Negative: SIMSA Drug Analogs

By “Coach Vance” Trefethen

AFF plan passes a bill pending in Congress but not yet enacted: SIMSA "Stop the Importation and Manufacturing of Synthetic Analogues Act." It makes it even more illegal than it already is to import substances that are "analogs" (slight modifications) of existing illegal drugs. AFF's theory is that existing law is too easy to bypass because bad guys can alter one molecule or make slight alterations and sneak in a drug that's basically just as bad as existing drugs and get away with it. "Synthetic" drugs are drugs created in the laboratory that used to be available only from natural substances. For example, morphine, codeine, opium and heroin were originally derived from the poppy flower, but now can be manufactured in mass quantities without any agricultural crops involved. Analogs (like fentanyl and similar drugs) of opioids are chemical variations on these natural drugs that can have much more powerful effects and can be even more powerfully addictive or life threatening (small quantities = fatal overdose).

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Negative: SIMSA Drug Analogs

TOPICALITY

1. Not significant reform

Link: Analog drugs are already illegal under the Federal Analogue Act

William Kroger copyright 2022 (attorney) "Delta-8" (accessed 14 Feb 2023) https://www.laattorney.com/delta-8.html

An analogue is any variation of a drug that is already illegal, meaning any change in the molecular structure which produces the same or similar effects as the original substance, and is intended for human consumption. Analogues are fairly common creations by those trying to get around drug laws, so the Federal Analogue Act was passed to counter this.

Violation: Doing a little more of the same thing is not significant reform

Repealing the Analogue Act might have been a significant reform but endorsing it and agreeing with Status Quo policy is not.

Impact: No one affirming the resolution means Negative ballot

If no one in the room is affirming significant change to any trade policy, then no one is affirming the resolution, and no matter who wins, you should write "Negative" on the ballot.

HARMS / SIGNIFICANCE

1. Hype over analogs based on public ignorance

Hype over analogs comes from federal law enforcement agencies to boost their own power

Grant Smith 2021 (Deputy Director of National Affairs for the Drug Policy Alliance) 16 Mar 2021 "Prioritizing Science Over Fear: An Interdisciplinary Response to Fentanyl Analogue" (accessed 14 Feb 2023) https://cpb-us-w2.wpmucdn.com/u.osu.edu/dist/b/102847/files/2021/04/Fentanyl-Analogues-Transcript-Formatted.pdf

As fentanyl and fentanyl analogue overdoses increased, law enforcement seized upon public ignorance about these substances and growing fear about the perceived potency of these substances and circulated miss about these drugs. The media soon picked up on these myths, such as the notion that skin contact with fentanyl is lethal. Soon, a wave of media headlines fueled concern among lawmakers and calls to get tough, similar to what we saw in the crack era. Here we can see examples of fear inducing headlines, fed by law enforcement and I want to point out the last two headlines, in particular were false alarms which was often so often been the case with a lot of these media headlines that were fed by law enforcement to media. Next slide please. Federal law enforcement agencies, like the Drug Enforcement Administration and Homeland Security further amped up the hysteria to another level around fentanyl but training fentanyl as a weapon of mass destruction, a poison that can only be stopped by tough laws and enforcement first approaches.

INHERENCY

1. Analogs are already illegal

Federal Analogue Act makes analog opioids illegal under Status Quo law

Peter Hess 2018 (journalist) 19 June 2018 INVERSE "What Does the SITSA Act Mean for Kratom's Legal Status?" (accessed 14 Feb 2023) https://www.inverse.com/article/46172-how-is-sitsa-different-from-the-federal-analogue-act

Schedule I of the Federal Controlled Substances Act includes drugs of the highest illegality, including heroin, marijuana, and LSD. Schedule II, which includes oxycodone and fentanyl, designates tightly controlled prescription drugs. So under the Federal Analogue Act, any analog of fentanyl is already illegal to possess without a prescription.

