

NOTES

TERROR IN TRADING: SHOULD THE UNITED STATES CLASSIFY MEXICAN DRUG TRAFFICKING ORGANIZATIONS AS TERRORIST ORGANIZATIONS?

BEN JAKOVLJEVIC*

I. INTRODUCTION

Drug policy reform in the United States is a controversial topic that has generated much discussion but little substantive change. One strategy proposed that could both generate broad support and retain the U.S. principle of “getting tough on drugs”¹ is to attack Mexican drug trafficking organizations (“MDTOs”)² by treating them as Foreign Terrorist Organizations (“FTOs”).

MDTOs are unconventional candidates for FTO designation because their main motivation is profit, which is categorically distinct from the political motivation that is characteristic of other FTOs. As demonstrated by rampant intimidation and public executions, however, the collateral effects of MDTOs’ economic motives have a political quality to them, leading to a recent demand that they be treated as foreign terrorists.

This Note will explore a potential designation of MDTOs as FTOs. The topic was prompted by a bill proposed in March 2011 that called on

* University of Southern California, Gould School of Law; Juris Doctorate Candidate, 2014. I am very thankful to those who helped me turn a draft into a Note, particularly: Professor Jody Armour, Jordan Bubin, Jessica Gomez, Matt Ardoin, Professor James Cooper, Alek Jakovljevic, Mark Jakovljevic, Nicholas Shapiro, Zvi Smith, as well as Lauren De Lilly, Daniella Shulman, and the *Southern California Interdisciplinary Law Journal* staff and editors.

1. *See generally* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 59–61 (rev. ed. 2012). This rhetorical device was first used to gain votes among poor and working-class white people who were ambivalent about the gains made by blacks during the civil rights movement. *Id.*

2. MDTOs are the main source of marijuana, methamphetamines, and cocaine in the United States. COLLEEN W. COOK, CONG. RESEARCH SERV., RL 34215, *MEXICO’S DRUG CARTELS* (2007).

the U.S. Secretary of State to designate six major MDTOs as FTOs.³ Though it is currently unclear whether the bill will pass or not, an explication of the proposed path may highlight its flaws and illuminate more fruitful paths for federal drug policy; hopefully, an honest appraisal will minimize casualties while promoting justice and efficiency.

This Note addresses whether the United States *can* and *should* designate the major MDTOs as FTOs. Part II of this Note surveys the context of the conflict and describes the problem of rampant violence in Mexico, the threat MDTOs pose to U.S. national security, and the proposal to designate MDTOs as FTOs. I also examine select groups with an interest in the U.S. “drug war” in order to hypothesize whether each party would favor the designation or not. This context will aid in framing the issue for Part III. In Part III, I consider the possibility of such a designation through an analysis of the relevant statutes. After concluding that a designation *could* happen, in Part IV, I then analyze the normative question of whether MDTOs *should* be designated as FTOs. This Part examines the potential legal implications of an FTO designation, especially with respect to the material support statutes⁴ and the possible infringement of constitutional protections. This Note argues that, while MDTOs could be designated as FTOs, the potential negative repercussions would likely outweigh the benefits; thus, a designation should not occur. Part V will conclude the Note with a broader look at the national security framework currently developing with respect to suspicious targets—which include, but are not limited to, terrorists, criminal participants in the illegal drug market, and innocent people. Finally, the Note offers recommendations responding to the issue of federal drug policy.

3. The bill is a call to designate each of the following six organizations as FTOs: (1) The Arellano Feliz Organization; (2) The Los Zetas Cartel; (3) The Beltran Leyva Organization; (4) La Familia Michoacana; (5) The Sinaloa Cartel; and (6) The Gulf Cartel/New Federation. H.R. 1270, 112th Cong. (2011).

4. 18 U.S.C. §§ 2339A–2339B (2009).

II. THE VIOLENCE, THE PROPOSAL, AND THE INTERESTED PARTIES

A. THE DRUG WAR IN MEXICO HAS REACHED NEW LEVELS OF VIOLENCE AND CORRUPTION

Though Colombia was the main supplier of drugs to the United States in the distant past, Mexico has taken the lead in recent decades.⁵ Besides sharing a border with the consumption-heavy United States, having fertile land to grow the products, and suffering from a dearth of legitimate economic options,⁶ Mexico now has an entrenched history of drug trafficking to the United States. Predecessors to today's kingpins established drug trade routes during the past century,⁷ and MDTOs continue to control and develop these routes.⁸ Throughout the 1990s, the drug trade thrived in Mexico, probably in part because there was little resistance from the Mexican government. However, this activity has become much more difficult since the 2000 election of President Vicente Fox and the 2006 election of President Felipe Calderon, who initiated a military offensive against drug trafficking.⁹ MDTOs, fighting the military and one another for control of territory, have spun into subsidiaries and branched into new cartels.¹⁰

As the drug trade has become more difficult to conduct, MDTOs have upped the ante, using powerful weapons from U.S. sources¹¹ and elsewhere to commit various atrocities in order to gain property and power. Control is volatile and so violence is common, ranging from slaughters of migrant

5. NAT'L GANG INTEL. CENTER, NAT'L GANG THREAT ASSESSMENT 26 (2011) [hereinafter NAT'L GANG THREAT ASSESSMENT].

6. The average daily wage in Mexico is approximately \$3.70; for this reason, "[t]hat which is 'illegal becomes what seems reasonable and necessary.'" Craig A. Bloom, *Square Pegs and Round Holes: Mexico, Drugs, and International Law*, 34 HOUS. J. INT'L L. 345, 393 (2012).

7. *Id.* at 350–51. For example, Mexican alcohol cartels smuggled rum into the United States during prohibition; during World War II, Mexico provided "morphine to the legal [U.S.] market and heroin to the illegal one." *Id.*

8. MDTOs have been successful in exerting substantial influence across the United States through connections with gangs in major U.S. cities. *See generally* NAT'L GANG THREAT ASSESSMENT, *supra* note 5. *See also* NAT'L DRUG INTEL. CENTER, NAT'L DRUG THREAT ASSESSMENT 8 (2011) [hereinafter NAT'L DRUG THREAT ASSESSMENT].

9. Bloom, *supra* note 6, at 359–63.

10. *Id.* at 353–59.

11. "'Most of the weapons, I would say around 95 percent of the weapons that we have seized, come from the U.S.," said [Mexico Attorney General Eduardo Medina] Mora." Mark Potter, *Mexican Drug War "Alarming" U.S. Officials*, NBC NEWS (Jun. 25, 2008, 1:55 PM), http://worldblog.nbcnews.com/_news/2008/06/25/4376042-mexican-drug-war-alarming-us-officials.

workers,¹² to political assassinations,¹³ to alleged false flag attacks.¹⁴ The numbers are staggering: the MDTOs boast a combined figure of 100,000 foot soldiers,¹⁵ estimated drug-related killings in Mexico range from 54,000 to nearly 100,000 since 2006,¹⁶ and approximately 1.6 million people have been displaced.¹⁷ Meanwhile, illicit drug trade is at least eight percent of

12. The Tamaulipas Massacre of 2010 involved seventy-two murders of Central American migrants; moreover, “migrant attacks are a regular occurrence in Mexico. After drug trafficking itself, migrant extortion is the primary source of income for the cartels.” Spencer Thomas, *A Complementarity Conundrum: International Criminal Enforcement in the Mexican Drug War*, 45 VAND. J. TRANSNAT’L L. 599, 607 (2012). But this is not even the only Tamaulipas Massacre. See *Aumenta a 193 los muertos por matanza en San Fernando, Tamaulipas: PGR* [The Number of Deaths Increases to 193 in the Massacre at San Fernando, Tamaulipas: PGR], MILENIO (June 7, 2011, 11:48 AM), <http://www.milenio.com/cdb/doc/noticias2011/a83771a907f9b3b0aaf6153c163b67ca> (Mex.) (explaining that there was a mass murder of 193 people by Los Zetas at a ranch and victims were forced to fight to the death with other hostages, with victorious ones later recruited by Los Zetas).

13. See, e.g., Sam Webb, “Please Spare My Little Girl”: How Mexico’s Fearless Female Mayor Sacrificed Herself to Save Her Daughter’s Life as She Was Abducted by Drug Gang, Tortured and Executed, DAILY MAIL (Nov. 26, 2012, 4:23 PM), [http://www.dailymail.co.uk/news/article-2238577/Maria-Santos-Gorrostieta-executed-surviving-assassination-attempts.html#ixzz2DMehwpVY\(U.K.\)](http://www.dailymail.co.uk/news/article-2238577/Maria-Santos-Gorrostieta-executed-surviving-assassination-attempts.html#ixzz2DMehwpVY(U.K.)). Mexican mayor Maria Santos Gorrostieta was “stabbed, burned, battered and bound at wrist and ankle” before being murdered. She is the most recent of two-dozen murders of Mexican mayors in recent years. *Id.*

14. False flag attacks, a strategy that originated in naval battle, are acts in which forces of one power or group disguise themselves as another power or group (generally an enemy). While it is a real phenomenon, the nature of this type of attack often makes it difficult to prove who actually committed the attack. Outside of the naval context, the Reichstag fire, which enabled Adolf Hitler to gain control in Germany, has been cited as an example of a false flag attack. See Mike Rothschild, *False Flag Attacks: Myth and Reality*, SKEPTOID (Jan. 21, 2013), <http://skeptoid.com/blog/2013/01/21/false-flag-attacks-myth-and-reality/>. This strategy may be used by MDTOs. In 2012, a secret workshop in northern Mexico was discovered by Mexican marines, “where presumed drug traffickers made copies of military uniforms.” *Mexican Drug Traffickers Make Knockoff Military Uniforms, 4th Gen Arrested For Cartel Ties*, FOX NEWS LATINO (May 24, 2012), <http://latino.foxnews.com/latino/news/2012/05/24/mexican-drug-traffickers-make-knockoff-military-uniforms-mexican-general/>. See also Jason Howerton, *Are Drug Cartels Learning From Islamic Terrorist Groups?*, THE BLAZE (May 29, 2012, 2:57 PM), <http://www.theblaze.com/stories/are-drug-cartels-learning-from-islamic-terrorist-groups/>.

15. *EXCLUSIVE: 100,000 Foot Soldiers in Mexican Cartels*, WASH. TIMES (Mar. 3, 2009), <http://www.washingtontimes.com/news/2009/mar/03/100000-foot-soldiers-in-cartels/>.

16. *Compare Damien Cave, Mexico Updates Death Toll in Drug War to 47,515, but Critics Dispute the Data*, N.Y. TIMES (Jan. 11, 2012), http://www.nytimes.com/2012/01/12/world/americas/mexico-updates-drug-war-death-toll-but-critics-dispute-data.html?_r=0 (estimating a death count at 47,515), with Nick Miroff & William Booth, *Mexico’s Drug War Is at a Stalemate as Calderon’s Presidency Ends*, WASH. POST (Nov. 27, 2012), http://www.washingtonpost.com/world/the_americas/calderon-finishes-his-six-year-drug-war-at-stalemate/2012/11/26/82c90a94-31eb-11e2-92f0-496af208bf23_story_2.html (citing Mexico’s National Statistics Institute figure of 100,000 homicides from December 2006 to December 2012).

17. *Desplazados, Tragedia Silenciosa en México* [Displaced People, A Silent Tragedy in Mexico], EL ECONOMISTA (Jan. 7, 2012, 10:11 AM), <http://eleconomista.com.mx/seguridad-publica/2012/01/07/desplazados-tragedia-silenciosa-mexico> (Mex.).

international trade;¹⁸ of that amount, U.S. officials estimate more than twelve billion dollars a year flows from the United States to MDTOs.¹⁹ Money-laundering cases involve the assistance of U.S. horseracing,²⁰ beauty queens,²¹ and even the Drug Enforcement Agency (“DEA”) itself.²² Widespread corruption in Mexico permeates the culture, leading some to fear that the 2012 election of President Enrique Peña Nieto²³ is spurring a return to “going easy” on the MDTOs.²⁴ While Mexico has had some success catching suspected drug traffickers, the country has an estimated

18. Illicit drug trade was estimated at eight percent of international trade, or four hundred billion dollars, in 2005. See DRUG LEGALIZATION (Karen F. Balkin ed., 2010); Syal, *infra* note 335.

19. Compare Manuel Roig-Franzia, *Mexican Drug Cartels Move North*, WASH. POST (Sept. 20, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/19/AR2007091902442.html> (estimating \$23 billion dollars), with Potter, *supra* note 11, and COOK, *supra* note 2, at 7 (estimating \$13.6–48.4 billion).

20. Richard A. Serrano, *Mexico Cartel Accused of Laundering Money at U.S. Racetracks*, L.A. TIMES (Jun. 12, 2012), <http://articles.latimes.com/2012/jun/12/nation/la-na-cartel-horses-20120613>.

21. In one case, a former Sinaloa beauty queen contestant “fired at army soldiers before she was killed in an armed clash.” In another case, the winner of “Our Sinaloa Beauty” in 2008 was arrested on firearms and money-laundering charges. She was released a few weeks later because there was insufficient evidence to bring her to trial. Links between drug kingpins and beauty queens are said to be a constant in Mexico, as young women are sought out by criminals in schools and on the street. *Beauty Queen Shot at Mexican Soldiers Before Being Shot Dead*, HISPANICALLY SPEAKING NEWS (Dec. 5, 2012, 9:00 AM), <http://www.hispanicallyspeakingnews.com/latino-daily-news/details/narco-blog-beauty-queen-shot-at-mexican-soldiers-before-being-shot-dead/20252/>.

22. See, e.g., Ginger Thompson, *U.S. Agents Launder Mexican Profits of Drug Cartels*, N.Y. TIMES (Dec. 3, 2011), <http://www.nytimes.com/2011/12/04/world/americas/us-drug-agents-launders-profits-of-mexican-cartels.html?pagewanted=all>. See also Alan Rice, *DEA Defends Money Laundering Sting Operations*, 02-01-12 BSA/AML UPDATE 8 (2012) (“A DEA statement declared that the agency and Mexican authorities have ‘for years’ worked together in secret operations intended to derail the laundering of large sums of money that represent the proceeds of illegal drug trafficking . . . [Ginger Thompson’s New York] Times report led House Oversight and Government Reform Committee Chairman Darrell Issa (R-CA) to order an investigation into the DEA’s activity. According to Issa, the DEA allowed money to be laundered illegally while its agents monitored the transactions in an effort to identify and apprehend the crime bosses . . . Issa compared the DEA’s actions with those of the [ATF] in connection with that agency’s ‘Operation Fast and Furious.’ . . . Issa’s committee has been investigating Operation Fast and Furious and now intends to extend the investigation to include DEA activities in connection with money laundering.”).

23. “Hot money also has tainted . . . the Mexican presidential elections this year, where the Institutional Revolutionary Party, known as PRI, of President-Elect Enrique Peña Nieto was accused by rivals of campaigning using illicit funds. The charges were not proven.” Tomas Sarmiento & Miguel Gutierrez, *Mexico Passes Law to Combat Cartel Money Laundering*, CHI. TRIB. (Oct. 11, 2012), http://articles.chicagotribune.com/2012-10-11/news/sns-rt-us-mexico-drugsbre89a1pv-20121011_1_cartels-cash-purchases-illicit-funds.

24. See, e.g., Rory Carroll, *U.S. Concerned Mexico’s New President May Go Easy on Drug Cartels*, THE GUARDIAN (July 1, 2012), <http://www.guardian.co.uk/world/2012/jul/02/usa-mexico-president-drugs-cartels> (U.K.).

two percent conviction rate for drug-related crimes²⁵ and has suffered embarrassments even in the face of success. For example, the government scored a victory in 2012 when Zetas leader Heriberto Lazcano was reportedly gunned down outside a baseball game in a state on the Texas border.²⁶ However, within a couple of days, “the body was stolen from a funeral home in a pre-dawn raid by a group of armed men.”²⁷ The Mexican military has generated controversy for its own corruption,²⁸ and Mexican citizens themselves have identified crime and illegal drugs as some of their country’s most serious problems.²⁹

Meanwhile, the United States, the country with the world’s highest illegal drug usage,³⁰ faces more drug-related problems. The Department of Justice (“DOJ”) admitted in September 2011 that “Mexican-based trafficking organizations control access to the United States-Mexico border.”³¹ U.S. gangs are increasingly linked to MDTOs,³² and there is concern of spillover violence from Mexico into the United States. In July 2011, Steve McCraw, Texas Department of Public Safety Director, claimed that “22 murders, 24 assaults, 15 shootings and five kidnappings in Texas were linked to Mexican cartels since 2010.”³³ In response, the United States has contributed approximately 1.5 billion dollars to the Merida

25. See Nicholas Casey, *U.S. Shifts Mexico Drug Fight: Military Aid Plummets as Washington Turns Focus to Bolstering Legal System*, WALL ST. J. (Sept. 17, 2012, 7:43 PM), <http://online.wsj.com/article/SB10000872396390443720204578000463890865962.html> (estimating the conviction rate at two percent).

26. *Official: Body of Slain Mexican Drug Lord Stolen*, CBS NEWS (Oct. 9, 2012, 12:02 PM), <http://www.cbsnews.com/8301-202-162-57528780/official-body-of-slain-mexican-drug-lord-stolen/>.

27. *Id.*

28. Gabrielle D. Schneck, Note, *A War on Civilians: Disaster Capitalism and the Drug War in Mexico*, 10 SEATTLE J. FOR SOC. JUST. 927, 971–72 (2012). See also Bloom, *supra* note 6, at 412.

29. JEFFREY PASSEL, D’VERA COHN & ANA GONZALEZ-BARRERA, PEW RESEARCH CENTER, NET MIGRATION FROM MEXICO FALLS TO ZERO—AND PERHAPS LESS (2012), available at http://www.pewhispanic.org/files/2012/04/Mexican-migrants-report_final.pdf (“In a 2011 survey, 80% of respondents said crime was a very big problem, and 77% said the same about drug-related violence . . . The next most serious problems, in the view of the Mexican public, were rising prices (74% said this was a very big problem); illegal drugs (71%); lack of jobs (70%); and the economic situation (69%). In the United States, by contrast, concerns about jobs and the economy far outstrip all other issues in similar surveys about national conditions.”).

