

PAUL MICHEL: A PATRIOT AND A MENTOR

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Patriot: [from the Latin *patria*, meaning fatherland] one who loves, supports, and defends one's country.⁴

Mentor: Odysseus's trusted counselor, in whose guise Athena became the guardian and teacher of Telemachus; a wise or trusted teacher or counselor.⁵

Each person has a unique perspective on any given event. Every law student learns in the introductory evidence class that eyewitness accounts are notoriously suspect. The light was red. No, it was green. The shots came from the grassy knoll. No, I heard them come from the book depository. Be that as it may, I submit that few can reasonably disagree with my assessment that Paul Redmond Michel, former Chief Judge of the U.S. Court of Appeals for the Federal Circuit, is a true patriot and an invaluable mentor.

THE PATRIOT

I do not have first-hand experience with Paul Michel, the young Philadelphia assistant district attorney. He graduated law school in 1966, the same year the Supreme Court decided the seminal case of *Miranda v. Arizona*.⁶ For those in my generation or younger, it is difficult to appreciate the significance of and controversy surrounding *Miranda*. After all, we have grown up in an age when the phrase "You have the right to remain silent" is a requisite line of every television police drama. Thirty-five years ago, however, prosecuting criminal cases after such a sea change must have been an extraordinary challenge for a new lawyer. And, according to Sen. Arlen Specter, in comments he made during a dinner in honor of Judge Michel, the young Paul Michel became the constitutional law expert on *Miranda*, a decision that continues to affect our nation.⁷

I also never witnessed in action the young Watergate prosecutor. According to those more knowledgeable than I, Judge Michel is one of the few people who has deposed a sitting president. Nor do I know enough about Judge Michel's prosecutorial role in the influence-peddling scandal known as "Koreagate." For those details, I look forward to his forthcoming memoir.

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⁴ WEBSTER'S NEW COLLEGE DICTIONARY 826 (3d ed. 2008).

⁵ *Id.* at 701.

⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁷ See, e.g., *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2264 (2010) (holding that a suspect can waive *Miranda* rights by responding to questioning and that "the police . . . were not required to obtain a waiver of Thompkin's [right to remain silent] before interrogating him"); *Dickerson v. United States*, 530 U.S. 428 (2000) (affirming *Miranda* and noting that "the warnings have become part of our national culture").

Putting aside any lack of personal knowledge of his early career, an examination of Judge Michel's judicial opinions confirms his life-long devotion to upholding and interpreting the Constitution and the various laws of our nation. Judge Michel has written forcefully on key issues affecting our nation as whole, including patent damages,⁸ inequitable conduct in patent cases,⁹ veterans' law,¹⁰ and tax cases.¹¹ His jurisprudence encompassed constitutional issues, and included taking claims under the Fifth Amendment¹² and an Equal Protection Clause challenge to racial preferences for government contracts.¹³ Judge Michel also undertook additional work, routinely sitting by designation on the Third Circuit and deciding issues such as reparation claims based on Nazi slave labor,¹⁴ qualified immunity claims of police officers and prosecutors,¹⁵ and whether the "National Collegiate Athletic Association adopted certain educational standards because of their adverse impact on black student athletes seeking college scholarships."¹⁶ As is evident, Judge Michel's jurisprudential interests expand far beyond Title 35.

Judge Michel's judicial approach can probably be best categorized as reasoned pragmatism. Difficult to discern in his myriad opinions is any hard-line doctrinal approach. He cannot be charged with being a rigid textualist who ignores the practical consequences of interpretative choices. Nor can one accuse him of disregarding the text of a statute simply to reach a policy-based end. In his own words, he simply wanted to hit it down the middle of the fairway:

Balance, balance, balance. Trying to balance the competing, conflicting goals of each of the areas of law within the court's jurisdiction, including patent law. It's like golf. The right place to be is in the middle of the fairway—not at one extreme, the rough on the right, and not at the other extreme, in the rough on the left. I have always tried to optimize getting the balanced approach. I think the other judges have a similar view, but for me, that's sort of the guiding principle. That's the compass I try to navigate by.¹⁷

The opinions also reveal Judge Michel to be a parsimonious dissenter. A Westlaw search indicates that, of his more than 800 opinions, he dissented infrequently. Judge Michel's judicial philosophy probably hewed closely to Justice Cardozo's sentiment in *Burnet v. Coronado Oil & Gas Co.*,¹⁸ in which he explained in dissent that "in most matters it is more important that the applicable rule of law be

⁸ *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 3324 (2010).

