The Antitrust Legacy of Thurman Arnold

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Introduction

No one will probably ever know exactly why Franklin Roosevelt hired Thurman Arnold as head of the Antitrust Division of the Justice Division in 1938. It may have been as simple as that the head of the Antitrust Division was the first important Administration job available when Arnold’s supporters and friends sought a full-time Washington position for him. While the nomination proved to be an awkward and controversial choice, it was also an inspired choice. For the next five years, Thurman Arnold revitalized antitrust law and enforcement and changed the entire focus of the New Deal from corporatist planning to competition as the fundamental economic policy of the Roosevelt Administration. Those who favor a consumer friendly competitive economy owe him a debt that transcends the specific cases he brought and the doctrines that he espoused. This article is a look at that legacy.

I. The New Deal and Antitrust

Although always part of the so-called Roosevelt brain trust, Arnold personally had little contact with Roosevelt, consisting of only a single half hour meeting with the President while on loan from the Tax Division of the Justice Department to assist the Treasury Department with the

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preparation of hearings on tax evasion by the rich.\textsuperscript{2} Roosevelt admitted he had not read Arnold’s best seller \textit{The Folklore of Capitalism} in which he had lambasted antitrust when he nominated Arnold to head the Antitrust Division. In general Roosevelt had paid little attention to antitrust over the years.\textsuperscript{3} The President presided over a brain trust that included such diverse personalities as Felix Frankfurter, Rexford Tugwell, Henry Wallace, Donald Richberg, Robert Jackson, Jerome Frank, Herman Oliphant, and Arnold, each of whom held contrasting views on the relative importance and effectiveness of competition enforcement versus planning in curing the country’s ills. For most of the group, including Arnold prior to 1938, antitrust and economic competition were never the preeminent tools to combat the Great Depression.\textsuperscript{4} No one in the Roosevelt inner circle, really knew if the President had a fundamental predisposition one way or another, but it was unlikely that he was a committed trustbuster.\textsuperscript{5}

As Robert Jackson commented in his memoir of the New Deal:

He [FDR] knew there were evils in the suppression of competition and that there were evils in competition itself, and where the greater evils were he never fully

\textsuperscript{2} Letter to Mr. And Mrs. C.P. Arnold, July 1, 1937, \textit{reprinted in} GRESSLEY at 255, 257.

\textsuperscript{3} For example in his 1933 book \textit{Looking Forward}, President Roosevelt had devoted all of one brief historical paragraph to antitrust. FRANKLIN D. ROOSEVELT, \textit{LOOKING FORWARD} 26 (1933)(1973).

\textsuperscript{4} See BERNARD STERN Sher, REXFORD TUGWELL AND THE NEW DEAL 342-43 (1964).

\textsuperscript{5} \textit{See e.g.}, HAWLEY, NEW DEAL at 123-24; REXFORD G. TUGWELL, THE DEMOCRATIC ROOSEVELT 563 (1957); Raymond Moley, \textit{Roosevelt’s Refusal to Make a Choice}, in NEW DEAL THOUGHT 135-150 (Howard Zinn ed. 1966); Wilson D. Miscamble, \textit{Thurman Arnold Goes to Washington: A Look at Antitrust Policy in the Later New Deal}, 56 BUS. HIST. 5 (Spring 1982).
The entire history of the New Deal and competition was a contradiction. It had been preceded by the experience of war mobilization during World War I where industry cooperated with government and colluded among itself under the direction of Bernard Baruch and his war board. Then followed the era of associationalism in the 1920s where the antitrust laws were sporadically enforced, and key government officials, up to and including President Hoover, preferred industry cooperation to the robust competition mandated by the antitrust laws.

Throughout the early New Deal period, the antitrust laws were at best a minor federal policy among many, and for some key New Dealers, a threat to prosperity to be replaced by some form of business-government cooperation and economic planning.

The first half of the New Deal focused on the National Industrial Recovery Act, the Agricultural Adjustment Administration, and the promulgation of industry codes which were the

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7 ELLIS D. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY (1966); WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 56-60, 64-70, 163-65, 248-49, 258 (1963). Even after the fall of the NRA the planning wing of the New Deal remained a potent force within the administration in constant tension with the antimonopoly proponents. See generally BRINKLEY, END OF REFORM, supra note 1.


9 For example, even during the campaign of 1932, key Roosevelt advisors such as Rexford Tugwell and Adolph Berle believed that free market competition was impossible and a cause, rather than a cure, for the Depression. LEUCHTENBURG, supra note 7, at 34-35.
antithesis of the free market competition protected by the antitrust laws.\textsuperscript{10} Industry, with minimal government supervision, would draft codes of fair competition with only limited input from labor and consumers. The codes would then be legally enforceable against the entire industry, regardless of whether they participated in the drafting or had agreed to be bound. Most codes directly or indirectly sought to control prices, prevent price discounting, legalize open price systems, limit production, and standardize terms of sale to minimize non-price competition.\textsuperscript{11} As the distinguished historian of the New Deal, Ellis Hawley, concluded: “By and large ... the codes reflected the desires of businessmen to create economic cartels that could check the forces of deflation.”\textsuperscript{12} The antitrust laws were repealed except for a vague and virtually unenforced provisions prohibiting “monopolies or monopolistic practices.”\textsuperscript{13} Sales at less than the code price could be enjoined by the courts and violators were subject to significant penalties. Adlai Stevenson, who was briefly a lawyer with the AAA noted: “in essence we’re really creating gigantic trusts in all the food industries.”\textsuperscript{14} It was even the era where the popular board game Monopoly was first introduced.

The goal of the NIRA was to restrict production, raise price, create profits, and restart business investment. Not surprisingly, to the extent prices were increased, this further limited

\textsuperscript{10} GEIST, \textit{supra} note 7, at 140-43; HAWLEY, NEW DEAL, \textit{supra} note 7, at 19-148; CHARLES F. ROOS, NRA ECONOMIC PLANNING (Principia, Bloomington, IN. 1937).

\textsuperscript{11} HAWLEY, NEW DEAL, supra note 7, at 57-60; PETER H. IRONS, THE NEW DEAL LAWYERS 33 (1982).

\textsuperscript{12} HAWLEY, NEW DEAL, at 136.

\textsuperscript{13} 15 U.S.C. § 703(a) (1933).

\textsuperscript{14} I THE PAPERS OF ADLAI E. STEVENSON 267, 269 (Walter Johnson ed. 1972).
production, employment, and the purchasing power of consumers, leaving the country in even worse straits than at the beginning of the Great Depression. Over time, consumer interests, labor groups, smaller producers, antitrusters, and government purchasers became increasingly concerned with higher prices and began to vocally oppose the NRA and its codes.  

Throughout this period, the Antitrust Division had been a backwater of the Justice Department. Formed as a separate division of the Justice Department in 1933, it perversely spent its early years enforcing the industry price-fixing codes of the NIRA and the AAA and representing a hodge podge of federal agencies and departments in appellate matters.

Those few true antitrust cases it brought often ended in disaster. In the landmark 1934 case *Appalachian Coal* decision, the Supreme Court refused to outlaw a joint selling arrangement in the coal industry, despite past precedent that all price fixing arrangements were per se illegal.  

After the Supreme Court declared the NRA unconstitutional in 1935 in the *Schechter Poultry* case, Roosevelt showed some renewed interest in antitrust enforcement and competition over planning. The recession of 1937 was a shock to the nation and a threat to the political health of the New Deal, already suffering from the defeat of the infamous Court

15  HAWLEY, NEW DEAL, *supra* note 7, at 72-90. In less than one year, Harold Ickes as head of the Public Works Administration received identical bids on government projects 257 times. *Id.* at 361.


18  Appalachian Coals v. United States, 288 U.S. 344 (1933).

Packing plan and the proposed reorganization of the Executive Branch. Arnold attributed this change to Roosevelt’s pragmatism in searching for new ways to end the Depression regardless of their philosophical consistency.\(^{20}\)

Change was slow in coming however. References to the importance of antitrust began to appear in Roosevelt’s public pronouncements.\(^{21}\) Key New Dealers such as Harold Ickes and Robert Jackson gave fiery speeches on the dangers of monopolies.\(^{22}\) Yet, the President followed these initiatives with a message to Congress including a renewed call for greater cooperation between government and business.

The Antitrust Division did revive somewhat under the leadership of Robert Jackson from 1937 to 1938, bringing important cases in the auto, oil, and aluminum industries.\(^{23}\) But it simply had too much to do and too little resources. In addition to investigating hundreds of complaints of monopoly and restraint of trade, the Antitrust Division also defended or enforced the orders of administrative agencies including the ICC, FTC, and FCC. Even the defense of labor and agricultural regulations were normally referred to the by now badly misnamed and undermanned Antitrust Division.\(^{24}\)

II. A Controversial Nominee

\(^{20}\) THURMAN ARNOLD, FAIR FIGHTS AND FOUL 146 (1965).

\(^{21}\) See III THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 129 (Samuel I. Rosenman ed. 1938).

\(^{22}\) BRINKLEY, supra note 1, at 56-57; HAWLEY, supra note 7, at 392-93.

\(^{23}\) HAWLEY, NEW DEAL, supra note 7, at 374-76.

\(^{24}\) PAPERS OF HOMER CUMMINGS 17 (Carl Brent Swisher ed. 1939).
The Washington pundits viewed the Arnold nomination as part of the continuing struggle between the planners and the antimonopoly forces within the administration. In particular, Arnold’s nomination to head the Antitrust Division was seen as a loss for Attorney General Homer Cummings who, although friendly with Arnold, wanted a more conservative successor to Jackson who was moving on to become the Solicitor General. A column in the Washington Star described Arnold as the fourth choice in a contest over the direction of antitrust policy.25

Arnold’s nomination also came at a time when the Senate was feeling buffaoloed in a series of key controversial nominations by Roosevelt including Hugo Black and Stanley Reed to Supreme Court and Robert Jackson to Solicitor General. Most also viewed the nomination as particularly auspicious for Arnold as following in the paths of Jackson and Stanley Reed toward eventual promotion to Solicitor General, Attorney General, and perhaps the Supreme Court.

