

**HERO AND VILLAIN: THE DEFENSE
PRODUCTION ACT IN TI**

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-

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

deregulation,⁴² heatwaves,⁴³ and energy pron,

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

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’

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

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

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

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.

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