

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

1999

Today is September 15, 1992. I am in the chambers of Circuit Judge Thomas Fairchild, in Madison, Wisconsin, and we're starting an oral history. My name is Collins Fitzpatrick. I'm the Circuit Executive.

CTF: Judge Fairchild -- maybe you can tell us a little bit about the family, where your mother and father are from and their parents, so that we can get an idea of the background that the family comes from.

TEF: Well, we were part of the traditional westward movement, I guess. My mother and father both came from a place in western New York, about 70 miles from Buffalo, about 40 miles south of Rochester, a little town called Dansville in Livingston County, New York.

My mother's family had migrated there. Her great-great-grandmother was the first white woman in that vicinity, back in 1795. She was a Scotch-Irish lady. Her second husband's name was McCoy. The name that matters to us (of her first husband and children) was McCurdy. My mother's other lines kind of converged there in Dansville, largely Yankee people, and one German line, which had first settled in this country in Philadelphia, and later migrated up to western New York.

My father's people -- the American original Thomas Fairchild was a guy who came from England to Stratford, Connecticut in about 1639, and that family had moved from generation-to-generation to Vermont, Central New York, and finally, my father's father had wound up in Dansville. His mother came from Pennsylvania German families which had come to farm in the town of Sparta, near Dansville.

CTF: Are these ancestors coming to America because of religious persecution, or because of economic promise, or do you know?

TEF: I don't really know, and I suppose it would be different for different ones. The Endress -- that was my mother's mother's family. The man that came, John Zachariah Endress, who came to Philadelphia from Germany, was kind of an adventurer. He had been captured by Barbary pirates, and he lived in France for a while, and had some run-ins with the authorities there on account of religion. He was kind of an enterpriser. He started a brewery in Philadelphia, burned by the British in the Revolution. The others -- I think it was probably economic opportunity, the ones from Northern Ireland, and from Great Britain.

CTF: Is there any of this that is written down? As we go along, if there's things that would help us go into later on, that you can think of, we ought to just put them in here so that they're in one place.

TEF: Well, my grandmother's brother, Uncle Will Endress, wrote a book about the Endress family, and he was a great fellow to think that his family was the cream of the crop. He started with an ancestor in the Fourteenth Century in Germany, and there never was a marriage in the family that somebody in the family didn't marry into the "well known and prominent so and so's of such and such." But anyway, Uncle Will's book covered considerable family history, and it comes down to mentioning my sister and me. We were just kids when it was written.

CTF: What's the name of the book?

TEF: *Endress Im Hof*, indicating sort of baronial status. Then, there's a Kiehle genealogy, which was compiled by a second or third cousin recently, and that covers my paternal Grandmother's family. The Kiehles, who were German, came to Pennsylvania, and then migrated up to western New York, and that book has a lot of family facts and relatives, and so forth, and who did what. Then, there's the Edwards side. Actually, I've got two, I've got two Edwards families in my ancestry. My mother's mother's mother came from Sodus Point, New York, on Lake Ontario, east of Rochester, and her name was Helen Edwards, and that was one family of Edwards, and I don't know an awful lot about their background. The others, I never could escape their background. My mother's father's name was Edwards, and they came down from Jonathan Edwards, who was well known back in the early days. He was a prominent preacher, and president of Princeton University. I was never allowed to forget that I had ancestry that I shouldn't make ashamed of me. There are books on the Edwards genealogy also.

Of course, when you take Jonathan Edwards, you've got to take the bitter with the sweet. We were descended from Timothy, who was one of Jonathan's sons, but Jonathan's grandson, by a sister of Timothy, was Aaron Burr. So you have to take Aaron Burr when you're bragging about the Edwards ancestry. Incidentally, my wife is descended from another sister, but she wasn't brought up in Jonathan's shadow, as my sister and I were.

CTF: Are there any other people that strike your mind right now as sort of famous or infamous?

TEF: Not particularly. Back in the Sodus family, that I mentioned earlier, that Edwards family, the mother was Maria Fitzhugh, and she was descended from Peregrine Fitzhugh, who was on Washington's staff. Well, I guess I can't claim very many famous ones.

CTF: What did your ancestors do back in Dansville, New York?

TEF: My Grandfather Edwards was a hardware merchant, and then, later in life, was selected to head one of the banks that had had a tough time. He went in as cashier of that bank, and that's what he was when I knew him. My Grandfather Fairchild was apparently a very, very genial nice guy, but he had no great economic success. He had clerked in various

stores. My father happened to be born in Towanda, Pennsylvania, and the way that came about is his father had joined forces with somebody, and they went down and opened a store that ultimately went under, and my Dad was born while they were down there. He was a revered person, but not a great economic success.

My Dad, born in 1872, came back to Dansville as a very young kid. He had no education beyond high school; read law in an office there in Dansville; took the bar exam, and passed it; and practiced a couple of years there in the small town. But as I mentioned earlier, we were part of the traditional westward migration. People from those smaller towns moved, in those days, to look for opportunities in midwestern or western cities, and that was true of my father. He practiced a few years there, and saw no great opportunities, and then he came to Milwaukee in 1897. Some six years later, he went back to Dansville, and married my mother. That was the beginning of our family in Milwaukee. And that's how I happen to be in Wisconsin.

CTF: Was there any other relative in Milwaukee that brought your dad to come there?

TEF: Yes. He had an uncle, Uncle Amos, his mother's brother, Amos Kiehle. Uncle Amos was a Presbyterian minister, and had some pastorates up in the Minnesota area. But his longest tour was at the Calvary Presbyterian Church in Milwaukee. He was there at the time that Dad was thinking about locating somewhere, and I'm sure that the thought that he had somebody who had a home, and there might be an available meal once in a while, had something to do with influencing him to come to Milwaukee. There were no other connections to Milwaukee.

There's a story I like from Uncle Amos. I have a clipping from the Ontario County Times. It is a letter he wrote to the editor in 1923, reminiscing about a period he had been in Canandaigua, New York in 1867. At age 18, he had started teaching at the Canandaigua Academy. In the letter, he recalled a visit of President Andrew Johnson. On the platform with the President were Secretary Seward, General Grant, Admiral Faragut, and General Custer. At one point in the President's speech the crowd began to sway, dangerously. Uncle Amos recalled, "General Grant, who stood near the front on the platform, holding a large bouquet of flowers, saw the danger, and I heard him call out, 'Look out there, or somebody will be hurt!'"

CTF: Now, when your Dad read law in New York, when he came out here, probably in those days he could just hang up a shingle in Wisconsin. Did he have to do anything in Wisconsin to meet their rules?

TEF: I don't think he had to. He passed the bar exam in Buffalo, in New York, when he was 21, and I think, when he came here, he could be admitted on motion. I never heard him say, anyway, that he had to take any kind of an examination in Milwaukee. He formed some partnership relationships, after a while, and there was a time that he was an assistant

district attorney in Milwaukee. He was interested in politics, not the kind I was later active in. He was a stalwart, anti-LaFollette Republican. But, as such, he had something of a career. He was elected to the state senate in 1906 and served from 1907 to 1911. Then he ran for governor in 1914. He was the stalwart candidate for the Republican nomination, because in those days, the battle was in the Republican party, and he was defeated by Francis McGovern, who was a Progressive LaFollette supporter. And McGovern then went on to be elected governor, and Dad wasn't. My Dad went back then to practice in Milwaukee, and was elected to the state senate again in 1916, where he was floor leader for the then governor. And when there was a judicial vacancy in Milwaukee, he was appointed by Governor Phillip to that job. I literally do not remember before my Dad was a judge, because he was appointed in 1917 when I was just four. (Memorial to Chief Justice Edward T. Fairchild, Wisconsin Supreme Court, at 33 Wis.2d XXIX.)

CTF: Do you remember him ever talking about the turn of the century and was he at one time a Teddy Roosevelt supporter, or was it always couched in terms of the Wisconsin Progressives versus the stalwarts?

TEF: He had some interest in T. R., but was always, I think, on the conservative side of things. Many years later, I used to drive the car for him and take him back to summer in Dansville, where he had a farm. There's a little town of Tuscarora, New York and usually, in bypassing Buffalo and getting over to Dansville, we'd go through Tuscarora. There's a particular corner there, and when we'd go around it, he'd always tell me about having come over there in the first McKinley campaign to dedicate a flag pole. So he was on the fairly conservative side of things, I believe.

CTF: This is an aside to your later development, but do you see his conservatism as, I mean, how did that influence you, because you certainly didn't end up on that side of the philosophical line?

TEF: Well, at first, of course, it was some influence. If I dug, I could find the newspaper photograph of a bunch of tables I had on our front lawn in Milwaukee in 1924 with me handing out literature for Coolidge and Dawes. I spent a couple of years at Princeton, in college, and I was a member of the Princeton Young Republicans. And we used to go out in the 1932 campaign in the back of a truck. We'd play in a make-shift band and make speeches, and believe it or not, they were for Hoover. So, I did succumb to some degree to paternal influence. Incidentally, on that Princeton Young Republican Club, whenever there is anybody that suggests that maybe I shouldn't have been there, I am quick to tell them that one of the other members of that same Young Republican Club was a guy whose name was G. Mennen Williams, familiarly known as "Soapy," who was later a thorough-going Democrat and Governor of Michigan, say nothing of Justice and Chief Justice of Michigan.

CTF: Getting back to life in Milwaukee where the Fairchilds lived, why don't you describe what the house was like, and the family was like as you were growing up, and the schools that you went to.

TEF: Well, I went to the public schools. I went to what was then Grand Avenue Grade School, now would be called Wisconsin Avenue Grade School. And then about the time I was through grade school, we moved over onto the east side, so I went to Riverside High School in Milwaukee.

CTF: Where was Grand Avenue School?

TEF: Grand Avenue School was 27th and the Avenue.

CTF: There's still a school there isn't it?

TEF: Oh yes. I was in Milwaukee last Saturday night, and my wife and I, on our way home, we traveled to the old neighborhood, and actually went by the place I was born in, but that's gone since the last time I looked. But we went past Grand Avenue School just for old time sake.

CTF: And then the family moved over to the east side of Milwaukee and you went to Riverside.

TEF: Yes, about 1924.

CTF: What was the family house like? I mean, did relatives from New York come and visit? Your Dad was active in politics. How much did that take him away from the family? How much did the family participate other than your running the tables for Coolidge-Dawes on the front lawn?

TEF: Well, my Dad's activity in partisan politics had been before I was very lively about it. As a judge, he was not active in partisan politics. I was more active than he was at that time. But he was a person who loved the drama of the courtroom. He was a trial judge; circuit judge is the title. And he would always preside at the dinner table, and tell a lot of stories. He enjoyed stories of his experiences as a young person, going out from Dansville and visiting the farm relatives that he had in the nearby town of Sparta, and he was full of those stories. And then he would always recount things that he thought were funny or exciting that had happened in the trial of cases. That was kind of a standard supper operation for him. He and my Mother were 40 years older than I, and so there wasn't that chronologically close relationship that is more frequent. There was always a lot of reverence for dignity, and all that sort of thing. But we had a close and warm relationship, nevertheless.

CTF: Did you have many relatives that would visit?

TEF: Occasionally. Of course, in those days, it was a long way from New York to Milwaukee. And so it wasn't a real frequent thing. A cousin of his mother's came and lived with us, and kind of half kept house for us for a while, Cousin Lizzie Deitzel. My grandparents visited a couple of times from Dansville. We'd moved. I suppose because he was going to be getting a steady salary, he felt that he could afford to move from the house that I was born in to a bigger house. And that was a roomy place in which we could have company, and did, although it wasn't always relatives. Tom Reid, an editor, from Appleton used to come. We called him Uncle Tom. Mildred Brooks, a young professional woman, occupied a spare room for several years, helping some as part of her rent. Uncle Al Kiehle was the family practical joker. He lived in Minneapolis and was a traveling salesman for Palmolive Soap. Uncle Al arrived one time during a visit from Uncle Tom. When Uncle Tom returned from downtown, Uncle Al went to the door and convinced Uncle Tom that he had come to the wrong house, a block away.

Then there was a young engineer, Donald Fairchild, who looked Dad up because of the name. He was the first to inform us about the early Fairchild ancestry. Years later, he became a desert artist in Arizona, using the name Hurlstone Fairchild. Rachel King, a second cousin from Portland, Oregon, worked in Chicago and would come for weekends.

Mrs. Sarah Meixsell, who was older than my parents, was originally a babysitter for me, but she lived with us later on. She was always pleasant and caring, but I recall one incident at a church supper when someone played and sang "Dixie." I then learned what she, who had grown up in Uniontown, Pennsylvania during the Civil War, thought about the "Rebels."

CTF: What do you remember about what's called, I guess, by the history books the "Roaring Twenties"?

TEF: Well, I was, of course, my grade school time was from around 1919 til 1925, so that covers some of it, and I don't know as I knew much about anything that was roaring at that time. Then, I was in high school from 1925 to 1929 and had some observation, I guess, of prohibition and all that sort of thing. But I guess I was basically kind of a studious sort of a person. I did have some health problems as a young person and I had a fair amount of time being sick.

CTF: What were the health problems?

TEF: Well, I had lots of colds and flu and that -- the most serious thing was a mastoid infection. I had what I suppose was a fairly early mastoidectomy in about 1919. I spent a fair amount of time home ill with one thing or another. I didn't have any more serious thing than the double mastoid but that's large enough so it's something I remember.

CTF: Now when it came time to go to college, you went to a college that not a lot of people have heard of.

TEF: That's right. Deep Springs in Inyo County, California. It's right on the border between California and Nevada, in a desert location, about a mile high, and about 250 miles north of Los Angeles, 250 miles south of Reno east of the Sierra Nevada and east of Owens Valley. Deep Springs was started in 1917. It was one of the projects started by Mr. L. L. Nunn, who had been a pioneer in the long-distance transmission of alternating current. He had developed that when he was living in southwestern Colorado in Telluride; developed that as a means of converting streams into power, and then transmitting the power fairly long distances, to operate the stamp mills, and so forth, for gold mines and similar enterprises in that area. He made a lot of money, and he did two things. He started the Telluride Association on the Cornell Campus, originally thinking more of training engineers, although that's no longer true. And then he also started in 1917 the kind of junior college, or undergraduate institution at Deep Springs. He bought a ranch, and built some buildings to house the students, a library, and classrooms. And the student body consisted, in my day, of 20. That's now expanded terrifically to about 26 or 28, but in those days, 20. Isolation was one of the things he thought was important to educating young men, and one of the issues, of course, now is whether it could ever be co-educational. He had no idea of ever making it co-educational. It was definitely young men, as far as he was concerned. But, it was and is 50 miles from the nearest movie, and 28 miles, then, from a railroad station, over a mountain pass, and people just didn't go out of the valley except on business or to go home for vacations. We had week-long spring trips. In my years, the trips were to Saline Valley, next valley south, and Death Valley, east and south.

CTF: How did you find out about the school, and why did you decide to go there?

TEF: Well, there was a man named Dallas Lore Sharp, who was something of a naturalist, writer, and speaker. And somehow he learned about it, and two of his sons had gone there. He came to Milwaukee to give lectures and became acquainted with my Mother and Father, and told them about it, and that was the connection. Most people in those days, and until fairly recent years, learned about it only through word of mouth from somebody who had a contact with it. Anyway, he interested my parents in it and they interested me. I applied and was accepted, in the fall of 1929. It was a great adventure for a 16 year old to take the train to Los Angeles, be met there by friends, and finally proceed north on a narrow gauge train up the Owens Valley. Also, I had stopped off in Laramie, met a school friend who took me in his Model T on my first trip into mountain country. We visited a family on a ranch in northern Colorado.

CTF: What was tuition like, and room and board, or did you work?

TEF: Well, you basically studied in very small classes with faculty. There were people capable of teaching college level subjects. And you studied half time, and you were supposed to work half time, and you'd work whatever kinds of jobs that were passed around -- the dairy, which meant milking the cows; garage mechanic, office person, student laundry, general farm work, which meant whatever kind of work, or hauling, or anything of that nature that had to be done at that time; and chicken man -- somebody who fed the chickens, and so forth. And that was all part of the program. The other part of the program was that the student body should be a very responsible, self-governing institution, which it always was and still is. And, the student body was permitted to elect one of the 8 trustees of the institution.

CTF: Today is September 16th, and we're continuing with the oral history of Judge Thomas Fairchild in his chambers in Madison, Wisconsin, and this is Collins Fitzpatrick.

CTF: Yesterday, we were talking about your attendance at Deep Springs College, and the philosophy of the founder of that school. Maybe we can continue in that vein.

TEF: Mr. Nunn wanted to use his wealth, considerable for those days, to make these opportunities available to young men, and to make it as much a merit selection as possible and so he endowed Telluride Association on the Cornell Campus of Ithaca, and gave a substantial amount of money there so that it could operate and extend scholarships to students at Cornell. And also Deep Springs was endowed with money and was tuition free. Actually a small cash allowance was made each month to each student to cover necessary supplies and that sort of thing. The idea being that it wouldn't cost anybody anything to come to the school. And students could be selected entirely on merit. Selection in the early days was largely done by Mr. Nunn personally. He'd be going around the country and he'd happen to meet some young guy somewhere, maybe on a train or in a restaurant, or something and start talking to him and if he liked him, he'd say, "Well, come to my school." It got to be somewhat more sophisticated.

CTF: How long does a student stay at Deep Springs?

TEF: If he is considered a success the first year, the Trustees invite him to return, and the same after two years. Many leave after two years, as I did, although reinvited. Some stay three years. I had taken college board exams and been admitted to Princeton in 1929 before I was invited to Deep Springs. Princeton kept my admission open for two years but declined further delay. I made a difficult decision and left Deep Springs at the end of the second year, even though I knew Princeton (in those days) would give no credit for Deep Springs academic work.

CTF: How was Princeton?

TEF: It was a great place to learn. I started as a freshman in September 1931. At the end of my sophomore year, I made another difficult decision, and transferred to Cornell.

CTF: How did that come about?

TEF: I had earlier been elected a member of Telluride Association, Mr. Nunn's other project. He had built Telluride House on the Cornell campus in about 1911, and the Association would, and still does, give selected students the privilege of living there, free of charge. That was quite an attraction. And because Cornell had long experience with students who had been at Deep Springs, it gave full credit for Deep Springs courses. That made it possible for me to finish a year earlier than if I remained at Princeton and was another advantage. The change saved us the cost of the extra year, as well as room and board for the year at Cornell.

CTF: I know you studied law at the University of Wisconsin. Cornell has a good law school. Did you consider going there?

TEF: By that time we had pretty well decided that Wisconsin was a good place for me to get my law training because I might have opportunities here because of my Father being on the Court. He served on the Supreme Court of Wisconsin from 1930 to 1957, the last three years as Chief Justice. He was appointed by the elder Governor Kohler. His position had some significance, and the University, we felt, had a good reputation, and Dean Lloyd Garrison had come to be Dean at the Law School by then, and it seemed like a good choice. On the expense side, I lived at home in Madison, where my parents had moved, and total fees for the University, for a Wisconsin resident, were \$37.50 per semester.

CTF: What did you do work-wise in the summers? Like when you came home from Deep Springs, or Princeton, or Cornell?

TEF: Basically, I didn't have any particular jobs. They weren't all that easy to come by in the Depression years. But, anyway, we had always spent the summers down in the New York area, where my parents came from. And I would work -- do some things on the farm. But other than that, I didn't.

CTF: Did your Dad still own the farm?

TEF: His brother had farmed for years there, and my Dad had bought an adjoining farm so that they could be worked together, which sometimes they were, and sometimes they weren't. But, he owned that farm the rest of his life.

CTF: Was there anybody, let's say, in grade school when you went to Grand Avenue School or Riverside that had an impact on you? It may not necessarily be a professor, maybe somebody that coached you, or something else.

TEF: Well, there were teachers that I had high regards for in grade school. When I think now about the problems people talk about in public schools, and I think back to those individuals, who were all older ladies, spinsters, that was the common situation then, but I think of their kind of enthusiasm and their ability to get ideas across and get you to do stuff, learn whatever it was you were trying to learn, and I just have a hard time relating that to what our children and grandchildren have reported from their own schools. Those were people who really had enthusiasm and dedication and were, I think, very good teachers. Names, oh, I could mention a few, but that would just be kind of a happen so. In high school, there were several, and one in particular that any of my law clerks could tell you about, because every once in a while I, in correcting a draft of theirs, run into a split infinitive, or "different than" instead of "different from," and things of that sort, and I will put a little note on there, saying, "You never met Mary K. Howe, but she wouldn't stand for that." Mary Howe was an English teacher that I had three years out of the four in high school. And she really had an effect on us. She was strong on grammar and all that, but also very interesting. She was a real good person with whom to study literature, plus the kind of teacher who went beyond the subject immediately at hand. I mean a lot of things that she would observe about life or responsibility, philosophy or citizenship, or whatever. She often told us about a special Riverside student, a guy named George Kennan.

And then, at Riverside also, was a man named Merton Lean. He was a Latin teacher, and I had him three out of four years. He was a good Latin teacher, but even more, he was a person that had general views that he talked about, and which interested his students. I always had a very, very fond recollection of him. I remember the year that we were studying Cicero, and he was talking about orators, in general, and saying that there weren't many that were left that could be considered orators of the Cicero type. Some of the older names in American history that you might think of, Webster, and so on, but not many. He said about the only one that he thought really measured up to that standard was a man who was not too active at that point, but had once run for Vice President, and that was Franklin Roosevelt. And Roosevelt was not yet governor of New York when he told us this -- 1927 probably.

It just so happened that a short time after that, the Bremen flyers -- they were some Germans who flew an airplane across the ocean from Europe to the United States. They were feted in Milwaukee, and my Dad took me to a dinner, and the speaker for that occasion was Franklin Roosevelt, then not yet governor. But all that started my interest in Roosevelt's ability to communicate.

CTF: What about at Deep Springs?

TEF: Oh, there are people I remember, all right. I don't recall anybody in particular who I felt was a great influence. There was a lecturer named Hartley Burr Alexander. He was a philosopher, somewhat of a religious bent, although he wasn't a clergyman. But he came as a lecturer, and I thought he left an impression just in a week or so of being there, and talking. And then there was an artist, by the name of Pijoan, who came and showed slides and talked about art and paintings and sculpture and the like. But more than that, he thought Deep Springs was an interesting place, and he talked to us about what we were going to do with our opportunities, and so forth. He was an interesting person.

The very first year I was there, we had a course in which a Professor Von Engeln from Cornell taught us geology. And Deep Springs is just a natural place in which to study geology, because you can look out the window and you see all kinds of geologic structures. Eric Moeller taught us German. His brother was a leader of sorts among National Socialists of the Stuttgart area. Eric showed us some leaflets lampooning the greedy rich. It was from him I learned the political slogan, "Versailles muss fallen." I gained some appreciation of what we later knew as Nazi thinking, although I do not remember patent anti-Semitism at that point.

CTF: Did geology tie into your spring trips when you went to Death Valley then, too, or were those more of a recreation?

TEF: Those were more recreation. Von Engeln was there in the fall. He was on a sabbatical and on his way around the world. He had just two and a half months, or so, to spend at Deep Springs, and probably got some financial help for his trip. And he was an outstanding sort of person. He did take us to study a glacier at about 13,000 feet in the Sierra.

CTF: When do you first start to figure out what your philosophy of life is, and what you want to do with your life? Was that at Deep Springs, or was that at Riverside, or . . .

TEF: The whole approach at Deep Springs was on the importance of being a responsible citizen, making a contribution, public service, and that sort of thing. And I don't have at hand some of the quotes, but Mr. Nunn would write letters to the student body when he was still alive, and we were exposed to those letters. One letter, I think, starts out, "Young men, why came ye into the wilderness." And he was definitely interested in people thinking about themselves and their life, and what they were going to do with it, etc., etc.

CTF: But it was at Deep Springs that you started to think what you wanted to do after college?

TEF: Yes, although it never got carved in stone there.

CTF: You weren't knocked off the horse like Saint Paul?

TEF: No. No. Not quite.

CTF: What about professors at Princeton, and also at Cornell, and the Telluride House? Is there anybody that you remember that had a major influence on you?

