

PROCEEDINGS IN THE SUPREME COURT OF THE
UNITED STATES IN MEMORY OF
JUSTICE GOLDBERG*

MONDAY, OCTOBER 15, 1990

Present: CHIEF JUSTICE REHNQUIST, JUSTICE WHITE,
JUSTICE MARSHALL, JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER.

THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to our former colleague and friend, the late Justice Arthur J. Goldberg.

The Solicitor General is recognized at this time for the purpose of presenting those Resolutions which were adopted by the Bar. Mr. Solicitor General.

Mr. Solicitor General Starr addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

At a meeting of the members of the Bar of the Supreme Court this afternoon, a Resolution memorializing our regard for the Honorable Arthur J. Goldberg and expressing our profound sorrow at his death was unanimously adopted. With the Court's leave, I shall proceed to read this Resolution to the Court.

*Justice Goldberg, who resigned from the Court effective July 25, 1965 (382 U. S. 77), died in Washington, D. C., on January 19, 1990 (493 U. S. XXI).

RESOLUTION

The members of the Bar of the Supreme Court of the United States met today to record our respect, admiration, and affection for Arthur J. Goldberg, who served as Associate Justice from 1962 to 1965, and who gave life for sixty years to the ideal of justice as it is embodied in law.

Few people find the variety of opportunities for public service that came to Arthur Goldberg. Still fewer improve their opportunities so fully.

Yet if this extraordinary man played an unusual number of different roles—as practitioner, as military intelligence officer, as Cabinet member, as an Associate Justice on this Court, as Ambassador, as statesman emeritus—he always kept his own character. He possessed both an unfailing sense of justice and the ability to make it work.

Born in Chicago on August 8, 1908, Arthur Goldberg would say sixty years later, “my concern for justice, for peace, for enlightenment, for morality all stem from my heritage.” He was speaking particularly on that occasion, when he accepted the presidency of the American Jewish Committee, as a proud heir of Judaism. Many of us, of all faiths, were introduced to that inheritance as guests at Passover Seders at the Goldberg home on Albemarle Street. He wrote the family Haggadah, equating the Israelites’ story to the civil rights struggle of the 1960s, and he told the Story of Exodus in contemporary terms.

Justice Goldberg was also acknowledging, with equal pride, the legacy of deep understanding and compassion that came from the humble circumstances of his formative years. True to the great universals of his Faith, he was also American to the core. His father, Joseph Goldberg, the town clerk of Zhinkov, a Ukrainian village northeast of Kiev, had come to Texas in 1890 by way of Vladivostok, Alaska, and California, and had then, in the pioneer tradition of this country—but reversing the conventional route—driven a horse and wagon across the great plains to Chicago.

Sending as soon as he could for his wife Rebecca and their daughter Mary, Joseph carved out a living the hard way. An educated man, he could find work only as a peddler to shops and hotels on Chicago's West Side of fruits and vegetables he picked up at the South Water Street Market. The family grew rapidly, Arthur being the last of Rebecca and Joseph's six children born in this country.

Arthur would recall that the family moved from apartment to apartment each year, taking advantage of the one month's free rent to new tenants. Another recollection was of going out on the street with his father in the early morning before school opened to sell vegetables from a wagon pulled by a horse that had only one good eye. They couldn't afford, he explained, a horse with two good eyes.

After his father's death, when Arthur was eight, his brothers and sisters, none of whom had gone beyond grade school, pitched in to send him to Theodore Herzl Elementary School. He went on to Crane Junior College where he had an English teacher, Lillian Herstein, who was an official of the Chicago Federation of Labor and who interested her young pupil in the needs of working people. Arthur took some classes, too, at De Paul University.

In 1926, the eighteen-year-old Goldberg, deeply affected by Clarence Darrow's defense of Loeb and Leopold, entered Northwestern Law School. John Henry Wigmore, Northwestern's dean, picked him out to help on the preparation of the Third Edition of Wigmore's Cases on the Law of Evidence. Earning his keep all the way, Arthur finished at the top of his class and began clerking in one of the Chicago firms.

Two years later, the fledgling lawyer married Dorothy Kurgans. They shared brilliance of mind, warmth of heart, and commitment to justice and humanity. Dorothy, the adored mother of Barbara and Robert, became a treasured artist and admired author, a distinguished civic leader, and the beloved friend of all those in the Goldbergs' ever-widening circle of acquaintances and associates. For 57

years, until her death in 1988, she and Arthur drew much of their strength from each other.

Joining at first an established and distinguished Chicago law firm, the brilliant young Northwestern graduate soon realized his lack of enthusiasm for representing bondholder committees and foreclosing mortgages on little people's property. Undaunted by the darkest economic clouds the country has ever known, he and an associate set up their own office in 1933, and sought their clientele among employees and labor unions.

This courageous step was the start of almost thirty years of labor representation. It would lead to Arthur Goldberg's national preeminence in the field, and to his becoming the only labor lawyer in history to attain membership on this Court.

Upon the outbreak of war in 1941, General William J. Donovan, setting up the Office of Strategic Services, asked the young labor lawyer from Chicago to establish an intelligence network that would draw on union leaders in Germany, throughout occupied Europe, and around the world. Goldberg assembled a staff made up at first of other labor lawyers, many of whom later became members of this Bar.

