

THE JUDICIARY AND ENVIRONMENTAL LAW

by Adam Torem¹

Ever since Chief Justice Marshall declared the United States Supreme Court to be the final arbiter on all constitutional issues in Marbury v. Madison,² the American judiciary has influenced nearly all of our political and legal concerns. This article addresses those influences, specifically on environmental laws and policies. After a short introduction, there is a brief synopsis of the careers of Judge Skelly Wright and Justice Stanley Mosk, two men whose writings have been legendary in environmental law circles. The centerpiece of the article is an interview with Judge David Ezra, a relatively new member of the District Court of Hawaii, who has decided a number of environmental cases. Finally, we present some expectations about the future of judicial interaction with environmental law.

The Influence of (In)Famous Judges and Justices

While Congress creates laws for the Executive Branch to enforce, it is only the courts which wield the powers of injunction and review of governmental actions. Sometimes, however, members of the court can become more than just judges; they can

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carry a torch of reform or hold an entire nation steady in difficult times. The names of Benjamin Cardozo, Oliver Wendell Holmes, Earl Warren, and perhaps even Antonin Scalia will be long remembered by all American citizens, not just the law students and attorneys who deal directly with their writings.

Environmental laws are not excepted from the influence exerted by federal and

state courts. In fact, these laws have a special relationship with the judiciary. Most environmental statutes contain citizen suit provisions, allowing the judiciary to take an active role in their enforcement. Further, the provisions of the Administrative Procedure Act have allowed conservation organizations standing to sue for a number of environmental "injuries" brought about by agency action or inaction. Environmentalists have often dragged delinquent federal agencies before receptive panels of appellate circuit courts, and this promises to continue despite Justice Scalia's doorslamming decision in Defenders of Wildlife v. Lujan³ last summer.

Perhaps even more important, courts have the power to create common law, especially when faced with a matter of first impression. While environmental law is largely statutory in nature, several "environmental" doctrines date back to common law and are most receptive to activist judicial wrangling. For instance, the public trust doctrine was utilized by Justice Field in Illinois Central⁴ to justify the nullification of a contract purporting to sell the majority of the Chicago harbor and waterfront into private ownership. Similar landmark decisions have come from nuisance law, and Western water law has its origins in court-endorsed customs practiced by the California mining community. Further, the concept of a "reserved water right" did not exist until U.S. v. Rio Grande Dam & Irrigation Co.⁵ and Winters v. United States.⁶

Even without common law powers of creativity, judicial interpretation of statutes and the Constitution can change the "obvious" outcome of a case. For example, early interpretations that broadly construed the scope and meaning of the National Environmental Policy Act (NEPA) probably surprised even the congressmen who authored

it. Regarding the separation of powers, Justice Thomas recently decided that a Congressional appropriations rider naming two cases by docket number did not violate this principle that denies Congress the power to determine the outcome of cases currently under judicial review.⁷ With new environmental legislation, the courts retain freedoms to interpret them, unbound by prior case law. Obviously, the judiciary has the power to act as a co-equal branch of government when dealing with environmental issues and the "plain wording" of statutes.

Giants of Environmental Law

Judge Skelly Wright (1911-1988)

Skelly Wright began his 37 year judicial career in 1949, appointed to a federal trial court in New Orleans by President Harry Truman. He presided over the integration of schools in southern Louisiana and numerous other societal upheavals, earning the attention of President John F. Kennedy and an appointment to the D.C. Circuit Court of Appeals.⁸ It was in Washington, D.C., that he made his mark in the world of environmental law, but he never gave up his main goal of providing justice to each litigant who came before him. It was this lofty principle that led him to dissent 134 times during his service in Washington, D.C.⁹

In the environmental field, Skelly Wright took part in and authored decisions regarding international whaling,¹⁰ the Trans-Alaska Pipeline,¹¹ the liquid metal fast breeder reactor program,¹² and numerous other NEPA cases. Perhaps most famously, he authored the Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n¹³ decision, the first detailed appellate review of NEPA.