TEF: Oh, one interesting person -- my second year at Deep Springs, I got the assignment of spending half the summer there in charge of the office, the bookkeeping, the post office, and all that. There were two of us. One, Chuck Dimmler, was doing the milking and the outside work, as well as he could, and I was helping him some with that, but doing the office work. We were there the first half of the summer. And we were the ones on whom fell the responsibility of entertaining any visitors that happened to come, and there was one man who was from Oxford. Somehow, through Telluride Association, he had gotten the idea that he would be welcome at Deep Springs on a trip he took around the country. Dr. Neville Sidgwick. He came by train and bus and spent a matter of days or a week with us, and I spent all the time I could with him. I would take him around a little bit to show him some of the mountain country and desert country. He was a very much older person. I think he was in the sciences, maybe chemistry. Anyway, we corresponded for a period of years after that. I don't believe I ever saw him again, but we did exchange letters once in a while. He was an influence.

CTF: But not into the sciences?

TEF: No. I was, I think, pretty well set by then, although I was still kind of toying with the idea of studying medicine at that time. So that would have meant, of course, following scientific studies.

CTF: So at one time you thought of being a doctor.

TEF: Yes. That was what my Father would have chosen, at one point anyway, for me. He thought that was a good thing to be.

Then, at Princeton, there was an English literature professor. I think his name was Mudge, if I remember correctly, second year, and we used to have our classes in his apartment because it wasn't a large class. And he was, he just exuded the love of the literature that he was talking about. And he was somebody that I always remembered -- *Paradise Lost*, and some of the things that we studied with him.

Buzzer Hall, Walter Phelps Hall, was a very dramatic history teacher. I had European history from him, and he was one of those that really put out in his lectures in a dramatic way. You remember the scenes, some of them, that he described: Garibaldi climbing up a cliff somewhere in South America, holding his baby -- holding the cloth around the baby in his teeth. Images stayed with you if Buzzer gave them to you. So he was somebody that made an impression.

I remember a lecturer that came to Princeton, who was a specialist in the Weimar Constitution, the Constitution of Germany before the Nazis changed it. He came and gave a series of lectures that I attended.

At Cornell there was Carl Becker, teaching about the French Revolution, and Frederick Marcham on the history of English law. He died only a year ago.

CTF: What about in law school?

TEF: Well, of course, you have to start with William Herbert Page. He was the "Paper Chase" type law professor -- very witty, very sharp, full of stories, the traditional method of teaching where you embarrass the heck out of students.

CTF: Did you always sit in your same seat?

TEF: "Oh, Mr. So and So. But, now, could we find a course in the university which is easy enough for you. Now down the hill, down the hill here is Music Hall. That's the next building down the hill. And I think that perhaps a course in Music Appreciation . . ."

CTF: How big were his classes?

TEF: Oh, they were big. He taught contracts the first year. Then he taught wills and conflicts of law. They were not as big classes, the latter two, but everybody took contracts. So there were a hundred and some people in the class.

CTF: So the numbers were with you.

TEF: Yes. But, if somebody came in a little late, why he'd pause and have something to say about that. Then, you know, you never forget Herby Page stories. He had one about a fellow that came to law school one day and then left and somebody asked him why he left, and he said, well, he didn't like the law, and he was sorry he learned it.

Then, of course, there were others who were not as dramatic as Herby -- Nate Feinsinger, who taught labor law. I never had him for that -- I had him for partnerships. But, Nate was one of the people who was very active in national affairs. He was in on the formation of the Labor Board, and so forth. He's dead now, but not too many years ago, he was still around.

Dick Campbell taught torts. He died only a couple of years ago. Very interesting person. Oliver Rundell, who had been acting dean before Lloyd Garrison came, and then he was dean after Garrison left. He taught property and future interests, and so on. He was a very delightful and lovable individual that did well with teaching. I don't know how

effective he was with me, but he was all right. And Charles (Bob) Bunn taught constitutional law. He would almost apologize for calling on a student.

And, Frank Boesel, of course. There wasn't any time I didn't know Frank Boesel. He was a practitioner in Milwaukee, and he came to Madison to teach pleading. He'd come out on the train and teach two hours on Thursday. But, he had been a partner of my Father in law practice, even before I was around. He had been best man at my parents' wedding in 1903.

CTF: What firm was your Dad with?

TEF: Well, the name was Lenicheck, Fairchild, Boesel, & Robinson. Later, John Wickhem became a partner. Years later, he was on the Supreme Court with Dad. I knew Frank Boesel and family all my life. He was an interesting character -- quite scholarly; also a traditional Democrat. His first two names were Frank Tilden, and he'd been named for a guy that lost, some think shouldn't have lost, to President Hayes. And Howard Hall. Oh, Jake Beuscher. Ed Gauzewitz. Jake was a family friend also from Milwaukee. Taught equity. William Gorham Rice taught us criminal law. He was around here for many years afterwards. He was very active in the Democratic movement here. I knew him that way later on. His wife, Rosamond, was also an active Democrat, and a daughter of President Eliot of Harvard.

CTF: Did you ever go down to visit your Dad when he was trying cases in Milwaukee or when he was on the Supreme Court?

TEF: I certainly was in the courthouse at times when he was trying a case, but not that often. Of course that was high school, or earlier. I used to go to the Supreme Court once in a while, and listen to an argument. No law clerks were provided for state judges in those days. He had the right to name a secretary and pay \$150.00 a month under the statute. He inherited a particular secretary when he came, somebody that had been a secretary for his predecessor, and kept her until she retired. But after that, he had a system of hiring as secretary, a senior law student, with the understanding that the student would work through the senior year, and a year afterwards. And he or she would do as much law clerking as there was time for. You had to type the opinions, but my Dad didn't demand much in the way of letters and that. There was an occasional letter. He didn't dictate a lot, although we tried to learn shorthand. But he'd write out stuff a lot. So we could get the typing done and still do a certain amount of research and checking of cases cited in briefs, and that sort of thing, and helping, to some extent, with opinions. He carried that on for a great many years. I was number three in the succession. He had done it for four years with the two other people before I came, and then there were quite a number afterwards.

CTF: How much of an influence in your life has your Mom and Dad been, and in what aspects would you say that it's been strong?

TEF: Well, they were a great influence, I'm sure. Of course, my Dad, in addition to being the Father of the family was a great influence in terms of the law. Every once in a while, now, on this court (federal judges, you know, they think they can do anything) an opinion will say, "the trial court is affirmed," or something like that. Well, I just can't stand that, and my Dad couldn't stand that. You're not affirming a court, you're not affirming a judge, you're affirming a judgment! Somebody appeals from a judgment, and that's something that the trial court created. And that's what the appeal is from, and you reverse, or you affirm, or you modify that! And, of course, everybody understands usually what the loose language means. Every once in a while, though, you get into a problem because somebody used that language. His point of view was more conservative, *stare decisis*-oriented than I, yet he did dissent a few times.

CTF: Then he ran again for Senate, didn't he?

TEF: Yes. He ran for Governor in 1910, and for State Senate in 1914. In 1910-11, he was on the committee which drew the Workers' Compensation Act for Wisconsin, which was the first in the country. And he had some feelings about that, which got expressed in a few dissents when the court was being conservative about applying the idea of injury arising out of employment to illness arising out of employment. Silicosis, and that kind of thing. He thought the court should have been more ready to award compensation for injury that came out of exposure to dust and the like.

CTF: What about the influence of your Mom?

TEF: Well, she was an English teacher. And she didn't like misspelling.

CTF: Or splitting infinitives?

TEF: She was a loving person, and she had this ancestry bug, and people are not supposed to not live up to the ancestors. So she was a strong influence in character, or whatever. In the later years, she became much more of a liberal person. She was politically. I'm not sure how many times my Dad voted for me, but I do know my Mother did.

CTF: One last thing with regard to your Dad, for now, and that is you worked for him. Obviously you couldn't do that in the federal system now.

TEF: Right.

CTF: Did anybody question that then?

TEF: None that we knew of. It was nepotism, and as you say, I couldn't hire my child to be my law clerk or secretary, but nobody raised any serious question about it. It was for two years and he did it with others, before and after. Some interesting people. Catherine Cleary, who later became President of the First Wisconsin Trust Company, and a woman of real distinction. She's one of the early women on a lot of corporate boards, and so forth. She was one of his. Margo Melli, who now teaches at the law school. Ruth LaFave, who used to be Clerk of District Court at Milwaukee. John Stedman became a professor at Wisconsin Law School.

CTF: Were they all Wisconsin graduates?

TEF: Oh yes, because that was a matter of feasibility. You'd be going to classes part of the time in your senior year.

CTF: So that there's really only one position.

TEF: Right.

CTF: And so, in senior year, you probably weren't as much help as you were after you'd graduated.

TEF: That's right. And it was understood, that you had your class time and you had to study for the classes, too. In those days, you actually had to type the opinion. There was no Xerox. And you had to type 13 copies!

CTF: More importantly, 13 correct copies.

TEF: Yes. That's right. You had the original that was ultimately going to repose in the court record, and then starting with carbon copy number one, that was going to the Chief Justice, and seniority played a part there. If you were number seven, you got the seventh copy, and then there had to be extra copies to go later to West Publishing, and so forth. As I remember, it was an original and twelve. The Justices returned their copies, so that when the process was complete, there were copies on hand. Art McLeod, the Clerk, would sell the copies to the press, and divide the proceeds with the secretaries. You always hoped your Judge would write newsworthy opinions.

CTF: Do you remember any cases in which you had a serious difference of opinion with your Dad, over how the court was going to decide the case?

TEF: There were some that I wished would go the other way, but I can't pick one out at the moment.

One part of the job was to heat water on a hot plate and make tea every afternoon. The other justices would come in to Dad's chambers, have tea, and talk.

CTF: Judge, when you were at the law school here, were you active in any activities other than just the law study itself?

TEF: Yes, this was about the stage for me of changing political direction. This was New Deal time, and I had this strong, fairly conservative, Republican background. But I'd begun to feel that the power of government ought to be used for broader purposes in helping solve problems, and so on. The New Deal, I guess, had something to do with convincing me of that. I had been President of the Liberal Club on the Cornell campus. And the Progressives, the LaFollette Progressive Movement split off from the Republican Party and started a new party in Wisconsin in 1934, so there was a separate Progressive Party at that time. And I wound up going in that direction.

There was a fairly active University Progressive Club here on the campus. And I joined and was active in that. And I remained active in the Progressive Party during the time that I was first practicing law in Portage. We had some small groups of law students that used to get in organized bull sessions about public issues, and the like, but no other formal organization, I believe. Later, I was County Chairman of the Progressive Party in Columbia County, and one year I was State Chairman of the Young Progressives of Wisconsin.

One year, I got to hand out some patronage. The Wisconsin Progressives had an uneasy alliance with the Democrats nationally. Because of a deal between them, I named half the census takers in Columbia County in 1940.

CTF: Did any of the other political parties have organizations on campus, or in the law school?

TEF: I'm not sure. I wasn't aware of either Democratic or Republican organizations, as such. But the Progressives were, there was an active University Progressive Club -- both law school and undergraduate at that time.

One activity along the way -- Dad had to run for reelection to the Court in 1936. Judicial elections in Wisconsin are non-partisan. Dad had an opponent 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. Of course, the United States Supreme Court had held various depression motivated laws unconstitutional, and that was not popular. I debated the question before the University Progressive Club with the daughter of Dad's opponent. The election went our way although my debate had little to do with it.

On the subject of Supreme Court elections, Dad ran again in 1946. He was 73 and we had to be concerned about a possible age issue. I talked with former Governor Phil LaFollette. He suggested that I "work the Progressive side of the street." I did go to people I knew, seeking support. The election was awfully close, and maybe my contacts made a difference.

CTF: Well, you met your wife here in Madison.

TEF: That's right. She was a native of Indiana, and had gone to college in Maryville, Tennessee, and then, because of depression problems, worked a while, and then wound up here at the University. She had a job as secretary for the Student YWCA. That would be the on-campus organization. And she had an office. Yesterday we heard Chief Justice Rehnquist give a speech in the Union Theater. Well, the Union Theater wasn't always there, even though the student union, the rest of it had been built before that. And on that particular site, where we were yesterday, stood what had been the residence of President Van Hise when he was president of the University -- an old, stately sort of a frame residence building. And, it had been taken over for University offices at various times. Our law fraternity, which was Phi Delta Phi, rented an attic study room in that residence, and we had books there. It was our library, used mostly for group study sessions, and so forth. And I went up there occasionally to use the library or be with some group of students before exams, or something. The University YWCA had the office on the ground floor. I think it had been the living room of the mansion, and its doorway was right as you went up the stairs. On one occasion, when I went up that stairs, I just happened to look into the YWCA Office and saw a very handsome young lady sitting at the desk there and was *quite* impressed! And, things were done a little differently in those days. I didn't just barge in and say, "Hi!" I hunted up a friend of mine in law school, who I knew had been president of the Student YMCA, and I discovered that he had met this lady and knew her name. I got his permission to go in and introduce myself. And on the strength of that, I went in and said, "Hello." And that blossomed into a friendship, etc., and then ultimately we got married.

CTF: Is this when you were a first-year student?

TEF: I probably was late first-year or early second.

CTF: When did you get married?

TEF: After graduation from law school, and after her graduation from the L&S. She was part-time employee and part-time student. And she finished her degree in February of '37.

CTF: L&S is . . . ?

TEF: Letters and Science.

TEF: I got my certificate -- it wasn't a degree yet -- in June of '37, and we were married in July of '37, on the home place back in Indiana.

CTF: In Lowell.

TEF: Lowell, Indiana, just outside of Lowell. It was a farm west of Lowell.

CTF: Now, after you finished the secretary or clerkship with your Dad, you went to practice law in Portage?

TEF: Well, yes. Actually, I didn't finish the clerkship with my Dad, although I felt I was obligated to. I'd agreed, I'd signed on for two years. But, this particular opening occurred in a law firm in Portage -- Grady, Farnsworth & Walker. And one day on the way down to argue a case in the Supreme Court, there were a group of Portage lawyers who had a misfortune. A car skidded into them, or they skidded into a car. Something happened, anyway, and Farnsworth of that firm, ultimately died as a result of that accident. Incidentally, just as a parenthesis, Ted Kammholz of Vedder, Price, the Chicago firm, and who recently died, Ted was then practicing in Portage, and he was in that car and he wrecked his knee in the same accident. But anyway, that left an opening in the Grady, Farnsworth & Walker firm, and it was known around that they were looking for someone to replace, either on an employment basis, or as a possible partner. Anyway, they were looking for someone to replace Walter Farnsworth. And, my Dad was *very* anxious that I should try to get that position, even if it meant leaving him before my time was up. Justice Fowler was then on our court, the Wisconsin court, and years ago, he had practiced in Portage and had known Dan Grady. The point of my Dad's insistence that I ought to get that job if at all possible was his regard for Dan Grady, who had been a lawyer of great prominence and ability, and had a practice almost state-wide, and who had been President of the Board of Regents at the University. (Memorial to Daniel H. Grady at 275 Wis. XLIII includes response by then Justice Thomas E. Fairchild at 275 Wis. XLV.) Dorothy Walker was the junior partner of the three. Dorothy was very capable in general practice, and an excellent trial lawyer, and my Dad knew her also, although she was obviously much younger than Dan. But Dad was insistent that if I could get that job, I ought to take it. And Justice Fowler, having been a friend of Dan Grady, put in a good word for me, and ultimately they offered me a job. I was an employee. I wasn't a partner. But I went up and took that job.

CTF: Was it just the three of you in the firm?

TEF: That's right. They were the two partners and I was the associate. And that was April of 1938, so I short-changed my Dad for a couple of months, and started law practice with the firm in April of '38. Dorothy remained in the office for only about a year and then opened her own office. She had been district attorney at age 22 and maintained a great trial

CTF: What was the nature of the practice. I take it, sort of general, but tell me about some of the cases that you worked on.

TEF: It was general. They appeared for personal injury plaintiffs. Dan had a reputation which brought in interesting cases that other lawyers brought in, looking for some help, and so on. We had some probate work. I started to learn about handling estates. I helped defend some claims against estates, contract claims, and so forth, in county court.

CTF: Judge, you were about to mention about an interesting case that you worked on when you were in Dan Grady's office.

TEF: Yes, somebody had brought to Dan the case of a fellow in Baraboo who had worked for Justice R. D. Marshall who had been on the Supreme Court of Wisconsin up until about 1918. This man had worked the farm for Justice Marshall. Marshall had left him the farm in his will. Marshall had considerable other property, but Marshall's widow had elected to take her statutory third interest in the real estate against the will. And so this Hillman, I think his name was, dispossessed of a one-third interest. I think the widow had let him occupy the farm even though she owned a third interest. So some time had gone by before the case got to Dan's notice. Dan had a theory for which there's some support in the books, that if the widow elects to take property bequeathed to somebody else, then anything that she would have taken, if she hadn't elected, must be sequestered and used for the benefit of the person who lost as a result of her election. We didn't win. I've forgotten the details now whether it was a lapse of time or something of that sort that prevented. But I remember doing an awful lot of work, and reading an awful lot of cases about an equitable substitution of one thing for another, hopefully to carry out the intent of the testator.

CTF: Did the farm end up getting sold?

TEF: Yes. Mr. Hillman lost all of it ultimately. We did our best for him, but cases like that were brought in to Dan because of his reputation. He was a contemporary of my Dad. He was born, I think, the same year, 1872, so when I was working there in Portage, he was in his late sixties, and he had a very, very resilient mental attitude toward the law. He would be able to think up things that a lot of lawyers would never think of. It was a good, interesting experience to work with him, and obviously that's what my Dad was thinking, that that was an opportunity I ought to take. So I was with him for four years.

CTF: Why did you leave?

TEF: Well, I got to a point where I wanted, I guess, to try my wings at something bigger. Maybe I shouldn't have. But I did think of government service, and ultimately I got myself a job with the Office of Price Administration, the Chicago office.

CTF: The war had started . . .

TEF: The war had started in Europe but we were not yet in it. We were not in it until December of '41, and actually I was hired for that job in late October previous to Pearl Harbor. I didn't actually go down and hang my hat in Chicago until the end of December of '41. So it was after Pearl Harbor.

CTF: But the Office of Price Administration which was to put control on consumer products, I assume.

TEF: Well, originally there was very little law as a foundation for the Office of Price Administration. There was fear on the part of the government that there would be inflation as a result of the war and the dislocations that came from it. But they didn't have much more to go on in the way of enforcing anything than simply that they could bring pressure on people who dealt with the government. So there were price schedules and originally it wasn't consumer goods as much as scrap iron and things of that nature that the government would be interested in buying or ammunitions makers would be. And they had these price schedules and they enforced them pretty much by jaw-boning originally. The Emergency Price Control Act, which was the foundation of the whole price control system for rents and a lot of consumer products, and which had some teeth in it, was not passed until January 30, I believe, 1942. So we were already in the war when that happened. And then the business of allocating scarce goods had been thought about, certainly, and there was a whole priority system which was purely based on executive orders, so that defense industries would have a higher priority for types of goods that they needed to build into munitions and what not. And there was the War Powers Act, which gave the President power to "allocate" scarce commodities. And on that phrase, the whole consumer rationing system was built. Rationing of tires, new automobiles, sugar, typewriters, gasoline, shoes, ultimately canned goods, butter, and meat. All built on that phrase, allocate scarce commodities. There were no penalties originally, no laws creating penalties for violations of rationing orders. So enforcement was a very difficult task early on. The early enforcement actions that caused anybody to go jail, or anything like that were based on requirements that people certify their inventories of a commodity, like tires, and then they'd catch the people that gave false statements of their inventories, and they could prosecute them for that under 18 U.S.C. § 1001, the false statement section, and rationing was not shored up with legislation until, I think, the following October.

CTF: What did you know about the position before you took it. You were coming from Portage. I assume Eleanor was up there in Portage with you. Were you living in Portage?

TEF: That's right. Living in Portage.

CTF: And so the move to Chicago was kind of a major move.

TEF: Well we didn't move. I changed my job. She went on in Portage for a while with the kids. And the OPA Office, when I went into it, was on the 23rd Floor of the Opera House on Wacker Drive. We worked on Saturday mornings then -- later we worked all day Saturdays -- and I had it so that I could run out of the office not too many minutes before noon on Saturday and get myself to the Union Station, and catch the Hiawatha to Portage, to spend the weekend at home. Then I'd catch the Pioneer Limited going back about 4:40 AM on Monday. That would get me into Chicago just in time to show up for work on Monday. That continued a matter of months.

CTF: A longer commute than Tom Strubbe.

TEF: That's right. Originally when I signed on to the job, we didn't think of rationing being involved. The United States was not in the war. War wasn't really expected down through the ranks, anyway. And the people who hired me were not sure that there would ever be an office any closer than the regional office, which was in Chicago. The people who hired me were Brunson McChesney of Northwestern University and Tom Emerson, an expert on the First Amendment, a Professor at Yale, I think. But anyway, they were then working for the government for the Office of Price Administration and they were the ones who interviewed me and hired me in October, 1941. They had no idea whether there would ever be an OPA office in Wisconsin.

CTF: What exactly was your position or what title?

TEF: Pearl Harbor was December 7, 1941. There was almost immediately a freeze order on new tires. Nobody could buy a new tire after December 10th, 1941. Rationing Order No. 1, providing for issuance of certificates for tires to persons on the eligibility list went into effect on January 5th, 1942. I had arrived in the office on December 29th, 1941. Everyone there before me was busy so obviously I was the tire expert. I was the new guy, and that was the new thing. So I became the tire rationing lawyer, and worked at that. The Regional Attorney was Alex Elson, still a practicing lawyer in Chicago.

CTF: I assume that somebody had had those orders in draft form before Pearl Harbor occurred. It went that quickly.

TEF: There must have been a great deal of advance work. David Ginsburg and Harold Leventhal came to Chicago to give some instructions. They both had worked on the rationing orders. I think David was the staff person for Otto Kerner in the Kerner Report, then a much older person obviously. Harold became a Circuit Judge in the District of Columbia Circuit. There was a brain trust working on those things for sure. They had some trouble getting the tire rationing order out in final form by the 5th of January. They followed the technique of prohibiting every transfer except for a few which were expressly permitted. And then they'd amend it once in a while to permit more transactions.

Just as an example, you would think that about the most eligible person for a scarce commodity like tires would be the Fire Department, indeed, their eligibility was recognized in those first regulations. But, you couldn't buy that size of tire from a filling station on the corner or from a dealer. Those tires would be in the hands of wholesalers or manufacturers. The regulations did permit a certificate to be issued by a rationing board to a Fire Department. But the certificate couldn't be negotiated except with a dealer, and the dealers didn't have tires of that size, and the wholesaler was forbidden to transfer. So, pretty soon we had Fire Departments calling around, you know, and what do we do? What do we do? We're eligible. We got a certificate. We need a tire, but we can't buy it!

Well, in Chicago, the Regional Director was a guy by the name of Weigel, John C. Weigel. He was kind of a practical guy, and I was his legal advisor on rationing. Between us, we worked out that Weigel would just write a letter and tell wholesalers you can honor this certificate, which had no basis in the regulations whatsoever. But in California, there was a stricter point of view and they wouldn't do that. And so they kept hot on the phone with Washington trying to get the regulations amended to permit the sale of the tire to a Fire Company. And, in particular, it was the Alameda Fire Department that was the hot one. Finally the Regional Attorney out in San Francisco got plenty mad and he sent a teletype to Washington. He said, "Washington fiddles while Alameda burns!" Only a few years ago when I was sitting on the Ninth Circuit, Circuit Judge Ben Duniway told me he had been the one who sent the teletypes. We didn't fiddle.

CTF: You just made sure it was taken care of.

TEF: We just made sure it was taken care of.

CTF: When the war broke out, did they then set up other offices?

TEF: Yes. And that's the next stage of the story. There were going to be State Offices first, because they were real strong on federalism at the time, but ultimately they were District Offices, and they might cross state lines. An office was opened in Milwaukee. It was originally the Wisconsin State Office and became the Milwaukee District Office. I was sent up to open it and from then on I was attached to the Milwaukee Office. After that happened, Eleanor and I moved our belongings and our family down to Milwaukee.

CTF: Now when was that again -- time wise?

TEF: '42. We moved in June of '42.