Most of the details of the OSS Labor Branch's activities are still sealed in official obscurity. Its chief, who carried the rank of Major and was based first in Washington, then in London, never talked much about his activities. We know that he was at Omaha Beach, in North Africa and Egypt and Israel, and very close to the heavy water plants in Norway. When asked, one of his lawyer associates, who was with the first allied troops to cross the Bridge at Remagen—in order to protect the Labor Branch's sources there—answers with characteristically restrained pride, "Yes, I guess we were able to make a significant contribution." Those who shared this service with him recall a respect for Arthur Goldberg rarely accorded a man in his middle thirties.

At the end of the war, Goldberg and an OSS associate, Carl Devoe, returned to Chicago, where Arthur resumed the representation of workers and labor unions. On the occasion

of the 40th anniversary of the firm they established, founder Goldberg would write:

"Our firm honored the precept that (the lawyer) is not meant to be a servant of the client, . . . but to serve the client—a very different thing. The commitment of lawyers is the attainment of justice, the ultimate goal of the rule of law If we are to realize (this) goal, the law must be a flexible living instrument, . . . a balance wheel, not a brake."

Soon after his return to practice Goldberg became counsel to several unions that had broken away from the American Federation of Labor and formed the Congress of Industrial Organizations; he eventually became General Counsel to the CIO itself. It was a protean situation and his responsibilities were broad. They included a leadership role in cleansing some of these unions of both corruption and communism, which he insisted be done without compromising democracy's tenets.

It was a noteworthy Goldberg characteristic that he always enlarged his effectiveness by assembling around him extraordinarily competent and highly principled associates. Naming any of them would risk unfairness to others, except that they would all share the desire to recognize the lifelong participation in his achievements of his executive assistant, Frances Simonson Guilbert.

As advocates in this Court and others, Arthur Goldberg and his colleagues helped forge critical links in the law of collective bargaining. Yet he counted litigation a last and poor resort. Almost constantly at the center of controversy, he believed deeply in negotiation and agreement as superior processes of dispute resolution. One of the nation's most effective negotiators, he was respected equally by those on both sides of the bargaining table. He was known, one commentator reported after his death, as a "nice guy and a tough customer at the same time."

Only in hindsight is it clear how far the contribution of labor lawyers in the 1940s and '50s went beyond their serv-

ices to immediate clients. A century of judicial enjoining and penalizing of strikes, picketing, and boycotts had engrained in workers and their unions a bitterness toward the law. They also distrusted what they regarded as lawyers' fondness for technicality and casuistry. Despite these obstacles, Arthur Goldberg and his colleagues at the labor bar, finding justice in the labor statutes of the 1930s, managed to build among workers and their unions a degree of confidence in the legal process.

The Counsel for the Steelworkers and the CIO was a principal architect of the merger of American labor unions in 1955. He drafted the crucial "no-raiding" agreement. When a critical impasse developed over a name for the new organization, symbolizing the divisions among the parties, Goldberg broke the deadlock with an equally symbolic resolution that committed future generations to the clumsy but egalitarian "American Federation of Labor and Congress of Industrial Organizations."

Senator John F. Kennedy of Massachusetts had come to know Arthur Goldberg and to respect him for both his advocacy of labor's interest and his underlying independence of mind. In January of 1961, Goldberg became President Kennedy's first Secretary of Labor. Although that term would prove to be short, its achievements led the official department historian to report recently that "no other Secretary of Labor has had as much influence on national labor policy as Goldberg."

In his first 90 days, Secretary Goldberg initiated the Extended Unemployment Act of 1961; prepared a bill increasing the minimum wage and another establishing the Manpower Development and Training Program; drafted, with the Attorney General, an executive order setting up the President's Committee on Equal Employment Opportunity; prepared additional orders organizing the President's Labor-Management Advisory Committee and a Committee on the Status of Women. His clients in those three months included the unemployed, the poor, minorities, and women. His brief was for justice and equality.

Secretary Goldberg undertook and accomplished successfully, during his 20 months in the Labor Department, the mediation of twelve national emergency labor disputes. Despite his previous professional representation of workers' interests, his commitment to justice and fairness, and his ability to bring those abstractions to the table, help to account for his extraordinary success at mediation. To those who criticized these efforts later as undue government intervention, he replied simply: "President Kennedy believed in an activist government to protect the public interest. I shared this belief."

Arthur Goldberg's zeal for justice had shown itself in every facet of his professional life. So it was appropriate that in August of 1962 President Kennedy nominated him to be an Associate Justice of this Court. His selection was endorsed in the Senate, and more generally, by acclamation.

Shortly before Justice Goldberg was appointed to the Supreme Court he described what he called the "liberal spirit" as an "attitude of idealism based upon the possible."

Those few words capture Arthur Goldberg's tenure on the Court. Few Justices in history have contributed so much in so short a time. His idealism and his constantly fresh perspective combined with his superb legal skills and diligent scholarship to produce a stream of opinions that, from the very first, had an influence highly unusual for the newcomer to the Court.

