judicial council's powers differ from those of the chief judge. The Act expressly empowers the council to issue direct orders including reprimands.¹³⁰ The final order of the judicial council added a private reprimand to the corrective action that the chief judge had imposed. The approaches to administering and monitoring the clerk's office, however, were similar in both orders, as each called for more judicial council involvement. Nonetheless, because of its express powers under 28 U.S.C. § 332(d),¹³¹ the orders of the judicial council may prove more effective than the informal corrective action approach. In addition, the collective acts of the entire council are likely to have more credibility with complainants, the judge, and the public than the individual acts of a chief judge.¹³²

Additional questions about corrective actions need to be addressed. How well documented is the action? Would an outside

¹²⁹ The complainants were given the opportunity to testify and were represented by counsel throughout the five days. Complainants' counsel was given the opportunity to suggest avenues of questioning to the investigator. The judge was also allowed to participate fully, with counsel, during the hearings.

¹³⁰ See § 372(c)(6)(B).

¹³¹ See 28 U.S.C. § 332(d)(1) (1988) ("Each Judicial Council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit.").

¹³² It is worth noting, however, that neither side in CA-12 was satisfied with the judicial council's order; each filed petitions for review with the Judicial Conference's Committee to Review Circuit Council Conduct and Disability Orders, which denied both petitions.

observer know what action the judge has taken or plans to take? Does the corrective action provide any benefit to the complainant? Documentation allows the complainant, the public, and the judges to understand the basis for terminating the complaint and to gauge whether the terms were satisfied. An added benefit from documentation is that the corrective action orders may be passed along in a redacted format for the education of other judges. The above examples of corrective action generally specified the action taken or to be taken in a written order, and those actions generally benefited the complainant. For example, the complaints dealing with delay generally produced a decision or a specific pledge to issue a decision immediately;¹³³ the complaints dealing with demeanor generated either a written apology contained in the judge's response to the complaint,¹³⁴ an apology to the complainant on the record,¹³⁵ or an apology stated clearly to the chief judge and communicated to the complainant via the chief judge's order.¹³⁶ Other orders specified the behavior to be followed, such as avoiding expression of specific partisan political views,¹³⁷ clarifying a recusal policy,¹³⁸ or abstaining from alcohol.¹³⁹

A few dismissals for corrective action, however, did not appear to satisfy the criteria of documenting specific conduct to be corrected. The following is a summary of those problem complaints:

- *Case CA-14.* An attorney complained that a judge engaged in an improper ex parte communication with opposing counsel regarding an award of attorneys' fees. At a hearing at which the complainant and opposing counsel were present, the judge awarded \$750 in fees over the objection of opposing counsel that the award was too low. After the hearing and after the complainant had left the courthouse, opposing counsel appeared before the same judge on another matter. The judge informed opposing counsel that the judge had decided to increase the award to \$1000 and, after a brief discussion in which counsel protested the \$1000 award as too low, directed opposing counsel to inform the complainant of the change. Opposing counsel communicated the gist of this exchange

¹³³ See *supra* part I.C.2.b. (discussing cases CA-1 and CA-2).

¹³⁴ See *supra* part I.C.2.b. (discussing case CA-3).

¹³⁵ See *supra* part I.C.2.c. (discussing case CA-13).

¹³⁶ See *supra* part I.C.2.c. (discussing case CA-9).

¹³⁷ See *supra* part I.C.2.c. (discussing case CA-5).

¹³⁸ See *supra* part I.C.2.c. (discussing cases CA-10 and CA-11).

¹³⁹ See *supra* part I.C.2.c. (discussing case CA-8).

to the complainant and apologized for his role. The chief judge concluded the proceedings based on corrective action and stated:

I have discussed this matter with the judge. I invited the judge to explore how such actions, taken with an understandable desire to speed proceedings, could appear to constitute an improper *ex parte* discussion of the merits of the motion and how a better method of proceeding might have been followed. Although the judge was clear in his own mind that the matter was settled, the brief discussion . . . outside the complainant's hearing could lead a person to believe the exchange concerned a matter still under determination.

The problem in this complaint arises from the named judge's lack of recognition that the exchange was improper. It appears to have been an *ex parte* communication that might have persuaded a judge to change his mind. According to the order, the judge did not concede or recognize any impropriety and thus was concerned only with the appearance of impropriety. Hopefully, the avoidance of the appearance of impropriety will encompass all instances of impropriety, but that conclusion rests on an assurance that the judge understands the impropriety itself. The order does not give the outside observer confidence that the judge recognizes the problem and will attempt to change his practices.

- *Case CA-15.* An attorney in a bankruptcy proceeding complained that the judge initiated an improper *ex parte* communication with the debtor. According to the chief judge's order, the bankruptcy judge responded that he instructed his law clerk to contact counsel for both parties to ascertain the status of a discovery request. After the debtor's counsel informed the clerk that a previous settlement had been rescinded, the clerk apparently did not contact the complainant. The chief judge dismissed the complaint as both frivolous and resolved by corrective action. The corrective aspects of the bankruptcy judge's response are not set out in the chief judge's order, and the order does not explain what feature of the judge's response constituted corrective action.

Here, the primary problem is simply the failure to document the response of the judge and specify the actions to be taken or avoided in implementing the corrective action. The corrective action was presumably appropriate, but the complainant, judges, and outside observers have no way of knowing that from reading the order. In addition, combining the dismissal for frivolousness with the corrective action may send a signal that the matter is, at bottom, frivolous and therefore unimportant.

- *Case CA-16.* A police officer filed a complaint about a magistrate judge's demeanor in demanding, in a peremptory tone, that an

eighty-year-old man in a wheelchair remove his cap by saying, "Don't you know you're in a courtroom?" The chief judge concluded the proceeding because appropriate corrective action had been taken, but did not document either the communications that led to any corrective action or any specific action that the magistrate judge had taken to correct the matter or to avoid a repetition of it.

- *Case CA-17.* A public interest organization complained that a judge at a sentencing hearing praised the political movement with which defendants' activities were associated and gave defendants a lenient sentence. The complaint asserted that the judge abused the power of the judicial office by using the sentencing proceeding as a forum to praise and encourage a political movement. The complaint further alleged that the judge said to the defendants, "I don't agree with the fact that you both should be facing a felony," and that this statement gave the blessing of the judiciary to illegal activities and fomented disrespect for the law.

The chief judge reviewed the transcript and spoke to the judge. In the order concluding the proceedings, the chief judge said that the transcript made it clear that the judge praised the political movement itself and not the illegal activities. The judge made it clear that the defendants had broken the law and had to be held accountable for their acts despite their charitable motives. The chief judge also indicated that the judge acknowledged that some people equated this particular political and social movement with illegal activity and that the judge should avoid using the name of the movement because of this ambiguity. The judge did not, however, agree to refrain from praising the movement in less ambiguous terms or to refrain from making political statements of approval or disapproval of the movement while on the bench. Perhaps in an effort to strike a compromise, the order fails to address the core allegation that judicial endorsement of a partisan political effort, particularly in official communications, may represent an abuse of the judicial office, as in CA-9 above. At the same time, the complaint raises core concerns about judicial independence because the statements were made in the course of imposing a sentence and communicating reasons for that sentence to the defendants and the public. These concerns are addressed further in Part II.B.

- *Case CA-18.* A public interest group complained that a district judge had ex parte contact with a public official who was a defendant in a civil rights complaint. The chief judge found that the alleged behavior did not amount to misconduct because the judge simply repeated to the public official what he had already stated to counsel in a pretrial conference. The judge "did not

consider such *ex parte* communication in deciding the merits or conducting procedures affecting the merits of any action pending before him." The chief judge also found that the record showed corrective action to be evidenced by "the filing of the complaint and the affidavits of the mayor and city attorney, together with publication of this order." The chief judge's order stated that "the judge's communications with Mayor . . . can be seen in retrospect to have been ill advised." The complainant filed a subsequent complaint alleging that the judge had dissembled in responding to the original complaint by asserting that the parties had agreed to the *ex parte* communication. The chief judge recused himself from deciding that complaint and the acting chief judge dismissed on the grounds that the complaint did not allege misconduct covered by the Act. The complainant expressed dissatisfaction with these rulings and judicial council affirmances of them in testimony before the Commission.¹⁴⁰

We note parenthetically one additional corrective action matter that appears problematic for different reasons.

In that matter, an attorney filed a complaint alleging that the judge had conducted a personal vendetta against the attorney, and that the judge had engaged "special counsel" to investigate the attorney's practice and to assist in any proceeding against the attorney in any other forum. The chief judge, after finding "no warrant in statute or proper practice for the action of [the judge] in appointing an attorney to investigate [complainant's] conduct," directed the judge to rescind the order appointing the "special counsel." The chief judge noted that this was done in the exercise of the power conferred by § 372(c)(2)-(3).¹⁴¹ The chief judge then dismissed the complaint on the basis of corrective action taken.

We question whether the Act conferred any power on the chief judge to direct the judge to rescind the judge's order. On the theory that this matter involved a complained-against judge's administrative directive regarding bar discipline and not an exercise of the judge's judicial powers under Article III, the judicial council might have had power under § 372(c)(6), following the report of a special committee, to direct the judge to rescind this order.¹⁴² Whether or not the judicial council could have done so, however, the chief judge clearly lacked such power. All

¹⁴⁰ See NCJDR Hearings, *supra* note 111, at 155-59 (May 1, 1992) (testimony of Paul D. Kamenar, Executive Legal Director, Washington Legal Foundation).

¹⁴¹ § 372(c)(2)-(3) (establishing the procedures to be followed by the chief judge in handling complaints).

¹⁴² See § 372(c)(6) (describing generally the powers of the judicial councils).

that the chief judge could do was attempt to persuade the judge—with the threat of a special committee in the background—to voluntarily rescind the order.

e. *Summary*

The vast majority of corrective actions studied documented specific remedies that benefitted the complainants. These actions were documented in a form that could be disseminated to other judges for educational purposes. Some orders sowed the seeds for what could be deep-rooted changes in practices, perhaps on a district-wide, circuit-wide, or even on a national level. Part II considers these long-term effects more fully. Problem complaints tended to represent a failure to document unambiguously the terms of a corrective action or to extend it fully to the complainant who initiated the action. These problems may result from chief judges' efforts to negotiate compromises that avoid the costs associated with appointing a special committee and with passing the matter along for judicial council action.

3. Special Committee Investigations

If a complaint is not dismissed under § 372(c)(3)(A) or concluded under § 372(c)(3)(B), the chief judge's only remaining option is to appoint a special committee to investigate the allegations of the complaint under § 372(c)(4). That section provides:

If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly—

(A) appoint himself 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;

(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.¹⁴³

Formal sanctions or other actions under the Act, as provided for in §§ 372(c)(6)-(7), can only be ordered by the judicial council following the report of the special committee convened under

¹⁴³ § 372(c)(4).

§ 372(c)(4). Thus, while the very existence of the Act's complaint mechanism may facilitate informal action by the chief judge, it is only through the special committee process that the formal strictures of the Act can be brought into play.

The Act does not prescribe in any detail how a special committee should go about its investigation. It provides only that

Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.¹⁴⁴

The Act does mandate, however, some of the content of judicial council rules for investigatory proceedings, requiring traditional due process protections.¹⁴⁵ In response to this statutory endorsement of local rule making, the Illustrative Rules do contain provisions discussing the appointment of a special committee, the conduct of special committee investigations and hearings, and the rights of the judge and the complainant in an investigation. We do not attempt to summarize these provisions here, but refer to particular provisions of the Illustrative Rules in our discussion where appropriate.¹⁴⁶

This section examines national statistics about special committee investigations. The special committee matters encountered in the field study are then examined more closely. Finally, Judicial Conference review of the outcome of special committee matters is discussed.

a. *National Statistics*

National data gleaned from the reports submitted by the circuits to the AO provide a rough, numerical sense of how often special committees are employed, and with what results. According to those data, the 2405 complaints filed from the inception of the Act through 1991 resulted in the appointment of forty special commit-

¹⁴⁴ § 372(c)(5).

¹⁴⁵ See § 372(c)(11) (requiring that Judicial Council and Judicial Conference rules contain certain basic procedural safeguards).

¹⁴⁶ Differences in the special committee procedures will be discussed *infra* part I.C.3.e., and differences in their formation will be discussed *infra* part I.C.3.f.

tees. Table 13 shows the number and disposition of special committee matters on a circuit-by-circuit basis.¹⁴⁷

¹⁴⁷ The disposition data is incomplete and the reports of outcomes in the special committee matters underestimate several of the important categories, such as the number of reprimands. *See supra* tbl. 9; *infra* app.

TABLE 13
Disposition by Judicial Council for Reported § 372(c)
Filings by Circuit, 1980-1991 (N=40)

<i>Court</i>	<i>Disposition</i>					
	<i>Complaint Dismissed</i>	<i>Judge Censured¹⁴⁸</i>	<i>Impeach- ment</i>	<i>Voluntary Retire- ment</i>	<i>Voluntary Retire- ment & Certified Disability</i>	<i>Unknown Disposition</i>
1st Cir.	0	1	0	0	0	0
2d Cir.	2	0	0	0	0	1
3d Cir.	3	0	0	1	0	0
4th Cir.	0	0	0	0	0	0
5th Cir.	3	0	0	0	0	0
6th Cir.	8	0	0	0	2	0
7th Cir.	2	4	0	0	0	0
8th Cir.	2	0	0	0	0	0
9th Cir.	0	0	0	0	0	0
10th Cir.	4	0	0	0	0	0
11th Cir.	0	0	1	0	0	2
D.C. Cir.	3	0	0	0	0	1
Fed. Cir.	0	0	0	0	0	0
Int'l Trade	0	0	0	0	0	0
Cl. Ct.	0	0	0	0	0	0
<i>Total</i>	27	5	1	1	2	4

¹⁴⁸ In addition, we are aware of a public reprimand in the Eleventh Circuit in October 1990, a public reprimand in the Fifth Circuit in May 1992 (after the cut-off date for this table), and a private reprimand in the Ninth Circuit in 1982. Four of the five reprimands reported in this table were private (one of which had been converted from public to private by the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders). The remaining reprimand was reported to the AO as both public and private.

Twenty-seven of these special committee proceedings eventually resulted in judicial council dismissal of the complaint. At the judicial council level, the AO data form does not distinguish between dismissals based on corrective action¹⁴⁹ and other dismissals. The field study revealed, however, that at least two dismissals by judicial councils after a special committee investigation were based on corrective action.¹⁵⁰ In a third matter, a private reprimand was accompanied by corrective action. Three proceedings resulted in retirement, one instance of a voluntary retirement and two instances in which a judge was asked to retire on grounds of disability.¹⁵¹ In four instances, the data reported to the AO did not include complete disposition information at the judicial council level. The remaining six proceedings resulted in some form of sanctions.

Of the six proceedings in which sanctions were imposed, there were four private reprimands,¹⁵² one combined public-private reprimand,¹⁵³ and one matter in which the judicial council certified the case to the Judicial Conference of the United States ("Judicial Conference") recommending that one or more grounds for impeachment might exist.¹⁵⁴

Adding the reprimands uncovered in the course of this study that were not included in the AO database,¹⁵⁵ there were a total of eight complaints that led to reprimands: five that were private, two that were public, and one that combined public and private features.

¹⁴⁹ Under § 372(c)(3)(A), the chief judge may dismiss a complaint only if it is not in conformity with § 372(c)(1), merits-related, or frivolous. Section 372(c)(3)(B) adds that a chief judge may "conclude" a complaint if "appropriate corrective action has been taken" or "action on the complaint is no longer necessary because of intervening events." Thus, technically, a complaint cannot be "dismissed," but only "concluded," on the basis of corrective action.

¹⁵⁰ See *supra* part I.C.2.c. (discussing case CA-12, in which the corrective action was an opinion issued by a court of appeals).

¹⁵¹ See § 372(c)(6)(B)(iii).

¹⁵² See § 372(c)(6)(B)(v).

¹⁵³ See § 372(c)(6)(B)(v)-(vi).

¹⁵⁴ See § 372(c)(7)(B). In two other instances, judicial councils certified to the Judicial Conference that grounds for impeachment might exist, but these actions did not result from a complaint filed under the Act.

¹⁵⁵ See *supra* tbl. 9.

b. *Special Committee Investigation in the Sampled Circuits*

We now turn from the limited national data available on special committee proceedings to our findings from a sampling of eight circuits. The eight circuits have had a total of twenty-five special committee investigations since the inception of the Act.¹⁵⁶

Sixteen of these twenty-five investigations resulted in the eventual dismissal of the complaint, usually on the ground that the investigation did not reveal any factual foundation for the complaint's allegations of misconduct. Other grounds for dismissal were that the complaint was merits-related in whole or in part (five cases); that the conduct alleged did not constitute misconduct under the statutory definition (one case); and that the complaint was moot since the House of Representatives had transmitted to the Senate articles of impeachment against the judge that included the allegations of the complaint (one case). In addition to the sixteen dismissals, no action was taken on one complaint because articles of impeachment had been voted against the judge on other grounds.

Of the eight investigated complaints that were not ultimately either dismissed or left without any action taken, two were concluded on the basis that appropriate corrective action had been taken. In one case, the corrective action took the form of language in a court of appeals opinion that was severely critical of the judge and that was tantamount to a public reprimand. In the other instance, the corrective action was the judge's pledge to abstain from the consumption of alcohol.¹⁵⁷

The remaining six complaints resulted in sanctions of one form or another. In one instance, the judicial council, after a finding of physical disability, authorized the chief judge to request that the judge voluntarily retire, with the provision that the length-of-service requirements of § 371(b) would not apply.¹⁵⁸ The judge subsequently agreed to retire. This is the only case revealed by the field study in which the formal procedures of the Act have been used to bring about the retirement of a disabled judge. One might speculate that even this situation would have been handled informally if not for the circumstance that the judge did not meet

¹⁵⁶ Our sampling constituted a subset of the proceedings for which national data (as reported to the AO) was available.

¹⁵⁷ See *supra* part I.C.2.c. (discussing case CA-8).

¹⁵⁸ See § 371(b) (Supp. IV 1992) (stating that justices and judges may retire from regular active service upon meeting the age and service requirements delineated in § 371(c)).

the length-in-service requirements of § 371(b). Only by proceeding under the Act could those requirements be rendered inapplicable, pursuant to § 372(c)(6)(B)(iii).¹⁵⁹

In another matter that resulted in sanctions, the judicial council certified to the Judicial Conference of the United States under § 372(c)(7)(B) its determination that one or more grounds for impeachment might exist.¹⁶⁰ Subsequently, the Judicial Conference made a similar certification to the House of Representatives under § 372(c)(8). Ultimately, the judge was impeached and removed from office.

The remaining four matters resulted in two public reprimands and two private reprimands. One of the private reprimands was directed by the Judicial Conference Committee following the judicial council's decision to issue a public reprimand. The other private reprimand was accompanied by corrective actions ordered by the judicial council, which itself undertook to monitor the operations of the clerk's office.¹⁶¹

c. *Substantive Evaluation*

It is beyond the scope of this project to offer any substantive evaluation of whether or not any special committee matters were inappropriately handled or concluded. In most instances, not all of the evidence and testimony the special committee considered was available. Even in those instances where transcripts of testimony were available, time constraints did not permit an exhaustive substantive review of them. In many instances, the report of the special committee or the evidence on which it was based was not seen. We are in no position, therefore, to attempt to evaluate the predominantly fact-based determinations made by special committees, or to assess the adequacy of the sanctions meted out by judicial councils in these matters.

The information that is available reveals only one special committee matter that arguably was precipitously dismissed.¹⁶² In this matter, the judicial council dismissed an allegation of the

¹⁵⁹ This section provides that the judicial council may request that a "judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 . . . shall not apply." § 372(c)(6)(B)(iii).

¹⁶⁰ See § 372(c)(7)(B).

¹⁶¹ See *supra* part I.C.2.c. (discussing case CA-12).

¹⁶² See *supra* part I.C.1.a.i.(B).

complaint—that the judge had accepted free trips paid for by the government agency that was the opposition in complainant's lawsuit—apparently on the ground that the complainant would not reveal the complainant's source of information, unless it was done privately to the special committee, and outside the judge's presence. Since the commentary to Illustrative Rule 12 states that such a procedure would be entirely proper,¹⁶³ the dismissal of the complaint on that ground is questionable. This special committee proceeding occurred during the first year or two of the Act, long before the Illustrative Rules were promulgated.

In contrast, the study revealed five matters in which it appears possible that the appointment of a special committee was unnecessary, and that the complaint could have been dismissed by the chief judge. In one of these matters, already discussed, the judicial council dismissed the complaint on the ground that the complaint's allegations—perjury in testimony regarding alleged conduct prior to the judge's appointment to the federal bench—did not constitute misconduct under the statutory definition.¹⁶⁴ The special committee had merely examined the record; it had not held a hearing or elicited any new testimony. Apparently, the judicial council's dismissal did not rest on any special committee finding on a factual matter in dispute. Thus, it seems that the chief judge could have dismissed the complaint on precisely the same basis, without the use of a special committee. Indeed, the judicial council's dismissal order cited as persuasive authority a chief judge's dismissal order in another circuit on exactly the same grounds.

The other four matters were all complaints in which some inquiry, or additional inquiry, by the chief judge might have obviated the need for a special committee. However, the permissible limits of chief judge inquiry are unclear. The Act does not expressly accord the power of limited inquiry to the chief judge. Although this power is recognized by Illustrative Rule 4(b), the Rule leaves ambiguous the contours and limits of the power.¹⁶⁵

¹⁶³ See ILLUSTRATIVE RULES, *supra* note 7, Rule 12 commentary at 31 (stating that the statute does not require "that the judge be permitted to attend *all* proceedings of the special committee" where the committee is engaged in investigative activity such as interviewing witnesses).

¹⁶⁴ See *supra* part I.C.1.a.iii.(C); see also § 372(c)(7)(B) (defining in broad terms what constitutes actionable "conduct" under the Act).

¹⁶⁵ See ILLUSTRATIVE RULES, *supra* note 7 (allowing the chief judge to make a limited inquiry to determine "(1) whether appropriate corrective action has been or can be taken without necessity for formal investigation, (2) whether intervening events have made action on the complaint unnecessary, and (3) whether the facts stated in

In one of these four matters, the complainant alleged that two district judges had attended a partisan fund-raising dinner also attended by the President of the United States. The chief judge requested the two judges to respond to the complaint, but one refused to respond and the other gave a terse, unhelpful response. A special committee was then appointed. The special committee concluded that there was no merit to the complaint because the two judges did not attend the dinner, but were merely in the building to meet the President before the dinner began. The record clearly showed that the complaint could have been disposed of without the use of a special committee if the judges had filed responses.

In three other matters, all from one circuit, the chief judge appointed a special committee without undertaking any factual inquiry at all. The chief judge did not even request a response from the judge complained against. In some or all of these matters, such a response from the judge, perhaps with some additional inquiry, could have permitted the chief judge to dismiss the complaint without a special committee.

