

Designating Mexican Drug Trafficking Organizations as Foreign Terrorist Organizations

Paul J. Larkin

KEY TAKEAWAYS

Mexican cartels have manufactured and smuggled the illicit fentanyl that has recently caused thousands of deaths in the U.S.

Designating the cartels as Foreign Terrorist Organizations would not materially advance America's ability to fight them.

Our problem is not a lack of tools but a lack of will to use the ones that we already have.

The Mexican cartels, also known as Drug Trafficking Organizations (DTOs) or “El Narco,” are responsible for using precursor chemicals purchased from China illicitly to manufacture fentanyl, an analgesic 50–100 times more powerful than morphine, and smuggling that drug across the southwest border.¹ Witting or unwitting illicit fentanyl use has led to thousands of overdose deaths and poisonings over the past few years.² In response, some Members of Congress and private parties have debated or urged the Biden Administration or Congress (1) to designate those DTOs as Foreign Terrorist Organizations (FTOs) and (2) to use military force to snuff out the fentanyl laboratories and cartels.³ The two issues are distinct and should be discussed separately.

This paper, in its entirety, can be found at <http://report.heritage.org/bg3762>

The Heritage Foundation | 214 Massachusetts Avenue, NE | Washington, DC 20002 | (202) 546-4400 | heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

Designation of Mexican DTOs as FTOs

The issue whether Mexican DTOs should be designated as FTOs has been battered around for some time.⁴ The principal argument against such a designation is that the cartels are motivated by profit, not politics, religion, or another comparable ideology, and that they do not wish to overthrow the current government in favor of one with different political, economic, or social underpinnings as has happened in Russia, China, Cuba, and elsewhere. That argument is unpersuasive.⁵

To qualify as an FTO, (1) an entity must be foreign, (2) it must engage in terrorist activity, and (3) that activity must threaten the security of this nation or its citizens.⁶ The first element is a given; the second and third are easily proved. The production and smuggling of massive quantities of illicitly made fentanyl, the disguised addition of that fentanyl to other powdered drugs like cocaine, the fabrication of fentanyl into counterfeit pills resembling prescription drugs such as Adderall, and the massive number of deaths those activities cause⁷ all satisfy the last two elements. The relevant statutes require no additional proof of political motivation by individuals or groups, so the cartels' profit-seeking goal is not an automatic disqualification.

In addition, the cartels *do* seek to supplant the elected Mexican officials as the responsible body in any government's most elementary function: protecting the public against outlaws. The cartels seek to control the Mexican law enforcement system through the use of bribery, threats, and physical force—the “*plata o plomo*” (silver or lead) form of governance. In effect, the cartels operate as a quasi-government throughout Mexico by controlling the Mexican government's application of force to guarantee the rule of law.⁸ We have seen that phenomenon before. Just as the Ku Klux Klan used the threat and fact of violence to operate as a shadow government throughout the former Confederate states during Reconstruction,⁹ the cartels systematically use bribery and violence to prevent legitimate Mexican government officials from enforcing the laws prohibiting drug trafficking and from guaranteeing that the rule of law applies to everyone throughout that nation.¹⁰ That should be sufficient under federal law even though the cartels gladly leave the remaining, quotidian features of governance—such as public health, education, and sanitation—to elected officials.

Debating *that* issue, however, is the wrong approach to *this* issue. The better inquiry is to ask whether such a designation offers the federal government any tools to fight drug trafficking that it now lacks. There, the legal answer is, “No.” There are only two apparent tools that a terrorist designation would supply. The Justice Department could take advantage

of an express congressional desire to exercise extraterritorial jurisdiction over terrorist activities affecting this nation or its people, and it would be a crime to provide material assistance to the cartels.¹¹ Yet the statement of extraterritorial jurisdiction has not prevented our prosecution of senior cartel officers, and the material assistance ban is unnecessary to prosecute drug-trafficking kingpins. The El Chapo case illustrates the validity of both conclusions.¹²

