

HERO AND VILLAIN: THE DEFENSE PRODUCTION ACT IN THE ERA OF COVID-19

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“You either die a hero or you live long enough to see yourself become the villain.”

- Harvey Dent¹

I. INTRODUCTION

In moments of crisis, heroic acts are typically those that are most decisive. Few statutes embody this sentiment more than the Defense Production Act of 1950 (DPA). The DPA has long been a statutory hero to a country that has needed to adapt to the international and domestic adversities of a post-industrial world. However, the line between hero and villain can often blur when decisive power begins to corrupt. In the nascent stages of the U.S. COVID-19 outbreak, President Trump invoked the DPA to galvanize the production of critical medical supplies for the federal stockpile.² What resulted was a use of DPA power that brought states to their knees.

Part II of this Note will examine the power that the DPA offers and the era of war from which it emerged. Part III will assert that the DPA’s long and protracted evolution has set the stage for unchecked presidential power that has wantonly burdened COVID-stricken states and opened the statute to the harms of political sway. Part IV will explore the judicial and legislative recourse available to remedy the DPA’s demonstrable shortcomings.

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1. THE DARK KNIGHT (Warner Bros. Pictures 2008).
2. Exec. Order No. 13,909, 85 Fed. Reg. 16,277 (Mar. 18, 2020).

Finally, Part V will offer some closing thoughts on one of the nation's most powerful statutes.

II. THE DPA AND ITS PURPOSE

Above all else, the DPA is a statute of pragmatism. The DPA emanates from the governmental objective of ensuring that U.S. domestic industry can satisfy the emergent material needs that arise from war, terrorism, or disaster.³ To this end, the DPA grants the President expansive authority to effect economic policy and streamline the nation's industrial response to threats of national security.⁴ The broad authorities entrusted to the President under the DPA are varied and include the power to designate materials critical to national defense,⁵ prohibit the hoarding of scarce materials,⁶ issue loans to private businesses for the production of critical materials,⁷ and punish the statute's violators.⁸ While subject to certain congressional limits,⁹ the emergency power derived from the DPA nonetheless represents an example of the awesome latitude and responsibility allotted to the executive in times of crisis.

A. *The Priorities and Allocations Provision of the DPA*

Perhaps the President's most acute and practical authority under the DPA stems from the statute's "Priorities and Allocations" section. Under this provision, Congress authorizes the President to compel private entities to accept and prioritize government contracts for the production of materials "necessary or appropriate to promote the national defense," allowing the President to allocate those materials as he or she sees fit.¹⁰ Concerned with the disruptive impact that allocation could pose to the civilian market, Congress amended the DPA in 1953 to ensure that the executive would exercise the power in a manner that would "make available, so far as

3. 50 U.S.C. § 4502(a)(1).

4. MICHAEL H. CECIRE & HEIDI M. PETERS, CONG. RSCH. SERV., R43767, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS 2 (2020).

5. 50 U.S.C. § 4511(a).

6. *Id.* § 4512.

7. *Id.* § 4532(a).

8. Violating the DPA's provisions results in not more than a \$10,000 fine, not more than a year in prison, or both. *Id.* § 4513.

9. Among other limitations, the DPA restricts the President from imposing wage controls, price controls, and gasoline rationing programs without congressional approval. *Id.* §§ 4514(a), 4515.

10. *Id.* § 4511(a).

practicable . . . a fair share of the available civilian supply.”¹¹ Modernly, the DPA upholds such civilian market protections through the following language:

The powers granted in this section shall not be used to control the general distribution of any material in the civilian market unless the President finds (1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.¹²

Seemingly appropriate for a nation in or anticipating crisis, this language provides the legal framework and circumstances under which the President can expedite, allocate, and control the distribution of critical materials even to the detriment of the civilian market.¹³

Despite the stated goal of safeguarding the civilian market, the provision does little to curb the executive’s considerable latitude. The clause purports to bar executive action in the public commercial sphere, yet it simultaneously grants broad discretion to circumvent its restraints.¹⁴ The President can surmount the limiting provision so long as he or she deems a resource to be “scarce,” “critical,” or “essential,”¹⁵ requiring only a unilateral executive determination in the form of a Presidential Order or memorandum to succeed. Once the designation occurs, the executive can set the priority and allocations provision into motion and facilitate federal disruption of the civilian market.

The DPA’s broad definition of “national defense” equally dilutes the civilian market’s protection by providing a wide net of application.¹⁶ “National defense” under the DPA includes “programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity.”¹⁷ The DPA’s definition also extends to the executive prioritization and allocation of materials required to restore critical U.S. infrastructure and supply the federal government’s emergency response to domestic disasters.¹⁸ With this scale of application, the DPA effectively grants the President the power to exercise near-absolute discretion to direct

11. 99 CONG. REC. 7722 (1953).

12. 50 U.S.C. § 4511(b).

13. *See id.*

14. *See id.*

15. *Id.*

16. *See id.*

17. *Id.* § 4552(14).

18. *Id.*

U.S. domestic industry in an extremely broad capacity, and in a multitude of scenarios.¹⁹

While the breadth of the DPA's powers can indeed help to buttress national security and mitigate disasters, wary minds have nonetheless dubbed the DPA "the most powerful and potentially dangerous American law"²⁰ for its sweeping and virtually unfettered authority to influence private markets. Prioritizing national defense over the civilian market would seem to be a feature of the DPA, begging the question of what would occur should the executive push such a priority to its moral limits.

