

IN HIS OWN WORDS: THE CAREER OF CHIEF JUDGE PAUL MICHEL

GENE QUINN¹⁰¹

On June 1, 2010, Paul Michel became a private citizen for the first time since he graduated from law school at the University of Virginia in 1966. Upon graduating from law school he became an Assistant District Attorney in Philadelphia, thus embarking upon the career of a public servant from 1966 to his retirement from the United States Court of Appeals for the Federal Circuit in 2010. It was a remarkable forty-four years of public service, and Chief Judge Michel is one of those individuals who will command a place in history.

The day after Chief Judge Michel officially became a private citizen I ran into him at the Center for American Progress. We were both there for a speech to be delivered by David Kappos, the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office. We were both there quite early, and in fact were the only two present for some time, which gave me an opportunity to chat with him. I recall asking him “how are you enjoying retirement?” To which he replied: “well, it has only been one day so far.” I wasn’t sure if he knew who I was, but upon chatting some more it became apparent that he was at least familiar with me, some of my writings and the fact that I had earlier in the year interviewed Randall Rader, then Judge Rader and now Chief Judge Rader of the Federal Circuit. I asked him if he would be interested in sitting down and going on the record with me, and he agreed. Little did I know just how forthcoming Chief Judge Michel would be, and just how much time he would dedicate to the interview.

Three months later I had formally interviewed Chief Judge Michel on the record for close to four hours, along with a variety of conversations at various events. As many know by now, Chief Judge Michel decided to leave the Court rather than take senior status because he wanted to be able to advocate for the patent system without the constraints that tie a Jurist and public servant. He has been outspoken in his views regarding patent reform, the Patent Office, the Supreme Court and what Congress should be doing. Rather than rehash those positions here I thought I would use my on the record interviews with Chief Judge Michel to tell his career journey in his own words.

During my first interview with Chief Judge Michel, early on I started with some basic background to try and paint a picture of this legal icon who worked his way up from an Assistant District Attorney in Philadelphia to being involved in the investigations of President Nixon and of Members of Congress, ultimately finding himself on the Court of Appeals for the Federal Circuit. To start down that path, I asked him what made him decide to become an Assistant District Attorney in Philadelphia. Chief Judge Michel explained that he had received some very good advice while in law school, which was “to learn your craft as a lawyer. Not as a law student, but as a practicing lawyer.” This meant learning in the trenches, and where

¹⁰¹ Gene Quinn is a Patent Attorney and the founder of IPWatchdog.com, which was selected as the top intellectual property blog by the ABA Journal for 2010. He is also a principal lecturer in the PLI patent bar review course and a former law professor.

does someone interested in litigation go where they can do it every day? He went on to tell me:

[T]he advice I got was go somewhere where you can litigate every day. That's how you learn to be a good litigator. Can't learn it from books or movies or training manual[s], all those can help, but the main teacher is [to] do it over and over and over. So I went to work in the district attorney's office in Philadelphia right out of law school for exactly that reason. And like many people who start that kind of work, I sort of imagined that maybe after three or four years I'd end up going off into a law firm and probably shifting from criminal litigation to civil litigation. But I had such a great experience. I was learning so much so fast, and getting a great variety of different experiences, I ended up staying the entire time that Senator Specter was the district attorney in Philadelphia, which was eight years. So just a little bit less than eight years, I was in that office and it was a great learning experience. It couldn't have been better. I had good advice, I followed it, and it worked out absolutely great.

Being a history buff I couldn't wait to find out how it was that Chief Judge Michel, then Assistant District Attorney ("ADA") Michel, managed to go from the District Attorney's Office in Philadelphia to being a member of the Watergate investigations. It seems that ADA Michel had developed a bit of a reputation and specialty for white collar financial crimes involving public figures, following the money like a modern day Elliot Ness (my description, not his). When an investigation opened up into President Nixon's slush fund Michel was a natural, having by that time already participated in investigating the Governor of Pennsylvania, the Mayor of Philadelphia, the Chief of Police for Philadelphia and half of the Philadelphia City Council. Judge Michel explained:

In the seven years I was in the DA's office, I started out as sort of specialist in Constitutional Law and criminal procedure matters. They had exploded in the mid-sixties with decisions coming out of the U.S. Supreme Court, and many lawyers and judges were not very well steeped in them, and I luckily was immersed in them as a law student. So for the first several years I specialized in handling pre-trial suppression motions involving confessions and line ups and searches and seizures and so forth. And also in post-trial matters that again involved these new constitutional rights. But in the last several years I was in the DA's office, I shifted more and more into complex investigations. And as time went on they tended to focus more than anything else on misconduct in office, high office by public officials. So I became kind of a specialized type of investigator investigating public corruption. So I did that for nineteen months through a special investigating grand jury that was called by the courts in Philadelphia in which I ran as the lead prosecutor. And I had many helpers, other assistant district attorneys, and detectives, and accountants, and so on. But in any event, I developed a little bit of expertise and a little bit of a reputation.

