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Session I: The Legacy of Justice Arthur Goldberg, 29 J. Marshall J. Computer & Info. L. 285 (2012)

Samuel R. Olken
John Marshall Law School, solken@uic.edu

Gerald Berendt
John Marshall Law School, 7berendt@jmls.edu

Gilbert A. Cornfield

Gilbert Feldman

David Stebenne

See next page for additional authors

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Session I: The Legacy of Justice Arthur Goldberg, 29 J. Marshall J. Computer & Info. L. 285 (2012)

Authors

Samuel R. Olken, Gerald Berendt, Gilbert A. Cornfield, Gilbert Feldman, David Stebenne, and Milton I. Shadur

**SESSION I:
THE LEGACY OF JUSTICE ARTHUR
GOLDBERG**

MODERATOR:

SAMUEL R. OLKEN
PROFESSOR, THE JOHN MARSHALL LAW SCHOOL

PANELISTS:

GERALD BERENDT
PROFESSOR, THE JOHN MARSHALL LAW SCHOOL

GILBERT A. CORNFELD
CORNFELD AND FELDMAN

GILBERT FELDMAN
CORNFELD AND FELDMAN

HON. MILTON I. SHADUR
SENIOR JUDGE, U.S. DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS, EASTERN DIVISION

DR. DAVID STEBENNE
PROFESSOR, THE OHIO STATE UNIVERSITY

PROFESSOR SORKIN: I'd first like to thank Dr. Etzioni for challenging us to consider privacy in a broader context and for his fascinating remarks. We now move to Session I, Examining the Legacy of Arthur Goldberg. Our moderator will be my colleague, Professor Samuel Olken of The John Marshall Law School, who teaches and writes in the areas of constitutional law and legal history. Professor Olken.

(Applause.)

PROFESSOR OLKEN: Thank you, David. To appreciate the legacy of Arthur Goldberg, one needs to understand that his work as a labor lawyer reflected a steadfast commitment to the autonomy and personal dignity of the individual. Indeed, these are also two of the core policies at the heart of the right of privacy. Goldberg's considerable efforts on behalf of the men and women of labor, who sought to assume control over their working conditions, and his devotion to the process of collective bargaining emanated from his implicit recognition that the integrity of labor relations mandates that employers respect the freedom of their employees to choose whether to join a union. Accordingly, this choice is derived from the applied First Amendment freedom of association, a constitutional liberty that Goldberg and six other Supreme Court justices recognized as integral to the implied fundamental constitutional right of privacy. Therein is the link between Arthur Goldberg's considerable legacy as a labor lawyer and his famous concurring opinion in *Griswold v. Connecticut*. The autonomy of the individual, the dignity of the person, and the freedom to choose one's associates are not only essential attributes of the constitutional right of privacy but were also values that influenced Arthur Goldberg's life in the law. This first panel, comprised of a jurist, three eminent labor lawyers, and Arthur Goldberg's biographer, will discuss his legacy in labor relations and on the Court. Our first speaker is the Honorable Milton I. Shadur, senior district judge of the United States District Court for the Northern District of Illinois, Eastern Division, and a federal judge since 1980, who will share with us some of his reminiscences about Arthur Goldberg's early law practice in Chicago during the 1930s and into the 1950s. Judge Shadur.

JUDGE SHADUR: Well, let me start out by saying that they allocated ten minutes to me. And those of you who know *The Tales of Hoffmann* know that when they wound up the doll, the time for her to run out would be long past ten minutes. So I violated a lifetime rule by writing things out and I hope that you will pardon me for that.

When I was first asked whether I'd say a few words at these ceremonies that celebrate my former partner, Arthur, I was, of course, enormously flattered and immediately responded, "I'd be delighted to do

that.” But shortly after that I realized the organizers had made a serious mistake, which you’ve just heard repeated and, that is, when the general invitation got down to specifics, I was told that I’d be expected to provide some insight as to Arthur’s early days in practice in the 1930s and 1940s.

Now, you can tell by looking at me that I’m antediluvian, but, you know, after all, last month would have been the 104th anniversary of Arthur’s birth; and even I don’t go back far enough to provide anything, other than, of course, hearsay, which is verboten, you know, in that score.

Well, anyway, when I made that plain to the sponsors, they were very gracious, they didn’t rescind the invitation. So the question shifted to just what the extent of my brief input ought to be. It struck me that occasions on which people, or organizations, engage in carrying out what was described in Ecclesiastes as “Let us now praise famous men,” that was chauvinistic, of course.

Too often in dealing with those famous men of earlier generations, the tendency was to deify them, or at least to dehumanize them, in favor of limiting the discussion to their public personae. So I decided to spend my few minutes in telling you something about the human being whose public accomplishments we celebrate today and tomorrow. In terms of those earliest days, I will share one hearsay anecdote with you.

Our law firm began as Goldberg and Devoe, just two lawyers, Arthur and Carl Devoe. They cofounded the firm when the two came back to Chicago to practice after World War II. Both of them had been, if you’ll pardon my saying so, in the OSS, the predecessor of the CIA, an odd couple, right, under General Wild Bill Donovan. Arthur was in the Army, Carl was in the Navy.

After I became a partner, Carl told me about the formation of the firm when both of them, good friends before the war, arranged to get leave at the same time. And they met in Casablanca where they decided that if each of them were to survive the war, which was a question, they would indeed go into practice together.

Now, the way Carl told me the story, they were sitting on a hillside in Casablanca that evening talking about the future. And Carl realized that Arthur, who was facing him, seemed to be looking over his shoulder and not listening to what Carl was saying. So Carl turned around and he saw, framed in a lighted window, in an apartment building across from the hill, a nubile young woman unself-consciously undressing herself, because she had no reason to think that the hill opposite was populated. Now, the way Carl put it, theirs was the only law firm in history that was formed to the accompaniment of a striptease.

More seriously, I particularly wanted to share with you something about Arthur’s sense of the practice of law as a profession, which I fear—

and don't get me started on this—has changed a good deal, something about which I learned about during my first meeting with him.

As it happened, I'd been referred to the law firm by one of my law professors who knew that things had not worked out with the firm's only associate, a young associate, and they were looking for a replacement. Now, that first interview ended with my being hired by the other two partners, Carl and Abe Brussell, because on the date that we met Arthur was in Washington. At that point my recollection is that he was spending probably as much time in the air as he was spending on the ground in either office.

A few days later, I met Arthur and he said some things to me about the then profession of lawyering that really have stayed with me for a lifetime. Most vivid of all is his telling me that almost inevitably at some point in my career some client was going to want me to do something in the course of representation that I regarded as simply wrong from a moral viewpoint, from an ethical standpoint, maybe both. It didn't matter, as Arthur put it, how large the client was, how important the client was, even the Steelworkers. My recollection is that at about that time probably that represented a third of the law firm's total billing.

What Arthur said was that if that were to happen, we had to be prepared to tell the client to go to hell. As he put it, we can count on the fact that we're good enough lawyers so that we'll always be able to make a living, and we must be able to retain our independence and our integrity.

Now, that lifetime lesson, independence and integrity, is something that I've always thought about in kind of oxymoronic terms, that is, never rise above principle. Now, when I joined the firm, I learned that those precepts also carried with them a kind of generosity of spirit on the part of Arthur and, of course, Carl and Abe as well. Abe was the third partner who later became a distinguished state court judge in Chicago. Once you had the confidence of those people, there was no limit to the responsibility that they would place in your hands. Believe it or not, in my second year in practice, Arthur and Phil Murray, who was then president of the CIO, decided an amicus brief ought to be filed in the Supreme Court in what was then one of the equal protection education cases. At that time they were dealing primarily with colleges and professional schools.

One of those cases was called *McLaurin* against Oklahoma State Regents. Arthur called me up to say "Write the amicus brief." And what he said to me was "Just write it and send it in. There's no need to check it with me first." Remember, I was all of twenty-five years old, not yet a partner in the firm—that honor came to me at the end of my second

year—not a member of the Supreme Court bar, so my name couldn't appear on the brief.

Now, you can think, and I can hardly blame you if you do, that that reflected a kind of rash or even foolhardy judgment on Arthur's part. My own preference, however, is to demur, I prefer to believe that our experience together at that point, including an intensive stretch when I came to Washington the preceding year to work with him in developing a set of standards and hearing procedures for the possible ouster of then communist-dominated unions from the CIO, had led Arthur to make a value judgment on which he was unafraid to act.

As it turned out, I was young and foolhardy enough to write a brief that urged the Supreme Court to overrule the separate-but-equal doctrine of Plessy against Ferguson, four years before the Supreme Court got that message in Brown against Board of Education. But even though, Arthur's name and not mine had to be on the brief. So I had put him at risk. Fortunately, it gave rise to no explosions that impaired his standing before the Court.

