

Usage of the Defense Production Act throughout history and to combat COVID-19

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Original post [here](#).

As the Federal Reserve and the Treasury launch programs to provide relief to individuals and businesses affected by the COVID-19 crisis, President Donald Trump has been using a tool that gives him considerable discretionary authority over private corporations: the [Defense Production Act \(DPA\)](#).

The DPA gives the president the authority to compel the private sector to work with the government to provide essential material goods needed for the national defense. The Act currently includes the following powers:

- Title I: Prioritization and Allocation. This allows the president to designate specific goods as “critical and strategic” and require the private businesses to accept and prioritize government contracts for these goods. Thus far, the government has used this to enhance production of key medical supplies and personal protective equipment (PPE), including \$2.9 billion to purchase over 187,000 ventilators by the end of the year.
- Title III: Expansion of Productive Capacity and Supply: This allows the president to make loans and provide guarantees to businesses, directly purchase critical and strategic goods, and repurpose production facilities in order to increase production capacity. So far, the administration has spent \$208 million under the direct purchase authority in Title III to increase capacity for nasal swabs and respirators in limited amounts. The other powers have not been used.
- Title VII: General Provisions. This allows the president to enter into voluntary agreements with private businesses to coordinate the production of critical and strategic goods. These are subject to some antitrust protection and have yet to be used.

In addition, the CARES Act provided some Title III reporting relief and appropriated \$1 billion to the DPA Fund. However, comprehensive usage is hard to capture; DPA contract awards are kept confidential, since the Act has traditionally been used for military technology.

This post provides background for better understanding of available authorities under the DPA and a full picture of their usage in response to COVID-19 crisis. Additionally, it highlights some criticisms around the current usage of authorities.

Background and Origination of the DPA

While the original DPA was signed into law in 1950 by President Harry Truman, the president’s authority for industrial reorganization and prioritization can be traced back to World War I. The official declaration of war, signed on April 6, 1917, stated that the president could “employ...the resources of the Government to carry on war against the Imperial German Government” (see [here](#)). President Woodrow Wilson used this authority to create two temporary federal agencies: the National War Labor Board and the War Industries Board. The former was primarily used to mediate labor disputes and the latter allowed the government to settle labor-

management disputes, set quotas, and allocate and prioritize the production of critical wartime goods.

The advent of World War II saw the creation of even more expansive emergency authority: The War Powers Act. The [first War Powers Act](#) was passed on December 18, 1941, and gave the president broad powers to reorganize the functions of any executive agency for the purpose of fighting the war. President Franklin Delano Roosevelt issued a total of 75 executive orders under this act (see [here](#), pp. 5710, 5729). The [second War Powers Act](#), signed into law on March 27, 1942, allowed the president to allocate resources, acquire land and property, and compel businesses to take on government contracts for national defense. The second Act also permitted the Federal Reserve to purchase up to \$5 billion in Treasury bonds directly from the U.S. government. Both of the acts expired either during World War II (the second Act), or shortly after (the first Act). While the basis for its authority was sewn in World War I, the two War Powers Acts are the predecessors to the DPA.

Dramatic defense budget cuts followed World War II due to a lack of need and an increased reliance on atomic weaponry. Additionally, demand for housing and consumer products shot up as wartime controls lapsed, culminating in a series of [labor strikes](#) in 1946. The onset of the Korean War amplified the need for dramatic industrial reorganization, and President Harry Truman quickly [pushed](#) for authority similar to what his predecessor had used. As such, the Defense Production Act ultimately was signed into law on September 8, 1950.

What powers does the DPA grant the government over private industry?

The DPA allows the president to “shape national defense preparedness programs and to take appropriate steps to maintain and enhance the domestic industrial base” (see [here, pp. 2](#)).

The Act’s three tools are allocation and prioritization of contracts for critical and strategic goods (Title I), expansion of productive capacity through financial incentives (Title III), and voluntary agreements with private industry (Title VII). The [original act](#) included four other titles that Congress allowed to expire. These authorities allowed the president to requisition private property (Title II), fix wages, prices and ration goods (Title IV), forcibly settle labor disputes (Title V), and control various aspects of consumer credit (Title VI).

The Act also includes a sunset provision that requires it to be reauthorized every few years, which allows changes to be made to ensure the law can account for new developments. When reauthorizing, Congress has occasionally amended the definition of “national defense.” It now extends beyond military application to homeland security and national emergencies, such as those invoked by a terrorist attack or pandemic.