30. *U.S. Leads the World in Illegal Drug Use*, CBS NEWS (July 1, 2008, 9:30 AM), http://www.cbsnews.com/2100-500368_162-4222322.html.

31. NAT’L DRUG THREAT ASSESSMENT, *supra* note 8, at 8.

32. *Id.*

33. Gary Martin, *Texas Officials Dispute Obama’s Claims on Border Security*, HOUS. CHRON. (May 11, 2011), <http://www.chron.com/news/houston-texas/article/Texas-officials-dispute-Obama-s-claims-on-border-1682289.php>.

Initiative³⁴ and increased forces at the border.³⁵ U.S. voters, meanwhile, are increasingly open to substantive drug policy reform,³⁶ although President Barack Obama has made little substantive change³⁷ to the status quo of the drug war. With marijuana's outright legalization in Colorado and Washington in November 2012, people in the United States and around the world await the federal response.³⁸

B. H.R. 1270: A CALL FOR THE DESIGNATION OF THE MDTOS AS FTOs

Amid continued concern from U.S. citizens living along the U.S.-Mexico border, Representative Michael McCaul and Representative Richard Davis proposed House Resolution 1270 in 2011.³⁹ In an effort to designate MDTOs as FTOs, the bill cites the killings of U.S. citizens David Hartley (a citizen killed while jet-skiing in Falcon Lake, which borders Texas and Mexico) and Jaime Zapata (an Immigration and Customs Enforcement ("ICE") agent killed while on duty in Mexico), as well as the MDTOs' use of "brutal tactics of violence and the threat of violence against U.S. citizens to protect and expand their drug trade and as well their areas of operation."⁴⁰ H.R. 1270 concludes with a statement that MDTOs are "a continual threat to the safety and security of the United States and its people."⁴¹ Representative McCaul, Chairman of the House Committee on Homeland Security, would likely disagree with the Department of

34. See Casey, *supra* note 25; Bloom, *supra* note 6, at 404–06.

35. Approximately twelve hundred additional National Guard troops were deployed to the border in 2010. John Burnett, "Spillover" *Violence From Mexico: Trickle or Flood?*, NAT'L PUB. RADIO (Jul. 6, 2011, 12:01 AM), <http://www.npr.org/2011/07/06/137445310/spillover-violence-from-mexico-a-trickle-or-flood>.

36. Tim Gaynor, Cynthia Johnston & Steve Orlofsky, *For First Time, Most Americans Favor Legalizing Marijuana—Poll*, REUTERS NEWS (Oct. 22, 2013) (showing the increasing trend of acceptance for recreational and medicinal marijuana laws). See also Nick Gillespie, *Obama on Pot: Har Har Har, The Joke's On You!*, REASON.COM (Mar. 27, 2009, 10:32 AM), <http://reason.com/blog/2009/03/27/obama-on-pot-har-har-har-the-j>.

37. See Kara Rowland, *Obama Changes Anti-Drug Policies*, WASH. TIMES (May 12, 2010), <http://www.washingtontimes.com/news/2010/may/12/obama-outlines-minor-changes-to-anti-drug-policies/>.

38. A UK committee "urged ministers to monitor the effect of plans for cannabis legalisation in the US states of Colorado and Washington and in Uruguay." Dominic Casciani, *Consider Drugs Decriminalization System, MPs Say*, BBC NEWS (Dec. 10, 2012, 4:28 AM), <http://www.bbc.co.uk/news/uk-20648276> (U.K.).

39. H.R. 1270, 112th Cong. (2011).

40. *Id.*

41. *Id.*

Homeland Security (“DHS”) Secretary Janet Napolitano, who said in March 2011 that “the border is better now than it ever has been.”⁴²

This is not the first time legislation has attempted to create a link between drug crimes and terrorism,⁴³ but this proposal is noteworthy because it is tailored specifically to pursue MDTOs through the use of existing statutory bases. Designating the MDTOs as FTOs would do the following: allow federal charges to be brought against those who provide material support or resources to FTOs (which provide for a penalty of up to fifteen years, or death if their actions resulted in death); permit deportation of FTO members, even if they are in this country legally; and require banks to freeze funds tied to FTOs.⁴⁴

There are two material support statutes, and they bear special mention here because of their far-reaching potential. Under these statutes, it is a federal crime to provide material support or resources to aid acts of terrorism⁴⁵ or to aid FTOs.⁴⁶ These statutes will be discussed in more detail in Part IV, but it is important to underscore at this juncture that otherwise legal activity could still qualify as material support in violation of this statute, provided the individual knew that support helped an FTO.

C. SETTING THE STAKES

As with any proposed change to the law, it can be helpful to conduct stakeholder analysis to get a sense of the competing interests on each side of the proposal. This Subsection examines some of the U.S. stakeholders with emotional, political, and financial investments in the drug war in an attempt to identify what their disposition might be with respect to an FTO designation for MDTOs. It does not address all the U.S. actors with interests in the drug war; after all, this is a big play and plenty of actors are involved in its production. Indeed, some individuals play multiple roles. The scope is also limited in that I omit the various interests on the Mexican

42. *Napolitano: Border Security Better Than Ever*, CBS NEWS (Mar. 25, 2011), http://www.cbsnews.com/8301-503544_162-20047102-503544.html.

43. A more ambitious attempt at blending drug laws and terror laws was 2003’s VICTORY Act. It has been called a “watered-down version . . . of Patriot Act II” and sought to create a new category of crime, “narco-terrorism.” *VICTORY Act*, THE CENTER FOR MEDIA AND DEMOCRACY, (Apr. 1, 2008), http://www.sourcewatch.org/index.php?title=VICTORY_Act.

44. Alan Rice, *Legislation Would Add Mexican Cartels to Terrorist List*, 04-15-11 BSA/AML UPDATE 4 (2011).

45. 18 U.S.C. § 2339A (2009).

46. 18 U.S.C. § 2339B (2009).

side. Nonetheless, this Subsection will provide an overview of H.R. 1270's possible effect on the current drug-war environment.

1. U.S. Public

There would likely be a mixed reaction from the U.S. public. Many individuals and advocacy groups would probably oppose further militarization of the drug war. Also, the Mexican-born population in the United States is approximately twelve million people;⁴⁷ they, and other minorities, might be hesitant to support a designation with potentially discriminatory impact. Critics argue there are already enough criminal laws available to prosecute MDTOs. They point to trials of captured kingpins,⁴⁸ as well as successful raids⁴⁹ and economic sanctions that have already been imposed.⁵⁰ Three of the six MDTOs at issue—Sinaloa Cartel, Los Zetas, and La Familia Michoacana—are listed as appropriate for sanctions pursuant to the Kingpin Act.⁵¹ Further, critics might argue that, up to this point, the actual amount of spillover violence appears minimal.⁵² The

47. PASSEL, COHN & GONZALEZ-BARRERA, *supra* note 29, at 8.

48. See, e.g., Marty Graham, *Last Brother from Mexico's Arellano Felix Cartel Pleads Not Guilty*, CHI. TRIB. (Sept. 4, 2012), http://articles.chicagotribune.com/2012-09-04/news/sns-rt-us-usa-kingpin-mexicobre88315c-20120904_1_mexico-s-arellano-felix-flamboyant-enforcer-francisco-rafael.

49. One raid against the Sinaloa Cartel was particularly extensive, resulting in the arrest of 755 individuals. See, e.g., *US Raids Target Mexican Drug Gang*, BBC NEWS (Feb. 26, 2009, 10:27 AM), <http://news.bbc.co.uk/2/hi/americas/7911468.stm> (U.K.).

50. Los Zetas, for example, have been the subject of economic sanctions. See *Updates*, 24 INT'L Q., no. 1, art. 6. It is important to note that, while the primary source of funding for the MDTOs is drug income, it is not the only available resource. Both major and minor drug cartels in Mexico have been known to diversify into other areas of crime, such as kidnapping, extortion, and sex trafficking. There is also evidence that they are targeting other aspects of the Mexican economy, including the nationalized oil supply. See generally William A. Fix, Kendra J. Harris & Aida A. Montanaro, *Offense, Defense, or Just a Big Fence?: Why Border Security Is a Valid National Security Issue*, 14 SCHOLAR 741 (2012).

51. THE WHITE HOUSE OFFICE OF THE PRESS SEC'Y, FACT SHEET: OVERVIEW OF THE FOREIGN NARCOTICS KINGPIN DESIGNATION ACT (2009), available at http://www.whitehouse.gov/the_press_office/Fact-Sheet-Overview-of-the-Foreign-Narcotics-Kingpin-Designation-Act.

52. See Chris Arsenault, *US Drones Prowl Mexico Bicentennial*, AL JAZEERA (Sept. 19, 2010, 8:14 AM), <http://www.aljazeera.com/indepth/features/2010/09/2010915175744263894.html> (explaining that, in 2010, the "top four large US cities with the lowest rates of violent crime . . . [were] Phoenix, San Diego, El Paso and Austin."). It is undeniable that every human life has value, so the murders and kidnappings resulting from MDTO violence in the U.S. is nothing to dismiss. However, spillover violence is simply not increasing with the frequency many feared. Compare Kevin Johnson & Alan Gomez, *Violent Crimes Drop Overall in U.S. Border Cities*, USA TODAY (Nov. 4, 2012, 8:27 PM), <http://www.usatoday.com/story/news/nation/2012/11/04/violent-crimes-drop-overall-in-us-border-cities/1681821> ("[T]en of the 13 largest cities in Texas, Arizona and California closest to the Mexico border recorded reductions in overall violent crime."), with Martin, *supra* note 33, and Burnett, *supra* note 35, and Elliot Spagat, *Border States Shun Arizona's Immigration Law*, NBC NEWS (May 13, 2010

reason for the stark contrast between the gore in Mexico and the relative calm in the United States is possibly due to the MDTOs' recognition that they should "avoid disturbing the hand that feeds them."⁵³ Moreover, critics might argue federal agencies are already well equipped to deal with the dangers posed by the MDTOs, especially after the Merida Initiative's funding.⁵⁴ As a result of the sequestering of government funding in March 2013, however, there will be a cut of between five and nearly eight percent across government budgets, including that of the Department of Defense's Military Programs, the DHS, and the DOJ.⁵⁵ But this is a small dent in overall drug war funding; for instance, the Customs and Border Patrol's ("CBP") budget and border staff were doubled from 2002 to 2011, even as Mexico-to-United States immigration⁵⁶ and arrest rates fell dramatically.⁵⁷ Thus, there may be a multitude of reasons why an individual might oppose the designation.

On the other hand, other members of the U.S. public could also support H.R. 1270. Proponents argue that states along the U.S. border have been combating the threat of spillover violence for years and that they need more military and paramilitary resources. They argue that an FTO designation would enable the United States to freeze MDTOs' monetary assets and prosecute anyone providing material support.⁵⁸ Further, proponents could argue that MDTOs fit the FTO mold by virtue of their

12:46 PM), <http://www.nbcnews.com/id/37116159#.UTm5Rhyk1zA> ("[T]he illegal flow of people across the border is seen as a more acute problem, and a more dangerous one, in Arizona.").

53. Elliott McLaughlin, *In Small-Town USA, Business as Usual for Mexican Cartels*, CNN.COM (June 12, 2012, 9:47 AM ET), <http://www.cnn.com/2012/06/09/us/mexican-cartels-small-town-usa> (in which author Charles Bowden stated that "[i]n El Paso, murder's bad for business In Juarez, it is business.").

54. See *supra* text accompanying note 34–35. The Merida Initiative is a "security cooperation initiative with Mexico and the countries of Central America in order to combat the threats of drug trafficking, transnational crime, and terrorism in the Western Hemisphere." COUNCIL ON FOREIGN RELATIONS, JOINT STATEMENT ON THE MERIDA INITIATIVE, (2007), available at <http://www.cfr.org/mexico/joint-statement-merida-initiative/p14603>.

55. OFFICE OF MGMT. AND BUDGET, OMB REPORT TO THE CONGRESS ON THE JOINT COMM. SEQUESTRATION FOR FISCAL YEAR 2013 13–19, 27–30, 38–39 (2013), available at http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/fy13ombjcequestrianreport.pdf.

56. PASSEL, COHN & GONZALEZ-BARRERRA, *supra* note 29, at 27–28.

57. Rebecca Leber, *More Agents Patrol Arizona's Border Than Ever Before, but Arrests Drop to Historic Low*, THINKPROGRESS (Feb. 12, 2013, 12:45 PM), <http://thinkprogress.org/special/2013/02/12/1562241/more-agents-patrol-arizonas-border-than-ever-before-but-arrests-drop-to-historic-low/?mobile=nc>.

58. Edwin Mora, *State Department: Mexican Drug Cartel Activity Is "Consistent With" Terrorism*, CNSNEWS.COM (Oct. 17, 2011, 6:01 PM), <http://cnsnews.com/news/article/state-department-mexican-drug-cartel-activity-consistent-terrorism>.

undeniable political effect in Mexico; their *motive* is also political because they attempt to squelch any effective government regulation of their illegal industries. In addition, there have already been other reactions in border communities to problems stemming from the drug trade, most notably in the form of The Support Our Law Enforcement and Safe Neighborhoods Act (“S.B. 1070”) voter initiative in Arizona.⁵⁹ In April 2012, the Supreme Court upheld portions of S.B. 1070, including a provision that requires law enforcement authorities in Arizona to make a “reasonable effort” to determine the immigration status of anyone who is stopped, detained, or arrested.⁶⁰ This provision has likely increased the rate of illegal immigrants leaving Arizona.⁶¹ Their fear is that law enforcement will stop and harass anyone who “looks like” an illegal alien—most notably Mexicans and Mexican-Americans, who constitute a majority of the nation’s immigrants,⁶² and whom the U.S. public already views as facing the most discrimination of any ethnic group.⁶³ Some individuals along the border would argue this strict framework is necessary.⁶⁴ Several states have attempted to craft their own legislation modeled after Arizona,⁶⁵ and if an FTO designation proposal was framed as an issue of criminal and immigration law, it might generate considerable support from the U.S. public on a national level.⁶⁶

59. The author of the bill, ex-Arizona Senator Russell Pearce, cites the increased rate of immigrants leaving Arizona as evidence that the bill is working. *Immigration Statistics Show SB 1070 Is Working*, TOWN HALL (Apr. 3, 2012, 12:01 AM), http://townhall.com/columnists/russellpearce/2012/04/03/immigration_statistics_show_sb_1070_is_working/page/full/.

60. *Arizona v. United States*, 132 S. Ct. 2492, 2505, 2510 (2012), ruled that Sections 3, 5(C), and 6 of S.B. 1070 were preempted by federal immigration law. The Court reasoned that it is too early to know if Section 2(B) can be implemented in a way that will not violate the Constitution. The remaining portions of the bill were upheld.

61. Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NATIONAL PUBLIC RADIO (Oct. 28, 2010, 11:01 AM), <http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law> (discussing how legislative co-sponsors of the measure that ultimately became S.B. 1070 received donations from private prison companies and their lobbyists).

62. PASSEL, COHN & GONZALEZ-BARRERAET, *supra* note 29, at 34.

63. PEW RESEARCH HISPANIC CENTER, FACT SHEET: HISPANICS AND ARIZONA’S NEW IMMIGRATION LAW 1 (2010), available at <http://www.pewhispanic.org/files/2010/04/68.pdf>.

64. *But see* Spagat, *supra* note 52.

65. PASSEL, COHN & GONZALEZ-BARRERA, *supra* note 29, at 27.

66. *Cf. id.* *But see* Spagat, *supra* note 52 (noting that political leaders in California, New Mexico, and Texas stated they would not support a bill like S.B. 1070 in their own states); Stephen Lemons, *Right-Wingers Lie on SB 1070, Claim (Falsely) That Majority of Hispanics Support It*, PHOENIX NEW TIMES (May 8, 2010, 11:12 AM), <http://blogs.phoenixnewtimes.com/bastard/2010/05/right-wingers-lie-on-sb-1070-c.php> (discussing the role of political bias in polling).

Further, just as some African-American neighborhoods supported⁶⁷ harsh punishments during the crack cocaine plague in the 1980s and African-American youth subsequently faced harsh prison sentences,⁶⁸ working-class Hispanic neighborhoods in the United States would potentially be strong supporters of the FTO designation in the hopes that their gang-infested streets would be cleaned up. It would be tragic if the same consequence from the crack cocaine plague occurred in this scenario, with families inadvertently condemning their own race to lengthy prison sentences.⁶⁹

2. U.S. Politicians

The executive and legislative branches would likely support a designation as a whole, though some would resist. The U.S. Government has generally embraced a “get tough” approach to the drug war, to the point of suppressing scientific studies that appear to compromise the position that drugs are innately dangerous.⁷⁰ In 2011, the House Judiciary Committee even attempted to impose federal drug law *globally*.⁷¹ Vice President Joe Biden, who guides the Obama Administration’s drug policy, originally coined the term “drug czar,”⁷² a title that has been used to indicate the head of U.S. drug policy. Given Biden’s interest in the issue and current power, there are probably “not many friends to legalization [of illegal drugs] in

67. See ALEXANDER, *supra* note 1, at 202–05.

68. *Id.*; JOHN MCWHORTER, LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA 14–15 (2000).

69. *Id.*

70. The World Health Organization commissioned the largest study ever on cocaine use. The conclusions were that there were some beneficial effects to cocaine use, but the 1995 report was never released due to U.S. threats to withhold funding if it were ever published. DRUG LEGALIZATION, *supra* note 18, at 57.

71. Radley Balko, *U.S. Drug Policy Would Be Imposed Globally by New House Bill*, HUFFINGTON POST (Oct. 9, 2011, 10:38 AM), http://www.huffingtonpost.com/2011/10/06/us-drug-policy-war-congress_n_998993.html (“The House Judiciary Committee passed a bill [in 2011] that would make it a federal crime for U.S. residents to discuss or plan activities on foreign soil that, if carried out in the U.S., would violate the Controlled Substances Act (CSA)—even if the planned activities are legal in the countries where they’re carried out. H.R. 313, the ‘Drug Trafficking Safe Harbor Elimination Act of 2011,’ is sponsored by Judiciary Committee Chairman Rep. Lamar Smith (R-Texas), and allows prosecutors to bring conspiracy charges against anyone who discusses, plans or advises someone else to engage in any activity that violates the CSA, the massive federal law that prohibits drugs like marijuana and strictly regulates prescription medication.”). This bill would, by definition, encompass more activity than previous laws, but a global prohibition law would, if nothing else, be consistent with a “get (very) tough” approach. *Id.*

72. Tim Dickinson, *Obama’s Pot Problem*, ROLLING STONE 1 (Dec. 7, 2012, 8:00 AM ET), <http://www.rollingstone.com/politics/news/obamas-pot-problem-20121207#ixzz2EVpqCKGT>.

this administration.”⁷³ Also, there is an extensive web of government careers that depend on the existence of the drug war, including positions within the judiciary and law enforcement.⁷⁴ Border state representatives, in particular, would likely be in favor of an FTO designation because of the threat of drug violence spilling over into their communities.

