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# The Short Unhappy Judgeship of Thurman Arnold

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# THE SHORT UNHAPPY JUDGESHIP OF THURMAN ARNOLD

*Spencer Weber Waller\**

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### INTRODUCTION

Thurman Arnold is one of the towering figures of twentieth century American law. He is one of the few individuals to have served as a mayor, state legislator, small town practitioner, law dean, law professor, Assistant Attorney General of the United States (heading the antitrust division), Judge on the D.C. Circuit, founder of one of the great Washington law firms, and pro bono defender of civil liberties, all in a single career.

This parade of positions comes close to constituting the decathlon of American law. While most people's reputation rests on great accomplishments in perhaps one of these categories, Arnold's importance comes from his extraordinary achievements in at least three of these aspects of the legal profession.

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\* Copyright 2002, Spencer Weber Waller. Professor and Director of the Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law; Of Counsel, Kaye Scholer LLP. Professor Waller is preparing a biography of the life and work of Thurman Arnold for NYU Press. This research was supported through a summer research stipend from Loyola University Chicago School of Law and the Institute for Consumer Antitrust Studies, available at <http://www.luc.edu/schools/law//antitrust/index.html> (last visited December 8, 2002). Thanks to Thomas Haney, Christian Johnson, Jeffrey Kwall, and Victor Kramer for their comments and Michael Lansing and Dooyong Kang for their research assistance.

As a professor at Yale Law School, Arnold burst on the national scene as one of the seminal figures in American Legal Realism. As head of the Antitrust Division in the second half of the Roosevelt Administration, Arnold revitalized antitrust enforcement with a vigor not seen before or since, and helped shape the post-war American economy and our concept of the role of competition. Arnold also enjoyed much fame and success as a private practitioner founding the firm now known as Arnold & Porter, which today has over 650 lawyers and a reputation as one of the leading law firms in the United States.

Much has been written about these phases of Thurman Arnold's career,<sup>1</sup> but less so about his service as an Associate Justice (as judges were then called) of the United States Court of Appeals for the District of Columbia from 1943 to 1945. This period was an interregnum between Arnold's extraordinary, but controversial, tenure at the Antitrust Division and his eminence as a private practitioner equally adept at handling business litigation and pro bono representation of the victims of the McCarthy era repression.

This article examines the judicial period of Arnold's life in the context of his lengthy and distinguished career. Part I outlines Arnold's youth in Laramie, Wyoming, his education, and early practice years as lawyer, soldier, and politician. Part II briefly examines his career in academia both as Dean of the West Virginia University College of Law and one of the firebrands of the Legal Realist movement at Yale. Part III surveys his groundbreaking work at the Antitrust Division of the Justice Department and the forces that led him reluctantly to leave the work he loved best for the federal bench.

Part IV focuses on the frustrations and opportunities that Arnold faced as a judge and his contributions while on the bench. While a few of Justice Arnold's decisions are significant in their own right, the bench proved to be a dramatic illustration of what Arnold did *not* want – a lifetime of the passive virtues of appellate judging. Judging ultimately grew intolerable and created the impetus for Arnold's courageous decision to abandon the life tenure (which he viewed more as a life sentence) of the federal bench and opened the door to his later spectacular success as a private practitioner and perhaps his greatest public service as spokesman and defender of civil liberties in the Cold War era that followed.

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1. See NORMAN R. DIAMOND, *A PRACTICE ALMOST PERFECT* (1997); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); THURMAN ARNOLD, *VOLTAIRE AND THE COWBOY* (Gene M. Gressley ed., 1977) [hereinafter GRESSLEY]; EDWARD N. KEARNEY, *THURMAN ARNOLD, SOCIAL CRITIC* (1970); THURMAN ARNOLD, *FAIR FIGHTS AND FOUL, A DISSENTING LAWYER'S LIFE* (1965) [hereinafter FAIR FIGHTS].

## THE ROAD TO THE EAST

Thurman Arnold was born in Laramie, Wyoming, in 1891. The year before, Wyoming became a state and the Sherman Antitrust Act was passed, both within the same week in early July and both of which proved to be two of the greatest influences on Arnold's life. Arnold's father was a prominent local attorney and a Democrat, two of the other powerful influences on Arnold's life and work. Fortunately for the Arnold family, Laramie was one of few areas in Wyoming to routinely elect Democrats in an otherwise mostly Republican state.

Laramie in the 1890s was still a small town of about 6,000, founded along the right of way of the Union Pacific Railroad which had laid in track and moved on in 1868 on its way to linking the east and west via the trans-continental railroad. Although it was a generation removed from its true Wild West days, the Laramie of Arnold's youth was pre-airplane, pre-radio, and was largely isolated from the national economy. It had few, if any, cars. Livestock roamed through the city itself, and unfenced ranches stretched for miles beyond Laramie all the way to the Medicine Bow Mountain Range to the West and South. Arnold attended the University of Wyoming in Laramie, Wyoming, which functioned in those days primarily as a college preparatory academy for high school. He spent summers visiting and working on his father's ranch and those of the friends of the family.

Arnold attended his freshman year of college at the University of Wyoming, his second year at Wabash College in Indiana, his father's alma mater, and ultimately graduated from Princeton at the age of 20. He enrolled in Harvard Law School, and did well, but just missed the law review if his letter to his mother is to be believed.<sup>2</sup>

Arnold turned down both a job with a respected Boston firm, and the chance to join his father in practice in Laramie, and instead moved to Chicago which a professor and various friends had recommended. After an intense round of job hunting, he settled down as an associate with a well-regarded law firm headed by a former president of the Chicago Bar Association. The work was hard and routine with the exception of a Wisconsin case involving the complex bankruptcy of a lumber company and fraud on the creditors.<sup>3</sup> After a couple of years, Arnold and two fellow associates from his firm went out on their own. Supported by legal research assignments from their old firm and such clients as they could generate on their own, the new firm of O'Bryan, Waite and Arnold struggled on with a generally up-

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2. Letter from Thurman W. Arnold to Mrs. C.P. Arnold (June 19, 1914), in GRESSLEY, *supra* note 1, at 120-21.

3. Letter from Thurman W. Arnold to C.P. Arnold (May 5, 1915), in GRESSLEY, *supra* note 1, at 125.

ward trajectory until Arnold's induction into the Army during World War I sealed its fate.

Arnold sailed for France the day after he got married to Frances Lorgan, who waited out the war with Arnold's family in Wyoming. Arnold served as an artillery officer in France where the cold and wet, plus the inability to obtain cigars, rather than the danger of the front line, were his main experiences and memories.<sup>4</sup>

Following the end of the war, Arnold finally returned to Laramie and joined his father's law firm. There he prospered as a practicing attorney and politician, serving one term as mayor in 1920 and a term in 1922 as the only Democrat in the lower house of the Wyoming legislature.<sup>5</sup> He also played a critical role in the founding of the University of Wyoming College of Law and taught Torts and Property as an adjunct in the early years of the school.<sup>6</sup>

Three events combined to prevent Thurman Arnold from following his father's path as dean of the Laramie bar. First, Arnold lost an election for prosecuting attorney and his political career had reached an end. Second, he saw the disintegration of the local legal economy. The continuing agricultural depression affected Wyoming throughout the 1920s and destroyed the prospects for many significant ranching operations and the rare farms in the region which were significant clients. Moreover, the growth of the national corporation destroyed the industrial client base for a Laramie business lawyer and made Wyoming, in Arnold's view, little more than an economic colony of the eastern United States.

