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Reversal by Recusal: Comer v. Murphy Oil U.S.A. Inc., and Mandatory Judicial Recusal Statements

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REVERSAL BY RECUSAL?: *COMER V. MURPHY OIL USA, INC.* AND MANDATORY JUDICIAL RECUSAL STATEMENTS

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In many, if not most, cases voluntary judicial recusal is both an efficient use of judicial resources and exceptional safeguard to the legitimacy of the federal judiciary.¹ However, voluntary judicial recusal poses its own unique problems when the withdrawing judge declines to issue a statement explaining the statutory grounds for his or her recusal. Unlike when a party seeks to disqualify a judge by motion—where the reasons for recusal will, at a minimum, be set out in the motion papers—when a judge voluntarily recuses, there is not necessarily any record created as to the reasons for the recusal.² Such recusals leave litigants in the dark, creating numerous practical problems. These problems are compounded when, prior to recusal, the judge has already taken meaningful action in the case.

This article will analyze the recent case of *Comer v. Murphy Oil USA Inc.* in an effort to illustrate several of the many reasons why federal judges, upon voluntary recusal, should be required to issue a statement identifying the statutory provision requiring their disqualification. The article will also argue that where a judge is recusing him or herself from a case in which he or she has already substantially participated, litigants should be permitted to demand, and receive, a more detailed statement as to the reasons for recusal.

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¹ Bruce A. Green, *Fear of the Unknown: Judicial Ethics After Caperton*, 60 SYRACUSE L. REV. 229, 234 (2010) (voluntary recusal “promote[s] judicial economy [and] minimize[s] public scrutiny and criticism” of courts.) This article is limited to recusal issues involving the federal judiciary because the federal system has one unified standard; the federal statutes or language similar to that found in those statutes have been adopted by several states; and the illustrating case, *Comer v. Murphy Oil U.S.A., Inc.*, is a federal case. That said, many of the arguments for mandatory recusal statements would apply with equal force in the context of state courts.

² In addition to the reasons for a recusal being set out in the motion papers, judges are also strongly encouraged to issue statements when they deny disqualification motions. See RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 22.1 (2007). Some jurisdictions even make the issuance of such statements mandatory. See *id.*

First, to put the arguments in context, this article will lay out the highly unusual procedural history of *Comer v. Murphy Oil U.S.A., Inc.* Next, the article will use the facts of *Comer* to illustrate several problems created, exacerbated, or made insoluble by voluntary recusal without the issuance of a recusal statement. Finally, the article will propose two statutory provisions for suggested inclusion in federal judicial recusal statutes. Those provisions would require judges to issue basic recusal statements whenever they become disqualified and more detailed statements in appropriate circumstances without over burdening the judiciary.

I. The Sordid Procedural History of *Comer v. Murphy Oil USA, Inc.*

On its merits, *Comer* was one of a handful of politically charged climate change related lawsuits recently filed in the federal courts.³ Although a step behind the recently certified *Connecticut v. American Elec. Power Inc.*,⁴ *Comer* has been followed by environmental law blogs and journals since shortly after its complaint was filed.⁵ *Comer* named several dozen major oil companies in its complaint, alleging that the companies' role in increasing greenhouse gas emissions contributed to global warming, which made Hurricane Katrina more severe, causing property damage to the plaintiffs.⁶ Like *American Elec. Power*, the *Comer* plaintiffs alleged causes of action both in negligence and public nuisance.⁷ Also like *American Elec. Power*, *Comer* was initially dismissed at the district court level, by order dated August 30, 2007. No written opinion accompanies the order of dismissal itself. Instead the basis for the judge's

³ *Comer v. Murphy Oil U.S.A. Inc.*, 585 F.3d 855, 859--861 (5th Cir. 2009) [hereinafter *Comer I*] (reversing district court in part).

⁴ *Connecticut v. American Elec. Power Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) rev'd by 582 F.3d 309 (2d Cir. 2009), cert. granted by --- S.Ct. ---, No. 10-174, 2010 WL 4922905. [hereinafter A.E.P.]

⁵ . See, e.g., Gilbert Keteltas, *Climate Change Lawsuits*, NAT. L. J. (April 30, 2007), <http://howrey.de/files/News/796f0b3c-2014-487d-b0ea-e25a1a98cfac/Presentation/NewsAttachment/13b20fdd-6999-4684-a830-e3a2662d0f89/Climate%20Change%20-%20Keteltas.pdf>.

⁶ *Comer I*, 585 F.3d at 859--61.

⁷ *Id.*; A.E.P., 406 F. Supp. 2d 265, 267.

ruling was “read into the record at the hearing.”⁸ Based on that record, the case was dismissed, apparently for lack of standing on the grounds that global warming litigation presents a non-justiciable political question.⁹

Much has been written elsewhere regarding the merits of *Comer*, the applicability of the political question doctrine to *Comer* and other climate change lawsuits, and the affects those law suits may have on tort and insurance law nationwide.¹⁰ Those issues are beyond the scope of this article. Instead, this article will focus on issues outside of the merits: i.e., the issues of judicial ethics implicated by decisions of the Fifth Circuit in this case.

Comer's tortuous path toward appellate review encountered its first obstacle almost immediately. The appeal was never decided by the original three judge panel of the Fifth Circuit Court of Appeals to which it was assigned.¹¹ On the day oral argument was scheduled to be heard in the case, one judge was kept away by a family emergency and of the remaining two judges, a second subsequently recused himself, requiring that the case be reassigned to a second panel and that oral argument take place a second time.¹² The second panel reversed the district court's dismissal of the plaintiffs' nuisance, trespass, and negligence claims, finding that the

⁸ *Id.*; Record Excerpts at 144--151, *Comer v. Murphy Oil USA Inc.*, No. 07-60756 (5th Cir. 2007), ECF No. 00512879 (containing a transcript of the judge's ruling from the bench).

⁹ Order Without Opinion Dismissing Case at 1, *Comer v. Murphy Oil USA Inc.*, No. 05-00436 (S.D.Miss. 2007), ECF No. 368.

¹⁰ See, e.g., Schwartz, Goldberg, & Schaecher, *Why Trial Courts Have Been Quick to Cool “Global Warming” Suits*, 77 TENN. L. REV. 803, 804 (2010) (arguing that global warming cases in tort should be dismissed for failure to state a claim); Jeremy Hessler, *A Temporary Soloution to Climate Change: The Federal Common Law to the Rescue?*, 38 HASTINGS CONST. L.Q. 407, 409 (2011) (arguing that “climate change litigation could be a step forward in our nation's policy of regulating pollutants that cause climate change”); Mary Catherine Nagle, *Tracing the Origins of Fairly Traceable: The Black Hole of Private Climate Change Litigation*, 85 TUL. L. REV. 477, 500—502 (2010) (discussing the standing and political question doctrine aspects of *Comer.*); James Malloy & John Sylvester, *Insurance Coverage for Global Warming Liability Claims*, 45 TORT TRIAL & INS. PRAC. L.J. 811 (2010) (discussing developments in environmental litigation).

¹¹ See Docket Sheet, *Comer v. Murphy Oil USA, Inc.*, No. 07-60756 (5th Cir.).

¹² *Id.*

district court had erred in concluding that the political question doctrine required dismissal of the plaintiffs' claims.¹³

Between November 27 and December 2, 2009, the defendants petitioned for rehearing en banc by the full Fifth Circuit Court of Appeals.¹⁴ Without issuing recusal memos, seven of the judges on the Fifth Circuit recused themselves from both the case and the petition for rehearing.¹⁵ At that time, there was one vacancy on the court.¹⁶ The minimum number of judges required to participate in order for the court to have a quorum to vote to grant rehearing was nine.¹⁷ All nine of the remaining judges participated and on January 26, 2010 the circuit, by a 6-3 vote, granted rehearing.¹⁸

Where a rehearing en banc has been granted, many circuits have local rules containing a provision designed to prevent attorneys and lower courts from relying upon panel decisions.¹⁹ In the Fifth Circuit, local rule 41.3 fulfills that role and provides that a grant of rehearing "vacates the panel opinion and judgment . . . and stays the mandate."²⁰ Thus, when the circuit voted on February 26, 2010 to rehear the case en banc, the panel decision in *Comer I* was automatically vacated.²¹ Here local rule 41.3, rather than serving simply as a procedural safeguard, ended up

¹³ *Comer I*, 585 F.3d at 879—880.

