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# Reconsidering NEPA

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# Reconsidering NEPA

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*The National Environmental Policy Act (NEPA) ushered in the modern era of environmental law. Thanks to its environmental impact statement (EIS) provision, it remains, by far, the most litigated environmental statute. Many administrations have sought to weaken the law. The Trump administration, for example, put into place regulations that strictly limit the EIS process, which the Biden administration seems poised to roll back. For the most part, however, NEPA has shown remarkable staying power and resilience since its passage just over fifty years ago. As a result, its legislative history remains relevant. But the accepted history of NEPA is deeply flawed.*

*By bringing the history to light, this Article makes three contributions. First, relying on both original primary sources and a thorough review of the literature, we provide a nuanced and engaging history of the EIS provision, correcting common misconceptions of the accepted story. Second, we show why understanding this more accurate history of the Act's key provision can rebut major threats to NEPA and the regulations that govern it, such as those introduced during the Trump administration. Third, our granular history of NEPA provides an ideal experiment to test the accuracy of traditional canons of legislative history. We find that most canons fail to recognize the most critical aspects of NEPA's history. Positive political theory–derived canons, on the other hand, most accurately capture the actual legislative history.*



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## INTRODUCTION

Signed into law just over fifty years ago, the National Environmental Policy Act (NEPA)[1] was the first modern environmental statute[2] and remains among the most important. Its core requirement is simple—an environmental impact statement (EIS) must be prepared for major federal actions significantly affecting the human environment.[3] NEPA has become the legal tool of choice in a wide range of environmental issues[4]—indeed, it has resulted in more litigation than all other environmental laws *combined*. Widely admired, NEPA has served as the model for similar laws in more than 180 jurisdictions worldwide.[5]

Near the end of its term, the Trump administration set its sights on this foundational Act, proposing regulations intended to weaken significantly the environmental impact analysis requirement through restrictive page limits and time frames. While the Biden administration has made reversal of these and other NEPA changes an early priority,[6] it will take some time before the Biden administration can sort through all the issues the changes adopted by the Trump administration. Even once this is accomplished, there is no reason to assume a future like-minded administration will not seek identical or even more far-reaching changes. Additionally, in facilitating the development of new energy or infrastructure projects, the Biden administration might keep streamlining the EIS on the table, at least in part. In providing thorough research to rebut too much deregulation in the future (while providing boundaries for positive streamlining by more environmentally friendly administrations), this Article focuses closely on the boundaries and meaning of NEPA's text and legislative history, showing that it has been misunderstood in important respects.

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1. National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1970).

2. DAVID M. DRIESEN, ROBERT W. ADLER & KIRSTEN H. ENGEL, ENVIRONMENTAL LAW: A CONCEPTUAL AND PRAGMATIC APPROACH 121 (2d ed. 2011); JAMES RASBAND, JAMES SALZMAN, MARK SQUILLACE & SAM KALEN, NATURAL RESOURCES LAW AND POLICY 291 (3d ed. 2016); J.B. RUHL, JOHN COPELAND NAGLE, JAMES SALZMAN & ALEXANDRA B. KLASS, THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW 406 (3d ed. 2014); JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 321 (3d ed. 2010); Michael B. Gerrard, *Climate Change and the Environmental Impact Review Process*, 22 NAT. RES. & ENV'T 20 (2008).

3. ELIZABETH GLASS GELTMAN, MODERN ENVIRONMENTAL LAW: POLICY AND PRACTICE 9 (1997); ROBERT V. PERCIVAL, CHRISTOPHER H. SCHROEDER, ALAN S. MILLER & JAMES P. LEAPE, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 857 (6th ed. 2009); WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 801–09 (2d ed. 1994); PHILIP WEINBERG & KEVIN A. REILLY, UNDERSTANDING ENVIRONMENTAL LAW 56 (1998); H. Paul Friesema & Paul J. Culhane, *Social Impacts, Politics, and the Environmental Impact Statement Process*, 16 NAT. RESOURCES J. 339 (1976).

4. *See* ZACHARY A. SMITH, THE ENVIRONMENTAL POLICY PARADOX (4th ed. 2004).

5. Tseming Yang, *The Emergence of the Environmental Impact Assessment Duty as a Global Legal Norm and General Principle of Law*, 70 HASTINGS L.J. 525, 526 (2019) ("[A]t least 183 jurisdictions have now adopted the EIA duty as part of their environmental governance system.").

6. 86 Fed. Reg. 7037–43 (Jan. 20, 2021).

As interpreted in early judicial decisions, NEPA's novel "action-forcing" mandate made agencies to take a "hard look" at the environmental impacts of their projects.[7] It gave citizens and public interest groups an unprecedented foothold in administrative decision making, in many ways establishing what we now call environmental law. Unlike every other modern environmental law, NEPA has shown a remarkable path dependency. Despite attacks for half a century through nine administrations, the Act and the regulations that govern it remain largely unchanged, particularly after the Biden administration is able to walk back the most problematic aspects of the administrative rulemaking of the Trump administration. Putting aside rulemakings, no Congress has changed the original enactment that passed through Congress in 1969. Thus, understanding its legislative history is especially important to understanding its meaning today.

The reported and generally accepted history of NEPA is well known and straightforward[8]: responding to public pressure from the growing environmental movement and eyeing a 1972 presidential campaign, Senator Henry "Scoop" Jackson masterfully guided the legislation through his Interior and Insular Affairs Committee. He had to face down opposition by the Nixon administration and the obstinate Senator Ed Muskie, who sought to defend his environmental mantle in Congress and extend his committee's jurisdiction. Jackson was closely assisted by political scientist Lynton K. Caldwell, on leave from Indiana University, who spontaneously proposed the environmental impact statement and insisted on its inclusion in the Act during hearings.[9]

Thorough original historical research and interviews with participants make clear that this widely accepted story is deeply inaccurate. The EIS did not originate spontaneously. There had been serious discussion of similar strategies to force agency action both in and outside of Congress for almost a full decade before Jackson and Caldwell "invented" the policy tool.[10] Second, the critical language requiring the

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7. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

8. *See, e.g.*, FREDERICK R. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT (2013); MATTHEW J. LINDSTROM & ZACHARY A. SMITH, THE NATIONAL ENVIRONMENTAL POLICY ACT: JUDICIAL MISCONSTRUCTION, LEGISLATIVE INDIFFERENCE, AND EXECUTIVE NEGLECT (2008); RICHARD A. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH (1976); A. Dan Tarlock, *The Story of* Calvert Cliffs: *A Court Construes the National Environmental Policy Act to Create a Powerful Cause of Action*, *in* ENVIRONMENTAL LAW STORIES 77 (Richard J. Lazarus & Oliver A. Houck eds., 2005); Oliver A. Houck, *Is That All? A Review of* The National Environmental Policy Act, an Agenda for the Future, 11 DUKE ENV'T L. & POL'Y F. 173, 174 (2000); Sam Kalen, *Ecology Comes of Age*: *NEPA's Lost Mandate*, 21 DUKE ENV'T L. & POL'Y F. 113, 139 (2010); Richard A. Liroff, *NEPA—Where Have We Been and Where Are We Going?*, 46 J. AM. PLAN. ASS'N 154, 154–55 (1980).

9. *See infra* note 47 and accompanying text.

10. *See, e.g.*, *Hearing on S. 2282 Before the S. Comm. on Interior and Insular Affs.*, 89th Cong. 59 (1966); *Hearing on S. 239 & S. 1415 Before the S. Comm. on Interior and Insular Affs.*, 87th Cong. 32–33 (1961); ORG. FOR ECON. COOP. & DEV., REVIEWS OF NATIONAL SCIENCE POLICIES: THE UNITED STATES 295–96 (1968); U.S. EXEC. OFF. OF THE PRESIDENT, OFF. OF SCI. & TECH., FED. COUNCIL FOR SCI. & TECH., RESEARCH AND DEVELOPMENT ON NATURAL RESOURCES 16 (1963). Additionally, at the time of NEPA's passage, a series of other bills were in play that sought to force action and deliver on a national environmental policy,

"detailed statements" that would become the EIS was inserted into the draft law not by Jackson, but by the Committee on Environment and Public Works and its staff following aggressive intervention by Senator Muskie.[11] Without the bitter competition between Muskie and Jackson, and the intervention of the Public Works Committee, NEPA would have likely emerged as a forgettable administrative nudge, simply requiring agencies to report "findings" of intended impacts. Rather than the villainous foil to Jackson's heroic leadership, Muskie was equally critical in crafting NEPA as it exists today.

These two stories—the mythic and the accurate—lend themselves to substantively different readings of Section 102 by attributing key concepts to different legislative players with very different intents and purposes. Recognizing the correct story may make a substantial difference to whether NEPA stands or falls in the face of current and future challenges.

This Article makes three important contributions—two to substance and one to theory. First, it sets the historical record straight. In providing a more accurate and nuanced history of NEPA's environmental impact statement, this Article relies on extensive and previously unpublished primary sources, including original interviews, historical documents, unpublished scholarship, and never-before-reported, secretly recorded transcriptions of President Nixon's conversations about NEPA. What emerges is a more complete cast of actors and a fuller picture of legislative intent. We find the heroic story of Jackson and Caldwell displaced by a more accurate history of NEPA marked by conflict, bargaining, and compromise.

Second, taking advantage of granular knowledge of how NEPA came to be,[12] this Article engages in the larger debate over various canons of statutory interpretation and their value. Knowing the full history of NEPA provides a rare opportunity to test traditional canons' ability to reconstruct the core aspects of a law's legislative history. We find that traditional canons employed by the judiciary in its quest to understand NEPA[13] would fail to parse out the full story of Section 102 by emphasizing red herrings and drawing out the "told" but grossly oversimplified story. In contrast, we find McNollgast's positive political "veto gates" canons and their application to NEPA to be remarkably useful.[14] Positive canons, we argue, should be

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some through even more dramatic mandates. A more detailed history of environmental impact analysis during this era is the subject of forthcoming research by the authors.

11. *See infra* Section II.B.

12. Such an opportunity is largely a byproduct of NEPA's historic significance—not all acts of Congress are so significant that everyone involved, down to staff, spend the rest of their lives discussing and lecturing on it, of course.

13. *See infra* note 181.

14. McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 L. & CONTEMP. PROBS. 3, 31 (1994) [hereinafter *Legislative Intent*]; s*ee also* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); McNollgast, *Positive and Normative Models of Procedural Rights: An Integrative Approach to Administrative Procedures*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 307 (1990); Daniel B. Rodriguez & Barry Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1438–39 (2003). While McNollgast analyzed the applicability of the positive political theory to NEPA's Section 103, in this Article, we consider the larger and more weighty bargains which remade Section 102.

employed in future controversies regarding NEPA regulations on the meaning and intent of Section 102. Understanding NEPA's true story is thus important not only for environmental legal history and the preservation of the EIS, but also to the general discussion over the use of extrinsic sources.

Third, and most importantly, this Article argues that the history and interpretive methods we put forward may be the legally most effective defense of environmental impact statements against improper regulatory rollbacks under future hostile administrations—rather than being backward-oriented, this Article considers the future vitality and effectiveness of NEPA.

We proceed in three parts. Part I introduces the proposed Trump regulations in a historical context. We outline an oftentimes bipartisan pattern of proposed rollbacks to the environmental impact statement and explore the ways in which the Trump proposal was qualitatively different and, we argue, more dangerous to the Act and its purposes than previous proposals.

Part II explores the legislative history of NEPA and considers the atmosphere of competition and conflict in which the bill came to be. We describe its passage through the Senate without a "detailed statements" provision and the irregular means by which the bill was amended and remade off the record. We show that, barring such conflict, NEPA would have been a trivial law, long forgotten by now.

Part III assesses how well the leading canons of statutory interpretation serve to explain NEPA's legislative history and construct its legislative intent and purpose. Unlike McNollgast's "veto gates" canons, most of the traditionally employed canons fare poorly, suggesting the need for a more critical assessment of their application by the judiciary. In light of the proposed Trump regulations, we discuss the potential ramifications of the legislative history and use of different canons as it applies to the future of NEPA. If the same old approach to NEPA's legislative history is taken, the EIS may not survive future administration assaults.

## I. THE CAMPAIGN TO REMAKE NEPA

Fifty years ago, no one observing NEPA's passage would have guessed that it would grow into an environmental behemoth. To most observers in Congress, NEPA was regarded as a general policy statement or even an antipollution measure. As one scholar later noted,

> one of two Senate staff members who drafted the initial version of Section 102, Daniel Dreyfus, noted that "there wasn't much wrangling in the [conference] committee" over the language of Section 102, and although the staff attempted to generate public interest in the provisions, there was a "gross lack of appreciation for the significance of that language."[15]

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15. Claude E. Barfield & Richard Corrigan, *White House Seeks to Restrict Scope of Environment Law*, 4 NAT'L J. 336, 340 (1972), *cited in* Hanna J. Cortner, *A Case Analysis of Policy Implementation: The National Environmental Policy Act of 1969*, 16 NAT. RES. J. 323, 330 (1976).

Discussion of what is now the most controversial aspect of the bill, the EIS-demanding Section 102, hardly appeared in the Senate report.[16]

Instead, the Council of Environmental Quality (CEQ), created by NEPA in the Executive Office of the President, was assumed to be the most significant outcome of the statute.[17] Writing to bill sponsor Henry "Scoop" Jackson, Nixon described NEPA as the "Council on Environmental Quality" bill.[18] No one else in the Executive branch seemed to have regarded NEPA as anything more, either. As John Whitaker, Nixon's chief environmental policy adviser, later commented,

> NEPA seemed, I think, to a number of people, to be almost a policy statement and without teeth . . . . Did it have a legal implication, and the government would end up being sued and this would be kind of a cottage industry for the lawyers and this was really going to change the world? Maybe somebody in OMB knew. I certainly didn't know. The President didn't know. John Ehrlichman didn't know.[19]

Not seeing any threat posed by the bill, Nixon used its signing ceremony to announce a major push for environmental legislation and glean some of the spotlight.[20] White House staff, led by John Ehrlichman and John Whitaker, had constructed a set of broad environmental protection proposals that Nixon intended to unveil at his State of the Union Address at the end of January 1970. Signing NEPA would signal that more was yet to come,[21] as Nixon stated:

> It is particularly fitting that my first official act in this new decade is to approve the National Environmental Policy Act . . . . By my participation in these efforts I have become further convinced that the 1970s absolutely must be the years when America pays its debt to the past by

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16. *See* S. REP. NO. 91-296, at 8 (1969).

17. ANDERSON, *supra* note 8, at 1–3.

18. Letter from President Richard Nixon to Sen. Henry M. Jackson (Jan. 19, 1970) (unpublished letter on file with the *Indiana Law Journal*). The White House and others seem to have interpreted NEPA to be significant first and foremost for Title II. Letter from Harold LeVander, Governor of Minnesota, to President Richard Nixon (Jan. 2, 1970) (unpublished letter on file with the *Indiana Law Journal*); Memorandum from Wilfred H. Rommel, Assistant Dir. for Legis. Reference, to President Richard Nixon (Dec. 30, 1969) (unpublished letter on file with the *Indiana Law Journal*). This misunderstanding was critical to the bill's passage. As one staff aide later admitted, "If Congress had appreciated what the law would do, it would not have passed. They would have seen it as screwing public works . . . . If Congress had known what it was doing, it would not have passed the law." LIROFF, *supra* note 8, at 35.

19. Interview by Frederick J. Graboske & Raymond H. Geselbrach with John C. Whitaker, former White House Domestic Council member, at the Nat'l Archives (Dec. 30, 1987). Whitaker continues, "But yes, Charlie, there was a lot of griping. The Secretary of Commerce would call every couple of days and say the world is falling apart and this thing was just going to ruin the world. And we didn't know how to write an environmental impact statement very well. We got sued a lot and we lost a lot." *Id.*

20. The political pressure that led him to do this is discussed below. *See infra* note 86 and accompanying text.

21. *See* PERCIVAL, *supra* note 3, at 858.

> reclaiming the purity of its air, its waters and our living environment. It is literally now or never. . . . We are determined that the decade of the 70's will be known as the time when this country regained a productive harmony between man and nature.[22]

Nixon's strong support for harmony between man and nature, though, soon became discordant thanks to the actions of D.C. Circuit Judge Skelly Wright and a seemingly obscure case about the process of licensing nuclear reactors. Judge Wright's opinion in *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission* interpreted NEPA's requirement for a "detailed statement"[23] in a manner that the White House had never imagined. According to the court, agencies must provide "evidence that the mandated decision-making process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own."[24]

With a clear mandate for agencies from the D.C. Circuit's reading of NEPA that required agencies to examine environmental impacts to the fullest extent possible (or face lawsuits if they did not), NEPA's power quickly became apparent. As White House adviser John Whitaker recalled,

> [T]here was a lot of griping. The Secretary of Commerce would call every couple of days and say the world is falling apart and this thing was just going to ruin the world. And we didn't know how to write an environmental impact statement very well. We got sued a lot and we lost a lot. The judge saying the facts we had unearthed when writing the environmental statement were not adequate to make a decision whether you should or should not go forward with a certain development project.[25]

Even before *Calvert Cliffs* was decided, Nixon was beginning to sour. NEPA drew special criticism from Nixon during this period:

> We get an environmental impact statement on the [proposed] Alaskan pipeline, but nowhere in the law does it require an economic impact statement to show what the plusses would be of that particular one. So

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22. Statement of President Richard Nixon at the Signing of the National Environmental Policy Act of 1969 (Jan. 1, 1970) (unpublished press release on file with the *Indiana Law Journal*).

