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TRANSCRIPT

Event
Incentivizing Innovation for National Security
Panel Discussion

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FEATURING

Former Representative Doug Collins (R-GA)
Former Ranking Member, House Judiciary Committee

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Andrei Iancu: We're ready now? OK, great. Welcome back, everybody. And following the conversation with Congresswoman Ross, we have now assembled a stellar panel to dive deeper into the PREVAIL Act and discuss its various provisions, as well as understand the implications to American innovation, competitiveness, and national security. As we've heard Sujai mention at the beginning, let me do a quick introduction of the panelists. Once again, I will not talk about all of their very lengthy and incredible accomplishments.

But first, at my far left, is former Congressman Doug Collins. Congressman from Georgia. And he was also the ranking member on the Judiciary Committee during the time when I was the director of the PTO. So we interacted quite a bit back then. He has been a lawyer in private practice and also a member of the military, and continuing to this day.

Right next to him, Tom Brown, who is the senior managing legal director at Dell. He leads Dell's intellectual property litigation team, as well as the policy efforts at Dell.

Next to him is Henry Hadad, who is senior vice president and deputy general counsel for innovation law at Bristol-Myers Squibb. But most important function within all of that, is that – he told me that this is the most important function – is that he is the chief IP counsel for BMS. Henry has – currently also serves on the USPTO's PPAC. And he's also been a board member and chairperson – a president of IPO.

Welcome, everybody. Good to see you all. We've all worked together quite a bit in the past. So let me start with you, Congressman. And if you don't mind following up listening to Congresswoman Ross, maybe you can share your thoughts about the linkage between intellectual property and national security and American competitiveness.

Doug Collins: Well, I would love to. And it's good to be here with this panel as well. Also, it's the very – one of the very few times I'm ever introduced as the far left of anybody. (Laughter.) So that was sort of interesting, but it's good. (Laughs.)

No, I think really where we're getting into this – and I think the congresswoman stated this out in terms – is we're getting to the point where intellectual property, especially in our society today, whether it be a national-security issue, not only when we think of our military but also our businesses and our financial systems, our pharmaceutical systems, our computer systems, they're all interlinked. And when you start to look at how basically the

investment economy, that intellectual economy, is actually protected, this is where stuff like the PREVAIL Act and others actually come in, because what we're trying to do here is continue what we've had for years, and that is a dominance in protection of intellectual property.

And for the United States to ever lose that or step backwards in it will send, actually, jobs, it will send intellectual accomplishments, overseas. When we were in – when I was in the Judiciary Committee, one of the biggest issues that we have is how that tied to just everyday life, not just the everyday life of people coming – you know, their products that they use – but then, from my perspective, also in the military, and still being there, when you look at the rise of China. You look at the rise even of North Korea. You look at Iran. You look at the issues that are going on that we don't normally think about.

When you see China in particular, which has, in many ways, reverse-engineered their way to a lot of military superiority or military competitiveness – I'm not willing to go superiority yet with China, but competitiveness – it comes a lot from the things that could be protected here. And I think this is where we've got to make it a clean, pure system in which I think the PTAB actually, you know, started that process down the road. It gained a lot. I was there during the early years on saying is this going to work? Is it not going to work? Should we give it time?

And now there is some time, I think, actually looking back on it, to protect national-security interests in many ways is allowing our companies to be able to go before a place in which they get protection, but also then are also able to protect those smaller inventors who come up with issues.

I'm going to bring one little nugget here, though, that I don't think we talk about enough in Washington, and that is the difference here is we think about cost – and you'll hear a lot about this from these two experts here – of the cost it takes to defend IP, to defend these issues. But I'm going to take it to a different step with the taxpayer.

For the defense side of this – and we'll talk specifically national security, whether it be CIA, whether it be Defense, whether it be others – when you're taking longer to get to market, when you're taking longer to get products developed, whether it be a plane, whether it be a device, a wearable device for our Army soldiers, our Marines and others on the ground, where they can actually have better battlefield vision, when you have these kind of just broad strokes that take too long to get to market, then you're actually rising the cost.

So it's not just an issue on the inventor side, but it's also an actual problem on the taxpayer side, because if we're starting to see something come up and then it gets delayed – it gets delayed in courts; it gets delayed somewhere else in the innovation process – it adds cost to the federal government on that other side. So it's really a national-security issue, but also an economic issue, that I think has got to be addressed. And I think this is a good start as we look at it.

Mr. Iancu: Congressman, some will say that IP actually works against those goals that you have just articulated. Some will say that there is too much patent litigation, for example, and that the lawsuits are delaying others from bringing their stuff to the market. What do you say about that?

Mr. Collins: I think one of the things is if we want to have this larger discussion of patent litigation – and there's a lot out there – is it's really getting into what you talked on. And I've seen both sides – the small inventor, the large inventor, the buyers of innovation, which, you know, it needs to be there, because there has to be a market for the products – it's a bigger issue, not just in the PTAB, not just in our Article III courts. And especially in Article III courts, it's solving some of these cases before they ever get to the further discovery process. Let's solve them much earlier in the pretrial process. Let's get these things to where you're getting to an answer before we're having to draw out discovery, draw out everything else. So you've got to look at this.

