National Security and Competition: How Courts Evaluate National Security When Assessing a Merger

Michael McLaughlin*

I. Introduction

Many of the preeminent antitrust cases concerning mergers of firms in the defense industrial base (DIB) occurred in the 1980s and 1990s.[1] In multiple cases, federal courts found that the national security concerns of enjoining a merger were too speculative to overcome the merger's anticompetitive effects or that the merger would be detrimental to national security.[2] Since that period, the antitrust and national security landscapes have changed significantly. Not only does the Department of Defense (DOD) believe consolidation in the DIB can create national security risks[3] when it previously encouraged consolidation,[4] but the world has potentially entered a new Cold War between the West and China.[5]

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* J.D., Georgetown University Law Center; M.A. Communications, Stanford University; B.A. Communications, Wake Forest University. The author is an associate in the Antitrust and Competition practice at Wilson Sonsini Goodrich & Rosati.

1. Between 1979 and 1994, the Federal Trade Commission and Department of Justice approved over 300 mergers in the defense industry and litigated four. Mark Shwartz, *The Not-So-New Antitrust Environment for Consolidation in the Defense Industry: The Martin Marietta-Lockheed Merger*, 1996 Colum. Bus. L. Rev. 329, 329 (1996). The four mergers were *Grumman Corp. v. LTV Corp.*, 665 F.2d 10 (2d Cir. 1981); *FTC v. Alliant Techsystems Inc.*, 808 F. Supp. 9 (D.D.C. 1992); *FTC v. PPG Indus., Inc.*, 798 F.2d 1500 (D.C. Cir. 1986); and *FTC v. Imo Indus. Inc.*, 89-2955, 1989 WL 362363 (D.D.C. 1989). *Id.* at 330.

2. *See* FTC v. Alliant Techsystems Inc., 808 F. Supp. 9, 17, 19, 23-24 (D.D.C. 1992) (finding that national security concerns did not outweigh public interest in enjoining the merger); Grumman Corp. v. LTV Corp., 527 F. Supp. 86, 92, 106 (E.D.N.Y. 1981) ("The interest of the public here is greater than in the ordinary case since a lessening of competition might very well affect the quality and price of weapons sold to the United States Navy.") (granting preliminary injunction), *aff'd*, 665 F.2d 10; FTC v. Imo Indus. Inc., 89-2955, 1989 WL 362363, at *6 (D.D.C. 1989) (granting a preliminary injunction despite finding that the "merger could be in the interest of a strong national defense and mobilization base").

3. Riya Patel, *How to Mitigate the Threat of Industrial Base Consolidation*, Fed. News Network (May 11, 2022, 3:07 PM), https://perma.cc/3PPF-H893; *see also* U.S. Dep't of Def., State of Competition within the Defense Industrial Base (2022) (noting, for example, that having a limited number of suppliers can create mission risk and create national security risks when adversarial nations influence the dominant supplier). Section 5 of Executive Order 14,036 ("Promoting Competition in the American Economy") directed the DOD to submit a report concerning the state of competition in the defense industrial base to the Chair of the White House Competition Council. *Id.* at 1; Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 14, 2021).

4. *See* Kathleen Luz, Note, *The Boeing-McDonnell Douglas Merger: Competition Law, Parochialism, and the Need for a Globalized Antitrust System*, 32 Geo. Wash. J. Int'l & Econ. 155, 163 (1999) (noting that the DOD responded to smaller post-Cold War budgets by encouraging consolidation).

5. *See, e.g.*, Michael Hirsch, *We Are Now in a Global Cold War*, Foreign Pol'y (June 27, 2022, 4:10 PM), https://perma.cc/RLW9-FCQK; Evan Osnos, *Sliding into a New Cold War*, The New Yorker

Moreover, increased antitrust oversight has already led to an increase in government challenges to mergers.[6] This trend could spread to the increasing number of mergers and acquisitions in the DIB,[7] which would mean more attempts by the government to obtain preliminary injunctions[8] to block DIB mergers. If so, past mergers of firms in the DIB demonstrate that some litigants will ask courts to weigh the transaction's competitive effects against its impact on national security.[9] This balancing could reveal conflicts between the goals of antitrust law—fostering competition[10]—and national security—namely, protecting the security of the American people.[11] For example, a merger may lead to an increase in the capacity of an Army munitions supplier, thereby benefitting national security, but also reduce competition and lead to higher prices. How should courts balance these concerns?

In most cases, courts will not have to balance the competing considerations. This Note 1) details how courts evaluate if there is a national security risk and 2) argues that conflicts between national security and antitrust are likely to be rare. In situations with potential conflicts, courts will consider the government customer's opinion, the customer's ability to mitigate risks, and congressional intent to determine the level of national security risk. Unless the national security concerns are glaringly obvious, however, such as an acquisition that would lead to the United States losing control of a critical technology, litigating parties' time would be better spent translating their national security arguments into traditional arguments about a transaction's competitive effects than arguing that the national security considerations outweigh a transaction's effect on competition. It is not just that merging parties would find it challenging to show the national security risks of enjoining a merger outweigh its adverse competitive effects, which Casey R. Triggs and Melissa K. Heydenreich concluded in 1994.[12] Rather, this

(Feb. 26, 2023), https://perma.cc/T8TH-TQ2J; *see generally* Michael G. Roskin, *The New Cold War*, 44 Parameters 5 (2014) (discussing how the United States can make a new cold war shorter and less dangerous).

6. Leah Nylen and Michelle F. Davis, *Big Deals Being Chilled by Biden's Aggressive Antitrust Agenda*, BLOOMBERG L. (May 10, 2023, 9:00 AM), https://perma.cc/P8S2-Q2BC.

7. Sean Carberry, *Private Equity Fueling Growth of Defense Mergers*, NAT'L DEF. (Feb. 27, 2023), https://perma.cc/7WJ9-S8NU.

8. This Note focuses only on preliminary injunctions rather than permanent injunctions.

9. *See, e.g.*, FTC v. Alliant Techsystems Inc., 808 F. Supp. 9, 23 (D.D.C. 1992) (rejecting the argument by defendants that the public interest in competition was outweighed by national security considerations).

10. *Mission*, DEP'T OF JUST. (Sept. 14, 2023), https://perma.cc/43VX-W7XP (explaining that enforcement of antitrust laws promotes competition).

11. *See* Press Release, The White House, FACT SHEET: The Biden-Harris Administration's National Security Strategy (Oct. 12, 2022), https://perma.cc/6GN8-VP5Q.

