

From Shortages to Stockpiles: How the Defense Production Act Can be Used to Save Lives, Make America the Global Arsenal of Public Health, and Address the Security Challenges Ahead

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INTRODUCTION

Decisionmakers often speak of using all the tools of national security to address a crisis. However, in the context of the COVID-19 pandemic, which as of

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June 2020 had taken more than 116,000 American lives and counting, the federal government has not done so. The Defense Production Act (DPA) is a case in point. Rather than play to what General Michael Hayden refers to as the edge of the law (or anywhere near the edge), the federal government has been slow to use the authority it has to rapidly generate medical supplies at scale. In time, it has used the Act, but only in an episodic rather than systemic way to replenish the Strategic National Stockpile (SNS).¹ However, the DPA may yet prove an important authority for producing a COVID-19 vaccine at scale, for constructing a long-term, secure, and independent medical supply chain, and to stimulate the economy by making America a global arsenal of public health. Moreover, it is not too soon to identify and incorporate the lessons to learn from how the DPA was and was not used at the outbreak of the COVID-19 pandemic. These are lessons we will need to act upon in preparing for the 21st Century challenges to come.

The DPA was enacted in 1950 to provide the federal government with authority to systemically mobilize the industrial capacity of the nation to address national security emergencies. The Act was modeled on World War II laws giving the president authority to mobilize the industrial might of the nation, making America “the arsenal of democracy.” With the coming of the Cold War and the hot war in Korea, Congress renewed many of these authorities addressed to what was referred to as the Defense Industrial Base (DIB). The 1950 law was written with Cold War breadth and a 1950s sense of confidence in the institutions of government and the presidency. However, the Act has been reauthorized 53 times, as recently as 2019. And while initially passed with steel and tanks in mind, the law now expressly covers “critical infrastructure,” “critical technology,” “national economic security,” and “national public health and safety.”² It also applies to manmade and natural disasters as well as to wartime contexts.³

Today, the DPA is primarily used to prioritize Department of Defense (DOD) contracts and to incentivize the production of defense goods for which there is otherwise too small a market to generate organic production. However, in the context of a pandemic, we should not lose sight of the law’s broader purpose to mobilize the nation’s industrial capacity to meet national security challenges. This is reflected in the law’s first congressional policy finding: “the security of the United States is dependent on the ability of the domestic industrial base to

1. 42 U.S.C. §247d-6b (2018). Originally called the National Pharmaceutical Stockpile, the SNS was created in 1999 and originally managed by CDC. It was renamed the SNS in 2004 and management over the SNS was transferred from the CDC to the Department of Health and Human Services (HHS) Office of Preparedness and Response in 2018. However, the law states that the Secretary of HHS “shall maintain a stockpile” in “collaboration” with the Assistant Secretary for Preparedness and Response and the Director of the CDC and do so in “coordination” with the Secretary of the Department of Homeland Security (DHS).

2. Defense Production Act of 1950, Pub. L. No. 81-774, §702(2), 64 Stat. 798, 815-16 (1950) (codified as amended at 50 U.S.C. §§4501-4568 (2018)). Citations in this article refer to the original sections of the 1950 DPA.

3. *See id.* at §702(14).

supply materials and services for the national defense and to prepare for and respond to . . . natural or man-caused disasters . . . within the United States.” It is also reflected in Section 107, which states, “The President shall take appropriate actions to assure that critical technology, essential materials, and industrial resources are available from reliable sources . . . when needed to meet a national emergency.”

This article introduces the reader to the DPA. Section I presents its core authorities, including the way they have generally been used by the government before and during the first six months of the pandemic. Section II considers some real and perceived concerns with the Act’s potential use, as well as the safeguards embedded in the Act that would, or could, address these concerns. Section III identifies eight issues regarding the Act. These issues should be addressed as soon as possible within the government, and if necessary, by Congress, if the Act is going to be used effectively to produce pandemic medical supplies, including, we hope, tests and a vaccine at scale, and to assure that we are better prepared for the next challenge to come. One such issue is transparency. While the Act requires annual reporting, and presidents have issued public executive orders invoking the Act, much of DPA practice is conducted in a confidential and opaque manner at the department and agency level. Without greater systemic transparency regarding the medical supplies that are needed and are being produced, and their allocation priority, it is not possible for the public to assess whether the DPA or other authorities are being used effectively. Neither is it possible for Congress to determine whether additional authority is needed. As importantly, health systems cannot prepare for supply chain contingencies.

The article concludes by identifying three lessons from the pandemic, each with a link to the DPA. First, the pandemic demonstrates anew that public health and the economy are national security issues and that they are linked. Second, government matters, expertise matters, and logistics matter. Third, an effective response to a pandemic requires national mechanisms to rapidly produce and allocate medical resources, so that states do not compete for supplies and supplies are made available based on public health factors rather than market leverage. Used wisely and well, the DPA provides one mechanism to help address each of these lessons. That is why it is imperative that policymakers address the issues identified in Section III and do so now. The DPA might yet be an essential tool for the production, roll-out, and allocation of a vaccine. It will also be an essential tool in meeting the challenges of a technological race with China, as well as climate change.

I. DPA AUTHORITIES AND USE

The DPA consists of seven Titles; however, only three remain in force: Titles I, III, and VII.⁴ Let us start with Title I, which among other things, provides

4. This is noted because specialists often refer to the DPA by Title and not by statutory section.

prioritization and allocation authority for “materials, services, and facilities.” The key language is found in Section 101(a)(1):

The President is hereby authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance

Prioritization allows the government to move its contracts to the front of the line and do so on an urgent basis. The Department of Defense (DOD) uses this authority approximately 300,000 times a year, designating “rated” contracts as either “critical to national defense,” which requires approval at the undersecretary level, or of “highest national defense urgency,” which requires approval by the Secretary or Deputy Secretary of Defense.⁵ Six other agencies, including the Department of Homeland Security (DHS), have been delegated Section 101 authority by Presidents Obama and Trump.⁶ Prior to the pandemic, use of this authority required the relevant Secretaries to designate eligible programs “as necessary or appropriate to promote the national defense.”⁷ These agencies use the authority less often than the DOD, and for varied reasons. According to its website, DHS uses the authority to ensure on-time performance of contracts and to address supply chain problems.

The allocation authority in Section 101(a)(2) allows the government “to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he [the President] shall deem necessary and appropriate to promote the national defense.” Where this section is used to “control the general distribution of any material in the civilian market,” in exercising “the powers granted in this section” (*i.e.*, prioritization and allocation) the President is required to make two predicate findings as stated in Section 101(b):

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.

5. U.S. DEP’T OF DEF, DoD 4400.1-M, DEPARTMENT OF DEFENSE PRIORITIES AND ALLOCATIONS MANUAL (Feb. 21, 2002).

6. *See* Exec. Order No. 13,603, 77 Fed. Reg. 16651 (Mar. 16, 2012), as well as the orders discussed in Section I of this article.

