



THE DPA: DOES THE PRESIDENT HAVE AUTHORITY?

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INTRODUCTION

One of the President's most expansive and historically controversial powers is the ability to effectively nationalize an industry in response to a national emergency. Recent uses of the Defense Production Act ("DPA") have pushed the contours of "national defense," highlighting the difficulty of drawing a tangible line to determine when the DPA can or should be invoked—and perhaps more crucially for our constitutional system, when such invocations impede the scope of Congressional authority granted by the DPA.

The DPA is a major source of emergency authorities for the President of the United States:

to expedite and expand the supply of materials and services from the U.S. industrial base needed to promote the national defense. DPA authorities are available to support: emergency preparedness activities conducted pursuant to title VI of the Stafford Act; protection or restoration of critical infrastructure; and efforts to prevent, reduce vulnerability to, minimize damage from, and recover from acts of terrorism within the United States.¹

President Trump invoked the DPA during the early days of the COVID-19 pandemic in support of the national pandemic response. The invocation increased critical medical resource supplies, boosted domestic manufacturing, and strengthened the industrial base. President Trump invoked the DPA more than 30 times "to generate N-95 respirators, ventilators, and boost testing resources, as well as other vital supplies."²

At the height of the COVID-19 pandemic, it was easy to understand why a global pandemic would qualify as a national security issue. At the time, there were no U.S. Food and Drug Administration-authorized COVID-19 vaccines; people were sick and dying; the

¹ *Defense Production Act*, FEMA (last updated Apr. 19, 2023) <https://www.fema.gov/disaster/defense-production-act>.

² *President Trump Invokes Defense Production Act to Support COVID-19 Response*, ENERGY & COM. COMM. (Aug. 24, 2020). <https://republicans-energycommerce.house.gov/posts/president-trump-invokes-defense-production-act-to-support-covid-19-response/>.

health care system was overrun; the nation's economy was teetering; and medical supply chains were desperately strained. Contrast a global pandemic with two domestic issues that, while important, are less obvious reasons to invoke the DPA in the context of its historical usage.

President Biden continued employing the DPA to respond to the COVID-19 pandemic. Later in his administration, however, he went further, using the DPA to address domestic issues that arguably do not represent true emergencies or threats to the national defense. For example, President Biden invoked the DPA to increase the domestic production of resources for the electric vehicle ("EV") market in the U.S.³ Public reporting suggested that this invocation of the DPA was in response to a Biden-Harris administration policy priority.⁴ In addition, after facing mounting political pressure over the domestic shortage of infant formula, President Biden invoked the DPA to speed up the production of infant formula and authorize importations of infant formula.⁵

This comment explores the separation of powers concerns raised under the expanding scope of "emergencies" that have qualified for invoking the DPA. This comment also argues that, in light of this expansion, Congress should use its Article I powers—including oversight and legislation—to protect its role in our constitutional system.

³ Levi McAllister & Maggie E. Curran, *Biden Invokes Defense Production Act to Secure EV Battery Supply Chain*, MORGAN LEWIS (Apr. 1, 2022), <https://www.morganlewis.com/blogs/powerandpipes/2022/03/biden-invokes-defense-production-act-to-secure-ev-battery-supply-chain>.

⁴ *Id.*

⁵ See Zeke Miller & Kevin Freking, *Biden Invokes Defense Production Act for Baby Formula Shortage*, AP (May 19, 2022), <https://apnews.com/article/biden-health-government-and-politics-df586c2e52b5e5865ea9f8091d4d1f80>.

I. BACKGROUND

A. *The History and Background of the DPA*

The DPA, enacted in 1950, “gave the President [of the United States] a broad set of powers.”⁶ The DPA was inspired by the War Powers Acts of 1941 and 1942,⁷ which gave the President extensive authority “to control the U.S. economy during World War II.”⁸ The purpose of the DPA was also to help the military and domestic defense industries address the exigencies of war.⁹

The original DPA granted the President extraordinary abilities, including the ability “to set wages and prices” and “ration consumer goods.”¹⁰ Four of the DPA’s seven original titles lapsed three years after it was enacted.¹¹ These lapsed titles—Title II, which authorized the President to “requisition materials and property from businesses;” Title IV, which authorized the President “to ration consumer goods and impose wage and price controls;” Title V, which authorized the President “to force the settlement of labour disputes;” and Title VI, which authorized the President “to regulate consumer credit and credit loans for real-estate construction”—were repealed in 2009.¹²

Even though some of the DPA’s original titles are no longer in effect, the law still provides the President with significant power. Title I of the DPA gives the President two primary authorities: (1)

⁶ The Defense Production Act of 1950, 50 U.S.C. § 4501 *et seq.*; Anshu Siripurapu, *What Is the Defense Production Act?*, COUNCIL ON FOREIGN RELATIONS (last updated Dec. 22, 2021), <https://www.cfr.org/in-brief/what-defense-production-act>.

⁷ The Defense Production Act of 1950, 50 U.S.C. § 4501 *et seq.*; Anshu Siripurapu, *What Is the Defense Production Act?*, COUNCIL ON FOREIGN RELATIONS (last updated Dec. 22, 2021), <https://www.cfr.org/in-brief/what-defense-production-act>.

⁸ Siripurapu, *supra* note 7.

⁹ See Brian Duignan, *Defense Production Act*, BRITANNICA (last updated May 18, 2022) <https://www.britannica.com/topic/Defense-Production-Act>.

