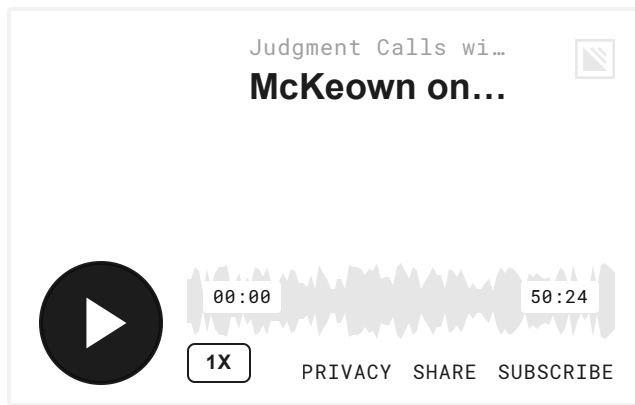


# McKeown on the Environmental Legacy of William O. Douglas

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*“One thing I came to believe when I finished the book was that we always think of heroes as perfect, and Douglas was both fascinating and flawed. I realized that heroes don’t have to be perfect.”*

Senior Judge [M. Margaret](#)

[McKeown](https://margaretmckeown.com/) of the U.S. Court of Appeals for the Ninth Circuit talks with [David F. Levi](https://judicialstudies.duke.edu/about/our-team/#Levi) about McKeown’s new book, *Citizen Justice: The Environmental Legacy of William O. Douglas—Public Advocate and Conservation Champion* (<https://www.nebraskapress.unl.edu/potomac-books/9781640123007>).

U.S. Supreme Court Justice William O. Douglas was a giant in the legal world, particularly as the longest-serving justice from 1939 to 1975. His most enduring legacy, however, is perhaps his advocacy for the environment. In a way unthinkable today, Douglas ran a one-man lobby shop from his chambers at the U.S.

Supreme Court, bringing him admiration from allies in conservation groups but raising ethical issues with his colleagues. He became a national figure through his books, articles, and speeches warning against environmental dangers. Douglas organized protest hikes to leverage his position as a national icon, he lobbied politicians and policymakers privately about everything from logging to highway construction and pollution, and he protested at the Supreme Court through his voluminous and passionate dissents.

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## Transcript

*This transcript has been lightly edited for clarity.*

**David F. Levi:** Hello. I'm David Levi, director of the Bolch Judicial Institute at Duke Law School and president of The American Law Institute. And this is a special joint podcast of *Judgment Calls* and *Reasonably Speaking*. I'm so pleased to be able to welcome as my guest today, Judge Margaret McKeown of the US Court of Appeals for the Ninth Circuit. A native of Casper, Wyoming, Judge McKeown earned her bachelor's degree from the University of Wyoming and her law degree from

Georgetown. She served as a White House fellow after law school, and then joined the law firm of Perkins Coie in Seattle, where she established the firm's intellectual property practice. She was appointed to the United States Court of Appeals for the Ninth Circuit in 1998, and she's had a most distinguished judicial career.

She is a member of the Council of the American Law Institute. She is very much admired, and her colleagues frequently turn to her for advice and leadership on issues ranging from the international rule of law to the governance of the courthouse workplace. Today, we're going to discuss her terrific new book, *Citizen Justice: The Environmental Legacy of William O. Douglas, Public Advocate and Conservation Champion*. Judge McKeown, Margaret, thank you so much for joining me.

**Margaret McKeown:** Thank you. It's a pleasure to be here.

**David F. Levi:** So you are a child of the West and the great outdoors, and something of an outdoors person, I understand. Is that what drew you to write this wonderful book about Justice Douglas as an environmentalist?

**Margaret McKeown:** Well, David, only in part because of course, I love the outdoors, and I was out in my home state of Wyoming snowshoeing. And I came upon a homestead that I was not familiar with. So I was on top of the roof because it was so snowy, and I didn't know exactly where I was. So someone came out of a cabin

and I said, "Where am I?" And he said, "You're at The Murie Center." And I said, "Oh, yeah, I know John Muir." And he said, "No, no, Murie, M-U-R-I-E." And I learned that the Muries were very well-known conservationists and biologists and worked in Alaska and Wyoming. And Olaus Murie had been president of The Wilderness Society.

