



AN INTERVIEW WITH THEODORE GARRETT

Theodore Garrett is the winner of the environment lawyer of the year for the seventh year running, meaning he has been the only recipient of the award since its inception in 2005. A leading name in the international environmental and energy sector, he has over 40 years experience in environmental regulation and compliance and also in the newer field of carbon emissions and clean technology. Based in DC, he represents multinationals in the various industries in transactions, litigation, and regulatory proceedings at the US Environmental Protection Agency and other agencies. In a special conversation he provides an insight into his career and shares his views on the environmental issues facing lawyers today.

With a BA in philosophy and physics, law does not seem an obvious choice, so how did you find yourself in this profession and how did you become interested in environment law?

As a youngster, I was very interested in science, building rockets and transistor radios, entering science fairs, and the like. When it came time for college came, I was accepted at MIT and Yale and decided to attend Yale because I wanted an exposure to a broader curriculum in the humanities, not only engineering. Partly by process of elimination, I decided that a career in law might be more gratifying and suitable for me than a career in engineering and science. My environmental law practice covers the intersection of science, law and policy, and thus in retrospect, my undergraduate education at Yale provided a great foundation for my subsequent legal career.

Following law school, I clerked on the United States Court of Appeals for the Second Circuit and the US Supreme Court and the Department of Justice before joining Covington & Burling in 1971. It was a pivotal moment to start practising environmental law, with the passage of the Clean Air Act in 1970 and the Clean Water Act in 1972. Clients began asking for assistance in this new area, and I was fortunate to be involved in the early regulatory proceedings and litigation that would shape the law in this area. It was exciting and gratifying because the issues were interesting and important and it allowed me to combine my keen interest in science with my law practice.

What do you find most fulfilling about this area of practice?

Environmental law is fulfilling in many ways. The issues are of national and international importance. Environmental law is about protecting human health and the environment from a local, national and global perspective. The issues are important to the public at large and, of course, the issues are important to our clients, who need advice and assistance concerning compliance, transactions and the development of regulations. This area of the law is continually evolving and changing in complex ways, which makes it a challenge. To practise effectively, one must understand the underlying scientific and engineering issues as well as the client's business. During my years in practice, I

have had the good fortune to work with a number of first-rate scientists and engineers on a broad array of subjects, including air quality modelling, the fate and transport of groundwater, aquatic toxicology, wastewater treatment design, and in situ bioremediation. Finally, many of the issues arise in contexts that become highly visible matters of public interest, which means that lawyers need to understand and effectively address the policy and reputational implications of their clients' interactions with regulatory agencies and the public.

You clerked for the Hon Warren Burger at the Supreme Court of the United States and later and later assisted the Hon William Rehnquist at the US Department of Justice. How did you find yourself in those roles, and how did those experiences inform your practice of law?

A Supreme Court clerkship is a special experience – it is a great honour to be selected. My year at the court was very gratifying. I had an opportunity to witness advocacy at a very high level. I had an opportunity to get to know Chief Justice Burger, who was as remarkable as the Chief Justice of the nation's highest court and as a person. He was filled with passion for the law and had a wide range of interests. He was interested in how the courts worked in England and other countries around the world. He improved relations with the U.S. Congress and obtained resources to improve the federal and state court systems. I also had an opportunity to interact with the other justices and their law clerks. During my year with the Chief Justice, the Court decided a number of exciting and significant cases, including the Pentagon Papers case and the school desegregation cases.

I served as a special assistant to William Rehnquist when he was the assistant attorney general in charge of the Office of Legal Counsel (the OLC) at the US Department of Justice in Washington. At that time, the OLC effectively served as counsel to the White House. Unlike the present, at that time the White House did not have a significant legal staff. The OLC dealt with a wide range of issues, including disputes among agencies, matters overlapping different Department of Justice divisions, and the vetting process for Supreme Court justices. I

had the opportunity to work with Bill Rehnquist, before he was appointed to the Supreme Court, and with seasoned staff lawyers. I learned much about how the Department of Justice handles the government's legal matters. At times when I was in the Department of Justice law library, I would see Bill Rehnquist, uncommon among the senior appointed officials, reading cases and statutes for himself.

What was your first, most significant environment case at Covington & Burling, and what did you take away from it that stayed with you throughout your career?

Soon after arriving at Covington, the firm was asked to represent the Sun Oil Company in a matter involving an offshore oil lease in the Santa Barbara Channel. Sun's lease was adjacent to a tract leased by the Union Oil Company, which had a blowout that received national media attention. After the Union Oil blowout, the Department of the Interior revised its regulations to require drilling practices that would avoid another such blowout. Nonetheless, the department denied Sun permission to install an oil-drilling platform to produce oil on its tract. Sun asked us for advice. We filed a lawsuit in the US Court of Claims on the grounds that Sun had paid a considerable amount for its lease and the government's refusal to allow the company to produce oil was a breach of its lease agreement and a taking of property that entitled Sun to compensation.