¹⁴ See Docket Sheet, *Comer v. Murphy Oil USA, Inc.*, No. 07-60756 (5th Cir.).

¹⁵ *Comer v. Murphy Oil USA Inc.*, 598 F.3d 208, 208—9 (5th Cir. Feb. 26, 2010), (Granting rehearing en banc and listing the recused judges in a footnote) [hereinafter *Order Granting Rehearing*].

¹⁶ *Comer v. Murphy Oil USA Inc.*, 607 F.3d 1049, 1065 (5th Cir. Feb. 26, 2010) (Dennis, J., dissenting) [hereinafter *Comer II*].

¹⁷ *Id.*, 607 F.3d at 1053 (majority opinion).

¹⁸ *Order Granting Rehearing*, 598 F.3d at 208.

¹⁹ *Comer II*, 607 F.3d at 1055 (Davis, J., dissenting).

²⁰ Rules and Operating Procedures of The United States Court of Appeals for the Fifth Circuit, <http://www.ca5.U.S.Courts.gov/clerk/docs/5thCir-IOP.pdf> at 47 [hereinafter *5th Cir. Local Rules*].

²¹ See *Id.*, See also *Comer II*, 607 F.3d at 1049, 1053.

determining the outcome of the merits of the litigation by causing the original district court decision to be reinstated.²²

Despite being fully briefed on the issues, the en banc panel never reached the merits of the case.²³ Less than two months after the en-banc court granted rehearing, "new circumstances [had] arisen that [made] it necessary for another judge to recuse, leaving only eight members of the court able to participate in the case."²⁴ Like the judges who recused themselves prior to the grant of rehearing the newly recusing judge, the Hon. Jennifer Walker Elrod, issued no statement identifying her reasons for recusal or any explanation as to what the "new circumstances" requiring her to step aside might be.²⁵ Nevertheless in this case, because of its timing, Judge Elrod's recusal became the most important decision at the Fifth Circuit level. With Elrod gone, the panel was reduced to eight judges and the en banc court fell below the minimum number of judges required for quorum.²⁶

After becoming aware of the reduction in the membership of the panel, the court contacted the parties and made the unusual request for additional briefing on whether the court still retained a quorum to hear the case, and if not, what authority it had with regard to the case going forward.²⁷ The parties submitted letter briefs on the issue and on May 28, 2010 the court issued an order, commanding a 5-3 majority of the remaining judges, and determined that the court lacked a quorum.²⁸ The court discussed and dismissed several proposed cures for the

²² See *Comer II*, 607 F.3d at 1055 (dismissing the appeal without reinstating the decision in *Comer I*); see also Supreme Court Order List for January 10, 2011, <http://www.supremecourt.gov/orders/courtorders/011011zor.pdf> at 26. (Denying mandamus).

²³ See Docket Sheet, *Comer v. Murphy Oil USA Inc.*, No. 07-60756 (5th Cir.).

²⁴ Letter to the Parties Notifying Them of Loss of Quorum and Canceling Oral Argument at 1--2, *Comer v. Murphy Oil USA Inc.*, No. 07-60756 (5th Cir. April 30, 2010), ECF No. 00511097646.

²⁵ See Docket Sheet, *Comer v. Murphy Oil USA*, No. 07-60756 (5th Cir.).

²⁶ *Comer II*, 607 F.3d at 1055—56 (majority opinion).

²⁷ Letter to the Parties Requesting Letter Brief at 9--10, *Comer v. Murphy Oil USA Inc.*, No. 07-60756 (5th Cir. May 6, 2010), ECF No. 0051103180.

²⁸ *Comer II*, 607 F.3d at 1055—56 (majority opinion).

problem of lack of quorum. These included a request that, pursuant to 28 U.S.C. § 291, Chief Justice Roberts designate a judge from another circuit; interpreting FRAP 35(a) to define quorum such that the court did have a quorum; "holding the case in abeyance" until the vacancy on the court was filled, dis-enbancing and reinstating the panel opinion; and "[a]dopting the Rule of Necessity" to allow one or more of the recused judges to participate in the case.²⁹ Rejecting all of these options, the submajority held it could not "conduct judicial business" as a consequence of the lack of quorum.³⁰ The court further held, somewhat paradoxically, that because of its quorumless status it was powerless to take any action other than to dismiss the appeal.³¹

All three members of the *Comer I* panel, Judges Davis, Dennis, and Stewart, dissented.³² Davis issued a dissenting opinion, which Stewart joined and Dennis issued a separate dissent, but noted his general agreement with Davis.³³ The dissents offered different interpretations of all of the options considered by the court, including the definition of a quorum.³⁴

²⁹ Supreme Court Order List for January 10, 2011, <http://www.supremecourt.gov/orders/courtorders/011011zor.pdf> at 26 (denying mandamus).

³⁰ *Id.*

³¹ *Id.* Whether and how much precedential weight *Comer II* should be entitled to is an interesting question. Given that *Comer II* was decided by a proportionally small majority of a quorumless court, *Comer II* presents a particularly sharp example of the minority-majority problem. See generally, Jonathan Remy Nash, *The Majority That Wasn't: Stare Decisis, Majority Rule, and The Mischief of Quorum Requirements*, 58 EMORY L.J. 831 (2009) (discussing the precedential value of decisions made where the number of judges in the majority of a particular opinion is less than a majority of the number of judges on the court due to vacancy, disqualification, or absence.) Although a detailed discussion of that issue is beyond the scope of this article, it is worth mentioning that American Jurisprudence, Second Edition and Corpus Juris Secundum have already included *Comer II* in the cumulative supplement portions of their online editions.

³² *Comer II*, 607 F.3d at 1055—55 (majority opinion).

³³ *Id.* at 1055, 1057 n.2 (Dennis J., dissenting).

³⁴ *Id.* at 1058—1069. The issues raised by the dissenting judges highlight other procedural problems and ambiguities in need of redress. An in depth analysis of those concerns is beyond the scope of this article but the most obvious and some potential solutions are: 1) the ambiguity as to the definition of "quorum" under 28 U.S.C. § 46(d) which could be solved by legislation clarifying the statute, 2) inadequate local rule structures to cope with the loss of quorum, which could be addressed by amended local rules automatically reinstating panel opinions if an en banc court's quorum is lost, 3) whether the Rule of Necessity can be invoked by a court of appeals, which would easily be remedied by codifying the rule to adopt one position or the other, and 4) the non-mandatory nature of requesting a judge from another circuit be designated where the alternative is dismissal of an appeal without a decision on the merits, which could be solved by amending designation statutes to require the request be made in such circumstances.

The dismissal of the appeal, brought about as a consequence of Judge Elrod's recusal, had a peculiar and disturbing consequence in this instance. Having automatically vacated the October 15, 2009 three-judge panel decision, the order of dismissal had the practical effect of reinstating the district court's dismissal of the case from the bench in its entirety, without ever providing a determinative appellate review on the merits.³⁵

The concluding statement to the en banc court's order dismissing the appeal that "[t]he parties, of course, now have the right to petition the Supreme Court of the United States" was ironic at best.³⁶ Such appeals (either by mandamus or certiorari) are discretionary and, should review be denied—as it was here—a case could avoid appellate review on the merits entirely.³⁷ The plaintiffs accepted the majority's invitation to appeal, petitioning the Supreme Court of the United States a writ of mandamus.³⁸ However, the Supreme Court declined to grant the petition without comment, leaving the trial court order, without written opinion, as the only disposition of the case on the merits.³⁹ This mass, unexplained recusal, the timing of which ultimately resulted in the reversal of a properly constituted appellate panel, brings to the forefront several important reasons why the practice of voluntary judicial recusal without comment from the recusing judge is a practice that, for both constitutional and practical reasons, must end.

II. Recusal in the Federal System

A brief overview of the purposes and machinery of federal judicial recusal is required to put the following discussion in the proper context. It is beyond the scope of this article to delve too deeply into the history and purposes of judicial recusal and disqualification. Entire treatises

³⁵ *Comer II*, 607 F.3d at 1055, 1057 (Dennis J., dissenting).

³⁶ *Comer II*, 607 F.3d at 1055 (majority opinion).

³⁷ Supreme Court Order List for January 10, 2011, <http://www.supremecourt.gov/orders/courtorders/011011zor.pdf> at 26. (denying mandamus).

³⁸ See Docket, *Comer v. Murphy Oil USA Inc.*, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-294.htm>.

