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The Frontier Justice

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William O. Douglas was a strong advocate of conservation and environmentalism, but as a Supreme Court justice his involvement in such issues was often ethically questionable.

Reviewed:

Citizen Justice: The Environmental Legacy of William O. Douglas—Public Advocate and Conservation Champion
by M. Margaret McKeown
Potomac/University of Nebraska Press, 249 pp., $29.95

National Park Service

Supreme Court Justice William O. Douglas leading *Washington Post* editors on a hike along the Chesapeake and Ohio Canal, as part of his campaign to prevent the construction of a highway along its route, Maryland, 1954

Supreme Court Justice William O. Douglas had all the makings of a successful politician. His rugged good looks accompanied an energetic personality that fit well with his "cowboy" image. His widely accepted exaggerations about his military service and childhood poverty diverted attention from his numerous extramarital affairs and neglect of his children, not to mention his intemperate treatment of his staff. His spiritual writings about his worldwide travels avoided mention of the questionable financial dealings that provided some of the means for those trips and that almost resulted in his impeachment.

Yet even though he was attracted by the occasional "Draft Douglas" movements that sought to make him the Democratic candidate for the vice-presidency in 1944 and the presidency in 1948, Douglas never ran for elective office. Instead, he chose to remain on the Supreme Court, to which Franklin Roosevelt appointed him in 1939, until his retirement in 1975. The longest-serving justice in the Court's history, he was acknowledged as a champion of progressive interpretations of the Constitution, and among liberals he was widely regarded as a hero. But he never hesitated to leverage his judicial renown to lobby sympathetic members of the legislative and executive branches, as well as the general public, in support of his favorite causes.

While previous biographers of Douglas have tended to focus on the apparent inconsistency between his public and private behavior,* a subject of perhaps greater institutional importance is the question of when, if ever, the extrajudicial activities of a judge go too far. In *Citizen Justice: The Environmental Legacy of William O. Douglas*, M. Margaret McKeown, a highly respected federal appellate judge, contributes to this debate by exploring Douglas's important but controversial contributions to the growth of the conservationist and environmentalist movements.

The environmental destruction that accompanied US industrialization in the late nineteenth century gave rise to a conservation movement that found its first governmental champion in Theodore Roosevelt, and its goals became an important part of the progressive Democratic platforms of both Woodrow Wilson and Franklin Roosevelt. But after FDR's death, there was for a time no major public figure who wholeheartedly embraced the movement. Douglas stepped into this vacuum. While lacking a president's ability to order important conservation measures, he was prominent enough to promote them in a manner that caught the public's attention.

Although Douglas's championing of conservationist policies did not become widely known until after he became a justice, it seems fair to assume that his strong attachment to them came naturally, as he had spent much of his boyhood hiking the trails and mountains of rural Washington State. Somewhat more doubtful was his assumption of the mantle of, in McKeown's words, "the frontier justice." Prior to joining the Court, he had spent seventeen uninterrupted years in the East, first as a law student and lecturer at Columbia, then as a professor at Yale, and finally as chair of the Securities and Exchange Commission. But when Douglas learned, while being considered for nomination to the Court, that several western senators wanted to redress what they believed was its geographic imbalance, he suddenly rediscovered his "westernness" and cultivated that image for the rest of his life—while living primarily in Washington, D.C.

Indeed, his first major foray into environmental advocacy involved not the West but the Chesapeake and Ohio (C&O) Canal, which ran for 185 miles from Washington to Cumberland, Maryland, accompanied by a towpath for the men and animals that towed the barges. By the 1920s the canal was no longer used for transportation, but the towpath had become a favorite for local hikers. In 1954, however, *The Washington Post* editorialized in favor of replacing either the towpath or the canal bed with a highway that would allow many more people to enjoy what it envisioned as a "great Potomac playground." Douglas was infuriated by the editorial, which in his view ignored the fact that a hike along the towpath offered solitude and introspection that a highway would entirely destroy. In what was in effect his first environmental protest march, Douglas challenged the editorial writer to join him on a hike along the full length of the towpath, and multiple editors accepted. While the *Post*'s chairbound journalists proved unable to complete the full hike—which Douglas did with ease—the quiet beauty of what they saw changed their minds. The *Post* modified its position and largely adopted his view, and the public followed.