So one thing led to another, and someone showed me a letter from Justice Douglas to the Muries, saying that they should give this homestead to The National Park Service in honor of conservation heritage and as a spiritual place to enjoy nature. So I thought it was pretty interesting that Justice Douglas was in touch with these humble conservationists from Wyoming. And as I did more research at The Library of Congress and the Berkeley Library, University of Washington, Denver, it was one thing that led to another, and it was kind of a lark. I was not intending to write a book, but the story just unfolded that Justice Douglas had a life on the bench, and then he had a completely separate life out in the wilderness promoting the environment. So as I continued my research, it just seemed that this was a story worth telling.

**David F. Levi:** Justice Douglas was born in 1898 in Minnesota, and his family eventually settled in Yakima, Washington. I learned this from your book. He experienced adversity in his childhood. His father died when he was just six years old. The family was in some financial distress, and Douglas also had a serious early

childhood illness, which he eventually overcame. His circumstances changed quite dramatically when he received a full scholarship to Whitman College. Can you describe how the justice's early years formed his character and his later interest in nature and in the environment?

**Margaret McKeown:** You're right that he was a sickly child and he was bullied. And he was a skinny, sickly child, so he began to go out and hike as both a way to get stronger, and eventually, he began to see nature in a spiritual way. For him, nature was a cathedral. And he also — because of the family's adverse economic circumstances — he worked a lot of jobs. He worked out in the fields with migrant workers; he worked in a drug store, newspapers, anything to help the family with their financial circumstances. His mother called him "Treasure," which was kind of a cute name, but she had a big aspiration for him. She wanted him to be President of the United States.

So, I think his early years really formed two of what he said were his overriding interests and philosophy in life. Number one is that the wilderness is a very special and spiritual place, and if it's not saved, then it will disappear. And then the second thing that became an overriding passion is his view that the Constitution was intended to get the government off the backs of little people. So the combination of those things really formed his philosophy, not only as an environmentalist, but also on the court.

**David F. Levi:** So interesting. That was liberalism at a certain point and time, I think. Of course, it's changed a great deal in later years. We'll come back to that. So he was born in the West and he spent all this time in the West, and then he moved East to the extent that he became sort of viewed as an Easterner. He went to Columbia Law School. He was an associate at Cravath. He taught at Columbia and then Yale. And he was chair of the SEC, where he succeeded Joseph Kennedy.

And when FDR decided to appoint him to the court in 1939 at the very young age of 40, it was important to the confirmation that Douglas really be a Westerner, and that the Western senators be very supportive. Can you tell us about that part of his life?

**Margaret McKeown:** Well, he had come down to Washington from Yale to do a study in business reorganization, and then he quickly went on to the SEC as commissioner. He was a protégé of Joe Kennedy and became the chair of the Securities and Exchange Commission. So really on two occasions, FDR told him to unpack your bags just as he was about to head back to Yale, one when he got the important position on the SEC, but the other when FDR wanted to appoint him to the court. He was Brandeis' choice to go on the court and succeed Brandeis. But when the president called him in, he was somewhat nervous because he thought the president was going to ask him to be chair of the Federal Communications Commission. And that, he thought, might be somewhat deadly boring.



So when the president says, “Unpack your bags. I’m going to appoint you to something that’s somewhat like being in jail,” at which point he thought, “I’m definitely being appointed to chair the FCC,” and that’s when the president then said, “No, I’d like you to go onto the Supreme Court.” So with that, he was thrilled. But you’re right, he had been in the East so long, and one of his very early books was called *Go East, Young Man*. But he began to work his connections out West with the bar association in Yakima, where he grew up and with the Washington State Bar Association, and really embellishing his Western credentials because he was a Westerner first. And his soul was in the mountains of the West, so he really did begin a personal lobbying campaign once his name was floated, and then ultimately, when he’s appointed, as you note, he was only 40 years old. And he then went on to serve for 36 years, the longest-serving justice ever.

**David F. Levi:** It was a very long and fruitful career on the court. He had, I think, two cabins, your book says, back in the West that were very important to him. Do I have that right?

**Margaret McKeown:** Right. Well, at one point, he had three, but more or less in most of his life, he had a cabin some two to three hours from Seattle in the Cascade Mountains. He had a fishing cabin out on the Olympic Peninsula in the Pacific Coast of Washington. And then at one point, he had a cabin down in Oregon as well.

**David F. Levi:** I remember hearing stories, and I think your book mentions this, that at some point toward the end of the term, he would've completed all his work. Maybe the court hadn't completed all of its work, but he was done. And he would take off, and he'd be out there in one of his remote cabins without a telephone, without the internet, obviously. And he would have to check in, walk into town every day and call from the general store to see whether he needed to vote on something. Is that apocryphal, or is that actually what happened?

