The Short Unhappy Judgeship of Thurman Arnold

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Thurman Wesley Arnold was one of the most intriguing individuals ever to serve on the D.C. Circuit although the vast majority of his accomplishments occurred before and after his brief service on the D.C. Circuit from 1943-45.

As I discuss in greater detail in my biography of Arnold,¹ he was born in Laramie, Wyoming in 1891 shortly after Wyoming became a state. He came east for the first time to attend Princeton and then Harvard Law School, although he very much felt out of step with the eastern establishment that defined both of these institutions in the years before World War I. Following a brief stint in private practice in Chicago he joined the Army and served in France as an artillery officer in the last year of the War.

After the war, the now married Arnold returned to Laramie and joined his father, a prominent attorney, in private practice. Arnold’s family were Democrats and Laramie in that era was one of the few towns in Wyoming where a Democrat could be elected to public office. In fact, Thurman Arnold served as the only Democrat in the Wyoming legislature amusing himself and taking advantage of his unique status by nominating himself for speaker, rising a few moments later to second the nomination on behalf of a unanimous party caucus, and then finally withdrawing the nomination on the grounds that no one had consulted him before putting his name forward. He then served as mayor of Laramie all the while continuing to practice and teach at the newly established law school at the University of Wyoming.

By 1927, a very different opportunity beckoned. Roscoe Pound, one of his professors at Harvard Law, had recommended Arnold for the vacant deanship at the West Virginia College of Law. When selected, he left Laramie for good, returning only for occasional brief visits.

West Virginia had a small, but distinguished, law school with a tradition of excellent faculty who often moved on to more elite law schools. Now Dean Arnold helped modernize the law school and its curriculum and contributed to an updated code of civil procedure for the state. He began work as a legal scholar and quickly came to the attention of Yale Law School professor and later dean Charles Clark, the eventual drafter of the Federal Rules of Civil Procedure.

After visiting at Yale for two semesters, Arnold joined the Yale faculty on a full-time basis in 1931 and quickly established himself as an important part of the legal realist wing of the faculty more interested in the law in action rather than the law on the books. Arnold was a popular, enthusiastic, if somewhat incoherent, teacher and made a name for himself as the author

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¹ While this is the only full length biography of Arnold, there is also an excellent collection of correspondence with a biographical essay entitled Voltaire and the Cowboy: The Letters of Thurman Arnold (1977).
of numerous articles and two important books, *The Symbols of Government*,\(^2\) and *The Folklore of Capitalism*\(^3\) which improbably became a best seller. His academic work and his moonlighting on various New Deal projects for the Roosevelt administration brought him to the attention of President Roosevelt, who was searching for a new head of the Antitrust Division as part of a reinvigorated push for competitive markets following the overturning of the National Recovery Act by the Supreme Court.

Despite having ridiculed the antitrust laws as empty symbolic reminders of a 19\(^{th}\) century economy long replaced by industrial giants, Arnold proved to be a most successful and enthusiastic Assistant Attorney General in charge of the Antitrust Division of the Justice Department. No one to this day served longer in the position and few can equal his record of enforcing the antitrust laws. During Arnold’s tenure, the Division more than quadrupled its budget and expanded to nearly five hundred employees. Countless investigations, civil and criminal cases, guilty verdicts, consent decrees, and more informal settlements ensued and included key cases such as Socony-Vacuum\(^4\) and Alcoa.\(^5\) Perhaps more importantly Arnold became a public figure in his own right and helped establish antitrust law as a critical piece of American political economy and late New Deal policy.

This seemingly unending flurry of activity eventually brought political controversy as Arnold’s enforcement efforts bumped up against key parts of the New Deal coalition as he attacked labor unions, the construction industry, the American Medical Association, and politically influential corporations involved in the growing war effort in the months following Pearl Harbor and America’s entrance into World War II. Eventually Arnold was promoted, or shunted aside depending on your point of view, and nominated for a seat of D.C. Circuit when Wiley Rutledge was appointed to the Supreme Court.

Arnold began his judicial service in March of 1943. To put in bluntly, he hated it. The D.C. Circuit in that era still heard appeals from the local courts of the District of Columbia and had few of the regulatory and administrative law cases that make it such an influential court today. While Arnold sat on several patent cases which he enjoyed, he had no cases directly involving the antitrust laws and spent most of his time hearing appeals from more mundane criminal cases, petitions for habeas corpus, questions of confinement at government mental institutions, and a host of minor tort, contract, insurance, procedure, tax, estate and trust, matrimonial, custody, child support and routine government administrative matters. In addition to the cases being largely uninteresting to Arnold’s fertile mind, the workload was substantial with the court frequently being understaffed with as few as three judges in the spring of 1944.

By 1945, Arnold had had enough. He had heard 168 cases, written 65 opinions, and concurred or dissented in a handful of other matters. With no appointment to the Supreme Court realistically in the cards, Arnold submitted his resignation to President Truman in July of 1945 at the age of 54 and hung out a shingle forming Arnold, Fortas, and Porter with two younger colleagues from his New Deal days.

\(^3\) Thurman Arnold, *The Folklore of Capitalism* (1938).
\(^5\) United States v. Aluminum Co. of Am., 148 F. 2d 416 (2d Cir. 1945).
The firm, now known as Arnold & Porter, prospered as it benefitted from the explosive growth of the federal government and the regulatory state and the growing reputation of all three founding partners as preeminent Washington lawyers who could litigate, lobby, or more informally work the halls of government depending on the needs of the client. At the same time, the firm courageously took on numerous pro bono cases defending government employees accused of Communist sympathies in the growing paranoia of the McCarthy era. These cases eventually grew to account for 25% of the firm’s work and could have jeopardized the reputation and revenues of the still fledgling firm. Instead both the paying and pro bono work solidified the reputation of the firm as a fearless defender of unpopular causes whether corporate interests or innocent victims of Cold War hysteria.

Over time, the firm grew into one of the true Washington powerhouses. Arnold won key trials and other victories in both the First Amendment and antitrust fields. As counsellor, he handled the estate of famed heiress and Washington socialite Evalyn Walsh McLean including the disposition of the famed (or possibly cursed) Hope Diamond which now resides in the Smithsonian. His pro bono matters included helping to win the release of famed poet Ezra Pound from the mental institution where he had been confined since making propaganda broadcasts for the Nazis during World War II.

As time passed, Arnold became senior statesmen of the firm helping to train future generations of partners and regale them with stories of his colorful life. Abe Fortas left to join the Supreme Court, only to resign in disgrace a few years later, and then be told he could not rejoin the firm that has once borne his name. Arnold’s last years were marred by this tragedy and with increasingly serious heart disease. He eventually passed away quietly in his sleep in early November, 1969.

Later that month, over 500 friends and colleagues gathered for a memorial service at the National Cathedral. Paul Porter, Justice William Douglas, Chief Justice Warren Burger, and Abe Fortas, among others, all spoke. Justice Douglas, who like Fortas had known Arnold for more than forty years, closed the service summing up the essence of Thurman Arnold:

Here was a man of many dimensions, of tremendous vitality, of inventive genius. He was constantly at war with the forces of orthodoxy that have long been overtaking us. He made every status quo quite uncomfortable and uneasy, including traditional legal education. He was indeed the very embodiment of the spirit of dissent.

Only the climate of the First Amendment could have produced him. And he did more to strengthen the spirit of the First Amendment than anyone of our time.

In the end, Thurman Arnold’s time on the United States Court of Appeals for the District of Columbia may have been brief but it was part of a rich and vibrant tapestry of an unparalleled American life.