

An Interview with Judge M. Margaret McKeown on Her Book *Citizen Justice*

By Marla N. Greenstein

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MG: What prompted you to start doing this book project?

MMM: I'm originally from Wyoming, and I was snowshoeing in Grand Teton Park in the winter, and I stumbled on this big ranch. I didn't know that ranch. And so I was contemplating, could I sit on the porch and have my lunch? And the snow was about 6 feet high. This man came out and I said, "Where am I?" And he said, "You're at the Murie Ranch." And I said, "Oh, yeah, I know John Muir," and he said, "No, no, Murie, it's not Muir." And I've learned that the Muries who had owned this ranch had been pioneers in conservation—both the husband Olaus, who was an expert in caribou, and his wife Mardy, who they call the grandmother of conservation. They had been in Alaska for many years and then moved down to Wyoming. In fact, in Alaska, [there's a Mardy Murie building at the University of Alaska Fairbanks](#). She was the first female graduate of that university.

MG: What time was this? How long ago?

MMM: I started research about seven years ago, at least. By happenstance, I learned that a former hiking partner from D.C. was chair of the board of the Murie Ranch, which is dedicated to preserving the Murie legacy and promoting conservation dialogues. And someone showed me a letter from Supreme Court Justice [William O.] Douglas to the Muries in which he said, "I think you should donate your ranch to the park service so that it would be a legacy for conservation." And I thought, well, that's pretty presumptuous. And

who is this guy? How does he know these people in Wyoming? Of course, I knew Douglas because, during my time in law school, he was very well-known as a civil libertarian on the court.

So, I looked at the archives at the Murie Ranch, and I found various correspondence documenting that they had become friends over time and that Douglas had accompanied the Muries on a scientific expedition to Alaska to the Sheenjek River region. That piqued my curiosity, and really, on a lark when I was in D.C., I went to the Library of Congress and started looking at Douglas's papers about the Muries. And the more I dug, the more I found. So, then I went to the Wilderness Society archives in Denver because Olaus had been president of the Wilderness Society. And then I just was digging around more, and people said you should write a book. It might be interesting. I said I write opinions, not books. And I realized the story was bigger than the Muries and Douglas and that the larger story was really about Douglas's conservation advocacy.

So, then I did some more research, and I still wasn't ready to write a book. Ultimately, I wrote a little article for the *Seattle Times* and then a more academic piece for the *Journal of Supreme Court History*, and I was hooked and couldn't stop myself from doing more research. Eventually, I ended up writing the book, backed by research at different libraries—Berkeley, for the Sierra Club; the University of Washington for a variety of conservation research; Yale, Princeton, LBJ, and JFK libraries. And then when COVID came, locked in my house, I had almost finished most of the research. So, I sat down and wrote the book.

MG: As we talk more, I am struck by the connections between Alaska and Douglas's efforts.

MMM: Douglas saw that he and the Muries had very different styles, you know. He was more confrontational, and they were more collegial and collaborative. The Muries, along with several other Alaska pioneers, fanned out across Alaska to talk with the Natives, with people who were fishing, and people who were

logging, and they tried to reach a collaborative solution. Meanwhile, Douglas was back in D.C. pulling levers of power back there.

As one writer said, negotiating with Douglas was like shaving with a blowtorch. So, Douglas was an aggressive advocate. Ultimately, President Eisenhower put a large portion of the Alaska wilderness in protected status. In the end, in 1980, the Alaska National Lands Conservation Act was passed. Olaus Murie had already died just before the passage of the Wilderness Act in 1964. But Mardy Murie was still very active in the Alaska campaign, and she was later awarded the Presidential Medal of Freedom for her work. It's a fascinating history, especially because, as you know, there's remaining tension between federal, environmental, and local interests.

MG: I found that part incredibly fascinating.

MMM: Right—because being in Alaska, you know these issues. I was at the Interior Department with Cecil Andrus at the time, and when we would visit Alaska, we would see these bumper stickers: “Lock up Secretary Andrus, not Alaska.” And that was the tenor of the time, and probably you could replicate that now.

