



TRUSTBUSTERS

Thurman Arnold: An American Original

BY WILLIAM KOLASKY

AS HE PREPARED FOR THE SENATE HEARING on his nomination to head the Antitrust Division, Thurman Arnold had even more reason than most nominees to be nervous. Just a few months earlier, as a Yale law school professor, Arnold had written a best-selling book, *The Folklore of Capitalism*,¹ which seemed to debunk the entire antitrust enterprise. In it, he dismissed as “mythology” the notion that American industry should be made up of small competing concerns. Large firms, he argued, were “essential to producing goods in large enough quantities and at a price low enough” to maintain the American standard of living.² Antitrust enforcement had, therefore, become little more than a “pure ritual.” The antitrust laws, he concluded, were much like the laws against prostitution, which we use to show our “commitment to chastity” while never making any serious effort “to actually stamp it out.” Arnold singled out Senator William Borah as an example of someone who had founded his political career on crusades against big business that were “entirely futile but enormously picturesque.”³

Arnold therefore felt “considerable trepidation” when he took his seat and saw Senator Borah—then the longest serving member of the Senate—sitting directly in front of him, “conspicuously” holding *The Folklore of Capitalism* in his hand.⁴ Once the hearing began, Borah cross-examined Arnold for nearly forty-five minutes, asking how he could be trusted to enforce laws he had

ridiculed just a few months before.⁵ Arnold sought to assure Borah that he would enforce the antitrust laws vigorously. He explained that his book was not intended “as an attack on the antitrust laws,” but simply as a “diagnosis” of what had happened, written “from the point [of view] of someone looking at another, you might say, primitive tribe.”⁶ Catching himself, Arnold quickly added that he did not mean to suggest he considered “ours a primitive tribe.”⁷ Borah responded by saying that he must have been “sadly misled” by Arnold’s book.⁸ Borah then initially withheld his vote for confirmation, although he ultimately voted to confirm Arnold’s nomination once it reached the Senate floor.⁹ A few days later, Arnold wrote Borah apologizing for the reference to him in the book and thanking him for his “unusual tolerance and fairness” at the hearing.¹⁰

Thurman Arnold’s performance as head of the Antitrust Division must have dispelled any concerns Borah or anyone else may have had about his commitment to enforce the antitrust laws. Over the next five years, Arnold became the most aggressive and effective trustbuster of all time. This article is his story.¹¹

A Long Way to Washington

Thurman Arnold was an American original. He was born and raised in the Old West, in Laramie, Wyoming, a town with a population of just 5,000, in a state that had joined the Union only a year before Arnold was born in 1891. Arnold’s grandfather had come to Laramie as a missionary, where he founded the first Presbyterian church in the state. His father became a prosperous small-town lawyer and rancher, and Arnold himself was raised on a ranch that covered some thirty square miles.¹²

When Arnold was sixteen, his parents sent him east to school, first to Wabash College, then Princeton, and ultimately to the Harvard Law School. Arnold arrived at Princeton in 1907, during Woodrow Wilson’s tenure as the school’s president. Arnold hated Princeton, and his experience there seems to confirm Wilson’s description of the school as “a fine country club, where many of the alumni make snobs of their boys.”¹³ With his “western clothes, mannerisms, and speech” Arnold felt like a misfit, and he later described his years at Princeton as “chiefly remarkable for their loneliness.”¹⁴ Despite making Phi Beta Kappa, Arnold found the curriculum “extraordinarily dull” and observed that it would be “impossible to exaggerate the narrow intellectual horizon of both the students and the faculty of that day.”¹⁵

After Princeton, Arnold found law school at Harvard a “new and exciting experience.” Enough of his Western manners had rubbed off so that he no longer felt so much an outsider socially.¹⁶ The professors there, as compared to those at Princeton, seemed to him “intellectual giants.” Arnold also found “the logic of the law,” which required building a legal principle from a long line of precedents in classes taught by the Socratic method, “fascinating.” Despite his enthusiasm, Arnold received mediocre grades and failed to make the law review—something he would joke about later after he became a professor at the Yale Law School, turning down an offer to teach instead at his alma mater.

After graduating in 1914, Arnold practiced law briefly in Chicago, first at a large corporate law firm. He found the work

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there dull and routine and after just two years he and two fellow associates left to form their own firm. Arnold, however, was almost immediately called up to join the Illinois National Guard. One year later, in October 1917, he shipped overseas, first to London and then to France. Arnold's assignments were all behind the lines, so he never saw combat, and his principal memories of the war seem to have been of how cold and wet it was while he was "over there."¹⁷

After the war ended, Arnold went home to Laramie, now a town of 8,000, to practice law with his father. Quickly recognizing that a young lawyer in a small town needed to enter politics in order to enhance his influence and reputation, Arnold ran for mayor as an ardent Prohibitionist and won the election by promising to clean up the town's saloons. The next year, Arnold was elected as the only Democrat in the Wyoming House of Representatives. When the House assembled to elect a speaker, Arnold rose, announced that the Democratic Party had caucused the previous night, and nominated himself. After sitting down, he immediately rose again to second his own nomination. Everyone laughed, except the Speaker *pro tem*, who was "flummoxed" as to what to do next. Arnold then rose a third time, this time to say: "Mr. Speaker, some irresponsible Democrat has put my name in nomination and I wish to withdraw it"—triggering another, even louder round of laughter.¹⁸

