RECONSIDERING RECUSALS: THE NEED FOR REQUIREMENTS FOR WHEN NOT TO RECUSE

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ABSTRACT

In the American judiciary system, it is imperative that judges act free of bias. Although this seems to be an easy-enough-to-understand theory, its practical application is not always so simple. As a result, there have been wide-ranging, unpredictable, and sometimes undesirable results. Others have noted the need for clearer recusal rules and guidelines. There have been various suggestions for how to improve or reform recusal rules, all of which note that there is a lack of standardized and predictable rules for when judges are required to recuse themselves. These previous suggestions have correctly identified the root of the problem and provided practical solutions to the problem of judges improperly refusing to recuse themselves, but they have also ignored a significant problem with the current landscape of recusal law: an equal need of standardized guidance for when not to recuse, an area not adequately considered to this point. This is not just a hypothetical problem. As the United States Court of Appeals for the Fifth Circuit’s en banc decision in Comer v. Murphy Oil shows, a judge’s decision to recuse can be just as detrimental, if not more so, than a judge’s decision not to recuse.

This Article first briefly outlines the historical background of and purpose behind recusals. It then discusses the odd—but certainly potentially repeatable—procedural path of Murphy Oil, which ultimately led to the dismissal of an appellant’s victory as if no appeal had ever taken place, explaining why this decision was

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not only unsound but also symptomatic of a much larger recusal problem. It next describes alternatives available to the Fifth Circuit, including following the decision of the Fourth Circuit in a similar case; although there were better options, the Fifth Circuit's course of action was perfectly permissible under the law. Finally, this Article explains why these conflicting decisions illustrate the need for better recusal standards, including standards not only for when judges must recuse themselves, but also for when judges must not recuse themselves.

Others have theorized that recusal statutes and procedures are “systematically underused and underenforced.” It is not just underuse, however, that poses a problem. Although underuse can deprive litigants of an impartial forum, overuse can be even more problematic as it can deprive litigants not just of an impartial forum, but any forum at all.

INTRODUCTION ................................................................. 949
I. A BRIEF HISTORY OF RECUSALS ........................................ 952
II. COMER V. MURPHY OIL .................................................... 956
    A. THE DISTRICT COURT PROCEEDINGS ............................. 957
    B. THE APPELLATE PROCEEDINGS ..................................... 958
    C. THE EN BANC DECISION .............................................. 959
III. ARNOLD V. EASTERN AIR LINES, INC. ................................ 961
IV. THE CONFLICTING OPINIONS SHOW THE NEED FOR MORE STANDARDIZED RECUSAL REQUIREMENTS .............................................. 963
    A. CURRENT RECUSAL LAWS ALLOW A RECUSED JUDGE TO DETERMINE THE OUTCOME OF A CASE ................................. 964
    B. MURPHY OIL IGNORES THE PURPOSE BEHIND 28 U.S.C. § 46(C) ............................................................................. 967
V. RECUSAL REFORM (INCLUDING WHEN NOT TO RECUSE) IS NECESSARY ................................................................. 968
    A. JUSTICE SCALIA’S DISTINCTION BETWEEN THE UNITED STATES SUPREME COURT AND COURTS OF APPEALS WHEN IT COMES TO RECUSALS IS NO DISTINCTION AT ALL .................................................................................. 970
    B. CONSISTENT GUIDELINES ARE NECESSARY; THEY MUST REQUIRE THAT A JUDGE CANNOT, ABSENT EXTRAORDINARY CIRCUMSTANCES, INFLUENCE ANY PROCEEDING IN WHICH THE JUDGE IS INTERESTED ..... 972
    C. ONE OF THE CORNERSTONES OF ANY STANDARDIZED
INTRODUCTION

One of the most basic cornerstones of the American judicial system is that judges are the ultimate impartial arbiters. But there is no absolute standard for what constitutes “impartiality” when it comes to the judiciary or what actions a judicial officer must take if there is some question about the judge’s impartiality. This is the case even if that judge is the very one harboring such doubts about impartiality. To be sure, there are recusal statutes, and 28 U.S.C. § 455(b) sets out specific factual instances when a judge “shall . . . disqualify himself.”1 Not all of the circumstances set forth in 28 U.S.C. § 455 are clear, however. For instance, 28 U.S.C. § 455(b) requires disqualification when a judge “has a personal bias or prejudice concerning a party,” but does not explain what constitutes a personal bias or prejudice sufficient to require recusal.2 Even less clear is the requirement for recusal when a judge’s “impartiality might reasonably be questioned.”3

This lack of clarity and concrete guidance has led to wide-ranging, unpredictable, and sometimes undesirable results, such as in the cases discussed below. It has also led to critics noting the need for more systematic and concrete recusal rules and guidelines.4 To date, suggestions for how to improve or reform the recusal guidelines have included everything from providing counsel with peremptory challenges of judges5 to requiring

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1. 28 U.S.C. § 455(b) (2006). To name a few, a judge must recuse when the judge served as a lawyer in the matter in controversy, the judge or the judge’s spouse has a financial interest in the income, the judge’s spouse is a lawyer in the proceeding, or the judge has personal knowledge of facts in dispute. Id.
2. See id. § 455(b)(1).
3. Id. § 455(a).
5. Sample et al., supra note 4, at 5, 26-27.
written opinions when a judge denies a motion to recuse. The suggestions differ in their approach to solving the problem, but they are uniform in their diagnosis of the problem: the lack of truly standardized and predictable rules for when judges are required to recuse themselves.

Previous proposals have correctly identified the root of the problem (a lack of clear rules) and provided practical solutions to the problem of judges improperly refusing to recuse themselves, but they have also ignored a significant problem with the current landscape of recusal law. Recusal law is in need not only of standardized guidance for when to recuse but also of standardized guidance for when not to recuse, an area scholars—and legislatures and courts—have not adequately considered to this point. This is not just a hypothetical problem. As the United States Court of Appeals for the Fifth Circuit’s en banc decision in Comer v. Murphy Oil shows, a judge’s decision to recuse can be just as detrimental, if not more so, than a judge’s decision not to recuse.

In Murphy Oil, a Fifth Circuit judge’s recusal—a procedural tool designed to ensure fairness and impartiality—led to the violation of the appellants’ absolute, statutory right to appeal. As discussed below, the court in Murphy Oil effectively eliminated the statutory right to appeal by voting to hear an appeal en banc and then later deciding it could not consider the appeal due to quorum issues as a result of one judge’s recusal. As a result, the Fifth Circuit’s original three-judge panel appellate decision, which overturned the district court decision,

6. Letter on Changing Ethical and Recusal Rules, supra note 4, at 2-3. To name just a few more, there have also been proposals for per se recusal rules for campaign contributors, independent adjudication of disqualification motions, and de novo review on interlocutory appeal of a refusal to recuse. Sample et al., supra note 4, at 6, 29-33.

7. See Comer v. Murphy Oil USA, 607 F.3d 1049, 1053-55 (5th Cir. 2010) (en banc).

8. See id.; see also United States v. DeLeon, 444 F.3d 41, 58 (1st Cir. 2006) (citing Evitts v. Lucey, 469 U.S. 387, 393 (1985) (explaining that “[t]he right of appeal is statutory, and the grant is subject to due process requirements”). One would have believed that the violation of a statutory right to appeal would have led to significant criticism. Although there has been some outrage expressed in legal circles and in legal blogs, however, the general public and news outlets did not cover the Comer v. Murphy Oil case with the same excitement, closeness, or intimacy as cases with more shock value and commercial appeal, such as large jury verdicts and salacious criminal trials. See sources cited infra note 87.

