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# The National Environmental Policy Act and the Battle for Control of Environmental Policy

**Abstract:** In 1969, a public debate between President Nixon and Congress took place during the legislative passage of the National Environmental Policy Act and centered on two very different and competing conceptions of how presidential advice should be organized in the Executive Office of the President. It focused on the proposed establishment of the Council on Environmental Quality. The outcome of the ensuing battle represented a complete victory for congressional interests against the expressed wishes of the president. The nature of the debate has been overlooked in the literature on the presidency, but it highlights fundamental issues about agency design and presidential control of the institutional presidency. It also highlights broader concerns about the degree of congressional involvement in shaping the Executive Office of the President.

**Keywords:** National Environmental Policy Act, Council on Environmental Quality, Executive Office of the President, President Richard Nixon, President Bill Clinton, U.S. Congress, institutional design

Just twenty days into his presidency, on February 8, 1993, President Clinton, accompanied by Vice President Gore, launched the first major initiative of his administration. The president told the White House press corps that he was

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keeping his election commitment to bring new leadership and new energy to environmental issues. "We face urgent environmental and economic challenges," he said, "that demand a new way of thinking and a new way of organizing our efforts here in the White House and in the national government." As part of a package of changes to the environmental policymaking structure, the president announced that he would establish a new White House Office on Environmental Policy to replace the Council on Environmental Quality (CEQ), and that he would work with Congress to elevate the Environmental Protection Agency to department status. This new structure, President Clinton claimed, "represents our commitment to the environment and to a new, more efficient and effective way to craft policies that work, policies that recognize that protecting the environment, strengthening the economy, promoting the global environment, and dealing with global environmental problems that have all too often been relegated to the bottom of the agenda. . . . The days of photo-op environmentalism are over."<sup>1</sup>

The president's announcement was followed by a statement from Vice President Gore, who explained that the new Office on Environmental Policy would exist not just to ensure a *coordinated* environmental policy across the executive branch, but also to make certain that environmental considerations were fully *integrated* into the work of the other policy units in the White House. "One of the most serious problems with environmental policy development and policymaking in the past," the Vice President asserted, "has been that the environment has been treated as an afterthought. . . . This new framework will ensure that environmental considerations are brought to bear at the earliest stages in the development of every policy that the president and his staff and his Cabinet look at."<sup>2</sup>

The Clinton-Gore initiative promised a significantly enhanced presence for environmental policy in the White House even though it proposed the abolition of the CEQ, a statutorily established presidential staff unit within the Executive Office of the President (EOP) that had been created as part of the National Environmental Policy Act (NEPA) of 1969 and had existed within the EOP ever since. Neither Clinton nor Gore thought that the council could provide the kind of policy leadership that they desired. President Clinton said that the new White House Office on Environmental Policy "will have a broader influence and a more effective and focused mandate"<sup>3</sup> than the CEQ and Vice President Gore, in responding to a question on this very point, emphasized how peripheral the CEQ had become in its relationship to the policy development process. By contrast, the Vice President made it clear that

the new Office on Environmental Policy would be located at the very center of the policy-making process in the White House itself.

The reaction to the Clinton-Gore reorganization initiative was negative. In general, environmental interests groups were critical of the intention to abolish the CEQ, partly because they were concerned that any transfer of its statutory responsibilities to a new Department of Environment (the upgraded Environmental Protection Agency) would adversely shift responsibility out of the White House and away from the president, and partly because they also feared that the abolition of CEQ would come back to haunt them under a future, less environment-friendly administration.<sup>4</sup> Congress also proved to be a major impediment to the Clinton-Gore reorganization. It refused to elevate the Environmental Protection Agency to departmental status and actively opposed Clinton's request that the CEQ be terminated.<sup>5</sup> An Office on Environmental Policy was subsequently established within the White House,<sup>6</sup> but, once it became clear that Congress was not going to abolish the CEQ, the Clinton response was simply to make the Chair of the CEQ and the Director of the Office on Environmental Policy one and the same person and so any distinctiveness that the new Office on Environmental Policy may have had quickly dissipated. The public, the politicians, the journalists, and the environmental groups soon lost interest in the proposal and, although this was the first major initiative of the Clinton administration, it quietly faded from memory, even from President Clinton's to the extent that it rates not a single mention in his 950-page memoir.<sup>7</sup>

This institutional clash between President Clinton and Congress has not been satisfactorily explained. Most accounts of the Clinton presidency, like Clinton's own, ignore it. But, an important question remains: Why did a generally pro-environment Congress prevent a pro-environment president from reforming and strengthening the environmental policymaking machinery in the White House? This article seeks one explanation within the context of a debate that took place in Congress during its consideration of the NEPA in 1969, a debate that has broad implications for the way in which policy advice is structured and organized within the Executive Office of the President.

As David Lewis has so effectively pointed out, the design of administrative agencies is shaped by the separation-of-powers system. "By constitutional design," he notes, "the two branches view agency design differently, one from the parochial perspective of narrow reelection interests and the other from a broader perspective derived from unique constitutional responsibilities and a national constituency. In order to delve more deeply into the politics of agency design, we need to examine how presidents and members of Congress

view the process differently based upon their unique, institution-created perspectives.<sup>8</sup> The case of the CEQ provides a valuable insight into agency design at the highest level of U.S. government.

### THE COUNCIL OF ENVIRONMENTAL QUALITY AND NEPA

The National Environmental Policy Act, passed by Congress at the end of 1969 and signed by President Richard Nixon on the first day of January 1970, was the culmination of a decade of intense congressional concern with environmental policy.<sup>9</sup> It was a decade that produced major legislation to improve the quality of air and water, to protect America's wilderness areas, to beautify highways, and, as the centerpiece of the NEPA, a policy mandate to protect the environment and ensure that environmental concerns were to be taken into account in any federal government legislation and federal government programs. The centerpiece of the legislation was the establishment of what became one of the less prominent units within the EOP, the Council on Environmental Quality.

