

CHEMICAL HERITAGE FOUNDATION

**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

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

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

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

1981-1992 Yale University, New Haven, Connecticut  
Professor of Law

1992-1993 Julien and Virginia Cornell Chair in Environmental Law  
and Litigation

1993-present Professor (Adjunct) of Law

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

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

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

1989-1991 U.S. Environmental Protection Agency, Washington, D.C.  
General Counsel

1991-1996	Fried, Frank, Harris, Shriver & Jacobson LLP, Washington, D.C. Partner and head of the Environmental and Product Safety Department
1996-2003	Paul, Hastings, Janofsky & Walker LLP, Washington, D.C. Partner and co-chair of the national environmental practice group
2003-2013	Willkie, Farr & Gallagher LLP, Washington, D.C. Partner and chair of the Environment, Health and Safety Department
2014-present	Covington & Burling LLP, Washington, D.C. 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
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## ABSTRACT

**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.

**Kavita D. Hardy** is a research assistant in the Environmental History and Policy Program at the Chemical Heritage Foundation. She received a B.A. in Chemistry and Economics from Swarthmore College.

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<p>Elliott's early career suit against Donald Clay and Environmental Protection Agency (EPA) for not regulating asbestos in public schools. Asbestos guidelines established as result. <i>Corrosion Proof Fittings v. EPA</i> limited power of TSCA. Ernie Rosenberg. Section 6 as lever to get negotiation. Confidentiality required of Elliott, who was general counsel. William Reilly and Terry Davies drafted TSCA about 1970. Roger Strelow and Resource Conservation and Recovery Act (RCRA) first invoked pollution prevention, now called green chemistry. Paul Anastes, "Father of Green Chemistry." F. Henry Habicht and concepts of risk; risk assessment; market-based systems; internationalism; pollution prevention. Ten years of work on asbestos abatement regulation as major public health initiative; catastrophic failure. Reasons for failure. Fraudulent injury claims. Scientific Advisory Board to reevaluate, using risk as metric across programs. Asbestos Ban and Phaseout Rule a test of EPA's ability to prevent pollution.</p>	
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<p>"Precaution principle" used in Europe. High burden of 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.</p>	
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<p>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). <i>Ethyl Corporation v. EPA</i> 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 <i>Ethyl</i>. EPA should have appealed <i>Corrosion</i>, 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 <i>International Harvester Company v. Ruckelshaus</i>: must balance risks of false positives and false negatives.</p>	



## More General Thoughts on TSCA

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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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