

Trump Wields Defense Production Act to Promote Fossil Fuels

DPA Could Instead Be Used to Promote All-of-the-Above Energy Abundance

By Joel Dodge and Todd N. Tucker

On March 13, the Department of Energy (DOE) invoked the Defense Production Act (DPA) to [order](#) Sable Offshore Corporation, a Houston-based offshore oil and gas operation, to immediately resume pumping and transportation in California, overriding state regulators who had kept the pipeline offline after a 2015 oil spill. That order came days after the Department of Justice's Office of Legal Counsel (OLC) issued an [opinion](#) providing legal backing for the government to require the oilfield's corporate lessee to operate and override state law.

The DPA is one of the federal government's most powerful and flexible industrial policy tools. Together and separately we have written about the law, including how it could be used to [fight COVID-19](#), unstick [broken supply chains](#), preempt [state right-to-work laws](#) that keep workers from unionizing, bolster US [competitiveness with China](#), build [publicly owned cloud computing](#), [reduce inflation](#), and promote [geographic resilience](#). Trump's use of the DPA appears to be a handout to a longtime campaign donor in an attempt to lessen [the blow of an energy shock](#) his [administration created](#) by attacking Iran. In light of these actions, reasonable people might think the DPA is no longer serving its purpose and should be abandoned. We argue this would be a short-sighted mistake, given the likely severity of the crises the US will soon face, including but not limited to [energy costs](#) and securing energy independence.

Case Background: A Donor Protection Act?

The story of DOE's recent order begins in 2015, when an [oil spill](#) from ExxonMobil's Santa Ynez pipeline spewed 100,000 gallons of crude oil across the California coast, shutting down beaches and fisheries. In 2020, after [extensive](#) back-and-forth with state authorities, the company entered a consent decree with the first Trump administration, and regulators shut down the pipeline. According to the [Wall Street Journal](#), in 2021 Sable began talks with

Exxon to buy the assets, finally completing the deal in February 2024 with a loan borrowed from Exxon, betting that it would be able to overcome resistance from state authorities. As the Journal reported, “Investors have grown skeptical of Sable, whose entire business hinges on the California bet. Its market capitalization has melted from about \$3.2 billion in July [2025] to about \$600 million.” Sable CEO [James C. Flores](#), a [longtime](#) campaign [contributor](#) to Donald Trump, began a campaign in 2025 to tie Sable’s fate to Trump’s anti-climate policies. On November 26, 2025, Sable [wrote](#) to federal pipeline authorities, declaring that the Santa Ynez pipeline should be considered interstate and therefore fall under federal jurisdiction. A month later, the Trump administration [agreed](#) and issued a federal permit, at which point environmental [groups sued](#) to block the action. This litigation remains pending.

Meanwhile, Sable separately wrote to the DOE [alleging](#) that California had used a variety of regulatory mechanisms to block its ability to drill and transport oil and gas. The oil company asked the Department to invoke the DPA to “requir[e] Sable to operate the [oilfield and pipeline] to maximize domestic energy production,” which would override state law. On March 3, the Office of Legal Counsel [agreed](#) that the DPA, together with President Trump’s inauguration day [executive order](#) declaring a national energy emergency, gave the Department the power to command Sable to produce and transport oil and gas—and to preempt state legal and regulatory processes that stood in its way. On March 13, the Department of Energy issued an [order](#) to the company “direct[ing] [Sable] to immediately prioritize and allocate pipeline transportation services for hydrocarbons” from the oilfield through the pipeline system connecting to mainland California.

Within days of the order, the pipeline was pumping oil for the first time in over a decade. This has [prompted](#) a flurry of legal actions from state and local officials: California [filed a lawsuit](#) accusing the company of trespassing on state property, and is [pledging](#) to sue the federal government as well. Sable has also [filed](#) suit in federal court seeking a declaratory judgment affirming that the DPA order means it does not need to comply with state law.

Powers Under the Defense Production Act of 1950 and Implications of This Ruling

DOE’s order, and OLC’s opinion, relied on Title I of the Defense Production Act of 1950. There are a few things to note about the DPA. First, it is modeled upon provisions of the war powers acts signed by President Franklin D. Roosevelt in 1940–41, but it’s not limited to wartime. Second, it is not even confined to peacetime military operations, but allows presidents to promote the “national defense,” broadly defined to include energy

production, emergency preparedness, stockpiling, and other activities in civilian markets. Third, it is not limited to giving priority to government contracts. Rather it applies more broadly to include authority over the flows of goods in private commerce. Notably, these powers have been repeatedly upheld by courts, in use cases from the Roosevelt administration to the Biden administration.¹

Title I of the DPA (codified at 50 U.S.C. § 4511) [authorizes](#) the government to (a) require priority performance for certain contracts or orders over others, and (b) to allocate materials, services, facilities, and/or equipment, subject to certain conditions. Each authority is conditioned on the president first making various findings and determinations, as detailed in Table 1.

