



# Property Rights: The Key to National Wealth and National Security

*Restoring “Morning in America” to Regain Industrial Competitiveness*

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## **Property Rights: The Key to National Wealth and National Security Restoring “Morning in America” to Regain Industrial Competitiveness**

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### ***Executive Summary***

Ronald Reagan won election in 1980 as America was reeling from a series of economic shocks in the 1970s. Reagan’s message of “A New Beginning” offered a brighter alternative to the status quo “malaise” of Jimmy Carter. He was followed 36 years later by a pro-American message that also hit an electoral target facing similar poor economic circumstances: “Make America Great Again.” The nation both times was suffering lost industrial competitiveness, seen in shuttered factories, manufacturing job losses, stiff foreign competition, stagnant wages, and widening trade deficits. Reagan’s landslide reelection won on the theme, “Morning in America.”

#### **Industrial Competitiveness**

Reagan embarked on a range of policy initiatives to strengthen the U.S. economy, premised on strong private property rights. In particular, he created the President’s Commission on Industrial Competitiveness (“Young Commission”). It defined competitiveness as *“the degree to which a nation can, under free and fair market conditions, produce goods and services that meet the test of international markets while simultaneously maintaining or expanding the real incomes of its citizens.”*

Throughout the 19th and most of the 20th centuries, America’s industrial base had risen rapidly from a largely agrarian society to one of factories and manufacturing plants that attracted workers and raised standards of living through higher wages and better products. Much of this transformation depended on strong patent protection. All of it depended on private property rights. People with secure property rights flourished. Ownership rights undergirded the ability to exchange the fruits of one’s intellect or labor for another’s, to enter legally enforceable contracts for economic transactions, or to combine with others to start an enterprise such as a manufacturing company. The U.S. industrial base sought innovation to increase productivity through capital investment, technological invention, and management improvements. The resulting “virtuous-circle” economy created and sustained a broad middle class. Our

competitiveness was seen in domestic production of enough goods to supply our own and other countries' needs. By the start of the Reagan administration, our competitive edge was slipping.

Reagan's Young Commission identified several key components to keeping our edge in innovation and technology, improving manufacturing's access to capital, maximizing America's human resources, and making free and fair trade a priority, in particular by countering foreign unfair trade practices and expropriation of U.S. companies' intellectual property, to restore an internationally competitive U.S. industrial base. Of these, the Young Commission said, "Technological innovation is a mainstay of the American economy, . . . the foundation of our economic prosperity, our national security, and our competitiveness in world markets."

### **Case Study: Intellectual Property**

The American patent system was designed to promote technological and scientific progress. It democratized IP rights, ensuring that original creators held ownership rights in their inventions, discoveries, and works. Three aspects of intellectual property protection — risk and reward, the right to exclude, and broader societal benefits — lead to industrial competitiveness. The Young Commission recognized that strong IP rights are required in order to commercialize discoveries and inventions, especially sophisticated, complex products and processes involved in advanced industrial and manufacturing sectors.

Challenges to patent rights — including some the Young Commission flagged, some arising from harmful court rulings, others from bad legislation and regulatory agency missteps — interfere with the ability of research and development-based, patent-centric industrial firms and other patent owners to thrive with the high-risk, high-reward business model. These headwinds diminish U.S. industrial competitiveness by undermining a key competitive advantage.

***"When intellectual property rights are fully protected under the law — in the same way that tangible property is — the competitive edge that U.S. industries gain from new technologies is preserved."***

**— President Reagan's Young Commission**

Those challenges highlighted in this paper include what some commentators, including the government itself, assert: that patents are "**public rights**," which treats patents unlike other property rights and instead like government-issued health, welfare, or veterans benefits. Another problem involves new technology's **patentability**. Even in the 1980s, the Young Commission cited the lack of patentability of biotechnology and software as hindrances to U.S. competitiveness. More recently, on the issues of patentability and property rights, courts have set innovation back 30 years with the *AMP v. Myriad Genetics*, *Mayo v. Prometheus Labs*, *Alice Corp. v. CLS Bank*, and *Bilski v. Kappos* rulings.

Reagan's prescient commission also found **patent enforcement** to be difficult, expensive, uncertain, and unsatisfactory in making patent owners whole. Courts have compounded the hurdles to securing one's patent exclusivity through the *eBay v. MercExchange* decision, which made it even harder to obtain an injunction against a patent infringer.

Another problem area is **patent validity and patent reexamination**. The commission said, "The uncertainty of a patent's validity has long been a factor in discouraging sizable investment in patented innovations." However, Congress, courts, and the Patent & Trademark Office have undermined the assumption of validity, made it too easy to challenge a patent's validity, and

created a biased administrative forum that invalidates about four out of five patent claims. **Patent licensing**, though long the norm for most inventors (including Edison and the Wright Brothers) and R&D firms for commercializing their inventions, faces increasing assault from Silicon Valley patent licensees, the Federal Trade Commission, and foreign trade competitors.

The Young Commission also highlighted ill-advised **antitrust enforcement** against patent owners exercising patent exclusivity, writing, “Not only do licenses introduce more competitors into the marketplace, but insofar as they increase the patent holder's reward, they encourage the patent system itself and therefore the incentive for R&D.” The Obama administration, serving its Silicon Valley cronies, aggressively ramped up antitrust action against technological standard-setting U.S. firms simply trying to license their patents.

Internationally, the Young Commission cited **unfair international competition** as a tug of war between nations that protect IP rights, which tend to be exporters of technology-based goods, and countries that don't respect property rights. The latter practice expropriation of U.S. firms' sensitive, proprietary IP through mandatory technology transfer as the price of access to their markets and, over time, overcome the American firm's competitive edge. Other unfair trade practices involving taking U.S. IP include licensing restrictions and compulsory licensing, abuse of antitrust laws, denial of due process and fair legal treatment, and other favoritism of their domestic industrial champions.

### **Adverse Effects on U.S. Industrial Competitiveness**

The weakening of property rights domestically and abroad, including intellectual property, strikes at the foundation of our industrial competitiveness. Reagan's Young Commission explained

***“If the United States is to benefit from its own technology and remain competitive, the U.S. Government must improve the protection that U.S. intellectual property laws provide to U.S. technology. . . . [and] work aggressively in the international community to ensure that intellectual property rights are adequately protected abroad.”***

how weakened property rights translate into reduced U.S. economic growth, lost jobs, flat wages, imbalanced trade, and national security risks. Lost industrial competitiveness relative to other nations is what counts, and America has lost ground vis a vis competitors' gains.

### **Conclusion**

Secure, enforceable property rights enable human flourishing and human progress, spurring enterprise and

ingenuity, inspiring new discoveries and creations, and driving business formation, industrial output, desired products, and wealth creation. The key is secure private property rights. The critical conditions for U.S. industrial competitiveness are free, fair markets, reciprocity, transparency, and accountability.

The time is right to revive America's stricken economic competitiveness. A new presidential commission of IP sector leaders could identify ways to restore the U.S. industrial base, strengthen property rights, and foster U.S. technological/industrial leadership. We must restore U.S. IP rights and protect American IP, which have been weakened or lost, both at home and abroad. We would do well to pursue property rights-based U.S. industrial competitiveness as a top national economic priority.