Arnold was attacked in the press as a radical and a professional smart aleck.26 Other papers weighed in by describing him as a “Foe of Capitalists,” a “Left Wing New Dealer” and a “Capitalist critic.”27 Most papers pointed out the irony in his selection, but the Philadelphia Record more accurately noted that although personally an opponent of prohibition, Arnold had also produced the driest administration possible in Laramie as mayor.28 The Baltimore Sun wrote: “Now that he is going to be put in charge of this huge joke, it will be interesting to see

25 Mar. 9, 1938.

26 World Telegram, New York City, Mar. 8, 1938; Monitor, Concord, NH, Mar. 8, 1938.


28 Mar 7, 1938.
whether he continues to laugh or whether he suddenly decides to take it seriously.”

Arnold was quite uneasy about the upcoming hearings, although Senator Joseph O’Mahoney of Wyoming, a strong supporter and friend of Arnold, was the chair of the Senate subcommittee handling the nomination. Senators King of Utah and Burke of Nebraska, both conservative Democrats, promised to closely investigate Arnold’s background because in their view too many men with a socialist taint were already in Administration. Senator Borah, the great Republican populist of Idaho, was concerned both with the substance of Arnold’s views on antitrust expressed in *Folklore* as well as a completely gratuitous personal attack on him by name for trust busting crusades which were “entirely futile but enormously picturesque and which paid big dividends in terms of personal prestige.” There was a second surge in book sales for *Folklore* as the press, the Senators, their staff, and the public scrambled to see what Arnold had actually said.

Before the hearing, Arnold wrote to his parents:

I go on before the Senate Judiciary sub-committee tomorrow, who have been taking sentences out of context of my book to throw at me – at least this is the rumor. I am caught between the conservatives who are afraid I am tougher than Jackson and the liberals who think my book is a satire on antitrust laws. The New

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29 Mar. 7, 1938.


31 *Folklore* was even eventually placed on a list of 100 recommended books for young naval officers. Wash. Post, Oct. 25, 1938.
York Times and New York Sun have urged that I be thoroughly investigated because I am a sarcastic joker not fit for solemn duties.\textsuperscript{32}

Everyone predicted a lively and exciting hearing in the Senate.

On Friday March 11, 1938, in front of a full gallery, the subcommittee approved Arnold’s nomination by a 4-0 vote after 45 minutes of questioning almost entirely by Borah.\textsuperscript{33} O’Mahoney lobbed a few softball questions so that Arnold could affirm his belief in capitalism. When prompted, Arnold duly professed faith in capitalism, support for antitrust, and argued that antitrust was badly enforced and ought to be improved. Arnold claimed in response to sharper questioning by Borah, that his book was merely a diagnosis and not a prescription for remedy.\textsuperscript{34} Max Lerner later wrote: “One who read the account of the Arnold-Borah encounter in the committee room cannot but feel that the temper of Arnold’s replies to Borah was not quite the temper of the book. There was more restraint in it, less joyfulness, less certitude, less of the sharp quality of the dissecting room.”\textsuperscript{35} Whether or not his testimony was entirely consistent with his personal beliefs or his writings, it appears persuasive.

When it came time for the subcommittee to vote, Borah on the left and King on the right

\textsuperscript{32} Thurman W. Arnold to Mr. And Mrs. C.P. Arnold, undated, Box 45, C.P. Arnold Collection, American Heritage Collection (hereinafter AHC).

\textsuperscript{33} Nomination of Thurman W. Arnold, Hearings Before A Subcommittee of the Committee on the Judiciary, United States Senate, Seventy-Fifth Congress, Third Session on The Nomination of Thurman W. Arnold to be Assistant Attorney General, March 11, 1938 (GPO 1938).

\textsuperscript{34} ARNOLD, FOLKLORE, supra note 30, at 141.

\textsuperscript{35} Max Lerner, The Shadow World of Thurman Arnold, 47 U. CHI. L. REV. 687, 701 (1938). For Lerner, this wasn’t necessarily a bad thing and that the morale of the story was “that you don’t take your dissecting instruments into the Senate chamber.” Id.
withheld their votes, confirming Arnold’s earlier concerns that he would be attacked from both sides. Borah claimed there were other matters about Arnold he wished to investigate before the matter came before full Senate.

After Arnold’s performance in the subcommittee, quick approval by Judiciary Committee and full Senate was assured. The full judiciary committee recommended Arnold for the post on March 14th despite Senator King statement that Arnold was “not qualified.” There was no recorded vote, but 3-4 committee members were rumored to have opposed the nomination. Unlike the stormy debate and vote over Robert Jackson’s nomination, the full Senate confirmed without a recorded vote on March 16th “amidst confusion preceding recess.”

He was sworn in on March 21th. At his initial press conference, he appeared ill at ease, sitting at Jackson’s former desk, with his pipe clenched in teeth, with his hands alternately hooked in his vest or folded across his ample stomach. He was said to resemble a slightly paunchy version of the actor Ronald Colman.

Arnold began blandly enough with a prepared statement: “All I can say at this time is that I intend to pursue a policy of enforcement of the Antitrust Laws which will be both fair and vigorous. I have just arrived in Washington and as yet I have not had the opportunity to acquaint myself with the various complicated matters now pending; therefore, in fairness to my colleagues and to my chief, I must restrict myself to this general statement. The only specific

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37 Washington Herald Mar. 16, 1938
38 Hartford Times, Mar. 23, 1938.
39 BRINKLEY, supra note 1, at 118.
thing I can say now is that I am ready to go to work.”

III. The Task Ahead

Arnold had a profoundly difficult task ahead of him. Throughout the 1920s, the antitrust laws had been laxly enforced, if at all.\textsuperscript{40} Competition law then had been all but abandoned during the NRA in favor of industry codes which made price competition an unfair practice to be stamped out by the government and the courts. Even after the formal demise of the NRA in the courts, many industries continued to adhere to informal codes of fair competition (illegal price fixing or cartels in another era) with the acquiescence, or even informal support, of key New Deal officials.\textsuperscript{41}

Arnold was aware of the enormity of his task and his reputation of a smart alecky opponent of the value of antitrust itself. Arnold always viewed the latter as somewhat undeserved. In his autobiography, he noted that he supported price controls and production quotas in agricultural because competition had failed to either help the farmer or provide adequate food production for the nation. He said he had felt differently about the NRA since business would bounce back and therefore did not need additional help by restricting production.\textsuperscript{42}

In one important way, Arnold was helped immeasurably by the lax enforcement of the prior decade. Because of the lull in enforcement activity in the 1920s, the virtual repeal of

\begin{footnotes}
\item[40] PERITZ, \textit{supra} note 8, at 75-89.
\item[41] HAWLEY, NEW DEAL, \textit{supra} note 7, at 166-68.
\item[42] ARNOLD, FAIR FIGHTS, \textit{supra} note 20, at 133.
\end{footnotes}
antitrust during the NRA, and the continued support from the administration for industry coordination even after the formal demise of the NRA in the courts, few in the business community felt the need to conceal their anticompetitive activities. There was much low hanging fruit to be plucked by the Antitrust Division, but Arnold needed a way to ensure that the President and the public supported the renewed enforcement of the antitrust laws and that the remaining foes of antitrust within the New Deal were shunted to the sidelines of the debate and prevented from active interference.

Consistent with his academic writings, Arnold saw his task in symbolic and institutional terms and not just about the merits of individual antitrust case. He wrote:

I believed that my principal function was to convince American businessmen that the Sherman Act represented something more than a pious platitude; second, that its enforcement was an important economic policy.  

During this brief interlude, which historian Alan Brinkley has referred to as the "Anti-Monopoly Moment," Arnold seized on the image of antitrust as the non-partisan traffic cop, the "cop on the beat," or as the “referee” of the competitive process, as the way to create a viable program of antitrust enforcement with broad public support. This was a deliberate choice by

43 ARNOLD, FAIR FIGHTS, supra note 20, at 113.

44 BRINKLEY, END OF REFORM, supra note 1, at 106-36.

45 THURMAN W. ARNOLD, THE BOTTLENECKS OF BUSINESS 122, 202, 211-12 (1940); Thurman Arnold, Labor’s Hidden Holdup Men, READER’S DIGEST, June 2, 1941, at 136, 139-40; Thurman Arnold, Antitrust Law Enforcement, Past and Future, 7 LAW & CONTEMP. PROB. 5, 12 (1940); N.Y. Sun Aug. 9, 1940; Thurman W. Arnold, Feathers and Prices, 8 COMMON SENSE 3,5 (July 1939); Thurman Arnold, What Can Government Offer - What can Business Expect?, 5 VITAL SPEECHES 525 (1939); Thurman Arnold, Address at Banquet, 9 MISS. BAR J. 219, 223 (1938); Thurman Arnold, An Inquiry into the Monopoly Issue, N.Y. Times, Aug. 21, 1938, Sec. 7 at 1, 14.
Arnold who had written so eloquently about the symbolism of such concepts as "law enforcement" and the distinctions in the public mind between courts and bureaucracies as decision-makers while a law professor at Yale.\textsuperscript{46} As he explained in a letter to an acquaintance:

My belief is that the only instrument which has a chance to preserve competition in America is antitrust enforcement through the courts. Traditionally we accept the courts as an institution which cannot be criticized without public protest in way that was impossible for an administrative tribunal to function.\textsuperscript{47}

Arnold went out of his way to distinguish antitrust enforcement from either "regulation" or the kind of emergency legislation experimented with in the NRA.\textsuperscript{48} Arnold praised the federal courts and a case-by-case method as the proper way to make antitrust policy as opposed to the creation of new agencies or bureaucracies.\textsuperscript{49} He elevated public, rather than private, enforcement of the Sherman Act as the critical policy tool.\textsuperscript{50} He conceptualized both cartels and monopolies as “bottlenecks” on production and distribution which kept the industrial production of America from reaching the consumer and continued the now seemingly endless Depression through

\textsuperscript{46} THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 149-71, 199-228 (1935).

\textsuperscript{47} TWA to Dexter M. Keezer, Aug, 1, 1947, AHC, Box 37, File 4.

\textsuperscript{48} ARNOLD, BOTTLENECKS, supra note 45, at 107; Thurman Arnold, Antitrust Law Enforcement, Past and Future, 7 LAW & CONTEMP. PROB. 5, 14 (1940).

\textsuperscript{49} ARNOLD, BOTTLENECKS, supra note 45, at 103-07, Thurman W. Arnold to William L. Chenery (May 5 1939), reprinted in GRESSLEY, supra note 30, at 284-85; Thurman W. Arnold, Consent Decrees and the Sherman Act, WORLD CONVENTION DATES 12 (June 1939).

