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INTRODUCTION
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Transcript By
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John J. Hamre: Hello, everybody. My name is John Hamre. We’ve got an audience that’s building as people are getting admitted into the room, and so we’ll just – let me just say a few words of welcome before we turn to this remarkable panel that we’re going to have the opportunity to listen to today. I want to welcome you all to this, day two of the U.S. Innovation Competitiveness Summit. And this our – this is going to be exciting today because we’re talking about a topic that I’ve never covered here at CSIS, but it’s so vital to our national security, it’s vital to our economy, and that is intellectual property. You know, everything in the world that you see that was created by human hands, everything, started off initially as just an idea in one person’s mind. It’s a remarkable thing when you think about it. One person, whether it’s the idea of a microphone, whether it’s the shape of a glass, whether it’s the construction of a table, whatever, everything is the product of one person’s mind thinking of it and then sharing it in ways with other people to turn it into reality. That’s a remarkable thing, and it is a precious thing as to the foundation of our economy. The intellectual property system is designed to strike a balance between what’s good for society and what’s good for the inventor. And it’s a rich, robust, and well-developed system, but not well understood. And we’re going to dig into that today. It’s going to be a very exciting time with all of you, so I want to say thank you to Andrei Iancu and this remarkable panel. Let me just say a word of introduction to Andrei. He’s going to run this session. You know, Andrei is an example of why America benefits so much from immigration. You know, he came to this country as a young kid, planning to become an engineer; did become an engineer; was an engineer at Hughes Aircraft Company. But then he became interested in the world of patents and intellectual property, became a recognized leader while working at Irell & Manella, I think is the firm. It’s a premier intellectual property firm. And in that role, he was very involved in the community of lawyers and intellectuals that think about and deal with intellectual property. He was nominated by President Trump to be undersecretary of commerce for intellectual property and director of the U.S. Patent and Trademark Office, confirmed unanimously by the Senate, I should say, and he’s done a remarkable job. He and Walt Copan came to me in January and said they wanted to sustain momentum behind the ideas they have been working, and that’s the origin of Renewing American Innovation, this project we have at CSIS. Today we have this rare opportunity – I’m going to be learning today; this is a marvelous opportunity for me and for all of us. So, I welcome you. And Andrei, let me turn to you and just say thank you for being the leader on this and thank you for leading this session. And I am excited to hear everybody’s presentations today. Thank you, Andrei.
Andrei Iancu: Well, thank you, Dr. Hamre, for that very generous introduction, and really thank you for providing a home at CSIS for the Renewing American Innovation Project and the support for this super-important issue in the current state of the American economy. By the way, to your point, John, that IP has to balance between the interests of society and interests of the inventors or the creators, of course, James Madison in Federalist 43 said that the intellectual property clause, which arises from the Constitution, is equally beneficial to both. And that’s why he said and concluded that the utility of this power, the constitutional power granted to Congress to create intellectual property rights, patents, and copyright, in James Madison’s views, that power will scarcely be questioned. Now, I don’t know if that’s proven to be true. I think it is being questioned all the time and – but certainly the utility cannot be in doubt to the importance of innovation. Before we get to the panel, let me say a few words to set the stage as to why we are talking about these issues nowadays. The news, to be frank, in recent weeks has been stark. General Motors shuts down virtually all North American plants for about two weeks. Think about that. When was the last time that General Motors shuts down all of its plants, and why did it do that? Because there’s a shortage in the United States and, frankly, worldwide of computer chips, silicon chips. And this is not only for cars. Certainly, it’s being – it’s applied cars, so cars right now, whether they’re GM cars or whatever other brand, they are on backorder because there’s a shortage of silicon chip supplies. But in addition to that: refrigerators, dishwashers. Everything is in short supply right now, and we are not in – you know, this is not a world war situation. There’s a shortage of computer chips in the United States. What happened? The United States was the forefront of the silicon revolution. So that is a question that – it just is one of the latest issues in the news right now that is prompting us to rethink all of issues surrounding American innovation and the American economy. It is my view that the United States right now is being outdone in strategy, technology, and manufacturing on a whole host of technologies and most – such as silicon chips, especially the manufacturing side, and – but, more importantly, in technologies of the future, whether we are talking 5G or 6G communications, whether we are talking about crypto-type technologies, artificial intelligence, and the like. By any measure that we can count, we know that now it is up to us on some of these technologies to come from behind. Let me give you some examples. In the technologies that matter, China right now issues many more patents than the United States. What I mean by the technologies that matter is technologies that are at the forefront of the next technological revolution. So that’s patents. That’s one measure, easiest for me to talk about as the former director of the Patent and Trademark Office. But it’s not just patents. If we look at technical publications in scientific and engineering peer-reviewed
journals: China outperforms the United States. The number of Ph.D. graduates in science and engineering with science and engineering degrees: We are falling behind. When it comes to leadership of standard-setting committees around the world, the United States is losing its edge. So, well beyond semiconductors – when we talk about 5G, artificial intelligence, quantum computing, the United States needs to up its game. For us to maintain our technical leads, which we have been used to for the past couple hundreds of years, we must double down and effect change. Frankly, something has to change. The trajectory we have been on in recent years has to change. I liken it to the need in the United States for another Sputnik moment. By that I mean looking back a few decades, during the – you know, at the beginning of the Cold War, when the Soviet Union launched the first satellite in space, named Sputnik, the United States realized that we must compete. And we had leadership at that time. President Kennedy went in front of the nation and declared that by the end of the decade, that was the 1960s, we as a nation shall put a man on the moon. And then the national concentration focused on that goal. Are our leaders today willing to make that type of commitment and lead us in a direction where we will once again have the technical lead in these really critically important technologies? There are lots of issues that go into this, and throughout the week CSIS and the Renewing American Innovation Project has been focusing on a variety of such issues, such as technology transfer and the like. But here is the bottom line: We need to identify as a nation all the various issues, whether it’s education, whether it’s diversity and more folks from traditionally underrepresented groups participating, whether it is immigration when it comes to folks with STEM degrees, whether it is funding, private- and public-sector funding for research and development – all these issues need to be addressed as a nation. The United States needs an innovation policy to address – to identify and address a whole host of issues. And of course, we need better intellectual property policies. Why? Because it is my firm belief that intellectual property drives innovation. For innovation in the United States to be successful, we need the private sector to be involved and not just involved but to lead in new technologies of the future. In order for the private sector to participate at its maximum capacity, the private sector has to be assured of the protections provided by intellectual property laws in order to incentivize and protect the investments made. Innovation does not just happen, as some argue. Innovation is driven, first and foremost, by investment, and investment needs both time and capital, and that investment needs the protections of intellectual property laws. So, on this – in this part of the CSIS innovation week, for this program we’re going to focus on those intellectual property policies, what has happened over the past decade or so, what’s been good, what needs to be improved, and what
specifically do we need to focus on for the future? So, with that, let me introduce our incredibly distinguished panel, and we have four remarkable leaders in this field, two from the judiciary and two from the administration side. And let me just introduce them alphabetically, so with that, first let me introduce Drew Hirshfeld. Drew – I had the privilege of working with Drew when I was director of the PTO, and of course he has served with multiple directors over a very long and distinguished career at the PTO. Drew right now, his title is performing the functions and duties of undersecretary of commerce for intellectual property and director of the United States Patent and Trademark Office. I used to think that I have the longest title in government, but I’m quite certain that Drew now absolutely takes the honors for that. In addition to this, Drew is the commissioner for patents. That means he leads the patents organization. He’s been doing that for five-plus years. He was appointed to that position by my predecessor, Director Michelle Lee, and the secretary of commerce at that time, and he was reappointed when I was the director just last year for a second term, and this is incredibly unusual and a testament to Drew’s performance and leadership at the United States PTO for a long time. He started in 1994 as an examiner and worked his way up through many, many different administrations. Then let me introduce David Kappos. Dave is a predecessor of mine. He was director of the Patent and Trademark Office from 2009 to 2013. He currently is a partner at Cravath law firm in New York City. And before all of that, he had a long and distinguished career at IBM, including chief IP counsel. He was at IBM for 25 years. The list of accomplishments that Dave has and honors before and after his service at the PTO is too long to mention. Let me just say that he is an inspiration because he’s been out of the PTO office for almost 10 years but stays active and super-involved in all of these discussions and continues to be one of the most important leaders in this space on an ongoing basis. By the way, Drew also worked with Dave. I think Drew was, at least at some point, Dave’s chief of staff, if I’m not mistaken, right? Yeah. And then let me introduce Judge Michel – Judge Michel, are you online yet?

