

November 1, 2013



THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Fifth Circuit Court of Appeals has appellate jurisdiction over the federal courts in Texas, Louisiana, and Mississippi. It often has the last word on questions of federal law, so it's imperative that the court is staffed with fair-minded judges who uphold the rule of law and treat all litigants equally. However, 10 of its 15 active judges were appointed by Republican Presidents, and its decisions often reflect a concerted effort by Republican administrations to impose a conservative policy agenda through the courts.

This heavy imbalance has favored powerful special interests at the expense of ordinary Americans. For example, after a group of Hurricane Katrina victims received a favorable ruling from a three-judge panel in their suit against polluter energy companies,¹ the court decided to hear the case “*en banc*”—meaning that the panel decision would be vacated and the court’s full roster of judges would decide the case. But because ties to the energy industry forced so many judges to recuse themselves, there weren’t enough judges left to hear the appeal. The result was that the hurricane victims lost without ever getting their day in court. Their favorable panel decision had already been set aside, and the lost quorum meant that the trial court’s decision—which sided with the energy companies—was reinstated.²

The court’s decisions have also eroded civil rights, marginalized criminal defendants, and demonstrated insensitivity and even outright hostility toward racial minorities and women. Just this past week, a panel of three Republican appointees—Judges Priscilla Owen, Catharina Haynes, and Jennifer Elrod—voted to reinstate a Texas law that places unnecessary, burdensome requirements on abortion providers, and that is already forcing clinics to close down.³

Below, the court’s 15 active judges and their judicial records are profiled in order of seniority.

A. Chief Judge Carl E. Stewart

Current Chief Judge Carl E. Stewart is the first African American Chief Judge of the Fifth Circuit, and the first African American U.S. Circuit Court judge from Louisiana. He was appointed to the court by President Bill Clinton in 1994. Before taking the bench, Chief Judge Stewart worked as a defense attorney in the Army JAG Corps, an Assistant State Attorney General for the State of Louisiana, and a federal prosecutor for the Department of Justice. From 1985 to his federal appointment in 1994, Judge Stewart was a Louisiana state court judge on both trial and appellate



¹ *Comer v. Murphy Oil*, 585 F.3d 855 (5th Cir. 2009).

² *See Comer v. Murphy Oil*, 718 F.3d 460 (5th Cir. 2013).

³ *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13-51008, 2013 U.S. App. LEXIS 22231 (5th Cir. 2013).

courts. On the Fifth Circuit, Chief Judge Stewart recently switched his vote in an important civil rights case. After first rejecting an ironworker’s claim that he had suffered unlawful sex discrimination in the form of “gender-stereotyping harassment,” Chief Judge Stewart joined the *en banc* majority that reinstated the ironworker’s favorable jury verdict under Title VII.⁴

B. Judge Carolyn King

Appointed by President Jimmy Carter in 1979, Judge King is the longest-serving judge on the Fifth Circuit. Widely regarded as a moderate voice on the largely conservative court, Judge King is the only woman on the Fifth Circuit appointed by a Democratic President. In 1999, she became the first woman to serve as Chief Judge, and in 2002 she became the first woman to chair the Executive Committee of the Judicial Conference, the nonpartisan body headed by the Chief Justice of the United States. Her husband, Judge Thomas Morrow Reavley, was also appointed to the Fifth Circuit by President Carter in 1979 and took senior status in 1990. Judge King has announced her intention to take senior status on December 31, 2013.



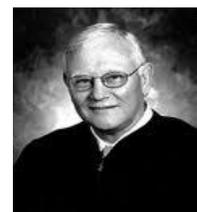
C. Judge E. Grady Jolly

Judge Jolly was appointed to the bench by President Ronald Reagan in 1982. In 2009, Judge Jolly attended the “Criminalization of Corporate Conduct” seminar sponsored by the American Petroleum Institute and the U.S. Chamber of Commerce. Then, in 2012, he ruled in favor of both entities in a suit against the Environmental Protection Agency. In a 2-1 majority opinion, Judge Jolly ruled that the EPA unlawfully rejected a Texas emissions cap that had been supported by the fossil fuels industry.⁵ In addition, Judge Jolly trivialized undisputed evidence of pervasive sexual harassment to reject an ironworker’s Title VII sex discrimination claim,⁶ a decision that was later vacated on *en banc* review.