Time after time, whether he was in the majority or concurring or in the dissent, he offered new ideas and new applications based soundly in values and traditions deeply rooted in our nation's history and complemented by a sound sense of strategy. He seemed to know both intuitively and intellectually what would move the law along, not just from the previous case to the current one, but down a path that would build for the longer term.

His writing ranged across the law, but it rang with greatest clarity and power when he was expounding on the Constitution. When he spoke on a constitutional issue before the Court, he repeatedly looked both to history and poster-

ity, whether the issue was assuring the right of marital privacy or guaranteeing the right of a person accused of crime to be questioned in the presence of his lawyer, limiting the use of capital punishment or hastening the pace of desegregation, protecting the right of people to criticize public officials or articulating appropriate accommodations between church and state, vindicating the rights of civil rights protesters or seeing that the status of citizenship is not arbitrarily taken away.

It would be difficult to identify Justice Goldberg's most important opinion—there were many, even in that brief span of time. One he felt strongly about was his concurrence in *Griswold v. Connecticut*, 381 U. S. 479 (1965), in which he made a powerful scholarly argument that the Ninth Amendment shows the Framers' belief in fundamental personal liberties which are not specifically mentioned in the Bill of Rights. He stressed that he was not arguing "that the Ninth Amendment constitutes an independent source of rights," but rather that it "shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." He sensed that *Griswold* was to be a critical stepping stone in constitutional history, and his concurrence added weight to its impact in later cases.

Justice Goldberg's opinion for the Court in *Escobedo v. Illinois*, 378 U. S. 478 (1964), was an important step in the march to *Miranda v. Arizona*, 384 U. S. 436 (1966). Building on *Gideon v. Wainwright*, 372 U. S. 335 (1963), which held that every person accused of a crime is entitled to a lawyer at trial, he wrote for the majority that "when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession," the adversary system is in play, and the assistance of counsel becomes a constitutional imperative.

Justice Goldberg's remarkable blend of idealism and practicality was reflected in his eloquent statement in *Escobedo* that "no system of criminal justice can, or should, survive if it

comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights." His opinion was grounded upon the practical reality that the prosecutorial process is not just a judicial matter, but begins when the defendant is in the hands of the police. The right to counsel at trial, he wrote, would be hollow indeed if the trial is "no more than an appeal from the interrogation," where advice of counsel is denied. He referred in particular to the duty of the police to advise a defendant of his right to remain silent, the key building block underlying the decision in *Miranda* two years later.

Justice Goldberg's initiative on capital punishment began a process of great historical significance. After his first year on the Court, he decided to circularize his colleagues on the issue. He prepared a long memorandum to the entire Court expressing the view that the "institutionalized" taking of life by the state" was "barbaric and inhuman." Then, aware that most of the other Justices would want to proceed only a step at a time if at all, he offered a more measured analysis broken down by type of crime and offender, to suggest categories of cases in which imposition of the death penalty might more readily be found unconstitutional.

He never published the memorandum, but, joined by Justices Douglas and Brennan, he did publish a brief dissent to the denial of certiorari in *Rudolph v. Alabama*, 375 U. S. 889 (1963), a case involving a black man under sentence of death for the rape of a white woman. The effect was as he had hoped. The civil rights and civil liberties communities undertook a strategy to present the Court with a series of capital punishment cases, which culminated with the decision in *Furman v. Georgia*, 408 U. S. 239 (1972).

When Justice Goldberg joined the Court, nearly a decade had passed since *Brown v. Board of Education*, 347 U. S. 483 (1954), had been decided. He, along with many others, was concerned that "all deliberate speed" had acquired much more emphasis on the "deliberate" than on the "speed." During his first Term, a case arose, *Watson v. Memphis*, 373 U. S. 526 (1963), involving the pace of desegregation of parks

and recreational facilities in Memphis, Tennessee. Instead of simply deciding that desegregating parks was not so exceptionally complex as to require the eight-year period the city was seeking, Justice Goldberg led a unanimous Court in sending a broader message about the pace of desegregation. He wrote "*Brown* never contemplated . . . indefinite delay in elimination of racial barriers in schools, let alone other public facilities The rights here asserted are, like all such rights, present rights; they are not merely hopes to some future enjoyment of some formalistic constitutional process."

Watson is only one among many important decisions in the post-*Brown* history, but, as with so many Goldberg opinions, it made an important and eloquent statement that advanced the law significantly at a strategically crucial moment.

Justice Goldberg's original turn of mind often led him to concur, as he did in *Griswold*, on the basis of a different theory from the one advanced in the majority opinion. For example, in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), joined by Justice Douglas, he said the majority's "actual malice" standard was wrong. He believed the "citizen and the press" should have "an unconditional privilege to criticize official conduct," even if the privilege is sometimes abused. "The prized American right 'to speak one's mind' . . . should not depend upon a probing by the jury of the motivation" of the speaker, lest public debate and advocacy be constrained. Subjecting the press to libel damages for criticizing official conduct would mean that "no critical citizen can safely utter anything but faint praise about the government or its officials."

Justice Goldberg would, on the other hand, have allowed recovery for defamatory statements against a public official when directed against his private conduct and he would have done so on the basis of the traditional libel standard rather than by the more restrictive "actual malice" approach. This was a distinction grounded both in Justice Goldberg's bent for the practical and in his idealism. Maintaining his belief in the importance of individual privacy, he insisted equally on

the broadest scope for criticism of official conduct. As time has passed, his position in *New York Times Co. v. Sullivan* has, as a consequence, found adherents among both the press and advocates of privacy.