Controlled Substances Act and the Analogue Act, already on the books, are sufficient to prosecute analogs

Dr. Sheila Vakharia 2021 (PhD; MSW; **Drug Policy Alliance** Deputy Director of the **Department of Research and Academic Engagement** ) 16 Mar 2021 "Prioritizing Science Over Fear: An Interdisciplinary Response to Fentanyl Analogue" (accessed 14 Feb 2023) https://cpb-us-w2.wpmucdn.com/u.osu.edu/dist/b/102847/files/2021/04/Fentanyl-Analogues-Transcript-Formatted.pdf

For the second point that we needed additional laws to capture fentanyl analogues and to prosecute them, we already had legislation on the books that made fentanyl analogues that were harmful already illegal and subject to harsh penalties. As already very articulately explained by our opening remarks, you can see here that the Controlled Substances Act, which was passed in 1971 and which has seen amendments over the years already included, as you can see to the left, on all scheduled drugs, including scheduled analogues dimensional analogues such as an acetyl fentanyl and carfentanyl. And the point about emerging harmful fentanyl analogues, we do have the Analogue Act, which is also embedded within the Controlled Substances Act which allows us to, it to identify harmful fentanyl analogues that should be subject to other penalties. So, as you can see, the Controlled Substances Act already contains enough provisions to allow for the prosecution of these analogues

SOLVENCY

1. Already tried and failed

Link: Attorney General Jeff Sessions in 2018 announced a big crackdown on synthetic opioid analogs

Jacob Sullum 2018 (senior editor) REASON magazine, "Thank Drug Warriors for the Escalating Death Toll From Superpotent Synthetic Opioids" 20 July 2018 (accessed 14 Feb 2023) https://reason.com/2018/07/20/thank-drug-warriors-for-the-escalating-d/

Last week Sessions [announced](https://www.justice.gov/usao-edca/pr/operation-synthetic-opioid-surge-announced-department-justice) Operation Synthetic Opioid Surge, which aims to "reduce the supply of deadly synthetic opioids in high impact areas" by federally prosecuting "every readily provable case involving the distribution of fentanyl, fentanyl analogues, and other synthetic opioids" in 10 U.S. attorney districts. This strategy may send more people to prison for longer periods of time and temporarily disrupt retail markets. But judging from a century of drug prohibition in America, Sessions' innovative plan to arrest and imprison readily replaced drug dealers will not have a substantial and lasting impact on the availability of opioids or reduce the death toll associated with them. To the contrary, the enforcement pressure is apt to make drug use even more dangerous.

Impact: Proven policy failure. Opioid deaths didn’t go down, they went up after the 2018 crackdown

National Institutes of Health 2023. (agency of the US Dept of Health & Human Services) 9 Feb 2023 "Drug Overdose Death Rates" (accessed 14 Feb 2023) https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates#:~:text=Opioid%2Dinvolved%20overdose%20deaths%20rose,with%2080%2C411%20reported%20overdose%20deaths.

Opioid-involved overdose deaths rose from 21,089 in 2010 to 47,600 in 2017 and remained steady through 2019. This was followed by a significant increase in 2020 with 68,630 reported deaths and again in 2021 with 80,411 reported overdose deaths.

Treating analog drugs as a criminal justice problem is another repetition of the last 50 years of failed "Drug War" policies

Prof. Douglas Berman 2021 (professor at The Ohio State University Moritz College of Law) 16 Mar 2021 "Prioritizing Science Over Fear: An Interdisciplinary Response to Fentanyl Analogue" (accessed 14 Feb 2023) https://cpb-us-w2.wpmucdn.com/u.osu.edu/dist/b/102847/files/2021/04/Fentanyl-Analogues-Transcript-Formatted.pdf

But now we have five decades of experience and the evidence is overwhelming: that mandatory minimum penalties don't decrease drug supply, don't decrease demand, don't decrease overdose deaths and yet still we keep fighting, despite the evidence, despite what we should have been able to learn from seeing these patterns play out throughout our criminal justice system in so many ways. We continue, it seems, to respond to drug crises with punitive responses. Policymakers are still turning to enforcement-first approaches and often without even considering, let alone integrating, the science, the evidence we've built. If we can't learn from past patterns, I don't know why we expect to do better and that's fundamentally why we're here today. We are seeking to have a conversation that connects policymakers and policy responses in the fentanyl space, particularly fentanyl analogues, where we have again signs, we have evidence and we need to build off that in order to have the right kind of response to make sure we don't repeat the mistakes of the past, yet again.

