

# SENATOR EDMUND MUSKIE'S ENDURING LEGACY IN THE COURTS

*Richard J. Lazarus*

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## SENATOR EDMUND MUSKIE'S ENDURING LEGACY IN THE COURTS

*Richard J. Lazarus*\*

More than any other legislator in the nation's history, Senator Ed Muskie is environmental law's champion. Over forty years ago, Muskie helped secure passage of an extraordinary series of ambitious and demanding air and water pollution control laws that sought no less than to redefine the relationship of humankind here in the United States to our natural environment. The upshot has been the nation's enjoyment, for more than four decades, of enormous economic growth without the kind of accompanying environmental destruction witnessed during the same time period in nations lacking such controls.

While President Richard Nixon is properly credited as playing a critical role alongside Muskie in promoting tougher environmental laws,<sup>1</sup> Nixon's role is both routinely overstated<sup>2</sup> and best understood as yet another expression of Muskie's influence. Nixon can be fairly touted for creating the Environmental Protection Agency (EPA) and trumpeting, along with Muskie, passage of the federal Clean Air Act,<sup>3</sup> the nation's first comprehensive pollution control law that imposed sweeping and ambitious restrictions on emissions of air pollutants from motor vehicles and stationary sources. What is too often forgotten is that Nixon's environmentalism was short-lived (lasting less than two years), was largely a product of political posturing rather than personal ideology, and was clearly aimed at undercutting Muskie's prospects as Nixon's Democratic opponent in the 1972 Presidential campaign.<sup>4</sup> As soon as Nixon perceived there was less to be gained politically in promoting environmental protection than by appealing to business

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1. See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 76 (2004); J. BROOKS FLIPPEN, *NIXON AND THE ENVIRONMENT* 227-28 (2000).

2. See, e.g., Michael D. Lemonick, *Lost in Watergate's Wake: Nixon's Green Legacy*, CLIMATE CENTRAL BLOG (August 8, 2012), <http://www.climatecentral.org/blogs/richard-nixon-the-environmentalist-resigned-38-years-ago-today-14776> (the article mistakenly credits Nixon for Clean Water Act of 1972, which was enacted only because Congress overrode the President's veto).

3. See 42 U.S.C. §§ 7401 *et seq.*

4. LAZARUS, *supra* note 1, at 77; FLIPPEN, *supra* note 1, at 27 ("Nixon always had Muskie on his mind.") (quoting Russell Train, Nixon's Chair of the Council on Environmental Quality). The focus on Muskie is highlighted by how, according to Nixon's Chief of Staff, H.R. Haldeman, Nixon on July 23, 1971, concluded that emphasizing "economics and the economy" was "more important than undercutting Muskie" on the environment. See H.R. Haldeman, H. R. Haldeman Diaries Collection, January 18, 1969 – April 30, 1973, National Archives and Records Administration, <http://www.nixonlibrary.gov/virtuallibrary/documents/haldeman-diaries/37-hrhd-audiocassette-ac11ab-19710723-pa.pdf>.

interests opposed to those efforts, the President did a quick about-face.<sup>5</sup> Nixon at first acted quietly behind the scenes to work against tougher pollution control limitations. But then he became more public, culminating in his veto of the Federal Water Pollution Control Act Amendments of 1972.

While Muskie's Congress represents lawmaking at its best, Congress since 1990 has been the exact opposite: Congress at its worst.<sup>6</sup> The spirit of bipartisanship and constructive compromise that Muskie fostered and that was crucial to his success has since collapsed. While we once had environmental law *because* of Congress, we now have environmental law *without* Congress.<sup>7</sup> In the absence of any new, significant environmental legislation, the United States EPA's only recourse is to address today's pressing environmental problems with statutory language drafted by lawmakers almost a half-century ago with very different problems in mind.<sup>8</sup> Although that language has proven remarkably durable, the EPA faces considerable barriers in litigation challenging its efforts. And nowhere is that challenge more apparent than in EPA's current efforts to apply the existing Clean Air Act to address climate change.