Finally, designating the Mexican cartels as FTOs would exacerbate an already existing problem: viz., the massive number of illegal immigrants pouring across the southwestern border due to the Biden Administration's refusal to enforce the territorial sovereignty of this nation and the southwest border in particular. Coupled with the cartels' effective control of vast portions of Mexico, the designation would enable both Mexicans and others seeking to enter the United States from Mexico to claim a protection defense against removal on the ground that they are seeking to escape from a terrorist-run nation.¹³ Even if that claim were ultimately to fail in the immigration courts—and most do—it would take at least three, four, or more years of litigation for a final resolution. It would be unreasonable to allow so much fraud for the alien's purpose of entry and delay to continue for that period. In addition, regardless of how that litigation plays out, most applicants wind up staying in this country despite receiving a final order of removal.

Authorization for the Use of Military Force Against the Mexican Cartels

Designation of any organization as an FTO does not itself authorize the President to use military force outside the territory of the United States to conduct kinetic activity against the cartels. Neither the immigration code nor the drug code expressly authorizes such action,¹⁴ and the War Powers Resolution bars the executive and judicial branches from interpreting existing laws as impliedly authorizing it.¹⁵ The President would need specific authorization from Congress to use the military in that manner¹⁶ or invoke his inherent authority as commander-in-chief to protect the national security of the United States,¹⁷ a subject that has been the source of much debate and is beyond the scope of this *Backgrounder*.

Conclusion

Yale Law School Professor Alexander Bickel once wrote that “[n]o answer is what the wrong question begets.”¹⁸ The relevant question is not whether

the United States can and should designate the Mexican DTOs as FTOs under current law. The pertinent question is whether that designation would grant the nation any additional necessary tools to fight the cartels' drug trafficking-efforts. If the answer is, "Yes," the correct remedy is not for Congress to declare the cartels FTOs, but to grant the executive branch whatever additional powers it needs to address the cartels' drug trafficking, especially their fentanyl smuggling.

Ultimately, however, the problem that America faces today is not a lack of tools to fight the cartels. It is a lack of will to use the tools we already have—and new legislation cannot solve that problem.

Paul J. Larkin is the John, Barbara, and Victoria Rumpel Senior Legal Research Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. The author would like to thank John Malcolm, Derrick Morgan, Bill Poole, Lora Reis, and Cully Stimson for helpful comments on an earlier version of this paper.

Appendix

1. 8 U.S.C. § 1182 (2018) provides in part as follows:

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

(3) Security and related grounds

* * * * *

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) Exception

Subclause (IX) of clause (i) does not apply to a spouse or child—

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) “Terrorist activity” defined

As used in this chapter, the term “terrorist activity” means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) “Engage in terrorist activity” defined

As used in this chapter, the term “engage in terrorist activity” means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) “Representative” defined

As used in this paragraph, the term “representative” includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) “Terrorist organization” defined

As used in this section, the term “terrorist organization” means an organization— **(I)** designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist

organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

2. 8 U.S.C. § 1189 (2018) provides in part as follows:

§ 1189. Designation of foreign terrorist organizations

(a) Designation

(1) In general

The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that—

(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. The Foreign Narcotics Kingpin Designation Act, Title VIII of the Intelligence Authorization Act for Fiscal Year 2000, Pub. L. No. 106-120, 113 Stat. 1606 (codified at 21 U.S.C. §§ 1901--1908 (2018)), provides in part as follows:

§ 1901. Findings and policy

* * * * *

(b) Policy

It shall be the policy of the United States to apply economic and other financial sanctions to significant foreign narcotics traffickers and their organizations worldwide to protect the national security, foreign policy, and economy of the United States from the threat described in subsection (a)(4).

§ 1902. Purpose

The purpose of this chapter is to provide authority for the identification of, and application of sanctions on a worldwide basis to, significant foreign narcotics traffickers, their organizations, and the foreign persons who provide support to those significant foreign narcotics traffickers and their organizations, whose activities threaten the national security, foreign policy, and economy of the United States.