7. *Id.*

The allocation authority was used during the Korean War with petroleum and steel to make sure the country's defense needs were met first before being allocated to the rapidly expanding domestic market for cars and household goods.⁸ Prior to the pandemic, the only apparent extant use of this authority was with the contingency designation of certain commercial aircraft and tankers for the Civil Reserve Air Fleet.⁹

To prevent hoarding and price gauging (“in excess of prevailing market prices”), Title I provides authority for the President to designate “scarce materials or materials the supply of which would be threatened by such accumulation.” The President may prescribe conditions making the accumulation of such materials unlawful “as he deems necessary to carry out the objectives of this Act.” Section 104 states that “no provision of this Act shall be interpreted as providing for the imposition of wage or price controls without the prior authorization of such action by a joint resolution of Congress.” Title IV of the Act providing for Wage and Price Stabilization expired in 1953 and was repealed in 2009. However, implicit in Section 104 is an understanding that wage and price controls might be used in conjunction with the DPA's other authorities, but only with specific congressional authorization.

Title III provides an array of incentive authorities to encourage industry to provide goods and services essential for national defense. These include federal loan guarantees (Section 301), federal loans (Section 302), and federal procurement power, including authority to enter into advance purchase commitments so a company does not bear the risk of production without a guaranteed buyer (Section 303). Each section includes predicate determinations and findings as well as reporting requirements to Congress, and in the case of loan guarantees additional congressional legislation. Section 304 of the Act establishes a fund “to carry out the provisions and purposes of this Title.”¹⁰ Annual Defense Production Committee (DPAC) reports indicate that DOD uses Title III authority in a “highly tailored” way about 20-30 times a year, in order “to create, maintain, protect, expand, or restore domestic industrial base capabilities.”¹¹

Title VII includes many relevant authorities and definitions. Title VII includes authority for the President to consult with industry and develop industry “plans of action” without running afoul of antitrust laws or FTC regulations that would otherwise restrict such coordination. Title VII, Section 706, also provides U.S. district courts with jurisdiction over enforcement of the Act, as well as over any rule, regulation, order, or subpoena under the Act. Section 705 provides broad

8. See Chong-do Hah & Robert M. Lindquist, *The 1952 Steel Seizure Revisited: A Systematic Study in Presidential Decision Making*, 20-4 ADMIN. SCI. Q. 587 (Dec. 1975).

9. See U.S. Dep't of Transp., *Civil Reserve Air Fleet Allocations* (Aug. 13, 2020), <https://perma.cc/G3GF-8EXG>.

10. In FY 2020 \$64.4 million was appropriated to the fund. See CONG. RESEARCH SERV., R43767, *THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS* 13 (Mar. 2, 2020).

11. Dep't of Def. Industrial Policy, *DPA Title III Overview*, <https://perma.cc/3AEX-ET5V>.

authority for the government to gather information from “any person as may be necessary or appropriate, in his [the President’s] discretion, to the enforcement or administration of this Act.” This section also provides authority to conduct industry assessments so that the government can determine which entities have the capacity to produce needed items. This authority might be critical, for example, in cases where the U.S. supply chain is dependent on foreign suppliers and/or is subject to a single point of failure, and the U.S. government wants to identify alternative, secure, or redundant sources of supply. Section 705(c) makes failure to perform any act required by this section, or disclosure of information obtained pursuant to this section that the President deems confidential, subject to up to one year of confinement or a fine of not more than \$10,000.

Title VII also includes statutory enabling authority for the Committee on Foreign Investment in the United States (CFIUS), one of the principal executive instruments for safeguarding U.S. industry and the supply chain for national security reasons.¹² Notably, Title VII also provides statutory enabling authority for the Defense Production Act Committee, which is Chaired by the Administrator of FEMA, and the Federal Priorities and Allocation System (known as the Defense Priorities Allocation System or DPAS in the DOD), both of which are intended to oversee implementation of the DPA and create a standing bureaucratic mechanism to implement the law.

A. Presidential Pandemic Practice

As of June 1, 2020, President Trump had issued five executive orders invoking the Act. In brief:

Executive Order 13,909 (March 18, 2020) included the presidential findings required by Section 101(b) of the Act with respect to personal protective equipment and ventilators, and delegated to the Secretary of Health and Human Services (HHS) the prioritization and allocation authorities found in Section 101, allowing the Secretary to identify “additional specific health and medical resources that meet the criteria of Section 101(b).” On March 27, 2020, the President issued a memorandum to the Secretary of HHS stating, “The Secretary shall use any and all authority available under the Act to require General Motors Company to accept, perform, and prioritize contracts or orders for the number of ventilators that the Secretary determines to be appropriate.” On April 2, the President issued an additional memorandum including six additional companies within the scope of the March 27 ventilator memorandum. On April 2, the President also issued a memorandum directing the Secretary of DHS, “through the Administrator of the Federal Emergency Management Agency,” to “use any and all authority available under the Act to acquire, from any appropriate subsidiary or affiliate of 3M Company, the number of N-95 respirators that the Administrator determines to be appropriate.”

12. CFIUS is discussed in detail elsewhere and is not the subject of this article. See James K. Jackson, CONG. RESEARCH SERV., THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) (Feb. 14, 2020).

Executive Order 13,910 (March 23, 2020) invoked Section 102 of the Act to prohibit hoarding of health and medical resources. The Department of HHS subsequently issued a memorandum designating specific medical equipment and materials as scarce and thus subject to the hoarding prohibitions. On April 3, 2020, the President issued a memorandum directing “the Secretary of Homeland Security, through the Administrator of FEMA, in consultation with the Secretary of HHS,” to “use any and all authority available under section 101 of the Act to allocate to domestic use, as appropriate, the following scarce or threatened materials designated by the Secretary of HHS under section 102 of the Act.” The memorandum listed N95 respirators, other filtering respirators, and PPE surgical gloves and masks. An accompanying statement indicated the memorandum was directed at “profiteering by unscrupulous brokers, distributors, and other intermediaries operating in secondary markets.”

Executive Order 13,911 (March 27, 2020) delegated certain authorities to the Secretary of HHS, including those found in sections 301, 302, and 303 of Title III of the DPA.

Executive Order 13,917 (April 28, 2020) found that “meat and poultry in the food supply chain” were “scarce and critical materials essential to the national defense.” The order delegated a range of administrative authorities, including administrative exemptions, as well as Section 101 prioritization and allocation authority, to the Secretary of Agriculture “to ensure a continued supply of protein for Americans” among other policy purposes.

Finally, **Executive Order 13,922** (May 14, 2020) delegated to the CEO of the United States International Development Finance Corporation (DFC), in consultation with certain cabinet secretaries, authority under Title III sections 302 and 303 for “the domestic production of strategic resources needed to respond to the Covid-19 outbreak, or to strengthen any relevant domestic supply chains.” (The DFC is an independent government agency created in 2019 to provide financing for development projects.)