As expansive as such power may appear on its face, it would be misleading to portray the DPA's allocation powers as entirely monolithic or individually operated. To "coordinate and plan for . . . the effective use of the priorities and allocations authorities," the DPA establishes the Defense Production Act Committee.²¹ The committee includes roughly seventeen executive officers,²² each tasked with leading their respective departments,²³ issuing DPA-relevant reports to Congress,²⁴ and executing presidential directives under the priorities and allocations provision.²⁵ Nonetheless, this small army of executive agents and administrative departments is subordinate to a general, and the DPA authority on which these agents act still ultimately flows from the President.²⁶

B. *Predecessors and the Context of DPA Enactment*

Understanding the DPA's modern risks requires an appreciation for the statute's origins in war. At the time of its enactment in 1950, the DPA was the latest evolution of a thirty-year military-industrial metamorphosis. In 1917, the United States entered its first industrialized worldwide conflict in

19. *See id.* §§ 4511(a)-(b), 4522(14).

20. *The California Energy Crisis and Use of the Defense Production Act: Hearing Before the Comm. on Banking, Hous., and Urban Affs.*, 107th Cong. 1 (2001) [hereinafter *Hearings*] (statement of Sen. Phil Gramm, Chairman, Comm. on Banking, Hous., and Urban Affs.).

21. 50 U.S.C. § 4567(a).

22. The Defense Production Act Committee consists of the Secretaries of State, Treasury, Defense, Interior, Agriculture, Commerce, Labor, Health and Human Services, Transportation, Energy, Homeland Security, the Attorney General, the Directors of National Intelligence and the Central Intelligence Agency, the Chair of the Council of Economic Advisers, the Administrator of the National Aeronautics and Space Administration, the Administrator of General Services, and invitations to participate in meetings are extended to the Director of the Office of Management and Budget, as well as the Director of the Office of Science and Technology Policy. Exec. Order No. 13,603, 77 Fed. Reg. 16,651 (Mar. 16, 2012).

23. 50 U.S.C. § 4567(b)(1)(A).

24. *Id.* § 4567(d).

25. *Id.* § 4567(a).

26. *Id.*

World War I.²⁷ In the twilight of the war, Congress enacted the Departmental Reorganization Act, empowering the President to unilaterally reorganize, consolidate, and repurpose the executive apparatus to ensure a more efficient war effort.²⁸ In the shadow of Pearl Harbor just twenty-three years later, Congress again expanded the executive's wartime latitude with the First and Second War Powers Acts of 1941 and 1942.²⁹ Similarly meant to expedite national defense, the Second War Powers Act conveyed to the President powers of government contract prioritization and even allowed authorized executive officers to condemn private land as a means of acquiring real property for military purposes.³⁰

Like its predecessors, the DPA emerged in an atmosphere of external military threat. In the five-year martial respite following V-E Day,³¹ nuclear bombardment of Hiroshima and Nagasaki, and unconditional Japanese surrender,³² the United States became attuned to the silent tension of a burgeoning Cold War.³³ On June 25, 1950, a Chinese and Soviet-backed North Korea invaded its southern counterpart, igniting the Korean War and spurring American intervention.³⁴ Keen on a military response, the Truman Administration pressed Congress for heightened executive authority, framing the invasion as an act of "raw aggression" which threatened the hard-won global peace of World War II victory.³⁵ As a majority of Americans believed World War III was on the horizon,³⁶ President Truman called for enlarging the nation's defense production to contend with the world's communist

27. John Graham Royde-Smith, *World War I: 1914-1918*, BRITANNICA, <https://www.britannica.com/event/World-War-I> (July 21, 2021).

28. Departmental Reorganization Act of 1918, Pub. L. No. 65-152, 40 Stat. 556.

29. MICHAEL H. CECIRE & HEIDI M. PETERS, CONG. RSCH. SERV., R43767, *THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS* 2 n. 6 (2020).

30. *See* Second War Powers Act of 1942, Pub. L. No. 77-507, 56 Stat. 176.

31. Victory in Europe Day, stylized as V-E Day, marks the 1945 surrender of Nazi Germany. Gerald D. Swick, *V-E Day 1945: The Celebration Heard 'round the World*, MIL. TIMES (May 8, 2019), <https://www.militarytimes.com/off-duty/military-culture/2019/05/08/v-e-day-1945-the-celebration-heard-round-the-world/>.

32. *Bombings of Hiroshima and Nagasaki - 1945*, ATOMIC HERITAGE FOUND. (June 5, 2014), <https://www.atomicheritage.org/history/bombings-hiroshima-and-nagasaki-1945>.

33. *See* Erin Blakemore, *What was the Cold War?*, NAT'L GEOGRAPHIC (Mar. 22, 2019), <https://www.nationalgeographic.com/culture/topics/reference/cold-war/>.

34. Allan R. Millett, *Korean War: 1950-1953*, BRITANNICA, <https://www.britannica.com/event/Korean-War> (last visited Sept. 26, 2021).

35. Radio and Television Address to the American People on the Situation in Korea, PUB. PAPERS 537-38 (July 19, 1950).

36. PAUL G. PIERPAOLI, JR., *TRUMAN AND KOREA: THE POLITICAL CULTURE OF THE EARLY COLD WAR* 29 (1999).

superpowers and potential nuclear war.³⁷ By September 8, 1950, the DPA was law.³⁸

In the DPA's initial priorities and allocations volley, the Truman administration focused heavily on steel production meant to supply the renewed American war machine.³⁹ However, the DPA's reach would ultimately expand well beyond steel production and, unlike its predecessors, outlive the conflict that instigated its enactment.⁴⁰ Over fifty reauthorizations in seventy years would significantly prolong its statutory life, allowing the DPA to evolve with the nation's needs and emerge as one of the most expansive statutes in the United States.⁴¹

III. THE PITFALLS OF A COVID-ERA DPA

The exercise of immense and unilateral power, even when essential to survival, is never entirely free from unforeseen consequences, collateral damage, or duplicity. The DPA is no exception. The DPA has three problems: one in its evolution, one in its cost, and one in its abuse. The following will (a) explore the DPA's path to becoming President Trump's industrial response to COVID-19; (b) highlight the civilian-market fallout of applying the DPA during a nationwide pandemic; and (c) evaluate whether a path exists for reigning in the DPA's colossal power.

