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From the Halls of Montezuma:
The Promise and Pitfalls of Designating Mexican Drug
Cartels as Foreign Terrorist Organizations

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**FROM THE HALLS OF MONTEZUMA: THE PROMISE AND PITFALLS OF
DESIGNATING MEXICAN DRUG CARTELS AS FOREIGN TERRORIST
ORGANIZATIONS**

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ABSTRACT

A common rhetorical refrain in American politics is to treat malignant groups “like terrorists.” Today, this language is often applied to Mexican drug cartels. Seeking to curb cross-border violence and fentanyl trafficking, scores of policymakers have urged the federal government to designate these cartels as Foreign Terrorist Organizations (“FTOs”). Using this trend as a jumping-off point, this essay examines the FTO designation framework as-applied to Mexican drug cartels. Specifically, this essay addresses whether these cartels can be designated as FTOs and, if so, whether designation would be in the best interests of the United States. Ultimately, this essay argues that Mexican drug cartels can be designated as FTOs, but for a variety of legal, practical, and political considerations, this would be an imprudent move. Further, this essay notes that there are a variety of arguably more effective alternatives if policymakers remain interested in aggressively pursuing cartel activity.

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INTRODUCTION

In March 2023, four Americans civilians suddenly found themselves under siege on foreign soil.¹ Moments before, they were traveling to a doctor's appointment.² Now, their car was quickly being surrounded by armed men clad in tactical gear.³ In a desperate attempt to escape, they abandoned their car and started running.⁴ They did not get far. Shots rang out—two of the Americans were wounded, while the other two lay dying in the street.⁵ The living and dead were loaded into the back of a pickup truck at gunpoint and whisked away to a wooden shack where they were kept under guard.⁶ After searching an area colloquially referred to as “Bagdad Beach” local authorities eventually rescued the two survivors.⁷

Despite the regional nickname, this murder-kidnapping occurred nowhere near the Middle East. Rather, it occurred mere miles from Brownsville, Texas, across the border in Mexico.⁸ And this was no lone-wolf act of street violence. Rather, the perpetrators were members of the Gulf Cartel, an international drug trafficking organization.⁹ But perhaps more shocking than the attack itself was the aftermath. Days later, police discovered five members of the Gulf Cartel with their hands bound, lying on a high-traffic street in Matamoros, Mexico.¹⁰ They were under guard by a man that provided the police with a letter from Gulf Cartel leadership.¹¹ Astonishingly, it was an apology letter that expressed sympathy for the American victims and declared that the men lying prone in the street were not only blameworthy, but ready to accept responsibility.¹² The viciousness and sheer oddity of this event captured the fascination of media outlets around the world.¹³

With media attention came Congressional action. Their proposed solution? Designate Mexican drug cartels as foreign terrorist organizations (“FTOs”).¹⁴ At first glance this makes sense: if cartels are willing to attack civilian populations like terrorists, we should treat them like terrorists. This argument has found wide appeal

¹ Alfredo Peña, Fabiola Sánchez & Travis Loller, *Survivors of Deadly Mexico Abduction Return to America*, ASSOCIATED PRESS, Mar. 7, 2023.

² *Id.*

³ CNN, *Americans Kidnapped by Mexican Cartel Reveal Horrifying Details*, YOUTUBE 4:57 (Apr. 11, 2023), <https://www.youtube.com/watch?v=4AT6AJLZnOU>.

⁴ *Id.*

⁵ Peña, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Juan Montes & José de Córdoba, *Mexican Drug Gang Turns In Members It Blames for Americans' Deaths*, WALL ST. J., Mar. 9, 2023.

¹¹ *Id.*

¹² *Id.*

¹³ Will Grant, *Mexico Kidnapping: A Twisted Moral Code Explains Cartel's Apology*, BBC, Mar. 11, 2023.

¹⁴ Press Release, Lindsey Graham, Senator, United States Senate, Graham, Senators Introduce Legislation To Designate Mexican Drug Cartels As Foreign Terrorist Organizations (Mar. 29, 2023), <https://www.lgraham.senate.gov/public/index.cfm/2023/3/graham-senators-introduce-legislation-to-designate-mexican-drug-cartels-as-foreign-terrorist-organizations>.

among many high-ranking state and federal officials. As of the writing of this essay, nearly half of the country's state Attorney Generals support designating Mexican cartels as FTOs.¹⁵ During the fourth Republican Presidential Primary Debate, Governor Ron DeSantis promised that he would designate all Mexican cartels as FTOs if America sent him to the White House.¹⁶ Far from the campaign trail in Washington D.C., Senator Lindsey Graham took to the Senate floor with a rhetorically explosive endorsement of cartel designation:

Drug cartels in Mexico have been terrorizing Americans for decades. We are going to unleash the fury and might of the U.S. against these cartels. We are going to destroy their business model and their lifestyle because our national security and the security of the United States as a whole depends on us taking this decisive action.¹⁷

It is easy to understand where this fiery floor speech comes from. Overt acts of violence aside, designating cartels as FTOs seems like a proportional response considering the number of deaths indirectly caused by drug trafficking. The Drug Enforcement Agency found that Mexican cartels were a driving force behind a new record high for overdose deaths in the United States—over 100,000 deaths in 2021 alone.¹⁸ Many of these deaths were caused by fentanyl or its chemical analogs which, as Senator Graham noted, “cause[s] the equivalent of a new September 11th every two weeks.”¹⁹ The U.S. Commission on Combatting Synthetic Opioid Trafficking went so far as to describe fentanyl as a “slow-motion weapon of mass destruction in pill form.”²⁰

As demonstrated above, there are vivid parallels between the activities of drug cartels and terrorists. But rhetoric aside, does it make sense to designate drug cartels as FTOs alongside Al-Qaeda and Hamas? The initial thesis for this essay was yes—it would make sense. However, further research revealed that the legal, practical, and political dimensions of this issue make designating drug cartels as FTOs undesirable. While designating drug cartels as FTOs is possible under the current legal framework, we should decline to do so. Designation would stretch the limits of the law, cause disfunction, and recklessly spend limited political capital on redundant or inert posturing. In short, it would be a waste, and we can do better.

¹⁵ See Letter to Pres. Joseph R. Biden & Sec’y. of State Antony J. Blinken from Att’y General of the Commonwealth of Va. Jason S. Miyares et. al. 5–6 (Feb. 8, 2023) (including signatures from 21 State Attorney Generals) [hereinafter “Letter from State Attorney Generals”].

¹⁶ Zaid Jilani, *GOP Candidates at Debate Demand Stricter Policy on Immigration*, NEWS NATION, Dec. 7, 2023.

¹⁷ Office of U.S. Senator Lindsay Graham, *Graham, Kennedy at Press Conference on Stepping Up Fight Against Fentanyl, Mexican Drug Cartels*, YOUTUBE 2:10 (Mar. 8, 2023), <https://www.youtube.com/watch?v=fAGn9HyLX6c&t=128s>.

¹⁸ Washington Division Public Information Office, *Fentanyl Deaths Climbing, DEA Washington Continues the Fight* (Feb. 16, 2022), <https://www.dea.gov/stories/2022/02/2022-02-16/fentanyl-deaths-climbing-dea-washington-continues-fight>.

¹⁹ Office of U.S. Senator Lindsay Graham, *supra* note 17.

²⁰ U.S.A. COMMISSION ON COMBATTING SYNTHETIC OPIOID TRAFFICKING, FINAL REPORT ix (Feb. 2022).

This essay will walk through the analysis that led to this conclusion in five parts: Part I will briefly cover the legal framework of FTO designation; Part II will explain how prominent drug cartels can legally qualify as FTOs; Part III will address the promise and pitfalls of cartel designation; Part IV will touch on preferable alternatives; and Part V will provide closing thoughts on why this flawed and obscure legal mechanism has entered the political mainstream.

I. THE FRAMEWORK(S) OF DESIGNATION

The legal framework used to designate FTOs comes from what is perhaps one of the most controversial pieces of legislation enacted in the last 30 years, the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).²¹ Fortunately for this essay, we need not delve into the often-debated death penalty provisions. Instead, our focus is limited to Sections 302: the provisions that created the FTO designation framework.²²

On its face, FTO designation is relatively simple. To designate an organization as an FTO, the Secretary of State only needs to make three findings.²³ First, that the organization in question is a foreign organization.²⁴ Second, that the organization engages in “terrorist activity”; “terrorism”; or retains the capability and intent to engage in either “terrorist activity or terrorism.”²⁵ Third, that the organization’s terrorist activities “threaten the security of United States nationals or the national security of the United States.”²⁶ There are also several bureaucratic requirements associated with FTO designation, but in practice, they have little impact on whether the Secretary of State decides which foreign organizations qualify as FTOs.²⁷

The first and third requirements are permissive. For the purposes of this essay, determining whether an organization is foreign presents no interpretive issue.²⁸ As for threatening the national security of the United States, 8 U.S.C. § 1189(d)(2) defines “national security” in sweeping terms. Any threat to “national

²¹ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1248 [hereinafter “AEDPA”]; see Brandon Garrett & Kaitlin Phillips, *AEDPA Repeal*, 107 CORNELL L. REV. 1739, 1744 (2022) (collecting criticism of AEDPA’s death penalty provisions from academics, legislators, and federal judges).

