



Emergency Powers Reform Project: Preventing Abuse of the Defense Production Act

The Defense Production Act of 1950 (DPA) grants the president authority to centrally plan industry for national defense purposes, but lacks checks and balances and transparency requirements, making it ripe for abuse and mismanagement. In recent years, and especially during the COVID-19 pandemic, the DPA has been abused for non-defense purposes and exploited to avoid fixing bad policies.

DPA Title I and Title III are the most used authorities. Title I allows the president to require firms to give priority treatment to contracts for favored materials and services (e.g., putting baby formula manufacturers at the head of the line for ingredients). Title III is focused on incentives, including financial support, loans, loan guarantees, purchase commitments, etc., to increase production capacity and supply of domestic industrial products.

The DPA was intended to be used for national defense, but the broad definition in the statute leaves it vulnerable to abuse.

The DPA is being misused for non-defense purposes to avoid fixing bad policy choices. For example, harmful government policies underly production capacity shortages for baby formula and mineral mining.

The repeated invocation of the DPA for non-defense purposes, such as mineral mining, baby food, solar panel components, heat pumps, and possibly now gasoline refining, is irresponsible. It disrupts complex supply chains, wastes taxpayer money, and undermines Congress’ intent that the program be available for actual emergencies that threaten our national security.

- Then-Senator Pat Toomey in 2022

The DPA statute includes extremely limited transparency requirements and, even then, it provides the president with the ability to waive certain notification provisions during a period of “national emergency.” As a result, there is scant information about DPA projects after the White House announcement, which makes it difficult to determine

if it’s an effective and accountable use of emergency powers. A Presidential Determination under the DPA requires the president give notice to Senate Banking and House Financial Services, but it also allows the president to waive this requirement. In some cases, the president delegates the authority to a federal agency, making it even harder to track its use.

DPA presidential determinations do not expire unless the President expressly indicates so in the determination, or the determination is otherwise amended or revoked. The DPA does not require the President to report these determinations to the public.

- 2022 CRS Report

It is unclear which executive agency leads overall efforts under DPA authority, in response to the pandemic. Reporting on DPA activities remains dispersed among multiple agency sources and appears incomplete. In addition, it is not clear under which authorities agencies are undertaking certain DPA attributed activities, such as DOD’s redirection of Title III funds, or DOJ’s enforcement of anti-hoarding/price gouging.

- 2020 CRS Report

Recent Usage of the Defense Production Act¹

PRODUCT(S)	DATE
Solar, transformers and electric grid components, heat pumps, insulation; and electrolyzers, fuel cells, and platinum group metals	<u>June 6, 2022</u>
Infant Formula	<u>May 18, 2022</u>
Critical Minerals	<u>March 31, 2022</u>
PPE & Ventilators	<u>April 2, 2020</u>
Rare Earth Metals & Alloys	<u>July 22, 2019</u>

¹ The table is not a comprehensive list of all uses of the DPA, but includes examples from the last two Administrations.

DPA Fails to Fix Infant Formula Shortage

The tragic reality is there was no global baby formula supply shortage—only in the U.S. A mountain of evidence indicates the overbearing federal regulatory regime—including draconian FDA labeling requirements and tariffs on competing products from overseas—was largely responsible for choking the baby formula supply, creating a terrifying hardship for the parents of infants nationwide.

In response, President Biden invoked the DPA. His plan required that producers of baby formula ingredients ship to formula manufacturers first before customers from other industries, who are forced to wait.

But siphoning off products to specific sectors and flying over formula from Europe doesn't address the root problem in this case, which is formula production. Today, the supply shortage persists in some areas and the U.S. remains unprepared for future supply shocks. But, leveraging the DPA, the Biden Administration was able to generate photo-ops called "Operation Fly Formula" designed for fawning press coverage without actually solving the problem. Meanwhile, the diversion of ingredients disrupted a complex supply chain and will have unintended downstream effects.

Compounding this issue is policymakers' inability to know which products to target both during and after the pandemic. Ventilators, for example, were on no one's radar before COVID-19 hit. In March 2020, when they were suddenly considered essential for fighting the coronavirus, the U.S. government invoked the Defense Production Act (DPA) to force domestic manufacturers to make them. By the summer, however, medical professionals determined that ventilators were not as critical as once thought, but producers continued to churn them out under government orders, leading to reports of the goods "piling up" in a strategic reserve or being donated to "countries that don't need or can't use them."

- Scott Lincicome, Cato Institute

Reform Principles

- Tighten the definitions in the statute so that the DPA is reserved only for defense purposes.
- Without reform of the statute, consider allowing the DPA to lapse without reauthorization in 2025.
- Require proactive transparency of actions taken under DPA authority.
- DPA determinations should sunset after 30 calendar days unless approved by Congress. After that, determinations should sunset every six months unless reapproved by Congress.
- Inspectors General should conduct annual oversight over the use of the DPA in each respective agency.
- Eliminate congressional notification waivers.

Resources

Congressional Research Service: The Defense Production Act of 1950: History, Authorities, and Considerations for Congress (March 2, 2020)

R Street: Stop Misusing and Abusing the Defense Production Act (May 5, 2022)