B. Agency Practice

Agency actions have not received the same attention as the President’s executive orders and memoranda, creating for some the impression that the DPA was not used, and is not being used, to procure and provide essential medical resources to the states and frontline medical facilities. Agency DPA actions include the following:

On April 8, The Department of Health and Human Services (HHS) announced the first contract for ventilator production under the DPA with GM for 30,000

ventilators for the Strategic National Stockpile by the end of August, for a price of \$489.4 million.¹³

The same day, April 8, HHS announced an additional ventilator contract under the DPA with Philips for 2,500 ventilators by the end of May 2020, and a total of 43,000 ventilators by the end of December 2020, at a price of \$646.7 million.¹⁴

On April 13, HHS announced seven new ventilator contracts with GE, Hill-Rom, Medtronic, ResMed, Vyaire, Hamilton, and Zoll for 110,880 ventilators with delivery dates ranging from June 29 to July 13, at a combined cost of \$1,435,280.¹⁵

The DOD announced on April 14, 2020, a DPA contract to provide 39 million N95 respirator masks “over the next 90 days to help in the fight against coronavirus.” The announcement notes that DOD already provided 10 million of the masks to FEMA and HHS “and is prepared to provide 10 million more.” The announcement also noted that Defense Logistics Agency had awarded a \$415 million contract “providing 60 systems that can decontaminate as many as 80,000 N95 respirator masks each day, allowing those masks to be reused. This will allow medical professionals to reuse masks up to 20 times and will reduce the nation’s need for new inventory.”¹⁶

On April 16, HHS announced a ventilator contract with GE under the DPA for 50,000 ventilators to be produced by July 13, at a contract price of \$336 million. The announcement further noted that HHS had finalized contracts to produce or acquire 41,000 ventilators by the end of May and more than 187,000 ventilators by the end of the year.¹⁷

On April 29, the DOD announced that it would “invest \$75.5 million in Defense Production Act Title 3 funding to increase swab production by 20 million per month starting in May.” The announcement further noted that the recipient of the contract, Puritan Medical Products, “will quickly establish a new manufacturing facility . . . doubling its current monthly output of 20 million to

13. Press Release, U.S. Dep’t of Health & Human Serv.s, HHS Announces Ventilator Contract with GM under Defense Production Act (Apr. 8, 2020), <https://perma.cc/6Z3T-8PBD>.

14. Press Release, U.S. Dep’t of Health & Human Serv.s, HHS Announces Ventilator Contract with Philips under Defense Production Act (Apr. 8, 2020), <https://perma.cc/C3A4-VZ9F>.

15. Press Release, U.S. Dep’t of Health & Human Serv.s, HHS Announces New Ventilator Contracts, Orders Now Totaling Over 130,000 Ventilators (Apr. 13, 2020), <https://perma.cc/N52J-V5LH>.

16. C. Todd Lopez, *Defense Production Act Contract to Provide 39 Million Masks*, U.S. DEP’T OF DEF. (Apr. 14, 2020), <https://perma.cc/U6M9-5T95>.

17. Press Release, U.S. Dep’t of Health & Human Serv.s, HHS Announces Ventilator Contract with GE Under Defense Production Act (Apr. 16, 2020), <https://perma.cc/MD87-Q3WP>.

40 million swabs,” while also adding 150 employees.¹⁸ Puritan subsequently stated that the “goal” was to have the plant “up and running by July 1,” boosting production to “40 million swabs a month by August or September . . . double the company’s current output of about 720,000 swabs a day, or 21.6 million per month.”¹⁹

On May 6, using funding from the CARES Act, the DOD “in coordination with the Department of Health and Human Services” announced the signing of “a \$126 million contract award with 3M for the increased production of 26 million N95 medical-grade masks per month, starting in October 2020.” The announcement indicates that 3M will “design, procure, and implement necessary production facilities” to produce “at least 312 million [N95 masks] annually within the next twelve months.” The masks appear destined to “ensure a sustainable supply chain of N95 respirators and resupply the Strategic National Stockpile.”²⁰

C. Observations

1. Reactive Use

The federal government has used the DPA in a reactive rather than proactive manner. The White House Coronavirus Task Force was established on January 29, 2020;²¹ however, the first use of the DPA to procure medical supplies was not announced until April 8, nine weeks later, when HHS announced a DPA rated contract with GM to produce 30,000 ventilators by the end of August 2020. That same day, HHS announced a DPA contract with Philips for 2,500 ventilators by the end of May 2020. In short, the federal government did not use the DPA at the outset of the pandemic, or upon warning, to rapidly expand production capacity and prioritize federal contracts to support the Strategic National Stockpile (SNS).

2. Episodic Rather than Systemic Use

The executive branch has not used the DPA in a strategic manner or to systemically mobilize the industrial base of the United States to create the material capacity or a permanent supply chain to combat the COVID-19 pandemic. Likewise, it has not used the authority to create a U.S. furnished international supply chain for medical resources and supplies, which might stimulate the economy as well as provide a public health benefit. The government *did* after April

18. Press Release, U.S. Dep’t of Def., DOD Details \$75 Million Defense Production Act Title 3 Puritan Contract (Apr 29, 2020), <https://perma.cc/GHB7-KG4S>.

19. Edward D. Murphy, *Swab Maker for Covid-19 Testing Prepares to Open New Plant in Pittsfield*, PRESS HERALD (May 25, 2020), <https://perma.cc/T23C-L36H>.

20. Press Release, U.S. Dep’t of Def., DOD Awards \$126 Million Contract to 3M, Increasing Production of N95 Masks (May 6, 2020), <https://perma.cc/B4M4-4EP3>.

21. Press Release, The White House, Statement from the Press Secretary Regarding the President’s Coronavirus Task Force (Jan. 29, 2020), <https://perma.cc/9WUL-2CTL>.

2020 take substantial steps to replenish and expand the SNS with ventilators and N95 masks. It also used Title III of the Act to increase swab production.

The President appears to have invoked the DPA on an episodic and selective basis, in part, to leverage negotiations with specific companies to produce products like ventilators and N95 masks, as well as to keep meat packing plants operating during outbreaks of COVID-19 at those plants. The qualifier “appears” is used because while the executive orders are public, the negotiating process was not, and company statements and media reports provide conflicting and uncertain accounts of behind-the-scenes events and motives. Statements from both GM and Ventec in the case of ventilators, and 3M in the case of N95 masks, indicate that the companies were already in discussions with HHS to produce the subject equipment and had already committed to manufacture the products at the time the DPA was invoked. In addition, the DPA was not ultimately used to require production by GM or 3M.²² At the same time, it appears that senior advisors in the White House, and not just agency experts, were aware that the DPA could be used as a strategic tool as well as a tactical tool to rapidly fill supply shortages. According to White House Trade Advisor Peter Navarro at the end of April 2020, “As Congress adds funds to DPA Title III, this invaluable tool can be strategically used to provide both surge capacity and longer run capabilities through funding key projects.”²³

There is little indication the cabinet agencies with delegated authority, including HHS and DOD, moved to fill the vacuum in national planning for a comprehensive and strategic supply chain. If the federal government is using the DPA, and other laws, to produce and provide medical materials and testing in a systemic and needs-based manner, it has not publicly identified the supply chain requirements, the sourcing for those requirements, or how resources will be allocated within the federal government and between states, and the priorities and methodology for doing so. Department of Defense statements pointedly refer to a “whole-of-government approach to the coronavirus pandemic,” as opposed to a whole-of-nation effort. Neither does it appear that the federal government is seeking to create a national or international supply chain, with redundant domestic sources of supply.