**Margaret McKeown:** It's not really apocryphal because, as you might imagine, he didn't endear himself to his colleagues when the end of June came, and as you say, if he had his dissents done, or he had authored a majority, he was done, and he would jump on the plane and come West. He often said the court work only took three or four days a week, so you can imagine that too was not well received by his colleagues. But he would jump on the plane, he'd come out to the cabin. And he would have to go into either the post office or a general store to use the phone because his cabin, his primary cabin at Goose Prairie, Washington, definitely did not have a telephone. And back then, lawyers could present emergency petitions to individual justices personally, not just send them via the internet.

So Justice Douglas was the circuit representative, or the Supreme Court justice assigned to the Ninth Circuit. So from time to time, lawyers would hike out to his cabin

all dressed up in their lawyer clothes and he'd say, "That's no way to dress in the wilderness," and then they'd have a petition for him. And he'd say, "I'll consider it, and I'll put it back under the rock or the log tomorrow." And most of those, the lawyer would show back up the next day dressed the same, inappropriate for the wilderness, and there would be the answer, "petition denied." There was a courthouse out there, but it was a good hour, hour and a half away, and there was one occasion when he enjoined basically the bombing in the Vietnam War, which decision only lasted about a nanosecond before the full court weighed in. But once he was done with the work, he was out of there.

And asked about that, one of the things he said is, "I figured the only soul I had to save was my own." So he was not necessarily prone to jaw boning about how the decision might be finessed or changed to get more joiners in his dissents, for example.

**David F. Levi:** That's so interesting. You mentioned that he'd written a book, *Go East, Young Man*. And at some point in his career on the court, I think fairly early on, he began writing travel books and other accounts of his experiences in the mountains and in remote places. And he became quite a well-known author. I don't know if he writes quite a book a year, but he was prolific. How did this happen?

**Margaret McKeown:** He did almost write a book a year, which is pretty remarkable. First of all, he was a very

fast writer. Some people thought too fast, and some of his opinions have been criticized. On the other hand, one of the well-known professors from years ago at the University of Washington [later Harvard Law School], Vern —a former Douglas law —actually analyzed his decisions and felt that was an unfair criticism. Douglas started writing these books; he wrote *Of Men and Mountains*, which is a soliloquy about his relationship with the mountains. And that occurred after he'd had a major horse accident out near his cabin. He and the horse had rode down the mountain, the horse was about 1600 pounds, and just crushed him, and he broke 23 ribs, which is kind of amazing. I didn't know we had 23 ribs to break.

But while he was recovering, he wrote *Of Men and Mountains*, and then he was just off and running. As you mentioned, he traveled internationally, Russia, Persia, Tibet, China, India. And so he wrote also a series of books about these international travels. One of them was called *Stranger in a Strange Land*. Another one I remember is called *In the High Himalayas*. And actually, if you are watching the Hitchcock movie *Rear Window*, and you see Grace Kelly reading a book, it's actually a Douglas book called *In the High Himalayas* Just sort of an interesting footnote to the movie industry. But he continued to write books. Some were about the environment. He wrote a wilderness bill of rights, for example; he also wrote books on Constitutional law, on the rule of law, and then a whole series of books related

to the environment and places that he felt were threatened in America and needed to be saved.

**David F. Levi:** I'll tell you, this is amusing to me. Like many people, I have my iPad propped up on a bunch of books, and one of them is *North From Malaya*, by William O. Douglas, *Adventure of Five Fronts* it's called. It's actually signed by him.

**Margaret McKeown:** Fabulous. He wrote nearly 50 books, and he also wrote a lot of magazine articles, so he was just prolific. He wrote for *Playboy*, for example, which was really shocking back then, and even today, for a justice. And the reason he said is, "Well, that's what young men read and I want to reach them." And he also wrote for *Good Housekeeping* and *Ladies Home Journal*, *National Geographic*, I mean, just scores of these magazine articles coupled with these books. Meanwhile, he also has a full-time job on the Supreme Court.

**David F. Levi:** Pretty incredible. So when would you say that Douglas became an environmentalist in the sense of moving from someone who loved and responded to nature to actual advocacy and lobbying?

**Margaret McKeown:** I think that is probably best pinpointed in 1954 when he read an editorial in the *Washington Post* that supported the Park Service proposal to build a highway down to that C&O Canal near Washington DC. And it was the old shipping canal, went up almost 190 miles up to Cumberland, Maryland. And he was outraged, so he actually wrote back to the

Washington Post and said how wrong the Post was and how wrong the Park Service was because they would be invading this area that should be protected. So he challenged the editors to come on a hike on the C&O canal. And it's interesting because in his calendar for that day that the hike was to start, all it says is, "Hike."