DISADVANTAGES

1. Higher drug potency and more deaths

Increased enforcement of drug prohibition incentivizes higher potency drugs that lead to more opioid deaths

Jacob Sullum 2018 (senior editor) REASON magazine, "Thank Drug Warriors for the Escalating Death Toll From Superpotent Synthetic Opioids" 20 July 2018 (accessed 14 Feb 2023) https://reason.com/2018/07/20/thank-drug-warriors-for-the-escalating-d/

Worse, the purity and potency of black-market drugs are highly variable and unpredictable, making consumers vulnerable to lethal dose miscalculation, especially when they are taking more than one substance at a time (as is typically the case in drug-related deaths). The wider the range of purity and potency, the greater the potential for fatal mistakes. Prohibition contributes to this problem in several ways. It creates a black market where consumers don't know what they're getting, encourages dilution along the supply chain that dealers may try to counteract by adding fentanyl or fentanyl analogs to heroin, and [pushes](https://reason.com/blog/2017/08/04/researchers-highlight-the-governments-co) traffickers toward more potent drugs, which reduce the volume that must be smuggled for any given number of doses. Increased enforcement of prohibition magnifies these tendencies, exposing users to greater risks and feeding the upward trend in opioid-related deaths.

Prohibition increases potency. Crack down on analogs and what replaces them will be worse

Dr. Daniel Ciccarone 2021. (MD; University of California San Francisco) 16 Mar 2021 "Prioritizing Science Over Fear: An Interdisciplinary Response to Fentanyl Analogue" (accessed 14 Feb 2023) https://cpb-us-w2.wpmucdn.com/u.osu.edu/dist/b/102847/files/2021/04/Fentanyl-Analogues-Transcript-Formatted.pdf

It also fits into what we understand from studies of alcohol and other, other drugs that have supply side pressures and the iron law of prohibition and that is, as you put prohibition pressure on a drug class which produces greater potency. Fentanyl is the ultimate example of that. In the alcohol era, you put pressure on beer you create bootlegs hard liquor. In this case, you put pressure on heroin, and you've created a monstrous wave of dangerous drugs. And the thing is, we're putting you know the problem with the sentencing effort is that it's putting pressure if you put pressure on mother chemical, a mother fentanyl chemical, which is fentanyl you get 200, and some people have estimated as high as 600, fentanyl analogues that are out there right now. You put pressure on fentanyl analogues, what happens? You're going to see synthetic opioids of other classes, of classes we don't we don't we don't know because we're just giving them numbers, like U47-700 and U98-900, you know? The ingenuity of the illicit chemical market is enormous, right? Why add more pressure to it? We should reverse that, get back to demand control, demand reduction and harm reduction.

2. Distracts us from real solutions

Further criminal drug policy "solutions" make social problems worse and distract us from doing things that would actually make communities safer

Leadership Conference on Civil & Human Rights 2021. (coalition of >200 civil and human rights advocacy groups) 30 Sept 2021 "Spending Bill Escalates Disastrous War on Drugs" (accessed 14 Feb 2023) https://civilrights.org/2021/09/30/spending-bill-escalates-disastrous-war-on-drugs/

“The past 50 years of failed criminal legal policy and communities torn apart by the so-called War on Drugs should be more than enough evidence for Congress to finally understand that we cannot arrest or convict our way out of a public health crisis. The continued criminalization of illicit fentanyl and fentanyl-related substances will only lead to more deaths and deepen the racial disparities evident in the criminal legal system,” said Sakira Cook, senior director of the justice reform program at The Leadership Conference on Civil and Human Rights. “Congress should take this opportunity to chart a new course forward, providing resources to impacted communities, rather than relying on old punitive enforcement tactics that do nothing to prevent the use of these substances, nor promote public health and safety. Until policymakers decide to do the right thing, we will continue to fight for laws that actually address the overdose crisis and make our communities safer.”

3. Endless chase after new substances

Link: No substances specifically specified in SIMSA

The text of SIMSA doesn't name a single chemical substance that is banned. Instead it says new things that are "substantially similar" to existing illegal drugs are prohibited.