³⁹ *Id.*; see also, Supreme Court Order List for January 10, 2011, <http://www.supremecourt.gov/orders/courtorders/011011zor.pdf> at 26.

have been written on the subject.⁴⁰ However, as the Court of Appeals for the Third Circuit has aptly stated: “Impartiality and the appearance of impartiality in a judicial officer are the *sine qua non* of the American legal system.”⁴¹ The purpose of an impartial tribunal is obvious enough. “It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process.”⁴² The need for the appearance of impartiality is less obvious, and indeed traditional common law disqualification had no such express purpose and required a judge to step down if he possessed a “direct financial interest in the case, and for nothing else.”⁴³

Unlike common law, the present American federal system directly recognizes the importance of maintaining the appearance of impartiality as well as an absence of actual bias. One reason is that these two goals, impartiality and its appearance, are interrelated—the latter can implicate the former where the appearance of bias is strong enough.⁴⁴ A second, more common, reason is that the maintenance of public confidence in the judiciary system is a sweeping and institutional concern for any system of justice.⁴⁵ “Justice must satisfy the appearance of justice” has long been a watchword of American recusal jurisprudence.⁴⁶ Confidence in the judiciary is never undermined more than by “the failure of judges to comply with established professional norms, including rules of conduct specifically prescribed.”⁴⁷

But, the public confidence in the judiciary can be undermined not only by actual misconduct, but by the perception of misconduct. A judge need not be biased or act improperly

⁴⁰ See generally, e.g., FLAMM, *supra* note 2.

⁴¹ Lewis v. Curtis, 671 F.2d 779, 789 (3d Cir. 1982) (directing that upon remand a case be assigned to a different trial judge so that “the appearance of justice will be served.”)

⁴² *Id.* (citations and internal quotation marks omitted).

⁴³ John A. Meiser, Note, *The (Non)Problem of a Limited Due Process Right to Judicial Disqualification*, 84 NOTRE DAME L. REV. 1799, 1804 (2009).

⁴⁴ See, e.g., Caperton v. A.T. Massey Coal Co., --- U.S. ---, 129 S. Ct. 2252, 2257 (2009) (citation and internal quotation marks omitted) (Holding that there “are circumstances in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”)

⁴⁵ See Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 862—66 (1988).

⁴⁶ Offut v. United States, 348 U.S. 11, 13 (1954).

⁴⁷ Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends*, 32 HOFSTRA L. REV. 1107, 1108 (2004).

to raise questions as to the integrity of the judicial process.⁴⁸ The unique position of the federal courts in our government places the appearance of neutrality in a place of similar importance to that of actual neutrality. As Justice Frankfurter pointed out, judicial “authority---possessed of neither the purse nor the sword---ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance.”⁴⁹ Although this “stringent rule may sometimes bar trial by judges who have no actual bias,”⁵⁰ its purpose is justified by the fact that “[j]udicial decisions rendered under circumstances suggesting bias or favoritism tend to breed skepticism, undermine the integrity of the courts, and generally thwart the principles upon which our jurisprudential system is based.”⁵¹

It is important to remember that a focus on the impact of the appearance of judicial conduct and possible bias alone can cut both ways. Recusal where inappropriate, or under circumstances that raise questions as to the propriety of the recusal decision itself, “would only serve to undermine public confidence in the impartiality of all judges.”⁵² Thus, to achieve the second purpose of the recusal mechanism, to promote confidence in the judiciary, recusal must be used in a manner that is not self-defeating. As discussed in Part III.D below, recusals without issuing a statement can run afoul of this very concern.

In express pursuance of these twin aims, in 1974 Congress amended the federal recusal statutes to require disqualification where a judge’s impartiality may “reasonably be questioned” and where there are more traditional and direct sources of bias.⁵³ Despite the fact that the 1974 changes effectively abolished older “duty to sit” doctrine, judges are still expected to remain on

⁴⁸ See, *Liljeberg*, 486 U.S. at 860 (discussing how a conflict of which a judge is unaware can still require recusal).

⁴⁹ *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

⁵⁰ *In re Murchison*, 349 U.S. 133, 136 (1955).

⁵¹ FLAMM, *supra* note 2, at 110.

⁵² Vt. Supreme Court Admin. Directive No. 17. v. Vt. Supreme Court, 576 A.2d 127, 131 (Vt. 1990) quoting *State v. Hunt*, 527 A.2d 223, 224 (Vt. 1987).

⁵³ See *Litkey v. United States*, 510 U.S. 540, 546—548 (1994) (discussing the 1974 changes to the 28 U.S.C. § 455).

cases where the recusal applicable statutes do not require their disqualification.⁵⁴ Broadly, under federal statutes and the Code of Conduct for United States Judges, there are five situations where it is mandatory that a federal judge recuse him or herself from a case.⁵⁵ These are where:

- 1) the judge has a personal bias about a party or has personal knowledge of disputed facts in the case;
- 2) the judge, or a lawyer with whom the judge previously practiced law, served as a lawyer in the matter in controversy, or the judge or lawyer has been a material witness in the matter;
- 3) the judge, judge's spouse, or minor child has any financial interest in the subject matter in controversy or in a party, or any other interest that could be affected substantially by the outcome of the proceeding;
- 4) the judge's spouse, or a close relative is a party, a lawyer, a witness, or has some interest that could be substantially affected by the outcome of the proceeding; or
- 5) the judge served in previous governmental employment and participated as a judge, counsel, advisor, or material witness concerning the proceeding, or expressed an opinion concerning the merits of the particular case in controversy.⁵⁶

There is also mandatory, but waiveable, disqualification under 28 U.S.C. § 455(a), which is applicable where a judge's "impartiality might reasonably be questioned."⁵⁷ Moreover, a judge also has an ongoing ethical and statutory duty to "inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children."⁵⁸ Further, all federal judges are required by

⁵⁴ Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 Buff. L. Rev, 813, 821 ("[T]he nature of a judgeship implies that the judge has a responsibility to hear and decide cases, one that should not be shirked for political or personal reasons. To the extent one views the duty to sit as a general and rebuttable obligation to preside over a case until disqualified, it is unobjectionable."); see also Jeffrey M. Hayes, *To Recuse or To Refuse: Self-Judging and The Reasonable Person Problem*, 33 J. LEGAL PROF. 85, 92 n.33 (2009) (Observing that "[m]ost circuits take the approach that a judge has just as much of a duty to sit as he does to recuse himself" and collecting cases.)

⁵⁵ *Examining the State of Judicial Recusals After Caperton v. A.T. Massey: Hearing Before the S. Comm. on Courts and Competition Policy of the H. Com. on the Judiciary*, 111th Cong. 2—4, (2009), <http://www.U.S.Courts.gov/News/Viewer.aspx?doc=/U.S.Courts/News/2009/docs/HonMMargaretMcKeownTestimony-JudicialRecusalsHrg-HouseJudSubcomCts12-10-09.pdf> [hereinafter *McKeown Statement*] (Written testimony of Hon. Margaret McKeown, United States Court of Appeals, Chair, Comm. on Codes of Conduct of the Judicial Conference of the United States).

⁵⁶ *Id.*

⁵⁷ 28 U.S.C. § 455(a)

⁵⁸ 28 U.S.C. § 455(c); CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3 § (C)(2) (containing identical language to § 455(c)); see also *Liljeberg*, 486 U.S. at 862 ("[N]otwithstanding the size and complexity of the

the Ethics in Government Act to file extremely detailed financial statements annually.⁵⁹ Those statements are supposed to be used in tandem with a computerized conflict checking system, which should automatically flag potential financial conflicts for judges as soon as a case appears in the system, allowing a judge to spot situations where they must recuse well in advance of taking any action in the case.⁶⁰

III. The Problems with Judicial Opacity in Voluntary Recusal Cases

Comer well illustrates how voluntary recusal without a disclosure of the reasons for the recusal can create a host of potentially unanticipated problems, harming rather than helping the public perception of judges and raising potential constitutional problems. Several of those problems are discussed in context below.

A. *The Appearance of Propriety and Impartiality Can be Compromised*

“The very purpose of [recusal statutes] is to promote confidence in the judiciary by avoiding even the appearance of impropriety.”⁶¹ Voluntary recusals, which are not explained to the litigants and the general public, have the potential to thwart that basic purpose. The absence of explanation can be particularly troubling in the case of appellate courts, since “for all practical purposes, no review exists of appellate judges’ recusal decisions.”⁶² Judge Elrod’s late recusal had exactly that negative effect, leading commentators to question the competence and the impartiality of the Fifth Circuit.⁶³

litigation, judges remain under a duty to stay informed of any personal or fiduciary financial interest in cases over which they preside.”)

