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In Memoriam

THE HONORABLE IRVING L. GOLDBERG: A PLACE IN HISTORY

*Lawrence J. Vilaro and Howard W. Gutman**

The federal building in Dallas is a huge rectangle with windows. Built in the late 1960s, it seems suitable only for bureaucrats and bean counters. Post-deco, pre-contemporary, soon-to-be-destroyed. You can smell the vinyl from blocks away. The subliminal buzz of a fluorescent bulb on the blink follows you through every corridor.

But for a quarter of a century, that unlikely repository housed a national treasure. Tucked away in a corner of the thirteenth floor, down a linoleum hallway and behind a large wooden door, was a garden of warmth and wit and wisdom. And in the midst of that garden, in an office filled with photos of friends whose lives he touched over the years, Judge Irving L. Goldberg presided.

With a nervous chuckle and the wave of a hand, Judge Goldberg undoubtedly would have resisted the “treasure” label. His humility precluded even the acknowledgement of admiration. But certainly this man—whose eyes and voice sparkled as he spoke, whose brilliance dazzled those who listened to him, whose wisdom enriched all lucky enough to be privy to it—was a treasure. From his place in history to his place in the hearts of those close to him, Judge Goldberg was precious indeed.

The fact that Irving Goldberg’s life spanned every decade of the twentieth century is more than just an interesting bit of trivia. In a sense, Judge Goldberg’s life was itself a chronicle of much of America’s history during the past hundred years. He was born into frontier Texas. He studied at the feet of Felix Frankfurter before his rise. He knew Alger Hiss before his fall. He witnessed one President’s death and another’s birth. He presided over Jane Roe’s case as she became anonymous and famous at the

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Much of this tribute is taken from an interview by the authors with Judge Goldberg. Lawrence J. Vilaro & Howard W. Gutman, *With Justice From One: Interview With Hon. Irving L. Goldberg*, LITIG., Spring 1991, at 16.

same time. He rendered decisions that helped the Black to emerge from the Negro.

Judge Goldberg's contribution to American history was more than a matter of longevity or historical coincidence, however. In fact, he contributed a sense of justice and compassion that is rivaled by few in American jurisprudence. He simply could not understand how a rider could be prohibited from choosing any empty seat on a bus; how a voter could be prevented from casting a meaningful ballot; how a child—dressed in third-generation rayon or Givenchy's latest silk—could be deprived of a first-rate education.

And justice was more than a philosophical concept for Judge Goldberg. Energized with a strong social conscience and emboldened by a tremendous amount of courage, Judge Goldberg put justice into action. Being a liberal in the South was never easy. But, in the old days, with comrades like John Minor Wisdom and Elbert Tuttle, at least a good fight could be had. And a powerful dissent could always keep the other side from going too far.

Towards the end, there were more dissents and fewer good fights. But this octogenarian judge—a man called the “personification of justice” by none other than Judge Frank M. Johnson, Jr.—did not want to stop. It was more important than ever to be heard.

Last February, the choice of whether to continue was taken away from the Judge. The battles and the laughs were left to those who remained behind. A courthouse cried. A city mourned. A legion of friends and colleagues felt their hearts crumble. And what had been a living treasure became a legacy of warmth and wit and wisdom, and wonderful stories—some with a lesson, some with historical significance, all entertaining and memorable.

Like the one about the man the Judge called “Lyndon” becoming President

According to the Judge, no author had ever reported it accurately. It was, as the Judge remembered, a beautiful November day, crisp, sixty-one or sixty-two degrees, just cool enough for a coat. The sun was bright, and there was going to be a luncheon for President John F. Kennedy and Vice President Lyndon B. Johnson at Market Hall, one of the big convention centers on I-35. The place was packed.

The Judge—just plain Irving Goldberg back then—was asked by the man in charge of seating where he wished to sit. As Vice President Johnson's friend and lawyer, he had his choice of locations at the luncheon. Goldberg requested a seat upstairs so that he could look down on everybody and see who was there, rather than being one of the people who were seen. They waited and waited. No entourage arrived.

Eventually, Goldberg approached someone he knew whom he had seen walking around downstairs. He learned only that there had been an accident. Goldberg suggested that an announcement be made, but no

one knew how the crowd would react. The crowd was becoming rather restless, but the news would also create a problem.

As Goldberg walked back to his table, he heard a news report on a transistor radio. Shots had been fired. Cars were on the way to the hospital. Goldberg and his wife left the hall.