During discovery, we learned that various offices within the Department of Interior recommended approval of the Sun platform, but those recommendations were mysteriously overruled from above. Our client sent us a clue to the mystery: a report, published in a local Californian newspaper during a campaign appearance by President Nixon, who was then seeking re-election, saying that although Rogers Morton made the announcement concerning the Sun platform, he [Nixon] made the decision. On that basis, we proceeded to request White House documents. The government objected, submitting an affidavit listing the documents withheld. One of documents was described as a White House poll in California to learn the public's view of Nixon's reelection prospects if the government denied the Sun platform application. We were naturally troubled by the possibility that politics was behind the decision to renege on the lease. The matter was referred by the trial judge to the full Court of Claims en banc. The week before oral argument, President Nixon resigned in the wake of the Watergate affair. He had not yet been pardoned so criminal charges were a possibility. President Nixon's lawyers entered an appearance and claimed executive privilege, wishing to preserve the confidentiality of the White House files. I handled the briefing, and Henry Sailer, the senior partner in charge and a brilliant antitrust lawyer, asked me to argue the case. It was a heady experience for a young lawyer.

To cut a long story short, the Court of Claims ruled that we were entitled to the documents, and on remand the Trial Court held on partial summary judgment that the government had breached Sun's lease. We worked for some time on the damages phase of the case, which involved interesting hydrocarbon

modelling issues. In the meantime, the department decided to grant Sun permission to install its drilling platform. Sun still had a claim for damages based on delay and drainage. Finally, before trial, we reached a gratifying monetary settlement with the government. Many more environmental matters came my way after that case.

What is the result you are most proud of?

I have had the opportunity to work on a wide range of matters over the years, most of which have been very satisfying. I take pride not only in the bigger cases involving nationwide issues, but also in the confidential advice we give clients on particular issues involving transactions and compliance with environmental requirements. Helping a client work through a tough regulatory compliance issue, where the application of the law to the facts may be complex and the practical business and cost implication important, is very satisfying. As you can understand, however, such matters are confidential.

One result that stands out concerns EPA's spill regulations under section 311 of the Clean Water Act. The statute authorised EPA to promulgate regulations concerning spills of hazardous substances that would cause harm to the environment under various conditions. Although the EPA recognised that the harm caused by a particular spill would depend on the size of the water body involved and other factors, EPA promulgated regulations establishing 'harmful quantities' that did not take such factors into account.

We challenged the regulations in the Federal District Court in Louisiana, where a number of chemical companies had facilities, on the basis that many clients thought the regulations were arbitrary and would make unlawful the discharge of wastewater that was in compliance with NPDES permits duly issued by EPA and delegated states under the Clean Water Act. The district court agreed with us that the EPA regulations were arbitrary and unlawful.

After the district court's ruling, EPA officials approached us to discuss whether a compromise might be reached. We explained that our clients did not have a generic concern with the EPA's harmful quantities as applied to traditional spills, but believed that the regulations should not apply to normal discharges of wastewater that are regulated by the National Pollutant Discharge Elimination System's permit system. The EPA agreed. We worked with the EPA to develop legislation that announced a new concept: a federally permitted release exception to the section 311 spill provision of the Act. The legislation was introduced as a rider to an appropriations bill, had an abbreviated hearing with industry support, and was promptly enacted. Subsequently, I received a letter from Tom Jorling, EPA's assistant administrator for water, thanking me for my constructive work with EPA to solve this problem. This exception was later also incorporated into the U.S. Superfund law.

What have been the highlights of your career so far?

I have been fortunate to work on a number of matters of

national importance. On behalf of various clients, I have worked on many of the major EPA rule-making proceedings and resulting litigation involving the Clean Air Act. These include the approval of state implementation plans, prevention of significant deterioration and requirements in non-attainment areas, including the leading Alabama Power and Chevron cases. I also represented clients in the State of Michigan v EPA litigation concerning EPA's downwind ozone transport regulations.

I have also represented clients in virtually all facets of EPA rule-making and related litigation under the Clean Water Act. This has included NPDES permit and general pretreatment programme regulations. I have represented clients in effluent limitations guidelines and standards proceedings before EPA and the courts for particular industries, including organic chemicals, electroplating, nonferrous metals, bauxite refining, copper forming and metal moulding. I represented CMA in a successful defence of the FDF variance before the Supreme Court in the Chemical Manufacturers Association v EPA case and participated as amicus in the Gwaltney case before the Supreme Court. I served as coordinating counsel for industry petitioners in the NRDC v EPA NPDES litigation in the DC Circuit, and have represented individual companies in NPDES permit proceedings across the country.