CTF: Now, John Reynolds, later to be Governor, later to be District Judge from Eastern Wisconsin, was in OPA also.

TEF: No. He was in OPS. That's a different animal. OPS stood for Office of Price Stabilization and was the Korean War counterpart of OPA. OPA was the Office of Price Administration. It was a very unpopular agency. And when the Korean War began, nobody wanted that name. When it got to something of a crisis they created OPS. And John was Green Bay District Director. My connection with OPS was after I had been defeated for the Senate in 1950, I wasn't Attorney General any more and needed a job. After a few months, President Truman appointed me United States Attorney for this District. In between times, I went to Washington as a consultant for OPS. And I worked with Harold Leventhal, later the very distinguished Judge on the D. C. Circuit. Harold was then the General Counsel for OPS. I was a consultant to him in recruiting OPS personnel. Just as an aside, Judge Hubert Will worked with OPA in Washington, on the price control side of things. Another was Richard Nixon, who never bragged about OPA during his political career.

CTF: What were some of the interesting cases you would have handled when you were with OPA? The fire engine is kind of interesting, there's no doubt about that, but there's others.

TEF: Yes. I was, for most of the time on the administrative side of the legal division. I was Rationing Attorney, which meant that I advised Boards and Administrative Officers on the regulations, wrote decisions on appeals from local rationing boards, and so forth, and so a lot of that was not litigation. Later, there was a time that I was the Enforcement Attorney for the Milwaukee District and then, of course, I was bringing lawsuits and occasionally recommending prosecutions for price and rationing violations. The federal district judges were resistant. They thought we were cluttering their courts. But in those earlier times, I was advising rationing boards that you can or can't issue a ration for this person, and so forth. And there were some at least amusing things that happened in that respect. When our third child was born, and my wife was in the hospital,

CTF: Was that Jenny?

TEF: Jenny. Those were still the days when hospitals wouldn't let anybody but the father visit a new mother for five days of the nine they kept her there. At that point, we hadn't been in Milwaukee very long, and she had just one friend really in the city. Louise and John Paul Jones had moved down from Portage after we had moved, and they lived over in Wauwatosa. And obviously Louise was somebody she would like to see and who would like to see her and the new baby. Louise did come to see Eleanor on what she thought was the sixth day. And I got a call from her at the hospital and she said, "They say it's only the fifth day and they won't let me in." And so I talked to her and then I said, "Well, who's around?" A resident, Dr. So and So, got on the phone. I tried to explain to him that this lady had spent a lot of her precious gasoline to drive across to visit my wife, and she was the only friend she had in town, and so forth. And I said it was really, really pretty important that they stretch the rules a little bit and let her in, but he would not budge,

except that finally he permitted her to stick her nose in the door and wave at Eleanor in the bed. Well, that was that.

About three or four weeks later, something like that, I got a call from a rationing board there in Milwaukee. The clerk explained that they had a man there who was looking for a special ration so that he could draw a trailer from Milwaukee out to Richland Center to take his household goods out to put in his parents' home. He'd just been called into service. He was a doctor and had to report in a very short time. They had to give up their apartment in Milwaukee and haul their stuff out to Richland Center and they needed gasoline for that purpose. I said, "Well, unfortunately, there was no allowance for extra gas." He could use his ordinary ration. Well, that wasn't big enough, and so on. But there was no extra gas for that purpose. No special ration. And so, finally, the clerk asked could the doctor talk to me. O.K., the doctor can talk to me. So he got on the phone. And I explained all of this, and he explained who he was and how important he was to the war effort and all that sort of thing, which we'd heard from a lot of people. It finally came out that he had been at Columbia Hospital. And I said, "Were you by any chance the resident on duty in early February up there?" And I said, "Well, I don't know if you remember or not, but my wife had a visitor, and you wouldn't let her in because it wasn't yet the sixth day after the baby had been born. . . ." Well, yes, he did remember something about that. And I said, "Well, you wouldn't relax that rule and we have rules, too." And that was the end of that conversation.

Then, later, a lawyer, still a lawyer right here in Madison, Bob Arthur, was on the Enforcement Staff. And Bob had kind of an idea that if you had a law, you were supposed to enforce it. Under gasoline rationing, everybody was allowed an A ration and those coupons would take you so many miles a month. Then, if you could qualify for a B ration for some specific, usually business, purpose, you could get a B ration and that would give you tickets for gas, enough for some more miles, but limited. You had to be a minister, physician, or an engineer to get a C ration, and gas for more miles!

CTF: Did you have to carry that ration card with you, or just use it when you went to buy gas.

TEF: You got tickets and you used the tickets at the gas station.

CTF: But it wasn't like police would stop you?

TEF: But you were supposed to have a sticker on your windshield, A, B or C, corresponding to your ration. A lot of people bought black market gas or stolen coupons, or bought counterfeits so they could get around the rules. But any way, Bob and an investigator figured out that somebody from Illinois, no matter how far north in Illinois, could not, within an A ration, get farther and get home again, than Fond du Lac, Wisconsin. And so Bob and the investigator got the cooperation of the Fond du Lac Police, and they got the Ration Board to sit in special session on Saturday at their office in a bank building at one

of the downtown corners. And, so the police officer and OPA investigator would watch for cars with Illinois plates, some hauling boats and canoes and headed up north.

There was a traffic light, and the police would stop the car, and ask for a driver's license, and then the OPA Investigator would ask also for their ration book. And of course, there were lots of violations like, "you didn't sign your book," or, "you have loose coupons," or "you don't have your ration sticker," or "you are using a B or C ration for pleasure." Bob had worked out a whole check list of violations. The investigator would give the driver a notice that he was charged and there would be a hearing before the ration board in about ten days. This was kind of an order to show cause why their ration shouldn't be revoked. The Wisconsin Fond du Lac Board had authority to revoke the rations even though issued in Illinois, so the investigator would give a driver this notice -- check, check, check, check -- and fill it in. Of course, if you don't want to come back to Fond du lac next week, the ration board is right upstairs. You can waive the notice and they'll hear it right now. Ration boards, being boards of your neighbors, like Draft Boards, as they were supposed to be, there were even a couple of occasions where they gave a driver extra coupons if he had a hard enough, hard luck story. But mostly they revoked rations. And then there was somebody who didn't take the bait, and said he'd come back the second next Tuesday or Wednesday, or whatever it was, and he came back with a Chicago lawyer. The *Chicago Tribune* was against gas rationing, along with other things, and we always believed the *Tribune* financed the lawyer. Anyway, there was a lot of quoting the Declaration of Independence, and the like. Many newspapers expressed opposition. As a tire saving method, primarily, speeds above 35 mph were prohibited, and gas rations could be revoked for violations. We started a program of bringing speeding tickets to the attention of rationing boards. The Wisconsin State *Journal*, in Madison, ran an editorial entitled, "Bow Down Ye Serfs." In it, the District Director, Bruno Bitker, was referred to as King Bruno of the House of Bitker, allegedly sitting in the throne city of Milwaukee and telling the citizens of Madison what they could wear, eat, and how much they could drive, and the like. And so I was given the job of going up to Fond du Lac before the Board, representing enforcement. Strangely enough, we won. But that was just one of those things that happened. Rationing accomplished something, but there was a lot of violation. There were a lot of ways around it and people tried to find them. This was one guy's attempt and fairly successful, at least, on a one shot basis, to enforce the law the way he saw it. The incident drew wide attention, and ultimately the then Governor of Wisconsin forbade police to cooperate in similar endeavors.

CTF: I assume you stayed in it until the war ended?

TEF: Yes. I was in it until October of '45.

CTF: When did you meet Jim Doyle?

TEF: I knew Jim and my wife knew Ruth, his wife to be, before they were wives of either of us, when we were here at the University in the 1930's.

CTF: Were you good friends?

TEF: Oh, reasonably good. My wife and Ruth were quite good friends. Jim and I were friends, but we didn't have a lot in common then. I knew of him politically. 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 and so on. So I knew of him, and we had some dealings together, although he was not a member of the Progressive Club. I didn't know him that way.

CTF: Were you active in Portage politically?

TEF: Yes, I was a Progressive, and I ultimately became chairman of the Columbia County Progressive Club.

CTF: How was that Club organized? There was obviously a Republican Party at the same time and stalwarts, or conservatives, when you were a Republican, but how was the Progressive Club organized, and what did you do? Did you have precinct captains and elections?

TEF: Well you have an exaggerated notion of things from your Chicago background.

CTF: Who found its workers?

TEF: Well, we had a meeting once in a while, maybe monthly, in the City Hall at Portage, and whoever was interested would come and there were a few precinct committeemen, they called them. They were actually elected on the party ballot at the time of the primary. But there were many precincts nobody would bother to get elected committeeman. And so it was just people who were interested who would come to the meetings and elect a chairman, and so forth.

CTF: Did you work on the Roosevelt Campaign of '40 when you were there?

TEF: No. We worked on the Progressive Campaign of '40.

CTF: Who was the candidate? For President?

TEF: Spike Loomis was our candidate for Governor, and Bob LaFollette for the Senate. Of course, I voted, and I assume most of us, voted for Roosevelt in the final election, but there was no Progressive candidate for President. We fielded a complete slate of Progressive County candidates that year, although none of them got anywhere. District Attorney, Sheriff, and so forth.

CTF: The Republicans won those -- all of them?

TEF: Yes.

CTF: Were you active when you were with OPA? Did you continue your experiences?

TEF: No. There is a Hatch Act, you know.

One other facet of my time with OPA is of some interest. Within OPA there was an Office of Administrative Hearings. A species of enforcement of rationing regulations had been developed. A rationing board's revocation of a gasoline ration because the holder had committed a violation was one instance of "allocation" of scarce commodities. The Office of Administrative Hearings dealt with another, the suspension of a dealer's license to deal in a rationed commodity where he had committed a violation. An enforcement attorney would start a proceeding alleging one or more violations. A hearing Commissioner (comparable to today's administrative law judge) would conduct a hearing, determine the facts and enter a suspension order if he found violation. Sometimes the Commissioner would place a dealer on probation. A party could appeal to an appellate unit in Washington. I served as a hearing Commissioner, riding the circuit, most of my last year. That was the closest I came to being a trial judge, and I enjoyed the experience.

CTF: After the war ends, what did you have plans to do?

TEF: Well, the first thing was to get a job because obviously the OPA was not going to last. I was looking around and my Dad was inquiring around, and so forth. He put me on to an opening that one of his colleagues had heard of in Winona, Minnesota. It was a case where somebody in a law firm had died, a small firm that had a good established practice. It got to a point where my wife and I went up and met the main partner and his wife, and had dinner with them, and had conversation about the possibility of going to Winona. That was probably in July of 1945, and ultimately an offer came through, but not until I had accepted one in Milwaukee. A friend of mine was leaving the firm which is now known as Foley and Lardner, then known as Miller, Mack and Fairchild, which was the largest corporate law firm in Milwaukee. I think he had something to do with suggesting that I might be interested. Anyway, I was asked to come in and talk. I waited a while, because I kind of liked this idea of Winona, a smaller town and everything, but I finally accepted the Milwaukee job before the Winona offer came in.

CTF: I noted in looking under your name in the index for the Foley and Lardner history, which has just come out, that there is the reference to Arthur Fairchild, who was the main partner in the firm and who wanted to make it clear that he was not related to you by blood or politics .

TEF: Yes, I've seen that quote, and its probably accurate, although I never actually heard him say it. Some years later, I heard from him when I was running for judge, which, of course, is non-partisan and so wasn't quite as frontal an assault on the Republican Party, which would be his choice. Arthur came from Green Bay, and his family had been up there for a couple of generations. He sent me a letter from somebody who had known his family. This letter referred to the campaign for the Supreme Court. And it showed a great deal of confusion on the writer's part among the three of us, that is my father, myself and Arthur. I don't remember exactly which one this person thought was running for office. It may even have been Arthur, but it had references to my Dad, and that Dad's son had worked in Arthur's office, and so forth. It didn't have me as a candidate, but was favorable to Dad and Arthur. Arthur sent it along saying, "I thought I just wouldn't try to straighten them out because the way it's left, any one of the three of us could run for office and have their support." So that was genial.

CTF: John Skilton, your former law clerk, and partner at Foley and Lardner, told me that the firm history cites you with giving a eulogy for . . .

TEF: Edwin Mack, which isn't so.

CTF: Right, which would have been your Dad?

TEF: The author referred to a memorial statement in the Supreme Court for Edwin Mack, as if it had been given by me, a former associate of the firm. The Mack memorial was presented to the court by Frank Boesel, and Dad responded for the Court. That would have been sometime in the '30's.

CTF: Did you think the OPA worked well when you were in it?

TEF: It worked, but not always well. It was spotty. We liked to think that we had fairly active enforcement in Wisconsin, and that there was a degree of compliance with rent controls, price controls, and rationing. But, it was spotty. I went to Omaha to fill in as enforcement attorney in 1944, I think. Their enforcement attorney had died, or something. Anyway, there was a vacancy, and I had been bumped. I had replaced a guy as enforcement attorney in Milwaukee when he went into the service. Then he was discharged medically and came back and I was bumped. And so they had to do something with me, and sent me to Omaha. Omaha, you know, is a great meat packing place, and the steaks that we had out there, I don't think restaurants could have gotten them within the law. I'm sure there were all kinds of ways around rationing. In enforcing price controls, it would have been important for investigators to be able to buy articles when over-ceiling prices were charged. But the government provided no funds to buy evidence. Our ingenious enforcement attorney financed purchases of liquor overceiling by holding a raffle. The winner got his choice of a bottle among those purchased.

CTF: Was rationing needed?

TEF: I think it was important. At least it was our experience; my wife had to wait in line for meats and stuff at the local stores, and all that. And there was always kind of a running argument about the need for gasoline rationing. Actually, I think they had it in the east before they had it in the midwest. And there were people who beefed about it, but overall, I think probably it was a needed program, although it never worked perfectly by any means.

CTF: Why didn't you, or maybe you did, consider going back to work in Portage?

TEF: Well, there was even some conversation with the younger lawyer, who had gone in and helped Dan in the office. Dan, of course, was getting older all this time, and doing less. He had begun to taper off some when I was there. So it never seemed a big opportunity, and I guess maybe I had decided that I wanted something bigger than a city of 7,000. Winona would have been bigger, and more client base there perhaps. I don't know at this moment, just how much thought was given to it, or why I thought otherwise.

CTF: When you went to Miller, Mack and Fairchild, what kind of a practice did you have there?

TEF: Well, first thing I was, assigned to was reviewing pension plans. In those days, of course, there wasn't any ERISA. The big thing about pension plans was that employers wanted to qualify them for tax deductions. And so you had to live up to certain rules of the IRS. And then, of course, you wanted to accomplish whatever you wanted to accomplish. You wanted to deal with your union, if you had one. You wanted to do what they felt was a fair result. So you drew plans to give benefits and you provided for some kind of vesting because that was required by IRS. But you weren't overly generous, probably. And there were quite a number of clients in the office who had such plans, either pension plans which will produce a particular benefit and you fund it accordingly, so that actually it will produce that benefit. Or, profit sharing plans where companies would have a program of putting a certain percentage of net profit into the plan every year and then pay whatever benefits could be paid out of the individual accounts .

CTF: Is this an area that you volunteered to work in, or is this an area that they assigned you?

TEF: I was assigned. I had no teacher

CTF: How big was the firm at that time.

TEF: Twenty-six. I think there were 13 partners and 13 associates, about even, I believe. And then I was put into corporate type stuff. I never could get a real big kick out of splitting stock, which was kind of a fad in those days. It's been at different times since. Theory being that the corporation wants its stock to have a good market; maybe it's a better

market if it's within a certain range of price, and if your stock happens to be selling at three times that range, you really prefer, you'd split your stock and get it down into that range. And then there was a theory that the market would react favorably to a stock split that was considered kind of a dividend, and it would maybe be worth a little more after the split than before. But it always looked to me as if you're just taking one unit and making three out of it, and I didn't see a lot of social accomplishment in that operation. I did some other things in the securities area, adjustments and so forth. And then I did several securities registrations and getting out prospectuses for stock issues of various client companies. That was a little more interesting because, at least, there was a company that needed some money in order to conduct its business better, or expand, or something like that. And it was fun. You would work closely with usually lower management, not top management, but pretty nice and knowledgeable guys, who would work with you on getting the figures and descriptions of the business in shape for publication.

CTF: This is a continuation of the oral history of Judge Fairchild on September 16, 1992.

CTF: Judge, we were just talking about your work with Miller, Mack and that you considered the work corporate, I guess you would call it.

TEF: That's right. I, did get quite a bit of satisfaction out of one financing that I did. One client of the firm was Four-Wheel Drive at Clintonville and the executives up there had used airplanes for their own transportation and they got particularly interested in the need of Wisconsin for local air transport. So they had been instrumental in starting up a possible airline operation to serve as a so-called feeder line which would pick up from a lot of places in Wisconsin, and pour them into Chicago for connections with the majors. And we got the necessary preliminary mail contracts, and so forth. That was the thing that was needed really to make a go of it. But they needed some equipment. They had been flying on a provisional basis some plane just to find out how it might work. But they needed to do a public financing to get some money for three planes to start this company. And it fell to me to do the legal work on that financing. It was interesting because I felt I was doing something. This was a little bit of a shoestring sort of an operation. We had to go and settle some lawsuits in the process so that we wouldn't have to disclose that this company was going to be a defendant in a lawsuit right away. And a few things like that that I thought not everybody could do, and maybe I could. But anyway, I did. And this turned out to be Wisconsin Central. And Wisconsin Central became North Central, after some mergers, and so forth, and then became Republic after more mergers and now is merged again and part of Northwest. But in some ways there isn't as much air transportation around Wisconsin now as there was right after that started. I had the feeling that I was doing something that really was worth doing. And I got some satisfaction out of that.

One thing that happened; we had a wage and hour claim made against one of our clients. There was not much question but that the claim was valid, and about how much really

ought to be paid to the claimant. Anyway, the claimant's attorney was a fellow named Max Raskin, who had been City Attorney in Milwaukee, and ultimately became counsel for UAW-CIO. I got acquainted with Max in settling that with him, and there was nothing unfriendly about it because our client paid what was owed. Max ultimately became a judge in Milwaukee County. But he was my friend, and all through any political operations that I ever was in that friendship was always very valuable. He was usually in my corner. So there were some things like that that happened.

CTF: You worked at Miller Mack?

TEF: October 1945 to November 1948.

CTF: And now you ran for Attorney General. How was it working in a fairly staunchly Republican firm and campaigning for the Democratic ticket?

TEF: Well, it had its problems. Not so much at first. I got a telephone call, actually I think it was the morning of July 4, 1948, from a guy by the name of Jim Doyle, and he wanted to know if I had read about the state Democratic convention in Madison the weekend before, and they had been talking about fielding a bunch of candidates for that election. I had read something about it, and he wanted to know if I'd run for Attorney General on that ticket. And I said, "Why Jim, I don't even know I'm a Democrat." The Progressives folded, and were supposed to become Republicans, and some of us considered ourselves such in '46 in backing Bob LaFollette. But he lost to Joe McCarthy in the Republican primary in '46, and I just don't feel that much allegiance to anything. Well, the proposition he was selling was this: That there was certainly no chance of anybody winning office that year.

Other people who were active in those days were Clem Zablocki, longtime U.S. Representative from the south side district in Milwaukee, Andy Biemiller, off and on representative from the north side district, Gaylord Nelson, elected to the state senate in 1948, later Governor and later U.S. Senator, and Henry Maier, later state senator and later Mayor of Milwaukee. The idea was that the new Democrats were trying to build up an organization which would be attractive to ex-Progressives, and to people who had been Democrats anyway. Often the Democrats were the third party in Wisconsin in number up to 1946. They just wanted to begin building a state Democratic party by fielding a good ticket in 1948. He said everybody knew that Truman couldn't win, and none of us would.

CTF: 1946 was the death knell for the Progressives?

TEF: Yes, spring of 1946. It was a compliment to be asked to get into a quality ticket. Anyway, I was invited out to a meeting at Jefferson Junction on a certain evening the next week. The deadline for filing was only a couple of weeks off. Jim Doyle told me some of the people who were involved -- some of them I'd known from Progressive days. Carl

Thompson. Carl had been in the University Progressive Club with me, and I had a lot of respect for him, and Carl had actually gone over to be a Democrat ahead of the rest of us. He had run in a special election for Congress. A guy who had been a Democrat and had changed to Republican, was in Congress and died, and Carl had run for that seat in the special election, as a Democrat. He had almost defeated Glenn Davis, who was a Republican and who was successful in that election. Carl was running for Governor in '48. Horace Wilkie would be a candidate for Congress. He was a state senator later and ultimately a Justice and Chief Justice of our Court. Miles McMillin was second in command at the Madison *Capital Times* and he had been active in the Progressives. He was going to run for Lieutenant Governor, but his boss did not favor that. Henry and Margie Reuss rode with us to Jefferson Junction.

CTF: And that district is the western and northern suburbs of Milwaukee?

TEF: No. It's partly the district we are in, in Madison. In those days it stretched from Dane County to Waukesha County. You had Dane, Jefferson, Waukesha, Dodge, and Columbia. The second district was Bob Kastenmeier's district.

CTF: So it included Dane County, too?

TEF: Oh, yes. And it had been a LaFollette and Progressive stronghold. There was a group of people in Dane County who were beginning to kind of rattle the harness. They thought maybe they ought to be Democrats. There were still people in Dane County who had been elected to County office as Progressives, and even in 1946, I think. Or they were Progressives who changed to be Republicans and got elected as such. So we went to that meeting at Jefferson Junction, and whether it was the martini or the steak, I don't know, but one or the other, I decided to go with it. But I had to lay down two conditions. One was I had already had plans to go back to New York to the family farm for vacation and that wasn't to be interfered with for this political effort. And that was going to happen between then and filing so I was to have no responsibility for getting the papers signed and filed. The other thing was that I had to draw my paycheck every month, and I was working for a firm that I didn't know would be too receptive to this idea, and so it would have to be understood that I would have no obligations to spend any time except evenings and weekends. I had told Mr. Foley, who was an important partner, although not the senior partner, about my considering this when Jim Doyle had first called. He had not said no, if you want to do that, you have to leave here. He just said this probably isn't a very good idea, and he cited the example of somebody who had once been an assistant, or a deputy attorney general. He said Ralph Hoyt, who was from Milwaukee, a very able lawyer, always felt that time in public service had cost him a lot of advancement in the profession. He was advising me that this wasn't a good idea. I later agreed to run on the evening and weekend basis. There was never any particular flap about that until after the primary. There were people who reported that some of the clients raised their eyebrows at the fact

that an associate of the firm was making speeches in which I said the Taft-Hartley Act ought to be repealed. That wasn't very acceptable doctrine at the firm.

CTF: What did Eleanor think about this idea?

TEF: Well, she'd been a part of the University Progressive Club and all that. She was interested in that. She was . . .

CTF: A good sport.

TEF: Yes. I'm sure I had misgivings about would it turn out that I'd lose my job, or something, but we thought we had that covered. I certainly wouldn't be elected to anything. So there was no reason to be fearful about it. It meant spending some time and I did, regularly, Saturdays and Sundays, and went to evening meetings and found out what the insides of labor unions were like, went to Democratic ward meetings, and that sort of thing in Milwaukee. And those things you could do in an evening.

CTF: What did your Dad think about this?

TEF: Well, of course, this was not his cup of tea, but he knew that I'd been active as a Progressive. It wasn't any worse to be a Democrat than to be a Progressive in his point of view, I don't believe. So we didn't have any ruckus about that. He had a very old political friend whose first name was Herman. And he was a Milwaukee Republican worker of some kind. He was a great big guy, and Dad used to call him Der Grosse Herman. Herman used to drop in on Dad once in a while over at the Capitol just to pay a visit. And he told me that Herman was in, and said, "What the hell did that Pat Grady do to our Tom?" He had Dan's name wrong, but he figured that Dan was a Democrat. He had been traditionally, although he was also partly Progressive. He certainly wasn't Republican. He could have run for the Senate seat that Duffy got in the '32 Roosevelt landslide. Dan had turned that down. He could have run for Governor, or Senator, or whatever, in that ruckus. But he preferred not to, and that's when Duffy went to the Senate. But that was Herman's "what did that Pat Grady do to our Tom." Oh Dad would tell me that sort of a story, you know, but he was accepting of whatever I wanted to do. I've told you, in the talk I've given sometimes to the law clerks, about the fluke that happened on the Republican side. They nominated in 1948 the wrong persons. They nominated several who weren't the individuals people thought.