23. 449 F.2d 1109, 1123 (D.C. Cir. 1971).

24. *Id.* at 1114. The opinion then goes on to refine what NEPA's action-forcing language of "detailed statement" means: "Of course, all of these Section 102 duties are qualified by the phrase 'to the fullest extent possible.' We must stress as forcefully as possible that this language does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow 'discretionary.' Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration 'to the fullest extent possible' sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts." *Id.*

25. Patricia Limerick, *Inside Interior Interview with John C. Whitaker*, CTR. AM. WEST (Nov. 19, 2003), https://www.centerwest.org/wp-content/uploads/2011/01/whitaker.pdf [https://perma.cc/J6S7-MRKF].

> you get all these impact statements that point out just the horror stories, but no statement required on a formal basis that says, "Here's the reasons that dictate in favor of building the darn thing . . . . I've got [Attorney General John Mitchell] working on it now, and he's being persuasive, trying to get reasonable and just go through with it. Because the pipeline should be built, it should be built through Alaska, not through Canada. Period. That's all. That's all . . . . [The people opposing it] are wild. Say we're going to get skin cancer. (laughter). Skin cancer!"[26]

After his reelection in 1972, Nixon lost all appetite to push environmental bills and began to even walk back some of his own environmental measures. Despite the increasing demands of Watergate, Nixon's staff developed a proposal to suspend NEPA for five years.[27] In one meeting, Whitaker reminded Nixon of his order that his staff "prepare for you as soon as possible legislation which would remove all environmental roadblocks to energy production and supply by cancelling environmental inhibitions for the next few years."[28]

Opposition to NEPA started emerging from Congress, as well. Indeed, in 1972, environmental groups created a coalition called "Save NEPA" to mobilize against weakening legislation. Just two years after the law's passage, alarmed by the *Calvert Cliffs* opinion and agency defeat after defeat to NEPA litigants, the landscape had fundamentally changed. Gone was the consensus support for harmony between man and environment or an overarching government commitment to the environment. A new era emerged that continues through today—periodic strong opposition to NEPA from the White House and Congress alike.[29] Reining in NEPA is not a partisan issue in Congress, either. Congress time and again has exempted NEPA from slowing down border walls, grazing programs on federal lands, and transport projects, under both Democratic and Republican control.[30] Even Scoop Jackson, the mythic creator of NEPA, turned against his own statute. During the OPEC oil crisis in the 1970s, he favored limiting NEPA challenges in order to increase production through the Trans-Alaska Pipeline.[31]

Initiatives to reform or streamline NEPA (whether to facilitate or hamper environmental protections) have become routine and are bound to continue into future administrations. President George W. Bush created a task force charged with "modernizing NEPA implementation."[32] President Trump issued a series of

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26. Audiotape: Nixon White House Tapes, Conversation with Peter H. Dominick & Clark MacGregor, Tape 471(a) (Mar. 24, 1971) (available at the Nixon Presidential Library).

27. Memorandum from Ken Cole, Aide, to President Richard Nixon (Feb. 27, 1974) (unpublished memorandum on file with the *Indiana Law Journal*).

28. *Id.*

29. Edmund S. Muskie & Eliot R. Cutler, *A National Environment Policy: Now You See It, Now You Don't*, 25 ME. L. REV. 163, 164 (1973) ("No longer is NEPA the litmus test of environmental concern which it once was. Everyone is confused, and the confusion is understandable when an observer tries to bring order out of the chaotic state of federal environmental law.").

30. Sam Kalen, *NEPA's Trajectory: Our Waning Environmental Charter from Nixon to Trump?*, 50 ENV'T L. REP. 10398, 10404 (2020).

31. *Id.*

32. *Id.* at 10405.

executive orders calling for expedited environmental reviews for high-priority infrastructure and energy independence projects, among others.[33] But efforts to weaken NEPA have not only come from Republican administrations. In 2009, Congress passed President Obama's stimulus package that provided for expedited NEPA review as well as similar exceptions in his law for freight and large-scale projects.[34]

Despite executive orders from the White House and congressional legislation calling for expedited review or even excluding particular types of projects from NEPA's reach, an important fact stands out. NEPA, itself, has not been significantly amended.[35] The statute has shown remarkable resilience. This stands in stark contrast to every other major environmental law. It's not that Congress hasn't tried. Proposed bills gutting NEPA are commonplace.[36] But they have not gained enough support for passage.

While over the years many have argued that NEPA should be read to have substantive as well as procedural requirements,[37] attempts to get courts to follow along have been fruitless—courts have only recognized NEPA's procedural EIS

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33. *Id.* at 10406–07.

34. *Id.* at 10405.

35. LINDA LUTHER, CONG. RSCH. SERV., RL33152, THE NATIONAL ENVIRONMENTAL POLICY ACT: BACKGROUND AND IMPLEMENTATION CRS-6 n.1 (2005) ("NEPA was amended by P.L. 94-52, July 3, 1975, regarding how CEQ may spend appropriated funds; P.L. 94-83, August 9, 1975, specifying parameters under which states may prepare an EIS; and P.L. 97-258, § 4(b), September 13, 1982, regarding budget and accounting procedures.").

36. *See generally* Kalen, *supra* note 30.

37. Lynton K. Caldwell, *The National Environmental Policy Act: Retrospect and Prospect*, 6 ENV'T L. REP. 50030, 50032–33 (1976); Lynton K. Caldwell, *Environmental Impact Analysis (EIA): Origins, Evolution, and Future Directions*, 6:3–4 IMPACT ASSESSMENT 75, 78 (1988); ZYGMUNT PLATER, ROBERT ABRAMS, ROBERT GRAHAM, LISA HEINZERLING, DAVID WIRTH & NOAH HALL, ENVIRONMENTAL LAW AND POLICY: NATURE, LAW & SOCIETY 320–323 (5th ed. 2016); Nicholas C. Yost, *NEPA's Promise—Partially Fulfilled*, 20 ENV'T L. 533, 534–36 (1990); Paul S. Weiland, *Amending the National Environmental Policy Act: Federal Environmental Protection in the Twenty-First Century*, 12 J. LAND USE & ENV'T L. 275, 281–282 (1997); Bernard S. Cohen & Jacqueline Manney Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969*, 13 B.C. INDUS. & COM. L. REV. 685, 704 (1972); L.K. Caldwell, *Implementing NEPA: A Non-technical Political Task*, *in* ENVIRONMENTAL POLICY AND NEPA: PAST, PRESENT, AND FUTURE 25, 35 (Ray Clark & Larry Canter eds., 1997); ANDERSON, *supra* note 8, at 1–3 (positing that the legislative history of the Act is taken up with issues of study, research, and institutional reorganization); ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW IN A NUTSHELL 27 (2008). Mourning a "substantive" NEPA is something of a ritual in the environmental legal literature. *See generally* Roger M. Leed, *The National Environmental Policy Act of 1969: Is the Fact of Compliance a Procedural or Substantive Question*, 15 SANTA CLARA LAW. 303, 325 (1975); Kalen, *supra* note 8; David G. Burleson, *NEPA at 21: Over the Hill Already?*, 24:3 AKRON L. REV. 623 (1991); Lynton K. Caldwell, *Is NEPA Inherently Self-Defeating?*, 9 ENV'T L. REP. 50001 (1979); Weiland, *supra*, at 286–290; Sam Kalen, *The Devolution of NEPA: How the APA Transformed the Nation's Environmental Policy*, 33 WM. & MARY ENV'T L. & POL'Y REV. 483 (2009); LYNTON KEITH CALDWELL, THE NATIONAL ENVIRONMENTAL POLICY ACT: AN AGENDA FOR THE FUTURE 36 (1998).

requirement.[38] NEPA does not require federal agencies to choose environmentally friendly projects. However, they only must look before they leap and disclose project impacts and disclose certain information about reasonable project alternatives and their environmental impacts.

Thus, the meaning of NEPA depends very much on how hard agencies look, in addition to how much leverage outsiders—including the public—have to scrutinize the information that is disclosed. The Trump administration sought to undercut this.[39] The regulations put in place at the tail-end of Trump's presidency impose an arbitrary, unrealistic page limit to constrict information made public. It caps most EISs to 150 pages, only allowing exceptions in certain narrow circumstances.[40] Moreover, unless a narrow exemption were met, the regulations also caps the time an agency can devote to two years (from the time an agency publishes notice to complete an EIS to the time it is finalized with a record of decision).[41] Without context, these numbers may not mean very much. To understand the scope of these changes, however, and how fundamentally they might affect EISs, consider the data points that the administration itself volunteered:

> [A]cross all Federal agencies, draft EISs [finalized between January 1, 2013, and December 31, 2017] averaged 586 pages in total, with a median document length of 403 pages. One quarter of the draft EISs were 288 pages or shorter, and one quarter were 630 pages or longer. For final EISs, the mean document length was 669 pages, and the median document length was 445 pages. One quarter of the final EISs were 299 pages or shorter, and one quarter were 729 pages or longer. On average, the change in document length from draft EIS to final EIS was an additional 83 pages or a 14 percent increase. With respect to final EISs, CEQ found that approximately 7 percent were 150 pages or shorter, and 25 percent were 300 pages or shorter.[42]

The Trump administration's proposed time limit was in stark contrast with the time actually taken on EISs: "[A]cross the Federal Government, the average time for

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38. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 756–57 (2004) (citing Robertson v. Methow Valley Citizens Valley, 490 U.S. 332, 349–50 (1989)); *see also* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.").

39. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (Jan. 10, 2020); *see also* COUNCIL ON ENV'T QUALITY, FACT SHEET: PRESIDENT DONALD J. TRUMP IS COMMITTED TO MODERNIZING ENVIRONMENTAL POLICIES AND PAVING THE WAY FOR VITAL INFRASTRUCTURE IMPROVEMENTS (Jan. 9, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-committed-modernizing-environmental-policies-paving-way-vital-infrastructure-improvements/?utm_source=facebook&utm_medium=social&utm_campaign=wh [https://perma.cc/74TJ-KVUW].

40. Update to the Regulations, *supra* note 39 at 1700–02 (discussing proposed changes to 40 C.F.R. § 1502.7).

41. *Id.* at 1699–1700 (discussing proposed changes to 40 C.F.R. § 1502.8).

42. *Id.* at 1688.

completion of an EIS and issuance of a ROD was over 4.5 years and the median was 3.6 years. One quarter of the EISs took less than 2.2 years, and one quarter of the EISs took more than 6 years."[43]

The changes have thrown a major wrench in EIS preparation (and will continue to do so as long as they are on the books), changing common practice since the 1970s.[44] The great majority of EISs, under these rules, will have to be smaller than 93% of all detailed statements published in the greater part of the last decade and take less time to prepare than nearly 75%.

At least on case challenging these rules promulgated by the Trump administration has been allowed to proceed under the Biden administration,[45] and regardless, the Biden administration may want to keep at least portions of Trump's changes on the table, at least for projects it deems environmentally critical (like the building of green infrastructure). Whether it is a court confronting the changes the Trump administration introduced through rulemaking or the Biden administration (or any other future administration) trying to figure out what sorts of changes are permissible, a proper understanding of NEPA's legislative history is important. As for the Trump changes, these requirements that limit the reach of NEPA review are unreasonable. The proposed page limits frustrate the question of how detailed is "detailed"? Similarly, the time limits restrict how much agencies can consider, question, and suggest new lines of inquiry (such as unexplored alternatives derived from comment periods). Finally, how much information is volunteered to the public would be significantly constrained.

For the first time in nearly a half century, NEPA faces a serious challenge to the EIS. Put simply, as long as the changes Trump introduced remain on the books, NEPA is greatly weakened, and weakened in ways that contradict the meaning of the statute that an accurate view of the legislative history makes clear.

While the most problematic parts of the Trump changes will likely to be reversed by the Biden administration, it will take some time. Additionally, the Trump regulations provide a roadmap for future administrations seeking to continue the strategy of deregulation and environmental rollback. Should such regulations come into force, the ensuing litigation will need to ask the same question that *Calvert Cliffs* asked: What is meant by detailed statement? Similarly, streamlining NEPA to facilitate a rapid energy transition or the development of a green economy under a more environmentally minded administration might force us to ask the same question. In answering that question, a reviewing court should follow the lead of Judge Wright in *Calvert Cliffs*—rely on the legislative history of NEPA to parse the meaning of the statute. The problem is that the commonly understood history of the action-forcing provision of the detailed statement is wrong.

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43. *Id*. at 1687.

44. *Id.* at 1684.

45. Rachel Frazin, *Judge Rejects Biden Request for Delay in Trump Environmental Rollback Case*, HILL (Feb. 22, 2021), https://thehill.com/policy/energy-environment/539859-federal-judge-rejects-biden-request-to-pause-case-over-trump [https://perma.cc/UVT4-X4KW].

## II. LEGISLATING NEPA

The accepted history of NEPA is heroic. In its simplest form, it is the story of Lynton Caldwell who, in a flash of policy genius, had the idea to insert an action-forcing mechanism into NEPA—the EIS. In some versions, Caldwell developed the idea over a period of years. In more hagiographic tellings, the idea was spontaneous, coming "to Caldwell as a young man while he was gazing at a sunset over the harbor of Hong Kong."[46] Caldwell's testimony before the Senate on April 16, 1969, is most often highlighted as the singular creation moment. Caldwell told the Committee:

> [I]t seems to me, that the Congress indeed has a responsibility . . . and could enunciate [a national environmental] policy. But beyond this, I would urge that in the shaping of such policy, it have an action-forcing, operational aspect. When we speak of policy we ought to think of a statement which is so written that it is capable of implementation; that it is not merely a statement of things hoped for . . . but that it is a statement which will compel or reinforce or assist . . . the executive agencies . . . .[47]

Caldwell no doubt played a part in highlighting his singular contribution to NEPA (history, after all, is written by the victors), but the idea of what would become NEPA's Section 102, which mandates EISs, has deeper roots than a single

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46. William H. Rodgers, Jr., *The Most Creative Moments in the History of Environmental Law: The Who's*, 39 WASHBURN L.J. 1, 12 (1999) ("Perhaps the grandest 'Aha!' moment in the history of environmental law was Lynton Caldwell's idea to insert an action-forcing mechanism into NEPA. . . . It came to Caldwell as a young man while he was gazing at a sunset over the harbor in Hong Kong."). Other Caldwell-centric versions of this story exist as well. *See, e.g.*, Kalen, *supra* note 8, at 139; CALDWELL, *supra* note 37, at 48; LINDSTROM & SMITH, *supra* note 8, at 36.

47. *National Environmental Policy: Hearing on S. 1075, S. 237, and S. 1752 Before the S. Comm. on Interior & Insular Affs.*, 91st Cong. 116 (1969) [hereinafter *Hearing on S. 1075*]. Caldwell also credits himself with originating environmental impact analysis as action-forcing in an unpublished 1964 paper, in which he wrote that "some instrumental means are . . . needed to improve the quality of decision making on environmental and ecological matters, and which can be successfully applied under conditions wherein ecological sophistication is minimal." Caldwell, *Implementing NEPA*, *supra* note 37, at 61; Terence T. Finn, Conflict and Compromise: Congress Makes A Law, The Passage of the National Environmental Policy Act 305 (Nov. 16, 1972) (Ph.D. dissertation, Georgetown University) (ProQuest) ("Looking back in 1971 Caldwell pointed to his memoranda . . . as the genesis of the National Environmental Policy Act's requirement for a detailed statement on the environmental impact of proposed actions."). Caldwell later conceded somewhat. *See* Lynton K. Caldwell, *Implementing Policy Through Procedure: Impact Assessment and the National Environmental Policy Act (NEPA)*, *in* ENVIRONMENTAL METHODS REVIEW: RETOOLING IMPACT ASSESSMENT FOR THE NEW CENTURY 1, 9–10 (Alan L. Porter & John J. Fittipaldi eds., 1998). Responding to Caldwell, Senator Jackson continued: "I am wondering if we might not broaden the policy provision in the bill so as to lay down a general requirement that would be applicable to all agencies that have responsibilities that affect the environment rather than trying to go through agency by agency." *Hearing on S. 1075*, *supra*, at 116–117. The interchange between the two, however, was effectively "scripted." Kalen, *supra* note 8, at 141.

congressional hearing or Hong Kong sunset, and in many ways was thrusted upon Jackson rather than developed by him or Caldwell.

