

Justice William O. Douglas: Public Advocate and Conservation Champion

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[00:00:00] Jeffrey Rosen: I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People, the weekly show of constitutional debate. The National Constitution Center is a non-partisan, non-profit chartered by Congress to increase awareness and understanding of the Constitution among the American people.

[00:00:21] Jeffrey Rosen: We recently hosted a great conversation about Justice William O. Douglas. He's the subject of a new book by the Honorable Margaret McKeown. She's Senior Judge on the US Court of Appeals for the Ninth Circuit, and she's written a new biography called Citizen Justice: The Environmental Legacy of William O. Douglas, Public Advocate and Conservation Champion.

[00:00:43] Jeffrey Rosen: Joining Judge McKeown to discuss Justice Douglas's legacy is the Honorable Jeffrey Sutton. He's Chief Judge of the US Court of Appeals for the Sixth Circuit. Both judges are great friends of the National Constitution Center, and it was an honor to convene them both for this great conversation. Enjoy the show.

[00:01:01] Jeffrey Rosen: Judge McKeown, it is an honor to welcome you. Congratulations on your new book, Citizen Justice, and let's begin with the obvious question, what was William O. Douglas's environmental legacy, and why did you choose to write about it?

[00:01:15] Judge McKeown: Thank you. It's a real pleasure to be here with you, Jeff Rosen, but also with Judge Sutton, a good friend and co-member of the ALI Council among other things.

[00:01:26] Judge McKeown: Well, his legacy is really long-lasting. To begin, he was a band leader for the conservation movement in the '50s, '60s, and '70s, a somewhat unusual role for a US Supreme Court justice.

[00:01:41] Judge McKeown: But probably just as importantly were what I call his hiking and hollering, and that was where he was physically out hiking and protesting, usually against some incursion into wilderness or some highway that was about to be built. So he really is responsible for saving physical places, from Alaska to Maine to Texas to Washington State to Washington DC.

[00:02:08] Judge McKeown: How I got into it was a little bit of an accident. I was snowshoeing one day out in my home state of Wyoming, and I came across this homestead. And I didn't know quite where I was. I knew how to get back to where I was. But a guy came out, and I said, "Where am I?" And he said, "Well, you're at the Murie Center." And I said, "Oh, I know. I know John Muir." He said, "No, Murie, M-U-R-I-E." I said, "Oh, okay. I don't know Murie." He said, "Well, he was a celebrated conservationist, president of the Wilderness Society, and his wife was called the grandmother of conservation." So a few more discussions and some books exchanged, and I discovered a letter from Douglas to the Muries suggesting they give that very ranch to the National Park Service as a place to celebrate conservation. I thought that was pretty presumptuous, telling you to give away your house. But in fact, they did.

[00:03:02] Judge McKeown: And one thing led to another. I started to go to the Library of Congress, look at the Douglas papers, go to The Wilderness Society, the Sierra Club, various archives, and it was really just a lark. And someone said, "Well, you should write a book." And I said, "Well, I write opinions, not books." But I was really captured by his story, and that's what led to the book.

[00:03:24] Jeffrey Rosen: Wonderful! Hiking and hollering is a great phrase, and then the idea that it was a homonym about Murie or Muir that led to this discovery of letters and to this great project is superb.

[00:03:36] Jeffrey Rosen: Judge Sutton William O. Douglas, of course, is well-known, and people have strong opinions about him. What did you learn about Justice Douglas from the book, and did it change your view of him in any way?

[00:03:47] Judge Sutton: Yeah, thank you, Jeff, for inviting me to be with Margaret. Judge McKeown is a great friend, and I gotta say, this is a terrific book. I'd read, Wild Bill—a biography out there. And so I knew that story and, I knew a little bit just from knowing federal Con law and his decisions.

[00:04:03] Judge Sutton: I have to say, he wasn't one of my favorites until I read this book. The things that came to mind, I knew he was one of the longest serving justices. That, of course, is interesting. You know, the penumbras from Griswold, pretty creative decision-making, which is probably not my typical cup of tea. And then, you know, the four wives, which is both salacious and I suppose, in ways, maybe irrelevant.

[00:04:26] Judge Sutton: But what is so enjoyable about this book is it shows you this other side of him. Well, it turns out I love hiking, and my family's a big outdoors family. So every time he's off on one of these hikes, I'm thinking, "Boy, I wish I could've joined him."

[00:04:42] Judge Sutton: So I really enjoyed the book. And I feel like it's a really wonderful book for right now partly because he doesn't fit. You think of him as progressive and inventive justice, but he's fundamentally quite libertarian. You can see him agreeing with several so-called conservative justices on the current court in some areas. He was skeptical of agencies. That sounds like something that's relevant at the Court today.

[00:05:09] Judge Sutton: There's another feature of him which is also quite current. Perhaps because the federal courts are so significant now, we have a lotta judges and justices going on at young ages. And he was one of the first to go on at a young age. And I think it showed the complexities of it, right? On the one hand, he becomes the longest serving justice. I'm sure there are ways FDR was quite happy that he has this legacy of Justice Douglas lasting til 1975.