9. Comer, 607 F.3d at 1053-55.
was vacated, and the district court decision was reinstated.\textsuperscript{10} By finding as it did, the en banc court accomplished two problematic ends: (1) it, as noted, effectively took away the appellants’ statutory right to appeal;\textsuperscript{11} and (2) it allowed the very judge who recused herself to be the judge who ultimately caused the appellants to lose their right to appeal.\textsuperscript{12} Put differently, the judge who asserted that she could not be (or could not appear to be) impartial enough to issue an unbiased decision was the very one who ultimately determined the outcome of the case by recusing herself.

The result in \textit{Murphy Oil} highlights the necessity of a fair forum. And, despite the fact that recusals are intended to ensure a fair forum, a judge’s recusal does not always guarantee a fair forum. In fact, as \textit{Murphy Oil} shows, recusals not only can fail to guarantee fair forums, they can actually eliminate forums altogether. Thus, recusal requirements are necessary not only for when a judge should recuse, but also for when a judge \textit{cannot} recuse. The \textit{Murphy Oil} decision underscores a larger problem: the lack of predictability and standards in recusal rules, not only when recusal should be obligatory, but also when it should be prohibited. In addition, the law currently requires recusal, without exception, in certain circumstances. Narrow exceptions to these required recusal circumstances are necessary in order to guarantee that no party is denied a forum.

This Article first briefly outlines the historical background of recusals. It then discusses the odd—but certainly potentially repeatable—procedural path of \textit{Murphy Oil}, which ultimately led to the dismissal of an appellant’s victory being dismissed as if no appeal had ever taken place, explaining why this decision was not only unsound but also symptomatic of a much larger problem. It next describes alternatives available to the Fifth Circuit that would have avoided a breach of the statutory right to appeal, including following the decision of a different circuit court with which the \textit{Murphy Oil} decision conflicts.\textsuperscript{13} Finally, it explains

\begin{itemize}
  \item \textsuperscript{10} \textit{Id.} at 1056-57 (Dennis, J., dissenting).
  \item \textsuperscript{11} \textit{Id.} at 1056 (Davis, J., dissenting).
  \item \textsuperscript{12} \textit{Comer v. Murphy Oil USA,} 607 F.3d 1049, 1057 (5th Cir. 2010) (en banc) (Dennis, J., dissenting).
  \item \textsuperscript{13} Although the Fifth Circuit had alternatives, it had no legal obligation to choose any option other than the one it did, which highlights the need for rules for when judges cannot recuse themselves. \textit{See id.} at 1056, 1059-66 (Dennis, J., dissenting).
\end{itemize}
why these conflicting decisions illustrate the need for better recusal standards, including standards for when judges must not recuse themselves. Others have theorized that recusal statutes and procedures are “systematically underused and underenforced.”14 It is not just underuse, however, that poses a problem. Although underuse can deprive litigants of an impartial forum, overuse can be even more problematic as it can deprive litigants not just of an impartial forum, but any forum at all.15

I. A BRIEF HISTORY OF RECUSALS

Recusals have long been a part of the American judicial landscape. In 1792, Congress passed legislation making it necessary for judges to recuse themselves from any proceedings in which they had an interest.16 In the early nineteenth century, Congress clarified that it was the individual judge who made the decision on recusal, and even then, only on the judge's own initiative.17 From 1792 until the late nineteenth century, there were some small changes in recusal rules, but no drastic differences in the different statutory versions.18

Congress waited until 1911, almost 120 years after first adopting legislation requiring recusal, to pass a statute that permitted litigants to request recusal, rather than requiring litigants to rely on the judicial officers to independently decide whether to recuse themselves without any input or suggestions from the litigants or attorneys.19 With the 1911 legislation, later codified as 28 U.S.C. § 144, parties could finally take recusal motions into their own hands:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge

14. Sample et al., supra note 4, at 20.
15. Although the Rule of Necessity, discussed below in Section V(C), would seemingly alleviate any concerns of parties losing their forum, Murphy Oil demonstrates that the Rule of Necessity is not always enough. See Comer v. Murphy Oil USA, 607 F.3d 1049, 1054 (5th Cir. 2010) (en banc).
17. See Act of Mar. 3, 1821, ch. 51, 3 Stat. 643; Downing, supra note 4, at 35.
18. See Downing, supra note 4, at 35.
before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.\textsuperscript{20}

Although 28 U.S.C. § 144 technically allowed for parties to move for recusal—and thus changed the longstanding tradition of judges deciding whether to recuse themselves without any input from the parties—courts rarely granted these motions, partly because they were considered on the merits by the very judge whose impartiality was being questioned.\textsuperscript{21} Moreover, parties were understandably reluctant to even bring these motions, as they were questioning the impartiality of a judge who was likely to continue to hear the case and who arguably could become even more hostile given that a party had questioned his ability to be unbiased and unprejudiced. This, of course, further reduced the practical availability of this technical recusal motion option.

In the fifty years after Congress passed 28 U.S.C. § 144, occasional issues with recusal requirements arose in litigation.\textsuperscript{22} During that time, the question of what constituted a bias requiring recusal was left entirely to the judge whose impartiality was questioned. For instance, a judge could decide to continue to hear a case—act as an impartial arbiter—even if that judge had a significant interest, financial or otherwise, in the case.\textsuperscript{23} Ultimately, in 1974, Congress enacted 28 U.S.C. § 455, which provided more explicit guidance for recusal determinations, including a list of specific situations in which judges must recuse themselves because bias is assumed.\textsuperscript{24} 28 U.S.C. § 455, which called for judges to recuse themselves even in the absence of a party requesting recusal,\textsuperscript{25} complemented 28 U.S.C. § 144, which still allowed for litigants to move for recusal.\textsuperscript{26}

\textsuperscript{20} 28 U.S.C. § 144 (1948).


\textsuperscript{22} For instance, the United States Supreme Court in Berger v. United States ultimately held that a judge who had been asked to recuse himself first must determine whether the motion is "legally sufficient." 255 U.S. 22, 30-32, 36 (1921). Only if that judge (the very judge asked to recuse himself) found the motion to be legally sufficient would he pass the merits of the motion to another judge. \textit{Id.}

\textsuperscript{23} FED. JUDICIAL CTR., \textit{supra} note 16, at 2.


\textsuperscript{25} 28 U.S.C. § 455(b).

\textsuperscript{26} \textit{Id.} § 144. A third, but rarely noted or invoked, statute also governs recusals.
28 U.S.C. § 455—the standard introduced in 1974—remains the rule today. 28 U.S.C. § 455(b) requires recusal when a judge:

1. has a personal bias about a party or has knowledge of disputed facts;
2. served as a lawyer in the matter before reaching the bench;
3. served in governmental employment as a lawyer, adviser, or witness or expressed some opinion on the merits of the case while in governmental employment;
4. knows that he (or a close relative) has a financial interest in the case; or
5. is (or a close relative is) a party in the case, is a lawyer in the case, has an interest that could be impacted by the case (and the judge knows this), or is likely to be a material witness in the case (and the judge knows this).27

28 U.S.C. § 455(b) thus provides, for the most part, unambiguous rules for when recusal is required. § 455(a) of the same statute, however, is not so clear and straightforward; instead, it requires judges to recuse themselves whenever objectivity “might reasonably be questioned.”28 The obvious ambiguity in this section is at the core of many of the recusal problems today.