But here's the bigger issue with that. For anybody who says that this is not worth protecting, then what is the investment process here? What is it even for a small inventor? What are they going to do, whether it be in computers or pharma or anything else? Are they going to spend the time knowing that there may not be an outlet for them to actually monetize their results?

Now, I'm a capitalist. At the same point, people do this because they love – and I love how Congresswoman Ross actually said they love the intellectual stimulation. Intellectual stimulation is great. A paycheck is better, OK? And you have to have both. So there has to be that incentive. So I think that's where it really comes down to it.

You can't not allow the protection to be there, even if there is a process to get to it. We've just got to make it easier for those who want to be a part of it.

Mr. Iancu: Yeah. One of the most important things about IP in general, patents in particular, is it's got to be a balanced system. Both sides have to, you

know, be well-represented. Otherwise, the system goes out of whack.

OK, so let's turn to the PREVAIL Act in some detail. It's a long bill that addresses various issues at the PTAB. One way to think about it, I think, is to categorize it into three major components. One is harmonization between PTAB actions – IPRs, PGRs, and so on – and district courts. A second category is preventing repetitive proceedings of various sorts. So, you know, do it once, do it right, but don't do it again kind of thing. And the third major category is good governance. You know, just different procedural issues addressed. So I want to take each one in turn, if you don't mind.

So let's begin with the harmonization process – the harmonization of provisions. Tom, let me – let me start with you. You know, one of them is a standing requirement. You know, district courts have a standing requirement, the PTAB currently does not really have a standing requirement. The bill prevailed, tries to harmonize those and add the standing requirement. That's one of the harmonization provisions. Can you talk a bit about it?

Tom Brown: Sure. Thank you, Andrei. Nice to be here. Thanks for inviting me.

So I want to just step back for a moment because my views on all of these requirements are informed by what we're trying to accomplish. And it is critical to promote innovation. And, as you recognize, innovation is about a balance between those who are inventors, who invent new subject material, and the public. And also in there is those who – those who use the inventions in new and important ways to put out real products. And there's overlap. There's substantial overlap. So those, like Dell, who are significant patent owners, we also are – we are we are also, quote/unquote, "implementers." And we – and oftentimes we implement – we innovate when we are implementing. So those are not mutually exclusive categories. But it is critical that there be a balance, as you say.

There's been a lot of talk of individual inventors. And I just – if we're talking about not over-indexing in one direction or the other, it's important to recognize that of the 1,351, I think, PTAB proceedings that concluded in 2021, the most recent year for which we have this sort of data, 13 of those involved individual and small inventors. It is nonsensical to me that we should, over – that we should focus so much attention on small inventors and rework a system that has been working well for the benefit of such a small percentage. If we want to protect them, and we should, we should give them more targeted protections. We should have rules that maybe apply specifically to those 13 inventors, those 13 small parties, and we

should not throw the baby out with the bathwater, which represents the benefits that we've gotten from the PTAB system.

Also, since we're here at CSIS, want to point out that on the subject of national security, in fiscal year 2022, 56 percent of issued U.S. patents were granted to foreign companies. Among the top 10 of those was Huawei. So as we – as we work to protect U.S. interests, we just need to be clear that the more we strengthen U.S. patents, the more we strengthen foreign patent owners to the detriment of U.S. innovators, U.S. implementers, and ultimately the U.S. consumer. So on the standing question, the PTO – so just one other point that came up earlier. There was this discussion about whether PTAB proceedings are a quasi-judicial dispute between two parties. I don't think that's right at all. I think PTAB proceedings are a chance for the expert Patent Office, the experts who first issued the patent, to fix their own mistakes.

A private party can raise, can bring to the attention of the Patent Office the fact that a patent or a patent claim – we're not talking – we're not usually talking about full patents. We're talking about one particular description of the private party's property right.

Maybe that was poorly drafted. Maybe that was – maybe that just doesn't quite capture what their invention was. By the way, less than 0.004 percent in fiscal '23 of all life patents were fully invalidated. That means that all claims on the patents were taken away.

So the vast majority of time – vast, vast majority of time nobody loses their patent. Nobody loses their whole patent in a PTAB proceeding.

So, yes, in terms of standing, the – it's important that the PTAB be able to perform its public function of making sure that those night – that small percent of the claims whose validity is being contested should – you know, should be subject to a second look by the PTAB and limiting who can raise those concerns with the Patent Office is, again, a sledgehammer to me for a much, much, much narrower problem.

Mr. Iancu: But on that point, why is that? So can you talk a bit about why more than 80 percent of the patents in IPR already have this recorded litigation. So what – those are not going to have a standing issue.

Why do you think it's important to allow nonparties, those who are not aggrieved or don't actually have concerns – they're not being sued, right, or threatened – why – what's the benefit of allowing those entities to challenge?

Mr. Brown: Sure. So there's a wide range of instances where parties who haven't been sued might – may validly have concerns about the validity of the patent. The biggest one, from my own perspective, is suppliers.

