

QUICK TAKE

ILLICITLY MANUFACTURED FENTANYL AS A WEAPON OF MASS DESTRUCTION: RHETORIC AND REALITY

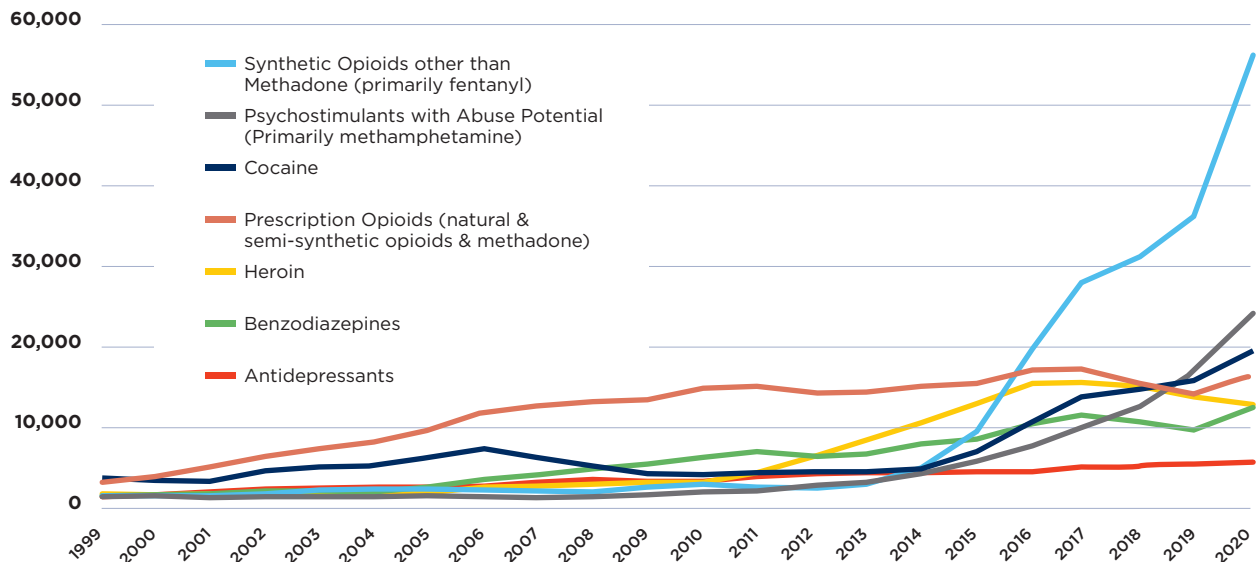
RECENTLY, MEMBERS OF CONGRESS¹ AND EIGHTEEN STATE AND TERRITORY ATTORNEYS GENERAL² have called for action that would require the federal government to treat illicitly manufactured fentanyl as a “weapon of mass destruction (WMD).” The letter from the attorneys general called for an “unorthodox” response to illicitly manufactured fentanyl, fearing that it could be used as a weapon against Americans.

Tragically, synthetic opioids, primarily illicitly manufactured fentanyl, were involved in over 71,000 overdose deaths in 2021.³ Americans need a smart, long-term, and aggressive response to save lives and dramatically reduce the damage that illicitly

manufactured fentanyl does to our communities, families, and loved ones. While classifying illicitly manufactured fentanyl as a weapon of mass destruction has some intuitive and emotional appeal, it is ultimately counterproductive in efforts to stem overdose deaths.

WHILE CLASSIFYING ILLICITLY MANUFACTURED FENTANYL AS A WEAPON OF MASS DESTRUCTION HAS SOME INTUITIVE AND EMOTIONAL APPEAL, IT IS ULTIMATELY COUNTERPRODUCTIVE IN EFFORTS TO STEM OVERDOSE DEATHS.

NATIONAL DRUG-INVOLVED OVERDOSE DEATHS*
NUMBER AMONG ALL AGES, 1999-2020



*Includes deaths with underlying causes of unintentional; drug poisoning (X40-X44), suicide drug poisoning (X60-X64), homicide drug poisoning (X85), or drug poisoning of undermined intent (Y10-Y14), as coded in the international Classification of Disease, 10th Revision. Source: Centers for Disease Control and Prevention, National Center for Health Statistics. Multiple Cause of Death 1999-2020 on CDC WONDER Online Database, release 12/2021.

