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BREAKING THE MEXICAN CARTELS: A KEY HOMELAND SECURITY CHALLENGE FOR THE NEXT FOUR YEARS

Carrie F. Cordero*

Abstract

Although accurate statistics are hard to come by, it is quite possible that 60,000 people have died in the last six-plus years as a result of armed conflict between the Mexican cartels and the Mexican government, amongst cartels fighting each other, and as a result of cartels targeting citizens. And this figure does not even include the nearly 40,000 Americans who die each year from using illegal drugs, much of which is trafficked through the U.S.-Mexican border. The death toll is only part of the story. The rest includes the terrorist tactics used by cartels to intimidate the Mexican people and government, an emerging point of view that the cartels resemble an insurgency, the threat—both feared and realized—of danger to Americans, and the understated policy approach currently employed by the U.S. government. This short article only scratches the surface by identifying the Mexican Situation as a pressing U.S. homeland security issue requiring a renewed strategic effort by the United States over the next four years. Involving a complex web of foreign policy, law enforcement, intelligence, military, border security, drug consumption and public policy considerations, breaking the Mexican cartels is no easy feat. But it is a necessary one to secure our southern border, eliminate the presence of dangerous cartels in our cities, reduce Americans' contribution to the drug trade and resulting violence, and play our role in restoring the Mexican citizenry to a society free from daily terror.

I. INTRODUCTION

Homeland security is a post-9/11 concept in the United States. Prior to 9/11, we did not have a Department of Homeland Security (“DHS”). We did not even talk about our domestic security in terms of “protecting the homeland.” Homeland security issues involve a complex web of threats to national security, domestic preparedness, internal security, the protection of privacy and civil liberties, and the health and safety of Americans domestically.

There are a number of homeland security issues that will require attention in the new presidential term. Cybersecurity, for one, is to the next decade what counterterrorism was to the last: a pressing and urgent need to develop a legal and policy framework to prevent what could be a catastrophic event. In the last four years, the homeland security community has recognized the threat posed by nation states, terrorist groups and organized criminal networks in the cyber realm. In the summer of 2012, Congress considered

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cybersecurity legislation, but its chances fizzled by the start of fall.¹ As we enter 2013, executive action seems likely. As a result, we have, as a legal and policy community, started to move from the threat recognition stage to the problem solving stage. But completing this transition and actually solving the cybersecurity problem is a critical homeland security need as we move forward.

On a more subtle level, the role of government—particularly local authorities (such as the New York Police Department)—in protecting Americans from homeland security threats such as home grown, domestic, or international terrorists will require more attention and debate. The role of the federal government in such investigations and intelligence activities is subject to a wide range of laws, Executive Orders, and Executive Branch policy documents that enable federal authorities to do their job protecting Americans in a framework that takes into account the protection of privacy and civil liberties. Since 9/11, a significant debate in Congress and in public has occurred vetting different perspectives on the appropriate federal role in conducting so-called domestic intelligence activities, and the laws and policies that govern them. On the other hand, the framework for local government involvement in these activities is far less clear, and, while subject to episodic exposure in the media, has not actually been subject to a substantive public policy debate. It will be hard for lawmakers, policymakers, and intelligence officials to brush off concerns about these local intelligence activities for four more years.

This article focuses on an emerging homeland security issue for which the events on the ground have outrun the current U.S. legal and policy framework, but which has received relatively subdued attention from not only the legal and policy communities but scholars and media alike: the Mexican Situation. Mexico, and how the U.S. Government addresses the threat from drug cartels on our southern border, just may be the most politically sensitive and difficult homeland security problem to solve. Why is that?

First, the Mexican Situation is a homeland security issue that involves long-standing foreign policy sensitivities.² Unlike homeland security issues that we can address through purely domestic efforts, it is a U.S. homeland security issue that must be solved through cooperative efforts here at home and with a sovereign and allied nation that is also a significant economic partner. Second, there is not even consensus yet that the Mexican cartels pose a homeland security problem. Much like international terrorism was pre-9/11, the Mexican Situation has historically been viewed as a law enforcement problem. Drug users, sellers, and kingpins alike have all been primarily dealt with through the criminal justice system. However, with an ineffective Mexican criminal justice system and a U.S. justice system whose role is not intended to be that of problem solver, the

¹ See Cybersecurity Act of 2012, S. 2105, 112th Cong. (2012).

² AGNES GEREBEN SCHAEFER, BENJAMIN BAHNEY & K. JACK RILEY, RAND CORP., SECURITY IN MEXICO: IMPLICATIONS FOR U.S. POLICY OPTIONS xxii-xxiii (2009), available at http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG876.pdf.

limits of the law enforcement approach are increasingly evident. Third, there are many labels under our laws to deal with the Mexican drug cartels, and those labels have consequences. As outlined further in this article, Mexican drug cartels may be, all at once, transnational criminal organizations, international terrorist organizations, and insurgents under the laws of war. Fourth, issues of state and local versus federal control and responsibilities, and a federal budget crisis, get tangled up in the debate over which resources and the amount of resources to put on the southern border to secure it. States like Texas and Arizona, who currently have governors ideologically on the side of asserting state's autonomy, are, at the same time, frustrated with the amount of federal aid to secure the border, both in terms of money and manpower. And fifth, breaking the Mexican cartels requires a government-led and very public dialogue and recalibration of our views and policies regarding U.S. illegal drug consumption. Adopting a stronger U.S. policy of breaking the Mexican cartels would require a sustained commitment to drastically reducing American drug use. Doing so would require an extraordinary amount of political leadership and moral courage.³

II. THE MEXICAN SITUATION

A. Terror on the Border

The homeland security community has been forced to steadily increase its engagement on the issue of how the U.S. legal and policy framework should address the Mexico Situation. The traditional view has been to treat the Mexican drug cartels⁴ like criminal organizations—that is, primarily as a law enforcement

³ The limited legalization of marijuana in Colorado and Washington State in the November 2012 election cycle makes federal efforts against drug use even more challenging.

⁴ There are seven main cartels operating in Mexico, with varying degrees of prominence: (1) **Sinaloa Cartel**, led by Joaquin “El Chapo” Guzman. Sinaloa operates along the western and southern areas of Mexico, but also has reach up to the northwest area; (2) **Gulf Cartel**, led by Osiel Cardenas-Giullen until his arrest and extradition to the United States in January 2007, and currently led by Jorge Eduardo Costilla-Sanchez. Gulf operates in northeastern Mexico. It is aligned with Sinaloa and La Familia against the Zetas; (3) **La Familia Michoacana**, which is based in Michoacana, Mexico; (4) **Beltran Leyva Organization**, whose influence has diminished in recent years due to the arrests of leadership and killing of Arturo Beltran Leyva in 2010 during an attempted arrest by the Mexican Navy; (5) **Juarez Cartel** (a.k.a. Vicente Carrillo Fuentes Organization), based in Ciudad Juarez, Mexico, which is just over the border from El Paso, Texas. Juarez has been one of the most violent locations of the cartel wars. As of August 2012, reports indicate that the Juarez cartel may have been finally marginalized for control of the Juarez trafficking corridor; (6) **Tijuana Cartel** (a.k.a. the Arrellano Felix Organization), which operates in western Mexico, has diminished in dominance due to the arrests of senior leaders as well as the overpowering by Sinaloa and La Familia; (7) **Los Zetas**, which were previously the armed and enforcement wing of the Gulf cartel, have emerged as extremely violent, using particularly gruesome tactics of torture and murder. The Zetas operate in central and southern Mexico. They are led by Miguel Trevino-Morales. See, e.g., Major Nagesh Chelluri, *A New War on America's Old Frontier: Mexico's Drug Cartel Insurgency*, 210 MIL. L. REV. 51, 64-69 (2011); see also

issue. But, in recent years, the drug cartels have stretched beyond the Italian mafia model; their activities increasingly are more similar to those of international terrorist organizations and insurgencies as defined by the laws of war. According to Steven C. McCraw, Director of the Texas Department of Public Safety and a former FBI Agent, the Mexican Situation is both a public safety and national security issue:⁵

