



TECHNICAL REPORT

# How Will National Security Considerations Affect Antitrust Decisions in AI? An Examination of Historical Precedents

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## Introduction: The Confluence of AI, National Security, and Antitrust

Artificial Intelligence (AI)—like past general purpose technologies such as railways, the internet, and electricity—is likely to have significant effects on both national security<sup>1</sup> and market structure.<sup>2</sup> These market structure effects, as well as AI firms’ efforts to cooperate on AI safety and trustworthiness,<sup>3</sup> may implicate antitrust in the coming decades. Meanwhile, as AI becomes increasingly seen as important to national security, such considerations may come to affect antitrust enforcement.<sup>4</sup> By examining historical precedents, this paper sheds light on the possible interactions between traditional—that is, economic—antitrust considerations and national security in the United States.

Several useful analyses of antitrust enforcement in national security and foreign policy<sup>5</sup> contexts already exist.<sup>6</sup> This paper compiles past known American antitrust cases that have implicated national security and systematically analyzes them on a number of dimensions of interest.<sup>7</sup> By studying these cases, I am able to draw novel lessons on how national security considerations have influenced antitrust enforcement<sup>8</sup> and adjudication in past cases.

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<sup>1</sup> See, e.g., GREG ALLEN & TANIEL CHAN, *ARTIFICIAL INTELLIGENCE & NATIONAL SECURITY* (2017), <https://perma.cc/HL2J-6Y4K>; PAUL SCHARRE, *ARMY OF NONE* (2018).

<sup>2</sup> See Tom C.W. Lin, *Artificial Intelligence, Finance, and the Law*, 88 *FORDHAM L. REV.* 531, 546–48 (2019); cf. Hal R. Varian, *High-Technology Industries and Market Structure* (Sept. 4, 2001) (unpublished manuscript), <https://perma.cc/DZ2B-E7GT>.

<sup>3</sup> See MILES BRUNDAGE, SHAHAR AVIN, JASMINE WANG, HAYDN BELFIELD, GRETCHEN KRUEGER ET AL., *TOWARDS TRUSTWORTHY AI DEVELOPMENT: MECHANISMS FOR SUPPORTING VERIFIABLE CLAIMS* 70 (2020), <https://arxiv.org/pdf/2004.07213.pdf>; Shin-Shin Hua & Haydn Belfield, *EU Competition Law and Cooperation between AI Firms: Potential Concerns and Solutions* (forthcoming 2020); Amanda Askeff et al., *The Role of Cooperation in Responsible AI Development* (July 10, 2019) (preprint), <https://arxiv.org/pdf/1907.04534.pdf>; Cullen O’Keefe, *Antitrust-Compliant AI Industry Self-Regulation* (July 7, 2020) (unpublished manuscript), <https://perma.cc/HS5P-6WZ6>.

<sup>4</sup> See DAKOTA FOSTER & ZACHARY ARNOLD, *ANTITRUST AND ARTIFICIAL INTELLIGENCE: HOW BREAKING UP BIG TECH COULD AFFECT THE PENTAGON’S ACCESS TO AI* (2020), <https://perma.cc/TPM7-CS5N>; Sophie-Charlotte Fischer et al., *Levers of Influence: A Primer on the U.S. Government’s Tools to Influence AI Research, Development, and Deployment* (Future of Humanity Inst. Technical Report, forthcoming 2020); see also GANESH SITARAMAN, *THE NATIONAL SECURITY CASE FOR BREAKING UP BIG TECH* (Jan. 30, 2020), <https://perma.cc/2XBA-DWCA>; Jon Bateman, *The Antitrust Threat to National Security*, *WALL ST. J.* (Oct. 22, 2019), <https://www.wsj.com/articles/the-antitrust-threat-to-national-security-11571784197>.

<sup>5</sup> Hereinafter, “national security or foreign policy” is simplified to “national security,” notwithstanding the fact that, strictly speaking, not all foreign policy matters obviously implicate national security.

<sup>6</sup> See Samuel K. Abrams, *Antitrust Laws in National Emergency*, 36 *MINN. L. REV.* 490 (1952); Amit Bindra, Note, *The Application of Antitrust Logic to Military Procurement Would Enhance America’s National Security*, 10 *DEPAUL BUS. & COM. L.J.* 405 (2012); Thomas K. Fisher, *Antitrust During National Emergencies: I*, 40 *MICH. L. REV.* 969 (1942) [hereinafter Fisher, *National Emergencies I*]; Thomas K. Fisher, *Antitrust During National Emergencies: II*, 40 *MICH. L. REV.* 1161 (1942) [hereinafter Fisher, *National Emergencies II*]; Bruce A. Khula, Note, *Antitrust at the Water’s Edge: National Security and Antitrust Enforcement*, 78 *NOTRE DAME L. REV.* 629 (2003); Robert Pitofsky, *Antitrust Modified: Education, Defense, and Other Worthy Enterprises*, *ANTITRUST*, Spring 1995, at 23; Richard M. Steuer & Peter A. Barile III, *Antitrust in Wartime*, 16 *ANTITRUST* 71 (2002); see also sources cited *supra* note 4 and *infra* notes 259, 261, 263, 295 (discussing defense industry mergers).

<sup>7</sup> See *infra* § I.A.

<sup>8</sup> Responsibility for enforcing American antitrust law is split between the Department of Justice (DOJ) and Federal Trade Commission (FTC). Collectively, I call these “antitrust enforcers.”

This paper aims to include all cases where there is substantial discussion in the literature of how national security influenced antitrust enforcement.<sup>9</sup> Though they are not the sole focus of this study, I am especially interested in cases where national security concerns and economic considerations *conflict*, suggesting different outcomes.<sup>10</sup> Such cases are interesting because, since the late 1970s, the dominant view—associated with the Chicago school of economics—has been that antitrust ought to primarily promote well-functioning, efficient markets by preventing firms from extracting monopoly rents.<sup>11</sup> Thus, cases in which national security considerations conflict with economic (i.e., efficiency-based) ones create tension between the primary goal of antitrust and other governmental objectives. Analyzing these conflicts reveals interesting insight into governmental prioritization. I find that in cases where national security and economic considerations conflict, economics has been given increased consideration over time.

Cases in which the United States government (USG) actively uses (or threatens to use) antitrust enforcement to advance *unrelated* national security goals may be seen as a particularly worrisome historical precedent.<sup>12</sup> The ability to threaten antitrust enforcement to advance unrelated goals implies that the antitrust-relevant corporate conduct would have otherwise been tolerated. This further suggests that such enforcement would be *contrary* to the course of action recommended by economic analysis of that conduct.<sup>13</sup> If such uses of antitrust are tolerated, companies may worry that they will become targets of antitrust due to circumstances outside their control,<sup>14</sup> or that they will be pressured to abandon stated values like pacifism.<sup>15</sup> This could

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<sup>9</sup> See *infra* § I.A.

<sup>10</sup> National security and economic considerations do not always conflict; sometimes, they both suggest the same outcome.

<sup>11</sup> See, e.g., *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 688 (1978) (“Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint’s impact on competitive conditions.”); Organisation for Economic Co-operation and Development [OECD], Note by the United States: Public Interest Considerations in Merger Control 2 (2016), <https://perma.cc/XB26-CRTP> (“U.S. antitrust law and policy, including merger review, are implemented based on the belief, borne out by our economic history, that the public interest is best served by focusing exclusively on competition considerations.”); ROBERT BORK, *THE ANTITRUST PARADOX* (1978); RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976); Jonathan B. Baker, *Recent Developments in Economics that Challenge Chicago School Views*, 58 *ANTITRUST L. J.* 645, 655 (1989) (“Over the past fifteen years, the courts and enforcement agencies have created Robert Bork’s antitrust paradise. Antitrust has adopted the Chicago School’s . . . conclusions about the effects of business practices.”); George L. Priest, *Bork’s Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 *J.L. & ECON. S1* (2014); Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 *ARIZ. ST. L.J.* 293 (2019); see also William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 *U. CHI. L. REV.* 459, 463 n.12 (2020) (collecting sources); cf. Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 *B.C. L. REV.* 551, 563–66 (2012) (“Although unsuccessful with Congress, the Chicago School influenced the Reagan and Bush administrations and the courts. The debate over antitrust’s goals shifted, though not completely, to the economic sphere. The primary policy debate was whether to apply a total or consumer welfare standard. Likewise, in the past policy cycle, the Supreme Court acknowledged antitrust’s economic goals, but not its political, social, and moral goals.”).

<sup>12</sup> For more clarity on this point, see *infra* note 21 and accompanying text.

<sup>13</sup> Thus, such cases will generally have conflicting considerations, as a threat of antitrust enforcement is only effective if the outcome would have otherwise been no (or less severe) antitrust action. My findings are consistent with this. See *infra* § I.C (for all cases in which there is indirect use of antitrust, there were conflicting considerations).

<sup>14</sup> Cf. *infra* § I.B.6 (Bananas in Guatemala (1953)) (antitrust suit revived due to new geopolitical circumstances giving the USG a national security interest in appearing unfriendly towards defendant corporation).

<sup>15</sup> Cf. *Artificial Intelligence at Google: Our Principles*, GOOGLE, <https://perma.cc/NR2S-SMF9> (archived Apr. 21,

raise various legal concerns. Normative preferences for underpunishment instead of overpunishment are common in law.<sup>16</sup> Overpunishment due to arguably irrelevant policy considerations<sup>17</sup> seems particularly objectionable. Yet, I am only able to find one case wherein the USG used antitrust to advance unrelated national security objectives: *Bananas in Guatemala* (1953).<sup>18,19</sup> The rarity of overenforcement due to unrelated national security objectives suggests that future security-driven overenforcement would violate historical enforcement norms.

Part I lists and analyzes the cases I identified, then lists several conclusions I was able to draw from my case studies. Those conclusions are:

1. National security considerations have entered the antitrust enforcement process numerous times over the past 100 years.
2. It is rare for the USG to actively use antitrust enforcement to advance unrelated national security objectives.
3. In cases where national security and economic considerations conflict, economics has been given more weight over time.
4. The president plays an important role in reconciling conflicting considerations.

Part II discusses how these conclusions might apply to AI firms in the coming decades.

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2020) (“[W]e will not design or deploy AI in the following application areas: 1. Technologies that cause or are likely to cause overall harm. Where there is a material risk of harm, we will proceed only where we believe that the benefits substantially outweigh the risks, and will incorporate appropriate safety constraints. 2. Weapons or other technologies whose principal purpose or implementation is to cause or directly facilitate injury to people. 3. Technologies that gather or use information for surveillance violating internationally accepted norms. 4. Technologies whose purpose contravenes widely accepted principles of international law and human rights.”).

<sup>16</sup> See, e.g., *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion) (“The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.”); 4 WILLIAM BLACKSTONE, COMMENTARIES \*352 (“[B]etter that ten guilty persons escape, than that one innocent suffer”); Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1592 (2000); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1695 (2008).

<sup>17</sup> See *supra* note 11 (sources arguing that only economic considerations should drive antitrust enforcement).

<sup>18</sup> *Infra* § I.B.6.

<sup>19</sup> Furthermore, even this case does not fit this characterization neatly. In the *Bananas in Guatemala* (1953) case, the USG began prosecuting the United Fruit Company (“UFCO”) for purely economic reasons. See *infra* note 176 and accompanying text. However, the USG suspended its prosecution for foreign policy reasons. See *infra* notes 177–179 and accompanying text. But once the facts changed such that prosecuting UFCO was in the USG’s foreign policy interests, the USG resumed prosecution. See *infra* notes 180–189 and accompanying text. Thus, although *resuming* prosecution of UFCO served unrelated national security goals (as did the suspension of prosecution), the *initiation* of the prosecution appears to have been purely economic.

## I. Case Studies

This Section lists twelve antitrust cases in which national security considerations influenced the case's outcome. It also analyzes those cases across several dimensions of interest.

### I.A. Methodology

I found cases to include in this study by searching secondary literature and, to a lesser extent, primary sources (namely case law) for existing discussions on antitrust in national security and foreign policy contexts. I attempted to include all cases where I could find substantial discussion of how national security influenced antitrust enforcement.<sup>20</sup> However, I am not an historian by training, so it is possible that I failed to find some relevant cases. Additionally, it seems likely that, due to the sensitivity of the subject matter, there is no easily discoverable documentary evidence of how national security influenced antitrust cases. While I hope that I have been objective and reasonably thorough in my search, it is possible I missed some cases. I would be excited to see this analysis improved by discovery of more data. Finally, the small number of cases studied here means that the conclusions I draw have large degrees of uncertainty.

To structure my analysis, I identified several interesting dimensions across which cases could vary. Those dimensions are:

1. *Directness*: Whether the national security and antitrust concerns relate to the *same conduct*. A case is “direct” when the conduct of national security interest itself triggered antitrust scrutiny. A case is “indirect,” therefore, when the government used antitrust enforcement to influence something *other than the antitrust-triggering conduct*.<sup>21</sup>
2. *Activeness*. The USG was “active” in a case if they sued or threatened to sue. The USG was “passive” if they refrained from suing or dropped an existing suit.
3. *Presidential Involvement* simply indicates whether there is any evidence the president was involved in the direction of the case. Of course, presidential intervention may not have left an accessible documentary record. Nevertheless, in the absence of such evidence, I assume that there was no such intervention.
4. *Conflicting Considerations*: Whether national security and economic considerations suggested opposite courses of action.<sup>22</sup>
5. *Conflict Winner*: In cases where there were conflicting considerations, which of those dominated as evidenced by the actual course of action pursued.

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<sup>20</sup> Note the inclusion of the word “substantial”: some cases have national security relevance, but it seems to have been a minor factor in the case. *See, e.g.*, *United States v. Microsoft Corp.*, No. 98-1232, at 1 (D.D.C. Sept. 28, 2001) (pre-trial conference order) (ordering parties to expedite the settlement process due to the September 11th terrorist attacks). Furthermore, some of the “cases” discussed herein constitute multiple legal cases or general trends from a specific historical era.

<sup>21</sup> A stylized example might help illustrate. Suppose XYZ Corp. sells two products: guns and butter. Butter sales are not relevant to national security, but gun sales to the USG are. XYZ wants to merge with another butter seller. The USG also wants XYZ to lower its gun prices. If the USG uses XYZ's pending merger as leverage to get XYZ to lower its gun prices, then it will have used antitrust in an *indirect* fashion. If, on the other hand, XYZ was proposing to merge with another gun seller, the merger would have been directly relevant to the USG's desire for lower gun prices, and so conditioning the merger on lower gun prices would have been *directly* relevant to the USG's national security goals.

<sup>22</sup> *See supra* note 10 and accompanying text.