So in the bill as drafted if we have a component that we include in Dell products and Dell is sued, as we often are, for our use of that component there's no ability for our supplier to come in and protect us. And, conversely, if our own customers are sued for their use of a Dell product and they're the only ones who are sued there's no ability for us to come in and protect our customers.

So that's the easiest example. And then, again, more broadly, if there's a patent that has – there is a difference in technologies here. So in my own space we often have patents that appear to cover one thing when they're issued and then 10, 15 years later when they're asserted in litigation the owners are now asserting that they cover some other technology that didn't even exist at the time the patent was issued.

And so I understand that there's no standing under – no standing requirement under the PREVAIL Act if you bring your challenge early within the timeframe for what's called a post-grant review.

But in my own space we don't know what the patent owner is going to think that it covers during that time period and so there is, again, a public interest – a public interest incentive to allow the public to tell the Patent Office that this patent actually turns out to be much broader than it thought when it issued it and from a public policy perspective there's just no reason to limit who can raise that concern with the Patent Office.

Mr. Iancu: Henry, let me turn to you on this one. Do you agree with that, that there is a public interest to allow folks who are not aggrieved in any way to bring challenges in an IPR adversarial process?

Mr. Hadad: Yeah. Thanks, Andre, and thanks, Tom, for your response.

So first off, let me just say that I'm here providing my own views. I'm not representing Bristol-Myers Squibb, certainly not the PPAC, or anyone else.

But I have to say they have been informed not just by my experience in the life sciences, which is obviously a very R&D intensive space, but also just seeing the work of innovators across the different

technologies, right, whether it's through IPO or through any other organizations I've worked with, seeing the – basically the traditional American manufacturers who rely on a robust patent system to justify the significant investments they make in innovation and development.

I've also had the opportunity to see the plight of the small-end vendor who has been litigated into powder by a system which allows repetitive challenges over and over again. Getting to the standing requirement in particular, so there's a reason why the – our form of the law has developed a standing requirement. The law didn't want judges to have amorphous potential harm being a jumping-off board for basically judges having the opportunity to provide advisory opinions on things which don't have a real concrete possibility of causing a challenge to a litigant. So for that reason they implemented the standing requirement, and the standing requirement actually requires some type of concrete harm, or threatened harm, going forward.

The vast majority of the time, as Andrei pointed out, these patents are already in litigation. Clearly, the harm is in existence. But I think when you just take a step back, the idea of having open season on patents is antithetical to the concept of creating quiet title in a property right. A patent – and we're going to get to the standards of proof in a couple of minutes. A patent is basically a presumptive legal property right, and as you create more opportunities to challenge it – particularly by people who don't have a vested interest in the challenge but rather just want to challenge it maybe because they're funded to challenge or they have a conceptual problem with the patent system – just creates more opportunities for mischief and undermining that property right in a way that's not going to justify more innovation and certainly investment into that technology.

Mr. Iancu: So, Henry, one of the arguments here is from patient advocacy groups who say that it would benefit the public if they, the patient advocacy group, would be able to bring IPRs and challenge pharmaceutical patents to lower drug prices, for example. Thoughts about that and the benefits that they say that would be removed by including a standing provision?

Mr. Hadad: Yeah. So generally speaking – and that's only a segment of advocacy groups, because there are other groups who also recognize that without a robust patent system, there will be no drug discovery in the first place. I think, getting back to the life sciences space, we spend the most in R&D spent compared to revenue of any technology, and there's a reason for that. It is incredibly risky. It is incredibly

difficult to discover a new drug and then to develop it. You have many, many, many more failures than successes along the way. You're spending billions of dollars taking 12 years, thousands of people hours over that decade or so to get to an approvable drug and without a patent system to be that platform for that investment and also to use the revenue from that period of exclusivity, which is rather limited. It's on average about a dozen, 13 years, according to a Tufts study. You will never be able to not only bring the current drugs to market but to invest in the future generation of drugs. So I do think there's ample opportunities to challenge the patents by organizations and individuals who have a vested interest as they're developing new drugs in this space, and that's the system that's worked for many years and continues to work well.

Mr. Iancu: I will point out that patent office also has a reexamination proceeding, an ex parte reexamination proceeding, that anyone can use.

Mr. Hadad: That's right.

Mr. Iancu: And there is no standing requirement for that.

Let me turn to the second harmonization provision here that's important, and you mentioned it, Henry, so I'm going to start with you on this one, which is the burden of proof. In the district courts patents are presumed valid. District courts presume that the patent office did a good job, so to show invalidity you have to show it by clear and convincing evidence. At the patent office, under the America Invents Act, the burden of proof is just preponderance of the evidence; there is no presumption of validity, no deference given by the patent office to its own original examination. So PREVAIL would equalize the burdens and require that the post-grant proceedings, IPRs, PGRs, be shown, invalidity be shown in those proceedings by clear and convincing evidence, like in the district court. Can you talk a bit about this, what's it trying to solve for, and is it a good idea?

Mr. Hadad: Yeah, I think it's an excellent idea, one I think from the very beginning of the AIA was a missed opportunity.

