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LEST WE FORGET: COVID-19, THE DEFENSE PRODUCTION ACT, AND EXECUTIVE ORDER 13,917

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ABSTRACT

During his 2024 presidential campaign, Donald Trump claimed that the ongoing conflicts in Ukraine and Gaza would not have occurred had he been reelected in 2020. However, during his first presidency, President Trump faced another significant adversary—the COVID-19 pandemic caused by Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2)—and many contend that Trump’s inadequate response to this viral enemy contributed significantly to his 2020 election loss. Central to the pandemic response was the Defense Production Act, a Cold War–era statute granting broad emergency powers.

This Article argues that the Trump administration fundamentally misunderstood the Defense Production Act, initially by failing to invoke it promptly to secure critical medical supplies, and later by misapplying it via Executive Order 13,917 to compel meat-processing operations in a manner that ultimately prioritized corporate profits over worker safety. With the notable exception of Operation Warp Speed and a few less noteworthy instances, the Trump administration’s use of the Defense Production Act largely failed to safeguard the nation’s public health and harmed vulnerable workers in the meatpacking industry.

Compounding these failures, the meatpacking industry, USDA, and OSHA also largely failed to meaningfully protect these workers, many of whom are members of communities suffering the impacts of marginalization. Meat-processing workers labored in the shadows of public concern under conditions that paralleled the industry’s treatment of animals—both denied meaningful protection, both ultimately treated as disposable. In either case, the underlying assumption seems clear: some lives matter less than money.

¹ Attorney at Law. Copyright © 2025 N. Brock Enger, JD, MBA. Thank you to David S. Schwartz, Steph Tai, the editors of the *Columbia Journal of Race and Law*, K. Brock, and M. Brock. A special thank you to Esther C.

This Article ultimately serves as a resource for policymakers and attorneys, highlighting how the Defense Production Act, when judiciously deployed, can effectively safeguard public health, protect worker rights, and affirm the nation's commitment to valuing human life.

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INTRODUCTION

“If you know the enemy and know yourself, you need not fear the result of a hundred battles.”

—Sun Tzu, *The Art of War*

President Donald Trump, during his 2024 presidential campaign, asserted that the ongoing conflicts in Ukraine and Gaza would not have occurred under his leadership. He claimed that, had he been reelected in 2020, Vladimir Putin would not have invaded Ukraine on February 24, 2022, and neither would Israel have been attacked by Hamas on October 7, 2023.² While his diplomatic efforts with Russia and North Korea may support these assertions, they nonetheless overshadow the fact that, during his first term, the United States was engaged in another war—one against a deadly virus: Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2). When faced with a pandemic that demanded imminent, decisive action, many contend that President Trump failed to rise to the occasion—and that his administration’s mismanagement of the crisis ultimately cost him the 2020 election.³ If this is so, then one could deduce and proceed to argue that these conflicts might not have occurred had Trump’s leadership during the COVID-19 pandemic been deemed sufficient by the American public.

Because collective memory is short, it is crucial to revisit and critically examine how the pandemic response impacted American lives—particularly the decisions that had consequences for some of society’s most vulnerable: workers in American meat-processing facilities. This Article argues that the Trump administration fundamentally misunderstood the Defense Production Act—failing to invoke it when urgently needed to secure personal protective equipment, and later invoking it to mandate meat-processing plant operations in a way that prioritized corporate profit over worker safety. The Defense Production Act—a Cold War-era law granting broad emergency powers—was arguably the most significant statutory vehicle available to the President in confronting the viral

² See, e.g., Tracy Wilkinson, *Trump’s answer to foreign policy woes: Never would have happened*, LA TIMES (June 27, 2024), <https://www.latimes.com/politics/story/2024-06-27/debate-trump-foreign-policy-russia-ukraine-gaza-israel>; Edith M. Lederer, *Trump says he can end the Russia-Ukraine war in one day. Russia’s UN ambassador says he can’t*, THE ASSOCIATED PRESS (July 2, 2024), <https://apnews.com/article/trump-russia-ukraine-war-un-election-a78ecb843af452b8dda1d52d137ca893>.

³ See, e.g., Alex Isenstadt, *Trump pollster’s campaign autopsy paints damning picture of defeat*, POLITICO (Feb. 01, 2021), <https://www.politico.com/news/2021/02/01/trump-campaign-autopsy-paints-damning-picture-of-defeat-464636>.

enemy, SARS-CoV-2.⁴ By learning from both missteps and successes, public officials can ensure that the Defense Production Act is fully utilized and effectively leveraged in future pandemics to protect public health and safeguard worker rights. Ultimately, this Article serves as a resource for public officials and attorneys—both to understand what went wrong, and to more effectively utilize the Defense Production Act in future public health emergencies.

To be sure, the entire nation was unprepared for COVID-19. In January 2020, President Trump was informed by experts that the worst global pandemic since the 1918 influenza outbreak was about to spread throughout the United States.⁵ He concededly “play[ed] it down” to avoid widespread panic.⁶ In March 2020, when governors sought federal assistance in obtaining critical medical supplies, he stated, at one point, to “try getting it yourselves.”⁷ He also hesitated to fully deploy the Defense Production Act early on to obtain necessary medical supplies, citing that “we’re a country not based on nationalizing our business.”⁸ At various points during the pandemic, his decisions fueled controversy. Hospital medical supplies were seized and redirected,⁹ protests against state stay-at-home orders were encouraged,¹⁰ and SARS-CoV-2 was referred to as the “China Virus”—rhetoric widely criticized for inflaming anti-

⁴ See Defense Production Act of 1950, 50 U.S.C. §§ 4501–4568.

⁵ See, e.g., Ed Pilkington & Martin Pengelly, *Trump was warned in January of Covid-19's devastating impact, memos reveal*, THE GUARDIAN (Apr. 7, 2020), <https://www.theguardian.com/world/2020/apr/07/donald-trump-coronavirus-memos-warning-peter-navarro>.

⁶ See, e.g., Daren Gregorian, *Trump told Bob Woodward he knew in February that COVID-19 was 'deadly stuff' but wanted to 'play it down'*, NBC NEWS (Sept. 9, 2020), <https://www.nbcnews.com/politics/Donald-trump/trump-told-bob-woodward-he-knew-february-covid-19-was-n1239658>.

⁷ See, e.g., Juliette Kayyem, *Trump Leaves States to Fend for Themselves*, THE ATLANTIC (Mar. 17, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/america-has-never-had-50-state-disaster-before/608155/>.

⁸ See, e.g., James Doubek, *Trump Compares Defense Production Act To Nationalization*, NPR (Mar. 23, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/23/819926854/fact-check-trump-compares-defense-production-act-to-nationalization>.

⁹ See, e.g., Noam N. Levey, *Hospitals say feds are seizing masks and other coronavirus supplies without a word*, LA TIMES (Apr. 7, 2020), <https://www.latimes.com/politics/story/2020-04-07/hospitals-washington-seize-coronavirus-supplies>.

¹⁰ See, e.g., Michael D. Shear & Sarah Mervosh, *Trump Encourages Protest Against Governors Who Have Imposed Virus Restrictions*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/04/17/us/politics/trump-coronavirus-governors.html>.

Asian sentiment.¹¹ Mask-wearing was publicly questioned,¹² Dr. Anthony Fauci's judgment was scrutinized,¹³ the idea of letting the virus "wash over" the U.S. was considered,¹⁴ and efforts to dismantle the Affordable Care Act continued at a time when healthcare access was critical.¹⁵ Large-scale, in-person campaign rallies were also held, which were linked to increased transmission of the virus.¹⁶ Such actions, many contend, contributed to unnecessary suffering across the United States. Tragically, by the time President Trump left office on January 20, 2021, more than 400,000 Americans had reportedly died from COVID-19—an immeasurable loss that might have been substantially reduced had the Defense Production Act been invoked optimally.¹⁷

¹¹ See, e.g., Sabrina Tavernise & Richard A. Oppel Jr., *Spit On, Yelled At, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html>.

¹² See, e.g., Robert Mackey, *Trump Is Hospitalized With Covid-19, Days After Mocking Biden for Wearing a Mask*, THE INTERCEPT (Oct. 2, 2020), <https://theintercept.com/2020/10/02/trump-tests-positive-covid-48-hours-mocking-biden-wearing-mask/>.

¹³ See, e.g., Sheryl Gay Stolberg, Maggie Haberman, & Noah Weiland, *Trump Calls Fauci 'a Disaster' and Shrugs Off Virus as Infections Soar*, N.Y. TIMES (Oct. 19, 2020), <https://www.nytimes.com/2020/10/19/us/politics/trump-fauci-covid.html>.

¹⁴ See, e.g., Chidanand Rajghatta, *'Trump asked why not allow coronavirus to wash over US' as toll passes 21,000*, TIMES OF INDIA (Apr. 12, 2020), <https://timesofindia.indiatimes.com/world/us/trump-asked-why-not-allow-coronavirus-to-wash-over-us-as-toll-passes-21000/articleshow/75111561.cms>.

¹⁵ See, e.g., Aviva Aron-Dine, *Trump's renewed effort to dismantle Obamacare is particularly cruel during the pandemic*, BUSINESS INSIDER (July 7, 2020), <https://www.businessinsider.com/trump-obamacare-affordable-care-act-covid-19-healthcare-pandemic-coronavirus-2020-7>.

¹⁶ See, e.g., Gene Lyons, *Trump super-spreader events are immoral and criminal*, CHICAGO SUN-TIMES (Oct. 28, 2020), <https://chicago.suntimes.com/columnists/2020/10/28/21539209/trump-maga-rally-super-spreaders-typhoid-mary-gene-lyons>; Carol D. Leonnig & Josh Dawsey, *More than 130 Secret Service officers are said to be infected with coronavirus or quarantining in wake of Trump's campaign travel*, THE WASHINGTON POST (Nov. 13, 2020), https://www.washingtonpost.com/politics/secret-service-coronavirus-outbreak/2020/11/13/610eebcc-2539-11eb-8672-c281c7a2c96e_story.html.

¹⁷ Adam Geller & Janie Har, *'Shameful': US virus deaths top 400K as Trump leaves office*, THE ASSOCIATED PRESS (Jan. 19, 2021), <https://apnews.com/article/donald-trump-pandemics-public-health-coronavirus-pandemic-f6e976f34a6971c889ca8a4c5e1c0068>. See also Rebecca Bratspies, *This Great Catastrophe: Bungling Pandemics from 1918 to Today*, 30 MICH. ST. INT'L.L. REV. 189, 219 (2022) (arguing that while "[t]housands of Americans would have died because of the COVID-19 pandemic, no matter who was in the White House," "the Trump administration's incompetence and malfeasance ensured that the carnage was many times worse than it might have been"); Richard W. Parker, *Why America's Response to the COVID-19 Pandemic Failed: Lessons from New Zealand's Success*, 73 ADMIN. L. REV. 77, 84 (2021) (concluding that "if the Trump Administration had done as well as Germany or Canada," "over

Legal scholars¹⁸ and commentators¹⁹ have argued that President Trump failed to fully exercise his authority under the Defense Production Act—neglecting to invoke the Defense Production Act when he should have used it,²⁰ and misapplying it when he should not have.²¹ That is, his reluctance to deploy the Defense Production Act early in the crisis was said to leave States scrambling for critical medical supplies, while his later invocation of the Act through Executive Order 13,917 forced meat-processing facilities to remain operational, allegedly prioritizing industrial output over worker

210,000 Americans now dead would still be alive today,” and that matching the performance of Australia, New Zealand, South Korea, or Japan “would have saved over 340,000 American lives”); Beverly A. Cigler, *Fighting COVID-19 in the United States with Federalism and Other Constitutional and Statutory Authority*, 51 PUBLIUS: J. FEDERALISM 673, 689 (2021) (noting the Lancet Commission’s conclusion that 40 percent of pandemic deaths could have been avoided “had President Trump made different choices” and Columbia University’s National Center for Disease Preparedness suggestion that stronger national action early in the pandemic might have resulted in 130,000-210,000 fewer deaths).

¹⁸ See, e.g., Jane Chong, *Defense Production Act*, THE ATLANTIC (Apr. 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/how-actually-use-dpa-fight-covid-19/609469/>.

¹⁹ See, e.g., Caleb Watney & Alec Stapp, *Trump Is Using the Defense Production Act All Wrong*, POLITICO (Apr. 9, 2020), <https://www.politico.com/news/agenda/2020/04/09/trump-defense-production-act-175920>.

²⁰ See, e.g., Ayesha Rascoe, *Trump Resists Using Wartime Law To Get, Distribute Coronavirus Supplies*, NPR (Mar. 25, 2020), <https://www.npr.org/2020/03/25/821285204/trump-sends-mixed-messages-about-invoking-defense-production-act>; 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>; Press Release, Debbie Wasserman Schultz, *Top VA Appropriators in Congress to Trump: Fully Deploy Defense Production Act to Protect Health Workers, Veterans* (Apr. 27, 2020), <https://wassermanschultz.house.gov/news/documentsingle.aspx?DocumentID=2489>; Press Release, Chris Van Hollen, *Van Hollen, Schatz, Senators to Trump: Instead of Deflecting Blame for Failing COVID-19 Response, Fully Invoke Defense Production Act* (May 15, 2020), <https://www.vanhollen.senate.gov/news/press-releases/van-hollen-schatz-senators-to-trump-instead-of-deflecting-blame-for-failing-covid-19-response-fully-invoke-defense-production-act>; Andrew Jacobs, *Despite Claims, Trump Rarely Uses Wartime Law in Battle Against Covid*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/09/22/health/Covid-Trump-Defense-Production-Act.html>.

