

1-1-2016

Reversal by Recusal? *Comer V. Murphy Oil U.S.A., Inc.* And The Need for Mandatory Judicial Recusal Statements

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United States Court of Appeals for the Second Circuit

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Reversal by Recusal? *Comer v. Murphy Oil U.S.A., Inc.* and
the Need for Mandatory Judicial Recusal Statements

PATRICK A. WOODS*

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INTRODUCTION

In many cases, if not most, voluntary judicial recusal is both an efficient use of judicial resources and an 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 where the recusal itself has collateral consequences. 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 where the basis of the recusal may be waived, the parties should be permitted to demand, and receive, a statement sufficiently detailed so as to permit them to waive the conflict if they so choose.

¹ Bruce A. Green, *Fear of the Unknown: Judicial Ethics After Caperton*, 60 SYRACUSE L. REV. 229, 234 (2010) (stating that 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* 645 (2nd ed. 2007). Some jurisdictions even make the issuance of such statements mandatory. See *id.* at 646 n.4 (citing *Kurz v. Justices of the S. Ct. of N.Y.*, 654 N.Y.S.2d 783 (1997)).

To put the arguments in context, this article will first lay out the highly unusual procedural history of *Comer v. Murphy Oil USA, 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 the 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 requiring a level of detail that would overburden the judiciary or impinge too far upon the privacy interests of individual federal judges.

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 filed in the federal courts.³ Although a step behind *Connecticut v. American Elec. Power Inc.*,⁴ *Comer* was followed by environmental law blogs and journals since shortly after its complaint was filed.⁵ The plaintiffs in *Comer* named numerous major oil companies in their complaint, alleging that the companies' roles in increasing greenhouse gas emissions contributed to global warming, making Hurricane Katrina more severe, and causing damage to the plaintiffs' property.⁶ Like *American Electric Power*, the *Comer* plaintiffs alleged causes of action both in negligence and public nuisance.⁷ Also like *American Electric Power*, *Comer* was

³ *Comer v. Murphy Oil USA*, 585 F.3d 855, 859–61 (5th Cir. 2009) [hereinafter *Comer I*] (reversing district court in part).

⁴ See *Connecticut v. Am. Elec. Power Inc.*, 131 S. Ct. 2527 (2011).

⁵ See, e.g., Gilbert S. Keteltas, *Climate Change Lawsuits*, NAT. L. J. Apr. 30, 2007, at 12.

⁶ *Comer I*, 585 F.3d at 859–61.

⁷ *Am. Elec. Power*, 131 S. Ct. at 2529; *Comer I*, 585 F.3d at 859–61.

initially dismissed at the district court level, by order dated August 30, 2007.⁸

In *Comer*, no written opinion accompanies the order of dismissal. Instead the basis for the judge's ruling was read into the record at the hearing.⁹ According to the transcript, the case was dismissed for lack of standing on the grounds that global warming litigation presents a non-justiciable political question.¹⁰

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 lawsuits may have on tort and insurance law nationwide.¹¹ Those issues are beyond the scope of this article. Instead, this article focuses on 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.¹² On the day oral argument was scheduled to be heard in the case, one judge was kept away by a family

⁸ *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005) *vacated and remanded*, 582 F.3d 309 (2d Cir. 2009) *rev'd*, 131 S. Ct. 2527 (2011); *Comer I*, 585 F.3d at 860.

⁹ *Comer v. Murphy Oil USA, Inc.*, No. 1:05CV436LGRHW, 2007 WL 6942285, at *1 (S.D. Miss. Aug. 30, 2007).

¹⁰ *Id.*

¹¹ See, e.g., Jeremy Hessler, *A Temporary Solution to Climate Change: The Federal Common Law to the Rescue?*, 38 HASTINGS CONST. L.Q. 407, 409 (2011) (“[C]limate change litigation could be a step forward in our nation's policy of regulating pollutants that cause climate change.”); James S. Malloy & John M. Sylvester, *Insurance Coverage for Global Warming Liability Claims*, 45 TORT TRIAL & INS. PRAC. L.J. 811 (2010) (discussing developments in environmental litigation); Mary Kathryn Nagle, *Tracing the Origins of Fairly Traceable: The Black Hole of Private Climate Change Litigation*, 85 TUL. L. REV. 477, 500-02 (2010) (discussing the standing and political question doctrine aspects of *Comer*); Victor E. Schwartz et al., *Why Trial Courts Have Been Quick to Cool “Global Warming” Suits*, 77 TENN. L. REV. 803, 805 (2010) (arguing that global warming cases in tort should be dismissed for failure to state a claim); see also *Am. Elec. Power*, 131 S. Ct. at 2535 (affirming on the political question doctrine issue because the court split four justices to four justices).

¹² See *Comer v. Murphy Oil USA*, No. 07-60756 (5th Cir. argued Aug. 8, 2008).

emergency. 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.¹³ The second panel reversed the district court's dismissal of the plaintiffs' nuisance, trespass, and negligence claims, finding that the district court had erred in concluding that the political question doctrine required dismissal of the plaintiffs' claims.¹⁴

Between November 27 and December 2, 2009, the defendants petitioned for rehearing en banc by the full Fifth Circuit Court of Appeals.¹⁵ Without issuing recusal memos, seven of the judges on the Fifth Circuit recused themselves from both the case and the petition for rehearing.¹⁶ At that time, there was one vacancy on the Fifth Circuit.¹⁷ The minimum number of judges required to participate in order for the court to have a quorum to vote to grant rehearing was nine.¹⁸ All nine of the remaining judges participated and on January 26, 2010 the circuit, by a six to three vote, granted rehearing.¹⁹

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 potentially suspect panel decisions.²⁰ 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."²¹ Thus, when the circuit voted on February 26, 2010 to rehear the case en banc, the panel decision in *Comer I* was

¹³ *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1058 (5th Cir. 2010) (Dennis, J., dissenting) [hereinafter *Comer II*]

¹⁴ *Comer I*, 585 F.3d at 879–80.

¹⁵ See *Comer v. Murphy Oil USA*, No. 07-60756 (5th Cir. argued Nov. 3, 2008).

¹⁶ *Comer v. Murphy Oil USA*, 598 F.3d 208, 210 & n.1 (5th Cir. 2010) [hereinafter *Order Granting Rehearing*] (granting rehearing en banc and listing the recused judges in a footnote).

¹⁷ *Comer II*, 607 F.3d at 1065 (Dennis, J., dissenting).

¹⁸ *Id.* at 1055 (Davis, J., dissenting).