[The cartels] use military and terrorist tactics and weaponry . . . They employ horrific tactics to intimidate their adversaries and the public such as decapitations, acid baths, skinning people alive, torture and Improvised Explosive Devices and they have expanded their criminal operations to profit from kidnappings, robberies, human trafficking, extortions, and theft We continu[e] [to] see multi-ton drug loads seized throughout Texas.⁶

In line with McCraw's description, events of recent years have made clear that the citizens of Mexico live in terror. Murder, torture, kidnappings, and extortion are the daily goings-on in Mexico at the direction of the cartels.⁷ The average Mexican citizen, law enforcement official, or local public official, may no longer have a choice whether or not to cooperate with the cartels. When the choice is to cooperate, or face death of oneself or one's family, there really is no choice.⁸

The frightening security situation is not limited to the Mexican side of the border. Americans are at risk, too. Sigifredo Gonzalez, the Zapata County, Texas Sheriff, described in May 2011 how families on the United States side of

Merida Part Two: Insurgency and Terrorism in Mexico: Joint Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs and Subcomm. on Oversight, Investigations, and Mgmt. of the H. Comm. on Homeland Sec., 112th Cong. 19-22 (2011) [hereinafter Benson Statement October 2011] (statement of Rodney G. Benson, Assistant Administrator and Chief of Intelligence for the Drug Enforcement Administration). One of Los Zetas' previous leaders, Heriberto Lazcano-Lazcano was killed in October 2012. See Alfredo Corchado, *Mexico's Drug War Undiminished in Some Areas Close to Texas, Authorities Say*, DALLAS MORNING NEWS (Jan. 12, 2013, 11:09 PM), <http://www.dallasnews.com/news/nationworld/mexico/20130112-mexico-s-drug-war-undiminished-in-some-areas-close-to-texas-authorities-say.ece>.

⁵ See *On the Border and In the Line of Fire: U.S. Law Enforcement, Homeland Security, and Drug Cartel Violence: Hearing Before the Subcomm. on Oversight, Investigations, and Mgmt. of the H. Comm. on Homeland Sec.*, 112th Cong. 40 (2011) [hereinafter McCraw Statement May 2011] (statement of Steven C. McCraw, Director Texas Department of Safety).

⁶ *Id.* at 42-43 (stating that equipment used by the cartels is military and nation-grade including: "communication intercepts, interrogations, trend analysis, secure communications, coordinated military-style tactical operations, GPS, thermal imagery, and military armaments including fully automatic weapons, rocket-propelled grenades, and hand grenades.").

⁷ Craig A. Bloom, *Square Pegs in Round Holes: Mexico, Drugs, and International Law*, 34 HOUS. J. INT'L L. 345, 390 (2012) ("It is impossible to know how many people have disappeared, and the population is scared to ask.").

⁸ See William Finnegan, *Letter from Mexico: Silver or Lead. The Drug Cartel La Familia Gives Local Officials a Choice: Take a Bribe or a Bullet*, THE NEW YORKER, May 31, 2010, available at http://www.newyorker.com/reporting/2010/05/31/100531fa_fact_finnegan?currentPage=all (reporting a compelling narrative of Mexican life under the eyes of La Familia).

the border have bullet holes in their homes and periodically need to hide or evacuate to avoid cross-border gunfire.⁹ U.S. citizens have been killed, including some on official duty (e.g., the February 2011 killing of U.S. Immigration and Customs Enforcement (“ICE”) Agent Jaime Zapata by Los Zetas), and others innocently visiting Mexico (e.g., Agustin Roberto “Bobby” Salcedo).¹⁰

The U.S. State Department recognizes the extreme risk to Americans traveling to Mexico. According to the State Department’s travel advisory on Mexico issued in November 2012, Americans should defer “non-essential” travel to fifteen of Mexico’s thirty-two states, and exercise caution in at least four others.¹¹ Mexico is one of only thirty-three countries that the State Department publishes travel advisories for, and, at ten pages long with a state-by-state analysis of the dangers posed in each region of the country, is the longest advisory on the list.¹² One hundred and thirteen Americans were murdered in Mexico in 2011 and thirty-two were murdered in the first six months of 2012.¹³ Additional threats to Americans in Mexico include kidnappings, disappearances, armed carjackings, and highway robberies.¹⁴ Cartels are known to set up false checkpoints on Mexican highways,¹⁵ and the State Department’s advice is to cooperate with them.¹⁶

Overall, it is difficult to identify how many people in Mexico have been killed by cartel violence in recent years because the Mexican Government does not release statistics. Some of the varying estimates include: 28,000 deaths since

⁹ *On the Border and In the Line of Fire: U.S. Law Enforcement, Homeland Security and Drug Cartel Violence: Hearing Before the Subcomm. on Oversight, Investigations, and Mgmt. of the H. Comm. on Homeland Sec.*, 112th Cong. 62 (2011) [hereinafter Gonzalez Statement May 2011] (statement of Sigifredo Gonzalez, Jr., Sheriff Zapata County, Texas) (“When people in the United States fear the cartels in Mexico, even if they are not involved in drug trafficking, but are afraid to be at the wrong place at the wrong time in their own country, this is terrorism which to me is the fear of spillover violence.”).

¹⁰ See H.R. Res. 1032, 111th Cong. (2010) (narrating the murder of U.S. citizen Agustin Roberto “Bobby” Salcedo while on vacation in Mexico).

¹¹ U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, TRAVEL WARNING – MEXICO (Nov. 20, 2012) [hereinafter TRAVEL WARNING – MEXICO], available at http://travel.state.gov/travel/cis_pa_tw/tw/tw_5815.html.

¹² Mexico is one of only three nations in the Americas that carries a State Department warning—the others are Haiti and Colombia. They are in dubious company. The remaining countries on the list advising against travel for Americans or warning serious caution are: Tunisia, Mali, Syria, Pakistan, Libya, Israel (the West Bank, and Gaza), Iraq, the Democratic Republic of Congo, Central African Republic, Kenya, Afghanistan, Nigeria, Somalia, Philippines, Mauritania, Saudi Arabia, Lebanon, Algeria, Iran, Cote d’Ivoire, Burundi, Eritrea, Niger, Chad, Yemen, Sudan, Republic of South Sudan, Guinea, and the Democratic People’s Republic of Korea. U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, CURRENT TRAVEL WARNINGS, available at http://travel.state.gov/travel/cis_pa_tw/tw/tw_1764.html (last visited Dec. 21, 2012).