[00:05:38] Judge Sutton: But it did show us what I would consider some risks. It's very hard to cloister ambition. And fundamentally judges are in a cloistered job, for the most part. We're not expected to be out with elected officials. And he had a lot of ambition. He's an incredibly talented guy. Had he not been a justice, I could've seen him being president, running the Department of Interior, AG, you name it. And that ambition, that energy, that idealism kept finding new ways to express itself. Apparently the job of Supreme Court justice took him four days of the week. Well, that left three, and I'm quite confident he wasn't using one of 'em just for faith. So he was, he was doing other things in those three days. And I think they were terrific things. There's some complexities, which we'll get into. But I must say, the book is the other half of the book of Wild Bill. It just shows you the other side of him in a way that's just fascinating and has so much salience for today's court, if you ask me.

[00:06:43] Judge McKeown: I would just jump in. When you mention he was not using the last day for faith, it's interesting because he talks a lot about spiritualism and the wilderness as his sanctuary. So that's where he put his faith was in nature.

[00:06:59] Judge McKeown: But he was really a restless guy. And during that first decade on the Court, you would think he would settle in and just dedicate himself to the job of justice. But he was meddling in politics. And although he would keep saying, "The court is a monastery," just as Justice Frankfurter said that the Court is a monastery. Well, that was a bit disingenuous on the part of both of 'em, because that was some monastery he was operating in, from all I learned. Because he was considered as a Vice Presidential candidate for FDR. And, of course, we know that Truman was ultimately chosen, but there was a little piece of paper that said, "Truman-Douglas." Or maybe it said, "Douglas-Truman." Nobody knows for sure. But Truman was chosen.

[00:07:46] Judge McKeown: And then after FDR dies and Truman becomes President, he asks Douglas to be his vice president. Now Douglas had ambitions as president also, but at that point when he's asked to be vice president, he said, "Why be number two to a number two." And he turns it down and then goes back to the court, or more accurately, then he went into a life of the environment and conservation.

[00:08:12] Jeffrey Rosen: So true, and it's so powerful that you mention his spiritualism in the chapter about the rise of the conservation movement. You note that really he was reading Emerson and Thoreau and the idea of the over-soul. And he took that with him in his famous walk down the C&O Canal, when he dared the editors of The Washington Post to trek with him for eight days and to see the effects of supporting a highway that would've destroyed the canal.

[00:08:41] Jeffrey Rosen: So maybe just another word on how central transcendental or spiritualism was in the environmental movement. You say that that more spiritual conception

competed with a more utilitarian conception of environmentalism and how Douglas embraced it in the C&O Canal crusade.

[00:08:57] Judge McKeown: You know, the C&O Canal is what I think was really the catalyst for Douglas to get into conservation. He had been a person of nature. He had polio. There are some disputes about it as a kid, but he was sick and skinny. And so he used nature to try to shore himself up, to try to connect with things.

[00:09:17] Judge McKeown: So when he sees this proposal by the National Park Service that they should put a highway down the C&O Canal, he uses those words. "This is a sanctuary. This is a spiritual place. Come hike with me." So he challenges them to this hike, 189 miles. Course, the editors don't make it, but Mr. Murie does. And that's where he meets Olaus Murie and various others in the conservation movement.

[00:09:43] Judge McKeown: By now, he's come through that first decade on the court. He's had a big accident. Horse rolled over him, 1,600 pounds. That waylaid him for a few years. And his first marriage is on the rocks. So he's restless again. And he now sees the C&O Canal as his new refuge.

[00:10:04] Judge McKeown: So when they finish the hike, of course, he has arranged for the head of the Interior Department to be there. So there's a lotta publicity. And he then forms a committee. He, of course, becomes the chair of the committee, and he puts together this group of citizens and begins to agitate, lobby the Park Service and others to make this an historic place. And it took quite a few years, but ultimately that's what happened. And the Park Service now proudly displays the canal as the William O. Douglas National Historic Canal, as the only park that was walked into existence.

[00:10:46] Judge McKeown: But I think that really started him on his MO of how he would go about it. He sees a threatened place. He's personally offended, but he knows other people will be. So he really garners the support of large numbers of citizens. They rally with him, and then by using his connections, how to really move those levers of government, whether it's in Congress, or in the agencies—and he's quite familiar with both. And then he achieves success, either through legislation or a designation or something else. So that was 1954, and now he's off and running.

[00:11:29] Jeffrey Rosen: Such a powerful story. And then that launch of his career as an environmentalist at the C&O Canal is so powerful.

[00:11:36] Jeffrey Rosen: Jeff Sutton, your reaction to his activism on behalf of the environment starting with the C&O Canal. Was it appropriate for a justice then, and would it be appropriate now?

[00:11:48] Judge Sutton: Yeah, I asked myself, what would I have done had I gotten an invitation? Lemme just start by saying, I would've loved the eight-day hike. I mean, hearing the story, they ate pretty well, for what it's worth. I don't think they were carrying all their provisions either. So that's the best of all worlds on an eight-day hike: a great meal at the end of it. Well, they did hike a lot. 25 miles a day, pretty impressive for a Supreme Court justice.

[00:12:13] Judge Sutton: You know what's interesting is the world of ethics and how government officials interact has changed a little bit in the last 50-plus years. What's interesting is that lots of people were accepting invitations to FDR's poker matches. That wasn't covered by the press. It wasn't intended to be covered by the press. But surely you're cozying up with very consequential people. And I suspect those are hard invitations to turn down. What's different about this is he's doing something quite publicly.

