

Center for Strategic and International Studies

TRANSCRIPT  
Event  
Leadership 2024  
**(Panel III) Architecting the Future: Call to Action for  
Innovation Policy**

DATE  
**Tuesday, April 9, 2024 at 1:15 p.m. ET**

FEATURING  
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**Kate Hudson**  
*Associate Vice President and Counsel for Government Relations and Public Policy, American  
Association of Universities*

**Judge Paul Michel**  
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**Brian Pomper**  
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**Judge Randall R. Rader**  
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Kirti Gupta: Welcome back from lunch, everyone. And to lure everyone back from lunch, this is my favorite panel. Don't tell anyone. (Laughs.) But it's about "Architecting the Future: Call to Action for Innovation Policy." There are, as you know, many legislative proposals on the table today affecting IP and antitrust competition. And there's – the question with this panel is about whether there's more or less needed for a holistic innovation policy.

We have a star panel. Let me just hand it over to my friend Holly Fechner here, who serves as one of the steering committee members for leadership for some time. She's a partner at Covington and Burling, and the cochair of the technology practice – group?

Holly Fechner: Industry Group.

Dr. Gupta: Technology Industry Group. (Laughs.) I'll get it right eventually. And she's worked in many capacities in the past, including for Senator Kennedy and also teaching at Harvard's Kennedy School for Policy.

With that, Holly, the floor is yours.

Ms. Fechner: Well, thank you so much, Kirti. What a pleasure to be here. And, Kirti, thank you for your leadership. It's really tremendous to have Leadership here at CSIS. And we've got an amazing panel to talk about innovation.

So, I'm going to start by introducing our panelists, and then we'll engage in a robust conversation. Be sure to be thinking about what you'd like to ask our panelists later. So first, to my right, is Kate Hudson. Kate is the associate vice president and counsel for government relations and public policy at the American Association of Universities, where her portfolio includes intellectual property, technology transfer, open and public access, data privacy, and copyright issues. So, thank you so much for joining us, Kate.

Next is Judge Paul Michel. Judge Michel served at the U.S. Court of Appeals for the Federal Circuit for 12 years, and as its chief judge for the six years before retiring from the judiciary in 2010. Since then, we have benefitted because he has spoken regularly about the need for a stronger patent system, publishing dozens of articles and filing numerous amicus briefs before the federal circuit, the Ninth Circuit and the Supreme Court. So welcome, Judge Michel.

Next, we've got Brian Pomper, who is a partner at Akin Gump, where he represents companies before Congress, the White House, and federal agencies on a diverse set of public policy issues. IP being most important for our purposes today, but also trade, investment, and international tax, and customs issues. Formerly, Brian worked for the chair of the Senate Finance Committee, Senator Max Baucus from Montana. Welcome, Brian.

Brian Pomper: Thank you.

Ms. Fechner: And then joining us remotely, we're so honored to have Judge Randy Rader. Judge Rader served on the U.S. Court of Appeals for the Federal Circuit for 24 years, the last four where he served as chief judge. Since leaving the bench in 2014, he has continued to advocate for improvements to innovation policy. And he has taught at leading law schools all around the world, from Tokyo, to Munich, to D.C., to China. So welcome Judge Rader.

Judge Randall R. Rader: Thank you, Holly.

Ms. Fechner: So, panelists, our topic here is about innovation policy. And we know that there are so many tools that Congress and the administration can use to develop and implement innovation policy. There's tax policy, investment, education, immigration, of course, our favorite, IP. Industrial policy seems to be a topic of the day. How would you grade our public policy officials on our current innovation policy? Brian, do you want to start with that? (Laughter.)

Mr. Pomper: You're killing me. (Laughter.) OK, how would I grade them? You mean, how would I grade all my friends in this democratic administration? (Laughter.) As I sit here –

Ms. Fechner: We're not going to tell them, OK? We won't report the grade.

Mr. Pomper: OK. Yeah. OK.

Audience Member: Please be nice. (Laughter.)

Mr. Pomper: I mean, it's hard to do a letter grade. I would say, look, in some ways, I think some of the industrial policy that you mentioned – the CHIPS act, for instance – probably not a terrible idea in concept. Remains to be seen if it will be successful in practice. And I think the goal of the administration was not necessarily – not necessarily to have an industrial policy where they were going to create this chips industry totally with federal money, but to send market signals to try to get the private investment community to kind of piggyback onto the, in some respects, seed money that the administration put in place. So, I think in that respect, it's – those are probably good ideas in areas where we really compete with China.

And really, my substantive expertise, as many people know, is really international trade. And that's the vision through which – or, of the lens through which I think about all of these issues. And so competing with China,

as China has specifically identified certain target areas, including semiconductors and biotechnology and AI and quantum computing, we need to have policies in our government to, you know, try to compete with the Chinese on that. And maybe this one particular industrial policy is one of them.

In other areas, I think they do a terrible job, and specifically, with respect to the IP system. I think this administration seems to really kind of lean hard into the antitrust, anticompetitive elements really across the board. And I think that lends a certain suspicion for – with respect to patent rights, which are in limited time limited monopoly over, you know, the ability to use this particular invention. And I just think there is a certain degree of skepticism in the administration. And I think it doesn't help that politically the pharmaceutical industry, which, of course, relies quite a bit on patents, is kind of in the crosshairs of this administration on a variety of levels. March-in rights, I know, Judge, you're likely to talk about that and you've been quite active on that as well.

So, look, I give it a pretty mixed record, maybe leaning more negative than positive to be candid. I could talk about immigration, which I think is a very important one. I think they've done a better job there, at least they've been trying to. But I'll stop talking and let others speak.

Ms. Fechner: Well, Kate, Brian mentioned the CHIPS and Science Act. And I think so many of us are very familiar with the chips part of it, right? The over \$50 billion to invest in domestic chip manufacturing in the United States. But the science part doesn't get quite as much attention, or funding, as it should. But tell us more about the science part of CHIPS and Science.

Kate Hudson: Right. So, I'm also not going to give a letter grade. (Laughter.) But I would say if you're asking me today, right now where we are in the budget cycle, it's pretty disappointing to see the CHIPS and Science Act be passed and authorized, and be just an incredible piece of legislation, and then just fall through on the appropriations. Sitting in the university space, using those federal funds that go to this groundbreaking research, we can't get that momentum going if the funds are not appropriated. And it's just, you know, a basic budgetary issue.

