

EDMUND S. MUSKIE: THE ENVIRONMENTAL
LEADER AND CHAMPION

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Leon Billings has referred to Edmund S. Muskie as America's "most important environmental leader"¹ and Richard Lazarus has called him "environmental law's champion."² Indeed he was. Their essays in this volume make evident Muskie's enormous and enduring legacy in shaping the environmental laws that have protected health and life for more than forty years and the remarkable extent to which executive agencies and courts continue to look to and rely upon the work he did roughly four decades ago. To the extent there are inadequacies in the regulatory regime, Muskie cannot fairly be blamed. He left Congress more than thirty-five years ago; surely it could (and should) have installed the updates subsequent experience suggested and new situations require.

Billings helped produce, and Lazarus is the leading legal scholar of,³ Muskie's two most monumental environmental accomplishments—the Clean Air Act of 1970 and the Clean Water Act of 1972—and these two laws, especially the Clean Air Act, are the focus of their two essays. Those two seminal environmental laws occurred in the context of Muskie's work as an environmentalist and as one of the great legislators of the twentieth century, and this Introduction to the Billings and Lazarus contributions simply and briefly so locates them.

I. MUSKIE AND THE ENVIRONMENT

Whereas Richard M. Nixon's commitment to environmental protection was opportunistic and short-lived,⁴ Muskie's was neither. Growing up in Rumford, Maine, Muskie observed the impact of pollution on the Androscoggin River and the air from nearby paper mill smokestacks.⁵ In his 1954 gubernatorial campaign, he had raised pollution as a problem.⁶ As governor, he called for legislation to address water pollution⁷ and began to understand the complexity of the problem.⁸ After his election to the Senate in 1958, he had little opportunity to act on his environmental interest until April 1963 when he became the chairman of the newly

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1. Leon G. Billings, Eulogy at A Service in Thanksgiving for The Life of the Hon. Edmund Sixtus Muskie (Mar. 30, 1996) (reprinted in S. DOC. NO. 104-17, at xxxv (1996)).

2. Richard J. Lazarus, *Senator Edmund Muskie's Enduring Legacy in the Courts*, 67 ME. L. REV. 239, 239 (2015).

3. See generally RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (2004).

4. LAZARUS, *supra* note 3, at 75-79; Lazarus, *supra* note 2.

5. JAMES L. WITHERELL, *ED MUSKIE: MADE IN MAINE 192-93* (2014); Interview by Henry Srigo with Don Nicoll (July 7, 1998) (on file with the Muskie Oral History Project, Muskie Archives, Bates College, 4).

6. Robert F. Blomquist, *What is Past is Prologue: Senator Edmund S. Muskie's Environmental Policymaking Roots as Governor of Maine, 1955-58*, 51 ME. L. REV. 87, 93-94 (1999).

7. WITHERELL, *supra* note 5, at 192-93; Blomquist, *supra* note 6, at 95-98.

8. Blomquist, *supra* note 6, at 127-28.

created Senate Subcommittee on Air and Water Pollution.⁹ Muskie quickly commissioned comprehensive staff reports on water and air pollution.¹⁰ Although Muskie saw pollution as interfering with economic development¹¹ and was interested in conservation, early on he recognized pollution as a public health problem.¹² By mid-June 1963, Muskie was holding six days of hearings on water pollution; in September 1963, Muskie held three days of hearings on air.¹³ The Senate passed legislation in both areas during 1963, although the water bill died in the House of Representatives. The work of America's greatest environmental legislative leader had begun.

In 1963, fighting pollution brought little political payoff.¹⁴ The first Earth Day was still seven years away and the environment had not become a popular cause. Regulating pollution raised then-complicated issues of constitutional power and scientific causation.¹⁵ It was not an endeavor for the faint of heart or for uncurious minds and spirits. Pioneering never is.

