

## THE PAUL MICHEL YOU NEVER KNEW

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The readers of this journal no doubt summon to mind a few common images upon hearing the name Paul Michel: the beloved brown cover of *Patent Litigation and Strategy*; the center chair of a courtroom at the Federal Circuit, in front of which an oral advocate is being challenged (often in a humorous way, to the spectators at least) to provide *real guidance* to the Court; a classroom, where the students are being forcefully encouraged to brief and argue their cases in an efficient way; or the podium at a conference dinner, which is being used to advocate for the Federal Circuit or advance the profession of intellectual property law. These images come to mind because the readers of this journal think of Paul Michel as one of the most highly-regarded patent lawyers in our country, and that he is. But he was not always a patent lawyer. Indeed, I daresay that, had someone asked the Paul Michel of the 1970s where he envisioned himself twenty or thirty years later, patent law would never have crossed his mind.

For as fascinating as our beloved Chief Judge Michel is, he is predated by an arguably more fascinating Paul Michel. How much do you know about the wide-eyed 25-year-old graduate of the University of Virginia Law School who became an aggressive young prosecutor in Philadelphia under District Attorney Arlen Specter and alongside such illustrious colleagues as Governor Ed Rendell, U.S. Attorney Michael J. Rotko, Professor Welsh S. White, and Judge Harry Takiff? Or the 33-year-old Watergate prosecutor who was given the formidable task of examining President Richard Nixon before the Grand Jury? Or the lawyer who served with distinction as the first Deputy Chief of the Department of Justice's Public Integrity Section, and even enjoyed a brief stint as Acting Attorney General under President Carter? Truth be told, Paul Michel may have lived his most colorful days before taking the bench; his judicial personality was certainly shaped by those early experiences. But don't take my word for it: peruse some of these synopses and decide for yourself.

- Chief Judge Michel's former law clerks knew to do two things immediately upon receiving a new case: (1) verify subject matter jurisdiction; and (2) confirm the burden, and which side bore the burden. It seems that one of these rules arose from an experience he had as a young prosecutor. In *Commonwealth v. Conyers*,<sup>28</sup> the court vacated and remanded a prisoner's claim that his appeal rights and right to counsel on appeal were improperly denied—not on the merits, but because the lower court erroneously placed

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I had the honor of serving as a law clerk to Chief Judge Paul R. Michel from August 2005 to September 2006. I extend my deepest thanks to Chief Judge Michel for serving as a great mentor to me and playing an important role in my decision to become a prosecutor.

<sup>28</sup> 244 A.2d 791 (Pa. Super. 1968).

the burden of proof on the prisoner instead of the government.<sup>29</sup> The source of the other rule remains a mystery, although it is a good rule—I vividly recall being assigned one case that had made it all the way to the United States Court of Appeals without proper federal jurisdiction.

- An esteemed trial lawyer once told me that you are not a “real” prosecutor until you endure a tough loss. By that measure, Chief Judge Michel was initiated into the profession early on, when the Pennsylvania Supreme Court vacated the conviction of a man suspected of setting the home of his girlfriend ablaze, killing the woman and her two children. The court held that evidence tying the suspect to the arson had been illegally seized when police opened the unlocked trunk of the suspect’s unattended vehicle, where they found gasoline and paper, before obtaining consent or a search warrant.<sup>30</sup> The story has a happy ending: the defendant was convicted again after a retrial, and the Pennsylvania Supreme Court affirmed the second conviction.<sup>31</sup>
- Chief Judge Michel’s road became no easier after that first tough loss. Over the next three years, our future Chief Judge developed an enviable expertise in Fourth Amendment law thanks to other creative search and seizure techniques employed by Philadelphia law enforcement. Such cases included: *United States ex rel. Cabey v. Mazurkiewicz*,<sup>32</sup> where a wife facilitated an illegal search of her husband’s individually-leased storage unit by taking her husband’s key and providing it to law enforcement; *Commonwealth v. DeMichel*,<sup>33</sup> where the court held that a “five to fifteen second” delay between police announcing their presence and breaking down a suspect’s door violated the Fourth Amendment; *Commonwealth v. Dussell*,<sup>34</sup> where the court held probable cause did not justify a vehicle search after the vehicle ran a red light and the driver could not produce vehicle registration, because the driver did provide valid identification and claimed to be using the vehicle with permission; and *Commonwealth v. Harris*,<sup>35</sup> where the court excluded evidence tying the defendant to burglary because the defendant’s post-arrest consent to search the vehicle may have been given under duress, and the vehicle was not in the immediate vicinity of the arrest.
- Another lesson Chief Judge Michel learned early in his legal career is that there are certain things a judge cannot do. For example, a judge cannot facilitate plea bargaining by disclosing in sidebar conferences his sentencing intentions.<sup>36</sup> A judge also cannot reserve a ruling on the merits until after

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<sup>29</sup> See *id.* at 791–92.

<sup>30</sup> *Commonwealth v. Cockfield*, 246 A.2d 381, 383–84 (Pa. 1968).

<sup>31</sup> *Commonwealth v. Cockfield*, 350 A.2d 833 (Pa. 1976).

<sup>32</sup> 431 F.2d 839, 843–44 (3d Cir. 1970).

<sup>33</sup> 277 A.2d 159, 163 (Pa. 1971).

<sup>34</sup> 266 A.2d 659, 661–62 (Pa. 1970).