Other politicians might be against an FTO designation. The United States already spends twenty-five billion dollars annually on drug control funding, and more annual federal funding is allocated to domestic law enforcement than any other function.⁷⁵ Politicians might think H.R. 1270 would inexcusably increase spending on enforcement budgets or that alternative reforms⁷⁶ would better address the issues. In addition, the material support statute could potentially deter some politicians for a more selfish reason: they would not want to see controversy arise against themselves or their own agencies.⁷⁷

73. *Id.*

74. *See generally id.* (discussing how federal agencies, such as the DEA, are staffed with individuals who have crafted their careers around fighting marijuana use).

75. WHITE HOUSE OFFICE OF NAT'L DRUG CONTROL POLICY, FY 2013 BUDGET AND PERFORMANCE SUMMARY 19, 23 (2012), *available at* http://www.whitehouse.gov/sites/default/files/ondcp/fy2013_drug_control_budget_and_performance_summary.pdf.

76. One example is further prison sentencing reform. For example, the sentencing disparity between crack cocaine and powder cocaine, which was recently reduced from 100-to-1 to 18-to-1, could be further reduced. *See* Ryan Grim, *Crack-Powder Sentencing Disparity Reduced By Congress*, HUFFINGTON POST (May 25, 2011, 6:10 PM), http://www.huffingtonpost.com/2010/07/28/crack-powder-sentencing-d_n_662526.html.

77. 18 U.S.C. §§ 2339A–2339B. The scandal behind Operation Fast and Furious continues to unfold. Conor Finnegan, *Holder Seeks Fast and Furious Appeal*, CNN.COM (Nov. 16, 2013, 8:39 PM ET), <http://politicalticker.blogs.cnn.com/2013/11/16/holder-seeks-fast-and-furious-appeal/> (explaining Attorney General Eric Holder's seeking of an appeal regarding contempt charges over this program). If an FTO designation were to be added to the scandal, it would potentially add material support enhancements to charges, since the federal officials who authorized this program allowed gun shops to sell thousands of guns (material support) to straw purchasers for MDTO members (FTO members). Even without an FTO designation at play, top DOJ officials, and even President Obama, may be implicated in this scandal, depending on how the executive-privilege issue plays out: “Representative Issa is certain that most top Justice Department officials knew about the Fast and Furious operation. He has also stated, regarding [Attorney General Eric] Holder, that either ‘He knew, and he’s lied to Congress, or he didn’t know, and he’s so detached that he wasn’t doing his job.’” Larry Bell, *Obama Orders Prosecution of Fast and Furious Perpetrators (Sort of)*, FORBES (Jan. 29, 2013, 8:00 AM), <http://www.forbes.com/sites/larrybell/2013/01/29/obama-orders-prosecution-of-fast-and-furious-perpetrators-sort-of/>. *See also* Thompson, *supra* note 22 (“[T]he DEA could wind up being the largest money launderer in the business, and that money results in violence and deaths.”).

3. U.S. Criminal Justice System

Nearly all actors in the U.S. criminal justice system would support the designation of MDTOs as FTOs because it would give more funding to law enforcement and more “tools” for prosecutors.⁷⁸ There would be a few opponents, however. Just as in the case of S.B. 1070, in which some sheriffs and police chiefs did not support the law’s passage,⁷⁹ here there would likely be some individuals opposed to an FTO designation. In particular, defense attorneys charged with defending suspects would likely be against the designation. Giving police and prosecutors more tools to use against defense attorneys’ clients would make an already difficult job more onerous. Other individuals who felt the criminal justice system was already draconian and over-burdened, such as some judges, staff, and law clerks, might similarly be against the designation if they thought it would do little to stop the MDTOs’ supply and U.S. drug demand.

Furthermore, critics might be wary of the expanding toolbox; if history has taught anything, it is that law enforcement agencies will use the tools they are given, even when those actions infringe civil liberties or belie wise policy.⁸⁰ For example, in the 1980s, the DEA “was effectively paying for itself” through the use of forfeiture laws.⁸¹ Drug forfeiture laws, and civil forfeiture laws in general, are controversial because they enable law enforcement to incorporate the proceeds from the illegal drug trade into the enforcing agency’s budget, thereby giving them an interest in this black market.⁸² More recently, in conjunction with the Mexican Air Force, the CBP has since 2009 been deploying a new tool: unarmed Unmanned Aerial Vehicles (“drones”) along the border.⁸³ While there are currently several hundred licenses for drone use in U.S. airspace, “[t]he general public would likely find it exceedingly unusual for a drone to fly over their homes in

78. See, e.g., Eric Lichtblau, *U.S. Uses Terror Law to Pursue Crimes from Drugs to Swindling*, N.Y. TIMES (Sept. 28, 2003), available at <http://www.nytimes.com/2003/09/28/us/us-uses-terror-law-to-pursue-crimes-from-drugs-to-swindling.html?src=pm>.

79. American Civil Liberties Union, Letter to the Editor, *Arizona’s Immigration Law*, N.Y. TIMES, May 22, 2011, at A22, available at <http://www.nytimes.com/2011/05/13/opinion/13Dever.html> (responding to Larry Dever, Op-Ed., *Abandoned on the Border*, *infra* note 91).

80. See, e.g., Lichtblau, *supra* note 78.

81. Eric D. Blumenson & Eva S. Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 56–57, 64 (1998).

82. ALEXANDER, *supra* note 1, at 77–79, 80–83.

83. RICHARD M. THOMPSON, CONG. RESEARCH SERV., R42701, DRONES IN DOMESTIC SURVEILLANCE OPERATIONS: FOURTH AMENDMENT IMPLICATIONS AND LEGISLATIVE RESPONSES 12–13 (2012).

order to take surveillance photographs.”⁸⁴ Accordingly, some wariness is justifiable. Federal and state officials have already expanded their use of drones without public knowledge or debate.⁸⁵ In addition, state police departments are already “more federalized and globalized than ever before.”⁸⁶ The speed of transformation of U.S. government agencies into paramilitary institutions would likely be accelerated by an FTO designation.⁸⁷ For example, federal and state officers would be able to use more discretion in their surveillances, searches, and seizures of suspects and contraband, and prosecutors would have additional statutes with which to charge defendants.⁸⁸ The PATRIOT Act gives federal officials the ability to conduct surreptitious warrantless searches; expands wiretapping and other domestic surveillance; broadens the definition of terrorism; and increases criminal penalties.⁸⁹ Thus, “what the Justice Department has really done . . . is to get things put into the law that have been on prosecutors’ wish lists for years. They’ve used terrorism as a guise to expand law enforcement powers in areas that are totally unrelated to terrorism.”⁹⁰ This is not to say that law enforcement has an easy job; it is difficult to achieve the fine line between satisfactory enforcement and over-enforcement, and there are certainly many officials that would not attempt to abuse the discretionary power that an FTO designation grants them.⁹¹ Ultimately, though, law enforcement uses the tools that the law provides in order to pursue the targets that the law assigns, regardless of whether those tools are good or bad. The more powerful the tool is, the more costly the consequences of misuse.

84. *Id.*

85. JAY STANLEY & CATHERINE CRUMP, AM. CIVIL LIBERTIES UNION, PROTECTING PRIVACY FROM AERIAL SURVEILLANCE: RECOMMENDATIONS FOR GOVERNMENT USE OF DRONE AIRCRAFT 6–8 (2011), available at <http://www.aclu.org/files/assets/protectingprivacyfromaerialsurveillance.pdf> [hereinafter ACLU DRONE REPORT].

86. See generally Dru Stevenson, *Effect of the National Security Paradigm on Criminal Law*, 22 STAN. L. & POL’Y REV. 129 (2011).

87. Cf. DRUG WAR FACTS 206–08 (Douglas A. McVay ed., 6th ed. 2007) (discussing amendments to the Posse Comitatus Act, which now allows task force and counter-drug training by military personnel).

88. See generally Lichtblau, *supra* note 78.

89. Stevenson, *supra* note 86, at 134–35.

90. Lichtblau, *supra* note 78, at 2.

91. “In Cochise County, my deputies and I often have to travel many miles to respond to a resident’s call for assistance. The last thing we have time to do is harass law-abiding people.” Larry Dever, Op-Ed., *Abandoned on the Border*, N.Y. TIMES (May 12, 2011), <http://www.nytimes.com/2011/05/13/opinion/13Dever.html>.

To illustrate the stance of law enforcement toward drug laws, consider that, in 2012, Michele Leonhart, the head of the DEA, “continue[d] to maintain that pot is as dangerous as heroin—a position unsupported by either science or experience. When pressed on the point at a congressional hearing, Leonhart refused to concede any distinction between the two substances . . . insisting that ‘all illegal drugs are bad.’”⁹² Notwithstanding Leonhart’s stubborn mentality, additional funding under an FTO designation would likely be justified under the guise of fighting terror, which would be used to further the detection, tracking, and detention of suspected MDTO members. Law enforcement would likely welcome another “important tool” that could expand law enforcement powers even if the FTOs designation would not be a “silver bullet.”⁹³

4. U.S. Private Industry

Since the private industry profits from war, it has a significant interest in a possible FTO designation; private U.S. companies provide civilian contracting services to the government in the fields of surveillance, intelligence gathering, data mining, and more.⁹⁴ Private industry also profits from criminal detention⁹⁵ and military operations.⁹⁶ Thus, if MDTOs were designated as FTOs, some of the biggest winners and losers might be private companies that provide resources to the government.⁹⁷

On the one hand, designating MDTOs as FTOs would likely deter the banking industry from continuing business with Mexico. It is no secret that banks serve as a financial tool for MDTOs. Recent scandals have surfaced that involve banks serving as laundering intermediaries for MDTOs; evidence suggests bank officials actively ignored—and ignore⁹⁸—signs of

92. Dickinson, *supra* note 72, at 1.

93. Dever, *supra* note 91.

94. See Schneck, *supra* note 28, at 952–56.

95. César Cuauhtémoc García Hernández & Carlos Moctezuma García, *Scholar’s Sidebar: Immigration Prisons Need Careful Eye*, CRIMMIGRATION (Mar. 6, 2013 4:00 AM), <http://crimmigration.com/2013/03/05/scholars-sidebar-immigration-prisons-need-careful-eye.aspx>.

96. See Arsenault, *supra* note 52 (“‘As a privately held company, we don’t do a lot of interviews,’ a General Atomics Aeronautical spokeswoman said, in refusing to comment on the company’s expanded border business.”).

97. *Id.* Historian Greg Grandin argues U.S. military tactics of “invented threats, targeted killings, and covert support for death squads” were first used in Latin America and are currently being employed in the Middle East. Similarly, Mexican economic migrants will face drone technology originally developed to deal with insurgents in the Middle East and Asia. *Id.*

98. Marni Halasa, *Is Anybody Listening? HSBC Continues to Launder Money for Terrorist Groups Says Whistleblower*, HUFFINGTON POST (Aug. 28, 2013), http://www.huffingtonpost.com/marni-halasa/is-anybody-listening-hsbc_b_3831412.html (HSBC Anti-

suspicious activity while being aware of billions of dollars in illicit transactions. In the most glaring example, HSBC Mexico had several “high-profile clients linked to drug trafficking” and may have allowed up to seven billion dollars in illegal drug proceeds to transfer to its U.S. affiliate.⁹⁹ HSBC, however, is not the only player—other financial institutions involved in laundering include Bank of America, Wachovia/Wells Fargo, Banco Santander, Citigroup Inc., and American Express Bank International.¹⁰⁰ Uncovering intentional wrongdoing is difficult in these cases because, despite the transfer of exorbitant sums of money, the banks either cannot divulge client information or they claim they did not know about the transactions. Even if a bank is caught, the penalties fail to effectively deter future violations. For instance, Wachovia Bank (just prior to being purchased in 2008 by Wells Fargo Bank) had a deficient anti-money-laundering program from 2004 to 2008 that may have allowed over \$350 billion in MDTO money to pass through its institution.¹⁰¹ However, after facing federal charges in Florida, Wells Fargo paid only \$160 million in fines and fees,¹⁰² which “was less than 2% of the bank’s \$12.3 billion profit for 2009.”¹⁰³ Thus, an FTO designation could serve to focus the spotlight on banks and compel stricter U.S. and foreign government laws and standards.¹⁰⁴ If formerly “secret” clients were suddenly exposed FTO members, their assets could be frozen¹⁰⁵ and there might be enhanced scrutiny of bank transactions, imperiling deals between Mexican individuals and businesses associated with MDTOs. Because

Money Laundering officer Everett Stern says, “The public needs to know that money is still being funneled through HSBC to directly buy guns and bullets to kill our soldiers. Fines are not acceptable. I want a criminal indictment of HSBC executives,” he asserts. “And if I die because of this, my life will have been worthwhile.”).

99. Further, HSBC commissioned an outside review that found nearly twenty billion dollars in transactions between 2001 and 2007 may have been subject to U.S. sanctions. The anti-laundering mechanism failure was thus not restricted to funding from MDTOs. There may have also been links to financiers of terrorism in Saudi Arabia, Bangladesh, and Iran. HSBC U.S. executives were aware of this practice “as far back as 2001, the report says.” James O’Toole, *HSBC Lax in Preventing Money Laundering by Cartels, Terrorists*, CNN.COM (Jul. 17, 2012, 1:42 PM ET), <http://money.cnn.com/2012/07/16/news/companies/hsbc-money-laundering/index.htm>.

100. Michael Smith, *Banks Financing Mexico Gangs Admitted in Wells Fargo Deal*, BLOOMBERG 1, 3 (Jun. 28, 2010, 9:00 PM), <http://www.bloomberg.com/news/2010-06-29/banks-financing-mexico-s-drug-cartels-admitted-in-wells-fargo-s-u-s-deal.html>.

101. Ed Vulliamy, *How a Big US Bank Laundered Billions from Mexico’s Murderous Drug Gangs*, THE OBSERVER 7 (Apr. 2, 2011), available at <http://www.guardian.co.uk/world/2011/apr/03/us-bank-mexico-drug-gangs>.

102. Smith, *supra* note 100, at 4.

103. Vulliamy, *supra* note 101, at 2.

104. *See id.*

105. 8 U.S.C. § 1189(a)(2)(C) (2013).

businesses only carry out profit-maximizing transactions, the material support statute could make the prospect of dealing with suspect clients from Mexico undesirable. Since banks would make less profit from illegal money-laundering activities, they may not rejoice in an FTO designation.

On the other hand, other private companies would likely thrive under an FTO designation, especially in the detainment and military contexts.¹⁰⁶ Private prison corporations already obtain government contracts and “take most of the credit for filling our prisons” during the drug war.¹⁰⁷ It stands to reason that private prison corporations would house terror prisoners too.¹⁰⁸ Moreover, while banks would be discouraged from money-laundering operations, financial institutions with investments in U.S. prison, aerospace, and military industries would profit from increased drone usage across the U.S. border.¹⁰⁹ Congressional lobbyists have pressed to loosen Federal Aviation Association drone restrictions because “[a]erospace companies . . . see a potentially lucrative domestic market for their technology, and supporters argue that the United States must . . . be a leader in the industry.”¹¹⁰ MDTOs are already known for their broad range of weaponry,¹¹¹ and thus sophisticated artillery from private sources¹¹² would be needed to counter their forces.

5. U.S. Drug Dealers and Users

Finally, an FTO designation could have profoundly harmful effects on the recipients of MDTO products: drug dealers and users in the United

106. See Schneck, *supra* note 28, at 952–55 (citing Sullivan, *supra* note 61 and discussing how legislative co-sponsors of the measure that ultimately became S.B. 1070 received donations from private prison companies and their lobbyists).

107. See *id.* at 955.

108. See Sasha Chavkin, *Immigration Reform and Private Prison Cash: Key Lawmakers in the Immigration Debate Are Among the Top Recipients of Campaign Contributions From the Prison Industry*, COLUM. JOURNALISM REV. (Feb. 20, 2013, 2:20 PM), http://www.cjr.org/united_states_project/key_senators_on_immigration_get_campaign_cash_from_prison_companies.php?page=1 (“While the companies insist that they do not seek to shape immigration policy, the private prison industry has at times acknowledged its business could be affected by the reform debate.”); García Hernández & García, *supra* note 95.

109. ACLU DRONE REPORT, *supra* note 85, at 9.

110. *Id.*

111. Laura Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1749 (2011) (explaining that criminal organizations like MDTOs are increasingly employing weaponry and equipment traditionally used by nations, such as a semi-submersible vessel).

112. Gun dealers could thus potentially generate business from both sides of the conflict: U.S. officials directly, and MDTOs indirectly. Dan Freedman, *Study Finds Mexican Gangs Prefer High-Powered Assault Rifles*, HOUS. CHRON., May 29, 2011, <http://www.chron.com/news/nation-world/article/Study-finds-Mexican-gangs-prefer-high-powered-1683978.php>.

States. Nearly every stakeholder in this category would likely be affected by an FTO designation: dealers who have knowingly dealt with MDTOs and users who know the source of their product would be subject to the material support statute since they were aware that their money—or “material support”—was going to a designated FTO. (One could imagine a criminal drug possession case hinging on whether the defendant could prove he obtained the product from a domestic, non-MDTO source.) This designation could deter many individuals from continuing business with their MDTO counterparts for fear of prosecution. But it seems equally likely that desperate individuals would fill any roles abandoned by dealers.

However, on a more general level, even “false positives”—or innocent people who are suspected of being tied to MDTOs—could be victimized by the increased discretion given to police officers to enforce drug laws based on national security principles. At the very least, private citizens would be subjected to a fear of stop and frisks, but they could also suffer arrests, criminal charges, convictions, and prison sentences.

