



OVERVIEW AND APPLICATION OF THE DEFENSE PRODUCTION ACT

OVERVIEW AND BACKGROUND

Passed in response to the Korean War, the Defense Production Act (DPA) confers upon the President a set of extraordinary authorities, most of which are delegated to several cabinet¹ agencies, to guide domestic industry and resources in the interest of “national defense.”² This includes uses for domestic preparedness, response, and recovery from terrorist attacks, natural disasters, and other national emergencies, such as those that implicate the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

Today, the various delegations of presidential authority are largely codified under [Executive Order 13603](#), National Defense Resources Preparedness. Additional delegations, including those from one cabinet agency to another, are also common (i.e., the Department of Agriculture to the Department of Homeland Security (DHS) under the Agriculture Priorities and Allocations System (APAS), authorizing DHS to place APAS priority rated orders for food resources in response to disasters).³ The DPA is currently divided into three main sections. While the statute and its implementing Executive Orders (EOs) and regulations are expansive and complex, they may be summarized as follows.

Title I: Priorities and Allocations. This authority is used hundreds of thousands of times per year⁴ and allows the President to require domestic businesses to prioritize and accept contracts for materials and services to promote the national defense, including for domestic energy, for both emergency and non-emergency situations. Under EO 13603, whether an action serves the national defense, and can thus be supported by DPA Title I authorities, is first determined by the secretary of defense, homeland security, or energy. Such contracts may be between the federal government and a private contractor, or between two

¹ The cabinet agencies are Defense, Homeland Security, Agriculture, Energy, Health and Human Services, Transportation, and Commerce. See *National Defense Resources Preparedness*, EO 13603, Section 201(a)(1)-(6), <https://www.govinfo.gov/content/pkg/CFR-2013-title3-vol1/pdf/CFR-2013-title3-vol1-eo13603.pdf>, and *Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical Resources To Respond to the Spread of COVID-19*, EO 13911, Section 2(b), <https://www.federalregister.gov/documents/2020/04/01/2020-06969/delegating-additional-authority-under-the-defense-production-act-with-respect-to-health-and-medical>.

² National defense is defined as “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. Such term 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.” 50 U.S. Code §4552(14); Section 702(14) of the DPA.

³ *Agriculture Priorities and Allocations System (APAS) Delegation 2*, Title 7, CFR, Part 789, February 22, 2016, https://www.fema.gov/sites/default/files/documents/fema_apas-delegation-2.pdf.

⁴ Todd N. Tucker, Testimony Before the House Financial Services Committee, Subcommittee on National Security, Illicit Finance, and International Financial Institutions, *Mission Critical: Restoring National Security as the Focus of Defense Production Act Reauthorization*, Mar. 12, 2024, <https://docs.house.gov/meetings/BA/BA10/20240312/116950/HMTG-118-BA10-Wstate-TuckerT-20240312.pdf>.



private entities. Allocation authority, which is used less frequently, addresses controlled materials programs used to maximize the domestic production of goods needed for national defense.

Title III: Expansion of Productive Capacity and Supply. This authority allows the President to incentivize the domestic industrial base to expand the production and supply of critical materials and goods needed for national defense. This includes the issuance of loans and loan guarantees to private businesses to help produce and deliver services essential to national defense.⁵ In addition, Title III allows for federal subsidies for domestic private industry to produce and supply critical goods that are necessary for national defense.⁶

Title VII: General Provisions. This includes key definitions for the DPA and several distinct authorities, such as a preference for small businesses when issuing contracts under the law and the authority to establish voluntary agreements with domestic private industry, including among competing businesses that would otherwise fall within the scope of anti-trust rules. For example, the Maritime Administration manages the longstanding Voluntary Intermodal Sealift Agreement and the Voluntary Tanker Agreement to ensure the maritime industry can respond to the rapid mobilization, deployment, and transportation requirements of the Department of Defense (DOD).⁷

CRITICAL INFRASTRUCTURE RESTORATION AND INCIDENT RESPONSE

DHS⁸ is responsible for providing government-wide coordination and guidance for DPA plans and programs to promote the security and resilience of critical infrastructure, and to give priority to state, local, tribal, and territorial government emergency preparedness activities.⁹ DHS's DPA responsibilities are delegated to the Federal Emergency Management Agency (FEMA).

Although the authority to prioritize contracts under Title I is most often used by DOD for military acquisitions, it has also been used to restore critical infrastructure during emergencies and after disasters, such as when the manufacture of baby formula was expedited in 2022 during a national shortage.¹⁰ In addition, two Hurricane Katrina-related authorizations permitted an owner/operator of a critical infrastructure facility to place a priority rating on its orders to expedite the delivery of power generators and transfer switches that were needed to restore railroad operations in the New Orleans area¹¹ and to

⁵ *Presidential Authorization for the National Defense*, Title 50, U.S. Code, §4531(a)(1).