²² AEDPA § 302 (codified at 8 U.S.C.A. § 1189).

²³ The Secretary of State is required to consult with the Secretary of the Treasury and Attorney General when making these findings. 8 U.S.C. § 1189(d)(4).

²⁴ 8 U.S.C. § 1189(a)(1)(A).

²⁵ *Id.* § 1189(a)(1)(B).

²⁶ *Id.* § 1189(a)(1)(C).

²⁷ See U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-629, COMBATING TERRORISM: FOREIGN TERRORIST ORGANIZATION DESIGNATION PROCESS AND U.S. AGENCY ENFORCEMENT ACTIONS 3–6 (Sept. 2023) (observing that the FTO designation process could be analyzed through the lens of six bureaucratic steps, but recognizing that the law only requires the Secretary of State to make three findings to designate a group as an FTO).

²⁸ One could argue that some cartels may no longer be truly “foreign organizations” in that some are now primarily based or conduct most of their operations within the borders of the United States. But this question, while interesting, is outside the scope of this essay. This essay is concerned with what most people would colloquially understand a Mexican cartel to be, that is, a drug trafficking organization that is primarily based in Mexico.

defense, foreign relations, or economic interests of the United States” would qualify as a threat to our “national security.”²⁹ As a result, the first and third requirements present no real barrier to designating almost any foreign organization as an FTO. The second requirement—the “terrorist activity” or “terrorism” requirement—is the limiting principle here that requires deeper analysis.

Both “terrorist activity” and “terrorism” are terms of art in the FTO framework that include parenthetical cross references to other statutory schemes.³⁰ Congress likely chose to provide specific cross references for these definitions due to the rapid proliferation of terrorism-related terms throughout federal law. Indeed, when the FTO framework was last amended in 2004,³¹ the U.S. Code included no less than 18 different definitions of terrorism.³² This is up from one definition in 1976.³³ While intuition would tell us that “terrorist activity” and “terrorism” are similar terms, in the strange reality of the U.S. Code, their definitions are substantially different.

The term “terrorist activity” is taken from a section of the U.S. Code dealing with disqualifying conduct for those seeking to immigrate to the United States.³⁴ Under this definition any act, threat, or conspiracy that violates the laws of the relevant host country or United States, and involves a hijacking, kidnapping, attack on diplomatic staff, assassination, use of a chemical agent, or use of a dangerous weapon, constitutes “terrorist activity.”³⁵ Importantly, the only portions of this definition that include an intent requirement are the dangerous weapon and chemical use provisions.³⁶ The dangerous weapon provision requires that the weapon be used “for more than pecuniary gain” and with an intent to endanger the safety of individuals or cause substantial property damage.³⁷ The chemical use provision still requires an intent to endanger or cause property damage, but drops the “for more than pecuniary gain” language.³⁸ In both form and function, this is an exceedingly permissible definition. For example, threatening to kidnap an individual is technically enough to qualify as “terrorist activity.”

In contrast, the term “terrorism” is taken from a section of the U.S. Code requiring the Secretary of State to create an annual report on terrorist activities in other countries.³⁹ This definition is more exacting, defining “terrorism” as any “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”⁴⁰ While the *actus reus* element

²⁹ 8 U.S.C. § 1189(d)(2).

³⁰ *See id.* § 1189(a)(1)(B) (providing cross references for specific statutory definitions of “terrorist activity” and “terrorism”).

³¹ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458, 118 Stat. 3801.

³² *See* Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem Of Too Many Grails*, 30 J. LEG. 249, 255 n.48 (providing citations to 18 definitions of “terrorism” in the U.S. Code).

³³ *Id.* at 254.

³⁴ 8 U.S.C. § 1182(a)(3)(B)(iii).

³⁵ *Id.* § 1182(a)(3)(B)(iii).

³⁶ *Id.* § 1182(a)(3)(B)(iii)(V).

³⁷ *Id.* § 1182(a)(3)(B)(iii)(V)(b).

³⁸ *Id.* § 1182(a)(3)(B)(iii)(V)(a).

³⁹ 22 U.S.C. § 2656f(a)

⁴⁰ *Id.* § 2656f(d)(2).

here is arguably more broad, the dual intent requirements of premeditation and political motivation make this definition far more restrictive than the “terrorist activity” definition above. Using the same example, a simple threat to kidnap an individual would not qualify as “terrorism.” To qualify as “terrorism,” a threat to kidnap would have to be both premeditated and politically motivated.

In practice, we have two different FTO frameworks. The broadly permissive “terrorist activity” framework, and the more restrictive “terrorism” framework.” Outside of these frameworks, Congress has consistently maintained that they have the authority to direct the Secretary of State to designate certain organization as FTOs through legislation.⁴¹ However, critics have argued that such legislation may qualify as illegal bills of attainder or violate other administrative law principles.⁴² As Congress has never successfully designated an FTO through legislation, this essay will focus on the existing statutes that empower the Secretary of State to make FTO designations.

II. FRIENDS IN LOW PLACES: APPLYING THE FTO FRAMEWORK TO SELECT CARTELS

Like the sand dunes that shift and swirl along Mexico’s northern border,⁴³ the landscape of cartel activity is constantly changing.⁴⁴ In 2006, there were four dominant cartels operating in Mexico.⁴⁵ But by 2022, those four cartels had splintered into nine major groups.⁴⁶ Analysts have concluded that this fragmentation has largely been driven by enforcement strategies focused on eliminating cartel leadership.⁴⁷ While the goal of this strategy is commendable, an undeniable side effect has been the creation of power vacuums across Mexico.⁴⁸ Seeking to fill these power vacuums, rival cartel factions have become increasingly violent and militarized.⁴⁹ This has created a mosaic of overlapping territorial claims which cartels contest in seemingly never-ending multi-lateral conflicts.⁵⁰ Indeed, Secretary of State Blinken recently testified to Congress that it would be “fair to

⁴¹ See Ending the Notorious, Aggressive, and Remorseless Criminal Organizations and Syndicates Act of 2023, S. 1048, 118th Cong. § 3(a) (seeking to designate certain listed cartels as FTOs with simple “hereby designated” language); see also, Holding Accountable Russian Mercenaries Act, S. 416, 118th Cong., § 4(a) (2023) (seeking to designate the Wagner Group as an FTO by stating that the Secretary of State “shall” designate).

⁴² Adam Pearlman, *Talking Points — The Fatal Flaws of the HARM Act*, SCIF NAT’L SEC. BLOG, Mar. 8, 2023, <https://thescif.org/talking-points-the-fatal-flaws-of-the-harm-act-a91cd4c79727>.

⁴³ *Samalayuca Sand Dunes*, NASA EARTH OBSERVATORY (Mar. 24, 2018), <https://earthobservatory.nasa.gov/images/91885/samalayuca-sand-dunes>.

⁴⁴ JUNE S. BIETTEL, CONG. RSCH. SERV., R45176, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS 1 (June 7, 2022).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 22–23.

⁴⁹ *Id.*

⁵⁰ *Id.* at 11.

say” that cartels, rather than the Mexican government, control sizable portions of Mexico.⁵¹

Of the nine substantial cartel groups currently operating in Mexico, three have consistently maintained a dominant or substantial regional presence over the past several years—the Jalisco New Generation, Sinaloa, and Gulf cartels.⁵² The most recent survey of cartel geography in 2021 indicates that these three cartels have largely maintained their own regional strongholds despite continuing fragmentation and intra-group conflict.⁵³



Figure 1: Estimated territorial presence and dominance of three prominent cartels.⁵⁴

To demonstrate that the Secretary of State could designate these groups as FTOs, we will walk through a brief analysis of each group in turn. Because the “terrorist activity” FTO framework is the most permissive, and thus provides the most likely avenue of designation, we will be looking at these cartels through that lens.