The science agencies are not immune from the larger conversations about kind of our defective budgetary process, if I can be so bold to say that. But the problem is that these stops and starts, this kind of schizophrenic nature of it, doesn't allow us to build that momentum on the promises and the good decisions that policymakers are doing, right? We've got immigration on one hand. We've got the science funding on the other. And it the stops and starts, we make progress and then we shoot ourselves in the foot with something like the march-in framework, right? So it feels a little disjointed.

There are really great ideas that went into the science portion of CHIPS and Science. There are great ideas that were left on the cutting room floor which I am really – both myself and my organization in my member institutions are really wanting to see almost like a CHIPS 2.0 bill, and some of those great ideas get picked up and carried on. But right now, it's especially frustrating seeing the science portion not come to fruition in the way that it was really envisioned.

Ms. Fechner: Kate, tell us more about what was – what is in the science provisions of the act, and also the ideas that AAU hoping to get in, and what might be part of an innovation 2.0 type bill. What would that mean for innovation policy in the U.S.?

Ms. Hudson: Well, I mean, there are landmark authorizations and increases in appropriations for the existing science agencies. But really starting to link up the science with the commercialization aspect of it to fund specific programs that already exist, like at the Department of Commerce, EDA, the Economic Engines Program at NSF, the TIP Directorate. Those are really pieces that we are really hoping get fully funded both now and into the future. The NSF – the cuts just to NSF were particularly disappointing. I know that – I know that many in the NSF were very disappointed by it, not just – not just the university space. But there are great people and great research projects to fund. And it's – I'm a broken record here. We're a little disappointed, as you can tell. (Laughs.) We're a little frustrated.

Some of the ideas left in the cutting room floor of science, for example, the idea act. (Laughs.) Which would be a great low-hanging fruit to pass, and we can talk about that more later. But in terms of the science portion of it, really marrying up – really marrying up that – the fundamental research that's being done to that commercialization aspect. There's many – like bulking up the SBIR, STTR programs in every government agency would be something that we would want to see. There's orders of magnitude. Those programs are successful. They're a proven success. And they should be expanded and moved to scale. That's something that has proved its worth that we would be really interested in seeing more of.

Ms. Fechner: Randy, you have spent a lot of time in many other countries. And would love to hear your thoughts on U.S. innovation policy, compared to some of those other countries. And, for example, with things like CHIPS and Science, are we just trying to copy China? (Laughter.)

Judge Rader: Well, thank you very much, Holly. The one place where I am actually a full professor of law is Tsinghua University in Beijing. And I am called, on multiple occasions, to give advice to a different government. (Laughter.) But I can tell you that there is a warning that needs to sound in all of our ears.

The president of China, President Xi, speaks on intellectual property and innovation policy two or three times a year. And these are not passing references. These are full speeches in which he enjoins their multiple intellectual property courts. We have one, the federal circuit. They have at least 29.

And they are motivated to bring their government into the leadership in the world in innovation policy. They will stop at nothing in terms of government funding. They will stop at nothing in terms of trade policy. They will stop at nothing in terms of making their patent law stronger than ours. And, indeed, if I had one voice of warning, it would be, I hope that we understand that this is a competitive enterprise we're involved in here. And right now, we're not winning the race.

Ms. Fechner: Paul, this is your chance to grade our policymakers. What do you – what do you think?

Judge Paul Michel: When I was on the bench with Judge Rader for 22 years, it always frustrated me when a question to a lawyer at the podium presenting a case would never get answered. (Laughter.) So I want to answer your question directly. (Laughter.) I'm going to piggyback on a study that was commissioned by this new organization I'm affiliated with called C4IP. A very detailed, empirical study. Which concluded, looking at all the people in Congress – 535 members – that only about a dozen were engaged at all in a meaningful way. About half in a positive way and half in a very negative way. And so this study evaluated the pluses and minuses of all 35. And said the average grade for the Congress, C-minus. So that's the first part of the answer.

The second part of the answer is if we focus on the policymaking going on in the executive branch or the courts, as distinct from Congress, D-plus. Appallingly disappointing and harmful to the country. And I'd like to pick up on just one thing my former colleague, Judge Rader, said about the determination of China Enter to eclipse us – I guess I shouldn't use the word "eclipse" this week, but –

Ms. Fechner: (Laughs.) We need some glasses.

Judge Michel: But they already are making huge headway in surpassing us in numerous technologies, pulling even with us in others, particularly the most important, sensitive new technologies of the new century. So, for example, there was a very detailed empirical study done with State Department funding, by our State Department, by the way. But it was done by an Australian think tank. An enormously complicated, empirical study. It concluded that in 44 of the most advanced technologies, China was already ahead in 37. Thirty-seven out of 44. So when Judge Rader says the warning bells should be ringing in the ears of all of our policymakers, he couldn't be more right.

And when I step back and think about innovation policy, I don't think America really has an innovation policy – a single, integrated, practical blueprint for how to make advances in technology. I would say we have a half a dozen – no, more than that – a couple dozen agencies tinkering with innovation in different ways. And with respect to intellectual property, and particularly patents, often working at cross-purposes from one another. So we know we don't have a unified policy, we have conflicting policies from agency to agency, and sometimes from administration to administration. And that has to end. We need an integrated, practical national innovation policy. We need to put huge resources behind it.

And not actually mainly government resources. There are a lot of different numbers and a lot of different studies, but I'm going to use an intermediate number because I think it's easily defensible. Economists say that for every dollar of federal government investment in science and technology – and they're important. We've needed them in the past. We need them now. We need them more than ever. So every additional government dollar, great. But the studies show that for every federal dollar that gets spent, the private sector has to spend \$160. So overwhelmingly, where the fuel for innovation comes from is the private sector. Established companies, startups, small companies, venture capitalists, and all the other players.

So then the question, and this goes back to the debate in the earlier panel about can we associate patents with incentives. And Brian (sp) and Bill Wichterman went back and forth on this. But the effect of strong patents is to increase incentives to take big risks, to make big investments, to stick it out with multiple investments over the years. A lot of these technologies take a decade or more to mature. They can cost billions of dollars to perfect. So it's going to take a whole lot of money.

