Center for Strategic and International Studies

TRANSCRIPT

Event

LeadershIP 2025

(Panel IV) Architecting the Future: Call to Action for Innovation Policy

DATE

Tuesday, April 3, 2025 at 3:00 p.m. EDT

FEATURING

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Kirti Gupta: Welcome back, everyone. So this is our final panel of the day, and I think it's a really important one. It's our call to action, "Architecting the Future" for innovation policy. And it's aligned with what I started the day with, which is the transition report that CSIS has put out for this administration on intellectual property. And it ends with certain key points on call to action. And so this panel is, you know, very carefully orchestrated, again, to bring very different perspectives on the table.

Moderated by Jamie Simpson, who currently is the chief policy officer and counsel at the Center for Innovation promotion, C4IP. And she was, before that – before being in this role she was counsel for Senator Coons and has spent quite a bit of time in different positions in House and Senate Judiciary Committees on IP. So lot of legislation experience from Jamie. And we have Judge Michel bringing the judiciary experience; Adam Mossoff from academia; Brian Pomper, who can bring a trade perspective; and Makan Delrahim, who can bring the competition (manager's ?) perspective. So I think this is a perfect playground for you, Jamie. So please take it away, and give a plug to our report, please.

Jamie Simpson: Thank you. Well, it's my pleasure and honor to moderate such a well-informed and esteemed panel to talk about, I think, a really important topic, which is how to take everything we've discussed today and to put it into action. What actions should our country be thinking about to address all of these challenges? So I think this panel probably needs no introduction. So I think, if it's OK with everyone, we'll just jump right into the conversation.

And I wanted to start by asking an opening question that every panelist could comment on. And it kind of goes to a fundamental issue of, is the United States able to be in a position to affect policy change? Which might kind of strike you as an odd question, but the reason I bring this up is that one of the interesting points of the CSIS report is that it notes that United States courts are not always the first choice courts for litigants looking to settle international disputes. Litigants might go to Europe, to Germany first. You know, I've even heard of plaintiffs going to Brazil, which is giving very speedy injunctions these days.

So, you know, with that basis, you know, I'm kind of curious, and I'd like the panelists to comment on how does this shift in what courts are the courts of first choice affect the ability of the United States to influence global innovation rules? And, second, if you think the shift undermines the U.S. ability – the U.S.' ability, what legislative or regulatory steps should the United States be considering? So anyone can jump in.

Brian Pomper: It's a court question. Sounds like you, Judge? (Laughter.)

Honorable Paul Michel: Well, the first thing to say about courts is that they are not your best institution to make broad innovation or economic policy. Of course, as a default mechanism they end up making certain important decisions. And those decisions are nearly always authoritative and binding. Of course, they can be changed with subsequent legislation if they depend on statutes, as opposed to the Constitution. But the courts are not well equipped to make broad policy in these areas. And so getting the roles straightened out, I think, is the key. Let the courts do what they do best, let the Congress do what only the Congress can legitimately do in a democracy, to balance out conflicting interests and to make basic judgments on behalf of the society. And the executive, of course, also has a really critical role.

Now, obviously, commerce is global, science is global, money is mobile and therefore also global. And one of the problems with courts is that they not only look backwards, precedent reigns, but also they look inward, in the United States. The courts don't focus on what's happening in Europe, or Asia, or China. It's just not in their nature. So we're giving up, in several ways, on leadership in intellectual property and all the scientific and commercial advantages it can fuel. And it's a big mistake. And it's easy to fix, if we get the roles right and get some kind of coordination among the three branches, each in its best role.

And, secondly, have a unified strategy. We need – we don't have innovation policy in the United States. We have 10 different innovation policies fragmented around different executive branch agencies. We need a unified plan. And it needs a high-level direction once it's being activated or implemented in the executive branch. Now, maybe the secretary of commerce, particularly in the current administration, can play that unifying quarterback role, if you will. Or maybe it needs to be also involving the National Security Council, the National Economic Council, the advisor on science and technology. I don't really know the perfect way to structure it.

But we need to change what we're doing because we're basically losing the race for innovation domination to China, and increasingly to Europe. And we're giving up not just the ability to influence, but the ability to prosper.

Mr. Pomper: Well, let me associate myself with this, and just say one thing. I was introduced as a trade person, which is really my – I'm secretly a trade person. That was my job on the Hill. And so I've been obsessed with the tariffs that are going to be announced tomorrow. And it strikes me that the connection here is I feel like history moves in cycles. And humans are doomed to have to relearn old lessons. And so I think to myself how – and I was struck earlier when we were talking about the various

things, like the TRIPS waiver, and march-in rights, and – just how innovative United States economy is. But yet, we have seen this relentless attack on the system that has allowed all of these innovations to happen.

How we've been seduced by this idea, well, we need to go to the TRIPS waiver, because that's going to be best for innovation. And we need to dumb down the patent system, because that's going to be best for innovation. And I just – it's almost like a tragic comment. It sort of reminds me of the Joni Mitchell song, "Big Yellow Taxi." Anybody know this? You don't know what you got till it's gone, right? (Laughter.) And so that's how I sort of feel, that we are in this moment of having to relearn these lessons.

Now, I will say, I think in the patent space I've seen – since I've been involved in it for so many years – I feel like the pendulum has sort of swung. Sort of gradually, maybe slowly, we are sort of figuring out, Judge, what you've been saying. It's that we kind of allowed our edge to get dulled. It's not that the United States is not going to be innovative. We'll always be really innovative. But I guess, in some respects, it's kind of what kind of innovation do we have? Do we have design innovation? That's great and wonderful, but that's not fundamental science innovation. That's not going to lead to sort of these new breakthrough areas and all that sort of thing. For that, you really do need a system that channels private sector money to the most – I'd say, the riskiest scientific innovations.