The purpose of this paper is to focus on Muskie's enduring legacy in federal court litigation in which EPA has defended its implementation of the laws that Muskie championed. To that end, this article is divided into two parts: Part I generally describes the remarkable extent to which judges have sought to determine Muskie's views on a particular issue in deciding whether EPA's actions are consistent with congressional intent. Senator Muskie has not served in the Senate since 1980, yet judges and advocates today continue to debate Muskie's views in determining the legality of EPA actions. Part II focuses more specifically on EPA's current efforts to invoke its Clean Air Act authorities to address the worldwide threat of climate change. What EPA's most recent final and proposed rulemakings make clear, especially in light of the litigation launched to challenge those rulemakings, is Muskie's continuing relevance today as the nation continues to depend on the statutes he championed to address our most pressing environmental problems.

## I. SENATOR MUSKIE IN THE COURTS

The settled touchstone for determining the meaning of statutory language is congressional intent. Where Congress has enacted language with "plain meaning," the Supreme Court has long made clear that the judicial presumption must be that Congress intended that plain meaning to control.<sup>9</sup> And neither the judicial branch nor an agency responsible for administering the statute can overcome the plain meaning of that statutory language. But, where Congress has instead enacted language the meaning of which is ambiguous, then the courts must defer to the

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5. LAZARUS, *supra* note 1, at 77-78.

6. *See generally* Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619 (2006).

7. Richard Lazarus, *Environmental Law Without Congress*, 42 FLA. ST. U. L. REV. \_\_\_ (forthcoming 2015).

8. *See generally* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014).

9. *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

reasonable interpretation of the agency charged by Congress with its administration, so long as that agency is acting pursuant to its legislatively delegated lawmaking authority.<sup>10</sup>

For federal environmental law, however, a review of the case law suggests the possible propriety of placing an asterisk at the conclusion of any such hornbook statement of administrative law, offering the following caveat: *Congressional intent in the context of federal environmental law may be fairly equated with the intent of Senator Ed Muskie of Maine.* Federal courts in their opinions have cited to the views of Senator Muskie in the enactment of federal environmental statutes in at least 293 separate cases.<sup>11</sup> That is an enormous number of cases. The United States Court of Appeals for the District of Columbia has itself cited to Muskie's views in fifty-four cases.<sup>12</sup> And, the D.C. Circuit of course is the nation's most important court for federal environmental law because it has original jurisdiction to hear challenges to EPA rules promulgated under a host of federal environmental laws, including the Clean Air and Clean Water Acts,<sup>13</sup> and exclusive jurisdiction to consider some of those challenges.<sup>14</sup>

Looking just to the United States Supreme Court, the statistics are even more striking. The Justices have cited to Muskie in twenty-two different cases.<sup>15</sup> They include eight Clean Air Act cases,<sup>16</sup> and eleven Clean Water Act cases.<sup>17</sup> For each

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10. *United States v. Mead*, 533 U.S. 218, 226-27 (2001).

11. The number of federal court citations to the Senator, D.C. Circuit citations, and Supreme Court citations is based on a Westlaw Next search conducted of all federal court cases as of October 7, 2014.

12. *See supra* note 11.

13. *See Clean Water Act*, 33 U.S.C. § 1369(b)(1); *Clean Air Act*, 42 U.S.C. § 1857(b)(1).

14. *See Clean Air Act*, 42 U.S.C. § 1857(b)(1) (providing D.C. Circuit with exclusive jurisdiction to review validity of certain EPA rules).

15. *See Train v. New York*, 420 U.S. 35, 48 & n.14 (1975); *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 84-85 (1975); *Train v. Colorado Pub. Interest Research Grp., Inc.*, 426 U.S. 1, 14 (1976); *Union Elec. Co. v. E.P.A.*, 427 U.S. 246, 258-59 (1976); *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129 (1977); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 296 (1978) (Stewart, J., dissenting); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 599 (1980) (Rehnquist, J., dissenting); *E.P.A. v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 71 n.10 (1980); *City of Milwaukee v. Illinois*, 451 U.S. 304, 329 (1981); *id.* at 344 n.16 (Blackmun, J., dissenting); *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 17 n.27 (1981); *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 862 (1984); *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 129 & n.19 (1985); *id.* at 140, 150, 155, 157, 162, 163 (Marshall, J., dissenting); *Exxon Corp. v. Hunt*, 475 U.S. 355, 366 (1986); *Tull v. U.S.*, 481 U.S. 412, 422 (1987); *id.* at 424 (Brennan, J., dissenting); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61 (1987); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Hallstrom v. Tillamook Cnty*, 493 U.S. 20, 28 (1989); *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 490 (2001) (Breyer, J., concurring in part & concurring in the judgment); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 261 (2004) (Souter, J., dissenting); *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 386 (2006); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 231-32 (2009) (Breyer, J., concurring in part & dissenting in part); *id.* at 243 (Stevens, J., dissenting); *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2453 (2014) (Ginsburg, J., dissenting).

