

1/17/2020

Lindsey Graham, Chairman
Diane Feinstein, Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Graham and Ranking Member Feinstein,

The undersigned organizations write to oppose S.1622 - *Stopping Overdoses of Fentanyl Analogues Act (SOFA)*¹ because we believe this legislation is deeply flawed. Rather than focusing resources on reducing overdose deaths from synthetic drugs, the bill would grant the Drug Enforcement Administration (DEA) broad authority within the scheduling process, increase sentences, and expose many more individuals to harsh penalties, including mandatory minimum sentences. S.1622's approach contradicts this Committee's recent work to advance criminal justice reform and public health approaches to the overdose crisis. We urge you to oppose this legislation.

The U.S. is in the midst of a deadly overdose crisis that has claimed thousands of lives each year. In the past few years, synthetic drugs such as fentanyl and their analogues have been responsible for overdose deaths in many parts of the country.² In the East Coast and Midwest, use of fentanyl and its variants has been especially dominant with users overdosing after heroin is mixed with fentanyl.³

In February 2018, the DEA – in conjunction with the Department of Health and Human Services (HHS)– used its emergency scheduling authority to include a list of specific fentanyl-related substances in Schedule I.⁴ This “class-wide” emergency ban, effectively placed any substances similar to fentanyl —*in existence or not*—in Schedule I. The “class-wide” ban means that any substance produced in the future deemed by the DEA (either prior to or after interdiction) similar to fentanyl would be included in Schedule I. In early 2020, this emergency authority runs out. DEA has not asked the relevant public health agencies, HHS and Food and Drug Administration (FDA), to determine if their scheduling action is medically and scientifically valid, so they are ineligible for a one-year extension to this timeline. As a result, the DEA has requested that Congress pass legislation, the Stopping Overdoses of Fentanyl Analogues Act, to give the

¹ <https://www.congress.gov/bill/116th-congress/senate-bill/1622?q=%7B%22search%22%3A%5B%22Stopping+Overdoses+of+Fentanyl+Analogues+Act%22%5D%7D&s=1&r=2>

² <https://www.drugabuse.gov/related-topics/trends-statistics/infographics/fentanyl-other-synthetic-opioids-drug-overdose-deaths>

³ <https://www.seattletimes.com/seattle-news/opioid-deaths-surge-in-midwest-and-east-while-west-sees-declines/>

⁴ <https://www.dea.gov/press-releases/2018/02/07/us-drug-enforcement-administration-emergency-schedules-all-illicit>

agency broad “class-wide” powers to schedule all fentanyls, circumventing essential coordination with HHS (as is currently required under the Controlled Substances Act).⁵

Giving the DEA such sweeping powers, via legislation like SOFA, has grave implications for the criminal justice system.⁶ If granted this authority, the DEA could place each substance it deems chemically similar to fentanyl into Schedule I, regardless of whether or not the substance has similar physiological effects to fentanyl. Indeed, DEA would reserve for itself the right to treat substances as Schedule I even if it has not specifically identified the substance prior to its interdiction.⁷ The shift would enable DOJ to churn through fentanyl-analogue prosecutions, and deny accused persons the opportunity to mount a meaningful defense.

Along with placement in Schedule I comes harsh mandatory minimums.⁸ DOJ already has broad prosecutorial power under current federal law and has aggressively used this power to prosecute cases involving fentanyl and its analogues to pursue very severe penalties. Current federal law penalizes offenses involving 10 or more grams of a mixture or substance containing a detectable amount of fentanyl analogues with a five-year mandatory minimum; 100 or more grams triggers at ten-year mandatory minimum.⁹ SOFA would increase the reach of these mandatory minimums by making a potentially limitless class of substances into Schedule I. Under current law, possession with intent to distribute a controlled-substance analogue would generate a 20-year maximum sentence for a defendant.¹⁰ Once the substance is in Schedule I, per SOFA, a defendant with 100 grams or more of it would likely face a 10-year mandatory minimum sentence and a maximum of life in prison.¹¹ Evidence that the charged substance could have no effect on the human body would be irrelevant to the accused’s defense.¹²

There are additional sentencing enhancements too. The United States Sentencing Commission (USSC) revised its guidelines last year, following lobbying by DOJ, to allow sentencing enhancements for fentanyl and fentanyl analogues, with one of the enhancements equating to a

⁵ <https://www.judiciary.senate.gov/meetings/the-countdown-fentanyl-analogues-and-the-expiring-emergency-scheduling-order>

⁶ <https://www.congress.gov/bill/115th-congress/house-bill/2851/text?format=txt>

⁷ See Department of Justice, Drug Enforcement Administration; Schedules of Controlled Substances: Temporary Placement of Fentanyl-Related Substances in Schedule I, 83 Fed. Reg. 25, 5,188 (Feb. 6, 2018) (codified at 21 CFR Part 1308) (“It bears emphasis, however, that even in the absence of a future publication by DEA specifically identifying such a substance, the substance is controlled by virtue of this temporary scheduling order if it falls within the definition of fentanyl-related substance.”).