A. *DPA's Domestic Evolution*

The DPA's first significant step in its domestic evolution occurred during the California Energy Crisis in 2001. A combination of

37. Special Message to the Congress Reporting on the Situation in Korea, PUB. PAPERS 527, 531-33 (July 19, 1950).

38. MICHAEL H. CECIRE & HEIDI M. PETERS, CONG. RSCH. SERV., R43767, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS 2 (2020).

39. DANIEL H. ELSE, CONG. RSCH. SERV., RS20587, DEFENSE PRODUCTION ACT: PURPOSE AND SCOPE 4 (2009).

40. MICHAEL H. CECIRE & HEIDI M. PETERS, CONG. RSCH. SERV., R43767, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS 3-5 (2020).

41. *See id.* at 3.

deregulation,⁴² heatwaves,⁴³ and energy price manipulation⁴⁴ led Pacific Gas and Electric (PG&E), one of California's largest gas and electric providers, to the brink of insolvency.⁴⁵ Californian energy consumption swelled while PG&E's vendors refused to continue supplying the bankrupting company, threatening massive gas shutoffs throughout the state.⁴⁶ To counter the impending crisis, President Clinton invoked the DPA and authorized Secretary of Energy Bill Richardson to compel the suppliers to continue their sales to PG&E.⁴⁷ Averting the shutoff, this decisive DPA action marked the statute's first application that was not traceable to an external threat.

Despite its relative success, the DPA's plunge into the domestic arena did not go unopposed. One vocal critic of the DPA's use during the energy crisis was former Texas Senator Phil Gramm.⁴⁸ In February 2001, during the Senate Committee on Banking, Housing, and Urban Affairs' review of the DPA's role in the energy crisis, Gramm objected to the statute's domestic economic intervention, emphasizing that the DPA's unilateral executive powers were now operating in a world far removed from the imminent geopolitical danger of the Cold War.⁴⁹ Gramm's concern was clear: A wartime defense production statute, enacted in the midst of a bygone external existential threat, was now gaining a greater foothold in domestic commerce.

Although the Senate Committee's investigation concluded that Clinton's DPA action had properly supplied national defense installations within PG&E's service area, Gramm focused instead on the act's civilian market intrusion.⁵⁰ The executive had used the DPA to force PG&E's suppliers to sell "under conditions the supplier did not agree to, at prices they did not agree to, with no guarantee of payment" —all for a gas shortage based

42. The 1996 California Assembly Bill 1890 deregulated California's electricity market, resulting in severe price increases by the year 2000. Nicholas W. Fels & Frank R. Lindh, *Lessons from the California "Apocalypse:" Jurisdiction Over Electric Utilities*, 22 ENERGY L.J. 1, 1, 9 (2001).

43. Todd S. Purdum, *Heat Wave Nearly Causes Rolling Blackouts in California*, N.Y. TIMES (Aug. 2, 2000), <https://www.nytimes.com/2000/08/02/us/heat-wave-nearly-causes-rolling-blackouts-in-california.html>.

44. Richard A. Oppel Jr. & Jeff Gerth, *Enron Forced Up California Prices, Documents Show*, N.Y. TIMES (May 7, 2002), <https://www.nytimes.com/2002/05/07/business/enron-forced-up-california-prices-documents-show.html>.

45. Frank R. Lindh, *Keeping California's Pilot Lights Burning: A Rare Exercise of Presidential Powers*, 16 NAT. RES. & ENV'T 320, 320 (2001).

46. *Id.*

47. *Id.* at 320-21.

48. J. Michael Littlejohn, *Using All the King's Horses for Homeland Security: Implementing the Defense Production Act for Disaster Relief and Critical Infrastructure Protection*, 36 PUB. CONT. L.J. 1, 11 (2006).

49. *Hearings*, *supra* note 20.

50. *Id.* at 9 (statement of Eric J. Fygi, Acting Gen. Couns., Dep't of Energy).

entirely on debt.⁵¹ In Gramm's eyes, such an imposition sowed excessive market uncertainty with the potential of unduly burdening private market participants and taxpayers alike.⁵² Nonetheless, Gramm's inquiry faded in mid-2001, as the September 11th attacks engulfed Congressional focus and brought the conversation of DPA reform to an abrupt end.⁵³

Equally controversial, albeit for different reasons, DPA use (or lack thereof) during Hurricane Katrina marked another turning point in the statute's evolution. Hurricane Katrina remains one of the most devastating hurricanes ever to hit mainland America.⁵⁴ Making landfall on August 29, 2005,⁵⁵ the hurricane's impact coupled with governmental response prompted a new era of scrutiny for federal disaster relief.⁵⁶

Criticisms of inefficiency, indecisiveness, and indifference marred the federal government's response to the Katrina disaster,⁵⁷ particularly in regard to the general lack and mismanagement of emergency supplies.⁵⁸ Despite having the authority to invoke the DPA to galvanize production of disaster relief materials, the Department of Homeland Security ("DHS") and the Federal Emergency Management Agency (FEMA) used the DPA's provisions "sparingly, if it all."⁵⁹ David Kaufman, the former Associate Administrator for Policy at FEMA, explained that the DPA was "peripheral" to the government's relief efforts, adding that: "It was not as well-known as one of those [emergency response] tools until after Katrina."⁶⁰ While difficult to determine whether the DPA would have significantly altered the

51. *Id.*

52. *See id.* at 11-12.

53. *See* Littlejohn, *supra* note 48, at 12.