⁶ *Other Presidential Action Authorized*, Title 50, U.S. Code, §4533(a), Section 303(a)(1)(A).

⁷ *Voluntary Intermodal Sealift Agreement*, 79 Fed. Reg. 64462, October 29, 2014. See also MARAD's website: at <https://www.marad.dot.gov/ships-and-shipping/strategic-sealift/voluntary-intermodal-sealift-agreement-visa/>.

⁸ FEMA, *Use of the Defense Production Act to Reduce Interruptions in Critical Infrastructure and Key Resource Operations During Emergencies*, Calendar Year 2020 Report to Congress, 2021, p. 12,

https://www.fema.gov/sites/default/files/documents/fema_CIKR-report_defense-production-act_2020.pdf.

⁹ *Delegation of Authority to the Secretary of Homeland Security*, Title 15, CFR, Part 700, U.S. Department of Commerce, DPAS Delegation 4, https://www.fema.gov/sites/default/files/2020-03/dpas_delegation_4.pdf.

¹⁰ Joseph Biden, "President Biden Announces First Two Infant Formula Defense Production Act Authorizations," (Briefing Room statement, May 22, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/22/president-biden-announces-first-two-infant-formula-defense-production-act-authorizations/>.

¹¹ FEMA, *Use of the Defense Production Act to Reduce Interruptions in Critical Infrastructure and Key Resource Operations During Emergencies*, Final Report, 2008, p. 12, https://permanent.fdlp.gov/gpo17565/2008/final_ip_report_to_congress_080305.pdf.



facilitate the restoration of levees and waterways in the Gulf Coast.¹² Priority contract ratings were also used to speed the restoration of refinery operations interrupted by flooding and fire during the summer of 2007.¹³

More recently, in February 2021, the President issued [EO 14017](#), which required various departments and agencies to assess potential supply-chain disruption risks within their jurisdictions, including those from cyberattacks, and to come up with strategies under the DPA to mitigate or overcome them.

In response to the COVID-19 pandemic, Congress appropriated \$1 billion to the DPA Fund through the CARES Act in March 2020.¹⁴ From that same time through September 2021, eight EOs related to the DPA and COVID-19 medical supply chain issues were also promulgated.¹⁵ These include [EO 13909](#) and [EO 13911](#), both of which issued were in March 2020, expanding the Department of Health and Human Services (HHS) and DHS/FEMA's authorities to address the pandemic. For example, DHS/FEMA used the DPA's "allocation" authority to control critical materials, services, and facilities to block the export of five types of personal protective equipment.¹⁶

Priority ratings under Title I were used over 100 times in response to COVID-19. For example, HHS and DHS/FEMA used priority ratings on contracts for medical supplies including N95 respirators, ventilators, and goggles, early in the pandemic response, later shifting their focus to vaccines, vaccine-related supplies, therapeutics, and diagnostics.¹⁷ These priority ratings helped manufacturers expedite the delivery of critical supplies and raw materials and support vaccine development. Agencies also invested with commercial companies using DPA Title III authority and other actions to expand the domestic production capacity for a range of medical supplies.¹⁸

The use of DPA authorities to support the response to the COVID-19 response across HHS and FEMA was challenging at the beginning of the pandemic because staff lacked experience¹⁹ and training and because of insufficient staff members²⁰ dedicated to implementing the DPA authorities. For example, FEMA's DPA office had 60 full time employees at the end of the Cold War but only four at the start of the pandemic. To critics, this fact was emblematic of an agency that had all but abandoned its civil defense and national mobilization mission when the Cold War concluded.²¹

Because HHS and DHS/FEMA personnel lacked full understanding of the medical and health supply chains, they were more hesitant to exercise their authorities for fear of causing unwanted disruptions, especially in

¹² Id at 18.

¹³ Id at 19.

¹⁴ The Defense Production Act of 1950, History, Authorities, and Considerations for Congress, October 6, 2023, p. 12.

¹⁵ United States Government Accountability Office (GAO), *COVID-19: Agencies Are Taking Steps to Improve Future Use of Defense Production Act Authorities*, Report to Congressional Committees, 2021, p. 6, <https://www.gao.gov/assets/gao-22-105380.pdf>.

¹⁶ Department of Homeland Security, Federal Emergency Management Agency, 44 CFR Part 328, April 23, 2020, <https://www.federalregister.gov/documents/2020/04/10/2020-07659/prioritization-and-allocation-of-certain-scarce-or-threatened-health-and-medical-resources-for>

¹⁷ GAO, *COVID-19: Agencies Are Taking Steps to Improve Future Use of Defense Production Act Authorities*, p. 7.

¹⁸ Id.

¹⁹ Id at p.12.

