

Good News for Patentees: Bipartisan NSCAI Invokes National Security in Calling for Legislation to Clarify Patent Eligibility



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“The NSCAI Final Report’s bipartisan endorsement of Section 101 reform on national security grounds [hopefully] will attract White House interest and provide new bipartisan impetus for serious congressional consideration of legislative changes to clarify patent eligibility.”



The judicial undermining of patent eligibility, in defiance of the clear language in Section 101 of the Patent Act, poses a clear and present danger to the pace of American innovation. [As Adam Mossoff notes:](#)

Over the past decade, . . . the U.S. patent system has been put under an extensive amount of stress from all branches of the federal government. For its part, the Supreme Court is now deciding patent cases at a rate not seen for almost 100 years, changing the law in all aspects of the patent system. This has sown extensive uncertainty for innovators, which has undermined the reliability of patents as a guaranty that an inventor or creator will be able to rely on them to reap the fruits of their labors.

But it is far worse. The Supreme Court is now closing off the patent system to the innovations that it has long recognized as worthy of securing with patent protection. This has had a tremendously negative impact on the inventors and the companies working in the innovation industries that invest millions of dollars in creating the new products and services that drive economic growth, job creation, and higher standards of living. The Supreme Court is undermining America's long-standing comparative advantage among world economies in securing reliable and effective patent rights for all innovators.

Unfortunately, efforts in the last Congress to enact Section 101 reform legislation in order to increase certainty for patent applicants [were for naught](#). Now, however, as a new Administration and Congress focus on strengthening America's high-tech economy, there is a fresh opportunity to make senior policymakers aware of the role patent eligibility plays in stimulating innovative efforts.

A New Source of Support for a 101 Fix

Fortunately, a recently released report by a bipartisan congressionally-established commission lends powerful support to Section 101 reform initiatives. The National Defense Authorization Act of 2019 created a 15-member National Security Commission on Artificial Intelligence (NSCAI) ([see the press release](#)). Congress directed that the NSCAI “review and advise on the competitiveness of the United States in artificial intelligence, machine learning, and other associated technologies, including matters related to national security, defense, public-private partnerships, and investments.” The NSCAI was chaired by former Google CEO Eric Schmidt. Its 15 Commissioners (appointed by the Secretaries of Defense and Commerce, as well as leading congressional Democrats and Republicans) included senior academic and corporate scientists as well as public policy experts.

On March 1, 2021 the NSCAI [released its final Report](#) to the President and Congress ([NSCAI Final Report](#)) ([see the press release](#)). Of particular note, the NSCAI's Final Report includes a chapter underscoring the importance of a strong intellectual property law system to U.S. national security interests tied to technological advancement:

America's intellectual property (IP) laws and institutions must be considered as critical components for safeguarding U.S. national security interests, including advancing economic prosperity and technology competitiveness. Prioritization of IP policy is especially important given China is both leveraging and exploiting IP policies as a tool within its national strategies for emerging technologies. The United States must, at a minimum, articulate and develop national IP reforms and policies with the goal of incentivizing, expanding, and protecting artificial intelligence (AI) and

emerging technologies, at home and abroad. Such policies should be developed and proposed via the Executive Branch with a process that integrates the disparate departments and agencies that serve important roles in promoting U.S. innovation.

A Point of View Not Previously Expressed

Building on the theme of prioritizing IP, the NSCAI Report specifically recommends that Section 101 reform be pursued. Particularly noteworthy is its discussion of how legislation clarifying patent eligibility would spur investments in key technologies, incentivize innovation, and strengthen national security:

- 1. Patent Eligibility: The Secretary of Commerce should assess and articulate the impact of current patent eligibility laws on innovation in AI and emerging technologies from an economic, trade, and national security policy perspective to better inform the legislative and agency efforts on patent eligibility reform. America's IP regime has spurred American ingenuity since the late 18th century. By protecting "any new and useful process, machine, manufacture, or composition of matter" through stable legal institutions governed by the rule of law, inventors and investors have relied on America's IP system to provide the certainty necessary to justify large and risky R&D investments, which are critical for technologies. A strong and robust patent system is equally critical to incentivizing American innovation in AI and emerging technologies that affect national security. Unfortunately, recent patent eligibility court rulings have narrowed the scope of inventions that are eligible for patent protection. This has resulted in a broad swath of innovation that is now ineligible for patent protection in both digital technologies and biopharma, among others. The legal uncertainty for U.S. innovators and companies as to whether their inventions will be eligible for patent protection or susceptible to invalidation once granted is pervasive. This uncertainty in turn has impacted investments in AI and technologies critical to national security. Empirical studies have proven that patents are causally linked to venture capital investments in startups, and, as a result, are causally linked to the success of startups. Recent reports, however, reveal that investments in patent-intensive U.S. startups that develop critical technologies (e.g., computer hardware, semiconductors, medical devices and supplies, and pharmaceuticals and biotechnology) have declined relative to non-patent-*

intensive companies. This is consistent with investors consistently reporting that patent eligibility is a key factor in their decisions whether to invest in a particular company's technologies or bring a new product to market.

Legislation appears to be the only practical means to reform patent eligibility doctrine. The Judiciary, specifically the Supreme Court, has indicated an unwillingness to revisit its decisions in the past decade that have created this fundamental problem in patent eligibility doctrine. The USPTO has adopted a framework for assessing patent eligibility during the examination process of patent applications, which has had positive results in providing greater certainty to patent applicants, but the Federal Circuit does not seem inclined to follow USPTO guidance.

Efforts to reform the patent eligibility doctrine by amending the relevant provision in the patent statutes failed in 2019. Efforts continue to restart the legislative reform process. A national security point of view has not been expressed on the impact of patent eligibility law on technologies critical to national security, such as AI, microelectronics, 5G telecommunications, quantum computing, and biotechnology. A national security point of view on the impact of current patent eligibility laws on AI and emerging technologies should inform a national IP strategy.

The NSCAI Final Report's bipartisan endorsement of Section 101 reform on national security grounds—a “point of view [that] has not been expressed” previously—as well as on technological innovation grounds merits highlighting. It is to be hoped that it will attract White House interest and provide new bipartisan impetus for serious congressional consideration of legislative changes to clarify patent eligibility.

National security is not the only underappreciated aspect of Section 101 reform. Clarification of patentability, emphasizing a broad understanding of patentable subject matter, would enhance competition and thereby promote economic welfare. The economic logic is straightforward. Clarifying the expansive subject matter of inventions that may qualify for a patent (if they also meet the separate Patent Act requirements of novelty, non-obviousness, and utility) would engender additional innovative activity in a wide variety of industries. The new and

improved products and processes that resulted would enhance the quality of goods and services in many market sectors (such as medical diagnostics, for example), thereby bestowing substantial benefits on consumers and creative producers. What's more, a rising pace of innovation would stimulate competition in affected markets, as firms strove to match their competitors' inventive improvements so as to meet consumer demand and retain customers. Under innovation-based competition, the most creative firms in this race would thrive, consumers would benefit, and total economic surplus would expand ([see here](#), for example).

Let's Clarify this Judicial Error

In sum, legislative reform to clarify patentable subject matter would spur technological progress and be pro-competitive to boot. The release of the prestigious, bipartisan, congressionally-inspired NSCAI Report, which finds that such reform would also benefit national security, could not be more timely. Let us hope that Congress and the White House take note and place badly needed Section 101 clarification (aka clarification of harmful judicial error) high on their "to do" list.