12. In 1994, Casey R. Triggs and Melissa K. Heydenreich concluded that when there is a conflict between antitrust and national security, merging parties would find it challenging to show the national security risks of enjoining a merger outweigh its adverse competitive effects. *See* Casey R. Triggs & Melissa K. Heydenreich, *The Judicial Evaluation of Mergers Where the Department of Defense is the Primary Customer*, 62 ANTITRUST L.J. 435, 462 (1994) (noting that several factors make it difficult for firms to establish that enjoining a merger creates a national security risk). Rather than affirming their likely correct conclusion, this Note argues that there is unlikely to be a conflict in the first place.

Note shows that these competitive effects, such as a transaction's impact on prices, output, and quality, often create the national security benefits or drawbacks of a transaction—making conflicts between antitrust law and national security unlikely.

Given that a significant portion of the consolidation in the defense industry occurred before the year 2000, this Note reexamines court opinions and litigation documents from cases such as *FTC v. Alliant* (1992)[13] and recently published cases such as *United States v. Booz Allen Hamilton* (2022) to assess how courts have, are, and likely will evaluate national security in the context of mergers.[14] In Section II, the Note discusses why it is an appropriate time to reevaluate how courts analyze competition vis-à-vis national security. Next, Section III provides an overview of the standard for a court to grant a preliminary injunction to enjoin a merger. Section IV highlights how courts assess a transaction's effect on national security. Lastly, in Section V, this Note argues that conflicts between antitrust law and national security are unlikely because a transaction's competitive effects typically create the national security effects as well.

II. WHY IT IS IMPORTANT TO UNDERSTAND HOW COURTS ANALYZE MERGERS IN THE DEFENSE INDUSTRY

Assessing how courts analyze national security concerns in defense mergers is particularly important because of the lack of competition in many defense markets, barriers to entry in those markets, limitations of non-antitrust tools for improving competition, and the DOD's recent reevaluation of its role in assessing mergers.

A. Competition in the Defense Industry is Mixed

Competition in the defense industrial base is essential because it provides the DOD with more innovative and better-performing products and services at lower costs.[15] In contrast, a lack of competition reduces firms' incentives to innovate and lower prices and can reduce the capacity and capabilities of DOD suppliers.[16] Reducing the number of competitive suppliers can lead to weak supply chains prone to capacity shortfalls.[17] There are particularly acute national security concerns in markets with only a small number of suppliers, especially where those suppliers are in adversarial nations.[18] For example, the People's Republic of China controls "approximately 80 of the material sources" in the battery cell market.[19] Such situations can put the U.S. military's access to critical resources at risk.

13. *Alliant Techsystems Inc.*, 808 F. Supp. 9.

14. United States v. Booz Allen Hamilton Inc., No. CCB-22-1603, 2022 WL 9976035, at *1 (D. Md. Oct. 17, 2022).

15. STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 1-2.

16. STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 1.

17. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 19-20.

18. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 1, 5, 22.

19. STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 20.

Nonetheless, competition in the defense industrial base is mixed, despite the number of competitors in many markets remaining unchanged since 2000.[20] Roughly 90 percent of DOD contract actions have two or more bidders ("a competitive contract"), but only 50-60 percent of the dollars obligated to contracts were for competitive contracts.[21] Moreover, the percentage of contracted dollars obligated to competitive contracts has generally declined since 2014.[22] The competitive contract rates are also lower for major weapon systems platforms, such as aircraft and electronic and communications equipment. In these categories, the percentage of competitive contracts typically ranges from 15 percent to 40 percent for dollars obligated.[23] These figures could be a result of the size of the contracts, i.e., that only a few firms can afford to invest in a bid on large projects they may not win. Even if that is the case, the figures suggest competition for these, and other projects, is lacking.

This mixed level of competition may have resulted from the defense sector consolidating substantially since the 1990s, as evidenced by the reduction in the number of contractors in numerous key markets.[24] First, between 1980 and 2001, the number of aerospace and defense prime contractors, the firms working directly with the DOD and supervising subcontractors,[25] shrank from fifty-one to five.[26] Second, in major weapons systems, the number of suppliers for tactical missiles declined from thirteen to three.[27] Lastly, in missiles and munitions, the number of prime contractors decreased from thirty to seven in the last three decades.[28] Indeed, today, 90 percent of missiles come from three suppliers.[29] Many of the defense markets have consolidated over the past three decades, and that consolidation has not reversed.[30]

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20. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 23-24.

21. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 3.

22. STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 3. The competitive contract rate was 58.3 percent in 2014 and 52 percent in 2021. STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 3.

23. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 4.

24. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 1.

25. *Prime and Subcontracting*, U.S. SMALL BUS. ADMIN. (last updated Dec. 1, 2023), https://perma.cc/LB9F-AE4A.

26. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 1, 4. These firms are Lockheed Martin, Raytheon, General Dynamics, Northrup Grumman, and Boeing. STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 4.

27. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 1.

28. STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 19. There are numerous other examples as well. For example, there are only two domestic suppliers in the solid rocket motors sector. STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 24. Similarly, General Dynamics is the only prime contractor for tracked combat vehicles. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 5.

29. STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 1 (citing 2020 DMCA Munitions Industry Production Analysis and July 2020 Missile Sector Economic Assessment).

30. Consolidation has occurred in other markets as well, including for fixed-wing aircraft (the number of suppliers decreased from eight in 1990 to three now) and satellites (decreasing from eight to four since 1990). STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 1. In

B. The Barriers to Entering a Defense Market are Significant

The competition landscape in the defense sector may not improve rapidly because of significant barriers to entry. First, contracting with the DOD often requires firms to meet challenging technical standards, which can require firms to "expend great financial sums [. . .] as a preliminary step to entering a competition for a military contract."[31] For example, in the missiles and munitions market, the costs of safety requirements to store energetic materials can deter potential entrants.[32] Projects can also require contractors' employees to have security clearances, which imposes further costs.[33] Second, the DOD's unique requirements and occasional role as a product's only customer can result in low demand for certain products, further deterring companies from entering the market.[34] Third, in some defense markets, the development and procurement cycles can take years, meaning firms may not see investment returns for years.[35] For example, in *FTC v. PPG*,[36] where the FTC sued to enjoin the merger of firms that created windshields and windows for military aircraft, witnesses estimated it would take between two and six years, or maybe more, for a firm to be a competitor in the market.[37] Given these long timelines, companies that lose a contract bid may exit the market because the next procurement will not be for years.[38] Fourth, some markets, such as the markets within castings and forgings, have thin margins, disincentivizing entry.[39] These challenges can hinder the DOD's access to innovative products and services[40] and make concentration more likely.

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addition, there is only one prime contractor for hypersonic weapon systems. STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 19.