¹⁹ *Id.*

²⁰ *Id.*

²¹ 5th Cir. R. 41.3 available at <http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/rules/5thcir-iop.pdf>.

automatically vacated.²² As will be seen, in *Comer*, local rule 41.3 ended up determining the outcome of the merits of the litigation rather than serving simply as a procedural safeguard for the en banc rehearing process.²³

Despite being fully briefed on the issues, the en banc panel never reached the merits of the case.²⁴ 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.”²⁵ 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 at this later procedural state were.²⁶ 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; one below the minimum number of judges required for en banc quorum.²⁷

After becoming aware of the reduction in the membership of the panel, the court contacted the parties and requested 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.²⁸ The parties submitted letter briefs on the issue and on May 28, 2010 the court issued an order, with a five to three majority of the remaining judges agreeing, that the court lacked a quorum.²⁹ The court discussed and dismissed several proposed cures for the

²² See *id.*; *Comer II*, 607 F.3d at 1053.

²³ See *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 467–69 (5th Cir. 2013) [hereinafter *Comer 2013*]; *Comer II*, 607 F.3d at 1055 (dismissing the appeal without reinstating the decision in *Comer I*); see also *in re Comer*, 131 S. Ct. 902 (2011) (denying mandamus).

²⁴ See *Comer v. Murphy Oil USA*, No. 07-60756 (5th Cir. argued Nov. 3, 2008).

²⁵ Letter to the Parties Notifying Them of Loss of Quorum and Canceling Oral Argument, *Comer v. Murphy Oil USA Inc.*, No. 07-60756 (5th Cir. April 30, 2010), ECF No. 00511097646.

²⁶ See *Comer v. Murphy Oil USA*, No. 07-60756 (5th Cir. argued Nov. 3, 2008).

²⁷ *Comer II*, 607 F.3d at 1055–56.

²⁸ *Id.* at 1058.

²⁹ *Id.* at 1055–56.

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 Federal Rule of Appellate Procedure 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.³⁰ Rejecting all of these options, the sub-majority held it could not “conduct judicial business” as a consequence of the lack of quorum.³¹ 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.³²

All three members of the *Comer I* panel, Judges Davis, Dennis, and Stewart dissented.³³ Davis issued a dissenting opinion, which Stewart joined and Dennis issued a separate dissent, but noted his general agreement with Davis.³⁴ The dissents offered different

³⁰ *Id.* at 1054–55.

³¹ *Id.* at 1055.

³² *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. In subsequent litigation raising the same issues, the Fifth Circuit also declined to give *Comer II* res judicata effect. Rather, the Circuit has subsequently determined that the district court’s verbal opinion is the relevant final judgment in the case. *Comer 2013*, 718 F.3d at 469.

³³ *Comer II*, 607 F.3d at 1055.

³⁴ *Id.* at 1055, 1057 n.2 (Dennis J., dissenting).

interpretations of all of the options considered by the court, including the definition of a quorum.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" is somewhat ironic in retrospect.³⁶ The plaintiffs accepted the majority's invitation to appeal, petitioning the Supreme Court of the United States for a writ of mandamus.³⁷ Most appeals to the United States Supreme Court (either by mandamus or certiorari) are, of course, discretionary and rarely granted.³⁸ Unsurprisingly, 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 end of the case, brought about as a consequence of a mass recusal followed by a late recusal, had a peculiar and disturbing consequence in this instance. Having automatically vacated the October 15, 2009 three-judge panel decision by the operation of its local rule, the sub-majority's order of dismissal left the district court's determination untouched and, despite the lack of a

³⁵ *Id.* at 1055–66 (Davis, J., dissenting) (Dennis, J., dissenting). 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 that the request be made in such circumstances.

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

³⁷ *See in re Comer*, No. 10-294 (U.S. appeal docketed Aug. 30, 2010).

³⁸ *See* Supreme Court Order List for January 10, 2011, available at <http://www.supremecourt.gov/orders/courtorders/011011zor.pdf> at 26.

³⁹ *In re Comer*, 131 S. Ct. 902 (2011) (denying mandamus).

determinative appellate review on the merits, entitled to res judicata effects in later cases.⁴⁰

The mass recusal followed by an unexplained recusal, the timing of which ultimately resulted in the reversal of a decision on the merits 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 have been written on the subject.⁴¹ 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.”⁴² 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.”⁴³ The need for the appearance of impartiality is less obvious. 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.”⁴⁴

Unlike common law, the present American federal system directly recognizes the importance of maintaining the appearance of

⁴⁰ *Comer* 2013, 718 F.3d at 467–69.

⁴¹ See, e.g., FLAMM, *supra* note 3.

⁴² *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.”)

⁴³ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009).

⁴⁴ John A. Meiser, Note, *The (Non)Problem of a Limited Due Process Right to Judicial Disqualification*, 84 NOTRE DAME L. REV. 1799, 1804 (2009).

impartiality as well as an absence of actual bias.⁴⁵ 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.⁴⁶ A second, more common, reason is that the maintenance of public confidence in the judiciary is a sweeping and institutional concern for any system of justice.⁴⁷ “Justice must satisfy the appearance of justice” has long been a watchword of American recusal jurisprudence.⁴⁸ 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.”⁴⁹

Public confidence in the judiciary can be diminished not only by actual misconduct, but also by the perception of misconduct. A judge needs not be biased or act improperly to raise questions as to the integrity of the judicial process.⁵⁰ 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.”⁵¹ Although this “stringent rule may sometimes bar trial by judges who have no actual bias,”⁵² 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

⁴⁵ See 28 U.S.C. § 455(a).

⁴⁶ See, e.g., *Caperton*, 556 U.S. at 876 (citations omitted) (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 decision maker is too high to be constitutionally tolerable”).

⁴⁷ See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988).

⁴⁸ *Offut v. United States*, 348 U.S. 11, 13 (1954).

⁴⁹ Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends*, 32 HOFSTRA L. REV. 1107, 1108 (2004).

⁵⁰ See, *Liljeberg*, 486 U.S. at 860 (discussing how a conflict of which a judge is unaware can still require recusal).

⁵¹ *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

⁵² *In re Murchison*, 349 U.S. 133, 136 (1955).

courts, and generally thwart the principles upon which our jurisprudential system is based.”⁵³

It is important to remember that the impact of the appearance of judicial bias can cut both ways. Judges must consider both the appearance of the decision to recuse and the appearance of the decision *not* to recuse. To achieve the second purpose of the recusal mechanism, promoting confidence in the judiciary, recusal must be used in a manner that is not self-defeating. 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.”⁵⁴ As discussed in Part III.D below, voluntary recusals made without issuing a statement can run afoul of this very concern.