In one of these three complaints, the complainant, a convicted criminal defendant, alleged, *inter alia*, that (1) the judge on several occasions during complainant's trial had dined with the prosecution team in full view of the jurors; (2) the judge and the judge's courtroom clerk deliberately eavesdropped on the jury's deliberations; (3) the judge instructed the clerk to keep the prosecutor informed as to how the deliberations were going; and (4) when the jury appeared deadlocked, the judge brought the jury back to the courtroom and browbeat the jury into convicting the complainant. Apparently, the special committee found no evidence to support any of these allegations. The chief judge possibly could have reached the same conclusion but instead chose not to conduct an inquiry.

In the second matter, the complainant, a litigant, alleged that (1) the judge should have recused himself because of certain financial interests; (2) the judge issued incorrect rulings as a result of this bias; and (3) the judge was systematically biased against products liability plaintiffs and lengthy trials. After the report of a special committee, the judicial council dismissed the complaint as merits-related. The council's order did not discuss the allegations of systematic bias against products liability plaintiffs and lengthy trials,

the complaint are either plainly untrue or are incapable of being established through investigation").

but these allegations probably could have been dismissed as frivolous for lack of any pleaded factual support. It is not clear why the chief judge, with or without a response from the judge, could not have dismissed the complaint on the same basis that the council did.

In the third matter, the complainant, a convicted criminal defendant, alleged, *inter alia*, that the judge (1) acted with bias and illicit motives against the complainant; (2) attempted to influence and intimidate the jurors against the complainant; and (3) permitted his law clerks to engage in improper financial dealings with business interests adverse to the complainant. The special committee requested and received a response from the judge, got the complainant to respond to written questions, and received additional documents from the complainant. The judicial council, adopting the special committee's report, dismissed the complaint, finding no factual basis for any of the complaint's allegations. The chief judge could have undertaken the same inquiry as the committee and dismissed the complaint on the same basis.

As stated previously, all three of these matters occurred in the same circuit. It appears likely that this circuit, at least at one time, adopted a more limited view of the permissible scope of chief judge inquiry than that of other circuits. In fact, at the time these three matters occurred, this circuit had no local rule, parallel to Illustrative Rule 4(b),¹⁶⁶ recognizing a power of limited chief judge inquiry. Nor did this circuit then have any local counterpart to Illustrative Rule 4(e), which states that "ordinarily a special committee will not be appointed until the judge complained about has been invited to respond to the complaint."¹⁶⁷ Nonetheless, there have been complaints to which the chief judge of this circuit has indeed requested a response from the judge complained against, although the chief judge may have felt that it would be inappropriate to inquire much further without appointing a special committee.

It is also worth noting that this is one of two circuits that produced the lion's share of "problem" chief judge dismissals noted in Part I.C. The apparent eagerness to appoint special committees in some matters may seem incongruous in a circuit which arguably has precipitously dismissed other complaints. A deep reluctance to undertake much chief judge inquiry—resulting in both dismissals and special committee appointments in matters

¹⁶⁶ *See id.*

¹⁶⁷ *Id.*

where further inquiry seems preferable—may explain, at least in part, both types of outcomes.

d. *Differences in Special Committee Procedures*

The field study revealed, in most instances, what general procedures special committees had followed. It also showed that there has been considerable experimentation within the basic limits established by the Act and, where applicable, the Illustrative Rules.

One notable difference in the circuits' special committee practices involves the engagement of an outside attorney-investigator to investigate the allegations of the complaint on the committee's behalf. Five of the eight circuits have never done this. In three of these five circuits, it appears that members of the special committee have themselves performed all investigative tasks and conducted all hearings. In the other two circuits, court of appeals' staff has been used in appropriate matters to interview witnesses. The circuit executive in one of these circuits explained that the circuit might hire independent counsel to present a matter "in a big, complex, paper-based case," but that none of the circuit's special committee proceedings had fit that description. The circuit executive stated:

We don't have the experience on our staff to handle that type of case. Judges on the committee have had the relevant prosecutorial experience to present such a case. There are also former judges who might be available. Investigating and presenting a case against a judge might also create a problem for our office in terms of future relationships. Generally, judges don't like to be investigated by their staff.

In the remaining three circuits, investigators have been hired in most special committee proceedings. Investigators were used in eight of the twenty-five special committee proceedings. In some of these eight proceedings, the investigator conducted a preliminary investigation, performing such tasks as interviewing witnesses, developing and reviewing evidence, and presenting a report to the committee. However, if hearings were necessary, as they were in all but one matter, the committee itself conducted them. In other proceedings, the investigator played a major role in the special committee's hearings. In all but one of these matters, the investigator assumed the function of examining witnesses at the hearing on the committee's behalf. In one matter, the special committee

delegated to the investigator the responsibility of conducting the entire evidentiary hearing.¹⁶⁸

There have also been differences in the role complainants have been permitted to play in special committee proceedings. Illustrative Rule 13 "leave[s] the complainant's role largely within the discretion of the special committee."¹⁶⁹ In seven of the fifteen special committee hearings studied, the complainant chose not to be involved in the hearings.¹⁷⁰ In four matters, the complainant testified at the hearing and/or presented written argument, but was not permitted to examine or cross-examine witnesses. In only two instances, both serious matters that resulted in a public and a private reprimand, was the complainant permitted to be involved in examining or cross-examining witnesses. In one, the complainant, a well-known attorney who both attended and was represented by counsel at the hearing, examined and cross-examined witnesses through counsel. In the other, the complainants, clerk's office employees, were permitted to be present only when testifying, but the complainants' counsel was permitted to be present throughout the proceedings. Although the complainants' counsel was not permitted to examine or cross-examine witnesses, counsel was permitted to suggest to the investigator, who conducted all of the direct examination, additional areas of inquiry for each witness.

e. Differences in Formation of a Special Committee

Four of the eight circuits sampled have always employed an ad hoc special committee in § 372(c) proceedings. In these circuits, each time the chief judge has had to appoint a special committee, the chief judge has named one for that particular complaint. There has never been any standing committee that remains ready to investigate § 372(c) complaints when necessary. Three other circuits also presently employ ad hoc special committees, but have had a standing special committee in the past. No information is available

¹⁶⁸ In the 25 special committee proceedings reviewed, hearings were held in 15 of them, the majority of which lasted from between two and seven days. In nine of the remaining 10 proceedings reviewed, the judicial council dismissed the complaint.

¹⁶⁹ ILLUSTRATIVE RULES, *supra* note 7, Rule 13 commentary at 31.

¹⁷⁰ In three of these matters, the complainant was a public prosecutor. In one, the complainants were lawyers' associations, and in another, they were federal judges. In two instances, it was not clear what role, if any, the complainant may have played at the hearings.

about whether the remaining circuit has employed a standing committee.

Among the circuits sampled, therefore, there has been a trend toward the use of ad hoc special committees. All of the chief judges to whom we spoke and who addressed the question favored the ad hoc approach. One said, "With an ad hoc committee, you can tailor the membership to fit the needs of that particular investigation. . . . The downside . . . is that you may have new judges each time who are not familiar with the special committee process" According to another chief judge, "You have to tailor the special committee to the problem at hand. If you change it in a particular case, you're saying the standing committee isn't fit for that matter. And, you don't want to establish an elite among judges."

f. Judicial Conference Review

The Act permits a judge or a complainant to petition the Judicial Conference for review of a judicial council order issued under § 372(c)(6) following the report of a special committee. The Act provides,

A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph.¹⁷¹

Section 331 provides, in turn,

The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee.¹⁷²

As of January 1, 1992, the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders had issued nine orders disposing of petitions for review.¹⁷³ In only two of

¹⁷¹ § 372(c)(10).

¹⁷² 28 U.S.C. § 331 (1988 & Supp. IV 1992).

¹⁷³ It should be noted that in six of the nine decisions of the Judicial Conference Committee, no special committee was ever convened. These were petitions for Judicial Conference review of judicial council orders denying petitions for review of chief judge dismissals. Section 372(c)(10) of the Act makes it clear that such judicial

these instances has the Judicial Conference Committee disturbed the ruling or sanction of the judicial council. In the first of these two cases, the Judicial Conference Committee issued a public reprimand after the circuit judicial council, in a three to three vote, had concluded the proceeding without any sanction. In the second matter, the Judicial Conference Committee ordered a private reprimand where the circuit council had voted to issue a forty-two-page public order that would have been tantamount to a public reprimand. The complaint in that case alleged, *inter alia*, that the judge had involved himself in a heated public wrangle with the complainant, a well-known attorney, and had stated from the bench that he would not permit the attorney to practice in his courtroom. A former chief judge argued that the decision of the Judicial Conference Committee to make the public reprimand private may have been a mistake. According to this judge, "I rather imagine the committee did not want to undermine the authority of a new judge, at the very outset of his career, who had acted wrongly but under some provocation. But it was seen as a cover-up." In this matter, the local judges, with greater knowledge of the situation and of the players involved in the complaint, preferred a more stringent sanction than the one meted out by a distant national authority. Thus, the matter acts as a powerful counterexample to the arguments advanced by those who assume that local judges are more lenient and protective than outside judges.

g. Summary and Conclusions

In reviewing the 469 complaints examined in the field study, we found that the vast majority (approximately ninety percent) fell outside the purview of the Act and were properly dismissed. A small minority of the dismissals were problematic, largely due to a failure to inquire into allegations that conceivably, but not probably, could have been true. The balance of the complaints led either to corrective action or to the appointment of a special investigative committee. Generally, corrective actions have served to enforce the

council orders denying petitions for review are final and conclusive, and cannot be appealed to the Judicial Conference. Only judicial council orders issued under § 372(c)(6), following the report of a special committee, can be appealed to the Judicial Conference. Thus, the Judicial Conference Committee had no statutory jurisdiction to review these orders. In two of these matters, the committee so ruled. In the other four, all of which arose in the first years of the Act, the committee reviewed and affirmed council orders.

Act in a prospective manner. Special committee investigations, by contrast, have led to a retrospective enforcement of the Act through occasional public and private reprimands, as well as through an impeachment.

As with the treatment of dismissals, examining corrective actions and special committee investigations revealed that a small minority contained problematic applications of the Act. The problems with special committees were mostly related to the unnecessary appointment of a special committee when a more extensive chief judge inquiry might have detected a complaint's lack of substance. In the corrective actions, the problems related to a failure to document the action and extend the benefit to the complainant.

Overall, our review of the complaints uncovered a serious effort to enforce the Act by pursuing substantial allegations of misconduct and treating summarily complaints that were devoid of substantial allegations. Staff support in scrutinizing the record and drafting orders responding to the allegations appears to result in well-documented outcomes. Reluctance on the part of the chief judge to delegate or to conduct a limited inquiry seemed to be linked with a significant portion of the problematic matters we encountered.

*D. What Information Is, or Is Not, Available in Each
Court to Permit Meaningful Public, Media, or
Congressional Oversight?*

One important goal of the Act is to assure the public of a vehicle for filing complaints against judges. In the words of one chief judge, "The Act is useful symbolically, it reassures the public that anyone can file a complaint at any time. That's important." In order for this goal to be realized, the public must also be assured that complaints will be taken seriously, and that the disciplinary mechanism not only exists formally, but is operating satisfactorily. This assurance requires some form of meaningful public, media, and congressional oversight of the operation of the disciplinary process.

This need for oversight, however, is in tension with another important policy embodied in the Act—the goal of maintaining the confidentiality of at least some aspects of the § 372(c) process. "The statute and its legislative history exhibit a strong policy goal of protecting judges from the damage that could be done by publiciz-

ing unfounded allegations of misconduct.”¹⁷⁴ All of the chief judges spoken to agreed that some measure of confidentiality was important. As one said, “If every complaint is in the newspaper every time, that would undermine public confidence in the judiciary. Chief judges would then have to spend enormous time refuting frivolous allegations.”

1. The Act and the Rules

The Act does not address most of the tension between the goals of oversight and confidentiality. The Act requires that “[e]ach written order to implement any action under paragraph (6)(B) of this subsection, which is issued by a judicial council . . . shall be made available to the public through the appropriate clerk’s office of the court of appeals for the circuit.”¹⁷⁵ This provision requires public availability for only those judicial council orders that follow a special committee investigation, since only those orders are issued under § 372(c)(6)(B). The Act itself does not require the public availability of chief judges’ orders of dismissal and judicial council orders on petitions for review.

In contrast, the Act’s confidentiality provision does not unequivocally prohibit making those orders publicly available. The Act states that all “papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding” unless certain requirements are met.¹⁷⁶ The reference to “investigations” is ambiguous, but can be plausibly interpreted to refer only to special committee investigations and not to a chief judge’s initial inquiry into a complaint. Thus, the Act leaves open the question whether the many orders issued without investigation by a special committee may be disclosed.

The Illustrative Rules attempt to fill this gap. Illustrative Rule 16(a) provides that

[c]onsideration of a complaint by the chief judge, a special committee, or the judicial council will be treated as confidential business, and information about such consideration will not be disclosed by any judge or employee of the judicial branch or any

¹⁷⁴ ILLUSTRATIVE RULES, *supra* note 7, Rule 17 commentary at 43.

¹⁷⁵ § 372(c)(15).

¹⁷⁶ § 372(c)(14).

person who records or transcribes testimony except in accordance with these rules.¹⁷⁷

Thus, as the commentary to Rule 16 states, "rule 16(a) applies the rule of confidentiality more broadly [than the Act], covering consideration of a complaint at any stage."¹⁷⁸

Illustrative Rule 17(a) resolves the matter by providing that all orders of the chief judge and judicial council "will be made public when final action on the complaint has been taken and is no longer subject to review."¹⁷⁹ When a complaint is disposed of without appointment of a special committee, however, "the publicly available materials will not disclose the name of the judge complained about without his or her consent."¹⁸⁰ Furthermore, the name of the complainant will not be disclosed "unless the chief judge orders such disclosure."¹⁸¹ Thus, the Rules make confidential the files in each complaint for which a special committee is not appointed, but do require that a sanitized version of the final order of dismissal be made publicly available. The commentary to Rule 17 explains that these provisions were intended to accommodate "the congressional intent to protect a judge from public disclosure of a complaint, both while it is pending and after it has been dismissed if that should be the outcome," with the goals of "assuring the public that the disciplinary mechanism is operating satisfactorily . . . by making the process more open" and creating a "body of published precedent" to guide decision-makers.¹⁸²

Rule 17 also attempts to maximize the degree of oversight that will be possible, consistent with confidentiality concerns, by designating the Federal Judicial Center (FJC) in Washington, D.C., as the public repository of § 372(c) orders. Rule 17(b) provides that records of orders

will be made public by placing them in a publicly accessible file in the office of the clerk of the court of appeals The clerk will send copies of the publicly available materials to the Federal Judicial Center . . . where such materials will also be available for public inspection. In cases in which memoranda appear to have

¹⁷⁷ ILLUSTRATIVE RULES, *supra* note 7, at 39.

¹⁷⁸ *Id.* at 40.

¹⁷⁹ ILLUSTRATIVE RULES, *supra* note 7.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 44.

precedential value, the chief judge may cause them to be published.¹⁸³

Filing all public orders with the FJC would permit the convenient public review of orders, eliminating the need to travel to fifteen courts situated all around the country in order to perform a thorough review.

Assessing how well the Illustrative Rules actually permit effective oversight of the circuits' administration of the Act is beyond the scope of this project. No data exist to suggest whether particular persons or institutions¹⁸⁴ who have attempted, or might attempt, oversight would find the amount of information that the Illustrative Rules make public adequate. Moreover, no attempt is made to weigh whether or not any deficiencies in the circuits' accountability are justified by the competing confidentiality concerns. Instead, this Section examines only the extent to which the circuits have fully implemented the Illustrative Rules' approach.

2. The Circuits' Practices

In practice, the effectiveness of this compromise depends largely upon the circuits' cooperation in administering the Act to permit the Rules' oversight goals to be realized. For that to happen, each circuit would need to: (1) issue chief judges' orders dismissing complaints of judicial misconduct that provide sufficient discussion of the complaint's allegations and of the grounds for dismissal; (2) make those orders publicly available at the office of the clerk of the court of appeals; and (3) file those orders with the FJC. All three of these actions are commonly understood by chief judges to be entirely voluntary. Section 372(c)(3) of the Act does state that a chief judge may dismiss a complaint "by written order stating his reasons." Thus, there is a strong argument that the Act requires chief judges to include reasons for their conclusions. Nevertheless, most of the chief judges interviewed appeared to view the inclusion of reasons as within the discretion of the chief judge.

As of October 1, 1993, twelve of the fifteen courts covered by the Act had implemented all three of these prerequisites for oversight. Today, a member of the public can perform a reasonably effective and meaningful review of these courts' administration of

¹⁸³ ILLUSTRATIVE RULES, *supra* note 7.

¹⁸⁴ Such persons or institutions include the press, Congress, and the Judicial Conference.

the Act. This state of affairs not only helps meet the oversight needs of the public, but may also enhance the judiciary's public status by demonstrating that the judiciary is an institution willing to police itself. A major benefit to the judiciary is lost if confidentiality is applied so broadly as to prevent the public from learning that a court is doing a good job. As a chief judge in one of these courts noted,

After a newspaper article accusing the judiciary of a cover-up in [a] special committee matter [which resulted in a private, rather than a public, reprimand], a local reporter wanted to look at our § 372(c) files. We were able to show him files of reasoned orders. He was very surprised. I think he went away thinking this was an honest ship.

For some of these courts, all the public orders issued since the inception of the Act may not be available. In some cases, orders were made public only when the court adopted the relevant provisions of the Illustrative Rules.¹⁸⁵

Three courts' practices preclude this degree of oversight for a number of different reasons. Two still cling to the practice of issuing conclusory form orders of dismissal for many complaints.¹⁸⁶ The remaining circuit has adopted the Illustrative Rules, including the requirement of depositing public orders with the FJC. This circuit, however, has modified Illustrative Rule 17 to provide that orders disposing of complaints without appointment of a special committee shall be kept private and confidential.¹⁸⁷ Dismissal orders are therefore not available to the public in the clerk's office, and they are not sent to the FJC. This circuit's dismissal orders are generally as thorough and careful as the orders in any other circuit and would provide positive recognition for the circuit if they were made available for public oversight. Nonetheless, the circuit currently has no intention of reconsidering this

¹⁸⁵ Some circuits, upon adopting the Illustrative Rule 17(b) requirement of filing public orders with the FJC, filed only prospectively and did not deposit prior public orders with the FJC. Nevertheless, for these circuits, a complete collection of all orders is available on-site at the clerk's office.

¹⁸⁶ Both of these circuits may abandon, or at least lessen, this practice in the future. The chief judge of one of these circuits intended to delegate much more of the task of drafting dismissal orders, while the chief judge of the other circuit recognized the importance of giving reasons for orders and intended to deviate from the previous chief judge's practice of using conclusory form orders.

¹⁸⁷ Cf. ILLUSTRATIVE RULES, *supra* note 7, Rule 17(a) (providing for public access to complaint materials once final action has been taken).

policy. On the contrary, the two chief judges we interviewed in this circuit vigorously defended it. One argued:

If the complaint is insubstantial, it's not in the public interest to make information about the complaint public, even if the chief judge's order says it's frivolous. The media does not handle these things responsibly. A newspaper would say that Judge X has had sixteen complaints filed against him, even though they were all dismissed as frivolous. That concern is not fully addressed by sanitizing orders. Sanitizing is a good idea if you're going to make orders public. But, the press is good at figuring out who it is. . . . In any case, there's no reason to make the chief judges' orders public, so why do it?

The other chief judge aired similar views:

Our circuit's practice . . . protects the innocent. An efficient judge, who won't put up with anything from lawyers, may attract more complaints. That doesn't mean anything. . . . As for issuing public, but sanitized, orders of dismissal, I don't know what purpose that would serve. If it were sanitized, it wouldn't satisfy the press. I haven't heard any complaints that in this circuit we're making public too much or too little The public is generally not aware of the whole procedure, so this question of making orders public doesn't affect public confidence.

3. Summary and Recommendations

In conclusion, with some notable gaps, the circuits have generally adopted practices that allow oversight to the extent envisioned by the Illustrative Rules. Twelve of the fifteen courts covered by the Act have essentially done everything the Rules permit to make the grounds for dismissals available to potential overseers. Although the remaining three courts have not, two of the three have either taken steps, or expressed an intention to take steps, to achieve greater accountability in the near future.

Given the importance of accountability, a uniform national rule (imposed either by statute or by the Judicial Conference) may be desirable in this area. This rule could include requirements that each court make sanitized dismissal orders publicly available in the clerk's office. For each of those orders, a statement of the complaint and the grounds for dismissal would be provided, and each order would be filed in a central public repository.¹⁸⁸

¹⁸⁸ Before such a rule is adopted, however, judges and other interested parties should be given the opportunity to air contrary views.

This concludes the discussion of issues arising out of the disposition by chief judges and judicial councils of formal complaints filed under § 372(c). Judicial discipline in the federal courts, however, is by no means limited to this formal machinery. To get the full picture, it is also necessary to examine informal methods of judicial discipline.

E. What Informal Actions Have Chief Judges or Judicial Councils Taken Regarding Matters That Fall Within the Potential Reach of the Statute?

"In my experience, the most serious complaints never hit the complaint process."

"There are more remedial actions taking place outside the complaint process than following formal complaints."

These comments, made by two former chief judges, capture the experience in most of the circuits visited. In every circuit, chief judges reported informally addressing and resolving serious allegations of judicial disability or patterns of misconduct. Some chief judges view formal, adjudicative procedures as a last resort, laden with disadvantages, particularly for dealing with complaints that do not allege criminal or impeachable conduct. These chief judges prefer a voluntary resolution to the cumbersome, formal fact-finding process that generally only leads to a public reprimand.

The chief judges' preference for informal, corrective processes manifested itself more fully in the absence of a formal complaint. After a complaint had been filed, the statutory process channeled the chief judges' responses, leaving little time or flexibility for addressing patterns of behavior that a single incident might represent. Options for informal investigation of charges become limited. Informal approaches to resolving the problem, perhaps initiated by friends of the named judge or by surrogates of the chief judge, are displaced by the formal procedures that must be followed in responding to the allegations in the complaint.

This study's findings corroborate and expand on those of Collins Fitzpatrick, Circuit Executive in the Seventh Circuit. In a "general [national] survey of confidential, informal reprimands against judicial officers," Fitzpatrick found that "[o]ver the last several years, there have been at least nine federal judicial officers who retired after a judicial misconduct complaint was filed or was looming in

the background."¹⁸⁹ He added that, in his experience, "the most serious judicial problems have not been initiated with a formal complaint."¹⁹⁰

The findings of this study also concur with the results reached by Professor Geyh in his national survey of current and former chief judges. He asked these judges to rank eight types of disciplinary mechanisms in terms of frequency of use and effectiveness as a deterrent to judicial misconduct. The judges ranked informal actions as the most frequently used. Section 372(c) proceedings ranked fifth, behind informal actions of the chief circuit judge, informal actions of the chief district judge, informal actions by peer judges, and judicial actions (such as mandamus and judicial review).¹⁹¹ Informal chief judge action and § 372(c) action were both deemed to be more effective than other options and "significant" general deterrents to judicial misconduct. Informal action rated slightly more effective than § 372(c) actions.¹⁹²

This Section examines the role that informal activity plays in meeting the goals of the Act and the manner in which chief judges have implemented that role. It explores the advantages and disadvantages of formal versus informal approaches and summarizes examples of the type of informal activity encountered.¹⁹³

1. Role of Informal Activity

What role does informal activity play in the grand scheme of judicial self-regulation? How does informal activity relate to enforcing the Act? Does it displace the Act, complement it, or act in some other way? The short answer is that informal activity and the formal mechanisms of the Act seem to operate synergistically, with each approach reinforcing the other. Informal activity operates in the shadow of the Act, which looms in the background as a disfavored but imposing alternative.