31. *See* Grumman Corp. v. LTV Corp., 527 F. Supp. 86, 92 (E.D.N.Y. 1981) ("In order to sell new tactical military aircraft to the Government, a prime contractor would have to expend great financial sums of money over a period of many years (for purposes of research and development) as a preliminary step to entering a competition for a military contract. The cost involved in entering a competition today would be in excess of $30 million.").

32. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 19.

33. *See* United States v. Booz Allen Hamilton, No. CCB-22-1603, 2022 WL 9976035, at *10 (D. Md. Oct. 17, 2022).

34. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 21. In batteries made specifically for the DOD for example, "barriers to market entry include low demand, lack of specialty skill sets, and the need for reliable productions processes." STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 21. *See* Triggs & Heydenreich, *supra* note 12, at 439-440 (noting that the DOD defines the relevant product and geographic market through its specifications). DOD suppliers arguably may be able to expand DOD's "needs" by developing innovative products or services that the DOD at one point did not desire. Triggs & Heydenreich, *supra* note 12, at 440.

35. For example, it can take years for companies to develop the major weapons systems the DOD procures. STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 5; *see also* Triggs & Heydenreich, *supra* note 12, at 443.

36. FTC v. PPG Indus., Inc., 628 F. Supp. 881 (D.D.C. 1986).

37. *See id*. at 883, 885.

38. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 5; *see also* Triggs & Heydenreich, *supra* note 12, at 448 (noting that the DOD often make large, infrequent procurements, which can make it challenge for courts to define antitrust markets).

39. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 19.

40. Patel, *supra* note 3.

C. There are Many Non-Antitrust Tools to Enhance Competition, but Each of Them has Limitations

Many non-antitrust solutions can improve competition in the defense industrial base, but no solution is a panacea. First, consider government agencies' cost auditing and profit analysis authorities.[41] In *United States v. Booz Allen Hamilton*, the government unsuccessfully attempted to preliminarily enjoin a merger between Booz Allen and EverWatch, the only two firms competing for a contract to provide the NSA modeling and simulation services for signals intelligence.[42] The contract pays the contractor for its costs and provides an award, and the NSA calculates the amount of the award based on its rating of the contractor's performance.[43] The court believed the contract's structure for providing the contractor a profit empowers the NSA to control the combined Booz Allen-EverWatch profit and its incentive to perform admirably at a reasonable price. [44] However, contractors can inflate their costs under such a contract and are not subject to the same incentive to lower costs as a firm that is competing with another would experience.[45] Second, the DOD can sponsor a new competitor, but sponsoring a new competitor entails significant financial investments from the DOD, making the investments less likely to occur.[46] Third, the DOD is only a small proportion of a market's customer base in some markets, which limits its ability to use the aforementioned tools to spur competition.[47] To be sure, the DOD can enhance competition in other ways as well, including through IP licensing[48] or altering its bidding requirements,[49] but none are a complete replacement for combatting the effects of an anticompetitive merger.

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41. *See* Triggs & Heydenreich, *supra* note 12, at 439, 445, 451.

42. United States v. Booz Allen Hamilton Inc., No. CCB-22-1603, 2022 WL 9976035, at *1 (D. Md. Oct. 17, 2022).

43. *Id*., at *7.

44. *See id*., at *7.

45. *But cf*. FTC v. Alliant Techsystems Inc., 808 F. Supp. 9, 16 (D.D.C. 1992) (enjoining the merger because the combined firm would have reduced incentives to lower costs despite the fact that its profit would be based on its costs to supply the product).

46. *See id*. at 15; *see also* Triggs & Heydenreich, *supra* note 12, at 452 (noting that the *Alliant* court found vertical integration would require the Army to hire up to 300 additional personnel and that sponsoring entry would require large investments in developing the facilities to produce 120mm ammunition); *Prepared Statement of The Federal Trade Commission Before the Comm. On the Judiciary, Subcomm. on Antitrust, Business Rights, and Competition*, 105th Cong. (1997) [hereinafter *Prepared Statement*] (statement of Robert Pitofsky, Chairman, Federal Trade Commission) .

47. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 21 (explaining this concept as relates to energy storage and microelectronics).

48. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 9-10 (showing the example of DOD attempting to counteract the adverse effect IP restrictions can have on competition by "dedicating significant effort to train[] and educat[e] its acquisition workforce" on modernizing IP policies).

49. *See* FTC v. Imo Indus. Inc., No. 89-2955, 1989 WL 362363, at *2 (D.D.C. 1989) (noting that DOD requirements and procurement schedules affected entry into the market and the competitive effects of the merger); Triggs & Heydenreich, *supra* note 12, at 440.

D. DOD's Commitment to Heightened Merger Review

The DOD's recent revaluations of its role in reviewing mergers not only makes it an appropriate time to assess how courts analyze mergers in the defense sectors but also evidences the importance of merger review. As directed by Executive Order 14036,[50] the DOD published a 2022 report called the *State of Competition Within the Defense Industrial Base*.[51] In the report, the DOD notes that, to combat a "historically consolidated [Defense Industrial Base]," it believes a heightened review of mergers and acquisitions is necessary.[52] To ensure such reviews occur, the DOD has committed to "assess[ing] its approach to evaluating vertical and horizontal mergers, with adequate attention to national security risks."[53] Under its current approach to analyzing mergers, outlined in the 2017 DOD Directive 5000.62,[54] the DOD's assessment considers the transaction's competitive effects[55] and "concerns related to mission risk or national security."[56] The DOD then makes a recommendation to the antitrust agency, which has the authority to pursue the appropriate remedy, and supports the agency whenever it believes a merger threatens DOD interests.[57] The *State of Competition Within the Defense Industrial Base* report does not signal that the DOD is abandoning the approach it outlined in Directive 5000.62, but it does suggest that the DOD will scrutinize mergers more closely.[58] This approach aligns with the remarks of Deputy Secretary of Defense Kathleen Hicks, who in her 2021 confirmation hearing stated that "[e]xtreme consolidation does create challenges for innovation. We need to have a lot of different good ideas out there. That's our competitive advantage over authoritarian states like China, and Russia."[59] Lastly, the National Defense Authorization Act for Fiscal Year 2024 requires companies that must report a proposed merger or acquisition to the Department of Justice or the Federal Trade Commission to also report the deal to the DOD.[60] While these developments suggest the DOD will perform enhanced scrutiny of mergers, the

50. Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 14, 2021).

51. STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3.

52. STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 1. The State of Competition Within the Defense Industrial Base Report is not the first time the DOD has indicated its desire to increase its role in antitrust review. For example, the Defense Science Board published the Antitrust Aspects of Defense Industry Consolidation in 1994, asserting its plans to play a great role. *See* U.S. DEP'T OF DEF., REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON ANTIRUST ASPECTS OF DEFENSE INDUSTRY CONSOLIDATION (1994). *See also* Shwartz, *supra* note 1.

53. STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 27.

54. U.S. Dep't of Def., DOD Directive 5000.62 Review of Mergers, Acquisitions, Joint Ventures, and Strategic Alliances of Major Defense Suppliers on National Security and Public Interest (2017), https://perma.cc/6NRT-3BMC.

55. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 6.

56. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 6. *See generally About*, U.S. DEP'T OF DEF., https://perma.cc/H2WJ-NNTA (stating the DOD's overall mission "is to provide the military forces needed to deter war and ensure our nation's security").

57. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 1-2, 6.

58. *See* STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 6.

59. Lawrence Ukenye, *How the Pentagon Seeds Small Companies*, POLITICO (July 31, 2023).

60. National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31 § 857.

remainder of this Note analyzes how courts and litigating parties assess mergers for national security concerns.

III. TO OBTAIN A PRELIMINARY INJUNCTION, THE GOVERNMENT MUST ESTABLISH THAT THE MERGER IS LIKELY TO SUBSTANTIALLY LESSEN COMPETITION AND THAT THE PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

The government—the FTC or DOJ—will typically pursue a preliminary injunction to stop parties from consummating a merger.[61] The government will seek this injunction if it believes the merger violates Section 7 of the Clayton Act, which prohibits mergers that substantially lessen competition or create a monopoly.[62] While the preliminary injunction's purpose is to stop the parties from closing the transaction until there is a full trial on the merits, in practice, the parties or the government will typically abandon the attempt to close or enjoin the merger based on the court's ruling on the preliminary injunction.[63] Thus, the outcome at the preliminary injunction phase is usually determinative.

The standards for the FTC and DOJ to obtain a preliminary injunction are similar. For the FTC to obtain a preliminary injunction, the FTC must show 1) it will likely win on the merits by raising serious questions about whether the merger will substantially lessen competition or create a monopoly and 2) that enjoining the merger is in the public interest.[64] When the DOJ pursues a preliminary injunction, courts will balance 1) whether the DOJ will likely succeed on the merits, 2) the threat of irreparable harm, 3) substantial harm to the defendant, and 4) whether the preliminary injunction is in the public interest.[65] Courts also assess equities, such as procompetitive efficiencies or the national security benefits of the merger, to determine if a merger is in the public interest.[66] While there are other differences between the processes for the FTC and DOJ, including that courts frequently combine DOJ preliminary injunction proceedings with the merits trial, both agencies typically show the injunction is in the public interest when it demonstrates the merger is anticompetitive.[67]

Alliant, which this Note discusses later, demonstrates how a court reviews an FTC motion for a preliminary injunction of a defense industry merger. The district court initially assessed the merger's competitive effects before weighing

61. PRACTICAL LAW ANTITRUST, *Preliminary Injunctions in FTC and DOJ Merger Challenges*. The government can seek the preliminary injunction for transactions that are either 1) reportable under the Hart-Scott-Rodino Act or 2) already consummated, but the DOJ will sometimes only seek permanent relief. *See id*.

62. 15 U.S.C. § 18; *see also* FTC v. Alliant Techsystems Inc., 808 F. Supp. 9, 19 (D.D.C. 1992).

63. *See* 15 U.S.C. § 18; *see also* PRACTICAL LAW ANTITRUST, *supra* note 61; *Alliant Techsystems Inc*., 808 F. Supp. at 19.

64. *See* 15 U.S.C. § 18; *see also Alliant Techsystems Inc*., 808 F. Supp. at 19; PRACTICAL LAW ANTITRUST, *supra* note 61.

65. *See* PRACTICAL LAW ANTITRUST, *supra* note 61.

66. *See* PRACTICAL LAW ANTITRUST, *supra* note 61.

67. *See* PRACTICAL LAW ANTITRUST, *supra* note 61.

public interest considerations, including national security concerns.[68] Ultimately, the court issued a preliminary injunction because of the merged firm's potential monopoly of the 1994–1998 contract for ammunition—a violation of the Clayton Act—and the defendant's failure to show "a threat to the national security that would override the public interest in promoting competition." [69] The next section of this Note analyzes how courts determine if there is a credible national security threat.

IV. COURTS ASSESS THE GOVERNMENT CUSTOMER'S OPINION, ABILITY TO OVERCOME THE THREAT, AND CONGRESSIONAL INTENT TO ANALYZE NATIONAL SECURITY CONCERNS

Courts can weigh the national security implications when determining if a merger is in the public interest. In *Alliant*, Judge Oberdorfer stated that national security concerns are "entitled to great weight" and that "circumstances could arise under which national defense priorities would override any other public interest in preserving competition that might exist."[70] A later section in this Note will argue that such circumstances are likely to be rare. Nonetheless, this section demonstrates how courts will evaluate these circumstances, focusing on the government customer's position, the government customer's ability to mitigate national security concerns, and congressional intent. This analysis reinforces that merging parties are unlikely to convince a court that the national security benefits of a merger outweigh its competitive concerns.[71]

A. Courts Will Assess if the Government Customer Believes the Merger or Preliminarily Enjoining it Creates National Security Concerns

To assess national security concerns, courts rely on the government customer's perspective, often derived from individual officials' testimony or an official position. The beliefs of individual officials are unlikely to sway a court. However, an official position by an agency supporting a merger, while likely difficult for merging parties to acquire,[72] may be able to outweigh the public equity of maintaining

68. *See Alliant Techsystems Inc.*, 808 F. Supp. at 19, 21, 23.

69. *Id.* at 12, 21, 23.

70. *Id.* at 23.

71. *See* Triggs & Heydenreich, *supra* note 12, at 462 (noting that several factors make it difficult for firms to establish that enjoining a merger creates a national security risk).