And although that really understates the impact of what was really a catalyst for him, he went on the hike. The Post editors came. They did not finish the hike, but nine people did, including Olaus Murie, head of The Wilderness Society. And that's how they began their friendship. But at the end of the hike, he had arranged it to end in Washington, DC because he understood the importance of publicity and the importance of leveraging those in power. So there was the Secretary of the Interior and other dignitaries. And in the end, the Post changed its mind and said that the highway should not be built. Right after the hike, Douglas gathered people together, various citizens and citizen groups, and they began lobbying to save the canal and eventually turn it into a national park. So in the end, he was successful.

Some years down the road, it became a national historic park. And then it was dedicated to Douglas, and the Park Service, on its website exclaims that it was the only national park walked into existence. So if you are in Georgetown today on the canal, you see a bust of Douglas commemorating that. And of course, the canal was saved, and you can now walk the entire length of

the canal without a highway interceding or intersecting your journey, so I think that really was something that gave him not only prominence in the conservation movement, but also just stirred something in him to realize that there were many places that needed protecting, and he could do that, which he did all over the country.

**David F. Levi:** So you describe in the book how the C&O episode, I'll call it, that as successful as it was, that this became something of a template for Douglas, the invitation to walk and the use of the media. Can you elaborate on that?

**Margaret McKeown:** Sure. Well, he first identifies a place that is threatened, and then he invites people to come and see it. That was one of his big strategies, whether it was the Secretary of Interior, and the head of the Park Service, the Secretary of Agriculture, or others, members of Congress, come and see, and then you'll understand. And once he did that, and he often was protesting with a group of people either from the Sierra Club or some local group. And once he did that, then he would form a committee. And sometimes he called these "Committees of Correspondence," which derived from an historical analog in the [Revolutionary] War, where he wanted citizens to write in to complain, to seek action. And then there was always a committee. He generally was the chair of the committee. And then they would, like missionaries, go out and lobby,

whether it needed to be in Congress, or locally, or with the president even, or with an organization.

And he did this all over the country, Maine, Arkansas, Kentucky, Texas, Colorado, Washington, California, Alaska, another very major point in his wilderness career. So he was all over the country doing this, and at the same time, working with these grassroots organizations. So that kind of became his MO, and something of how Douglas saw that you should get citizens to be part of this conservation movement.

**David F. Levi:** It's so interesting. Of course, it was very effective. He developed, as you've already said, friends in the environmental movement in the Wilderness Society and then some of the other organizations that were just getting traction during that time. Can you talk about that movement, sort of paint a picture for us of what the different organizations were, and how they differed or were alike?

**Margaret McKeown:** Sure. Well, when you go back to the late 1800s, early 1900s, there were a lot of standard bearers that were heroes to Douglas, such as Thoreau, John Muir, Teddy Roosevelt. And there were organizations in those early years as well. Usually, they were targeted to a single species or a particular area, like the Audubon Society, for example, was for birds. There were some big game hunting organizations, the Boone and Crockett Club. Most of them were targeted primarily to conservation of an area or a species. As time went on, and in the '30s, The Wilderness Society



was formed. The Sierra Club was much earlier with John Muir. But he began to interact with all of these national conservation leaders. And later, he kind of morphed that into working with the conservation leaders who were within the various agencies. So what he was preaching of course is that there's the spiritual value of nature to human beings.

And he worked with all these organizations and in a way became a band leader because what better than to have a Supreme Court justice who's espousing your cause? One of the major pieces of legislation that came out of collaboration was the 1964 Wilderness Act, signed into law by President Lyndon Johnson, and Douglas was behind the scenes working as well on the Wilderness Act because it really spoke to what he believed—that you needed to preserve the wilderness. And it also reflected that it was a minority right. It wasn't necessarily a large majority of America that necessarily agreed with that. But he felt that even where there's a small group with a good idea, he would cater to that minority idea.

So interestingly, as time went on, some of the conservationists and some of the early people were preservationists. And preservationists in rough terms were into preserving and keeping things as they were, not necessarily just to conserving things. So you then have somewhat of a collision between those who think multiple use, what the Forest Service espouses, recreation, but also timber cutting. There became this

collision between those who thought multiple use could be accommodated with conservation, but the preservationists didn't really believe that. So there were definitely schisms in the movement, and there wasn't a single movement at the time. By the time he got actively involved in the '50s, there were a number of organizations, but they begin to coalesce, and then certainly in the '60s and '70s, we began to see what might be more accurately called the environment movement. But he was there really as a grassroots organizer and promoter, and also really a spiritual head of that whole undertaking.