The council has had a turbulent existence during its fifty-year life and probably more turbulent than any other current EOP unit. There have been times when the CEQ has been influential within the policymaking process and has had some impact. It got off to an impressive start under President Nixon, although the Nixon administration's enthusiasm for the council was not sustained for very long. It did well during the Carter years and was impressive under President Clinton in protecting environmental interests against the deregulatory push by the Republican-controlled Congress. But, there have also been long periods of time during the past fifty years when the council has not had the support of the president. It reached its nadir during the Reagan administration, when the council's annual budget was reduced from \$4 million to \$700,000 in the space of four years and its staff cut from nearly sixty in the last year of the Carter presidency to just ten. According to a contemporary report in *The New York Times*, "its lack of resources and minimal influence . . . have reduced its effectiveness to the vanishing point."<sup>10</sup> The highpoint of the CEQ's budget and staffing allocation occurred during the Nixon and Carter administrations when its staffing level reached a total of seventy-two and its initial budget of \$1.5 million rapidly grew to \$3.1 million by the end of the Carter years.<sup>11</sup> The proposed CEQ appropriation for fiscal year 2019 is \$3 million—the same dollar level it was twenty-eight years ago—and it has a staff complement of just twenty-four full-time equivalent positions.<sup>12</sup>

Budget cuts and staff reductions have not been the only institutional damage done to the CEQ during its fifty-year history. The standing of the CEQ has been undermined by all presidents since Jimmy Carter, who have simply ignored the statutory requirement to appoint a three-member council, preferring instead to make do with just a chairperson who exercised all the powers, functions, and duties of the council. Congress has concurred with and given its imprimatur to this practice in every appropriation bill since 1988.<sup>13</sup> During the Clinton presidency, Congress further undercut the role and effectiveness of the council by eliminating the statutory requirement that it publish an Annual Environmental Quality Report. The report had been a significant CEQ activity since 1970 and was a vital mechanism and an important focus for putting into effect the policy goals mandated in the National Environmental Policy Act.<sup>14</sup>

Today, the CEQ exists on the periphery of policymaking in the Executive Office of the President, and it is but a shadow of what was intended to be the institutional focus of NEPA. It has certainly failed to serve the purposes of some presidents. President Reagan signified that by his desire to abolish it and President Clinton tried and failed to reform it because, in its existing structure, it could not do as much as he wanted it to do.<sup>15</sup>

For such a landmark piece of legislation, the passage of the National Environmental Policy Act (NEPA) through Congress was remarkably swift and relatively noncontentious.<sup>16</sup> The Senate version of NEPA (S.1075) was introduced by Senator Henry Jackson (D-Wash.) on February 18, 1969, and referred to the Senate Committee on Interior and Insular Affairs. The committee held a one-day hearing on April 16, during which it considered S.1075 and two related bills and subsequently reported an amended S.1075 in June. The full Senate approved it on July 10 without debate, without any floor amendments, and without a roll-call vote. The House version (HR.6750) was introduced by Rep. John Dingell (D-Mich.) on July 1 as an amendment to the Fish and Wildlife Coordination Act. Hearings were held on HR.6750, along with ten other related bills, over seven days in May and June and the legislation went to the House floor on September 23, where it was passed overwhelmingly by 372–15 votes. The agreed version of NEPA that emerged from the conference committee on December 17 was approved by the Senate three days later after a brief debate and without a roll-call vote. Similarly, debate in the House on the conference report was brief and the House voted approval without a roll-call vote on December 22.

The CEQ was created under Title II of the National Environmental Policy Act and was clearly modeled on the Council of Economic Advisers (CEA) in

the 1946 Employment Act.<sup>17</sup> Section 202 of NEPA established a three-person CEQ to be formally located in the Executive Office of the President, as was the three-person CEA. Similarly, the three CEQ members, one of whom was to be designated as the Chairman of the Council, were to be nominated by the president and appointed subject to the advice and consent of the Senate.

In its original form, the CEQ was a purely advisory body for the use of the president intended to provide the necessary institutional capacity to implement the policy goals of NEPA. The CEQ had no statutory powers to implement or regulate environmental policy, nor any line responsibilities. The council emerged in tact from the legislative process in 1969 and, when President Nixon signed the Act on January 1, 1970, it became part of the EOP, where it has remained ever since. The CEQ is now fifty years of age. Of the current formal divisions in the EOP, it is the fourth oldest, outranked in longevity by only the White House Office, the Council of Economic Advisers and the National Security Council.<sup>18</sup>

The statutory framework created by the National Environmental Policy Act is an obvious starting point for exploring the fate of the CEQ and addressing the issues raised earlier in this paper. That framework, however, is just skeletal. Underpinning the legislative language of NEPA is a rich debate in Congress about the desirability of placing a new policy unit in the EOP, a debate that has been almost completely overlooked in the literature on the presidency.<sup>19</sup>

The debate in Congress was not about the policy goals of NEPA, partly because there was a consensus on the desirability of a clean environment and the urgent need for improved management of it. No one argued that the federal government ought to stay out of environmental policy and, of course, no one made a case for more environmental pollution and degradation. The major purpose of the legislation was not an issue at all. The absence of any opposition to the policy goals of NEPA was also, in part, attributable to the form of the legislation when it was considered by the relevant committees in the Senate and the House. The broad national environmental policy goals that eventually became Title I of NEPA did not appear in the original bill introduced in the Senate on February 18, 1969, and then considered by the Senate Interior and Insular Affairs Committee when it held its one-day hearing on NEPA on April 16. Nor were the environmental impact statement provisions included in the original bill. They, too, were added after the hearing following a suggestion made by one key witness, Professor Lynton Caldwell, at that hearing.<sup>20</sup> The same was true of the House version of NEPA introduced by Rep. John Dingell as an amendment to a Bill about fish and wildlife coordination.

At the time of the committee hearings, which formed the major part of the congressional deliberations on NEPA, both versions of the legislation were mainly about the proposed CEQ and the environmental quality report that the president was mandated to transmit to Congress annually. So, given the initial absence of both the legislative language on policy goals and the provisions for the environmental impact statement process, a large part of the testimony and discussion in the hearings focused inevitably on the CEQ and the reporting requirement, with the result that the hearing provided a rich source of competing views about how presidential policy advice should be organized in The White House.