⁵⁹ Ethics in Government Act, 5 U.S.C. Appx. §§ 103—104 (2010).

⁶⁰ Karen Redmond, *Broad Array of Tools Ensures Fair and Impartial Adjudication*, UNITED STATES COURTS, (Dec. 10, 2009) http://www.U.S.Courts.gov/News/NewsView/09-12-10/Broad_Array_of_Tools_Ensures_Fair_and_Impartial_Adjudication.aspx.

⁶¹ *Liljeberg*, 486 U.S. at 862.

⁶² Debra Lyn Basset, *Judicial Disqualification in the Federal Courts*, 87 IOWA L. REV. 1213, 1221 (2002).

⁶³ See, e.g., Climate Change and the Courts: A Curious Case of Judicial Recusal, WALL ST. J., May 18, 2010, <http://online.wsj.com/article/SB10001424052748704635204575242361135307650.html?KEYWORDS=Mass+recu>

The timing of Elrod’ recusal was “a shock” to most observers, considering the sweeping round of recusals that preceded the vote to rehear the case en banc.⁶⁴ Because of the unusual circumstances surrounding the mass recusal, the timing of the last recusal, and the ultimate outcome, skepticism as to whether improper reasons underlay *Comer II* left many observers, including this author, with an arched eyebrow.⁶⁵ Many “environmentalists . . . viewed the [recusals and decision] as a sign that the [oil] industry has all but captured the appeals court in the Gulf region.”⁶⁶ One commentator went so far as to say that unless the Supreme Court granted the mandamus petition and restored the panel opinion “it’s going to be very difficult to avoid the conclusion that Americans can’t sue Big Oil and win. And that the Fifth Circuit has some judges who are unclear on the concept of ‘justice.’”⁶⁷ Even commentators who declined to question the integrity of the Comer submajority, many of whom were opposed to the suit on its merits, derided the result as “curiouser and curiouser,”⁶⁸ “a shameful disappearing act,”⁶⁹ “boggling the minds of lawyers and non-lawyers alike,”⁷⁰ “an inappropriate way to end a case,”⁷¹ “a rather bizarre decision,”⁷² and “an exceedingly unfair conclusion to five years of litigation.”⁷³

sal#articleTabs%3Darticle (“In *Comer*, did one or more of the more liberal Fifth Circuit judges buy stock specifically to blow up the quorum? That isn’t as far-fetched as it sounds.”) [hereinafter *Curious Case*].

⁶⁴ Melissa Maleske, *Comer v. Murphy Oil Leaves the future of climate change litigation uncertain*, INSIDE COUNSEL (Aug. 1, 2010), <http://www.insidecounsel.com/Issues/2010/August-2010/Pages/Comer-v-Murphy-Oil-Leaves-the-Future-of-Climate-Change-Litigation-Uncertain.aspx?page=1>

⁶⁵ See, e.g., Anderson, *A Miscarriage of Justice*, THUS BLOGGED ANDERSON (May 29, 2010), <http://thusbloggedanderson.blogspot.com/2010/05/judicial-depravity.html>.

⁶⁶ Elana Schor, *Pivotal Climate Change Test Case Dismissed--- For Now*, WASHINGTON INDEPENDENT, (June 1, 2010), <http://washingtonindependent.com/86062/pivotal-climate-change-test-case-dismissed-for-now>.

⁶⁷ Anderson, *supra* note 42.

⁶⁸ Howard Bashman, *Fifth Circuit’s En Banc Disposition Of Global Warming-related Case Can Only Be Described As Curiouser And Curiouser*, HOW APPEALING (May 28, 2010), <http://howappealing.law.com/052810.html#038172>.

⁶⁹ Jonathan R. Nash, *5th Circuit’s Shameful Disappearing Act*, NAT’L L. J., (July 12, 2010), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202463364698&slreturn=1&hblogin=1>.

⁷⁰ Seth Jaffe, *Due Process? We Don’t Need No Stinkin’ Due Process*, LAW & THE ENV’T, (June 1, 2010), <http://www.lawandenvironment.com/tags/comer-v-murphy-oil/>.

⁷¹ Jonathan Adler, *Writ of Mandamus Sought in Comer v. Murphy Oil*, VOLKH CONSPIRACY, (Aug. 27, 2010), <http://volokh.com/2010/08/27/writ-of-mandamus-sought-in-comer-v-murphy-oil/>.

⁷² Steven M. Taber, *Fifth Circuit Punts on Comer v. Murphy Oil Appeal --- Dismisses Appeal on Procedural Grounds, Not Merits*, ENV’T L. & CLIMATE CHANGE BLOG, (June 4, 2010),

Even the extremely conservative *Washington Times*, which had been particularly hostile to the decision in *Comer I*,⁷⁴ remarked that *Comer II* was “an unusual decision marked by significant controversy.”⁷⁵ That Judge Elrod was appointed by President George W. Bush and all but one of the judges in the majority of *Comer II* were appointed by either Bush (Judges Prado, Owen, and Clement) or President Ronald Reagan (Judge Jolly) probably also fueled speculation that the decision was politically motivated.⁷⁶

Admittedly, Judge Elrod’s recusal, its timing, and its effect on quorum may have been unavoidable, but the utter lack of information provided to the parties and the general public as to the reasons for the late recusal certainly made the appearance of the circuit court’s ultimate decision to dismiss appear all the more suspect. The en banc court did not even expressly identify which judge had been the one to recuse, saying only that “new circumstances arose that caused the disqualification and recusal of one of the nine judges”⁷⁷ which left it up to the litigants to deduce that it was Judge Elrod by comparing the order granting rehearing with the letter informing them of the loss of quorum, and opening the court up to speculation as to what the “new circumstances” could possibly have been.⁷⁸ Whether or not such speculation is fair or

<http://taberlaw.wordpress.com/2010/06/04/fifth-circuit-punts-on-comer-v-murphy-oil-appeal-dismisses-appeal-on-procedural-grounds-not-merits/>.

⁷³ Ann Powers, *Comer v. Murphy Oil USA, En Banc in the Fifth Circuit: What Were They Thinking?*, GREENLAW, (Aug. 27, 2010), <http://greenlaw.blogs.law.pace.edu/2010/08/31/comer-v-murphy-oil-usa-en-banc-in-the-fifth-circuit-what-were-they-thinking/>.

⁷⁴ See, Quinn Hylier, *No Butterfly Caused Katrina*, WASHINGTON TIMES, (Mar. 10, 2010), <http://www.washingtontimes.com/news/2010/mar/18/no-butterfly-caused-katrina/>.

⁷⁵ Douglas Smith, *Courtroom Gasbags Blow Blackmail Plan*, WASHINGTON TIMES, (June 10, 2010), <http://www.washingtontimes.com/news/2010/jun/10/courtroom-gasbags-blow-blackmail-plan/>.

⁷⁶ *United States Court of Appeals for the Fifth Circuit*, WIKIPEDIA, (last visited Jan. 9, 2010), http://en.wikipedia.org/wiki/United_States_Court_of_Appeals_for_the_Fifth_Circuit#Current_composition_of_the_court; see also *Judicial Gusher: the Fifth Circuit’s Ties to Oil*, ALLIANCE FOR JUSTICE, http://www.tulanelink.com/pdf/fifth_circuit_judges_report.pdf at 7 (“Notably out of the sixteen judges on the Fifth Circuit, more than one third were appointed by President George W. Bush, and twelve out of the sixteen were appointed by republican presidents.”) [hereinafter “*Judicial Gusher*”].

⁷⁷ *Comer II*, 607 F.3d at 1055 (majority opinion).