<sup>35</sup> 239 A.2d 290, 293 (Pa. 1968).

<sup>36</sup> See *Commonwealth v. Evans*, 252 A.2d 689, 690 (Pa. 1969).

he has had the opportunity to learn about a defendant's prior misdeeds.<sup>37</sup> Unfortunately, Chief Judge Michel learned these lessons through unsuccessful attempts to defend judgments in these cases. Though he may not have realized it at the time, these cases may be the original source of Chief Judge Michel's vigilance about proper judicial conduct.

- Chief Judge Michel spent roughly the last two years of his time in Philadelphia as lead prosecutor over a special grand jury investigating alleged public corruption involving the mayor of Philadelphia, several members of the City Council, the Police Chief, and the governor of Pennsylvania. Naturally, he was on the short list to come to Washington, D.C. when the Watergate scandal broke. Chief Judge Michel was among the youngest of the thirty-three special Watergate prosecutors, and was tasked with investigating a personal slush fund kept for the benefit of President Nixon by his friend Charles "Bebe" Rebozo and secretary Rose Mary Woods. For several hours on one morning in 1975, Chief Judge Michel questioned former President Nixon about that fund before the Grand Jury. A few months ago, the Public Citizen Litigation Group petitioned a federal district court in D.C. on behalf of several groups of historians to release the transcripts of that testimony.<sup>38</sup> When the transcripts are finally released, take the time to read them: there will be no better way to appreciate Chief Judge Michel's work on this historic case.
- One of Chief Judge Michel's first cases as Deputy Chief of the newly-formed Public Corruption Section of the Department of Justice was the Koreagate investigation, in which Tongsun Park was accused of bribing members of Congress. Chief Judge Michel conducted a marathon seventeen interrogation sessions of Park in Seoul, Korea. When asked to comment on the interrogation sessions, the Chief Judge—in his typical economical fashion—called them "useful."<sup>39</sup> The government eventually offered Park immunity in exchange for his testimony at trial, and Park's testimony may have been the impetus for Congressional reprimands of Representatives John McFall, Ed Roybal, and Charlie Wilson.<sup>40</sup> But things usually come full circle, and Park had not seen the last of a United States courtroom. In July 2006, Park became the first person convicted in the Iraqi/United Nations Oil-For-Food scandal. Park was sentenced to five years imprisonment and was forced to forfeit \$ 1.2 million.
- As if that wasn't enough to keep our Chief Judge busy, 1978 also brought President Carter's creation of the now-ubiquitous Offices of Inspector

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<sup>37</sup> See *Commonwealth v. Oglesby*, 263 A.2d 419, 420 (Pa. 1970).

<sup>38</sup> See Spencer S. Hsu, *Historians Ask Court to Unseal Nixon Grand Jury Testimony*, WASH. POST (Sept. 16, 2010, 1:51 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/16/AR2010091603851.html>.

<sup>39</sup> See *Korean Agrees to Aid Probe of U.S. Scandal*, TORONTO GLOBE & MAIL, Jan. 12, 1978, at 2.

<sup>40</sup> See REBEKAH HERRICK, *FASHIONING THE MORE ETHICAL REPRESENTATIVE: THE IMPACT OF ETHICS REFORMS IN THE U.S. HOUSE OF REPRESENTATIVES*, app. A (2003).

General, to root out and prevent fraud and abuse at twelve federal agencies. The competition for those twelve positions was fierce, and the 300-plus initial applicants were narrowed down to thirty finalists through a highly competitive selection process overseen by a team of high-level officials, including our Chief Judge Michel.<sup>41</sup> The final hiring decisions were made by President Carter, in conjunction with the heads of each federal agency.

- Mere weeks before Senator Specter's election, and thus Chief Judge Michel's departure from the Executive Branch, the Chief Judge made one last appearance in the headlines as the Department of Justice investigated whether the Reverend Jesse Jackson had acted as a foreign agent of Libya. Chief Judge Michel was the recipient of an inquiring call from White House Counsel Lloyd N. Cutler, who had learned that the FBI intended to deliver a letter of inquiry to Rev. Jackson—potentially through hand delivery on the Jimmy Carter re-election campaign trail. Hand-delivery was called off, though both the Department of Justice and the FBI insisted the decision was unrelated to Mr. Cutler's call. And, despite the best efforts of esteemed investigative reporter Ed Pound to link the two, Chief Judge Michel insisted that Cutler "did not ask me to do anything."<sup>42</sup>

My hope is that the next time the readers of this journal hear the name Paul Michel, they will each call to mind at least one more image of our beloved Chief Judge. When you next see him, use one of these stories as a conversation starter—I suspect he does not receive many opportunities to relive these events in intellectual property quarters. And finally, to those of you who survived the blistering pelt of Chief Judge Michel's questions at oral argument, take solace in two things: first, know that Chief Judge Michel's law clerks were the practice round for those barrages (and often had it worse than you did); second, and more importantly, feel privileged to have argued before a man who had already conducted some of the highest-stakes, highest-profile questioning of our time. Thank you, Chief Judge Michel, for your unparalleled service to the United States.

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<sup>41</sup> See *30 Considered For Dozen IG Positions*, LEGAL TIMES, Dec. 18, 1978, at 29.

<sup>42</sup> See Edward T. Pound, *U.S. Asks the Rev. Jesse Jackson if He Is a Foreign Agent of Libya*, N.Y. TIMES, Nov. 1, 1980, at 13.