MG: Definitely. And those things ebb and flow with the economy. So, the reason we deferred doing this book review until now is we had planned this issue on environmental justice for *The Judges' Journal*. I thought this was such a great fit. And one of the reasons I volunteered to be a co-editor of the environmental justice issue is that it's a new concept for me. I wasn't quite sure what environmental justice meant. It seems that all the contemporary ideas in environmental justice are the connection to the environment and quality of life and that not everyone has equal access to that. And certainly, some decisions by the government or industry have marginalized groups of people, and they tend to be the less empowered people. So, it occurred to me that Douglas had some innate sense of that. And I don't know if you've thought about that.

MMM: I think you capture to a degree what Douglas would be saying. Because, first of all, the word “environmental” was not used in the Supreme Court until

1970. And Douglas was the first justice to use the word in the way that we think of it today. That is, environmental law, the environment. And even before that, he had written some opinions that highlighted this tension and the concern about quality of life. For example, he highlighted the issue of DDT and pollutants, quoting scientific papers and Rachel Carson, among others. Rachel Carson then later talked about Justice Douglas and the DDT opinion in her book *Silent Spring*. So that was very early in what one might call the environmental movement.

But even earlier than that were groups of individuals who were focused on the wilderness. And I would say in large part, Douglas did focus on wilderness. Sometimes he's been called Wilderness Bill. The Wilderness Society, with which he had close relations, was focused on preserving wilderness. And there was a tension between preserving wilderness and opening up areas, for example, through national parks. Particularly during the Franklin D. Roosevelt administration, that tension was highlighted because Roosevelt and others before him had really pushed to open national parks and, with the advent of the expansion of roads and cars, to make nature accessible to large swaths of the public. Although he was a supporter of wilderness, Roosevelt was concerned that by locking up wilderness, you would be excluding people from going there. And he even mentioned people like himself, being in a wheelchair, for example. So, the effort to focus on wilderness was sometimes viewed as elitist. On the other hand, Douglas, who fought many of what he would see as environmental tragedies, was focused on wilderness in part because, he said, "Once you lose it, you can never get it back." There is a tension between preservationists who fought for more pristine wilderness and conservationists, some of whom advocated for multiple uses of our outdoor natural resources. That was a tension that began to develop as the environmental movement went through different stages. And interestingly, Douglas became less of a conservationist and more of a preservationist as time went on. But he definitely was an advocate. And part of that I believe stemmed from his background.

He grew up in Yakima in eastern Washington, a small town that jokingly has a sign outside town that says, "Yakima, the Palm Springs of Washington." His

father died when he was young, and his mother had three children. So, they grew up in a rather poor but loving environment, and he could see both Mt. Adams and Mt. Rainier from his home. He went into the woods quite a bit; part of that stemmed from the fact that he had polio as a child, and he was skinny and scrawny and was the brunt of bullying and torments. So, part of his way to overcome that was to hike and to be out in nature. That incredible connection with nature is really what drove him in life in so many respects. I think he always felt he was overcoming something: being poor, having had polio, being from a small town. By the time he went off to college, which was at Whitman College in Walla Walla, not that far from home, he really had a connection with the environment. And even in his younger days, he was out in the woods observing different kinds of flowers and trees. He said he also learned quite a bit from the Natives who lived in the area, members of the Yakama tribe.

Then he went to Columbia Law School, where he felt quite disconnected from nature. There he was in this urban environment, hardly seeing any trees. He did help with a youth group in trying to get them to understand nature. But he felt pretty disconnected in New York because the social environment and the physical environment were so foreign to him. He did very well in law school and thought he should have been the one to receive that brass ring of a clerkship on the U.S. Supreme Court, but he did not get it. He was very disappointed. But the interesting thing is that 14 years after graduating from law school, he was on the U.S. Supreme Court, which is quite remarkable.