Arnold stayed in Laramie for eight years before leaving in 1927 to become dean of the College of Law at West Virginia University. Arnold's reasons for leaving Laramie help explain why he became as ardent a trustbuster as he once had been a Prohibitionist. While practicing law there, Arnold saw many of the local businesses he represented bought up by large "nation-wide combinations," which "would use their control over a product local enterprises had to have to force the latter to sell out at a distress price."¹⁹ It was, he wrote, "plain murder of small business," which local lawyers could do nothing to stop because they "were as ignorant of the antitrust laws as they were of the laws of the Medes and Persians." The agricultural depression that began in 1925 made the situation even worse. Many Wyoming ranchers had to borrow heavily from local banks. When the ranchers were unable to pay off their loans, the banks themselves were forced to close. Arnold left because he "saw no future in Laramie under these conditions."²⁰

In 1930, after two years in West Virginia, Arnold accepted an offer to join the law faculty at Yale. At the time, Dean Charles Clark was assembling a remarkable faculty, which included the future Supreme Court Justice, William O. Douglas. Douglas—who also hailed from a small town in the West—quickly became Arnold's closest friend on the faculty. In his autobiography, *Go East, Young Man*, Douglas recounts an evening when he and Arnold drank an entire fifth of bourbon while engaged in "an exciting conversation." They then piled into Arnold's car, which he drove down the sidewalk, as they went from house to house knocking on doors on a "good will mission aimed at generating a more friendly attitude among the people of New Haven."²¹

Arnold fit in very well at Yale, where he quickly became aligned with the legal realist movement centered there. While at Yale,

Arnold published several books and articles examining American legal institutions from a legal realist perspective, including not only his best-selling *The Folklore of Capitalism*, but also *The Symbols of Government*,²² which advanced many of the same arguments in a more academic style. Arnold, with his irreverent humor and casual manner, also became one of the school's most popular teachers. One of his students, the noted judge Gerhard Gesell, recalled that Arnold would regularly bring his dog, Duffy, to class and would arrive "covered with cigar ashes, looking as though he had just gotten out of bed in his clothes, and somewhat bewildered and shaggy."²³

After Franklin Roosevelt's election in 1932, Arnold began spending increasing amounts of time away from New Haven in Washington. Showing his versatility, Arnold spent one summer working with his fellow Yale law professor Jerome Frank (later a federal judge) at the Agricultural Adjustment Administration, another summer working for the governor of the Philippines, and a third summer as a hearing examiner for the Securities Exchange Commission, which was then chaired by his friend William O. Douglas. In 1937, his sabbatical year at Yale, Arnold was invited by Robert Jackson, then head of the Tax Division at Justice, to come to Washington to argue tax cases before the Supreme Court. Shortly after Arnold arrived, Jackson moved from the Tax Division to the Antitrust Division. During his short tenure there, Jackson succeeded in persuading Roosevelt to make stronger enforcement of the antitrust laws a top priority during his second term.²⁴

At the beginning of 1938, Attorney General Homer Cummings, at Jackson's suggestion, asked Arnold whether he would accept an appointment as head of the Antitrust Division to replace Jackson, who was leaving to become Solicitor General. Cummings told him that Roosevelt had become convinced that the monopoly problem was the most important economic issue facing the country. After Yale agreed to give him a one-year leave of absence, Arnold accepted the appointment, but told Yale he would be back at the end of that year. Once at the Division, however, Arnold became "so engrossed in the fascinating problem of antitrust enforcement" that he twice asked the school to extend his leave.²⁵ Yale granted his first request. When Arnold made his second request, the school—without responding directly—announced that Arnold had resigned from the faculty. Arnold never forgave the school. Arnold ended up remaining at the Antitrust Division for five full years, until April 1943, making him the second longest serving head in the Division's history.

"An Idiot in a Powder Mill"

When he arrived at the Antitrust Division, one of Arnold's first tasks was to work with Jackson and others to draft Roosevelt's Message to Congress on Curbing Monopolies.²⁶ In his message, Roosevelt outlined a two-part program. The first part was reinvigorated enforcement of the existing antitrust laws, for which he requested an appropriation of \$200,000 to give the Antitrust Division the resources it needed. The second part was a study of the concentration of economic power in American industry in order to identify changes in the laws needed to counter the effect

of that growing concentration on competition, for which he requested an appropriation of \$500,000.

As a former academic who had been highly critical of the existing antitrust laws, Arnold must have surprised everyone by deciding to focus his energies on enforcing the existing laws, rather than on studying how to improve them. Hugh Cox, then a young staff lawyer in the Division who later became a preeminent antitrust practitioner at Covington & Burling, recalled that Arnold's arrival at the Division was, for this reason, "like that of a fresh wind, blowing across Medicine Bow in Wyoming."²⁷