¹⁸⁹ Collins T. Fitzpatrick, *Misconduct and Disability of Federal Judges: The Unreported Informal Responses*, 71 JUDICATURE 282, 283 (1988).

¹⁹⁰ *Id.*

¹⁹¹ See Geyh, *supra* note 26, app. (Question 1).

¹⁹² *Id.*

¹⁹³ This research was not designed to uncover all instances of informal activity. The instances described below were discovered incidentally during discussions with chief judges about formal and informal processes, as well as during discussions with clerks and circuit executives. The following reports should be treated accordingly, as illustrative, rather than comprehensive, examples of the process.

The compatibility between the Act and informal processes is not surprising. The Act was designed to facilitate self-regulation by the judiciary. A premise underlying the judiciary's approach to the pending legislation was that informal actions of chief judges and judicial councils already addressed major problems regarding misconduct.¹⁹⁴ In Judge Browning's words, "[i]t was an informal process, simple and generally very effective."¹⁹⁵ Before and after the Act, the goals have been to correct problems and to maintain the independence and integrity of the judiciary.

One chief judge, who believes that "the informal process is a critical part of the whole thing," says that the Act "gives you an entree you wouldn't otherwise have when you start to poke into a judge's personal business." While chief judges examined such behavior before 1980, "it's easier [now] because the Act is there." Regarding a disability situation, another chief judge said that

behind the velvet glove, there has to be an iron fist, with other judges threatening to file complaints. [The complaint process is] there in the background; other judges know it. In the one case [referring to a matter in which the chief judge talked to a judge's spouse about retirement after the judge resisted the suggestion] the judge's spouse knew the Act was there and thought the worst thing in the world would be a § 372(c) complaint at the end of the judge's illustrious career.

How does the combined formal/informal process work? The following is a brief sketch of the major elements of the process as gleaned from interviews with chief judges and circuit executives.

2. Sources of Informal Complaints

In the absence of a complaint, how does a chief judge learn about and confirm the existence of a problem? While the network of informal information available to the chief judge varies as widely as the personalities of the chief judges, certain institutional sources appear to play a similar role in many circuits.

Often, the circuit executive's office channels complaints to the chief judge. Four of the six circuit executives interviewed regularly received informal complaints, generally from lawyers. The frequency of these contacts ranged from a couple a month to once a year.

¹⁹⁴ See NCJDR Hearings, *supra* note 111, at 121 (May 15, 1992) (testimony of Judge James R. Browning).

¹⁹⁵ *Id.*

The substance of the complaints ranged from routine problems regarding delay to serious problems relating to disability. Only two circuit executives indicated that their office never got involved in informal misconduct issues. Two former chief judges also reported relying on quarterly statistical reports of each judge's caseload, compiled in the circuit executive's office. These reports were most useful in addressing the issue of whether an instance of delay was part of a pattern.

In addition to the informal complaints from attorneys that are filtered through the circuit executive's office, all of the chief judges and former chief judges interviewed reported that they received informal information directly from lawyers or from the U.S. Attorney's office. Most chief judges recognized, as one put it, that "it's very difficult for a practicing lawyer to file a complaint [because] they're in constant practice before the judge." That judge, however, also recognized that lawyer complaints "are the complaints that tend to require some action or caution on my part. So, the informal process of getting lawyer comments is very important." This chief judge opens the channels of communication with the bar by making certain that "they understand [I'm] interested in the institution of the court." Contact with the bar is crucial because "the bar knows the most about misconduct; there must be some way to tap into that knowledge."

Other chief judges mentioned receiving information about judicial conduct from chief district judges, chief bankruptcy judges, and other judges throughout the circuit. After receiving information about a judge serving in a district court, the chief judge of that court is often instrumental in confirming or rejecting the accuracy of the report. If there is a basis to proceed, the chief district judge may play a critical role in developing the appropriate informal response. One chief judge received information about misconduct from a departing chief judge; passing along such information is probably a routine part of the transition process.

Three chief judges learned about disability situations from colleagues on the court of appeals. These judges observed signs of deterioration in their peers during oral argument, conferences, or lunch. Appeals from district court actions sometimes also include allegations of misconduct relating to the demeanor of the trial judge. In one such instance, the lawyers argued that a district judge should not be permitted to continue to sit in the matter because of an age-related disability. The clerk of the court of appeals in that

instance brought the matter to the attention of the chief judge, who was not a member of the panel assigned to the case.

In two instances, criminal investigative bodies generated information that stimulated a chief judge to investigate a matter. One was related to a grand jury proceeding, which did not produce an indictment but raised questions about the fitness of a non-Article III judge; the other was related to an FBI investigation of a charge that the victim did not want to pursue. Other sources of informal complaints include jurors, deputy clerks and other court staff. In half of the circuits, at least one instance of possible misconduct came to the chief judge's attention via the media—once by television and the rest through newspapers. One chief judge has a clipping service that includes articles about federal judges. In one instance, the attorney for a victim of alleged misconduct contacted the chief judge directly, and this contact led to mediation of a dispute between the judge and the informal complainant.

3. Investigation and Inquiry

Inquiries into informal complaints frequently follow different paths than the formal processes. First, a chief judge must screen the information. As one chief judge put it, "lawyers who know you will complain, but not usually about things you would act on." Generally, a chief judge will seek additional information to confirm or refute the claim before confronting the judge. Second, confidentiality concerns are dictated by common sense and fairness, not by the strictures of a statute. And third, chief judges appear more likely to enlist the chief district judge to assist in confirming or rejecting the allegation. The chief district judge may have local sources of information and contacts that are less accessible to the chief judge of the circuit. As one chief judge of a circuit noted, the complaint process does not give the chief judge of the district any role to play. In the informal process, however, chief judges of the circuit tend to treat the chief judge of the district as an ally in responding to a potential problem.¹⁹⁶

¹⁹⁶ In one instance that occurred before 1980, a chief judge responded to an informal but serious allegation regarding demeanor by asking a well-known member of a local metropolitan bar to conduct an informal survey among local lawyers. When the survey confirmed the informal allegation, the chief judge proceeded to deal with the problem by confronting the judge.

4. Bargaining in the Shadow of the Act

The inquiry and problem-solving aspects of the informal process fit together. Discussing the situation with the chief judge of the district may naturally lead the circuit chief to involve the district chief in developing a strategy to remedy the situation. When questions are raised regarding a judge's physical or mental ability to continue on the bench, the task of setting a strategy looms large. Confronting the issue constitutes, in the words of one chief judge, "an act of friendship and responsibility." Deciding who (for example, the chief circuit judge, the chief district judge, or another judge) should approach whom (for example, the judge, a friend, or a family member) opens complex issues of high diplomacy. It is hard to imagine a statutory formula that could adjust to the myriad human relationships involved.

Although these informal transactions are more than mere commercial exchanges, bargaining chips may nevertheless exist that would induce a judge to resign or retire on disability, rather than contest claims of physical or mental unfitness. Similarly, various influences might lead a judge to acknowledge a problem of delay or demeanor and to take steps to correct it.

When the first signs of problems arise, the informal approach generally involves trying to assist the judge in continuing to perform the work of the court. In some instances, this entails altering the mix of cases to coincide with changes in ability or temperament; in other instances, it entails providing additional staff or other resources to address a backlog of cases. The goal is to create rehabilitative remedies.

In more serious instances involving questions of disability, a dignified retirement may be the ideal resolution of the issue. Here, the presence of the Act and the possibility that someone might file a complaint (or that the chief judge might identify a complaint) may serve to induce a voluntary retirement rather than a bitter and protracted disability proceeding. For a senior judge, the prospect that the chief judge of the circuit might refuse to certify the judge as eligible to continue receiving the salary of the office presents an equally strong reason to accede.¹⁹⁷ In contrast, for a nonsenior judge, the ability of a judicial council under § 372(c)(6)(B)(iii) to

¹⁹⁷ See § 371(f)(1) (Supp. IV 1992) (providing that judges must be certified each year by the chief judge in the circuit as having met the requirements set forth in the statute).

request voluntary retirement, without regard to the length of service requirements, creates an incentive to invoke the formal process, although perhaps in an uncontested manner.

In discussing voluntary retirement, chief judges and circuit executives noted the importance of addressing issues of timing and other factors that might affect the terms and conditions of retirement. For example, the availability of chambers may be a critical factor. More than one chief judge has interpreted the rules liberally to permit a retired judge to maintain an office if space is available.

In two situations involving possible removal of a bankruptcy judge¹⁹⁸ pursuant to § 152(e), the option of invoking the formal process played a part in informal negotiations. In one instance, the bankruptcy judge was persuaded not to apply for renewal; in another, the circuit executive treated a serious informal complaint as a reason for collecting information that would be relevant to renewal.

5. Formal Versus Informal Proceedings

In almost all situations, chief judges remain reluctant to shift to the formal process even after an informal complaint has been corroborated. In comparing the advantages and disadvantages of the two approaches, chief judges uniformly maintain that the informal process has distinct advantages that far outweigh any drawbacks. One chief judge said that "it's always better to [deal with a situation] informally. You get the right result without unnecessarily humiliating or degrading anyone." Similarly, another chief judge said that identifying a complaint pursuant to the 1990 amendments "is a big step for a chief judge; you'd try to settle it amicably first If you identified a complaint you'd establish an adversarial relationship with the judge." Using the statutory power to "identify" a complaint where none has been filed thrusts the chief judge to the forefront as the prime mover of the process. One chief judge articulated a general principle that seems to speak for many:

The informal process is a teaching mode, not a disciplinary mode. I can talk to a judge without the judge getting defensive. I can get real corrective action, not mere grudging changes. I see the

¹⁹⁸ See 28 U.S.C. § 152(e) (1988) (providing that bankruptcy judges may only be removed for incompetence, misconduct, neglect of duty, or disability, and only in limited circumstances). We did not encounter any instances in which removal of a magistrate judge appeared to be under consideration.

formal process as what I must use where I have failed in the informal process.

Related to the educational benefits of the informal process is the flexibility that it permits in shaping a remedy. As one chief judge stated, "the informal process is more flexible; you can make the remedy fit the problem." For example, in one matter, a judge appointed a committee of three judges with appropriate expertise to review allegations of criminal misconduct. As noted above, another chief judge had a lawyer survey other lawyers to identify and corroborate a problem. This survey, in turn, gave shape to the remedy.

These benefits of the informal process may explain why chief judges have rarely used the newly created statutory power to identify a complaint.¹⁹⁹ Only one instance of its use was uncovered in this study (although the low number may reflect the fact that the amendment did not take effect until March 1991). In that instance, a chief judge received a specific, but anonymous, complaint from a lawyer, alleging misconduct by a district judge. The chief judge identified the complaint and presented it to the district judge for a response. Given the specificity of the complaint and the seriousness of the allegations, identifying a complaint did not seem to put the chief judge in an adversarial position. The allegation required a response and the district judge responded by changing a recusal policy that had failed to prevent a serious conflict of interest.

6. Disadvantages

Using informal processes may have disadvantages. Because there is no record of complaints and action taken, accountability is likely to be limited. This affects the process in two primary ways. First, the complainant may not know whether action was taken. When the appropriate response is to seek corrective action short of retirement, the correction may be invisible to the public and the person or group that registered the complaint. In this instance, justice will not be seen to be done even if the informal approach successfully corrected the problem.²⁰⁰ Second, the public will

¹⁹⁹ See § 372(c)(1) (amending the Act to enable chief judges to identify a complaint without its having been filed).

²⁰⁰ This disadvantage can be avoided, of course, by the chief judge, who can communicate the informal action to the complainant.

have no idea that complaints have been presented. Any failure to respond to serious informal complaints will remain as invisible as the complaints themselves. Only the complainant retains the power to overcome this disadvantage by formalizing the complaint or by disclosing the failure of the chief judge to respond.

Although the lack of accountability is a serious disadvantage, it seems inextricably linked to the advantages of the informal process. If an informal informant is dissatisfied with the chief judge's response, filing a complaint remains an option.

7. Examples

Against the backdrop of the chief judges' and circuit executives' views about the informal process, capsule summaries of informal actions follow. These examples were used by chief judges and circuit executives to illustrate their discussions and should not be seen as an exhaustive review of informal activity.

a. *Disability Examples*

The most extensively discussed and most dramatic types of informal actions involve questions of disability. Chief judges and former chief judges from every circuit spontaneously discussed instances of disability that they faced during their tenure. Twenty-five instances were uncovered.²⁰¹ The details of the specific matters do not venture beyond what one might expect. They represent a host of physical and mental symptoms ranging from a memory afflicted by Alzheimer's disease to an inability to speak as

²⁰¹ For several reasons, this is surely a conservative estimate, representing the absolute minimum amount of such activity in those circuits during the span of service of the chief judges and former chief judges. First, any overlap or double-counting between matters discussed by current and former chief judges and by circuit executives was eliminated. Second, accounts of these instances did not result from a direct question seeking a quantitative estimate. Rather, each matter arose as an example in the course of discussing the advantages and disadvantages of formal versus informal processes. It is likely that some of the judges would have recounted more situations if asked. Indeed, one former chief judge indicated that the total number of informal actions, some of which must have related to disabilities, was two to four per year. Yet, for that circuit, only one specific example of a disability was recounted. As that chief judge said, "You don't keep score." Third, in three of the eight circuits, former chief judges were not interviewed. In the other circuits, however, it was generally the former chief judge, or, in one instance, the circuit executive, who had the most experience with disability matters. The current chief judges often simply had not spent sufficient time in the position to have had much experience with disability cases.

a result of a stroke. For the most part, they result from aging and amount to a natural byproduct of a system in which judges have life tenure.

The typical approach to disability matters illustrates the advantages and disadvantages of informal versus formal systems. Judges have crafted ways to handle the "act of friendship and responsibility" so as to meet the needs of the situation without imposing needless pain on a colleague. One chief judge, caught between the denial of a problem from a distinguished colleague and threats from other judges to file a formal complaint, met with the judge's spouse and persuaded her to convince the judge to end his career while his reputation remained outstanding. Finally, one judge told a story of how a senior judge's death resolved the problem: "I knew he couldn't do any more work, but I didn't tell him. I knew he'd die soon. If I'd told him, he'd have died that day." Making judgments about situations like this is the largely untold story of responding to problems of disability and aging. The above presents only a glimpse into the total story.

b. *Delay Examples*

Four of the five former chief judges and one current chief judge mentioned that they used informal approaches to deal with problems of delay. One chief judge reported great success in attacking delay issues by routinely reviewing the quarterly caseload reports for each district and circuit judge. This judge developed and applied criteria to identify early warning signals of serious logjams in the early stages of litigation and called the judges whose quarterly reports suggested problems.

Another former chief judge reported that the judicial council received reports under the Civil Justice Reform Act, identified problems, and discussed possible solutions. In another circuit, the circuit executive brought the names of judges who appeared to have backlog problems to the attention of the chief judge. Together they would send a constructive letter, offering assistance to address the backlog.

Yet another former chief judge indicated that the statistical reports on caseload delays supply much better information than the occasional litigant complaint.²⁰² This former chief judge ap-

²⁰² Even so, such complaints may serve the purpose of providing an opportunity to talk with the judge about the situation and to explore constructive ways of dealing

proached judges even after dismissing a complaint of delay and explored ways to attack the underlying problem. The very act of dismissing the complaint reinforces the informal process by presenting the chief judge as an ally who is truly interested in resolving the problem, not in disciplining a colleague.

Another former chief judge institutionalized the issue of delay by creating a "sixty day list" which catalogs cases pending sixty days after becoming decisional in the court of appeals. The list is presented each month at the meeting of the court of appeals, and each judge is required to explain why his or her case remains on it.

A chief judge reported addressing one district judge's chronic problem of delay by enlisting the support of the entire district court. He simply called the chief district judge's attention to the problem and let the court determine how to deal with it. In this instance, the district judges assisted in resolving the problem by accepting the reassignment of cases from the judge's backlog.

The amount of informal activity dealing with issues of delay appears consistent with the findings of the Geyh survey.²⁰³ In the Geyh survey, chief judges rated Civil Justice Reform Act reports and informal chief judge action at the district or circuit level as the most effective "measures for remedying judicial neglect and unjustified delay."²⁰⁴ Both were rated approximately halfway between "somewhat effective" and "very effective" on the scale used in the questionnaire. Section 372(c) actions, in contrast, were rated slightly less than "somewhat effective."²⁰⁵

c. *Misconduct Examples*

Informal processes are sometimes used, with apparent effectiveness, to deal with complaints that would be cognizable under the Act, but which come to the court's attention through informal channels. In one instance, an informal action short-circuited a serious public outcry. A district judge used a derogatory term to

with it. In one instance, the court took a district judge off the docket for a full year to give him the opportunity to reduce the backlog.

²⁰³ See Geyh, *supra* note 26, app.

²⁰⁴ *Id.* (Question 13). The Civil Justice Reform Act employs various techniques to reduce problems of cost and delay in U.S. District Courts. See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 103, 104 Stat. 5089, 5090 (codified as amended at 28 U.S.C. § 471 (1988 & Supp. IV 1992)). These techniques include the requirement of an expense and delay plan, advisory groups, and training programs for court personnel. See *id.* §§ 477-478, 480.

²⁰⁵ See Geyh, *supra* note 26, app. (Question 13).

refer to a minority group. An attorney who was not involved in the litigation complained to the local newspaper about the judge's language and sent a letter to the chief judge. The chief judge of the circuit discussed the matter with the chief judge of the district, who in turn discussed the matter with the district judge. The district judge apologized to the parties and their attorneys on the record, and the matter was resolved. In other circuits, similar language was the subject of formal complaints that were not resolved so effectively.

Three chief judges reported using informal processes to deal effectively with reports of alcohol problems. In one instance, the judge with the alleged problem chose senior status. Continued certification and assignment of staff to that judge became contingent upon satisfactory handling of a specific caseload. Another chief judge delegated authority to a judge who had administrative responsibility for the lower court. The latter judge conducted an informal investigation and then spoke to the judge who had the problem. The third chief judge recounted a pre-Act situation in which a judge was drinking too much at lunch. A colleague who was a close friend spoke to the judge and remedied the situation.

Very few instances of sexual misconduct were mentioned by chief judges or circuit executives, but one chief judge expressed the opinion that such matters are the "untold story" of judicial misconduct. In two instances, however, chief judges did report dealing with issues of sexual misconduct by a judge. In one case, a law enforcement agency informed the chief judge about allegations of sexual misconduct that the victim did not wish to pursue on a criminal basis. The chief judge informed the victim of the existence of the § 372(c) process, but the victim declined to come forward. Section 372(c) at that time did not give the chief judge the power to identify a complaint.²⁰⁶ In the chief judge's opinion, the matter may have had a deterrent effect on the judge, who was never again accused of a similar offense, and on other judges, who learned of the matter. In the other instance of alleged sexual misconduct, the chief judge mediated a dispute between a potential complainant and a judge. Neither party wanted to proceed through formal processes and the dispute was successfully resolved with the chief judge's assistance. Testimony presented to the Commission about allegations of sexual harassment of female law clerks by federal judges

²⁰⁶ See *supra* note 199.

tended to corroborate the assessment that there was an "untold story" here.²⁰⁷ The above two instances and the testimony presented to the Commission may represent the beginning of the telling of that story.

In the area of alleged sexual misconduct, few successful uses of informal processes were uncovered. It is likely that increased public attention to this problem, especially in the context of sexual harassment of law clerks, will test the ability of chief judges to fashion informal remedies to address the unique problems of law clerks in temporary and highly personal positions. We also expect that the relative visibility and formality of the § 372(c) process will deter its use by law clerks. Separate grievance machinery may be necessary to deal with complaints filed by judicial clerks and other court staff.

Two chief judges reported situations that involved serious charges of possible criminal misconduct. In one, the grand jury failed to indict a bankruptcy judge, but the chief judge nevertheless appointed an informal committee to review the grand jury records and determine whether there were violations of the Act. In another instance, the chief judge received an anonymous complaint that a judge was exceeding the limits of permissible outside income. The chief judge and the judge reviewed the complaint, and the judge satisfied the chief judge that the allegations were untrue.

In a much less serious context, Judge John C. Godbold presented the Commission with an everyday illustration of informal corrective action. A school teacher wrote to him and said, "I brought my class to watch the proceedings in the federal district court and the judge sat there for half of the proceedings with his feet on the bench and I was humiliated and embarrassed." The chief judge sent the letter to the judge and asked, "What shall I tell this lady?" The judge responded, "Tell her she's correct. I appreciate it and it will never happen again." Judge Godbold indicated that he could give "half a dozen examples like this."²⁰⁸

²⁰⁷ See NCJDR Hearings, *supra* note 111, at 26-33, 59-76, 80-81 (Jan. 29, 1993) (testimony of Barbara Safriet, Associate Dean, Yale Law School) (discussing the extent and nature of sexual harassment of female law clerks by judges).

²⁰⁸ *Id.* at 58 (May 1, 1992) (testimony of Judge John C. Godbold).

8. Summary

Chief judges draw information from a variety of sources and apply it to instances of misconduct or allegations of disability without relying on the formalities of the complaint process. Together with the process for recertifying senior judges, the informal process appears to be the primary method for addressing issues of physical or mental disability. Chief judges prefer to use the informal process because it operates more flexibly and humanely. Moreover, the possibility of invoking the formal process appears to reinforce the efficacy of the informal process.

II. EFFECTS OF THE PROCESS

A. *What Beneficial Effects Have Flowed from the Operation of the Act?*

In Part I, we described the process of administering the Act. In the course of that description, we identified positive and negative effects that the Act has generated. In this Part, we build on that description to examine in a more general way the questions of how corrective actions and other benefits affect the complainants, the courts, and individual judges. How widely are rulings disseminated? To what extent does the Act encourage good conduct or deter misconduct? We also attempt to place the administration of the Act into the context of judicial governance.

1. Dissemination

As we have just seen in Part I.D., the Act's confidentiality provisions consist of a directive to make public those actions taken by judicial councils on special committee reports,²⁰⁹ and a statement of limits on the authority of a judicial council to release papers, documents, and records of proceedings related to special committee investigations.²¹⁰ The Illustrative Rules have attempted to fill the statutory gaps. Rule 17(a) mandates that orders be made available to the public, generally without disclosing the judge's name unless the judge consents.²¹¹ The rule attempts to strike a balance between protecting the confidentiality of a judge named in

²⁰⁹ See § 372(c)(15).