CTF: Was that Zimmerman?

TEF: No, Fred Zimmerman had been Secretary of State for ten years. They nominated Zimmerman all right, and he was the right Zimmerman. John Smith had been elected state treasurer five times, but had died. John Martin had been elected attorney general five times but had been appointed to the Supreme Court. In 1948 the Republicans nominated a

different Smith for lieutenant governor, a different Smith for treasurer, and a different Martin for attorney general. The newspaper just made a laughing stock out of that Republican primary because here were not one, but three people that were nominated because they had names that were like somebody else. Our candidate for Lieutenant Governor came within, oh maybe 8,000, of knocking off one of the Smiths. But he didn't quite make it. And I did.

CTF: You were the only one who won.

TEF: I was the only one who won. But I carried very heavily in the southeast, from Dane to Milwaukee, and Sheboygan and then south from there. I probably carried Douglas and Iron up on the north end, but other than that I didn't carry. It was largely the circulation area of the *Milwaukee Journal* where I was successful.

CTF: Do you think you picked up any votes just because your Dad had been on the Supreme Court, and people were seeing Fairchild as a name?

TEF: It is possible in some degree, but after all, my opponents name was Martin and his uncle had been attorney general for ten years.

CTF: That ought to be a wash, at best.

TEF: Yes. John Martin had been elected Attorney General five times and then had gone to the Supreme Court. The Martin family actually had been Democrats. John's uncle, Joe, had been Democratic State Chairman at one point as well as on the Supreme Court. So the Martin name was a pretty good name.

CTF: What did you win by?

TEF: Oh about 60,000. I had 622,000. It was about 60,000 difference between me and Don Martin.

CTF: So you woke up and the . . .

TEF: Woke up and that was the first time we ever checked to see what salary they paid the Attorney General. And I realized that I had a pay cut of 30%. It was a lucky win. Of course it put me on the path that eventually came to this Court of Appeals.

CTF: What did it cost out of pocket to run that campaign for you

TEF: \$500 or \$600 probably that I spent traveling around.

And a group of young lawyers -- they were mostly people in the Junior Bar in Milwaukee that I'd been friends with, and were of various political shades -- but they formed a committee for me and had printed a small hand bill that was just parallel, two columns, my experience and Don's. And his column was a little short and mine was longer, including the Miller, Mack business, and all that. I don't remember now, but they maybe spent \$700 or \$800 on that. But the Milwaukee *Journal* printed it in the news section. You know you can't buy that. One other thing that happened, a client of the firm was the B. C. Ziegler & Company of West Bend, which is still operating. In those days it sold bonds to finance churches and hospitals. Now it's branched out and does a number of other financings as well. But anyway, it was a financial house of prominence and stability in West Bend, and Delbert J. Kenney was the CEO. I had done a little work for him at the firm. So I knew Del slightly. He had been the regular Republican endorsed candidate for Governor against the Independent Republican, Goodland, in '46. So he was a power in the Republican Party, and widely known. I got a chance to look at the Milwaukee *Journal* the Sunday before the election. There was a story about a statement that Del Kenney had made, that the way to be a good Republican in 1948 was to vote for a Democrat for Attorney General. And Eleanor had a list of calls. A lot of people I'd never heard of who evidently were Republican workers had called me asking if I could give them some literature. There were a lot of elements working to make that happen. On election morning our daughter Susan, seven years old, went to school. The teacher, wanting to make a point about elections, asked, "Can you tell us what day this is?" Another child answered, "This is the day people are supposed to vote for Susan's daddy." This was a fairly Republican area, and the word had gone around.

Some friends in various towns ran ads in the local papers. The first person I went to see after the primary was Leon Feingold, a law school classmate, and Senator Feingold's father. He practiced in Janesville and promptly organized a bipartisan group of lawyers there who signed an ad for me.

CTF: Now you had just mentioned that you were out campaigning with Pat Lucey, who later is to be Governor of Wisconsin.

TEF: Yep.

CTF: Was he running for office at that time?

TEF: Running for the Assembly, the lower house of our Legislature.

CTF: From which district?

TEF: Over on the Mississippi, around Prairie du Chien, Crawford County. He and Ruth Doyle of Madison and Bill Duffy of Green Bay were young Democrats who won seats in the Assembly that year.

CTF: O.K.

TEF: I had gone out at his invitation. We'd spent Saturday, going to places, and stayed at Prairie du Chein that night. In the morning at the motel, I had run into a Milwaukee *Journal* circulation guy. He was not a news person. He was quite enthusiastic about my chances. And he kind of saw what the *Journal* was doing. On the way home I had stopped in Lancaster, which is the county seat of Grant County, a southwestern county in solid Republican area. I'd stopped there because one of my friends from University Progressive days ran a newspaper out there. Norm Clapp. We had a picnic and had a good time mostly Sunday noon. But anyway, Norm said, "Something is happening. Dick Orton is going around town telling people they should vote for you." And Dick Orton was a Republican power in that area of Grant County. Later he was a judge.

CTF: What did Carl Thompson lose by in the Governor's race?

TEF: He lost by an amount similar to what I won by.

CTF: But Jim Doyle then, did he run in '50 for Governor?

TEF: He ran for Governor in '54, against Proxmire, and Proxmire defeated him in the primary. And that was the end of that.

CTF: Right, and then Proxmire got beat. Well there you are the next morning, 30% pay cut, you were going to be the next Attorney General.

TEF: Then I got a call from a guy named Stu Honeck. He was originally a Milwaukee lawyer who had been Deputy Attorney General. When Martin had been put on the Court, the Governor had appointed a guy named Grover Broadfoot as the Attorney General. And Broadfoot was defeated by Martin in the Republican Primary. So Broadfoot had been in the office five or six months and then was defeated for the nomination. There came another vacancy on the court and the Governor decided to appoint Broadfoot. But that would leave a vacancy as Attorney General. So they sent Stu over to see me and wanted to know if I would accept appointment by the Governor for the six weeks. And I did. And so I left Miller, Mack sooner than I would have had I just waited and gone into office in January.

CTF: Now during that time as Attorney General, maybe, I'm sure there's some very interesting case, I can remember you mentioning about the Beloit case which I thought was pretty interesting, the swimming pool.

TEF: In the '48 campaign, my wife and I went down to Beloit to a League of Women Voters forum. Some lady got up, and asked Governor Rennebohm, the Republican incumbent, how come the Black kids couldn't swim in the White pool in Beloit. Governor Rennebohm

said, "Ask him. That guy's running for Attorney General, you know." And so I said, I didn't know the facts, but as she described it, it would be wrong. Somebody brought that matter up after I got into office, and we tried to discover what was going on. Beloit is an interesting place. I think it was Fairbanks Morse that had imported a lot of Black labor into that area in World War One. Anyway, there had been quite an influx and so Beloit had more Blacks, in proportion than Milwaukee or any other place in the state. It's a college town and has that influence in it; still it's a small city and behaves something like some of the small southern cities, I guess. There were two swimming pools and Blacks were not expected to swim in the big, nicer one. The Blacks understood it and the Whites understood it, and that was it. There was no posting, there was no ordinance, there was no official act of any kind. So we started a lawsuit in the Circuit Court for Rock County against the city administration. We served a summons and affidavit outlining a possible claim and saying that we needed discovery in order to plead. I went down and cross-examined the city manager. There was a little skirmish before that. They tried to get the local circuit judge to knock it out for some defect. I've forgotten what the argument was, but some defect . . .

CTF: Did you have a complaint?

TEF: No, we didn't have a complaint. You give an affidavit that outlines the area and then you want to have discovery, so that you can draw a complaint.

CTF: This is a statutory authority to the Attorney General, or can anybody?

TEF: No, anybody. Any lawsuit. Judge Harry Fox sided with us and said this was valid and that the city manager would have to show for the deposition. We made the cross-examination as effective a public thing as we could. He came close, at least, to admitting that there was a public conception that Blacks couldn't go into that pool. We never could nail down anything that any city person ever did to keep Blacks out, but we had an admission of the existence of an exclusion by social custom. So we finally settled the lawsuit for dismissal on the basis that the city manager made a statement in which he very emphatically said that exclusion was wrong and was not the policy of the city. It was the best that we knew how to do, and, of course, none of us had ever heard of Section 1983. It had been around on the books since 1871, but nobody had ever heard of it. What we did wasn't much more than jawboning. I don't know how many Black people were able to go swimming in the big pool after that. But we made some dent in the custom.

About the same time, it so happened that the American Bowling Congress was incorporated in Wisconsin. And they had literal exclusion, Whites only, or something, for competition in the American Bowling Congress. And because it was a Wisconsin corporation we had some hold over them. We started an action to compel the forfeiture of the charter and we settled for them taking the clause out. Now, again, how many Black teams bowled the next day, I don't know, but at least, it was a step.

CTF: What other cases can you remember from that were historically important or merely of interest?

TEF: From the Attorney General days?

CTF: Yes.

TEF: Well, there were things that I did that weren't very smart politically. I ran the office on as objective and non-political basis as you can. And that's pretty easy in that office because for generations the staff had been on civil service. The Attorney General is elected on a partisan ballot but all of the assistants have tenure. They get there by an examination process, and appointment from a panel, and all that. So all of these guys were pretty professional people. I ran it on a basis that I had to trust them. I got some questions that were loaded. Well, the legislature can ask a question of the Attorney General, and they might ask a tougher question if you're a Democratic Attorney General. We held that some kind of a proposal for having farmers pay to promote dairy products wasn't a valid tax. Vaguely that's what it was. I don't remember exactly. So that got some people mad. And we had an opinion on released time. We pretty well hued the line of separation of church and state and that got some folks mad.

CTF: What was the issue there?

TEF: Well, released time. Is it valid for school boards to release students half a Friday, for

CTF: Released time for kids to go for parochial or religious education . . .

TEF: Yes. And then the real killer, and this one was pretty stupid, politically speaking, on my part. There were a lot of opinions on the subject of gambling, and we were then pretty straight-laced, our court and constitution. You don't gamble. You do it maybe, but not legally. They were coming along then with these radio shows. You phone in to identify something and you get a prize, and was that gambling? And an opinion came out that yes, indeed, a show called "Stop the Music" was illegal. The opinion came out right in the middle of my 1950 campaign for the Senate. And I never saw anything like that. You know, I'd been issuing opinions, and a lot of people didn't know anything about them. But the day that opinion came out, I was coming down from Fond du Lac toward West Bend. I couldn't walk into a store without someone saying, "Oh, you're the Attorney General. You got out that goddamn opinion that says we can't watch that show." Oh, it was vicious. I lost a lot of votes, I'm sure, just on that.

CTF: Were there many battles with the Assembly or with the Republican Governor, or is that really saved just for the elections?

TEF: Oh, the Governor and I got along very well. I operated the office objectively and never tried to put him in a corner, and I don't think he ever did particularly with me. There was something called the Board of Deposits. The Governor, the Secretary of State, the Treasurer and the Attorney General, were on that board. Governor Rennebohm was trying to get state deposits into banks which would pay interest. Some of the bankers weren't too happy about that. The Secretary of State and State Treasurer showed some disposition to go slow on that, maybe they had friends. Anyway Rennebohm and I voted together on quite a few things in that kind of context.

CTF: Now in '50, you're running for the Senate?

TEF: Yes. That's the first Senate race. That was probably a mistake. I have a great deal of feeling for the present Attorney General, Jim Doyle, because I've been there. I know what he's being put through. He has the advantage over me that his is a four year term. Mine was only two. But the pressures that there must be on him to run for this or that, or groom himself to run for Governor or whatever are pretty strong.

CTF: You were the first Democrat elected state-wide since Duffy won the Senate; was that when Duffy . . .

TEF: 1932, the Roosevelt landslide. Before then you have to go back to Senator Husting in 1916 or so, and before that to Governor Peck in the 1890's.

CTF: So the pressure's on you to run for something.

TEF: They wanted me to run for something and my choice would have been to run for re-election. I liked the job. I hadn't been in it very long. This made a lot of sense in most ways. Learn more about state government, more about the problems there were. I was a young guy then.

CTF: Forty-two?

TEF: No. In December of '50 I would have been 38. So lots of reasons why I should have done that. And even if I had lost, I think I would have been a better candidate against McCarthy the next. But, there was this terrific pressure . . . there were people who wanted somebody else to run for the Senate and wanted me to run for Governor. And then Governor Rennebohm announced that he would not run again. So there was to be an open slot. I wouldn't be running against him, which would have some awkwardness. And then a lot of people said, "Oh, oh, you should shift over now and not run for the Senate. You should run for Governor." But many others supported me for the Senate. No matter which way I went, it was not going to be very great, so I stuck with what I had announced. I stuck with the campaign against Wiley.

CTF: Did you have any primary opponent?

TEF: Yes, and that was somewhat sapping of energy. I had three of them. Dan Hoan, who had been Mayor of Milwaukee for 24 years, had run for Governor back in '44 as a Democrat. He was originally a Socialist. A guy named Bill Sanderson, who had some labor support, had been executive assistant to Merlin Hull who was a Progressive Congressman from up around Eau Claire. And Lavvy Dilweg of Green Bay Packer fame. So there were four candidates. We went all around the state. We had meetings with all four of us speaking. So before the campaign was over I could have given the speech of any of the others, and they could have given mine. But I came out fairly well. I've forgotten now what the margins were. I think Hoan was second, Sanderson third, and Dilweg fourth.

CTF: Were there primary contests for the Governor's race in the Democratic Primary as well as for the Attorney General? Or was it just the Senate?

TEF: I don't believe there were contests at the state level. Carl Thompson ran again for Governor as in '48 and Henry Reuss ran for Attorney General. I think Bob Arthur ran against him in the Primary. So there was one contest.

CTF: Now had you declared first for the Senate seat? You would think that you, being the first state-wide Democrat in decades to win office, that people wouldn't be particularly interested in going up against you.

TEF: I don't remember the order in which we came out. We all came out early that year. Mine was announced in late February or early March. Whether there had been formal announcements by anybody else, I don't know.

CTF: Now, Wiley had been a long-time Senator here, hadn't he? And he was pretty well established.

TEF: Yes. He had defeated Duffy in '38. And then he had defeated Joe McCarthy in '44, for the Republican nomination, and I don't remember now who the other candidates were in '44 in the final. He'd been elected in '38 and '44, and this was his third run. And while there were things to argue about in his record, he didn't present anything like the McCarthy picture. There was no issue of that magnitude about Wiley. So, I tend to think it was a mistake to have run. With the incumbent Republican Governor ultimately deciding not to run, I might well have been pushed into running for Governor and who knows what would have happened then.

CTF: You won the primary and you lost to Wiley,

TEF: Uh huh.

CTF: What did you lose to him by?

TEF: I think somewhere near the same 60,000 we were talking about. Anyway, that general neck of the woods. I think I had 45 -- 46 % of the vote.

CTF: So you wake up the next morning, and this time you don't have a job. . . .

TEF: Or not for very long.

CTF: Right.

TEF: Well, that's the point at which I became a candidate to be appointed U. S. Attorney, and while waiting for that, I went down and did this work with OPS, with Harold Leventhal, that month of January, 1951, and into February. I came back and was appointed U. S. Attorney in March.

CTF: I should have asked you before, what were the issues in the Senate race, both in the primary and then the general election; do you remember any particular issues that at least you emphasized that you thought that the voters may make this decision on, or do you think it was just on the matter of qualifications and background?

TEF: Well, we were still in a situation where it was an uphill road against a Republican and particularly a Republican incumbent. Our party just hadn't shown that much strength. I'd won, but there were these so-called "fluke factors," that had given me extra strength in '48. So, it was still an uphill fight and I would have to get across that I'd been a real good Attorney General and so on. And hopefully they'd think I was a pretty good guy. There were some issues: the plan was a Brannon Democratic proposal of 1950. Brannon was Secretary of Agriculture and advocated a different type of farm program. You subsidize the farmer rather than support the market. I've forgotten the details of it right now. I can't tell you now what it was. I probably did a pretty poor job telling anybody else what a good idea it was then. But Brannon came out here and helped us. I get a kick out of present day talk about a national health plan and national health insurance. President Truman had come out for a payroll tax and to provide national health insurance in 1950, and I supported that. I was a long ways ahead of some of these other guys. And, of course, you had a question of what the attitude should be toward the United Nations. And then of course in February of 1950, McCarthy fired his first shots on communists in the State Department. Then in June of 1950, the North Koreans moved into South Korea. And the President started, or went along with the United Nations, combating that.

CTF: We also had at that time the Berlin Blockade. Has that occurred at that point, that the Russians had stopped the access to Berlin and we had the Berlin airlift?

TEF: I don't remember the exact sequence of that. But it had to be in there somewhere, because that was under Truman. And then, of course, the Chinese army overwhelmingly crossed the Yalu in about September, and all of those things made an awful difference in people's thinking at home.

CTF: Was that the trigger that brought foreign affairs, let's say, as opposed to the domestic economy to the forefront of the issues? Were people talking about foreign affairs prior to that?

TEF: People were very concerned. People's kids were dying in Korea, and maybe more of them were going. And, this idea that something had gone wrong, and we were losing out to China, began to surface and be rampant. That summer was full of feeling.

CTF: Now, you were appointed in March to the U. S. Attorney's position. Your background is not in criminal law. Granted at that time, the Western District of Wisconsin was probably not a hot bed of criminal filings, but did you find any problems at all in taking your trial skills from Portage and from Milwaukee, basically in the civil area, and applying them in the criminal area?

TEF: I had some things to learn. Of course I'd defended a couple of people in Portage in minor cases. One of the things I had to learn was about grand juries. We don't need grand juries in Wisconsin and usually don't use them. In the federal system, unless you can get somebody to waive indictment, you have to have a grand jury and get an indictment. There hadn't been a grand jury in this district in a period of years because the then District Judge, kind of pressured the U. S. Attorney, I think, either you get a waiver of indictment, or do something else. Anyway, there hadn't been a grand jury for several years.

CTF: Now that judge was Pat Stone that you're referring to?

TEF: Yes. I had the first grand jury for quite a while. We were running out of time on a bankruptcy fraud case, which was of considerable substance, I thought, and they wouldn't waive. So, we indicted them. And from then on, I had several grand juries, and didn't fool around getting waivers unless somebody just offered them.

CTF: What was Judge Stone like?

TEF: He was a very congenial, sometimes fairly quick tempered, quick reacting individual. This was definitely back in the days when the court wasn't that busy. He lived in Wausau, came to Madison occasionally for a set of trials. There was a courtroom in Wausau, and sometimes he'd hear things there and would hear cases two weeks a year in Superior. It wasn't a real busy court, and yet he was a guy who wanted to get things done. When he'd invested the time to come to Madison, he would set things so that if you had a hearing in the morning, and you went out for lunch, you might come back to the recessed hearing in

the afternoon and find out that he'd started another hearing before you got back and have to wait until it was over.

CTF: How many assistants did you have in those days?

TEF: I was lucky when I had one. Some of the time I didn't have any.

CTF: So the office was really just you?

TEF: Yes, and the two secretaries. They did the collection work.

CTF: Did the Department of Justice give you any kind of training on the use of grand juries and criminal investigative techniques or was everything that you did sort of learning on your own?

TEF: It was all on my own.

CTF: What were the most interesting cases that you handled as U. S. Attorney?

TEF: Well, the bankruptcy case was a pretty good one. Judge Stone felt disqualified in that case. And Judge Tehan came over from Milwaukee and tried it four days a week. It lasted about four weeks. There were eleven or a dozen counts of false swearing.

CTF: How many defendants?

TEF: Two. A man and his wife. Our star witness was the ex-husband of the wife. This goes back to immediately after the cessation of price controls, or about then. The company was buying carload shipments of butter and cheese and corn oil, in Nebraska for delivery in New York. It sold at pretty high prices -- cash, and the wife brought the money home in suitcases. She'd fly to New York, and bring the money back to Portage. And her then husband Joe was in New York. He knew what was happening from that angle. Later came the divorce and remarriage and then the company sought reorganization in bankruptcy. I'm a little fuzzy on the details. It's in Fed Second somewhere because it eventually got down to Chicago on appeal.

CTF: What was the case name again?

TEF: *U.S. v. Marachowsky*, 15 F.R.D. 130. The basis of the fraud was that the husband Jake had filed claims as if he had lent this money to the corporation rather than that it was the corporation's own money that came out of these deals. We had to reconstruct the deals pretty much and we got all these dealers from New York who had bought the stuff to come in and testify. I had an FBI Agent Accountant who sat with me through the trial. He would keep the exhibits straight. He was my assistant in that trial. I had some bank robbery cases,

some draft cases, and lots of Dyer Act, transportation of stolen vehicle cases. We usually got pleas in those. And there were prosecutions for sale of intoxicating liquor to Indians.

CTF: Did you have many land condemnation cases?

TEF: I don't recall having a lot of them. We had a case where the steamer Butterfield hauled a log boom across Lake Superior to Ashland and they did something wrong. That was a civil case. The Government tried to get a forfeiture. *U.S. v. 1500 Cords, More or Less, Jackpine Pulpwood*, 108 F.Supp. 224.

CTF: Would it have come from the Canadian side then, or was it a Canadian ship?

TEF: I'm not sure if it was from Canada or Minnesota. Again, I shouldn't spend much time on it because the details are pretty fuzzy.

CTF: O. K. Why don't we take a break, and when we come back we'll start with the campaign for '52.

CTF: This is a continuation of the oral history of Circuit Judge Thomas E. Fairchild. The date is September 30, 1992, and Collins Fitzpatrick, Circuit Executive, is conducting the interview.

CTF: Judge Fairchild, you mentioned that you had some additional thoughts about your Dad since we last met. Maybe you could mention those, please.

TEF: Well, you asked me about relationships in the family and I thought maybe I had shortchanged Dad a bit. Some things came to me that were real important to me. We didn't have a car in our family until 1924, which was late for people around our neighborhood. And so we did other things to enjoy life. I remember going on many Sunday walks with him around the neighborhood. A good many of them actually passed the Miller Brewery. I sometimes say I was born in the shadow of the Miller Brewery. Well, I guess it can't be literally true, because it was north of our house. And then, in those days, an adult could ride the streetcar in Milwaukee for a nickel, and a kid for three cents. We used to climb on the streetcar, a block and a half, from our house, and take different routes. You could choose quite a number, all told, around the city of Milwaukee. This was interesting just to sit there and ride. Dad would comment on the parts of the city we were going through. There were electric interurban lines, going north, south, and west from Milwaukee, and sometimes we would ride on them. And that was another activity which we often went on, on a Sunday.

CTF: Would it be just you and he, or would the rest of the family go?

TEF: No, just the two of us. One of the very frequent destinations of the walks was the Milwaukee Zoo, which in those days was located in Washington Park, within a fair walking distance of our home. On those trips, my Mother and sister might be along as well as my Dad and myself. As I mentioned, we didn't have a car. My Dad had a very good friend who was a judge in the Criminal Court in Milwaukee by the name of August Backus. Judge Backus did have a car, and they liked to take Sunday drives. When their whole family wasn't going along he would like to have us as guests. Many Sundays we would drive quite a considerable distance. I remember one of his daughters went to Rockford College down in Illinois and we drove over there, and so on.

CTF: How long would that drive be in those days?

TEF: Well it's a couple of hours, I guess, from Milwaukee. At least that. It's almost that now and longer then because the roads were nowhere near as good. Then he had a kind of a political flair, even though he was a judge, and he was always being asked to go out and give talks in various parts of the state. On a very substantial number of occasions, I can't say how many, but enough to have made quite an impression on me, he would be going up to Wausau or Stevens Point, Oshkosh, or some other place, to give an address of an evening and he would invite my Dad and me to ride along with him. Sometimes we'd drive back at night. Sometimes we'd stay overnight. In my later political endeavors I covered a good deal of the state and I always remembered some of those runs that I had first made way back in those days as a guest of Judge Backus.

CTF: What would his speeches be on?

