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## Amending the Defense Production Act: Preventing Another Pandemic

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## Articles

# Amending the Defense Production Act: Preventing Another Pandemic

Madalyn McGunagle\*

“It’s going to disappear. One day, it’s like a miracle, it will disappear.”<sup>1</sup> Former President Donald Trump said this statement and several other public messages in reference to the COVID-19 (COVID-19) virus that took hold of the globe early in 2020. His declaration was incorrect, as COVID-19 has been an international threat since 2020.<sup>2</sup> American legislative history reflects the practice of creating or amending statutes to address pressing issues of the time, often granting the executive branches broader powers to act in times of crises.<sup>3</sup> Specifically, because of this prescribed power

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\* Recent Graduate; B.A. American University; J.D. Roger Williams University School of Law. Thank you to my parents, my sister, and my dear friends who had to hear me talk about the Defense Production Act for far too long and without whom I would not be where I am today.

1. Dan Goldberg, *“It’s Going to Disappear”: Trump’s Changing Tone on Coronavirus*, POLITICO (Mar. 17, 2020, 10:52 PM), <https://www.politico.com/news/2020/03/17/how-trump-shifted-his-tone-on-coronavirus-134246>.

2. *No Time for COVID-19 Complacency, Say Key Countries Responsible for Tracking Global Rollout of COVID-19 Vaccines, Tests and Treatments*, WHO (Sept. 22, 2022), <https://www.who.int/news/item/22-09-2022-no-time-for-covid-19-complacency—say-key-countries-responsible-for-tracking-global-rollout-of-covid-19-vaccines—tests-and-treatments> [https://perma.cc/RS4F-PMDG].

3. MICHAEL H. CECIRE & HEIDI M. PETERS, CONG. RSCH SERV., R43767, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS 2 (2020).

distribution, a president may invoke his authority in a timely manner, or has the option not to utilize all of his powers, to protect the American people.<sup>4</sup> For example, President Trump hesitated to invoke the Defense Production Act (DPA), which would have granted him wide-ranging authority to essentially stunt the spread of the COVID-19 pandemic.<sup>5</sup> This inaction highlights the need for lawmakers to amend the DPA to include a standard to ensure public safety and welfare, and to include trigger events that prompt action by the president.

Broadly speaking, the DPA authorizes the President to act in furtherance of national defense.<sup>6</sup> Presidents including Eisenhower, Johnson and Carter have used this authority in times of war to compel the necessary production of goods required for the United States war effort.<sup>7</sup> In response to the COVID-19 pandemic, many Americans and members of Congress insisted that former President Donald Trump use the powers granted in the DPA to quell price gouging, prevent hoarding, and compel production of fundamental items such as ventilators and cotton swabs used for testing.<sup>8</sup> The former President did engage the powers of the DPA—though many argue this action was too late to prevent a large infection rate, which perhaps led to the rapid spread of the virus in the United States.<sup>9</sup>

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4. MICHAEL H. CECIRE ET AL., CONG. RSCH. SERV., R46628, COVID-19 AND DOMESTIC PPE PRODUCTION AND DISTRIBUTION: ISSUES AND POLICY OPTIONS 48 (2020).

5. MICHAEL H. CECIRE & HEIDI M. PETERS, CONG. RSCH. SERV., IN11470, DEFENSE PRODUCTION ACT (DPA): RECENT DEVELOPMENTS IN RESPONSE TO COVID-19 3 (2020).

6. CECIRE ET AL., *supra* note 3, at 29.

7. DOUGLAS I. BELL ET AL., “A LITTLE-KNOWN BILL OF GREAT NATIONAL SIGNIFICANCE”: THE USES AND EVOLUTION OF THE DEFENSE PRODUCTION ACT, 1950-2020, U.S. ARMY HERITAGE AND EDUC. CTR. 1, 19, 23 (2020), [https://ahec.armywarcollege.edu/documents/Defense\\_Production\\_Act\\_1950-2020.pdf](https://ahec.armywarcollege.edu/documents/Defense_Production_Act_1950-2020.pdf) [<https://perma.cc/6YCY-KK8T>].

8. Andrew Jacobs, *Despite Claims, Trump Rarely Uses Wartime Law in Battle Against Covid*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2020/09/22/health/Covid-Trump-Defense-Production-Act.html> [<https://perma.cc/PW7J-KSGW>]; Li Zhou, *How Congress Could Force Trump to Use the Defense Production Act*, VOX (Mar. 25, 2020), <https://www.vox.com/2020/3/25/21191600/congress-defense-production-act-trump>.

9. Alex Gangitano & Morgan Chalfant, *Biden Increasingly Relies on DPA, Drawing GOP Scorn*, THE HILL (June 7, 2022, 6:21 PM), <https://thehill.com/news/administration/3515197-biden-increasingly-relies-on-dpa-drawing-gop-scorn/> [<https://perma.cc/29RQ-JKEV>].

Because of this failure to act in a timely manner, Congress should expand the powers of the DPA to provide for situations where public health and safety is at issue by amending the definition of “national defense” as referenced in the DPA. This Comment argues that Congress should broaden the definition of “national defense” to include trigger situations for presidential action and that the DPA standard should include scenarios for ensuring public safety and welfare. Section I of this Comment analyzes the background of the DPA and its historic uses. Section II analyzes the federal response to pandemic disease. Section III analyzes COVID-19 and President Trump’s use of the DPA compared to President Biden’s use of the Act. Section IV analyzes proposed language changes. Finally, section V addresses potential counterarguments.

### I. THE DEFENSE PRODUCTION ACT

Congress passed the Defense Production Act of 1950 in response to the Korean War.<sup>10</sup> The DPA replaced the First and Second War Powers Acts of 1941 and 1942, which gave the president authority to control industry when necessary during World War II.<sup>11</sup> Following World War II, this executive power subsided until the beginning of the Cold War in the late 1940s.<sup>12</sup> After the Cold War, the DPA stayed relatively dormant until the North Korean invasion of South Korea in 1950 when the Truman Administration recognized that, for the sake of national defense, the executive needed stronger authority.<sup>13</sup>

The DPA’s statutory protections stem from the definition of “to promote the national defense,” which authorizes the president to instruct executive agencies to act and compel domestic industries in times of national emergency.<sup>14</sup> Among the numerous powers conferred to the president through this act, the president is empowered to prioritize contracts, expand production, and prevent price gouging.<sup>15</sup> Under the DPA, the president is also provided “an array of authorities to shape national defense preparedness programs

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10. CECIRE & PETERS, *supra* note 3, at 2.

11. *Id.*

12. *Id.*

13. BELL ET AL., *supra* note 7, at 1.

14. 50 U.S.C. § 4511(a).

15. 50 U.S.C. § 4512.

and to take appropriate steps to maintain and enhance the domestic industrial base.”<sup>16</sup> Authority to act is derived from the statutory definition of the phrase “national defense,” which encompasses “programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity.”<sup>17</sup> The DPA is due for reauthorization in 2025, though it can be amended at any time.<sup>18</sup>

Since the DPA’s enactment, several presidents have used the DPA powers in response to a variety of crises. The Eisenhower administration used the DPA to increase the national stockpile of war munitions for fear of a global war with rival communist powers.<sup>19</sup> In the late 1960s and 1970s, the DPA was mainly used to address energy issues.<sup>20</sup> Specifically, President Johnson used the DPA to increase domestic oil production and to compel oil producers to prioritize the United States military over civilian clients when facing potential shortages.<sup>21</sup> President Carter later used the DPA to research synthetic fuel options and President Reagan used it to further develop certain technologies such as “composite materials and microelectronics.”<sup>22</sup> In the mid-1990s, President Clinton tasked the National Security Council with maintaining the national security preparedness standard included in the DPA.<sup>23</sup> In 2011, President Obama invoked the DPA to thwart threatened Chinese cyberespionage by forcing telecommunications companies to give network and equipment information.<sup>24</sup> More recently, in 2017, President Trump used the DPA to declare that certain components related to space industry are “critical to national defense” because “the United

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16. 50 U.S.C. § 4502(a)(4).