⁷⁸ Compare *id.* (listing judges the order was before not including Judge Elrod) with *Order Granting Rehearing*, 598 F.3d at 208 (listing judges the order was before including judge Elrod).

deserved is beside the point. It is inevitable that such speculation will take place in cases where judicial integrity has become an issue.⁷⁹ The very purpose of recusal statutes is the minimization of the impact of such speculation on the perceived integrity of the judiciary.⁸⁰ By increasing speculation here, the lack of explanation from Judge Elrod hindered rather than aided the perception of judicial integrity.⁸¹

Comer is highly illustrative of this point because the lack of explanation as to the “new circumstances” requiring Judge Elrod’s recusal paints a particularly troubling picture. Of the statutory provisions requiring recusal, it appears that most of the conflicts which would have required Judge Elrod’s recusal should have been detectable before the initial vote on whether to grant rehearing en banc. Taking those statutory possibilities in turn:

1) Whether or not a judge has a bias or personal knowledge of the case should be apparent virtually immediately upon being assigned the case. Hence, Judge Elrod should have been aware of any potential conflict based upon personal bias or personal knowledge long before the vote on rehearing.

2) Judge Elrod has never personally appeared in the matter and it does not appear that any other attorney with whom she practiced law did either. Judge Elrod’s only time in private practice was at Baker Botts toward the beginning of her legal career.⁸² Given the narrow construction of the term “previously practiced law,” it seems unlikely that any of the attorneys

⁷⁹ See *Liljeberg*, 486 U.S. at 864--65 (“[P]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges.”) A particularly apt example of the unavoidable speculation that attaches to these sorts of cases is that Judges Dennis and Davis, two of the original panel in *Comer I* and the authors of the dissents in *Comer II*, have subsequently been attacked for their ties to big oil in the recent BP oil spill litigation. See *Judicial Gusher*, *supra* note 55 at 5—7.

⁸⁰ See *Liljeberg*, 486 U.S. at 860 (stating that the purpose of the federal recusal statute is “to promote public confidence in the integrity of the judicial process” and citing to the legislative history.)

⁸¹ For another illustration of where recusal statements are needed, see the letter to congress signed by over 100 law professors urging, among other things, that members of the Supreme Court be required to issue recusal statements when they choose to deny a disqualification motion. See Changing Ethical and Recusal Rules for Supreme Court Justices, to Patrick Leahy et al. (Feb. 23, 2011), http://www.afj.org/judicial_ethics_sign_on_letter.pdf at 2.

⁸² See JENNIFER ELROD, ALMANAC OF THE FEDERAL JUDICIARY (2011), available at 2011 WL 124871.

involved would qualify.⁸³ Regardless, whether an attorney appearing in the case practiced law with the judge or not should have been known to Elrod prior to the vote to rehear in all but two cases.⁸⁴ Both of the two lawyers who appeared after the vote to rehear and before the letter informing the parties of Elrod's recusal, both of whom represented amici, never worked for Baker-Botts.⁸⁵

3) The automated conflict checking system should have informed Elrod of any financial conflicts and the corresponding need to recuse well in advance of any action being taken in the matter.⁸⁶

4) That same conflict checking system should have also alerted Judge Elrod to other interests her family may have had in the litigation, as federal judges are required to compile a list of potential conflicts beyond their simple financial statements.⁸⁷

5) Judge Elrod never participated in the matter, in any capacity, before the case came to the Fifth Circuit and, even if she had, that should also have been a circumstance she was aware of prior to participating in the en banc rehearing.

The foregoing analysis leaves only three possibilities that would explain Judge Elrod's late need to recuse. First, Judge Elrod, or a close family member, may have somehow *acquired* a new financial or other personal interest in the outcome of the litigation between the grant of rehearing en banc and the letter to the parties canceling oral argument. This could have happened if Elrod or a family member had purchased stocks or other financial instruments tied to

⁸³ 28 U.S.C. § 455 (b)(2). To create a conflict under that provision the attorney must be presently and personally participating in the case. *See* UNITED STATES SUPREME COURT RECUSAL POLICY, in FLAMM at 1102. In the Fifth Circuit, an attorney not presently participating in the representation but who is both related to the judge and a partner in a firm appearing in the matter also requires recusal. *See* Hayes, *supra* note 59, at 95.

⁸⁴ *See* Docket Sheet, Comer v. Murphy Oil USA Inc., No. 07-60756 (5th Cir.).

⁸⁵ *See About Sean Donahue*, DONAHUE & GOLDBERG LLP, <http://www.donahuegoldberg.com/attorneys.html#donahue> (last visited Jan. 17, 2011); *James R. May*, WIDENER LAW, <http://law.widener.edu/Academics/Faculty/ProfilesDe/MayJamesR.aspx> (last visited Jan. 17, 2011).

⁸⁶ Maleske, *supra* note 41.

⁸⁷ *McKeown Statement* *supra* note 60, at 5—6.

one of the defendants. Second, Judge Elrod may not have performed a sufficiently thorough conflict check before participating in the vote to rehear the case and did, in fact, have a conflict of interest requiring mandatory recusal at the time she voted to rehear the case.⁸⁸ Third, Judge Elrod recused under the reasonable appearance provision of 28 U.S.C. § 455(a).⁸⁹ The first two cases are troubling, as both would indicate at the very least a somewhat cavalier attitude on the part of Judge Elrod toward her ethical and statutory duties as a federal judge. Needless to say, the specter that recusal was because a judge did not live up to her obligations to check for personal conflicts before taking important actions in a case, or did not make reasonable efforts to ensure that they or close relatives did not acquire a new interest in the case or the parties during the pendency of the appeal, undermines the appearance that the Fifth Circuit is impartial and primarily interested in meting out justice.⁹⁰

The final possibility is that Judge Elrod recused herself pursuant to 28 U.S.C. § 455(a). However, it is worth noting that whatever the “new circumstance” may be giving rise to disqualification under Section § 455(a), additional problems arise if Judge Elrod only became *aware* of the appearance of impropriety after voting for rehearing en banc but the facts creating the potential appearance predated Elrod’s vote to rehear the case en banc. Because violations of 455(a) require no element of *scienter*—knowledge of the violation on the part of the judge—a judge can be in violation of this section before he or she becomes aware of the circumstances that give rise to the appearance.⁹¹ Thus, only entirely new circumstances, not the becoming aware of previously existing circumstances, would merit Judge Elrod’s recusal only after the

⁸⁸ This possibility would also raise some of the retroactivity and due process concerns addressed *infra*.

⁸⁹ See 28 U.S.C. § 455(a).

⁹⁰ *Curious Case*, *supra* note 42 (“it’s likely another judge acquired a financial interest in one of the defendants.”)

⁹¹ See *Liljeberg*, 486 U.S. at 859 (“Scienter is not an element of a violation of Sec. 455(a)”).

vote to rehear, rather than existing beforehand and raising some of the retroactivity and due process concerns discussed *infra*.

Even in the case of recusal due to new circumstances that make it possible to reasonably question Elrod’s impartiality under § 455(a), the issuance of a recusal memorandum stating as much would have been better for the image of the court in general and Judge Elrod personally than opening herself to the speculation engaged in above by recusing in silence. Moreover, recusal under § 455 (a) raises additional concerns, which could have been alleviated by the issuance of a recusal memorandum discussed below.

B. Non-disclosure Defeats the Waiver Provision in Section 455(a)

The decision not to disclose the reason for recusal by Judge Elrod may have denied the parties the opportunity to acquire an appellate decision on the merits of the case. If Judge Elrod recused under 28 U.S.C. § 455(a), the conflict could potentially have been waived by the parties.⁹² Unlike the situations outlined above—which are essentially a paraphrase of 28 U.S.C. § 455(b) and are not waiveable—the “mandatory” recusal under 28 U.S.C. 455(a) may be waived pursuant to 28 U.S.C. 455(e).⁹³ “The process [of obtaining a waiver] is transparent and designed to avoid placing pressure on parties to waive a judge’s decision to disqualify.”⁹⁴ For waiver to be effective, the recusing judge must make a full statement on the record of what circumstances they believe will bring about a scenario where a reasonable person would have good cause to doubt their impartiality.⁹⁵ The exact method of waiver does not appear to be entirely settled. The Judicial Conference of the United States believes the recusing judge must

⁹² See 28 U.S.C. § 455(e) (“Where the ground for disqualification arises only under subsection (a), waiver may be accepted”).

⁹³ *Id.*

⁹⁴ *McKeown Statement*, *supra* note 60, at 4.

⁹⁵ See 28 U.S.C. § 455(e) (waiver must be “preceded by a full disclosure on the record of the basis for disqualification”)

then allow the parties to contemplate waiver outside of their presence and only may remain on the case if all of the parties consent to the waiver “in writing or on the record.”⁹⁶ However, some circuits have held, citing § 455(e), that disclosure by the judge on the record of the potential reasons for recusal and a lack of objection at that point by the parties to the judge remaining on the case, waives the parties right to seek the judge’s disqualification on appeal.⁹⁷ Regardless, this process is, in effect, optional and left up to the judge.⁹⁸ Thus, if Judge Elrod recused pursuant to 28 U.S.C. § 455(a), this procedure should have been available to Judge Elrod in *Comer*.