While a much longer history could be provided,[48] what would become NEPA began to take its final form in 1968, when Senator Jackson and other congressional colleagues[49] organized and held on July 17, 1968, a "Joint House-Senate Colloquium to Discuss a National Policy for the Environment."[50] During the Colloquium, Interior Secretary and conservation thought leader Stewart Udall argued for an action-forcing mechanism.[51] Recognizing that policy statements alone will not "stop the inexorable highway construction, the obnoxious boom of supersonic aircraft, the wrongheaded dam building, or the pernicious concept of calculated obsolescence that fouls our countryside,"[52] he said, harmful activities will be mitigated only when Congress gives life to policy statements "through new laws and new policies that reject the old ways. For example, we must be willing to require that the nature and potential of new goods and services be examined for their impact on man and nature before, not after, their first use."[53] He did not use the term "environmental impact statement," but the conceptual framework was the same. Rather than create a singular agency or oversight body, he argued that "[e]ach agency should designate responsible officials and establish environmental checkpoints to be sure they have properly assessed this impact."[54]

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48. *See supra* note 10.

49. Senator Jackson reportedly agreed to the Colloquium only after being "prodded by Van Ness" and realizing that such a colloquium might defuse pressure for a Joint Committee on the environment of the sort that Muskie had been advocating. Finn, *supra* note 47, at 261–62.

50. *Joint House-Senate Colloquium to Discuss a National Policy for the Environment: Hearing Before the S. Comm. on Interior & Insular Affs. & the H. Comm. on Sci. & Astronautics*, 90th Cong. (1968) [hereinafter *Colloquium*]. The stated objective of the Colloquium, as reported in the resulting white paper, was to "avoid conventional committee jurisdiction limitations and bring together interested members with executive branch heads and leaders of industrial, commercial, academic, and scientific organizations." STAFF OF S. COMM. ON INTERIOR & INSULAR AFFS. & STAFF OF H. COMM. ON SCI. & ASTRONAUTICS, CONGRESSIONAL WHITE PAPER ON A NATIONAL POLICY FOR THE ENVIRONMENT, 90th Cong. iii (1968) [hereinafter WHITE PAPER].

51. *Colloquium, supra* note 50, at 16 ("Let no one suppose there is any organizational panacea for dealing with environmental problems at the Federal level. . . . [T]o combine all programs affecting the environment in one department would obviously be physically impossible. . . . Each agency should designate responsible officials to establish environmental checkpoints to be sure they have properly assessed this impact."). Enclosed in the records of the Colloquium is the statement of Dr. Gerald F. Tape, commissioner of the Atomic Energy Commission, who argued for a similar EIS-adjacent proposal: "We can commit ourselves to the interdisciplinary process in environmental decision-making just as we are committed to the democratic process, and certain procedural checks and balances, in political decision-making. We can, for example, decide to involve from the beginning of the planning process, and to take fully into account the counsel of . . . professionals . . . . And we can, as a matter of policy, do much more to facilitate the timely participation of informed citizens in environmental decision-making." *Id.* at 221.

52. *Colloquium*, *supra* note 50, at 15.

53. *Id.* at 15–16.

54. *Id.* at 18. These comments were also reprinted in the white paper. WHITE PAPER, *supra*

Jackson and others, including Dr. Donald Hornig, science advisor to President Johnson, emphasized the need for "action-forcing processes."[55] One last testimony, in particular, had far-reaching effects on the development of NEPA. Dr. Dillon Ripley, an ornithologist and secretary of the Smithsonian Institution, articulated a version of the environmental impact assessment process which would closely reflect some key language of NEPA:

> There should be established mechanisms to assess and predict the effects of technology on the environment prior to its introduction into the public domain . . . . These methods must certainly include detailed ecological analysis and must, of course, be complemented by sociological, engineering, and economic analysis so that each perspective can be evaluated within the context of human fulfillment. Additionally, these devices must be available at all decision making levels, governmental and private. Inclusion of this recommendation in a Congressional statement of national policy would stimulated [sic] their development.[56]

Although not credited to Dr. Ripley, this framing of the analysis procedure was repeated in the Colloquium's report as one of the proposed "Elements of a National Policy for the Environment."[57] Thus, by as late as 1968,[58] the major policy ingredients of NEPA were already part of the conversation.

### *A. Almost NEPA: Senate Bill 1075*

The environmental movement was still cresting in the final year of the 1960s. Pressure on Congress to integrate environmental values into federal governance exploded in the period immediately following the Colloquium. As was the case with the Clean Air Act[59] passed the following year, momentum for NEPA was driven in large part by broad public cynicism regarding the efficacy and responsiveness of the

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note 50, at 9.

55. *Colloquium*, *supra* note 50, at 60. Jackson didn't provide any substantive discussion, however, and only recognized a general need. Dr. Hornig called for "a suitable means of insuring [policy] effectiveness and carrying it out, and an evaluation and rationalization of effects on other national goals." *Id.* at 31.

56. *Id*. at 213.

57. WHITE PAPER, *supra* note 50, at 15–16 ("Alternatives must be actively generated and widely discussed. Technological development, introduction of new factors affecting the environment, and modifications of the landscape must be planned to maintain the diversity of plants and animals. Furthermore, such activities should proceed only after an ecological analysis and projection of probable effects."). For the later significance of these comments, as well as a discussion of the Smithsonian counsel who offered the remarks, see *infra* note 146 and accompanying text.

58. In 1968, Train similarly testified before the Public Works Committee that any statement of a congressional policy on the environment must necessarily be accompanied by some "institutional innovation necessary to implement such a policy." *Waste Management Research and Environmental Quality Management: Hearings Before the Subcomm. on Air and Water Pollution of the Comm. on Pub. Works*, 90th Cong. 157 (1968) (statement of Russell E. Train, President, Conservation Foundation).

59. Clean Air Act of 1970, 42 U.S.C. §§ 7401–7671q.

federal government.[60] Savvy politicians realized the strength of this new class of voters and vied to add to their environmental credentials.[61] Jackson and Muskie, two "Senate barons"[62] and candidates for the 1972 Democratic presidential nomination,[63] both competed for the environmentalist vote,[64] although they approached the issue from very different perspectives. They each had impressive records. Senator Muskie's Air and Water Pollution Subcommittee had been actively legislating to combat pollution since 1963.[65] The Interior Committee, under Jackson, crafted classical conservation bills like the Wilderness Act of 1964[66] and the Wild and Scenic Rivers Act of 1968.[67]

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60. "A primary purpose of the bill," Senator Jackson told the Senate, referring to Senate Bill 1075, "is to restore public confidence in the Federal Government's capacity to achieve important public purposes and objectives and at the same time to maintain and enhance the quality of the environment." S. REP. NO. 91-296, at 8 (1969). *See generally* Brigham Daniels, Andrew P. Follett & Josh Davis, *The Making of the Clean Air Act*, 71 HASTINGS L. J. 901, 907–15 (2020); Brigham Daniels & Andrew P. Follett, *Building Credibility: Lessons from the Leadership of William Ruckelshaus*, 50 ENV'T L. REP. 10238, 10239–40 (2020).

61. Henry M. Jackson, *Environmental Policy and the Congress*, 11 NAT. RES. J. 403, 408 (1971). Muskie was not competing for total ownership, however, as he was skeptical of the theoretical approach of Jackson's bill in the first place. *See* Muskie & Cutler, *supra* note 29, at 165–66.

62. Leon Billings & Tom Jorling, *The Earth Institute – Columbia University – Origins of Environmental Law (Class 3; Fall 2014)*, VIMEO, at 6:08–6:22 (Sept. 2014), https://vimeo.com/122375776 [https://perma.cc/QAQ3-ZE5G] [hereinafter *Columbia Lecture*].

63. Interview with Thomas C. Jorling, former counsel, S. Pub. Works Comm., in Provo, Utah (Feb. 11, 2019). *See generally* Daniels et al., *supra* note 60 (explaining the political pressure Muskie exerted on Nixon). As Leon Billings later characterized, Senator Jackson "had ambitions of his own" in pushing for NEPA. *Columbia Lecture*, *supra* note 62, at 5:47–5:52.

64. With an engine of dissatisfied youth and progressives, environmentalism complemented anti-war and consumer rights movements and burst into the mainstream in the late 1960s. "Environment" as an issue was dominated by popular "God and motherhood" concern over pollution. *See* Jackson, *supra* note 61, at 406–09; Henry M. Jackson, *Foreword: Environmental Quality, the Courts, and the Congress*, 68 MICH. L. REV. 1073 (1970); Weiland, *supra* note 37, at 279; Henry Caulfield, *The Conservation and Environmental Movements: An Historical Analysis*, *in* ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE 13, 19 (James P. Lester ed., 1989); J. BROOKS FLIPPEN, CONSERVATIVE CONSERVATIONIST: RUSSELL E. TRAIN AND THE EMERGENCE OF AMERICAN ENVIRONMENTALISM 59–60 (2006); PETER S. MENELL & RICHARD B. STEWART, ENVIRONMENTAL LAW AND POLICY 898 (1994); PLATER ET AL., *supra* note 37, at 323; Tarlock, *supra* note 8, at 83–84; PHILLIP WEINBERG & KEVIN A. REILLY, UNDERSTANDING ENVIRONMENTAL LAW 56–58 (1998); *Environment in Politics*, SARASOTA FLA. HERALD-TRIB. (undated) (news article on file with the *Indiana Law Journal*).

65. Finn, *supra* note 47, at 223. Robert F. Blomquist, *To Stir up Public Interest: Edmund S. Muskie and the US Senate Special Subcommittee's Water Pollution Investigations and Legislative Activities, 1963-66 — A Case Study in Early Congressional Environmental Policy Development*, 22 COLUM. J. ENV'T L. 1, 16–17 (1997).

66. Wilderness Act of 1964, 16 U.S.C. §§ 1131–36 (2018).

67. Wild and Scenic Rivers Act of 1968, Pub. L. No. 90-542, §§ 1–16, 82 Stat. 906 (codified as amended at 16 U.S.C. §§ 1271–87 (2000)).

Many other legislators, of course, were deeply involved in environmental lawmaking. During this period, a broad wave of environmental policy bills were introduced and debated in the Senate, including bills seeking to create what would come to resemble the CEQ later established by NEPA, establish a national environmental ethic, or coordinate environmental projects between agencies. During the 91st Congress alone (January 3, 1969–January 3, 1971), 121 bills signed into law were listed by the Congressional Research Service as "environment oriented,"[68] and by the summer of 1969, forty bills concerned with a national policy on the environment in particular were introduced during that session of Congress.[69]

Due to his stature in the Senate, his leadership in the Interior Committee, and his visibility during the previous year's colloquium, Jackson's bill was seen as the frontrunner. Jackson introduced Senate Bill 1075[70] to the Senate in February 1969. It was sparse, with only a preamble and two titles—the first directing the Secretary of the Interior to conduct research on the state of the environment and the second creating a CEQ and mandating an annual report.[71] As originally introduced, Senate Bill 1075 had nothing even resembling an EIS provision.[72]

Following initial hearings in April,[73] the bill was amended to include a policy statement on the environment (what became Section 101 of NEPA)[74] and a provision

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68. ENV'T POL'Y DIV., CONG. RSCH. SERV., LIBR. OF CONG., 92D CONG., CONGRESS AND THE NATION'S ENVIRONMENT: ENVIRONMENTAL AFFAIRS OF THE 91ST CONGRESS 245 (Comm. Print 1971) (prepared at the request of Henry M. Jackson); *see* FLIPPEN, *supra* note 64, at 59.

69. S. REP. NO. 91-296, at 12 n.7 (1969) ("In the present Congress, an initial tabulation indicates that over 40 bills have been introduced which are concerned either with a national policy for the environment or the establishment of machinery to study the overall problems of the human environment. Of the 16 standing committees of the Senate, eight have broad jurisdiction of this type of legislation. Of the 21 House standing committees, 11 are similarly involved.").

70. National Environmental Policy Act of 1969, S. 1075, 91st Cong. (1969). Senate Bill 1075 was functionally a reintroduction of the previous year's Senate Bill 2805, S. 2805, 90th Cong. (1968), and a spiritual successor to the Murray Bill, S. 2549, 86th Cong. (1959).

71. 115 CONG. REC. 40,416 (1969) (statement of Sen. Jackson); *see also* LIROFF, *supra* note 8, at 15. The Council of Economic Advisers was established under the Employment Act of 1946. National Policy on Employment and Productivity, 15 U.S.C. § 1023 (2018).

72. Although Caldwell claims it was already under preparation. CALDWELL, *supra* note 37, at 63.

73. *Hearing on S. 1075*, *supra* note 47, at 1.

74. S. REP. NO. 91-296, at 1–2 ("The Congress, recognizing that man depends on his biological and physical surroundings . . . hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable

establishing an individual "right to a healthful environment."[75] Jackson's Section 102 mandated that agencies produce "findings" regarding their actions[76] (rather than what later would become "detailed statement[s]").[77]

At the same time, Muskie had been promoting Senate Bill 7,[78] which would come to have significant consequences for the legislative history of NEPA. The drafting of Senate Bill 7 was driven by the still unfolding Santa Barbara Oil Spill, called by Secretary Udall "a sort of conservation 'Bay of Pigs,'"[79] which Russell Train regarded as the vital impetus for the larger environmental movement.[80] Concerned primarily with the discharge of oil and other pollutants into U.S. waters,[81] Muskie's Water Quality Improvement Act, like many other proposed bills at the time, sought to establish some sort of council in the Executive Office of the President to oversee environmental issues and to advise the President, although the two iterations varied slightly.[82]

Despite some similarities, the two bills exemplified the differing approaches to lawmaking taken by Jackson and Muskie. Jackson took a more optimistic[83] view that administrative reorganization and a policy could improve the environmental impact of agency actions. Muskie, by contrast, believed that process was insufficient. Only

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resources."); 115 CONG. REC. 29,089 (1969); ANDERSON, *supra* note 8, at 4–5 (claiming the lack of policy title was a strategy to maintain jurisdiction and ensure the bill wouldn't be referred to the Public Works Committee); *see also* LINDSTROM ET AL., *supra* note 8, at 37–38. Section 101's final author was William Van Ness, who also included the individual right provision at the request of Henry J. Kellerman. Finn, *supra* note 47, at 427.

75. S. REP. NO. 91-296, at 2.

76. *Id.* Section 102(3) as it was passed by the Senate was authored by Daniel Dreyfus. Finn, *supra* note 47, at 428.

77. Finn, *supra* note 47, at 305. Conceding to the administration, the amended Senate Bill 1075 included that agencies must consider environmental impact, but only "to the fullest extent possible," and "significant federal actions affecting" the human environment was changed to a narrower scoped "major federal actions significantly affecting" the environment—raising the threshold for a Section 102 trigger. S. REP. NO. 91-296, at 2. *See* LIROFF, *supra* note 8, at 25.

78. S. 7, 91st Cong. (1969).

79. *Environmental Citizen Action: Hearings on H.R. 49, H.R. 290, H.R.4517, H.R. 8050, H.R. 5074, H.R. 5075, H.R. 5076, H.R. 5819, H.R. 6862, H.R. 9564, H.R. 8331, H.R. 9583 Before the Subcomm. on Fisheries & Wildlife Conservation of the H. Comm. on Merch. Marine & Fisheries*, 92nd Cong. 131 (1971) (statement of Joseph L. Sax, Law Professor, Univ. of Mich.).

80. Memorandum from Russell E. Train, Chairman, Council on Env't Quality, to Robert P. Mayo, Dir., Off. of Mgmt. and Budget (Apr. 16, 1970) (unpublished memorandum on file with the *Indiana Law Journal*).

81. From a conceptual perspective, Senate Bill 7 was considered significant by drafters in leading to the policy framework of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675 (2018)). *See Columbia Lecture*, *supra* note 62.

82. Kane Sauchuk, *The Origins of the National Environmental Policy Act of 1969*, RICHARD NIXON FOUND. (June 15, 2015), https://www.nixonfoundation.org/2015/06/the-origins-of-the-national-environmental-policy-act-of-1969 [https://perma.cc/BE8P-DBGS].