17. 50 U.S.C. § 4552(14).

18. Anshu Siripurapu, *What is the Defense Production Act?*, COUNS. ON FOREIGN RELS. (December 22, 2021, 3:40 PM), <https://www.cfr.org/in-brief/what-defense-production-act> [https://perma.cc/DX8Y-BNNT].

19. BELL ET AL., *supra* note 7, at 15.

20. *Id.* at 22.

21. *Id.*

22. *Id.* at 23.

23. *Id.* at 26.

24. Michael Riley, *Obama Invokes Cold-War Law to Unmask Chinese Telecom Spyware*, BLOOMBERG (Nov. 30, 2011, 2:45 PM), <https://www.bloomberg.com/news/articles/2011-11-30/obama-invokes-cold-war-security-powers-to-unmask-chinese-telecom-spyware> [https://perma.cc/V59N-G3WL].

States space industrial base cannot reasonably be expected to adequately provide those critical technology items in a timely manner.”<sup>25</sup>

Three weeks into his term, President Biden announced he would invoke the DPA to manufacture approximately sixty-one million at-home COVID-19 tests and to instruct the Department of Defense to deploy more than 1,000 military personnel to state-run vaccination sites.<sup>26</sup> Through the DPA, the Biden administration increased the number of at-home rapid tests from 24 million in August 2021 to 300 million by December 2021.<sup>27</sup> The Biden administration also used the DPA to “give Pfizer priority access to two components it [needed] to manufacture its COVID-19 vaccine.”<sup>28</sup> In 2022, President Biden invoked the DPA to “boost domestic production of goods used to make solar panels,” prior to the Senate passage of the Inflation Reduction Act of 2022.<sup>29</sup> The White House considered this an “important first step towards the administration’s clean energy goals.”<sup>30</sup> In May 2022, following a baby formula recall from Abbott Nutrition coupled with supply chain issues across the country, President Biden used the DPA to increase production of formula and to authorize “the Department of Defense to use commercial aircraft to fly formula supplies that meet federal standards from overseas to the U.S.”<sup>31</sup> In June 2022, President Biden also

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25. Presidential Determination Pursuant to Section 4533(a)(5) of the Defense Production Act of 1950: Memorandum for the Secretary of Defense, 82 Fed. Reg. 27,607 (June 15, 2017).

26. Rachel Rouben, *Biden to Use Defense Production Act to Increase Supply of Covid-19 Vaccines and Tests*, POLITICO (Feb. 5, 2021, 1:36 PM), <https://www.politico.com/news/2021/02/05/biden-defense-production-act-coronavirus-466130> [<https://perma.cc/9GM4-74X9>].

27. Gangitano & Chalfant, *supra* note 9.

28. Rouben, *supra* note 26.

29. Gangitano & Chalfant, *supra* note 9; see Tony Romm, *Senate Approves Inflation Reduction Act, Clinching Long-Delayed Health and Climate Bill*, WASH. POST (Aug. 7, 2022, 5:16 PM), <https://www.washingtonpost.com/us-policy/2022/08/07/senate-inflation-reduction-act-climate/> [<https://perma.cc/D3FJ-8PMU>].

30. Gangitano & Chalfant, *supra* note 9.

31. Zeke Miller & Kevin Freking, *Biden Invokes the Defense Production Act for the Baby Formula Shortage*, NPR (May 18, 2022, 6:48 PM), <https://www.npr.org/2022/05/18/1099937734/biden-invokes-defense-production-act-for-baby-formula-shortage> [<https://perma.cc/7VCV-YHZV>].

announced he would be willing to use the DPA to control gasoline output in response to an increase in gas prices.<sup>32</sup>

President Biden's usage of the DPA has not been without criticism, specifically that Biden's uses exceed the scope of the DPA's "national emergency" defense standard.<sup>33</sup> Following Biden's solar panel DPA use, Senator Pat Toomey of Pennsylvania tweeted "[o]nce again, @POTUS is abusing the Defense Production Act – this time to advance his global warming agenda by using taxpayer dollars to build solar panels. If the administration keeps misusing the DPA for non-defense purposes, Congress must curtail it."<sup>34</sup> However, a Department of Defense report from October 2021 noted that "climate change was an issue of national security, and the text of the DPA itself lists energy as a 'strategic and critical material.'"<sup>35</sup> Furthermore, in an opinion piece on *The Daily Beast*, Taylor Millard criticized using the DPA for baby formula production: "And baby formula? How the hell does that equal national defense? It's not like the Department of Defense will suddenly start employing baby soldiers to fight wars."<sup>36</sup> This statement misconstrues the purpose of the DPA and demonstrates a lack of understanding of the use of the DPA.

## II. FEDERAL PANDEMIC RESPONSE

### A. *Federal Pandemic Preparedness*

In March 2020, early in the COVID-19 pandemic, President Trump said of the deadly virus: "[n]obody ever expected a thing like

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32. Ari Natter & Jenny Leonard, *Biden Open to Using Cold-War Era Law to Ramp Up Gasoline Output*, BLOOMBERG (June 15, 2022, 4:45 PM), <https://www.bloomberg.com/news/articles/2022-06-15/biden-willing-to-use-emergency-war-time-law-to-boost-gasoline> [https://perma.cc/9M5P-WH79].

33. Gangitano & Chalfant, *supra* note 9.

34. Senator Pat Toomey (@SenToomey), TWITTER (June 6, 2022, 11:43 AM), <https://twitter.com/SenToomey/status/1533836960183238656> [https://perma.cc/T6QP-G89B].

35. Neel Dhanesha, *Why Joe Biden is Invoking a War Power to Build Heat Pumps and Solar Panels*, VOX (June 8, 2022, 12:00 PM), <https://www.vox.com/recode/2022/6/8/23159767/biden-defense-production-act-clean-energy-solar> [https://perma.cc/6Q67-57W7].

36. Taylor Millard, *Stop Using the Defense Production Act and Antitrust to Fix Government-Created Problems*, DAILY BEAST (Jul. 4, 2022, 3:35 AM), <https://www.thedailybeast.com/stop-using-defense-production-act-antitrust-to-fix-government-created-economic-problems> [https://perma.cc/W396-4GCY].

this.”<sup>37</sup> However, something “like this” was indeed expected, exemplified by the national pre-existing strategic framework for counter-ing pandemics based on similar events in the past.<sup>38</sup> In 2005, the George W. Bush administration created a framework called the National Strategy for Pandemic Influenza to prepare for the threat of H5N1 avian influenza.<sup>39</sup> Through this preparedness framework, the federal government stressed the need for the “federal government [to] use all instruments of national power to address the pandemic threat,” as well as reliance on states to have their own comprehensive preparedness plans in place.<sup>40</sup> The framework also suggested that “[t]he private sector should play an integral role in preparedness before a pandemic begins, and should be part of the national response.”<sup>41</sup> The federal government, as authorized by the plan, should encourage stockpiles and production of necessary materials and equipment while also cooperating with state and local plans.<sup>42</sup> States and localities are in turn instructed to take all possible measures to limit community spread of the virus as well as take personalized procedures consistent with their community.<sup>43</sup>

In a 2017 update to the Pandemic Influenza Plan, the Department of Health and Human Services (HHS) emphasized the necessity for community mitigation tactics in addition to cooperation between the federal government and the states.<sup>44</sup> Such community mitigation includes commonly accepted practices like staying home when sick, covering one’s mouth when coughing or sneezing, and other more obscure practices (though now commonplace) like travel restrictions and reduced social contact.<sup>45</sup> The Center for Disease Control (CDC) also created the Pandemic Intervals Framework

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37. Dan Diamond & Nahal Toosi, *Trump Team Failed to Follow NSC’s Pandemic Playbook*, POLITICO (Mar. 25, 2020, 8:00 PM), <https://www.politico.com/news/2020/03/25/trump-coronavirus-national-security-council-149285> [<https://perma.cc/M26T-7SYV>].

38. HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA (2005).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. U.S. DEPT OF HEALTH AND HUMAN SERVICES, PANDEMIC INFLUENZA PLAN 2017 UPDATE (2017).

45. *Id.*



which is used to guide pandemic preparedness planning while also providing recommendations for risk assessment and decision-making.<sup>46</sup> The Pandemic Intervals Framework begins at its first stage where authorities investigate a potential new virus and continues to its second stage where authorities recognize the increased potential for ongoing transmission.<sup>47</sup> In stage three a pandemic wave occurs, is accelerated in stage four, and decelerated in stage five.<sup>48</sup> In stage six, the CDC begins preparation for any potential future pandemic waves.<sup>49</sup>

Various government entities and agencies are responsible for emergency preparedness and responses.<sup>50</sup> Combined with international cooperation from organizations like the World Health Organization and the Food and Agriculture Organization of the United Nations, the United States has an intricate system of inter-agency collaboration.<sup>51</sup> Numerous agencies fall under the HHS umbrella.<sup>52</sup> The Secretary of Health and Human Services directs the HHS pandemic response activities while the Office of the Assistant Secretary for Health monitors the progress of HHS pandemic response activities.<sup>53</sup> Other vital agencies fall under this umbrella, including the CDC, the Food and Drug Administration, the National Institute of Health, and the National Vaccine Program Office.<sup>54</sup> Coordinated responses also come from other executive departments including the Department of Homeland Security, the Department of Defense, and the Department of Agriculture.<sup>55</sup> All of these federal efforts are in concert with state departments of

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46. *Pandemic Intervals Framework*, CTR. FOR DISEASE CONTROL & PREVENTION (Nov. 3, 2016), <https://www.cdc.gov/flu/pandemic-resources/national-strategy/intervals-framework.html> [<https://perma.cc/US9N-JHA7>].

47. *Id.*

48. *Id.*

49. *Id.*

50. See Georgetown Univ. L. Libr., *Pandemics - Public Health Research Guide: Agencies Responsible for Emergency Preparedness & Responses*, GEORGETOWN L. (June 16, 2022, 2:16 PM), <https://guides.ll.georgetown.edu/c.php?g=364692&p=2463714> [<https://perma.cc/BFV2-6SMY>].

51. *See id.*

52. *See id.*

53. *Id.*

54. *Id.*

55. *Id.*

health, which monitor the community spread on a local level and locally triage vital materials.<sup>56</sup>

### B. *Strategic National Stockpile*

The national government, through the CDC, maintains a stockpile, called the U.S. Strategic National Stockpile (SNS), of “medicine and medical supplies to protect the American public if there is a public health emergency (terrorist attack, outbreak, earthquake) severe enough to cause local supplies to run out.”<sup>57</sup> Most things about the SNS are classified, though, reportedly, approximately “\$8 billion worth of vaccines, pharmaceuticals, protective gear, ventilators[,] and other kinds of medical equipment are housed in warehouses that are strategically located around the United States.”<sup>58</sup> Since its founding in 1999, the SNS has provided necessary materials in various crises such as the 2001 World Trade Center and subsequent anthrax attacks, Hurricane Katrina in 2005, and Hurricanes Harvey, Irma, and Maria in 2017.<sup>59</sup> The SNS is designed to act as a “bridge . . . not a replacement for the private sector,” meaning that, within this framework, shortages of necessary items can still occur.<sup>60</sup> Former director of the SNS, Greg Burel, said of the stockpile: “[W]e would be foolish not to prepare for those events

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56. See Emily Berman, *The Roles of the State and Federal Governments in A Pandemic*, 11 J. NAT’L SECURITY L. & POL’Y 61, 62–64 (2020).

57. Admin. for Strategic Preparedness and Response, *Strategic National Stockpile*, U.S. DEPT OF HEALTH & HUM. SERVS., <https://aspr.hhs.gov/SNS/Pages/Products.aspx> [<https://perma.cc/F8PG-A8QR>] (last visited Dec. 22, 2022).

58. Nell Greenfieldboyce, *Why Even a Huge Medical Stockpile Will be of Limited Use Against Covid-19*, NPR (Mar. 14, 2020, 10:09 AM), <https://www.npr.org/sections/health-shots/2020/03/14/814121891/why-even-a-huge-medical-stockpile-will-be-of-limited-use-against-covid-19> [<https://perma.cc/J6AH-59LU>]. No one knows how many separate warehouses there are, though a former government official has said there are six. See Nell Greenfieldboyce, *Inside a Secret Government Warehouse Prepped for Health Catastrophes*, NPR (June 27, 2016, 4:56 AM), <https://www.npr.org/sections/health-shots/2016/06/27/483069862/inside-a-secret-government-warehouse-prepped-for-health-catastrophes> [<https://perma.cc/AZ8N-6HC7>].

59. Tessa Berenson, *States Need Medical Supplies to Fight Coronavirus. Can the National Stockpile Keep up with Demand?*, TIME (Mar. 10, 2020, 5:15 PM), <https://time.com/5800200/strategic-national-stockpile-coronavirus/> [<https://perma.cc/VD5V-6FQV>].

60. Greenfieldboyce, *Why Even a Huge Medical Stockpile Will be of Limited Use Against Covid-19*, *supra* note 58.

that we could predict might happen.”<sup>61</sup> The SNS is continuously updated based on credible threats and expiration dates of products are routinely monitored.<sup>62</sup>

The federal government designed SNS to supply state and local public health workers with required materials. The public health workers then determine the triage of materials within their community.<sup>63</sup> At the beginning of the COVID-19 pandemic, each state asked for necessary medical items stored in the SNS, like masks and ventilators.<sup>64</sup> Governors soon found out that they were on their own, as the SNS was entirely depleted only a few weeks after states of emergency were declared.<sup>65</sup> On April 4, 2020, the Trump administration changed the federal characterization of the SNS from “the nation’s largest supply of life-saving pharmaceuticals and medical supplies for use in a public health emergency severe enough to cause local supplies to run out” to reflect that its “role is to supplement state and local supplies during public health emergencies.”<sup>66</sup>

A report in 2017 funded by the National Institutes of Health (NIH) and the CDC said that there was a large risk that “intensive care units might have insufficient resources to treat all persons requiring ventilator support” and that the SNS “might not suffice to

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61. Greenfieldboyce, *supra* note 58.

62. *Id.*

63. *Id.*

64. Andrew Hay, ‘On Our Own No’: U.S. Strategic Stockpile Empty of Medical Supplies, REUTERS (Mar. 31, 2020, 10:04 AM) <https://www.reuters.com/article/us-health-coronavirus-usa-stockpile/on-our-own-now-u-s-strategic-stockpile-empty-of-medical-supplies-idUSKBN21I3FE> [<https://perma.cc/6ESQ-M5M5>].