16. *See Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60 (1975); *Union Elec. v. E.P.A.*, 427 U.S. 246 (1976); *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978); *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980); *Whitman v. Am. Trucking Associations*, 531 U.S. 457 (2001); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004); *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014).

of those laws, that number constitutes a large percentage of Clean Air and Clean Water Act cases decided by the Court.

The Senator, moreover, was cited most often by the Court majority in those cases, meaning that his views literally influenced the reasoning underlying the Court's ruling. Seventeen different majority opinions cited to Muskie.<sup>18</sup> On ten occasions, Muskie's views were cited by separate opinions, either dissenting or concurring in whole or in part from the majority.<sup>19</sup> The Justices referred to the Senator as "the principal Senate sponsor" and the "primary author" of federal environmental legislation.<sup>20</sup>

Not surprisingly, the vast majority of those Supreme Court citations occurred in environmental cases decided between 1975 and 1989, either while Muskie was in the Senate, or after he left the Senate in 1980 to become Secretary of State and was still a prominent national figure closely identified with the still-then-recently-enacted laws at issue in the cases. That first period accounts for seventeen of the twenty-two Supreme Court cases.<sup>21</sup> What is more surprising, and ultimately more telling, is that although the Court did not cite to Muskie in any environmental case decided between 1990 and 2000, the Court has since cited to Muskie in five cases,

17. See *Train v. City of New York*, 420 U.S. 35 (1975); *Train v. Colorado Pub. Interest Research Grp., Inc.*, 426 U.S. 1 (1976); *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977); *E.P.A. v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116 (1985); *Tull v. United States*, 481 U.S. 412 (1987); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987); *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370 (2006); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009).

18. See *Train v. City of New York*, 420 U.S. 35, 48 & n.14 (1975); *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 84-85 (1975); *Train v. Colorado Pub. Interest Research Grp.*, 426 U.S. 1, 14 (1976); *Union Elec. Co. v. E.P.A.*, 427 U.S. 246, 258-59 (1976); *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129 (1977); *E.P.A. v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 71 n.10 (1980); *City of Milwaukee v. Illinois*, 451 U.S. 304, 329 (1981); *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 17 n.27 (1981); *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 862 (1984); *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 129 & n.19 (1985); *Exxon Corp. v. Hunt*, 475 U.S. 355, 366 (1986); *Tull v. United States*, 481 U.S. 412, 422 (1987); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61 (1987); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 28 (1989); *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 386 (2006).

19. See *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 296 (1978) (Stewart, J., dissenting); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 599 (1980) (Rehnquist, J., dissenting); *City of Milwaukee v. Illinois*, 451 U.S. 304, 344 n.16 (1981) (Blackmun, J., dissenting); *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 140, 150, 155, 157, 162, 163 (1985) (Marshall, J., dissenting); *Tull v. United States*, 481 U.S. 412, 424 (1987) (Brennan, J., dissenting); *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 490 (2001) (Breyer, J., concurring in part & concurring in the judgment); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 261 (2004) (Souter, J., dissenting); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 231-32 (2009) (Breyer, J., concurring in part & dissenting in part); *id.* at 243 (Stevens, J., dissenting); *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2453 (2014) (Breyer, J., dissenting).

20. See *E.P.A. v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 71 n.10 (1980) ("the principal Senate sponsor"); *Train v. Colorado Pub. Interest Research Grp., Inc.*, 426 U.S. 1, 14 (1984) ("the FWPCA's primary author"); see also *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129 (1977) ("perhaps the Act's primary author").

21. See *supra* note 5.

including as recently as June 2014,<sup>22</sup> thereby underscoring Muskie's continuing influence as an accepted authority decades after he left the Senate.