⁹ *Star Scientific, Inc. v. R.J. Reynolds Tobacco Co.*, 537 F.3d 1357 (Fed. Cir. 2008).

¹⁰ *Skoczen v. Shinseki*, 564 F.3d 1319 (Fed. Cir. 2009).

¹¹ *Exxon Mobil Corp. v. United States*, 244 F.3d 1341 (Fed. Cir. 2001).

¹² *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 1501 (2010).

¹³ *Rothe Dev. Corp. v. Dep't of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

¹⁴ *Gross v. German Found. Indus. Initiative*, 549 F.3d 605 (3d Cir. 2008), *cert. denied* 129 S. Ct. 2384 (2009).

¹⁵ *Walter v. Pike Cnty., Pa.*, 544 F.3d 182 (3d Cir. 2008).

¹⁶ *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548 (3d Cir. 2002).

¹⁷ Matthew J. Dowd, *Conversations with Two Chief Judges*, 2 MED. INNOVATION & BUS. 60, 71 (Summer 2010).

¹⁸ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis J., dissenting).

settled than that it be settled right.”¹⁹ I remember Judge Michel saying that more often than not, a dissent merely states what was *not* the law and does not further the legal analysis.

At the same time, Judge Michel appreciated the value of the occasional, measured dissent. A dissenting opinion can do more than just state why the dissenting judge disagrees with the panel. A well-reasoned draft dissent, as Justice Ginsburg recently explained, can change the outcome of the case.²⁰ And Judge Michel also willingly voiced his dissenting opinion when he thought an important issue should be reconsidered by the full court.²¹

As for Judge Michel’s work ethic, one word suffices: astounding. Before accepting my clerkship with Judge Michel, I learned of his proclivity for an early start. Not being a morning person, this concerned me, but I concluded that my two children had sufficiently ended my Galilean schedule of past years. Little did I know that Judge Michel’s work day routinely started at 5:00 a.m., and, on argument days, at 4:00 a.m.²² (Fortunately, we were not called to chambers that early). I do recall several times when I would finish a bench memo only a few hours before Judge Michel would start analyzing before sunrise.

Judge Michel’s pace did not diminish as he headed into his final days as Chief Judge of one of the most powerful appellate courts in the nation. In the last month of his tenure, Westlaw reports ten precedential and non-precedential opinions. Indeed, on his last business day as Chief Judge, he authored two precedential opinions, one dealing with patent invalidity and jurisdiction,²³ and the other deciding an issue of attorney fees and costs in a patent case.²⁴

Also self-evident is Judge Michel’s uncommon definition of “retirement.” From my vantage point, he seems busier than ever. He moderates panels for the Federal Circuit Bar Association and numerous other bar and professional associations. He has co-authored an op-ed piece in the *New York Times*, arguing that one of the best strategies for invigorating the economy is to tackle the backlog of patent applications by fully funding the Patent Office.²⁵ Although no longer issuing opinions from the bench, Judge Michel continues his role as a decision-maker when serving as mediator and arbitrator.

These are but a few accomplishments of a dedicated lawyer and jurist who has steadfastly served our country in all three branches of government.

¹⁹ *Id.*

²⁰ Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 4 (2010) (“I had the heady experience once of writing a dissent for myself and just one other Justice; in time, it became the opinion of the Court from which only three of my colleagues dissented.”).