TEF: Oh, they'd be on motherhood and the hearth, and how you have to be tough with criminals, and how some of them would learn their lesson if you were. I mean a lot of old homespun sort of stuff. He was a criminal court judge with a lot of stories about undesirable people and what happened to them. He was kind of a conservative, law and order type person.

CTF: Now would he speak to political gatherings or would it be more to the Rotary and Kiwanis?

TEF: Well, I remember them being in places like theaters or schools. We're talking about a time that I wasn't all that cognizant of how these things worked. But I do remember sitting in theaters. Sometimes it would be like Rotary or Kiwanis. There would be a dinner, and he would speak afterwards. Of course, I went to many of those with my Dad. I learned a good many of his speeches, too. His were more likely to be at church groups or schools in the Milwaukee area. These with Judge Backus were often at some considerable distance.

CTF: Was Backus ever considering a state-wide campaign or was he just a popular speaker who was asked by different groups to come out and speak?

TEF: Well, I think perhaps a little of both. Why he must have been thought of as a good speaker because people asked him to come a considerable distance. And he was thought to have political ambitions at some time or other. But nothing ever materialized. He ultimately left the bench, some time before the 20's were over, and he became the publisher of the *Milwaukee Sentinel*, which then was a paper on which Hearst had an option. I don't know the ins and outs of that arrangement, but I do know that while I was in high school Backus was the chief in command there at the *Milwaukee Sentinel*. It now is owned by the *Journal*, but it was not then. They were real rivals in those days. I remember a couple of occasions that Dad took me on the train and we went out to Madison from Milwaukee and visited the capitol. He had been in the State Senate at the time the present capitol was being built. So he was interested in the building from that point of view. It was first occupied generally, I think, in about 1917. And that's about the time that he left the Senate and became a judge in Milwaukee. But he was proud of the building. I remember an occasion, probably was in about 1922 or 1923. I remember his showing me around the legislative halls and the Supreme Court chambers and the capitol generally. Then in 1929, the first Governor Kohler of Kohler Plumbing fame, became Governor, and we tried to go to the inauguration which was in January. We never saw the inauguration because of a severe snow storm that stalled the train between Milwaukee and Madison. We didn't get to Madison until long after the Governor had been sworn in. But I well remember being taken into the Supreme Court, and remember something of the personalities of the people who were sitting. There were only six of them because the Chief Justice was ailing at the time, and the man who later was Chief Justice for 21 years, Marvin Rosenberry, was presiding but he was not sitting in the center chair. I could not have imagined that some 37 years later I would be sitting in the Number Two chair and presiding because Chief Justice Currie was absent for a few days. On one of these visits Dad took me to meet the Attorney General, who was John W. Reynolds, father of the later Attorney General, Governor, and District Judge Reynolds. Again I am sure I didn't picture myself sitting in his chair.

CTF: Would he talk to you about the cases that he was working on?

TEF: A great deal. He was very likely to talk at dinner, for instance, about cases, usually about human interest or comical things that had happened, and occasionally about a particular case and why it was there, or what he had done, or so on.

CTF: Did he ask you how you would decide it?

TEF: No, I don't think he was too interested in that. Incidentally, I'm sure you know Jim Shellow. Well, Jim's mother, Sadie Shellow, was a psychologist, maybe still is. She's a very elderly lady, but she's been alive at least at fairly recent days. She did a lot of work in connection with juvenile proceedings in Milwaukee. I first became acquainted with the name Shellow because my Dad had a high regard for her and her input in cases. I think she was probably a juvenile court functionary at that time or if not she was called in to advise on psychology in connection with juvenile cases. In 1923 he went to attend the meeting in

Washington of the National Probation Association. That turned out to be a week long and he took me along. We went on the train and stayed at the Willard Hotel. I was around the edges of some of the sessions although I didn't probably absorb everything that was being said.

TEF: Probation as a device began to be used maybe in the early part of the century. But it wasn't an old system, and there was this National Probation Association, which I assume included judges and probation officers, and so on, I suppose they had meetings annually. I remember a cabinet officer Denby came over and appeared at one session. For me, it wasn't all attending the sessions because some other family members happened to be in Washington at the same time. They saw to it that I got to Mount Vernon and up and down the Washington Monument, Lincoln Memorial, Rock Creek Park, all the sights that there are. In some way or another, we got over to the White House and met the then-President, Warren Harding, and got to shake his hand and pat his dog. Dad and Judge Backus managed that.

CTF: You also met President Coolidge?

TEF: I didn't. I mention him because he came to a northern Wisconsin river area for a vacation. My Dad journeyed up there and I have a picture of Dad and Judge Backus flanking President Coolidge. But I had no contact with him. I never had contact with President Hoover. My Mother had some connection with his wife and my Father had some casual connections with him. I have mentioned, I think, the business of campaigning for Hoover in 1932, which was certainly not a great success. But my one chance to see him was during that campaign. He was on the back platform of his campaign train on the Pennsylvania Railroad going through Princeton Junction, and since I was at Princeton at that time, I went down to see a very tired looking man out on the back platform waving. President Roosevelt I never saw while he was President. I mentioned earlier that I had heard him speak at a meeting welcoming the Bremen Flyers in Milwaukee after they'd flown across the Atlantic from Germany to the United States. I did see him once when he was Governor of New York. This would have been in the summer, probably, of 1931. I doubt if it was the same year as the campaign, but it was close to it because the issues were kind of building up between him and Hoover at that time. I'd mentioned earlier that my parents came from Dansville, New York. One of the institutions in Dansville of some prominence was the so-called Jackson Hotel and Health Resort, or Jackson Sanitarium. It'd been kind of an advance sort of thing for its day back in the latter part of the 19th Century. People were put to exercises and, using water cures, and so forth. The Doctors Jackson ran the place and a great many distinguished people came there. And one of them was Clara Barton, the nurse who was the founder of the American Red Cross. And because of her stay there, at the sanitarium, the first chapter of the American Red Cross is the Dansville Chapter, of which my Grandfather was a charter member. And so this 50th Anniversary (if it was the 50th) big celebration was held at Dansville. Governor Roosevelt came and spoke at the outdoor meeting. And Hoover also spoke by radio. It was interesting to me because here was the

Governor of New York who was a Democrat, saying that the government should intervene to help cure the ills of the country. But Hoover spoke about maintaining the responsibilities and powers of the states. That seemed to me to be kind of a reversal of what I had understood the two parties basically thought up until that time. Incidentally, my part in this celebration was to play in the band so I not only heard Governor Roosevelt speak, but I tooted a few toots.

CTF: Now what were you, what instrument?

TEF: I played the French Horn.

CTF: Had you learned that in school or had you had lessons at home?

TEF: That had been something I had picked up in school. I originally was selected to play the trombone. I was not very good on either one, but they needed a French Horn player when I got to high school a lot worse than they needed another trombone player. There weren't too many French Horns, and I had a fair number of opportunities. I just never was any good. There's a camp at Interlochen, the National High School Orchestra Camp is what it used to be called. The name is different now. The first session of that camp was in 1928, and I was there. The National High School Orchestra had played here in Chicago under the direction of Dr. Frederick Stock in the spring of 1928. And I was here at that! I can drop a lot of names, but that's all I got out of any of this, except, of course for a heightened enjoyment of classical music. Stock, Damrosch, Gabrilowitsch, Stokowski, Maddy, Giddings, Howard Hanson, Falcome – all were conductors. I got to play something under all those guys, but I never amounted to anything.

CTF: We did not talk about the Truman campaign trip in '48 when you were running for Attorney General. The train trip.

TEF: Yes, the president that I saw the most, was President Truman. The very first time was in that campaign. I was running for Attorney General and he was running for President. And the common wisdom of the day was that he didn't have the chance of the proverbial snowball. And then I was told at some point in the early part of October of '48 that if I could get myself and my wife, up to Sparta, Wisconsin, I could get on the presidential campaign train, which would be running from St. Paul toward Madison, and then eventually Milwaukee. The President was to speak in the evening, October 12, at the baseball park in Milwaukee, not the stadium. This is before there was a county stadium.

CTF: Is that out on the west side, past Washington Park?

TEF: No, the county stadium is out in the valley there, but Borchert Field at Eighth and Chambers was where a lot of our high school football games were played. The Brewers of that day would play there. Anyway that's where Truman spoke. A couple of very nice ladies

volunteered to take us up to Sparta that morning. And they would drive our car back, and so we and our son Tim did. We were permitted to board the train at Sparta, and got to meet the President and Mrs. Truman, and ride along on the train. And it was a quite revealing sort of observation that we were able to make. This is through rural territory coming down from Sparta, which is 100 miles or so up northwest of Madison to Madison. And at almost all highway crossings, there would be people out there to see this train go through. Of course it was *the* President and that always will draw a few people, but it began to look as if maybe people thought a little bit more about this man than we had been led to believe. We came down to Madison in the early afternoon, went out to the Stock Pavilion. It happened, in those days, to be the ordinary place for a big meeting of that type on the campus, even though it was primarily for showing off cattle. But they had seats set up in it, and a crowd, people hanging off the rafters practically. Truman spoke there. And then we had a dickens of a time getting back to the train because the town was so tied up by traffic. We were just lucky, my wife and I; our driver knew the town pretty well, and had considerable savvy. From what he could get over the radio, he said, "We'll never make it to the station before the train leaves." But he said, "If you're game, I'll take you out to a Y. The train has to back out around the Y and then turn east and go to Milwaukee. And I think I can get you out there." And he did. And we got on. There were some others that had the same good advice, and there was the train sitting out there. We were just lucky.

CTF: Some presence of mind on the train?

TEF: On the train. Somebody was convinced to open the doors and let us climb up, which was quite a job. There were no little stools to step on. This was out in the railroad yards. But we were able to make the train. And there was a stop scheduled in Waukesha on the way to Milwaukee. This was October 12th and getting toward dusk or past when we got to Waukesha because it was fall time, and we got to go out on the back platform with the President. He made some talk out there and none of the rest of us did, but we at least got to wave at the crowd. But the vastness of the sea of faces in the railroad yards at Waukesha, which is normally considered fairly strong Republican territory, seemed to convey a message. Someone from Washington who came to Milwaukee a week or so later quoted Truman as saying that the crowd in Waukesha meant he was going to win. Then we went on into Milwaukee and went to the Park at Eighth and Chambers and he made an address. That was the first time I was with him. Then there were times that he came to Madison for one thing or another, it seemed, and I got to meet him casually at least during the '50 campaign. During '49 when I was Attorney General, there was a meeting which had something to do with highway funds.

Anyway, as Attorney General, this was a place that I was supposed to go in Washington and I did. I'll never forget the picture of this fairly small statured individual, "Hail to the Chief" being played, and the way he bounced when he'd come out. He obviously loved it. Then in the '52 campaign, there had been a primary fight in Wisconsin for the Democratic nomination for United States Senator. Henry Reuss of Milwaukee, now retired, who was

Congressman from the Fifth District in Milwaukee for a long time, and I were opponents for the nomination for the United States Senate in the fall of '52. And that primary turned out to be close. He had been campaigning longer than I had. I had started late. Had to because of the necessity of collecting my salary as U.S. Attorney to keep feeding the family.

The primary vote was so close that the night of the primary we did not learn whether I had prevailed or Henry had. This was particularly perplexing because Mrs. Eleanor Roosevelt was coming to Milwaukee the next day, that Wednesday morning, and it had been planned that she would be met at the station and would then spend some time with the Democratic nominee whoever he might be. And who was he? That was the problem. We didn't know whether we were or not. My wife and I were then living out near Madison in Verona, and that's 80 miles and some way from the railroad station in Milwaukee where she was to come in. So when we left Verona that morning we did not know. We had the radio turned on so we'd find out we hoped before we got there, whether we were supposed to show up or Henry and Margie were.

CTF: O.K. Now, you mentioned in the past that '52 was a race that you really felt that you needed to make because of what Joe McCarthy stood for.

TEF: Right.

CTF: It was going to be a lot of work, but you felt that Joe McCarthy had to be defeated.

TEF: Absolutely. We had to make the best shot we could. I had no money. I owned a house in Milwaukee when I became Attorney General. We sold that and bought one in Verona. That had to be mortgaged for the '50 campaign. I had a fairly modest salary as Attorney General (\$6500), up to the end of the '50 campaign, and then a similarly modest salary as United States Attorney during part of the period afterwards. I needed what money I could lay my hands on. I had to mortgage the house again deeper for the '52 campaign. There's a fellow I used to go and see at a bank in Madison who'd lend me a few hundred dollars on my car. But it wasn't easy to have a family of four children without any outside income and then to cut off what I had. So that was certainly one reason for hesitancy. If I felt easy in my conscience about it, I would just as soon not have run. But I became convinced that because of my run for Attorney General which had been successful and my run for the Senate which had not, and other factors in terms of my relationships with leaders around the state, that I could do better than Henry was doing. Those are hard decisions to make because you know it's never going to be proved one way or the other. But I made it that way because I felt it was essential to do it.

An individual's decision to run or not run for an office involves many considerations that the public and media may not recognize. Looking at my situation in 1952, my run for and record as Attorney General, my run for the Senate in '50, in which I had shown some, but not winning, strength, my service as U. S. Attorney, my background as a Progressive as well as

in Milwaukee were political assets which might make me a winning Democratic candidate in some election. Should I risk them in '52 or wait for a future race? Len Schmidt was a former Progressive who was campaigning hard in '52 to defeat McCarthy in the Republican primary. Henry Reuss had been campaigning for months and had built up something. Would my entering the race hurt the chance, either via Schmidt or Reuss, to defeat McCarthy? Was I exaggerating the strength I might show? In early May '52, I had resolved these issues by deciding not to run. The next two months called that decision into question. Leaders including at least one Republican who could not afford to be quoted assured me that I was more likely to defeat McCarthy and my running would aid the effort to accomplish that. It was a big responsibility for me to take but I decided to run.

CTF: Now you've mentioned in the past that there were decisions made by national groups that Joe McCarthy could only be stopped in the Republican primary. That, if he won the primary because of Wisconsin's history, with your exception, of always electing Republicans, that he was a cinch to win.

TEF: Yes there was that line of thought for sure.

CTF: There wasn't really lots of money as we hear at least about in 1990's terms, but there was a lot of money nationally that was interested in stopping Joe McCarthy.

TEF: Nationally and state-wise too, both ways. There was a great deal of interest. As you suggest the common wisdom was that the opportunity would be in the Republican Party, rather than to try to defeat Senator McCarthy with a Democrat. And there was a very vibrant and in some ways appealing candidate against McCarthy in the Republican Primary, and that was Leonard Schmidt, a lawyer from Merrill, Wisconsin. A lot of people bet on him and put their money on him. Well what people outside the state didn't realize was that Len Schmidt had a long record as a Progressive. Tagged as a Progressive, he was going to have a pretty difficult time defeating the sitting regular Republican candidate. A Progressive background should be a strength in the general election, but definitely not in the Republican primary. Other candidates had been talked to. Ex-Governor Rennebohm was thought of as a possible candidate, but he declined. Somebody like him would have had a different type of opportunity against Joe McCarthy because there was no blot on their escutcheon as a Republican. But Len probably was widely thought of as an ex-Progressive. And there are a lot of Republicans who weren't about to go for that. Len made a very distinguished campaign. He did have money to spend as a result of the premise you are referring to. He was the only viable opposition in the Republican Party. One of the things that's interesting in perspective is that 1952 is the first campaign year in which television played a major part. There was television before that, but 1952 is really when it came into its own. There were things like going on a hookup of stations with some radio and some T.V. There weren't too many T.V. stations in Wisconsin at that time. Some candidate in another state had gone on a marathon T.V. appearance, T.V. and radio. And Len did that, but he still was beaten two to one in the Republican primary. And so, what was left? What was left, was me.

CTF: Now Wisconsin, at this time, and I think still today, has an open primary system.

TEF: That's right.

CTF: Did Schmidt make any kind of an appeal to get Democrats or ex-Progressives who became Democrats to his camp?

TEF: He certainly did. I don't know in terms of contacts with particular people but he certainly put out a message which would encourage that. And anyway the McCarthy issue was something that overrode normal partisan feelings. In my campaign for the nomination we became concerned right at the end that Henry was going to be very strong in Milwaukee where he had run for mayor, and which is where I hoped to have some strength too among Democrats. I happened to go to Milwaukee to campaign that Sunday before the Tuesday and we decided early that morning that we had to do something a little bit spectacular. On a Sunday morning we called the Milwaukee *Journal* which had the television station. We got half an hour at prime time, about seven o'clock Sunday evening, for the sum of \$500, which we had a tough time raising, but we raised it. We got somebody to bring my wife and the kids in from Verona. We got a bunch of friendly people to be on the stage with me. We had a half hour talk show. Well you just wouldn't do that today. But it was illustrative of how much cheaper things were, and that this was just the beginning of the use of television. We had all these friendly questions being asked of me with answers that I liked to give and hoped to be appealing to people. I'd introduce my family and so on. Our youngest son was then a little over three and he got good and tired of this operation. Before it was over, he had started to yell. My wife sat him on her lap and tried to coax, cajole, and comfort him, and all to no avail. He didn't like this. So finally she stood up and put him over her shoulder, and said to me, "Tom, I think Andy's had enough." And she walked off the set. That was right in the middle of the show. The next morning I was up at Kiel, Wisconsin at some dairy plant, cheese plant, or industrial plant of some sort, greeting workers as they went to work that morning, which was a common method of campaigning. Kiel was at the edge of the Milwaukee WTMJ viewing area. I was being introduced and my literature handed out by friends and I was there to shake hands with people. And guy after guy who went in that gate said, "Oh, you're the guy whose kid cried on television last night. That was the best part of the program."

CTF: They probably could identify with that.

TEF: That's right. I have to acknowledge that Andy was the effective campaigner.

Just to illustrate the point about the hope of defeating McCarthy in the Republican primary - after arranging that TV show I realized I didn't have the right shirt for the occasion and borrowed one from a very good friend. He was glad to help, but said, "I'll be voting for Schmidt on Tuesday." I had his shirt and best wishes, but not his vote.

CTF: What were the issues between you and Reuss. Just who would be more effective against Senator McCarthy as a candidate?

TEF: That's really all there was. It was a personality sort of thing at that point. It's commonly said that a primary fight is good for a party and in a sense this can be true. There's more attention paid to it. On the other hand, it can be bad, particularly if the candidates get into a ruckus with each other. Because then they tend to destroy each other, and they do not tend to focus upon the candidate of the other side. But I think both of us pretty well concentrated our attacks on Senator McCarthy and stated our positions on various other issues. I do not think there was really an issue that you'd say that he was on one side of the question and I was on the other.

CTF: Was it clear to the public as a whole what Senator McCarthy's philosophy was at this point? Or was it sort of just the folks that you would consider to be more politically knowledgeable?

TEF: I would say it tended in that latter direction, and or tended that way. McCarthy started his communists in the State Department theme in February of 1950. And in June of 1950 came the Korean War. And in September or October of 1950 came the Chinese across the Yalu River. People are getting killed over there and there are people who are commencing to wonder about the leadership that we had and why that leadership had permitted this to happen. Here comes McCarthy saying that our State Department is infiltrated with communists. I don't think he realized at first how sensitive a cord he was touching. Charges of communists in government were not new. John Chapple of Ashland had said that kind of thing when he ran for the Senate in 1934. But in 1950, '51, and '52 people's fears made them susceptible. And other people are talking about the loss of China, and so forth, and so on. Somebody by the name of Richard Nixon being among them .

CTF: Now Nixon had just won his Senator's position, it was in 1950?

TEF: I think so. I think in '46 he beat Voorhees for Congress, and then he beat Mrs. Douglas for the Senate. Many people thought, well maybe this guy McCarthy has put his finger on something. That's why things are going badly. There was this kind of current. And, during that summer of '52 and early fall, you could say that his tactics of accusation without proof tended toward the Nazi or Hitler way of doing things and making scapegoats and so forth. You could say that but nobody really took the point. And it seemed to me that McCarthy himself started to make that point better than anybody else could make it. He never bothered to mention me and that was smart politics under the circumstances, I think -- but, he often would attack Stevenson, and imply that Stevenson had friends who were less than loyal Americans and so forth. There was this speech he made in the middle of October in which he said something to the effect that he wasn't accusing Governor Stevenson of any disloyalty, but he would like to just climb on his campaign train with a slippery elm club and take it to some of the advisers Stevenson had around him, and beat some Americanism into

them. Something like that, that's not an exact quote. But the speech was very much publicized and you could feel a reaction to that. You could commence to feel people were saying, "Gee this is not what we want." And, maybe there's some analogy to Hitler. At least I had feelings of increased support, particularly from people who are normally Republican or not Democratic. I began to feel that this is changing. In the early part of October, I wouldn't have given a nickel for my chances with the reactions that I was seeing as I traveled around the state. But after that speech and its effect I commenced to think there was an outside chance of doing it.

CTF: You've already mentioned that he really ignored you as a campaign tactic so that he didn't give your name any publicity. Were there questions raised as to your position as to the Korean War which was going on at that time?

TEF: I don't think questions were raised particularly. I gave talks and issued press releases which basically defended what the President had done in going in there. But this was not an area where I had to answer charges of the opposition. I was up trying to make a mark here or there. About the only thing that ever happened of that particular ilk really wasn't that year, but was the '50 campaign. I was Attorney General during the campaign against Wiley and I went to an organization in Milwaukee one night, a non-partisan organization. I was an announced candidate for the Senate as a Democrat, but I went to this organization wearing my hat as Attorney General. I talked more generally about public service and what the Attorney General does, and so forth. And that day, or the day before, I had issued an open letter to Senator McCarthy, challenging him to come up with names. Later I made this speech in Milwaukee to an organization which wouldn't have wanted a campaign speech. And a guy from the Milwaukee *Sentinel* came up to me afterwards and we got into conversation, and he wanted to know what position I'd taken about various things, and I told him. And the next morning the *Sentinel* had a story headlined Fairchild critical of McCarthy, but silent on Hiss. There just was no foundation for a story with that twist at all. I finally wound up in the editorial rooms of the Milwaukee *Sentinel* and ultimately had a chance to have a column of mine on their editorial page. Not an apology but at least a chance to explain my position. This occurred early in the campaign against Wiley.

CTF: Where did he get the name of Tailgunner Joe?

TEF: Well he was a judge, which was one of the problems that he had, because our Constitution says you can't be a judge and run for a non-judicial office. He took a leave of absence as judge to be in service and he was over in the Pacific Theater. I don't know the details of what he did and what he didn't do. But anyway he was generally accused of having exaggerated his military record. He claimed to have some shrapnel in his leg and there's debate about how he got whatever he got in his leg. But he ran in the Republican primary in 1944 against Senator Wiley. He had in his campaign literature a picture of him climbing into or out of a cockpit. I think it was in that that he put this appellation Tailgunner Joe. I don't know how close he ever got to being a tailgunner.

CTF: Had Wiley beaten him in the primary?

TEF: Yes.

CTF: I mean, fairly badly, or was it questionable?

TEF: I don't remember the size of the vote.

CTF: Now, back in the '52 election, at that time running for Governor is . . .

TEF: Bill Proxmire.

CTF: Bill Proxmire in '52 and the Republican is . . .

TEF: Walter Kohler, Jr.

CTF: And we, of course, have on the national scene Eisenhower and . . .

TEF: Stevenson.

CTF: Stevenson. And you had a story about talking to President Truman, looking for some help in the campaign.

TEF: Yes. There was thought to be a little bit of friction between Truman and Stevenson. I think President Truman had wanted Stevenson to get in earlier than he did, and one problem or another. Anyway, immediately after I had won the Wisconsin primary, people that were helping me thought it was very important to try to pay some homage to both Stevenson and Truman, and to do it in a way that didn't make either of them, particularly Truman, upset with me, or at the other. So I traveled to Springfield and had a friendly conversation with the Governor, and then got on a plane and wound up in Washington and went to The White House the next morning. Jim Doyle, later District Judge In Western Wisconsin, and Bruno Bitker, who was quite a leader of affairs in Milwaukee, were there and we had this little audience with the President. The first thing he said was to me, "Now, I want to help you. I don't want to hurt you. If you want your picture taken with me fine, if it will help you. But you decide." I've always been thankful that I said, "Oh yes, that would be great." Because he snapped his fingers and out of all the doors around the room came the waiting cameras and pictures were taken. I got the impression that the other answer wouldn't have been all that welcome.