[00:12:46] Judge Sutton: The way Justice Douglas did it, I suppose, whether it's then or now, probably I would say pushes the envelope and probably, at least by today's standards, crosses some lines. If you think back to it though, had what he done been to join forces with someone else to do a public hike to illustrate the beauty of this, 150-160 mile canal, I'm not sure that would rub me the wrong way.

[00:13:16] Judge Sutton: But that wasn't all he did. I mean, he was writing letters to the editor. Now, of course, if all you're doing is saying, "You don't think this is a beautiful spot. Please join me in this hike," I'm not sure that bothers me. But when you're now saying, "We need to pass legislation," the slippery slopes are, are pretty darn apparent at that point.

[00:13:36] Judge Sutton: I knew about the C&O hike, I didn't realize it worked! And so he thought, "Well, gee. Let's keep doing this." And that's what Margaret's book is. Margaret's book is about what happened after the C&O Canal. It's just astonishing what happened later.

[00:13:51] Judge Sutton: So the shorter answer is I am probably a little bit uncomfortable with it, even by those standards back then. But I think today a judge would kinda have to make the choice. If you wanna do that, I think you're just gonna have to leave the bench, take a leave of absence. And then that's probably for the good. But I'm still happy Justice Douglas lived, because I think he did some really neat things. And he also was one of nine. You know, maybe there's room for an iconoclastic justice. As long as they're not all nine doing it, maybe that's another way to think about it, to be a little more forgiving. That surely if you have nine ambitious, very talented people, don't be surprised if they push the envelope in engaging the public on the issues of the day.

[00:14:39] Jeffrey Rosen: That's great. Judge McKeown, talk more about the objects of his program. You say that they included federal agencies. And just as he demonized corporations and big business, he targeted federal agencies. And he writes, "It's not easy to pick out public enemy number one from our federal agencies," he explained in a Playboy article... spoilers...and competition is great. Obviously, you know, probably couldn't happen today. But describe that and what he did with agencies, his correspondence with the Interior Secretary Mo Udall, and whether whether you think it was appropriate by the standards of his day.

[00:15:13] Judge McKeown: Sure. I do think it's somewhat shocking to see a Supreme Court justice, particularly of that era, writing in Playboy. And when asked why he did it, he said, "Well, that's what young men read, and I would like to get the story out." In that article when he talked about the spoilers and his number one enemy, it was the Army Corps of Engineers, which, of course, are responsible for flood control and dams. And on that point, he parted company with the President. Because Roosevelt coming out of the Depression was looking at all kinds of ways

for economic development, and he was putting up dams. Douglas would like to have never had those dams. So he names the Army Corps of Engineers as his number one enemy.

[00:15:56] Judge McKeown: Another one of his enemies was the Forest Service. When he was a kid, he wanted to be a forester. And he certainly admired Gifford Pinchot, America's first forester. But then he said he grew up and learned that all the Forest Service does is cut, cut, cut, which, of course, isn't true, but that's how he played it. So he had these enemies and he was pretty vocal about it.

[00:16:22] Judge McKeown: You have to also remember that back then they actually paid you to write articles. Nobody, I don't think, pays you to write magazine articles much these days. So that was a good supplement to his income, both for alimony and any other purpose that he might need it for.

[00:16:38] Judge McKeown: And in doing that, he was not only dealing with the agencies... Udall was a very, very close friend. He was also dealing with President Kennedy and President Johnson. And I think one thing maybe that I brought to the book that other books about Douglas haven't really commented on is this ethical issue. So I was looking at him both in terms of the incredible contribution he made to the environment, but also through an ethical lens of, did that bring him into conflict when it came to cases? And did it really implicate the separation of powers? And I say it does.

[00:17:20] Jeffrey Rosen: He famously said, "I'm going to bend the law against the corporations and in favor of the environment." And he has a range of powerful opinions, including most famously the Sierra Club and Moore case, that did arguably just that. So maybe Judge McKeown, maybe you could set up his environmental cases, and then Judge Sutton can respond.

[00:17:41] Judge McKeown: Sure. Well, certainly he made that statement. I know it's been disputed. But, of course, one of the people who disputed it has died, so I couldn't interview that person. But there is documentation that he made the statement. So I just took it at face value. I know it's been disputed.

[00:17:59] Judge McKeown: But I would say apropos of what Judge Sutton said earlier about him being a libertarian, his view was that the Constitution's purpose was to get the government off the backs of little people. So you see that throughout his opinions, whether it's environmental opinions or others.

[00:18:20] Judge McKeown: Of course, his most famous opinion was really a dissent. And there I would say, of course, he's a big dissenter. He dissented almost in 500 opinions. And about 40 percent of those, or 45%, he was the lone dissenter. So that's a little unusual. And even when you stack him up to later dissenters, like Justice Scalia or Justice Stevens, he was really a king of dissents, I would say.