To be sure, it is clear that certain Justices look to Muskie as an authority more than others, and one can accurately predict that a Justice such as Antonin Scalia, who famously decries any reliance on legislative history, has not cited to the Senator on even one occasion. But, putting Scalia's distinct views aside and acknowledging some ideological skewing in the identity of those citing Muskie as authority, it is still clear that the Senator's influence cuts across a wide spectrum of views on the bench. The Justices who cited Muskie the most in their opinions extend beyond more liberal Justices such as Thurgood Marshall (six),<sup>23</sup> John Paul Stevens (four),<sup>24</sup> and Stephen Breyer (three),<sup>25</sup> to include Chief Justice William Rehnquist (three),<sup>26</sup> and Justice Byron White (three).<sup>27</sup>

In *City of Milwaukee v. Illinois*,<sup>28</sup> for example, the majority and dissenting opinions referred to Muskie by name seventeen times in debating whether the Clean Water Act displaced federal common law remedies for water pollution. The two opinions engaged in a lengthy and prolonged debate over the meaning of remarks made by Muskie during the passage of that Act. The dissent stressed that the "Court previously has observed that Senator Muskie was perhaps the Act's primary author, and has credited his views accordingly."<sup>29</sup> The majority responded that the dissent had mischaracterized what Muskie had said and that the dissent's inaccuracy "appears to be of no little importance."<sup>30</sup> In short, the Justices may disagree on the meaning of federal environmental statutes in application in individual cases, but they tend to share one common premise: Senator Muskie's views matter.

Finally, the oral arguments before the Court similarly highlight the extent to which Muskie's views are considered weighty legal authority. During oral argument, an attorney has limited time to put forth her arguments, especially considering the many questions posed by the bench. There is time only for the best and potentially most persuasive points; an attorney must identify the critical issues

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22. See *supra* note 5.

23. See *Train v. Colorado Pub. Interest Research Grp.*, 426 U.S. 1, 14 (1984); *Union Elec. Co. v. E.P.A.*, 427 U.S. 246, 258-59 (1976); *Chem. Mfrs. Ass'n v. Natural Res. Def. Council*, 470 U.S. 116, 140, 150, 155, 157, 162, 163 (1985) (Marshall, J., dissenting); *Exxon Corp. v. Hunt*, 475 U.S. 355, 366 (1986); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61 (1987).

24. See *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129 (1977); *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 862 (1984); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Entergy Corp. v. Riverkeeper Inc.*, 556 U.S. 208, 243 (2009) (Stevens, J., dissenting).

25. See *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 490 (2001) (Breyer, J., concurring in part & concurring in the judgment); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 231-32 (2009) (Breyer, J., concurring in part & dissenting in part); *id.* at 243 (Stevens, J., dissenting); *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2453 (2009) (Breyer, J., dissenting).

26. See *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 84-85 (1975); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 599 (1980); *City of Milwaukee v. Illinois*, 451 U.S. 304, 329 (1981).

27. See *Train v. City of New York*, 420 U.S. 35, 48 & n.14 (1975); *E.P.A. v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 71 n.10 (1980); *Chem. Mfrs. Ass'n v. Natural Res. Def. Council*, 470 U.S. 116, 129 & n.19 (1985).

28. 451 U.S. 304 (1981).

29. *Id.* at 344 n.16.

30. *Id.* at 331 n.23.

and address only the legal authority most likely to persuade the Justices in favor of her argument or distinguish those arguments that are detrimental to her case. Yet, even in these limited circumstances, counsel arguing before the Court referred to Muskie on thirty-four occasions,<sup>31</sup> with most of those references occurring in five cases.<sup>32</sup>

Justice Breyer, who famously believes in the relevance of legislative history as much as Justice Scalia does not, has been Muskie's great champion at oral argument. Breyer has referred to Muskie's views, including specific quotes from the legislative record, six times in two cases.<sup>33</sup> And, even that number understates the weight the Justice clearly assigns to Muskie's views. For instance, during oral argument in *Entergy v. Riverkeeper*,<sup>34</sup> Breyer repeatedly questioned counsel for petitioner and respondent on Muskie's views, quoting from statements made by the Senator during the 1972 Clean Water Act debates:

So I go back to page 170 of the legislative history, which I have read now six times, and I agree with you that it is not totally clear. Maybe you think it is. But it seems to me what he is saying there is just what you've said: Don't go into this with some elaborate thing, but remember costs are still relevant. And what I've been searching for throughout is a set of words that would help me translate that thought into a legal reality.<sup>35</sup>

Indeed, Justice Breyer's treatment of Senator Muskie as authority is so deep that it apparently extends to the staff who worked for the Senator. In the Court's major Clean Air Act greenhouse gas ruling in June, 2014, *Utility Air Regulatory Group v. EPA*,<sup>36</sup> Breyer mused about what the language and history of the bill suggested in terms of congressional intent. And, in raising that issue with arguing

31. This number is based on my research assistant's review in October 2014 of Supreme Court oral argument transcripts available at [www.oyez.org](http://www.oyez.org).

32. See *Train v. Colorado Pub. Interest Research Grp., Inc.* (arguing counsel referred to Muskie eleven times); *City of Milwaukee v. Illinois* (five times); *Chevron v. Natural Res. Def. Council* (four times by both Court and counsel); *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.* (one time); *Entergy Corp. v. Riverkeeper, Inc.* (nine times for both the Court and counsel). Transcript of Oral Argument at 5-6, 8, 11, 12, 13-14, *Train v. Colorado Pub. Interest Research Grp., Inc.*, 426 U.S. 1 (1976) (No. 74-1270), available at [http://www.oyez.org/cases/1970-1979/1975/1975\\_74\\_1270](http://www.oyez.org/cases/1970-1979/1975/1975_74_1270); Transcript of Oral Argument at 16, 19, *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (No. 79-408), available at [http://www.oyez.org/cases/1980-1989/1980/1980\\_79\\_408](http://www.oyez.org/cases/1980-1989/1980/1980_79_408); Transcript of Oral Argument at 8, 12-13, *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (Nos. 82-1005, 82-1247, and 82-1591), available at [http://www.oyez.org/cases/1980-1989/1983/1983\\_82\\_1005](http://www.oyez.org/cases/1980-1989/1983/1983_82_1005); Transcript of Oral Argument at 11, *Chem. Mfrs. Ass'n v. Natural Res. Defense Council, Inc.*, 470 U.S. 116 (1985) (Nos. 83-1013 and 83-1373), available at [http://www.oyez.org/cases/1980-1989/1984/1984\\_83\\_1013](http://www.oyez.org/cases/1980-1989/1984/1984_83_1013); Transcript of Oral Argument at 20-21, 43-45, 51, 60-61, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009) (Nos. 07-588, 07-589, and 07-597).

33. Justice Breyer referred to Muskie five times during the argument in *Entergy Corp. v. Riverkeeper, Inc.*, and once during the argument in *Util. Air Regulatory Grp. v. E.P.A.* Transcript of Oral Argument at 20-21, 43, 51, 61, *Entergy Corp.*, 556 U.S. 208 (Nos. 07-588, 07-589, and 07-597); Transcript of Oral Argument at 40, *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014) (Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, and 12-1272).

34. 556 U.S. 208 (2009). This author was the arguing counsel for respondent Riverkeeper in this case.

35. Transcript of Oral Argument at 43-44, *Entergy Corp.*, 556 U.S. 208 (Nos. 07-588, 07-589, and 07-597).

36. 134 S. Ct. 2427 (2014).

counsel, the Justice referred not only to Muskie, but explicitly to his chief staffer for the bill, Leon Billings.<sup>37</sup> No longer were the Justices solely pondering, as they have now for decades of environmental litigation: *what did Senator Muskie think?* At least for Justice Breyer, the scope of inquiry has expanded to include the question: *what did Leon Billings think?*

## II. SENATOR MUSKIE'S ENDURING LEGACY IN CLIMATE LITIGATION TODAY

Greenhouse gas emissions and climate change are the nation's, and the planet's, most pressing and most difficult environmental problems. As stressed by the most recent report issued by the United Nations Intergovernmental Panel on Climate Change (IPCC), "[c]ontinued emission of greenhouse gases will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts for people and ecosystems."<sup>38</sup> Nor did the IPCC, in its most dire statement ever of the environmental consequences of continued failure to curtail greenhouse gas emissions, express doubt concerning the role that human activities have played, and will continue to play, in contributing to dangerous concentrations of greenhouse gases in the atmosphere, absent dramatic change: "[H]uman influence . . . is *extremely likely* to have been the dominant cause of the observed warming since the mid-20th century."<sup>39</sup>