In Calvert Cliffs, Wright gave NEPA a broad reading. According to Judge Wright, the mission of the court was "to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the

federal bureaucracy."¹⁴ While focusing on the procedural requirements of NEPA, Judge Wright managed to create a fairly substantial zone of judicial review of an agency's "individualized consideration and balancing of environmental factors" in reaching their decisions.

Calvert Cliffs demanded federal agencies to take the initiative themselves when considering environmental factors, and not rely upon interest group challenges. Here, Skelly Wright succeeded in pointing out the moral obligations of our government, a high expectation that would be challenged in later cases.¹⁵ It is for these judicial extensions of the law that Skelly

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Wright is best remembered, and his reasons behind them are certainly best explained in his own words:

"I guess I am an activist, but I want to do what's right. When I get a case, I look at it and the first thing I think of automatically is what's right, what should be done -- and then you look at the law to see whether or not you can do it. That might invert the process of how you should arrive at a decision,...., but if you don't take it to extremes, I think that it's good to come out with a fair and just result and then look for law to support it."¹⁶

Skelly Wright may well be the most famous Circuit Court judge of his time. To environmentalists, his influence will always be remembered as friendly, fair, and pioneering.

Justice Stanley Mosk, Supreme Court of California

In California, Stanley Mosk's role in the environmental law community is legend. The California Environmental Quality Act (CEQA), the state's version of NEPA,

would never have been as powerful without his decisions.

Friends of Mammoth v. Mono County¹⁷ was the tone-setting decree by which CEQA was determined to apply to nearly every development activity in the State of California. If any private person needed a municipal or state permit to build or modify something, the CEQA process was triggered.

Justice Mosk also lent his creativity to expanding the public trust doctrine in California. In Marks v. Whitney,¹⁸ a landowner wanted to fill some tidelands along the Tomales Bay. While none of the traditional public trust uses (navigation, fishing, and bathing) were applicable to Mr. Marks'

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property, Justice Mosk found flexibility in the doctrine to accommodate evolving public needs. Preserving the tidelands in a natural state held importance to the public in the form of "ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area."¹⁹ This powerful language reinforced the public trust doctrine and extended it to aesthetic and recreational uses, creating a lasting legacy for Californians.

Some years later, Justice Mosk asserted the long reach of the public trust doctrine, beyond California's tidelands to its inland lakes.²⁰ Soon thereafter, the Mono Lake²¹ decision, though written by Justice Allan Broussard, was thought to be heavily influenced by the writings of his colleague Justice Stanley Mosk. Mono Lake extended the public trust doctrine to protect the non-navigable tributaries of trust waters, a quantum leap for California jurisprudence. With the upcoming battles over water allocation in the Central Valley,²² the doctrines created

and developed by Justice Mosk are sure to provide a strong foundation for environmentalists.

INTERVIEW: Judge David Ezra, District of Hawaii (19 Nov 92)

[Ed.Note: Judge Ezra recently attended an Environmental Law "short course" specifically designed for judges at Lewis & Clark College's Northwestern School of Law. While there, he related many of his experiences to a class on wildlife law and agreed to give this interview. An edited transcript follows.]

Personal Background

ENV: How did you become interested in the legal profession?

J. Ezra: I always had a strong interest in law and, from as far back as high school wanted to be an attorney.

ENV: What brought you to the judiciary?

J. Ezra: I was nominated to the bench in November of 1987, by President Reagan.

ENV: Have you always been with the District of Hawaii?

J. Ezra: I am permanently assigned to the District of Hawaii, but I have been designated to sit in other districts of the 9th Circuit. I've heard cases in Idaho, Arizona, Montana, and in two districts of California. Also, I have been designated to sit on the 9th Circuit Court of Appeals on several occasions.

Environmental Law: A Judge's Perspective

ENV: What was your first "environmental" case?

J. Ezra: The "first" major cases were the Greenpeace suit (involving transportation of

chemical armaments from Germany to the Johnston Atoll) and *Morgan v. Walter* (a complex Endangered Species Act decision regarding a rare freshwater snail in Idaho). Both cases came up at about the same time. Since those, I have had a number of sewage and pollution cases and much additional exposure to environmental cases.