[00:18:50] Judge McKeown: So how did this all play out in his opinions? Well, Sierra Club v. Morton, of course, is the case where Walt Disney wanted to build a ski resort in the middle of this pristine valley in California. The Sierra Club sued to stop that. And they took a gamble. So instead of really arguing, "Here's one of our members. They hike here. They're gonna be

implicated," they really pled it as if the valley or the mountain was going to be implicated. And the Supreme Court didn't have a lotta truck with that. Basically said, "No, you have to have an actual person who's been harmed or damaged." And they sent it back. Ultimately, Walt Disney dropped their plan and the case went forward. And the district court on amendment, let it go forward.

[00:19:43] Judge McKeown: But Douglas did something there, I think, that was really kind of one of his centerpieces. In his dissent, he talks about what we now know as rights of nature, and that is the valleys, the rivers, the mountains, those are the pieces of life that are gonna be damaged, so why shouldn't we give them a voice in the courts? And he compared that to a ship. A ship is an inanimate object, and you can sue in the name of a ship, in the name of a corporation. And much of that, of course, was derived was a professor at USC, Jeff Stone [sic], who'd written a similar article.

[00:20:23] Judge McKeown: But if you read the dissent, it's very lyrical. And you could be reading Sand County Almanac or Thoreau. And so he wrote that really in the space of about two hours when he got off the bench.

[00:20:37] Judge McKeown: The beauty of going to the archives is you can see the drafts, you can see the cut and paste and the tape and the do-overs. There weren't computers doing all of this.

[00:20:48] Judge McKeown: But it's a really beautiful dissent, and it raises that issue about why nature and the environment can't have a voice. And ironically, his law clerk working on it at the time, Douglas gives the law clerk the draft opinion and says, "Now, you need to put in the footnotes." So they kinda did it backwards in the sense of he was castigating the Forest Service and others, and the law clerk had to find all the support for all these things.

[00:21:18] Judge McKeown: He was writing for the future, and it's had some resonance in international law in various countries in their constitutions, and even in America for various municipalities who have put that into their regulations. It hasn't really found a lot of traction in the courts, I would say. But again, it's found traction in common sense.

[00:21:42] Judge McKeown: So when it came to the environment, there's no doubt if given an opportunity, he would tip to the environment. But the interesting cases come when we have the Native Americans, or as called in the statutes and in the case law at the time, Indians versus fish. So he loved fish, and he would write eloquently when stopping a dam about the importance of fish and how a dam could ruin that.

[00:22:13] Judge McKeown: And at the same time, he wrote about his connection with the Indians, because he grew up in Yakima Washington and the Yakima tribe was out there. And he knew many of the people in the tribe. He worked in the fields with migrant workers. He met the Indians on his hikes.

[00:22:33] Judge McKeown: And these fishing cases were very complicated. But if you kinda weigh them all up, if you have a case of the Indians versus the fish, typically the fish would win. But in other cases where the Indians are against various other prospects or challenges, then

typically the Indians would win. But he had conflicting feelings about this for sure. And not every case can be distilled into that kind of a dichotomy. But when you are looking backwards at somebody, you are trying to make some sense out of their jurisprudential thinking, and that's what I have come to think about then.

[00:23:13] Judge McKeown: But, of course, the other thing to remember is that Indian law, as we know it now, which is much more developed, was really an emerging field back then. It was not something that was taught in law schools. It was not something that people thought about a lot. And now, of course, Indian law is front and center, both in the Supreme Court and in all of our circuit courts as well.

[00:23:35] Jeffrey Rosen: Judge, I'm gonna ask you to discuss the Morton case in a sec, but I wanna read just a few sentences from it 'cause it is so striking, and we love primary texts here at the NCC. So here's from Justice Douglas dissents. First he says, "Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing on environmental object to sue for their own preservation. See *Stone, Should Trees Have Standing? Toward Legal Rights for Natural Objects*." And he says, "So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, rivers, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life." I'll stop there, but that'll give everyone a great sense of his unusual prose.

[00:24:21] Jeffrey Rosen: Judge Sutton, what do you make of this remarkable piece, and what is its current influence in the Supreme Court's law of standing, if any?

[00:24:29] Judge Sutton: Well, one thing I wanna just bracket, and maybe we can come back to, because I wanna ask Judge McKeown this ... He was such a quick writer, and some of his writing really was very terrific. He wasn't known for polishing and polishing, but he had this poetic, lyrical component. And I'd just be curious if she had any thoughts on the source of that because the guy was a really quick writer. He didn't rely on law clerks. He did it all himself, which is quite impressive.

[00:24:57] Judge Sutton: I would say I share the sentiment in that opinion, but not the legal conclusion. I certainly know what he's saying. Do I think it's problematic to say trees and fish have standing to file lawsuits? That a pretty big stretch, and, maybe the best way to put it is that's exactly the kind of thing we ought to experiment with in the states before we nationalize that kind of an approach.

[00:25:24] Judge Sutton: For what it's worth, he has had a big impact. I mean, a third of the states have these clauses in their constitutions that require their legislature to look after the environment in every single law they pass. It's like a NEPA for every statute in a state. And the states also don't have Article 3 standing, so they allow all kinds of lawsuits letting the rocks, the trees, the fish, the water sue. So there is room for this approach in the states, but, you have to admit that it was against the current when it comes to federal law at the time.

