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### All in the Family: A Legacy of Public Service and Engagement - Edward and Thomas Fairchild

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THOMAS E. FAIRCHILD LECTURE

**ALL IN THE FAMILY: A LEGACY OF PUBLIC SERVICE  
AND ENGAGEMENT—EDWARD AND THOMAS  
FAIRCHILD**

R. NILS OLSEN, JR.\*

*The Thomas E. Fairchild Lecture  
University of Wisconsin Law School  
April 24, 2015*

Rarely in life can you say that your first experience was your best. For my part, however, although my clerkship with Tom Fairchild was my first position as a lawyer, it was also the best experience in an otherwise privileged legal career. This is why I have chosen to focus on Judge Fairchild's life and experiences. However, recognizing the unique family tradition of judicial and public service of the father-and-son combination of Edward and Thomas Fairchild, perhaps matched in Wisconsin history only by the achievements of the La Follettes, I will consider the lives and accomplishments of both men.

Our story begins in the hardscrabble northeastern Pennsylvania Borough of Towanda, on June 17, 1872, with the birth of Edward Thomas Fairchild to Mary Elizabeth Kiehle and Harvey Arthur Fairchild.<sup>1</sup> At the age of five, Edward moved with his family to the lovely, bucolic western New York Village of Dansville, where he was to spend his formative years.

Edward was one of eight members of the first class to graduate from the Dansville High School in 1890.<sup>2</sup> He had no further formal education, working first as a teacher, bookkeeper, and part-time newspaperman. Edward then pursued his life-long ambition for a career in the legal profession, clerking in the Dansville law offices of Rowe

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\* Emeritus Professor and Dean, University at Buffalo Law School, the State University of New York. This article is dedicated to the memory of Thomas and Eleanor Fairchild. I extend thanks for the professional assistance of the capable staff of the Wisconsin Historical Society archives, to my research assistant John Ewing, to the lecture selection committee for entrusting me with this honor, and to Lynn Thompson for all of her supportive assistance throughout the process. Finally, I wish to thank Cameron Marston for his patient and helpful editorial assistance.

1. *Edward Thomas Fairchild*, GENI.COM, <http://www.geni.com/people/Edward-Fairchild/6000000008439062161> (last visited Sept. 28, 2015).

2. Louis Quarles, Memorial of the State Bar of Wisconsin to Edward T. Fairchild (June 2, 1967), in 33 Wis. 2d xxix, xxx (1967).

and Coyne.<sup>3</sup> He subsequently sat for and passed the New York State bar examination and was admitted to practice in Buffalo in 1894.

After practicing law in Dansville for three years, Edward was drawn to the greater professional opportunities afforded by the rapidly expanding city of Milwaukee, Wisconsin. His first office was in a vacant room in the old Milwaukee Sentinel building, which had formerly been occupied by the law firm of Kleist, Bennett & Churchill. W. H. Bennett, a prominent citizen with strong Republican political connections, was elected Milwaukee County District Attorney in 1900.<sup>4</sup>

Edward was influenced in his decision to relocate to Wisconsin by the fact that his mother's brother, Dr. Amos Kiehle, was serving as pastor of Milwaukee's Calvary Presbyterian church.<sup>5</sup> He rented a room from his uncle until acquiring his first major client, the Milwaukee Tallow and Grease Company. He then moved in with Captain Merriman, a retired Great Lakes ship captain, who ran a local boarding house.<sup>6</sup> Serendipitously, Edward's fellow boarders included Michael Laffey, who was active in local Milwaukee County Republican Party politics and later served several terms in the Wisconsin State Assembly.<sup>7</sup>

In 1900, the Fourth Ward was electing a delegate to the Milwaukee County Republican Convention. Mike Laffey encouraged Edward to run for the position. He did so, was elected, and ultimately seconded Bennett's nomination for District Attorney.<sup>8</sup>

In 1903, Edward was rewarded for his political support and was appointed by Bennett to the position of Second Assistant Milwaukee County District Attorney. This new employment opportunity provided sufficient economic security for Edward to return to Dansville and, on June 30, 1903, marry his high school sweetheart, Helen McCurdy Edwards.<sup>9</sup> The local Dansville newspaper described the Fairchild-Edwards nuptials as "the prettiest wedding as well as the

3. Audio tape: Oral History Interview with Edward T. Fairchild (June 11, 1957) (on file with the Wisconsin Historical Society archives, Edward Thomas Fairchild, 1872-1965 collection).

4. *Id.*

5. The Oral History of Judge Thomas E. Fairchild, As Told to Collins T. Fitzpatrick, Circuit Executive, United States Court of Appeals for the Seventh Circuit 3 (1999) [hereinafter Fitzpatrick], [http://www.lb7.uscourts.gov/oralHistories/The Oral History of Judge Thomas E. Fairchild.pdf](http://www.lb7.uscourts.gov/oralHistories/The%20Oral%20History%20of%20Judge%20Thomas%20E.%20Fairchild.pdf). This oral history is a model of its kind, a thorough exploration of Tom's life and career, and an exceptional source of information concerning the Fairchilds.

6. Oral History Interview with Edward T. Fairchild, *supra* note 3.

7. *Id.*; see also WIS. LEG., ASSEMB. JOURNAL OF PROCEEDINGS, 56th Sess., at 5 (1923).

8. Oral History Interview with Edward T. Fairchild, *supra* note 3.

9. *Id.*; Quarles, *supra* note 2, at xxx.

largest wedding ever [celebrated] in Dansville,” with the Presbyterian Church filled with four hundred invited guests.<sup>10</sup> The couple ultimately had five children, three of whom, James, Helen, and Elizabeth, tragically died in infancy. Anne Edwards Fairchild Carter, who became a missile design engineer for the United States Navy, was their first child, and her little brother Tom was their fourth.<sup>11</sup> The couple celebrated their golden wedding anniversary in 1953, with both their best man and maid of honor present.<sup>12</sup>

Edward served in the Milwaukee County District Attorney’s Office until 1906, when he left to join Frank Lenicheck and Frank Boesel in private practice. Together they formed the law firm of Lenicheck, Fairchild, and Boesel. Frank Boesel, who also served as an adjunct faculty member of the University of Wisconsin Law School for many years beginning in 1911,<sup>13</sup> was a life-long friend of Edward’s and was the best man at his wedding.<sup>14</sup>

In 1904, Edward unsuccessfully sought the Republican nomination for Milwaukee County District Attorney.<sup>15</sup> He then successfully ran for a seat in the Wisconsin State Senate in 1906, in which he served two sessions. While a State Senator, Edward developed what was to become a lifelong interest in vocational training. He chaired a legislative committee that studied the need for vocational education in Wisconsin, and which ultimately resulted in a law establishing Continuation Schools under the State Board of Vocational Education.<sup>16</sup> Edward was justly proud of the characterization of him by Charles McCarthy, the first Librarian of the Wisconsin Legislative Reference Library, as “father of the Continuation School Movement in America.”<sup>17</sup> Edward also played an instrumental role in the drafting, sponsorship, and passage of Wisconsin’s Workmen’s Compensation Law, the first of its kind in the nation.<sup>18</sup>

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10. *A Beautiful Church Wedding*, DANSVILLE EXPRESS, July 1, 1903.

11. Quarles, *supra* note 2, at xxx.

12. *Id.*

13. UNIV. OF WIS. BD. OF REGENTS, BIENNIAL REPORT 140 (1912).

14. Fitzpatrick, *supra* note 5, at 14.

15. Quarles, *supra* note 2, at xxx.

16. Oral History Interview with Edward T. Fairchild, *supra* note 3.

17. *Edward T. Fairchild Papers, 1898–1965, Biography/History*, U. WIS. DIGITAL COLLECTIONS, <http://digicoll.library.wisc.edu/cgi/f/findaid/findaid-idx?c=wiarchives;view=reslist;subview=standard;didno=uw-whs-mss00374;focusrgn=bioghist;cc=wiarchives;byte=183363702> (last visited June 12, 2015).

18. Joseph A. Ranney, *Chief Justice Edward T. Fairchild: A “Soldier in the Great War of Commerce,”* WIS. LAW., Dec. 2003, at 14, 16–17, <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=76&issue=12&ArticleID=431> (last visited June 10, 2015); *see also* JOSEPH A.

In politics, Edward was a conservative, Stalwart Republican. He had close personal friendships with Charles Pfister, an important Republican leader of the time, and with two wealthy businessmen, Emanuel Philipp and Walter Kohler, both of whom were later elected Governor of Wisconsin.<sup>19</sup> As his legislative record makes clear, however, Edward was firmly committed to a course of action in which the government provided support for those challenged by personal hardship and deprivation. Indeed, Edward helped people throughout his private life as well. He played an instrumental role in the organization of Milwaukee's Community Welfare Council, the Milwaukee Urban League, and the Society for the Friendless, later known as the Wisconsin Service Association, which was devoted to work with prisoners and their families.<sup>20</sup>

Friends and admirers of Edward organized a committee in 1909 to encourage him to run for Mayor of the City of Milwaukee. News accounts in the *Milwaukee Free Press* quote his supporters. Edward Schwarm, an electrical engineer, explained, "Mr. Fairchild is popular with the laboring men . . . Fairchild is fair and honest . . . he is intelligent and can make a good speech. He isn't stuck up . . . [He] has many warm friends in all parts of the city."<sup>21</sup> These efforts, however, never came to fruition.

The Stalwarts by this time were engaged in an annual fratricidal struggle with Robert La Follette Sr.'s Progressive Republicans for control of the party and its nominees. For many decades this struggle was the main act in Wisconsin politics, with an easy victory virtually guaranteed for the survivor of the Republican Party primary. The Stalwarts were in need of a gubernatorial candidate to run in the Republican primary, and Edward fit the bill. However, Francis E. McGovern ultimately defeated him in the primary election.<sup>22</sup> Edward was a committed member of the William Howard Taft wing of the national Republican Party, while McGovern was a Robert La Follette and Theodore Roosevelt Progressive.<sup>23</sup>

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RANNEY, TRUSTING NOTHING TO PROVIDENCE: A HISTORY OF WISCONSIN'S LEGAL SYSTEM 348-52 (1999); Burt Wuttken, *Day Hails Labor Stamp*, MILWAUKEE SENTINEL, Sept. 5, 1961, at 14; Fitzpatrick, *supra* note 5, at 15.

19. Oral History Interview with Edward T. Fairchild, *supra* note 3; Quarles, *supra* note 2, at xxxi.

20. *Edward T. Fairchild Papers, 1898-1965, Biography/History*, *supra* note 17; see also Quarles, *supra* note 2, at xxxii.

21. *Urge Fairchild to Make the Run*, MILWAUKEE FREE PRESS (1909).

22. *The Progress of the World*, 42 AM. REV. REVS. 387, 398 (1910); see also Fitzpatrick, *supra* note 5, at 4.

23. Fitzpatrick, *supra* note 5, at 4.

Edward was elected to the Wisconsin State Senate once again in 1914. Missing his law practice, however, he resolved to reenter private life. Stalwart Republican Governor Emanuel L. Philipp, whom Edward loyally served as Floor Leader, asked him to delay his departure. In September 1916, Governor Philipp appointed Edward to the Circuit Court of Milwaukee County.<sup>24</sup> He was elected to retain this position in 1917 and twice thereafter.

On April 30, 1930, Governor Walter J. Kohler appointed Edward to a position of justice on the Wisconsin Supreme Court, where he served with distinction until his retirement, January 7, 1957, at eighty-six years of age.<sup>25</sup> He became Chief Justice on January 4, 1954. It has been estimated conservatively that, during his lengthy career on the high court bench, Edward participated in more than eight thousand appeals and authored more than one thousand majority opinions.<sup>26</sup>

Edward was the last justice of the Wisconsin Supreme Court who did not attend law school, not to mention college. At a testimonial dinner honoring Edward on the occasion of his retirement from the bench, Justice Steinle of the Wisconsin Supreme Court accurately described his opinions: “Many, indeed rank as literary gems. [They reflect] his keen power of analysis and discrimination, and above all his tremendous knowledge and appreciation of sound legal principles . . . .”<sup>27</sup> Reading his many opinions is indeed a humbling experience for a legal academic, as he clearly did not suffer from his lack of a university or professional law school education.

Edward stood for retention on the Supreme Court bench in 1936 and again in 1946. In his first election, he confronted an opponent, one Turner, who, undoubtedly responding to the “five old men” of the United States Supreme Court and their votes invalidating much of the early New Deal legislation,<sup>28</sup> pledged that he would never vote to hold a law unconstitutional.<sup>29</sup>

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24. *Id.*; see also Quarles, *supra* note 2, at xxx.

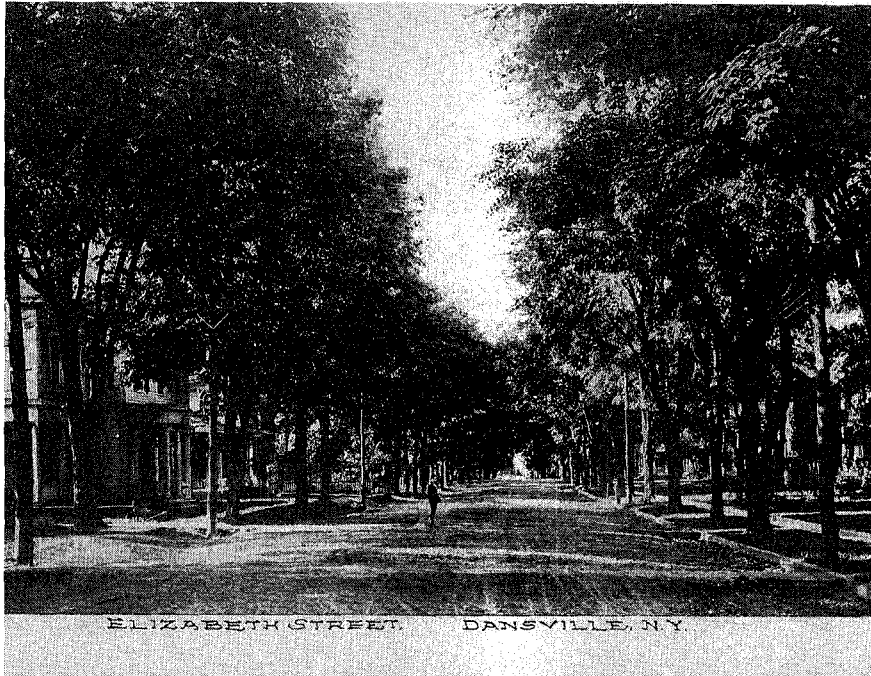
25. Quarles, *supra* note 2, at xxxi.

26. Roland J. Steinle, Assoc. Justice, Wis. Supreme Court, Testimonial Address in Honor of Chief Justice Edward T. Fairchild at the Board of Circuit Judges Meeting 5 (Jan. 3, 1957) (transcript available at the Wisconsin Historical Society Archives, Thomas E. Fairchild Papers).

27. *Id.* at 6.

28. See *New Deal*, LAW LIBR. – AM. L. & LEGAL INFO., <http://law.jrank.org/pages/8798/New-Deal.html> (last visited June 12, 2015); see also *Chronology: The Making of the New Deal*, AM. STUD. U. VA., [http://xroads.virginia.edu/~ma02/volpe/newdeal/timeline\\_text.html](http://xroads.virginia.edu/~ma02/volpe/newdeal/timeline_text.html) (last visited June 12, 2015).

29. Fitzpatrick, *supra* note 5, at 17 (“Dad had an opponent [in 1936] who ran on the platform that if elected, he would never vote to hold a law unconstitutional. He argued that court nullification was a usurpation which John Marshall had dreamed up.



Dansville, New York, 1912 – site of the homesteads of Edward Fairchild and Helen McCurdy Edwards.

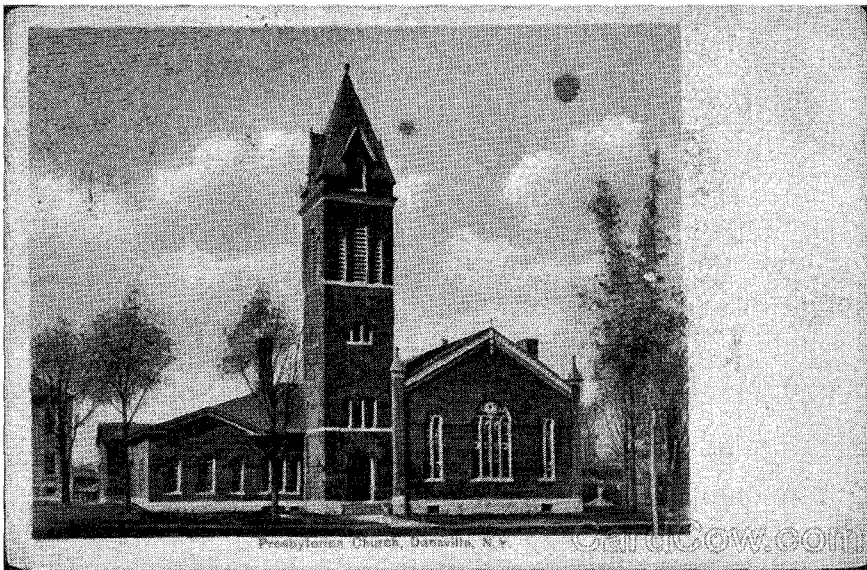
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Of course, the United States Supreme Court had held various depression motivated laws unconstitutional, and that was not popular.”).





Dansville, New York High School from which Edward Fairchild and Helen McCurdy Edwards graduated in 1890.



Dansville, New York Presbyterian Church where Edward Fairchild was married to Helen McCurdy Edwards.



Young Milwaukee attorney, Edward T. Fairchild. Wisconsin Historical Society, WHS-61850.



Fiftieth Wedding Anniversary, Retired Wisconsin Justice Edward T. Fairchild and Helen McCurdy Fairchild, Madison, Wisconsin, 1953. Wisconsin Historical Society, WHS-80538.