## I.B. Cases in Chronological Order<sup>23</sup>

### I.B.1. German Espionage during World War I (1916)<sup>24</sup>

#### *Facts*

During World War I, German agents plotted to “disrupt the flow of war materiel from U.S. factories to countries fighting against Germany” by disrupting war industry labor (in which they actually succeeded) and planning to bomb factories and transportation facilities.<sup>25</sup> The USG successfully prosecuted the plotters under Section 1 of the Sherman Act<sup>26</sup> under the theory that the labor disruptions<sup>27</sup> and planned bombings<sup>28</sup> “restrained” foreign trade.<sup>29</sup>

This case seems to retain little relevance. The USG has better tools with which to prosecute industrial saboteurs today.<sup>30</sup> Still, this case provides an early and successful<sup>31</sup> strategic use of antitrust law as a punitive measure against enemy agents.

#### *Dimensional Analysis*

1. *Directness*: **Direct**, since the disruptive acts were also the acts that allegedly restrained trade.
2. *Activeness*: **Active**, since the cases were actually prosecuted.<sup>32</sup>
3. *Presidential Involvement*: **No**. I did not find any evidence of this.
4. *Conflicting Considerations*: **No**. Presumably, the economic interests in this case were not at the forefront, but neither were they likely in conflict with the national security interests.
5. Conflict Winner: **N/A**.

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<sup>23</sup> Some cases span many years. I generally date a case to the point when significant antitrust enforcement began.

<sup>24</sup> *United States v. Rintelen*, 233 F. 793 (S.D.N.Y. 1916), *aff'd sub nom. Lamar v. United States*, 260 F. 561 (2d Cir. 1919); *United States v. Bopp*, 237 F. 283 (N.D. Cal. 1916).

<sup>25</sup> *See Steuer & Barile*, *supra* note 6, at 7.

<sup>26</sup> 15 U.S.C. § 1.

<sup>27</sup> *See Lamar*, 260 F. at 262 (“The end or object of the proven conspiracy was not to call strikes, but to restrain or rather suppress foreign trade. That object is as illegal as ever . . . .”); *Rintelen*, 233 F. at 787 (“The purpose of the indictment in the present case is not to charge the commission of an offense against the United States . . . but to charge a conspiracy in violation of the first section of the Sherman Act, namely, a conspiracy in restraint of trade and commerce with foreign nations; the very gist of the offense being the conspiracy. . . . The conspiracy does not go to the restraint in trade of any particular individual or corporation, or combination of men, but to the restraint of all foreign trade where munitions of war are the subject of commerce.”).

<sup>28</sup> *See Bopp*, 237 F. at 285 (“In so far as these activities were to be directed against the manufacturing plants, in this country, and railroads and ships generally engaged in the transportation of such munitions of war as were manufactured therein, it is claimed that a conspiracy existed in violation of the Sherman Act . . . .”).

<sup>29</sup> *See generally Fisher, National Emergencies I*, *supra* note 6, at 988–89.

<sup>30</sup> *Cf. Steuer & Barile*, *supra* note 6, at 71 (these cases took place “[i]n an era when federal prosecutors had fewer law enforcement tools available to them than today . . . .”).

<sup>31</sup> Multiple defendants received statutory maximum prison terms. *See Fisher, National Emergencies I*, *supra* note 6, at 988–89.

<sup>32</sup> *See supra* note 31.

I.B.2. Military Optical Instruments (1940)<sup>33</sup>

*Facts*

The USG alleged that two corporations—American Bausch & Lomb and German Carl Zeiss—entered into illegal agreements that,

among other things, prevented Bausch & Lomb from selling outside the United States without the prior consent of the German Carl Zeiss corporation, and prevented the latter from selling in the United States without the like consent of Bausch & Lomb. Inventions resulting from the joint labor of the two companies were to be patented in the United States by Bausch & Lomb for the account of Carl Zeiss.<sup>34</sup>

The USG alleged that the cartel was adversely affecting war production.<sup>35</sup> The case was settled through a consent decree.<sup>36</sup>

[The consent decree] expressly provided, however, that the rights of Bausch & Lomb under any patents for the manufacture of military optical instruments were not affected by the provisions of the decree. *This would mean that sole ownership of those patents obtained by [Bausch & Lomb] for the account of Carl Zeiss was thereby vested in the American company.*<sup>37</sup>

The retention of patent rights to military technologies by the American firm presumably conferred strategic benefits to the United States government.<sup>38</sup> However, the nature and extent of these benefits is unclear.

More generally, then head of the Department of Justice Antitrust Division Thurman Arnold said that cases like this had a number of harmful consequences:

Throttling American capacity to produce essential war materials by foreign ownership and control of patents; Cartelization of certain industries with price and production control in foreign hands; Transmission to foreign companies of American military secrets; Division of markets, fixing and restricting of price of materials essential to military preparation; Collusive bidding on contracts for the Army and Navy.<sup>39</sup>

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<sup>33</sup> United States v. Bausch & Lomb Optical Co., 34 F. Supp. 267 (S.D.N.Y. 1940).

<sup>34</sup> Fisher, *National Emergencies II*, *supra* note 6, at 1189. Dividing markets like this is a violation of the Sherman Act. *See, e.g.*, White Motor Co. v. United States, 372 U.S. 253, 259 (1963).

<sup>35</sup> *See* Fisher, *National Emergencies II*, *supra* note 6, at 1188.

<sup>36</sup> *See id.*

<sup>37</sup> *Id.* at 1189 (emphasis added).

<sup>38</sup> *See* Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 ST. JOHN'S L. REV. 569, 603 (2004); *cf.* Steuer & Barile, *supra* note 6, at 72 (“[T]he government launched some powerful antitrust measures against international cartels that held the keys to strategic products.”).

<sup>39</sup> Waller, *supra* note 38, at 603–04 (quoting THURMAN W. ARNOLD, *THE BOTTLENECKS OF BUSINESS* 74 (1940)); *see also* Fisher, *National Emergencies II*, *supra* note 6, at 1186–87.



The *Bausch & Lomb* case was “the earliest”<sup>40</sup> of a number of antitrust consent decrees for the war production effort.<sup>41</sup> The Rubber Manufacturing (1942) case was another.<sup>42</sup>

### *Dimensional Analysis*

1. *Directness: Direct.* The cartelization of military optical instruments was of both national security and economic concern.
2. *Activeness: Active,* since the DOJ sought and entered into a consent decree.<sup>43</sup>
3. *Presidential Involvement: No.* I did not find any evidence of this.
4. *Conflicting Considerations: No.* Although the security concerns here may have been foremost, geographic market division is a classic economic antitrust offense.<sup>44</sup> Thus, both economic and national security considerations favored antitrust enforcement here.
5. *Conflict Winner: N/A.*

### I.B.3. Rubber Manufacturing (1942)<sup>45</sup>

The Department of Justice’s wartime prosecution of the American Standard Oil Co. for disclosing rubber manufacturing processes to the German chemical company I.G. Farbenindustrie (“I.G.”)<sup>46</sup> provides a stark example of the USG using antitrust in response to a firm that aided enemies.

In the 1920s, Standard and I.G. had entered into several agreements to illegally<sup>47</sup> divide the oil, coal, and chemical markets.<sup>48</sup> “In the words of a Standard official, ‘[I.G. was] going to stay out of the oil business—and [Standard was] going to stay out of the chemical business.’”<sup>49</sup> To administer these deals, they incorporated (in America) and jointly owned the Standard-I.G. Company and Joint American Standard Company (“Jasco”).<sup>50</sup>

In 1937, pursuant to its agreements with I.G., Standard gave I.G. the rights and technical knowledge for the manufacture of a synthetic rubber called Butyl.<sup>51</sup> At the time, I.G. was a “mighty industrial colossus”<sup>52</sup> that controlled key strategic resources and technical knowledge in

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<sup>40</sup> Fisher, *National Emergencies II*, *supra* note 6, at 1188.

<sup>41</sup> *See id.* at 1187–91.

<sup>42</sup> *See infra* § I.B.3.

<sup>43</sup> *See supra* note 36 and accompanying text.

<sup>44</sup> *See supra* note 34.

<sup>45</sup> *United States v. Standard Oil Co.*, 1940-43 Trade Cas. (CCH) ¶ 56,198 (D.N.J. 1942) [hereinafter *Standard Oil I*], *amended by* 1940-43 Trade Cas. (CCH) ¶ 56,269 (D.N.J. 1943).

<sup>46</sup> *See generally id.*; JOSEPH BORKIN, *THE CRIME AND PUNISHMENT OF I.G. FARBEN* 76–94 (1978); Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 524–25 (2009); Frank L. Kluckhohn, *Arnold Says Standard Oil Gave Nazis Rubber Process*, N.Y. TIMES, Mar. 27, 1942.

<sup>47</sup> As with geographic markets, *see supra* note 34, dividing product markets violates Section 1 of the Sherman Act. *See United States v. Associated Patents, Inc.*, 134 F. Supp. 74 (E.D. Mich. 1955), *aff’d sub nom. Mac Inv. Co. v. United States*, 350 U.S. 960 (1956) (per curiam).

<sup>48</sup> *See BORKIN*, *supra* note 46, at 46–52.

<sup>49</sup> *Id.* at 51 (quoting *Investigation on the National Defense Program: Hearing Before the Special Comm. Investigating the Nat’l Def. Program*, 77th Cong. 4312 (1942)).

<sup>50</sup> *See id.* at 51.

<sup>51</sup> *See id.* at 79–80.

<sup>52</sup> *Id.* at 1.



a variety of fields<sup>53</sup> necessary to the Nazi war effort.<sup>54</sup> The Nazis' dependence upon I.G. was extensive;<sup>55</sup> a postwar USG report concluded that “[w]ithout I.G. . . . , Germany would not have been in a position to start its aggressive war in September 1939.”<sup>56</sup> Rubber was a “key[] to German rearmament,”<sup>57</sup> and Butyl was “cheaper and better” than the process previously used there,<sup>58</sup> so the transfer was a strategic boon to the Nazis.<sup>59</sup> At the same time, Standard “refused to reveal to the United States Navy and the British Government its process for making synthetic rubber . . . .”<sup>60</sup>

Though they had promised to “stay out of the chemical business,” Standard officials repeatedly pleaded for technical knowledge of I.G.’s own synthetic rubber, Buna.<sup>61</sup> The Nazi government, acutely aware of rubber’s strategic value and of the potential for conflict with America, refused to allow I.G. to give Standard instructions for Buna production.<sup>62</sup> However, I.G. did transfer patents to the Standard-I.G. Company (“S.I.G.”) and Jasco to avoid their seizure by the USG’s Alien Property Custodian.<sup>63</sup> I.G. included the Buna patent in this transfer, but not (the more important) technical knowledge of how to produce it.<sup>64</sup> The result was that I.G. (and by extension the Nazi government) retained control over the knowledge necessary for much of the synthetic rubber production in America.<sup>65</sup>

After the Pearl Harbor attack, Japan blocked the U.S. from its primary natural rubber supply in Southeast Asia, precipitating a “monumental rubber crisis.”<sup>66</sup> The U.S. Department of Justice Antitrust Division, under the leadership of Assistant Attorney General Thurman Arnold<sup>67</sup> and “with the backing of several powerful senators and administration officials,”<sup>68</sup> began antitrust enforcement against Standard with the goal of “open[ing] up the development and manufacture of synthetic rubber.”<sup>69</sup> This enforcement came as a compromise, though—President Roosevelt agreed to suspend other pending antitrust investigations so industry could focus on war

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<sup>53</sup> E.g., “the synthetics of oil, rubber, nitrates, and fibers . . . vaccines, sera, and drugs such as Salvarsan, aspirin, Atabrine, and Novocain, along with sulfa drugs, as well as poison gases and rocket fuels.” *Id.*

<sup>54</sup> Germany’s lack of domestic natural resources necessitated reliance on the firm. *See id.* at 1–2.

<sup>55</sup> *See id.* at 53–75, 93.

<sup>56</sup> *See id.* at 1 (quoting U.S. GRP. CONTROL COUNCIL, FIN. DIV., GER., REPORT ON INVESTIGATION OF I.G. FARBENINDUSTRIE (1945)). I.G.’s collaboration with the Nazi government extended far beyond the supply of strategic goods; for example, I.G. built a synthetic rubber and oil plant at Auschwitz to exploit the slave labor available therefrom. *See id.* at 2–3.

<sup>57</sup> *Id.* at 79

<sup>58</sup> *See Kluckhorn, supra* note 46.

<sup>59</sup> *See BORKIN, supra* note 46, at 79.

<sup>60</sup> *See Kluckhorn, supra* note 46.

<sup>61</sup> *See BORKIN, supra* note 46, at 79–88.

<sup>62</sup> *See id.* at 79–88, 92.

<sup>63</sup> *See id.* at 83–88. The Alien Property Custodian can only seize “enemy” property, and a corporation incorporated in the United States cannot be an enemy under the Trading with the Enemy Act. *See* 50 U.S.C. § 4302; *Hamburg-Am. Line Terminal & Navigation Co. v. United States*, 277 U.S. 138, 140–41 (1928).

<sup>64</sup> *See BORKIN, supra* note 46, at 86–88.

<sup>65</sup> *See* WENDELL BERGE, CARTELS: CHALLENGE TO A FREE WORLD 211–13 (1944); GEORGE W. STOCKING & MYRON W. WATKINS, CARTELS IN ACTION 114–15 (1946); Stucke, *supra* note 11, at 524–25; Corwin D. Edwards, *Thurman Arnold and the Antitrust Laws*, 58 POL. SCI. Q. 338, 344 (1943).

<sup>66</sup> *See BORKIN, supra* note 46, at 88–89.

<sup>67</sup> *See Edwards, supra* note 65, at 344.

<sup>68</sup> BORKIN, *supra* note 46, at 89.

<sup>69</sup> *See id.*

production.<sup>70</sup> The DOJ complaint alleged that the Standard-I.G. cartel contributed to the ongoing rubber crisis.<sup>71</sup>

Despite initial protests that the suit would disrupt their war production activities,<sup>72</sup> Standard and the DOJ successfully negotiated a consent decree shortly after.<sup>73</sup> Key provisions of the consent decree included:

- The severance of all relations between American cartel members (including Standard, S.I.G., and Jasco)<sup>74</sup> and I.G.;<sup>75</sup>
- Transfer of cartel-owned patents—including in Butyl and Buna—to Jasco and S.I.G., along with the “know-how” for the use thereof;<sup>76</sup> and
- A requirement that, for the duration of the war, Jasco and S.I.G. would issue royalty-free licenses for those patents upon request by anyone.<sup>77</sup>

“Freed from cartel restrictions, the [American] wartime synthetic rubber program overcame all obstacles and expanded production of rubber substitutes at a rate which was sufficient eventually to meet emergency needs.”<sup>78</sup>

It is worth noting that, despite being accused of “treason” by incensed politicians,<sup>79</sup> Standard did not intend to aid the Nazi war efforts.<sup>80</sup> Its motive was simply cartel profits.<sup>81</sup> Of course, this fact did not impede USG antitrust enforcement against a firm that plainly and significantly aided enemy war efforts.