[00:26:03] Judge Sutton: But the other thing that the book made me think about is so often I found myself agreeing with what he's doing. Like I hate the dams. I'm a fly fisherman. The dams

have ruined these streams. And I'd tear down every single one of them if I could. But I found myself thinking, you know, would it be more effective today, or would it have been more effective then to follow the conventions? You can push here and there. But then write a concurrence, as opposed to a dissent, and a concurrence that says, "Listen, I can understand why we have these requirements of injury, being animate, whatever it is, and that there's of the federal courts in terms of our policymaking. But let me just tell you why this is a silly policy or why this would be a great policy."

[00:26:55] Judge Sutton: I mean, if you go back to Griswold, the contraception case, Black and Stewart in their dissents, said this. I think Connecticut, Massachusetts were the only states that still banned contraceptives. And they just said, "These are silly laws. They're medieval. There's no place for them." I don't think there's a problem with that. I think there's actually a lot to be said for a really intelligent a justice to explain maybe the best way to handle the policy.

[00:27:27] Judge Sutton: You know, the conflict between the fish and the Native Americans is a cautionary tale. It, proves once you go down this road, it gets very hard. I mean, it's not easy being the secretary of the Department of Interior. You can have the best, most progressive values, and you're gonna run into complications. And, you know, then think about property rights and so forth. So it does get complicated if you decide you get to figure it all out. And I suspect that's what started to happen with that line of cases.

[00:27:59] Jeffrey Rosen: Fascinating and important to remind us of the conflicting interests on both sides here. One more sentence, 'cause this is one I remember from law school. He's talking about the Mineral King Valley, where the ski resort is supposed to be built, and he says, "Mineral King is doubtless like other wonders of the Sierra Nevada, such as the Tuolumne Mountains and the John Muir trail. Those who hike it, fish it, hunt it, camp it, frequent it-" (Nice parallelism there) "... or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they be few or many. Those who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled, are its legitimate spokesmen."

[00:28:40] Jeffrey Rosen: Judge McKeown, this is a dissent. Did it get any traction in the law? Did lower courts cite it, and what's the status of trees having standing today? And how important it is in the bigger picture of Justice Douglas's work?

[00:28:52] Judge McKeown: Well, I think it's important because it highlighted the importance of the environment and the importance of nature. It did not have a lot of traction. We've seen some cases filed in local courts, even federal courts, where this was attempted but rebuffed.

[00:29:11] Judge McKeown: Although one could ask, what's the difference between saying I have a hiker who stepped on this land, versus, I, a public interest group, am representing this land or this river or this valley? So we have a lot of fictions in the law. This is just one fiction too far, at least according to the majority of the courts. But I think it's a fiction that we should think about when we are putting up barriers to getting into federal court. Because what often happens if when you have a fiction like this, and somebody goes back and they fix the fiction, and then magically they have standing to be in federal court.

[00:29:52] Judge McKeown: So what he was doing here, I don't think he thought he was going to by any means convince his colleagues. And he didn't usually spend a lotta time trying to do that. He said famously, "The only soul I have to save is my own." And so he was not somebody to try to put the collegiality in colleagues in terms of bringing them together.

[00:30:17] Judge McKeown: But I do think the importance of the case is that other countries have actually put these provisions in their constitution. And as Jeff said, you know, the states have comparable provisions that could be interpreted this way. And I think he was somebody who also saw the states as both a positive and a negative. Because one of the reasons a lot of the environmental law went federal is that there was a lot of concern about what was happening in the states vis-a-vis the environment.

[00:30:53] Judge McKeown: And that came up a lot in Texas. He wrote a book called Farewell to Texas kind of proclaiming all the bad things that were happening in Texas in terms of development. Lady Bird Johnson hated the title of that book. She tried to get him to change it. She wanted to endorse the book. She believed in parts of it, but she didn't like the idea that he was saying farewell to Texas. But there he kind of highlights that tension between what's happening locally and what's happening nationally.

[00:31:26] Judge McKeown: And the irony of it is Douglas understood that in effect all politics is local. So when he was going down to Congress to talk with members of Congress, he was talking to them about the interests of their constituents and what would matter back home. So even though he's just walking those few steps between the Supreme Court and the Capitol, he knew that they would really cotton to their constituents. So he was somebody that was always playing the state angle all the time. And when he would get an issue or an area that he was concerned about, he had what he called committees of correspondence, kind of hearkening back to the Civil War, where he would get all these citizens to flood the members of Congress with what their personal and local interests might be.

[00:32:23] Judge McKeown: So Douglas was somebody with a larger vision. He certainly was not somebody who was telescoping his view just on one issue or one area of the country, but he was looking much broader. And I think that whether he changed the law of standing, he had other cases on standing in which they expanded to be able to basically have environmental rights be a basis for bringing standing, although you had to have someone who was impacted by it. So he had some significant standing cases that didn't go as far as this one.

[00:33:01] Judge McKeown: And interestingly, Black wrote a beautiful dissent. He's never given credit for it because Douglas overshadowed him. But Black wrote a beautiful dissent in the same case, bringing up a lot of those same and lyrical issues that you talk about, Jeff.

[00:33:18] Jeffrey Rosen: Fascinating. And, of course, I'm tempted to find the Black dissent, but we'll wait for that. And, Jeff Sutton, your book, 51 Imperfect Solutions, is such a powerful illumination of state constitutions, and you've noted that about a third of states have provisions that allow them to construe laws to protect the environment. Are there Justice Douglasses today who are serving on state courts?