§ 1904. Blocking assets and prohibiting transactions

(a) Applicability of sanctions

A significant foreign narcotics trafficker publicly identified in the report required under subsection (b) or (h)(1) of section 1903 of this title and foreign persons designated by the Secretary of the Treasury pursuant to subsection (b) of this section shall be subject to any and all sanctions as authorized by this chapter. The application of sanctions on any foreign person pursuant to subsection (b) or (h)(1) of section 1903 of this title or subsection (b) of this section shall remain in effect until revoked pursuant to section 1903(h)(2) of this title or subsection (e)(1)(A) of this section or waived pursuant to section 1903(g)(1) of this title.

(b) Blocking of assets

Except to the extent provided in regulations, orders, instructions, licenses, or directives issued pursuant to this chapter, and notwithstanding any contract entered into or any license or permit granted prior to the date on which the President submits the report required under subsection (b) or (h)(1) of section 1903 of this title, there are blocked as of such date, and any date thereafter, all such property and interests in property within the United States, or within the possession or control of any United States person, which are owned or controlled by—

(1) any significant foreign narcotics trafficker publicly identified by the President in the report required under subsection (b) or (h)(1) of section 1903 of this title;

(2) any foreign person that the Secretary of the Treasury, in consultation with the Attorney General, the Director of Central Intelligence, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, and the Secretary of State, designates as materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a significant foreign narcotics trafficker so identified in the report required under subsection (b) or (h)(1) of section 1903 of this title, or foreign persons designated by the Secretary of the Treasury pursuant to this subsection;

(3) any foreign person that the Secretary of the Treasury, in consultation with the Attorney General, the Director of Central Intelligence, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, and the Secretary of State, designates as owned, controlled, or directed by, or acting for or on behalf of, a significant foreign narcotics trafficker so identified in the report required under subsection (b) or (h)(1) of section 1903 of this title,

or foreign persons designated by the Secretary of the Treasury pursuant to this subsection; and

(4) any foreign person that the Secretary of the Treasury, in consultation with the Attorney General, the Director of Central Intelligence, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, and the Secretary of State, designates as playing a significant role in international narcotics trafficking.

(c) Prohibited transactions

Except to the extent provided in regulations, orders, instructions, licenses, or directives issued pursuant to this chapter, and notwithstanding any contract entered into or any license or permit granted prior to the date on which the President submits the report required under subsection (b) or (h)(1) of section 1903 of this title, the following transactions are prohibited:

(1) Any transaction or dealing by a United States person, or within the United States, in property or interests in property of any significant foreign narcotics trafficker so identified in the report required pursuant to subsection (b) or (h)(1) of section 1903 of this title, and foreign persons designated by the Secretary of the Treasury pursuant to subsection (b) of this section.

(2) Any transaction or dealing by a United States person, or within the United States, that evades or avoids, or has the effect of evading or avoiding, and any endeavor, attempt, or conspiracy to violate, any of the prohibitions contained in this chapter.

(d) Law enforcement and intelligence activities not affected

Nothing in this chapter prohibits or otherwise limits the authorized law enforcement or intelligence activities of the United States, or the law enforcement activities of any State or subdivision thereof.

(e) Implementation

(1) The Secretary of the Treasury, in consultation with the Attorney General, the Director of Central Intelligence, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, and the Secretary of State, is authorized to take such actions as may be necessary to carry out this chapter, including—

(A) making those designations authorized by paragraphs (2), (3), and (4) of subsection (b) of this section and revocation thereof;

(B) promulgating rules and regulations permitted under this chapter; and

(C) employing all powers conferred on the Secretary of the Treasury under this chapter.

(2) Each agency of the United States shall take all appropriate measures within its authority to carry out the provisions of this chapter.

(3) Section 552(a)(3) of title 5 shall not apply to any record or information obtained or created in the implementation of this chapter.

§ 1906. Enforcement

(a) Criminal penalties

(1) Whoever willfully violates the provisions of this chapter, or any license rule, or regulation issued pursuant to this chapter, or willfully neglects or refuses to comply with any order of the President issued under this chapter shall be—

(A) imprisoned for not more than 10 years,

(B) fined in the amount provided in title 18 or, in the case of an entity, fined not more than \$10,000,000,

or both.

(2) Any officer, director, or agent of any entity who knowingly participates in a violation of the provisions of this chapter shall be imprisoned for not more than 30 years, fined not more than \$5,000,000, or both.