¹⁰ See Brian Duignan, *Defense Production Act*, BRITANNICA (last updated May 18, 2022) <https://www.britannica.com/topic/Defense-Production-Act>; Siripurapu, *supra* note 7.

¹¹ See Defense Production Act Amendments of 1953, P.L. 83-95 (1953); Duignan, *supra* note 10.

¹² Duignan, *supra* note 10.

prioritization authority, which allows the President to prioritize contracts or orders; and (2) allocation authority, which allows the President to “‘allocate,’ or control the distribution of ‘materials, services, and facilities’” when the President “deems it ‘necessary or appropriate to promote the national defense.’”¹³ Relatedly, Title I also allows the President to prohibit hoarding.¹⁴ Title I has been used to support the production of military tanks and planes; supply natural gas to California during the 2000 to 2001 energy crisis; and provide supplies to disaster-affected areas.¹⁵ While Title I has been invoked many times since the law’s enactment, the allocation authority was used sparingly until President Trump used both the “prioritization and allocation authorities” during the COVID-19 pandemic.¹⁶

Title III of the DPA gives the President authority “to provide financial incentives to businesses, including loans or loan guarantees and purchases or purchase commitments, to increase the country’s capacity to produce goods, materials, and technology that the president deems to be ‘critical’ or ‘essential’ to national defense.”¹⁷ Past uses of Title III included “support[ing] the development of advanced radar and electronic warfare capabilities and the production of rare-earth elements. . . .”¹⁸

Title VII of the DPA authorizes the President or the President’s designee “to approve voluntary agreements or plans of action among competing businesses that in normal circumstances would violate or potentially violate antitrust or contract laws.”¹⁹ A 1988 amendment to the DPA also allows the President or the President’s designee “to review and suspend or prohibit proposed acquisitions, mergers, or takeovers involving U.S. and foreign companies that ‘threaten to impair the national security.’”²⁰ For

¹³ *Id.* (quoting Defense Production Act of 1950, 50 U.S.C. § 4511(a)).

¹⁴ *Id.*

¹⁵ *See id.*; HEIDI M. PETERS & ERICA A. LEE, CONG. RSCH. SERV., RL IN11884, DEFENSE PRODUCTION ACT AUTHORITIES AND U.S. DOMESTIC ENERGY SUPPLIES 2 (2022).

¹⁶ Duignan, *supra* note 10.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

example, Title VII was used to compel “a Chinese aerospace technology company to divest itself of a Seattle-based manufacturer of aircraft parts.”²¹

The DPA originally defined national defense as “the operations and activities of the armed forces, the Atomic Energy Commission, or any other Government department or agency directly or indirectly and substantially concerned with the national defense.”²² Despite its original scope, the definition of “national defense” in the context of the DPA has expanded over the years through reauthorizations and amendments by Congress.²³ Under the expanded definition, the authorities granted to the President “extend[] beyond shaping U.S. military preparedness and capabilities, as the authorities may also be used to enhance and support domestic preparedness, response, and recovery from natural hazards, terrorist attacks, and other national emergencies.”²⁴

Congress made a few parts of the DPA permanent, including “the Exon-Florio Amendment (which established government review of the acquisition of U.S. companies by foreigners) and anti-trust protections for certain voluntary industry agreements.”²⁵ Other parts of the DPA require periodic reauthorization. The DPA has been reauthorized over 50 times since it was enacted in 1950.²⁶ The law was most recently reauthorized by the National Defense Authorization Act of 2019.²⁷ That authorization will expire in 2025.²⁸

²¹ *Id.*

²² 42 U.S.C. § 1592(n) (1951), amended by 50 U.S.C. § 4501.

²³ ALEXANDRA G. NEENAN AND LUKE A. NICASTRO, CONG. RSCH. SERV., R43767, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS, 3, 5 (2023).

²⁴ *Id.* at 4–5. *See generally*, FEMA providing materials during a natural disaster.

²⁵ *See id.* at 18–19.

²⁶ *Id.* at 1.

²⁷ *Id.* at 3, 19, 22. *See generally* P.L. 115-232; *see also* Siripurapu, *supra* note 7.

²⁸ Siripurapu, *supra* note 7.

B. *How the DPA Has Been Used In the Past*

1. Common Uses of the DPA

The DPA has been used many times since it was enacted in 1950. Historically, the law's most frequent uses ensured the manufacturing of military-related equipment.²⁹ The DPA grants the President authority to take certain actions, and the President can also delegate those powers to different departments and agencies in the federal government.³⁰ For example, President Obama delegated "DPA authority to sixteen federal departments and agencies" in 2012.³¹

Various federal agencies regularly invoke the DPA. One department that routinely uses the DPA is the Department of Defense ("DoD").³² The DoD uses the DPA "to prioritize the fulfillment of its contracts."³³ It is estimated that the DoD "uses DPA authority to place roughly three hundred thousand orders per year for a variety of military-related equipment."³⁴ The Federal Emergency Management Agency ("FEMA") is another federal entity that uses the DPA.³⁵ FEMA uses the DPA to prioritize orders for resources to help respond to disasters, including food and bottled water.³⁶

While the majority of the DPA's historical uses addressed national defense needs, it appears as though the DPA has been increasingly invoked for non-military reasons that may or may not fall within even the DPA's expanded definition of "national defense." For example, the law was invoked "to supply natural gas to California during the 2000-2001 energy crisis."³⁷ This trend of expanded DPA use outside the traditional realm of "national defense" has increased in recent history.

