



---

## The Application of Antitrust Logic to Military Procurement Policies Would Enhance America's National Security

Amit Bindra

Follow this and additional works at: <https://via.library.depaul.edu/bclj>

---

### Recommended Citation

Amit Bindra, *The Application of Antitrust Logic to Military Procurement Policies Would Enhance America's National Security*, 10 DePaul Bus. & Com. L.J. 405 (2012)

Available at: <https://via.library.depaul.edu/bclj/vol10/iss3/4>

This Note is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Business and Commercial Law Journal by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# The Application of Antitrust Logic to Military Procurement Policies Would Enhance America's National Security

Amit Bindra\*

## I. CONGRESS PASSED LEGISLATION DECREASING COMPETITION WHEN THE MILITARY PURCHASES GOODS

The United States military procurement process is a rigged game. The Defense Department gives preferential treatment to American companies at the expense of foreign firms and foreign innovation.<sup>1</sup> The military attempts to promote small businesses over larger corporations, which has the potential to increase production costs.<sup>2</sup> Instead of purchasing products separately, different military branches now purchase products together as a singular unit.<sup>3</sup> This new process has contributed to a decreased level of product quality.<sup>4</sup> The Defense Department can additionally restrict research dissemination and prevent private sector companies from either accessing certain research or using it for non-military purposes.<sup>5</sup> These policies can result in decreased competition in the military procurement market.

Society benefits when firms attempt to maximize competition: competing firms attempt to decrease their costs and innovate their prod-

---

\* Bachelor of Arts, International Relations and History, May 2009, James Madison College at Michigan State University; Juris Doctor, Certificate in Business Law, May 2012, DePaul University College of Law.

I would like to thank several individuals for their support: Ms. Parminder Kaur, Ms. Gurjit Ahuja, Mrs. Davinder Chawla, Mr. Parmjit Chawla, Mr. Kawal Singh, and Mr. Narinder Singh. Thank you Mr. Brian Brown for dealing with my occasional absurdity. Mr. Jerrell Braden, you were a mentor and friend: may you rest in peace. I owe gratitude to the members of the BCLJ for the valuable editorial comments. Finally, I would like to thank Mrs. Sandy Zunker Brown for her instrumental guidance with this article and in life.

1. Dean E. Brunk, *Government Procurement: "FAR" from a Competitive Process*, in *ADVANCING PUBLIC PROCUREMENT: PRACTICES, EXPERIENCES, INNOVATION, AND KNOWLEDGE SHARING* 156, 160 (Khi V. Thai & Gustavo Piga eds., 2006), available at [http://www.ippe.org/ippe2\\_book.html](http://www.ippe.org/ippe2_book.html).

2. *Id.* at 160–61.

3. HARVEY M. SAPOLSKY, EUGENE GHOLZ & CAITLIN TALMADGE, *U.S. DEFENSE POLITICS: THE ORIGINS OF SECURITY POLICY*, 76–77 (2009).

4. *Id.* at 61–95.

5. Glenn Harlan Reynolds, *Nanotechnology and Regulatory Policy: Three Futures*, 17 *HARV. J.L. & TECH.* 179, 193–97 (2003).

ucts to attract more consumers.<sup>6</sup> Without competition, firms produce goods inefficiently and without increasing the quality of those products.<sup>7</sup> Consumers lose in this environment as costs increase but the product quality decreases. A society can maximize aggregate wealth when the greatest number of buyers can acquire the products they desire just slightly above the price it costs firms to produce those goods.<sup>8</sup> Antitrust laws thus function as a way to protect the public by maximizing competition.<sup>9</sup>

Americans are the ultimate losers as a result of the Defense Department's policies. Citizens pay the price as inefficient production means an increase in costs, and thus higher taxes. These military policies can also make Americans unsafe because a decrease in product and weapon quality negatively impacts U.S. national security. American military strength depends on its technological advantage over other nations, and product innovation plays a critical role in military strength.<sup>10</sup> Product innovation also suffers when the military branches purchase products together, instead of the branches purchasing those products separately.<sup>11</sup> By limiting the pool of military suppliers to American companies<sup>12</sup> and by preferring small businesses,<sup>13</sup> the Defense Department again limits product innovation. When the military prevents private sector companies from accessing innovative research and information, the military potentially deprives consumers of critical new products. Competition can advance U.S. national security by increasing weapon quality while decreasing the costs. Due to these factors, Congress should repeal military procurement policies because the laws are inefficient.

---

6. ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 30 (2d ed. 2008).

7. *Id.*

8. *Id.*

9. GAVIL, KOVACIC & BAKER, *supra* note 6, at 64 (citing 21 CONG. REC. 2456-57 (1890) (statement of Sen. Sherman) ("If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life. If we would not submit to an emperor we should not submit to an autocrat of trade.")). *See also* HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE* 1 (2005) ("Few people dispute that anti-trust's core mission is protecting consumers' right to the low prices, innovation, and diverse production that competition promises."). Professor Hovenkamp also states, "The antitrust laws are concerned with maintaining competition in private markets. 'Competition' refers to a state of affairs in which prices are sufficient to cover a firm's cost, but not excessively higher, and firms are given the correct sent of incentives to innovate." *Id.* at 13.

10. Zalmay Khalilzad, *Losing the Moment? The United States and the World After the Cold War*, 18 WASH. Q. 87 (1995).

11. SAPOLSKY, GHOLZ & TALMADGE, *supra* note 3 at 76-77.

12. Brunk, *supra* note 1, at 160.

13. *Id.*

## II. BACKGROUND

### A. *Price Competition Improves Society's Aggregate Wealth*

It is important to understand the economic rationale behind U.S. antitrust laws. The laws have both economic and non-economic goals.<sup>14</sup> The primary economic goal of antitrust law is to prevent firms from exercising “market power” or restricting output.<sup>15</sup> A seller exercises “market power” when the seller reduces output or limits competition to raise price above the competitive level.<sup>16</sup> A decrease in competition ultimately hurts society: it transfers resources from buyers to sellers.<sup>17</sup> Competition between firms has three advantages for society and consumers: (1) the most efficient firm will produce the goods or services at the lowest cost; (2) the consumer that values the good the most will acquire it; and (3) competition between firms increases the quality of goods as firms competing for profits have a greater incentive to innovate their products.<sup>18</sup>

Sellers attempt to achieve profit maximization in three ways: (1) finding ways to decrease the costs of production so that the firm can lower the price of the goods; (2) differentiating the product from available substitutes;<sup>19</sup> and (3) exercising market power and raising prices above the competitive level.<sup>20</sup> When sellers increase the price of their products, they sell fewer goods because buyers find less expensive substitutes; however, some buyers will continue to purchase the product at the same price.<sup>21</sup> When the price decreases, new buyers will begin to acquire the good sold at the lower price.<sup>22</sup> In a perfectly competitive market, a firm will produce an additional product so that the market price equals the cost of producing that additional unit; or the “marginal cost.”<sup>23</sup> No firm will have the ability to raise price by reducing output in a perfectly competitive market.<sup>24</sup> When sellers can reduce marginal cost, it benefits both buyers and sellers. Sellers can produce more goods at a lower price, which allows more buyers to acquire goods they desire.

---

14. GAVIL, KOVACIC & BAKER, *supra* note 6, at 16. See also HOVENKAMP, *supra* note 9, at 15–20, 95–96 (providing a detailed economic explanation).

15. GAVIL, KOVACIC & BAKER, *supra* note 6, at 17; HOVENKAMP, *supra* note 9, at 13–15.

16. GAVIL, KOVACIC & BAKER, *supra* note 6, at 17.

17. *Id.* at 29.

18. *Id.* at 29–30. See also HOVENKAMP, *supra* note 9, at 25–30.

19. GAVIL, KOVACIC & BAKER, *supra* note 6, at 30.

20. *Id.* at 26.

21. *Id.* at 18.

22. *Id.*

23. *Id.* at 21.

24. GAVIL, KOVACIC & BAKER, *supra* note 6, at 31.

The coffee industry serves as an illustrative example to explain these economic concepts.<sup>25</sup> One hundred buyers will purchase coffee priced at \$1.00, fifty buyers will purchase coffee priced at \$1.50, and one hundred and fifty buyers will purchase coffee priced at \$0.50. The shop maximizes profit by selling its coffee to one hundred buyers at \$1.00; the seller would make \$100 at that price and \$75 at the other two prices. To increase profits, the shop might attempt to decrease its marginal costs so that it can lower the price of its coffee to attract more consumers; for example, the firm might purchase less expensive coffee beans. The seller could also find a way to differentiate its product; it could try to produce coffee that tastes better or produce coffee that has a higher concentration of caffeine. In these situations, the consumer benefits as the coffee costs less, the coffee tastes better, or it has more caffeine.

The exercise of market power can have severe consequences for consumers.<sup>26</sup> If a seller has market power, it has the ability to raise the price of the product and has a disincentive to innovate its production. When buyers do not have attractive substitutes, a seller with market power can raise prices without losing profits; or at least until buyers find an imperfect substitute. If there is only one coffee shop in an area heavily concentrated with consumers, that coffee shop can raise prices above the competitive level or its marginal costs. While some buyers will find alternative products, the firm will still increase profits. Of the one hundred buyers who purchased coffee at the marginal cost level of \$1.00, ninety buyers might purchase coffee at \$1.50, increasing overall profits for the firm. Ten individuals might stop drinking coffee or bring a beverage from home, but the majority of the people will continue to go to the coffee shop.

Buyers can also attempt to dictate the economic relationship with sellers to achieve advantages.<sup>27</sup> In a monopsony, a single buyer purchases goods and services from multiple sellers. The coffee shop again helps to explain monopsony power. If there is only one dominate coffee corporation, it could attempt to negotiate favorable terms when purchasing coffee beans from suppliers. The corporation could negotiate lower than competitive prices because no other buyers could attempt to purchase coffee beans. While the corporation would have lower costs, it could still maintain the same price of coffee for its buyers. Even if the corporation did decrease its prices, the suppliers

---

25. *See id.* at 17-32 (explaining the example of a coffee shop in much further detail).