\textsuperscript{50} ARNOLD, BOTTLENECKS, supra note 45, at 164-189.
artificial private arrangements.51 He wrote: “The four horsemen -- fixed prices, low turnover, restricted production and monopoly control -- rode through our economy from factory to fair.”52 He advocated the proper mission of the Antitrust Division as that of a prosecutor using the courts rather than agencies to make law. Antitrust would not be hostile to large business, only the abuse of power, and the Antitrust Division would operate as an expert body largely independent of politics.53 He cleverly praised Henry Ford as a innovative businessman beset by combinations of competitors, and later suppliers, intent on blocking Ford from producing cheaper and higher quality automobiles for consumers as a means to show he was neither opposed to size alone nor anti-business.54 He argued that vigorous antitrust enforcement was even good for a balanced budget, returning far more in fines than it costs to run the entire Antitrust Division.55 Always conscious of symbols, Arnold even bought himself a 1927 square topped coupe automobile of “ancient vintage” for $45 at time when he was making $9000. In 1942 when the rear end of that car dropped off, he sold it for $5 and replaced it with an equally ancient 1930

51 ARNOLD, BOTTLENECKS, supra note 45, passim; Report of the Assistant Attorney General, Thurman Arnold, in Charge of the Antitrust Division 1-2 (G.P.O. 1939); Thurman Arnold, Address at Banquet, 9 MISS. BAR J. 219, 220-21 (1938).

52 Thurman Arnold, Cartels Threaten Democracy, Science Digest 78, 80 (1944).


54 ARNOLD, BOTTLENECKS, supra note 45, at 119-21.

55 Id. at 212.
Arnold discontinued the former occasional practice of using the threat of criminal prosecution solely to leverage defendants into negotiating a civil consent decree to avoid a trial and accept meaningless symbolic equitable relief. Consent decrees would be limited to those situations where defendants proposed industry-wide relief that fully restored competition beyond what could be achieved through a successful prosecution or civil action by the government and the defendants permit meaningful monitoring by the government. He also instituted a policy by which business interested in ascertaining the legality of future action could seek the opinion of the Antitrust Division as to its enforcement intentions toward the proposed conduct. In return, business could count on not being charged criminally even if the government ultimately opposed to the notified conduct.

Arnold did believe that the only thing that would make businessmen behave was the threat of indictment. When he brought a case he would indict the individual defendants and have them fingerprinted like ordinary criminals. He shrewdly observed how even the mere bringing of an indictment usually brought prices down and ended the alleged anticompetitive practices


58 *Id.* at 141-44, 152-63. Arnold also left open the door to the exceptional circumstance where a consent decree was necessary to implement some innovative business arrangements without fear of government challenge. *Id.* at 152-54.

59 *Id.* at 144-52.
harming the public.\textsuperscript{60}

Arnold was relentless in promoting himself, his vision for antitrust, the work of the Antitrust Division, and the need for ever greater resources, staffing, and budgets. He lobbied for competition policy and resources with Capital Hill and the executive branch. He cultivated the press assiduously, spoke directly to the public, and continued to produce an astonishing stream of books, articles and speeches, all while supervising and inspiring the Antitrust Division to new heights of activity. For example, in one of his earliest initiatives, he initiated a new policy of issuing extensive publicity accompanying each prosecution in order to educate the public and to provide guidance to the business community by setting forth the practices being challenged and the reasons why the government thought there was an antitrust violation.\textsuperscript{61}

Arnold used symbols and imagery repeatedly to justify the mission of the Antitrust Division to Congress. He was spectacularely successful, vastly increasing the size and budget of the Antitrust Division. As Senator McCarran noted, on one occasion Arnold both defeated an attempt to cut his budget and emerged with an increase of $750,000: “He is the best salesman I ever listened to in all my life. He can come to the United States Senate to sell a red-hot stove and make you think it is a refrigerator.”\textsuperscript{62} By the end of his tenure, commentators ranked Arnold and J. Edgar Hoover as both the most popular New Deal figures and its biggest prima donnas.\textsuperscript{63}

\textsuperscript{60} Interview with Victor Kramer, July 2, 2002 on file with author.


\textsuperscript{63} I.F. Stone or Strout; Wilson D. Miscamble, \textit{Thurman Arnold Goes to Washington: A Look at Antitrust Policy in the Later New Deal}, 56 BUS. HIST. 5, 13 (Spring 1982).
From the moment Arnold entered office, he lobbied in speeches, broadcasts, articles, and books to increase the size and budget of the Antitrust Division, often citing to the example of the Securities & Exchange Commission, which had over 1200 personnel, and the Civil Aeronautics Board with a staff of over 2800.\footnote{Report of the Assistant Attorney General, Thurman Arnold, in Charge of the Antitrust Division 4-6 (G.P.O. 1939); Thurman Arnold, \textit{Antitrust Law Enforcement, Past and Future}, 7 LAW & CONTEMP. PROB. 5, 10 (1940) Thurman W. Arnold, \textit{Feathers and Prices}, 8 COMMON SENSE 3,4 (July 1939); Thurman Arnold, \textit{Address at Banquet}, 9 MISS. BAR J. 219, 222 (1938).} While he never achieved those lofty targets, he did more than anyone would have expected. From 1933 until Arnold left the Justice Department in 1943, the number of Antitrust Division employees grew from 18 to nearly 500 and the budget more than quadrupled.\footnote{ARNOLD, BOTTLENECKS, supra note 45, at 171, 276.} The peak was reached in 1942 with a budget of $2,325,000 and a total staff of 583 persons.\footnote{Corwin D. Edwards, \textit{Thurman Arnold and the Antitrust Laws}, 58 POL. SC. Q. 338 (Sept. 1943).} New cases jumped from 11 in 1938 to 92 in 1940 and investigations jumped from 59 to 215 in the same period. By February, 1941, the Antitrust Division had 93 total criminal and civil cases pending involving 2909 defendants with 24 additional grand juries authorized or in progress.\footnote{Antitrust Division, Summary of Cases Under the Antitrust Laws, February 19, 1941 (Inclusive), AHC Box __.} Regional offices were established throughout the country to uncover, investigate, and prosecute antitrust violations with an eye and ear to what was going on both locally and nationally.

Arnold delegated to his chief deputy, Wendell Berge, the recruiting of a top staff and training them to create an effective organization with high prestige in the outside legal world and
high internal morale. Such luminaries as future Supreme Court Justice Tom Clark and future Attorney General and University of Chicago President Edward Levi served in the Division under Arnold. With the help of a growing number of well-credentialed and ambitious young men, Arnold embarked on the most extensive program of civil and criminal enforcement in the history of antitrust, bringing nearly as many cases during his tenure as head of the Antitrust Division as in the roughly prior fifty years the federal antitrust laws had been in existence. He also created the first generation of true antitrust specialists the country had ever known, who would keep the Arnold flame for antitrust alive across the country for generations to come.

IV. The Temporary National Economic Commission

April 1938 brought the planning for Roosevelt’s anti-monopoly message to Congress which Arnold assisted in drafting along with Cummings, Jackson, Donald Richberg, the head of the NRA, and Ben Cohen, the author of the utility holding company act. It was a stark illustration of the balance of power between the planners and the advocates of competition. It was apparent to all that Roosevelt finally intended to make a real attack on the problem of monopoly.

The message itself was symbolically important, but rather mild in actual content. The President decried the “concentration of economic power” in the country and deplored the “concealed cartel system” and “the disappearance of price competition.” The President thundered: “the liberty of a democracy is not safe if the people tolerate the growth of private

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68 HAWLEY, NEW DEAL, supra note 7, at 432. Recruiting standards were so high that Arnold had to fend off charges that he would only hire men from Yale, Harvard, and Columbia. To Gordon Dean, Oct. 15, 1938, GRESSLEY, supra note 30, at 276. Wendell Berge himself led the Antitrust Division after Tom Clark from September 1943 until April 1947.
power to a point where it becomes stronger than their democratic state itself ..."\textsuperscript{69}

The recommendations were hardly stirring however. Roosevelt asked for $200,000 in additional funds to expand the Antitrust Division, an investigation of the monopoly problem with a budget of $500,000, and for legislation to control bank holding companies (almost certainly the brain child of Ben Cohen). No new specific antitrust legislation or initiative beyond the antimonopoly inquiry was sought.

Even this ambivalent message was the product of in-fighting between the Jackson and Richberg wings of the administration each with separate drafts presented to Roosevelt. Richberg’s original draft revived the idea of self regulation or industrial self-government as in the NRA. This was rejected by Roosevelt despite support from Cummings. Jackson then became the primary drafter of the final version sent to the Hill.\textsuperscript{70} Overall it was a slight victory for trust-busters in terms of specific proposals, but a radical victory for Arnold and the other antitrusters in terms of the attitude toward the kind of wholesale cartelization previously endorsed by the NRA. To have the President talking about the “concentration of private power without equal in history” was sweet music to Arnold indeed.

Although new to the public, the idea for the Temporary National Economic Committee

\begin{quote}
\textsuperscript{69} S. Doc. 173, 75\textsuperscript{th} Cong., 3d Sess.
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\textsuperscript{70} Drew Pearson, Washington Merry-Go-Round, Washington Herald, May 5, 1938. Arnold remembers the antimonopoly message in his autobiography as a radio address where the original draft linked the monopoly problem to tariff reduction reviving one of the earliest arguments in favor of the antitrust laws in the 19\textsuperscript{th} century, but this was blue penciled by Roosevelt. According to Arnold, he and Cohen then wrote and rewrote the message until it was short enough and simple enough for a Presidential radio address. Then Roosevelt added his effective personal touch to the message as Arnold watched him deliver it over the air to the nation. ARNOLD, FAIR FIGHTS, \textit{supra} note 20, at 137. This may be further proof of the Arnold maxim from later in life that some of the things he remembered the best never actually happened.
\end{quote}
(TNEC) had been floating around the Roosevelt administration since 1935 when it had been first proposed by Leon Henderson. 71 Ever since, it had been part of the continuing fight within the New Deal among those who saw the TNEC as the vehicle to promote a variety of diverse ideas including new antitrust legislation, greater antitrust enforcement, concern over administered pricing, fear about underconsumption, attempts at greater economic regulation, and the national licensing of corporations. 72 Even Roosevelt was not set on the need of a TNEC until just weeks before his Anti-Monopoly message as he continued to dither between endorsing a renewed version of the NRA, promoting greater antitrust enforcement, or supporting federal incorporation of interstate businesses.

The fight over the purpose and form of the TNEC continued on Capitol Hill. Senator O’Mahoney sponsored the Congressional resolution for the TNEC. Borah remained aloof to the idea of a Commission, preferring to focus on the need for specific new antitrust legislation. 73

The initial proposal for the Committee called for 2 members from the Senate, 2 from the House, plus representatives of the Attorney General, the Federal Trade Commission, and the Securities Exchange Commission to study the causes and effects of concentration on competition; pricing policies, the general level of trade and employment; and the effect of existing tax, patent, and other government policies on competition, price levels, employment and consumption. $500,000 was to be appropriated for the work of the TNEC.

