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WHY ARTHUR GOLDBERG CARED SO MUCH ABOUT PRIVACY

DAVID STEBENNE*

The single U.S. Supreme Court opinion for which Arthur Goldberg is best known is probably his concurrence in *Griswold v. Connecticut*, the decision that marked the emergence of “the new privacy” in American constitutional law.¹ That was no accident. Justice Goldberg had a special interest in privacy while serving as an Associate Justice from 1962 to 1965, which grew out of his career as a labor lawyer. After graduating from Northwestern Law School in 1929 and spending three years in practice at the Pritzger firm, Arthur Goldberg opened his own firm in 1933, where at first he mostly represented small businessmen. Six years later, he took his first labor client, the Chicago chapter of the American Newspaper Guild (ANG), an affiliate of the newly formed Congress of Industrial Organizations (CIO). Goldberg’s great success in defending ANG members striking at the Hearst newspaper there (the “Herald-Examiner”) led to a request from the CIO’s Steelworkers Organizing Committee (SWOC) head in Chicago, Vann Bittner, that Goldberg represent SWOC’s western region, which included steelworkers at mills from Chicago westward to California. As SWOC grew into the powerful United Steelworkers of America (USA), Goldberg’s highly effective legal representation on its behalf steadily expanded his labor practice. So, too, did his reputation, built by his support for the Chicago chapter of the American Civil Liberties Union (ACLU), as a humane liberal of the New Deal era variety. Even Goldberg’s departure from his firm during World War II bolstered his standing with the labor move-

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1. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *see also*, JOHN W. JOHNSON, *GRISWOLD V. CONNECTICUT: BIRTH CONTROL AND THE CONSTITUTIONAL RIGHT OF PRIVACY* 163-75 (2005).

ment. He served with the U.S. wartime intelligence agency, the Office of Strategic Services (OSS), and organized a network of trade union affiliated spies in Europe, North Africa, and the Middle East to aid the Allied war effort. This sort of background led directly to Goldberg's appointment in March 1948 as general counsel of the CIO and the Steelworkers Union. In agreeing to represent them, Goldberg accepted, in effect, two jobs: chief Washington lobbyist for the CIO and chief contract negotiator for the Steelworkers Union. Until that time, Goldberg was not well known outside of Chicago, but over the next thirteen years, these new roles made him a national figure.²

These work experiences had interesting implications for Goldberg's views on privacy. He did not form his views on that complex subject simply by studying in law school or by teaching law part-time at The John Marshall Law School in Chicago, Illinois during the 1930's and 1940's. His law practice in Chicago, and then Washington, D.C., as well as his wartime service, gave him real world experience dealing with a wide range of privacy issues. Having that kind of depth and breadth of exposure to privacy issues was unusual for most members of the nation's highest court.

Turning to a brief examination of the development of privacy issues over time, we begin with the "old" privacy associated with Samuel Warren and Louis Brandeis, which was born out of reaction against overly intrusive journalism, which Goldberg experienced firsthand during the 1950's. Much of the nation's press at this time remained suspicious of powerful labor unions, such as the Steelworkers, and labor federations, such as the CIO. As a result, unfair press coverage was a part of life for organized labor, especially on the topic of corruption within its ranks. As the chief bargainer for the Steelworkers and the chief lobbyist for the CIO, Goldberg had to cope with this problem on a regular basis. His associates noted that Goldberg was unusually sensitive to press criticism of labor clients and his work on their behalf. He could, in truth, be a bit thin-skinned when it came to unfair press, which contributed to his concern about the loss of privacy for private citizens.³

Another privacy issue was the concern about excessively intrusive police surveillance, which had helped prompt Justice Brandeis's famous dissent in *Olmstead v. United States*.⁴ The Steelworkers Union was familiar with excessively intrusive police surveillance during the height

2. DAVID STEBENNE, ARTHUR J. GOLDBERG: NEW DEAL LIBERAL 6-232 (1996).

3. *Labor's Plenipotentiary*, FORTUNE, Mar. 1960. Goldberg thought differently when it came to press criticism of public officials. With respect to them, he was a strong defender of press freedom. See KERMIT L. HALL & MELVIN I. UROFSKY, NEW YORK TIMES V. SULLIVAN: CIVIL RIGHTS, LIBEL LAW AND THE FREE PRESS 144-45, 163-64, 170, 181 (2011).