Paul Michel: Yes, I am.

Mr. Iancu: All right. Fantastic. Judge Michel was for 22 years at the Court of Appeals for the Federal Circuit, the last six of which he served as the chief judge of the circuit. He authored during that time more than 800 opinions. I need to calculate how many a day that makes, but in any event, that’s quite a record. Since he has retired from the court, he does a lot of writing, a lot of public speaking. He is a great supporter of intellectual property rights. Like David, in private life, Judge Michel has not shied away from providing leadership in the IP sector, and he likewise is an inspiration. Before he was on the court, he was an
assistant district attorney in Philadelphia. He had many other jobs also in the U.S. government, and he also served as counsel for Senator Specter at that time. Last and not least – and sorry, Judge; it’s just the alphabet – Judge Kathleen O’Malley. She is a sitting judge currently at the Court of Appeals for the Federal Circuit. She was appointed by President Obama in 2010. Before that, Judge O’Malley was a district court judge in the Northern District of Ohio where she was appointed by President Clinton in 1994. And to this day, I believe she remains the only judge at the federal circuit who has had district court experience. And I can’t tell you how important that added perspective is that Judge O’Malley brought to the Court of Appeals. She also worked for the attorney general’s office in the state of Ohio before she was appointed to the bench. And she started her career as a lawyer in private practice in Ohio. So with that, let me start the questions of the panel. I’ll be the moderator. And I want to touch upon some of the hottest and most important issues right now in intellectual property law that we need to address as a nation. And let me start with Drew who is the acting – the current leader of the office. Drew, this week we are about to celebrate the 10th anniversary of the America Invents Act, the AIA, which passed – was signed by President Obama I think on September 16th, 2011. That law was one of the biggest changes or the biggest change in patent law since 1952 and it had quite a few components to it. Maybe you can reflect for a minute about what this – what the AIA has meant. How has it performed in the last decade? And what are the hot issues surrounding the AIA at this point, 10 years in?

Andrew Hirshfeld: Sure. Well, thank you. I’m happy to address those points, Andrei. Let me start off by thanking CSIS for having me and it is quite an honor for me to be on this panel. As Andrei said, two members of the panel were my bosses who I’ve learned a great deal from, so particular thanks to Andrei and Dave for all you’ve done helping me in my career. So as Andrei mentioned, the AIA anniversary, the 10-year anniversary, is coming up in two days, so I’ve been reading a lot about it and there’s been a lot of discussion about the AIA. And let me just, if I may, just go through some of the key changes that were implemented 10 – you know, starting with 10 years ago. And by the way, Dave Kappos was director at the time and was really instrumental in moving all of these issues forward. So, a special kudos goes to Dave for his efforts. But one of the biggest changes and perhaps at the time 10 years ago we thought was the most controversial was the change of the whole U.S. IP system to a first-to-file system from a first-to-invent system. And up to that point the U.S. was one of the only places that was first-to-invent, so this was a significant change. I will say looking back 10 years later and having the ability of hindsight, it certainly did not pan out to be as controversial as people thought it was and as troublesome
as people thought it was. Sure, people had to change some of their practices and get ready and there were new laws and rules put in place, but this does – the intent here was to add certainty and to better align us with some of our foreign partners, and it certainly seems to have accomplished that. An additional change of the AIA was that it gave the USPTO fee-setting authority. And I will tell you as a longtime employee of the PTO, that should not be underestimated as having a great benefit for all of us. The ability for PTO to be able to set our fees, to be able to gauge what work we have coming in, what we’re going to need to do as an agency and to be able to set the fees and keep the money really has helped us be most effective and efficient as an agency. That was certainly a huge change. Additionally, with the AIA we had the ability to create regional offices and we’ve created four regional offices throughout the country. And I have an interesting perspective here because I will tell you that I was on the original planning of Detroit, our first office in terms of the structure of that office, and I share this with people all the time. When we were planning it, we were planning really for examiners to be there and the operations of having patent examiners, what would they do. And I will tell you: What we really missed and what we’ve learned in the last decade is the amount of outreach that those regional offices provide; it really was quite eye-opening and fascinating, and as Andrei said, you know, he wants us to look back and look forward. Looking back, their creation of the regional offices was absolutely fantastic, helping us with our nationwide workforce, but more so, even the outreach has just been an absolute boon to all of the U.S. And I will tell you, as we look forward, the more outreach education we can all do the better. I’m sure we’ll probably get into that. A couple other changes by the AIA were the creation of a pro bono program, which is still being scaled up and has really enabled people who don’t have the means to be able to represent themselves to get assistance. And I think that has been a great change and I would love to see additional work being done there. And then the final change I’ll talk about is the creation of the Patent Trial and Appeal Board. Prior to the AIA, judges at the USPTO, the judges would hear ex parte appeals from examiners’ actions, so if an examiner rejected a patent application the judges would hear that. But with the creation of the AIA, it gave the ability for people to challenge and issue patent, and so judges now have that dual role – or the PTAB, rather, has that dual role to be able to handle both of those. The intent here was that the AIA trials are cheaper, faster alternatives to district court litigation. So, I’m really proud of the way we’ve implemented all of those provisions. As Andrei said, he wants us to look forward, so one area that I think we definitely need to look forward – and is probably one of the most heated issues of debate today is some of the rules and regulations regarding the Patent Trial and Appeal Board and these AIA trials that I mentioned. The
issue I’m most particularly relating to or talking about is the issue of what’s called discretionary denials; this is – actually it was written into the statute that the director of the USPTO has the ability to accept or deny petitions to challenge a patent, and there’s a lot of discussion that has been taking place about what those denials should – what form they should take. And I know there’s been a lot of movement to put denials into place to prevent harassment of a patent owner – for example, if there’s multiple petitions being filed, if there’s either multiple at the same time or multiple in succession, if there’s concurrent litigation going on. So anyway, I flag this as being a very hotly discussed item and something that needs focus and attention moving forward. Last thing I’ll say about that, and then I’ll kick it back to Andrei, is I know that relatively recently we came out with a request for comments to get people’s views on this and we received over 800 comments in response from the public, which is, you know, way beyond what we normally receive, and there’s very differing views on how we should move forward. So, this is certainly an area that we should be focusing on moving forward.