54. Hurricane Katrina resulted in 1,833 fatalities, displaced over 1 million people, and caused an estimated \$125 billion (or \$176.3 billion in 2021 dollars) in damage across five gulf states (Alabama, Florida, Georgia, Louisiana, and Mississippi). *Hurricane Katrina Statistics Fast Facts*, CNN, <https://www.cnn.com/2013/08/23/us/hurricane-katrina-statistics-fast-facts/index.html> (Aug. 27, 2021, 8:56 PM).

55. *Id.*

56. Littlejohn, *supra* note 48, at 1-2.

57. *See* German Lopez, *Hurricane Katrina, in 7 essential facts*, VOX, <https://www.vox.com/2015/8/23/9191907/hurricane-katrina> (Aug. 28, 2015, 12:10 PM).

58. Chris Edwards, *Hurricane Katrina: Remembering the Federal Failures*, CATO INST., LIBERTY BLOG (Aug. 27, 2015, 2:56 PM), <https://www.cato.org/blog/hurricane-katrina-remembering-federal-failures>.

59. Littlejohn, *supra* note 48, at 4.

60. Thomas Frank, *How the Defense Production Act Became a Disaster Law*, E&E NEWS: CLIMATEWIRE (Mar. 31, 2020) (alteration in original), https://www.cna.org/CNA_files/research/covid/ClimateWire-NL.pdf.

overall outcome of the federal response, Katrina's missteps would ultimately propel the DPA onto the shortlist of disaster relief measures.⁶¹

In total, both the California Energy Crisis and Hurricane Katrina represent pivotal moments in the DPA's evolution. Where the energy crisis displaced the DPA's traditional military character,⁶² Katrina left a void in disaster response that lawmakers sought to fill.⁶³ The DPA would in time firmly shift into this role of internal savior, setting the stage for its application during the COVID-19 outbreak.

B. Taking from the Needy: COVID-19, the DPA, and Civilian Market Burdens

What differentiated the COVID-19 pandemic from previous domestic DPA applications was that the pandemic occurred simultaneously nationwide.⁶⁴ Unlike regional energy shutoffs or coastal hurricanes, the pandemic was not localized to a handful of states.⁶⁵ The frontline was everywhere, causing the demand for scarce medical materials to soar across the country.⁶⁶ Exercising the DPA to innervate medical production would become paramount, and the choice of allocation would mean the difference between life and death for some Americans – all while escalating the burden on the civilian market.

By mid-March 2020, COVID-19 had killed 115 Americans and had yielded 7,327 confirmed cases nationwide.⁶⁷ On March 18, 2020, President Trump issued an executive order declaring a national emergency, and invoking the DPA.⁶⁸ In the Order, President Trump declared that health and medical resources, “including personal protective equipment [PPE] and ventilators,” were critical materials necessary to stem the spread and impact

61. See FRANCES F. TOWNSEND, THE WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA LESSONS LEARNED (2006), https://tools.niehs.nih.gov/wetp/public/hasl_get_blob.cfm?ID=4628.

62. See *Hearings*, *supra* note 20, at 1 (statement of Sen. Phil Gramm, Chairman, Comm. on Banking, Hous., and Urban Affs.), 9 (statement of Eric J. Fygi, Acting Gen. Couns., Dep't of Energy).

63. See TOWNSEND, *supra* note 61.

64. Compare *Trends in COVID-19 Cases and Deaths in the US*, CDC, https://covid.cdc.gov/covid-data-tracker/#compare-trends_newcases (last visited Sept. 17, 2021).

65. See *id.*

66. See *Medical Device Shortages During the COVID-19 Public Health Emergency*, FDA, <https://www.fda.gov/medical-devices/coronavirus-covid-19-and-medical-devices/medical-device-shortages-during-covid-19-public-health-emergency> (last visited Sept. 17, 2021).

67. Jeannette Jiang et al., *COVID-19 Updated Data & Developments - March 18, 2020*, YALE SCH. OF MED. (Mar. 18, 2020), <https://medicine.yale.edu/news-article/23224/>.

68. Exec. Order No. 13,909, 85 Fed. Reg. 16,277 (Mar. 18, 2020).

of the virus.⁶⁹ In turn, the President conferred authority to the Secretary of Health and Human Services (HHS) to determine which companies would prioritize the production of PPE and ventilators, as well as which states would receive the supplies.⁷⁰

By mid-April 2020, HHS had closed priority contracts with several American firms⁷¹ to produce ventilators for the Strategic National Stockpile.⁷² One contract of note was with General Motors (GM) where, following deteriorating negotiations and a Twitter diatribe, President Trump invoked the DPA to compel GM to both accept *and* prioritize the contract.⁷³ Despite a clear resemblance to the forced contracting seen during the California Energy Crisis,⁷⁴ urgent needs overrode any concern for the private market. Former Governor of New York, Andrew Cuomo, voiced such urgency stating: “Yes, it is an assertion of government power on private sector companies . . . But so what. This is a national emergency.”⁷⁵

In practice, the DPA’s priority powers allowed the federal government to jump “to the front of the line” nearly everywhere medical supplies were available.⁷⁶ But where did that leave states and private buyers? The Trump administration instructed non-federal actors to seek out their own supply sources, claiming: “They can get them faster by getting them on their own.”⁷⁷

69. *Id.*

70. *Id.*

71. These firms included 3M, General Electric, General Motors, Royal Philips, Hill-Rom, Medtronic, Res Med, and Vyair Medical. Sergei Klebnikov & Matt Perez, *Trump Ordered These Companies to Make Medical Supplies Under the Defense Production Act*, FORBES (Apr. 8, 2020, 3:33 PM), <https://www.forbes.com/sites/sergeiklebnikov/2020/04/08/trump-ordered-these-companies-to-make-medical-supplies-under-the-defense-production-act/?sh=36672f9570ae>.