4. *Olmstead v. United States*, 277 U.S. 438 (1928).

of the furor over labor corruption in the later 1950's. One may wonder how the Steelworkers Union leaders could have known about surveillance such as wiretapping during this time. Listening surveillance technology in the 1950's was unsophisticated, so members of the Steelworkers Executive Board could easily discover if their phones had been tapped, and then discuss the issue at board meetings. For example, the following is an excerpt from the Steelworkers board meeting minutes from September 10, 1957 where Steelworkers Secretary-Treasurer I. W. Abel complains about the government's invasion of his privacy by wire-tapping:

I want to try, if I can, to impress on everybody with just the extent to which this sort of thing has gone and how dastardly it is and how impossible it makes the functions of an organization such as ours. As President [David] McDonald has said, 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 [in the sense of "certain"] that there hasn't been a conversation by President [David] McDonald over any of his phones or by myself over any of my phones in the past year that isn't recorded.⁵

Additionally, there were the invasive privacy practices posed by the ever more elaborate system of FBI informants and file-making propensities of then FBI-director J. Edgar Hoover and his staff. The FBI personally invaded Goldberg's privacy when a file was opened on him in the late 1930's when he first began representing labor unions. Goldberg's file was just one of many that were assembled on prominent citizens associated with left-wing groups. A consequence of the FBI gathering this data in the late 1930's and early 1940's was the development of a list of certain citizens to be rounded up in the event of an enemy attack. FBI Director J. Edgar Hoover personally signed the detention order for Goldberg in 1941. Although the order was never used against Goldberg, the FBI picked up his secretary, Elizabeth Oh, a Japanese-American, immediately after the attack on Pearl Harbor. Goldberg actually had to meet with a judge and then tell the FBI agent holding Oh that unless she were released right away Goldberg would get a court order from the judge commanding she be released. Only that persuaded the FBI agent to agree.⁶

5. *USA Executive Board Meeting Minutes, November 10, 1957*, STEELWORKERS UNION PAPERS 156 (on file with the Pennsylvania State University Library, State College, PA).

6. Robert M. Goldberg, *Cheap Shots from the Grave: FBI File on Arthur Goldberg is Less Revealing than Hyped*, LEGAL TIMES, May 13, 1996; Tony Mauro, *What the FBI Had on Arthur Goldberg*, COURTSIDE, Apr. 22, 1996; STEBENNE, *supra* note 2, at 29-30.

Matters got worse for Goldberg when he was away working for the OSS because he was required to keep very quiet about what he was doing there. Therefore, his absence from Chicago, Illinois from March 1942 through October 1944 was not publicized. This appears to have led to a case of mistaken identity, as FBI informants in Chicago reported that “Arthur Goldberg” was involved in communist activities there during the time that he was gone. The person referred to in these reports must have been another Arthur Goldberg. The future Supreme Court justice was an anticommunist liberal who never joined in any communist activities, and could not possibly have participated in ones that took place while he was away in New York, Washington, and London doing his OSS work.⁷

This sort of mistaken identity problem was not that uncommon. For example, a lawyer named Arthur Larson, who had worked at a law firm in Milwaukee, Wisconsin during the 1930’s, fell victim to the same sort of false accusation while employed by the Office of Price Administration (OPA) in Washington during World War II. Larson, a moderate Republican, who would later hold three high posts in the Eisenhower Administration, was summoned during the early 1940’s to the Justice Department building. There, he was questioned by three FBI agents about whether he had signed a pacifist petition circulated by a Communist front group in Tomah, Wisconsin. Larson said they interrogated him, “in precisely the same manner suitable to the interrogation of a thrice-convicted safe cracker.”⁸ He was able to persuade the FBI agents that they had the wrong Arthur Larson, in part by pointing out that western Wisconsin, where the petition had been circulated, was one of the most prominent areas for the surname “Larson.”⁹