²¹ See, e.g., John Rehm, *Immunity by executive order probably isn’t constitutional, but beware of federal immunity for COVID-19 in workers’ compensation*, WORKERS’ COMPENSATION WATCH (May 4, 2020), <https://workerscompensationwatch.com/2020/05/04/beware-covid-19-related-federalization-of-workers-compensation/>; Richard Trumka, *Trump’s Dangerous Decision on Meatpacking Plants*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/05/07/opinion/trump-meat-plants-coronavirus.html>.

safety.²² Moreover, some observers contend that Trump exerted unnecessary influence over key administrative agencies such as the Center for Disease Control and Prevention (CDC),²³ the United States Department of Agriculture (USDA),²⁴ and the Occupational Safety and Health Administration (OSHA).²⁵ Health law experts argue that these agencies, either through willful complicity or bureaucratic inaction, failed to meaningfully protect frontline workers—particularly those in meat-processing plants, where COVID-19 outbreaks surged.²⁶

This article explores one dimension of the Trump administration's handling of the pandemic: its misunderstanding of the Defense Production Act. Through a legal and policy-based analysis of the Defense Production Act's implementation, this article examines how the Trump administration utilized this powerful federal statute and explores how it could be more effectively leveraged in future pandemics. Additionally, this article situates its analysis within the broader discussion of government accountability and the crucial role the Plaintiffs' Bar plays in helping enforce it.

²² See, e.g., Ariel F. Coto, *Hero and Villain: The Defense Production Act in the Era of Covid-19*, 51 SW. L. REV. 156, 169 (2021) (contending that the Trump administration's use of the Defense Production Act was "morally questionable" and that it "ultimately fell short of its character test." The author contrasts this with the Biden administration's invocation of the Act to bolster vaccine production, characterizing it as a "source for good," while overlooking the Trump administration's use of the same authority for Operation Warp Speed).

²³ See, e.g., Dan Diamond, *Trump officials interfered with CDC reports on Covid-19*, POLITICO (Sept. 12, 2020), <https://www.politico.com/news/2020/09/11/exclusive-trump-officials-interfered-with-cdc-reports-on-covid-19-412809>; Elisabeth Buchwald, *U.S. health officials say Americans shouldn't wear face masks to prevent coronavirus — here are 3 other reasons not to wear them*, MARKETWATCH (Mar. 2, 2020), <https://www.marketwatch.com/story/the-cdc-says-americans-dont-have-to-wear-facemasks-because-of-coronavirus-2020-01-30>.

²⁴ See, e.g., Michael Grabell & Bernice Yeung, *Emails Show the Meatpacking Industry Drafted an Executive Order to Keep Plants Open*, PROPUBLICA (Sept. 14, 2020), <https://www.propublica.org/article/emails-show-the-meatpacking-industry-drafted-an-executive-order-to-keep-plants-open>.

²⁵ See, e.g., Christina Zhao, *'Failure to Protect': Trump's OSHA Criticized for Fining Meatpacking Plant About \$10 Per COVID-Infected Worker*, NEWSWEEK (Sept. 10, 2020), <https://www.newsweek.com/failure-protect-trumps-osha-criticized-fining-meatpacking-plant-about-10-per-covid-infected-1531150>; Corrinne Hess, *OSHA Will Oversee Opening Of Meatpacking Plants Following Trump Order*, WPR (Apr. 29, 2020), <https://www.wpr.org/osha-will-oversee-opening-meatpacking-plants-following-trump-order>.

²⁶ See, e.g., Rachel Treisman, *Meatpacking Companies, OSHA Face Investigation Over Coronavirus In Plants*, NPR (Feb. 1, 2021), <https://www.npr.org/sections/coronavirus-live-updates/2021/02/01/962877199/meatpacking-companies-osha-face-investigation-over-coronavirus-in-plants>; Olivia Nevola, *People over Profits: Why A Private Right of Action in the Occupational Safety and Health Act Is Necessary During the Covid-19 Pandemic*, 29 CARDOZO J. EQUAL RTS. & SOC. JUST. 845 (2023).

Given the failures of key federal agencies such as the USDA and OSHA, the Plaintiffs' Bar became an essential force in holding both government and corporate actors accountable for worker safety. Through a close examination of these issues, this article raises important questions about how the executive branch's interpretation—and possible misinterpretation—of the Defense Production Act influenced crisis management, as well as the vital importance of education and awareness regarding the immense power of this federal statute. And while many of the Trump administration's actions under the Defense Production Act were criticized as inadequate or misapplied, not all were constrained. On the contrary, one of the Trump administration's most consequential successes was Operation Warp Speed—which proved to be a case study in effectively leveraging the Defense Production Act to accelerate vaccine development and distribution.²⁷ Had the administration recognized the potential of this aging statute sooner, its use might have been swifter and more impactful.

This article proceeds in four parts. First, Part I provides an overview of the Defense Production Act, highlighting the Trump administration's insufficient initial deployment of this powerful federal statute during the early stages of the pandemic. In so doing, it underscores the vast federal powers that should be utilized more quickly to address any future pandemic in the United States. Next, Part II examines the context and one potential rationale underlying Executive Order 13,917, which served to mandate that meatpacking plants remain operational. Then, Part III explores how the USDA and OSHA fell short in effectively addressing COVID-19 infections in meat-processing facilities—before, during, and after the implementation of Executive Order 13,917—requiring intervention from the Plaintiffs' Bar. Finally, Part IV considers potential legal grounds upon which Executive Order 13,917 might have been challenged.

I. THE DEFENSE PRODUCTION ACT: AN OVERVIEW

Early on in the American COVID-19 pandemic, nurses were so short on medical supplies that they had no choice but to wear

²⁷ For further discussions of Operation Warp Speed, *see, e.g.*, Barry Sullivan, *Lessons of the Plague Years*, 54 LOY. U. CHI. L.J. 15, 30 (2022) (noting that Operation Warp Speed “may have been the Trump administration's greatest accomplishment, as well as the one bright spot in its pandemic response.”).

garbage bags for gowns²⁸ and coffee filters for masks.²⁹ At one meat-processing facility in Wisconsin, workers were allegedly instructed to use hairnets for masks,³⁰ and in at least one fast-food restaurant, it was reported that food workers were donning dog diapers as face masks.³¹ Had the Defense Production Act been used initially as intended, such concerning reports might possibly have been avoided.³² At one point early on in the COVID-19 pandemic, legislators in Congress introduced a bill to *require* President Trump to use his authority under the Defense Production Act to produce medical equipment.³³ Specifically, the bill directed the President to determine, pursuant to 50 U.S.C. § 4511(b), that medical equipment—including not less than 500 million N95 respirators; 200,000 medical ventilators; 20 million face shields; 500 million pairs of medical exam gloves; and 20 million surgical gowns—was “scarce and a critical material essential to the national defense,” and that “the requirements of the national defense for such equipment cannot be met without exercising the authorities provided by the Defense Production Act of 1950.”³⁴ The bill further instructed the President to require emergency production of such personal

²⁸ See, e.g., Susan B. Glasser, *How did the U.S. end up with Nurses wearing Garbage Bags?*, THE NEW YORKER (Apr. 9, 2020), <https://www.newyorker.com/news/letter-from-trumps-washington/the-coronavirus-and-how-the-united-states-ended-up-with-nurses-wearing-garbage-bags>.

²⁹ See, e.g., Angie Moreschi, *Pennsylvania nursing home employees resorting to coffee filter face masks during coronavirus outbreak*, KIRO7 (Mar. 24, 2020), <https://www.kiro7.com/news/trending/pennsylvania-nursing-home-employees-resorting-coffee-filter-face-masks-during-coronavirus-outbreak/KPQMLBL4CRFORMZN2L4PY3IZCA>; David Enrich, Rachel Abrams, & Steven Kurutz, *A Sewing Army, Making Masks for America*, N.Y. TIMES (Mar. 25, 2020), <https://www.nytimes.com/2020/03/25/business/coronavirus-masks-sewers.html>.

³⁰ See, e.g., Maria Perez, *‘Please do something’: As COVID-19 swept through Wisconsin food plants, companies, government failed to protect workers*, MILWAUKEE JOURNAL SENTINEL (Aug. 13, 2020), <https://www.jsonline.com/story/news/2020/07/31/wisconsin-food-plants-failed-protect-workers-covid-19-smithfield-birds-eye-diversified-meats-calumet/5334812002/>.

³¹ See, e.g., Justine Coleman, *McDonald’s employees allege managers provided coffee filters, dog diapers as face masks*, THE HILL (May 28, 2020), <https://thehill.com/blogs/blog-briefing-room/news/500024-mcdonalds-employees-allege-managers-provided-coffee-filters-dog>.

³² See Alejandro E. Camacho & Robert L. Glicksman, *Structured to Fail: Lessons from the Trump Administration’s Faulty Pandemic Planning and Response*, 10 MICH. J. ENV’T & ADMIN. L. 329, 351 (2021) (highlighting that President Trump “resisted using his authority under the Defense Production Act” to produce scarce medical supplies).

³³ See Medical Supply Chain Emergency Act of 2020, H.R. 6390, 116th Cong. (2020) (“A Bill to require the President to use authorities under the Defense Production Act of 1950 to require emergency production of medical equipment to address the COVID-19 outbreak. . .”).

³⁴ *Id.*

protective equipment (PPE), establish a fair and reasonable price for its sale, and coordinate its distribution to states based on need and vulnerability.³⁵ Instead of embracing this call to action, critics contend that the administration later interpreted the Defense Production Act in a way that placed additional strain on workers in meat-processing facilities who were already vulnerable—while simultaneously benefiting the wealthy.³⁶ To illustrate how difficult conditions in meat-processing facilities can be, consider the demanding requirements in some facilities where reports have indicated that bathroom breaks are routinely denied on the job, forcing workers to don adult diapers.³⁷

The Defense Production Act was enacted shortly before the American-Korean conflict in 1950,³⁸ and granted broad powers to the President similar to those provided by the First and Second War Powers Acts during World War II.³⁹ Authority for the DPA can be found in Article 1, Section 8; Article 2, Section 2; and Article 4, Section 4 of the U.S. Constitution.⁴⁰ Originally containing seven Titles, the DPA's Titles relating to the settlement of labor disputes, price and wage stabilization, requisition and condemnation, and control of real estate credit were allowed by Congress to expire in

³⁵ *Id.*

³⁶ See Exec. Order No. 13,917, 85 Fed. Reg. 26,313 (Apr. 28, 2020); *infra* Part II. See also Catherine Powell, *War on Covid: Warfare and Its Discontents*, 70 UCLA L. REV. DISCOURSE 2, 17 (2023) (describing Executive Order No. 13917 as an “act of executive overreach” which forced poultry workers “to risk their lives on the ostensible frontlines”).

³⁷ See, e.g., Peggy Lowe, *Tyson Foods Promises Better Conditions and Safety For Meat Workers*, NPR (Apr. 26, 2017), <https://www.npr.org/sections/thesalt/2017/04/26/525736888/tyson-foods-promises-better-conditions-and-safety-for-meat-workers>.

³⁸ See, e.g., Richard H. Field, *Economic Stabilization under the Defense Production Act of 1950*, 64 HARV. L. REV. 1, 1-2 (1950).

³⁹ See, e.g., Alfred L. Scanlan, *The Defense Production Act of 1950*, 5 RUTGERS L. REV. 518, 521 (1951); Alfred Long Scanlan, *Defense Production Act Extended and Amended*, 27 NOTRE DAME L. REV. 185, 186 (1952); Rutherford Day, *Federal Government's Power to Requisition Under the Defense Production Act of 1950*, 41 GEO. L. J. 18, 18-21 (1952).

⁴⁰ See, e.g., James G. Jr. Hodge & Kim Weidenaar, *Public Health Emergencies as Threats to National Security*, 9 J. NAT'L SEC. L. & POL'Y 81, 84 n.19 (2017); U.S. CONST. art. 1, § 8 (granting broad power to Congress to provide for the common defense and general welfare); U.S. CONST. art. 2, § 2 (granting power to the President as Commander in Chief); U.S. CONST. art. 4, § 4 (protecting states from invasion). For the authority of the Defense Production Act as it relates to the general welfare clause, see, e.g., David S. Schwartz, *Recovering the Lost General Welfare Clause*, 63 WM. & MARY L. REV. 857, 870 (2022); David S. Schwartz & N. Brock Enger, *The Dot That Nearly Destroyed Federalism: Erroneously Parsing Punctuation in the Constitution* (Mar. 10, 2025) (unpublished manuscript) (on file with authors).

1953.⁴¹ What has remained are its three longstanding Titles: Title I—Priorities and Allocations (Subchapter I); Title III—Expansion of Productive Capacity and Supply (Subchapter II); and Title VII—General Provisions (Subchapter III).⁴² Having been reauthorized over fifty times since its enactment⁴³ the DPA is used frequently by the Federal Government,⁴⁴ and its current version is active until September 30, 2025.⁴⁵ The requirement that the DPA be frequently reauthorized by Congress is a function of the broad power it conveys to the President.

Historically, Presidential power under the DPA has been delegated to Federal Agencies⁴⁶ via Executive Order,⁴⁷ although the President alone may directly prescribe regulations and issue orders under the Act.⁴⁸ Moreover, much of the outer reach of Presidential power under the DPA remains to be delineated by Federal Courts,⁴⁹ to the extent that the text of the DPA does not require Congress's

⁴¹ See, e.g., MICHAEL H. CECIRE ET AL., CONG. RSCH., SERV. R43767, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS 2 (2020); Defense Production Act of 1950, ch. 932, 64 Stat. 798 (1950); *infra* Part IV.