The 1970 Clean Air Act and the 1972 Clean Water Act were the culmination of Muskie's legislative efforts that began the prior decade. From 1963 to 1970, the Senate passed a series of measures that incrementally enhanced pollution control, each adding to the edifice predecessor acts had begun to build. For instance, the Clean Air Act of 1963¹⁶ expanded programs for research and technical assistance and incentivized states to improve their air quality programs.¹⁷ It also authorized the Secretary of Health, Education and Welfare to convene state and local officials to address interstate air problems. In 1964, Muskie held air pollution hearings in six cities and reported "our war" against "this menace to our health and welfare" was "in its infancy."¹⁸ The Clean Air Act of 1965 directed the Secretary of Health, Education and Welfare to establish the first, albeit modest, emissions standards for motor vehicles.¹⁹ In 1965, Muskie held field hearings regarding water pollution, culminating in the Water Quality Act of 1965, which authorized the federal government to establish standards for federal waterways unless states set adequate water standards for interstate water within their jurisdictions.²⁰ Congress passed

9. Robert F. Blomquist, *Senator Edmund S. Muskie and the Dawn of Modern American Environmental Law: First Term, 1959-1964*, 26 WM. & MARY ENVTL. L. POL'Y REV. 509, 550 (2002) [hereinafter Blomquist, *Senator Edmund S. Muskie*].

10. *Id.* at 555, 578-79.

11. PAUL MILAZZO, UNLIKELY ENVIRONMENTALISTS: CONGRESS AND CLEAN WATER, 1945-1972 65 (2006).

12. 109 CONG. REC. 22,322 (1963) ("Air is life. . . . Air pollution is injurious to health."); 110 CONG. REC. 13,112 (1964); Senator Edmund S. Muskie, Chairman, Special Subcommittee on Air and Water Pollution, Water Quality and the National Interest (Apr. 16, 1964) (reprinted in 110 CONG. REC. 8,757 (1964)) (calling water pollution a threat to health, industrial production and recreation).

13. Blomquist, *Senator Edmund S. Muskie*, *supra* note 9, at 554, 569, 593-94.

14. THEO LIPPMAN, JR. AND DONALD C. HANSEN, MUSKIE 143 (1971).

15. Edmund S. Muskie, *Role of the Federal Government in Air Pollution Control*, 10 ARIZ. L. REV. 17, 17 (1968) (discussing problems of federalism and tracing causation in water and air contamination).

16. Pub. L. No. 88-206, 77 Stat. 392.

17. *Id.*

18. 110 CONG. REC. 6,261 (1964).

19. See Pub. L. No. 89-272, 79 Stat. 992.

20. 111 CONG. REC. 24,560-62 (1965) (statement of Sen. Edmund Muskie); Robert F. Blomquist, "To Stir Up Public Interest": *Edmund S. Muskie and the U.S. Senate Special Subcommittee's Water*

the Clean Water Restoration Act of 1966, which was an amended version of legislation Muskie had introduced and shepherded through the Senate. It provided funds to help defray the cost of compliance with the 1965 act.²¹ That year Congress also passed amendments to the Clean Air Act to strengthen and expand it.²² Convinced that a national response was needed, Congress passed the Air Quality Act of 1967 to establish ambient air quality standards based on federal criteria.²³ The Act adopted a regional approach to implement the national criteria.²⁴ HEW was to designate “atmospheric regions,” the States were to adopt plans showing how they would comply with the federal standards, and HEW was to report on progress.²⁵

This brief sketch of some legislative enactments leading up to Muskie’s two environmental masterpieces, the Clean Air Act of 1970 and Clean Water Act of 1972, simply identifies some markers along the way. It does not even begin to suggest the activities that produced them, the extensive study and hearings to understand the problems, the committee meetings to exchange views and develop consensus, the conferences with members of the House of Representatives to try to resolve conflicting approaches, and the continuing work to educate the public about the twin menaces to its health; not to mention Muskie’s own mastery of every aspect of the subject—technical, political, strategic, constitutional.