In express pursuance of these twin aims, in 1974 Congress broke with the common law by amending the federal recusal statutes to require disqualification where a judge’s impartiality may “reasonably be questioned” in addition to where the more traditional and direct sources of bias are present.⁵⁵ Despite the fact that the 1974 changes effectively abolished the older “duty to sit” doctrine, judges are still expected to remain on cases where the applicable recusal statutes do not require their disqualification.⁵⁶ Broadly,

⁵³ FLAMM, *supra* note 3, at 110.

⁵⁴ *In re* 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)).

⁵⁵ See *Litkey v. United States*, 510 U.S. 540, 546–48 (1994) (discussing the 1974 changes to 28 U.S.C. § 455).

⁵⁶ Jeffrey W. Stempel, *Chief William’s Ghost: The Problematic Persistence of the Duty to Sit*, 57 *Buff. L. Rev* 813, 821 (2009) (“[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 unless 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 (2008) (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) [hereinafter Hayes]; but see Luke McFarland, Note, *Is Anyone Listening? The Duty To Sit Still Matters Because the Justices Say It Does*, 24 *GEO. J. LEGAL ETHICS* 677 (2011).

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 himself or herself from a case.⁵⁷ 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.⁵⁸

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."⁵⁹ 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

⁵⁷ *Examining the State of Judicial Recusals After Caperton v. A.T. Massey: Hearing Before the Subcomm. on Courts and Competition Policy of the Comm. on the Judiciary H.R.*, 111th Cong. 6 (2009) (statement of Hon. M. Margaret McKeown, Judge, United States Court of Appeals, Ninth Circuit District, San Diego, CA) [hereinafter *McKeown Statement*].

⁵⁸ *Id.* at 2–3.

⁵⁹ 28 U.S.C. § 455(a) (2012).

spouse and minor children.”⁶⁰ Further, all federal judges are required by the Ethics in Government Act to file extremely detailed financial statements annually.⁶¹ 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.⁶²

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 problems, harming the public perception of the federal courts and raising constitutional concerns. Several of those issues 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.”⁶³ 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

⁶⁰ 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.9 (“[N]otwithstanding the size and complexity of the litigation, judges remain under a duty to stay informed of any personal or fiduciary financial interest they may have in cases over which they preside.”).

⁶¹ 5 U.S.C. app. § 103–04 (2010).

⁶² Karen Redmond, *Broad Array of Tools Ensures Fair and Impartial Adjudication*, THE THIRD BRANCH NEWS, Dec. 10, 2009, available at http://www.uscourts.gov/News/NewsView/09-12-10/Broad_Array_of_Tools_Ensures_Fair_and_Impartial_Adjudication.aspx.

⁶³ *Liljeberg*, 486 U.S. at 865.

appellate courts, since “for all practical purposes, no review exists of appellate judges’ recusal decisions.”⁶⁴ The late recusal in *Comer* had exactly that negative effect, leading commentators to question the competence and the impartiality of the Fifth Circuit.⁶⁵

The timing of the late recusal in *Comer* was “a shock” to most observers, considering the sweeping round of recusals that preceded the vote to rehear the case en banc.⁶⁶ Because of the initial mass recusal, the unusual circumstances surrounding the last judge’s recusal, and the ultimate outcome, skepticism as to whether improper reasons underlay *Comer II* left commentators with an arched eyebrow.⁶⁷ Some “environmentalists . . . viewed the [recusals and decision] as a sign that the [oil] industry has all but captured the appeals court in the Gulf region.”⁶⁸ One commentator went so far as to say that unless the Supreme Court granted the mandamus petition and restored the panel opinion, it would “be very

⁶⁴ Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1221 (2002). The issue of unexplained recusal determinations in the United States Supreme Court has gotten more attention than the problem as it arises in the Circuit Courts of Appeal. See, e.g., Suzanne Levy, Comment, *Your Honor, Please Explain: Why Congress Can, and Should, Require Justices to Publish Reasons for Their Recusal Decisions*, 16 U. PA. J. CONST. L. 1161 (2014) (discussing the problem of recusal decisions made without explanation in the United States Supreme Court).

⁶⁵ See, e.g., *Climate Change and the Courts: A Curious Case of Judicial Recusal*, WALL ST. J.COM (May 18, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704635204575242361135307650> [hereinafter *Curious Case*] (“In *Comer*, did one of the more liberal Fifth Circuit judges buy stock specifically to blow up the quorum? That isn’t as far-fetched as it sounds.”).

⁶⁶ Melissa Maleske, *Comer v. Murphy Oil Leaves the Future of Climate Change Litigation Uncertain*, INSIDE COUNSEL, Aug. 1, 2010 available at <http://www.insidecounsel.com/Issues/2010/August-2010/Pages/Comer-v-Murphy-Oil-Leaves-the-Future-of-Climate-Change-Litigation-Uncertain.aspx?page=1> [hereinafter Maleske].

⁶⁷ See, e.g., Anderson, *A Miscarriage of Justice*, THUS BLOGGED ANDERSON (May 29, 2010), <http://thusbloggedanderson.blogspot.com/2010/05/judicial-depravity.html>.

⁶⁸ Elana Schor, *Pivotal Climate Change Test Case Dismissed—For Now*, WASH. INDEPENDENT (June 1, 2010), <https://web.archive.org/web/20130627100255/http://washingtonindependent.com/86062/pivotal-climate-change-test-case-dismissed-for-now>.

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.'"⁶⁹ Even commentators who declined to question the integrity of the *Comer* sub-majority, many of whom were opposed to the suit on its merits, derided the result as "curiouser and curiouser,"⁷⁰ a "shameful disappearing act,"⁷¹ "boggling the minds of lawyers and non-lawyers alike,"⁷² "an inappropriate way to end a case,"⁷³ "a rather bizarre decision,"⁷⁴ and "an exceedingly unfair conclusion to five years of litigation."⁷⁵ Even the extremely conservative *Washington Times*,⁷⁶ which had been particularly hostile to the decision in *Comer I*,⁷⁷ remarked that

⁶⁹ Anderson, *supra* note 68.

⁷⁰ 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, 11:58 PM), <http://howappealing.law.com/052810.html#038172>.

⁷¹ Jonathan R. Nash, *5th Circuit's Shameful Disappearing Act*, NAT'L L. J., July 12, 2010.

⁷² Seth Jaffe, *Due Process? We Don't Need No Stinkin' Due Process*, L. & ENV'T (June 1, 2010), <http://www.lawandenvironment.com/2010/06/01/due-process-we-dont-need-no-stinkin-due-process>.

⁷³ Jonathan H. Adler, *Writ of Mandamus Sought in Comer v. Murphy Oil*, VOLOKH CONSPIRACY (Aug. 27, 2010, 5:12 PM), <http://volokh.com/2010/08/27/writ-of-mandamus-sought-in-comer-v-murphy-oil>.