65. *Id.*

66. ASSISTANT SECRETARY FOR PREPAREDNESS AND RESPONSE, DEFINITION OF STRATEGIC NATIONAL STOCKPILE (Apr. 1, 2020), <https://web.archive.org/web/20200402234018/https://www.phe.gov/about/sns/Pages/default.aspx>; ASSISTANT SECRETARY FOR PREPAREDNESS AND RESPONSE, DEFINITION OF STRATEGIC NATIONAL STOCKPILE (Apr. 3, 2020), <https://web.archive.org/web/20200403163355/https://www.phe.gov/about/sns/Pages/default.aspx>. The Trump administration changed the description seemingly in response to White House advisor Jared Kushner’s April 2<sup>nd</sup>, 2020, statement: “The notion of the federal stockpile was it’s supposed to be our stockpile. It’s not supposed to be states’ stockpiles that they then use.” See Nathaniel Weixel, *Trump Administration Changes Definition of National Stockpile After Kushner Remarks*, THE HILL (Apr. 3, 2020, 1:27 PM), <https://thehill.com/homenews/administration/491037-trump-administration-changes-definition-of-national-stockpile-after?rl=1> [<https://perma.cc/7X5T-8CWK>].

meet demand during a severe public health emergency.”<sup>67</sup> In the early days of the COVID-19 pandemic, HHS estimated that the United States would need approximately 3.5 billion N95 face-masks,<sup>68</sup> despite the fact that the SNS only had around twelve million such masks.<sup>69</sup> On March 21, 2020, former New York Governor Andrew Cuomo announced that the state was looking to buy more ventilators, in addition to the four thousand sent by the Federal Emergency Management Agency and the seven thousand the state had already, as New York was expected to need approximately thirty thousand total ventilators to fight the COVID-19 pandemic.<sup>70</sup> The longer intubation period for a typical adult COVID-19 patient seemingly drew this demand for ventilators.<sup>71</sup> A person admitted to the ICU for non-COVID reasons typically stays an average of three to four days,<sup>72</sup> while the average time for a COVID-19 patient in the ICU before vaccine development was two to three weeks.<sup>73</sup>

### C. *Modern Pandemics*

The federal government has experience dealing with threats of potential pandemics and lower-level pandemics, such as the 2009 H1N1 influenza, sometimes referred to as the swine flu.<sup>74</sup> Three months into his first term, former President Barack Obama pledged to monitor H1N1, encouraged schools to close if there were

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67. Majile de Puy Kamp, *Federal officials repeatedly warned that US hospitals lacked enough ventilators*, CNN (Mar. 27, 2020, 7:33 PM), <https://www.cnn.com/2020/03/27/cnn10/ventilators-supply-government-warnings-coronavirus-invs/index.html> [<https://perma.cc/M85L-UFQZ>].

68. Berenson, *supra*, note 59. N95 masks became an important asset for the healthcare industry because they filter out ninety-five percent of small particles, which proved to be useful in preventing the contraction of Covid-19. Austin Hufford, *Why Are N95 Masks So Important?*, THE WALL STREET JOURNAL (June 1, 2020, 11:51 AM), <https://www.wsj.com/articles/why-are-n95-masks-so-important-11591026684> [<https://perma.cc/53LQ-4GLF>].

69. Berenson, *supra*, note 59.

70. Kamp, *supra*, note 67.

71. *Id.*

72. *Id.*

73. *Id.*

74. *See generally* PRESIDENT’S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, REPORT TO THE PRESIDENT ON U.S. PREPARATIONS FOR 2009-H1N1 INFLUENZA (Aug. 7, 2009), <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/pcast-h1n1-report-final2.pdf> [<https://perma.cc/AXH8-V2AG>].

suspected cases, and put experts in charge of delivering information to the general public.<sup>75</sup> He also attempted to get Congress on board with his plan, which proved difficult at first, but eventually Congress agreed on a supplemental funding bill of nearly \$8 billion.<sup>76</sup> At the outset, experts predicted that H1N1 would be a highly transmissible disease, that approximately 30-50% of the United States population would become infected, and that it could cause between 30,000 and 90,000 deaths, concentrated mostly in children and young adults.<sup>77</sup> However, the CDC estimates that there were 60.8 million cases of swine flu in the United States from 2009 to 2010, resulting in 12,469 deaths.<sup>78</sup> Officials attribute this comparatively minor impact to a variety of causes, including H1N1's low lethality rate relative to COVID-19, as well as the timely and effective guidelines created in the National Strategy for Pandemic Influenza.<sup>79</sup> In a report prepared for President Obama on the possible resurgence of H1N1 in autumn 2009, the President's Council of Advisors on Science and Technology counseled that the impact of potential pandemics can be mitigated through "vaccination, administration of anti-viral drugs, symptomatic medical care, and non-medical interventions," including social distancing, school closures, and remote work policies.<sup>80</sup> The report also suggested that the administration

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75. *See id.*

76. Natasha Korecki, *Biden has fought a pandemic before. It did not go smoothly*, POLITICO (Apr. 4, 2020), <https://www.politico.com/news/2020/05/04/joe-biden-contain-h1n1-virus-232992> [<https://perma.cc/URB6-3RCC>].

77. PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, *supra* note 74, at vi. The virus may have attacked children and young adults because people over sixty years old had been exposed to a different H1N1 virus earlier in their lives. *See 2009 H1N1 Pandemic (H1N1pdm09 Virus)*, CTR. FOR DISEASE CONTROL & PREVENTION (June 11, 2019), <https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html> [<https://perma.cc/WK7V-PHG9>].

78. *2009 H1N1 Pandemic*, *supra* note 77. Compare that figure to the peak weekly death rate of the Covid-19 pandemic at 26,027 during the week of January 9, 2021. *See generally*, Nat'l Ctr. for Health Stat., *Provisional Death Counts for Coronavirus Disease 2019 (COVID-19)*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm> [<https://perma.cc/42JU-AKGS>] (last visited Dec. 22, 2022).

79. Korecki, *supra* note 76. White House Chief of Staff and former Ebola czar Ron Klain said, "It had nothing to do with us doing anything right. It just had to do with luck. If anyone thinks that this can't happen again, they don't have to go back to 1918, they just have to go back to 2009, 2010 and imagine a virus with a different lethality, and you can just do the math on that." *Id.*

80. *See* PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, *supra* note 74, at 31, 50, 51.

designate one federal official, most likely the Homeland Security Advisor, as the point person for coordinating policy developments for H1N1, as well as notifying relevant people and entities of developments in decision-making and presenting recommendations to the president.<sup>81</sup>

Following H1N1 and the 2014 Ebola epidemic, President Obama created the Directorate for Global Health Security and Bio-defense (“Directorate”) through the National Security Council (“NSC”), tasked with advising the President on pressing potential global health issues such as foreseeable pandemics.<sup>82</sup> In 2018, President Trump’s third national security adviser, John Bolton, decided that the NSC was too structurally complex and reorganized the Directorate to focus on “counterproliferation and biodefense.”<sup>83</sup> Some within the NSC said this shift was in name only, as many of the employees retained both their positions and specialized subject matter.<sup>84</sup> However, critics likened the change to “terminating the fire department chief and putting the firefighters in the police department.”<sup>85</sup>

### III. COVID-19 AND THE DEFENSE PRODUCTION ACT

On December 31, 2019, the United States became aware of a highly transmissible respiratory illness originating in China, later identified as 2019-nCoV, colloquially referred to as COVID-19.<sup>86</sup> To date, over 1.1 million Americans have died from COVID-19.<sup>87</sup> In the course of understanding the virus symptoms and transmission, the world as a whole adopted practices such as social distancing, quarantining, social isolation, and face coverings, all of which

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81. *Id.* at 31.

82. Glenn Kessler & Meg Kelly, *Was the White House office for global pandemics eliminated?*, WASH. POST (Mar. 20, 2020, 3:00 AM), <https://www.washingtonpost.com/politics/2020/03/20/was-white-house-office-global-pandemics-eliminated/> [https://perma.cc/Y66T-YEMY].

83. *Id.*

84. *Id.*

85. *Id.*

86. SARAH A. LISTER & KAVYA SEKAR, CONG. RSCH. SERV., IN11212, ANOTHER CORONAVIRUS EMERGES: U.S. DOMESTIC RESPONSE TO 2019-nCoV, 1 (2020).