For Douglas, however, this was just a first step. He immediately helped form, and eventually helped incorporate, the C&O Canal Association, whose purpose was to lobby the Department of the Interior to preserve the canal and the towpath. Its members were prominent conservationists, but its chairman was Douglas. McKeown notes, "He apparently gave no consideration whether he could take on this role as a Supreme Court justice." Eventually, the association's promotional and lobbying campaign, led by Douglas, was so successful that in 1971 Congress enacted, and President Nixon signed, a bill that created the C&O Canal National Historical Park, designed not just to protect the towpath and canal but to preserve and beautify the surroundings. It was a huge victory, and, as everyone recognized, it was almost entirely due to Douglas's efforts. Indeed, the C&O Canal National Historical Park remains to this day the only national park dedicated to a single individual—Douglas.

When, after this success, Douglas finally resigned as a director of the C&O Canal Association, he recommended that it should disqualify from its board anyone from the executive branch. McKeown comments, "There is some irony in this recommendation and sensitivity to conflicts of interest, given Douglas's sustained lobbying of the legislative and executive branches from his own perch on the Supreme Court."

Over the next several decades, Douglas's public activities included several successful protest hikes to prevent a highway from being constructed on a long stretch of the Washington State coastline, a much-publicized camping trip to save the Arctic regions of Alaska from mining, and a nearly endless series of books, speeches, and letters to the editor that argued for conservationist goals. McKeown

cites with approval the view of one historian that "in the three decades following FDR's death, Douglas became the 'most prominent conservationist in public life.'"

Douglas shrewdly combined these public efforts with intensive private lobbying of legislators, regulators, and even presidents in support of conservationist causes. In fairness, such activity was not unique to Douglas among Supreme Court justices of the time. Long after joining the Court, Felix Frankfurter continued to lobby a very receptive FDR on a host of issues, including some likely to eventually come before the Court; and Truman, Eisenhower, Kennedy, and Johnson solicited advice from their favorite justices. But in 1969, this began to change when it was revealed that Justice Abe Fortas, with whom President Johnson regularly conferred, had received large payments from a foundation funded by the convicted felon Louis Wolfson, allegedly in return for Fortas's asking Johnson to pardon Wolfson. While admitting receipt of the payments, Fortas denied that he had asked Johnson to pardon him, but he nonetheless resigned from the Court.

Fortas later said that he "resigned to save Douglas," who was at the time under fire for serving as president of the Parvin Foundation, funded by the controversial casino financier Albert Parvin, who was alleged (perhaps unfairly) to have ties to organized crime. This relationship led to an attempt by Gerald Ford, then the House minority leader, to impeach Douglas, which was unsuccessful. While these events made other Supreme Court justices more chary of consulting with presidents and more concerned with avoiding the appearance of conflicts of interest, and while it also eventually led Congress to impose strict limits on federal judges' outside income (other than from teaching and writing), none of this deterred Douglas from continuing to regularly lobby members of the executive branch on environmental issues. But it is important to note that at the time there was no law that expressly prevented him from doing so. And to this day, Supreme Court justices are not bound by any formal code of ethics.

The focus of much of Douglas's public advocacy and behind-the-scenes lobbying was to prevent the Army Corps of Engineers from constructing dams that would detract from the beauty of the rivers on which they were built. While nominally promoted as means of avoiding flooding and providing cheap electricity, many of these dams were classic "pork barrel" projects supported by one administration or another as part of securing the votes of local senators and representatives for other legislation. Douglas's animosity toward the corps's dam works was no secret. In 1969, he wrote an article for *Playboy* denouncing the corps under the title "The Public Be Dammed." Mincing no words, he declared, "The Corps has no conservation, no ecological standards.... And when it finishes, America the beautiful is doomed."

Much of Douglas's success in preventing the building of some (though not all) dams arose, however, from his close association with President Kennedy's secretary of the interior, Stewart Udall. Douglas and Udall became close friends, taking numerous hikes together as well as exchanging a voluminous correspondence. Leaving nothing to chance, Douglas also went hiking and fishing with Bobby Kennedy. The result was the passage, with President Kennedy's strong support, of the Wilderness Act of 1964, which designated 9.1 million acres as protected wilderness and created the process for future designations.

Given all this proconservation activity, Douglas might have recused himself from cases before the Supreme Court that raised challenges to conservation measures. Since 1948 (nine years after Douglas went on the bench but twenty-seven years before he retired), Supreme Court justices have been required by statute to recuse themselves when their "impartiality might reasonably be questioned." But it was, and still is, left to the individual justice to make this determination, without scrutiny from any of the other justices or other authority. Douglas believed that his advocacy of conservationist policies in no way disqualified him from deciding issues of law. Theoretically, this might have been true, but in reality the two cannot so easily be separated, especially when emotionally charged issues are involved. And in environmental cases, Douglas's very strongly held views frequently led him to conclusions inconsistent with what the law seemingly required.