Four major amendments to the definition have been made since the DPA’s inception. In 1975, the definition was [expanded](#) to include space activity. The [1980 reauthorization](#) of the Act designated energy as an essential material good. In 1994, the scope of the DPA was significantly broadened to incorporate emergency preparedness during natural disasters or other events that caused national emergencies under Title VI of the [Stafford Act](#) (see pp. 71 - 85). The [fourth amendment](#) in 2003 added “critical infrastructure protection and restoration” to the definition of national defense.

Title I of the DPA gives the president the authority to compel businesses to prioritize and accept contracts for goods that are designated as “critical and strategic” for the national defense, much like in the second War Powers Act. These goods are designated as such by the president, who

can allocate, distribute, and restrict their supply as needed. Any contracting decisions made under this must be made with a “strong preference” for small businesses, especially those in economically depressed areas. Title I also includes provisions to prevent the hoarding of materials.

Title III complements Title I’s allocation and prioritization authority by providing tools to expand domestic industrial capacity. It allows the president to incentivize private business to expand their production capacity of critical goods if more are needed. These incentives can include loans, loan guarantees, direct purchases and purchase commitments, as well as the ability to outright produce and install equipment in private facilities (see [here](#), pp. 13 - 16). The president can also designate Federal Reserve banks as fiscal agents to administer guarantees (see [here](#), pp. 9).

Generally, the incentives must be:

1. For goods designated as critical and strategic only
2. For institutions that cannot obtain credit elsewhere to produce critical and strategic goods
3. For businesses with sufficient creditworthiness and earning power
4. The most “cost-effective, expedient, and practical alternative”

There are additional requirements based on the form of the incentive. Both loans and guarantees are priced at rates that are commensurate to Treasury yields of similar maturities, while direct purchases of goods will be made at the ceiling price, or domestic market price if no ceiling price has been established. If the aggregate amount of any potential assistance exceeds \$50 million the president must notify Congress and wait 30 days before disbursing any funds. Additionally, an Executive Order passed in 2012 requires an act of Congress for all Title III projects exceeding \$50 million. Historically, very few of these projects were expected to exceed \$50 million (see [here](#), pp. 11).

However, the DPA gives the president a considerable amount of reporting flexibility. The \$50 million congressional reporting threshold can be waived if the actions are taking place during a national emergency or if the president determines that doing so would “severely impair” capability. This discretion can also be exercised when providing assistance that would prevent a company from becoming insolvent or undergoing bankruptcy proceedings, which is generally not permitted. The president can even set maximum amounts, interest rates, guarantee and commitment fees, and other charges.

The primary difference between Title I and Title III is that the former allows the government to direct industry to prioritize existing resources, while the latter allows the government to direct industry to expand these resources.

The Department of Defense (DoD) is the most frequent user of both Title I and Title III authority. It prioritizes about 300,000 orders each year under Title I and is the only federal agency with a standing [Title III program](#) (see [here](#), pp. 8). It has primarily used Title III to “mitigate critical shortfalls in domestic defense industries;” most recently, it used Title III in July 2019 to expand production capacity for rare earth elements, which are essential components of key military technologies (see [here](#)).

Title VII includes a number of general provisions that grant the president additional reorganization capacity. The most noteworthy of these have to do with the power to create “voluntary agreements” between the government and private industry. During periods of severe stress, the president can consult and create renewable, five-year “voluntary agreements and plans of action” to coordinate the production of goods.

As originally written, Title VII also gave complete antitrust immunity to businesses engaged in these agreements. However, the DPA now provides them special legal defense if their actions violate antitrust laws instead of complete immunity. The government had used similar authority under the [1942 Small Business Mobilization Act](#), which mobilized small business production capacity for World War II and created a Smaller War Plants Corporation that would make loans to these businesses (see [here](#), pp. 6 - 11).

Title VII also includes the authority of the President, generally through the Committee on Foreign Investment in the U.S., to unilaterally review any merger, acquisition, or takeover to assess its impact on national security (see [here](#), pp. 39 - 40, pp. 45 - 46). If the review finds that the transaction could be harmful to national security or is foreign-government controlled, the president can suspend or outright prohibit a transaction from taking place. Title VIII also authorizes the president to establish a National Defense Executive Reserve to train members of private industry to be placed in higher-level government positions during periods of national emergency, though none currently are active (see [here](#), pp 35).

Much of the allocation and spending under the DPA is done through the Defense Production Act Fund, which receives and manages appropriated money for the purposes outlined above. Up to \$750 million may be kept there indefinitely, with any excess amounts from repayments, fees, or premiums being returned to the Treasury at the end of each fiscal year. Other government agencies are allowed to appropriate money to the Fund, with the Departments of Defense and Energy being two recent examples (see [here](#), pp. 16). [Executive Order 13603](#), the most recent DPA amendment, assigned the Secretary of Defense as the manager of the DPA fund.