Mr. Iancu: Thanks, Drew. Really good background and history and also the hottest issues that you identified. Just to pick up on the last point you made, I believe the office put out a summary, an executive summary of sorts, just a few pages of the 800 or so comments, right? It’s available on the website someplace?

Mr. Hirshfeld: Yes. So, there is a summary available, and if people are interested in reading any of the 800 or all of the 800-plus comments, you can do that as well. It’s all available on our website.

Mr. Iancu: Can you give folks – and the answer might be no, you can’t, but can you give folks – (laughs) – a sense of the motivations – not the motivations but the crux of the arguments on the two sides on – of the issue of multiple petitions at the office. What are the main arguments on the various sides and motivations behind them?

Mr. Hirshfeld: Sure. So, on the one hand, you have many members of the public that feel that they should be able to bring, you know, whatever challenges that they would like to and that that fits within the guidelines of the AIA, so whether that’s multiple petitions, again, at the same time or in serial or even with concurrent litigation with district court. And on the other side, you have the feeling that we should be limiting these so as to make the PTAB truly an alternative, a cheaper, faster alternative, not let it be used in a harassing way, and I’m being careful trying not to pass judgment, although I do definitely believe that the office should take steps to prevent any type of harassment. I think we want
the issues to be decided on the merits and not be deep pockets type of issue. So again, I think these are the issues, Andrei.

Mr. Iancu: And of course, given that there’s 800 comments, there’s – the whole spectrum is covered. There’s, like, lots of things in between, right?

Mr. Hirshfeld: Absolutely.

Mr. Iancu: So, look, not to put you on the spot so I’ll offer a thought here as a general principle, why this is important to the United States, right? It is somewhat of an – for the general public. For all of us who are in the midst of it, dealing with this every single day, it’s become second-hand, the issue has, but it’s somewhat obscure and technical for the rest of the public. But the bottom line is, with respect to patents, which are basically commercial instruments, certainty, predictability is important to them, for everyone in an industry. It’s important to the patent owner to know what their rights are, generally speaking, so that they can make appropriate investments in their technology that’s protected by this IP. And for the competitors, it’s important to know what the patents are and exactly what they mean so that they can work around them or take licenses to them, whatever the need is at that time. So, any time when there is a level of uncertainty or multiple serial potential challenges that might give inconsistent results and the like, it makes the system, the commercial system somewhat unpredictable and perhaps, as a result, will attract less investment both of capital and human talent in those particular areas of technology. So it’s really important to dial this just right, and it is a dial, so you have to, you know, you have to consider the entire spectrum, and it’s important to dial this just right in order to make sure that the United States investment and innovation communities are hitting on all cylinders, in all areas of technology, to make sure that we don’t disincentivize anyone and, in fact, we provide the appropriate level of incentives. So out of all the AIA, of all the issues that you’ve mentioned, Drew, I suspect you’d agree that this somehow has become, like, the hottest one still being debated, right?

Mr. Hirshfeld: Absolutely, without question the hottest one – you know, I’ve been in this role as – you know, performing the functions of director since January – (laughs) – and as I know you well know because you held the position prior to me, it’s what you hear about 90 percent of the time of the issues. I just wanted to add, if I may, one point to what you said about certainty, and I certainly absolutely agree with the point that you made. I’d just like to make a further point that it’s not only about the uncertainty of the validity of your patent and whether you’re going to be able to retain your patent rights, we have heard from many that the uncertainty is about whether they’re going to be
able to defend themselves with the cost of either being in AIA trials at the PTAB and potentially also in the district court or, again, if there's multiple suits being filed. So, the issue is also just, do we have the ability – do people have the ability to defend themselves, even when their patent, they feel very confident, will be held to be valid. So, anyway, that's one of the issues that also needs to be looked at.

Mr. Iancu: Costs, of course, of litigation on both sides.

Mr. Hirshfeld: Correct. Yes.

Mr. Iancu: Cost of defending your patents and also costs of the folks accused of patent infringement, of defending those – against those accusations. So, the overall costs of litigation, which is a cost on the entire innovation system, needs to be appropriately considered as well. All right, well, thank you very much.

David Kappos: Andrei, just –

Mr. Iancu: Yes, please.

