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THE LEGACY OF JUDGE HOWARD T. MARKEY

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## ABSTRACT

On September 16, 2008, Associate Justice of the Supreme Court of the United States Antonin Scalia delivered a speech on the legacy of the late Howard T. Markey. The speech was given at The John Marshall Law School's The Legacy of Judge Howard T. Markey Symposium, held at the law school in Chicago, Illinois. The text of the speech appears here.

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## THE LEGACY OF JUDGE HOWARD T. MARKEY

ANTONIN SCALIA \*

I am here because I was a close friend of Howard Markey. And when I was invited to participate in this symposium dedicated to him, to his legacy, I could hardly say no. I am not here because I am an expert in patent law or in intellectual property law; and hence, I am not here because I am among those most qualified to evaluate his legacy, if that's what you think his legacy is. But let me talk about Howard and about some of his work on the Federal circuit.

Howard, of course, was a successful lawyer before he went on the bench.<sup>1</sup> He received his Master's Degree in patent law from this law school.<sup>2</sup> He practiced here in Chicago for almost 25 years, becoming one of the leading patent law and intellectual property law practitioners.<sup>3</sup> Later he became a respected and extremely active jurist, sitting in over 5,000 cases on the Court of Customs and Patent Appeals and the Federal Circuit and sitting as a visiting judge in over 1,400 cases, both civil and criminal, in every one of the Regional Circuit Courts.<sup>4</sup> He authored over 1,000 opinions, numerous articles on the law and delivered countless speeches and lectures.<sup>5</sup> He had a good Irishman's way with an after-dinner speech, as those who know him will recall.

Howard was a judicial administrator. He served for 10 years as Chief Judge of the United States Court of Customs and Patent Appeals and then for eight years as Chief Judge of the newly created Federal Circuit,<sup>6</sup> getting it started on a sound footing, designing its procedures and winning it acceptance as a respected part of the Article III Judiciary. He was Chair of the Committee on Codes of Conduct, Chair of the Science Advisory Committee of the Federal Judiciary Center, Chair of the Circuit Chief Judges Conference and a member of numerous other committees and conferences.<sup>7</sup>

When the Federal Circuit was first created, skeptics questioned its staying power.<sup>8</sup> There was fear that other courts might resent their loss of jurisdiction over matters entrusted exclusively to this new upstart circuit.<sup>9</sup> And Chief Judge Markey

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<sup>1</sup> See Sherman L. Cohn, *Howard T. Markey*, 1 J. FED. CIR. HIST. SOC'Y 7, 9 (2007).

<sup>2</sup> *Id.*

<sup>3</sup> See *id.*

<sup>4</sup> *Id.* at 10.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 9.

<sup>7</sup> *Id.* at 10.

<sup>8</sup> See Howard T. Markey, *The Federal Circuit and Congressional Intent*, 41 AM. U. L. REV. 577, 577 (1992) ("Those 'in at the creation' will recall the skeptics' predictions that the Federal Circuit would be short-lived.")

<sup>9</sup> S. REP. NO. 97-275, at 40 (1981), as reprinted in 1982 U.S.C.C.A.N. 11, 49 (statement of Sen. Baucus).

There are many portions of [the Federal Courts Improvement Act of 1982] that I support and endorse as needed improvements in our federal judicial system. However, I cannot support that portion of the legislation which would remove the jurisdiction of all patent cases from the eleven federal circuit court [sic] of appeals. I believe this provision will undermine the status of existing regional circuits, will

himself noted the challenge of running a court with exclusive jurisdiction over areas of law for which the court would not have the luxury of looking to its sister circuits for guidance.<sup>10</sup>

He was also aware that the absence of conflict with those sister circuits would tend to insulate his court's opinions from further review.<sup>11</sup> Those of you who know much about Supreme Court practice know that the principal basis on which we grant certiorari is not that the decision below was wrong. That is not the point at all. We cannot correct all the mistakes. The principal criterion is that there be a circuit conflict.<sup>12</sup> Howard realized that the absence of any circuit conflict in those areas over which the Federal Circuit has exclusive jurisdiction means that to an unusual degree the Federal Circuit's law-making is insulated from review. The Supreme Court cannot say, well, we do not know whether it is right or wrong, but at least it disagrees with this other circuit; we ought to straighten it out, and determine which of the two is correct. Rather, we have to look at the Federal Circuit's product in isolation and guess whether it smells bad. There is no other basis on which to grant certiorari. Howard did not view that absence of extensive Supreme Court review as liberating but rather as a problem—as another factor which demanded careful attention to all of the cases brought before the Federal Circuit.<sup>13</sup>