⁴² 50 U.S.C. §§ 4511–4568 (2018). See also Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798 (1950).

⁴³ CECIRE ET AL., *supra* note 41, at 1.

⁴⁴ See, e.g., DEPARTMENT OF HOMELAND SECURITY, 116TH CONG., REP. ON DEF. PROD. ACT 8 (June 24, 2019); Andrew Jacobs, *Despite Claims, Trump Rarely Uses Wartime Law in Battle Against Covid*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/22/health/Covid-Trump-Defense-Production-Act.html>.

⁴⁵ DEPARTMENT OF HOMELAND SECURITY, 116TH CONG., REP. ON DEF. PROD. ACT, *supra* note 44, at 3.

⁴⁶ See, e.g., 50 U.S.C. § 4511(d) (2018) (establishing the delegation of procedural rule-making power for Title I—Priorities and Allocations); 15 C.F.R. §§ 700-700.93 (procedural rules for Title I—Priorities and Allocations); 50 U.S.C. § 4567 (2018) (establishing the Defense Production Act Committee “which shall coordinate and plan for on the effective use of the priorities and allocations authorities under this chapter by the departments, agencies, and independent establishments of the Federal Government to which the President has delegated authority under this chapter.”).

⁴⁷ Compare Exec. Order No. 13,909, 85 Fed. Reg. 16,227 (Mar. 18, 2020) (delegating power under Title I—Priorities and Allocations to the Secretary of Health and Human Services) with Exec. Order No. 13,603, 77 Fed. Reg. 16,651 (Mar. 16, 2012) (delegating power under Title I—Priorities and Allocations to several Federal Agencies). See also Exec. Order No. 10,340, 17 Fed. Reg. 3,139 (Apr. 8, 1952) (“The Secretary of Commerce is hereby authorized and directed to take possession of all or such of the plants, facilities, and other property of the companies named in the list attached hereto, or any part thereof, as he may deem necessary in the interests of national defense. . .”). See also *infra* Part II.

⁴⁸ 50 U.S.C. § 4554 (2018).

⁴⁹ See, e.g., *United States v. Nixon*, 418 U.S. 683, 703 (1974) (“[I]t is emphatically the province and duty of the judiciary to say what the law is.” (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803))).

approval.⁵⁰ When Congress or the President declares a National Emergency, such as during the COVID-19 pandemic,⁵¹ broader Presidential powers are activated than would otherwise be the case.⁵² And counterintuitively, notwithstanding the DPA's name and focus on "national defense,"⁵³ the DPA can readily be deployed by the President in a national emergency such as COVID-19.⁵⁴

A. Title I—Priorities and Allocations

Title I of the DPA articulates the priorities and allocations provisions of the Act, granting the President the power to require private industry actors to accept contracts on the President's terms (priorities authority) and to allocate materials, services, and facilities to promote the national defense (allocations authority).⁵⁵ Early on in the COVID-19 pandemic, for example, when nurses were wearing garbage-bag gowns and coffee-filter masks, and workers in meat-processing facilities were wearing hairnet masks,⁵⁶ Title I priorities authority might have been used swiftly to compel private industry actors to produce at least 500 million N95 respirators, 200,000 medical ventilators, 20 million face shields, 500 million pairs of

⁵⁰ See, e.g., 50 U.S.C. § 4514(a) (2018) (joint resolution of Congress required for wage and price controls).

⁵¹ See, e.g., Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

⁵² See, e.g., 50 U.S.C. § 4531(a)(2) (2018); 50 U.S.C. § 4533 (2018)(a)(7)(A).

⁵³ The term, "national defense," presents sixteen times in the DPA's Congressional Declaration of Policy alone, and recurs throughout the Statute. See 50 U.S.C. §§ 4502–4568 (2018).

⁵⁴ See, e.g., Nikiforos Mathews & Christopher J. Cariello, *COVID-19 and The Defense Production Act*, ORRICK (Mar. 22, 2020), <https://www.orrick.com/en/insights/2020/03/covid-19-and-the-defense-production-act>; Andrew Geltman, *Defusing the Bug Bomb: Legal Strategies to Combat Antibiotic Resistant Infections*, 18 J. HEALTH CARE L. & POL'Y 115, 136 n.207–21 (2015). This is because the term, "national defense," as used in the DPA, "includes emergency preparedness activities conducted pursuant to title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act." 50 U.S.C. § 4552 (2018). Further, "emergency preparedness" activities include measures undertaken in preparation for, during, and following a "hazard upon the civilian population"—with the term "hazard" referring to a "natural disaster" or an accidental or man-caused event. 42 U.S.C. § 5195a (2018). The term, "natural disaster" includes catastrophes in any part of the United States causing "substantial damage or injury to civilian property or persons." 42 U.S.C. § 5195a(2) (2018). Donald Trump's Executive Order Number 13,917, however, was issued, it appears, pursuant to "national defense" covering "critical infrastructure protection and restoration." See *infra* Parts II, IV.

⁵⁵ 50 U.S.C. § 4511 (2018). See also Eric Hargan et al., *Vaccine Law 101*, 35 J.L. MED. & ETHICS 72, 73 (2007) (mentioning that the Department of Health and Human Services could potentially "use the *Defense Production Act* to require manufacturers to give priority to vaccine production for the federal government in an emergency.").

⁵⁶ See *supra* notes 29, 30.

medical exam gloves, and 20 million surgical gowns—as Congress requested.⁵⁷ However, instead of focusing on mass producing personal protective equipment (PPE), Title I was initially used to ban hoarding and exportation of the little PPE that was then available, and also to mandate that meat-processing facilities stay open.⁵⁸ To be sure, ensuring the continuity of meat-processing facility operations was important to the national food supply and to worker jobs and financial livelihoods, but it would have been arguably more imperative to keep the meat-processing facilities open while simultaneously ensuring that comprehensive safety protocols were consistently mandated, health measures rigorously enforced, and sufficient PPE reliably provided to fully protect workers from COVID-19.⁵⁹

To invoke the allocations authority under 50 U.S.C. § 4511(b) (2018)—which, prior to the COVID-19 pandemic, had not been used since the Cold War⁶⁰—the President must find:

(1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of

⁵⁷ See Letter from Members of Congress to President Trump (Mar. 13, 2020), <https://sherrill.house.gov/media/press-releases/sherrill-joins-colleagues-in-urgent-letter-to-the-president-to-invoke-defense-production-act-authority-and-increase-availability-of-vital-medical-supplies>; Michael H. Cecire & Heidi M. Peters, CONG. RSCH. SERV. IN11231, THE DEFENSE PRODUCTION ACT (DPA) AND COVID-19: KEY AUTHORITIES AND POLICY CONSIDERATIONS 2 (2020).

⁵⁸ See Chong, *supra* note 18; Exec. Order No. 13,910, 85 Fed. Reg. 17,001 (Mar. 23, 2020); *infra* Part II.

⁵⁹ See Jocelyn J. Herstein et al., *Characteristics of SARS-CoV-2 Transmission among Meat Processing Workers in Nebraska, USA, and Effectiveness of Risk Mitigation Measures*, 27 EMERGING INFECTIOUS DISEASES 1032, 1036 (2021) (finding “significantly reduced incidence of COVID-19 cases in 62% of studied facilities following adoption of universal masking and physical barrier interventions”—measures which were developed and implemented with the support of the University of Nebraska Medical Center and the Nebraska Department of Health and Human Services); Kelly K. Dineen, *Meat Processing Workers and the Covid-19 Pandemic: The Subrogation of People, Public Health, and Ethics to Profits and a Path Forward*, 14 ST. LOUIS. U. J. HEALTH L. & POL’Y 7, 13 (2020) (noting that workers in meat processing facilities were “left with a terrible choice between their health and their livelihood”). Cf. N. Brock Enger, *Offers You Can’t Refuse: Post-Hire Noncompete Agreement Insertions and Procedural Unconscionability Doctrine*, 2020 WIS. L. REV. 769, 775 (2020) (discussing the procedural unconscionability inherent in “offers you can’t refuse”—take-it-or-leave-it contractual modifications presented by employers to existing employees).

⁶⁰ CECIRE ET AL., *supra* note 41, at 9.

such material in the civilian market to such a degree as to create appreciable hardship.⁶¹

(In Executive Order Number 13,917, President Trump deemed that “meat and poultry” fit this statutory requirement.⁶²) Additionally, failure to comply with actions prohibited or required by any rule, regulation, or order issued pursuant to Title I—Priorities and Allocations (Subchapter I) of the DPA can result in criminal penalties.⁶³ This provision appeared to have been leveraged as a veiled threat to ensure that meat-processing facilities were reopened and stayed operational.⁶⁴

B. Title III—Expansion of Productive Capacity and Supply

Title III—Expansion of Productive Capacity and Supply (Subchapter II)—grants the President significant authority to offer generous economic incentives to encourage private industry actors “to develop, maintain, modernize, restore, and expand the productive capacities of domestic sources for critical components, critical technology items, materials, and industrial resources essential for the execution of the national security strategy of the United States.”⁶⁵ These incentives include loans⁶⁶ and loan guarantees,⁶⁷ direct purchases, and purchase commitments.⁶⁸ Under the CARES Act, Congress expressly waived the ordinary appropriations limits on loans and loan guarantees issued pursuant to the Defense Production Act.⁶⁹ As applied to COVID-19, Title III could have been a vehicle whereby manufacturing facilities of PPE were built, or existing facilities were retooled to produce it. Deployed early on in the COVID-19 pandemic, Title III could have been a particularly powerful tool for ramping up production of personal protective equipment.

⁶¹ 50 U.S.C. § 4511(b) (2018). *See also infra* Part IV.

⁶² *See infra* Part IV.

⁶³ 50 U.S.C. § 4513 (2018) (“Any person who willfully performs any act prohibited, or willfully fails to perform any act required, by the provisions of this subchapter or any rule, regulation, or order thereunder, shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.”).

⁶⁴ *See infra* Part II.C.

⁶⁵ 50 U.S.C. § 4517 (2018).

⁶⁶ *See, e.g.*, 50 U.S.C. § 4532 (2018).

⁶⁷ *See, e.g.*, 50 U.S.C. § 4531 (2018).

⁶⁸ *See, e.g.*, 50 U.S.C. § 4533 (2018).

⁶⁹ *See* Pub. L. No. 116–136, 134 Stat. 520 (2020).

C. Title VII—General Provisions

Title VII—General Provisions (Subchapter III)—provides the President additional strategic authority to establish teams of experts and consultants devoted to effectively addressing emergencies such as COVID-19,⁷⁰ as well as to endorse private agreements among industry executives committed to effectively addressing COVID-19, shielding them from antitrust liability.⁷¹ A President more inclined to listen to leading experts and foster alliances and cooperation might have been able to more effectively leverage Title VII in a nationwide effort to curb COVID-19 infections. For example, the Trump administration could have convened public health experts, manufacturers, and logistics specialists into federally led supply chain coordination teams to identify PPE shortages early on, rapidly scale domestic production, and ensure equitable distribution.⁷² However, President Trump’s approach to implementing the Defense Production Act at the onset of the pandemic contributed to challenges in securing adequate PPE supplies⁷³ and addressing alarming increases in infections.⁷⁴ Rather than proactively deploying federal authority, the administration initially deferred to market forces, leaving manufacturers uncertain and reluctant to retool without clear demand signals or coordination.⁷⁵ When the DPA was finally invoked, its use was narrow—focused primarily on ventilator production—while critical shortages of protective equipment and test kits persisted.⁷⁶ Compounding the problem, the federal government left key response functions to the states, undermining the kind of centralized, expert-guided planning envisioned under Title VII.⁷⁷

⁷⁰ See, e.g., 50 U.S.C. § 4560 (2018); Chong *supra* note 18.

⁷¹ See, e.g., 50 U.S.C. § 4558 (2018); Watney & Stapp, *supra* note 19.

⁷² See Parker, *supra* note 17, at 87–98 (describing how New Zealand established a national register to coordinate PPE sourcing and completely met demand early in the pandemic by mobilizing manufacturers and logistics networks, contributing to rapid containment and economic reopening).

⁷³ See, e.g., TERESA MURRAY & JAMIE FRIEDMAN, NURSING HOME SAFETY DURING COVID: PPE SHORTAGES (Oct. 2, 2020), <https://uspirg.org/feature/usp/nursing-home-safety-during-covid-ppe-shortages>.

⁷⁴ WORLDOMETER, UNITED STATES CORONAVIRUS CASES (Dec. 2, 2020), <https://www.worldometers.info/coronavirus/country/us/>.

⁷⁵ Parker, *supra* note 17, at 87 (noting that “President Trump initially resisted using the considerable powers conferred on him by the Defense Production Act (DPA) to expand production of PPE and test kits—citing a preference for relying on market forces”); *id.* at 87–88 (noting that manufacturers “reported a reluctance to invest in retooling factories to make PPE in the absence of any assurance of a market after the pandemic receded, so market forces did not yield the hoped-for surge in supplies”).

⁷⁶ *Id.* at 88–89. The U.S. Department of Defense’s late Spring 2020 contracts for production of N95 masks were a day late and a dollar short. *Id.* at 88.

⁷⁷ See Cigler, *supra* note 17, at 683, 684.