On June 7th, the resolution passed the judiciary committee, but called for an expanded

71 HAWLEY, NEW DEAL, supra note 7, at 405.
72 BRINKLEY, supra note 1, at 122-31.
Douglas left shortly after the creation of the TNEC to join the Supreme Court. He was replaced by SEC Commissioners Jerome Frank and then Sumner Pike. For more about Oliphant as an antitrust scholar and a legal realist see Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 CASE WEST. L. REV. 283, 286-87 (2001); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* 9-10, 19-20, 29-32, 68-74, 109-113 (1986); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE passim* (1995). Oliphant died within a year of the beginning of the TNEC’s work.

Senators O’Mahoney, and Arnold’s old critics from the right and the left, Senators King and Borah, were named to the TNEC, with O’Mahoney as the chair. No prominent new deal senators were included. The House nominees were Hatton W. Summers, a veteran Texas Democrat, B. Carroll Reece, an independent-minded Republican from Tennessee, and Edward C. Eicher, a liberal New Deal Democrat from Iowa. O’Mahoney became the driving force behind the TNEC as King lost reelection, and Borah died. The other Congressional appointees lacked influence, and frequent changes in the rest of the TNEC membership left O’Mahoney as virtually the sole enthusiastic member present from start to finish.

The Commerce Department as the voice of the business community was viewed as sabotaging the mission of the TNEC. However, the other Department and Agency appointees were all tried and true New Dealers including William Douglas from the SEC and Herman Oliphant, the general counsel of Treasury, who was a former antitrust scholar at Columbia Law School. The executive secretary of the TNEC was Leon Henderson, an economic adviser in the

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74 Douglas left shortly after the creation of the TNEC to join the Supreme Court. He was replaced by SEC Commissioners Jerome Frank and then Sumner Pike. For more about Oliphant as an antitrust scholar and a legal realist see Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 CASE WEST. L. REV. 283, 286-87 (2001); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* 9-10, 19-20, 29-32, 68-74, 109-113 (1986); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE passim* (1995). Oliphant died within a year of the beginning of the TNEC’s work.
Commerce Department, who paradoxically supported both greater antitrust enforcement and great governmental planning of the economy.\textsuperscript{75} The infighting over the mission and scope of the TNEC mirrored in many ways the fight over economic policy more generally in New Deal.\textsuperscript{76}

The TNEC met for the first time on July 1, 1938 and immediately was embroiled in battles over the scope of subpoenas, the site of hearings, and which industries to study. Finally it was agreed that it would work in teams of one legislator and one agency official with hearings to begin in September, later postponed until after the November elections. The investigation meandered through the insurance, banking, steel, oil, liquor, investment banking, and automobile industries and further examined the impact of cartels, state fair trade laws, patents, and various other competitive practices.

Arnold was assigned to head the inquiry into patents. To facilitate the hearings, Arnold agreed on behalf of the Justice Department that the TNEC’s investigation would not be used to gather evidence for Antitrust Division prosecutions.\textsuperscript{77}

Eventually the TNEC produced 37 volumes of testimony and 43 monographs. In all there were 20,000 pages of testimony, 552 business witnesses, and over 230,000 copies of the hearings and monographs sold by GPO. The TNEC and the various agencies working with it spent virtually the entire budget allotted to them returning a paltry $8000 out of more than a million to the Treasury.\textsuperscript{78}

\textsuperscript{75} BRINKLEY, \textit{supra} note 1, at 83.

\textsuperscript{76} \textit{Id.} at 124-31.

\textsuperscript{77} Department of Justice Release, July 14, 1938.

\textsuperscript{78} Christian Science Monitor, Mar. 31, 1941.
The TNEC issued its final report on Mar 31, 1941. The report recommended repealing the Miller-Tydings Act which had authorized state fair trade laws, prohibiting horizontal mergers in excess of $5 million unless approved by the FTC, prohibiting basing point pricing, raising penalties for criminal antitrust violations, creating federal regulation of trade associations, requiring mandatory licensing of patents at fair prices, and establishing national chartering of corporations.79

The TNEC produced detailed thoughtful studies of the state of competition in various industries and the state of antitrust more generally, and made reasonable recommendations for its time, but no new antitrust legislation emerged directly from the effort. Senator O’Mahoney had steered the TNEC to lay out the record about the state of competition in copious detail but to leave drawing conclusions to others. No one ever really did, and Arnold viewed the final work product of the TNEC with the same degree of enthusiasm that he viewed the earlier empirical work of the legal realists – as ignored and unread. After participating halfheartedly in the work of the TNEC at the beginning, Arnold soon simply left the work to his subordinates and concentrated his efforts on the nationwide enforcement of the antitrust laws.80

A couple developments came out of the TNEC which made the exercise something more than the gigantic waste of time portrayed by Arnold. It was essentially “an anti-monopoly document” with a nod toward Chairman O’Mahoney’s long standing interest in the national chartering of corporations. Although the final report of the TNEC was mild stuff calling for no dramatic changes in antitrust, the hearings included a vivid demonstrated of how the Hartford-


80 ARNOLD, FAIR FIGHTS, supra note 20, at 139-43.
Empire Company had monopolized the glass container market through the acquisition and misuse of patent rights and collusion with the competitors who held patent rights for related technologies. The Antitrust Division eventually charged Hartford-Empire in a separate monopolization case and ultimately required the company to license its vast array of patents and forego damages from past infringements. The revelations also prompted Congress to amend the patent laws consistent with some of the TNEC’s recommendations. Moreover the TNEC was the key impetus leading to the eventual 1950 strengthening of the merger provisions of the Clayton Act and a source of the eventual adoption of mandatory pre-merger notification.

In addition, the TNEC stabilized antitrust policy and made it a fundamental part of the government’s law enforcement and economic regulation policies. The decade that followed the TNEC produced a high point in both the reach of antitrust doctrine and antitrust enforcement, neither of which would have been possible without the dual efforts of Arnold as head of the Antitrust Division and the buttressing effect of the TNEC as state of the art economic research on the actual condition of the American economy.

V. **Enforcing the Antitrust Laws**

Arnold’s first large case involved the automobile industry. The big three car companies had long coerced dealers to finance customer purchases through finance companies owned by the manufacturers and to bar as much as possible the use of independent finance companies. The

81 ARNOLD, FAIR FIGHTS, supra note 20, at 140-41.

82 Hartford-Empire Co. v. United States, 323 U.S. 386, clarified, 324 U.S. 570 (1945).

Antitrust Division had already investigated and challenged the practice in Milwaukee, Wisconsin, but had suffered a serious setback when the supervising judge threw out the case, offended that the Justice Department appeared to have used the threat of criminal indictment to seek a civil settlement.

Arnold was undeterred and sought a friendlier venue for round two of the litigation. He visited South Bend, Indiana on a speaking trip and used the occasion to prepare for summoning a new grand jury to investigate the same auto finance issues.\textsuperscript{84} The coercion of dealers and discrimination against independent finance companies was again the focus of the investigation. The grand jury investigation was expected to last 6 weeks, but indictments issued in 5 days. \textsuperscript{86} firms and individuals were indicted, including the biggest names in industry. Attorney General Cummings announced the indictments, but also announced that he was willing to listen to voluntary offers for consent decrees.\textsuperscript{85} Within weeks, everyone but General Motors approached by the government to negotiate.

In the end, the Antitrust Division worked out a civil consent decree with Ford and Chrysler, and obtained a conviction against General Motors. The settlement was a highly regulatory consent decree that imposed complex obligations on the car companies and a registration system for the entire finance industry in order to assure fair and equal treatment by the manufacturers. It was as if the play book for the Antitrust Division had come from Arnold’s own writings. It was a ad hoc regulatory solution to address a pressing societal need dressed up in law enforcement terms in order to satisfy the folklore of the times.

\textsuperscript{84} South Bend Tribune May 17, 1938.

\textsuperscript{85} South Bend Tribune, May 18, 1938.
Other early cases brought by Arnold were designed to appeal to consumer interests and to show how cartels and monopolies, in Arnold’s terms “bottlenecks,” were causing higher prices and artificial shortages. In Arnold’s words, “To catch their imaginations you must talk in terms of concrete items in the family budget.”

In July 1938, Arnold brought a civil suit against the motion picture industry seeking to force the major studios to divest their ownership of movie theaters and change their licensing practices to independent exhibitors. The suit made headlines both because Arnold announced that he would personally lead the case and because the complaint named all 8 major studios and over 130 individuals including the president’s son, James Roosevelt, Charlie Chaplin, Douglas Fairbanks, and Mary Pickford and other prominent Hollywood celebrities who served on the boards of the studios.

In November 1938, the Division brought indictments in Chicago against the dairy industry that Arnold claimed had raised the price of milk more than 40%. The case against the milk industry supposedly produced $10,000,000 in consumer savings.

Arnold claimed his antitrust campaign against the housing and construction industries saved consumers over $300,000,000. An internal Antitrust Division memo estimated that the “minimum” consumer savings from antitrust “pressure” in the tire, newsprint, steel ingot, potash

86 ARNOLD, BOTTLENECKS, supra note 45, at 123.

87 HAWLEY, supra note 7, at 436.

88 Id. at 435-36.

89 ARNOLD, BOTTLENECKS, supra note 45, at 194.

90 HAWLEY, supra note 7, at 439.
and sulphur at over $266,000,000.\textsuperscript{91} Even a case against local Washington, D.C. service stations produced estimated savings of $2,000,000.\textsuperscript{92}

Each new case or grand jury investigation brought nationwide press coverage, often on the front page of the newspaper in the city where the case or investigation was brought. Arnold would tell anyone who would listen that this incredible flurry of activity was no crusade, but simply “law enforcement.”\textsuperscript{93}

Almost simultaneously, trial resumed in the Alcoa monopolization case. The stakes were high. The monopolization charges against Alcoa were the most important case in a generation, rivaling those against Standard Oil and U.S. Steel in the past, and the cases against AT&T and Microsoft in the far distant future. Andrew Mellon, the founder of Alcoa and former Secretary of the Treasury, had been indicted the past previous year, but had died before trial began.

The case resumed on June 1, 1938 with Arnold at the counsel table. Alcoa was represented by Charles Evan Hughes Jr. the son of the former Presidential candidate and Supreme Court Justice.