26. *Id.* at 27-29.

27. *See generally* RODGER D. BLAIR & JEFFREY L. HARRISON, *MONOPSONY: ANTITRUST LAW AND ECONOMICS* 36-42 (1993) (explaining monopsony power using a textile mill as an example).

would still suffer an economic loss. The corporation could also dictate the types of products it wants. For example, if the corporation only wants generic coffee beans, the suppliers have a disincentive to create new products.

The last two scenarios represent an allocative loss for society and consumers: fewer buyers are acquiring goods they desire and companies are not improving product quality.<sup>28</sup> Society maximizes aggregate wealth when the greatest amount of buyers purchase goods they desire at the lowest price.<sup>29</sup> Maximizing aggregate wealth most likely occurs when firms compete amongst one another, decreasing costs and increasing quality.<sup>30</sup> Ultimately, society benefits the most from perfect competition.<sup>31</sup>

The U.S. has often used antitrust laws to promote non-economic goals as well: fairness, social justice, equity, political stability, and the protection of small businesses.<sup>32</sup> These issues are concerned more with subjective values than with the economic well-being of the consumer.<sup>33</sup> Larger firms might produce at a more efficient rate than smaller firms, so consumers might benefit if larger firms eliminated smaller firms.<sup>34</sup> Smaller firms, however, might produce additional benefits even if the firms do not maximize production efficiency.<sup>35</sup> Smaller firms could result in the increase in “quality of life” through local ownership.<sup>36</sup> They might increase aggregate employment, which might outweigh the harm from the firms’ inefficient production.<sup>37</sup> Some individuals additionally fear that highly concentrated wealth be-

---

28. GAVIL, KOVACIC & BAKER, *supra* note 6, at 32.

29. *Id.* at 32.

30. *Id.* at 29–32.

31. *Id.*

32. *Id.* See generally Warren S. Grimes, *Brand Marketing, Intra-brand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L.J. 83 (1995); Louis B. Schwartz, “Justice” and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076 (1979).

33. GAVIL, KOVACIC & BAKER, *supra* note 6, at 32.

34. *Id.*

35. *Id.* See also *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (“[W]e cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.”); Brian G. Smith, *Size Standards and Contract Bundling in the Federal Marketplace: An Uphill Battle for Small Business Owners*, 1 OHIO ST. ENTREPRENEURIAL BUS. L.J. 175, 176 (2006).

36. GAVIL, KOVACIC & BAKER, *supra* note 6, at 32. See also Bernard W. Bell, *Legislatively Revising Kelo v. City of New London: Eminent Domain, Federalism, and Congressional Powers*, 32 J. LEGIS. 165, 203–04 (2006).

37. GAVIL, KOVACIC & BAKER, *supra* note 6, at 32.

tween a few big firms could also lead to the corruption of the political process.<sup>38</sup>

### B. *An Explanation of the Sherman Antitrust Act*

#### 1. The Sherman Antitrust Act Attempts to Maximize Competition

The Sherman Antitrust Act primarily focuses on the number of buyers and the conditions of entry: markets do not work competitively without these factors.<sup>39</sup> State legislatures, however, have immunity from antitrust liability as Congress's intent was not to prevent states from exercising their police powers.<sup>40</sup> The Supreme Court has recognized that competitive markets produce a variety of economic benefits: "The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."<sup>41</sup>

Section 1 of the Act indicates "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade" to be unlawful both civilly and criminally.<sup>42</sup> Thus, there are two elements under Act: (1) concerted action and (2) an anticompetitive effect.<sup>43</sup> Section 2 of the Act attempts to prevent the monopolization of the market.<sup>44</sup> It indicates that there are three violations: (1) monopolization; (2) attempted monopolization, and (3) conspiracy to monopolize.<sup>45</sup> The Supreme Court has indicated there are two elements to monopolization: "(1) the possession of monopoly power in the relevant market and (2) 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."<sup>46</sup> The Court has indicated that for attempted monopolization, the plaintiff must prove "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3)

---

38. *Id.*

39. *Id.* at 40. See generally HOVENKAMP, *supra* note 9, at 20–25 (explaining briefly the important antitrust statutes and sections).

40. See Mark L. Leib, *White Coats and Union Labels: Physicians and Collective Bargaining*, 42 ARIZ. L. REV. 803, 813 (2000).

41. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978).

42. 15 U.S.C. § 1 (2006).

43. GAVIL, KOVACIC & BAKER, *supra* note 6, at 89.

44. *Id.* at 582.

45. *Id.*

46. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

a dangerous probability of achieving monopoly power.”<sup>47</sup> Conspiracies to monopolize require a concerted action with a specific intent to monopolize, but the plaintiff does not have to prove that the defendant had monopoly power.<sup>48</sup>

## 2. Courts Primarily Use Two Tests to Apply the Sherman Antitrust Act

For the most part, courts apply two different tests to determine the existence of an antitrust violation: *per se* or rule of reason.<sup>49</sup> In *Addyston Pipe*, Justice Taft carved out a *per se* rule when the object of a contract is to limit competition: “it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void.”<sup>50</sup> *Per se* violations are “conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or to the business excuse for their use.”<sup>51</sup> Courts consistently find that group boycotts<sup>52</sup> and horizontal agreements to fix prices<sup>53</sup> are *per se* violations of the Act. For the courts to presume that particular conduct had an unreasonable anticompetitive effect, plaintiffs only need to establish concerted action that falls within those recognized categories.<sup>54</sup> The *per se* rule ultimately created an irrebuttable presumption of unreasonableness.<sup>55</sup> This presumption is useful as an administrative matter: certain actions are defined as “unlawful” and this helps courts limit the amount of judicial resources devoted to antitrust litigation. Antitrust trials can be cumbersome, so these administrative concerns are important.<sup>56</sup>

The “rule of reason” analysis considers numerous factors: the totality of the circumstances, balancing the procompetitive and anticompetitive implications of the situation in that industry, and the business

---

47. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

48. GAVIL, KOVACIC & BAKER, *supra* note 6, at 583.

49. See GAVIL, KOVACIC & BAKER, *supra* note 6, at 185–87, 201–02, for a discussion of the “quick look” test. *But see* *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 779 (1999) (indicating that the Court limited the test).

50. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282–83 (6th Cir. 1898), *aff’d* 175 U.S. 211 (1899).

51. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

52. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 290 (1985) (“This Court has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as *per se* violations of § 1 of the Sherman Act.”).

53. *United States v. Socony-Vacuum, Oil Co.*, 310 U.S. 150 (1940).

54. GAVIL, KOVACIC & BAKER, *supra* note 6, at 164.

55. *Id.*

56. See HOVENKAMP, *supra* note 9, at 77–78.



justification of the parties.<sup>57</sup> The Supreme Court emphasized its “rule of reason” analysis in *Board of Trade of Chicago*:

[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.<sup>58</sup>

The Supreme Court did not use a rule of reason analysis, or give it much consideration, from 1918 until the 1970s.<sup>59</sup> In the 1970s, the Court started to move away from a heavy reliance on per se rules and began to move toward the “rule of reason” framework articulated in *Board of Trade of Chicago*.<sup>60</sup> The courts subsequently called for a multifactor analysis to prove an unreasonable trade restraint.<sup>61</sup> The plaintiff would have to introduce evidence of likely or actual adverse competitive effects.<sup>62</sup>

Ultimately, the Supreme Court made it clear that the rule of reason and the per se rules represented two different ways to implement the same standard: “reasonableness.”<sup>63</sup> Scholars and practitioners can also interpret the per se rule as an abbreviated way of applying the rule of reason.<sup>64</sup> The Supreme Court thus reframed antitrust rules around economic concepts: the core issues for antitrust laws are the anticompetitive effects that are unlikely to arise without significant market power and courts should give consideration to the potential of the conduct to generate efficiencies.<sup>65</sup>

---

57. Brunk, *supra* note 1, at 157.

58. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

59. GAVIL, KOVACIC & BAKER, *supra* note 6, at 158.

60. *Id.* at 159.

61. *Id.* at 164.

62. *Id.*

63. *Id.*

64. GAVIL, KOVACIC & BAKER, *supra* note 6, at 164.

65. *Id.* at 165.

### 3. The Use of Monopsony Power Is Inefficient

The courts have limited experience regarding monopsony<sup>66</sup> conduct and it is often necessary for scholars to rely on court precedent in the context of seller behavior in the market.<sup>67</sup> When analyzing monopolization cases under Section 2 of the Antitrust Act, courts often use economic rationales that are also applicable if the courts analyzed monopsony cases.<sup>68</sup> Courts only respond to abuses of monopoly power, and the law for monopsonies is no different: a buyer does not abuse its market power if it attempts to seek a lower price.<sup>69</sup> Some federal courts use a per se standard to determine unlawful buyer conduct.<sup>70</sup> Alternatively, some courts have adopted a consumer welfare standard and focused on the impact on consumers.<sup>71</sup> Other courts apply the full rule of reason analysis, giving the defendant the burden to prove that the agreement benefited consumers.<sup>72</sup> A recent federal court decision indicated that the courts adjudicate potentially anticompetitive buyer conduct in similar ways to strictly seller conduct: essentially, courts resolve monopsony cases similar to monopoly cases.<sup>73</sup>

Buyers have often refused to deal with certain sellers to limit competition and to gain advantages over competitors. The courts have sometimes characterized these cases as monopoly cases even though buyers committed the alleged conduct. In *U.S. v. Griffith*, the owners of a chain of movie theaters purchased exhibition rights from movie

---

66. In a monopsony, a single buyer purchases goods and services from multiple sellers. Thus, the buyer is able to dictate the terms to achieve advantages. See BLAIR & HARRISON, *supra* note 27, at 36–42.