D. Judge W. Eugene Davis

Judge Davis was nominated to a district court seat in the Western District of Louisiana by President Gerald Ford in 1976. In 1983, President Reagan elevated Judge Davis to the Fifth Circuit. Only months after the Deep Water Horizon disaster that caused almost five million barrels of oil to spill into the Gulf of Mexico, Judge Davis—along with fellow Reagan appointee Judge Jerry Smith—ruled in favor of oil companies that challenged the President’s partial moratorium on offshore drilling in the Gulf. At the same time, both Judge Davis and Judge Smith have attended seminars—for which they were reimbursed transportation, lodging, and meal expenses—hosted by the Foundation for Research on Economics & the Environment (FREE), an oil-industry funded and anti-regulation think-tank.



⁴ *EEOC v. Bob Bros. Constr. Co.*, No. 11-30770, 2013 U.S. App. LEXIS 19867 (5th Cir. 2013) (*en banc*); *c.f.* *EEOC v. Bob Bros. Const. Co.*, 689 F.3d 458 (5th Cir. 2012).

⁵ *Texas v. Environmental Protection Agency*, 690 F.3d 670 (5th Cir. 2012).

⁶ *EEOC v. Bob Bros. Const. Co.*, 689 F.3d 458 (5th Cir. 2012).

E. Judge Edith H. Jones

Appointed to the Fifth Circuit by President Reagan in 1985, Judge Jones has disparaged the right to abortion, advocated for streamlined appeals in death penalty cases, suggested that Congress lacks the power to prohibit possession of machine guns, and stated that whether a public school student has the right to be free from sexual harassment is “still vague.”⁷ Her views were laid bare in *McCorvey v. Hill*,⁸ a suit challenging the constitutional right to abortion. Although Judge Jones agreed to dismiss the case on procedural grounds, she wrote separately to urge the Supreme Court to overturn *Roe v. Wade*, and to criticize the Court for “struggl[ing] with the particular facts . . . of death penalty cases,” while ignoring unsupported, right-wing claims about women’s mental and physical health following abortion. More recently, a group of civil rights organizations and ethics experts filed a complaint of misconduct against Judge Jones, alleging, among other things, that she made overtly racist remarks during a speech on the death penalty. The complaint is pending with the judicial council of the U.S. Court of Appeals for the D.C. Circuit.⁹



F. Judge Jerry E. Smith

Appointed by President Reagan, Judge Smith has served on the Fifth Circuit since 1987. Judge Smith wrote the opinion striking down affirmative action at the University of Texas Law School,¹⁰ a ruling later rejected by the Supreme Court.¹¹ He also wrote an opinion in favor of asbestos manufacturers that struck down an EPA ban on asbestos products,¹² and was one of five Fifth Circuit judges who rejected an ineffective assistance of counsel claim against a lawyer who slept through key parts of a capital murder trial.¹³ During oral argument in 2012, Judge Smith gave an unprecedented and highly-politicized order requiring the Department of Justice to submit a letter on whether judges may rule that federal laws are unconstitutional. The order was in direct response to President Barack Obama’s off-the-cuff remark—made wholly apart from the litigation before the Fifth Circuit—that it would be “unprecedented” for the Supreme Court to strike down the Affordable Care Act.



G. Judge James L. Dennis

After serving on the Supreme Court of Louisiana for twenty years, Judge Dennis was appointed to the Fifth Circuit by President Clinton in 1995. Judge Dennis dissented in two cases arising out of the Deepwater Horizon oil spill disaster. In one, he dissented from a ruling that placed a hold on

⁷ *Doe v. Taylor Ind. School Dist.*, 15 F.3d 443 (5th Cir. 1994) (Jones, J., dissenting).

⁸ 385 F.3d 846, 850 (5th Cir. 2004) (Jones, J., concurring).