**David F. Levi:** You mentioned Alaska and that Justice Douglas had a great interest in preserving the wilderness in Alaska. And you also were connected to Alaska conservation, preservation because you were working for Secretary of the Interior Andrus at some point that intersected Douglas' efforts. Can you tell us about this?

**Margaret McKeown:** Well, as I mentioned, he met Olaus Murie on the C&O Canal protest. And so Olaus was going to conduct a scientific expedition to the Arctic because there was a lot of concern that the Arctic needed to be preserved and that it was a very fragile environment. So he put together an expedition sponsored by the New York Zoological Society with a number of very esteemed young scientists, and invited Douglas along. So although Murie is kind of a humble guy from Wyoming, he realized that with the

imprimatur of Douglas, he could bring, really put Alaska on the map, so to speak.

So Douglas came along just on part of the expedition. And when he was up there, he's very much a humble guy, certainly when he's out on the trail. So for example, Mardy Murie would say, "Would you like hot chocolate, Justice Douglas?" And he'd say, "Call me Bill. Just call me Bill." And he was very adamant about that. So he was out there collecting specimens, talking about the Arctic, meeting with conservation people from the federal government, and when they finished, Douglas went back and wrote a whole chapter in one of his books, saying how special the Arctic was and that it needed friends. And he was also lobbying behind the scenes to save the Arctic, whereas the Muries spread out all across Alaska. And they were very much by personality people who wanted to bring people together. They wanted to bring the hunters, the natives, the oil and gas exploration people, they wanted to bring them together and find some middle ground. And ultimately, Eisenhower signed documents that would protect at least in part the Arctic area. And there was a feeling that it was always at risk, so that was early '60s.

Fast forward to the late '70s, early '80s, and Alaska's still on the chopping block for a lot of development. And I was fortunate there to kind of have a front row seat because I was a special assistant to Cecil Andrus, Secretary of Interior. And Andrus wanted to get passed the Alaska National Lands Conservation Act, which

would bring together huge swaths of Alaska, some he put into wilderness, some preserved for the natives, some actually available for exploration and timber cutting, but to really do it in a comprehensive way. And that was during the time Jimmy Carter was running to preserve his presidency against Reagan. And Andrus felt that Carter would be unsuccessful and that he needed to keep ... Andrus needed his staff and also the Congress to keep moving.

And in what was kind of remarkable is after Reagan won and Carter lost, Andrus brought all these disparate groups together, and they hammered out the details of this Alaska lands legislation. And so much of what you see in Alaska today in terms of preservation, development, and what areas are open for exploration or exploitation can be traced to Cecil Andrus. And he really felt that the environmentalists couldn't hold out for every tree, and that the timber people couldn't hold out for every tree on the other side. And so he remarkably brought this together. He'd been governor of Idaho [and had?] a real folksy manner, and he was somebody that could kind of mediate these controversies. So Douglas, of course, had been there in the '50s trying to do this same thing. And over the years, he continued his interest in Alaska. He died right around the time in the same year that the bill was passed. And although he was not directly involved in it, Mardy Murie was. And out of that, she's been called the grandmother of conservation.

**David F. Levi:** So that was a kind of a long-range plan, I suppose you would say, that Douglas had, that came to fruition under Andrus and while you were working for him, so maybe that was part of the motivation for this book.

**Margaret McKeown:** It was kind of coincidental in a way. In some ways, I say I started this project on a lark, but then it ended up to be quite an interesting story. And I of course only played a tiny part in it. I did not know Justice Douglas. He left the court in 1975, the year I graduated from law school, and then died five years later.

**David F. Levi:** So you're an expert on judicial ethics. And in your book, you don't shy away from some of the questions that this life that Justice Douglas led raise because he was a Supreme Court justice, and he was also an environmental advocate, and in that sense, a political actor. You reflect at different places in the book on the ethical difficulties that present to a judge or a justice who wishes to be active in the political sphere. And moreshave changed over time. Perhaps at an earlier time in the 20th century, justices were more active outside of the court. And we know that many of them had big political careers. William Howard Taft came to the court having been president. Charles Evans Hughes left the court to run for president. And some of them did other things like the Warren Commission, or Justice Jackson at Nuremberg. Many of the justices were informal presidential advisors, like Brandeis. Douglas

was personal friends with FDR, played poker with him. He knew Bobby Kennedy well and Lyndon Johnson.