And I think that's something that we've really dulled in the United States. And there are bills – and I won't bore you with them all – but there was bills in Congress, PERA, PREVAIL, RESTORE, things that, you know, have catchy names, that I think will gradually sort of move the system back to where I think it needs to be, but we still may have some learning to do.

Ms. Simpson: Thanks.

Honorable Makan Delrahim: I'll jump in, just to agree. But just to add also just another perspective. I think the United States is an incredible example of innovation. We want to look around the world. You know, you have different models where actually capitalist economy allowed for that. You look at Israel, you know, a tiny little country that has so much innovation coming out of it. And why is that? I think Judge Michel mentioned a position in the government. We don't have a coordinated innovation policy. And we have different pockets that sometimes work counter to each other, rather than a coordinated innovation policy.

And we'd be wise – now, I think in this current administration, you have Michael Kratsios who just got sworn in as the OSTP. He gets it. But, you know, innovation requires not only the brilliance of the, you know, engineers and the employees of many folks affiliated in this room, but, you know, you have patent policy, important IP policies that unfortunately the pendulum started swinging for many years. At the beginning of my career I remembered when everybody was for strong IP, and it was our greatest export out of the United States. And then somehow domestic policy changed.

You have, you know, antitrust and competition policy that regulates how patents are addressed. And those changes from the administrative a lot of times, because it's – Congress doesn't really get involved. I mean, the antitrust laws have remained more or less the same four lines for the past hundred years. And so it becomes the enforcement policies of the Justice Department, FTC that have huge implications for valuations and enforcement of them. But then you have regulatory policies at the FCC or, you know, DOT, or other places that direct that. And then you have tax policy. And then you have spending. Are we spending, you know, $600 billion to allocate to certain things, or $500 billion to allocate to solar or AI?

This needs to be coordinated, I think, from a policy standpoint. I don't know if Congress needs to do something, or, you know, the president. But all of these need to – we need to figure this out, because it has a huge national security implication. If we have been in a race with China, and it is a huge focus of the last administration as well as this administration, I think for the last 10 years it has been an issue that folks have been considering is, are we losing leadership? You know, whether it was solar panels, automated cars, chips. And now those countries, because of their system of government, are using a lot of these policies, whether it's antitrust policies and semiconductors in China – you've got a merger trying to go around in that to try to improve and compete in a vertical manner? Good luck, you know?

And SAMR is now – now, just yesterday they announced that they're using their antitrust authority to block the merger of – or, takeover of the Panama Canal by, you know, a consortium of investors. What does antitrust have to do with it? Well, you know, in Panama from Beijing, well, it's a power that is being used. Another one of our great exports out of the United States has been antitrust law. You know, we have 147 or so different antitrust agencies. I'd say 90 percent of them have no idea about the power that's in their hands and the damage they could do with the wrong policy. We've certainly been learning.

You know, it wasn't that long ago, maybe, what, 10-15 years ago, where

we had a major policy that affected and put its thumb on the scale of how patents are used, particularly in the standard setting stage, which was wrong. And, you know, fortunately, Andrei and I thought about this, and we came up with a better policy to remove the thumb from that scale and let, you know, the system work its way. But we need to think about all of these and the implications they have in the international and national security sectors.

Ms. Simpson: Makan, just – you mentioned SAMR. I was wondering if you could explain that briefly for people who might not be familiar with it. And maybe, just kind of piggybacking off of that, talk a little bit more about antitrust in this context, and especially when you're talking about standard essential patents. You know, recently we've seen proposals from around the globe that would go, you know, maybe even beyond standard antitrust to try and regulate it. Thoughts about that, and how the United States should respond?

Hon. Delrahim: Sure. So, let me get to SAMR. I mean, it's the Chinese antitrust authority. China didn't have a comprehensive antitrust law until 2008, August 8th, 2008, they did. In my previous time when I was the deputy for international at the Antitrust Division, I had the good fortune of going out there a few times and helping them – provide technical assistance to craft their antitrust law, they called the antimonopoly law. But they had three agencies. And, unlike the United States, the Chinese saw the wisdom of consolidating their antitrust agencies. But we still have two, and some would argue 52, antitrust agencies in the United States with concurrent jurisdiction.

But then they combined this, I want to say, six, seven years ago, into SAMR. And it's been a very muscular antitrust agency. The Chinese have been using their approval powers to block certain mergers, to impose conditions, maybe extract licenses, joint ventures, others, some local requirements, through that agency. It is – you know, it's become an arm of their industrial policy of that regime. It is what it is. It's just reality. An antitrust law and how it affects IP, and particularly in the standard setting, as you asked, there were creative – you know, that's one thing we do have in the United States. We have creative lawyers, creative economists. People came up with different theories.

Fortunately, there was some pushback, and I think we have some changes in the laws. And these are my personal views. No clients or my firm's views. And to the extent they might affect them, I will disavow any association with those. (Laughter.) But I've been pretty much an open book for 25 years on these issues. But creative laws that came in and said, you know, just enforcing your right to exclude, you know, somebody who you haven't licensed is a violation of Section two of the

Sherman Act. It's a violation of the antitrust laws. You know, the exercise of an injunctive relief is, and should be.