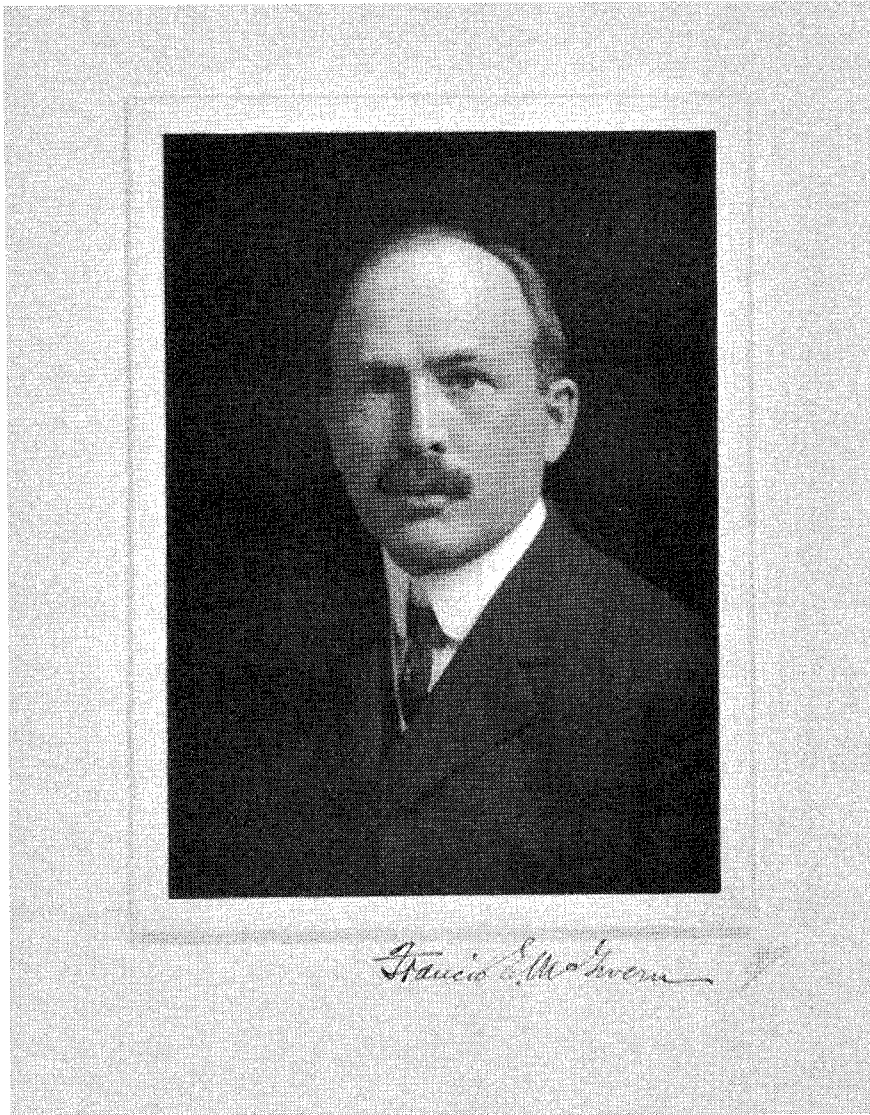
# EDWARD T. FAIRCHILD

**Republican Candidate for Governor**

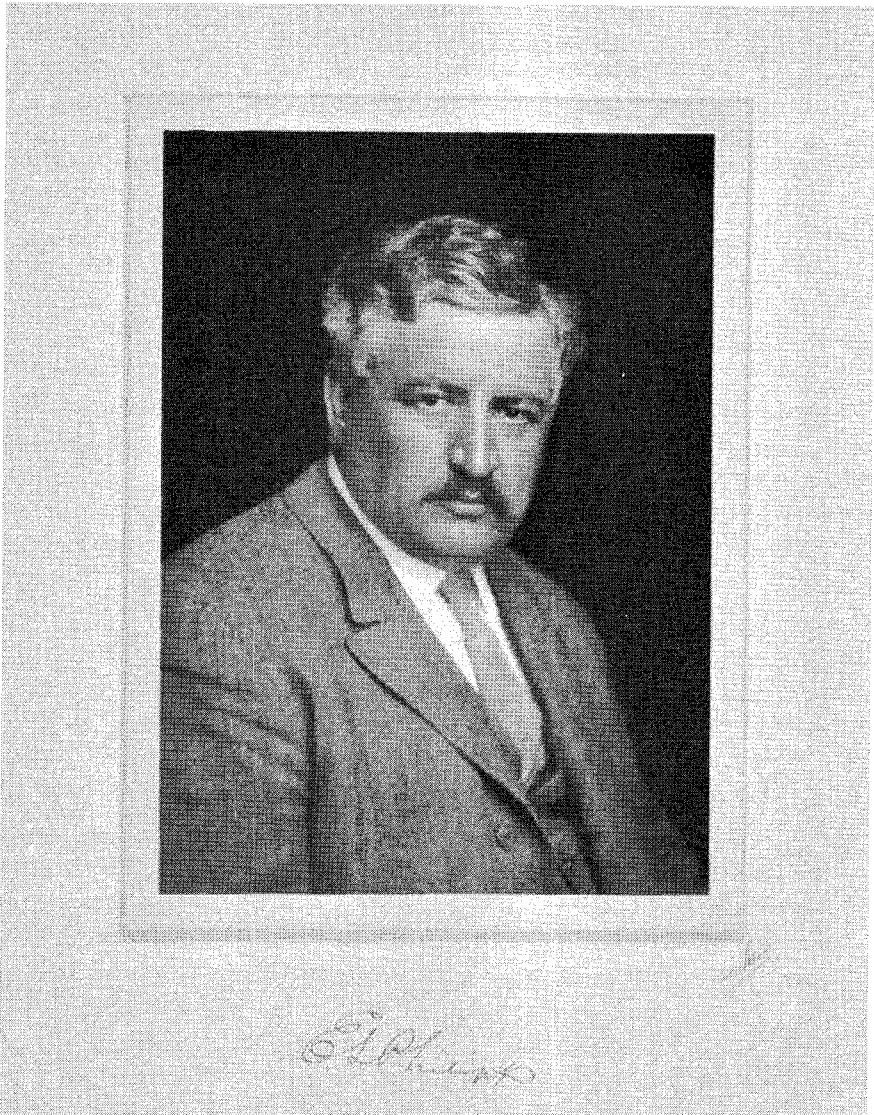


**PRIMARIES: SEPT. 6, 1910**

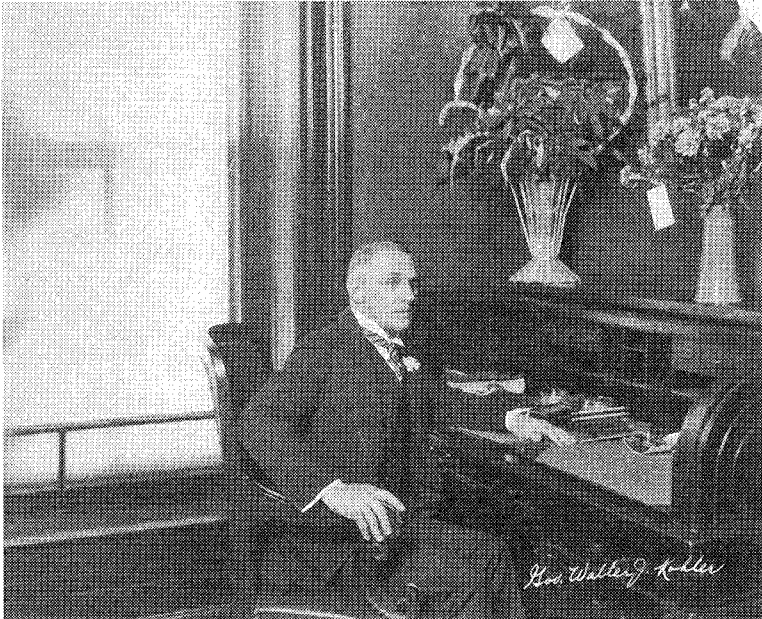
Edward T. Fairchild, Republican Primary for Wisconsin Governor, 1910.



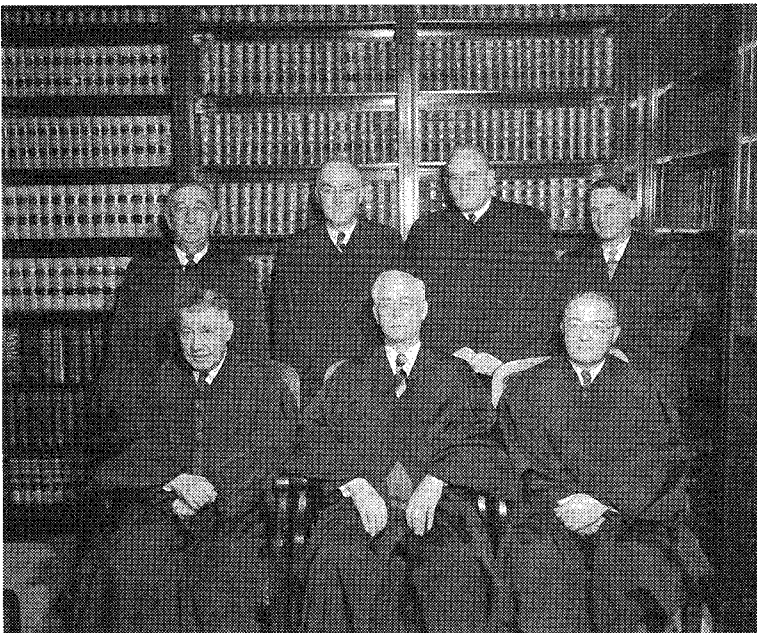
Wisconsin Governor Francis McGovern who defeated Edward T. Fairchild in the Republican Primary Election, 1910. Wisconsin Historical Society, WH-62290.



Wisconsin Governor Emanuel Philipp who appointed Edward T. Fairchild to the Wisconsin Circuit Court of Milwaukee County in 1916. Wisconsin Historical Society, WHS-62414.



Wisconsin Governor Walter J Kohler who appointed Edward T. Fairchild to the Wisconsin Supreme Court in 1930. Wisconsin Historical Society, WHS-24260.



Wisconsin Supreme Court, 1956. Standing left to right: Justices Edward Gehl; George R. Currie; Roland J. Steinle; and Timothy Brown. Seated: Justice John E. Martin; Chief Justice Edward T. Fairchild; and Justice Grover Broadfoot. Wisconsin Historical Society, WHS-83879.



Retirement Portrait of Chief Justice Edward T. Fairchild. Wisconsin Court System. Permission to reproduce granted.



Young Tom, who was a law student at the University of Wisconsin in Madison at the time, debated the issue with the daughter of his father's opponent before the University of Wisconsin Progressive Club.<sup>30</sup> Alarmed at the potential for a Depression-era backlash against traditional Wisconsin Supreme Court jurisdiction, a bi-partisan committee of attorneys across the state was organized in support of Edward.<sup>31</sup> He ultimately prevailed in the election by a significant margin.

In his second retention election, Edward's opponent, Henry P. Hughes, who was a Circuit Judge in Oshkosh, sought to make his age the issue. In correspondence that requested attorneys across the state to circulate his petitions, Hughes stated, "In 1935 the average age of the court was 56 years. Today the average age is 68 years. Three of the present members are over 73 years of age. . . . I am 41 years [old]."<sup>32</sup>—apparently his most noteworthy qualification for the position of Wisconsin Supreme Court Justice.

Edward delivered a speech supporting his retention and addressing the issue of his age. He stated: "I am 73 years of age . . . old enough to have six grandchildren, and to have had . . . thirty years [of Supreme Court] experience . . . but nevertheless young compared to such a man as Justice Holmes, who continued an active and illustrious judicial career until the age of 93."<sup>33</sup>

Tom, who was at that time in private law practice in Portage, sought the counsel of former Progressive Party Governor Philip Fox La

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30. *Id.*

31. A letter from the Committee to prospective voters in the retention election for Supreme Court Justice states:

Mr. Turner claims that judicial review of legislative acts is usurpation. To the contrary, that power has been exercised in colonial, national, and state courts for two hundred years. The only test to determine whether the legislature has acted within its constitutional rights has been applied by the courts. To remove that test nullifies the constitution. . . . We urge all believers in constitutional government to vote, and to influence others to vote on April 7 on the separate judicial ballot for Justice Fairchild.

Letter from Marshall Norseng, Edwin M. Wilkie, Joseph G. Werner, John Conway & Charles A. Orth Jr. to the Voters of Wisconsin (on file with the Wisconsin Historical Society archives, Edward Thomas Fairchild, 1898–1965 collection).

32. Letter from Judge Henry P. Hughes to attorneys (on file with the Wisconsin Historical Society archives, Edward Thomas Fairchild, 1898–1965 collection). It is not clear if Judge Hughes offered anything other than his comparative youth in support of his candidacy.

33. Edward Thomas Fairchild, Speech to Citizens of Wisconsin 5 (1946) (transcript available in the Wisconsin Historical Society archives, Edward Thomas Fairchild, 1898–1965 collection). Edward closely studied Justice Holmes' opinions when he was clerking in Dansville. Oral History Interview with Edward T. Fairchild, *supra* note 3.

Follette concerning the most effective way he could support his father's retention efforts. He was advised to work the Progressive side of the street and to contact as many party supporters as possible on behalf of Edward. Tom believed that his efforts in support of his father might well have made a significant difference in what subsequently turned out to be a very close election.<sup>34</sup> While Hughes was defeated, he was ultimately elected as a justice in 1947, though he resigned only three years later because the salary for a justice, \$10,000 annually, was apparently insufficient to pay for the education of his children.<sup>35</sup>

Madison attorney Joseph A. Ranney has discussed the pivotal role that Edward played during his time as a justice on the Wisconsin Supreme Court in several excellent articles.<sup>36</sup> Edward's high court judicial career began at a difficult time in the State's history, during the darkest depths of the Depression, when the Wisconsin State Legislature had enacted numerous Progressive reform laws that have been aptly described as the "Little New Deal."<sup>37</sup> These laws provided the state government with important regulatory responsibilities in diverse areas, most of which it had never possessed in the past.<sup>38</sup> This presented enormous challenges for the court, especially to its Stalwart Republican justices.

Unlike the early New Deal United States Supreme Court, the Wisconsin justices, under the leadership of Chief Justice Marvin Bristol Rosenberry,<sup>39</sup> were, by and large, moderate and supportive of these legislative initiatives.<sup>40</sup> Edward's Stalwart Republican beliefs can be

34. Fitzpatrick, *supra* note 5, at 18.

35. See Henry P. Hughes (1904–1968), WIS. CT. SYS., <https://www.wicourts.gov/courts/supreme/justices/retired/hughes.htm> (last updated Mar. 7, 2012).

36. Joseph A. Ranney, *Shaping Debate, Shaping Society: Three Wisconsin Chief Justices and Their Counterparts*, 81 MARQ. L. REV. 923, 946–53 (1988); see also Ranney, *supra* note 18.

37. Joseph A. Ranney, *Beating the Great Depression: Wisconsin's "Little New Deal,"* WIS. CT. SYS., <http://www.wicourts.gov/courts/history/article43.htm> (last visited June 24, 2015).

38. See generally JOHN E. MILLER, GOVERNOR PHILIP F. LA FOLLETTE, THE WISCONSIN PROGRESSIVES AND THE NEW DEAL (1982).

39. Ann Walsh Bradley, *Marvin B. Rosenberry: Unparalleled Breadth of Service*, WIS. LAW. (Oct. 2003), <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=76&Issue=10&ArticleID=545>. Governor Philipp appointed Marvin Bristol Rosenberry to the Wisconsin Supreme Court on February 12, 1916. He won retention elections in 1929 and 1939 and served on the Court for thirty-four years. He died on February 15, 1958, at age ninety. *Supreme Court Former Justices, Marvin B. Rosenberry (1868-1958)*, WIS. CT. SYS., <http://www.wicourts.gov/courts/supreme/justices/retired/rosenberry.htm> (last updated Mar. 7, 2012).

40. Ranney, *supra* note 36, at 947.

readily discerned in his dissenting opinion in the 1931 case of *Corstvet v. Bank of Deerfield*,<sup>41</sup> in which, in Ranney's words, Edward "began his emergence as the leader of the court's conservative wing."<sup>42</sup>

*Corstvet* concerned the constitutionality of a Wisconsin law that authorized banks to defer depositors' demands for immediate withdrawal of their funds and to make gradual repayments over time, preserving institutional solvency and avoiding destructive runs on the State's banks. Edward expressed a conservative perspective in a dissenting opinion, concluding that impairment of individual depositors' rights to immediate access to their money overcame the interests of society at large in the continued solvency of its banks.<sup>43</sup>

Unlike some politically conservative judges of today, Edward was a pragmatic, self-consciously collegial justice who actively sought consensus over division<sup>44</sup> and was deeply respectful of the doctrine of *stare decisis*. As stated by Ranney, Edward Fairchild "lived in an era of dramatic social and economic change and played a significant part in shaping that change."<sup>45</sup>

Edward retired from the Wisconsin Supreme Court on January 7, 1957 at eighty-six years of age.<sup>46</sup> Immediately prior to his retirement,

41. 263 N.W. 687 (1935).

42. RANNEY, *supra* note 18, at 412.

43. *Corstvet*, 263 N.W. at 700.

44. Indeed, Edward was justly famous for his end of the working week tea sessions he hosted in his Chambers for the other Justices, at which consensus was often reached on contentious opinions through reasoned discussion, mutual respect, compromise, and an effort to reach unanimity. See, e.g., Quarles, *supra* note 2, at xxxi; Fitzpatrick, *supra* note 5, at 17. One case, which more than likely would engender significant partisan and political disagreement on today's Wisconsin Supreme Court, illustrates the court's apolitical and consultative nature: The death of Progressive Orland Loomis less than a month before his scheduled inauguration as Governor of Wisconsin presented the court with competing claims as to who would serve as Acting Governor for Loomis' term, Walter Goodland, who had been elected Lieutenant Governor, or Julius Heil, who was the incumbent Governor at the time of Loomis' death. The court unanimously ruled in favor of Goodland. *Goodland Governor By Wisconsin Ruling*, N.Y. TIMES, Dec. 30, 1942, at 40; see also WILLIAM F. THOMPSON, THE HISTORY OF WISCONSIN, VOLUME VI, CONTINUITY AND CHANGE, 1940-1965, at 425-26 (1988); Quarles, *supra* note 2, at xxxiii (writing in a heart-felt tribute: "Looking back over [Edward's] life, it well exemplifies the poet's comment: 'That best portion of a good man's life—his little, nameless, unremembered, acts of kindness and love.'").

45. Ranney, *supra* note 36, at 958.

46. In his retirement, Edward remained an active proponent of individuals' constitutional protections. As observed in a Joint Resolution of the Wisconsin State Legislature at the occasion of his death:

The judge did not just sit back and relax after his retirement. He practiced law on a limited scale as long as he was able . . . . On his 90th birthday, June 17, 1962, he took the occasion to plead with his fellow

Edward had the happy task of swearing in his son, Tom Fairchild, who was replacing him as justice on the court.<sup>47</sup> Edward died October 29, 1965 at the age of ninety-three.

The ultimate distillation of Edward's judicial career was articulated by Judge McCann in his memorial on behalf of the court:

Mr. Justice Fairchild's career can be summed up as that of a typical farm boy with only a high-school education working his way up, passing the bar examination, entering politics and crowning his career with forty years on the bench, the last portion of which he served as chief justice of this court—*per aspera ad asta* [through hardship to the stars].<sup>48</sup>

We will next turn our attention to the life and times of Thomas E. Fairchild. Tom was born on Christmas Day, 1912, in Milwaukee. The first writing that we have from a youthful Tom was written in Dansville and was addressed to Edward. Tom attended the Grand Avenue grade school. The Fairchild family then relocated to a home on the east side of Milwaukee, and Tom enrolled in Riverside High School, from which he graduated in 1929 at the age of sixteen.<sup>49</sup> Tom played French horn in the school orchestra and performed on a national radio broadcast in 1928, a feat that was reported proudly in the local Dansville newspapers.<sup>50</sup>

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attorneys to fight constantly against erosion of rights guaranteed by the state and United States Constitutions.

He said a nation based on right principles, such as those contained in the Constitutions, offered the individual and society many advantages.

"Too often these advantages are taken for granted, and unless careful watch is kept, there is a tendency toward encroachment caused by the development of special interest groups or factions whose members are willing to sacrifice the long term good for a short term gain," Mr. Fairchild admonished.

S.J. Res. 114, 1965 Leg., 81st Sess. (Wis. 1965).