Yet, because the associated political obstacles of enacting national climate legislation have so far proven overwhelming, EPA has been relegated to relying on the statutory authorities set forth in Muskie's Clean Air Act legislation, first comprehensively enacted in 1970 and since amended, including under Muskie's watchful eye, in 1977. In *Massachusetts v. EPA*,<sup>40</sup> the Supreme Court's first major climate case, decided in 2006, the Court relied on the Act's "capacious" definition of "air pollutant" in rejecting EPA's then-view that the Agency lacked authority to address climate change under the Clean Air Act.<sup>41</sup> The Court acknowledged that Muskie's Congress no doubt had enacted the relevant language without the climate issue in mind, but by drafting language of deliberate breadth, Congress had nonetheless fairly authorized EPA to address issues, like climate change, that arose in the future.<sup>42</sup> The Court's more recent ruling in *Utility Air Regulatory Group v. EPA*,<sup>43</sup> decided June 2014, is to similar effect. Building upon *Massachusetts v. EPA*, the Court held that the Prevention of Significant Deterioration Program, added to the Clean Air Act under Muskie's stewardship in 1977, further authorized EPA to regulate greenhouse gas emissions from new and modified major stationary

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37. Transcript of Oral Argument at 40, *Util. Air Regulatory Grp.*, 134 S. Ct. 2427 (Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, and 12-1272) ("I get that answer on the language there. But if you had been sitting in Congress and the Senate, Mr. Billings, I think is the staff person, Senator Muskie, and suppose that you had this choice put to you with your language.")

38. INTERGOV'TL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014, FIFTH ASSESSMENT SYNTHESIS REPORT 8 (November 5, 2014), [http://www.ipcc.ch/pdf/assessmentreport/ar5/syr/SYR\\_AR5\\_FINAL\\_full.pdf](http://www.ipcc.ch/pdf/assessmentreport/ar5/syr/SYR_AR5_FINAL_full.pdf).

39. *Id.* at 47 (emphasis in original).

40. 549 U.S. 497 (2007).

41. *Id.* at 532.

42. *Id.*

43. 134 S. Ct. 2427 (2014).



sources that were already subject to regulation under that Program.<sup>44</sup>

EPA's most important climate change related challenge, however, is yet to come, and it is likely that Senator Muskie's handiwork, and intent, will once again be front and center. Entirely missing from EPA's greenhouse gas regulations to date has been regulation of the nation's *existing* fossil fuel electric generating units, which are the single largest source of greenhouse gas emissions. In 2012, the production of electricity was the largest single source of total U.S. greenhouse gas emissions, and coal combustion from existing power plants was responsible for the vast majority of those emissions.<sup>45</sup>

In June 2014, however, EPA published for the first time a proposed set of rules under the Clean Air Act aimed at sharply reducing greenhouse gas emissions from existing power plants.<sup>46</sup> EPA seeks to leverage its mostly untapped authority over existing stationary sources of air pollutants that endanger public health and welfare to prompt the States to undertake a series of steps—dubbed “building blocks” by EPA's rulemaking—to reduce existing power plant greenhouse emissions by thirty percent in 2030 from 2005 levels.<sup>47</sup> These steps include increased coal combustion efficiency, decreasing the hours that coal combustion units are used by offloading demand to existing non-coal units with lower greenhouse gas emissions and available excess capacity, increasing the electricity production capacity of renewable sources of power such as wind and solar, and decreasing consumer demand for electricity with more efficient buildings, homes, appliances, and individual behavior.<sup>48</sup>

The ambition, reach, and creativity of the proposed regulations are undeniable. What is still an open question is their legality. Because Congress has failed to enact new, comprehensive climate legislation, EPA's authority is limited to what is available under the existing Clean Air Act, in particular Section 111(d) of that Act.<sup>49</sup> EPA will need to persuade the reviewing courts that although Congress did not have these kinds of greenhouse gas control measures in mind in enacting the relevant statutory language, the language is nonetheless, as in *Massachusetts v. EPA*, sufficiently capacious to authorize EPA's regulations. Because, moreover, much of the relevant statutory language within Section 111(d) that will determine whether EPA's regulations pass judicial muster originated with Senator Muskie's Public Works Committee, the Senator will once again likely be front and center in the litigation.