¹³ TRAVEL WARNING – MEXICO, *supra* note 11.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.*

2006;¹⁷ 43,000 drug-related deaths since 2006;¹⁸ over 23,000 drug related deaths since January 2007;¹⁹ 12,600 deaths from January 2008-March 2009;²⁰ 35,000 since the cartels launched the last several years' aggression;²¹ 45,000 since Mexican President Felipe Calderón launched his effort against the cartels, beginning in early 2007;²² and, as of January 2013, an astounding 60,000 deaths.²³ The State Department relies on figures provided by the Mexican Government, which places the death toll at 47,515 between December 1, 2006 and September 30, 2011.²⁴ There were more than 15,200 drug-related killings in Mexico in 2010,²⁵ and 12,903 drug-related killings from January to September 2011.²⁶ Although the current wave of cartel wars amongst each other and against the Mexican Government are roughly considered as beginning circa 2006 when President Calderón was elected and subsequently deployed the Army against the cartels, in 2004-2005 there was a "cross-border killing spree" by Gulf Cartel-affiliated Zetas in the Laredo-Nuevo Laredo area.²⁷

A topic of some disagreement is whether the violence has spilled over the border.²⁸ According to federal officials, it has not²⁹—even though there are documented incidents in U.S. soil.³⁰ Some scholars and local border officials disagree with federal officials, and cite to kidnappings, stray bullets, gang activity, and drug courier attacks on American ranchers as examples that the problems are not only on the Mexican side of the border.³¹ According to one report, the cartels, either through direct representatives or affiliated gangs have a

¹⁷ Chelluri, *supra* note 4, at 53-54.

¹⁸ Benson Statement October 2011, *supra* note 4, at 22.

¹⁹ Finnegan, *supra* note 8.

²⁰ H.R. Res. 1032, 111th Cong. (2010).

²¹ Mark Mazzetti & Ginger Thompson, *U.S. Widens Role in Mexican Fight*, N.Y. TIMES, Aug. 26, 2011, at A1.

²² Ginger Thompson, *U.S. Widens Its Role in Battle Against Mexico's Drug Cartels*, N.Y. TIMES, Aug. 7, 2011, at A1.

²³ See, e.g., Richard Fausset, *Mexico Considers Marijuana Legalization After Ballot Wins in U.S.*, L.A. TIMES (Jan. 23, 2013, 6:54 PM), <http://www.latimes.com/news/nationworld/world/la-fg-mexico-marijuana-20130105,0,2199612.story>; *Killings Surge Again in Mexico*, DALLAS MORNING NEWS, Jan. 16, 2013.

²⁴ TRAVEL WARNING – MEXICO, *supra* note 11.

²⁵ See Benson Statement October 2011, *supra* note 4, at 22.

²⁶ See TRAVEL WARNING – MEXICO, *supra* note 11.

²⁷ Benson Statement October 2011, *supra* note 4, at 17.

²⁸ See Mark Potter, *Debate Rages Over Mexico 'Spillover Violence' in U.S.*, DAILY NIGHTLY (Mar. 15, 2012, 12:36 PM), http://dailynightly.nbcnews.com/_news/2012/03/15/10701978-debate-rages-over-mexico-spillover-violence-in-us?lite#.

²⁹ See *id.*

³⁰ See text accompanying notes 9-10.

³¹ BOB KILLEBREW & JENNIFER BERNAL, CTR. FOR A NEW AM. SEC., CRIME WARS: GANGS, CARTELS AND U.S. NATIONAL SECURITY 37-38 (2010), available at http://www.cnas.org/files/documents/publications/CNAS_CrimeWars_KillebrewBernal_3.pdf; see also Potter, *supra* note 28.

presence “in more than 230 U.S. and Canadian cities.”³² Drug-related kidnappings are also taking place in the United States.³³ As of May 2011, “six of the seven Mexican Cartels ha[d] established command-and-control networks in Texas cities.”³⁴ And, the cartel operations in the United States have a significant impact on the corruption of U.S. Government actors. In particular, “over 70 [U.S.] CBP Agents have been arrested for corruption” in the Southwest.³⁵

B. U.S. Policy

U.S. officials have presented a confused and unclear representation of U.S. policy addressing the Mexican Situation. Officially, the United States has maintained a primarily law enforcement posture as a matter of policy.³⁶ But, as described below, U.S. officials have, in various statements and remarks, referred to the cartels and the Mexican Situation as “organized crime,” “terrorists,” “national security,” “homeland security,” and “insurgency.”³⁷ U.S. officials acknowledge that the vast amount of U.S. drugs come from Mexico,³⁸ but we have not launched a new, high profile and visible public campaign to discourage American drug use.³⁹

³² KILLEBREW & BERNAL, *supra* note 31, at 39. Killebrew and Bernal make the case for a renewed U.S. effort in light of the awful choices the Mexican Government has, which they identify as: (i) tolerating the cartels and allowing the Mexican Government to wither, (ii) considering drug legalization, or (iii) “favoring some cartels over others.” *Id.* at 6, 22; *see also* 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: St. Mary’s University School of Law Center for Terrorism Law*, 14 SCHOLAR 741, 747 (2012).

³³ Fix et al., *supra* note 32, at 758.

³⁴ McCraw Statement May 2011, *supra* note 5, at 43.

³⁵ *Id.* at 44 (the acronym CBP refers to Customs and Border Patrol).

³⁶ KILLEBREW & BERNAL, *supra* note 31, at 8-10.

³⁷ *See* discussion *infra* Part II.D.

³⁸ *See Counternarcotics Enforcement: Coordination at the Federal, State, and Local Level: Hearing Before the Subcomm. on State, Local, and Private Sector Preparedness and Integration of the S. Homeland Sec. and Governmental Affairs Comm.*, 111th Cong. 3 (2009) [hereinafter Leech Statement April 2009] (statement of John Leech, Acting Director for the Office of Counternarcotics Enforcement, U.S. Dep’t of Homeland Security).

³⁹ The November 2012 election votes to legalize marijuana in Colorado and Washington State further complicate U.S. policy considerations. So far, the federal government has not changed its policy. According to a written statement by U.S. Attorney Jenny A. Durkan for the Western District of Washington on December 5, 2012, “The Department of Justice is reviewing the legalization initiatives recently passed in Colorado and Washington State. The Department’s responsibility to enforce the Controlled Substances Act remains unchanged.” *Statement from U.S. Attorney’s Office on Initiative 502*, U.S. ATT’Y OFF. W.D. OF WASH. (Dec. 5, 2012), <http://www.justice.gov/usao/waw/press/2012/December/Statement.html>. The DEA, accordingly, has not changed its existing position on marijuana, which is that, “Marijuana is properly categorized under Schedule I of the Controlled Substances Act (CSA), 21 U.S.C. § 801, et seq. The clear weight of the currently available evidence supports this classification, including evidence that smoked marijuana has a high potential for abuse [and] has no accepted medicinal value in treatment in the United States” *See* U.S. DEP’T OF JUST., DRUG ENFORCEMENT ADMIN., THE

An important study performed by the Center for a New American Security in September 2010, found that “American policymakers . . . have been slow to recognize the evolution of the drug cartels and gangs from a problem for law enforcement to a strategic threat.”⁴⁰ According to the report, “[n]o state in the hemisphere is more important to U.S. security than Mexico, which is fighting for its life against a widespread criminal insurgency. Mexican drug cartels dominate hemisphere-wide criminal networks.”⁴¹ The report puts forth that the United States has an obligation and should adopt a strategy to go after the cartels within the United States, as well as throughout the Western Hemisphere.⁴²

C. The Mérida Initiative

The increase in U.S. demand for cocaine in the 1970s led to the strength of the Colombian cartels.⁴³ With the successful marginalization of the Colombian cartels in the 1980s and early 1990s, the Mexican cartels stepped in to fill the breach.⁴⁴ The current war being waged by the cartels, against each other and the Mexican Government, heightened in 2006 when then-Mexican President Calderón took “a more active policy” towards the drug cartel problem and deployed the Mexican army against the cartels.⁴⁵ Calderón, as the newly elected leader from the National Action Party (“PAN”),⁴⁶ launched an aggressive campaign against the cartels.⁴⁷ In doing so, he upset the status quo relationship between the government and cartels, which had previously enabled the cartels to operate and thrive.⁴⁸ In addition to deploying his army domestically to combat the cartels militarily, shortly after taking office in January 2007 he also facilitated the extradition of major drug cartel kingpins, such as Gulf Cartel leader Osiel Cardenas Guillen.⁴⁹ Although Calderón’s effort has garnered some success, it

DEA POSITION ON MARIJUANA (2011), available at http://www.justice.gov/dea/docs/marijuana_position_2011.pdf.

