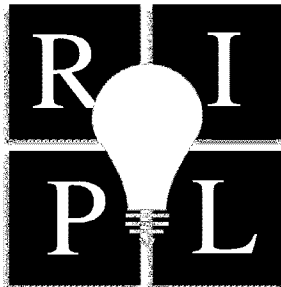


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A MEMOIR OF THE FIRST CHIEF JUDGE BY THE FIFTH CHIEF JUDGE

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CHIEF JUDGE HOWARD T. MARKEY OF THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

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PAUL R. MICHEL

Chief Judge Markey can best be described as a phenomenon of nature, one of a kind. When the Federal Circuit was created by Congress in April 1982, Howard Markey was completing his tenth year as Chief Judge of the Court of Customs and Patent Appeals (CCPA). He had led that court in eliminating a large backlog of long-delayed cases. Not surprisingly, then, Congress chose him to lead the new court.

The Congress formed the United States Court of Appeals for the Federal Circuit essentially by merging the CCPA with the United States Court of Claims, and adding jurisdiction over patent infringement cases from the district courts as well as government personnel cases from the Merit Systems Protection Board. Congressional selection of the new court's Chief Judge, however, was accomplished indirectly. The Federal Courts Improvement Act of 1982 stipulated that the chief judge of the new court would be the chief judge from the predecessor courts who was most senior in service. That was Howard Markey. However his selection was achieved, I still infer that Congress wanted to harness his endless energy, unmatched capacity for hard work, and proven leadership skills to guide the new court.

Chief Judge Markey was a most impressive, imposing, and even intimidating man. He had a direct manner, with laser-beam eyes, a gravelly voice, strong nerves, and complete self-confidence. All of this grew naturally from earlier life experiences. In high school, Howard Markey raced motorcycles he built himself from scrap parts. In early 1942, he volunteered for service in the United States Army Air Corps. After serving as an instructor for wartime fighter pilots, he test flew prototype jet fighters right after the war—with many fires, emergency landings, and bail-outs. Recalled to active duty during the Korean Conflict, he led transport squadrons dropping ammunition and supplies to ground troops trapped in mountain ravines, suffering wounds to his face when flak shattered the windshield of his C-130. Later, he became a Major General in the Air Force Reserves, flying his own F-86 Super Sabre out of O'Hare International Airport, after long days of patent law practice.

In short, this short-statured man was larger than life. He had lived through so much before leading first one and then a second national appellate court, that one could hardly question his requests or demands. He asked only that you do your very best at all times despite all obstacles, just as he did. But he always had a ready smile, twinkling eyes, and a sense of humor. With his thousands of memorized jokes, he easily could have made a living as a stand-up comic. The source of this, and of every trait of this remarkable man and accomplished judge, was sheer love of life. While in modern society the word "love" has lost much of its meaning, I can only say that Howard Markey loved: loved family and country, law and judging, food and drink, prayer and jokes.

From its very first day, he led the Federal Circuit with strong vision and fierce determination. But perhaps more importantly, he led by example. He sat on more cases, wrote more opinions, published more articles, traveled to and sat with more

courts throughout the country, chaired more committees—did more of every judicial duty—than any other judge on the court. In its first five years, the Federal Circuit resolved all thirteen areas of confusion in patent law, while clarifying personnel, contract, and other areas of law as well. In most major cases, he was the author. In the rest, he guided the author, writing precise suggestions by hand on vote sheets, often while traveling all around the country.

His judicial output was simply astonishing—nearly a thousand opinions for his own court, hundreds for other circuits, scores of speeches (all carefully written in full text following meticulous research), fifty-seven law review articles, and dozens of opinions for the Judicial Ethics Committee which he chaired for over a decade. As a new judge, I often wondered if he ever slept. Later, I learned that he did, though for only four hours a night. Up before dawn, he often attended Mass before putting in a twelve-hour work day.

He never wasted time, his own or anyone else's. At monthly court administrative meetings, he would put an old-fashioned alarm clock before him on the conference table. I cannot recall any meeting that lasted more than one hour. At lunch, he was often seen with a fork in one hand and a law book in the other. At his desk he wrote and dictated opinions, speeches, and articles at “mach” speed, chain-smoking and sipping thick, black coffee, surrounded by law clerks fetching books and secretaries running off to type another page of handwritten text.

When Howard Markey asked a judge to come to his office, it felt akin to being summoned to the school principal's office. En route, one tried to imagine what error or omission could have occasioned the call and what, if any, defense might be available. He hated tardy or sloppy opinions, and pushed colleagues to do better—and we did. Indeed, he could be demanding, grave and tough, but also generous, fair, and funny.

The Federal Circuit needed just such a leader in its first years, for its formation caused controversy among lawyers and stirred resentment among judges in the regional circuits, which had lost jurisdiction in patent cases to the new, unproven, Washington-based national court. As time went by, Chief Judge Markey converted many doubters. It is difficult to imagine anyone else doing so because no one else could match his creativity, credibility, or stature among judges all over America.

Some historians of America's founding generation suggest that Providence favored it with exceptionally able and devoted leaders. At its own founding, the United States Court of Appeals for the Federal Circuit was similarly blessed.

A natural leader and teacher, Chief Judge Markey left after nineteen years on the bench to become the Dean of The John Marshall Law School. It was a kind of homecoming because he had earned his L.L.M. in Patent Law at The John Marshall Law School. He also taught courses there, as he had earlier at the George Washington University Law School. As with every job he ever took, he approached it with big goals and bigger enthusiasm. Like the two courts he served, the law school soon bore his distinct imprint. He had lasting impact in both careers, principally because he influenced his colleagues by the very force of his personality. Many of us adopted his ways as best we could, and though he is now gone, we are still here, still living and leading by the example he set for us. In this way, Chief Judge Markey's impact continues at the Federal Circuit, in the case law, at the American Inns of Court, and finally, at The John Marshall Law School.

The first Chief Judge's landmark opinions were many and enduring. But the full measure of this remarkable man exceeds his opinions and lives on in the continuing judicial work of the colleagues and the court he shaped.