²¹ See, e.g., *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 469 F.3d 1039, 1040 (Fed. Cir. 2006) (Michel, C.J., dissenting from denial of rehearing en banc) (“Rehearing this case en banc would have enabled us to reconsider *Cybor’s* rule of de novo review for claim construction in light of our eight years of experience with its application. I have come to believe that reconsideration is appropriate and revision may be advisable.”).

²² In this respect, Judge Michel’s work day was much like that of Chief Judge Howard Markey, the first chief judge of the Federal Circuit. See Paul R. Michel, *A Memoir of the First Chief Judge by the Fifth Chief Judge*, 6 J. MARSHALL REV. INTELL. PROP. L. 310, 311 (2007).

²³ *Dow Jones & Co. v. Ablaise Ltd.*, 606 F.3d 1338 (Fed. Cir. 2010).

²⁴ *Leviton Mfg. Co. v. Universal Sec. Instruments, Inc.*, 606 F.3d 1353 (Fed. Cir. 2010).

²⁵ Paul R. Michel & Henry R. Nothhaft, *Inventing Our Way Out of Joblessness*, N.Y. TIMES, Aug. 5, 2010, at A23.

THE MENTOR

Judge Michel has spent—and continues to spend—his career as a faithful servant to our country. For that, he is a true patriot. What I will remember most, however—beyond all his writings, speeches, and legal work—is his role as my mentor.

Judge Michel's excellence as a mentor should come as no surprise. He talks fondly of the significant mentors he has had during his career: Senator Arlen Specter, Attorney General Benjamin Civiletti, Deputy Attorney General Charles Byron Renfrew, and Assistant Attorney General Dick Thornberg, to name a few. And Judge Michel routinely praises his former colleagues on the bench, extolling the assistance he received as a young judge.

As a mentor, Judge Michel always allotted time for his clerks. Even though pressing court business waited just around the corner in chambers, Judge Michel regularly enjoyed lunch with his clerks. Our discussions focused on what was happening with ourselves, peppered with sharp questions from Judge Michel about pending cases or intriguing legal issues peaking over the horizon.

Judge Michel also took an active interest in each of our lives. He inquired about what we would want to do after clerking. He came to know our wives, husbands, sons, and daughters. He welcomed our families into his chambers. To this day, my now six-year-old son asks when we can see “The Judge” again.

Finally, Judge Michel taught us much by his actions. Judge Michel's work ethic underscores everything he teaches his clerks. We saw in him a tireless effort to resolve disputes, alongside managing the operational demands of the Federal Circuit and other duties which were literally the nation's business. Now, we watch Judge Michel continue that effort from the private sector, speaking on important issues such as patent reform and judicial salaries.²⁶ His actions counsel us to achieve more.

A recent comment by friend and colleague, Judge Alan Lourie, captures Judge Michel's excellence as a mentor. During Judge Michel's retirement dinner, sponsored by the Federal Circuit Bar Association, Judge Lourie lauded Chief Judge Michel's leadership qualities, as exemplified by Judge Michel's opinion writing assignments. As the Chief Judge, if he were in the majority, Judge Michel could assign an en banc opinion to himself. But, as Judge Lourie noted, Judge Michel usually “gave the limelight to his colleagues,” letting the other judges carry the torch by writing for the court. As Judge Lourie explained, “That is a reflection of his respect for his colleagues and a willingness to let the light shine on them rather than on himself. That is a mark of an admirable leader.”

Life is truly a journey, each fork in the road creating new and unforeseen opportunities. Mine was a circuitous route to the ninth floor of 717 Madison Place. I will be forever grateful for the year I worked for Chief Judge Michel, and I eagerly anticipate future accomplishments from our patriot and mentor.

²⁶ See, e.g., *Beer v. United States*, 592 F.3d 1326, 1327 (Fed. Cir. 2010) (Michel, C.J., dissenting from denial of petition for rehearing en banc) (noting that, “[b]ecause [the challenge regarding judicial salaries] presents constitutional issues of the Compensation Clause and the independence of the judiciary as a separate and equal Branch, this is clearly an appeal of exceptional importance.”), *petition for cert. filed*. 78 U.S.L.W. 3689 (May 14, 2010).