So, to start with, a patent, as I mentioned before, is a presumptive legal right. And for the history of the American patent system, that presumptive legal right was: You have, after going through a hopefully robust examination which took a number of years and in today's dollars costs thousands of dollars, that you will have a right that warrants investment, to build a factory, to invest in a new area of technology. And that clear and convincing right, which has been

established a district court – let's use the number, and people vary – 75 percent. You have to have a 75 percent chance of showing that a patent is invalid at the district court level.

At the patent office level – now, remember, this is the very office that examined the patent in the first place, is giving no credence to that examination at all, effectively. And basically, a preponderance is roughly, what, a 51 percent chance. If you just do the math, that's a significant diminution in the right overall. And that's certainly not the direction we need to go in as a country if we want to invest and incentivize new technologies. So just looking at the property right overall, I think that tells one story.

The other piece of it is that one of the justifications for serial or parallel challenges with the PTAB and district court are the different standards of review. And if we can harmonize those standards of review, then we have a fairer playing field for patentholders and more consistency in the approach taken by both the PTAB and the district court judges.

Mr. Iancu: So, Tom, with the different burdens of proof, some argue that there is an opportunity for forum shopping and therefore mischief by the accused infringer, petitioner, and looking for the better forum. Also, there's an argument of potentially inconsistent results. Patent office and district court giving different answers to the same validity question. Thoughts about those?

Mr. Brown: Sure. And I should have started out with a similar comment disclaimer that these – I'm not speaking on behalf of Dell in any of these comments. These are my own views, likewise informed by my job but not on behalf of my employer.

So let's talk – I want to talk about consistency versus predictability, because we're – this is a question, should the PTAB be consistent with district courts? District courts – a recent study found that district courts are almost two and a half times more likely to get it wrong, more likely to be reversed on appeal on questions of validity than the PTAB has. We don't want consistency. We don't want the PTAB to be wrong as much as the district court is. We want – I'm sorry – yeah, as much as the district court is. We want accuracy. And, yes, we want predictability.

And let's talk briefly about this presumptive legal right. Inventors absolutely should have a vested interest in what they invented. And this PTAB process, at the end of the day, determines more carefully what they actually invented. There's an opportunity if the claims

were written incorrectly, they should get fixed. They can fix it during the PTAB process. They could fix it later in the reissue process. Yes, they should have a vested legal right in their invention. And now the PTAB process is determining what that invention is.

So should there be the same standard of proof in the district court and the PTAB? Absolutely not. The district court is a lay judge and a panel of lay jurors. And, yes, they should be deferring to the expert agency that issued the patent in the first place by giving a deference. And that deference is represented in the clear and convincing standard. Should a panel of three expert judges who are spending vastly more time with the specific language of the claim likewise give deference to the examiner who had very little time comparatively to analyze the claim, much less evidence at his or her disposal, much less – no benefit of an adversarial system? No. The PTAB should fix mistakes where it finds them and then work with the inventor to come up with claims that accurately represent his or her invention.

Mr. Iancu: Congressman, there is a fundamental debate here that Tom touched on briefly about the role of juries in the American legal system. It's in the Constitution twice, really. It's both in the body and in the amendments, in the Bill of Rights. But we really are the last country really that decides patent issues with a jury system. And some will say, as Tom has alluded to, that they're less accurate, juries are, than the experts in the administration, the career judges. What are your thoughts on that? And how does that play on Capitol Hill, that debate?

Mr. Collins: Well, I think you've just seen – we've just seen here for the last few minutes excellently the very good analysis by both sides of what you're dealing with. And here I'm going to take it a step further. If we deal with judges who may or may not – district-court judges who deal with everything under the sun in federal court and then have to deal with a patent case, in which they, you know, may or may not have knowledge of, and one or two clerks who may not have ever seen a patent case in their life, there is an issue here.

As someone who comes from the north – actually the circuit that I came from, north Georgia, back in the '70s, late '60s, '70s, was one of the highest patent-issue courts in the country. Most people wouldn't think that, because you think California; you think other places, pharmaceuticals. And you know why? It was the chicken industry. I kid you not. It was the manufacture of poultry and the different mechanical parts they get patent for. And it just flooded the court.

And the judge at the time, who I became friends with, said this is the

most difficult thing we had to deal with. He said if you wanted to come in here with a murder case or a conspiracy case, I understood it. He said you come in here with drawings, we were having to spend so much time, which gave the advocacy for saying that there may be a need for more specialized district-court proceedings or an Article III kind of court.

I'll tell you one place we see this is in China. Actually, I've been to China. I've actually sat with their intellectual-property courts. And it takes their courts, which they do – which most people don't realize – they do – the vast amount of their work is in-house or in-country, if you would, Chinese companies against Chinese companies. There's the American version and foreign versions there. But they have said that we needed a more specialized court.

I think that might be something that is something that may be later on, because there is an issue of are we getting the proper knowledge in a third – in an Article III court with a jury proceeding of people who may or may not understand the issue. But I will take it back. I'm not sure many inventors have seen are they getting a fair shake at the, quote, experts who have issued a patent and now are getting – coming in without a standard and saying, OK, are these experts actually looking at this from a perspective of is there a problem here, or are the experts looking at it with a blinded vision of here's the way we've always done it inside the department.