83. *Columbia Lecture*, *supra* note 62, at 11:00.

substance—standards-based regulations and enforceable laws to hold industries' and government's feet to the fire—could make a lasting change.[84]

President Richard Nixon, a master politician in his own right, was of course well aware of the rising environmental movement, especially given the threat of running against Jackson or Muskie.[85] He could play the same game, and better.[86] Thus, in May, while Jackson's and Muskie's bills were working their way through committee, Nixon issued Executive Order 11,472[87] to create an interagency Environmental Quality Council (EQC). The EQC would be composed of the Vice President, six Cabinet secretaries, and other appointed leaders within the bureaucracy.[88] The President would sit as chair.[89] A revival of a similar proposal he had offered as Vice President during the Eisenhower administration,[90] Nixon argued the Council would be "a Cabinet-level advisory group which will provide the focal point for this administration's efforts to protect all of our natural resources."[91] Nixon's move did not have its intended effect and was even criticized as insincere and an attempt to slow the dramatic momentum building in Congress for far-reaching legislation.[92]

Senator Millard Tydings of Maryland, for example, introduced legislation "to provide for the inclusion of environmental quality considerations in the decision-making processes of government," which demonstrated such momentum.[93] Immediately following Caldwell's supposedly mythic[94] testimony in the April hearings on Senate Bill 1075 before Jackson's Interior Committee, Tydings stressed the urgent need for a national statement of environmental policy. But he went further, insisting:

> There must be an office which will ensure that environmental considerations are brought into the decision-making processes of government.
> . . .

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84. *See id.* at 33:50.

85. Audiotape: Nixon White House Tapes, Tape 623-019 (Nov. 23, 1971) ("I think we might have to modify some of the legislation you've got in the environmental pack. But I think failure to do this will let the Muskies . . . uh, whoever is going to be in, Jackson (Henry Scoop), and the rest of these guys take this issue away from you. I think this would be the worst kind of disaster. Because the economy is kind of a mediocre thing.") (available with the Nixon Presidential Library).

86. *See* Finn, *supra* note 47, at 294–95.

87. Exec. Order No. 11,472, 3 C.F.R. § 101 (1969).

88. *Id.*; LIROFF, *supra* note 8, at 21.

89. 3 C.F.R. § 101; S. REP. NO. 91-296, at 15–16 (1969).

90. 115 CONG. REC. 29,089 (1969).

91. Statement Announcing the Creation of the Environmental Quality Council and the Citizens' Advisory Committee on Environmental Quality, 221 PUB. PAPERS 422 (May 29, 1969).

92. *See Hearing on S. 1075*, *supra* note 47, at 92, 98–101, 103, 115; 115 CONG. REC. 26,581 (1969) (statement of Rep. Obey); *id.* at 26,582 (statement of Rep. Minish); John R. Sandler, Note, *The National Environmental Policy Act: A Sheep in Wolf's Clothing?*, 37 BROOK. L. REV. 139, 141 (1970); LINDSTROM ET AL., *supra* note 8, at 42.

93. S. 1818, 91st Cong. § 1 (1969).

94. *See supra* note 47 and accompanying text.

> Mr. Chairman, . . . I would like to urge the Committee in its deliberation to consider creating an overview agency that goes beyond mere advice. I think it is necessary to establish an agency with some political muscle. And I think the time to do this is now.[95]

Unlike Jackson's bill, Tydings's proposed CEQ variant outstripped anything that Jackson and his committee would consider or enact. Rather than just review environmental impacts, Tydings's oversight body would have power to delay projects it saw as environmentally damaging.[96]

A similarly powerful CEQ was considered in the House hearings alongside Jackson's bill, although this language was "put on the back burner" in executive sessions.[97] The similarities between the House and Senate bills were limited to general structure and purpose—both House Bill 6750 and the Senate bill sought to establish a national policy on the environment and create a council on environmental issues within the Executive Office of the President.[98]

Members of the Public Works Committee expressed concern to Jackson that the Title I Amendments to Senate Bill 1075 after committee hearings had dramatically affected the substance of the bill. Public Works Committee Chair Randolph met with Jackson to express these concerns, as well as his committee's view that the amendments merited hearings and deeper scrutiny.[99] Without making the bill or report available, the Interior Committee reported Senate Bill 1075 two days after Jackson's meeting with Randolph.[100] In a move that would make the Public Works Committee feel deceived, Jackson bypassed his agreement with Senator Randolph, and moved to have Senate Bill 1075 passed on the morning calendar the very next day. Jackson reportedly feared that scrutiny from the administration and Muskie (especially given his reputation in the Senate) would sink the bill.[101]

In order to shortcut perceived obstacles, Jackson told Senate Majority Leader Mike Mansfield that his bill would have minor impacts,[102] and should be passed by

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95. *Hearing on S. 1075*, *supra* note 47, at 138. Most pointedly, Tydings told Jackson, "I hope that you will consider at least giving the agency or council, or whatever you want to call it, the actual political muscle to do the job, because if you just have advice, I don't think it will serve the purpose that we need." *Id.* at 137.

96. Tydings stated that his overview council would, like Jackson's CEQ, have "power [to] review" and advise the President on environmental matters. *Hearing on S. 1075*, *supra* note 47, at 136–38. More significantly, however, it would have "power [to] delay." *Id.*

97. LIROFF, *supra* note 8, at 23. Subcommittee Counsel Ned Everett proposed a "stop-order" power to be held by the CEQ for ongoing projects and actions in the House side, widely supported by virtually all witnesses. *Id.* Anthony Wayne Smith, former president and general counsel of the National Parks Association suggested such a CEQ "stop-order." *Hearing on S. 1075*, *supra* note 47, at 177.

98. 115 CONG. REC. 26,590 (1969). Wayne Aspinall opposed the bill, placed himself on the conference committee, and would affect the bill's language as it related to "to the fullest extent possible." LIROFF, *supra* note 8, at 28. For more on Dingell's role in developing the CEQ idea and details, see CALDWELL, *supra* note 37, at 30; LIROFF, *supra* note 8, at 26–29.

99. Finn, *supra* note 47, at 454–56.

100. *Id.*

101. *Id.* at 460–61, 475.

102. Interview with Thomas C. Jorling, *supra* note 63. As Muskie later summarized in an

consent during the Senate's routine morning hours.[103] Thus, the bill faced no substantive consideration by the Senate, nor was it discussed, and its passage took only a few minutes, being witnessed by "no more than seven Senators."[104]

After Senate Bill 1075 passed the Senate, Jackson entered into the record a written statement declaring the bill to be extremely significant in the domestic and environmental sense, perhaps the most important that would be presented during the session of Congress.[105] Lacking floor debate on Section 102 and only a slim hearing record covering the bill,[106] the ramifications of Senate Bill 1075 were poorly understood,[107] and not communicated to interest groups.[108] The legislation was almost totally ignored by news media.[109]

### *B. NEPA Becomes NEPA: The Untold Story of Section 102*

The bill shepherded through the Senate by Jackson was marked by the optimistic assumption that "a clear statement of goals, science and technology, if vigorously supported, would provide the knowledge and wherewithal to solve environmental problems."[110] Muskie was less sanguine. This Section tells the story of how Muskie

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article generally criticizing the regulatory approach of Senate Bill 1075, "following Senate hearings, the bill was rewritten by the Interior Committee in closed door marking sessions. The new version of the bill which was sent to the Senate floor had not been the subject of any public hearings, and it was passed on the consent calendar without Senate debate." Muskie et al., *supra* note 29, at 163 n.2.

103. 115 CONG. REC. 19,008–09 (1969); CALDWELL, *supra* note 37, at 30.

104. Finn, *supra* note 47, at 457–58.

105. 115 CONG. REC. 19,009 (1969) ("Mr. President, S. 1075, the National Environmental Policy Act of 1969 . . . is in my judgment the most significant and important measure in the area of long-range domestic policymaking that will come before the 91st Congress. Without question, it is the most significant measure in the area of natural resource policy ever considered by the Congress. . . . This constitutes a statutory enlargement of the responsibilities and the concerns of all instrumentalities of the Federal Government. . . . In many respects, the only precedent and parallel to what is proposed in S. 1075 is in the Full Employment Act of 1946, which declared an historic national policy on management of the economy and established the Council of Economic Advisers."); 115 CONG. REC. 40,416 (1969); Interview with Thomas C. Jorling, *supra* note 63.

106. *See generally Hearing on S. 1075*, *supra* note 47.

107. *See supra* Part I.

108. LIROFF, *supra* note 8, at 10–11; MENELL ET AL., *supra* note 64, at 898; PLATER ET AL., *supra* note 37, at 323–24 (calling NEPA "accidental legislation"); Tarlock, *supra* note 8, at 83–85 ("[T]he basic idea behind the statute survived from start to finish and the entire process took place out of the public eye."). The biggest news story on January 1 was whether Texas, which defeated Notre Dame in the Cotton Bowl, or Penn State, which downed Missouri in the Orange Bowl, should be the national football champion. *See* ANDERSON, *supra* note 8, at 1–3; CALDWELL, *supra* note 37, at 64; LIROFF, *supra* note 8, at 34–35; Jackson, *supra* note 61, at 406–07.

109. LIROFF, *supra* note 8, at 10. Many assumed at the time that NEPA was a "mere" antipollution bill. CALDWELL, *supra* note 37, at 27, 37; LINDSTROM ET AL., *supra* note 8, at ix.

110. Finn, *supra* note 47, at 93; *see id.* at 465 ("[Jackson] thought that Federal agencies were administered by reasonable men who would respond to a mandate or a procedure requiring consideration of environmental values.").

transformed Jackson's bill into the NEPA we know today.[111] To be fair, the need for language to make the Act effective was recognized early in the drafting stage.[112] But the actual text forcing development of the EIS was the result of next-to-last minute intervention by Muskie.

Section 102 is NEPA's most significant provision.[113] It requires that:

> all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[114]

After Senate Bill 1075 was reported to and passed by the Senate in early July 1969, controversy between Senate environmental leaders Jackson and Muskie erupted. Senator Muskie was troubled that neither he nor his committee had an opportunity to consider the bill or offer amendments—Senate Bill 1075 as passed, he believed, would be ineffective.[115] Muskie argued that, unlike his standards-setting

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111. For more on Muskie's "pessimistic" worldview, see Daniels et al., *supra* note 60.

112. CALDWELL, *supra* note 37.

113. ENVIRONMENTAL QUALITY: THE TWENTY-SECOND ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY TOGETHER WITH THE PRESIDENT'S MESSAGE TO CONGRESS 133 (Dale Curtis & Barry Walden Walsh eds., 1991); Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 IND. L.J. 1239, 1252 (2014); Houck, *supra* note 8, at 190; Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 239–40 (1973); ANDERSON, *supra* note 8, at 1–3, 275; CALDWELL, *supra* note 37, at 78; DAVID M. DRIESEN, ROBERT W. ADLER & KIRSTEN H. ENGEL, ENVIRONMENTAL LAW: A CONCEPTUAL AND PRAGMATIC APPROACH 121 (2d ed. 2011); ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW IN A NUTSHELL 28 (7th ed. 2008); RASBAND ET AL., *supra* note 2, at 291–92; J.B. RUHL, JOHN COPELAND NAGLE, JAMES SALZMAN & ALEXANDRA B. KLASS, THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW 406–07 (3d ed. 2014); JAMES SALZMAN ET AL., *supra* note 2, at 321; PHILIP WEINBERG & KEVIN A. REILLY, UNDERSTANDING ENVIRONMENTAL LAW 56–58 (1998); *see* JONATHAN R. NASH, ENVIRONMENTAL LAW AND POLICY: THE ESSENTIALS 129–31 (2010); Tarlock, *supra* note 8, at 105. *But see* CALDWELL, *supra* note 37, at 30; *id.* at 38 (arguing that seeing 102 as "the primary purpose and intent of NEPA" is a "limited understanding" or a "misinterpretation"); *id.* at xvi–xvii.

114. National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102(2)(C), 83 Stat. 852, 853 (1970).

115. Taken together, Muskie saw the environmental laws produced by his committee as creating a sort of national statement on the policy by themselves, built around forcing action and changing behavior. *See* Muskie et al., *supra* note 29; *see also Colloquium*, *supra* note 50, at 44. This is, as it turns out, the better and more effective means of affecting government planning and actions. *See* Houck, *supra* note 8, at 187–90 ("Many of the major, long-overdue,

legislation, NEPA only created "meager,"[116] "minimal procedural standards of conduct"[117] that only apply to a narrow set of governmental actions.[118] "When you read words in a statute, 'lofty' is not good enough to get to that endpoint where someone or something changes its behavior," Public Works minority counsel Tom Jorling later said of the bill and the Public Works Committee's reaction.[119]

Despite being characterized in NEPA histories as being jealous or late to the game[120] (generally acting as a roadblock to the Act's passage), Muskie had solid reasons to be worried. He viewed NEPA as counterproductive, potentially hampering the Public Works' ability to continue creating standards-based antipollution statutes.[121] Staff member and Muskie confidant, Leon Billings, recalled, "I can't describe to you the words that Senator Muskie used when he found out what the amendment said, but . . . they were probably not words that you'd ordinarily use in a public place."[122] Muskie was also upset by the parliamentary shortcut Jackson employed to speed up passage. Public Works staff characterized Muskie's view of the normal Senate procedures as "sacred."[123] Muskie felt Jackson had abused his position, running his committee as a "one-man show"[124] and short-circuiting the proper functioning of the Senate.[125]

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and extremely difficult improvements in federal planning—improvements clearly aspired to in NEPA's substantive provisions—are coming about through other, more targeted laws with more specific requirements, such as the Endangered Species Act and the Section 404 (wetlands) program of the Clean Water Act. Yet other federal laws have since reached out to address the impacts of private actions on air, water, soils, and nearly every conceivable medium."). A similar argument is made by Tom Jorling and Leon Billings. *Columbia Lecture*, *supra* note 62, at 8:00; *see also* Finn, *supra* note 47, at 223–24 (agreeing generally that Muskie's approach created justiciable rights in a way that NEPA did not). Further, a similar argument was made on the Senate floor. 115 CONG. REC. 29,052 (1969).

116. Muskie et al., *supra* note 29, at 173.

117. *Id.* at 164.

118. *Id.* at 173.

119. *Columbia Lecture*, *supra* note 62, at 34:30.

120. Kalen, *supra* note 8, at 144; LIROFF, *supra* note 8, at 199; *see* CALDWELL, *supra* note 37, at 29–36 ("Disagreements between Jackson and Muskie and staffs . . . threatened delay of Jackson's bill S. 1075 . . . . Senator Jackson and his principal counsel on environmental policy, William Van Ness, proved to be the better legislative tacticianers."). Legislation was "complicated" by these rivalries. *Id.*; LINDSTROM ET AL., *supra* note 8, at 43 (characterizing "squabbling" which "held up" the bills); Finn, *supra* note 47, at 192–93, 204–06; Interview with Thomas C. Jorling, *supra* note 63.

121. COUNCIL ON ENV'T QUALITY, ANNUAL ENVIRONMENTAL QUALITY REPORTS, https://ceq.doe.gov/ceq-reports/annual_environmental_quality_reports.html [https://perma.cc/P55R-W6LC]. NEPA provided that annual reports on the environment only be submitted to one committee, Jackson's Interior and Insular Affairs Committee, which Muskie feared would create new precedent for the referral of any future bills on the environment to Interior alone. *Id.*

122. *Columbia Lecture*, *supra* note 62, at 31:20.

123. *Id.* at 25:20.

124. *Id.* at 26:10.

125. Muskie prided himself in the unusual bipartisanship of the Public Works Committee. *Id.* at 25:00.

Muskie and the Public Works Committee added in a policy statement into Title II of Senate Bill 7 to increase overlap with Senate Bill 1075,[126] and using the two points of bill overlap (the overview council and policy statement)[127] as leverage, Muskie arranged with Senate leader Mike Mansfield to put an informal stay or "hold"[128] on Jackson's bill until the conflict between Senate Bill 7 and Senate Bill 1075 could be resolved. Jackson's bill was prevented from advancing to conference, while Muskie's bill was withheld from the Senate floor.[129] According to Leon Billings,[130] Mansfield was upset that Jackson had misled him,[131] so Mansfield privately met with the two senators and some staff, saying, "Boys, you are hurting the reputation of the Senate of the United States. Get this done."[132] Billings, representing Muskie's Public Works Committee, met with William Van Ness and Senator Jackson[133] and introduced amendments to the bill, which they believed would prevent damage to their own regulatory programs and strengthen the action-forcing capacity of Section 102. According to staffers Billings and Jorling, they were concerned about protecting their committee's jurisdiction but equally sought to make the bill "work."[134]

Their primary focus was on the "findings"[135] mandated by the Interior Committee's Senate Bill 1075 as it was passed in the Senate.[136] They felt this

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126. Finn, *supra* note 47, at 452.

127. *See* S. 7, 91st Cong. (1969); *supra* text accompanying note 78. The national policy provision contained in Title II of Senate Bill 7 was grafted in from another Muskie subcommittee bill—the Environmental Quality Improvement Act of 1969, introduced in June. 115 CONG. REC. 24,605 (1969) (statement of Sen. Randolph); Finn, *supra* note 47, at 450–51.

128. *Columbia Lecture*, *supra* note 62, at 24:45.