As soon as he arrived at home, Goldberg threw himself on the lounge chair, and just then the telephone rang. It was the receptionist from his office. She said that the White House—the Dallas White House—was trying to reach him. Goldberg replied, “Well, then we’d better get off the phone.” Pretty soon, the telephone rang again. “Dallas White House. Please hold the line.”

A brusque voice came on the line. “This is Lyndon.” Goldberg barely had time to say “yes,” when Johnson continued: “Now, I want some answers to hard questions right away. First you need to know that Kennedy has been assassinated. I need to know how I become President. Do I get sworn in here, or do I go to Washington?” Goldberg informed Johnson, “Well, Mr. President, if I remember the Constitution of the United States, you are now the President of the United States by what I would call constitutional devolution. It says you shall become the President upon the death of the President.”

Johnson sounded surprised. “Don’t I need to be sworn in?” he insisted. Goldberg recalled the swearing-in procedure of Calvin Coolidge, who had been sworn into office in New England by his father. Goldberg thus responded, “Well, you are President right now, but it should be memorialized by some formality with witnesses.”

Johnson asked who could do the job. Goldberg responded that it could be anybody who could take an oath, but warned: “It should not be a Republican.” He insisted Johnson look elsewhere, stating, “You want someone other than me. You want someone who is an officeholder, a judge, someone who has an office with some stature.”

Johnson again requested help. “Well, whom do you suggest?” Finally, Goldberg suggested Sarah Hughes, describing her as “a Democrat, a supporter of yours, a woman, and a fine judge.” Johnson loved the idea. But Johnson’s next question shocked Goldberg: “Can you get her for me?”

Amidst the urgency, Goldberg chuckled to himself. He explained to Johnson that the President of the United States would be better served by asking the Secret Service, the F.B.I., the I.R.S., or the Army to find Sarah Hughes. But, reluctant to argue with the new President, Goldberg agreed to do his best. Johnson urged Goldberg to go to Love Field in order to meet him on Air Force One. Goldberg explained that Johnson did not need him, and protested that he would simply see if he could get Judge Hughes.

Perplexed about the best way to proceed, Goldberg had an idea. He called Barefoot Sanders, then the United States Attorney (and now a federal district judge). Goldberg explained to Sanders that Kennedy had been shot, and that Johnson was waiting on Air Force One at Love Field

to be sworn in. He said that Johnson wanted Judge Hughes to handle the oath and counted on Goldberg to find her. Goldberg instructed Sanders to use the FBI, the Secret Service, or whoever else was at his disposal "to find Sarah."

After the two men had hung up, Goldberg realized that he had forgotten to tell Sanders where Judge Hughes could find the oath of office. Goldberg knew it was in the Constitution, and he called Sanders back. He urged Sanders to provide Judge Hughes with a copy of the Constitution. When Sanders began to protest, Goldberg warned, "Barefoot, I don't think Sarah carries it in her hip pocket." In fact, when Judge Hughes arrived at the plane, someone handed her a copy of the Constitution that had come from Washington. It had been sent down by the office of Attorney General Robert Kennedy.

Sanders had offered to secure an escort to bring Judge Hughes to the airport. True to character, Judge Hughes refused and drove herself to the swearing-in.

After Judge Hughes had been located, Mrs. Goldberg suggested that she and her husband proceed to Love Field. They drove to the airport and parked their car. The only thing now separating Goldberg from his rendezvous with the new President was a wall of the people the soon-to-be-judge feared most: Dallas' finest men in blue.

As the Goldbergs walked on the runway, they were appropriately stopped by a policeman. Goldberg attempted to explain that he had just spoken to the new President, who had requested his attendance. The officer only stared. Goldberg finally explained to his wife that it was difficult to convince policemen of anything, and the couple left. The next day, Johnson called to ask Goldberg where he had been. Goldberg simply responded, "Never mind."

The road to becoming a presidential confidant had taken Goldberg through many of the small towns in Texas. Goldberg had left the town of Port Arthur to attend Harvard Law School. Upon graduation, he returned to Beaumont, Texas, not far from his home town. There, he practiced with one of the best firms in Beaumont. But Beaumont proved too small, so the Goldbergs moved to Houston, where the young lawyer opened his own practice.

When the oil boom hit Tyler, Texas, it caused a gusher for the law practice of Mrs. Goldberg's uncle, and the Goldbergs moved to Tyler to pitch in. Within a couple of years the oil frenzy subsided, and Goldberg became house counsel for the Murray Company, a manufacturer of cotton gins. Shortly thereafter, he left the cotton gin business to practice litigation with an acquaintance, a young lawyer named Martin Winfrey. That relationship carried on for six years until 1942, when, according to the Judge, the Battle of Washington began.