Mr. Kappos: Just before we go on, could I offer a comment, having been directly involved in putting the legislation together with members of Congress and their staff? What we were thinking and trying to solve for at the time the AIA was put together with respect to this particular point in the PTAB was we knew that there would be any amount of strategic behavior by parties on all sides of PTAB procedures, patent holders as well as those seeking PTAB reviews, and we knew that there would be attempts or there would be conflicts with ongoing litigation, and so we specifically wanted to provide the office with flexibility to use judgment that you can't legislate to recognize those situations where district courts are already involved, where the federal circuit is already involved, where multiple procedures are already underway, and where the better part of valor, even as much as the USPTO wants to be an adjudicator and wants to correct its errors, if there are errors, or affirm patents, if they should be affirmed, the better part of valor is to have the flexibility to make good decisions, if you will, in the moment. And that was what that provision was meant for. I find myself feeling like the debates we're having over it are testament to how important it is that that kind of discretion remain with the office and there be flexibility, because at the end of the day, no one's being denied their rights; they're being told, take this fight to the Article III
courts, take it to Judge O’Malley, take it to the district courts; they’ve got 200-plus years’ experience adjudicating these kinds of disputes. They can do – and they do a perfectly fine job of it.

Mr. Iancu: Right. Thank you. Thank you, Dave. And thanks for that, those comments. And I encourage everyone on the panel to please jump in at any time on the other topics that folks are speaking on. I also want to encourage the audience to send us questions. This session was scheduled for an hour and a half. We have another 55 minutes or so, and please feel free to put your comments in the Q&A or in the chat, and we’ll try to get to them during the program. OK, let me now turn to a different topic that’s of really significant importance, and I’m going to ask Judge O’Malley to take the lead on this topic, and that is with respect to the issue of injunctions, because the entire IP system, certainly patents and copyrights, stems from the constitutional grant of the power to Congress which says that Congress has the right to give to inventors and authors their “exclusive right” to their respective writings and inventions. So, Judge O’Malley, let me just start with a provocative question, but then you can say anything you would like, which is, how can an exclusive right be enforced without an inclusionary type – an exclusionary type of a remedy like an injunction?

Kathleen O’Malley: Well, I don’t think it can completely. I think that’s part of the problem. I think that both the framers of the Constitution and those who passed the Patent Act did have in mind that “exclusionary right” was one of the things that went along with the grant of a patent. And up until 2006, it was at least presumed that if there was an infringement of a valid patent that there would be irreparable harm and that while the court still retained discretion not to grant an injunction, it was heavy lifting for the one who was found to be an infringer of a valid patent to overcome that presumption. In 2006 the Supreme Court took a case called eBay and the Supreme Court in a shockingly short opinion looked at the case below and said, all right, the district court said I’m not going to issue an injunction because you choose to license your patents to some people, and then the Court of Appeals said, no, that’s too extreme, but the Court of Appeals – at the time the CAFC said the general rule is that you get your injunction. Now, that wasn’t the way the federal circuit really had acted, but I think it was reacting to the extreme nature of the district court decision. The Supreme Court took the case and said, no, patents are just like every other property right and, despite the fact that both the Constitution and the Patent Act talk about the right to exclude or the exclusive right to manufacture, sell, offer for sale used – we’re going to say that you still need to apply a four-factor test, an equity test, which considers the likelihood of success on the merits, whether the harm is irreparable, the balancing
of interests between the parties and the public interest, and said, therefore, going forward, there’s no absolute right to exclude; it’s up to the district court to apply the general rules of equity. The problem—a couple problems with that opinion: one is that it included the balancing-of-interests factor, which had never been included at the end of a trial with respect to a permanent injunction. That was only a preliminary injunction. And so, they even didn’t get their own four-factor test quite right. But the other problem with the opinion is that it has been interpreted as having swung the pendulum in the opposite direction, to the point that it’s very difficult to get an injunction. Before eBay, the infringers or alleged infringers knew that they had a risk that they would be completely out of business if they decided to infringe and went forward and were found to infringe that they had the risk of losing their business. Without that risk, you end up basically having essentially efficient infringement; in other words, individuals and parties can infringe and know that at the end of the day all they’re probably going to do is pay the same license fee or royalty fee that they would have paid had they agreed to do it up front, rather than be found to be an infringer of a valid patent. Now, I’m not saying you can never get an injunction. There are injunctions that issue—that usually only issue where there are direct competitors and where the competition in the market is such that a sale to the infringer would be a non-sale to the patent holder. But short of that, we very often don’t see injunctions being entered. I once was at an international conference where Sir Robin Jacob from the U.K. said that that decision, the Supreme Court’s decision in eBay, was the thing that started the slide in terms of the preeminence of the United States and its intellectual property position. You can get automatic injunctions in Germany; injunctions are not automatic in the U.K. but they’re pretty close. You can get injunctions pretty easily in China. You can get injunctions all over the world except, apparently, in the United States. There are a number of other problems, I think, are posed by this; it’s not just the efficient infringement issue, but it’s also—we have—now have an excessive attention on damages awards, and the effort to get huge damages to replace the right to an injunction has caused a lot of controversy as well because the damage numbers in the U.S. are so large and it’s because that is the primary remedy at this point in time. So, I can talk about a lot of other aspects of this but it’s—to me it’s a mistake. It was—I think it was the Supreme Court’s reaction to the notion that someone would think their four-factor equity test didn’t apply in a particular circumstance, and they even in that opinion said that this is what they—that it’s always applied that way to copyright cases. Now, most copyright experts will tell you they didn’t know that until the eBay decision, but since then, clearly in the copyright field, the courts have said eBay changed the landscape and injunctions are far more difficult to get, even in the copyright era.
Mr. Iancu: Let me ask – thank you for the comments. Let me ask – you raise so many good points and I’m going to follow up on a few of them. But first of all, at the higher level, why – if we look at the broader innovation ecosystem in the United States, why does this particular remedy have an impact on potentially the investment and innovation – investment in innovation and R&D and the like? I mean, I don’t personally – I don’t think it’s a coincidence that the Founders in the Constitution itself put “exclusive right.” They could have said you can create an IP system. They didn’t have to say the exclusive right, but they clearly thought back then that this is the crux – I mean, you know, it’s a sentence long; the IP clause in the Constitution is a sentence long. And this is what they focused on. So obviously they were onto something, but what is it exactly that is making the difference here to the underlying innovation ecosystem, do you think?