This country is blessed with enormous talent, in national labs, in private universities that focus on research, in hospitals, and all kinds of other institutions. We have the tech talent. What we don't have is adequate monetary investment in the technologies that count the most. So it seems to me that that's the reason we need a better strategy, because we need to free up all that private money. There's ample money. There's four times as much venture capital money today as five years ago. So the money is there. But it's not going to be devoted to hard technology if the patents aren't reliable and robust, and the outcomes aren't predictable. It's going to migrate into other, less-risky ventures.

And it already is. Like, you know, building casinos, or hotels, or opening up restaurants, or all kinds of other things. They're worthwhile in and of themselves, but on a priority basis they can't compare with defense technologies or technologies vital to human health. So we have a lot of work

to do. And, lastly, I'd like to say I'm so happy to be on this panel. Not only with allies like Holly, and Kate, and Brian, and my former colleague, but to just be here at CSIS. This is one of the most exciting developments in the 14 years I've been working on patent policy since I retired.

CSIS has enormous credibility, enormous talent, huge connections, and on and on and on. And Innovation Alliance, Holly and Brian, another very valuable, active player for a long time, getting stronger all the time. Leadership is a spin-off of – at least the way I think about it – or a subsidiary of IAI. However, you want to put it. And as I mentioned, we have this new organization that Iancu, and Kappos, and Judge O'Malley and I are affiliated with, that's called C4IP for short. The Chamber of Commerce has gotten seriously involved. Again, a new development. So, the landscape has changed hugely in the last few years. And it provides a lot of hope that we can and will deal with what's an appalling landscape of bad policy.

Ms. Fechner: So important, I think, to acknowledge the infrastructure needed and the coalitions needed to really move public policy forward. So, appreciate those thoughts about how that landscape has been changing in recent years.

Brian, we are living in such an incredibly politically polarized time. I mean, just think about the Democrats and Republicans in Congress. And, frankly, voters, right? Voters that align with one of our presidential candidates or the others. But one issue that most members of both parties seem to agree on really does have to do with creating public policy responses to our economic and national security risks related to China. We've got – the House created a special committee, the Select Committee on this CCP, to try to deal with these issues. Has no legislative jurisdiction, but they have developed various bills. And some of those bills have actually moved forward.

How does this dynamic – this sort of unique issue where Republicans and Democrats seem to agree on something – how has that affected innovation policy?

Mr. Pomper: Well, I'll tell you where I wish it would have affected. (Laughter.) But I don't think it has been. It's hard in public policy. And those of us who work in politics, it's often the issue of the moment. And it's harder to think about a longer-term horizon. The way I have long thought about the patent system generally, but innovation policy more – patents specifically, innovation policy more generally, in the United States – and this, again, relates all to China. So I appreciate all the comments folks have made. Is, what, the Chinese have essentially a command-and-control economy, right? The leaders can snap their fingers and invest \$50 billion here and \$100 billion here. Like you said, Judge Rader, they will stop at – no investment is small – is too large, really, for them to try to leapfrog the United States and gain global dominance in the industries of the future.



We don't have the ability to do that. CHIPS and Science is great. Fifty-two billion dollars, that's wonderful. We can't even appropriate that amount – the amount that we authorized. But even that is a drop in the bucket compared to what the private sector can truly invest in these areas. And so how do we in the United States make sure we can compete with China which, again, can just direct the money to flow where it wants? We have to have the right policy architecture to make sure that private companies have the incentives to invest where we want them to invest. And I've always thought that the patent system is one of the critical components of that innovation architecture.

And, boy, I got to tell you, we are screwing that up. I mean, just as Judge Michel said, where, you know, it's not clear if you can patent specific inventions, or if you do patent them they can – you know, big, deep-pocketed rivals can just litigate you to death before the PTAB. You can't enforce your patents, because injunctions are hard to get now for a variety of folks. So really, there are – there are really things that we need to pay attention to. And I know many of the folks in this room have for many years been working on all of these issues, and gradually, slowly, painfully, we've made a little bit of progress. Whereas I feel like when I first started working on these patent issues 16 years ago, horrifyingly, I feel like we were very much on the defense. Holly, we were in the trenches together at the time, and many others.

Now I feel like we fought to sort of neutrality. And I feel like we are a little bit more on the offense now. So slowly, we do make progress. But I really do think policymakers should think about the innovation ecosystem not in a vacuum of, oh, patent trolls and inefficiency in the system and, frankly, stuff that I think is just total noise, and think about the broader picture of how do we make our economy in a situation where we can really compete against the threat against China. And, again, I think the patent system is a key component to that.

Ms. Fechner: So I'm going to open this up to anybody who's brave enough to take it on. But we are in an election season. We've got a presidential coming up. And it appears that we're facing the same choices that we faced in the last election. But as we think about that election and the various innovation policies that President Biden has enacted and what he might do in a second term, and what former President Trump did when he was president and what he's talking about now doing and what he might do, how would you compare and contrast their innovation policies? What do you think we can expect from either of them in a second term? Who's brave enough? (Laughs.)

Judge Rader: Well, I'll start out a little bit here, Holly.

Ms. Fechner: Oh, thank you, Randy.

Judge Rader: The two statements that I've heard today that have resonated the most with me are Judge Michel saying we don't really have an innovation policy – and he's entirely correct. The other statement that has resonated so much with me is Brian's accurate observation that in our free economy the only way we can generate the capital, the income, and the drive to improve our inventive and innovative capacity, is by giving incentives. We can incentivize the creation of capital. And that happens nowhere better than in the patent system, where if you invent something, you can, indeed, obtain a limited, exclusive right. And that can incentivize you to propagate your technology, to develop it further, to render it available to the marketplace – which, indeed, stimulates a whole second round of innovation as people take that new technology and improve it.

But I think Judge Michel was, again, insightful in saying the grades that have to be given for our patent policy have been, I think you said, D-plus in the judicial category, Judge Michel. And I echo that. I think he's right. We're simply going to need a new president who appoints pro-innovation judicial officers. We are going to need a president and a new administration who, like Trump in his trade policy, took on China and put restrictions on their goods until they would comply with importing ours. And, indeed, by the way, the other major portion of that trade agreement was an intellectual property section that created a Hatch-Waxman Act in China. A tremendous move forward.