When enacting § 455, Congress made clear that its purpose was “to promote public confidence in the impartiality of the judicial process.”29 In 1988, the Supreme Court of the United States further affirmed that the goal of recusal requirements “is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would

28 U.S.C. § 47 provides that a judge cannot “hear or determine an appeal from the decision of a case or issue tried by him.” This, of course, only applies in the rare instance where an appellate judge has the opportunity to hear a case that the judge tried. See FED. JUDICIAL CTR., supra note 16, at 52-53. Thus, it would only apply in the limited circumstances where (a) an appellate judge presided over a trial when sitting by designation or (b) a district judge was “promoted” to the appellate level and a recent case of that judge’s is brought on appeal. Id. at 1. Moreover, 28 U.S.C. § 47 is rarely noted or invoked is because the same result that would be reached under § 47 would be reached under § 455(a). Id. at 52.

27. 28 U.S.C. § 455(b).
28. Id. § 455(a).
give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists.\footnote{30}

Judges are supposed to determine whether, from an objective perspective, they should recuse themselves rather than relying on their subjective belief as to whether they could be fair; the standards do not require recusal only when judges believe themselves to be incapable of impartiality, but also require recusal in other situations where their “impartiality might reasonably be questioned.”\footnote{31} The Fifth Circuit has been particularly strict about enforcing recusal rules.\footnote{32} However, the Fifth Circuit has also noted that judges must determine whether their impartiality would be questioned by a “well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person.”\footnote{33} Although there is a general consensus that the question of bias is to be considered under a “reasonable person” standard, courts are inconsistent, both internally and with each other, when it comes to less obvious situations.\footnote{34}

\footnote{30. Liljeberg v. Health Servs. Corp., 486 U.S. 847, 860 (1988) (quoting Health Servs. Acquisition Corp. v. Liljeberg, 796 F.2d 796, 802 (5th Cir. 1986); see FED. JUDICIAL CTR., supra note 16, at 6-7.}

\footnote{31. 28 U.S.C. § 455 (2006).}

\footnote{32. See, e.g., Tramonte v. Chrysler Corp., 136 F.3d 1025, 1029-30 (5th Cir. 1998) (holding that if a judge or judge’s family member is part of a class seeking monetary damages, there is a “per se rule” that the judge must recuse himself under 28 U.S.C. § 455(b)(4)); In re Faulkner, 856 F.2d 716, 721 (5th Cir. 1988) (reversing based on the refusal to recuse even though there was a “total absence of any showing of actual bias”).}

\footnote{33. United States v. Jordan, 49 F.3d 152, 156 (5th Cir. 1995). Along those same lines, the Tenth Circuit has provided a list of situations that are typically not sufficient to require recusal:

(1) Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters; (2) the mere fact that a judge has previously expressed an opinion on a point of law or has expressed a dedication to upholding the law or a determination to impose severe punishment within the limits of the law upon those found guilty of a particular offense; (3) prior rulings in the proceeding, or another proceeding, solely because they were adverse; (4) mere familiarity with the defendant(s), or the type of charge, or kind of defense presented; (5) baseless personal attacks on or suits against the judge by a party; (6) reporters’ personal opinions or characterizations appearing in the media, media notoriety, and reports in the media purporting to be factual, such as quotes attributed to the judge or others, but which are in fact false or materially inaccurate or misleading; and (7) threats or other attempts to intimidate the judge.

United States v. Cooley, 1 F.3d 985, 993-94 (10th Cir. 1993) (citations omitted).}

\footnote{34. For instance, the Fifth and Eleventh Circuits strongly favor recusals in close calls. See, e.g., Republic of Pan. v. Am. Tobacco Co., 217 F.3d 343, 347 (5th Cir. 2000); United States v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989). Other circuits
These inconsistencies have real implications. In fact, the Supreme Court recently explained in Caperton v. A.T. Massey Coal Co. that although most recusal issues do not have constitutional implications, due process necessitates recusal "when ‘the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’"35 The Court explained that states can require recusals even where due process implications are not involved: "States may choose to ′adopt recusal standards more rigorous than due process requires.’”36

It is this framework behind recusal rules and the Fifth Circuit’s treatment—that recusal decisions should be based on fairness, should promote public confidence, and should be strictly enforced—that makes the Murphy Oil decision, especially the fact that it technically comported with existing recusal law, so troubling.37 There are no straightforward guidelines for when judges should recuse themselves under the “impartiality might reasonably be questioned” standard; in fact, the Fifth Circuit has confirmed this observation by stating that “each § 455(a) case is extremely fact intensive and fact bound . . . .”38 Because there is no clear-cut guidance, there are inconsistent results. And these inconsistent results mandate the necessity for standardized recusal rules, including rules regarding when not to recuse.

II. COMER V. MURPHY OIL

Recusal standards are designed to promote public confidence in the judiciary. Yet, the Fifth Circuit—unarmed with proper standardized requirements for what recusal actions to take when

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36. Id. at 889-90 (quoting Republican Party of Minn. v. White, 536 U.S. 765, 764 (2002)).
37. Although there was a time when courts and commentators believed that only "extrajudicial sources" (sources outside the case itself) were supposed to be considered in recusals (rather than intrajudicial sources), Liteky v. United States made clear that "extrajudicial source" is a "common basis [for recusal], but not the exclusive one.” 510 U.S. 540, 551 (1994) (emphasis in original).
a judge's recusal creates the opposite result of what is intended—undercut these principles in *Murphy Oil*.

A. THE DISTRICT COURT PROCEEDINGS

In *Murphy Oil*, residents and landowners of property along the Mississippi Gulf Coast filed a class action in federal district court against a number of foreign oil and energy corporations, all of which conducted business in Mississippi.\(^3\) The plaintiffs claimed to own property and homes that were destroyed by high winds, storm surge, tornados, and other of Hurricane Katrina's destructive meteorological effects, effects allegedly increased in "frequency and intensity" by the defendants' conduct.\(^4\) Specifically, the plaintiffs alleged that the defendants' operations caused greenhouse gas emissions that contributed to global warming and ultimately magnified the impact of Hurricane Katrina.\(^4\) The plaintiffs brought claims of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy.\(^5\) Though the allegations were relatively complex, the three-judge Fifth Circuit panel who first considered the appeal described them succinctly:

The plaintiffs allege that defendants' operation of energy,

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40. *Id.* at 8, 10-11.

41. *Id.* at 7-10.