Judge O’Malley: Well, I think, you know, if you go all the way back to the Constitution, Madison had a vision of the intellectual property system that was very much a democratic one. He wanted to make sure that everybody in the United States – and at that point there were mostly poor people in the United States – who had any kind of creative idea could be incentivized to follow those ideas and to implement them. And not everybody had the money or the wherewithal to effectuate their ideas, but they had the ability to license them and to actually earn a living from their own creativity. And that was the idea behind the patent system in the very beginning, and it worked. I mean, our economy, our then-nascent economy really took off because we had, you know, farmers and even slaves being creative because there was the ability to protect their inventions. And I won’t get into the issue about at what point were slaves allowed to have their own patents, but they were able to effectuate their inventions through their owners at the time. But we had a broad swath of people who we were able to tap into. I think what happens now is, if you’re not a big company who can afford to withstand litigation till the end of the day and hopefully get some money at the end, you don’t feel that you have those protections. If you have a university, if you have an individual inventor – I mean, if they don’t have the money and the wherewithal to fight that efficient infringer, then their incentive to continue to be creative dissipates. And that’s what I think the problem is. I think we have lost the vision that originally prompted the constitutional provision and the original patent acts and even, frankly, is supposed to underlie the current Patent Act. But I think we have lost it by not understanding the importance of protecting everybody who would be an inventor.

Mr. Iancu: Of course, the argument on the other side is that you’re being – the inventor, at the end of the day, if they prevail, they’re compensated anyway. Why in the world would you take somebody else out of the
market if they’re forced by the court order to pay damages, royalties and the like? Why isn’t it better for the public at that point to allow multiple competitors to go on as long as the inventor gets the money? Again, this is completely at odds with the constitutional concept of an exclusive right. But if the small inventor or whoever, the university or whoever the inventor is, gets compensated anyway, why not let everybody do it at that point?

Judge O’Malley: Well, that sort of ignores the reality of litigation, number one. There’s always threats in litigation in terms of what might happen, what a jury might decide, what a judge might decide, what the Court of Appeals or the Supreme Court might decide, and there’s also the, you know, the impact of having to live through very expensive – you know, it’s like the Bataan Death March sometimes when you’re talking about complex litigation. And not every small inventor has the wherewithal to withstand that without themselves going out of business before they ever can get to that award at the end of the day. So, I think that by saying that, oh, what’s the problem if you can get the money at the end of the day, the problem is that you have too many would-be inventors who can’t withstand the system and aren’t able – and it also, frankly, prevents settlements of cases. I mean, when I was a district court judge before eBay, it was a lot easier to settle complex litigations, including patent cases, because that threat of an injunction hung over the heads of the alleged infringers. Without that, there’s no incentive to settle. You can say – because all you do, at the end of the day, is pay what would have been a reasonable royalty. And so, I think that it really does impact certainly the smaller inventors.

Mr. Iancu Yeah, paradoxically, it actually has made the system more expensive and more complicated, not less. But before I turn to Dave Kappos on a similar issue, let me just add a perspective here in an answer to my own question – (laughs) – as to what’s wrong with it, which is, one of the main points of the patent system, as Judge O’Malley said, is to enable everyone to participate; in particular, it enables the disruptive technologies on the edges, and those are ultimately the ones, on the grand scale, that move us forward. It enables the little guy, the upstart, to compete against the established firms. It enables capital to flow to the new, small companies to compete against the established firms. Even if you compensate with dollars and you allow everyone to compete at that point, then the – you haven’t enabled the upstart to compete against the established firm because the established firm will then just go ahead and do it. And therefore, because it has greater advantages in capital, size, marketing, history, and so on, and that, in the end, removes the original incentive of the upstart to begin with. So, you know, I personally think remembering the constitutional premise here is critically important. On the trademark side, we passed
part of the Trademark Modernization Act in December of 2020. We passed the statute that restores the presumption to an injunction in trademark cases. Congress here might be interested in attending to the same or similar issue on the patent side. With that –

Judge O’Malley: You did mention – I just want to say one more thing. You did mention public interest and there is an ability to say – and there always had been an ability to say that the public interest is such that an injunction should not issue even in situations where they’re direct competitors, where, for instance, the alleged infringer’s product is greatly beneficial to the public, like an amazing new drug, and actually works better than the patent holder’s drug. In those instances, the court does have the discretion to deny the injunction, despite the direct competition, and to then say, but we will make sure that the patent holder is benefited as we allow the competition to go forward. So, it’s not that the public interest doesn’t come into play and it’s not that the public interest wouldn’t have already been a factor for the court to consider pre-eBay, but it’s that for some reason we assume the public interest is that everybody should be able to compete completely freely with each other, regardless of the extent to which they are essentially taking each other’s rights.

Mr. Iancu: Right. Excellent points. Thank you, Judge. Let me turn to Director Kappos. Dave, a special category of patents or a category of patents to whom the injunction discussion applies, especially so nowadays, is what’s called standard essential patents. So rather than me setting the stage, why don’t I turn to you, Dave, and maybe you can explain a little bit what those types, what they are, standard essential patents, why they’re important to the economy, and what is the current IP-related issue that the country should address?