Arnold put one of his assistants, Wendell Berge—who had been brought into the Division by John Lord O'Brian in 1930 and would later succeed Arnold as head of the Division—in charge of recruiting talented and energetic young lawyers from the nation's best law schools. Berge succeeded so well that by November Arnold was being accused of hiring only from Harvard, Yale, and Columbia—a charge he refuted by showing that he had also hired from other top law schools like Georgetown and Michigan.²⁸ The lawyers Arnold and Berge recruited into the Division included such exceptionally talented lawyers as Edward Levi (later dean of the University of Chicago Law School and Attorney General of the United States), and Tom Clark (later a Supreme Court Justice). Recognizing the importance of having boots on the ground, Arnold also opened field offices for the Division in several major cities across the United States in order to enhance its ability to investigate and prosecute antitrust offenders throughout the country. By the time Arnold left the Division five years later in 1943, he had quadrupled the Division's budget and increased its personnel nearly five-fold, from 111 to 496.²⁹

Arnold also acted quickly to improve the Division's procedures for enforcing the antitrust laws.³⁰ Believing that criminal prosecution was the only effective deterrent available under the statute, Arnold reversed the Division's long-standing policy of accepting civil consent decrees in lieu of criminal prosecution. Henceforth, he announced, the Division would conduct most of its investigations through grand juries, would seek indictments as soon as it had evidence that a criminal offense had been committed, and would no longer accept civil consent decrees in lieu of criminal prosecution.³¹ As he explained later, "A dog talks by barking, but we talk by litigation."³² Nevertheless, he said, once a prosecution had begun, "the door is open" for proposals as to how to resolve the case short of trial. Knowing that celerity is as important to deterrence as severity, Arnold encouraged his staff to settle criminal prosecutions with *nolo contendere* pleas, but no formal guilty pleas, accompanied by fines and a civil consent decree designed to reform the business practices that had given rise to the violation.

Arnold understood that in order to run an aggressive enforcement program, with criminal prosecutions of companies and businessmen, many of whom were highly respected in their communities, he would need public support. Shortly after taking office, Arnold, therefore, had a series of meetings with leading industrialists to explain how he intended to carry out Roosevelt's program of renewed antitrust enforcement.³³ At the same time, he also began a campaign of articles and speeches aimed to edu-

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cate both the business community and the public generally about the importance of strong antitrust enforcement. As part of this effort, in August 1938, Arnold published a long article in the *New York Times* that laid out in plain English the case for strong antitrust enforcement.³⁴ In it, he characterized the higher prices that resulted from a concentration of economic power as a "private tax" on consumers that had contributed to the recent downturn in economic activity and to the increased unemployment and lower standard of living that had resulted. "You can't solve this problem by preaching"; what was needed instead was "to build up an effective enforcement organization" that would prosecute the businesses that imposed these taxes.

In this and other articles, Arnold shifted the focus of his antitrust enforcement program away from "trust-busting" to consumer welfare. The purpose of the antitrust laws, he wrote, is not to "break[] up large businesses into small ones regardless of their efficiency," but instead "to condemn combinations going beyond efficient mass production which become instruments arbitrarily affixing inflexible prices or exercising coercive power."³⁵ In his later articles, Arnold increasingly shifted his focus away from single-firm concentration and more toward collusion among competitors that created what he called "economic toll bridges" that enabled them "to impose charges on others who have to pass over them to buy or sell their goods."³⁶ To assure that both business and the public would understand the reasons for the Division's enforcement actions, Arnold promised to accompany every prosecution with a public statement explaining the reason for the action and what the Division was seeking to accomplish.³⁷

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- In May, Arnold announced a grand jury investigation of the Big Three automakers into allegations that they had coerced their dealers to finance customer purchases through their affiliated finance companies.³⁸
- In July, Arnold announced a grand jury investigation into an alleged conspiracy among dairy distributors, farmers' cooperatives, union leaders, and city officials in the Chicago area

to restrain the distribution of dairy products through retail stores, forcing consumers to buy them through an antiquated and expensive home delivery system.³⁹

- The same month, Arnold announced a civil injunctive action accusing the 8 major movie producers and 133 individuals of unfair and coercive practices and asking for the complete separation of producer from exhibitor interests.⁴⁰
- One month later, in August, Arnold announced a grand jury investigation of the American Medical Association and its members for seeking to suppress competition from prepaid group health practices by boycotting doctors who worked for those associations.⁴¹

Arnold's first year was just a warm-up for what was to follow. In his second year, Arnold continued to file individual actions at a record pace, but also opened the first of several industry-wide investigations into restraints of trade throughout an entire industry on a scale the Division had never before had the resources to undertake. As he explained at the time, the idea was "to hit hard, hit everyone, and hit them all at once."⁴²

In selecting which industries to target, Arnold chose those that had the largest and most direct impact on the consumer's wallet. The first and largest of these industry-wide investigations was into restraints in the building trades.⁴³ Arnold's investigation was prompted by complaints the Division had received about a substantial rise in building costs in 1937–1938, at a time when economic activity generally was falling back into recession. Arnold divided the country into ten districts and convened grand juries in eleven cities around the country. At its peak, Arnold had close to 100 persons—half the Division's staff at the time—working on the investigation. The investigation extended to all levels of the industry, including building materials manufacturers, wholesale and retail distributors, general contractors and subcontractors, and building trade unions. In another unprecedented move, Arnold put an economist, Corwin Edwards, in charge of coordinating the investigation.

