

The U.S. and Mexico Must Develop a New Strategy Against Mexican Cartels But Avoid Designating Them As Foreign Terrorist Organizations

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KEY TAKEAWAYS

Mexican cartels are the most serious criminal threat to both the U.S. and Mexico. Accordingly, the two nations must work together to tackle this shared challenge.

While it is understandable that U.S. policymakers want to designate violent foreign cartels as foreign terrorist organizations (FTOs), it is the wrong approach.

An FTO designation would undermine the U.S.–Mexico relationship, jeopardize key immigration cooperation agreements, and potentially worsen the migration crisis.

The Trump Administration and some Members of Congress have floated the idea of designating Mexican cartels as foreign terrorist organizations (FTOs). This comes on the heels of an upswing in violence in Mexico, including the gruesome murder of nine American citizens in broad daylight.¹ The White House has now dismissed this idea, but some Members of Congress continue to call for the designation. While it is understandable why U.S. policymakers would want to designate supremely violent foreign cartels as FTOs, it is the wrong approach in the long term.

Mexican cartels are the most serious criminal threat to both Mexico and the United States. The cartels traffic illicit narcotics and spread human misery throughout the Western hemisphere. In the midst of discussions on labeling cartels FTOs, both countries should take the discussions as an opportunity to

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deepen cooperation on the shared threat. President Donald Trump must send a clear signal that combatting cartels is a top U.S. national security interest by developing a comprehensive strategy. Accordingly, U.S. policy-makers should work with their Mexican counterparts to tackle this shared challenge. The U.S. should develop a new bilateral framework for targeting cartel networks based on lessons learned from current U.S. counterterrorism measures. U.S. security assistance to Mexico must be modernized, and both countries should commit to restarting an annual cabinet-level security dialogue. Congress must support these efforts by fixing the shortfalls of the Foreign Narcotics Kingpin Designation Act of 1999.

Mexican Cartels Are Transnational Criminal Organizations and Do Not Meet the Terrorism Statute

There is no legal basis for the FTO designation for Mexican cartels. In order to label any group an FTO, it must meet all criteria laid out under Title 8 U.S. Code § 1189, “Designation of foreign terrorist organizations.”² Those criteria are as follows:

- (A) the organization is a foreign organization;
- (B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title or terrorism (as defined in section 2656f(d)(2) of title 22)), or retains the capability and intent to engage in terrorist activity or terrorism; and
- (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.³

Every terrorist group designated under this statute—ranging from Colombia’s Revolutionary Armed Forces of Colombia (FARC) to ISIS and its various affiliates—is so designated because of its *political or social motivations*. Attempting to classify Mexican cartels under this statute would not only be legally unsound, but would undermine the integrity of the FTO list. Mexican cartels are criminal organizations; they are motivated by profit, not ideology or religion. While cartels can have political dimensions, as they often use corrupt government officials to protect their criminal operations, but at their core, cartels are purely criminal organizations.

For the purposes of U.S. law, the working definition of terrorism in the U.S. Code of Federal Regulations describes it as “the unlawful use of force and violence against persons or property to intimidate or coerce a government,

the civilian population, or any segment thereof, in furtherance of political or social objectives.”⁴ While cartel violence is spectacularly gruesome, the objectives are clearly criminal and profit-driven.

Existing Legislation Provides Broad Sanctions Authorities

If the U.S. moves forward with the FTO designation for Mexican cartels, it would make antiterrorism laws and authorities redundant with existing authorities. There is an argument that declaring cartels terrorists would grant U.S. authorities additional tools to combat the cartels, but current legislation already grants the executive branch ample sanctioning authorities against narcotrafficking organizations. In 1999, the Kingpin Act created worldwide sanctions against significant international narcotics traffickers, their affiliates, entities, and organizations. Once an individual, organization, or entity is designated under the Kingpin Act, the assets in question under U.S. jurisdiction are blocked, and all U.S. persons and companies are banned from any transaction with the designated entity. In addition to asset blocking, the Kingpin Act also revokes visas of designated aliens.⁵