67. *Id.* at 62.

68. *Id.* at 63.

69. *Id.* at 64.

70. See *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948) (indicating that collusive monopolies are illegal even if the defendant did not harm consumers); Allan Devlin & Bruno Peixoto, *Reformulating Antitrust Rules to Safeguard Societal Wealth*, 13 STAN. J.L. BUS. & FIN. 225, 240–41 (2008) (citing *Addamax Corp. v. Open Software Found., Inc.*, 888 F. Supp. 274 (D. Mass. 1995); *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194, 1203 (W.D.N.Y. 1995)).

71. Richard Scheelings & Joshua D. Wright, “*Sui Generis*”: *An Antitrust Analysis of Buyer Power in the United States and European Union*, 39 AKRON L. REV. 207, 225 (2006). See also Devlin & Peixoto, *supra* note 70, at 241 (citing *Telecor Commc’ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1133–36 (10th Cir. 2002); *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1061 (D.C. Cir. 1995)).

72. Laura Alexander, *Monopsony and the Consumer Harm Standard*, 95 GEO. L.J. 1611, 1626 (2007).

73. Natalie Rosenfelt, *The Verdict on Monopsony*, 20 LOY. CONSUMER L. REV. 402, 403–05 (2008); Devlin & Peixoto, *supra* note 70, at 241. See, e.g., *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 325 (2007) (indicating that courts should apply the same standard in predatory buying and pricing cases).

distributors.<sup>74</sup> In some towns, the owners were the only buyers of those rights because the towns did not contain other movie theaters.<sup>75</sup> In other towns, the owners faced competition from other theaters.<sup>76</sup> The owners in *Griffith* conditioned their purchases of the exhibition rights on the distributors' agreement that the distributors would give the owners exclusive rights in every market.<sup>77</sup> The owners essentially used their monopsony power in some markets to enhance their monopoly power in all markets. While the Supreme Court did not note the monopsony element, the Court did find that the practice violated Section 2 of the Sherman Act.<sup>78</sup>

The Supreme Court has condemned monopsony power when a buyer used it to eliminate other competitors. In *Klor's v. Broadway-Hale*, an owner of a chain of department stores used its buying power to convince appliance manufacturers not to sell products to a competing retailer.<sup>79</sup> The Court indicated that the practice was illegal per se and held that the group boycott violated the Sherman Act.<sup>80</sup> The case is unique because the buyer did not try to dictate a lower price but instead attempted to limit competition.<sup>81</sup>

### C. U.S. Military Hegemony Is Necessary to Foster Global Peace

It is critical that limits on competition do not harm the U.S. military. American hegemony<sup>82</sup> is critical to foster global peace and security for several reasons.<sup>83</sup> The United States military is the dominant power

74. *United States v. Griffith*, 334 U.S. 100, 102–03 (1948).

75. *Id.* at 102.

76. *Id.*

77. *Id.* at 103–04.

78. *Id.* at 107–09.

79. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212–13 (1959).

80. *Id.*

81. BLAIR & HARRISON, *supra* note 27, at 79.

82. See generally Randolph B. Persaud, *Shades of American Hegemony: The Primitive, the Enlightened, and the Benevolent*, 19 CONN. J. INT'L L. 263, 263 (2004) (indicating that the term "hegemony" refers to "dominance" and that international relations scholars use the terms "hegemony," "power," and "strength" interchangeably).

83. See generally ZBIGNIEW BRZEZINSKI, STRATEGIC VISION: AMERICA AND THE CRISIS OF GLOBAL POWER 1, 75, 90–120, 157 (2012); ROBERT KAGAN, THE WORLD AMERICA MADE 8, 30, 40, 66, 70, 75, 86, 89, 99 (2012) [hereinafter KAGAN I]; Josef Joffe, *The Default Power: The False Prophecy of America's Decline*, 88 FOREIGN AFF. 21 (2009); Robert Kagan, *End of Dreams, Return of History*, 144 HOOVER INST. POL'Y REV. (2007), available at <http://www.hoover.org/publications/policy-review/article/6136> [hereinafter Kagan II]; Stephen M. Walt, *American Primacy: Its Prospects and Pitfalls*, 55 NAVAL WAR C. REV. 9 (2002), available at [http://belfercenter.ksg.harvard.edu/files/american\\_primacy\\_prospects\\_pitfalls.pdf](http://belfercenter.ksg.harvard.edu/files/american_primacy_prospects_pitfalls.pdf); Peter Brookes, *Why the World Still Needs America's Military Might*, HERITAGE FOUNDATION (2008), available at <http://www.heritage.org/research/lecture/why-the-world-still-needs-americas-military-might>; Niall Ferguson, *A World Without Power*, FOREIGN POL'Y (2004), available at <http://www.foreignpolicy.com/>

internationally: foreign nations are unable to compete with U.S. military strength.<sup>84</sup> American military power can be a stabilizing force to reduce the risk of regional conflicts between nations: India and Pakistan;<sup>85</sup> China and Taiwan;<sup>86</sup> Russia and other European nations;<sup>87</sup> and Israel and other Middle Eastern countries.<sup>88</sup> A reduction in American influence could intensify the risk of regional conflicts as the regional powers attempt to gain superiority.<sup>89</sup> The exercise of U.S. leadership can also be influential in other areas as nations become more receptive to American values.<sup>90</sup> If America exercises its leadership, nations are more likely to cooperate on critical issues: free trade markets,<sup>91</sup> global warming and environmental issues,<sup>92</sup> the spread of democracy,<sup>93</sup> and human rights.<sup>94</sup> Cooperation amongst nations can also be critical to limit nuclear proliferation to rogue states<sup>95</sup> or to reduce the risks of international terrorism.<sup>96</sup> Ultimately, U.S. hegemony is necessary to preclude global war between nations possessing nuclear weaponry while also fostering international cooperation in important areas.<sup>97</sup>

If America's military strength became inadequate, a global rival to the U.S. could emerge or the U.S. might be unable to fulfill military strategies.<sup>98</sup> The best way for America to maintain its military superiority is to prioritize the innovation and research of new technology.<sup>99</sup> The superiority of America's military is currently due to the quality of

---

articles/2004/07/01/a\_world\_without\_power; Bradley Thayer, *In Defense of Primacy*, THE NAT'L INTEREST (2006); Khalilzad, *supra* note 10.

84. Kagan II, *supra* note 83.

85. BRZEZINSKI, *supra* note 83, at 85; Joffe, *supra* note 83, at 35; Khalilzad, *supra* note 10; Thayer, *supra* note 83.

86. BRZEZINSKI, *supra* note 83, at 91–92; KAGAN I, *supra* note 83, at 86–89; Kagan II, *supra* note 83; Khalilzad, *supra* note 10; Brookes, *supra* note 83.

87. BRZEZINSKI, *supra* note 83, at 90, 93–96; KAGAN I, *supra* note 83, at 87–91.

88. BRZEZINSKI, *supra* note 83, at 98–100; Kagan II, *supra* note 83; Khalilzad, *supra* note 10; Walter Mead, *Why We're in the Gulf*, WALL ST. J. (Dec. 27, 2007), available at <http://www.cfr.org/energy-security/why-were-gulf/p15139>; Joffe, *supra* note 83, at 34–35; Thayer, *supra* note 83.

89. See *supra* note 83.

90. Khalilzad, *supra* note 10; Thayer, *supra* note 83.

91. KAGAN I, *supra* note 83, at 8, 40, 75–76; Kagan II, *supra* note 83; Khalilzad, *supra* note 10; Walt, *supra* note 83, at 13–14; Thayer, *supra* note 83.

92. BRZEZINSKI, *supra* note 83, at 110–11, 115–119; Khalilzad, *supra* note 10.

93. KAGAN I, *supra* note 83, at 30; Kagan II, *supra* note 83; Khalilzad, *supra* note 10; Walt, *supra* note 83, at 14–15; Thayer, *supra* note 83.

94. See *supra* note 92.

95. BRZEZINSKI, *supra* note 83, at 113–15; Walt, *supra* note 83, at 14–15; Thayer, *supra* note 83.

96. Kagan II, *supra* note 83.

97. See *supra* note 83.

98. See *supra* note 83.

99. Khalilzad, *supra* note 10.

America's weapons, as the U.S. currently possesses weapons that other nations do not.<sup>100</sup> During the middle of the twentieth century, advancements in science became critical to advance American hegemony because they led to a more sophisticated military arsenal.<sup>101</sup> A decline in innovation or product quality in America's military arsenal could lead to decrease in U.S. hegemony, ultimately creating an unstable global environment.<sup>102</sup>

#### D. *The History and Structure Military Weapons Procurement*

##### 1. The Military Procurement Process Is Inefficient

Deputy Secretary of Defense William Lynn criticized the current state of defense acquisition by stating, "[A]cquisition reform is not an option, it is an imperative."<sup>103</sup> A buyer in the private sector could purchase some of the same goods as the government in one third of the time and for one third of the price.<sup>104</sup> One extreme example of excessive government regulation is the specifications for the fruitcake: the government's requirements exceed eighteen pages.<sup>105</sup> The Defense Department's procurement process is also inefficient. The House Armed Services Committee's report in the 2007 Fiscal year stated, "[T]he Department of Defense (DoD) acquisition process is broken."<sup>106</sup> According to the U.S. Government Accountability Office (GAO), the final cost for research and development projects was forty-two percent higher than the Defense Department initially estimated.<sup>107</sup> Since 1990, the GAO has continuously indicated that the Defense Department's weapon acquisitions program is inefficient and needs reform.<sup>108</sup>

---

100. *Id.*

101. *Id.*

102. *Id.*

103. *Nominations: Hearing before the S. Armed Serv. Comm.*, 111th Cong. 10, 12 (2009) (statement of William Lynn, Deputy Sec'y of Def.) [hereinafter *Hearing*].