#### *Dimensional Analysis*

1. *Directness*: **Direct**. The market divisions to which Standard and I.G. agreed were the cause of both the strategic problems for the USG and the antitrust offense.
2. *Activeness*: **Active**. The USG reached a consent decree with Standard.<sup>82</sup>
3. *Presidential Involvement*: **Yes**.<sup>83</sup>
4. *Conflicting Considerations*: **No**. Similar to the *Bausch & Lomb* case,<sup>84</sup> the national security considerations may have been stronger, but there was still a clear economic harm present.
5. *Conflict Winner*: **N/A**.

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<sup>70</sup> *See id.*

<sup>71</sup> *See id.* at 91.

<sup>72</sup> *See id.* 89.

<sup>73</sup> *Standard Oil I*, 1940-43 Trade Cas. (CCH) ¶ 56,198. Ten individual Standard defendants pleaded guilty to criminal antitrust charges and received \$5,000 in fines each. *See BORKIN*, *supra* note 46, at 91.

<sup>74</sup> *See Standard Oil I*, 1940-43 Trade Cas. (CCH) ¶ 56,198 at 706.

<sup>75</sup> *See id.* at 710.

<sup>76</sup> *See id.* at 710–11.

<sup>77</sup> *See id.* at 711.

<sup>78</sup> *STOCKING & WATKINS*, *supra* note 65, at 106.

<sup>79</sup> *See Kluckhorn*, *supra* note 46.

<sup>80</sup> *See STOCKING & WATKINS*, *supra* note 65, at 116–17.

<sup>81</sup> *See id.*

<sup>82</sup> *See supra* note 73 and accompanying text.

<sup>83</sup> *See supra* note 70 and accompanying text.

<sup>84</sup> *Supra* § I.B.2.

#### I.B.4. Union Pacific Railroad (1943)

##### *Facts*

DOJ Antitrust Division leader Thurman Arnold attempted to prosecute railroads for price-fixing in 1943. However, this conflicted with national security priorities, which saw the railroads as important to war production:<sup>85</sup>

The final straw [for Arnold's tenure at DOJ Antitrust] appeared to be Arnold's attempt to criminally prosecute the railroads for price fixing and to indict Averell Harriman, the chairman of the Union Pacific, who was appointed as United States Ambassador to the Soviet Union in the same year that Arnold would have indicted him. The indictment was quashed in the name of national defense . . . .<sup>86</sup>

Understanding that he lacked support from the Roosevelt administration for vigorous antitrust enforcement, Arnold resigned from DOJ.<sup>87</sup>

As the above excerpt suggests, Arnold's wartime antitrust efforts frequently conflicted with war priorities, which generally included protecting industries involved in defense production.<sup>88</sup> When this happened, war priorities almost always won out:

Arnold was losing the antitrust battle to defense preparation and the war effort on a daily basis. The problem was that while the Standard Oils, DuPonts, GEs, and Alcoas were guilty of heinous conduct, their sins were ultimately greedy in nature rather than traitorous. These companies were absolutely vital to the war effort and many of their executives were now working in the war planning and production effort. Arnold was forced to agree publicly—if not entirely voluntarily—to defer to the War and Navy Departments in the event they explicitly found that any particular antitrust violation was necessary for national defense. Perhaps it was inevitable that this would overwhelm his antitrust enforcement program given the scope of the national emergency and the corporatist culture of the war planners themselves. Case after case was vetoed by the planning and defense authorities, including cases involving conduct predating the war. Arnold spent more and more of his time fighting with the war planners, including Hugh Johnson, who was the first head of the NRA [National Recovery Administration] and still had little use for the antitrust laws. For the first

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<sup>85</sup> See Waller, *supra* note 38, at 606.

<sup>86</sup> *Id.* at 606–07 (citations omitted).

<sup>87</sup> See Alan Brinkley, *The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold*, 80 J. AM. HIST. 557, 578 (1993).

<sup>88</sup> See I.F. Stone, *Thurman Arnold and the Railroads*, 156 NATION 331, 331 (1943) (“Today the [War Production Board], the War and Navy departments, the Office of the Petroleum Administrator for War, and the [Board of Economic Warfare] are run by business men and lawyers who have devoted much of their activity to violating the anti-trust laws. Little wonder that they proved powerful enough, first, to force weak consent decrees on Arnold, then to shut off one scheduled prosecution after another, and finally to promote Arnold to the bench.”).

time, Congress cut rather than increased Arnold's budget and staffing.<sup>89</sup>

From another source:

Arnold had twenty-one anti-trust cases shot out from under him by the arrangement last spring whereby the corporation lawyers and bankers who man the offices of the War and Navy departments are permitted to suspend the anti-trust laws for the convenience of themselves, their ex-clients, and their friends. Among these cases are no fewer than five against the du Ponts and two against General Electric. All but one of them are criminal, not civil cases. In all but two instances the prosecution was stopped after indictments were obtained. The indictments act as a considerable deterrent. Recently the Secretaries of War and the Navy have begun to stop investigations before indictments can be returned. One such case was the inquiry into the Hawaiian pineapple industry. The other involved a group of three indictments prepared against the Illinois Freight Association and the Central States Motor Freight Bureau. These were to be the beginning of the first major attack on the greatest monopoly in this country, the growing monopoly in transportation—on the methods whereby the railroads fix not only their own rates but impose uneconomic and non-competitive rates on the movement of goods by air, water, and highway. The request was stopped by [Office of Defense Transportation Director Joseph B.] Eastman, with the approval of Under Secretaries [Robert P.] Patterson [of the War Department] and [James] Forrestal [of the Navy Department].

A letter to Attorney General [Francis] Biddle by Secretary of War [Henry L.] Stimson and Acting Secretary of the Navy Forrestal throws new light on the curious procedure now being followed in anti-trust cases. It reveals that drafts of the proposed indictments were presented by the Anti-Trust Division to the Secretaries of War and the Navy before submission to the grand jury in Chicago, and that this was done “in pursuance of an arrangement made at a conference held in your [Biddle’s] office.” The War and Navy departments, and Eastman, prevented the proposed indictments from ever reaching the grand jury. War, Navy, and Eastman were willing only to permit the prosecution of labor leaders and others who were alleged to have used a strike to coerce a motor carrier to increase its rates. Arnold and Biddle refused to do this.<sup>90</sup>

A longtime Antitrust Division lawyer recalls:

[A]t the beginning of World War II, antitrust enforcement was suspended by Executive Order. Numerous complaints were being made to the military about the Antitrust Division's activities under Thurman Arnold

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<sup>89</sup> Waller, *supra* note 38, at 606 (citations omitted).

<sup>90</sup> Stone, *supra* note 88, at 331–32 (last alteration in original).

who was Assistant Attorney General. The War Department and the Navy Department were bringing to the attention of President Roosevelt's office complaints that investigations, prosecutions, and other activities in connection with antitrust enforcement were allegedly interfering with the manufacture of munitions and other war materials by the large companies that were involved in these antitrust matters. . . .

I think there were something like twenty-five cases that were postponed because FDR was approached and told about these complaints by the War Department, the Navy and the individual companies and he agreed to call a moratorium on any antitrust matter whether it was a case, an investigation or whatever, until the end of the war. So, from March 20, 1942, when FDR issued an Executive Order, until June 30, 1945, there was a moratorium on all, or most, antitrust matters. The statute of limitations was also suspended for any of these antitrust investigations or cases so that it didn't run during the war. And at the end of the war, which was four or five years before I came into the Antitrust Division, there were a lot of cases brought that involved cartels and price fixing and all kinds of stuff involving U.S. companies abroad.<sup>91</sup>

It is not clear why Arnold decided to prosecute Union Pacific despite the moratorium, though his decision to do so proved fatal to his career with the Antitrust Division.

#### *Dimensional Analysis*

1. *Directness: Indirect.* The wartime considerations militating against prosecution were unrelated to the underlying price-fixing.
2. *Activeness: Passive.* Although Arnold attempted to prosecute the railroad,<sup>92</sup> the case was ultimately quashed on national security grounds.<sup>93</sup>
3. *Presidential Involvement: Yes.* President Roosevelt suspended antitrust enforcement.<sup>94</sup>
4. *Conflicting Considerations: Yes,* since Arnold wanted to prosecute the case but the various national security departments and, ultimately, the president disagreed.
5. *Conflict Winner: National Security,* since the case was ultimately quashed.<sup>95</sup>

#### I.B.5. The Oil Cartel Case (1952)<sup>96</sup>

##### *Facts*

This case concerns a number of agreements, dating back to the 1920s,<sup>97</sup> between major European (Royal Dutch Shell and Anglo-Iranian Oil [BP]) and American (Standard Oil of New Jersey [Exxon], Socony Mobil [Mobil], Standard Oil of California [Chevron], Texaco, and Gulf Oil) oil

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<sup>91</sup> Bernard M. Hollander, *Fifty-Eight Years in the Antitrust Division: 1949–2007* at 76–77 (2007) (unpublished oral history) (on file with author).

<sup>92</sup> See *supra* notes 85–86 and accompanying text.

<sup>93</sup> See *supra* note 86 and accompanying text.

<sup>94</sup> See *supra* notes 86, 91 and accompanying text.

<sup>95</sup> See *supra* note 86 and accompanying text.

<sup>96</sup> See generally BURTON I. KAUFMAN, *THE OIL CARTEL CASE* (1978).

<sup>97</sup> See *id.* at 20.

producers<sup>98</sup> regarding “market allocation, price fixing, elimination of outside competition, mutual assistance in curtailing expenses, avoidance of duplicate facilities, and reciprocal sales and exchanges of crude and petroleum products.”<sup>99</sup>

Initially, these agreements garnered little antitrust enforcement:<sup>100</sup> “[b]ecause of the growing dependence of the industrialized world on oil, the petroleum industry became the beneficiary of preferential treatment, receiving immunities and grants that other industries simply did not enjoy.”<sup>101</sup> The necessities of the World Wars also contributed to this preferential treatment.<sup>102</sup>

However, a combination of post-WWII agreements that further consolidated the American oil producers began to concern the Department of Justice.<sup>103</sup> The cartel had a number of adverse effects on strategic operations, which contributed to the decision to pursue the case:

- “[T]he high prices Aramco was charging for petroleum delivered to the Navy as opposed to what it was charging a number of countries such as France and Uruguay.”<sup>104</sup>
- “[T]he prices [the major oil corporations] charged for oil delivered to Europe under the Marshall Plan . . . were higher than those charged to their own affiliates.”<sup>105</sup> “As Secretary of Defense James Forrestal wrote [President] Truman in 1948, ‘[w]ithout Middle East Oil the [Marshall Plan] has a very slim chance of success.’”<sup>106</sup>
- An FTC report described the agreements as “detrimental to the . . . security of the United States . . . .”<sup>107</sup>

However, national security advisors urged keeping the report secret on the grounds that it would “greatly assist Soviet propaganda, would further the achievement of Soviet objectives throughout the world and [would] hinder the achievement of U. S. foreign policy objectives, particularly in the Near and Middle East.”<sup>108</sup> After the report leaked, the same advisors “strongly urged against prosecuting the oil majors, pointing out the damage such prosecution might do to American interests abroad. President Truman shared this view.”<sup>109</sup> However, while a Senator, Truman had described oil cartel sales to Axis powers as “approach[ing] treason.”<sup>110</sup> As president, he wanted to “strengthen[] the powers of the federal government over oil”<sup>111</sup> and generally supported strengthening antitrust law.<sup>112</sup>

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<sup>98</sup> *See id.* at 11–12.

<sup>99</sup> *See id.* at 20–21.

<sup>100</sup> *See generally id.* at 3–14.

<sup>101</sup> *Id.* at 22.

<sup>102</sup> *See id.* at 22–23.

<sup>103</sup> *See id.*

<sup>104</sup> *Id.* at 28.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 29.

<sup>107</sup> *See id.*

<sup>108</sup> *See id.* at 30.

<sup>109</sup> *Id.* at 30–31.

<sup>110</sup> *See id.* at 31.

<sup>111</sup> *Id.*

<sup>112</sup> *See id.* at 31–32.

Taking all of the above into account, “Truman decided by June 1952 that an international oil cartel did exist, *which was more harmful to American interests than any action a grand jury might take against it*. On June 23, therefore, he ordered the Justice Department to begin a grand jury [criminal] investigation of the seven multinational oil giants. In letters to the secretaries of Defense, State, Interior, and Commerce and to the FTC, he asked these agencies to cooperate with the Justice Department in gathering evidence for the legal proceedings to follow.”<sup>113</sup>

As the case developed, a series of foreign policy crises and exigencies undermined Justice’s attempts at antitrust enforcement. In spring 1951, the government of Iran nationalized BP, precipitating a political crisis for the U.S.<sup>114</sup> This strengthened the conviction of officials in the National Security Council and Departments of State and Defense to oppose further prosecution of the domestic oil cartel case, which they argued “would be fodder for the Soviet propaganda machine and lead to further nationalization of American foreign oil interests.”<sup>115</sup>

However, after negotiations with Iran stalled, the United Kingdom launched a boycott of Iranian oil, leaving the U.S. responsible for ensuring an adequate oil supply to Europe.<sup>116</sup> This was likely to require coordination, though this immediately implicated antitrust.<sup>117</sup> President Truman considered invoking his powers under the Defense Production Act<sup>118</sup> (“DPA”) to “make exceptions to the antitrust laws for national-security reasons”<sup>119</sup> but “was reluctant to do so because of the pending case . . . .”<sup>120</sup> “The Justice Department and FTC also opposed granting any antitrust immunity to the oil industry.”<sup>121</sup> “In contrast, the Departments of State and Interior, the latter through the Petroleum Administration for Defense (PAD), urged the exception to be made . . . .”<sup>122</sup> *Truman ultimately agreed with State and Interior and allowed the exception.*<sup>123</sup> The oil companies were successful in negotiating the inclusion of “a paragraph [in the exception agreement] that stated the agreement would not be construed as to require the participants to take any action in conflict with prior obligations.”<sup>124</sup> The agreement remained in effect until 1952, when it was no longer necessary to meet Europe’s energy needs.<sup>125</sup>

Meanwhile, the Iran crisis continued. The Department of Justice continued to disagree with the foreign policy wing of the cabinet on whether to resolve the crisis through a consortium of the major oil corporations (the strategy favored by the Department of State) or through a loan to Iran in exchange for them lifting restrictions on oil exports through BP (the strategy favored by the

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<sup>113</sup> *Id.* at 32 (emphasis added).

<sup>114</sup> *See generally id.* at 38–40.

<sup>115</sup> *See id.* at 40.

<sup>116</sup> *See id.* at 41–42.

<sup>117</sup> *See id.* at 42.