72. Press Release, FEMA, *Applying the Defense Production Act* (Apr. 13, 2020), <https://www.fema.gov/press-release/20210420/applying-defense-production-act>. The Strategic National Stockpile is the federal government’s store of emergency medical supplies intended to “support any public health threat” and “to ensure the right resources are ready and can get to the right place at the right time.” Off. of the Assistant Sec’y for Preparedness and Response, Strategic National Stockpile – Who We Are, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://www.phe.gov/about/sns/Pages/about.aspx> (last visited Aug. 9, 2021).

73. Matt Perez, *President Trump Invokes the Defense Production Act, Orders General Motors to Make Ventilators*, FORBES (Mar. 27, 2020, 4:32 PM), <https://www.forbes.com/sites/mattperez/2020/03/27/president-trump-invokes-the-defense-production-act-orders-general-motors-to-make-ventilators/?sh=34abcf5f3b5f>.

74. *Hearings, supra* note 20, at 9 (statement of Eric J. Fygi, Acting Gen. Couns., Dep’t of Energy).

75. Perez, *supra* note 73.

76. Press Release, *supra* note 72.

77. Jessie Hellmann, *Trump Urges States to Secure Their Own Medical Supplies for Coronavirus*, THE HILL (Mar. 16, 2020, 5:23 PM), <https://thehill.com/homenews/administration/487900-trump-urges-states-secure-their-own-medical-supplies-coronavirus>.

Yet with much of the initial wave of medical products going to the federal stockpile, state governors struggled to provide for their respective states.⁷⁸ The already deficient supply—reduced through federal priority and allocation—ignited a bidding war, driving up prices for states and private entities.⁷⁹ Adding insult to injury, statements from then-Senior White House Adviser Jared Kushner⁸⁰ and President Trump himself⁸¹ discouraged states' pleas for additional federal aid while the federal government continued to outbid, out-prioritize, and “poach” state and private orders.⁸²

Therein lies the crux of the civilian market burden under a pandemic DPA. While dire need has eroded civilian market concerns as to the DPA's coercion of private entities,⁸³ new concerns arise regarding the availability of scarce and critical supplies. The ubiquity of COVID-19 ensured that the government could not disperse the cost of relief amongst unaffected states.⁸⁴ As the DPA's 2020 application demonstrated, prioritization and allocation of any degree in a scenario of scarcity will inevitably disrupt the immediate needs of non-federal actors. FEMA spokeswoman, Lizzie Litzow, admitted as much, stating that such actions “can have the unintended consequence of disrupting the regular supply chain deliveries” of other COVID-stricken

78. See Christina Jewett & Lauren Weber, *Trump Administration Uses Wartime Powers to be First in Line on Medical Supplies*, KAISER HEALTH NEWS (Apr. 3, 2020), <https://khn.org/news/trump-administration-uses-wartime-powers-to-be-first-in-line-on-medical-supplies-ppc>; Clary Estes, *States are Being Forced into Bidding Wars to Get Medical Equipment to Combat Coronavirus*, FORBES (Mar. 28, 2020, 6:00 AM), <https://www.forbes.com/sites/claryestes/2020/03/28/states-have-are-being-forced-into-bidding-wars-to-get-medical-equipment-to-combat-coronavirus/?sh=469366981cde>.

79. Estes, *supra* note 78.

80. “[T]he notion of the federal stockpile was it's supposed to be our stockpile; it's not supposed to be state stockpiles that they then use.” Daniel Dale, *Trump Administration Edits National Stockpile Website a Day After it Contradicted Jared Kushner*, CNN, <https://www.cnn.com/2020/04/03/politics/stockpile-website-edited-kushner-claim/index.html> (Apr. 3, 2020, 6:07 PM).

81. Donald Trump told state governors that they “should have been building their stockpiles” and that the federal stockpile should only be a “backup” to their own supplies. Kathryn Watson, *Trump Says States Need to “Work Out” Competing Bids for Medical Equipment for Themselves*, CBS NEWS (Apr. 3, 2020, 7:48 AM), <https://www.cbsnews.com/news/trump-states-bids-medical-equipment-ventilators-supplies/>.

82. Joel Rose, *A ‘War’ for Medical Supplies: States Say FEMA Wins by Poaching Orders*, NPR (Apr. 15, 2020, 4:18 PM), <https://www.npr.org/> (click “search”; then type “A ‘War’ for Medical Supplies”; then follow the link to the article); Jewett & Weber, *supra* note 78; Estes, *supra* note 78.

83. See Perez, *supra* note 73; See *Hearings*, *supra* note 20, at 9-10 (statement of Eric J. Fygi, Acting Gen. Couns., Dep't of Energy).

84. See *Compare Trends in COVID-19 Cases and Deaths in the US*, *supra* note 64.

states.⁸⁵ Essentially taking from the needy to give to the needier, the collateral damage of the priorities and allocations provision in this instance cannot be overstated. While rapid, efficient, and decisive federal distribution might have worked to ameliorate the DPA's inadvertent effects, this was not the case in 2020.⁸⁶

Where in the past, the designating, prioritizing, and allocating of a critical material may have burdened producers, the administration's COVID-era DPA encumbered consumers. State-level supply shortages placed a severe medical burden on the civilian market, and federal intervention fueled the financial strains on state and private purchasers.⁸⁷ Altogether, local and private actors paid an exorbitant price for DPA application, further raising the question of whether the statute's costs had the potential to engulf its benefits.

C. Abuse and Politicization of the DPA

"Nearly all men can stand adversity, but if you want to test a man's character, give him power."⁸⁸ Consequently, the statute at hand presents such a test. The DPA itself is not political, capricious, or malevolent; however, the humans who wield it are perfectly capable of being so. Troubling headlines proved as much in how the Trump Administration both acquired and distributed some of its DPA-herded medical supplies at the height of the initial outbreak.⁸⁹ In sum, the administration's statements and actions would unmask the DPA's potential for abuse and politicization.