ENV: Did you feel overwhelmed or ill-equipped when confronted with the plethora of complex environmental statutes?

J. Ezra: I went to law school in the late 1960's and early 1970's. At that time, the environmental laws that we take for granted and litigate so extensively today were not being enforced or were not even on the books yet. It was not the focused topic in law school that it is today. Many of the environmental organizations like the Sierra Club and even Greenpeace were around, but they were not as active as they are today. Anyone who graduated from law school when I did, or before, certainly did not get an environmental law education. So yes, I did find myself very challenged by these cases and laws.

ENV: How did you educate yourself about all these environmental laws? How important were your law clerks in that process?

J. Ezra: I'm still learning. What you do as a judge faced with a new law is study the statute, get your hands on as much legislative history as possible, and conduct some independent research into the precedents controlling or influencing the area. Being lucky, as I was, with good law clerks can provide an additional source of information and perspective. Self-education is part of the job when you become a judge, and it takes a lot of time. The laws continue to be interpreted and amended, so it never ends.

ENV: Environmental laws often reflect a conservationist or even a preservationist

ethic. How do your personal feelings on nature and the environment influence your reading of the statutes, especially when construing legislative intent?

J. Ezra: My job is to be unbiased, with a fair and open outlook on the facts. If you're asking for my feelings on the environment, of course I care about the environment. I am concerned about what happens in Hawaii. I grew up here, and it is a beautiful, but fragile ecosystem. In Hawaii, I think that any responsible person would have similar feelings. Beyond that I keep my

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personal preferences out of the courtroom and out of my judicial decisions.

ENV: Scientific evidence in environmental cases can be difficult to understand (i.e. population biology equations and projections in ESA cases, chemical formulas in pollution control cases, etc.). Should a judge have specific knowledge about the science behind the laws? Should a separate "science court" be set up for complex cases?

J. Ezra: I have thought a lot about this issue. As far as I can see, a separate science or environmental court isn't really needed or justified. In the context of a well-prepared case, good lawyering will do the job. Fortunately for me, I've been blessed with good attorneys on all sides.

I think lawyers understand that the judge is not necessarily a naturalist, not a scientist, and will not understand the particulars of the science involved in the litigation. What they do is present you with experts, excerpts of testimony from depositions of experts, or

other matters which assist in the learning process. Good lawyers will recognize that their job is to educate the judge or, as the case may be, a jury.

I've seen a jury become reasonably proficient in the science that goes into sewage treatment. This occurred in the context of a criminal prosecution under the Clean Water Act, and they had to be taken beyond any reasonable doubt. If it is done right,

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and the judge makes sure that the jury sees the site, the important points can be taught. I'm not exceptional in any regard, but I've felt comfortable with my understanding of the science in the cases I've decided.

ENV: Despite the learning abilities of the judiciary, do you think that the specialized water courts of Colorado or the federal bankruptcy courts offer any conveniences to judges?

J. Ezra: Not necessarily, as there just aren't enough cases to keep an Article III court in each of many federal districts busy solely with environmental issues. I wouldn't advocate placing a court in some centralized place, either, since the local courts are there for the local populace to try their cases. District court judges are expected to try complicated cases, and I think that the system as a whole, including the current appellate system, does a good job with environmental cases.

ENV: The recent Supreme Court decision of Defenders of Wildlife v. Lujan has again made standing a prime issue in environmental cases. Do you think that the existing framework of Lujan and Article III require-

ments provide an adequate voice for environmental plaintiffs? What rights should individual organisms have in our judicial system? Should trees have standing?

J. Ezra: I would love to respond to this question, but this is an issue facing me in a current case, the Hawaiian Crow litigation. As you know, the Canon of Judicial Ethics prohibits me from discussing any aspect of pending cases, so I really can't comment, despite the intriguing issues your question raises.

Specific Cases Decided by Judge Ezra

[Ed. note: The reader who is not familiar with the following cases is given a very brief summary of the issues as well as a citation to the appropriate case reporter.]

