

IN MEMORIAM

TRIBUTES TO THOMAS E. FAIRCHILD

Thomas E. Fairchild died on February 12, 2007 at the age of ninety-four. After serving the state of Wisconsin in various capacities—as the state Attorney General, a U.S. Attorney, and a justice on the Wisconsin Supreme Court—Judge Fairchild joined the U.S. Court of Appeals for the Seventh Circuit in 1966. He graduated from the University of Wisconsin Law School in 1938 and was a member of the *Wisconsin Law Review*. Since 1988, the Law School has held the Thomas E. Fairchild Lecture Series in his honor each spring.

The following essays—written by distinguished members of the legal community—exemplify the breadth and depth of Judge Fairchild’s career. Irvin Charne speaks to the judge’s time as a practicing attorney. Governor Jim Doyle and Senator Russ Feingold provide a more personal view, as their fathers participated in Judge Fairchild’s political endeavors. Former Wisconsin Supreme Court Chief Justice Nathan S. Heffernan recounts the experiences of a young justice who served with then-Justice Fairchild at the end of the latter’s tenure on the court. Current Wisconsin Supreme Court Chief Justice Shirley S. Abrahamson attests to her relationship with Judge Fairchild as a peer in the American Law Institute. Finally, Judge Richard D. Cudahy and U.S. Supreme Court Justice John Paul Stevens present the perspectives of colleagues on the Seventh Circuit Court of Appeals.

The *Wisconsin Law Review* is honored to celebrate Judge Fairchild’s legacy of public service to the state of Wisconsin.



TOM FAIRCHILD: LAWYER, STATESMAN, JUDGE

IRVIN CHARNE*

How does one do justice to honoring a person of such extraordinary achievement and such magnificent human qualities?

Tom Fairchild was born and raised in Milwaukee, Wisconsin. He received his undergraduate education from Deep Springs College in California, Princeton, and Cornell. While at the University of Wisconsin Law School, he was a member of the *Wisconsin Law Review* and was elected to the Order of the Coif. Following his graduation in 1938, he practiced law with Dan Grady in Portage, Wisconsin, with the Miller, Mack & Fairchild firm in Milwaukee, and with the firm of Fairchild, Charne & Kops in Milwaukee (where he was my partner). His experience in private practice served him well throughout his legal career. He dedicated the bulk of his professional life, however, to public service—which I believe was his great and unique contribution to our profession and to our society.

Tom Fairchild was one of the intelligent and dedicated idealists who joined Bob Tehan to establish a viable Democratic Party in our state, and he helped to provide real meaning to a two-party government in Wisconsin. At the request of James E. Doyle, Sr., he agreed to run for attorney general in 1948, and his election to that office required that he leave private practice. Then, he sacrificed an opportunity for reelection to run against Senator Alexander Wylie as the Democratic candidate for the U.S. Senate. Two years later, he gave up his position as U.S. Attorney to run as the Democratic candidate against Senator Joseph McCarthy.

In those days, a Wisconsin Democrat really did not stand much of a chance for election to a state-wide office. But Tom's willingness to run for partisan office at the cost of giving up a paying job contributed to the establishment of the Democratic Party and helped to pave the way for later campaigns. Tom's race for elective office—including his two successful campaigns for election to the position of justice of the

* Irvin Charne is a practicing lawyer in Milwaukee. He first met Judge Fairchild while clerking for Judge Robert E. Tehan when Judge Fairchild was serving as the U.S. Attorney for the Western District of Wisconsin. Among his many professional accomplishments, Charne has served as the President of the Seventh Circuit Bar Association and was a co-recipient (with Judge Fairchild) of the American Inns of Court Foundation's Seventh Circuit Professionalism Award in 2001.

Wisconsin Supreme Court—made a lasting impression on him. He truly enjoyed the opportunity to get to know the people of Wisconsin.

As a result of these campaigns and his years of work as a public servant, the people of our state developed a remarkable outpouring of respect and affection for him. Without doubt, Tom Fairchild was one of the most admired and well-liked public servants who has ever held public office in Wisconsin. His integrity and dedication, even at the risk of personal sacrifice, were well known to many.

For example, shortly before his 1950 U.S. Senate race, while Tom was still acting as attorney general, his office issued an opinion declaring participation in “Stop The Music”—a radio-contest show awarding large prizes—an unlawful activity in Wisconsin. His decision to outlaw it in the state of Wisconsin created a furor; some voters even wrote snide remarks on their ballots as they voted for his opponent in the election. Most political pros indicated that they could not understand why he had not delayed the issuance of the opinion until after the election. The general consensus was that he was too honest for politics.