²⁹ See NEENAN & NICASTRO, *supra* note 23, at 2.

³⁰ See Siripurapu, *supra* note 7.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ See Siripurapu, *supra* note 7.

³⁷ *Id.*

2. President Trump's Uses of The DPA

President Trump invoked the DPA multiple times during the COVID-19 pandemic. Among the earliest of these invocations were orders for “General Motors to produce ventilators and 3M to produce N95 respirator masks for the federal government.”³⁸ During the pandemic, the President also used the DPA “to prevent hoarding of essential supplies and directed his administration to increase the domestic production capacity of essential health products,” and ensure meat processing plants remained open.³⁹ On another occasion, President Trump issued a directive that prevented the export of personal protective equipment.⁴⁰ Throughout the pandemic, companies who manufactured COVID-19 vaccine candidates and companies who manufactured COVID-19 therapeutics received DPA ratings.⁴¹

3. President Biden's Uses of The DPA

President Biden also used the DPA to respond to the COVID-19 pandemic. On January 21, 2021, President Biden signed an executive order that directed federal agencies to use all available legal authorities, including the DPA, “to fill [supply] shortfalls” for the COVID-19 response.⁴² Since then, the Biden Administration invoked the DPA to help manufacturers secure supplies and equipment for COVID-19 vaccine production and expand access to COVID-19 testing.⁴³

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Katelyn M. Hilferty, *The Defense Production Act and The Biden Administration*, MORGAN LEWIS (Feb. 12, 2021), <https://www.morganlewis.com/pubs/2021/02/insight-the-defense-production-act-and-the-biden-administration-first100>; *Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as Amended*.

⁴² *Executive Order on a Sustainable Public Health Supply Chain*, THE WHITE HOUSE (Jan. 21, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-a-sustainable-public-health-supply-chain/>; Hilferty, *supra* note 41.

⁴³ See Siripurapu, *supra* note 7.

President Biden, has, however, invoked the DPA for other reasons. For example, in March 2022, President Biden invoked the DPA “to spur the domestic production of critical minerals needed to produce batteries for the automotive, emobility, and stationary electricity storage sectors.”⁴⁴ It was reported that the reason for President Biden’s use of the DPA:

is in direct response to the Biden-Harris administration’s longstanding concern that the existing supply chain and domestic capabilities to produce large-capacity batteries are insufficient to meet current and projected production and consumer domestic demand for the growing electric vehicle (EV) market. The administration’s action also aims to relieve the United States’ reliance on foreign oil while adding a swift transition to a clean energy future.⁴⁵

Additionally, in response to an infant formula shortage in the U.S., President Biden announced, in May 2022, that he would invoke the DPA for infant formula, allowing two infant formula manufacturers to require suppliers to give their orders priority over those of other customers.⁴⁶ The Biden Administration noted that it would “continue to identify opportunities to invoke the Defense Production Act and further increase infant formula production to maximum capacity.”⁴⁷

More recently, in October 2022, the Department of Energy (“DOE”) “announced a Request for Information . . . to determine how DOE could best leverage the Defense Production Act . . . to accelerate domestic production of key technologies, strengthen U.S. power grid reliability, and deploy clean energy.”⁴⁸ The Biden

⁴⁴ McAllister & Curran, *supra* note 3.

⁴⁵ *Id.*

⁴⁶ *President Biden Announces First Two Infant Formula Defense Production Act Authorizations*, THE WHITE HOUSE (May 22, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/22/president-biden-announces-first-two-infant-formula-defense-production-act-authorizations/>.

⁴⁷ *Id.*

⁴⁸ *DOE Seeks Input on How Defense Production Act Could Support National Security by Strengthening Grid Reliability*, U.S. DEP’T OF ENERGY (Oct. 3, 2022), <https://www.energy.gov/articles/doe-seeks-input-how-defense-production-act-could-support-national-security-strengthening>.

Administration is exploring the use of the DPA in this way “to develop more robust onshore production of clean energy-related sectors.”⁴⁹

Reports also indicate that President Biden considered invoking the DPA to address high oil prices by reopening eleven refineries.⁵⁰ As these examples demonstrate, President Biden used the DPA for domestic priorities—some of which do not have a clear connection to the plain meaning of a “national emergency” or “national defense.”

C. *Background of the Separation of Powers in the U.S. Government*

Under the separation of powers doctrine, the three branches of the U.S. federal government have distinct powers, supporting a system of checks and balances.⁵¹ Under the U.S. Constitution, each branch is vested with certain powers that, for the most part, are not exercised by the other two branches.⁵² This model helps ensure that one branch of the federal government does not become more powerful than the others.⁵³

The federal government must maintain the separation of powers because the doctrine prevents abuses of power and helps to preserve and maintain a democratic system of government.

⁴⁹ Todd N. Tucker, *Making Sense of Biden’s Green Energy Defense Production Act Announcements*, ROOSEVELT INSTITUTE (June 9, 2022), <https://rooseveltinstitute.org/2022/06/09/biden-green-energy-defense-production-act-announcements/>.

⁵⁰ See, e.g., Taylor Millard, *Stop Using the Defense Production Act and Antitrust to Fix Government-Created Problems*, THE DAILY BEAST (July 4, 2022), <https://www.thedailybeast.com/stop-using-defense-production-act-antitrust-to-fix-government-created-economic-problems>.

⁵¹ See THE FEDERALIST NO. 51 (James Madison).

⁵² *Id.* See generally U.S. CONST. art. I-III.