And that's not to be offensive to the department or offensive to the examiners. But that's also one of those things – how many times in life do we actually go out of our office buildings and we see the same things every day? And nobody – until somebody all of a sudden moves a chair and you run into it, you don't realize, hey, maybe I should be looking at this.

This is why Congress is so difficult on this issue to make people understand, because there is a balance here. And I go back to my first comments, though. These issues need to be more reconciled. They need to be more available; maybe targeted approach, maybe a more broader approach, definitely, to have consistency in what we're looking at, because I think the act does that.

But there's a part of the act also that is, I think, more important than any, and that is the pulling of money away from this court for experts, that I think putting that money back into getting good quality patents coming out, getting the experts and making sure, is something that you may discuss later, but I think that is something that needs to be emphasized more to give the justification to these courts and say, hey,

pick one of these; you'll get a better result.

Mr. Iancu: Actually, the PREVAIL Act does have a provision to allow the Patent Office to make sure it keeps its fees entirely. And, frankly, there's a billion dollars out there sitting in Treasury that belongs to the PTO, and it still has not been appropriated; so just putting a plug in for that to make sure that gets returned.

But anyway, so back to PREVAIL, I will say, as a litigator, you know, people say what you want, as people might say about lay judges and juries, but one thing about them is that they're fresh every single time. As you have indicated, Congressman, they are not – they don't see the same thing over and over again. They bring an open mind. They really try to do a good job. And there is tremendous wisdom in the constitutional system that we have that has to be balanced, of course, by the appropriate results.

Turning to the second big category, repetitive proceedings, there are various provisions that PREVAIL talks about. First and foremost is the single-forum provision. So can you talk a bit about that, Henry? Let's start with you on that.

Mr. Hadad: Sure. I think, right from the outside of the PTAB proceedings, the single largest complaint that I heard and that we experienced was the opportunity for multiple bites at the apple of challenging a patent. And it's bad enough for a large company like Bristol-Myers Squibb or Dell to deal with these type of things because it injects considerable uncertainty into the robustness of that right. You may believe in your patent, but you know, you hit – you hit a patent enough times in court or before a different fact-finder at the PTAB and you never know what's going to happen. There's always a degree of uncertainty, right?

So I think that was – that was a real problem for the larger entities involved in the innovation ecosystem. It was absolutely devastating for the smaller entities in the – and the small inventor groups who are impacted by PTAB, because at the end of the day – and Tom mentioned some statistics about the number of patents affected by small inventors before the PTAB. That doesn't count the number of small inventors who are no longer seeking patents, which we've heard, or are not trying to enforce their patents because, ultimately, they believe it's a road to ruin. And that's a real problem. And I've heard firsthand from those either testifying or speaking about these issues going – in their experience.

But turning to the single forum, so a few years back there was a case, the Sotera case, where basically a party would have to – if they were

bringing a petition, would have to stipulate that they're going to attack the patent in one forum or another forum. And what this is effectively doing is codifying that approach. I personally cannot see how this prejudices a petitioner. They have their opportunity to choose their forum, and they can choose either the PTAB or the district court; they just can't choose both.

And I will stop there and turn it back to you, Andrei.

Mr. Iancu: Yeah. And I will note that they have to choose one, but there is no penalty unless the PTAB institutes, right?

Mr. Hadad: Right.

Mr. Iancu: So if they choose to file a petition and the PTAB does not institute, they can still keep going in the district court.

Mr. Hadad: And if new bases of challenge come up, they can again go back to the PTAB.

Mr. Iancu: Correct.

Mr. Hadad: Yeah.

Mr. Iancu: But if the PTAB does institute on a particular claim, then they can no longer maintain the same arguments in district court. What's wrong with that, Tom?

Mr. Brown: OK. So I'm going to re-stress my caveat before that this is my own views.

Are duplicative proceedings wasteful? Absolutely. Should you be litigating at the same time on the same issues in the district court and in the PTAB? No.

So what's the solution? Recall the district courts are 2.5 times more likely to be reversed than the PTAB. The solution is clearly that you should be litigating in the case that gets it right. OK. So you should – the PTAB, in my view, is the right forum.

What does that mean about what happens in the district court? The solution is very simple. When there's litigation in the district court that may – I'm sorry, when there's litigation in the PTAB that may affect what happens in the district court, the district court proceedings should be stayed.

Why is that critical?

First of all, if you don't stay the district court proceedings, then you have the same problem; you're still litigating in two fora at the same time. It's not going to be any cheaper for anybody just because a couple of issues may be removed from the district court proceedings and moved over to the PTAB. You're still spending the same money at the same time. It's incredibly expensive. I can say that from personal experience.

Second, you cannot have district court proceedings that determine infringement proceed in parallel with PTAB proceedings that determine validity because they interact with each other. The patent owner is going to make arguments – both sides are going to make arguments in the PTAB proceedings that influence how they view the scope of the claims. If the patent owner views the claims narrowly in the PTAB in order to – in order to get the – get the claims past validity challenges and then broadly in the district court in order to get a finding of infringement, that's a problem. The district court proceedings should be stayed until the – until the PTAB proceedings are done so that the district court can use the proceedings in the PTAB to understand better what the claims mean. And also, by the way, the patent owner may and should have a full and fair opportunity to amend the claims in the PTAB.