By 1942, Goldberg was thirty-six years old, had been out of law school for thirteen years, and was a fairly successful lawyer with a family. And

then, in the Judge's words, "the darndest thing happened." Goldberg was drafted.

Never much of a physical specimen, the thirty-six-year-old lawyer, who would later describe himself as being "allergic to exercise," presented quite a problem for his new superiors. The Navy had no idea what to do with him. During his placement interview, Goldberg suggested that he could take the job of the person to whom he was speaking, the person who decided what to do with people. But the interviewer protested, noting that Goldberg was not familiar with the "Dictionary of Occupational Titles." Never at a loss for words, Goldberg asked earnestly: "Does it have an index?"

The middle-aged lawyer was assigned to the hospital corps. Goldberg did his best, but his entire medical experience had consisted of buying aspirin in drug stores. Finally, Lieutenant Goldberg found his way to the Office of General Counsel of the Navy in Washington, D.C.

During the Battle of Washington, Goldberg, who had had a casual acquaintance with Lyndon Johnson and his family through mutual friends in Texas, struck up a warm friendship with the young Congressman. On his first Sunday in Washington, Goldberg had dinner at the Johnson home. Sometime thereafter, when future first lady Ladybird Johnson needed a blood transfusion, Goldberg came to the rescue. In those days, the Judge recalled, the transfusion was provided directly from donor to recipient.

Goldberg had no love for Washington. Bureaucracies—like lines of police officers—were intimidating. Paper bred more paper. Goldberg wanted to return to Texas, but Johnson had other ideas. And that is when Navy Reservist Goldberg became friends with "Mr. Sam." In fact, Johnson, Goldberg, and Speaker of the House Sam Rayburn formed a rather impressive car pool.

Goldberg had been released from the Navy, but was still on reserve duty. Johnson served as Chairman of the Senate Committee on Naval Affairs during the Korean War. Needing a report on manpower utilization for his committee, he called on reservist Goldberg to head the task force. Goldberg reported to Washington for duty, but he was not happy. He noted that he did not wish to spend the rest of his life writing bureaucratic reports, and Johnson assured Goldberg that he would be released as soon as the report was completed.

Johnson lived past Goldberg's house on the drive from Capitol Hill. Rayburn often went to the Johnson home for dinner. Johnson would drive the trio. Rayburn would sit up front, with Goldberg quaking in the back, and Rayburn and Johnson would chuckle about the possibility that they would be unable to spring Goldberg from his Washington tour of duty after the report was done. Goldberg would chuckle nervously, but he never thought much of the joke.

Goldberg did, however, think a great deal of Rayburn. He found Rayburn to be devoted, honest, and a friend to all he met. Rayburn was

always busy, yet always had time for everyone. And, like Goldberg and Johnson, Rayburn loved Texas.

Goldberg had long paid his dues, but Johnson was to have one more laugh. After becoming President, Johnson circulated, through a close friend of Goldberg, the story that Johnson intended to name Goldberg to be the head of the Federal Power Commission. That would have required Goldberg to move again to Washington and to be cast amidst one of its worst bureaucracies. Already in his late fifties, and greatly distressed by the rumor, Goldberg later received the happy news that he had not only dodged the FPC bullet, but that he had been appointed to a position he had long desired—a federal appellate judgeship.

Goldberg cherished a seat on an appellate bench because he loved the law. That love had its roots in the 1920s, when the Jewish kid from Texas attended Harvard Law School. Even as a long-distinguished jurist in his eighties, Goldberg spoke about his mentors at Harvard with awe. He had taken classes taught by legendary professors—Bull Warren, Ed Warren, McGuire, and Beale. And he had endured Felix Frankfurter.

Although recognizing the greatness of the man, Goldberg never regarded Frankfurter as a fine person. Fifty years after his graduation from law school, Goldberg still recalled Frankfurter coming into an exam room to watch the students writhe in pain. Frankfurter offered no preliminaries, no practice, and no help at any time during the year. Students would sink on the final exam, but Frankfurter provided no life preservers.