⁷⁴ Steven M. Taber, *Fifth Circuit Punts on Comer v. Murphy Oil Appeal – Dismisses Appeal on Procedural Grounds, Not Merits*, ENVTL. L. & CLIMATE CHANGE L. BLOG (June 4, 2010), <http://taberlaw.wordpress.com/2010/06/04/fifth-circuit-punts-on-comer-v-murphy-oil-appeal-dismisses-appeal-on-procedural-grounds-not-merits>.

⁷⁵ Ann Powers, *Comer v. Murphy Oil USA, En Banc in the Fifth Circuit: What Were They Thinking?!?!*, GREENLAW (Aug. 31, 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> [hereinafter Taber].

⁷⁶ See, e.g., Matthew Gentzkow & Jesse M. Shapiro, *What Drives Media Slant? Evidence from U.S. Daily Newspapers*, 78 ECONOMETRICA 35, 42, 47 (Jan. 2010) (showing the conservative leanings of the *Washington Times* readership and highlighting the publication's propensity for using conservative, politically charged language).

⁷⁷ See, e.g., Quin Hillyer, Editorial, *No Butterfly Caused Katrina*, WASH. TIMES, Mar. 18, 2010, <http://www.washingtontimes.com/news/2010/mar/18/no-butterfly->

Comer II was “an unusual decision marked by significant controversy.”⁷⁸

Politics, of course, played into this wave of negative speculation. That the late recusal came from Judge Elrod, an appointee of President George W. Bush, and all but one of the judges in the sub-majority of *Comer II* were appointed by either President Bush (Judges Prado, Owen, and Clement) or President Ronald Reagan (Judge Jolly), probably also fueled speculation that the decision was politically motivated.⁷⁹

It is important to observe that the comments I have just recounted are probably neither fair nor accurate to the extent that they accuse the membership of the Fifth Circuit of impropriety. Any accusation that the Fifth Circuit was in the pocket of the oil industry at that time, or that it is now, is almost certainly untrue. My own experience with members of the federal judiciary leads me to believe that federal judges, regardless of the political affiliations of their appointing presidents, are exceedingly ethical and, while their judicial philosophies may differ, they simply will not manipulate the federal judicial machinery to rig the outcome of a case so as to benefit some particular set of parties.⁸⁰

The truth of the comments, however, is beside the point. Such speculations need not be true to affect the appearance of impartiality

caused-katrina (describing the plaintiffs’ claims as “foolishness” and a “perfect storm of fantasy fulfillment” for “leftists”).

⁷⁸ Douglas Smith, *Courtroom Gasbags Blow Blackmail Plan*, WASH. TIMES, June 10, 2010, <http://www.washingtontimes.com/news/2010/jun/10/courtroom-gasbags-blow-blackmail-plan>.

⁷⁹ *United States Court of Appeals for the Fifth Circuit*, WIKIPEDIA, http://en.wikipedia.org/wiki/United_States_Court_of_Appeals_for_the_Fifth_Circuit#Current_composition_of_the_court (last visited Jan. 9, 2010); see also *Judicial Gusher: the Fifth Circuit’s Ties to Oil*, ALLIANCE FOR JUSTICE 7, http://www.afj.org/wp-content/uploads/2014/04/fifth_circuit_judges_report.pdf (last visited Feb. 15, 2015) [hereinafter *Judicial Gusher*] (“Notably, out of the sixteen active 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.”).

⁸⁰ Having clerked for two federal judges appointed by presidents of different political parties, I also have the benefit of a perspective unavailable to most members of the general public.

of the court.⁸¹ While the timing of the late recusal and its effect on quorum may have been unavoidable, the impact on the circuit's reputation could have been mitigated by greater transparency. The 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 seem all the more suspect.⁸² The en banc court did not 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."⁸³ This 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.⁸⁴ The lack of detail further opened the court up to speculation as to what the "new circumstances" could possibly have been at that stage of the proceedings.⁸⁵

It is inevitable that such speculation will take place in cases where judicial integrity has become an issue.⁸⁶ A core purpose of

⁸¹ See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864–65 (1988) (“[P]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges.”).

⁸² See Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 560–62, 579 (2005) (arguing that a recusing judge “should take some responsibility to ensure that the facts [of his recusal] are accurately presented to the public from the beginning” so that the judiciary’s reputation is not damaged by inaccurate reporting) [hereinafter Frost].

⁸³ *Comer II*, 607 F.3d 1049, 1053–54 (5th Cir. 2010).

⁸⁴ Compare *id.* at 1053 (listing the judges hearing the appeal and omitting Judge Elrod’s name) with *Order Granting Rehearing*, 598 F.3d 208, 210 (5th Cir. Feb. 26, 2010) (listing the judges hearing the appeal and including Judge Elrod’s name).

⁸⁵ See, e.g., *Curious Case*, *supra* note 66 (speculating that “another judge acquired a financial interest in one of the defendants”).

⁸⁶ 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, members of the *Comer I* panel and authors of the dissents in *Comer II*, were subsequently criticized for their ties to the oil industry in the BP oil spill litigation. See *Judicial Gusher*, *supra* note 79, at 5–8.

recusal statutes is the minimization of the impact of such speculation on the perceived integrity of the judiciary.⁸⁷ By increasing speculation here, the lack of explanation of the reasons for the late recusal hindered rather than aided the perception of judicial integrity.⁸⁸

Comer is highly illustrative of this point because the lack of explanation as to the “new circumstances” requiring the late recusal could paint a particularly troubling picture to a skeptical observer. In particular, 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 the bases for recusal outlined above 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.⁸⁹ Given the narrow construction of the term “previously practiced law,” it seems unlikely that any of the attorneys involved would qualify.⁹⁰ Regardless, whether an

⁸⁷ See *Liljeberg*, 486 U.S. at 859–60 (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).

⁸⁸ For another illustration of where recusal statements are needed, see the letter to Congress signed by over one hundred 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. Letter from Mark N. Aaronson et al. to Judiciary Comms., *Changing Ethical and Recusal Rules for Supreme Court Justices* 2–3 (Mar. 27, 2011), available at http://www.afj.org/wp-content/uploads/2013/09/judicial_ethics_sign_on_letter.pdf.

⁸⁹ See *Jennifer Walker Elrod*, in *ALMANAC OF THE FEDERAL JUDICIARY* (Aspen Publishers 2015), available at 2015 WL 7335.