104. Christopher F. Corr & Kristina Zissis, *Convergence and Opportunity: The WTO Government Procurement Agreement and U.S. Procurement Reform*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 303, 314 (1999).

105. *Id.*

106. MOSHE SCHWARTZ, CONG. RESEARCH SERV., RL34026, DEFENSE ACQUISITIONS: HOW DOD ACQUIRES WEAPON SYSTEMS AND RECENT EFFORTS TO REFORM THE PROCESS 1 (2010) (citing H.R. REP. NO. 109-452, at 350 (2006), available at <http://www.fas.org/sgp/crs/natsec/RL34026.pdf>).

107. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-326SP, DEFENSE ACQUISITIONS: ASSESSMENTS OF SELECTED PROGRAMS 1 (2009), available at <http://www.gao.gov/assets/290/287947.pdf> [hereinafter GAO: DEFENSE ACQUISITIONS].

108. SCHWARTZ, *supra* note 106, at 16.

For products that the Defense Department acquired in 2008, it took the Department twenty-two months longer to start using those goods than the Department initially estimated.<sup>109</sup> From 2005 to 2009, the Department spent thirty-one percent of its budget on contracts that defense firms acquired through noncompetitive means.<sup>110</sup> Given the current trends, Deputy Secretary Lynn has stated that it will be difficult for the U.S. to sustain a large enough military force to meet its current military demands.<sup>111</sup>

## 2. Several Pieces of Legislation Govern Military Procurement

Several statutes and pieces of legislation are critical to the analysis of the intersection of military policies and antitrust laws. The Armed Services Procurement Act authorizes the Defense Department, the military services, NASA, and the Coast Guard to acquire goods and services.<sup>112</sup> Executive agencies have implemented the Federal Acquisition Regulations (FAR).<sup>113</sup> The FAR is a body of rules that govern acquisitions made by governmental agencies.<sup>114</sup> The Defense Department has implemented the Defense Federal Acquisition Regulations (DFAR) to govern its procurement practices.<sup>115</sup> The DFARs also incorporate incentives for small businesses.<sup>116</sup> The Competition in Contracting Act (CICA) mandates that the government use competitive procedures when selecting goods and services.<sup>117</sup> CICA's goal is to ensure that the government purchases products efficiently.<sup>118</sup> The Berry Amendment<sup>119</sup> and the Buy American Act<sup>120</sup> prioritize securing goods from domestic sources. The military can also classify research and technology for the sake of national security under Executive Order 12958.<sup>121</sup>

---

109. GAO: DEFENSE ACQUISITIONS, *supra* note 107, at 2.

110. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-833, FEDERAL CONTRACTING: OPPORTUNITIES EXIST TO INCREASE COMPETITION AND ASSESS REASONS WHEN ONLY ONE OFFER IS RECEIVED 2 (2010), available at <http://www.gao.gov/new.items/d10833.pdf>.

111. *Hearing*, *supra* note 103, at 61.

112. Corr & Zissis, *supra* note 104, at 308.

113. *Id.*

114. *Id.*

115. SCHWARTZ, *supra* note 106, at 2.

116. DFARs 219.502 (2009), available at [http://www.acq.osd.mil/dpap/dars/dfars/html/current/219\\_5.htm](http://www.acq.osd.mil/dpap/dars/dfars/html/current/219_5.htm).

117. Corr & Zissis, *supra* note 104, at 309.

118. *Id.*

119. 10 U.S.C. § 2533(a) (2006).

120. 41 U.S.C. § 8302 (Supp. 2011).

121. Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995).

Government agencies award contracts using one of two procedures: (1) sealed bidding or (2) competitive negotiation.<sup>122</sup> When using the sealed bidding procedure, the government issues written solicitation to private contractors, and those contractors then submit bids to the government.<sup>123</sup> Alternatively, in competitive negotiations, the government gives detailed “requests for proposals.”<sup>124</sup> The government will accept the best offer the contractors provide.<sup>125</sup>

### 3. The Government Is the Sole Buyer When Making Defense Acquisitions

Part of the complexity of the acquisition process is inherent in the market forces that underlie the defense industry. The coffee shop example represents the antithesis of defense acquisition. A customer buying coffee might have several options: she could go to the location near her office; she could chose to go to a coffee shop farther away but with a less expensive product; she could bring coffee from home; or she could forgo coffee and sleep more. The coffee shop can also rely on certain market forces: it has a standard product; it has a general idea about the budget and the amount of coffee it should make; the price is determined by competition between shops; it is easy for new shops to enter the market; the transaction between the buyer and the shop is simple; and the buyers and sellers have near perfect market information.

A completely different relationship exists in defense acquisitions. While a coffee shop enjoys numerous customers, the U.S. government is the only purchaser.<sup>126</sup> Essentially, the defense industry represents a monopsony because there is only one buyer for the numerous sellers.<sup>127</sup> The military is more akin to a coffee shop that dominates the coffee market, and is essentially the only buyer of coffee beans. Defense firms compete at the design stage, and the government is more interested in quality than price.<sup>128</sup> The price is also a multi-step and often multi-year process between the government and the defense

---

122. Corr & Zissis, *supra* note 104, at 309.

123. *Id.*

124. *Id.*

125. *Id.*

126. Mark V. Arena & John Birkler, *Determining When Competition is a Reasonable Strategy for the Production Phase of Defense Acquisition*, in FROM MARGINAL ADJUSTMENTS TO MEANINGFUL CHANGE: RETHINKING WEAPON SYSTEM ACQUISITION 4-5 (2010), available at [http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND\\_MG1020.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG1020.pdf).

127. SAPOLSKY, GHOLZ & TALMADGE, *supra* note 3, at 75.

128. Arena & Birkler, *supra* note 126, at 2-3.

firms and their subcontractors.<sup>129</sup> Defense firms additionally encounter numerous uncertainties in the acquisition process: they might discover problems with the products they are creating; they might incorrectly estimate how long it will take to build a new product or how expensive the project will be; and the firms or the Defense Department might discover additional problems during the product testing.<sup>130</sup> These factors mean that the price can change even after the negotiation stage. Unlike other markets, the government has unparalleled power: the contractors work with very few customers and have to meet government demands, as it is illegal to sell weapons to other sources.<sup>131</sup>

All military branches now purchase weapons together as one unit, while historically the branches purchased weapons separately.<sup>132</sup> The weapons centralization process exacerbates the negative impacts of monopsony power and decreases competition and product quality.<sup>133</sup> When military branches purchase weapons together, the seller is unlikely to deviate from the preference of the one buyer, and this decreases project creativity.<sup>134</sup>

Aircraft technology exemplifies the advantages of inter-military competition. When the military branches bought aircraft separately, the branches competed with one another to guarantee the better product, and each branch was creative in its technology specifications.<sup>135</sup> The competition led to the Air Force purchasing the A-10 ground attack aircraft, which aviation historians consider the best aircraft to have flown close air support missions.<sup>136</sup> Another example of the benefits of inter-military competition is in the context of nuclear weaponry. Out of concern that the Air Force would dominate America's nuclear forces during the Cold War, the Navy purchased the Polaris submarine-based ballistic missile.<sup>137</sup> The Polaris made America's second-strike nuclear deterrent more efficient and cost effective.<sup>138</sup>

---

129. *Id.* at 7.

130. *Id.* at 5.

131. SAPOLSKY, GHOLZ & TALMADGE, *supra* note 3, at 75.

132. *Id.* at 76 (indicating that the modern Joint Striker Fighter and the TFX of the 1960s are projects in which the Navy, Marine Corps, and Air Force attempted to purchase the same version of the equipment).

133. *Id.* at 76.

134. *Id.*

135. *Id.* at 77.

136. SAPOLSKY, GHOLZ & TALMADGE, *supra* note 3, at 77.

137. *Id.*

138. *Id.*



#### 4. The History and Evolution of Defense Procurement

The process of defense acquisition is cumbersome and has evolved throughout American history. During the Revolutionary War, the Continental Army purchased goods and services from contractors.<sup>139</sup> The contractors provided transportation, clothing, engineering services, labor, and weapons for the Army.<sup>140</sup> The Continental Congress established a procurement system to aid the Continental Army.<sup>141</sup> The Congress appointed both a Commissary General and a Quartermaster General to purchase goods and services for the army.<sup>142</sup> The process has changed substantially over time to meet the needs of the current military.<sup>143</sup>

The broad phrase “defense acquisition” applies to more than just the purchase of a good.<sup>144</sup> The acquisition process includes numerous stages: the Defense Department must specify the design of a product; the contractors must engineer and construct the product; the Department and the contractors must test the new project; the military then deploys the new product; and the military must dispose of the obsolete weapons.<sup>145</sup>

It is also difficult for the military to acquire funding for a new product.<sup>146</sup> Four congressional committees must separately agree to fund any new project.<sup>147</sup> The Department additionally experiences a high degree of turnover within its leadership positions.<sup>148</sup> The juxtaposition of congressional approval and new Defense Department leadership can make it difficult for Congress and the Department to agree on funding for new projects.<sup>149</sup> Without the same leadership in the military, Congress often cuts the projects when it experiences a budget crisis.<sup>150</sup>

The Defense Department and Congress use a three-step process to develop weapons.<sup>151</sup> The military creates each weapon to meet a certain requirement, the federal budget pays for each weapon, and the

---

139. SCHWARTZ, *supra* note 106, at 1–2.

140. *Id.*

141. *Id.* at 2.