47. Fitzpatrick, *supra* note 5, at 63-64.

48. Quarles, *supra* note 2, at xxxiii.

49. Fitzpatrick, *supra* note 5, at 5-6.

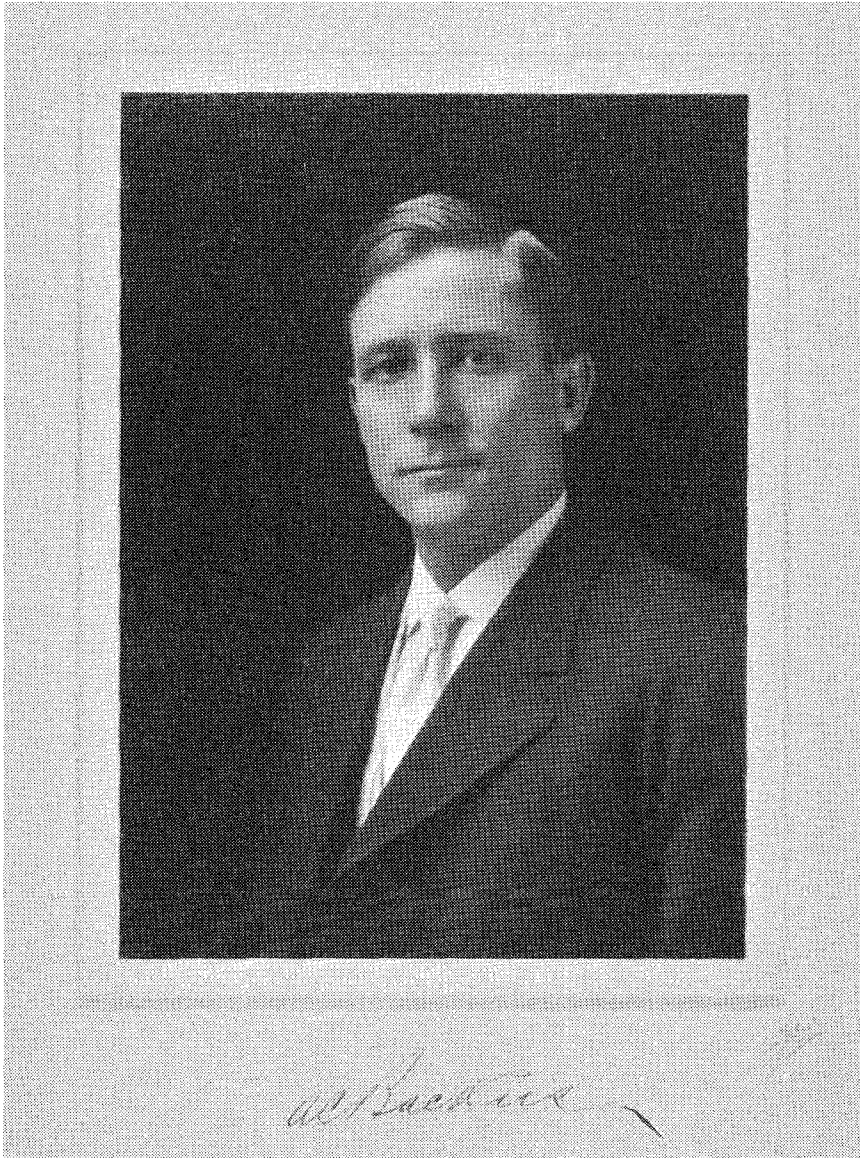
50. *Thomas Fairchild, Grandson of Mr. and Mrs. James Edwards on Broadcasting Program*, DANSVILLE EXPRESS, Apr. 18, 1928; Fitzpatrick, *supra* note 5, at 49.

Lots of love from Nan

Dear Dad  
Love  
Tom

TOM

Early note from Thomas E. Fairchild to Edward T. Fairchild.



Milwaukee County Criminal Court Judge August C. Backus, friend of Edward Fairchild who would drive Tom and Edward Fairchild around southern Wisconsin and northern Illinois, where he would deliver political speeches. Wisconsin Historical Society, WHS-60776.

P.O. 1354-13.75  
 435  
 18.21 off  
 636 Shepard Avenue  
 Milwaukee, Wisconsin  
 September 30, 1928 L10/3

Dear Fetter,  
 Will you send me, Please, the interest on the \$500 bond (Post Office), and, when it is due, the 15 of October, the interest on the two Liberty Bonds.

Last night, five of us boys went down to the Auditorium and ~~xxxx~~ heard Governor Smith on Prohibition. We got down there at fivethirty; the speech didn't begin till nine, but early as that, we only got as far forward as the center of the Auditorium. I suppose you heard the speech over the radio. As far as personality goes, you don't get much more from seeing him than you do from hearing him. He surely had the crowd with him. From time to time, a person would yell from the galleries "You're right, Al!" "Were with you, Al!" or something like that. He inspires familiarity.

They have some new "Smith" campaign buttons out now. They are made up of his picture and a little beer mug attached with three inches of red white and blue ribbon. They had them all over the Auditorium, selling them.

According to the papers, there was a regular riot when Al arrived Friday night. Cops just didn't do any good at all. The Gov. stayed till today.

Love,  
 Tom  
 P.S. I have put on glasses to read parts of his speech. How would you like to see them? The best played "Red" was "Smith".

September 30, 1928 letter from Tom Fairchild to Edward Fairchild in which he describes a rally for Al Smith for President.

Tom's parents were forty years his elder. However, there was always a close, if a somewhat formal, relationship between them. Tom recalled fondly the many Sunday walks he took with his father around their Milwaukee neighborhood; street car rides, during which Edward would discuss the various urban communities they passed through; trips to the Milwaukee County Zoo;<sup>51</sup> and automobile adventures he would take, sometimes ranging all the way to Rockford, Illinois and back, with Edward's close friend, Judge August Backus of the Milwaukee County Criminal Court,<sup>52</sup> who owned an automobile. Tom also took several train trips to Madison with his father while he served in the Wisconsin State Senate, as well as a memorable journey to Washington, D.C., where he had the opportunity to meet President Warren G. Harding.<sup>53</sup>

Upon graduation from high school, Tom took an unexpected direction in his choice of a higher educational institution. He enrolled in Deep Springs College, which was situated in the high desert terrain of Inyo County, California, near the Nevada border and close to Death Valley, not far from the area in which the Charles Manson Family was finally apprehended by law enforcement authorities. The all-male college had an enrolled student body of only twenty. Tom's parents learned of the school from an acquaintance, naturalist and author Dallas Lore Sharp, whose two sons had attended Deep Springs.<sup>54</sup>

Deep Springs College charged no tuition or fees, and employed a radical governance system in which the student body, considered beneficial owners of the institution, elected one of the college trustees, was instrumental in the hiring of faculty, played an important role in determination of the college's curriculum, and performed all the tasks associated with the operation of the college, including milking the cows, collecting eggs from the school's chickens, repairing the college's agricultural implements, cooking, dishwashing, and serving as clerical workers and laundrymen.<sup>55</sup> Young Tom was in charge of the office work during his stay at the college.<sup>56</sup>

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51. Fitzpatrick, *supra* note 5, at 45-46.

52. Judge Backus would deliver political speeches at various civic events around the area. *Id.* at 46.

53. *Id.* at 47-48.

54. *Id.* at 7. When it is considered that Tom was only sixteen at the time he began his attendance at Deep Springs College, his parents displayed great confidence, both in the institution's support systems and in the maturity of their young son, to permit him to venture so far from home and to attend such an unusual college with fellow students three to four important years his senior.

55. MICHAEL A. SMITH, L. JACKSON NEWELL & WILLIAM T. VOLLMANN, *THE STUDENTS OF DEEP SPRINGS COLLEGE* 5-6 (2000).

56. Fitzpatrick, *supra* note 5, at 12.



L.L. Nunn, who made his personal fortune in Telluride, Colorado by developing a system for the long-distance transmission of alternating current, was the founder of Deep Springs College. Nunn had a lifelong, if somewhat eclectic, interest in higher education that began with the creation of several on-site institutions that provided educational opportunities for the workers in his power plants.<sup>57</sup>

In 1911, Nunn sold all of his commercial interests, applied most of the proceeds to fund the newly established Telluride Association, and devoted his attention to higher education. Through the Association, he first constructed a large house at Cornell University in Ithaca, New York, which became known as the Telluride House, and offered room-and-board fellowships to qualified students, including former workers in his power business.<sup>58</sup> In 1917, Nunn took an automobile trip to Death Valley, California. He was deeply impressed by the nearly total isolation, solitude, and the desolate beauty of the site. He purchased a ranch in Deep Springs Valley, and it was there that he constructed his university.<sup>59</sup>

Nunn expressed his educational vision and expectations to the students shortly before his death in 1925:

“Gentlemen, for what came ye into the wilderness?” Not for conventional scholastic training; not for ranch life; not to become proficient in commercial or professional pursuits for personal gain. You came to prepare for a life of service, with the understanding that superior ability and generous purpose would be expected of you.<sup>60</sup>

In considering the remarkable trajectory of Tom Fairchild’s public life, the effects of this vision upon him, with its strong emphasis on a life informed by the ethic of civic engagement and leadership, are clear. His years in the desert wilderness were indeed formative for young

57. *History*, DEEP SPRINGS C., <http://www.deepsprings.edu/about/history/> (last visited Jan. 29, 2016); *see also* L. JACKSON NEWELL, *THE ELECTRIC EDGE OF ACADEME: THE SAGA OF LUCIEN L. NUNN AND DEEP SPRINGS COLLEGE* (2015).

58. NEWELL, *supra* note 57, at 25, 46. The workers were affectionately described as “pinheads.” *Id.* at 25; SMITH ET AL., *supra* note 55, at 4. *See generally* *About*, TELLURIDE HOUSE, <http://www.telluridehouse.org/about/> (last visited Jan. 29, 2016).

59. This isolation was a key element of the educational philosophy of the College’s founder who stated: “The few have often come out of the wilderness—the eternal silence of the desert. This is not a fanatic life of asceticism but a short season of preparation for the work of the few, the great work—the heavy toll of leadership.” NEWELL, *supra* note 57, at 122.

60. DEEP SPRINGS C., <http://www.deepsprings.edu/> (last visited Jan. 29, 2016).

Tom, and in Nunn's words, he heard, and never forgot, the desert's voice.<sup>61</sup>

Prior to his acceptance and matriculation at Deep Springs College, Tom had secured admission at Princeton University, which would defer that status for only two years. As a result, he left Deep Springs College in 1931, after two productive and happy years, and enrolled at Princeton. Not surprisingly, the Ivy League, tradition-bound Princeton declined to recognize or credit any of his two years' studies in the radical setting of Deep Springs College. As a result, he began his university studies anew as an eighteen-year-old freshman.<sup>62</sup>

At the end of his sophomore year, Tom Fairchild, the academic wanderer, made yet another move, this time transferring to Cornell, not far from the original Fairchild homestead of Dansville.<sup>63</sup> This change was prompted, once again, by Mr. Nunn's largess. The Telluride Association at Cornell University provided selected students, including some transferring from Deep Springs, the privilege of living in its beautiful residence, cost-free. As a result, Cornell was quite familiar with Deep Springs and gave full reciprocity to credits that were earned there. Tom had been elected a member of the Telluride Association, enabling him to take advantage of the free room and board. During the Depression, family finances were tight in the Fairchild household, and these advantages proved irresistible. Tom lived in Telluride House at Cornell and graduated one year early, in 1934.<sup>64</sup>

Tom next enrolled in the University of Wisconsin Law School in Madison. Because of Edward's position as a justice on the Wisconsin Supreme Court, the Fairchilds believed the law school might well present unique opportunities to young Tom. Moreover, he could save significant funds, living at home and paying the affordable in-state tuition of only \$37.50 per semester.<sup>65</sup>

Tom's favorite faculty members at the law school included William Herbert Page, famed for his *Paper Chase* Professor Charles W. Kingsfield-like manner and founder of the annual law graduate cane toss at a Wisconsin football game; Nate Feinsinger; Dick Campbell; Oliver Rundell; and his father's old friend and law partner, Frank Boesel.<sup>66</sup> During his third year at the law school, Tom was selected to

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61. "The desert speaks. Those who listen will hear the purpose, philosophy and ethics of Deep Springs . . ." SMITH ET AL., *supra* note 55, at 3. Indeed, Tom remained engaged with Deep Springs College throughout his life, serving as a college trustee from 1979 until 1982. NEWELL, *supra* note 57, at 361.

62. Fitzpatrick, *supra* note 5, at 8-9.

63. *Id.* at 9.

64. *Id.*

65. *Id.*

66. *Id.* at 13-14.

serve as a law secretary to his father—a highly sought after part-time position that paid the then-princely sum of \$150.00 per month. The position carried with it a firm commitment by the student to extend the position, on a full-time basis, through the first year after their graduation.<sup>67</sup>

While at the law school, Tom often studied in the Phi Delta Phi library, located in the attic of the old University Presidential residence at the foot of Langdon Street by Lake Mendota. Walking through the building, he frequently observed a striking young woman who often worked at a desk in the University YMCA office, and she soon caught his fancy. After what he described as a persistent, traditional, and entirely appropriate courtship, Tom proposed to Eleanor Dahl. In 1937, after both graduated from the University of Wisconsin, the young couple was married in Lowell, Indiana, where Eleanor had been raised on a nearby farm.<sup>68</sup>

Notwithstanding Tom's one-year post-graduate commitment to serve as law secretary for his father, when Edward learned that an employment opportunity had unexpectedly, and tragically, become available in the Portage law firm of Grady, Farnsworth & Walker,<sup>69</sup> which was led by Dan Grady, he was most anxious that Tom seek the position.<sup>70</sup> Dan Grady was a prominent attorney of his time, who was highly respected by Edward. He also served as a long-time member and President of the University of Wisconsin Board of Regents.<sup>71</sup> Justice Chester A. Fowler, a colleague of Edward's on the Wisconsin Supreme Court who knew Grady, put in a good word on behalf of Tom. When he received an employment offer from the Portage law firm in April 1938, Tom became a junior associate and relocated his family to Portage.<sup>72</sup>

During his association with the firm, Tom benefitted greatly from his experiences with Dan Grady, a veteran and talented attorney who ultimately "tried, settled or otherwise disposed of" nearly eleven thousand cases during the span of his fifty-seven years of legal practice.<sup>73</sup> Grady was described by E. Harold Hallows, then President of the State Bar Association who later served as Chief Justice of the

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67. *Id.* at 14.

68. *Id.* at 18–19.

69. A senior partner in the firm, Walter Farnsworth, had died as a result of injuries he sustained in an automobile crash that occurred on the way to Madison to argue a case before the Wisconsin Supreme Court. *Id.* at 19.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Atty. Daniel Grady Dies at Portage*, MILWAUKEE SENTINEL, May 12, 1954, at 1.

Wisconsin Supreme Court, as “the last of that colorful, oldtime generation of lawyers, who really loved people and emphasized the human side of the law.”<sup>74</sup> Tom always fondly recalled this formative legal experience.

Tom left the firm in 1941 to accept a position as an attorney in the World War II-era United States Office of Price Administration (OPA) in Chicago.<sup>75</sup> He later characterized this employment position as “the greatest educational experience which [an attorney could have]. The office reached directly and intimately into almost all phases of human life . . . .”<sup>76</sup> Tom initially served as the office expert in the wartime rationing of rubber automobile tires.<sup>77</sup>

However, this arrangement was far from ideal and took its toll on the young attorney. Tom’s growing family remained with Eleanor in Portage. He worked in Chicago at the OPA through Saturday mornings, then rode the Hiawatha passenger train to Portage in order to spend some time with his family, returning to Chicago on Monday morning on the Pioneer Limited train.<sup>78</sup>

Fortunately for the Fairchild family, on March 30, 1942, the Milwaukee Regional Office of the OPA, to which Tom was subsequently posted, was opened, permitting him to return to Wisconsin and live in his family home. The extensive geographic jurisdiction covered by the office consisted of twenty-two Wisconsin counties, including the cities of Milwaukee, Racine, Kenosha, Sheboygan, Fond du Lac, Madison, Janesville, Beloit, and all areas in

74. *State Leaders Mourn Loss of Noted Attorney, Grady*, MILWAUKEE SENTINEL, May 12, 1954, at 8.

Learned lawyer, brilliant orator, keen and sparkling wit, distinguished statesman who never held elective office, gifted conversationalist, loyal and devoted public servant, warm and affectionate friend and one of Wisconsin’s most colorful characters,—that and more we lost in the death of Daniel H. Grady.

. . . He was a man of rare ability and courage. Both as a regent and as a citizen, his sympathies were always on the side of the individual. He was at heart a liberal in the truest sense of the word. He had the courage to stand for what he thought was right, even though he had to stand alone.

*Daniel H. Grady*, SHEBOYGAN PRESS, May 13, 1954, at 46.

75. Fitzpatrick, *supra* note 5, at 20.

76. Thomas E. Fairchild, History – Milwaukee District Office 1 (unpublished manuscript) (on file with Wisconsin Historical Society archives, Thomas E. Fairchild, 1785–1999 collection).

77. Fitzpatrick, *supra* note 5, at 22.

78. *Id.* This was likely the beginning of Tom’s affection for the pre-Amtrak passenger trains, which he took while he was a judge in the Seventh Circuit and lived in Milwaukee. See *infra* note 222 and accompanying text.

between.<sup>79</sup> His traveling for the OPA was an excellent primer for his future political forays, campaigning throughout the state.

Tom served as the District Enforcement Attorney for the Milwaukee region. This was an exceptional legal experience for the young attorney that included making referrals to the United States Attorney for criminal prosecutions; seeking injunctions, both in federal and state court, often accompanied by associated contempt proceedings; and litigating civil suits seeking either treble damages or license suspensions.<sup>80</sup> Under Tom's leadership, the Milwaukee office achieved an impressive record, obtaining treble damage awards of more than \$1.2 million, commencing and prosecuting more than 2,300 legal actions, and conducting more than 18,000 investigations.<sup>81</sup>

By the end of World War II and the return to normalcy, it was apparent the OPA would not long survive, and Tom once again sought new legal employment. After seriously considering a job offer from a small firm in Winona, Minnesota, he accepted an associate's position with the largest corporate law firm in Milwaukee, Miller, Mack & Fairchild, presently Foley & Lardner.<sup>82</sup>

While at Miller, Mack, Tom primarily engaged in a generic corporate practice that ranged from reviewing pension and profit sharing plans to ensure their compliance with applicable Internal Revenue Service regulations to working on a number of stock splits and associated securities review to defending wage and hour disputes.<sup>83</sup> Tom enjoyed the work, as well as the generous salary he was paid by the firm.

However, his time at Miller, Mack was brief. Like his father before him was drawn to the cause of the Stalwart Republicans, Tom was irresistibly drawn to the brave new world of Wisconsin post-War Democratic politics.

Naturally enough, Tom's early political beliefs reflected his father's Stalwart Republican outlook. Thus, as early as twelve years of age, a young Tom Fairchild was involved in his first foray into the world of politics, setting up tables on the front lawn of his Milwaukee home in 1924 and distributing literature in support of Calvin Coolidge and his running mate Charles Dawes.<sup>84</sup>

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79. See Lee K. Benzor et al., Milwaukee District Office, Office of Price Administration, 1942-1945, at 5 (unpublished manuscript) (on file with Wisconsin Historical Society archives, Thomas E. Fairchild, 1785-1999 collection).

80. *Id.* at 2, 78, 80.

81. *Id.* at 78.

82. Fitzpatrick, *supra* note 5, at 28. The firm had twenty-six attorneys at the time, thirteen partners and thirteen associates. *Id.* at 30.

83. *Id.* at 30-31.

84. *Id.* at 4.

In 1928, Tom attended a raucous political rally in Madison, Wisconsin, which featured the colorful presidential candidate New York Governor Al Smith. However, as a contemporaneous letter he sent to his father seeking additional funds and reporting on his experience at the rally makes clear, his primary interest, as a precocious sixteen-year-old recent high school graduate, was focused on Smith's avowed position in favor of the abolishment of Prohibition. He was also drawn to the novel New York City campaign ambience, which was punctuated by the band's frequent renditions of Smith's campaign theme song, "The Sidewalks of New York," rather than to the Democratic Party's candidate himself.<sup>85</sup> In his early collegiate experience, Tom was a member of the Young Republican Club at Princeton. During the 1932 presidential election, he ventured off campus, precariously seated in the bed of an old pickup truck, played in a makeshift band, and delivered political speeches in support of President Herbert Hoover, a man his father deeply admired.<sup>86</sup>

Tom's political outlook evolved significantly during his time at Cornell, where he served as president of the Liberal Club. He was drawn initially to the Progressive Party led by United States Senator Robert La Follette, Jr. (better known in Wisconsin as "Young Bob") and former Congressman Thomas R. Amlie, which had split away from the Republican Party in 1934.<sup>87</sup> He continued this interest through his membership in the Wisconsin Progressive Club while a student at the law school. Tom remained involved with the Party during his time as a young attorney residing in Portage, where he served as County Chair of the Progressive Party of Columbia County and, for one year, as the Chair of the Young Progressives of Wisconsin.<sup>88</sup>

Everything changed for Tom on July 4, 1948, when he received an unexpected telephone call from a former University of Wisconsin acquaintance. Jim Doyle Sr. informed Tom that the Wisconsin Democratic Party Convention was coming up and that a number of activists, who subsequently came to be known as the "Young Turks" and who founded the Democratic Organizing Committee,<sup>89</sup> were

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85. Letter from Thomas Edward Fairchild to Edward Thomas Fairchild (Sept. 30, 1928) (on file with the Wisconsin Historical Society archives, Thomas E. Fairchild, 1785-1999 collection).