A WEAPON OF MASS DESTRUCTION IS CURRENTLY DEFINED AS A CHEMICAL, BIOLOGICAL, OR RADIOACTIVE AGENT OR ANY EXPLOSIVE OR GAS THAT IS DESIGNED TO INJURE OR KILL A LARGE NUMBER OF PEOPLE.

WHAT WOULD IT MEAN TO CLASSIFY ILLICITLY MANUFACTURED FENTANYL AS A WEAPON OF MASS DESTRUCTION?

Proposed Congressional legislation would require the Department of Homeland Security (DHS) to treat illicitly manufactured fentanyl as a weapon of mass destruction under 6 U.S.C. § 590 et seq. A weapon of mass destruction is currently defined as a chemical, biological, or radioactive agent or any explosive or gas that is designed to injure or kill a large number of people. See 50 U.S.C. § 1801.

The legislation would require the Department of Homeland Security's Countering Weapons of Mass Destruction Office to spend resources combatting illicitly manufactured fentanyl. This Office's responsibilities, as laid out in 6 U.S.C. § 592, are nearly all related to the prevention of a nuclear attack on the United States. The legislation does not appropriate new financial resources to tackle the overdose epidemic, nor does it provide the government any additional regulatory tools that could help combat the crisis.

WHY DECLARING ILLICIT FENTANYL A "WEAPON OF MASS DESTRUCTION" IS A MISTAKE.

We must use every available and effective tool to combat the overdose epidemic. This legislation will not get us closer to ending the overdose epidemic for several reasons.

Declaring Illicitly Manufactured Fentanyl a WMD Distracts from DHS's Countering Weapons of Mass Destruction Office's Mission of Preventing a Nuclear Attack

First, it dangerously expands, and potentially distracts from, the mission of one of the most critically important offices in the government. DHS's Countering Weapons of Mass Destruction Office is nearly solely focused on preventing a nuclear, biological, or chemical attack on our country and American nationals around the world. To add a new mission to this office, without providing additional resources or expertise, could take crucial staff away from their fulltime duties protecting our nation from a devastating nuclear attack. With nuclear aggression from Russia and North Korea, now is not the time to fundamentally restructure this office. Additionally,

while this office has expertise in preventing a nuclear, biological, or chemical attack, it does not currently have expertise in how to respond to the overdose epidemic—a medical, public health, and criminal justice issue. Many instruments of the federal government, including different divisions of DHS, are currently coordinating on the response to illicitly manufactured fentanyl.

Declaring Illicitly Manufactured Fentanyl a WMD would duplicate and needlessly increase punitive and ineffective criminal consequences for people who use drugs

Defining illicitly manufactured fentanyl as a weapon of mass destruction could also have unnecessarily punitive, and ultimately ineffective, criminal consequences. Federal criminal law prohibits the use or attempted use of a weapon of mass destruction "against any person or property within the United States" in any way that affects interstate commerce, or in the case of an attempt, any way that would have affected interstate commerce. 18 U.S.C. § 2332a(a)(2).⁴ The statute goes on to impose a maximum sentence of life in prison for violation of the weapons of mass destruction statute, and, if death results, permits bringing the death penalty. This punishment is duplicative of other federal statutes⁵ in addition to being disproportionate⁶ and overbroad. Studies have shown no relationship between increased punishment and lower rates of problematic drug use, while costing the United

COUNTERING WEAPONS OF MASS DESTRUCTION OFFICE

Mission Statement: The [Countering Weapons of Mass Destruction] Office shall be responsible for coordinating Federal efforts to detect and protect against the unauthorized importation, possession, storage, transportation, development, or use of a nuclear explosive device, fissile material, or radiological material in the United States, and to protect against attack using such devices or materials against the people, territory, or interests of the United States" 6 U.S.C. § 592(a).

A PUBLIC HEALTH APPROACH TO REDUCING ILLICITLY MANUFACTURED FENTANYL USE.