⁹⁰ 28 U.S.C. § 455(b)(2) (2012). To create a conflict under that provision the attorney must be presently and personally participating in the case. See *FLAMM*,

attorney appearing in the case practiced law with the judge or not should have been known to Judge Elrod prior to the vote to rehear.⁹¹ Only two attorneys entered appearances after the vote to rehear but before the letter informing the parties of Judge Elrod's recusal.⁹² Neither of the two lawyers, both of whom represented amici, ever worked for Baker Botts, however.⁹³

- (3) The automated conflict-checking system should have informed Judge Elrod of any financial conflicts and the corresponding need to recuse well in advance of any action being taken in the matter.⁹⁴
- (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.⁹⁵
- (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 vote for en banc rehearing.⁹⁶

supra note 3, 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 57, at 95.

⁹¹ *See* McKeown Statement, *supra* note 57, at 5–6 (describing the software used by courts to flag potential conflicts automatically).

⁹² *See* Docket Sheet, *Comer v. Murphy Oil USA*, No. 07-60756 (5th Cir. June 18, 2013) (reporting that the court granted a rehearing on Feb. 26, 2010; attorneys James Robert May and Sean Hoe Donahue filed appearance forms on Apr. 23, 2010; and Judge Elrod recused herself on Apr. 30, 2010).

⁹³ *See* *About Sean Donahue*, DONAHUE & GOLDBERG LLP, <http://www.donahuegoldberg.com/attorneys.html#donahue> (last visited Feb. 15, 2015); *James R. May*, WIDENER LAW, <http://law.widener.edu/Academics/Faculty/ProfilesDe/MayJamesR.aspx> (last visited Feb. 15, 2015).

⁹⁴ Maleske, *supra* 67.

⁹⁵ McKeown Statement, *supra* note 58, at 5–6.

⁹⁶ *See* Jennifer Walker Elrod, in ALMANAC OF THE FEDERAL JUDICIARY (Aspen Publishers 2015), available at 2015 WL 7335 (indicating that Judge Elrod left private practice in 2002, prior to the events giving rise to the litigation).

The foregoing analysis leaves only three possibilities that would explain the need for a late recusal. 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 Judge Elrod or a family member had purchased stocks or other financial instruments tied to one of the defendants.⁹⁷ Second, Judge Elrod initially made a mistake in her original 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.⁹⁸ Third, Judge Elrod recused under the reasonable appearance provision of § 455(a).⁹⁹

The first two explanations are the most potentially damaging to the appearance of propriety without disclosure, even though Judge Elrod may be entirely blameless if all facts are known.¹⁰⁰ The specter that a late, case-altering recusal occurred because a judge did not live up to her obligation to accurately check for personal conflicts of interest before taking important actions in a case, or that she did not make reasonable efforts to ensure that she or her close relatives refrained from acquiring new interests 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.¹⁰¹

⁹⁷ See 28 U.S.C. § 455(b)(4) (2012) (“He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy.”).

⁹⁸ This possibility would also raise some of the retroactivity and due process concerns addressed *infra*.

⁹⁹ See 28 U.S.C. § 455(a) (2012) (requiring a judge to disqualify herself if her “impartiality might reasonably be questioned”).

¹⁰⁰ Judge Elrod could have become recused on the basis of a financial interest through no doing of her own. For example, if some sufficiently close blood relative of Judge Elrod, over whom she had utterly no control, were to have acquired an interest in one of the parties, she would have needed to recuse. This would be true even if Judge Elrod had attempted to convince this hypothetical relative not to do so and been ignored. See 28 U.S.C. § 455(b)(5)(iii) (2012).

¹⁰¹ See *Curious Case*, *supra* note 66 (speculating that “it’s likely another judge acquired a financial interest in one of the defendants”).

The final possibility, as noted, is that the late recusal was pursuant to § 455(a).¹⁰² However, it is worth noting that whatever the “new circumstance”¹⁰³ giving rise to disqualification under Section § 455(a) may be, 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 the vote on en banc rehearing. 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 of impropriety.¹⁰⁴ The upshot is that only entirely new circumstances, not the new awareness of previously existing circumstances, would save the late recusal in *Comer* from the retroactivity and due process concerns discussed *infra*.¹⁰⁵

All of these options may be troubling to an observer but may also be made less troubling by additional disclosure. Even in the case of a potentially embarrassing disclosure (such as a mistake as to the content of personal financial holdings) or where recusal due to new circumstances makes it possible to reasonably question Judge Elrod’s impartiality under § 455(a), the issuance of a recusal memorandum stating as much would have been better for the image of the Fifth Circuit writ large and Judge Elrod individually. Silence simply opens the door to the kind of speculation recounted above.¹⁰⁶ Moreover, if the late recusal was under § 455(a), the timing of the

¹⁰² 28 U.S.C. § 455(a) (“Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”).

¹⁰³ *Comer II*, 607 F.3d 1049, 1053–54 (5th Cir. 2010) (stating that “new circumstances arose that caused the disqualification and recusal of one of the nine judges”).

¹⁰⁴ See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859 (1988) (“Scienter is not an element of a violation of § 455(a).”).

¹⁰⁵ See *id.* at 859–61 (stating that § 455(a) may be applied “retroactively” and does not require scienter for a violation).

¹⁰⁶ See, e.g., *Curious Case*, *supra* note 66 (“No further explanation was offered, but it’s likely another judge acquired a financial interest in one of the defendants.”).

recusal may raise further, avoidable concerns. Those concerns are discussed in the sections that follow.

B. Non-Disclosure Defeats the Waiver Provision in § 455(a)

The decision not to disclose the reason for the late recusal may have also denied the parties the opportunity to acquire an appellate decision on the merits of the case. If Judge Elrod recused pursuant to § 455(a), that conflict could potentially have been waived by the parties.¹⁰⁷ Unlike the situations outlined above—which are essentially a paraphrase of § 455(b) and are not waivable—the “mandatory” recusal under § 455(a) may, in fact, be waived by the parties pursuant to § 455(e).¹⁰⁸

“The process [of obtaining a waiver] is transparent and is designed to avoid placing pressure on parties to waive a judge’s decision to disqualify.”¹⁰⁹ For waiver to be effective, the recusing judge must make a full statement on the record of what circumstances he believes exist that provide a reasonable person good cause to doubt his impartiality.¹¹⁰

The exact method of waiver does not appear to be entirely settled, however. The Judicial Conference of the United States believes the recusing judge must then allow the parties to contemplate waiver outside of his presence and only may remain on the case if all of the parties consent to the waiver “in writing or on the record.”¹¹¹ 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 by the parties at the time of disclosure waives the parties’ right to seek the judge’s later disqualification on appeal.¹¹²

¹⁰⁷ See 28 U.S.C. § 455(e) (“Where the ground for disqualification arises only under subsection (a), waiver may be accepted.”).