(b) Civil penalties

A civil penalty not to exceed \$1,000,000 may be imposed by the Secretary of the Treasury on any person who violates any license, order, rule, or regulation issued in compliance with the provisions of this chapter.

(c) Judicial review of civil penalty

Any penalty imposed under subsection (b) shall be subject to judicial review only to the extent provided in section 702 of title 5.

§ 1907. Definitions

As used in this chapter:

(1) Entity

The term “entity” means a partnership, joint venture, association, corporation, organization, network, group, or subgroup, or any form of business collaboration.

(2) Foreign person

The term “foreign person” means any citizen or national of a foreign state or any entity not organized under the laws of the United States, but does not include a foreign state.

(3) Narcotics trafficking

The term “narcotics trafficking” means any illicit activity to cultivate, produce, manufacture, distribute, sell, finance, or transport narcotic drugs, controlled substances, or listed chemicals, or otherwise endeavor or attempt to do so, or to assist, abet, conspire, or collude with others to do so.

(4) Narcotic drug; controlled substance; listed chemical

The terms “narcotic drug”, “controlled substance”, and “listed chemical” have the meanings given those terms in section 802 of this title.

(5) Person

The term “person” means an individual or entity.

(6) United States person

The term “United States person” means any United States citizen or national, permanent resident alien, an entity organized under the laws of the United States (including its foreign branches), or any person within the United States.

(7) Significant foreign narcotics trafficker

The term “significant foreign narcotics trafficker” means any foreign person that plays a significant role in international narcotics trafficking, that the President has determined to be appropriate for sanctions pursuant to this chapter, and that the President has publicly identified in the report required under subsection (b) or (h)(1) of section 1903 of this title.

4. 22 U.S.C. § 2656f (2018) provides in part as follows:

§ 2656f. Annual country reports on terrorism

(a) Requirement of annual country reports on terrorism

The Secretary of State shall transmit to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate, by April 30 of each year, a full and complete report providing—

(1)(A) detailed assessments with respect to each foreign country—

(i) in which acts of international terrorism occurred which were, in the opinion of the Secretary, of major significance;

(ii) about which the Congress was notified during the preceding five years pursuant to section 4605(j) of title 50; and

(iii) which the Secretary determines should be the subject of such report; and

(B) detailed assessments with respect to each foreign country whose territory is being used as a sanctuary for terrorists or terrorist organizations;

* * * * *

(d) Definitions

As used in this section—

(1) the term “international terrorism” means terrorism involving citizens or the territory of more than 1 country;

(2) the term “terrorism” means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents;

(3) the term “terrorist group” means any group practicing, or which has significant subgroups which practice, international terrorism;

(4) the terms “territory” and “territory of the country” mean the land, waters, and airspace of the country; and

(5) the terms “terrorist sanctuary” and “sanctuary” mean an area in the territory of the country—

(A) that is used by a terrorist or terrorist organization—

(i) to carry out terrorist activities, including training, fundraising, financing, and recruitment; or

(ii) as a transit point; and

(B) the government of which expressly consents to, or with knowledge, allows, tolerates, or disregards such use of its territory and is not subject to a determination under—

(i) section 4605(j)(1)(A) of title 50;

(ii) section 2371(a) of this title; or

(iii) section 2780(d) of this title.