Punishments for violations of the Kingpin Act are quite steep. Corporate criminal violations by corporate officers may reach 30 years in prison and up to \$5 million in fines. Corporate violations for a company may rise as high as \$10 million. Civil violations may incur penalties up to \$1.075 million per violation as well as criminal punishments.⁶

Yet the Kingpin Act is not without its limitations. While existing sanctions are useful in pursuing the most significant members of the organization, they are often unable to target those who are just a few steps removed from the inner circle. Criminal enterprises rely on networks of facilitators, such as lawyers and money launderers, who are often able to evade sanctions. This loophole in the Kingpin Act can be remedied with legislation.

Setting the Clock Back on the U.S.–Mexico Relationship

U.S. policymakers need to consider the consequences of this designation for the U.S.–Mexico partnership, arguably one of the U.S.’s most important relationships. It is a relationship where foreign and domestic policy are intertwined due to Mexico’s geographic proximity and massive volume of trade. As of 2019, Mexico is the U.S.’s top trading partner.⁷ On a daily basis, the two countries cooperate on a wide range of issues that go unspoken from energy to counterterrorism and counternarcotics to the environment. Granted, the U.S. and Mexico do not see eye to eye on every

issue. There are also outstanding areas of concern, from illegal immigration to the symbiotic relationship of Mexican drug trafficking and U.S. drug consumption. On balance, though, the cross-border relationship is one of goodwill and trust, which an unnecessary FTO designation of the cartels would undermine. From Mexicans' perspective, the FTO designation is a pretext for unauthorized U.S. military action in their country. With this designation, America's message to Mexico and the Western Hemisphere would be of an unreliable partner, jeopardizing intelligence and military relationships along the way.

The fallout between Washington, DC, and Mexico City would probably be immediate. In the near future, the U.S. could find itself preparing for the end of the Migration Protection Protocols (key immigration cooperation agreements) and Mexico's National Guard deployment to secure its border with Guatemala. Neither program is popular in Mexico, meaning there is little incentive for Mexican President Andres Manuel Lopez Obrador to maintain the status quo. Cooperation with Mexico on the Central American migration crisis has produced a sizeable decrease in both the number of U.S. border apprehensions and asylum applicants. It is in both countries' interests to continue building on that.

Legal Implications of an FTO Designation

In addition to the impact on the bilateral relationship, U.S. policymakers should consider the legal consequences of an FTO designation. The following is not meant to be an exhaustive accounting for all of the legal implications, but questions for policymakers about entities that could be affected. For starters, drug cartels use some unwitting participants and legal businesses to facilitate their criminal activities. Fentanyl is most commonly transported into the U.S. from China via parcel service. Hidden in tractor-trailers co-mingled with legal goods is the second-most common way that heroin is brought into the U.S.⁸ The U.S. Drug Enforcement Agency reports that "the use of commercial parcel services like the USPS, FedEx, and UPS is also common" for transporting marijuana produced in the U.S.⁹ Under antiterrorism laws a terrorism designation of Mexican cartels would raise questions about culpability. In addition, how will the U.S. define membership in the terrorist organization? The designation also raises questions about U.S. drug consumers. Does the FTO designation open the door to prosecuting them under anti-terrorism laws when they, even unknowingly, purchase narcotics from Mexican cartels or cartel-affiliated groups?

Within Mexico, there will be a cost on U.S. businesses. American companies can probably expect to pay higher insurance premiums because of the terrorism designation, as would Mexican companies. At some point, this could affect U.S. consumers back home, because of the closely integrated economies. Of every \$1 in Mexican exports, 40 cents are of U.S. origin, far outpacing Canada at 25 cents.