¹⁰⁸ *Id.*

¹⁰⁹ *McKeown Statement*, *supra* note 58, at 4.

¹¹⁰ See 28 U.S.C. § 455(e) (waiver must be “preceded by a full disclosure on the record of the basis for disqualification”).

¹¹¹ *McKeown Statement*, *supra* note 58, at 4.

¹¹² See, e.g., *Moran v. Clarke*, 296 F.3d 638, 648–49 (8th Cir. 2002) (“[W]here judges have fully disclosed potential conflicts and have then retained their

Regardless of the specific nuts and bolts, the upshot is that if a judge chooses to make the underlying reasons he believes that he is disqualified under § 455(a) known to the parties, the parties may choose to waive the conflict and keep the judge on the case.¹¹³ In other words, if the late recusal was pursuant to § 455(a), this procedure should have been available in *Comer*, providing an avenue to maintain the en banc quorum.

That the waiver option was not pursued 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.¹¹⁴ 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 points to a more serious conflict of interest under § 455(b) and to the question of whether the conflict predated the vote to grant rehearing en banc.

Making disclosure on the record of the reasons for recusal may not have made Judge Elrod look particularly good, but it was the least damaging of her options. She almost certainly 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.¹¹⁵ It is hard to imagine what "new circumstances" arose in the approximately nine weeks after the vote to rehear that would have tipped the scales in

mandate in a case, we have been solicitous of their discretion."); *United States v. Nobel*, 696 F.2d 231, 236–37 (3d Cir. 1982) ("The election to proceed after full disclosure of the relevant facts satisfies those requisites and constitutes an effective waiver under the statute.").

¹¹³ *McKeown Statement*, *supra* 58, at 4.

¹¹⁴ *See, e.g., Seth E. Bloom, Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662 (1985) (noting that members of Congress "objected to the inflexibility of a per se rule that did not permit waiver" and arguing that waiver prevents "the potential loss of capable, experienced judges, the disruption of litigation, and the resulting waste of judicial resources").

¹¹⁵ The court's conflict-screening software should have flagged potential conflicts and thus prompted the judge's analysis. *See McKeown Statement*, *supra* note 58, at 5–6 (describing the software used by courts to flag potential conflicts).

the other direction without those circumstances being somewhat personally embarrassing.

Even so, if it was an option, the offer to waive the conflict should have been presented to the parties for two reasons. First, as mentioned, not doing so invited the kind of speculation as to Judge Elrod's judicial integrity and that of the entire circuit court outlined above. Second, faced with the option of allowing Judge Elrod to continue or having the en banc court lose its quorum—a result that no one, not even the court, could foresee at the time—the parties may well have preferred to keep Judge Elrod and obtain a decision on the merits.¹¹⁶ 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*.¹¹⁷ But the plaintiffs may have also had a shot even with Judge 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.¹¹⁸ 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 going forward with 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 *Connecticut v. American Electric Power Co., Inc.*¹¹⁹ had been decided, thus dramatically increasing

¹¹⁶ See Mason E. Lowe, *Reconsidering Recusals: The Need for Requirements for When Not to Recuse*, 59 LOY. L. REV. 947, 975 (2013) (asserting that “surely, were [the *Comer* appellants] given the option of waiving any need for disqualification, they would have preferred that to a dismissal at the hands of the disqualified judge, particularly in an en banc situation, where a single judge’s influence is more limited than in a regular three-panel review”).

¹¹⁷ See Taber, *supra* note 75 (“[A]fter the Fifth Circuit granted rehearing *en banc*, most court watchers assumed this was a signal that the Fifth Circuit would reverse itself.”).

¹¹⁸ Compare *Comer II*, 607 F.3d 1049, 1055 (5th Cir. 2010) (listing Judges Davis, Stewart, and Dennis as dissenting from the majority opinion) with *Comer I*, 585 F.3d 855, 859 (5th Cir. 2009) (listing Judges Davis, Stewart, and Dennis as hearing the case).

¹¹⁹ 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).

the chances that the Supreme Court would hear *Comer*.¹²⁰ Finally, it is not out of the question that, given the somewhat subjective nature of the reasonable person analysis,¹²¹ the parties may have simply concluded that what Judge Elrod viewed as a § 455(a) conflict was not one as far as they were concerned, that recusal was unnecessary, and that they would then allow her to remain on the panel.

Given that Judge 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, providing the parties with the waiver option, were it available, was clearly the better course. When a judge becomes aware of a violation of § 455(a), that judge is "called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary."¹²² In the interest of preserving the integrity of the court, Judge Elrod ought, at least, to have offered the parties the option of continuing, even at the cost of some potential personal embarrassment, if she was able to do so. Having not done so and not indicated that she was unable to do so, not only did she injure her own reputation; but the entire Fifth Circuit has also taken a reputational hit.¹²³ All of that being the case, however, with so many of the other judges of the circuit also recusing without explanation, the circuit was unlikely to emerge from the en banc proceedings in *Comer* with a perception of neutrality assured, regardless of whether Judge Elrod issued a recusal statement.

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

¹²⁰ Taber, *supra* note 75 (noting that 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").

¹²¹ See generally Hayes, *supra* note 57, at 99–100 (discussing the subjectivity problem of the reasonable person standard as applied to judicial recusal cases).

¹²² *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 861 (1988).

¹²³ See Lowe, *supra* note 117, at 956–57 (describing the Fifth Circuit's handling of *Comer II* as "troubling" and contrary to the principle that recusal standards should "promote public confidence in the judiciary").

That over half of the membership of the Fifth Circuit voluntarily recused, without a single judge issuing a memorandum 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 families, either have now or had in the past ties to one or more of the major oil companies.¹²⁴ 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 or in other circuits when cases implicate large swaths of important industries.¹²⁵ 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, or other large corporations, 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 have been 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

¹²⁴ See Ashby Jones, *Eight Judges Out: Mass Recusal Cripples 5th Circuit*, WALL ST. J. L. BLOG (June 2, 2010, 12:29 PM), <http://blogs.wsj.com/law/2010/06/02/eight-judges-out-mass-recusal-cripples-5th-circuit> (“The recusals [in *Comer*], it seems, are likely due to stock-ownership issues.”).