A. *The Jalisco New Generation Cartel*

The Jalisco New Generation Cartel (“JNGC”) primarily operates along Mexico’s Pacific Coast and western interior.⁵⁵ Originally, the JNGC served as an enforcement arm of the Sinaloa Cartel, but sometime in the early 2010s, the group was spun-off as an independent organization.⁵⁶ By 2016, the United States Treasury Department had labeled the JNGC as “one of the world’s most violent and prolific drug trafficking organizations.”⁵⁷ This ignominious distinction is well-earned. The JNGC has been linked to several mass gravesites in southwestern Mexico and, in

⁵¹ *Mexico Denies Cartels Control Parts of Country, Rejecting Blinken Remark*, REUTERS (Mar. 24, 2023).

⁵² Biettel, *supra* note 44, at 9–11.

⁵³ *Id.*

⁵⁴ *Id.* at 11.

⁵⁵ Luis Alonso Pérez, *Mexico’s Jalisco Cartel—New Generation: From Extinction to World Domination*, INSIGHT CRIME, Dec. 26, 2016, <https://insightcrime.org/news/analysis/mexico-cartel-jalisco-new-generation-extinction-world-domination/>.

⁵⁶ Biettel, *supra* note 44, at 32.

⁵⁷ Press Release, U.S. Dep’t of the Treasury, Treasury Sanctions Individuals Supporting Powerful Mexico-Based Drug Cartels, (Oct. 27, 2016), <https://home.treasury.gov/news/press-releases/j10596>.

2015, successfully shot down a Mexican Army helicopter.⁵⁸ The JNGC has also been linked to more than 100 assassinations of Mexican officials across all three branches of government.⁵⁹ In 2020, the JNGC assassinated the former Governor of Jalisco State, Aristoteles Sandoval, in the cartel's stronghold of Puerto Vallarta.⁶⁰ This came only months after the JNGC's assassination attempt against the Mexico City Chief of Police.⁶¹

Under the "terrorist activity" FTO framework the JNGC qualifies as an FTO. First, being based in Mexico, it satisfies the foreign organization requirement. Second, both its successful and attempted assassinations satisfy the permissive "terrorist activity" requirement.⁶² Third, the JNGC's assassination of Mexican officials threatens the national security of the United States. As defined under the FTO framework, national security encompasses defense, foreign relations, and the economic interests of the United States.⁶³ Assassinating Mexican officials harms the national security of the United States in two distinct ways. First, these assassinations disrupt our foreign relations with Mexico by depriving the United States of potential governmental partners in the fight against drug trafficking. Second, United States economic interests are harmed due to the chilling and destabilizing effect that assassinations have on cross-border trade.⁶⁴

B. *The Sinaloa Cartel*

The Sinaloa Cartel is one of the world's most expansive drug trafficking organizations with active operations in an estimated 50 countries.⁶⁵ In 2012, the Sinaloa Cartel was so dominant that analysts calculated it controlled roughly half of all drug trafficking operations in Mexico, generating annual revenues upwards of \$3 billion.⁶⁶ While still powerful, the Sinaloa Cartel has suffered several setbacks over the past decade. The extradition and imprisonment of its de facto leader Joaquín "El Chapo" Guzmán sparked, or arguably accelerated, a power struggle

⁵⁸ RAND CORP., COUNTERWORK: COUNTERING THE EXPANSION OF TRANSNATIONAL CRIMINAL NETWORKS 52, (2017), https://www.rand.org/pubs/research_reports/RR1481.html; Biettel, *supra* note 44, at 4.

⁵⁹ Biettel, *supra* note 44, at 34.

⁶⁰ Oscar Lopez, *An Ex-Governor Is Gunned Down, Punctuating a Deadly Year for Mexico*, N.Y. TIMES, Dec. 18, 2020.

⁶¹ *Id.*

⁶² The federal murder statute—18 U.S.C. § 1111—or its Mexican analogue would satisfy the threshold requirement for the violation of United States law. The premeditated nature of the murders as well as the victims' status—Mexican officials—elevate these murders to assassinations and thus satisfies 8 U.S.C. § 1182(a)(3)(B)(iii).

⁶³ 8 U.S.C. § 1189(d)(2).

⁶⁴ See Arturo Cervantes et. al., *Estimating the Economic Impact Of Interpersonal Violence In Mexico In 2021: Projecting Three Hypothetical Scenarios for 2030*, 47 REV. PANAM SALUD PUBLICA 39 (2023) (estimating the economic cost of crime and violence in Mexico to be upwards of \$192 billion).

⁶⁵ *Sinaloa Cartel*, INSIGHT CRIME (May 4, 2021), <https://insightcrime.org/mexico-organized-crime-news/sinaloa-cartel-profile/>; Cecilia Anesi & Giulio Rubino, *Inside the Sinaloa Cartel's Move Toward Europe*, ORGANIZED CRIME AND CORRUPTION REPORTING PROJECT (Dec. 15, 2020), <https://www.occrp.org/en/investigations/inside-the-sinaloa-cartels-move-toward-europe>.

⁶⁶ Biettel, *supra* note 44, at 23.

between four factions within the Sinaloa Cartel.⁶⁷ At the same time, smaller factions that had left the Sinaloa Cartel in the early 2000s have started to challenge it for dominance in various regions across Mexico.⁶⁸

While the JNGC employs brazen acts of violence, the Sinaloa Cartel uses what commentators have called a “careful calibration of violence”—a mixture of subtle threat and corruption backed by the potential of violence.⁶⁹ But the Sinaloa Cartel shows little restraint when combatting rival cartels. In April 2023, Attorney General Merrick Garland announced a series of indictments against Sinaloa Cartel leaders that detail how the Sinaloa Cartel uses kidnapping, torture, and murder to coerce competing drug traffickers to leave contested territory.⁷⁰ Indeed, members of rival cartels were allegedly kidnapped, waterboarded, electrocuted, and in at least one case, fed to a tiger.⁷¹

Like the JNGC, the Sinaloa Cartel also qualifies as an FTO. First, it is based in Mexico with more operations abroad, making it a foreign organization. Second, the Sinaloa Cartel’s use of kidnapping to coerce rival cartels into leaving contested territory satisfies the “terrorist activity” requirement.⁷² Third, the Sinaloa Cartel’s systematic use of kidnapping to protect its trafficking activities harms the United States’ national security interests by impairing foreign relations and economic activity. Indeed, the U.S. Department of State bars government officials from traveling to several Mexican states where the Sinaloa Cartel is most active.⁷³ This is due to the pervasiveness of crime, and more specifically, kidnappings in those areas.⁷⁴

C. *The Gulf Cartel*

The Gulf Cartel, as one might expect, operates along Mexico’s Gulf Coast.⁷⁵ But unlike the JNGC or Sinaloa Cartel, the Gulf Cartel is arguably in the process of deteriorating into distinct competing factions.⁷⁶ Once a major rival to the Sinaloa Cartel in the early 2000s, the Gulf Cartel has been reduced to playing the proverbial

⁶⁷ *Id.* at 26.

⁶⁸ *Id.* at 25.

⁶⁹ Vanda Felbab-Brown, *How The Sinaloa Cartel Rules*, BROOKINGS COMMENTARY, Apr. 2022, <https://www.brookings.edu/articles/how-the-sinaloa-cartel-rules/>.

⁷⁰ Press Release, U.S. Att’y Off. S.D.N.Y., U.S. Attorney Announces Charges Against Leadership Of The Sinaloa Cartel And 25 Other Defendants In Massive Fentanyl Importation And Trafficking Conspiracies (Apr. 14, 2023), <https://www.justice.gov/usao-sdny/pr/us-attorney-announces-charges-against-leadership-sinaloa-cartel-and-25-other-defendants>.

⁷¹ Alexander Mallin, *DOJ Details Gruesome Crimes by Sinaloa Cartel in Global Fentanyl Trafficking Crackdown*, ABC NEWS, Apr. 14, 2023.

⁷² The federal kidnapping statute—18 U.S.C. § 1201—or its Mexican analogue would satisfy the threshold requirement for the violation of United States law. The required “reward” under § 1201 in these circumstances would be the removal of rival cartels from contested territory. As for 8 U.S.C. § 1182(a)(3)(B)(iii), kidnapping is itself a qualifying act that constitutes “terrorist activity.”

⁷³ See *Mexico Travel Advisory*, U.S. DEP’T OF STATE (giving a “do not travel to” warning to Sinaloa State due to “crime and kidnappings.”).

⁷⁴ See *id.* (giving a “do not travel to” warning to Sinaloa State due to “crime and kidnappings.”).

⁷⁵ Biettel, *supra* note 44, at 28.