Overall, nationwide, the housing investigation produced nearly 100 separate cases, each with multiple indictments. In Los Angeles alone, Arnold ended up indicting 8 trade associations, 4 labor unions, 38 corporations, and 171 individuals in the building trades, garnering banner headlines on the front pages of every Los Angeles newspaper.⁴⁴ Indictments aside, Arnold found that the presence of his investigators itself was enough to stop many illegal practices. In one city, he reported that lumber prices dropped 18 percent and sand and gravel prices 22 percent while his investigators were on the ground in that city.⁴⁵

Buoyed by the success of his housing program, the next year Arnold launched similarly wide-ranging investigations in the food and transportation industries. Like his housing investigation, Arnold's food investigation covered all levels of the industry, from producers to retailers. At the production level, grand juries returned indictments against dairy companies, bakers, cheese blenders, fruit and vegetable growers, and meat packers. At the retail level, they returned indictments both against major chain stores for attempting to restrain competition from small grocers and against independent grocery groups for seeking to maintain

high prices by keeping chain stores out of their markets under the cloak of protective state legislation.⁴⁶

The last of Arnold's major industry-wide programs covered transportation. It sought primarily to address efforts by transportation companies to eliminate competition from other, newer forms of transport. One major action growing out of this program was a civil suit filed in October 1939, accusing the Association of American Railroads, its officers and directors, and its 236 member railroad companies of violating the Sherman Act through an agreement discriminating against motor carriers. In another action, Arnold tried unsuccessfully to persuade the Interstate Commerce Commission to block a proposed merger that would have unified the thirty-five most important motor carriers operating along the Eastern seaboard from Maine to Florida.⁴⁷

While pursuing these large industry-wide investigations, Arnold continued to initiate major antitrust actions in other industries as well. In motion pictures, he sought to protect independent exhibitors by challenging block booking and similar practices by the major studios. In radio broadcasting, he sought to protect local stations from network control over their choice of programs. In petroleum, he sought to protect independent gasoline refiners by eliminating the discriminatory advantage major refiners enjoyed by their ownership of pipelines. In pharmaceuticals, he sought to protect discount retailers challenging the use of fair trade laws to fix resale prices on branded drugs.

The result was a level of antitrust enforcement that dwarfed that of any prior administration. Whereas the previous high-water mark had been the 23 antitrust actions brought by William Howard Taft in 1911, Arnold surpassed that number in his first full year in office.⁴⁸ The next year he doubled it to 65 and increased it again to 71 the year after. By the time he left office, Arnold had instituted nearly half of all the cases that had been brought since the Sherman Act was enacted a half-century before.⁴⁹

The raw number of cases, however, understates the impact of Arnold's stepped-up enforcement activity. In many of the cases he brought, both criminal and civil, Arnold named large numbers of companies and individuals as defendants. As a result, the *New York Times* reported in 1940 that Arnold had nearly 1,500 individuals under indictment for violations of the antitrust laws in the building trades alone.⁵⁰ And like Taft, Arnold was not afraid to go after large and powerful companies. His targets included the major automakers, major tobacco companies, major oil companies, major motion picture studios, major press organizations, and even revered professional groups like the American Medical Association. His prosecutions also produced a remarkable number of important Supreme Court decisions that reshaped antitrust law and that law students still study in their introductory antitrust course—cases like *Socony-Vacuum*,⁵¹ *Alcoa*,⁵² *Associated Press*,⁵³ and *American Tobacco*,⁵⁴ to name just a few.

Not surprisingly, Arnold's aggressive trust-busting encountered strong resistance from those he was investigating and led sometimes to scathing criticism in the press. *The Chicago Tribune*, which Arnold sued in the *Associated Press* case, dubbed Arnold "an idiot in a powder mill,"⁵⁵ and one editorial cartoon in another newspaper depicted him as a king under a sign reading

"I am the law."⁵⁶ The action that triggered some of the strongest attacks was Arnold's indictment of the AMA for violating the Sherman Act by conspiring to destroy the business of group health practices through adoption of an ethical canon threatening to expel from membership salaried doctors working in group practices. The AMA's aggressive public relations counter-offensive generated a flood of letters to the White House protesting Arnold's threat to put doctors in jail.⁵⁷

Arnold met these attacks head on. When, in his opinion, a paper criticized him unfairly Arnold would write directly to the editor of the paper, defending his actions in often colorful language.⁵⁸ Arnold also responded more publicly by continuing to write articles and give speeches that sought to educate the public about the need for strong antitrust enforcement. These articles, which Arnold later collected in a book, *The Bottlenecks of Business*, focused on the role of the antitrust laws in protecting consumers from the high prices that result from a lack of competition, rather than on the evils of large size alone.⁵⁹ The courts, he urged, should therefore focus primarily on the effect of the alleged anticompetitive conduct on consumers, asking: "Does it increase the efficiency of production or distribution and pass the savings on to consumers?" That, he argued, is "economic substance of the rule of reason."⁶⁰

By speaking in plain terms of the effects of anticompetitive practices on consumers, Arnold was able to generate widespread public support for his program of vigorous antitrust enforcement. When he finally left office in 1943, members of Congress, newspapers, and citizens from around the country protested his departure, writing editorials and letters urging him not to resign. Even *Fortune* magazine praised Arnold's effort to maintain a competitive marketplace, writing that he was "one of the very few" who "had the nerve to treat agriculture, industry, and labor on the same impartial terms."⁶¹