<sup>118</sup> 50 U.S.C. App. § 2061 *et seq.*

<sup>119</sup> *See KAUFMAN, supra note 96, at 42.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *See id.* at 43.

<sup>124</sup> *See id.*

<sup>125</sup> *See id.*



Department of Justice).<sup>126</sup> Truman ultimately decided to follow State's recommendation, which necessitated demoting the case from a criminal to a civil action.<sup>127</sup>

In return,

[t]he only conditions that Truman imposed on the oil companies . . . were that they turn over to the Justice Department the documents required by the subpoena and that they pledge not to make any motion to amend or dismiss the new suit until the documents were received and the details of the government's case made known.<sup>128</sup>

The formation of the Iranian consortium proceeded under the Eisenhower administration.<sup>129</sup> The oil majors approached the consortium apprehensively, as they already had access to adequate supply elsewhere.<sup>130</sup> "They made it clear to the administration that they would enter a consortium only in the interest of national security . . . [and] *also insisted on being granted antitrust immunity in the production of Iranian oil.*"<sup>131</sup> "Even though a question existed about the authority of the Justice Department to give antitrust immunity for national security purposes outside the provisions of the Defense Production Act, the Justice Department gave its sanction [for the consortium, including immunity]."<sup>132</sup> Recognizing the risk of the appearance of self-contradiction, the Antitrust Division dropped allegations relating to oil production and refining and instead focused on distribution, marketing, pricing, and transportation.<sup>133</sup> This was another major blow to antitrust goals in the name of national security: "the result of this administration policy was . . . to maintain the hold of the multinationals over Mideast oil *without any compensating factors in the form of . . . significant changes in government policy towards multinationals.*"<sup>134</sup>

Changes to DPA required the attorney general to review existing voluntary agreements regarding nonmilitary goods.<sup>135</sup> In January 1956, the Acting Attorney General declared his intention to withdraw Justice's approval from the voluntary agreement arising out of the Iranian crisis, saying that its "adverse impacts . . . outweighed its contribution to national defense."<sup>136</sup> However, under pressure from the Office of Defense Mobilization, the Acting Attorney General agreed to concessions that left the agreement in place.<sup>137</sup> "Furthermore, the government and the oil companies secretly agreed that the proposed antitrust safeguards would apply only to the

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<sup>126</sup> *See id.* at 44–46.

<sup>127</sup> *See id.* at 46.

<sup>128</sup> *Id.* at 46–47 (emphasis added).

<sup>129</sup> *See id.* at 50–60.

<sup>130</sup> *See id.* at 57. However, some statements suggest a continued interest in accessing Iranian supply and preventing oil dumping by Soviet producers. *See id.*

<sup>131</sup> *Id.* (emphasis added).

<sup>132</sup> *Id.* at 58.

<sup>133</sup> *See id.* at 59–60.

<sup>134</sup> *See id.* (emphasis added).

<sup>135</sup> *See id.* at 66.

<sup>136</sup> *See id.*

<sup>137</sup> *See id.*

gathering of information and statistics and would be of no effect in case of an emergency necessitating the use of plans of cooperative action by the oil companies.”<sup>138</sup>

The administration granted antitrust immunity to oil majors yet again during the Suez Crisis of 1956–57,<sup>139</sup> though this immunity was of questionable legality.<sup>140</sup> This too was motivated by national security concerns—namely, fears that without such immunity, the oil majors would be unable to ship a sufficient amount of oil to American allies in Europe—and represented another setback for antitrust enforcement.<sup>141</sup>

The Eisenhower administration also began to see the U.S.’s reliance on foreign oil as a threat to national security.<sup>142</sup> It therefore sought voluntary import quotas from the oil majors,<sup>143</sup> raising obvious antitrust issues.<sup>144</sup> This too frustrated Justice’s antitrust enforcement goals.<sup>145</sup>

From the beginning of negotiations, Justice sought a consent decree with the majors.<sup>146</sup> Its objectives were:<sup>147</sup>

- “An injunction against price fixing and division of the markets”;<sup>148</sup>
- The elimination of “joint-marketing companies and other joint-marketing arrangements”;<sup>149</sup>
- “[R]equiring each of the [majors] to compete on the basis of its own resources rather than that of its competitors and . . . making excess oil available to all companies at the same price”;<sup>150</sup>
- “[A]n injunction against sales of crude or products among defendants at [below-market prices]”;<sup>151</sup>
- “[A]n injunction against any defendant [purchasing] any more or less than its proportionate share of any joint-production arrangement”;<sup>152</sup> and
- “An injunction against the use by any defendant of a delivered price”<sup>153</sup> (A delivered price is “a system whereby oil prices were based on the cost of fuel at one or more places regardless of the actual cost of production.”)<sup>154</sup>

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<sup>138</sup> *Id.*

<sup>139</sup> *See generally id.* at 64–76.

<sup>140</sup> *See id.* at 64–65, 68–70.

<sup>141</sup> *See generally id.* at 64–76.

<sup>142</sup> *See id.* at 72.

<sup>143</sup> *See id.* at 72–75.

<sup>144</sup> *See id.* at 73.

<sup>145</sup> *See id.* at 74.

<sup>146</sup> *See id.* at 80, 86. This was at least partially due to “the need for government-industry collaboration in the Mideast and other world areas . . .” *See id.* at 86; *see also id.* at 88.

<sup>147</sup> The (perceived?) strategic importance of each of these to foreign policy goals is not explicit and can only be discerned from officials’ prior assertions that anticompetitive agreements harmed foreign policy goals. *See, e.g., id.* at 28–30, 138–40.

<sup>148</sup> *Id.* at 80.

<sup>149</sup> *See id.* at 81

<sup>150</sup> *Id.* at 81–82.

<sup>151</sup> *Id.* at 82.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

The insistence of the oil companies that the case harmed U.S. foreign policy interests apparently “weighed heavily with the presiding judge.”<sup>155</sup> In response to a motion requesting the court to order defendants to produce documents from foreign subsidiaries, the judge “asked the defendants and the Justice Department to seek the views of the Department of State on the likely effects of such an order.”<sup>156</sup> “The State Department’s reply was noncommittal, yet favorable to the oil companies.”<sup>157</sup> Seeing this, the presiding judge rejected Justice’s requests.<sup>158</sup> However, after the State Department greenlighted the production of the documents, the judge ordered them produced.<sup>159</sup>

Justice entered into consent agreements with Exxon, Gulf, and Texaco.<sup>160</sup> National security concerns in *favor* of the oil companies were the driving force behind the settlements and the way they were disclosed to the public.<sup>161</sup> Justice was unable to obtain consent decrees with Mobil and Socal but was unwilling to take the case to trial.<sup>162</sup> It dropped the suit against them in 1968.<sup>163</sup>

Note how, in this case, antitrust goals were subservient to external assessments of the national interest. Even when Justice interprets antitrust enforcement to be in its interest, indications to the contrary from the national security apparatus (e.g., State) were sufficiently powerful to significantly delay and alter antitrust enforcement priorities. Indeed, the case also shows that corporations sufficiently important to U.S. foreign policy goals, as the big oil corporations were,<sup>164</sup> are likely to receive favorable treatment, including antitrust immunity, insofar as antitrust enforcement against them is detrimental to U.S. foreign policy objectives. Perhaps most shockingly, the oil corporations were unabashed about asserting that they, not Justice, were serving national interests, and the State Department largely agreed.

However, the case also shows that Justice *is* also willing to shape its antitrust enforcement to further (its independent assessment of) national security needs.

#### *Dimensional Analysis*

1. *Directness*: **Both**. Certainly, the artificially high prices were harmful from both national security and economic perspectives. However, some national security considerations that played a role in this case were not relevant to competitive conditions, such as the nationalization of BP and the resulting concern about whether the Soviet government could use the antitrust prosecutions as propaganda.
2. *Activeness*: **Both**. Interestingly, in this case the USG’s strategy towards the majors changed depending on the geopolitical circumstances. Initially, the USG was **passive** by

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<sup>155</sup> *See id.* at 88.

<sup>156</sup> *See id.* at 88–89.

<sup>157</sup> *Id.* at 89.

<sup>158</sup> *See id.* at 90.

<sup>159</sup> *See id.*

<sup>160</sup> *See generally id.* at 90, 93–101.

<sup>161</sup> *See id.* at 95–96.

<sup>162</sup> *See id.* at 99.

<sup>163</sup> *See id.*

<sup>164</sup> *See id.* at 149.

granting immunities to the companies.<sup>165</sup> However, the government switched to an **active** approach when President Truman decided that prosecuting the oil majors was beneficial on net.<sup>166</sup> During the Iranian nationalization crisis, President Truman took the **passive** steps of granting an antitrust exception under the DPA<sup>167</sup> and demoting the case from criminal to civil.<sup>168</sup> When he inherited the case, President Eisenhower also took the **passive** step of removing allegations relating to oil production from the case.<sup>169</sup>

It is worth noting that the **active** uses of antitrust against the oil majors were all **direct**. That is, the USG only actively used antitrust in this case when the targeted conduct was both security *and* economically relevant.

3. *Presidential Involvement: Yes*. President Truman was personally and extensively involved in weighing the various considerations for and against antitrust enforcement.<sup>170</sup>
4. *Conflicting Considerations: Yes*.
5. *Conflict Winner: National Security (generally)*. Towards the beginning of the case, President Truman decided to prosecute the oil majors notwithstanding the objections from his national security advisors.<sup>171</sup> However, even this decision was at least partially motivated by the national security considerations that others raised in *favor* of the prosecution.<sup>172</sup> Throughout the rest of the case, however, antitrust enforcement efforts were gradually weakened by national security considerations.

#### I.B.6. Bananas in Guatemala (1953)

##### *Facts*

The United Fruit Company (“UFCO”) was a leading American producer of fruits, with significant banana plantations in Guatemala.<sup>173</sup> “By the mid-1950s, United Fruit had captured nearly 65% of the U.S. banana market.”<sup>174</sup> Then, between 1952 and 1954, Guatemala’s “left-wing, nationalist government” under Jacobo Árbenz seized and redistributed 400,000 acres of UFCO land.<sup>175</sup>

“[T]he [American] Justice Department had just finished its preliminary investigation of United Fruit. The investigation had found ample cause to pursue antitrust action against the company's monopoly of the Central American banana industry . . . .”<sup>176</sup> In light of Árbenz’s expropriation, however, United Fruit sought to leverage the USG’s anticommunist stance into antitrust leniency.<sup>177</sup>

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<sup>165</sup> See *supra* notes 100–102 and accompanying text.

<sup>166</sup> See *supra* notes 103–113 and accompanying text.

<sup>167</sup> See *supra* notes 114–125 and accompanying text.

<sup>168</sup> See *supra* notes 126–128 and accompanying text.

<sup>169</sup> See *supra* notes 129–134 and accompanying text.

<sup>170</sup> See *supra* notes 108–127 and accompanying text.

<sup>171</sup> See *supra* notes 103–113 and accompanying text.

<sup>172</sup> See *supra* notes 103–107, 113 and accompanying text.

<sup>173</sup> See Khula, *supra* note 6, at 656.

<sup>174</sup> *Id.* at 657.

<sup>175</sup> See RICHARD H. IMMERMANN, *THE CIA IN GUATEMALA* 80–81 (9th prtg 2004); Khula, *supra* note 6, at 656–57. For background on United Fruit’s longstanding, inequitable economic relationship with the Guatemalan host population, see IMMERMANN, *supra*, at 68–75.

<sup>176</sup> Khula, *supra* note 6, at 659.

<sup>177</sup> *Id.* at 657.

[UFCO] gambled that national security needs were stronger than Eisenhower's commitment to antitrust—and in the short run they were right. When the Guatemalan government decided in February 1953 to nationalize more property, dozens of U.S. congressmen bombarded the State Department with telegrams, urging a strong line in support of United Fruit and in defense of American overseas investment. Company officials echoed this sentiment in a meeting with Assistant Secretary of State John Moors Cabot on May 6, 1953. For his part, Cabot was already convinced that Communism was an “international conspiracy and ipso facto a menace to everybody in the world.” Capitalizing on this conviction, company officials soon turned the discussion away from United Fruit’s great unpopularity in Latin America to a discussion of the antitrust suit. Samuel G. Baggett, vice president of United Fruit, brought up the subject, claiming that a suit would prove “very damaging” to the company at a time when its entire Latin American operations were in jeopardy. “No one,” he emphasized, “would believe there was not something seriously wrong with an American company being sued by its own government.”<sup>178</sup>

Concerned about promoting American investment abroad, high-level government officials—including the president, secretary of state, and assistant secretary of state—intervened to encourage private settlement and successfully postpone the suit.<sup>179</sup>

In 1954, U.S.-backed Castillo Armas toppled the Árbenz regime.<sup>180</sup> Thus, the secretary of state (initially) no longer had objections to antitrust action against UFCO.<sup>181</sup> “Indeed, he and others apparently realized that, in the aftermath of Armas’s coup, *they now had more to gain by putting distance between the United States and United Fruit.*”<sup>182</sup> This is because the Eisenhower administration wanted to show both to domestic journalists and Central American governments that they were not “handmaidens of United Fruit.”<sup>183</sup>

Apparently worried at the prospect of antitrust action stifling American business investment in Guatemala (and therefore development thereof), however, Deputy Undersecretary of State Murphy raised the alarm within State.<sup>184</sup> State then reversed its official position and told Justice that it “must therefore seek a swift settlement through a consent decree that only addressed

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<sup>178</sup> *Id.* at 658–59.

<sup>179</sup> *See id.* at 659–61.

<sup>180</sup> *See id.* at 662

<sup>181</sup> *See id.*

<sup>182</sup> *Id.* (emphasis added).

<sup>183</sup> *See* STEPHEN G. RABE, *EISENHOWER AND LATIN AMERICA* 58 (1988); *cf.* PIERO GLEIJESES, *SHATTERED HOPE: THE GUATEMALAN REVOLUTION AND THE UNITED STATES, 1944-1954* 361 n.3 (1991) (“Some portray a U.S. government that is putty in the hands of the company, conveniently overlooking evidence that might temper or complicate this thesis, including the fact that the government initiated an antitrust suit against UFCO shortly after the fall of Arbenz.”); IMMERMANN, *supra* note 175, at 123 (“The official line of Eisenhower’s [Guatemala] policy defended United Fruit’s interests so avidly that political scientist and former State Department member Cole Blasier wrote that the United States government entered into the controversy as a virtual speaker for the company”).

<sup>184</sup> *See* Khula, *supra* note 6, at 663–64.