⁷⁶ *Id.*

second-fiddle due to intense conflict with its former enforcement arm Los Zetas.⁷⁷ But make no mistake, the Gulf Cartel is still an active and dangerous organization—particularly along the Texas border.⁷⁸ The Gulf Cartel was responsible for the kidnapping and murders mentioned in the Introduction,⁷⁹ but has also been known to strike at United States diplomatic personnel. In 2008, Gulf Cartel associates threw a grenade and fired several 45 caliber rounds at the United States consulate in Monterey, Mexico.⁸⁰ This attempted attack on consular staff was the high-water mark for attacks on American diplomats in Mexico until 2010, when a consular employee and her husband were both killed in broad daylight by a newly formed splinter cartel in Juarez.⁸¹

Despite its recent decline, the Gulf Cartel still fits under the same “terrorist activity” FTO framework as the JNGC and Sinaloa Cartel. First, the Gulf Cartel qualifies as a foreign organization given that it primarily operates along the Mexican Gulf. Second, the 2008 consular attack would satisfy the “terrorist activity” requirement as an attempted attack on diplomatic staff.⁸² Alternatively, the 2023 kidnapping of four American citizens would also qualify as “terrorist activity.”⁸³ Third, attacks on diplomatic staff or kidnapping American citizens harms American foreign relations with Mexico and contravenes shared economic interests—satisfying the national security requirement.

D. *The All-Cartel “Chemical Agent” Theory of Designation*

While the above cartel-specific applications of the FTO “terrorist activity” framework are valid, there is another general theory of designation that would qualify virtually any drug trafficking organization as an FTO. After the threshold violation of United States or relevant foreign law is established, 8 U.S.C. § 1182 notes that the use of any “chemical agent. . . with the intent to endanger, directly or indirectly, the safety of one or more individuals” qualifies as “terrorist activity.”⁸⁴

Despite what the American public might think, trafficking controlled substances like fentanyl is illegal in Mexico, so the violation of foreign law

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ CNN, *supra* note 3.

⁸⁰ *Zetas Drug Cartel Leader Who Ordered US Consulate Attack Dies in Mexican Prison*, ASSOCIATED PRESS (Sept. 8, 2015). The Zetas were still an integrated element of the Gulf Cartel at the time of the attack. Biettel, *supra* note 44 at 28.

⁸¹ Julian Cardona, *Mexico Gunmen Kill American Consulate Staff*, REUTERS, Mar. 15, 2010.

⁸² While it is a slim reed to hang your hat on, the damage to federal property statute—18 U.S.C. § 1363—or its Mexican analogue would satisfy the threshold requirement for the violation of United States law. The federal attempted assault statute—18 U.S.C. 111(a)—could provide an alternative basis. As for 8 U.S.C. § 1182(a)(3)(B)(iii), an attempted assault on United States diplomatic staff qualifies as “terrorist activity.”

⁸³ *Cf. supra* note 72 (outlining a similar case for designation based on different instances of kidnapping).

⁸⁴ 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(a).

requirement could easily be satisfied.⁸⁵ The “terrorist activity” requirement is then satisfied by the inherent nature of drug trafficking. To elaborate, cartels are using a “chemical agent”—fentanyl—with the intent that the fentanyl in question will be used as an illicit drug by members of the public, indirectly endangering the safety of one or more individuals as a result. Indeed, fentanyl has rapidly accelerated to become the leading cause of overdose deaths in the United States.⁸⁶ And while this interpretation of § 1182 may seem like a “neat trick,” this was the same theory of FTO designation adopted by 21 State Attorney Generals in a letter to Secretary Blinken.⁸⁷ So while it may be a wildly permissive interoperation of the FTO framework, and a far stretch of the term “use,” it is a textually supported argument with the backing of prominent law enforcement officials.⁸⁸

The existing FTO framework is both broad and permissive. While there are provisions in the § 1182 statutory scheme that impose exacting requirements, like the political motivation element in the “terrorism” definition, these are easily bypassed. FTO designation could simply proceed under the alternative “terrorist activity” definition which provides a path of least resistance due to its comparatively relaxed intent requirements. Under the “terrorist activity” FTO framework, a variety of violent actions support designation even if motivated by non-political goals like profit. And under the Chemical Use Theory, virtually any foreign drug trafficking organization qualifies as an FTO. With such a low bar for designation, the focus on the issue of cartel designation should not be whether we *can*, but whether we *should* pursue these designations.⁸⁹

III. THE PROMISE AND PITFALLS OF CARTEL DESIGNATION

Up until now, we have solely focused on the FTO designation process and its possible application to select cartels. As demonstrated above, it would be relatively easy for the Secretary of State to designate a variety of prominent cartels as FTOs. So now we must turn to the normative question—should we designate these cartels as FTOs? To be sure, FTO designation has the potential to be beneficial, but policymakers seem to neglect the possible downsides of designation in the cartel context. The following sections will discuss the promise and pitfalls of designation, but will ultimately conclude, for legal, practical, and political considerations, that we should not seek to designate cartels as FTOs.

⁸⁵ See DRUG ENFORCEMENT AGENCY, INTELLIGENCE REPORT: FENTANYL FLOW TO THE UNITED STATES 3 (Jan. 2020) (recounting recent efforts of Mexican officials to crack down on fentanyl and fentanyl analogues).

⁸⁶ Washington Division Public Information Office, *supra* note 18.

⁸⁷ Letter from State Attorney Generals, *supra* note 15.

⁸⁸ *Id.*

⁸⁹ Moviegoers may recognize a similar philosophical quandary explored in Steven Spielberg’s 1993 blockbuster *Jurassic Park*. Confronted with the fact that John Hammond’s company has reanimated dinosaurs for profit, Dr. Ian Malcom begins to berate Hammond. The following dialogue ensues:

John Hammond: I don't think you're giving us our due credit. Our scientists have done things which nobody's ever done before...

Dr. Ian Malcom: Yeah, yeah, but your scientists were so preoccupied with *whether or not they could* that they didn't stop to think *if they should*.

JURASSIC PARK, UNIVERSAL PICTURES (1993) (emphasis added).

A. *The Promise of Designation*

Seeking to treat cartels like terrorists certainly has rhetorical power.⁹⁰ But beyond rhetoric, FTO designation could theoretically help to combat cartels by empowering law enforcement and imposing certain restrictions on cartel members. Specifically, there are three enforcement-related consequences that directly flow from FTO designation. First, individuals may be prosecuted for providing “material support” to an FTO.⁹¹ Second, the Treasury Secretary may require all United States financial institutions to freeze any FTO assets under their control.⁹² Third, non-citizen members or representatives of an FTO are barred from entering the United States, and if already present, could face removal proceedings.⁹³

These are potent ramifications and have been used with great effect to take down the support networks of more traditional FTOs. Recently, material support prosecutions have been used to shut down ISIS fundraising sources operating in the United States.⁹⁴ One such prosecution involved a complex scheme featuring sham charities and international cryptocurrency money laundering.⁹⁵ The Department of Justice is also becoming more aggressive in prosecuting material support cases. In fact, it just secured the first material support guilty plea from a corporation—a French cement maker that made extortion payments to an ISIS affiliate in North Africa.⁹⁶ At the same time, the Treasury Department has also frozen substantial amounts of FTO assets. As of 2020, the Treasury Department has frozen over \$22 million in assets linked to Hezbollah alone.⁹⁷ Even the immigration system, which has been widely derided in recent years for its dysfunction,⁹⁸ still seems to regularly deport individuals linked with FTOs.⁹⁹

⁹⁰ See Jilani, *supra* note 16 (including an embedded video of Ron DeSantis receiving a round of applause after promising to designate Mexican cartels as FTOs); see also Office of U.S. Senator Lindsay Graham, *supra* note 17 (demonstrating that Senator Graham’s office thought this speech was important enough to schedule a speech on the Senate floor and clip the C-SPAN footage for his official YouTube page).

⁹¹ CONG. RSCH. SERV., IF10613, FOREIGN TERRORIST ORGANIZATION (FTO) 1 (Sept. 2023).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Press Release, U.S. Dep’t Jus. Pub. Aff. Off., Four Defendants Charged with Conspiring to Provide Material Support to ISIS (Dec. 15, 2022), <https://www.justice.gov/opa/pr/four-defendants-charged-conspiring-provide-material-support-isis>.

⁹⁵ *Id.*

⁹⁶ Press Release, U.S. Dep’t Jus. Pub. Aff. Off., Lafarge Pleads Guilty to Conspiring to Provide Material Support to Foreign Terrorist Organization (Oct. 18, 2022), <https://www.justice.gov/opa/pr/lafarge-pleads-guilty-conspiring-provide-material-support-foreign-terrorist-organizations>.