A Backlash from Big Labor

While Arnold's enforcement actions against bottlenecks imposed by businesses were both popular and generally successful, he had less success when he attempted to attack what he viewed as blatantly anticompetitive conduct by labor unions. Growing out of his investigations of the housing and food industries, Arnold believed that labor unions were responsible for some of the worst bottlenecks that raised the cost to consumers of basic goods and services. One of his favorite examples was a building trade union rule that limited the paint brush that could be used to 4½ inches, thereby increasing the amount of labor needed to paint a room and artificially increasing the cost. As he later explained: "When a labor union utilize[s] its collective power to destroy another union, or to prevent the introduction of modern labor-saving devices, or to require the employer to pay for useless and unnecessary labor, I believe[d] that the [labor] exemption had been exceeded and that the union was operating in violation of the Sherman Act."⁶² Acting on this belief, Arnold filed more than a dozen indictments against thirty-five unions and a large number of their officials and was successful in obtaining convictions in a number of cases.⁶³

The American Federation of Labor, an important element of FDR's New Deal coalition, reacted with outrage. It denounced Arnold's prosecutions of labor union as "the most vicious attack" the government had ever made on "organized labor," identifying him as "the greatest enemy of organized labor in America," and passed a resolution at its annual convention in 1941 calling for his removal.⁶⁴ Even some of Arnold's strongest supporters within the Administration, including his good friend and predecessor, Robert Jackson, privately expressed "great doubt whether the antitrust laws could be properly applied to the activities of labor unions."⁶⁵

When the indictments Arnold had filed reached the Supreme Court for review, the Court—most of whose Justices were by now Roosevelt appointees—sided with organized labor. In a series of three decisions, beginning with *United States v. Hutcheson*,⁶⁶ the Court ruled that the policies underlying the Norris-LaGuardia Act insulated the unions from criminal prosecution under the Sherman Act. Unable to use the antitrust laws to attack these practices, Arnold tried instead to rely on the Anti-Racketeering Act, obtaining a conviction against the Teamsters for using threats of violence to keep trucks with out-of-state drivers who were not members of the union from delivering goods into New York City and brutally beating some of the drivers who did not comply. Again, the Supreme Court ruled against Arnold, relying on an exception in the Act for the use of violence to obtain payment of wages by an employer to an employee.⁶⁷ Rebuffed by the Court, many of whose Justices he regarded as friends, Arnold described himself as both "shocked" and "bitter" at the decision. While he vowed not "to give up the fight," these decisions were a fatal blow to his efforts to prosecute restraints of trade involving unions.⁶⁸

The War Years

War clouds began gathering in Europe shortly before Arnold took office, with Hitler's annexation of Austria on March 13, 1938—just two days after his confirmation hearing. Although most of his early enforcement actions were directed at domestic sectors of the economy that directly impacted consumers, such as food and housing, Arnold believed that antitrust should also play a central role in maintaining competitive markets as the United States prepared for war. Thus, on September 14, 1939—just two weeks after Hitler invaded Poland—Arnold, in a speech to the National Petroleum Association, pledged to "put the antitrust division in the 'front-line trenches'" of the American war effort. He announced that he would seek increased funding for the Division and would "make plans to cooperate with all of the other governmental agencies concerned with the problem."⁶⁹

A key component of Arnold's plans to use the antitrust laws to aid the defense effort was his creation in 1938 of a new Patent and Cartel Section within the Division to focus on what he saw as two closely interrelated issues.⁷⁰ Arnold created this new section shortly after taking office in 1938 in response to information the Division had gathered in the course of its prosecution of Alcoa for monopolizing the U.S. market for aluminum, in part through cartel-like arrangements with foreign producers of aluminum with cross-licensing of patent rights to the technology

needed to produce aluminum. The first chief of the new section was an economist, Joseph Borkin, who served in that position until the end of the war in 1945. One of its key staff attorneys was Heinrich Kronstein, a German emigre who, before fleeing the Nazi regime in 1935, was already an established authority on German cartel law and who joined the section after graduating from Columbia Law School in 1939.

With this new section, Arnold investigated and prosecuted a large number of international cartels, many involving German companies. Arnold brought five major cartel cases in 1939 and seven more in 1940.⁷⁴ Arnold's first major cartel case, in February 1939, charged eighteen major automotive tire manufacturers with collusive bidding on government contracts. Another major case resulted in the indictment of Bausch & Lomb and Carl Zeiss—the two leading suppliers of optical equipment—for conspiring to restrict the supply of equipment to the military. Other prosecutions involved cartels in the newsprint, potash, nitrogen, and steel industries, which Arnold estimated saved American consumers over \$170 million.

In 1941, Arnold's multinational cartel prosecutions reached an even higher level. That year, Arnold brought twenty-three cases involving such diverse commodities as incandescent lamps, magnesium alloys, fertilizer nitrogen, pharmaceuticals, lumber, sheet music, evaporated milk, rice, hard metal alloys, photographic materials and film, and dyestuffs. The companies that were parties to these cartels included such major American companies as General Electric, Standard Oil, Alcoa, and Dow, and such leading German companies as Bayer and I.G. Farben.⁷²

Through these prosecutions—as well as through congressional testimony, speeches, and articles—Arnold “publicized an image of America threatened by an ‘international cartel movement’ loosely associated with Nazi Germany.”⁷³ He argued that “strengthened antitrust enforcement was essential” to meet this danger. He claimed that “every single instance of German influence” on the international operations of U.S. companies was “uncovered by an antitrust investigation or prosecution.”⁷⁴ In contrast to what had happened in World War I, Arnold was thus able not only to maintain, but to actually increase, funding for the Division during the Second World War.

