

Emergency U.S. Maritime Authorities Potentially Available During the Crisis



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President Trump declared a national emergency as a result of the spread of the COVID-19 virus on March 13, 2020, and he selectively invoked the Defense Production Act on March 27 and April 2. These announcements were narrowly drawn and did not address potential maritime supply chain disruptions. Under existing U.S. law, the President has a range of maritime-related authorities he can invoke to deal with maritime-related supply chain issues if necessary.

The National Emergencies Act of 1976 governs the declaration of national emergencies by the President. That Act specifically provides that “no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes he . . . will act.” The March 13 Presidential declaration of a national emergency only invoked health care-related authorities. Similarly, the Defense Production Act invocations were narrowly tailored and left the full range of authorities – including maritime-related authorities – untouched.

The maritime-related extraordinary and overlapping authorities that might have applicability in the current pandemic cover a wide range of maritime activities and do not all require a declaration of national emergency.

Port and Anchorage Restrictions. A number of authorities exist empowering the U.S. Coast Guard and other federal agencies to take steps to prevent the spread of pandemics with respect to vessels in U.S. waters. In addition, there is a law intended to deal with mass migrations, 46 U.S.C. § 70051 (formerly 50 U.S.C. § 191) which could be made to apply in a pandemic situation. Under that law, when there is a declared “threatened disturbance of the international relations of the United States,” authorities become available to regulate vessel movements and anchorages including taking full possession and control of vessels to ensure compliance.

Navigation and Vessel-Inspection Law Waiver Authority. Almost immediately following the attack on Pearl Harbor, President Roosevelt issued an executive order creating authority to waive “navigation” and “vessel inspection” laws if necessary to further war purposes. That executive order was ultimately embodied in a law that exists today at 46 U.S.C. § 501 which permits the issuance of waivers when found to be in the “interest of national defense.” No national emergency declaration is required to grant a waiver.

During World War II and the Korean War in particular, this authority was used to waive a number of requirements ranging from load lines, merchant mariner credentials and manning. This statute is best known for its use to issue

U.S. coastwise law (Jones Act) waivers following hurricanes beginning with Hurricane Katrina in 2005 and in connection with Strategic Petroleum Reserve sales in 2011.

Waivers under this statute can be issued by the Secretary of Defense directly or by the Secretary of Homeland Security upon request from another agency or private person. In the latter case, there must be finding that no Jones Act qualified vessel is available to meet the need in the event the waiver relates to the Jones Act.

With respect to requirements that might be waived that are within the purview of the U.S. Coast Guard, there are regulations at 33 C.F.R. § 19.01 and 46 C.F.R. § 6.01 that describe what must be submitted and to whom.

Vessel Requisition. The U.S. Government has a number of pre-existing authorities that permit it to requisition for title or use vessels to meet national needs. Specifically, the U.S. Secretary of Transportation can requisition foreign vessels owned by U.S. citizens, U.S.-flag vessels, vessels under construction in the United States and non-U.S.-flag vessels in U.S. waters. These authorities were first instituted in World War I to deal with a shipping capacity crisis.

These requisition authorities can be invoked when specified in a declaration of national emergency. In addition, like the navigation and vessel-inspection waiver law, the law governing vessel requisition can be invoked without a declaration of a national emergency. All that is required is a declaration from the President “that the security of the national defense” supports vessel requisitions. Essentially, the Secretary of Transportation can requisition vessels as needed to meet national requirements provided “just compensation” is paid for the vessel or for the period of use. There is also a mechanism for resolving disputes as to what constitutes “just compensation.”

The U.S. Government also has separate authority to call up for U.S. Government use U.S.-flag vessels committed under the Voluntary Intermodal Sealift Agreement (VISA) program.

Vessel Manning. In addition to the general navigation and vessel-inspection law waiver, there is a specific vessel manning waiver authority applicable to U.S.-flag vessels in the U.S. statute (46 U.S.C. § 8103) that requires that a crew be essentially all U.S. citizens. Applicable manning requirements can be waived in a proclaimed national emergency identifying this statute or “when the needs of commerce require.” It is not clear whether this latter provision has ever been invoked.

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