129. Interview with Thomas C. Jorling, *supra* note 63.

130. See Daniels et al., *supra* note 60, for more on Leon Billings and his contribution to environmental law, as well as his strong personality.

131. *Columbia Lecture*, *supra* note 62, at 37:10 (stating that Jackson "misled him [Mansfield]—some would use a stronger word").

132. *Id.* at 53:20; Interview with Thomas C. Jorling, *supra* note 63 ("But you don't want to understate how tense it was in the beginning of this process."); LIROFF, *supra* note 8, at 27 (reporting similar language of a staffer—possibly Jorling).

133. Billings remembers meeting at first with both Van Ness and Jackson, but Van Ness refused the amendments. *Columbia Lecture*, *supra* note 62, at 55:45. When Billings met with Jackson alone later, Jackson reviewed the proposed amendments and, apparently under the impression that the amendments were significant, asked, "Is this it?" *Id.* Billings was sent by Muskie since Muskie "simply didn't *like* Senator Jackson," who said, "I'm not calling that [expletive]." There was a great "personality conflict" between the two—Jackson was a hawk on Vietnam who acted as a strong proponent of SST while Muskie was a dove. *Id.* at 52:15, 1:03:00 (emphasis added). According to Jackson staffers, Jackson tried to make peace, but Muskie was "petty and pouty." WILLIAM W. PROCHNAU & RICHARD W. LARSEN, A CERTAIN DEMOCRAT: SENATOR HENRY M. JACKSON: A POLITICAL BIOGRAPHY 276 (1972). At one point, staffers said that Jackson called Muskie but was shouted down, causing Jackson to hang up and mutter, "That guy is just utterly hopeless." *Id.* at 277.

134. *Columbia Lecture*, *supra* note 62.

135. Interestingly, the Senate's section-by-section analysis of the new language borrows both terms in discussing the new 102(2)(C), speaking both of "statements" and "findings." 115 CONG. REC. 29,085 (1969).

136. *See* S. REP. NO. 91-296 (1969).

language was inflexible[137] and would only require reporting the final decision along with a brief justification—no more than a reporting mechanism for administrative decisions.[138] More than anything, it was vague.[139] Where would the findings go? Who would review them? How long were they supposed to be? Not only might the findings fail to force any action or serious consideration on the part of federal mission agencies, but there was also a fear among members of the Public Works Committee and its staff that such a provision would create a shield behind which environmental degradation could be protected[140]—a "high hurdle" for potential litigants to overcome.[141] Public Works Minority Committee counsel, Tom Jorling, recounted that:[142]

> Senator Muskie's substantive concern with the National Environmental Policy Act was that, the way it was written, it authorized federal agencies that have a tradition of adverse impact on the environment to simply prepare a report and make a finding that to the extent that the environment was harmed, it was necessary and appropriate and warranted.[143]

The "findings" required by Jackson's Senate bill, after all, were regarded by staff of Jackson's committee only to be "brief, general statements averaging about two pages in length."[144] Muskie wanted more. He and Public Works' chief of staff, Don Nicoll, offered the text "detailed statement." This language seems directly drawn from the suggestion of Dillon Ripley in the 1968 Colloquium.[145] Indeed, this was no coincidence. Ripley's statement, it turns out, were not the words of Dr. Ripley himself, but of Jorling, who was at the time Smithsonian Institution counsel and who

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137. Finn, *supra* note 47, at 505.

138. *See id.* at 468. Billings wrote a memo to Muskie using the Santa Barbara oil spill as an example of how, upon reporting the "finding" that environmental risks were outweighed by other considerations, agencies might be protected from challenge on environmental grounds. *Id.*

139. *Id.* at 469.

140. *See Columbia Lecture*, *supra* note 62, at 39:50.

141. Interview with Thomas C. Jorling, *supra* note 63.

142. *Id.*; *see also Finding*, BLACK'S LAW DICTIONARY (4th ed. 1968) (defining "finding" as "the result of the deliberations of a jury or a court"); *Finding*, BLACK'S LAW DICTIONARY (6th ed. 1990); LINDSTROM ET AL., *supra* note 8, at 45; *Columbia Lecture*, *supra* note 62, at 41:40 (explaining that the term might be abused, for example, by the Secretary of the Interior who would be empowered to say "I'm finding that the impact is warranted" and go ahead); *id.* at 1:00:00.

143. *Columbia Lecture*, *supra* note 62, at 39:15.

144. Hanna J. Cortner, *A Case Analysis of Policy Implementation: The National Environmental Policy Act of 1969*, 16 NAT. RES. J. 323, 330 (1976) (quoting Claude E. Barfield & Richard Corrigan, *White House Seeks to Restrict Scope of Environment Law*, 4 NAT'L J., 336, 340 (1972)). Dreyfus defended a similar view later on, as well. Daniel A. Dreyfus, *NEPA: The Original Intent of the Law*, 109 J. PROF. ISSUES IN ENG'G 249 (1983). Comparing the post-passage comments of Interior's Dreyfus and Public Works' Jorling and Billings might provide some insight by contrast into the conflicting views of the two parties.

145. *See supra* text accompanying notes 56–57.

authored the Colloquium statement.[146] Jorling viewed this amendment as critical to NEPA's power. "Detailed statement was sufficient to allow litigants now that were starting to bubble up . . . to challenge federal agencies that wrote a statement less than detailed . . . [this] led to an outpouring of litigation."[147]

Another way of breaking down the administrative shield the "findings" might pose,[148] the Public Works Committee, Muskie in particular,[149] insisted on what would become Section 102(2)(C)(iii), requiring as a part of any detailed statement "alternatives to the proposed action."[150] The alternatives mandate has come to define NEPA's "heart,"[151] forcing agencies to consider options with fewer environmental impacts.

Most of all, Muskie believed that self-policing by mission-oriented agencies would be insufficient to change environmental decision making,[152] like letting the fox guard the henhouse.[153] Relying on the White House or the Bureau of the Budget to oversee the "findings," as Interior had imagined, did not seem promising.[154] Similarly, Muskie viewed the Jackson committee's assumptions that "agency policies would improve through organizational learning"[155] as unduly optimistic and saw some form of external review with teeth as the only reasonable means of shifting behavior.[156]

Although Muskie initially wanted more centralized oversight and policing by an environmental agency,[157] it was resolved that engaging other agencies and the public

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146. Finn, *supra* note 47, at 279 (also calling Jorling's comments the "most thoughtful statement of the colloquium").

147. *Columbia Lecture*, *supra* note 62, at 42:38.

148. Interview with Thomas C. Jorling, *supra* note 63 (fearing that the findings "would be interpreted by the project agency as a way of showing that the project was the project that had to go forward").

149. *Columbia Lecture*, *supra* note 62, at 55:00.

150. Interview with Thomas C. Jorling, *supra* note 63; *Columbia Lecture*, *supra* note 62, at 43:20. Here, we are careful not to replace one heroic myth with another—the need to assess alternatives was considered in the Colloquium white paper and Senate report and was not the spontaneous invention of Muskie in 1969. S. REP. NO. 91-296, at 2 (1969).

151. 40 C.F.R. § 1502.14 (1995).

152. 115 CONG. REC. 29,053 (1969).

153. Finn, *supra* note 47, at 465.

154. *See id.* at 469–71.

155. Liroff, *supra* note 8, at 154–55.

156. This conflict of attitudinal or behavioral change dominated this Muskie-Jackson conflict. Public Works feared administrative decisions would be made "in camera." *Columbia Lecture*, *supra* note 62, at 40:20.

157. *See* Finn, *supra* note 47, at 503–04. Muskie later recovered some lost ground through later legislation. *See* LINDA LUTHER, CONG. RSCH. SERV., RL33152, THE NATIONAL ENVIRONMENTAL POLICY ACT: BACKGROUND AND IMPLEMENTATION 6 (2007) ("To further clarify agencies' responsibilities with regard to public involvement in the NEPA process, in December 1970, Congress added Section 309 to the Clean Air Act. Provisions of Section 309 made explicit that the Administrator of the newly formed Environmental Protection Agency (EPA) has a duty to examine and comment on all EISs. After that review, the Administrator was directed to make those comments public and, if the proposal was environmentally 'unsatisfactory,' to publish this finding and refer the matter to the CEQ.") (citation omitted); 42 U.S.C. § 7609 (2018).

(implying citizen suits) was the most direct solution. Muskie successfully inserted language mandating that agencies "consult with and obtain the comments of [other] federal agenc[ies]" and the public.[158] Concerning agency review, Muskie had in mind the air and water pollution control agencies that had specialized content knowledge and which Muskie desired to have an involved review role.[159] His proposed Office of Environmental Quality would also provide staff manpower to assist the CEQ review statements.[160] As Richard Liroff, environmental scholar and prolific NEPA historian, recounted[161]:

> Jackson's staff assumed that agency policies would improve through organizational learning, and that the Office of Management and Budget would play an important policing role. Other than the role contemplated for OMB, significant external oversight was not envisioned. In contrast, Senator Muskie held the view that agencies could not be trusted with environmental responsibilities.[162]

Muskie and Public Works also envisioned a key role for courts and the public through creating the opportunity for citizen suits. As the *Calvert Cliffs* decision would later make clear, the amendments to Section 102 created opportunities for litigants to involve courts directly in environmental matters.[163] Jorling and Senator Nelson of the Public Works Committee in particular championed the disclosure of detailed statements to the public.[164]

Finally, Muskie requested that agencies with clear environmental mandates enforcing antipollution statutes should be exempted from the EIS process.[165] Muskie "feared that S. 1075 would debilitate existing environmental protection programs

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158. National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102, 83 Stat. 852, 853 (1970); *Columbia Lecture*, *supra* note 62, at 43:45. This amendment is mentioned in the conference report, but in such a way that seems to imply that the change was made during one of the three conference meetings. The conference report comments on this new provision that it is not intended to "unreasonably delay" federal proposals. H.R. REP. NO. 91-765, at 9–10 (1969); Finn, *supra* note 47, at 503.

159. *See* Finn, *supra* note 47, at 504; 115 CONG. REC. 29,053 (1969).

160. Finn, *supra* note 47, at 501.

161. *See* Liroff, *supra* note 8, at 155 ("[Muskie's] belief spawned the impact statement requirement, an alteration of Jackson's action-forcing requirement for a 'finding' of environmental impact."); LINDSTROM ET AL., *supra* note 8, at 47 (noting that it was the compromise that acted as the creation of the EIS as we know it); Sauchuk, *supra* note 82. Caldwell later maintained a similar view. Caldwell, *The National Environmental Policy Act*, *supra* note 37, at 50035. *See generally* Daniel A. Dreyfus & Helen M. Ingram, *The National Environmental Policy Act: A View of Intent and Practice,* 16 NAT. RES. J. 243 (1976).

162. Liroff, *supra* note 8, at 154–55 (citations omitted).

163. *Columbia Lecture*, *supra* note 62, at 44:28. Such a degree of public engagement was probably impossible to foresee, given the then immature state of environmental law in general.

164. *Columbia Lecture*, *supra* note 62, at 55:00; Finn, *supra* note 47, at 504. William Van Ness at one pointed stated his preference that the findings of Section 102(d) be made public, although there was no means in his bill to make this a reality. It took the Public Works Committee to make public engagement explicit. Finn, *supra* note 47, at 490–91.

165. Muskie et al., *supra* note 29, at 164–65.

over which his Air and Water Pollution Subcommittee had jurisdiction,"[166] by introducing cost-benefit analysis in environmental regulatory processes in which economic considerations ought to play no part.[167]

These major amendments[168] dramatically changed the meaning and importance of Section 102 and were seen as generally constructive by Interior staff (including Caldwell).[169] In satisfying the Public Works Committee's apprehension and concerns over the Jackson bill, Muskie needed to compromise as well. His proposed Office on Environmental Quality was downgraded to support staff for Jackson's Board of Environmental Advisers.[170] Both Committees would be granted jurisdiction to receive the Board's annual reports, defusing the turf battle.[171]

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166. LIROFF, *supra* note 8, at 18.

167. *Columbia Lecture*, *supra* note 62, at 48:30. Jorling and Billings feared a "hidden agenda" that would weaken environmental agencies by foisting nonenvironmental values into their decision-making process. *Id.* at 49:28. Leon Billings even believed that NEPA's potential negative side effects were a move by Jackson and others to appease nuclear energy and extraction interests in the West—the home of most members of the Interior Committee. *Id.* at 16:55; *see also* Finn, *supra* note 47, at 447. That Jackson was later upset by NEPA might lend credence that this is a nontrivial polemic. *See* ROBERT G. KAUFMAN, HENRY M. JACKSON: A LIFE IN POLITICS 208 (2000). Dreyfus had similar qualms with the outcome of Public Works' EIS. Dreyfus, *supra* note 144, at 249. Further, Jorling stated that the Interior Committee had "no concept" of the threat or risk at hand because they were inexperienced in writing statutes that "ultimately result[ed] in a pound of pollution being removed." *Columbia Lecture*, *supra* note 62, at 51:00. In order to streamline environmental governance and eliminate any need for the consideration of nonenvironmental values, Section 104 was amended in 42 U.S.C. § 4334 (2012). 115 CONG. REC. 29,053 (1969) ("This language [the intercommittee compromise language] eliminated the requirement that a 'finding' be made but provides that environmental impact be discussed as a part of any report on legislation, or any decision to commence a major activity. The requirement that established environmental agencies be consulted and that their comments accompany any such report would place the environmental control responsibility where it should be."). *See also* Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm., 449 F.2d 1109, 1125–26 (D.C. Cir. 1979).

168. We note that each of these amendments was significant and to the effect of strengthening Section 102, while virtually all other changes to the bill originating outside of Interior (but accepted by Jackson) were to the effect of weakening the bill. *See* Eva H. Hanks & John L. Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230, 249 (1970); Burton C. Kross, *Preparation of an Environmental Impact Statement*, 44 U. COLO. L. REV. 81, 84–85 (1972); LINDSTROM ET AL., *supra* note 8, at 48–49 (noting that Aspinall also wanted a "no change in authority" clause but lost the fight); LIROFF, *supra* note 8, at 26–30.

169. Finn, *supra* note 47, at 504–05.

170. 115 CONG. REC. 29,051 (1969). Although Muskie's support for the Office on Environmental Quality would be created in the Environmental Improvement Act of 1970, it was never invoked by the President and fell by the wayside. The Environmental Quality Improvement Act, passed in 1970, created a support staff for CEQ and recognized the existence of a national policy for the environment. Environmental Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 114; *see* Kalen, *supra* note 37, at 497; Sauchuk, *supra* note 82. The Clean Air Act had a similar provision canonizing NEPA. Clean Air Act of 1970, 42 U.S.C. §§ 7401–7671q.

171. LINDSTROM ET AL., *supra* note 8, at 158 n.39 (noting maturely that Senate Bill 1075

These points of compromise were presented to the Senate on October 8, 1969.[172] Introducing the amendments on the Senate floor, Muskie laid out his broader strategy of what the revised NEPA could achieve: "By development of meaningful methods of measurement of environmental impact, through development of standards-setting procedures at the local level, through careful analysis of existing and future land uses, we can begin to order our progress without environmental chaos."[173] Here, Muskie outlined his general skepticism for agency self-policing—the linchpin philosophy tying together "detailed statements," consideration of alternatives, public and interagency review, and environmental agency supremacy:

> The concept of self-policing by Federal agencies which pollute or license pollution is contrary to the philosophy and intent of existing environmental quality legislation. In hearing after hearing agencies of the Federal Government have argued that their primary authorization, whether it be maintenance of the navigable waters by the Corps of Engineers or licensing of nuclear powerplants by the Atomic Energy Commission, takes precedence over water quality requirements.
>
> I repeat, these agencies have always emphasized their primary responsibility making environmental considerations secondary in their view.
>
> . . . .
>
> The proposed compromise language developed for section 102(c) clearly indicates the extent to which the polluter is involved in determining environmental effects. This language eliminated the requirement that a "finding" be made but provides that environmental impact be discussed as a part of any report on legislation, or any decision to commence a major activity. The requirement that established environmental agencies be consulted and that their comments accompany any such report would place the environmental control responsibility where it should be.[174]

At the time, few recognized the power of the Public Works compromise language, and Section 102 received very little attention during conference.[175] Opponents of the bill, however, seemed more attuned to what the new language might mean. Congressman Wayne Aspinall, who had sought to weaken the bill in conference committee, aptly called the revised Section 102 a "new handle for

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previously "arrogantly" referred the annual reports only to Interior Committee).

172. 115 CONG. REC. 29,050 (1969).

173. *Id. at* 29,053.