We're going to need something of that nature – an aggressive, very cognizant awareness that we don't have an innovation policy yet. But if we don't get one, we're going to end up not in second place but, as the Bloomberg survey shows, we're currently in 11th place in the world in innovation policy.

Judge Michel: Holly, you know, there's another perspective that I'd like to add here. And that has to do with the proper role of judges in our democracy. Judges are unelected people. And seems to me axiomatic at the most fundamental level that broad public policy, including on innovation, including on patents, including on all the sub issues like eligibility and injunctions and so forth, should be made by the elected representatives of the people – that's the Congress – not be made by judges. For many reasons. It's undemocratic, number one. But, number two, the competence of judges to do well is very limited. Most judges have a very limited understanding of business economics, financial incentives, venture capital, how startups work, how to advance all the kinds of things that people in this room are quite expert in.

So judges may be the least competent of the three branches to be making innovation policy. Even worse, when the innovation policy has been made by the Congress – take eligibility – the eligibility section of the Patent Act is over

200 years old. It was written by Congress in clear terms, to my eye. The Supreme Court came along and rewrote it, because they didn't agree with the policy behind it. That's not a proper judicial role. That's a congressional role. Of course, courts have to apply and interpret statutes at the margin, or regulations where it's a little unclear where the individual case falls compared to the border line. But on a broad policy, it should be made by people who are responsible to the voters, especially the Congress but also the executive branch.

And of the three branches, in my opinion having served 22 years on the federal circuit and watched this up close, the judiciary is the least capable to be doing good innovation policy for our country. Now you can say, well, OK, fine, but the Congress is hopeless. It's so dysfunctional. They fight about everything. They can hardly legislate anything. There's some truth in that. But the Congress is not hopeless. It's worked many times in the past. It's risen to many emergencies. It's greatly improved the system at various intervals. The federal circuit creation was an example. The Bayh-Dole Act was another example. Judge Rader mentioned is that Hatch-Waxman Act, that he had a role in personally. Another great example. So Congress has and does do great, positive things that drive better innovation. And they can do it again.

Now, here's the problem. Here's the disconnect that I see. If you ask 535 congressmen walking down the hallway, are you for innovation, do you support innovation? They would all say yes. But if you ask them, do you support strong patents? Huh? What does that have to do with innovation? They just don't see the connection. And that's because they don't understand the money flows. Low incentives, low flow of money, low innovation, low competitiveness with China – and other nations, as Judge Rader says. Not only China. We have commercial rivals in Europe. Yes, they're our allies on strategic matters, and they're democratic to a great extent – 17 countries, and 24 are in the broader group of European countries. But they're also competitors of ours.

And they're doing great. They just created a new court. Judge Rader talks about the Chinese creating all kinds of new courts, which they have, including one that's sort of like the federal circuit. All kinds of specialized judges. Their trials are much faster. They're much cheaper. They routinely give injunctions when infringement is proven. All things that we used to do, we pioneered them, and now we've completely switched places with China. They've adopted the American patent system and we've adopted something to the opposite, voluntarily self-inflicted wound because of bad policymaking. I think it's that simple. And we can easily resolve it by educating the congressmen so they see the bridge, the connection between IP incentives and the flow of innovation capital.

Ms. Fechner: Let's explore that more. And I think both judges have given us a perspective on how challenging it's been for the judiciary to get this right. And in fact, the damage that they have actually done to the intellectual property system. But Kate, and Brian, and Paul, you know, you all work very closely with members of Congress on these issues. And I think one of the challenges that we face is that members of Congress, I think, do run away from patent and IP issues generally. They seem scared of them, or that they don't have the expertise, they don't want to deal with them.

And it's so interesting to me, because members of Congress deal with all kinds of very complicated issues. And, of course, they're all different. So some are better than other at dealing with complicated issues. But most wouldn't say, you know, I can't deal with the health care system because it's too complicated, even though the health care system is probably a lot more complicated than the patent system. But, Kate, how – you know, how can we better connect with members of Congress over the importance of these patent issues?

Ms. Hudson: I think, as a preliminary matter, spending that time with their staff is a huge first step. Just providing that baseline education with them about the system as it exists now, and the system moving forward, and ways to improve that. Taking that time with them. Obviously on the Hill there's a lot of staff turnover. Continuing to make those connections every time, helping to cultivate those allies and hopefully, those champions. It comes from the staff level. And any staffer will tell you that, right? (Laughs.) It comes from the staff level.

And when they are more informed about the bills that are passing over the desk, they can stop and say, you know, what? I actually know about this. I learned about the Bayh-Dole Act from talking to Kate. And I wonder what she thinks on this bill. So I get a call, right? But if I hadn't been there doing that baseline education, it would just be another bill in thousands that go over the desk, right? So that's a – that's a great first step. But also continuing to cultivate those relationships geographically with members of Congress.

In the university space, we say, you know, a lot of people don't like universities but they like the one in their district, right? So those kinds of organic constituency-based geographic connections are another way. The members of Congress who get it talk about what's happening in their district in terms of innovation and tech transfer. I recently heard Representative Flood talk at the Innovation Caucus meeting. And he knows exactly what's going on in his district in this space, and how – and is very informed on these issues. You can tell that difference because of what his staff has done and what his local constituency outreach has done to help inform him and make that a priority for him going forward.

That's a great model. Like, that just needs to happen over and over and over again. Congress needs to know that that link between innovation policy, and economic security, and national security is a straight line. They need to make that connection. That's something now that, to add to Brian's comments, you know, this moment with China, where the focus is very much on the competition with China, has crystallized for a lot of members. They don't know what to do.

And so when we're coming to them and saying, you know what would really help is strengthening the patent system. You know, what would really help is if we are research – if we are bolstering the federal research dollars in these critical and emerging technologies so that we can keep pace or hopefully maintain dominance. We need to be the gold standard for standards, right? We can't cede that field to other countries. So that's crystallizing for a number of members of Congress. But there's a lot of work to be done there to make that tie all the more clear, especially out in the public narrative as well. Members of Congress are starting to understand that, but there's a lot more work to be done.

Ms. Fechner: Brian, every member of Congress can talk about theft of U.S. IP by China, right? They all raise that. But they don't seem to understand IP theft in the U.S. What is the disconnect?