II. THE CONTROVERSIAL EXECUTIVE ORDER 13,917

A key underlying intent of Executive Order 13,917 was to mandate the continued operation of meat-processing facilities while also serving to limit their liability for worker illnesses and deaths—actions seemingly designed to protect their profitability during the worst public health crisis in over a century.⁷⁸

A. *The Context of the Crisis*

Since the United States' initial outbreak of COVID-19, the pandemic had a disproportionate impact on workers in meat-processing facilities,⁷⁹ many of whom face socioeconomic challenges and systemic inequalities, including disparities based on ethnicity and skin color.⁸⁰ As of July 2020, for example, nearly nine out of ten workers in U.S. meat-packing plants infected by COVID-19 were ethnic minorities, and multiple companies operating these facilities had recently faced allegations of discrimination in lawsuits.⁸¹ These disparities have been attributed to “systemic

⁷⁸ See Sherley E. Cruz, *Essentially Unprotected*, 96 TUL. L. REV. 637, 652 (2022) (concluding that “[t]hroughout the pandemic, the meatpacking industry used its power to ensure that profits were protected” despite widespread COVID-19 outbreaks at meat processing plants). See also Kelly K. Dineen, *Meat Processing Workers and the COVID-19 Pandemic: The Subrogation of People, Public Health, and Ethics to Profits and a Path Forward*, 14 ST. LOUIS U. J. HEALTH L. & POL'Y 7 (2020); Chalfant, *infra* note 117 and accompanying text (“We’re working with Tyson . . . We’re going to sign an executive order today I believe, and that will solve any liability problems, and they had certain liability problems. . . .”); *infra* note 106 and accompanying text.

⁷⁹ See, e.g., Meagan Flynn, *Wisconsin chief justice sparks backlash by saying covid-19 outbreak is among meatpacking workers, not ‘the regular folks,’* THE WASHINGTON POST (May 7, 2020), <https://www.washingtonpost.com/nation/2020/05/07/meatpacking-workers-wisconsin-coronavirus/>.

⁸⁰ See, e.g., Matt Perez, *87% Of Meatpacking Workers Infected With Coronavirus Have Been Racial And Ethnic Minorities, CDC Says*, FORBES (July 7, 2020), <https://www.forbes.com/sites/mattperez/2020/07/07/87-of-meatpacking-workers-infected-with-coronavirus-have-been-racial-and-ethnic-minorities-cdc-says/?sh=46a03213634f>; Laura Reiley, *As coronavirus ravaged meatpackers, minorities bore the brunt. Now worker groups say Tyson and JBS violated the Civil Rights Act.*, THE WASHINGTON POST (July 13, 2020), <https://www.washingtonpost.com/business/2020/07/13/coronavirus-meat-tyson-jbs-racial-discrimination/>; Beth Waldon, *Lawsuit: Meat plants failed to protect workers’ health, safety during pandemic*, KTVO (July 8, 2020), <https://ktvo.com/news/local/lawsuit-meat-plants-failed-to-protect-workers-health-safety-during-pandemic>. See also Herstein et al., *supra* note 59, at 1035 (noting that outcomes in Nebraska meat processing workers supports “the increasing body of evidence that the COVID-19 pandemic has disproportionately affected racial and ethnic minority groups”).

⁸¹ See, e.g., David Pitt, *Worker advocates file meat plants discrimination complaint*, AP NEWS (July 9, 2020), <https://apnews.com/article/41f90b02d3>

racism in the government's pandemic response"⁸² and exacerbated structural vulnerabilities, which place racial and ethnic minority workers at disproportionately high risk.⁸³ This Article points out further that this disparity reflects a troubling moral calculus: some lives are treated as expendable and undeserving of protection. Meat-processing workers labored in the shadows of public concern under conditions that paralleled the industry's treatment of animals—both denied meaningful protection, both ultimately treated as disposable. In either case, the underlying assumption seems clear: some lives matter less than money.⁸⁴ Moreover, workers in meat-processing facilities are particularly vulnerable to COVID-19 due to the nature of the work and the reportedly limited attention that management often gives to health and safety concerns.⁸⁵ Meat-processing employees frequently work in close proximity to maintain high line speeds,⁸⁶ are denied bathroom breaks,⁸⁷ and at times receive inadequate protective equipment.

During the early stages of the pandemic, for example, reports emerged from a Pennsylvania plant and another in Wisconsin indicating that workers were instructed not to wear protective equipment.⁸⁸ One such case involved Rafael Benjamin, who was

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⁸² Ruqaiyah Yearby & Seema Mohapatra, *Systemic Racism, the Government's Pandemic Response, and Racial Inequities in Covid-19*, 70 EMORY L.J. 1419, 1429 (2021).

⁸³ Michele Goodwin & Erwin Chemerinsky, *The Trump Administration: Immigration, Racism, and Covid-19*, 169 U. PA. L. REV. 313, 336–40 (2021).

⁸⁴ See Yearby & Mohapatra, *supra* note 74, at 1444–45 (discussing how one industry leader ramped up pork exports during the height of the pandemic, nearly doubled its fourth-quarter 2020 earnings compared to the prior year, and challenged worker and family requests for compensation and safety protections—all while workers became sick and died from COVID-19). See also Stuart Strother, *When Making Money Is More Important than Saving Lives: Revisiting the Ford Pinto Case*, 5 J. INT'L & INTERDISC. BUS. RES. 166 (2018) (conducting a study and finding that over half of business students would choose monetary profit even if it means other people will necessarily perish).

⁸⁵ See, e.g., San Twin, *COVID-19 ravaged meat plants: My refugee mother's life is worth more than the bottom line*, USA TODAY (Oct. 1, 2020), <https://www.usatoday.com/story/opinion/voices/2020/10/01/meat-packing-plants-coronavirus-covid-19-death-column/3586030001/>. Cf. Upton Sinclair, *THE JUNGLE* (1906) (detailing the horrific working conditions in early 20th-century Chicago meatpacking plants).

⁸⁶ See, e.g., Gosia Wozniacka, *Poor Conditions at Meatpacking Plants Have Long Put Workers at Risk. The Pandemic Makes it Much Worse.*, CIVIL EATS (Apr. 17, 2020), <https://civileats.com/2020/04/17/poor-conditions-at-meatpacking-plants-have-long-put-workers-at-risk-the-pandemic-makes-it-much-worse/>.

⁸⁷ See *supra* note 37.

⁸⁸ See Peter Waldman, Lydia Mulvany & Polly Mosendz, *Cold, Crowded, Deadly: How U.S. Meat Plants Became a Virus Breeding Ground*, BLOOMBERG BUSINESSWEEK (May 7, 2020), <https://www.bloomberg.com/news/features/2020-05-07/coronavirus-closes-meat-plants-threatens-food-supply?sref=JTUIXQSO>; *supra* note 30.

allegedly told not to wear the mask his daughter had given him, as it might alarm other employees. He later contracted COVID-19, spent his work anniversary on a ventilator, and tragically passed away.⁸⁹ In a Waterloo, Iowa plant, working conditions purportedly “shook” a local sheriff “to the core”—with workers “crowded elbow to elbow; most without face coverings.”⁹⁰ In one particularly troubling incident, a plant manager was reported to have organized a cash buy-in, winner-take-all betting pool for supervisors and managers to wager how many employees would test positive for COVID-19. At least 1,000 workers at that plant tested positive and five were reported to have passed away.⁹¹

Beyond concerns associated with the pandemic, working conditions in U.S. meat-processing facilities are widely considered to be among the most hazardous and physically demanding in the nation.⁹² Wages in these plants remain low relative to the physically demanding and high-risk nature of the work.⁹³ These challenges reflect Marx’s paradox that “in the same measure in which labour becomes more unsatisfactory, more repulsive, do competition increase and wages decrease.”⁹⁴ Such conditions provide one example of many that fundamentally contradict the assumptions of neoclassical economic theory, which posits that compensation efficiently aligns with occupational risk.⁹⁵ Empirical evidence shows that hazardous and demanding jobs frequently fail to yield adequate compensating wage differentials, demonstrating structural market failures that underscore the empirical validity of Keynesian economic theory—namely, that governmental intervention and regulatory oversight are necessary to correct labor-market imbalances and protect vulnerable workers.⁹⁶

⁸⁹ *See id.*

⁹⁰ First Amended Complaint & Demand for Jury Trial at 9, *Fernandez v. Tyson Foods, Inc.*, No. 6:20-cv-02079-LRR-KEM (N.D. Iowa Nov. 11, 2020).

⁹¹ *Id.*

⁹² *See, e.g., supra* note 86; *Study of severe injury data finds poultry and meat workers at high risk*, SAFETY+HEALTH (May 7, 2017), <https://www.safetyandhealthmagazine.com/articles/15617-study-of-severe-injury-data-finds-poultry-and-meat-workers-at-high-risk>. *See also* Steph Tai, *Legalizing the Meaning of Meat*, 51 LOY. U. CHI. L.J. 743, 761 (2020) (American consumers historically distanced themselves from the meat production process while keeping the product itself close to the dinner table).

⁹³ *See, e.g.,* Livia Gershon, *Why Does Meatpacking Have Such Bad Working Conditions?* JSTOR DAILY (May 8, 2020), <https://daily.jstor.org/why-does-meatpacking-have-such-bad-working-conditions/>.

⁹⁴ KARL MARX, WAGE-LABOUR AND CAPITAL 45 (1933).

⁹⁵ *See* Julie Graham & Don M. Shakow, *Labor Market Segmentation and Job-Related Risk: Differences in Risk and Compensation Between Primary and Secondary Labor Markets*, 49 AM. J. ECON. & SOCIOL. 307 (1990).

⁹⁶ *See* Peter Dorman & Les Boden, *Risk Without Reward: The Myth of Wage Compensation for Hazardous Work*, ECON. POL’Y INST. (Apr. 19, 2021),

What's more, prior to the COVID-19 pandemic, leaders in the meat-packing industry reportedly received repeated warnings about the industry's potential vulnerability to a pandemic and were advised by experts and government agencies to take appropriate precautions (precautions that, in some cases, may have required significant financial investment).⁹⁷ Notwithstanding such warning, the industry proved unprepared for COVID-19. As the first wave of the pandemic swept through the United States in March and April of 2020, infections in meat-packing plants surged—potentially due to factors such as limited personal protective equipment, rapid line speeds, and long hours in confined working conditions.⁹⁸ By April 27, 2020, some 3,963 workers in American meat-packing plants were reported to have contracted COVID-19, and 27 were reported to have died.⁹⁹ While some plants continued operating in ways that reportedly failed to adequately protect workers, many others, facing potential financial losses tied to legal liability, began shutting down operations—an expensive decision that resulted in steep financial losses.¹⁰⁰ One might surmise that the plants that chose to shut down did so only when the projected costs of liability from continued

<https://www.epi.org/unequalpower/publications/risk-without-reward-the-myth-of-wage-compensation-for-hazardous-work/>.

⁹⁷ See, e.g., *Report: The Meatpacking Industry Ignored Years Of Warnings About What A Pandemic Would Mean*, HPPR (Aug. 20, 2020), <https://www.hppr.org/post/report-meatpacking-industry-ignored-years-warnings-about-what-pandemic-would-mean>.

⁹⁸ See, e.g., Ryan J. Foley, *Tyson Foods idles largest pork plant as virus slams industry*, AP NEWS (Apr. 22, 2020), <https://apnews.com/article/d21fe9a4864971427d40fd2caa61ad34>; Justine Coleman, *Meatpacking worker told not to wear face mask on job died of coronavirus: report*, THE HILL (May 7, 2020), <https://thehill.com/policy/finance/496595-meatpacking-worker-told-not-to-wear-face-mask-on-job-died-of-coronavirus>; Claire Kelloway, *USDA Continues to Lift Meat Processing Line Speed Limits During Pandemic, Threatening Frontline Workers and Consumers*, FOOD & POWER (Apr. 9, 2020), <https://www.foodandpower.net/latest/2020/04/09/usda-continues-to-lift-meat-processing-line-speed-limits-during-pandemic-threatening-frontline-workers-and-consumers>; Jim Spencer, *Meatpacking plant workers need greater protection from COVID-19, union says*, STAR TRIBUNE (Apr. 24, 2020), <https://www.startribune.com/meat-packing-plant-workers-need-greater-protection-from-covid-19-union-says/569906762/>. See also *Complaint for Declaratory and Injunctive Relief and Designation of Place of Trial, Alma v. Noah's Ark Processors, LLC*, No. 4:20-cv-03141 (D. Neb. Nov. 23, 2020).

⁹⁹ Leah Douglas, *Mapping Covid-19 outbreaks in the food system*, FOOD & ENV'T REPORTING NETWORK (Apr. 22, 2020), <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/>.

¹⁰⁰ See, e.g., Diane Gallagher & Pamela Kirkland, *Meat processing plants across the US are closing due to the pandemic. Will consumers feel the impact?* CNN BUSINESS (Apr. 27, 2020), <https://www.cnn.com/2020/04/26/business/meat-processing-plants-coronavirus/index.html>; *supra* note 24.

operations outweighed the financial losses associated with closing.¹⁰¹

B. The Origins of the Order

Facing financial strife from shutting down the meat-packing plants, industry leaders sought President Donald Trump's assistance pursuant to Title I—Priorities and Allocations (Subchapter I) authority under the Defense Production Act.¹⁰² President Trump's authority under 50 U.S.C. § 4511(b) (2018),¹⁰³ combined with the Defense Production Act's liability shield¹⁰⁴ and purported compliance with CDC and OSHA guidelines,¹⁰⁵ could help keep plants open and profitable by mitigating the industry's legal exposure, despite risks to workers' health.¹⁰⁶ Industry leaders thus sought an executive order that would shield them from liability¹⁰⁷

¹⁰¹ See, e.g., ERIK OLIN WRIGHT, ENVISIONING REAL UTOPIAS 74 (2010). Cf. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 813, 174 Cal. Rptr. 348 (Ct. App. 1981) (concluding that evidence existed that Ford "engag[ed] in a cost-benefit analysis balancing human lives and limbs against corporate profits").