142. *Id.*

143. *Id.*

144. SCHWARTZ, *supra* note 106, at 1.

145. *Id.*

146. Arena & Birkler, *supra* note 126, at 8.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. SCHWARTZ, *supra* note 106, at 3.

Department allocates the weapon to a specific part of the military.<sup>152</sup> The Department uses the Joint Capabilities Integration and Development System to identify which capabilities the military needs for its future missions.<sup>153</sup> The Planning, Programming, Budgeting, and Execution System develop the Department's budget for all of its acquisitions.<sup>154</sup> The Defense Acquisition System manages each acquisition to maximize U.S. national security.<sup>155</sup>

Acquisition reform is not a novel concept, and it is something that the federal government has focused on for over a century.<sup>156</sup> Congress and the Executive Branch have consistently been frustrated with the levels of mismanagement in defense acquisitions.<sup>157</sup> Even during the Civil War, President Abraham Lincoln requested the resignation of Simon Cameron, the Secretary of War, because of his mismanagement.<sup>158</sup> That year, the House Committee on Contracts published a 1,100-page report documenting misdeeds that resulted in the government purchasing diseased horses, rotten food, and weapons that did not work.<sup>159</sup>

### III. MILITARY PROCUREMENT POLICIES ARE INEFFICIENT

#### A. *Barriers to Entry Make Acquisition Reform Problematic*

While competition would help the U.S. defense industry reduce costs and maintain global military superiority, there are occasions when competition is not helpful and the military would be wise to forgo it.<sup>160</sup> Specifically, the acquisition of major systems involving large nonrecurring costs dictates that the Department focus on a single supplier.<sup>161</sup> For example, the military might purchase an expensive vehicle from one source. The initial cost will be high but the military will not have continuous costs. So the Department purchases the vehicle just from one supplier. An increase in competition between defense firms would require the Department to allocate additional

---

152. *Id.*

153. *Id.*

154. *Id.* at 4.

155. *Id.* at 7.

156. SCHWARTZ, *supra* note 106, at 13.

157. *Id.*

158. *Id.*

159. *Id.* (citing *Government Contracts: The Fraud of the Contractors*, N.Y. TIMES, Feb. 6, 1862, at 2).

160. Arena & Birkler, *supra* note 126, at 1.

161. *Id.* at 1-2.

resources to manage the additional products that the firms would offer.<sup>162</sup>

From a practical standpoint, the Defense Department might encounter difficulty fostering greater competition, as new defense firms would face high entry barriers. In the defense acquisition industry, weapon producers must have an enormous amount of monetary resources at the research and pre-production stages.<sup>163</sup> New companies would also lack the requisite manufacturing experience necessary to produce products for the military.<sup>164</sup> Also, as additional firms produce more goods, the Defense Department will require additional testing of those goods.<sup>165</sup> Additional product testing could result in delays in the production process.<sup>166</sup> The selection process would also raise a number of questions regarding fairness, otherwise the government could open itself up to future litigation.<sup>167</sup> The military would have to allocate more individuals to manage the new defense firms.<sup>168</sup> By allocating more upper level management for new products, the military would increase the production costs while decreasing the probability of project competition.<sup>169</sup>

Politics only conflate the problems: any new competitor would have to persuade four different congressional committees.<sup>170</sup> The committees and the Department often have conflicting views, creating additional barriers.<sup>171</sup> The biggest problem might be that the short-term costs to competition are clear, while the long-term benefits are not easy for Congress to determine as they face yearly deficits.<sup>172</sup> Exacerbating the problem, divergent studies have indicated that acquisition reform could decrease Defense Department procurement costs by seventy-nine percent or could increase procurement costs by fourteen percent.<sup>173</sup>

---

162. *Id.* at 7.

163. *Id.*

164. Arena & Birkler, *supra* note 126, at 9.

165. *Id.* at 8.

166. *Id.*

167. *Id.* at 9.

168. *Id.* at 7.

169. Arena & Birkler, *supra* note 126, at 7.

170. *Id.* at 8.

171. *Id.*

172. *Id.* at 9.

173. *Id.* at 9-10.

### B. *The Current Structure Is Anticompetitive, Harming American Hegemony*

There are numerous disadvantages and consequences to current military policies. There are issues with protectionism and the promotion of certain types of businesses at the expense of product quality and efficient costs. Both the Berry Amendment<sup>174</sup> and the Buy American Act<sup>175</sup> seek to promote American corporations at the expense of potentially more efficient foreign firms. The Defense Department sets aside procurement contracts for small businesses to promote those companies.<sup>176</sup> The military also has advantages with critical research in the private sector: it has the ability to classify research<sup>177</sup> or it can privilege information in court documents and prevent the release of that information to the public.<sup>178</sup> These policies create disincentives for businesses to innovate while keeping valuable information from consumers.<sup>179</sup>

#### 1. Protectionism Is Rife in Military Procurement

Congress and the Defense Department limit foreign firms from creating military products to minimize the risk to national security.<sup>180</sup> Companies that are subject to foreign ownership face hardships in acquiring security clearances.<sup>181</sup> The impact is simple: a security clearance is essential for a defense industry supplier and makes Defense Department acquisitions impossible from foreign sources.<sup>182</sup> A company without a clearance is unable to work with the U.S. Defense Department. Two pieces of legislation exist that can also limit a company's access: the Defense Industrial Security Program and the National Security Act of 1947.<sup>183</sup> The National Security Act autho-

---

174. 10 U.S.C. § 2533(a) (2006).

175. 41 U.S.C. § 8302 (Supp. 2011).

176. DFARs, *supra* note 116, at 219.502.

177. KEVIN KOSAR, CONG. RESEARCH SERV., 97-771, SECURITY CLASSIFICATION POLICY AND PROCEDURE: E.O. 12958, AS AMENDED 5 (2009), available at <http://www.fas.org/sgp/crs/secretcy/97-771.pdf>.

178. David H. Isaacs & Robert M. Farle, *Privilege-Wise and Patent (and Trade Secret) Foolish: How the Courts' Misapplication of the Military and State Secrets Privilege Violates the Constitution and Endangers National Security*, 24 BERKELEY TECH. L.J. 785, 786 (2009).

179. *Id.*

180. Christopher F. Corr, *A Survey of United States Controls on Foreign Investment and Operations: How Much is Enough?*, 9 AM. U. J. INT'L L. & POL'Y 417, 436-37 (1994).

181. *Id.* at 437.

182. *Id.*

183. *Id.* at 437-38.

rizes the Defense Department to restrict access to classified information to private corporations.<sup>184</sup>

The sheer size of the international market of weapons sellers would give the U.S. many new procurement possibilities. The world military procurement market represented nearly \$5.5 trillion in 1998 while the U.S. federal procurement market alone accounted for approximately \$400 billion in 2007.<sup>185</sup> By purchasing goods from foreign corporations, America could benefit not only from increased competition and better products but the harm to the domestic economy would be tempered. Nations often make reciprocal agreements to open markets; so if the U.S. de-emphasized its domestic procurement, other nations would be more willing to give procurement contracts to U.S. firms.<sup>186</sup> Historical studies have found a welfare loss for nations that have high barriers for the international procurement process.<sup>187</sup>

a. The Buy American Act Decreases Competition for Government Procurement

The Buy American Act applies to procurement by the Federal Government in general and is not limited to the Defense Department.<sup>188</sup> Under the Act, when American products are half of the project's total cost, U.S. government entities must prioritize working with domestic firms.<sup>189</sup> There are three exceptions to the Act: (1) if the restrictions are "inconsistent with the public interest," (2) the cost is "unreasonable," or (3) the end products or components are not reasonably available at sufficient quality and quantity from a domestic source.<sup>190</sup> To waive the Act, the President or a federal agency would have to determine that a waiver is necessary for national security, to avoid a monopoly, or to ensure a sufficient amount of qualified bidders to allow for a competitive price.<sup>191</sup> International trade agreements also provide three more exceptions to the Act: (1) products from Caribbean Basin Economic Recovery Act Countries, (2) products from Mexico and Canada pursuant to NAFTA, and (3) end products from Israel.<sup>192</sup> The National Defense Authorization Act amended the Act and re-

---

184. *Id.*

185. Christopher R. Yukins & Steven L. Schooner, *Incrementalism: Eroding the Impediments to a Global Public Procurement Market*, 38 GEO. J. INT'L L. 529, 533 (2007).

186. *Id.* at 534.

187. *Id.* at 533.

188. Corr, *supra* note at 180, at 441.

189. *Id.* at 441-42.

190. Corr & Zissis, *supra* note 104, at 321.

191. *Id.* at 323.

192. *Id.* at 325-26.

quired the Defense Secretary to submit a report to Congress that indicates the total cost of Defense Department purchases from other nations.<sup>193</sup>

The Act impacts not only the military but also foreign investors.<sup>194</sup> An international corporation might be deterred from establishing or purchasing an American assembly facility because the final product would no longer come from a U.S. company.<sup>195</sup> Before contracting with the federal government, a company must certify that it complied with the Act and the federal government will penalize false certifications by suspending the contractors for up to three years and imposing civil penalties.<sup>196</sup>

#### b. The Berry Amendment Limits Defense Procurement

Congress and the Defense Department have attempted to protect American industries, especially the defense industrial base.<sup>197</sup> Thus, the two have attempted to limit foreign procurement through “domestic source restrictions.”<sup>198</sup> Representative Elias Berry introduced two bills to amend the Buy America Act and Congress subsequently named the amendment the Berry Amendment.<sup>199</sup> The purpose of the Amendment was to ensure that U.S. firms produced military uniforms and clothing.<sup>200</sup> Congress subsequently added other products to the Amendment to protect American businesses.<sup>201</sup> In 2001, the National Defense Authorization Act codified and modified the Berry Amendment.<sup>202</sup> The Act gives the Secretary of Defense the authority to waive the requirements to buy domestically but only under certain conditions.<sup>203</sup> The Amendment essentially prohibits the Defense Department from purchasing numerous goods and services from foreign sources: clothing, specialty metals, stainless steel, hand or measuring tools, clothing fabrics, and food.<sup>204</sup> The main difference between this and the Buy American Act is that the Berry Amendment governs De-

---

193. VALERIE GRASSO, CONG. RESEARCH SERV., RL31236, THE BERRY AMENDMENT: REQUIRING DEFENSE PROCUREMENT TO COME FROM DOMESTIC SOURCES 2 (2009), available at <http://www.fas.org/sgp/crs/natsec/RL31236.pdf>.