School District of Abington v. Schempp, 374 U. S. 203 (1963), the public school Bible-reading case, led to another important concurrence. Joined by Justice Harlan, Justice Goldberg worried that a rigid concept of state neutrality would result in a "brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." He agreed that devotional Bible-reading was unconstitutional, but said "providing military chaplains" would not be.

The opinion stressed that the constitutionally required aim is to find the "required and permissible accommodations between state and church (to) frame the relation as one free of hostility or favor and productive of religious and political harmony, but without undue involvement of one in the concerns or practices of the other." The Justice recognized that "the judgment in each case is a delicate one, . . . but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." His emphasis on the need for accommodation in order to vindicate both the establishment clause and the free exercise clause is an idea that has found favor in recent First Amendment jurisprudence.

In the early 1960s the Supreme Court was struggling with the issue of how to handle trespass convictions for sit-in demonstrations protesting whites-only policies of lunch counters and restaurants. Justice Goldberg wrote a concurrence in *Bell v. Maryland*, 378 U. S. 226 (1964), a case in which the Court's disposition was to remand the matter for further consideration by the Maryland courts in light of that State's enactment of an equal-accommodations law. Marshalling impressive historical evidence, as he often did, Justice Goldberg argued that the "American commitment to equality" as manifested in the post-Civil War constitutional amendments contemplated "that the states would continue, as they had for

ages, to enforce the right of citizens to enter public places," and that a state's "omission to protect" a person against racially discriminatory exclusion constituted a denial of the equal protection of the laws.

The question was in effect mooted by the passage of the Civil Rights Act of 1964. Had the sit-in issue remained on the front burner, however, Justice Goldberg's reasoning might well have served as the groundwork for a decision invalidating convictions like the one in *Bell*.

Another enduring contribution came in *Kennedy v. Mendoza-Martinez*, 372 U. S. 144 (1963), which he wrote when he had been on the Court for less than five months. At issue was the validity of a statute that deprived Americans of their citizenship if they left the country or stayed away during a war or time of national emergency in order to avoid military service. The Court was divided, and Justice Goldberg was able to stitch together a majority on the theory that the statute was "penal in character . . . (and) constituted governmental punishment without due process of law and without the rights guaranteed all those accused of crimes . . ." It was an early example of the fresh but sound approach that was characteristic of the Justice's work.

Justice Goldberg's attention and superb legal skills were also focused intently on the innumerable non-constitutional issues that comprise the bulk of the cases that fill the federal courts and that must ultimately be supervised by the Supreme Court. To these mundane but vital issues of common law, procedure, and statutory interpretation, the Justice brought an intense professional interest, his years of practical experience as a litigator and advocate, and his sense of balance between literal directives and their purposes.

In *Foman v. Davis*, 371 U. S. 178 (1962), which involved an application of the Federal Rules of Civil Procedure but has been cited in and guided hundreds of unreported trial court decisions, a key issue was whether, when, and why a complaint could be amended. Writing for the Court, Justice Goldberg gave meaning to the fundamental principle that the

rules should be applied to grant litigants decisions on the merits. By ruling that it was an abuse of discretion to refuse an amendment without an explicit or apparent reason, he placed the burden on the party who sought to win without reaching the merits.

In 1965 President Lyndon Johnson prevailed on Justice Goldberg to leave the Court for the position of United States Ambassador to the United Nations. He was sworn in as Ambassador by his good friend Justice Hugo Black. The reluctance with which he left the Court is perhaps suggested, poignantly, in his asking at the UN to be addressed and referred to as Justice Goldberg.

He continued as a diplomat his passionate pursuit of freedom and justice for all people. He found at the United Nations, from 1965 to 1968, a world very different from the Court. Here was conflict in Cyprus, Kashmir, and the Middle East; diplomacy in the reelection of U Thant as Secretary General; intrigue in the complex internal and external discussions relating to the war in Vietnam; international law in the decision of the International Court of Justice regarding South Africa's stewardship of South West Africa.

The Justice made the transition with ease. The situation called for new knowledge, but no one could have come better prepared. Foreign policy had long been among his most intense interests, and international diplomacy was virtually second nature to him. He became deeply immersed personally in all of the issues at the United Nations of concern to the United States, more so perhaps than U. S. ambassadors before and after him. He impressed the foreign service officers who worked closely with him by the degree to which he did his homework on every issue, by the energy that he put into resolving the issues before him, and by his negotiating skills.

As one aide at the United States Mission to the United Nations observed, the new ambassador "raised negotiation to an art form." Until he came to the UN, it had operated primarily in public—in the Security Council or the General Assem-

bly—where, once positions were taken, there was little room for maneuvering. Justice Goldberg believed strongly in negotiating positions and working out agreements as a means of resolving disputes rather than taking hard and fast public positions. A group of UN security guards commented once to a member of Goldberg's staff on the changes he had brought to the modus operandi of the United Nations, noting that many of the delegates had begun to engage in negotiation prior to meeting in the Security Council.