Even so, this incomplete outline suggests the longevity and commitment of Muskie’s legislative work up to 1970 and 1972, a record that would have made him America’s “most important environmental leader” and “environmental law’s champion” even had he shifted his attention to other areas after he achieved national prominence during his spectacular 1968 vice-presidential candidacy.²⁶ He did not. His rising national stature expanded the demands made on him, yet he retained his leadership role regarding environmental legislation and his commitment to protecting spaceship Earth and the people and species on it. In fact, it was during these years after Muskie had achieved national prominence, and at a time when other claims on his time increased exponentially due to his position as a leading party spokesman on a host of issues and front-runner for the 1972 Democratic presidential nomination, that Muskie shepherded the monumental Clean Air Act of 1970 to become law and did most of the work to complete the Clean Water Act of 1972, a project that retained his devotion even amidst the disappointment of his failed run for the presidency.

Many legislators claim victory after a legislative accomplishment and move on to other pursuits, but that was not Muskie’s way. He recognized that legislating was an ongoing enterprise and there was much more to do to combat pollution. On

Pollution Investigations and Legislative Activities, 1963-66—A Case Study in Early Congressional Environmental Policy Development, 22 COLUM. J. ENVTL. L. 1, 54-55 (1997).

21. 112 CONG. REC. 27,244 (1966).

22. 112 CONG. REC. 26,808 (1966) (statement of Sen. Edmund Muskie).

23. Edmund S. Muskie, *NEPA to CERCLA: The Clean Air Act: a Commitment to Public Health*, THE ENVTL. FORUM 3 (1990).

24. *Id.*

25. *Id.*

26. See generally Joel K. Goldstein, *Campaigning for America: Edmund S. Muskie’s 1968 Vice-Presidential Campaign*, 4 NEW ENG. J. POL. SCI. 153 (2009).

April 23, 1974, the day after the fourth Earth Day and after the master pieces were in place, Muskie lamented, “notwithstanding the legislation we have enacted, and the public awareness which has been stimulated, we have achieved so little in dealing with the problem.”²⁷ In 1975, he held extensive hearings on the Clean Air Act. A substantial part of 1976 was dedicated to passing amendments to the Clean Air Act in the Senate, reaching agreement with the House in conference, before the bill ultimately died via filibuster.²⁸ Legislation passed the following term.²⁹ Far from short-lived and opportunistic, Muskie’s work on environmental issues began before the cause became a cause and spanned most of the four terms of his Senate career until he left that body to become Secretary of State on May 8, 1980.³⁰ Indeed, he continued to write about,³¹ and advocate that government address,³² newly discovered environmental challenges as well as some of the familiar ones where work remained to be done after he left public office.

Although the Clean Air Act and Clean Water Act are not known as the “Muskie” Act(s) they might well be. Indeed, as Richard Lazarus points out, members of the Supreme Court treat Muskie’s intent as the relevant lodestar for understanding those acts.³³ The justices recognize him as the creator of the regulatory framework.

Muskie never relinquished his environmental role, yet that was far from the only area in which he led. It was no coincidence that Muskie also played the leading role regarding the Model Cities Act, as Don Nicoll has demonstrated elsewhere in this volume.³⁴ From his first term, Muskie was deeply immersed in issues relating to federalism and intergovernmental matters, and by the mid-1960s, if not before, he was widely recognized by close Congressional observers as one of the Senate’s ablest and most constructive members. Later, following Vietnam and Watergate, he became very involved in issues relating to separation of powers. He was the first chair of the Senate Budget Committee, which was designed to allow Congress to exercise its spending power in a more coherent fashion.³⁵ He managed the War Powers Resolution and became deeply engaged in foreign policy even before leaving the Senate to serve as Secretary of State.³⁶ Muskie led on, and championed, the environment but he did so in the context of his broader role as a Senator.

27. 120 CONG. REC. 11,324 (1974) (statement of Sen. Edmund Muskie).

28. See BERNARD ASBELL, *THE SENATE NOBODY KNOWS* 392-395, 398-399, 400-401, 407-411, 420-447 (1978).

29. *Id.* at 451-452; 123 CONG. REC. 26,841 (1977).

30. UNITED STATES SENATE, *HISTORY OF THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS—UNITED STATES SENATE*, S.DOC. NO. 100-45 (1988), 5.

31. See, e.g., Muskie, *supra* note 23.

32. *The Twentieth Anniversary of the Clean Water Act: Hearing Before the S. Comm. on Environment and Public Works*, 102d Cong. 11-17 (statement of Hon. Edmund S. Muskie, former U.S. Senator from the State of Maine).