22. See Press Release, 3M Company, 3M Response to Defense Production Act Order (Apr. 3, 2020), <https://perma.cc/T9CL-RMZW>; Tomi Kilgore, *3M Hits Back at Trump, Says Ceasing Exports of N95 Masks will have ‘Opposite’ Effect, Humanitarian Consequences*, MARKETWATCH (Apr. 5, 2020, 10:14 AM) <https://perma.cc/9Q67-72FK>; Marty Johnson, *3M CEO Defends Company After Trump Tweet: ‘We are Doing Everything we Can’*, THE HILL (Apr. 3, 2020, 9:49 AM), <https://perma.cc/95CY-77MA>; Catherine Roberts, *3M Accepts U.S. Move on Mask Production, but Criticizes a Clampdown on Exports*, STAR TRIBUNE (Apr. 3, 2020), <https://perma.cc/D2UQ-TE3S>; Kevin Breuninger, *3M Warns Trump: Halting Exports under Defense Production Act Would Reduce Number of Masks Available to U.S.*, CNBC (Apr. 3, 2020, 2:49 PM), <https://perma.cc/ZE4V-AQQ4>.

23. Justine Coleman, *Pentagon Moves to Increase Production of Coronavirus Test Swabs*, THE HILL (Apr. 30, 2020, 8:29 AM), <https://perma.cc/L5LD-K3JA>.

3. Allocation

Although the DPA is written in many places in broad language, many of the most expansive authorities, including the allocation authority found in Section 101(a)(2), have not been used in a long time, nor have they been fully litigated. Thus, use of the allocation authority is uncharted territory. However, the federal government appears to have used an alternative allocation mechanism by using the federal government's authority to prioritize its own contracts over state and private contracts to restock the SNS and then allocate supplies from the Stockpile to states and private entities as needed or requested. Use of a fully replenished and stocked SNS would thus serve as an alternative allocation mechanism, at least for medical (SNS) rather than civilian goods.

4. Lingering Federalism Issues

In addition, federalism issues linger within the meat and poultry order, including the possibility that federal health guidelines and state health guidelines might conflict. In such a case, presumably, federal law would preempt state law under the Supremacy Clause. Thus, the federal government could, in theory, require the production of meat. However, under the states' distinct 10th Amendment "police power" (which covers public health and safety), states might still influence outcomes through the exercise of stay-at-home orders that wouldn't close the meat packing plants *per se*, conflicting with federal DPA authority, but would have the effect of preventing employees from coming to work. As of June 2020, neither the Secretary of HHS nor the Secretary of Agriculture appears to have asserted the allocation authority following the President's delegations of authority in E.O. 13917 or taken actions that appear to conflict with state orders.

5. Process

A central and coherent national process to oversee use of the DPA and other authorities to provide a national supply chain of medical equipment during the pandemic has not been evident, in part because the federal government has not provided regular press briefings on supply chain needs and how they are being met. In theory, policy input and oversight were, and still are, provided by the White House Coronavirus Task Force chaired by the Vice President, with United States Global AIDS Coordinator Deborah Birx serving as Response Coordinator. However, the Task Force has not briefed supply chain issues to the public, nor is it evident in the wake of national protests following the killing of George Floyd whether the Task Force will remain in existence. According to one report on June 17, 2020, "the task force is going through a slow death" and meets only twice a week.²⁴

In theory, policy direction is implemented through the National Response Coordination Center at FEMA. In practice, however, some if not most of the

24. Sheryl Gay Stolberg et al. *With the Federal Health Megaphone Silent, States Struggle With a Shifting Pandemic*, N.Y. TIMES (June 17, 2020), <https://perma.cc/8LDU-S64N>.

functions ordinarily performed by the Defense Production Act Committee process, the Defense Logistics Agency, and the Federal Priorities and Allocation System appear to have (at least initially) been brought within the White House using *ad hoc* or informal process. Although, as noted above, DPA authority was delegated to multiple Department Secretaries, responsibility was diffuse, with different agencies or officials taking the lead on certain supply chain components like testing and masks. Responsibility appears to remain diffuse, with no single actor (to date), either within the White House or at the Departmental level, taking on the role of systemically coordinating the production and allocation of pandemic supplies and services, as well as publicly articulating national needs for PPE and testing. In contrast, many governors have daily provided statewide statistics on the demand for and supply of medical resources.

There are also indications of bureaucratic dysfunction. In mid-May 2020, the DOD official with direct responsibility over use of the DPA in support of COVID-19 efforts, the Deputy Assistant Secretary of Defense for Industrial Policy, was fired.²⁵ On June 1, the Public Health Service official leading the COVID-19 testing efforts at the White House announced that he would be leaving FEMA to return to his home agency and prior responsibilities, including HIV.²⁶ On June 18, media outlets reported that control of the SNS was moving “back under the control of federal health officials” at HHS/CDC and away from FEMA, which had assumed management of the stockpile in March 2020.²⁷

6. State Solutions and Workarounds

In the absence of a systemic federal response for producing and allocating medical supplies, states initially struggled to create and maintain supply chains while competing for resources with other states and the federal government.²⁸ The states filled the leadership vacuum by relying on existing relationships and mechanisms as well as *ad hoc* regional compacts to allocate resources and coordinate interstate public health policy. These included the Emergency Management Assistance Compact (EMAC), which has been in existence for 25 years. With the

25. Lara Seligman & Daniel Lippman, *Pentagon Fires Its Point Person on Defense Production Act*, POLITICO (May 15, 2020, 8:07 AM), <https://perma.cc/V8UU-M3EZ>.

26. Jessie Hellmann, *Trump Official Leading Covid-19 Testing to Return to Regular Duty*, THE HILL (June 1, 2020, 6:07 PM), <https://perma.cc/C4SM-PDNQ>; see also Kristen Holmes & Kaitlan Collins, *Trump and FEMA Chief Contradict Each Other on Defense Production Act*, CNN (Mar. 24, 2020, 9:10 PM), <https://perma.cc/RGP8-G7A3>.

27. Amy Goldstein, *Stockpile of Emergency Medical Supplies Moving Back to Health Officials Control*, WASH. POST (June 18, 2020, 6:47 PM), <https://perma.cc/D6Q4-2R9F>.