87. Center for Systems Science and Engineering, *COVID-19 Dashboard*, JOHNS HOPKINS UNIV., <https://coronavirus.jhu.edu/us-map> (last visited Dec. 22, 2022).

became commonplace as a result of the COVID-19 pandemic.<sup>88</sup> At the beginning of the COVID-19 pandemic, Americans were without access to widespread testing due to a shortage of cotton swabs.<sup>89</sup> Lack of access to extensive testing ultimately proved costly. The virus spread undetected throughout the United State because of its sometimes asymptomatic nature.<sup>90</sup> As COVID-19 overtook the globe, highly impacted and infected countries experienced a decrease in exports of vital materials compared to the increased demand for these items, creating a classic supply crunch.<sup>91</sup> Although the DPA gives the President broad powers to act, many argued that President Trump failed to timely invoke those powers and protect the American public by mandating production of vital, unique products such as masks and testing materials.<sup>92</sup>

#### A. *President Trump's Use of the DPA*

President Trump first invoked the DPA with an eye toward combating COVID-19 on March 18, 2020, following a letter sent earlier in the month from fifty-seven House Democrats that asked the President to invoke the Act to “begin mass production of supplies needed to address the ongoing COVID-19 pandemic.”<sup>93</sup> This initial invocation created conditions for the administration to utilize the

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88. Donald G. McNeil, Jr., *The Virus Can Be Stopped, but Only With Harsh Steps, Experts Say*, N.Y. TIMES (Mar. 25, 2022), <https://www.nytimes.com/2020/03/22/health/coronavirus-restrictions-us.html> [https://perma.cc/XG72-VK8Z].

89. David Lim, *Latest coronavirus testing glitch: Not enough cotton swabs*, POLITICO (Mar. 16, 2020, 5:28 PM), <https://www.politico.com/news/2020/03/16/coronavirus-testing-glitch-cotton-swabs-132692> [https://perma.cc/6VEV-T8ZF].

90. See *Why Covid-19 Testing is the key to getting back to normal*, NAT'L INST. ON AGING (Sept. 4, 2020), <https://www.nia.nih.gov/news/why-covid-19-testing-key-getting-back-normal> [https://perma.cc/M336-BQHK].

91. Vital materials included masks, ventilators, cleaning materials, and hand sanitizer. See Patrick McDonnell, *What's in Trump's Executive Order on the Defense Production Act?*, LAWFARE (Mar. 20, 2020, 3:04 PM), <https://www.lawfareblog.com/whats-trumps-executive-order-defense-production-act> [https://perma.cc/8FVJ-4SEE].

92. Salvador Rizzo, *What to Know About the Defense Production Act*, WASH. POST (Mar. 25, 2020, 3:00 AM) <https://www.washingtonpost.com/politics/2020/03/25/is-trump-using-defense-production-act/> [https://perma.cc/68CK-ZCKX].

93. Response time was seventy-eight days between December 31, 2019, and March 18, 2020. McDonnell, *supra* note 91.

DPA's powers, specifically by classifying necessary resources as vital so that, if necessary, the government could prioritize their contracts over other contracts.<sup>94</sup> On March 24, 2020, President Trump tweeted that he was hesitant to further utilize the DPA, saying "[t]he Defense Production Act is in full force, but haven't had to use it because no one has said NO! Millions of masks coming as back up to States."<sup>95</sup> Earlier that week, on March 22, 2020, President Trump also said, "[w]e're a country not based on nationalizing our business . . . the concept of nationalizing our business is not a good concept."<sup>96</sup> This is not an accurate characterization because private companies that the federal government engages with under the DPA remain private and receive compensation.<sup>97</sup> The DPA only allows the president to create contracts with companies in times of need to "prioritize the production of 'scarce and critical material.'"<sup>98</sup> The DPA also gives the president power to "provide loan guarantees or lend money directly to targeted industries, and it can shield them from anti-trust actions resulting from" these actions.<sup>99</sup> This framework is different from the concept of nationalization, which is characterized by a government's forced control over a company or industry that is often unpaid.<sup>100</sup>

Following criticism that he did not act quickly enough to quell COVID-19 in its early days, President Trump finally compelled General Motors to produce ventilators by executive order on March 27, 2020.<sup>101</sup> President Trump then expanded this order to include

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94. *Id.*

95. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 24, 2020, 12:00 PM), <https://www.presidency.ucsb.edu/documents/tweets-march-24-2020> [https://perma.cc/22SZ-HQU4].

96. *President Trump with Coronavirus Task Force Briefing*, C-SPAN (Mar. 22, 2020), <https://www.c-span.org/video/?470588-1/president-trump-coronavirus-task-force-briefing>; Rizzo, *supra* note 92.

97. Rizzo, *supra* note 92.

98. James Doubek, *Fact Check: Trump Compares Defense Production Act to Nationalization*, NPR (Mar. 23, 2020, 7:56 AM), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/23/819926854/fact-check-trump-compares-defense-production-act-to-nationalization> [https://perma.cc/9UP7-GCFA].

99. *Id.*

100. *Id.*

101. Cameron Peters, *A Detailed Timeline of All the Ways Trump Failed to Respond to the Coronavirus*, Vox (June 8, 2020, 6:00 AM), <https://www.vox.com/2020/6/8/21242003/trump-failed-coronavirus-response>;



other private entities, like 3M, and targeted the hoarding of medical supplies, though some said this hands-off approach “still [fell] short of the DPA’s ultimate authority.”<sup>102</sup> Through the full extent of the DPA’s authority, President Trump could have encouraged production, while also tasking a federal agency with the industrial response to purchase necessary items and to distribute goods to states and localities.<sup>103</sup> In the weeks following the DPA’s initial authorization, President Trump invoked the DPA eight more times, both by executive order and memorandum.<sup>104</sup> The Trump administration said that it selectively invoked the DPA, with intent to focus more “on individual companies or industry sub-sectors” after meeting complaints from Congress for his delayed action.<sup>105</sup> In November 2020, the U.S. International Development Finance Corporation approved a \$590 million loan to ApiJect Systems under the DPA to make syringes for COVID-19 vaccines under the threat of a potential syringe shortage.<sup>106</sup> As of April 2021, a large percentage of Americans have been vaccinated and ApiJect had not yet received the first of necessary approvals to begin production of the syringes.<sup>107</sup>

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Gavin Bade, *Trump Expands DPA, Amid Mounting Pressure*, POLITICO (Apr. 2, 2020 6:44 PM), <https://www.politico.com/news/2020/04/02/trump-expands-dpa-order-162128> [<https://perma.cc/A97A-6WQG>]; Donald J. Trump, *Memorandum on Order Under the Defense Production Act Regarding General Motors Company*, TRUMP WHITE HOUSE ARCHIVES (Mar. 27, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-order-defense-production-act-regarding-general-motors-company/> [<https://perma.cc/DE5F-8UQA>].

102. Gavin Bade, *Trump Expands DPA, Amid Mounting Pressure*, POLITICO (Apr. 2, 2020, 6:44 PM), <https://www.politico.com/news/2020/04/02/trump-expands-dpa-order-162128> [<https://perma.cc/3XKU-E7TE>].

103. *Id.*

104. CECIRE ET AL., *supra* note 4, at 31.

105. *Id.* at 30.

106. Press Release, U.S. Int’l Dev. Fin. Corp., DFC Approves \$590 Million Loan to ApiJect to Expand Infrastructure and Deliver Critical Vaccines in Response to the Covid-19 Pandemic (Nov. 19, 2020), <https://www.dfc.gov/media/press-releases/dfc-approves-590-million-loan-apiject-expand-infrastructure-and-deliver> [<https://perma.cc/E77T-8XRQ>].

107. Andrew W. Lehren and Laura Strickler, *The Trump Admin Awarded a Firm Up to \$1.3 Billion to Make Covid Vaccine Syringes. Where Are They?*, NBC NEWS (Apr. 21, 2021, 4:31 AM), <https://www.nbcnews.com/health/health-care/trump-administration-awarded-firm-1-3-billion-make-covid-vaccine-n1263872> [<https://perma.cc/AR22-FEF7>].