Mr. Iancu: So, Tom, just to follow up on that, I mean, whether you stay a district court case or you allow the petitioner to choose the PTAB or the district court, to me it doesn't – it seems like you're making that decision for the petitioner. I don't see why you wouldn't want to allow the petitioner to make that decision.

Mr. Brown: The petitioner should make the decision, but the problem is that it's the patent owner who may sue in a district or may just refuse to stipulate that the – that the – remember, most of these cases are in the context of a preexisting district court litigation, so it's the patent owner that files suit. The petitioner then may challenge the claims. At that point, the patent owner ought to agree or the court ought to rule or it should be mandatory that that the preexisting district court case get paused to take into account what happens at the PTAB.

Mr. Iancu: Now, so the reality is that in many, many cases that already happens. There are many, many districts, many judges that will say, depending on facts and circumstances. But what you're suggesting, if I hear you correctly, Tom, is that it should be mandatory and there should be no discretion for the district judge to manage their own docket.

Mr. Brown: I mean, no discretion? No, I don't think that. I mean, I think that there – I think that if there's real hardship on the part of the patent owner or if there's – you know, if there's unusual circumstances where, you know, for example, if the patent owner – again, off the record as much as we can – but if a patent owner seeking a preliminary injunction, and if there's, you know, real imminent harm that the patent owner may have as a result of the infringement, maybe preliminary injunction proceedings can go on. But the notion that you should have a full-fledged trial while you're having a full-fledged, PTAB proceeding, even if the issues are different, doesn't make sense to me.

Mr. Iancu: How about staying the PTAB while the district court is going in some cases?

Mr. Brown: The problem with that is that the analysis and validity in the district court case is going to be truncated because there's so many issues that – so many issues involved in the district court proceeding. And so the record will be much more developed if you allow the PTAB to go first. And also, you can – if you stay the PTAB proceedings, then that will – I haven't thought it through entirely – but there's logistical challenges on when do you get to enforce the judgment, right? You can't enforce a judgment that comes out of the district court proceeding if the PTAB proceedings haven't even had a chance to –

Mr. Iancu: Congressman.

Mr. Collins: I'll jump in here, because from a political standpoint this is what we're trying – and I go back. I came into Congress right after this was passed, with Lamar Smith. And so I felt – we felt a lot of this. And one of my biggest arguments for taking this was the first few years we didn't have enough knowledge in seeing, you know, these different issues out. The one issue that I will take with Tom here is this, is basically your application of this would be different, I think, than the understanding of many members at the time, that there was one or the other, and there's a lower cost and probably.

What I just heard you say – and I'm just curious here – as we discussed this, you're giving preference to the PTAB proceedings as the authoritative voice, because if you stay the district court and then have to come back to see whatever happens at PTAB, you're sort of binding the court to a non-Article III body. So it's different. And I understand what you're saying, don't get me wrong, but it is interesting to hear. From your perspective, everything should just go through PTAB.

Mr. Brown: The reason why there should be one or the other is to make for a faster, more effective, cheaper solution. That solution is the PTAB, as the AIA recognized. And so, yes, it should be the PTAB.

Mr. Collins: So then you're keeping people out of the Article III – I think this is the political argument that we're going to have on Capitol Hill, that we're going to see, you know, play out here. Is you're – in essence, you're making a quasi-Article III court out of the PTAB. And I think that's something that will never fly from any political, just on the argument, whether it may – and the curious question I would have in this – and I think you made some great points here – is what were they reverse on? That's a curious question for me. They may be more reverse, but were they reverse on actual issues of patent law or are they actually reversed on which we've seen a Supreme Court that, frankly, hasn't got it right either on deciding some of these issues? Or will they reverse on technical issues in these, as opposed to it?

Mr. Brown: These were validity questions. And we can dive into –

Mr. Collins: No, this is cool, but I think you see the political issue here. And I'm not attacking. I'm just saying, this is the political issue that we've dealt with for a number of years now on trying to find a balance, as you just said just a second ago. Find us a lane and deal with that lane. And if you think the PTAB is better, you'll go to the PTAB. If you find this Article III court is better, you will go to the Article III.

Mr. Hadad: Yeah, I remember when the AIA was being debated. And the goal of the PTAB was for very clear situations where a patent should not have been granted. And that's why it was limited, at least for IPRs. Remember, IPRs can be brought anytime, as opposed to PGRs, right, after grant. Was that it was based on patents or printed publications, because you're supposed to look on the face of, oh, yeah, this probably shouldn't have been granted. These claims – we need to amend this or that.

It has turned into something quite different, which is a primary basis for invalidating patents based on a limited record, based on limited witnesses, an inability to test the veracity of both the fact witnesses and the experts through cross examination. These are all very serious parts of the American jurisprudence system, which protect the property holder. And if you believe that a patent is a significant property right that warrants investment and is the incentive for innovation, you believe in robust protections for it. If you believe that it's an inconvenience, then you want a political body that will go in and look at it and at a very lower standard and knock it out based on a limited evidentiary record, and I think there's a fundamental

schism in certain views of certain technologies and certain innovation ecosystem sectors.

