

**Statement of Kevin L. Butler
Federal Public Defender for the Northern District of Alabama**

**Judiciary Committee of the House of Representatives
Subcommittee on Crime, Terrorism, and Homeland Security**

**January 28, 2020 Hearing on
“Fentanyl Analogues:
Perspectives on Classwide Scheduling”**

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Mr. Chairman and Members of the Subcommittee:

Thank you for holding this hearing and for inviting me to testify. At any given time, Federal Public and Community Defenders and other appointed counsel under the Criminal Justice Act represent 80 to 90 percent of all federal defendants because they cannot afford counsel.

I have spent 27 years as a public defender on the front lines of the War on Drugs. From this vantage point, I have watched the implementation of law enforcement policies adopted in the name of ending drug addiction, reducing supply, and making streets safer. I have watched as harsh mandatory minimums and the unjust discriminatory 100-to-1 crack cocaine penalties sent my clients—many young men of color—to crowd our prisons. I have seen the broken families and communities left behind. And I've witnessed through my clients that the policies adopted in this War on Drugs have failed.

Tens of millions of Americans continue to struggle with addiction and its consequences.¹ Near-daily headlines reporting large scale seizures of a variety of drugs prove that our nation's choice to address drug dependence through sweeping and severe law enforcement efforts, rather than public health responses, has failed to alleviate the addiction that fuels demand.²

¹ Substance Abuse and Mental Health Services Administration, *Key Substance Use and Mental Health Indicators in the United States: Results from the 2018 National Survey on Drug Use and Health*, at 2 (2019), <http://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHNationalFindingsReport2018/NSDUHNationalFindingsReport2018.pdf> (“In 2018, approximately 20.3 million people aged 12 or older had a substance use disorder (SUD) related to their use of alcohol or illicit drugs in the past year”).

² See e.g., Kelly McCarthy, *\$377 Million Drug Bust Includes Almost 40,000 Combined Pounds of Cocaine and Marijuana*, ABC News (Oct. 29, 2019), <https://abcnews.go.com/US/377-million-drug-bust-includes-40000-combined-pounds/story?id=66611327> (U.S. Coast Guard seizes 28,000 pounds of cocaine and 11,000

We can and must do better for the individuals, families and communities impacted by addiction and its consequences. I have been encouraged by the last decade's bipartisan movement toward reform. In 2010, Congress enacted the Fair Sentencing Act to reduce the unjust disparity between crack and cocaine from 100-to-1 to 18-to-1.³ President Obama granted clemency to almost 2,000 individuals serving lengthy sentences for drug offenses, and during his administration the Department of Justice (Department) curtailed its use of mandatory minimums.⁴ Just over a year ago, Congress passed the First Step Act of 2018 with overwhelming bipartisan support, reducing sentences for certain drug offenses and making the Fair Sentencing Act of 2010 retroactive.⁵ To date, more than 2,400 individuals serving unduly long sentences imposed under the discriminatory 100-to-1 ratio have seen reductions in their sentences.⁶ And recent government efforts to emphasize treatment instead of incapacitation, such as the SUPPORT Patients and

pounds of marijuana at a Florida port); U.S. Customs and Border Control, *U.S. Customs and Border Protection Seizes Over 17.5 Tons of Cocaine in Philadelphia* (June 21, 2019), <https://www.cbp.gov/newsroom/national-media-release/us-customs-and-border-protection-seizes-over-175-tons-cocaine> (reporting largest cocaine seizure in the 230-year history of Customs and Border Protection, valued at \$1.1 billion); Joel Shannon, *Frozen Strawberry Shipment from Mexico Contained \$12.7 Million Worth of Meth, Authorities Say*, USA Today (Feb. 20, 2019), <https://www.usatoday.com/story/news/nation/2019/02/20/meth-worth-12-7-million-found-frozen-strawberries-mexico/2931988002/> (Customs and Border Protection seized 906 pounds of methamphetamine, worth \$12.7 million concealed in a commercial shipment of frozen strawberries).

³ Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat 2372 (Aug. 3, 2010).

⁴ Sari Horwitz, *Obama Grants Final 330 Commutations to Nonviolent Drug Offenders*, Wash. Post (Jan. 19, 2017), https://www.washingtonpost.com/world/national-security/obama-grants-final-330-commutations-to-nonviolent-drug-offenders/2017/01/19/41506468-de5d-11e6-918c-99ede3c8cafa_story.html (granting a total of 1,715 clemencies); United States Dep't of Justice, *In Milestone for Sentencing Reform, Attorney General Holder Announces Record Reduction in Mandatory Minimums Against Nonviolent Drug Offenders* (Feb. 17, 2015).

⁵ First Step Act of 2018, Pub. L. No. 115-391, 132 Stat 5194 (Dec. 21, 2018).

⁶ Federal Bureau of Prisons, *First Step Act*, <https://www.bop.gov/inmates/fsa/> (Jan. 24, 2020).

Communities Act,⁷ show a hopeful commitment to reverse our past missteps and respond to this public health problem deliberately and humanely.

