

Amid overdose crisis, disputes grow over how to classify fentanyl cousins

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Federal authorities in 2018 temporarily placed all substances related to fentanyl in a category reserved for the most dangerous controlled substances, an effort to stymie drug traffickers. Five years later, the number of overdose deaths linked to synthetic opioids is as high as ever, and critics warn that efforts to make the classification permanent will entrench harsh sentencing laws.

With frustration mounting about the toll of fentanyl, the debate has sparked clashing political approaches. On Tuesday, Sen. Cory Booker (D-N.J.) plans to introduce legislation extending the temporary measure for up to two years for existing fentanyl-related substances and for up to four years when new analogues emerge. The measure would give time to complete the bill's required scientific evaluation of fentanyl's chemical cousins, allowing for the classification to be changed or removed if the substances are less dangerous or have no potential to be abused.

Booker's legislation contrasts with the Republican-backed [Halt Fentanyl Act](#), which passed the House with bipartisan support in May and would make the classification permanent.

“Placing fentanyl analogues on the list of scheduled substances without corresponding efforts to address the root causes of the opioid epidemic isn’t turning the tide of the crisis because as long as there’s demand and money to be made, cartels will continue to produce these drugs,” Booker said in a statement, pointing to his legislation as the path forward.

On the other side, Republican state attorneys general are urging the Senate to permanently place all chemical substances related to fentanyl in the most restricted category, aiming to bolster law enforcement’s ability to crack down on an array of deadly synthetic opioids — and substances that may emerge. It’s unclear whether the Senate will take up the [Halt Fentanyl Act](#).

If the measure doesn’t pass, legal experts say, drug dealers won’t exactly be getting a pass — authorities can still use a decades-old law that allows for the prosecution of dealers who traffic in analogues that are similar to dangerous drugs. Similarly, many states have laws criminalizing drugs with the same effects as fentanyl.

“The government already has plenty of tools in its toolbox to address fentanyl analogues,” said Liz Komar, an attorney for the Sentencing Project, a D.C. nonprofit that advocates for more humane sentences and opposes the Halt Fentanyl Act. “We know harsher sentences are not the answer to stopping overdoses.”

The friction over the bill reflects wider frustrations about fentanyl and related opioids, which have largely displaced pain pills and heroin as catalysts of the country’s [overdose death crisis](#). Fentanyl remains a political flash point, with Republicans blaming President Biden for failing to secure the southern border from drugs smuggled by Mexican cartels.

[In a June 1 letter](#), 23 Republican attorneys general urged Senate Majority Leader Charles E. Schumer (D-N.Y.) and Senate Minority Leader Mitch McConnell (R-Ky.) to make permanent the temporary designation of all fentanyl-related substances, which is set to expire at the end of 2024. Making the measure permanent would put drug cartels and traffickers “on notice,” they wrote, saying “this national catastrophe requires a serious federal solution.”

The measure [passed 289-133](#) in the House with support from 74 Democrats, many considered moderates or from swing districts that could respond negatively to a vote against a bill aimed at curbing fentanyl analogues. Biden gave a [nod of support](#) for two of the bill’s key provisions, which seemed to give cover to vulnerable House Democrats to vote yes. But the legislation could face an uphill battle in the Democratic-controlled Senate. Schumer’s office didn’t say whether the Senate would take up the legislation.

This month, Schumer embraced the possibility of increased funding to address the drug crisis. During debate on the debt ceiling, he said the deal to stave off a government default doesn't affect the chamber's ability to appropriate emergency and supplemental funds for a host of issues, such as combating fentanyl.

Illicit fentanyl — concocted first in clandestine labs in China and now Mexico — has flooded U.S. streets, as have the drug's chemical cousins, compounds similar in molecular structure and often just as deadly, if not more so. In what law enforcement has long described as a perpetual game of whack-a-mole, underground chemists tweak the compounds to try to stay ahead of the law.

Over the years, the Drug Enforcement Administration has classified as Schedule I — the highest level — many analogues with names such as acetyl fentanyl, para-fluorofentanyl and valeryl fentanyl. Carfentanil, a Schedule II substance found in the illicit drug supply, is notorious for its potency: up to 100 times stronger than fentanyl and intended to be used as an elephant tranquilizer.