194. Corr, *supra* note at 180, at 442.

195. *Id.*

196. *Id.* at 443.

197. GRASSO, *supra* note 193, at 3.

198. *Id.*

199. *Id.*

200. *Id.* at 5.

201. *Id.*

202. GRASSO, *supra* note 193, at 6.

203. *Id.*

204. *Id.* at 3.

fense Department procurement only while the Buy American Act is broader and encompasses the entire federal government.<sup>205</sup>

The Berry Amendment grants several potential advantages to the U.S. economy and the U.S. military. First, it might be necessary for the Defense Department to purchase certain clothing and metals from domestic sources.<sup>206</sup> Dependency on foreign sources could be dangerous if the U.S. is engaged in war with foreign sources because the other nation might cut off the supply for a critical component for U.S. technology.<sup>207</sup> It would also be possible for another nation to engage in chemical warfare and damage American products.<sup>208</sup> The Amendment also represents an economic lifeline to distressed small American firms that produce certain metals covered by the Amendment.<sup>209</sup>

Relying only on domestic sources, however, has numerous disadvantages, including additional costs and inefficient results. The Amendment creates a disincentive for American firms to modernize their products because the firms do not have to compete with international firms.<sup>210</sup> This essentially means that the U.S. government pays a higher price for a low quality product. If the goal of the Defense Department's procurement process is to maximize product quality for purposes of U.S. national security, then the Berry Amendment runs afoul of those goals. The military should make case-by-case determinations to weigh the economic benefits versus the security risks. If the military deems it necessary for the promotion of U.S. national security to purchase a beret from China because of lower production costs and non-existent risks of chemical warfare, then concerns over American businesses should not prevent lower costs. If military leaders, however, fear that purchasing berets from China poses a risk to national security, it should not make those purchases. The military leaders, however, should have the ability to make that determination.

The Amendment has the ability to permeate every corner of the defense industry, from technology to foreign policy.<sup>211</sup> Technology plays a vital role in most industries, and the Defense Department is no different.<sup>212</sup> The Department uses specialty metals in most of its equipment, from aircraft to computers.<sup>213</sup> Domestic sources, how-

205. *Id.* at 9.

206. *Id.* at 7.

207. GRASSO, *supra* note 193, at 7.

208. *Id.*

209. *Id.* at 11.

210. *Id.* at 12.

211. Yukins & Schooner, *supra* note 185, at 537.

212. *Id.*

213. *Id.*

ever, do not always produce the metals necessary for the equipment.<sup>214</sup> Sophisticated and advanced weapons systems are critical to military supremacy and these technological devices often use titanium and certain alloys that are less expensive internationally.<sup>215</sup> Defense agencies need to aggressively rely on foreign suppliers as the global procurement market continues to expand.<sup>216</sup> The Under Secretary of Defense indicated that the Amendment fosters large delays in the procurement process, “seriously impact[ing] [America’s] ability [to] meet military needs.”<sup>217</sup> Shay Assad, the Director of Defense Procurement and Acquisition Policy, indicated that compliance with the Amendment leads to higher military costs because it is difficult to trace the supply chains completely to ensure that metals from other nations do not reach the U.S. military.<sup>218</sup>

The Amendment additionally has the potential to negatively impact American foreign policy and create animosity between the U.S. and other nations. The Bush Administration fought against the barriers to procurement because the policy negatively impacts military strategy by making it harder for the U.S. to engage other leaders.<sup>219</sup> It reflects poorly on America when Congress prohibits the Department from purchasing goods with potential allies.<sup>220</sup> Allies can easily misconstrue these policies as a sign of American mistrust.

Congress did make some changes to the Amendment in 2006 to allow the military more flexibility.<sup>221</sup> The Defense Department now has the authority to waive the metals ban if the domestic market cannot meet the military’s demand.<sup>222</sup> Congress also exempted smaller procurements from the metals ban.<sup>223</sup> Additionally, Congress allowed exemptions for specialty metals incorporated into defense items from certain nations.<sup>224</sup> Thus, the Amendment essentially only prohibits in-

---

214. *Id.*

215. *Id.*

216. Yukins & Schooner, *supra* note 185, at 540.

217. *Id.* at 538–39 (quoting Memorandum from U.S. Under Sec’y of Def. Kenneth J. Krieg (June 1, 2006)).

218. Yukins & Schooner, *supra* note 185, at 539 (quoting Memorandum from Shay D. Assad, Def. Procurement and Acquisition Policy to Commander, U.S. Special Operations (Sept. 21, 2006), available at <http://www.acq.osd.mil/dpap/policy/policyvault/2006-1788-DPAP.pdf>).

219. Yukins & Schooner, *supra* note 185, at 540.

220. *Id.*

221. *Id.* at 540–41.

222. *Id.*

223. *Id.*

224. Yukins & Schooner, *supra* note 185, at 541.



ternational trade in the metals themselves: the Defense Department is allowed to purchase technology that includes foreign metals.<sup>225</sup>

The changes, however, are not sufficient to protect national security. Congress created political hurdles if the military seeks an exemption: a board, consisting of members of Congress, must assess the military's concerns and authorize any exceptions.<sup>226</sup> The changes still allow for much ambiguity and confusion.<sup>227</sup> Congress attempted to only ban foreign metals in end products, the first-tier parts that end products directly incorporate, and second-tier components used directly by the first-tier parts.<sup>228</sup> For example, if the end product would be an aircraft, then the first-tier component could be an engine, and the second-tier components could be parts used to power the engine. This results in a problem defining and determining in which tier a certain part falls.<sup>229</sup> This confusion results in higher costs while also bringing inefficient results for military planners.<sup>230</sup> However, there is one hidden advantage of this new structure: the tier system gives the Defense Department greater latitude in its interpretation of the Berry Amendment while also making congressional enforcement much harder.<sup>231</sup> The Amendment ultimately serves minimal purpose: either it increases military costs while decreasing weapon quality or the Defense Department can easily sidestep it.<sup>232</sup>

### c. The Buy American Act and the Berry Amendment Create An Inefficient Monopsony

Congress should employ the economic rationale embedded in the Sherman Act to rethink the Buy American Act and the Berry Amendment with respect to military procurement. Courts have found bid-rigging, horizontal agreements to fix prices, and collusive bidding to be illegal *per se*.<sup>233</sup> In this case, Congress should apply a rule of reason test because the government's conduct does not fall within one of the three categories. When applying rule of reason analysis, courts consider numerous factors, including the justifications for the government's conduct.<sup>234</sup>

---

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 543.

229. Yukins & Schooner, *supra* note 185, at 544.

230. *Id.*

231. *Id.*

232. *Id.*

233. GAVIL, KOVACIC & BAKER, *supra* note 6, at 164.

234. Brunk, *supra* note 1, at 157.

Both the Act and the Amendment have positive benefits. If the military purchases products from foreign firms, the firms could harm U.S. national security: foreign companies could sabotage American products or refuse to sell products during times of war. American firms could also benefit from Defense Department contracts. Some U.S. small businesses rely on sales from specialty metals for economic profits.<sup>235</sup>

The anticompetitive results of the Act and the Amendment outweigh the justifications. Part of Congress's intent for the restrictions was to prevent foreign firms from competing with domestic firms. Congress could find that this rationale is inconsistent with the socially beneficial rationale behind the Sherman Act.<sup>236</sup> The monopsony case law is inconsistent with the military's actions. The Defense Department exercises its market power to dictate the terms with defense firms. The military's conduct resembles the conduct in *Klor's*.<sup>237</sup> In that case, the owner of a chain of department stores used its market power to force appliance manufacturers not to sell products to a competing retailer.<sup>238</sup> Similarly, Congress uses the government's buying power to restrict competition amongst defense firms by refusing to purchase items from foreign companies.

When evaluating monopsonies, courts often determine how the buyer's use of market power affects consumers.<sup>239</sup> In the context of military procurement, American taxpayers should be the consumers. The government enacted the restrictions to promote American firms and to increase national security. Due to the restrictions, however, the military might award a contract to an inefficient domestic firm that produces a worse product than a foreign firm. If the Defense Department purchased products from foreign sources, other nations might increase their purchases from U.S. firms.<sup>240</sup> The government's limitations on foreign products also increase animosity with foreign leaders, potentially harming America's national security.<sup>241</sup> The Defense Department should have the option of purchasing products from foreign firms when it feels the risk to national security is minimal. Thus, Congress should determine that the Buy American Act and the Berry Amendment violate the logic of American antitrust laws.

---

235. GRASSO, *supra* note 193, at 7–8.

236. GAVIL, KOVACIC & BAKER, *supra* note 6, at 89.

237. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212–13 (1959).

238. *Id.*

239. Alexander, *supra* note 72, at 1626–27.

240. Yukins & Schooner, *supra* note 185, at 534.

241. *Id.* at 540.