⁵³ See, e.g., THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”); see also *Separation of Powers in Action - U.S. v. Alvarez*, U.S. COURTS, EDUCATIONAL ACTIVITIES, <https://www.uscourts.gov/educational-resources/educational-activities/separation-powers-action-us-v-alvarez> (last visited Nov. 29, 2023).

Throughout the COVID-19 pandemic, the Supreme Court emphasized the importance of the separation of powers.⁵⁴ For example, the Court halted the Centers for Disease Control and Prevention from imposing an eviction moratorium when “the sheer scope of the [agency’s] claimed authority under [the statute] would counsel against the Government’s interpretation” of the statute.⁵⁵ The executive branch may be tempted or encouraged to act in ways that exceed its Constitutional authority (e.g., changing laws, creating policy, etc.) to respond to a situation quickly.⁵⁶ When the executive acts alone, however, it does so without the constitutional process that accompanies congressional authorization.⁵⁷

Unless there is an explicit delegation of authority by the legislative branch to the executive branch, unilateral actions by the President or executive branch violate of the separation of powers.⁵⁸ This can become a slippery slope to an overly powerful executive branch which violates the democratic structure established by the Constitution. It also reduces the level of accountability of decision makers to the American people.

One area of the law, however, where the executive branch receives a large amount of deference is the national security space, particularly in the context of foreign affairs. There are a few reasons for this, articulated in Article II of the Constitution.⁵⁹ Specifically, Article II, Section 2 states that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United

⁵⁴ See, e.g., *Alabama Ass’n of Realtors, et al. v. U.S. Dep’t. of Health and Hum. Servs.*, et al., 141 S.Ct. 2485, 2489–90 (2021).

⁵⁵ *Id.* at 2489.

⁵⁶ *Id.* (noting the CDC’s interpretation of the statute would give the CDC “a breathtaking amount of authority” and that “[i]t is hard to see what measures this interpretation would place outside the CDC’s reach” considering “the Government has identified no limit . . . beyond the requirement that the CDC deem a measure ‘necessary’”).

⁵⁷ *Id.* at 2490 (“[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends . . . It is up to Congress, not the CDC, to decide whether the public interest merits further action here.”) (internal citation omitted).

⁵⁸ See U.S. CONST. art. I, § 1; see also THE FEDERALIST NO. 51 (James Madison).

⁵⁹ U.S. CONST. art. II.

States.”⁶⁰ Alexander Hamilton justified the President’s Commander-in-Chief power because “Energy in the Executive...is essential to the protection of the community against foreign attacks” among other executive powers.⁶¹ The Commander-in-Chief clause gives the President broad authority when it comes to issues of national security and war.⁶²

In addition to the inherent powers vested in the President by Article II of the Constitution, Congress has passed laws that grant the President additional authorities in the national security and foreign affairs space. For example, after September 11, 2001, Congress passed a joint resolution—the Authorization for Use of Military Force (“AUMF”) of 2001—which became law on September 18, 2001.⁶³ The AUMF authorized the President:

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁶⁴

Much like an AUMF, the DPA gives the President broad legal authority to take independent actions to protect the nation’s security without waiting for further congressional approval. While the DPA does not grant the President authority to take actions that one traditionally considers “Commander-in-Chief duties,” (e.g., ordering troops to carry out certain actions, ordering or approving military missions, etc.), the original purpose of the law tangentially relates to national security issues since it was created with the intention of helping the military and domestic defense industries prepare for war.⁶⁵ Over time, however, the definition of “national defense” has expanded and creeps further and further away from the most common and

⁶⁰ *Id.* at § 2.

⁶¹ THE FEDERALIST NO. 70 (Alexander Hamilton).

⁶² U.S. CONST. art. II, § 2. *See, e.g.,* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936).

⁶³ Pub. L. 107-40.

⁶⁴ *Id.*

⁶⁵ *See* Duignan, *supra* note 10.

traditional definition of “national defense.”⁶⁶ As explained in Part II of the Background Section of this Comment, the DPA has been increasingly used for domestic priorities as opposed to true national defense or national security issues.

As analyzed *infra*, the recent uses of the DPA for domestic priorities raises significant separation of powers concerns, especially if such domestic priorities have little to no nexus to national defense as the term is defined in the DPA. This is a key component of the analysis because courts have not historically afforded the President as much deference in the domestic policy context as in the national defense, foreign affairs, or national security context.

II. ANALYSIS

A. *Do the Recent Uses of The DPA Align With Congress’s Purpose for Enacting the DPA?*

By passing the DPA, Congress certainly did not intend for the law to give the President or the executive branch an unlimited tool to use emergency powers at any time or for any reason. In fact, the law was modeled after the War Powers Acts of 1941 and 1942 and was created with the intention of helping the military and domestic defense industries prepare for war.⁶⁷ Though technology and society may have evolved to create challenges unimaginable by those who initially enacted the DPA, it is a stretch to think that the President invoking the DPA to spur the production of EV batteries or to develop more onshore production of clean energy-related sectors are the type of “national defense” issues that fell within Congress’s intended purpose for creating the law.

B. *The Expanding Definition of “National Defense” in The Context of The DPA*

While there may be slight variations when defining the term “national defense,” a reasonable interpretation of the term includes activities related to the planning and preparedness to meet the nation’s

⁶⁶ See generally NEENAN & NICASTRO, *supra* note 23, at 4.