These were not easy years in the community of nations, nor for the foreign policy of the United States. Justice Goldberg experienced great frustration, especially with regard to the moving target of peace in Southeast Asia. To his deep regret, it was impossible to control, and ultimately to affect, the course of events from an office at the United States Mission to the United Nations. The distance from Washington was something no Cabinet title could overcome. He expressed nostalgia for the Court and, especially, its tidy decisionmaking. He remarked on more than one occasion that no one at the United Nations could say "it is so ordered."

But there was triumph, too, especially in regard to the Middle East. The U. S. Mission in New York did indeed function as a second State Department during the "Six-Day War" in June of 1967. And in the fall of 1967, there came the crowning achievement of Resolution 242, following months of subtle and painstaking negotiations with all sides in the Middle East dispute. This Resolution established a framework for a lasting peace, an objective that ranked among the highest of Justice Goldberg's public goals. He succeeded here because, as a representative of the United States, he was so believable. With knowledge of the legal implications, credible access to high levels of U. S. political power, and unusual insight into the reasoning and motivation of his counterparts, he was able to move the entire institution of the United Nations to an extent most observers had thought impossible. Resolution 242 still remains, twenty-three years later, the framework for pursuing peace in the Middle East.

The Nuclear Non-Proliferation Treaty offers another example of his skill as a negotiator. In the early stages of the development of that treaty, after the Eighteen Nation Disarmament Committee had prepared the initial draft, the deputy foreign minister of the Soviet Union came to New York to meet with Goldberg to ask if he would take over the negotiations, inasmuch as the Soviet Union and its ambassador to the UN had lost credibility with most of the "near-nuclear" and non-nuclear nations. With Justice Goldberg as chair, the ambassadors of the eighteen nations met for two days of intensive negotiations. Then he took the three principal holdouts aside and was able to negotiate compromise language that would get them to agree to the treaty. That treaty is the product of his patience, his concern for the safety of the world, his consummate skill as a negotiator, and his persistence.

He negotiated patiently with Greek, Turkish, and Cypriot leaders to forestall a war between Greece and Turkey over Cyprus. One all-night session led to some imaginative approaches to defusing this very dangerous situation at a time when both the White House and the State Department were distracted by Vietnam and unable to recognize the seriousness of what was about to happen in Cyprus.

Justice Goldberg took the unprecedented step of formally protesting to the UN Commission on Human Rights against the suppression of free speech in the Soviet Union through the secret trials and imprisonment of dissident writers. This reflected, as he stated it, his own deep commitment to "the belief that freedom of information and of expression are essential to the preservation and advancement of human rights." The idea of addressing the Commission originated with him and not his aides or the State Department. Stating that "a trial for the crime of writing a literary work . . . is an outrageous attempt to give the form of legality to the suppression of a basic human right," he noted that the secret trials were in violation of Article 11 of the Universal Declaration of Human Rights. He then pointed out that, ironically, the acts for which the accused were tried were protected not only by the

Declaration of Human Rights but also by the Soviet Constitution itself.

Justice Goldberg took a strong stand with the State Department and the White House on many issues where he felt that the spirit, if not the letter, of agreements was being violated. Through the force of his personality, his understanding of the legal issues involved, and the correctness of his position, he was able to get the State Department to change its policy.

Although Justice Goldberg was widely known to be unhappy with American policy in Vietnam, he declined, at the time of his resignation, to list any disagreement with Administration policy. His refusal to dwell on what were profound differences, particularly over the bombing of North Vietnam, was characteristic of his view that such differences should be treated as "within the family." He resigned when it became apparent that his voice was no longer persuasive in the inner policymaking circles. At the time of his resignation, leading commentators noted his recognition by UN ambassadors as one of the most effective of those who have served as the American representative to the United Nations. He had done much to help maintain peace in many unpublicized ways and to ensure that the United States remained as much as possible on the high road. His sense of justice and of ethics would permit no less.

Upon leaving the United Nations, Justice Goldberg initially reentered private law practice, but his innate activism continued to draw him in many directions, always working for justice. In mid-1968 he agreed to handle the appeal of the Reverend William Sloane Coffin, Jr., from his conviction for civil disobedience in opposition to the war in Vietnam. The following year, he co-chaired, with former Attorney General Ramsey Clark, a commission of inquiry into the deaths of Black Panther leaders in Chicago in a pre-dawn police department raid.

In 1970 the Democratic Party drafted Justice Goldberg to be its candidate for Governor of New York. Following an unsuccessful campaign, he moved back to Washington, to

practice law and to serve, as a highly active "elder statesman," those causes that seemed to him interesting and worthwhile. He was President Jimmy Carter's Ambassador to the Belgrade Conference on Human Rights. He argued the Curt Flood case in the Supreme Court, trying to subject professional baseball to the antitrust laws; represented federal judges in litigation seeking a pay raise; served as Special Counsel to the Rhode Island Judicial Commission in a sensitive judicial ethics case; and spent considerable time making a scholarly case that Klaus Barbie could still be brought to account for crimes against humanity.

Justice Goldberg found time to chair the American Jewish Committee and to be active in many Jewish causes. He helped Cardinal O'Connor convince the Army to create standards of "human rights" for enlisted men. He chaired a committee to right the wrongs done to Japanese citizens of the United States during World War II. He mediated international disputes. And nearly every year he went to some college or law school to be a resident scholar and teacher, to introduce young people to his beloved Constitution.