Mr. Iancu: OK. So we could keep going on this one for quite some time. It really does go to some fundamental principles of American jurisprudence: who – you know, who gets to choose the forum, which historically is the claimant, the plaintiff; the viability of independent courts; the viability of a jury system; how it applies and interacts with complex technical issues in patent cases. It's a – this one issue, it's a remarkable cross – a microcosm of all these arguments. And I think, hopefully, it will get the debate it deserves on Capitol Hill.

Mr. Collins: Can I bring this back to national security? And this goes back to the very issue here on dealing with national security, whether it be in – especially when you're dealing with new weapon systems. Let's take it to the hypersonic system. We're taking it to the AI, even if you want to go into that.

When you're looking at battlefield technology the question here would become what is the best, most efficient route to protect – I do believe it's part of the bundle of sticks, going back to Dell, that a property right of that patent is a right. It is something that needs to be protected.

Can it be challenged? Of course it can be challenged. But you got to find the best route to do that in the most cost effective way and what we're seeing in some of our developments we're seeing some of that move off out of the country because of some of these issues on the best and the multiple bites of the apple, which I don't think, frankly, Invents Act had any desire for this to be multiple bites at the apple. It just didn't appear that way in the legal text.

But from a national security perspective, are we, again, raising costs? Are we limiting who we are able to not only contract with, but go to a supply chain? Are we having to supply more – getting – from a national security perspective, are we having to source more foreign investment? Are we having to source more foreign companies that would be integrated into our national security network such as, you know, things from security monitoring systems, data monitoring systems? These are the kind of things that need to be adjudicated early enough to keep the cost down.

So that's the security aspect that the Hill has to look at. Whether you go which way or the other it's finding the best solution.

Mr. Brown: And just to recall that when you over index on the side of patent protection you're protecting Huawei. Huawei is consistently one of the top 10 patentees. Foreign entities are 56 percent of the U.S. patent grants.

Mr. Collins: And then the issue to come is, is there a way that we look at this from a perspective of you're over indexing – whether you over index or not. It's where the patent system comes from and who is the vendor coming from and are you then taking it away from ours, which I think there could be things put in for American-based companies that can protect that patent system in a different way as well.

Huawei has a different issue from a national security perspective in the fact of the connection to the Chinese government. So I think that's a – could be a whole different aspect. But a good point. I mean, it's –

Mr. Hadad: I'd also like to add from a perspective of economic competitiveness, I would say that over the past two decades between certain court decisions and these procedural challenges at the PTAB we've created a less stable patent system and we are as a country, I would say, a knowledge economy, one that has been steeped in some of the greatest innovations in the history of the world over the past 200 some odd years.

If we develop innovations here and then allow them to be exported internationally and then sold back in our country with a weak patent system that really can't be enforced or it's so difficult to enforce that you really are hobbled by that, then we're not doing our country a service. We're actually exporting jobs and exporting technology internationally, and that can't be good for our long-term perspective on this.

Mr. Iancu: So, given the time, let's just turn very quickly to the third bucket, which is just good governance type provisions, and I think there is likely more consensus on those. But let's just test it out.

You know, one of them is codifying the director review from Arthrex and how the PTO has implemented that. There's a code of conduct for PTAB judges.

And just very quickly, so on those two do people think that those are good ideas or not? Tom?

Mr. Brown: Absolutely. I think allowing, requiring, the director to have responsibility for the PTAB decisions really does go hand in hand and emphasize that it is a PTO obligation to issue good patents. It's not

just a debate – it's not just a dispute between private parties. The PTO is an active participant, and the director should be responsible for those decisions.

Mr. Iancu: Henry.

Mr. Hadad: I'm fine with both provisions. I would say that if I had a choice personally, I would allow 146 appeals to district court after a PTAB decision, which would also solve the Arthrex problem. But as far as I'm concerned, the provision is fine.

Mr. Iancu: Any concern with a political appointee that comes and goes? And sometimes you don't have one, because they're interim between administrations when we don't have a political appointee. Any concerns with –

Mr. Hadad: Why the 146 action seems to be maybe a slightly better solution. You know, when you come to, like, claim constructure, any type of policy change, a patent is a 20-year right for many industries. And to have the property right wax and wane, depending on who's appointed in the office, doesn't seem to make sense. And it's not particularly encouraging for investment.

So I think having more stability in terms of rules are very important. I mean, as I think the congresswoman said earlier, I think her perspective was you're going to get a high level of appointee there that's going to try to adhere to the standards. And hopefully that will be the case.

Mr. Iancu: Another governance-procedure provision is the idea that judges who rule on the institution shall not also participate in the merits decision, in the final written decision. Thoughts on that, Tom?

Mr. Brown: There's no other area of law where we say that someone who's invested substantial time and effort into evaluating the merits of a particular dispute should then go away and not participate in further evaluations. It's a waste of time to say that – it's a waste of time to disqualify those who are the most knowledgeable about a dispute from further participation. Again, if you want to ensure – if you're concerned about bias or you're concerned about accuracy, that's what the appellate process is for. So I think that there's no reason. And it's counterproductive.