28. See, e.g., Jeanne Whalen et al., *Scramble for Medical Equipment Descends Into Chaos as U.S. States and Hospitals Compete for Rare Supplies*, WASH. POST (Mar. 24, 2020, 8:08 PM), <https://perma.cc/99XM-M2DW>; Farhad Manjoo, *How the World's Richest Country Ran out of a 75-Cent Face Mask*, N.Y. TIMES (Mar. 25, 2020), <https://perma.cc/HW5X-SZRD>; David Sanger et al., *Under Intense Criticism, Trump Says Government will buy More Ventilators*, N.Y. TIMES (Mar. 27, 2020), <https://perma.cc/S9S8-Y29R>; Susan B. Glasser, *How Did the U.S. End Up With Nurses Wearing Garbage Bags?*, THE NEW YORKER (Apr. 9, 2020), <https://perma.cc/V6XT-JHKF>.

requisite congressional consent,²⁹ EMAC provides a procedural and legal mechanism “that allows states to send personnel, equipment, and commodities to assist with response and recovery efforts in other states.”³⁰ In addition, states have relied on *ad hoc* as well as long standing state contracting consortiums to facilitate the purchase of medical supplies and tests, such as NASPO ValuePoint, “the cooperative purchasing arm of the National Association of State Procurement Officials.”³¹

7. Laying the Groundwork for Vaccines

The government’s effort to develop a vaccine is based on a public-private partnership model operating under the authority and direction of the Biomedical Advanced Research and Development Authority (BARDA). BARDA is part of the HHS Office of Preparedness and Response, with the mission of supporting “the transition of medical countermeasures such as vaccines, drugs, and diagnostics from research through advanced development towards consideration and inclusion into the Strategic National Stockpile.”³² Media reports indicate that the federal government has selected five coronavirus vaccine candidates as “finalists,” which means the companies considered most likely to produce viable vaccines. The project is under new leadership, including a doctor, “from the pharmaceutical and venture capital worlds,” and General Gustave F. Perna, the commanding general of the Army Materiel Command.³³ Notably, the inclusion of a logistics expert seems to indicate that the federal government is aware of and

29. See Emergency Management Assistance Compact, Pub. L. No. 104-321, 110 Stat. 3877 (1996).

30. Nat’l Emergency Mgt. Ass’n, *What is EMAC?*, <https://perma.cc/SA6E-DBW8>.

31. See NASPO VALUEPOINT (Aug. 13, 2020), <https://perma.cc/6JTW-BUM9>; MMCAP INFUSE (Aug. 13, 2020), <https://perma.cc/V6JV-F8X4>.

32. BARDA was created pursuant to §401 of the Pandemic and All-Hazards Preparedness Act, Pub. L. No. 109-417, 120 Stat. 2831 (2006) (codified in part at 42 U.S.C. §§201 *et seq.*). HHS/BARDA’s principal authority to provide protections and countermeasures and streamline the FDA approval process for countermeasures are found in the Project Bioshield Act of 2004, Pub. L. No. 108-276, 118 Stat. 835. According to the March 30, 2020, HHS Press Release cited below, the “FDA has provided emergency use authorization for 20 diagnostic tests” (for COVID-19), and without reference to the pandemic, “to date, 54 BARDA-supported products have achieved regulatory approval, licensure or clearance.”

33. See Press Release, U.S. Dep’t of Health & Human Serv.s, HHS Accelerates Clinical Trials, Prepares for Manufacturing of COVID-19 Vaccines (Mar. 30, 2020), <https://perma.cc/ZS84-YH97>; Press Release, U.S. Dep’t of Health & Human Serv.s, HHS, Industry Partners Expand U.S.-Based Pharmaceutical Manufacturing for COVID-19 Response (May 19, 2020), <https://perma.cc/G6NL-UGU6> (the release notes that “drug ingredients will be manufactured at facilities in the United States, including a new facility to be built in Virginia”); Press Release, U.S. Dep’t of Health & Human Serv.s., Trump Administration’s Operation Warp Speed Accelerates AstraZeneca COVID-19 Vaccine to be Available Beginning in October (May 21, 2020), <https://perma.cc/9JZA-8479>; Noah Weiland & David Sanger, *Trump Administration Selects Five Coronavirus Vaccine Candidates as Finalists*, N.Y. TIMES (June 3, 2020), <https://perma.cc/V43S-DADQ>. As stated on its website, the Army Materiel Command “develops and delivers materiel readiness solutions” and “[a]s the Army’s Lead Materiel Integrator, Army Materiel Command manages the global supply chain, synchronizing logistics and sustainment activities across the Army.” Prior to commanding AMC, Gen. Perna was the Army’s Deputy Chief of Staff for Logistics.

endeavoring to get ahead of the logistics challenges of producing and distributing a vaccine at scale.

The executive branch has not indicated whether the DPA, or any other authority beyond FDA licensing exemptions, will be needed to produce and allocate a vaccine(s) at scale. The DPA could be used to help set the groundwork to produce a vaccine; however, allocation is most likely to occur using the SNS as the mechanism. The industry assessment and “Plan of Action” authorities (discussed below) in Title VII could also be used to determine methodologies to produce a vaccine at national scale, while Title III could be used to incentivize the development of production capacity.

One clear lesson from the pandemic so far is to act early and decisively to identify and develop redundant supply chains.

II. BOUNDARIES AND SAFEGUARDS

From first passage, commentators have recognized that the DPA provides the executive branch with broad authority to regulate portions of the economy in a manner potentially in tension with traditional free market principles. Commentators at the time of initial passage, for example, wrote about the sanctity of contract.³⁴ This tension is also reflected in President George H.W. Bush’s signing statement accompanying the Defense Production Amendments Act of 1992, in which he addressed the Section 705 industry subpoena and assessment authority.

Collecting industrial base data from America’s companies through the means provided in section 705 would intrude inappropriately in peacetime in the lives of Americans who own and work in the nation’s businesses. Such intrusion is neither necessary to meet U.S. national defense needs nor would be consistent with the liberties of those who own and work in America’s businesses. Accordingly, I direct the affected heads of executive departments and agencies not to use subpoena, search warrant, or other intrusive techniques under the authority of section 705 of the Defense Production Act, implementing section 722 [establishing the Defense Production Act Committee] of the act without the specific approval of the president. They will proceed instead to seek information from America’s businesses on a voluntary basis. However, the provisions of section 705 may be used to support other programs and other provisions of the Defense Production Act, in accordance with current delegations of authority under section 705.

Indeed, the DPA has at times been referred to as a “commandeering” authority. Most recently, during the pandemic, the U.S. Chamber of Commerce and others expressed reservations about use of the DPA, equating the law to the nationalization of industry and unnecessary government regulation. In March 2020, the

34. Donald S. Frey, *Maintaining Economic Freedom under the Defense Act of 1950*, 18 U. CHI. L. REV. 218 (1950).

Chamber lobbied against using the DPA to respond to the pandemic, arguing that its use should be limited to “specific industrial bottlenecks and other problems such as price gouging.”³⁵ In response, one might note that these concerns would not apply to many of the authorities in the DPA, including Title III incentives and guaranteed markets. It is also fair to note that Congress must not have shared these concerns when it reauthorized the law 53 times—most recently in August of 2019.