My view is that, you know, when you're committing to a standard setting body, it's a contractual right. If there's an anticompetitive effect of that, there's a perfect remedy, you know, through contract law. Or if you've committed a fraud on the system, there's a perfectly good remedy. In and of itself does not conjure up the antitrust laws. This was one of the pillars of what we termed the new Madison approach during my tenure at the Justice Department. But things like the unilateral, unconditional refusal to license your patent. You create a patent, you don't want to license it. You have a limited time to sit on it. That's kind of the exchange with society.

The fact that you're not licensing it should not be an antitrust violation. It's your right. And you can't agree with your competitor not to license it. That's fine. That's a Section One potential violation. But it can't be a violation of you not licensing it. You have – just the fact that you have the right to exclude others, it's from the practice, it kind of takes it away. I never thought that was controversial. I mean, it would be like telling my 11-year-old daughter she can't drive. I didn't think that was, like, taking away her rights. But that was quite a controversial thing – (laughter) – the last 20 years.

And part of that is this whole view somehow that we had – again, it's great business. You go and extract something out of Congress, or out of a regulatory agency, because it's good for your business or your competitive, or you don't have to pay a license fee to an innovator. But the long-term implications it has in the pharmaceutical industry, in other sectors, you know, chips and others, is huge because it takes away incentives. You know, I think we've had decisions in the Ninth Circuit, and the Fifth Circuit, and the supreme courts around the world that have now adopted a lot of those theories, which I think is good for broader innovation policy. But, you know, I don't need to give specific examples about where U.S. has lost its leadership to foreign countries.

Ms. Simpson: I'd like to stick on that topic for a second, and have a question for Adam here. Kind of talking about, you know, what might be considered our chief rival right now, China. Kind of picking up on some of these themes that we've been talking about. You know, it's pretty clear right now that there's a Chinese state-sponsored project for achieving global technological leadership in key areas of technology. And that they've used some probably, you know, you can politely call them extra legal means for some of these. But in addition to that, they've set up a strong domestic IP system as well.

But in response to this growing threat from China, some in the U.S. have started to talk about ideas along the lines of just making Chinese-owned U.S. patents unenforceable. And I'd like to explore this idea a little, and ask Adam to comment on it, and whether or not it's likely to be an effective approach, and explain his thoughts.

Adam Mossoff: Well, thank you. And I appreciate, Brian, that you quoted Joni Mitchell. I mean, usually I'm the person quoting something historical that no one understands what I'm talking about. So thank you. (Laughter.)

Mr. Pomper: Also shows my age. (Laughter.)

Mr. Mossoff: But it would – to give you the conclusion first, it would be a disaster to turn the patent system and patent rights into a – into a political chip that we are using in our foreign policy efforts and in our attempt to address this global competitor that has arisen in the 21st century, and has been a global competitor, and we've only recently recognized it to be as such. They have viewed themselves as in competition with us for a very long time. And it's only recently that I think we've woken up to this.

You know, the beauty of our patent system is it's something that we all now take for granted in a lot of respects, even internationally. Every aspect of our patent system, the fact that we are protecting property rights, the right to exclude that Makan described, that they are secured through courts, that they're issued by agencies that are governed by various rules, you know, that are defined by the rule of law and due process. These are all actual innovations of the United States. We actually implemented this through the founders and putting it in the Constitution, and then the early Judges and jurists in this country.

And then it spread throughout the whole entire world because, by the mid-19th century, people were marveling at, like, this backward little country that, you know, had just broken from England, 50 years later is marveling the world with the sewing machine, and vulcanized rubber, and mechanized reaper, and the telegraph, and the repeating firearm, and, I mean, so many other types of innovations. And they're like, where did this come from? And people thought, OK, it's the patent. They recognized it was our patent system. So these were all patented innovations, and deployed in the marketplace through licensing, through franchise business models, and things of this sort.

And so other countries, and especially like Japan, but also Germany. And then Germany – a lot of countries copied Germany's patent system. And that's how our patent system kind of spread throughout the world and became kind of the baseline norm. And this goes to your earlier question, your opening question, right? This is how, you know, the rule

of law and due process and the functioning of our patent system as a property rights system became the norm of what we now understand as modern patents, as opposed to these kind of discretionary regulatory entitlements, for purely policy reasons.

And so China is – you know, as we now recognize, is in competition with us. And, you know, a lot of people think it's kind of a – when they hear that China has implemented this very robust intellectual property system, you know, courts and their patent office, and the patent system modeled after our patent system from about 30 or 40 years ago, and they also hear that they're stealing our technology still, and they're confused by that. And they don't recognize that those are two parts of an integrated industrial policy. They're going to steal technologies that they haven't invented, and they're going to foster and grow their own innovation economy, because they recognize they can't succeed entirely by just continuing to take technologies from other countries and other people. They have to eventually become their own innovation economy. And you do that through providing robust IP protections.

And so it would be a disaster for us then to respond to that by saying, we are going to shut down our patent system to China and to other countries. It would do this for two reasons. One is, is that it would be, by the way, 100 percent ineffectual, because, as Makan mentioned, you know, the patent bargain is I get a patent and it's published, and this is what I get in exchange for my exclusive right. And so, you know, Americans are still getting their patents. They're still getting disclosed through our patent system. So the Chinese still have access to these technologies through the publication. Just that we're no longer getting access to the Chinese publication – to the Chinese inventors and innovators who are right now patented in the United States, and those patents are being published in English, not in Chinese. And so we would then lose access, the same type of access, to the disclosure of these new technologies that they're starting to create in the United States in English, because they'd only be patented in China.

