



Judicial Gusher: the Fifth Circuit's Ties to Oil

I. EXECUTIVE SUMMARY

On April 20, 2010, the Deepwater Horizon drilling rig in the Gulf of Mexico exploded, killing 11 workers, gushing an unprecedented amount of crude oil into the Gulf, and precipitating the largest environmental disaster in American history. On Thursday, July 8, 2010, the Fifth Circuit Court of Appeals will hear arguments in one of the first major lawsuits resulting from the oil spill, regarding the Obama Administration's proposed six-month moratorium on offshore deepwater drilling, which was enjoined by a federal district court judge in New Orleans. This report provides some background information about the case, the district court judge who enjoined the moratorium, and the circuit court judges who will hear the Administration's appeal, in particular noting the judges' often significant ties to the oil and gas industries. This report concludes with a chart summarizing the energy investments and other ties to big oil companies of every judge on the Fifth Circuit Court of Appeals, which includes Louisiana, Texas, and Mississippi.

II. SIX-MONTH DRILLING MORATORIUM CASE OVERVIEW

A week after the Deepwater Horizon accident, President Obama ordered Secretary of the Interior Ken Salazar to conduct a 30-day environmental review of the causes of the event and offer precautions that might prevent a similar disaster from occurring again. On the basis of that review, at the end of May, Secretary Salazar suspended drilling operations for deepwater rigs in the Gulf that are "similarly situated" to the Deepwater Horizon. In effect, the Secretary's order imposed a six-month moratorium on 33 offshore oil rigs currently in the Gulf as well as any newly permitted deepwater drilling projects in the region, pending results of the President's bipartisan commission's investigation into the accident.

A group of energy companies that offer support services for offshore drilling operations sued the government in federal court in New Orleans, seeking a preliminary injunction that would prevent the moratorium from taking effect. On June 22, 2010 in the case *Hornbeck Offshore Services v. Salazar*, Judge Martin Feldman of the Eastern District of Louisiana granted the plaintiffs' request and lifted the moratorium.¹ Judge Feldman concluded that the government's moratorium was

¹ *Hornbeck Offshore Services v. Salazar*, No. 10-1663 (E.D.La. June 22, 2010).

“blanket,” “generic,” and “punitive,” and would clearly harm the plaintiff industries and the region.²

The Department of Justice has appealed Judge Feldman’s ruling and has moved for a stay pending the appeal, arguing that the Department of Interior’s temporary suspensions are critically important to protect human health and the environment from another disaster while the government investigates the Deepwater Horizon explosion.³ According to DOJ, the proposed moratorium targets only deepwater drilling operations that pose similar safety concerns as did Deepwater Horizon, affecting less than 1% of the existing rigs in the Gulf.⁴ The State of Louisiana has filed an amicus brief in opposition to DOJ’s motion, asserting that a drilling moratorium would impose an adverse economic impact on the state and its residents.⁵ Arguments will be heard by a three-judge panel of the Fifth Circuit Court of Appeals on Thursday, July 8, 2010.

The *Hornbeck* case follows closely on the heels of another case in which the Fifth Circuit Court of Appeals judges’ strong ties to the oil industry were scrutinized after there were too few judges with no conflict of interest to hear a case. In *Comer v. Murphy Oil USA*,⁶ land and property owners in the Gulf brought a class action against oil and energy corporations, alleging that their emission of greenhouse gasses added to the effects of global warming so as to augment the ferocity of Hurricane Katrina. The District Court found in favor of the oil companies but a Fifth Circuit panel of three judges reversed. On rehearing *en banc*, eight of the sixteen active judges on the Fifth Circuit recused themselves.⁷ In a procedurally bizarre move, a majority of the remaining judges held that because it lacked a quorum it could not hear the case and reinstated the District Court decision in favor of the oil companies.⁸ The judges were not required to explain why they recused themselves, but federal law requires a judge to disqualify him/herself when 1) his/her impartiality might be reasonably questioned, or when 2) he/she knows that he/she or a family member has a financial interest in the subject matter of the controversy, or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceedings (the rule does not apply to mutual funds the judge does not manage).⁹ The *Comer* decision represents an instance in which plaintiffs were denied their day in court because of the Fifth Circuit judges’ overwhelming connections to the oil and energy industry.