The final event pushing Arnold back east was more fortuitous. Dean Roscoe Pound of the Harvard Law School had remembered Thurman as a student and had recommended him for the vacant deanship of West Virginia University College of Law. Dean Pound's support and that of a Harvard Law School classmate, Dave Howard, who had returned to practice in West Virginia and served on the search committee for the law school, proved to be enough. In a sign of the informality of the times (or perhaps the dominance of Harvard Law School), Arnold was offered the deanship on the spot after a brief interview and Arnold accepted and called home to tell his family that they would be leaving Laramie for West Virginia.

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4. Various letters from Thurman W. Arnold to his parents, in GRESSLEY, *supra* note 1, at 150-59; FAIR FIGHTS, *supra* note 1, at 28.

5. This is in marked contrast to the first Wyoming territorial legislature which, when convened in 1869, consisted of all Democrats and promptly enacted the first complete women's suffrage and property ownership laws in the United States. See T.A. LARSON, HISTORY OF WYOMING 78-80 (1965).

6. See Michael Golden, *History of the University of Wyoming College of Law: The First Seventy-Five Years*, 31 LAND & WATER L. REV. 1, 3-6 (1996).

## DEAN AND FIREBRAND

In 1927, Arnold packed up his family (now wife and two young children) and drove for the first time to Morgantown, West Virginia, to take over the deanship of the College of Law, its five faculty members, and its tiny student body. The deanship gave him the chance to ride out the Great Depression on a dean's salary and begin to hone his skills as a legal academic. Most modern law deans would recognize and sympathize with Arnold's daily routine of budgeting, staffing issues, contacts with the local Bar, and attempts to modernize the faculty. In his four years at West Virginia, Dean Arnold modernized the law review, organized a moot court for students modeled on Arnold's experiences at Harvard, used his contacts to bring the luminaries of the day to the West Virginia campus, began his own legal scholarship involving empirical research about procedure and the courts,<sup>7</sup> and undertook a major project in cooperation with the West Virginia Bar Association to produce a codification and revision of West Virginia procedure.<sup>8</sup>

Arnold also began cultivating the contacts that led him to join the Yale faculty on a permanent basis by 1930. His work on procedure brought him to the attention of Charles Clark, the dean of the Yale Law School. Arnold spent the summer of 1928 as a visitor at Yale. Most unusually, for a sitting dean, he also spent the 1929-1930 academic year as a visitor at Yale as well. He joined the faculty on a permanent basis the following year, turning down offers of a professorship from Harvard and a deanship from Wisconsin.

At Yale, Arnold can only be described as a kid in a candy store. He was freed from the administrative duties of a small college dean in a poor state in the midst of the Great Depression. At Yale he joined an outstanding faculty with a strong interdisciplinary bent. In addition to first rate lawyers such as William Douglas, Charles Clark, Underhill Moore, and Fred Rodell, there were economists such as Walton Hamilton,<sup>9</sup> psychologists such as Edward Robinson, and other prominent social scientists.<sup>10</sup>

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7. See Thurman W. Arnold, *Judicial Councils*, 35 W. VA. L.Q. 193 (1929); Thurman W. Arnold, *Bar and Law School United For Research*, 15 A.B.A. J. 67 (1929); Thurman W. Arnold, *The Relation of the West Virginia College of Law to the Bar*, 1927 REP. W. VA. BAR. ASS'N 26. Arnold also published a number of short case notes and book reviews on diverse topics.

8. See *Report to the Committee on Judicial Administration and Legal Reform of the West Virginia Bar Association*, 36 W. VA. L.Q. 1 (1929).

9. Hamilton, an outstanding economist with a focus on antitrust law, had been head of the Brookings Institute prior to teaching at Yale, and later became part of Arnold's staff at the Antitrust Division. Most unusually Hamilton was admitted to the bar at the age of 67 and practiced as a partner at Arnold Fortas & Porter until his death in 1958.

10. See KALMAN, *supra* note 1, at 107-44.

Arnold taught Evidence, a course on Trials and Appeals, and various seminars. He became known for bringing his pipe and his dog to class and wearing old clothes with tobacco burns and stains from whatever he had eaten in the past couple of days. He led discussions in a loud voice and with a rambling free association style, which occasionally bordered on the incoherent only because Arnold's train of thought moved more quickly than most of his listeners. Even by Yale standards he was eccentric and quickly became a student favorite.<sup>11</sup>

Arnold quickly became a centerpiece of the flourishing Legal Realist movement at Yale which by then had replaced Columbia as the center of the movement.<sup>12</sup> The Realists challenged the view that law was the deduction of a handful of conceptual and formal rules unrelated to the social setting in which they arose. The Realists were skeptical of the logical deduction of any legal neutral rules and most promoted the use of the social sciences and empirical research to create better rules to achieve public policy goals. In terms of legal education, the Realists sought to reorganize the curriculum and the casebooks, which were the principal teaching tools, to better reflect the law in action.

Members of the Yale faculty also participated in the law in action through service to the New Deal and the Roosevelt Administration during summer vacations, leaves of absences, and eventually full-time service in Washington necessitating resignation from the Yale faculty. Arnold participated at a somewhat lesser role than many of his colleagues, but found time to consult and help litigate the constitutionality of the Agricultural Adjustment Agency, assist in the regulation of the sugar industry in the Philippines, serve as a trial examiner for the Securities Exchange Commission, and undertake various tasks for the Tax Division and the Antitrust Division of the Justice Department.<sup>13</sup>

Arnold was part of the smaller branch of the Legal Realist movement that focused on governmental regulation of business activity rather than the operation of so-called private law fields such as property, contracts, and torts.<sup>14</sup> Arnold's unique contribution to the realist movement was framing issues in terms of symbols, but at the same time not denigrating the role of symbols. Arnold, in fact, praised the use of symbols and folklore in guid-

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11. Interview with Victor Kramer in Washington, D.C. (July 2, 2002).

12. The full scope of the Realist movement, its failure to explicitly reform legal thought and education, and its role as the precursor to post-modern legal thought is beyond the scope of this essay and is explored in the voluminous literature on twentieth century jurisprudence. See, e.g., KALMAN, *supra* note 1; WILLIAM W. FISHER III ET AL., AMERICAN LEGAL REALISM (1993); WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).

13. See GRESSLEY, *supra* note 1, at 38-39.

14. See FAIR FIGHTS, *supra* note 1, at 67-68.

ing people toward the future while at the same time reassuring them of links to a past that was in fact receding at an otherwise alarming rate.