33. Lazarus, *supra* note 2, at 242-43.

34. Don Nicoll, *Model Cities, Senator Muskie and Creative Federalism*, 67 Me. L. Rev. 255 (2015).

35. ASBELL, *supra* note 28, at 6-7.

36. Interview by Don Nicoll with Maynard Toll (November 1, 2000) (on file with the Muskie Oral History Project, Muskie Archives, Bates College, 8-10, 12-14).

II. MUSKIE AND LESSONS IN LEGISLATIVE LEADERSHIP

This brief sketch, along with the Billings and Lazarus contributions, suggests several characteristics of Muskie the legislator and Muskie the public servant as they emerged in his environmental work. These qualities furnish models worthy of emulation.

Muskie had a strong commitment to serving the public interest, which included protecting the health and welfare of individuals. Muskie was not oblivious to the benefits of a growing economy. On the contrary, he understood that economic growth created jobs and jobs provided opportunity which was part of the promise of America. But he did not believe that protecting the environment was inconsistent with protecting the economy. “[A]n economic growth policy which abandons environmental objectives would be a foolish course. The Nation must have clean growth,” he told the Senate in 1976.³⁷ In fact, he understood that pollution imposed substantial economic costs that its apologists tended to exclude from the calculus. He did not believe that economic gain justified poisoning human beings or degrading the planet. For Muskie’s sense of the public interest was anchored in firm ideas of right and wrong. The point could be illustrated in multiple contexts. For now, since the environment is the topic, his 1974 remarks the day after Earth Day are illustrative. “Man has burst upon the environment like an invader—destroying rather than using, discarding rather than saving, and giving the environment little chance to adapt.”³⁸ Or, if one doubts that a prophetic vision drove Muskie’s work, consider the closing paragraph in his 1974 Earth Day speech:

Brotherhood is both a form of freedom and a promise of sacrifice. As we learn that our planet is a fragile physical support, we learn as well that cooperation is what holds it and us together. We learn to see ourselves as free men able to give up that part of our freedom which is license, and able to give it up by our own choice in order to preserve freedom for all men.³⁹

Muskie was moved by rational consideration of data. Justice Louis Brandeis wrote that “[k]nowledge is essential to understanding and understanding should precede judging.”⁴⁰ Change “judging” to “legislating” and you capture Muskie’s approach. As Leon Billings points out, Muskie studied environmental issues intensely and extensively.⁴¹ At times Muskie had to operate without much scientific information but when data was available he collected it, studied it, internalized it, and acted upon it rather than denying it or wishing it away. Knowledge was a source of his influence; he used information to reach positions and shape arguments, and his colleagues, on both sides of the aisle, often deferred to him because they recognized, sometimes from embarrassing experiences, that Muskie knew what he was talking about, more so than they did. His credibility with his colleagues was reinforced by his intellectual integrity. He did not cherry-

37. 122 CONG. REC. 23,851 (1976) (statement of Sen. Edmund Muskie).

38. 120 CONG. REC. 11,324 (1974) (statement of Sen. Edmund Muskie).

39. Edmund S. Muskie, *The Environmental Agenda: Past and Future* (Apr. 22, 1974) (reprinted in 120 CONG. REC. 11,325-27 (1974)).

40. *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 520 (1924) (Brandeis, J., dissenting).

41. Leon Billings, *Edmund S. Muskie: A Man With a Vision*, 67 ME. L. REV. 233 (2015).

pick facts to protect his ideological predispositions but digested and shared information in comprehensive fashion to reach supportable and sustainable conclusions.

Muskie was interested in solving problems by creating workable laws.⁴² He was not one of those familiar (and abundant) legislators David Mayhew described who preferred position-taking to legislating.⁴³ That course may have forged a more efficient connection to election, but it was not what Muskie was sent to do. Creating appropriate laws required hard work from Muskie at several different stages: identifying a solution; reaching consensus on it; passing it through the Senate; reaching agreement with the House; and, sometimes, as in the case of the Clean Water Act, passing it over a presidential (Nixon) veto.