42. *Id.* at 13-19. Specifically, the bases for these different claims were as follows: *Nuisance:* The plaintiffs claimed that the defendants used their property to produce substantial greenhouse gases, causing injury to the plaintiffs and the general public by contributing to global warming. *Id.* at 16-17. This increase in global warming, the plaintiffs claimed, added to the destructive properties of Hurricane Katrina which, in turn, destroyed the plaintiffs' property and public property in the vicinity of the plaintiffs' property. *See id.*

*Trespass:* The plaintiffs alleged that the defendants' massive greenhouse gas production caused saltwater, debris, and other hazardous materials to enter and remain on the plaintiffs' property. *Id.* at 18. Their negligence claim consisted of allegations that the defendants breached their duty by unreasonably endangering the environment, public health, public and private properties, and Mississippi citizens. *Id.* This breach, the plaintiffs alleged, caused property to be destroyed or damaged. *See id.*

*Unjust Enrichment:* The plaintiffs claimed that some of the defendants artificially inflated the price of petrochemicals and, consequently, received profits that rightfully belonged to the plaintiffs. *Id.* at 13-14. The plaintiffs' civil conspiracy claim asserted that some of the defendants knew of the dangers of greenhouse gas emissions for years, but unlawfully disseminated misinformation about these dangers in order to decrease public awareness. *Id.* at 14-16. *Fraudulent Misrepresentation:* The plaintiffs alleged that the defendants made false statements in advertising campaigns in the hopes of deflecting attention away from the dangers of global warming. *Id.* at 18-19.
fossil fuels, and chemical industries in the United States caused the emission of greenhouse gases that contributed to global warming, *viz.*, the increase in global surface air and water temperatures, that in turn caused a rise in sea levels and added to the ferocity of Hurricane Katrina, which combined to destroy the plaintiffs’ private property, as well as public property useful to them.43

At the district court level, the defendants moved to dismiss the plaintiffs’ claims, arguing that the plaintiffs lacked standing and that the claims presented nonjusticiable political questions.44 The district court granted the defendants’ motion to dismiss from the bench without a written opinion.45 From the bench, the court explained that the plaintiffs’ complaint sought to have “this court do what *Baker v. Carr* told me not to do, and that is to balance economic, environmental, foreign policy, and national security interests and make an initial policy determination of a kind which is simply nonjudicial.”46 The district court concluded that “[t]hese policy decisions are best left to the executive and legislative branches of the government, who are not only in the best position to make those decisions but are constitutionally empowered to do so.”47

B. THE APPELLATE PROCEEDINGS

The plaintiffs appealed, and the Fifth Circuit three-judge panel—consisting of Judges Davis, Stewart, and Dennis—disagreed with the district court, holding that the plaintiffs had pled sufficient facts to establish standing for all but three of their claims and that the claims did not present nonjusticiable political questions.48 The defendants then petitioned for en banc consideration. Four months after the three-judge panel decision, nine Fifth Circuit judges—six new to the case (Jolly, Smith, Clement, Prado, Owen, and Elrod) and the original three in the three-judge panel (Davis, Stewart, and Dennis)—issued an order

43. *Comer v. Murphy Oil USA*, 585 F.3d 855, 859 (5th Cir. 2009), *reh’g en banc granted by* 598 F.3d 208 (5th Cir. 2010), *on reh’g en banc*, 607 F.3d 1049 (5th Cir. 2010).
45. *See id.*; *Comer*, 585 F.3d at 860 n.2.
46. *Comer*, 585 F.3d at 860 n.2.
47. *Id.*
48. *Id.* at 859, 879-80.
for a hearing en banc.\textsuperscript{49}

En banc consideration of a case is, by the Fifth Circuit's own internal operating procedures, "an extraordinary procedure that is intended to bring to the attention of the entire court" "a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court [or] Fifth Circuit precedent."\textsuperscript{50} Put another way, en banc consideration is an extraordinary procedure limited only to particularly important cases; so, the very decision to give en banc consideration of the case demonstrates that the court found the decision particularly significant.

Despite the court's acknowledgement that the case was either exceptionally important or directly in conflict with precedent, the court ultimately failed to provide any guidance on the case. Rather, as discussed below, the lack of standardized recusal guidelines resulted in the court exploiting a procedural loophole arising from a judge's choice to recuse herself, which allowed the court to avoid consideration of the merits of the appeal entirely.

The court's order granting an en banc hearing automatically vacated the three-judge panel's decision and stayed the mandate.\textsuperscript{51} Thus, at the time of the announcement that the court would hold an en banc hearing, the dismissal from the district court stood, pending the decision from the en banc court. Essentially, for all practical purposes, it was as if the three-judge panel had never issued a decision.

C. THE EN BANC DECISION

On May 28, 2010, just two months after the Fifth Circuit's February 26, 2010 order granting en banc consideration, the en banc court issued its decision.\textsuperscript{52} In the two months between the decision to hear the case en banc and the en banc court's ruling,

\begin{itemize}
\item \textsuperscript{49} Comer v. Murphy Oil USA, 598 F.3d 208, 210 (5th Cir. 2010). Judges Jones, King, Wiener, Garza, Benavides, Southwick, and Haynes were recused and did not participate in the vote to hear the case en banc. \textit{Id.} at 210 n.1.
\item \textsuperscript{50} See 5TH CIR. R. 35 I.O.P.; United States v. Nixon, 827 F.2d 1019, 1023 (5th Cir. 1987) (quoting Gonzalez v. S. Pac. Transp. Co., 773 F.2d 637, 641 (5th Cir. 1985)) (explaining that en banc consideration is \textit{limited} to exceptional circumstances).
\item \textsuperscript{51} See 5TH CIR. R. 41.3.; see, e.g., Thompson v. Connick, 578 F.3d 293, 293 (5th Cir. 2009), \textit{rev'd sub nom.} Connick v. Thompson, 131 S. Ct. 1350 (2011).
\item \textsuperscript{52} Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010) (en banc).
\end{itemize}
Judge Elrod had a conflict arise. Judge Elrod, who was part of the en banc court that granted rehearing, recused herself at some point after voting on whether to hear the case en banc. Because of Judge Elrod's recusal, the en banc panel did not consider the merits.

Specifically, the en banc court held that, because there was not a quorum once Judge Elrod recused herself, the court could not conduct judicial business on this case. The en banc court explained:

After the en banc court was properly constituted, new circumstances arose that caused the disqualification and recusal of one of the nine judges, leaving only eight judges in regular active service, on a court of sixteen judges, who are not disqualified in this en banc case. Upon this recusal, this en banc court lost its quorum. Absent a quorum, no court is authorized to transact judicial business.

In so ruling, the en banc Murphy Oil court stressed that it relied on the plain language of 28 U.S.C. § 46(c) and Rule 35 of the Federal Rules of Appellate Procedure which provide, in pertinent part, that “a majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc.” In doing so, the en banc court summarily rejected a number of options, any of which would have allowed the court to consider the case on the merits.

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53. Comer v. Murphy Oil USA, 607 F.3d 1049, 1053-54 (5th Cir. 2010) (en banc).
54. See id. at 1053 n.*. It is worth noting that nothing in this Article is intended to imply that Judge Elrod—or any judge—acted inappropriately or intended to improperly influence the decision. In fact, Judge Elrod obviously did not intentionally influence the decision, or she would not have recused herself in the first place.
55. Id. at 1053-55.
56. Id. at 1053-54. Judges Jolly, Davis, Smith, Stewart, Dennis, Clement, Prado, and Owen joined the en banc decision. Id. at 1053. Judges Davis, Stewart, and Dennis—the judges who were on the three-judge panel—dissented. Id. at 1055.
57. Comer v. Murphy Oil USA, 607 F.3d 1049, 1053-54 (5th Cir. 2010) (en banc) (emphasis added) (citing Nguyen v. United States, 539 U.S. 69, 82 n.14 (2003)).
58. Id. at 1054; 28 U.S.C. § 46(c) (2006); FED. R. APP. P. 35(a).
59. The en banc court listed these rejected possibilities, dismissing each without significant discussion: appointing another judge from a different circuit; declaring there is a quorum under FED. R. APP. P. 35(a); adopting the Rule of Necessity; holding the case in abeyance; and “dis-enbancing.” Comer, 607 F.3d at 1054.
Because the en banc court found itself unable to conduct judicial business only after it vacated the three-judge panel decision, it held that it could not reinstate the three-judge panel's decision. In effect, by refusing to conduct business after the recusal, the en banc court actually reversed the three-judge panel decision and affirmed the district court's dismissal of the lawsuit. In a final sentence—perhaps in an attempt to thwart criticism that, for all practical purposes, the court had taken away the appellants' right to appeal—the en banc court stated simply: "The parties, of course, now have the right to petition the Supreme Court of the United States."