⁴⁰ KILLEBREW & BERNAL, *supra* note 31, at 8.

⁴¹ *Id.* at 15.

⁴² *Id.* at 49-50. The Center recommends a “hemispheric counter-cartel strategy” incorporating concepts of rule of law, financial tools, and military activities. *Id.*

⁴³ Fix et al., *supra* note 32, at 745.

⁴⁴ Chelluri, *supra* note 4, at 62 (“As the Colombian cartels were brought down, the Mexican cartels rose to dominate the U.S. narcotics market.”); *see also* Fix et al., *supra* note 32, at 745, 759.

⁴⁵ Chelluri, *supra* note 4, at 63; *see also* Fix et al., *supra* note 32, at 745-46.

⁴⁶ Fix et al., *supra* note 32, at 745-46. Calderón succeeded Vicente Fox, who, when elected in 2000, ended over seventy years of continuous governance by the Institutional Revolutionary Party (“PRI”). *E.g.*, SCHAEFER ET AL., *supra* note 2, at 6.

⁴⁷ *See, e.g.*, William Finnegan, *Letter from Mexico: The Kingpins: The Fight for Guadalajara*, THE NEW YORKER, July 2, 2012, available at http://www.newyorker.com/reporting/2012/07/02/120702fa_fact_finnegan.

⁴⁸ Fix et al., *supra* note 32, at 746 (“President Calderón’s election, and subsequent declaration of war on the drug cartels, along with his administration’s capture of many high-ranking drug lords, may have caused drug cartels to suddenly lose the government support and protection they previously enjoyed for decades.”).

⁴⁹ Benson Statement October 2011, *supra* note 4, at 23 (“[T]he [Government of Mexico] has extradited a total of 422 criminals to the United States, as of June 25, 2011.”).

also poked the hornets' nest and the cartels launched a vicious counterpunch against both Mexican Government officials and its citizens.⁵⁰ In July 2012, the candidate for the Institutional Revolutionary Party ("PRI"), Enrique Peña Nieto, won election to the presidency.⁵¹ Only time will tell if he will continue Calderón's counter-cartel initiatives during his presidency.⁵²

The centerpiece of the United States' policy with respect to Mexico and cartel drug trafficking and violence is the Mérida Initiative.⁵³ At its most broad, the four key pillars of the Mérida Initiative are: (1) "Disrupt Organized Criminal Groups;" (2) "Strengthen Institutions" (e.g., the judicial sector and rule of law); (3) "Build a 21st Century Border;" and (4) "Build Strong and Resilient Communities" (through greater support to Mexican social services and communities).⁵⁴ Instituted in 2007, the Mérida Initiative pledged \$1.4 billion to Mexico over three years, primarily for the purpose of combating drug trafficking.⁵⁵ "The U.S. Congress has appropriated \$1.6 billion since the Mérida Initiative began in Fiscal Year 2008."⁵⁶ A significant amount of Mérida funds are used for hardware to help the Mexican forces fight the drug cartels—particularly helicopters, surveillance equipment and military gear.⁵⁷ Funds are also used for rule of law programs such as training law enforcement and criminal

⁵⁰ *Id.* at 22.

⁵¹ Associated Press, *Enrique Pena Nieto Wins Mexican Election, Bring Power Back to PRI*, CBS NEWS (July 2, 2012, 2:54 PM), http://www.cbsnews.com/8301-202_162-57465160/enrique-pena-nieto-wins-mexican-election-bring-power-back-to-pri/.

⁵² President Peña Nieto assumed office on December 1, 2012.

⁵³ U.S. DEP'T OF STATE, BUREAU OF W. HEMISPHERE AFF., THE MERIDA INITIATIVE: EXPANDING THE U.S./MEXICO PARTNERSHIP (2012) [hereinafter THE MERIDA INITIATIVE], available at <http://www.state.gov/documents/organization/187329.pdf>.

⁵⁴ *Id.*; see also *Transnational Crime, U.S. Border Security, and the War on Drugs in Mexico: Hearing Before the Subcomm. on Oversight, Investigations, and Mgmt. of the H. Comm. on Homeland Sec.*, 112th Cong. 4 (2011) (statement of Dr. David A. Shirk, Director of the Trans-Border Institute, University of San Diego), available at <http://homeland.house.gov/sites/homeland.house.gov/files/Testimony%20Shirk.pdf>.

⁵⁵ SCHAEFER ET AL., *supra* note 2, at 8-9; see also Press Release, U.S. Dep't of State, United States-Mexico Security Partnership: Progress and Impact (Mar. 23, 2010) [hereinafter Progress & Impact], available at <http://www.state.gov/r/pa/prs/ps/2010/03/138929.htm>. Mérida was initially conceived as a program that was not only directed at Mexico, but also allocated funds for Central America, the Dominican Republic, and Haiti. See *The Merida Initiative: Hearing Before the Subcomm. on State, Foreign Operations, and Related Programs of the H. Comm. on Appropriations*, 111th Cong. (2009) (statement of Thomas A. Shannon, Jr. Assistant Secretary, Bureau of Western Hemisphere Affairs), available at <http://www.state.gov/p/wha/rls/rm/2009/120229.htm>.

⁵⁶ THE MERIDA INITIATIVE, *supra* note 53. One academic cited Mérida as "anemic" and noted that Mérida's \$1.4 billion over three years is less than the United States spends in Afghanistan in one week. See *The U.S. Homeland Security Role in the Mexican War Against Drug Cartels: Hearing Before the Subcomm. on Oversight, Investigations, and Mgmt. of the H. Comm. on Homeland Sec.*, 112th Cong. (2011) (statement of Ricardo C. Ainslie, Professor, University of Texas at Austin). For a breakdown of U.S. spending for Mexican counternarcotics programs, see SCHAEFER ET AL., *supra* note 2, at 49.

⁵⁷ Fix et al., *supra* note 32, at 756.

justice personnel, although some critics allege that not enough funding has gone towards rule of law initiatives.⁵⁸

The Mérida Initiative has had its share of successes.⁵⁹ According to the U.S. State Department, in Mexico, major cartel leaders have been arrested, extradited or killed by authorities; and tens of thousands of tons of illicit drugs, millions in currency, and tens of thousands of weapons have been seized.⁶⁰ In the United States, numerous interagency task forces and multi-agency operations have led to hundreds of arrests of drug cartel operatives, millions of dollars have been seized, and, as of 2010, nearly forty individuals had been designated under the U.S. Foreign Narcotics Kingpin Designation Act by the Treasury Department's Office of Foreign Asset Control ("OFAC").⁶¹ Significant efforts have been taken to train Mexican law enforcement and judicial system officials, and the United States and Mexico have partnered to reduce arms trafficking and money laundering.⁶² Joint efforts amongst the Departments of Justice, Homeland Security and Treasury exist to facilitate anti-money laundering training programs, including increased information sharing, improving investigative techniques, disrupting cash couriers, implementing Mexico's anti-money laundering laws, and designating the cartels under the Kingpin Act to facilitate economic sanctions.⁶³ A variety of U.S. Government agencies are involved in implementing the Mérida Initiative, and related counter-cartel efforts.⁶⁴ These include establishing a Southwest Border Initiative, launched in March 2009, and

⁵⁸ See Chelluri, *supra* note 4, at 97-98.