Second of all, you know, that they would continue to take advantage of our – of it. They would get the advantages of us disclosing our innovations. And they would retaliate. They would shut – they would say, fine, if you're going to shut down your patent system, we'll shut down our patent system. And this will balkanize patent systems. And this will make – this will be the easiest way to throw, you know, not just sand but, like, acid into the gears of the global innovation economy, where you have technologies, especially mobile technologies, but biopharmaceutical technologies as well, that are – that have supply chain throughout different – many different countries. And you need to have kind of settled rule of law norms governing this that apply to every

person, every citizen equally. And it won't happen if we just are doing things like this.

Mr. Pomper: If I could just real quick, I just want to say, because I have another quote I need to say – (laughter) – because it brings to mind, for every – one of my favorite authors, H.L. Mencken: "For every complex problem, there's a solution that's clear, simple, and wrong." (Laughter.) And that's what I think of this approach, right? We're all here because we care about policy, because policy matters. And I understand this desire to punish China, right? They're not treating us well. Well, let's get them. But it's kind of like stabbing ourselves in the knee because we're fighting China. It doesn't make any sense to me. And I hope that's not where we go.

Hon. Michel: And on top of all that, barring Chinese companies from applying for and obtaining U.S. patents and enforcing them in the U.S. courts is almost certainly a treaty violation. So we would be violating – knowingly violating a treaty that we followed for decades, and whose promulgation we led. So how hypocritical would that be?

Ms. Simpson: To kind of follow up on that, what do you think would be better approaches to kind of addressing some of the ongoing concerns we see here?

Mr. Pomper: There's so many concerns, Jamie. Which ones are you – (laughter)

Mr. Mossoff: Yes.

Mr. Pomper: Which ones in particular?

Ms. Simpson: Well, that is a fair point. But I think, you know, this kind of comes from just hearing these terms kind of thrown around loosely. So to the extent you think Chinese companies are engaging in unfair trade practices, or engaging in, you know, some forms of theft, or to the extent you think Chinese courts do respect U.S. companies, have gotten patents there, can enforce them. But, you know, there are some indications that maybe the enforcement isn't as strong for foreign countries in China. But what do we do about, collectively, all of these problems we're still seeing, you know, if not for this kind of sledgehammer approach?

Mr. Pomper: Well, first of all, I think, you know, the easy answer is we run faster. But it's kind of where we started. It's, like, let's do a better job supporting our own innovators and our own system so that we can – we can beat China at the innovation game. Which, by the way, we've done for, you know, since Chinese founding, right, for whatever – however long, 80 years. So I think that's, frankly, the better approach. It's funny, right? Like you – if you – you know, I know that President Trump likes to use tariffs. But I feel like we've tariffed China so much that that tool has now

lost its edge. I mean, normally what you would say is, oh, we'll put them – we'll put them on the 301 list, and we'll tariff them this way and that way. And I just don't know that China – they're already kind of boxed out of the market. I'm not sure that they would care so much about that, but.

Hon. Michel: It seems like there are two other approaches we should consider. One is our whole foreign policy apparatus could be brought to bear to try to get better treatment of Western companies in Chinese courts. And the second thing is, if individual Chinese companies can be shown to have abused our patent system, they could be singled out. And they could be discriminated against lawfully. But to bar all Chinese companies, regardless of their behavior, from getting U.S. patents would be illegal and counterproductive, and create endless problems for us because, of course, they're going to retaliate. And then we're worse off.

Mr. Mossoff: Yeah, I mean, our innovation – we do have an innovation policy, or have had an innovation policy in this country. And it was an innovation policy that relied upon reliable and effective IP rights – patents, copyrights, trade secrets. I mean, we have been the leader traditionally and historically in securing reliable and effective property rights, when many other countries balked and wouldn't do it. It was true in the biotech revolution. We were the ones that stepped forward in the early 1980s and said, these are patentable inventions, while other countries said this is – no, we can't do this. This is patenting life. You know, and this is why the biotech revolution occurs in the United States. It's why the high-tech revolution and the mobile revolution ultimately occur in the United States, when historically other revolutions started in other countries first.

You know, the industrial revolution started in England. And the pharmaceutical revolution originally started in Germany in the 19th century. And it wasn't until later that they shifted to the United States, because of our IP system. And so I think, you know, the primary focus – you know, we don't have any – we can't directly control China, right? China is going to do what China is going to do. (Laughs.) And so I think our primary focus should be keeping our own house in order and returning our system back to the system that we had, because we have spent the past 20 years eviscerating our patent rights and destabilizing this property rights regime that has been a massive spur to all of the revolutions, economic and technological, that we've had in this country and around the world.

Hon. Delrahim: One of the – oh – I was just going to say that, you know, I think IP rights is important. And I couldn't agree more with Adam. If we go back to our old approach on how we treated and viewed and valued, whether it's

patents or copyrights, the creatives. But the other reason why U.S. has been, you know, a hub of innovation is because of our capital system. It's the rule of law. Why do investors want to put money here? Why do they, for many years, here versus Argentina? Why do they buy our bonds versus – you know, why do the Chinese buy U.S. bonds? It's because the certainty of it, and the rights, and remedies that you have for the capital markets. And the ability – why is it that so many foreign countries – foreign companies want to be listed on the U.S. stock exchanges? Because they can raise capital there.