The DPA’s authority has often been delegated to the heads of government agencies and departments. President Truman was the first to do this through Executive Order 10161, issued a day after the DPA was signed into law (see [here](#)). Under this order the heads of government agencies were given Title I, III, and VII authority for national defense matters that fell within the scope of their respective agencies. The Secretary of Agriculture, for instance, was given prioritization authority over food resources and related facilities. Over the years, the authority given under Executive Order 10161 has been amended as the definition of national defense has developed and the U.S. industrial base has changed.

DPA Usage during the COVID-19 crisis

The Trump administration alluded to using the DPA on [February 28](#) but did not officially invoke it until [March 18](#), five days after the national emergency was declared. Shortly after, the administration issued Executive Orders [13909](#) and [13910](#), which gave the Secretary of Health and Human Services (HHS) Title I prioritization authority, as well as the ability to introduce hoarding restrictions for PPE and critical medical equipment. Management and coordination of all DPA programs were delegated to a White House trade advisor, [Peter Navarro](#).

[Executive Order 13911](#) (EO 13911) delegated Title III authority to the Secretaries of HHS and Homeland Security (DHS) to respond to the COVID-19 crisis. EO 13911 also granted the DHS Secretary Title I and anti-hoarding authority given to HHS in the previous executive orders.

Additionally, the president waived many of the Title III reporting requirements to provide loans and guarantees, or purchase items during the national emergency. Aid packages exceeding \$50 million do not have to be reported to Congress and sales prices for direct purchases were made more flexible. Even goods that are not critical and strategic are eligible for Title III assistance.

EO 13911 also delegated the right to form voluntary agreements under Title VII to both Secretaries with the approval of the president. This may raise some antitrust concerns, but the DPA provides for some antitrust protection and federal regulators [stated](#) that the exceptional circumstances surrounding the crisis may necessitate joint ventures between businesses, and that they would take these into account when enforcing antitrust laws.

[Executive Order 13922](#), issued on May 14, gave Title III authority to the CEO of the U.S. International Development Finance Corporation (DFC). The DFC, formed in October 2018, provides up to \$60 billion annually in investment financing for developing countries across the world (see [here](#)). EO 13922 requires the CEO of the DFC to work with the HHS and DHS Secretaries to make loans that enhance the domestic COVID-19 response or that support “the resiliency of any relevant domestic supply chains.”

Section 4017 of the [CARES Act](#) provided additional Title III relief:

- Two-year exemption from the requirement that Congress approve loans and guarantees exceeding \$50 million.
- Two-year exemption that allows the balance of the DPA Fund to exceed \$750 million.
- One-year reporting relief of requirement to notify Congress and wait 30 days after notification to provide Title III assistance exceeding \$50 million for one year.

On March 31, the Secretary of HHS used Title I authority to designate a number of health and medical resources, such as respirators with an N-95 effectiveness level, portable ventilators, disinfecting devices, and PPE, as “scarce or threatened” (see [here](#)). This designation lasts until the end of July.

The White House has issued a number of presidential memoranda to complement its executive orders. One [memorandum](#), issued on March 27, required the Secretary of HHS to use Title I authority in compelling General Motors (GM) to prioritize contracts for a potentially unlimited number of ventilators. [Another](#) banned the export of scarce or threatened PPE.

Two months after the DPA was invoked, HHS finalized a number of contracts to provide over 187,000 ventilators by the end of the year. See Table 1 for a list of DPA ventilator contracts.

While DPA authority had been delegated to the Secretary of DHS, [existing regulations](#) meant that this responsibility had been delegated to Federal Emergency Management Agency (FEMA), which is the primary federal disaster relief agency in the U.S. (see [here](#)). Under this regulation, FEMA has the role of brokering sales to third parties to obtain critical health and medical supplies and directly prioritizing which businesses receive supplies (see [here](#), pp. 28502, 28504). Additionally, HHS has [worked out](#) an arrangement under the DPA with The 3M Company to produce a total of 166.5 million masks over the next few months.

Table 1: Title I COVID-19 Ventilator contracts (\$millions)

Company	Contract Amount	Ventilators Produced (end of 2020)
Phillips	\$646.7	43,000
Hamilton	\$552	14,115
General Motors	\$489.4	30,000
Vyair	\$407.9	22,000
Zoll	\$350.1	18,900
General Electric, Ford	\$336	50,000
GE Healthcare	\$64.1	2,410
ResMed	\$31.98	2,550
Hillrom	\$20.1	3,400
Medtronic	\$9.1	1,056

Source: Department of Health and Human Services press releases

The DPA Fund, according to the government’s most recent budget, had an estimated \$228 million available (see [here](#), pp. 276). The CARES Act has augmented this by providing an additional \$1 billion for DPA activities out of \$50 billion that was released for the COVID-19 crisis when the Trump administration declared a national emergency in March (see [here](#)).