In addition to a bevy of law review articles,<sup>15</sup> Arnold's seminal academic works are *The Symbols of Governments*,<sup>16</sup> and in particular *The Folklore of Capitalism*.<sup>17</sup> In *Folklore*, which inexplicably became a minor best-seller, Arnold ridiculed the antitrust laws as empty symbolic vehicles designed to assuage popular fears of bigness and power without actually constraining the behavior of the modern business corporation.<sup>18</sup> This body of work did not deter President Roosevelt in 1938 from appointing Arnold as the head of the Antitrust Division, nor Arnold from accepting the position. The fact that he was virtually the only New Dealer with a public reputation as an expert in antitrust counted far more in the decision than the views he had expressed in his writings. While questioned mercilessly at his confirmation hearings about those views, Arnold ultimately was confirmed and proved his critics wrong once in charge.

#### NEW DEALER AND TRUSTBUSTER

As head of the Antitrust Division, Arnold presided over an unprecedented expansion of the staff, budget, prestige, and influence of the Antitrust Division from a backwater of the New Deal to one of the most prominent features of the Roosevelt post-New Deal agenda. Arnold arrived at the Antitrust Division at a propitious time. The early New Deal was characterized by a profound distrust for competition as a solution for the Great Depression, and the forced cartelization of much of the American economy under the National Industrial Recovery Act ("NIRA") in an attempt to stimulate economic recovery through limiting production and setting higher prices. This worked neither conceptually, as the NIRA was held unconstitutional in 1935, nor in the real world, as the Depression continued and to a large extent deepened in 1937. For a combination of legal, political, pragmatic, bureaucratic infighting, and perhaps simple intellectual despair, Roosevelt turned to

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15. Arnold's legal scholarship began in 1928 at West Virginia where as Dean he founded the modern West Virginia Law Review. Arnold's earlier articles are more yeoman-like in nature and include a number of short descriptive pieces, decanal type reports, book reviews, case notes and other material oriented toward the practicing bar. The more significant law review articles came later while Arnold was a visiting or full-time faculty member at Yale. See, e.g., Thurman W. Arnold, *Apologia for Jurisprudence*, 44 YALE L.J. 729 (1935); Thurman W. Arnold, *Trial By Combat and the New Deal*, 47 HARV. L. REV. 913 (1934); Thurman W. Arnold, *Law Enforcement - An Attempt at Social Dissection*, 42 YALE L.J. 1 (1932); Thurman W. Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617 (1932); Thurman W. Arnold, *Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800 (1931); Thurman W. Arnold, *Criminal Attempts - The Rise and Fall of an Abstraction*, 40 YALE L.J. 53 (1930). Several of these articles formed the basis of chapters in Arnold's subsequent books.

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

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

18. *Id.* at 207-29.



antitrust and the enforcement of competition by law as his outline for the later New Deal.<sup>19</sup>

Arnold introduced economics and economists into the structure of the Division and forced the lawyers "to think of antitrust enforcement in objective, systematic, economic terms."<sup>20</sup> Arnold helped create a well-funded Antitrust Division of both lawyers and economists that to this day continues to enjoy a reputation as politically neutral, but expert, law enforcers, with broad bipartisan support for its mission of criminal and civil antitrust enforcement.<sup>21</sup>

Arnold seized on the image of antitrust as the 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.<sup>22</sup> This was a deliberate choice by Arnold, drawing on his academic writing about the symbolism of such concepts as "law enforcement," and the distinctions in the public mind between the positive images of courts, and the negative images of government bureaucrats, as decision-makers.<sup>23</sup>

Arnold went out of his way to distinguish antitrust enforcement from either "regulation" or the kind of emergency legislation experimented with in the NIRA.<sup>24</sup> Arnold praised the federal courts and a case-by-case method as the proper way to make antitrust policy.<sup>25</sup>

He explicitly reconceptualized the mission of the Antitrust Division as that of a prosecutor, but one not hostile to large business, only the abuse of power, and one that operated as an expert body largely independent of politics.<sup>26</sup> Arnold used this imagery repeatedly to justify the mission of the Antitrust Division to his supporters in the Administration, Congress, and the

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19. The ambivalence of the Roosevelt Administration toward competition and antitrust principles is discussed at length in ELLIS HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* (1966) and ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* (1995).

20. SUZANNE WEAVER, *DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION* 30 (1977).

21. See Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383 (1998).

22. THURMAN W. ARNOLD, *THE BOTTLENECKS OF BUSINESS* 211-12 (1940) [hereinafter *BOTTLENECKS*]; Thurman W. Arnold, *An Inquiry Into the Monopoly Issue*, N.Y. TIMES, Aug. 21, 1938, at 1; Thurman W. Arnold, *Labor's Hidden Holdup Men*, READER'S DIG., June 2, 1941, at 136, 139-40.

23. See THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 149-171, 199-228 (1935).

24. See *BOTTLENECKS*, *supra* note 22, at 107.

25. *Id.* at 103-07.

26. See *id.* at 97, 134-35, 191, 272-73; Letter from Thurman W. Arnold to Helen Rogers Reid (Dec. 2, 1938), in GRESSLEY, *supra* note 1, at 278-79; Letter from Thurman W. Arnold to Frank Knox (July 6, 1939), in GRESSLEY, *supra* note 1, at 286; Letter from Thurman W. Arnold to Robert H. Jackson (Sept. 2, 1942), in GRESSLEY, *supra* note 1, at 330.

public directly. He was spectacularly successful, vastly increasing the size and budget of the Antitrust Division, making trust-busting the most visible symbol of the latter New Deal, and embarking on the most extensive program of civil and criminal cases since the passage of the Sherman Act.

#### THE FEDERAL BENCH AS CONSOLATION PRIZE

In 1943 the antimonopoly movement as the symbol of the latter New Deal was over and Thurman Arnold had completed burning all his bridges. Despite his many successes (or perhaps because of them), his enforcement decisions had enraged both the industries he attacked and their political supporters within the Roosevelt Administration. When one combines the automobile, aluminum, medical, rubber, motion picture, energy, construction, the railroads, and organized labor, one has a summary of most of the American economy. Throw in the demands of the war effort and Arnold's tenure was unsustainable.

Nor was there anyone on the inside to save Arnold. Strong Arnold supporters like Frank Murphy, Robert Jackson, and William Douglas were by now all on the Supreme Court and no longer as influential within the Roosevelt Administration. The older advocates of planning within the Administration under the early New Deal and the NRA had never favored Arnold's approach and were not inclined to intervene to save him. Arnold never had much direct contact with President Roosevelt,<sup>27</sup> who was at best ambivalent about Arnold's crusade.

Arnold in his autobiography describes the offer of a judgeship as a bolt out of the blue and one he was delighted to accept.<sup>28</sup> Roosevelt, however, knew how uneasy Arnold was in leaving the Antitrust Division which was his one true professional love. In January, 1943, he wrote to Arnold:

I know you leave your post in the Department of Justice with mingled feelings. You, of course, have keen regret at leaving the body of men in the Antitrust Division among whom you have built such an excellent esprit du (sic) corps. I know also that you can leave them with the assurance that the same vigorous enforcement of the antitrust laws will continue.