Endnotes

1. Paul J. Larkin, "Twenty-First Century Illicit Drugs and Their Discontents: The Scourge of Illicit Fentanyl," Heritage Foundation *Legal Memorandum* No. 313, November 1, 2022, <https://www.heritage.org/sites/default/files/2022-11/LM313.pdf>.
2. See Centers for Disease Control and Prevention, "Fentanyl: Deaths Involving Illicitly Manufactured Fentanyl Are on the Rise," last reviewed June 1, 2022, <https://www.cdc.gov/opioids/basics/fentanyl.html> (accessed April 18, 2023) ("Rates of overdose deaths involving synthetic opioids other than methadone, which includes fentanyl and fentanyl analogs, increased over 56% from 2019 to 2020. The number of overdose deaths involving synthetic opioids in 2020 was more than 18 times the number in 2013. More than 56,000 people died from overdoses involving synthetic opioids in 2020. The latest provisional drug overdose death counts through June 2021 suggest an acceleration of overdose deaths during the COVID-19 pandemic."), and Commission on Combatting Synthetic Opioid Trafficking, *Final Report*, February 2022, p. vii, https://www.rand.org/pubs/external_publications/EP68838.html (accessed April 18, 2023) ("The overdose crisis in the United States claims more lives each year than firearms, suicide, homicide, or motor vehicle crashes.").
3. See, for example, S. 698, Drug Cartel Terrorist Designation Act, 118th Congress, introduced March 8, 2023, <https://www.congress.gov/118/bills/s698/BILLS-118s698is.pdf> (accessed April 18, 2023); press release, "Graham: We Are Going to Unleash the Fury and Might of the U.S. Against These Drug Cartels," Office of Senator Lindsey Graham, March 7, 2023, <https://www.lgraham.senate.gov/public/index.cfm/press-releases?ID=A86EA474-0423-4160-974D-EBCEB3C8F6E7> (accessed April 18, 2023) ("The second step that we will be engaging in is give the military the authority to go after these organizations wherever they exist. Not to invade Mexico. Not to shoot Mexican airplanes down. But to destroy drug labs that are poisoning Americans."); William P. Barr, "The U.S. Must Defeat Mexico's Drug Cartels," *The Wall Street Journal*, March 2, 2023, <https://www.wsj.com/articles/the-us-must-defeat-mexicos-drug-cartels-narco-terrorism-amlo-el-chapo-crenshaw-military-law-enforcement-b8fac731> (accessed April 18, 2023); Brian Michael Jenkins, "Should Mexico's Drug Cartels Be Designated Foreign Terrorist Organizations?" The RAND Blog, March 22, 2023, <https://www.rand.org/blog/2023/03/should-mexicos-drug-cartels-be-designated-foreign-terrorist.html> (accessed April 18, 2023); and Joshua Treviño, "Designating Mexican Cartels as Terrorist Organizations," Texas Public Policy Foundation, March 2023, <https://www.texaspolicy.com/wp-content/uploads/2023/03/2023-03-RR-SST-DesignatingCartelsTerroristOrganizations-JoshuaTrevino-1.pdf> (accessed April 18, 2023). Some parties have urged Congress to list all fentanyl-related substances permanently in Schedule I of the Controlled Substances Act of 1970 or to close the Mexico–United States border to stop fentanyl smuggling. See, for example, S. 614, Protecting Americans from Fentanyl Trafficking Act of 2023, 118th Congress, introduced March 1, 2023, <https://www.congress.gov/118/bills/s614/BILLS-118s614is.pdf> (accessed April 18, 2023), and H.R. 1210, Stop Fentanyl Border Crossing Act, 118th Congress, introduced February 27, 2023, <https://www.congress.gov/118/bills/hr1210/BILLS-118hr1210ih.pdf> (accessed April 18, 2023). Those issues are not discussed in this paper.