That Judge Elrod did not pursue the waiver option, preferring to keep the reasons for her recusal private, further undermines the appearance of impartiality of the court and the purposes of the availability of § 455(e)’s waiver provision. The provision is clearly intended to encourage judges to remain on cases where they might otherwise have been conflicted out. A judge’s non-disclosure effectively shuts the door on the parties’ waiver option. Here, not presenting the parties with the option to waive the conflict again calls into question the basis of the recusal and whether the conflict predated the vote to grant rehearing en banc.

Although, making disclosure on the record of the reasons for recusal may not have made Elrod look particularly good either, it was the least damaging of her options. Presumably, Elrod undertook a § 455(a) analysis before she participated in the vote to rehear the case en banc and, at that time, reached the conclusion that she could participate in the case without requiring a waiver. Consequently, the judge would still have needed to make plain and public what “new

⁹⁶ *McKeown Statement*, *supra* note 60, at 4.

⁹⁷ *See, e.g., Moran v. Clarke*, 296 F.3d 638, 648—9 (8th Cir. 2002) (“where judges have fully disclosed potential conflicts and have then retained their mandate in a case, we have been solicitous of their discretion.”); *United States v. Nobel*, 696 F.2d 231, 236—7 (3d Cir. 1982) (“The election to proceed after full disclosure of the relevant facts satisfies those requirements and constitutes an effective waiver under the statute.”)

⁹⁸ *McKeown Statement*, *supra* note 60, at 4.

circumstances” arose in the approximately nine weeks after the vote to rehear that would have tipped the scales in the other direction. Moreover, there was probably a fair chance that even after making that disclosure, the parties would not have all consented to her remaining on the case.

Even so, Elrod should have offered the parties the option of waiver for two reasons. First, as mentioned, not doing so invited the kind of speculations as to her judicial integrity and that of the entire circuit court outlined above. Second, because faced with the option of allowing Elrod to continue or having the en banc court lose its quorum, to a result that no one—not even the court—could foresee at the time, the parties may well have preferred to keep Elrod and obtain a decision on the merits. This is particularly so since it was the defendants who requested the rehearing en banc, with the probable expectation that the court would reverse the panel in *Comer I*,⁹⁹ but the plaintiffs may have also had a shot even with Elrod on the bench because three of the non-recused judges, the eventual dissenters in *Comer II*, were the same judges from the *Comer I* panel and could be expected to vote as they had previously.¹⁰⁰ Moreover, considering the ultimate disposition due to the loss of quorum—dismissal and reinstatement of the adverse district court decision—the *Comer* plaintiffs had nothing to lose by an en banc hearing on the merits. Additionally, even if the en banc court did reverse the panel on the merits, that would have created a split with the Second Circuit, where *American Electric* had been decided, thus dramatically increasing the chances that the Supreme Court would hear one of the two cases.¹⁰¹ Finally, it is not out of the question that, given the somewhat subjective nature of the

⁹⁹ Taber, *supra* note 50 (“after the Fifth Circuit granted rehearing *en banc*, most court watchers assumed this was a signal that the Fifth Circuit would reverse itself.”)

¹⁰⁰ Compare *Comer II*, 607 F.3d at 1055 (majority opinion listing dissenters) with *Comer I*, 585 F.3d at 855 (listing judges the case was before).

¹⁰¹ Taber, *supra* note 50 (reversal of *Comer I* “would set up a ‘classic conflict between the circuits’ review of [climate change] issue[s] in the U.S. Supreme Court.”)

reasonable person analysis, the parties may have simply concluded that what Judge Elrod viewed as a § 455(a) conflict was not one in their minds, that recusal was unnecessary, and allowed her to remain on the panel.¹⁰²

Given that Elrod's recusal was the second late recusal resulting in a loss of quorum since the appeal first made it to the Fifth Circuit for review, it seems that, in the view of this author, Judge Elrod was under a duty to provide the parties with the waiver option, were it available. When a judge becomes aware of a violation of § 455(a), that judge is "called upon to rectify an oversight and take the steps necessary to maintain public confidence in the impartiality of the judiciary."¹⁰³ In the interest of preserving the integrity of the court, Elrod ought, at least, to have offered the parties the option of continuing, even at the cost of some potential personal embarrassment. Having not done so, not only does she look bad, the entire Fifth Circuit has taken a serious reputational hit as well. That said, as discussed below, with so many of the other judges of the circuit also recusing without explanation, the circuit was not going to emerge with a perception of neutrality assured regardless of whether Judge Elrod had issued a recusal statement.

C. Judicial Disclosure Could Help Prevent of Future Mass or Late Recusals

That over half of the entire Fifth Circuit Court of Appeals voluntarily recused, without a single judge issuing a memoranda explaining why, is an invitation for similar trouble in the not too distant future. The entire gulf region is heavily involved with the oil industry and many assumed that the reason for the mass recusal in *Comer* was because many judges, or their

¹⁰² See generally, Hayes, *supra* note 59 (discussing the subjectivity problem of the reasonable person standard as applied to judicial recusal cases.)

¹⁰³ *Liljeberg*, 486 U.S. at 859.

families, either have now or had in the past ties to one or more of the major oil companies.¹⁰⁴ That situation presents the very real possibility that *Comer* may be only the tip of the iceberg when it comes to future mass recusals in the Fifth Circuit.¹⁰⁵ Certainly, much more litigation will follow should the Supreme Court affirm *American Electric* and the recent BP Oil spill is virtually guaranteed to spawn a host of lawsuits, which may create similar mass recusal situations.¹⁰⁶ The timing of the recusals in such situations could result in more dismissals without reaching the merits, potentially limiting the practical liability of big oil companies solely because of their ties to sitting federal judges. Had the recusing judges issued memoranda explaining their reasons for recusal, many of these potential problems with future cases could be avoided.

Explanation of the reasons for recusal could have helped to mitigate the potential for late recusals in subsequent cases. Public recusal memoranda would both make future parties aware of potential conflicts and provide possible grounds for disqualification motions. As it stands now, voluntary recusal generally does not, standing alone, provide a justification for disqualification of judges in future litigation, even where the litigation concerns one or all of the same parties.¹⁰⁷ The availability of some sort of particular indication on the part of a judge who

¹⁰⁴ See Ashby Jones, *Eight Judges Out: Mass Recusal Cripples 5th Circuit*, WALL ST. J., June 2, 2010, <http://blogs.wsj.com/law/2010/06/02/eight-judges-out-mass-recusal-cripples-5th-circuit/?KEYWORDS=%22mass+recusal%22> (“The recusals [in *Comer*], it seems, are likely due to stock-ownership issues.”)

¹⁰⁵ See Ashby Jones, *Hello? Can Anyone Down There Handle The oil-Spill Litigation?*, WALL ST. J., June 2, 2010, <http://blogs.wsj.com/law/2010/06/02/hello-hello-can-anyone-down-there-handle-the-oil-spill-litigation/?KEYWORDS=%22mass+recusal%22> (observing that half of the district court judges in BP oil spill litigation have recused themselves); See also Maleske, *supra* note 41 (“Given the number defendants that climate change suits similar to *Comer* have named, any judge with energy company stocks in his portfolio will have to consider potential recusal.”)

¹⁰⁶ Jones, *supra* note 88; Maleske, *supra* note 41.