[00:33:41] Judge Sutton: There are. There are. There's a recent Pennsylvania Supreme Court decision, recent as in a few years ago, where they take the state constitutional provision to which you're referring, and really give it quite a bit of muscle. So it's one of these provisions. A lot of them are pre-Douglas. Some of these come from the Progressive Era, at least the origin of them. But they really do say to the Legislature, in passing laws, you're supposed to pay attention to clean water, clean air, preserving our environment. New York has the wildest constitutional provision. It's a constitution which sets aside the Adirondacks and whole sections of New York State for preservation, which explains why the New York Constitution mentions the length and width of ski trails. They're referring to ski trails going through the wilds. You know, what better place than a constitution to set aside the land in the state for not being developed, for being preserved.

[00:34:41] Judge Sutton: One of the wonderful things about American federalism is you have two ways to protect things you care deeply about. And I think that's what going on here. As Judge McKeown pointed out, the states have made plenty of mistakes. There are, of course, externalities when it comes to, say, air pollution. You pollute in one state, the air goes to another. There's obviously a very significant role for Congress in that kind of situation. But you're not gonna do a very good on the environment if you're not putting all hands on deck. And a very significant set of hands are the state EPAs, state constitutions, and state legislatures.

[00:35:19] Judge Sutton: I think Justice Douglas would've approved. I'm not sure he was thought of as a federalism guy. It sounds like he did most of his lobbying at the federal level, so he had the incentive of national rather than local solutions. I appreciate the point. But for every federal reserve, there are plenty of state reserves. People forget that the states can do that. In, in my state, Ohio, most of the land that's prohibited from being developed is prohibited by state law. We only have one federal park in Ohio. Everything else is state.

[00:35:55] Judge McKeown: Yeah, and I might add that one of the reasons this came about, of course, is as you go further west, there's a large percentage of the states that have a large percentage of federal land. Alaska, Wyoming, Idaho, and others. So that brought the focus, I think, to federal attention because there was such a significant amount of the states that were federal land or that are federal land even today.

[00:36:23] Judge Sutton: Yeah. Well, Margaret, his writing, was he just a smart guy? I mean, you wouldn't have guessed it—rural Washington, itinerant preacher as a father, and suddenly he's this terrific writer. At least his first drafts are terrific and fast.

[00:36:39] Judge McKeown: Well, some people say his first drafts were his last drafts. And one of his observers at the Supreme Court said some of the times he sent in what they called airplane specials—that were decidedly drafted on the airplane between Washington and when he was flying out to his cabin in Goose Prairie, Washington.

[00:37:01] Judge McKeown: But in terms of his writing, it has been criticized as being somewhat loose and sloppy sometimes. But then when he writes from his heart, in fact, that may be some of his better writing, I think. And you're right, he didn't use the law clerks for this. And they did some research, they looked up footnotes, but he did all the writing himself. And that's

why he would only have two law clerks, and other justices would have three law clerks. So his writing has been criticized by some as not being tight enough or precise enough. But he has a number of opinions, whether in the criminal justice area and others, where he was really breaking new ground. And many of those cases have held ground later on.

[00:37:53] Judge McKeown: And I think the thing about Douglas is that he didn't didn't want to spend any more time on anything than he needed to. Brennan said he was one of the few geniuses he had ever met. And I think that's true from everything you read is that he was a genius. And he was a genius with a diffuse brain.

[00:38:16] Judge McKeown: So he did his Supreme Court work, and then he was on the trail or he was climbing or he was traveling to Russia with Bobby Kennedy at the behest of President Kennedy. So he lived life to the fullest. There was not a minute left in his day. And yet when he was out in the wilderness or on the trail, that was his sanctuary. That was his getaway and his downtime. Other people might've thought, "Well, that seems strenuous to go mountain climbing," for example, as opposed to sitting by the fire and reading a book.

[00:38:52] Judge McKeown: But I also think he was a big reader, and that is one of the reasons that he was such a prolific writer is that he read so much. If you count his academic books, he wrote probably 50 books, which is astounding. You have a little ways to go, but I know you're trying to catch up with him.

[00:39:09] Judge Sutton: Not gonna happen.

[00:39:13] Jeffrey Rosen: Well, let's talk about his most famous and most controversial opinion, *Griswold versus Connecticut*. You note in the book, Judge McKeown, that although the Constitution doesn't explicitly mention privacy, Douglas wrote that, "Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." You note also that scholars derided the decision, and Justice Clarence Thomas famously has a plaque in his chambers mocking Douglas's theory, "Please don't emanate in the penumbras." It's a very memorable phrase, and it sums up the criticism that this was just too loosey-goosey, written too quickly, and not good constitutional law. What would you say your study of his environmental record taught you about *Griswold*, and do you think *Griswold* is convincing or not?

[00:40:00] Judge McKeown: Well, I think the right of privacy is very convincing, and it's a question of how you frame it. Now, the penumbras of the Constitution, there had been some discussion. He wasn't the first to suggest that there were penumbras in the Constitution. But, of course, he's tagged with that. And then and I do get a big smile out of the Justice Thomas plaque and because Justice Thomas disagrees with that.