⁵⁹ See Press Release, U.S. Dep't of State, United States-Mexico Partnership: Anti-Arms Trafficking and Anti-Money Laundering (Mar. 23, 2010) [hereinafter Anti-Arms Trafficking], *available at* <http://www.state.gov/r/pa/prs/ps/2010/03/138924.htm>.

⁶⁰ Progress & Impact, *supra* note 55.

⁶¹ *Id.*; Foreign Narcotics Kingpin Sanctions Regulations, 31 C.F.R. § 598 (2012). The Kingpin Act blocks all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant narcotics traffickers. Recent Kingpin Act designations include actions against a Guatemalan drug trafficker affiliated with the Sinaloa cartel (Nov. 14, 2012); a leading organization in methamphetamine trafficking (Nov. 20, 2012); a business network affiliated with the Sinaloa cartel (Dec. 12, 2012); and the Meza Flores Drug Trafficking Organization, which is a major rival to the Sinaloa cartel (Jan. 17, 2013). See Press Release, U.S. Dep't of Treasury, Treasury Designates Lorenzana Family Members and Businesses Allied with the Sinaloa Cartel (Nov. 14, 2012), *available at* www.treasury.gov/press-center/press-releases/Pages/tg1767.aspx; Press Release, U.S. Dep't of Treasury, Treasury Designates Ibarra Cardona Drug Trafficking Organization (Nov. 20, 2012), *available at* www.treasury.gov/press-center/press-releases/Pages/tg1778.aspx; Press Release, U.S. Dep't of Treasury, Treasury Levies Additional Sanctions Against Business Network Linked to Sinaloa Cartel Drug Lord "El Azul" (Dec. 12, 2012), *available at* www.treasury.gov/press-center/press-releases/Pages/tg1802.aspx; Press Release, U.S. Dep't of Treasury, Treasury Designates Additional Sinaloa-Based Drug Trafficking Organization (Jan. 17, 2013), *available at* www.treasury.gov/press-center/press-releases/Pages/tg1824.aspx.

⁶² Anti-Arms Trafficking, *supra* note 59.

⁶³ *See id.*

⁶⁴ *See id.*

increasing the number of ICE agents in the border.⁶⁵ The Department of Defense is also involved in training and sharing information with its Mexican counterparts.⁶⁶ Despite these and many more efforts, however, the violence has not abated and the cartels remain strong.

It is curious that Mérida has not been more consequential. The successes attributable to Mérida do not seem to have translated into strategic defeat of the cartels and their influence on the public and political systems in Mexico, violence, drug trafficking or overall state of terror they inflict on the Mexican population. And despite a wide range of tactical successes over the last four years, the Mexican Situation remains a strategic problem. Therefore, we need to take another look at U.S. legal framework and policy with respect to Mexico, and determine what changes we need to make to strategically defeat the cartels and their influence both in Mexico and the United States.

D. From a Law Enforcement Issue to a Homeland Security Issue

Traditionally, U.S. policy classified the cartels as sophisticated criminal organizations; the modern day versions of the Italian mafia at its peak of influence.⁶⁷ Law enforcement entities have used criminal prosecution as the primary mechanism to support enforcement actions.⁶⁸ The U.S. State Department described the Mérida Initiative as a partnership to “fight organized

⁶⁵ *The U.S. Homeland Security Role in the Mexican War Against Drug Cartels: Hearing Before the Subcomm. on Oversight, Investigations, and Mgmt. of the H. Comm. on Homeland Sec.*, 111th Cong. 4 (2010) (statement of Luis Alvarez, Assistant Director of International Affairs, Homeland Security Investigations at the U.S. Immigration & Customs Enforcement in the Department of Homeland Security). Alvarez highlighted a number of initiatives and projects directed at the drug and cartel issues. *See id.* These include the Southwest Border Initiative, a comprehensive effort at border security by ICE; the Border Enforcement Security Taskforce (BEST) program, led by ICE, which brings multiple stakeholders together for border security; the San Diego Tunnel Task Force, a BEST program that discovered tunnels and disrupted drug shipments; Operation in Plain Site, ICE’s largest human smuggling disruption to date; Operation Firewall, an ICE cash smuggling disruption effort; the ICE National Bulk Cash Smuggling Center, a support center located in Vermont; Operation Pacific Rim, a bulk cash smuggling disruption; and Project Southern Tempest, an ICE-led initiative against gangs affiliated with Mexican cartels. *Id.* While each of these operations and programs has had individual successes, this listing also demonstrates that the patchwork of law enforcement-style investigations and operations has not had the strategic victory of breaking the cartels.

⁶⁶ *See* Press Release, Office of the Press Secretary, The White House, Administration Officials Announce U.S.-Mexico Border Security Policy: A Comprehensive Response & Commitment (Mar. 24, 2009), available at http://www.whitehouse.gov/the_press_office/Administration-Officials-Announce-US-Mexico-Border-Security-Policy-A-Comprehensive-Response-and-Commitment.

⁶⁷ *See Southern Border Violence: Homeland Security Threats, Vulnerabilities, and Responsibilities: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. 2, 8 (2009) [hereinafter Arabat Statement March 2009] (statement of Joseph M. Arabat, Special Agent, Drug Enforcement Administration & William McMahon, Deputy Assistant Director of Field Operations, Bureau of Alcohol, Tobacco, Firearms and Explosives).

⁶⁸ *See id.* at 3.

crime and associated violence while furthering respect for human rights and the rule of law.”⁶⁹ This approach seems in line with that put forth by John Leech, the Acting Director of DHS’s Office of Counternarcotics Enforcement (“CNE”) in April 2009.⁷⁰ Leech explained CNE’s two functions: (1) to support DHS’s drug interdiction efforts; and (2) to “track and sever the connections between illegal drug trafficking and terrorism.”⁷¹ In this instance, the terrorism he appears to be referring to is the 9/11-related Islamist international terrorism.⁷² There have been concerns that international terrorists, such as agents of al Qaeda or Hizballah, would use the Mexican cartels and the security situation on the border to enter the United States.⁷³ To avoid this and better fulfill its functions, CNE opened a Drug Terror Nexus Division charged with coordinating between the intelligence agencies and law enforcement agencies to ensure that information regarding terrorists passes to the appropriate channels.⁷⁴

A Drug Enforcement Administration (“DEA”) official similarly emphasized the law enforcement approach, while recognizing that drug cartels pose a national security (or perhaps domestic security) threat within Mexico. In March 2009, DEA Special Agent in Charge Joseph Arabit characterized the United States’ approach as attacking criminal organized crime. He outlined the Department of Justice’s strategy as follows:

[T]he Department’s strategy—built on its proven track record in dismantling transnational organized criminal groups, such as the mafia in the 1980s and 1990s—confronts the Mexican cartels as criminal organizations, rather than simply responding to individual acts of criminal violence. Pursued vigorously, and in coordination with the efforts of other U.S. government agencies like the Departments of State and Homeland Security and with the full cooperation of the Government of Mexico, this strategy can and will neutralize the organizations causing the violence.⁷⁵

While expressing a commitment that the law enforcement paradigm was the right one, he recognized its shortcomings but attributed those to resources:

We believe that we have the right strategy for stopping the violence spawned by the cartels. But despite recent successes, we also recognize that we have much more work to do to implement it effectively. The cartels remain too powerful and able to move too many drugs into the

⁶⁹ Progress & Impact, *supra* note 55.

⁷⁰ See Leech Statement April 2009, *supra* note 38.

⁷¹ *Id.* at 2.