So in the middle of the Watergate scandals, a new investigation opened up in the spring of 1974, and I was kind of a natural to do it because of this work I was doing in Philadelphia where I was investigating the mayor, and the police chief, and the governor, and half the city council, and so forth. So I came to Washington in March of '74 to run a newly opened investigation in the Watergate Special Prosecutor's office that focused on a cash slush fund, I'll call it, maintained on behalf of President Nixon by his personal friend, a banker named Charles Rebozo, now deceased and also by his secretary, Rose Mary Woods.

Then the question I was dying to know: did he appreciate the magnitude of the moment? The exchange went like this:

Q: Now, as you're focused on these moments, finding the bricks and building a house, so to speak, did you have a sense that this was going to be an historic moment? And what was going through your mind? Because at that point, even though you had quite a bit of experience, you were still relatively young, and you're investigating the President of the United States. Can you give us a sense of what was going through your mind?

A: Well, we were so busy working on the cases that we didn't have too much time to sort of ruminate about the way it might be viewed later by historians, or even earlier by journalists, or the general public. But we certainly all were very conscious that this was really important. This really had to do with, does the rule of law really control or can people in supremely powerful positions dodge around the law and get away with it? That was really the basic challenge. And we all knew that. I was probably the youngest of about thirty-three special prosecutors who were a part of that operation. It started in '73, and it wound down gradually in '75 and '76. And I was there in '74, '75, and a little bit of '76. So, I was one of the younger ones. I think I was thirty when I joined the office, maybe thirty-one. I have the identification badge that I wore then, and I had completely black hair, that very thick curly black hair. Course, now I have very little hair, and it's totally white. But I was young. I was one of the younger, if not the youngest. It was a terrific group of people. It was led by Leon Jaworski. He had succeeded Professor Cox.

After concluding his role with the Watergate investigation, the Department of Justice was just forming a Public Integrity Section, which was intended to be the unit responsible for investigating and prosecuting, where appropriate, high level political leaders. Shortly upon Special Prosecutor Michel arriving at the Department of Justice an investigation opened, which would become known as Koreagate, and Michel was named Special Prosecutor in Charge. This was the second "gate," which is now synonymous with political scandal. This particular scandal related to the bribery of Members of Congress by Korea. He explained:

And shortly after I got there, several new pieces of information became available about the activities of Tongsun Park and some other Korean businessmen and some Korean intelligence agents, actual employees of the Korean Central Intelligence Agency, KCIA. So I, because of my background, was the logical person to run this new investigation, which burgeoned into quite a large enterprise. I remember in the fall of '76 picking up the *Washington Post* on the sidewalk in front of the little house I was renting in Virginia in the suburbs, and the headline said, *110 Members of Congress on Korean Payroll*, or words to that affect. So it really did turn into quite a big deal because there were various allegations and bits of information that suggested that money had been received by quite a number of members of Congress. So that was the focus of the investigation: . . . receipt of funds by members of Congress, and it turned out it was nowhere near 110 people who got any money—legal or not. But, there were some who had and in some cases it was clearly not legal. I ran that investigation for the new Public Integrity section from 1976 until 1978. I'm very proud of what the outcome was, because it did exactly what prosecutors are supposed to do in this sense; it indicted some people who clearly were guilty, several pleaded guilty, one died before he could be tried, and so forth. But a very large number of congressmen whose names had been mentioned here or there and had ended up showing up in the *Washington Post*, hadn't done anything wrong, hadn't received any money, and to a certain degree they [were] exonerated by the investigation. So, I thought it was a very good illustration of the two-sided nature of criminal investigations—when they're done right . . . prosecute the guilty and clear the innocent, so that their reputations aren't permanently ruined by what appeared to be false allegations. That was the nature of the so-called Koreagate. That was what the *Washington Post* called it because of having invented the word for the *Watergate* investigation. And, of course now every new investigation is this-gate, that-gate. But Koreagate was the second after Watergate.