B. *President Biden's Use of the DPA to Curb COVID-19*

President Joe Biden took office on January 20, 2021.<sup>108</sup> During his first week in office, President Biden used the DPA to establish the role of the COVID-19 Response Coordinator to organize the federal government's COVID-19 efforts by executive order.<sup>109</sup> Another Biden executive order created a sustainable public health supply chain by prioritizing inventorying medical supplies, applying federal pricing schedules to those supplies, allowing tribal access to the SNS, and developing a long-term strategy with a focus on future pandemics.<sup>110</sup> With this foundation, the Biden Administration announced on February 5, 2021, that, through the DPA, the country had both increased its production of COVID-19 tests and personal protective equipment and granted Pfizer priority access to raw materials needed to boost vaccine production.<sup>111</sup> On March 2, 2021, the White House announced it was using the DPA once again to update Merck & Co.'s manufacturing plants to partner with Johnson & Johnson to produce the J&J COVID-19 vaccine.<sup>112</sup>

Later in his administration, President Biden again used the DPA to boost domestic clean energy technologies.<sup>113</sup> This time, the authorization specifically targeted solar technology, green hydrogen, and grid components.<sup>114</sup> The authorization emphasized the changing nature of the DPA: "in the past few years we have seen

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108. 167 CONG. REC. S75-77 (Daily ed. Jan. 21, 2021) (statement of Joseph R. Biden, President of the United States, during his inaugural address).

109. Exec. Order No. 13987, 86 Fed. Reg. 7019, 7019 (Jan. 20, 2021).

110. Exec. Order No. 14001, 86 Fed. Reg. 7219, 7219-21 (Jan. 21, 2021).

111. The personal protective equipment was intended for both caregivers and medical workers, as well as vaccine administrators. Emma Court & Josh Wingrove, *Biden Team to Use DPA for Vaccine Manufacturing, Testing*, BLOOMBERG (Feb. 5, 2021, 11:47 AM), <https://www.bloomberg.com/news/articles/2021-02-05/biden-team-to-use-dpa-for-vaccine-manufacturing-testing?srnd=premium> [<https://perma.cc/56PB-2KAP>].

112. Reuters Staff, *White House Using Defense Production Act to Equip Merck Plants for Johnson & Johnson Vaccine*, REUTERS (Mar. 2, 2021, 1:10 PM), <https://www.reuters.com/article/us-health-coronavirus-merck-co-dpa/white-house-using-defense-production-act-to-equip-merck-plants-for-johnson-johnson-vaccine-idUSKCN2AU2AX?il=0> [<https://perma.cc/K4U7-NX44>].

113. Neel Dhanesha, *Why Joe Biden is Invoking a War Power to Build Heat Pumps and Solar Panels*, VOX (Jun. 8, 2022, 12:00 PM), <https://www.vox.com/recode/2022/6/8/23159767/biden-defense-production-act-clean-energy-solar> [<https://perma.cc/RP5S-2LG7>].

114. *Id.*

the definition of national security shift to encompass more than just military spending. It now includes everything from the manufacture of equipment to treat COVID-19 to baby formula.”<sup>115</sup> Biden’s use of the DPA marks a shift in the nature of the DPA, demonstrating that the law should reflect the changing times in which we operate.

#### IV. PROPOSED ADDITIONAL LANGUAGE

##### A. “*National Security*” Too Broad to Adequately Protect Safety in a Modern World

In the aftermath of COVID-19, Congress should amend the DPA. Currently, the DPA allows for an overly broad interpretation within its definition of “national security.”<sup>116</sup> The amendments should include narrower, more specific language to compel the president to act under an expanded definition of “national emergency.”<sup>117</sup> As mentioned above, the DPA currently defines “national defense” as “programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity.”<sup>118</sup> This language, while vital to preparing the nation for physical threats, ignores the potential for invisible threats, such as COVID-19. Thus, the DPA should be amended to include language that encompasses situations like a global pandemic. This Comment argues that the language should be changed to the following:

The term “national defense” means programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, *[public health and safety,*<sup>119]</sup>

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115. *Id.*

116. CECIRE & PETERS, *supra* note 3, at 1.

117. *Id.* at 2 (“In addition, Congress may consider amending the definitions of the DPA to expand or restrict the DPA’s scope.”); *id.* at 22 (“Congress could expand the DPA to include new authorities to address novel threats to the national defense. For example, Congress may consider creating new authorities to address specific concerns relating to production and security of emerging technologies necessary for the national defense.”).

118. 50 U.S.C. § 4552 (14).

119. Proposed amendment by author.

and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 U.S.C. 5195 et seq.] and critical infrastructure protection and restoration.<sup>120</sup>

Adding specific language to provide for instances of threats to public health and safety, such as the COVID-19 pandemic, would modernize the DPA. The DPA originally aimed to prepare the United States to endure conventional wartime pressures.<sup>121</sup> When enacted, “national defense” meant manufacturing instrumentalities of war: tanks, bombs, airplanes, and rifles.<sup>122</sup> The proposed new language would prepare the country for times when there is not a conventional armed conflict, but rather a bio-medical threat like a pandemic.<sup>123</sup> Threats of bioterrorism through weaponized biological agents or similarly lethal viruses to COVID-19 should also be factored into the analysis for use of the DPA, as such types of warfare could also be considered public health and safety.<sup>124</sup> Furthermore, the added language leaves no room for hesitation to utilize the broad powers of the DPA because all potential scenarios are encompassed within the proposed new language. This new language does not allow the president or other figureheads to undermine the extensive and preexisting federal pandemic response through inaction.

In the landmark DPA case, *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court held that the president can only act through explicit congressional approval.<sup>125</sup> In *Youngstown*, President Truman directed the Secretary of Commerce, through an executive order, to “take possession of most of the steel mills and keep

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120. 50 U.S.C. § 4552 (14).

121. See DANIEL H. ELSE, CONG. RSCH. SERV., RS20587, DEFENSE PRODUCTION ACT: PURPOSE AND SCOPE (2009).

122. BELL ET AL., *supra* note 7, at 3.

123. See generally Healthcare Emergency Preparedness Info. Gateway: Topic Collection: Bioterrorism and High Consequence Biological Threats, U.S. DEPT OF HEALTH & HUM. SERVS., <https://asprtracie.hhs.gov/technical-resources/41/bioterrorism-and-high-consequence-biological-threats/27> [<https://perma.cc/S749-AJ86>] (last visited Dec. 22, 2022) (collecting sources).

124. *Id.*

125. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Jackson, J., concurring).

them running.”<sup>126</sup> The Court, in considering this case, held “[i]t is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation.”<sup>127</sup> The Court further reasoned that this theoretical delegation is required to uphold the doctrine of separation of powers, and that “our government was designed to have such restrictions.”<sup>128</sup> With this language in mind, Congress should explicitly outline the president’s authority, emphasizing that it is within the president’s authority to act when necessary to compel businesses to protect public health and safety.

Congressional approval of this proposed amendment would require a simple majority in the House of Representatives and Senate—barring a Senate filibuster that would require sixty Senators to end debate in a cloture vote.<sup>129</sup> Based on the present polarized nature of Congress, however, any potential vote is bound to split down party lines.<sup>130</sup> Senator Chuck Schumer took over as Senate Majority Leader in 2021 when the Democrats took control of the Senate,<sup>131</sup> and at the apex of the COVID-19 crisis, he criticized President Trump’s hesitancy to invoke the DPA.<sup>132</sup> On a call with President Trump in March 2020, Senator Schumer advocated using the DPA to “get ventilators and other important medical equipment to those who need it.”<sup>133</sup> Senator Schumer’s support for invoking the DPA early in the pandemic suggests that many democrats

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126. *Id.* at 583 (majority opinion).

127. *Id.* at 609 (Jackson, J., concurring).

128. *Id.* at 613.

129. See ELIZABETH RYBICKI, CONG. RESEARCH SERV., 96-452, VOTING AND QUORUM PROCEDURES IN THE SENATE (2020); ELIZABETH RYBICKI, CONG. RESEARCH SERV., 98-988, VOTING AND QUORUM PROCEDURES IN THE HOUSE OF REPRESENTATIVES (2020).

130. See Laura Litvan et al., *When Exactly Do Democrats Take Control in Washington?*, BLOOMBERG (Jan. 17, 2021, 4:54 PM) <https://www.bloomberg.com/news/articles/2021-01-14/when-exactly-do-democrats-take-control-in-washington-quicktake#xj4y7vzkg> [<https://perma.cc/HM8X-44RW>].