The Antitrust Division promised to prove that Alcoa had a “100% monopoly in virgin aluminum and bauxite industry throughout the Western Hemisphere” and controlled output through “rest of world” through subsidiaries, affiliates and a cartel with foreign producers. Alcoa originally had a lawful monopoly on the production of aluminum from bauxite ore

\textsuperscript{91} Memo from George P. Comer to Johnston Avery, December 18, 1939, AHC Box __. By the time BOTTLENECKS appeared in print, the estimated savings was reduced to $170,000,000 at a cost of only $200,000 for the investigations and prosecutions. ARNOLD, BOTTLENECKS, supra note 45, at 77.

\textsuperscript{92} Id. at 48.

\textsuperscript{93} United States News, August 1, 1938.
through various patents which expired in the early part of the 20th century. An earlier antitrust suit by the United States in 1912 had eliminated certain restrictive covenants and cartel arrangements with foreign producers which had further buttressed Alcoa’s monopoly of the American aluminum market. Nevertheless, Alcoa still sold more than 90% of the virgin aluminum ingot in the United States, although a growing amount of recycled ingot was also on the market. Imports remained nil due to Alcoa’s continuing participation in international cartel arrangements. New domestic competition was almost impossible given Alcoa’s aggressive expansion and its lock on the key sources of hydroelectric power, the single most important input for aluminum production after bauxite ore itself.

The trial lasted until August 14, 1940 after more than 40,000 pages of testimony had been taken and 10,000 pages of exhibits entered into evidence. The New Yorker magazine claimed it was the longest trial in the history of the world and that the trial record was three times heavier than the Encyclopedia Britannica and thirty times longer than Gone with the Wind.94

The judge immediately issued a draft oral opinion dismissing all charges, which itself took nine days to deliver. The formal written opinion did not appear until July 23, 1942.95 The government appealed directly to the Supreme Court, but on June 12, 1944, the Supreme Court referred the case to the Second Circuit, because it lacked a quorum of six justices to hear the case. The Court was down to only eight members because Roosevelt had not yet filled the seat formerly held by Justice Byrnes. Justice Jackson, Reed, and Murphy presumably were


95 44 F. Supp. 97 (S.D.N.Y. 1941).
disqualified for their earlier work on the case for the Roosevelt Justice Department with Chief Justice Stone similarly being disqualified because of his earlier involvement in prosecuting Alcoa while Attorney General under Coolidge. Even if Roosevelt had filled the vacancy, there may not have been a quorum for this critical case.

It was not until March 12, 1945, as Arnold was near the end of his own service as a federal appellate judge, that the Second Circuit upheld the government’s case and created landmark precedent on what constitutes a monopoly, when a monopoly’s actions violates the antitrust law, and when anticompetitive conduct outside the United States constitutes a violation of the Sherman Act. Even then, the Court deferred the issue of remedy until after the war.

All the while, Arnold and his staff worked at a furious pace and seemingly on dozens of matters at once. Far from shying away from investigating or attacking the sacred cows of the economy, Arnold seemed to delight in tormenting them. On August 1, 1938, Arnold announced a grand jury investigation of the American Medical Association’s opposition to group health plans. He focused on the District of Columbia where federal employees had formed the Group Health Association Inc. (“GHA”) to provide a prepaid medical plan akin a modern HMO. GHA retained its own physicians who agreed to provide the members virtually complete medical care. The AMA, the Medical Society of D.C., and its officers and directors reacted by threatening to expel any physicians who provided services to GHA or consulted with any GHA physicians, and

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96 United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

97 A special provision of the antitrust laws applied to the District of Columbia without the need to show an effect on interstate commerce. 15 U.S.C. § 3. This was still a potentially thorny issue for an investigation in the medical profession in the 1930s. The issue of the effect of the practice of medicine on interstate commerce was only resolved by the Supreme Court decades later by a closely divided Supreme Court in Pinhas v. Summit Health, Ltd., 500 U.S. 322 (1991).
denied hospital privileges to any GHA physicians.

Arnold tied the medical industry’s restrictions to the high cost of medical care, the failure to provide adequate medical care to lower income families, and even to preventable infant mortality. Although common place today, Arnold appears to have broken new ground in the AMA case in using FBI agents to assist in the gathering of evidence against the AMA.

The AMA case began a war of words. Arnold was attacked for everything from promoting socialized medicine to perverting the antitrust laws for attacking a voluntary professional association. Some critics wondered sarcastically if bar associations were next. Arnold fired back by releasing a letter to counsel for the DC Medical Society expressing the expectation that his client would cease the “coercion of qualified people in the practice of their profession” and laying out his case in a nation-wide radio broadcast on August 19th. Despite the controversy, Roosevelt supported the AMA investigation and Attorney General Cummings publicly backed Arnold as well.

It appeared at first that the case would not even make it to trial. The district court threw out the indictments on the grounds that the practice of medicine was not “trade” and thus not

98 Statement by Assistant Attorney General Thurman Arnold, Chief of the Anti-Trust Division of the Department of Justice, 49 CURRENT HISTORY 49 (1938).


100 LaCrosse Tribune Aug. 5, 1938. They were eventually right as mandatory price schedules and restrictions on lawyer advertising fell to attack under the antitrust laws and the First Amendment. See Bates v. State Bar of Virginia, 433 U.S. 350 (1977).


102 Chicago Daily Tribune August 2, 1938.
covered by the antitrust laws, only to be reversed on appeal.\(^{103}\)

At trial the defendants were convicted and fined $2500 for the AMA and $1500 for the D.C. Medical Society. The case ended in January 1943 with a total victory in the Supreme Court in a case which Arnold argued personally.\(^{104}\) By a 6-0 vote the Court upheld the application of the antitrust laws against the AMA and the D.C. Medical Society and held that they had engaged in an illegal boycott against the clinic.

No industry was safe if it demonstrated either signs of price fixing or monopolization. Arnold obtained a landmark ruling that the insurance industry was engaged in interstate commerce, rendering it subject to the federal antitrust laws. This ruling was promptly overturned by statute in one of the few Congressional rebukes to Arnold’s enforcement regime.\(^{105}\) Other cases were brought or concluded against the retail, tire, fertilizer, tobacco, shoe, construction, dairy, and agricultural industries. Nor did antitrust deal just with the blockbuster cases. Arnold also brought indictment against smaller local industries including the wooden ice cream stick industry in NY.\(^{106}\) By the end of fiscal 1939, there were 1375 complaints pending in 213 cases involving 40 industries with 185 continuing investigations.\(^{107}\)


\(^{104}\) American Medical Association v. United States, 317 U.S. 519 (1943).


\(^{106}\) AHC, Box 88, File 1.

\(^{107}\) AHC, Box 88, File 3.
VI. The Socony Vacuum Case

Perhaps no case was more important than the case against the oil industry. The oil industry had been plagued for years with falling prices and the problem of so-called hot oil, oil which had been produced in violation of state quotas and dumped on the market driving down the price, often below the cost of production. To counter falling oil prices, the major oil companies devised a plan where they would buy up hot oil at prevailing market prices. Each major tracked the production of one or more of the smaller independent refiners and agreed to buy the oil of its “dancing partner” as it came on the market. Officials in the Roosevelt Administration were aware of the plan and had given their unofficial acquiescence, if not outright approval, both during and after the NRA.

No one, of course, had sought or obtained the approval of the Antitrust Division. From the perspective of the Antitrust Division, it was plain and simple price fixing. Nor were the nods and winks of the planning wing of the Administration a defense. Although the case only concerned post-NRA activity, Arnold contended that the practices had been in effect since 1931 before the NRA had even started, were never covered by any NRA code, and continued after the NRA had been declared unconstitutional.¹⁰⁸ The indictment charged 27 companies and 56 of their officers with criminal violation of Section One of the Sherman Act.

The case had a long and tortured history. The indictments had originally been brought in Madison Wisconsin in December 1936 while Jackson still headed the Antitrust Division. Following a number of guilty and nolo contendre pleas, 26 companies and 46 individuals went to trial. The sheer scope of the case required over one hundred lawyers for the defendants who

¹⁰⁸ The key provisions restricting the sale of so-called hot oil has been declared unconstitutional in January 1935 in Panama Refining Co. v. United States, 293 U.S. 388 (1935).
leased an entire hotel for the trial.\footnote{ARNOLD, BOTTLENECKS, supra note 45, at 208.}

Just before jury deliberations, the judge dismissed the case against ten companies and 16 individuals. The rest were found guilty by the jury. The judge granted new trials to some of the defendants and granted outright dismissals to others, leaving twelve corporations and five individuals guilty as charged. The corporations were fined $5000 and the individuals fined $1000. On appeal, all defendants were granted new trials on the grounds that the informal arrangement was not per se illegal, the trial judge had improperly excluded much of the defendants’ proffered evidence, and had given the jury improper instructions as to the law.\footnote{105 F.2d 809 (7th Cir. 1939).}

To underscore the importance of the case, Arnold argued the appeal himself in the Supreme Court against William “Wild Bill” Donovan, later to become the head of the OSS in World War II. Arnold told the Justices that the agreement among the oil companies was “an attempt to set up the N.R.A. again without control.” According to press reports, Arnold got carried away and shouted that similar practices were so prevalent in the economy that “This case represents the most dangerous threat to the enforcement of the anti-trust laws ever seriously presented to this court.”\footnote{New York Herald Tribune, Feb. 7, 1940.}

Arnold again prevailed in the Supreme Court. On May 6, 1940, the Supreme Court affirmed the convictions of all defendants in a 5-2 decision written by William Douglas, Arnold’s old friend from Yale.\footnote{United States v. Socony-Vacuum Co., 310 U.S. 150 (1940). Chief Justice Hughes and Justice Murphy did not participate in the case. Justice Roberts wrote a dissent in which Justice}
Douglas’s opinion ran for nearly 100 printed pages and did more than just vindicate the government’s prosecution. It established two of the key principles of modern antitrust law. First, it held that price fixing was illegal per se regardless of why the defendant had conspired, whether the prices fixed were reasonable, or whether the defendants had raised, lowered, or merely stabilized prices. Moreover, avoiding ruinous competition or competitive evils were not a defense.\textsuperscript{113}

Douglas wrote in a thundering style that would be typical of his years on the Court:

\begin{quote}
Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se, Where the machinery for price-fixing is an agreement on the prices to be charged or paid for commodity in the interstate or foreign channels of trade, the power to fix prices exists if a combination has control of a substantial part of the commerce of that commodity.\textsuperscript{114}
\end{quote}

Then in the most famous footnote in the history of antitrust, Douglas essentially held that since the Sherman Act prohibited “conspiracies” in restraint of trade, the violation was complete with the agreement to accomplish the illegal objective, even if the defendants lacked the power to

\textsuperscript{113} Id. at 200-21.

