

SHERROD BROWN, OHIO, CHAIRMAN
JACK REED, RHODE ISLAND
ROBERT MENENDEZ, NEW JERSEY
JON TESTER, MONTANA
MARK WARNER, VIRGINIA
ELIZABETH WARREN, MASSACHUSETTS
CHRIS VAN HOLLEN, MARYLAND
CATHERINE CORTEZ MASTO, NEVADA
TINA SMITH, MINNESOTA
KYRSTEN SINEMA, ARIZONA
JON OSSOFF, GEORGIA
RAPHAEL G. WARNOCK, GEORGIA
PATRICK J. TOOMEY, PENNSYLVANIA
RICHARD C. SHELBY, ALABAMA
MIKE CRAPO, IDAHO
TIM SCOTT, SOUTH CAROLINA
MIKE ROUNDS, SOUTH DAKOTA
THOM TILLIS, NORTH CAROLINA
JOHN KENNEDY, LOUISIANA
BILL HAGERTY, TENNESSEE
CYNTHIA M. LUMMIS, WYOMING
JERRY MORAN, KANSAS
KEVIN CRAMER, NORTH DAKOTA
STEVE DAINES, MONTANA
LAURA SWANSON, STAFF DIRECTOR
BRAD GRANTZ, REPUBLICAN STAFF DIRECTOR

United States Senate
COMMITTEE ON BANKING, HOUSING, AND
URBAN AFFAIRS
WASHINGTON, DC 20510-6075

September 26, 2022

The Honorable Joseph R. Biden
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Dear President Biden:

I write today to express my concern over the administration's increasing misuse and reliance on the Defense Production Act (DPA), a statute within the jurisdiction of the Senate Committee on Banking, Housing, and Urban Affairs (Banking Committee).¹ 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.

In fact, the DPA has built-in guardrails that are meant to ensure the statutory authorities conveyed to the president are only used for genuine national security purposes. Section 303(a)(6) of the DPA requires that the president, prior to the expenditure of any DPA money, provide the Banking Committee with a written explanation justifying (a) why the material or item in question was "essential to the national defense," (b) why "United States industry cannot reasonably be expected to provide the capability" needed for the material or item in a timely manner; and (c) why the DPA expenditure was "the most cost effective, expedient, and practical alternative method for meeting the need." This requirement can be waived only if the president determines that DPA action is necessary to overcome a shortfall so severe that a delay would "severely impair national defense capability," or during a national emergency declared by Congress or the president.

On six separate occasions since March 2022, you issued Presidential Determinations to use the DPA on the following materials and technologies:

- a. electric heat pumps,
- b. solar panel parts such as photovoltaic modules and module components,
- c. building insulation,
- d. electrolyzers,

¹ The DPA's jurisdiction in the House of Representatives is the Committee on Financial Services (Financial Services Committee).

- e. electric power grid components,
- f. fuel cells,
- g. transformers,
- h. strategic and critical materials, such as lithium, nickel, cobalt, graphite, and manganese, needed for the production of large-capacity batteries for the automotive, e-mobility, and stationary storage sectors, and
- i. platinum group metals.

Troublingly, each President Determination since March has waived the congressional notification requirement in section 303(a)(6). The DPA is not a utility knife for resolving complex economic issues or financing the administration's climate agenda. Abusing the DPA while circumventing congressional oversight risks turning the program into a partisan tool for advancing the policies of the political party that holds the White House. For example, a future Republican president may decide the DPA is a convenient means for funding construction of a border wall or finishing a long-stalled natural gas pipeline even though neither matter has any relationship to the defense-industrial base.

Given that the administration gave no information to Congress pursuant to section 303(a)(6) regarding the intended use of the DPA for the above listed resources and technologies, I request that you provide answers to the following questions by no later than October 11, 2022:

1. What analyses, if any, did the administration conduct to determine that the above-listed technologies and materials are needed for the national defense? Please provide any such analyses for each technology or material.
2. What amount of the technologies and materials listed above, and by what future date, do you assess will be sufficient to overcome the respective shortfalls that you have said severely impair our national defense capability?
3. By issuing these Presidential Determinations, your administration waived section 303(a)(6) of the DPA, which in part requires Congress to authorize any DPA action that would cost over \$50 million. Did you waive section 303(a)(6) to avoid Congress's scrutiny over your assertion that the use of the DPA was necessary to address supply shortages impairing our national defense?
4. Section 303 of the DPA authorizes taxpayer money to be directed towards private industry. Please detail the aggregate amounts of money that has been, or will be, directed towards private industry for each of the technologies or materials listed, and please describe the form of this financial support (e.g., purchase agreement, subsidy, or other support) authorized by section 303 of the DPA.
5. Please total the estimated number of domestic producers that currently manufacture each of the technologies or materials noted above. Please indicate whether the administration spoke to those entities in advance of invoking the DPA.

6. Please explain how the government will acquire, sell, subsidize, or otherwise support the manufacture of these technologies.
 - a. Will the government be the sole end-user of these purchases?
 - b. Will the government purchase and resell these technologies at market rates?

As you can infer from these questions, I worry that you see the administration sees the DPA as a nearly limitless pool of funding to be used for whatever your administration desires—so long as you issue a memorandum asserting that such spending is relevant to the national defense. Your administration’s deliberate effort to avoid congressional oversight of the DPA, by consistently waiving section 303(a)(6) of the statute, only fuels my concerns. Please respond to this letter with a detailed and thoughtful set of answers to each question. If your administration continues to abuse the DPA and skirt legitimate questions surrounding its use, Congress may have to curtail the executive branch’s ability to so easily invoke it.

Thank you for your attention to this important matter.

Sincerely,



Pat Toomey
Ranking Member

cc: The Honorable Sherrod Brown, Chairman, Senate Committee on Banking, Housing, and Urban Affairs