Mr. Pomper: Yeah. It's funny, I usually make this joke – many of you have maybe heard me make – that most members of Congress can't spell IP, you know? It's true. It is a topic that I think they shy away from. I don't know why, to your point. You know, it's funny, I remember – if folks ever read Al Franken's book – I think it was called "Master of the Senate." There's a line in that book where he says, of all things the topic that I've been most lobbied on, that I've spent the most time on, and most people come to see me about, is the patent system. Which I thought that was sort of funny, having been one of those people at the time. (Laughter.)

I don't know. I mean, I think a little bit of this is a legacy hangover from the birth of the internet. And what I mean by this is it gave rise to some very large companies who are very innovative – large, American companies – who are patent implementers. And I think they were very vocal and active when we started working on this together, Holly, in the early 2000s – early to mid-2000s. And I think they're the ones who propagated the patent troll narrative. They sort of – they really captured the imagination. I think this is part of the reason why some judges twisted the – they wanted to. That old adage hard cases make bad law. They sort of felt like, my God, there's this terrible patent troll problem. We need to – I need to play my part in tamping it down.

I think that moment has passed. I think the bloom is off the rose for a lot of those companies. And I think many policymakers now see them for what they, who are very large, arguably monopolistic, players in the system, who were using their very large wallets and power to really kind of preserve their incumbency. I always thought, even at the time, that, my God, the patent system is such a great leveler for the small companies going after these very large companies. You know, you think – to be able to sit across the table, you need to have a strong patent. But Congress wasn't all that interested in it.

So, I think to a certain degree members still think about this patent troll narrative, which is still out there. And there's no doubt, right, there are inefficiencies in the patent system. There are inefficiencies in any system. The secret is not to, like, kill the goose that lays the golden egg by trying to go after those inefficiencies. And I think that's really where a lot of members were focused for a long time. So, I mean, look, I think the tide has slowly started to turn. I do worry about this real focus on competition that this administration has, and that many in my party have really embraced. This large FTC event yesterday. I understand patents were part of the discussion. I haven't had a chance to look at that yet. But it's that kind of marrying, like the competition angle with patents, I think there's much room for mischief there. And I worry about that being kind of the next wave that we will have to fight back against.

Judge Michel:

You know, I think a lot of congressional impressions and behaviors are basically a function of how many times have they heard this message. The patent troll narrative was blasted for 20 years, 60,000 times every year. So it's penetrated the deep brain of members of Congress, a lot of people in the media, people in other institutions. So that's a lot of momentum to have to overcome. And it's going to take time. But I'm actually optimistic in the long run that we'll get major IP reform, better innovation policy, and stronger patents. Part of the reason is that there are new allies.

I quickly mentioned C4IP, Chamber of Commerce, and CSIS. But there are many others too. Licensing Executive Society is very active, the Association of University Technology Managers is very active. Mike Waring, who's here, just mentioned to me that 100 different universities, 100 different significant universities, big employers in every congressional district, sent in letters opposing the march-in framework. That's powerful. That didn't happen before. And the Association of American Universities, represented here by Kate Hudson, they were, at some points not helpful, at other points, missing in action. And now they're full tilt helping with improving innovation policy. So lots of new allies. Lots of new people.

And so in the long run I think, you know, we'll do pretty well. It may take some shocking breakthrough by China to really shake the hell out of members of Congress. But it will happen. And there are other things that are

pushing them already in this direction. I actually don't agree with the thesis that patent law is too complicated for politicians and their staff. I don't agree with that. They don't need to become experts in every little doctrine of what's a non-obviousness or not. They just need to understand the financial realities of patent incentives. If they get that, the rest is sort of irrelevant.

So it's a doable project to get them to a point where they'll support strengthening the patent system. It's not some pie in the sky wishful thinking by people like Judge Rader and me. It's a realistic goal. You know, will it happen in the next six months? No. Will it happen in the next few years? For sure. Will it happen fast enough? That's the real question. Because China is surging. Our friends in Europe are surging. And we need to pick up the pace right away. If we can strengthen the patent system in a couple of years, we'll be all right. If it takes six or eight years, we won't be all right.

Judge Rader: Holly, I think you started us on this discussion by asking, what should the next president do, or what would we expect from them? Well, I really hope – whether it's President Biden or President Trump – that they'll call the speaker and the majority leader to their office. They'll say some of the things we've said today. We don't have an innovation policy and our nation stands to suffer greatly if we don't make corrections, starting with the patent system. And I'm calling upon you to take my blueprint, that he can ask Paul to do for him – Paul will do that just happily – and move forward. But I think it's going to need that leadership at the top. President Biden or President Trump, whoever it is, they need to call on Congress to act.

Judge Michel: You know, we have a chief something-or-other officer in every organization, public and private. But we don't have a chief innovation officer for the United States of America. How dumb is that? We obviously need one at the top level, a well-informed, well-staffed, well-financed person with power to coordinate the work of the 20 or 30 federal agencies that are active in this space. That would be a starting point. And then we need a real policy to be framed out and implemented.

Ms. Fechner: I mean, I would expect that the head of the National Economic Council thinks she is the chief innovation officer. But I don't think it has historically functioned that way.

Let's get into some of the specifics about changes in patent law that would really make a difference. Some of the bills, some of the potential court cases. Randy, what do you think is the most significant change in patent law that Congress could make that would improve innovation policy in the U.S.?

Judge Rader: Well, I'm going to go in a little different direction and say what we need to do is something Judge Michel mentioned earlier. If you win an infringement action, you should get an almost automatic injunction. There is no question

that the remedy for trespassing on property is to remove the trespasser. And I think I'd start there, and say if we have a proven infringer, they're entitled – except if there's some danger to health and safety – they're entitled to an injunction.

Judge Michel: You know, I mentioned how China injunctions are practically automatic, but it's also true in Europe. So both our strategic rival and our commercial – main commercial rivals, they give out injunctions. And we hardly ever do anymore. It's just bizarre.

Ms. Fechner: Brian, do you want to talk about where this issue stands in Congress?