Text of SIMSA 2021. "Stop the Importation and Manufacturing of Synthetic Analogues Act of 2021" (accessed 14 Feb 2023) https://www.congress.gov/bill/117th-congress/senate-bill/2351/text



Impact: Laws that don't name specific drugs create a never-ending chase that leads to new exotic and more dangerous drugs being developed

Jacob Sullum 2015 (senior editor) 22 Apr 2015 "Is Banning Designer Drugs Constitutional?" (accessed 14 Feb 2023) https://reason.com/2015/04/22/designer-drug-dilemma/

If Congress insists on telling grownups what substances they may not consume, the least it can do is specify the substances. In this case, legislators had no particular drugs in mind. They merely anticipated that no matter what substances they banned, new ones would take their place. Perhaps it is time to reconsider this never-ending game of catch-up, which drives producers and consumers away from familiar intoxicants and toward exotic ones that may prove [more dangerous](https://reason.com/archives/2014/10/06/rise-of-the-mystery-highs#.0cpqml:Y6FG).

4. Constitutional rights violation

Link: SIMSA contains no definition of "substantially similar" to define what an analog drug is

Analog drugs are "substantially similar" to existing illegal drugs, but SIMSA nowhere defines what that means. If AFF thinks the bill defines it, we challenge them to come up and read the bill's definition (and not one they made up).

Link: Juries decide whether the drug is an "analog" or not on a case by case basis. That's what happened the last time Congress passed an "analog drug" law

J. Lloyd Snook and Kevin K. Russell 2015. (attorneys) 2 March 2015 Brief for the petitioner in the case of McFadden v. U.S. before the Supreme Court of the United States (accessed 14 Feb 2023) http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/14-378-ts.pdf

Thus, a “substance’s legal status as a controlled substance analogue is not a fact that a defendant can know conclusively ex ante; it is a fact that the jury must find at trial.” United States v. Turcotte, 405 F.3d 515, 526 (7th Cir. 2005). Generally, to decide whether something is “substantially similar” to a scheduled controlled substance, juries must resolve the conflicting claims of expert witnesses on complex matters of scientific methodology, chemistry, and biology. See, e.g., United States v. Brown, 415 F.3d 1257, 1261-63 (11th Cir. 2005) (describing relevant testimony in one trial). Because a substance’s status as an analogue is a question of fact under the statute, a jury’s decision whether a substance is an analogue is binding authority for that case and that case alone. Which is to say, it is binding only on the defendant: a determination that a particular substance is not an analogue does not bar the Government in future cases from prosecuting others for possessing or selling the product.

Link: Arbitrary definition violates the Due Process Clause of the Constitution

J. Lloyd Snook and Kevin K. Russell 2015. (attorneys) 2 March 2015 Brief for the petitioner in the case of McFadden v. U.S. before the Supreme Court of the United States (accessed 14 Feb 2023) http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/14-378-ts.pdf

The Due Process Clause requires Congress to define criminal conduct in a way that permits ordinary citizens to know their legal obligations and conform their conduct to the law. But the Analogue Act’s “substantially similar” standard makes that all but impossible for someone like petitioner. First, it defines criminal conduct by reference to information (e.g., the structure and effect of chemicals) that is inaccessible to ordinary people. Second, even if someone can figure out the chemical structure and effect of an alleged analogue, he is left to guess whether the inevitable combination of similarities and differences amount to substantial similarity under the Act. Nothing in the statute, regulations, common law, or any other legal source provides the answer. Nor does the term have any established meaning in science. As a consequence, even scientists – including scientists within the DEA itself – regularly disagree about how to evaluate alleged analogues and whether particular substances meet the vague statutory definition. The result is uncertainty and arbitrariness. The only way to know for certain whether a particular substance is an illegal analogue is to get prosecuted for selling it and then see how a jury resolves the inevitable battle of scientific experts (whose testimony the jury may not even be able to understand). And even that will not provide any guidance for the future, as the jury’s verdict has no binding effect in later prosecutions.