He was only 40 years old when appointed. Douglas was the second youngest person ever and, even to date, the longest-serving justice at 36 years. He made his mark early and was definitely a driven individual after law school. He practiced law briefly. He actually taught school briefly after college, and there in Yakima met the woman who would become the mother of his children and his first of four wives. Because he did not find the practice of law interesting, he thought he should go back to Washington State, which he did briefly. As a kid, he had often gone down to the courthouse in Yakima and listened to proceedings. He also interviewed in Seattle at my former firm, Perkins Coie, which offered him a job, but Cravath offered him multiple times more money. So, he went back to New York, and he said he still found practice boring even

though he was being paid quite a bit. He then transitioned to being a law professor at Columbia and then at Yale. But D.C. beckoned, so he went down to Washington to work on a study of business reorganization for the SEC. There he met Joe Kennedy, who became really his guardian and patron.

At a young age, he became an SEC commissioner, followed by his appointment as chair of the SEC, all of this before age 40, when he was appointed to the Court. He was really a man on a mission with a very fast trajectory. But he was restless and, even with the Court appointment, he wasn't quite satisfied. He was always moving; he was always pushing; he was always seeking. As a result, once he settled in Washington, he got caught up in the political environment, which intrigued him. At that time, he had met the president, he played poker with the president, and he went to embassy parties and hobnobbed with the political crowd.

MG: Was it Roosevelt at the time?

MMM: Yes, that would have been Roosevelt. He and Roosevelt had a very special relationship, I think in part because Douglas had lost his father at a young age. Roosevelt was a father figure to him, a friend, and then also this bigger-than-life political figure. At one point, even after he went on the Court in 1940, Douglas was in play to be a vice-presidential candidate for Roosevelt. He would have loved to have been president, of course, but he was in play to be a vice-presidential candidate. In the end, there was a piece of paper that said "Truman-Douglas or Douglas-Truman?" No one can say for sure as to Roosevelt's preferences. Douglas left town and went out to a cabin he had in Oregon, basically saying, "I'm not really interested." But the truth was that he was very interested, and he did not get the appointment. We know, of course, that Truman became the vice president, but even that didn't end Douglas's political ambitions.

At times, there were campaign buttons that said, "Douglas for President," and there were rallies when Roosevelt died. That death was really devastating to Douglas. Truman became president, and then Truman asked Douglas to be his vice president. You would think at this point—because he was so enamored

with the political world—that he might have taken it. But he supposedly quipped, “Why be number two to a number two?” And he also said, “My place is on the Court because the Court is more enduring than politics.” But he wasn’t done. Even into the 1950s, Douglas was dabbling in politics, and there were renewed efforts for “Douglas for President.” Douglas kept saying, “Oh, no, I’m not interested,” but, in fact, he still had it in the back of his mind. As late as Lyndon Baines Johnson’s tenure, there was a suggestion that Douglas would have resigned from the Court if he could have been vice president to Johnson, which, of course, also did not happen.

My theory from my research and Douglas’s writing was that in about the mid-’50s, it was clear Douglas wouldn’t really be a player politically. And that’s when I see him really shifting to the environment, to conservation in a really active way. The very first public effort he made that’s now been emblazoned in history is that he organized a protest march on the C & O Canal in Washington, D.C. It was a place where he had been going hiking on most Sundays, and there was a proposal to put a highway down to the canal. The *Washington Post* thought this was a good idea. In a letter to the editor, Douglas wrote as a Supreme Court justice: “You’re wrong. This is a place of beauty and sanctuary and you should preserve it. And I challenge you and your editors to come with me on a hike on the canal.” So, they did. Douglas hiked the entire 189 miles. The editors only hiked a portion of it. But when they returned to Washington, D.C., Douglas had arranged for maximum publicity. That protest really sparked this stirring in him that he’d had as a child—this connection to nature. There is another reason that there began to be a kind of shift in his life. In the late 1940s, he had an almost fatal horse accident where he broke 23 ribs, and his horse, 1,600 pounds, landed on him out in the Cascade Mountains in Washington. While he was recuperating, he wrote a classic book called *Of Men and Mountains*. The book recounts a lot of his early days as a boy in the mountains and also his connection to nature.

After the C & O Canal, he became chair of an advocacy that lobbied the Park Service for quite some time to preserve the canal. Eventually, the canal became a National Historic Park. Park Services says it’s the only park “walked into existence.” Of course, it was Douglas doing the walking. That hike really got him

going in terms of active advocacy. On that hike, he met Olaus Murie, head of the Wilderness Society, and other luminaries who were connected with the wilderness movement.