### **ORGANIZING THE PRESIDENCY: PRESIDENT NIXON'S PERSPECTIVE**

The congressional debate over the new council was also triggered and framed in large measure by the position of the Nixon administration. From the very start, President Nixon did not want the CEQ in his White House. A Nixon task force on environmental policy had reported to the president-elect the week of the inauguration urging that "improved environmental management be made a principal objective of the new administration." It had recommended the appointment of a Special Assistant for Environmental Affairs in the White House Office who would also act as the executive secretary of a new interdepartmental President's Council on the Environment.<sup>21</sup> President Nixon never showed much interest in the special-assistant position, but he did commit to the interdepartmental environmental council and quickly established an Environmental Quality Council at cabinet-level by Executive Order, which he issued at the end of May 1969.<sup>22</sup> Its membership consisted of the vice president, the secretaries of agriculture, commerce, health, education, and welfare, housing and urban development, and interior, other departmental heads as the president may from time to time direct, plus a number of observers from relevant EOP agencies. Rather than appoint a Special Assistant for Environmental Affairs as Executive Secretary, as the task force had recommended, Nixon gave the job to the Science Adviser to the President, a position then held by Dr. Lee DuBridge. The council's major functions were to advise the president on matters relating to environmental quality and to facilitate coordination of environmental policy among federal government departments and agencies. According to Richard Liroff, Senator Jackson, who was strongly opposed to the Nixon initiative, managed to persuade the president not to issue the Executive Order before his committee had held its hearings on S.1075,<sup>23</sup> but the Nixon cabinet council was the subject of discussion at those

hearings and turned out to be a major point of contention between the president and Congress. Nixon's objections and opposition to the CEQ proposed by Senator Jackson were registered in every departmental response to S.1075 and HR.6750 and in the testimony of every administration witness called before the committees.

Three models of presidential policy advice were before Congress during its deliberations over NEPA. The Nixon cabinet-council was a small body of relevant departmental secretaries and existing presidential staff to provide a focal point within the administration for environmental policy advice and coordination. It necessitated no new presidential advisory unit in the EOP and not even a new staff unit because the staffing was to come from the existing Office of Science and Technology. It is worth emphasizing that this body was to operate at Cabinet level because, during the legislative passage of NEPA, the status of Nixon's cabinet-council was often denigrated by members of Congress who tended to refer to it as simply an "inter-agency committee." The Nixon approach to enhancing environmental policy advice in his White House was also important because his cabinet-level Environmental Quality Council was the forerunner of the cabinet-council system that the president established in 1973 across the whole range of the administration's policy responsibilities.

The model advocated by Senator Jackson and Representative Dingell was a new high-level policy advisory body consisting of three environmental policy experts and based upon the well-established and highly successful precedent of the Council of Economic Advisers. In essence, it was meant to focus primarily on providing policy advice to the president, but it was also given a brief to oversee environmental policy across the departments and agencies.

A third option, advocated by Senator Muskie, was the establishment of an environmental policy staff in the form of an Office of Environmental Quality to be located in the EOP. This proposal got little consideration in the House or Senate because it was part of a larger conflict between Jackson and Muskie over NEPA and eventually got sorted out as part of a compromise between the two, but it did generate a personal reaction by President Nixon. In a signing statement when he approved the National Environmental Policy Act, the president made reference to the Muskie Bill, which had not then completed the legislative process. He said, "I know that the Congress has before it a proposal to establish yet another staff organization to deal with environmental problems in the Executive Office of the President. I believe this would be a mistake. No matter how pressing the problem, to over-organize, to over-staff, or to compound the levels of review and advice seldom brings earlier or better results."<sup>24</sup>



Ironically, although the three models competed as solutions for strengthening federal government management of environmental policy, all three were, eventually, formally established. President Nixon's Environmental Quality Council was created through an Executive Order, Senator Henry Jackson's CEQ was established as part of NEPA, and Senator Muskie's Office of Environmental Quality was the product of his 1970 Environmental Quality Act. By April 1970, the Nixon White House, formally at least, contained all three. However, the confusing structure did not last for long. The president's cabinet-council had a short shelf-life and was terminated in July 1970 with its functions, which were very similar to those Senator Jackson gave his CEQ, transferred to what was then the Domestic Council. Senator Muskie's environmental policy staff unit existed in form only and was never activated by President Nixon. Only the Jackson model survived the first year of the Nixon presidency.

While the Nixon administration supported the objectives of the various environmental policy bills being considered in the House and Senate, it strongly opposed the idea of a statutorily established CEQ on the grounds that such a body was unnecessary in light of the president's own initiative in setting up a cabinet-council on environmental policy. Administration officials testifying before Senator Jackson's Interior and Insular Affairs Committee and Representative Dingell's Merchant Marine and Fisheries subcommittee argued that not only was CEQ unnecessary, but that President Nixon's model would be a more effective and more flexible body than the one Congress was proposing.

The great merit of the Nixon cabinet-council model, according to the president's science adviser, Dr. Lee DuBridge, was that members of the council, by virtue of being departmental secretaries and members of the cabinet, would have the authority to implement its decisions. The emphasis here was on implementation and action so the status of the membership of the Nixon council was paramount. As Dr. DuBridge told the Senate Interior Committee, the model would work very effectively "because tasks can be assigned then and there in the meeting to the proper cabinet officer or on a group or committee of Cabinet officers and the things decided upon can be implemented instantly by presidential directive on the spot."<sup>25</sup> Later on in his testimony, in response to a question from Senator Gaylord Nelson, Dr. DuBridge reiterated the point. "The intention of this Council is to create an action agency whereby those who are responsible for action in fields affecting the environment can get together, can be instructed by the president to carry out the actions."<sup>26</sup>

There was at least one supporter of this argument amongst the members of the Senate Committee. The ranking Republican, Senator Gordon Allott, told his colleagues that he was “concerned about all of the studies that can come out of a council; a commission, or a committee without producing actual results in the end. The most appealing thing to me about the Administration’s approach, is that you develop the staff under the people who can actually implement and initiate policy under the direction of the President”<sup>27</sup>

The various departmental and agency submissions to the two congressional committees also emphasized the virtue of flexibility in the Nixon model. The fear was that a statutorily established unit in the EOP would be difficult to change as circumstances changed. As the Bureau of the Budget said in its submission, the establishment of a new environmental policy unit “should be undertaken by executive action rather than by legislation in order to assure flexibility necessary in exploratory or pilot efforts and in meeting changing needs”<sup>28</sup> Similarly, the view of the Department of Transportation was that, although a coordinating mechanism in the EOP was needed, “the argument for maintaining organizational flexibility is a compelling one and [we] would recommend an administrative, rather than a statutory approach at this time.”<sup>29</sup>

The prospect of a statutorily established environmental policy unit in the White House that could only be modified or abolished with congressional approval via the legislative process clearly disturbed President Nixon. In addition to the public case made by the Administration for the Nixon cabinet-council initiative and against the congressional variant, there were political reasons that weren’t made public at the time. John C. Whitaker, a deputy assistant to the president for environmental policy, recalls that “Nixon did not particularly like the idea of institutionalizing into the law a permanent council whose advisers, over the long run, could be counted on to be pushed by their natural constituency always to advocate an environmental position and probably an extreme one.”<sup>30</sup> The assumption here was that the form of advisory mechanism would dictate the nature of the advice given to the president.