⁶⁷ See Siripurapu, *supra* note 7.

defense needs. This may incorporate the military or certain industrial needs of the nation to ensure preparedness for war or conflict. Based on historical uses of the DPA, this could also include national energy needs. For example, one statute defines “national defense” as including “the needs of, and the planning and preparedness to meet, essential defense, industrial, and military emergency energy requirements relative to the national safety, welfare, and economy, particularly resulting from foreign military or economic actions.”⁶⁸

Under this definition of “national defense,” the DPA has been invoked numerous times to help fulfill orders for military-related equipment and prioritize orders for necessary supplies during natural disasters. As explained in Section II of this comment, some of the recent uses of the DPA were for problems that appear on their face to fall outside of the more traditional interpretation of “national defense.”⁶⁹ The DPA is increasingly used for domestic priorities as opposed to true national emergencies, national defense, or national security issues. This includes invocation of the DPA for EV car batteries, infant formula, and a variety of production needs during the COVID-19 pandemic as well as exploring ways to use the DPA to expand clean energy.⁷⁰

One reason for this shift is the increasing frequency and indefinite duration of declared emergencies. Consider the wars fought immediately before, during, and after the DPA was adopted. America’s direct involvement in the Second World War lasted from

⁶⁸ Naval Petroleum Reserves Production Act of 1976 § 7420, 10 U.S.C. § 8720(1).

⁶⁹ See generally NEENAN & NICASTRO, *supra* note 23, at 13–14.

⁷⁰ See THE WHITE HOUSE, EXECUTIVE ORDER ON A SUSTAINABLE PUBLIC HEALTH SUPPLY CHAIN (Jan. 21, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-a-sustainable-public-health-supply-chain/>; McAllister, *supra* note 3; THE WHITE HOUSE, PRESIDENT BIDEN ANNOUNCES FIRST TWO INFANT FORMULA DEFENSE PRODUCTION ACT AUTHORIZATIONS (May 22, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/22/president-biden-announces-first-two-infant-formula-defense-production-act-authorizations/>; U.S. DEPT. OF ENERGY, DOE SEEKS INPUT ON HOW DEFENSE PRODUCTION ACT COULD SUPPORT NATIONAL SECURITY BY STRENGTHENING GRID RELIABILITY (Oct. 3, 2022), <https://www.energy.gov/articles/doe-seeks-input-how-defense-production-act-could-support-national-security-strengthening>.

late 1941 to 1945.⁷¹ The Korean War was waged from 1950 to 1953.⁷² By contrast, the Iraq War was more protracted: from 2003 to 2011.⁷³ The Global War on Terror writ large has lasted even longer. As wars last longer and longer, the ease at which Presidents may justify actions as wartime exigencies increases as well.

In addition, public health emergencies have, in recent years, become increasingly salient. Under Section 319 of the Public Health Service Act, the Secretary of the U.S. Department of Health and Human Services (“HHS”) may declare a public health emergency if he or she “determine[s] that: (a) a disaster or disorder presents a public health emergency; or (b) that a public health emergency, including significant outbreaks of infectious disease or bioterrorist attacks, otherwise exists.”⁷⁴

The breadth of this authority can be seen from the changing nature of the emergencies HHS has declared. The Administration for Strategic Preparedness and Response within HHS lists U.S. public health emergencies dating back to 2005 on its website.⁷⁵ The majority of the early public health emergencies from 2005 to 2009 fell into category (a) as they were related to hurricanes or floods.⁷⁶ Starting in 2009, HHS started making fuller use of its power to declare category (b) emergencies. The proportion of such emergencies therefore increased—notably including public health emergencies for H1N1 flu outbreaks and the Zika virus outbreak.⁷⁷

In 2017, there was a further shift in the types of public health emergencies that the federal government declared, and how often the public health emergencies were renewed. Specifically, in 2017, a

⁷¹ See NEENAN & NICASTRO, *supra* note 23, at 2.

⁷² *Id.*

⁷³ *Id.* See also *The Iraq War*, Council on Foreign Relations, <https://www.cfr.org/timeline/iraq-war> (last visited Sep. 11, 2023).

⁷⁴ *Declarations of a Public Health Emergency*, U.S. DEP’T. OF HEALTH AND HUM. SERVS., ADMIN. FOR STRATEGIC PREPAREDNESS AND RESPONSE, <https://aspr.hhs.gov/legal/PHE/Pages/default.aspx> (last visited Sep. 3, 2023) [hereinafter *Declarations of a Public Health Emergency*].

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

public health emergency was declared for the opioid crisis.⁷⁸ HHS subsequently renewed this emergency several times.⁷⁹ Other repeatedly-renewed public health emergencies included those declared for COVID-19 and Mpox (i.e., monkeypox).⁸⁰ In some cases, the public health emergency was renewed despite a presidential declaration that the immediate underlying crisis had ended. For example, President Biden announced the end of the COVID-19 pandemic in September 2022.⁸¹ Nevertheless, he renewed the public health emergency for COVID-19 on October 13 of that year.⁸²

There is a striking parallel between the recent declarations of public health emergencies despite the lack of an emergency, and the expanding interpretation of “national defense” to use the DPA for purposes that fall outside the scope of the traditional definition of “national defense.”

As previously described, in more recent history, the U.S. has been in a more consistent state of war or conflict as compared to when the DPA was first enacted. As a result, the President has had more frequent occasions to invoke the DPA. That does not explain, however, the expanding definition of “national defense.” The expanding definition appears more akin to the public health emergency declaration examples provided above.