United Fruit's most egregious behavior."<sup>185</sup> Justice, however, continued aggressive enforcement against UFCO, rejecting State's consent decree proposal.<sup>186</sup>

"Hoping to destroy the company's effort to undercut the lawsuit once and for all, Justice officials explained to their counterparts in [State] that too often corporations attempted to escape antitrust action by pitting the government's diplomats against its own lawyers. Conceding the point, Loftus Becker, the State Department's legal counsel, replied that his department would no longer muscle in on the case."<sup>187</sup> Nevertheless, the case ultimately ended in a modest consent decree<sup>188</sup> that gave substantial deference to foreign policy concerns and UFCO itself.<sup>189</sup>

This case is interesting because it shows how responsive antitrust enforcement can be to foreign policy considerations. Initially, foreign policy actors successfully shaped Department of Justice antitrust enforcement to further foreign policy goals (namely, anti-communism). However, when the U.S.'s strategic interest changed and it became desirable for State to distance itself from UFCO, State took a more hands-off approach (for a limited time). After State concluded it retained an interest in the case, it began to pressure Justice towards a tidier solution. The final resolution of the case, like the rest of it, distinctly favored foreign policy concerns over pure antitrust concerns.<sup>190</sup>

#### *Dimensional Analysis*

1. *Directness*: **Indirect**. UFCO's antitrust offenses were, at most, tangentially related to enforcement decisions.<sup>191</sup> In general, unrelated national security considerations guided many enforcement decisions.
2. *Activeness*: **Both**. As noted, the USG's approach to enforcement changed from **passive**<sup>192</sup> to **active**<sup>193</sup> and back to **passive**<sup>194</sup> again based on changing national security considerations.
3. *Presidential Involvement*: **Yes**.<sup>195</sup>
4. *Conflicting Considerations*: **Yes**. Throughout this case, antitrust enforcers disagreed with national security officials about what to do.
5. *Conflict Winner*: **National Security (generally)**. National security officials were successful at getting initial leniency for UFCO.<sup>196</sup> Enforcement only resumed once the

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<sup>185</sup> See *id.* at 664.

<sup>186</sup> See *id.* at 665.

<sup>187</sup> *Id.* at 668.

<sup>188</sup> See *id.* at 668–70.

<sup>189</sup> See *id.*

<sup>190</sup> See *id.* at 670 ("From postponement to prosecution to consent decree, the case had been dictated by the paramount concern of President Eisenhower and his foreign policy elite: the necessities and vagaries of national security.").

<sup>191</sup> The decision to prosecute UFCO after Armas came to power was proximately motivated by the USG wanting to distance itself from UFCO. See *supra* notes 180–183. However, this desire in turn was probably related to UFCO's anticompetitive behavior. Since the relation between the conduct and the enforcement decision was mediated by the USG's desire to be perceived in a certain way, I have categorized this as indirect.

<sup>192</sup> See *supra* notes 176–179 and accompanying text.

<sup>193</sup> See *supra* notes 181–183 and accompanying text.

<sup>194</sup> See *supra* notes 184–189 and accompanying text.

<sup>195</sup> See *supra* note 179 and accompanying text.

<sup>196</sup> See *supra* notes 176–179 and accompanying text.

considerations were no longer conflicting.<sup>197</sup> Even when the State Department agreed to stop meddling in the case,<sup>198</sup> the ultimate resolution of the case was close to what they wanted.<sup>199</sup>

#### I.B.7. Yellowcake Uranium (1972)

##### *Facts*

Yellowcake is a uranium product. After uranium is mined, it is “milled”: “crushed and treated with chemicals . . . to yield a mixture of compounds including uranium oxides concentrate, known for its color when pure and calcined as ‘yellowcake.’”<sup>200</sup> After being converted to uranium hexafluoride, the uranium is “enriched” to 3% uranium-235 for use in nuclear power reactors.<sup>201</sup> By comparison, weapons-grade uranium needs enrichment to >90% U-235.<sup>202</sup> “[E]nriched uranium is the ingredient most difficult to obtain in fabricating nuclear weapons,”<sup>203</sup> so America has focused nuclear nonproliferation efforts on controlling enrichment facilities,<sup>204</sup> rather than the supply of unenriched uranium (which is quite common).<sup>205</sup>

In 1972, a booming market for uranium ended due to decreased demand for new weapons-grade uranium.<sup>206</sup> Since 1970, “military uses [of uranium] ha[d] been met from previously accumulated stockpiles.”<sup>207</sup> To protect its domestic uranium suppliers from falling prices, the U.S. “imposed an embargo on enrichment of foreign uranium for use in United States reactors.”<sup>208</sup>

At the time, Canada, Australia, France, and South Africa essentially controlled all non-U.S. yellowcake sales.<sup>209</sup> Responding to the same market forces, the dominant producers from these countries and their respective governments formed the “Uranium Club,” a cartel that would fix worldwide uranium prices.<sup>210</sup>

In 1978, the DOJ learned about the cartel following leaks from an Australian environmental group.<sup>211</sup> They criminally indicted Gulf Oil for violating antitrust laws by joining the cartel.<sup>212</sup> For unexplained reasons, the DOJ chose not to charge any of the foreign firms in the Club.<sup>213</sup>

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<sup>197</sup> See *supra* notes 184–189 and accompanying text.

<sup>198</sup> See *supra* note 187 and accompanying text.

<sup>199</sup> See *supra* notes 188–189 and accompanying text.

<sup>200</sup> See JUNE H. TAYLOR & MICHAEL D. YOKELL, *YELLOWCAKE* 13 (1979).

<sup>201</sup> See *id.* at 14–15.

<sup>202</sup> See *id.* at 15.

<sup>203</sup> *Id.* at 16.

<sup>204</sup> Cf. *id.* at 15.

<sup>205</sup> Cf. *What is Uranium?*, URANIUM PRODUCERS AM., <https://perma.cc/KMT7-WMPK> (archived Nov. 14, 2018).

<sup>206</sup> See TAYLOR & YOKELL, *supra* note 200, at 55.

<sup>207</sup> See *id.* at 3.

<sup>208</sup> See *id.* at 55.

<sup>209</sup> See *id.* at 68.

<sup>210</sup> See *id.* at 57, 63.

<sup>211</sup> See *id.* at 61.

<sup>212</sup> See *id.* at 175.

<sup>213</sup> See *id.* Antitrust law can apply extraterritorially, meaning that under certain circumstances American courts can impose antitrust penalties on foreign firms for anticompetitive conduct outside of the US but which affects American markets. For an historical overview of the development of this doctrine at the time of the Yellowcake case, see Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 6–27 (1992–1993).



Furthermore, Gulf's alleged crime took place before the 1975 enactment of stiffer penalties, so the charge was only a misdemeanor.<sup>214</sup> The authors of *Yellowcake* speculate:

The reason for the lenient treatment of Gulf and the absence of charges against foreign participants may have been pressure from the Government of Canada and the United States State Department. The governments of Australia, Canada, and Great Britain all lodged complaints with the State Department over the Justice Department's efforts to subpoena information in their countries. (In Australia and Canada it was actually illegal to cooperate with United States investigators . . . .) The Justice Department denies that it was taking orders from State. Even if it weren't, *attorneys familiar with the case have noted that the attorney general's office is quite capable of determining on its own what kind of cases and charges are consistent with United States foreign policy goals, and handling its affairs accordingly.* It should be noted that President Carter has openly expressed his desire to see uranium mining developed in Australia to provide a greater quantity of raw uranium resources for the free world. This complement[ed] his international nuclear policies of discouraging [nuclear] breeder and reprocessing technologies. Given these goals President Carter would not want to antagonize the government of Australia.<sup>215</sup>

Gulf pleaded no contest and received a mere \$40,000 in fines.<sup>216</sup>

Note that, contrary to my initial presumption, the government did not treat the cartel as a bottleneck on a strategic weapons commodity, but rather as a potential constraint on American energy supply.<sup>217</sup> Nevertheless, the above excerpt suggests that foreign policy considerations played a role in the disposition of the suit.

#### *Dimensional Analysis*

1. *Directness: Direct.* The cartel was the object of the antitrust complaint and also sensitive as a matter of foreign policy due to foreign governments' interest in it.<sup>218</sup>
2. *Activeness: Passive.* As noted above, the fines against Gulf were small<sup>219</sup> and no foreign firms were charged.<sup>220</sup>
3. *Presidential Involvement: No (speculative).* there is no evidence of this, though statements by the president may have influenced DOJ's decision-making.<sup>221</sup>

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<sup>214</sup> See TAYLOR & YOKELL, *supra* note 200, at 175.

<sup>215</sup> *Id.* at 176–77 (emphasis added).

<sup>216</sup> See *id.* at 177.

<sup>217</sup> See generally *id.*

<sup>218</sup> See *supra* note 215 and accompanying text.

<sup>219</sup> See *supra* note 216 and accompanying text.

<sup>220</sup> See *supra* note 213 and accompanying text.

<sup>221</sup> Cf. *supra* note 215 and accompanying text (discussing Executive Branch dynamics in the case).

4. *Conflicting Considerations: Yes*. Price-fixing is illegal under the antitrust laws, but foreign policy considerations would have suggested leniency on the cartel and especially the foreign cartel participants.<sup>222</sup>
5. *Conflict Winner: National Security (speculative)*. Again, we do not know for certain whether national security was the reason for the lenient resolution, but Taylor and Yokell suggest it is.<sup>223</sup>

#### I.B.8. AT&T Breakup (1974)<sup>224</sup>

##### *Facts*

This case began in the Ford administration with the antitrust breakup of the Bell telephone system.<sup>225</sup> Presidents Carter and then Reagan inherited the case.<sup>226</sup> Some in the Reagan administration considered the Bell system crucial to national security. Testifying before the Senate Armed Services Committee about communications command and control, Secretary of Defense Caspar Weinberger asserted that “[t]he [AT&T] network is the most important communication net we have to service our strategic systems in this country.”<sup>227</sup> He also reported his disagreement with the antitrust case:

Because of the discussions I have had concerning the effect of the Department of Justice suit that would break up part of that network, I have written to the Attorney General and urged very strongly that the suit be dismissed, recognizing all of the problems that might cause and because of the fact it seems to me essential that we keep together this one communications network we now have, and have to rely on.<sup>228</sup>

Antitrust Assistant Attorney General William Baxter, who was overseeing the case, was unphased by Weinberger’s objections and pressed on.<sup>229</sup> Perhaps surprisingly, given his reputation as a hawk,<sup>230</sup> “Reagan [resolved the conflict] in favor of Justice and of pursuing the antitrust case.”<sup>231</sup>

<sup>222</sup> See *supra* note 215 and accompanying text.

<sup>223</sup> See *supra* note 215 and accompanying text.

<sup>224</sup> Complaint, *United States v. Am. Tel. & Tel. Co.*, Civ. No. 74-1698 (D.D.C. Nov. 20, 1974).

<sup>225</sup> See James F. Rill & Stacy L. Turner, *Presidents Practicing Antitrust: Where to Draw the Line?*, 79 ANTITRUST L.J. 577, 590 (2014). See generally STEVE COLL, *THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T* (1986).

<sup>226</sup> Cf. Rill & Turner, *supra* note 225, at 590.

<sup>227</sup> *To Authorize Supplemental Appropriations for Fiscal Year 1981 for Procurement of Aircraft, Missiles, Naval Vessels, and Tracked Combat Vehicles, and for Research, Development, Test, and Evaluation, and to Increase the Authorized Personnel Strength for Military and Civilian Personnel of the Department of Defense, and for Other Purposes: Hearing on S. 694 Before the S. Comm. on Armed Services*, 97th Cong. 21 (1981) (statement of Caspar Weinberger, Sec’y of Def. of the United States) [hereinafter *1981 Appropriations*]; see also Ted Hearn, *Reagan’s Imprint Includes ‘84 Cable Act, Bell System Breakup*, MULTICHANNEL NEWS, June 14, 2004, at 1, 60. (“There was furious lobbying by Cap Weinberger against breaking up AT&T . . .”).

<sup>228</sup> *1981 Appropriations*, *supra* note 227, at 21.

<sup>229</sup> See Merrill Brown, *Reagan Antitrust Chief Vows to Pursue AT&T Breakup*, WASH. POST, Apr. 10, 1981, at E1; Rill & Turner, *supra* note 225, at 590.

<sup>230</sup> See Rill & Turner, *supra* note 225, at 591.

<sup>231</sup> *Id.*

### Dimensional Analysis

1. *Directness*: **Direct**. The AT&T breakup had both antitrust and national security relevance.
2. *Activeness*: **Active**. The USG ultimately pursued the antitrust case.<sup>232</sup>
3. *Presidential Involvement*: **Yes**, President Reagan intervened to decide with the Department of Justice.<sup>233</sup>
4. *Conflicting Considerations*: **Yes**. Secretary of Defense Weinberger disagreed with the DOJ's continued pursuit of the case.<sup>234</sup>
5. *Conflict Winner*: **Economics**.<sup>235</sup>

I.B.9. Transatlantic Air Travel (1984)<sup>236</sup>

### Facts

Laker Airways, a British company, offered low-fare routes between New York and London starting in 1977.<sup>237</sup> These plans were originally successful,<sup>238</sup> but the falling strength of the British pound caused Laker to flounder.<sup>239</sup> In 1982, it underwent liquidation.<sup>240</sup>

Laker's liquidators filed a civil antitrust suit against British and American competitors,<sup>241</sup> alleging that they engaged in coordinated predatory pricing design to render Laker unprofitable.<sup>242</sup>

"The Antitrust Division initiated a grand jury investigation into the allegations and an international firestorm ensued."<sup>243</sup> The British government, which owned one of the British defendant airlines (British Airways) and supported the creation of the other (British Caledonian),<sup>244</sup> strongly objected to the extraterritorial application of American antitrust law

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<sup>232</sup> See *supra* note 231 and accompanying text.

<sup>233</sup> See *supra* note 231 and accompanying text.

<sup>234</sup> See *supra* notes 227–229 and accompanying text.

<sup>235</sup> See *supra* note 231 and accompanying text.

<sup>236</sup> *Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124 (D.D.C. 1983), *aff'd sub nom. Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

<sup>237</sup> See Aryeh S. Friedman, *Laker Airways: The Dilemma of Concurrent Jurisdiction and Conflicting National Policies*, 11 BROOK. J. INT'L L. 181, 189 (1985); Rill & Turner, *supra* note 225, at 588.

<sup>238</sup> See *Sabena*, 731 F.2d at 917.

<sup>239</sup> See *id.* Specifically, Laker owed a large amount in dollars but earned revenue in pounds. See *id.*

<sup>240</sup> See *id.*

<sup>241</sup> *Pan Am.*, 559 F. Supp. 1124.

<sup>242</sup> See *Sabena*, 731 F.2d at 917.

<sup>243</sup> Rill & Turner, *supra* note 225, at 589.