So, Chief Judge Markey set out to define the new court's mission and achieve success. He recognized that a key goal of the newly created circuit was the development of a unified body of law in the substantive areas entrusted to its exclusive jurisdiction, so he set out to achieve that uniformity.<sup>14</sup> He identified over a dozen conflicts that had infected the administration of patent law in the Regional Circuits, and within three years his court had resolved all of them.<sup>15</sup> Together with his colleagues, he established a procedure subjecting every judge's opinion to review by the full court to assure uniformity within the court's decisions.<sup>16</sup> I'm not sure how long that has lasted by the way, but it was that way under Markey. He did this because he recognized that consistent and proper administration of the law takes precedence over pride of authorship.<sup>17</sup>

He also recognized that "justice delayed is justice denied."<sup>18</sup> As Chief Judge of the Court of Customs and Patent Appeals, he had reduced the time from filing to

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lead to a proliferation of federal specialty courts and will not solve the problems it is designed to address in the patent system.

*Id.*

<sup>10</sup> See Howard T. Markey, *The Court of Appeals for the Federal Circuit: Challenge and Opportunity*, 34 AM. U. L. REV. 595, 599 (1985) ("The new court [Federal Circuit] must reach its decisions in its exclusive areas with a care occasioned by its inability to look to other courts for differing views.").

<sup>11</sup> Markey, *supra* note 8, at 578 ("The Federal Circuit also recognized the special responsibility placed on it as the probable court of last resort in most of its cases.").

<sup>12</sup> See SUP. CT. R. 10(a).

<sup>13</sup> See Markey, *supra* note 8, at 578.

<sup>14</sup> *Id.* at 577 ("[T]he Federal Circuit set out to meet Congress' express intent that it contribute to increased uniformity and reliability in the fields of national law assigned.").

<sup>15</sup> *Id.* ("In its first three years, for example, [the Federal Circuit] identified and resolved all of the thirteen conflicts in the previous patent law decisions of the regional circuit courts.").

<sup>16</sup> *Id.* at 578.

<sup>17</sup> *Id.*

<sup>18</sup> Howard T. Markey, *The State of the Court*, 38 AM. U. L. REV. 1093, 1094 (1989)

decision to a mere seven months,<sup>19</sup> a remarkable achievement given that five of those seven months are consumed by the parties' briefing.<sup>20</sup> He maintained that record as Chief of the Federal Circuit,<sup>21</sup> and he did this without compromising the quality of the court's work, adhering to the court's mission of producing what he called, "The Best Possible Decisions in the Shortest Possible Time at the Least Possible Cost."<sup>22</sup>

Howard recalled the fundamental constitutional principles that our federal courts are courts of limited jurisdiction, the scope of their power being defined by the Congress.<sup>23</sup> And so upon his departure from the bench, he proudly recalled his efforts to adhere faithfully to the congressionally expressed expectation that the Federal Circuit would not attempt to unduly restrict or expand its own jurisdiction.<sup>24</sup>

Perhaps most importantly, Chief Judge Markey recognized, and in his own eloquent words pronounced, that, "[t]o best serve its critical role in a free society, the law must be understandable, uniform, reliable, and consistent with the intent of the people's representatives who enacted it."<sup>25</sup> So Howard set out crafting an immense body of work known for its careful reasoning, thorough research, and clear – indeed some might say blunt – prose.

In a now famous line of cases, Judge Markey set out to refute the notion that so-called combination patents were a different beast requiring a different level of judicial scrutiny.<sup>26</sup> He spoke firmly, noting that virtually all claimed inventions are combinations of old elements, that the Supreme Court had long recognized the patentability of combinations of old elements, and that the text of the patent law provided no basis for distinguishing one class of patents from another.<sup>27</sup> In a follow-

<sup>19</sup> Cohn, *supra* note 1, at 9.

<sup>20</sup> See Markey, *supra* note 18, at 1093–94.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1094.

<sup>23</sup> *Williams v. Secretary of the Navy*, 787 F.2d 552, 557 (Fed. Cir. 1986) (Markey, C.J.)

("[F]ederal courts are of limited jurisdiction, and may not alter the scope of either their own or another courts' statutory mandate.").

<sup>24</sup> See Markey, *supra* note 8, at 578.

<sup>25</sup> See *id.* at 579.