For example, EPA's proposed rulemaking raises a host of legal questions under Section 111(d), but a central linchpin of EPA's proposal is that the “best system of emission reduction,” within the meaning of Section 111,<sup>50</sup> is not limited

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44. *Id.* at 2446-49.

45. U.S. ENVTL. PROT. AGENCY, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2012, ES8-ES10 (April 15, 2014), [http://www.epa.gov/climatechange/Downloads/ghg\\_emissions/US-GHG-Inventory-2014-Main-Text.pdf](http://www.epa.gov/climatechange/Downloads/ghg_emissions/US-GHG-Inventory-2014-Main-Text.pdf).

46. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830, 34,830 (June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

47. *Id.* at 34,832, 34,855-56.

48. *See generally id.* at 34,856-78.

49. 42 U.S.C. § 7411(d) (2013).

50. Clean Air Act § 111(a)(1), 42 U.S.C. § 7411(a)(1) (2013).

to those that can be achieved by *on-site* emission controls imposed on a facility. The agency contends that the statutory reference to “system” allows EPA to consider the further possibility of actions taken *off-site* that are capable of reducing the very need for the facility’s operation. In other words, the “system” of emission reduction, according to EPA, includes the possibility of the facility reducing its hours of operation or closing altogether because the need that had historically been met by a facility with high greenhouse gas emissions can be met by other facilities with lower emissions rates or by decreasing consumer electricity demand.<sup>51</sup>

EPA’s theory has an obvious, commonsense appeal that can be squared with an expansive definition of the plain meaning of the word “system.” Looking to *The Oxford Dictionary of English*, the agency relies on a “broad” definition of the term “system”: “a set of things working together as parts of a mechanism or interconnecting network; a complex whole.”<sup>52</sup> EPA further argues that the clear import of that plain meaning is that “the ‘system of emission reduction’ may include anything that reduces emissions” for those sources.<sup>53</sup>

But, it is also clear that such a view constitutes a significant expansion of EPA authority far beyond that which the agency has historically claimed under the Clean Air Act, let alone under Section 111(d). To be sure, EPA has previously allowed sources to comply with pollution control standards by relying on a host of measures, including such off-site activities. EPA, however, has never before used those measures as the basis for determining the degree of control achievable in the first instance. For EPA, that may be a distinction without a legal difference; industry, however, will likely make clear in litigation that they view the difference as fatal to EPA’s claim of authority.

Nor is EPA’s claim that “reduced generation” is a “system of emission reduction” an incidental part of its rulemaking proposal. Just the opposite. The vast majority of reductions in greenhouse gas emissions contemplated by EPA’s proposal turn on whether EPA is correct. While the precise percentages of greenhouse gas emission reductions achievable by the various “building blocks” described above varies by State, for all States the amount of reductions achievable by reduction of demand for electricity produced by high carbon emitting, coal combustion facilities is less than one quarter of the total emission reductions EPA believes to be achievable by the proposed rule, and for most States it is far lower than that.<sup>54</sup> For this reason, the success of EPA’s ambitious rulemaking is very much dependent on whether the agency can persuade the courts that Section 111(d)’s language is sufficiently broad to support the agency’s interpretation of its sweep.

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51. U.S. ENVTL. PROT. AGENCY, Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units 50-54 (June 2014), <http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf> [hereinafter EPA Legal Memorandum].

52. *Id.* at 51 & n.42 (citation omitted).

53. *Id.* at 51-52.

54. THE BRATTLE GRP., EPA’S CLEAN POWER PLAN – BASICS AND IMPLICATIONS OF THE PROPOSED CO2 EMISSIONS STANDARDS ON EXISTING FOSSIL UNITS UNDER CAA SECTION 111(D) 6 (Aug. 12, 2014), [http://www.brattle.com/system/publications/pdfs/000/005/067/original/EPA%27s\\_Clean\\_Power\\_Plan\\_Newell\\_GS\\_PUMP\\_Conference\\_081214.pdf?1408040470](http://www.brattle.com/system/publications/pdfs/000/005/067/original/EPA%27s_Clean_Power_Plan_Newell_GS_PUMP_Conference_081214.pdf?1408040470).