U.S. v. Kaneholani²³ (conviction dealing with aboriginal rights to take the endangered Hawaiian Monk Seal or endangered sea turtles for sustenance purposes)

ENV: When presented with aboriginal rights, do you find any special considerations for these people? Should their treaty rights be broadly or narrowly construed?

J. Ezra: In this case, there were no treaty rights existing for the Hawaiians. Currently there is a big controversy over the Hawaiian's right to some level of sovereignty. In the case, though, the defendant asserted a violation of the equal protection clause, comparing himself to a native Alaskans' enjoyment of the right to hunt marine mammals which would otherwise have been protected by the Marine Mammal Protection Act. This claim failed, based mostly on the big difference in the necessity of the subsistence hunting in the different areas. Certain native Alaskans [Ed. note: such as the Inuit] must rely on their customary hunting traditions to obtain food, because there really are no other alternatives. In Hawaii, on the other hand, there are

normal, everyday channels for obtaining food. Under the law and these facts, this distinction exists. In fact, both of the convictions were upheld on appeal.

I did not decide in the case whether or not past injustices to the native Hawaiians, dating back to the U.S. takeover in 1893, create a circumstance where a special status might be granted. As I noted, that is a hot issue for us right now. The Trust arrangements for Hawaii does provide some special status, but nothing really comparable to the status and sovereignty given to the American Indians or other indigenous peoples in the United States. As the law now exists, the taking of the seal was illegal. As a side point, many native Hawaiians pointed out that there was no history of early Hawaiians consuming monk seals.

Greenpeace USA v. Stone²⁴ (dealing with NEPA's extraterritorial application to transportation of chemical munitions through the Federal Republic of Germany and across oceans en route to Johnston Atoll for destruction by the U.S. Army)

J. Ezra: Before we really get into this case, let me update you on the status of it. It is very much alive, so I would be compromising myself and the litigants if I suggest my feelings on issues that remain potentially open. The toxics and chemical armaments arrived safely at the Johnston Atoll's JACADS facility and are currently awaiting destruction. That transportation was the subject matter of my earlier ruling, but now the question remains whether an EIS should be required for the destruction.

I am sure to be asked to enjoin the operation of the facility, so any real discussion would be difficult without touching on current issues. This is not a small case, and when it's all over I would really enjoy having an open discussion of what really went on in my mind. Again, the Judicial Canon of

Ethics is quite broad, so it limits my ability to espouse my opinion or explain my reasoning here.

ENV: Do you feel your decision denying the extraterritorial application of NEPA should apply to more than just the facts of the Greenpeace case?

J. Ezra: When any U.S. District court rules on a broad issue like that, the influence of the decision really depends on how well documented and researched the opinion is, and how well it is accepted by the Court of Appeals. As you know, the trial court's opinion isn't binding precedent for any other court. It can be very persuasive for others, but it isn't binding. Ultimately, it's up to the Courts of Appeals to decide how swayed they are by the judge's logic.

I think the Greenpeace opinion should be fairly convincing, but there were some special facts upon which it could be distinguished, like the Executive Agreement between German Chancellor Helmut Kohl and Presidents Reagan and Bush.

[Ed. note: President Bush had agreed to accelerate the removal promised by President Reagan.]

Blue Ocean Preservation Society v. Watkins²⁵ (dealing with necessity of an EIS for geothermal projects in Hawaii)

ENV: What is the current status of geothermal energy production in Hawaii?

J. Ezra: That case dealt with the construction of transmission facilities on the big island of Hawaii and laying cables to get the electricity to Honolulu. My involvement came only by issuing an injunction against any further federal government financing or participation until an EIS had been completed. I understand that one is being prepared now.

Geothermal energy is a controversial issue in Hawaii. The volcanic activity offers a unique source of power, but there are many concerns about the consequences of harnessing it. The State of Hawaii is developing a facility on the big island, and I expect that the federal government will be asked to step back in sometime soon. *[Ed. note: Hawaii's volcanoes are some of the most active and central in the "Ring of Fire" encircling the entire Pacific Ocean.]*

ENV: What special insights can you offer on NEPA after dealing with it for several years? How could it be improved?