I hate to see you go but I know that you want to and I, therefore, bid you Godspeed and great success in your new career. The same qualities of intellect and of heart which you

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27. FAIR FIGHTS, *supra* note 1, at 146.

28. FAIR FIGHTS, *supra* note 1, at 156.

brought to the Department of Justice will serve you well in your new career on the bench.<sup>29</sup>

Arnold's later memory of excitement in a judicial appointment is thus suspect and Roosevelt's profession of loss in Arnold assuming the bench amounts to something in between a face saving gesture and a white lie. Nonetheless, Arnold accepted the judicial appointment, probably seeing the handwriting on the wall.

Arnold was given an adulatory going away party attended by 800 friends and co-workers. Wyoming Senator O'Mahoney was toastmaster with fulsome tributes given by the Attorney General, the Speaker of the House, Senator Robert LaFollette, the Majority Leader of the Senate, the president of Kaiser Aluminum, long time friend and Supreme Court Justice William Douglas, and others. Arnold topped off the evening by delivering a farewell address broadcast nation-wide on the Mutual Broadcasting Network radio network where he linked the freedom to produce and the rights of consumers under the Sherman Act with the goals of World War II in seeking a politically and economically free post-war order.<sup>30</sup> In modern times, it is virtually inconceivable that a sub-cabinet appointment would even be known by the public or whose farewell speech would be deemed worthy of national network media coverage.

Thurman Arnold's judgeship was confirmed on March 9, 1943, without controversy by a voice vote in the Senate.<sup>31</sup> He thus became Associate Justice Thurman Arnold of the United States Court of Appeals for the District of Columbia, replacing Justice Wiley Rutledge of that same court, whom Roosevelt elevated to the United States Supreme Court. While today the D.C. Circuit enjoys the reputation as the most important court in the country after the Supreme Court and a true stepping stone to that prized appointment, this was not the case in 1943. That honor for this era went to the United States Court of Appeals for the Second Circuit which covered appeals from the federal district courts in New York, Connecticut, and Vermont. The Second Circuit included such luminaries as Learned Hand, his cousin Augustus Hand, Arnold's former Yale colleague and boss at the Agricultural Adjustment Agency, Jerome Frank, and Arnold's former mentor and Yale law dean Charles Clark. The Second Circuit, as the appellate court

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29. Letter from Franklin D. Roosevelt to Thurman W. Arnold, Washington, D.C., (January 28, 1943) (on file Box 45, C.P. Arnold Collection, with the American Heritage Center, University of Wyoming).

30. Friends and Associates of the Antitrust Division, Department of Justice, A Tribute to the Honorable Thurman W. Arnold at the Presidential Room, Statler Hotel, Wash., D.C. (Mar. 9, 1943) (transcript available at Box 6, Thurman W. Arnold Collection, American Heritage Center, University of Wyoming); Thurman W. Arnold, Address Before the Mutual Broadcasting Network (Mar. 9, 1943) (transcript available at Box 6, Thurman W. Arnold Collection, American Heritage Center, University of Wyoming).

31. 89 CONG. REC. 1724 (1943).

for Wall Street, decided some of the most famous and important cases in the country, including the final decision in the monopolization case against *Alcoa* in 1945 which Arnold had supervised at the Antitrust Division.<sup>32</sup>

Had Arnold been appointed to the Second Circuit, with his many friends and prestigious docket, the Supreme Court, with such friends as Douglas, Frankfurter, Murphy, and Jackson, or even the Tenth Circuit, covering his native Wyoming, Arnold's judicial career might have a lengthy and fulfilling capstone to an already remarkable career. Arnold rationalized his selection for the D.C. Circuit on the basis of Senatorial prerogative.<sup>33</sup> The Senators from each state traditionally nominate the judges for the federal district and appellate courts within their jurisdiction. In contrast, the D.C. Circuit was the only Circuit Court which was viewed as Presidential patronage, since the District of Columbia had no Senator to whom the President traditionally deferred in matters of judicial selection.

While this is true, it is only part of the story. The Supreme Court is another court for which there is no tradition of Senatorial prerogative and there was in fact a contemporaneous opening. There is simply no evidence that Roosevelt ever considered Arnold, who was a sub-cabinet level appointee (despite being a famous one), for this lofty post.<sup>34</sup> The D.C. Circuit had in fact been the judicial reward for one of Arnold's predecessors as Assistant Attorney General for Antitrust.

Even taking Senatorial prerogative into account, Arnold always had been friendly with Joseph O'Mahoney, the longtime Democratic Senator from Wyoming who presumably would not have been opposed to a nomination to the Tenth Circuit for Arnold, had a timely vacancy been available. This would have, of course, required Arnold to move back to Wyoming, or one of the other states within the Tenth Circuit, a decision he ultimately was never willing to make.<sup>35</sup> All the evidence points to the conclusion that the judge pickers in the Roosevelt Administration, with the President's concurrence, viewed the D.C. Circuit as the appropriate judicial reward for Arnold's meritorious, but divisive, service as head of the Antitrust Division.

In 1943, the D.C. Circuit was a mixed blessing for any appointee, let alone the mercurial Arnold. There was no Superior Court or Appellate

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32. *United States v. Alum. Co. of America*, 148 F.2d 416 (2d Cir. 1945) (having been remanded on certification from the Supreme Court for lack of a quorum).

33. *FAIR FIGHTS*, *supra* note 1, at 157.

34. In comparison, William Douglas had been chair of the Securities Exchange Commission, Frank Murphy had been Attorney General, Robert Jackson had been Attorney General as well, and Hugo Black had been a United States Senator.

35. Although Arnold retained Wyoming residence and re-registered to vote in Wyoming starting in 1943, he never lived in Wyoming following his move to West Virginia in 1927. Along the same lines, Arnold flirted with running for the Wyoming Senate seat in 1948, but never took the plunge.

Court for the District of Columbia to hear the myriad of local criminal and civil matters. This modern local court system for the District was not created until 1970.<sup>36</sup> As a result, the United States District Court for the District of Columbia heard *all* but the most lowly cases in the District, and the D.C. Circuit heard *all* appeals from these cases. In contrast, the other federal courts heard *only* a smaller number of more significant cases involving federal statutes, the Constitution, and treaties, as well as diversity cases between citizens of different states where a substantial amount of money was at stake.<sup>37</sup>

In a little more than two years, Justice Arnold heard 168 cases in total. Justice Arnold wrote 65 opinions, most of which were during his first year on the bench. He concurred separately or dissented in only a handful of additional cases.<sup>38</sup>

None were antitrust cases, and almost none raised the kind of earth shaking matters that Arnold had critiqued as a scholar, assisted as a part-time New Dealer, or directed at the Antitrust Division. Instead the opinions consisted of an enormous number of per curiam or brief signed affirmances of criminal convictions and denials of petitions for habeas corpus from prisoners and inmates at government mental institutions. There were an equal number of minor contract, tort, insurance, procedure, tax, estate and trust, matrimonial, custody, and child support cases. Even the appeal of government agency decisions, a major source of the modern D.C. Circuit docket, were mostly routine affirmances that the agency decision was supported by substantial evidence.