Table 1: Tiers of Defense Production Act Powers Under Title I

What Power Is It?	How Does the Government Unlock This Power?
Controlling the general distribution of any material in the civilian market (50 U.S.C. § 4511(b))	The president must find that 1) the material is scarce, critical, and essential for the national defense; and 2) that no alternative and less painful path is available.
Maximizing domestic energy supplies through priority and allocation (50 U.S.C. § 4511(c))	The president has a free hand directing equipment flows. If the president is directing materials, services, or facilities flows, he must find that a) they are scarce, critical, and essential to maintain, expand, conserve, or construct energy activity; and b) there is no reasonable alternative to DPA action.
Requiring the priority performance of certain contracts and orders (50 U.S.C. § 4511(a)(1))	The president deems it necessary or appropriate to promote the national defense (broadly defined).
Allocating materials, services, and facilities (50 U.S.C. § 4511(a)(2))	The president deems it necessary or appropriate to promote the national defense (broadly defined).

¹ Investigation of the National Defense Program: Hearing on Part 39 before the Special Committee Investigating the National Defense Program, US Senate (1947), at 23477; US v. Krikor Topouzian, No. 20 CR 721, 2021 WL 5882204, at *3 (N.D. Ill. Dec. 13, 2021). For priorities and allocation cases, see e.g. U.S. for Use & Benefit of Caldwell Foundry & Mach. Co. v. Texas Const. Co., 224 F.2d 289 (5th Cir. 1955); Hayslett v. Tyson Foods, Inc., No. 1:22-CV-1123-STA-JAY, 2023 WL 3666091 (W.D. Tenn. May 25, 2023).

The [Sable DPA order](#), together with the underlying OLC opinion, represents a significant development for two elements of the DPA: its preemptive effect on state law, and the scope of its Title I priorities and allocations authorities. We address each in turn.

Preemption of State Law

Federal preemption of state law is grounded in the Constitution’s Supremacy Clause, which dictates that federal law is the “supreme law of land” over any conflicting state or local law. There are [two types of preemption](#): express preemption, whereby Congress explicitly states its intent to preempt state law in legislative text; and implied preemption, where Congress’s preemptive intent is inferred from a statute’s structure and purpose.

In a [previous paper](#), we argued that Title III of the DPA authorizes actions that preempts conflicting federal, state, and local law. That section allows the government to use congressionally appropriated funds for investments to expand productive capacity in critical economic sectors. Title III specifically [allows](#) the government to make those investments “without regard to the limitations of existing law.” This, we argued, could be used to preempt other laws that would obstruct or weaken Title III investments in clean energy, such as by overriding certain detrimental corporate and securities laws, bypassing anti-worker laws, and streamlining procedural and environmental review laws. The Trump administration subsequently used Title III’s “without regard” clause [last year](#) to sidestep procurement and contracting laws in its investment in the critical minerals firm MP Materials.

Title I of the DPA, however, does not have a similar “without regard” clause. Nonetheless, the OLC opinion determined that Title I impliedly preempts state law that conflicts with executive orders to prioritize contracts or allocate materials and services. OLC also treated a [provision](#) of the DPA granting legal immunity to persons following orders issued under the Act as a de facto preemption clause.

On some level, the DPA preempting conflicting laws is noncontroversial. A law designed to address crises and assert important national defense and economic imperatives would be worth little if it could be tripped up by competing federal and subnational rules and regulations. The president’s power to assert priority for certain contracts inherently preempts aspects of state contract law. The Department of Transportation, for example, [takes the position](#) that it could use Title I allocations authority to “require the nation’s bus companies to dedicate 40% of their bus fleet to a designated emergency.” And the Department of Agriculture has [said](#) it could use allocations authority during a milk shortage to redistribute milk products to school food programs, nutritional programs for mothers

and infant children, and other priority uses. To be effective, such orders would have to override conflicting state and local transportation laws, or state and local laws affecting milk production and distribution.