The breadth and quality of this remarkable man's contributions to his country were acknowledged in President Carter's conferring on him in 1978 the Presidential Medal of Freedom. Yet saying today, as members of this Bar, our final farewell, it cannot be inappropriate to recognize that Arthur Goldberg prized above all else his opportunity to serve as a member of this Court.

He loved the Court. Sitting on this bench was the fulfillment of his life's ambition. But he loved his country even more. His President told him in 1965 that America needed his unique negotiating skills to further the cause of peace. A son of immigrants and a deeply patriotic man, he responded to that call. It was just that simple.

Wherefore, it is accordingly

RESOLVED, that we, the Bar of the Supreme Court of the United States, express our profound sorrow that Associate Justice Arthur J. Goldberg is no longer with us; we ex-

press our admiration for his dedication in carrying the principles and standards of the legal profession into so many areas of public service, and our respect for his contributions to the letter of the law and to the effectuation of its purpose; we say once more our affection for a man who felt deeply, spoke out strongly, and was devoted to what his wide-ranging experience disclosed to him as justice; and it is further

RESOLVED, that the Solicitor General be asked to present these Resolutions to the Court and that the Attorney General be asked to move that they be inscribed upon the Court's permanent records.

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General. The Court now recognizes the Attorney General of the United States.

Mr. Attorney General Thornburgh addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

The Bar of this Court met today to honor the memory of Arthur Joseph Goldberg, Associate Justice of the Supreme Court from 1962 to 1965.

Arthur Goldberg served the Nation with distinction as a lawyer, soldier, Cabinet officer, Supreme Court Justice, and diplomat. Born in Chicago in 1908, he was educated in the Chicago public schools and at Northwestern University, where he was first in his law school class and Editor-in-Chief of the Law Review.

By special dispensation, Arthur Goldberg sat for the Illinois bar examination before he reached the age of 21. He was admitted to the Illinois bar in 1929 and began a general law practice in Chicago. He opened his own law office in 1933, and soon began handling labor matters for clients such as the United Steelworkers and the Chicago Newspaper Guild.

During World War II, Arthur Goldberg served under William J. Donovan as Chief of the Labor Division in the Office of Strategic Services. He carried out several intelligence missions to Europe, where he organized transportation workers into a valuable Allied intelligence network.

After the war, he resumed his law practice and soon gained recognition as a preeminent labor lawyer. He served as general counsel to the United Steelworkers from 1948 to 1961. As general counsel to the Congress of Industrial Organizations (CIO), Arthur Goldberg played a major role in the merger of that organization and the American Federation of Labor in 1955. He remained as special counsel to the merged AFL-CIO until 1961. During this period, he was active in efforts to rid the unions of corruption. He made six oral arguments before this Court in the 1950s, and was on the brief in many other cases. He argued as *amicus curiae* in the Steel Seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952).¹

Arthur Goldberg was appointed Secretary of Labor by President Kennedy in 1961. Secretary Goldberg employed his superb negotiating skills to resolve labor conflicts that he regarded as jeopardizing national interests. Within 24 hours after his swearing in by Chief Justice Warren, he was on his way to New York to mediate a harbor strike. This pattern of personal mediation was repeated several times during his months as Labor Secretary.

Arthur Goldberg was nominated by President Kennedy to succeed Justice Felix Frankfurter and sworn in on October 1, 1962. The seat he occupied is a distinguished one, having been held by Benjamin Cardozo, Oliver Wendell Holmes, and Joseph Story in addition to Justice Frankfurter. It is now

¹ He also argued in *United Steelworkers of America v. United States*, 361 U. S. 39 (1959); *Hotel Employees v. Sax Enterprises, Inc.*, 358 U. S. 270 (1959); *Textile Workers v. Lincoln Mills*, 353 U. S. 448 (1957); *NLRB v. Coca-Cola Bottling Co.*, 350 U. S. 264 (1956); *Amalgamated Assn. of Street, Electric Railway & Motor Coach v. Wisconsin Employment Relations Board*, 340 U. S. 388 (1951). He won all but the United Steelworkers case.

held by JUSTICE BLACKMUN. Soon after his appointment, the new Justice commented on the transition from life as a Secretary of Labor to life as a Supreme Court Justice:

"The Secretary's phone never stops ringing; the Justice's phone never rings—even his best friends won't call him.

"The Secretary . . . worries about what the President and . . . Congress will do to his carefully formulated legislative proposals; the President, the Congress, and the Secretary wonder what the Justice will do to theirs.

"The Secretary's . . . vacations are . . . interrupted by unanticipated strikes; the Justice's . . . long recess by an apparently endless flow of petitions for certiorari, difficult stay applications, and the certitude that if he vacations too obviously he will be 'time charted' by Professor Hart and the editors of the *Harvard Law Review*."²

In his three Terms on the Court, Justice Goldberg delivered 94 opinions, including 37 opinions for the Court. His first opinion for the Court, in *United States v. Loew's, Inc.*, 371 U. S. 38 (1962), a complex antitrust case, revealed his high abilities as a judicial craftsman.³

One of Justice Goldberg's most significant opinions came later in his first Term. The Court held unconstitutional, as imposing punishment without a criminal trial, a statute providing that persons who evaded military service by remaining outside the jurisdiction of the United States in time of war would automatically be deprived of citizenship. *Ken-*

² Reprinted in D. Moynihan, ed., *The Defense of Freedom: The Public Papers of Arthur J. Goldberg* 128-129 (1964).