You know, we do a ton of capital markets work – Israeli companies, Chinese companies, others – who want to be in the U.S. if they can, Saudi companies. And it is that certainty. So I think our rule of law is really important, that not every country has. And we emphasize the rule of law. We emphasize the IP – strong IP system. And that rule of law also allows for, you know, venture capital, and the ability to risk that capital. That comes from – the other thing is, that both of those need, is the regulatory system. It is securities laws and regulations to allow for more of that risk to happen, instead of conjuring up that some, you know, SEC rules would do to limit that. But it's also the regulation of these nascent industries that come about.

I mean, Europe couldn't have – not to criticize Europe, but I will – they really rushed as fast as you could to regulate this new thing that nobody really understood what the heck it was, artificial intelligence. Well, what is that? Is that NVIDIA and their chips? Is it OpenAI? Is it applications of them? But in Europe, there's a full regulation for it. In the United States, we don't have that yet. Now, will there be some societal harms until we do, or other things? We got to let the system work before running to regulation. It should be, as traditionally has been in the United States, some of these regulations – of course, health and safety, we want to protect that. But just economic regulation for the sake of doing it, in Europe, you know, is not great. It should be the last resort when the markets fail.

The lightest touch of regulation, I think, is antitrust and competition for economic regulation. And we should rely on that. And I think that's been one of the hallmarks in the United States about how we treated that. And I think if we go back to that, promote that, use our diplomatic influences to open up market access for U.S. companies, as Judge Michel said, but go out there. To the extent they're using their rules to deny access for U.S. markets, that should be reciprocated. You know, tariffs is one tool, but market access is really important. And that would be a huge part of, I think, you know, somebody like the Secretary of Commerce and others, who would and should do that as part of a broader innovation policy.

Ms. Simpson: Well, switching gears a little bit, I'd like to pick up on what Brian said about kind of focusing on ourselves at home, and making sure we have our own house in order. I think that is a very important point. And one area where I think the United States has had a lot of criticism about the coherence of its overall policy is the issue of patent eligible subject matter. Which, as probably many of you in the room know, has been the subject of four recent Supreme Court cases, and then a number of follow-on cases since that last case was decided in 2014. And I'd like to ask Judge Michel to expand upon this a little bit, how these Supreme Court cases have affected our system, and how they position us vis-à-vis other countries, and what we might want to consider in response?

Hon. Michel: Well, first of all, these cases have created chaos, unpredictability, uncertainty, and therefore unreliability of patents. The more you make patents unreliable, the lower the incentives are, the less innovation you get. It's really about that simple, at the most basic level. And in addition to creating uncertainty, they sharply restricted the zone of eligibility to even be considered for a patent. There are numerous other high hurdles to surmount, as people in this room know, but the first hurdle is eligibility. And the Supreme Court sharply restricted eligibility. So one result was we destroyed our whole medical diagnostic industry because the Mayo decision was understood to say practically anything diagnostic depends on the law of nature, therefore ineligible, categorically. And many other technologies were also adversely affected.

So uncertainty, shrinkage of the zone of eligibility, and what about globally? Well, Adam did a study. He can give you the exact numbers. But a huge number of patents found ineligible here were later found eligible in all the European countries and in major Asian jurisdictions, including China. So we really – (laughs) – you know, we really switched positions with some of our commercial rivals, like Europe, and our strategic rival, like China. And the doctrine is incoherent. You know, the first of the four cases, of course, was Bilski, which said you could have a patent that embodies an abstract concept, but not if it's too abstract. But then they refuse to give any hint at all about how abstract is too abstract to be eligible.

And then a few years later, four years later, in Alice, they doubled down on that, again refusing to give any hint or definition, and making it even worse. And then the Alice decision was put on steroids by the court I formerly had the privilege of sitting on, where they extended the doctrine of Alice to say, unless you improve the functioning of a computer, nothing that you do on a computer can be eligible. Which is completely crazy doctrine. So both in the medical area and the information technology area, these four cases have been extremely

harmful. And ironically, the Supreme Court has been asked in the ensuing decade-plus upwards of a hundred times, please revisit and revise this case law. They've turned down every single request.

The message I draw is clear as could be. They have no intention anytime soon of straightening out this chaos. Someone else is going to have to do it. Well, the only other agency of our government left is the Congress. So of course, they have this so-called PERA bill before them. It may need some adjustment. I'm not saying it's perfect. But it's a huge step in the right direction, in my opinion. And it would sharply reduce the unpredictability and greatly enlarge, and appropriately enlarge, the zone of eligibility. So it seems to me we can make great progress, but only if the Congress mobilizes itself to promote a solution to these problems.

And when you step back and think about whether it was appropriate for the Supreme Court to even be doing this. The eligibility law is a single sentence in the first section of the patent law. It has zero exceptions in it. And it expressly makes eligible improvements. But the Supreme Court comes along and casts doubt about improvement patents and creates a common law of eligibility in interpreting a statute that has zero exceptions in it. So it's questionable judicial behavior, in my opinion, at the very least. And it's inconsistent with Congress's Section 101. So Congress should step in and, in effect, say to all the courts, hey, we really mean it. There are no exceptions by categories to eligibility. There are other requirements, but there are no technologies that are automatically ineligible.

So that's where we are. And seems to me the solution is simple. The difficult part is getting traction in Congress, because it's very easy to slow things down, stall them, create confusion, engage in PR wars, PR campaigns, massive campaign contributions, and all kind of other levers. And that's been done. So these three reform bills – PERA, PREVAIL – you know, they're having trouble getting traction. I think they will eventually. The big question on my mind is will it be soon enough? Or, will China be so far ahead at that point we can't realistically catch up?