²¹⁰ See § 372(c)(14).

²¹¹ ILLUSTRATIVE RULES, *supra* note 7.

a pending or dismissed complaint and making the process more open.

The drafters of the Illustrative Rules articulated two values in disseminating orders to the public. Their first value is "assuring the public that the disciplinary mechanism is operating satisfactorily," while the other is improving the operation of the complaint mechanism by establishing a body of published precedent.²¹² Our review suggests that an additional value should be made explicit, namely, bringing significant orders to the attention of judges as a guide for assessing their own conduct. This value may be implicit in the establishment of a body of precedent.

A national overview of the dissemination of the results of judicial misconduct complaints was obtained by searching a national database of national and local newspapers, law papers, and magazines. The search²¹³ uncovered eighteen matters for which there were seventy-seven national and sixty-five local articles in the newspapers or magazines included in the database. All but one of the eighteen matters received national attention. Twelve of the thirteen circuits were represented in the stories. Four circuits were represented by two complaints and one circuit by three. Five of the eighteen complaints had been filed by a single organization that apparently sought and received extensive publicity for its filings.²¹⁴

In most of the stories, the Act's terms and procedures were discussed. Several of the references were part of lengthy national stories, such as a discussion of some of the public orders filed with the Federal Judicial Center by the end of 1983²¹⁵ and a lengthy front page *National Law Journal* review of the Act and the develop-

²¹² *Id.* Rule commentary at 44.

²¹³ The NEXIS search consisted of a query using the terms "judicial misconduct," "judicial discipline," "judicial corruption" and "federal" in the MAJPAP database. Using the names found in the above search, a second NEXIS search was conducted, searching by the judge's name and sometimes limiting the search either by the word "complaint" or by something important involved in the incident. Excluded from the eighteen matters uncovered were the Claiborne, Hastings, and Nixon referrals to the House of Representatives for consideration of impeachment.

²¹⁴ The organization is the Washington Legal Foundation. For background information, see NCJDR Hearings, *supra* note 111, at 151-65 (May 1, 1992) (testimony of Paul Kamenar).

²¹⁵ See David F. Pike, *At Least 4 Final Orders Filed Under Act*, NAT'L L.J., Dec. 19, 1983, at 26 (discussing orders submitted by the Third and Sixth Circuit councils).

ing Illustrative Rules in 1986.²¹⁶ A front page *New York Times* headline in 1989 promised *A Glimpse at the Secrets of Penalizing Judges*.²¹⁷ Serious complaints under the Act presumably generate comparable publicity on the local level.²¹⁸

Can the above information about dissemination be reconciled with the results of the survey by William Slate and the Justice Research Institute?²¹⁹ The survey reported that the vast majority of journalists covering the federal courts did not recognize the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 by name and that more than two-thirds were not aware of any system that allows citizens to file complaints against federal judges.²²⁰ The number of articles about the Act suggests that journalists may gather information about complaints under the Act on an ad hoc basis and do not retain it as part of a permanent body of knowledge about the courts. The data also suggest that most journalists do not routinely check for public orders under the Act as part of their regular beat. Further analysis of the Slate Survey data may reveal whether journalists' knowledge of the system differs according to their experience in covering the federal courts.

What additional efforts do courts make to disseminate information about the complaint process? In serious matters, particularly the few that result in a public reprimand, the chief judge and circuit executive make special efforts to disseminate the final order. For example, in a matter in which the judicial council ordered a public reprimand, the chief judge stimulated a story in a publication for local lawyers "to make the public and the bar aware that there is a

²¹⁶ See Eric Effron, *Disciplinary Feud Brews Among U.S. Judges*, NAT'L L.J., June 16, 1986, at 1 (discussing the Act and the development of the Illustrative Rules).

²¹⁷ David Margolick, *A Glimpse at the Secrets of Penalizing Judges*, N.Y. TIMES, July 14, 1989, at A1.

²¹⁸ See NCJDR Hearings, *supra* note 111, exhibits 9-19 (May 1, 1992) (testimony of Paul Kamenar plus exhibits). In testimony to the Commission, Paul Kamenar, Executive Legal Director of the Washington Legal Foundation, submitted materials relating to a complaint in the Fifth Circuit. Exhibits 9-19, attached to those materials, consisted of twelve local newspaper articles, editorials, and a letter to the editor relating to that complaint. Our NEXIS search uncovered one national law paper article, one local newspaper article, four local law paper articles, and one local wire service story about that complaint. None of the local stories submitted by Mr. Kamenar appeared in the NEXIS search. The judge's name used with the search was "Buchmeyer." See *supra* note 213.

²¹⁹ See William K. Slate, II, *Analysis and Report: Surveys of Knowledge and Satisfaction of Federal Judicial Discipline and Removal Mechanisms and Processes*, in 2 RESEARCH PAPERS, *supra* note 38, at 959 [hereinafter Slate Survey].

²²⁰ See *id.* at 1003 (Questions 1 and 2).

procedure and that we take complaints seriously." In another matter, a public reprimand order was distributed to all clerks of court and chief district judges within the circuit and posted in the clerk's office of the court where the named magistrate judge sat. In other situations, publicity about the complaints appears to originate outside the judiciary, frequently from the complainant.

With one exception, dissemination to judges follows informal channels. Circuit executives used terms like "grapevine," "casual conversation," and "tribal communication" to describe the process. All who addressed the issue were confident that judges were aware of some of the more serious matters arising under the Act. In at least two circuits, the chief judge presented statistics relating to activity under the Act as part of the annual state of the circuit address at the circuit's annual judicial conference. These occasions also presented opportunities to communicate information about the Act to lawyers who practice frequently in the federal courts.

The exception to the informal, episodic transmission of information about the Act is the judicial council's role in the process. Judicial council review of chief judge dismissals and particularly of special committee reports has a side effect of disseminating information about complaints. Judicial councils comprise an average of fourteen judges, almost half of whom are required to be district judges. The judicial council review process disseminates information to at least those judges and, perhaps in an anonymous form, to judges throughout the circuit.

One circuit's effort to disseminate information about the Act warrants special attention. The circuit executive's staff prepared a report categorizing and summarizing the complaints that had been filed in the previous six months. The report tallied the types of complainants, the disposition of the complaints, the extent of the chief judge's inquiry, and the types of allegations. Examples of corrective actions taken were presented in brief summaries. Examples of characteristic charges were also summarized in categories like "incompetence," "undue delay," and "lack of demeanor/bias/prejudice." One apparent difficulty is that apart from a few references to corrective actions, frivolous complaints are intermingled with more serious charges. This may accurately represent the mix of complaints, but communicates little to the judges about the type of allegations that the chief judge took seriously. Omitting complaints that were dismissed for frivolousness might highlight matters that warrant attention.

Some circuits also disseminate information in statistical form as part of the Annual Report. Such a report may include a brief description of the Act, the circuit's procedures, and a statistical summary of the year's activity.²²¹ Nationally, the Director of the Administrative Office of the U.S. Courts reports on the administration of the Act on a regular basis. A typical report describes the structure of the Act and presents statistics by circuit on the number of filings, the nature of complaint allegations, and the actions taken on those complaints.²²²

Lawyers may become aware of the Act and a circuit's administration of it through publicity, informal communications with judges or other lawyers, attendance at circuit judicial conferences, and national or local reports. Regular practitioners in the federal courts frequently have served as clerks to federal judges and may have learned about the Act during their employment in the judicial branch. Further dissemination occurs through service on federal court rules committees which have a role in reviewing the Illustrative Rules and updating them. The Act also comes to the attention of practitioners when draft local rules are published for comment²²³ and when final rules are distributed.

Most of the chief judges indicated in their interviews that lawyers are aware of the opportunity to file complaints and to discuss problem situations with the chief judge. In one circuit, which has had few complaints of substance, the chief judge said, "We haven't tried to publicize . . . [the Act], nor should we." This chief judge indicated that lawyers with serious complaints will find and utilize the Act, while publicizing the Act will encourage litigants to use the process in lieu of filing appeals. Given the high percentage of frivolous, merits-related complaints in all circuits, one might reasonably hesitate at the prospect of encouraging more complaints.

Several chief judges indicated that lawyers are aware of the process but are afraid to use it for fear of antagonizing the judiciary. In interviews for another report to the Commission, lawyers from the Public Integrity Section of the Department of Justice expressed misgivings about filing complaints.²²⁴ Professor Todd Peterson

²²¹ See, e.g., UNITED STATES COURTS FOR THE NINTH CIRCUIT, 1991 ANNUAL REPORT 25-26 (1991).

²²² See, e.g., ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 115-18 (1991).

²²³ See 28 U.S.C. § 2071(b) (1988) (providing that a rule "shall be prescribed only after giving appropriate public notice and an opportunity for comment").

²²⁴ See Todd D. Peterson, *The Role of the Executive Branch in the Discipline and*

reported that "the attorneys were incredulous at the suggestion that a Department attorney would risk souring relations between the Department and a federal judge by making a complaint under the 1980 Act."²²⁵ The absence of complaints from federal attorneys coincided with reports from the same interviewees that federal judges sometimes exhibit signs of an "arrogant and arbitrary exercise of authority" that includes "sexism and racism in the treatment of attorneys."²²⁶ Given the power and influence of the Department of Justice, one can imagine that the average practitioner would be at least as timid in risking their personal reputation or that of their law firm.

In summary, most circuits report that dissemination to the public, the bar, and the bench is episodic and generally responsive to a specific need such as communicating a public reprimand, amending local rules, or issuing an annual report. Whether there is any purpose to be served by increased efforts to disseminate information to the public or the bar appears questionable. It does seem, however, that the most serious complaints have been filed by public interest organizations, including members of the bar acting through an organization. Encouraging bar groups to serve as filters and conduits for serious complaints warrants careful consideration.

Dissemination of information to judges in circuits other than the one named in the complaint has also been episodic and informal. Relying on "tribal communications" invites errors in transmitting the lessons of the most serious matters. Systematic attention to corrective measures that have resulted from the complaint process could only improve the benefits that flow from efforts to enforce the Act by making it easier for judges to assess and modify their own behavior.

There are potential benefits—such as facilitating the development of a common law—that are likely to arise from greater dissemination to the judiciary of information on the § 372(c) process. If these benefits are considered significant, the Judicial Conference of the United States might consider undertaking an effort to analyze and disseminate information from public orders now technically available under Rule 17 of the Illustrative Rules. Greater dissemination of precedents under the Act will aid chief judges and judicial councils in their decision-making and might

Removal of Federal Judges, in 1 RESEARCH PAPERS, *supra* note 38, at 243, 353.

²²⁵ *Id.*

²²⁶ *Id.* at 354.

reduce the number of "problem" dispositions. Protecting the confidentiality and privacy interests of judges and complainants in appropriate instances can be accomplished by sanitizing the orders to delete identifying references. Orders submitted to the FJC generally have been sanitized in this way.

Against the backdrop of this review of dissemination efforts, we may now examine the benefits of the Act in relation to individual complainants, the courts, and the public.

2. Benefits to Complainants

In Part I.C.2.a., it was reported that complainants received a tangible benefit in more than three out of four matters in which corrective action was cited as a reason for concluding the complaint process. In most of these matters, the action took the form of a ruling on a matter that had been the subject of a delay complaint, an apology for an intemperate remark, or a correction of the record. The summaries of corrective actions in Part I.C.2. supply a number of examples. Whether such benefits give complainants sufficient incentive to invoke the Act remains an open question.

It was also noted that a significant number of corrective actions afforded no benefits to the complainants. Their complaints were related to final decisions that could not be remedied easily. The forward-looking nature of corrective actions, perhaps combined with a named judge's unwillingness to concede wrongdoing in a particular situation, can easily lead to a corrective action that does not benefit the party who initiated the review. Whether the absence of benefits in such matters will discourage potential complainants from invoking the Act also remains an open question.²²⁷

Nevertheless, drawing a rough composite of a typical complainant may aid in discussing benefits to complainants. As Part I.C. illustrated, most complainants appear to be dissatisfied litigants attempting to obtain an alternative redress. Frequently, they seem to be using the complaint process as a low-cost avenue to appeal. Because the rate of success on appeal for pro se litigants is very low, the prospect of an unsuccessful complaint may not deter the filing. In interviews, court staff repeatedly acknowledged that their

²²⁷ These questions about incentives or disincentives to invoking the Act are difficult to answer satisfactorily. Little is known about complainants and what they seek. This research was not designed to address those issues.

explanations of the complaint process and its exclusion of merits-related matters did not deter litigants from filing such complaints.

The vast majority of these complainants are doomed to be frustrated. To the extent that such complaints happen to illustrate a pattern of delay, complainants may receive some satisfaction in the form of a ruling. Their claims, however, are usually inextricably bound up with the merits. Therefore, they are likely to be informed, sometimes summarily, that the Act is simply not the proper vehicle for their grievance. Complainants face the ironic situation that because they seek the equivalent of an appeal, they are not in the proper forum and their appellate-type issues go unaddressed. Their complaints serve neither to evaluate judicial conduct nor to review the record for potential error. These complaints seem misplaced from the perspective of both the complainants and the courts.

The only benefit these complainants receive is the opportunity to articulate a complaint about a trial judge's action and to get a response. These responses are generally accompanied with narrow, statutory reasons for the decision. At least for a moment, the complainant has captured the attention of the chief judge of the circuit. This marginal benefit is at the expense of imposing a burden on the chief judge and the court's staff (and, in some instances, the judicial council of the circuit), forcing them to review hosts of complaints directly related to the merits. By itself, the benefit to individual litigants who seek to bypass the appeals process does not seem to justify the burden the Act imposes on the courts.

Less typical but more successful complainants include public interest groups of both "liberal" and "conservative" orientations. Their motives and goals extend beyond the outcome of a given complaint and perhaps even the redress of a specific grievance. Issues selected by these groups are traditionally less likely to be tied to the merits of specific litigation even when the subject of the complaint arises from litigation. "Liberal" groups, for example, have filed complaints when a judge has reportedly made public statements that stereotype or otherwise disparage a group based on race, gender, sexual preference, or the equivalent.²²⁸ "Conserva-

²²⁸ See, e.g., *supra* part I.C.2.c. (discussing case CA-7) (referring to complaints by public-interest organizations in response to a judge's statement that a female defendant must have been using drugs to have lived in a predominantly black city with her male companion); *supra* part I.C.2.c. (discussing case CA-13) (describing complaints about a judge who ordered a female attorney to use her married name in

tive" groups have singled out judges who appear to have engaged in partisan speech or partisan activity that conflicts with the ideology of the complaining group.²²⁹ These complaints resemble test-case litigation and seem designed and motivated, at least in part, to make an example of the named judge in order to deter similar conduct. Generally, they have resulted in corrective actions.

Complaints filed by public interest groups appear to reflect mixed motives. On the one hand, these groups seem to seek an official pronouncement that their political or ideological perspective is supported by restraints on judicial conduct. Sometimes, however, in reading the complaints and petitions for review, one detects a punitive purpose, one that cannot be satisfied by an acknowledgment of improper conduct and a promise to correct it in the future. In some matters, public-interest groups file petitions for review that challenge the corrective action and make plain their desire for a clear finding of misconduct and a public reprimand.

The complaint process seems ill-suited to the more punitive demands of public-interest complainants. By emphasizing prospective corrective action as opposed to retrospective punishment, the Act seems destined to frustrate some public-interest court watchers. Judges perceive the corrective processes of the Act as designed to educate, not punish. Voluntary corrective action partakes of understanding and compromise, not rigid judgments of guilt or innocence.

Does the above discussion indicate that the Act is ill-suited to a test-case approach? We see no basic incompatibility between the goals of specifically deterring misconduct (that is, specific to a single judge) and correcting examples of misconduct in a forward looking manner. The educational effects sought through the corrective action mechanism are deterrent effects by another name. Dissemination of outcomes is likely to promote general education of the bench and deterrence simultaneously. As presently administered in some courts, concerns for confidentiality inhibit the ability to provide these benefits. In other courts, a different balance has been

proceedings before him). For a more detailed discussion of these cases, see generally *supra* part I.C.2.

²²⁹ See, e.g., *supra* part I.C.2.c. (discussing cases CA-5 & CA-6); *supra* part I.C.2.d. (discussing cases CA-17 and CA-18) (concerning complaints against judges who, respectively, publicly advocated a partisan political position on a highly contested local issue, solicited lawyers to join a national bar group, praised at sentencing the political movement associated with the defendants' activities, and had an ex parte contact with a public official who was a defendant in a civil rights complaint).

struck between confidentiality and dissemination, and arguably it is in those courts that corrective actions and reprimands have widespread educational effects for other judges.

In summary, the Act has provided limited benefits for both litigant and public-interest complainants. To the extent that the latter seek to extend the educational effects of the Act to other judges, the system seems capable of responding to their interests. To the extent that the complainants seek punitive actions against judges for misconduct that falls short of "high crimes and misdemeanors," their goals extend beyond the limits of what can reasonably be expected of a self-regulatory mechanism designed to address the conduct of judges appointed for life.

3. Benefits to the Courts and the Public

As was observed in Part I.E., the Act supports informal communications between the chief judge and other judges about issues of conduct. One chief judge asserted: "The statute gives you an entree you wouldn't otherwise have, when you start to poke into a judge's personal business. I guess you could have done that before—the chief judges did it before 1980—but now it's easier because the Act is there." The increased communication facilitates the use of informal actions for many of the serious cases involving judicial conduct and disability. It probably cannot be known to what extent these informal activities would have taken place without the Act. Experienced chief judges' statements that the Act has facilitated the judiciary's regulation of the conduct of judges should be acknowledged. These benefits are linked to the presence of the Act, the structure established for review, the empowerment of the chief judge and the judicial councils, and the balance struck between accountability and judicial independence under the Act. In considering changes in the Act, these strengths should be recognized and any changes should avoid radically altering the balance.

A major benefit to both the public and the judiciary is that the Act presents a system of judicial accountability.²³⁰ One expects such a system to benefit the courts by rendering the power and authority of federal judges more acceptable to the public. Judicial orders are more likely to be respected and followed when judicial institutions generate respect. Without accountability, the aberra-

²³⁰ See *infra* part II.B.2.

tional actions of a few judges contaminate the reputation of all. In the plain words of one chief judge: "If the boat is leaky, you're on it." Another expressed similar sentiments equally tersely: "No one wants to serve with crooks."²³¹

In addition to the benefits explored above, important administrative benefits also arise as a byproduct of the Act's implementation. For example, the § 372(c) process of examining the record in the underlying litigation often reveals defective record keeping procedures. One circuit executive summarized this benefit:

Sometimes our phone calls inquiring about the record have identified glitches that have been corrected. For example, in one matter a litigant complained that he had filed a notice of appeal in a timely manner only to have it rejected because the clerk's office had not yet entered a final judgment.

As a result of the inquiry, the internal issue of the clerk's timing in entering final orders came to the circuit executive's attention and the clerk remedied the practice. Because a clerk's practices are not covered by the Act, the complaint may be dismissed. Nevertheless, the information received in the process enabled the circuit executive and hence the court to correct the matter to the benefit of all.²³²

4. Benefits to the Legislative Branch

a. Referrals

Congress often receives complaints about the conduct of federal judges. The Act creates a mechanism that allows courts to address these complaints in the first instance. A chief judge who was active in the discussions leading to adoption of the Act recalled that "it all started because Congress was getting complaints from constituents

²³¹ Cf. Warren S. Grimes, *The Role of the U.S. House of Representatives in the Proceedings to Impeach and Remove Federal Judges*, in 1 RESEARCH PAPERS, *supra* note 38, at 39, 75 (quoting Judge Charles Wiggins' testimony that Judge Claiborne's conduct "embarrassed" him and brought "into disrepute the judiciary as a whole").

²³² Another example of derivative administrative benefits cited by clerks or circuit executives included the discovery that a deputy clerk had crossed out an entry on a docket sheet. The chief judge or circuit executive brought the impropriety of that procedure to the clerk's attention.

The review benefit should not, however, be overstated. One would expect that only glaring errors will be detected through this process. A manager could easily establish an equivalent system by randomly selecting cases from the court's docket and carefully reviewing the record keeping, looking directly for important features. In administering the Act, the review serves multiple purposes. The examination of practices is only tangential to the main purpose.

and had nothing to do with them. Now Congress can tell constituents 'there's a system, go through that.'"

In an appendix to Warren Grimes's report to the Commission, Peter Hutt documented that members of the House of Representatives, primarily the chairs of the Committee on the Judiciary and the Subcommittee on the Courts, received 56 complaints during the Ninety-eighth Congress (1983-84) and 125 complaints during the 100th Congress (1987-88).²³³ In his judgment, the vast majority (94%) did not raise "a genuine issue pertinent to judicial discipline."²³⁴

The Act provides a suitable mechanism for screening the complaints and responding to those that appear to raise a genuine or arguable claim of judicial misconduct. As Mr. Hutt recommends, the relevant committee "should forward these complaints to the appropriate judicial councils, which were established precisely to undertake such investigations."²³⁵ This should be done because the House Subcommittee on Courts is "not well equipped to undertake such investigations."²³⁶ Public filing of chief judge and judicial council orders with the clerk of the court in the circuit or national court and with the Federal Judicial Center affords an opportunity for the congressional committee to monitor the outcome of the referral.

The presence of the Act and the structure for enforcing it permits Congress to refer complaints to the chief judge and the judicial councils and expect that those complaints will be handled promptly and fairly. The process enables Congress to respond to each complaint with an appropriate referral and to select those complaints that warrant continuing attention or monitoring. If consideration of impeachment is warranted, the committee can await the outcome of the judicial branch process and use the product of the judiciary's investigation as a starting point for its own processes.

²³³ Peter B. Hutt, *Complaints About Judges Received by Congress: What the Complaints Allege, and How Congress Responds*, reprinted in Grimes, *supra* note 231, app. C, at 99.

²³⁴ *Id.* exhibits 2-3.

²³⁵ *Id.* at 106.

²³⁶ *Id.*

b. *Impeachment Investigation*

Proceedings under the Act may benefit Congress by providing it with the fruits of the judiciary's investigation. In the Alcee Hastings impeachment, the Judicial Council of the Eleventh Circuit conducted a lengthy investigation. The special committee held forty days of hearings and issued a four-volume report that was 381 pages long, accompanied by a two-volume appendix of exhibits. In addressing the bribery count in the § 372(c) complaint, the special committee produced evidence that was based on a painstaking, detailed investigation. For example, they reviewed the records of a bankrupt telephone company and old airline travel records. The committee report recommended that the council take no action on five other counts of the complaint. In contrast, the House held nine days of hearings over a two year period.²³⁷ Presumably, the recommendations in the report served to guide the House in preparing, evaluating, and trying the charges.