Mr. Kappos: Yeah, well, thanks. First of all, thanks, Andrei, for inviting me to this program and thanks to the CSIS folks for setting this up; it’s really super important and a great discussion. So, standards, of course, are ubiquitous. We plug our plugs into the wall and enable our railroad cars to run on tracks all over the world because of standards. Standards have been around for hundreds of years. But in recent years, standards have become the subject of innovation and have extended themselves into areas that are bringing together innovators and putting innovators on common platforms, and we call those innovation-driven standards. And of course, where you’ve got innovation, you’ve got intellectual property and particular patents, and so about a generation or so ago standards and patents started coming into contact with one and another more and more and the courts started getting involved, and that’s what Andrei’s referring to when he mentions SEPs and the IP issues that come up with SEPs. And
of course, what gets complicated is that the standard-setting process brings competitors together which introduces natural antitrust concerns, and to ameliorate those more than a generation ago, standard-setting organizations and what’s now known as SDOs, standard development organizations, began requiring the participants to make what they call FRAND commitments; those are commitments that they would license their patents on fair, reasonable, and nondiscriminatory terms, and there’s been a tremendous amount of litigation over the years around many issues surrounding the FRAND debate. So that’s sort of a background on what gets us to this point. What I would say, turning to the topic of the day of, you know, what have the hot issues been and what are the hot issues now and how do we look to the future involving SEPs and innovation-driven standards, what I would say is that first of all, we need to understand that standards-driven innovation has created the most dynamic business model that our planet has ever known. It has created ecosystems that produce public benefit, welfare for real humans at all levels of all economies, and some would say even disproportionately in the least-developed economies, created opportunities of truly monumental proportions. So I start by stating – I don’t think I have to assert because I think it’s now obvious that standards-based innovation ecosystems – and I take the 5G innovation ecosystem which sits on the shoulders of the 4G and LTE innovation ecosystems that power our smartphones, and I happen to have mine right here – as being, you know, absolutely perfect examples of the enormous spillover of public benefit that results from encouraging innovators to contribute their innovations to standards. The foundation of standards are the innovators, and the innovations that they, I would tell you, bravely put into the standards for their competitors to use and get equal benefit to them on the basis of maybe in the future, if the standard is successful and their patents can be upheld, maybe getting part of their investment back so that they can invest it in the next standard. So, it’s a rather brave step, and I think one that we should applaud, that the innovators to the standards make. There has been a lot of progress in resolving the disputes that have crept up over the last generation at this intersection between standards and patents. There was a belief that patent holders, SEP, standard essential patent holders engaged in rampant acts of what’s called holdup, using their patents to hold up a captive industry that had agreed to implement the standard. But we have since found out, because a generation of data became available, that the bigger problem is holdout, which is these well-heeled implementers, companies with extremely deep pockets that Judge O’Malley and Andrei have referred to as those who engage in efficient infringement, and effectively, if you will, thumb their noses to the patent holders, the SEP holders, and say, look, you can’t get an injunction against me; I’m just going to infringe your patent and the
best you’re going to do in court after three, four, five years and after you spend 10, 20 or 30 million dollars is maybe you’ll win and you’ll get an award of damages that was what I was going to have to pay you now anyway but I get to use the money in the meantime, take some shots at your patent; I’m never going to have to pay you interest from today equal to the value of my time use of the money, so of course – I’d be committing malpractice if I didn’t recommend to my CEO and my board that I infringe your patent, that I delay, delay, delay and hold out, and maybe not pay at all or, at worst, pay later. So, what we’ve learned is that the real problem is not holdup but holdout. And it’s nice to have the facts and to have the truth on that. There was a big issue about licensing level. Should we license at the so-called component level or the level of the smallest salable patent practicing unit? And thank you to the 9th Circuit, we have learned the answer to that question, which is no, the patent holder is entitled to license at whatever efficient level it wants to license, which in the case of 5G tends to be the handset level. There was the issue of royalty stacking. We were told by smart academics that the royalty stack would become unsustainable and would overwhelm the SEP industry. Well, data shows that that didn’t happen either. The royalty stack has stayed about the same for now more than a generation. There was an issue of injunctive relief, which Judge O’Malley and Andrei have already talked about quite a bit, and a view that injunctive relief should absolutely not be available in the case involving standard essential patents. Well, thank you to Andrei and Makan Delrahim and Walt Copan during the last administration, we got clear guidance in a new policy from the three agencies involved, NIST in Commerce, USPTO, of course, and Department of Justice Antitrust Division, that no, injunction should be available for SEPs using the very same factors that are used for any other kind of patent. So, we’ve really settled a lot of issues in a very constructive and appropriate way.

Mr. Iancu

All right, welcome back everybody, with apologies. There was apparently a technical issue with the webcast. We are back and we were in the middle of Dave Kappos’ discussion of standard essential patents. Go ahead, Dave.

Mr. Kappos:

OK. Thanks, Andrei. It was a good place for a break, actually, because I was just transitioning and saying briefly, I wanted to come back to your charge to us and mention a few of the current hot issues, because while a lot has been resolved nicely by the courts, as well as the administration, the last administration, about SEPs, there are some current hot issues. I would say global royalty rate setting is a major issue right now, probably the major issue with courts all over the world competing to be the royalty-rate setters for SEPs. And this has spawned an issue of global forum shopping because if you could be in
the court you like, you can get the rate set the way you like them, and that in turn has spawned a spate of anti-suit and anti-anti-suit injunctions, particularly involving Chinese courts in the province of Wuhan versus courts in India, courts in Germany, and courts in the U.K. and courts in the U.S. So, there’s a lot to be done still in that area; we can talk about it to the extent folks want in the Q&A. But then, lastly, looking forward, I would say, if there’s anything we’ve learned in the last generation it’s that facts count. Getting the facts enables us to make good policy, not making policy based on anecdote or – you know, one thing happens one time and we suddenly go and make policy based on that, and then, perhaps most importantly, celebrating innovation – and Andrei, to your point, the fact that innovation doesn’t just happen; it happens because of incentives and our patent system is the incentive and it works the same way for SEP-based innovation as it does for any other kind of innovation. So, we need to celebrate innovation and recognize that the innovators are good guys. And we need to, most importantly, avoid backsliding, because there are calls now with all the attacks on the IP system to move backwards and to go back to those debates of the last decade and even 20 years ago, and we can’t let ourselves do that. We’ve learned from those debates, the courts have made good decisions, policymakers have made good decisions – we need to move forward. So, I’ll stop there. Thanks, Andrei.

Mr. Iancu Well, thanks, Dave, for very insightful comments. And look, it’s – when it comes to standards-based innovation, as you have indicated, Dave, it’s hard to underestimate and hard to overemphasize how important it is for the technologies of the future, because when we’re talking about telecom, 5G, 6G, and beyond, artificial intelligence, more and more, these are based on standards and if the American system does not provide the appropriate level of protection and incentives, especially relative to our competitors outside, other systems, then American-based innovation will not be able to fire on all cylinders, as we have said, and not be able to maximize itself. There’s a question in the Q&A, or was before the interruption – there was a question as to, why is that important to the United States? Why does the United States have to be first? Well, look, I mean, the fact of the matter is, and I’ll be blunt: If I have a choice between, for this particular example, standards-based technologies that are driven by the Chinese Communist Party versus being driven by American free-market enterprise, you know, color me picky, but I pick the United States and I pick American innovators, and I would rather live in a world where technology and the standards, where the American innovation system has a meaningful participation. So, leaving it at that – so that is a critically important area, but now let me turn to the last major point that’s very, very hot, and let’s go to Judge Michel. And let me ask you,
Judge, about an area called patentable subject matter, which means effectively what creations by human beings are subject to the patent system and which creations are not subject to the patent system? For example, fine arts, paintings, songs – those get copyright protection, whatever, but they don’t get patent protection. Certainly, industrial equipment and the like is supposed to get patent protection. But some areas are very gray. And this is critically important. The statute that defines those boundaries was written in 1793 by Jefferson and Madison; it has not changed since. So, it’s left to the courts to interpret it, and what’s the problem with that, Judge, and what would be the proposed solution?