¹⁰² See, e.g., Sky Chadde, Kyle Bagenstose, & Rachel Axton, *A week before Trump's order protecting meat plants, industry sent draft language to feds*, USA TODAY (Sept. 14, 2020), <https://www.usatoday.com/story/news/2020/09/14/covid-19-meat-plants-sought-feds-protection-local-health-depts/5797051002/>.

¹⁰³ "The powers granted in this section shall not be used to control the general distribution of any material in the civilian market unless the President finds (1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship." See also *supra* Part I.

¹⁰⁴ See 50 U.S.C. § 4557 (2018) ("No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this chapter, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid. No person shall discriminate against orders or contracts to which priority is assigned or for which materials or facilities are allocated under subchapter I of this chapter or under any rule, regulation, or order issued thereunder, by charging higher prices or by imposing different terms and conditions for such orders or contracts than for other generally comparable orders or contracts, or in any other manner.").

¹⁰⁵ News Release, U.S. Dep't of Labor, Statement of Enforcement Policy by Solicitor of Labor Kate O'Scannlain and Principal Deputy Assistant Secretary for OSHA Loren Sweatt regarding Meat and Poultry Processing Facilities (Apr. 28, 2020), <https://www.dol.gov/newsroom/releases/osh/osh20200428-1>.

¹⁰⁶ See McCauliff, *infra* note 169, at 227 (noting that "John Tyson and his supporting owners wanted to re-open the slaughterhouse plants immediately while many workers were sick, *if and only if* the President precluded the sick workers from suing the slaughterhouses over working conditions that promote the spread of infectious disease such as COVID-19") (emphasis in original).

¹⁰⁷ See *supra* note 24. See also McCauliff, *infra* note 169, at 220 ("Tyson 'shout[ed] out[] for help from the President' and '[t]he President answered Tyson (and oversaw careful negotiations with the four largest meat processing plants, the

and launched a public communications effort. On April 26, 2020, for example—just two days before Trump’s issuance of Executive Order 13,917—John H. Tyson, the grandson of Tyson Food’s founder and Chairman of the Board, stated that “our plants must remain operational” in a blog post and in full-page advertisements published in *The Washington Post* and *The New York Times*, warning that Tyson’s meat-packing plants were “being forced to close.”¹⁰⁸ These ads characterized the situation as a threat to the nation’s food supply and tacitly conceded that meat-processing facilities had become epicenters of a catastrophic and disproportionately deadly public health crisis.¹⁰⁹

Two days later, on April 28, 2020, President Trump issued Executive Order 13,917, effectively ordering the Secretary of Agriculture, Sonny Perdue, to ensure that meat-packing plants stay open during the COVID-19 pandemic.¹¹⁰ Executive Order 13,917 closely aligned with the proposed order provided by industry leaders to Trump, with only minor modifications.¹¹¹ Executive Order 13,917 invoked the allocations authority of the DPA—which, prior to the COVID-19 pandemic, had not been used since the Cold War¹¹²—in an attempt to ensure that profitable meat-packing plants stayed open.¹¹³ The act was additionally intended to limit meat-packing plants’ potential exposure to liability for worker illnesses and deaths.¹¹⁴ Before issuing Executive Order 13,917, Trump had used allocations authority under Title I of the DPA only once—merely finding that “health and medical resources needed to respond to the

descendants of the slaughterhouses) to ask what they wanted done to avert the meat ‘supply crisis’”); First Amended Complaint & Demand for Jury Trial at 11, *Fernandez v. Tyson Foods, Inc.*, No. 6: 20-cv-02079-LRR-KEM (N.D. Iowa Nov. 11, 2020) (“High-level Tyson executives began lobbying the White House for COVID-19 related liability protections as early as March and continued their lobbying efforts throughout April. Tyson officials dined at the White House and participated in several calls with President Trump and Vice President Pence during March and April.”).

¹⁰⁸ See Tyson Foods, Inc., *A Delicate Balance: Feeding the Nation and Keeping Our Employees Healthy*, THE WASHINGTON POST (Apr. 26, 2020), at A13, <https://context-cdn.washingtonpost.com/notes/prod/default/documents/85d81e35-f0f2-48bb-bd58-c0a133b0d8c0/note/d104a57a-0aac-4420-aa28-8bb41c99593a.#page=1>; John Tyson, *Feeding the Nation and Keeping Our Team Members Healthy*, TYSON FOODS: THE FEED BLOG (Apr. 26, 2020), <https://thefeed.blog/2020/04/26/feeding-the-nation-and-keeping-our-employees-healthy/> [https://perma.cc/VM6E-TF53]; Schlosser, *infra* note 109.

¹⁰⁹ See, e.g., Eric Schlosser, *The Essentials: How We’re Killing the People Who Feed Us*, THE ATLANTIC (May 12, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpacking-coronavirus/611437/>; *supra* note 24.

¹¹⁰ See Exec. Order No. 13,917, 85 Fed. Reg. 26,313 (Apr. 28, 2020).

¹¹¹ See *supra* note 24.

¹¹² CECIRE ET AL., *supra* note 41, at 9.

¹¹³ See *supra* note 109.

¹¹⁴ See, e.g., *supra* notes 21, 104.

spread of COVID-19, including personal protective equipment and ventilators, meet the criteria specified in section 101(b) of the Act (50 U.S.C. 4511(b)).”¹¹⁵ However, this initial finding had little practical effect, as it did not immediately trigger significant domestic production of PPE and ventilators. Indeed, approximately one month earlier, on February 7, 2020, the U.S. government facilitated the shipment of approximately 17.8 tons of donated medical supplies—including masks, gowns, and respirators—to China.¹¹⁶ When asked by reporters about the proposed order during an Oval Office meeting with Florida’s Governor, Ron DeSantis, Trump stated: “We’re working with Tyson . . . We’re going to sign an executive order today I believe, and that will solve any liability problems, and they had certain liability problems. . . .”¹¹⁷ Executive Order 13,917 was issued with the stated goal of ensuring “a continued supply of protein for Americans.”¹¹⁸ The order follows, in pertinent part:

It is important that processors of beef, pork, and poultry (“meat and poultry”) in the food supply chain continue operating and fulfilling orders *to ensure a continued supply of protein for Americans*. However, outbreaks of COVID–19 among workers at some processing facilities have led to the reduction in some of those facilities’ production capacity. In addition, recent actions in some States have led to the complete closure of some large processing facilities. Such actions may differ from or be inconsistent with interim guidance recently issued by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services and the Occupational Safety and Health Administration (OSHA) of the Department of Labor entitled “Meat and Poultry Processing Workers and Employers” providing for the safe operation of such facilities. . . . Such closures threaten the continued functioning of the national meat and poultry supply chain, undermining critical infrastructure during the

¹¹⁵ See Exec. Order No. 13,909, 85 Fed. Reg. 16,227 (Mar. 18, 2020).

¹¹⁶ See Parker, *supra* note 17, at 87. See also Bill McCarthy, *Yes, US shipped donated personal protective equipment to China in February*, POLITIFACT (Apr. 2, 2020), <https://www.politifact.com/factchecks/2020/apr/02/facebook-posts/yes-us-shipped-donated-personal-protective-equipme/>.

¹¹⁷ See, e.g., Morgan Chalfant, *Trump to sign order compelling meat plants to stay open during pandemic*, THE HILL (Apr. 28, 2020), <https://thehill.com/homenews/administration/495055-trump-order-compelling-meat-plants-stay-open-coronavirus-outbreak>.

¹¹⁸ See Exec. Order No. 13,917, 85 Fed. Reg. 26,313 (Apr. 28, 2020).

national emergency. . . Accordingly, I find that meat and poultry in the food supply chain meet the criteria specified in section 101(b) of the Act (50 U.S.C. 4511(b)). Under the delegation of authority provided in this order, the Secretary of Agriculture shall take all appropriate action under that section to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA. . . .¹¹⁹

C. The Impact of Invocation

President Donald Trump's Executive Order 13,917 had a direct, tangible impact on American meat-packing plant re-openings, which coincided with a significant increase in worker illnesses and deaths from COVID-19.¹²⁰ On May 5, 2020, a week after Trump issued Executive Order 13,917, the Secretary of Agriculture, Sonny Perdue, issued letters to State Governors and executives of American meat companies directing them, pursuant to the order, to re-open meat-packing plants under guidelines issued by the CDC and OSHA¹²¹—which, according to various reports, were inconsistently enforced.¹²² Perdue also directed that documentation be submitted to the USDA only for meat-packing plants *not* in current operation, and threatened further executive action under the DPA if necessary.¹²³ Pertinent sections of Sonny Perdue's letter to State Governors follow:

Effective immediately, I have directed meat and poultry processors to utilize the guidance issued on Sunday, April 26, 2020, by CDC and OSHA specific to the meat and poultry processing industry to implement practices and protocols for staying operational or resuming operations while safeguarding the health of the workers and the community. The U.S. Department of Agriculture (USDA) has also directed meat and poultry

¹¹⁹ *Id.* (emphasis added).

¹²⁰ See *supra* note 99.

¹²¹ See News Release, U.S. Dep't of Labor, *U.S. Department of Labor's OSHA and CDC Issue Interim Guidance to Protect Workers in Meatpacking and Processing Industries* (Apr. 26, 2020).

¹²² See *infra* Part III.

¹²³ Letter from Secretary Perdue to Governors (May 5, 2020), <https://www.usda.gov/sites/default/files/documents/governor-letters-covid.pdf>. See also 50 U.S.C. § 4513 (2018) (violations of the Defense Production Act (DPA), including failure to comply with its orders, may result in criminal penalties of up to a \$10,000 fine or one year of imprisonment, or both).

processing plants currently closed and without a clear timetable for near-term reopening to submit to USDA written documentation of their protocol, developed based on the CDC/OSHA guidance, and resume operations as soon as they are able after implementing the CDC/OSHA guidance for the protection of workers. . . *Further action under the Executive Order and the Defense Production Act is under consideration and will be taken if necessary.*¹²⁴

In his letter to the executives of American meat companies, Sonny Perdue's message was substantially the same as his letter to Governors—but issued a sterner warning about potential future Executive action that might be taken under the DPA: “*Again, I exhort you to do this*; further action under the Executive Order and the Defense Production Act is under consideration and will be taken if necessary.”¹²⁵

Sonny Perdue's letters worked as intended. On May 8, 2020, three days after sending them out, he announced that fourteen major meat-packing plants across the United States would be reopening—seven of which were owned by Tyson Foods.¹²⁶ And on June 9, 2020, he announced, in effect, mission accomplished: American meat-packing plants were operating at levels exceeding 95% of their capacity from the prior year. In this June 9, 2020 announcement, Sonny Perdue “applauded the safe reopening of critical infrastructure meatpacking facilities across the United States,” “thank[ed] the patriotic and heroic meatpacking facility workers, the companies, and the local authorities for quickly getting their operations back up and running,” and credited President Trump for “[taking] decisive action to ensure America's producers and ranchers will be able to bring their product to market.”¹²⁷ There was

¹²⁴ See Letter from Secretary Perdue to Governors, *supra* note 123 (emphasis added).

¹²⁵ Letter from Secretary Perdue to Stakeholders (May 5, 2020), <https://www.usda.gov/sites/default/files/documents/stakeholder-letterscovid.pdf> (emphasis added). Perdue's exhortation and threat of further legal action appears to be a veiled threat of invocation of Section 4513 as a means to ensure that meat-processing facilities were re-opened and stayed open. See 50 U.S.C. § 4513 (2018) (failing to comply with orders made pursuant to the Defense Production Act may result in criminal penalties of up to a \$10,000 fine or one year of imprisonment, or both).

¹²⁶ Press Release, U.S. Dep't of Agric., *America's Meatpacking Facilities Practicing Safe Reopening to Ensure a Stable Food Supply* (May 8, 2020), <https://www.usda.gov/media/press-releases/2020/05/08/americas-meatpacking-facilities-practicing-safe-reopening-ensure>.

¹²⁷ Press Release, U.S. Dep't of Agric., *America's Meatpacking Facilities Operating More Than 95% of Capacity Compared to 2019* (June 9, 2020),

no mention in his June 9, 2020 announcement that reported cases of COVID-19 among workers in American meat-packing plants had by then sky-rocketed to 26,151, with 90 workers reported dead.¹²⁸

III. THE USDA, OSHA, AND COVID-19 IN MEAT-PROCESSING FACILITIES

As of December 11, 2020, there were 50,123 reported COVID-19 cases among workers in American meat-packing plants, and 255 deaths.¹²⁹ Thus, it should come as no surprise that neither the Secretary of Agriculture, Sonny Perdue, nor the Secretary of Labor, Eugene Scalia, took all appropriate action “to ensure that meat and poultry processors continue[d] operations consistent with the guidance for their operations jointly issued by the CDC and OSHA.”¹³⁰ To be clear, both Secretaries took affirmative steps to ensure the continuance of the operation of meat and poultry processors—but any “guidance” was, in large part, just that: guidance.¹³¹ In operation, President Donald Trump’s Executive Order 13,917 worked to re-open and keep open American meat-packing plants—despite inconsistent adherence to safety protocols—with the involvement of both Perdue and Scalia. Particularly concerning, as will be shown, both department heads took actions following the issuance of Executive Order 13,917 that effectively weakened existing safety measures, including allowing increased production line speeds and substantially limiting OSHA inspections. Thus, both federal agencies played a role in enabling the Trump administration’s use of the DPA in a manner that emphasized keeping meat-packing plants profitable during the worst public health crisis in over 100 years, rather than prioritizing worker safety. The human cost of these decisions was severe.