Judicial branch investigations under the Act provide the immediate benefit of relieving pressure on the House to engage in initial investigations and fact-finding hearings regarding specific complaints, a process that is outside of the House's normal course of operation.²³⁸ Historically, the House has conducted its own impeachment investigations. However, in recent years this practice has generally ceased. Professor Warren Grimes concluded that "the existence of a workable internal discipline system will remove the need for many House impeachment investigations of non-criminal behavior."²³⁹

c. *Certifying Questions to the House*

In the Claiborne, Hastings, and Nixon impeachments, the Act provided a path for the judicial councils of the respective circuits to forward their certification of possible grounds for impeachment to the Judicial Conference of the U.S. and for that body to certify such grounds to the House of Representatives. In the Claiborne and Nixon proceedings, the criminal convictions and files amassed by the Department of Justice provided the major sources of information for the House managers.²⁴⁰

²³⁷ See Grimes, *supra* note 231, at 52.

²³⁸ For a comparison of the demands of an adjudicatory-type hearing with the more traditional congressional oversight and legislative hearings, see *id.* at 56-57.

²³⁹ *Id.* at 73.

²⁴⁰ See *id.* at 54 (stating that, in the Nixon, Claiborne, and Hastings matters, "the

In the Claiborne and Nixon matters, however, the Act had additional potentially beneficial effects. The process of considering and certifying the question of whether an Article III judge may have engaged in conduct "which might constitute one or more grounds for impeachment under Article II of the Constitution"²⁴¹ had the effect of placing the judiciary on record regarding those two matters. In implementing the § 372(c) process, both the judicial council of the circuit and the Judicial Conference of the United States have an opportunity to review the matter and determine whether a particular prosecution and proposed impeachment might adversely affect the independence of the judiciary or for some other reason might be contrary to the interests of justice. This provides the judiciary with a further check on both the prosecutorial functions and the impeachment process.

The opportunity to act officially on questions of impeachment that arise from criminal prosecutions can be burdensome for the judiciary. Because action by the judiciary in certifying a question of impeachment to the House will be seen as approving the impeachment investigation in the matter at hand, each matter requires consideration commensurate with the seriousness of the consequences. In the case of a conviction that has been affirmed on appeal, the pressure to act promptly can impose a considerable strain on the process. In the Claiborne matter, for example, the public demanded prompt action because the judge had been sentenced and imprisoned while still drawing a salary and retaining his position as federal district judge. Under extreme pressure to resolve the matter promptly, investigating charges of prosecutorial misconduct²⁴² may have been beyond the resources available to the four district and five circuit judges on the Judicial Council of the Ninth Circuit.

Judicial review of a conviction and certification of an issue for consideration of impeachment aids the legislative branch in moving

House's primary investigatory task consisted of gathering and analyzing the full record . . . from prior proceedings").

²⁴¹ § 372(c)(7)(B)(i).

²⁴² The Supreme Court of Nevada later assessed such claims in a 78-page opinion dealing with Claiborne's status as a member of the Nevada bar. The court concluded that "[q]uestionable investigative and prosecutorial motivations, as well as anomalous and arguably unfair practices and procedures, pervade the record of this matter from its inception," declined to "impose additional punishment upon respondent Claiborne by way of professional discipline," and dismissed the disciplinary proceedings against him. *State Bar v. Claiborne*, 756 P.2d 464, 540-41 (Nev. 1988).

forward with a controversial impeachment. Having the official support of the judicial branch assures Congress that there will be no official judicial challenge to follow. Conversely, judicial refusal to certify a question that the House wishes to consider clearly demarcates the lines of conflict.

5. Benefits to the Executive Branch

a. *Referrals*

The Act may also benefit the executive branch by providing the option of referring to the judiciary matters not deemed to warrant criminal prosecution, thereby relieving the pressure to criminalize matters of judicial ethics and misconduct. The field study disclosed a handful of instances in which the Department of Justice referred a matter to the chief judge of a circuit, either through a complaint under the Act or informally, after the Department or a grand jury decided not to pursue criminal charges against a judge. According to one interviewee at the Public Integrity Section of the Department of Justice, such referrals occur approximately once or twice a year.²⁴³

Two matters illustrate the benefits (and burdens) of the referral process. One formal complaint involved an uncorroborated allegation by an informant that a magistrate judge had intervened with a district judge on behalf of a defendant. A special committee investigated the complaint thoroughly before finding a lack of credible evidence to support the allegation and a plausible reason for the informant's mistaken impression. Another matter dealt with an allegation of misconduct by a bankruptcy judge. The chief judge appointed an informal committee to review grand jury materials and decide whether to file a complaint under the Act. Obtaining the grand jury materials required litigation and a court order. This matter was pending at the time of the field study.

In both instances the executive branch was able to save its scarce prosecutorial resources. Whether the correlative burden on judicial resources is justified raises another question. It seems important to note that both matters involved situations in which the prosecutor had decided not to pursue criminal charges. On this point, one chief judge said: "Just because you're not indicted doesn't mean you should be a judge."

²⁴³ See Peterson, *supra* note 224, at 352-53.

In the matter of the alleged intervention to "fix" a case, the lack of credible evidence precluded a prosecution. At the same time, if the informant's story had a patina of truth—that the magistrate judge somehow gave the informant the impression that the case had been "fixed"—the referral could have benefitted both the executive and the judicial branches. A judicial investigation might teach judges how to avoid the impression of improper intervention.

In situations involving criminal behavior, referral to the judicial branch could be a misallocation of resources. The executive branch seems best suited to resolve questions of criminal conduct. Indeed, referral of criminal misconduct matters by chief judges to prosecutors seems more apt. The borderline may be vague in the abstract but clear in a given factual context. In any case, referrals give chief judges the flexibility to decide whether to proceed.

b. *As Complainants*

At the very least, the Act affords executive branch attorneys and officials an opportunity to raise complaints of judicial misconduct. As frequent litigators in the federal courts, executive branch attorneys often might be expected to be aware of patterns of judicial misconduct and disability, and thus might be an expected source of meritorious complaints. In practice, however, this benefit may not have been fully realized. Professor Peterson found that attorneys in the Public Integrity Section of the Department of Justice were reluctant to file complaints against federal judges. These attorneys expressed fear of harming the Department's relationship with federal judges.²⁴⁴

B. *What Negative Effects Has the Administration of the Act Imposed on the Courts?*

1. Introduction

The previous subsection presented a discussion of the advantageous effects of the Act for all participants and potential beneficiaries. The research done here and other research submitted to the Commission made it relatively easy to identify benefits to complainants and the executive and legislative branches of government. However, identifying the burdens of the process on individuals and

²⁴⁴ See *id.* at 353.

institutions outside the judicial branch, and on the executive and legislative branches of government, exceeds the scope of available data. Therefore, this subsection's concentration is limited to the negative effects that the complaint process may have on judges, court staff, and the judicial branch as a whole.

In Part I.B., the burdens that routine administration of the Act imposes on chief judges was assessed. It was argued that current chief judges did not think that routine administration of the Act imposed an undue burden on their time. In this section, however, the burdens are documented in more detail to include the routine burdens on the judicial council of the circuit and on the staff of the court. Finally, this section examines the extraordinary hardships that special committees and impeachment issues have generated for chief judges, judicial councils, and the staff of the circuits.

2. Routine Administration

a. *Chief Judges*²⁴⁵

Current chief judges are more likely than their predecessors to delegate the time-consuming tasks of reviewing the record and drafting an order responding to each allegation in the complaint. Yet, even those current and former chief judges who delegated little or none of the drafting did not report a major burden. The chief judge of a circuit with an average number of complaints estimated reviewing one complaint a week. The judge spent approximately a half hour reading the complaint and dictating a brief, but not standardized, order. Another chief judge spends "no more than an hour to review a complaint in the first instance. It takes more time if you have to inquire into it, less time if it's clear what the complainant is saying."²⁴⁶

Chief judges, of course, spend more time on other aspects of the process. In the early years of the Act's operation, drafting local rules and establishing an internal structure for handling complaints, appointing special committees, and managing confidentiality

²⁴⁵ For additional discussion of the burdens imposed on chief judges, see *supra* part I.A.5.

²⁴⁶ Assuming a one hour norm for a chief judge's review of a complaint and applying this figure to the 1990 and 1991 AO data on filings, see *infra* app., tbl. A-1, we estimate that approximately 300 chief judge hours per year were spent on the review portion of the process, an average of about twenty-five hours per chief judge per year.

consumed the time of policy makers such as the chief judge, judicial council members, clerks, and circuit executives. For example, one chief judge experimented with appointing ad hoc informal screening committees, usually composed of a district judge and a court of appeals judge, to inquire into the merits of complaints that seemed to have some substance. This judge concluded that the practice was not worth the drain on court resources. Devising and testing this experimental approach, however, illustrates the burden that implementing new systems may impose on the courts. A former chief judge described a major burden in "figuring out the forms and procedures, including inter-office procedures, chief judge meetings, and many things for the Judicial Conference of the U.S., including work on the impeachment matters."

Now that practices have become more standard in the circuits, the time spent on creating and changing the process seems to have lessened. Amendments to local rules remain an intermittent and apparently manageable task.

b. *Judicial Councils*

Similar to the routine review of complaints by chief judges, judicial council review of petitions tends to be seen by chief judges as a process that "takes some time" but is "not a substantial burden." Generally, a chief judge will have served as a member of the circuit's judicial council before becoming chief judge and will have seen the process from the perspective of a council member.

The typical process²⁴⁷ for judicial council review is for the clerk or circuit executive to compile a file consisting of at least the complaint, the chief judge's order, and the petition for review. In addition, in some situations, the file might include a response from the named judge, relevant portions of the record in the underlying litigation, and a memorandum from a staff attorney. This file is copied and distributed to all members of the council together with a ballot form that lists all the options. Unless one or two members of the council (the number varies by circuit) request discussion at a council meeting by checking a box and returning the ballot by mail, the ballots determine the outcome. Generally, mail ballots determine the matter unanimously. Sometimes, but rarely, the matter will be set for discussion by the council. For example, in a

²⁴⁷ For a more detailed discussion of judicial council reviews, see *supra* part I.C.1.e.

circuit with an average number of petitions for review, the chief judge could recall only one that had been placed on the discussion agenda of the judicial council. As seen in Part I, the field study revealed only two occasions when the judicial council voted to reject the chief judge's order dismissing a complaint without special committee investigation.²⁴⁸ Moreover, the judicial council has undertaken further factual inquiry several times before affirming a chief judge's dismissal of a complaint.²⁴⁹

Dealing with meritless complaints sparks a more intense feeling or perception of burden than does the experience of sitting on a special committee or reviewing a special committee report. As one judge described a time-consuming special committee matter, "that was a legitimate complaint, so it was okay." In contrast, judicial council review tended to be seen as "a nuisance." One chief judge reported spending about an hour reviewing each petition. His assessment was that "it's not that burdensome, but it's an hour on something meritless."²⁵⁰

As the above comments suggest, review by the full judicial council may be an unnecessary burden. The primary reasons for having some form of review are, in the words of a chief judge, because "the chief could exercise poor judgment" and because "the review process conveys a greater sense of fairness." Serving these functions, however, may not require review by an average of fourteen judges per circuit. In only two matters in the field study did the judicial council alter the chief judge's action. The vast majority of the petitions reviewed resulted in unanimous affirmance of the chief judge's order without discussion. A marginal benefit can be found in those two cases, as well as from the exposure of other judges on the judicial council to the substance of complaints filed and of chief judge actions. But these benefits are truly marginal.

²⁴⁸ See *supra* part I.C.1.e.

²⁴⁹ See *supra* part I.C.1.e.

²⁵⁰ Documenting the burden on judicial council members entails multiplying the burden of each petition for review by the number of members on the judicial council and the number of petitions within each circuit. In Part I it was estimated that at least 662 complaints involved a petition for review, amounting to approximately five per circuit per year. See *supra* part I.C.1.e. As for the number of judges on judicial councils as of December, 1992, the sizes of the twelve circuit councils ranged from nine to twenty-one judges, with a median size of thirteen and an average size of fourteen judges, including the chief judge. The average size of the councils in the eight circuits in the field study was 13.75.

Because petitions almost always involve dismissed complaints (a few might involve corrective action or mootness issues), the benefit of exposing council members to the complaints is minimal; indeed looking at only dismissed complaints or special committee matters may give judges on the council a distorted view of the process. Such an effect is especially likely to occur in a circuit in which the chief judge uses the corrective action mechanism regularly.²⁵¹ By looking primarily at dismissals and special committee matters, council members may become insufficiently aware of complaints that fall between the extremes of warranting dismissal or full-scale investigation.

As noted, a key benefit of judicial council review is that the actions of the chief judge are subject to a second look by peers who were not involved in the initial decision. The same benefit—or even a greater benefit—could probably be attained, however, by having a standing or rotating three-judge panel review the dismissal orders, much as a court of appeals finds panel review sufficient for most appeals. With responsibility focused upon a small number of judges, the panel might take the responsibility more seriously than if it were diffused among thirteen or fifteen members of a judicial council. In keeping with recent statutory changes augmenting the representation of district judges on the judicial councils, the amendment could require that at least one panel member be a district judge.²⁵²

c. *Circuit Staff*

Administration of the Act commands considerable resources to support the chief judge and the judicial council and to keep their burdens to a minimum. A full range of staff from the court infrastructure delivers supporting services. These services range from screening complaints for form, docketing them, checking the record in underlying cases and related complaints, researching legal issues, drafting memoranda of alternative actions, drafting orders with reasons for decision, investigating factual allegations, identifying witnesses, staffing special committees, arranging for hearings,

²⁵¹ None of the circuits studied appear to have any procedure to bring corrective actions to the council's attention.

²⁵² For a more detailed discussion, see *infra* part III.D. (suggestion 9).

and perhaps even drafting portions of special committee reports.²⁵³

These tasks demand experienced staff who can be trusted to handle confidential matters with sensitivity. Employees who carry out these functions range from clerical staff in the clerk or circuit executive's office (at levels of JS-7 to -10)²⁵⁴ to circuit executives themselves (senior executive level).²⁵⁵ No special funding is provided for the portion of these positions devoted to administration of the Act. In all of the circuits, assigned staff devote part of their time to administration of the Act in addition to their other duties. To protect the confidentiality of the proceedings, clerical support and legal work are generally limited to one or two individuals.

For purposes of detailing the administrative burdens, it is difficult to identify a typical circuit. Each circuit divides the labor uniquely to conform to its administrative structure. In a circuit that allocated a large amount of its resources to the process, an attorney at a JS-14 level devoted about two-thirds of the time to judicial discipline matters. In that circuit, the circuit executive spent about 10% of full-time on the Act, and that a secretary in the circuit executive's office spent an unspecified but substantial amount of time. A secretary in the clerk's office spent 5 to 10% of full-time, and the chief deputy clerk spent 1%.²⁵⁶

3. Special Committee Matters

The major burden of administering the Act for the chief judge, the judicial council, and the circuit's staff relates to the appointment, leadership, and support of special committees. These committees investigate allegations that were not dismissed or concluded on a finding of corrective action or intervening events. For the most part, chief judges did not describe their activity on

²⁵³ See *supra* part I.A.

²⁵⁴ The salary grade "JS" is the federal judicial branch's equivalent to the "GS" grade used in the executive branch.

²⁵⁵ Also carrying on these functions are law clerks or staff attorneys (JS-12 to -15), chief deputy clerks or assistant circuit executives (JS-14 or -15), and clerks of court (JS-16 to -18).

²⁵⁶ A circuit in the mid-range on the burden spectrum devoted 20% of full-time of a chief deputy clerk and a secretary, 15% of full-time of a staff attorney or administrative law clerk, and a negligible amount of the circuit executive's time to the Act. At the low end of the burden range, a clerk and secretary spent less than 1% of full-time on the process, and a law clerk spent about the same proportion of time.

these special committees as a burden, but rather as a necessary part of their duties.

Interviews with chief judges and supporting staff in the eight sampled circuits revealed that the burdens of special committee proceedings have varied very widely from circuit to circuit from 1980 to 1992. This is not surprising in view of the fact that the number of special committee matters in these circuits has varied widely as well.²⁵⁷ Three of the eight circuits sampled have had only one special committee proceeding each, and a fourth circuit has had only two. In the other four circuits, by contrast, two have had four proceedings each, and the other two circuits have had six proceedings each.

In seven of the circuits, special committee proceedings were deemed to have imposed either a minor or a substantial burden on judges' time. In the remaining circuit, by contrast, the chief judge portrayed the burden as formidable. This reflected that particular circuit's unique experience under the Act. The circuit not only has had six special committee matters, but also has had the most serious, high-profile and time-consuming proceeding in any of the eight circuits. This proceeding ultimately led to the impeachment and removal of the judge complained against.

The chief judge estimated that this major special committee proceeding

took at least 2,500 hours of my time. It took literally over a year of my judicial life. There were 60-hour weeks with nothing but that case. [This judge wrote the special committee's report]. As for the other judges on the special committee, it took at least 700 to 800 hours of the time of each of them and one or more may have spent as much time as I did. I'd guess that the members of the judicial council not on the special committee spent between 30 and 80 hours each considering and reviewing the matter. Also, there was a lot of post-judicial council stuff to do in that case, I haven't included that, for example, counsel for the House of Representatives needed to talk to the investigator, etc.

²⁵⁷ This is not to say that there is a precise correlation between the number of special committee matters addressed and the burden incurred. In fact, while one former chief judge, whose circuit had four special committee matters, said that "special committees are too infrequent to impose a real burden," another chief judge, whose circuit has had only one special committee proceeding, stated that that proceeding consumed "a lot of time, . . . [and] did have a negative effect on doing the work of the court."

The field study did not reveal any other special committee matters that required anywhere near this amount of judicial resources.²⁵⁸

This chief judge reported personally spending approximately 3450 to 3700 hours—virtually two full years of work—on three special committee matters. This could hardly present a more stark contrast from those circuits where special committee proceedings were described as “too infrequent to impose a real burden.”

The study did not reveal anything in this circuit's special committee procedures that differed dramatically from other circuits' procedures, and that might be expected to require a greater expenditure of judge time. On the contrary, this circuit made more frequent use of outside attorney/investigators than any other circuit, which might have been expected to help reduce the judges' time commitment. Apparently, this circuit has simply been cursed by happenstance with unusually difficult complaints that required very burdensome investigations.²⁵⁹

Special committee proceedings have imposed other costs on the courts, besides the investment of judge time. There is the time spent by court staff; the funds expended for outside attorney investigators and for reimbursement of attorneys' fees paid by judges who were the subjects of complaints; and occasional special administrative expenses for hearing facilities.

In all of the circuits for which information was available, the circuit executives and their staff expended a significant amount of time assisting the special committees. In general, interviews with court staff revealed that the burdens of special committee proceedings for staff were proportionate with the burdens of those same proceedings for judges serving on the committees.²⁶⁰

²⁵⁸ This chief judge also wrote the special committee's report for two other less burdensome special committee proceedings. He estimated his time spent at 750 to 1000 hours on one, a sum which itself dwarfs any estimate from any other chief judge. On the other matter, this chief judge estimates that he spent about 200 hours.

²⁵⁹ Three of the six special committee matters in this circuit arose within a relatively short period of time against the same judge. Another was a complicated matter filed by an attorney who skillfully pieced together plausible, but at bottom unfounded, allegations. Moreover, the one major investigation involved a unique set of circumstances—allegations of bribery leveled against a judge who had been acquitted of the same charges in a criminal proceeding—that required intensive, full-scale investigation and hearings.

²⁶⁰ For three of the eight circuits, the study revealed no information about the amount of staff time expended in connection with special committee matters. In each of these circuits, the only special committees ever convened—one in two of the circuits, two in the other—were convened before the tenure of the staff members that were interviewed.

Because of gaps in the data about staff time expended, the relative burdens borne by judges and by staff in the various circuits cannot be compared with any certainty. The data that was obtained, however, does not seem to point to any relative diminution of judge time as staff time increases. Instead, the data suggests that as staff time increases, judge time increases in similar proportions. These circuits' delegation practices in special committee proceedings do not appear to differ radically from each other. Judges and staff simply play different roles, each role producing its own burdens.

The sums paid to outside attorney investigators in a number of special committee matters are another significant cost of the process. According to information provided by the Administrative Office of the United States Courts, outside investigators had been paid by the judiciary in eleven matters as of January 1, 1993.²⁶¹ The total sum paid to these investigators was \$1,066,211. Most of this sum was paid to the investigator in the one mammoth special committee proceeding mentioned above. This investigator apparently devoted several years of work to the task.

Another cost of the process is reimbursement for the attorneys' fees paid by judges who were the subjects of complaints. The 1990 amendments to the Act explicitly empower the judicial council to

In one circuit, only one of the circuit's four special committees took place within the memory of the circuit executive. The circuit executive reported that an outside attorney investigator was used in this matter and that the circuit executive's office did not play a substantive role, but it did play a procedural and organizational role. Although the circuit executive did not specifically estimate the amount of time spent by his office on the matter, the lack of a substantive role would suggest that it was not huge. The clerk's office's personnel were essentially not involved.

The circuit executive of another circuit reported that the total time spent by the circuit executive on one recent special committee matter was approximately two days. This circuit executive did not estimate time spent on any of the circuit's other special committee matters, except to note that the amount of circuit executive involvement varies considerably with the preferences of the chair of the special committee.

In a circuit which has had only one special committee, the circuit executive estimated that he spent three to four weeks of his time on the matter over the course of almost a year. A staff attorney in that circuit, who is generally responsible for § 372(c) matters, estimated having spent approximately three months on the matter.

In the remaining circuit—the one that reported massive expenditures of judge time on special committees—the circuit executive estimated an expenditure of eighty to one hundred hours on the largest matter, and gave no estimate for other special committee proceedings. The clerk of the court of appeals, who was the courtroom deputy for special committee hearings, estimated spending 560 hours on the largest matter, and 165 hours and fifty-five hours, respectively, on the next two most serious matters.

²⁶¹ Telephone Interview with Jean Coates, Office of the General Counsel, Administrative Office of the U.S. Courts (Feb. 1993).

recommend that a judge be reimbursed for attorneys' fees where, after a special committee investigation, the complaint has been finally dismissed under § 372(c)(6)(C). The Act now states:

Upon the request of a judge or magistrate whose conduct is the subject of a complaint under this subsection, the judicial council may, if the complaint has been finally dismissed under paragraph (6)(C), recommend that the Director of the Administrative Office of the U.S. Courts award reimbursement, from funds appropriated to the Federal judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge or magistrate during the investigation which would not have been incurred but for the requirements of this subsection.²⁶²

The Illustrative Rules have been modified so that Illustrative Rule 14(h) now incorporates this provision.²⁶³

Even before the 1990 statutory amendments, the Administrative Office of the U.S. Courts construed applicable statutes to permit reimbursement for judges' attorneys' fees upon recommendation of the judicial council.²⁶⁴ Pursuant to that interpretation, five judges were reimbursed by the Administrative Office for their attorneys' fees.²⁶⁵ According to the Administrative Office, the total sum paid for these five judges' attorneys' fees was \$168,635.²⁶⁶

It is interesting to note that in only two of these five instances—involving payment of approximately \$26,000 in judges' attorneys' fees—was the complaint ultimately dismissed by the judicial council following a special committee investigation and report. The other three matters, in which a total of approximately \$143,000 was paid, resulted in one corrective action, one private reprimand, and one sanction that combined a private reprimand with corrective actions.²⁶⁷ Thus, under the new statutory provision, reimbursement for attorneys' fees would have been payable in only two of these five matters.²⁶⁸

²⁶² § 372(c)(16).

