THE TOXIC SUBSTANCES CONTROL ACT:
FROM THE PERSPECTIVE OF
E. DONALD ELLIOTT

Transcript of Interviews
Conducted by
Jody A. Roberts and Kavita D. Hardy

at
Willkie Farr & Gallagher LLP
Washington, D.C.

on
22 January 2010

(With Subsequent Corrections and Additions)
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E. DONALD ELLIOTT

1948 Born in Chicago, Illinois on 4 April

Education

1970 B.A., summa cum laude, Phi Beta Kappa, Department Honors with Exceptional Distinction, Yale University
1974 J.D., Yale University

Professional Experience

U.S. District Court for the District of Columbia, Washington, D.C.
1974-1975 Law Clerk to Gerhard Gesell

U.S. Court of Appeals for the District of Columbia Circuit, Washington, D.C.
1975-1976 Law Clerk to David L. Bazelon, Chief Judge

Leva, Hawes, Symington, Martin & Oppenheimer LLP, Washington, D.C.
1976-1980 Associate

Yale University, New Haven, Connecticut
1981-1992 Professor of Law
1992-1993 Julien and Virginia Cornell Chair in Environmental Law and Litigation
1993-present Professor (Adjunct) of Law

General Electric Company, Fairfield, Connecticut
1985-1989 Special Litigation Counsel, Corporate Environmental Programs

University of Chicago, Chicago, IL
1985-1986 Visiting Professor of Law

Georgetown University, Washington, D.C.
1986-1987 Visiting Professor of Law
2001-2009 Adjunct Professor of Law

U.S. Environmental Protection Agency, Washington, D.C.
1989-1991 General Counsel
Fried, Frank, Harris, Shriver & Jacobson LLP, Washington, D.C.  
1991-1996  
Partner and head of the Environmental and Product Safety Department

Paul, Hastings, Janofsky & Walker LLP, Washington, D.C.  
1996-2003  
Partner and co-chair of the national environmental practice group

Willkie, Farr & Gallagher LLP, Washington, D.C.  
2003-2013  
Partner and chair of the Environment, Health and Safety Department

Covington & Burling LLP, Washington, D.C.  
2014-present  
Senior of Counsel & Co-chair, Environmental Practice Group

**Honors**

2003-2009  
Board of Environmental Studies and Toxicology, National Academy of Sciences  
Fellow, American College of Environmental Laws  
Senior Fellow, Administrative Conference of the United States Boards, Environmental Law Institute and Center for Clean Air Policy
E. Donald Elliott obtained his bachelor’s degree and his law degree from Yale University, where he now teaches. He clerked for Judge Gerhard Gesell and Chief Judge David Bazelon, both of the U.S. Court of Appeals for the District of Columbia Circuit; and served as General Counsel for the U.S. Environmental Protection Agency. Since leaving the Agency he has been in private practice, specializing in environmental law.

Elliott begins his interview by emphasizing that confidentiality about legal matters during his tenure at the EPA. He then discusses the beginnings of Toxic Substances Control Act (TSCA) and its relation to Resource Conservation and Recovery Act. He concentrates on concepts of risk and prevention, explaining their changing interplay over the years. He describes what he wishes the EPA’s role could be and what it is, decrying especially the “disaster” of the failure of the EPA to regulate asbestos. Noting especially a case involving a judgment against Corrosion Proof Fittings. Elliott believes that the major reason for failure in this major public health initiative was the conservative interpretation of the law. He also believes that this decision detracted power from Section 6 of TSCA.

According to Elliott, instead of using Europe’s “precautionary principle,” the EPA must now show strong evidence of harm in all areas; that is, regulation must now hinge on risk assessment, not on prevention of harm. Other attempts to use Section 6 also have not succeeded. In Ethyl Corporation v. EPA, Judge James Wright established the precaution principle but was reversed by the Supreme Court, which held that hazards are a matter of fact, not policy; furthermore, this decision removed “deference” to the EPA that previously had been assumed, thus establishing “hybrid rulemaking” that made Section 6 much harder to implement.