\textsuperscript{114} Id. at 223-24.
carry out the plan, or if the plan produced no actual effects in the markets.\textsuperscript{115}

Although technically Douglas distinguished, rather than overruled the earlier \textit{Appalachian Coal} case, Douglas’s rhetoric destroyed whatever was left in that earlier NRA tinged decision which had appeared to open the door to some price fixing under some circumstances. Had \textit{Appalachian Coal} remained the law of the land, criminal antitrust prosecution would be virtually impossible. Each defendant would have been able to raise any number of reasons why it was reasonable to agree with their competitors as to price or production making proof beyond a reasonable doubt an impossible burden for the government.

The Court then rejected the defense that government knowledge, or even acquiescence, in the price stabilization scheme was a defense. According to Douglas, only Congress, not executive branch officials could confer immunity from the antitrust laws.\textsuperscript{116} Thus \textit{Socony-Vacuum} was also the final death knell for the planning wing of the New Deal and whatever informal versions of the NRA that existed after the \textit{Schechter Poultry} ruling.

VII. The Patent Cases

The one type of investigation that cut across industry lines was Arnold’s crusade against the misuse of patents. Arnold railed against the misuse of patents every chance he could as a tool of price fixing, division of markets among competitors, and monopolization.\textsuperscript{117} In a speech

\begin{flushright}
\textsuperscript{115}Id. at 224 n. 59.
\textsuperscript{116}Id. at 225-28.
\end{flushright}
before the American Business Congress broadcast nationwide over the Mutual Radio Network, Arnold said: “Since 1926 the most effective instrument of monopoly control and restrictions on production has been the abuse of the patent privilege.”

In a letter to one of Roosevelt’s top aides he argued: “The real vice of the patent system does not lie in the law itself but in the various schemes which have perverted it into an instrument for monopoly control of corporations.” He instituted numerous investigations and cases alleging that competitors had used patent and other licenses as a disguise for traditional price fixing and cartel arrangements in international markets. He publicized how the control of a patent for a lowly screw fastener became a vital bottleneck slowing down aircraft production and the war effort.

He brought a landmark case against the Hartford-Empire company for monopolizing the glass container industry through its accumulation of patents and its licensing practices. Arnold


119 TWA to Isador Lubin, Sept. 20, 1943, Walton Hamilton Collection, Box J11, Folder 2, rare Books and Special Collections, Tarlton Law Library, University of Texas at Austin.

120 Many of these cases were postponed because of the advent of the World War II and came to fruition long after Arnold had left the Justice Department. See e.g. United States v. Timken Roller Bearing Co., 341 U.S. 593 (1951).

121 Statement of Honorable Thurman W. Arnold, Assistant Attorney General of the United States Before the Committee on Patents of the Senate of the United States (Bone Committee), 77th Cong., 2d Sess, Wash., D.C. Apr. 25, 1942.

continued the earlier Ethyl Gasoline case and personally argued it in the Supreme Court winning a ruling that patents could not be used to set prices for resale or to impose restrictions on matters outside the scope of the patent.\footnote{Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940).} Arnold also argued the Univis Lens Case in the Supreme Court where the Court also condemned the use of patent licenses as a device to control resale prices of the licensee to the public.\footnote{United States v. Univis Lens Co., Inc., 316 U.S. 241 (1942).}

VIII. \textit{Associated Press}

The controversial suit against the Associated Press was filed in August 1942 shortly after Marshall Field tried to get AP service for the new Chicago Sun paper and was blocked by Colonel McCormick, the publisher of Tribune.\footnote{Department of Justice Release, August 28, 1942, AHC Box 60.} Arnold had been aware for some time of the AP’s restrictive by-laws which gave prevented AP members from sharing news with non-members and which also gave current AP members a veto over new entrants in their market. Earlier in 1940, he had unsuccessfully tried to get Eleanor “Cissy” Patterson, a family friend and publisher of the Washington Times-Herald, who was also a cousin of Colonel McCormick of the Chicago Tribune, to file a complaint. Her paper had been blocked from AP membership by her competitor, the Washington Post, but for family or personal reasons, she had refused to cooperate.

When Arnold then later prosecuted her cousin and the rest of the industry, Patterson

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\textsuperscript{123} Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940).
\footnotesize
\textsuperscript{124} United States v. Univis Lens Co., Inc., 316 U.S. 241 (1942).
\footnotesize
\textsuperscript{125} Department of Justice Release, August 28, 1942, AHC Box 60.
\end{flushright}
bitterly denounced Arnold and the case as an attack on freedom of the press.\textsuperscript{126} At the height of the case, Colonel Robert McCormick even called Arnold “an idiot in a powdermill,” an epithet that Arnold treasured for the rest of his career.\textsuperscript{127} Eventually, a majority of the Supreme Court saw the matter Arnold’s way and required the restructuring of the AP bylaws to prevent newspapers from vetoing new AP members in their territories. The opinion by Justice Black stands as one of the few to link the goals of free competition under the antitrust laws to the free expression of ideas under the First Amendment.\textsuperscript{128}

IX. The Labor Cases

The main blemish on Arnold’s record was his quixotic pursuit of a series of antitrust cases against labor unions. Part of Arnold’s plan was to attack restraints involving entire industries affecting bottom-line consumer interests in their entirety where attacking any single aspect of the problem would likely not remove the bottlenecks. In housing and construction, this meant attacking a web of interlocking restraints involving manufacturers, contractors, and labor unions which artificially inflated the cost of housing at a time when the national economy had not yet recovered from the crash of 1929.

Arnold conceived of the campaign against this deep seated set of restraints on

\textsuperscript{126}Cissy Patterson’s biography recalls this incident quite differently with Patterson trying to get Arnold to file suit with him, refusing unless Patterson’s paper more strongly supported President Roosevelt editorially for reelection in 1940. There is no support offered for this supposed direct quid-pro-quo particularly at a time when Patterson’s Washington Herald had not definitively broken with the Roosevelt administration. See ALICE ALBRIGHT HOGE, CISSY PATTERSON 190 (1966).

\textsuperscript{127} ARNOLD, FAIR FIGHTS, \textit{supra} note 20, at 114.

\textsuperscript{128} Associated Press v. United States, 326 U.S. 1 (1945).
competition in manufacturing, distribution, and labor as an even-handed attack on the misuse of economic power. Arnold wrote:

Whenever a small group of individuals uncurbed by legal authority, is permitted to dominate any important part of the production or distribution of the necessities of life, these results will inevitably follow:

They seek to consolidate their power by destroying existing independent enterprise.

They prevent new enterprise from entering the field.

They restrict production and raise prices.

They stop the introduction of more efficient methods of production in order to maintain obsolete ways in which they have a vested interest.

They set up an arbitrary and despotic control over the industry and exploit members of their own group.

They enter into politics, using money and economic coercion to maintain themselves in power.129

Although by no means antilabor, Arnold had a blind spot regarding the symbolism of attacking labor unions through the antitrust laws. It was, however, simply impossible to apply the antitrust laws equally to business and labor, even if Arnold was right on some theoretical level.130 Under the common law, and in the early days of the antitrust laws, labor unions had been attacked as unlawful conspiracies, their activities enjoined by the courts, and their leaders


130 TWA to Robert H. Jackson, Jan. 23, 1940, reprinted in GRESSLEY supra note 30, at 300; TWA to Freda Kirchwey, Dec. 14, 1939, id. at 298.
often imprisoned, while manufacturers were free to conspire with virtual impunity. Congress had reacted by passing not one, but two different provisions immunizing labor unions from the antitrust laws.\footnote{131}{15 U.S.C. § 17; 29 U.S.C. § 52.}

What troubled Arnold was how labor, particularly in the construction industry, inflated costs, restricted production, blocked cost saving innovations, enlisted business in jurisdictional disputes with other unions, and generally contributed to the paradox of the Depression of want in the midst of plenty. For example, Arnold wrote in his official capacity to a labor leader: “The union may not act as a private police force to perpetuate unnecessarily costly and uneconomic practices in the housing industry.”\footnote{132}{Department of Justice Release, November 20, 1939 (releasing letter from Arnold to Secretary of Central Labor Union of Indianapolis).}

He also objected to the secondary boycott where a union boycotted persons doing business with a firm involved in a labor dispute. Arnold objected to the coercive effect this tactic had on innocent otherwise uninvolved parties and how it greatly increased the power of some unions like the Teamsters over other unions like the UAW which were not in a position to engage in such behavior with the customers of the firms which employed their members.\footnote{133}{Letter to Arthur Krock, Feb, 27, 1958, \textit{reprinted in} GRESSLEY, \textit{supra} note 30, at 424.}

Although this hardly endeared Arnold to most of his liberal pro-labor friends and New Deal colleagues,\footnote{134}{Arnold had such conflicts with Attorney General Murphy over his labor cases that he contemplated resigning and joining a New York law firm. TWA to Robert H. Jackson, Jan. 23, 1940, GRESSLEY, \textit{supra} note 30, at 300.} Arnold’s held fast to his belief that labor restrictions were a hidden tariff, a
private tax, a restraint on interstate commerce, and a huge contributor to increased prices to consumers from his earliest days as head of the Antitrust Division throughout the rest of his life.\textsuperscript{135} He reflected later in his memoirs: “When a labor union utilized its collective power to destroy another union, or to prevent the introduction of modern labor-saving devices, or require the employer to pay for useless and unnecessary labor, I believe that the [antitrust exemption] has been exceeded and that the union was operating in violation of the Sherman Act.”\textsuperscript{136}

Arnold’s first labor prosecution was a criminal indictment against the Carpenter’s union, and its president William Hutcheson, for a jurisdictional strike against Anheuser Busch over which union had the right to install machinery in the company’s plant. The Supreme Court held that the strike was legal and not an antitrust violation.\textsuperscript{137} As a result, subsequent antitrust indictments against labor unions were struck down by the Supreme Court without comment other than citation to \textit{Hutcheson}.\textsuperscript{138} The Court further stopped Arnold from using the antiracketeering laws to the same effect.\textsuperscript{139}

The normally savvy and political astute Arnold was simply blind to the political danger in attacking a core element of the New Deal coalition. Some of his Congressional testimony on

\textsuperscript{135} ARNOLD, BOTTLENECKS, supra note 45 at 240-59; ARNOLD, FAIR FIGHTS, supra note 20 at 130; Arnold, Labor’s Hidden Holdup Men, supra note 45; Letter to Arthur Krock, Feb. 27, 1958, GRESSLEY, supra note 30 at 424; TWA to Arthur Sulzberger, Jan. 25, 1940, \textit{id.} at 303.

\textsuperscript{136} ARNOLD, FAIR FIGHTS, supra note 20, at 116.