And you describe how he did harbor the ambition maybe that he inherited from his mother of being FDR's, or Truman's, or Adlai Stevenson's running mate as vice president. Maybe he thought that he would be president one day. So what do you think about this, justices who harbor political ambition and who actually are political actors? Is that viable at least in the current era?

**Margaret McKeown:** I don't think it's viable in the current era because of prohibitions, at least on federal judges engaging in political activity. But as you've pointed out, all the different ways that a variety of justices were intersecting with the political sphere, and another one of those would've been Justice Frankfurter, for example. He was lobbying for the Zionist cause and dealing with FDR on a very personal basis. So one thing about Douglas is I think he's a restless person. So even on the first decade of being on the court, he's still harboring some political ambitions. And he thought he might be named vice president for FDR. Of course, we know that didn't happen, that it was Truman. And then Truman, after Roosevelt died, becomes president. And who does he ask to be vice president other than Justice William O. Douglas?

And Douglas declines, but he doesn't just decline, he basically tells people, "Who wants to be number two to a number two?" So at this point, I think he's realizing

that maybe politics won't be the arena where he's placed. But even up to Lyndon Johnson, he was still harboring some thought that he wouldn't mind being vice president for Lyndon Johnson. Of course, none of that ever came to pass, but he really had these feelings for more than a decade on the court. My feeling is the horse accident and then the spark of the C&O canal put a lot of that to rest for him. And that's when he realized maybe his most inner self was telling him to do what he really loved best, and that was to get out in the wilderness, rather than to be directly involved in politics.

But of course, when you think of politics and you think of the separation of powers, Douglas certainly blurred his role as a justice in terms of jawboning the President for something he wanted, the environment, or members of Congress. He grew up in Washington. Senators Magnuson and Jackson were very powerful. They were called the "Twin Towers of Power." And so he used his access to them and to others in Oregon to really bring about, I think, what was his most remarkable really contribution, and that is his contribution to saving pieces of America, for preserving landscape. And I'm not sure if he saw it as a grand vision, but if you put all the places together where he had an impact, it's a pretty remarkable pastiche and an amazing landscape. But it was also done through political connections and a sense of politics with a small "p" as well. And that is he always thought that even though senators live in Washington, not far from the

Supreme Court, and that the agencies are there, he always knew that all politics was local.

So he tried to use grassroots organizing to bring about whatever project that he was promoting at the time. So even if he wasn't playing politics, with the big "p", such as trying to be vice president, his view of the world was certainly shaded by years in politics with a small "p".

**David F. Levi:** You say throughout the book that he had a one man lobby shop in his chambers in the Supreme Court, which is pretty unusual. At the same time, somewhat inconsistently, he thought of himself as just a citizen. Of course, he wasn't just a citizen, so I think maybe that was a little bit of pretend on his part. But feeling that he was just a citizen, he did not like some of the ethical rules, like disclosure rules that might impinge on his activities as a citizen. And at one point while he was a justice, he was drawing a salary from a foundation, and this became known at some point, and that and other issues led to an effort to impeach him. And that resistance, I don't know if that was typical of judges at the time. I suspect not. I think he was somewhat unique in that respect. But you do a nice job in the book, I think, of showing how complex the justice was, and that he was operating in a gray area that did lead to criticism.

**Margaret McKeown:** Certainly, the impeachment is about as direct criticism as you can get, led by then-Representative Ford. And that was for his work for a foundation that did rule of law and democracy in Latin



America. But it got tied up with the funder of the foundation and whether he had various connections and other things that were scurrilous. Fortas, as you may recall, also became entangled in a foundation-related ethical thing. So the impeachment ultimately didn't go anywhere, but I remember one thing is when the attorney general was informing him about the impeachment process, and I think some people thought, "Well, maybe he'll resign," and Douglas says, "Well, saddle your horses, Mr. AG." And that was his view about the impeachment, ultimately.

There were a lot of justices doing a lot of things. As you say, some of them that we now look back on with admiration, such as Nuremberg, but clearly, raised a huge separation of powers issue. And while Douglas was a justice, one of the proposals was that people who are on the court should have their writing pre-approved. Well, you can imagine he was a big supporter of the First Amendment, along with Justice Black. That sent him over the edge. And he said that he thought that was a violation of the First Amendment. And then they said, "Well, at least you should report the money you get from writing."

And to that he retorted, "Well, what about these justices who own stock? Shouldn't they have to report their stock ownership?" So in that way, he was somewhat prescient because I know stock ownership is something that all federal judges report now, and even one share of stock can cause you to recuse from a case. So he was

ahead of his time in some respects. And ultimately, when they did put in certain disclosure rules, he complied with them, although kind of with a little asterisk: I don't like it; I'm doing this under protest.

