Cross-posted at CPRBlog.

Conservative media and bloggers are making much of a ruling last week by Judge Martin Feldman of the Eastern District of Louisiana that the Department of Interior was in contempt of his June 2010 order enjoining enforcement of the May moratorium on new deepwater exploratory drilling for oil. The Washington Times, for example, accused the administration of "tempt[ing] a constitutional confrontation." Not so fast. Judge Feldman's latest decision says more about the contempt of some conservative judges for the law than it does about the administration. Can you say "activist judge"?

Judge Feldman, who was appointed to the federal bench by Ronald Reagan, is a staunch friend of the Gulf energy industry. Until recently, he was also an investor. In 2008, he owned stock in Transocean (the owner of the Deepwater Horizon and other drilling rigs) and several other energy companies. He sold his Exxon stock the very day he enjoined the moratorium last June, prompting six Democratic Senators to call for an investigation by the Senate's Judiciary Committee.

Opinion seems to be divided on whether Judge Feldman was required to recuse himself by the Code of Judicial Conduct for U.S. Judges, which says that "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities," or by 28 U.S.C. 455, which requires that federal judges disqualify themselves "in any proceeding in which [their] impartiality might reasonably be questioned" and specifically if they have "a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." (Compare this take with this one and this one.)

I was willing to give Judge Feldman the benefit of the doubt last summer. I opined at the time that the decision enjoining the initial moratorium was "clearly wrong," but I didn't think it was so far beyond the pale as to be absurd. The gravamen of that decision was not that Interior lacked the authority to impose a moratorium, but simply that the agency had not adequately explained its rationale for doing so. There's no question that the record supporting that initial moratorium was thin, to put it mildly. The Department acted in a hurry, relying primarily on a common sense argument that if one deep exploratory well blew another might too. That would have been enough for me, but it didn't shock me that it wasn't enough for a Gulf-region conservative judge.

This latest ruling is, however, too far beyond the pale. Perhaps Judge Feldman was displaying his anger over being asked to recuse himself, perhaps he truly believes the feds were thumbing their nose at him, or perhaps he now wishes he had framed his initial

decision differently. But personal pique isn't supposed to drive judge's decisions, and this one is wholly divorced from any reasonable reading of the law or the facts.

Last week, Judge Feldman ordered the Interior Department to pay the attorney fees of the oil interests that sued it, on the theory that the Department had ignored his earlier order in a manner that amounted to contempt of court.

That theory is simply insupportable. As Judge Feldman himself concedes, it requires a showing by clear and convincing evidence that the government failed to comply with a court order. That flat out didn't happen. Interior complied fully with both the letter and the spirit of Judge Feldman's injunction. It withdrew the first moratorium. That a second moratorium quickly followed is in no way inconsistent with the injunction. Perhaps Judge Feldman didn't go back and read his injunction decision, but what it says repeatedly is that Interior didn't sufficiently explain the basis for the moratorium. Here's his key conclusion:

> The Court cannot substitute its judgment for that of the agency, but the agency must "cogently explain why it has exercised its discretion in a given manner." State Farm, 463 U.S. at 48. It has not done so.

Interior took Judge Feldman's objections to heart. When it issued the second moratorium, the Department supplied a detailed justification for its scope and duration. It directly answered Judge Feldman's criticisms of the first moratorium. Far from displaying its contempt for Judge Feldman's opinion, the second moratorium gave that opinion full credence, and answered it in a way that was both respectful and well within the agency's authority.

Maybe at this point Judge Feldman wishes he had ruled earlier that Interior flat out lacked authority to temporarily halt offshore drilling. It's hard to imagine how he could have justified such a ruling, since the Outer Continental Shelf Lands Act clearly conveys that authority. Nonetheless, *if* that's what he had said and it had stood up on appeal, I would agree that respect for law would prohibit the administration from issuing essentially the same moratorium with a different framing. But he said nothing of the kind. It's revisionist history and wholly unfair to the government for Judge Feldman now to characterize Interior as treating his order with contempt. He seems to have expected Interior to read his mind rather than his written opinion. If this opinion isn't enough to show that Judge Feldman's personal bias is interfering with his performance of his judicial function, it's hard to imagine what would be.

At best this opinion is judicial activism, stretching both law and facts to reach the judge's preferred result. At worst, it evidences the judge's own contempt for the rule of law and the power of the executive branch as explicitly conferred by Congress.