Since 2015, fentanyl has replaced heroin and crack as the face of drug addiction in our country.⁸ Fentanyl is a potent, fast-acting, synthetic opioid. There are also fentanyl analogues: substances with chemical structures and effects substantially similar to fentanyl. Fentanyl and its analogues have increasingly emerged in the illegal drug market, most often added to heroin or sold in counterfeit opioid prescription pills.⁹ In 2018, 30,000 overdose deaths involved synthetic opioids.¹⁰ Fentanyl is now present in most heroin in the Midwest and Northeast and its prevalence is spreading West.¹¹

There are troubling signs that Congress's response to fentanyl threatens to erase the gains of the past decade by returning to the failed and unjust strategies of the drug war. Some legislators who have supported the bipartisan movement away from the War on Drugs are nevertheless endorsing a harsh and punitive response to fentanyl.¹² Classwide scheduling of fentanyl-related substances, as proposed by the Department and Drug Enforcement Agency (DEA),¹³ and in several pending bills in

⁷ See, e.g., Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (SUPPORT for Patients and Communities Act), Pub. L. No. 11-271, 132 Stat 3894 (Oct. 24, 2018).

⁸ Drug Policy Alliance, *Criminal Justice Reform in the Fentanyl Era: One Step Forward, Two Steps Back*, at 6 (2020), http://www.drugpolicy.org/sites/default/files/dpa-cj-reform-fentanyl-era-v.3_0.pdf (*One Step Forward*).

⁹ *Id.* See also Centers for Disease Control and Prevention, *Synthetic Opioid Overdose Data*, <https://www.cdc.gov/drugoverdose/data/fentanyl.html>.

¹⁰ *One Step Forward*, at 3; Overdose deaths resulting from these substances are grouped together with other synthetic opioids, like Tramadol. See Centers for Disease Control and Prevention, *supra* note 9.

¹¹ *One Step Forward*, at 7.

¹² *Id.* at 8.

¹³ *The Countdown: Fentanyl Analogues & the Expiring Emergency Scheduling Order*, Hearing Before the Committee on the Judiciary, United States Senate (2019) (statement of Amanda Liskamm, Director of Opioid Enforcement and Prevention Efforts, Office of the Deputy Attorney General and Greg Cherundolo, Chief of Operations, Office of Global Enforcement, Drug Enforcement Administration) (*DOJ Statement*).

the House and Senate,¹⁴ is part and parcel of this devolution. Classwide scheduling of fentanyl-related substances would grant the DEA broad and unilateral authority to place any existing or future substance it deems to have a certain chemical structure on Schedule I, the highest restriction, with no further health or scientific justification required.¹⁵

Classwide scheduling would facilitate broader prosecutions, with harsher penalties and fewer Constitutional Due Process protections. The Department has indicated that it will use classwide scheduling to pursue severe mandatory minimums for anyone trafficking in an undefined and potentially limitless set of substances,¹⁶ without having to prove these substances harm, or were intended to harm, the human body.¹⁷ I urge you to reject this approach.

Classwide scheduling would disrupt the careful balance of drug policy authority between enforcement and public health authorities. The campaign in support of this radical shift rests on misinformation.¹⁸ To be clear: harmful fentanyl analogues are

¹⁴ See, e.g., Federal Initiative to Guarantee Health by Targeting Fentanyl Act, S. 2701, 116th Cong. (1st Sess. 2019); Stopping Overdoses of Fentanyl Analogues Act, S. 1622, 116th Cong. (1st Sess. 2019); Extend Act, H.R. 5233, 116th Cong. (1st Sess. 2019); Stopping Illicit Trafficking Act of 2019, H.R. 5421, 116th Cong. (1st Sess. 2019).

¹⁵ See, e.g., Schedules of Controlled Substances: Temporary Placement of Fentanyl-Related Substances in Schedule 1, 83 Fed. Reg. 5188, n.4 (Feb. 6, 2018) (*2018 Scheduling Order*); Stopping Overdoses of Fentanyl Analogues Act, S. 1622, 116th Cong. (1st Sess. 2019) (proposing codification of *2018 Scheduling Order*).

¹⁶ United States Dep't of Justice, Drug Enforcement Administration, *2018 National Drug Threat Assessment*, at 25 (2018), <https://www.dea.gov/sites/default/files/2018-11/DIR-032-18%202018%20NDTA%20final%20low%20resolution.pdf>. (Explaining that classwide scheduling “signifies criminals who possess, import, distribute, or manufacture any [fentanyl-related substance] is subject to criminal prosecution in the same manner as for fentanyl and other controlled substances. . . . This action will make it easier for law enforcement officers and federal prosecutors to arrest and prosecute traffickers of all forms of FRS without having to rely on the Analogue Act.”).

¹⁷ See 21 U.S.C. § 802(32)(A).

¹⁸ See, e.g., William P. Barr, *William Barr: Fentanyl Could Flood the Country Unless Congress Passes this Bill*, Wash. Post, (Jan. 10, 2020), https://www.washingtonpost.com/opinions/william-barr-congress-pass-this-bill-so-we-can-attack-the-onslaught-of-illegal-fentanyl/2020/01/10/cbb8ccdc-33cb-11ea-a053-dc6d944ba776_story.html; Drug Enforcement Administration (@DEAHQ), Twitter (Jan. 11, 2020), <https://twitter.com/DEAHQ/status/1216094432648409090>.

illegal *with or without* classwide scheduling. The Department has a long history of prosecuting crimes involving fentanyl analogues, and successfully pursues stringent penalties for possessing and trafficking in these substances under existing law.

We have been here before: over 30 years ago, reacting to alarmist rhetoric and media coverage of drug abuse in America, Congress responded by passing harsh sentencing laws replete with mandatory minimums and one-size-fits-all penalties.¹⁹ Decades later, these policies have destroyed communities, but they haven't reduced drug supply or demand. I urge this Committee to resist the misguided and rhetorically simple approach of a drug policy predicated on penalties. Evidence shows it will not work, and we will soon again be seeking inadequate remedies for the missteps of the past. Opioid addiction has devastated too many lives to respond with a false antidote. Congress must focus on evidence-based approaches directed at education, treatment, and reducing overdose deaths. We cannot incarcerate our way out of this health crisis.