Well, as you gather from the note that was handed to me, my time has been wisely limited in light of the wide spectrum that has to be occupied during these proceedings, even though what I think of as my anecdotage might otherwise lead me into the many years of my continued relationship with Arthur over the decades that followed his tenure as a partner.

It has been, I tell you, a singular honor to have been asked to provide this brief kickoff tribute to him.

But, one last point, as I've thought about it, I find it quite ironic that I have provided a small introduction to a session that's captioned "The Legacy of Justice Arthur Goldberg." And, of course, I'm talking about the fateful decision that deprived all of us of the value that Arthur would otherwise have continued to contribute to the Supreme Court and to our country as a whole. There I believe that Arthur's own strengths, his integrity, the other attributes that made him such a great lawyer and a great person, including, by the way, the belief that any appeal by a President carried with it a powerful sense that it had to be honored, made it easier for Lyndon Johnson to overcome his reluctance to leave the Court. In a sense, President Johnson was the one client, in quotes, whom Arthur didn't feel he could tell "to go to hell." And on that score, I personally believe that all of us, not just Arthur, suffered a great loss.

In short, to me, The Legacy of Justice Arthur Goldberg, as significant as your remaining speakers will demonstrate, as I've given them enough time to do that, was far more brief and far more incomplete than it really should or could have been.

(Applause.)

PROFESSOR OLKEN: Our second speaker is Gil Cornfield, cofounder of the Chicago labor law firm, Cornfield and Feldman, a firm created in 1960 by Mr. Cornfield and another panelist today, Gil Feldman. Their firm, Cornfield and Feldman, is the successor to Brussell and Goldberg, a union-side labor practice developed by Arthur Goldberg and his partner, Abraham W. Brussell, prior to Goldberg's moving to Washington, DC, to become general counsel of the CIO and of the United Steelworkers of America.

Mr. Cornfield's talk is: Arthur Goldberg, the Attorney, as a Participant in a Social Movement.

MR. CORNFIELD: Actually, I did not meet Arthur Goldberg until many years after 1960 in connection with our first litigation challenging the patronage system. And that was after the Secretary of Labor experience, Supreme Court experience, and UN experience. And I met him in Washington to review what we were doing on behalf of the American Federation of State, County and Municipal Employees. What I'm supposed to be talking about is Arthur Goldberg's legacy. And in a certain sense I'm here, as has been indicated, because of that legacy. And I started with Gil Feldman and other people working with Abraham W. Brussell after Arthur Goldberg had moved to Washington to become general counsel of the CIO and the United Steelworkers of America. The firm Milt Shadur was part of was kind of bifurcated. Brussell went off by himself with basically the labor practice and successively hired a bunch of young associates, one of which I was and then Gil Feldman.

I want to talk a little bit about the historical context of Arthur Goldberg. He is unique as an individual but part of a whole group of people that emerged in the 1930s and in a certain sense were archetypes for lawyers as participants in the labor movement. The labor movement really wasn't the client, you were a participant. And characteristic of those people in the '30s, where they were exceptional in several ways, they were predominantly Jewish. They almost all had very significant academic backgrounds. For instance, Abe Brussell came out of Minnesota, was a Harvard graduate, law school graduate, in the '30s when there were very few Jews. And Arthur Goldberg was a graduate of Northwestern Law School also when there were very few Jews.

Now, these individuals had a wide range of ideological perspective, from far left to involvement in movements in part because there were no real alternatives for them. I remember some years ago being involved in an Illinois Humanities Council project concerning the labor lawyers of that period and particularly the Jewish labor lawyers of that period.

So what is the legacy from that perspective in terms of Arthur Goldberg? He enabled myself and others in the next generation to continue as participants in movement, the labor movement. By the time Arthur Goldberg was appointed to the Supreme Court—yes, it was called a labor movement—he had become established, in similar ways as Thurgood Marshall became a great judge and justice after the civil rights movement, had become part of our ethos.

What happened is that from the late '50s through the '60s new social movements emerged. And they kind of bridged each other, in some sense they were sequential. There was the antiwar movement, the civil rights movement, and the public employee labor movement was really an outgrowth of those two things. Because, as young associates in this law firm, we were in our twenties at the time, we were able to get involved in these social movements in a very similar way that the earlier people, such as Arthur Goldberg, had become involved as participants in those social movements.

And it is that legacy that is so significant in terms of individuals such as Arthur Goldberg from that period and is almost peculiar to the American experience of the twentieth century of the lawyer as a participant in a social movement.

It's also, just as a note, the time that I came on board was after Goldberg had gone to Washington to become general counsel to CIO. It's very interesting, and I think Jerry said I shouldn't shy away from this, that Arthur Goldberg was a very big proponent of the merger and was to a great extent behind the merger of the CIO and the AFL. Interestingly enough, Abe Brussell, when he had spun off from the firm, was general counsel to the CIO in Illinois. And I know, and having talked with Abe, that he was opposed to the merger because he saw that the AFL would dominate and they would lose the sense of ideology. I mean, one can go around on that. I'm just making the point and just describing that. So it's just an interesting comment in that regard.

One last comment about the lawyer as a participant in the labor movement. And I don't know if Judge Shadur knows this from his earlier experience at the firm, but when we came on board there was hardly any billing going on for the unions we represented. We lived literally off of Workmen's Compensation. And I believe that that was probably true before us, because Brussell was active in terms of Workmen's Compensation, and I believe that probably in the '30s and '40s, as these lawyers became participants in the labor movement, that was really their source of livelihood. And that remained with us for several years. Not until well into the '60s and even beyond that we could start having a lawyer-client relationship with a labor organizations we now represent.

Thank you.

(Applause.)

PROFESSOR OLKEN: Our third speaker is Gil Feldman, cofounder of Cornfield and Feldman. His talk is: Arthur Goldberg, His Impact on History and On Me.

Gil.

MR. FELDMAN: For the first time in my life I have written down a talk word for word, which I'm to give to stay within my allotted time. Fortunately, Brother Cornfield has covered some of these items, which I can cross off of my notes, and has done it more eloquently than I could.

Arthur Goldberg fundamentally influenced my professional career, yet I did not know him personally. I met him only once and just to shake hands, period. It was January 1961 and he had returned to Chicago to install his former labor law partner, Abe Brussell, as a newly elected judge of the Circuit Court of Cook County. Brussell, as has been mentioned, had retained the local CIO and Steelworkers' labor practice when Goldberg departed in 1948 to become general counsel of the Steelworkers and the CIO.

When Brussell became a judge, he had three young associates, two of whom had not yet reached the age of thirty, and we formed a law firm and assumed Brussell's then practice.

Since I only met him once, remaining in my memory are certain key features of his remarks on the occasion of Brussell's installation as a judge. First, he complained vigorously that Brussell should have been on the Illinois Supreme Court, not the Circuit Court.

Secondly, to my surprise, his great skill as a lawyer was not matched by his skill as an orator. This was amply demonstrated nine years later in his disastrous campaign against a very charismatic Nelson Rockefeller for governor of New York.

Third, he was absolutely exuberant about the forthcoming Kennedy administration in which he was about to serve as the Secretary of Labor.

Now, I knew of Goldberg before these events which we have discussed. He was well known in the '40s and '50s among young liberal lawyers in the Chicago area for a number of things he had been doing—and given ten minutes, I'll skip them—but we knew of him by reputation.

One thing that should be mentioned, in 1959-1960, the year before he became Secretary of Labor, as the Steelworkers' general counsel, he was severely tested in a way I don't think any labor lawyer was ever tested. Because he, in effect, was in charge of the four-month nationwide Steelworkers' strike over the steel industry's demand to modernize equipment so as to become globally competitive, a move that Goldberg

knew would result in the imminent or short-term loss of hundreds of thousands of jobs in the steelworker industry. I don't know of any other instance when a lawyer in a large union assumed such a role, and this was the largest strike in U.S. history, 116 days to be exact.

The union won the strike and the jobs were preserved for at least another decade until foreign competition forced plant modernization and eventually the closing of the U.S. steel mills.

It was 1963, only a few years later, when, in Illinois, AFSCME and the Illinois Federation of Teachers sought to engage legal counsel for the first time and their selection of our law firm was based largely on the heritage, going back to Goldberg, as well as our experience as CIO attorneys.

I think something should be said about his brilliance as a lawyer. And I have selected two cases from the United States Supreme Court in which he wrote concurring opinions. They stand out because they show how even if he reached the same result of other liberal judges at that time, his legal acumen went far beyond that of most of them because of his great understanding of the underlying issues involved.

The first one is *Humphrey v. Moore*. Justice Byron White wrote a majority opinion holding that an action challenging a union's decision agreed by the employer in favor of one of two competing groups of employees was governed by the written collective bargaining agreement. The issue arose because in collective bargaining a union often, of necessity, represents employees with conflicting interests, a situation that in other branches of law is deemed unethical requiring separate representation.