72. Convincing the government customer to take an official position supporting a merger because of national security can be challenging. First, the antitrust agencies and the DOD, for example, work together to review mergers. While the antitrust agencies decide whether to challenge a merger, the agencies provide "great weight" to DOD's view on a merger. *Prepared Statement*, *supra* note 46. As such, an attempt by the FTC or DOJ to block a merger may signal that the government customer does not support the merger. Second, the government customer may be unaccustomed to publicly supporting a merger due to national security. At least until 1994, DOD had "never taken the official position that blocking a particular merger would endanger national security." Triggs & Heydenreich, *supra* note 12, at 462. Instead, the DOD has voiced opposition to mergers. For example, in 1998, DOJ, with DOD support, sued to enjoin the merger of Lockheed Martin and Northrup Grumman. *DOJ, DOD Will Go to Court to Block Lockheed-Northrop Combination*, 8 ANDREWS MERGERS & ACQUISITIONS LITIG. REP. 11 (1998) [hereinafter *DOJ, DOD Will Go to Court*].

competition because "deference to clearly stated and authoritative military caveats [can] be appropriate and substantial."[73]

Individual DOD officials have offered their views as testimony,[74] but the testimony is unlikely to sway courts because 1) the government can present conflicting testimony and 2) courts value official positions over individual testimony. To support that the merger was in the public interest in *Alliant*, a case in which two suppliers of tank ammunition unsuccessfully attempted to merge, the merging parties had two DOD officials—one was the Assistant Secretary of the Army for Research, Development, and Acquisition, and the other was the Program Manager of the Tank Main Armament Systems—testify that they professionally preferred the merger.[75] However, three former or current Army officials also testified, stating there was little risk of the competition's winner not being able to produce sufficient ammunition—contradicting the testimony of the defense witnesses.[76] This contradiction undermined the credibility of the national security threat of enjoining the merger. Indeed, the history or DIB mergers illustrated it has not been difficult to find current or former DOD officials who can advocate for or against a merger.[77]

The caselaw suggests that courts value official department opinions over individual statements from government executives and the statements of executives over lower employees. Consider three examples. First, official documents can represent a party's best assessment of a situation,[78] which is why the district court in *Alliant* stated "[t]he Army's own actions best evidence its appraisal of the security threat."[79] Consequently, the district court placed more weight on Army planning documents, which suggested either Olin or Alliant could meet the Army's needs for 120mm ammunition, and on an Army witness stating that the Army's official position was neutral regarding the merger,[80] than it did that same witness' personal opinion that enjoining the merger would put the supply of ammunition at "some risk."[81] Second, in *Booz Allen*, a conflict arose between executive and lower-level employee opinions. Employee communications suggested that Booz Allen and EverWatch had reduced incentivizes to compete for the NSA contract.[82] The court dismissed these opinions as reflecting "the individual perception

73. *Alliant Techsystems Inc*., 808 F. Supp. at 23.

74. *See* Triggs & Heydenreich, *supra* note 12, at 462 (noting that, at least until 1994, the DOD had never officially asserted that blocking a merger would negatively impact national security).

75. *Alliant Techsystems Inc*., 808 F. Supp. at 12 (D.D.C. 1992).

76. *See Alliant Techsystems Inc*., 808 F. Supp. at 18 (citing the plaintiff's exhibits to the court).

77. Shwartz, *supra* note 1, at 343, 346.

78. *See Alliant Techsystems Inc*., 808 F. Supp. at 17 (citing the plaintiff's exhibits to the court).

79. *Id.*

80. *Id.* at 12.

81. *Id.* at 17, 19. That witness was Colonel Franklin Y. Hartline, Program Manager, Tank Main Armament Systems at the U.S. Army Armament Research, Development and Engineering Center at Picatinny Arsenal. *Id.* at 12.

82. United States v. Booz Allen Hamilton Inc., No. CCB-22-1603, 2022 WL 9976035, at *5 (D. Md. Oct. 17, 2022).

of specific employees, not broad corporate strategy,'"[83] in favor of comments from executives indicating competition for the contract was "full steam ahead."[84] To be sure, in *Booz Allen*, the district court analyzed these statements to determine the company's intent to compete, not the credibility of a threat to national security.[85] Nonetheless, neither the DOD officials' testimony in *Alliant*[86] nor the contemporaneous statements of employees in *Booz Allen*[87] reflected the organization's official policy, which resulted in the courts placing more weight on other evidence. Lastly, in *Northrop v. McDonnell,* Northrop alleged that McDonnell sought to monopolize a specific military aircraft market.[88] McDonnell successfully argued at the trial court that the court should dismiss the case because the government was a necessary party to the action and had not been joined.[89] However, the Ninth Circuit found that the Navy had advised the companies to resolve the dispute "in accordance with law and their private agreements," suggesting the Navy did not view itself as having a formal interest in the lawsuit or as a necessary party.[90] Thus, the court did not "second-guess the Government's assessment of its own interests" and held the government was not a necessary party.[91] These cases underscore courts' inclination to prioritize official positions and executive statements in legal proceedings.

Failed mergers provide additional evidence that courts will defer to official department positions. Courts "are likely to give considerable [. . .] weight to an unequivocal and substantiated claim by the DoD that a defense industry merger is important to national security."[92] Conversely, the lack of official support can undermine the credibility of national security concerns,[93] and the merger can become "the victim of a largely indifferent Department of Defense."[94] For example, in *Alliant*, one reason Judge Oberdorfer found that the national security risks were insufficient to overcome the court's competition concerns was that the Army could have, but did not, intervene by itself or through the DOJ "to assert a fundamental national security interest to be balanced against the public interest in competition."[95] Instead, the Army took no position on the antitrust impacts of the merger other than being "not

83. *Id*. at *5-6.

84. *Id*. at *6.

85. *Id.*

86. *See* FTC v. Alliant Techsystems Inc., 808 F. Supp. 9, 12 (D.D.C. 1992) ("the officer authorized to represent the official Army position, testified that the Army 'has no objection to the proposed merger,' and 'take[s] no official position concerning the antitrust implications of this transaction.'")

87. *See Booz Allen Hamilton Inc.,* No. CCB-22-1603, 2022 WL 9976035, at *6 ("At best, these contemporaneous statements reflect the individual perception of specific employees, not broad corporate strategy.")

88. Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1138 (9th Cir. 1983).

89. *Id*. at 1042-43.

90. *Id*. at 1040.

91. *Id*. at 1044-46.

92. Shwartz, *supra* note 1, at 370 (citing *See* DEP'T OF DEF., REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON ANTIRUST ASPECTS OF DEFENSE INDUSTRY CONSOLIDATION 1, 32 n.78 (1994)).

93. *See* Shwartz, *supra* note 1, at 352.

94. Norman R. Augustine, *Antitrust in the Era of Perestroika: What is Happening in the Defense Industry?*, 60 VITAL SPEECHES OF THE DAY 51, 52 (1993).

95. FTC v. Alliant Techsystems Inc., 808 F. Supp. 9, 24 (D.D.C. 1992).

opposed" to it.[96] Compared to the Army's silence, the testimony supporting the merger by two Army officials "was too muted and speculative. . ."[97] The caselaw illustrates that courts defer to official department positions and executive statements when assessing the national security implications of mergers, underscoring the significant impact these official perspectives have on the legal proceedings.