²⁶³ See ILLUSTRATIVE RULES, *supra* note 7.

²⁶⁴ See *id.* Rule 14 commentary at 36 (redlined version of 1986 rules).

²⁶⁵ Telephone Interview with Jean Coates, *supra* note 261.

²⁶⁶ See *id.*

²⁶⁷ See *id.*

²⁶⁸ Furthermore, in interviews during the field study, staff in one circuit noted the need for special expenditures on the courtroom space that a special committee used for extensive hearings in one proceeding. Since the special committee conducted hearings on weekends as well as on workdays, it cost about \$10,000 each weekend to heat or cool the space where the hearings were held.

The data was not extensive enough to permit a precise aggregation and averaging of the costs of special committee proceedings in the eight sampled circuits. It can only be reported with certainty that these costs, although varying widely from circuit to circuit, are, on the whole, substantial.

It is possible, however, to arrive at a base total for the expenditure of judge time by adding up the chief judges' numerical estimates of judge time spent on special committee matters. Such specific estimates were given for only five of the twenty-five special committees convened in these eight circuits; no judge time estimates for any of the other twenty special committees have been added to this figure. The one exceptional matter can be treated as an outlier. It consumed an estimated 6270 hours of judge time, including judicial council review. The remaining four matters commanded an estimated 2070 hours of judge time. This estimate represents a conservative minimum that was spent on special committee matters in the eight circuits studied.

Since this figure of 2070 hours omits twenty of the twenty-five special committees, the actual total is certainly higher. On the other hand, since this figure reflects relatively serious matters and since nine of the twenty uncounted matters were dismissed without hearings, the actual total is certainly nowhere near five times higher than the data suggests. One can only speculate as to the appropriate multiplier of the base figure of 2070 hours, which represents an average of twenty-five hours per circuit per year during the life of the Act.²⁶⁹

4. Other Administrative Burdens

a. *Vexatious Complainants*

Another source of burden for the courts arises in the form of the complainant who files repetitious, multiple complaints. The burden on routine administration of the process has already been accounted for in the above discussion. AO data collected since February 1984 indicate that 597 (29%) of 2061 complaints were filed by complainants who had previously filed.²⁷⁰ Because the identity

²⁶⁹ A similar calculation of the base total hours of staff time spent on special committees was not attempted due to the inconclusive nature of the data.

²⁷⁰ This figure was extracted directly from a data base compiled by the FJC using AO records. See *infra* app.

of the complainant is not reported to the AO, there is no way of knowing how many complaints were filed by the same complainants.

One circuit executive described the problem of repeat complainants, and the circuit's resolution, this way:

In one case, a pro se litigant filed numerous frivolous and repetitious complaints over a period of years. The complaints were snowballing to include complaints about handling the complaints, threatening to lead to the recusal of the entire circuit's judges. [The council] . . . voted to hold the complaints in a separate file, available for public inspection and not to circulate or process them as complaints if the chief judge finds them to be repetitious or outside the ambit of [§] 372(c).

Only two of the eight circuits reported that they had taken no action about vexatious complainants. Two circuits reported issuing judicial council orders against an individual, prohibiting the filing of multiple, repetitious complaints. One other circuit was considering such an order against an individual and two other circuits had issued orders banning an individual from refiling the same complaint against the same judge. Another circuit issued a warning against further repetitious filings by a given complainant, which successfully deterred that individual.

On the basis of the above discussion, it cannot be said that the vexatious complainant creates an additional burden by filing multiple complaints. Actions taken by judicial councils stemmed the burden. Such complaints are included in statistical tables and there is no indication that each takes more or less time than a typical complaint. As discussed in the following section, the burdens arise when a circuit is forced to create special procedures to deal with the problem.

b. *Recusal Issues*

When a vexatious complainant names all of the judges who are eligible to act as chief judge or when a complainant names so many judges that the judicial council of the circuit is unable to muster a quorum to vote on a petition for review, problems follow. Illustrative Rule 18(b) states a rigid recusal policy: "A judge whose conduct is the subject of a complaint will be disqualified from participating in any consideration of the complaint"²⁷¹ The commentary states that the Rules' drafters considered a number of options and

²⁷¹ ILLUSTRATIVE RULES, *supra* note 7.

decided that "the appearance of justice is best served by adherence to traditional principles that matters should be decided by disinterested judges."²⁷²

Only one of the eight circuits in the field study reported that it had experienced no problems of this sort. Three circuits reported recusal problems that required them to resort to the intercourt assignment system. Three other circuits faced situations in which they had only one judge available to act as chief judge and to conduct the initial review of a complaint. In two of those situations, the complainant had named all of the circuit judges but a new appointee was confirmed in the interim and that judge acted on the complaint. The other circuit reported a quorum problem, but in the end it was able to gather a quorum of three to meet as a judicial council.

Table 14 shows the number of instances reported in the field study in which an acting chief judge issued the initial order regarding a complaint. The number of instances in which all judges are recused would be a subset of this number.

TABLE 14
Orders Issued by Acting Chief Judges, Field Study (N=445)

	Circuit								Total
	A	B	C	D	E	F	G	H	
Number	4	0	6	2	11	1	5	4	33
% of All Orders	33%	0%	19%	2%	15%	2%	9%	6%	7%

The absolute number of recusals and the percentage of recusals indicate that this problem does not occur frequently. However, each instance of complete recusal and resort to intercourt assignments represents a significant burden on the judiciary.

How do the chief judges and judicial councils handle such matters? When all eligible judges are named in a complaint and, following Illustrative Rule 18(b),²⁷³ are recused, the chief judges have used the intercourt assignment process on the advice of the General Counsel of the Administrative Office. This requires

²⁷² *Id.* Rule 18 commentary at 48.

²⁷³ ILLUSTRATIVE RULES, *supra* note 7.

completing a form request to the Chief Justice of the United States, who generally designates the chief judge of a neighboring circuit to serve as an acting chief judge for purposes of ruling on the complaint. In one such case, the papers were sent to the chief judge of a neighboring circuit and he dismissed the complaint as frivolous, but wrote an order addressing all of the major allegations. If a complaint is not dismissible on its face, conducting an inquiry from a neighboring circuit might entail locating the record of the underlying case in the other circuit, locating other complaints filed by the same person, making an inquiry of the named judge, interviewing a third-party witness, or even appointing a special committee to conduct an investigation and hearing. No complaints that required such an inquiry were found in the field study.

After one circuit initiated an intercircuit assignment, the complainant filed a subsequent pleading seeking to expand the complaint and a petition for review to include all of the judges and magistrates of the neighboring circuit. Apparently (according to the complainant), they had become part of the expanding conspiracy against the complainant. Shortly after that filing, the complainant again attempted to expand the original complaint to name all of the justices of the Supreme Court and all of the judges of the D.C. and Federal Circuits. At that point, the circuit in which the complaint had been originally filed decided that it was futile to continue to use the intercircuit assignment process. The judicial council of that circuit invoked a "rule of necessity"²⁷⁴ to permit judges' discretion not to recuse themselves despite the mandatory language in their local rule. In the context of that complaint, the "rule of necessity" appears to have been invoked only after it became apparent that use of the intercircuit process would only lead to further complaints against judges of other circuits and courts.

Another circuit has recently applied the rule of necessity in less extreme circumstances. In ruling on a petition for review of the dismissal of a complaint that named most of the members of the judicial council, the council noted that the remaining members of the council did not constitute a quorum and therefore could not decide the matter themselves. The council emphasized, furthermore, that there existed no statute expressly authorizing the designation of another body (such as the judicial council of another circuit) to rule on a petition for review in such circumstances.

²⁷⁴ See *United States v. Will*, 449 U.S. 200, 213-16 (1980).

Accordingly, the council concluded that the rule of necessity justified participation by members of the council who were named in the complaint in ruling on the petition for review.

Long-term solutions to the recusal problems have entailed the revision of local rules. One circuit adopted a rule of necessity by local rule.²⁷⁵ This rule modifies the quorum requirement in multiple recusal situations.

Attempts at a national solution to the multiple recusal problem should probably focus on modifying Illustrative Rule 18²⁷⁶ to include some version of the rule of necessity. Since such a modified Illustrative Rule would not, of course, be binding on any circuit, each circuit could, if it chose, alter the rule according to local needs and quorum requirements. At the same time, the existence of a national statement by the federal judiciary that invocation of the rule of necessity is justified may serve to encourage its use.

5. Judicial Independence

How do chief judges view the impact of the Act on judicial independence? Eight current and five former chief judges were asked variations of this question.²⁷⁷ The short answer is that none of the chief judges found that the Act had any effect on judicial independence. No one cited an instance in which judicial independence was seriously implicated, and none felt that the current structure or administration of the Act posed a threat to the independence of the judiciary as a whole or to any specific judge in any proceeding they had encountered.²⁷⁸

One might reasonably ask whether chief judges, who, after all, are the primary officials who wield regulatory power under the Act, are the best sources of information regarding these issues. Research into the attitudes, thoughts, and experiences of district and circuit

²⁷⁵ See Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers Under 28 U.S.C. § 372 (c) at 36-37 (Rule 18(b)) (allowing the council to refer complaints to the Judicial Conference of the United States or to the judicial council of another circuit in the event that the complaint is against a majority of the members of the judicial council of the Second Circuit).

²⁷⁶ See ILLUSTRATIVE RULES, *supra* note 7.

²⁷⁷ The judges were asked: "What, if any, aspects of judicial independence have been affected in any way by the § 372(c) process?", and "Do you think there is a risk that the Act and its processes could compromise some aspect of judicial independence?" They were also asked, "What impact have the recent criminal prosecutions and impeachments of federal judges had on judicial independence?"

²⁷⁸ Two chief judges did express slight misgivings about one impeachment.

judges (the regulatees) might better test whether the values underlying Article III of the Constitution are in danger.²⁷⁹

In the field study chief judges expressed a high value and concern for judicial independence. Responses to these questions reflected the serious thought given to the concept of judicial independence and its application to various aspects of a judge's activities. In response to the general questions listed above, most of the judges focused on independence in decision-making, which they distinguished from absolute freedom to behave as one pleases in the courtroom or elsewhere. One chief judge summarized the idea this way: "The overbearing, rude judge is no more independent than decent judges. . . . No one is being picked on for the merits of decisions." Another chief judge observed that "the Act doesn't affect independence of decision-making, but judges do watch their conduct more." A third judge said that "the most important part of judicial independence is that when a judge decides [a case], personally, he doesn't have much to gain or lose."

These judges saw the process of excluding complaints directly related to the merits of the underlying litigation as a linchpin for protecting judicial independence. As one judge said, "If I as chief judge, in a disciplinary context, poked into the merits-related rulings in cases, that would impact on judicial independence. . . . Of course, you can't look at a judge's rulings, but it's wrong to say you can't look at anything else."

Several judges raised and answered the question of whether another type of disciplinary process, for example a national court or a citizen tribunal, might impinge on judicial independence. These judges clearly believed that vesting decisions in the chief judge and circuit council were critical to preserving judicial independence. In one chief judge's view, "If responsibility for discipline were given to an outside agency with a bureaucracy and a lot of power, there could be an impact on judicial independence." Another chief judge said, "The Nunn-DeConcini bill [which proposed the creation of a national discipline court within the judicial branch] would have been a terrible mistake. As soon as the disciplinary power goes outside the circuit to some national body, you may begin to

²⁷⁹ This question would be an interesting research project on its own, but it exceeds the scope of this project. A survey conducted for the Commission by William Slate produced an interesting datum on this point. Asked whether "discipline proceedings ever interfered in any way with [their] judicial independence," 294 of 301 (98%) federal appellate, district, bankruptcy, and magistrate judges responded in the negative. Slate, *supra* note 219, at 998 (Question 16).

implicate judicial independence." In the view of this chief judge, "You could compromise judicial independence if you bring in outside officials, even outside judges." One chief judge summed up the issue of local control succinctly: "Nunn-DeConcini²⁸⁰ . . . would take power away from people who know what's going on and have the ability to act tactfully and give power to those who don't."

The key to the idea of local control seems to be found in the Act's emphasis on correction of misconduct, which depends on the relationship of the chief judge to judges within the circuit.²⁸¹ As a former chief judge asserted, the "chief judge is in the best position to understand the problems within the circuit. I always met with district judges, magistrate judges, and bankruptcy judges to keep abreast of problems. So, when complaints came in, I knew who they were talking about." The concern seems to be that the administration of complaints from outside the circuit would become formal, literal, and bureaucratic—a situation that the existing forms of administration appear to have avoided.

Finally, responses to the question about the effect of impeachments on judicial independence revealed a consensus that there has been no effect. Two judges expressed mild concern about the Hastings impeachment because he had been acquitted in the criminal proceeding, but those judges seemed satisfied that the decisions were reached fairly on the basis of substantial evidence of guilt. With the exception of these two judges, the unanimous sentiment was embodied in the following statement that the three impeachments and the pending criminal prosecutions "had no effect on judicial independence. They were such clear cases, they had no effect." One chief judge refined the point: "I don't think there's been any impact on judicial decision-making. Certainly a judge will be less liable to take a bribe, but that's fine." Thus, any effect of the impeachments was a deterrent effect and did not implicate independent decision-making.

None of the matters that were examined in the field study represented a serious threat to independent decision-making. Three matters, however, did raise the issue, and in two of them, the action taken could be described as troublesome. In all three of these matters, judges faced complaints about statements made in the course of sentencing defendants. In the "untroublesome" matter,

²⁸⁰ S. 1423, 95th Cong., 1st Sess. (1977).

²⁸¹ See *supra* part I.C.2.

the judge was accused of showing leniency toward defendants who had been convicted of damaging military property. In the course of imposing a sentence that the complainants found to be too lenient, the judge expressed approval of the defendants' motives and acts and disapproval of the conduct of the corporate defense contractor whose property had been damaged. In dismissing the complaints as directly related to the merits of the sentencing decision, the chief judge held that "the trial judge's comments fall outside the scope of the Act" because the "comments were made during a sentencing proceeding in his capacity as a judicial officer, and they were related to the merits and reasons for the sentence imposed."²⁸² In words that might apply to the two "troublesome" cases discussed below, the chief judge asserted that "[a] trial judge should not fear that because of comments he or she makes from the bench, which in good faith the judge feels are related to the proceeding before the court, he or she ultimately may be subject to disciplinary sanction by the Judicial Council."²⁸³

In a similar type of matter, complainants alleged that a district judge had expressed approval of the "sanctuary movement" in sentencing defendants for violating the immigration laws.²⁸⁴ The chief judge indicated in his order that he had reviewed the transcript and discussed the complaint informally with the district judge, after which the chief judge dismissed the complaint on the grounds of corrective action. In his order the chief judge seemed to agree with the premise that it would be improper for the district judge to express approval of criminal activities engaged in by the sanctuary movement. However, the chief judge found that the district judge had not expressed approval, and that, regardless, the district judge's response to the complaint, and his promise to avoid use of the ambiguous term "sanctuary movement," constituted corrective action.²⁸⁵

In the third matter, a judge expressed the view during sentencing proceedings that the defendant, a white woman, may have been

²⁸² *In re Lauer*, 788 F.2d 135, 137 (8th Cir. Jud. Council 1985). The court held that "[t]he Judicial Conduct and Disability Act should not be invoked so as to chill the independence of a trial judge in a judicial proceeding." *Id.* at 138.

²⁸³ *Id.*

²⁸⁴ See *supra* part I.C.2.d. (discussing case CA-17). The "sanctuary movement" provides shelter and other support, including sanctuary in churches, to immigrants who entered the United States without proper papers to avoid political repression in their homelands.

²⁸⁵ For a more detailed discussion, see *supra* part I.C.2.d. (discussing case CA-17).

"under the hypnotic spell" of a black male co-defendant and that drugs must have been involved because the activity had taken place in a ghetto location. The chief judge discussed the matter with the district judge, who explained that he had been searching for a rationale for avoiding a harsh result under the sentencing guidelines. The complaint was dismissed on the grounds of corrective action after the judge agreed that his statements were troubling and that he would avoid such statements in the future.²⁸⁶

No discipline was imposed in any of these cases. Nor was there any pressure in the cases to modify the sentences themselves. Nevertheless, the termination of two complaints on the basis of corrective action possibly gave the misimpression that the judge could be held accountable, apart from appellate review, for expressing reasons for imposing a particular sentence. In each of these three cases the judge's expression of personal opinions and values related directly to the issue of what sentence to impose. Certainly, one can see the value in using these cases for educational purposes in order to expose the judge to the effect of his or her expression of controversial personal views. At the same time, one should not lose sight of the fact that the process can create consequences for judges who state reasons for a judicial decision. The latter two matters seem to border on invading judicial independence in decision-making.

While neither of these two judges appeared to object, or to assert judicial independence or its statutory surrogate, merits-relatedness, as a reason for the chief judge to dismiss the complaints, the context of the complaints may have imposed pressure on them to agree to take corrective action. In both of these matters, considerable publicity accompanied the complaints, perhaps because the judges were out of step with public opinion. The publicity may have generated pressure on the chief judges to take corrective action and bring the proceedings to prompt conclusions. Of course, it is not known what motivated these two named judges to agree to corrective action. Perhaps the judges themselves believed that the views they had expressed were not, in fact, central to the legal rationale that they had applied in the cases.

Including these two matters, the field study revealed no matter that can be considered to have directly interfered with or seriously threatened independent judicial decision-making.

²⁸⁶ For a more detailed discussion, see *supra* part I.C.2.c. (discussing case CA-7).

6. Effects on Court Morale and Collegiality

Three of the chief judges were asked whether a court suffers when its members sit in judgment of each other. The negative impact seems to be minimal.²⁸⁷ Most judgments are made by the chief judge and, as shown earlier, most complaints that lead to special committee investigations and judicial council judgments are against district, magistrate, and bankruptcy judges. District judges sit on judicial councils, but it is not likely that more than one judge would be from the same district as the named judge. Recusal could cure any discomfiture that existed. Moreover, even if a judge from the same district as a named judge does sit in judgment on a judicial council matter, the effect on collegiality will generally be limited because judges at the trial level rarely have occasion to sit collegially.

7. Harms to the Judicial Branch Relating to Confidentiality

Provisions of the Act and the Illustrative Rules combine with the restraints of judicial ethics to create a dilemma for judges and courts in responding to publicly voiced complaints of misconduct under the Act. The Act provides that "all papers, documents, and records . . . related to [special committee] investigations . . . shall be confidential."²⁸⁸ In most circuits there is no explicit provision in the local rules that a complaint will be kept confidential merely because it is filed. As a practical matter a complainant can call a press conference (as many have), disclose the contents of the

²⁸⁷ One chief judge observed that "[i]f it's a meritorious complaint, anytime you sit in judgment on your peers, it is discomfiting. It does not add to collegiality." This judge recalled that there were such problems involving serious misconduct matters (at the court of appeals level) that were informally handled without a complaint under the Act, but there was "no lasting effect." Another chief judge noted that a district judge who had been reprimanded "was angry at the judicial council members for a while. But, he shouldn't have done it [that is, engaged in misconduct]."

Another chief judge noted a "tension with appellate judges looking at complaints against other appellate judges," but felt that the tension had dissipated with experience under the Act and that "most judges now are sophisticated enough not to be bothered by complaints . . . unless they know it's serious." Serious complaints, however, occur so infrequently that tensions created by the judgments of peers are likely to be rare. Finally, another chief judge indicated that "all the semi-serious issues we've had have not involved judges on the court of appeals." If such a conflict arose, this judge would want to consider alternatives to avoid judging among peers. Recusals for collegiality concerns could cause a serious problem, but after more than a decade under the Act, the issue remains hypothetical.

²⁸⁸ § 372(c)(14).

complaint, and discuss the allegations and the process. This has occurred with such frequency that most chief judges raised the issue in response to our general inquiries about the purposes of confidentiality. One particular organization that has filed many complaints in various circuits appears to use publicity about the filing of such complaints as a *modus operandi*. Other complainants have also aired their complaints publicly without waiting for the process to unfold.

Chief judges and their staffs operate under different constraints than complainants. As the persons responsible for deciding whether to proceed, chief judges, at a minimum, may be criticized for acting injudiciously, and perhaps even for acting unethically by commenting on a pending complaint. As noted above, if the chief judge appoints a special committee, the Act dictates that the council and staff treat the proceedings as confidential.²⁸⁹

The current state of affairs is that, in the words of one chief judge, "[i]f there's a serious allegation, the reality is that confidentiality is unlikely." Unlike the situation in litigation, with parties generally able to respond to "trial by media," publicity is one-sided when a complaint is made against a judge. Another chief judge recounted such an instance: "It was frustrating for me. Here was [the complainant] merrily issuing press releases, and I felt I couldn't respond."

The named judge may not be the sole victim of this process; the judiciary and the complaint process may also be implicated. When the media contacts the court for comment, the answer generally must be "no comment." Indeed in most jurisdictions, including those whose final orders are fully available to the public, staff will not even acknowledge the filing of a specific complaint against a specific judge. The appearance to the public may be that the judiciary is protecting a judge who has engaged in misconduct. Ironically, however, the intent is the opposite—to protect the reputation of a judge who has probably not engaged in misconduct under the Act.

The protection of a named judge from such prejudgment publicity is a major concern of chief judges. One chief judge presented the following hypothetical situation to illustrate this concern:

²⁸⁹ See *id.*

A complaint alleges that a judge was drunk on the bench. If the complaint were public, it would be a big headline. By the time the chief judge investigated and found out that the charge was not true, or that the judge actually was drowsy from medication or something, the judge's reputation would be ruined.

We have seen that the Act imposes substantial negative effects on the courts in the form of burdens on resources in handling routine as well as serious matters. Chief judges have also reported limited negative effects on collegial relations and judicial independence. In addition, we found two instances in the field study that appeared to implicate judicial independence. Judges sometimes face one-sided publicity without a fair opportunity to defend their conduct in the media.

III. ASSESSMENTS: WHAT WORKS? WHAT NEEDS IMPROVEMENT?

A. *What Are the Relationships Between the Positive Effects and the Negative Effects?*

In this section, we address questions that combine our descriptions of the positive and negative effects that courts have experienced in administering the Act. At what stage of the process do the positive effects occur and who produces them? Are the negative effects, especially the burdens on court staff and resources, necessary to achieve the beneficial effects? Addressing these questions involves examining how to achieve the benefits and looking at how courts have approached, and might approach, the demands involved in administering the Act.

The positive effects fall into four categories: (1) informal and corrective actions taken to modify judicial conduct in serious contexts that do not involve criminal or impeachable conduct; (2) informal actions taken to resolve serious disability matters; (3) investigations into serious allegations of misconduct, including criminal charges and impeachable offenses; and (4) a structure that complainants can use to file complaints relating to judicial conduct and obtain a response to their concerns.