Despite the success of his anti-cartel drive, there were growing protests against Arnold's vigorous enforcement effort within many industries critical to the U.S. defense effort. This opposition jumped dramatically after the United States was drawn into the war by the attack on Pearl Harbor on December 7, 1941. The result was that in March 1942, Roosevelt—acting on the basis of a memorandum signed by Attorney General Francis Biddle, Secretary of War Henry Stimson, Secretary of the Navy Frank Knox, and Arnold—approved a formal policy under which any pending antitrust investigation, civil action, or criminal prosecution would be suspended if the Attorney General and the two Secretaries agreed that it would otherwise “interfere with the production of war materials.”⁷⁵ In the event of a difference of view among the three officials, the views of the Secretary of War or Navy would prevail, subject to final review by the President. As a concession to Arnold, the President asked Congress to extend

the statute of limitations so that violators could be punished after the war ended.

Because of this policy, more than twenty antitrust proceedings were postponed during 1942 alone, and several other postponement requests were pending when Arnold resigned as head of the Division in March 1943 to accept Roosevelt's nomination to become a judge on the U.S. Court of Appeals for the District of Columbia Circuit.⁷⁶ Although Arnold claimed at the time to have been pleased by his nomination to the court, Washington was “filled with stories” that he was “being ‘kicked upstairs’ in order to call him off his anti-trust drive, especially in the critical war period.”⁷⁷ Arnold himself later complained that he felt Roosevelt had effectively abandoned him. The *New York Times* reported that, in a speech he gave in November 1943, Arnold charged that “the war was being used as an excuse to soften provisions of the anti-trust laws to pave the way for domination of industry after the war.”⁷⁸ And in an article written five years later, Arnold complained that “FDR recognizing that he could have only one war at a time, was content to declare a truce in the fight against monopoly.”⁷⁹

Life After the Division

In his memoirs, published in 1963, Arnold described his five years at the Division as “[t]he most exciting period of my career.”⁸⁰ Edward Levi says that leaving the Division was “devastating” for Arnold—so much so that “[f]or many years, Thurman was very reluctant to come to any social event held by the Antitrust Division within the Department of Justice building.”⁸¹ It was equally devastating for the Division, which he had led successfully for five years and where he was “an idolized Mr. Chips to his corps of assistants.”⁸² Fortunately, his successors, first Tom Clark and then Wendell Berge—both of whom had worked for Arnold—were equally committed to strong antitrust enforcement. Tom Clark was later promoted to Attorney General, before being appointed to the Supreme Court, and Berge, with Clark's support, was able to restore an active enforcement program once the war ended.

Arnold's displeasure at having to leave the Division was compounded by his profound unhappiness as a court of appeals judge. In his memoirs, *Fair Fights and Foul*, Arnold explains why he resigned from the court after just three years to go into private practice by recounting a conversation with George Wharton Pepper, a distinguished Philadelphia lawyer and founder of the law firm Pepper & Hamilton.⁸³ Arnold says that when Pepper asked him why he had resigned, he “hesitated, not knowing what to say.” Pepper interjected: “Let me help you out—I think I know. Some years ago I was offered an appointment on the bench—it wobbled me. I was almost ready to accept. But I finally decided that I would rather make my living talking to a bunch of damn fools than listening to a bunch of damn fools.”

After leaving the bench, Arnold formed a law partnership with his former student and good friend, Abe Fortas, who had just resigned as Under Secretary of the Interior. Shortly after, they recruited a third partner, Paul Porter, who after having served as head of the Office of Price Administration had completed a one-

year stint as the U.S. Ambassador to Greece. Together, they created what is now the law firm of Arnold & Porter. Arnold became the *pater familias* to the younger lawyers in the firm. Under the leadership of its three founding partners, Arnold, Fortas & Porter, as it was then known, quickly became a model for the modern Washington law firm—recruiting only the best and brightest young lawyers from the top law schools in part through a strong commitment to pro bono legal work. One of the firm’s first associates, Norman Diamond, who spent his entire career at the firm, wrote a book about the firm’s early years whose title says it all: *A Practice Almost Perfect*.⁸⁴ In it, Mr. Diamond makes clear the critical role Thurman Arnold played in creating the culture that made Arnold & Porter a great and enduring law firm. Echoing Mr. Diamond, Abe Krash, a now-retired partner at the firm who was for many years one of Washington’s leading antitrust practitioners and who also spent his entire career at the firm, summed up Arnold’s role in this way:

What was it like to work with Judge Arnold? . . . The sheer fun of it all. It was exhilarating. He was a great teacher, and he had the ability to bring out the best in everyone who worked together with him. . . . Thurman had an enormous capacity to enjoy life. . . . Wherever Thurman was . . . there was laughter.⁸⁵

Thurman Arnold’s Legacy

Early in his tenure at the Antitrust Division, *The New Yorker* wrote that Thurman Arnold had “put the forgotten law back on the map.”⁸⁶ Two decades later, in his classic, *What Happened to the Antitrust Movement?*, Richard Hofstadter added that Arnold’s tenure at the Division “mark[s] the true beginning of effective antitrust action.”⁸⁷

Hofstadter is right. Arnold was the first head of the Division to secure sufficient funding to build an effective enforcement agency. He was the first to redefine the purpose of the antitrust laws to focus on the effects of anticompetitive practices on consumers rather than on smaller producers. He was the first to understand the value of criminal enforcement as a deterrent to anticompetitive collusion. He was the first to integrate the economics unit his predecessor Robert Jackson created fully into his enforcement program. And, finally, he was the first to have the Division look beyond our shores to examine the effects of international cartels on American consumers. In all these respects, Arnold could be said to be the father of modern antitrust enforcement. ■

¹ THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937).