But the question remains as to how much state law Title I may lawfully preempt. OLC's Sable opinion takes the position that the law's preemptive effect extends to state environmental and permitting regulations that hinder a DPA order. As the opinion [put it](#):

A DPA order could thus declare on its face that particular California environmental regulations, permitting requirements, or other restrictions are preempted with respect to Sable's production on the SYU and operation of the Santa Ynez Pipeline System. Indeed, if the President were to find that Sable being noncompliant with particular state laws is "necessary" to promote the national defense. . . . he could instruct Sable to disregard state laws that would otherwise frustrate its obligations under the order.

After DOE's order, the permissible scope of DPA preemption will now be litigated in court. But if it stands, the order will create significant new precedent allowing the president to override state regulatory obstacles to facilitate effective priorities and allocations actions under Title I of the DPA.

Priorities and Allocations

As explained above, Title I of the DPA [authorizes](#) the government to (a) require priority performance for certain contracts or orders over others, and (b) to "allocate materials, services, and facilities." These authorities can be used to promote the national defense (broadly defined) or to "maximize domestic energy supplies." The government's [regulations](#) implementing the DPA explain that when receiving contracts or orders designated as priorities by the government, sellers "must give them preferential treatment"—that is, those priority orders get to cut in line ahead of other customers' orders. Those regulations additionally define "allocation" as "the control of the distribution of materials, services or facilities for a purpose deemed necessary or appropriate to promote the national defense."

In 1950, when enacting the DPA, Congress detailed a number of different ways priorities and allocations authorities could be used. The Senate report accompanying the bill explained:

These powers can be used in many ways. They can be used to require the filling of a particular order in preference to another order, or to require the filling of a

particular class of orders in preference to other classes of orders. They can also be used to stop or reduce the production of any item, in order to conserve the materials and manpower which would otherwise go into that item; they can be used to prohibit the use of a particular material for a specified purpose, or for anything except a specified purpose, in order to make the most effective use of that material. They can be used to restrict the output of an industry, to divert that industry from one type of product or another. They can be used to allocate productive facilities, transportation facilities and equipment, power and fuels, raw materials and finished products. They can be used to prohibit the accumulation of excessive inventories. They can be used to ration consumer goods at the retail level.

These powers can be used to channel materials to fill direct Government contracts, or subcontracts thereunder. They can also be used to channel materials to direct war support purposes or other essential purposes such as factories, utilities and transportation systems. They can also be used to promote the national defense by maintaining the essential civilian economy. They can also be used to restrict or prohibit less essential industries and those industries which directly interfere with the national defense.²

Several of those proposed uses have since been incorporated into the federal government's regulations governing the use of Title I allocations authority (see [15 C.F.R. § 700.33](#)).

The Senate report also illustrated how priorities and allocations could interact together. It noted that “the priority and allocations powers are needed particularly in connection with scarce metals,” like steel.³ The report recognized that growing military- and defense-related demand would consume a significant share of the country's steel supply (a priority), while the “reduction in the steel available for [other] firms ... [should] be made in a way which will impose the least hardship on these firms and will impose the least hardship on the essential needs of the rest of the economy” (an allocation).⁴

Since the law's enactment, priorities and allocations authorities have provided flexible tools for administrations to address and stabilize economic challenges. For example, they were used to keep energy flowing during the 2000–01 California utility crisis. As described in an [earlier Roosevelt Institute report](#), market manipulation by Enron led to 800 percent increases in wholesale prices, threatening the financial viability of energy providers like the Pacific Gas

² S. Rep. No. 81-2250, at 13 (1950).

³ Id.

⁴ Id. at 13-14.

& Electric Company (PG&E). Six natural gas suppliers threatened to halt orders to the company. The Clinton administration invoked the DPA to require continued delivery by 27 suppliers under previously agreed terms, justified on the basis of the importance of continuity of service to not only private households but also defense bases and NASA facilities.

Expanding on that precedent, President Trump has increasingly used priorities and allocations authorities to command production by particular firms. In 2020, the administration [invoked](#) Title I at the [request](#) of the meat industry to require meat facilities to remain in production during the pandemic (despite state orders to close those facilities in response to COVID-19 outbreaks to protect workers' lives in what are notoriously cramped working conditions).⁵ In February, the administration [threatened](#) to invoke the DPA against AI company Anthropic to force it to produce an unrestricted version of its Claude model that could be used by the military for mass surveillance and automated weapon systems, despite the company's founding commitment to safe AI development. (The administration has not yet invoked the DPA against Anthropic, but designated the company a supply-chain risk to limit the use of its technology in government contracts. Anthropic is challenging the supply-chain risk designation in federal court.)