⁸ <https://fas.org/sgp/crs/misc/RL30722.pdf>

⁹ <https://famm.org/wp-content/uploads/Reject-S.-2635-Fentanyl-Changes.pdf>

¹⁰ <https://fas.org/sgp/crs/misc/RL30722.pdf>

¹¹ *Idem*

¹² See 21 U.S.C. § 802(32)(A) (to prove that a substance is a controlled-substance analogue, the government must prove: 1) the chemical structure is substantially similar to the chemical structure of a controlled substance in Schedule I or II; 2) that the substance has a substantially similar stimulant, depressant, or hallucinogenic effect on the central nervous system as the analogous Schedule 1 substance, or 3) the person intends or represents that the substance would have a substantially similar effect on the central nervous system).

50 percent increase in an individual's sentence.¹³ The Trump Administration reported in May that there has been a 40-fold increase in federal fentanyl-related prosecutions during the President's time in the White House.¹⁴

DOJ has intentionally misled lawmakers by arguing that controlled substance analogues are not already illegal or that if the scheduling runs out the substances will become legal. In April 2019, for instance, a DEA spokesperson said that "...any fentanyl substances not already permanently placed in Schedule I or II would fall off the list and technically not be an illegal substance."¹⁵ This statement, as DOJ knows well, is false. The DOJ's emergency scheduling order states this plainly, noting that trafficking of fentanyl analogues is "actually illegal as persons who do so can be prosecuted using the controlled substance analogue provisions of the CSA."¹⁶ Moreover, in a June 2019 Senate Judiciary hearing, DOJ and the DEA acknowledged in sworn testimony:

In terms of investigations and prosecutions, if the temporary emergency scheduling order lapses without permanent scheduling, the Department would once again have to rely on the Analogue Act to bring fentanyl traffickers to justice. These cases require several elements of proof that are either presumed, or simply not relevant to routine controlled substance prosecutions. To prevail, the government must prove:

1. that the substance involved in the case was intended for human consumption;
2. that the substance is a "controlled substance analogue," which in turn requires proof of the following "prongs":
 - a. it has a substantially similar chemical structure as a Schedule I or II controlled substance – in this case fentanyl; and
 - b. it either (i) has a substantially similar effect on the central nervous system (i.e., psychoactive effect) as a Schedule I or II controlled substance – in this case fentanyl – or (ii) in a particular case, was intended or represented as having such an effect. All of these elements must be proven to a jury beyond a reasonable doubt.¹⁷

This testimony identifies the mechanism through which DOJ and DEA can prosecute unscheduled fentanyl analogues. And though the government regards these elements as a mere speed bump to quickly securing convictions and lengthy sentences, they exist for a reason: it is impossible to tell from a substance's chemical structure alone whether it would have *any* effect on the central nervous system, let alone a "substantially similar" effect as a controlled substance analogue. Current law equips a defendant, found in possession of a substance chemically

¹³ News Release: U.S. Sentencing Commission Unanimously Adopts ... - U.S. Sentencing Commission. 12 Apr. 2018, https://www.usc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20180412_Press_Release.pdf. Accessed 26 Apr. 2019.

¹⁴ <https://www.whitehouse.gov/wp-content/uploads/2019/05/Opioid-Commission-Report-One-Year-Later-20190507.pdf>

¹⁵ <https://tribunecontentagency.com/article/deas-plea-to-congress-permanently-ban-fentanyl-substances/>

¹⁶ See Department of Justice, Drug Enforcement Administration; Schedules of Controlled Substances: Temporary Placement of Fentanyl-Related Substances in Schedule I, 83 Fed. Reg. 25, 5,188 (Feb. 6, 2018) (codified at 21 CFR Part 1308).