Mr. Michel: Well, the problem is that the Supreme Court in the last decade has greatly expanded judge-made exceptions to eligibility for inventions falling in the four categories specified by Congress in the relevant section, Section 101, and not only have they expanded the exception so that some technologies like medical diagnostic methods are almost per se not eligible and therefore lose the incentive of the power of patents to justify the investments, but in other areas, the recent decisions have created so much uncertainty that many decision makers, corporate executives, venture capitalists, inventors, and others, no longer consider patents reliable enough to justify making these risky investments which are slow to mature and which usually have to be large and repeated. So, it has huge economic consequences which I'll summarize in a minute, but first let me emphasize that before the last decade, for over a hundred years, there was a relatively benign, stable law of eligibility coming out of the Supreme Court. And then suddenly, in 2012 in a case referred to as Mayo, for short, the Supreme Court upended that stable, predictable eligibility regime and substituted a regime that’s vague, highly subjective, impossible for adjudicators at all levels to apply consistently, and this has caused, I think, grave harm to our innovation ecosystem, and it also has put us at a big disadvantage compared to global competitors, because while the United States Supreme Court was shrinking eligibility and muddying the waters, all of the countries in Europe and major countries in Asia, including China, were widening and clarifying eligibility, so we’ve put ourselves at a disadvantage compared to our past, but also a present disadvantage compared to our rivals. So, we have a regime now that’s highly unpredictable; the outcomes are not only unpredictable, but many are inconsistent with one another. So, patents are no longer trusted by those who have to commit the money, whether it’s corporate money or outside investor money, like from venture capitalists. And this has to shrink the incentive to invest, which is the fuel that drives the innovation ecosystem to begin with. And there’s already considerable evidence that many smaller companies in the biotech sector, in computer-implemented
innovations have gone out of business or are barely limping along, particularly smaller companies, startups, universities, hospitals, research institutions, engineering firms, and the like. And as a result of this new regime, totally judge-made with no real insight or prediction into the practical economic consequences, the country is now, in my view, confronted with seven different harms at the macro level. Harm number one is investment capital is beginning to flee away from real technology to uses not dependent on patents, like entertainment, building casinos, and the like, and capital is beginning to flee abroad to rival countries that have wider and clearer eligibility laws and stronger enforcement systems, like Europe, particularly Germany but many others as well, and increasingly even China. So, we are suffering compared to rivals and compared to our own needs. Medical diagnostic tests are so important, including to combat the ongoing pandemic, but we badly handicapped that industry, almost destroyed it, over the last decade. They made a quick recovery under the pressure of the pandemic, which is a credit to those firms, but they shouldn’t have had to start from a dead standstill. So, the second problem is that the eligibility law is now frozen in place because the Supreme Court has refused to revisit its 2012 Mayo case or 2014 case known as Alice, even though every year it has large numbers of requests to revisit and revise their eligibility law, more than 60 such petitions. Yet another harm, mentioned earlier, is that in the 10 advanced technologies of the 21st century, artificial intelligence and the rest enumerated earlier, we’re now at severe risk of losing out to China that’s investing massively while we’re investing less, as seen, for example, with regard to computer chips, also known as semiconductors. The proportion of venture capital presently invested in chips out of all the total VC investment is now about one-seventh of what it was a decade ago, so we’re suffering in the chip area because of eligibility law as well as other problems. And course, meanwhile China: not only massively investing but making great strides technologically and working hard to realize its promise in its Made in China 2025 plan to surpass the U.S. in all 10 of the advanced technologies of the 21st century. And even national security is now threatened, as was recognized by the April 2021 report of the National Security Commission on Artificial Intelligence. So, we have problems across the board. It was interesting to me that at a recent Senate hearing, 45 true experts on innovation policy and patent law testified, and out of the 45, 40 – 40 out of 45 agreed that eligibility law given to us by the Supreme Court was a mess, was chaotic, was counterproductive, and needed to be fixed. But unfortunately, the Congress has yet to act. And finally, the combined effect of the restriction on injunctions, the repeat attacks on patents and the Patent Trial and Appeal Board have compounded the problem of eligibility law being such a mess. And of course, the actors, whether
it’s Congress or the Supreme Court or others, were not able to predict all the effects and we have huge unintended and very harmful consequences. So, in my view, adjustments need to be made and need to be made urgently. And it really is a matter of national economic, technological, and security imperative. So, Andrei, that’s the summary of the sad state of U.S. law of eligibility and its many harmful practical impacts that threaten the future of our country, and I hope they get fixed promptly.

Mr. Iancu: Thank you. Thank you, Judge Michel. And look, I said in my opening comments that U.S. leadership needs to realize that we are perhaps in a new Sputnik moment here. Somebody needs to rise to the occasion and take a leading role to lead the United States in the right direction. And the effects are concrete. What Judge Michel just said about the effects surrounding eligibility law on silicon development, manufacturing in the United States – look what is happening right now. There is no reason for the United States, the inventor of silicon technology in the 20th century – we have a whole valley called Silicon Valley, for example – for us to have a shortage to the effect that major manufacturers have to close down plants should be a wakeup call. And it’s not just this. As Judge Michel mentioned, medical technologies of the highest importance to human health, quantum computing and the like, this is the time that the ship needs to be righted. The question, though is: where is that leadership going to come from? Let me ask Dave Kappos if you have some thoughts on that question. Where do we get the leadership to change this? And I ask in particular because you were the crux at the last, very significant change in patent law, as we mentioned at the beginning of the program, the AIA. Is there the wherewithal? Are there leaders here now that can affect similar or even bigger changes?

Mr. Kappos: Yeah, great question, Andrei. So, first of all, I think the administration now needs to get involved the same way that you were involved and made changes during your administration and, you know, the rest of us. We need a leader of the USPTO, and with all respect, of course, to Drew, who I absolutely love, we need a political, confirmed leader who can, you know, carry the weight of the administration. And it’s going to be very difficult until we get that. But I think that once we get that leadership, you know, we can make progress. I also think that it’s important that we have leadership from DOJ, particularly in that antitrust slot. And so, we’ll see how that goes. The other place where we need leadership from is Congress, and fortunately we’ve had senators like Senator Tillis and Senator Coons who’ve been tremendous advocates for change and improvement. But of course, as Judge Michel points out, you know, no one’s been able to get it done yet. I think, you know, the last component where leadership is needed
is from the private sector, from the companies that are affected and the industries that are affected to step forward more assertively, more positively, and tell their story. And that to me is – remains somewhat of a missing ingredient.