In general, Elliott believes that the EPA is responsible for maintaining public health and should use police power to regulate in order to prevent harm from pollution. He prefers the Registration, Evaluation, Authorisation, and Restriction of Chemical substances (REACH) approach in Europe, maintaining that Americans do not trust government as much as Europeans do. He affirms Judge Harold Leventhal’s dictum that regulation should balance the risk of false negatives with the risk of false positives. Using the standard of “reasonable assurance of no harm” works for food quality but not for hazardous materials; in cases involving such materials overregulation is preferred. From his perspective, the Clean Air Act and Superfund are EPA’s finest achievements. Elliott has spent his career trying to “mesh” science and the law.
INTERVIEWERS

Jody A. Roberts is the Associate Director for the Center for Contemporary History and Policy and the Manager of the Environmental History and Policy Program at the Chemical Heritage Foundation. Roberts received his Ph.D. and M.S. in Science and Technology Studies from Virginia Tech and holds a B.S. in Chemistry from Saint Vincent College. His research focuses on the intersections of regulation, innovation, environmental issues, and emerging technologies within the chemical sciences.

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Early Years of Toxic Substances Control Act (TSCA)  

**Attempting to Expand TSCA’s Scope**  
“Precaution principle” used in Europe. High burden or proof is required. More articles about asbestos than about anything else except ionizing radiation. Regulation struck down, hence public health “disaster.” Voluntary industry agreements have led to no more asbestos. Asbestos as test case. Section 6 rendered much more difficult to use. Edward Warren and Gary Marchant, opponents’ lawyers, “best environmental lawyers for industry.” Argument hinged on risk assessment, not prevention. Result requires least drastic remedy.

**Fallout for Future of TSCA**  
Section 6 cannot be used for cross-media purposes. Turning away from prevention began with benzene and cotton dust cases in Occupational Safety and Health Administration (OSHA). Ethyl Corporation v. EPA established precaution approach. Hazards to be defined by “delegated decisions of legislative policy.” Judge James Skelly Wright. Supreme Court held that hazards are matter of fact, not policy. Differences among Circuits, especially Fifth, Eleventh, and District of Columbia. Policy judgments crucial; theory abandoned in favor of hybrid rulemaking after Ethyl. EPA should have appealed Corrosion, as asbestos has no thresholds. Twenty years of OSHA, seven regulations; but number of regulations not important if change in behavior effected. Michael Shapiro: Ten percent of resources used to determine course of action, ninety percent to prepare for court. Courts should balance fact and policy but assume conscientious honesty of scientists and defer to EPA. Judge Harold Leventhal and International Harvester Company v. Ruckelshaus: must balance risks of false positives and false negatives.
More General Thoughts on TSCA

Using “reasonable assurance of no harm” as standard in Food Quality Protection Act okay, but not for hazardous materials. Judge David Bazelon. *Corrosion* case about the most comprehensive evidence Agency could provide; Judge Smith’s decision wrong. One hundred thousand pages of documents, 10,000 documents testifying to harmfulness of asbestos. Justice Benjamin Cardozo’s belief that judges must be given flexibility compared with Judge Smith’s belief that law must be strictly defined. Circuit hunting. Wants all TSCA cases tried only in District of Columbia Circuit. Blanket authority for EPA. Kepone and James River. Industry and TSCA. Environmentalists, EPA, and industry compromising on regulation: everyone goes away a little unhappy (Judge Gerhard Gesell’s dictum). Elliott has spent career trying to mesh science and law. Bazelon, Wright, and Leventhal willing to err on overregulation side. Toxicologists, including Elliott’s wife, disagree about science of secondhand smoke, but he thinks regulating it good anyway. Clean Air Act and Superfund best successes of EPA.
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