But Muskie's work did not end when a bill became law. That is when the oversight began, to monitor enforcement and to discover ways to perfect the legislation through the data produced by its implementation. The legislative process required constant study in a continuing search for knowledge and understanding. Muskie did not accept the simplistic conclusion that the failure of a law to deliver as expected meant regulation was a mistake. He recognized that failures of implementation accounted for some deficiencies and that correcting an initial legislative design was possible. Indeed, it was a legislator's responsibility to continue to search for ways to improve existing regimes.

Muskie was an inclusive legislator. The Clean Air Act and Clean Water Act were his bills, not because he wrote them from scratch but because he ran the legislative process that produced them. As a legislator, he more resembled the symphony conductor than the soloist. That's why he was not simply a source of ideas but of laws. He drew from, and included, the best suggestions of his colleagues. He was more interested in constructive action than accolades, so he was content to share credit in order to build consensus. Thus, the Clean Air Act was shaped by Howard Baker's belief that technology could be harnessed to reduce air pollution; by Tom Eagleton's commitment to deadlines as a necessary ingredient of laws that would deliver on promises; and by Muskie's insistence that environmental law safeguard human health. But Muskie also was very persuasive and his practice of engaging in collective rational deliberation encouraged his colleagues to join him,⁴⁴ ultimately bringing out the best in legislative behavior not the worst.

Finally, Muskie realized that compromise was not a dirty word but the fuel of legislative accomplishment and societal progress. Muskie was not willing to fold on his principles and he knew how to storm out of a negotiation in order to force concessions. Yet generally, Muskie preferred to enact partial advances rather than lose while preserving the purity of his position. He understood that legislation was a collaborative process, and accordingly, accommodation and consensus were its necessary instruments and dispositions. Today's advance was not the end of the journey but a step along the way—at least if you were willing to persevere along

42. Joel K. Goldstein, *Why Study Muskie?*, Remarks presented to Board of Visitors of the Edmund S. Muskie School of Public Service at the University of Southern Maine (April 15, 2008).

43. See generally DAVID MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

44. See Leon G. Billings, *Eagleton and the Environment: Promises Made, Promises Kept*, 52 ST. LOUIS U. L.J. 91, 92 (2007).

the road.

The upshot was that Muskie's work on environmental (and other) legislation shows the possibilities of constructive Congressional behavior. Richard Lazarus rightly wrote that "Muskie's Congress represents lawmaking at its best."⁴⁵ No wonder Ira Shapiro included Muskie's picture as one of the five senators on the cover of his book, *The Last Great Senate*.⁴⁶ Muskie was one of the giants in a well-functioning body full of eminent figures that Shapiro depicts.⁴⁷ Muskie's colleagues, and others who observed him at close range, could best attest to his greatness. After listening to and reading tributes to Muskie following his death, the perceptive columnist, Edwin M. Yoder, Jr., wrote that they "well show that even in a cynical age a man can be a hero to his intimates."⁴⁸ At least a man like Muskie could.

When Muskie died, Washington Post columnist (and former Muskie staffer) Mark Shields wrote of the enormous impact of Muskie's environmental laws in protecting human health, wildlife and natural resources. "But more than the landmark environmental laws he crafted," Shields wrote, Muskie's legacy was "a truly healthier, safer and more responsible country."⁴⁹ Muskie's environmental work advanced the public interest, demonstrated Congress at its finest, and provided an enduring lesson of political leadership.

Muskie was an environmental leader and champion, as Billings and Lazarus show. And much, much more.

45. Lazarus, *supra* note 2 at 241.

46. IRA SHAPIRO, *THE LAST GREAT SENATE: COURAGE AND STATESMANSHIP IN TIMES OF CRISIS* (2012).

47. *Id.* at 51-55, 244-45.

48. Edwin Yoder, *Ed Muskie Still Heroic to Intimates*, MONTGOMERY ADVERTISER, Apr. 4, 1996.

49. Mark Shields, *Muskie's Gift*, WASH. POST, Mar. 30, 1996, A17.