There already are two think tank studies that suggest that overall, considering everything, China is already ahead of the U.S. in at least 37 of the 44 most advanced technologies in the world today, the 21st century technologies. Even if those numbers are not exactly right, and you can debate it, they're closing fast. And they are ahead in some. And this is a self-inflicted wound. We've eviscerated our patent system and the incentive to invest that it previously provided amply. And now it doesn't provide it amply. And the solution is to strengthen patents,

including by reforming eligibility. So I hope we will take the obvious course of action.

Ms. Simpson: Great. Does any other panelists want to comment on that?

Mr. Mossoff: Well, God help us that we have to – that we're looking to Congress to save us all, but – (laughter) – but, I mean, if you had said to me 20 years ago that the U.S. patent system is going to become closed, and guess which two sectors of our innovation economy it's going to become closed to, I would have said, I don't know, I mean, you know, maybe old-school, you know, machines and stuff. But if you had said, no, it's going to be biotech and high tech, computers, I would have said, you're crazy. I mean, those are – those are the leading edges of our innovation economy. Those are what made us a global tech leader.

And, again, kind of historically, we were the country that said, these are new innovations, 80 years ago, and we are going to protect them in our patent system, because they count. They fall within those kind of broad, open categories that have been in our patent laws for over 150 years. And so, you know, we've now constricted and closed them, which is bad enough for us just in terms of our own economic growth. But now that we're facing a global competitor like China, who recognizes that it needs to grow its innovation economy, and it's creating the alternative, and so that's where the capital is going to flow. That's why we're seeing litigation and other – licensing activities leaving the United States and things of this sort. So what the Judge said is exactly right. I mean, it's a real – it's a real problem.

Hon. Michel: Not just technology, but venture capital is flowing increasingly overseas. It used to be spent almost 90 percent here. U.S. venture capital money was almost all spent in the U.S. Now it's down from almost 90 to 50 percent. And a lot of U.S. venture capital money has been going not just overseas, but a lot of it to China. So we're helping to finance China overtaking us in technology with our own VC money. But money is agnostic. It's going to go where the protections are best, the incentives are highest, the rewards are biggest, the rewards are the most dependable.

So it's, again, the worst kind of self-inflicted wound. And we haven't really gotten to the third area of weakening of patent rights, of the lack of injunctions. But the combination of the ineligibility mess, the lack of injunctions, and to some extent the excesses of the Patent Trial and Appeal Board, have all combined to severely weaken the incentives of patents by weakening the patents. And we've gone back to where we were before. In the decades before the 1980s we had very weak patents. In the 1980s, we strengthened patents. We had the Bayh-Dole Act, the

Hatch-Waxman Act, the creation of the Federal Circuit, the Federal Circuit case law. And so for several decades we had innovation exploding in the United States, surging in the United States. And now in the last 15 or 20 years, we've been reversing course and going right back to where we were before. We know how this movie ends. Why are we doing this?

Ms. Simpson: Well, to pick up on one of your points, one of the laws in the 1980s, the Bayh-Dole Act, was really foundational in establishing our tech transfer system at the universities. And, again, as many of you may know, there was a proposal in the last administration that would have really reinterpreted part of this act and affected the patents that universities and other federal recipients of federal funds – how they could enforce their patents. And, Brian, I was wondering if you could talk a little bit more about this proposal and your thoughts on this.

Mr. Pomper: Well, sure. I mean, as I recall that it was – and, again, it's a good example of you forget, you know, we created this whole ecosystem back in the day. And I know, I think, Stephen Susalka earlier talked quite a bit about Bayh-Dole, and what the world was like before Bayh-Dole. You'd have these great inventions, but they'd sit on a shelf gathering dust. But you incentivized this kind of transfer between the universities and the private sector. And it did lead to all sorts of great innovations like this. But the terms that were used in the Bayh-Dole Act, again, creative wiring, Makan, to your point. By the way, I take great offense as a lawyer to that. (Laughter.)

But no. So the creative wiring they found some language in the Bayh-Dole Act and said, oh, no, we can say it's unreasonable, right? I think that was the term. The prices that are being charged are unreasonable, and so the government now gets to come in and say, no, we're going to march in, we're going to take your intellectual properties because we think the price that you're charging is too unreasonable. And that is a terrible idea, right, because this is sort of, you know, government price controls and I just generally think those don't work, period, full stop. I think we've seen that throughout history, and I just – I'm thankful that there was a real groundswell of opposition.

I will say as – I'm a lobbyist, right? As a lobbyist there are few groups or interests that are more powerful in any individual state than universities. Every member of Congress loves their local university and so when the universities start coming up and say, oh my God, you know, this is going to devastate our research system and all the money that comes out – I mean, there's – my brother actually is a medical researcher and he actually came up with a drug – a patent – that deals with cancer of your prostate.

Anybody hear of the medicine called Pylarify? Anyway, so this is my brother's medicine, and he was a professor at Johns Hopkins when he did it and Johns Hopkins is making millions of dollars off of this because he was a medical researcher who came up with this and through the tech transfer office they license it.

It's a great success story and it's going to help tons and tons of people. But if we allow the government to say which inventions, essentially, get to be put on the market and when and where and why and how and how much things like that may never see the light of day.

So, again, there was a groundswell of opposition from all these universities and ultimately it was put on the shelf. Now, I hope it doesn't get taken back off the shelf. I don't think it would be by this administration.

We haven't talked, by the way, about personnel. I hope we will in this administration. But I'm hopeful that we won't have to talk about that again.