III. ARNOLD V. EASTERN AIR LINES, INC.

The Fifth Circuit was not the first court to face the issue of a recusal after voting on an en banc petition. The Fifth Circuit was, however, the first—though, perhaps not the last, absent new uniform recusal requirements—whose resolution foreclosed any real chance at appeal. In Arnold v. Eastern Air Lines, Inc., the...
United States District Court for the Western District of North Carolina consolidated several actions arising out of an Eastern Air Lines crash in Charlotte, North Carolina in 1974. The three plaintiffs were all awarded damages at the district court trial. A three-judge panel heard the appeal. The panel affirmed judgments for the plaintiffs in two of the cases and reversed and remanded the third case for a new trial on a sub-issue of compensatory damages. Eastern Air Lines petitioned for an en banc rehearing, contesting the two affirmed judgments. At the time of voting on the en banc petition, there were ten judges in active service. Of the ten active judges, five voted in favor of rehearing, four voted against rehearing, and one recused himself.

Before considering the merits of the case, the Fourth Circuit en banc court considered whether the case had actually achieved the status of entitlement to en banc rehearing. The Fourth Circuit also considered what constitutes a quorum, allowing a court to properly transact business. Like the Murphy Oil en banc court, the Arnold court considered the plain language of 28 U.S.C. § 46(c). The court noted that 28 U.S.C. § 46(c) states: “Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.”

The Arnold court focused on the “in regular active service” phrase of § 46(c), holding that “without any contrary indication from a rule or regulation, than that there shall be excluded, for quorum ascertainment purposes, any disqualified judge when a vote on a

62. Arnold v. E. Air Lines, Inc., 681 F.2d 186, 190 (4th Cir. 1982). The substantive specifics of the district court trial and three-judge panel appeal are not important to the procedural posture. Briefly, however, two surviving passengers as well as the personal representative of one deceased passenger brought suit. Id. Eastern Airlines appealed the award of about $5 million in damages. Id.

63. See id.


65. Id.

66. Id.

67. Id.

68. Id. at 902.


70. Id. at 903.

71. Id.
suggestion for hearing or rehearing *en banc* takes place.

Simply, the Fourth Circuit held that, for purposes of ascertaining a quorum, judges who are disqualified when a vote for a petition for hearing or rehearing *en banc* takes place (even if those judges are available at the time of petition, but not at rehearing) should be excluded; thus, regular, active members of a court who recuse or disqualify themselves do not count in the calculation of a quorum for that case.

The *Arnold* court reasoned that the court, sitting *en banc*, could not have among it in active service judges who had recused themselves. The court explained that judges who recuse themselves are out of service for that particular case. As the court stated, “should [a judge], or any other regular, active member of the court, recuse or disqualify himself at any time, he is *out of service* insofar as that particular case is concerned” and necessarily could not be considered in service. Accordingly, the *Arnold* court proceeded to hear the case *en banc*, ultimately ruling on the merits by reversing and remanding the district court’s decision.

Faced with the same issue on whether a court had a quorum after a judge’s recusal, the *Murphy Oil* and *Arnold* courts came to opposite conclusions. Although their conclusions were different, both decisions are permissible—though not both ideal—under recusal rules as they currently stand, illustrating that a change to recusal rules is necessary.

**IV. THE CONFLICTING OPINIONS SHOW THE NEED FOR MORE STANDARDIZED RECUSAL REQUIREMENTS**

As *Murphy Oil* illustrates, recused judges can sway—if not dispositively decide—the very cases from which they have recused themselves under current recusal rules. Additionally,

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73. *See id.* at 903-04.
74. *Id.* at 905.
75. *Id.* at 904.
76. *Id.* (emphasis in original).
78. They also show the need for more standardized quorum rules, but that is a question for another day.
Murphy Oil also ignores the purpose behind the statutory definition of a quorum. While the Arnold decision avoided both of these issues by ruling as it did, the fact that the Murphy Oil outcome is possible highlights the importance of further recusal requirements.

A. CURRENT RECUSAL LAWS ALLOW A RECUSED JUDGE TO DETERMINE THE OUTCOME OF A CASE

Though a judge's neutrality—actual or reasonably perceived—is always important, neutrality is paramount when a judge has a particularly significant impact on the outcome of the case. Murphy Oil provides one example of a judge's actions impacting the outcome. The appellants in Murphy Oil—who had reason to believe their position had merit given that the three-judge panel agreed with them—effectively lost their right to appeal altogether as the result of the actions of an admittedly biased judge, in direct contravention of the very purposes behind the recusal statutes. Courts need a standardized approach to recusals, one that would never allow a recused judge to intentionally—or unintentionally—decide the ultimate issue.

It is true that a party's right to appeal from a circuit court decision is actually not entirely lost because the United States Supreme Court can still consider the issue. But, as discussed above, the United States Supreme Court considers an incredibly small percentage of appeals on the merits. Thus, the odds of appellate review, once the intermediate appellate court

79. See Comer v. Murphy Oil USA, 607 F.3d 1049, 1056 (5th Cir. 2010) (en banc) (Davis, J., dissenting). Of course, as I note below, I make absolutely no suggestion that the judge who recused herself—Judge Elrod—did anything to intentionally impact the decision. She was, of course, acting entirely properly in recusing herself under the current rules and did not know her decision to recuse herself would result in the appellants effectively losing their right to appeal.

80. This is exactly the circumstance that the Fourth Circuit warned against when it stated, in what seemed an obvious point at the time: "Patently a judge who is disqualified from acting must not be able to affect the determination of any cause from which he is barred." Arnold v. E. Air Lines, Inc., 712 F.2d 899, 904 (4th Cir. 1983) (per curiam).

81. In fact, the Supreme Court grants oral argument in less than one percent of the cases appealed to it. See Frequently Asked Questions, SUP. CT. U.S., http://www.supremecourt.gov/faq.aspx (last visited Feb. 7, 2014) ("The Court receives approximately 10,000 petitions for a writ of certiorari each year. The Court grants and hears oral argument in about 75-80 cases."); see also supra note 61 and accompanying text.
completely exits the picture, are extremely low. Consequently, although the Murphy Oil plaintiffs may not have wholly lost their right to appeal as a technical matter, that right was certainly drastically diminished, if not lost, for all practical purposes. And, the right was drastically diminished because one judge—a judge who admits by her actions to have a bias or at least the perception of one—first voted to consider the case en banc, but then decided not to sit on the en banc court.

A biased or potentially biased judge’s actions should not be permitted to decide a case. But, that is exactly what happened in Murphy Oil when one judge voted on whether the en banc rehearing would take place, and then that same judge later determined that she could not consider the case, which caused the dismissal of the case and the judgment of the lower court to be reinstated even after being vacated by the three-judge panel. Because there are no clear guidelines or rules for when judges should not or cannot recuse themselves, this result is perfectly permissible, even if not rationally sound or consistent with the purpose of the recusal rules.

As previously noted, the purpose of 28 U.S.C. § 455, which requires a judge to recuse himself “in any proceeding in which his impartiality might reasonably be questioned” is not to undercut judicial and appellate review, but rather to ensure that, when a judge recuses himself, he could either be replaced by another judge or the remaining judges could consider the case. 28 U.S.C. § 455 is not intended to allow for a recusal to limit the


83. 28 U.S.C. § 455(a) (2006); Levitt v. Univ. of Tex. at El Paso, 847 F.2d 221, 225 (5th Cir. 1988).

availability of appellate or en banc review.

