

## Using the Defense Production Act To Combat COVID-19 A Talk with Professor Deborah Pearlstein

- Defense Production Act of 1950 (50 U.S.C. §§4501et seq.)
  - Passed during the Korean War
  - Modeled on the War Powers Acts of '41 and '42
  - Original versions gave President power to set prices and wages
  - Scope of Act has broadened over the decades. Has been used routinely to prioritize government contracts and to respond to natural disasters.
  
- Key provisions
  - Title VII, § 702 Definitions<sup>1</sup>
    - (14) National defense  
*programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and ay directly related activity.” Includes emergency preparedness activities conducted pursuant to title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 U.S.C. 5195 et seq.] and critical infrastructure protection and restoration.*
      - 42 U.S.C. §5195(a)(3) Emergency preparedness  
*means all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard.*<sup>2</sup>
  - Title I – Priorities and Allocations
    - § 101 Priority in contracts and orders<sup>3</sup>
      - Authorizes President to require that contracts and orders deemed necessary to promote the national defense take priority over performance under other contracts and to allocate materials, services, and facilities in such manner.
    - § 104 DPA cannot be used to set wage or price controls without congressional authorization.<sup>4</sup>

<sup>1</sup> 50 U.S.C. § 4552, <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title50-section4552&num=0&edition=prelim>.

<sup>2</sup> [https://uscode.house.gov/view.xhtml?req=\(title:42%20section:5195a%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:42%20section:5195a%20edition:prelim)).

<sup>3</sup> 50 U.S.C. § 4511, [https://uscode.house.gov/view.xhtml?req=\(title:50%20section:4511%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:50%20section:4511%20edition:prelim)).

<sup>4</sup> 50 U.S.C. § 4514, [https://uscode.house.gov/view.xhtml?req=\(title:50%20section:4514%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:50%20section:4514%20edition:prelim)).

- Title III – Expansion of Productive Capacity and Supply
  - § 301(a)(1) Allows President to authorize loan guarantees by private institutions.<sup>5</sup>
  - § 302(a) Allows President to make provisions for loans to private businesses.<sup>6</sup>
  - § 303 Other presidential action authorized<sup>7</sup>
    - (a)(1)(A) Authorizes President to make purchases or purchase commitments of an industrial resource or critical technology item.
    - (e)(1) Authorizes President to procure and install equipment in facilities owned by the government and by private businesses.
- Title VII – General Provisions
  - §707 Liability for compliance with invalid regulations; discrimination against orders or contracts affected by priorities or allocations<sup>8</sup>
    - Private party is not liable for damages or penalties resulting from compliance with a rule, regulation, or order pursuant to the DPA. May not discriminate against prioritized contracts under the DPA by imposing higher prices or different terms than for other comparable contracts.
  - § 708(j) Provides for an antitrust defense for any action under voluntary agreement of plans of action under the Section.<sup>9</sup>
- DPA in the COVID-19 pandemic
  - Trump administration
    - Administration employed DPA powers in limited ways for pandemic responses.
    - Employed DPA powers to traditional defense contracts. In July 2020, the Congressional Research Service looked at DPA implementations of the administration and found that \$688 million of \$1 billion appropriated for health resources under the CARES Act was reallocated for defense industrial base investments.<sup>10</sup>
  - Biden administration

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<sup>5</sup> 50 U.S.C. § 4531(a)(1),

[https://uscode.house.gov/view.xhtml?req=\(title:50%20section:4531%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:50%20section:4531%20edition:prelim))

<sup>6</sup> 50 U.S.C. § 4532(a),

[https://uscode.house.gov/view.xhtml?req=\(title:50%20section:4532%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:50%20section:4532%20edition:prelim))

<sup>7</sup> 50 U.S.C. § 4533,

[https://uscode.house.gov/view.xhtml?req=\(title:50%20section:4533%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:50%20section:4533%20edition:prelim))

<sup>8</sup> 50 U.S.C. § 4557, <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title50-section4557&num=0&edition=prelim>.

<sup>9</sup> 50 U.S.C. § 4558(j), <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title50-section4558&edition=prelim>

<sup>10</sup> Cong. Research Serv. Insight IN11470, Defense Production Act (DPA): Recent Developments in Response to COVID-19 (Updated Jul. 28, 2020), <https://fas.org/sqp/crs/natsec/IN11470.pdf>.

- Is expected to use DPA powers to increase supplies in masks, gloves, and other similar products and to increase supplies necessary to vaccinate the population.
- In one of his first acts, Biden issued Executive Order 14001, invoking the DPA to take immediate inventory of materials and supplies to distribute tests and vaccines and to take action to fill shortfalls.<sup>11</sup>

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<sup>11</sup> Exec. Order No. 14,001, 86 Fed. Reg. 7,219 (Jan. 21, 2021).  
<https://www.federalregister.gov/documents/2021/01/26/2021-01865/a-sustainable-public-health-supply-chain>.