<sup>26</sup> *Amstar Corp. v. Envirotech Corp.*, 730 F.2d 1476, 1483 (Fed. Cir. 1984) (Markey, C.J.) ("There is no separate classification of 'combination patents' and no basis for considering claims to combinations of elements differently from any other."); *Medtronic, Inc. v. Cardiac Pacemakers, Inc.*, 721 F.2d 1563, 1566 (Fed. Cir. 1983) (Markey, C.J.) ("There is neither a statutory distinction between 'combination patents' and some other, never defined type of patent, nor a reason to treat the conditions for patentability differently with respect to 'combination patents'. [sic] It but obfuscates the law to posit a non-statutory, judge-created classification labeled 'combination patents'." [sic]); *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983) (Markey, C.J.) ("There is no classification [in the patent statute] entitled 'combination patents.'"); *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1540 (Fed. Cir. 1983) (Markey, C.J.) ("The reference to a 'combination patent' is . . . without support in the statute.").

<sup>27</sup> See *Amstar*, 730 F.2d at 1483 (noting that there is no distinction among patents in the patent statute); *Raytheon Co. v. Roper Corp.*, 724 F.2d 951, 961 (Fed. Cir. 1983) (Markey, C.J.) (citing *United States v. Adams*, 383 U.S. 39, 51–52 (1966)) (noting the Supreme Court's recognition that combinations of old elements are patentable); *Medtronic*, 721 F.2d at 1566 (noting that there is no distinction among patents in the patent statute); *Connell*, 722 F.2d at 1548 (noting that there is no distinction among patents in the patent statute); *Stratoflex*, 713 F.2d at 1540.

There is no warrant for judicial classifications of patents, whether into 'combination' patents and some other unnamed and undefined class or otherwise. Nor is there warrant for differing treatment or consideration of patents based on a

up case he stepped up his rhetoric, calling the distinction “simplistically unrealistic,” and sharply criticizing any such distinction not rooted in the text of the patent act.<sup>28</sup> Finally, his point having been made, he was content in the subsequent opinion to say simply that the “Patent Act provides no basis for any separate ‘combination patent’ classification.”<sup>29</sup>

In remarks reflecting on the early years of the Federal Circuit, Judge William Conner, a judge on the Southern District of New York, recalled the excitement and fear these opinions generated as the patent bar waited to see the Supreme Court’s reaction to Judge Markey’s sometimes provocative opinions.<sup>30</sup> But those opinions stood, and Judge Markey achieved his goal, as he put it, of “remov[ing] the slogans that for years had barnacled the patent law.”<sup>31</sup>

In a related and perhaps equally notable set of early opinions, Judge Markey criticized the synergism requirement that some courts had used as a test for patentability.<sup>32</sup> Here again, he demonstrated a commitment to statutory text, sound reasoning, and clear and colorful writing. He wrote in a case early in his tenure that the “requirement that an invention reflect ‘synergism’ . . . appears nowhere in the statute” and that “[r]eferences to synergism as a patentability requirement are, therefore, unnecessary and confusing.”<sup>33</sup> In another case not long after, he referred to the requirement simply as “non-existent.”<sup>34</sup> This was all something of a novelty to the patent bar.<sup>35</sup> He made much the same point no fewer than six times in the

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judicially devised label. Reference to ‘combination’ patents is, moreover, meaningless. Virtually *all* patents are ‘combination patents,’ if by that label one intends to describe patents having claims to inventions formed of a combination of elements. It is difficult to visualize, at least in the mechanical-structural arts, a ‘non-combination’ invention, i.e., an invention consisting of a *single* element.

*Id.*

<sup>28</sup> *Raytheon*, 724 F.2d at 961 (“It is . . . simplistically unrealistic to employ a separate test of patentability for combinations of old elements when the language of the 1952 Patent Act provides no basis for either classifying patents into different ‘types’ or for applying different treatment to different ‘types’ of patents.”).

<sup>29</sup> *Pentec, Inc. v. Graphic Controls Corp.*, 776 F. 2d 309, 317 (Fed. Cir. 1985).

<sup>30</sup> William C. Conner, *Speech at the 75th Annual Dinner of the NYIPLA—March 21, 1997*, 6 FED. CIR. B.J. 363, 369 (1996) (“In a series of decisions written by Chief Judge Markey, the [Federal Circuit] expressly and brazenly rejected many of the principles of patent law which the Supreme Court had promulgated . . . . Because all of those decisions were subject to review by the Supreme Court, the patent bar waited with trembling dread for their ax to fall. It never did.”).

<sup>31</sup> *See* Markey, *supra* note 8, at 577.