<sup>244</sup> See Barnaby J. Feder, *Laker Civil Antitrust Suit to Go On*, N.Y. TIMES, Nov. 21, 1984, <https://perma.cc/VVR3-Y5UC>.

against those carriers.<sup>245</sup> One particular source of concern was the investigation's effect on British Airways, which the UK was seeking to privatize.<sup>246</sup>

In addition to their diplomatic protests, the British government retaliated by refusing to approve American carriers' proposed new discount transatlantic fares.<sup>247</sup> In 1984, in an attempt to alleviate further tensions over air travel between the two nations, President Reagan instructed the Department of Justice to halt the federal investigation into Laker.<sup>248</sup> The Justice Department acknowledged the propriety of the president adjusting antitrust enforcement to accommodate foreign policy.<sup>249</sup>

### *Dimensional Analysis*

1. *Directness: Both.* The USG's foreign policy concerns were based on the UK government's responses to the case, which were both **direct** and **indirect**. **Directly**, the UK government protested the extraterritorial application of antitrust law to its state-owned airlines.<sup>250</sup> The UK government also retaliated **indirectly** by refusing approval of American carriers' proposed fares.<sup>251</sup> Thus, the U.S. government's interest in easing tensions with the UK ultimately derived from both **direct** concerns about the implications of antitrust enforcement against state-owned airlines and **indirect** concerns about the UK's retaliatory measures.
2. *Activeness: Passive.* The DOJ halted the investigation.<sup>252</sup>
3. *Presidential Involvement: Yes.*<sup>253</sup>
4. *Conflicting Considerations: Yes.* DOJ's enforcement was antithetical to Reagan's foreign policy objectives.<sup>254</sup>
5. *Conflict Winner: National Security.* Reagan chose to halt the investigation for foreign policy reasons.<sup>255</sup>

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<sup>245</sup> See *id.*; Friedman, *supra* note 237, at 183–86; *President Halts Grand Jury Antitrust Inquiry; British Reject Low Fares Despite U.S. Action*, AVIATION WK. & SPACE TECH., Nov. 26, 1984, at 36; Rill & Turner, *supra* note 225, at 589. The *Laker* actions were only the latest such incident—the British government had long protested extraterritorial application of American antitrust law. See Friedman, *supra* note 237, at 184–85 (“The government of the United Kingdom ha[d] historically been opposed to United States antitrust policy insofar as it affects business enterprises based in the United Kingdom, and ha[d] long objected to the scope of extraterritorial prescriptive jurisdiction asserted by United States courts for its antitrust laws.” (footnote omitted)). For more background on extraterritorial application of American antitrust law, see *supra* note 213.

<sup>246</sup> Feder, *supra* note 244; Rill & Turner, *supra* note 225, at 589.

<sup>247</sup> See Friedman, *supra* note 237, at 216–17. At the time, the Bermuda II agreement between the two countries required governmental approval of proposed routes, capacities, and fares on transatlantic flights. See generally Rill & Turner, *supra* note 225, at 589 n.49.

<sup>248</sup> See *id.* at 589.

<sup>249</sup> See *id.*

<sup>250</sup> See *supra* notes 244–246 and accompanying text.

<sup>251</sup> See *supra* note 247 and accompanying text.

<sup>252</sup> See *supra* note 248 and accompanying text.

<sup>253</sup> See *supra* notes 248–249 and accompanying text.

<sup>254</sup> See *supra* notes 248–249 and accompanying text.

<sup>255</sup> See *supra* notes 248–249 and accompanying text.

## I.B.10. Wave of Defense Industry Mergers (1985–99)

### Facts

The number of mergers and acquisitions (M&A) in all industries has risen dramatically since approximately 1990, with peaks in 1999, 2007, and 2015.<sup>256</sup> Defense and aerospace<sup>257</sup> M&A has grown similarly.<sup>258</sup> American defense outlays declined starting in 1985 and dropped even further due to the end of the Cold War, which caused defense firms to have excess capacity.<sup>259</sup> This led to an unprecedented spike in defense industry mergers in the late 1980s and 1990s,<sup>260</sup> which precipitated a wave of responses in legal scholarship,<sup>261</sup> industry,<sup>262</sup> and government.<sup>263</sup>

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<sup>256</sup> See *M&A Statistics*, INSTITUTE FOR MERGERS, ACQUISITIONS AND ALLIANCES, <https://perma.cc/75JC-UVAB> (archived Apr. 24, 2020).

<sup>257</sup> Defense and aerospace are considered deeply interrelated. See, e.g., Eric J. Stock, *Explaining the Differing U.S. and EU Positions on the Boeing/McDonnell-Douglas Merger: Avoiding Another Near-Miss*, 20 U. PA. J. INT'L ECON. L. 825, 836–41 (1999).

<sup>258</sup> See *M&A by Industry*, INSTITUTE FOR MERGERS, ACQUISITIONS AND ALLIANCES, <https://perma.cc/N4J7-NENT> (archived Apr. 24, 2020).

<sup>259</sup> See, e.g., Joseph Kattan, *The Declining Defense Sector and Federal Antitrust Enforcement*, 23 PUB. CONT. L.J. 21, 21 (1993); William E. Kovacic, *Merger Policy in a Declining Defense Industry*, 36 ANTITRUST BULL. 543, 546–53 (1991) [hereinafter Kovacic, *Declining Defense Industry*]; Thomas B. Leary & Janet L. McDavid, *The Defense of Mergers in the Defense Industry*, ANTITRUST, Summer 1993, at 4, 4–5; Marina Lao, *Mergers in A Declining Defense Industry: Should the Merger Guidelines Be Reassessed?*, 28 CONN. L. REV. 347, 347–48 (1996); 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.

<sup>260</sup> See *M&A by Industry*, *supra* note 258.

<sup>261</sup> See, e.g., DONALD L. PILLING, *COMPETITION IN DEFENSE PROCUREMENT* (1989); Amy J. Boatner, *Consolidation of the Aerospace and Defense Industries: The Effect of the Big Three Mergers in the United States Defense Industry*, 64 J. AIR L. & COM. 913 (1999); Francis Dymond, *DOD Contractor Collaborations: Proposed Procedures for Integrating Antitrust Law, Procurement Law, and Purchasing Decisions*, 172 MIL. L. REV. 96 (2002); Harold W. Furchtgott-Roth, *Comments on Merger Policy in a Declining Defense Industry by W. E. Kovacic*, 36 ANTITRUST BULL. 593 (1991); Kattan, *supra* note 259; Craig S. King, *DoD Review of Mergers and Joint Ventures: Not Just for Antitrust Lawyers*, 32 PROCUREMENT LAW. 1 (1997); William E. Kovacic, *Competition Policy in the Postconsolidation Defense Industry*, 44 ANTITRUST BULL. 421 (1999) [hereinafter Kovacic, *Postconsolidation Defense Industry*]; Kovacic, *Declining Defense Industry*, *supra* note 259; William E. Kovacic & Dennis E. Smallwood, *Competition Policy, Rivalries, and Defense Industry Consolidation*, 8 J. ECON. PERSP. 91 (1994); J. Robert Kramer II, *Antitrust Review in Banking and Defense*, 11 GEO. MASON L. REV. 111 (2002); Lao, *supra* note 259; Leary & McDavid, *supra* note 259; 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 L. & ECON. 155 (1999); Shwartz, *supra* note 259; Eric J. Stock, *Explaining the Differing U.S. and EU Positions on the Boeing/McDonnell-Douglas Merger: Avoiding Another Near-Miss*, 20 U. PA. J. INT'L ECON. L. 825 (1999); 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 (1994); Laura A. Wilkinson & Steven K. Bernstein, *Analyzing Defense Industry Mergers Under the 1992 Merger Guidelines*, ANTITRUST, Summer 1993, at 10; Dennis A. Yao & Susan S. DeSanti, *Antitrust Analysis of Defense Industry Mergers*, 23 PUB. CONT. L.J. 379 (1994).

<sup>262</sup> See Kattan, *supra* note 259, at 22.

<sup>263</sup> See *Hearing on S. 936 before the Subcomm. on Acquisition & Tech. of the S. Armed Services Comm.*, 105 Cong. (1997) (statement of Robert Pitofsky, Chairman, Fed. Trade Comm'n), <https://perma.cc/22JP-5LZD>; *Testimony before the Subcomm. on Acquisition & Tech. of the S. Armed Services Comm.*, 105 Cong. (1998) (statement of David E. Cooper, Assoc. Dir., Def. Acquisition Issues, Internal Affairs Div., U.S. Gen. Accounting Office), <https://perma.cc/5M3B-TBUE>; DEF. SCI. BD., *REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON ANTITRUST ASPECTS OF DEFENSE INDUSTRY CONSOLIDATION* (Apr. 1994) [hereinafter DEF. SCI. BD., *CONSOLIDATION REPORT*], <https://perma.cc/PS2Q-L7TZ>; DEF. SCI. BD., *REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON VERTICAL INTEGRATION AND SUPPLIER DECISIONS* (May 1997) [hereinafter DEF. SCI. BD., *VERTICAL INTEGRATION REPORT*], <https://perma.cc/67JG-MW7N>.

Until 1994, the Department of Defense (DoD) did not intervene in the merger process much.<sup>264</sup> Though individual contemporary and former DoD officials testified on both sides of merger cases, the DoD never took a formal position on them.<sup>265</sup> In 1994, the DoD's Defense Science Board released a report on the wave of mergers and made recommendations on the proper role of the DoD in merger review.<sup>266</sup>

During this period, some had argued that DoD's role as a monopsonist with an interest in keeping prices low rendered antitrust oversight redundant.<sup>267</sup> Though regulators and courts<sup>268</sup> have consistently rejected such arguments, they do take account of DoD's expressed views on proposed mergers.<sup>269</sup> This is not unusual; courts and regulators often note customers' views during merger review under the theory that they have both good (but imperfect) information and incentives to object when appropriate.<sup>270</sup> Furthermore, the Defense Science Board found that

[r]eview of defense industry mergers and joint ventures by the antitrust enforcement agencies is in the public interest and continues to protect the DOD (and ultimately the United States taxpayer) against the risk that a transaction may create a firm or group of firms with enhanced market power, i.e., the power to increase prices.<sup>271</sup>

They thus agreed with enforcers that an exemption for defense mergers was unwarranted.<sup>272</sup>

Some observers did worry that a continued focus on antitrust economics could undermine security. As the Defense Science Board remarked, however:

Most claims that a merger or joint venture is important to national security are recognized by the antitrust agencies as "efficiencies" as that term is used in the Merger Guidelines—i.e., the combined firms can produce a better product at a lower price, maintain long-term R&D capacity, or put together complementary resources or staff that will produce a superior product. There may be rare situations, however, where DOD may assert that a transaction is essential to national security, even though it may

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<sup>264</sup> See DEF. SCI. BD., CONSOLIDATION REPORT, *supra* note 263, at 1, 9–15; King, *supra* note 261, at 22; Kovacic, *Postconsolidation Defense Industry*, *supra* note 261, at 469 n.121; Kramer, *supra* note 261, at 113–14.

<sup>265</sup> See DEF. SCI. BD., CONSOLIDATION REPORT, *supra* note 263, at 9.

<sup>266</sup> *Id.*

<sup>267</sup> See Kattan, *supra* note 259, at 22 (“[Industry] critics see no useful role for antitrust in the defense industry in light of the industry’s fealty to a monopsonist customer that employs a complex web of regulatory mechanisms to control prices in the market.”); Kovacic & Smallwood, *supra* note 261, at 92 n.1 (collecting sources). For analysis of this argument, see Kovacic, *Declining Defense Industry*, *supra* note 259, at 575–85.

<sup>268</sup> See *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1055–57 (9th Cir. 1983); *F.T.C. v. Alliant Techsystems Inc.*, 808 F. Supp. 9, 21–22 (D.D.C. 1992).

<sup>269</sup> See Kattan, *supra* note 259, at 22.

<sup>270</sup> See, e.g., Ken Heyer, *Predicting the Competitive Effects of Mergers by Listening to Customers*, 74 ANTITRUST L.J. 87 (2007).

<sup>271</sup> DEF. SCI. BD., CONSOLIDATION REPORT, *supra* note 263, at 15.

<sup>272</sup> See *id.*

substantially increase concentration and not produce cost savings.<sup>273</sup>

The DoD noted that under *National Society of Professional Engineers v. United States*,<sup>274</sup> such arguments were “not an acceptable counterbalance to potential anticompetitive effects.”<sup>275</sup> Contrary to *Professional Engineers*, courts do seem to consider these national security arguments,<sup>276</sup> but “no otherwise illegal defense industry merger reviewed by the courts has survived a preliminary injunction motion, or otherwise resulted in dismissal of a government charge, on a determination that public equities like national security outweighed anticompetitive effects.”<sup>277</sup> The DoD thus recommended raising noneconomic national security considerations with enforcement agencies to inform their prosecutorial decisions.<sup>278</sup>

To summarize, the consensus at the time was that DoD could provide useful information on competitive conditions to antitrust enforcers, but that its recommendations should not be conclusive because the antitrust enforcers were capable of balancing economic and security considerations well.<sup>279</sup> Instead, the DoD recommended enhanced communication with the antitrust authorities to more consistently offer useful advice on proposed mergers.<sup>280</sup>

Following the recommendations from the 1994 report, DoD formalized internal procedures for developing a position on pending mergers and increased communication with the antitrust authorities.<sup>281</sup> Those procedures were modified in 2017 and remain in force in their amended form.<sup>282</sup> In 1997, an antitrust practitioner reported on the effect of the changes:

[R]elations between DoD and the antitrust enforcement agencies appear to have evolved significantly during the last two years. DoD now has handled enough transactions that it has a significant positive track record with both FTC and DoJ. Dealings between the agencies are frequent—and apparently are relatively open and respectful. Also, in virtually all cases DoD makes program and contracts officials available to the antitrust enforcement agencies to answer questions and provide any requested information.

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<sup>273</sup> *Id.* at 32.

<sup>274</sup> 435 U.S. 679 (1978); *see also supra* note 11.

<sup>275</sup> DEF. SCI. BD., CONSOLIDATION REPORT, *supra* note 263, at 32.

<sup>276</sup> *See id.* at 32, 32 nn.77–78.

<sup>277</sup> *Id.* at 32; *see also* Kattan, *supra* note 259, at 27.

<sup>278</sup> *See* DEF. SCI. BD., CONSOLIDATION REPORT, *supra* note 263, at 32.

<sup>279</sup> *See id.* at 1 (“Although competition among firms in the defense industry is significantly different from competition in other industries, the Task Force concluded that current antitrust law and enforcement, including exercise of prosecutorial discretion, is flexible enough to take these important differences into account.”).

<sup>280</sup> *See id.* at 37–43.