The functions served in items one and two are traditional chief judge functions. The burdens of self-regulation imposed by dealing with day-to-day problems that require feedback and correction seem linked to the prestige and role of the chief judge as the chief administrative judge of the circuit and as a respected, experienced member of the bench. Any delegation of responsibility—for example, to a chief district judge or a close friend of a judge facing

disability questions—would have to be under the direction and control of the chief judge. The burdens associated with investigating problems and creating a plan for responding may be shared with other judges. Ultimately, however, the chief judge bears the burden and power of the office to lead and manage the process. In interviews, chief judges recognized and accepted this responsibility, not as a burden, but as a necessary and valuable activity.²⁹⁰

Issues relating to investigation of serious complaints also seem related to the authority and prestige of the chief judge. Ultimately, peer review demands judicial involvement under the leadership of the chief judge. Some aspects of serving on special investigative committees, however, might be made less burdensome by sharing the roles involved in those committees. For example, burdens could be eased by assigning tasks of assembling witnesses and examining exhibits, hiring an investigator, scheduling a hearing, organizing legal research, and drafting a report. Using staff, including the clerk and circuit executive, to develop information and options may lessen the burden. Sharing these roles with judges, as opposed to staff, merely shifts the burden from the chief judge to other judges who have full caseloads of their own. Inevitably, serious matters of misconduct or disability will place greater demands on already scarce judicial resources.

For reasons that we have not seen articulated, most special committees to date, with at least one major exception, have been composed of five judges. Experience suggests that many matters that require investigation do not require the perspectives of five judges. Indeed, in many instances a simple investigation by the chief judge or a designate could resolve the matter. The five-judge panel is a cumbersome entity that seems likely to institutionalize a burden that may exceed the benefit achieved in some matters. For example, one of the complaints singled out as a problem matter in Part I.C. involved a judge who was accused of using a pejorative term to refer to a group of third parties. The chief judge ruled that the term was not necessarily pejorative and that its use was related to the merits. If the chief judge had any doubts about the issues, he may nevertheless have hesitated to create a committee of five judges to address them. Making it clear that other alternatives, such as the appointment of a committee of three judges or a limited inquiry by

²⁹⁰ See *supra* part II.B.3.

the chief judge, are available might avoid problems associated with a cumbersome special committee process.

The fourth function—having a structure to review and respond to complaints—presents the greatest opportunity for separation of the positive effects from the negative. The functions served at the filing stage are to review and screen the complaints and to respond to each complaint according to its merit. The process seems ripe for a “track system” whereby matters that demand the attention of the chief judge are isolated from other matters.²⁹¹ Cases with serious allegations—candidates for corrective action, informal actions regarding disability, or full investigation—should be brought immediately to the chief judge’s attention. Further actions in those matters should be delegable, but only at the chief judge’s express direction. Experienced staff will quickly learn the type of information the chief judge needs before embarking on a corrective strategy, such as a verification of the record, and can assemble such support. Complaints that on their face fail to raise even an arguable claim of disability or misconduct need not even be brought to the chief judge’s attention until a memorandum and draft order have been prepared by the staff.

Having such a dual-track system (or a multiple-track system) depends on being able to delegate the initial review of complaints and the drafting of orders. Experience in several circuits indicates that such delegation can take place without interfering with either the corrective functions of the Act or the need for a prompt response. The average disposition times in circuits that delegate extensively is within the normal range of disposition times in the other circuits. Whether confidentiality concerns would be implicated may be a matter for individual decision within a circuit. Our study shows that different circuits assign different values to the degree of confidentiality required by the Act and by judges within the circuits.²⁹² By employing a dual-track system, a court can reserve the chief judge’s time for matters that warrant the chief judge’s direction and leadership. Use of staff resources to prepare

²⁹¹ In another context, Congress has mandated that advisory groups appointed under the Civil Justice Reform Act consider adopting a track system as part of a cost and delay reduction plan. *See* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 103, 104 Stat. 5089, 5091-92 (codified as amended at 28 U.S.C. § 473(a)(1) (Supp. IV 1992)) (providing that each U.S. district court shall consider “systemic, differential treatment of civil cases that tailors the level of individualized and case specific management” in its cost and delay reduction plans).

²⁹² *See supra* part I.D.2.

the routine cases would reduce the burden on judicial time in some circuits.

*B. Do the Positive Effects Outweigh the Negative
Effects or Vice Versa?*

We asked the eight current and five former chief judges who participated in the field study to provide an overall assessment of the benefits and burdens of the Act. We posed this question: "Do the positive effects of the Act outweigh the negative effects or vice versa?" Six of the eight current chief judges and four of the five former chief judges indicated that the positive effects of the Act outweigh its negative effects.

What positive and negative effects did these judges identify in their overall assessments of their experiences under the Act? The positive effects were concentrated in three areas: (1) reinforcing the chief judge's traditional role as overseer of judicial conduct in the circuit; (2) assuring that the public has an opportunity to complain about judicial conduct; and (3) assigning the process to judges familiar with local conditions. The negative effects reported were related exclusively to the lack of merit in most complaints and the burden the Act imposes on court resources.

1. Chief Judge as Overseer

Prior to the Act, some chief judges were active in striving to improve judicial conduct. These judges presumably relied on the prestige of their office and experience to persuade other judges to conform to ethical and professional norms of conduct. One chief judge whose tenure spanned the passage of the Act volunteered this assessment of the benefits and burdens of the Act:

In trying to bring about corrective action, I was glad we had the Act. It's hard to talk to a judge about his deficiencies. If you do it in response to a complaint, you're seen as on the judge's side, you have an objective reason to talk to the judge. Corrective action then helps the judge and helps the system.

Other judges recognized that the Act facilitated their interactions with judges about delicate issues relating to conduct. Three judges characterized the benefit as stimulating negotiations with another judge, each using their own metaphors for the process.²⁹³

²⁹³ The judges' comments were as follows: "The Act was a bargaining chip the

These reports verify that these chief judges view one of the benefits described—the creation of a structure with a long shadow that facilitates informal responses—as a central and positive feature of the Act.²⁹⁴ One chief judge summarizes this feature well: “There are real problems. The Act is a very good vehicle for advising everyone how to handle them. Before the Act you had to scurry around to figure out what to do.”

2. Opportunity for Public to Complain

For several of the judges, the assurance that the public has an opportunity to complain is the Act’s most important feature. These judges underscored the symbolic value of the Act.²⁹⁵ Even the two chief judges and the one former chief judge who thought that the burdens of the Act outweighed the benefits recognized the benefit of having a system of public complaints. One judge commented:

If the public thinks of the Act as a weapon that gives them more confidence in the judiciary, then I’d say yes, the positive outweighs the negative. But the complaints are all meritless, they generate a lot of paper and the expenditure of a lot of time and energy, to almost no purpose.

Similar sentiments were expressed by the other two judges.²⁹⁶

chief judge could use, hanging in the background. The presence of the complaint process, not necessarily its use, is the best therapy.”; “The Act is important in giving the chief judge the big stick while speaking softly. The chief judge can use the Act as a negotiating weapon in informal situations.”; “You always need a shotgun behind the door. You need someone looking over your shoulder, everyone does.”

One of the judges who found the negative effects of the Act to predominate also identified this feature as a positive benefit: “If I call a judge about a particular problem raised in a complaint, I can say ‘I will dismiss the complaint if you say you won’t do it anymore.’ That’s a benefit.”

²⁹⁴ See *supra* part I.E.

²⁹⁵ The judges’ comments included: “The Act gave complainants a place to go, and there are few serious complaints. The greatest benefit of the Act is just having a system.”; “The Act is useful symbolically. It reassures the public that anyone can file a complaint at any time. That’s important.”; “The Act is a vehicle for someone to make a complaint about crazy demeanor of a trial judge. Even if the complaint is dismissed as merits-related, it could have a dampening effect on the judge. The downside is that there is no deterrent against complainants filing complaints.”

²⁹⁶ The other judges’ remarks included: “A few complaints are from citizens who genuinely don’t understand the legal process; it’s good to have an opportunity to explain it to them and help them understand it.”; and “The Act is more important in perception than reality—the public knows they have a place to complain. It soothes the public.”

3. Decentralized Self-Regulation

Six of the thirteen chief judges volunteered the opinion that the assignment of responsibility for enforcement of the Act to the circuit level was a key positive feature of the Act. Several of the remaining judges touted this feature at other points in the interview. One of the six capsulized the benefits of local control in these words:

Nunn-Deconcini²⁹⁷ would be time-consuming and would weaken the authority of the chief judge. It would take power away from people who know what's going on and have the ability to act tactfully and give power to those who don't. You would have an endless series of confrontations between the judiciary and outside bureaucrats.²⁹⁸

In sum, the vast majority of chief judges think that the Act strengthens their ability to administer a system of peer review within each circuit and that it serves the public as an outlet for its complaints. Chief judges who find the Act's effects to be predominantly negative primarily cite its tendency to generate frivolous and merits-related complaints. Even those judges, however, recognize the benefits of the Act and the system of decentralized self-regulation that underlies it.

C. Chief Judges' Suggestions for Change

The following are excerpts from chief judges' responses to the interview question, "What suggestions do you have for improvements in the Act and the Illustrative Rules?"²⁹⁹ To facilitate cross-referencing, the chief judges' suggestions have been organized by reproducing relevant headings and subheadings from this report

²⁹⁷ S. 1423, 95th Cong., 1st Sess. (1977).

²⁹⁸ Other chief judges supplied additional comments: "When I call judges, they know me. I'm not threatening."; "[The Act] opens up the process so that the chief judge can carry out the chief judge's responsibility for discipline. When the judicial councils were set up in earlier decades, this was the idea."; "It would be a mistake to have a national commission, for a lot of reasons. That would even be inconvenient geographically, among other things."; "The Act offers a chief judge an opportunity to close gaps, which an outsider couldn't do. You have to rely on judges, on peer review."

²⁹⁹ There has been no attempt to catalogue all other suggestions made by chief judges in the course of their responses to other interview questions. Many of these other suggestions have been discussed or incorporated elsewhere in this report.

and placing each suggestion under the subheading that most closely approximates the subject of the suggestion.

*Who Does What About Complaints*³⁰⁰

As long as the chief judge has the responsibility, the chief judge has to spend a lot of time on 372(c) orders and satisfy himself with them. It is not necessary that this be confined to the chief judge. With Criminal Justice Act vouchers now, the chief judge can delegate the responsibility to another judge. I suggested at the JCUS that, just like Criminal Justice Act vouchers, the chief judge should be able to delegate 372(c) orders to another judge.³⁰¹ The chief judge's job is very time consuming; anything that can be delegated should be. There's no reason the chief judge must be involved in every one of these complaints. The chief judge should be able to decide whether a complaint must be looked at more carefully. The chief judge should hang on to anything that's close or controversial, but most are not; the chief judge could delegate those. Some chief judges disagree, they feel the chief judge must hold on to it.

It has been suggested that the filing of 372(c) complaints with the clerk confuses the litigant into thinking that the complaint is like an appeal. Perhaps they could file it with the chief judge. But that would remove the insulation from the chief judge, with the clerk serving as a buffer. You'd have crazies calling the chief judge's chambers. So, it's better to leave it as it is.

*Who Does What About Complaints—Initial Screening*³⁰²

Finally, I note that under the Illustrative Rules the clerk can send back a complaint not in the proper form.³⁰³ There is a potential conflict between that rule and the 1991 amendment to Fed. R. Civ. P. 5 that clerks shouldn't decline to accept filings for impropriety of form.³⁰⁴ Of course it's not technically a conflict,

³⁰⁰ See *supra* part I.A.

³⁰¹ See 18 U.S.C. § 3006A(d)(3), (e)(3) (1988) (noting that chief judge of the circuit has authority to waive statutory maximum attorney's fee awards for indigent criminal defense and may delegate such authority to an active circuit judge).

³⁰² See *supra* part I.A.I.

³⁰³ See ILLUSTRATIVE RULES, *supra* note 7, Rule 3(d). Rule 3(d) states that if a complaint does not meet the requirements of rule 2 (how to file a complaint), the clerk "will normally not accept the complaint for filing and will advise the complainant of the appropriate procedures."

³⁰⁴ Rule 5 of the Federal Rules of Civil Procedure 5 provides in relevant part that "[t]he clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any

Rule 5 doesn't cover a 372 situation. But it shows a different approach.

*Dismissals of Complaints—The Frequency of and Bases for Dismissals*³⁰⁵

We need to broaden those bases for dismissal. I'd like to give the chief judge more blanket discretion to get rid of non-substantive complaints more easily. I would feel better about the Act if there were added a blanket discretionary phrase, like permitting dismissal of a complaint that was "not in accord with the purposes of the Act."

*Dismissals of Complaints—Fivolousness*³⁰⁶

Another point is, there are so many frivolous complaints. You may want to consider imposing sanctions on complainants, to provide some deterrent to the constant merits-related complaints. I don't know exactly what kind of deterrent. I don't necessarily advocate sanctions, but I want to identify this as an issue the Commission should think about.

My solution to the problem of all the frivolous complaints is that since 99+% are actually attempts at an appeal, the complainant ought to have to pay a filing fee, similar to the filing fee on appeal. You can make the filing fee refundable if the chief judge sees any merit in the complaint, or finds it to be nonfrivolous. Have the money go to the U.S. Treasury. These complainants put the judiciary to an expense, they file what is in effect an appeal without a filing fee. It may take the chief judge two hours to work on it, plus there'll be a petition for review so all judges on the judicial council have to read it, that may be twelve hours there, plus staff and secretary time. It costs money. A complainant with no legitimate complaint shouldn't be able to put the taxpayers to such an expense. Some may think this would discourage complaints, and it probably would, but it would probably discourage only the meritless ones. The most frivolous ones generally make the most serious charges, but are conclusory.

*Dismissals of Complaints—Complaints of Delay*³⁰⁷

The greatest problem in the judicial system today is delay. I have some concern whether delay is really within the scope of the

local rules or practices." FED. R. CIV. P. 5

³⁰⁵ See *supra* part I.C.1.a.

³⁰⁶ See *supra* part I.C.1.a.i.

³⁰⁷ See *supra* part I.C.1.a.ii.(D).

Act, or should be dealt with by mandamus instead. I've vacillated on that. Often we deny the mandamus, but we suggest that the petitioner can refile it in ninety days if the judge hasn't acted. With complaints of delay under the Act, I call the judge, or inquire by letter, and the judge then decides on a timely basis. I never turned any of those over to the judicial council. I think the Judicial Conference of the US should direct that all cases shall be decided in ninety days. All cases that are not, without some legal reason, shall be turned over to the judicial council for review and action to deal with the delay. The judicial council would act on these delay problems as a body. If district judges were faced with the idea that the judicial council will automatically get any case not decided in ninety days, that would be a great deterrent. That would be much better than a cumbersome complaint process.

We need clarification, perhaps in a case format, on undue delay in a particular case where complainant could file a mandamus, versus a serious pattern of delay. In one case, we took a judge's docket away for a year. There were grumblings from the other judges, they got extra cases. But it did work, the judge got the old opinions out. It's not lazy judges, but a perfectionist mindset; and older judges are not ready to change, it's ingrained in them. These judges have no sense of urgency, they view each case as an intellectual puzzle they have to solve, divorced from the real litigants. This is an obvious problem in the appeals court, but surprisingly the district court has the same problem, even though district judges see people every day. Fortunately, these judges are a minority. There is the Civil Justice Reform Act to help, but really intractable cases are not solved. Litigants deserve a decision in a reasonable amount of time.

I know mandamus is not a real remedy for delay. There are lots of systems to track delay, perhaps 372(c) could be another one. The lawyer is reluctant to file a mandamus; under 372(c), the client can file.

*Corrective Actions*³⁰⁸

I would hate to see the Act get any more intrusive than it is. One must understand that this system is not to try or punish judges, but to improve them. You act not to accuse a judge, but only where conduct interferes with the business of the court. You don't save a judge by accusing him, but by working with him. Some disagreed, said it should be accusatory, you convict a judge of being a bad judge. When the Act was enacted, we won the day,

³⁰⁸ See *supra* part I.C.2.

to make it an improvement process. That's proven its worth. I'd hate to see the Commission get away from that. Using some kind of outside overseer would be like using a sledgehammer to do a ball-peen hammer's job. There's no need for that in this circuit. The great majority of work is by informal counseling and corrective action. This process allows us to deal with our problems by helping judges.

*Special Committee Investigations*³⁰⁹

It would be helpful to have articulated guidelines to cover the situation where an issue raised by a non-frivolous complaint is also the subject of a pending appeal. Should the judicial council stay its hand in the § 372 matter pending disposition of the appeal, or not? The point is, there can be matters raised on appeal that are appropriate subjects for discipline. An allegation that a judge's decision was the result of a bribe could come up in both contexts. You'd need an investigating committee for that; it could be acting at the same time as the appeal. Who acts first? Do they act in tandem? This needs to be worked out, whether by the Commission or the Judicial Conference Committee. Suppose a judge gave an appearance of impropriety. An appeals court could knock a judge out for that, and it could also be a discipline case. I was on an investigating committee looking into a complaint that a judge had been spoken to on behalf of a particular defendant. The committee heard testimony from an informant. Arguably, such a complaint should go ahead immediately. The relevant facts are extra-record, and wouldn't be developed on appeal. In the recusal case, by contrast, it's all on the record, there's little need for a separate factual investigation. In that case the complaint could wait for years, it wouldn't matter, it would affect only that case. But in a bribery situation, the council must proceed promptly. It would be nice for the rules to provide articulated guidelines to say, in deciding whether the two should proceed in tandem or the appeal should go first, the council should consider the following factors. When should council or special committee action be deferred pending a determination on the merits, and when not? There is no guidance on this now.

A special committee essentially functions like a grand jury. If in a grand jury proceeding a witness obstructs justice, they commit a federal offense, they can be indicted. You can have a contempt proceeding. The law has teeth in it to prevent the obstruction of the grand jury process. But in a 372(c) proceeding, if complainant

³⁰⁹ See *supra* part I.C.3.

won't answer a special committee question, or complainant abuses the process, the judicial council has little power. The special committee and the council have no more power than the grand jury to sit as a court. We need a mechanism for handling obstruction of justice in special committee proceedings. The obstruction statute is limited to proceedings in courts, so it doesn't cover special committee proceedings. I'd favor a statutory change on that, to allow prosecution of complainant for obstruction of justice in a 372(c) proceeding. Whether to actually pursue complainant criminally, and thereby publicize the name of the judge and hurt the judge's reputation, would be a discretionary call for the prosecutor. That is a common kind of decision for prosecutors. There are nuts out there, harassing judges, and you can't control them. Perhaps it's not a bad idea to impose costs or sanctions on such complainants. But the judicial council is not a court, and has no present authority to do that. Prisoners are not the problem, it's non-prisoner pro se's. You need a mechanism to deal with this problem. Again, we should extend the obstruction of justice statute to this, make it the same as obstructing a grand jury proceeding, and provide a remedy for obstructing or impeding a 372(c) proceeding. Then, you could give complainants a sheet in advance, warning them about obstruction, that they could be prosecuted. By and large, judges complained against will cooperate in these matters, although problems may arise [in a rare situation]. If the judge, or complainant, wants to cause trouble, they can. The question is whether changes are necessary to deal with the one in a thousand case, when the changes could affect other things. It all goes back to the particular personalities involved.

Also, there should be no permanent standing special committee permitted. There is no policy consideration in favor of that, and there are a lot of them on the other side. Our special committees have all been five judges, a good size, but discretion is fine for the number. I can see a three-judge special committee, if the complaint is not too complicated, but does state a claim. Having five judges gives you more perspectives. You don't need more explicit rules on the participation of complainant and the judge in special committee proceedings. You need to be flexible.

*Oversight—The Act and the Rules (Confidentiality)*³¹⁰

Where a judicial council acts on or dismisses a complaint, and you have a long special committee report, some things in the

³¹⁰ See *supra* part I.D.1.

report could do harm, but some things would be helpful. The judicial council should have discretion to release all or part of the report, as it sees fit, without the judge's prior permission.

I'd like to make it clear in the Rules that either complainant or the judge has the right to respond publicly once confidentiality is breached by the other side.

The Illustrative Rules are an abomination, and need to be rewritten. You should allow complaints against only one judge at a time. You should remove sending copies of the complaint to the chief judge of the district or bankruptcy court, as appropriate. If the complaint is confidential, then the chief judge of the district court shouldn't know about it.

*Informal Actions—Sources of Informal Complaints*³¹¹

I wish there were a vehicle by which lawyers could better air their grievances, without the concern or fear of retaliation. Perhaps bar associations can help with this. They could be a conduit by which to do it. Lawyers go to bar committees, and the committee as a whole files the complaint. This would keep the individual lawyer confidential [unless the factual circumstances of the complaint are sufficient to reveal the lawyer's identity to the judge, as may often be the case].

Maybe there ought to be more efforts at bar meetings to explain that this procedure exists. Lawyers ought to know how informal it can be, they can just call the chief judge or clerk if they want.

*Beneficial Effects of the Act—Dissemination*³¹²

[I would suggest] publishing orders, in order to pass information through the system. Circuits which do not give adequate reasons in their dismissal orders should be required to do so. The circuits which do not make their orders public should do so. All circuits should adopt the Illustrative Rules; the Fifth Circuit apparently is about to, which leaves just the Claims Court. I see no local values at play to prevent that.

We need some kind of clearinghouse about general 372(c) practices, how to handle things. Some judges are uncomfortable about that, they feel it would violate confidentiality. But the ABA Code would have sanitized cases in point. We could do the same thing, it would be very useful to the chief judge. Occasionally one

³¹¹ See *supra* part I.E.2.

³¹² See *supra* part II.A.1.

must skip a case altogether, because there's no way to disguise it. But most cases can be successfully sanitized, they would provide examples that could be used.

*Negative Effects—Other Administrative Burdens: Vexatious Complainants, Recusal Issues*³¹³

Also, there is the situation where all appellate judges are complained against. Perhaps the rule of necessity should be, nationally, put into the Illustrative Rules.

The only time I thought the Act was self-defeating was when a complainant filed a complaint against all circuit judges. It was clearly without merit, but we had to send it to another circuit. We need some kind of rule of necessity broader than the usual one, to avoid the need to do that.

*Assessments—Do the Positive Effects Outweigh the Negative Effects?*³¹⁴

The Act should be repealed.

Abolish the Act. I know it won't be done.

D. *Summary of Suggestions for Change*

The following is a list of all the suggestions for change advanced in this Article. This list is intended to be an exhaustive one, including not only changes endorsed in this Article, but any change that was identified as having some possible merit. The list embraces suggested changes to the Act, the Illustrative Rules, and circuits' practices. Many, probably most, of the suggestions originated from ideas expressed in the field study by chief judges, clerks, or circuit executives. All suggested changes that were put forward by chief judges in response to specific requests for suggestions have not been included. Those ideas are already quoted above. They are omitted below only to avoid unnecessary repetition; the omission does not suggest approval or disapproval of any of the chief judges' suggestions.