B. Courts Will Determine How and by How Much the Government Customer Can Mitigate National Security Concerns

Similar to how courts will analyze a government customer's ability to mitigate competition concerns that result from enjoining or allowing a merger, courts will analyze the customer's ability to mitigate national security concerns. Government customers can mitigate national security concerns through their regulatory and procurement powers. The DOD and NSA, for example, have regulatory power that can mitigate some anticompetitive harm, and their power is one consideration courts can use to evaluate the ultimate competitive effects of a merger.[98] *Alliant* provides multiple examples of how government customers can alter their procurement strategies to protect competition. First, the district court noted that if the Army became concerned that an unmerged Alliant or Olin by itself would not have the capacity to provide sufficient tactical rounds, the Army could procure *training* rounds from the lowest bidder to save money and continue to procure *tactical* rounds from both Alliant and Olin for an additional cost of $3 to $4 million.[99] Second, an alternative solution to procuring tactical ammunition from both firms in *Alliant* was for the Army to direct that if Alliant won the contract, it would use the facilities of Olin to produce the ammunition.[100] Third, the Army could have loosened domestic supplier requirements to overcome a national security issue.[101] In Operation Desert Storm, for example, there was a shortage of ammunition, but the DOD overcame this shortage by procuring the ammunition from a German manufacturer.[102] To be sure, the court in *Alliant*, which discussed this example, noted the lack of evidence that the Army would switch to a foreign supplier outside of an emergency.[103] Moreover, these solutions may have varied effectiveness today given increased tensions between the West and Russia and China and potential shortages of some forms of ammunition

96. *Id*. at 23-24.

97. *Id*. at 12.

98. *See* United States v. Booz Allen Hamilton Inc., No. CCB-22-1603, 2022 WL 9976035, at *9 n.26 (D. Md. Oct. 17, 2022).

99. *Alliant Techsystems Inc*., 808 F. Supp. at 19.

100. *See id*. at 24.

101. The DOD limits the geographic market to domestic suppliers in part because it "wants to maintain a potential mobilization base in the United States." *See* Triggs & Heydenreich, *supra* note 12, at 442.

102. *Alliant Techsystems Inc*., 808 F. Supp. at 19-20; *see also* Triggs & Heydenreich, *supra* note 12, at 458.

103. *Alliant Techsystems Inc*., 808 F. Supp. at 20.

stemming from Russia's invasion of Ukraine.[104] Regardless, these examples highlight that the government, and DOD in particular, has the power to autonomously mitigate some national security concerns.

C. Congressional Intent Can Affect Whether the National Security Concern Outweighs the Public's Interest in Competition

Courts will also consider congressional intent to determine how to weigh antitrust and national security concerns, which can lead to courts prioritizing competition over national security. For example, the Sherman Act and Clayton Act demonstrate Congress' belief that competition serves a robust public interest,[105] and the Competition in Contract Act espouses a preference for competition in government procurement.[106] Consequently, a showing of anticompetitive effects can be "adequate to satisfy the equity requirement for injunctive relief."[107] Therefore, if a merger is deemed to impede competition, it faces a significant disadvantage in court.

Courts may also look to congressional actions to determine the weight of a national security risk. The defendants in *Alliant* argued that enjoining the merger and holding a winner-take-all competition could jeopardize national security by putting the Army's supply of tactical tank ammunition at risk.[108] However, in *Alliant*, the Congressional Conference Committee on the Department of Defense Appropriations had "recently questioned whether the advanced KE round 'should remain in production.'"[109] The court viewed this questioning as challenging the severity of the security risk of the Army's ammunition supply.[110] In addition, when considering congressional intent, the enactment of the Sherman and Clayton Acts create an initial presumption in favor of competition.[111] Parties can rebut or strengthen this assumption by citing recent congressional action concerning the products or services at issue.

Courts weigh national security concerns through multiple factors, including the government customer's perspective, their ability to mitigate the concerns, and congressional intent. While national security has the potential to hold substantial weight in the judicial evaluation, courts have prioritized competition. Moreover, past court decisions underscore the significance of official department positions and congressional intent. During the last period of significant consolidation in the defense industrial base, caselaw suggests that courts will defer to these perspectives.

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104. Mark F. Cancian, *Rebuilding U.S. Inventories: Six Critical Systems*, CNTR. FOR STRATEGIC AND INT'L STUD. (Jan. 9, 2023), https://perma.cc/6RJU-USRS.

105. *See* FTC v. Imo Indus. Inc., No. 89-2955, 1989 WL 362363, at *6 (D.D.C. 1989); *see also* Triggs & Heydenreich, *supra* note 12, at 454; *Alliant Techsystems Inc*., 808 F. Supp. at 12.

106. *See* Competition in Contracting Act of 1984, Pub. L. 98-369, 98 Stat. 494; 10 U.S.C. § 2301 et seq. (repealed 1984); *Alliant Techsystems Inc*., 808 F. Supp. at 12.

107. *See Alliant Techsystems Inc*., 808 F. Supp. at 22.

108. *See id*. at 23.

109. *Id*. at 18 n.3 (citing the plaintiff's exhibits to the court).

110. *Id*.

111. *Id*. at 22.

V. LITIGATING PARTIES SHOULD TRANSLATE THEIR NATIONAL SECURITY ARGUMENTS INTO COMPETITIVE EFFECTS ARGUMENTS

Given that the DOD wants to provide "adequate attention to risks to national security" when evaluating mergers,[112] it is vital for merging parties to understand how antitrust and national security impacts overlap. These impacts will typically operate in lockstep because the competitive impacts of the merger will often create the national security concerns. Moreover, given courts' deference to competition concerns when considering whether to grant a preliminary injunction, parties should focus their arguments on the competitive effects of the transaction. Thus, merging parties should translate or frame their national security arguments into arguments about the merger's competitive effects. Focusing on the "why" of the national security impact can illuminate the connection and enable translation. For example, in *Imo*, the court found a merger could be in the "interest of a strong national defense and mobilization base" because it would improve competition for third-generation image intensifier tubes.[113] There, the positive competitive effect created a positive national security impact. If the parties cannot make this connection, the national security concern is potentially overblown. In 1997, FTC Chairman Robert Pitofsky stated, "that there is generally no conflict between antitrust enforcement and national security."[114] The rest of this Note illustrates why Chairman Pitofsky was right.