¹²⁵ See Ashby Jones, *Hello? Can Anyone Down There Handle the Oil-Spill Litigation?*, WALL ST. J. L. BLOG (June 2, 2010, 3:59 PM), <http://blogs.wsj.com/law/2010/06/02/hello-hello-can-anyone-down-there-handle-the-oil-spill-litigation> (observing that half of the judges in the Eastern District of Louisiana had recused themselves from litigation involving the 2010 BP oil spill); see also Maleske, *supra* 67 (noting that the large number of defendants in *Comer* “made it much more likely that a judge hearing the case would have a financial interest in one of the energy companies or would have a spouse or family member who worked for them or represented them in the past”).

the same parties.¹²⁶ The availability of some sort of particular indication on the part of a judge who 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.¹²⁷ Disclosure of the reasons for a voluntary recusal would provide parties with details that may allow them to meaningfully raise the issue of disqualification in future cases before panels hear oral argument or the circuit votes to rehear cases en banc.¹²⁸ 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

¹²⁶ *Mackey v. United States*, 221 F. App'x 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, Inc. 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 Cir. 1986) (holding that “disqualification was not required . . . merely because [the judge] voluntarily withdrew from another case” with the same defendant as the instant action).

¹²⁷ *See, e.g., United States v. Carlton*, 534 F.3d 97, 100 (2d 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); *Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir. 2003) (applying an “abuse of discretion” standard in reviewing a judge’s decision not to recuse himself); *Higginbotham v. Okla. ex rel. Okla. Transp. Comm’n*, 328 F.3d 638, 645 (10th Cir. 2003) (applying an “abuse of discretion” standard in reviewing a judge’s decision not to recuse himself).

¹²⁸ *See Frost, supra* 83, at 567–68 (noting that “parties often lack the factual information necessary” to seek recusal, and they “will hesitate to ask the judge to recuse himself on the basis of speculation or gossip”). Such details are important for parties in future cases because “the mere fact that a judge has recused himself from one case will not normally mandate his disqualification from other cases of a similar type which involve different parties and counsel.” FLAMM, *supra* note 3, § 22.9, at 663–64.

down the road and allow them to take appropriate steps.¹²⁹ 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 the reasons for recusal 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 could be sufficient to justify a transfer of venue to a trial court in a different circuit “in the interest of justice.”¹³⁰ Depending on the circumstances, such motions may not even be opposed by corporate defendants. Since judicial ties to the corporate defendants are likely to trigger most mass recusals, defendants might reasonably conclude that they would fare better in another circuit. The judges who remain eligible to sit on three-judge appellate panels in circuits where a mass recusal is a realistic possibility not have financial ties to the industries involved in the litigation because of political or ideological views unsympathetic to those industries.¹³¹ Thus, for corporate defendants, the prospect of mass recusal in a circuit increases the odds of an unsympathetic panel and the odds that 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 Unsolvable Due Process Problems*

The reasons for requiring recusal memoranda 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

¹²⁹ See Frost, *supra* note 82, at 567–69.

¹³⁰ 28 U.S.C. § 1404(a) (2012).

¹³¹ *Curious Case*, *supra* note 66 (pointing out that plaintiffs could game the system by “add[ing] defendants to the suit for the purposes of targeting judicial recusals and [obtaining] a more favorable hearing”).

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.¹³² 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 himself or herself and issued no statement.

Although the injury to a party potentially prejudiced by an untimely judicial recusal can rise to constitutionally impermissible levels, most such determinations will be made under statutory provisions.¹³³ Given the Supreme Court's pronouncement in *Caperton v. Massey*, we know that judicial recusals are governed by an objective standard whether the violation is deemed to be statutory¹³⁴ or constitutional.¹³⁵ However, as a practical matter, whether the violation based on an appearance of impropriety is merely statutory, arising out of § 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

¹³² See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825, 827–28 (1986) (disqualifying a judge under the Due Process Clause and then considering the proper remedy for the injured parties).

¹³³ See *id.* at 828 (“The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.”).

¹³⁴ *Liteky v. United States*, 510 U.S. 540, 548 (1994) (holding that under § 455(a) “what matters is not the reality of bias or prejudice but its appearance”).

¹³⁵ *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 883 (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).

being adjudicated under § 455(a).¹³⁶ The upshot is that although state courts may need to grapple with the standard to be applied in determining remedies,¹³⁷ federal cases will ultimately be determined by the “harmless error” test set out in *Liljeberg v. Health Services Acquisition Corp.*¹³⁸ There, the court held:

[I]n 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.¹³⁹

When a judge has not issued a recusal statement, this issue becomes particularly tricky. First, determining the risk of injustice to the parties hinges upon what decisions the judge has made, if any, in violation of his duty to recuse.¹⁴⁰ Second, determining the magnitude of the risk that denial of relief in the instant case will produce injustice in other cases must have some focus on the nature

¹³⁶ See Keith R. Fisher, *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, the existence of [recusal statutes] renders that prospect remote.”) [hereinafter Fisher]; see also Dmitry Bam, *Understanding Caperton: Judicial Disqualification Under the Due Process Clause*, 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).

¹³⁷ See Fisher, *supra* 138, at 821 (commenting that a harmless error standard seems “inappropriate” in *Caperton* cases).

¹³⁸ *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 862, 864 (1988).

¹³⁹ *Id.* at 864.

¹⁴⁰ See, e.g., *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 485–86 (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).

of the conflict in the instant case.¹⁴¹ Third, accurately assessing the risk of undermining the public's confidence in the judicial process¹⁴² now requires consideration of whether the means of the recusal itself affect 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. Knowing the holdings of those orders is necessary to determine the scope of the potential injury, which is an essential element of the harmless error analysis.¹⁴³ An improperly issued order setting the date of a scheduling conference is unlikely to have resulted in injury to a party; a judgment dismissing a cause of action is far more likely to have done so.

In *Comer*, the timing issue is particularly glaring because of the late recusal. Only nine weeks had passed between the vote to rehear en banc and the letter to the parties indicating that an additional judge had recused.¹⁴⁴ Although the court indicated that "new circumstances" had given rise to the recusal,¹⁴⁵ that statement does not resolve the critical question of whether the disqualifying conflict pre-existed the vote to rehear. Whether that vote was properly cast is critical to determining what the risk of injury was. If the conflict reaches back to before the vote on rehearing en banc, then the injury is clear: the failure to timely recuse was outcome-determinative of the case and the potential injury to the *Comer* plaintiffs was

¹⁴¹ See *id.* at 486 (weighing the likelihood that refusing to vacate "post-recusal orders would create injustice in future cases" as the second step in a harmless error analysis).

¹⁴² See *id.* (assessing whether "the public's confidence in the judicial process [would] be undermined" by a finding of harmless error).

¹⁴³ *Liljeberg*, 486 U.S. at 864.

¹⁴⁴ See Docket Sheet, *Comer v. Murphy Oil USA*, No. 07-60756 (5th Cir. June 18, 2013) (showing the petition granted on Feb. 26, 2010, and notice of recusal nine weeks later on Apr. 30, 2010).

