Antitrust Chief Kauper Returns To Law School

As U.S. antitrust chief in Washington, Thomas E. Kauper sat behind a huge antique desk which he says was the "prized possession" of the Antitrust Division.

In the 1960's—or at least so the story goes—when Robert Kennedy, then the U.S. attorney general, spotted that desk in the Antitrust Division, he quickly had it transferred for his own use in the attorney general's suite. After Kennedy's departure, the desk was returned to the Antitrust Division where it has remained ever since.

Kauper, now back at the University of Michigan Law School, has left the old desk behind along with other mementos of his four years as antitrust chief. He served in the post longer than anyone else in recent history, with the exception of Thurman Arnold, who served slightly longer in the early 1940's.

Although his service in Washington came during a time of hectic transition between the Nixon and Ford administrations, Kauper became known for his steady professionalism in enforcing the nation's antitrust laws. During the past two years especially, his division was known for its vigorous campaign against price-fixing, leading to many cases and indictments.

Kauper was granted leave from the Law School when he accepted the antitrust post in 1972. He returned to the U-M in the fall, taking up his old teaching specialty—antitrust law.

Although Kauper admits to attractions of Washington life, he says he is happy to be back in Ann Arbor where the pace is more "relaxed" and the responsibilities less grave.

The pressures in Washington were considerable, Kauper said in a recent interview here. "On Friday afternoon you might find that certain companies were going to merge on Monday, and you'd have to decide whether you're going to block it. Then you're told that one of the companies is going to go bankrupt if they cannot go ahead with the merger."

"This sort of pressure gets to you after a while. I think anyone would tire of it," said the 40-year-old professor.

Although there were reports that Kauper had decided to step down from the antitrust post because of dis-putes with the Ford administration, Kauper firmly denies this.

"As far as I know, anyone who reported this had not talked to me directly," said Kauper. "It simply was not true.

"Of course, anyone in that kind of job (antitrust chief) knows there will be disagreements," Kauper added. "But unless it's on an extraordinary moral principle, you can't just pick up your marbles and go home."

The reported disagreements between Kauper and the Ford administration were said to focus on the proposed Antitrust Improvements Act, described as one of the most significant antitrust measures since early statutes forming the foundation of U.S. antitrust regulation.

Converting price-fixing from a misdemeanor to a felony. Under the measure, price-fixers now face the possibility of a three-year prison sentence and up to $1 million in corporate fines, compared to the previous one-year sentence (usually suspended) and $50,000 fines.

Kauper also helped in gaining repeal of federal legislation that had enabled states to enforce "fair trade" laws. These laws prohibited retailers from selling many products at prices below those set by manufacturers.

Kauper says he is pleased with the "aggressive" role the Antitrust Division has played in the price-fixing area.

"We made a judgment that we wanted a campaign made against price-fixing," Kauper recalls. "And I think we have been relatively successful, in the sense that many cases were brought and a number of people indicted.

"I don't have the precise figures, but I believe we indicted as many people in three years as in the previous 10 or 15 or 20 put together. Although I try not to use such labels, I suppose one could view our activities as being 'aggressive.'

Despite the increased price-fixing penalties, Kauper is not altogether optimistic about future enforcement in this area. Ultimately, he says, the question of whether price-fixers are given substantial jail sentences can only be resolved in the courts.

"It is extremely difficult to get anyone—the business community or the public—to believe that price fixing is a major offense," says Kauper.

"And if we perceive the judiciary continuing to refuse to impose jail sentences at all—or imposing 30 day sentences suspended, or something of that sort—then it seems to me that the business community will rightfully draw the conclusions that the penalties, at least in terms of jail sentences, are a very minor matter."

The Antitrust Division under Kauper while cracking down on price-fixing, was less active in the merger area.

"In the merger area I think I could have been viewed as a bit more moderate than Richard McLaren, my predecessor, because I didn't really share all his views on conglomerate mergers. But other than that, there was no substantial difference," says Kauper.

"It is true we didn't file many merger cases, but that was largely a function of the fact that the economy wasn't doing well, and there simply weren't many mergers going on."

Undoubtedly, the major antitrust case filed during Kauper's tenure was the one charging American Telephone

Among other provisions, the new proposal—now passed by the Congress and signed by the President—allows state attorneys general to bring "paren t pat riae" suits (similar to "class action" complaints) on behalf of consumers who are victims of business conspiracies to set prices. Another major section of the legislation gives the Justice Department significantly greater power to compel production of documents and testimony in antitrust cases.

Kauper, who strongly backed most of the bill, notes that although Ford had "voiced considerable concern over the 'paren t pat riae' part of the bill," the President was presumably comfortable with the section expanding investigative powers of the Justice Department.

There are several other important legislative measures which were enacted during Kauper's tenure as antitrust chief.

One of Kauper's major accomplishments was gaining enactment of a bill...
& Telegraph with monopolizing telecommunications equipment. The four-year-old suit, which some consider to be the largest antitrust action in the nation’s history, was argued about a year ago but a decision is still pending.

Kauper’s division was less successful in two major civil suits against the nation’s two largest tire manufacturers, the Goodyear Tire & Rubber Co. and the Firestone Tire and Rubber Co. After substantial time and money had been spent in the action, Kauper was forced to make the difficult decision to drop the case because the division simply could not substantiate its early charges.

“It became quite clear as we struggled with this that the only conclusion we could come to, based on what we knew at that point compared to what we had put together when we had first filed, was that we just didn’t have a case,” Kauper recalled.

“The choice really came down to whether we could decide to keep the cases going and let the judge make the decision to throw it out, or try to negotiate a rather cosmetic decree that wouldn’t have done much of anything, or dismiss the cases entirely.

“But a cosmetic decree usually does more harm that good; and if we went to trial it would have cost an enormous amount of money.”

Kauper notes that seeking a resolution to the review of the Firestone and Goodyear cases was a major reason he chose to remain in the antitrust post for four rather than three years. “I just didn’t think it was appropriate to leave that decision to someone else,” said the professor.

“Looking from hindsight,” Kauper adds, “I may have stayed in Washington a year too long. But despite all this business about policy disagreements with the President, one reason I stayed was that I was very much in agreement with what he was trying to do.”

In particular, Kauper says he was eager to follow through on certain White House-backed proposals, such as bills dealing with “deregulation” of the airline industry which has been exempted from antitrust laws by virtue of government regulation.

At U-M Law School, Kauper says he will probably teach “a lot less theoretical course,” but one based more on the realities of the antitrust field.—H.L.S.

Prof. Alan N. Polasky Is Dead At Age 52

Alan N. Polasky, University of Michigan law professor since 1957 and a specialist in evidence, estate planning, and taxation, died on July 22 at the age of 52.

Prof. Polasky died of a heart attack while returning to Ann Arbor from Washington, D.C. Cremation has taken place, and memorial contributions were made to the St. Joseph’s Mercy Hospital Building Fund in Ann Arbor.

U-M law Dean Theodore J. St. Antoine issued the following statement shortly after Prof. Polasky’s death:

“Alan Polasky had the imagination, quickness of mind, and zest for combat to have been one of the legendary trial lawyers of our time. That he decided instead to devote his extraordinary talents to the teaching of law has put a whole generation of Michigan students immeasurably in his debt.

“Alan was a dynamic, stimulating classroom performer, with a sense of the dramatic that a veteran actor would envy. Some students were frustrated by his refusal to make the law simple and easy. Alan would laugh and respond that anything easy, could be learned from books, and wasn’t worth his attention.

“Few law teachers could match Alan in versatility. He was a nationally recognized authority in such diverse fields as evidence, taxation, and estate planning. He taught and...