As will be argued in Part IV, there could be a significant detrimental impact on minority communities, particularly Hispanics. Where higher police discretion is enabled, instances of race-based discrimination may occur. This would likely add a new chapter to the already overwhelming racial disparities in the criminal justice system.¹¹³

Also, the price of foreign illegal drugs would likely rise because it would be more costly to transport drugs through U.S. borders and prisons. This price change would negatively affect both distributors and consumers because the MDTOs would seek to maintain the same level of profits. For these reasons, drug dealers and users would likely be against this designation.

III. ANALYSIS OF THE PROPOSAL

As the preceding Part shows, the United States–Mexico illegal drug trade is a complex issue consisting of many different stakeholders with competing interests. Understanding the interpretation and implementation of H.R. 1270, therefore, is key to determining the bill’s viability.

113. See generally Jordan Blair Woods, *Systemic Racial Bias and Rico’s Application to Criminal Street and Prison Gangs*, 17 MICH. J. RACE & L. 303 (2012) (stating that a majority of gang prosecution is affiliated with one or more racial minorities and exploring the problems with the existing legal framework).

A. CONSEQUENCES OF ATTEMPTING TO DEFINE TERRORISM

“Terrorism” is a notoriously difficult term to define.¹¹⁴ In comparison to general criminal law, in which a criminal’s motivation is sometimes of little consequence to the actual commission of the crime, holding a suspect responsible for terrorism entails an examination of the individual’s motivations and ideologies.¹¹⁵ While identifying one’s choice of action or target may be helpful in this examination, it is often difficult to determine which motivations are criminal in nature and which constitute terrorism.¹¹⁶ The practical implication of this difficulty is that there are twenty-two different definitions of terrorism and related concepts in federal legal definitions.¹¹⁷ Even worse, many definitions are “inconsistent as to what constitutes terrorism, differing on, inter alia, the requirements of a political motivation and even the nature of the victims.”¹¹⁸ Despite the lack of a consistent definition, terrorism has gained prevalence in the U.S. psyche since the terror attacks of September 11, 2001. As a consequence, actions are now easier to justify on national security grounds because it is difficult to argue that preventing harm is a bad thing, especially when the magnitude of the potential harm is unclear.¹¹⁹ Hence, the vagueness of the term “terrorism” has enabled national security to become a driving force of U.S. policy and law in the twenty-first century.¹²⁰

Under a national security approach to the law, many types of violent attacks that were previously constrained to criminal law can now be theoretically classified as “terrorism.”¹²¹ In *People v. Morales*, for example, the prosecution initially succeeded in convicting a gang member’s murder

114. See generally Thalif Deen, *Politics: U.N. Member States Struggle to Define Terrorism*, INTER PRESS SERV. (Jul. 25, 2005) (explaining that finalizing the 13th U.N. Convention against Terrorism has remained stalled over the definition of “terrorism”), <http://www.ipsnews.net/2005/07/politics-un-member-states-struggle-to-define-terrorism>.

115. Emma Björnehed, *Narco-Terrorism: The Merger of the War on Drugs and the War on Terror*, 6 GLOBAL CRIME 305, 312 (2004). See also Stevenson, *supra* note 86, at 138; Tom Stacy, *The “Material Support” Offense: The Use of Strict Liability in the War Against Terror*, 14 KAN. J.L. & PUB. POL’Y 461, 465 (2005).

116. See Björnehed, *supra* note 115, at 312–13.

117. Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 273 (2004).

118. *Id.* at 269.

119. See Stevenson, *supra* note 86, at 139–40.

120. See, e.g., Donohue, *supra* note 111, at 1583, 1589 (citing *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) and discussing the emergence of the “fourth epoch” as the next progression in an expansion of the definition of “national security”).

121. See, e.g., *People v. Morales*, 957 N.E.2d 1163 (N.Y. 2011).

as a crime of terrorism.¹²² While the decision was reversed on appeal, the idea that a gang member's actions could qualify as terrorism exemplifies the emerging trend of equating criminal acts with acts of terrorism.¹²³ Other examples of acts that now straddle the line between criminal law and terrorism include hate speech, cyber-attacks, environmental demonstrations, and, in the case of MDTOs, "narco-terrorism."¹²⁴ H.R. 1270 is thus a proposal that seeks to include organized drug trafficking in the net of terrorism. An over-inclusive net may trigger a swift reaction by governments to sub-national actors, but it favors a national security framework over traditional criminal law. Moreover, treating misdeeds as terrorism instead of criminal activity may only magnify existing enforcement problems, such as the risk of subjective standards,¹²⁵ aforementioned corporate interests, and unintended tragedies like wrongful arrests and deaths.¹²⁶

B. STATUTORY CRITERIA FOR AN FTO DESIGNATION

Fortunately, there is a concrete standard for determining whether an organization can appropriately be designated as an FTO. The legal requirement for designation, found in § 219 of the Immigration and Nationality Act and amended by 8 U.S.C. § 1189(a), consists of three requirements that the U.S. Secretary of State assesses in consultation with

122. *Id.*

123. Stevenson, *supra* note 86, at 149.

124. But even the term "narco-terrorism" may fail to accurately capture the essence of MDTOs, since their objectives, in contrast to Revolutionary Armed Forces of Colombia and Real Irish Republican Army, are not to advance political goals. Major Nagesh Chelluri, *A New War on America's Old Frontier: Mexico's Drug Cartel Insurgency*, 210 MIL. L. REV. 51, 84–86 (2011). *See also* Donohue, *supra* note 111, at 1747–51 (describing the "Muddy Waters" problem to be that terrorism, drugs, and crime—alternate sources of coercive power—all operate outside the traditional legal and political framework).

125. Post-Cold War International Security Threats: Terrorism, Drugs, and Organized Crime Symposium Transcript, Address Before the University of Michigan Law School, (Feb. 19, 1999), in 21 MICH. J. INT'L L. 527, 569 (2000). A participant from the audience, loosely paraphrasing the common argument that one man's terrorist is another man's freedom fighter, stated:

I, frankly, can't see any difference between Arafat, Mandela, and for that matter Shamir, Begin, many of our own founding fathers, and Bin Laden, the Blind Sheiks, and the guy who blew up the Oklahoma Federal Building. The only difference is the first people that I mentioned, whom you didn't want to define as terrorists, all succeeded in establishing what they wanted to establish. The people whom you want to define as terrorists have not succeeded, at least not yet.

Id.

126. Enforcement itself can be a source of casualties. *See, e.g., Drug War Victims*, STUDENTS FOR SENSIBLE DRUG POL'Y, <http://ssdp.org/resources/drug-war-victims/> (last visited Dec. 20, 2012) (detailing a variety of victims of police enforcement, including individuals who have been shot and killed by officers during raids).

the Secretary of the Treasury and the Attorney General.¹²⁷ Designation is not a one-way street: an organization initially designated as an FTO can, on rare occasions, have its name removed from the designation list,¹²⁸ but a designation is nonetheless a significant political and legal statement.

Of the three criteria,¹²⁹ the first and third are easily met by MDTOs, while the second is debatable. The first criterion for designation is that the organization be foreign. This requirement is satisfied: all six MDTOs are based in Mexico. The second criterion—that the organization must engage in terrorist activity—is met if the organization engages in “terrorist activity” or “terrorism” or retains the “capability and intent to engage in terrorist activity or terrorism.”¹³⁰ Partly because of the difficulties of clearly defining terrorism and related concepts, and partly because of the characteristics of the MDTOs, this criterion is the most debatable and will receive analysis in Subsections D, E, and F of this Part. The third criterion requires that the actions of the group threaten either the national security of the United States or the security of U.S. nationals. This criterion is likely met; given that the term “national security” is defined in this Subsection as “the national defense, foreign relations, or economic interests of the United States,”¹³¹ one might wonder what would *not* count under this expansive definition. In any event, MDTOs’ disregard for human life,¹³² coupled with

127. 8 U.S.C. § 1189(a) (2013). There are steps which must be taken after this legal determination but before official designation (such as notifying select congressional leaders in writing seven days beforehand). These other steps are largely procedural and will not be discussed in this Note, though it is important to note that “[t]he unique feature of this statutory procedure is the dearth of procedural participation and protection afforded the designated entity. At no point . . . is the alleged [FTO] afforded notice of the materials used against it, or a right to comment on such materials” *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 196 (D.C. Cir. 2001). Because of the short seven-day window between the determination and designation, the Secretary of State enjoys a fairly large amount of unchecked discretion in determining which organizations will be FTOs.

128. There are fifty-one designated FTOs. In contrast, only nine organizations have been delisted. *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE: BUREAU OF COUNTERTERRORISM (Sept. 28, 2012), <http://www.state.gov/j/ct/rls/other/des/123085.htm>.

129. 8 U.S.C. § 1189(a)(1).

130. *Id.*

131. 8 U.S.C. § 1182(d)(2).

132. Dave Gibson, *Cartels Refer to U.S. Children as “Expendables,”* EXAMINER.COM (Oct. 23, 2011), <http://www.examiner.com/article/cartels-refer-to-u-s-children-as-expendables> (explaining that the U.S. Customs and Border Protection have started a program to warn children about the dangers of getting involved with drug cartels).

a “goal to use Texas as a launch pad into the heartland of America, to use for the distribution of drugs,”¹³³ makes them a threat to U.S. security.

Thus, this second criterion is the crux of the question because if the MDTOs are deemed to be engaging in “terrorist activity,” the first prong and the third prong are also satisfied and the groups could be designated as FTOs.

1. The Second Criterion: Whether MDTOs Engage in “Terrorist Activity”

The second criterion of the FTO designation statute is a disjunctive test, meaning “terrorist activity” can be satisfied if the MDTOs engage in *either* “terrorism” *or* “terrorist activity.”¹³⁴ Thus, it is important to look at the definitions of both of these terms. The FTO designation statute provides references to two statutes that should be used to determine what the legislature means by “terrorist activity” and “terrorism”: 22 U.S.C. § 1182 (a)(3)(B) and 22 U.S.C. § 2656f (d)(2), respectively. The two definitions are actually quite different. To understand the distinctions, it is helpful to mention the latter term first.

“Terrorism” is defined under the relevant statute¹³⁵ as “premeditated, *politically motivated* violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”¹³⁶ Whether the MDTOs are politically motivated is an important issue to resolve (which this Note addresses in Subsection E of this Part). Since, however, the designation statute requirement is a disjunctive test, it can also be satisfied if the MDTOs engage in “terrorist activity.”

Terrorist activity, in contrast to terrorism, lacks a political component.¹³⁷ “Terrorist activity” is defined under the relevant statute¹³⁸ as unlawful activity in either the United States or home state which involves, among other things, “seizing or detaining, and threatening to kill [or] injure . . . another individual in order to compel a third person (including a

133. Jim Forsyth, *Mexican Drug Cartels Gaining Ground in Texas*, WOAI LOCAL NEWS (Sept. 26, 2011, 1:00 PM), <http://www.woai.com/articles/woai-local-news-119078/mexican-drug-cartels-gaining-ground-in-9162792>.

134. 8 U.S.C. § 1189(a)(1). There is technically a third possibility, which is that the organization “retains the capability and intent to engage in terrorist activity or terrorism.” *Id.* I will omit analysis of this third possibility, as it is in many respects redundant.

135. 22 U.S.C. § 2656f(d)(2) (2013). This part of the statute also requires the Secretary of State to provide annual reports on terrorism.

136. *Id.* (emphasis added).

137. 8 U.S.C. § 1182 (a)(3)(B) (2013).

138. *Id.*

government organization) to do or abstain from doing *any* act as an explicit or implicit condition for the release of the individual seized or detained.”¹³⁹ Based on this set of requirements, the kidnappings and killings that MDTOs conduct in their home state of Mexico easily qualify as terrorist activity since these activities either result in ransom money from families or compel the government to disregard illegal drug trade channels.¹⁴⁰ An alternate definition for “terrorist activity” under the statute is an “assassination”¹⁴¹ which, again, seems easily met by the MDTOs’ killings of political figures, such as mayors.¹⁴² Even if neither of these requirements were met under this definition, the statute further provides that “terrorist activity” may also be “the use of . . . [a] firearm or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals.”¹⁴³ MDTOs certainly use many types of dangerous devices intended to endanger whole communities. The definition excludes acts committed for “mere personal monetary gain,” which raises doubts about the qualification of MDTO member actions, since their ultimate objective is *group* monetary gain (thereby resulting in each individual receiving “mere personal monetary gain”). The statute, unfortunately, offers no guidance on whether “group monetary gain” is equivalent to “mere personal monetary gain.”¹⁴⁴ Taken holistically, MDTOs’ group actions appear to be beyond the scope of “mere personal monetary gain.” Besides killing politicians and law enforcement figures, MDTOs influence elections with drug money and occasionally even act as a quasi-government themselves,¹⁴⁵ not just in order to expand “monetary gain,” but also to legitimize and institutionalize this method of monetary gain.¹⁴⁶ Thus, even though monetary gain is the

139. *Id.* § 1182 (a)(3)(B)(iii)(IV) (emphasis added).

140. SYLVIA LONGMIRE, *CARTEL: THE COMING INVASION OF MEXICO’S DRUG CARTEL* 82–93 (2011) (discussing how the second biggest moneymaker for MDTOs after drug trafficking is kidnapping).

141. 8 U.S.C. § 1182 (a)(3)(B)(iii)(IV) (2013).

142. *See* Webb, *supra* note 13.

143. 8 U.S.C. § 1182 (a)(3)(B)(iii)(V)(b) (2013).

144. It is also curious that this statutory section, 8 U.S.C. § 1182, is unique in its reference to monetary gain. If other sections also excluded financial motivations, there might be a better basis for rejecting MDTOs entirely from this definition. However, as the statute is currently written, there are no other references to monetary gain.

145. *See* Chelluri, *supra* note 124, at 81 (“Additionally, much like government officials, the cartel leaders also make economic decisions such as providing jobs and building infrastructure for the local population—which can result in reverence by the local population for the cartel leaders, who are perceived as being able to make local improvements when elected officials cannot.”)

146. Bloom, *supra* note 6, at 392–93.

MDTOs' ultimate objective, they also pursue secondary political, economic, and social goals that probably make their operations too sophisticated and pervasive to be accurately described as "mere personal monetary gain."

Thus, there are at least three possible definitions of "terrorist activity" that MDTOs' actions meet. In sum, it seems the second prong required for FTO designation is met by virtue of applying the "terrorist activity" definition.

C. PROPOSING A HIGHER STANDARD

While it appears that the MDTOs could be designated as FTOs because they meet all three requirements, according to the above analysis, this designation seems inappropriate in light of the low legal threshold. For instance, the current formulation would permit the following hypothetical designation: a foreign group (satisfying the first prong) in which an individual member, in an attempt to steal a ham sandwich, used a knife (satisfying the second prong) to threaten a U.S. citizen (satisfying the third prong). As this example demonstrates, the current definition has an extremely low standard, and it is unclear what type of motivation would be excluded from the definition.¹⁴⁷ A higher standard for designating an FTO is therefore necessary in order to avoid the possibility of results as absurd as the ham-sandwich hypothetical. I am not arguing, as others have, that one federal definition of terrorism or terrorist activity is superior to all others.¹⁴⁸ But the definition of terrorism needs be clearer and narrower, and more closely aligned with the existing definition in § 2656f(d)(2). The second prong of the FTO designation statute should, rather than employing a disjunctive test, require that the organization engages in "terrorism," defined as follows: *pre-meditated unlawful violence or intimidation in furtherance of a political motivation*.¹⁴⁹

147. Randolph N. Jonakait, *The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization*, 56 BAYLOR L. REV. 861, 867 (2004) (arguing that "[t]he definitions of terrorism include much of what might not usually be thought of as terrorism but just ordinary criminal behavior").

148. See generally Perry, *supra* note 117 (concluding that one single definition of "terrorism" should exist as opposed to the status quo where multiple definitions are used concurrently).

149. I am not arguing that this formulation results in a perfect definition, but it does make the criterion narrower. These elements are common among other definitions of the word "terrorism." Additionally, although there are significant nuances in meanings between similar words, this Note does not try to parse the rhetorical differences between words such as: "intimidation" and "coercion"; "political" and "social"; or "motivation" and "objective."

Although it is true that the problem discussed in Subsection A is now returning (that is, federal definitions will continue to be “inconsistent [with respect to the requirement] of a political motivation”),¹⁵⁰ pre-meditation, unlawfulness, violence, intimidation, and political motivation are commonly recognized concepts that can at least clarify the term “terrorism.” In fact, a federal definition already identifies many of these requirements. The U.S. Code of Federal Regulations defines “terrorism” as “the *unlawful* use of force and *violence* against persons or property *to intimidate* or coerce a government, the civilian population, or any segment thereof, *in furtherance of political* or social objectives.”¹⁵¹ Also, recall that the definition of “terrorism” referenced in the original FTO designation statute, similarly, requires “*premeditated, politically motivated violence.*”¹⁵² Terrorism often implies not just violence, but additionally or alternatively intimidation itself. Moreover, academic definitions also commonly contain an intimidation element and a political element.¹⁵³

Given how common the intimidation and political requirements are, and given that they make the definition of terrorism more stringent, my revised version gives more clarity and substance to the FTO designation statute. The hypothetical sandwich-stealing group no longer qualifies under this statute because there is no “intimidation in furtherance of a political motivation.” Rather, the intimidation is done only in furtherance of a theft. Under this proposed revision, we can now return to the question of whether the MDTOs meet the new requirements of the second criterion.

D. RAMPANT INTIMIDATION AND SIMILARITIES TO ISLAMIC FTOS

The “pre-meditated unlawful violence or intimidation” requirements are clearly met by the conduct of MDTOs. MDTOs certainly intend to intimidate the public and governments through startling acts of unlawful violence against military officers and civilians alike. In fact, MDTOs plan and perform the same sort of acts that are usually associated with

150. See Perry, *supra* note 117 and accompanying text.

151. 28 C.F.R. § 0.85 (2004) (emphasis added).

152. 22 U.S.C. § 2656f (d)(2) (emphasis added).