Goldberg’s experience differed only in that the FBI did not tell him about its file on him. He learned of it more or less by accident in 1955 when Goldberg received a letter from a fellow lawyer. The letter stated that while representing someone before a Loyalty Board, Goldberg’s name had come up as someone belonging to a Communist front group. Goldberg immediately moved to set the record straight by meeting with FBI deputy director Louis Nichols, who showed him an eleven-page dossier that Goldberg refuted, point by point. After the meeting, Nichols reported to his superiors that “an injustice has been done” in Goldberg’s case. What Nichols meant by that remark was not just that Goldberg had been unfairly targeted, but consequently he had lost the chance to serve in the Eisenhower Administration. The Eisenhower Administration had considered offering him a position in 1954 and then

7. STEBENNE, *supra* note 2, at 30, 42, 45-46.

8. DAVID STEBENNE, MODERN REPUBLICAN: ARTHUR LARSON AND THE EISENHOWER YEARS 120 (2006).

9. *Id.*

backed off when the FBI sent its error-filled Arthur Goldberg dossier to the White House Chief of Staff, Sherman Adams.¹⁰

The good news for Goldberg was that he, unlike some others, had a chance to clear his name in 1955, which opened up possibilities for public service thereafter. Goldberg's unusual ability to meet with Louis Nichols on this matter grew out of his professional dealings with the FBI after he took his two high-profile jobs in Washington. One of his duties as CIO general counsel was to process communist-led affiliates out of the CIO in the late 1940's and early 1950's, a topic of concern to the FBI. Goldberg worked directly with FBI personnel in this manner because one of his jobs was to try to protect CIO officials who were not communists from wrongful investigation. When the FBI had a serious concern about a CIO union official's left-wing associations, they would check with Goldberg. Often the information on their suspect was old and completely out of date in terms of that person's current political convictions, and in that context Goldberg helped protect that person from FBI harassment. A later generation of labor activists would look on this sort of collaboration with the FBI suspiciously, but in the early 1950's dealing with Hoover's FBI was infinitely preferable to either the House Un-American Activities Committee (HUAC) or Joseph McCarthy's Senate investigating committee. All of these FBI experiences gave Goldberg a very clear sense of just how invasive of one's privacy the agency could be, how unreliable much of the information that they collected was, and thus how serious a threat to privacy the much bigger and better financed FBI of the 1950's had become when compared with earlier decades.¹¹

Then there was the similar kind of privacy invasion posed by the newer CIA and its counterparts in other countries. Working for the CIA's predecessor, the OSS, had introduced Goldberg to some prominent spies and to the kinds of techniques used by espionage agencies in Western Europe at that time. He was personally trained by a British intelligence officer named William Stephenson, the man called "Intrepid." Goldberg was also briefly a target of German intelligence while working with Stephenson in New York City. He learned firsthand both what it was like to spy, and to be spied upon. Goldberg also made some lasting connections to the world of American espionage. Among the people he got to know well was William Casey,¹² who moved his way up through the CIA and eventually became its director. The CIA maintained an interest in organized labor during the 1950's, because labor

10. Tony Mauro, *What the FBI Had on Arthur Goldberg*, COURTSIDE, Apr. 22, 1996.; Robert M. Goldberg, *Cheap Shots from the Grave: FBI File on Arthur Goldberg is Less Revealing than Hyped*, LEGAL TIMES, May 13, 1996.