<sup>32</sup> *See, e.g., Connell*, 722 F.2d at 1549 (“Virtually every invention is a combination of elements or process steps, and synergism, or its equivalent ‘new and different result,’ is not *required* for patentability.”); *Chore-Time Equip., Inc. v. Cumberland Corp.*, 713 F.2d 774, 781 (Fed. Cir. 1983) (Markey, C.J.).

<sup>33</sup> *Chore-Time*, 713 F.2d at 781.

<sup>34</sup> *Kansas Jack, Inc. v. Kuhn*, 719 F.2d 1144, 1150 (Fed. Cir. 1983) (Markey, C.J.) (“The ‘effect greater’ language is but a longer statement of a non-existent requirement for ‘synergism’.” (citation omitted)).

<sup>35</sup> *See, e.g.,* Robert W. Harris, *Prospects for Supreme Court Review of the Federal Circuit Standards for Obviousness of Inventions Combining Old Elements*, 68 J. PAT. & TRADEMARK OFF. SOC’Y 66, 71–72 (1986) (“As to synergism or unexpected results, the [Federal Circuit] takes the most pro-patent position possible: neither synergism nor unexpected results is required to establish nonobviousness . . .”).

Court's first three years.<sup>36</sup> This too was part of the task of establishing a new court whose authority was still in doubt. It was not long before Judge Markey put those doubts to rest.

Ultimately these opinions reflected Markey's adherence to the principle that, as he put it, "Judges are not constitutionally empowered to legislate their individual subjective views respecting degrees of inventiveness . . . . What is required to uphold [the] validity of a patent . . . is what Congress . . . has said is required."<sup>37</sup> Words to live by, in and out of the patent context. Judge Markey understood that the credibility of judges and the legitimacy of the courts depend on their ability to articulate clear principles of law consistent with the statutes enacted by Congress.<sup>38</sup>

Howard was also a practical man and a practical judge who understood the formative role he would play in the development of the law – patent law in particular. He knew that members of the bar, called upon by their clients to give reliable advice, depended on the clarity, consistency, and completeness of his court's opinions, and he was intent on delivering.<sup>39</sup>

In its infancy, the Federal Circuit produced an immense body of learned opinions, and no one more than Judge Markey deserves credit for that effort. He led his court in articulating the foundational principles of patent law, and he is for that reason universally acknowledged as one of the forefathers of modern patent law, an area of law now densely populated by academics and practitioners, with entire departments at our leading universities and law firms dedicated to the subject. That was not the case when Howard Markey first started the Federal Circuit. It was through the strength of his opinions and the force of his leadership that Chief Judge Markey earned his designation as the John Marshall of the Federal Circuit.

But Howard's contributions to the law, as Chairman Cohn will affirm, were not limited to his pronouncements from the bench. In a series of influential articles and speeches, Howard explored the often troubled relationship between technology and the law.<sup>40</sup> He was skeptical of the notion that science and technology could answer our legal quandaries.<sup>41</sup> But Howard was no Luddite. He saw a proper role for technology in the judicial process and he advised his fellow judges not to fear technology or treat it as something alien to the law.<sup>42</sup> "Technology is in the court and is likely to stay there," he said. "It cannot be shunned. But it can be welcomed by judges made happier by the welcoming."<sup>43</sup> As a lawyer and a judge steeped in those

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<sup>36</sup> See, e.g., *Panduit Corp. v. Dennison Mfg. Co.*, 774 F.2d 1082, 1098 (Fed. Cir. 1985) (Markey, C.J.); *Amstar Corp. v. Envirotech Corp.*, 730 F.2d 1476, 1479 & n. 4 (Fed. Cir. 1984) (Markey, C.J.); *Connell*, 722 F.2d at 1549; *Kansas Jack*, 719 F.2d at 1150; *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1540 (Fed. Cir. 1983) (Markey, C.J.); *Chore-Time*, 713 F.2d at 781.

<sup>37</sup> *Jones v. Hardy*, 727 F.2d 1524, 1530 (Fed. Cir. 1984).

<sup>38</sup> See Markey, *supra* note 8, at 579.

<sup>39</sup> See Markey, *supra* note 10, at 595 ("The challenge to the court and its bar is to create and maintain a uniform, reliable, predictable, nationally-applicable body of law in each of the many and varied fields of substantive law assigned exclusively to the court.")

<sup>40</sup> See, e.g., Howard T. Markey, *Jurisprudence or "Juriscience"?*, 25 WM. & MARY L. REV. 525 (1984).