153. For example, one legal textbook defines “terrorism” as “the *unlawful* use or threat of *violence* against persons or property *to further political* or social objectives. It is generally *intended to intimidate* or coerce a government individuals or groups to modify their behavior or policies.” STEPHEN DYCUS ET AL., COUNTERTERRORISM LAW 3 (2007) (emphasis added).

stereotypical Islamic terrorism, including beheadings,¹⁵⁴ mass graves,¹⁵⁵ car bombs,¹⁵⁶ gruesome killings to send a message,¹⁵⁷ political corruption,¹⁵⁸ underground tunnels,¹⁵⁹ false flag attacks,¹⁶⁰ and torture.¹⁶¹ Another common theme in these horrific events is that they occur at popular locations during the day without notice.¹⁶² As with designated Islamic FTOs like al Qaeda, the public quality of these acts is what makes them successful displays of power for the MDTOs.¹⁶³ These characteristics do not prove that the MDTOs are politically motivated, but are noteworthy because they are consistent with the intimidation strategy of Islamic FTOs.

The MDTOs' planning and organizational structure is also similar to Islamic FTOs, such as al Qaeda, in that their groups are capable of breaking up into small independent cells if the need arises.¹⁶⁴ A de-centralization of power not only ensures continued viability in the wake of absent leadership but also enables each cell to fund and train young men at a faster rate.¹⁶⁵ The MDTOs are perhaps most similar to Islamic FTOs with respect to their U.S. network. The MDTOs are increasingly linked to organized crime in the United States, especially prominent prison and street gangs.¹⁶⁶ There is also evidence that the U.S. prison and street gangs tied to MDTOs are

154. For example, in 2006 several gunmen rushed into a nightclub and fired shots in the air, and then, after ordering all the people to lie down, rolled five human heads onto the dance floor. Bloom, *supra* note 6, at 390.

155. Thomas, *supra* note 12, at 607.

156. Barnard R. Thompson, *The Drug War in Mexico: By Any Other Name It's Terrorism*, MEXIDATA.INFO (Aug. 9, 2010), <http://www.mexidata.info/id2755.html>.

157. LONGMIRE, *supra* note 140, at 28.

158. Tracy Wilkinson, *Mexico Drug Traffickers Corrupt Politics*, L.A. TIMES 1, May 31, 2009, available at <http://articles.latimes.com/2009/may/31/world/fg-michoacan-drugs31> ("Unlike some drug syndicates, La Familia goes beyond the production and transport of marijuana, cocaine and methamphetamine and seeks political and social standing. It has created a cult-like mystique and developed pseudo-evangelical recruitment techniques that experts and law enforcement authorities say are unique in Mexico.").

159. See Elisabeth Malkin, *131 Escape in One of Mexico's Largest Jailbreaks*, N.Y. TIMES, Sept. 18, 2012, available at http://www.nytimes.com/2012/09/19/world/americas/131-prisoners-tunnel-out-of-mexico-jail.html?_r=0; Howerton, *supra* note 14; LONGMIRE *supra* note 140, at 46 (noting that over seventy-five tunnels between the United States and Mexico have been discovered).

160. These are also known as "green on blue" attacks. Essentially, they involve MDTO members posing as military and then conducting attacks or collecting bribes to allow people to pass through roads. Howerton, *supra* note 14.

161. Schneck, *supra* note 28, at 930–34.

162. For example, a July 2010 car bombing in Ciudad Juarez, Chihuahua. See Thompson, *supra* note 156.

163. Bloom, *supra* note 6, at 390.

164. *Id.* at 383–89. See generally Björnehed, *supra* note 115, at 309.

165. Bloom, *supra* note 6, at 385.

166. NAT'L GANG THREAT ASSESSMENT, *supra* note 5, at 32–33.

becoming ideologically radicalized.¹⁶⁷ In theory, this could mean a member of the Sinaloa Cartel could simultaneously be a member of al Qaeda. For the time being, though, a radical religious ideology does not appear to have infiltrated the MDTO's philosophy.¹⁶⁸

1. In Furtherance of What Aim?

Whereas the aim of some Islamic FTOs is to spread their religious ideology, the MDTOs' aim is to eliminate obstacles in the supply chain.¹⁶⁹ Islamic FTOs, such as Hamas and Hezbollah, have actually succeeded in exerting significant formal influence on their respective political systems through both non-violent and violent means.¹⁷⁰ The underlying goal of many stereotypical terrorist attacks is to publicize the deed in order to draw attention to a particular cause and ultimately effectuate governmental change.¹⁷¹ Although MDTOs execute chilling public displays, they tend to operate with the opposite goal in mind; MDTOs despise media attention and have been known to kill journalists critical of their practices.¹⁷² When mainstream television and radio stations in Mexico stopped reporting on drug-related violence, many Mexicans turned to the Internet and social media to learn about possible dangers in their communities. MDTOs then attacked those news sources; on one occasion, the MTDOs hung the bodies of two bloggers from a highway bridge with a sign that read: "This is what happens to people who post funny things on the Internet. Pay attention."¹⁷³ Increasingly, online forums also feature posts from MDTO members themselves.¹⁷⁴ Thus, MDTOs seemingly "want it both ways."¹⁷⁵ They misdirect police forces with false leads and censor media, but they also

167. *Id.*

168. *But see* Wilkinson, *supra* note 158.

169. *See* Chelluri, *supra* note 124, at 84–86; *No Police in Mexico Town After Last Officer Kidnapped*, BBC NEWS (Dec. 28, 2010), <http://www.bbc.co.uk/news/world-latin-america-12085405>; Randal C. Archibold, *Bit by Bit, a Mexican Police Force Is Eradicated*, N.Y. TIMES (Jan. 11, 2011), available at <http://www.nytimes.com/2011/01/12/world/americas/12mexico.html>; Björnehed, *supra* note 115, at 309.

170. *See, e.g.*, KRISTA E. WIEGAND, BOMBS AND BALLOTS: GOVERNANCE BY ISLAMIST TERRORIST AND GUERRILLA GROUPS 1–2, 123–24 (2010).

171. *See generally* BRIGITTE L. NACOS, MASS-MEDIATED TERRORISM: THE CENTRAL ROLE OF THE MEDIA IN TERRORISM AND COUNTERTERRORISM (2002).

172. HUMAN RIGHTS WATCH, MEXICO: COUNTRY SUMMARY (2012).

173. John Burnett, *Mexican Drug Cartels Now Menace Social Media*, NAT'L PUB. RADIO (Sept. 23, 2011, 4:04 PM), <http://www.npr.org/2011/09/23/140745739/mexican-drug-cartels-now-menace-social-media>. Often, there are literally notes stuck onto the bodies; these are called "narcomensajes." LONGMIRE, *supra* note 140, at 28.

174. *Id.*

175. *Id.*

want to glorify themselves and threaten the public.¹⁷⁶ Yet, despite enjoying de facto control in poor portions of Mexico¹⁷⁷ and generating panic in the greater community,¹⁷⁸ it is not clear whether MDTOs have an interest in formally running a political system in Mexico.¹⁷⁹ It is more likely that the intimidation is done in furtherance of a profit, rather than in furtherance of influencing politics. However, while the furtherance of a profit may be their central goal, it nonetheless has the by-product of influencing politics.

Whether or not MDTO attack strategies and fluid organizational structures were influenced by the example of Islamic FTOs,¹⁸⁰ their gruesome conduct clearly suffices as pre-meditated unlawful violence or intimidation. The result is a setting wherein both MDTOs and the Islamic FTOs enjoy some control over the public;¹⁸¹ both groups feature political motivations behind their intimidation tactics, even if the underlying motivation is derived from a different source.

E. WHETHER FINANCIAL MOTIVE IS SUFFICIENTLY POLITICAL

As shown above, the MDTOs' displays of violent bravado are consistent with a political motivation, and the intimidation has the effect of compelling political corruption and intentional ignorance. In addition to physical attacks and coercion, MDTOs exploit the bleak economic situation of impoverished Mexicans to draw them into drug cultivation and trafficking.¹⁸² MDTOs provide economic opportunities in poor communities, and this "reinvestment" allows them to function as the government does: securing the loyalty of the people, which thereby "legitimizes" MDTOs.¹⁸³ Yet, while the MDTOs seek to eliminate government resistance—for example, to aid MDTO takeover of prime transaction territory, called plazas—these intentions are incidental goals derived from a primary goal of making profit from the drug trade.¹⁸⁴ The crucial issue thus becomes whether financial motivation can ever be sufficiently political for the purposes of qualifying as terrorism.

176. *Id.*

177. Bloom, *supra* note 6, at 392–93.

178. Burnett, *supra* note 173.

179. However, there is evidence that the MDTOs may operate as both a quasi-government and community support system. *See* Wilkinson, *supra* note 158; Chelluri, *supra* note 124, at 81.

180. *See* Howerton, *supra* note 14.

181. Bloom, *supra* note 6, at 392–93. *Cf.* WIEGAND, *supra* note 170, at 161.

182. Bloom, *supra* note 6, at 392–93.

183. *Id.*

184. Chelluri, *supra* note 124, at 84–86. *See also* Björnehed, *supra* note 115, at 312–13.

At their most basic level, the MDTOs' profit-maximization scheme is comparable to that of a private company.¹⁸⁵ Both companies and MDTOs share the same operating principle: to serve the interests of shareholders or members by generating as much profit as possible.¹⁸⁶ Like companies, MDTOs may consider external environmental factors but, if the ultimate decision makes financial sense, MDTOs will ultimately be indifferent to the impact on many stakeholders and the law.¹⁸⁷ In an MDTO's calculation, the value of human life receives little consideration.¹⁸⁸ To MDTOs, prosecution and sentencing is seen as a form of investment rather than a cost: once in prison, MDTO members actively recruit new gang members.¹⁸⁹

Hence, it is MDTOs' financial motivation that differentiates them from FTOs, which should have political motivations. This distinction has been described as the difference between crime and terrorism itself:

[T]errorism is a form of political violence where the political aspect of motivation is a significant factor in classifying an organisation as terrorist. On the other hand, for actors in organised crime the driving force is mainly economic gain. The state is a case in point. So far as mainly economically-motivated organisations are a threat to the state this primarily concerns the control of parts of the state, such as the judicial branch, law enforcement agencies, as opposed to actively challenging the state. Politically-motivated organisations on the other hand, wish not only to control parts of the state and society, they wish to reform or revolutionise the state and societal structures to fit their ideological conviction.¹⁹⁰

185. See McLaughlin, *supra* note 53 (in which retired DEA agent Phil Jordan observed that "the cartels' operations are much like that of chain retail businesses").

186. Chelluri, *supra* note 124, at 84–86. See also Björnehed, *supra* note 115, at 312–13.

187. See Chelluri, *supra* note 124, at 84–86 ("From this perspective, the Mexican cartels are in reality a business, or a multinational corporation, whose product happens to be illegal To sustain their businesses over the years, the cartels invested in public officials through corruption and intimidation. The cartels also invest in capital equipment, like methamphetamine labs, aircraft, and vehicles, as well as infrastructure such as roads and a tunnel under the U.S.-Mexican border to transport their illegal products Under these conditions the cartels represent a criminal insurgency based on economics. The criminal insurgent differs from other insurgents by lack of political goal, but the pursuit of an economic goal, the unencumbered ability to conduct business without interference from the government. The economic insurgent is the ultimate capitalist, willing to take up arms to advance a business agenda."); Björnehed, *supra* note 115, at 312–13.

188. Björnehed, *supra* note 115, at 312–13.

189. NAT'L GANG THREAT ASSESSMENT, *supra* note 5, at 30.

190. Björnehed, *supra* note 115, at 312.

The distinction between ideologically motivated action and economic pursuit is useful in the abstract, but becomes difficult to apply as a bright-line rule. For example, the Real Irish Republican Army, which aims to create a united Ireland, is currently designated as an FTO.¹⁹¹ While qualifying as an FTO because of its ideological motivation, this organization appears to be a fraction of the threat to the U.S. that the MDTOs present.¹⁹² Moreover, MDTO operations arguably *are* “actively challenging the state” and “societal structures” of Mexico and the U.S. The differences in capability between these groups reveal the limitations of the distinction. On this account, MDTOs seem to personify terrorism.

This discussion, therefore, begs the question of whether the gain and expenditure of money can ever be political. A dictionary definition of “political” does not help make this determination, but it underscores the importance of government involvement. Merriam-Webster defines the term as “of, relating to, or concerned with the making as distinguished from the administration of governmental policy.”¹⁹³

On one hand, while hard to quantify, money plays an undeniably large role in the making of governmental policy.¹⁹⁴ After the 2010 ruling in *Citizens United v. Federal Election Commission*, corporations can now freely make political expenditures.¹⁹⁵ The 2012 U.S. Presidential election is a highly visible example of corporations taking part in political speech through funding campaigns.¹⁹⁶ Lobbying through corporate interest groups is not a new concept. As shown in Part II, Section C, *supra*, private

191. *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE: BUREAU OF COUNTERTERRORISM (Sept. 28, 2012), <http://www.state.gov/j/ct/rls/other/des/123085.htm>.

192. See John Nugent, *Lurking Not Acting, 'Real IRA' Remains a Threat*, FORBES (Aug. 14, 2013), <http://www.forbes.com/sites/riskmap/2013/08/14/lurking-not-acting-real-ira-remains-a-threat/> (“While [the Real IRA] remains intent on targeting England, MI5 (internal security service)’s downgrading of the threat from dissident republican organizations from ‘substantial’ to ‘moderate’ in October 2012 underlined that, though an attack by the Real IRA and other groups is possible, it is not assessed to be likely.”).

193. *Political Definition*, MERRIAM-WEBSTER, available at <http://www.merriam-webster.com/dictionary/political> (last visited Oct. 15., 2013). See also MICHAEL AGNES, WEBSTER’S NEW WORLD COMPACT OFFICE DICTIONARY (4th ed. 2002) (defining “political” as “of, concerned with, or engaged in government, politics, etc.”).

194. See e.g., Jill Replegle, *The Drone Makers and Their Friends in Washington*, KPBS.ORG (Apr. 11, 2013, 11:13 AM), <http://www.kpbs.org/news/2012/jul/05/drone-makers-friends-washington/>.

195. See *Citizens United v. FEC*, 558 U.S. 310 (2010) (holding that it was unconstitutional to ban free speech by limiting direct advocacy by companies and similar organizations).

196. Nate C. Hindman & Christina Wilkie, *Wynn Employee Voter Guide Pressures Workers to Vote Right*, HUFFINGTON POST, (Oct. 26, 2012, 8:38 AM), http://www.huffingtonpost.com/2012/10/25/wynn-employee-voter-guide_n_2018595.html.

companies would likely have a financial stake in a new conflict,¹⁹⁷ and they could play a role in the formulation of U.S. policy with respect to Mexico. Thus, to define “political” in a way that excludes financial motives, while simultaneously including religious or social motives, seems inaccurate.

On the other hand, if the profit motive is accepted as a political motive when defining terrorism, other groups along with the MDTOs would be eligible for FTO designation.¹⁹⁸ For instance, in 2009, Royal Dutch Shell settled a case after allegedly conspiring in the arrest, torture, prosecution, and hanging of a Nigerian activist, Ken Saro-Wiwa.¹⁹⁹ Saro-Wiwa was a critic of the environmental harms left in the wake of Shell’s operations.²⁰⁰ The fact that this was done in conjunction with the local government likely makes the entire scenario, from an activist’s perspective, *more* intimidating.

In summary, the financially motivated actions of MDTOs could qualify as “political” under an expansive conception of the term, but it would probably be a conception that is more expansive than what has been formally recognized. Such recognition would raise new questions regarding corporate lobbying, its corrupting effect on politics, and how that corruption shapes society. Does an attempt to implement an economic system represent a politically motivated ideology and, if so, how intimidating must that system be to qualify as “political”? Could financial spending, paired with illegal intimidation, provide the grounds to designate an otherwise legal business as a domestic or foreign terrorist organization? Qualifying organizations based purely on financial motivations or activities, like MDTOs, as “political” for the purposes of an FTO

197. Some examples of potential stakeholders are Lockheed Martin Corporation (drones), Century International Arms (firearms), and Geo Group (detention). *See, e.g.,* Paige St. John, *California Signs Private-Prison Deal*, L.A. TIMES (Sept. 23, 2013, 9:03 AM PT), <http://www.latimes.com/local/political/la-me-ff-state-signs-private-prison-deal-20130923,0,1218662.story#axzz2ISvwEo7j>.

198. *See* Jad Mouawad, *Shell to Pay \$15.5 Million to Settle Nigerian Case*, N.Y. TIMES, Jun. 9, 2009, *available at* http://www.nytimes.com/2009/06/09/business/global/09shell.html?_r=0&adxnnl=1&ref=global&adxnnlx=1356043458-qcE4PHhI5i9cDNN2WMrX1g.

199. *See* Mouawad, *supra* note 198; Peter Weiss, *Should Corporations Have More Leeway to Kill Than People Do?*, N.Y. TIMES, (Feb. 24, 2012), <http://www.nytimes.com/2012/02/25/opinion/should-corporations-have-more-leeway-to-kill-than-people-do.html>.

200. Jon Entine, *Seeds of NGO Activism: Shell Capitulates in Saro-Wiwa Case*, NGO WATCH (June 18, 2009), http://www.globalgovernancewatch.org/ngo_watch/seeds-of-ngo-activism-shell-capitulates-in-sarowiwa-case.

designation would be a significant event that would fuel an interesting debate.

F. MDTOS COULD BE DESIGNATED AS FTOs

The MDTOs are foreign entities that threaten U.S. national security and engage in “terrorist activity.” They also could be construed as exhibiting a broadly “political” motivation for the purposes of defining “terrorism.” However, because profit seeking has not been formally identified as a political motivation in itself, designation under my suggested revision would not be possible.

This analysis shows that MDTOs exemplify the distinction between terrorist activity and terrorism. Terrorist activity refers to how the acts appear from a bystander’s perspective, whereas terrorism encompasses both terrorist activity and the political motivation behind that activity. The MDTOs are groups that conduct activity that *looks like* terrorism; as the evidence demonstrates, their tactics and organizational structures appear to be practically identical to those of appropriately designated FTOs.²⁰¹ The motivation behind this activity, however, is not political in a narrow sense of the term. Thus, depending on how narrowly or broadly the term “political” is construed, the MDTOs’ actions might not qualify as “terrorism.” Nonetheless, MDTOs meet the existing statutory requirements under the FTO designation statute. Because their actions meet the definition of “terrorist activity,” the second prong is satisfied, and the designation is possible.