⁹ Alliance for Justice submitted a letter to Chief D.C. Circuit Judge Merrick B. Garland in support of the ethics complaint; it is available at http://www.afj.org/wp-content/uploads/2013/06/edith_jones_letter.pdf.

¹⁰ *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

¹¹ See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹² *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991).

¹³ *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001).

payments from BP Exploration & Production, Inc. to victims of the disaster.¹⁴ In another, he said the President’s moratorium on offshore drilling should remain in place pending the appeal of a district court order.¹⁵ And in a case with sweeping civil rights implications, Judge Dennis dissented from a decision holding that undocumented immigrants do not have Second Amendment rights because they are not “people,” and suggesting that they lack Fourth Amendment and other fundamental rights for the same reason.¹⁶ In 2009, Judge Dennis wrote the opinion finding that Gulf Coast residents had standing to sue based on allegations that the defendant energy companies had contributed to global warming, which in turn increased the severity of Hurricane Katrina and the resulting property damage.¹⁷

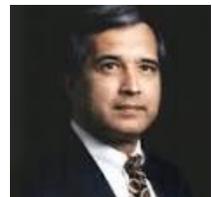
H. Judge Edith Brown Clement

In 1991, Judge Clement was nominated by President George H.W. Bush to the U.S. District Court for the Eastern District of Louisiana. She was elevated to the Fifth Circuit by President George W. Bush in 2001. Consistent with her “strict constructionist” judicial philosophy, Judge Clement has joined several decisions that argue for a narrow view of Congress’s authority under the Commerce Clause.¹⁸ She also joined one of the Fifth Circuit’s most notorious recent decisions, *Doe v. Silsbee Independent School District*.¹⁹ The plaintiff in *Doe*, a high school student and former member of her school’s cheerleading team, alleged a First Amendment violation because she was forced to cheer for her alleged rapist during a basketball game. In a decision joined by Judge Clement, the Fifth Circuit not only dismissed the claim against the school district, but ordered the plaintiff to pay legal fees for filing a “frivolous” lawsuit. Finally, Judge Clement sits on the board of the oil-funded, anti-regulation think-tank “FREE,” despite an opinion from the Judicial Conference’s Committee on Codes of Conduct that it is an ethics violation to do so.²⁰



I. Judge Edward C. Prado

Judge Prado has worked on both sides of the criminal justice system, having spent time as an Assistant District Attorney, an Assistant Federal Public Defender, and as the United States Attorney for the Western District of Texas. In 1984,



¹⁴ *Deepwater Horizon v. BP Exploration & Prod.*, 2013 U.S. App. LEXIS 20188 (5th Cir. Oct. 2, 2013) (Dennis, J., dissenting).

¹⁵ *Hornbeck Offshore Servs. v. Salazar*, 396 Fed. App’x 147 (5th Cir. 2010) (Dennis, J., dissenting).

¹⁶ *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) (Dennis, J., dissenting).

¹⁷ *Comer v. Murphy Oil*, 585 F.3d 855 (5th Cir. 2009). This opinion was vacated when the court decided to review the case *en banc*. See note 2, *supra*.

¹⁸ See, e.g., *United States v. McFarland*, 311 F.3d 376 (5th Cir. Tex. 2001) (en banc) (Garwood, J., dissenting) (arguing that the Commerce Clause does not permit Congress to regulate local robberies); *GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286 (5th Cir. 2004) (arguing that the Endangered Species Act, which regulates rare species, is unconstitutional absent a commercial nexus).

¹⁹ No. 09-41075 (5th Cir. Sept. 16, 2010) (per curiam). The award of attorney’s fees was subsequently reversed, in part.

²⁰ See Letter from Gordon J. Quist, Chairman of the Committee on Codes of Conduct, to Judge Andre M. Davis (March 30, 2005), available at <http://www.tulanelink.com/pdf/judge-davis-ethics-hearing-opinion.pdf>.