I. Classwide Scheduling Would Repeat Past Mistakes.

In 1971, President Nixon declared drug abuse as “America’s public enemy number one.”²⁰ “In order to fight and defeat this enemy,” he said, “it is necessary to wage a new, all-out offensive.”²¹ Fifteen years later, Ronald Reagan warned that “illegal drugs were every bit as much a threat to the United States as enemy planes and missiles.” We must “do all we can to defeat the drug menace threatening our country.”²² Congress heeded this command, enacting sweeping and severe penalties like the Comprehensive Crime Control Act of 1984 and the Anti-Drug Abuse Act of

¹⁹ See Lucius Outlaw III, *We Have a Growing Fentanyl Problem So Let's Not Repeat Past Mistakes*, The Hill (Jul. 29, 2019), <https://thehill.com/opinion/criminal-justice/455213-we-have-a-growing-fentanyl-problem-so-lets-not-repeat-past-mistakes>.

²⁰ Richard Nixon, *Remarks About an Intensified Program for Drug Abuse Prevention and Control* (Jun. 17, 1971), <https://prhome.defense.gov/Portals/52/Documents/RFM/Readiness/DDRP/docs/41%20Nixon%20Remarks%20Intensified%20Program%20for%20Drug%20Abuse.pdf>.

²¹ *Id.*

²² *Remarks on Signing the Just Say No To Drugs Week Proclamation*, Ronald Reagan Presidential Library & Museum (May 20, 1986) <https://www.reaganlibrary.gov/research/speeches/52086a>.

1986.²³ And a decade later, on the eve of his reelection, Bill Clinton reported “we passed ‘three strikes and you’re out’ and the death penalty for drug kingpins and cop killers,” touting the accomplishments of the Violent Crime Control and Law Enforcement Act of 1994.²⁴ The laws from this era imposed harsh mandatory minimums for a variety of offenses, including drug offenses, and introduced the now-discredited 100-to-1 ratio between crack and powder cocaine.²⁵

What in 1971 was “public enemy number one,” is now in 2020 “a tsunami” of “legalized poison.”²⁶ Trafficking in fentanyl, says the Attorney General (AG), “amounts to outright murder.”²⁷ But while the rhetoric of today is the same of that from the past, we know our actions must be different. We have three decades of evidence proving that increasing sentences does not make communities safer and it does not drive down drug supply or demand.²⁸ A 2014 report commissioned by the

²³ See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (Oct. 12, 1984); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (Oct. 27, 1986).

²⁴ The President’s Radio Address, 32 Weekly Comp. Pres. Doc. 2282 (Nov. 2, 1996), <https://www.govinfo.gov/content/pkg/WCPD-1996-11-11/pdf/WCPD-1996-11-11-Pg2282.pdf#page=1>; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (Jan. 25, 1994).

²⁵ See Rachel E. Barkow, *Categorical Mistakes: the Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 212 (2019) (*Categorical Mistakes*); see also Ranya Shannon, *3 Ways the 1994 Crime Bill Continues to Hurt Communities of Color*, Center for American Progress (May 10, 2019), <https://www.americanprogress.org/issues/race/news/2019/05/10/469642/3-ways-1994-crime-bill-continues-hurt-communities-color/>.

²⁶ Barr, *supra* note 18.

²⁷ *Id.* See also Attorney General William P. Barr Delivers Remarks at the Grand Lodge Fraternal Order of Police’s 64th National Biennial Conference, Dep’t of Justice (Aug. 12, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-grand-lodge-fraternal-order-polices-64th> (“A tsunami built up and has been crashing over the country, bringing death and destruction.”).

²⁸ See, e.g., Rachel E. Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration 42-44* (2019) (*Prisoners of Politics*) (collecting studies); see also Pew Charitable Trusts, *More Imprisonment Does Not Reduce State Drug Problems* (Mar. 8, 2018), https://www.pewtrusts.org/-/media/assets/2018/03/pspp_more_imprisonment_does_not_reduce_state_drug_problems.pdf; Drug Policy Alliance, *Rethinking the “Drug Dealer,”* 12-13 (2019), http://www.drugpolicy.org/sites/default/files/dpa-rethinking-the-drug-dealer_0.pdf

Department “found that lengthy prison sentences are not the best way to deter crime,”²⁹ and data indicate that long sentences can actually be criminogenic and increase recidivism.³⁰ To avoid detection, users are less inclined to seek treatment and instead more likely to engage in risky drug-use behaviors.³¹

These lessons apply to fentanyl and its analogues. A 2019 Rand study reviewed fentanyl’s presence in domestic and international drug markets to create a framework for the response to fentanyl and other synthetic opioids.³² It concluded that “[t]here is little reason to believe that tougher sentences, including drug-induced homicide laws for low-level retailers and easily replaced functionaries (*e.g.*, couriers) will make a positive difference.”³³

Our missteps in the War on Drugs are clear. Congress enacted harsh mandatory penalty laws with the goal of incapacitating high-level traffickers, “managers of drug enterprises,” and “king-pins,”³⁴ but it had no evidence from experts that higher sentences would achieve that goal in practice. Once on the books, the draconian sentencing laws impacted a broader population than Congress intended.³⁵ Indeed, only 14% of all people incarcerated federally are the managers, leaders, and

(*Rethinking the Drug Dealer*); Letter from FreedomWorks, Prison Fellowship, R Street Institute, et al., to the Hons. Lindsey Graham & Dianne Feinstein, at 1 (Jul. 2, 2019), <https://www.rstreet.org/2019/07/02/letter-in-opposition-to-the-stopping-overdoses-of-fentanyl-analogues-act-sofa/>.