⁹⁷ U.S. TREASURY DEP’T, TWENTY-NINTH ANNUAL REPORT TO THE CONGRESS ON ASSETS IN THE UNITED STATES RELATING TO TERRORIST COUNTRIES AND ORGANIZATIONS ENGAGED IN INTERNATIONAL TERRORISM 10 (2020).

⁹⁸ Nicole Halet, *‘Dysfunctional’ Doesn’t Begin to Describe Our Immigration Bureaucracy*, THE HILL, Aug. 12, 2021.

⁹⁹ Press Release, U.S. Immigr. & Customs Enf’t, Former naturalized citizen deported to Jordan for withholding ties to deadly Israel bombing (Sept. 21, 2017), <https://www.ice.gov/news/releases/convicted-terrorist-stripped-citizenship-ordered-deported-failing-disclose-ties>.

When policymakers see these positive results, it is understandable that they would naturally want to apply those same successful methods to combatting cartels. Access to material support prosecutions could help to neutralize groups that support or enable cartel activity. For example, it is widely acknowledged that Chinese chemical manufacturers have been selling precursor chemicals for fentanyl and methamphetamine to the JNGC and Sinaloa Cartel for years.¹⁰⁰ If those cartels were designated as FTOs, then the threat of criminal liability could incentivize Chinese chemical manufacturers to discontinue these illicit business arrangements, or at the very least, deter new entrants into the wink-wink, nudge-nudge precursor market.

The same could be said for the application of financial asset freezes. Thanks to the United States' position as the world's largest economy, its banking and financial institutions have far-reaching influence that could make enabling cartel activity more difficult.¹⁰¹ For example, the Sinaloa Cartel effectively operates numerous commercial fishing operations along the Pacific Coast.¹⁰² These businesses likely, either directly or indirectly, have their money pass through American financial institutions at some point. If those cartels were designated as FTOs, the fisheries' assets could be frozen, depriving the cartels of a small revenue stream or an easy money laundering opportunity. However, this would depend on how intertwined the fisheries are with the formal Sinaloa Cartel organization and whether the fishery employees are considered cartel members. This is because asset freezes under the FTO framework only impact the designated organization itself,¹⁰³ not its agents or affiliates like other designation schemes.¹⁰⁴

These are plausible sketches of the effects that FTO designation could have on cartels. But aside from the potential enforcement benefits, FTO designation might also serve as a useful signaling device to both the cartels and the international community. The message that the United States will start treating cartel members like terrorists may deter more risk-averse organizations like the Sinaloa Cartel from further aggressive expansion into the United States.¹⁰⁵ At the same time, it may also encourage Mexico to reconsider their decision to take a more isolationist enforcement approach to combatting cross-border cartel activity. In 2019, President

¹⁰⁰ Vanda Felbab-Brown, *The China Connection in Mexico's Illegal Economies*, BROOKINGS COMMENTARY, Feb. 4, 2022, <https://www.brookings.edu/articles/the-china-connection-in-mexicos-illegal-economies/>.

¹⁰¹ See generally Edward L. Symons, *The United States Banking System*, 19 BROOK. INT'L L. J. 1 (1993) (describing the various modalities of influence that United States banking institutions can exercise on the global stage).

¹⁰² Vanda Felbab-Brown, *Organized Crime Is Taking Over Mexican Fisheries*, BROOKINGS COMMENTARY, Feb. 21, 2022, <https://www.brookings.edu/articles/organized-crime-is-taking-over-mexican-fisheries/>.

¹⁰³ See 8 U.S.C. § 1189(a)(2)(C) ("Secretary of the Treasury may require United States financial institutions possessing or controlling any assets of any foreign *organization* included in the notification to block all financial transactions involving those assets. . .") (emphasis added).

¹⁰⁴ See *infra* Part II.B.2 and accompanying notes (discussing designations schemes that apply to not only organizations, but also individual organization members, organization agents, and even unaffiliated persons that knowingly benefit from drug trafficking activity).

¹⁰⁵ See COUNCIL ON FOREIGN RELATIONS, *MEXICO'S LONG WAR: DRUGS, CRIME, AND THE CARTELS* (Sept. 7, 2022) (detailing the aggressive expansion of both the JNGC and Sinaloa Cartel), <https://www.cfr.org/backgrounder/mexicos-long-war-drugs-crime-and-cartels>.

Obrador decided to withdraw from the Merida Initiative: an anti-trafficking partnership that facilitated cooperation between enforcement officials from Mexico and the United States.¹⁰⁶ Further, in 2020, Mexico passed new national security legislation that restricted the activities of United States law enforcement working in Mexico.¹⁰⁷ The message that the United States is “getting serious” about dismantling the cartels may prompt Mexico to come back to the table and be a part of the discussion, rather than just leave the United States to its own devices.

B. *The Pitfalls of Designation*

At first glance, FTO designation seems like an unutilized tool that might be helpful in the fight against drug trafficking. But legal, practical, and political considerations all urge against designating cartels as FTOs.

1. *The Legal Considerations.* First, legal considerations like precedent and administrability both urge against cartel designation. As demonstrated in Part II, it is easy for the FTO framework to cover a variety of cartels—from the ultra-violent JNGC to the more buttoned-down Sinaloa Cartel.¹⁰⁸ A political motive is not necessary under the “terrorist activity” FTO framework, paving the way for the designation of profit seeking organizations like cartels.¹⁰⁹ But designating cartels, however violent, would undermine a longstanding general definition of “terrorism” and deviate from the existing precedent of FTOs requiring an overarching political goal.¹¹⁰ Granted, it is true that some FTOs like the Revolutionary Armed Forces of Columbia (“FARC”) traffic drugs.¹¹¹ But the FARC are easily distinguishable from Mexican cartels because they have an overarching political goal of implementing Marxist-Leninist policies by any means necessary.¹¹² Indeed, FARC trafficking operations only exist to fuel their protracted insurgency against the bourgeoisie.¹¹³ Cartels, on the other hand, are simply profit driven.¹¹⁴ It would not be an

¹⁰⁶ Biettel, *supra* note 44, at 6.

¹⁰⁷ *Id.*

¹⁰⁸ *Supra* Part II.

¹⁰⁹ *Supra* Part I.

¹¹⁰ See Geoffrey Levitt, *Is 'Terrorism' Worth Defining?*, 13 OHIO N.U. L. REV. 97, 108–09 (2000) (observing that many existing definitions of terrorism are “characterized by the use of a fairly broad substantive element and a general, politically oriented intent element.”); *See also Designated Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, <https://www.state.gov/foreign-terrorist-organizations/> (last visited Dec. 8, 2023) (listing existing FTOs; all of which are militant organizations seeking political ends of a religious, philosophical, or economic sense).

¹¹¹ *Designated Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, <https://www.state.gov/foreign-terrorist-organizations/> (last visited Dec. 8, 2023) (listing the FARC as an FTO).

¹¹² GARY LEECH, *FARC: THE LONGEST INSURGENCY* 31 (2004)

¹¹³ *Id.* at 69.

¹¹⁴ Scott Englund, *Mexican Drug Cartels Are Violent—But They’re Not Terrorists*, WAR ON THE ROCKS, Feb. 24, 2020, <https://warontherocks.com/2020/02/mexican-drug-cartels-are-violent-but-theyre-not-terrorists/>.

exaggeration to say that cartels have more in common with La Cosa Nostra than any FTO.¹¹⁵ Leading counterterrorism experts like Professor Scott Englund concur:

Profit motivates a drug cartel to use violence; violence is used to protect its business, settle disputes, and avoid law enforcement. Coercion, intimidation, and undermining the effectiveness of a government are goals a drug cartel can have in common with terrorist groups, but it does so to maximize its profit.¹¹⁶

Precedent aside, administrability concerns also urge against cartel designation. Indeed, designating cartels as FTOs could inadvertently increase the bureaucratic barriers associated with bringing prosecutions against cartels. Along with various other notice and investigation requirements, Section 9-2.136 of the Justice Manual requires Assistant United States Attorneys to seek prior approval from the Department of Justice National Security Division before proceeding with any material support prosecutions.¹¹⁷ If cartels are designated as FTOs, the volume of material support prosecutions could clog bureaucratic channels or monopolize limited national security resources. The National Security Division could also just deny approval for such prosecutions, rendering one of the major reasons for FTO designation inert.