¹⁷ <https://www.judiciary.senate.gov/imo/media/doc/Liskamm-Cherundolo%20Joint%20Testimony.pdf>

similar to a controlled substance, but which would have no effect on the human body, to defend against a wrongful prosecution. For this reason, these elements are critical to a defendant's opportunity to mount a meaningful defense. Nor do these elements seem to be a true impediment to the government's ability to prosecute analogue cases; the testimony concedes that "...the government has a very good track record in Analogue Act prosecutions."¹⁸ Removing these evidentiary requirements will leave it to prosecutors to decide what should or should not be treated as a Schedule I substance, increasing prosecutorial power, and enabling prosecutors to leverage mandatory minimums to coerce guilty pleas from defendants even if the substance is not in fact a controlled-substance analogue of fentanyl.

The expansion of the DEA's authority over fentanyl analogues would enable the DEA to decide which substance belongs in the fentanyl class and deem it to be immediately and permanently in Schedule I. The DEA is a law enforcement agency that does not have the scientific or health expertise to schedule substances on its own. This is why HHS plays an essential role in determining whether substances should be placed on Schedule I.

Failure to consult with HHS will almost certainly lead to the criminalization of substances that have no place in Schedule I. This lesson is taught by the past: in 2015, Congressman Charlie Dent (R-PA) introduced a bill containing a DEA's list of synthetic drugs to place in Schedule I.¹⁹ The bill initially had more than 300 substances, but was ultimately reduced to 22 substances after scientists could only reach agreement that this small subset met Schedule I's criteria. Some of the substances that DEA wanted to schedule by way of the Dent bill were not even psychoactive.²⁰ This demonstrates the danger of allowing the DEA broad authority to propose drugs for scheduling. The DEA's request could encompass substances that, although chemically similar to fentanyl, have no effect on the human body, thus exposing individuals to fentanyl analogue sentences for substances that are benign. There is every indication that DEA/DOJ would abuse this broad grant of power. It has prosecuted cases in which *its own chemists* disagreed about whether the charged substance was a controlled substance analogue.²¹ Not only has DOJ pursued such charges, but it has improperly withheld the evidence of its chemists' disagreement from the defense.²²

Finally, research on fentanyl prosecutions demonstrates a reason for concern. In January 2018, the USSC released data looking at individuals who were convicted as fentanyl drug traffickers in 2016.²³ The data indicate significant racial disparities in fentanyl sentencing with people of color comprising 75% of those prosecuted.²⁴ Moreover, only 15.7% of individuals report clear knowledge that they knew they were trafficking fentanyl, underlining *mens rea* concerns.²⁵ Of

¹⁸ Idem

¹⁹ <https://www.congress.gov/bill/114th-congress/house-bill/3537>

²⁰ idem

²¹ <https://www.techdirt.com/articles/20180526/19435939923/court-says-govt-cant-claim-testimony-that-undermines-criminal-case-is-privileged-when-used-in-other-cases.shtml>

²² idem

²³ "Public Data Briefing: Synthetic Drugs - United States Sentencing"

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018_synthetic-drugs.pdf.

Accessed 26 Apr. 2018.

²⁴ Idem

²⁵ Idem

those sentenced, 25.5% were couriers/mules, and 23.5% were street-level dealers. Drug kingpins or leaders in the trade for whom harsh federal drug laws are purported to target comprise less than 16% of those convicted.²⁶

We believe the Committee is right to be concerned about fentanyl-related deaths, but this approach merely repeats the mistakes of the past by exacerbating our incarceration problem. The Committee should move away from the belief that increased enforcement powers for the DEA will translate into reduced overdose deaths. Instead, the Committee should embrace public health approaches to the overdose crisis. We welcome a dialogue with you and your staff about how to move forward on this important topic. However, we must firmly oppose SOFA.

Sincerely,

Cook County Government
Community Renewal Society
Safer Foundation
Communities United
Chicago Urban League
John Howard Association
Uptown People's Law Center
Shriver Center on Poverty Law
Chicago Appleseed Fund for Justice
Chicago Council of Lawyers
Illinois Religious Action Center of Reform Judaism (RAC-IL)
Chicago Jobs Council
Chicago Community Bond Fund
Live4Lali, Inc.
Perfectly Flawed Foundation
Clergy for a New Drug Policy
ACLU of Illinois

CC: Senate Committee on the Judiciary Members, Representative Rush, Representative Schakowsky, Representative Kelly, Illinois Attorney General Kwame Raoul

²⁶ Idem