Whitaker also highlighted another White House objection to the congressional CEQ. “If there were a council of advisers for the environment,” he asks, “why not a council for transportation, civil rights, Indians, blacks, welfare planning—indeed why not for any issue that required coordination between departments?” He went on to say that: “It would be better, in Nixon’s view, to recast the departments around broad functions to reduce the coordination needed and thereby reduce the size of the White House staff.”<sup>31</sup> That is

precisely what President Nixon did when he announced in March 1971 his proposal to reorganize the executive branch of government around four new super-departments, a scheme which Congress did not enact and which eventually led to Nixon's establishment of a cabinet-council system of executive branch management in lieu of the super-department proposal.<sup>32</sup> Nixon's Environmental Quality Council was the forerunner of this scheme.

Apart from the fear of being saddled with an advisory body that would reflect the views of extreme environmentalists, the Nixon administration had little to say about the nature of advice that would emanate from its own innovation or from that foisted on it by Congress. The public record shows that Nixon's major concern focused on the coordinating capacity of any environmental policy body rather than its advisory role and, therein, was a major point of difference between the presidential perspective on how to organize the White House and that of Congress. The argument about flexibility was also a significant point of contention. The president wanted an environmental policy unit that could be adapted to changing circumstances and could even be dispensed with should it be deemed not to be serving the interests of the president. The case the Nixon administration made may not have been strong and it certainly was not strong enough to sway opinion within Congress, but it did indicate a clear White House perspective on the design of the presidential advisory system, and it was an unambiguous expression of opposition to what Congress was trying to do by way of the proposed Council on Environmental Quality.

In two respects, the argument President Nixon advanced stopped short of what might have been said. Those members of the Nixon administration who testified before the two congressional committees never asserted that what Congress wanted to do was an interference with executive prerogative or a breach of the separation of powers. Their case went no further than claiming that the Nixon cabinet-council was better than the congressional version and that the proposed CEQ was unnecessary because of the prior existence of the Nixon model. However, for a fleeting moment, the propriety of what Congress wanted to do was alluded to in testimony to the Senate committee, although not from the Nixon administration but from Senator Jackson's chief adviser on NEPA, Professor Lynton Caldwell.

In responding to a question from Republican Senator Len Jordan, Professor Caldwell admitted that "there is a question here, it seems to me, of whether the president ought to have the full initiative, the freedom of exercising his own Executive Office, and the extent to which Congress should attempt to guide the President in that organization."<sup>33</sup> But, to be fair to Professor Caldwell,

he had not intended his statement to be read as a recognition that Congress might possibly be impinging on the separation-of-powers by legislatively imposing the CEQ on the president. Indeed, it was part of the opposite argument that the CEQ ought to be as much a congressional agency as a presidential one because environmental policymaking had to be a shared responsibility between the two branches.

Neither did the Nixon administration try to reinforce its opposition to the CEQ by threatening a veto of NEPA. Taking into account the popular policy goals of the legislation and the Democratic majority in Congress, it was, according to John Whitaker, “hardly worth a veto because the veto would have been overridden.”<sup>34</sup> In short, while clearly establishing a presidential perspective against the proposed CEQ, the arguments advanced by the Nixon administration failed to persuade a majority in Congress to support its position or to doubt the counterarguments for a CEQ put forward by Senator Jackson and others. Moreover, much of the congressional argument for the CEQ was triggered by what legislators saw as serious deficiencies in the mechanism that President Nixon had proposed.

#### **ORGANIZING THE PRESIDENCY: THE CONGRESSIONAL PERSPECTIVE**

Senator Jackson was absolutely clear in his mind about why the president of the United States needed to have a Council on Environmental Quality located in the EOP irrespective of any similar advisory body already established there. “It is my view,” he said, “that what is needed is an impartial, objective, full-time Council of Environmental Advisors in the Executive Office of the President. The interagency council that the president is considering would be useful for implementing action proposals, but the president also needs independent and impartial advice as to what action to take. The Council I have proposed would be properly staffed and equipped to provide this advice.”<sup>35</sup> By “impartial” and “objective,” the Senator meant that the advice should not come from the departments and agencies that, in his view, always reflected narrow departmental interests. He told the Senate hearing that it would be “advice that will not be adverse to them. It will be compromised advice. This has been the history of the agencies. It is hard for the President to get objective advice.”<sup>36</sup>

Senator Jackson was also concerned about the problem of executive branch coordination of environmental policy, as was President Nixon, but with a difference. When introducing NEPA on the floor of the Senate on February 18,

1969, he said: "Our present governmental institutions are not designed to deal in a comprehensive manner with problems involving the quality of our surroundings and man's relationship to the environment. The responsibilities and functions of government institutions as presently organized are extremely fractionated." He went on to point out that responsibility for federal programs relating to environmental management were spread over eleven executive branch departments and sixteen independent agencies. "The problems of coordination and control are obvious. It is clear that new approaches are required. . . . Better concepts and better institutions must be designed to supplement the programs and goals of existing agencies."<sup>37</sup>

Senator Jackson's views about the nature of advisory structures in the EOP directly countered the Nixon plan. Nixon's cabinet-council on environmental policy would, in Jackson's opinion, simply reflect narrow departmental interests, even though it was a cabinet-level body and chaired by the president. Interestingly, Jackson never once referred to the Nixon initiative as a cabinet council. His preferred terminology was "interdepartmental" or "interagency committee," which, whatever the weaknesses of the Nixon proposal, certainly downgraded the status of the cabinet council. In a discussion during the Senate hearing on NEPA, Jackson challenged Dr. DuBridge's testimony in support of the existing cabinet council that Nixon had established. "The effectiveness of these interdepartmental committees is highly questionable. . . . What happens is that they all get together, they compromise and come up with the least common denominator or they come up with as many different minority views as there are representatives."<sup>38</sup> Rep. John Dingell, the House sponsor of NEPA, expressed an almost identical view during the House hearings on the Bill. The proposed CEQ, he said, "would provide a top level, independent body, unencumbered by the demands and politics of operating programs and individual interests, free to draw independent conclusions, and to formulate a broad policy which would be of nationwide benefit."<sup>39</sup>