A. If the Competitive Effects Arguments are Speculative, the National Security Arguments are Likely Speculative Too

This section focuses on how competitive effects create national security concerns. For example, when discussing a potential merger between Lockheed and Northrup in 1998, Attorney General Janet Reno noted that the merger could lead to higher prices and lower quality in aircraft, radar and sonar systems, and other systems "that save our pilots from being shot down when they are flying in hostile skies."[115] Reno stressed that blocking the merger was not "just about dollars and cents [. . .but] about winning wars and saving lives."[116] Thus, Reno argued that the merger's adverse impact on competition would, in turn, undermine national security. This section underscores the interrelation between competition and national security, emphasizing that if evidence of competitive effects is speculative, so are the national security implications. The section discusses this connection for output and quality.

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112. STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE, *supra* note 3, at 27.

113. FTC v. Imo Indus. Inc., No. 89-2955, 1989 WL 362363, at *6 (D.D.C. Nov. 22, 1989); *see also* Triggs & Heydenreich, *supra* note 12, at 459.

114. *Prepared Statement*, *supra* note 46.

115. *DOJ, DOD Will Go to Court*, *supra* note 72.

116. *DOJ, DOD Will Go to Court*, *supra* note 72.

1. If the Merger is Unlikely to Reduce Output, It Does Not Create Capacity Concerns

One link between a national security argument and a competitive effects analysis is the merger's impact on output. For example, the government may assert that the merger negatively affects national security by diminishing the capacity of DOD suppliers, jeopardizing the DOD's ability to secure essential supplies. To translate this national security concern into a competitive effects argument, the government could show the merger will likely lead to lower production outputs. However, if the evidence supporting the competitive effect (lower outputs) is speculative, it implies that the national security concern (DOD's ability to obtain necessary supplies) is also speculative. This section examines *FTC v. Alliant Techsystems Inc*.[117] to demonstrate this relationship.

In *Alliant*, the FTC secured a preliminary injunction against the merger of Alliant Techsystems and Olin Corporation.[118] Alliant and Olin revealed their merger plans after the Army had chosen a single contractor, rather than the usual two, for the upcoming 120mm tank ammunition contract.[119] The defendants argued enjoining the merger bid "would require the Army to incur much higher costs, risks of failure, procurement delays, and uncertainty in obtaining the advanced tactical rounds."[120] The advanced tactical rounds were rounds the Army used for combat.[121] From a national security viewpoint, the defendants argued that the merger would strengthen national security by avoiding the risk "that the Army's tankers will not have the ammunition they need if and when they are next called into battle."[122] Appealing to the DOD's desire to have "sufficient domestic supply available in case of military conflict,"[123] the defendants argued that enjoining the merger would negatively impact the supply of ammunition for Army tanks,[124] which is both an adverse competitive effect and a national security concern. However, the DOD was the only domestic customer for the ammunition, and the merger would have made the combined firm the "sole source for all future 120mm tank ammunition contracts."[125] Consequently, the court

117. FTC v. Alliant Techsystems Inc., 808 F. Supp. 9 (D.D.C. 1992).

118. *See* Triggs & Heydenreich, *supra* note 12, at 437. The companies provided both tactical and training rounds to DOD. *See Alliant Techsystems Inc*., 808 F. Supp. at 11. The FTC moved for an injunction pursuant to 15 U.S.C. § 53(b). *See id*. at 13. Alliant and Olin were systems prime contractors, meaning it was their duty to ensure "that the rounds ordered by the government [were] produced on schedule, on budget, and within specifications." *Id*. at 14. With the exception of one category of tank ammunition, subcontractors produce the actual ammunition. *Id*. at 14-15.

119. *See Alliant Techsystems Inc*., 808 F. Supp. at 11, 14, 15 ("Alliant and Olin are the exclusive systems contractors for all rounds of 120mm ammunition.").

120. *Id*. at 21.

121. *See id*. at 14.

122. *Id*. at 17 (internal quotation marks omitted) (citations omitted).

123. *See* Triggs & Heydenreich, *supra* note 12, at 440.

124. *Alliant Techsystems Inc*., 808 F. Supp. at 17.

125. Triggs & Heydenreich, *supra* note 12, at 437; *see Alliant Techsystems Inc*., 808 F. Supp. at 11.

found the merged company would have a monopoly and could potentially raise ammunition contract prices.[126]

The defendants could produce only speculative evidence of negative competitive effects, which undermined their argument that the Army might not have sufficient ammunition if an unforeseen national emergency developed.[127] For example, Army Colonel Hartline stated there was "some risk" that transitioning to a winner-take-all contract without a merger would cost time and money,[128] but he also stated that either company could produce the necessary ammunition.[129] Even the defendants admitted that the costs of a delay in supplying ammunition to the Army, among other things, was a cost "which only the Army can value."[130] Because it was not clear that enjoining the merger would lead to the Army having insufficient 120mm tank ammunition, it was also not clear that it created a national security risk. Colonel Hartline stated in his testimony that "I'm not saying it's a matter of lives will be lost" if the court enjoined the merger.[131] Moreover, the court noted that circumstances where the serious concerns of national security, which would be entitled to "great weight," were "not presented here."[132] Because the evidence that enjoining the merger would lead to adverse competitive effects (hurting suppliers' capacity) was speculative, the evidence for the national security risks (an ammunition deficiency for the DOD) was also speculative.

B. Speculative Evidence of Lower Quality is Speculative for Both Competitive Effects and National Security Risks

Another form of competitive effects that can impact national security is product or service quality. For example, in *Grumman*, the Eastern District of New York noted that "a lessening of competition might very well affect the quality and price of weapons sold to the U.S. Navy."[133] Lower-quality weapons would impact national security by hindering the Navy's ability to protect the United States and its interests. In contrast, intense competition can incentivize firms to provide higher-quality products and services, promoting the ability of the DOD to protect national security. Thus, like output, the strength of the national security concern is often dependent on the strength of the competitive effects. This section discusses *Alliant* and *Booz Allen* to highlight this connection.

First, *Alliant* highlights that weak competitive effects arguments about quality undermine arguments concerning national security. In *Alliant*, the defendants

126. *See Alliant Techsystems Inc*., 808 F. Supp. at 11, 21.

127. *See id*. at 12.

128. *See id*. at 17 (citing the preliminary injunction hearing transcript).

129. *See id*. at 18 (citing the preliminary injunction hearing transcript).

130. *Id*. at 21 (internal quotation marks omitted).

131. *Id*. at 18 (internal quotation marks omitted) (citing the preliminary injunction hearing transcript).

132. *See id*. at 23-24.