174. *Id.*

175. Finn, *supra* note 47, at 530. Finn notes that conferees believed the new language, including a mandate for "detailed statements," was "simple and self-evident." *Id.* at 531. That the new Section 102 was overlooked in conference may best be explained by the fact that Senator Muskie and others—those closest to the new language—were not appointed as conferees. In other words, Jackson, eager to bypass controversy, did not attempt to communicate Muskie's point of view. *Id.* at 547. For more on conference amendments, see *id.* at 532–39.

environmentalists."[176] William Harsha, a member of the House Public Works Committee, warned:

> [T]hat they should be on guard against the ramifications of a measure that is so loose and ambiguous as this.
> . . . .
> . . . [T]his is a major revision of the administrative functions of the U.S. Government . . . .
> . . . .
> The impact of S. 1075, if it becomes law, I am convinced would be so wide sweeping as to involve every branch of the Government, every committee of Congress, every agency, and every program of the Nation.[177]

He was proven right.

A few outside of Congress also sounded the alarm about what the new bill might mean. For example, *Time* magazine claimed that if NEPA became law, its impact might be felt by "every imaginable special interest—airlines, highway builders, mining companies, [and] real estate developers," and that all federal policies with environmental implications would be open to challenge.[178]

Despite these alarms, the post-conference bill was treated the same as the earlier versions—rushed through the approval process of both the House and Senate with neither a substantive debate nor a roll call vote.[179]

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This untold history of NEPA challenges us to think about the tools jurists use to dissect legislative history. Would the canons frequently employed by courts help jurists parse out accurately the meaning of Section 102, recognizing aspects of the record that Muskie fought for? Or would the methods of investigation lead courts to overlook Muskie and to focus on Jackson and his committee's brief, perfunctory statements of findings (and downplay the contributions of the Public Works Committee)? Senator Muskie and his staff are the unrecognized heroes of NEPA's legislative history. Reclaiming their central role rebuts recent efforts to gut NEPA

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176. LIROFF, *supra* note 8, at 26–30 ("One staff proponent of Section 102 acknowledge[d] that he was 'one of the few individuals smart enough to see the possibility of procedural delay deriving from the general provisions of Section 102.'").

177. 115 CONG. REC. 40,927–28 (1969).

178. *Policing the Polluters*, TIME, Aug. 1, 1969, at 42. *See generally* Ronald Lee Shelton, The Environmental Era: A Chronological Guide to Policy and Concepts, 1962–1972 (May 1973) (Ph.D. dissertation, Cornell University) (ProQuest).

179. LIROFF, *supra* note 8, at 30–31. With Muskie's amendments now incorporated in NEPA, his proposed Senate 7 bill seemed less important. It would die later that year in conference after conferees from each chamber of Congress failed to reconcile their bills. Three years later, Senate Bill 7 would become the basis for Section 311 of the highly influential Clean Water Act Amendments of 1972. Interview with Thomas C. Jorling, *supra* note 63. The Water Quality Improvement Act would thus become the third major water pollution bill to fail passage since 1967, joining Senate Bill 2760 in 1967 and Senate Bill 3206 in 1968.

and maintain the functionality of the EIS. Jackson, Caldwell, and even Hong Kong sunsets, by contrast, are not going to get us there.

## III. INTERPRETING NEPA: ASSESSING EXTRINSIC SOURCE CANONS

Almost all episodes in the legislative history that help illuminate a nuanced and enduring interpretation of "detailed statement" are the product of Muskie and his staff. The trouble is that the most commonly consulted evidence of NEPA's legislative history is generally limited to Jackson.

Our research offers a valuable opportunity. Because we know the real legislative history of NEPA, we can put canons of legislative history to the test—examining which details they emphasize and which they conceal. More importantly, it allowed us to test which of the canons or interpretive approaches proved most accurate and helpful.

In major NEPA cases, the complex history of Section 102 has yet to be considered. Although *Calvert Cliffs* is the singular opinion which considers the Muskie-Jackson compromise, it focuses primarily on Section 104.[180] Even in cases discussing Muskie's language (such as the "alternatives" provision), the legislative history is not discussed[181] or, when it is, refers only to Jackson's comments on the conference committee report.[182]

In this Part, we show that traditional canons of statutory interpretation fail to reveal the real legislative history of NEPA. This exercise is meaningful for two reasons. The first is specific—if future administrations seek to weaken the requirement for "detailed statements" or undercut Section 102, as the Trump administration attempted to do, courts will turn to canons of interpretation to evaluate whether this is permissible. The second is general—analyzing the canons' performance for a known legislative history allows us to predict their accuracy and usefulness more generally.

Our careful research into NEPA's passage provides the opportunity to "ground truth" statutory canons.[183] NEPA is a particularly good vehicle to ground truth the

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180. Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm., 449 F.2d 1109, 1123 (D.C. Cir. 1979).

181. *See, e.g.*, Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990); Marble Mountain Audubon Soc'y v. Rice, 914 F. 2d 179 (9th Cir. 1990); Nat. Res. Def. Council v. Callaway, 524 F.2d 79 (2d Cir. 1975).

182. *See, e.g.*, Kleppe v. Sierra Club, 427 U.S. 390, 409 n.18 (1976) (citing S. REP. NO. 91–296, at 9 (1969); 115 CONG. REC. 40,416, 40,419 (1969)) (defining "action-forcing"); *Kleppe*, 427 U.S. at 401 n.12; *Kleppe*, 427 U.S. at 409 n.19 (citing 115 CONG. REC. 29,052–53, 29,055, 29,058, 40,416 (1969)) (referring to Senator Jackson's remarks to the point of the EIS's timing); Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 371 n.14 (1989) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 409 n.18 (1976)); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195 n.4 (D.C. Cir. 1991) (citing 115 CONG. REC. 40,420 (1969)); Nat, Res. Def. Council v. Morton, 458 F.2d 827, 833 n.10 (D.C. Cir. 1972) (("[T]he language of the Section-by-Section Analysis presented by Senator Jackson, in charge of the legislation and chairman of the Senate Interior Committee, in explaining and recommending approval of the bill as agreed in conference.") (citing 115 CONG. REC. 40,420 (1969)).

183. "Ground truthing," simply put, is the activity of testing a theory or a model by comparing its results with what is known on the ground. *See, e.g.*, Jana Carp, *"Ground-*

canons. Due to the Act's significance, virtually all participants in the process have spent the past fifty years recounting and analyzing the legislative process, providing a considerable body of research sources. Additionally, despite its ostensible simplicity, NEPA has proven tricky: academic attention is often directed towards unfulfilled expectations behind the Act and,[184] perhaps due to the degree to which the Act is studied, taught, and written about, an oversimplified legislative history shorthand has evolved (which means that there is a story to tell and a story to correct).

All this leads us to ask a number of questions. Why hasn't more of the story been unearthed? Would the traditional canons find the true story behind the "detailed statements" requirement if the Trump administration regulations had been challenged in a second term? And, given all this, what can we learn about the canons from a theoretical perspective from this exercise? What real-world aspects of the legislative process do they capture? Which do they overlook?

We apply the most commonly used or accepted canons and find that they fail to uncover a complete picture of Section 102, including a nuanced picture of its legislative intent. We do find, however, that alternative canons of legislative history suggested by Professors Matthew McCubbins, Roger Noll, and Barry Weingast (collectively referred to—even by themselves—as McNollgast) fares much better. While McNollgast's canons are commonly discussed among scholars, they are rarely employed by jurists. The fact that a theory mainly discussed by scholars outperformed canons embraced by judges raises an important challenge to the ways that the judiciary approaches legislative history.

### *A. What Has Not Worked—Dominant Legislative History Canons*

We recognize that the use of legislative histories to determine congressional intent is, to use an understatement, not without its critics.[185] However, for those jurists who rely on legislative histories as an extrinsic source to interpret ambiguous[186] statutes,

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*Truthing" Representations of Social Space: Using Lefebvre's Conceptual Triad*, 28 J. PLAN. EDUC. & RSCH. 129 (2008); George M. Garrity, *Ground Truth*, 29 STANDARDS GEONOMIC SCI. 91 (2009).

184. *See supra* note 37; Harvey Bartlett, Comment, *Is NEPA Substantive Review Extinct, or Merely Hibernating? Resurrecting NEPA Section 102(1)*, 13 TUL. ENV'T L.J. 411 (2000).

185. *See, e.g.*, *In re* Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989) ("Resort to 'intent' [by using legislative history] . . . has no more force than [an] opinion poll [of Congress]."); *see also* Miller v. Comm'r, 836 F.2d 1274, 1282 (10th Cir. 1988); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383 (1992); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998); Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 160-75 (1990); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY *passim* (1997).

186. The key word here being ambiguous, i.e., vague. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005); *see* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 17–71 (2d ed. 2013); Milner v. Dep't of the Navy, 562 U.S. 562, 574 (2011) ("Legislative history, for those who [would] take it into account, is meant to clear up ambiguity, not create it."); *see also* Packard Motor Car Co. v. NLRB, 330 U.S. 485

legislative history canons are indispensable tools, acting as rules of thumb to identify details or narrative sequences considered most important or consequential in determining Congress' intents or purposes. Employing a structured (at times hierarchical) toolkit of legislative historical analysis is meant to introduce rigor to historical reading and to protect jurists against the sort of folly Judge Leventhal aptly described when he likened choosing aspects of legislative history to "looking over a crowd and picking out your friends."[187] For these reasons, statutory canons are a core part of any "Leg/Reg" class in law school. Below, we consider the two major families of traditional extrinsic source canons—those of source and person, which also dominate those NEPA cases which refer to legislative history.[188]

### 1. Hierarchy of Sources Canons

The most common genre of canons suggests a loose hierarchy of historical source categories. In this line of thinking, given the broad range of materials typically considered part of what can be extensive legislative histories of statutes,[189] certain types of documents or reports ought to take precedence over others, assumed to be more informative, legitimate, or conclusive.[190]

It is generally accepted in hierarchies of source canons that committee reports occupy the top of the pyramid.[191] This is the case for a number of reasons. First,

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(1947); Kuehner v. Irving Trust Co., 299 U.S. 445 (1937); Fairport, Painesville & E.R.R. Co. v. Meredith, 292 U.S. 589 (1934); Wilbur v. United States *ex rel.* Vindicator Consol. Gold Mining Co., 284 U.S. 231 (1931).

187. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983); Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

188. *See supra* note 182.

189. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 972 (4th ed. 2007) (citing OTTO HETZEL, MICHAEL LIBONATI & ROBERT WILLIAMS, LEGISLATIVE LAW & PROCESS 589 (3d ed. 2001)) (providing a checklist of materials to be considered in a legislative history).

190. MANNING ET AL., *supra* note 186, at 173 ("[T]here has traditionally been a rough hierarchy of legislative history sources, with committee reports at the top, sponsor statements somewhere in the middle, and other statements in floor debates and hearings closer to the bottom."); *see* EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 116, 124–26 (2008).

191. ESKRIDGE ET AL., *supra* note 189, at 981; MANNING ET AL., *supra* note 186, at 136–37; *see* Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 304 (1982); J.P. Chamberlain, *The Courts and Committee Reports*, 1 U. CHI. L. REV. 81, 82 (1933) ("[I]t is fair to assume that Congress has adopted as its intent the intent of the committee."); James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 888–89 (1930); Harry Willmer Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 969 (1940); *see also* Thornburg v. Gingles, 478 U.S. 30, 43 n.7 (1986); Zuber v. Allen, 396 U.S. 168, 186 (1969); Garcia v. United States, 469 U.S. 70, 76 & n.3 (1984); J.W. Bateson Co. v. United States *ex rel.* Bd. of Trs. of the Nat'l Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 591 (1978); Orloff v. Willoughby, 345 U.S. 83, 98 (1953) (Frankfurter, J., dissenting); SEC v. Robert Collier & Co., 76 F.2d 939, 941 (2d Cir. 1935). *But see* Daniel A. Farber & Philip P.

committee reports are written by more than a single member of Congress and are assumed to be reported only with the consent of the committee. By relying on consensus-driven sources, jurists employing legislative histories to construct statutory meaning hope to deflect arguments that Congress is incapable of speaking in a single voice or articulating a single intention.[192] Even though they lack the authority of a roll-call vote in which every legislator participates, committee reports are thus thought to represent the voice or intent of at least a relevant legislative subgroup. As the ultimate and most authoritative legislative subgroup, the conference committee and its report are generally viewed as the tip of the spear in terms of documentary history.[193]

Because a committee is more than just a collection of legislators, a second rationale for paying particular deference to conference committee reports is that it is assumed that committees are made up of conferees who are closest to the bill in question.[194] After all, conferees will be members of the sponsoring committee who introduced, considered, and reported the bills to the floor. Why wouldn't they be most familiar with the legislation, and why wouldn't their stated intentions be the most meaningful? Conferees help reconcile conflicting bills between chambers, finalize the bill, and engage in the complex processes of persuasion and compromise sufficient to move the bill to passage.[195] In this way, a hierarchy of sources that prioritizes conference committee reports incorporates the basic philosophies and assumptions of hierarchies of person.[196]

A final reason that jurists give particular weight to committee reports is that these reports are crafted carefully because they are "circulated . . . [with] a bill . . . to Members . . . and their staff."[197] It is not only the formality of the communication that matters, but also that the recipient of the communications is the whole or chamber of Congress—more recipients implies greater buy-in and greater load-bearing capacity for the intentions of the larger Congress.[198] The timing of the communication is extremely relevant, it is provided at the time the whole of Congress or a chamber is asked to consider the language of the bill.[199] The committee report attempts to explain to congressional colleagues what a bill does and what it will mean

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Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); Hirschey v. FERC, 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring).

192. *See generally* Ryan D. Doerfler, *Who Cares How Congress Really Works*, 66 DUKE L.J. 979, 981 (2017) (citing MICHAEL E. BRATMAN, SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER (2014)); MARGARET GILBERT, JOINT COMMITMENT: HOW WE MAKE THE SOCIAL WORLD (2014); *see also* Frank H. Easterbrook, *What Does Legislative History Tell Us*, 66 CHI.-KENT L. REV. 441, 446–47 (1990).

193. ESKRIDGE ET AL., *supra* note 189, at 982.

194. *Id.*

195. *See id.*; Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 209 (2000); Bank One Chi. v. Midwest Bank & Trust Co., 516 U.S. 264, 276–77 (1996) (Stevens, J., concurring).

196. *See* ESKRIDGE ET AL., *supra* note 189, at 982.

197. Digit. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 782 (2018) (Sotomayor, J., concurring).

198. MANNING ET AL., *supra* note 186, at 136–37. *But see* Doerfler, *supra* note 192, at 982.

199. *See* MANNING ET AL., *supra* note 186, at 136–37.

to enact it, implying a straightforward articulation of intent and purpose to fellow legislators who may be less familiar with the technical details of legislation.

Less persuasive sources of historical materials (listed loosely in the order of importance) include sponsor statements,[200] statements by individual speakers directed to a chamber during a floor debate,[201] rejected draft language,[202] and finally statements on the record during committee hearings,[203] or elsewhere.[204] The general trajectory is clear—sources with smaller audiences or further from the final passage of the bill are downplayed.

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200. ESKRIDGE ET AL., *supra* note 189, at 1000 ("Next to committee reports, the most persuasive legislative materials are explanations of statutory meanings, and compromises reached to achieve enactment, by the sponsors and floor managers of the legislation."). For examples of courts relying on the hierarchy of such materials, see Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704–05 (1995) (giving most weight to a committee report followed by a floor manager statement); United Steelworkers v. Weber, 443 U.S. 193 (1979); Commonwealth v. Ahlborn, 626 A.2d 1265, 1270 (Pa. 1993) (giving weight to a committee report and inferences from a bill amendment); Dillehey v. State, 815 S.W.2d 623, 626 (Tex. Crim. App. 1991) (relying mostly on committee reports and some on a floor debate).

201. MANNING ET AL., *supra* note 186, at 139–41 (citing Patsy v. Bd. of Regents, 457 U.S. 496, 503–04 (1982)); *see* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 262 n.36 (1975); Harry Willmer Jones, *Extrinsic Aids in the Federal Courts*, 25 IOWA L. REV. 737, 751–52 (1940); Thomas W. Merrill, Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1014 (1992); Murphy v. Kenneth Cole Prods., Inc., 115 P.3d 284 (Cal. 2007); Quelimane Co. v. Stewart Title Guar. Co., 960 P.2d 513 (Cal. 1998); ESKRIDGE ET AL., *supra* note 189, at 1020; NLRB v. Fruit & Vegetable Packers & Warehousemen, 377 U.S. 58, 66 (1964); BankAmerica Co. v. United States, 462 U.S. 122 (1983); Regan v. Wald, 468 U.S. 222, 237–42 (1984).

202. *See generally* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988); *see* JOHN M. KERNOCHAN, THE LEGISLATIVE PROCESS 25 (1981); ESKRIDGE ET AL., *supra* note 189, at 1026; Hamdan v. Rumsfeld, 548 U.S. 557, 577–80 (2006); Pattern Makers' League of N. Am. v. NLRB, 473 U.S. 95 (1985).

203. Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1131–32 (1983); ESKRIDGE ET AL., *supra* note 189, at 1020; MANNING ET AL., *supra* note 186, at 141; *see also* Kelly v. Robinson, 479 U.S. 36, 51 n.13 (1986); S & E Contractors, Inc. v. United States, 406 U.S. 1, 13 n.9 (1972); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 61 (1987); Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 236–37 (1986).

204. Gustafson v. Alloyd Co., 513 U.S. 561, 579 (1995); Trbovich v. United Mine Workers, 404 U.S. 528, 532 (1972); NLRB v. Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 347 n.9 (1978); Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 629 n.8 (1975); W. Union Tel. Co. v. Lenroot, 323 U.S. 490, 492 (1945); Dickerson, *supra* note 203, at 1131; ESKRIDGE ET AL., *supra* note 189, at 1043–47 (commenting on presidential signing statements); MANNING ET AL., *supra* note 186, at 141; *see also Kelly*, 479 U.S. at 51 n.13; *S & E Contractors, Inc.*, 406 U.S. at 13 n.9; Gwaltney of Smithfield, Ltd., 484 U.S. at 61; Japan Whaling Ass'n, 478 U.S. at 236–37. *See generally* Kathryn Marie Dessayer, Note, *The First Word: The President's Place in "Legislative History,"* 89 MICH. L. REV. 399 (1990).

### 2. Hierarchy of Persons Canons

Nestled within the first canon structure, a hierarchy of persons is consulted when consensus-driven materials are insufficient.[205] When statutory language is ambiguous or unclear, this hierarchy of persons would prioritize the views of some individuals before others.[206] The basic assumption behind such a hierarchy is relatively straightforward—that is, the more prominent an individual is in guiding a bill through the legislative procedures, the more their perspective counts, since they understand the bill or its context better or, alternatively, they worked their views into the bill.[207] Determinations of importance during the legislative process tend to be prescriptive rather than descriptive, highlighting certain categories of legislators by position or rank. Bill sponsors in particular have been pointed to in times of statutory ambiguity.[208]

Following sponsors, the canons suggest that other important actors in a legislative history (listed at least loosely in order of relative importance) include committee chairs, committee members, and other congressional leaders. The less important players are all other legislators and back benchers,[209] those in the losing coalition,[210] and those who are not members of Congress, including staffers[211] and those in the

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205. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395–96 (1951) (Jackson, J., concurring).

206. MANNING ET AL., *supra* note 186, at 138; *see also* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 119–27 (2012).

207. Orloff v. Willoughby, 345 U.S. 83, 98 (1953) ("Whatever we may think about the loose use of legislative history, it has never been questioned that reports of committees and utterances of those in charge of legislation constitute authoritative exposition of the meaning of legislation."); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 638 (1990); Jacobus tenBroek, *Admissibility of Congressional Debates in Statutory Construction by the United States Supreme Court*, 25 CALIF. L. REV. 326, 329 n.20 (1937); ESKRIDGE ET AL., *supra* note 189, at 1000. *But see* William Moorhead, *A Congressman Looks at the Planned Colloquy and Its Effect in the Interpretation of Statutes*, 45 A.B.A. J. 1314, 1314 (1959) (leveraging a critique about "planned colloquies" that might be rightly leveraged against Senator Jackson and Lynton Caldwell during the April Hearings on S. 1075).

208. *Schwegmann Bros.*, 341 U.S. at 394–95 ("It is the sponsors that [the Courts] look to when the meaning of the statutory words is in doubt."); *see also* MANNING ET AL., *supra* note 186, at 141 ("The Court has described the views of sponsors or floor managers as weighty, or even authoritative.").

209. Murphy v. Kenneth Cole Prods., Inc., 155 P.3d 284, 292–93 (Cal. 2007); Quelimane Co. v. Stewart Title Guar. Co., 960 P.2d 513, 529 n.9 (Cal. 1998); ESKRIDGE ET AL., *supra* note 189, at 1000; MANNING ET AL., *supra* note 186, at 138–39.

210. Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1176 (2011).

211. Kosak v. United States, 465 U.S. 848, 857–58 (1984); Grp. Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 223 (1979); ESKRIDGE ET AL., *supra* note 189, at 1018; *see also* Michael Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 836 (1991). *See generally* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 128–29 (2001) (Stevens, J., dissenting); Negonsott v. Samuels, 507 U.S. 99, 106–09 (1993); Gollust v. Mendell, 501 U.S. 115, 125 & n.7 (1991); Howe v. Smith, 452 U.S. 473, 484–85 (1981); Monroe v. Standard Oil Co., 452 U.S. 549,

federal bureaucracy.[212]

Although such hierarchies are not always rigid in rank, they seem to rely on assumptions of consistency—in order for such a view to be cogent, bill sponsors or committee chairs tend to occupy certain roles in the legislative process, which we can assume are fairly consistent. Therefore, rank is correlated with influence exerted; and knowing a legislator's role in the bill's ecosystem allows us to know something about their interaction with the bill's language, intent, or purpose and thus defer to (or disregard) them appropriately.

Traditional application of source hierarchy canons would have us turn first to the Senate and conference committee reports, as the courts have done in the past.[213] The conference report, however, tells us little about the ideology driving earlier amendments introducing Section 102's key language—"detailed statements," "alternatives," and interagency review. Its treatment of the new language found in Section 102 is very sparse. Nothing is said in the report about *how* those changes came to be. This is not surprising since they were not the result of committee deliberations. There is no hint of Muskie's role in the amendments, the ideological differences that threatened the passage of the bill, or even the existence of a controversy in the first place. In discussing Section 102, what the conference report does focus on is unhelpful.[214]

Next, in the Senate Interior and Insular Affairs Committee's report on Senate Bill 1075, we find outdated Section 102 language mandating only "findings" and lacking key provisions. From the House Committee on Merchant Marine and Fisheries, we

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558–59 (1981); Hayes v. Continental Ins. Co., 872 P.2d 668 (Ariz. 1994); Alison C. Giles, Note, *The Value of Nonlegislators' Contributions to Legislative History,* 79 GEO. L.J. 359 (1990); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807 (2014) (stating that the judicial take on staff's role is oversimplified); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 222 (1994) (stating that nonlegislator statements occupy no place of honor and are considered among the least authoritative sources).

212. *See* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 758 (2014); Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 454 (2017); Jarrod Shobe, *Agency Legislative History*, 68 EMORY L.J. 283, 286 (2018); Shobe, *supra* note 211, at 863–64; Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 131–32 (2015); Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1378–79 (2017).

213. In fact, these are close to the *only* documents relied upon in NEPA's legislative history. *See supra* note 182.

214. H.R. REP. NO. 91-765, at 8–10 (1969). This problem is neither unforeseen nor totally unheard of, of course. *See* ESKRIDGE ET AL., *supra* note 189, at 982. The report discusses that the new NEPA requirements allow state and local governments to provide comments on environmental impact statements (a product of Muskie's intervention). The committee notes that seeking these comments should not "unreasonably delay the processing of Federal proposals" and envisions that state and local agencies would monitor the *Federal Register*, identify proposals of interest, and then request that federal entities provide "supplementary information" upon request. If there ever was a failed prognosis of an enactment's future, it was this one.

find no Section 102 analogue whatsoever. If we were to consider floor statements as the next most important source in the hierarchy, we risk being misled by appeals to simplicity. In the legislative history of Senate Bill 1075, Muskie's amendment of a "detailed statement" is never explained on the floor, at least in floor sessions discussing Jackson's bill. This is not to say that the amendments were never discussed on the Senate floor, however—only that the comments are entered instead under Muskie's separate bill, Senate Bill 7. Perhaps because it was filed under a separate bill, significant NEPA decisions fail to refer to the critical October 8 compromise that introduced the "detailed statement" requirement.

Committee hearings yield only general discussions of "action-forcing" by Jackson and Caldwell,[215] showing only that *some* action had to be forced. The extent of the action expected, however, is undefined. Two-page notices of finding, as committee drafters assumed would result,[216] are actions and thus might not unreasonably be considered a fulfillment of the committee's "action-forcing" ideals. "Detailed statements" might be understood to be a one-to-one substitute for findings, as there are no grounds in the legislative history to read into the new language a different value set. What if this were the reading taken by the courts had the Trump administration's limits on page limits been challenged? It is, after all, all that might be found or prioritized using traditional source canons. These sources also do not speak to a meaningful need for public review or citizen suits, as these were not a primary concern of the traditionally centered framers of NEPA. Strict timelines or restricted access to scientific research might affect interagency review or public scrutiny of proposed government actions.

Although deemed less important by the hierarchy of sources canons, a canon focused on rejected language[217] would have proven much more helpful in constructing meaning from Section 102. Comparing the weaker "finding" language with the stronger revised "detailed statement" language at least tips us off that an amendment was made and might provide some sense of trajectory. It does not, however, explain how that language came to be, nor does it tell us where to look. Was the amendment made under the assumption that the new language was synonymous with the old? That it would better reflect the intent of the bill sponsor? Or, on the other hand, did it reflect some controversy and a shift of meaning or statutory purpose? Not all amendments are introduced for the same reason, and only so much can be deduced from language swaps without further context. None of the prioritized sources in a traditional source hierarchy serve to answer these questions, and it is left up to judges to decide—perhaps arbitrarily.

Would a court determine that, in many ways, the "detailed statement" was not addressed and that we should therefore assume that "detailed" meant something not

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215. *See supra* note 47 and accompanying text.

216. *See supra* note 144.

217. *See* SEC v. Robert Collier & Co., 76 F.2d 939, 941 (2d Cir. 1935); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 220 (1983); Busic v. United States, 446 U.S. 398, 406 n.11 (1980); United States v. Great N. Ry. Co., 287 U.S. 144, 155 (1932); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873 (1930). *But see* Gemsco, Inc. v. Walling, 324 U.S. 244, 261–63 (1945); REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 160 (1975).

all that detailed—given the dog that didn't bark canon?[218] Many scholars and other experts have opined that had Congress understood the impact that NEPA would have on the legal landscape, it would not have passed in the first place.[219] However, even on Senate Bill 1075's record, some dogs did bark.[220] Still, it is imaginable that, as Dreyfus (one of Jackson's staffers) later argued, the future NEPA litigants might argue that Congress got it wrong and, in so doing, transformed a modest legislative vehicle into a runaway train.[221] While Jackson, Dreyfus, and others may have not seen what Muskie saw in the language he proposed, Muskie saw them as significant. That the canons do not point to Muskie—such a fundamental part of NEPA's history—as having a major role in crafting the enactment is, of course, worrisome both for the future NEPA litigation and for the soundness of reliance on these canons in the first place.

Much like canons of source hierarchy, canons referring to a hierarchy of persons fail to identify the most important processes in making Section 102. In a traditional hierarchy, the legislator introduces the key amendments in question; but in this case, pivotal portions of Section 102 occupied no place of honor. After all, Muskie was not a bill sponsor, a member of the relevant committee, or in the general party leadership. In much the same way, staffers, despite their role in actually proposing and defending key language, are often excluded by formal interpretations of congressional operation.

Canons of persons hierarchy rely too optimistically that leadership implies involvement, engagement, or understanding, or that congressional structures reflect actual legislative processes. NEPA may be aberrant in that its legislation involved, perhaps to an unusual degree, inter-committee engagement and informal amendments. But empirical research published elsewhere suggests that variances from the "norm" of congressional procedure might be, in many cases, the norm.[222] Strictly applying such a canon, NEPA is understood to be of the product of Jackson—he was NEPA's sponsor in the Senate, Interior Committee chair, and led the Senate conference delegation. Focusing on Jackson and ignoring Muskie is problematic not only because the language of the most important provision of NEPA was Muskie's in the first place, but also because Jackson did little to highlight the changes to Section 102. If we only look for his statements, we will come up with the same general "action-forcing" found in the April 16 hearings.[223] In a floor speech, Jackson

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218. *See generally* ESKRIDGE ET AL., *supra* note 189, at 1020–21, 1035.

219. *See supra* note 18.

220. *See supra* note 176–177 and accompanying text.

221. *See supra* note 167.

222. *See* Bressman et al., *supra* note 212; Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992); Nourse, *supra* note 206, at 77; Shobe, *supra* note 211. *But see* William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 672–73 (1999) (noting that empirical testing does not necessarily answer to normative disagreement underlying application of the canons or legislative history).

223. *See supra* note 47.

mentioned that he had cooperated with Muskie to change some of the language but added that he did not consider the changes as very significant,[224] calling the Muskie amendments "minor changes."[225]

Without directly giving or taking credit for the changes in Section 102, Jackson said the revised NEPA would "apply pressure . . . on those agencies that have an impact on the environment" and that the "strong language" is aimed at making "those agencies . . . become environment[ally] conscious."[226] Forcing action—any action—should create internal reform. If it does not, the Court is not bound to demand more action. Muskie spoke more directly of the need to change behavior by external pressure stemming from disclosure, implying a more demanding impact statement process and interagency policing.[227] Interestingly, in *Calvert Cliffs*, Judge Skelly Wright notes and then brushes off how the changes to Section102 came to be. Doing so, he does not compare the Senate-passed language to the final version. Rather, and exemplifying the risk of relying on a hierarchy of persons, he quotes Jackson's characterization of the changes Muskie insisted upon as leaving the "substance . . . relatively unchanged,"[228] noting that "Senator Muskie seemed to give greater emphasis to the supposed conflict between the two bills."[229] By deferring to Jackson, Judge Wright confuses the origins and intent of critical language. He fails to comprehend the conflict that threatened to sink the bill and, in essence, ascribes Muskie's more stringent, action-forcing agency expectations to Jackson.

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Reliance on hierarchies of person and canon exemplify NEPA case law discussing the Act's legislative history.[230] Overall, the traditional canons do not explain the actual history of NEPA's passage very well and narrow our view to the brief, incomplete explanations of "action forcing" offered in the Senate and conference reports and, when in doubt, citing only Jackson's celebratory comments after conference committee—consistent with NEPA's early case law.[231] Relying on source hierarchy canons points us towards sources that either fail to reveal the source and procedure of amendments, or that otherwise do not provide any commentary on the intent or purpose of the amendments. Hierarchies of person rely on overly simplistic models of congressional rules and procedure and fail to consider persons who were actually critical to the statutory language as passed, leaving unexplored significant troves of information that could explain why language was introduced or what it was supposed by its drafters to mean. It would have us downplay Muskie's view of environmental impact statements and interagency review altogether, and totally prioritize Jackson, whose "action-forcing" mechanism was optimistic and poorly

224. 115 CONG. REC. 29,053, 40,425.
225. 115 CONG. REC. 40,417.
226. 115 CONG. REC. 40,425.
227. *Id.* at 29,053.
228. *Id.* at 29,055.
229. Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Com., 449 F.2d 1109, 1125–26 n.37 (1971).
230. *See supra* notes 181–182 and accompanying text.
231. *See supra* note 182.

defined. Using the history of NEPA to ground truth common canons of construction provides a case study demonstrating their potential shortcomings in practice.

Knowing all this is not just important because of what it tells us about the canons, but also because of what it tells us about the work *future litigants* will need to take on in order to get courts to focus on the most vital aspects of the legislative history relevant to the "detailed statement" language (and those passages of the legislative history which lend themselves to a favorable outcome).

With this in mind, we searched alternative canons for a more flexible and adaptable approach which could adapt to NEPA's unique legislative circumstances.

### *B. What Might Protect NEPA—Positive "Veto Gates" Canons*

The most promising discrete canons we found came not from the legal academy proper but from the world of positive political theory (although these canons are no strangers to Legislation casebooks). Professors Matthew McCubbins, Roger Noll, and Barry Weingast, all prominent political scientists, have transcended coauthorship: as the positive political science boy band of our time, they are known by the mononym McNollgast. To be fair, the collective name is much more than a gimmick. Together, they are well-published and prolific. Their ideas have frequently proven important enough to watchers of congressional politics that their scholarship and empirical work have sparked a new genre of canons.

In their article, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, McNollgast propose a number of interpretive canons of legislative histories.[232] McNollgast argue that, instead of focusing on hierarchies of source, person, or time, judges should employ a different lens when parsing legislative history—one that instead tracks "the major lines of compromise" that "result from bargains among veto players in the legislative process."[233] This is a functional analysis, one that focuses on which specific players had the descriptive potential to stop (and therefore shape) a piece of legislation through compromises that allow the legislation to pass through imposed "veto gates."[234]

Though not formally referred to as a power of veto, McNollgast extend insights of presidential-congressional politics[235] into those situations where a member or

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232. McNollgast, *supra* note 222. *See also* Rodriguez et al., *supra* note 14, at 1438–39.

233. McNollgast, *supra* note 222, at 706–07, 736 ("Statutes are most assuredly not embodiments of the objectives of any particular person, but a compromise among numerous political actors."); *see* Rodriguez et al., *supra* note 14, at 1442. 707. *But see* Nourse*, supra* note 210, at 1155–58.

