

## Kim, Sabrina

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**Sent:** Wednesday, March 25, 2020 3:00 PM  
**To:** Halucha, Paul  
**Subject:** FW: Defense Production Act Potential Imminent Use by the US

For your info:

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**Subject:** Defense Production Act Potential Imminent Use by the US

Hello,

WSHDC has provided the following reports regarding the potential use of the Defence Production Act to acquire healthcare and medical equipment in the U.S. – the first part was provided by the Congressional team at the Embassy, regarding the Chris Murphy legislation. The second part is from the Trade team regarding the Defence Procurement Act more broadly.

In summary, the legislation in Congress is likely less of a concern than the announcement today by FEMA Administrator Gaynor that the DPA may be implemented imminently (by the President) to boost availability of healthcare and medical equipment in the U.S. – such an announcement could impact the availability of material in Canada that is manufactured in the U.S., depending on how the DPA is implemented. More details are below and the Embassy is following closely.

Angus

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### Information on the bills in U.S. Congress

The bill is **S. 3568 - the Medical Supply Chain Emergency Act**, though the text is not available yet – we will forward it to this email group when we get a hold of it. The bill is so far co-sponsored by only two Democrats, Senator Murphy (D-CT) and Senator Schatz (D-HI). We do not expect it to have legs with the Republican Majority and expect the Senate will recess after the third stimulus bill is passed (WSHDC will report on this) – with all efforts focused on the stimulus bill, any standalone bill is unlikely to advance given the current environment. You can access Senator Murphy's press release [here](#).

In parallel, and for your awareness, Rep. Levin (D-MI) [announced](#) the introduction of a bipartisan resolution with a similar objective. It is not clear at all that it will find enough and timely support in the Senate and in any event, the resolution would not be binding.

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**Report: Defense Production Act Potential Imminent Use by the US**

**Summary:** As pressure mounts on the US President in managing the current health crisis caused by the Coronavirus, so does the pressure to use the Defense Production Act (DPA) to acquire healthcare and medical equipment urgently needed by hospitals and medical staff in the US. The DPA was invoked on March 18 by the US President and reports are alluding to its potential use as soon as today, Tuesday March 24, 2020. The use of the Act will have implications on supply chains, including potentially on Canada at a time where there are unprecedented demands for medical and healthcare equipment in Canada and around the globe. WSHDC/Badro will continue to monitor and report on plans by Federal Emergency Management Agency (FEMA) administrator, Peter Gaynor, to implement the DPA.

**Report:** On Wednesday, March 18, 2020, the President of the United States invoked the Title 1 ("Priorities and Allocations" authority) of the Defense Production Act via Executive Order (EO).

The DPA, more broadly, could allow the federal government to require industry to fulfil federal contracts for supplies prioritizing federal orders and shifting to the production of medical equipment. Federal Emergency Management Agency (FEMA) administrator Peter Gaynor announced today March 24, 2020 that the Defense Production Act (DPA) may be implemented imminently and for the first time under the Coronavirus crisis to secure critically needed medical equipment. Gaynor committed to using the DPA to acquire about 60,000 COVID-19 testing kits. If used through an EO, the DPA would allow designation of some industries as "critical technologies" for the production of essential medicines, medical countermeasures, and Active Pharmaceutical Ingredients. The DPA would authorize the federal government to require businesses to prioritize federal contracts and orders.

**Use of the DPA:** the March 18 Executive Order only invoked the Title 1 "Priorities and Allocations" authority which enables the federal government to require domestic manufacturers to ramp up current production to meet government needs for essential equipment. This would allow to require private manufacturers to fulfill government orders for essential goods ahead of fulfilling other contracts or orders the supplier may have. Under Title 1, the US Department of Health and Human Services (HHS) would have the authority to (1) issue "rated orders" for critical supplies and services, which must be accepted over non-rated orders and (2) issue "allocation orders" directing allocation of health and medical resources. Another Presidential EO would be required for invoking Title 3 "Expansion of Productive Capacity and Supply" that would allow the increase of domestic production of essential equipment by providing purchase guarantees, subsidies, or other incentives to domestic manufacturers. In essence, this would allow the President to direct and transform production to meet domestic needs. The US President is currently under pressure to leverage both Title 1 and Title 3 of the DPA.