The opinions were mostly stiff, formal, and boring affairs. Arnold did not cite to his own academic work or that of his fellow realists as did Douglas and Frank in their opinions. Only rarely did Arnold's well-honed sense of humor shine through. In *James Heddon's Sons v. Coe*,<sup>39</sup> Arnold opined on the ability to trademark a herringbone design for fishing lures. He summarized the issue and his decision by stating:

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36. Pub. L. No. 91-358, 84 Stat. 473; D.C. CODE ANN. tit 11 (1970).

37. 28 U.S.C. §§ 1331, 1332, 1367.

38. *Waterman Steamship Corp. v. Land*, 151 F.2d 292 (D.C. Cir. 1945) (Arnold, J., dissenting) (claiming lack of jurisdiction to reverse Federal Maritime Commission decision investigating fleet's profits from charter with British government); *Rainbow Dyeing & Cleaning v. Bowles*, 150 F.2d 273 (D.C. Cir. 1945) (Arnold, J., dissenting) (dissenting from affirmance of maximum price regulation on grounds of ambiguity); *Holmes v. Frederick W. Berens, Inc.*, 149 F.2d 388 (D.C. Cir. 1945) (Arnold, J., dissenting) (dissenting in contract case over meaning of word "eventual"); *Tippitt v. Wood*, 140 F.2d 689 (D.C. Cir. 1944) (Arnold, J., concurring) (concurring in result over power of district court to direct concurrent running of unexpired portion of sentence imposed by Parole Commission).

39. *James Heddon's Sons v. Coe*, 146 F.2d 865 (D.C. Cir. 1945).

Appellant contends that the mark serves no useful function, and that there is no evidence of an increase in sales. It therefore argues that the above findings are without support. To prove lack of utility experts were called who testified that within certain broad limits it makes no difference to a fish how an artificial lure is shaped or marked. It is the flash of color and the movement of the object which attracts the fish. Fish, according to these experts, are incapable of distinguishing variations of color or design.

We would be reluctant indeed to undermine the folklore of fishing by making such a revolutionary finding of fact. It would constitute such a serious reflection on the intelligence and discrimination of fish that no angler with a spark of loyalty could fail to resent it.<sup>40</sup>

A more typical case was *Bailey v. Zlotnick*<sup>41</sup> where the issue was the extent to which a landlord is liable to a tenant for the negligence of an independent contractor who repairs the premises at the direction of the landlord.<sup>42</sup> Merely because such cases were important to the parties did not make them either important or interesting to Arnold as a judge.

Justice Arnold was able to make his mark in three principal areas. Because of the location of the Patent Office in Washington, D.C., most of the significant appeals of the denials of patents came before the D.C. Circuit.<sup>43</sup> In key cases, Justice Arnold construed patent rights narrowly in order to protect competition. In *Monsanto Chemical Co. v. Coe*,<sup>44</sup> Arnold analyzed the scope of a series of patent claims related to the chemistry for softening water. He expressed the concern that what multiple claims actually do in the ordinary case is to state a single invention in as many different ways as possible in order to give the resulting patent as much scope as possible.<sup>45</sup> He tied this concern to the very purpose of the patent clause of the Constitution to promote rather than retard science and invention.<sup>46</sup> He affirmed the Patent Commissioner's decision to limit the number of claims granted patent protection for essentially the same invention. He also sounded a familiar theme in stating:

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40. *Id.*

41. *Bailey v. Zlotnick*, 149 F.2d 505 (D.C. Cir. 1945).

42. *Id.* at 505.

43. This is one of the few areas where it was more advantageous to be a judge on the D.C. Circuit in the 1940s versus today. Since 1982, by statute, all patent appeals are heard by the newly created United States Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(4)(A) & (B).

44. *Monsanto Chemical Co. v. Coe*, 145 F.2d 18 (D.C. Cir. 1944).

45. *Id.* at 20.

46. *Id.* at 20-21.

In many industries the careless extension of a patent on a formula or a way of doing things has already turned patents into instruments to suppress new inventive ability, new experimentation and new initiative. Industrial empires have been given power to suppress production and to organize domestic and international cartels through patents of carelessly defined scope which created a *prima facie* monopoly right over technical information.<sup>47</sup>

In *Special Equipment Co. v. Coe*,<sup>48</sup> Arnold affirmed the rejection of the claim for a patent for a machine that was merely a portion of a previously patented pear cutting device. Arnold viewed the request for a second patent on a partial subcombination of the first machine which had no independent use in the real world as an improper and unlawful attempt to extend the patent monopoly to the production or use of unpatented goods. He concluded:

It seems, therefore, a safe, practical test to limit the number of distinct patents rights in a single machine to those which the inventor expects to exploit separately, and not to suppress. Distinct patent rights should not be granted for the sole purpose of handicapping future inventors whose discoveries would not otherwise infringe the complete patent.<sup>49</sup>

These holdings, while not technically antitrust cases, were clear extensions of the principles from the cases that Assistant Attorney General Arnold had brought to prevent the cartelization or monopolization of key industries through the restrictive licensing of patents and other intellectual property rights.<sup>50</sup> Interestingly, *Monsanto* and *Special Equipment* both relied heavily upon antitrust precedents. In both cases, the antitrust rhetoric was correct in the sense of being a cautionary tale and warning about the importance of clearly (and narrowly) defining patent rights lest innovation and competition be destroyed. At another level, they were clearly extraneous to the case at bar with neither defendant having been charged with, or suspected of, the specific parade of horrors being dragged out by Arnold. Perhaps, as a result of the somewhat gratuitous use of antitrust rhetoric, both cases had separate concurrences, relatively rare in those days.

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47. *Id.* at 21.

48. *Special Equip. Co. v. Coe*, 144 F.2d 497 (D.C. Cir. 1944).

49. *Id.* at 501-02.

50. *See, e.g., Hartford-Empire Co. v. United States*, 324 U.S. 570 (1945) (containing a successful monopolization case against acquisition and misuse of patents for glass technology).