86. Fitzpatrick, *supra* note 5, at 4.

87. PATRICK J. MANEY, *YOUNG BOB: A BIOGRAPHY OF ROBERT M. LA FOLLETTE, JR.* 133, 136 (2d ed. 2003).

88. Fitzpatrick, *supra* note 5, at 17.

89. *Id.* at 32. "Leaders of several liberal political groups, including Dan Hoan's Liberal League and the Dane County Democratic Club led by Carl Thompson, met in the Retlaw Hotel in Fond du Lac in May, 1948, to establish formally the Democratic Organizing Committee." RICHARD CARLTON HANEY, *A HISTORY OF THE*

seeking to field a slate in the upcoming general election. He asked Tom if he would consider running as the Democratic Party's nominee for Attorney General of the State of Wisconsin in the 1948 elections. While Tom had begun what subsequently turned into a life-long association with the young liberals in the evolving Democratic Party as early as 1947,<sup>90</sup> his reply was characteristically understated and self-effacing: "Why Jim, I don't even know I'm a Democrat."<sup>91</sup>

The Progressive Party effectively had folded in the spring of 1946 when its founder and most prominent office holder, Young Bob La Follette, elected to join the Republican Party. Much of the senior leadership of the Progressives followed him back into active membership in the GOP.<sup>92</sup>

Young Bob had to run in a Republican Party primary to retain his Senate seat. He faced active opposition from the Stalwart leadership of the Party, which was led by the aggressively conservative and longtime La Follette foe, Wisconsin Republican boss, Chairman Tom Coleman, who well remembered the annual pitched battles for control of the Party between the Stalwart Republicans and Robert La Follette Sr.'s Progressive wing of the Party.

Coleman correctly understood Young Bob's decision to affiliate with the Republicans as an effort to reestablish Progressive leadership of the GOP.<sup>93</sup> As a result, the conservative Stalwart leadership actively opposed his candidacy.<sup>94</sup> The Democrats, then effectively Wisconsin's third political party, assisted Republican regulars in these efforts. Outside of the Madison and Milwaukee areas, the Party had atrophied into a largely patronage-based, vestigial organization with no elected statewide and virtually no legislative representatives.<sup>95</sup> Young Bob ran a

DEMOCRATIC PARTY OF WISCONSIN 4 (1989); *see also* BILL CHRISTOFFERSON, *THE MAN FROM CLEAR LAKE, EARTH DAY FOUNDER SENATOR GAYLORD NELSON* 55 (2004).

90. Tom served on an Advisory Board when the Dane County Democratic Club was formed in May to June 1947 with Carl Thompson, Jim and Ruth Doyle, Gaylord Nelson, William Gorham Rice, Horace Wilkie, Miles McMillan, and Julia Bogholt. *See* the definitive Richard C. Haney, *A History of the Democratic Party of Wisconsin Since World War Two* (1970) (unpublished PhD thesis, University of Wisconsin) (on file with the University of Wisconsin), at 97-98.

91. Fitzpatrick, *supra* note 5, at 32.

92. HANEY, *supra* note 89, at 3; *see also* MANEY, *supra* note 87, at 288; THOMPSON, *supra* note 44, at 561.

93. THOMPSON, *supra* note 44, at 441; *see also* CHRISTOFFERSON, *supra* note 89, at 49-50.

94. HANEY, *supra* note 89, at 3. "Subsequently, the state Republicans snubbed La Follette and endorsed State Chairman Thomas Coleman's choice for Senator - then little-known Marine Corps veteran Joseph R. McCarthy." *Id.*; *see also* MANEY, *supra* note 87, at 289; THOMPSON, *supra* note 44, at 441.

95. *See* LEON D. EPSTEIN, *POLITICS IN WISCONSIN* 50-51 (1958); HANEY, *supra* note 89, at 2.

rather listless campaign, electing to remain at work in Washington, D.C. on his Senate reorganization bill for much of the election campaign. He was narrowly defeated by a young, ambitious, Appleton, Wisconsin judge, Joseph McCarthy,<sup>96</sup> who ran on the slogan that Congress needs a “tail gunner”—though, as it turned out, it did not necessarily get one in Joe McCarthy.<sup>97</sup>

With the effective demise of the Progressive Party, the existing Democratic Party leadership, largely from Milwaukee, including Bob Tehan, who served from 1937 to 1948 in the Wisconsin Assembly and Senate until his appointment by President Truman as United States District Judge for the Eastern District of Wisconsin in 1949, and colorful ex-socialist and multiple-term Milwaukee mayor Daniel Hoan, along with Madison liberals, including University of Wisconsin Law Professor William Gorham Rice, Jr. and Julia Bogholt, wife of University of Wisconsin Philosophy Professor Carl M. Bogholt, warmly welcomed the many young liberal Progressives into the party. After the defeat of Young Bob La Follette and the effective end of the Progressive Party, these Young Turks correctly understood that Tom Coleman and the Republican Party he led were openly hostile to their liberal agenda. As a result, they instinctively gravitated to a changing Democratic Party, which was, in turn, galvanized by their presence.<sup>98</sup>

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From 1900 to 1932 the average state vote for the Democratic candidate for governor was 37.8% of the popular vote. The low was an anemic twelve per cent in the 1922 election. In that thirty-two year period no Democrat won election to any of the five statewide constitutional offices . . . . Neither house of the state legislature ever experienced a Democratic majority. In the mid-twenties only one Democrat in one hundred member state Assembly was elected to two consecutive terms. There were no Democrats in the state Senate for a period from 1923 to 1931 . . . .

Haney, *supra* note 90, at 4 (footnote omitted).

96. HANEY, *supra* note 89, at 3; *see also* CHRISTOFFERSON, *supra* note 89, at 51; MANEY, *supra* note 87, at 289.

97. Morris H. Rubin & Mary Sheridan, *Off to War*, PROGRESSIVE, Apr. 1954, at 9, 9-11; *see also* Fitzpatrick, *supra* note 5, at 55.

98. HANEY, *supra* note 89, at 4; *see also* THOMPSON, *supra* note 44, at 435-36, 565-66. A new and openly liberal Democratic Party in Wisconsin first turned heads in the 1944 election, when Dan Hoan ran for Governor against popular incumbent Walter Goodland and Howard McMurray, a University of Wisconsin political science professor, challenged United States Senator Alexander Wiley. Strongly supported by William T. Evjue's *Capital Times* newspaper, and as a result of an energetic and aggressive campaign, despite being significantly outspent, Hoan garnered 536,357 votes to Goodland's 697,740, while McMurray received 557,144 votes to Senator Wiley's 634,513. The Progressive candidates for the two offices received less than 150,000 votes between them, providing early indication of an ongoing transformation of the Wisconsin political landscape to a traditional two-party (Republican and Democratic) state, with a Democratic Party that was becoming home both for the labor unions that were located in Milwaukee and the young liberals



These new Democrats included Tom and Eleanor's University of Wisconsin friends Jim and Ruth Doyle,<sup>99</sup> Carl Thompson, Horace Wilkie, Pat Lucey, Henry Reuss, and Miles McMillin.<sup>100</sup> Of the group, Carl Thompson, Jim Doyle Sr., and Horace Wilkie have been acknowledged to be the most important and active leaders of the emerging and youthful Democratic Party.<sup>101</sup> In 1948, Gaylord Nelson joined the Party after a brief and unsuccessful flirtation with the Republicans.<sup>102</sup>

These self-styled Young Turks, and the Democratic Organizing Committee they founded, were closely associated with the Americans for Democratic Action, which was an unabashedly activist and liberal organization with a national leadership team that included Eleanor Roosevelt and Jim Doyle Sr.<sup>103</sup> By 1948, the Young Turks had achieved effective control of the Wisconsin Democratic Party and set a drastically new course for the venerable, and historically conservative, institution.<sup>104</sup>

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primarily situated in Dane County that offered traditionally Progressive Party voters a slate of strong and attractive liberal candidates. ROBERT BOOTH FOWLER, *WISCONSIN VOTES: AN ELECTORAL HISTORY* 157 (2008); Haney, *supra* note 90, at 22–23. Democratic hopes were further buoyed in the special election of 1947 to replace Republican Congressman Robert K. Henry of the Madison-area Second Congressional District who died shortly after his reelection in 1946. While Republican candidate Glenn Davis was heavily favored, Carl Thompson, the young progressive Democratic candidate, lost by the narrowest of margins, 24,023 votes for Davis to 23,181 for Thompson. Haney, *supra* note 90, at 57.

99. Tom and Eleanor had been acquainted with both Ruth and Jim Doyle since their undergraduate days at the University of Wisconsin, where both Doyles had served as president of Board of Control, the campus newspaper the *Daily Cardinal*. THOMPSON, *supra* note 44, at 562. Tom described Jim Doyle: “He was quite a powerhouse on the campus as an undergraduate. He was a so-called independent candidate for various things, and was elected president of the senior class . . . .” Fitzgerald, *supra* note 5, at 27. Unlike many of his fellow young Democrats, Jim Doyle Sr. was not a Progressive Party member, but rather a lifelong New Deal Democrat. THOMPSON, *supra* note 44, at 562.

100. HANEY, *supra* note 89, at 4; THOMPSON, *supra* note 44, at 562–63.

101. HANEY, *supra* note 90, at 63, 66.

102. CHRISTOFFERSON, *supra* note 89, at 50–57. Nelson ran, as a “Progressive” Republican, for the Polk County Wisconsin State Assembly seat held by incumbent Stalwart Republican Raymond Peabody. *Id.* at 50. He was defeated, with Peabody garnering 1,232 votes to Nelson’s 1,045. *Id.* at 51; *see also* THOMPSON, *supra* note 44, at 562–63.

103. HANEY, *supra* note 89, at 5–6; *see also* Haney, *supra* note 90, at 110–11.

104. HANEY, *supra* note 89, at 5; *see also* THOMPSON, *supra* note 44, at 570. Many of the Young Turks came together in the Wisconsin unit of the American Veteran’s Committee (AVC) following the conclusion of World War II. AVC membership included Jim Doyle Sr., Gaylord Nelson, Henry Reuss, and Horace Wilkie, who served as chairman of the Wisconsin State American Veteran’s Committee chapter. They first had contact prior to the war in the University of Wisconsin Young



Senator Robert (Young Bob) La Follette, Progressive Party, and his wife. Wisconsin Historical Society, WHS-20032.

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Progressive Club. Carl Thompson served as President of the Club. Gaylord Nelson was the Young Progressive representative on the Central Committee of the Wisconsin Progressive Party. Tom was President of the Wisconsin Young Progressive Club for three years before the war, and John Reynolds, Horace Wilkie, and Miles McMillin were also Young Progressives. Haney, *supra* note 90, at 65.



"No Place Like Home," Political Cartoon by Clifford Berryman, dedicated to Young Bob La Follette and depicting his reentry into the Republican Party, March 20, 1946. Wisconsin Historical Society, WHS-48259.



Republican boss Thomas Coleman. Wisconsin Historical Society, WHS-34486.



Wisconsin Assemblyman and Senator and United States District Judge for the Eastern District of Wisconsin Robert (Bob) Tehan, who was an instrumental leader of the Wisconsin Democratic Party who welcomed the “Young Turks” into the party. Wisconsin Historical Society, WHS-96547.



Daniel W. Hoan, who served twenty-four years as Mayor of Milwaukee as a member of the Socialist Party. He then joined the Democrats and, with Bob Tehan and Madison liberals, welcomed the "Young Turks" into the Democratic fold. WHS-97271.



Wisconsin Democratic leaders Ruth and Jim Doyle Sr. in 1948. Wisconsin Historical Society, WHS-55601.



New Wisconsin Assembly members signing in 1948, including a youthful William Proxmire (second from the left) and Ruth Doyle (fourth from the left). Wisconsin Historical Society, WHS-30114.

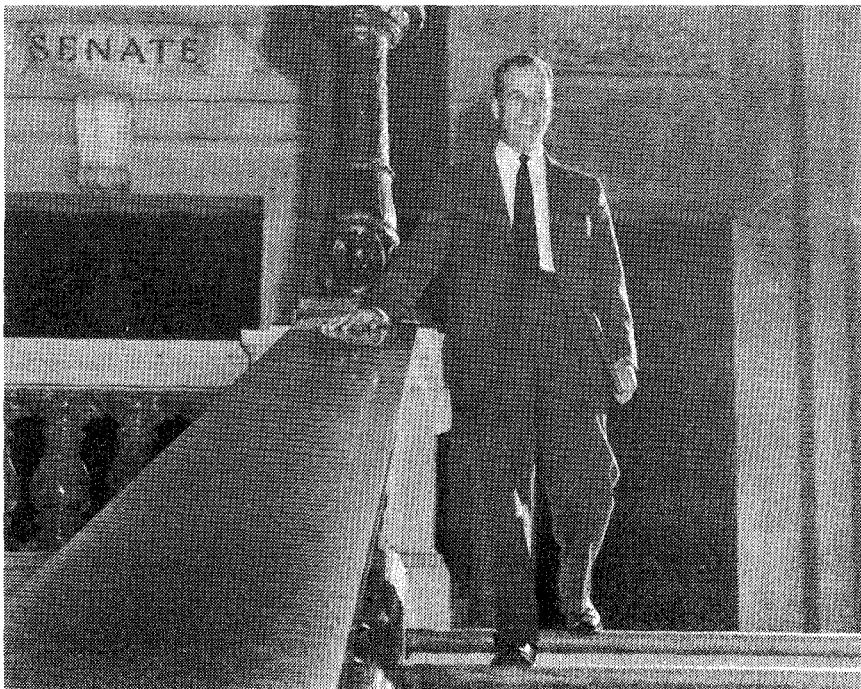


Horace Wilkie (left), “Young Turk” and Wisconsin Democratic Party leader, receiving the Junior Chamber of Commerce Award as Madison’s Most Outstanding Young Man of 1947. Wisconsin Historical Society, WHS-49829.





Eleanor Roosevelt and Jim Doyle Sr. at a meeting of the Americans for Democratic Action. Wisconsin Historical Society, WHS-47992.



Wisconsin State Senator Gaylord Nelson, 1948. Wisconsin Historical Society, WHS-45438.



Wisconsin Assemblywoman Ruth Doyle in 1948. She was one of the only women to successfully run for office as a candidate from the new Democratic Party of Wisconsin. Wisconsin Historical Society, WHS-58114.



Patrick J. Lucey, long-time Wisconsin Democratic leader, who was elected to the Wisconsin Assembly in 1948 and later served as Lieutenant Governor and Governor of Wisconsin and as a candidate for Vice President running with John B. Anderson in the 1980 Presidential election. Wisconsin Historical Society, WHS-118673.



Justice Edward T. Fairchild swearing in new Wisconsin State Attorney General Thomas E. Fairchild. Wisconsin Historical Society, WHS-55487.



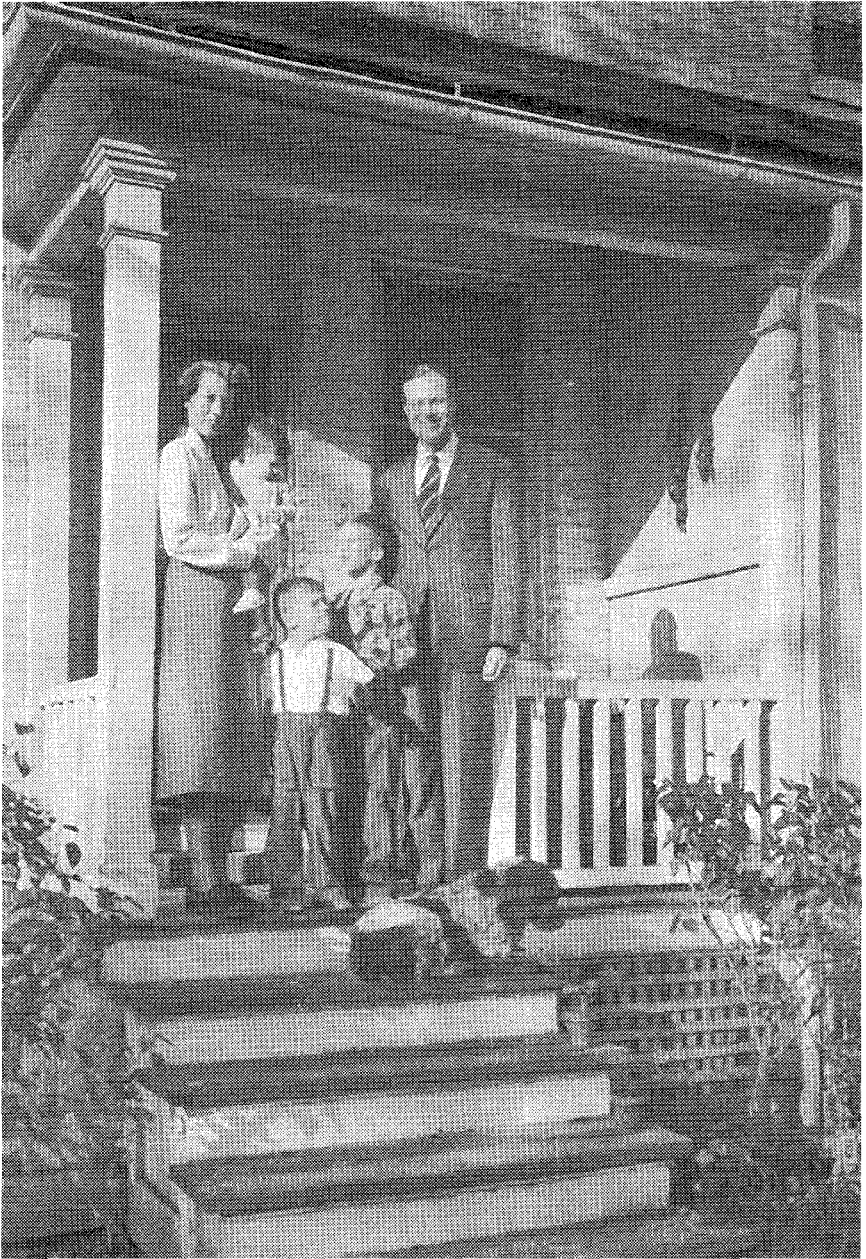
Wisconsin United States Senator Alexander J. Wiley with a guided missile model. Wisconsin Historical Society, WHS-69878.



Joe McCarthy, Wisconsin Historical Society, WHS-23590.



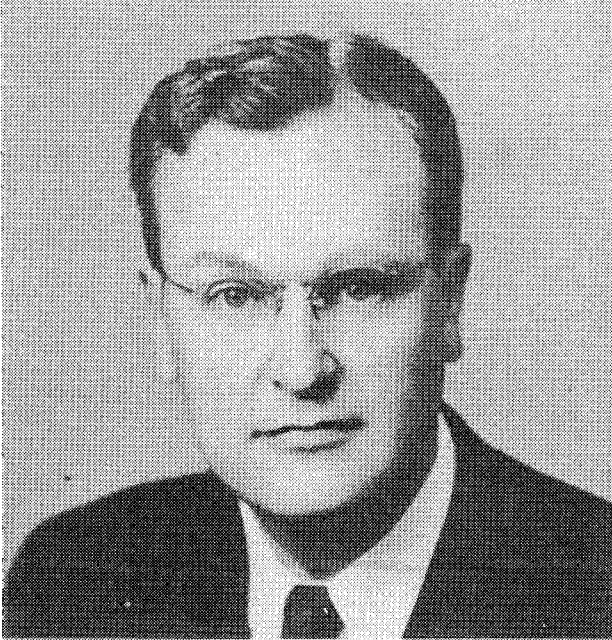
Morris H. Rubin, long-time editor of the *Progressive* magazine, who was a ferocious and effective critic of Senator Joseph McCarthy, and who represented Jim Doyle Sr. in a unique arbitration proceeding to determine the Democratic candidate with the best chance of prevailing in a challenge to McCarthy. Wisconsin Historical Society, WHS-65530.



