

THE ANTITRUST LEGACY OF THURMAN ARNOLD

SPENCER WEBER WALLER, JOHN PAUL STEVENS CHAIR IN COMPETITION LAW

LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW

FASCINATING CAREER OF THURMAN ARNOLD

- Prominent Attorney, Mayor of Laramie, Wyoming and Sole Democratic Member of Wyoming Legislature
- Dean, West Virginia University Law School
- Legal Realist at Yale Law School
- Longest Serving Head of the Antitrust Division of DOJ
- Judge on the United States Court of Appeals for the District of Columbia
- Founder of Arnold & Porter
- Pro Bono Attorney for Accused Communists in the McCarthy Era
- Prominent Antitrust and 1st Amendment Practitioner for Another 25 Years

PROFOUND AMBIVALENCE OF FDR ADMINISTRATION REGARDING COMPETITION

- Little ideological commitment by the President one way or another
- Mostly Pragmatic Experimentation to Combat Great Depression
- NRA and the Code Process
- Perverse Role of the Antitrust Division
- Disaster of Appalachian Coal
- NRA and AAA eventually held unconstitutional
- Likelihood NRA/AAA exacerbated Great Depression
- Renewed Depression of 1937
- Shift to Renewed Interest in Market Competition and Antitrust Enforcement
- Anti-Monopoly Message of 1938



UNLIKELY CHOICE OF THURMAN ARNOLD TO HEAD THE ANTITRUST DIVISION

- Not a central or even fulltime member of the FDR brain trust
- Viewed as a bit of a sarcastic wisecracker
- Folklore of Capitalism critiqued antitrust itself as a useful charade to mask economic change
- Book also critiqued key Senators by name

ARNOLD BECAME MOST VIGOROUS ENFORCER OF THE ANTITRUST LAWS THEN OR NOW

- Longest Serving AAG in history of Antitrust Division
- Brought Roughly Same Number of Cases as in the Prior 50 Years Since Passage of Sherman Act
- Recruited a Generation of Enforcers and Incorporated Economic Advisors
- Rallied Public and Congressional Support for Antitrust Enforcement and Resources for the Division
- Established Regional Offices
- Became Public Face of Antitrust in Unprecedented Manner
- Emphasized Link Between Antitrust and Actual Interests of Individual Consumers

ANTITRUST CELEBRITY?

- Impossible to understand in modern terms the degree of national prominence of Thurman Arnold as what would be a mid-level technocratic position in modern times
- Frequent national radio addresses
- Best selling author
- Cover of Saturday Evening Post
- Best known member of FDR administration other than J. Edgar Hoover head of the FBI
- Only modern analogue possibly Margrethe Vestager

BROUGHT SERIES OF CASES FOCUSING ON OVERCHARGES TO CONSUMERS

- Used Symbols of “Law Enforcement” and “Bottlenecks”
- Later Highlighted How Certain International Cartels Hindered the War Effort and Supported the Nazi Regime
- Extensively Used Press Releases to Highlight Savings to Family Budget
- Targeted Industries and Companies that Resonated with Consumer Interests
- Auto Financing
- Milk
- Tires
- Petroleum
- Tobacco
- Medical Care
- Motion Pictures
- Misuse of Patents – Example of Airplane Screw
- Even the Lowly Popsicle Stick

ALSO RENOVATED ANTITRUST DOCTRINE AFTER DECADES OF STAGNATION AND MISUSE

- Socony Vacuum
 - Per Se Rule
 - Informal Government Approval Not a Defense
- Alcoa
- American Medical Association (Medicine as Trade & Commerce)
- Associated Press
- Interstate Circuit/American Tobacco
- Also Pushed Hard and Encountered Setbacks
 - Parker v. Brown (State Action)
 - Southeastern Insurance
- Greatest Frustration in the Labor Area
 - Great Political Blowback
 - Losses in SCOTUS
 - One of Few Times Not in Tune with Public and Political Sentiments

MIXED LEGACY IN INTERNATIONAL CARTEL AREA

- Standard Oil-Farben Cartel (Synthetic Rubber)
- Siemens-Bendix (Automatic Pilot Tech)
- Beryllium
- GE-Krupp Carboly
- Established Post-War Antitrust Consensus and Anti-Cartel Agenda
- Needs of War Effort Began to Eclipse Antitrust Concerns
- Investigations Deferred
- Immunities Granted
- Arnold Eventually Forced Out for Judgeship on D.C. Circuit



BEGINNING OF MODERN ANTITRUST ERA

- Few Individuals Played Such a Prominent Role in Academia, Government Enforcement, and Private Practice
- Creator of Modern Antitrust Division
- Fierce Advocate for Market Competition and Government and Private Antitrust Enforcement
- Irreverent Iconoclast

FOR MORE INFORMATION

- Thurman Arnold, *The Bottlenecks of Business* (1940)
- Thurman Arnold, *The Folklore of Capitalism* (1937)
- Eugene Gressley, *Voltaire and the Cowboy: The Correspondence of Thurman Arnold* (1977)
- Spencer Weber Waller, *Thurman Arnold: A Biography* (2005)

- Or contact me at swalle1@luc.edu