11. STEBENNE, *supra* note 2, at 108-09.

12. JOSEPH I. PERSICO, CASEY: FROM THE OSS TO THE CIA (1990).

was in a sense an international movement, and so from time to time the CIA consulted with Goldberg about Cold War espionage efforts in Europe and Latin America. All of these espionage related experiences, like the one with the FBI, gave Goldberg a sense of just how elaborate and invasive American and foreign espionage was becoming, which posed yet another potential threat to privacy.¹³

In the mid-1950's, Goldberg had a leading role in bringing about the merger of the AFL and CIO, which raised a different kind of privacy issue. The heart of that process was a bargain that each side's member unions stop trying to steal members from the rival federation, the so-called "no-raiding" agreement. Negotiation of the agreement was very complicated and difficult, and Goldberg maintained a leading role in the process, along with George Meany of the AFL. The road to merger was a tense and difficult process, in part because of the strong and often-clashing personalities involved. One of the best indicators of those tensions is the lack of group photographs of the leading people involved. The three most influential figures in the labor movement in the later 1950's were George Meany, Walter Reuther, and Arthur Goldberg. Even though all three were often photographed, pictures of the three of them together are almost non-existent.¹⁴ One of the very few ever taken was when Goldberg was serving as Labor Secretary in the early 1960's at a ceremony in the Oval Office. Kennedy is standing in the midst of the trio and literally appears to be the glue keeping them all in the picture. The privacy issue connection here has to do with Goldberg's decision to write a book in 1956 about the AFL-CIO merger. His book, entitled *Labor United*, leaves out a lot, and intentionally so. As Goldberg later explained, the formula for merger left many issues to be worked out in the future. The need to maintain that fragile bargain and encourage the two sides to produce a truly united union movement took precedence over a more informative account of how the merger came about, and how individual union leaders actually behaved. Negotiating the AFL-CIO merger was probably the single most important thing Goldberg did as a union lawyer in the 1950's. Writing about it drove home the need to protect privacy in another way, lest a positive social process be derailed.¹⁵

Being a Washington lawyer on behalf of labor in the 1950's allowed Goldberg to learn things about prominent people that could be damaging if revealed either in the press or at a government hearing. For ex-

13. STEBENNE, *supra* note 2, at 31-40; Interview with Rand Richards Cooper, Author (July 6, 2011).

14. The photo of Meany, Reuther, and Goldberg is in the Kennedy White House Photographs Collection in the John F. Kennedy Presidential Library, Boston, MA.

15. STEBENNE, *supra* note 2, at 120-25; ARTHUR J. GOLDBERG, *AFL-CIO: LABOR UNITED* (1965).

ample, Goldberg's single most important client, President David McDonald of the Steelworkers Union, had a serious drinking problem that sometimes incapacitated him. McDonald, a married Catholic, was also having an affair with his secretary during the 1950's. Some honest labor union officials, such as the Auto Workers head Walter Reuther, danced around problems of corruption in UAW locals over which Reuther had limited control. In the late 1950's and early 1960's, Goldberg and John F. Kennedy were closely associated in a professional sense, although it is unclear how much he knew about Kennedy's peccadilloes. What Goldberg tended to say privately about Kennedy was that he, Goldberg, "would never understand Kennedy's personality."¹⁶ These examples help highlight the type of information Goldberg obtained through his role as a labor lawyer in the 1950's, and that he needed to keep secret in order to protect people's reputations.

Accordingly, when Goldberg ascended to the Court in September 1962, he had a very clear sense from his experiences how harmful privacy invasions could be. He was especially knowledgeable about how the growth of media, the government and the advent of new technologies tended to invade traditional zones of privacy. When Brandeis and Warren wrote their famous article about privacy in 1890, those developments were in their infancy. By the 1950's a transformation had taken place. In that sense, it is no surprise that beginning in the mid-1960's, the Supreme Court would pay more attention to privacy issues. From 1962 to 1965, the Court had in Goldberg an Associate Justice with a great deal of real-world experience with this growing social problem. And that captures Goldberg's greatest contribution as a justice, in the privacy area and others: he had a lot of experience with ordinary people and groups that lacked the power to defend themselves against mounting invasions of their privacy. At the same time, he had a clear sense of the necessary functions performed by the press, law enforcement, and the intelligence agencies. In other words, 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 as ones that required a balancing of competing legitimate interests.

16. STEBENNE, *supra* note 2, at 100-01; DOROTHY K. GOLDBERG, A PRIVATE VIEW OF A PUBLIC LIFE, 120-21, 131-34 (1975).