Arnold also wrote significant opinions in the criminal law area, particularly in the area of the insanity defense.<sup>51</sup> In *DeMarcos v. Overholser*,<sup>52</sup> Arnold, on behalf of a unanimous court, denied the habeas corpus petition by an inmate seeking release from the Saint Elizabeth Mental Hospital in which he was confined following the determination that he was of unsound mind and that his release would be dangerous. Arnold used the opinion to explore the uneasy relationship between law and psychiatry in dealing with the insanity defense.<sup>53</sup> The case must have been a relief, since it represented a rare opportunity to delve back into issues which had fascinated him since his earliest days on the Yale faculty.<sup>54</sup>

It was, however, an uneasy vehicle to explore these issues. The petitioner had filed an unsuccessful habeas petition in 1940 and the only new issue was whether the Court was required on its own motion to obtain a report and recommendation from the Commission on Mental Health.<sup>55</sup> Arnold wrote:

Habeas corpus is a proper remedy to challenge the continued confinement of persons who claim to be restored to mental health. Yet the right to bring habeas corpus would be of little value to an indigent person unless expert testimony were available to him to rebut the opinion evidence of the staff of the institution who believed he should be continued in custody.<sup>56</sup>

Given a judge's reluctance to release an allegedly insane criminal against the wishes of the sole experts who cared on a daily basis for the petitioner, Arnold correctly observed that it was probably more important to provide an indigent habeas petitioner with an independent psychiatric examination than to give him independent counsel.<sup>57</sup> Arnold thundered that such an examination by the Commission should be granted whenever requested or whenever the court believed it appropriate on its initiative, but with the greatest reluc-

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51. Arnold also decided *Williams v. United States*, 138 F.2d 81 (D.C. Cir. 1943), which affirmed a criminal conviction of a doctor for providing abortion service where the issue was which party had burden for showing the necessity of the abortion for the life or health of the woman.

52. *DeMarcos v. Overholser*, 137 F.2d 698 (D.C. Cir. 1943).

53. See also *Fisher v. United States*, 149 F.2d 29 (D.C. Cir. 1945); *Holloway v. United States*, 148 F.2d 665 (D.C. Cir. 1945) (rejecting challenges to convictions based on insanity grounds).

54. At Yale, Arnold had co-taught a seminar on law and psychology with Edward S. Robinson, a psychologist at Yale, and co-taught a later seminar with Henry Stack Sullivan, a renowned psychiatrist. GRESSLEY, *supra* note 1, at 32.

55. *DeMarcos*, 137 F.2d at 699.

56. *Id.*

57. *Id.*



tance concluded that the petitioner had affirmatively waived his rights to any such hearing.<sup>58</sup>

The case also represents a precursor to Arnold's subsequent 1958 pro bono representation of the Nobel laureate poet Ezra Pound in which he secured Pound's release from the very same facility where he had been confined since 1945, using an expert report from the very same Dr. Overholser, the director of the facility.<sup>59</sup> Arnold's later law partner, Abe Fortas, also ventured into these waters in his famous pro bono case, *Durham v. United States*, which altered the definition of the insanity defense.<sup>60</sup>

Arnold's immense, but underused, judicial talents are best represented in two civil liberties decisions at the very end of his career on the bench. In *Walker v. Popenoe*,<sup>61</sup> Arnold heard the appeal of the Post Office's decision denying mailing privileges for a pamphlet entitled "Preparing for Marriage" because of its sexual content. The court restored the mailing privileges because of the failure to provide a hearing, but Arnold concurred separately to discuss the broader censorship issues. In his concurrence, he stated:

The statute under which the Postmaster General acted in this case makes the mailing of obscene matter a serious crime. It also provides that obscene material shall not be conveyed in the mails. The Postmaster General construed this statute as giving him power to exclude from the mails, without a hearing, any publication which in his judgment was obscene. The court below correctly decided that the order barring appellees' pamphlet from the mails without a hearing was a violation of due process . . . .<sup>62</sup>

Arnold concluded: "Appellees have been prevented for a long period of time from mailing a publication which we now find contains nothing offensive to current standards of public decency. A full hearing is the minimum protection required by due process to prevent that kind of injury . . . ."<sup>63</sup>

The *Popenoe* case was merely a dress rehearsal for Arnold's most famous opinion. Just one week after the issuance of the *Popenoe* decision, Arnold wrote his masterpiece on government censorship, *Esquire v.*

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58. *Id.* at 700.

59. FAIR FIGHTS, *supra* note 1, at 236-42. See also JULIEN CORNELL, THE TRIAL OF EZRA POUND 123-29 (1992).

60. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954) (holding that accused was not criminally responsible if his unlawful act was the product of mental disease or mental defect).

61. *Walker v. Popenoe*, 149 F.2d 511 (D.C. Cir. 1945).

62. *Id.* at 513.

63. *Id.* at 514.

*Walker*.<sup>64</sup> Here, the Postmaster General had revoked Esquire Magazine's second class mailing privileges. This decision cost the magazine an additional \$100,000 per year to mail first class and jeopardized Esquire's status as a general circulation magazine. The Postmaster had not found Esquire to be obscene, but rather held that its content was "morally improper" and not for the public welfare and good.<sup>65</sup>

The vast majority of witnesses opposed the government position at trial. One poignant example was H.L. Mencken, who testified for Esquire about his past experiences where his American Mercury magazine was effectively shut down without judicial review by the denial of similar mailing privileges. Among the government witnesses were a rabbi, priest, and a minister, which must have conjured up any number of bad jokes in Arnold's fertile imagination.

Arnold's opinion for the court restoring Esquire's mailing privileges was both devastating and dismissive to the entire premise of the government's case.

It does not follow that an administrative official may be delegated the power first to determine what is good for the public to read and then force compliance with his ideas by putting editors who do not follow them at a competitive disadvantage. It is inconceivable that Congress intended to delegate such power to an administrative official or that the exercise of such a power, if delegated, could be held constitutional.<sup>66</sup>

Arnold cited the famous test from Justice Oliver Wendell Holmes's dissent in *Abrams v. United States*,<sup>67</sup> later adopted by the Supreme Court in *Brandenburg v. Ohio*,<sup>68</sup> that it is the marketplace of ideas and not government censorship that should determine the competitiveness of unpopular ideologies and points of views. Arnold continued:

Since we hope that this is the last time that a government agency will attempt to compel the acceptance of its literary or moral standards relating to material admittedly not obscene, the voluminous record may serve as a useful re-

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64. *Esquire, Inc. v. Walker*, 151 F.2d 49 (D.C. Cir. 1945).

65. *Id.* at 50.

66. *Id.*

67. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

68. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Interestingly, the Supreme Court's *Brandenburg* opinion was drafted by Arnold's former law partner Abe Fortas immediately prior to his resignation from the court and was issued as a per curiam opinion. GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 32 (1999).

minder of the kind of mental confusion which always accompanies such censorship.<sup>69</sup>

Arnold's next weapons were sarcasm and wit: "The first source of that confusion is, of course, the age old question when a scantily clad lady is art, and when she is highly improper. Some refined persons are hopeful that an answer to this vexing riddle may be found. Others are pessimistic."<sup>70</sup> He illustrated this point with the absurd testimony of one government witness about an *Esquire* photo of a woman in a bathing suit at the beach which the witness said was improper for depiction in a magazine photograph, but proper for the beach itself.<sup>71</sup>

Arnold continued with an additional line of attack: "A second source of confusion in determining what kind of literature furthers public welfare is the dividing line between refined humor and low comedy."<sup>72</sup> The essential point was an inability to find a meaningful dividing line between the occasional vulgar lapse and a vulgar dominant purpose and the equally important question of who is allowed to decide such questions. Arnold's opinion was hailed as a triumph of free speech in the press and Arnold himself was lauded widely as a champion of civil liberties.