Henry Reuss and family at his home in Milwaukee. Reuss, who unsuccessfully challenged Tom Fairchild in the 1952 Democratic Party primary election for United States Senator, subsequently served as a long-time U.S. Congressman from Wisconsin's Fifth District in Congress. Wisconsin Historical Society, WHS-65427.



**Build A Better  
America for All  
With  
Tom Fairchild**



**DEMOCRATIC CANDIDATE  
for  
U. S. SENATOR**

Authorized and paid for by the Fairchild for Senator Club, Rose-  
mond Rice, 2212 Hillington Green, Madison, Wisconsin, Secretary.

Campaign flyer supporting Tom Fairchild's candidacy for U.S. Senate in the 1952 Democratic Party primary election. Wisconsin Historical Society, WHS-47768.



From left to right, Congressman Clement Zablocki, Former Wisconsin State Attorney General Thomas Fairchild, and Congressman Andrew Biemiller taken in October 1950. *Milwaukee Journal* Photo, reprinted with permission.



Administration of the oath to Tom Fairchild upon his appointment by President Truman as United States Attorney for the Western District of Wisconsin. Wisconsin Historical Society, WHS-70453.



Democratic candidate for President Adlai Stevenson campaigning with Tom Fairchild in the 1952 election. Wisconsin Historical Society, WHS-47997.



Dane County Democratic Club Hostesses, including Eleanor Fairchild, Marion Wilkie, Ruth Doyle, Elise Rockefeller (first wife of William Proxmire), Mrs. Carl Thompson, and several other active Democratic women during the 1952 election. Wisconsin Historical Society, WHS-34530.



Tom and Eleanor Fairchild, accompanied by their son Andrew, voting in the 1952 election in which Tom challenged U.S. Senator Joseph McCarthy. Wisconsin Historical Society, WHS-48002.



Hubert H. Humphrey, who acted as Wisconsin's honorary Democratic Senator and worked closely with the "Young Turks" efforts to revitalize the Party. Wisconsin Historical Society, WHS-103953.

Intrigued by Doyle's suggestion, Tom drove to Jefferson Junction only several weeks before the deadline for the filing of petitions. The proposed Democratic ticket included, among others, Carl Thompson for Governor, Horace Wilkie for Congress, Bill Proxmire and Ruth Doyle for Assembly, and Gaylord Nelson for the Wisconsin State Senate. After a steak dinner, and loosened up by several excellent martinis, Tom agreed to run, but with two conditions: he had long-established plans to take his annual family vacation in Dansville, so the election petition signatures would have to be obtained by others, and he had to be a part-time candidate because he needed his existing Miller, Mack salary to support his family, a consistent theme during his political career.<sup>105</sup>

Tom has provided a wonderful description of the early Democratic Party campaigning experience:

We Democrats had no significant money and those campaigns were really on a shoestring. I drove to towns in all parts of the state, played polkas over a loud speaker on top of my car to attract attention, made street speeches hoping newspapers would report each day's press release, got acquainted with as many people as I could in stores and on streets, stood at factory gates at early hours shaking hands with people coming to work, and introduced myself at weekend picnics of ethnic and other organizations.<sup>106</sup>

On Election Day, the Young Turks had performed remarkably well. Gaylord Nelson had defeated Fred Risser, a Progressive State Senator from Madison who fatefully had followed Young Bob into the Republican Party.<sup>107</sup> Ruth Doyle won a seat in the Wisconsin State Assembly along with Pat Lucey and a youthful Bill Proxmire, who had only recently moved to Wisconsin from Illinois and was employed as a reporter for the Madison *Capitol Times*. Two of the State's ten Congressional Districts in Milwaukee also went to the Democrats, won by an ambitious former Socialist and later senior aide to President

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105. Fitzpatrick, *supra* note 5, at 33.

106. *Id.* at 86.

107. CHRISTOFFERSON, *supra* note 89, at 57. The switch to the Republican Party was brief for Risser who, taking a page from Gaylord Nelson, switched to the Democrats. He ultimately became, for a time, the longest serving legislator in the United States, representing Wisconsin Senate District 26, encompassing the Madison area. See John Nichols, *Sen. Risser Outraged that Capitol Has Become an "Armed Fortress,"* CAP. TIMES (Madison, Wis.) (Mar. 3, 2011), [http://host.madison.com/ct/news/local/govt-and-politics/sen-risser-outraged-that-capitol-has-become-an-armed-fortress/article\\_c7f90412-45c4-11e0-bace-001cc4c03286.html](http://host.madison.com/ct/news/local/govt-and-politics/sen-risser-outraged-that-capitol-has-become-an-armed-fortress/article_c7f90412-45c4-11e0-bace-001cc4c03286.html).

Harry S. Truman, Andrew Biemiller, and by long-time Congressman-to-be, Clement Zablocki.<sup>108</sup>

The only statewide success for the Democrats was Tom's unexpected victory for Attorney General, in which he received the highest vote total in history for a Democrat—and the first successful statewide election for the Democratic party since F. Ryan Duffy's one term in the United States Senate, won in the 1932 Franklin Roosevelt–New Deal landslide.<sup>109</sup> Edward proudly administered the oath of office to his son.

Not to diminish Tom's achievement, but he certainly was advantaged by a unique and quite unexpected occurrence. His Republican Party opponent, Don Martin, lost the support of many of his fellow Republican Party members<sup>110</sup> after he was charged with public intoxication and urination on a bank window in downtown Madison during broad daylight; perhaps a rather graphic, scatological statement reflecting the public's lingering antipathy towards banks, formed during the dark days of the Depression with its widespread foreclosures of residential and farm properties throughout the state, or more likely, caused by too much strong liquor. Parenthetically, Tom's opponent was ultimately not punished for his behavior, based upon the conclusion that “his conduct ‘came within the reach of the constitutional right to free speech and expression’”—only in Madison!<sup>111</sup>

During Tom's one term as Attorney General, he displayed two traits that were to be hallmarks throughout both his subsequent judicial and political careers—principled decision-making without regard to the probable negative political consequences and an abiding and heart-felt support for the immediate extension of civil rights protections and equal

108. CHRISTOFFERSON, *supra* note 89, at 57; THOMPSON, *supra* note 44, at 571. The new Democrats' electoral success was almost exclusively limited to Milwaukee, Dane, Racine, and Kenosha Counties. Shortly after the election, under the leadership of new DOC Chair Carl Thompson, the fledgling party undertook the daunting, but necessary task of statewide organization. Frequent trips throughout the state were made by Tom, Jim Doyle, Gaylord Nelson, Patrick Lucey, Horace Wilkie, Dan Hoan, and others, who would sometimes schedule public organizational meetings that were attended by only one or two individuals, often patronage-derived positions. THOMPSON, *supra* note 44, at 572–73; Haney, *supra* note 90, at 112.

109. Fitzpatrick, *supra* note 5, at 34–35, 40. Tom had received about 622,000 votes to approximately 560,000 for his opponent. *Id.* at 35.

110. Tom's 1948 statewide victory was won with open bi-partisan support of many Republican attorneys, as well as the endorsement of his campaign by traditionally Republican newspapers, including the *Wisconsin State Journal* (Madison, Wis.), the *Janesville Gazette*, the *Waukesha Freeman*, the *La Crosse Tribune*, the *Manitowoc Herald-Times*, the *Racine Journal-Times*, the *Green Bay Press-Gazette*, the *Watertown Times*, and the *Oconomowoc Enterprise*. See Haney, *supra* note 90, at 103 n.42.

111. CHRISTOFFERSON, *supra* note 89, at 95 (quoting Gaylord Nelson).

opportunities to Wisconsin's minority citizens.<sup>112</sup> Thus, Tom aggressively investigated racial discrimination in the public's access to municipal swimming pools in Beloit, Wisconsin. The City maintained two facilities; one was a spacious 13,000-square foot modern pool, traditionally exclusively used by white residents, the other was a 2,250-square foot older swimming pool frequented only by African Americans.<sup>113</sup>

In 1950, four African American youths who sought entrance to the larger pool were "persuaded" by a pool administrator to instead use the facility traditionally reserved for Blacks. As a result, Tom brought a controversial action in the Rock County Circuit Court against Beloit City Manager A. D. Telfer, seeking an injunction against future racial discrimination.<sup>114</sup>

As reported by the locally acclaimed *Capital Times* Progressive columnist Aldric Revell, City Manager Telfer testified in a deposition, personally conducted by Wisconsin Attorney General Tom Fairchild himself, that he had never heard of any whites swimming in the smaller pool; that he approved of the action of the local pool attendant persuading the four children not to swim in the larger pool; that he was familiar with Wisconsin State civil rights law prohibiting the denial of equal enjoyment of public accommodation on account of race; that he had never personally issued any written or verbal order to discriminate based on race in access to the swimming pools; that he intended to comply with the law in the future; and accordingly that, if an African American were to present himself at the larger pool, it would be the duty of the attendant to admit him.<sup>115</sup> Largely because of the perceived problem of sustaining the claim in court—since the racial discrimination at issue was the product of a longtime and unwritten custom and not *de jure*<sup>116</sup>—the sworn promise of the City Manager of future access to the new pool without regard to race, and the explicit request of Governor Oscar Rennebohm, Tom dismissed the suit without prejudice.<sup>117</sup>

112. One early example of this commitment to civil rights for all can be seen in a groundbreaking 1950 lawsuit Tom brought against the American Bowling Congress, resulting in the organization's elimination of a clause in its constitution banning membership to African Americans. THOMPSON, *supra* note 44, at 330 n.22.

113. Aldric Revell, *Hope Segregation to End at Beloit*, CAP. TIMES (Madison, Wis.), June 8, 1950; *see also* Fitzpatrick, *supra* note 5, at 38.

114. Revell, *supra* note 113; *see also* Fitzpatrick, *supra* note 5, at 38.

115. Revell, *supra* note 113.

116. Tom indicated that, like most attorneys of the day, he was not familiar with the then-obscure provisions of Reconstruction federal civil rights law, 42 U.S.C. § 1983. Fitzpatrick, *supra* note 5, at 38.

117. *Beloit Discrimination Suit Will Be Dropped*, GREEN BAY PRESS-GAZETTE, June 3, 1950.



Tom's tendency to, in effect, assert, "damn the political torpedoes, full speed ahead," can most clearly be seen in his willingness to provide Attorney General's opinions as to the legality of a wide range of politically sensitive questions. Examples included an opinion that found popular baseball tally cards that gave prizes based on major league baseball scores to constitute illegal gambling devices;<sup>118</sup> an opinion that concerned the no-win issue of the legality of antivivisectionists' blocking enforcement of a 1949 law requiring humane societies to honor medical school requisitions for stray dogs from the pound;<sup>119</sup> an opinion that validated the setting of standards for public welfare programs funded jointly by state and federal governments and administered by Wisconsin counties, many of which were paying lower benefits than state and federal agencies required;<sup>120</sup> an opinion that the City of Milwaukee, and its Socialist Party Mayor Frank Paul Zeidler, could issue rent control rules to protect the health and safety of the public;<sup>121</sup> and an opinion that provision of public school release time for religious studies instruction to Roman Catholic school children was a violation of the State Constitution.<sup>122</sup>

Ironically, the most controversial and deeply politically damaging opinion Tom issued was one that declared four popular radio shows and one television program that gave away prizes to the audience—including the wildly popular *Stop the Music*, launched in 1948 and hosted by a young, pre-Miss America Pageant Master of Ceremonies Bert Parks—to be illegal lotteries.<sup>123</sup> The level of hostility this ruling engendered can clearly be seen in a letter to the *Milwaukee Sentinel* from a Miss Pat McKinley:

What is this world coming to? A few people telling the people of our state what they can listen to and what they can watch! This seems more like things we are told happen behind the Iron Curtain . . . . [Tom] Fairchild's action in this matter is going to make a lot of people vote for someone who can apply

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118. *Talley Cards with Prizes Based on Games Held Invalid*, APPLETON POST-CRESCENT, Dec. 11, 1950.

119. *Regent Ask Attorney General to Act: Would Force Humane Society to Make Dogs Available to Medical School*, CAP. TIMES (Madison, Wis.), Nov. 11, 1950; *Settling the Dog Question*, WIS. ST. J., Nov. 26, 1950.

120. John Wyngaard, *Head-On Conflict Involves 71 Counties, State's Welfare Group on Public Assistance Standards*, LA CROSSE TRIB., Nov. 7, 1950.

121. *Milwaukee Can Enact Rent Rules, Fairchild Informs*, OSHKOSH NW., Oct. 26, 1950.

122. Fitzpatrick, *supra* note 5, at 39.

123. *Fairchild Tells Why He Gave Giveaway Opinion*, MILWAUKEE SENTINEL, Nov. 1, 1950; see also *Stop the Music!*, JIM BAMSBERG'S GOLD TIME RADIO, <http://www.jimramsberg.com/stop-the-music-audio.html> (last visited June 10, 2015).

themselves to the job at hand and not waste people's money. . . .<sup>124</sup>

As the only statewide Democratic Party officeholder, Tom was under intense pressure from his Democratic colleagues to move up the ticket in 1950 and either run for Governor, an office that had been recently vacated as a result of the retirement of popular Republican Party incumbent, successful businessman Oscar Rennebohm,<sup>125</sup> or to challenge the State's admired, and aptly-named, senior independent-minded Republican Senator, Alexander Wiley, who had been first elected in 1938.<sup>126</sup>

Despite several very good reasons to keep the Attorney General position, including the advantages of a well-known and comparatively popular incumbent office-holder running for reelection, not to mention a steady salary to support his family, Tom gave in to the pressure and announced for the Senate, a decision he subsequently deemed "a mistake."<sup>127</sup> First, he had to prevail in a difficult and divisive Democratic Party Primary Election in which he faced off against a range of challengers. These included Dan Hoan, who had been Mayor of Milwaukee for twenty-four years as a member of the Socialist Party and then switched to the newly-resurgent liberal Democrats; William Sanderson of Menominee, Wisconsin, who had been secretary to Merlin Hull, a Progressive and Republican Congressman who represented Wisconsin's Ninth Congressional District from the 1930s through the early 1950s and was supported by agricultural and labor organizations that opposed the perceived domination of the Democratic Organizing Committee by the Madison "silk shirt" faction, of which Tom was seen as a charter member; and LaVern (Lavvy) Dilweg, a popular multi-sport athlete at Marquette University, who ended up playing professional football for the Packers while practicing law in Green Bay.<sup>128</sup>

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124. Charles House, *By the Way*, MILWAUKEE SENTINEL, Oct. 30, 1950.

125. See Fitzpatrick, *supra* note 5, at 40.

126. See *id.* at 40-41. Wiley entered the Senate by defeating F. Ryan Duffy, who had been elected in 1932, carried to victory by the huge margin of ballots cast for Franklin Roosevelt, and was later appointed to the Seventh Circuit. See *id.* at 41.

127. Fitzpatrick, *supra* note 5, at 41. In hindsight, Tom noted that he liked the Attorney General job, he hadn't been in it very long, and that he could have "learn[ed] more about state government, more about the problems there were." *Id.* He was only thirty-eight years old and also was convinced that, even if he had been defeated for a second term as Attorney General, he "would have been a better candidate against McCarthy." *Id.*

128. *Id.* at 41; see also Haney, *supra* note 90, at 123-24; *Daniel Hoan Collection*, MILWAUKEE COUNTY HIST. SOC'Y, <http://www.milwaukeehistory.net/museum/exhibits/unlocking-the-vault/daniel-hoan-collection-text/> (last visited June 20,

Tom won the close primary election, receiving 58,399 votes to 44,423 for Hoan, 41,961 for Sanderson, and 21,609 for Dilweg.<sup>129</sup> He then moved on to face the popular and well-funded Wiley in the general election. Tom ran on a remarkably liberal platform, one largely reflective of President Truman's Fair Deal.<sup>130</sup> In an October 1950 discussion panel, Tom stated prescient views on health insurance:

Do I believe that the high cost of medical care causes middle and low income families to delay needed medical care? I do.

Do I believe that the high cost makes it impossible for the great mass of people to obtain preventative care? I do.

.....

Do I believe that our social security insurance system should be expanded so as to provide means with which to pay the cost of medical care? I do.

.....

I have told you where I stand on the principle involved in government health insurance. I view it as the projection of the social security insurance system so as to provide funds to meet the costs of medical care.<sup>131</sup>

He also took a strong position on income redistribution, asserting, “[W]e have come about half way in eliminating inequities of income. . . . This has been done through little-appreciated changes in the distribution of a rapidly growing national income.”<sup>132</sup> He continued,

America must continue to improve its economic lot by . . . leveling up rather than . . . leveling down . . . .

.....

We must make certain that this leveling up process is continued in the future . . . and not . . . the idea of letting the

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2015); *Hull, Merlin, (1870 - 1953)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000943> (last visited Sept. 24, 2015).

129. Haney, *supra* note 90, at 124. Tom may have owed his victory to Hoan, who captured a significant number of labor votes that might well have otherwise gone to Sanderson. *Id.*

130. *Id.* at 125.

131. Candidates Forum at the Schroeder Hotel, Milwaukee 3, 4 (Oct. 2, 1950) (transcript on file with author).

132. Press Release, Fairchild for Senator Headquarters (undated) (on file with author) (internal quotation marks omitted).

bottom income groups exist on the crumbs that fall from the table of a wealthy minority . . . .<sup>133</sup>

Finally, responding to practices he found deeply undemocratic, unethical, and personally offensive, he was one of the first to attack publicly Wisconsin's Junior Senator Joseph McCarthy for his anti-communist crusade. On February 9, 1950, McCarthy infamously told an audience in Wheeling, West Virginia that the United States State Department "was thoroughly infested with Communists" and stated, for the first time, that he had a list, which he would not publicly disclose, naming many "individuals who would appear to be either card carrying members or certainly loyal to the Communist Party."<sup>134</sup>

Tom charged that a similar speech delivered by McCarthy at the 1950 Wisconsin State Republican Convention was "an admission that the GOP can win only if it instills in the minds of Americans hysteria and fear"<sup>135</sup> and further accused McCarthy of smearing the State Department with "wild charges and cruel innuendo."<sup>136</sup> He also publicly challenged McCarthy to repeat his charges of Communists in the State Department without the Congressional immunity from libel actions, asserting that McCarthy had brought "shame to Wisconsin."<sup>137</sup> Tom's telegram read in part: "The time is now, senator. The place is here at home. If you ever intend to shed the immunity which has protected you from libel action, why not now? Don't weasel this time; don't hedge; don't shift your ground."<sup>138</sup> McCarthy curtly and characteristically dismissed Tom's charges and replied to the Fairchild telegram: "I have been too busy on more important things to have the time to read telegrams and letters, much less to answer . . . crackpots who want to protect the Communists and perverts in the state department."<sup>139</sup>

Despite his aggressive campaign, Tom was defeated by a 55%-to-45% margin. Once again, he found himself unemployed, until

133. *Id.* (internal quotation marks omitted).

134. "Enemies from Within": Senator Joseph R. McCarthy's Accusations of Disloyalty, HIST. MATTERS, <http://historymatters.gmu.edu/d/6456> (last visited June 12, 2015); see also THOMPSON, *supra* note 44, at 579.

135. *Fairchild Again Attacks M'Carthy*, OSHKOSH NW., June 12, 1950.

136. *Fairchild Wire Raps McCarthy*, GREEN BAY PRESS-GAZETTE, June 8, 1950.

137. *State Shamed by McCarthy, Fairchild Says*, SHEBOYGAN PRESS, June 8, 1950.