4. For a concise summary of how and why such a designation could be done, see Robert Chesney, "Should Mexican Cartels Be Designated as Terrorist Organizations?" Lawfare, March 31, 2011, <https://www.lawfareblog.com/should-mexican-cartels-be-designated-terrorist-organizations> (accessed April 18, 2023). For arguments pro and con, see Liana W. Rosen, June S. Beittel, John W. Rollins, and Clare Ribando Seelke, "Designating Mexican Drug Cartels as Foreign Terrorists: Policy Implications," Congressional Research Service *Insight* No. IN11205, December 6, 2019, <https://crsreports.congress.gov/product/pdf/IN/IN11205/3> (accessed April 18, 2023).
5. In 2019, The Heritage Foundation recommended against such a designation on the grounds that (1) the cartels do not qualify under the relevant federal laws and (2) in any event, such a designation would be the wrong approach to the problems of cartel drug trafficking and the violence that activity creates. See Ana Rosa Quintana, "The U.S. and Mexico Must Develop a New Strategy Against Mexican Cartels But Avoid Designating Them as Foreign Terrorist Organizations," Heritage Foundation *Issue Brief* No. 5021, December 19, 2019, p. 2, https://www.heritage.org/sites/default/files/2019-12/IB5021_0.pdf ("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...at their core, cartels are purely criminal organizations."). Heritage has changed its position on the first point. The second one is under reconsideration.
6. See 8 U.S. Code §§ 1182 and 1899, 21 U.S. Code §§ 1901–1908, and 22 U.S. Code § 2256f, reprinted in Appendix, *infra*. See generally Treviño, "Designating Mexican Cartels as Terrorist Organizations," pp. 3–6.
7. See, for example, Larkin, "Twenty-First Century Illicit Drugs and Their Discontents: The Scourge of Illicit Fentanyl," pp. 10–13.
8. See, for example, Christopher Paul, Agnes Gereben Schaefer, and Colin P. Clarke, *The Challenge of Violent Drug-Trafficking Organizations: An Assessment of Mexican Security Based on Existing RAND Research on Urban Unrest, Insurgency, and Defense-Sector Reform*, RAND Corporation, 2011, <https://www.rand.org/pubs/monographs/MG1125.html> (accessed April 19, 2023) (concluding that Mexico is at risk of becoming overtaken by a narco-trafficker insurgency), and Benjamin Bahney and Agnes Gereben Schaefer, "Assessing Mexico's Narco-Violence," The RAND Blog, May 14, 2009, <https://www.rand.org/blog/2009/05/assessing-mexicos-narco-violence.html> (accessed April 19, 2023) ("The real risk is not drug trafficking itself, or the osmosis of criminality across the border, as pernicious as those problems may be. The real threat to the United States is that Mexicans lose their political will for the fight, and the cartels' organized violence and bribery will permanently subvert Mexican institutions, suppressing real political and economic progress."). That risk has now materialized under current Mexican President Andrés Manuel López Obrador. See Larkin, "Twenty-First Century Illicit Drugs and Their Discontents: The Scourge of Illicit Fentanyl," note 92 ("Mexico is less a partner in the fight against the cartels than a willfully blind observer."). See also *ibid.*, notes 86–92; Barr, "The U.S. Must Defeat Mexico's Drug Cartels"; and William P. Barr, Letter, "Barr Responds to Mexico on Drug Cartels," *The Wall Street Journal*, March 21, 2023, <https://www.wsj.com/articles/barr-mexico-drug-cartels-ee0d8933> (accessed April 19, 2023) ("[Mexican Foreign Secretary Marcelo Ebrard Casaubon] ignores the obstacles to real progress. First, the cartels' grip on Mexico is so strong