Senator Gaylord Nelson also objected to President Nixon's proposal, and his objections were directed to the role of the president himself. The Nixon cabinet-council model had the president as chair of the cabinet committee and that was a selling point for those testifying to Congress on behalf of the administration's proposal. To them, it indicated the seriousness and importance President Nixon attached to his new structure for environmental policy advice in the White House. Senator Nelson, on the other hand, was deeply skeptical about the amount of time and energy the president could devote to environmental policy. In a sharp exchange with Interior Secretary Walter

Hickel during the Senate hearing, Senator Nelson remarked: "Everybody here knows without saying that there are 300 hours of time demanded of the President for every hour that the poor man who holds that responsibility can give. . . . If you are really expecting the President to lead it, how much time can he spend on it? In all due respect, the President is just too harassed. . . . I just quite frankly don't think the President can devote all that time to this problem."<sup>40</sup>

Senator Nelson's concerns were reinforced in the testimony of Professor Caldwell. He, too, questioned whether the president would be able to devote sufficient time to this one policy area. But Caldwell went further than Senator Nelson and linked the prospect of a high degree of personal presidential involvement to the fear of overload. "Are we making the Presidency unmanageable?" he asked. "There is a growing feeling among students of public policy in the United States, and I think among citizens generally, that we are increasingly placing upon the Office of the President responsibilities and burdens that no individual can be expected to manage."<sup>41</sup>

Senator Jackson's central concern about the need for the president to have access to independent and impartial advice on environmental policymaking was taken one step further during the Senate hearing. It was first raised in a written submission from Wisconsin Democratic congressman Henry Reuss, who, although strongly supporting the proposed CEQ, thought that its members ought not to serve at the pleasure of the president, but rather be appointed for a fixed term so that they would be independent of the president and "insulated from presidential pressure so they can speak up if they feel they must."<sup>42</sup> He advocated a council whose members would be appointed for a staggered six-year term. Support for the idea of an independent advisory body came from the Republican side as well. Senator Jordan told his colleagues on the Interior Committee that he saw "some merit to . . . having an independent council whose sole and single purpose is to deal with this subject."<sup>43</sup> He did not specifically endorse the Reuss proposal on fixed-term appointments, but he went even further than Congressman Reuss in pursuit of an independent council by raising the possibility of establishing a body "set up like the Federal Reserve Board, with almost complete independence."<sup>44</sup>

That proposal came during an exchange with Professor Caldwell, who responded that he had some reservations about placing the CEQ in the Executive Office of the President, and that "the possibility of such an independent agency ought to be considered." Much of his empathy with Senator Jordan's position was consequent on his own strongly held view that the whole exercise of establishing and implementing a national environmental policy was a

joint responsibility of the president and the Congress, not merely a responsibility of the president alone. “The Constitution of the United States,” he said at the Senate hearing, “places on Congress a responsibility for the formulation of national policy that it cannot avoid.” He argued that Congress needed to do more in the shaping of domestic policy, that the president must share with Congress policy determination in environmental matters, and that “we need somewhere [in the structure of government] an independent forum and focus for a review of the Nation’s condition of the environment, a body that is capable of making assessment not only of our current conditions, but of presenting alternatives for coping not only with the problems that we know about, . . . but with problems that we have yet to face.”<sup>45</sup>

Implicitly, Professor Caldwell did not see the CEQ as an exclusively presidential agency serving just the needs of the president. It was, in his view, an institutional device through which the president would share environmental policymaking with the Congress. Moreover, he suggested that the Congress and the country would have less confidence in a policymaking unit that was “tied closely to the politics and personality of the incumbent President as they would in an organization created by the Congress and staffed independently of any other agency affiliation.”<sup>46</sup>

Lynton Caldwell was not the only distinguished academic used to reinforce the views of the sponsors of the various bills before Congress. Senator Jackson also placed considerable weight on a paper written by Professor Stephen K. Bailey, then Dean of the Maxwell Graduate School of Public Affairs at Syracuse University, which had been published in a volume produced in 1968 by the Brookings Institution entitled *Agenda for the Nation*.<sup>47</sup> The book highlighted what it considered to be the urgent policy issues facing the new administration when it took office in January 1969, and Professor Bailey’s contribution addressed the issue of managing the federal government. Jackson had placed an edited version of the paper in the *Congressional Record* and again in the Senate Interior Committee’s published hearing on NEPA.<sup>48</sup>

Bailey’s argument was that the structural fragmentation and diffusion of power, control, and accountability across the whole of the federal government were “grotesque in their complexity” and, unless remedied, “the consequences for the future of the American polity could be serious in the extreme.”<sup>49</sup> What must have appealed to Senator Jackson was that Professor Bailey had specifically identified “environmental management and control” as one of the pre-occupations of the modern presidency in the field of public policy, the other three being national security, economic stability and growth, and human resource development.<sup>50</sup> In that respect, the professor and the senator were at

one on the urgency of better federal government coordination and management in the field of environmental policy.

Professor Bailey also criticized attempts at coordination by presidential advisers and White House assistants and highlighted another institutional pathology of presidential staffing that indirectly supported the case that Senator Jackson was making for his proposal. In this instance, Bailey was referring to the president's closest and most senior aides in the White House Office, not the kind of outside experts who were to be the appointees to the CEQ. Bailey made a number of comments on the institutional risks when presidents delegate major authority to senior staffers, in essence arguing that it sets up a no-win situation and that presidential staff, no matter how brilliant, are limited by legal and political realities.<sup>51</sup> Again, Professor Bailey's criticisms of this particular coordinating mechanism were consistent with the purposes of the institutional device that Senator Jackson wanted to put in place.