Goldberg's disdain for Frankfurter was matched by his admiration for Bull Warren. Goldberg believed that Warren was a soft touch who liked to think of himself as a tough guy, chanting, "look to your left and look to your right, and one of you won't be here next year." Goldberg's favorite Bull Warren story involved Warren's traditional description of the final exam. He recalled that Warren would summon his most professional voice, and proclaim: "The exam is going to be held next Tuesday. Don't worry about it. Here's what it will be. There will be ten questions—three questions any damn fool can answer; three questions reasonably good students can answer; you should get them all. That totals six questions. Two of the questions can be answered by only the really extraordinary students. That's a total of eight. As for number nine, only God and Bull Warren can answer it; and as for number ten, only Warren." Goldberg recalled that half the students would roar with laughter, while the other half would shudder with fear. Goldberg always found himself roaring.

Student Goldberg not only crossed historical paths with Bull Warren and Felix Frankfurter, but he also befriended a quiet and thoughtful classmate, Alger Hiss. Goldberg recalled that Hiss measured his words carefully and spoke only when called upon. But Hiss always responded intelligently. During one session, Goldberg was being harassed by a torts professor when Hiss volunteered to speak, a rare occurrence. Hiss came to Goldberg's rescue. Hiss' manner was mild, but his comments were profound.

But Goldberg did not find everything about Harvard to be appealing. For example, he recalled Harvard as a gathering exclusively of white male faces. Five African-Americans had started in his class, but none survived the first year. No women were admitted.

Goldberg's penchant for being in historical places at historical times continued after he became a federal judge. In one particular sitting, Judge Goldberg was assigned what appeared to him to be a rather easy and somewhat routine case. A state statute made it a crime for any doctor to perform any type of abortion, even in cases of rape. In Goldberg's view, the statute clearly was improper, and Goldberg and his two appellate comrades crafted a narrow ruling. They thought not of decades of bumper stickers, nor of marches on Washington. Yet, in striking down the Texas statute in *Roe v. Wade*,¹ Judge Goldberg added his name once more to the history books.

To Goldberg, *Roe v. Wade* was by no means his most important or memorable decision. Rather, the Judge always believed that the most significant case in which he had participated was one he had "lost." In *Rodriguez v. San Antonio Independent School District*,² Goldberg wrote an opinion for a unanimous three-judge panel, sitting as a district court, holding that education was a fundamental right.³ To the Judge, the question did not seem difficult. A free country could not give a little more education to some, and a lot less to others, simply because the some lived in wealthy areas with a high tax base, while the others lived in poor areas. The right to education was simply too fundamental. Education was the key obligation of the government, and the most important right possessed by its citizens.⁴ The Supreme Court disagreed, reversing the decision by a vote of five to four.⁵ To his death, Goldberg refused to believe that education was less than a fundamental right.

One case that Goldberg always recalled with pride was *White v. Regester*,⁶ affirming in part and reversing in part the decision of a three-judge panel sitting as a district court in a series of consolidated cases.⁷ In *White*, minority voters and the Republican Party both challenged new voting district lines in Texas. Goldberg found the case to be a challenge, forcing him to define the type of misconduct that constitutes voting discrimination. He concluded that such discrimination consists of the denial of access to the political process.⁸ At oral argument, Goldberg closely questioned the attorney representing the county as to how many schools in the county were more than ninety percent Black or ninety percent

1. 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), *aff'd in part, rev'd in part*, 410 U.S. 113 (1973).

2. 337 F. Supp. 280 (W.D. Tex. 1971) (per curiam), *rev'd*, 411 U.S. 1 (1973).

3. *Id.* at 282.

4. *Id.* at 283.

5. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6 (1973).

6. 412 U.S. 755 (1973).

7. *Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972) (per curiam).

8. *Id.* at 733.

White; how many Blacks were on the City Council; and how many Blacks had ever been elected. Sheepishly, the attorney admitted that he did not know the answers. A dismayed Judge Goldberg concluded that, given such representation, the minorities in that county most certainly had been denied access to the political process.

In his quarter of a century as a judge, Goldberg heard arguments from many famous lawyers. But the oral argument that he thought had been the most effective came from a small-town practitioner. The Fifth Circuit was hearing a public accommodations case concerning a young Black girl who was not allowed to ice skate at the rink at the Louisiana State Fair in Baton Rouge. Big-wig attorneys representing amici argued all sides of the private facilities doctrine and statutory legislative history.

At the end, the girl's counsel was given a few minutes to argue. The lawyer stated that he had been prepared to argue legislative history and the like, but, as he listened to the prior arguments, he realized that his case was really about something far simpler. It was about a little twelve-year-old girl who had always wanted to ice skate. Her parents had taken her to the fair. They had gotten her skates. And a white attendant had thrown her off. The lawyer asked what those in the courtroom would tell their children or grandchildren in a similar case. What rational explanation could a judge give to a grandchild to explain that the color of a person's skin meant that she could not skate?