138. *Id.*

139. Aldric Revell, *McCarthy Says Fairchild Is 'Crackpot'; Ignores Challenge*, CAP. TIMES, June 9, 1950.

President Truman appointed him United States Attorney for the Western District of Wisconsin, in Madison.<sup>140</sup>

The Democrats' political focus two years later in 1952 was almost single-mindedly directed to defeating Joe McCarthy, who since 1950 had attracted continued broadside attacks from liberal Democrats such as Tom Fairchild and by courageous Republicans, including Senators Margaret Chase Smith of Maine, Charles Tobey of New Hampshire, Irving Ives of New York, Edward Thye of Minnesota, George Aiken of Vermont, and Wayne Morse of Oregon (the later Vietnam War critic, who coincidentally was born in Madison and educated at the University of Wisconsin).<sup>141</sup> Respected newspapers, including the *Capital Times* in Madison and the *Milwaukee Journal*, had consistently attacked him for a number of years.<sup>142</sup> McCarthy had shown his true nature and taken to an aggressive offensive as early as November 9, 1949, when he released a copy of a letter sent to over four hundred Wisconsin newspapers, accusing the City Editor of the *Capital Times* of being an active and leading Communist Party member and "wondering" whether the paper itself was "the Red mouthpiece for the Communist party in Wisconsin."<sup>143</sup>

In 1952, a number of prominent Democrats were considering a run against McCarthy, including Wisconsin State Senator Gaylord Nelson,

140. Fitzpatrick, *supra* note 5, at 42. He also briefly undertook consulting work for future District of Columbia Circuit Judge Harold Leventhal, who was then Chief Counsel for the Korea War-era Office of Price Stabilization. *Id.*

141. H. Lew Wallace, *The McCarthy Era 1954*, in 4 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792-1794, at 3729, 3810-14 (Schlesinger & Burns eds., 1963).

142. THOMPSON, *supra* note 44, at 578-79. Indeed, "[a]t the behest of Miles McMillin, who was an attorney as well as an editor of the *Capital Times*, the Wisconsin Board of Bar Commissioners investigated and censured McCarthy for running for the U.S. Senate while sitting on the bench." *Id.* at 579.

143. EDWIN R. BAYLEY, JOE MCCARTHY AND THE PRESS 128 (1981); THOMPSON, *supra* note 44, at 580. The *Capital Times* was not in any way deterred by the attack and remained a bur under McCarthy's saddle until his death. Mike Miller, *Downing a Demagogue*, CAP. TIMES (Sept. 11, 2009), [http://host.madison.com/about/downing-a-demagogue/article\\_96d4cc20-9f0f-11de-972f-001cc4c002e0.html](http://host.madison.com/about/downing-a-demagogue/article_96d4cc20-9f0f-11de-972f-001cc4c002e0.html).

Opposition to McCarthy picked up steam a year before the election in 1951. The Wisconsin party's persistent attacks on the Senator prompted visits from prominent national Democrats eager to join in the fray. Thus, the keynote speaker at the 1951 convention was Averell Harriman. Adlai Stevenson was also scheduled to come to Wisconsin, but inclement weather caused him to cancel. Former White House counsel and Truman administration insider Clark Clifford replaced him. Estes Kefauver, prominent Senator and active presidential candidate, was the speaker at the 1951 Jefferson-Jackson dinner, while the long-time liberal friend and Wisconsin Democratic Party supporter Hubert H. Humphrey was the speaker at the 1952 event. Each speech featured substantial and pointed criticism of McCarthy. Haney, *supra* note 90, at 150-51.

Jim Doyle Sr., Henry Reuss, a previously unsuccessful candidate for Milwaukee Mayor and Wisconsin Attorney General who later served as a long-time United States Congressman from Wisconsin's Fifth District in Milwaukee, and a reluctant and uncertain Tom Fairchild. The Democratic Party had no endorsement mechanism for primary contests, so some of the candidates resorted to a remarkable and unconventional process to avoid, at least in part, what almost certainly would be an expensive, divisive, and destructive primary.<sup>144</sup>

A unique arbitration proceeding, unimaginable in today's political climate, was undertaken. Miles McMillan, editor of the *Capital Times*, and Morris Ruben, editor of the *Progressive* magazine, both ferocious critics of Senator McCarthy, represented Gaylord Nelson and Jim Doyle Sr., respectively, before Robert Lewis, who worked for the National Farmers Union, an organization that advocated for the economic and social well-being and quality of life of family farmers,<sup>145</sup> and served as a neutral arbiter. After hearing the competing, but friendly, arguments, Lewis, whose charge was to determine the Democratic candidate with the best chance of prevailing in a challenge to McCarthy, selected Gaylord Nelson. Jim Doyle subsequently withdrew from the race.<sup>146</sup>

Henry Reuss, however, remained interested in the Senate race and complicated the Democrat's electoral process.<sup>147</sup> In November 1951, the Democratic Organizing Committee considered once again who would be the candidate best situated to challenge McCarthy, conducting a "Postcard Poll" of its membership, which listed nine potential candidates and asked party adherents to identify their first and second choices. The resultant tabulation revealed the selection of Gaylord

144. CHRISTOFFERSON, *supra* note 89, at 66-67; THOMPSON, *supra* note 44, at 588-89.

145. *Mission*, NAT'L FARMERS UNION, <http://www.nfu.org/mission> (last visited June 23, 2015).

146. CHRISTOFFERSON, *supra* note 89, at 67. Jim Doyle Sr. was subsequently elected Chairman of the Wisconsin Democratic Organizing Committee at the 1951 convention held in Wausau in October, removing him from consideration for the nomination. At the convention, the Delegates passed a harshly worded and unequivocal condemnation of McCarthy:

The Democratic party . . . unqualifiedly criticizes Sen. McCarthy for placing his shallow ambitions against the tremendous historical traditions of the state. We call upon all citizens of Wisconsin, regardless of party, to repudiate this charlatan and thus prove to America that the esteem in which they have justly held this state is still deserved.

Only by defeating McCarthy in 1952 can the people of Wisconsin restore their great tradition in the eyes of America and the world.

Haney, *supra* note 90, at 152.

147. CHRISTOFFERSON, *supra* note 89, at 67.

Nelson, again, as the strongest; Tom Fairchild was second, followed by Henry Reuss and Jim Doyle, who still enjoyed significant party support notwithstanding his announced withdrawal from the race.<sup>148</sup> Despite the consistently favorable sentiment expressed by Party faithful, Nelson ultimately decided against entering the race, leaving Reuss, who sought to foreclose further discussion of who the best candidate was through his announcement on November 8, 1951 that “[f]rom now on, its me or McCarthy,” an effort to situate himself as the prohibitive favorite to gain the nomination.<sup>149</sup>

Some Milwaukee Democrats, among others, exerted pressure on Tom, establishing a “Draft Fairchild for Senator Committee.”<sup>150</sup> Obstacles existed, however. He was United States Attorney for the Western District of Wisconsin and obviously could not participate in a partisan political campaign for the nomination, and, once again, there was the problem of his ever-present need for a regular salary to support the needs of his growing family.<sup>151</sup>

After a difficult period of indecision, Tom announced on July 8, 1952 that he was indeed a candidate and intended to run in a September 1952 Wisconsin primary election against Henry Reuss. Both Tom and Reuss stayed on message, agreeing that the only real issue in the primary was Joe McCarthy.<sup>152</sup> In a contest that once again featured the ever-present and damaging schism within the new Democratic party, with a representative of the Dane County wing of the party (Tom) running against a Milwaukee-based opponent (Henry Reuss), Tom ultimately prevailed in what was an extremely tight election by some 3,000 votes of the 190,000 that were cast.<sup>153</sup>

Those who knew Tom as a federal judge often remark on the apparent dissonance between the gently ironic, soft-spoken judge engaged in a slugging match with Senator McCarthy at his personal zenith in 1952, a proponent and master of the aggressive low blow and sharply delivered attack school of politics. Indeed, in private conversations with key supporters, McCarthy commented on the ironic situation in which he found himself enmeshed: “[McCarthy] was a Republican with a ‘Democratic name’ and background, and [Tom] was a Democrat with a ‘Republican name’ and background [presumably a

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148. Haney, *supra* note 90, at 161.

149. *Id.* at 150–51, 161–62; *see also* CHRISTOFFERSON, *supra* note 89, at 67; THOMPSON, *supra* note 44, at 589–90.

150. Haney, *supra* note 90, at 162.

151. Fitzpatrick, *supra* note 5, at 50–51.

152. Haney, *supra* note 90, at 162–63.

153. Fitzpatrick, *supra* note 5, at 56; *see also* HANEY, *supra* note 89, at 8; THOMPSON, *supra* note 44, at 591; Haney, *supra* note 90, at 166.

reference to Edward's politics]."<sup>154</sup> As Haney observes in his history of the party, "Thomas Fairchild: soft-spoken, mild-mannered, former Progressive, heir to a tradition of family political leadership in Wisconsin. McCarthy and Fairchild: the dichotomy was nearly total. A 'tail-gunner' against a 'pilot.'"<sup>155</sup>

While the character and campaigning approach of the two men could not have been more divergent, such a dichotomous view fails adequately to credit the tenacity and inexhaustible campaign efforts of the otherwise soft-spoken candidate, not to mention the very real joy he took, traversing the state and meeting the voters, sharing his public policy vision. Thus, Tom waged a characteristically diligent and exhaustive campaign. On Fairchild Day in Milwaukee, his schedule included:

- 9:00 - Republicans for Fairchild Breakfast.
- 10:00 - Reuss Backyard Rally.
- 11:00 - Welcome by Mayor Zeidler.
- 12:00 - Testimonial Luncheon.
- 2:00 - Corner Speech.
- 2:45 - Another Corner Speech.
- 4:15 - Speech at Southgate.
- 5:00 - Sandwiches at Kovack's Pub.
- 7:30 - Parade.
- 8:00 - Veterans for Fairchild Party.
- 8:30 - Fairchild Radio Address.<sup>156</sup>

In all, Tom conducted a 17,000-mile campaign, entirely by automobile, and garnered continued public support from national Democrats intent on defeating McCarthy, including presidential candidate Adlai Stevenson and a racket-busting United States Senator Estes Kefauver of Tennessee.<sup>157</sup> It was one of the first political campaigns in Wisconsin to feature extensive fund raising from

154. Haney, *supra* note 90, at 166-67.

155. *Id.* at 167. Tom often recounted, with a chuckle, an event that reflected this dichotomy. Perhaps out of deference to Edward's continued respected position in the State's Republican Party, Joe McCarthy sent the elder Fairchild a letter indicating that, despite Tom's liberal beliefs and associations, he had no connection with the Communist Party.

156. *Milwaukee Welcomes Fairchild! Fairchild Day! in Milwaukee Saturday, Nov. 1: See and Meet the Democratic Candidate for U.S. Senator Thomas E. Fairchild*, MILWAUKEE SENTINEL, Oct. 31, 1952.

157. Fitzpatrick, *supra* note 5, at 58; *see also Political Notes*, KENOSHA NEWS, Oct. 28, 1952.



out-of-state contributors<sup>158</sup> and rely to a significant extent on radio and television advertisements.<sup>159</sup>

Eleanor also played a significant role in the campaign. In a wonderful letter to Miss Pearl Kluge of Racine, she stated:

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158. Henry Reuss and Jim Doyle Sr. were instrumental in actively identifying and raising financial support for the campaign from out-of-state donors. Thus Reuss, a member of a respected Milwaukee banking family, called a meeting at the “21 Club” in New York City, at which he raised significant contributions in support of the campaign. The meeting also resulted in the hiring of a Manhattan public relations consultant who assisted the party in fund raising from McCarthy opponents on the east coast. Haney, *supra* note 90, at 173–74. The national interest in the race and importance of fundraising efforts originating outside the state was further reflected in a fundraising letter for the 1952 Civil Liberties Appeal:

There is not a liberal in the county, of any age or either party, who does not know that the re-election of Senator McCarthy in Wisconsin would be a major and tragic defeat for everything decent Americans have believed in since the founding of the Republic. . . .

We propose that American liberals unite, not as a committee or as an organization, but as individuals to contribute to the campaign[] . . .

. . . [of] ex-Attorney-General Fairchild who is the Democratic candidate for McCarthy’s Senate seat in Wisconsin . . . .

Letter from Mark De (W) Howe, Archibald MacLeish & Arthur M. Schlesinger (Oct. 1952) (on file with author). This remarkable letter also sought funding for McCarthy foes Democrat William Benton of Connecticut, one of the first Senate colleagues to publicly attack the Senator, and Indiana Governor Schricker, who was running against McCarthy crony Senator William Jenner. *Id.* It was signed by Mark De Wolfe Howe, whose distinguished career ranged from a film director at Paramount Pictures to Dean of the University of Buffalo Law School to army military service during World War II, during which he received the Distinguished Service Medal and Legion of Merit, to the Charles Warren Professor of American Legal History at Harvard Law School to publisher of the papers of Justice Oliver Wendell Holmes, *see Mark De Wolfe Howe Dies; Lawyer, Historian Was 60*, HARV. CRIMSON (Mar. 1, 1967), <http://www.thecrimson.com/article/1967/3/1/mark-de-wolfe-howe-dies-lawyer/>; Arthur M. Schlesinger, eminent Harvard University historian and senior advisor to President John F. Kennedy, *see Douglas Martin, Arthur Schlesinger, Historian of Power, Dies at 89*, N.Y. TIMES (Mar. 1, 2007), <http://www.nytimes.com/2007/03/01/washington/01schlesinger.html>; and Archibald MacLeish, three-time Pulitzer Prize winner (twice for poetry and once for drama), Harvard University’s Boylston Professor of Rhetoric and Oratory, National Book Award and Academy Award winner, and former Librarian of the U.S. Library of Congress, *see Archibald MacLeish*, POETS.ORG (last visited Feb. 24, 2016), <https://www.poets.org/poetsorg/poet/archibald-macleish>.

159. See Fitzpatrick, *supra* note 5, at 52–53, in which there is a description of an early television appearance of Tom, Eleanor, and his youngest son Andy, who had apparently disliked the process and started to yell. After several unsuccessful efforts to calm him down, Eleanor “finally . . . stood up and put him over her shoulder, and said to [Tom,] ‘I think Andy’s had enough.’ And she walked off the set. That was right in the middle of the show.” After subsequently meeting a worker at a plant gate who said, “Oh, you’re the guy whose kid cried on television last night. That was the best part of the program,” Tom jokingly indicated that he had “to acknowledge that Andy was the effective campaigner” in the family.

I shall plan to meet you at [the Business and Professional Women's Club meeting].

Perhaps these bits of information about me will help with your introduction:

Wife of Thomas E. Fairchild, former Attorney General of the state, and former United States Attorney for the Western District of Wisconsin, now the Democratic candidate for United States Senate.

Mother of four children, from 3 1/2 to 13 years of age.

Active in League of Women Voters and in P.T.A. and school activities. . . .

*Presently very much engaged in my husband's campaign!*<sup>160</sup>

Tom's campaign was the premier race statewide for the Democrats.<sup>161</sup> As reported in the *Wisconsin State Journal*,

While Thomas E. Fairchild has had considerable assistance . . . in his campaign against McCarthy, [Gubernatorial candidate William] Proxmire has continued to go it virtually single-handed.

He has had to write his own ads and radio talks, put out his own literature, and get his releases to the newspapers. He and his wife have done most of the work on his mail, and Proxmire has been his own driver on his endless travels of the state.<sup>162</sup>

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160. Letter from Eleanor D. Fairchild to Pearl Kluge (Oct. 11, 1952) (on file with author) (emphasis added).

161. As Haney observed:

Every aspect of the 1952 Democratic campaign in Wisconsin centered around the single-minded goal of defeating Joseph McCarthy. Fairchild's low-key campaign provided an obvious contrast to McCarthy's 'tail-gunner' tactics. Congressional candidates such as [John] Reynolds [Congressional candidate from the Eighth District] and [Horace] Wilkie [Congressional candidate from the Second District] ran against McCarthy. The Proxmire campaign for governor was conducted against McCarthy. Even in the Presidential campaign, the first consideration of Wisconsin Democrats was how to bring about the downfall of McCarthy rather than the election of Stevenson.

Haney, *supra* note 90, at 179.

162. Sanford Goltz, *DOC Shoots Works for Fairchild, While Proxmire is Ignored*, WIS. ST. J., Oct. 30, 1952; see also THOMPSON, *supra* note 44, at 588-89.

This situation, along with fundamental differences in personality and political approach, led to a sometimes thorny, but essentially mutually respectful, relationship between the two men.<sup>163</sup>

Tom delivered a remarkable address in Darlington, Wisconsin that reflected his fundamental and very personal rejection of McCarthy's smear tactics:

We believe in America that truth is developed from free discussion of ideas. Ideas cannot be killed by force. . . . If an idea be wrong, it must be out-thought and proved false by logic and experience. You cannot kill it by punishing the man who holds it. . . .

When we destroy a man's character, we take away from his dignity of soul. We take from him something that money cannot buy, something which may never be regained. When we stop and examine this spectacle, it revolts us. . . .

And yet the floor of the United States Senate . . . has been turned into an arena of crosses upon which the characters of men and women are crucified.<sup>164</sup>

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163. See, for example, a subsequent letter dated May 15, 1956 sent by Thomas E. Fairchild to William Proxmire concerning his on-going race for Wisconsin Governor, which was "intended to be helpful although . . . it may not be flattering." In the letter, Tom proffered "two primary needs which [Proxmire] ought to try to meet during the course of the next several months." First, he urged Proxmire:

You desperately need to create a public impression that you have some constructive program. . . . [T]he second great need of your campaign is to engender a little more enthusiasm for it on the part of the organization people. They will do much if they have the feeling that you are the leader of a great joint effort, in which they are partners, but many of them will devote their energies to other things if they do not feel so. I have sensed that many ordinarily active democrats feel that you are a "loner". [sic]

Letter from Thomas E. Fairchild to William Proxmire (May 15, 1956) (on file with the Wisconsin Historical Society archives, Thomas Edward Fairchild, 1785-1999 collection); see also Fitzpatrick, *supra* note 5, at 74-75. Despite his ultimate considerable electoral success, Proxmire was always viewed as a "political maverick [who] irritated presidents and lawmakers from both parties," confirming Tom's observation about the campaign approach of Proxmire. Richard Severo, *William Proxmire, Maverick Democratic Senator From Wisconsin, Is Dead at 90*, N.Y. TIMES (Dec. 16, 2005), <http://www.nytimes.com/2005/12/16/us/william-proxmire-maverick-democratic-senator-from-wisconsin-is-dead-at-90.html>.

164. Thomas E. Fairchild Speech at Darlington, Wisconsin (draft available in the Wisconsin State Historical Society archives, Thomas E. Fairchild, 1785-1999 Collection). "It is, of course, just plain common sense to be to be on our guard against any infiltration of spies or traitors. But we can do that job - we can protect our government and our institutions - we can do it effectively and forcefully, without ever once lowering our American standards of justice and fair play, and without ever once

Tom's attacks on McCarthy were supported by the Democrats' self-styled and aggressive "Operation Truth," in which prominent Democrats dogged the Senator throughout the state, challenging his blanket assertions, mocking him, and emphasizing his poor attendance and voting record in the Senate.<sup>165</sup> Individual Truth Squad participants included, at one time or another, Gaylord Nelson, William Proxmire, Jim Doyle Sr., Henry Reuss, Carl Thompson, Miles McMillin, and Horace Wilkie.<sup>166</sup>

An encounter with McCarthy in La Crosse, Wisconsin provides a good example of how the Truth Squad functioned during the election. The Senator was speaking at a service club luncheon on a typically hot summer afternoon. Through an open window, attendees could hear Gaylord Nelson and Bill Proxmire, both future United States Senators and proven voter-getters, who were situated outside of the hall, enthusiastically heckling McCarthy, their taunts amplified through a car-top speaker system. During the period set aside for questions at the end of McCarthy's remarks, Miles McMillin, who was a ringer planted in the audience, sought to raise a query for the Senator. "Get him out!" McCarthy shouted him down and informed the audience, "That's a representative of a Communist newspaper."<sup>167</sup> Attendees unceremoniously gave McMillin the "bum's rush" out of the hall, and his question remained unasked and unanswered.<sup>168</sup>

Finally, Tom's career-long commitment to equal rights without regard to race, national origin, or creed occupied a central position in his campaign, operating as a positive message of hopeful aspiration to counter-balance his aggressive attacks on McCarthy's character and tactics. Thus, in a speech on Wisconsin Public Radio, Tom emphatically restated his life-long support for efforts to ensure civil and human rights for all American citizens:

A . . . great issue not only in this campaign, but in out [sic] time, is the struggle for equality of opportunity for every individual. No American child should be limited to inferior education because of his race, creed or descent. No American adult should, by discrimination, be deprived of his chance at the best job he is capable of filling.