Goldberg, joined by Justice Brennan—and he was often joined by Justice Brennan, and I consider that the most brilliant duo of Supreme Court justices in the twentieth century—Goldberg wrote a concurring opinion contending that given a union's broad discretionary powers to settle disputes, the actions should be governed not by the contract but by the union's duty of fair representation under the Labor Management Relations Act. And frankly, in retrospect, it is difficult to understand how seven other justices failed to accept this clear reasoning.

His most important decision, I think, is one that, frankly, is not completely understood today. It was in *Griswold*. Justice Douglas found a constitutional right of privacy even though no such right was specified in the Bill of Rights. An archaic Connecticut law made it a crime to prescribe a drug to prevent pregnancy. Douglas's majority opinion declared the law an unconstitutional violation of a right of marital privacy which he wrote was within the, quote, end quote, penumbra of rights covered by the Bill of Rights.

Other justices dissented or concurred contending that although this law obviously was silly, that the Constitution contained no overall right of privacy and the Court had no power to create one. Goldberg wrote this concurring opinion, which I think great note should be taken of, because it's very important today. He based his argument on the Ninth Amendment, which expressly provides that the enumerated constitutional rights are not to be construed to deny other rights retained by people. That's in the Constitution. This amendment, for which James Madison was responsible, was adopted specifically out of concern that in its absence the government might be empowered to interfere with fundamental rights of people. On the basis of plentiful precedent and prevailing cultural attitudes, Goldberg then, after citing the Ninth Amendment, argued in a brilliant opinion why marital privacy fell within the category of fundamental rights.

Now, eight years later, relying on *Griswold*, the Court decided *Roe v. Wade*. Although there had been general agreement that the law struck down in *Griswold* was an abomination, there was no such national consensus in *Roe*. And the attack on the penumbra precedent was revived and persists to this very day. What difference it might have made if Goldberg's Ninth Amendment rationale had been the basis for the judgment in *Griswold*. Indeed, what a difference it might have made had he declined to succumb to President Johnson's plea that he leave the Supreme Court to become Ambassador of the United Nations, one of the worst decisions ever made by anybody in this country.

Gil and I were among those fortunate enough to gain from our direct inheritance from Goldberg's legal mettle. But in closing, there is no doubt that many other young labor lawyers have shared indirectly in the benefits of his extraordinary influence and for that we are very lucky.

(Applause.)

PROFESSOR OLKEN: Our fourth speaker is Gerald Berendt, Professor of Law at The John Marshall Law School, a distinguished labor lawyer who has held several governor's appointments to Illinois agencies, including chairman of the Illinois Educational Labor Relations Board and chairman and executive director of the Illinois Office of Collective Bargaining.

The author or coauthor of numerous books and articles, Jerry was also the chair of the very first Goldberg symposium this law school held back in 1998.

Professor Berendt's talk is: Arthur Goldberg, The John Marshall Law School and Secretary of Labor in the Kennedy Administration.

Jerry.

PROFESSOR BERENDT: Thank you, Sandy.

In e-mails that I exchanged with all of our speakers, other than Judge Shadur, we all struggled with the question of how we were going to link our talks about Arthur Goldberg's legacy to the question of privacy. You heard Gil Feldman do a fabulous job of talking about *Griswold* here, but I think the prize ought to go to Judge Shadur who managed to connect, or provide a segue, from privacy to what we're talking about with his anecdote about the woman undressing in the window in—*Casablanca*, was it?

JUDGE SHADUR: Ah, yes.

PROFESSOR BERENDT: And I might add to Gil Cornfield's remarks also about Abe Brussell not being particularly supportive of the merger of the AFL-CIO. When we founded the Goldberg conference, I invited steelworker legend, Ed Sadlowski, to be, and he did, serve on the advisory committee, notwithstanding the fact that he said that he and Arty, is the way he put it, disagreed over the merger, particularly the cleansing of the CIO of the unions that were said to have communist affiliation.

Well, let me begin by saying that you've now heard everything I have to say about privacy. Now, I did, in the early 1970s, as a law student, write a couple of law review articles, one on the rights of homosexuals and advocating decriminalization of homosexuality, and in part based upon *Griswold*. And I later wrote an article about abortion rights before *Roe v. Wade* and, of course, touched on privacy rights then. But that's it, that's the extent of my involvement in privacy issues for the most part.

My topic today is a twofold topic, really, Arthur Goldberg's association with The John Marshall Law School and his distinguished service as Secretary of Labor in the Kennedy administration. And I wish to acknowledge openly here that with respect to Arthur Goldberg's legacy as Secretary of Labor, I am relying heavily, to the point of plagiarism, on the outstanding biography of our speaker, our last speaker, Professor David Stebenne of The Ohio State University.

Arthur Goldberg first joined the John Marshall Law faculty in the 1930s as you heard. If you have a chance, in front of our main entrance to the library we have a case devoted to him and his association with John Marshall. There are photographs of him during that period on display in front of the library. And as you know, you should see the color of his hair. We all tend to think of Arthur Goldberg as a white mane, but his hair was quite dark and someone told me it was even —

MRS. CRAMER: It was black.

PROFESSOR BERENDT: —black. Was it raising the children or was it the CIO that did it? He continued to serve, let's see, he joined the faculty in the '30s, he continued to serve after the war into the late '40s, and was listed as a faculty member into the 1950s. During World War II, as you've already heard, he left Chicago and took a leave of absence from the John Marshall faculty as well to serve in the newly formed OSS, under Wild Bill Donovan, the predecessor agency to the CIA.

After the war, you also heard he returned to Chicago and practiced law. He had been with the firm of Goldberg and Devoe, later Goldberg, Devoe and Brussell, and it went through various other incarnations as time went by. He resumed teaching at John Marshall after the war. We know this because he taught members of our famous class of 1948 which produced a number of members of our Board of Trustees who were still here at the law school when many of us were hired, including two board presidents, Lou Biro and Al Gallo, and our longtime Associate Dean Helen M. Thatcher was in that class of 1948 also. Goldberg also taught students who later became members of our faculty, including Mel Lewis and Art Sabin.

President Biro, when we honored Justice Goldberg in 1998, we had a dinner and Lou Biro came over to several of us and told us, as he did frequently thereafter, that Arthur Goldberg was the law school's best teacher when he, Biro, was a student here.

During his extended service at John Marshall, he taught labor law, equity, torts, municipal corporations, constitutional law, and even bills and notes. And if you know anything about the history of the law school, and Noble Lee, who was the dean at the time, Arthur Goldberg probably taught all six of those courses on different nights in the same semester.

In 1948 Arthur left Chicago again, this time, as has already been reported, to go to Washington to become general counsel to the Steelworkers' Union and, I guess, for the CIO as well. He, however, continued to be listed on the faculty, but as on leave of absence, until 1955. We have somewhere in our collection, I have been told by the late Bill Lipinski, a letter from him resigning from the faculty because of his commitments that were keeping him in Washington.

And like any historical figure with a list of great accomplishments, Arthur Goldberg and his career, you know, you can tell from the conversation here, has taken on almost mythical proportions. His later career as a Supreme Court Justice, United Nations Ambassador, and Democratic nominee for governor of New York, have tended to crowd out the memory of his earlier accomplishments on behalf of the labor movement and his accomplishments for the working class and as Secretary of Labor in the first two years of the Kennedy administration. And that's one of the reasons we had this panel, to try to backfill that legacy, before the

rest of the conference is largely devoted to his Supreme Court accomplishments. He was appointed, again, to the Supreme Court in 1962 and that's when he left Secretary of Labor.

I met—this sounds like *deja vu*—I met Arthur Goldberg only once and it was at a John Marshall Law School commencement. I have a photograph of it somewhere at home. I've been digging around trying to find it. It was at the Palmer House Hotel in the mid 1980s. In the robing room before the commencement, Justice Goldberg patiently answered the frequently asked question, "Why did you leave the Supreme Court and how in hell did Lyndon Johnson convince you to do this?"

And I waited patiently while he answered. He must have answered that question a million times over the course of his career. When he was finished, the dean, Leonard Schrager, introduced me to him and we shook hands. Initially Justice Goldberg didn't make eye contact with me and I was a little bit concerned. But then Len Schrager introduced me as "our labor law professor," so I smiled and I said, "I'm not going to bore you with any of these trivial questions about Lyndon Johnson, the Supreme Court and the UN, I'm going to ask you about your relationship with Roger Blough." Roger Blough was the president of the United States Steel Corporation during the early 1960s when Arthur Goldberg was Secretary of Labor. And to put it mildly, he was a problem. He was a problem for the union, the Steelworkers of America. He was also a problem for President Kennedy and Arthur Goldberg.