And this is where Senator Muskie, once again, becomes front and center. In support of its interpretation, EPA repeatedly turns to Senator Muskie in both its proposed rulemaking and in its accompanying “Legal Memorandum.” EPA twice expressly refers to statements made by the Senator in its proposed rulemaking, and adds five such references in that accompanying memorandum.<sup>55</sup> Each of the references relates to this same core issue: the Agency’s claim that reduced generation is within the scope of a “system of emission reduction.”

In the preamble to the proposed regulations, EPA cites to statements made by Senator Muskie in support of its contention that “the legislative history of the 1970 amendments indicates that Congress recognized that emitting sources could comply with pollution control requirements by reducing production, including retiring.”<sup>56</sup> Relying on further statements by the Senator, EPA states in its Legal Memorandum that “Congress has recognized” that parts of the Act depend on industrial sources “retiring” in order to attain the Clean Air Act’s pollution control standards.<sup>57</sup> Pointing to another Muskie statement, EPA similarly argues that the Senator’s discussion of how cities might meet pollution standards by “restrict[ing]” the “use of motor vehicles” within their borders further buttresses the Agency’s view of the propriety of taking such emission reduction measures into account in Section 111(d).<sup>58</sup> Finally, quoting Muskie yet one more time, EPA proffers as evidence that Congress clearly understood that reduction of a source’s operation was within the scope of control measures the Senator’s statement that “standards could be sufficiently stringent so that ‘effectively . . . a plant would be required to close because of the absence of control techniques.’”<sup>59</sup> According to EPA, “Congress’s recognition that closing plants is a method of reducing pollution necessarily encompasses reduced utilization as a system of reducing pollution.”<sup>60</sup> What is most telling is that in all of these examples, EPA is essentially treating statements by Senator Muskie as tantamount to congressional intent and knowledge. The two are effectively conflated for the purposes of legal argument. “Congress” is “Muskie.”

### III. CONCLUSION

Senator Muskie’s environmental law legacy is no less than stunning in terms of positive impact on the nation’s natural environment. It takes little imagination to speculate what our national landscape would now look like if the economic growth we witnessed in the past four decades had not been accompanied by the environmental protections for air, land, and water provided by the laws that Senator Muskie championed in the 1970s. All one has to do is look to the environmental devastation that has been inflicted on other parts of the globe, such as in parts of

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55. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, *supra* note 46, at 34889 n.240; EPA Legal Memorandum, *supra* note 51, at 82 & nn.64 & 66.

56. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, *supra* note 46, at 34889 & n.240.

57. EPA Legal Memorandum, *supra* note 51, at 81-82 & n.64.

58. EPA Legal Memorandum, *supra* note 51, at 82 n.64.

59. EPA Legal Memorandum, *supra* note 51, at 82 & n.66.

60. EPA Legal Memorandum, *supra* note 51, at 83.

eastern Europe and Asia, where dramatic economic growth and industrialization occurred over the same time period without comparable environmental protection safeguards.

What is equally remarkable is the enduring nature of Senator Muskie's contributions. Decades after their first enactment, the basic legal architecture that the Senator and his staffers like Leon Billings constructed remains largely in place. Repeated efforts to dismantle the architecture, launched sometimes by members of Congress and other times within the executive branch, have largely failed. And, even though Congress for decades has largely absented itself from environmental lawmaking, Muskie's voice can still be heard in the federal courts decades after he departed those legislative chambers. His voice is expressed in the arguments made by lawyers, and in the judicial rulings themselves, extending to the United States Supreme Court.

The current debate over EPA's authority to address climate change under existing laws tells the same story. The legal stakes for EPA in defending the legality of the Clean Power Plan are huge. And, the legal arguments that EPA must make in litigation are far from slam-dunks in favor of the Agency. But, EPA knows that when the going gets tough, it can rarely do better than to rely on environmental law's true champion: Mr. Clean, the Senator from Maine, Ed Muskie.