Mr. Pomper: Yeah. Well, let me first just say I've often sat in the role of moderator for panels like this. And, Judge Rader, to your point, when I ask, what's the one change you could make to the patent system that would have the greatest impact, it is always injunctions. Everybody. Every single person says, we need to fix the injunctions. So where does it stand? I think this has been a difficult issue in part because I think, again, going back to this – the patent troll narrative, there has been this concern, like well, aren't we just giving patent trolls some ability to extract, you know, money out of – for weak patents, that sort of thing?

Again, really missing the forest for the trees, in my view. To your point, Judge, if a patent is the right to exclude others from using the invention, what on Earth is a patent if you cannot exclude others from using the invention? I truly – and it's a serious question. I don't understand it. It really – it becomes a compulsory license in some respects where you're really just arguing over price when you have no leverage because you can't stop them from continuing to use the product. So it's insanity. It's a crazy thing.

Where does it stand? I think there are members who are starting to understand this. I believe there are members who are contemplating a legislative solution to try to bring the law of injunctions back to where it should be, after the Supreme Court – really, the Kennedy Concurrence in eBay in 2006, that lower courts really picked up, has really screwed up the injunction ecosystem.

Ms. Fechner: Yeah. Well, and, Kate, I think the next issue that's going to be particularly relevant legislatively is the PREVAIL Act, having to do with PTAB. I think people are familiar that the America Invents Act created this administrative process which, as we've seen, has suffered many different problems over the years. So, tell us more about the PREVAIL Act and the outlook for that bill.

Ms. Hudson: So, PREVAIL is gaining momentum. We can all cross our fingers, right, and knock on wood. I think that the messages of many of us in the coalitions that have been working together are resonating, and it's making sense to them



that we can't look to the Supreme Court to fix these. There's a myriad of issues, obviously, in the patent system. But specifically, with regards to PTAB issues, we can't look to the Supreme Court to fix that. We need a legislative solution. That message is resonating. Counting noses for votes, were hoping to have a mark-up very soon. Hopefully, it moves in the House as well. But this is gaining more momentum.

And it's been an opportunity to open that door, like I said, with staffers. And this is just one of a bevy of IP-related legislation that's coming through. And really tying it to other parts of the innovation ecosystem has been a message that also resonates on the Hill with members and their senior staff. So we're very hopeful that that momentum continues and that we get that passed.

Ms. Fechner: So, pay attention, because we – as Kate said – we do expect the Senate Judiciary Committee to consider that bill soon. So hopeful that there will be some progress in the pro-patent direction in Congress.

But speaking of the damage that the Supreme Court has done, Paul, let's touch on Section 101 and subject matter eligibility. And, again, we've got our champions – Senator Tillis and Senator Coons – leading the charge on very important legislation in that area. So tell us more about what the bill would do and the outlook.

Judge Michel: Essentially, it would correct four errant Supreme Court decisions of the last decade. They go by shorthand by the names of the four cases, Bilski, Myriad, Mayo, and Alice. Would basically abrogate those errant precedents and would substitute a restoration of Section 101 to be understood the way Congress wrote it. One of the things the Supreme Court did – the worst of the four cases, in my view, being Mayo – was to intermingle eligibility – the question – initial question in a patent examination – with the other conditions, the other hurdles that applicant has to overcome. So by mashing them all together, they just made a total mess. That was the word used in the hearings years ago by David Kappos. And it's actually a quite a good description.

So, the bill would basically erase the bad decisions, put the law back where it was as of 2009, and reassert congressional control over the whole subject of innovation policy and eligibility for patents, assuming all the other tests are also met. And it clarifies that the courts are not to make up new exclusions. That the only exclusions from eligibility are going to be those Congress has legislated that are right in the bill. So the PERA bill, the shorthand for this eligibility reform bill, lists five specific exceptions. And they're roughly similar to the pre-Mayo exceptions that the courts have recognized.

So, it gets the courts out of the business. It puts Congress back in the business, back in control – as I think it plainly should be in our democratic

system. And it provides clarity. There are two terrible problems with eligibility. Number one, it's way too restrictive. There are, like, whole industries that have been decimated. The medical industry that came up around diagnosis has been destroyed by the Supreme Court cases. There's clarity there. It's predictability. It's all not eligible. (Laughter.) In all the other technologies, it's not predictable. So what does that do? That increases the risk of the funders. So they stop funding as much as they otherwise would because they can never tell in advance, will this patent stand up against the eligibility attacks or not? So unpredictability is a problem for many sectors, and too much predictability for medical technologies. And it's just a disaster.

The bill maybe isn't perfect. All bills change as they go through the legislative process. PERA undoubtedly will have adjustments. Hopefully, improvements. I would say, probably improvements. But something has to be done with this problem, because it is killing innovation and assessment. And innovation and assessments are what we need much more of, very fast, not less of. So, I'm very hopeful that this bill will get – it has a lot of opposition from all the people who now are able to get out of a patent infringement case at step one really cheaply by screaming: Ineligible, ineligible! And a lot of judges fall for it, sometimes without even any evidence or without even defining what the patent claim covers and doesn't cover.

So, it's just become a nightmare. And it would be well ended by this bill, or some variation of it. But the people who want a free ride on other people's patents are fighting it like crazy. They have a ton of money. They have scores of PR firms, scores of law firms, scores of lobby firms. And they inundate the Hill every day to try to scare members: Don't mess with this patent stuff. It's dangerous. It's controversial. You're going to have a lot of trouble. You're going to lose votes. You're going to lose funding support. You better watch out. It's the third rail. Stay away. So they basically use a scare tactic. And it's worked all too well to slow down the progress that the PERA bill otherwise would have.

And you can even see a difference between PERA and PREVAIL by who the sponsors are. In the case of PERA there are only two sponsors – Tillis and Coons. Two very well-informed senators exercising great, sober national interest leadership. But the PREVAIL bill is sponsored not only by them but also by Senator Hirono and, very importantly, Senator Durbin. Durbin chairs the full Judiciary Committee. He's the number-two official on the D-majority side of the Senate. He's very close to all the decisions made on that side of the aisle. So that bill has got a sponsorship that's much stronger than PERA.