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undermining our American ideals of freedom of speech and thought." Thomas E. Fairchild, Talk at Princeton Class of 1935 Dinner (Jan. 16, 1953) (on file with author).

165. See THOMPSON, *supra* note 44, at 584; Haney, *supra* note 90, at 157.

166. CHRISTOFFERSON, *supra* note 89, at 68; THOMPSON, *supra* note 44, at 584.

167. CHRISTOFFERSON, *supra* note 89, at 69.

168. *Id.*

This is a great issue because we know that there can be a free world only if the rights of the individual are respected every where. . . . [W]e can not lead the free world unless we show complete loyalty to the principle of human rights at home.<sup>169</sup>

In spite of Tom's spirited and aggressive campaigning, the extra resources deployed in support of those efforts, and the zealous, if unconventional, support he received from the Truth Squad, McCarthy was reelected by a 54%-46% statewide margin. The beneficiary of many Republican crossover votes,<sup>170</sup> Tom ran comfortably ahead of both Adlai Stevenson on the presidential and Bill Proxmire on the gubernatorial lines.<sup>171</sup>

Tom courageously critiqued not only McCarthy's charges of Communist sympathizers embedded within America's government but the competing process put in place by the Truman administration in 1947 to assess the loyalty of federal employees. Calling for a revocation of the program, Tom concluded, "[S]ome risk of infiltration of disloyal persons into government service [is] inherent in democracy. . . . The present loyalty program is an abridgement of individual liberty and every such encroachment tends toward totalitarianism. To preserve freedom, we must have the courage to take the risks which are the price of freedom."<sup>172</sup> Tom further critiqued President Truman's loyalty program, concluding that "these objectionable aspects of the loyalty program," referring to the absence of rights to confront adverse witnesses and the Attorney General's authority to blacklist, without notice or hearing, any organization he believed to be totalitarian, fascist, communist, or subversive, with membership or sympathetic

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169. Thomas E. Fairchild Radio Speech Delivered on WHA Radio During the 1952 Wisconsin Senatorial Campaign 4 (transcript available in the Wisconsin Historical Society archives, Thomas E. Fairchild, 1785-1999 collection).

170. Fitzpatrick, *supra* note 5, at 58. The campaign was remarkably bi-partisan, as McCarthy opponents from both parties publicly lined up in support of Tom. Thus, a number of organizations were created to support the candidate, including the "Wisconsin Citizens' Committee on the McCarthy Record," which had prominent Republican members including Wisconsin's Secretary of State Fred Zimmerman, popular author Dr. John Schindler of Monroe, and Mrs. Orland Loomis of Mauston, widow of the former Progressive Party leader and Governor of Wisconsin. Additionally, Pat Lucey, Tom's Campaign Manager and a future Governor and national Democratic leader, was instrumental in forming a group known as "Republicans for Fairchild." Jim Doyle Sr. credited this group with having been extremely helpful during the campaign. Haney, *supra* note 90, at 171-73.

171. Fitzpatrick, *supra* note 5, at 58. Indeed, the comparative closeness of the Senatorial election kept Tom and his supporters assembled in his home up until the early morning hours. Haney, *supra* note 90, at 180.

172. Thomas E. Fairchild, Speech 3-4 (transcript on file with author).

association with any such blacklisted group a ground for dismissal, “seem to me certain to make it result in miscarriages of justice even when administered by conscientious people.”<sup>173</sup>

In a handwritten note dated November 6, 1976, unaddressed but almost certainly delivered to Collins Fitzpatrick, the Circuit Executive for the Seventh Circuit who conducted Tom’s oral history, the judge disclosed several personal experiences that had informed his convictions on the failings of the Truman administration’s federal employee loyalty investigative process.<sup>174</sup> First, as a young lawyer in Portage, Tom recalled being flattered at having been identified as a “political leader” and asked to permit his name to be used as a sponsor for some random conference concerning civil rights. Years later, when he was serving as Wisconsin’s Attorney General, Tom received a telegram from an out-of-state union member who was seeking one of his union’s leadership positions. The telegram indicated that its author had information that suggested that his opponent had been involved in a meeting of the Wisconsin Civil Rights Conference at La Crosse in 1940. He inquired of Tom whether any available state files containing information about that meeting could be located and whether such document confirmed that his opponent indeed had been involved in the conference.

Tom diligently investigated the question and located a copy of the program for the meeting in the collection of the Wisconsin State Legislative Reference Library. He replied to the telegram and informed the aspiring union leader that his opponent’s name did indeed appear in a list of participants at the conference. He further recalled, “Having certain tendencies toward honesty . . . I pointed out that, on the following page my [own] name appeared in a list of sponsors of the meeting, and I cautioned him about the inferences to be drawn.”<sup>175</sup>

The next incident occurred when Tom was serving as the United States Attorney in Madison. In those days, when a Selective Service System draft registrant raised a claim to Conscientious Objector status, his file was turned over to the Federal Bureau of Investigation for review. The Bureau’s report was then sent to a Hearing Officer, selected by the United States Department of Justice, who heard the case and made a recommendation to the local Draft Board concerning the sincerity of the claim.<sup>176</sup>

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173. *Id.* at 1-2.

174. Letter from Thomas E. Fairchild (Nov. 6, 1976) (on file with the Wisconsin Historical Society archives, Thomas E. Fairchild, 1785-1999 collection).

175. *Id.*

176. *Id.*

Tom was asked to recruit and nominate such a Hearing Officer. He could think of none better qualified than a distinguished member of the University of Wisconsin Law School faculty, with whom he had studied Constitutional Law as a student and whom he held in the very highest regard.<sup>177</sup> The professor indicated that he was willing to serve, so Tom sent his name on, accompanied by his own enthusiastic recommendation, but heard nothing in response. This soon became embarrassing, as the two men would occasionally run into one another, and the subject of the pending nomination inevitably would come up. Finally, Tom wrote directly to the Bureau and inquired into the status of the nomination. The answer he ultimately received indicated that there existed some doubt as to the professor's loyalty to the United States because, ironically, his name was included on the list of sponsors of the ubiquitous Wisconsin Civil Rights conference at La Crosse in 1940! Tom immediately sent a vigorous and uncharacteristically heated reply that, if this was to be deemed misconduct, he was equally or more guilty of the same because he also had served as a sponsor for the very same conference. Despite the fact that Tom had survived the rigorous loyalty review process required by his position as United States Attorney, notwithstanding his participation in the conference, the proposed appointment was never approved.<sup>178</sup>

Within days of the election, Tom received many telegrams of gratitude and recognition of the good fight that he had waged against McCarthy from Democratic leaders around the country.<sup>179</sup> The characteristically ebullient words of Hubert Humphrey of Minnesota, who had long served as Wisconsin's unelected, honorary liberal Democratic Senator,<sup>180</sup> are indicative of the respect Tom had earned during his campaign:

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177. I have not disclosed the individual's identity, respecting the instructions of Tom in his undated note that this particular occurrence required suitable discretion on the part of his oral historian. *Id.* The incident is not even referred to in the oral history, and identification of the law professor in question accordingly does not appear, so it will not be disclosed here.

178. *Id.*

179. Telegrams included warm wishes from a range of national Democrats including United States Senators Blair Mooney, Dem.-Michigan; Hubert H. Humphrey, Dem.-Minnesota; Earl Clements, Dem.-Kentucky; Estes Kefauver, Dem.-Tennessee; Herbert H. Lehman, Dem.-New York; and William Benton, Dem.-Connecticut; as well as W. Averell Harriman, Democratic Governor of New York and war-time United States Ambassador to the United Kingdom and the Soviet Union. Letters to Thomas E. Fairchild (1952) (on file with the Wisconsin Historical Society archives, Thomas E. Fairchild, 1785-1999 collection).

180. Letter from Hubert H. Humphrey to Thomas E. Fairchild, *supra* note 179; see also Fitzpatrick, *supra* note 5, at 71.

I am sick at heart at the results in Wisconsin. You ran a beautiful campaign under great handicaps. You deserved to win. We are in a difficult period in American politics, however, and the odds simply were against us.

We have a great responsibility here in the Midwest, Tom, to keep the liberal message before the people.<sup>181</sup>

Once again finding himself without a job, Tom joined Floyd Kops and Irv Charne and formed the law firm of Fairchild, Charne & Kops in Milwaukee. During this time, he continued his courageous opposition to McCarthy's methodology and arranged representation for a number of Wisconsin citizens subpoenaed to testify before the United States House of Representatives Un-American Activities Committee (the infamous HUAC). Tom himself successfully represented one such individual who had invoked his Fifth Amendment right not to testify before the Committee and had refused to provide the names of others who might have been associated with the Communist Party. He was justly proud that his client was neither indicted for the crime of perjury nor held in contempt by the Committee.<sup>182</sup>

In 1956, Tom decided to run for a seat on the Wisconsin Supreme Court. The idea had originated with Edward, who was retiring after his long and respected career as a justice on the court. Tom filed his nomination papers in December. There was a three-candidate primary election, which Tom won handily, followed by his more than two-to-one victory in the general election.<sup>183</sup>

Tom participated in many cases during his tenure on the court. Two that reflect his record of a continuing commitment to equal opportunity for all citizens without regard to race and his willingness to render politically unpopular opinions will be briefly considered. The first case is *Ross v. Ebert*,<sup>184</sup> a 1957 lawsuit brought by two African Americans denied membership by the Bricklayer's Union, indisputably on the basis of their race.<sup>185</sup>

The two sought injunctive relief requiring the union to accept them as members, without which they could not obtain employment in the mason's trade. The majority of the court held that, like other voluntary associations, trade unions could establish qualifications for membership and the courts were powerless to compel the admission of an individual

181. Letter from Hubert H. Humphrey to Thomas E. Fairchild, *supra* note 179.

182. Fitzpatrick, *supra* note 5, at 60.

183. WIS. LEGISLATIVE REFERENCE LIBRARY, WISCONSIN BLUE BOOK 780-82 (M.G. Toepel & Hazel L. Kuehn eds., 1958).

184. 82 N.W.2d 315 (1957).

185. *Id.* at 316.



denied membership in such an association. The court also concluded there was no express remedy, even in a case of clear racial discrimination, provided by the Wisconsin Fair Employment Code<sup>186</sup> and rejected any equal protection claim because of the absence of any state action.<sup>187</sup>

Tom filed a vigorous, but lone, dissenting opinion. He believed that trade unions were clearly distinguishable from other voluntary associations and should be subject to judicial restraint if they engaged in racial discrimination. He memorably observed,

We are engaged in a struggle to make equality and freedom realities for all Americans. . . . [T]o be denied the economic opportunity to work out one's destiny as best he can, solely because of a racial or religious difference, impairs the very substance of citizenship itself. Perhaps the degree of the impairment is so great and the character of the rights impaired so fundamental that the wrong must be recognized and remedied by the judicial branch even in the absence of action by the legislature.<sup>188</sup>

He also would have found an equal protection violation, resolving the state action question by finding that a state court's refusal to invalidate private agreements to discriminate based on race would violate the Fourteenth Amendment to the United States Constitution.<sup>189</sup> The dissenting opinion earned Tom the praise of President Harry Truman. It also had legs, as the Wisconsin State Legislature subsequently passed such a law, providing effective remedies for racial discrimination by unions.<sup>190</sup>

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186. See THOMPSON, *supra* note 44, at 330. Tom did not differ from this statutory interpretation. Indeed, while Attorney General, and as early as 1950, he publically called on the Wisconsin State Legislature to amend the Code and provide an effective remedy. See *Stronger State Racial Law Urged*, MILWAUKEE SENTINEL, June 12, 1950 ("A stronger state law relating to race discrimination in employment was advocated Sunday night by Atty. Gen. Thomas E. Fairchild. He told an audience of mixed racial backgrounds at Baha'i Community Center . . . that while there is a law with penalties, which forbids discrimination in places of amusement, the one on employment does not have penalty provisions or enforcement procedure. He said the latter simply states it is the policy of the state not to discriminate.").

187. *Ross*, 82 N.W.2d at 316, 320.

188. *Id.* at 321 (Fairchild, J., dissenting).

189. He did so by drawing an analogy with, and extending, the United States Supreme Court's decision outlawing private covenants excluding African Americans from owning private property in *Shelley v. Kraemer*, 334 U.S. 1 (1948). See *Ross*, 82 N.W.2d at 322 (Fairchild, J., dissenting).

190. Fitzpatrick, *supra* note 5, at 65.

The other decision I will address was indeed mischievous and politically unpopular, which caused trouble, although not so much for Tom, but for his friends and colleagues on the Wisconsin Supreme Court. The case is *McCauley v. Tropic of Cancer*,<sup>191</sup> a 1983 obscenity dispute in which Tom authored the majority opinion, concluding that the autobiographical novel at issue<sup>192</sup> was not obscene.<sup>193</sup>

The clash of experts in the case featured professors from the University of Wisconsin in Madison and Milwaukee on behalf of the controversial Henry Miller novel and clergymen of three faiths in support of the suppression of the book as obscene.<sup>194</sup> Tom concluded for a majority of the court:

Our reading of the book has engendered no enthusiasm. We do not endorse it. Our judgment will preserve its access to the market place where Wisconsin readers may buy it if they choose. In terms of the good that this particular book is likely to accomplish, we probably do no great thing in preserving it. Our function, however, is not to determine the quality of a book. Our duty is to respect and enforce in full measure the freedom of expression guaranteed by state and federal constitutions.<sup>195</sup>

Chief Justice Brown's dissenting opinion was both forceful and blunt:

The book is a collection of anecdotes which, with few exceptions, describe in detail the sexual proclivities of a number of depraved men . . . . [The author's] account of their practices and perversions in the erotic arena are described in the vilest terms known to the English language. The portrayal is patently offense [sic]. . . . "Tropic of Cancer" is saturated with filth in its substance and its expression.<sup>196</sup>

As might well have been predicted, the public response to the court's opinion was sharply critical.<sup>197</sup> A letter to Tom from John Jene

191. 121 N.W.2d 545 (1963).

192. HENRY MILLER, *TROPIC OF CANCER* (1934).

193. *McCauley*, 121 N.W.2d at 554.

194. *Id.* at 551-52.

195. *Id.* at 554.

196. *Id.* at 556 (Brown, C.J., dissenting).

197. Not every letter was negative. Tom's friend Morris H. Rubin, Editor of the *Progressive* magazine, wrote on May 31, 1963, "I appreciate greatly your giving me an opportunity to read the full text of your decision in the *Tropic of Cancer* case. It

of Eau Claire, Wisconsin was representative. He wrote, “A mother’s lot is hard enough without having this filth around so that youngsters can get ahold of it,” and more ominously, “I want to vote in the April election but will not vote for a justice of the Supreme Court who will not try and get rid of the filth . . . .”<sup>198</sup>

Wisconsin legislators were represented by several letters from Republican Assemblyman Ray Heinzen of Marshfield that also were highly critical. The Assemblyman expressed his feelings about the decision to Tom:

Having read enough of the book to make one retch with disgust, I must come to this conclusion: the court has sadly misjudged the “contemporary community standards” (of decency) of a great many Wisconsin Communities, including my own. Your decision implies that our “contemporary community standards” are pitifully low, and I sincerely feel that you owe these communities an apology. On the other hand, if you are right in your appraisal of these standards, then communism has already achieved its goal in America, and is merely waiting patiently to pick up the pieces. . . .

I am not trying to ridicule your opinion. I think you are a capable and conscientious justice, and that’s why I support your re-election. But, as a parent, as a citizen, as a legislator, I also have to exercise my judgment. And in my judgment, you goofed.<sup>199</sup>

Tom’s reply was characteristically at once diplomatic, while also reflecting a certain understated irony:

Thank you very much for your thoughtful letter. I appreciate your taking the trouble to write me what is on your

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is a superb job and I want to renew and extend my congratulations.” Letter from Morris H. Rubin to Thomas E. Fairchild (May 31, 1963) (on file with the Wisconsin Historical Society archives, Thomas E. Fairchild, 1785–1999 collection). Moreover, the United States Supreme Court reached the same conclusion as Tom’s majority opinion in an equally divided *per curiam* opinion—five Justices found the novel could not be suppressed, while four others would have dodged the issue by denying *certiorari*. See *Grove Press, Inc. v. Gerstein*, 378 U.S. 577 (1964).

198. Letter from John Jene to Thomas E. Fairchild (Mar. 29, 1966) (on file with the Wisconsin Historical Society archives in the Thomas E. Fairchild, 1785–1999 collection).

199. Letter from Assemblyman Ray Heinzen to Thomas E. Fairchild (Jan. 6, 1966) (on file with the Wisconsin Historical Society archives, Thomas E. Fairchild, 1785–1999 collection). It is hard to imagine such a letter being written today because of the highly politicized environment of the court. See *infra* notes 210, 221 and accompanying text.

mind. And I am pleased that on the whole record you consider me capable, and support my reelection, notwithstanding your appraisal of the *Tropic of Cancer* decision. . . .

[W]e now know that if our court had decided that *Tropic of Cancer* could validly be suppressed, our decision would have been reversed if appealed. In 1964 the supreme court of the United States (5-4) did reverse a Florida decision suppressing the book.<sup>200</sup>

But perhaps the most serious consequences of the opinion were confronted not by Tom, but first by his good friend and early Democratic Organizing Committee colleague Justice Horace Wilkie,<sup>201</sup> and subsequently by another friend, Justice Nathan Heffernan.<sup>202</sup> Thus, when Justice Wilkie stood for retention in 1964, he was met with an aggressive, intensely partisan, and well-funded campaign in opposition from Howard Boyle, Jr. of Beaver Dam, who ran with the active financial support of conservative political and religious groups throughout the state. Boyle raucously and repeatedly asserted that the high court's liberal philosophy, as exemplified by the *Tropic of Cancer* decision, had contributed to the distribution of obscene literature throughout the state, the breakdown of the family unit, and other symptoms of moral decline. He lashed out at Wilkie personally for his vote in support of Tom's majority opinion.<sup>203</sup>

200. Letter from Thomas E. Fairchild to Assemblyman Ray Heinzen (Jan. 25, 1966) (on file with the Wisconsin Historical Society archives, Thomas E. Fairchild, 1785-1999 collection).

201. Justice Wilkie was a respected member of a politically prominent Madison, Wisconsin family. A former president of the Student Union Board at the University of Wisconsin, *see* THOMPSON, *supra* note 44, at 562, Justice Wilkie had been a fellow Young Turk with Jim Doyle, Tom, Gaylord Nelson, and others; was a member of the McCarthy Truth Squad that supported Tom's candidacy; and was elected to the Wisconsin State Senate in 1956. He was appointed as a justice on the Wisconsin Supreme Court by Governor Gaylord Nelson in 1962 and was successfully retained by the voters in 1964 and again in 1974. He served as Chief Justice of the court from 1974 until his untimely death in 1976. *Supreme Court, Former Justices, Horace W. Wilkie (1917-1976)*, WIS. CT. SYS., <https://www.wicourts.gov/courts/supreme/justices/retired/wilkie.htm> (last updated Mar. 7, 2012).

202. Justice Heffernan served on the Wisconsin Supreme Court from 1964 to 1995 and as Chief Justice from 1983 to 1995, retiring with the third longest tenure in the history of the court. *Supreme Court, Former Justices, Nathan S. Heffernan (1920-2007)*, WIS. CT. SYS., <http://www.wicourts.gov/courts/supreme/justices/retired/heffernan.htm> (last updated Mar. 7, 2012).

203. *Campaign for Court Post Grows Heated*, DAILY TELEGRAM, Mar. 26, 1964, at 3; *see also Decision on Book an Issue in Wilkie-Boyle Court Race*, RACINE J.-TIMES SUNDAY BULL., Apr. 5, 1964, at 6B; *Hopefuls for Supreme Court Discuss Campaign*, OSHKOSH DAILY NW., Apr. 4, 1964, at 10.