131. *Id.*

132. See Jake Sherman et al., *Schumer Urges Trump to Invoke the Defense Production Act to Rush Medical Equipment to Providers*, POLITICO (Mar. 20, 2020, 12:02 PM), <https://www.politico.com/news/2020/03/20/schumer-urges-trump-to-invoke-defense-production-act-to-rush-medical-equipment-138883> [<https://perma.cc/SBV2-FFAC>].

133. *Id.*

would support the amended language proposed in this Comment. On the other side of the aisle, however, former Senator Phil Gramm of Texas called the DPA the “most powerful and potentially dangerous American law” in a 2000 committee hearing.<sup>134</sup> Though Senator Gramm retired shortly thereafter, many current congressional Republicans likely share his sentiment and would oppose the proposed amended language. Yet, in May 2020, four Democrat Representatives introduced legislation that would force the president to use his full authority under the DPA to provide for a federal response to the pandemic.<sup>135</sup> This bill, the Medical Supply Transparency and Delivery Act, was referred to committee, but no further actions have been taken, leaving congressional support for any proposed amendment in question.<sup>136</sup>

*B. Normalization of Production of Pandemic Goods and Necessities*

The DPA currently states, “[t]he President shall take appropriate actions to assure that critical components, critical technology items, essential materials, and industrial resources are available from reliable sources when needed to meet defense requirements during peacetime, graduated mobilization, and national emergency.”<sup>137</sup> This Comment argues that the language should be changed to include the phrase, “public health crises,” such that the provision would read:

The President shall take appropriate actions to assure that critical components, critical technology items, essential materials, and industrial resources are available from

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134. J. Michael Littlejohn, *Using All the King’s Horses for Homeland Security: Implementing the Defense Production Act for Disaster Relief and Critical Infrastructure Protection*, 36 PUB. CONT. L.J. 1, 11–12 (2006) (discussing Senator Phil Gramm’s opposition to the DPA).

135. See Medical Supply Transparency and Delivery Act, H.R. 6711, 116th Cong. (2020); Press Release, Crow, Slotkin, Ryan, and Porter Announce Legislation to Federalize Medical Supply Chain and Address Critical Medical Supply Shortages (Apr. 29, 2020), <https://crow.house.gov/media/press-releases/crow-slotkin-ryan-and-porter-announce-legislation-federalize-medical-supply>.

136. See *All Actions: H.R. 6711 — 116th Congress (2019–2020)*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/6711/all-actions> (last visited Dec. 22, 2022).

137. 50 U.S.C. § 4517(b)(1).

reliable sources when needed to meet defense requirements during peacetime, graduated mobilization, [*public health crises,*] and national emergency.<sup>138</sup>

This language, following the adjustment in the definition of “national security,” would provide sufficient guidance for the president to take action to prevent a future pandemic or other public health crisis. In line with the above-proposed modification to the definition of “national defense,” this amendment would recognize that the need for materials that qualify under the new definition would change. Under this definition, and relating to the COVID-19 pandemic, the U.S. would ideally begin to re-stockpile masks, ventilators, vaccines, and testing kits rather than materials necessary for the traditional definition of “national defense,” such as weapons and vehicles. This new language would encourage this type of stockpile, such that a future pandemic of this size would not again deplete the national stockpile.<sup>139</sup>

By March 2022, HHS had restored the SNS pandemic preparedness equipment far beyond pre-pandemic levels, including fifty-nine times the inventory of N95 respirators and ten times the inventory for ventilators.<sup>140</sup> Because the United States now understands the type of materials necessary to fight a pandemic, the SNS coordinators can thus update the SNS accordingly such that a shortage similar to that during COVID-19 does not happen again. Including language for public health crises would force the creation of substantial stockpiles of medical instruments like ventilators and suitable masks to prevent another depletion of the stockpile at the speed seen during the onset of COVID-19.

Moreover, this language would also normalize the types of medical protocols that provide access to the necessary materials included in the stockpiles that are required to fight a pandemic. Things like surgical masks, ventilators, and testing kits would be stockpiled in preparation for future potential pandemics. By doing this, states would readily have access to necessary materials early on, while encouraging safe virus protocols such as sufficient masks,

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138. *See id.* (emphasis added indicating proposed amendment).

139. *See* Admin. for Strategic Preparedness and Response, *supra* note 57.

140. *Snapshot: How HHS is Building a Healthier America*, U.S. DEPT. OF HEALTH AND HUMAN SERVS., <https://www.hhs.gov/sites/default/files/hhs-building-a-healthier-america.pdf> [<https://perma.cc/9MSE-A497>] (last updated Mar. 2022).

testing materials, and vaccines. The COVID-19 pandemic provided many lessons, specifically the need for implementation of safe practices as the guidance of the CDC and other officials were ever changing, as was necessary to keep up with the developing research and facts about the virus. In theory, this new language combined with experience from COVID-19, states will have earlier access to a better-stocked SNS and thus will be able to get in front of a future virus before it spreads throughout the United States.

*C. Forced to Act*

Further, the DPA should also be amended to include a trigger event that compels the President's usage of the powers granted in the Act. Specifically, the DPA should be amended to require action when a majority of states declare states of emergency or if a national state of emergency is declared. As it is written now, numerous portions of the DPA rely on presidential discretion for invocation.<sup>141</sup> For example, § 4511(a) of the DPA says:

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, and (2) to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.<sup>142</sup>

This Comment argues that the language in the DPA should be changed to include a trigger event, such as a certain number of declared states of emergency or nationwide declaration of a state of emergency, which would mandate use of the presidential authorities within the DPA. Adding this particular language elevates the importance of invoking the DPA in reference to other emergency governmental actions and authorities. Despite the extensive and

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141. See 50 U.S.C. § 4511.

142. 50 U.S.C. § 4511(a).



pre-existing list of emergency use actions, the DPA presents unique presidential authority that is necessary for states of emergency, especially in a situation reminiscent of COVID-19, where there is a genuine threat of a deadly virus, which presents no room for hesitation on the part of the president.

The DPA trigger event should be either a simple majority or a two-thirds majority of declared states of emergency if in the absence of a nationwide declaration of a state of emergency. States set their own conditions for declaring states of emergency, specifically through a general statute that outlines the types of emergencies for which a governor can declare a state of emergency.<sup>143</sup> For example, Rhode Island's emergency management statute says, "[a] state of emergency shall be declared by executive order or proclamation of the governor if he or she finds a disaster has occurred or that this occurrence, or the threat thereof, is imminent."<sup>144</sup> The word "disaster" is broadly defined to include events such as epidemics, earthquakes, riots, or blight.<sup>145</sup> What may prompt a state of emergency differs by state, but most jurisdictions permit broad reading of those statutes to cover a wide range of circumstances, including epidemics, pandemics, or other public health emergencies.<sup>146</sup> When a governor declares a state of emergency, various authorities and actions are triggered.<sup>147</sup> Such authorities include "activation of state emergency response plans" and "authority to expend funds and deploy personnel, equipment, supplies, and stockpiles."<sup>148</sup>

On the federal level, some officials like the President, can declare emergencies under certain circumstances.<sup>149</sup> With that declaration, certain federal authorities are also triggered.<sup>150</sup> Federal assistance programs are activated, as well as liability protections in the Public Readiness and Emergency Preparedness Act, and the

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143. See ASTHO LEGAL PREPAREDNESS SERIES: EMERGENCY DECLARATIONS AND AUTHORITIES FACT SHEET, <https://astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Authority-and-Immunity-Toolkit/Emergency-Declarations-and-Authorities-Fact-Sheet/> [https://perma.cc/DC3P-A5K2] (last visited Feb. 24, 2021).

144. 30 R.I. GEN. LAWS § 30-15-9 (2021).

145. 30 R.I. GEN. LAWS ANN. § 30-15-3(1).