To delay the issuance of the opinion would have been inconsistent with the way in which Tom Fairchild lived his life. Every time a decision had to be made between what was right and what was expedient, right prevailed. In 1956, when he was planning to run for the Wisconsin Supreme Court, the House Un-American Activities Committee subpoenaed known Communists in Wisconsin to testify at a hearing at the Federal Building in Milwaukee. The subpoenaed witnesses had difficulty in finding lawyers to represent them at the hearing, and they asked Tom Fairchild to help them. He did not say that he was busy or that it was an inconvenient time for him to be defending Communists. He agreed to undertake the representation, and recruited other members of the Bar to join him in the fulfillment of our professional commitment. He felt strongly that each person who needed representation by an attorney should be able to secure it.

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.

TRIBUTE TO JUDGE TOM FAIRCHILD

GOVERNOR JIM DOYLE*

I grew up in a family that revered Tom Fairchild. He was a man of great intelligence, commitment, compassion, and humility. His contributions to Wisconsin and the United States were extraordinary.

Judge Fairchild was born to a distinguished family. A leading force in the creation of the modern Democratic Party of Wisconsin, he fought the good fight—often against long odds. His election as Attorney General in 1948 was the first big victory for the newly emerging party. His campaign against Senator Joe McCarthy is still remembered for its decency and courage.

Judge Fairchild moved from politics to become one of our country's most outstanding judges. He possessed all the qualities of a great jurist. I always believed that he, like my father, was born to be on the bench. Fair, considerate, and brilliant, he shaped this country's law in his quiet way and demonstrated to several generations of lawyers what a high calling the legal profession is.

In his later years, Judge Fairchild and Eleanor moved in down the street from my parents. Their warm friendship helped my mother and father immensely.

Judge Fairchild was an extraordinary man—the best our great state has to offer.

* Jim Doyle was elected governor in 2002. From 1990 until 2002, he served as attorney general of Wisconsin.

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A TRIBUTE TO JUDGE THOMAS E. FAIRCHILD

SENATOR RUSS FEINGOLD*

Judge Thomas Fairchild was one of the great jurists in the history of Wisconsin, and someone I was honored to call a family friend and a mentor. I have heard many people speak about Judge Fairchild over the years, and whenever they do so, they wait a moment, as if they need to pause before invoking the name of someone held in such high esteem. He possessed much more than a keen mind and great legal skill; he also had a wonderfully kind manner and a deep sense of humility.

Judge Fairchild had a long and distinguished career in public service, including his time as Wisconsin's Attorney General, as a U.S. Attorney, as a Wisconsin Supreme Court justice, and as a judge on the U.S. Court of Appeals for the Seventh Circuit. He fought for justice and equality on the bench and in politics. Through his courageous run for the Senate against Senator Joe McCarthy in 1952 and other efforts, he played a critical role in revitalizing the state's Democratic Party.

Judge Fairchild was not only a great public servant and a man of exceptional character, but he was also someone who was extremely special to my family. He and my father, Leon Feingold, were good friends dating back to their days at the University of Wisconsin Law School, and he seemed like family to me.

As is the case with anyone who has known me for more than forty years, Judge Fairchild called me "Rusty." He influenced my life from early on, seeing me for the first time when I was in my crib in our family home in Janesville. Judge Fairchild was a wonderful role model: a dedicated public servant who treated everyone he came across with dignity and kindness.

When Judge Fairchild was a young lawyer at Miller, Mack & Fairchild, which later became Foley & Lardner, his interest in public service led him to leave the firm to run for attorney general of Wisconsin. Years later, when I was a young lawyer at Foley & Lardner thinking about running for office myself, I looked to Judge Fairchild as

* U.S. Senator from the state of Wisconsin. Senator Feingold delivered the Seventeenth Thomas E. Fairchild Lecture at the University of Wisconsin Law School. See Russ Feingold, U.S. Senator, Upholding an Oath to the Constitution: A Legislator's Responsibilities, Thomas E. Fairchild Lecture (May 2, 2006), *in* 2006 Wis. L. REV. 1.

an example. It was one of the many times that I did this, and one of the many ways he influenced my life.