Then there was just some general conversation about how it was going and so forth. Somebody in the group said, "Mr. President, they're saying a lot about Potsdam." And the President bristled a bit and said, "Potsdam, Potsdam." He said, "They should remember who was with me at Potsdam." We all thought that he was going to say that Eisenhower advised

things people were critical of and we thought we were going to get a scoop. But almost immediately he got off that subject. It was kind of an obvious switch in subject matter because he said, "Ike was there and old Patton" and then he took off on General Patton. And he said, "That General Patton, I soon found out that he wore more stars than the President of the United States. He had four stars on his cap, four stars on each shoulder strap, four stars on each cuff, and four stars on his holsters -- 28 stars. The President of the United States only had 13." And he said, "I made up my mind right then, no damn general is gonna have more stars than the President of the United States. The first thing that I did when I got back from Potsdam was to redesign the seal of the President of the United States." And he stood up and stepped over to where the Presidential flag is on a little staff, and he pulled it out and showed us that there were 13 stars in the middle for the 13 colonies and there were 48 stars around the edge for the then 48 states, and he said, "No damn general is ever gonna beat that."

CTF: You have another story about some campaigning when you were up in Eau Claire during the 1952 Campaign. I think it was Eau Claire.

TEF: Yes, you are quite right. I was on one of my runs around the area. The way it happens is your planners work out a hopefully efficient route for you to follow and reach places that are important, and meetings that are important, and so forth. But then all of a sudden you have to break into it all and you have to go to Milwaukee or some place, and meet a cabinet officer or somebody that's come in from outside. But basically you follow a certain route. I was scheduled into Eau Claire for a luncheon after being in counties nearby. And at the luncheon, I was seated next to an old friend, who was a very active Democrat in Eau Claire in those days, named Eppie Lederer, now better known to most people as Ann Landers. Eppie was strong in the camp of any Democrat and strong in my behalf at that time. I think she had been for Henry Reuss before the primary. But anyway, she was full speed ahead in the general election and I did ultimately get endorsements from some papers that didn't endorse any other Democrat. I got endorsements that joined endorsements of Eisenhower for President, Kohler for Governor and Fairchild for Senator. Well, she said to me, "Don't be surprised if this weekend you are endorsed by the Eau Claire *Leader*. You will be endorsed with Eisenhower and Kohler." And she said, "But I should tell you what I had to tell Marshall (Marshall Atkinson was the name of the Editor) in order to get that." I don't know whether she ever said this, but she told me she'd said it, "I told him that if he endorsed you, and if you won, I would do a striptease in the Dime Store window." Support like that is not easy to come by.

CTF: There's another story, speaking of support like that. I think there's also a story about a railroad engineer who was running for the state senate during this campaign.

TEF: Yes, Art Henning. Art was an engineer on the Omaha Railroad. He was also running for state senate from the district around Eau Claire. And it so happened that he drew the assignment to run the engine that pulled the campaign train that Nixon, running for Vice-

President, was on coming down from Superior. And the Nixon people were quite happy that they were drawing big crowds at the crossings. They made a stop somewhere with a big crowd and sent word up to the engineer that they would like a stop at Merrilan Junction, which they were going through soon so that there could be a back platform appearance. Democrat Art Henning, the engineer, sent back word that his orders didn't read that way. But he finally did slow down and there was quite a crowd there waiting for Nixon. As the engine pulled through the crowd, the trainmen threw off campaign buttons. The crowd was scrambling to pick them up out of the dirt, and only later did those people realize that the train crew was throwing Fairchild and Stevenson buttons off of the Nixon train.

I had another train experience. I was down near Burlington, Wisconsin, and I was to meet some people for a luncheon. I was coming into Burlington, came to the Soo Line tracks, and there was an engine coming down the track. The light is flashing and I stop my car, which had a big Fairchild sign on the top of it, to wait for the engine to pass. Lo and behold the engine stopped before it got to the crossing, and one of the trainmen came over and wanted to know if I had any spare Stevenson literature I could give him.

CTF: How did the vote total come out in the '52 election?

TEF: The numbers escape me at the moment; the percentage was about 46% for Fairchild, 54% for McCarthy.

CTF: Now Eisenhower and Kohler won by much larger margins didn't they?

TEF: Yes, putting it the other way, the Democrats got much lower percentages.

CTF: You were the leading Democrat?

TEF: You can pretty well identify well over 100,000 votes that I got that were Republican for President and Governor.

CTF: In that campaign was there much coordination with the Proxmire Campaign?

TEF: Not a great deal. Of course, there were always big occasions when . . .

CTF: They all were on the platform.

TEF: When Adlai Stevenson was in Madison and traveled to Milwaukee by motorcade, the other candidates were there too. But it was not a closely coordinated campaign, I would say.

CTF: Now we've talked a lot about the campaigns that you've been in and we know that you supported back in '32, Hoover for President. What other campaigns were you involved in

and who are the other people that over the years you've really worked hard on their campaigns?

TEF: Other than my own, the most work would have been where there still was a Progressive Party and I was a Progressive in Portage and Columbia County when I was first practicing law. We worked in those campaigns for Robert LaFollette, Jr. for Senator, that would be in '40 and Orland Loomis, familiarly known as "Spike" Loomis, for Governor in '40. And Phil LaFollette for Governor in '38. Those come back to me as instances of campaigns in which I tried to take an active part. Of course, I helped my Dad when he was running non-partisan campaigns for the Supreme Court. These were '36 and '46.

CTF: November of 1952, you find yourself up after the day after election, not having won, and you're out of a job, because you had given that up in order to campaign, what were the options you were thinking of at that time as far as jobs were concerned?

TEF: Well, of course in 1950 when I was in that position of having lost, we had a Democratic administration in Washington, and I was able to get myself appointed U. S. Attorney, but that option wasn't there in 1952, because now there's a Republican administration and great necessity for earning some money. And really nothing much to do about it except practice law at some level or another. We lived in Verona which was a fairly small town and didn't seem like the place where hanging out a shingle would be very immediately productive, and it had to be immediate. I made some efforts to find out what might be available in firms in Madison and Milwaukee and ultimately was lucky enough to form an association with Floyd Kops and Irv Charne in Milwaukee. They were nice enough to let me put my name first -- they had been practicing as Charne and Kops and let me put my name first in the firm name. And I was working there for four years until I went on the State Supreme Court.

CTF: Now in 1953, you met Truman again? In Chicago?

TEF: Yes the Democratic Party obviously had suffered a defeat in the fall of 1952, and anytime a party is turned out of office, there's always somebody around, maybe several somebodies, that say, "Well, that's the end of that Party, they'll never rise again." That is an overstatement in any case, but somebody organized a big what they called a "mid-term convention" here in Chicago in the fall of 1953. The idea was to heal wounds, and so forth. It was fairly interesting, and I believe, in some ways, successful. I was down here and at one point was invited to President Truman's suite over in the Congress Hotel. A group of people had a nice conversation about how things had improved to some degree and the Party was showing some signs of life. Somebody spoke up and said, "Mr. President, all the news people are speaking about how surprising it is that there is a great deal of unity in the Democratic Party. It was expected to split apart in factions and they were surprised. Do you have some comment on that?" Whereupon, the President rejoined, "Unity, hell! There ought to be unity. I've been doing nothing for the last three days but kissing asses all over the place!"

CTF: Now this is the fall of 1953, the first Mayor Daley is the mayor of Chicago. Does he play any role in this at all or does this just happen to be in Chicago?

TEF: I assume he certainly had some input, but I don't know.

CTF: What kind of cases did you handle? Is there anything of real note during those years you were with Charne & Kops?

TEF: We made a living. There was one interesting episode although it was not ordinary litigation. A man came to the office and said he was speaking for a dozen or so people who had received subpoenas to testify before a subcommittee of the House Un-American Activities Committee. The hearing to investigate communist activity would be in Milwaukee. The people wanted me to represent them, not gratuitously, but for a fee. I explained my quandary to my caller. I had recently run against Joe McCarthy and there are people who equate being anti McCarthy with being pro-communist and I didn't want that idea applied to me. I was trying to develop a law practice and I didn't want to be thought of as the lawyer regularly called on by suspected communists. I declined to appear for all those witnesses, but I agreed to try to arrange for all of them to have access to competent counsel. I went to the executive committee of the Milwaukee Bar Association. We developed a list of 15 or 20 attorneys who would be willing to take on these representations if called upon. Ultimately each of these witnesses was represented by someone on our list, including me.

Like everyone else. I interviewed my client as to the inquiry he expected, attended the HUAC hearing, sat next to the witness while testifying, and gave him advice in whispered conferences. All our clients frequently refused to answer questions on grounds of possible self-incrimination. In preparation I had learned some law in the area, including the tricky doctrine of waiver, whereby a witness may lose the right to refuse to answer some questions by answering related ones.

We felt that these people were entitled to legal advice, and that one indication that counsel were competent was the fact that none of the clients was indicted for perjury or other offense, nor cited for contempt. I must say that I wondered whether anyone might use my appearance against me, and two judicial campaigns were to follow, but I am not aware that anyone ever tried.

CTF: Was it just the three of you?

TEF: There were three most of the time. And then toward the end, perhaps a year before I left, Bob Tehan, Jr., who was the son of District Judge Robert Tehan, came into the firm, and Bill McCarty came in just about the time I left. And they carried on. I left in January of '57.

I'm wearing a watch here. Wearing it for 35 years may have faded things a little bit on the back of it, but the back of it says, "To Fairchild from Charne & Kops, 1/7/57." And that was handed to me on the day that I was sworn in as Justice of the Wisconsin Supreme Court.

CTF: Obviously not a retirement watch.

TEF: No.

CTF: Now did you know Irv Charne from law school?

TEF: No. He is younger. He had clerked for Judge Tehan. And when I was U.S. Attorney, as I mentioned earlier, Judge Tehan came over and tried a bankruptcy fraud case because Judge Stone recused himself. Irv was Judge Tehan's clerk at that time so I think that's where we got acquainted. Then I saw him from time-to-time after that. Floyd Kops is a little older than Irv. I don't remember just what our original contact was, but he may have been in the Junior Bar Association when I was still practicing in Milwaukee. Anyway I had known him.

I should say something, too, about the kindly help I had from Judge Bob Tehan. He had been Democratic National Committeeman during the revitalization of the Democratic Party of Wisconsin. He had been appointed District Judge in Milwaukee in 1949 after Judge Duffy went to the Court of Appeals.

I was terribly short of money in the winter and spring of 1953, and for several months my family stayed in Verona and Bob let me stay at his home. I usually got breakfast and he, a far more artful cook, prepared dinner. I had some appointments in bankruptcy cases which I am sure he inspired (and Referee Jim McCarty was also a good friend) and later he appointed me a master in a reorganization proceeding. Earlier I had the benefit of his advice on my political endeavors and I would have been better off if I had acted on it more often.

There are many kinds of heart-warming responses as a result of political endeavors. After we returned to Milwaukee our dentist declined to bill us for dental care. He never really explained and continued for several years until his death. My belief is that he wanted to make that contribution toward the costs of my political activity.

CTF: Now in 1956 you ran for the Wisconsin Supreme Court.

TEF: Yes.

CTF: This is a non-partisan election although everybody seems to know who's a Democrat and who's a Republican and who's a Progressive and who's a Regular.

TEF: It's known by anyone who is interested normally. But there have been successful candidates who have not been identified as partisans.

CTF: Is there a primary for that?

TEF: Yes. I had something to do with creating the primary. In 1949 Chief Justice Rosenberry, whom I referred to earlier, decided not to run. He was then approaching the high 80's. So there was an open year and a large number of candidates announced themselves, a large number of lawyers and trial judges. And then Fred Zimmerman who had once been governor and who had been and was then Secretary of State, and often pulled more votes than anybody else, made noises as if he would run for the court. Well, Fred was not a lawyer, and he was a campaigner par excellence and I guess everything was done reasonably well in the Secretary of State's Office. If he ran as one of maybe 10 or 12, it could be very likely that Zimmerman would run first. And at that time, that's all that was required to win.

CTF: A plurality?

TEF: Plurality. The most votes won. The election was early in April. Well, people began to get excited about this. It was about the same time, I believe, that Lyndon Johnson had survived a run-off down in Texas. Anyway I had read something about a run-off which we wouldn't have in Wisconsin, but apparently they have them in some states. I went to a legislative bipartisan dinner one evening. As we were walking back to the Capitol afterwards, Warren Knowles, who was later Governor, then a State Senator, and I, and a couple of others were expressing concern about Fred's running, and what might happen. I said, "Why can't you change the law so that this election in April will not hold unless one candidate gets a majority, and if not there would be a run-off, a month or six weeks later?" And they said, "Maybe you have something." And lo and behold the legislature passed the bill, created this run-off for two offices – Superintendent of Public Instruction and Supreme Court Justice. The Constitution requires that they be elected under the same rules. Both offices were open that year. So it had to affect both. The bill provided that if a candidate for either or both of those offices did not get fifty percent or over in the April election, there would be a run-off in May. They passed the bill, the Governor signed it, and then people challenged it. *State ex rel. Frederick v. Zimmerman et al.*, 254 Wis. 600. Time is running short so they persuaded the Supreme Court to let them file an original action in the Supreme Court without going to the trial court first. The lawyer who was selected to appear for the plaintiffs who were challenging this, was my old boss Dan Grady from Portage. Legislators said, "Well, it was your idea, now go and defend it." He argued the Constitution made certain requirements about the election for Supreme Court Justice and forbade changing them. So we went to work on a brief, and I argued the case, and thanks be, the Supreme Court upheld the run-off law.

CTF: What was your argument:

TEF: Well, we said that the Constitution did not freeze every detail of the election machinery for all time. There are three provisions in the Constitution which might have some bearing.

One was that the two offices must be elected in the same manner. This law did that – another was that an election for judge cannot be held within thirty days of a general election.

CTF: It had done that.

TEF: That was O.K. And the Constitution provides that no more than one Justice can be elected in one year and the law did not change that. And the ten year term remained the same. Dan relied mainly on one phrase “shall be elected as now provided.” He said that “as now provided” spoke as ...

CTF: Now and forever.

TEF: Yes. That it froze every detail of the election process as of 1917, or whenever those words were put into the Constitution, and that meant forever, and permitted no foolishness like having a run-off between the two top vote-getters. We were able to convince the Court that those words did not have that significance. They were put in at a time, I think, that the Court was increased in number. And that every Justice should be elected in compliance with the specific requirements of the Constitution. 1949, however, was the only year there was ever a run-off. The legislature changed the law so that, ever since, and as of now, in any non-partisan offices, if more than two file, there is a primary and the top two vote-getters compete in the April election. So it changes the timing and it changes the methods, but no longer will a plurality prevail.

CTF: What happened to Zimmerman in the Supreme Court race?

TEF: He didn't run.

CTF: Was that the dissuading factor?

TEF: It may well have been but I never talked to him about it.

CTF: Well coming back to your campaign in '56, you had a primary.

TEF: There was a primary. There were three running, and ...

CTF: Now, when did your father leave the court?

TEF: When I came on. In fact, this idea of my running was as much his as anybody's. He was elected in '36 and '46, and in '46 he was already 73. Sometime in the fifties, the people had adopted a constitutional amendment which cut off any judicial officer from remaining in office after he became 70 except that it grandfathered anybody who already was serving a term. Of course he was already serving one that was going to end when he was 84. He could continue to serve, but he could not run for re-election. One day he said, “Why don't

you?" He said, "Some of my friends think that's not such a bad idea, and why don't you think about it?" So I did, and this seemed attractive. That conversation was probably in the spring of 1955. That summer of 1955, I wrote letters broadside to everybody I could think of – lawyers and some political figures, and so forth, and said, "What do you think?" I would appreciate your support if I did it. And I got back a very good response. Then I went ahead and I ran. I filed my papers in December. Then the primary came along in February, and that was easy. Of course, bear in mind that this is 1956, and in the preceding eight years, although more in the early ones of those years, I had been on a state-wide ballot six times, counting primaries, and had gotten quite a few votes in a number of them. I'm sure that that helped. Some people knew my dad and may not have known he was disqualified. That might have helped too.

CTF: Now, this time there's a primary. I mean, it was a split, so nobody got a clear majority.

TEF: I did.

CTF: You did get a clear majority?

TEF: Yes.

CTF: So you won it all.

TEF: Well I had to run in April anyway. Because now it's a primary. It's not a run-off.

CTF: O.K.

TEF: But it was very easy, as it turned out. Parties were not involved. Sure it was very evident that I was a Democrat. And a lot of voters weren't. After all, Gaylord hadn't been elected Governor yet. Proxmire hadn't been elected Senator. They were within a year, or two. One of the other two candidates was an ex-Progressive, who had become Republican, and had run numerous times for nomination by one party or the other for Attorney General, and was, a couple of years later, elected to the Court.

CTF: Who was that?

TEF: Bill Dieterich. He was nominally a Republican. And Clare Finch had been a Republican Assemblyman. He had been appointed to the State Board of Tax Appeals, and he could have carried a certain amount of sympathy vote because he was not sighted. But he was eliminated in the primary, and then in the finals it was two to one, or better.

CTF: You could have used some of those excess votes in a couple of earlier elections.

TEF: It would have been nice.

CTF: Ah, what were the issues in the campaign for the Supreme Court – strictly qualifications for the Court?

TEF: That's right. You shouldn't have many issues. It's more just qualifications. I made a vigorous campaign. I went around, went to small towns, and covered the State, called on newspaper editors and lawyers, and issued press releases saying relatively innocuous things – you're for hard work, and getting cases decided, and so forth.

CTF: What were the cases that you really thought were important when you were on the Wisconsin Supreme Court?

TEF: Well, there were several. I don't know how other people would line them up in importance. Early on, there was a case where a couple of Black bricklayers in Milwaukee sued the union, claiming that they had been rejected from membership on account of race and the circuit court decided that that was not a nice thing, but there's no law that says you can sue your way into a union. And then the plaintiffs appealed and our court decided, in effect, the same thing. I did my best, in dissent, and I don't know what anybody would think of the opinion today in terms of its merits, but I did develop, I thought, an argument that the Wisconsin Labor Peace Act, or Labor Relations Law had the effect of giving unions enough part to play in employment so that there is a little bit of state action when a union says to somebody you can't get in this channel of getting a job. Once you're over the hurdle of state action, then they certainly can't exclude on the grounds of race. The theory of the dissent is something like that, and that's the subject of that letter from President Truman. *Ross v. Ebert* is the name of it. 275 Wisconsin 523. Well, that case, I believe, had some significance in that the state law was then amended by the legislature so as to make a provision with respect to discrimination by unions. So that it had some indirect effect.

CTF: Let me read this just so that we've got it in here. We'll keep it elsewhere, but I think it's a pretty meaningful. Letter: "Dear Mr. Justice Fairchild," (it's dated June 28, 1957), "Thank you very much for your letter of the 25th enclosing a copy of your dissent in the case of *Randolph Ross v. Charles Ebert*. It gave me quite a lift. For I am very happy that there still are people in this great United States who believe in the rights of the individual and work for his welfare. As you know from long experience, when certain organizations become powerful they do things they otherwise would never have done under any circumstances. It is often the case that when the underdog gets on top, he's a darn site meaner than his predecessor ever was. Your thoughtfulness in sending me your dissent in this affair is highly appreciated. Sincerely yours, Harry Truman." Impressive letter.

TEF: Well I liked it.

CTF: I note that the date is early on in the real development, at least by my meager legal knowledge, of the application of state action. This is the fifties. Although the statute we've

had around since 1871, it clearly is still early in the development of Section 1983 jurisprudence.

TEF: Well those civil rights statutes laid somewhat dormant. People hadn't resurrected them yet. I wasn't aware of section 1983. I was dealing with the Fourteenth Amendment directly, when I wrote it.

CTF: So you weren't aware of the civil rights acts?

TEF: I didn't know there was such a thing and *Brown v. The Board of Education* had only three years on it at the time of this case.

CTF: And that's a clearer kind of a case where the state's involved because we're talking about...

TEF: Where the state's involved. Yes, yes.

CTF: What other cases can you remember?

TEF: Well that was one, of course, and we're talking about a dissent. There were some other cases. I didn't write many of these decisions, but I supported them, participated in them, and they were important while I was on the court. In the torts field, we abrogated several of the common law immunities. Common law municipal immunity, immunity of religious organizations, hospital immunity and parental immunity – all of those we abrogated during the time I was on the court.

CTF: This is a continuation of the oral history of Judge Fairchild. Judge, we were talking about some of the decisions about the abrogation of common law immunity defenses. I know that you wrote an article regarding "Sunbursting" and the application of new principles of law. *Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or "Sunbursting"*, 51 Marq. L. Rev. 524 (1967).

TEF: In some of these, we did limit retroactive application. Actually we did this in different ways in some of the decisions because we felt that one type of limitation on retroactivity was more appropriate in one field than in another. I was certainly brought up to believe that when a court overruled a prior decision, it was just making itself right where it had been wrong before, that the law had always been there, and just misperceived before, and therefore all the current law is completely retroactive. But there is another school of thought about it, and it began to be used to some extent.

There are a couple of historic examples that go back quite a ways, but really it first began to be used in connection with court decisions in civil matters where judges are in effect changing rules which were made originally by judges, common law rules. And a court will

say that except for the case before the court, this new rule will not apply to any case where the facts occurred earlier. There can be various types of limitation on complete retroactivity. I was sure, as many people were, I think, when this began to be done in connection with ordinary common law rules, that it would not be done in terms of the Constitution. After all the Constitution theoretically has been there since the provision was adopted, either an original provision or an amendment. If the court says today it means something different from what the court said yesterday, it meant that all along. And we felt that limitation on retroactivity would not be applied to constitutional decisions. But of course we now know we were 100% wrong in that point of view. There is a whole body of law now as to when new rulings will be limited to prospective effect only. Then there was another development which was important in the torts field.

By statute Wisconsin had been a comparative negligence state since the 1930's so that a plaintiff's contributory negligence did not bar him from recovery if it was less than defendant's. But he would get his damages reduced by the percentage of his own negligence that contributed to the injury. For many years if the injury had been produced by the negligence of joint tortfeasors, both would be liable to plaintiff, but if one paid in full he could recover only half from the other even if the paying defendant was far less causally negligent than the other. Our court, in decision of a case, changed the rule so that the defendant who pays can recover contribution from the other in proportion to comparative fault. And that was an important change in that field.

In one case, we decided that a plaintiff's assumption of risk, implied from the circumstances, would no longer be a complete defense, and could be no more than contributory negligence, reducing the amount of recovery. I wrote that decision, *McConville*, I believe. *McConville v. State Farm Mutual Automobile Insurance Co.*, 15 Wis.2d 374.

We did make legal history for Wisconsin in the field of reapportionment. The principle had been that, if in an apportionment of legislative districts, the legislature was correct on the basis of the last census, a court would not interfere even though the proportions of people in the various districts changed after the original apportionment and the legislature violated its duty to reapportion after every census according to population. There was nothing the court could do. That was the old doctrine. And that's like the United States Supreme Court doctrine of political question. In 1960, there was a census, and the '61 legislature did not reapportion. Then Attorney General, now Judge, Reynolds petitioned the court to order reapportionment based on that census and asked us to authorize an original action. We declined, but in our order we said that if the First Session ended and the legislature still had not complied with its duty, he would be entitled to come back to us. And that order was entered two days after the decision of the United States Supreme Court in *Baker v. Carr* which abandoned the old political question doctrine on that subject. Of course, we were not dealing with the federal constitution in this case. We were dealing with the state constitution. That session of the legislature adjourned and nothing was done and Judge Reynolds did come back. We took the case and said judicial action is appropriate but we

will give the legislature one more chance, and if by a certain date they haven't redistricted, we will. They didn't, and we did.

CTF: At this time, the Wisconsin Supreme Court had a pre-assignment system for cases.

TEF: Right.

CTF: That led to situations where the authoring judge might not be in agreement with the vote of the court. Maybe you can talk a little bit about that. What, I guess, was known as the "Fairchild Device."