But his view, that's where I get the title of the book, *Citizen Justice*. There was a case in which the court decided that federal judges should pay income tax, and he didn't disagree with that. But he basically said, "I voted myself first class citizenship," that a justice should be able to do anything a citizen can do, as long as it doesn't conflict with being a justice. And therein lies the rub, and depending on your perspective as to whether something conflicts with being a justice. He had a wide-ranging view of that, I would say. And he thought of himself as a citizen justice when he was out there on the trail protesting, protesting dams being built because of injury to the fish, or protesting Kennecott Copper, digging, excavating on a mine, which was on top of a mountain. He was out there kind of front and center in a lot of protests, but he felt like that doesn't really interfere with what I'm doing on the court.

**David F. Levi:** So interesting. Something else that's interesting, and you talked about this a little bit a few moments ago, is as a justice and as a Westerner and as a sort of wilderness person, his judicial philosophy included the idea that the government should get off the backs of the people, which was I think what Reagan said. And yet, they were not in the same place on the political spectrum. What I found striking because you

highlight it, is that in that era, to be liberal, progressive on environmental issues, at least for Douglas, was to oppose deference to the administrative agencies, whereas I think now that would be flipped. Is that a fair description of his judicial philosophy at that time?

**Margaret McKeown:** Yes. I think one of the things that he contributed to was the effort to have administrative agencies be more transparent. And of course, he'd been the head of an administrative agency, so he knew what some of the pitfalls were. But you're right, he also proposed that the agency should have less deference, that courts and others were giving too much deference to the agencies. And so in some ways, he was a libertarian in many respects, and he wasn't easy to necessarily peg into one thing or another. But I do think on this administrative state issue, of course, this was long before we had the Freedom of Information Act and before we actually have such a window into agencies; he's suggesting they should be more transparent.

And one of the reasons I think he felt this way is that he'd been in an agency, and he saw what went on behind the scenes, and when you're making the sausage, as they say about Congress. So he has his own kind of iconic classic streak about where he stands in the political spectrum, but it's also hard to peg because so much of that has changed over the years in terms of labels that get put on these principles.

**David F. Levi:** Yes, and the circumstances have changed. So his experience with the Army Corps of

Engineers, or some of the other administrative agencies was that they were promoting, permitting, what he viewed as intrusions on the environment, depredations on the environment, whereas now maybe that's changed.

**Margaret McKeown:** He thought many of the agencies that should've been protecting the environment were actually doing the opposite. So he had a list of enemies, and Army Corps of Engineers was right at the top.

**David F. Levi:** Right up there! So maybe he's most famous for his dissent in *Sierra Club vs. Morton*. I don't know. Maybe there are other opinions that are of equal renown. But this is the opinion in which the justice advocated for standing by natural features. And there was a law review article written right at the same time on whether trees have standing. And there was some relationship I think between the opinion in that article. Can you tell us about the case and his dissent?

**Margaret McKeown:** Well, the *Sierra Club vs. Morton* case is certainly well-known to law students and lawyers as a case that lays out the principles of standing. It involved a beautiful valley in the Sierra Nevada, Mineral King, and Disney wanted to put in a ski resort. And of course to get there, one of the things they would have to do is build a highway. So again, his nemesis was highways getting built? , and they were going to of course build all these buildings. So the Sierra Club was quite opposed to this and sued to stop it. And they took a somewhat novel approach because at that point,

standing could include aesthetic values, so that had been established by Douglas in earlier opinions. But in general, one would think of standing as having actually a real person who'd been injured. And the Sierra Club kind of rolled the dice and thought they'd advance this idea that who's actually being injured here are the valleys, the mountains, the streams, which made for some very lyrical writing, but it didn't really sit well in the Supreme Court with the majority.

The majority said, "Well, that might be, but you need a person who's hiking, or has been affected." So they reversed the district court decision. In fact, they affirmed the Ninth Circuit in that particular case. And Douglas, during the time that this case was pending, he'd been kind of bootlegged a copy of this law review article that you're talking about, and that law professor, [Christopher] Stone, who unfortunately recently passed away, had this idea also of rights of nature. It was not new to Douglas, of course, *A Sand County Almanac* and some of these other writings, Douglas was well familiar with. But he wrote a very lyrical and beautiful dissent in which he basically laid out that these natural features have their own being, so to speak, and that they should be able to sue. Why not? A corporation can sue, a ship can sue. So why not other inanimate objects, but particularly nature? And that you need to save it. And again, he put forth that if you don't save these sacred places, they'll be lost.

