



## Memo

TO: **Monument Advocacy's Clients**  
FROM: **Monument Advocacy**  
DATE: **March 23, 2020**  
RE: **Authorities Invoked in a National Emergency**

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In response to the COVID-19 pandemic, President Trump announced a national emergency on March 13. The proclamation includes two types of emergencies: one under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act) and one under the National Emergencies Act (NEA). The proclamation marks the beginning of the national emergency as March 1. A national emergency issued under NEA can be terminated by a subsequent presidential proclamation or by a joint resolution of Congress. Emergencies under both acts trigger different responses and authorities and when used together provide significant resources for states and the federal government.

We have outlined below the differences between the two acts and the recent history of their use. In addition, we have included a brief explanation of the Jones Act as well as the Defense Production Act and how they can be used in response to the pandemic.

### **I. Robert T. Stafford Disaster Relief and Emergency Assistance Act**

The President's emergency declaration under section 501 of the Stafford Act authorized assistance to U.S. states, territories and D.C. for their COVID-19 response efforts. There has been no precedent for a nationwide Stafford Act declaration. Typically, a governor requests the President to declare an emergency and the type of assistance needed, and then the President makes the decision in consultation with the Federal Emergency Management Agency (FEMA). President Trump made this declaration under section 501 because it allows the president to use it unilaterally *"when he determines that an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority."* (42 U.S.C. §5191). This declaration currently covers 42 states and territories, and the other 14 states and territories are in the declaration process and should be approved within the next few days.

Under the declaration, the U.S. Department of Health and Human Services is the lead federal agency responding to the pandemic. The Stafford Act is traditionally used in response to natural disasters; however, it has a broad definition of emergency and may include “public health incidents.” President Clinton used the Stafford Act in response to the West Nile virus outbreak in New York and New Jersey in 2000.

There are several types of public assistance authorized under the Stafford Act. However, under President Trump’s declaration regarding COVID-19, the only designated type of public assistance is for emergency protective measures. Applicants are reimbursed for 75% of eligible expenses incurred while performing emergency protective measures. When public assistance is authorized, a state, territory or tribe becomes the grant recipient. Local governments and certain nonprofit entities may apply for grant funds through the recipient.

Emergency protective measures include a wide range of activities. Under the COVID-19 emergency declaration, reimbursable activities may include *“activation of State Emergency Operations Centers, National Guard costs, law enforcement and other measures necessary to protect public health and safety.”* Additionally, FEMA may reimburse costs for overtime labor performed by applicants’ budgeted employees and for overtime and regular-time labor performed by unbudgeted employees engaged in eligible work.

## **II. National Emergencies Act**

The National Emergencies Act (NEA) was enacted in 1976 to pare back the President’s emergency authorities. The NEA establishes a framework for presidential declarations of national emergencies intended to provide enhanced congressional oversight and prevent indefinite emergency declarations.

President Trump’s declaration of a national emergency under Section 201 and 301 of the NEA enables access to statutory emergency authorities not otherwise available. To exercise those authorities, the president must specify the provisions of law under which officials will act.

The COVID-19 emergency proclamation provides for three specific provisions:

- Allows the Secretary of Health and Human Services (HHS) to exercise authority under Section 1135 of the Social Security Act (SSA) to waive or modify certain requirements of Medicare, Medicaid, and State Children’s Health Insurance programs and of the Health Insurance Portability and Accountability Act Privacy Rule throughout the duration of the emergency. These waivers loosen restrictions on telehealth usage and certain requirements for hospitals and healthcare providers so they can better respond to the crisis.
- Authorizes the HHS Secretary to provide advanced written notice of the waiver to Congress. As mandated by section 1135(d) of the SSA, this notice must include a description of the specific provisions that will be waived, the health care providers to whom the waiver will apply, the relevant geographic area, and the period of time for which the waiver or modification will be in effect.

- Clarifies that nothing in the proclamation should impair or otherwise affect executive branch authority or the functions of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

### **III. Defense Production Act (DPA)**

On March 17, President Trump discussed the possibility of invoking the Defense Production Act (DPA) in response to COVID-19. The Act gives the federal government substantially more latitude to direct industrial production in emergencies and provides the President a broad set of authorities to influence domestic industry to provide essential materials and goods needed for the national defense.

Initially codified in response to the Korean War, the DPA is historically based on the War Powers Acts of World War II. Over the course of the last few decades, Congress has expanded the definition of “national defense.” Now, the scope of DPA extends beyond shaping U.S. military preparedness and capabilities, as the authorities may also be used to enhance and support domestic preparedness, response, and recovery from natural hazards, terrorist attacks and other national emergencies.