More, “[t]he goal of the disqualification statute is to promote public confidence in the judicial system by avoiding even the appearance of partiality.” Thus, the Murphy Oil en banc decision, even if technically permissible, undercuts the purpose behind the recusal procedure. The purpose is to maintain public confidence in the judicial system, but the decision did just the opposite. A Google search provides a number of outlets that expressed outrage over the decision. At least one blogger accused the court of “carefully tim[ing] for late Friday release on Memorial Day Weekend . . . [an] unbelievable decision.” That same blogger expressed the sentiment that others shared: “Just when you think you can’t be any more appalled, you’re more appalled. What a sorry stunt.”

The reaction is unsurprising: a court announced that it could not consider a case because there were too few judges to provide an impartial review, but simultaneously rendered a decision that, for all practical purposes, overturned the previous appellate decision. Judge Elrod did not (and was not required to) explain the reason behind her recusal, but, by definition, she either had an actual conflict or apparent conflict. Despite Judge Elrod’s apparent or actual partiality that was so great as to prod her to recuse herself, her recusal—a procedural safeguard aimed at keeping a partial judge from impacting a case—unwittingly, but dispositively, decided not only the Murphy Oil appellants’ substantive appeal, but effectively the Murphy Oil appellants’ procedural right to appeal.


87. A miscarriage of justice, supra note 86.

88. Id.

89. See generally Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010) (en banc). Although it actually vacated the decision rather than overturned it, the practical impact on the appellants remains the same.
B. MURPHY OIL IGNORES THE PURPOSE BEHIND 28 U.S.C. § 46(c)

Although not the primary focus, this Article would be remiss if it did not point out that the Murphy Oil decision not only ignores the purpose of recusal, but also ignores (without actually violating) the plain language and purpose of 28 U.S.C. § 46(c).

28 U.S.C. § 46(c) defines an en banc court as follows: “A court in banc shall consist of all circuit judges in regular active service.”90 There is no mention of the entire court, consisting of all judges; rather there is mention of the judges in regular active service. The Murphy Oil en banc panel, however, interprets 28 U.S.C. § 46(c) as requiring a “majority of the judges of the entire court who are in regular active service, and not as a body of the non-recused judges of the court, however few,” to constitute a quorum to conduct judicial business.”91 Thus, after Judge Elrod recused herself, the Fifth Circuit was without a majority of the sixteen judges that sit on the court. Reading 28 U.S.C. § 46(c) as requiring a majority of the entire court to hear or rehear en banc cases is contrary to the Advisory Committee Notes to the 2005 amendment to Federal Rule of Appellate Procedure 35(a) that defines when a hearing or rehearing en banc may be ordered: “It is clear that ‘all circuit judges in regular active service’ in the second sentence [of § 46(c)] does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc.”92

Moreover, the Murphy Oil en banc court’s decision ignored principles of fairness. The en banc court had alternative options after ruling that it lacked a quorum, such as finding another judge, using some other procedural rule,93 or ruling that it could not render a decision, meaning the panel decision stood. Alternatively, it could have ruled that it had a quorum—and then ruled on the merits.

The Fourth Circuit view—that “regular active service”

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91. Comer v. Murphy Oil USA, 607 F.3d 1049, 1054 (5th Cir. 2010) (en banc) (emphasis added).
92. FED. R. APP. P. 35(a) advisory committee’s note to 2005 Amendments, quoted in Comer, 607 F.3d at 1058 n.3 (Dennis, J., dissenting).
93. For example, the court could have invoked the Rule of Necessity, discussed below in Section V(C).
means only those judges who are not barred from considering a particular case—is, if nothing else, more evenhanded than the Fifth Circuit's view—that "regular active service" refers to every judge who serves on active duty on the court. Although certainly not all cases will result in the panel's decision being vacated merely because of a single judge's recusal, the fact that it can happen (and has happened) illustrates the problem with the Fifth Circuit's approach and an even bigger problem with recusal law as it now stands: a judge who refuses to consider the case because of either an actual or a perceived bias can be the very judge who determines the ultimate result, even when that judge does not officially cast a vote on the merits.

The Fourth Circuit's view is also more logical; the majority of the active judges are needed to consider a case en banc.\(^{94}\) An inactive judge, whether this inactivity is the result of recusal or something else, should not be in active service. And as the *Murphy Oil* en banc dissent aptly notes, if all judges in regular active service included judges who were disqualified from a certain case, then "the statute would necessarily require all disqualified active judges to sit as part of the en banc court in every case that is heard or reheard en banc."\(^{95}\)

Although the Fourth Circuit's rationale may be more logical and fair, the Fifth Circuit rationale is equally permissible given the current state of recusal law. And, it is precisely for that reason that additional safeguards are necessary.

**V. RECUSAL REFORM (INCLUDING WHEN NOT TO RECUSE) IS NECESSARY**

Others have noted the need for more systematic or concrete recusal rules and guidelines.\(^{96}\) Those who have considered the need for recusal reform have provided a litany of options and proposals that would purportedly be better than the rules currently in place. Just a few of those proposals include: peremptory challenges of judges,\(^{97}\) per se recusal rules for

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95. *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1058 (5th Cir. 2010) (en banc) (Dennis, J., dissenting).
96. See, e.g., *Downing*, supra note 4, at 44-46; *Sample et al.*, supra note 4, at 5-7.
campaign contributors, independent adjudication of disqualification motions, de novo review on interlocutory appeal of a refusal to recuse, recusal advisory boards, enhanced disclosure by litigants, and required written opinions when a judge denies a motion to recuse.

As recently as March 17, 2011, a letter sent to the Chairmen and Ranking Minority Members of the House and Senate Judiciary Committees by over 100 law school professors and deans around the country highlighted the need for a “nonpartisan call for the implementation of mandatory and enforceable rules to protect the integrity of the Supreme Court.” Although that letter was targeted at Supreme Court justices, one of its points is particularly relevant for courts of all levels:

The impartiality of justices, and, as a result, the integrity of the Supreme Court, has come under question because the primary recusal statute – 28 U.S.C. § 455 – fails to meet this standard for Supreme Court justices. On recusal motions, justices may sit in silent judgment of their own impartiality, with no opportunity for review, even though the standard to be applied is the appearance of bias, which by necessity depends on the views of others.

These academics had a major concern that “there is no review procedure for recusal decisions by Supreme Court justices.” Ultimately, that letter suggested that the Supreme Court needs to take the following steps:

1. Apply the Code of Conduct for United States Judges to Supreme Court justices;

2. Establish a set of procedures to enforce the Code’s standards as applied to Supreme Court justices;

98. Sample et al., supra note 4, at 6, 29-30.
99. Id. at 6, 31-32.
100. Id. at 6, 33.
101. Id. at 7, 34-35.
103. See Letter on Changing Ethical and Recusal Rules, supra note 4, at 3.
104. Id. at 1.
105. Id. at 2 (emphasis in original).
106. Id.
3. Require a written opinion when a Supreme Court justice denies a motion to recuse; and

4. Determine a procedure, or require the Court to do so, that provides for review of a decision by a Supreme Court justice not to recuse himself or herself from a case pending before the Court.107

Every one of the above proposals has merit, but the proposals do not go far enough. They are limited to providing standards and guidelines to when judges must recuse themselves, not when judges must not recuse themselves.108 For instance, rather than limiting the need for a written opinion and procedure when a judge denies a motion to recuse, as suggested in the March 17, 2011 letter, the judge should also be required to write a written opinion when a judge grants a motion to recuse, since—as Murphy Oil shows us—recusal can be just as detrimental to the litigants as failure to recuse.