85. Zolan Kanno-Youngs & Jack Nicas, *'Swept Up by FEMA': Complicated Medical Supply System Sows Confusion*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/us/politics/coronavirus-fema-medical-supplies.html>.

86. See Press Release, House Comm. on Oversight and Reform, *New Document Shows Inadequate Distribution of Personal Protective Equip. and Critical Med. Supplies to States* (Apr. 8, 2020), <https://oversight.house.gov/news/press-releases/new-document-shows-inadequate-distribution-of-personal-protective-equipment-and>; Justin Wise, *Illinois Governor Says State Has Gotten 10 Percent of Medical Equipment it's Requested*, THE HILL (Mar. 31, 2020, 10:58 PM), <https://thehill.com/homenews/state-watch/490520-illinois-governor-says-state-has-gotten-10-percent-of-medical-equipments>.

87. Estes, *supra* note 78.

88. Often misattributed to Abraham Lincoln, this quote was actually made *about* Lincoln by Robert G. Ingersoll. Dan MacGuill, *Did Lincoln Say, 'If You Want to Test a Man's Character, Give Him Power'?*, SNOPE (Sept. 25, 2019), <https://www.snopes.com/fact-check/lincoln-character-power/>.

89. Noam N. Levey, *Hospitals Say Feds are Seizing Masks and Other Coronavirus Supplies Without a Word*, L.A. TIMES (Apr. 7, 2020, 2:07 PM), <https://www.latimes.com/politics/story/2020-04-07/hospitals-washington-seize-coronavirus-supplies>; Jonathan Allen et al., *Want a Mask Contract or Some Ventilators? A White House Connection Helps*, NBC NEWS (Apr. 24, 2020, 1:30 AM),

Reports of federal agents intercepting and seizing state supply orders began cropping up across the country in early April of 2020.⁹⁰ Prior to the reports, the President had issued a memorandum directing the DHS, in conjunction with the HHS secretary and FEMA, to use DPA authority to “allocate to domestic use, as appropriate,” scarce PPE and respirator equipment.⁹¹ Couched in rhetoric seeking to limit private hoarding and excessive export of medical supplies,⁹² the directive in practice produced frightening results. Medical and state officials in states like California, Colorado, Massachusetts, New Jersey, Kentucky, Texas, and Florida complained of unannounced and unexplained seizures of medical supply orders.⁹³

While FEMA officials assured the media that no such seizures were occurring,⁹⁴ the alleged federal intercepts nonetheless forced state governors and private entities to take matters into their own hands. Much to the chagrin of the President, Illinois Governor J.B. Pritzker began secretly importing PPE from China to avoid losing medical supplies to the federal stockpile.⁹⁵ Similar reports of cloak-and-dagger shipments arose in Massachusetts where Governor Charlie Baker and New England Patriot’s owner Robert Kraft coordinated to circumvent the DPA’s reach, using the professional football team’s private jet to fly critical PPE into the state and “keep the Feds from finding out.”⁹⁶ Amounting to state-sponsored smuggling, these stories nonetheless punctuate the distrust and desperation that developed from the DPA’s abuse.

<https://www.nbcnews.com/politics/white-house/political-influence-skews-trump-s-coronavirus-response-n1191236>.

90. Matt Stout, *Warren to Feds: Why Did You Take Massachusetts’ Medical Supplies?*, BOS. GLOBE, <https://www.bostonglobe.com/2020/03/31/nation/warren-feds-why-did-you-take-massachusetts-medical-supplies/> (Mar. 31, 2020, 9:00 AM); Mia Jankowicz, *Officials in at Least 6 States are Accusing the Federal Government of Quietly Diverting Their Orders for Coronavirus Medical Equipment*, BUS. INSIDER (Apr. 8, 2020, 4:58 AM), <https://www.businessinsider.com/coronavirus-federal-govt-fema-accused-taking-states-masks-ventilator-orders-2020-4>; Levey, *supra* note 89.

91. Memorandum on Allocating Certain Scarce or Threatened Health and Medical Resources to Domestic Use, 2020 DAILY COMP. PRES. DOC. 1-2 (Apr. 3, 2020), available at <https://www.govinfo.gov/content/pkg/DCPD-202000237/pdf/DCPD-202000237.pdf>.

92. *See id.* at 1.

93. Levey, *supra* note 89; Stout, *supra* note 90; Jankowicz, *supra* note 90.

94. Jankowicz, *supra* note 90.

95. Sergei Klebnikov, *Illinois Gov. Pritzker Secretly Bought Medical Supplies from China. And the White House Is Not Happy.*, FORBES (Apr. 18, 2020, 4:59 PM), <https://www.forbes.com/sites/sergeiklebnikov/2020/04/18/illinois-gov-pritzker-secretly-bought-medical-supplies-from-china-and-the-white-house-is-not-happy/?sh=24b7eec87891>.

96. Terry Nguyen, *How the Trump Administration has Stood in the Way of PPE Distribution*, VOX (Apr. 4, 2020, 2:10 PM), <https://www.vox.com/2020/4/4/21208122/ppe-distribution-trump-administration-states>.

Once the federal stockpile began taking shape, the DPA's potential for political influence became clear. While advisers praised President Trump's "very hands-on" approach in distributing supplies, others expressed concern with the White House's departure from the delegative practices typical of DPA usage.⁹⁷ When asked about the administration's cooperation with outspoken democratic governors, President Trump said: "[I]t's a two-way street. They have to treat us well also," hinting that federal assistance could be contingent on a change in the governors' political tune.⁹⁸ On the other hand, republican supporters seemed to fare far better than their democratic counterparts. Republican Senators Cory Gardner and Martha McSally, both of whom were up for re-election at the time of the outbreak, publicly cited their influence with Trump as key to securing ventilators for their respective states.⁹⁹ Furthermore, Florida Governor Ron DeSantis openly cited his state's importance to Trump's re-election bid as a driving force behind Florida's access to the federal stockpile.¹⁰⁰ Despite its denial of DPA politicization,¹⁰¹ the administration's statements and actions suggest that political favor was just as dispositive as actual need when it came to deciding where supplies would go.