And so now he had his perch at the Court as a justice and an advocate. And he also had his connection with these conservationists. He really was like a bandleader for them. These are early days of the modern conservation movement. One of the biggest adventures with the Muries was in 1956 when [Douglas] went to Alaska with them. They were on a scientific expedition sponsored by the New York Zoological Society—mapping, exploring, documenting, and charting an area called the Sheenjek, which is a river in the Arctic. The time there was instrumental in Douglas connecting with them, becoming an advocate back in Washington, and being very closely aligned with the environmental or, back then as it was called, the conservation movement.

Two years later, in 1958, another big protest hike that he led was down the Washington Coast in an area that was the last piece of pristine coastline in the lower 48. As with the C & O Canal, the Park Service was going to build a highway. Douglas's protest was consistent with his theme of keeping highways out of the wilderness and parklands. He also believed in that mantra for cities as well. For example, there's a case in which he wrote a dissent to the Court's denial of certiorari about a highway in Texas that would cut through the city, cutting off many poor people from access. Again, he saw that project as an incursion that he equated to the incursion into the wilderness. Apart from Douglas's early protests, he also led protests against a copper mine and against dams. He was very much against dams in large part because he felt that they upset the natural balance with nature and the fish, especially salmon. And as we know, many dams were built, particularly in Washington State and across the West, and now some of those dams are coming down (which I'm sure Douglas would stand up and cheer about).

But behind the scenes, really, what astonished me were his other conservation campaigns that might not have been quite as public: writing to the forest service telling them don't do this, do that; arranging testimony before public hearings out West; writing letters and making quiet calls and visits to members

of Congress; and lobbying government officials. Although much of his work was out West and related to disputes he had with the Park Service, the Forest Service, and the Army Corps of Engineers, which was responsible for the dams and the flood control, Douglas was active all over the country. From Texas to Maine, he was front and center of environmental controversies. He went to Kentucky to save the Red River Gorge from a dam, which ultimately was blocked. He was a roving advocate all over the country. People would write to him out of the blue, like: "You're Justice Douglas. I know you're concerned about pesticides and pollution. I live in the Midwest, and I'm concerned about the river and the waters near my house, particularly with discharge of detergent and pollutants." Douglas would write back and counsel the writer to contact a specific organization, such as the Sierra Club. He responded to hundreds of letters from concerned citizens.

By spending so many hours in his papers at the Library of Congress, in a way I felt I was communing with him. I love research. Maybe that's one reason I love being on the Court of Appeals. As a result of my research, I felt like I began to know and understand Douglas's pathos. In 1939, he joined an opinion in which the Court said that judges are citizens and, hence, they should pay federal taxes too. And Douglas then thought, well, if I'm a citizen, I can do anything anybody else can do as long as it doesn't interfere with my duties on the Court. And, of course, that's the view he then took, that none of his conservation activities interfered with his duties. Although there were times when I think he considered ethical issues surrounding his outside activities, in large part, he viewed himself as a "citizen justice" and he could be out there leading the charge against the copper mine or against logging in the forest or pollution in the rivers. That's the reason I call the book *Citizen Justice*.

MG: Obviously because we're both interested in ethics, that was something that was very striking. But I didn't know if, at the time, there were other justices that were involved in their own things. Was this extra?

MMM: It's a great question. Nothing to this degree. But certainly, during Roosevelt's time, there were justices advising the president on war policy, and Justice Frankfurter was very active, as had been Brandeis in the Zionist

movement, which was a fairly political and public enterprise. We know Justice Jackson left the court to be the prosecutor at Nuremberg. That is something that is unthinkable today, although certainly a laudatory undertaking addressing the horrors of the war. But when Jackson took a leave from the Court, Douglas was critical of him, saying, "It leaves us shorthanded and we have more work."