A. JUSTICE SCALIA'S DISTINCTION BETWEEN THE UNITED STATES SUPREME COURT AND COURTS OF APPEALS WHEN IT COMES TO RECUSALS IS NO DISTINCTION AT ALL

In Cheney v. United States District Court, Justice Scalia considered—and denied—a motion for his recusal.109 In Cheney, a public interest law firm and the Sierra Club brought suit against the National Energy Policy Development Group and some of its individual members, including Richard B. Cheney, then the Vice President of the United States.110 After the district court denied Vice President Cheney's motion to dismiss, Cheney filed an interlocutory appeal petitioning for a writ of mandamus vacating discovery orders and requiring the lower court to dismiss him.111 After the D.C. Circuit dismissed Vice President Cheney's petition

108. In addition, the March 17, 2011 nonpartisan call for reform limits itself to Supreme Court Justices because they “are not subject to a comprehensive code of judicial ethics.” Letter on Changing Ethical and Recusal Rules, supra note 4, at 1. Although this distinction makes the need for reform at the Supreme Court level particularly necessary, there is no reason that standards and guidelines should not apply at all levels.
and interlocutory appeal, the Vice President’s motion reached the United States Supreme Court. The Sierra Club moved to recuse Justice Scalia based on his well-documented friendship with Vice President Cheney, which included guest seats on the Vice President’s government airplane when they went on a hunting trip together. Scalia denied the Sierra Club’s motion to recuse him, taking the somewhat unusual step of providing a written memorandum explaining his rationale in doing so. In the written denial, Scalia went to great lengths in explaining why his friendship with Vice President Cheney (including the seats on the plane) would not impact his impartiality.

Of particular note here is that part of Scalia’s overall analysis for why a motion to recuse a Supreme Court justice contains peculiar consideration that is unique to that Court. Scalia rejected the argument that he should “resolve any doubts in favor of recusal” for (particularly when considering Murphy Oil) an interesting reason:

That might be sound advice if I were sitting on a Court of Appeals. There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case.

Despite Scalia’s contention, however, Murphy Oil—which the Fifth Circuit decided after Scalia’s memorandum—shows that it is not always the case that an appellate court judge’s “place would be taken by another judge, and the case would proceed

113. Cheney, 541 U.S. at 920-23; Motion to Recuse, supra note 112, at *6.
115. Id. at 916-22. Scalia seemed to ignore the question of whether his impartiality “might reasonably be questioned.” Presumably, it could “reasonably be questioned,” as the Sierra Club argued—and Scalia acknowledged—that a “significant portion of the press, which is deemed to be the American public, demands [recusal].” See id. at 922-23.
116. I intentionally do not consider the merits of Scalia’s position here. The focus here is not to approve or disapprove of any particular judge’s decision on recusal, but rather to demonstrate the larger problem that there is inadequate guidance.
117. Cheney, 541 U.S. at 915 (internal citations omitted).
normally." Thus, after *Murphy Oil*, and even after the rules adopted by the Fifth Circuit, there is no reason why appellate courts should have more (or less) stringent recusal requirements than the United States Supreme Court.

**B. CONSISTENT GUIDELINES ARE NECESSARY; THEY MUST REQUIRE THAT A JUDGE CANNOT, ABSENT EXTRAORDINARY CIRCUMSTANCES, INFLUENCE ANY PROCEEDING IN WHICH THE JUDGE IS INTERESTED**

Standardized recusal requirements are essential. There is no reason why recusal rules should be limited to providing instances where judges either should or must recuse themselves. The rules must similarly allow for instances where judges either should not—or cannot—recuse themselves.

The requirements for when not to recuse would share a number of traits in common with when to recuse; in many ways, they would be the inverse of each other. But, the rules governing recusals, rather than refusals to recuse, would have additional requirements. The fundamental principle behind a rule requiring judges *not* to disqualify themselves must be that the judges must minimize any influence on any proceedings where they are—or could be perceived to be—interested, *unless the parties consent*. Whether a judge granted or denied a motion to recuse, that judge would be required to issue a written opinion on that decision. In addition, there must be an independent review of any denial of a recusal motion *or any* decision to recuse. This independent review could be performed either by a panel of non-judicial legal professionals or by a panel of disinterested judges. The independent review panel would examine the written opinion provided by judges who either refused to recuse themselves or did recuse themselves, as a written opinion would be required.

Ultimately, the independent review panel would have to be governed by a specific set of guidelines that the panel could not ignore. This would be more stringent than the recusal statutes. Of particular note, one of the cornerstones would be that a judge could not, absent extraordinary circumstances, adversely impact a party or influence proceedings in which the judge is biased or apparently biased. So, if a recusal would result in dismissal—as was the case in *Murphy Oil*—then the judge would be required to

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The need for standardized requirements is increasingly necessary as society becomes increasingly globalized. Judges are more and more likely to have some sort of interest in an increasing number of cases, and thus a lack of standardized rules for when judges cannot recuse themselves could result in a lack of judges in certain cases. For instance, it would be difficult to imagine finding judges with absolutely no interest in litigation involving certain credit cards or computer software.

In addition, there is no reason why the most common recusal statute should remain written as is. Right now, 28 U.S.C. § 455(b) sets out specific factual instances when a judge "shall disqualify himself." But, there are times when justice requires that the judges not recuse themselves, even under one of the currently mandatory reasons for recusal; Murphy Oil makes this very clear. Either rewriting or creating an exception to the statute to account for this situation is necessary.

C. ONE OF THE CORNERSTONES OF ANY STANDARDIZED SET OF RECUSAL RULES MUST BE THAT A LITIGANT CANNOT BE DENIED A FORUM

It is beyond the scope of this Article to discuss every single aspect of a different set of recusal rules, but one thing is clear: in order to avoid a situation where a judge's recusal can impact a litigant's rights or position, any uniform recusal rules must require a judge to consider a case, even if the judge has an interest in the case, if the judge's disqualification would mean the case could not otherwise be heard. Thus, the courts would invoke the Rule of Necessity, which always (should) trumps any recusal requirements of 28 U.S.C. § 455.

The Supreme Court has explained that there are procedural safeguards to allow judicial review in most circumstances, but in certain circumstances the Rule of Necessity is needed. The

119. Of course, if a judge "unrecuses," the judge has the potential to still influence the outcome. Although influencing the outcome is less than perfect, it is better than being denied a forum altogether.

120. In United States v. Will, the Supreme Court held that § 455 did not change the Rule of Necessity. 449 U.S. 200, 217 (1980). However, the Murphy Oil decision shows that the Rule of Necessity has not always trumped § 455. See Comer v. Murphy Oil USA, 607 F.3d 1049, 1054 (5th Cir. 2010) (en bane).