The following information provides an overview of oil industry ties to the federal judges who are overseeing the six-month drilling moratorium case.

² *Id.* at 21.

³ Brief of Appellants, *Hornbeck Offshore Services v. Salazar*, No. 10-30585 (5th Cir. June 24, 2010).

⁴ *Id.*

⁵ Brief for State of Louisiana as Amici Curiae Supporting Respondents, *Hornbeck Offshore Services v. Salazar*, No. 10-30585 (5th Cir. June 29, 2010).

⁶ No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010) (en banc).

⁷ The judges who recused themselves include: Chief Judge Jones, Judge King, Judge Wiener, Judge Garza, Judge Benavides, Judge Southwick & Judge Haynes.

⁸ No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010) (en banc).

⁹ 28 U.S.C. § 455.

III. JUDGES' TIES TO THE OIL INDUSTRY

A. *U.S. District Court, Eastern District of Louisiana*

Judge Martin Feldman

Judge Feldman was appointed to the federal district court in the Eastern District of Louisiana in 1983 by President Reagan. After serving as a Military Service Captain in the Judge Advocate General's Corps and a clerk for Fifth Circuit Judge John Minor Wisdom, in 1959 Judge Feldman joined the New Orleans law firm Bronfin, Heller, Feldman, Steinberg & Berins in New Orleans, where he practiced until he was confirmed to the bench. Judge Feldman was also involved in local and national Republican Party politics from 1959-1983.¹⁰

In 2009, Judge Feldman had financial investments valued at between \$41,000-395,000 in twenty-five individual energy and energy-related corporations, among them Exxon Mobil, Transocean, General Electric, Tyco International, and numerous smaller companies such as Ocean Energy, El Paso, and Quicksilver Resources. Additionally, in 2009 Judge Feldman invested between \$7,000–105,000 in Blackrock, a money management firm that is BP's biggest shareholder. A letter dated June 23, 2010 from Judge Feldman to the Committee on Financial Disclosure of the U.S. Courts notes, "This is to advise that the Exxon stock noted on line 140 of my 2009 Financial Disclosure Report was sold at the opening of the stock market on June 22, 2010 prior to the opening of a Court hearing on the Oil Spill Moratorium case." That same afternoon, he issued a twenty-two page decision granting the offshore oil drilling companies' request to enjoin the six-month drilling moratorium. In his 2008 financial disclosure forms, he indicated that he sold both Halliburton and KBR stock, each valued at between \$1,000-15,000, and also that he held stock in many additional energy-related companies that do not appear on his 2009 forms.

The government has not moved to disqualify Judge Feldman, but on June 2, 2010, a group of environmental groups intervened and filed a motion for his disqualification, arguing that his financial holdings in oil and gas companies create the appearance of partiality.

B. *U.S. Court of Appeals, Fifth Circuit*

Judge Jerry Edwin Smith

Judge Smith of Houston, Texas, was appointed to the Fifth Circuit in 1987 by President Reagan. Prior to joining the bench, Judge Smith served as the City Attorney for the City of Houston (1984-87), the Special Assistant Attorney General of the State of Texas (1981-82), and the Director of the Harris County Housing Authority (1978-80). Judge Smith also served on the State GOP Executive Committee from 1976-1987 and chaired the Committee from 1977-1978.¹¹

¹⁰ *Id.*

¹¹ While in that position, he made several controversial statements, such as characterizing the League of Women Voters as the "plague of women voters" and referring to the International Women's Year Conference as a "gaggle of outcasts, misfits and rejects" with "perverted views." *Confirmation Hearing on: Jerry E. Smith, et al., Before the S. Comm. on the Judiciary*,

From 1973, following law school and a clerkship, to 1984, Judge Smith worked as a civil litigator at the firm Fulbright & Jaworski, where he concentrated on federal energy litigation.¹² He described his practice as “consist[ing] of working with groups of attorneys in various law firms representing major oil companies in lawsuits regarding the interpretation and enforcement of United States Department of Energy price and allocation regulations.”¹³ In three out of the ten cases Judge Smith described as being the most significant of his career, he defended big oil companies:¹⁴