Between DPA-sanctioned federal seizures and election-minded distribution, the Trump Administration ultimately fell short of its character test. To be fair, however, the Trump Administration's COVID-era DPA is not the first and only morally questionable exercise of an emergency statute. The Second War Powers Act was instrumental in facilitating the internment of Japanese-Americans during World War II,¹⁰² and the DPA itself was the driving statutory force behind the production of Agent Orange¹⁰³ during the

97. Allen et al., *supra* note 89.

98. Remarks in a Question-and-Answer Session at a Fox News Virtual Town Hall on the Coronavirus Pandemic, DAILY COMP. PRES. DOC. 15 (Mar. 24, 2020), available at <https://www.govinfo.gov/content/pkg/DCPD-202000186/pdf/DCPD-202000186.pdf>.

99. Allen et al., *supra* note 89.

100. *Id. But cf.* Toluse Olorunnipa et al., *Governors Plead for Medical Equipment from Federal Stockpile Plagued by Shortages and Confusion*, WASH. POST (Mar. 31, 2020), <https://www.washingtonpost.com/> (search in search bar for "Governors Plead for Medical Equipment"; then follow link to article) (stating that a White House Official cited Florida's importance to Trump's reelection, and DeSantis office did not respond for comment).

101. *See* Allen et al., *supra* note 89.

102. JR Minkel, *Confirmed: The U.S. Census Bureau Gave Up Names of Japanese-Americans in WW II*, SCI. AM. (Mar. 30, 2007), <https://www.scientificamerican.com/article/confirmed-the-us-census-b/> (explaining how the Second War Powers Act temporarily repealed census confidentiality law and allowed the U.S. Secret Service to acquire names and addresses of Japanese-Americans).

103. In addition to its devastating environmental impact, the herbicide Agent Orange has killed or harmed hundreds of thousands of American soldiers and millions of Vietnamese civilians since it was deployed by the U.S. military. Jamie Reno, *The Lingering Health Effects of Agent Orange*, HEALTHLINE, <https://www.healthline.com/health-news/lingering-health-effects-of-agent-orange>

Vietnam War.¹⁰⁴ This is to say that the dangers of authoritative statutes will consistently correlate to the degree of power granted, a notion that perhaps vindicates critics like Phil Gramm.¹⁰⁵ A design that places such authority in an individual will always be dangerous. So why not minimize its risks?

IV. REFORMING THE DPA

Clear from its pandemic performance, the DPA is not a “one size fits all” industrial solution to national emergency. While broad in its scope and utilization, the DPA’s priorities and allocations provision lacks the substantive civilian market protections and legislative outline to effectively handle the strain of nationwide emergency or prevent misuse of its power. Therefore, to ensure a more efficient statute and avoid presidential abuse, the DPA requires reform.

A. *Judicial Review*

An appropriate starting point in reining in the DPA would be the judiciary. If the exercise of statutory powers violates an entity’s constitutional rights, the Court should have the power to review. Although the DPA raised concerns regarding justiciability in its nascent years,¹⁰⁶ enough precedent exists to infer that the statute is not beyond the Court’s reach.

The DPA’s earliest brush with the judiciary was in *Youngstown Sheet & Tube Co. v. Sawyer* in 1952.¹⁰⁷ Roughly two years after the DPA’s signing, months of labor disputes between steel companies and steelworkers culminated in the announcement of a nationwide strike on April 4, 1952.¹⁰⁸ With the Korean War still raging,¹⁰⁹ halting steel production was tantamount to disaster in the eyes of President Truman.¹¹⁰ On April 8, 1952, Truman declared steel as “indispensable” not only to the war effort but also to the

(June 3, 2016); *see also* Ben Stocking, *Agent Orange Still Haunts Vietnam, US*, WASH. POST (June 14, 2007, 7:40 PM), <https://www.washingtonpost.com/wp-dyn/content/article/2007/06/14/AR2007061401077.html>.

104. *See Hercules, Inc. v. United States*, 516 U.S. 417, 419 (1996).

105. *See Hearings*, *supra* note 20, at 1-2.

106. Note, *The Defense Production Act: Choice as to Allocations*, 51 COLUM. L. REV. 350, 355-56 (1951).

107. 343 U.S. 579 (1952).

108. *Id.* at 582-83.

109. The Korean War would not conclude until July 27 of the following year. Millett, *supra* note 34.

110. *See* Exec. Order No. 10,340, 17 Fed. Reg. 3,139 (Apr. 8, 1952).

nation's pursuit of atomic energy and the survival of the U.S. economy.¹¹¹ Truman then ordered the Secretary of Commerce to seize and coordinate the continued operation of all affected steel mills, totaling eighty-seven sites throughout the country.¹¹²

In what would become a landmark case in curbing inherent executive power,¹¹³ the Supreme Court held Truman's executive order to be invalid.¹¹⁴ Justifying its position in part through DPA authority, government counsel would eventually admit that the order fell outside the statute's constraints.¹¹⁵ Compounding the admission, concurring opinions from Justices Frankfurter and Clark concluded that nothing in the DPA's language provided for the type of outright seizure of private industry that the order sought.¹¹⁶ Though neither the centerpiece of the case's discussion on presidential authority nor a direct examination of the priorities and allocations provision, the Court's brief DPA determination provides an early foundation for judicial review of DPA-related executive action.¹¹⁷