³ This was the first of several antitrust opinions by Justice Goldberg. See *FTC v. Sun Oil Co.*, 371 U. S. 505 (1963); *Silver v. New York Stock Exchange*, 373 U. S. 341 (1963); *United States v. Philadelphia Nat'l Bank*, 374 U. S. 321 (1963). Justice Goldberg also authored an opinion stating his view that the antitrust laws should not apply to collective bargaining over wages, hours, and working conditions. See 381 U. S. 697 (opinion of Goldberg, J., in *United Mine Workers v. Pennington*, 381 U. S. 657 (1965) and *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U. S. 676 (1965)).

nedy v. Mendoza-Martinez, 372 U. S. 144 (1963). In *Gibson v. Florida Legislative Investigation Committee*, 372 U. S. 539 (1963), Justice Goldberg's opinion for the Court held that the committee could not require the production of membership records of the NAACP absent some showing of a connection between the NAACP and the Communists activities it was investigating. His opinion for the Court the following year in *Aptheker v. Secretary of State*, 378 U. S. 500 (1964), held that a statute prohibiting any member of a Communist organization from applying for a passport was an unconstitutional infringement of the right to travel.

Justice Goldberg wrote noteworthy concurring opinions in a number of other constitutional cases. In *Griswold v. Connecticut*, 381 U. S. 479 (1965), he expressed the view that the Ninth Amendment expanded the concept of "liberty" in the Due Process Clauses beyond those rights specifically enumerated in the Constitution and the Bill of Rights. In *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), Justice Goldberg called for an unconditional privilege to criticize the conduct of public officials. And in *Heart of Atlanta Motel v. United States*, 379 U. S. 241 (1964), his opinion concluded that the public accommodations provision of the Civil Rights Act of 1964 was a valid exercise not only of Congress's power under the Commerce Clause, as the Court held, but under Section 5 of the Fourteenth Amendment as well.

Many of Justice Goldberg's opinions addressed matters of criminal procedure. *Draper v. Washington*, 372 U. S. 487 (1963), held that indigents appealing criminal convictions are entitled to a transcript or other account of the trial sufficient to permit review of their contentions on appeal. Justice Goldberg also wrote a trio of decisions concerning the sufficiency, under the Fourth Amendment, of affidavits used to obtain search warrants.⁴ Justice Goldberg's dissenting opinion in *United States v. Barnett*, 376 U. S. 681 (1964), con-

⁴ *Aguilar v. Texas*, 378 U. S. 108 (1964); *United States v. Ventresca*, 380 U. S. 102 (1965); *Jaben v. United States*, 381 U. S. 214 (1965) (Goldberg, J., dissenting in part).

cluded that state officials accused of disobeying orders of a federal court of appeals were entitled to a jury trial. And in a memorandum circulated to the Conference in 1963, Justice Goldberg anticipated and addressed many of the death penalty issues the Court would consider in the ensuing years.⁵

Justice Goldberg's best-known opinion for the Court was in *Escobedo v. Illinois*, 378 U. S. 478 (1964). The Court held that the admission of an incriminating statement made by Escobedo during the course of police questioning violated his Sixth Amendment right to counsel. Although the Sixth Amendment analysis of the *Escobedo* opinion was later abandoned by the Court,⁶ Justice Goldberg's reasoning foreshadowed the Court's decision two years later in *Miranda v. Arizona*, 384 U. S. 436 (1966).

Justice Goldberg also wrote several opinions in labor cases that drew on his great knowledge and expertise in this field.⁷ In both *NLRB v. Metropolitan Insurance Co.*, 380 U. S. 438 (1965) (concerning bargaining unit determinations), and *American Ship Building Co. v. NLRB*, 380 U. S. 300, 327 (1965) (Goldberg, J., concurring in the result) (concerning lockouts), he expressed a willingness to defer to decisions of the National Labor Relations Board, but only so long as the Board set forth reasons for its decision and the decision was supported by substantial evidence in the record.

In 1965, President Johnson prevailed upon Justice Goldberg to resign from the Supreme Court to succeed Adlai Stevenson as United States representative to the United

⁵ The memorandum was published in 27 S. Tex. L. Rev. 493 (1986). In *Rudolph v. Alabama*, 375 U. S. 889 (1963), Justice Goldberg dissented from the denial of certiorari in a case presenting the question whether the death penalty for rape is cruel and unusual punishment forbidden by the Eighth Amendment. The Court addressed this question 14 years later in *Coker v. Georgia*, 433 U. S. 584 (1977).

⁶ See *Johnson v. New Jersey*, 384 U. S. 719, 729 (1966); see also *Kirby v. Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion).

⁷ See *Humphrey v. Moore*, 375 U. S. 335, 351 (1964) (Goldberg, J., concurring); *Brotherhood of Locomotive Engineers v. Louisville & Nashville R.R. Co.*, 373 U. S. 33, 42 (1963) (Goldberg, J., dissenting).