Sometimes one’s perspective on a law and its reach is colored by one’s views about the president using the law and the specific purpose for which it is used. The DPA *does* provide broad authority; but it is a mobilization tool, as well as a tool that can be used for tailored acquisition needs. The DPA also includes several statutory and other protections against its overuse or abuse.

First, as with the PATRIOT Act, certain DPA provisions expire if not reauthorized by Congress (generally every five years, depending on the law itself). Thus, wage and price control authority expired in 1953. The law is next up for reauthorization in 2025. Moreover, there is nothing in the law that would preclude earlier amendment. The Congress has not hesitated to include specific timelines and procedural safeguards in the operation of CFIUS, most recently amended by the Foreign Investment Risk Review Modernization Act.³⁶ Congress could do so as well by adding additional reporting and timeline restrictions to other sections of the DPA.

Second, the imposition of price controls and wage stabilization can only occur with passage of a joint resolution by Congress, in other words, a law signed by the president.

Third, there is nothing in the DPA that requires companies to accept contracts at other than fair market value. It is to GM and Ventec’s credit that they agreed to produce ventilators at cost, but that is a product of good corporate citizenship, not the DPA.³⁷

Fourth, the DPA provides for federal court jurisdiction arising under the Act to include enforcement authority as well as injunctive power, allowing businesses to seek expedited federal court review, and, if appropriate, injunctions against government overreach.

Fifth, some provisions of the DPA are non-delegable, which means they can only be triggered by the President of the United States. Resort to Title III, Section 303 purchase commitments, for example, requires the President to determine “on a non-delegable basis that action is necessary to avert an industrial resource or

35. Letter from Neil L. Bradley, Exec. Vice President & Chief Policy Officer, Chamber of Commerce of the United States of America, to Sen. Elizabeth Warren (Mar. 25, 2020), <https://perma.cc/A8XQ-WY3C>; Katie Rogers et al., *Trump Resists Pressure to Use Wartime Law to Mobilize Industry in Virus Response*, N.Y. TIMES (Mar. 20, 2020), <https://perma.cc/J4JR-NPZV>.

36. Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, 132 Stat. 1636, 2173.

37. General Motors, *Ventec Life Systems and GM Partner to Mass Produce Critical Care Ventilators in Response to Covid-19 Pandemic*, GM CORPORATE NEWSROOM (Mar. 27, 2020), <https://perma.cc/273X-K7KJ>.

critical technology item shortfall that would severely impair national defense capability.”³⁸ Ordinarily, but clearly not always, a requirement for presidential approval increases the degree of scrutiny an issue receives, including legal review.

Sixth, the Act requires an annual report from the Defense Production Act Committee, which heretofore has been timely and detailed, largely reporting on DOD use of the Act. However, as discussed below, Congress should consider a requirement for further transparency and reporting in the case of pandemics and other emergency uses of the DPA.

Finally, it should be noted that the government has not pushed to the edge of the law, not during the pandemic or before, perhaps because government actors and business actors for their own reasons do not want to litigate the reach of the law and lose. Heretofore, the DPA appears to have met DOD’s needs, for example, to expedite contracts and to incentivize the provision of scarce materials and services. And until the pandemic, the DOD has been the principal user of DPA authority.

III. ISSUES

Sometimes it takes a crisis to identify the absence of a critical authority or gaps in existing law. The pandemic has done so with respect to the DPA and some of the laws associated with the DPA’s use, or lack of use, during the pandemic. This section identifies eight issues the Congress, and the executive branch, should address on an urgent basis because of their potential impact on use of the DPA to produce testing and a vaccine at scale, as well as to ensure a redundant and secure supply of PPE and testing for the duration of this pandemic and any future health emergencies.

A. Does Section 101 Require the Acceptance of New Contracts?

Section 101 of the DPA clearly requires companies to prioritize existing contracts or contracts within existing programs. However, the law is less clear on whether the government can require companies to accept new contracts or new contracts for products the company does not ordinarily make, or in the language of the Commerce regulations, “for an item not supplied or for a service not performed.”³⁹ One can parse the language found in Section 101 either way. Section 101(a)(1) requires “performance under contracts and orders.” The use of the word “under” implies the presence of an existing contract or order. However, language later in the section seems “to require acceptance and performance of such contracts and orders,” which, depending on how the word “under” is read, could mean either any new order or only those under existing contracts.

Government regulations implementing this section can be read either way as well. On the one hand, they state that companies are required to accept new contracts. On the other hand, they seem to exempt contracts for products “not

38. DPA §303(a)(7)(B).

39. 15 C.F.R. § 700.13(c)(2) (2020).

supplied.” Government statements such as those found on the FEMA and DHS DPA websites seem to take the view that companies are required to accept new contracts, including for products they do not ordinarily make. Executive Order 10,363, establishing a framework for “National Defense Resources Preparedness” (March 16, 2012), includes language that suggests the same, delegating in Section 201(a) “the authority of the President . . . to require acceptance and priority performance of contracts.”

Whether it is a good idea or not to require a company to make a medical product it does not ordinarily make, or any other such product or service, is a policy question. Such a requirement would more fully engage the concerns expressed by the Chamber of Commerce about an actual commandeering authority and the nationalization of industry. However, if indeed acceptance of contracts for products a company does not ordinarily supply is intended to be required by the DPA, it ought to be clearly stated in the law, and issues of liability and risk should be more clearly addressed in that context. Legal and policy disputes cause delay.

In addition, if products “not ordinarily supplied” are treated in a manner different from contracts for existing product lines or services, then the DPA and its implementing regulations need further clarity on what “not supplied” means. Does it mean the precise product, an N95 mask, or does it mean medical masks, or even masks in general, such as those used by carpenters and painters? These are urgent questions to resolve in the case of supply chains with single points of failure or that are reliant on foreign suppliers.