²⁹ *Prisoners of Politics*, at 43 (citing National Research Counsel, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, ed. Jeremy Travis and Bruce Western (2014)).

³⁰ *See id.* at 44.

³¹ *See Rethinking the Drug Dealer*, at 13.

³² *See* Bryce Pardo, et al., *The Future of Fentanyl and Other Synthetic Opioids*, Rand Corp. (2019), https://www.rand.org/content/dam/rand/pubs/research_reports/RR3100/RR3117/RAND_RR3117.pdf.

³³ *Id.* at 161.

³⁴ *See e.g., United States v. Dossie*, 851 F. Supp. 2d 478, 479-80 (E.D.N.Y. 2012) (collecting legislative history).

³⁵ *See Categorical Mistakes*, at 217.

organizers Congress intended to capture.³⁶ Because Congress legislated without evidence or the advice of experts, more than 2.2 million people are behind bars in America and 1 in 3 adults possess a criminal record.³⁷ We cannot repeat these mistakes.

II. The Department Can and Does Prosecute Harmful Fentanyl Analogues without Classwide Scheduling.

In recent months, the Department has claimed that failure to enact classwide scheduling will *legalize* harmful fentanyl analogues. “[T]he legal prohibitions on the various forms of fentanyl expire next month unless Congress reauthorizes them,” the AG wrote in the Washington Post earlier this month. Without classwide scheduling, he claimed, fentanyl analogues would become “newly legalized.”³⁸

These claims are untrue.

With or without classwide scheduling, the Department is armed with powerful tools it currently uses to successfully and aggressively prosecute fentanyl and its analogues. First, the Department can use its broad authorities under the Controlled Substances Act (CSA) to temporarily schedule—and then prosecute—fentanyl analogues on a substance-by-substance basis. Second, the Department can use the Analogue Act to immediately prosecute new substances that have not been scheduled. In contrast to classwide scheduling, both of these existing authorities include essential checks to confirm the accuracy of DEA’s designation of a substance as harmful.

First, the CSA. Many fentanyl analogues, such as carfentanil and acetyl fentanyl have already been scheduled on a substance-by-substance basis.³⁹ Fentanyl analogues that are scheduled controlled substances can be prosecuted as any other controlled substance would be prosecuted. The CSA also equips the DEA to swiftly

³⁶ *See id.* at 217, n.138.

³⁷ *See Prisoners of Politics*, at 2.

³⁸ Barr, *supra* note 18; *see also* Drug Enforcement Administration (@DEAHQ), Twitter (Jan. 11, 2020, 3:28 PM), <https://twitter.com/DEAHQ/status/1216094432648409090> (“Without the emergency scheduling of the entire class of fentanyl-related substances, all non-scheduled fentanyl substances will no longer be illegal. This scheduling expires in 26 days.”).

³⁹ 21 C.F.R. § 1308.12 Schedule II (2019) (carfentanil); 21 C.F.R. § 1308.11 Schedule I (2019) (acetyl fentanyl).

add new substances to the schedule by providing it with temporary scheduling authority. Temporary designation becomes permanent only if the AG asks the Secretary of Health and Human Services (“Secretary”) to confirm the accuracy of the designation and the Secretary so confirms.

The second avenue that has been available to the Department since 1986 for the prosecution of unscheduled analogues – fentanyl or not – is the Analogue Act. Congress passed the Analogue Act to criminalize the harmful unscheduled chemical variants of controlled substances “that otherwise would escape the reach of the drug laws.”⁴⁰ Under the Act, a “controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in Schedule I.”⁴¹ Congress listened to and relied on evidence from experts when it defined a “controlled substance analogue” to require two things: first, a chemical structure which is substantially similar to a schedule I or II controlled substance, and second, a physiological effect on the central nervous system that is substantially similar to or greater than the effect of a schedule I or II controlled substance, or a particular person must represent or intend to have a physiological effect on the central nervous system that is substantially similar to or greater than the effect of a schedule I or II controlled substance.⁴²

Whether the government would be required to prove that an unscheduled substance had both a substantially similar chemical structure, and an actual or intended substantially similar effect was carefully considered by Congress in enacting the Analogue Act. Although the Department argued for an approach that would look only to structure, Congress ultimately accepted the views of the American Chemical Society. The Society testified before the Senate Judiciary Committee that it “believe[d] it necessary to require that designer drugs meet both of these tests” –

⁴⁰ *United States v. Hodge*, 321 F.3d 429, 437 (3d Cir. 2003) (quoting 131 Cong. Rec. 19114 (1985) (statement of Sen. Thurmond) (“This proposal will prevent underground chemists from producing dangerous designer drugs by slightly changing the chemical composition of existing illegal drugs.”); 131 Cong. Rec. 27311 (1985) (statement of Sen. D’Amato) (stating that the Analogue Act “closes the loophole in present law that allows the creation and distribution of deadly new drugs without violating Federal law”); 131 Cong. Rec. 32950 (1985) (statement of Rep. Lungren) (“The focus of this proposal is clearly to impact on the designer drug phenomena by making it illegal for the clandestine chemists to manufacture and distribute these substances.”)).

⁴¹ 21 U.S.C. § 813(a).