Like the declaration of a public health emergency, the DPA unlocks a host of emergency powers that the President and others in the executive branch may invoke unilaterally. Thus, the President has an incentive to use the DPA as a tool to effectuate the President’s priorities, even if the priorities do not constitute something that traditionally falls within the definition or scope of “national defense.” Presidents, however, have deemed issues “emergencies” or necessary for the “national defense” as a means to invoke the DPA to address those issues. President Biden’s recent invocations and directives to

⁷⁸ *Id.*

⁷⁹ See *Declarations of a Public Health Emergency*, *supra* note 74.

⁸⁰ *Id.*

⁸¹ Frank Diamond, *Biden Declares the COVID-19 Pandemic Over as Experts Keep Wary Eye on Potential Fall Surge*, FIERCE HEALTHCARE (Sept. 19, 2022), <https://www.fiercehealthcare.com/payers/biden-declares-covid-19-pandemic-over>.

⁸² See *Declarations of a Public Health Emergency*, *supra* note 74.

explore possible use of the DPA are clear examples. If there is no clear line or definition for what constitutes “national defense,” the expanding definition quickly leads to an abuse of power by the President and the executive branch because the executive can define almost anything as a matter of “national defense” and unlock emergency powers through the DPA whenever it deems necessary. Moreover, the executive can do this regardless of whether Congress would approve or disapprove of such a use of the DPA.

C. Do the Reasons For Recent DPA Uses Fall Within the Expanded Definition of “National Defense?”

While some of the recent uses—mainly the ones in the early days of the nation’s response to the COVID-19 pandemic—have a closer nexus to the original definition of “national defense,” the most recent uses of the DPA have drifted increasingly further away from the plain meaning of “national defense” and closer to a category more akin to domestic challenges or priorities.

For example, while increasing domestic EV production is an environmental or energy policy initiative, there is less of a direct link, if any, between these initiatives and any national defense or national security issue that must be addressed by the President either via the DPA or in his Commander-in-Chief role. The same can be said for infant formula. While an infant formula shortage may be an emergency, one could hardly argue that it is a national defense emergency.

D. The Intersection of The DPA and The President’s Inherent Constitutional Authorities: Are There Still Separation of Powers Concerns with Recent Uses of The DPA?

One might argue that regardless of what the DPA says, the President has inherent authorities rooted in two places in the Constitution to take unilateral action without the express consent or direction of Congress: (1) the President’s role as Commander-in-

Chief,⁸³ and (2) the Take Care Clause.⁸⁴ Focusing on the national security issues at play, the more relevant clause at issue in this analysis is the President's Commander-in-Chief power. A narrow reading of the Commander-in-Chief clause, however, does not provide policy making authority to the President.⁸⁵

The Commander-in-Chief power is not absolute. Congress retains critical authorities in the national security domain in alignment with the separation of powers.⁸⁶ When Congress establishes a framework for handling a national security issue, the President must abide by it so long as doing so does not put the U.S. in immediate danger.⁸⁷ This reading faithfully balances the powers of the President and Congress.⁸⁸

Despite the lack of policy making authority granted to the President by the Constitution, the President sometimes takes unilateral action when there is a lack of action by Congress, or when Congress expresses a desire that the President refrain from acting. Without explicit authority from Congress, or exceptions carved out in case law, the President taking such action effectively usurps Congress's Article I powers.

One of the most cited judicial opinions concerning the President's power in these situations is Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.⁸⁹ Justice Jackson details three separate categories: (1) "[w]hen the President acts pursuant to an express or implied authorization of Congress;" (2) "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers;" and

⁸³ U.S. CONST. art. II, § 2, cl. 1.

⁸⁴ U.S. CONST. art. II, § 3.

⁸⁵ STEPHEN DYCUS, ET AL., NATIONAL SECURITY LAW 9 (Rachel E. Barkow, et al. eds., 7th ed. 2020).

⁸⁶ See, e.g., U.S. CONST. art. I, § 8.

⁸⁷ See Samuel Estreicher and Steven Menashi, *Taking Steel Seizure Seriously: The Iran Nuclear Agreement and the Separation of Powers*, 86 Fordham L. Rev. 1199, 1201 (2017); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J. concurring).

⁸⁸ See generally *Youngstown Sheet & Tube Co.*, 343 U.S. 579 (Jackson, J. concurring).

⁸⁹ See *id.*

(3) “[w]hen the President takes measures incompatible with the expressed or implied will of Congress.”⁹⁰ According to Justice Jackson, when the President takes actions consistent with category one, “his authority is at its maximum.”⁹¹ When the President takes action consistent with category two, “there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”⁹² And finally, when the President takes action consistent with category three, “his power is at its lowest ebb.”⁹³

When the President invokes the DPA for a more traditional, national defense purpose in the truest sense, such action arguably falls into category one or two of Justice Jackson’s framework.⁹⁴ It would fall under category one because Congress has expressly authorized the President to take such action by passing the DPA.⁹⁵ Such action could also fall under category two because even if one does not believe the DPA gives the President authority to act, if the matter is truly one of national defense—particularly in the foreign affairs context—the President can rely on their own independent Commander-in-Chief authority granted to them by the Constitution.⁹⁶

When analyzing more recent uses of the DPA in the context of Justice Jackson’s *Youngstown* framework, however, the President’s actions would more likely fall within category three.⁹⁷ This is because addressing domestic problems that do not fit within the definition of “national defense” falls neither within the express authorization of Congress made by enacting the DPA, nor within the President’s constitutional Commander-in-Chief authority. Thus, recent uses of the DPA constitute an action when the President’s “power is at its lowest ebb.”⁹⁸

⁹⁰ *Id.* at 635–38.