[00:40:26] Judge McKeown: But the others who joined him had different rationales for how you would get to privacy. And I think that's an interesting aspect, particularly of a court where you're sitting with nine justices. They all agreed on the core principle of privacy. And to my mind, that was the most important thing to come out of that decision. And we're seeing now. And I don't wanna get into the abortion decisions. But when you see all of the other issues that we're

seeing, particularly with internet privacy, with government surveillance, there's no doubt that the United States, which has no federal constitutional right written in specifically—in contrast to, for example, Europe and other places—that the right to privacy has really become front and center now. And so I think that principle has very significant traction now. One might frame it differently than he did, but I think it's important.

[00:41:34] Judge McKeown: And, you know, he had ways to turn a phrase that were appealing, and in that way he was writing not just... He never wrote for scholars, let's put it that way. And he would be the first to say that. He was not writing for a scholarly analysis. He was not writing a scholarly treatise. He was writing about the case, and he was writing about principles. And as a result, some scholars you know, have criticized him for that.

[00:42:03] Judge McKeown: But on the other hand, Vern Countryman, who was well-known professor at the University of Washington, wrote a very nice book about Douglas opinions and really takes issue with those who criticize him as a scholar. I didn't undertake a biography of Douglas, for obvious reasons. There've been several written and because I was really focusing on his environmental opinions. And they're pretty tight.

[00:42:30] Judge McKeown: Another example is the case of a dam in Idaho. It was the first time that the Supreme Court stopped the building of a dam. And they didn't say you couldn't build a dam, but they said the agency had to go back and give further reasons of why they had granted a dam permit under these particular things. And so it's kind of interesting. As Jeff said, he likes to go fly fishing, and fish don't love those dams.

[00:42:59] Judge McKeown: And in some ways, you know, Douglas was a canary in a coalmine. He was saying, "Don't build the dams." And so what's happening today? Many of those dams are actually coming down. He was saying, "Be careful of pollution." He warned about pesticides. He warned about the killing of sagebrush and other species. So a lot of the things that he wrote about, and along with Rachel Carson, was like being a canary in a coalmine saying, "This is gonna be a problem," and he was right. It has turned out to be that pollution and pesticides and dams have been not only a public policy debate but have turned out to be an on-the-ground, real life proposition in terms of the environment.

[00:43:47] Judge McKeown: So in that way, you could say that he could've packaged his message better in some ways. And in the same way on the court he didn't try to corral all of his colleagues. He was packaging his message through Good Housekeeping, Playboy, of course, but Good Housekeeping, Ladies Home Journal, National Geographic, and others. So he was speaking to America, and he was speaking to America at a time when we were in this growth period coming out of World War II. Highways were everywhere, and no one was really saying, could there be a downside to, for example, building a highway through an area that was primarily minority populated in the cities? And people weren't necessarily raising the issues.

[00:44:34] Judge McKeown: So I think that's where you have to give Douglas some credit, is he raised the issues not just in his opinions, but also in his incredibly prolific writing.

[00:44:45] Jeffrey Rosen: Judge Sutton, what do you think of Justice Douglas's opinion in *Griswold versus Connecticut*? Do you agree with it or not? And tell us about the broader conservative critique of it.

[00:44:54] Judge Sutton: Yeah, I probably am a little skeptical of how it's written. If we're gonna have substantive due process, I suppose applying it to situations where there's one or two outlier states doesn't strike me as the end of the world. So there's a way to think about the case where... this was, I think, Justice Harlan's view... It's an outlier law, and, you know, the substantive due process inquiry was ordered liberty as reflected in what the states we're doing. And clearly by the '60s, you just didn't have these bands anymore. And you really could've seen him writing it in a different way, which probably would've held up a little better.

[00:45:35] Judge Sutton: You know, the phrase privacy, the term privacy meaning clearly different constitutional provisions. That's embedded, right? The Fourth Amendment clearly, right to privacy in the home is what's embedded there. But I do think we have to be a little careful. I mean, you know, the game of telephone, it's one word, then it's the next word. And before you know it, it ends with a concept that's very different from how it started.

[00:45:59] Judge Sutton: But if I'm gonna say I might've written *Griswold* differently, even if I think its outcome can be defended, I do wanna acknowledge an area where I think he's been quite vindicated. And I remember being a skeptic of these decisions in law school. I think he wrote some of the early vagueness cases. So these criminal laws—It's very much a part of the Civil Rights Movement, that police officers were using very vague criminal laws and enforcing them in race-based, and in other ways that were really quite unseemly. And at the time, I remember thinking, "Boy, you know, I'm happy with the outcome, but where did this come from?" Well, sure enough, Justice Scalia first, and now Justice Gorsuch, are the leaders on the court in revitalizing this vagueness doctrine. And you know, to me, it's a great illustration of his libertarian roots, and they've worn quite well. They're really consequential decisions. And I'm pretty confident—Judge McKeown knows this better than I do—but I think this mainly started with Justice Douglas opinions.