Hon. Delrahim: Well, in 1993 we went through this again, remembering kind of mistakes of the past and this was when Hal Varmus was the head of the NIH. It was right between Dr. Bernadine Healy and Dr. Varmus, and Secretary Donna Shalala had just come in – a new administration – about putting limits.

And remember, back then AIDS was a big deal as a disease. We were still trying to find diagnostics and therapeutics for that. So AZT was an NIH-developed drug. I was in the office of tech transfer at that time. So it was this beginning – this huge political issue. It was a senator from Arkansas, Senator Pryor, the father of the latest Senator David Pryor but I forget his first name.

Mr. Pomper: Mark.

Hon. Delrahim: Mark Pryor was the son. David Pryor was the dad. And he – and then there was a young congressman at the time in the House side by the name of Ron Wyden who really made his name on this obscure committee called the Small Business Committee – Subcommittee of something else. But then he became a senator and now chairman of the Finance Committee and all that.

But they kept on holding all these hearings about taxpayer-funded drugs and the use. And so they wanted to mandate two things: The reasonable pricing clause, which meant that you set prices. You couldn't

set more than X amount. There was some kind of formula. And the second one was the march-in rights, which was effectively the government demand that you can't provide exclusive rights for the development if the government had any funding of it.

It went through this whole thing and then they realized – you know, Secretary Shalala, to her – and she had – I think she had been president of the University of Wisconsin at the time or something, had come in and she really figured it out and she shot it down, and there was a lot of political pressure to amend or effectuate the Bayh-Dole Act through regulation through the Department of Commerce to do that.

And now we're going through it yet again because, you know, somebody is affected. It was a terrible idea then because it removed the certainty for investment. Which pharmaceutical company is going to come and plop down 2 (hundred million dollars), 3 (hundred million dollars), 4 (hundred million dollars), $500 million to take some patent application or patented product into the whole FDA process to come up with a therapeutic or a diagnostic at the end of that if they know that if they blow, you know, $500 million in it then within, you know, two years they're going to march into the rights and take it away and give it to somebody else who can do it more cheaply.

They're just dumb policies and people will come around is my hope.

Mr. Pomper: So just to follow up on this, this TRIPS waiver is like this, too –

Hon. Delrahim: Or have the idea.

Mr. Pomper: – for these exigent circumstances, right? It's the seduction, right? It's the seduction. We're going to abandon our principles in order to solve the problem that's in front of us in the way that we think we need to solve it, but we're going to abandon our principles.

But, you know, we have those principles for a reason, right? They have guided us. They have led to the economy that we have and I, for one – maybe this makes me – I'm a Democrat but it makes me a conservative.

I don't think we should abandon principles. Anytime anybody tells you, oh, everything is different now – we got to throw out all those principles and, you know, that's – you got to be skeptical of that.

So I agree. Like, keeping the problem –

Hon. Michel: I used to be a Democrat.

Mr. Pomper: Yeah, I used to be. (Laughter.) I'm an old Bill Clinton Democrat, I'd say that.

So, look, I just – I think we – and we – I would say a lot of the issues that we deal with – China – fall into this same category where it's this seduction of wanting to be tough against our geostrategic rival but we do stupid things because we abandon our principles.

And I just – I really want the United States to stick to its principles.

Mr. Mossoff: Yeah. I mean, it all comes out of, you know, the adage never let a good crisis go to waste, right? And every time – and there's always going to be crises, right? Whether it's AIDS, whether it's the COVID pandemic, whether it's something, there's always going to be the pressure from particular people to abandon the system, abandon the rules. This time it's different. We have to change everything.

Mr. Pomper: And the rule of law.

Mr. Mossoff: Abandon the rule of law. You know, and the Bayh-Dole Act is a really great example of how the United States doubled down exactly on its principles at a time when there – we were – faced a geopolitical challenger at that time, a very different one. I mean, people – young people today will no longer remember the Soviet Union but I think all of us here are old enough to remember it very well, and when we used to think that hiding under our desks would actually help us if there was a nuclear war. (Laughter.)

And, you know – and there was a real – you know, in the 1970s, you know, remember Jimmy Carter and there's a national malaise and there was stagflation and there was a real questioning of, well, you know, what are we going to do. We face this challenger, primarily a military challenger, not an economic challenger, but a challenger at the time.

And as I always like to say, we didn't beat the Soviet Union by becoming more like the Soviet Union. We didn't say, OK, we're going to adopt price controls and to-down industrial policy and start dictating things. We doubled down on the patent system and on property rights. We adopted the Bayh-Dole Act, which promotes commercialization of new innovations through the patent system. We created the Federal Circuit to create more certainty and more stability to these national property rights that have long existed in the United States. And that's why we succeeded.

And I think that that is exactly the same type of lesson that we should be applying today. We should be doubling down on our system and fixing

it, not trying to mimic what this – what China is doing and what other countries are doing.

(Phone sound.) (Laughs.) Google is listening to me, I guess. (Laughter.)

Hon. Delrahim: Always listening.

Mr. Mossoff: (Laughs.) Shh! (Laughter.)

Hon. Delrahim: It's always listening.

Mr. Pomper: Always listening. (Laughter.)

Mr. Mossoff: I like Google. (Laughter.)

Ms. Simpson: Great. Thank you for that.

Well, I'd like to pick up on Brian's suggestion we talk a little bit about personnel and I'd like to circle back to something that was touched on at the very first question, which is, you know, the need for maybe more coordination of our national policy on IP.

And I thought it's kind of ironic we have a position that's called the intellectual property enforcement coordinator in the White House, and that position has been around for almost 20 years now and I was just wondering – I don't think there's been anyone nominated for that position yet in this administration.