⁹¹ *Id.* at 635.

⁹² *Id.* at 637.

⁹³ See *Youngstown Sheet & Tube Co.*, 343 U.S. at 637.

⁹⁴ See *id.* at 635–37.

⁹⁵ See *id.* at 635.

⁹⁶ See *id.* at 637; U.S. CONST. art. II, § 2. See, e.g., *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936).

⁹⁷ See *Youngstown*, 343 U.S. at 637 (Jackson, J. concurring).

⁹⁸ *Id.*

Beyond *Youngstown*, there is an ever-evolving body of case law surrounding national security and national defense issues and how much authority the President possesses to act without Congress's input, approval, or authority in such situations. By and large, the courts have determined that the President has broad authority and discretion to act unilaterally when it comes to foreign affairs matters.⁹⁹ The body of case law regarding the President's Commander-in-Chief powers in the national security context, however, is mostly concerned with foreign affairs issues.¹⁰⁰ The authority that the President has does not encompass the President's authority to take such action when the issue at hand is largely, if not entirely, a domestic one. To be sure, the issue might have some minor connection to national security, but the constant theme in the case law that holds the President has such authority to act unilaterally, rests on the fact that the issue before the court concerns a foreign affairs matter, not a domestic one unless the domestic issue directly implicates a foreign affairs matter.¹⁰¹

Otherwise, if the issue at hand is one that is merely domestic the analysis of whether the executive branch has the power to take unilateral action is likely to lead to a holding that is more akin to the Supreme Court's recent holding in *West Virginia v. EPA*.¹⁰² In that case, the Court ultimately held that Congress did not grant or delegate the Environmental Protection Agency ("EPA") (e.g., the executive branch) the authority to regulate the coal industry because it was a

⁹⁹ See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Dames & Moore v. Regan*, 453 U.S. 654, 682 (1981); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 14 (2015).

¹⁰⁰ See, e.g., *Curtiss-Wright*, 299 U.S. at 320; *Dames*, 453 U.S. at 682; *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 at 14.

¹⁰¹ See, e.g., *Curtiss-Wright*, 299 U.S. at 321–22 ("When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed.")

¹⁰² See *West Virginia v. EPA*, 142 S.Ct. 2587, 2600, 2609, 2610 (2022) (citing *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)).

question of major national significance that the authorizing statute did not address directly.¹⁰³

While the facts of *West Virginia v. EPA* do not squarely align with the facts that would be before a court in a case involving the use of the DPA, there are certainly important parallels.¹⁰⁴ As laid out in the facts of *West Virginia v. EPA*, the EPA's attempt to regulate the coal industry was significant in its scope, as the agency's regulations would have had a major impact on the industry.¹⁰⁵ Similarly, the President's use of the DPA can have a major impact on an industry.¹⁰⁶

In addition, the Court has consistently explained, as it did in *West Virginia v. EPA*, that "extraordinary grants of . . . authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'"¹⁰⁷ In essence, Congress is not in the habit of delegating broad authority without doing so explicitly. This is particularly relevant to an analysis of recent uses of the DPA because, if Congress wanted the President to be able to invoke the DPA for domestic purposes, it would have done so explicitly. Nationalizing an industry for domestic policy purposes is an extraordinary grant of authority that does not inherently align with promoting the national defense.

E. *Proposals to Prevent Future Separation of Powers Concerns by Use of The DPA*

There are a number of proposals for what can or should be done to prevent using the DPA as a means for the President or the executive branch to abuse power in the future. These proposals fall into two categories: (1) actions that can be taken by the executive branch; and (2) actions that can be taken by the legislative branch.

¹⁰³ *Id.* at 2615–16.

¹⁰⁴ *Id.* at 2600–06.

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., Kevin D. Costa and Charles Y. Lee, *Government Action Creates a Ripple Effect on Supply Chain*, THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS (Apr. 20, 2022), <https://www.asme.org/topics-resources/content/government-action-creates-a-ripple-effect-on-supply-chain>.

¹⁰⁷ See *West Virginia v. EPA*, 142 S.Ct at 2609 (quoting *Whitman v. American Trucking Assoc.*, 531 U.S. 458 (2001)); see, e.g., *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

1. The Executive Branch

The President should not invoke the DPA for reasons that are outside the bounds of the law and intended purpose of the Act. The President and the President's advisors should examine the currently available authorities and hold themselves accountable to acting within the bounds of those constitutional or congressionally granted authorities. If the executive branch determines that it does not have the authority to take certain actions but would like the authority to do so, it should request additional authority from Congress so that it can lawfully take such action in the future.