After the Koreagate investigations concluded, Chief Judge Michel remained at the Department of Justice, and as you might expect his career trajectory was up, up, up. By 1981 he was the Associate Deputy Attorney General, which made him the top Lieutenant to the second in command at the Justice Department, quite a high position to achieve for a career prosecutor. But then Arlen Specter called again, and Associate Deputy Attorney General Michel answered that call from his old boss, the former District Attorney for Philadelphia and newest Senator-Elect to the United States Senate. Judge Michel explained:

Specter ran for governor in 1974 or '76, I forget which and was not successful. So he went into private law practice and he asked me if I wanted to join him. I thought about it, but I ended up thinking I wanted to stay in public service, as I had always intended. Then in 1980 he ran for the Senate. He was elected and took office in early '81. He called me up and asked me to come back and work with him again. I actually told him no three times, in three separate lengthy conversations and the fourth time

I finally relented because he had given me such a great start as a young lawyer for that first seven years. I really felt I owed it to him to help out. So I told him, "Okay, here's what I'll do. I'll leave this job that I have at the Justice Department," which I actually loved. . . . I was helping supervise the FBI and the Marshal's Service, and the Border Patrol, and the U.S. Attorneys and all their prosecutions. It was a great, interesting job. I was very reluctant to leave it.

I said, I'll agree to come up and help you for six or seven months to organize the office and get started. Of course, I ended up staying seven years.

It was after serving as a top Lieutenant to Senator Arlen Specter for seven years that Michel was tapped for a position on the United States Court of Appeals. What you may not know is that he was originally considered for the Third Circuit, but later appointed to the Federal Circuit. To dive into this area, I asked Chief Judge Michel about the behind-the-scenes process associated with a judicial appointment. We all know that the President selects an individual, nominates the individual and then, the Senate must confirm the nominee before the President can officially appoint the him or her to become a member of the Federal Judiciary with a lifetime appointment. But, is this a position you lobby for? How does one know you are interested in the position? Chief Judge Michel explained:

I was working for Senator Specter in his Senate office. And he asked me if I'd be interested in a judgeship because he had worked with me for seven years when he was the district attorney in Philadelphia back in the sixties. And, we had started working together again in the early eighties when he first came to the Senate. I told him, yes, I'd be very interested in being considered for a judgeship. Originally I was considered for a judgeship on the Third Circuit and then an opening came up on the Federal Circuit and he asked me if I would be as interested in the Federal Circuit as the Third Circuit, and I said, yes, absolutely. I had not only worked so closely with him that I was well-known to him, but I had been at the Senate on my second tour . . . in the seventies for almost two years, and then I was back in the Senate as a staffer, and a lot of the Senators knew me and kn[e]w my work—senators on both side of the aisle. So, even though it was last year of the Reagan Administration, and I didn't even really have any very strong ties with the Reagan Administration itself, I had a lot of support by Senators. Particularly, Senators [who were] on the judiciary committee, but also Senators who were not

Obviously, an important role was played by the Attorney General and his advisors and by various people in the White House. But, I think the main push really came from Senators, and it was very much assisted by the fact that I was acceptable to the Democratic Senators on the Judiciary Committee as well as the Republican Senators. That's basically how [my appointment] came about. A lot of it is luck. I . . . happened to be working for a Senator who was a very influential, active member of the Judiciary Committee and who had a lot of credibility on legal and court-related

matters because he had, unlike most Senators, even the ones who are lawyers, done a lot of litigation.

As Chief Judge Michel continued to answer the question he turned to discuss that he thought this selection process was a good one, and that he didn't think it appropriate for judges to be elected. He explained:

I don't think people should be running for judgeships. I don't think people should be maneuvering, you know, get campaign contributions for this elected politician, or that politician. I think that the organized bar often can suggest people, and that that's constructive, and I think there's a role for these commissions that many Senators have formed. But however you do it, I think that it ought to be a selection of people who've shown in their career that they have the right kind of objective, neutral, impartial, fair approach to decision-making. And I'd be very wary of people who are campaigning for the job. They may not have the best of motives, and they may not be the best people. So I'm for merit selection based on proven legal ability and temperament, which I think actually is even more important than law school grades or fancy clerkships or how much money somebody made in private practice. The real question is: do they have judgment, do they have discretion, are they able to sort out conflicting claims and inconsistent testimony? And are they going to work hard enough? I mean, we really learn it all from the lawyers. We don't have any independent knowledge. So you have to study like hell. It's kind of like being a permanent Ph.D. student where every single day you're studying complicated, difficult, voluminous materials written by people who know much more about the subject matter than you do. So there's a certain skill that that takes and people should be sought out for judgeships who have that kind of skill and the temperament. You know, I think temperament is the most important thing of all. Temperament and judgment are way more important than pure legal smarts.