¹⁰⁷ Mackey v. United States, 221 Fed. Appx. 907, 910 (11th Cir. 2007) (Writing “[i]t is simply not true that once recused, always recused” where it held that a decision in the same action by a judge who had previously recused himself was valid because the moving party could not prove that the unknown prior conflict of interest had ceased to exist.); *Diversified Numismatics v. City of Orlando*, 949 F.2d 382, 385 (11th Cir. 1991) (“Prior recusals, without more, do not objectively demonstrate an appearance of partiality.”); *United States v. Merkt*, 794 F.2d 950, 960 (5th

previously recused in a similar matter but now seeks to remain on a case is particularly important considering that the standards of review for appeals of judicial decisions tend to be unfriendly to parties seeking disqualification and lack of evidence may make a critical difference upon appellate review.¹⁰⁸ Disclosure of the reasons for a voluntary recusal would provide parties with express details that would allow parties to meaningfully raise the issue of disqualification of circuit judges in future cases before panels hear oral argument or the entire circuit votes to rehear cases en banc. By raising the issues early, the circuit can avoid vacating the decisions of three judge panels with the intention of a rehearing en banc only to discover too late that the en banc court lacks a quorum. Additionally, having the reasons for prior recusals available will put parties on notice that potential disqualification issues may crop up down the road and allow them to take appropriate steps. Putting the ability to anticipate future issues more squarely in the hands of parties, who have a very strong monetary interest in an impartial judiciary in these types of cases, would go a long way toward ensuring that procedural snafus like the one in *Comer* are not repeated.

Disclosure of reasons might also allow litigants to avoid the problem of mass recusal entirely. If, through the use of recusal memoranda issued in earlier but similar cases, litigants could demonstrate to a trial court that meaningful appellate review would be extremely problematic, that may be sufficient to justify a transfer of venue to a trial court in different circuit “in the interest of justice.”¹⁰⁹ Depending on the circumstances, such motion may not even be opposed by corporate defendants. Since judicial ties to the corporate defendants would trigger

Cir. 1986) (holding disqualification “not required . . . merely because [the judge] voluntarily withdrew from another case [with the same defendant as the instant action]”).

¹⁰⁸ *E.g.* *United States v. Carlton*, 534 F.3d 97, 100 (2nd Cir. 2008) (applying “abuse of discretion” to cases where the reasons for recusal were before the district court and “plain error” where they were not.); *Adrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir. 2003)(applying “abuse of discretion”); *Higginbottom v. Okla. Transp. Comm’n*, 328 F.3d 638, 645 (10th Cir. 2003)(applying “abuse of discretion”).

¹⁰⁹ 28 U.S.C. § 1404(a).

most of the mass recusals, defendants could reasonably conclude they would fare better in another circuit. The reason is that the judges who remain eligible to sit on three judge appellate panels to initially hear cases may not have financial ties to the companies because they harbor political or ideological views unsympathetic to big business.¹¹⁰ That concern may loom particularly large for corporate defendants if the prospect of mass recusal virtually guarantees that the panel's decision will stand because an en banc court would not be able to muster a quorum to grant a rehearing.

D. Recusals without Explanation Create Potentially Insolvable Due Process Problems

The reasons for requiring recusal memoranda are extend not only to issues of judicial ethics and the appearance of bias, but also to the life and death of litigation. When a judge who later recuses or becomes disqualified has taken meaningful action on a case, questions as to what extent the rights of the party potentially prejudiced are infringed and what kind of remedy is appropriate come to the forefront. Obviously, most aggrieved parties would seek vacatur of unfavorable decisions and *Comer* is an excellent example of how determining whether vacatur is appropriate may prove to be impossible where a judge has voluntarily recused him or herself and issued no statement.

Although the injury to a potentially prejudiced party can rise to constitutionally impermissible levels, most such determinations will be made under statutory provisions. Given the Supreme Court's recent pronouncement in *Caperton v. Massey*, we know that judicial recusals governed by an objective standard whether the violation is deemed to be statutory¹¹¹ or

¹¹⁰ *Curious Case*, *supra* note 42 (pointing out that plaintiffs could game the system by "add[ing] defendants to the suit for the purposes of targeting judicial recusals and a more favorable hearing.")

¹¹¹ *Litkey v. United States*, 510 U.S. 540, 548 (1994) (holding that under § 455(a) "what matters is not the reality of bias but its appearance.")

constitutional.¹¹² However, as a practical matter, whether the violation based on an appearance of impropriety is merely statutory, arising out of the 28 § U.S.C. 455(a), or grounded in the Due Process Clause, makes little difference in terms of the remedy that will be available to the parties. Because the standard to make out a statutory violation is at least as low, if not lower, than that required to make out a constitutional violation, and the same top remedy—the vacatur of prior orders of the disqualified judge—is available for statutory violations, virtually all cases in Federal Court will end up being adjudicated under 28 § U.S.C. 455(a).¹¹³ The upshot is that although state courts may need to grapple with the standard to be applied in determining remedies,¹¹⁴ federal cases will ultimately be determined by the “harmless error” test set out in *Liljeberg v. Health Services Acquisition Corp.*¹¹⁵ There, the court held:

in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public’s confidence in the judicial process.¹¹⁶

Where a judge has not issued a recusal statement, this issue becomes particularly tricky. First, determining the risk of injustice to the parties must hinge upon what decisions the judge has

¹¹² *Caperton v. A.T. Massey Coal Co.*, --- U.S. ---, 129 S. Ct. 2252, 2257 (2009) (“[T]he Due Process Clause has been implemented by objective standards that do not require proof of actual bias [for non recusal to be a constitutional violation].”) (citations omitted).

¹¹³ Selva Oscura, *Judicial Campaign Contributions, Disqualification, and Due Process*, 48 DUQ. L. REV. 767, 822 n. 204 (2010) (“While it is possible that an ‘extreme case’ might someday arise in which denial by a federal judge of a disqualification motion might implicate the Due Process Clause of the Fifth Amendment, [recusal statutes] render that prospect remote.”); see also Dimitry Bam, *Understanding Caperton: Changing the Role of Appearances in Judicial Recusal Analysis*, 42 MCGEORGE L. REV. 65, 77, 77 n. 83 (2010) (discussing how the Caperton “probability of bias” standard is in some ways more difficult to apply than § 455(a)’s standard and that 455(a)’s standard would apply to most judges, and all federal judges, regardless of the constitutional standard.)

¹¹⁴ Oscura, *supra* note 97, at 821 (commenting that a harmless error standard seems “inappropriate” in *Caperton* cases.)

¹¹⁵ *Liljeberg*, 486 U.S. at 864.

¹¹⁶ *Id.*

made, if any, in violation of his duty to recuse.¹¹⁷ Second, determining the risk that denial of relief will produce injustice in other cases must have some focus on the nature of the conflict. Third, accurately assessing the risk of undermining the public's confidence in the judicial process now requires consideration of whether the means of the recusal itself affects the public's confidence: *i.e.* does the judge's choice not to issue a recusal statement itself have an impact on public confidence in the courts? *Comer* well illustrates all of these problems.

Determining exactly when a judge ought to have recused is necessary to allow the parties to identify which, if any, of the judge's prior orders are subject to challenge and the holdings in those orders determine the scope of potential injury. In *Comer*, the timing issue is particularly glaring because of the late Elrod recusal. Less than nine weeks had passed between the vote to rehear en banc and the letter to the parties indicating that Elrod had recused.¹¹⁸ Although the court indicated that "new circumstances" had given rise to the recusal, the question as to whether Elrod's conflict pre-existed the vote to rehear is very much alive in the minds of many and critical to determining what the risk of injury was.¹¹⁹ If the conflict reaches back to the prior vote then the injury is clear: the decision was outcome determinative of the case and the potential injury to the *Comer* plaintiff's is enormous.¹²⁰ Meaning, if Elrod had not participated in the vote to rehear, the court would not have had a quorum to grant rehearing and the *Comer I* panel decision would stand. As discussed *supra* in Subsection A, virtually all of the conflicts that would have explicitly required Elrod to recuse ought to have been detectable nine weeks earlier.

¹¹⁷ See, e.g., *Patterson v. Mobil Oil Corp.*, 355 F.3d 476, 485—6 (5th Cir. 2003) (Hinging the first prong of the harmless error analysis on a comparison of the standards of review for the district and appellate courts and finding that because the standards were the same there was minimal risk of injustice.)

¹¹⁸ See Docket Sheet, *Comer v. Murphy Oil USA Inc.*, No. 07-60756 (5th Cir.).

¹¹⁹ Letter to the Parties Notifying Them of Loss of Quorum and Canceling Oral Argument at 1--2, *Comer v. Murphy Oil USA Inc.*, No. 07-60756 (5th Cir. April 30, 2010), ECF No. 00511097646.

¹²⁰ It is possible that this injury might be considered to be mitigated somewhat because the *Comer* plaintiffs would have had a near impossible time of proving proximate causation. See *Comer I*, 585 F.3d at 880 (Davis, J. concurring.)