In contrast, Arnold's final opinion for the D.C. Circuit was a return to the mundane. In *Reeves v. Bowles*,<sup>73</sup> Arnold wrote a brief opinion upholding the Office of Price Administration's regulation of the maximum rates for the rental of taxicabs in the District of Columbia.

Arnold's judicial duties, if unfulfilling, were hardly onerous. Arnold's appointment diary for his court years shows a steady stream of visits with the movers and shakers of the day. Abe Fortas and Arnold's former colleagues from the Antitrust Division were the most frequent visitors. As his days on the bench drew to a close, Arnold met frequently with Arne Wiprud, a former colleague from the Antitrust Division who would become his first partner in private practice. After the issuance of the *Esquire* opinion, he lunched with H.L. Mencken at Mencken's invitation as a tribute to that opinion. Immediately prior to resigning, Arnold swore in his former colleague, successor as head of the Antitrust Division, and eventual Supreme Court Justice, Tom Clark as Attorney General of the United States. Then on July 3, 1945, he met with President Harry Truman at the White House, presumably to inform the President of his resignation. On July 9th, he left the court.

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69. *Esquire*, 151 F.2d at 52.

70. *Id.*

71. *Id.*

72. *Id.* at 53.

73. *Reeves v. Bowles*, 151 F.2d 16 (D.C. Cir. 1945).

In Arnold's own carefully chosen words of twenty years after his resignation, he stated the reasons for his decision to leave the bench:

I think it was my preference for partisan argument, rather than for impartial decision, that made me dissatisfied with a career on the appellate court. Furthermore, I was beginning to doubt whether a person of my temperament could ever be an ornament to the bench. I was impatient with legal precedents that seemed to me to reach an unjust result. I felt restricted by the fact that a judge has no business writing or speaking on controversial subjects. A judge can talk about human liberties, the rule of law above men, and similar abstractions. All of them seemed to me dull subjects. To sum it up, a person who is temperamentally an advocate, as I am, is not apt to make a good judge.<sup>74</sup>

Much closer to the actual event he wrote to a distant acquaintance:

I resigned from the United States Court of Appeals in Washington, D.C. about two years ago because I found the work of a judge much duller than that of an advocate. I think I might have liked the trial court but on the appellate court we sat in groups of three and all we did was to listen to argument and write opinions. I felt that a more active life was more to my taste, and so after much indecision I finally resigned and went into practice . . . .<sup>75</sup>

His Yale colleague and friend, William Douglas wrote years after Arnold left the bench:

Thurman served with distinction as a judge on the Court of Appeals. But he seemed in those days to be caged. His mind was far too active, his interests too wide to find satisfaction in the miscellany of cases coming before a federal court.<sup>76</sup>

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74. FAIR FIGHTS, *supra* note 1, at 159.

75. Letter from Thurman W. Arnold to Mrs. Elisabeth Schmidt Ranke (June 7, 1947), in SELECTIONS FROM THE LETTERS AND LEGAL PAPERS OF THURMAN ARNOLD 3 (Victor Kramer ed., 1961).

76. William O. Douglas, *Foreword* to SELECTIONS FROM THE LETTERS AND LEGAL PAPERS OF THURMAN ARNOLD viii (Victor Kramer ed., 1961).

Arnold captured the same flavor even more directly in agreeing with a colleague's assessment that he preferred to "make my living talking to a bunch of damned fools than listening to a bunch of damn fools."<sup>77</sup>

While both the long and short versions of Arnold's explanation of why he left the bench are both correct and amusing, they also represent a missed opportunity for a committed legal realist to reflect on the role of judging. Unlike his mentor Jerome Frank, Arnold did not use his judging for inward reflection on the binding role of either facts or rules or the place for realist skepticism on the bench.<sup>78</sup> Nor did he use his opinions, or his limited extrajudicial writings, to explore the role of power underlying seemingly neutral legal rules or the role of social science rather than conceptual thinking in developing legal rules as he had done as a professor. In part, Arnold appeared constrained by the very rules he had so aptly critiqued at Yale. In part, Arnold the realist was merely bored and wanted to move on to the next chapter in his colorful and successful life.

#### AFTER THE COURT

Arnold took the virtually unprecedented step for a former federal judge of starting his own firm with a single partner. Arnold declined a lucrative partnership with a large firm in New York<sup>79</sup> and instead opened Arnold & Wiprud to specialize in antitrust litigation. Buoyed by a \$25,000 retainer from Coca-Cola, the two lawyers opened a small office with one associate and a secretary. Arnold & Wiprud handled only a single case, unsuccessfully representing a corporation seeking to acquire the assets of the Pullman Corporation, which was being divested by its owners pursuant to a decree from a case Arnold himself had supervised while head of the Antitrust Division.<sup>80</sup>

Following the conclusion of this case, the firm dissolved within one year of its creation. In 1946, Thurman Arnold was 55 years old and had achieved lasting fame as both a legal academic and a key government lawyer in the latter New Deal. He also had been unsuccessful in four previous tries at private practice.

His fifth try created the final piece of his legacy. Arnold formed a partnership with his former student and colleague from Yale Law School and the New Deal, Abe Fortas.<sup>81</sup> After leaving the Yale faculty, Fortas had served throughout the New Deal first in the Agricultural Adjustment Ad-

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77. FAIR FIGHTS, *supra* note 1, at 158.

78. See, e.g., JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949).

79. GRESSLEY, *supra* note 1, at 77.

80. FAIR FIGHTS, *supra* note 1, at 188-90.

81. See LAURA KALMAN, ABE FORTAS (1990).

ministration under Jerome Frank and most recently as under-Secretary of the Interior.<sup>82</sup> Shortly thereafter, Paul Porter joined the firm following service as head of the Office of Price Administration, ambassador to Greece, Chairman of the Federal Communications Commission, among other positions in the Roosevelt Administration.<sup>83</sup> The firm was known as Arnold, Fortas and Porter, and then Arnold & Porter from the time Fortas joined the Supreme Court in 1965 through the present day.

Arnold & Porter was a creature of the New Deal and could not have existed without it. Its founding partners and most of its earliest associates were veterans of the Roosevelt Administration or were attracted to the firm because of its New Deal legacy and the reputations of the founding partners. Its expertise was understanding a complicated and ever expanding federal government and regulatory structure that the partners had helped create and legitimate. What the firm did best, in terms of representing clients in dealing with a powerful and aggressive federal government, would not have been needed even a generation before.