In our home, my father and my mother, Sylvia Feingold, referred to Judge Fairchild with reverence. Growing up, my siblings and I often heard about family friends active in progressive politics, but no one was mentioned with more genuine affection and respect than Judge Fairchild.

Some of the biggest decisions of his career were made, at least in part, in my family's home. My parents used to point to our living room and say with great pride that Judge Fairchild decided to run for the Senate against Joe McCarthy while sitting on their couch. Public service was such an important value in our home, and when Judge Fairchild stood up to McCarthy's fear-mongering, he made my family particularly proud to call him a friend.

Judge Fairchild was part of a generation of Democrats in Wisconsin which energized the Democratic Party in our state. My father also was involved in the effort to rebuild the party, and he and Judge Fairchild shared a strong commitment to a progressive Democratic Party in Wisconsin. Their work played a critical role in the party's growth then, and in its success to this day.

That is one of the many reasons why, so many years later, it was a tremendous honor for me to speak at the Thomas E. Fairchild Lecture at University of Wisconsin Law School. Established in 1988 as a tribute to Judge Fairchild, the lecture is just one reflection of his tremendous stature in Wisconsin. When I delivered the Fairchild Lecture in 2005, with Judge Fairchild listening in the audience, it was a wonderful experience.

I am deeply saddened by the passing of Judge Fairchild, and the loss that this means for his family and for all those who knew him. He was one of our state's great legal minds, and one of its most dedicated public servants. I feel so fortunate to have known him, and am so grateful for the many things he taught me and the many kindnesses he showed me over the years. The work he did, and the life he lived, will continue to enrich Wisconsin and the nation for many years to come.

TOM FAIRCHILD REMEMBERED

FORMER CHIEF JUSTICE NATHAN S. HEFFERNAN*

I am honored to join in the *Wisconsin Law Review*'s tribute to Tom Fairchild. Tom was a friend, mentor, and guiding inspiration throughout my career in politics and in the Wisconsin judiciary. I do not remember when I first met Tom Fairchild. I believe it was in or about 1950, shortly before Tom's first political race—the race for Attorney General. It was about two years before I first tried my hand, unsuccessfully, at politics by running as a Democrat for District Attorney of Sheboygan County.

I do remember meeting Tom and hearing him speak. I was impressed by his calm and dignified demeanor, leavened by a sense of humor (which was sometimes ribald as I discovered later) and his obvious passion for justice. I was privileged to support Tom in his successful race for attorney general and his unsuccessful campaigns for the U.S. Senate.

I campaigned for Tom when he ran successfully for the Wisconsin Supreme Court to succeed his father. I remember well a wintry dawn in the spring of 1957, standing with Tom in Sheboygan as he greeted the workers at plant gates; it was bitter cold as the icy blasts came across the river from Lake Michigan. But what was one day of discomfort for me was a daily event for Tom as he campaigned across the State. It was in this campaign that I got to know Tom Fairchild as a dedicated and thoughtful person who exuded competence and compassion.

When I became U.S. Attorney for the Western District of Wisconsin, Tom was a justice of the Wisconsin Supreme Court. We frequently met for lunch, there I had the good fortune to better understand my duties by listening to Tom's experience in the same position only a few years before.

After three years as U.S. Attorney, I was appointed to the Wisconsin Supreme Court by Governor John Reynolds and became a colleague of Tom's. By this time, he was second in seniority on the court and was in line to become the next chief justice. Tom more than lived up to my expectations. He obviously was very bright and an

* Chief Justice Heffernan sat on the Wisconsin Supreme Court for thirty-one years, serving as Chief Justice from 1983 until he retired in 1995. He passed away on April 13, 2007.

accomplished legal scholar, but more importantly his passion for justice shined through all of his court work. He was a model of what a great judge should be. He was diligent and collegial. He searched the record of every case before us and was adamant in assuring that the case decided by the supreme court accurately reflected the case that the parties tried in the court below. While Tom was clearly a liberal Democrat in his precourt political days, I never sensed that political partisan considerations influenced his decisions on the court; but, to paraphrase a Gilbert & Sullivan lyric, “Every child born into this world alive is bound to be a little liberal or a little conservative.”¹

He stressed in conference that we had to give the parties full recognition of what actually transpired in the trial court with meticulous attention to the facts (if found by a jury), to the decision of the trial judge, and to the briefs of the parties. He was a judicial conservative in the sense that we reviewed a case only on the facts before us and that the decision did not go beyond what was necessary to decide the particular case. Yet Tom Fairchild was an “activist” in making sure that the law moved forward consistent with the cause of justice. Tom did not hesitate to reexamine the existing law to accomplish that end. He was a leader in the Court’s abrogation of common-law immunities with respect to tort liability and in the application of comparative contributory negligence to joint tortfeasors. He also was a leader in recognizing the duty of courts to rectify the malapportionment of legislative districts when the legislature failed to act. In conference he was superb. He was friendly, open-minded, and collegial. It was a pleasure to discuss and debate a case with Tom Fairchild.