DOE's Sable order continues this emerging trend. In a [court filing](#), the company itself describes the order as "commanding Sable to immediately begin flowing oil through the entire Santa Ynez Pipeline System pursuant to the Defense Production Act." The [order](#) prioritizes and allocates Sable's pipeline transportation services, hydrocarbon transportation capacity, and hydrocarbon transportation service activities to contracts it has or could make, and to do so so long as it has the capacity to transport. Sable's counterparties are likewise directed to prioritize those flows.

The OLC [opinion](#) provides the administration's legal rationale for using priorities and allocations to command production. For allocations, it reasons that under Title I "the President's power to allocate services . . . includes the power to allocate productive capacity itself;" and therefore the broad discretion granted to the president "entails the authority to compel production, not just to allocate materials that already exist." For priorities, OLC concludes that "the President could . . . instruct that Sable's contracts for oil production and transportation take priority over Sable's other contractual obligations and

⁵ The DPA meatpacking order was upheld by two district court judges. See *Johnson v. Tyson Foods, Inc.*, 580 F. Supp. 3d 382, 389 (N.D. Tex. 2022) (characterizing Title I priorities and allocations authority as permitting the "President to determine the manner, conditions, and extent of critical infrastructure industries' operations during an emergency") (internal quotation marks omitted); *Reed v. Tyson Foods, Inc.*, No. 21-cv-01155, 2021 WL 5107725 (W.D. Tenn. Nov. 3, 2021).

expressly preempt California environmental regulations insofar as they would impede that prioritized performance.” (That is, upon receiving oil orders designated by the government as priorities under the DPA, a heretofore offlined Sable would be legally required to start production to comply.)

The increasing use of Title I power to not just shuffle and sequence existing economic output but to command new production by firms is a significant development. Some (including [one of us](#), Dodge) have voiced skepticism as to whether “[dragooning](#)” companies is consistent with the statutory text and [past practice](#) under Title I. Others (including the other of us, Tucker) see the DPA as broad enough to command new or converted production (subject to limited [optional rejection](#) of orders by firms written into [changeable] regulation). In either case, here, Sable was quite willing to be “dragooned,” and actively sought a DPA order for the sake of overriding California law. Courts may settle some of these questions in litigation.

Toward Energy Abundance

The Sable episode is, most immediately, a reminder of the outsize influence of the fossil fuel industry. It may also open the floodgates for more administration-connected companies to seek federal relief from irksome state regulators via the stroke of a pen on a DPA order. And it will undergo scrutiny from the other branches of government: both the courts in the course of resolving ensuing litigation, and Congress as it debates whether and how to reauthorize the DPA later this year.

Yet the Sable order could also create new pathways for the government to [unlock energy abundance](#). Instead of [waiting for energy markets](#) to fix themselves [amid a war](#) and [surging data center demand](#), or letting state and local governments [block the clean energy buildout](#), the Sable playbook would allow the government to use the DPA to affirmatively advance abundant energy across the board. State-level obstacles to unionization or excessively generous corporate governance terms could be preempted. Pipelines could be opened to give the public [green hydrogen “services”](#) under the DPA. Data centers that are burning through energy [without paying their fair share](#) could have scarce electricity allocated away from them. Offshore wind farms could be expedited [rather than strangled](#). New [nuclear](#) and [geothermal](#) projects could be ushered past state and local permitting restrictions. Many firms driving [\\$300 billion in clean energy investments](#) may, like Sable, welcome a DPA order to bypass regulatory holdups.

Whether for [COVID-19](#) or the [climate crisis](#), policymakers have often been too reluctant to deploy the full suite of crisis-management tools at their disposal. Given the urgency of our challenges, we can ill afford to unilaterally disarm from using these tools. If it withstands the judiciary and Congress, the same tool that the Trump administration has used to reward a fossil-fuel industry donor could be repurposed to meet some of these very challenges over the years ahead.

About the Authors

Joel Dodge is the Director of Industrial Policy & Economic Security at the Vanderbilt Policy Accelerator. His research has included work on the Defense Production Act. His writing on public policy issues has appeared in numerous outlets, including *The Atlantic*, *Washington Monthly*, *Heatmap News*, and more. As an attorney, he previously practiced public interest law and constitutional law.

Todd N. Tucker is a political scientist and Director of the Industrial Policy and Trade program at Roosevelt, leading work on the role of governance and institutions (both national and international) in facilitating economic transformation. A recognized expert on trade and political economy, Todd has testified before legislatures and expert committees around the world. His writing has been featured in *Politico*, *TIME*, *Democracy Journal*, the *Financial Times*, and the *Washington Post*.

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