A lot of work is being done, including by people on this panel and many people in this room, to get more support for PERA, and also more support for PREVAIL. And hopefully there'll be an injunction-related bill that's going to be coming in soon. It'll be called restore. And it would once again make

injunctions the norm when infringement of a valid patent has been proven. And what's holding it up now is the lack of a sponsor on the R-side of the aisle. But a lot of people are doing work on that. And they're well-informed people. Everybody on this panel has extensive congressional experience before their current jobs in law firms or associations, or people like Judge Rader and I go around and make trouble and pontificate about how to run the world. (Laughter.)

Ms. Fechner: Well, another area, Kate, where the U.S. could make great strides in terms of its innovation policy is just ensuring that everybody does have the opportunity to invent and patent. We see a serious underutilization of the talent we have in the country. Only 13 percent of patentholders are women. People of color all together are only 8 percent. So talk about an innovation policy. If we could make the policy changes needed, the changes in our education system, the changes needed to ensure that more of those people are inventing and patenting, that would go a tremendously long way to boosting our economy and to basically creating all kinds of inventions that haven't been created yet. Because people really do invent based on their own experiences. Tell us more what policies make the difference. For example, the IDEA Act, Unleashing American Innovators Act.

Ms. Hudson: Great. So that's low-hanging fruit right there. We could – the IDEA Act has already, you know, been vetted, basically for lack of a better term. And that would really inform our decision making – or, our policymaking with the USPTO, but also other agencies could use that data as well. So the IDEA Act allows for data to be collected about the demographics of individuals who filed for patents, right? That can inform the landscape – you can actually see the broader landscape. Right now, when you do research in that area you have to get it from multiple sources, you have to make some assumptions, right? You have to run the models. The PTO itself does research and they're like, yeah, this would be great if we had actual, like, master database to store this in. So the IDEA Act would be really great, low-hanging fruit, so that we could learn about the landscape to build those better policies in the future for more inclusive innovation.

We really have to – as part of a holistic innovation policy – we really have to talk about the lost Einsteins. We really have to address the fact that all of the research out there shows that exposure, exposure, exposure of children and young adults to innovation, to entrepreneurship, to inventorship makes the difference between whether a person invents or not. There are other demographic factors, but if they're not – if they're never exposed to it, that case is closed. And that can't just happen at the college level. We cannot wait for high school graduates to get onto my campuses to start talking about inventorship and innovation. We have to start earlier.

And so part of a holistic innovation policy would include education policy that would bring to bear, you know, the myriad of nonprofits and entities in this country already that go around and educate all populations on the value of inventorship, the value of innovation, teaching those kids at those little, you know, inventor fairs in seventh grade, right? That has real value. And, I mean, I would love to see a formal curriculum developed to be implemented then at the state level, at all levels from – you know, from kindergarten all the way through 12th grade, and then into the university atmosphere as well.

There are gaps in the university education as well in terms of, you know, you've got these great minds that are doing great, groundbreaking research. But they don't know anything about patents, right? And that basic – that baseline education, I'd love to see more universities implement, you know, an entire course around just that innovation aspect of it. You're studying all these great, groundbreaking things. But if you're not thinking about what to do with them, right, it could languish. And academia is not the only career path, right? There are – there are many career paths for people who are inclined to be an inventor. You don't have to stay on a campus.

And so those kinds of initiatives, along with informing our policymakers, using that kind of landscape data, I think will lead us to better policies in the future and bring more people into the innovation ecosystem itself. Like you said, representation matters. And people invent based on lived experiences. We can do nothing but foster inclusive innovation that is just going to bring to bear so many more of those lived experiences to solve both the small and the large societal challenges that we face. And so any policy, any innovation policy, I think would be remiss if it missed that lost Einsteins angle.

Ms. Fechner: Well, now it's your turn. So, I hope folks have thought of some questions. Who has a question for us? Yes. And I think there's microphones. If you could just say your name and ask your question or give your comment.

Audience Member: Thank you.

Ms. Fechner: Is that on? Thanks.

Audience Member: Thank you. Good afternoon. My name is Michael Cha-kim.  
I think Judge –

Ms. Fechner: Michel?

Audience Member: No, actually –

Ms. Fechner: Rader? Rader.

Audience Member: – Rader would be – has the most experience on this question. But if the U.S. economy and economic law allows large companies that dominate certain industry sectors and raise the cost of market entry for small firms, what about the PRC, particularly equally large firms in the PRC like state-owned enterprises, which are directly linked to Beijing? Would they also stifle domestic innovation and raise the price of market entry in their centralized economy? And if the PRC does something similar in stifling innovation, would that practice spill over into international markets? Thank you.

Judge Rader: Well, I think the main point remains the one that Brian made earlier, and that is in a command economy China can direct the investment of capital. Now, they're smarter than to do that just through one state-owned enterprise. They tend to channel their funding into several different directions so that they create a little internal domestic competition to keep their innovation policy moving forward. But, you know, that doesn't work in the United States.

I'm very proud to brag about my daughter, who has an NIH grant at the University of Colorado studying the genetic markers of chronic pain. But NIH funding is going to be far less than 5 percent of the amount of money we need, the investment we need, to drive a real innovation policy, to create the avenues of development that will shape our economy. That's going to require the renovation of our patent policy, the creation of all those private incentives that Brian, and Judge Michel, and Kate have talked about to make the system work.

Ms. Fechner: Other questions? Yeah.

Audience Member: I guess – Bob Schmidt, Small Business Technology Council.

I guess the major thing that I'm looking for is I want my patent to mean something. I've got about 300 patent assets that I control. And, you know, I get this nice folder around the patent. And it's got the gold seal on it with the little red ribbons. And that used to mean something. And the problem is, is it just doesn't mean anything anymore. It used to be when I got a patent that was a – you know, the gold seal saying that that was enforceable. And so, you know, I mean, we've all been saying the same thing here. We all want stronger patents. And, you know, we've got some different approaches to be able to do that. But the question is, how do I get something that's just very simple, saying: Patents are what they mean. As Brian said, you know, it's the right to exclude others. How do we get that back? And how do we get patents to mean something with, you know, a 10- or 20-line bill that just says that?

And, you know, let everybody else deal with it. So that's just a thought to put out there.

Judge Michel: Bob, I think the PREVAIL Act goes a long way to restoring the dependability of patents. The PTAB was created on the assumption that it would only go after obviously bad patents in small numbers, and that it would be quite separate from litigation. The way it worked in practice is the opposite. Eighty-five percent of the PTAB proceedings have district court infringement cases pending at the same time.