U.S. policymakers should question whether an FTO designation opens the door for Mexico to request application of antiterrorism laws against U.S. gun manufacturers or sellers. Weapons trafficking from the U.S. to Mexico is a long-standing sore spot for Mexico. Bad blood from the aggrieved party could invite reactionary and unproductive responses.

In addition to muddying the waters with their Mexican counterparts, U.S. officials could inadvertently undermine their own efforts for dealing with the migration crisis. The U.S. could find itself empowering previously meritless asylum claims or encouraging new political asylum claims. The U.S. commonly rejects asylum applications when individuals apply on the basis of fleeing criminal violence, but a terrorism designation could allow unintended numbers to apply for political asylum in the U.S. The pool of applicants could logically extend beyond Mexico. While Mexican cartels' territorial stronghold is within their own country, they have representatives on every continent except Antarctica.¹⁰

Eliminating Mexican Cartels Requires Political Will on Both Sides of the Border

The U.S. should capitalize on the discussions of FTO designations and look for smarter ways of going after the cartels. U.S. policymakers should:

- **Send a clear signal from the highest level of the policymaking process that eliminating Mexican cartels is a national security priority.** It is promising that combatting cartels was highlighted numerous times in the Administration's National Security Strategy and subsequent policies.¹¹ President Trump now needs to develop a comprehensive, long-term plan in order to accomplish this goal. This also means dedicating the proper resources to the problem. U.S. security assistance to Mexico must match U.S. national security objectives.¹² President Trump should consult with his Administration to determine whether adequate intelligence resources are allocated to combatting cartels.¹³

- **Modernize the Merida Initiative.** U.S. assistance to Mexico has largely been on autopilot, with the bulk of funds focused on training Mexican security services. While helpful, this outdated approach will not defeat the cartels. The U.S. must breathe new life into Merida by finding areas of untapped opportunity and ending unproductive programs. For starters, the U.S. and Mexico should resuscitate Plataforma Mexico (Platform Mexico). Shut down by Mexican President Enrique Peña Nieto, it was a successful network of databases connecting Mexican federal, state, and local law enforcement.¹⁴ By supporting Mexico's ability to better use its own resources, the U.S. is building Mexican capacity for combating a shared threat.
- **Develop a new bilateral framework between the U.S. and Mexico for targeting cartel networks.** The U.S. can import successful strategies and tactics from its counterterrorism targeting. Together, both countries must develop a strategy involving bi-national law enforcement, and information and intelligence sharing, to build on the Kingpin Act.
- **Reinstitute an annual dialogue between U.S. and Mexican cabinet-level security officials.** Aside from meetings in the midst of a crisis, there has been no mechanism for high-level engagement between U.S. and Mexican security officials since the U.S.–Mexico Binational Commission under the Reagan Administration and subsequent iterations. A permanent annual or biannual meeting allows close coordination and quicker development of new strategies.
- **Create legislation that builds on the Kingpin Act to allow sanctions against cartel facilitators.** While the Kingpin Act is a useful tool for targeting significant narcotics traffickers, U.S. sanctions must be strengthened in pursue the cartels' broader network of facilitators. Congress can pass legislation to shore up this weakness.
- **Increase inspections of Mexico-bound U.S. vehicles.** Illicit arms trafficking from the U.S. into Mexico is a critical problem. There are means to control the illegal flow of guns south without infringing on Americans' Second Amendment rights. The U.S. must stem the flow of south-bound weapons flows, starting with increasing Mexico-bound vehicle inspections.

The Way Forward

The U.S opioid crisis and continued challenges with other illicit drugs demands an urgent response. Mexico is in a dire security crisis and needs to reduce the cartels' influence and power. Both countries must address this shared problem. Now is the ideal time for the U.S. and Mexico to go big on a new strategy against the cartels.