Given that the President and executive branch officials have a strong incentive to stretch the limits of their legal authority, the more plausible solution is for Congress to take action to prevent the executive branch from abuses of power via the DPA. Any remedy that relies on the good faith of one branch of government is a fragile one. This is the exact reason our constitutional system was created on the foundational understanding that “[a]mbition must be made to counteract ambition.”¹⁰⁸

2. The Legislative Branch

In Federalist No. 51, James Madison theorized that Members of Congress would jealously guard its power from encroachment by the other two branches of government.¹⁰⁹ Federalist No. 51 discusses the important system of checks and balances and a separation of powers among the three branches of our federal government.¹¹⁰

Congress should jealously guard its powers by taking action to preserve its Article I legislative powers. It can do so by conducting oversight of the President and other components of the executive branch's recent uses of the DPA. This should include an evaluation of Congress's intended purpose for the DPA; the legal basis on which the President or the President's designees have used the DPA; what the DPA was used for; and whether or not those uses fall within Congress's intended purpose of the DPA. Congressional oversight can also

¹⁰⁸ THE FEDERALIST NO. 51 (James Madison).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

examine whether unintended consequences have emerged from the law, such as what falls within the scope of the term “national defense” or what qualifies as a “national emergency” to ensure the terms are not broadened beyond what Congress intended for them to include. Congress has a myriad of oversight tools at its disposal to conduct oversight, including letters requesting information or documents, briefings from decision makers, and hearings.

In addition, Congress should examine whether it is necessary and appropriate to reauthorize the DPA. Alternatively, should Congress determine the granting of such authority is necessary and appropriate, the law needs to be amended in a way to reflect the determined needs of the President and the executive branch.

Lastly, if deemed necessary, Congress could pass legislation that would make the changes the President has tried to effectuate by invoking the DPA. For example, if Congress agrees that it should be a priority to spur domestic production of certain materials to manufacture a commodity domestically or spur more domestic energy production, Congress can be a partner in executing these domestic priorities through legislation. Such action by Congress would help advance domestic priorities in a way that is consistent with the Constitution and the structure of our government by aiding the President in advancing domestic priorities or making the President’s uses of the DPA lawful instead of allowing a continued abuse of power and a violation of the separation of powers doctrine.

CONCLUSION

I. SUMMARY OF THE ARGUMENT

There are separation of powers concerns regarding the expanding scope of “emergencies” that qualify for invoking the DPA. Emergencies that have a national defense component warrant the use of the DPA as the law was intended to be used by Congress. Otherwise, claiming certain issues as emergencies or claiming that issues fall within the true meaning of “national defense” to address a domestic problem or priority is effectively nationalizing an industry in the United States. The tangible line or boundaries that can be drawn based on the original purpose of the DPA’s use and a common theme

in the DPA's historical use is that the DPA is meant to address issues involving the national defense and national emergencies in their truest sense.

Some of the recent uses of the DPA fall outside of those definitions and thus raise serious separation of powers concerns. In the last three years, President Trump and President Biden used the DPA for an increasing number of issues that fall outside of the traditional "national defense" definition and scope. Most recently, President Biden has used the DPA to spur the domestic production of minerals needed to produce large-capacity batteries. He also instructed officials within the executive branch to explore ways to use the DPA to spur domestic energy production with no real identification of an impending national defense nexus as the reason for using the DPA. This type of use of the DPA raises major separation of powers concerns as this type of use falls outside the scope of Congressional intent.

Moreover, even when looking outside the four corners of the law and looking to the President's inherent powers granted by the Constitution or case law that addresses the scope of the President's powers, the President still lacks the authority to use the DPA to address domestic issues. Without a foreign affairs component the President is acting outside the scope of both the DPA and the President's inherent Commander-in-Chief powers.

Thus, the President and, by extension, the executive branch is using authority that it does not inherently have via the Constitution, nor is it acting with authority that has been delegated to it by Congress—expressly or implied. In sum, the executive branch's recent uses of the DPA are a violation of our nation's separation of powers doctrine.

II. SUMMARY OF PROPOSALS TO PREVENT FUTURE USES OF THE DPA THAT CREATE SEPARATION OF POWERS CONCERNS

A. *The Executive Branch*

In order to address these separation of powers concerns and prevent the President of the United States or other components of the executive branch from abusing the DPA, the President should refrain

from invoking the DPA for reasons that are outside the bounds of the law and intended purpose of the Act. This exercise of restraint will help maintain continuity in the purpose of the law, and help to maintain the separation of powers in our three branches of government.

B. *The Legislative Branch*

In addition, Congress should take action to preserve its Article I legislative powers by conducting oversight of the President and other components of the executive branch's invocation and potential future uses of the DPA. Through this oversight, Congress can examine whether certain uses of the DPA are within the spirit of the law and the authorization that it provides to the executive branch, whether it is appropriate to reauthorize the DPA, or if the DPA needs to be amended to prevent such egregious overreach by the executive branch. This can be conducted through oversight hearings; letters requesting information and documents, such as information about the legal analysis used to justify invoking the DPA; or requesting briefings from officials in the administration. Information gathered through these means can help inform whether legislative changes are necessary to prevent such uses of the DPA in the future, including preventing the President or other components of the executive branch from using the DPA to effectuate domestic policies.

Lastly, if Congress identifies legitimate areas in which the President or executive branch needs additional authorities that would allow the executive branch to take unilateral action on domestic policy issues, Congress may pass legislation that explicitly grants such authorities. Such legislation can amend the DPA to provide the executive branch with explicit authority to address domestic policies, or Congress can pass separate legislation that codifies recent Presidents' uses of the DPA. While this would effectively have the same result as if Congress were to do nothing and allow the status quo to continue, it would alleviate the separation of powers concerns addressed above, prevent the executive branch from acting outside of the authority that it possesses, and preserve Congress's Article I legislative powers.

In sum, the recent uses of the DPA create significant separation of powers concerns, and Congress must act to defend its Article I powers from being further commandeered by the executive branch. Without such action, the executive branch will continue pushing the bounds of the DPA beyond the intent of the law, further violating the separation of powers doctrine.