Professor Bailey also pointed to the macro deficiencies in the presidential policy-making process. His major criticism of the EOP was its weakness in policy development. He believed that there was "no effective agency in the EOP charged with the study of emerging public problems and the development of effective programs to deal with them in terms of continuing and changing presidential perspectives of the public interest." He made two exceptions: economic stabilization policy and national security policy where the Council of Economic Advisers and the National Security Council staff had provided policy review capabilities. But he went on to say that, "in the increasingly troublesome and important areas of environmental management, the EOP is patently deficient." Bailey bemoaned the demise of the National Resources Planning Board, one of the original agencies established in the EOP in 1939 but terminated in 1943. Since it ceased to exist, he said, "no presidential staff has concerned itself full-time with ecological interdependencies." He noted that there had been "some gestures in this direction"—he mentioned the Committee on Environmental Quality in the Office of Science and Technology and a Water Resources Council that was outside the EOP—but, he said, "the former is too small and weak to be effective" and "the latter is limited by statute to water resources alone." Again, providing strong ammunition in support of Senator Jackson, Bailey suggested that the Committee on Environmental Quality "should be reconstituted as a separate, strongly staffed office in the Executive Office of the President."<sup>52</sup>

Notwithstanding the problems that Professor Bailey identified in the structure of the EOP, he was firmly of the view that responsibility for major policy initiatives concerning "the integrity and viability of the physical environment"



must reside with the president. “The presidency is the only institution in the American polity,” he wrote, “where overarching and long-range public imperatives can be coherently analyzed and melded.”<sup>53</sup> Again, Bailey’s perspective fitted well with Senator Jackson’s intentions in that NEPA delegated all responsibility for environmental policy to the president once Congress had formally recognized, as it did in Section 101(a) of the act, “the profound impact of man’s activity on the interrelations of all components of the natural environment.” The act imposed no duties or responsibilities on Congress to do anything more about environmental policy apart from receiving the annual environmental quality report from the president.

Professor Bailey’s paper was not written specifically for Senator Jackson’s committee, nor was it meant to apply only to the problems of environmental policymaking, but parts of it fitted very conveniently with the senator’s aims and provided a useful academic justification for the institutional structure to be established by NEPA. However, other parts of the Bailey paper were not so supportive and, in major respects, directly challenged the wisdom and practicality of NEPA, particularly the proposed CEQ. Bailey’s paper diverged significantly from Senator Jackson’s response to the problem of environmental policymaking and, ultimately, provided compelling arguments against the Jackson initiative.

Consistent with his view that the presidency had to be the focal point for long-range public policy development, Professor Bailey argued that the structure of the EOP “must reflect the prime concerns of the nation as viewed from the vantage point of the chief executive” and that the president “must be given very substantial latitude in organizing, reorganizing, and adjusting the constituent units of his executive office.” The president had to have the right “to structure and manage his own office without restriction, including the right to make in-office appointments without Senate confirmation and the right to create, shift, and abolish constituent units and personnel assignments as he deems necessary for the effective conduct of presidential business.” If the president can win that right from Congress, Bailey said, “he will have won a major victory for effective public management.”<sup>54</sup> Although he never spelled out why any presidential staff unit would fail if the president was not allowed complete discretion over the organization of the presidency, the message that failure would result was explicit in his writing and was repeated emphatically in the final section of his paper, a section that had been omitted from the version that Senator Jackson placed in the *Congressional Record* and in the Senate committee hearing on NEPA. “Above all,” Bailey wrote in the conclusion to his paper, “the President should attempt to win from Congress a greater

measure of discretion in effecting organizational shifts and consolidations in the executive branch, especially within his own Executive Office.” He insisted that the president should have permanent authority to submit reorganization proposals to Congress and that his power to reorganize the Executive Office should be “plenary.”<sup>55</sup> What, then, would be the role of Congress in shaping presidential decisionmaking mechanisms in the EOP? Bailey’s answer focused on the oversight function of Congress through its standing committees, the appropriations process, the advice-and-consent power, and investigation conducted by its Committees on Government Operations. The oversight process would give Congress a share in the overall management of public policy but would not dilute with the needs of the president in managing his responsibilities.<sup>56</sup>

Bailey’s concerns about how the Executive Office of the President ought to be structured and shaped was at odds with the design of the CEQ that Congress legislated one year after his paper had been published. Senator Jackson and his colleagues had done everything, specifically in relation to the proposed CEQ, that Professor Bailey had urged them not to do generally. The CEQ was placed in the Executive Office of the President against the wishes of the incumbent president and contrary to the structure for environmental policymaking that President Nixon preferred. Moreover, because it was established by statute, it could not be reformed, changed, or abolished without the approval of Congress. Jackson’s design gave no scope to the president to exercise “plenary” power or even “discretion” over the shape of the EOP. The thrust of Professor Bailey’s paper was that units in the EOP ought to be the creation of the president. The CEQ was just the opposite—a creature of Congress.

This part of Professor Bailey’s paper did not feature in the debate that took place in the Senate or the House committee hearings on NEPA. Bailey’s argument was ignored by the majority. On the other hand, the spokesmen for the Nixon administration who testified in favor of Nixon’s cabinet-level Environmental Quality Council and against the congressionally-imposed CEQ seemed unwilling to use the arguments advanced by Professor Bailey or, more probably, were unaware that the paper existed. Nevertheless, Professor Bailey’s perspective on the shaping of the EOP was fundamentally important in the longer-term debate about the institutional presidency. The thrust of his message was that a congressionally created staff unit placed in the Executive Office against the wishes of the president would, implicitly, fail. It was a message that was not only applicable to the CEQ, but also to a host of other Executive Office agencies that have been created by Congress.

The other aspect of Professor Bailey's paper that was ignored by the congressional advocates of NEPA was his emphatic statement that "political reforms in the structure of Congress are the prerequisites of effective structural reforms in the executive branch."<sup>57</sup> This section appeared at the end of the paper and was wholly contained in the twelve pages of the original that Senator Jackson or his staff had omitted from the version included in the Senate Committee hearings. Bailey's message was that no meaningful reform of the way federal government dealt with major policy problems would occur unless Congress changed its *modus operandi*.<sup>58</sup> "The goal," Bailey said, "is not to make Congress subservient to the President: it is to subject atomized power to the discipline of general politics in these two branches of government."<sup>59</sup> But, presumably, Senator Jackson and his colleagues saw this as a proposal that Congress should yield significant power to the President and wanted no part of it.