- *Dorchester Gas Producing Co. v. Dept. of Energy*¹⁵: From 1979 to 1984, Judge Smith represented Exxon in a declaratory judgment action brought by several major petroleum refiners, including Exxon, Texaco, Phillips, Mobil, and Standard Oil, challenging natural gas liquids price regulations promulgated by the Department of Energy under the Emergency Petroleum Allocation Act of 1973 (EPAA). The petroleum refiners contended that the Department’s method of calculating specific processing costs that could be passed through to customers resulted in “several hundred million dollars” of profit losses. The Department of Energy eventually prevailed on all claims.
- *Dougherty v. Continental Oil Co*¹⁶: Judge Smith represented Continental Oil Company (Conoco) in appealing an antitrust case brought by Conoco commission agents. The commission agents alleged that in the process of changing the way Conoco marketed its branded gasoline, it engaged in secret negotiations that shut commission agents out of the opportunity to become petroleum marketers. Judge Smith was successful in reversing the original verdict against Conoco and the case was subsequently settled.
- *Amoco Production Co. v. Dept. of Energy*¹⁷: Judge Smith represented Exxon and Sun Oil Company in a declaratory judgment action brought by numerous oil companies challenging Department of Energy regulations relating to natural gas liquids. The oil companies argued that the sale of natural gas liquids to corporate affiliates qualified as a “first sale” that allowed for upward cost adjustments. The oil companies were successful in obtaining summary judgment.

While Judge Smith did not report any financial investments in the energy sector between 2003 and 2008, in 2004 he attended a seminar hosted by the Foundation for Research on Economics & the Environment (FREE) in Big Sky, Montana, for which he was reimbursed transportation, lodging, and meal expenses.¹⁸ FREE is a think-tank that promotes free-market environmentalism rather than environmental regulation and is funded largely by corporations like ExxonMobil and

100th Cong. 31-58, 31-32 (1987) (during the hearing, Sen. Leahy cited articles from the Houston Chronicle that had reported the nominee’s controversial remarks).

¹² *Jerry E. Smith*, 2 ALMANAC FED. JUDICIARY, 2010, available at 2010 WL 2139840.

¹³ *Confirmation Hearing on: Jerry E. Smith, et al., Before the S. Comm. on the Judiciary*, 100th Cong. 89-123, 96 (1987) (questionnaire submitted by Jerry E. Smith).

¹⁴ *Id.* at 98-110.

¹⁵ 582 F.Supp. 911, (N.D. Tex. 1983), *reconsideration denied*; 582 F.Supp. 927 (N.D. Tex. 1983), *review on certified question sub nom*, and *Exxon Corp. v. Dept. of Energy*, 744 F.2d 98, (Em.App. 1984), *aff’d in part, rev’d in part, sub nom*; 752 F.2d 650 (Em. App. 1984), *cert. denied*, 496 U.S. 1077 (1984) and 471 U.S. 1099 (1985)

¹⁶ 579 F.2d 954 (5th Cir. 1978), *vacated by stipulation*; 591 F.2d 1206 (5th Cir. 1979).

¹⁷ 512 F.Supp. 815 (D. Del. 1981), *aff’d*, 671 F.2d 485 (Em. App. 1982).

¹⁸ SMITH, J., 2004 FINANCIAL DISCLOSURE REPORT 2 (2005).

conservative foundations.¹⁹ FREE hosts industry-funded seminars for judges, often including leisure activities such as golf and horseback riding,²⁰ to “explain why ecological values are not the only important ones.”²¹ The year that Judge Smith attended the seminar, FREE received \$70,000 from ExxonMobil, of which \$20,000 was for “Federal Judicial Seminars,” \$30,000 was for “General Operating Support,” and \$20,000 was for a “Climate Seminar.”²²

Judge William Eugene Davis

Judge Davis was elevated to the Fifth Circuit Court of Appeals in 1983 by President Reagan, having served as a U.S. District Judge for seven years in the Western District of Louisiana following an appointment by President Gerald Ford.²³ Prior to becoming a judge, Davis worked exclusively in private practice, first as an associate at the New Orleans firm of Phelps, Dunbar, Marks, Claverie & Sims from 1960 to 1964, and then as a partner at the New Iberia, Louisiana, firm of Caffery, Duhe & Davis from 1964 to 1976.²⁴ During his tenure as a private litigator, Judge Davis often represented major offshore drilling and oil companies in private suits.²⁵ Notable examples include:

- *Istre v. Diamond M. Drilling Co.*²⁶: In this case, Judge Davis represented Diamond Drilling Company against a negligence claim under the Jones Act brought by a crew member injured on a submersible drilling barge. Diamond and the other defendants in the case argued that the claim was barred by the doctrine of laches, but on appeal, the Louisiana Third Circuit rejected this argument.
- *Dearborn Marine Serv. Inc., v. Chambers & Kennedy*²⁷: This case involved a horrific explosion on an unmanned oil collection and storage platform in the Gulf of Mexico owned by Chambers & Kennedy (C&K). C&K had been ordered to make certain repairs on the barge to bring it into compliance with pollution and safety regulations. The company hired a contractor to make the repairs and in the course of the repair, there was a massive on-platform fire that killed workers. One of the employees of the contractor sued the contractor and C&K. Judge Davis represented C&K in the ensuing wrongful death and negligence suit.
- *Louviere v. Shell Oil Co.*²⁸: Judge Davis represented Texsteam Corporation in a civil suit against it and other companies including Shell Oil for damages arising out of a hot water heater explosion within the living quarters of a stationary drilling platform in the Gulf of Mexico.

¹⁹ <http://www.free-eco.org/funding.php#corporate>.

²⁰ Eric Weiss, *Firms Donated to Groups that Gave Judges Free Trips*, WASH. POST, May 25, 2006.

²¹ <http://www.free-eco.org/about.php>.

²² ExxonSecrets.org, Factsheet: FREE—Foundation for Research on Economics and the Environment, <http://www.exxonsecrets.org/html/orgfactsheet.php?id=34>, (referencing ExxonMobil 2004 Worldwide Giving Report).

²³ *W. Eugene Davis*, 2 ALMANAC FED. JUDICIARY, 2010, available at 2010 WL 2139829

²⁴ *Id.*

²⁵ See e.g., *Istre v. Diamond M. Drilling Co.*, 226 So. 2d 779 (3d Cir. 1969); *Dearborn Marine Serv. v. Chambers & Kennedy*, 499 F.2d 263 (5th Cir. 1974).

²⁶ 226 So. 2d 779 (3d Cir. 1969).

²⁷ 499 F.2d 263 (5th Cir. 1974).

²⁸ 509 F.2d 278 (5th Cir. 1975).

In 2008, Judge Davis had financial investments in oil and energy companies totaling \$2,000 - \$30,000 in annual gross value.²⁹ He had investments in Progress Energy Inc., a Fortune 500 company headquartered in Raleigh, NC providing electricity to customers in Carolina and Florida; Alabama Power, a subsidiary of Southern Company providing electrical services in Alabama; and Edge Petroleum, a Houston-based oil and natural gas company with onshore drilling operations in the Gulf of Mexico.³⁰

Additionally, in 2004, 2006, 2007, and 2008, Judge Davis attended the same seminar as Judge Smith run by the FREE Foundation, the free market environmentalism group described above, and sought corresponding reimbursement for transportation, food, and housing.³¹ Judge Davis has attended another of other judicial seminars, and in fact, was ranked tenth in the country on a list of judges who accept free trips.³²

Judge James L. Dennis

Judge Dennis was nominated to the Fifth Circuit Court of Appeals by President Clinton in 1995.³³ Prior to joining the federal bench, Judge Dennis was a member of the Louisiana House of Representatives (1968-72). He served on the Louisiana Fourth Judicial District Court from 1972 to 1975, the Louisiana Court of Appeals for the Second Circuit from 1974 to 1975, and the Supreme Court of Louisiana from 1975 to 1995.³⁴ Until becoming a state court judge in 1972, Judge Dennis practiced law for ten years at Hudson, Potts & Bernstein – the largest firm in Louisiana.³⁵ As a general civil and criminal defense practitioner, Judge Dennis represented a range of individual and commercial litigants, including personal injury claimants, railroads, a bank, a savings and loan association, insurance companies, small businesspersons, corporations, and federal criminal defendants.³⁶