TEF: Well, those are really two different things. The first is true, that the cases were marked by the Clerk's Office in a rotation system so that each judge knew which case he was responsible for when it was argued, and a judge either above him or below him in seniority would be the second judge on that case, the "checker" we called him, and those two judges would have the main responsibility to report to the conference on their recommendation as to whether the judgment should be reversed or affirmed, or modified, and so on.

CTF: Is this prior to argument that there'd be a conference?

TEF: No, under our routine in those days, there was a week of argument, followed by a week of study, followed by a week in which two days were given to conference. So, you had this study opportunity after the argument. Then at the conference, cases would be taken up in order, and for each case, one judge is the main speaker on that case, and one is the second speaker, the "checker." And so the first judge would report his view, and then the "checker" would either say I agree, or he would give his view. And if the view of either one of those two turned out not to be the majority view, then the writing of the opinion would pass to somebody else. Nobody was required under that system to write an opinion contrary to what he voted. If I were the reporter on a case and I came out to affirm it and my checker said I agree with affirming it, and four or five other judges said no, I vote to reverse, then the next judge in order beyond us would write it and we'd probably dissent. So that was how that was.

This other quirk that you mentioned, the Fairchild System, there are a lot of times when the judge who has studied the case knows it well, perhaps best of the bunch, and even though his view is not the majority view, he may be able to write the opinion of the court more easily, with less wasted motion. After stating the facts and analyzing the issues he simply states that the majority adopts one view and one result, although the writer of this opinion would reach a different result. Clearly this will not work in many cases. But there are some where this is perfectly feasible and I've done it a few times in the State Supreme Court, and I've done it here on this court.

CTF: You know anybody else who has done that?

TEF: Right now I can't think of anybody.

CTF: O.K. What about getting back to the assignment system on the Wisconsin Supreme Court where one is the primary reporter and the other one is the "checker"? Did that, at least with some justices of the Supreme Court, leave them not to be as prepared on cases as they might otherwise be?

TEF: I suppose that's bound to be true. You know you're hearing either 28 or 35 cases in one week for that month. They have to be decided in that month. You have responsibility for four or five of those cases; those are the ones on which you are going to put the greatest amount of work. But you read all the briefs and hear all the arguments, and if you feel very strongly about a result in a case, you'll set some time aside to consider that case and you'll be heard on that in conference and maybe you'll vote against what the reporting judge reported, and maybe you'll write a dissent when it's done. That system is often criticized as producing one-judge opinions. I don't think it really produces any more one-judge opinions than our system here, where the conferences are very short, not very meaningful, without much discussion. Three people vote, writing of an opinion is assigned, and I think the one-judge opinion criticism is valid in as many cases here as it was in the seven-judge court that had the other system. The question gets down to be, is a conscientious bunch of judges doing the best they can with the cases they've got to handle?

CTF: Did only the Chief Justice deal with the courts outside the Supreme Court? Did you as a justice of the Wisconsin Supreme Court deal with issues concerning, say the Milwaukee or Dane County Courts, other than the straight appeal of the decision of a judge of those respective trial courts?

TEF: Where a circuit, or in those days – circuit or county court is having a problem where there is a lot of criticism of the way that things are being handled, the responsibility is almost completely the Chief Justice's. Although the Constitution said that the Supreme Court shall have superintending control, so really it was the court, the Chief Justice is more likely to have things brought to his attention. And then a little bit after I got there, a Court Administrator was created. He became the right hand of the Chief Justice in dealing with questions of administration, delinquent conduct and all that sort of thing. There were a few occasions where it was felt that there ought to be a committee to deal with a particular problem, and I served on one of those in Milwaukee. There was a certain amount of friction between a couple of judges of the courts in Milwaukee, and the committee went in and took some kind of action, persuasive or otherwise to correct it.

CTF: But only in the more serious matters where the Supreme Court needed to address it as a whole would you really be involved in the judicial administration.

- TEF:** That would be right. I should add that the Wisconsin courts were changed by a constitutional amendment in about 1978. There are now intermediate courts of appeal and the Supreme Court has complete discretion as to the cases it reviews.
- CTF:** Now you were elected in 1956 to a ten year term. It came around to 1966 and you ran for re-election. Now I know that at some point prior to that, there had been some talk about you taking an appointment to this court, the Court of Appeals for the Seventh Circuit.
- TEF:** The conversation had arisen at times. But Judge Duffy, who was the judge from Wisconsin on this court, did not make up his mind to become a senior judge until the spring of 1966, when I was re-elected. There was no vacancy until Judge Duffy did that. (Memorial to Hon. F. Ryan Duffy, U.S. Court of Appeals for the Seventh Circuit, at 618 F2d CXV.)
- CTF:** Now, he had been eligible probably a good number of years prior? He was appointed...
- TEF:** He was appointed to our court in 1949 but to the district court in 1939. He became 70 about 1959. I guess he would have become eligible in 1954.
- CTF:** Did Judge Duffy ever talk to you about appointment to the Court of Appeals, succeeding him?
- TEF:** Many times. Year after year. His taking senior status began to be thinkable after President Kennedy was elected. I don't believe I saw him any time after that that he did not tell me that if he were sure that I would be appointed, he would become senior. He would always put it some way like "I'd love to have you succeed me, and if I were sure you'd be appointed, I'd do it in a minute," or something to that effect. And my wife and I would say, "Well, why doesn't he do it?" He didn't. He did it in 1966 after I had been through my second campaign, and had gotten to be only one chair away from being Chief Justice.
- CTF:** Immediately after the campaign?
- TEF:** Yes. Actually that was a default election. Nobody else filed. So I was as good as elected from the end of January in 1966, even though the election wasn't until April. Judge Duffy told me in April that he was going senior.
- CTF:** Now did you ever talk about any of the district court spots? Some of those were filled by Kennedy-Johnson appointments prior to your appointment here.
- TEF:** Yes, I had conversations about them. There was one vacancy in the Western District and one in the Eastern. I took the position that I didn't want to step from the appellate to the trial level, but that if a position opened up on this court I would be interested.

CTF: Now, a person that a lot of people in Wisconsin maintained relationships with, is the long time Senator from Minnesota, Hubert Humphrey, who was later to be the Vice President. This doesn't quite fit in here, but why don't I put it in.

TEF: While we're here.

CTF: While we're here. You had mentioned to me at one time that he was like a third Senator from Wisconsin, particularly the Western part because for the longest time there were no Democratic Senators.

TEF: Yes. Senator Humphrey became a national figure really in 1948 and our drive toward Democratic organization took place starting in about 1948 and on into the 1950s. He was immense help. He was very generous in coming to our meetings in Wisconsin, and would speak at the drop of a hat and at length. I've heard this from other people, but I remember hearing it from him. He gets up and he talks for 20 minutes and then he says, "Muriel always tells me that these speeches do not have to be eternal to be immortal." And then he'd get a laugh, and take a breath, and then he'd start on the next 20 minutes. The talks were worth it and he was a great help to us.

CTF: There was some tension between some Wisconsin Democratic officials and President Kennedy because there was at least part of the organization that had still wanted to support Adlai Stevenson in 1960. So did that play at all into any of the appointments in the state? I think it comes into play with Jim Doyle.

TEF: With Judge Doyle, yes.

TEF: Kennedy wouldn't appoint Doyle judge because he had been a manager for Stevenson at the 1960 convention. District Judge Stone dies in early 1963 and many active Democrats and others supported Doyle for the appointment. The President and Attorney General declined to name him and I am sure Doyle's support for Stevenson was part or all of the reason. They nominated Dave Rabinovitz, but he did not get to committee action. After the assassination President Johnson gave Dave an interim appointment, and he served for the rest of the session of the Senate. Tragically for Dave he was not confirmed. In 1965, Johnson appointed Doyle, who went on to a very distinguished judicial career.

Doyle was not alone in Wisconsin in preferring Stevenson. I was on the Supreme Court in 1960, and wasn't active in the Party or the campaign. One time, however, before the primary and before the convention, I got a call from the Democratic headquarters. The caller said that Sargent Shriver was in town on behalf of his brother-in-law, and was looking for people who had some influence in the Democratic Party and he asked if he could come over and talk with me. He started out saying that he knew former clients of mine in Chicago who had offered the Kennedy campaign the use of their building in downtown Milwaukee. He thought the offer was generous, and said my former clients had sent their regards. I

happened to know the building had some severe problems, and I responded "Indeed that was a nice gesture, but for God's sake don't let your candidate go into the place. It might fall in on him."

The story was that my client owned a one-half interest in the building and an estate owned the other half. They had no money. The building was leased to and occupied by Bond Stores which had ample funds. The long term lease had been drafted early in the War. Bond Stores were given the right to rebuild when war time restrictions were lifted, but only if the price level did not exceed 110% of 1941. Of course that never happened, and some new agreement was necessary. But all parties were terribly stubborn and no agreement was ever reached. Downtown Milwaukee was swampy and buildings rested on wood pilings. The pilings under our building deteriorated and the walls slumped. The local manager wanted desperately to have a nice store and would come almost to tears when the problem was discussed. There was merchandise on several floors and he showed me how the customers got wet getting on or off the elevators on rainy days. Bond Stores had sued for constructive eviction, and there was a great scene when the trial judge took a view, climbed down a ladder below the basement and came up with handfulls of fragmented pilings. We won the lawsuit, but the parties still never agreed (although we lawyers all tried hard) until the lease ran out, the rent stopped, and the mortgage was foreclosed. The only thing in the nature of a fee was attending our client's 100th birthday party a few years later.

So much for the generous offer of a campaign headquarters.

What Shriver wanted to discuss was that in every other intellectual community in the country, he said, the Kennedys were able to find people for support, but they didn't succeed in Madison. I mentioned the support for Stevenson, and he was aware of that. I mentioned the names I could think of and he knew Jim Doyle and various others.

Eventually Shriver located a prominent local Democrat with whom he had gone to college, Yale, perhaps. Shriver persuaded his friend to have a gathering at his home at which Shriver could give a pitch for Kennedy. My wife and I were invited and quite a group was present. After cordialities and drinks we were asked to sit down and hear Shriver. Many were seated on the floor of a big living room and Shriver spoke in behalf of Jack Kennedy. One of the people there was Morris Rubin, longtime editor of the Progressive Magazine. He had been a Progressive, going back to personal association with the younger LaFollettes. Morrie had been a great help in my '52 campaign and had written speeches and other materials for me. He sat in a wing-backed chair, with his back partly turned toward Shriver. Shriver called for questions. Morrie turned his head partly toward Shriver and asked, "Your brother-in-law, how did he stand on the censure of McCarthy?" That loaded question pretty well ended the whole affair.

CTF: Did Kennedy vote against the censure of him?

TEF: I don't remember now whether he voted against or abstained.

CTF: This a continuation of the oral history of Circuit Judge Thomas E. Fairchild on October 1, 1992. Judge, we were just starting to talk about your appointment to the United States Court of Appeals to the Seventh Circuit. Maybe you can give some of the background on that.

TEF: Well, you might say I had it the easy way. The two Democratic Senators in Wisconsin, in 1966, were William Proxmire, the senior Senator, and Gaylord Nelson, the junior Senator. I had been very close to both in Democratic politics as the revitalization of the state Democratic Party was underway. And both, in a sense, may have felt a little politically indebted to me. Of course, Lyndon Johnson was President, and he was a Democrat. This job opened up, and I don't know of any real chance that anybody else had at this appointment. In fact, my big problem was deciding whether I wanted to take it. I had just been re-elected in April for a ten year term on the Supreme Court. I would have been Chief Justice in about two years. Chief Justice Currie would have reached the age of 70. I was number two on the Court. So I would have been a cinch to be chief for about eight years. Then if I could have been re-elected, I wouldn't have hit age 70 for another six years after that, and I could have been Chief Justice for that period of time. And, as it has now turned out, with no age limit I maybe could have been Chief Justice right now. And if that had happened, there are several people who never would have been Chief Justice. Namely, Harold Hallows who succeeded Currie; Horace Wilkie who succeeded Hallows; Bruce Beilfuss who succeeded Wilkie; Nat Heffernan who succeeded Beilfuss. Of course Nat is younger than I am and he's still on the court. He would have eventually made it. But anyhow, my thinking at the time was limited by the idea that I would have to quit at age 70. There was my possible tenure of some 14 years a Chief Justice. It was hard to turn down, hard to leave. And I made quite a canvass of people asking their opinion on the subject, should I, or shouldn't I? I talked to Justice Walter Schaefer of the Illinois Supreme Court, and Chief Justice Roger Traynor of the California Supreme Court, and people that I knew in Wisconsin. One had been briefly a colleague on our Court, but had been defeated. I talked to Williard Hurst, who was on the Law School faculty at Madison. I talked to Leon Feingold, who had contributed greatly to any political success I had had. I didn't want to leave the Wisconsin Court without at least talking to Leon, who had a lot to do with my getting there. And certainly Jim Doyle, who was a district judge in Madison then and had been very instrumental in the whole reorganization of the Democratic Party, and had helped me in all my campaigns.

CTF: Now Judge Doyle had just been appointed fairly recently to the district court.

TEF: Yes, he had been sworn in by me as district judge in June of 1965, so he'd been in that position about a year. Those are the names that occur to me right now.

CTF: Now Judge Gordon, who was on the Wisconsin Supreme Court, had he been appointed as district judge?

TEF: No. He remained on the Supreme Court when I left. He was appointed in the spring of 1967 as district judge in Milwaukee.

CTF: So he had to face the same issue.

TEF: That's right. Myron seemed to have no trouble making that decision. I had a heck of a time deciding to come to the Court of Appeals. I enjoyed doing the work of the Supreme Court and the collegial way in which we did it. I had the highest respect for my colleagues and enjoyed the association with them. Yet almost all the people I've named urged taking the federal judgeship. It pays better. You are assured of the job as long as you live, and it can be chancy on the state court.

Bill Wingert was the justice that I referred to who had served with me on the state court, but had been defeated. He had a little different view about the interesting nature of our work. We were indeed supreme on matters of state law, including common law, and our Court had shown a degree of activism in molding common law in the tort cases. We had applied the state constitution in a new way in the reapportionment case when few other states did, and the United States Supreme Court had just begun to deal with that problem in federal terms.

Bill Wingert spoke strongly about our supremacy on state law and the challenge in making these choices. On the other hand he pointed out that he had been defeated and forced to start law practice again. He said, "I am sure that come 70 it must be awfully nice to be paid the full federal salary instead of the meager retirement benefits the state would give." I thought of my wife and family and how much better I would do for them over time as a federal judge. I made the decision I made and took the job. There were times of regret, even with better pay and security, but by then it was over the dam. Both Gaylord and Prox supported me. Once, jocularly, Gaylord put it "This was one of the few things Prox and I ever agreed on." So maybe I solved a problem for them, too.

CTF: Well, if I remember correctly, you were closer to Gaylord Nelson weren't you, than to Proxmire? Proxmire was to some extent a loner in the Democratic Party in Wisconsin, who hadn't been involved as much when Jim Doyle put together some of the former Progressives and the Democrats and some others to rejuvenate the Party.

TEF: That's true, in part. Prox had been around in 1948 and 1950, but he was not ever of the group that was really promoting reorganization. He did, I think, successfully run for the Assembly in 1950 as a Democrat. His earlier activity, though, was as a reporter for the *Capital Times*. And then he had a radio program. He was an independent person and people around Madison will pretty much tell you that. Maybe besides that, there was a little bit of possible competition between him and me. I'd gotten a lot more votes in '52 than he'd

gotten for Governor. Had I felt that I wanted to be, and had the funds to be, a candidate for Governor, say in '54, '56, I could have tried for that, and there would have been a collision between him and me. So that was maybe in the background. Gaylord, on the other hand, was one of the 1948 originals and we were all close personal and political friends. In fact, Gaylord had really been the one who talked me into finally taking the leap into the cold water in 1952 against McCarthy. Gaylord sat in my office almost days on end at the time the critical decision was made.

I find interesting one incident of the days before and after I announced I was running. General Ralph Immell, a lawyer in Madison, had been a Progressive leader, and then a Republican, and in '52 an Eisenhower supporter. The Republican Convention was to occur the following week. General Immell came to my office on a legal matter, but after we disposed of that, he offered his opinion that I would be missing an opportunity if I didn't run against McCarthy. His reasoning was that if Taft were to be nominated the next week, Taft would not carry Wisconsin. If Ike were nominated, he would "dump" McCarthy. He assured me, "Tom, the gravy train is on the track." Anyway, he promised to call me after he got to Chicago for the Convention. He did call Monday or Tuesday evening, and I told him I had committed myself in the meantime. He said I should back out and not run. He said he had learned that Ike, not Taft, would be nominated. I reminded him of his telling me that I would have a good chance with Eisenhower or Taft. He insisted that he had meant I should run if Taft were nominated, but not Ike. That was the gist of the two conversations. I have always believed that he had indeed predicted that Ike would "dump" McCarthy, but had learned in Chicago that Ike had committed himself to be a "regular" and go along with the nominees of the party, even including McCarthy.

CTF: Judge when you came on, we had eight judges and we had probably six or seven hundred cases in the Court of Appeals. We now have eleven judges and over 3,000 cases. What differences do you see in the Court? You also have your experience on the Wisconsin Supreme Court and as a visitor on the Court of Appeals in other circuits. Should there be a size limitation on appellate courts, or does it vary on whether it's an intermediate court as this is or a supreme court as the Wisconsin Supreme Court is?

TEF: Well, the common wisdom is that a supreme court should not exceed nine and many states, like Wisconsin, have seven. It's probably unmanageable as you get above those numbers. Those courts usually sit as a unit (*en banc*). Our court sits in panels of three and only rarely *en banc*. After all, the Supreme Court is there to knock the heads of two panels together and so maybe it isn't important to have consistency at our level. As you grow in number of judges and of disparate panels you're just bound to increase the chances of inconsistency. Of course, having a Court of Appeals able to sit *en banc* and change decisions reached by panels permits coming closer to consistency within a circuit.

CTF: When you came to the court, Judge Hastings was the Chief?

TEF: Yes, for my first two years.

CTF: And he was followed by Judge Castle, and then Judge Swygert.

TEF: Right.

CTF: Now, Judge Hastings, according to Judge Swygert, always had advocated that judges should live at the headquarters, in Chicago. Judge Castle didn't really do that. He lived in Sandwich, although I don't think he ever maintained any chambers in Sandwich, that I know of. Judge Duffy always maintained his main chambers in Milwaukee. I don't know if Judge Major was ever headquartered here; but I know that Judge Hastings talked to Judge Swygert when he came on board and convinced him he should move from Hammond to Chicago, which isn't a big move since it's like going from the suburbs to downtown.

TEF: Well, he moved his headquarters, but he didn't move his residence. When Judge Pell came on, Judge Hastings was no longer Chief but he strongly advised Judge Pell to move to this area from southern Indiana and Judge Pell took his advice.

CTF: On the Wisconsin Supreme Court, as I understand it, at least some of the justices continued to maintain their residences. You've seen it both ways. Judge Swygert was very strong in his views that all judges should be here. I'm sure that presented problems to a Wisconsin native that was used to living in Madison or Milwaukee.

TEF: I've seen it both ways on both courts. I didn't move to Madison for two years after I became a justice on the Wisconsin court. In three of the other seven years that I was on the court, all of our judges were in Madison. In the other four years, one justice lived outside and came to Madison only for arguments and conferences. At present, a number of them do their homework at their respective homes wherever they may be. Here there was a time when I was Chief Judge that everybody was here, because I was the last holdout, who didn't headquarter here, and when I became Chief Judge, I moved to Chicago and everybody was here during that period of time. Now, again some judges live and have their chambers elsewhere. I don't have any question but that a court works better if everybody is under the same roof. Judge Swygert was certainly right on that point. But at the same time I didn't sign on to this court to come live in Chicago. In fact, if I had been told I must move to Chicago, that would have tipped the balance that I referred to earlier. I wouldn't have come. Because this is the deal a circuit judge makes. Everybody in the country is entitled to, and in most circuits, does live wherever he/she feels comfortable. Sometimes a judge will move into the seat of court. Judges have been known to move from Alaska to Los Angeles for that reason. But on the other hand, this is just part of signing on to this job. Chief Judge Hastings made it evident that he would like me to move here, but he recognized my right not to do so. Back in my dad's day on the Wisconsin Supreme Court, he used to invite the other justices to his chambers at four in the afternoon for a cup of tea. Later on when I was there, we'd go into the conference room sometime along in the morning for coffee and all kinds of

business would be transacted. Even if only six out of the seven were there. We might adopt some kind of rule, or order, or plan, and somebody'd then call the seventh justice and say "How about it?" All kinds of business was done that way. That was much more of a collegial court than this one. I could come from Milwaukee and be here for a couple of days and only see the panel members that I sat with. And we wrote letters back and forth until Judge Pell arrived. He devised the two documents most frequently used. One is the voting card that's on the bench for each case argued. That's a Pell invention. And the other one is the memo that goes out with every proposed opinion, voting on an opinion, approval of somebody else's opinion, or voting on rehearing. That's a Pell device, which did away with a lot of typing of formal letters. This was not that collegial a court, even when everybody was here.

CTF: Chief Judge Bauer likes to say that when he took over as Chief Judge, he got the reins of the court and found out that the reins weren't connected to anything.

TEF: Sounds like Judge Bauer, and it's very true.

CTF: But you did have some clear problems to deal with. You had designation of several senior judges that wanted to continue to sit and there was a question as to their ability to continue.

TEF: First, let's recall the sort of safety valve built into the senior judge system. A senior judge has the full authority of a judge when he has been designated to sit on a court by the chief judge or council of a circuit. The power to withhold a designation is protection against having a senior judge exercise the power when deterioration due to age or illness, unrecognized by the senior judge, might render him unfit. Ordinarily near the close of any year the chief judge issues designations, good for one year, authorizing each senior district and circuit judge to sit on the court where he usually sits. More specific designations are issued to meet other needs. Withdrawing a designation is very rare, but can be used to avoid problems.

While I was chief judge there were two elderly senior judges in the Northern District of Illinois who had conducted long trials in high profile cases and reversible error was found on appeal. There was reason to believe that assignment of those cases to these judges was unwise because of the length and complexity of the cases.

The problem provoked discussion. There was a question whether the district court ought to have decided that cases of that magnitude should not be assigned to those judges. I was told by a district judge of his conclusion that the district court would not agree on a solution and there would be no action unless I took it. After consultation with the chief judge of the district court, I decided that when I issued designations for those judges, I would limit them to cases where the estimated time of trial would not exceed a specified period, one week as I recall. I thought the limitation was appropriate and worked well, although I am sure the two judges did not think so.

Judge Bauer told me one time that separately each of these judges had come to him to see whether something could be done to get me to change my decision. They had served on the district court with Judge Bauer, knew him, and thought well of him. Each of these two judges told Judge Bauer that the one of the two who was speaking appreciated, of course, the problem I had with the other.

CTF: That's the story. Prior to your becoming chief judge, one of the issues that we touched upon but really didn't get into was what the court or the judicial council or the chief judge should do with regards to Judge Kerner after he was indicted, and again after he was convicted. I don't know if there was ever any meeting at which that was discussed. I know there were individuals who talked to Judge Swygert about that, because he was the chief judge at the time.

TEF: There was one meeting that I remember. And certainly there were informal things. There were some judges on this court who would decline to be seen at lunch with Judge Kerner. I was not among them. I came in from Milwaukee in those days, and if somebody wanted to go to lunch and Judge Kerner was involved, I'd go. I didn't make any point of it. There's a difference of opinion, a real question of what power anybody has until trial after impeachment to say that an active judge cannot sit. Obviously, there are disqualification rules, statutory ones, and if a judge refused to disqualify himself, that might become a reason for upsetting a judgment. That's a different thing. But this court could say to Judge Kerner, you are presumed innocent but you've been indicted, and it doesn't look good for the court if you sit. It could be said, but in terms of an order being entered, or a rule, you're getting out to the edge of things. The only thing I ever participated in was a meeting of all the judges, including Judge Kerner, presided over by Chief Judge Swygert. I think this occurred perhaps after the affirmance of the conviction, that we said we thought the time had come for him to resign. But he said that he didn't think the time had come, and that was the end of that for a while. He was never impeached, never tried, never removed, but he did ultimately resign. I'm not clear at the moment about the stage that that took place. Perhaps it was after cert. was denied.