NEPA was a direct test of the willingness on the part of Congress to undertake the changes identified by Professor Bailey in two respects, and on both Congress responded in a contrary way. The first was its reluctance to give the President the flexibility to organize the Executive Office in the way that he wanted. The second was its rejection of a proposal made by Senator Nelson to establish a joint congressional committee on the environment as part of the institutional design of NEPA. Bailey had extolled the virtues of the joint congressional committee idea, committees that would have neither legislative authority nor direct oversight responsibility for any department or agency of government, but a mandate to examine policy in the long-term and across narrow departmental and agency jurisdictions. In his paper, Bailey had specifically proposed the creation of a Joint Committee on Environmental Management. By rejecting Senator Nelson's similar proposal, Congress showed its unwillingness to do anything to disturb the existing committee divisions of responsibility in Congress.

Professor Bailey's paper made important contributions to the debate on how the EOP should be used to respond to pressing longer-term policy problems and what preconditions would have to be met for reform to be successful. However, it was somewhat disingenuous of Senator Jackson to claim that Bailey provided support for the institutional arrangements established in NEPA, and even more disingenuous not to include the complete version of Professor Bailey's paper in the exhibits placed before the Senate Interior and Insular Affairs Committee when it was considering the legislation. Bailey's paper did provide support for some aspects of NEPA, but, in the longer term, the paper is more significant for providing an analysis of institutional design

through which one might better comprehend why NEPA and its progeny, the CEQ, has failed to achieve what its designers obviously hoped it would achieve.

## CONCLUSION

The Council on Environmental Quality, designed to be the centerpiece of the National Environmental Policy Act of 1969, emerged from the legislative process as a complete victory for Senator Henry Jackson and his conception of how the presidential staff and presidential advice ought to be organized and structured in The White House. The presidential perspective on this, albeit presented relatively passively by President Nixon and his administration and somewhat more aggressively by Professor Stephen K. Bailey, made little impact on the congressional deliberations. At the outset, the CEQ was what Congress, not the president, wanted established in the EOP and it had been located there with less than the wholehearted consent of the president.

This presidential policy unit had been shaped by Congress to reflect its priorities and values focusing on what it saw as the need for impartial, objective advice for the president achieved by a statutorily established body that could not be altered or abolished without the subsequent consent of Congress. The Nixon administration, however, had desired a body where the emphasis was on policy coordination and implementation and where the structure was flexible enough to allow the president to alter it if the necessity arose.

Rarely, have students of presidential organization had the opportunity to observe a debate such as this one. The specific arrangement of the units within the EOP are generally not considered in such detail by Congress and are almost never made public by the White House. Occasionally, there are glimpses of the kinds of concerns that make up decisions about how to organize the White House in presidential papers and memoirs of advisers and staffers,<sup>60</sup> but the stark choices and the opposing perspectives of president and Congress presented in this unusual public debate over the shape of environmental policy advice raise important issues that need to be added to the agenda of concerns in the field of presidential staffing and organization.

When a unit with the EOP is so obviously a creature of Congress, one needs to ask if congressional involvement in the detailed organization of the institutional presidency is wholly desirable and justified? There is a purpose

in considering the question Professor Lynton Caldwell raised during the hearings in the Senate Interior Committee about whether the president ought to have the full initiative, the freedom of exercising his own Executive Office. When Congress starts to shape the organization of the presidency, it also adopts ownership of it and that can act as an important constraint on presidents who wish to organize or reorganize the EOP to structure their staff in a way that best serves *their* interests.

The design of the CEQ certainly constrained President Clinton in his attempt to strengthen the environmental policymaking machinery in the EOP. It might be argued that such constraint on the presidency is a desirable cost of having a statutorily established unit in the White House that at least provides some degree of institutional consistency. However, the relevant statute (NEPA) has not provided any consistency at all in the functioning of the CEQ over the last fifty years, nor has it provided the kind of structural strength that would have protected it from the institutional damage, as detailed at the beginning of this article, that it has suffered over the years.

The experience of the CEQ is not unique. It is not the only part of the presidential branch that was constructed by Congress and deposited in the EOP without the support of the president at the time. The National Security Council, the Council of Economic Advisers, the Office of the U.S. Trade Representative, the Office of Science and Technology Policy, and the Office of National Drug Control Policy have all shared this fate, and the performance of those units over time also raise doubts about the wisdom of this level of congressional interference in what might be considered a presidential prerogative. The principal cost of congressional ownership of parts of the presidential staff is that it leaves the presidency saddled with staff units that can be structurally and functionally inflexible and rooted in a rigid framework established by Congress in the distant past.

As Lewis has pointed out in his work on the separation-of-powers and agency design, “Congress has legitimate constitutional and political claims to run the executive branch,” but that “presidents and their subordinates also legitimately claim jurisdiction over how delegated authority will be executed.”<sup>61</sup> This article is not a normative argument that Congress should always defer to presidential preferences in agency design, but rather a statement about the potential institutional costs of a conflict between Congress and the president over agency design, especially when the agency created by Congress is lodged in the Executive Office of the President.

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## NOTES

1. William J. Clinton, "Remarks Announcing the Creation of the White House Office on Environmental Policy," in *Public Papers of the Presidents of the United States: William J. Clinton 1993*, Book 1 (Washington, D.C., 1994), 62–63.

2. The vice president's remarks are not included with those of the president in *Public Papers of the Presidents*. For the text of Gore's contribution and the question-and-answer session that followed, see The White House, Office of the Press Secretary, "Statement by the President and Remarks by the Vice President on New Environmental Policy," 8 February 1993.

3. *Public Papers of the Presidents*, 1993, 63.

4. See Tom Kenworthy, "Clinton Plan on CEQ Sparks Tiff with Environmentalists," *Washington Post*, 25 March 1993, A22.

5. The arguments against the abolition of the CEQ are conveniently elaborated in the Senate hearings held less than two months after the Clinton announcement. See U.S. Congress, *Abolishing the Council on Environmental Quality*, Hearings Before the Committee on Environment and Public Works (S. HRG 103-79), U.S. Senate, 103rd Cong., 1st sess., 1 April 1993 (Washington, D.C., 1993).

6. As it was to be a staff unit within the White House Office, it did not require approval by Congress.

7. Bill Clinton, *My Life* (New York, 2004).

8. David E. Lewis, *Presidents and the Politics of Agency Design* (Stanford, 2003), 22.

9. The National Environmental Policy Act had a lengthy and complex legislative history during the 1960s. Its origins, as both Dreyfus and Ingram and Lindstrom and Smith have pointed out, can be traced back to Senator James Murray's proposed Resource and Conservation Act in 1959. See Daniel A. Dreyfus and Helen M. Ingram, "The National Environmental Policy Act: A View of Intent and Practice," *Natural Resources Journal* 16 (Spring 1976): 248, and Matthew J. Lindstrom and Zachary A. Smith, *The National Environmental Policy Act: Judicial Misconstruction, Legislative Indifference, and Executive Neglect* (College Station, Tex., 2001), 28.