President Reagan appointed Judge Prado to a district court seat in the Western District of Texas. President George W. Bush elevated him to the Fifth Circuit in 2003. Judge Prado has expressed moderate judicial views on both federalism and social justice issues. In *Koog v. United States*,²¹ for example, Judge Prado held that the Brady Handgun Violence Prevention Act, which required local law enforcement officials to comply with federal background checks, did not violate the Tenth Amendment. And in May 2012, Judge Prado joined Judges Smith and Davis to uphold an injunction barring enforcement of a state law that blocked Planned Parenthood from receiving funds under Texas’s “Women’s Health Program.”²²

J. Judge Priscilla Owen

Judge Owen was nominated to the Fifth Circuit by President George W. Bush in 2001, and confirmed in 2005. Judge Owen’s nomination faced opposition based on her record as a justice on the Texas Supreme Court. During her confirmation hearing, Senator Patrick Leahy, the senior Democrat on the Senate Judiciary Committee, remarked that Judge Owen is a “judicial activist . . . [whose] judicial record shows a bias in favor of government secrecy and business interests, and against the environment, victims of discrimination and medical malpractice.”²³ For example, Judge Owen took thousands of dollars in campaign contributions from Enron, and then wrote an opinion reducing Enron’s school taxes by \$15 million.²⁴ In a case involving reproductive rights, Judge Owen dissented and joined a minority that wanted to make it harder for minors to win approval for an abortion without parental notification.²⁵ Then-Justice Alberto Gonzalez—an established conservative who later served as U.S. Attorney General under President George W. Bush—accused Judge Owen and the other dissenters of trying to “create hurdles that simply are not to be found in the words of the statute,” and committing “an unconscionable act of judicial activism.”²⁶ In 2013, Judge Owen wrote a Fifth Circuit opinion reinstating a Texas law that requires abortion providers to meet impossible requirements—such as acquiring admitting privileges at a hospital, even when the closest hospital is more than 30 miles away, and even though hospitals are free to deny admitting privileges based on anti-choice institutional views.²⁷ The law has already forced many clinics to close down, leaving thousands of women without access to abortion services.



²¹ 852 F. Supp. 1376 (W.D. Tex. 1994). This ruling was overturned on appeal in an opinion written by Judge E. Grady Jolly. See *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996).

²² *Planned Parenthood Assoc. of Hidalgo Cnty v. Suehs*, No. 12-50377 (5th Cir. May 4, 2012). A subsequent panel, in a decision written by Judge E. Grady Jolly, vacated the injunction and let the law—which threatens the existence of Planned Parenthood in Texas—take effect. *Planned Parenthood Assoc. of Hidalgo Cnty v. Suehs*, 692 F.3d 343 (5th Cir. 2012).

²³ Opening Statement, Hearing for Priscilla Owen (March 13, 2003).

²⁴ *Enron Corp. v. Spring Ind. Sch. Dist.*, 922 S.W.2d 931 (Tex. 1996).

²⁵ *In re Doe*, 19 S.W.3d 346, 376 (Tex. 2000) (Owen, J., dissenting).

²⁶ *Id.* at 366.

²⁷ *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13-51008, 2013 U.S. App. LEXIS 22231 (5th Cir. 2013).

K. Judge Jennifer Walker Elrod

Before taking the bench, Judge Elrod was a litigator at the law firm of Baker Botts LLP. In 2002, Governor Rick Perry appointed Judge Elrod to the state bench in Harris County, Texas. She served there until 2007, when President George W. Bush appointed her to the Fifth Circuit. Her nomination faced some controversy over a temporary restraining order she issued that blocked a television news station from broadcasting information about a prominent televangelist. The TRO was subsequently removed by another state court judge, who found that Judge Elrod's order gave insufficient weight to First Amendment concerns. Despite the controversy, Judge Elrod was confirmed by the full Senate in October 2007, about six months after her nomination. This year, she joined Judge Owen's panel opinion that overturned a district court injunction, and reinstated a Texas law that has already forced a number of abortion clinics to close.