J. Ezra: My view is that a judge's role is to interpret the law, not try to change a statute.

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These environmental statutes are all very complex, and I don't know that there's any way that NEPA could make my job any easier. NEPA is a good and a workable law. I think the purposes behind it are good, appropriate, and necessary. I certainly don't fault the law, but question the way it is interpreted and applied at times.

In re Alala (Hawaiian Crow) (in progress, 1992) (dealing with the U.S. Fish & Wildlife Service's (USFWS) ability to regulate the remaining population of approximately 12 Hawaiian Crows which continue to exist only on private ranchland)

J. Ezra: This case involves the limits that constrain USFWS when implementing a recovery plan for listed endangered species or designating critical habitat. *[Ed. note: Particularly, when there is an endangered species living in a pristine habitat that exists solely on private land, with no potential*

harm from the landowner, can USFWS go onto that property to take action for the benefit of that species?]

USFWS has taken the position that they can't take any action when a private landowner is not harming the endangered species, but the plaintiffs are demanding that the government take some affirmative action. I can't discuss the matter further since the case is still pending.

ENV: Do you see property rights as a significant barrier to the protection of natural resources, especially in light of the Lucas decision?

J. Ezra: Well, the 5th Amendment Takings jurisprudence that has been such a hot topic lately certainly affects endangered species cases. Obviously there are competing interests between the Endangered Species Act and private property rights.

ENV: Is there anything else that you would like to add?

J. Ezra: Perhaps five or ten years ago we wouldn't be discussing environmental law, but more and more of us are dealing with NEPA, the ESA, the Clean Water Act, and many other environmental statutes on a daily basis. My current docket has several major environmental cases pending, and I don't expect that will ever change.

ENV: Judge Ezra, we would like to thank you for your time and your insights. I'm sure that our readers will get a greater understanding of just how many complex issues you're presented with as well as the way you deal with them. Thanks!

J. Ezra: You're very welcome. I'm sorry that I can't go into more detail on the specifics of many of your questions. Sometimes being a judge can be very restrictive, but I hope I've offered you a little more perspec-

tive on what my job involves.

Looking Forward: Potential Influence of Clinton/Gore Appointees

The new Democratic administration of President Bill Clinton and Vice President Al Gore promises to be much more environmentally friendly than the last 12 years of a Reagan-Bush agenda. Despite Clinton's lack of a green record during his years as governor of Arkansas, Al Gore has been touted as the country's new environmental czar. His book, *Earth in the Balance*, sets out Gore's plan for a Global Marshall Plan for the environment, as well as a shrill cry for attention to the world's environmental problems. Even if only a portion of Gore's ideas are implemented, the United States will have a chance to resume world leadership with a second "green revolution," this time in law and industry. Initial agency appointments promise strict enforcement of environmental laws, and perhaps the development of a Leopoldian land ethic.

Besides the new policies expected from the Executive Branch, there are scores of judicial appointments to be made. Most obviously, the Supreme Court is sure to have at least one retiree in the next four years. Justice White has announced his retirement; rumors suggest that since he was appointed by a Democrat, he feels that resignation during President Clinton's tenure would be equitable. Also, Justice Black

mun, age 84, has repeatedly expressed his desire to step down, and President Clinton will have the chance to appoint his successor.²⁶ While these two potential appointments won't recalibrate the balance of votes on the Court, they might insure against any further tipping toward a more conservative judicial branch.

In the federal courts, there are 828 judgeships over which the President holds appointment powers. 179 of these are at the appellate level, with 649 at the trial level; all federal judicial appointments are for life, unless individual behavior or fulfillment of duties results in an impeachment. Over 100 of these positions remain unfilled after the Reagan and Bush Administrations, who left their marks on nearly two thirds of the federal judiciary. President Clinton's opportunities are similarly vast.

The 1990's bring great hopes for environmentalists looking for a world of changes. While a new administration is guaranteed to be around for at least four years, environmentalists and their lobbyists should not overlook the Senate Judiciary Committee's hearings during these times, as the decisions made there will be the legacy that a Clinton/Gore Administration leaves to America long after their names appear on Trivial Pursuit cards.