[00:47:07] Judge McKeown: Yep, I think that's true, and it's interesting because what you just say really reflects how the court goes in different waves and periods of the court. So he writes *Griswold v. Connecticut*. It's a 7-2 decision. Then, of course, we have some dismantling of it. But then we have the vagueness issues, which then come to somewhat of a standstill, and then get rejuvenated here in the current court. So because the Court itself does not have a static membership, and because there's a lot of overlap—we have to remember, he was there from 1939 to 1975, very consequential periods for the court. So it's interesting, as you say, to have a look back and, and see if there were some things where he was the catalyst.

[00:47:54] Jeffrey Rosen: Judge Sutton, do you have a favorite Douglas opinion?

[00:47:57] Judge Sutton: Oh, boy. I'm not sure I agree with the vagueness decisions, but I do think they're quite consequential. And, I must say, I've come around to them. And I think I was judging the vagueness decisions by the author, which is ... this is just what Judge McKeown has done. She's made me look at me in a different light. I saw him as the epitome of the legal realist

movement, of, you know, we're not even gonna try to do law. It's all policy anyway. And, you know, any way to get what we want, we should go. And sometimes he looked a little bit like a caricature of that. But lo and behold, his skepticism of agencies, his skepticism of vague criminal laws, has taken root. And even if the right to privacy is a little complicated, I'm pretty confident the current court would never revisit *Griswold*. I mean, the current court in *Ramos*, the jury unanimity decision is very similar. There were two outlier states. It was Oregon and Louisiana that did not require jury unanimity in a criminal case. Lo and behold, they struck... That's a very similar situation.

[00:49:10] Judge Sutton: Now, it's incorporation, and they're incorporating something actually in the Sixth Amendment. Okay, fair enough. Or the Seventh Amendment, but it's still a pretty similar approach, that if we have outlier laws that time has passed by, I feel like the court is playing a pretty similar role. Whether you wanna call it peer substantive due process or incorporated substantive due process.

[00:49:32] Jeffrey Rosen: Such an important observation from you, Judge Sutton, that the current court you don't believe would revisit *Griswold*.

[00:49:39] Jeffrey Rosen: One of our friends in the chat, Kenneth Agenin, says, "Can you define the *Griswold* decision, please?" Thank you for asking, Kenneth Agenin. And very quickly, Connecticut was the only state of its kind in the country in 1965 that banned the use of contraceptives for married couples. The court wrote an opinion by Justice Douglas that struck down that law, and noting that a bunch of different Constitutional provisions protect privacy, including the First, Fourth, and Fifth Amendments. And Justice Douglas said, "The foregoing cases suggest specific guarantees in the Bill of Rights have penumbras, formed by emanations from the guarantees that give them life," and found a broader right to privacy. And as Judge Sutton said, they were narrow ways to decide the case, including the fact that Connecticut was a big outlier. And, and Judge Sutton thinks that given those now are options, the case would come out the same today.

[00:50:28] Jeffrey Rosen: We are approaching the end of this great discussion, and I think Judge McKeown, that Judge Sutton will agree that the last word should go to you. So why don't leave our friends with some final thoughts about perhaps some of your favorite of Justice Douglas opinion, and what you think his broader legacy is, and why we should care about it?

[00:50:49] Judge McKeown: Sure. I think some of his most important decisions were dissents from failure to accept certiorari in various environmental cases. And of course, we're now seeing a lot more of that, where the justices are dissenting for a failure to accept search.

[00:51:09] Judge McKeown: But if you might permit me, I'll just read the last paragraph in the book because I think it sums it up nicely. And I would say, he is a contrarian, and I do think he teaches us both the pros and cons of being a contrarian. But here's what I say in the last chapter. I said, "Douglas was a legal genius, a legal giant, a conservation hero, and a public philosopher. He always said he was talking to the next generation, and were he to look back on his remarkable journey, he might despair at the environmental challenges facing the planet today. But he would delight that his relentless faith and intervention did leave the Earth more beautiful than when he

came. Many rivers are running free, choice pieces of wilderness are preserved, and the trees are still standing."

[00:52:02] Jeffrey Rosen: Huh, wonderful. Beautiful and apt. Thanks for sharing that great prose. And thank you so much Judge McKeown and Judge Sutton for such a great discussion. You're both such models of thoughtful, principled judges who are also writing wonderful books that can really teach us about the law and our history in all sorts of unexpected ways.

[00:52:25] Jeffrey Rosen: So on behalf of the National Constitution Center, Judge McKeown and Judge Sutton, thank you so much for joining.

[00:52:31] Judge McKeown: Thank you.

[00:52:32] Judge Sutton: Thanks for inviting us.

[00:52:34] Jeffrey Rosen: Today's show was produced by Tanaya Tauber, John Guerra, Sam Desai, Lana Ulrich, and Melody Rowell. It was engineered by the NCC's AV team. Research was provided by Emily Campbell. Please rate, review, and subscribe to We the People. Recommend the show to anyone you can find who's eager for a weekly dose of constitutional debate. And always remember, when you wake and when you sleep, that the National Constitution Center is a private non-profit. We rely on the generosity, the passion, the engagement, the devotion to lifelong learning of people across the country who are inspired by our non-partisan mission of constitutional education and debate. Support the mission, friends, by becoming a member at constitutioncenter.org/membership or give a donation of any amount to support our work, including this podcast, at constitutioncenter.org/donate.

[00:53:19] Jeffrey Rosen: On behalf of the National Constitution Center, I'm Jeffrey Rosen.