Judge Dennis has also reported financial investments in the energy sector. Judge Dennis had invested in Transocean, but in 2006 he sold his assets worth less than \$15,000, gaining less than \$1,000 on the transaction.³⁷ In 2008, Judge Dennis reported investments between \$31,001-\$305,000 in oil and energy corporations, including: Teppco Partners L.P. (energy pipeline supplier, \$1,000-\$15,000), Inergy LP (fourth largest propane operator in the US, \$1,000-\$15,000), Crosstex Energy L.P. (natural gas supplier, \$0-\$15,000), Energy Transfer Equity (energy investment cooperative, \$15,001-\$50,000), Hiland Holdings (natural gas processor, \$1,000-\$15,000), Regency Energy Partners (natural gas provider, \$1,000-\$15,000), Encore Energy Partners (natural gas property investor, \$1,000-\$15,000), Energy Transfer Partners (natural gas and propane distributor, \$1,000-\$15,000), Enterprise Products Partners (natural gas

²⁹ Davis, E., 2008 FINANCIAL DISCLOSURE REPORT (2009);

³⁰ Answers.com, <http://www.answers.com/topic/edge-petroleum-corp>

³¹ Davis, E., 2008 FINANCIAL DISCLOSURE REPORT (2009); Davis, E., 2007 FINANCIAL DISCLOSURE REPORT (2008); Davis, E., 2006 FINANCIAL DISCLOSURE REPORT (2007); Davis, E., 2004 FINANCIAL DISCLOSURE REPORT (2005).

³² Harvey Rice, *Area Judge Ranked 4th in Free Trips; Group Lists Jones Among Circuit Jurists Going on the Most Junkets Paid by Conservatives*, HOUSTON CHRONICLE, May 9, 2006.

³³ *James L. Dennis*, 2 ALMANAC FED. JUDICIARY, 2010, available at 2010 WL 2139830.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ DENNIS, J., 2006 FINANCIAL DISCLOSURE REPORT (2007).

pipeline manager, \$1,000-\$15,000), Kinder Morgan Energy (pipeline manager and energy storage builder, \$1,000-\$15,000), Penn West Energy Trust (oil and natural gas producer, \$1,000-\$15,000), Plains All American Pipeline (oil and natural gas transporter, \$1,000-\$15,000), Quest Energy Partners (natural gas producer, \$1,000-\$15,000), Targa Resources Partners (natural gas producer, \$1,000-\$15,000), Vanguard Natural Resource (natural gas developer, \$1,000-\$15,000), Teekay Tankers (oil tanker owner, \$1,000-\$15,000), Western Gas Partners (works with Anadarko Petroleum Corporation to explore energy assets, \$1,000-\$15,000), and Genesis (crude oil developer, \$1,000-\$15,000).³⁸ Despite his substantial financial holdings in oil and gas, Judge Dennis did not recuse himself in the recent *Comer* decision described above.³⁹

Other Judges on the Fifth Circuit

It is not just Judges Smith, Davis, and Dennis who have ties to big oil – many judges on the Fifth Circuit have financial and other ties to oil and energy companies. An overview of some of those connections, based on the judges' 2008 financial disclosure forms and Senate Judiciary Committee questionnaires, is highlighted in the following chart. 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.

³⁸ DENNIS, J., 2008 FINANCIAL DISCLOSURE REPORT (2009).

³⁹ *Comer v. Murphy Oil USA*, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010) (en banc).