Based on historical use and likelihood of the President’s imminent use, some DPA authorities include:

- Requiring businesses to prioritize and accept contracts for materials and services as necessary to promote the national defense.
- Allowing the President to incentivize the domestic industrial base to expand the production and supply of critical materials and goods. Authorized incentives include loans, loan guarantees, direct purchases and purchase commitments, and the authority to procure and install equipment in private industrial facilities.
- Implementing Title VII: General Provisions, which includes key definitions for the DPA and several distinct authorities, including the authority to:
  - Establish voluntary agreements with private industry;
  - Block proposed or pending foreign corporate mergers, acquisitions or takeovers that threaten national security; and
  - Employ persons of outstanding expertise and establish a volunteer pool of industry executives who could be called to government service in the interest of national defense.

The authorities of the DPA are generally afforded to the President in the statute. The President, in turn, has delegated these authorities to department and agency heads. While the authorities are most frequently used by, and commonly associated with, the Department of Defense (DoD), they can be and have been used by numerous other executive departments and agencies.

### **IV. Jones Act**

President Trump has not yet decided to waive in full or in part the Merchant Marine Act of 1920 (the “Jones Act”) in response to the COVID-19 pandemic. The Jones Act requires that vessels transporting goods between U.S. ports must be U.S. flagged vessels. Operating under a U.S. flag is generally costlier — approximately 2.7% more expensive than foreign flag ships according to

the U.S. Maritime Administration (MARAD) — as it requires the vessel to be partially constructed in the U.S. and owned and crewed by U.S. citizens.

The Jones Act is proving to be an immense challenge for the City of Seattle, one of the metropolitan areas hit hardest by the novel coronavirus, because the Act is, in part, grinding cruise season to a halt. Normally, cruise ships sailing between Seattle and Alaska avoid the Jones Act's requirements by stopping in British Columbia between destinations. Recently, however, Canadian authorities suspended cruise season until July 1, thereby eliminating cruise lines' ability to stop there and creating a major financial disadvantage for cruise lines.

Arguments are being made that repealing or altering parts of the Jones Act would allow the U.S. to remain globally competitive and stimulate the economy during the pandemic. The Jones Act has previously been waived or modified in times of national crisis. However, there is some concern about waiving the Act during the pandemic because it would allow for foreign flag vessels with crews that could possibly pose an additional threat for spreading the virus. For example, in 2017, President Trump waived the act temporarily for Puerto Rico after Hurricane Maria.

## **V. National Emergency Declarations and Similar Actions in a Historical Context**

### **a. 2008 Financial Crisis TARP Program**

The federal government's response to the 2008 financial crisis may serve as a roadmap for how the 116<sup>th</sup> Congress and the Trump Administration will attempt to revamp the U.S. economy during and after the novel coronavirus pandemic. In the Summer and early-Fall of 2008, the American economy was reeling from the Great Recession, following the burst of the housing bubble and massive number of foreclosures. The banking industry was on the verge of collapse. In turn, the Federal Reserve responded to the economic crisis with interest rate cuts, targeted assistance to ailing financial institutions and large-scale asset purchases. However, significant legislative action was needed. The Emergency Economic Stabilization Act of 2008, signed into law on October 3, 2008, was the solution that Congress and President George W. Bush's Administration formulated. A key component of this Act was the Troubled Asset Relief Program, or TARP.

TARP, which was initially proposed by Treasury Secretary Henry Paulson, sought to strengthen the financial stability of banks and the overall market, bolster the struggling U.S. automobile industry and support foreclosure prevention programs. Congress initially authorized \$700 billion to be spent under the program, but that amount was reduced to \$475 billion when the Dodd-Frank Act was signed into law in 2010. The Treasury Department employed TARP funds in five key areas:

- \$250 billion dedicated to programs that stabilized banks (\$5 billion of this was cancelled), such as equity purchases;
- \$82 billion distributed to bolster the auto industry (\$2 billion of this was cancelled);

- \$70 billion to back the American International Group (\$2 billion of this was cancelled);
- \$46 billion dedicated to support Americans avoid foreclosure; and
- \$27 billion committed to programs to restart credit markets.

Two years after its inception, TARP expired on October 3, 2010.