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ENDNOTES

1. I would like to thank Daniel Muller for his assistance in the formulation of this article.

2. 5 U.S. (1 Cranch) 137 (1803).

3. 112 S.Ct. 2130 (1992).

4. 146 U.S. 387, 13 S.Ct. 110 (1892).

5. 174 U.S. 690 (1899).

6. 207 U.S. 564, 28 S.Ct. 207 (1908).

7. See *Robertson v. Seattle Audubon Society*, 112 S.Ct. 1407 (1992). Some scholars attribute the origin of this power of a judge to read exactly what he or she wants into or out of a statute to Humpty Dumpty. In the tale of *Alice in Wonderland*, Humpty Dumpty postulates "When I use

a word, it means just what I choose it to mean—neither more nor less." See Lewis Carroll, *Through the Looking Glass*, in The Complete Works of Lewis Carroll at 196 (1939), as cited by Chief Justice Burger in TVA v. Hill, 437 U.S. 153 (1978), note 18.

8. See *In Memoriam: Judge J. Skelly Wright*, 57 Geo. Wash. L. Rev. 1029 (1989). Many of Judge Wright's colleagues believe that it was his strong anti-segregation beliefs which prevented him from being appointed to the 5th Circuit Court of Appeals, a bench that would have kept him in New Orleans for his entire judicial career and certainly have limited his exposure to the national environmental issues he encountered in Washington.

9. See Wald, Patricia M., *In Memoriam: J. Skelly Wright*, 102 Harv. L. Rev. 363, 366 (1988).

10. American Cetacean Soc'y v. Baldrige, 768 F.2d 426 (D.C. Cir. 1985), rev'd sub nom., Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986).

11. Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 917 (1973).

12. Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973).

13. 449 F.2d 1109 (D.C. Cir. 1971).

14. *Id.*

15. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) (J. Rehnquist reversing the Court of Appeal's requirements for more than a literal following of NEPA's procedural guidelines); see also Baltimore Gas and Electric Co. v. NRDC, 103 S.Ct. 2246 (1983) (J. O'Connor reasserting the Vermont Yankee limitations on the judicial activism practiced by J. Skelly Wright).

16. See J. Bass, Unlikely Heroes, at 116 (1981). Several other books on Judge Wright are also available: A. Selwyn Miller (ed.), On Courts and Democracy: Selected Nonjudicial Writings of J. Skelly Wright, Greenwood Press (1984); A. Selwyn Miller, A "Capacity for Outrage": The Judicial Odyssey of J. Skelly Wright, Greenwood Press (1984).

17. 502 P.2d 1049 (Ca. Sup. Ct. 1972).

18. 491 P.2d 374 (Cal. Sup. Ct. 1971).

19. *Id.*

20. The shoreline around Clear Lake was at issue in State of California v. Superior Court (Lyon), 625 P.2d 239 (Cal. Sup. Ct. 1981). Lake Tahoe's public trust uses were addressed in State of California v. Superior Court (Fogerty), 625 P.2d 256 (Cal. Sup. Ct. 1981).

21. National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, cert. denied 464 U.S. 977, 104 S.Ct. 413 (1983).

22. Title 34 of the recently adopted Omnibus Water Bill addresses the federal government's Central Valley Project (CVP) and the irrigation water it contracts to sell. Fish and wildlife preservation has been raised to a high priority by the new law, and while these issues will probably remain in the federal courts, a future transfer of ownership of the CVP to the State of California might allow state courts to apply public trust law to the Central Valley.

23. 773 F.Supp. 1393 (D.Hawaii 1990).

24. 748 F.Supp. 749 (D.Hawaii 1990).

25. 767 F.Supp. 1518 (D.Hawaii 1991).

26. Among the choices mentioned to replace Justice White, the following names have been discussed: Judge Amalya L. Kearse (2d. Circuit); professor Lawrence Tribe (Harvard Law School); Jack Greenberg (dean of Columbia College, formerly of NAACP Leg. Def. F.); and Barbara Jordan (former U.S. Representative, now at LBJ School of Law, Austin, Texas.).