² *Id.* at 207–08.

³ *Id.* at 217.

⁴ THURMAN ARNOLD, *FAIR FIGHTS AND FOUL: A DISSIDENTING LAWYER’S LIFE 137* (1965) [hereinafter *FAIR FIGHTS*].

⁵ See U.S. SENATE, *HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY ON THE NOMINATION OF THURMAN W. ARNOLD TO BE ASSISTANT ATTORNEY GENERAL*, 75th Cong., 3d Sess. (Mar. 11, 1938).

⁶ *Id.* at 4, 10.

⁷ *Id.* at 10.

⁸ *Id.* at 5.

⁹ See *Arnold Approved by Subcommittee*, N.Y. TIMES, Mar. 12, 1938, at 17.

¹⁰ GENE M. GRESSLEY, ED., *VOLTAIRE AND THE COWBOY: THE LETTERS OF THURMAN ARNOLD* 268–69 (1977).

¹¹ For those who want to know more about Arnold, there is an excellent book-length biography: SPENCER WEBER WALLER, *THURMAN ARNOLD: A BIOGRAPHY* (2005).

¹² This account of Arnold’s early years is drawn largely from his own memoir, THURMAN W. ARNOLD, *FAIR FIGHTS AND FOUL: A DISSIDENTING LAWYER’S LIFE* 3–37 (1965).

¹³ See William Kolasky, *The Election of 1912: A Pivotal Moment in Antitrust History*, *ANTITRUST*, Summer 2011, at 82.

¹⁴ ARNOLD, *FAIR FIGHTS*, *supra* note 4, at 16.

¹⁵ *Id.* at 17.

¹⁶ *Id.* at 20–21.

¹⁷ *Id.* at 28–29.

¹⁸ *Id.* at 33.

¹⁹ *Id.* at 33–34.

²⁰ *Id.* at 35.

²¹ WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS 167–68* (1974).

²² THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935).

²³ ARNOLD & PORTER, *THURMAN ARNOLD REMEMBERED: A CENTENNIAL CELEBRATION 11–13* (Oct. 30, 1991) (Remarks of Hon. Gerhard A. Gesell).

²⁴ See William Kolasky, *Robert Jackson: How a “Country Lawyer” Converted Franklin Roosevelt into a Trustbuster*, *ANTITRUST*, Spring 2013, at 85.

²⁵ *FAIR FIGHTS*, *supra* note 4, at 135–36.

²⁶ See Franklin D. Roosevelt, *Message to Congress on Curbing Monopolies*, Apr. 29, 1938, available at <http://www.presidency.ucsb.edu/ws/?pid=15637>.

²⁷ ARNOLD & PORTER, *supra* note 23, at 18–19 (Remarks of Abe Krash).

²⁸ Thurman Arnold, *Letter to Gordon Dean*, Oct. 15, 1938, in ARNOLD & PORTER, *THURMAN ARNOLD LETTERS* 250–51 (2003).

²⁹ Corwin D. Edwards, *Thurman Arnold and the Antitrust Laws*, 58 *POL. SCI. Q.* 338, 339 (1943).

³⁰ See Report of Assistant Attorney General Thurman Arnold, in *ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR ENDED JUNE 30, 1939*, at 36–45.

³¹ See Thurman W. Arnold, *Prosecution Policy Under the Sherman Act*, 24 *A.B.A. J.* 417, 418–20 (1938).

³² See *Maps Trust Drive in Building Trades*, N.Y. TIMES, July 8, 1939, at 8.

³³ See *Business Confers with New Dealers*, N.Y. TIMES, June 22, 1938, at 1.

³⁴ See Thurman W. Arnold, *An Inquiry into the Monopoly Issue*, N.Y. TIMES, Aug. 21, 1938, at 12–15.

³⁵ *Id.*

³⁶ Thurman W. Arnold, *Antitrust Law and Enforcement, Past and Future*, 7 *L. & CONTEMP. PROBS.* 5, 12 (1940)

³⁷ See Arnold, *supra* note 30, at 41.

³⁸ See *id.*

³⁹ See ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 435 (Fordham Univ. Press 1995) (1966).

⁴⁰ See *id.* at 436.

⁴¹ See *id.* at 437.

⁴² Joseph Alsop, *quoted in* HAWLEY, *supra* note 39, at 430.

⁴³ For an excellent discussion of Arnold’s housing industry investigation, see Edwards, *supra* note 28, at 345–48.

⁴⁴ See THURMAN W. ARNOLD, *THE BOTTLENECKS OF BUSINESS* 205 (1940) [hereinafter *BOTTLENECKS*].

⁴⁵ See *id.* at 197.

⁴⁶ See Edwards, *supra* note 29, at 348–49.

⁴⁷ See *id.* at 349–50.