When I said that, suddenly, like the old joke goes, slowly I turn, Goldberg turned and made eye contact with me and he said, "You know, nobody asks about that anymore and I'm glad you did." He then went off on what seemed like a fifteen minute lecture about that dispute, how the settlement that had been reached fell apart because of the duplicity of Blough, how Blough was trying to use the President and the United States Secretary of Labor to cover an increase in the cost that he wanted to pass on to customers of U.S. Steel, and it was quite a show.

Now, I told David Stebenne this story in 1998. And he commented to me that when he interviewed Arthur Goldberg for the purpose of writing the definitive biography of Arthur Goldberg, that Goldberg got very animated when Roger Blough came up then also. So I played him like a harp.

Goldberg and Blough, as I said, bumped heads during the Kennedy administration. So I want to tell you a little bit about Arthur Goldberg's connection to John Kennedy. And much of this is from some articles that he himself, or interviews that he himself submitted to, and also from David Stebenne's book.

Arthur Goldberg first met John Kennedy in 1948 when Kennedy was a member of the House of Representatives. Goldberg later commented

that Kennedy looked like a high school graduate in those days. They came to know each other much better over time as Kennedy served on the House, and then later the Senate, Labor Committees from 1947 until the time he was elected President in 1960.

Following the McClellan Committee hearings and other hearings, Goldberg worked closely with John Kennedy in 1958 and 1959 on Kennedy's ill-fated version of the Labor Management Reporting and Disclosure Act that we know as Landrum-Griffin, which was designed to amend Taft-Hartley and also to implement reforms governing internal union affairs and governance.

Later, when he ran for President, Kennedy, based on his experience with Goldberg, approached him and asked Goldberg for his assistance in Kennedy's efforts to obtain the Democratic nomination. But Goldberg had been a supporter of Adlai Stevenson here in Illinois. Stevenson had been the Democrat's standard bearer in two prior unsuccessful attempts to be elected President in 1952 and 1956.

After consulting Adlai Stevenson, who assured him that he would not enter the primaries—and he kept his word on that score—Goldberg surprised Stevenson and labor leaders by declaring his support for John Kennedy over Hubert Humphrey. Hubert Humphrey was a favorite of organized labor. He actually had a much better record on behalf of workers' issues and New Deal-type programs than did John Kennedy.

Goldberg reasoned that Kennedy had the best chance to win against the likely Republican nominee, Vice President Richard Nixon—and you remember him – and that Kennedy offered the best chance for progress also against social class and racial oppression.

Labor leaders were still angry with Kennedy over his role in the labor law reform legislation, and the AFL-CIO actually considered publicly announcing its opposition to Kennedy's candidacy. However, Goldberg weighed in on Kennedy's behalf. After Goldberg appeared at an AFL-CIO Executive Council meeting, a motion that had been introduced to oppose Kennedy's candidacy failed.

After the Wisconsin and West Virginia primaries, Humphrey dropped out of the race. That left Lyndon Johnson, whose only hope, really, was for a brokered convention. Since Johnson was not well loved by organized labor at that time, most of the labor movement lined up behind Kennedy with the exception, I understand from the book, of the building trades unions.

Although Eleanor Roosevelt—and I remember this myself—although Eleanor Roosevelt led a last minute Draft Stevenson Movement, Kennedy prevailed and won the Democratic nomination at the Los Angeles convention.

I was thirteen years old and I remember watching on television the high drama of the Stevenson supporters marching through the floor in snakelike fashion with signs to draft Adlai Stevenson, but that didn't work out.

Once Kennedy secured the nomination, Arthur Goldberg participated in the discussions over whom Kennedy would choose for his running mate. Goldberg preferred Hubert Humphrey, but Kennedy chose Lyndon Johnson to complete the ticket. And in November of 1960, Goldberg's work cultivating labor support for President, then, John Kennedy paid off particularly in the tight Illinois race, and I assume we have to give the old Mayor Daley some credit also. There are too many inside jokes here, aren't there?

And Johnson's place on the ticket did help Kennedy keep Texas and several other southern states in the Democratic fold, and Kennedy and Johnson prevailed.

After the election, Goldberg anticipated appointment within the Cabinet, but his personal commitment to civil rights and his dream of an appointment to the Supreme Court led him to want to be Attorney General, or perhaps the number two person in the Justice Department. Kennedy, of course, had other plans for the Justice Department; as you know, he appointed his brother Bobby Kennedy the attorney general and the number two person was the late Nicholas Katzenbach, who just died within a year or so.

President Kennedy decided to tap Arthur Goldberg as Secretary of Labor. Kennedy asked the AFL-CIO leader George Meany to send him a list of candidates for Secretary of Labor, fully expecting that Meany would include the obvious choice of Arthur Goldberg on that list. But according to David Stebenne's biography, Goldberg had picked up some enemies in the labor movement, much of it going back to the merger of the AFL and the CIO, and in the building trades. And some wanted a more traditional AFL person rather than Arthur Goldberg whose roots were in the CIO.

Goldberg was understandably upset by labor's initial failure to support his appointment, but the President-elect smoothed these matters with George Meany, and Goldberg's appointment then sailed through the Senate. Following the confirmation hearing, he received unanimous votes in both the Senate committee and the Senate itself. Although according to, I think it's your book, David, one senator arranged to have stomach cramps and avoid the vote.

PROFESSOR STEBENNE: That's right, one of the leading southern segregationists, right.

PROFESSOR BERENDT: By the way, he was the senator from South Carolina my entire life until he died.

PROFESSOR STEBENNE: Strom Thurmond.

PROFESSOR BERENDT: Strom Thurmond. Am I correct?

PROFESSOR STEBENNE: I believe that's right, yes.

PROFESSOR BERENDT: Goldberg had solicited the President-elect's promise that he could choose his own aides without patronage pressure from the Kennedy political operation. He kept many of his predecessors from the Eisenhower administration. But for the important undersecretary's position, he chose a Northwestern law professor, Willard Wirtz, who served on the Wage Stabilization Board in World War II and was already a celebrated arbitrator. Willard Wirtz joined us in 1998, one of his last public appearances, and spoke at the 1998 conference as well.

Wirtz, as you may know, followed Arthur Goldberg. When Arthur Goldberg was appointed to the Supreme Court, Wirtz was appointed Secretary of Labor to replace him in 1962. When Willard Wirtz spoke here in 1998 in an outstanding set of remarks, he remembered that Kennedy was reluctant to appoint him, Willard Wirtz, because Wirtz had been closely associated with Adlai Stevenson. Here we go again. But Wirtz credited Arthur Goldberg for going to Kennedy and smoothing Kennedy's still ruffled feathers, and Wirtz was the right person for the job.

To enforce the anticorruption provisions of Landrum-Griffin, Goldberg chose former NLRB member, James J. Reynolds, a self-described liberal industrialist, a company man. Thus, the three top positions at labor mimicked the tripartite panel—Goldberg from labor; Reynolds from management; Wirtz, the neutral or public representative. And I'm certain that Arthur Goldberg had that in mind.

Goldberg also sent an important message, because of his commitment to civil rights and equality, with other high-level appointments. He appointed George Weaver, an African American who had worked for the IUE, he was named Assistant Secretary for International Affairs. He appointed Esther Peterson, a woman, as head of the Women's Bureau. He appointed Jerry Holleman from the AFL's traditional wing to the third position in the department's chain of command. Later Goldberg successfully moved to have Peterson's position elevated to assistant secretary status, emphasizing the importance of women's issues and making Esther Peterson at that time the highest ranking woman in the Kennedy administration.

Goldberg quickly assumed a prominent role in the Cabinet. He opposed an incomes policy proposed by economist Walter Heller and John Kenneth Galbraith on the ground that it was too close to being a “wage and price” control, a policy which would have been an anathema to both management and labor. Instead Goldberg suggested that the administration implement “wage and price” guidelines based on what’s called jawboning, or heavy-duty persuasion, and voluntaristic methods rather than a heavy-handed policy enforced directly by the government. Goldberg believed in the collective bargaining system and he believed that jawboning would be successful in preventing inflationary price-and-wage increases if strikes could be minimized. And he and his Labor Department staff employed mediation to an unprecedented degree.

In the first days of his tenure as Secretary of Labor, Goldberg successfully mediated a New York City tug and ferry boat workers’ strike at the personal request of Governor Nelson Rockefeller, who later defeated Goldberg for governor of New York. And shortly afterwards, he successfully mediated a wildcat strike by commercial airline pilots. He also urged Kennedy to intervene in a maritime strike by 80,000 longshoreman, convincing the President to invoke Taft-Hartley’s cooling-off period and national energy dispute provisions. After the strike was enjoined, the parties accepted the Taft-Hartley board’s recommended settlement.

So early on, Goldberg demonstrated a willingness to use the influence and power of his office to help end strikes and to settle disputes. And the nation was rewarded by the effort. Goldberg’s biographer, David Stebenne, sitting across here, reports that during the first half of 1961 the nation lost the fewest working hours to strikes since World War II.