234. *See also* William N. Eskridge Jr., *Vetogates and American Public Law*, 31 J.L. ECON. & ORG. 756, 773 (2012); William N. Eskridge, Jr., *Vetogates,* Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441 (2008).

235. Perhaps the idea that motivated McNollgast's veto gates more than any other is the idea embedded in the traditional canons used to parse legislative history that gives very little weight to statements of a president. McNollgast argue that, because a President has the power of the veto, their preferences have to be taken seriously by members of Congress. Out of this insight grows their threat of presidential veto canon, requiring that when a court is examining a meaning of a statute, courts should take presidential statements "into account and must accord them considerable weight if the President possessed a credible veto threat over the

members of Congress have the ability to exercise the functional veto or sink a bill. They write that:

> [t]he single most important feature of the legislative process is that, to succeed, a bill must survive a gauntlet of veto gates in both the House and Senate, each of which is guarded by members of the relevant chamber who were chosen by their peers to supervise that particular gate.[236]

Rather than lend credence to individuals in the legislative process based on their formal role, "positive political theory points to the members who control the various veto gates as crucial to understanding legislative intent."[237] From this focus, McNollgast teases out a number of other "veto gate"-derived canons that could be used as a hierarchy to structure inquiry into legislative history, three of which we consider here.[238] All of these positive canons sort details based on the extent to which, functionally speaking, they relate to legislation's traversal of conflict in the form of vetoes, whether formal or informal.

The first positive canon we consider is the *consequential statements canon*, which tries to separate consequential statements from "cheap talk."[239] What makes statements consequential is their relationship to veto gates and pivotal points.[240] Do these sources or statements explain the rationale behind the levying of a veto gate? Do they explain the rationale behind amendments which insure safe passage through a potential block? Using this lens as a sorting device, the canon provides that "consequential statements and actions have priority over inconsequential ones."[241] In other words, information about how veto gates were navigated is more meaningful and provides richer inferences of intent and purpose than cheap talk alone: "When talk is cheap—when members of Congress or the President cannot be held accountable for their statements about a bill by members of the coalition—its information content is not reliable."[242] Colloquies offered before a settled chamber should not be given the same weight as tense negotiations between conflicting factions, for example.[243] Because pivotal legislators and gatekeepers have "the

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statute in question." McNollgast, *supra* note 222, at 737.

236. McNollgast, *supra* note 222, at 720, 735; McNollgast, *Legislative Intent*, *supra* note 14, at 18.

237. McNollgast, *supra* note 222, at 707.

238. The remaining canon relates to presidential veto gates proper. *Id.* at 707–08. Even though a opposition to the Senate NEPA bill was floated early on in the Nixon White House, it was never publicized. By the time Muskie's amendments to Section 102 materialized, the differences between the Nixon administration and Congress had largely been reconciled as the Nixon administration acquiesced on earlier objections.

239. Rodriguez et al., *supra* note 14, at 1445–56. Worse than "cheap talk," statements of winners can be "[smuggled] in" or even be misleading. *See* ESKRIDGE ET AL., *supra* note 189, at 983.

240. McNollgast, *supra* note 222, at 731.

241. *Id.* at 707.

242. *Id.*; *see also id.* at 727 ("[O]nly when the majority is in a position to sanction such talk should it be considered relevant for statutory interpretation, and then only to the extent that it (statements, reports) is not directly contradicted by action (i.e., by voting behavior).").

243. *See Legislative Intent*, *supra* note 14, at 21–22.

strongest incentives to communicate reliably the act's meaning," their statements should be lent due credence as signals of meaning.[244] The consequential statements and compromises that come out of these negotiations might be regarded as agreements, much like contracts, between the parties to allow the bill to pass through the gate.[245]

The second positive canon is the *functional relationship canon*, which asks judges to look past the title or position that players in drafting congressional legislation have and rather to focus on the "totality of the legislative history conveys important information about whose preferences were most consequential in shaping the coalitional agreement."[246] Who controls the veto gates is an empirical question answered by considering ground conditions—it may commonly be correlated with official leadership positions and roles, but not necessarily.[247] Regardless of title, "veto players" should be granted particular deference.[248]

Third, McNollgast also considers a *rejected language canon* (also considered among the more traditional canons), which dictates that "decisions by legislators to reject language provide useful negative inferences about statutes."[249] While courts at times rely on rejected proposals as part of the traditionally applied canons,[250] the reason that positive political science considers rejected language is because rejected language tells us a good deal about the negotiations engaged in to pass through various veto gates.[251] In other words, McNollgast is interested in rejected language because it is revelatory of conflict and, by implication, threats of delay or veto.

Interestingly, McNollgast has briefly commented on NEPA and Wright's *Calvert Cliffs* in a positive political theory context before.[252] Drawing on a more developed set of historical artifacts, and considering more than *Calvert Cliffs*, we expand on their analysis and three of their proposed positive canons. In doing so, we find that they are much more helpful than the traditionally applied canons in bringing into focus the most consequential moments of NEPA's legislative history. Analyzing

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244. Rodriguez et al., *supra* note 14, at 1448. *See also* MANNING & STEPHENSON, *supra* note 186, at 175 (citing Nourse, *supra* note 206, at 70).

245. McNollgast, *supra* note 222, at 708 ("Writing statutes shares many similarities with writing contracts. Both formalize bargains among actors with diverse and partially conflicting interests. In the legislative process, as in the marketplace, actions happen only when bargains are struck. Further, in both cases bargaining is costly."); *id.* at 727.

246. *Id.* at 708. *See also* Tiefer, *supra* note 195, at 267 ("Courts interpret the choices actually made in Congress, not just the ones made by idealized processes. For legislative history to give a distorted view, committee reporting must diverge not from the idealized chamber, but from the actual enactment process of the text.").

247. *See* McNollgast, *supra* note 222, at 736.

248. *Id.* at 707 ("The preferences of veto players are most influential in determining policy bargains, and, therefore, their preferences must be ascertained in order to uncover the implicit agreement underlying the explicit statutory language.").

249. McNollgast, *supra* note 222, at 736.

250. MANNING & STEPHENSON, *supra* note 186, at 142–43.

251. *See* McNollgast, *supra* note 222, at 725–26 ("It follows that interpretations of a statute derived from proposed amendments and alternatives that were rejected at various veto gates cannot become part of a valid statutory interpretation.").

252. Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Com., 449 F.2d 1109, 1125–26 n.37 (1971).

legislative developments and players by relationship to conflict (rather than formal procedure) seems to provide positive canons greater flexibility when applied to unorthodox lawmaking.[253] The fact that an alternative set of canons performs better than the traditional canons, of course, raises important implications for the durability and utility of traditional canons.

First, the path of Senate Bill 1075 immediately following passage did, in fact, face a legitimate veto gate. Because Jackson's Senate bill passed the Senate through the consent calendar, Muskie was forced to resort to a hold as his only means of blocking the bill's passage to bring it back to the Senate for further consideration. Using the parlance of positive canons, Muskie imposed his own veto gate since Jackson had bypassed the appropriate gate by putting Senate Bill 1075 on the consent calendar.[254] Since such a st ay is an informal move arranged with the Senate Majority Leader, however, it does not appear on the Congressional Record (or the session's daily digest) and is not reflected in traditionally consulted sources. Muskie did not have an absolute veto; rather he could demand reconsideration of the bill by the Senate and force a vote. Bringing the bill back to the Senate would necessitate senator resources (e.g., floor time), would have likely caused controversy, and might have ended up sinking the bill.[255]

During this period, with Muskie acting as a gatekeeper, NEPA was renegotiated and emerged from the gate substantially different, particularly in its Section 102. Jackson needed Muskie's buy-in to navigate the veto gate, and concessions or amendments introduced here tell us more about this power struggle than do statements or amendments made afterwards, when the threat of veto was diminished. Thus, what happened during this period is consequential. By understanding this significant period, we know where to look for hints of momentous statements as they might be reflected in other sources, such as the floor proceedings of the October 8 compromise; presentation of the new Senate Bill 1075;[256] or Muskie's contemporary writing on the issue,[257] where he spells out an intentionality of Section 102, which seems to preclude the interpretation offered by CEQ in today's proposed regulations. All of this is much more significant than Jackson's "cheap talk" after the most critical veto gates have been passed, and at which point he can safely downplay Muskie's contributions without threat.[258] It is the statements that occurred during inter-committee negotiations through the veto gate that are consequential. Once the veto gate is passed, talk is again cheap.

By understanding consequential periods and statements using the first positive canon, we can gain a better understanding of operative bargaining coalitions and actors. McNollgast asks us to think about power dynamics realistically. In this canon, we do not consider the formal position or title of certain members, but rather the extent to which an individual's preference is necessarily taken into account because

253. *See, e.g.*, Gluck et al., *supra* note 222, at 1789.

254. *See supra* note 101–103. In fact, Jackson seems to have been eager to short circuit the process as much as possible to avoid a challenge to his bill.

255. Finn, *supra* note 47, at 460–61, 470.

256. *See* 115 CONG. REC. 29,046–65.

257. *See* Muskie et al., *supra* note 29. *See also* Finn, *supra* note 47.

258. *See* 115 CONG. REC. 40,420. For cases relying on "cheap talk" rather than consequential statements, see *supra* note 182.

or due to their relationship to a veto gate. While Muskie was not a bill sponsor, committee chair, party leader, or even member of the bill's committee, Muskie possessed the functional ability to upend Senate Bill 1075 as he leveraged a hold on the bill.

A positive canon of functional relationships prompts us to ask why Muskie had the ability to create a veto gate in the first place, and what implications that might have in interpreting NEPA.[259] First, Muskie was able to convince Mansfield to respect his requested hold because of the overlap between Senate Bill 1075 and his own Senate Bill 7.[260] Simply referring to this portion of the Congressional Record (concerning Senate Bill 7) provides the reader with a reasonably straightforward (if somewhat downplayed) explanation of Muskie's Section 102 amendments. Second, Muskie probably was able to put a stay on Senate Bill 1075 due to his general stature in the Senate, particularly on environmental issues—he was, after all, "Mr. Clean."[261] Formal leadership considered under the hierarchy of persons canon is one thing, but informal clout and "ownership" of certain legislative territories is another. McNollgast's second positive canon permits more flexible consideration of these sorts of informal or title-less powers in Congress and is more helpful in pointing us towards significant actors liable to exert influence on bills' substance. Although Jackson insists that his bill was not substantively affected by the Public Works Committee,[262] McNollgast asks us to consider conflict rather than to uncritically defer to bill sponsors.

Knowing why Muskie was able to put a hold on Senate Bill 1075 prompts us to give greater weight to Muskie's legislative intents and broader regulatory worldview[263] and allows us to contextualize the implied purpose behind the new Muskie language—agencies cannot be trusted to navigate the impact analysis process by themselves, neither should they be given broad discretion in disclosing or withholding information. Agencies have to lay it all out—anything that might be relevant—and let other agencies and the public review or litigate as appropriate. A focus on Muskie also centers Muskie's "standard-setting" approach more generally and supports a view of a toothy, requirements-created and agency-forcing section 102.

By understanding the general points of view at play, we come to better understand the implicit agreements[264] met in the amended Section 102 language and a more general concession to Muskie's regulatory point of view. A conflict-oriented positive canon set thus reframes Section 102 as an agreement between Jackson and Muskie.

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259. McNollgast, *supra* note 222, at 725.

260. *See supra* note 78.

261. *See* Daniels et al., *supra* note 60, at Part I.

262. *See supra* note 222-223 and accompanying text.

263. *See generally Legislative Intent, supra* note 14.

264. McNollgast, *supra* note 222, at 718 ("[T]he policy bargain among members of the enacting coalition consists of both an explicit statement of this agreement (e.g., in the text of the resulting statute) and implicit agreements over ambiguous provisions and how the explicit bargain will be applied to unforeseen circumstances . . . Because the coalition's agreements represent a compromise among its members, the ascertainment of an implied agreement rests on understanding what interests were compromised—that is, who actually can be regarded as a member of the enacting coalition.").

Rather than force action through research and findings alone, this section became a means of policing agency actions with review by other sectors of government and the public. In this light, imposing strict deadlines and dramatically constricting the volume of information and alternatives reported through page limits seem contrary to legislative intent. Mandating seventh-percentile-detailed statements hardly seems acceptable in light of the deal Muskie struck in order to avoid "meager," "minimal" requirements for agencies.[265] Although Jackson, Dreyfus, and other Interior Committee drafters might not have objected to the harshly limited EISs, theirs is not necessarily the intent that matters. Using the framing of positive canons, intent is defined by bargaining outcomes and, in this case, should be dominated by the expectations of Muskie and the Public Works Committee.

Simply put, Section 102, read as a Muskie-Jackson agreement, unmarred by Jackson's narrative sideling Muskie,[266] does not support the sort of streamlining put forward by the Trump administration. By locking out science altogether or hiding information in appendices that sit in agencies' file drawers, agencies become their own police, and the public loses its leverage to intervene in the courts. NEPA is as it is today, however, because a veto gate was foisted for the express purpose of avoiding this issue.

Muskie matters, especially when it comes to drawing meaning from Section 102 using positive political theory. Without his exercising a veto gate, it seems unlikely that NEPA would have ushered in a new era of environmental law. Rather, it would have likely been a bill that would have been appropriate to pass on the consent calendar, one that the press would have hardly covered, and one that Nixon—no matter how cynical he was about pushing environmental legislation on the sole basis of political gain—would have celebrated at a signing ceremony without regret.

Interestingly, one of the only traditional canons that we discussed above that would have helped courts zero in on the story behind Section 102 is also the only canon that McNollgast incorporate (though for different reasons) into their own proposed canons—the rejected language canon.[267] The reason that McNollgast have us look at rejected language, however, is broader than just the linguistic differences between different iterations of proposals. Rejected language also tells us something about the fruits of compromise—the necessary negotiations that brought about legislative bargains. While all of this is wrapped up in the other positive canons, focusing on rejected language proved very useful in helping see not only what caused Muskie to get off his perch, but also what gave him a perch in the first place.

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The relative performance of the traditional and positive canons is illuminating. We suspect, like the research in psychology focused on heuristics, the traditional canons are likely to continue to lose traction and fall into disuse—the assumptions that justified their use, if ever true, may be outmoded.[268] In their place, evidence and theory-based positive canons ought to be considered in the mainstream. The primary challenge for the traditional canons in the context of NEPA is that Muskie was not a

265. *See supra* note 116–117 and accompanying text.
266. *See supra* note 224–225 and accompanying text.
267. McNollgast, *supra* note 222, at 707.
268. *See supra* note 222 and accompanying text.

formal mover pushing NEPA—rather, he worked largely in the background, using his reputational clout and circumstantial leverage to impose a veto gate and force a change in legislation through irregular channels. It also does not help that the relevant compromise between Jackson and Muskie was memorialized in the Congressional Record in the legislative history of a bill that was contemporaneous with NEPA but not filed under Senate Bill 1075.

Should future administrations follow the lead of the Trump administration and attempt to undermine Section 102, it is important to realize that the traditional canons will fail to reveal the accurate legislative history.

## CONCLUSION

Over fifty years since its passage, the real history of Section 102 of NEPA deserves to be known—it is, after all, the reason NEPA is the most litigated statute in all of environmental law. While Congress and a number of presidents have attempted to weaken NEPA, the Act not only lives on but thrives. While correcting the historical record is important in its own right, a better understanding of the history raises significant questions about how this legislative history remained virtually unknown. How have scholars, litigants, and jurists ignored the enactment's nuanced history for so long?

In the past, and much to the dismay of many NEPA advocates, substantive requirements and NEPA's Section 101 policy have been read out of the Act as it has transformed into a procedural exercise.[269] But the environmental impact statement remained largely unchallenged. This changed in the Trump administration; and regardless of what the Biden administration is able to undo, as with so many norms and practices that were crossed, it is now likelier that future challenges to the meaning of "detailed statements" and the legislative intent behind Section 102 will be on the horizon.

In this Article, we applied the traditional canons of legislative histories and found that these classic tools did not fare very well in pointing to the actual history of Section 102. In many ways, in fact, these tools misdirect. The use of positive canons is better suited for the interpretation of NEPA's EIS. In the face of future challenges to Section 102, reliance on traditional canons will lead a court astray from an accurate understanding of NEPA's most important provision. In their place, we urge the use of positive canons, which reveal a detailed and conflict-oriented history and which best defend a rigorous environmental impact statement, one of environmental law's most important protections.[270]

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269. *See supra* note 37.

270. Despite Jackson's use of the term "action-forcing," the Interior Committee view of the EIS was that findings would be short, largely perfunctory, and without meaningful consideration of alternatives. Institutional reform would come through consideration of Section 101 and judicial intervention. Muskie's view, on the other hand, was that independent of a policy statement, agencies needed their behavior changed by forced, significant statements. *See* supra Section II.B.