A. The USDA’s Implementation of Executive Order 13,917

The USDA failed to implement its purported charge under Executive Order 13,917—specifically, the requirement to *ensure*

<https://www.usda.gov/media/press-releases/2020/06/09/americas-meatpacking-facilities-operating-more-95-capacity-compared>.

¹²⁸ Leah Douglas, *Mapping Covid-19 outbreaks in the food system*, FOOD & ENV’T REPORTING NETWORK (Apr. 22, 2020), <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/>.

¹²⁹ *See id.*

¹³⁰ Exec. Order No. 13,917, 85 Fed. Reg. 26,313 (Apr. 28, 2020). *See generally* Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL’Y 203 (2006).

¹³¹ *Meat and Poultry Processing Workers and Employers: Interim Guidance from CDC and the Occupational Safety and Health Administration (OSHA)*, CDC (Nov. 12, 2020).

that meat and poultry processors operate under the jointly issued CDC and OSHA guidance—and affirmatively took steps to contradict it.¹³² On May 15, 2020, for example—approximately a week after Secretary of Agriculture Sonny Perdue announced that fourteen meat-packing plants would be re-opening—Democratic Senators sent Perdue a letter with questions and concerns regarding meat-packing plants re-opening apart from the joint guidance issued by OSHA and the CDC.¹³³ Their letter noted that, in a briefing with the Senate Agriculture, Nutrition, and Forestry Committee, USDA officials were unable to confirm whether the meat-packing plants that had reopened were complying with the joint guidance issued by OSHA and the CDC, but that they had said “they expected the plants to follow the CDC/OSHA guidance *to the extent they can*.”¹³⁴ In other words, it appears that USDA officials had all but given the industry a free pass on safety guidance.

Moreover, throughout the COVID-19 pandemic, the USDA’s Food Safety and Inspection Service (FSIS) pressed for *increases* in line speeds in poultry plants—profitable alterations that serve to decrease worker protections and increase the likelihood of COVID-19 infections.¹³⁵ In April, 2020, for example, during the first wave of the COVID-19 pandemic, the FSIS granted requests from 15 large poultry plants to increase the maximum line speeds on poultry production lines—some of whom are owned by Tyson Foods—from 140 to 175 birds per minute via a new waiver program.¹³⁶ FSIS privately promulgated fifteen new waivers “under the cover of darkness, with no notice to the public and no request for public comment.”¹³⁷ In approximately half of these plants, ongoing COVID-19 outbreaks were reported—with several of the plants reporting COVID-19 outbreaks when the requests were first granted.¹³⁸ Additionally, while the waiver program itself was subject to ongoing litigation for violations of the Administrative Procedure Act,¹³⁹ the USDA submitted a proposal to the White House Office

¹³² See *infra* note 141.

¹³³ Letters from Members of Congress to Secretary Perdue (May 15, 2020), <https://www.agriculture.senate.gov/imo/media/doc/20.05.15%20Meat%20Processing%20Oversight%20Letter%20w%2029%20signatures.pdf>.

¹³⁴ *Id.* (emphasis added).

¹³⁵ Shayla Thompson & Deborah Berkowitz, *USDA Allows Poultry Plants to Raise Line Speeds, Exacerbating Risk of Covid-19 Outbreaks and Injury*, NAT’L EMP’T LAW PROJECT (June 17, 2020), <https://www.nelp.org/publication/usda-allows-poultry-plants-raise-line-speeds-exacerbating-risk-covid-19-outbreaks-injury/>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Complaint for Declaratory and Injunctive Relief at 2, *United Food & Com. Workers Union, Loc. No. 227 v. United States Dep’t of Agric.*, No. 1:20-cv-2045 (D.D.C. July 28, 2020).

of Management and Budget to *permanently* increase maximum line speeds to 175 birds per minute.¹⁴⁰

The USDA's granting of line speed waivers and its advocacy for permanent increases in line speeds at poultry plants fundamentally upended Executive Order's 13,917 purported requirement that the USDA "ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA."¹⁴¹ Namely, by serving to decrease social distancing among employees at these plants, it *directly contradicted* the CDC and OSHA's joint guidance that "workers should maintain at least six feet of distance from others at all times, including on breaks" and that "changes in production practices may be necessary in order to maintain appropriate distances among workers."¹⁴² Additionally, while the direct correlation between line speed increases and COVID-19 infection rates is facially obvious, both the CDC and OSHA have made explicit statements to this effect.¹⁴³ And indeed, as a sheer matter of numbers, there have been more COVID-19 infection outbreaks among the plants that have received the line-speed waivers, than those that have not.¹⁴⁴

B. OSHA's Negligible Response

OSHA took a "hands-off" approach to regulating meat-packing plants during the COVID-19 pandemic,¹⁴⁵ notwithstanding its broad jurisdiction¹⁴⁶ and purported mission "to ensure safe and healthful working conditions for working men and women by setting and enforcing standards."¹⁴⁷ On April 13, 2020, OSHA announced that

¹⁴⁰ Mike Dorning & Michael Hirtzer, *Trump Makes Last Push to Speed Up Chicken Lines Despite Pandemic*, BLOOMBERG POLITICS (Nov. 11, 2020), <https://www.bloomberg.com/news/articles/2020-11-11/trump-makes-last-push-to-speed-up-chicken-lines-despite-pandemic>.

¹⁴¹ See Exec. Order No. 13,917, 85 Fed. Reg. 26,313 (Apr. 28, 2020).

¹⁴² See Letters from Members of Congress to Secretary Perdue (May 15, 2020), <https://www.agriculture.senate.gov/imo/media/doc/20.05.15%20Meat%20Processing%20Oversight%20Letter%20w%2029%20signatures.pdf>.

¹⁴³ It should be readily apparent that increasing line speeds forces workers closer together, increasing infection risk; the CDC and OSHA recognized this connection. See, e.g., Leah Douglas, *At poultry plants allowed to run faster processing lines, a greater risk of Covid-19*, FOOD & ENV'T REPORTING NETWORK (Sept. 10, 2020), https://thefern.org/ag_insider/at-poultry-plants-allowed-to-run-faster-processing-lines-a-greater-risk-of-covid-19/.

¹⁴⁴ *Id.*

¹⁴⁵ *Why is OSHA AWOL?* N.Y. TIMES (June 21, 2020), <https://www.nytimes.com/2020/06/21/opinion/coronavirus-osha-work-safety.html>.

¹⁴⁶ See, e.g., 29 U.S.C. § 653(a) (2018).

¹⁴⁷ Luis Corchado, Tom Devine, Thad Guyer, & Jason Zuckerman, *Whistleblower Law 101: Facing Food Industry Retaliation*, 2 AM. U. LABOR & EMP. L.F. 98, 102 n.10 (2011).

it would largely be limiting inspections for COVID-19-related complaints and employer-reported illnesses to facilities “having high and very high exposure risk jobs, such as hospitals, emergency medical centers, and emergency response facilities.”¹⁴⁸ OSHA provided no reasoned explanation for excluding meat-packing plants—facilities with some of the highest COVID-19 infection rates in the country—from its inspection prioritization. This arbitrary-as-applied policy,¹⁴⁹ combined with OSHA’s joint-CDC “guidance-only” approach to interim regulation of meat-packing plants,¹⁵⁰ largely proved dispositive with respect to the negligible extent of its regulation of meat-packing plants for COVID-19-related safety breaches.¹⁵¹ For example, OSHA almost entirely failed to investigate complaints filed by workers for workplace safety violations¹⁵² and whistleblower retaliation complaints related to COVID-19.¹⁵³ Moreover, fines that were issued for safety infractions were so miniscule as to completely remove their disincentivizing tendency toward wrongful conduct, and—to the extent that they signal precedent—actually incentivized wrongful conduct.¹⁵⁴ OSHA’s obvious inaction with respect to regulation of

¹⁴⁸ Occupational Safety and Health Admin., *Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)* (Apr. 13, 2020), <https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>.

¹⁴⁹ Referring to the policy as arbitrary is arguably generous, especially given that the workforce in meat-packing plants primarily consisted of workers from marginalized communities. Viewed in this context, OSHA’s exclusion of these plants raises legitimate questions as to whether its approach deliberately benefited industry profitability amidst escalating worker illness and death. See First Amended Complaint & Demand for Jury Trial at 13, *Fernandez v. Tyson Foods, Inc.*, No. 6:20-cv-02079-LRR-KEM (N.D. Iowa Nov. 11, 2020) (alleging a 600% increase in Tyson’s exports in 2020’s first quarter).

¹⁵⁰ See *supra* note 131.

¹⁵¹ See, e.g., Noam Scheiber, *OSHA Criticized for Lax Regulation of Meatpacking in Pandemic*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/10/22/business/economy/osha-coronavirus-meat.html>.

¹⁵² See, e.g., Bernice Yeung & Michael Grabell, *They Warned OSHA They Were in “Imminent Danger” at the Meat Plant. Now They’re Suing the Agency.*, PROPUBLICA (July 23, 2020), <https://www.propublica.org/article/they-warned-osha-they-were-in-imminent-danger-at-the-meat-plant-now-theyre-suing-the-agency>.

¹⁵³ See, e.g., Deborah Berkowitz & Shayla Thompson, *OSHA Must Protect COVID Whistleblowers who file Retaliation Complaints*, NAT’L EMP’T LAW PROJECT (Oct. 8, 2020), <https://www.nelp.org/publication/osha-failed-protect-whistleblowers-filed-covid-retaliation-complaints/>.

¹⁵⁴ See, e.g., Tom Philpott, *Trump’s Paltry Meatpacking Fine Signals That “Workers’ Lives Are Worth Less Than Pork Shoulders”*, MOTHER JONES (Sept. 11, 2020), <https://www.motherjones.com/food/2020/09/trumps-paltry-meatpacking-fine-signals-that-workers-lives-are-worth-less-than-pork-shoulders/>; Patty Nieberg, *Workers protest \$15,000 COVID-19 fine issued to JBS meat plant in Greeley*, THE DENVER POST (Sept. 16, 2020),

the meat-packing plants (and other employers) during the COVID-19 pandemic increasingly drew scrutiny from media,¹⁵⁵ Democrats in Congress,¹⁵⁶ labor unions, and worker advocacy organizations.¹⁵⁷ These parties continuously urged the Federal Agency to enforce its General Duty Clause, which requires that employers provide a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm,”¹⁵⁸ as well as to issue an emergency temporary standard for infectious diseases, which would give mandatory rules for employers to follow rather than mere guidance.¹⁵⁹ Notwithstanding these pleas for help, OSHA obstinately refused to perform even the most basic functions of its duty—which increasingly resulted in litigation in federal courts.¹⁶⁰ Indeed, in the absence of meaningful federal enforcement, the plaintiffs’ bar stepped up and into the regulatory void by filing lawsuits on behalf of affected workers and their families, thereby playing a vital role in promoting accountability, worker safety, and public health.¹⁶¹

Federal courts, however, were not receptive to litigation on behalf of employees endangered by the SARS-CoV-2 virus at their places of employment. The AFL-CIO, for example, filed an

<https://www.denverpost.com/2020/09/16/workers-protest-covid-fine-jbs-greeley/>; Kimberly Kindy, *More than 200 meat plant workers in the U.S. have died of covid-19. Federal regulators just issued two modest fines.*, THE WASHINGTON POST (Sept. 13, 2020), https://www.washingtonpost.com/national/osha-covid-meat-plant-fines/2020/09/13/1dca3e14-f395-11ea-bc45-e5d48ab44b9f_story.html.

¹⁵⁵ See, e.g., Noam Scheiber, *OSHA is under fire over its regulation of meatpacking plants.*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/10/22/world/osha-is-under-fire-over-its-regulation-of-meatpacking-plants.html>.

¹⁵⁶ See Letter from Senators Elizabeth Warren and Cory A. Booker to Assistant Secretary of Labor, Loren Sweatt (Sept. 22, 2020), <https://www.warren.senate.gov/imo/media/doc/Letter%20from%20Senators%20Warren,%20Booker%20to%20OSHA%209-22-20.pdf>.

¹⁵⁷ See, e.g., *An Open Letter Calling for Swift Action Towards Workers’ and Communities’ Health and Safety*, HEAL FOOD ALLIANCE (May 19, 2020), <https://healfoodalliance.org/an-open-letter-calling-for-swift-action-towards-workers-and-communities-health-and-safety/>.

¹⁵⁸ 29 U.S.C. § 654 (2018).

¹⁵⁹ See, e.g., *Urge OSHA to issue an Emergency Temporary Standard for Infectious Diseases*, AFL-CIO, <https://actionnetwork.org/forms/covid-19-take-action>.

¹⁶⁰ See, e.g., Complaint and Emergency Petition for Emergency Mandamus Relief, *Jane Does I, II, III v. Scalia*, No. 3:20-cv-01260-MEM (M.D. Pa. July 22, 2020).