I was the junior member of a great court. Shortly after I became a justice of the Wisconsin Supreme Court, I met Roger Traynor, Chief Justice of the California Supreme Court. He greeted me by saying, “You are a very lucky young man. You are on the best court in the country.” When I demurred to that, he said, “Yes, you are. All are excellent judges, and two, George Currie and Tom Fairchild, are the best appellate judges in the country.”

I frequently found myself on the same side with Tom in the court’s decisions. On occasions when I wrote an opinion to which Tom dissented, his dissent would be logically and respectfully expressed, and would illuminate the law.

Still, as much as I loved his abilities as a judge, I am even more grateful for his friendship and tutelage over the years. My career and my life have been enriched. I missed him when he left for the U.S. Court of Appeals, and the Wisconsin Supreme Court missed his wise

1. W.S. Gilbert & Arthur Seymour Sullivan, *Iolanthe*, in *THE COMPLETE PLAYS OF GILBERT & SULLIVAN* 209, 228 (W.W. Norton & Co. 1997) (1941).

and friendly counsel. Happily our friendship continued for the years after he left Wisconsin. Tom's great contribution to Wisconsin and its jurisprudence continues to live. The cause of justice in Wisconsin and in the federal courts has been much enhanced by a great judge, Thomas E. Fairchild.²

2. I cannot but believe that Tom found the work of the Wisconsin Supreme Court personally more satisfying than that of the Seventh Circuit. In 1999, he discussed the common-law function of a state court: "[T]here are times when they properly take action when the legislature fails to recognize the need. This process was interesting and challenging and had no counterpart on the federal court of appeals." THOMAS E. FAIRCHILD, *THE ORAL HISTORY OF JUDGE THOMAS E. FAIRCHILD* 88 (1999).

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THOMAS E. FAIRCHILD: MY HERO, MY FRIEND

CHIEF JUSTICE SHIRLEY S. ABRAHAMSON*

I first heard of Thomas E. Fairchild when I came to Wisconsin in 1956. In that year, he succeeded his father, Justice Edward T. Fairchild, as a member of the Wisconsin Supreme Court. Stories about the father-son team were repeated in legal circles. I thought, how wonderful for both the father and the son for an illustrious son to follow in the footsteps of an illustrious father.

Justice Tom Fairchild was much admired for attorney Tom Fairchild's courageous willingness to undertake representation of unpopular individuals called before the House Un-American Activities Committee, his stand against Senator Joseph McCarthy in the 1952 U.S. Senate race, and his work to revitalize the Democratic Party in Wisconsin. Attorney Tom Fairchild gave voice to his principles—often at risk to his career.

Tom Fairchild was a “household” name in the LaFollette, Sinykin, Doyle & Anderson firm in which I practiced law starting in 1962. My partners Gordon Sinykin and James E. Doyle, Sr. were good friends, admirers, and supporters of Tom Fairchild. I began to feel that I knew Tom Fairchild (although I had met him casually only a few times), and I thought of myself as a Tom Fairchild groupie. Tom Fairchild, as attorney and as judge, was my hero and role model.

I came to know Tom personally when I joined one of his favorite institutions, the Wisconsin Supreme Court. I spoke with him about the court I was joining—its members and institutional history, habits, and quirks. Having heard that he had a significant collection of limericks about judges and lawyers carefully preserved in a guarded file box and desperate for speech material, I called to ask whether he would share some limericks with me. Somewhat sheepishly, he explained that his limericks might be characterized as risqué and not suitable for my public recitation. Indeed, even he did not use them publicly! (I hope the

* Chief Justice Abrahamson has served on the Wisconsin Supreme Court since 1976, and became chief justice in 1996. She delivered the Thomas E. Fairchild Lecture at the University of Wisconsin Law School in 1994. See Shirley S. Abrahamson, Justice, Wisconsin Supreme Court, Refreshing Institutional Memories: Wisconsin and the American Law Institute, Thomas E. Fairchild Lecture (Oct. 28, 1994), *in* 1995 Wis. L. REV. 1.

limericks have been preserved so an academician can study “lawyer jokes” and changing concepts of risqué over more than a half-century.)