⁷² Press Release, Office of the Press Secretary, *supra* note 66.

⁷³ Brian Michael Jenkins, *Will Mexico’s New President Continue the War on the Cartels?*, RAND CORP. (Nov. 16, 2012), <http://www.rand.org/blog/2012/11/will-mexicos-new-president-continue-the-war-on-the.html>.

⁷⁴ See Leech Statement April 2009, *supra* note 38, at 6.

⁷⁵ Arabat Statement March 2009, *supra* note 67, at 1-2.

United States. Too many guns and too much cash are moving south across the border into Mexico, where they fuel the cycle of violence. As a result, the Attorney General and I are working to allocate additional resources to address this threat.⁷⁶

But, to put the DEA position to task, the Mexican cartels of 2012 barely resemble the Italian mafia of old. The cartels have infiltrated Mexican law enforcement and military establishments through a pervasive corruption that was not experienced in the United States at the height of mafia activities and influence. The cartels are infinitely better armed, outfitted and trained in military and even special forces-like operations, than the mafia. Further, the sophistication of the cartels' money laundering operations far surpasses that of the mafia.⁷⁷

Perhaps recognizing that the ground was shifting, that same spring of 2009, Homeland Security Secretary Janet Napolitano seemed to go a step further in her remarks. Napolitano stated, "[The Mexican Situation] is a homeland security issue in which all Americans have a stake. America has a significant security stake in the success of Mexico's efforts against drug cartels."⁷⁸ Secretary Napolitano outlined a number of initiatives to combat the cartel violence and provide assistance to Mexico.⁷⁹ More recently, however, Secretary Napolitano did not identify the Mexican Situation and U.S. enforcement efforts against the cartels as one of her top priorities.⁸⁰

Taking a step further away from the law enforcement approach, some recent observers are assessing whether Mexico is undergoing an insurgency, or an armed conflict under International Law.⁸¹ Several observers argue that the Mexican Situation is a "noninternational armed conflict governed by Common

⁷⁶ *Id.* at 4-5.

⁷⁷ See, e.g., Bloom, *supra* note 7, at 384-86, 393 (drug cartels are "organizationally . . . almost indistinguishable from terrorist organizations. Just as al Qaeda provides funding and training to groups who wish to carry out its goals, [drug cartels] provide guns, drugs, and money to groups that are willing to do its dirty work."). Bloom suggests that, as an example, "Yemen is the terrorist analogue to the situation in Mexico" by virtue of its weakened central government, high unemployment numbers, poverty conditions for citizens, and few, if any natural resources. *Id.* at 393.

⁷⁸ *Southern Border Violence: Homeland Security Threats, Vulnerabilities, and Responsibilities: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. 2 (2009) (statement of Janet Napolitano, Secretary, U.S. Department of Homeland Security).

⁷⁹ *Id.* The initiatives presented by Napolitano include: providing "assistance to the Mexican government in its efforts to defeat the drug cartels," taking "action on our side of the border to cripple smuggling enterprises," and guarding against and preparing "for the possible spillover violence into the United States." *Id.*

⁸⁰ In remarks at the Wilson Center on January 24, 2013, Secretary Napolitano discussed cybersecurity, the coming immigration debate, and continued threat from terrorism as her top three priorities for the next term. See *From Cyber to Immigration, Terrorism to Disasters: Securing America in the Next Administration Transcript of Event with U.S. Secretary of Homeland Security Janet Napolitano*, WILSON CENTER (Jan. 24, 2013), http://www.wilsoncenter.org/sites/default/files/janetnapolitano_jan242013.pdf.

⁸¹ See Chelluri, *supra* note 4.

Article 3 of the Geneva Conventions” under International Law.⁸² This assessment is based on the nature of the fighting amongst the cartels and between the cartels and the Mexican Army.⁸³

Current and former high ranking officials have acknowledged in remarks that the Mexican Situation resembles other parts of the world in chaos. In September 2010, former Secretary of State Hillary Clinton stated that “these drug cartels are now showing more and more indices of insurgency [I]t’s looking more and more like Colombia looked 20 years ago, where the narco-traffickers control . . . certain parts of the country.”⁸⁴ Separately, the U.S. Joint Forces Command reported back in 2008 that Mexico (along with Pakistan) could face collapse of the state.⁸⁵ In 2010, former Secretary of State and National Security Advisor Condoleezza Rice compared the situation in Mexico to the “failed state” status of Afghanistan and Pakistan, “The border with Mexico has the characteristics of a failed state,” she said, noting that “Mexico has experienced 5,000 assassinations and kidnappings of officials.”⁸⁶

Other observers are not willing to go as far. In July 2012, RAND expert Brian Michael Jenkins testified that while the cartels have “in effect” created a “criminal insurgency,” that activity does not threaten the stability of the Mexican Government.⁸⁷ He acknowledged, however, the state of terror in Mexico:

Mexico’s violence is notable not merely for the scale of killing but for its deliberately savage quality. Kidnappings, mass killings and mass graves are common. Victims are brutally tortured and often beheaded. Messages are sent pinned to corpses. The purpose is terror, but the violence exceeds what is required to eliminate rivals and intimidate authorities.⁸⁸

In January 2012, Director of National Intelligence James Clapper devoted only three short paragraphs to Mexico in his annual Unclassified

⁸² *Id.* at 56; Bloom, *supra* note 7, at 365-66 (defining armed conflict as “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”).

⁸³ See Bloom, *supra* note 7, at 366; see also *Terrorism and the New Age of Irregular Warfare: Challenges and Opportunities: Hearing Before the Subcomm. on Terrorism, Unconventional Threats and Capabilities of the H. Comm. on Armed Services*, 111th Cong. 48 (2009) (statement of John Robb) (comparing the Mexican Situation with insurgencies in Iraq and Pakistan).

⁸⁴ Secretary of State Hillary R. Clinton, Counsel on Foreign Relations: A Conversation With Secretary of State Hillary Rodham Clinton (Sept. 8, 2010) (transcript available at <http://www.cfr.org/diplomacy/conversation-us-secretary-state-hillary-rodham-clinton/p22896>).

⁸⁵ Chelluri, *supra* note 4, at 54-55.

⁸⁶ M. Scott Carter, *Condoleezza Rice Warns of Danger From ‘Failed States,’* DAILY RECORD NEWSWIRE, Feb. 22, 2010, available at <http://www.legalnews.com/jackson/655062>.

⁸⁷ *New Challenges to U.S. Counterterrorism Efforts: An Assessment of the Current Terrorist Threat: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. 5 (2012) [hereinafter Jenkins Statement July 2012] (statement of Brian Michael Jenkins, RAND Corporation).

⁸⁸ *Id.* at 6.

Worldwide Threat Assessment.⁸⁹ His understated assessment, however, appears at odds with other high ranking U.S. Government statements and actions, which indicate far more grave circumstances.⁹⁰ According to one report, the United States is using drones, sophisticated surveillance equipment, and has deployed Central Intelligence Agency operatives and retired American military personnel to support the Mexican Army efforts.⁹¹

E. Mexican Cartels as Terrorist Organizations

A key issue in evaluating whether the U.S. policy shift should strategically move beyond, or complement, the law enforcement model is whether or not the cartels could, or should, be considered international terrorist organizations under the framework of post-9/11 laws and policies that were adopted to destroy al Qaeda and related groups. A growing group of observers

⁸⁹ *Unclassified Statement for the Record on the Worldwide Threat Assessment of the US Intelligence Community: Hearing Before the S. Select Comm. on Intelligence*, 112th Cong. 23-24 (2012) (statement of James R. Clapper, Director of National Intelligence). Clapper stated that “[t]he Mexican cartels have a presence in the United States, but we are not likely to see the level of violence that is plaguing Mexico spill across the US border. We assess that traffickers are wary of more effective law enforcement in the United States. . . . US officials and citizens in Mexico are at increased risk because of generalized violence.” *Id.* at 24.