Instead of declaring illicitly manufactured fentanyl a weapon of mass destruction, we need to boost evidence-based resources to combat overdose deaths. This can be accomplished by taking a public health approach to substance use across the continuum of care. The continuum of care includes enhancing evidence-based prevention, improving harm reduction services to prevent risky substance use and reduce overdose deaths, increasing access to quality, evidence-based treatment by reducing barriers to treatment, and increasing access to recovery support services to sustain long-term recovery.

In addition, the federal government should undertake efforts to educate parents about common warning signs indicating that their adolescent or young adult child may be struggling with a mental health condition. Untreated mental health conditions in young people can be a risk factor in engaging in problematic drug use at an early age.¹⁵ Young people report that they can access illicitly manufactured fentanyl over social media platforms forms like Snapchat. Parents need to be ready to have open, honest, and difficult conversations with their children about the dangers of drugs found online. Parents should read SAMHSA's guidance on how to talk to their children about drugs here: <https://www.samhsa.gov/talk-they-hear-you/parent-resources/why-you-should-talk-your-child>.

States over \$1 trillion since 1971.⁷ Applying this statute to illicitly manufactured fentanyl could impose a life sentence on any person who uses drugs laced with illicitly manufactured fentanyl, or anyone who gives drugs laced with illicitly manufactured fentanyl to their friend. It could also impose the death penalty on someone who gives their friend

drugs laced with illicitly manufactured fentanyl, and the friend dies of an overdose.⁸ Sadly, illicitly manufactured fentanyl and other synthetic opiates are remarkably common in the drugs circulating the country today, killing over 71,000 people in 2021.⁹ Illicitly manufactured fentanyl is found not just in heroin, but also in cocaine, methamphetamine, and MDMA, among other drugs.¹⁰

Existing Law and Regulations Allow Appropriate Action Against Weaponized Fentanyl

The state attorneys general's letter to President Biden requesting that he declare illicitly manufactured fentanyl a weapon of mass destruction points to one example of Russia using carfentanil (a derivative of fentanyl) in a counterterrorism operation that ended up killing over 100 people.¹¹ While tragic, this is the sole known example of fentanyl being used as a weapon of war. Devising an entire strategy on one incident isn't good policymaking. **Further, to the extent that it could be used as a chemical weapon again in the future, both current domestic law¹² and the Chemical Weapons Convention authorizes appropriate action to be taken.¹³**

Increasing rates of overdose death are a national tragedy and frustration and anger at the deaths are justified, however the weapon of mass destruction designation for illicitly manufactured fentanyl is not a solution. Neither the attorneys general nor the members of Congress in favor of this action have pointed to new, effective government resources that would result from this action. As discussed above, the proposed legislation would expand and distract from the mission of a critical national security office within DHS. Large amounts of illicitly manufactured fentanyl have already been seized by agencies like DOJ through existing resources.¹⁴ Continued strategic law enforcement activity is necessary to reduce the flow of illicitly manufactured fentanyl around the country. However, this specific intervention does not address shortcomings in our response to the crisis, risks bureaucratic confusion in some of the most important offices in government, and needlessly punishes people struggling with a substance use disorder. We need a robust, evidence-based public health response to the overdose crisis.

INCREASING RATES OF OVERDOSE DEATH ARE A NATIONAL TRAGEDY. HOWEVER, THE WEAPON OF MASS DESTRUCTION DESIGNATION FOR ILLICITLY MANUFACTURED FENTANYL IS NOT A SOLUTION.