So it was really a call to nature, a call to the rights of nature. Justice Blackmun also wrote a dissent, but a beautiful one. He never gets credit for that, actually. And in this particular case, after Douglas wrote this dissent, which he wrote in about two hours after the argument, he told the law clerk basically to fill in the footnotes kind of backwards. In other words, he wrote what he wanted, and then he says, "Find some footnotes to support this." But it's certainly one of his most famous dissents. And although it hasn't kind of taken root, I would say directly in American jurisprudence, you do see rights of nature reflected now in some municipal codes, and certainly in some Constitutions outside the United States.

**David F. Levi:** I can tell from just the wonderful conversation that we're having that you really enjoyed working on this book. And I'm wondering: What parts of it did you most enjoy? Were there any surprises? What do you take away as sort of some of the signal experiences that you've had in writing this book?

**Margaret McKeown:** First of all, I didn't intend to write a book, so that actually was a fun experience of deciding to move from curiosity and a lark to actually writing a book. I also learned that writing for a popular audience bears some relationship to writing opinions in terms of making them accessible to the public. But it's a very different endeavor. I loved my interviews with former law clerks, with law professors, with judges, justices. My days at the Library of Congress, plowing

through documents, and Douglas was a pack rat, he saved everything. He wrote to everyone, so there is a lot of material just at the Library of Congress. And I felt like I was an archeologist in a way, kind of plowing through these things. So the process of writing, to me, was very invigorating and very fun. And when COVID came, I had basically done the research, so then I could sit down at night since we weren't traveling or going anywhere. I'd also say that it really reinforced my love of history and the importance of thinking about: What can we learn from history?

**David F. Levi:** So I think maybe you just answered my next question, which was to say I don't think you would describe your job as a four-a-day week. And I know how busy you are, but it sounds like maybe this was your, at least the writing part of this, was sort of your COVID project. I do think most of us marvel at your ability to write a book like this when you're holding such a demanding position.

**Margaret McKeown:** I wouldn't agree with Douglas that it's just a three- to four-a-day week job. It's more than a full-time job. But when you have a passion for anything, you make time for it. And I think it's sometimes good to be able to counterbalance doing something as intense as deciding cases and writing opinions with something else. And of course, it was related to the law, so I was very comfortable in the topic. But it also spoke to my long-standing interest in nature, mountain climbing, hiking, being out in the wilderness, so I could live a little

bit vicariously either through some of the people I interviewed, or through some of his writings, his many writings, or some of his decisions. So in that regard, it was a certain joy. It was a project of joy. I never felt any kind of writer's block, or felt like I should abandon the project because once I was on it, I then of course wanted to finish it.

And the main reason I wrote it is I thought it's a very interesting story. I had no idea when I got started, but he had such an extensive environmental career or legacy, so that was a big surprise. And that was part of the story. I thought, "Well, this is worth telling. It's worth learning." It's a historical point in time where we go back and see what a justice was doing. So I felt like I was fairly lucky to look through his keyhole and try to understand where he fit both in American jurisprudence, but also in the history of environment and conservation. We didn't even use the word "environment" in the Supreme Court until the early '70s. And you could imagine who first used that word in that context. That was Justice Douglas.

**David F. Levi:** So when I do these podcasts with judges, I usually ask if they have a judicial hero, or mentor, or someone on whom they have modeled their own career and approach. And maybe it's foolish to ask you that question since you've just written this book. But would you include Douglas in that group for you? Or are there others maybe who you actually knew and interacted with?



**Margaret McKeown:** One thing I came to believe when I finished the book was that we always think of heroes as perfect, and Douglas was both fascinating and flawed. I realized that heroes don't have to be perfect. So I look at him as somewhat of a spiritual model connected to nature. He often said because he wrote so many dissents, that he was writing for the future. But when I think of that, I think of Justice Ginsburg because I did know her for also many years, since I was in law school. And she was always writing for the future, she would say. And I also really appreciated that her writing style was very succinct, but she also never had a mean pen. So if she was going to dissent, it was forceful, but it was respectful.

**David F. Levi:** That really captures it. Thank you so much, Judge McKeown, for being with me and with us today. It's a treat to discuss this book and to think about that era, the history of this country, and the history of the Court. I recommend it to anyone who's interested in the Supreme Court or the history of the environmental movement, or is just curious about the work and life of a judge. Well, this has been a special episode of *Reasonably Speaking* and *Judgment Calls*. I'm David Levi. Thank you for joining us.

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