10. Philip Shabecoff, "A Shrinking Agency That Survives," *New York Times*, 6 May 1985, 12.

11. See U.S. General Accounting Office, Report by the Comptroller General of the United States, *The Council on Environmental Quality: A Tool in Shaping National Policy*, rept. No. CED-81-66, 19 March 1981, 6–7.

12. See Office of Management and Budget, Budget of the U.S. Government Fiscal Year 2019, *An American Budget*, Appendix (Washington, D.C., 2018), 1053.

13. As Professor Lynton Caldwell, one of the architects of NEPA, noted in his major review of the legislation, this was an arrangement that "has proved convenient for presidential budget and political priorities but alters the intended role of the CEQ, effectively reducing its deliberative functions and Title II responsibilities." See Lynton Keith Caldwell, *The National Environmental Policy Act: An Agenda for the Future* (Bloomington, 1998), 42.

14. Shortly after winning control of Congress in the mid-term election of 1994, the Republican majority in the House introduced what became known as the Federal Reports

Elimination and Sunset Act of 1995 (Public Law 104-66). The CEQ's Annual Environmental Quality Report was terminated under a schedule referred to in Section 3003(c) of that legislation.

15. See John Hart, "President Clinton and the Politics of Symbolism," *Political Science Quarterly* 110 (Fall 1995): 396.

16. For a detailed legislative history of NEPA, see Richard A. Liroff, *A National Policy for the Environment: NEPA and Its Aftermath* (Bloomington, 1976), chap. 2; Richard N. L. Andrews, *Environmental Policy and Administrative Change* (Lexington, 1976), chap. 2; Dennis W. Johnson, *The Laws That Shaped America: Fifteen Acts of Congress and Their Lasting Impact* (New York, 2009), chap. 12; Terence T. Finn, "Conflict and Compromise: Congress Makes a Law," PhD diss., Georgetown University, 1972. For a concise yet broad overview of both the social and political forces behind the evolution of NEPA, see Lindstrom and Smith, *The National Environmental Policy Act*, chaps. 2 and 3.

17. See U.S. Congress, *National Environmental Policy*, Hearings Before the Committee on Interior and Insular Affairs, United States Senate, 91st Cong., 1st sess., 16 April 1969 (Washington, D.C., 1969), and Liroff, *A National Policy for the Environment*, 21.

18. The Office of Management and Budget and the Office of the U.S. Trade Representative have a longer pedigree in the EOP, but both are the current versions of earlier units and, legally, neither predate the Council on Environmental Quality.

19. Lindstrom and Smith give it brief consideration in *The National Environmental Policy Act*, 43–44.

20. See U.S. Congress, *National Environmental Policy*, 38, and Liroff, *A National Policy for the Environment*, 21.

21. Peter Khiss, "Nixon Task Force Urges Creation of Top-Level Environmental Affairs Post," *New York Times*, 14 January 1969, 27.

22. "Statement Announcing the Creation of the Environmental Quality Council and the Citizens' Advisory Committee on Environmental Quality," *Public Papers of the Presidents: Richard M. Nixon, 1969* (Washington D.C., 1970), 422–23.

23. Liroff, *A National Policy for the Environment*, 21–22.

24. "Statement About the National Environmental Policy Act of 1969," *Public Papers of the Presidents: Richard M. Nixon, 1970* (Washington, D.C., 1971), 2–3.

25. U.S. Congress, *National Environmental Policy*, 72.

26. *Ibid.*, 99.

27. *Ibid.*, 89.

28. *Ibid.*, 7.

29. *Ibid.*, 80.

30. John C. Whitaker, *Striking a Balance: Environment and Natural Resources Policy in the Nixon-Ford Years* (Washington, D.C., 1976), 13.

31. *Ibid.*, 50.

32. For the reorganization proposal, see President Nixon's "Special Message to Congress on Executive Branch Reorganization," 25 March 1971, *Public Papers of the Presidents: Richard M. Nixon, 1971* (Washington, D.C., 1972), 473–89.

33. See Caldwell's testimony in U.S. Congress, *National Environmental Policy*, 123.

34. Whitaker, *Striking a Balance*, 49.

35. U.S. Congress, *National Environmental Policy*, 205.

36. *Ibid.*, 86.

37. Senator Jackson's speech on the floor of the Senate is reprinted in U.S. Congress, *National Environmental Policy*, 24–25.

38. U.S. Congress, *National Environmental Policy*, 24–25.

39. U.S. Congress, *Environmental Quality*, Hearings Before the Subcommittee on Fisheries and Wildlife Conservation of the Committee on Merchant Marine and Fisheries, House of Representatives, 91st Cong., 1st sess., 7 May (Washington, D.C., 1969), 2.

40. U.S. Congress, *National Environmental Policy*, 101.

41. *Ibid.*, 114.

42. *Ibid.*, 67.

43. *Ibid.*, 92.

44. *Ibid.*, 123.

45. *Ibid.*, 123 and 113–14.

46. *Ibid.* 130.

47. Stephen K. Bailey, "Managing the Federal Government," in Kermit Gordon, ed., *Agenda for the Nation* (Washington, D.C., 1968).

48. In referring to Professor Bailey's paper, I cite the original Brookings Institution version rather than the edited version reproduced in the Senate Committee hearings on NEPA (see U.S. Congress, *National Environmental Policy*, 45–56). The edited version in the Committee's hearings contains the first twenty-one pages of Bailey's paper, but omits the last twelve pages. Those last twelve pages are particularly relevant to the discussion herein.

49. Bailey, "Managing the Federal Government," 301.

50. *Ibid.*, 303.

51. *Ibid.*, 310–11.

52. *Ibid.*, 313.

53. *Ibid.*, 312.

54. *Ibid.*

55. *Ibid.*, 330.

56. *Ibid.*, 331.

57. *Ibid.*, 327.

58. *Ibid.*, 326–27.

59. *Ibid.*, 327.

60. See, for example, Charles O. Jones, ed., *Preparing to Be President: The Memos of Richard Neustadt* (Washington, D.C., 2000).

61. Lewis, *Presidents and the Politics of Agency Design*, 23.