I watched for and read Tom’s Seventh Circuit opinions. He taught me to decide no more than the issue presented, to remember that cases involve real people with real problems, to appreciate the dire circumstances in which lawyers and litigants often find themselves, and to decide cases on the basis of the facts and law without a personal ideology or agenda.

Our paths crossed professionally and personally with frequency at the quarterly council meetings of the American Law Institute, at parties in Madison, and at judicial and bar events. I also spent one evening a month with Tom for a couple of years at the Madison Inns of Court.

Tom devoted his life to the law, to public service, and to the people of the state of Wisconsin. Judge Tom Fairchild was deservedly much admired as a judge of intellect, administrative ability, impartiality, decency, honesty, dignity, warmth, and integrity. Tom’s reputation as a wise man, a raconteur, and a wit was well deserved. He taught all of us how to be good people and to recognize and respect the good in everyone.

When in several instances I had to choose a fork in the road of my career, I always called Tom for an honest, impartial, neutral, no “personal agenda” discussion of the pros and cons of taking, in Yogi Berra’s words, the “forks.” His advice was always helpful and always on point. And I followed it.

Tom Fairchild started out as a young woman’s hero, and as I watched him over the years, I have never had to change his status in my heart or mind. More importantly, it became my privilege to call Tom a friend.

For those of us who knew Tom Fairchild, we shall remember him. We shall continue the principles by which he lived his life—each in our own way. And we shall miss him.

TOM FAIRCHILD—WISCONSIN ICON

THE HONORABLE RICHARD D. CUDAHY*

Thomas E. Fairchild was the son of Justice Edward T. Fairchild, an influential leader of the Wisconsin Supreme Court in the turbulent thirties and forties. That court then was struggling with novel economic issues like whether utility rates should bend with other prices to the forces of deflation.¹ Even I, as a child, felt the ultimate power of Edward Fairchild and his colleagues in deciding how my family arrangements were to be resolved.²

Tom Fairchild built with devotion and outstanding success upon the heritage of his father. That heritage was there for all to see in the political arena, where the honor and distinction accumulated by the father for the name “Fairchild” (reinforced by his run for Governor) helped launch the son to early and spectacular electoral achievements. Not much later, however, the Fairchild heritage asserted itself even more pervasively as Tom followed his father to the Wisconsin Supreme Court and later moved seamlessly to the federal bench (where I was honored to be his colleague). Tom was more liberal than his father, but his liberalism often did not extend to criminal cases. Tom affirmed a drug conviction in *United States v. Smith* against entrapment claims vigorously supported in a dissent.³ In *United States v. Schmuck*, the U.S. Supreme Court sustained Tom’s continuing support of a mail-fraud conviction against objections to the jury instructions.⁴

It was completely evident that Tom was every inch a judge and, for good measure, the son of a judge whose heritage he treasured. On the lighter side, Tom, like his father, was a raconteur of note. He famously recruited “Beer Panels” of his law clerks to sample Milwaukee’s iconic beverage and exchange yarns on Friday evenings. In a more serious way, he was “a lawyer’s lawyer.” At conference on the Seventh Circuit, when it came his time to state his opinion on how a

* Judge Cudahy is a Senior Judge on the United States Court of Appeals for the Seventh Circuit, where he served as a colleague of Judge Fairchild since 1979.

1. See *Wis. Tel. Co. v. Pub. Serv. Comm’n*, 232 Wis. 274, 287 N.W. 122 (1939).
2. See *Cudahy v. Cudahy*, 217 Wis. 355, 258 N.W. 168 (1935).
3. 508 F.2d 1157 (7th Cir. 1975).
4. See 776 F.2d 1368 (7th Cir. 1985), *rev’d en banc*, 840 F.2d 384 (7th Cir. 1988), *aff’d*, 489 U.S. 705 (1989).

case should be resolved, he gave responses which were always balanced, always deliberate, and always clothed in the precise language that lawyers treasure. This is by no means to say that he slighted the “big picture”—the larger implications of things or the controlling value judgments. It was just that, in articulating the “bottom line,” he left no word out of place, no concept unrefined, and no factor unweighed.