Judge Kerner had appealed from his conviction. Understandably we all disqualified ourselves and the Chief Justice designated judges from other circuits to hear the appeal. They affirmed the judgment. There was one interesting interplay. While the Kerner appeal was pending, a panel of our court decided a different case on a rationale which, if applied to the Kerner case, might well have required reversal and a new trial. The designated Kerner panel did not say that our other panel was trying to help Otto although some of the language came close to making that implication. One opinion said the judges disagreed with our panel's holding; another that it was bad law and could not conscientiously be followed; another that the designated panel was under no obligation to follow a Seventh Circuit decision made after the designation of the *Kerner* panel. It happened, however, that our court later, *en banc*, decided the other case differently. *U.S. v. Pacente*, 490 F2d 661, vacated by *en banc* opinion 503 F2d 543.

CTF: When you were chief judge, can you think of other problems that you dealt with, or other things that you did that you were particularly pleased to have done?

TEF: Not at the moment. This wasn't when I was chief judge, but I remember that Chief Judge Cummings went off to Europe, leaving Judge Bauer as acting chief. Judge Bauer got a call that said one of the older bankruptcy judges in a downstate district was peeing on the courthouse. Judge Bauer was only acting, but had to take care of that particular situation. I never had that. Chief Judge Hastings told us of a situation where a judge had got pretty much over the hill. Judge Hastings got the judge whose ability to sit was questionable to agree to having a desk in a small room and a secretary to write letters for him, but that he would not participate in cases. More of that sort of thing gets handled by the jawbone method than by formal action. I think you and I had some questions about staff and so on for a judge who was very much older and felt himself that he couldn't handle certain types of business.

CTF: We worked out that deal where he continued to work on unargued cases, so-called Circuit Rule 34's, but either you or Judge Swygert was on every panel with the judge in question.

TEF: Things sometimes were done in that vein. I used to think there was a tendency to exaggerate the duties of the chief judge beyond going to luncheons and dinners to represent the court, and that sort of thing, of which there is a fair amount. People would ask me, "Oh gee, how heavy is the administrative work that you have to do?" And I used to make the rejoinder that actually the most serious and difficult job I'd had to perform as chief judge was to write a memorandum in justification of a judge in a new chambers having a second bathroom for his private use. That was number one, and for a long time that was the most serious thing. And I won that one. But, many of the things that you have to do are more in terms of cajoling a judge that is in a little friction with somebody else and you try to smooth it out. These are not things that you codify, or that get reflected in statistics.

On the ceremonial side, I can recall one interesting event. The Chairman and several members of the Supreme Court of the USSR came to the United States and visited several places, including Washington, Chicago, and Brigham Young University in Provo, Utah. They were interested in some work in electronic records at the last named. Chief Justice Burger asked me to make them welcome at the Seventh Circuit. We did have a pleasant conference in my chambers, and heard, through an interpreter, a lengthy discussion by Chairman Smirnoff of the presumption of innocence in the Soviet Union. We also heard him address a luncheon of the Chicago Bar Association.

On a lighter side, there is nothing in the job description requiring the Chief Judge to play volleyball. But under your direction, Collins, the Clerk and many of his staff, and my staff and I would string up a net for informal games in Grant Park after work. I recall this occurring most in the summer of 1977. One special incident involved four onlookers whom we invited to join the games, and all of us partook of pizza and beer in the Loop afterwards.

Upon learning that our motley crew was from the Court of Appeals, including the Chief Judge, our friends told us, "We are from the CIA."

CTF: Judge, it's kind of an interesting sidenote to see where the sons of the late Judge Doyle and the late Leon Feingold are during this current fall of 1992.

TEF: It is very interesting. In neither case did the father live to see what has happened to each of them. I often think how pleased Jim Doyle and Leon Feingold would be. Young Jim Doyle was elected Attorney General of Wisconsin, as a Democrat, defeating the Republican incumbent in 1990. I often think of how many pressures there are on him, which are similar, if not identical, to the pressures that were on me when I was Attorney General, elected as a Democrat; the pressures to run for something else. He has the advantage that he has a four year term. I only had a two year term. He can sit it out longer. And then Russ Feingold, who I first saw when he was in his crib in Janesville, when I visited his father and mother. Russ Feingold has been, for ten years, a state senator in Wisconsin and just defeated two candidates for the Democratic nomination for United States Senator to oppose the incumbent Senator Bob Kasten. Bob Kasten is the guy who defeated Gaylord in 1980 and many of us remember that with displeasure. But anyway, Russ Feingold is the Democratic nominee and is given at least a fair chance. Poll-wise, he has run ahead in some polls recently. The joy that that would give Leon is really hard to describe.

CTF: Moving to the Court of Appeals job, your appointment came in 1966 and you took office...

TEF: August of 1966.

CTF: August of 1966. What were some of the cases, and I know we can get them out of F.2d, but cases that really gave you pleasure to have worked on where you really thought they were important, or interesting cases over the years? A big, big question since it's been a long time that you've been on the Seventh Circuit.

TEF: Pleasure in working on cases maybe isn't the appropriate term. Certainly an interesting case that I was on and wrote the opinion, was the case of the so-called "Chicago Seven", which this court heard in early 1972. *U.S. v. Dellinger*, 472 F.2d 340. I sat with Judges Cummings and Pell on that particular case. It was a big case in terms of public interest. It was a big case in terms of the kind of law and order support that had been voiced for the rulings and positions of Judge Julius Hoffman in the trial of the case; it cut to the heart of a lot of the feelings of the late '60s and early '70s in terms of opposition to the Vietnam War. The facts, of course, had all arisen out of the activities in and around the 1968 Democratic Convention here in Chicago.

CTF: Now, were you originally assigned to that case?

TEF: No. Up until that time, the chief judge had assigned members of the court to sit on panels on particular dates. Although he was not bound by any rule, I would be certain the chiefs I knew did not pick particular judges for particular cases. This court traditionally avoided having identical panels on successive days. That would be one constraint. Another would be keeping the load evenly distributed. There had been talk that it might be desirable to have judges selected by lot to avoid any suspicion that particular judges were selected for cases with the thought of how a judge might decide that case. It was decided to have the Chicago Seven cases assigned by lot, especially in those cases the court wanted to avoid any thought that it was the discretion of the chief judge to pick who should be on the panel. That was the first instance, although now it is a standard practice except that visiting judges are scheduled in advance to sit on particular days. The names of the active judges were put in Judge Swygert's hat and pulled out, I think, by Judge Swygert's secretary, unless it was you. It was also anticipated that there would be innumerable preliminary motions in the case. And it was decided not to have the orders entered in the names of the judges on the case because in that way the composition of the panel would become known. So all the orders of that sort were entered in the name of the court, even though the selected panel decided the issues. The panel drawn consisted of Judges Cummings, Kerner, and Pell. By the time we approached the argument of the case, Judge Kerner, unfortunately, had been indicted, and withdrew from sitting. It became necessary to draw a substitute and mine was the name drawn. So, that then, the panel became Fairchild, Cummings and Pell.

CTF: One of the practices that I think, to some extent, you are unique in, at least in this day, is the reading of the record. How many pages of transcript were in the Chicago Seven case since the trial went for a very long time?

TEF: I think five months actual trial. From September to February, or something like that. There were 22,000 pages. Many, many volumes.

You refer to my reading the full record more often than some of my colleagues. I do read extensively and am much more comfortable in writing an opinion if I feel I am fully aware of the facts and the way they were presented to the trial court. The more responsibly the lawyer for the appellant has stated the facts and his opponent has responded, the less necessary it is to go to the record one's self, but this is an area where briefs are often unsatisfactory. I am uncomfortable in deciding a question of law which the record does not really present. Perhaps I have gone overboard in trying to get the feel of cases for myself, but I have always put a high value on gaining a thorough knowledge of the whole case.

Turning specifically to the "Chicago Seven" case, it was almost a necessity to read the transcript to get an understanding of the issues. Nobody prepared a decent statement of facts in that case. There were hundreds of pages of argument. The charges, in large part, depended upon what people did over a series of four or five days here during the Democratic Convention. And there were different episodes. There was the battle in Lincoln Park and there was the battle in front of the Conrad Hilton Hotel. And there was Grant Park, the

Logan statue, and a parade, and a lot of other things. And the briefs mentioned facts in the course of the legal arguments as to what was wrong with the verdict, or was right. The statement of facts in the opinion is my own, without much help from the lawyers. It was necessary for me to read the 22,000 pages, which I did daytime and nighttime, at home and in the office. My wife got in on some of the funny things that there were in that record, and there were quite a few. I took a diary of 1968. There were some significant parts of the record which related to preliminary trips that had been made out here by some of the defendants and consultations with the city about parade permits and things of that sort. As I went through the transcript, I would note in my diary page references, or a little notation on something that happened. I finally wound up with a comprehensive narrative statement of facts, which I think was reasonably fair.

CTF: Now besides the "Chicago Seven" convictions, there was also the contempt of the "Chicago Seven" for a variety of different charges and the contempt of the one who made up the "Chicago Eight" at one time, Bobby Seale.

TEF: Yes.

CTF: That was all part of the same case, but different issues.

TEF: Yes. The contempt situations were separated from the review of the verdict. And Judge Cummings wrote the opinions for the contempt citations.

CTF: What did you think? You've already told me about the statement of facts leaving a lot to be desired from both the government counsel and defense counsel. What about the arguments, the quality of the arguments made both in the briefs and in the oral presentation?

TEF: Well, it went from some that you'd like to remember because of good quality, down to some that you thought were pretty pedestrian. There was quite a range. I do recall, on the contempt side of it, an argument on the behalf of Bobby Seale by Anthony Amsterdam. That was an argument worth remembering.

CTF: I would second your focusing on the Amsterdam oral argument. That's clearly the most outstanding one that I've heard in my limited listening to arguments in the Court of Appeals. That's been the best.

TEF: It was really a neat job.

CTF: What other cases can you remember having?

TEF: There was also an incident there. A Ms. Schwartz made an argument on behalf of the defense. I always tried when I was presiding to name counsel as called on for argument.

When it was a lady, if I knew it was Mrs. or Miss, I'd say one or the other. And if I didn't, I'd say "Ms." The appearance of women in the courtroom arguments was not anyway near as common or frequent as it is today. Judge Pell said, "I didn't quite catch it, whether you are Mrs. Schwartz or Miss Schwartz, or do you prefer that kind of recent invention of Ms.?" She was a pretty good looking lady and she looked Judge Pell squarely in the eye and she said, "Just call me counselor." Everybody laughed. I looked down in the front row and there was my wife sitting next to Mrs. Pell. And I thought Mrs. Pell was probably laughing harder than anybody else in the courtroom.

CTF: What are some of the other cases that you remember?

TEF: Well, there've been a good many cases. You sometimes remember better the ones where you got reversed.

CTF: I actually have heard an interesting story about how to get reversed twice.

TEF: Well, I didn't study how to do it, but it happened to me. It's *Sommerville v. Illinois*, 429 F.2d 1335, and *Sommerville v. Illinois*, 447 F.2d 733. The citations escape me. But Mr. Sommerville had been tried in an Illinois court. At some point in the first trial, the prosecutor realized that there was an element missing from the state indictment, which was essential to the statement of the offense. So he moved for a mistrial and dismissal at that point because he was afraid that if he got a conviction, he'd have nothing because there was an element of the offense that was missing from the indictment. And the court granted it. Then they reindicted and put the element in and tried Mr. Sommerville. And lo and behold, he was convicted. Mr. Sommerville then came to federal court on habeas, claiming that this was second jeopardy, and on appeal came before a panel consisting of Senior Judge Major, Judge Castle, and myself. Judge Castle was strongly of the opinion that this was not double jeopardy because the prosecutor was within bounds in moving for mistrial at the time he did and because there wasn't a complete statement of an offense. Anyway Judge Major thought that it was double jeopardy and so I had to go one way or the other and I went with Judge Castle. So Mr. Sommerville took us to the Supreme Court and the Supreme Court granted cert. – one of those grants where they say judgment is vacated to be reconsidered in the light of, I think the case is *U.S. v. Jorn*, 400 U.S. 470. Well, I hadn't been around very long, and I thought that meant something. I looked at *Jorn*, and I didn't know how much it had to do with it. But I thought they must have thought it did or they wouldn't have mentioned it. So we reconsidered. Judge Major again was saying that it was double jeopardy, fortified I guess by *Jorn*, and Judge Castle was for finding that it wasn't double jeopardy because he found his way around *Jorn*. But I thought the Supremes must mean something so I sided that time with Judge Major. So it was two to one in favor of granting the writ. That time, the state took us to the Supreme Court of the United States and darn if they didn't reverse the second time. So I have the distinction of being the judge that got reversed twice and my colleagues only one a piece.

CTF: Are there any, well I'm sure there's a lot, but any other cases that come to mind that you're particularly proud of, whether it be the dissent or the majority?

TEF: Well, I don't know about proud, but I was on a case with the beautiful name of "*Schmuck!*" *United States v. Schmuck*, 776 F.2d 1368, *reh'd en banc*, 840 F.2d 384, *aff'd. Schmuck v. U.S.*, 489 U.S. 705. Schmuck was a used car dealer dealing in stolen cars on which he set back odometers. He was prosecuted for mail fraud because by setting back the odometers, there was fraud on the purchasers, and of course he also caused a mailing, although it was a mailing by the purchaser of an application for registration of the car, to the state authorities in Wisconsin. He was convicted. But the defense said that the judge, Judge Barbara Crabb in Madison, should have also submitted to the jury the possibility of finding a lesser included offense because it is a misdemeanor to fraudulently reset odometers. And she said in about nine words, "Why Mr. So and So, that's not a lesser included offense of mail fraud." And so she didn't submit that verdict. Well it didn't take her long to say it wasn't a lesser included offense. But it took about three years and a panel on this court, an *en banc*, and the Supreme Court of the United States to come around to the same conclusion. It came to this court, and Judge Flaum, Judge Swygert and I were on the panel. Judge Swygert had a terrible time with mail fraud. He thought that mail fraud had been extended beyond reason. It was hard for him to say that a perfectly innocent mailing completes the crime because it was foreseeable. And he bought the argument that odometer tampering was a lesser included offense. He wrote his opinion, and I dissented. Then it was *en banc*. The *en banc* court went with me instead of Judge Swygert, so I wrote an opinion that it was indeed not a lesser included offense. And then the defense took it to the Supreme Court on both points. Justice Blackmun wrote a decision, affirming, which doesn't happen all that often. There's an old saying that they don't take 'em to affirm 'em. That's one that happens to come to mind where my judgment got affirmed. More law I've made by being reversed.

CTF: It's probably a little hard to figure sometimes which way the Supreme Court is going.

TEF: True! And I've had cases, of course, where I've wondered why they didn't issue cert. and take the case. But they didn't. Of course they have this vast load of five to six thousand opportunities to take a case every year and they obviously aren't going to take any sizeable fraction of those. They can't.

CTF: Now when you came to the court in 1966, was the court only hearing argument in two cases a day at that time?

TEF: Yes and the rules provided for 45 minutes on a side whether you needed it or not.

CTF: How did you stay awake?

TEF: Well if we had good fortune, the lawyers would realize that they didn't have to talk for 45 minutes and would stop sooner. But in those days, if a case folded, nobody would substitute anything. You'd just hear the one case, and sometimes those mornings went a little easily.

Oh, it just popped into my head that I wrote the case which resulted in the Supreme Court decision in *Lynch v. Donnelly*, on the Pawtucket creche case. I was sitting on the First Circuit. *Donnelly v. Lynch*, 691 F.2d 1029, *rev'd. Lynch v. Donnelly*, 465 U.S. 668.

CTF: Speaking of being difficult to predict the Supreme Court.

TEF: Well, many people do not seem sure just what Chief Justice Burger meant in that particular case. But anyway, they reversed our panel, which was divided. Judge Campbell had dissented and the New Hampshire judge, Judge Bownes, had agreed with my opinion, holding the creche was impairment of First Amendment religious freedom.

CTF: In 1966, when you came here, you just mentioned that there were two cases. This would bring it up to date in 1992 the court has six cases. Very seldom does anyone get 45 minutes a side. In most cases there are probably 15 or 20 minutes a side.

TEF: Thirty minutes as we have tomorrow on a side is a big allowance.

CTF: The necessity for that has been the dramatic increase in caseload after having relative stability in the caseload for decades. The end of the 1960s saw that, the big expansion which has continued on. How has that changed how you work?

TEF: It's changed how every judge has to work. For one thing you have more law clerks than when I first came. You're now allowed three and we were then permitted only one. I think Chief Justice Rehnquist, a long time ago, commented that the work of judging was getting to be more a matter of judge editing the work of law clerks. My clerk writes the first draft in most cases, and then – I don't just edit it in the sense of shoving a few words or sentences around. I often carve them up or send it back to my law clerk with a lot of notes on different approaches that ought to be taken. So it isn't just a matter of editing. But there's less personal input than when I came. I think that's true with any judge who spanned that period of time.

CTF: Where I was headed for on the workload increase is the appellate court writes decisions to set precedent so that lawyers and trial judges will be able to know what the law is. As the number of cases has increased, as the number of law clerks has increased, the work, as you just said, of the judges turned to some extent more to editing than to writing. What impact do you see in the long range on our development of case law—continuation of the common law system?

TEF: Well, it's hard to say in those general terms. With eleven judges plus seniors (and, perhaps visiting judges) on this court, sitting in panels of three, and addressing an increasing case load, consistency and the concept of circuit law seem necessarily more difficult to maintain.

Given thirteen circuits of substantial size, and some bigger, one can question whether one Supreme Court has the capacity to maintain national consistency. I used to advocate the idea of a national court of appeal between us and the Supreme Court to achieve more national consistency of legal rules and principles. But at the moment, I do not know whether that is really meritorious. Somebody has come up with the solution that the decision of every circuit is precedent, binding on every other, until reversed or called in question by the Supreme Court. That would provide a mechanism for approaching uniformity, but certainly runs in the face of tradition of circuits being independent and equal.

CTF: There's also another idea being kicked around which is whenever there's a conflict, at random, you designate a third circuit to sit *en banc* to decide the issue.

TEF: Something like that could do it. That's a different type of intermediate review.

OVERVIEW

By 1948, at age 35, I was a lawyer with several years' experience successively in general practice, administration of war-time regulations, and securities and corporate law. I was an associate with the leading corporate law firm in Milwaukee, which traces its origin to 1852. Prospects for a significant and profitable practice were excellent. I had developed liberal and progressive views on public matters, but had no party affiliation and no thought of running for any office.

My agreement in July 1948 to make a token run for Attorney General in order to help the young turk Wisconsin Democrats produced a drastic change in course. My unexpected win put me in a job I loved, but only for two years. I was also necessarily in politics, and that led to two unsuccessful runs for U.S. Senator.

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. Losing to McCarthy in 1952, I received 46% of the vote, many more than our Democratic candidates for president and governor.

When it was over, our home and car were fully mortgaged, our resources and energy spent. I had received no income for six months. The firm which had employed me was not willing to take me back. I joined a law practice with a new firm in Milwaukee and earned enough to keep afloat. Our kids got used to not having things.

Did the hard work, disappointment and family sacrifice accomplish anything? During this period the Democratic Party of Wisconsin gained in organization and strength. Bill Proxmire was elected U. S. Senator in 1957 (a special election after McCarthy died) and in 1958 Gaylord Nelson was elected Governor that year.

In 1948 there were only a few Democrats in the state legislature. At times later they have been a majority. I like to think that I made a contribution, along with many others, toward making Wisconsin a two-party state.

There were surely some personal rewards. Experience as Attorney General and U. S. Attorney made me grow as a lawyer. In those campaigns I made good friends and learned more about how to appreciate people.

Working acquaintance with people like President Truman, Governor Stevenson, Senator Humphrey, Eleanor Roosevelt, Jim Doyle, Gaylord Nelson and Bill Proxmire was enriching.

In 1956 I easily won a non-partisan election to the Supreme Court of Wisconsin to succeed Dad, who was Chief Justice by then. I am sure that having my name on the ballot in primaries and elections 1948 to 1952 made it easier for me to win. In 1966 when there was a recognized Wisconsin vacancy on the Seventh Circuit, our U.S. Senators were Proxmire and Nelson, with whom I had worked earlier. It was easy for them to recommend me to President Johnson for the appointment.

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 Federal Circuit where most cases are considered by only three. I have not found decision of cases easy. On occasion I have observed that if the appellant's lawyer had really done his job, accepting the facts as found by jury or judge, as he knows the appellate court usually must do, he would have convinced his client not to take the appeal. Cases like that present no problems. But where 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.

I know that lawyers and trial judges often feel that the case described in the appellate opinion bears no resemblance to the one they tried. I believe it is this reaction that has made me dig deeply into the record to be sure that the case where I write the opinion seems the same as the one the parties began.

In the Wisconsin Supreme Court the common law was more often controlling. I am a believer in the importance of stability, and thus in *stare decisis*, yet there are times when a court should be willing to reexamine the soundness of earlier decisions and resulting rules. During my time on the Wisconsin Supreme Court, we may have been classified as "activist." We abrogated or modified several common law-immunities from tort liability, converted the defense of assumption

of risk into a type of contributory negligence to be compared with defendant's fault. Although we had a comparative negligence rule by statute since the 1930's, we changed the rule for contribution between tort feorsors so as to recognize comparison of fault. We were one of the first state courts to reapportion legislative districts when the legislature failed to keep pace with population changes. We realized that although the need for stability requires judges to be very conservative about changing the law, there are times when they properly take such 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.

A word here about the Appellate Judges' Seminar which has been carried on for many summers at New York University Law School. I attended as a student judge in 1960 and was on the faculty in 1967 and 1968. Wisconsin's Chief Justice Heffernan was on the faculty for many years. Originally the Director was Professor Robert Leflar of the University of Arkansas Law School, who was for a time a Justice of the Supreme Court of Arkansas. A member of the faculty was Supreme Court Justice Bill Brennan.

Over time the seminar has had a substantial influence. As an example, it was there that some of my colleagues and I learned about "Sunbursting,"[from *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358] i.e. limiting the retroactivity of a new decision. We had previously thought that when a court overruled an earlier decision this was a correction of error and retroactive without question. As a result of learning about sunbursting, we limited the retroactivity of several of our decisions abrogating immunities. We applied the techniques in civil cases, but assumed that changes in constitutional doctrine would continue to be retroactive. How wrong that prediction was!

I found that in the federal court of appeals judges more often make law by being reversed. A few examples of Supreme Court cases cited with some frequency, which reversed decisions in which I wrote the opinion are *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, *Furnco Construction Corp. v. Waters*, 438 U.S. 567, and *Lynch v. Donnelly*, 465 U.S. 668.

One other example has facets which strike my funny bone. In earlier days we had jurisdiction of appeals in patent cases. Unlike some colleagues I was interested in them, although I often had difficulty in choosing whether the alleged invention would have been obvious to one reasonably skilled in the pertinent art. A peculiarity of patent law was that a patent could be found valid in one circuit and invalid in another. I wrote for our court in a case where the patent (on configuration of a TV antenna) had been found invalid in the 8th Circuit, later found valid in the Northen District of Illinois, and before us on appeal. The name of the plaintiff in our case was intriguing, "Blonder-Tongue." We decided on the merits that the patent was valid. The defendant patentee, though successful before the district court in our case had lost in the 8th Circuit. In the course of the opinion, however, I said something to the effect that a sensible system would utilize the doctrine of collateral estoppel to avoid opposite results on the same issue. The Supreme Court, to the apparent surprise of the lawyers, picked up the idea of collateral estoppel and reversed on that basis. There was something funny that having followed precedent while indicating another theory

would be more sensible, we were reversed on the basis of the theory we had introduced. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313.

I have always tried to approach a case with appreciation of its importance to the parties, to become thoroughly familiar with its posture and issues, to make a sound analysis, and to write an opinion which succinctly sets out the significant facts and the rationale for the outcome. I have no concern over whether readers will categorize it as “liberal” or “conservative.”

These forty (and indeed those fifty) years have been filled with stimulating activity. Whenever I have started to speculate what my career might have been if I had rejected the invitation to run for office in 1948, I readily decide I would not have traded the experience even if I could.