L. Judge Leslie H. Southwick

Judge Southwick is a Lieutenant Colonel in the Mississippi National Guard and a former judge of the Mississippi Court of Appeals. He was appointed to the Fifth Circuit by President George W. Bush in 2007. Judge Southwick's nomination was opposed by civil rights groups that claimed that his state court judicial record revealed insensitivity toward workers, consumers, people injured by corporations, racial minorities, and the gay community. In 2013, Judge Southwick joined a decision that favored B.P. in the oil company's dispute with its administrator of claims arising out of the 2010 Gulf oil spill. The ruling required the district court to partially enjoin payments made as part of a settlement between BP and a plaintiff-class of oil spill victims.²⁸ He also joined Judge Jolly, and ruled in favor of the petroleum and chemical manufacturing industries, to hold that the E.P.A. violated the Administrative Procedure Act when it rejected Texas state emissions standards.²⁹ In the civil rights context, Judge Southwick was part of the *en banc* majority in *Bob Brothers Construction* that recognized same-sex gender-stereotyping as actionable sex discrimination under Title VII.³⁰ And over a dissent by Judge Owen, he ruled to reinstate a Title VII racial discrimination claim brought by the EEOC and two African-American rail workers who alleged that they had been punished because of their race. Judge Southwick joined the 2-1 decision finding that the rail company had failed to meet its burden of "producing legitimate, nondiscriminatory reasons that motivated the actual employment decisions at issue."³¹



M. Judge Catharina Haynes

Judge Haynes was nominated to the Fifth Circuit by President George W. Bush in 2007, and confirmed in 2008. She was the sixth and final judge that President Bush appointed to the court. Thus far, Judge Haynes has issued rulings that set forth



²⁸ *Deepwater Horizon v. BP Exploration & Prod.*, note 14, *supra*.

²⁹ *Texas v. Environmental Protection Agency*, note 5, *supra*.

³⁰ *EEOC v. Bob Bros. Constr. Co.*, note 4, *supra*.

³¹ *Turner v. Kan. City Southern Ry. Co.*, 675 F.3d 887, 904 (5th Cir. 2012).

narrow views on the rights of immigrants and the right to abortion. For example, although federal law grants asylum to non-citizens whose “life or freedom would be threatened” because of their familial ties, Judge Haynes wrote a 2-1 opinion denying asylum to an Albanian woman whose husband testified against an Albanian mobster.³² Judge James L. Dennis dissented. And in September 2013, Judge Haynes helped to uphold a Louisiana law that broadens the malpractice liability of abortion providers by allowing women to sue for damage to the fetus—even despite written waiver—while also denying them access to the state-run malpractice insurance fund. Although the law may drive providers out of the state, the court ruled that it does not “unduly burden” women’s access to abortion.³³

N. Judge James E. Graves, Jr.

Judge Graves was President Obama’s first appointment to the Fifth Circuit, and is the first African American Circuit Court judge from Mississippi. He began his legal career in 1980 as a staff attorney at Central Mississippi Legal Services. In 2001, Mississippi Governor Ronnie Musgrove appointed Judge Graves to the Mississippi Supreme Court. He served there until his Fifth Circuit confirmation in 2011.



President Obama first nominated Judge Graves in 2010, but the Senate failed to act on his nomination and his name was resubmitted in 2011. Judge Graves’s nomination had the support of Republican Mississippi Senator Roger Wicker, who observed that, “during his time on the Mississippi Supreme Court, Justice Graves has been a diligent and capable jurist.”

O. Judge Stephen Higginson

Judge Higginson was appointed to the Fifth Circuit by President Obama in 2011. After his nomination, Republican Senator David Vitter said that “Steve Higginson will make an outstanding U.S. Fifth Circuit judge—his intellect and work ethic as a federal prosecutor have won him admiration from all quarters.” Judge Higginson clerked for D.C. Circuit Judge Patricia Wald, and for U.S. Supreme Court Justice Byron White. He then served as an Assistant United States Attorney in the District of Massachusetts and the Eastern District of Louisiana. In 2004, he became a full-time faculty member at Loyola University New Orleans College of Law, while retaining part-time status at the U.S. Attorney’s Office supervising appeals.



³² *Demiraj v. Holder*, 631 F.3d 194 (5th Cir. 2011).

³³ *KP v. LeBlanc*, No. 12-30456 (5th Cir. Sept. 4, 2013).