²⁰ FEMA, *Pandemic Response to Coronavirus Disease 2019 (COVID-19): Initial Assessment Report*, FEMA Operations January through September 2020, 2021, p. 72, https://www.fema.gov/sites/default/files/documents/fema_covid-19-initial-assessment-report_2021.pdf.

²¹ H. Quinton Lucie, "How FEMA Could Lose America's Next Great War," *Homeland Security Affairs* 15 (2019), Article 1, <https://www.hsaj.org/articles/15017>.



the early days of the pandemic.²² In one case the HHS priority ratings on ventilator and N95 respirator contracts risked a shortage in the meltblown fabric needed to manufacture the items, as 10 suppliers vied for the same material.²³ To address this DHS/FEMA established a five-year “Voluntary Agreement for the Manufacture and Distribution of Critical Healthcare Resources Necessary to Respond to a Pandemic” with manufacturers and distributors in 2020.²⁴

Finally, in 2020, in response to events mostly unrelated to COVID-19, DHS/FEMA prioritized 73 contracts and 66 orders under the DPA. Approximately 47 percentage of these rated orders involved resources needed to house and feed disaster survivors and first responders, communications and information technology, and other logistical needs associated with disaster response and recovery efforts.²⁵

THE FUTURE OF THE DPA

The DPA is an important tool for DHS/FEMA and other federal departments that enables a more effective response to an incident in the homeland that requires the mobilization of America’s industrial base to both repair critical infrastructure and support defense capabilities. Going forward, this could include restoring water and communications systems and power plants, as well as prioritizing access to fuel for affected areas. This is especially true where those needs impact defense installations,²⁶ if a nation state cyberattack were to debilitate power systems for large swaths or strategic areas of the country in the context of ongoing hostilities between the U.S. and a peer or near-peer adversary.

To prepare for such incidents, consistent with EO 13603,²⁷ federal departments should establish partnerships with private industry ahead of time by pre-placing priority ratings for contracts under Title I likely to be needed after a major incident²⁸ and through voluntary agreements under Title VII. This approach is far better than trying to engage with industry in the middle of a crisis and ordering them to turn on a dime to meet immediate needs,²⁹ ³⁰ risking large disruptions to supply chains due to a lack of pre-planning and understanding.³¹ ³² COVID-19 in particular exposed serious gaps across DHS/FEMA for using the DPA

²² FEMA, *Pandemic Response to Coronavirus Disease 2019 (COVID-19)*, p. 71.

²³ GAO, *COVID-19: Agencies Are Taking Steps to Improve Future Use of Defense Production Act Authorities*, p. 14.

²⁴ FEMA, *Pandemic Response to Coronavirus Disease 2019 (COVID-19)*, p. 73

²⁵ FEMA, *Use of the Defense Production Act to Reduce Interruptions in Critical Infrastructure and Key Resource Operations During Emergencies*, p.12

²⁶ In January 2001, President Clinton invoked Title I of the DPA and the Secretary of Energy ordered natural gas suppliers to sell through prioritized contracts at below-market rates to California utility PG&E, which was facing potential bankruptcy. The rationale used to invoke the DPA was the impact the loss of power would have on defense installations in California, including NASA facilities, if PG&E collapsed. See also United States Congress, Committee on Banking, Housing, and Urban Affairs, *Hearing on the Review of the Defense Production Act in Relation to the California Energy Crisis*, 107th Cong., 1st Sess., 2001. <https://www.govinfo.gov/content/pkg/CHRG-107shrg76811/html/CHRG-107shrg76811.htm>

²⁷ E.O. 13603, Section 103(a)-(e).

²⁸ GAO, *COVID-19: Agencies Are Taking Steps to Improve Future Use of Defense Production Act Authorities*, p. 4.

²⁹ FEMA, *Pandemic Response to Coronavirus Disease 2019 (COVID-19)*, p. 69.

³⁰ Matt Perez, “President Trump Invokes The Defense Production Act, Orders General Motors to Make Ventilators,” *Forbes*, Mar. 27, 2020, <https://www.forbes.com/sites/mattperez/2020/03/27/president-trump-invokes-the-defense-production-act-orders-general-motors-to-make-ventilators/?sh=34abcf5f3b5f>.

³¹ Ariel F. Coto, “Hero and Villain: The Defense Production Act in the Era of COVID-19,” *Southwestern Law Review* 51 (2022), pp. 156-173, https://www.swlaw.edu/sites/default/files/2022-02/Article%2012_Coto.pdf.

³² GAO, *COVID-19: Agencies Are Taking Steps to Improve Future Use of Defense Production Act Authorities*, p. 14.



to respond to a major incident, and any capability gaps at DHS/FEMA will be felt at the state and community level where many DPA sourced resources are needed. Comprehensive training will be important first step in addressing these gaps.