**The Defense Production Act:** was approved by Congress in 1950. It was initially passed in response to the Korean War, the DPA is historically based on the War Powers Acts of World War II. Gradually, Congress has expanded the term national defense, as defined in the DPA. Based on this definition, the scope of DPA authorities now extends 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.

**Other Use:** over the decades, presidents have used this act for strategies large (such as building up wartime materials during the Korean War or Cold War) and small (such as spurring innovation in the defense industry). But using the Act in a context of a pandemic would make its use unprecedented.

**Current Health Crisis:** Healthcare equipment including ventilators, masks, gowns, gloves, swabs, sanitizers and other medical equipment are in extremely short supply as US hospitals prepare to be overwhelmed by the Coronavirus. Using the Defense Production Act would allow the federal government to push U.S. manufacturers, such as automakers and clothing companies, to pivot to making medical equipment for hospitals and medical workers who say they are out of equipment or will be soon to treat the expected onslaught of coronavirus patients. The President is provided the ability to exercise emergency authorities to address the current health crisis under the Defense Production Act of 1950 (DPA);

50 U.S.C. §§4501 et seq.). The Congressional Research Service has released a short “Insight” regarding DPA authorities and explores potential policy considerations for Congress. Governors are arguing that the federal government has the best leverage for purchasing power, and that through the use of the DPA, companies could be directed to produce specifically what is currently needed instead of having private companies decide and potentially competing between states.

**President Trump and Congress:** the US President has been increasingly hesitant in implementing the DPA since it was invoked last week despite growing pressures from healthcare workers, Governors, Democrats and some Republicans in Congress to do so as soon as possible to deal with national shortages in masks, respirators and other critical supplies needed to fight the virus. Two Democratic senators announced that they would introduce a bill to force the President to implement the Defense Production Act and federalize the manufacturing and distribution of medical supplies. The President sees the use of the DPA as a “worst-case scenario.” He argued that using the DPA would amount to nationalization of US industries and increased government regulations. He also said that many manufacturers have stepped up on their own to switch production to medical equipment and supplies. House Democratic Leader Steny Hoyer (D-MD) said that while many US companies seem to want to help, they have received no guidance from the Administration on what items they should be producing, what quantities and where the items should be shipped.

**The DPA Would Allow Federal Government to:** direct some U.S. manufacturers towards building medical equipment for hospitals. It accomplishes this in a few ways, according to a Congressional Research Service report:

- The DPA could require U.S. manufacturers that already make ventilators to prioritize federal government contracts for supplies over other countries
- The DPA could require U.S. manufactures to make more face masks and other “critical materials and goods” and offer loans or promises to buy these things. The federal government could then decide which hospitals should get this equipment.
- The President could block proposed or pending foreign corporate mergers that threaten national security. That seems less of a concern with the coronavirus, where global cooperation is necessary
- The DPA could provide resources for companies “employ persons of outstanding experience and ability and to establish a volunteer pool of industry executives who could be called to government service in the interest of the national defense.” That could potentially shift automotive companies’ production, as an example, to ventilators rather than cars. CEO Elon Musk said on Twitter his company would be willing to do it. General Motors could also get involved. Trump has also mentioned the clothing company Hanes as an option.

**Impact on Canada:** If or when President Trump uses the Defense Production Act to have U.S. companies make health-care equipment, it would be one of the most dramatic uses of the act in decades. Using the DPA bares potential of disrupting existing supply chains as companies halt their production and pivot towards the production of other items. Using the DPA may also threaten open borders for production as supply-manufacturing facilities in the U.S. could be forced to supply some medical equipment -normally produces to other countries- only to the American market. More time will be required to assess impact on Canada as implications will depend on how the DPA will be used and leveraged. The DPA’s use by the US federal government may have an impact on Canada in terms of its regular supply from the US industry, as well as Canadian companies that are suppliers within the US Supply chains. But more importantly, it may impact Canada's supply of goods critical for the COVID-19 pandemic for which the US is a source.

WSHDC will continue to monitor and report on the use of the DPA as the situation evolves in the coming days and weeks.