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Endnotes

1. Jessica Donati and José de Córdoba, "Trump Says U.S. to Designate Mexican Drug Cartels as Terrorists," *The Wall Street Journal*, November 27, 2019, <https://www.wsj.com/articles/trump-says-u-s-to-designate-mexican-drug-cartels-as-terrorist-11574831409> (accessed December 5, 2019).
2. Legal Information Institute, "8 U.S. Code § 1189. Designation of foreign terrorist organizations," <https://www.law.cornell.edu/uscode/text/8/1189> (accessed December 2, 2019).
3. The definition of terrorism under section 2656f(d)(2) of title 22 is "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."
4. 28 C.F.R. Section 0.85.
5. Two U.S. kingpin sanctions that recently made headlines: (1) Rafael Marquez in 2017. At the time he was captain of Mexico's national soccer team and was sanctioned for being a front man for well-known drug trafficker Raul Flores Hernandez. (2) Also in 2017, Venezuela's then-Vice President Tareck El Aissami was sanctioned, and to date, U.S. authorities have seized more than \$500 million of El Aissami's narco-related assets in the U.S.
6. U.S. Department of Treasury, Office of Foreign Assets Control, "Narcotics Sanctions Program," July 18 2014, p. 6, <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/drugs.pdf> (accessed December 5, 2019).
7. U.S. Census Bureau, "Top Trading Partners—October 2019," <https://www.census.gov/foreign-trade/statistics/highlights/top/top1910yr.html> (accessed December 16, 2019).
8. U.S. Drug Enforcement Administration, "2018 National Drug Threat Assessment," October 2018, p. 20, <https://www.dea.gov/sites/default/files/2018-11/DIR-032-18%202018%20NDDTA%20final%20low%20resolution.pdf> (accessed December 5, 2019).
9. *Ibid.*, p. 88.
10. Beth Warren, "Who Is El Mencho? He's the Most Powerful Drug Kingpin You've Never Heard Of," *Louisville Courier Journal*, November 25, 2019, <https://www.courier-journal.com/in-depth/news/crime/2019/11/24/el-mencho-what-know-powerful-cjng-mexican-drug-cartel-leader/4086498002/> (accessed December 6, 2019).
11. The White House, *National Security Strategy of the United States of America*, December 2017, pp. 9, 12, and 51, <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> (accessed December 6, 2019).
12. Since 2012, U.S. assistance to Mexico for the Merida Initiative, the security cooperation plan, has steadily declined. In FY 2012, it was \$281.8 million, and in FY 2020 the White House requested \$76.3 million, with \$56 million allocated to the International Narcotics Control and Law Enforcement (INCLE) account. For the same budget year, the White House requested \$145.46 million for Haiti. There is a clear mismatch between the Administration's stated objectives and allocated resources.
13. Intelligence Community Directive 204: "The National Intelligence Priorities Framework (NIPF) is the primary mechanism to establish, disestablish, manage, and communicate national intelligence priorities." The President, National Security Advisor, and relevant Cabinet officials are all stakeholders in determining intelligence priorities in the NIPF. Authorities stem from Intelligence Community Directive 204: "guidance from the President and the National Security Advisor determines the overall priorities of top-level NIPF issues." Relevant Cabinet officials and heads of agencies also provide input to the NIPF's development. The NIPF "may be updated on an ad hoc basis to address emerging issues."
14. Plataforma Mexico contained detailed criminal data from around the country and was able to produce data sets richer than Mexican security services previously had the capacity to produce. From author conversations with former U.S. government officials involved with the program: the officials shared how Mexican officials discovered areas in western Mexico that were presumed to be safe because of the low crime rate. In actuality, the area was controlled by cartels and home to their families. The platform also helped police discover a correlation between areas with high vehicle thefts and cartel activity. Dennis A. Garcia, "Security Crisis Due to Budget Cuts" (in Spanish), *El Universal*, November 22, 2016, <https://www.eluniversal.com.mx/articulo/nacion/sociedad/2016/11/22/alerta-crisis-de-seguridad-por-recorte> (accessed December 6, 2019).