Link: The whole point of the AFF position is to bypass democracy and Due Process

Mike Riggs 2018. (deputy managing editor) REASON magazine 20 June 2018 " Congress Wants To Give Jeff Sessions Unprecedented New Drug War Powers" (accessed 14 Feb 2023) https://reason.com/2018/06/20/congress-wants-to-give-jeff-sessions-unp/

The Drug Enforcement Administration has [long bemoaned](https://www.deadiversion.usdoj.gov/mtgs/drug_chemical/2014/guzman.pdf) the fact that clandestine chemists can create these novel drugs faster than D.C. can ban them. The scheduling process is complicated, as it should be when the government makes things illegal: The DEA has to identify an analog's chemical structure and the scheduled or regulated drug to which it's most similar, then seek input from experts at the Department of Health and Human Services (HHS), then publish a scheduling notice in the Federal Register and review public comments. (Democracy can be such a drag!) Prosecuting drugs that have not gone through this process of analysis and scheduling, meanwhile, requires overcoming what [Sessions recently called](https://www.justice.gov/opa/pr/department-justice-announces-significant-tool-prosecuting-opioid-traffickers-emergency) "cumbersome evidentiary hurdles," such as chemistry experts who challenge the government's claims and defendants who say they believed they were importing and selling "potpourri" and "bath salts." (These hurdles are also known as "due process.")

Impact #1: Human rights violated. "Due Process" may be the most important guarantee in the Constitution

Prof. David Hudson 2022 (JD; Assistant Professor of Law, teaches Legal Information and Communication at Belmont) 1 Nov 2022 "How due process ensures fairness and protects from governmental overreach" (accessed 14 Feb 2023) https://www.thefire.org/news/how-due-process-ensures-fairness-and-protects-governmental-overreach

Due process is one of the most important concepts in the U.S. Constitution and American jurisprudence. It refers to the idea of fundamental fairness, that the government must treat an individual according to rules and procedures. [Due process](https://www.thefire.org/research-learn/due-process-college-campuses) may be the single most important guarantee in the Constitution and the entire legal system to ensure that the government does not run roughshod over individual liberty.

Impact #2: Justice violation. You could get convicted and sentenced for a new analog drug that turns out not to be harmful, because it's quite possible some undiscovered analogs are not dangerous

Government Accountability Office 2021. April 2021 "SYNTHETIC  OPIOIDS Considerations for  the Class­Wide  Scheduling of  Fentanyl­Related  Substances" (accessed 14 Feb 2023) https://www.gao.gov/assets/720/713678.pdf

DEA’s use of a structural definition for fentanyl-related substances classifies potentially harmful substances as Schedule I under the Controlled Substances Act, preemptively including an unknown number—potentially thousands—of substances that have not yet been identified by DEA and may not yet have been developed. According to ONDCP and HHS officials, it is possible that some substances in the class may be discovered to have low or no abuse potential or have a medical use. HHS had not completed an Eight-Factor Analysis evaluating the entire class requested by DEA as of March 2021, and HHS officials indicated that they are not certain such an analysis can be completed due to the large number of potential substances in the class, including those yet to be identified.

5. Lost rehab opportunity

Let the states prosecute dangerous drugs. Federal prosecution removes ability for addicts to get treatment

Jeffrey Lazarus 2021 (Assistant Federal Public Defender, Northern District of Ohio) 16 Mar 2021 "Prioritizing Science Over Fear: An Interdisciplinary Response to Fentanyl Analogue" (accessed 14 Feb 2023) https://cpb-us-w2.wpmucdn.com/u.osu.edu/dist/b/102847/files/2021/04/Fentanyl-Analogues-Transcript-Formatted.pdf

The first one is that our US attorneys are prosecuting very low-level drug traffickers. These are street traffickers not kingpins not even mid-level people, but just people on the street selling to confidential informants or getting stopped for a traffic stop that happened to have a small amount of fentanyl analogue. I have had cases that where we see someone who is been charged with just two grams of fentanyl analogue. And we are not saying that these cases shouldn't be prosecuted, but they should remain in the state, which is where we believe the penalties are more consistent with the with the crime and the truth of the matter is that many of the defendants that I have are people who are drug addicted to opioids themselves and are only selling these drugs in small amounts to feed their own habits. Had they continued to be prosecuted in the state, they would have an opportunity to seek drug treatment as an alternative to prison, but when they are prosecuted federally there's no ability for treatment.