that Mexico lacks the ability to free itself from their domination. This impotence is largely due to the cartels' success in corrupting Mexico's government at all levels. Breaking free will require U.S. help inside Mexico, hopefully working cooperatively with the Mexicans. [¶] Second, President Andrés Manuel López Obrador has no interest in seriously confronting the cartels and won't allow the U.S. to do it. He wants to 'hug' them, not fight them. Only after President Trump threatened to designate the cartels as terrorists did AMLO make halfhearted gestures at cooperation—for show. These abruptly stopped when Mr. Trump lost re-election. AMLO's plan: If the cartels are left free to traffic drugs to the U.S., they'll be more peaceful inside Mexico. This policy has failed.”).

9. See, for example, *Collins v. Hardyman*, 341 U.S. 651, 662 (1951), <https://tile.loc.gov/storage-services/service/ll/usrep/usrep341/usrep341651/usrep341651.pdf> (accessed April 19, 2023); Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Harper & Row, 1988), pp. 342–343, 425–429, and 434–435; and Randall Kennedy, *Race, Crime, and the Law* (New York: Vintage, 1997), pp. 29–49 and 87.
10. See, for example, CFR.org Editors, “Mexico's Long War: Drugs, Crime, and the Cartels,” Council on Foreign Relations *Background*, last updated September 7, 2022, <https://www.cfr.org/background/mexicos-long-war-drugs-crime-and-cartels> (accessed April 19, 2023).
11. See 18 U.S. Code § 2339A, <https://www.law.cornell.edu/uscode/text/18/2339A> (accessed April 19, 2023).
12. See *United States v. Guzman Loera*, 24 F.4th 144 (2d Cir. 2022), <https://casetext.com/case/united-states-v-loera-42> (accessed April 19, 2023).
13. Forms of protection can include asylum, withholding of removal, and protection under the Convention Against Torture. Aliens typically request all three types to increase their chances of receiving one form of relief.
14. Compare, for example, S.J. Res. 23, Authorization for Use of Military Force, Public Law No. 107-40, 107th Congress, September 18, 2021, Sec. 2(a), <https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf> (accessed April 19, 2023) (“IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”).
15. See H.J. Res. 542, War Powers Resolution, Public Law No. 93-148, 93rd Congress, November 7, 1973, Sec. 8(a), <https://www.congress.gov/93/statute/STATUTE-87/STATUTE-87-Pg555.pdf> (accessed April 19, 2023) (“Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—[¶] (1) from any provision of law (whether or not in effect before November 7, 1973), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or [¶] (2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.”).
16. One bill has already been introduced to provide such authorization. See H.J. Res. 18, Authorization for the Use of Military Force to Combat, Attack, Resist, Target, Eliminate, and Limit Influence Resolution (AUMF CARTEL Influence Resolution), 118th Congress, introduced January 12, 2023, <https://www.congress.gov/118/bills/hjres18/BILLS-118hjres18ih.pdf> (accessed April 19, 2023). Subsections 2(a)–(d) provide as follows:

In General.—The President is authorized to use all necessary and appropriate force against those foreign nations, foreign organizations, or foreign persons affiliated with foreign organizations that the President determines—

(1) have violated section 401(a)(1) of the Controlled Substances Act (21 U.S.C. 841(a)(1)), or have attempted or conspired to violate such section 401(a)(1) in violation of section 406 of such Act (21 U.S.C. 846), with respect to trafficking into the United States fentanyl or a fentanyl-related substance;

(2) have trafficked fentanyl or a fentanyl-related substance outside the United States with the intention of such fentanyl or fentanyl-related substance being trafficked into the United States in violation of section 401(a)(1) or 406 of the Controlled Substances Act (21 U.S.C. 841(a)(1), 846) as described in paragraph (1);

(3) have produced or trafficked a substance that is a precursor to fentanyl or a fentanyl-related substance with the intention of such precursor, fentanyl, or fentanyl-related substance being trafficked into the United States in violation of section 401(a)(1) or 406 of the Controlled Substances Act (21 U.S.C. 841(a)(1), 846) as described in paragraph (1);

(4) have engaged in kinetic actions against United States Federal, State, local, tribal, or territorial law enforcement personnel operating in the territory of the United States or abroad;

(5) have engaged in kinetic actions against law enforcement, military, or other governmental personnel of a country with a common border with the United States or any other country in the Western Hemisphere; or

(6) have used violence and intimidation for the purpose of establishing and controlling territory to be used for illicit means.

(b) Deemed Organizations.—Effective on the date of the enactment of this joint resolution, the following foreign organizations, and their members, shall be deemed to have been determined by the President under subsection (a) to meet the criteria described in such subsection:

(1) The Sinaloa Cartel.

(2) The Jalisco New Generation Cartel.

(3) The Gulf Cartel.

(4) The Los Zetas Cartel.

(5) The Northeast Cartel.

(6) The Juarez Cartel.

(7) The Tijuana Cartel.

(8) The Beltran–Levy Cartel.

(9) The La Familia Michoacana, also known as the Knight Templar Cartel.

(c) **Limitation.**—The authority to use all necessary and appropriate force pursuant to subsection (a) against foreign organizations and foreign persons affiliated with foreign organizations described in subsection (a) shall apply only with respect to those organizations and persons located outside of the territory of the United States.

(d) **Termination.**—The authority to use all necessary and appropriate force pursuant to subsection (a) shall terminate on the date that is 5 years after the date of the enactment of this joint resolution.

17. See H.J. Res. 542, War Powers Resolution, Sec. 2(c) (“The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”).
18. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd Ed. (New Haven and London: Yale University Press, 1986), p. 103.