Mr. Iancu: Well, the ITC, Tom, right, the institution decision of the ITC, is not made by the ALJ that's actually running the case, right?

Mr. Brown: One other area.

Mr. Iancu: OK, as an example. But it ultimately does come back to the commission at the end, after the ALJ's decision.

Congressman, while these issues are not partisan, there's still obviously – as we see on this panel itself, there are serious divisions, not along party or ideological lines but along different lines. Given that – and you've experienced that for sure while you were there – what are the chances here that something like this moves in the Congress?

Mr. Collins: I think that it's not partisan. I really think there's ideological differences, and I think that would come in a little bit in the sense of what you believe. And you brought it up well, you know, the difference in trusting an Article III court as opposed to a bureaucratic board or an appointed board. I mean, there's just ideological differences on the function of government.

I think on the Hill this is going to be – this is the unfortunate part. We've talked about Article III courts being sometimes not the most technologically place for these hearings. Well, I'm also going to say that the U.S. Senate and the United States House is probably not the overwhelmingly best place to have some of these agreements, not because the individual members don't want to, but we've spent – I've spent years doing this. These two amazing folks have spent – you as well – have spent amazing years doing this.

This is not a five-minute elevator speech. This is not something you can explain going up and down – well, here's why I'm voting for this – because there's legitimate – I mean, I've listened to the two arguments here today and I have some pretty good opinions about it and been, you know, very favorable to what's been said.

This is where it becomes a concern for me every time we open this up on the Hill. It is trying to find members who will actually be able to take an ownership or leadership role in this – you found this in the Senate; I think we've found that a little bit in the House now – and then getting it to the point where we can explain it to members and it not be bound.

I'm not as favorable that this would be on the easy path in the House. I think the Senate may be a little bit easier on this issue. There'll be some discussion, but I think they can get out if they can get over some other stuff. The House Judiciary Committee right now, I think the best thing they could do is start having some hearings about it.

The best thing they could do is begin to have the process of discussing it. I don't see that happening quickly. But hopefully within the next – by spring, if we can see this move a little bit on both sides, having the discussions, it has a possibility.

Because here's the biggest issue. We've got to make – I've always said this about intellectual property: We've got to get it out of the realm of theoretical. These two guys are great. This is theoretical. But average people and members of Congress are not theoretical. They're practical. How does this affect Joe in my – if you have a small inventor in your district, he doesn't care if it's .0004 percent of the people who get that because it's the inventor in my district who votes for me. And if you're Congressman Ross, you're in the Research Triangle; you have the bigger issues. So I think what we've got to just start doing is making this argument with members who go to their districts or go to the leadership and say, this affects our economy; this affects – as we're sitting here – national security. You make those arguments, then you move this forward. You get the details, you're losing it.

Mr. Iancu: (Laughs.) On that note, last thoughts. Let's start with you, Henry.

Mr. Hadad: I personally support the PREVAIL Act. I think it's an important step to clarifying the role of administrative agencies in adjudicating the property right, and I would hope that over the course of the next year we have hearings at the House level, certainly more hearings in the Senate, and that bill advances. I mean, taking just a step back and based on my observation, I think it's an important, important step in making sure that this property right is stable enough and predictable enough to warrant the innovation and investment that historically it has and created the greatest innovations the world has seen.

Mr. Iancu: Tom?

Mr. Brown: I think that there are important concerns that underlie the PREVAIL Act that ought to be addressed in a balanced way. If the small inventors are concerned about their property rights being taken away from them, then let's address that problem. If there's concerns about duplicative proceedings, let's address that problem in a balanced way. But I don't think that the PREVAIL Act is a balanced bill.

Mr. Iancu: And finally, Congressman, you get the last word.

Mr. Collins: I do think this is the right step. I think that the PREVAIL Act is something that can work. Is there – and this is the reason for a good, robust legislative process. If there is concerns, it could be adapted, it

could be tweaked just a little bit; I think that's the reason. And it has become more and more a concern in bills such as intellectual property sphere – and I'll just use that, not just in this area as well – has become more and more concerning that we do not have that robust debate among members who understand it, bringing in experts to understand it. But I think this step here in the PREVAIL Act actually goes back to the original intent of the Invents Act. There may be some things we'll disagree upon. But remember, the intent was to make a clear, more precise process that protects all entities involved, and do it at a less cost. That's the issue we've got to look at.

Mr. Iancu: Well, thank you all, and I think the challenge will be to continue to explain the nuances of these very complicated issues. You know, we've had an hour here but we can keep going for a very long time. We just scratched the surface. So on the one hand explaining the nuances and trying to get them right and appropriately balanced, while at the same time really understanding the ultimate impact on national competitiveness, national security, the economy, and jobs across the United States for not just this bill but the intellectual property system at large. And being able to do both of those things, the details and the bigger picture, I think is critically important and I think you all managed to do that well today.

Thank you all very much. It's been an honor to be with you.

(END.)