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EQUAL ENFORCEMENT FOR ALL

GEORGE VAN CLEVE*

I want to say I appreciate very much the opportunity to be here with you today, and I certainly have had a fun morning. I have been to a lot of panels. I have rarely seen such a diversity of views as ably advocated as I did during the first panel this morning. And you know, it was one of those "you don't have to drink coffee to stay awake" mornings, and there is a lot to be said for that in life. So I want to commend the organizers of this meeting.

To let you know, I am George Van Cleve. I am with Jones, Day, Reavis & Pogue, and with the environmental practice of our firm in Washington. I came to our firm from the Department of Justice. I was an environmental prosecutor at the Department. I want you to know, because I feel it has something to do with the content of the remarks I am going to make here, that I have been on both sides of the street. On the one hand, I have represented private, mostly industrial clients. On the other, I represented the government of the United States.

I am not here today to represent a specific industry, or industry in general. But I do counsel and litigate on behalf of industrial clients, so I have some sense of how they are beginning to deal with the problem here. What I want to convey to you first is a basic attitude companies take toward environmental regulation; then to talk about how that may affect their approach on the emerging issue of environmental justice.

Twenty years ago there were a lot of companies in this country who thought that environmental regulation was a communist plot. Quite frankly, they thought their patriotic duty was to subvert the efforts of this communist-inspired regime to impose environmental regulations on their operations.

* Of Counsel, Jones, Day, Reavis & Pogue, Governmental Regulation Group, Environmental Health and Safety Section, Washington, D.C.; former Deputy Assistant Attorney General, Environment and Natural Resources Division; former Special Counsel, United States Department of Defense; B.A., University of Chicago; J.D., Harvard University.

Thankfully, I think for everyone, that day has largely passed. That is not to say you cannot still find people in certain western states, for example, who are still profoundly convinced of the truth of what I have said to you. But, by and large, it is a minority view. As a result, companies that historically were very resistant to environmental regulation, and were out to block any regulation that affected their business, now realize that environmental regulation is here to stay. They realize it has to be part of their calculation in making business decisions, and that the intelligent way to approach this type of regulation is to begin with the premise that environmental regulation is sensible in a civilized, industrial society. They recognize that it has clear social benefits, and that it has to be part of doing business.

I think that today, most of the clients that I counsel start with that premise. A lot of their concern about environmental regulation is not focused around the idea that regulation or that environmental regulation is evil, but that some regulations are stupid or that some regulations cost more than they need to, or that some regulations mean that it takes five years to get an answer to whatever question you have as an industry.

Most of my clients are interested basically in trying to operate their businesses at the lowest possible cost they can. They think that is their primary responsibility to their stockholders, and because they have global competitors, many of whom face no regulation or very limited regulation, they look at the regulatory environment as something that adds to the cost of doing business. That is not because they are trying to escape regulation, *per se*. If they want to do that, very often what they will do is start operations in a place such as Thailand where they really do not have a serious problem because there is no serious regulation.

When they are looking at their operations here in the United States, what they really want is to be able to get an answer as to whether or not the government will let them do something, to get the answer relatively quickly, to get it at a reasonable cost, and to be able to calculate in advance what it is going to cost them to do business if they have to contend with that particular regulation.

The second thing that I would like to tell you is that with regard to the same companies that accept the legitimacy of environmental regulation, I do not think you are going to find them denying that environmental regulation, as it has been practiced over the

last twenty years, has caused disproportionate effects that affect the poor, and that affect minority communities, in ways that nobody can really defend. I do not think anybody can sit here and defend the idea that black children in the inner cities should have lead levels in their blood that are twice as high or more as children from well-to-do white families in the suburbs do. I just think it is a given. I do not think most of my clients would take issue at all with the notion that all children deserve to be protected from that kind of environmental risk, rich or poor, black or white. I think that in terms of the way we approach these issues, you are going to find people who want to try and develop a system of regulation that makes sure that that kind of protection is available to everybody.

The real issue, to broaden that a little bit, is that, as a premise, there is no reason in this society, at this time, for individuals of any race or economic status to be involuntarily exposed to disproportionate environmental risks. If you want to go mountain climbing, you know you are assuming a disproportionate risk, and in certain lines of work you cannot get insurance for it, and in certain lines of work they will not let you do it because you cannot get insurance for it. That is very different than living next to the freeway because your family cannot afford to live anywhere else, and being told that the government is not doing enough to protect you from automobile emissions that are coming from the freeway. Everybody who lives near a freeway should be entitled to assume that their children will be protected from whatever it is that that freeway does in the way of environmental effects. I do not think the people that I represent, by and large, are going to argue with that proposition.

The real question is: how do we get there? That is the real issue. My own sense of it is that the way people are beginning to deal with this kind of problem is backwards because the way people, as I listen to the panel this morning, want to argue about this issue is that they want to tell you what causes it and they want to tell you what labels to put on it because they think that points to a solution.