The DEA categorizes drugs into five “schedules,” taking into account the risk of abuse and their value as medical treatment. Schedule I includes heroin, LSD and ecstasy, drugs deemed to have no acceptable medical use and prone to abuse. (Marijuana remains Schedule I, even though roughly two dozen states have legalized it). Fentanyl is classified as Schedule II — a category that includes cocaine and methamphetamine — because doctors can prescribe legal fentanyl as a painkiller.

Classifying drugs is cumbersome and time-consuming and involves various agencies. In 2018, as the nation's overdose crisis escalated to unprecedented heights, the Trump administration temporarily placed all fentanyl-related substances in the Schedule I category. The DEA's acting administrator at the time said that action would ensure federal agents and prosecutors could take “swift and necessary” action against drug traffickers poisoning communities.

Still, overdose deaths continued rising — along with the flow of synthetic opioids into the country. The Centers for Disease Control and Prevention estimates more than 109,000 Americans died of overdoses in 2022, edging the record from the year before. Synthetic opioids are blamed for roughly 69 percent of that total.

“If the intention is to mitigate the harms of illicit fentanyl and put a dent in the overdose numbers, that hasn't happened with the class-wide scheduling,” said Maritza Perez Medina, director of federal affairs for the nonprofit Drug Policy Alliance, which advocates for reforming drug laws and joined dozens of organizations in opposing the legislation.

Supporters of the Halt Fentanyl Act cast it as a race against the clock. At the time the House bill passed, Rep. Kelly Armstrong (R-N.D.) said that without the law, many fentanyl-related substances could be legal, and that law enforcement “could lose the authority they need to seize these extremely lethal drugs.”

In a statement of administration policy, the White House didn't explicitly say whether Biden would sign the Republican-led bill. The Biden administration issued recommendations to Congress earlier that included permanently classifying analogues in the highest category while pushing other policies, such as excluding these substances from mandatory penalties except in cases of death or serious bodily harm.

The minimum sentence for a first-time offense of trafficking 10 grams of a fentanyl analogue is five years, which the Drug Policy Alliance contends would apply even if only a trace amount is found in the overall mixture.

As with the mandatory minimums meted out in the 1980s and 1990s, critics say prison sentences will disproportionately affect people of color. According to U.S. Sentencing Commission data released in May, nearly 56 percent of fentanyl analogue trafficking offenders were Black, and about 26 percent Hispanic.

Stories about fentanyl analogues abound. There was the San Jose police union executive accused of importing valeryl fentanyl from overseas, and there was the deadly mix of a type of fentanyl and other drugs that killed actor Michael K. Williams.

Typically, cases involving fentanyl analogues are charged alongside other Schedule I drugs, according to a 2021 Government Accountability Office report. According to the sentencing commission, the number of fentanyl analogue cases has increased more than 208 percent since 2018. Still, in fiscal year 2022, only 145 analogue offenders were charged — a small fraction of federal drug cases. And most of the analogues in these cases involved substances that have already been classified by the DEA.

State prosecutors use local laws to target dealers of fentanyl analogues, such as the group busted in Columbus, Ohio, in 2021 for selling four kilograms of fentanyl and para-fluorofentanyl to undercover investigators. Records show the ringleader got six to eight years in state prison for trafficking in a “fentanyl-related compound” under Ohio law.

If federal prosecutors charge someone for dealing in a fentanyl analogue that has yet to be classified, they can turn to the Controlled Substance Analogue Enforcement Act of 1986, which requires they prove the substance was “intended for human consumption” and is “substantially similar” to a scheduled one. That might require prosecutors to call to the witness stand pharmacologists or chemists to explain how an unlisted drug is, effectively, as deadly as fentanyl.

The Republican attorneys general cast the law as too complex, given the possibility of disputes between experts. Others disagree, saying prosecutors should be required to take the steps in court to prove that an unclassified analogue is dangerous.

The House-passed legislation has raised alarms from scientists who say it falsely assumes that thousands of fentanyl-related substances are dangerous, making them difficult to test and study as controlled substances. Some substances could be future fentanyl antidotes, said West Virginia University chemistry professor Gregory Dudley, who joined more than 40 researchers in opposing the legislation in a letter to House leaders.

“They could lead to better medicines, addiction therapies, and overdose interventions,” he wrote.