ENDNOTES

- 1 Fentanyl is a WMD Act, H.R. 8030, 117th Cong. § 2 (2022).
- 2 Letter from Eighteen Attorneys General to President Joseph R. Biden (Sept. 14, 2022), [http://myfloridalegal.com/webfiles.nsf/WF/GPEY-CJ9SJ9/\\$file/Multistate+WMD+Policy+Letter_9.15.22_18+A.Gs.pdf](http://myfloridalegal.com/webfiles.nsf/WF/GPEY-CJ9SJ9/$file/Multistate+WMD+Policy+Letter_9.15.22_18+A.Gs.pdf).
- 3 Press Release, Centers for Disease Control and Prevention, *U.S. Overdose Deaths In 2021 Increased Half as Much as in 2020—But Are Still Up 15%* (May 11, 2022), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/202205.htm.
- 4 If this statute were applied to illicitly manufactured fentanyl, federal courts would likely find that use of illicitly manufactured fentanyl substantially affects interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 18, 25 (2005) (holding that marijuana is “a fungible commodity for which there is an established, albeit illegal, interstate market” and that this economic activity substantially affects interstate commerce sufficient to justify Congressional regulation under the Commerce Clause).
- 5 See 21 U.S.C. § 844 (prohibiting use of illicitly manufactured fentanyl and imposing a maximum one year sentence, which could be enhanced with prior convictions); 21 U.S.C. § 841(a)(1) (prohibiting possession with the intent to distribute or distribution of illicitly manufactured fentanyl, with a twenty year maximum sentence).
- 6 The Supreme Court has left very little room for vacating a non-death penalty sentence on proportionality grounds under the Eighth Amendment. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (upholding a mandatory life sentence without possibility of parole for someone convicted of possessing 672 grams of cocaine); but see *Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding that the Constitution prohibits life sentence without parole for juveniles convicted of non-homicide offenses).
- 7 Adam Gelb, et al., *More Imprisonment Does Not Reduce State Drug Problems*, PEW CHARITABLE TRUSTS (Mar. 8, 2018), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems>; Nathaniel Lee, *American has spent over a trillion dollars fighting the war on drugs*, CNBC (June 17, 2021), <https://www.cnbc.com/2021/06/17/the-us-has-spent-over-a-trillion-dollars-fighting-war-on-drugs.html>.
- 8 The Supreme Court has held that major participation in a felony “combined with reckless indifference to human life” can amount to sufficient culpability for a death sentence in the context of felony murder, even where the defendant did not intend to murder the victim and the defendant did not strike the fatal blow. *Tison v. Arizona*, 481 U.S. 137, 158 (1987).
- 9 Press Release, Centers for Disease Control and Prevention, *U.S. Overdose Deaths In 2021 Increased Half as Much as in 2020—But Are Still Up 15%* (May 11, 2022), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/202205.htm.
- 10 *Fentanyl*, NATIONAL INSTITUTE ON DRUG ABUSE (June 2021), <https://nida.nih.gov/publications/drugfacts/fentanyl>.
- 11 Letter from Eighteen Attorneys General to President Joseph R. Biden (Sept. 14, 2022), [http://myfloridalegal.com/webfiles.nsf/WF/GPEY-CJ9SJ9/\\$file/Multistate+WMD+Policy+Letter_9.15.22_18+A.Gs.pdf](http://myfloridalegal.com/webfiles.nsf/WF/GPEY-CJ9SJ9/$file/Multistate+WMD+Policy+Letter_9.15.22_18+A.Gs.pdf).
- 12 Defining a weapon of mass destruction “any weapon that is designed, intended, or has the capability to cause death or serious bodily injury to a significant number of persons through the release, dissemination, or impact of toxic or poisonous chemicals or their precursors.” 50 U.S.C. § 1801(p)(1) (emphasis added). A weaponized version of fentanyl that proves toxic or poisonous fits neatly under this definition. Cf. Designation of Benzylfentanyl and 4-Anilinopiperidine, Precursor Chemicals Used in the Illicit Manufacture of Fentanyl, as List I Chemicals, 21 C.F.R. 1310 (2020) (federal rule classifying precursor chemicals to illicitly manufactured fentanyl as List I Chemicals).
- 13 See John P. Caves, Jr., *Fentanyl as a Chemical Weapon*, CENTER FOR THE STUDY OF WEAPONS OF MASS DESTRUCTION (Dec. 2019), <https://wmdcenter.ndu.edu/Portals/97/CSWMD%20Proceedings%20Dec%202019.pdf>.
- 14 Press Release, Department of Justice, *Department of Justice Announces Results of Enforcement Surge to Reduce the Fentanyl Supply Across the United States* (Sept. 27, 2022), <https://www.justice.gov/opa/pr/department-justice-announces-results-enforcement-surge-reduce-fentanyl-supply-across-united#:~:text=As%20part%20of%20the%20One,through%20Sept.%208%2C%202022>.
- 15 Over 2 in 5 young adults with mental health disorders are untreated and nearly 9 in 10 young adults with substance use disorders are untreated. *Mental Illness and Substance Use in Young Adults*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION (Sept. 22, 2022), <https://www.samhsa.gov/young-adults>.