⁹⁰ *See Annual Threat Assessment of the Intelligence Community: Hearing Before the S. Select Comm. on Intelligence*, 111th Cong. (2009) (statement of Dennis C. Blair, Director of National Intelligence). Clapper’s predecessor, Dennis C. Blair, was more blunt in a 2009 appearance before Congress:

Mexico remains the most important conduit for illicit drugs reaching the United States. As much as 90 percent of that cocaine known to be directed toward the United States, and some Colombian heroin, eventually transits Mexico before entering the United States. Despite recent successful efforts to counter precursor chemical diversion and drug trafficking, Mexico is the chief foreign supplier of methamphetamine and marijuana to the US market and produces most of the heroin consumed west of the Mississippi River. The corruptive influence and increasing violence of Mexican drug cartels, which are among the most powerful organized crime groups in the world, impede Mexico City’s ability to govern parts of its territory and build effective democratic institutions.

Nearly 5,500 people—mostly cartel operatives and to a lesser degree local police—were murdered in 2008 in cartel-related violence, far exceeding the record of about 2,700 drug-related murders in 2007. Also, the cartels have shown their willingness and capacity to strike Mexican Government officials, its leadership, and the military. Nevertheless, sustained government pressure has disrupted established transnational cocaine supply chains, interfered with day-to-day cartel operations, and has started to fragment Mexico’s powerful drug cartels. We assess that significantly more cocaine is diverting to Central America before moving into Mexico, a shift that, in our judgment, mitigates some risks drug traffickers faced in Mexico but that also complicates trafficking operations.

Id. at 29-30.

⁹¹ Mazzetti & Thompson, *supra* note 21.

believe that drug cartels could, under our laws and policies, be labeled as international terrorist organizations.⁹²

One southwest border sheriff who testified before Congress in March 2009 argued that residents living on the United States side of the southwest border with Mexico are victims of the terrorism perpetrated by the cartels.⁹³ The sheriff testified that because border residents live in fear of the cartels and their operatives who may enter the United States, that these residents are “terrorized.”⁹⁴ The sheriff paints a picture on the border “of an increase in abductions, kidnappings, carjackings, home invasions, murders, and large-scale incidents”—and these are just on the United States side—which he attributes to spillover violence.⁹⁵ He stated the cartels are not afraid of using “automatic weapons, grenades, grenade launchers, and rocket propelled grenades” to protect their “caches.”⁹⁶

Although the cartels have not been treated under U.S. law the same way as international terrorists affiliated with, for example, al Qaeda or Hizballah, the term “narco-terrorism” is not a new one. The concept of “narco-terrorism” has been used for the last quarter century to identify the tactics used by other drug cartels, which are similar to the tactics used by international terrorist organizations.⁹⁷ Clearly, the cartels are criminal organizations under U.S. law. They engage in murder, drug trafficking, money laundering, and assassination, at least.⁹⁸ However, as we have learned from the past decade’s approach to radical Islamic terrorist organizations such as al Qaeda, falling under the legal definitions of criminal activity is not mutually exclusive of being engaged in international terrorism; indeed, they are interrelated. But in recent years, it has become clear that the additional tactics such as kidnapping, beheadings, and

⁹² Congressman Michael McCaul (R-TX) has been the leading proponent of designating Mexican cartels as international terrorist organizations and has introduced legislation that would mandate designation. See H.R. 1270, 112th Cong. (2011). Chairman Peter King, would have designated, through legislation, the Mexican drug cartels as Foreign Terrorist Organizations. See 8 U.S.C. § 1189 (2006) (authorizing the Secretary of State to designate foreign terrorist organizations if certain requirements are met); see also *On the Border and in the Line of Fire: U.S. Law Enforcement, Homeland Security, and Drug Cartel Violence: Hearing Before H. Subcomm. on Oversight, Investigations, and Mgmt.*, 112th Cong. (2011).

⁹³ *Homeland Security and Border Security Issues: Hearing Before S. Comm. on Transp. and Homeland Sec.*, 2010 Leg., 82nd Sess. 4-5 (Tx. 2010) (statement of Sigifredo Gonzalez, Jr., Sheriff, Zapata County, Texas).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ KILLEBREW & BERNAL, *supra* note 31, at 23.

The concept of “narco-terrorism” was born in Colombia in the 1980s and 1990s, when cocaine traffickers began using terrorist tactics—car bombs, massacres of civilians, executions of political candidates and other attacks against both law enforcement officials and civilians—to fight extradition of convicted drug traffickers to the United States.

Id.

⁹⁸ See, e.g., Jenkins Statement July 2012, *supra* note 87.

torture are more similar to international terrorist organizations like al Qaeda, than anything else.⁹⁹ If the cartels were assessed as international terrorist organizations, then additional investigative and enforcement mechanisms would be available. For example, the cartels could be designated as Foreign Terrorist Organizations (“FTOs”) by the Secretary of State,¹⁰⁰ or they could be designated as Specially Designated Nationals by the Secretary of the Treasury.¹⁰¹ The cartels could also be targeted for surveillance under the Foreign Intelligence Surveillance Act (“FISA”).¹⁰²

The consequences of designation are that a designated entity may be subject to prosecution for providing material support to terrorism, removal from the United States, or, for U.S. entities, reporting requirements.¹⁰³ In addition to the threat of criminal prosecution, designation would send a signal to the broader international community that the cartels should be isolated, their assets frozen, and money flows disrupted.¹⁰⁴

There are at least two main arguments against designating the cartels as terrorist organizations. The first is that unless it is absolutely necessary, we

⁹⁹ Bloom, *supra* note 7, at 352-53.

¹⁰⁰ See Immigration and Nationality Act, 8 U.S.C. §§ 1189, 1153; see also Foreign Relations Authorization Act, 22 U.S.C. § 2656(f)(d)(2).

¹⁰¹ The Secretaries of State and Treasury are authorized to designate terrorist individuals and entities. See Exec. Order No. 13,224, 31 C.F.R. 595 (2001) (issued by President George W. Bush on September 23, 2001). For purposes of the order, terrorism is defined as an activity that:

- (i) involves a violent act or an act dangerous to human life, property or infrastructure; and
- (ii) appears to be intended—
 - (A) to intimidate or coerce a civilian population;
 - (B) to influence the policy of a government by intimidation or coercion; or
 - (C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.

Id.

¹⁰² FISA defines international terrorism as activities that:

- (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
- (2) appear to be intended—
 - (A) to intimidate or coerce a civilian population;
 - (B) to influence the policy of a government by intimidation or coercion; or
 - (C) to affect the conduct of a government by assassination or kidnapping; and
- (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801(c) (2006).

¹⁰³ Press Release, Bureau of Public Affairs, Foreign Terrorist Organization Designation (Sept. 1, 2010), available at <http://www.state.gov/r/pa/prs/ps/2010/09/146554.htm>; see also 18 U.S.C. §§ 2339-39D (2006) (the material support statutes).