If they were conflicts that should have been detected, the statutory conflict existed prior to the vote to rehear.¹²¹ Moreover, even if a 455(b) conflict did not exist prior to the vote, but circumstances creating a 455(a) conflict did, the conflict would be retroactive.¹²² However, because Judge Elrod issued no statement, it is impossible to determine exactly at what point the conflict came into existence and whether or not her participation in the vote to rehear would be subject to challenge. Had she issued a recusal memorandum, particularly one in conformity with the proposed statutory changes below, then the *Comer* plaintiffs would have been able to make that determination.

Whether denial of a remedy would promote injustice in other cases is also a question that can go unanswered where a judge voluntarily recuses without issuing a statement because the nature and circumstances of the conflict remain hidden. This factor is primarily concerned with the impact the remedy given will have on future judicial decision making, but without disclosure future courts have no guidance for future recusal decisions or the behavior they need to engage in to avoid the creation of § 455(a) conflicts.¹²³ Normally, a reviewing court could simply weigh the reasons for which a judge recused and forecast what precedential value the denial of a remedy in future similar cases have. However, in determining a remedy without a recusal statement to work with, a court must consider the impact of the existence of the non-statement in context and can only speculate as to the reasons for recusal; that is all the court would have to work with. In *Comer*, a reviewing court might see a good opportunity to create clearer recusal rules, potentially alleviating mass and late recusal problems such as those discussed *supra* in

¹²¹ See *United States v. Lindsey*, 556 F.3d 238, 246—248 (4th Cir. 2009) (vacating an order issued by a judge who had a § 455(b) conflict of which he was unaware at the time the order was issued.).

¹²² See *Liljeberg*, 486 U.S. at 860.

¹²³ See *United States v. Amico*, 486 F.3d 764, 777 (2nd Cir. 2007) (holding that encouraging different judicial conduct in future trials satisfied the second prong of *Liljeberg*); *Clemmons v. Wolfe*, 377 F.3d 322, 329 (3rd Cir. 2004) (applying *Liljeberg* and expressly exercising “supervisory powers” to “avoid recurrence” of the failure to recuse in circumstances before the court.)

subsection C, but without knowing the reason for the recusal, a reviewing court would be incapable of drawing the necessary line. How can a reviewing court predict the impact of giving a remedy and attempt to guide future judicial behavior when the exact behavior in question, other than a silent recusal, is unknown? Simply put, it cannot.

Assessing whether denial of a remedy will injure public confidence in the recusal process is similarly problematic where no recusal statement issued. Here, a court must weigh not only the issue of leaving the prior decision in place, but now also must consider the impact of leaving the prior decision in place where the judge has recused without issuing a reason. As discussed *supra* in Section III.A, the lack of issuing an explanation and outcome of *Comer* certainly damaged public confidence in the Fifth Circuit. The determination of such an impact would result in an odd practical equivalence of recusal for actual bias and those based on appearances only. Additionally, although a court can weigh the appearance created by saying nothing, such a determination must ultimately be grounded in little more than speculation and, since the public does not know the reason for the recusal, granting the vacatur may do little to restore public confidence given the extra time and expense that the state and the litigants must endure in such a case.¹²⁴ Moreover, a decision granting vacatur where this third factor is based on the non-issuance of a recusal memorandum may undermine confidence in the judicial system in, and of, itself.¹²⁵

III. A Proposal for Statutory Change Requiring Recusal Memoranda

¹²⁴ *Oscura*, *supra* note 97, at 822 n. 204 (arguing the creation of additional process, slowing down the judicial system, “diminish[es] public respect for, and confidence in, our judicial system.”).

¹²⁵ See Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 16 n. 70 (2007) (“The disingenuousness of [an approach focusing on the appearance of bias rather than actual bias] ultimately only further erodes public confidence in the judiciary.”)

The problems discussed in the preceding section can be minimized, or avoided by requiring judges who recuse sua sponte to issue memoranda. This section proposes two suggested statutory additions and explains why those provisions address the problem well. These two provisions, one creating a general obligation for disclosure and a second creating an additional procedure where a conflict could potentially be waived under §455(e), are designed to work together and to impose minimal burden on the judiciary. The proposal is that following should be added as additional section to 28 U.S.C. § 455:

(g) Any judge whose disqualification arises under the provisions of subsections (a), (b), or other statutory provision shall make a disclosure on the record which must include, but need not be limited to, a statement of the following:

(1) the statutory provision or provisions under which his disqualification arises; and

(2) the date upon which disqualification first arose.

(f) When any judge who has issued a disclosure under subsection (g) which indicated his disqualification arises under subsection (a) he shall, upon the timely request of the parties, make additional disclosure on the record of the basis of his disqualification. Such disclosure shall be sufficiently detailed to allow the parties to waive the conflict pursuant to subsection (e).

This statutory language, or something similar, would solve or lessen many of the problems with voluntary judicial recusal without overburdening the judiciary or unduly invading the privacy of recusing judges.

Problems resulting from speculation as to the cause for recusal that are damaging to the reputation of the court, like those that surrounded Judge Elrod's recusal in *Comer*, would be significantly curtailed by proposed subsection (g). By identifying the date of the beginning of the conflict and the relevant statutory provision or provisions, observers will have a more solid idea of the type of conflict that occurred, legitimizing the propriety of the recusal, and whether

the judge who is recusing should have identified the problem and recused earlier in the process.¹²⁶ Moreover, because a detailed disclosure is not initially required, the imposition upon judicial time and privacy is minimal. For example, the statement “As of January 17, 2011, I was disqualified from this case under 28 U.S.C. § 455(B)(5)(iii).” would be sufficient to satisfy the statute, take mere seconds to pen, and reveal only that the judge, the judge’s spouse, and or closely related person “is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.”¹²⁷

The provision requiring additional disclosure would make the waiver option in § 455(e) meaningful in cases where the parties may have an interest in keeping the judge presently assigned to the case. By allowing the parties to demand, and receive, additional disclosure where the conflict could be waived, parties will be empowered to affirmatively use the waiver provision. The problem of retroactivity and non-disclosure in § 455(e) cases would also be solved, allowing a reviewing court crafting a remedy to make an independent judgment as to when the appearance of impropriety arose.

Finally, although there is the potential for significant additional judicial time expenditure or meaningful invasion of privacy is theoretically possible under proposed subsection (f), pragmatism argues otherwise. It is the very rare case where a lawyer would want to keep a judge on a case when that judge is attempting to recuse. Therefore, the actual increase in judicial work and invasion of judicial privacy caused by invocations of § 455(e) by parties would be minimal

¹²⁶ It is true that such disclosure could essentially expose a judge who did not live up to their ethical obligations. Taking away the ability of a judge to cloak their prior wrongdoing in a later recusal, however, hardly seems objectionable.

¹²⁷ 28 U.S.C. § 455(B)(5)(iii).

in practice.¹²⁸ Accordingly, unless the timing of the recusal is important and disputed, parties who do not seek to keep a judge on the case would have little to no reason to demand a more significant statement. Even where a more significant statement must be issued, given the amount of disclosure that judges must engage in regardless, it seems unlikely that situations would arise where the conflict stems from some area about which the judge has not already revealed a substantial amount of information.¹²⁹ Last, although this provision would also apply to cases where the parties have sought the disqualification of a judge, minimal disclosure in such cases would present no additional burden to judges since compliance with the proposed statutory changes would require no more than an additional line or two in the order granting the motion they must issue anyway.

IV. Conclusion

The importance of maintaining the credibility of the American judicial system in a world that is increasingly interconnected both socially and economically is far too important a goal not to defend vigorously. *Comer* illustrated many of the presently unaddressed issues that can arise with voluntary judicial recusal. That a judicial conflict can leave parties in the dark as to why they were denied appellate adjudication on the merits is anathema to the healthy and transparent system of justice the American federal system strives for. The two proposed statutory provisions discussed could easily be incorporated into federal law, solve the problems discussed in the context of *Comer*, and do so without overburdening the judiciary by requiring minimal disclosure by federal judges when they *sua sponte* recuse. These, or other similar solutions, must be seriously considered by policy makers going forward, lest we risk more *Comers*.

¹²⁸ This is particularly true when the proposal here is compared to other proposals to increase the transparency of judicial recusal. See SAMPLE ET AL., FAIR COURTS: SETTING JUDICIAL RECUSAL STANDARDS 27—8 (2009) (discussing several other proposals for increased disclosure).

¹²⁹ See *McKeown Statement*, *supra* note 60, at 6.