Judge Fairchild was equally exacting in the writing of opinions, where he frequently employed his linguistic skills to extend constitutional protections to areas that may or may not have been crying out for attention. In *Pence v. Rosenquist*, he encountered a school-board policy precluding a person with a mustache, no matter how neatly trimmed, from driving a school bus and held that the prohibition lacked a rational relationship with a proper school purpose.⁵ In so holding, Judge Fairchild had to reconcile the Seventh Circuit decision in *Miller v. School District Number 167*, which held a government employee’s interest in choosing a style of appearance was not significant enough to raise a constitutional issue,⁶ with the Supreme Court’s decision in *Kelley v. Johnson*, which defined the test for a substantive due process violation as requiring a demonstration that there was no rational connection between the policy and the accomplishment of the public purpose.⁷ In undertaking this challenge, Judge Fairchild showed how impressively skilled he was in the craft of lawyering.

And Tom Fairchild was a leader. I learned this in the simplest, though not trivial, way on the first day I prepared to sit with a panel of the court in October 1979. As I readied myself to walk from my chambers located on the newly acquired twenty-sixth floor to our magnificent courtroom on the twenty-seventh, Chief Judge Fairchild suddenly appeared at my door and offered to take me in tow. Perhaps he thought I might get lost on the way to the bench, or perhaps he was only afraid I might be late; but he just was not about to have me wandering about on my own on that maiden trip. More likely, I think he saw his role as the chief judge to show his support by escorting me (the neophyte) to my first judicial assignment. So far as I know, this was an unusual thing for a chief judge to do: judges, even chief judges, pretty much leave their colleagues to their own devices, I guess assuming they know everything from birth. But not Tom Fairchild, he reached out to be helpful.

In the same vein, Tom and Eleanor Fairchild were forthcoming with the warmest hospitality when Janet and I joined the court. They

5. 573 F.2d 395 (7th Cir. 1978).

6. 495 F.2d 658 (7th Cir. 1974).

7. 425 U.S. 238 (1976).

arranged social events for judges, new and old, just to break down whatever barriers there were among them. This too was leadership.

Although *Pence* was a masterpiece in its own way, it was certainly not the most famous of Judge Fairchild's judicial products. That designation belongs to *United States v. Dellinger*—the reversal of an Anti-Riot Act conviction of a coterie of New Leftists, who were ostensibly inciting to riot in the instigation of protest demonstrations at the Democratic National Convention in Chicago in 1968.⁸ A principal basis of reversal was the failure of District Judge Julius Hoffman to probe in voir dire the attitudes of prospective jurors toward protests against the Vietnam War (specifically with respect to youth culture as well as relationships with law enforcement officers).⁹ The opinion also explored the value of the testimony of expert witnesses on racial discrimination, youth culture, torture of prisoners of war, and other sensitive issues of the day, and rested reversal on the district court's refusal to admit a great deal of this testimony.¹⁰

It is the rulings in these areas—with their awareness of the “big picture” and of the real-world implications of what was charged as criminal conduct in the case—that are so characteristic of Judge Fairchild. *Dellinger* involved not only protest against what many viewed as an ill-chosen war but also a broad social movement involving a more aggressive and a more politically sensitive role for youth.

What are the other memorable qualities of this treasure of Wisconsin public life and history? These qualities—both personal and professional—are too numerous and too significant to receive adequate treatment here. Many of them are more sharply portrayed in reminiscences of his political career than in judicial events. As attorney general, it came to his attention that African-Americans were being practically excluded from the better of two swimming pools in Beloit, and he moved promptly to correct the situation even though it was not the product of any official action. But a principle was involved.

Later, in his judicial work, he repeatedly demonstrated a proclivity to paint with a broad brush in issues of race discrimination. Although the Supreme Court rejected his view in *Waters v. Furnco Construction Corp.*, he said that

[t]he 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

8. 472 F.2d 340 (7th Cir. 1972).

9. See *id.* at 370-71.

10. See *id.* at 382-85.

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?¹¹

And in *United States v. City of Chicago*, he argued for retention of a 40 percent quota for minority police sergeants (an aspirational approach), while the en banc court voted for a downward quota adjustment to reflect changed circumstances.¹²

As a state and federal judge and a Wisconsin icon, Tom Fairchild filled a unique role and set a rare example for those of us who follow. Perhaps a permanent Beer Panel should be invoked in his memory.