Douglas was a fast writer. He would irritate his colleagues somewhat at the end of the term. He would finish all his work, including his dissents, and then he would just jump on the plane to his cabin in the Cascade Mountains, noting that he basically was done with his work. So, he didn't stick around to jawbone or convince people to join his dissents. And he was a big dissenter. He dissented in almost 500 cases, but remarkably, in 40 percent of those cases, he was the sole dissenter. He said he had no soul to save but his own.

MG: How to make friends.

MMM: He was a loner in many respects on the Court. He and Justice Black were quite aligned in the First Amendment area, and Douglas garnered majorities in other important areas, such as criminal law and privacy. But he was a loner.

MG: And I was just wondering too . . . that was, as you said, kind of at the beginnings of environmental law as we know it. So, were there cases that came before the Court when he had all these other involvements?

MMM: There were. The one that comes to mind is *Sierra Club v. Morton*. Douglas wrote a very famous dissent that spawned the question: "Do trees have standing?" There was a proposed development by Walt Disney in the Sierra Nevada Mountains. The Sierra Club lost in the Supreme Court on the basis of standing because the Club pushed the theory that the valley and the mountains were being degraded and should have a right to sue. And the Court said, no, you need a person that is impacted. Douglas countered, "Why? The mountains, the trees, the rivers, and the valleys should have their own status." At the time of the case, Douglas certainly was in touch with the Sierra Club. He

was protesting with them and corresponding with the Club regularly. He'd even been on the board at an earlier time, though he had resigned long before. Around the time of the case, he was still a life member of the Club but resigned, presumably to avoid a conflict. But there was scuttlebutt around the Court whether he should recuse himself. This I learned from the Supreme Court papers and interviews with former law clerks. Ultimately, he did not recuse himself even though he considered it. But I think this was a case that was really made for him, and he was made for this case.

Whether there were other cases that raised conflicts because of his views, it's hard to say. But it was true in the early 1970s that the Court was not granting certiorari in cases arising under the newly enacted National Environmental Policy Act. Douglas wrote a series of dissents, emphasizing the importance of the issues and the importance of the Court taking these cases. So, in dissent after dissent, he highlighted environmental concerns and was very disappointed that the Court did not review those cases. It was fitting that the very last case he wrote was an environmental case.

Douglas introduced the notion of aesthetic standing and laid the groundwork for what later would be called "nature's rights," natural objects having standing. He even wrote an article called "Nature's Constitutional Rights." Douglas always said he was dissenting for a future day. And, in fact, that's what happened. The notion of nature's rights appears in the constitutions of various countries and in the ordinances of municipalities around the United States. A good example is in Washington State. A town out on the Olympic Peninsula has given legal rights to endangered orcas. The evolution of this concept is very interesting. What was considered revolutionary back in Douglas's time is now a concept that is coming into play in the courts, albeit not yet in the federal courts.

MG: That's fascinating. One thing I thought is, I obviously chose to live in Alaska because I love the wilderness. It is so comforting and reassuring. And so, his attraction to the wilderness spoke to me.

MMM: You're the perfect person to do this environmental issue!

MG: There's so much that resonates with me, aside from his personality and the ethical issues.

MMM: Exactly. I felt no one had ever written about the ethical issues. So that's why I wanted to explore that issue in the book from a historical standpoint. And, as I wrote, other justices were engaged in many social and political activities, but Douglas was doing it to a different degree and in a more public way. For me, Douglas resonated because having grown up in Wyoming, being a mountain climber and a hiker, and having been out in many of these wildernesses, including Alaska, where I had both worked and also hiked, I felt this connection to him and to the land he wrote about.

It was very fun to write the book. I have written a lot of other things, including hundreds of opinions, but writing for the general public and not for a legal audience was fun and challenging. But I also felt that there was a real story to be told. Douglas had a very interesting and controversial life. I had no idea when I got into the project the many things I would discover, but it's been a fun journey. So, thank you.

Author



Marla N. Greenstein

Alaska Commission on Judicial Conduct

Marla N. Greenstein is the executive director of the Alaska Commission on Judicial Conduct. She is also a former chair of the ABA Judicial Division's Lawyers Conference. She can be reached at mgreenstein@acjc.state.ak.us.

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