<sup>41</sup> *Id.* at 526.

<sup>42</sup> *Id.* ("Science and law, however, need not be mutually exclusive. Both should serve society. They should complement each other, rather than conflict.")

<sup>43</sup> Howard T. Markey, *Judicial Assessment of Technology: Star Wars or Stare Decisis?*, Speech to the American Association for the Advancement of Science, Feb. 13, 1978, *reprinted in* 2 HOWARD

fields closest to the intersection of law and technology, Howard was an able guide to his fellow judges encountering for the first time the issues presented by new-fangled technologies, inscrutable experts, and complex assessments of risk and benefit.

Howard was also a keen observer and critic of the judiciary in general. In a lecture delivered at the University of South Dakota School of Law, he lamented the deterioration of the federal appellate process.<sup>44</sup> Courts burdened with ever-growing caseloads; judges unable to devote the time necessary to consider and properly resolve cases; a system that by virtue of necessity had been focused on, as he put it, “getting the cases out”—not on personal scholarship, memorable elucidation, or clear, forward thinking.<sup>45</sup> Courts, he feared, had become factories, the title of judge had become debased, the compensation of judges greatly diminished, the dockets crowded with too much chaff obscuring too little wheat.<sup>46</sup> He recalled a time not too long ago when judging was a *judicial* process.<sup>47</sup> Judges would review the briefs and the record, listen to oral argument, and prepare written opinions in consultation with their colleagues and with the limited assistance of a single law clerk.<sup>48</sup> He decried the transformation of judging into a bureaucratic process in which cases are triaged by a core of staff attorneys, oral argument is rare and brief, judicial conference is infrequent and short, and over two-thirds of the cases are disposed of without opinion.<sup>49</sup>

Howard was neither the first nor the last judge to express these sentiments, and he was not one to engage in excessive navel gazing. He once wrote—this is vividly put—that to “take time away from the constant flood of appeals” to reflect upon the state of the courts, “could visit upon the judges a disaster not unlike that suffered by the twentieth floor window washer who stepped back to view the results of his . . . labor.”<sup>50</sup> But his observations and criticisms are well taken and are as relevant today as they were twenty years ago when he first made them. The only thing that has changed is that we no longer have Howard Markey around to draw attention to the problems with his signature eloquence and pith.

At the end of his career, after retiring from the bench, Howard of course became an academic—to the extent that law school deans can be considered academics (deans will know what I mean).<sup>51</sup> He served as dean of this law school, where, as I mentioned, he had been a student more than forty years earlier.<sup>52</sup> That was typical of Howard. He knew who he was and where he came from and never wavered in his loyalty to the institutions that had formed him – from his Nation to his law school.

And I have not even mentioned what Howard had accomplished *before* coming to the law. Howard Markey was a patriot and a warrior, serving in the Air Force in

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<sup>44</sup> Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L. REV. 371 (1988).

<sup>45</sup> *Id.* at 373.

<sup>46</sup> *Id.* at 374–76.

<sup>47</sup> *Id.* at 373.

<sup>48</sup> *Id.* at 376.

<sup>49</sup> *Id.* at 377.

<sup>50</sup> See Markey, *supra* note 18, at 1095.

<sup>51</sup> Cohn, *supra* note 1, at 11.

<sup>52</sup> *Id.* at 9, 11.

both World War II and the Korean War, and flying combat missions in the latter.<sup>53</sup> He was awarded, among other things, the Distinguished Service Medal, the Legion of Merit, the Distinguished Flying Cross, the Soldier's Medal, the Purple Heart, the Air Medal, and the Bronze Star.<sup>54</sup> He was a Brigadier General at the age of 38 and commanded the Illinois Air National Guard for 12 years.<sup>55</sup>

It is hard to say which of these multiple careers Howard Markey enjoyed the most. I suspect it was a toss-up between the Air Force and his service on the bench. One of his online biographies claims that in his sad last days at a nursing home, he asked the staff to address him as Judge and General on alternate days.<sup>56</sup> I wouldn't be surprised.

I remember visiting Howard's office when he was chief of the Federal Circuit, a splendid office overlooking Lafayette Park and the White House. Proudly hanging there was a memento of his youthful days as a famous test pilot for the new jet engines. He flew with Chuck Yeager, the first man to break the sound barrier.<sup>57</sup> The memento was a blow-up of one of the boxes from a Dick Tracy comic strip. That strip, the older ones among you may recall, had a character called Diet Smith, an industrialist who developed a lot of cutting-edge technology equipment for Tracy's police force—things that seemed phenomenal in those days, like the wrist-radio and a vehicle to go to the moon. And in the installment of the strip enlarged on Howard's wall, Diet Smith announces that his new engine is ready for testing and he directs his staff to "SEND FOR MARKEY."<sup>58</sup> That's how well known he was, and Howard was proud of that.