My own view is that the causes of the fact that black children live in a ghetto and have blood lead levels twice as high as rich white kids are irrelevant. The key thing is that the government—the society—has a responsibility to put an end to that type of situ-

ation. If a debate about putting an end to it starts with putting a label on it or assigning a cause to it, as far as I'm concerned, that gets in the way.

One of the things I did at the Department of Justice, was to host groups of visitors from foreign countries. We met with environmental officials from Eastern Bloc countries, from the Soviet Union, from South America, and with people from the Philippines. Many of these countries have more stringent environmental laws on the books, as a purely formal matter, than the United States does. Many foreign governments have constitutional rights to environmental protection written into their constitutions.¹

Almost none of these countries enforce any of their laws, with the net result that if you live in Poland and you have a respiratory problem, or in Czechoslovakia, they put you down at the bottom of a coal mine 600 feet underground because it is the only place where the air is any better than the air that you would otherwise breathe, so that if you have respiratory problems, you have to be there. That is not law enforcement. As far as I am concerned, Hazel Johnson and I would be in agreement—and I think my clients are on the same page—by saying that the bottom line is not what the laws look like. It is the way they are enforced. If there are disproportionate impacts and you want to do something about it, and you want to do something about it now, you tell the government to increase enforcement resources, because enforcement resources are relatively limited. You tell the government to make sure that there are no exceptions, and that the fact that an employer is a large, local employer and politically influential does not mean that it should get any breaks from anybody for any reason.

I will tell you, based on the time I spent at the Department of Justice, the Department of Justice consistently takes that view and resists political pressure which is repeatedly put on it by members of Congress of all political persuasions to give special breaks to industry when it comes to enforcement of the law be-

¹ See BELARUS CONST. art. LV (noting that protection of environment is duty of everyone); see also TAJIKISTAN CONST. art. XIV (guaranteeing use of land, other natural riches, and protection of environment in interests of people of Tajikistan); *Russia: Nuclear Waste Agreement with Hungary Causes Uproar; Government Backs Down*, BBC Monitoring Service, Apr. 11, 1994, available in WESTLAW, INT-NEWS Database (noting citizens' rights to safe environment are guaranteed by constitution); *Germany Boosts Rights of Women and Disabled*, REUTERS, Sept. 6, 1994, available in WESTLAW, INT-NEWS Database (noting laws passed to protect environment for future generations).

cause it is going to cost jobs, it is inconvenient, and it is unfair. You name the reason, and the Department of Justice's position is: we do not do that here. We will enforce these laws. So the first thing you want, without regard to the rest of the debate here, is to increase enforcement resources.

Now, is that a view that would be terribly popular with my clients? I do not know that it would be. With this caveat, all of my clients are in favor of evenhanded enforcement across the board. Every client I have who produces a product wants to make sure that if they have to obey the law, every one of their competitors has to obey the law here in the United States and everywhere else. Thus, if an increase in enforcement resources means that the law will be enforced across the board, then my clients are going to be in favor of that. They are, however, not in favor of the notion that people in certain parts of the country get a break. But the bottom line for them is that they want to see evenhanded enforcement. They want predictable enforcement. They want to know what it is they are going to be asked to do.

Once you get beyond enforcement resources then you start thinking about the process—the bills that are in Congress or “Lawsuit City” or whatever it is. If people feel in that process they are being singled out in a lawsuit, for example, they are going to resist the lawsuit. If somebody in the community picks out one toxic waste facility and says, those are bad, we are going to close those down, and there are six other toxic waste facilities similar to that right around there, they are going to fight the lawsuit. But if the government comes in and says, “all of you people are a part of the problem and all of you people are going to have to contribute to the solution,” then you are talking about a different proposition.

When you begin to look at either judicial solutions or legislative solutions, then, you want to look at evenhandedness. I think that it is not clear at this point, as I hear the discussion, whether or not existing laws are sufficient, but I would very much discourage people from coming up with new solutions that make a process that already has substantial room for administrative discretion—like the environmental permitting process—into a process that has even broader discretion. It would be far better for everyone to have a clear legislative command on this issue.

For example, an amendment to the Civil Rights Act² that specified that these kinds of disproportionate effects are to be considered a form of discrimination and must be avoided, so that there was little discretion or limited discretion on the part of the administrative agencies, might make sense. This is because if people perceive that this is simply a way that people can use the courts to try and, in effect, give strength to a phenomenon such as "Not In My Backyard" ("NIMBY") and obtain, in effect, bribes for blocking facilities and so on, they are going to resist the change. If, on the other hand, the public consensus on this is made clear and there is a relatively smooth process for incorporating this environmental justice value as part of the process, I think my clients would support it.

² Civil Rights Act of 1964, 42 U.S.C. §§ 1971-75 (1988 & Supp. IV 1992).