I’ve left out the invocation of Taft-Hartley to end the strike at the metropolitan opera, which in his brief memoir, during an interview, Arthur Goldberg commented on. The question that was repeatedly asked was: How could a strike by opera singers be a national emergency dispute? And his answer essentially was: If Jackie Kennedy says it is, and then it is.

It is worth reflecting at this point on the willingness of both President Kennedy and Arthur Goldberg to act in all of these disputes. Goldberg’s belief was that government could and should act in private labor disputes with public ramifications. This is in stark contrast to our comparatively hands-off approach of more recent administrations. I’m not just knocking the current or even the preceding administration.

He was influenced by his life experiences—the depression, World War II, the Korean conflict, the Cold War, the ‘50s recessions. He firmly believed that government should take an active role in pursuing the public good. He is most often remembered as a pragmatist rather than as an

idealist. And it is true that he was a master of figuring out how to get from here to there whether in labor negotiation or in political matters. Nevertheless what struck me the most when reading about him was the firm anchoring of Goldberg's world view in a set of ideals which were acquired, as David Stebenne points out, during the New Deal.

He favored the improvement of the lives of the working class, the elimination of class, racial and, to a lesser degree, gender barriers in society. He was a confirmed civil libertarian. Although he spent his early career as a labor attorney fighting for higher wages and benefits and improved working conditions for workers, he was certainly conscious of the long-term broader considerations such as business competitiveness and national security. He was the sincerest type of patriot. He did not believe that his country was without fault, but he believed that our form of government was best. For me, the remarkable thing about Arthur Goldberg, and perhaps the most admirable thing as well, was his ability to bridge idealism and pragmatism and to translate his ideals into action. Thank you.

(Applause.)

PROFESSOR OLKEN: Thank you, Jerry.

Before I introduce our last speaker, our first speaker wants to say something in response to what Jerry raised. So I yield the floor for a minute or two to Judge Shadur.

JUDGE SHADUR: Yes, that's all.

You've heard about inside stories. I've got the ultimate inside story that Arthur told me, and I trust it was true because I trusted everything that Arthur said.

At the time that he and Dorothy were living in Washington, Dorothy's mother, Esther Kargans, was living with them. And as Arthur told it, the telephone rings and Mrs. Kargans picks up the phone and a voice says "Can I talk to Arthur?" And she said—I won't try to duplicate her broken handwriting—but in any event she said, "I'm sorry, he's not in. Can I take a message?" And the voice says "Tell him the President called." You understand he's the Secretary of Labor, right? "Tell him the President called." And Mrs. Kargans thought for a moment and said, "The president? The president of what [sic]?" I pass.

PROFESSOR OLKEN: Our final speaker is David Stebenne, a professor of history and law at The Ohio State University. Professor Stebenne, who is also a lawyer, is the author of three books and numer-

ous articles, essays and book reviews. In 1996 Oxford University Press published his acclaimed biography, “Arthur Goldberg: New Deal Liberal.”

His talk is: How Law Practice in Washington Helped Shape Arthur Goldberg’s Views on Privacy.

David.

PROFESSOR STEBENNE: Thank you, Sandy. Thank you, all the members of the panel. Judge Shadur, I feel terrible. I wish I could have yielded you some of my time, but I’m last. If I get done early, you can have some more.

I have one confession to make, since we’re confessing if we met Arthur Goldberg and when we met.

Arthur Goldberg, I’ll come clean on that too. I first met Arthur Goldberg in the fall of 1981. Very memorable for me. I was a senior in college. I was doing a senior thesis on the relationship between the Democratic Party and organized labor. And I went to interview him. And he was at a very interesting stage of his life and career, because Ronald Reagan was then in his first year as President. Justice Goldberg had had a job, a significant appointment under President Carter, with ambassadorial rank, but I don’t think he expected by 1981 to be in government again. And so he was entering this period of semi-retirement and reflecting on his career. And he startled me when I interviewed him because he told me that he didn’t plan to write a memoir. This in a town where seemingly everyone writes a memoir, I mean, Washington, DC.

And so I said that to him and he said to me, “Well, you know, I’ve been reading these memoirs for years now and I know about these people and I don’t like the way they write their memoirs. They’re not reliable. They’re too self-serving. It seems to be too hard a thing to do, so I’m just not going to do it at all.”

So I ended up writing about him. And I went to see him on and off for the last eight and a half years of his life. So I knew him in his 80s, in the 1980s period. And it was very interesting to talk to him, and he was willing to talk about almost anything. And the range of his knowledge by that point in his life was extraordinary. Literally he could talk about what it was like to work at Wrigley Field in the 1920s, that sort of thing—he was a baseball fan, I’m a baseball fan – as well as very intricate issues of American constitutional law. So it was a very interesting experience and I wrote this book. And then I was asked to come speak here and I was delighted to do that.

Arthur Goldberg was a native Chicagoan and he never ceased being a Chicagoan really. So the only reason he became a Washingtonian was really through a misunderstanding. And I’m going to talk about that

part of his career. And the misunderstanding is that when he went to talk to Philip Murray, then president of the Steelworkers' Union and of the CIO, in the winter of 1948, about taking on the job as top lawyer, general counsel for both organizations, Goldberg said to Murray, "Well, you know, I have a firm in Chicago and I'm from Chicago and I like being from there and my wife's from there and I want to be identified with my firm there and be there. And so if I do this, I want to be able to split my time between Chicago and Washington, DC."

And I have a colleague here who is on the program tomorrow, Peter Swire, who knows all about this sort of bifurcated existence. It's more common today. Peter is partly a resident of Columbus, Ohio, and partly a resident of Washington, DC.

So that was the idea in Justice Goldberg's mind. And Philip Murray was so eager to have him say yes, that Murray said, "Oh, sure, sure, sure. Fine." And then Goldberg found out, when he started working for Murray, that Murray pretty much worked whenever he was awake, and anyone who worked closely with Murray was expected to work closely with him whenever he was awake. And so the idea of being bifurcated, partly in Chicago and partly in DC, didn't really work. And that's, by the way, why he didn't resign his faculty position at John Marshall, he had hoped to continue teaching at John Marshall; and by the mid-1950s he finally gave up on that idea because the scope of his responsibilities as a Washington lawyer just kept expanding.

All right. So I'm writing this paper and I had word in advance that the time limits would be strictly observed. So I'm thinking to myself, the first idea is I'm going to write about how his work as a Washington lawyer affected his tenure on the Supreme Court. And very quickly I realized that was going to be too long a written paper and too long a talk. And then I decided I would zero in on privacy, which seemed relevant for this conference. So this is really about, as Sandy explained, how Goldberg's experience as a law practice, a legal practitioner in private practice in Washington, affected his thinking about privacy, which mattered a lot once he became a Supreme Court justice.

All right. So when does this happen? Goldberg becomes a permanent resident of Washington, DC, and a labor lawyer there in March 1948, when he officially becomes chief contract negotiator for the United Steelworkers Union and chief Washington lobbyist for the Congress of Industrial Organizations, the CIO.

Until that moment, the late winter of 1948, Goldberg was not well known outside of Chicago; but doing these two new jobs for the next thirteen years made him into a major national figure. And given that we've referred to the various law firms, the law firm he created in Washington,

Goldberg, Feller and Bredhoff, that's the firm I know the most about, right, from this period and we'll talk about.

All right. So these work experiences, these two main jobs, CIO and Steelworkers' general counsel, had interesting implications for Goldberg's views on privacy. His views on that complicated subject were formed not simply by the study of privacy issues in law school or via teaching; his law practice in Washington gave him real world experience with a very wide range of privacy issues. And having that kind of depth and breadth of exposure to privacy issues was unusual for most members of the nation's highest Court.

And his experience as a private practitioner was even more influential because he came from private practice almost directly to the Supreme Court. In other words, he was only in the Labor Department for about a year and a half. Most Supreme Court justices have longer periods where they're in government service or on the bench, something like that. Justice Goldberg went from private practice almost immediately to the Supreme Court. And so his experiences as a private practitioner mattered a lot.

So let me talk about some of those distinct, specific privacy issues. First, there was the old privacy associated with Samuel Warren and Louis Brandeis, the authors of this famous article in 1890 about privacy. And they wrote that article out of a reaction against overly intrusive journalists, literally, newspaper reporters butting into Samuel Warren's social events and so on against the will of Warren.

And so the first version of this is overly intrusive journalism. And Goldberg experienced that firsthand during the 1950s as a byproduct of his new jobs. Much of the nation's press in the 1950s remained suspicious of these great big and now powerful labor unions, like the Steelworkers and the CIO, and so the unfair press coverage was a fact of life during the 1950s for labor unions, including Goldberg's clients, especially on the topic of corruption within organized labor.