In addition to all I have described above, Howard was active—the operative word for Howard was always active—in all sorts of civic and professional causes. He was one of the moving forces in the foundation and spread of the American Inns of Court.<sup>59</sup> He founded the Thomas More Society of America.<sup>60</sup> And through it all—over it all, one might say—he was a devoted husband to his wife of 52 years, Elizabeth, whom he married when he was 21, and who predeceased him, and a loving father to their children, Jeffrey, Christopher, and Jennifer.<sup>61</sup>

To tell the truth, I think Howard Markey would be bemused at a symposium dedicated to the legacy of Howard Markey. I think Howard would likely say legacies are things for ex-Presidents and politicians. You might talk about my accomplishments, he would say, but legacies are enduring. And, sad as it is to contemplate, the Federal Circuit, even The John Marshall Law School, one day will be no longer. And the United States Patent Law that I elucidated and developed will one day be as antiquated as estates in land. What endures is the human spirit, and

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<sup>53</sup> *Id.* at 8–9; Death Claims AIC Founder Judge Howard T. Markey, <http://www.innsofcourt.org/Content/Default.aspx?ID=1646>

<sup>54</sup> Howard Thomas Markey, <http://www.cafc.uscourts.gov/pdf/MARKEY.pdf> (last visited Mar. 27, 2009).

<sup>55</sup> *Id.*

<sup>56</sup> Howard Thomas Markey, Major General, United States Air Force, Federal Judge, <http://www.arlingtoncemetery.net/htmarkey.htm> (last visited Mar. 27, 2009).

<sup>57</sup> Chuck Yeager & Leo Janos, *The Sound Barrier*, in *THE GREATEST FLYING STORIES EVER TOLD* 43, 43 (Lamar Underwood ed., 2004).

<sup>58</sup> Chester Gould, *Dick Tracy*, *CHI. TRIB.*, June 25, 1966, § 1B, at 18.

<sup>59</sup> Cohn, *supra* note 1, at 10–11.

<sup>60</sup> *Id.* at 10.

<sup>61</sup> *Id.* at 7, 9, 11–12.

if I have any legacy, anything that really endures, it is in the preserving and passing-on of that spirit.

I say much the same thing to law faculties when I have the occasion to speak to them at faculty lunches. They are obsessed with publishing. They think this is going to be their mark on the law, their legacy. I tell them how foolish that is. The shelf-life of the great American law review article is about five years, and of the great American treatise maybe 25; after that, they're just of historical interest. What endures is what happens in the classroom. I still have people come up to me who were my students at the University of Virginia, in the 1970s for Pete's sake, who are full of gratitude and say, you know, I was in your contracts class and you lit a spark in me for the love of the law and I never lost it. Some of those people have passed it on to others. So I tell the law professors, that's where you make your mark. That's where your legacy will be, in passing on your spirit of the law to others who will pass it on once again.

The best in the human spirit that existed in Howard Markey was, I think, represented by the man whom I'm sure he studied in the course of his Catholic education, Virgil's Aeneas.<sup>62</sup> The epithet that Virgil always used for Aeneas was "pius," Pius Aeneas.<sup>63</sup> We get the English word pious from it,<sup>64</sup> but pious doesn't bear the meaning that pius had in Latin. It meant dutiful—aware of and devoted to one's duty.<sup>65</sup> Well, you could say it was Pius Markey observing his duty to God, to family, to country and to community. And I think he would say that his legacy was the passing on of that virtue the way we all pass on such things—through the children we raise, through the law clerks to whom we are mentors, and through the friends and associates who observe the course of our life. And the course of Howard Markey's life was truly remarkable.

So, as I said, I don't know much about patent law. But I know much about the human spirit, and that to me is Howard Markey's legacy.

Thank you.

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<sup>62</sup> See VIRGIL, THE AENEID OF VIRGIL (Edgar S. Shumway ed., John Conington trans., MacMillan Co. 1917) (1910).

<sup>63</sup> See *id.* at 178.

<sup>64</sup> WEBSTER'S NEW INTERNATIONAL DICTIONARY COLLEGE DICTIONARY 1869 (2d ed. 1957).

<sup>65</sup> *Id.*