Mr. Iancu: And, not to forget, leadership from the White House itself. Again, in the 1960s, President Kennedy standing up in front of the nation challenging the nation to a singular goal when it comes to space-based innovation. That type of a call coming from the White House I believe is urgently needed. And for that, now, technologies are more complex now. There are many more issues, as we’re hearing on this program alone and throughout the week. Some of this, more and more – it’s harder to see artificial intelligence and quantum computing than satellites, you know, which you can visualize. But nevertheless, in order to enable that, you know, an innovation policy with a call to action from the highest leadership in the land, whether it’s in Congress or in the White House, I think would make a big difference. Given the time, I want to turn to one last topic here and give Drew the opportunity to speak. Drew, you can comment on any of the stuff that’s been since, including 101, if you’d like. But there was a question in the chat about diversity of innovation, whether it’s in the indigenous population or – as it’s in one of the questions right now, or just in general. I happen to believe this is critically important. I think this has been important for the PTO for many, many years, certainly going back to Dave Stein but even before. But now in particular, as we’re facing these challenges, when we need more Americans involved, talk a little bit about not just the importance of that, but what are some of the practical actions that can be taken by the administration or, frankly, anyone else in government?

Mr. Hirshfeld: Sure. Thanks, Andrei. Actually, before I mention an answer to your question on diversity, I wanted to circle back to something Dave just said on subject-matter eligibility, and I absolutely agree that this is an area that needs to be addressed and people need to show leadership. But I just want to make one sort of nuanced point. I think people need to show leadership, but that leadership is leadership of compromise. Just like I was talking about some of the Patent Trial and Appeal Board disagreements there are, subject-matter eligibility has people with very strong disagreements on what the law should be. And what we really need to do is to have people who are not afraid to compromise and find a solution that’s good for the country, because I fear that when people hear people like Dave and myself and others talk about leadership, they think leadership to push the position I believe in at the cost of moving forward, and I think we’re so passionate about the positions we believe, and I understand that, but sometimes a failure to compromise makes us stagnant and we don’t move forward, and
that’s exactly what’s happened in 101. So, I think the more compromise, the better. Anyway, to the point about diversity: I know the question came in earlier in the Q&A about, you know, why is leadership important, why is innovation important? And innovation is – the more innovation we have – it’s the livelihood of the country; it’s the financial well-being and the general well-being of the country. So, I can’t understate why – I can’t overstate, rather, why it’s so important to have innovation throughout the country. And what we’re seeing is, we’re not seeing a wide swath of innovation. We’ve done some studies. Women are underrepresented. We know there’s many underrepresented groups. So, it is critical for this country to be able to expand the number of people who are innovating from sectors that, and underrepresented groups that really haven’t been in front of PTO and haven’t been innovators in the past. What we’re doing at PTO for this – and you asked for some concrete steps – we are working on a national strategy for increasing innovation to underrepresented groups throughout the country. It’s something we’re – I’m personally very excited about. I know, Andrei, this started with you at the PTO, and I know we had Department of Commerce leadership then and we have Department of Commerce leadership now for this issue, and we are very excited about moving forward and convening the strategy. By the way, the strategy is being worked on and created by a combination of public- and private-sector people working together. And I know we’re running out of time; I’ll just mention one more quick way we’re addressing this is we’ve been very cognizant at PTO about where we do our outreach. I mentioned our regional offices, but we’ve actually started to capture by zip code where we’re doing outreach to be able to recognize where we are, not focused where we should be focused more, so that we’re letting people who don’t have the background in IP learn more about the value of IP because it is for the good of the country.

Judge O’Malley: Can I add just one point? Because I think it’s interesting how these two last topics tie together. There was a study out of Stanford; Mark Lemley and his research assistant analyzed all the Alice cases over about a 10-year period and their conclusion was that those groups that were most impacted by Alice disqualifications, or 101 disqualifications, were individual inventors and individual-started – inventor-started companies. In other words, it’s not the, you know, the evil patent trolls or it’s not the large corporations who are losing out the most because of the 101 problems. It’s those very individual inventors that the PTO wants to target. And the other point, as it relates to David’s point that there needs to be leadership from private industry: Part of the problem is that Jonathan Barnett has recently written a book that analyzes the incentives to innovate, and he said part of the problem is the largest corporations that have – that are
very highly, vertically integrated and structured have the ability to substitute for patent protection with other economies of scale and other large things, which means that the only innovation that we’re going to have is just sort of making the same products we have somewhat better, rather than finding new sparks of genius that we need to be looking for.

Mr. Iancu: Thank you, Judge O’Malley. We are basically out of time, but I want to close with a round of – last thoughts from each one of you; can be very short, could be rapid fire. So last comment or last thought from each one of you, basically answering the top-level question of if you had to pick one thing that the United States needs to do, in order to utilize the intellectual property system to its maximum potential to affect, you know, innovation growth and innovation leadership in the United States, what would it be? And I know that we talked about a lot of issues, and you can say anything you want in your last thoughts; it’s just one suggestion, this question from me; you don’t have to answer this exactly. But if we can leave the legislators out there that might be watching this or industry leaders or administrative leaders that might be watching this with an action item, what would that be? So, let’s see. Let me start with, in reverse order, with the way we went at the beginning, so let me start with Judge Michel.

Mr. Michel: Andrei, I think that the important thing for the country going forward is for Congress to retake its appropriate role as the framer of national innovation and economic policy, and not leave it to the courts who are ill-equipped, have not done it well, can’t do it well, and it’s undemocratic for unelected judges to be making broad economic and innovation policy anyway. So, Congress has to take back control jointly with the other so-called political branch of government, the administration, and let the courts adjudicate and not legislate.

Mr. Iancu: Thank you, Judge Michel. Dave Kappos?

Mr. Kappos: Yeah, thanks, Andrei, and I would add to that to say on the administration side we need a national innovation strategy.

Mr. Iancu: Thank you. Judge O’Malley.

Judge O’Malley: I’m going to be a little bit more granular because I’d like to think that if I pick one thing we might get it, and I think that we need to like we did in the trademark context and we need to change the law as it relates to the right to exclude, or, better yet, return the law to where it was as it relates to the right to exclude. And I think that’s something that Congress could easily do.
Mr. Iancu: All right. Thank you very much. And finally, Drew.

Mr. Hirshfeld: I would say educate, educate, educate. We need to really increase how we educate people, and I’m not just talking about patent lawyers; I’m talking about we need to move IP education and the value of IP way earlier in the process, as early as we can go, even to elementary school. We need to build it into the fabric of our entire educational process.

Mr. Iancu: Thank you so much. Such great thoughts from all of you. Thank you so much for taking the time to be with us and share your thoughts. For the two of you currently serving, thank you for your continued service to the United States. For the two of you who served and are now in private practice, thank you for continued engagement in the IP system and continuing to lead in the innovation economy. Thank you to all the audience and for being with us and, once again, to CSIS for putting this on.