⁴² 21 U.S.C. § 802(32)(A)(i)-(iii).

that it must “be specifically designed to have . . . a chemical structure substantially similar to that of a controlled substance” and “a biological effect substantially similar to that of a controlled substance” – “in order to protect the legitimate production of drugs that are intended for human consumption and that have similar chemical structures to those of designed drugs, but that are designed to have the opposite or dissimilar biological effects,” such as naloxone and other analogs designed with the purpose of countering drug abuse.⁴³ So long as an unscheduled substance is proven to be a “controlled substance analogue,” it can be treated and prosecuted as if it was a schedule I controlled substance.

Despite these authorities, and the Department’s history of prosecuting fentanyl traffickers under them, the Department now claims that it is unable to effectively prosecute fentanyl traffickers and that, without classwide scheduling, it would enter “relatively unknown territory.”⁴⁴ Other statements by the DEA and the Department, however, confirm that they know well how to use existing scheduling and prosecuting methods.⁴⁵ The Department has acknowledged its “very good track record in Analogue Act cases.”⁴⁶ As of May 2019, the Trump Administration reported a 40-fold increase fentanyl prosecutions from 2016 to 2018.⁴⁷ Data from the United States Sentencing Commission confirms that between 2014 and 2018, fentanyl trafficking offenders have increased by 4,711.1%.⁴⁸ These cases often

⁴³ *Controlled Substance Analogs Enforcement Act of 1985: Hearing on S. 1437 before the S. Comm. on the Judiciary*, 996th Cong. 79 (1985) (American Chemical Society Responses to Questions from Senator Biden); see also *United States v. Roberts*, No. 01 CR 410 RWS, 2001 WL 1646732, *5 (S.D.N.Y. Dec. 17, 2001).

⁴⁴ *DOJ Statement*, at 6.

⁴⁵ See *2018 Scheduling Order*, at n.4 (noting that trafficking in fentanyl related substances is “actually illegal as persons who do so can be prosecuted using the controlled substance analogue provisions of the Controlled Substances Act”); see also *DOJ Statement*, at 5 (“In terms of investigations and prosecutions, if the temporary emergency scheduling order lapses without permanent scheduling, the Department would once again have to rely on the Analogue Act to bring fentanyl traffickers to justice.”).

⁴⁶ *DOJ Statement*, at 5.

⁴⁷ See *An Update on the President’s Commission on Combating Drug Addiction and the Opioid Crisis: One Year Later*, <https://www.whitehouse.gov/wp-content/uploads/2019/05/Opioid-Commission-Report-One-Year-Later-20190507.pdf> (last accessed Jan. 24, 2020).

⁴⁸ See USSC, *Quick Facts on Federal Fentanyl Trafficking Offenses* 1 (2019).

involved mandatory minimums: in 2018, 44.6% of fentanyl traffickers were convicted of an offense carrying a mandatory minimum.⁴⁹ Such prosecutions are felt most harshly by minority defendants. In 2018, 77% of those prosecuted for fentanyl-related substances were people of color.⁵⁰

Despite claims to the contrary by proponents of classwide scheduling,⁵¹ the Department has not shown an intent to only target high-level traffickers. Available information indicates that most of the Department's prosecutions have not been of high-level importers or traffickers but rather of couriers, mules, street-level dealers, and users. In 2018, only 5.7% of prosecutions involved individuals who were given increased sentences for having a leadership/supervisory role in the offense.⁵² Almost half—41.1%—of those prosecuted had little or no criminal histories.⁵³ Indeed, the Department has made explicit that low-level dealers and addicts are exactly whom they intend to target. In 2018, former AG Sessions initiated an “enforcement surge,” directing prosecutors in ten regions of the United States to “prosecute every readily provable case involving the distribution of fentanyl, fentanyl analogues and other synthetic opioids, regardless of drug quantity.”⁵⁴ That same year, the Government Accountability Office issued a report that recognized that federal drug enforcement

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ *See* Editorial, *Congress Should Act to Allow a Ban on Fentanyl Indefinitely*, Wash. Post, Jan. 5, 2010, https://www.washingtonpost.com/opinions/congress-should-act-to-allow-a-ban-on-fentanyl-indefinitely/2020/01/05/432b94b2-2e67-11ea-bcb3-ac6482c4a92f_story.html (“there is little evidence that the Justice Department plans to target individual users rather than traffickers”).

⁵² *See Quick Facts*, *supra* note 48.

⁵³ *See id.*

⁵⁴ Dep't. of Justice, *Attorney General Jeff Sessions Announces the Formation of Operation Synthetic Opioid Surge (S.O.S.)*, July 12, 2018, <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-formation-operation-synthetic-opioid-surge-sos>.

AG Barr has confirmed his intention of “ratchet[ing] up” this initiative. *See Attorney General William P. Barr Delivers Remarks at the Grand Lodge Fraternal Order of Police's 64th National Biennial Conference*, *supra* note 27.

agencies are “target[ing] street-level and mid-level distributors, rather than focusing more heavily on traditional targets, such as cartels.”⁵⁵

These enforcement statistics are particularly troubling in light of testimony from the Acting Chief of the DEA’s Synthetic Drugs and Chemicals Section that, most often, people do not know that the substances they are selling contain fentanyl.⁵⁶ Sentencing Commission data supports this testimony: in 2016, only 16% of defendants sentenced in fentanyl-related cases clearly knew they had fentanyl.⁵⁷ And, more recently, the DEA agreed that: “It is highly likely many distributors do not know what exactly they are selling when it comes to differentiating between heroin, fentanyl, and fentanyl-laced heroin, as well as differentiating between diverted pills and fentanyl-containing counterfeit pills. This probably means many distributors are not intentionally deceiving customers; instead, suppliers do not always inform distributors specifically what substances or combinations of substances they are selling.”⁵⁸

Indeed, distinguishing between users and low-level dealers is simply not possible because “many people do both.”⁵⁹ Drug users sell drugs to support their habits and

⁵⁵ *Illicit Opioids: While Greater Attention Given to Combating Synthetic Opioids, Agencies Need to Better Assess their Efforts*, Government Accountability Office, March 29, 2018, <https://www.gao.gov/assets/700/690972.pdf>.