Nations. In accepting the President's nomination, Justice Goldberg said that he could not "conceal the pain with which I leave the Court It has been the richest and most satisfying period of my career."⁸ And in a letter to his fellow Justices, he said that "only the most compelling call to duty could bring me to leave this Court But that call did come, and I could not refuse." 382 U. S. ix. In his new post, Ambassador Goldberg confronted many difficult issues relating to the conflict in Vietnam. He also played a role in the adoption of Security Council Resolution 242 after the 1967 war in the Middle East.

Following his resignation from the UN post in 1968, Arthur Goldberg continued to contribute to public life as ambassador-at-large to the United Nations, chairman of the U. S. delegation to a major conference on the Helsinki human rights agreements, professor at several universities, and distinguished practicing lawyer. His final appearance before this Court was in *Flood v. Kuhn*, 407 U. S. 258 (1972), an antitrust challenge to professional baseball's reserve system. In 1978, he received the Medal of Freedom, the Nation's highest civilian award.

Appearing before the Senate Judiciary Committee prior to his confirmation as a member of this Court, Arthur Goldberg said:

"I would regard the first function of a judge, whether he sits in a trial court or an appellate court or in our highest tribunal, to make sure as much as any human being can that he puts aside his own prejudices, predilections, viewpoints, prejudices—which we all possess—and knowing that he possesses them, try to administer justice equally under the law."⁹

⁸ Reprinted in D. Moynihan, ed., *The Defense of Freedom: The Public Papers of Arthur J. Goldberg* xv (1964).

⁹ Hearings before the Senate Comm'n on the Judiciary on Nomination of Arthur J. Goldberg, of Illinois, to be Associate Justice of the Supreme Court of the United States, 87th Cong., 1st Sess. 29 (1962).

Throughout his public life, Arthur Goldberg remained committed to the rule of law. He recognized that "the law gives form and substance to the spirit of liberty."¹⁰ Justice Goldberg's tribute to Chief Justice Warren is a fitting tribute to Arthur Goldberg himself: "He did his part in the sacred stir towards equal justice."¹¹

MR. CHIEF JUSTICE, on behalf of the lawyers of this Nation and, in particular, of the Bar of this Court, I respectfully request that the resolutions presented to you in honor and celebration of the memory of Justice Arthur J. Goldberg be accepted by the Court, and that they, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Mr. Attorney General and Mr. Solicitor General, the Court thanks you on behalf of the Bar for your presentations today in memory of our late colleague and friend, Justice Goldberg.

We ask that you convey to Chairman Wirtz and the members of the Committee on Resolutions our profound appreciation for these very appropriate resolutions. Your motion that these resolutions be made a part of the permanent record of the Court is hereby granted.

As the Attorney General's description indicates, the career of Arthur J. Goldberg demonstrated a remarkable combination of intellectual ability and dedication to public service. I was privileged to witness a significant moment in that career in 1952, when I was serving in this Court as a law clerk to Justice Robert Jackson. The Court was hearing argument in the now famous "Steel Seizure" case. Arthur Goldberg argued in that case as *amicus curiae* for the Steelworkers' Union. By common consent among a most hypercritical au-

¹⁰ The Defenses of Freedom xv.

¹¹ Goldberg, A Tribute to Chief Justice Earl Warren, 69 N. W. U. L. Rev. 331, 334 (1974).

dience—the assembled law clerks of the Supreme Court—he did an excellent job. We were apparently accurate in our assessment of his capabilities; seven years later, when he argued again before the Court in a case which he actually subsequently lost, the Justices informed him that they had not heard any case argued more brilliantly that Term.

Arthur Goldberg served on the Supreme Court for only three Terms before leaving to become United States Representative to the United Nations. In those three short years, as the Attorney General has told us, he authored several significant opinions for the Court. Perhaps even more important, however, is the outlook on constitutional law which he brought to the Court. His succession to the seat of Felix Frankfurter gave the "Warren Court" a solid majority for an expansive reading of the Equal Protection and Due Process clauses. Justice Goldberg thereby gave his impetus to a judicial philosophy which was destined to endure beyond his rather brief tenure here.

The first time I had the opportunity to meet Arthur Goldberg was in 1971, on the occasion of the funeral of Justice John Harlan. It was my good fortune to sit next to him on a special plane which flew Members and former Members of the Supreme Court to New York for the funeral. During that delightful visit he talked freely of the various public posts he had held. It was my distinct impression at that time that, although he had enjoyed all of these jobs, he liked that of Associate Justice most of all. After his return to private practice, he continued to take a lively interest in the work of the Supreme Court and the judicial process as a whole. It is fitting that he should be remembered today, in the Courtroom which was graced with his presence and among the colleagues whose lives have been enhanced through their association with him.

Even in a country which is blessed with as many fine public servants as our own, Arthur Goldberg stands out for the remarkable combination of intellect, versatility, and dedication which he displayed. Many of us would be content to have

functioned in one or maybe two of the many positions which he occupied. Arthur Goldberg brought his tremendous energy to all of them. Our country is fortunate to have been enriched by the public service of this exceptional individual.