But, you know, apparently it hasn't solved the problem of coordination yet. I was wondering if you have thoughts on that or whether that is the right approach to doing this.

Hon. Michel: You know, if somebody is labeled a coordinator watch out – (laughter) – because what it really means is that person has no real power at all. Not in charge of anybody, can't fire anybody, can't spend any money, but he's going to plead with people to be more coordinated.

Well, how is that going to work out? We know how it's going to work out. That position has been, largely, stillborn since it was created. Sometimes it hasn't been filled. Other times it's been filled by people very capable. Chris Israel is an example and there are others.

But it doesn't really matter because it's a nothing position. The secretary of commerce has power. The patent office director has subordinate power and other people around the government, but the IPEC coordinator really doesn't have any power at all. It's a staff position within OMB and it's subject to the OMB hierarchy.

So if we're going to count on that to give us great IP policy we're going to be sadly disappointed.

Hon. Delrahim: Used to be at the NEC. It used to be at the Department of Commerce when Chris was there. It was at OMB. It could have been – nobody wants it, and that's got to tell you something.

Now, again, personnel is policy and it really matters. If you have the right person in that they could turn it into something, especially if they have – their center of power comes from a certain place and they can then contact this agency, say, hey, you know what, you're going to do this and I want you to do this.

And, you know, like the people at the NSC might be able to do that within the broader national security apparatus. So it really depends on who it is, and – but I don't think we have done that. And some of the folks who have occupied that have actually – probably, I would argue, were advocates for weaker patent policy.

And so it really depends on who that is and how that appointment process goes that they put that in there.

Hon. Michel: Who, obviously, matters hugely because personnel is policy but I think it's also very important where that person is functionally plugged in to the other key actors in the government.

One suggestion that made sense to me was made informally that the innovation czar – I just make this up as – to convey the idea – ideally should be somebody who has a high position on the National Economic Council and on the National Security Council staff because both those things have to be fully engaged.

And as Makan correctly says, if the president of the moment – whoever it is, whichever party – stands behind somebody who's trying to coordinate or direct IP policy it will happen. But if it's just talk at any level by anybody it's going to just be talk.

Ms. Simpson: Well, I know we only have a few minutes left so I wanted to close by asking each panelist to briefly identify, first, the easiest action you think the new administration can take to strengthen American innovation leadership and, second, the toughest challenge the administration needs to start addressing to achieve the same goal.

So let's start with the Judge.

Hon. Michel: Well, I'd say that if the administration backed the three reform bills, particularly RESTORE, because if the right to exclude actually isn't the right to exclude then the incentive for innovation has gone right down the drain right there.

So whatever reforms we need I would put at the top of the list pass RESTORE. It's a simple, easily understood one sentence bill, reportedly written by Adam, brilliantly thought through. All it does is shift the presumption.

It says if you've proven infringement of a valid patent, so you're now in the post-trial phase, you're presumptively entitled to an injunction but the adjudicated infringer can come forward with evidence to show that it would harm public health, be unduly detrimental to that infringer, or some other equitable consideration which could be waived by the Judge and the Judge might deny an injunction.

But absent that kind of proof the injunction should follow as it always did traditionally for 240 years. So we ought to get back to the right to include being a right to exclude, which means an injunction except in exceptional circumstances proven.

Mr. Mossoff: Well, I will just incorporate by reference everything that Judge Michel just said, to keep us moving along, and he said it far better than I could. So –

Mr. Pomper: I would say it a little bit differently but I was going to also talk about these bills.

One thing that we have not seen since these bills have been introduced is an administration leaning in in favor. Just having the administration lean in favor, say positive things about these bills, spend some political capital, that would be an enormous sea change for these bills. So that's what I would really love to see.

And, look, we do have a secretary of commerce who himself is a patent owner and who's written about how important the patent system was to him personally. I'm hopeful that he will empower his U.S. PTO director and he himself and will in the interagency encourage this kind of activity on the part of the administration because that really would change the calculus enormously.

In terms of what's difficult I'd just start with what we talked about before is ensuring U.S. intellectual property rights overseas. Always a hard issue. I should have mentioned this. I mean, look, we were talking about China's IP theft and China IP problems when I was on Capitol Hill

25 years ago but we were also talking about Brazil and we were talking about Japan and Colombia and Turkey and, you know, a lot of countries have issues there. China is just the biggest economy where we have these kinds of issues.

So that's always been a perennial problem. It always will be a problem, and maybe there are creative ways to resolve them but it's going to continue to be a problem.

Hon. Delrahim: Easy things will happen when you actually try to do the hard things, on principle. I think it's about time for folks to shock the system and introduce and support criminalization of willful violation and infringement of patent laws.

We have that for copyright law. If you're – you know, if you're mass producing and stealing, I don't know, Disney's "Snow White" or something, you can be subject to criminal felonies. You should be subject to criminal penalties for violations of other people's intellectual property laws.

That's the best way to introduce a debate of morality into the system, and then you go – everything flows downhill from there.

Ms. Simpson: Thank you. Well, I'd like to thank our panel. This is a great conversation and, yeah, a lot for us to do. (Applause.)

Dr. Gupta: Thank you, Jamie. Thank you, everybody.

I just took a shortcut. I just wanted to thank all the panelists here. Thank you all. And for all our participants today who came in person and those who were listening and watching at the live stream thanks for tuning in.

We have a cocktail hour outside. It's time to mingle, get to know each other a little better, and we'll be back soon with the next programming details. Thank you all.

(END.)