\textsuperscript{137} United States v. Hutcheson, 312 U.S. 219 (1941).

\textsuperscript{138} United States v. International Hod Carriers & C. L. District Council, 313 U.S. 539 (1941)(per curiam).

\textsuperscript{139} United States v. Local 807 International Brotherhood of Teamsters, 315 U.S. 521 (1942).
his labor views was so inflammatory that Attorney General Biddle prohibited him from returning to the Hill when subpoenaed to testify at a later hearing.\footnote{Arnold’s original March 21, 1942 testimony was simply reprinted. 22 Congressional Digest 176 (1943).} At one point, the general counsel of the AFL called him “the greatest enemy of organized labor in America today.”\footnote{Pittsburgh Press, Apr. 28, 1940.}

Even Arnold acknowledged that the labor cases were his “one conspicuous failure.” What he couldn’t understand was how he kept losing in the Supreme Court in increasingly brief and humiliating decisions or how these futile efforts were crippling his ability to continue an effective campaign of antitrust enforcement in other industries.

X.  \textbf{Antitrust and the Winds of War}

Perhaps the gravest challenge Arnold faced as head of the Antitrust Division was the wholesale repeal, and practical nullification, of antitrust in the face of the war planning and production leading up to the United States entry into World War II. The planning process (such as it was) and the war effort itself threatened to derail antitrust enforcement as effectively as the NRA had done so during his predecessors’ tenure. As early as July 1940, Arnold saw the threat war preparedness meant for antitrust.\footnote{GRESSLEY, \textit{supra} note 30, at 49.}

Arnold fought back both within the Administration and publicly by using antitrust to attack profiteering and impediments to preparedness during the early days of the war in Europe before Pearl Harbor, linking the attack on international cartels to the defense needs of the nations, showing the links between the international cartels and the Nazi war machine, and

\footnote{Pittsburgh Press, Apr. 28, 1940.}
arguing against the return of a cartelized economy in the postwar era. In *Bottlenecks*, Arnold eloquently described how anticompetitive agreements were injuring the national defense by:

1. Throttling American capacity to produce essential war materials by foreign ownership and control of patents;
2. Cartelization of certain industries with price and production control in foreign hands;
3. Transmission to foreign companies of American military secrets;
4. Division of markets, fixing and restricting of price of materials essential to military preparation;
5. Collusive bidding on contracts for the Army and Navy.

Arnold set out how agreements between American and German firms in the optical industry had jeopardized war preparedness and how the very same firms had unsuccessfully tried

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144 ARNOLD, BOTTLENECKS, supra note 45, at 74.
to threaten the War Department with delays if the antitrust suit was not dropped.\textsuperscript{145} In a nationwide radio address in 1942, Arnold cited to a list of 162 cartel agreements between the thoroughly nazified I.G. Farben company of German and various American firms.\textsuperscript{146}

The Standard Oil of New Jersey case was the notable success of this effort. Standard Oil and I.G. Farben of Germany had agreed as early as 1929 to divide world markets, with I.G. Farben being granted exclusive rights to artificial rubber and Standard Oil being given the world market for petroleum products. The companies exchanged technology with Farben being the recipient of a great deal of important Standard Oil work in the artificial rubber area. One of the consequences of the deal was Standard Oil’s inability to reenter the artificial rubber market without I.G. Farben’s consent, a decision which had profound consequences for war preparedness in the United States.

Arnold had the law and the facts on his side and was prepared to criminally indict the companies through the grand jury process. If the US had not already been at war this probably would have happened. Instead, Standard Oil was able to exert its influence with the War Department and Arnold was forced into accepting a consent decree which freed up some key patents, but required only the payment of a $50,000 fine.\textsuperscript{147}

Even here, Arnold “leaked” the real story to the press and Congressional hearings which

\textsuperscript{145} Id. at 70-71.

\textsuperscript{146} The Abuse of Patents, Speech by Thurman Arnold, Assistant Attorney General of the United States, Before the American Business Congress, Hotel Pennsylvania, New York City, July 28, 1942, AHC, Box 106.

\textsuperscript{147} United States v. Standard Oil Co., 1940-43 Trade Cas. (CCH) ¶ 56,198 (D.N.J. 1942), as amended, 1940-43 Trade Cas. (CCH) ¶ 56, 269 (D.N.J. 1943).
laid the record of the case before the public.\textsuperscript{148} In a series of appearances before the Senate National Defense Committee chaired by Truman and the Patent committee chaired by Homer Bone Arnold laid out what he had been prepared to prove in court.

As if the original cartel arrangement wasn’t bad enough, the companies continued to try to keep their private deal together, despite the war. Even after World War II had begun in Europe, there was evidence that Standard Oil had agreed with I.G. Farben to continue to suppress production of artificial rubber in the United States, even though the arrangement was increasingly one sided in favor of I.G. Farben and the wishes of the Hitler regime. Arnold linked Standard Oil to attempts to keep its cartel going even during the war and to near espionage in giving German companies vital technological information.\textsuperscript{149} Standard Oil limited its own development of artificial rubber and blocked its commercial development by others leaving the United States short of this vital commodity, while production flourished in Germany thanks to I.G. Farben’s uncontested control of this commodity. Although Arnold was always careful to attribute the cartel agreements to the desire to dominate world markets rather than lack of patriotism, Standard Oil’s conduct was characterized by Senator Truman as approaching treason.\textsuperscript{150} Arnold demonstrated the existence of similar agreements between Farben and other American companies for magnesium, titanium, and other products that had similar effects and how the initial cartel agreements inevitably expanded to include other American and

\textsuperscript{148} I.F. Stone, \textit{Thurman Arnold and the Railroads}, NATION 331 (Mar. 6, 1943); \textit{Arnold vs. Standard Oil}, NEWSWEEK 46 (June 8, 1942).

\textsuperscript{149} The Abuse of Patents, Speech by Thurman Arnold, Assistant Attorney General of the United States, Before the American Business Congress, Hotel Pennsylvania, New York City, July 28, 1942, Box 106.

\textsuperscript{150} ARNOLD, FAIR FIGHTS, \textit{supra} note 20, at 145.
international firms until they encompassed all the worldwide competitors in truly global cartels to the detriment of American’s consumers and the war effort.\textsuperscript{151}

Arnold himself was careful not to directly impugn the patriotism or loyalty of American companies as much as simply attribute these actions as a regrettable, but understandable, attitude of greed that could only be cured through more antitrust enforcement both during and after the coming victory against the Axis. For Arnold: “You cannot control prices unless you restrict production. You cannot restrict production without depriving a nation of wealth in peace, and of strength in war.”\textsuperscript{152}

Despite these revelations, Arnold was losing the antitrust battle to defense preparation and the war effort on a daily basis. The problem was that while the Standard Oils, DuPonts, GEs, and Alcos were guilty of heinous conduct, their sins were ultimately greedy in nature rather than traitorous. These companies were absolutely vital to the US war effort and many of their executives were now working in the war planning and production effort. Arnold was forced to agree publicly (if not entirely voluntarily) to defer to the War and Navy departments in the event they explicitly found that any particular antitrust violation was necessary for national defense.\textsuperscript{153} Perhaps it was inevitable that this would overwhelm his antitrust enforcement


\textsuperscript{153} ARNOLD, BOTTLENECKS, \textit{supra} note 45, at 73.
program, given the scope of the national emergency and the corporatist culture of the war planners themselves. Case after case was vetoed by the planning and defense authorities, including cases involving conduct predating the war.\(^{154}\) Arnold spent more and more of his time fighting with the war planners, including Hugh Johnson, who had led been the first head of the NRA and still had little use for the antitrust laws.\(^{155}\) For the first time Congress was cutting rather than increasing his budget and staffing.

The final straw appeared to be Arnold’s attempt to criminally prosecute the railroads for price fixing and to indict Averell Harriman, the chairman of the Union Pacific, who was appointed as United States Ambassador to the Soviet Union in the same year that Arnold would have indicted him.\(^{156}\) The indictment was quashed in the name of national defense and Arnold was effectively gone from the one job that he had truly loved.

Roosevelt offered Arnold a face-saving position on the federal appellate bench.\(^{157}\) Arnold pretended he wanted it and Roosevelt pretended he was sorry to see take it. Drew Pearson led a newspaper crusade to get Arnold to decline the appointment for the good of the country, but it is unlikely that Roosevelt would have kept him on in any event. Arnold himself

\(^{154}\) To Robert H. Jackson, Sept. 9, 1942, GRESSLEY, supra note 30, at 330; Miss C. Warriner, Apr. 28, 1942, id. at 326 (discussing by pressure by General Electric and other companies to use war needs to defer or derail antitrust investigations). See generally Richard M. Steuer & Peter A. Barile III, Antitrust in Wartime, 16 Antitrust 71 (Spring 2002).

\(^{155}\) See TWA to Hugh Johnson, Feb. 7, 1941, GRESSLEY, supra note 30, at 310. For Johnson’s views on antitrust generally see HAWLEY, NEW DEAL, supra note 7, at 53-106.

\(^{156}\) Bits and pieces of the investigation of the railroads can be found in Corwin D. Edwards, Thurman Arnold and the Antitrust Laws, 58 POL. SC. Q. 338, 349-53 (Sept. 1943); I.F. Stone, Thurman Arnold and the Railroads, NATION 331 (Mar. 6, 1943).

equipped to a Time magazine interviewer that he was like the Marx Brothers, funny at first, but something the public eventually grows tired of.

The conventional wisdom, even from friends (although philosophical opposites) like Rex Tugwell, was that Arnold’s antitrust efforts, particularly in the defense area, were a short term stir that had to be smothered in order to promote the consolidation, coordination, and centralized management of the war effort. Arnold disagreed: “Even during the war the symbol of the antitrust ideal was kept alive by the Department of Justice.”  

Arnold has the last laugh as after the war antitrust revived including a vigorous prosecution of international cartels and the sham patent and trademarks licensing agreements designed to bolster those arrangements. Moreover, the antitrust ideal spread to Germany (and to a lesser extent Japan) and led to the eventual creation of the European Economic Community which contained an antitrust system that eventually rivaled that of the United States.

XI. Relationship to Law and Economics

For all his populist rhetoric, it was Arnold who changed the age old debate about the virtues and vices of size. For Arnold, size alone was no offense and might even be desirable, if, and only if, it were efficient and passed those savings along to consumers. By linking antitrust to consumer interests, and in defining consumer interests as he did, Arnold set the stage for

\[158\] ARNOLD, FAIR FIGHTS, supra note 20, at 145.


\[160\] HAWLEY, supra note 7, at 428.
modern antitrust and the debates that continue today as to the meaning of harm to competition and how best to protect the interests of consumers.

