Question: If an 3-judge panel on an appellate court unanimously reverses a D Ct opinion, and the full Circuit lacks a quorum to reconsider the substance of that appellate panel decision, what happens?

If you answered "the appellate panel decision survives," you'd be supported by a certain (which is to say, all) logic — but try telling that to the Fifth Circuit.

Hat tip to Prof. James May of Widener University School of Law on this one: Apparently the Fifth Circuit just announced a decision (UPDATE: available here) in the widely-followed Comer en banc process. Comer is one of the recent high-profile climate change nuisance cases — Conn v AEP was another — in which the rights of plaintiffs injured by climate change to seek compensation for their injuries from large GHG-emitting defendants were vindicated on appeal, after district court dismissals. In the Comer case, Mississippi property owners harmed by Hurricane Katrina bring suit against a basket of oil, coal, and chemical company GHG emitters. The lower court dismissed plaintiffs' claims on political question grounds, and a 3-judge panel of the 5th Cir reversed and reinstated the case. See Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009).

Today's strange twist is this: Though the full Fifth Circuit had sufficient un-recused judges to decide to reconsider the merits of the panel decision en banc a while back, it lost its quorum somewhere along the way. (Many of its judges apparently have financial ties to the defendants in the case.) It now has no quorum and cannot, in fact, reconsider the substance of the panel's decision. It has therefore decided to reinstate the lower court's opinion, dismissing plaintiffs' claims.

I haven't done the research to figure out why this result is legally incorrect, but it certainly seems crazy. What must the injured plaintiffs be thinking, having lost their appellate victory precisely because so many 5th Circuit judges are too entwined with these corporate defendants to be perceived as neutral?

Check out the vigorous dissents from today's decision.