¹⁴⁵ Letter to the Parties Notifying Them of Loss of Quorum and Canceling Oral Argument, *Comer v. Murphy Oil USA*, No. 07-60756 (5th Cir. Apr. 30, 2010), ECF No. 00511097646.

enormous.¹⁴⁶ Meaning, if Judge Elrod had not participated in the vote to rehear, the court would not have had a quorum to vote on the motion for rehearing en banc. And, absent a vote to rehear en banc, the *Comer I* panel decision would not have been automatically vacated pursuant to the Fifth Circuit's local rules.¹⁴⁷

If the disqualifying conflict existed prior to the vote, the statutory command for disqualification was in effect prior to the vote to rehear and the late recusal was harmful error.¹⁴⁸ Moreover, even if a § 455(b) conflict did not exist prior to the vote, but circumstances creating a § 455(a) conflict did, that conflict would be retroactive.¹⁴⁹ 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 outlined *infra*, 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. Without disclosure, however, future courts have no guidance for future recusal decisions or the behavior

¹⁴⁶ 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 855, 880 (5th Cir. 2009) (Davis, J., concurring) (stating that he would have upheld the district court on the alternative ground “that the plaintiffs failed to allege facts” establishing proximate causation “of the plaintiffs’ alleged injuries”).

¹⁴⁷ See 5th Cir. R. 41.3 available at <http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/rules/5thcir-iop.pdf>.

¹⁴⁸ See *United States v. Lindsey*, 556 F.3d 238, 246–48 (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).

¹⁴⁹ See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860–61 (1988) (stating that § 455(a) may be applied “retroactively,” thus requiring the judge “to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary”).

they need to engage in to avoid the creation of § 455(a) conflicts.¹⁵⁰ 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 would 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.¹⁵¹

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 in *supra* 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 is 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 Subsection A, the lack of 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 recusals 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, vacatur of prior

¹⁵⁰See *United States v. Amico*, 486 F.3d 764, 777 (2d Cir. 2007) (holding that encouraging different judicial conduct in future trials satisfied the second prong of *Liljeberg*); *Clemmons v. Wolfe*, 377 F.3d 322, 328–29 (3d Cir. 2004) (applying *Liljeberg* and expressly exercising “supervisory powers” to “avoid the recurrence” of the failure to recuse in circumstances before the court).

¹⁵¹See *Frost*, *supra* 83, at 580 (discussing the “[t]he absence of precedents supporting recusal”).

orders 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.¹⁵² 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.¹⁵³

IV. A PROPOSAL FOR STATUTORY CHANGE TO REQUIRE RECUSAL MEMORANDA

The problems discussed in the preceding section can be minimized or avoided by requiring judges who recuse sua sponte to issue recusal memoranda. This section proposes two statutory additions and explains why they address the problem in a manner that is both helpful and respectful of judicial privacy. 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 burdens on the judiciary. The proposal is that the following should be added as additional subsections 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 his or her disqualification first arose.

¹⁵² Fisher, *supra* 138, at 822 n. 204 (arguing that creation of additional process slows down the judicial system and “diminish[es] public respect for, and confidence in, our judicial system”).

¹⁵³ 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.”).

- (h) When any judge is disqualified under subsection (a) he or she shall, upon the timely request of the parties, make additional disclosure on the record of the basis of his or her disqualification. Such disclosure shall be sufficiently detailed to permit 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. In essence, the provision requires that minimal disclosure be made in all cases. The most serious conflicts and those which potentially impede greatest upon judicial privacy (i.e., those which arise under § 455(b)) need only be identified to the extent necessary for a reviewing court to conduct a harmless error analysis. Those disqualifying circumstances that Congress has determined to be less serious and therefore waivable, arising under § 455(a), could require greater disclosure if the parties are contemplating exercising their waiver option under § 455(e).

Problems resulting from speculation as to the cause for recusal that are damaging to the reputation of the court, like those that surrounded the late recusal in *Comer*, would therefore be significantly curtailed by proposed subsection (g). By identifying the date of the disqualifying events 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 making plain whether the disqualified judge should have identified the problem and recused earlier in the process.¹⁵⁴ 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

¹⁵⁴ It is true that such disclosure could expose a judge who did not live up to his or her ethical obligations. Taking away the ability of a judge to cloak his or her prior wrongdoing in a later recusal, however, hardly seems objectionable. Moreover, as I have noted earlier, such cases would be very, very rare.

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, or a closely related person is “known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.”¹⁵⁵ The problem of retroactivity and non-disclosure in § 455(a) cases would also be solved; reviewing courts could craft remedies for late recusal with the full knowledge of when the disqualification arose.

The provision requiring additional disclosure would furthermore 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, the provision will empower the parties to affirmatively use the waiver option.

Finally, although the potential for greater judicial time expenditure or meaningful invasion of privacy is theoretically possible under proposed subsection (h), pragmatism argues otherwise. It is the very rare case where a lawyer would want to keep a judge when that judge is attempting to recuse. Unless the timing of the recusal is important and the parties doubt the disqualified judge’s determination of when the conflict arose, parties who do not earnestly seek to keep a judge on the case would have little to no reason to demand a more significant statement. Therefore, the actual increase in judicial work and invasion of judicial privacy caused by invocations of proposed subsection (h) would be minimal in practice.¹⁵⁶ Even where a more significant statement must be issued, given the amount of disclosure that judges must engage in as a general matter, it seems unlikely that situations would arise where the conflict stems from some area about which the judge has not already revealed to the public a substantial amount of information.¹⁵⁷ Last, although this provision would also apply to

¹⁵⁵ 28 U.S.C. § 455(B)(5)(iii) (2012).

¹⁵⁶ 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 27–28 (2009) (discussing several other proposals for increased disclosure).

¹⁵⁷ See *McKeown Statement*, *supra* note 58, at 6.

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.

Of course, the statutory provisions proposed are not a necessary prerequisite to judges issuing recusal memoranda. Judges are free to, and should, issue statements when they voluntarily recuse themselves from a case in which they have participated without being compelled to do so by statute. Given that most judges do not presently issue such memoranda, a statutory provision like the one outlined above seems advisable.

V. CONCLUSION

Maintaining the credibility of the American judicial system in a world that is increasingly interconnected both socially and economically is far too important not to defend vigorously. *Comer* illustrated many of the presently unaddressed issues that can arise with voluntary judicial recusal. That a judicial disqualification can leave parties in the dark as to why they were denied an 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 find they are disqualified from a case before them. These, or other similar solutions, must be seriously considered by policymakers going forward, lest we risk more cases like *Comer*.