## **b. Hurricane Katrina Stafford Act Declarations**

On August 27, 2005, as Hurricane Katrina neared Louisiana's shores, Louisiana Governor Kathleen Babineaux Blanco issued a letter addressed to President George W. Bush requesting that he declare an emergency for the State of Louisiana under Section 501(a) of the Stafford Act, 42 U.S.C. §§ 5121-5206. The letter included Governor Blanco's determination, pursuant to 44 C.F.R. § 206.35, that:

*The incident is of such severity and magnitude that effective response is beyond the capabilities of the State and affected local governments and that supplementary Federal assistance is necessary to save lives, protect property, public health, and safety, or to lessen or avert the threat of disaster.*

The Governor specifically requested emergency protective measures, direct Federal Assistance, Individual and Household Program (IHP) assistance, Special Needs Program assistance and debris removal. The same day, the Bush White House issued a press release declaring an emergency in Louisiana and ordered the federal aid to supplement state and local response efforts in specific Louisiana counties. The press release stated:

*The President's action authorizes the Department of Homeland Security, Federal Emergency Management Agency (FEMA), to coordinate all disaster relief efforts which have the purpose of alleviating the hardship and suffering caused by the emergency on the local population, and to provide appropriate assistance for required emergency measures, authorized under Title VI of the Stafford Act, to save lives, protect property and public health and safety, or to lessen or avert the threat of a catastrophe in [several Louisiana counties].*

The following day, on August 28, 2005, Katrina strengthened to a Category 5 Hurricane, prompting Governor Blanco to request a "major disaster declaration" under Section 401 of the Stafford Act, 42 U.S.C. § 5170, to trigger a broader range of Stafford Act authorities, which President Bush fulfilled. The White House issued similar emergency and major disaster declarations for the States of Alabama and Mississippi.

## **c. September 11th National Emergency Declarations**

### ***i. Stafford Act Declarations***

In the afternoon following the devastating al-Qaeda attacks on the morning of September 11, 2001 (9/11) President Bush, upon request from New York Governor George Pataki and within two hours after the attack, signed a major disaster declaration pursuant to Section 401 of the Stafford Act, 42 U.S.C. § 5170, for five counties in the State of New York (the declaration was subsequently amended on September 27, 2001 and again on October 2, 2001 to include all New

York counties). With respect to the attack on the Pentagon, President Bush, in coordination with Virginia Governor Jim Gilmore, declared a federal emergency in the State of Virginia under subsection 501(b) of the Stafford Act, and shortly thereafter declared a major disaster. Additionally, the President declared a major emergency for all 21 counties in the State of New Jersey.

Like the major disaster declaration issued for the State of Louisiana in the wake of Hurricane Katrina, the 9/11 Stafford Act major disaster declarations for Virginia and New York activated the federal response plan for the delivery of federal disaster assistance and resources to augment the efforts of all sub-federal governments overwhelmed by the 9/11 devastation. These declarations also triggered FEMA's role as coordinator of the governmental response to the 9/11 disaster and initiated FEMA's responsibility to deliver assistance through several programs. These programs include individual assistance to victims affected by the 9/11 attacks, hazard mitigation funds to state and local governments, and the agency's public assistance program, which includes various types of grants for eligible state and local governments, as well as qualified nonprofit organizations.

#### ***ii. National Emergencies Act Declarations***

In addition to the Stafford Act declarations, President Bush formally declared a national emergency on September 14, 2001 pursuant to the National Emergencies Act. The National Emergencies Act empowers the President, in times of national emergency, to activate dozens of emergency powers Congress has defined by law. The Act also prescribes procedural formalities for the President to follow when invoking such powers. For example, the President must indicate, according to Title III, the powers and authorities being invoked to respond to the exigency at hand.

In his September 14, 2001 national emergency declaration, President Bush activated nine statutory authorities related to U.S. armed services, including:

- 10 U.S.C. §123 (authorizing the President, in time of war or national emergency declared by Congress or the President, to suspend the operation of any provision of law relating to the promotion, involuntary retirement, or separation of commissioned officers of the Army, Navy, Air Force, Marine Corps or Coast Guard Reserve);
- 10 U.S.C. §2201(c) (authorizing the President to make a determination that it is necessary to increase the number of members of the armed services on active duty beyond the number for which funds have been appropriated for the Department of Defense); and
- 10 U.S.C. §12302 (authorizing the President, in time of national emergency declared by the President, to call members of the Ready Reserve to active duty).

On September 23, 2001, President Bush again declared a national emergency and invoked the International Emergency Economic Powers Act (IEEPA) in order to prohibit transactions with — and block property from — any persons who commit, threaten to commit or support terrorism.

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