⁵⁶ See Transcript of Public Hearing before the United States Sentencing Commission, Washington, D.C., at 28 (December 5, 2017) (Joe Schleigh, Acting Chief, Synthetic Drugs and Chemicals Section, Diversion Control Division (DEA)). <https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171205/transcript.pdf>.

⁵⁷ See USSC, *Public Data Presentation for Synthetic Cathinones, Synthetic Cannabinoids and Fentanyl and Fentanyl Analogues Amendments* (January 2018), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018_synthetic-drugs.pdf; see also Letter from Freedomworks, *supra* n. 28 at 2; Letter from American Civil Liberties Union (ACLU), Drug Policy Alliance, FAMM, The Leadership Conference on Civil and Human Rights, *et al.*, at 3-4 (Dec. 11, 2019), https://www.aclu.org/sites/default/files/field_document/sofa_and_class_wide_ban_extension_opposition_letter_final.pdf.

⁵⁸ *DEA 2018 Threat Assessment* at 25, *supra* note 16.

⁵⁹ *Rethinking the Drug Dealer*, at 13; see also Zachary A. Siegel, *How to Rethink Drug Dealing and Punishment*, The Appeal (Dec. 17, 2019), <https://theappeal.org/how-to-rethink-drug-dealing-and-punishment/>.

many low-level actors in the supply chain are not paid in money, but rather in drugs.”⁶⁰ “People who use drugs often sell them in small quantities to their friends, leaving little daylight between the role of the user and seller.”⁶¹

A client of one of my federal defender colleagues illustrates this point. The client, a 30-year old man with no criminal history, was charged with conspiracy to distribute fentanyl and fentanyl analogues, distribution of fentanyl and fentanyl analogues, and attempted distribution of fentanyl and fentanyl analogues. The client had suffered a serious back injury in high school but went on to play football in college before reinjuring his back and transferring to a school closer to home. While the client gave up football, his debilitating back pain persisted. He suffered a divorce, grew increasingly depressed and isolated, and moved away from his family. He was introduced to fentanyl by a girlfriend who was selling fentanyl online. He became addicted. Dependent upon his girlfriend for housing, finances, and fentanyl, he agreed to assist her with mailing and receiving packages and was subsequently arrested. While on bond, he successfully completed an inpatient treatment program and mental health counseling where he obtained the skills and resources to stay sober. He also addressed the root cause of his back pain. He has had two spinal fusions, which his surgeon described as “long” overdue. This individual, like so many of the clients I represent, did not sell drugs for a profit. He did not have a weapon. He was not a “king-pin,” manager, or organizer. He distributed drugs to feed his own addiction. And now he is a felon, with all of the collateral consequences that status carries, who will spend over a year in prison because his addiction was treated too late. Unfortunately, cases like this one are not outliers.

While the Department claims a permanent classwide ban of fentanyl-related substances is necessary to effective enforcement—and despite confusion regarding its use of these authorities to date⁶²—the Department has not identified any case

⁶⁰ See *Rethinking the Drug Dealer*, at 36.

⁶¹ See *How to Rethink Drug Dealing and Punishment*, *supra* note 59.

⁶² In July, ABC News reported, after a Department of Justice briefing with reporters about the classwide scheduling request, that the classwide scheduling had “assisted prosecutors in cases, such as an August 2018, 43-count indictment against two Chinese Citizens who were charged with shipping fentanyl analogues to 37 U.S. states over a decade, linked to at least two deaths of Americans in Ohio.” See Alexander Mallin, *DOJ Issues Plea to Congress in Battle Against Fentanyl Copycats*, ABC News, Jul. 1, 2019. But none of the charges in that case—*United States v. Zheng*, 18-cr-00474 (E.D. Ohio)—depended on the classwide scheduling. Instead, each fentanyl-analogue related charge was for analogues that had been

where it has relied on the classwide ban to prosecute any major manufacturing or importation cases. Instead, it has made effective use of its substance-by-substance controls and the Analogue Act, which allows the Department to prosecute unscheduled fentanyl analogues.⁶³

III. Classwide Scheduling Would Be a Radical Shift in the Current Balance of Drug Policy Authority between Enforcement and Health.

The Department asserts that Congress must enact classwide scheduling to preserve an uncontroversial status quo. This elides the unprecedented and radical nature of the DEA's placement of an entire class of drugs onto Schedule I.

Congress originally decided in the CSA that the authority to schedule substances should be shared between the AG and the Secretary of Health and Human Services.⁶⁴ "This division of decisionmaking responsibility was fashioned in recognition of the two agencies' respective areas of expertise. Members of the House repeatedly stated that the Department of Justice should make judgments based on law enforcement considerations, while [the Department of Health, Education, and Welfare] should have the final say with respect to medical and scientific determinations."⁶⁵ Although Congress originally gave the ultimate decision to control to the AG, it chose to bind that decision-making by the medical and scientific findings of the Secretary. Typically, both the AG and the Secretary must evaluate eight separate factors to determine whether and where to classify a substance.⁶⁶

Thus, in its original form, no drug could be "placed in any schedule unless the findings required for such a schedule [were] made."⁶⁷ But in 1984, in response to the emergence of synthetic drugs, Congress created an exception by granting the AG temporary scheduling power, allowing the Department to skip formalized review to

scheduled on a substance-by-substance basis by the DEA. Ten substances were charged under the Analogue Act, but none were fentanyl analogues.