Arnold introduced a symbiotic relationship between antitrust law and economics which also continues today, albeit in a very different form. By 1938, while few economists supported the mission for the Antitrust Division, there were prominent exceptions. Edward Chamberlin, Joan Robinson, and others had recently published groundbreaking work on monopolistic competition justifying a more interventionist government antitrust policy against firms which collectively dominated their industry without either a classic monopoly or traditional overt collusion. Antitrust finally had a set of theories that supported Arnold’s mission to enforce the antitrust laws in order to break private restraints holding back production, unlock rigid administered prices, help restore consumption, and benefit consumers.

To fully implement this vision, economists as well as lawyers and investigators were needed. Walton Hamilton, a distinguished economist who had been Arnold’s colleague on the Yale Law School faculty, and previously involved in the NRA as a representative of the public, soon joined Arnold at the Antitrust Division. Arnold also recruited Corwin Edwards, another distinguished economist to join the staff of the Division.

One commentator has mistakenly suggested that Arnold sought the type of economic

\[\text{\textsuperscript{161}}\text{EDWARD H. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (1933); JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (1933); Horace G. White, Jr., A Review of Monopolistic and Imperfect Competition Theories, 26 AM. ECON. REV. 637 (1939). See generally PERITZ, supra note 8, at 106-10.}\]

\[\text{\textsuperscript{162}}\text{For Hamilton’s academic career before joining Yale see Malcolm Rutherford, Walton Hamilton, Amherst, and the Brookings Graduate School, available at http://netec.wustl.edu/WoPEc/data/Papers/vicvicddp0104.html. For Hamilton’s NRA involvement see HAWLEY, at 95, 107.}\]
efficiency later pursued by the modern day law and economics movement.\textsuperscript{163} Despite having introduced economists into the warp and woof of the decision making of the Antitrust Division,\textsuperscript{164} Arnold can by no stretch of the imagination be considered a early forebearer of the contemporary law and economics movement. The law and economics movement today, often referred to as the Chicago School, regards markets as robust and largely self-correcting and antitrust enforcement, outside of price fixing and particularly large horizontal mergers, more harmful than simply allowing market forces to self-correct.\textsuperscript{165}

At most, Arnold shared the conviction that size alone should not be an offense against the antitrust laws.\textsuperscript{166} In Arnold’s unique style he claimed that preferring small economic units to big ones was like preferring low buildings to high ones or saying that “Milton is more poetical than the pig is fat.”\textsuperscript{167} As to the brand of economics practiced at the University of Chicago, Arnold thought it “fantastic nonsense.”\textsuperscript{168}


\textsuperscript{164} Economic thinking certainly dominates the Antitrust Division and the FTC in recent years. Arnold laid the groundwork for the prominence of economics in antitrust in over the years has on some occasions supported aggressive antitrust enforcement and at other times supported its retrenchment and virtual non-enforcement. MARC ALLEN EISNER, \textit{ANTITRUST AND THE TRIUMPH OF ECONOMICS} (1991); SUZANNE WEAVER, \textit{DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION} (1977); PERITZ, \textit{supra} note 8, \textit{passim}.


\textsuperscript{166} ARNOLD, \textit{BOTTLENECKS}, \textit{supra} note 45, at 4, 122; Letter to Alfred Friendly, Aug. 9, 1961, reprinted in GRESSLEY, \textit{supra} note 30, at 439.

\textsuperscript{167} Thurman W. Arnold, \textit{Feathers and Prices}, 8 COMMON SENSE 3, 5 (July 1939).

\textsuperscript{168} Letter to Clifford Hansen, May 1, 1967.
What Arnold meant by efficiency, however, is very different from the sole focus of the current emaciated form of antitrust on allocative efficiency and wealth maximization. At a minimum, Arnold believed that powerful organizations had to show that they were both efficient and serving the consumer in order to escape antitrust scrutiny. For Arnold, most economists were the priest of the old order, preaching that the government was powerless to take action to solve the ills of the day, lest it contravene the natural laws of markets. For Arnold, the newer economics of his day were a source of action, not inaction. More importantly, “Antitrust enforcement must come down from the blue sky of economic and legal theory and concern itself with the family budget items, one at a time.”

Inefficiency in the Great Depression meant an economy that produced much, but could not distribute those goods and services to consumers. Even where distribution worked reasonably well, consumers frequently lacked the purchasing power to buy the goods and services being produced. The failure of the Great Depression was “a dangerous kind of waste” that creates the situation that those in need “saw the spectacle of goods withheld from them for no understandable reason.”

Arnold described the basic economic problem as follows:

The great mass of our population sells their goods, and services, and labor in the

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169 ARNOLD, BOTTLENECKS, supra note 45, at 116-31; Arnold, Feathers and Prices, supra note 168, at 6.

170 ARNOLD, SYMBOLS, supra note 46, at 72-104; ARNOLD, FOLKLORE, supra note 30, at 65-66, 134-35.

171 ARNOLD, BOTTLENECKS, supra note 45, at 123.

172 Thurman Arnold, Address at Banquet, 9 MISS. BAR J. 219, 220-21 (1938).

173 Arnold, Feathers and Prices, supra note 168.
competitive markets. They buy their necessities in a controlled market. Thus our economic structure consists of two separate worlds. The first is a world of organized industry and the second is a world of small unorganized business men, farmers, laborers and consumers. In the first world, there is the power to maintain high prices no matter how much the demand for the product falls off. The result is that production drops, men are laid off and this in turn lowers the purchasing power and makes the demand drop still further. In the second world, unlimited competition still exists and cannot be controlled. In this world lives the farmer, retailers, and the small business men who supply the consumers with both goods and labor. Here, when the supply increases or the demand falls off, prices drop to the bottom, but the people go right on producing as much as the conditions of the market will permit. In the first world, we have concentrated control, which makes possible high and rigid prices, which in turn lead to restriction of production and wholesale discharge of labor. In the second world, we find competition, low flexible prices, large production and labor standards by the second world.\textsuperscript{174}

For Arnold, the Four Horsemen of the Apocalypse were: “fixed prices, low turnover, restricted production, and monopoly control.”\textsuperscript{175} Antitrust for Arnold was a pragmatic tool to attempt to help the New Deal end the Great Depression, rather than any specific legal or economic agenda of his one.

To his dying day, Arnold also believed in a variety of non-economic justifications for

\textsuperscript{174} Thurman Arnold, \textit{Antitrust Law Enforcement, Past and Future}, 7 LAW & CONTEMP. PROB. 5, 5-6 (1940).

\textsuperscript{175} ARNOLD, DEMOCRACY AND FREE ENTERPRISE, supra note 145, at 17.
antitrust as part of the attack on concentrated economic power in a democracy that was both inefficient and destroyed local business and drained away local capital.\(^{176}\) In 1955, Arnold wrote that: “The most significant evil at which the antitrust laws are aimed is the evil of absentee ownership and industrial concentration that makes for such depressions. We were slow to learn after 1929 that great corporate organizations cannot continue to take money out of local communities without somebody putting it back.”\(^{177}\) In his 70s, Arnold summarized his philosophy:

> The purpose of the antitrust laws is to ensure freedom of business opportunity. They are not designed to protect small business from larger and efficient competitors. They are not designed to prevent the growth of nationwide business enterprises so long as that growth is a product of industrial efficiency. Even if, through greater efficiency in operation and distribution, a corporation achieved a monopoly, that in itself would not violate the Sherman Act. But this has never yet happened. Monopolies have been built up by using financial strength to buy out competitors or force them out of business. It is this sort of growth and only this sort that the antitrust laws are designed to penalize....

This process repeated in industry after industry during the period between the first World War and the depression created a system of absentee ownership of local industries which made industrial colonies out the West and South, prevented the

\(^{176}\) ARNOLD, FAIR FIGHTS, \textit{supra} note 20, at 129; ARNOLD, DEMOCRACY AND FREE ENTERPRISE, \textit{supra} note 145, at 37; Letter to Alfred Friendly, Aug. 9, 1961, GRESSLEY, \textit{supra} note 30, at 439.

accumulation of local capital and siphoned the consumers’ dollars to a few
industrial centers like New York and Chicago.¹⁷⁸

The Yale professor, New Dealer, and elder statesmen of the Washington bar always remembered watching the economic vitality drain away from Laramie, Wyoming and what it felt like to be an economic colony of distant corporations without control of your destiny. Such a perspective is simply incompatible with the basic precepts of the law and economics movement, although ironically it is Arnold who laid the seeds for the rise of the economist within the antitrust enforcement agencies.

XII. Antitrust’s Debt to Thurman Arnold

When he left the Justice Department, Arnold was, and still remains, the longest serving head of the Antitrust Division in history. Even today, Arnold enjoys a special status among those who followed him at the Justice Department, regardless of party politics or personal philosophies about antitrust. The former Attorney General Janet Reno reflected that during her childhood Arnold’s name “was synonymous with what the New Deal meant.”¹⁷⁹ John Shenefield, head of the Division under President Carter, notes that “His photograph looked down on us in the Front Office so it was as though he was sitting there at your elbow, evaluating your performance” and that in making decisions the question was inevitably “What would Thurman


Arnold do?\textsuperscript{180} James Rill, head of the Antitrust Division under the first President Bush, describes Arnold as one of the two AAGs “head and shoulders” above the rest.\textsuperscript{181} Anne Bingaman who served as President Clinton’s first head of the Division described Arnold as having “created the modern Antitrust Division. His vigorous enforcement of the antitrust laws and his constant proselytizing of the benefits of competition raised the profile of the Division and convinced the American public of the benefits of our nation’s antitrust laws. The debt of the American public to Thurman Arnold cannot be overstated.”\textsuperscript{182}

Bingaman and the others are correct. Without Thurman Arnold, there would be no modern antitrust law or government antitrust enforcement. Just as the Supreme Court destroyed the legal underpinning for the corporate collectivism underlying the NRA Codes, Arnold destroyed the moral and economic basis for the culture of cartels in America and abroad. He upped the criminal and civil consequences for such business behavior, forced it underground, delegitimized it by making it both anti-consumer and un-American, created a stable mandate for antitrust as part of an expanded role of the federal government in policing a healthy national economy, and made it impossible that antitrust would be repealed in the future or completely undermined by changes in the prevailing political winds.

\textsuperscript{180} Email from John Shenefield, September 30, 2003, June 10, 2003.

\textsuperscript{181} Email from James R. Rill, December 11, 2003.

\textsuperscript{182} Email from Anne Bingaman, October 1, 2003.