133. Grumman Corp. v. LTV Corp., 527 F. Supp. 86, 106 (E.D.N.Y. 1981), *aff'd*, 665 F.2d 10 (2d Cir. 1981).

argued the merger would improve quality, and an Army representative noted that if the government enjoined the merger, "the surviving company might not be able to build the products to the Army's requisite quality, schedule, and cost specifications."[134] Yet, in its analysis of the merger's competitive effects, the district court found the risks of lower quality were "speculative at best," particularly given that the Army took no official position on the transaction.[135] The court did not connect quality and national security in its analysis of the public equities in favor of the merger.[136] This lack of a connection makes sense given that the evidence for the competitive effect of lower quality was speculative. Therefore, an argument that enjoining the merger would endanger the quality of the Army's ammunition would likely have been speculative as well.

Second, the government's complaint and the court's opinion treating the national security implications of the transaction in *Booz Allen* as superfluous also suggest that conflicts between antitrust law and national security are unlikely. In *Booz Allen*, the government's complaint argues the merger would provide the combined Booz Allen-EverWatch a reduced incentive to compete, which could lead to it providing lower-quality services at higher prices.[137] It also alludes to the importance of the contract to national security multiple times[138] without explicitly arguing it would be in the public's interest to block the merger for national security interests.[139] Finally, the district court's opinion contains no reference to the national security implications of the merger.[140] The combination of these factors suggests not only that there was not a conflict between the competitive and security effects of the merger, but also that the court did not find it necessary to evaluate the national security implications of the merger, despite the government alleging that the merger would affect the quality and price of the supply of a critical service to NSA.

Consider the government's complaint in *Booz Allen*, which only alludes to national security without explicitly arguing it. Specifically, the second paragraph of the complaint labels signals intelligence a "crucial service" that "plays a vital role in our national security" by providing leaders the information to "defend our

134. *Alliant Techsystems Inc*., 808 F. Supp. at 16-17 (citing the defendant's exhibits to the court).

135. *Id*. at 21.

136. *See id*. at 13-23.

137. Complaint at 2-3, United States v. Booz Allen Hamilton Inc., No. CCB-22-1603, 2022 WL 9976035 (D. Md. Oct. 17, 2022).

138. *See id*. at 2 ("Signals intelligence ... plays a vital role in our national security by providing America's leaders with critical information needed to defend our country, save lives, and advance U.S. goals and alliances globally."); *see also id*. at 17 ("Delaying the OPTIMAL DECISION project is not an option. NSA has set the schedule for OPTIMAL DECISION based on a number of factors, not the least of which is the national security of the United States, which depends in part on NSA's ability to effectively utilize signals intelligence.").

139. *See id*. at 2, 17 (noting that signals intelligence plays an important role in national security and that U.S. national security depends in part on the "NSA's ability to effectively utilize signals intelligence" but failing to explicitly argue that the merger would lead to lower quality signals intelligence and thus undermine national security).

140. *See* Booz Allen Hamilton Inc., 2022 WL 9976035.

country, save lives, and advance U.S. goals and alliances globally."[141] Second, it argues "[t]he merger must be blocked in order to restore the competition that NSA—and the Americans that it defends—rely on for innovative and high-quality signals intelligence modeling and simulation support services at fair prices."[142] Lastly, it states the "NSA project [. . .] is vital to our nation's security"[143] and notes that the NSA's schedule for the project was based on numerous factors, "not the least of which is the national security of the United States, which depends in part on NSA's ability to effectively utilize signals intelligence."[144] Each of these are allusions to the fact that the NSA and the project are important to national security. None, however, are explicit statements that blocking the merger would benefit national security. The government's complaint does not connect these ideas.

To be sure, it makes sense that the complaint focused on the competitive effects of the merger—the cause of action for the government's lawsuit were violations of the antitrust laws, not national security laws. Indeed, it was the alleged violations of Section 1 of the Sherman Act, which "prohibits agreements that unreasonably restrain trade," and Section 7 of the Clayton Act, which "prohibits mergers that are likely to substantially lessen competition and 'tend to create a monopoly,'" that gave rise to the complaint.[145] However, the complaint's request for relief is a call for an injunction. A court must find the injunction to be in the public interest to grant it and, as this Note has previously shown, parties have argued how the national security implications of a merger affect the public interest. The closest the complaint comes to discussing national security as a reason to block the merger is when the complaint states that the "merger is unlikely to generate verifiable, merger-specific efficiencies sufficient to reverse or outweigh the anticompetitive effects that are likely to occur."[146] Even here, though, the complaint does not specifically reference national security, only making a general reference to a lack of merger-specific efficiencies.[147] The government likely could not have made a clear connection to national security because the evidence the merger would lead to lower-quality services for signals intelligence was speculative. Thus, an argument that the merger would harm national security would have been speculative as well. Like output, weak evidence that a merger will have the adverse competitive effect of reducing quality likely also means that a national security argument focused on quality is weak.

The district court may not have discussed the national security implications of the transaction because it did not need to in order to deny an injunction. Indeed, the district court denied the preliminary injunction based on the

141. Complaint, *supra* note 137, at 2.
142. *Id*. at 3-4.
143. *Id*. at 6.
144. *Id*. at 17.
145. *Id*. at 6; *see* 15 U.S.C. §§ 1, 18.
146. Complaint, *supra* note 137, at 17.
147. Complaint, *supra* note 137, at 17.

competitive effects of the transaction, finding that evidence of negative competitive effects was based on the speculative comments of lower-level employees.[148] Regardless, the court's lack of discussion of national security suggests that the effects of the transaction on national security were unknown or not important enough to address. Either is surprising given how the government's complaint highlights the importance of the contract to national security. The lack of an explicit national security argument in either the complaint or the court's opinion not only suggests that the government may have viewed the argument as superfluous, but also that the government and the court found no conflict between the antitrust and national security implications of the merger.

VI. CONCLUSION

Since the wave of consolidation and antitrust cases involving the defense industrial base in the 1980s and 1990s, the U.S. government's concern about consolidation and the tensions between the West and China have increased. Past mergers suggest that courts take a cautious approach when evaluating national security concerns in antitrust cases, often deferring to the government customer's assessment of the threat and congressional intent. Moreover, the deference courts provide to departmental positions and executive statements suggests that parties should align their arguments with these positions. In addition, the interdependence between the competitive impacts of mergers and their subsequent implications for national security underlines the necessity of framing these arguments cohesively. Where competitive effects evidence remains speculative, the corresponding national security concerns also tend to lack substantive support. Lastly, this Note highlights an interesting trend: if the competitive effects of a merger are clear, courts may sideline explicit discussions concerning the national security implications in a preliminary injunction analysis. The lack of explicit discourse in certain court opinions may indicate either a lack of clear conflict between antitrust and national security aspects or the belief that the antitrust concerns alone are sufficient to decide a preliminary injunction.

148. *See* United States v. Booz Allen Hamilton Inc., No. CCB-22-1603, 2022 WL 9976035, at *5 (D. Md. Oct. 17, 2022).

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