## 2. Congress Passed Legislation to Promote Small Businesses

The Federal Acquisition Regulation<sup>242</sup> implements both the Small Business Act<sup>243</sup> and the Federal Property and Administrative Services Act.<sup>244</sup> Both Acts recommend that the Government assist small businesses by providing the businesses a portion of the Government's total procurement contracts.<sup>245</sup> The Defense Department's regulations have created set-asides for small businesses in three categories: (1) construction, maintenance, and repairs under \$2.5 million; (2) dredging<sup>246</sup> under \$1.5 million; and (3) architect and engineer services for family housing or military construction projects under \$300,000.<sup>247</sup> The regulations create incentives for small businesses while discouraging larger corporations from bidding on smaller projects.<sup>248</sup>

Small businesses represent a large component of the U.S. economy and provide economic and non-economic assets. Small businesses have created between sixty and eighty percent of all new jobs in the last decade while employing more than half of all private sector employees.<sup>249</sup> Overall, this workforce produces over fifty percent of America's Gross Domestic Product (GDP).<sup>250</sup> The businesses produce certain non-economic benefits as well: a higher quality of life, employment opportunities for individuals, and an opportunity for individuals to pursue their interests.<sup>251</sup> Small businesses can serve a critical function in the U.S. marketplace.

Competitive advantages for inefficient sellers negatively impact the military and U.S. national security interests. *Icono* provides an example of a situation in which the government favored the inefficient firm.<sup>252</sup> Two corporations, *Icono* and *Jensen*, submitted bids to build barricades in Central Iowa.<sup>253</sup> *Jensen* received an offer from the Army and performed the contract because it submitted the lowest bid,

242. FAR Part 19, available at <https://www.acquisition.gov/far/90-37/html/19.html>.

243. 15 U.S.C. § 631 (2006).

244. 41 U.S.C. § 252(b) (2006).

245. 15 U.S.C. § 631, 41 U.S.C. § 252(b) (2006).

246. Moving sediments from one water area to another to ensure that the ships can navigate the water.

247. DFARs, *supra* note 116, at 219.502-2 (2009).

248. Kara L. Haberbusch, *Limiting the Government's Exposure to Bid Rigging Schemes: A Critical Look at the Sealed Bidding Regime*, 30 PUB. CONT. L.J. 97, 104 (2001).

249. Smith, *supra* note 35, at 176.

250. *Id.*

251. *Id.*

252. Ofer Grosskopf, *Restitution and Unjust Enrichment: Protection of Competition Rules Via the Law of Restitution*, 79 TEX. L. REV. 1981, 2015 (2001) (citing *Iconco v. Jensen Constr. Co.*, 622 F.2d 1291, 1293-94 (8th Cir. 1980)).

253. *Icono*, 622 F.2d at 1293-94.

while Icono submitted the second lowest bid.<sup>254</sup> Icono later discovered that Jensen should not have qualified as a small business and thus the Army should not have awarded it the contract.<sup>255</sup>

The military often precludes large and efficient corporations from submitting bids for defense contracts.<sup>256</sup> The government has a noble goal of supporting small businesses, but the government should not sacrifice cost or product quality. *Icono* exemplifies this point: the Army awarded a defense contract to the lowest bidder without sacrificing product quality.<sup>257</sup> Yet, the regulations indicate the Army should not have awarded that contract. While the price differential of any individual project might be low, the costs can add up over time. Preferring a small business while excluding more efficient larger firms can ultimately increase military costs in an industry already rife with inefficiencies.

#### a. Preferential Treatment of Small Businesses Is Inefficient

The antitrust analysis for small business exceptions is similar to the analysis of domestic source restrictions. Congress again should find that the exceptions violate the logic of antitrust laws and rule of reason analysis. In the context of antitrust analysis, courts would probably apply a rule of reason analysis when considering the justifications for the exceptions.<sup>258</sup> Small businesses are important to the U.S. for economic and non-economic reasons: businesses produce jobs while also increasing employment opportunities for individuals.<sup>259</sup>

The rule of reason analysis is harder in this context. Congress's intent in enacting the exceptions was to promote small businesses. This intent is inconsistent with the rationale of the Sherman Act.<sup>260</sup> By promoting small businesses, the Defense Department is refusing to deal with larger corporations. This conduct is again akin to the owner of the chain of department stores in *Klor's* that forced appliance manufacturers not to sell products to a competing retailer.<sup>261</sup> Congress should also consider how the military's conduct affects consumers, or American taxpayers.<sup>262</sup> The Defense Department's policy of preferring small businesses could increase costs while decreasing product

---

254. *Id.*

255. *Id.*

256. Haberbush, *supra* note 248.

257. Grosskopf, *supra* note 252.

258. Brunk, *supra* note 1.

259. Smith, *supra* note 35.

260. GAVIL, KOVACIC & BAKER, *supra* note 6, at 89.

261. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212–13 (1959).

262. Alexander, *supra* note 72 at 1626.

quality. However, the U.S. does use antitrust laws to promote small business.<sup>263</sup> In this case, Congress could reasonably find that the economic and non-economic benefits to promoting small businesses outweigh the disadvantages. The Defense Department only prefers small businesses for a limited amount of projects and this fact should aid Congress in its decision.<sup>264</sup>

### 3. The Military Can Limit the Spread of Information to the Private Sector

Security classification can be boom or bust for America: on one level, classification of information could be necessary for purposes of national security but it could also prevent the public from taking advantage of the information. Security orders have existed since 1869; however, they assumed a presidential character in 1940 when President Franklin D. Roosevelt issued the first presidential security classification directive.<sup>265</sup> The current policy is in Executive Order 12958, which President Bill Clinton signed in 1995 and President George W. Bush amended in 2003.<sup>266</sup> The Order authorizes the classification of information for reasons of “national security,” or information for “the national defense or foreign relations of the United States.”<sup>267</sup> There are three levels of classification: Top Secret, Secret, and Confidential.<sup>268</sup> The order sets a ten-year time limit for any classification.<sup>269</sup>

The military and state secret privilege provides the Defense Department another avenue to limit information to the public that could endanger America’s security.<sup>270</sup> The privilege developed through common law and is an evidentiary rule.<sup>271</sup> During the litigation process, the government can invoke the privilege to exclude evidence related to foreign relations and national security.<sup>272</sup> Courts have expanded the privilege to cover patent litigation or circumstances when inventors alleged that the military, or its contractors, used their devices without proper authorization.<sup>273</sup> The military often asserts the privilege to cover documents so that the documents do not enter the

---

263. GAVIL, KOVACIC & BAKER, *supra* note 6, at 32.

264. DFARs, *supra* note 116, at 219.502-2 (2009).

265. KOSAR, *supra* note 177, at 5.

266. *Id.* at 6–10.

267. Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (1995).

268. *Id.*

269. *Id.*

270. Isaacs & Farle, *supra* note 178, at 786.

271. Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 105 (2007).

272. Isaacs & Farle, *supra* note 178, at 792–93.

273. *Id.* at 794.

public record.<sup>274</sup> When using the privilege, the military is usually successful because courts generally defer to the Executive Branch and only require a “reasonable danger” of security implications.<sup>275</sup> The government’s use of the privilege makes litigation difficult for inventors as courts preclude the inventors from using important evidence during litigation.<sup>276</sup>

Courts that defer to the military create severe harm to American national security. Protections for trade secrets and patents are necessary to give inventors proper incentives; without the protections, the inventors do not have a legal recourse if a third party copies the inventions and sells the product for a lower price.<sup>277</sup> Often, these inventions are critical for new military technology and intellectual property.<sup>278</sup> The lack of protection creates a disincentive for smaller inventors, as these individuals are less likely to have large amounts of capital.<sup>279</sup> Larger corporations hire lobbyists and former Defense Department employees to help the corporations politically.<sup>280</sup> The lack of monetary resources prevents the smaller inventors from gaining the same political clout.<sup>281</sup> Traditional defense firms do not have the same expertise in these technological areas as new inventors.<sup>282</sup> Defense Department studies have indicated the need to develop new technologies to aid U.S. national security.<sup>283</sup> These inventors are also essential for the future of national security as they provide a unique service that traditional suppliers do not: they are able to integrate advanced communications, information technology, and computers into military institutions.<sup>284</sup> While the military provides advantages to small businesses for certain types of defense contracts, the military disregards small business inventors. All corporations should have equal access to information: one corporation should not have to face a structural barrier that another corporation can avoid.

---

274. *Id.*

275. *Id.* at 800 (citing *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983) (citing *United States v. Reynolds*, 345 U.S. 1, 97 (1953))).

276. *Isaacs & Farle*, *supra* note 178, at 800.

277. *Id.* at 806–07.

278. *Id.* at 807.

279. *Id.*

280. *Id.* at 808–09.

281. *Isaacs & Farle*, *supra* note 178, at 808–09.

282. *Id.* at 808.

283. *Id.*

284. *Id.* at 807.

## a. Case Study: Nanotechnology

The military's classification of research can have an adverse impact on consumers. The case study of nanotechnology represents an intriguing example of how military classification can negatively impact American citizens. Nanotechnology is the discipline of building things from one atom or molecule at a time: a bottom-up approach.<sup>285</sup> This contrasts with traditional technology that builds from the top down: taking matter and scaling it down to form an object.<sup>286</sup> For example, if a person takes a large tree and then uses a chainsaw to carve a chair, that person is using a top-down approach. The person removes matter until achieving the desired outcome. Alternatively, if a person attempts to take individual atoms or molecules and combine them to make a chair, that person uses a bottom-up approach.

Life evolved through a bottom-up approach: life began from small molecules or atoms that evolved over time.<sup>287</sup> Thus, using nanotechnology could revolutionize future technology. The military could "classify" nanotechnology if it decided that the research regards "national security."<sup>288</sup> During the nineteenth century, certain technology was instrumental in giving Western powers unchallenged hegemony throughout the world: steam navigation, high explosives, and repeating firearms.<sup>289</sup> Nanotechnology could play a similar role in the future for the U.S. military, giving the military an incentive to classify the research, at least in the short term.<sup>290</sup> Professor Reynolds believes that the military could use nanotechnology to produce devices that are difficult to detect or use nanotechnology to modify soldiers' brains and their cognitive skills.<sup>291</sup> The Defense Department potentially could produce a weapon for psychological warfare: the devices could manipulate the brains of individuals or populations.<sup>292</sup>

Nanotechnology could potentially provide a boost to U.S. national security. However, the classification process is not necessary and might cause harm while hampering progress. During the Cold War, the federal government attempted to limit the spread of sensitive information, including information about atomic energy, by limiting in-

---

285. Reynolds, *supra* note 5, at 193–97.

286. *Id.*

287. *Id.* at 182.