Judge	Station	Appointing President	Investments in Gas & Oil in 2008	Investments	Other Ties to Oil
Edith Jones (Chief Judge)	Houston, TX	Reagan	\$110,000 – 330,000	Exxon Mobil, Pennzoil, BP Amoco, and other energy holdings	Ranked fourth on list of judges who accepted free trips for junkets, many paid for by conservative groups. ⁴⁰
Carolyn King	Houston, TX	Carter	\$200,000 – \$450,000	Exxon, BP	Represented various oil companies and the Associated of Oil & Gas Co. before taking the bench.
Thomas Reavley (Senior)	Houston, TX	Carter	\$945,000 - \$2,060,000	Indigo Minerals and various mineral interests which were harvested by companies like BP, EOG, XTO, and Apache	Worked for a firm that specialized in oil & gas. Married to Judge Carolyn King (see above).
William Garwood (Senior)	Austin, TX	Reagan	\$1,100,000 - \$2,280,000	Exxon, Emerson, Dominion, Duke Energy, and various mineral interests	---
Patrick Higginbotham (Senior)	Austin, TX	Reagan	\$115,000 - \$360,000	Exxon & other various smaller investments	---
E. Grady Jolly	Jackson, MS	Reagan	---	---	Ranked thirteenth on list of judges who accepted free trips for junkets, many paid for by conservative groups. ⁴¹
W. Eugene Davis	Lafayette, LA	Reagan	\$2,000 - \$30,000	Edge Petroleum & Progress Energy	Represented oil companies before becoming a judge. Attended junkets paid for by conservative groups.
Jerry Smith	Houston, TX	Reagan	---	---	Represented major oil companies, including Exxon, before becoming a judge.
Rhesa Hawkins Barksdale (Senior)	Jackson, MS	Reagan	---	---	---
Jacques Wiener	New Orleans, LA	G. H. W. Bush	\$1,760,000 - \$6,680,000	Exxon Mobil, Tee Energy Co, Chevron, and other various smaller investments	Represented oil & gas clients, including Texaco. Former Director of Lufkin Ind., an oil & gas equipment manufacturer.

⁴⁰ Harvey Rice, *Area Judge Ranked 4th in Free Trips; Group Lists Jones Among Circuit Jurists Going on the Most Junkets Paid by Conservatives*, HOUSTON CHRONICLE, May 9, 2006.

⁴¹ Harvey Rice, *Area Judge Ranked 4th in Free Trips; Group Lists Jones Among Circuit Jurists Going on the Most Junkets Paid by Conservatives*, HOUSTON CHRONICLE, May 9, 2006.

Emilio Garza	San Antonio, TX	G. H. W. Bush	---	---	Defended Laredo Diesel, Inc. in a civil damages case arising from the explosion of a propane-butane trailer. ⁴²
Harold DeMoss (Senior)	Houston, TX	G.H.W. Bush	\$4,000 - \$60,000	Sunoco, Devon Energy, Anadarko Petroleum (owns 25% share of the Macondo well involved in the Deepwater Horizon event), FPL Group	Represented oil, gas, and other mineral developers before becoming a judge.
Fortunato Benavides	Austin, TX	Clinton	---	---	---
Carl Stewart	Shreveport, LA	Clinton	---	---	---
James Dennis	New Orleans, LA	Clinton	\$31,000 - \$305,000	Numerous holdings in oil and gas developers	Formerly invested in Transocean.
Edith Clement	New Orleans, LA	G. W. Bush	\$595,000 - \$1,445,000	Substantial investments in oil companies including Exxon Mobil, BP, Chevron, Conoco, and numerous others.	Represented big oil companies like Gulf Oil Corp. and Texaco, including cases in which she defended companies responsible for offshore rigs sinking and/or exploding.
Edward Prado	San Antonio, TX	G. W. Bush	---	---	---
Priscilla Owen	Austin, TX	G. W. Bush	\$65,000 - \$255,000	Mineral interests, harvested by companies like Brigham, Apache, Unit, and Holliman	Before taking the bench, Owen specialized in representing oil companies like Exxon and Transco Gas Pipeline Corp.
Jennifer Elrod	Houston, TX	G. W. Bush	\$1,000 - \$15,000	Pricelock Corporation (a fuel price insurance company)	Represented big oil & energy corporations like Centerpoint Energy and Utility Fuels, Inc. before becoming a judge.
Leslie Southwick	Jackson, MS	G. W. Bush	\$2,000 - \$30,000	Mineral interests	Represented primarily oil & gas clients like Shell Oil, Conoco, and Inexco and spoke at seminars sponsored by oil & gas associations.
Catharina Haynes	Dallas, TX	G. W. Bush	\$1,000 - \$15,000	BP	Spent ten years representing corporations including Coastal Oil & Gas.

⁴² Davis v. Laredo Diesel, Inc., 611 S.W.2d 943 (Tex. Civ. App. 1981).