IV. LEGAL IMPLICATIONS OF DESIGNATION AND ENFORCEMENT

The previous Part established that MDTOs could be designated as FTOs under the current statutory test. Whether that is a prudent option, however, is a different matter.²⁰² This Part examines the legal implications

201. Bloom, *supra* note 6, at 383–89.

202. It is important to note that an FTO designation of MDTOs might be unlikely for other reasons that receive minimal analysis in this Note. A prominent reason might be the political impetus and impact of FTO designations. In an analogous example, despite the fact that Hezbollah rarely targets Americans, the group remains an FTO. The reason for this is likely that the United States wants to “relieve pressure on its ally [Israel] as it grapples with the ongoing Palestinian uprising.” See WIEGAND, *supra* note 170, at 97–98; Ali Garib, *Hezbollah’s Return to Terror*, THE DAILY BEAST, (Feb. 21, 2013, 10:45 AM), <http://www.thedailybeast.com/articles/2013/02/21/hezbollah-s-return-to-terror.html> (noting that “the terror list in the U.S. can fall prey to politics”). Similarly, there are important political considerations for United States–Mexico relations, which would undoubtedly play a huge role in this

of possible enforcement. An FTO designation of MDTOs would exacerbate disparate applications of the law; by giving the U.S. criminal justice system discretion over the use of the material support statute, sophisticated high-level offenders would likely evade prosecution²⁰³ whereas the smaller players would be exposed to harsh punishment. Discrimination would be codified, and just as Muslim-Americans are currently subjected to selective terrorism prosecutions,²⁰⁴ so too would Mexican-Americans—and those that “look Mexican”—be subjected to arguably unconstitutional enforcement. Such discrimination would be justified under an FTO designation. Moreover, those who exchanged any form of consideration with an MDTO or MDTO associate could be charged with providing material support to FTOs.

Because there would likely be many negative repercussions and few benefits, MDTOs should not be designated as FTOs. If MDTOs were designated as FTOs, it would establish a national security framework over a conflict that has already straddled the line between criminal law and national security. Such a designation would be consistent with an evolving trend in the criminal justice system: there has been a progression from a goal of retribution in the common law era, to rehabilitation and then deterrence in the last century, and finally to incapacitation and prevention in recent decades.²⁰⁵ This new paradigm, which has been called the “national security era,”²⁰⁶ places great value on ensuring safety and stability. Driven by the fear of a low-probability, high-magnitude event, a national security framework seeks to eliminate crime through incapacitation or, ideally, to prevent it through surveillance and detention.²⁰⁷ As a result, the focus becomes “lowering the chances of [crime’s] success [rather] than discouraging the behavior through

determination. *See, e.g.*, Rafael Romo, *Mexican Drug Cartels Considered Terrorists?*, CNN.COM (Apr. 15, 2011, 2:49 PM EDT), <http://www.cnn.com/2011/WORLD/americas/04/15/cartels.terror/> (“[Mexican Ambassador to the U.S. Arturo] Sarukhan says that ‘if you label these organizations as terrorist, you will have to start calling drug consumers in the U.S. ‘financiers of terrorist organizations’ and gun dealers ‘providers of material support to terrorists Otherwise . . . you really sound as if you want to have your cake and eat it too.’”).

203. *See* MEK example, *infra* Part IV.B.

204. In regards to a defendant’s background, “[t]errorism prosecutions provide a prominent example in which ethnic biases and nationality-based prejudices might infiltrate the prosecutorial decisionmaking process regarding the charges brought against a defendant whose conduct inflicted harm on a large number of victims.” Michal Buchhandler-Raphael, *What’s Terrorism Got to Do with It? The Perils of Prosecutorial Misuse of Terrorism Offenses*, 39 FLA. ST. U. L. REV. 807, 845 (2012).

205. *See generally* Stevenson, *supra* note 86.

206. *Id.* at 148.

207. *Id.* at 170–72.

threats.”²⁰⁸ A national security framework tends to value government concerns over individual liberty rights.²⁰⁹ An FTO designation of MFTOs would continue this trend, thereby increasing the incarceration rates of the most visible market participants: U.S. drug sellers and buyers.²¹⁰ The problem is that most of these individuals would likely be low-level players in the drug trade, and the void left by the market would probably be quickly filled.

A. THE USE OF MATERIAL SUPPORT STATUTES TO ENFORCE CRIMINAL LAW

The transition to the national security state began in the latter part of the twentieth century, but for many it is best signified by September 11, 2001 and the responsive legislation.²¹¹ Most significantly, the PATRIOT Act’s passage²¹² enhanced the utility of material support statutes, 18 U.S.C. § 2339A and 18 U.S.C. § 2339B. Since that time, the craze associated with the “war on terror” has amplified the use of these material support statutes.²¹³ However, these laws, conceivably passed to combat the war on terror, are instead used “as a guise to expand law enforcement powers in areas that are totally unrelated to terrorism.”²¹⁴ This is an irony of the war on terror: while the premise of having terror laws is to help fight terrorists, few terrorists are actually detected and convicted.²¹⁵ Instead, low-risk Muslims are charged for minor offenses, which normally would not be a federal case but for the terrorism allegations.²¹⁶ If the MDTOs were

208. *Id.* at 149.

209. *See generally* Buchhandler-Raphael, *supra* note 204, at 838–39.

210. Recognize that it is the lowest-level offenders that are the most visible market participants, and that is why these individuals would likely be incarcerated most frequently. The low-level workers of the drug business on the Mexican side are the impoverished Mexican migrants—the drug mules. *See* Bloom, *supra* note 6, at 392–93 (“That which is ‘illegal becomes what seems reasonable and necessary.’”). On the U.S. side, the business model consists of U.S. citizens (with MDTO ties) selling to U.S. consumers. Jesse Walker, *Debunking Drug Warriors’ Data*, REASON (Mar. 25, 2009, 3:12 PM), <http://reason.com/blog/2009/03/25/debunking-drug-warriors-data> (“[I]t is a criminal network in the United States, operated by U.S. citizens, and dealing to U.S. buyers. Of course it has links to foreign supply, but that does not change the transnational—not Mexican—nature of the threat.”).

211. Stevenson, *supra* note 86, at 134.

212. USA Patriot Act, Pub. L. No. 107–56, 115 Stat 272.

213. *See generally* Stacy, *supra* note 115.

214. Lichtblau, *supra* note 78.

215. Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST, Jun. 12, 2005, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/06/11/AR2005061100381_2.html?sid=ST2010111602361.

216. *Id.* (“[T]he primary strategy is to use ‘prosecutorial discretion’ to detain suspicious individuals by charging them with minor crimes. [Georgetown Law Professor Viet Dinh explains that]

designated as FTOs, Mexican-Americans, Mexican nationals, and other individuals living in the United States would be accused of giving material support to FTOs, mainly through illicit drug transactions.

The two material support statutes, 18 U.S.C. § 2339A and § 2339B, were passed as part of the Antiterrorism and Effective Death Penalty Act.²¹⁷ Under these statutes, it is a federal crime to provide material support or resources to aid acts of terrorism²¹⁸ or to aid FTOs.²¹⁹ Both statutes assist zealous prosecutors and harm suspected offenders, though it is the latter statute, § 2339B, which punishes material support to FTOs.

1. The Humanitarian Decision

The mens rea requirement of § 2339B is controversial because mere knowledge of support to an FTO is sufficient for conviction.²²⁰ A defendant need not even intend to support an FTO—under *Holder v. Humanitarian Law Project*, defendants must only know that their material support went to an individual or organization with ties to terrorism.²²¹ It might even be sufficient for convictions to be based on the fact that defendants *should have known* their material support was helping an FTO.²²² In *Humanitarian*, the defendants, the Humanitarian Law Project, sought to help the Kurdistan Workers' Party in Turkey and the Sri Lanka Liberation Tigers of Tamil Eelam (both FTOs) by providing free legal services and training, intending this assistance to be the means of peacefully resolving conflict.²²³ The Humanitarian Law Project argued for protection under the First Amendment. The Court dismissed this argument and held that their assistance constituted impermissible material support in violation of § 2339B.²²⁴

This knowledge requirement is a conceptual change in the law. Complicity or conspiracy-like offenses have traditionally required the

[t]he crimes are often, 'a violation of law that may or may not rise to the level of what might usually be called a federal case But the calculation does not happen in isolation; you are not just talking about the crime itself, but the suspicion of terrorism That skews the calculation in favor of prosecution.'").

217. See generally Stacy, *supra* note 115, at 462.

218. 18 U.S.C. § 2339A (2009).

219. *Id.* § 2339B.

220. Gerald G. Ashdown, *The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism*, 67 U. PITT. L. REV. 753 (2006).

221. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2730 (2010).

222. Stevenson, *supra* note 86, at 138.

223. *Humanitarian*, 130 S. Ct. at 2730.

224. *Id.*

suspect to intend to provide material support.²²⁵ The *Humanitarian* Court, however, reasoned that training members of FTOs to use legal means of addressing their claims had the effect of legitimizing their cause, thereby enabling the FTOs to obtain prohibited material support.²²⁶

The Court's interpretation of material support permits a broad definition, limits the scope of judicial review, and prohibits activities that are otherwise legal. The Court ruled that the statute's definition of "material support"—defined as "any property, tangible or intangible, or service"²²⁷—was not impermissibly vague and that the expert assistance intended to provide legitimate recourse was nonetheless illegal.²²⁸ Perhaps the only thing that is not impermissible material support to an FTO is representation by a criminal defense attorney, and only then because it is a constitutional protection.²²⁹ The Court further reasoned that the judgment of the legislative and executive branches in these matters was "entitled to significant weight."²³⁰ Importantly, § 2339B does not require the commission of an independent criminal act. For example, the defendants in this case, Humanitarian Law Project, wanted to provide assistance—free legal services and training—which is otherwise permitted by the law. This means illegal consensual transactions like exchanges for drugs or sex are not the only actions eligible for criminal enhancements under these statutes. Actions that are normally legal and subject to constitutional protections, like remittances or voluntary legal assistance, could conceivably be bases for enforcement under material support statutes.

225. Ashdown, *supra* note 220, at 779–80.

226. *Humanitarian*, 130 S. Ct. at 2736 (Breyer, J., dissenting) ("In the Court's view . . . the Constitution permits application of the statute to activities of the kind at issue in part because those activities could provide a group that engages in terrorism with 'legitimacy.' . . . [A]rmed with this greater 'legitimacy,' these organizations will more readily be able to obtain material support of the kinds Congress plainly intended to ban—money, arms, lodging, and the like."). This language also suggests that the mere aim to legitimize a group's agenda (on a social media site, for example) could be enough to constitute material support. *See id.*

227. 18 U.S.C. § 2339A(b)(1) (2009).

228. *Humanitarian*, 130 S. Ct. at 2719, 2736 (Breyer, J., dissenting). This holding represents the first time in First Amendment jurisprudence that a restriction on political speech has passed strict scrutiny.

229. Ashdown, *supra* note 220, at 782–84 (discussing *United States v. Sattar*, 314 F. Supp. 2d 279 (2004), in which a court rejected the government's theory that a defense attorney violated § 2339B by acting as personnel, which is prohibited).

230. *Humanitarian*, 130 S. Ct. at 2728.

2. Significance of an FTO Designation

If the MDTOs were designated as FTOs, the use of material support statutes would increase because of the sheer number of individuals close to the border and within the United States who could conceivably be members of the six newly designated FTOs. Anyone suspected of being a gang member—and in some U.S. states, six out of one thousand individuals are gang members²³¹—could generate reasonable suspicion that they are members of FTOs merely because many gangs deal drugs and most drugs come from the MDTOs.²³² That justification would give police officers increased discretion to detain individuals. Meanwhile, § 2339B gives the prosecutor substantial discretion if there is any link to MDTOs. This is problematic because it implicates otherwise law-abiding individuals if they knew or should have known their remittances or resources were going to a member of an FTO—even if they are simply trying to supplement or replace an impoverished family member’s illegal drug trade income.²³³

B. THE LAW’S UNEQUAL APPLICATION WOULD CONTINUE

Drug laws are enforced unequally on the basis of race and class,²³⁴ and this has been the case since the start of the drug war.²³⁵ Some examples of the disparate impact on racial minorities and corruption in law enforcement can be found in the crack-cocaine plague in the 1980s:²³⁶ CRASH, the Rampart Scandal,²³⁷ and Operation Pipeline.²³⁸ More generally, an oft-cited statistic is that blacks are arrested more often for drug crimes, even though drug use across all races is about the same and blacks are a minority in comparison to whites.²³⁹ Although there have been

231. NAT’L DRUG THREAT ASSESSMENT, *supra* note 8, at 47.

232. *See* COOK, *supra* note 2.

233. *See* Bloom, *supra*, note 6.

234. *See generally* Woods, *supra* note 113.

235. *See* ALEXANDER, *supra* note 1. *See also* Richard J. Bonnie & Charles H. Whitebread II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 6971, 1012, 1055 (1970).

236. *See* MCWHORTER, *supra* note 68.

237. The motto of Los Angeles’ Rampart police division was: “We intimidate those who intimidate others.” Throughout the 1990s, these officers aggressively—and very controversially—pursued gang violence by “dealing drugs, shooting unarmed suspects, planting guns and routinely falsifying police reports.” Over one hundred Rampart-related convictions were eventually overturned. Terry McCarthy, *The L.A.P.D. Blues*, TIME (Nov. 19, 2000), <http://www.time.com/time/magazine/article/0,9171,88806,00.html>.

238. *See* ALEXANDER, *supra* note 1, at 69–72.

239. Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 189–90 (2013).

attempts to get to the higher-level players in the drug trade, by and large the war has been aimed at small-time minorities.²⁴⁰ The pernicious effect of these strategies was not always apparent,²⁴¹ and the result would likely be the same with respect to terror law enforcement under a hypothetical FTO designation.²⁴²

Through militarization, the freezing of MDTO assets, and the ability to bring terror charges against sophisticated offenders, an FTO designation could potentially reduce the scope of the drug war in a positive way. There could very likely be some sort of targeted killing program employed, similar to those used by the United States in other parts of the world.²⁴³ This program may be a net benefit by minimizing casualties while neutralizing the heads of MDTOs. Additional surveillance drones are already slated for assignment to the border areas²⁴⁴ to ease the strain of human patrols.²⁴⁵ Given that some of these drone surveillance missions already navigate into Mexico,²⁴⁶ it is not hard to imagine these same drones being fitted with weaponry to take out MDTO kingpins while inflicting minimal damage. On the virtual front, stricter safeguards could freeze the

240. Cf. ALEXANDER *supra* note 1, at 8, 12, 13, 16–17, 45–48, 53, 59. The drug war is aimed at small dealers despite the rhetoric; terror laws would likely have the same effect.

241. In the 1990s, Operation Pipeline was actually touted as a useful program for CHP officers, “[giving] them added skills in identifying drug trafficking.” See *Operation Pipeline Training Targets Drugs*, CALIFORNIA HIGHWAY PATROL (1998), available at <http://www.chp.ca.gov/pdf/per98-12.pdf>.

242. Cf. *id.*

243. Cf. Arsenault, *supra* note 52.

244. Eight Predators fly for CBP alone, but up to twenty-four are planned for deployment, which would “giv[e] the agency the ability to deploy a drone anywhere over the continental United States within three hours.” William Booth, *More Predator Drones Fly U.S.-Mexico Border*, WASH. POST (Dec. 21, 2011), http://articles.washingtonpost.com/2011-12-21/world/35285176_1_drone-caucus-predator-drone-domestic-drones. Moreover, drones will soon have the capacity to collect vast amounts of information. See, e.g., Spencer Ackerman, *Every Day, Army’s Panopticon Drone Will Collect 80 Years’ Worth of HD Video*, WIRED.COM (Jan. 17, 2012, 6:30 AM), <http://www.wired.com/dangerroom/2012/01/army-helicopter-cross-eyed/> (stating that a panopticon drone could collect nearly eighty years’ worth of video in a single day and that a blimp-like version of the drone could potentially stay engaged in the air for five days in a row).

245. Compare *id.*, with Dever, *supra* note 91, at 2–3. Sheriff Dever is quoted as saying that S.B. 1070:

places an absurd burden on my deputies and me. Under the law, if I see people I suspect of being in the United States illegally, I already have to decide whether there is probable cause that they are here illegally. . . . In Cochise County, my deputies and I often have to travel many miles to respond to a resident’s call for assistance. The last thing we have time to do is harass law-abiding people.

Id. More drone surveillance would enable the sheriff to cut down on response time, thereby increasing the efficiency and frequency of suspect apprehension. See *id.*

246. See *U.S. Spy Drones Flown Over Mexico Since 2009*, KVOA.COM, NEWS 4 TUCSON (Mar. 16, 2011), <http://www.kvoa.com/news/us-spy-drones-flown-over-mexico-since-2009/>.

assets of MDTOs,²⁴⁷ making their violent trading more difficult to conduct. Possible charges under terror statutes could make a bank wary of dealing with suspect clients from Mexico.²⁴⁸ Similarly, instances of political or corporate corruption/scandals might decrease if a terror prosecution were possible. Operation Fast and Furious, for example, was part of a larger government operation in which the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) allowed illegal sales of thousands of firearms to straw purchasers to occur.²⁴⁹ After attempting to trace the routes back to MDTO leaders, the ATF lost track of most of the firearms; some of them later turned up at murder sites and other crime scenes along the United States–Mexico border.²⁵⁰ Although it is not yet entirely clear who was responsible for the botched operation, if the MDTOs were designated FTOs, then the deliberate failure to seize these weapons could conceivably count as material support. Hence, prosecution under the material support statutes could possibly focus the spotlight on banks, corrupt or inept government agencies,²⁵¹ and sophisticated criminals lending material support to MDTOs, all while neutralizing the MDTOs themselves.