<sup>281</sup> DEP’T OF DEF., DoD DIRECTIVE 5000.62, IMPACT OF MERGERS OR ACQUISITIONS OF MAJOR DoD SUPPLIERS ON DoD PROGRAMS (1996) [hereinafter DEP’T OF DEF., ORIGINAL DoD DIRECTIVE 5000.62], *amended by* DEP’T OF DEF., DoD DIRECTIVE 5000.62, REVIEW OF MERGERS, ACQUISITIONS, JOINT VENTURES, INVESTMENTS, AND STRATEGIC ALLIANCES OF MAJOR DEFENSE SUPPLIERS ON NATIONAL SECURITY AND PUBLIC INTEREST (2017) [hereinafter DEP’T OF DEF., CURRENT DoD DIRECTIVE 5000.62]; *see also* DEF. SCI. BD., VERTICAL INTEGRATION REPORT, *supra* note 263, at 30 n.46, 30–31; King, *supra* note 261, at 25–26; Kovacic, *Postconsolidation Defense Industry*, *supra* note 261, at 444–45; Kramer, *supra* note 261, at 114.

<sup>282</sup> DEP’T OF DEF., CURRENT DoD DIRECTIVE 5000.62, *supra* note 281.



Where no formal DoD position is developed, DoD nonetheless may be involved quite extensively with the antitrust enforcement agencies, or its activities may be very limited. Oftentimes, DoD may do little more than provide the antitrust enforcement agencies access to program and contracts personnel. Where there is no department position, interested DoD officials may convey views to the antitrust agencies that do not have “official” status.<sup>283</sup>

However, even as late as 1998, disagreements within DoD complicated disposition of proposed mergers.<sup>284</sup>

The Defense Science Board released a report on vertical integration in 1997.<sup>285</sup> The report found that vertical integration had not yet adversely affected DoD acquisition, but warned that it might in the future.<sup>286</sup> The authors also concluded that the DoD and antitrust enforcers were “capably and effectively identifying and addressing vertical concerns arising in defense transactions”<sup>287</sup>—further evidence that the post-1994 changes were effective.<sup>288</sup> The 1997 report does not appear to have led to formal changes in DoD comparable to those following the 1994 report.

#### *Dimensional Analysis*

Given that there were many mergers during this period,<sup>289</sup> this Dimensional Analysis tries to fairly summarize overall trends from this era.

1. *Directness: Direct.* The mergers were sensitive for both national security and economic reasons.
2. *Activeness: Both.* The antitrust authorities pursued some cases,<sup>290</sup> but also declined to intervene in the vast majority of cases.<sup>291</sup>
3. *Presidential Involvement: No.* I did not find any evidence of this.

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<sup>283</sup> King, *supra* note 261, at 25.

<sup>284</sup> See Kovacic, *Postconsolidation Defense Industry*, *supra* note 261, at 445–46, 468–75.

<sup>285</sup> DEF. SCI. BD., VERTICAL INTEGRATION REPORT, *supra* note 263.

<sup>286</sup> See *id.* at 15–28.

<sup>287</sup> *Id.* at 32.

<sup>288</sup> See also Kramer, *supra* note 261, at 114 (“Today, the process is characterized by strong personal relationships among agency staff, the use of integrated investigative teams, increased transparency into the military services for the antitrust agencies, joint meetings and negotiations with parties, the sharing of documents and depositions with DOD staff, and numerous activities for two-way advocacy.”).

<sup>289</sup> In 1994, the Defense Science Board noted that “[t]here ha[d] been over 300 defense-related mergers and acquisitions in the United States in the past 15 years.” DEF. SCI. BD., CONSOLIDATION REPORT, *supra* note 263, at 9. The board identified 34 “notable” defense M&As between 1994 and 1997. See DEF. SCI. BD., VERTICAL INTEGRATION REPORT, *supra* note 263, at D-2 to D-4.

<sup>290</sup> See DEF. SCI. BD., CONSOLIDATION REPORT, *supra* note 263, at 9–14; DEF. SCI. BD., VERTICAL INTEGRATION REPORT, *supra* note 263, at D-2 to D-4.

<sup>291</sup> See DEF. SCI. BD., CONSOLIDATION REPORT, *supra* note 263, at 14–15; DEF. SCI. BD., VERTICAL INTEGRATION REPORT, *supra* note 263, at D-2 to D-4.

4. *Conflicting Considerations: No (generally)*. Although there were some cases in which individual Defense officials or offices disagreed with antitrust authorities' approach to cases,<sup>292</sup> DoD's official position was generally cooperative or at least acquiescent.<sup>293</sup>
5. *Conflict Winner: N/A*.

#### I.B.11. DoD Antitrust Review Proposal (2015)

Recent years have seen another wave of defense industry M&A.<sup>294</sup> This wave has not attracted nearly as much scholarly attention as previous ones,<sup>295</sup> though regulators have been attentive to it.

For the purposes of this paper, the most significant development during this period was the DoD's increasing concern about defense industry consolidation. DoD officials began sounding the alarm about defense industry concentration in late 2015 following the acquisition of helicopter manufacturer Sikorsky by Lockheed-Martin.<sup>296</sup> Concerned that the antitrust authorities were too lenient on proposed mergers, the DoD began to develop a legislative proposal that would give DoD independent authority to review defense industry mergers.<sup>297</sup>

The antitrust authorities responded by issuing a joint statement that acknowledged DoD's concerns, but insisted that the existing merger guidelines were flexible enough to handle defense industry mergers well.<sup>298</sup> After the rebuke, DoD withdrew their legislative proposal.<sup>299</sup>

#### *Dimensional Analysis*

1. *Directness: Direct*. The mergers were sensitive for both national security and economic reasons.

<sup>292</sup> See *supra* notes 265, 284 and accompanying text.

<sup>293</sup> See *supra* notes 264–273, 283, 287–288 and accompanying text.

<sup>294</sup> See *M&A by Industry*, *supra* note 258. The effect of the coronavirus pandemic on this trend remains unclear at the time of writing.

<sup>295</sup> For commentary on this wave of mergers, see, e.g., Jon B. Dubrow, *Aerospace & Defense Series: Behavioral Remedies Remain a Viable Solution for Vertical Mergers in the Defense Industry*, NAT'L L. REV. (June 18, 2018), <https://perma.cc/J9UM-ZVSX>; Jon B. Dubrow & Anthony S. Ferrara, *Aerospace and Defense Series: DOJ and FTC Vertical Merger Guidelines Will Impact Government Contractors*, ANTITRUST ALERT (Feb. 24, 2020), <https://perma.cc/RJP5-C6EA>; Mark Thompson, *The Incredibly Shrinking Defense Industry*, POGO (Aug. 1, 2019), <https://perma.cc/VSK4-CCZZ>.

<sup>296</sup> See, e.g., Colin Clark, *Perry Warns Against Industry Consolidation; Wary of French Response to ISIL*, BREAKING DEF. (Dec. 3, 2015), <https://perma.cc/4M9E-4WYT>; Colin Clark, *Whoa, Lockheed & Co.! Kendall Urges Congress To Protect Innovation*, BREAKING DEF. (Oct. 2, 2015), <https://perma.cc/SB42-7ER9>; Sydney J. Freedberg, Jr., *Kendall's Merger Crusade: Bad Idea?*, BREAKING DEF. (Dec. 23, 2015), <https://perma.cc/XW38-R23E>; Scott A. Freling & Convington Team, *National Security M&A Trump Card for DoD?*, INSIDE GOV'T CONTRACTS (Oct. 5, 2015), <https://perma.cc/48Z9-EFGD>; Andrea Shahal, *Pentagon Eyes Proposals for M&A Changes in "Weeks"*, REUTERS (Dec. 22, 2015), <https://perma.cc/8Y67-4DCE>. For the defense industry's response, see, e.g., Christian Davenport, *Defense Industry Pushes Back against Pentagon's Consolidation Concerns*, WASH. POST (Oct. 1, 2015), <https://perma.cc/PEP9-Y842?type=image>.

<sup>297</sup> See, e.g., Freling & Convington Team, *supra*, note 296; Shahal, *supra* note 296.

<sup>298</sup> DEP'T OF JUSTICE & FED. TRADE COMM'N, JOINT STATEMENT OF THE DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION ON PRESERVING COMPETITION IN THE DEFENSE INDUSTRY (Apr. 12, 2016), <https://perma.cc/78SK-WY6H>.

<sup>299</sup> See Sydney J. Freedberg, Jr., *Justice Department to Pentagon on Mergers: Back Off*, BREAKING DEF. (Apr. 13, 2013), <https://perma.cc/A4AH-UNCW>.

2. *Activeness: Passive.* DoD was specifically concerned that the antitrust authorities were being too lenient during merger review.<sup>300</sup>
3. *Presidential Involvement: No.* I did not find any evidence of this.
4. *Conflicting Considerations: Yes.* DoD was initially concerned that the (perceived) leniency of merger review was detrimental to national security.<sup>301</sup> DoD wanted independent authority to block merger on national security grounds, whereas the antitrust authorities insisted pure economic analysis was sufficient.<sup>302</sup>
5. *Conflict Winner: Economics.* DoD ultimately withdrew its proposal.<sup>303</sup>

### I.C. Dimensional Summary of Case Studies

Case Name	Directness	Activeness	Presidential Involvement	Conflicting Considerations	Conflict Winner
German Espionage during World War I (1916)	Direct	Active	No	No	
Military Optical Instruments (1940)	Direct	Active	No	No	
Rubber Manufacturing (1942)	Direct	Active	Yes	No	
Union Pacific Railroad (1943)	Indirect	Passive	Yes	Yes	National Security
The Oil Cartel Case (1952)	Both	Both	Yes	Yes	National Security (generally)
Bananas in Guatemala (1953)	Indirect	Both	Yes	Yes	National Security (generally)
Yellowcake Uranium (1972)	Direct	Passive	No (speculative)	Yes	National Security (speculative)
AT&T Breakup (1974)	Direct	Active	Yes	Yes	Economics
Transatlantic Air Travel (1984)	Both	Passive	Yes	Yes	National Security
Wave of Defense Industry Mergers (1985–99)	Direct	Both	No	No (generally)	
DoD Antitrust Review Proposal (2015)	Direct	Passive	No	Yes	Economics

### I.D. Conclusions from Case Studies

I.D.1. National security considerations have entered the antitrust enforcement process numerous times over the past 100 years.

The existence of these cases shows that national security and foreign policy concerns have often entered the antitrust enforcement process. As such, if the AI industry becomes more relevant to national security, we can expect related concerns to be added to the economic antitrust considerations. However, these considerations do not always conflict. Both economic and

<sup>300</sup> See *supra* note 296 and accompanying text.

<sup>301</sup> See *supra* note 296 and accompanying text.

<sup>302</sup> See *supra* notes 297–299 and accompanying text.

<sup>303</sup> See *supra* note 299.

national security considerations favor antitrust scrutiny where anticompetitive behaviors bottleneck key war supplies<sup>304</sup> or increase defense industry concentration.<sup>305</sup>

I.D.2. It is rare for the USG to actively use antitrust enforcement to advance unrelated national security objectives.

Although national security considerations have influenced antitrust enforcement, this is usually because the antitrust-relevant conduct is also relevant to national security. In my terminology, these are “direct” uses of antitrust. Out of the eleven cases studied herein, the USG used antitrust indirectly in only four.<sup>306</sup>

Of the four indirect uses of antitrust, in only one case did the USG take a tougher stance towards the defendant due to national security considerations:<sup>307</sup> Bananas in Guatemala (1953).<sup>308</sup> In all other cases where the USG took an active stance towards potentially anticompetitive conduct (i.e., sued or threatened to sue), the anticompetitive conduct was directly relevant to the USG’s national security concerns.

	Direct	Indirect
Active	German Espionage during World War I (1916) Military Optical Instruments (1940) Rubber Manufacturing (1942) The Oil Cartel Case (1952) AT&T Breakup (1974) Wave of Defense Industry Mergers (1985–99)	Bananas in Guatemala (1953)
Passive	The Oil Cartel Case (1952) Yellowcake Uranium (1972) Transatlantic Air Travel (1984) Wave of Defense Industry Mergers (1985–99) DoD Antitrust Review Proposal (2015)	Union Pacific Railroad (1943) The Oil Cartel Case (1952) Bananas in Guatemala (1953) Transatlantic Air Travel (1984)

Recall that in the Bananas in Guatemala (1953) case, the DOJ had originally postponed a suit against the United Fruit Company to protect the American company’s interests in Guatemala,<sup>309</sup> but reversed course and sued UFCO to avoid appearing too lenient on the company.<sup>310</sup>

Finally, note that it is much more likely for the USG to be more *lenient* on companies (such as by dropping, reducing, or postponing charges) to advance unrelated national security objectives.<sup>311</sup>

<sup>304</sup> See *supra* §§ I.B.2 (Military Optical Instruments (1940)), I.B.3 (Rubber Manufacturing (1942)).

<sup>305</sup> See *supra* § I.B.10 (Wave of Defense Industry Mergers (1985–99)).

<sup>306</sup> See *supra* §§ I.B.4 (Union Pacific Railroad (1943)), I.B.5 (The Oil Cartel Case (1952)), I.B.6 (Bananas in Guatemala (1953)), I.B.9 (Transatlantic Air Travel (1984)).

<sup>307</sup> Recall that I argue that such cases are especially worrisome. See *supra* notes 12–18 and accompanying text.

<sup>308</sup> *Supra* § I.B.6.

<sup>309</sup> See *supra* notes 176–179 and accompanying text.

<sup>310</sup> See *supra* notes 180–183 and accompanying text.

<sup>311</sup> See *supra* §§ I.B.4 (Union Pacific Railroad (1943)), I.B.5 (The Oil Cartel Case (1952)), The Oil Cartel Case (1952), I.B.6 (Bananas in Guatemala (1953)), I.B.9 (Transatlantic Air Travel (1984)).

I.D.3. In cases where national security and economic considerations conflict, economics has been given more weight over time.

In all of the cases with conflicting considerations between 1940 and 1972, national security considerations generally had greater influence on case disposition.<sup>312</sup> However, since the 1970s, economic considerations better predicted the outcome in two<sup>313</sup> out of three<sup>314</sup> cases with conflicting considerations.

Although this is a small sample, there are reasons to think this is a meaningful trend. The late 1970s marked the beginning of the Chicago school analysis of antitrust law, which posited maximizing consumer welfare as the primary—or sole—goal of antitrust law.<sup>315</sup> It therefore makes sense that other considerations, including national security, were seen as less important to case resolution thereafter.

The end of the Cold War and the absence of total war since World War II may also have played a role in diminishing the comparative importance of national security considerations. If so, then this trend might reverse if the comparative importance of national security returns to twentieth century levels.

I.D.4. The president plays an important role in reconciling conflicting considerations.

In five<sup>316</sup> of the seven<sup>317</sup> cases with conflicting considerations, the president played a role in setting antitrust enforcement priorities. This is unsurprising—and largely unobjectionable—given the president’s role as the chief law enforcement official in the United States.<sup>318</sup>

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<sup>312</sup> See *supra* §§ I.B.4 (Union Pacific Railroad (1943)), I.B.5 (The Oil Cartel Case (1952)), I.B.6 (Bananas in Guatemala (1953)), I.B.7 (Yellowcake Uranium (1972)).