⁶³ See 21 U.S.C. § 813.

⁶⁴ See 21 U.S.C. § 811; see also Thomas M. Quinn & Gerald T. McLaughlin, *The Evolution of Federal Drug Control Legislation*, 22 Cath. U. Law. Rev. 586, 607-608 (1973).

⁶⁵ *Nat'l Org. for Reform of Marijuana Laws (NORML) v. Drug Enforcement Admin., U. S. Dep't. of Justice*, 559 F.2d 735, 745-46 (D.C. Cir. 1977).

⁶⁶ See 21 U.S.C. § 811(c).

⁶⁷ 21 U.S.C. § 812(b).

more quickly control new substances.⁶⁸ For that control to become permanent, however, the AG must ask the Secretary to initiate a period of scientific study to assess the scientific and medical necessity of the AG's control.⁶⁹ Congress enacted the temporary scheduling authority to "allow the Attorney General to respond quickly to protect the public from drugs of abuse that appear in the illicit traffic too rapidly to be effectively handled," but still required that the more "extensive scheduling procedures required under current law . . . be met."⁷⁰ Once that analysis is complete, and if the Secretary agrees with DEA's designation, the control is made permanent.⁷¹

In February 2018, the DEA announced it would temporarily schedule any substance with one of five modifications to the fentanyl structure in Schedule I – whether the substance is in existence or not.⁷² Prior to the order, approximately 220 individual drugs were listed on Schedule I.⁷³ The number of substances that fall within the class are unknown, but estimates have ranged from a thousand to "nearly infinite."⁷⁴ The Department did not follow the statutorily provided path to permanent scheduling which calls for initiating a scientific and medical review of its

⁶⁸ See Comprehensive Crime Control Act of 1984, at § 508, *supra* note 23.

⁶⁹ See 21 U.S.C. § 811.

⁷⁰ S. Rep. 98-225 at 264-265 (1984).

⁷¹ See 21 U.S.C. § 811(h)(1) and (2),

⁷² See *2018 Scheduling Order*, at 5189 ("As indicated, the temporary scheduling order includes all substances that fall within the above definition—even if such substances have not yet emerged on the market in the United States. As a result, DEA cannot currently specify the chemical name of every potential substance that might under this new definition.").

⁷³ See 21 C.F.R. § 1308.11 (2017).

⁷⁴ The Administration's estimates have varied from "hundreds to maybe a thousand," see Sarah Lynch, *Trump Administration Officials Clash Over How to Combat Fentanyl Copycats*, Reuters, Jul. 9, 2019, <https://www.reuters.com/article/usa-congress-fentanyl/corrected-trump-administration-drug-officials-clash-over-how-to-combat-fentanyl-copycats-idUSL2N248062>, to "over 3,000," Kemp Chester, Associate Director, National Heroin Coordinate Group, Office of National Drug Control Policy, *Response to Questions for the Record Following Hearing Entitled, The Countdown: Fentanyl Analogues & the Expiring Emergency Scheduling Order to S. Comm. on the Judiciary* (June 4, 2019 (Chester QFRs), to "millions" to "an infinite" number, see Lynch.

scheduling action by the Secretary. By turning to Congress instead, the Department has cut health experts out of the decision-making process. This temporary authority will expire on February 6, 2020.⁷⁵

The CSA does not allow the DEA to do what it did here: place an undefined and potentially limitless class of “fentanyl-related substances” on Schedule I.⁷⁶ The Department has expressly acknowledged this. In testimony before the Senate Judiciary Committee, the Department described classwide scheduling—in contrast to substance-by-substance scheduling—as an “untested approach.”⁷⁷ The Department warned of “legal uncertainty surrounding the authority of the Attorney General, through DEA, to schedule fentanyl-like substances,” because it is “[i]mplicit in the structure and text of the CSA’s scheduling authority” that substances “are scheduled one at a time.”⁷⁸

In its quest for classwide scheduling, DEA seeks to permanently and exclusively vest scheduling authority for these substances with the DEA at the expense of scientific evidence and research.⁷⁹ Abandoning the expert advice of HHS should trouble the Committee. In July, a bipartisan group of Senators raised concerns that this “failure to engage necessary health experts vests far too much authority to a law-enforcement agency and may result in action that will deter valid, critical

⁷⁵ See *2018 Scheduling Order*. Two weeks ago, the Senate passed a measure that would temporarily extend SOFA’s codification by 15-months, the *Temporary Reauthorization and Study of the Emergency Scheduling of Fentanyl Analogues Act*, S. 3201, 116th Cong. § 2 (2020), but Senator Graham has nevertheless indicated he hoped “in the coming days we can reach an agreement that will allow fentanyl analogues to be listed as a Schedule I drug permanently,” Press Release, *Feinstein, Graham, Durbin, Colleagues Pass Bill to Keep Fentanyl-Related Substances Schedule I* (Jan. 16, 2020), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=A4344756-7857-4160-964E-73A14E6B232D>.

⁷⁶ See 21 U.S.C. § 811(h) (permitting the Attorney General to only schedule drugs on a substance-by-substance basis).

⁷⁷ *DOJ Statement*, at 6.

⁷⁸ *Id.*

⁷⁹ See Freedomworks Letter, *supra* n. 28 at 1 (warning that SOFA would grant the Department the “unilateral authority to add substances to the federal schedule and pursue harsh penalties”).

medical research aimed at responses to the opioid crisis.”⁸⁰ But DEA’s effort to cut Health and Human Services out could also have devastating consequences for public health and participants in the federal criminal system by sweeping a potentially limitless set of substances onto Schedule I.