2. The Practical Considerations. Second, practical considerations also urge against cartel designation. Specifically, designating cartels would be both ineffective and redundant. FTO designation fills a particular national security niche. It combats terrorism by cutting terrorist organizations off from the privileges of civil society—such as the use of our banking and immigration systems. But when it comes to combatting criminal organizations that already circumvent those systems, FTO designation is ineffective and little more than an empty gesture. Indeed, a group of academics studying the effects of FTO designation found that organizations funded through criminal activities—like drug trafficking—were not substantially impacted by the effects of FTO designation.¹¹⁸

Even if we assume that the enforcement mechanisms that flow from FTO designation could have some disruptive effect on cartel operations, designation would still be redundant if not duplicative. The current enforcement landscape for

¹¹⁵ A surprising amount of scholarly debate exists on whether cartels should be placed in the same category as traditional criminal organizations like La Cosa Nostra and Japanese Yakuza. For a perspective that drug trafficking cartels closely resemble the “five iconic mafias”, see Peter Reuter & Letizia Paoli, *How Similar Are Modern Criminal Syndicates to Traditional Mafias?*, 49 CRIM. & JUS. 1, 53 (2020). For an alternative take that cartels are nothing like mafia organizations, see generally Letizia Paoli, Bryan Peters & Peter Reuter, *Is the Sinaloa Cartel a Mafia?*, 63 BRIT. J. CRIM. No. 2 (March 2023).

¹¹⁶ Englund, *supra* note 114.

¹¹⁷ JUSTICE MANUAL, JUS. DEP’T §§ 9-2.136A–C.

¹¹⁸ Hyeran Jo, Brian J. Phillips & Joshua Alley, *Can Blacklisting Reduce Terrorist Attacks? The Case of the U.S. Foreign Terrorist Organization (FTO) List*, in THE POWER OF GLOBAL PERFORMANCE INDICATORS 276 (Judith G. Kelly & Beth A. Simmons eds. 2020).

drug trafficking offers myriad other designation lists,¹¹⁹ prosecutorial options,¹²⁰ and asset controls¹²¹ that are not only tailored for tackling trafficking organizations, but have the same effects in a more direct way.

Consider our prior example of Chinese chemical manufacturers that sell fentanyl precursors to the cartels. Federal prosecutors have already filed numerous indictments against Chinese companies and their executives for supplying Mexican cartels with precursor chemicals.¹²² Instead of running the gambit of designation and material support prosecutions, federal prosecutors are using the existing drug enforcement structure. Specifically, charges are being brought under 21 U.S.C. § 690—a provision that prohibits the importation of certain chemicals designated by the Drug Enforcement Agency when the exporter has reason to believe they will be used to manufacture controlled substances.¹²³

For example, in June 2023, the Department of Justice announced a slew of indictments filed against Chinese chemical manufacturers and their executives.¹²⁴ An indictment in the Southern District of New York charged two Chinese chemical executives and their corporation with multiple counts of violating Section 690(d) for allegedly selling fentanyl precursors to the Sinaloa Cartel.¹²⁵ On the strength of their evidence, enforcement officials were able to successfully convince Fiji to extradite both executives who are now awaiting trial in United States custody.¹²⁶ Not to be upstaged, the Eastern District of New York unsealed two similar indictments charging additional companies and their respective executives with multiple counts of violating Section 690.¹²⁷

Precursor prosecutions aside, the existing drug enforcement structure also allows the Treasury Department to freeze financial assets. In 2021, President Joe Biden issued Executive Order 14059.¹²⁸ This executive order empowers the

¹¹⁹ See generally, CONG. RSCH. SERV., IF10909, INTERNATIONAL NARCOTICS TRAFFICKING SANCTIONS: AN OVERVIEW (June 12, 2018) (outlining the drug enforcement designation frameworks of Executive Order 12978 and the Foreign Narcotics Kingpin Designation Act).

¹²⁰ See CONG. RSCH. SERV., R43749, DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 21–24 (Oct. 2, 2014) (outlining several varying applicable prosecutorial options for drug enforcement).

¹²¹ See OFF. FOREIGN ASSET CONTROLS, NARCOTICS SANCTIONS PROGRAM 3 (2014) (surveying Department of Treasury authority to impose financial sanctions on drug traffickers and their organizations under Executive Order 12978 and the Foreign Narcotics Kingpin Designation Act).

¹²² Press Release, U.S. Dep't Jus. Pub. Aff. Off., Justice Department Announces Charges Against China-Based Chemical Manufacturing Companies and Arrests of Executives in Fentanyl Manufacturing (June 23, 2023), <https://www.justice.gov/opa/pr/justice-department-announces-charges-against-china-based-chemical-manufacturing-companies>.

¹²³ 21 U.S.C. § 960(d); see also 21 C.F.R. § 1310.02(a) (listing the chemicals designated by the Drug Enforcement Agency as precursor chemicals for controlled substances like fentanyl, meth, and cocaine).

¹²⁴ *Supra* note 122.

¹²⁵ Unsealed Indictment, *U.S. v. Hubei Amarvel Biotech Inc. et. al.*, No. 23-CR-302, at 22–24 (S.D.N.Y. June 23, 2023).

¹²⁶ *Supra* note 122.

¹²⁷ Unsealed Indictment, *U.S. v. Anhui Mokernew Material Tech. Co., et. al.*, No. 23-CR-263, at 11–12 (E.D.N.Y. June 23, 2023); Unsealed Indictment, *U.S. v. Hefei Gsk Trade Co., Ltd., et. al.*, No. 23-CR-264, at 9 (E.D.N.Y. June 23, 2023).

¹²⁸ Exec. Order No. 14,059, 86 C.F.R. 71549 (2021).

Treasury Department is to freeze assets of individuals and entities upon a finding that they have “engaged in, or attempted to engage in, activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production.”¹²⁹

And unlike so many other dead-letter laws on the books, this is no mere paper power. In April 2023, the Treasury Department announced that they were freezing the assets of two Chinese chemical manufacturers and five individuals based in China and Guatemala for facilitating the flow of fentanyl precursor chemicals to the Sinaloa Cartel.¹³⁰ This asset freeze has been followed by similar enforcement actions with increasing scope. In October 2023, the Treasury Department announced that they were freezing the assets of a “network” of Chinese chemical manufacturers and 28 associated individuals for facilitating the flow of fentanyl precursor chemicals to both the JNGC and Sinaloa Cartel.¹³¹

Even if we consider entities more removed from drug trafficking, like the Sinaloa controlled fisheries in Mexico, Executive Order 14059 again provides a solution. Under Section 1(ii)(A), the Treasury Department may freeze the assets of any foreign person or entity that has “knowingly received any property. . . . that the foreign person knows constitutes or *is derived from* proceeds of activities or transactions that have materially contributed to. . . . the international proliferation of illicit drugs or their means of production.”¹³² The broad sweep of that language arguably allows the Treasury Department to freeze the assets of virtually anyone who receives money or goods derived from a cartel’s trafficking business. As a result, the Treasury Department could theoretically freeze assets associated with the Sinaloa fisheries as long as Treasury officials find that some proceeds of drug trafficking have been invested into those businesses. For a freeze to occur under the FTO framework, the Treasury Department would have to find that the fishery itself was a formal part of the Sinaloa Cartel organization.¹³³ This would not only be difficult to determine, but stretch credulity. Executive Order 14059 provides a better way to tackle cartel-affiliated enterprises.

As a practical matter, cartels should not be designated as FTOs. The evidence of the effectiveness of FTO designation on profit-driven criminal organizations is mixed at best.¹³⁴ And, results aside, the machinery of the FTO framework is already duplicated by existing law enforcement mechanisms specifically designed to deal with international drug trafficking.

3. *The Political Considerations.* Aside from the legal and practical considerations, designating cartels as FTOs would likely create political problems for the United States. Specifically, designating cartels as FTOs would blur the lines between law enforcement and warfare in the eyes of the American public. Further,

¹²⁹ *Id.* § 1(i).

¹³⁰ Press Release, Treasury Dep’t U.S., Sanctions Suppliers of Precursor Chemicals for Fentanyl Production U.S. (Apr. 14, 2023), <https://home.treasury.gov/news/press-releases/jy1413#>.

¹³¹ Press Release, Treasury Dep’t U.S., Treasury Targets Large Chinese Network of Illicit Drug Producers (Oct. 3, 2023), <https://home.treasury.gov/news/press-releases/jy1779>.

¹³² *Supra* note 128, §1(ii)(A).

¹³³ *Supra* note 103.

¹³⁴ Jo, *supra* note 118.

cartel designation stands to further jeopardize the United States' already tenuous relationship with Mexico. Political considerations both at home and abroad tell us that cartel designation would only invite unnecessary trouble.