As an experienced litigation and regulatory lawyer, how has your law firm approach changed towards environment litigation since you began practising 40 years ago?

Although the specific issues change, I don't think that my basic approach has changed. At the administrative level, I have provided assistance at all stages and levels of the process in interpreting and complying with changing regulatory requirements. I have developed good relationships with regulatory officials and agency staff. I have helped our clients prepare comments on proposed regulations and represented clients in permit, variance and enforcement proceedings before federal and state regulatory agencies. I have assisted clients in determining the permits and other regulatory requirements applicable to new or expanded facilities and in achieving regulatory compliance with these requirements. I have also represented clients in challenges to new environmental regulations, and defended clients in enforcement suits and damages actions by the United States, individual states, environmental groups and individuals. I have also assisted clients in evaluating the impact of new legislation and in submitting proposals and testimony to Congress.

Clients often want to help shape the regulatory development process. However, once the regulations are established, they see their job as compliance. At times, lawsuits arise due to disputes concerning what the law requires. At other times, alleged non-compliance may result from unavoidable factors such as the failure of technology to perform as well as a company desires. In the case of Superfund, companies are often faced with claims involving the disposal of waste by companies that they never owned, but may they have inherited liability as a result of transactions decades ago.

The law may evolve and become more complex, but I don't think that the lawyer's role in litigation has changed. As a lawyer, my role is to advise a client as to its exposure, to explore possibilities for a reasonable settlement if that is in the client's interest, and to vigorously defend if the client concludes that plaintiff's case is unfounded. Of course, a lawyer's primary role is to keep his client out of litigation if possible.

Increasingly, multi-jurisdictional disputes and legal developments require lawyers to have a deeper and broader working knowledge of international regulations and laws. How have client expectations of lawyers' abilities and expertise changed over the years?

When I first started practising environmental law, the US was at the forefront of developments in the law. The US federal programme had comprehensive and most stringent regulations for air, water and waste. The first model was the Clean Air Act, under which the US EPA set national standards and criteria and states were delegated authority to implement the Act upon demonstrating that they were able to enforce and implement the programme. The other major statutes such as the Clean Water Act and the Resource Conservation and Recovery Act followed this cooperative federal-state approach. However, two things happened to complicate matters. First, the federal statutes allowed states to develop and enforce their own programmes as long as they were not less stringent than the federal programme. Some of the states became leaders in particular areas, such as California in the area of air pollution control and New Jersey in waste clean-up. Second, other countries began to develop environmental regulatory programmes, and our multinational clients needed to understand and comply with the new requirements. The European Union became a leader in the area of climate change and the regulation of packaging and other wastes. With the failure of the US to enact comprehensive climate change legislation, various U.S. states and groups of states, such as the Regional Greenhouse Gas Initiative and the Western Climate Initiative, began adopting regional climate change programmes, such as climate change action plans and adaptation plans and regional carbon markets.

Our clients operate across the US and internationally and need counsel that understands the law and the practical implications of this complex interstate and international landscape. We assist clients in national and international stewardship issues, including the management of the European Union's REACH, WEEE, RoHS, EuP programmes and the developing laws and regimes in this area. As part of the Clean Energy and Climate industry group, we work in the developing area of climate control and have participated actively during the legislative procedures leading to the adoption of the EU Emissions Trading Scheme and other carbon markets in the US and around the world. With the rising emphasis on environmental stewardship, we will continue to see increased national and international focus on managing historical releases and environmental conditions.

President Obama's intention to invest \$2.3 billion in a clean energy programme was announced early last year. What impact has this had on your practice, and how are your corporate clients reacting to the programme? How successful do you think it will be in closing the clean energy gap between America and leading clean technology producing countries, such as Denmark and China?

It is difficult to predict the relative success of US business efforts in this area compared to other countries. We know that China has been making substantial investments in this area and is likely to be a tough competitor. However, US companies have a history of innovation and are making significant strides. Our practice has evolved to address this expanding area.

Covington's clean technology (or "cleantech") practice focuses on emerging or established companies that are innovators in the efficient uses of energy, water and materials, and in the mitigation or avoidance of contamination and other environmental risks. We represent early-stage venture and private equity investors in these companies, as well as cleantech entrepreneurial and expansion-stage companies in their ongoing businesses. We also represent financial intermediaries working with these companies in financing and capital markets transactions, and advise cleantech companies on their potential use and monetisation of greenhouse gas emission reductions and other environmental credits.

Our cleantech practice draws on the capabilities of our energy and intellectual property practices, as well as our other practices in the environmental area (in particular, our carbon markets and climate change practice), integrating these capabilities with our transactional expertise and our knowledge generally of the venture and private equity markets. We consider the cleantech area to have large potential for growth and become a leading-edge practice with exceptional opportunities for our venture and private equity teams to leverage their collaborative approach for partnering with and providing services to clients.