And it's not so much that what's reported is entirely wrong, although that happened on occasion, I suppose the gentlest way of describing the problem with coverage then was it was under contextualized, right, if you want to write an antiunion story, you could certainly do it that way and that's what would go on.

And so as a chief bargainer for the Steelworkers and chief DC-based lobbyist for the CIO, Goldberg had to cope with that kind of privacy problem on a regular basis. And his associates in the labor world noted then that Justice Goldberg was unusually sensitive to press criticism of labor clients and of his own work on their behalf. Arthur Goldberg could be a bit thin-skinned about this, his associates said, when it came to unfair

press, which contributed to his concern about the loss of that kind of privacy. In other words, he was very sensitive to that aspect of the issue.

But there are other kinds of privacy issues and he had in-depth exposure to those other ones as well. There was the concern about excessively intrusive police surveillance, of the sort that had helped prompt Justice Brandeis's famous dissent in *Olmstead v. United States* in 1929, a very famous wiretapping case.

The Steelworkers Union, despite being a very respectable union and one of the biggest in the country in the 1950s, experienced exactly that kind of privacy invasion in a big way during the height of the furor over labor corruption in the later 1950s.

Now, you might wonder, given what the technology is like today, how they could know they were being wiretapped, right? Peter Swire is an expert on many of these issues, he deals with twenty-first century technology, he's got his computer there, he's utterly comfortable with it. I'm a historian of America from the '30s through the '60s, so I know a lot about old technology.

So what is listening like in the mid to late 1950s? Well, it's a less sophisticated era and so members of the Steelworkers' executive board, the top leadership of the union, plus the secretary-treasurer and the president, they could know that their phones were tapped in those days. It was something they discussed at board meetings. And we have verbatim minutes of those meetings and so we can know for sure about this. Twenty thousand pages worth, I've read them all.

So here, for example, is the number two person in the Steelworkers Union, the secretary-treasurer, I.W. Abel, complaining about this problem at a Steelworkers' executive board meeting held on September 10, 1957. So here he is speaking, "I want to try if I can to impress on everybody the extent to which this sort of thing has gone on and how dastardly it is and how impossible it makes the functions of an organization such as ours. As President McDonald has said"—that's David McDonald, the president of the union—"our wires have been tapped. As a matter of fact, many of you board members know in your conversations with me in the past year that it got to the place where we could barely hear each other talk there were so many taps on the wire and the drain was so heavy you could hardly get through. I am satisfied that there hasn't been a conversation by President McDonald over any of his phones, or by myself over any of my phones, in the past year that isn't recorded."

And so that's the steel union. So this problem doesn't affect Goldberg in some sense as directly. I don't think his own phones at his law firm were tapped during this period. But his single most important client lived with this problem for over a year.

What else to say about this? Then there's the invasion of privacy posed by the ever more elaborate system of FBI informants, and the file-making propensities of then FBI Director J. Edgar Hoover and his staff. Goldberg experienced that kind of invasion of privacy even more directly, because the FBI actually opened a file on him in 1941.

And this is a strange period in American national security history, which I can't really do justice to in the time I have today. The shorthand explanation is in September of 1939 the German government and the Soviet government concludes their infamous nonaggression agreement. And so the Communist Party line in the U.S. and elsewhere, from that moment, from September of 1939 until June of 1941 when the Nazi German armies roll into the Soviet Union, the Communist Party line is that the Americans should stay out of the European conflict, they should not aid the British and the French in any way, including the manufacture of armaments. And so temporarily the Communist Party of the United States of America is very active in trying to resist rearmament by the United States and aid to the allies. And Goldberg at this time is utterly on the opposite side of this issue.

But why does the FBI—what's the trigger for opening the file? Well, the world has blessed us with more than one Arthur Goldberg. And there's some other utterly obscure history Arthur Goldberg, who is active in this sort of effort to protest the Roosevelt administration's efforts to rearm and aid Britain and France. And so the FBI field office in Chicago gets this report from an informant that there's this Arthur Goldberg who is doing the work of the Communist Party propagandist machine, and they look up the newspapers and find there's another Arthur Goldberg. They think it's the same person, right? So this happens more often than you might think in this era. Believe me, I'm a student of this era.

The next book I wrote was about an Eisenhower administration official, very senior, number two in the Labor Department, then head of the USIA, then President Eisenhower's chief speech writer. This man had the same experience. His name is Arthur Larson. And in this same period, the world has blessed us with more than one Arthur Larson. There is an obscure one out somewhere in Wisconsin who signs a Communist Party-circulated peace petition, and so literally two FBI agents grilled the famous Arthur Larson about this, right?

So this is not an isolated episode, but it affects Justice Goldberg. And I call him Justice Goldberg because that was how I knew him. It's an anachronism for the purpose of this talk, right, it's all pre-U.S. Supreme Court, but I can't shake myself of that verbal habit.

All right. So here we are. The FBI opens the file based on an erroneous report conflating two very different Arthur Goldbergs, and they begin clipping the things they find in the Chicago papers and, aha, he

represents unions. And he's a Jewish labor lawyer. And so connect all the dots, he must be a communist operative if not a party member. So there is the origins of the file.

The worst thing about this in some ways is that Herbert Hoover personally signs an order in 1941 saying that in the event of hostilities between the U.S. and Germany and its then Soviet ally, Arthur Goldberg is to be arrested. Preventive detention.

All right. Now, it doesn't happen in part because the Germans attack the Soviets and that's the end of that relationship. But the point is, this order is signed by Hoover.

JUDGE SHADUR: I think you said Herbert, you meant J. Edgar.

PROFESSOR STEBENNE: Excuse me, J. Edgar, right, not Herbert. He's busy doing other things at this time. He really is. He's very busy politically by 1941, but he's not doing this. J. Edgar Hoover.

J. Edgar signs this thing and it goes into the file as well. And later I think it's very embarrassing to Director Hoover; but not at the time, he doesn't know Arthur Goldberg from anyone.

So Goldberg never gets picked up. His secretary, however, in 1941 is a Japanese American. And so literally he goes to the office the day after Pearl Harbor, that Monday, and there's no secretary. And then the phone rings and it's the secretary and she says "I'm in jail. I've been arrested by the FBI." And Goldberg is incredulous. And so he talks to the FBI agent about this. He still has no idea that he has his own file, right? But he's irate. Well, you know, the FBI, "It's Pearl Harbor, she's Japanese American, we can't be sure she isn't part of some grand conspiracy." "This is ridiculous," Goldberg tells them. He hangs up, he calls a judge, describes what's happened. The judge says "Well, if they won't release her, I'll give you a court order and get her out."

And so Goldberg calls the FBI back, the Chicago office, and said, "Look, a judge has agreed to give me a court order, you have to release her to my supervision." And the FBI isn't happy, but they did that.

The secretary ultimately serves in the U.S. Navy during World War II with distinction. Justice Goldberg is in the Army, serves as a decorated vet.

And this effort to build files sweeps in lots of people who really have no business being in these files. And once you create them, it's very hard to undo them, in other words, they take on a life of their own every time you look at them. If any senior member of the agency looks at them and writes a comment, then they recopy the entire file. So the thing mostly, it's not all that long in terms of evidence, but by the time they're done

recopying it a million times it's 800 pages long. That's what's released under the Freedom of Information Act.

Now, this FBI story, privacy story, has more to it than this. Because once Goldberg takes on his two jobs in Washington, DC, announced in the newspapers in March of 1948, the FBI opens their file and notes that there is an existing file on Arthur Goldberg. His predecessor in these jobs was close to the U.S. Communist Party. And so in a way you can understand why the FBI would do this. Lee Pressman is out, Arthur Goldberg is in, has there been a real change at the CIO or not?

So Washington in those days was a smaller town than it is today, a lot smaller. And I could tell you stories, but I don't have time to digress.

Mrs. George Meany hated going to Washington. She loved New York City. She found Washington a total bore. So nothing to do, everyone has dinner parties, and that's the extent of the social life.

But the reason this is significant is people know each other, it's a small town in some ways. And someone tells Goldberg in 1955, when he's very busy working on the AFL-CIO merger, that "Arthur, you've been named as someone who has belonged to a communist front organization and there's probably an FBI file on you and you should go talk to them."

And so Goldberg calls up the FBI and says "I want an appointment, I want to go talk to you." And he had been dealing with them on internal security matters ever since he took over as the CIO and Steelworkers' general counsel, consulting with them at their request. So this is not an odd thing for him to go to FBI headquarters. It's very strange to go there about himself. So off he goes.

And they know he's a major figure, so he doesn't talk to some low-level flunky, he talks to Deputy Director Louis Nichols about his file. And Nichols, under direct instruction from J. Edgar Hoover, the Director Hoover, shows him the file but takes out the detention order. That's the one thing in there from Hoover that's embarrassing to Hoover. So it's the file but not all of the file, right?