For example, in 1963 and 1971, the Supreme Court considered challenges to dams being built by the Army Corps of Engineers. Certainly by the time of the 1971 case, Douglas was clearly on record as very strongly disapproving of the corps's approach to planning dams. But rather than recusing himself, he dissented in both cases from the Court's rejection of the challenges to the dams, claiming that the corps should take greater account of conservation standards in approving such projects. A laudable idea, undoubtedly, but not one that could be grounded in the law as it then existed.

Still, Douglas's dissents in environmental cases had an effect, not so much directly on his fellow justices but as one more effort to shift public opinion to a more proconservation and proenvironment view. For example, his dissent in *Murphy* v. *Butler* (1960), in which the Court declined to review the widespread dangers of spraying with DDT, was singled out for praise by Rachel Carson in her immensely influential book *Silent Spring* (1962). Ten years later the use of DDT in the US was banned.

But the conflict between the intensity of Douglas's conservationist beliefs and the public's growing recognition that judges should endeavor to avoid even the appearance of partiality came to a head in *Sierra Club* v. *Morton* (1972). In that case, the Sierra Club sought to challenge a plan by Walt Disney Productions, which had been

approved by the US Forest Service, to turn a pristine wilderness area of the Sierra Nevada into a ski resort. Technically, the case involved the often-thorny issue of "standing," a judicially created doctrine that interprets Article III of the Constitution to preclude federal lawsuits by persons who have not suffered or are not about to suffer concrete personal injury from the defendant's conduct. In its original complaint, the Sierra Club did not allege that the organization itself, or even any of its members, were likely to suffer concrete or personal injury from the Disney proposal, and a federal appellate court therefore dismissed the complaint for want of standing. The Supreme Court then took the case for review.

Douglas had previously been a director of the Sierra Club for many years, and he maintained a lifetime membership in it, as well as very close relationships with many of its officers. Moreover, he had only recently survived the congressional impeachment attempt during which his ethics had been called into question. So it might have been prudent for him to recuse himself from the case, and McKeown cites convincing evidence that he seriously considered doing so. But the temptation to fulfill his self-appointed role of Nature's advocate proved too strong. Just one month after the Sierra Club petitioned the Supreme Court for review of the case, Douglas, rather than recusing himself, simply resigned his membership in the club. Then, after the Court granted review and eventually voted by a bare majority to affirm the lower court's dismissal of the case for lack of standing, Douglas wrote a searing dissent that called into question the entire doctrine of standing.

Specifically, he argued that organizations have standing to sue on behalf of inanimate objects when their very existence is threatened. As McKeown's careful research reveals, this extraordinary proposition largely derived from a recent *Southern California Law Review* article by Christopher Stone, "Should Trees Have Standing?—Toward Legal Rights for Natural Objects." But it was otherwise pretty much unprecedented. McKeown is nonetheless quietly favorable to Douglas's argument, noting that, with the shifting notions of standing over time, nations as different as Uganda, Colombia, and New Zealand have now recognized the legal rights of rivers, forests, and the like. She concedes, however, that American courts have yet to accept what is at best a legal fiction. Nevertheless, Douglas's dissent, like so many of his dissents, lost the battle but won the war. Disney abandoned its proposal, and the land in question is now part of Sequoia National Park.

Despite her words of caution, McKeown clearly admires Douglas, and her restraint in this carefully written and researched book only makes her praise more striking. Yet she is too balanced and judicious to ignore the dangers inherent in the ethically unrestrained path that Douglas so often took, a path that, as she says, "stretched—some might say eviscerated—notions of judicial propriety." And she worries

that such a freewheeling approach, if taken by other judges, could undermine "judicial independence, the separation of powers, and confidence in the judiciary." Still, she cannot help but admit that because of Douglas's extraordinary efforts, "many rivers are running free, choice pieces of wilderness are preserved, and the trees are still standing."

This does not answer the question of when and where to draw the line between a judge's exercising his rights as a citizen and his adhering to the restraints of his office, and McKeown does not undertake to draw that line. Given such recent controversies as the question of whether Justice Clarence Thomas should recuse himself from cases dealing with issues on which his wife has effectively taken a strong stand, the Supreme Court is now itself under considerable pressure from Congress to do so, or to have Congress draw the line for it. But wherever that line may be drawn, it is hard not to conclude that Douglas crossed it.

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* See, for example, Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas* (Random House, 2003). ↩