A class-based approach is certain to criminalize substances that have no place in Schedule I. The chemical composition of different fentanyl-related substances can cause vastly different physiological effects. The Administration has acknowledged that “[t]hese analogues have a wide variance in potency. Some analogues, like acetyl fentanyl, are less potent than fentanyl; others like carfentanil, are many times more potent; and still others, like benzylfentanyl, are believed to be essentially biologically inactive.”⁸¹

The incredible breadth of this request, in combination with the wide variance in potency of these substances, makes one fact certain: benign, helpful, and harmful drugs alike will be swept onto Schedule I.⁸² Once placed on Schedule I, any research

⁸⁰ Letter from Senators Richard J. Durbin, Michael S. Lee, Sheldon Whitehouse, Amy Klobuchar, Christopher A. Coons, Mazie Hirono, Cory A. Booker, Kamala D. Harris to The Hon. Alex M. Azar II, Secretary, United States Department of Health and Human Services (Jul. 10, 2019), <https://www.durbin.senate.gov/imo/media/doc/Letter%20to%20DOJ%20HHS%207.10.pdf>.

⁸¹ Chester QFRs, at 3; *see also* Statement of Kevin L. Butler Before the U.S. Sentencing Comm’n, Washington, D.C., at 28-29 (Mar. 14, 2018) (“[T]he relative potency of fentanyl and fentanyl analogues varies widely.”), <https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20180314/Butler.pdf>.

⁸² *See* Letter from the College of Problems of Drug Dependence (CPDD) to the Hons. Lindsey Graham & Dianne Feinstein, Senate Judiciary Comm. at 2 (Dec. 13, 2019) (on file with author); *see also* Letter from the Friends of NIDA to the Hons. Lindsey Graham & Dianne Feinstein, Senate Judiciary Comm. (Jul. 2, 2019) (on file); Letter from the American Psychological Association to the Hons. Lindsey Graham & Dianne Feinstein, Senate Judiciary Comm. (Jul. 8, 2019) (on file); Statement of Patrick M. Beardseley, Ph. D., Re: *S. 2701: Federal Initiative to Guarantee Health by Targeting Fentanyl*, (Nov. 27, 2019) (“Harm could be caused by this bill in that it will inevitably inhibit research with fentanyl-related substances.”) (on file); Statement of Charles B. France (Nov. 29, 2019) (writing to “express my concerns regarding congressional efforts to legislatively add compounds to Schedule I of the Controlled Substance Act, in the absence of direct scientific evidence for potential harmful effects of those compounds) (on file).

into these substances must flow through the DEA.⁸³ Researchers have warned that this will raise unnecessary barriers to critical research into, *inter alia*, life-saving antidotes, and warned that “the Department of Health and Human Services’ science-based agencies, specifically the National Institute on Drug Abuse and the Food and Drug Administration,” must be involved in “any decisions regarding scheduling of synthetic analogues.”⁸⁴

There are troubling signs that the Administration views a class-based approach that abandons science and evidence as the new framework for all new synthetic drugs—fentanyl or not. Kemp L. Chester, the Assistant Director of the National Opioids and Synthetics Coordination Group Office of National Drug Control Policy, explained that classwide scheduling provides “a framework for us to better address rapid and emerging changes in the dynamic illicit drug market, seize the initiative from illicit drug producers and traffickers and set the United States on a path to better preventing these drugs from entering the country before they kill Americans.”⁸⁵ Congress must be wary of setting a precedent that will cut health agencies out of drug policy decisions.

Moreover, the Administration has recognized that classwide scheduling will be, at best, a short term solution. Mr. Kemp has acknowledged that “scheduling an entire class of fentanyl related substances may drive illicit drug manufacturers to begin developing non-fentanyl synthetic opioids that would not be included in class-based scheduling.”⁸⁶ There are already a growing number of emerging non-fentanyl synthetic opioids—like the U-Series of drugs—that are not captured under the classwide ban and are causing overdose deaths.⁸⁷ Indeed, Mr. Chester has warned that “[G]iven what we know about the dynamism and rapid pace of illicit drug

⁸³ See 21 C.F.R § 1301, *et seq.*

⁸⁴ Letter from CPDD, *supra* note 82.

⁸⁵ Statement of Kemp L. Chester, Assistant Director of the National Opioids and Synthetics Coordination Group Office of National Drug Control Policy, Before the U.S. Senate, Committee on the Judiciary, at 6 (June 4, 2019).

⁸⁶ *Id.*

⁸⁷ See *id.* at 2.

production we see today, the synthetic opioid that will be killing Americans in 2021 or 2022 has not yet been invented.”⁸⁸

There is growing recognition that, based on evidence, the only way to stop the demand for drugs is through prevention and treatment.⁸⁹ Yet an outsize proportion of federal resources is still allocated towards enforcement. It is time for the government to adjust its drug policy to catch up. It is more important than ever to maintain—and increase—the distribution of power in drug control policy to the Secretary and prioritize evidence-based strategies to effectively fight this critical public health issue.

IV. Conclusion

Classwide scheduling is a step in the wrong direction and would mark a return to the failed approaches of the War on Drugs. The Department has used existing tools to successfully and aggressively prosecute harmful fentanyl analogues and those tools do not disrupt the balance between, on one hand, enforcement, and on the other, science, prevention and public health. Again, I thank the Committee and appreciate the invitation to share my perspective on this issue.

⁸⁸ *Id.* at 3.

⁸⁹ *See supra* note 7.