Government agencies, such as HHS, have only used Title I authority thus far, but the lack of funding in the DPA Fund may prove to be a limitation if U.S. industrial capacity as a whole needs to be expanded through Title III, rather than repurposed.

Title III has only been used twice by the DoD since the DPA was invoked over two months ago. The DoD used Section 303 to scale up production of both [nasal swabs](#) and [N-95 masks](#), investing an estimated total of \$208 million. However, the loan and guarantee authority in Sections 301 and 302 of Title III has not been used in decades. The projects done under Title III are done each year under Section 303, which allows the government to make direct purchases of goods and repurpose production facilities for national defense matters (see [here](#), pp. 14).

Criticism of the DPA during COVID-19

While the Trump administration has used the DPA to some extent, many have professed that its approach has been too little, too late. Shortly after the national emergency was declared, 57 members of the House of Representatives wrote a [letter](#) to the president imploring him to use the DPA, citing insufficient testing and widespread shortages of critical supplies. Even after activating it, the administration characterized the DPA as a break-the-glass authority, likening it to [nationalization](#) and as unnecessary since they argued businesses were [voluntarily increasing production](#).

On March 30, the U.S. Conference of Mayors, which represents over 1,400 mayors in large and medium-sized cities, sent a [letter](#) to the president requesting full usage of Title III to increase

the production of critical medical supplies that cities are having difficulty obtaining. These concerns have even prompted a legislative [proposal](#) to federalize the entire medical supply chain. The proposal would have the Secretary of Defense appoint an Executive Officer for Critical Medical Equipment and Supplies, who would use DPA authority to “oversee all acquisition and logistics functions related to the [COVID-19] response.” All requests for equipment would be directed to the Executive Officer, who would report weekly on the production capacity and supply needs of the U.S. and make recommendations based on these.

Concerns about the lack of medical supplies have persisted for years. A [2015 study](#) by government researchers estimated the number of N-95 respirators that would be needed for a hypothetical flu outbreak. In the more conservative “base” scenario, the researchers found that respirator demand ranged from 1.7 billion to 3.5 billion over the course of the outbreak. A second [study](#), conducted in 2017, evaluated the responsiveness of the U.S. medical supply chain based on previous experiences, such as the 2009 H1N1 and 2014 Ebola outbreaks. The researchers found that reliance on imported medical goods, a lack of “surge capacity”, and unclear government guidance and monitoring of these goods leaves the U.S. vulnerable. HHS estimated at the beginning of March that the U.S. would need about 3.5 billion N-95 respirators over the next year if COVID-19 developed into a “full-blown” pandemic. At the time, the government had a stockpile of about 35 million (see [here](#)).

The most notable example of the DPA’s usage has been to increase the production of ventilators through Title I authority. Usage of Title III authority, however, has been “[totally inadequate](#)”, according to a letter written by nine prominent U.S. Senators on May 6. There is still approximately \$1 billion that could be used for Title III projects. Lack of fiscal capacity could pose a problem for Title III usage, but several members of Congress stated that they would be willing to advocate for additional funding (see [here](#)). Theoretically, delegating Title III authority to the HHS and DHS Secretaries should promote expediency, but that has not happened so far. Lawmakers have been critical of Title III delegation to the CEO of the DFC, citing its lack of experience in the medical supply chain, domestic markets and relevant industrial reorganization expertise (see [here](#)).

Another concern has been the lack of transparency around DPA contract awards, as there is no requirement for these to be reported. Secrecy is often necessary when discussing and developing military technology during wartime but some COVID-19 contracts have been given to companies that are in [questionable financial status](#) or have [little-to-no background](#) in medical supplies.

The U.S. medical supply chain is built to maximize efficiency and leave little room for excess supply, which slows manufacturers’ ability to scale up production in times of crisis. COVID-19 export restrictions have received some [backlash](#), warning that these could lead to retaliation from trading partners and exacerbate shortages of other medical goods. In one case, a company contracted with the U.S. government [decried](#) the “significant humanitarian implications” associated with the administration’s export restrictions. The U.S. is a net importer of medical goods, and retaliatory trade policy, combined with existing production issues, could exacerbate already-known and serious flaws in the domestic medical supply chain. As the country begins to re-open, it is unclear how much more the administration plans to use the DPA.