First, if the government approves of the notion that cartel members are terrorists, then the public is more likely to expect the government to treat them like terrorists. This presents a problem because the popular conception of what it means to fight “the war on terror” conjures images of Seal Team Six killing Osama Bin Laden, the Iraq War, and more recently, strikes against ISIS.¹³⁵ FTO designation is a world away from authorizing such military actions.¹³⁶ But even if FTO designation could somehow make military strikes against cartels more likely, it would still be bad policy. If the public comes to expect a militarized response to cartels, then they may start to see the military as a law enforcement entity like the police rather than the distinctly apolitical institution that it is. This “police-ization” of the military is not only against the best interests of the public, but is also reminiscent of nascent authoritarian regimes.¹³⁷ And when we consider that public confidence in the military is in the midst of a two-decade-long decline, we should think twice about exposing it to additional public expectations or pressures.¹³⁸

Second, our foreign relations with Mexico will almost certainly be damaged if cartels are designated as FTOs. As it stands, our relationship with Mexico is already under considerable strain. In 2019, President Obrador pulled out of the Merida Initiative: a major anti-trafficking partnership between the United States and Mexico that Congress had appropriated billions of dollars to execute.¹³⁹ In 2021, Secretary Blinken and his Mexican counterpart announced that the Merida Initiative was being replaced by a new “Bicentennial Framework.”¹⁴⁰ But this new document is effectively toothless. In its assessment, the Government Accountability Office noted that the Bicentennial Framework failed to create any projects, establish milestones, or identify any metrics to evaluate progress towards the goals outlined in the document.¹⁴¹ Such a vague and noncommittal gesture signals that the quality of cooperation between the United States and Mexico has taken several steps backwards from the days of the Merida Initiative. If true, this would be disastrous for President Biden’s National Drug Control Strategy which

¹³⁵ JOHN MUELLER, PUBLIC OPINION ON WAR AND TERROR: MANIPULATED OR MANIPULATING? (Aug. 10, 2021), <https://www.cato.org/white-paper/public-opinion-war-terror>.

¹³⁶ Aside from the inability for FTO designations to materially impact decisions on military strikes in Mexico, there is also debate about whether such strikes would even be permissible under international law. See Cole Horton, *Bomb Thy Neighbor: How U.S. Military Force Against Mexican Drug cartels in Self-Defense Violate International Law*, DUKE L. ETHICS NAT’L SEC. ESSAY SERIES, no. 24, 2024, at 1, 13–19 (providing arguments and counterarguments).

¹³⁷ Charles J. Dunlap, *The Police-Ization Of The Military*, 27 J. POL. & MIL. SOCIO. 217, 226–28 (1999).

¹³⁸ Mohamed Younis, *Confidence in U.S. Military Lowest in Over Two Decades*, GALLUP, July 31, 2023.

¹³⁹ Biettel, *supra* note 44, at 6.

¹⁴⁰ Antony Blinken, Sec’y of State, Remarks on the Announcement of the Bicentennial Framework with Mexican Foreign Sec’y Marcelo Ebrard (Oct. 8, 2021), <https://www.state.gov/secretary-antony-j-blinken-and-mexican-foreign-secretary-marcelo-ebrard-at-a-joint-press-availability/>.

¹⁴¹ U.S. GOV’T ACCOUNTABILITY OFF., GAO- 23-103795, U.S. ASSISTANCE TO MEXICO: STATE DEPARTMENT SHOULD TAKE STEPS TO ASSESS OVERALL PROGRESS 1 (Sept. 2023).

heavily relies on the assumption that Mexico will be a fully engaged enforcement partner.¹⁴²

Aside from an inability to forge a new anti-trafficking agreement, domestic politics in the United States have also put pressure on foreign relations with Mexico. Then-candidate Trump's statements in 2015 about Mexico sending "rapists" to the United States was sharply criticized by high-ranking Mexican officials.¹⁴³ More recently, candidates vying for the Oval Office in 2024 have promised that, if elected, they will order military strikes on cartels in Mexico.¹⁴⁴ This is something that the American public seems to support. Indeed, a Reuters poll released in September 2023 found that 52% of Americans would support "sending U.S. military personnel to Mexico to fight against drug cartels."¹⁴⁵ President Obrador has stated that even suggesting a military intervention is "an offense to the people of Mexico" and contends that any such action would violate Mexican sovereignty.¹⁴⁶ At the same time, he announced plans for a media campaign that would urge Mexican-Americans in the United States to vote against Republican politicians seeking to intervene in Mexican affairs.¹⁴⁷ The state of United States-Mexican relations seems tense, and designating cartels as FTOs would only aggravate this brittle diplomatic situation. Cartel designation would effectively tell Mexico, and the world, that the United States has lost confidence in the Obrador Administration's ability to govern its own country, however true that may be.¹⁴⁸

Trying to designate drug cartels as FTOs is a classic case of "just because we can, doesn't mean that we should."¹⁴⁹ The legal, practical, and political considerations involved all weigh against designating cartels as FTOs. To do otherwise would disregard precedent, ignore existing effective enforcement mechanisms, and negatively impact the United States' political interests both at home and abroad. We should not waste time or effort on what ultimately amounts to a performative FTO designation. Instead, policymakers and law enforcement officials should channel what little political capital and resources they have into preferable alternatives.

¹⁴² WHITE HOUSE OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY: SOUTHWEST BORDER COUNTERNARCOTICS STRATEGY 2-3 (2022).

¹⁴³ See *Mexico Slams Trump for "Drugs," "Rapists" Comments*, REUTERS, June 15, 2015 (quoting the then-Mexican Foreign Secretary José Antonio Meade saying that then-candidate Donald Trump is "a politician who doesn't know reality—who doesn't know the contest he's participating in.").

¹⁴⁴ Anjali Huynh, *Republican Voters Have Shown an Appetite for Candidates' Calls to Use Military Force Against Mexican Cartels*, N.Y. TIMES, Oct. 3, 2023.

¹⁴⁵ Gram Slattery, *Americans Broadly Support Military Strikes in Mexico, Reuters/Ipsos Poll Finds*, REUTERS, Sept. 14, 2023.

¹⁴⁶ Brendan O'Boyle, *Mexico President Rejects 'Irresponsible' Calls for US Military Action Against Cartels*, REUTERS, Mar. 9, 2023.

¹⁴⁷ *Id.*

¹⁴⁸ Even though the Mexican government likely has lost de facto control in various parts of its territory, designating cartels as FTOs would tear-up the legal fiction of Mexican sovereignty and control that the Obrador administration relies on to govern and maintain legitimacy on the world stage and at home. See *supra* note 51 (Secretary Blinken agreeing that the Mexican government has lost control of certain territories to the cartels).

¹⁴⁹ Cf. Bill Taylor, *Just Because You Can Doesn't Mean You Should*, HARV. BUS. REV., Dec. 6, 2011 (applying the principle in the business context).

IV. PREFERABLE ALTERNATIVES

If we take FTO designation off the table, then how should we combat the cartels? Unfortunately, there is no one-size-fits-all solution. The cartels are dynamic, sophisticated, and often ruthless organizations, so any enforcement strategy will need to be multi-faceted in its approach. There are potentially limitless options, but discussed below are three alternative policy or enforcement actions that could form part of that multi-faceted approach. Each would almost certainly be a better use of resources than FTO designation.

First, the United States could seek to secure more cartel member extraditions from Mexico. It is well documented that Mexico has a problem with corruption.¹⁵⁰ A recent meta-study found that Mexico consistently rates as one of the most corrupt countries on Earth, and has only become more corrupt in recent years.¹⁵¹ A small army of Mexican officials from judges to governors have taken money from the JNGC and other cartels in exchange for favorable rulings or simply looking the other way.¹⁵² In February 2023, the United States successfully prosecuted Mexico's former Secretary of Public Security for taking millions of dollars in bribes from the Sinaloa Cartel in exchange for protection.¹⁵³ Even if cartel members are put in Mexican prisons, it is not uncommon for them to *miraculously* escape. Indeed, Joaquin "El Chapo" Guzman escaped from two separate high-security Mexican prisons before being extradited to the United States and ultimately sent to the federal "Supermax" prison in Florence, Colorado where he resides today.¹⁵⁴

If the Mexican legal system is unable to properly handle cartel prosecutions, then the United States should step-in to the fullest extent possible. The "El Chapo" prosecution was a prominent success of the United States' justice system over its Mexican counterpart, but it is not the only one. There has been the occasional extradition from Mexico,¹⁵⁵ but a steady flow of Mexican cartel members being extradited to the United States from other Central American countries shows that Mexico could be doing more.¹⁵⁶ Of course, getting Mexico to agree to ramp-up its

¹⁵⁰ JOSE IVAN RODRIGUEZ-SANCHEZ, MEASURING CORRUPTION IN MEXICO (Dec. 11, 2018), <https://www.bakerinstitute.org/research/measuring-corruption-mexico>.