Ralls Corp. v. Committee on Foreign Investment in 2014 saw a similar ruling, albeit in a lower court.¹¹⁸ In that case, the Committee on Foreign Investment in the United States ("Committee") cited the DPA's authority to review corporate transactions when it blocked the Ralls Corporation's purchase of four American companies.¹¹⁹ The District of Columbia Circuit Court of Appeals held that congressional intent did not "preclude judicial review of constitutional claims" arising under the Committee's DPA exercise.¹²⁰

Although neither *Youngstown* nor *Ralls* deals directly with the priorities and allocations provision, both cases illuminate precedent where overstepping DPA authority can garner judicial review. However, while review could ameliorate instances of federal seizures through damage recovery or injunction, the courts have shown a history of using a hands-off approach to the finer moral dilemmas of DPA use.¹²¹ The Court could indeed

111. *Id.*

112. *Id.*

113. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 275-76 (Rachel E. Barkow et al. eds., 6th ed. 2020).

114. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952).

115. *Id.* at 584-86.

116. *Id.* at 603-04, 663 (Frankfurter, J. & Clark, J., concurring).

117. *Youngstown*, 343 U.S. 579.

118. 758 F.3d 296, 312 (D.C. Cir. 2014).

119. *Id.* at 301-02.

120. *Id.* at 312.

121. See *Hercules, Inc. v. United States*, 516 U.S. 417, 426 (1996) (holding that the U.S. government had no contractual obligation to indemnify the producers of Agent Orange despite

evaluate specific instances where an executive order flies outside the bounds of the DPA's language, but outright challenges of DPA constitutionality or presidential action would likely run afoul the political question doctrine¹²² or hinder the executive decisiveness that the statute demands. With a lack of significant or feasible judicial recourse, the road to reform points squarely at the legislature.

B. *Legislative Solutions*

In this case, the DPA's evolving nature could prove to be both the statute's corruptor and its saving grace. While the wide array of DPA applications make terminating the statute all but out of the question, Congress may still employ certain strategies to reel in the executive power it has unleashed. In fact, the Congressional Research Service¹²³ has already proposed such measures.¹²⁴ First, Congress could increase oversight over DPA use¹²⁵ by tasking committees to take a more active role in assessing the DPA's civilian market burdens or the statute's politicization. Second, Congress could redistribute the executive's DPA powers through amendment.¹²⁶ Rather than having all DPA powers flow directly from the President, Congress could diffuse the authorities amongst specific federal agencies.¹²⁷

Furthermore, Congress could amend the statute with specific language that deters politicization and creates more substantive civilian market protections. Such language could include an outright ban on political favoritism or create clear rules for the type of "hands-on" presidential allocation seen during the COVID-19 outbreak. Also, to preclude federally "poached" orders of scarce materials, DPA amendments could apply a limit on federal consolidation that guarantees some degree of purchasing rights to

compelling performance under DPA authority, having "superior knowledge of the hazards" of Agent Orange, and seizing a degree of the plaintiff's processing facilities for Agent Orange production).

122. *Baker v. Carr*, 369 U.S. 186 (1962).

123. Established by Congress and President Woodrow Wilson in 1914, the Congressional Research Service "serve[s] Congress with the highest quality of research, analysis, information and confidential consultation to support the exercise of its legislative, representational and oversight duties in its role as a coequal branch of government." *About CRS: History and Mission*, LIBR. OF CONG., <https://www.loc.gov/crsinfo/about/history.html> (last updated Sept. 16, 2021).

124. MICHAEL H. CECIRE & HEIDI M. PETERS, CONG. RSCH. SERV., R43767, *THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS* 21-23 (2020).

125. *Id.* at 21-22.

126. *Id.* at 22-23.

127. *Id.* at 23.

non-federal actors. To avoid concerns that such protections would impede the DPA's need for rapid action and executive decisiveness, Congress could even go as far as localizing such limitations to a pandemic response provision.

Several paths to DPA reform exist so long as Congress is amenable to it. When national emergencies arise, desires for decisive and authoritative action are sure to follow.¹²⁸ What will make the difference between excessive unilateral power and measured emergency response is whether Congress and the electorate have the perspective to recognize the fallout of extreme executive power and the temper to limit such power when a crisis emerges.

V. CONCLUSION

This Note is by no means meant to negate the DPA's potential to be a statutory hero, but rather suggest that the repercussions of its unilateral nature are now hastening to envelop its merits. On February 5, 2021, the Biden Administration announced plans to invoke the DPA to bolster vaccine production and distribution,¹²⁹ placing the nation on track to vaccinate every American adult by the end of May 2021.¹³⁰ The DPA can be a source for good, however, its effectiveness should not be a coin toss between a prudent or imprudent administration.

For the past seventy years, the DPA has imparted an awesome power and responsibility upon the President; a latitude that can too easily fall victim to the faults of individuals and the influence of politics. The COVID-19 pandemic highlighted that the DPA is not immune to such shortcomings, demonstrating the statute's need for both reevaluation and reformation. When the executive takes from the needy to give to the needier (or more politically agreeable), the political, economic, and moral limits of the DPA become clear.

128. See Perez, *supra* note 73.

129. Emma Court & Josh Wingrove, *Biden Team to Use DPA for Vaccine Manufacturing, Testing*, BLOOMBERG (Feb. 5, 2021, 8:47 AM), <https://www.bloomberg.com/news/articles/2021-02-05/biden-team-to-use-dpa-for-vaccine-manufacturing-testing?srnd=premium>.

130. Zeke Miller et al., *Biden Vows Enough Vaccine for All US Adults by End of May*, AP NEWS (Mar. 2, 2021), <https://apnews.com/> (search in search bar "Biden Vows Enough Vaccine for All US Adults"; then click on link to the article).