146. See ASTHO, *supra* note 143.

147. See *id.*

148. See *id.*

149. *Id.*

150. *Id.*

National Response Framework managed by the Federal Emergency Management Agency.<sup>151</sup> While these protections are objectively important for states of emergency, none of them address the continued manufacture of products necessary to end the state of emergency. Because of this disparity, the DPA should be included in the list of programmatic responses after either a national declared state of emergency or either twenty-six states (a simple majority) or a two-thirds majority of declared states of emergency (like calling a constitutional convention).

Applying this proposed framework to previously mentioned H1N1, it is clear that by expanding the DPA's powers, the United States would finally learn a lesson in pandemic preparation. For example, in his H1N1 national emergency declaration, President Obama cited "the potential . . . for the pandemic to overburden health care resources in some localities" as a major reason to expedite a response.<sup>152</sup> Because of this potential for a pandemic, the American government was seemingly on notice that an illness could overwhelm the fragile health care system, leading to an immense number of deaths. Early in understanding COVID-19, many around the world were asked to practice social distancing and self-isolate in order to help flatten the infection thereby lessening the burden on the healthcare system.<sup>153</sup> Despite numerous restrictions, the American healthcare system faced significant strains.<sup>154</sup>

Earlier pandemics, such as H1N1, should have served as the necessary caution to prevent needless deaths in a future public health crisis, such as the current COVID-19 pandemic. In 2009, with the H1N1 outbreak, experts knew of the viable risk of a

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151. *Id.*

152. See Press Release, The White House, Declaration of a National Emergency with Respect to the 2009 H1N1 Influenza Pandemic (Oct. 24, 2009), <https://obamawhitehouse.archives.gov/realitycheck/the-press-office/declaration-a-national-emergency-with-respect-2009-h1n1-influenza-pandemic-0> [<https://perma.cc/45SF-U4V3>].

153. See Siobhan Roberts, *Flattening the Coronavirus Curve*, N.Y. TIMES, (Mar. 27, 2020), <https://www.nytimes.com/article/flatten-curve-coronavirus.html>.

154. See William Brangham, *Hospitals Near a Breaking Point with Latest Influx of COVID Patients*, PBS (Jan. 12, 2022, 6:55 PM), <https://www.pbs.org/newshour/show/hospitals-near-a-breaking-point-with-latest-influx-of-covid-patients> [<https://perma.cc/858T-RE3V>].

ventilator shortage because of the nature of the respiratory illness.<sup>155</sup> Recent experience should have put those in power on notice that this was a risk, and that in order to get in front of a virulent disease one must act quickly.<sup>156</sup> Accordingly, government officials should have been on notice that there were not enough ventilators in hospitals and equipped the SNS with necessary items to fight pandemic disease, not just potential bioterrorism threats.<sup>157</sup> If this proposed framework had been put into place following the H1N1 outbreak, President Trump could not have hesitated to compel the production of necessary materials at the beginning of the COVID-19 pandemic because a state declared state of emergency would have triggered mandatory use of the DPA.

#### V. POTENTIAL COUNTERARGUMENTS

One could argue that this framework presents three potential issues. First, the opposition could argue that this proposed language presents a separation of powers problem. This argument stems from the idea that creating a congressional mandate of presidential action blurs the line between the executive and the judicial branches. This view is not accurate. As Justice Jackson stated in his *Youngstown* concurrence, there is a framework for determining whether a presidential action is conducted outside the scope of his powers.<sup>158</sup> Justice Jackson opined, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”<sup>159</sup> From this viewpoint, the president is not only acting within his own express authority, but is also acting with explicit congressional approval.<sup>160</sup> The scenario would be different if the president were acting on his own volition, without express congressional approval, because the

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155. See Scott Hensley, *Virulent Swine Flu May Trigger Rationing of Ventilators*, NPR, (Sept. 24, 2009, 12:41 PM) [https://www.npr.org/sections/health-shots/2009/09/swine\\_flu\\_could\\_trigger\\_tough.html](https://www.npr.org/sections/health-shots/2009/09/swine_flu_could_trigger_tough.html) [<https://perma.cc/9YZ2-CL3E>].

156. See generally *id.*

157. Kamp, *supra* note 67.

158. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652 (1952) (Jackson, J., concurring).

159. *Id.* at 635.

160. See *id.*

president does not constitutionally possess the power to regulate businesses for defense preparation.<sup>161</sup> Therefore, this proposed language in the framework does not pose a serious separation of powers issue.

Second, one could argue that the president loses autonomy with this amended language. This criticism is also not accurate. Because the president would retain autonomy in *how* to invoke the DPA, the only choice taken from the president is *when* to invoke the DPA. Furthermore, this idea to use legislative power to compel the President to act is common in other legislation.<sup>162</sup> In the American Rescue Plan, § 4006 provides that when the president declares a state of emergency pursuant to the Stafford Act, the president is thus compelled to provide funeral expense financial assistance.<sup>163</sup> The president retains authority to compel certain industries in certain ways, so long as he acts in a timely manner to come out in front of whatever potential threat exists. Therefore, there is no autonomy argument because the majority of the DPA decisions remain with the president.

Lastly, one could argue that it is unfair to compare the two presidents' DPA uses because both utilized the statute at different times of the pandemic with different apparent needs. While this is a valid point, and one should not compare the substance of the DPA uses, it is worth noting the response times of the two different presidents.<sup>164</sup> In times of national emergency, the law, rather the proclivities of the person in office, should influence the federal government's response time.

#### CONCLUSION

The DPA is one of the most important laws of the twentieth century. The DPA grants the president numerous powers to act in

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161. *See id.* at 585–86.

162. *See, e.g.,* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 4006, 135 Stat. 4, 79 (codified as amended at 42 U.S.C. § 5174 note (Funeral Assistance)).

163. *Id.*

164. *See* Catherine Powell, *The 'War' Against COVID: Warfare and Its Discontents*, UCLA L. REV. DISCOURSE (forthcoming) (manuscript at 6, 8) (on file with author) ("Trump was slow to invoke the DPA to accelerate production of personal protective equipment (PPE) . . . . As for Biden, in his first day in office, Biden issued Executive Order 14,001 directing his administration to . . . use the DPA to address any shortfalls, if necessary.").

times of crisis.<sup>165</sup> Since its creation, several presidents have invoked the DPA for various reasons. Although the federal government has plans in place to fight and triage potential pandemics,<sup>166</sup> amending the DPA takes that preparation to another level with regards to producing vital materials. Because of the variation in the presidents' DPA uses and response times during the COVID-19 pandemic, Congress must amend the DPA to standardize the DPA's invocation process. One current barrier to invoking the DPA is that its protections hinge on the definition of "to promote national defense,"<sup>167</sup> so the DPA protections mostly deal with preparing the nation for acts warfare.<sup>168</sup> To bring the DPA into the twenty-first century, Congress must amend the DPA to cover public health crises. The proposed amendments would normalize the production of necessary pandemic materials so that the country could replenish the SNS and not get caught off guard by a pandemic ever again. Congress should also mandate the president's invocation of the DPA through either a simple majority or a two-thirds majority of declared states of emergency or a declared national state of emergency. For all above-mentioned reasons, Congress must amend the DPA to cover public health crises so that the President can help prevent or at least more effectively respond to another pandemic.

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165. See, e.g., 50 U.S.C. §§ 4502, 4511, 4512.

166. Admin. for Strategic Preparedness and Response, *supra* note 57.

167. 50 U.S.C. § 4511(a); CECIRE & PETERS, *supra* note 3, at 4.

168. See DEFENSE PRODUCTION ACT COMMITTEE, THE DEFENSE PRODUCTION ACT COMMITTEE REPORT TO CONGRESS: CALENDAR YEAR 2020 REPORT TO CONGRESS 3, 10 (Sept. 20, 2021) ("DOD is the primary user of priority rated contracts and orders ('rated orders') to support military programs . . . . DOD estimates it places 300,000 rated orders each year. By comparison, DHS (including FEMA) placed fewer than 150 rated contracts and orders in 2020.").