288. *Id.* at 193.

289. *Id.*

290. Reynolds, *supra* note 5, at 193.

291. *Id.* (citing Scott Pace, *Military Implications of Nanotechnology*, 6 FORESIGHT INST. 2 (Aug. 1, 1989), available at <http://www.foresight.org/Updates/Update06/Update06.2.html>).

292. *Id.* at 194.

ternational data sharing, and requiring pre-publication review.<sup>293</sup> While the U.S. did win the Cold War, scientists in 1980s believed that the limitations on information and research were overly strict and caused greater harm than good.<sup>294</sup> In the context of nanotechnology, critics fear that classifying the research could hurt consumers economically.<sup>295</sup> Even members of the military present doubts about classifying nanotechnology research; Admiral David Jeremiah stated, “the uninformed policymaker is likely to impose restrictions on development of technology in such a way as to inhibit commercial development (ultimately beneficial to mankind) while permitting those operating outside the restrictive bounds to gain an irrevocable advantage.”<sup>296</sup>

Policymakers and the Defense Department could decide to classify nanotechnology to protect U.S. national security, while hurting U.S. hegemony and consumers. Military nanotechnology is more likely to be dangerous than civilian versions because civilian counterparts are generally founded on a much deeper level of experience.<sup>297</sup> This is the case because in the private sector, peer review leads to greater oversight and allows researchers to find more problems than are found developing the research solely in the vacuum of the military realm.<sup>298</sup> The private sector allows for more testing and more competition to ensure a viable product. Nanotechnology also could have tremendous advantages for consumers: it could provide a cure for cancer while also providing sophisticated technology.<sup>299</sup>

The relevancy of nanotechnology hardly matters. The main point is that the military should not preclude the public from receiving the benefits of the research. While the military has numerous rationales for classifying the research, the advantages do not outweigh the costs. National security regulations must protect American citizens. Allowing the open market to have access to this research allows civilians and the military to receive the benefits of this information. As more firms have access to this technology, more firms are likely to develop new cures and new products. This in turn also increases economic efficiencies. At the same time, the market can still develop technol-

---

293. *Id.* at 195–96.

294. *Id.* at 196.

295. Reynolds, *supra* note 5, at 196.

296. David E. Jeremiah, Admiral, U.S. Navy, Nanotechnology and Global Security, Presentation at the Fourth Foresight Inst. Conference on Molecular Nanotechnology (Nov. 9, 1955), available at <http://www.zyvex.com/nanotech/nano4/jeremiahPaper.html>.

297. Reynolds, *supra* note 5, at 196.

298. *Id.* at 196–97.

299. *Id.* at 197.



ogy for military use. While it would be dangerous if the wrong person developed nanotechnology, it is just as dangerous to deny citizens access to a cure for cancer or other socially beneficial products.

b. The Military's Restrictions on Information Are Anticompetitive

Congress will have difficulties conducting antitrust analysis when the government limits research. Using a rule of reason analysis, Congress should consider the government's justifications for its conduct.<sup>300</sup> The government's ability to use the military and state secret privilege and the ability to classify research is potentially necessary to promote U.S. national security. The Buy American Act, the Berry Amendment, and the exceptions for small businesses are unique in that even without those policies, the Defense Department could still purchase items from domestic firms, or smaller firms if the military decided to make a purchase for national security reasons. In this context, the military is restricting access to research because of national security concerns. It is difficult for Congress to indicate otherwise since the military has greater expertise.

The Defense Department should follow antitrust rationales and use caution when limiting private sector access to information. Congress needs to protect inventors to encourage them to develop new technological products for the military's use. Private sector firms should have access to certain research; these firms can test and develop products, potentially helping the military. By having access to classified research, private sector firms could develop new products that benefit consumers; for example, private firms with access to nanotechnology research could develop a cure for cancer.<sup>301</sup>

4. Courts Defer to the Military Too Often in Disputes

Courts conflate the lack of competition in the military procurement process by deferring to the military in contractual disputes. In claims against the United States, a federal statute indicates that a court should give "due regard to the interests of national defense and national security" in making its final determination.<sup>302</sup> In theory, this is a good goal: it is important that the Defense Department is able to

---

300. Brunk, *supra* note 1, at 157.

301. Reynolds, *supra* note 5, at 197. See also Jessica K. Fender, Note and Comment, *The FDA and NANO: Big Problems with Tiny Technology*, 83 CHI.-KENT L. REV. 1063, 1070-72 (2008); James R. Heath & Mark E. Davis, *Nanotechnology and Cancer*, 59 ANN. REV. MED. 251 (2008), available at <http://authors.library.caltech.edu/10368/1/HEAarm08.pdf>; Gregory Mandel, *Nanotechnology Governance*, 59 ALA. L. REV. 1323, 1333-34 (2008).

302. 28 U.S.C. § 1491(b)(3) (2006).

procure weapons while entering into and terminating contracts at its own pace, especially during wartime. A delay in weaponry has the potential to drastically impact America's ability to engage in war efficiently.

The problem occurs in practice: the courts' deference to the military decreases competition, creating disincentives to innovate.<sup>303</sup> Recently, the U.S. has successfully used the national security defense to engage in anticompetitive behavior: this is partially due to the fact that America is currently engaged in conflict with several nations.<sup>304</sup> The legal system is the only enforcement mechanism guaranteeing that federal agencies abide by the pieces of legislation that govern the procurement process. Giving the Defense Department too much leeway can allow agencies to circumvent the rules without facing any consequences. One recent court even stated, "Accordingly — in this case and at this time — the court has determined that *the interests of open and fair competition* do not outweigh the interests of national defense and security."<sup>305</sup>

---

303. This issue is exacerbated by the fact that there is very little appellate court precedent. *Prot. Strategies, Inc. v. United States*, 76 Fed. Cl. 225, 236 (2007) ("The Federal Circuit has addressed this provision of the Tucker Act on only one occasion . . .") (citing *PGBA, LLC v. United States*, 389 F.3d 1219 (Fed. Cir. 2004)).

304. Surya Gablin Gunasekara, *The Balancing Act: Weighing National Security Against Equitable Procurement Practices*, 20 FED. CIR. B.J. 569, 576–77 (2011) (citing *Kropps Holding, Inc. v. United States*, 63 Fed. Cl. 537, 538–39, 551–52 (2005); *Maden Tech Consulting Inc. v. United States*, 74 Fed. Cl. 786, 790–93 (2006); *EOD Tech., Inc. v. United States*, 82 Fed. Cl. 12, 18, 23 (2008)). See also *Infrastructure Def. Tech., LLC v. United States*, 81 Fed. Cl. 375, 403 (2008) ("[T]he interests of national defense' . . . militates against granting the relief sought . . .") (quoting § 1491(b)(3)); *DataPath v. United States*, 87 Fed. Cl. 162, 166–67 (2009) (placing national security concerns ahead of concerns for competition); *Linc Gov't Servs., LLC v. United States*, 96 Fed. Cl. 672, 702–03 (2010) ("Thus, when military and national security interests are implicated, the public interest factor gains 'inflated' importance in the court's balancing of the equities.").

305. *DataPath*, 87 Fed. Cl. at 166 (emphasis added). To be fair, not all courts have ruled this way, indicating that courts have applied this statute inconsistently. One court stated,

The Tucker Act requires that the Court consider the interest of national defense in its bid protest decisions. . . . "The Court will not blindly accede to such claims but is bound to give them the most careful consideration." While the Court certainly must give serious consideration to national defense . . . allegations involving national security must be evaluated with the same analytical rigor as other allegations of potential harm to parties or to the public.

*Gentex Corp. v. United States*, 58 Fed. Cl. 634, 655 (2003) (quoting *Harris Corp. v. United States*, 628 F. Supp. 813, 822 n.13 (D.D.C. 1986)). See also *Afghan Am. Army Servs. Corp. v. United States*, 90 Fed. Cl. 341, 368 (2009) ("The mere fact that national security concerns are implicated does not create a 'law-free zone' where ordinary applicable legal principles must necessarily yield to the demands of homeland security."); *Sys. Application & Techs. v. United States*, 100 Fed. Cl. 687, 721–22 (2011).

## IV. COMPETITION WILL ENSURE AMERICA'S SAFETY

The goal of U.S. antitrust laws is to maximize efficiency and to benefit consumers.<sup>306</sup> Congress should apply the logic of antitrust laws to the public sector because the government is responsible for securing the safety of the nation. The Defense Department should prefer corporations that either increase the quality of their products or decrease the costs without sacrificing quality. The Department is rife with expensive and delayed projects, indicating a need for reform.<sup>307</sup> If the military wants to promote small businesses, it has sufficient avenues available to it that do not result in a potential decrease in national security. The government's primary goal in decreasing the pool of suppliers and limiting research is to enhance U.S. hegemony. Congress and legal scholars need to recognize that those policies can unintentionally run afoul of the government's goals. Congress should repeal laws that decrease competition and create inefficiencies. Ultimately, Congress needs to apply antitrust logic to the laws impacting the military, and courts need to decrease their deference to the government. This would lead to lower costs combined with higher product quality, benefiting U.S. citizens.

---

306. GAVIL, KOVACIC & BAKER, *supra* note 6, at 40.

307. SCHWARTZ, *supra* note 106, at 1.