<sup>313</sup> See *supra* §§ I.B.8 (AT&T Breakup (1974)), I.B.11 (DoD Antitrust Review Proposal (2015)). Although the AT&T Breakup (1974) case started in 1974, the resolution of the case in favor of the economic considerations took place under President Reagan. See *supra* notes 229–231 and accompanying text.

<sup>314</sup> The case from this period where national security won was Transatlantic Air Travel (1984), *supra* § I.B.9.

<sup>315</sup> See *supra* note 11 and accompanying text.

<sup>316</sup> See *supra* §§ I.B.4 (Union Pacific Railroad (1943)), I.B.5 (The Oil Cartel Case (1952)), I.B.6 (Bananas in Guatemala (1953)), I.B.8 (AT&T Breakup (1974)), I.B.9 (Transatlantic Air Travel (1984)).

<sup>317</sup> The cases with conflicting considerations for which I could not find any evidence of presidential involvement were Yellowcake Uranium (1972), *supra* § I.B.7, and DoD Antitrust Review Proposal (2015), *supra* § I.B.11.

<sup>318</sup> See Rill & Turner, *supra* note 225, at 599 (“When an overriding national interest is involved, [presidential] intervention may well be not only appropriate, but desirable.”).

## II. Discussion: The *Qualcomm* Case and National Security in Advanced Technologies

AI and other advanced technologies implicate both antitrust policy (especially with regard to industry concentration) and national security.<sup>319</sup> Thus, it should not be surprising to see technology firms simultaneously balancing antitrust and national security demands. Indeed, this is already happening for firms like Google<sup>320</sup> and Amazon.<sup>321</sup>

At the same time, there is increasing enthusiasm for reexamining the role of Chicago-style economic analysis in antitrust, much of which is motivated by the size of technology firms.<sup>322</sup> 2020 Democratic presidential candidates Elizabeth Warren<sup>323</sup> and Bernie Sanders<sup>324</sup> championed antitrust proposals as well. Such an expansion of antitrust’s policy goals, if realized, may leave a greater opening for national security considerations in the antitrust enforcement process.

In this atmosphere of increased scrutiny, both opponents and defenders of big tech companies are wielding national security arguments. Opponents argue that a less concentrated—and therefore more competitive and innovative—tech sector will be crucial to prevailing in great power conflict with China and defense procurement more broadly.<sup>325</sup> Defenders argue that technology firms’ size is instead a source of national strength due to their ability to counterbalance similarly sized foreign competitors.<sup>326</sup>

These dueling invocations of national security have been on stark display in the ongoing *Qualcomm* antitrust case.<sup>327</sup> The FTC sued wireless technology company Qualcomm for using its standard-essential patents<sup>328</sup> to harm competition in cellular modem chips, in which it was

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<sup>319</sup> See *supra* notes 1–6 and accompanying text.

<sup>320</sup> See Anthony Cuthbertson, *Trump Says Google May Be a ‘National Security Concern’ and Vows to Launch Probe into China Relationship*, INDEPENDENT (July 26, 2019), <https://perma.cc/VD84-NYDQ>; Lauren Hirsch, *Google Antitrust Probe Expands as Bipartisan State AGs Beef Up Staff and Resources*, CNBC (Feb. 7, 2020), <https://perma.cc/Q4AG-T6N6>.

<sup>321</sup> See Mike Leonard, *Amazon Accused of Monopolization, Sweeping Price-Fixing Scheme*, BLOOMBERG L. (Mar. 20, 2020), <https://perma.cc/7NM8-6JGL>; Brian Naylor, *Alexa, Tell Me A National Security Secret: Amazon’s Reach Goes Beyond The Post Office*, NPR (Apr. 23, 2018), <https://perma.cc/8TH9-TUW5>.

<sup>322</sup> See, e.g., Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710 (2017). See generally Wright et al., *supra* note 11.

<sup>323</sup> See, e.g., Astead W. Herndon, *Elizabeth Warren Proposes Breaking Up Tech Giants Like Amazon and Facebook*, N.Y. TIMES (Mar. 8, 2019), <https://perma.cc/Z9GP-2MEP>.

<sup>324</sup> See *Corporate Accountability and Democracy*, BERNIE SANDERS: ISSUES, <https://perma.cc/2W7K-8W5K> (archived May 6, 2020).

<sup>325</sup> See SITARAMAN, *supra* note 4, at 18–26; cf. FOSTER & ARNOLD, *supra* note 4 (discussing whether breaking up big tech would lead to more innovation).

<sup>326</sup> See, e.g., FOSTER & ARNOLD, *supra* note 4, at 5; SITARAMAN, *supra* note 4, at 5–6; Gerrit De Vynck, *Big Tech’s Antitrust Argument: We Need to Be Big to Beat China*, BLOOMBERG (June 14, 2019), <https://perma.cc/7PMQ-TM3Q>; Emily Stewart, *Facebook’s Latest Reason It Shouldn’t Be Broken Up: Chinese Companies Will Dominate*, VOX (May 20, 2019), <https://perma.cc/4NNR-9SJS>.

<sup>327</sup> Fed. Trade Comm’n v. Qualcomm Inc., 935 F.3d 752 (9th Cir. 2019). Thanks to Haydn Belfield for bringing this case to my attention.

<sup>328</sup> As explained by the trial court in *Qualcomm*:

Cellular communications standards . . . are adopted by standards setting organizations (“SSOs”).

. . .



dominant.<sup>329</sup> The FTC won a permanent injunction in the district court,<sup>330</sup> but the Ninth Circuit stayed that injunction order pending appeal.<sup>331</sup> On appeal, in an extraordinary move, the DOJ filed a brief *in favor of Qualcomm*.<sup>332</sup> In its brief, the DOJ argued that the injunction against Qualcomm “would significantly impact U.S. national security”<sup>333</sup> by diminishing Qualcomm’s R&D expenditures<sup>334</sup> and reducing America’s ability to compete in global 5G markets.<sup>335</sup> The brief also contained a statement from Ellen Lord, Under Secretary of Defense for Acquisition and Sustainment, who agreed that the injunction threatened national security, particularly emphasizing how harming Qualcomm could undermine American efforts to reduce China’s dominance in 5G.<sup>336</sup> The FTC, in its answering brief,<sup>337</sup> strongly argued that these national security arguments were incognizable under modern economics-focused antitrust law,<sup>338</sup> while also disputing the assertion that the injunction would harm innovation and therefore national security.<sup>339</sup> The Ninth Circuit apparently agreed with DOJ, citing their national security concerns as weighing in favor of a stay.<sup>340</sup> As of the time of this writing, whether and how national security will influence the final disposition of the case remains to be seen.

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In setting a cellular communications standard, SSOs often include technology in the cellular communications standard that is patented. Patents that cover technology that is incorporated into a standard are known as “standard essential patents” (“SEPs”).

Importantly, before incorporating a technology into a standard, SSOs “often require patent holders to disclose their patents and commit to license [SEPs] on fair, reasonable, and non-discriminatory (“FRAND”) terms.” “Absent such requirements, a patent holder might be able to parlay the standardization of its technology into a monopoly in standard-compliant products.” [SSOs] require each party that participates in the standard setting process “to commit to license its SEPs to firms that implement the standard on FRAND terms.”

“Most SSOs neither prescribe FRAND license terms nor offer a centralized dispute-resolution mechanism in the event that a patent holder and standard implementer cannot agree on [FRAND] terms.” Instead, “most SSOs rely on the outcome of bilateral negotiations between the parties, with resort to remedies available from courts in the event of disagreement.”

Fed. Trade Comm’n v. Qualcomm Inc., No. 17-CV-00220-LHK, 2017 WL 2774406, at \*2 (N.D. Cal. 2017) (first and third alterations in original) (citations omitted) (quoting Complaint ¶¶ 42, 48, 51–53, Fed. Trade Comm’n v. Qualcomm Inc., No. 17-CV-00220-LHK, 2017 WL 2774406 (N.D. Cal. 2017), <https://perma.cc/4GK5-YLXU>).

<sup>329</sup> “FTC allege[d] that Qualcomm uses its dominance in the supply of . . . modem chips to skew SEP licensing negotiations toward outcomes that benefit Qualcomm and harm Qualcomm’s modem chip competitors.” *Id.* at \*5.

<sup>330</sup> Fed. Trade Comm’n v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019).

<sup>331</sup> Qualcomm, 935 F.3d 752.

<sup>332</sup> United States’ Statement of Interest Concerning Qualcomm’s Motion for Partial Stay of Injunction Pending Appeal, Qualcomm, 935 F.3d 752 (No. 19-16122), <https://perma.cc/YKBS-XSHH>.

<sup>333</sup> *Id.* at 12.

<sup>334</sup> *See id.* at 12.

<sup>335</sup> *See id.* at 13.

<sup>336</sup> *See id.* app. 1.

<sup>337</sup> Brief of the Fed. Trade Comm’n, Qualcomm, 935 F.3d 752 (No. 19-16122), <https://perma.cc/KS26-5VJN>.

<sup>338</sup> *See id.* at 105–08.

<sup>339</sup> *See id.* at 108 n.37 (“DOJ’s apparent concern that the injunction will impair innovation is similarly misplaced because the policy judgment underlying the antitrust laws is that an industry will be *more* innovative and efficient if freed from anticompetitive constraints.” (citation omitted)).

<sup>340</sup> *See* Qualcomm, 935 F.3d at 756 (“Indeed, the Department of Defense and Department of Energy aver that the injunction threatens national security, and the DOJ posits that the injunction has the effect of *harming* rather than *benefiting* consumers.”).

We can expect to see more cases like *Qualcomm* in the future, with large tech companies facing both antitrust and national security demands. Which approach to antitrust ultimately serves national security best is beyond the scope of this paper.<sup>341</sup> However, those who would use antitrust to advance noneconomic national security goals should not expect doing so to be straightforward, even if they are correct about how to advance national security and disagree with the arguments for an economics-focused antitrust policy. The injection of national security considerations unrelated to competition into antitrust enforcement seems to run counter to a number of important trends. First, it seems inconsistent with the Supreme Court’s decision in the landmark *National Society of Professional Engineers* case, which demands a focus of conduct on economic conditions.<sup>342</sup> Second, it is inconsistent with the USG’s economics-focused position towards antitrust: a position which it has repeatedly espoused recently in international fora.<sup>343</sup> Third, it is rare—indeed, nearly unprecedented—for the USG to actively use antitrust enforcement to achieve unrelated national security goals.<sup>344</sup> Finally, using antitrust to advance national security despite countervailing economic considerations contravenes an existing domestic trend towards resolving conflicts between economics and national security in favor of the former.<sup>345</sup>

To be sure, some national security concerns are cognizable as economic harms, such as consolidation in an industry that sells to the U.S. military.<sup>346</sup> Yet, to be consistent with the trends just identified, such harms must be framed as harmful to the USG in its capacity as a consumer, and be balanced against any countervailing economic efficiencies and other longstanding antitrust principles.<sup>347</sup> Arguments about how an antitrust action will affect, for example, great

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<sup>341</sup> For analysis of this question, see FOSTER & ARNOLD, *supra* note 4.

<sup>342</sup> 435 U.S. at 688 (“Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint’s impact on competitive conditions.”); *accord* DEF. SCI. BD., CONSOLIDATION REPORT, *supra* note 263, at 32.

<sup>343</sup> *See* DEF. SCI. BD., CONSOLIDATION REPORT, *supra* note 263, at 32; OECD, *supra* note 11, at 2; Remarks of Deputy Assistant Attorney Gen. Roger Alford, 2019 China Competition Policy Forum (May 7, 2019), <https://perma.cc/CR2D-79SE>.

<sup>344</sup> *See supra* § I.D.2.

<sup>345</sup> *See supra* § I.D.3.

<sup>346</sup> *Accord* DEF. SCI. BD., CONSOLIDATION REPORT, *supra* note 263, at 15.

<sup>347</sup> For example, “a business ‘generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.’” *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 n.27 (1985) (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). Thus, refusing to deal with the DoD or USG generally should not, on its own, be grounds for antitrust action. Furthermore,

It is settled law that [the offense of monopolization] requires, in addition to the possession of monopoly power in the relevant market, “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element



power conflict,<sup>348</sup> are thus currently incognizable unless mediated by claims about how the targeted conduct will affect consumers (including the USG). Such national security claims are therefore superfluous to consumer-centric claims, which must ultimately ground those of national security.

However, this does not bar heightened prosecutorial scrutiny of actions that are harmful from *both* economic and noneconomic national security perspectives. Such elevated scrutiny makes sense given limited prosecutorial resources, the legitimate importance of protecting national security,<sup>349</sup> and the role the DOJ serves in protecting the economic interests of the USG’s national security apparatus.<sup>350</sup> The key distinguishing feature is not that national security considerations enter the USG’s decision-making process for allocating scarce prosecutorial resources, but rather whether such considerations are allowed to *override* economic analysis of a case.

In conclusion, AI firms are likely to face both antitrust and national security demands. This is not historically unique. Although there are proposals to increase use of antitrust to achieve noneconomic aims, these are controversial and contrary to recent antitrust policy and history. The trend over the past fifty years has been to keep unrelated national security concerns siloed from the economic analysis driving antitrust decisions. However, where potential anticompetitive conduct is also detrimental to national security, we should not be surprised if the USG takes a more aggressive approach to enforcement.

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of anticompetitive *conduct*.

Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–571 (1966)). Thus, the monopoly power of big tech companies cannot, on its own, be a reason for divestiture.

<sup>348</sup> Cf. SITARAMAN, *supra* note 4, at 18–26.

<sup>349</sup> Cf. Rill & Turner, *supra* note 225, at 597 (“On the other end of the spectrum are the very visible exercises of presidential authority where national security, foreign policy, or economic policy is involved and the engagement is in accordance with established procedures.”).

<sup>350</sup> Cf. Press Release, Dep’t of Justice, Three South Korean Companies Agree to Plead Guilty and to Enter into Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts (Nov. 14, 2018), <https://perma.cc/7922-UU28> (“The Antitrust Division has a long history of vigilantly protecting the interests of American consumers through civil and criminal antitrust enforcement. Going forward, it is my goal to apply that same vigilance to protect the interests of American taxpayers,’ [said Assistant Attorney General Makan Delrahim of the DOJ’s Antitrust Division].”).

## Acknowledgments

For helpful discussion and comments, I would like to thank Markus Anderljung, Jade Leung, Allan Dafoe, Luke Muehlhauser, Carrick Flynn, Michael Page, Haydn Belfield, Dakota Foster, Jack Clark, and Miles Brundage. This work was funded in part by the Berkeley Existential Risk Initiative and Open Philanthropy. All views and mistakes remain my own.