The more likely result, however, is that enforcement against minorities would be disproportionately high, and sensational cases involving banks or political officials would be the exception rather than the norm. Without additional incentives for law enforcement to pursue large-scale crimes, the existing incentives to seek out small-time suspects would likely continue to reign. Under a criminal law framework, police officers are restricted to using race only as an identifying factor for a known suspect, but under a national security framework (as in, when the offender may be a terrorist), the official is now able to use race *at their discretion* in enforcement.²⁵² Racial profiling is thus enabled, even encouraged, as a policy under the guise of “national security.”²⁵³ Discretion comes out of the Ashcroft Guidelines, an advisory memorandum that enables intelligence officers to do anything that a U.S. citizen can normally do.²⁵⁴ Under previous

247. 18 U.S.C. § 219(a) (1995).

248. See *supra* text accompanying notes 100–103.

249. Fix, Harris & Montanaro, *supra* note 50, at 749. See also *supra* note 77.

250. See Thompson, *supra* note 22; Bell, *supra* note 77.

251. See, e.g., Thompson, *supra* note 22.

252. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (June 2003).

253. *Id.*

254. OFFICE OF THE ATT’Y GEN., U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS (May 30, 2002).

guidance, an officer would need reasonable suspicion or participation in a criminal investigation to sit in a mosque. However, under the Ashcroft Guidelines, that same officer can now freely sit in a mosque and observe behavior, even without any hint of wrongdoing.²⁵⁵

1. A Lack of Fourth Amendment Protection

An MDTO FTO designation could impact Fourth Amendment protections.²⁵⁶ In recent decades, the Supreme Court has examined Fourth Amendment claims in a variety of contexts, and in many of those circumstances, the Court has held that there was either no search or that the search was reasonable.²⁵⁷ This includes search exceptions for drug offenses, the “special needs exception” under *Indianapolis v. Edmond*,²⁵⁸ and the authorization of programs such as the New York Container Inspection Program.²⁵⁹

Border authorities already have the inherent authority to consider any incoming traveler as an alien.²⁶⁰ In fact, an individual seeking entry into the United States must prove they are not inadmissible;²⁶¹ usually a U.S. passport proving citizenship will be sufficient, while sometimes a visa may be insufficient.²⁶² Until 2005, “the government maintained it could detain arriving aliens for *indefinite* periods of time if it determined that they were not admissible and it could not remove them.”²⁶³ Currently, under the PATRIOT Act, officers can detain a person for seven days without even filing a charging document if they certify that person is a terrorist.²⁶⁴ As far as border searches are concerned, DHS claims CBP and ICE have the authority to seize and search electronic devices along the border²⁶⁵ without

255. *Id.*

256. U.S. CONST. amend. IV.

257. See ALEXANDER, *supra* note 1, at 60–61.

258. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

259. Stevenson, *supra* note 86, at 171–74.

260. I.N.A. § 287(a)(2) [8 U.S.C. § 1357(a)(2)].

261. See 8 U.S.C. § 1182 (establishing guidelines for inadmissibility).

262. See, for example, *Kleindienst v. Mandel*, 408 U.S. 753 (1972), in which the defendant, who had a visa to speak at various U.S. universities, had his visa revoked because he “engaged in activities beyond the stated purposes” by going to additional universities not indicated in the original visa application.

263. SHANE DIZON & NADINE K. WETTSTEIN, *IMMIGRATION LAW SERVICE* § 2:149 (2d ed. 2013).

264. 8 U.S.C. § 1226a(a)(3) (2001).

265. David Kravets, *DHS Watchdog OKs “Suspicionless” Seizure of Electronic Devices Along Border*, WIRED.COM (Feb. 8, 2013, 1:20 PM), <http://www.wired.com/threatlevel/2013/02/electronics-border-seizures/>.

a reasonable suspicion requirement.²⁶⁶ DHS continues to assert that “suspicionless” searches along the border can be performed 100 miles inland from actual U.S. borders.²⁶⁷ Approximately 6500 people had their electronic devices searched between 2008 and 2010 under this assertion.²⁶⁸

It is possible that *any* search could be made reasonable by the threat of terrorism because the government interests in that situation are compelling.²⁶⁹ The danger of terrorism could be present whenever the government actor in good faith believes it is. The balancing test employed weighs the importance of the government interest against the public interest, the severity of the intrusion, and the purpose of the search as distinct from law enforcement.²⁷⁰ Courts tend to side with the government in national security cases because the fear of terrorism creates a strong presumption in favor of legitimizing government action.²⁷¹

If MDTOs were designated as FTOs, police and other law enforcement officials could conduct suspicionless searches. Police would enjoy the same broad discretion that border officials already possess and would not require an accompanying CBP or ICE agent to assert jurisdiction. Whether this unencumbered discretion could be ascribed to drones, which have been used to aid arrests of U.S. citizens,²⁷² is another question.

The threat of these suspicionless searches would likely apply across all demographics, yet would probably be most common in predominantly Mexican communities. The presumption would either be that they have direct ties to an MDTO or are indirectly connected via a street gang or prison gang with ties to an MDTO. Of gangs nationwide known to associate with organized crime, the highest association by far is with Mexican criminal organizations. Over a third of these gangs are tied to

266. OFFICE OF CIVIL RIGHTS & CIVIL LIBERTIES, U.S. DEP’T OF HOMELAND SEC., CIVIL RIGHTS/CIVIL LIBERTIES IMPACT ASSESSMENT: BORDER SEARCHES OF ELECTRONIC DEVICES (Jan. 29, 2003).

267. Kravets, *supra* note 265.

268. *Id.*

269. Stevenson, *supra* note 86, at 171.

270. *Id.*

271. It has been observed that “when national defense permeates the culture, the Supreme Court rules more often in favor of law enforcement, at least on non-war claims, than during other periods.” *Id.* (citing Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005)).

272. Jason Koebler, *Court Upholds Domestic Drone Use in Arrest of American Citizen*, U.S. NEWS (Aug. 2, 2012), http://www.usnews.com/news/articles/2012/08/02/court-upholds-domestic-drone-use-in-arrest-of-american-citizen_print.html.

Mexican criminal organizations; the next most common association is less than ten percent.²⁷³ Various MDTOs maintain wholesale operations with street gangs.²⁷⁴ Gangs control most of the internal distribution of drugs once inside the borders of the United States. For example, La Eme is a California-based prison gang that maintains a partnership with Tijuana Cartel and distributes the drugs through their network of Sureños, who are street gang members located in California and other Southwest border states.²⁷⁵ Law enforcement would target Mexicans because of the recurring stereotype that many of them are drug-dealing gang members and that they provide material support—perhaps guns, money, or information—to the MDTOs in exchange for their drugs. Armed with gang statistics and material support statutes, police could detain individuals who *may* have provided material support, and prosecutors could charge them with the equivalent of a strict liability crime.²⁷⁶ The amount of discretion would be virtually unlimited given the “national security” nature of the threat,²⁷⁷ allowing the government to take incredible steps and then claim legitimacy.²⁷⁸

2. The Problems with a Lack of Fourth Amendment Protection

The lack of Fourth Amendment protection would be problematic for numerous reasons. First, there is the issue of racial profiling. Hispanics already account for nearly half of all sentenced federal offenders, which is more than triple their share of the U.S. adult population.²⁷⁹ Minority communities, especially predominantly Mexican ones, would likely be vulnerable to profiling under this statute and, just as in prior drug exception cases where searches and seizures have been deemed permissible, there would be little judicial redress.

273. NAT'L GANG THREAT ASSESSMENT, *supra* note 5, at 29.

274. *Id.* at 27–28.

275. *Id.* at 17–18.

276. Stacy, *supra* note 115, at 462.

277. Extrajudicial action by the government may be more justified when it is done in order to protect national security, but when national security reasons perpetually serves as the basis for every action, validity becomes questionable at best.

278. President Obama reportedly asserted that he has “the power even to kill citizens without due process. As Bush’s own CIA and NSA chief Michael Hayden said this week about the Awlaki assassination: ‘We needed a court order to eavesdrop on him but we didn’t need a court order to kill him. Isn’t that something?’” Glenn Greenwald, *Repulsive Progressive Hypocrisy*, SALON.COM (Feb. 8, 2012 8:13 AM PT), http://www.salon.com/2012/02/08/repulsive_progressive_hypocrisy/.

279. Mark Hugo Lopez & Michael Light, *A Rising Share: Hispanics and Federal Crime*, PEW RES. CENTER (Feb. 18, 2009), <http://www.pewhispanic.org/2009/02/18/a-rising-share-hispanics-and-federal-crime/>.

Second, this profiling could lead to the arrest and detention of innocent individuals. Even if defendants were factually guilty of drug possession, and even if they possessed drugs from a U.S. source, they might still be detained as terror suspects for several days or until it could be proven that the drugs were not from MDTOs.²⁸⁰

Third, the ultimate impact on the drug supply would likely be negligible. While the presumed intention of designating MDTOs as FTOs is to fight the leaders of these organizations, search-and-seizure cases are more likely to apply to the employee drug mules that carry the product, since the MDTOs consider them to be expendable resources.²⁸¹ Small-time marijuana offenders are often viewed as easy arrests for police officers, but they would count as notable “terror suspects.” Yet it is precisely because the arrestees are so easily displaced and replaced that there would likely be no change in drug supply.

Fourth, while it is difficult to predict the scale of potential military operations in Mexico and around the border, it seems unlikely that any operation would be so thorough as to neutralize all MDTO kingpins. Given the market penetration into the United States, the already high incarceration rate of MDTO operatives, and the organization structure (which splinters and promotes quickly), the MDTOs would likely continue in some fashion.

3. The Failure of a Hypothetical Equal Protection Claim

If the MDTOs were designated as FTOs, broader discretion and harsher punishment for crimes would make an already unequal enforcement ratio even more skewed.²⁸² Recall that unlike ordinary criminal law, in which race may only be an identifying factor, race can become a basis for surveillance and enforcement in matters of national

280. Indefinite detention is an ongoing issue, and may depend on many factors, including whether the defendant is an alien or citizen, what his or her alleged connection to terrorism is, and whether he or she is captured inside or outside the U.S. In July 2013, a Second Circuit Court of Appeals judge held plaintiffs lacked standing to challenge a key provision of National Defense Authorization Act, which gives the President certain detention powers. The judge held the President’s authority did not apply to U.S. citizens arrested in the United States. *Hedges v. Obama*, 724 F.3d 170 (2d Cir., 2013). However, it is unclear how laws pertaining to indefinite detention will play out in the future. See Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 553–55 (2013) (summarizing the progression of detention legislation and case law since September 11, 2001).

281. Compare Bloom, *supra* note 6, at 392–93, with Thomas, *supra* note 12, and Gibson, *supra* note 132 (showing that migrants and children are used as drug mules to deliver products to their U.S. networks; these people are expendable resources in the sense that, desperate for any type of work, they are always available to MDTOs).

282. See Woods, *supra* note 113.

security.²⁸³ This could result in both a facial and as-applied challenge to the proposed law as a violation of the Equal Protection Clause of the Fourteenth Amendment.²⁸⁴

This theoretical claim could be brought by a Mexican-American criminal defendant, asserting the unequal application of the laws pertaining to terrorism and material support. A court would apply strict scrutiny on the basis of race and apply the basic standard for asserting an Equal Protection Clause violation: “proof of racially discriminatory intent or purpose.”²⁸⁵ This means that absent a demonstrable and extensive pattern of discrimination (which would likely take years to emerge), disparate impact will likely not be sufficient.²⁸⁶ Even with a demonstrable pattern and the benefit of a strict-scrutiny test, the case would be extremely difficult to win without showing proof of a discriminatory intent or purpose. This is because the government could assert compelling interests in the matter of national security, which could operate as a trump card.

A hypothetical case would likely be analogous to *McCleskey v. Kemp*,²⁸⁷ a 1987 capital case from Georgia, in which a black man was convicted of murdering a white police officer. The defense attorneys presented a state study to show that cases involving the killing of a white victim were four times more likely to result in a death sentence for the defendant than in cases involving the killing of a black victim.²⁸⁸ White defendants were also much less likely to receive capital punishment than blacks.²⁸⁹ The similarity between the categories and the disparity of the figures was noted, but the court held that the data failed to demonstrate the requisite discriminatory intent by the legislative and executive branches.²⁹⁰ While admitting that “apparent disparities in sentencing are an inevitable part of our criminal justice system,” the majority affirmed the death sentence.²⁹¹ Notwithstanding the outrage immediately after the *McCleskey*

283. GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES, *supra* note 252.

284. U.S. CONST. amend. XIV, § 1.

285. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

286. *Id.* at 264–65. *See also* *Washington v. Davis*, 426 U.S. 229, 242 (1976).

287. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

288. *Id.* at 286–87.

289. *Id.* at 291.

290. *Id.* at 292–94.

291. *Id.* at 312, 321.

case,²⁹² this case has since served as a cornerstone of Equal Protection jurisprudence.

A hypothetical defendant in the postulated case might contend that material support statutes are disproportionately charged against minorities, whereas political elites and whites enjoy protection. The defendant could then analogize to the recent scenario of Mujahedin-e Khalq Organization (“MEK”).²⁹³ MEK, after spending millions of dollars²⁹⁴ to persuade the Obama Administration to take its designation off the FTO list, finally succeeded in 2012.²⁹⁵ When MEK had been considered an FTO, the group had received vigorous support from paid sponsors, including prominent U.S. political figures.²⁹⁶ Although several Muslims inside the U.S. have been prosecuted for providing material support,²⁹⁷ the political figures have not been prosecuted, despite willingly offering what is very clear public material support in exchange for substantial fees.²⁹⁸ Of course, the

292. Anthony Lewis, *Abroad at Home; Bowing to Racism*, N.Y. TIMES (Apr. 28, 1987), <http://www.nytimes.com/1987/04/28/opinion/abroad-at-home-bowing-to-racism.html>.

293. For a second example involving political officials, consider that “former President Jimmy Carter’s election monitoring team could be prosecuted for meeting with and advising Hezbollah during the 2009 Lebanese elections.” David Cole, *Chewing Gum for Terrorists*, N.Y. TIMES (Jan. 2, 2011), http://www.nytimes.com/2011/01/03/opinion/03cole.html?_r=0.

294. Elizabeth Rubin, *An Iranian Cult and Its American Friends*, N.Y. TIMES (Aug. 13, 2011), http://www.nytimes.com/2011/08/14/opinion/sunday/an-iranian-cult-and-its-american-friends.html?pagewanted=all&_r=0.

295. Press Release, U.S. Dep’t of State, Delisting of the Mujahedin-e Khalq (Sept. 28, 2012), available at <http://www.state.gov/r/pa/prs/ps/2012/09/198443.htm>.

296. Consider that “[t]he group of MEK shills includes former top Bush officials and other Republicans (Michael Mukasey, Fran Townsend, Andy Card, Tom Ridge, Rudy Giuliani) as well as prominent Democrats (Howard Dean, Ed Rendell, Bill Richardson, Wesley Clark). The Christian Science Monitor reported in August 2012 that those individuals, ‘have been paid tens of thousands of dollars to speak in support of the MEK.’” Glenn Greenwald, *Israel, MEK and State Sponsor of Terror Groups*, SALON.COM (Feb. 10, 2012, 1:59 PM), http://www.salon.com/2012/02/10/israel_mek_and_state_sponsor_of_terror_groups/.

297. For example, a “TV salesman in 2009 was sentenced to five years in federal prison merely for including a Hezbollah TV channel as part of the satellite package he sold to customers . . . [a] Pakistani legal resident . . . was indicted . . . for uploading a 5-minute video to YouTube that was highly critical of U.S. actions in the Muslim world, an allegedly criminal act simply because prosecutors claim he discussed the video in advance with the son of a leader of a designated Terrorist organization (Lashkar-e-Tayyiba); a Saudi Arabian graduate student . . . was prosecuted simply for maintaining a website with links ‘to groups that praised suicide bombings[.]’ . . . and ‘jihadist’ sites that solicited donations for extremist groups (he was ultimately acquitted) . . . a 22-year-old former Penn State student . . . was indicted for—in the FBI’s words—‘repeatedly using the Internet to promote violent jihad against Americans’ by posting . . . ‘a comment online that praised the shootings’ at a Marine Corps [military base.]” *Id.*

298. While the promise of lucrative speaking fees was the first factor that drew them to the group’s cause, many supporters say they became convinced that it was unfair and dangerous to leave

Humanitarian standard represents the proposition that any assistance done on behalf of, and especially in coordination with, an FTO may be prosecuted under the material support statute regardless of the activity's legality.²⁹⁹ Free speech under the First Amendment is not a defense either.³⁰⁰ It was remarked that, "no matter what one thinks of [MEK] . . . it is formally designated as a Terrorist group and it is thus a felony under U.S. law to provide it with any 'material support.'"³⁰¹

This argument, while creative, would likely fail. The government's response could be that its national security interests justify bending constitutional protections. Moreover, one could argue these individuals are not being targeted because of their race but simply because their race happens to correspond with the make-up of members and associates of FTOs. A court would likely rely on the position outline in *McCleskey* that disparate impact, without proof of discriminatory intent, is not a valid protection recognized under the Equal Protection Clause. The court might dismiss the MEK situation and similar instances as examples of prosecutors validly exercising their discretion.

C. MDTOs SHOULD NOT BE DESIGNATED AS FTOs

The illegal drug trade between the United States and Mexico has generated complex problems of organized crime. The MDTOs are the source of a great deal of violence and corruption on both sides of the border. However, they are still criminals and should be treated as such, even if the current scheme appears to have many flaws. An FTO designation would probably not stop MDTO influence in the United States because of their expansive network and fluid organizational structure. Furthermore, because U.S. citizens desire MDTO products, the designation would generate a conflict of interest in that law enforcement would use material support statutes against U.S. citizens, not foreign terrorists. U.S. private industries, working as government contractors, would profit from the conflict as they have done in the drug war and war on terror. U.S. citizens and nationals, especially minorities, would endure a large portion of the casualties in the form of decreased liberties and increased detention and deportation. Individuals of Mexican descent would be particularly at

the group on the FTO list. Asked about the group's leader, Maryam Rajavi, Howard Dean stated: "I do not find her very terrorist-like." *Id.*

299. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2728–29 (2010).

300. See Cole, *supra* note 293.

301. See Greenwald, *supra* note 296.

risk, and refuge in Fourth Amendment and Equal Protection claims would likely fail because courts have already eroded those constitutional protections.