So, the poor patent owner, Bob Schmidt, for example, has to defend his patent against multiple attacks in the PTAB at the same time he's defending in the district court. So, it costs more money, it introduces more delay, there can be repetitive PTAB filings the way the bill was implemented. So, in a way, what the PREVAIL Act does is to simply restore the PTAB to the role that Congress charted out for it back in 2011. But the reality was not what Congress wanted and expected. So, PREVAIL puts it back to what Congress actually wanted. That would do a huge amount to make your patents more reliable.

Mr. Pomper: Look, I'd say injunctions as well. By the way, Bob Schmidt, also a long ally in these patent fights. So good to see you, Bob. I think having quiet title. I mean, that's what you're asking for. You get a patent, you want to know it is your patent. And if it's valid, by God, you should be able to enforce it. That's what you want. Twenty lines is going to be hard. I think some combination of the PREVAIL Act and in the Restore Act, when it's –

Ms. Fechner: It's only a few pages, right, the Restore Act?

Mr. Pomper: Yeah, actually, honestly, the Restore Act especially is fairly small, because it's a pretty simple concept. Again, the idea that a patent provides the right to exclude. You should be able to exclude others if you prove that your patent is valid and infringed. That's pretty much what the Restore Act does, so.

Judge Michel: The Patent Act actually says two things. A patent is private property. And it says that you have a right to exclude. Even the Constitution uses the phrase, "exclusionary right." So we've gone far astray from our own law in pursuit of the mythical patent troll, or some other imagined or exaggerated evil. It's easy to just put it back where it was supposed to be.

Mr. Pomper: And I would just add, on the PREVAIL Act, I think one of the motivating ideas here is to try to keep very well-financed, deep-pocketed companies from using it just as a tool to beat down innovators, to beat down inventors. Even if they know the patent is valid, they're going to drag it out as long as they possibly can. Maybe you give up. Maybe you have the money to keep defending it. So the PREVAIL Act is intended to try to prevent that kind of

activity.

Audience  
Member:

I have a quick question about the PREVAIL Act. Dirk Tomsin with US Inventor.

So one thing I want to bring up. The multiple petitions was brought up by Judge Paul Michel, serial petitions. And there was a study released in July 2023 from USPTO that says that 72 percent of all PTAB proceedings are one petitioner, single petitions. So I just want to bring that up. So just to make a point that to PREVAIL Act will only address a small sliver of those multiple petitions. Second point I want to bring up is, there's a standing problem at the PTAB currently where anyone can go ahead and drag anyone in front of the PTAB, and there was no standing requirements. As per what was mentioned earlier, 85 percent of all PTAB proceedings have co-open proceedings in another forum, like a district court. Does that mean that those 85 percent of proceedings that have proceedings in district court already have standing? And then, what would the standing fix in PREVAIL really fix?

Mr. Pomper:

I would just say, with respect to the first part of your question, I think, of course, right? Most are going to be single challenges. The problem are the multiple challenges, right? And so I'd say if you look at the list – and the Innovation Alliance publishes a list every year – of the most frequent fliers at the PTAB, and it's pretty much exactly the companies you would expect. And it's because they are filing these multiple, multiple petitions. It's too much say colluding, but I think there's definitely cooperation when you've got a patent that maybe touches upon different types of companies.

So I think it's not the case where many people are saying we should not have a PTAB. I think there are plenty of people who would be perfectly happy for there not to be a PTAB. Candidly, the Innovation Alliance was very concerned about it in 2011, when the American Invents Act passed, precisely because we were worried that there weren't sufficient safeguards around it and then it could be a tool for abuse. And in fact, that's exactly how we feel like it's been used.

In terms of the standing requirement, I'm less of an expert specifically. I do think it is intended to squeeze out certain activities of folks who are bringing these patents – bringing these challenges, again, for sort of abusive reasons. But Judge Michel, you may know more about it than I.

Judge Michel:

Well, in addition to requiring standing and keeping busybodies and allies of infringers out of the PTAB, it changes the standard to conform it to the standard in court that requires clear and convincing evidence, not a mere preponderance of evidence. The lower standard generate invalidations in the PTAB that don't happen in court. So we've rigged the system against the patent owner by the way we've architected this burden of proof. So the

PREVAIL Act makes it conform with courts. And also the PREVAIL Act basically makes the attacker choose one forum. You can't use both forums at the same time. You can either go into the PTAB or you can go into district court, but you can't do both at the same time. So it provides a lot of relief.

Like any other bill, you can think of scenarios where it doesn't maybe have a remedy. But it does have important remedies that cover a lot of situations. Would be a huge improvement over what we have today. And if it can be made better, by all means. Let's all get our heads together and make it even better.

Ms. Fechner: I think we have time for just one question. I see Mike in the back there.

Audience Member: Mike Waring with AUTM. It's been a great discussion. Thank you all.

I want to go back to the discussion earlier about what our policy ought to be on innovation. You know, I remember back in the '80s, we were very afraid that Japan was going to take over. They were going to build all the TVs, going to make all the cars. We were going to get rolled by Japan, because they had an industrial policy that was going to go through government and industry that was going to roll us through. That turned out not to be the case. We have a new economic adversary, China, probably trying to do the same sorts of things. But the bottom line on innovation is that, you know it's IP, but it's a lot more than IP. And most members of Congress are never going to get into the weeds on IP. The members on the Judiciary Committees will.

But so I think our policy ought to be: Let's get as many members of Congress that understand that having strong IP is important for innovation, but let's reward them for other things they're doing to help us on innovation as well, not just IP. Because innovation will help us in a broad way. And let's focus our real efforts on the people who are writing the bills, because most members of Congress are never going to get into the weeds on patent law. What we need is a – we need a strong policy. And, you know, every time you hear about a policy for the country, there's always this pushback. Well, we're picking winners and losers. Well, the winners and losers we're picking now are us and China. That's going to be the winners and losers we're talking about here. So, I'd be curious for your comments on that.

Judge Michel: It should be an easy choice. (Laughter.) Do we want to retain dominance and national security advantage? Or do we want to have China have it?

Ms. Fechner: Well, on that note, thank you all for joining us. (Laughter, applause.) And join me in thanking our panelists.

(END.)



