ACKNOWLEDGMENT

JUDGE PAULINE NEWMAN

Well, I think it's fair to say that I'm overwhelmed. This honor from my law school, from all of you, and your words, they warm my heart more than I can say, and that beautiful crystal gavel souvenir I shall put to very good use. I like its weight.

I should also say an appreciation to my dear colleague Judge Chen, my friend and mentor Professor Dreyfuss, my law clerks who started as law clerks and who became friends. I so much appreciate and treasure all that you've been saying this evening.

I must say I also believe every nice word that you've said. Just about only half of those who appear before me have nice things to say, I would say exactly half. The other half probably would not survive in polite society.

However, also, just in keeping with what we've been talking about, the ways of our court, I'll talk a little bit about the patent law. The ways of our court in patent law has convinced me that the judiciary perhaps is no longer the least dangerous branch. James Madison may have to reconsider. In fact, I had this inkling about the dangers of the judiciary some thirty-five years ago, when I was working in industry. When I thought that the thing to do was to remove patent cases from the judges who were deciding them. To shake up the judiciary, because there were so many dramatic new sciences, there was so much going on in the world. The nation was trying to recover from the recession of the Vietnam War. Industry viewed that uncertain law was the worst of commercial disincentives. Industry could handle competition alright, but there seemed to be no reason in the world why we at the time—I included myself in the industrial "we"—should cope with uncertainty as to what the law is, how the law is applied, particularly when the issues arise only after you've done all of your work and science, the research, the development, the marketing, the commercial aspects, only to find that someone comes along and says that you aren't entitled to whatever you based your evolution on. We in industry at that time, we've mentioned this evening some of the origins of the Federal Circuit. We in industry knew very well, we were convinced that judges just didn't understand how commerce worked. Not all judges, of course, but with forum shopping, it didn't matter if it was all, there were enough. So we in industry undertook to shake up the federal judiciary. Perhaps we didn't know better, but here we

are. In fact, that reaction of the people against the rulers would very much have pleased James Madison. I think we're very much in his tradition, as industry and universities, scholars, scientists, government agencies, and the Bar, perhaps not unanimous, but with enough weight behind them to convince the legislature that it was time to change the way cases were decided in the federal judicial structure.

Of course, the goal was to stabilize the law, to stabilize the judge-made law. We were looking at the patent law, but that certainly applies to any area that you can think of, any area of the law that produces behavior that produces a basis on which for one reason or another people rely and ought to be entitled to rely. The simple idea that we had as far as patent law was concerned was to take patent decisions away from the federal judges who were making the important law—the circuit judges of the nation and put it in the hands of a single national court that, by the very fact of this being a single national court, would provide consistency, and the product was the Federal Circuit. Actually, I think it worked. It worked pretty well. It worked pretty well for a couple of decades. There was much talk at that time in the early years of the new strength of patents. There was a burst of industrial investment, research and development. There were new products, new industries at a time when the science and technology was undergoing the kind of renaissance that you see only once every half century or so. And the court did get credit for—part of the credit, at least—for pulling the nation out of the post-Vietnam recession.[30] But after a couple of decades, that too wasn't working quite as well as we had hoped, and it looked as if another fresh look was appropriate. Another upheaval, at least in this same era of patent law, which was turning out to be a foundation of the industrial activity of the nation.

We had become in the nation a technology-based economy. If you look at the traditional measures of the gross domestic product, it's now measured, it's somewhere like seventy percent technology-based, whereas it was only fourteen or fifteen percent a few decades ago. So besides being heavily involved with patents, it was the way this economy was developing. Aggressive; litigious; and ingenious in the way litigation was being intertwined with commerce. Wasteful litigation, even those of you whose livelihood perhaps is intertwined with it. Unproductive; unpredictable. And so the concerned public again stepped in. This took another ten years, the past decade or so, with volumes of studies and debates and hearings. There was

30. *The Federal Circuit, the National Appellate Court, Celebration and Introspective Symposium*, 19 FED. CIR. B.J. 327 (2010).

always something called the America Invents Act.[31] It didn't change the substantive law—it changed the procedure. It took a procedural leap, moving many patent disputes, removing them from the trial, from the district courts of the nation, putting them in the hands of technical experts. And a new tribunal staffed by people knowledgeable, extremely knowledgeable in technology and the law. This is the tribunal on which Judge Worth now sits as an example of the attention that is being given to this national need. The goal was simple. Perhaps it applies to all areas of law. Consistency, predictability, harmony, confidence. Confidence in the rule of law, in a nation ruled by law where we care about the objective and subjective excellence of our situation.

I must say, I very much applaud this move. In fact, I put it in the same context, the same mindset of the modest revolution that I tried to have a hand in some decades earlier. So James, I think now that we are fixing the procedural law, I think it's probably time for us to return to the substantive law. There's a lot to be done. Our Supreme Court is much involved. It has come to be understood and appreciated that the technology, the world in which we live, requires optimum incentive; optimum human interaction; optimum betterment of the human condition as we are learning may be available, and available only through these advances of science.

I must say, these are not simple concepts. And sometimes I wonder whether we'll ever finish. But whenever I start to feel discouraged about the weight of what's ahead of us and what confronts the judiciary our court is visited by a delegation of foreign judges and lawyers. Judge Chen knows, he has entertained many such delegations. And they explain to us that the United States system, and law, and judiciary, and attitudes explain why we are indeed in the position of world leadership that we occupy. And I must say, I agree with them. I think we can and should take all of that credit. Someone has to. So why not us? And I must say now to add extra spice in the current political situation, I'm happy to see that again perhaps it is finally coming to be understood that the judiciary really is not the least dangerous branch after all.

It was an extraordinary law school that put me on this path, and I treasure the honor of this dedication. I so much appreciate all that all of you have been saying, and all of you being here. Dean Morrison, President Sexton, my old friends, new friends. Thank you.

31. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).