V. CONCLUSION

A. MOOT POINT OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE GOVERNMENT

Of course, an FTO designation may ultimately be rendered moot if MDTO members are treated as national security threats regardless of their official designation. U.S. national security policy has already taken a firm hold on society and presented the opportunity for further “terrorizing” that which would have once been considered criminal.³⁰² Seemingly driven to gather data “simply ‘because we can,’”³⁰³ the government, under a pretext of ensuring national security, has begun to mine, analyze, and share as much information as possible.³⁰⁴ The unfortunate reality is that there will be many opportunities for the U.S. to utilize this growing intelligence framework in the near future, as black markets and international criminal organizations continue to multiply.³⁰⁵

For example, the hearings on John Brennan’s nomination as head of the Central Intelligence Agency (“CIA”) in February 2013 shockingly featured government memos arguing high-ranking officials have authority to use “a weaponized drone to kill an American not engaged in combat on American soil.”³⁰⁶ The Obama Administration’s treatment of this issue has

302. Stevenson, *supra* note 86, at 170–72.

303. *Id.* at 166.

304. See James Bamford, *The NSA Is Building the Country’s Biggest Spy Center (Watch What You Say)*, WIREDCOM (Mar. 15, 2012, 7:24 PM), http://www.wired.com/threatlevel/2012/03/ff_nsadatacenter/all/.

305. JOHN ROBB, BRAVE NEW WAR: THE NEXT STAGE OF TERRORISM AND THE END OF GLOBALIZATION 5 (2007) (“Globalization has fostered the development of a huge criminal economy that boasts a technologically leveraged global supply chain (like Wal-Mart’s) and can handle everything from human trafficking (Eastern Europe) to illicit drugs (Asia and South America), pirated goods (Southeast Asia), arms (Central Asia), and money laundering (everywhere). Naim puts the value of that economy at between \$2 and \$3 trillion a year. He says it is expanding at seven times the rate of legitimate world trade.”).

306. Josh Voorhees, *Eric Holder’s Two-Sentence Response to Rand Paul’s 13-Hour Filibuster*, SLATE.COM (Mar. 7, 2013), http://www.slate.com/blogs/the_slatest/2013/03/07/eric_holder_s_43_word_response_to_rand_paul_s_13_hour_filibuster.html.

sparked criticism of the use of drone warfare generally, both inside the United States and around the world.³⁰⁷

The Obama Administration has sought to downplay this expansion of the national security complex while simultaneously developing new tactics. Continuing to call the current permutation a “war on terror,” then, may soon become antiquated.³⁰⁸ Whereas President George W. Bush was heavily criticized for the glaring constitutional violations of the Total Information Program and Guantanamo Bay, President Obama has continued similar programs under his two terms.³⁰⁹ The most notorious program, leaked via government documents starting in May 2013, revealed a complex set of National Security Agency (“NSA”) secret surveillance programs targeting all Americans.³¹⁰ Programs like these undermine the inherent value of FTO designations, since tools intended for counterterrorism are being used against terrorists and non-terrorists alike. This decreases both the efficacy of the programs themselves in countering FTOs as well as the public trust in government efforts.³¹¹ However, the Obama presidency has altered its rhetoric to downplay the perceived impact of these policies. Some examples of these changes include: Gil Kerlikowske, the official responsible for carrying out the U.S. drug war, insisting on the

307. See, e.g., Lloyd C. Gardner, *Are Drones “Obama’s Guantanamo?”*, SALON.COM (Nov. 17, 2013, 7:00 AM PT), http://www.salon.com/2013/11/17/are_drones_obamas_guantanamo/ (quoting South African Bishop Desmond Tutu’s letter to the New York Times).

308. See Daniel Klaidman, *Will Obama End the War on Terror?*, THE DAILY BEAST (Dec. 17, 2012, 12:00 AM), <http://www.thedailybeast.com/newsweek/2012/12/16/will-obama-end-the-war-on-terror.html>.

309. As was pointed out in 2012 after another detainee death, “more detainees have died at the Guantánamo camp (nine) than have been convicted of wrongdoing by its military commissions (six).” Glenn Greenwald, *Another Guantánamo Prisoner Death Highlights Democrats’ Hypocrisy*, THE GUARDIAN (Sept. 11, 2012, 10:22 AM), <http://www.guardian.co.uk/commentisfree/2012/sep/11/guantanamo-prisoner-death-democrats>.

Greenwald remarks in another article that “the real stain of Guantanamo—keeping people locked up in cages for years with no charges—endures. And contrary to the blatant myth propagated by Obama defenders, that has happened not because Obama tried but failed to eliminate it, but precisely because he embraced it as his own policy from the start.” Glenn Greenwald, *The Obama GITMO Myth*, SALON.COM (Jul. 23, 2012, 11:10 AM), http://www.salon.com/2012/07/23/the_obama_gitmo_myth/.

310. Ewen MacAskill and Gabriel Dance, *NSA, Files: Decoded*, THE GUARDIAN (Nov. 1, 2013) <http://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded#section/1>.

311. Bill Schneider, *Fear of Government Rivals Fear of Terrorism*, HUFFINGTON POST (Aug. 8, 2013 10:54 AM), http://www.huffingtonpost.com/bill-schneider/fear-of-government-rivals_b_3743673.html (describing a July 2013 Pew poll which revealed a heightened concern of U.S. citizens with respect to their civil liberties and the government).

elimination of his “drug czar” title because of its negative connotations;³¹² treating terrorism as if it were a criminal issue;³¹³ and giving innocuous names to confidential government projects.

Perpetually conducting war-like behavior is not wise, and statements by top government officials seem to acknowledge this point.³¹⁴ If these modifications in rhetoric reflect reality, then the national security framework is properly being scaled back. Ever since secret operations like the CIA’s drone and NSA’s surveillance programs have been disclosed to a wide-scale audience, there has been a backlash from the global community.³¹⁵

Meanwhile, other government deeds appear to be extending, rather than contracting, the grasp of the national security framework. Consider, for example, innocuously named programs like the “Utah Data Center,”³¹⁶ the “disposition matrix,”³¹⁷ and the “Overseas Contingency Operation.”³¹⁸ A November 2013 report discusses another recently discovered program, “Treasure Map,” which is described by the NSA as “a near real-time,

312. Others disagree: “[i]t’s still a war, but by another name, packaged with friendlier language,” says Eugene Jarecki, who made ‘The House I Live In.’ President Obama’s director of drug control policy, Gil Kerlikowske, has asked not to be called a ‘drug czar’ because of its war-like language, but Jarecki says he needs to do more to give peace a chance. ‘Until you stop prosecuting, and until the war on communities is over, I’d rather you call it a war,’ he says.” Elizabeth Flock, *New Documentary Lambasts Drug War, and Obama’s Failure to Stop It*, U.S. NEWS (Sept. 13, 2012), <http://www.usnews.com/news/blogs/washington-whispers/2012/09/13/new-documentary-lambasts-drug-war-and-obamas-failure-to-stop-it>.

313. Bob Adelman, *Obama Spokesman Suggests the End of the War on Terror*, NEW AM. (Dec. 7, 2012, 4:59 PM), <http://www.thenewamerican.com/usnews/foreign-policy/item/13865-obama-spokesman-suggests-the-end-of-the-war-on-terror>.

314. *Id.* See also Klaidman, *supra* note 308.

315. James Risen & Laura Poitras, *N.S.A. Report Outlined Goals for More Power*, N.Y. TIMES (Nov. 22, 2013), <http://www.nytimes.com/2013/11/23/us/politics/nsa-report-outlined-goals-for-more-power.html?pagewanted=2> (“Prompted by a public outcry over the N.S.A.’s domestic operations, the agency’s critics in Congress have been pushing to limit, rather than expand, its ability to routinely collect the phone and email records of millions of Americans, while foreign leaders have protested reports of virtually unlimited N.S.A. surveillance overseas, even in allied nations.”).

316. See generally Bamford, *supra* note 304 (discussing a spy center in Utah that will essentially serve as the next step in the Total Information Program).

317. See generally Greg Miller, *Plan for Hunting Terrorists Signals U.S. Intends to Keep Adding Names to Kill Lists*, WASH. POST (Oct. 23, 2012), http://www.washingtonpost.com/world/national-security/plan-for-hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408f6e6a4b_story_4.html. (discussing the list the government keeps of global targets and noting that targets are scheduled for a disposition, such as “kill” or “capture”).

318. See Adelman, *supra* note 313 (“Less than two months after his first inauguration, President Obama ordered the Defense Department to refrain from using the phrase ‘War on Terror’ and instead start calling it the ‘Overseas Contingency Operation’ (OCO).”).

interactive map of the global Internet.”³¹⁹ These secret government programs indicate a willingness to monitor foreign and domestic targets alike, regardless of an FTO designation. Despite rhetorical massaging by the executive branch, as one commentator has remarked, “[t]he essence . . . was that the War on Terror was going to continue indefinitely, but under a different name. This name change is merely in keeping with President Obama’s rhetoric on the war.”³²⁰ More broadly, the current policy path seems to indicate a continual focus on combating criminal threats with terror laws.³²¹ The problem is that by the time policy is implemented and the tools are given to law enforcement, it can be too late to reverse the policy, since a “fear of surveillance” is “insufficient to create standing” in a court.³²²

Hopefully, concerned citizens and politicians can band together in a bipartisan effort to ensure important policies, such as drone surveillance, are thoroughly discussed before widespread implementation.³²³ Without appropriate oversight, fundamental privacy violations conducted in the name of national security seem to be an inescapable conclusion.³²⁴

319. Risen & Poitras, *supra* note 315, at 2. Officials, for their part, insist “[t]he program is not used for surveillance . . . but to understand computer networks.” *Id.* at 3.

320. *Id.*

321. Lichtblau, *supra* note 78.

322. Clapper v. Amnesty Int’l USA, 133 S.Ct. 1138, 1147–48 (2013) (5-4 decision) (holding that respondents lacked the standing to challenge 50 U.S.C. § 1881(a) of the FISA Amendments Act of 2008, on the basis that they could not prove they actually were targets of such surveillance, but instead were resting on a “highly speculative” chain of contingencies to assert their theory of injury). *See also* Miller, *supra* note 317 (highlighting the dangers of enacting a controversial policy: “[w]hen you rely on a particular tactic, it starts to become the core of your strategy—you see the puff of smoke, and he’s gone,” said Paul Pillar, a former deputy director of the CIA’s counterterrorism center. ‘When we institutionalize certain things, including targeted killing, it does cross a threshold that makes it harder to cross back.’”).

323. Paul West & Michael A. Memoli, *Senate Debate Over Drones Divides Republican Party*, L.A. TIMES (Mar. 7, 2013), <http://www.latimes.com/news/politics/la-na-pn-gop-debate-drones-20130307,0,7906914.story>.

324. Amazingly, although some of these actions seem particularly egregious, there is evidence that these actions are actually becoming *legal*. Using the Federal Privacy Act:

allows agencies to exempt themselves from many requirements by placing notices in the Federal Register In practice, these privacy-act notices are rarely contested by government watchdogs or members of the public. ‘All you have to do is publish a notice in the Federal Register and you can do whatever you want,’ [The program’s opponents] couldn’t argue that the program would violate the law. Instead, they were left to question whether the rules were good policy. . . . Under the new rules . . . [NCTC] can obtain almost any database the government collects that it says is ‘reasonably believed’ to contain ‘terrorism information.’

Julia Angwin, *U.S. Terrorism Agency to Tap a Vast Database of Citizens*, WALL ST. J. (Dec. 13, 2012), <http://online.wsj.com/article/SB10001424127887324478304578171623040640006.html>.

B. RECOMMENDATIONS

This Note has attempted to provide commentary on one policy proposal, H.R. 1270. That proposal relies on a problematic threshold for designation. More importantly, given an enforcement scheme that already unequally applies the law, the prospect of designating major MDTOs poses a substantial risk to the freedoms of foreigners and U.S. citizens alike, without any indication that it would solve the core national security issues—an oversupply of illegal drugs and dangerous criminals.³²⁵ An unforgiving material support statute and the general erosion of constitutional protections only exacerbate the discrimination and profiling this designation would enable. Moreover, continued government actions under a national security framework threaten to make the terms “war on drugs” and “war on terror” outdated, rendering discussion of who is and who is not an FTO practically irrelevant.

The U.S. Secretary of State should not designate the MDTOs as FTOs. Given the fluid structure of MDTOs and their penetration of U.S. streets and prisons, a strategy of being “tough on crime” and waging a “war on drugs” would be unlikely to significantly reduce drug supply. The designation seems valid on its face, but if prior drug and terror law enforcement is any indication, then as applied it seems destined for unfair application. Because of disparate impact and ultimate ineffectiveness, an FTO designation of MDTOs should not occur.

Ironically, the best federal action would be inaction—at least initially. By relenting on enforcement of marijuana laws in states like Colorado and Washington, which have legalized the substance for medicinal and recreational use, the federal government could use these states as a laboratory to test how regulation works and evaluate the impact on MDTO income.³²⁶ President Obama stated in 2009 that he would relax federal enforcement of marijuana laws for states that allow the sale of medical marijuana.³²⁷ Perhaps because of his dissatisfaction with state regulation, President Obama soon backtracked from this stance; in 2011, he oversaw

325. See Forsyth, *supra* note 133; *supra* notes 30–38 and accompanying text.

326. A “state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

327. Rachel Gordon, *DEA Raids Pot Dispensary in SF*, S.F. CHRON. (Mar. 26, 2009, 4:00 AM), <http://www.sfgate.com/health/article/DEA-raids-pot-dispensary-in-SF-3167274.php>.

several high-profile raids of medical marijuana dispensaries,³²⁸ including a medical center with 100,000 patients and a twenty-million-dollar operating budget.³²⁹ The cases of Colorado and Washington provide President Obama with a chance to re-affirm his 2009 stance.³³⁰ If the scheme operates well, the second step in response should be to consider national legalization of marijuana. While it is possible that MDTOs would not go away but rather shift their operations to other criminal activity,³³¹ legalization would address the issues of marijuana and MDTO influence directly and effectively.³³²

In order to minimize the fundamentally unjust impact of drug laws on minorities and lower classes, stricter anti-laundering laws should be developed to establish harsher liability for sophisticated criminals. If banks allow seven billion dollars in drug funding to go untouched through bank wires,³³³ current laws are failing to deter or prevent wrongdoing. Merida

328. Michael Scherer, *What Is President Obama's Problem with Medical Marijuana?*, TIME (May 3, 2012), <http://swampland.time.com/2012/05/03/what-is-president-obamas-problem-with-medical-marijuana/#ixzz2EhWCD7Je>.

329. *Id.*

330. It has been noted that:

[if] President Obama succeeds in gutting the new state laws [in Colorado and Washington,] he may be serving the interests of foreign drug cartels. A study by the nonpartisan think tank Instituto Mexicano Para la Competitividad found that legalization in Colorado and Washington would deal a devastating blow to the cartels, depriving them of nearly a quarter of their annual drug revenues—unless the federal government decides to launch a ‘vigorous intervention.’ If that happens, pot profits would continue to flow to the cartels instead of to hard-hit state budgets. ‘Something’s wrong,’ says [Norm] Stamper, the former Seattle police chief, ‘when the lawbreakers and the law enforcers are on the same side.’

Dickinson, *supra* note 72. Other estimates state that the MDTOs could lose anywhere from fifteen to twenty-six percent of their revenue, or one to two billion dollars annually. JONATHAN P. CAULKINS ET. AL., *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* 176–77, 203–04 (2012).

331. Opponents of legalization sometimes cite this as one reason to keep the plant illegal: “[t]he drug trade is so profitable that even undercutting the legal (taxed) market price would leave cartels with a handsome profit. Marijuana legalization would also do nothing to loosen the cartels’ grip on other illegal trades such human trafficking, kidnapping, extortion, piracy and other illicit drugs.” Kevin A. Sabet, *Marijuana: A Case Against Legalization*, HOUS. CHRON. BAKER INST. BLOG (Sept. 25, 2012), <http://blog.chron.com/bakerblog/2012/09/marijuana-a-case-against-legalization/>. So, even if the MDTOs were to stop trafficking marijuana, they might simply opt to reallocate their soldiers to trafficking with more violence per person or per million dollars, solidifying the “grip on other illegal trades” which Sabet references. CAULKINS ET. AL., *supra* note 330, at 175–77.

332. It is even possible Mexico itself may move towards marijuana legalization. *US Marijuana Legalization Fuels Mexico Drugs War Debate*, BBC NEWS (Nov. 20, 2012), <http://www.bbc.co.uk/news/world-latin-america-20397335>. (“‘Obviously, we can’t handle a product that is illegal in Mexico, trying to stop its transfer to the United States, when in the United States—at least in part of the United States—it now has a different status,’ Luis Videgaray, President-elect Enrique Pena Nieto’s top adviser, told journalists.”).

333. O’Toole, *supra* note 99.

Initiative funding toward anti-corruption efforts in Mexico should be synchronized with stricter anti-money-laundering laws in that country too.³³⁴

Finally, the use of the term “terrorism” should receive a consistent federal definition, the material support statute should incorporate a heightened *mens rea* requirement, and the greater trend toward a national security state should stop in order to hedge against government overreaching in surveillance, government privatization, and discrimination in the law.

U.S. drug policy must use criminal law, not a national security paradigm, to alleviate the harms and inequities of the illegal drug trade. When designing policy, the federal government must realize that this black market will continue to exist³³⁵ and will not be defeated by force. Equipped with an understanding of the implications of policy proposals like H.R. 1270, we can enact positive changes that will benefit the entire nation.

334. Mexican anti-laundering laws are ineffective for a host of reasons. LONGMIRE, *supra* note 140, at 181–85.

335. Incredibly, it may not just be addicts and enforcement officers who rely on this market. See Rajeev Syal, *Drug Money Saved Banks in Global Crisis, Claims UN Advisor*, THE GUARDIAN (Dec. 12, 2009), <http://www.guardian.co.uk/global/2009/dec/13/drug-money-banks-saved-un-cfief-claims> (“Antonio Maria Costa, head of the UN Office on Drugs and Crime, said he has seen evidence that the proceeds of organised crime were ‘the only liquid investment capital’ available to some banks on the brink of collapse last year. He said that a majority of the \$352bn (£216bn) of drugs profits was absorbed into the economic system as a result.”); LONGMIRE, *supra* note 140, at 181–85 (citing the annual impact of the drug trade on Mexico’s economy).