11. 551 F.2d 1085, 1089 (7th Cir. 1977), *rev'd*, 438 U.S. 567 (1978).

12. No. 80-2235, 1981 WL 15482 (7th Cir. May 8, 1981), *rev'd en banc*, 663 F.2d 1354 (7th Cir. 1981).

TOM FAIRCHILD: FRIEND AND COLLEAGUE

JUSTICE JOHN PAUL STEVENS*

Tom Fairchild was a superb judge, an extraordinarily decent man, and a good friend. I first met him after joining the Court of Appeals for the Seventh Circuit in 1970. As the son of a distinguished Wisconsin judge, he inherited a special judicial temperament that radiated fairness and impartiality. His research was meticulous and thorough, and he always made sure that he understood the arguments that he was rejecting. His writing was always clear, cogent, and decisive. By his example, he constantly reminded his colleagues that it was more important to get the right answer than to get an answer quickly. He taught me many lessons, but one I have never forgotten is that a judge enhances respect for the rule of law by using the word “we” to describe a precedent that the judge did not personally endorse.

Occasionally judges must make unpopular decisions. Life tenure makes that aspect of our work less significant for federal judges, but elected judges have good reason to worry about possible unpopularity. That Tom was totally fearless and independent, even when on the Wisconsin bench, is well-illustrated by his opinion in *State v. Milwaukee Braves, Inc.*¹ As a lawyer doing antitrust work, I originally took note of his opinion for two totally unrelated reasons. First, it was a precedent that supported the legal position I advocated on behalf of Charley Finley when urging the American League to approve the transfer of the Athletics from Kansas City to Oakland. Second, to buttress his explanation of Congress’ intent, Tom quoted a key paragraph from a 1952 congressional report on “Organized Baseball” resulting from hearings of the Subcommittee on Study of Monopoly Power of the Committee on the Judiciary. I had served as counsel to that subcommittee during those hearings and happened to have been the author of that paragraph.²

* Associate Justice, United States Supreme Court. After serving on the Court of Appeals of the Seventh Circuit for five years, Justice Stevens joined the Supreme Court in 1975.

1. See 31 Wis. 2d 699, 144 N.W.2d 1 (1966).

2. *Id.* at 717, 144 N.W.2d at 10.

As part of its Conclusion, the Subcommittee said [the following]:

If there was ever an opinion that was certain to outrage the local electorate, it was this opinion for the 4-3 majority reversing the trial court's holding that Wisconsin's antitrust statute overrode the National League's power to move the baseball club to Atlanta.³ Some of the statistics that Tom recited in that opinion—the contrast between attendance of only 240,000 fans in the team's last year in Boston and sales that exceeded two million during successful seasons in Milwaukee⁴—demonstrated beyond doubt that Tom was following his understanding of the law rather than the Gallup poll. Tom's opinion was especially remarkable because it endorsed a legal theory that the average fan would have difficulty accepting. He held that the League had violated the Wisconsin statute, but that the violation was preempted by the dormant Commerce Clause—in other words, Congress' silence had trumped a sovereign state's power to keep its baseball heroes at home.⁵

The “small world” that Tom and I shared was not limited to antitrust law or baseball. It was vividly recalled during the recent ceremonies acknowledging the achievements of perhaps our most underappreciated president—Gerald Ford. Tom and his beloved wife Eleanor were with me when I first met President Ford at a White House dinner in the fall of 1975. A few days later, after the President had telephoned me to inform me of his decision to appoint me to replace Justice William Douglas, it was Tom to whom I first turned for advice and who calmly told me what to expect and how I should react during the ensuing hectic days. Needless to say, I have nothing other than gratitude, respect, and affection to remember about Tom.

“The subcommittee recognizes, however, that baseball is a unique industry. Of necessity, the several clubs in each league must act as partners as well as competitors. The history of baseball has demonstrated that cooperation in many of the details of the operation of the baseball business is essential to the maintenance of honest and vigorous competition on the playing field. For this reason organized baseball has adopted a system of rules and regulation that would be entirely inappropriate in an ordinary industry.”

Id. (quoting H.R. REP. NO. 82-2002, at 229 (1952)). My memory concerning authorship may be flawed because our especially competent research assistant, Peter Craig, prepared the first draft of the report.

3. *See id.* at 732, 144 N.W.2d at 18.

4. *See id.* at 702, 144 N.W.2d at 2.

5. *See id.* at 728-30, 144 N.W.2d at 17-19.