121. Will, 449 U.S. at 217.
Rule of Necessity is "a well-settled principle at common law" that provides that "although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise." Various courts throughout the country have explained that the Rule of Necessity requires a judge to consider a case when the failure to do so would deny a litigant's right to a day in court. Although the Rule of Necessity is occasionally invoked, it is not invoked consistently or in every situation that it should be invoked, likely because the need for it is rare and, like recusal standards, there is not adequate guidance on its use. The Murphy Oil plaintiffs surely would have wanted the Fifth Circuit to invoke the Rule of Necessity, and the fact that the court chose not to do so demonstrates that the Rule of Necessity as it now stands is not enough to fix the problems and fill in the gaps that now exist in the recusal standards. Standardized recusal requirements would help to keep courts from ignoring the Rule of Necessity, as they currently can do.

122. Id. at 213 (quoting F. POLLACK, A FIRST BOOK OF JURISPRUDENCE 270 (6th ed. 1929)).
123. See, e.g., State ex rel. Mitchell v. Sage Stores Co., 143 P.2d 652, 656 (Kan. 1943) ("It is well established that actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated."); City of Philadelphia v. Fox, 64 Pa. 169, 185 (Penn. 1870) ("The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest—where no provision is made for calling another in, or where no one else can take his place—it is his duty to hear and decide, however disagreeable it may be.").
124. See, e.g., United States v. Will, 449 U.S. 200, 213-14 (1980) (explaining that the Rule of Necessity is supposed to prohibit recusal if the case would not otherwise be heard); Bolin v. Story, 225 F.3d 1234, 1238 (11th Cir. 2000) ("The rule of necessity is generally invoked in cases in which no judge in the country is capable of hearing the case."); Switzer v. Berry, 198 F.3d 1255, 1258 (10th Cir. 2000); Tapia–Ortiz v. Winter, 185 F.3d 8, 10 (2d Cir. 1999); In re Petition to Inspect & Copy Grand Jury Materials, 735 F.2d 1261, 1266–67 (11th Cir. 1984).
125. See, e.g., Comer v. Murphy Oil USA, 607 F.3d 1049, 1057 (5th Cir. 2010) (en banc) (Dennis, J., dissenting); Bolin, 225 F.3d at 1238-39.
126. Of course, in the Murphy Oil context, the Rule of Necessity was not the only solution, but merely one of many possible solutions. See Comer, 607 F.3d at 1054. Whether it is the invocation of the Rule of Necessity, the appointment of a judge sitting by designation, "dis-enbancing" the panel so that the three-judge panel's decision was not vacated, or the transfer to another appellate court, any solution that allows for appellate review is preferable to one that does not. Murphy Oil was particularly problematic because the en banc decision affirmed the district court's opinion, meaning the judicial process ended (other than the longshot possibility of
Judge Elrod did not explain her reasons for recusal in *Murphy Oil*, nor did she have any obligation to do so. Under 28 U.S.C. § 455(a), a party may waive grounds for disqualification of a judge “provided it is preceded by a full disclosure on the record of the basis for disqualification.” Conversely, a party cannot waive “any ground for disqualification enumerated in subsection [28 U.S.C. § 455](b).” The rationale behind this is, at first blush, logical: § 455(a) only deals with situations where “impartiality might reasonably be questioned,” whereas § 455(b) provides a number of situations where impartiality is presumed. Still, courts have warned against accepting waivers of even permissible areas under § 455(a). There is no reason, however, why parties should be unable to determine whether judges should recuse themselves. If the party against whom a judge is either actually or apparently biased agrees that the judge can act as an impartial arbiter, then that judge should be able to consider the case. The *Murphy Oil* appellants were not given this opportunity; surely, were they 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. Accordingly, any standard should include the possibility of parties waiving grounds for disqualification both when a judge’s “impartiality might reasonably be questioned” and under the circumstances enumerated in § 455(b). Simply, a party should be given the opportunity to have a potentially partial judge instead of having no judge at all.

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Supreme Court review, which, of course, ended when the Supreme Court denied the appellant’s petition; if the en banc review had resulted in a remand to the district court, at least the judicial proceedings would have continued. See Comer v. Murphy Oil USA, 607 F.3d 1049, 1056-57 (5th Cir. 2010) (en banc) (Dennis, J., dissenting); In re Comer, 131 S. Ct. 902 (2011) (mem.). The *Murphy Oil* solution (or problem), however, is not the primary focus of this Article, nor should it be the primary concern; rather, the primary focus should be on the bigger problem: that lack of recusal standards permitted the Fifth Circuit to, for all practical purposes, deny the right to appellate review.


128. *Id.*

129. *See, e.g.*, United States v. Kelly, 888 F.2d 732, 745 (11th Cir. 1989) (“Under 28 U.S.C.A. § 455, ‘[w]here the ground for disqualification arises only under [section 455(a)], waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.’ While it is thus permissible for a judge to accept a waiver of recusal, we believe this option should be limited to marginal cases and should be exercised with the utmost restraint.”).
CONCLUSION

It bears repeating that, of course, nothing here is meant to suggest that Judge Elrod intentionally influenced the *Murphy Oil* decision. In fact, the very notion that she could have done so contradicts the fundamental premise of this Article. Because the Fifth Circuit’s decision was unpredictable, there is simply no way that Judge Elrod could have anticipated such a result. And that is exactly why the recusal rules need to be more standardized: not only can litigants not predict when judges will recuse themselves, judges themselves cannot predict what impact their recusals will have. Rather than acting improperly, Judge Elrod recused herself precisely so that she did not influence the decision. In direct contradiction of her intention, however, her recusal not only influenced the decision, but ultimately dispositively decided it.

The *Murphy Oil* en banc court held that it lacked a quorum and, therefore, could not decide the appeal under 28 U.S.C. § 46. But, despite the contention that the en banc panel lacked the authority to decide the appeal, it essentially decided the appeal by dismissing it. None of the rules of civil or appellate procedure or statutes intended—or are written in a way that demands—the *Murphy Oil* course of action. But, they do allow it. After Judge Elrod recused herself, the Fifth Circuit ignored the basic tenet that courts are not permitted to abstain from deciding cases on which jurisdiction has been conferred.130 The *Murphy Oil* en banc court relied on a procedural loophole to ignore its “absolute duty” to hear and decide the case.131 A standardized and predictable set of recusal rules that prohibit a recusal from adversely impacting the intended beneficiary would alleviate any such inconsistencies.132

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130. See New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 358 (1989) (“[F]ederal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred.”).

131. See Comer v. Murphy Oil USA, 607 F.3d 1049, 1054 (5th Cir. 2010) (en banc); United States v. Will, 449 U.S. 200, 215 (1980) (discussing “the absolute duty of judges to hear and decide cases within their jurisdiction”).

132. Some would no doubt argue that, in the future, this result is unlikely. Judges, unless intentionally hoping to improperly influence a decision (an unlikely situation), will either be more likely to recuse themselves earlier (even if potentially unnecessary) or less likely to vote for an en banc hearing, neither of which are ideal alternatives. At least these options, though, would not entirely eliminate circuit-level appellate review. Although this result is unlikely in the future, some safeguard needs to be put in place in order to eliminate the *Murphy Oil* problem from
The twenty-seven-year gap between the *Arnold* decision in 1983 and the *Murphy Oil* decision in 2010 shows that the issue of how a recusal will impact an appellate court’s en banc quorum does not arise often, but the fact that it has happened twice within a relatively short time-frame shows that it can (and does) happen. And when it does, the implications are serious and concerning. A standardized set of rules for when judges cannot recuse themselves is necessary.

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eliminating appellate review again—standardized recusal requirements, including requirements for when *not* to recuse, would provide that safeguard.

133. There are surely other situations where a judge’s recusal could improperly impact litigation. Although they are difficult to predict or imagine, so too was *Murphy Oil*. 