From its inception, Arnold & Porter was a success founded on a contradiction. It was a firm of Washington insiders founded by outsiders. Arnold was from Wyoming, Porter from Kentucky, and Fortas from Tennessee. Fortas was a double outsider being a Jew at a time when Jewish lawyers were rare at the major East Coast firms and virtually non-existent as name partners outside of the so-called Jewish firms in New York City. Most of the early associates also mirrored the founders' Midwest or Western origins. Most also brought with them the type of impeccable east coast law school credentials shared by Arnold and Fortas.

Arnold & Porter (A&P), then and now, has been known for its diversity.<sup>84</sup> While A&P was ultimately criticized for its slowness in welcoming African-American associates, it was a pioneer in hiring women associates. Future D.C. Circuit Judge Pat Wald practiced at A&P in its earliest days. Later, Carolyn Agger, Fortas's wife, joined the firm as a partner and head of the tax practice, jumping from another firm where she had already been a partner.

A&P has also been known from its inception for its pro bono practice. Arnold and his partners took on the defense of literally hundreds of individuals accused of Communist sympathies from the government during the darkest days of the McCarthy era. Arnold and his partners argued several of these cases all the way to the Supreme Court<sup>85</sup> at a time when they were trying to build a paying practice of business clients, many of whom

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82. *Id.* at 27-48, 65-101.

83. *See* DIAMOND, *supra* note 1, at 50-58.

84. *Diversity - Arnold & Porter*, 2 J.D. JUNGLE n.p (No. 3 Feb./Mar. 2002).

85. *Peters v. Hobby*, 349 U.S. 331 (1955); *Bailey v. Richardson*, 341 U.S. 918 (1951).

objected quite strongly to the defense of alleged subversives.<sup>86</sup> The firm simply did what it thought was right. Arnold later secured the release of the Nobel laureate poet Ezra Pound from St. Elizabeth's hospital and helped obtain the pardon of a lower level German defendant from the Nuremberg war crimes trials.<sup>87</sup>

While pursuing these lofty goals, the three founding partners successfully courted and represented some of the largest corporate clients in the world, ranging from Coca-Cola, Federated Department Stores, Lever Brothers, Hoffman LaRoche, and Phillip Morris. The founding fathers represented these clients, and their less well-known counterparts, in a myriad of matters before the courts, the agencies, and Congress, and derived a perverse enjoyment that these clients were helping underwrite the firm's pro bono efforts on behalf of a very different group of clients. In the world of A&P, everyone was entitled to a lawyer, lawyers did not have to endorse the views of their clients to effectively represent them, and the greatest danger was a government using its enormous power to injure the unpopular. Over time, Arnold's and the firm's creed became more oriented to the defense of business interests against the further extension of government power more than the defense of individual liberty, but the firm's commitment to traditional pro bono survived its founding fathers and became part of the firm's ethos and culture.<sup>88</sup>

How then did Arnold's judgeship contribute to the growth of what became the quintessential Washington law firm? The stature of having Judge Arnold as counsel of record certainly was of some value to some clients. This was, however, probably the case more for the pro bono rather than the paying clients. Having a former federal judge, backed by a vigorous and well-known firm, defend the loyalty of government workers for free was a far more attractive proposition than relying on the smaller network of solo practitioners themselves sometimes tarred with the brush of disloyalty or subject to various forms of intimidation.

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86. See, e.g., GRESSLEY, *supra* note 1, at 86 (recounting incident where Porter was accosted by a business acquaintance at their country club as to whether the firm still represented "Communists and homosexuals," to which Porter responded, "What's the matter John, are you in trouble?").

87. No slouch in the pro bono department, Fortas spent thousands of hours at minimal billing rates representing the government of Puerto Rico and argued pro bono in the Supreme Court the landmark case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), establishing the right to counsel for all criminal defendants.

88. See GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (1976) (describing lengthy pro bono litigation in which Arnold & Porter in early 1970s represented victims of flood in coal mining region); Steven Vogel, *First Black Army Officer is Pardoned by Clinton; 1882 Conviction Called Racially Motivated*, WASH. POST, Feb. 20, 1999, at A4 (reporting the posthumous full pardon for first African-American graduate of West Point).

A far greater proportion of Arnold's business clients came through his stature as the trustbuster of the Roosevelt Administration, or through social connections, rather than his brief judgeship. Even Arnold's justly famous involvement in defending Playboy from early obscenity charges that would have destroyed the company came through a different lawyer in the firm who had been referred the case by a Chicago lawyer, rather than as a result of Arnold's free speech opinions on the bench.<sup>89</sup> Coca-Cola became a critical early corporate client on retainer as a result of Congressional testimony by Arnold in the early 1940s where he praised the company as an example of a large corporation which violated neither the letter nor the spirit of the antitrust laws. Evelyn Walsh McClean, the owner of the Hope Diamond, whose estate Arnold represented, was a personal friend.

The largest number of Arnold's clients were either victims or competitors of the firms which Arnold had prosecuted at the Antitrust Division. Arnold's personal clients tended to be one time representations in trials around the country while Fortas and Porter built longer term client relationships with corporate giants.

The judgeship proved most valuable in creating the ethos of the firm. While stereotypes can be misleading, Arnold normally was portrayed as the icon of the firm, the theorist, and the eccentric genius; while Fortas was the client getter, firm manager, iron hand, and the politician; and Porter as the gentle humorist, the glad hander, and connected lobbyist. Having Arnold as a former judge, and as the oldest of the partners, completed the public image of the triumvirate in charge.

Despite despising being a judge, Arnold played off it quite successfully. He continued to receive an enormous amount of press which invariably discussed *both* his antitrust and judicial background. Although he did not encourage it, strangers and new acquaintances often referred to, or corresponded with, him as Judge Arnold. Most of the younger associates only referred to him as Judge Arnold. In fact, even his own grandchildren called him Judge.<sup>90</sup> It was in the end a valuable asset that helped Arnold precisely because he left the bench after so brief a time.

## CONCLUSION

Thurman Arnold's judgeship was a brief interlude in a career that had many spectacular and enduring accomplishments. It has been ignored and underappreciated for both qualitative and quantitative reasons. The fact that Arnold tended to dismiss its importance, particularly in his memoirs late in life, should not be relied upon too heavily. As Arnold himself frankly

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89. GRESSLEY, *supra* note 1, at 60-61.

90. Interview with Joseph Arnold, March 19, 2002.



admits during that latter period of his life, some of the things that he remembered best never actually happened.<sup>91</sup>

Unlike most judicial lives, Arnold's judgeship ultimately is significant not because of what he did on the bench, but because of what he became as a lawyer. It was not an ending but a beginning to the third stage in Arnold's life in which he helped redefine American law. The fact that it was too brief, ironically, made the next stage both possible, and perhaps inevitable. Thurman Arnold served on the bench for a mere two plus years, but he was Judge Arnold for the rest of his remarkable life and career.

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91. Thurman W. Arnold, *Antitrust, Then and Now - A Reminiscence*, Speech at the Annual Dinner of the Antitrust Law Section of the New York State Bar Association, Hotel Commodore, New York, New York (Jan. 24, 1968) (transcript available at Box 5, Thurman W. Arnold Collection, American Heritage Collection).