1. The Act should be amended to expressly recognize the power of the chief judge to conduct a limited inquiry into the factual support for a complaint's allegations, and to create a corresponding fourth ground for dismissal: a limited inquiry by the chief judge

³¹³ See *supra* part II.B.4.a.-b.

³¹⁴ See *supra* part III.B.

demonstrated that the allegations lacked any factual foundation.³¹⁵

2. Chief judges should be encouraged to delegate to qualified staff tasks associated with the initial review of a complaint and with the preparation of a draft order to dismiss a clearly unmeritorious complaint. Such delegation could be part of a dual-track or multiple-track system in which potentially meritorious complaints are quickly brought to the chief judge's attention, but nonmeritorious complaints are passed to the chief judge only after review by staff.³¹⁶

3. Chief judges should be encouraged, or required, to provide in each order of dismissal a statement of the allegations of the complaint and the reasons, not simply the conclusions, supporting dismissal. A uniform national rule, imposed either by statute or by the Judicial Conference of the United States, may be desirable to implement this change.³¹⁷

4. When concluding proceedings because corrective action has been taken, chief judges should be encouraged to document unambiguously in the order of dismissal the specific conduct that was corrected, and to extend the remedy, as fully as possible, to the complainant who raised the matter.³¹⁸

5. A uniform national rule, imposed either by statute or by the Judicial Conference of the United States, may be desirable. This rule would require that each circuit make publicly available, in the office of the clerk of the court of appeals, all chief judge dismissal orders, and that each circuit be required to file these orders in a central public repository (presumably, the Federal Judicial Center).³¹⁹

6. Bar groups should be encouraged to serve as filters and conduits for serious complaints.³²⁰

7. Efforts should be made to improve on the currently episodic and informal dissemination of information about complaints and the resolution of complaints to judges throughout the circuit. These efforts should focus on complaints having at least some substance or some instructive relevance for other judges, including

³¹⁵ See *supra* part I.C.1.a.i.(C).

³¹⁶ See *supra* parts I.A.1., I.A.5., III.A.

³¹⁷ See *supra* parts I.A.5., I.C.1.b., I.D.3.

³¹⁸ See *supra* parts I.C.2.d., I.D.2-3.

³¹⁹ See *supra* part I.D.3.

³²⁰ See *supra* part I.D.3.

all complaints resulting in sanctions or corrective actions. The purpose of such dissemination—which must be in a sanitized form—would be to bring significant orders to the attention of judges as a guide to assessing their own conduct.³²¹

8. The judiciary should disseminate information about the resolution of complaints to an even wider audience through publication of public orders. This would augment the body of published precedent under the Act, thereby facilitating the development of a common law and helping judges to assess their own conduct. The orders could be sanitized to remove information that would identify the judge or complainant.³²²

9. The Act should be amended to permit petitions for review to be determined by a standing or rotating three-judge panel of the judicial council, rather than by the entire council. In keeping with recent statutory changes augmenting the representation of district judges on the judicial councils, the amendment should require that at least one panel member be a district judge.³²³

10. The Illustrative Rules should be amended to permit the invocation of a rule of necessity. Such a rule would modify the automatic disqualification feature of Illustrative Rule 18(b) and would permit the chief judge or judicial council to consider a complaint or petition for review where multiple recusals otherwise would leave no judge available to act as chief judge, or would make it impossible to muster a quorum of the judicial council.³²⁴

11. Chief judges should be encouraged to conduct the limited inquiry permitted by Rule 4(b) of the Illustrative Rules³²⁵ to avoid impaneling special committees to investigate complaints that could be shown quickly to be unfounded. If a special committee is necessary, three-judge rather than five-judge committees should be employed more frequently. Such measures would minimize the investigatory burdens on judges.³²⁶

12. The Administrative Office and the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, in consultation with the Federal Judicial Center, should review the system for collecting and reporting statistical information about complaints and their outcomes to determine what changes

³²¹ See *supra* part II.A.1.

³²² See *supra* part II.A.1.

³²³ See *supra* part II.B.2.b.

³²⁴ See *supra* part II.B.4.b.

³²⁵ See ILLUSTRATIVE RULES, *supra* note 7.

³²⁶ See *supra* part III.A.

would improve the ability of the judicial branch, Congress, and the public to oversee administration of the Act. At a minimum, we recommend that judicial councils and national courts assign the completion of statistical forms to the staff member who has primary responsibility for assisting the chief judge in administering the Act. This individual is likely to understand the Act's terms and processes.³²⁷

³²⁷ See *infra* app.

APPENDIX—AO DATA BACKGROUND, LIMITS, AND TABLES

*Data on Filings Reported to the Administrative Office:
Background, Data Limits, and Tables*

This Appendix presents additional data on reports to the Administrative Office of the United States Courts (AO), summarizes the strengths and weaknesses of those data, and recommends changes.

The AO collects data on complaints filed under 28 U.S.C. § 372(c) for the purpose of meeting the reporting requirements that the Act imposes on the Director of the AO in 28 U.S.C. § 604(h). Section 604(h) requires the Director to "include in his annual report filed with the Congress under this section a summary of the number of complaints filed with each judicial council under section 372(c) of this title, indicating the general nature of such complaints and the disposition of those complaints in which action has been taken."³²⁸ To gather data to meet this requirement, the AO has created Form AO 372, a copy of which is attached to this Appendix, and a nine-page "Statistics Manual" instructing the courts on how to complete the form.

The instructions seek reporting information at two stages: when the complaint is filed and when it is concluded. Ideally, this means that an AO 372 form will be sent to the AO immediately after the complaint is filed, with information identifying the circuit, date filed, complaint number, type of complainant, and number and type of judicial official complained about. A photocopy of that form is to be kept by the circuit or national court for completing the termination information. After the complaint is terminated by chief judge action that is not the subject of a petition for review or after judicial council action on a petition for review or a special committee report, a second report must be filed. Information about the disposition of the complaint is entered on the bottom portion of the photocopy of the AO 372 form, which is then sent to the AO.

Data were entered from all of the reports on file at the AO to create the data set used in this report. The tables that follow in this Appendix, plus the tables in the report that refer to "reported § 372(c) filings" and indicate the AO reports as a source, are

³²⁸ 28 U.S.C. § 604(h)(2) (1988).

derived from these records. In one instance, missing records in the data set were identified for recent years by comparing the filing of final orders with the FJC with the filing of termination information with the AO. A problem was found with the data of one circuit. Fortunately, most of the information for that circuit could be reconstructed by reading the final orders of the chief judge and judicial council. A close correspondence between the number of chief judge orders in 1990 and 1991 in a sample of circuits and the number of AO records in those years from those circuits was observed.

The experience of working with the data suggests some of its limits. These fall into three major areas: missing or unlinked disposition data; misclassification of the type of complainant; and misclassification of the type of complaint. A discussion of each type of discrepancy follows.

1. Disposition Data

One hundred and thirty-three complaints were recorded as being filed with incomplete disposition information. Table A-2 documents the missing or unknown data by circuit. It is possible that a major cause of this gap is the two-step reporting system described above. For the complaint that the chief judge dismisses and that does not have further review, this system probably works well. For the complaint that has more than two stages, such as one with judicial council review or one that has a special committee, it may be more difficult for court staff to identify the proper time to submit the closing AO 372 form. It appears that a number of these forms are filed prematurely, either before judicial council action on a petition for review or before a special committee issues its report. It also appears that a number are not filed at all. The result is that disposition data are incomplete and it cannot be said with confidence that there have been a definite number of dismissals, petitions for review, special committee appointments, or, perhaps most importantly, disciplinary sanctions imposed by the judicial council. From the knowledge gained during visits to eight circuits in order to conduct the field study, and a general awareness of highly publicized actions in some circuits, it is safe to assert that a number of disciplinary matters were not included in the AO data. Based on the understanding gained of the pitfalls of the two-step process, it is suspected that activity at the judicial council level is overrepresented in the "incomplete" column in Table A-2. It should

also be noted that the information for forty chief judge orders and four judicial council orders is incomplete. The stages of the missing data for the other 89 missing complaints is unknown.

2. Classification of Complainants

The data revealed that complainants were often identified in inconsistent ways. For example, the AO 372 form calls for a selection among "prison inmate," "attorney," "litigant," "officer of the court," "public official," or "other _____." The "other" space was frequently filled with information that would fit one of the specific categories, such as "litigant" or "prisoner." The errors in classification of the complainant that were discovered in the field study led to a limitation of the analysis of the complainants to two groups: attorneys and all other complainants. Originally, the differences in outcomes revealed in the data were to have been analyzed for litigants and nonlitigants, but this was ultimately impossible given the lack of confidence in the underlying data.

3. Classification of Type of Complaint

Complaints and orders were examined in the files of eight circuits. Attempts were made to classify the allegations of the complaints according to the ten categories listed on the AO 372 form. We disagreed with the classification reported to the AO in a significant, but as yet undetermined, percentage of those complaints. Because of this level of disagreement, the AO data on "type of allegations" was not used. Table 5 reports only the field study data that were derived from a subset of arguably meritorious allegations in the field study complaints. This results in an absence of complete and reliable data regarding the type of allegation in the full set of complaints.

Observations on the reasons for the misclassifications may be helpful. The field study revealed that the court personnel who were most knowledgeable about the § 372(c) process, and who had responsibility for reviewing complaints, were generally not at all involved in recording data on the AO 372 form. In each circuit, staff attorneys, clerks of court and their chief deputies, circuit executives and their assistants, or some combination of the above had responsibility for reading the complaints and sometimes for drafting orders. Inquiries were made in at least one-half of the circuits about who filled out the AO 372 form. Invariably the primary contact, the person most knowledgeable about the process,

had no responsibility for filling out the AO 372 form and generally had no input into the report. In some instances, the primary contact person was not even aware that a statistical report form existed. In those circuits, the person who filed the report was generally a secretary or a deputy clerk with primarily clerical responsibility for the § 372(c) process. In other words, the person with the least training and the least responsibility for the process was asked to make complex judgments about the type of allegations in the complaints and the type of complainant.

It is recommended that each circuit assign primary responsibility for recording the data on the AO 372 form to the individual primarily responsible for assisting the chief judge in reviewing complaints and preparing draft orders. Additionally, the AO should monitor the circuits' and national courts' compliance with the reporting standards for the § 372(c) process.

TABLE A-1

Total Number of Reported § 372(c) Filings for All Circuits and National Courts, Calendar Years 1980-1991, Presented by Statistical Year (N=2405)³²⁹

Circuit or Court																	
Year	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	D.C.	Fed.	Trade	Int'l	Cl. Ct.	Total
1980	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1
1981	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
1982	3	4	2	4	3	5	8	4	20	1	17	11	0	1	2	2	85
1983	6	12	21	12	7	11	9	5	34	5	21	1	4	0	2	2	150
1984	11	34	9	22	18	15	16	6	12	7	21	2	1	0	0	0	174
1985	11	27	9	18	16	11	13	18	37	10	12	8	0	0	0	0	190
1986	38	56	26	24	23	20	4	22	43	17	17	6	0	0	1	1	297
1987	7	29	16	27	21	19	8	17	52	14	21	8	3	0	1	1	243
1988	7	26	10	12	26	23	16	15	34	14	12	2	0	0	4	4	201
1989	9	31	28	37	20	35	13	31	52	18	22	11	0	0	0	0	307
1990	2	57	20	30	23	35	13	40	49	17	17	4	5	0	3	3	315
1991	8	46	52	31	25	35	16	31	52	21	34	2	1	0	0	0	354
1992	2	8	12	9	8	16	1	0	14	1	16	0	0	0	0	0	87
Total	105	330	205	226	190	225	117	189	400	125	210	55	14	1	13	13	2405

³²⁹ Information obtained from § 372(c) forms filed by circuits and national courts with the Administrative Office. The Third Circuit indicates to us that their records show 204 complaints filed during the period.

TABLE A-2

*Type of Disposition (Chief Judge) for All Reported § 372(c) Filings,
by Circuit and National Court, 1980-1991 (N=2405)³³⁰*

CHIEF JUDGE ORDERS

<i>Circuit or Court</i>	<i>Com- plaint With- drawn</i>	<i>Correc- tive Action Taken</i>	<i>Action No Longer Necessary</i>	<i>No Frivolous</i>	<i>Related to Merits</i>	<i>Not in Confor- mance</i>	<i>Incom- plete Combina- tion Data</i>	
1st	0	1	0	35	36	4	28	0
2d	6	2	0	27	58	18	208	1
3d	0	5	0	13	131	0	37	3
4th	3	1	0	35	100	53	16	7
5th	0	9	0	14	99	3	49	13
6th	1	3	1	27	111	22	31	0
7th	0	4	0	12	57	15	23	0
8th	0	11	2	8	152	3	1	2
9th	0	22	0	34	146	45	135	6
10th	4	1	1	6	27	18	55	0
11th	2	13	0	5	147	6	18	7
D.C.	0	1	0	5	16	9	18	1
Fed.	0	0	0	4	8	1	0	0
Int'l Trade	0	0	0	0	0	1	0	0
Cl. Ct.	0	0	0	2	9	0	2	0
<i>Total</i>	16	73	4	227	1097	198	621	40

³³⁰ Information obtained from § 372(c) forms filed by circuits and national courts with the Administrative Office. The Third Circuit indicates to us that their records show 204 complaints filed during the period.

TABLE A-2 (cont'd)
*Type of Disposition (Judicial Council or Other) for All
 Reported § 372(c) Filings, by Circuit and National
 Court, 1980-1991 (N=2405)³³¹*

Circuit or Court	JUDICIAL COUNCIL ORDERS						OTHER	
	Judge Cen- sured	Judge Im- peached	Missing J.C. Data	Volun- tary Retire- ment	Voluntary Retire- ment/ Certified Disability	Complaint Dismissed	Unknown Data	Com- plaint With- drawn
1st	1	0	0	0	0	0	0	0
2d	0	0	1	0	0	2	7	6
3d	0	0	0	1	0	3	12	0
4th	0	0	0	0	0	0	11	3
5th	0	0	0	0	0	3	0	0
6th	0	0	0	0	2	8	19	1
7th	4	0	0	0	0	2	0	0
8th	0	0	0	0	0	2	8	0
9th	0	0	0	0	0	0	12	0
10th	0	0	0	0	0	4	9	4
11th	0	1	2	0	0	0	9	0
D.C.	0	0	1	0	0	3	1	2
Fed.	0	0	0	0	0	0	1	0
Int'l Trade	0	0	0	0	0	0	0	0
Cl. Ct.	0	0	0	0	0	0	0	0
<i>Total</i>	5	1	4	1	2	27	89	16

³³¹ Information obtained from § 372(c) forms filed by circuits and national courts with the Administrative Office. The Third Circuit indicates to us that their records show 204 complaints filed during the period.

TABLE A-3

Type of Complainant for All Reported § 372(c) Filings, All Circuit and National Courts, 1980-1991 (N=2389)³³²

<i>Circuit or Court</i>	<i>Attorney</i>	<i>Non-Attorney</i>	<i>Total</i>
1st Cir.	11	94	105
2d Cir.	29	295	324
3d Cir.	4	201	205
4th Cir.	5	218	223
5th Cir.	19	171	190
6th Cir.	15	209	224
7th Cir.	7	110	117
8th Cir.	9	180	189
9th Cir.	18	382	400
10th Cir.	6	115	121
11th Cir.	8	200	208
D.C. Cir.	2	53	55
Fed. Cir.	1	13	14
Int'l Trade	0	1	1
Cl. Ct.	1	12	13
<i>Total</i>	135	2254	2389

³³² Information obtained from § 372(c) forms filed by circuits and national courts with the Administrative Office. Sixteen withdrawn complaints are excluded.

TABLE A-4
*Cross-tabulation of Complainant Types and Dispositions,
 All Reported § 372(c) Filings, 1980-1991 (N=2272)³³³*

<i>Disposition</i>	<i>Attorney</i>	<i>Non-Attorney</i>	<i>Total</i>
1. Complaint Withdrawn	0	16	16
2. Action not necessary	1	3	4
3. Corrective Action	18	55	73
4. Frivolous	13	214	227
5. Related to Merits	30	1067	1097
6. Not in Conformance	21	177	198
7. Combination of 4, 5, & 6	34	587	621
8. Judge Impeached	0	1	1
9. Voluntary Retirement	0	3	3
10. Judge Censured	1	4	5
11. Dismissal	9	18	27
<i>Total</i>	127	2145	2272

³³³ Information obtained from § 372(c) forms filed by circuits and national courts with the Administrative Office. One hundred thirty-three reported filings had incomplete disposition or complainant data and thus were not included in this table.

TABLE A-5

*Types of Judges Complained Against in Reported § 372(c) Matters,
All Circuits and National Courts, 1980-1991 (N=2405)³³⁴*

<i>Circuit or Court</i>	<i>Type of Judge</i>									<i>Total</i>
	<i>Bank- ruptcy</i>	<i>Cl. Ct.</i>	<i>Cir- cuit</i>	<i>Dis- trict</i>	<i>Magis- trate</i>	<i>Ct. Int'l Trade</i>	<i>Other Specific</i>	<i>Combi- nation</i>	<i>Mis- sing Data</i>	
1st Cir.	11	0	7	33	4	0	1	48	1	105
2d Cir.	19	0	41	185	16	0	1	64	4	330
3d Cir.	8	0	32	130	34	0	0	1	0	205
4th Cir.	10	1	4	148	27	0	3	33	0	226
5th Cir.	20	0	11	85	19	0	1	54	0	190
6th Cir.	12	0	14	137	24	0	3	35	0	225
7th Cir.	15	0	5	66	7	0	3	21	0	117
8th Cir.	7	0	10	130	32	0	1	9	0	189
9th Cir.	36	0	13	187	52	0	13	97	2	400
10th Cir.	18	0	1	73	17	0	1	14	1	125
11th Cir.	7	0	12	121	16	0	2	48	4	210
D.C. Cir.	1	0	4	31	1	0	0	17	1	55
Fed. Cir.	0	0	9	0	0	0	1	4	0	14
Int'l Trade	0	0	0	0	0	1	0	0	0	1
Cl. Ct.	0	9	0	0	0	0	2	2	0	13
<i>Total</i>	164	10	163	1326	249	1	32	447	13	2405

³³⁴ Information obtained from § 372(c) forms filed by circuits and national courts with the Administrative Office.

TABLE A-6

*Cross-Tabulation of § 372(c) Filings Involving Corrective Action,
Discipline Imposed, or Retirement by Type of Complainant and
Type of Judge Filed Against, All Circuits and
National Courts, 1980-1991 (N=82)³³⁵*

	<i>Attorney</i>	<i>Non-Attorney</i>	<i>Total</i>
1 Bankruptcy Judge	4	8	12
1 Circuit Judge	1	1	2
1 District Judge	10	42	52
1 Magistrate Judge	1	5	6
2 District Judges	1	0	1
11 District Judges	0	1	1
11 Magistrate & 1 District	0	4	4
Other Specified Judge	3	0	3
Unknown Judge Data	0	1	1
<i>Total</i>	20	62	82

³³⁵ Information obtained from § 372(c) forms filed by circuits and national courts with the Administrative Office.

SAMPLE AO 372 FORM

AO 372 (Rev. 5/91)					REPORT ON COMPLAINT UNDER TITLE 28 U.S.C. SECTION 372(c) <i>(Complete items 1, 2, 3, 4, 5, 6, 7, and 11 when complaint is filed.)</i>						
① Circuit	② Date Filed			③ Complaint Number	④ Complaint type: ☐ Written ☐ On order of the Chief Judge (Go to item 7)						
	Mo.	Day	Yr.								
⑤ Complainant(s) (Fill in appropriate number of complainants, do not check.) <div style="display: flex; justify-content: space-between;"> <div> ☐ Prison inmate ☐ Attorney ☐ Litigant </div> <div> ☐ Officer of the court ☐ Public official ☐ Other (specify) _____ </div> </div>											
⑥ ☐ Check if any complainant has previously filed a complaint.											
⑦ Number and type of judicial officers complained about. (Fill in appropriate number of officers, do not check.) <div style="display: flex; justify-content: space-between;"> <div> ☐ Circuit Judges ☐ District Judges ☐ Court of International Trade Judges </div> <div> ☐ Claims Court Judges ☐ Bankruptcy Judges ☐ Magistrate Judges </div> </div>											
⑧ Date Terminated <table border="1" style="display: inline-table; border-collapse: collapse; text-align: center;"> <tr> <th style="width: 30px;">Mo.</th> <th style="width: 30px;">Day</th> <th style="width: 30px;">Yr.</th> </tr> <tr> <td style="height: 20px;"></td> <td></td> <td></td> </tr> </table>						Mo.	Day	Yr.			
Mo.	Day	Yr.									
⑨ Nature of Complaint (Check as many boxes as apply.) <div style="display: flex; flex-wrap: wrap;"> <div style="width: 50%;"> a. ☐ Mental disability b. ☐ Physical disability c. ☐ Demeanor d. ☐ Abuse of judicial power e. ☐ Prejudice/bias f. ☐ Conflict of interest </div> <div style="width: 50%;"> g. ☐ Bribery or corruption h. ☐ Undue decisional delay i. ☐ Incompetence/neglect j. ☐ Other (specify) _____ </div> </div>											
⑩ Disposition (Check all appropriate boxes.) A. By complainant: ☐ Complaint withdrawn before Chief Judge acts (Check only if this terminates the entire complaint.) B. By Chief Judge (Check as many boxes as apply for each complaint.) Dismissal Under 372(c)(3)(A): <div style="display: flex; justify-content: space-between;"> <div> 1. ☐ Not in conformance with statute 4. ☐ Appropriate corrective action taken under 372(c)(3)(B). 5. ☐ Action no longer necessary because of intervening events (28 USC 372(c)(3)(B)). 6. ☐ Appointed special investigative committee under 372(c)(4)(A). Indicate allegation(s) (from item 9 above) investigated _____ </div> <div> 2. ☐ Directly related to merits 3. ☐ Frivolous </div> </div> C. By Judicial Council after: Referral by investigative committee ☐ (Unless petition for review was denied Petition for review under 372(c)(10) ☐ granted check as many of the following boxes (1-12) as apply.) ☐ denied (Go to item 11)											
<div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> No disciplinary action taken (1) ☐ Dismissed by Judicial Council (2) ☐ Complaint withdrawn (Check only if this terminates the entire complaint.) </div> <div style="width: 45%;"> Disciplinary action (3) ☐ Directed Chief District Judge to take action (Magistrate Judges only) (4) ☐ Certified disability (5) ☐ Requested voluntary retirement (6) ☐ Suspended assignment of new cases (7) ☐ Privately censured (8) ☐ Publicly censured (9) ☐ Other (specify) _____ </div> </div>											
Referral to Judicial Conference under 372(c)(7)(A) and (B) (10) ☐ Discretionary (11) ☐ Mandatory (possibility of impeachment) (12) ☐ Mandatory (not resolvable by council)											
⑪ Name of Person Completing Form:				Telephone Number (include FTS or Area Code):							
Mail completed form to: Administrative Office of the U.S. Courts, Statistics Division Washington, D.C. 20544, Attention: ARB-JC											

F I L I N G

T E R M I N A T I O N