¹⁶¹ For scholarship exploring how the plaintiffs’ bar enforces accountability and safeguards democracy, see, e.g., Alexandra D. Lahav, IN PRAISE OF LITIGATION (2017); Sean Farhang, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); Carl T. Bogus, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW (2001); Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087 (2004).

emergency petition for a writ of mandamus in the U.S. Court of Appeals for the D.C. Circuit to compel OSHA to issue an emergency temporary standard, in part on the basis that its refusal to do so “constitutes an abuse of agency discretion so blatant and ‘of such magnitude’ as to amount to a clear ‘abdication of statutory responsibility.’”¹⁶² The petition was denied, however, on the basis of “the unprecedented nature of the COVID-19 pandemic,” “the regulatory tools that the OSHA has at its disposal to ensure that employers are maintaining hazard-free work environments,” and because “OSHA’s decision not to issue an ETS is entitled to considerable deference.”¹⁶³ In another action filed by the Rural Community Workers Alliance and three Jane Does in the U.S. District Court for the Western District of Missouri for declaratory and injunctive relief pursuant to counts arising under state law (namely, public nuisance and breach of duty to provide a safe workplace),¹⁶⁴ the Western District of Missouri elected to dismiss the complaint under the seldom-used primary-jurisdiction doctrine in order “to allow the Occupational Health and Safety Administration . . . to consider the issues raised by this case.”¹⁶⁵ The USDA “applauded” this latter decision, issuing the following statement on the USDA’s government website a day after the court handed it down:

This ruling affirms that OSHA is the primary entity that has authority over workers’ safety . . . Since President Trump issued his Executive Order last week to keep these critical facilities operating, USDA has been working hand in hand with OSHA and the CDC to ensure meat processing facilities are abiding by Federal guidelines. This ruling is directly in line with what the Federal government has been calling for companies and communities to do in light of the President’s Executive Order. If we continue to work together, we can maintain the critical supply of meat and poultry for Americans while also protecting worker health and safety.¹⁶⁶

¹⁶² Emergency Petition for a Writ of Mandamus, and Request for Expedited Briefing and Disposition, *In re AFL-CIO*, No. 20-1158 (D.C. Cir. May 18, 2020) (quoting *Pub. Citizen Health Research Grp. v. Comm’r, Food & Drug Admin.*, 740 F.2d 21, 32 (D.C. Cir. 1984)).

¹⁶³ *In re AFL-CIO*, No. 20-1158, 2020 WL 3125324.

¹⁶⁴ See Complaint, *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, No. 5:20-cv-06063-DGK (W.D. Mo. Apr. 23, 2020).

¹⁶⁵ *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, 459 F. Supp. 3d 1228, 1233 (W.D. Mo. 2020).

¹⁶⁶ Press Release, U.S. Dep’t of Agric., USDA Applauds Missouri Court Ruling on Meat Processing Plants (May 6, 2020), <https://www.usda.gov/media/press->

Thus, despite OSHA's statutory duty to protect workers, its failure to meaningfully regulate or enforce safety standards effectively rendered the agency complicit in enabling hazardous working conditions in meat-packing plants during the pandemic.¹⁶⁷

IV. POTENTIAL BASES TO CHALLENGE EXECUTIVE ORDER 13,917

Through Executive Order Number 13,917, President Donald Trump appropriated the Defense Production Act as a mechanism to mandate meat-packing plants' continued operation while simultaneously shielding them from liability for worker illnesses and deaths in order to help keep them profitable during the worst public health crisis in over 100 years.¹⁶⁸ In doing so, Trump fundamentally subverted and distorted the essence of the Defense Production Act, transforming the statute from its role in advancing the Nation's welfare into a commercial indemnity weapon of mass destruction.¹⁶⁹ Moreover, Executive Order 13,917, in addition to helping meat-packing plants deny workers' compensation claims related to COVID-19,¹⁷⁰ was appropriated by private companies as a tool to deny wrongful death claims¹⁷¹ and subvert legitimate state public health orders that required meat-packing plants to shut down

releases/2020/05/06/usda-applauds-missouri-court-ruling-meat-processing-plants.

¹⁶⁷ One might reasonably conclude, given the Secretary's record of regulatory enforcement—or lack thereof—that protecting marginalized workers was not among his chief concerns. See, e.g., Noam Scheiber, *OSHA Criticized for Lax Regulation During Pandemic*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/10/22/business/economy/osha-coronavirus-meat.html>. Perhaps the apple does not fall far from the tree. See, e.g., *Hoffmann Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002) (holding that undocumented workers are not entitled to backpay remedies under federal labor law, despite unlawful termination).

¹⁶⁸ See *supra* Part II.

¹⁶⁹ *Id.* See also Catherine M.A. McCauliff, *Where's the Meat? Lochner and the President's Executive Order*, 100 NEB. L. REV. 210, 213 (2021) (“[T]he radical elimination of the slaughterhouse's liability for unsafe conditions was unmistakably the point[.]”).

¹⁷⁰ See, e.g., Jacey Fortin, *After Meat Workers Die of Covid-19, Families Fight for Compensation*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/business/coronavirus-meatpacking-plants-compensation.html>; Tom Hals & Tom Polansek, *Majority of workers' compensation claims of meatpacking workers with COVID-19 denied, including in Minnesota*, STAR TRIBUNE (Sept. 29, 2020), <https://www.startribune.com/majority-of-workers-compensation-claims-of-meatpacking-workers-with-covid-19-denied-including-in-minnesota/572579272/>.

¹⁷¹ See, e.g., First Amended Complaint & Demand for Jury Trial at 9, *Fernandez v. Tyson Foods, Inc.*, No. 6: 20-cv-02079-LRR-KEM (N.D. Iowa Nov. 11, 2020).

due to COVID-19 outbreaks.¹⁷² As a matter of legality, morality, and public policy, Executive Order 13,917 should have been struck down. Toward this end, apart from a finding that the USDA and OSHA acted unlawfully in implementing Executive Order 13,917,¹⁷³ there appear to be at least two viable bases whereby this might have been achieved in Federal Court.¹⁷⁴

A. Fifth Amendment Due Process Clause

First, Executive Order 13,917 could have been challenged on the basis that it violates the Fifth Amendment to the U.S. Constitution.¹⁷⁵ It effectively requires workers—almost all of whom are ethnic minorities—to choose between either making a living and risking their lives, a dilemma that directly implicates the Due Process Clause. By serving to preempt workers' compensation, tort, and unemployment claims without notice and an opportunity to be heard, Executive Order 13,917 contravenes the Fifth Amendment's mandate that no person shall "be deprived of life, liberty, or property without due process of law,"¹⁷⁶ as well as the Equal Protection Clause as incorporated against the Federal Government through the Fifth Amendment.¹⁷⁷ A right to life has been recognized as fundamental by the Eighth Circuit,¹⁷⁸ and the equal protection component of the Fifth Amendment's Due Process Clause prohibits racial discrimination through official conduct.¹⁷⁹ Because

¹⁷² See Verified Complaint and Application for Declaratory Judgment and Injunctive Relief at 17–18, *Stampede Meat, Inc. v. Grisham*, No. 2:20-cv-01160-MV-CG (D.N.M. Nov. 6, 2020).

¹⁷³ See, e.g., 5 U.S.C. § 706 (2018).

¹⁷⁴ See, e.g., 28 U.S.C. § 2201(a) (2018) ("In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.").

¹⁷⁵ See, e.g., *United States v. Nixon*, 418 U.S. 683, 703 (1974) ("[I]t is emphatically the province and duty of the judicial department to say what the law is.") (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)); *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 313 (D.C. Cir. 2014) ("[T]he judiciary is the ultimate interpreter of the Constitution and, in most instances, claims alleging its violation will rightly be heard by the courts.").

¹⁷⁶ U.S. CONST. amend. V.

¹⁷⁷ See *Bolling v. Sharpe*, 347 U.S. 497, 498–500 (1954).

¹⁷⁸ *Landrum v. Moats*, 576 F.2d 1320, 1325 (8th Cir. 1978). See also Joshua Herman, *Death Denies Due Process: Evaluating Due Process Challenges to the Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777 (2004); Kevin M. Barry, *The Death Penalty and the Fundamental Right to Life*, 60 B.C. L. REV. 1545 (2019).

¹⁷⁹ *Saget v. Trump*, 375 F. Supp. 3d 280, 365 (E.D.N.Y. 2019). See also *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public

procedural due process and substantive due process represent the more viable constitutional arguments under current jurisprudence, each will be addressed in turn.

1. PROCEDURAL DUE PROCESS: DEPRIVATIONS OF LIFE, LIBERTY, AND PROPERTY WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD

A procedural due process challenge requires that the plaintiff be deprived of a protected interest in “life, liberty, or property”¹⁸⁰ without adequate notice and a meaningful opportunity to be heard.¹⁸¹ In this case, Executive Order 13,917 implicated all three guarantees protected by the Fifth Amendment’s Due Process Clause.¹⁸² Specifically, workers impacted by the Executive Order had protected interests in continuing to live,¹⁸³ liberty interests in avoiding unreasonable government-compelled exposure to deadly workplace conditions, and property interests in their workers’ compensation and tort claims.¹⁸⁴ Procedural due process protections are especially critical when deprivations involve matters of life or death, as they do here.¹⁸⁵

Recently, procedural due process protections specific to presidential actions under the Defense Production Act (DPA) were clarified by the U.S. Court of Appeals for the D.C. Circuit. In *Ralls Corporation v. Committee on Foreign Investment in the United States*, the U.S. Court of Appeals for the D.C. Circuit found that presidential action taken under the DPA requiring an energy holding company, Ralls Corporation, to divest its windfarm investments deprived it of protected property interests under the Due Process Clause of the Fifth Amendment.¹⁸⁶ Specifically, the court held that “due process requires, at the least, that an affected party be informed

authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.”).

¹⁸⁰ U.S. CONST. amend. V.

¹⁸¹ *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 565 (6th Cir. 2004) (“The fourteenth amendment’s guarantee of procedural due process assures that the deprivation of life, liberty, or property ‘be preceded by notice and opportunity for a hearing appropriate to the nature of the case.’”) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1986)).

¹⁸² See *supra* note 180.

¹⁸³ *Landrum v. Moats*, 576 F.2d 1320, 1325 (8th Cir. 1978) (“The right to life is fundamental and is protected against unreasonable or unlawful takings by the procedural due process safeguards of the fifth and fourteenth amendments.”).

¹⁸⁴ See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982).

¹⁸⁵ *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (describing due process violation where “very means by which to live” are deprived without notice and a hearing).

¹⁸⁶ See *Ralls Corp.*, 758 F.3d at 319.

of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence.”¹⁸⁷

Here, Executive Order 13,917 deprived workers of their right to life, physical health, and state-law workers’ compensation and tort claims without offering even minimal notice or opportunity to contest the evidentiary grounds upon which the deprivations were based. Thus, applying the logic of *Ralls*, it should be just as feasible for a federal court to find that the Fifth Amendment prohibits an order under the DPA threatening workers’ interests in continuing to live and serving to preempt their state law tort and wage claims, as it does an order under the DPA serving to deprive an energy company of its state law interests in private property.¹⁸⁸ That is, of course, assuming a system where the federal judiciary values the lives of workers as much as it does a private corporation’s property.¹⁸⁹

Moreover, it should be apparent that President Trump’s finding that meat and poultry are “scarce and critical material[s] essential to the national defense”¹⁹⁰ is insufficient justification for circumventing procedural due process guarantees. Presidential discretion—especially in matters implicating national security—is not unlimited and must yield to fundamental procedural protections mandated by the U.S. Constitution. The Supreme Court put it this way in *Kennedy v. Mendoza-Martinez*:

The *imperative necessity* for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental

¹⁸⁷ *Id.* at 319–20.

¹⁸⁸ *Id.*

¹⁸⁹ The author cannot confidently make such an assertion. For scholarship exploring the judiciary’s tendency to prioritize corporate property interests over those of workers and individuals, see, e.g., Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220 (2021); Joel Rogers, *Divide and Conquer: Further Reflections on the Distinctive Character of American Labor Laws*, 1990 WIS. L. REV. 1 (1990); Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 YALE L.J. 1749 (1990).

¹⁹⁰ See Exec. Order No. 13,917, 85 Fed. Reg. 26,313 (Apr. 28, 2020) (“I find that meat and poultry in the food supply chain meet the criteria specified in section 101(b) of the Act (50 U.S.C. 4511(b)).”); 50 U.S.C. 4511(b) (“The powers granted in this section shall not be used to control the general distribution of any material in the civilian market unless the President finds (1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.”).

constitutional guarantees which, it is feared, will inhibit governmental action.¹⁹¹

Or, as stated even more aptly by the Court in *United States v. Robel*, “[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.”¹⁹² Executive Order 13,917 patently disregarded these core constitutional mandates; federal courts have both the authority and the constitutional obligation to ensure that procedural protections are upheld when governmental action infringes upon fundamental human rights.¹⁹³

2. SUBSTANTIVE DUE PROCESS: THE FUNDAMENTAL RIGHT TO LIFE

The United States Constitution enshrines fundamental rights upon which the federal government must not infringe. Some are enumerated explicitly, while others are implicit and exist within “penumbras, formed by emanations from those guarantees that help give them life and substance.”¹⁹⁴ The right to life is expressly enumerated in the Due Process Clause of the Fifth Amendment: “No person shall be . . . deprived of life, liberty, or property, without due process of law.”¹⁹⁵ The Eighth Circuit has recognized this as a fundamental right, emphasizing that “[t]he right to life is fundamental and is protected against unreasonable or unlawful takings”¹⁹⁶—a position widely affirmed by legal scholars.¹⁹⁷

Furthermore, the Supreme Court has emphasized that life itself is a core constitutionally protected interest. In *Cruzan v. Director, Missouri Department of Health*, the Court noted that “it cannot be

¹⁹¹ 372 U.S. 144 at 165 (1963) (emphasis added). *See also Ex parte Milligan*, 71 U.S. 2, 120–21 (1866) (“The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”).