Perhaps one hesitation in using the DPA more fully in the current pandemic was the lack of clarity on these questions. While it is noteworthy that companies like GM did not publicly contest the potential use of the DPA to compel the production of ventilators, a product it did not ordinarily supply, it might be equally noteworthy that the matter was resolved by both sides short of using the DPA as authority. In the end, GM acted not just as a matter of corporate good citizenship, but in partnership with a company that did make ventilators, presumably eliminating or at least mitigating some of the harder legal and policy questions presented.⁴⁰

B. The Scope of the DPA’s Allocation Authority

The allocation authority in the DPA is written with broad, if not breathtaking, language. Section 101(2) permits allocation “in such manner, upon such conditions, and to such an extent as he shall deem necessary or appropriate to promote the national defense.” This is the sort of language executive branch lawyers sneak into legislation when no one is watching. At the same time, the executive branch appears not to have used this authority since the Korean War, except for the contingency designation of aircraft for the Civil Air Fleet. Thus, executive branch

40. General Motors, *Ventec Life Systems and GM Partner to Mass Produce Critical Care Ventilators in Response to Covid-19 Pandemic*, GM CORP. NEWSROOM (Mar. 27, 2020), <https://perma.cc/5QU2-C2Q9>.

and industry actors have not had occasion to test what “manner,” “conditions,” and “extent” mean in a pandemic or any other context. That context may come with the advent of a COVID-19 vaccine. Prudent logistics actors would do well to explore now with key industry actors what these terms might mean, with a view toward reaching a common agreement to avoid delay and litigation when the time comes to allocate a vaccine. Alternatively, they might engage on whether the SNS is an effective allocation mechanism to distribute a vaccine equitably and ethically. Within the executive branch, key actors should also seek the input of the Justice Department’s Office of Legal Counsel. And, in any event, Congress would do well to provide additional legislative guidance regarding the scope of the DPA’s allocation authority.

C. Liability

Section 707 of the DPA states:

No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid.

A plain reading of this section indicates that it would protect companies from contractual liability for prioritizing a DPA contract over an existing commercial contract with a private party. It would also protect the contractor for relying in good faith on government direction and contracts pursuant to the DPA.

Liability, however, remains an issue in implementing the DPA. To start, the section does not extend to tort liability. The term tort is not mentioned, and were the section intended to preempt state tort law, courts would expect an express legislative statement in an area where federal law could not be said to already occupy the field. In addition, liability remains an issue where companies are requested to provide a product or service they do not ordinarily make.

Liability concerns were evident in the hesitation of some companies to make ventilators before passage of Section 4113 of the CARES Act,⁴¹ which expressly includes “respiratory protective devices” within Section 247d-6d of Title 42 (The Public Readiness and Emergency Preparedness Act (PREP Act) of 2005, Pub. L. No. 109-148). Companies were hesitant to manufacture ventilators notwithstanding Section 247d-6d’s provision of liability protection for “pandemic products and countermeasures” designated by the Secretary of HHS. The 2005 law was intended to address the liability concerns still at issue when the CARES Act was passed in March 2020. It was also triggered by notice and declaration of the Secretary of HHS on February 4, 2020. However, six weeks elapsed before the

41. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

liability question was addressed in the CARES Act, while the nation waited for the production and allocation of additional ventilators.

The public policy question is when, if at all, should companies receive tort liability protection for making products on an emergency or experimental basis to counter pandemics. The drafting question is how to implement that policy clearly into law. So far, it appears, the liability provision in the DPA and the liability provisions found at Section 247d-6d do not create a coherent regime that both reflects congressional intent and provides a regime on which industry is prepared to rely. Resolution of this issue prior to the successful development of a vaccine may be urgent, depending on the views of the companies. This is not an argument for or against liability protection, but merely for clarity in the law, so that companies can make knowing and purposeful decisions, cognizant of risk, and production and delivery of a vaccine at scale is not delayed by an issue that was foreseen.

D. Does the DPA Provide “Notwithstanding” Authority?

The President’s invocation of the DPA to leverage meat packing companies into staying open, if in fact that is what occurred, raises the question whether the DPA can override otherwise applicable health or safety laws or regulations.⁴² For example, would the “manner,” “condition,” and “extent,” language found in the allocation authority allow the President to bypass otherwise applicable OSHA, EPA, or CDC guidelines and regulations? Usually, when Congress provides “notwithstanding” authority it expressly does so by stating in the statute that the law operates “notwithstanding any other law.” However, the DPA is, in part, an emergency authority, and one can imagine the government taking the view that it overrides other law on that basis alone. Indeed, Executive Order 13,917, addressed to the meat and poultry supply, appears to delegate to the Secretary of Agriculture authority to exempt food supply chain rulemaking from the requirements of the Administrative Procedure Act.⁴³

E. Voluntary Agreements and Plans of Action

In theory, but so far not in practice, Section 708 of the DPA authorizes the President to “consult with representatives of industry, business, financing, agriculture, labor, and other interests in order to provide for the making by such persons, with the approval of the President, of voluntary agreements and plans of action.” This lengthy section has numerous requirements, including the monitoring of any agreement by the Attorney General and the Chairman of the Federal Trade Commission to “assure . . . the protection and fostering of competition and

42. Jennifer Jacobs, *Trump to Order U.S. Meat Plants to Stay Open Amid Pandemic*, BLOOMBERG (Apr. 28, 2020, 12:18 PM), <https://perma.cc/U7KK-Q4AT>; Ana Swanson & David Yaffe-Bellany, *Trump Declares Meat Supply ‘Critical’ Aiming to Reopen Plants*, N.Y. TIMES (Apr. 28, 2020), <https://perma.cc/E8NS-HB9J>; Michael Corkery et al., *Powerful Meat Industry Holds More Sway after Trump’s Order*, N.Y. TIMES (Apr. 29, 2020), <https://perma.cc/7FQ8-28NK>.

43. Exec. Order No. 13917 § 2(a), 85 Fed. Reg. 26313 (Apr. 28, 2020).

the prevention of anticompetitive practices.” However, in the absence of practice, it is not clear how these sections will align with contemporary understandings and practices regarding antitrust rules and fair-trade practices. For that same reason, it is not clear whether the requirements of this section, including potential antitrust or fair-trade regulations, deterred either the government, industry, or both from utilizing this authority more systemically and coherently to plan for and provide a national supply of medical supplies, tests, and eventually a vaccine.

F. Federal Acquisition Regulations and Practice

Although not expressly a DPA issue, one reason the DOD uses the DPA so frequently to help expedite and manage contracts is because the Federal Acquisition Regulations (the FAR) are otherwise outdated, cumbersome, and highly bureaucratic. The FAR deters interest in government contracts and deters corporate social responsibility to produce emergency supplies and services. If, indeed, the DPA is intended to be used in emergencies to incentivize contracting with the government for essential national security supplies, reform of the government contracting process generally would be a good place to start, in order to make government business a more attractive and viable option for more companies. This is especially urgent where the U.S. government is concerned about single source and foreign source supply chains.

G. Pricing

In light of the limitations on wage stabilization and price controls, and the DPA provisions addressed to price gouging, as well as generalized concerns about use of the DPA to “nationalize” industry, further legislative clarity on equitable pricing and price ceilings under the DPA would be useful. DOD, of course, has longstanding practice negotiating DPA contracts. The law might be updated to reflect this practice, in order to limit the risk that the government might use the DPA to require companies to accept contracts below market value, or conversely, to prevent companies in emergency or sole source contexts from demanding excessive or inappropriate compensation.

H. Transparency

The President has invoked and delegated many of the authorities found in the DPA. However, what the federal government—the President or the Secretaries possessing delegated authority—have not yet done is:

- *use the full authority* of the DPA to incentivize the production and distribution of rapid testing,
- to spur development of the vaccine,
- to assess industry capacity to produce an eventual vaccine at scale, and to incentivize preparation for its production, or
- to create a permanent U.S. medical resources supply chain.