Goldberg recalled eyes filling with tears throughout the courtroom. And the legal doctrines quickly fell into perspective.

Goldberg also loved being an appellate judge because he so admired the English language. Words could perform monumental service, if a judge could only find the right ones. "Don't be afraid of words," the Judge would instruct his law clerks. "They make you live. They make you go."

To the Judge, opinions were supposed to be a crusading force in daily life. But boring opinions are never read, and ignored decisions lose their potential for power. "An opinion should have not only a beginning and an end, but a future," the Judge often explained. To earn a future for a decision, the author had to use every available tool. The Judge often preached: "Use wit, humor, allusions to history and literature, metaphors and similes. Use verbs. Make an opinion talk. Heck, make it walk."

Many Goldberg opinions talked. A few probably even walked:

"A taxpayer cannot simply enter a telephone booth and change into his Subchapter S suit."⁹

"[W]e would not substitute one hour of efficiency for one moment of justice."¹⁰

9. *Pacific Coast Music Jobbers, Inc. v. Commissioner*, 457 F.2d 1165, 1166 (5th Cir. 1972).

10. *J. H. Rutter Rex Mfg. Co. v. NLRB*, 473 F.2d 223, 243 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973).

“This case presents us with something mundane, something novel, and something bizarre. . . . [T]he bizarre element is the facially implausible—some might say unappetizing—contention that the man whose chicken is ‘finger-lickin’ good’ has unclean hands.”¹¹

“The Bankruptcy Act was intended to be a sturdy bridge over financially troubled waters We refuse to make it a treacherous tightrope on which the slightest misstep spells disaster and over which only the most accomplished acrobat can successfully pass.”¹²

“And when a marriage made in heaven plummets to earth, the postlapsarian ceremonies are presided over by that most fallen of angels, the Commissioner of Internal Revenue.”¹³

“The jury box is a holy place.”¹⁴

“Without clear instruction from the Georgia courts or legislature as to the current status of this leap-frogging history of lien law in its state, we see no reason why we should not apply the most basic principle of statutory interpretation (not to mention, of leap-frog itself). That principle, of course, is that the last leap wins.”¹⁵

“Only a cave dweller or other layman would not realize that there has been a remarkable change of attitude by the Supreme Court regarding the inference of private rights of action in the last fifteen years.”¹⁶

Perhaps most of all, Goldberg loved being an appellate judge because of the camaraderie. Friendships were fewer, but they meant far more. Goldberg felt that after a fairly full life and career, he had been blessed, at age sixty, with a second go-round, filled with spirited colleagues and devoted clerks.

And those clerks—those won-the-lottery-lucky law students whom the judge chose to help him—were the greatest beneficiaries of the treasure that was Irving Goldberg. He taught us how to write. He taught us how to analyze. He taught us how to deal with responsibility and how to make decisions.

But more than all that, he taught us how to welcome strangers to a new job, and often a new city, with unlimited warmth and joy. Whether we were Yankees or native Texans, whether we were in Dallas or New Orleans, whether we were currently clerking for the Judge or simply wished we still were, when we were with the Judge, we were at home. Because Irving Goldberg’s greatest gift was the ability to fill others—secretaries, law clerks, their spouses and children—with his unconditional kindness and affection. Working with the Judge meant joining his extended family.

11. *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 372 (5th Cir. 1977).

12. *In re Jones*, 490 F.2d 452, 457 (5th Cir. 1974).

13. *Stock v. Commissioner*, 551 F.2d 614, 615 (5th Cir. 1977).

14. *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976).

15. *United States v. Crittenden*, 600 F.2d 478, 480 (5th Cir. 1979).

16. *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1088 (5th Cir.) (Goldberg, J., dissenting), *cert. denied*, 449 U.S. 889 (1980), *and cert. denied*, 449 U.S. 889 (1980).

Clerks and their families never truly departed the chambers—they just left the current drafting to others.

As he counted his joys and blessings, the Judge never seemed to appreciate what he gave—and what he meant—to others. Some tried to tell him, but he would dismiss such sentiments with a wave of his hand.

He may still be waving that hand somewhere today, but we care not. For, in 1980, with the ink on our degrees from Harvard Law School still wet, the son of an Italian printer from Buffalo and the son of a Jewish garment worker from the Bronx became kings, and were given a treasure, when we became Goldberg clerks.

And for that we shall always love him.