Chief Judge Michel's temperament, judgment, dedication and inquisitive nature are no doubt what made him an excellent prosecutor who was looking for the truth and justice, and an excellent judge who was constantly learning, probing and questioning to reach the best decision he could make for the parties and for the good of the system as a whole. While he would likely never say it for himself, allow me to opine that while "pure legal smarts" may not be as necessary, Chief Judge Michel certainly had an abundance of "legal smarts" and a desire to do the right thing.

One of the things I most admire about Chief Judge Michel is his willingness to engage and the fact that he is unafraid of criticism, and in fact welcomes it. This, for me, was a good thing. On the day that I met Chief Judge Michel I had posted an article critical of one of his last decisions, and more generally opined that the judges on the Federal Circuit should be forced to examine patent applications that the United States Patent and Trademark Office so they could experience the difficulties presented by many of the rules they announce. I remember commenting to my wife later that day: "I am almost sorry I posted that article this morning, he is such a nice guy." Thus, I knew that at some point while on the record with Chief Judge Michel I

wanted to approach the topic and acknowledge that some of what I had written in the past hasn't always been particularly flattering in regard to some of his decisions. I asked him three questions regarding criticism. The exchange was as follows:

Q: Well, I know you must tolerate disagreement pretty well. Because I know some of the stuff that I've written in the past hasn't always been quite so flattering about some of your decisions. And yet, you seem to like me, and you seem to enjoy chatting with me. So I have a handful of questions. One, do you enjoy a heated debate? Two, as a judge were you aware of what commentators were saying, and if so, did you care at all or consider it? And finally, is it easier to handle any criticism knowing that it's coming from others who are really passionately engaged in the issues?

A: Well, I think criticism is good in general, and I think it's good for judges. Judges have so little oversight, you know, every year the Supreme Court would take one or two of our cases out of 800 we adjudicated. So almost always we were the final result. And maybe even only a two to one vote. So I think criticism's very healthy. I don't so much like the word "heated" criticism. If criticism is well informed, then I think it's very worth weighing. And if criticism is well motivated I think it's very worth weighing. And I think judges benefit from criticism, whether it's in a law review article, or in a blog, or in a panel at a CLE meeting, or in any other fashion. We all have a lot to learn. Nobody has all the answers. I think there's an idea that's followed by some, you know, judges know everything and they should just tell everybody else what to do. But I think that's a very silly naïve notion. Judges are students of the law as well as teachers of the law. So I think the criticism was good. I don't expect commentators to agree with me all the time. How could they when the litigators don't. One side loses, they think the decision is terrible. Sometimes even the winning side is not very happy with the decision. So why should commentators always be happy?

[...]

I tried to keep hearing what different practitioners were saying and try to learn from it. I think that's an important role in the overall process for commentary to be provided by informed people. Judges ought to pay attention to that. I spent a lot of time going to CLE meetings and bar meetings and so forth because I learned a lot from practitioners, and also professors, and people in industry and other players in the system. And I tried to encourage other judges to do that. And most of them do quite a lot of that.

So where does Chief Judge Michel go from here? Now that he is retired he has the flexibility to say things he never could before. He doesn't like to refer to his current employment state as "retired," rather choosing to call it a second career.

Chief Judge Michel has been doing some neutral case evaluation work, and work as a mediator, primarily in patent disputes, but he is also staying front and center as an advocate for a healthy, vibrant patent system.

He told me: “[O]ne of my goals is to try to become an educator, an advocate, a trouble maker, I guess, to try to show those people in the journalistic community or the political community or the business community that we need to immediately revive the patent office and greatly strengthen the courts, and strengthen the whole investment in innovation and in technological development.” He then later went on to say:

If a small but significant minority of business leaders would press Congress to help, Congress would respond. You probably wouldn’t need more than 15 or 20% of the corporate CEOs of the thousand biggest companies in this country to get involved in order to significantly move the Congress off the dime. I think it’s entirely possible. There are a thousand big companies, and we only need 15%? That’s 150 CEOs. I think it’s entirely possible to motivate 150 CEOs to write and call senators and representatives, particularly from their areas and create a strong force for good. And that’s exactly what I’m engaged in trying to do . . . to motivate a small segment of business leaders and a small segment of the media to get knowledgeable, get involved, get motivated, and get active. I think it will make a huge difference.

If anyone can make this happen it is Chief Judge Paul Michel. While the Federal Circuit will undoubtedly miss his steady leadership, support, friendship and even temperament, now the patent and innovation industries have a chief advocate like no other.

Whatever may become of Chief Judge Michel’s efforts to draw attention to the dire straits of the U.S. patent system, from Elliot Ness-like prosecutor who investigated a President, a Governor, members of Congress and a Mayor, to more than two decades on the Federal Circuit, he has distinguished himself as one of the most accomplished lawyers and jurists in U.S. history.