¹⁵¹ *Id.*

¹⁵² Ivana Saric, *Mexican President Goes After Judges Bribed by Narco Cartel*, ORGANIZED CRIME & CORRUPTION PROJECT, May 21, 2019, <https://www.occrp.org/en/daily/9769-mexican-president-goes-after-judges-bribed-by-narco-cartels>.

¹⁵³ Press Release, U.S. Att'y Off. E.D.N.Y., Ex-Mexican Secretary of Public Security Genaro Garcia Luna Convicted of Engaging in a Continuing Criminal Enterprise and Taking Millions in Cash Bribes from the Sinaloa Cartel (Feb. 21, 2023), <https://www.justice.gov/usao-edny/pr/ex-mexican-secretary-public-security-genaro-garcia-luna-convicted-engaging-continuing>.

¹⁵⁴ Kirk Mitchell, *Colorado's Supermax Prison Now Occupied By El Chapo is "Worse Than Death," Ex-Warden Says*, DENVER POST, July. 27, 2019.

¹⁵⁵ Press Release, U.S. Att'y Off. N. Dist. Ill., Alleged High-Ranking Member of Sinaloa Cartel Arraigned on Federal Charges Following Extradition From Mexico to the U.S. (Sept. 18, 2023), <https://www.justice.gov/usao-ndil/pr/alleged-high-ranking-member-sinaloa-cartel-arraigned-federal-charges-following>.

¹⁵⁶ Press Release, Drug Enf't Agency, Leader of Mexico's United Cartels Extradited to U.S. (June 13, 2022), <https://www.dea.gov/press-releases/2022/06/13/leader-mexicos-united-cartels-extradited-us>.

extraditions for cases that qualify for United States prosecution would require some diplomacy given the current state of the United States-Mexico relationship.

Second, we could refocus day-to-day drug enforcement resources on prosecuting the so-called “middle managers” of the cartels instead of their top leaders.¹⁵⁷ This strategic change has the potential to realize two major benefits. First, a deemphasis on neutralizing cartel leaders would help to mitigate the fragmentation and power vacuum dynamics that have bred increasingly violent cartels.¹⁵⁸ Second, neutralizing cartel middle management would guide existing cartels into a wind-down trajectory. By eliminating the middle strata of a cartel, it deprives the organization of its long-term institutional knowledge and hollows-out the line of succession as leadership phases out. Though this alternative is based on the two assumptions that cartel middle-management could be prosecuted in the United States, and that the reallocated resources from leadership prosecutions could cover the resource demands of the new middle-management prosecutions.

Third, we could expand the capacity of online-focused drug trafficking enforcement mechanisms. In the wake of COVID-19, the JNGC and Sinaloa Cartel have expanded their online operations to such an extent that they now have their own in-house IT departments.¹⁵⁹ To meet this rise in online cartel activity, we should invest in our own online enforcement capabilities. Fortunately, we already have an effective model that we can expand upon.

The Department of Justice’s Joint Criminal Opioid Darknet Enforcement team (“J-CODE”) has been exceedingly effective in combatting the use of the dark web and cryptocurrency in drug trafficking. Since 2018, J-CODE enforcement actions have resulted in hundreds of trafficking arrests and tens of millions of dollars seized.¹⁶⁰ Its latest action, operation SpecTor, resulted in 288 arrests, over 1,800 pounds of seized narcotics, and \$53.4 million in seized cash and digital currency.¹⁶¹ J-CODE has stated that these actions help to disrupt the fentanyl distribution networks of the JNGC and Sinaloa Cartel—something that should be a top law enforcement priority.¹⁶² Spending political capital to expand J-CODE’s capabilities through investment would help to combat the cartels and mitigate the rising tide of the fentanyl crisis.

¹⁵⁷ The term “middle managers” here is used to describe the caste of drug cartel members that have already graduated from street-level dealing or other low-authority positions, but have not yet ascended to cartel leadership.

¹⁵⁸ Biettel, *supra* note 44; see also Matthew Dickenson, *The Impact of Leadership Removal on Mexican Drug Trafficking Organizations*, 30 J. QUANTITATIVE CRIMINOLOGY 651, 651 (2014) (concluding that the Mexican government’s strategy of pursuing cartel leadership resulted in over four hundred additional deaths in a four year span).

¹⁵⁹ Robert J. Bunker & Alma Keshavarz, *Mexican Cartels Turn to the Dark Web for Drug Operations*, APAN OE WATCH COMMENTARY, Nov. 2020, <https://community.apan.org/wg/tradoc-g2/fmso/m/oe-watch-articles-2-singular-format/377040>.

¹⁶⁰ Press Release, U.S. Dep’t Jus. Pub. Aff. Off., *Largest International Operation Against Darknet Trafficking of Fentanyl and Opioids Results in Record Arrests and Seizures* (May 2, 2023), <https://www.justice.gov/opa/pr/largest-international-operation-against-darknet-trafficking-fentanyl-and-opioids-results>.

¹⁶¹ *Id.*

¹⁶² *Id.*

CONCLUSION

While designating Mexican cartels as FTOs is possible, it is ultimately undesirable on legal, practical, and political grounds. Statements made by policymakers implicitly reflect this conclusion because they tend to focus more on channeling outrage than policy merits.¹⁶³ Indeed, the push to designate cartels as FTOs never seemed to be firmly rooted in data or philosophical reasoning.¹⁶⁴ Rather, calls to designate cartels as FTOs appear to have been an empathetic response to the American public's anger that their communities are being destroyed by illicit drugs. Brian Michael Jenkins, the former chair of Political Science at RAND, put it best:

The terrorist label seems to have great appeal *not because it expands legal authority, but because it sends a loud message*. People view terrorism as more heinous than ordinary crime. Calling it drug trafficking, kidnapping, and murder by themselves doesn't adequately reflect the national outrage to some.¹⁶⁵

Our national security institutions must be wary of this public outrage. The story of beleaguered citizens looking to sources of centralized power for solutions to difficult problems is common in world history.¹⁶⁶ But those stories seldom have happy endings.¹⁶⁷ From a realist perspective, liberal use of the FTO designation is unlikely to put any of our national security intuitions in imminent danger. But such frivolous labeling could be another small erosive force that the military, intelligence, and justice systems would be better off without.

¹⁶³ See *supra* notes 14–17 (providing examples of speeches that focus on conveying the devastation of the opioid crisis and cartel violence rather than articulating normative arguments for why cartels should be designated as FTOs).

¹⁶⁴ The only common thread of data that can be seen in almost every policymaker statement on this issue is that over 100,000 people died of overdoses in 2021. You can find little, if any, data about the effectiveness of FTO designations in these statements. See Letter from State Attorney Generals, *supra* note 15 (failing to provide any evidence or citations for the effectiveness of FTO designation on criminal organizations).

¹⁶⁵ Brian Michael Jenkins, *Should Mexico's Drug Cartels Be Designated Foreign Terrorist Organizations?*, RAND BLOG, Mar. 22, 2023 (emphasis added), <https://www.rand.org/pubs/commentary/2023/03/should-mexicos-drug-cartels-be-designated-foreign-terrorist.html>.

¹⁶⁶ Perhaps the most famous example—one that inspired a young George Washington—is the Roman general Lucius Quinctius Cincinnatus. Ryan Burns, *Cincinnatus: A Roman Dictator's Resounding Impact*, DISCENTES, May 19, 2022, <https://web.sas.upenn.edu/discentes/2022/05/19/cincinnatus-a-roman-dictators-resounding-impact/>. A less idyllic modern example is Paul Kagame and his philosophy of “economic development first, human rights later” that has lifted Rwanda out of global poverty. Shawn Russel, *The Benevolent Dictatorship in Rwanda: Negative Government, Positive Outcomes?*, 32 APPLIED ANTHROPOLOGIST 12, 20 (2012).

¹⁶⁷ See, e.g., Shawn Russel, *The Benevolent Dictatorship in Rwanda: Negative Government, Positive Outcomes?*, 32 APPLIED ANTHROPOLOGIST 12, 18–20 (2012) (detailing the Paul Kagame is likely responsible for assassinating rival politicians and questioning whether he will ever willingly give up power).

It is understandable that politicians would want to channel their constituents' frustrations, but here, a bad situation seems to be priming the public for bad policy. My optimistic nature leads me to believe that the policymakers pushing to designate cartels as FTOs have good intentions. But then again, the road to Hell is paved with good intentions.