¹⁹² *United States v. Robel*, 389 U.S. 258, 264 (1967).

¹⁹³ Denmark’s King Christian X’s symbolic defiance of Nazi oppression during World War II offers a powerful reminder that leaders have moral and civic obligations to protect vulnerable populations during times of national crisis—no matter the cost. The author’s great-great-grandfather served as a guard for that King. *See* Bo Lidegaard, COUNTRYMEN: THE UNTOLD STORY OF HOW DENMARK’S JEWS ESCAPED THE NAZIS (2013); Carmen Agra Deedy & Henri Sørensen, THE YELLOW STAR: THE LEGEND OF KING CHRISTIAN X OF DENMARK (2000).

¹⁹⁴ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

¹⁹⁵ U.S. CONST. amend. V.

¹⁹⁶ *Landrum v. Moats*, 576 F.2d 1320, 1325 (8th Cir. 1978).

¹⁹⁷ *See, e.g.,* Joshua Herman, *Death Denies Due Process: Evaluating Due Process Challenges to the Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777 (2004); Kevin M. Barry, *The Death Penalty and the Fundamental Right to Life*, 60 B.C. L. REV. 1545 (2019).

disputed that the Due Process Clause protects an interest in life.”¹⁹⁸ The Court went further in *Tennessee v. Garner*, expressly recognizing “the suspect’s fundamental interest in his own life,” and yet deferring that the interest is so fundamental it “need not be elaborated upon.”¹⁹⁹ While establishing a high bar against governmental conduct that arbitrarily or unjustifiably infringes upon it, the High Court has nonetheless come up short of recognizing the right to life as one of those cherished rights subject to strict scrutiny.²⁰⁰

Here, Executive Order 13,917 pigeon-holed meatpacking plant workers into a life-or-death, Russian-roulette-style paradigm. Workers were compelled to choose between maintaining their livelihoods at the risk of serious illness or death, or losing their jobs entirely. Because many of these workers live paycheck-to-paycheck, the federal government effectively presented them with “an offer they couldn’t refuse.”²⁰¹ The protective provisions within the Order—requiring meat processors to operate “consistent with the guidance for their operations jointly issued by the CDC and OSHA”²⁰²—were, in practice, largely illusory.²⁰³ Personal protective equipment shortages persisted, OSHA failed to rigorously enforce the mandated joint guidelines, and the USDA actively facilitated increased line speeds, effectively reducing social distancing and exacerbating infection risks.²⁰⁴ Substantive due process forbids such coercive state action where the government forces individuals into an impossible choice between exercising a fundamental right and economic survival.²⁰⁵

Moreover, when evaluating substantive due process claims, courts inquire first into whether the governmental action infringes upon a fundamental right, and second, whether that infringement is narrowly tailored to serve a compelling governmental interest.²⁰⁶ Here, assuming *arguendo* that continued meat production during the

¹⁹⁸ 497 U.S. 261, 281 (1990).

¹⁹⁹ 471 U.S. 1, 9 (1985).

²⁰⁰ See *Griswold*, 381 U.S. at 488 (Goldberg, J., concurring) (“[T]he Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which *exist alongside those fundamental rights specifically mentioned* in the first eight constitutional amendments.”) (emphasis added).

²⁰¹ See N. Brock Enger, *supra* note 59, at 775–76.

²⁰² See *supra* note 141.

²⁰³ See *supra* Part III.

²⁰⁴ See *id.*

²⁰⁵ See *United States v. Jackson*, 390 U.S. 570, 583 (1968) (“Congress cannot impose [a] penalty in a manner that needlessly penalizes the assertion of a constitutional right.”); *Simmons v. United States*, 390 U.S. 377, 394 (1968) (“it [is] intolerable that one constitutional right should have to be surrendered in order to assert another”).

²⁰⁶ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

pandemic constituted a compelling interest, Executive Order 13,917—and particularly its implementation—was demonstrably not narrowly tailored to achieve this objective. That is, numerous alternative protein sources—including fish, dairy, legumes, and plant-based products—remained accessible throughout the pandemic. So, too, the stated governmental objective of “ensuring a continued supply of protein” arguably fails to constitute a compelling governmental interest.²⁰⁷ Evidence suggests, instead, that this rationale was pretextual, designed primarily to ensure profitability rather than genuinely protect public welfare or national security.²⁰⁸ A pretextual or insincere government interest does not qualify as compelling under constitutional analysis.²⁰⁹ Ultimately, by subjecting meatpacking employees to predictably lethal workplace conditions, Executive Order 13,917 exhibited the sort of deliberate indifference to human life contemplated by the Supreme Court in *County of Sacramento v. Lewis*, which opined that substantive due process is violated when government officials have a practical opportunity to deliberate—as they certainly did here.²¹⁰

B. Ultra Vires Doctrine

Under the *ultra vires* doctrine—literally meaning “beyond the powers”—governmental action may be invalidated if it exceeds statutory or constitutional authority. By issuing Executive Order 13,917 in order to protect the financial interests of large corporations such as Tyson Foods²¹¹ under the pretext of “ensuring a continued supply of protein for Americans,”²¹² Trump acted *ultra vires*—outside the scope of his authority under the Defense Production Act,²¹³ as well as any authority under Article II of the U.S.

²⁰⁷ See *supra* Part II.B.

²⁰⁸ See *supra* note 78 and accompanying text.

²⁰⁹ See *Shaw v. Hunt*, 517 U.S. 899, 932 (1996) (Strict scrutiny cannot be avoided by “proffering pretextual . . . explanations”); *United States v. Virginia*, 518 U.S. 515, 562 (1996) (the “proffered purpose” must be “the actual purpose”).

²¹⁰ 523 U.S. 833, 851 (1998) (“As the very term ‘deliberate indifference’ implies, the standard is sensibly employed only when actual deliberation is practical.”).

²¹¹ See, e.g., First Amended Complaint & Demand for Jury Trial at 11, *Fernandez v. Tyson Foods, Inc.*, No. 6: 20-cv-02079-LRR-KEM (N.D. Iowa Nov. 11, 2020) (“High-level Tyson executives began lobbying the White House for COVID-19 related liability protections as early as March and continued their lobbying efforts throughout April. Tyson officials dined at the White House and participated in several calls with President Trump and Vice President Pence during March and April.”).

²¹² See *id.* at 13 (alleging a 600% increase in Tyson’s exports in 2020’s first quarter); *supra* note 78 and accompanying text.

²¹³ See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982). See also *Am. Fed’n of Labor & Cong. of Indus. Organizations v. Kahn*, 618 F.2d 784, 798–99 (D.C. Cir. 1979) (MacKinnon, J., dissenting) (“If Congress did not intend to delegate [an] authority, or purported to delegate it without constitutionally sufficient standards

Constitution.²¹⁴ Under Article II, presidential authority is limited to powers expressly granted by the Constitution or implied from it; the President may not create law, seize private property, or override Congress's legislative determinations absent explicit constitutional or statutory authorization.²¹⁵ Moreover, as an unconstitutional exercise of Presidential power, Executive Order 13,917 could be deemed to encroach on States' power to regulate public health under the 10th Amendment,²¹⁶ as well as Congress's plenary authority to regulate interstate commerce.²¹⁷ Executive Order 13,917 could thus be challenged to the extent that "when an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority."²¹⁸ Indeed, "the Supreme Court has held on many occasions that officers of the Executive Branch of the Government may be enjoined when their conduct is unauthorized by statute, exceeds the scope of constitutional authority, or is pursuant to unconstitutional enactment."²¹⁹

Toward this end, Executive Order 13,917 could be likened to Executive Order 10,340 in *Youngstown Sheet and Tube v. Sawyer*, where President Truman ordered that American steel mills be seized during the American-Korean conflict, and the Supreme Court struck down the order as one of lawmaking, outside the scope of the

then the President's action amounts to law-making in violation of Article I of the Constitution . . . The ambit of a delegated power is controlled by the purposes of the statute which delegates it.").

²¹⁴ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

²¹⁵ *Id.* at 585 ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."). See also *id.* at 637, 659. Cf. *Clinton v. City of New York*, 524 U.S. 417, 427 (U.S. D.C., 1998) (a President violates Article I "when he unilaterally cancel[s] provisions of duly enacted statutes").

²¹⁶ See, e.g., *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 (1905) ("[T]he police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."). An examination of potential Tenth Amendment claims is reserved for a future article.

²¹⁷ See, e.g., *United States v. Darby*, 312 U.S. 100, 115 (1941) ("Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause."). An analysis of claims involving Congress's authority under the Dormant Commerce Clause is likewise reserved for future scholarship.

²¹⁸ *Sierra Club v. Trump*, 963 F.3d 874, 891 (9th Cir. 2020).

²¹⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 576 (D.D.C.), *aff'd*, 343 U.S. 579 (1952) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Land v. Dollar*, 330 U.S. 731 (1947); *United States v. Lee*, 106 U.S. 196 (1882)).

President's authority under Article II of the U.S. Constitution.²²⁰ Similar to the issue in *Youngstown*, President Trump ordering that meat-packing plants "continue operating and fulfilling orders to ensure a continued supply of protein for Americans,"²²¹ in effect, "requisitioned" the American meat-packing plants, taking "measures incompatible with the expressed or implied will of Congress, [where] his power is at its lowest ebb"²²²—especially since Congress allowed requisitions authority under the DPA to expire in 1953.²²³

Furthermore, if a Federal Court were to strictly construe the textual provisions of the DPA and their statutory definitions relevant to Executive Order 13,917,²²⁴ it might similarly find that Trump acted *ultra vires*. That is, Trump's required findings under 50 U.S.C. § 4511(b) are highly questionable. Namely, his findings that meat and poultry were "scarce and critical material[s] essential to the national defense" and that "the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship."²²⁵ Trump's characterization of the national meat and poultry supply chain as "critical infrastructure" is equally unavailing given that "critical infrastructure" refers to "any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems and assets would have a debilitating impact on national security, including, but not limited to, national economic security and national public health or safety."²²⁶ At the time Executive Order 13,917 was issued, there was little genuine evidence of a protein shortage severe enough to justify invoking such an extraordinary mandate; on the contrary—and not unlike the 17.8 tons of masks, gowns, and respirators donated to China²²⁷—meat producers substantially increased overseas meat exports during the pre-vaccine pandemic.²²⁸

²²⁰ *Youngstown*, 343 U.S. at 583, 587. See also *Sierra Club*, 963 F.3d at 891 ("That Sierra Club has a cause of action to enjoin the unconstitutional actions at issue here is best illustrated by *Youngstown*.").

²²¹ Exec. Order No. 13,917, 85 Fed. Reg. 26,313 (Apr. 28, 2020).

²²² *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

²²³ MICHAEL H. CECIRE ET AL., CONG. RSCH., SERV. R43767, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS 2 (2020). See also *supra* Part I.

²²⁴ See, e.g., *Acorn Iron & Supply Co. v. Bethlehem Steel Co.*, 96 F. Supp. 481, 481 (E.D. Pa. 1951) ("Since the [DPA] imposes duties on the defendant in derogation of its common law right to sell or refuse to sell to anyone for any or no reason, the Act must be strictly construed.").

²²⁵ 50 U.S.C. § 4511(b) (2018).

²²⁶ 50 U.S.C. § 4554(2) (2018).

²²⁷ See *supra* notes 116.

²²⁸ See *supra* notes 84, 149.

Given the foregoing, the federal judiciary would be justified in concluding that Executive Order 13,917 was an impermissible act of executive lawmaking encroaching on Congress's exclusive legislative powers under Article I, thus violating fundamental principles of the separation of powers. As the Supreme Court duly noted in *Stark v. Wickard*, "[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."²²⁹

CONCLUSION

During his 2024 presidential campaign, Donald Trump asserted that the ongoing conflicts in Ukraine and Gaza "never would have happened" under his leadership.²³⁰ During his first presidency, the United States was at war with a different kind of adversary—a viral enemy, Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2). Trump failed to win the 2020 election, in large part, due to his administration's inadequate response to this viral belligerent.²³¹ Had the administration more effectively utilized the Defense Production Act, the outcome may have been different—and applying Trump's own logic, perhaps the conflicts in Ukraine and Israel could have been prevented.

This article provides a focused analysis of the Defense Production Act, demonstrating the powers that could be leveraged during future pandemics in the United States. It illustrates that, with the notable exception of Operation Warp Speed and a few other less noteworthy instances, the Trump administration largely failed to fully utilize the Defense Production Act when circumstances demanded it. Moreover, with respect to Executive Order 13,917, the Defense Production Act was invoked in a manner that ultimately harmed vulnerable Americans. The purpose of this analysis is not to assign blame; rather, it aims to encourage public officials and attorneys to understand past shortcomings so that similar mistakes will not be repeated. Future pandemics are inevitable, making it essential to appreciate both the potential and the risks inherent in the Defense Production Act's deployment. Lest we forget, when invoked judiciously, this powerful legal instrument is uniquely capable of protecting public health, safeguarding worker rights, and affirming the nation's commitment to valuing human life.²³²

²²⁹ 321 U.S. 288, 310 (1944).

²³⁰ See *supra* note 2.

²³¹ See *supra* note 3.

²³² As aptly put by President Franklin D. Roosevelt, "The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little." Franklin D. Roosevelt, Second Inaugural Address (Jan. 20, 1937).