⁴⁸ Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 *J.L. & ECON.* 365, 366 (1970).

- ⁴⁹ Edwards, *supra* note 29, at 339.
- ⁵⁰ See *Food Probe Curbed by Lack of Funds*, N.Y. TIMES, May 8, 1940, at 1.
- ⁵¹ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).
- ⁵² *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416 (2d Cir. 1945).
- ⁵³ *Associated Press v. United States*, 326 U.S. 1 (1945).
- ⁵⁴ *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946).
- ⁵⁵ ARNOLD, FAIR FIGHTS, *supra* note 4, at 114.
- ⁵⁶ See ARNOLD, BOTTLENECKS, *supra* note 44, at 156.
- ⁵⁷ See Letter to Professor L.E. Aylsworth, Apr. 28, 1948, in VICTOR H. KRAMER, SELECTIONS FROM THE LETTER AND LEGAL PAPERS OF THURMAN ARNOLD 109 (1961). Hugh Cox later recounted that when Arnold proposed this action against the AMA, Attorney General Cummings called Arnold into his office and told him: “Thurman, this is the Goddamnedest thing I ever heard. You propose to indict a hospital, a local medical association, and all these doctors? Well, these doctors are leading citizens of their communities, and I play golf with some of them; you know if you do this there’s going to be a lot of trouble and somebody’s going to catch hell. Now who is it?” Arnold replied, “Well, you will!” Cummings laughed and waved Arnold out, saying “All right. Go ahead.” See GRESSLEY, *supra* note 10, at 514 n.139.
- ⁵⁸ See, e.g., Letter to Eugene Meyer, Aug. 5, 1938, in GENE M. GRESSLEY, *supra* note 10, at 272–74; Letter to Hamilton Owens, Sept. 30, 1938, in GRESSLEY, *supra*, at 274–76.
- ⁵⁹ ARNOLD, BOTTLENECKS, *supra* note 44.
- ⁶⁰ *Id.* at 125.
- ⁶¹ See GRESSLEY, *supra* note 10, at 32.
- ⁶² See Letter to Dorothy Thompson, Nov. 27, 1939, in GRESSLEY, *supra* note 10, at 295–97; Alan Brinkley, *The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold*, 80 J. AM. HIST. 557, 572 (1993).
- ⁶³ *Anti-Trust Cases Stir Labor*, N.Y. TIMES, Feb. 11, 1940, at 1.
- ⁶⁴ See Brinkley, *supra* note 62, at 574; *A.F.L. Hits Arnold and Asks Ouster*, N.Y. TIMES, Oct. 15, 1941, at 1.
- ⁶⁵ See Brinkley, *supra* note 62, at 574.
- ⁶⁶ 312 U.S. 219 (1941).
- ⁶⁷ See *United States v. Local 807, Int’l Brotherhood of Teamsters*, 315 U.S. 521 (1942).
- ⁶⁸ See Letters to Edward A. Evans, Feb. 17, 1941, and to Reed Powell, Feb. 21, 1941, in GRESSLEY, *supra* note 10, at 311–12 & 315–17.
- ⁶⁹ See *Wider Trust Curbs in Crisis Pledged*, N.Y. TIMES, Sept. 14, 1939, at 1.
- ⁷⁰ See TONY A. FREYER, *ANTITRUST AND GLOBAL CAPITALISM, 1930–2004*, at 27–28 (2006).
- ⁷¹ See *id.* at 34–35.
- ⁷² See *id.* at 36.
- ⁷³ See *id.* at 33.
- ⁷⁴ See *id.*
- ⁷⁵ See *Roosevelt Backs Ban on Trust Suits Delaying War Job*, N.Y. TIMES, Mar. 29, 1942, at 1.
- ⁷⁶ See Edwards, *supra* note 29, at 352.
- ⁷⁷ See *Arnold Nominated for Circuit Court*, N.Y. TIMES, Feb. 12, 1943, at 1.
- ⁷⁸ See *Arnold Sees Peril to Curb on Trusts*, N.Y. TIMES, Nov. 25, 1943, at 1.
- ⁷⁹ Thurman W. Arnold, *Must 1929 Repeat Itself?*, 26 HARV. BUS. REV. 26, 43 (1948).
- ⁸⁰ ARNOLD, FAIR FIGHTS, *supra* note 4, at 147.
- ⁸¹ ARNOLD & PORTER, *supra* note 22, at 7 (Remarks of Hon. Edward H. Levi).
- ⁸² See Alva Johnston, *Thurman Arnold’s Biggest Case*, THE NEW YORKER, Jan. 31, 1942, at 40, 46.
- ⁸³ See ARNOLD, FAIR FIGHTS, *supra* note 4, at 158.
- ⁸⁴ NORMAN DIAMOND, *A PRACTICE ALMOST PERFECT: THE EARLY DAYS OF ARNOLD*, FORTAS & PORTER (1997).
- ⁸⁵ ARNOLD & PORTER, *supra* note 22, at 17, 18 (Remarks of Abe Krash).
- ⁸⁶ See Alva Johnston, *supra* note 82, at 46.
- ⁸⁷ Richard Hofstadter, *What Happened to the Antitrust Movement*, in RICHARD HOFSTADTER, *THE PARANOID STYLES IN AMERICAN POLITICS AND OTHER ESSAYS* 188, 192 (1965).