And Goldberg explains, "Well, you know, I never did this. This is some other Arthur Goldberg. There really are more than one. As proud as I am to be Arthur Goldberg, I'm not the only Arthur Goldberg. I mean, literally, these other things that you have are incorrect."

And so at the end of this conversation, Goldberg leaves and Deputy Director Nichols writes up a memo, which is standard practice, summarizing the conversation and Nichols' conclusion. And the memo survives. And Nichols' conclusion, and I quote, "Is that an injustice has been done in Arthur Goldberg's case." In other words, that we're wrong about this. And so, you know, a later generation of labor activists would look on this sort of informal working with the FBI somewhat suspiciously. But

Goldberg was obliged to work with the FBI in part because the alternatives—the House Un-American Activities Committee and its staff, then there's that committee that Joseph McCarthy ran and his staff—were so unappealing. Hoover is the best of the lot and so he worked—I mean that's Arthur Goldberg, right, you live in the world as it is. He's a very realistic person.

But what I'm trying to convey here, however imperfectly, is these experiences gave Goldberg a very clear sense of just how invasive of one's privacy the agency could be, the FBI, how unreliable much of the information that they collected was, unnamed informants, not checked in terms of is this the same person and so on, and thus of how serious a threat to privacy the much bigger and better financed FBI of the 1950s had become when compared with earlier decades.

It's one thing to represent a client who has this experience in the '50s, or to read about it, it's quite something else if it happens to you, all right, and so it's really a very central—he doesn't forget about it. He gets along with J. Edgar Hoover thereafter. It's a strange relationship. But Goldberg had to work with all kinds of people and Hoover had all sorts of strange relationships with people. I mean, he was around forever.

All right. But I go on. This would be plenty, you would think, in terms of a background exposure to privacy issues before he goes on the Court. But there's more, there is the kind of privacy invasion posed by the new, New Earth and the FBI/CIA.

Goldberg worked for the World War II intelligence agency, the Office of Strategic Services, the OSS, the forerunner to the CIA, where he organized a string of labor union spies who operated in occupied Europe and Italy. And he operated partly out of New York, partly out of Washington, partly out of London. His field operatives were in Western Europe and Italy for the most part. He didn't know anything about doing this kind of work before he was asked by the head of the OSS to join that operation, the lawyer William Donovan.

And Goldberg had to learn. So he went to New York where the OSS had an early operation, and he was personally trained in intelligence work by a legendary British intelligence officer named William Stephenson, the man code named "Intrepid." So that's how Arthur Goldberg learns about espionage.

Goldberg in New York City, away from home, being in Chicago, and family for the first time, is also briefly a target of enemy intelligence himself while working with Stephenson in New York City. And so he learns firsthand both what it's like to spy and to be spied upon. Very unusual for a future member of the U.S. Supreme Court.

Goldberg also made some lasting connections to the world of American espionage. Among the people he got to know well was William

Casey, a future CIA director. And the CIA maintained an interest in organized labor during the 1950s. Because labor was in a sense an international movement. There are unions here, there are unions in Western Europe, in places where the Cold War was going on. And so from time to time the CIA would consult with Goldberg about Cold War espionage efforts in Europe and Latin America. And Goldberg was the logical person to talk to because he had this background, he knew people in the agency and so on.

And so all of these CIA-related experiences, like the ones with the FBI, gave Goldberg a sense of just how elaborate and invasive American espionage was becoming. The technology is always getting better, the agency is getting bigger, its operations are becoming more systematic and professional, another potential to privacy as we have known it. And then there were other kinds of privacy concerns raised by Goldberg's role in helping bring about the merger of the AFL and the CIO in the mid '50s. And if you're not a labor person or a labor historian, this may seem like a sort of arcane aspect of American labor history, but it was really the most significant thing he did as a union lawyer in private practice. The AFL and CIO had been trying to reunite almost since they were born, and it had been a very hard thing for them to do.

And Arthur Goldberg really is the person who makes the merger more than any other single individual.

The heart of that process, the basic first prerequisite, was achieving an agreement on the part of each side, the AFL and the CIO, on the part of their unions, their member unions, to stop trying to steal members from the other rival federation, the so-called no-raiding agreement. And working that out was an extremely complicated and difficult thing. You needed great political sense, you needed great legal sense, because it is an agreement, it's a bargain reduced to writing. And you have to work intensely with Walter Reuther and George Meany, but never at the same time, because they couldn't stand each other, right?

And so Goldberg is the guy who talks to Reuther, who is at that point head of the CIO, and then with Meany, who is the head of the AFL, and spends countless hours drafting and redrafting this agreement. And then once that's accomplished, the larger merger of the AFL and CIO finally became possible. And this is a tense and difficult process in part because of the, shall I say, the strong and clashing personalities involved.

And by the way, one of the best illustrations of this challenge concerns something as simple as photographs. The three most influential labor people, labor figures, in the country in the mid to late 1950s when the AFL and CIO merged, were George Meany, Walter Reuther of the Autoworkers, and Arthur Goldberg. Even though all three were nation-

ally known figures by the late '50s and often photographed, pictures of the three of them together are almost nonexistent. Again, this might not be of interest to you, but as a biographer I found this —how could it be possible, because they did so much work in common. Thus far I have found exactly one such photograph of Meany, Reuther and Goldberg together. And it was taken when Goldberg was serving as Labor Secretary in the early 1960s at a ceremony in the Oval Office. So there is President Kennedy and he is literally standing in the middle of this trio and is the functional glue holding them together, all right? And so I'm just trying to emphasize how challenging it is to have negotiated the AFL-CIO merger given the, in particular, the friction between Meany and Reuther.

Now, what does this have to do with privacy? The privacy issue here has to do with Goldberg's decision immediately after the merger in 1955 to write a book about the AFL-CIO merger, published a year later in 1956, called "Labor United." So it's supposed to be the official history of the merger written by the person who knows more about it than anyone else.

And he and I talked about that book. This is one of the things he liked discussing in retirement. And he, as he put it, that book leaves out a lot and intentionally so. All right. And to a historian, this is not a very satisfying concept. So I would ask him about this, I did ask him about this, and he explained to me the formula for merger left so many issues to be worked out later down the road that the deed to maintaining that fragile bargain and encourage the two sides to move toward a truly united labor movement, took precedence over a more complete and informative account of how the merger was made. All right. And so there are competing interests and the interests in promoting this socially useful process of a united labor movement takes precedence over an account that gives a clearer sense of how various union leaders actually behaved during the process.

I wish I had time to talk about it. It's a fascinating story. It literally is the kind that once you do something that's satisfied the demands of negotiation, where once you do something that satisfies the demands of one side and then you go back, they're horrified, "Oh, no, really, they said yes to that? We have to keep going?" It's that kind of negotiation.

Bringing about the AFL-CIO merger, as I mentioned, is about the most important thing that Goldberg ever did as a union lawyer. But the need to protect privacy issues was driven home in a different way when he tried to write about it. I can't do it, can't write what I want to write in some sense, because there are other socially worthwhile considerations at stake.

All right. Then there are—you think I'm done and I'm getting done—but there are other privacy issues that grow out of this period that

are different from any of the ones I've already mentioned. To do the jobs that he did as chief contract negotiator for the Steelworkers, chief lobbyist for the CIO, and then, once the merger took place, the Industrial Union Department of the AFL-CIO, it exposed Goldberg to things about prominent people that could be damaging if revealed either in the press or at a government hearing. And so to do his job is to learn all sorts of things about people that should not become public.

For example, Goldberg's single most important client, the Steelworkers Union, was headed, from 1952 to 1960, officially by President David McDonald. And McDonald is sort of an oddball in many ways. In other words, he had worked his way up the bureaucracy. He was not a natural person to have that job, he inherited it in some sense when the existing president, Philip Murray, died in office. And so in a way he is the Lyndon Johnson of the labor movement. He's an accident as head of a major union, just as Johnson is kind of an accident as President of the country.

So what's the problem with David McDonald? Well, there are many. But among them he had a serious drinking problem. And the more stressful the situation, the more he would drink. So you can imagine in major negotiations what an unsatisfactory situation that could be. And how harmful it could be to the union, composed of about 950,000 members in the 1950s, if in fact this was revealed.

Even worse in ways on challenging the '50s, McDonald is a married Catholic who is also carrying on with his secretary, to use a '50s phrase. All right.

Arthur Goldberg is as square as square can be. It's one of his most refreshing qualities in today's world, right, where we have a deficit of squareness. So he has to work with this person. He learns some things about this person he does not want to know but that could be very harmful to the union and lots of ordinary working people if they become known.

And it's not just McDonald. I could give you other examples. Goldberg is among the most ethically conscious people in the labor movement and so he's in charge of trying to root out corruption in the late '50s and he learns a lot of things he doesn't want to know then. All right.