Indeed, Boyle's attacks on Justice Wilkie were so over the top and unprecedented that six other Wisconsin Supreme Court Justices (five active justices, including Tom, joined by the recently retired Chief Justice Brown, the author of the court's dissenting opinion) took the unprecedented step of approving a resolution that publicly, and controversially,<sup>204</sup> challenged the propriety of Boyle's brazen attacks on Justice Wilkie.<sup>205</sup> Authored by Justice Myron Gordon,<sup>206</sup> and publicly delivered by him at a luncheon meeting of the Milwaukee Junior Bar Association on March 23, 1964, the statement expressed "deep concern[] about the propriety of an attack on a justice because of his vote on a particular case."<sup>207</sup> In closing, Justice Gordon quoted a former Wisconsin Supreme Court jurist, whose thoughts unhappily hold as much, or more, relevance today as they did when they were written in 1912 by Chief Justice John Bradley Winslow, or when Justice Gordon delivered the justices' public statement in 1964:

The idea that an honest judge is to meet with defeat whenever a decision made by him does not accord with the popular idea upon the subject is an idea which can only make timeservers and cowards of the occupants of the bench. It is at least one degree worse that the idea that an honest judge should be defeated because his political views are at variance with the majority. Fortunately for the stability and manhood of the bench, these ideas have been generally repudiated in Wisconsin.<sup>208</sup>

Justice Wilkie, who had five daughters, was personally vilified and attacked. One of his children, a good friend in college, reported receiving anonymous telephone calls at home as a teenager that cruelly and crudely made alarming and defamatory attacks on the family values and character of Justice Wilkie, a good and decent man.

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204. *Six Justices Join in Boyle Criticism*, MILWAUKEE J., Mar. 24, 1964, at 1; see also Editorial, *Press Views of State Supreme Court Race*, LA CROSSE TRIB., Mar. 26, 1964, at 4.

205. *Total Impartiality Vital Wilkie Says*, LA CROSSE TRIB., Mar. 26, 1964, at 3; see also Press Release, Justice Myron L. Gordon (Mar. 23, 1964) (on file with the Wisconsin Historical Society archives, Thomas E. Fairchild, 1785-1999 collection).

206. Justice Gordon served as a justice on the Wisconsin Supreme Court from 1962 to 1967, when President Lyndon B. Johnson appointed him as a United States District Court Judge for the Eastern District of Wisconsin. *Supreme Court, Former Justices, Myron L. Gordon (1918-2009)*, WIS. CT. SYS., <https://www.wicourts.gov/courts/supreme/justices/retired/gordon.htm> (last updated Mar. 7, 2012).

207. Press Release, Justice Myron L. Gordon, *supra* note 205, at 1.

208. *Id.* at 4; see JOHN BRADLEY WINSLOW, *THE STORY OF A GREAT COURT* 179 (1912).

Justice Wilkie survived these attacks and prevailed in the popular vote.<sup>209</sup> However, the election ultimately helped transform the nature of Wisconsin Supreme Court elections, as they mutated from a nonpolitical consideration of the essentially narrow question of demonstrated professional competence and judicial abilities worthy of retention on the high court to well-funded and aggressive personal *ad hominem* attacks based upon votes taken in controversial cases or on the presumed political ideology and social beliefs of a particular justice.<sup>210</sup>

Ironically, Justice Heffernan, who was not even a member of the court when the *Tropic of Cancer* decision was announced, was forced to confront and ultimately overcome similar difficulties. Boyle, running for a second time in search of a seat on the Wisconsin Supreme Court, seized upon a family law opinion authored by Heffernan that rejected the values of a “less enlightened age,”<sup>211</sup> declaring that the opinion represented “modern thought” that had resulted in an “era characterized by a breakdown of the family unit, free flowing filth and an increase in juvenile indiscretion.”<sup>212</sup> Despite the vigor of Boyle’s attacks and his well-funded campaign, Justice Heffernan won the election, eking out a razor thin margin: 386,907 votes for Heffernan to 366,579 for Boyle. This defeat mercifully put an end to Boyle’s divisive Wisconsin Supreme Court races but, unhappily, not to the vitriolic, personal attacks and harsh language directed at Wisconsin Supreme Court justices, their opinions, and perceived personal values that characterized both of his campaigns.

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209. The vote was 541,419 for Wilkie to 477,649 for Boyle. *Wilkie Wins 10-Year Term on High Court*, OSHKOSH DAILY NW., Apr. 8, 1964, at 1.

210. See, e.g., Mitch Smith, *Wisconsin Supreme Court Election Raises Concerns About Partisanship*, N.Y. TIMES (Apr. 5, 2015), <http://www.nytimes.com/2015/04/06/us/wisconsin-supreme-court-election-raises-partisanship-concerns.html>.

211. *Merten v. Nat'l Mfrs. Bank*, 131 N.W.2d 868, 871 (Wis. 1965) (“Although the only evidence of cruel and inhuman treatment was the striking of a single blow, a single act of cruelty may be sufficient grounds for divorce. . . . What might well in a less enlightened age, or under different circumstances, merely constitute a reasonable interspousal chastisement could constitute cruel and inhuman treatment in this case.”). Boyle, who apparently disagreed with the proposition that the slapping of one’s wife constituted legal grounds for divorce, stated, “[I]t seems typical of modern thought to regard values from the past as something out of a less enlightened age.” *Heffernan, Boyle Differ on Book Issue, Wife-Slapping*, WAUKESHA DAILY FREEMAN, Apr. 1, 1965, at 3. Apparently, Boyle considered at least some forms of what today would be regarded as domestic violence as “values from the past.”

212. *Heffernan, Boyle Differ on Book Issue, Wife-Slapping*, *supra* note 211, at 3; see also Editorial, *Heffernan, Doyle Should Be Nominated*, WAUKESHA DAILY FREEMAN, Mar. 8, 1965, at 10.



Wisconsin Supreme Court. Justices seated left to right: Thomas E. Fairchild; George R. Currie; Grover L. Broadfoot; Chief Justice John E. Martin; Timothy E. Brown; Emmert L. Wingert; and E. Harold Hallows. Wisconsin Historical Society, Wisconsin Historical Society, WHS-97731.



Wisconsin Supreme Court Justice Myron Gordon, who wrote and delivered publicly, the controversial resolution, signed by five active Justices, including Tom Fairchild, challenging the propriety of attacks leveled against the retention of Justice Horace Wilkie based upon his support for Tom's decision for the Court in the *Tropic of Cancer* opinion. Wisconsin Historical Society, WHS-65878.





United States Circuit Chief Judge Thomas E. Fairchild, Seventh Circuit Court of Appeals. University of Wisconsin Law School, permission granted.

After all of the fuss, it was perhaps more than a bit surprising when Tom Fairchild, the author of the controversial *Tropic of Cancer* opinion, ran unopposed in 1966 when seeking a second term on the Wisconsin Supreme Court. After his retention,<sup>213</sup> the future was bright. Tom was in line to become Chief Justice of the court in just two years and could have served in that post for at least eight additional years with another six after that if reelected to serve on the court for a third term.<sup>214</sup>

However, shortly after his reelection, Tom was confronted with a difficult but highly enviable choice. Judge F. Ryan Duffy, a long-time member of the United States Court of Appeals for the Seventh Circuit in Chicago and friend of Tom's, announced that he was finally assuming senior status.<sup>215</sup> An appointment to the Seventh Circuit vacancy essentially was Tom's for the taking with his two long-time associates and fellow Young Turks Gaylord Nelson and William Proxmire then serving as Wisconsin's Senators and Lyndon Baines Johnson, a Democrat, in the White House.<sup>216</sup>

It was a difficult decision for Tom. He greatly enjoyed the work of the Wisconsin Supreme Court and appreciated the collegial and respectful relationship of the justices, not to mention his position on the State's court of last resort considering only cases deemed worthy of high court consideration, as opposed to an intermediate federal appellate tribunal with appeals of right from the trial courts. He also very much looked forward to assuming the office of Chief Justice of the Wisconsin Supreme Court that his father had held immediately prior to his retirement in 1957.<sup>217</sup>

Characteristically, Tom sought the advice of others concerning his difficult decision. This time, he discussed his choices with state supreme court luminaries Justice Walter Schaefer of Illinois and Justice Roger Traynor of California. He also reached out to some individuals in Wisconsin whose advice he especially valued, such as the preeminent legal historian Professor Willard Hurst of the University of Wisconsin Law School and old friends Leon Feingold (the father of Russ Feingold, who later would serve in the United State Senate representing Wisconsin and who delivered a previous Thomas E. Fairchild lecture),<sup>218</sup> and Jim Doyle Sr., who was by then a highly respected

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213. 556,000 Ballots Cast for Judge Fairchild, JANESVILLE DAILY GAZETTE, Apr. 6, 1966, at 12.

214. Fitzpatrick, *supra* note 5, at 73.

215. *Id.* at 70.

216. *Id.* at 73.

217. *Id.*

218. Russ Feingold, *Upholding an Oath to the Constitution: A Legislator's Responsibilities*, 2006 WIS. L. REV. 1. Tom frequently joked that he first encountered

United States District Judge for the Western District of Wisconsin in Madison.<sup>219</sup>

A former Wisconsin Supreme Court colleague, Justice William Wingert, who earlier had been defeated while seeking retention for an additional term on the court, unquestionably gave Tom pause to consider. Wingert emphasized the lifetime tenure that federal judges enjoy, their salary that continued for life, and the very real difficulty he had experienced in starting a new legal career relatively late in his professional life.<sup>220</sup> Tom also could have “gone to school” on the recent retention elections of his friends Horace Wilkie and Nate Heffernan and anticipated the changing nature of the Wisconsin Supreme Court election process as well as the corresponding corrosive effects on the personal and traditionally collegial working relationships among the justices that would inevitably follow.<sup>221</sup>

In any event, after his consultations, Tom ultimately decided to accept the federal appointment to the Seventh Circuit United States Court of Appeals. In 1966, the Seventh Circuit’s Chief Judge, John Simpson Hastings of Indiana, met with Tom and shared his strongly held perspective that it was best if all active judges on the Seventh Circuit relocate their personal residence and judicial chambers to the court’s home in Chicago. Tom respectfully declined to relocate from Milwaukee, where he planned to maintain his chambers in the historic

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the future United States Senator in his crib in Janesville. Fitzpatrick, *supra* note 5, at 80.

219. Fitzpatrick, *supra* note 5, at 73.

220. *Id.* at 74.

221. See *Wilkie Wins 10-Year Term on High Court*, *supra* note 209, at 1; see also Crocker Stephenson et al., *Justices’ Feud Gets Physical*, MILWAUKEE J. SENTINEL (June 25, 2011), <http://www.jsonline.com/news/statepolitics/124546064.html> (“Supreme Court Justice Ann Walsh Bradley late Saturday accused fellow Justice David Prosser of putting her in a chokehold during a dispute in her office earlier this month.”). Disparaging remarks Justice David Prosser had made about Chief Justice Shirley Abrahamson, a former University of Wisconsin Law School professor who had been a Wisconsin Supreme Court justice since 1976 and was the first woman to serve on the tribunal, see *Supreme Court, Justices, Chief Justice Shirley S. Abrahamson*, Wis. CT. Sys., <https://www.wicourts.gov/courts/supreme/justices/abrahamson.htm> (last updated May 8, 2015), apparently prompted a request by Justice Ann Walsh Bradley for Prosser to leave her chambers and preceded the escalating dispute. Stephenson et al., *supra*. One can only look back wistfully to the distant and halcyon days of Edward’s weekly informal teas for his fellow justices and the sincerity and warmth of their personal relationships, whether they agreed on a particular matter that was before the court, were members of the same political party, or shared the same social and political philosophy. See *supra* note 44 and accompanying text; see also WINSLOW, *supra* note 208.

Federal Courthouse, taking the train to Chicago with his law clerk for the occasions when he was scheduled to sit on an appeals panel.<sup>222</sup>

Tom ultimately did move to Chicago in late summer 1974, in anticipation of his pending appointment as Chief Judge of the Circuit the next year. This was the year of my clerkship, and I had the unique experience of working first in the stately, historic Milwaukee Federal Courthouse during the summer months of 1974, then moving to Chicago with my wife in late August. I spent the remainder of my clerkship working in the chief judge's spacious chambers in the Mies van der Rohe-designed Federal Office and Courthouse complex, with its striking and brightly colored Alexander Calder "stabile," entitled *Flamingo*, that was placed in its plaza. This public artwork was dedicated in 1974 with a flamboyant event in which Mayor Richard J. Daley and Calder led a genuine circus parade with a procession of elephants, calliopes, and a team of forty horses up State Street in celebration of the work—an amazing and quite unexpected lunchtime entertainment.<sup>223</sup>

This period of transition from Milwaukee to Chicago resulted in a wonderful opportunity for me. My wife and I relocated to an apartment on the near north side of Chicago, but in September and October she was living in Europe during a graduate research fellowship. At the same time, Eleanor was unhappily closing down their long-time, gracious family residence in Milwaukee, and Tom had moved temporarily into what can only be characterized charitably as a somewhat rundown, even seedy, S.R.O., a bit further north on Clark Street.<sup>224</sup> Largely for the lack of much to go home to at the end of the working day, we often worked in chambers until 6:00 or 6:30 p.m.; adjourned to the nearby historic Berghoff Restaurant, where we closed down the politically incorrectly named "Gentlemen's Bar" and consumed a dinner of German sausage, sauerkraut, and dark beer; and walked back north to our respective lodgings.

This was an unmatched opportunity for me to get to know the judge well from the very start of the clerkship, and I gained a keen appreciation for the fond memories of his political career and his deep,

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222. Fitzpatrick, *supra* note 5, at 76. Tom often enjoyed lunch in Milwaukee with his old political supporter and mentor Senior District Judge Bob Tehan, District Judges Myron Gordon and John Reynolds, and Bankruptcy Judge Bob Hilgendorf. He was very comfortable continuing to reside in Milwaukee and maintaining his chambers in the Federal Courthouse.

223. Lee Bey, *Alexander Calder's 'Flamingo,'* WBEZ 91.4 (Apr. 6, 2010), <http://www.wbez.org/bey/2010/04/alexander-calders-flamingo/19741>.

224. My fellow law clerk Jim Klenk and I often joked at how shocked his fellow S.R.O. tenants would be if they learned that their neighbor was the Chief Judge of the Seventh Circuit United States Court of Appeals.

abiding love for the State of Wisconsin. Indeed, we often joked that, when driving “home” to Wisconsin from our work in Chicago, we both considered briefly stopping in South Beloit to swap our Illinois license plates with the preferred Wisconsin ones, so no passing motorist could gain the wrong impression.

Tom authored many important opinions during his lengthy service on the Seventh Circuit. Certainly, one of the best known was his majority opinion in *United States v. Dellinger*,<sup>225</sup> familiarly known as the “Chicago Seven” appeal. The record in that case consisted of more than twenty-two thousand pages and, as was his uniform custom, Tom and his two law clerks each carefully read the record in its entirety before preparing the final opinion for the court.<sup>226</sup>

Tom’s majority opinion is notable not only for its length and extraordinary, factually rich texture but for the respectful tone taken by its author. In a trial that was laden with misbehavior, name-calling, and taunting by everyone involved, and which featured a clash between the ethos and sense of propriety of the elderly and inflexible, conservative presiding district judge with the sixties, in-your-face and admittedly provocative behavior of the self-styled radical defendants, the opinion is a measured and cautious discussion of judicial and prosecutorial over-reaching. In the end, it is marked by its spirit of noble kindness as much as by its heralded determination of the appropriate judicial process of the state and federal governments in their on-going efforts to prosecute and punish anti-Vietnam War protesters.

Tom’s life-long commitment to civil rights and equal opportunity for all Americans is also evident in his opinion for the Court, while sitting as a senior judge, in *Waters v. Furnco Construction Corp.*,<sup>227</sup> an employment discrimination case, which was later reversed by the United States Supreme Court.<sup>228</sup> In his opinion, Tom stated:

The historical inequality of treatment of black workers seems to us to establish that it is *prima facie* racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing only the names of white bricklayers. How else will qualified black applicants be able to overcome the racial imbalance in a particular craft, itself the result of past discrimination?<sup>229</sup>

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225. 472 F.2d 340 (7th Cir. 1972).

226. Fitzpatrick, *supra* note 5, at 81.

227. 551 F.2d 1085 (7th Cir. 1977).

228. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 581 (1978).

229. *Waters*, 551 F.2d at 1089.

There is discernable throughout the course of Tom's distinguished judicial and political careers a clear, bright line of commitment to civil rights over thirty years from the four lads seeking to swim in the Beloit municipal pool reserved by unbroken custom for whites in the late 1940s that he challenged while Wisconsin Attorney General; to his unambiguous and courageous championing of civil rights and equal opportunity during his 1950 and 1952 senatorial campaigns; to the Milwaukee Bricklayers Union that consciously discriminated based on race, which he condemned in his 1957 dissent while serving on the Wisconsin Supreme Court; to the next generation of Black bricklayers denied employment in Cook County in 1977 because they had not been included in a list of qualified union workers in a trade that had historically excluded them from membership based upon racial identity. He never shrank from the issue, and it was always central to his deeply held personal values, public policy, and legal convictions.

Tom served as a judge on the United States Court of Appeals for the Seventh Circuit from his appointment in 1966 until 1975 when he became Chief Judge of the Circuit for six years. He assumed the position of Senior Judge in 1981 until his death on February 12, 2007, at the age of ninety-four. He gave a fitting recapitulation of his lengthy experience as an appellate jurist in a statement he authored for his oral history:

I have indeed enjoyed the work of an appellate judge, almost ten years on the Wisconsin Supreme Court, where every case got the attention of seven justices, and more than 30 in the Seventh . . . Circuit, where most cases are considered by only three. I have not found decision of cases easy. . . . [W]here there are critical choices to be made in the course of decision, my own insistence on seeing both sides has often made me agonize over them. Nevertheless, there is satisfaction in careful analysis and working out a sound result.<sup>230</sup>

Tom's law clerks and those who knew him well certainly can attest to the great difficulty he often had in resolving close cases. His initial decision of which party should prevail in these cases was most frequently reached through application of his highly developed sense of fairness to all of the parties. More often than not, this initial sense of who "should" prevail as a matter of his innate understanding of "justice" would be confirmed in the end by the legal analysis employed in reaching the ultimate decision. Truly, if a sense of justness, quiet courage, civility, and goodness can be said to be the mark both of an

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230. Fitzpatrick, *supra* note 5, at 87.

exceptional man and of an exceptional judge, then it is easy to appreciate the uniqueness of Thomas Edward Fairchild<sup>231</sup> and the deep respect and affection for him uniformly expressed by his colleagues on the bench<sup>232</sup> and by those employed as his law clerks.<sup>233</sup>

I end with the expression of his former law partner and good friend Irv Charne, who memorialized Tom in words that are applicable to all of us who had the privilege of working with him:

How does one do justice to honoring a person of such extraordinary achievement and such magnificent human qualities [as Tom Fairchild] . . . those of us who had the opportunity to share part of our lives with him have been enriched by that experience. He was a role model for many of us in demonstrating that good can triumph over evil, and that integrity can triumph over opportunism.<sup>234</sup>

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231. Highlighting these character traits of Tom Fairchild in no way is intended to denigrate or minimize the depth of his legal knowledge, experience, and abilities—but these are traits ubiquitous among many federal judges. His exceptional temperament and character were indeed exceptional among his peers.

232. See John Paul Stevens, *A Judge's Use of History—Thomas E. Fairchild Inaugural Lecture*, 1989 WIS. L. REV. 223, 223; Hon. Diane P. Wood, *Snapshots from the Seventh Circuit: Continuity and Change, 1966–2007*, 2008 WIS. L. REV. 1.

233. See Joan H. Lefkow, *Thomas E. Fairchild: A Judge's Legacy*, 2007 WIS. L. REV. 1, 1.

234. Irvin Charne, *Tom Fairchild: Lawyer, Statesman, Judge*, 2007 WIS. L. REV. 27, 27–28.

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