Last year the EPA ruled that greenhouse gas emitters will be required to obtain a permit in accordance with type and volume of emissions. How are your clients planning to deal with the greenhouse gas regime, and how will your firm assist them in achieving their aims?

Covington's carbon markets and climate change practice focuses on the business challenges and opportunities created by emerging climate change regimes (ie, legal instruments aimed at countering the effects of increased concentrations of greenhouse gases (GHGs) in the earth's atmosphere). In a carbon-constrained world, companies that are first to adopt cleaner energy technologies, or that can claim credit for reducing emissions of GHGs in their respective countries, will have a competitive edge. A new asset class in the form of GHG emission credits is being traded in domestic and international markets. Regulatory structures are being developed, with varying degrees of coordination at local, state, federal and international levels, that will affect a variety of industries – imposing burdens on some, and creating opportunities for others. Covington assists clients

in evaluating, managing and planning for these diverse effects of climate change initiatives. Our practice team in this area includes a former under-secretary of state who was the lead United States negotiator of the 1997 Kyoto Protocol and a former chairman of the White House Council on Environmental Quality. It draws on experts in our energy, environmental, transactional, intellectual property, securities, trade and legislative practices. It covers the European Union, where an emissions trading scheme is already in effect, the United States, where regional and state initiatives are underway and federal policies are being developed, and Canada. Our practice also focuses on Latin America and parts of Asia where, as the Clean Development Mechanism under the Kyoto Protocol is put into effect, a range of transactional opportunities will arise.

Can you summarise why a permit regime was favoured over a system where emitters can purchase allowances (adopted in the UK) or one of carbon capture and storage (used in parts of Europe)?

There are various ways to approach GHG reductions, and each has its advantages and disadvantages. Proponents of a permit scheme prefer reductions and emissions limits on a source-by-source basis because they are verifiable through emissions monitoring and because they believe that such a scheme will result in greater reductions. Proponents of emissions trading maintain that the costs and burdens of reducing GHG emissions will be economically efficient only if one allows for the purchase of allowances. Under an emissions trading regime, facilities that can readily reduce emissions can trade their excess reductions with facilities that would otherwise need to incur crushing costs in order to comply. Carbon capture and storage is relatively new technology involving the storage of the CO₂ in deep geological formations. Some are concerned that CO₂ might leak back into the atmosphere and want to see this technology further studied before being used on a widespread basis. Demonstration projects may answer these questions. My own view is that we will need all of the available tools in order to successfully address the climate change challenge. We need to encourage innovation and investment in clean technology.

What are the biggest challenges facing the environmental law community in the next five years?

The biggest challenge over the next five years is to make progress in a tough economic and political climate. The economies of the US and Europe are under strain. Governments are under pressure to cut expenses. In such a climate, it will be a challenge to move forward. Like other programmes, environmental programmes in the US require funds for agency personnel and for grants to states and municipalities. States that implement federal programmes also are facing budget strains. Cuts have been proposed for state and tribal assistance grants that fund water infrastructure upgrades and local drinking water projects and reductions in regional programmes, such as the Great Lakes Restoration Initiative. One can try to do more with less, but the

practical reality is that governments usually do less with less.

The other challenge we face in the US is a political challenge. The US Congress is deeply divided, as illustrated by the recent debt ceiling episode. Conservatives have objected to certain EPA initiatives. The result may be that new programmes and implementation of existing programmes may be abandoned, changed or developed more slowly than might otherwise have been the case.

If you could be granted one wish to make your job easier what would it be?

I relish challenges. The more important, challenging and complex the matter, the more gratifying it is to handle. I have never wanted my job to be easier. That said, I appreciate the conveniences that modern technology has brought to the practice of law and to our clients. When I first started practising law, we used manual typewriters and made carbon copies. If you wanted a document from an agency, you went to the agency and rummaged around in the files. Drafts were mailed to clients. We sent briefs to the printer a few days before the due date and proofed the drafts. Now agency documents and legal research

materials are available online, making research much easier, briefs and other pleadings are filed electronically with courts, and documents are exchanged electronically with clients, consultants and regulatory agencies. Thanks to modern technology, lawyers are now able to work more efficiently, anywhere in the world.

If you were not an environment lawyer what would you be?

I play jazz piano and enjoy tennis, woodworking and gardening. They are avocations that keep me balanced, but they are only avocations. It's always difficult to predict what would happen if one were to take a different path. If I had gone to MIT instead of Yale, I might have been an engineer. In college, I briefly wondered what it might be like to be a professional jazz musician and considered studying for a PhD in philosophy. If I had not had the good fortune to be involved in some of the early environmental law matters, I might have become a life sciences lawyer or an intellectual property lawyer. As it happens, I was exposed to the emerging environmental field as I began practising law and I found it very stimulating and gratifying. I have never looked back or had second thoughts.