And then there is the matter of his close association with President Kennedy, whom he deeply admired for his contribution to our national political life. It's never been entirely clear to me how much Arthur Goldberg knew about Kennedy's peccadillos, right? So the most I ever got out of Justice Goldberg on this point was Goldberg's admission that, "Well, I never understood Kennedy's personality." Right? And I think that is a nice, tactful way of covering that subject. But the point is he learned lots of things that could have been damaging if revealed publicly.

And when I say damage, I don't mean just to the reputations of the people involved, but to the organizations and causes of which they were a part.

And so Goldberg's encounters with all these privacy issues were really extraordinary in their breadth and depth for someone named to the Court. And so when he ascended to the Court fifty years ago this month, he had a very clear sense from all of these experiences just how much the growth of media and the government and the advent of new technologies had tended to invade traditional kinds of privacy and how harmful those invasions could be. In other words, when Brandeis and Warren wrote their seminal article in 1890, that process, that problem was in its infancy. By 1962 a transformation had taken place. And so in that sense it's no surprise that beginning in the mid '60s the Supreme Court would pay more attention to privacy issues.

What I want to say finally, having run a little bit over my time, but for a good reason, what the Court had in Goldberg from 1962 to 1965 was a member with a great deal of real world experience with this growing social problem, an ever more intrusive media, government, new technologies that aided that kind of intrusion. And that, I think, captures Goldberg's greatest contribution as a justice in the privacy area and others. In other words, he had a lot of experience with ordinary people and groups that lacked the power to defend themselves against ever more effective and intrusive invasions of their privacy, either by the media or by the government.

But at the same time, and I want to emphasize this, Goldberg had a clear sense of the necessary functions performed by the press, by law enforcement, and by the intelligence agencies. Or to put that thought another way, Goldberg did not approach privacy entirely or primarily as an abstraction but rather as a set of issues to be seen in their current social context and that required a balancing of competing legitimate interests. And to me, that kind of approach seems as relevant today as it was fifty years ago.

So thank you for being good listeners.

(Applause.)

PROFESSOR OLKEN: At this point if there are any questions from the audience we have—David, how much time do we have left?

PROFESSOR SORKIN: About ten minutes.

PROFESSOR OLKEN: Ten minutes. Any questions from the audience of any of our panelists? Do the panelists have any questions of each other? Anything?

FROM THE FLOOR: Professor Stebenne, since you spent the most time at the end of his life, can you give me future opinions about what he thought about privacy with modern technology?

PROFESSOR STEBENNE: We did not talk a lot about that. In other words, he did so many different things.

PROFESSOR OLKEN: Repeat what the question was.

PROFESSOR STEBENNE: Oh, surely. The questioner wanted to know if in this late phase of his life—he was mentally very lucid, in other words, his mind worked fine, it was just his body was beginning to slow down—but the point is did we talk about how new technology was in some ways making this problem of privacy invasion even more severe.

And we talked a little bit about privacy in that regard but not a lot, in part because both he, and in some sense I, we were—I am no longer—but I'm mostly sort of a twentieth century person. In other words, I'm a humanist primarily, I'm not really a technology guy. Peter, my colleague at OSU, is an exemplary person in the sense of having an up-to-date sense of twenty-first century technology. Goldberg and I did not. So it was challenging for us—let me illustrate this point – to keep a small tape recorder equipped with batteries and operating with the tape turned over properly during the course of our conversations. All right?

So the short answer to your question is no. But the thing I want to emphasize is he remained very networked in Washington, DC, to the end of his life, with professional people in, by that point, high reaches of the government. So he definitely had a sense that the problems he had experienced continued and in some ways were getting more severe. So I'll stop there.

FROM THE FLOOR: I haven't read your book yet.

PROFESSOR STEBENNE: That's all right.

FROM THE FLOOR: What was his position on Israel?

PROFESSOR STEBENNE: One of the things I liked about Justice Goldberg was that he was in some ways very brilliant and also rather uncomplicated. All right?

So he was an old-fashioned kind of patriot and an old-fashioned kind of defender of Israel, supporter of Israel.

But his experiences, I should say, with Israel were time-specific. In other words, his Israel was the Israel of the founding and the founding generation. All right? So there is now more history to the state of Israel

and in some ways the state of Israel has become more controversial. All right? But when I first asked —

FROM THE FLOOR: Are you talking about what Goldberg thinks or you think?

PROFESSOR STEBENNE: No, no, what Goldberg thinks. In other words, his opinion was formed during the founding. And so to him, as he put it to me, it was like asking an Irishman—because I asked him this question, literally—How do you feel about home rule for Ireland? Right? In other words, this is not the most, in some sense, nuanced, complicated approach to this issue. But what he was trying to convey to me was that there was an affinity of the heart as well as the head. All right? And so he knew Golda Meir well. There was a picture of them embracing, which is bizarre in some ways in terms of the warmth and friendliness of this. Nothing is going on between the two of them. It's just that he had an affinity with Israel that grew out of the birth of Israel's experience.

Does that help?

FROM THE FLOOR: Yes.

PROFESSOR STEBENNE: All right. Good. I'll stop there.

PROFESSOR BERENDT: I want to add, and correct me if I'm wrong, he was Ambassador to the United Nations for our country during the 1967 war. And as part of the settlement of the war, he was largely responsible for the drafting of Resolution 242 which created the land-for-peace formula, which to a considerable extent is still the formula discussed today.

PROFESSOR STEBENNE: Right. And he did that even though it is a rather awkward situation for him to be in. All right? He was a leading Zionist who was also our UN representative during the midst of this. But he worked away at the problem with the British ambassador and the two of them developed that formula. I'll stop.

MR. FELDMAN: When he wrote that formula, he used the word "boundaries" in a way that was ambiguous intentionally so it wouldn't be—it was to be worked out later whether that meant exact boundaries or starting out with boundaries, which is still the discussion going on today.

FROM THE FLOOR: So could you connect up, David. You have this wonderful history about the ten different reasons he's a privacy maven

and then you have *Griswold*. Why did he write the concurrence of *Griswold* the way he did?

PROFESSOR STEBENNE: Well, I did ask him about that. All right? And the first question I asked about that was why is it that the opinion for the Court, Justice Douglas's opinion, lists the Ninth Amendment but doesn't explain it? And he said to me, "Well, Bill Douglas wasn't entirely comfortable with this legal argument. So my bargain with him was, "you will have my support for your opinion if you just list it and I will explain what it means."

Well, see, this is a man who is an expert at forging compromises, right, and so there's a compromise. And it is a kind of unusual opinion in many ways. Because it doesn't deal a lot with the potential problem of how do you establish limits, how do you figure out what's a preexisting right, which is the biggest problem proposed by the Ninth Amendment.

But the specific facts of the case, and Goldberg believed that facts plus procedure were most cases, activated this privacy concern. Because the way the Connecticut statute was drafted, it wasn't really enforced. I mean, the case that ends up before the Court is a bit of a contrived suit. But, you know, if they were actually to do in the state of Connecticut what the law envisioned, it opened the possibility of one marital partner being questioned about whether or not reproductive technology, contraceptive technology, was used with the other partner, which struck most members of the Court as positively indecent, right, that you would have a public discussion of what goes on in the marital bedroom. And so I think that's the key in terms of where Goldberg comes from. Anything like that, even before the Constitution was written, would have offended people, right? In other words, that seems inconceivable—no pun intended – to discuss such matters, have one spouse talk about the other in this regard in an open courtroom, whether it's 1750 or 1950 or 1965. So does that answer? All right, I'll stop.

JUDGE SHADUR: I wonder if I might add something about that. You have to understand, Arthur was not an original constructionist, because his view was that the Constitution—and we talked a lot about this while I was learning, in a sense, although I was bringing with me some misconceptions from law school—but his view was that the Constitution in many respects, and properly for a constitution, was deliberately ambiguous. Deliberately ambiguous why? Because nobody has an unclouded crystal ball. And I found that, I must tell, I found it extraordinarily ironic. And I'm not going to ask Justice Scalia what he thinks about the thing because, you know, revisionist history is not my strong point either.

PROFESSOR STEBENNE: And the one thing I would add to that is that Arthur Goldberg was a firm believer in and user of intentional ambiguity if it allowed you to hurdle obstacles to agreement. So I think his conception of the original constitutional bargain in Philadelphia was exactly that.

PROFESSOR SORKIN: Well, I apologize for having to cut off this wonderful panel, but we do need to keep on schedule. We're going to take a brief coffee break now and resume in fifteen minutes, at 3:30, back in this courtroom. We invite you to join us down one flight. There's elevators around here, the first set of elevators down to 3 East, where I'm told you will find a penumbra of light refreshments.

(Applause.)

(Whereupon a recess was taken.)