As noted above, assessment of the operation of the DPA is difficult in the absence of additional data on how the Act is utilized by Departments and how pricing is established.

If one purpose of the DPA is to ensure that the industrial capacity of the United States is mobilized to meet emergencies, Congress should require more detailed and timely reporting in emergencies on how the Act is being used, including specific contractual obligations and incentives. Congress should also require reporting on how the SNS is used to allocate resources, including criteria. Whereas such reporting is generally ill-advised in the context of routine national security uses of Title III, in the context of a pandemic additional transparency should be required. American public and health professionals should know what the supply needs are and how they will, or will not, be met, including through the use of DPA authorities. After all, as Section 107 states, that is the purpose of the Act: “The President shall take appropriate actions to assure that critical technology, essential materials, and industrial resources are available from reliable sources . . . when needed to meet a national emergency.” A reporting requirement would help determine whether and how the President is meeting this statutory requirement. It would also help state and local public health officials plan for contingencies. And in the case of a vaccine, it would help validate that distribution is equitable and based on best public health practices.

CONCLUSION

The ancient Chinese military philosopher Sun Tzu said, “The line between disorder and order lies in logistics.” One might debate the right metaphor to describe the federal government’s response to mobilizing the industrial capacity of the United States to meet the COVID-19 pandemic. The initial response might be compared to General Eisenhower telling his division commanders prior to D-Day to find their own ammunition and their own boats to cross the English Channel. And, if it happens that the Quartermasters landing in the 10th wave allocate all the ammunition for themselves, then the 29th Division landing in the first wave is just out of luck. More recently, in late May 2020, the government’s response has not unfairly been described by historian John M. Barry, who wrote the leading history of the 1918 Flu pandemic, as “incomprehensibly incoherent.”⁴⁴

Harsh? Perhaps. One thing is clear, the DPA’s capacity to rapidly mobilize and prioritize industrial capacity was not used for months after the advent of the pandemic, and not used at scale. For sure, the law, even one as broad as the DPA, does not provide an on and off switch. Supply chains are difficult to create and some equipment complex to produce. Ventilators are composed of 1,750 unique parts and 1 million lines of code.⁴⁵ They need to work as intended. But there is no

44. Joe Heim, *America’s Response to Coronavirus Pandemic is “Incomprehensibly Incoherent,”* says Historian Who Studied the 1918 Flu, WASH. POST (May 26, 2020, 7:00 AM), <https://perma.cc/7ZPM-7Z8J>.

45. Editorial Board, *Trump Can’t Fix the Ventilator Problem. But Right Now, He’s Not Even Managing It*, WASH. POST (Mar. 26, 2020, 1:56 PM), <https://perma.cc/HQ83-GNTR>.

doubt that at the outset of the pandemic and for months thereafter, states were left on their own to find and compete for medical resources. When it comes to testing that appears to remain the case, and we have yet to see what will come with a vaccine. Subsequently, agencies have done well to replenish and grow parts of the SNS while increasingly turning over the supply chain process to logistical professionals. However, the federal government's procurement efforts remain episodic and do not appear systemically designed to create or sustain a permanent pandemic health system. Finally, responsibility and thus accountability for the supply chain is unclear, and thus there is no single point of public entry to know what is needed, what is being produced, or the mechanism that will ensure that supply meets demand.

The federal government has not led; it has followed, while being pulled along by the states. Neither has it thought big and gone big in a strategic manner, but rather has acted in a selective and tactical manner to replenish the SNS. A COVID-19 vaccine may be the opportunity for the federal government to demonstrate that it has absorbed and applied the supply chain lessons from the early months of the pandemic.

Leadership in a pandemic is about defining the mission, setting objectives to achieve that mission, and providing the resources to do so.

The first objective during a pandemic should be to save lives. That requires medical equipment, testing, and a vaccine. Mobilizing a national industrial response to COVID-19 is a role that only the federal government can perform. The DPA is one vehicle with which to do so. The key is that it be done, not how it is done. If this were already effectively happening on its own, then we would not see the nation's governors or health care providers continue to ask for testing resources. The public would not still be looking for masks and wipes. The need for millions and potentially billions of doses of vaccine is the looming question mark. Vaccine production at scale is the challenge at the end of the tunnel. If I were advising the President I would say, "Use these authorities now: get industry ready to make the vaccine when it comes, ensure that there is a viable supply of Covid tests in the meantime, create a permanent domestic medical supply chain, and, ultimately, make America the arsenal of global public health. No other nation has America's capacity to do so, and this is a demand and a market that is not going away."

The second objective during a pandemic is arguably to secure the economic well-being of the nation and to return to normalcy as soon as it is safe to do so. The countries that showed the most preparation, leadership, and initiative in fighting the pandemic have also (so far) had the least damage to their economies, such as South Korea, Taiwan, and New Zealand. The economy and public health work together, not against each other. So, the idea that we should just re-open 100% immediately so that the economy can do well is wrong: that will lead to more death, which is bad in and of itself, as well as bad for the economy. Likewise, the idea that we should just keep everything closed down 100% for the foreseeable

future is wrong: economic destruction is a public health crisis of its own, as people are not able to make money to take care of themselves and their families. We need to get away from false dichotomies that purport to require a choice between health and the economy. The DPA is one authority that can help the United States do so.

During World War II, America was referred to as the Arsenal of Democracy. As much as the pandemic has been economically destructive, every crisis is an opportunity. We have an opportunity here to be the Arsenal of Global Public Health, and the DPA is one of the Nation's essential tools to do so. If we were to invest in becoming the world's leader in PPE manufacture, in vaccine research, in public health education, in engineering and design solutions for how to reconfigure modern life to reduce the risk of pandemic disease—those investments would not only address the pandemic directly, they would also bear tremendous economic fruit. Go-it-alone Americanism is not going to look so great when another nation comes up with a vaccine for COVID-19 first. We might wish we had built up more goodwill in the world at that time by producing and sharing medical supplies. One is reminded here of the Marshall Plan, as well as the goodwill it engendered. With winter coming to the Southern hemisphere, policy-makers might well consider the opportunity to use the public health supply chain as an opportunity to address not only the pandemic but also America's standing in the world following the death of George Floyd. In doing so, we might find that we solve some of the economic hardships generated by COVID-19 as well (much as the industrial mobilization of WWII kicked us out of the Great Depression).

Leadership is also about setting a vision for the future based on an understanding of what lies over the horizon. We know now that there are additional national security challenges coming that will require the mobilization of the U.S. national security industrial and innovation base. A technology race with China and climate change are the two most evident. That makes the DPA an essential national security tool in the century ahead. Time now for the Congress to update the law, and for national security generalists, and not just contract specialists, to master the law and use its full potential to save lives, prepare for the future, and make America the arsenal of public health.