¹⁰⁴ Press Release, Bureau of Counterterrorism, Foreign Terrorist Organizations (Sept. 28, 2012), available at <http://www.state.gov/j/ct/rls/other/des/123085.htm>.

should not apply the terrorist label to organizations or entities when they can remain squarely under a criminal organization framework. The status quo, however, has enabled the cartels to thrive. A second argument is that Executive Order 13224 was really intended to address the specific threats emanating from al Qaeda—responsible for the 9/11 attacks—or related groups, who aspired to conduct more attacks in the days, months and years following 9/11. However, some of the earliest designations under 13224 were of entities unrelated to al Qaeda, for example the Real IRA (“RIRA”) or the Revolutionary Armed Forces of Colombia (“FARC”).¹⁰⁵

Whether FISA surveillance could be used to collect foreign intelligence on the cartels is determined by factual and legal analysis conducted by Executive Branch officials and then either approved or disapproved by a judge on the Foreign Intelligence Surveillance Court.¹⁰⁶ Court orders issued pursuant to FISA authorize electronic surveillance of agents of a foreign power—in this case, an international terrorist group.¹⁰⁷ To qualify for surveillance under FISA when the target of surveillance is located in the United States, the court must find, among other findings, probable cause that the target is an agent of the international terrorist group—in this case, a cartel.¹⁰⁸ In 2008, Congress passed the Foreign Intelligence Surveillance Amendments Act which enables an acquisition against persons reasonably believed to be located outside the United States, for foreign intelligence purposes.¹⁰⁹ The FAA enabled FISA to adapt to modern technologies by facilitating acquisitions against non-U.S. persons outside the United States, when the assistance of a U.S. communications provider is required.¹¹⁰ Accordingly, FISA has several provisions which, if the cartels were assessed as international terrorist groups under FISA (and all of the other provisions of the statute were satisfied), could be useful in collecting foreign intelligence information about the cartels.¹¹¹

¹⁰⁵ *Id.* Real IRA was designated as a Foreign Terrorist Organization on May 16, 2001. *Id.* The FARC was originally designated by the U.S. State Department as a Foreign Terrorist Organization in 1997 and then designated as a Specially Designated Global Terrorist in 2001 pursuant to Executive Order 13,224. See Press Release, U.S. Dep’t of the Treasury, Treasury Designates Four Venezuelan Officials for Providing Arms and Security to the FARC (Sept. 8, 2011).

¹⁰⁶ 50 U.S.C. § 1805.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* There must also be a foreign intelligence surveillance purpose to the surveillance request. See 50 U.S.C. § 1804.

¹⁰⁹ 50 U.S.C. § 1881a, amended by 50 U.S.C § 1881(a) (Supp. I 2008).

¹¹⁰ *Id.*

¹¹¹ Note that information acquired pursuant to FISA can be used in a criminal prosecution. See, e.g., 50 U.S.C. § 1806. An alternative approach would be to amend FISA to include new definitions of a foreign power and agent of a foreign power that are tailored to the Mexican cartels, specifically, or drug cartels, more generally. While not exactly similar, this approach would be more in line with the approach taken to amend FISA to enable collection against foreign powers and agents of foreign powers involved in the proliferation of Weapons of Mass Destruction. See 50 U.S.C. § 1801(a)(7), (b)(1)(E), amended by 50 U.S.C. § 1801(a)(7), (b)(1)(E) (Supp. I 2008).

Despite the potential availability of the terrorist designations and FISA surveillance in light of the activities of the cartels, there may be resistance to do so on the part of U.S. Government entities. For instance, currently, there are federal agencies and offices that have defined responsibilities in fighting the cartels. Countering the cartels and drug trafficking falls into law enforcement and homeland security lanes in the road. There may be concerns about putting additional burdens on the agencies conducting counterterrorism investigation, activities, and analysis against radical Islamic terrorist organizations and other existing homeland or national security threats, both domestically and abroad. However, in evaluating which authorities are available to use in counter-cartel activities, caution should be exercised so that what may be bureaucratic considerations are not presented in pseudo-legal arguments.¹¹² As we learned in the re-calibration of our legal approach to Islamic terrorist organizations after 9/11, just because an organization is a criminal organization does not preclude it from being a terrorist organization; indeed, they are often both.

A significant, and legitimate, concern some may have in designating the cartels under the definitions of international terrorism as used against al Qaeda and related organizations since 9/11, would be the potential criminal exposure it would pose for the millions of drug users in the United States. President Calderón placed blame for the cartels' wealth and growth at the feet of U.S. drug users.¹¹³ According to the testimony of Rodney G. Benson, Assistant Administrator and Chief of Intelligence for the DEA, “[a]lmost 38,000 Americans die each year as a direct result of drug abuse. In 2009, an estimated 23 million Americans had an active substance use disorder.”¹¹⁴ Americans use nearly \$64 billion worth of drugs per year.¹¹⁵ The drug industry itself is an over \$200 billion industry.¹¹⁶ Most major illicit drugs now come through Mexico, since enforcement efforts diminished the Caribbean route via Florida.¹¹⁷

¹¹² This was a phenomenon that plagued pre-9/11 counterterrorism thinking. See COMM’N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 335 (2005) (unclassified version), available at <http://www.gpo.gov/fdsys/pkg/GPO-WMD/pdf/GPO-WMD.pdf> (noting that perceived legal restrictions on conducting intelligence operations were “either myths that overcautious lawyers had never debunked or policy choices swathed in pseudo-legal justifications. Needless to say, such confusion about what the law actually requires can seriously hinder the Intelligence Community’s ability to be proactive and innovative. Moreover, over time, it can breed uncertainty about *real* legal prohibitions.”).

¹¹³ See *Joint Meeting to Hear an Address by His Excellency Felipe Calderon Hinojosa, President of Mexico*, 111th Cong. (2010) (statement of President Calderón) (stating that the origin of the cartel violence in Mexico has as its origin “the high demand for drugs here” (the United States) and elsewhere).

¹¹⁴ Benson Statement October 2011, *supra* note 4, at 1.

¹¹⁵ Bloom, *supra* note 7, at 350.

¹¹⁶ Fix et al., *supra* note 32, at 759.

¹¹⁷ See Bruce Michael Bagley, *Drug Trafficking, Political Violence and U.S. Policy in Colombia in the 1990s*, UNIV. OF MIAMI, DEP’T OF INT’L STUDIES (Feb. 7, 2001), <http://www.as.miami.edu/international-studies/pdf/Bagley%20Drugs%20and%20violence%20final3.pdf>

According to reports, “more than [eighty] percent of the drugs that enter the United States”¹¹⁸ and “[n]inety percent of the cocaine sold in the U.S.” comes through Mexico.¹¹⁹ Mexican cartels are the conduit for cocaine, heroin, marijuana, and methamphetamines.¹²⁰ According to the testimony of a DHS official, “Mexico is currently the transit point for approximately 90 percent of all cocaine consumed in the United States and is the primary source of foreign marijuana and methamphetamine, and a major source of heroin to the United States.”¹²¹

If the United States were to use heavy handed financial enforcement action against the cartels, there could be significant criminal penalty exposure for U.S. drug consumers.¹²² For example, if drug cartels were designated as terrorist organizations, then drug consumers in the United States could potentially be exposed to prosecution under the material support statutes, which are serious federal offenses carrying heavy sentencing ranges.¹²³ Exposing drug users to these penalties could have dramatic effects—it would either serve as an incredible deterrent to recreational drug use, or it would cause a public outcry that terrorist support statutes were being applied to U.S. citizens who have an addiction problem, which may be viewed from a medical and public health perspective. But on the deterrent side, reframing the cartels in the terrorist (or, insurgency) category could have an effect on the United States’ outlook towards drug use. Similar to the “blood diamond” argument deterring consumers from buying conflict diamonds, if U.S. recreational drug users, or those who think drug use is a benign personal choice, viewed their activities as fueling insurgent and/or terrorist organizations that are torturing and murdering thousands of people, and contributing to the destruction of a nation, perhaps the public mood in the United States regarding drug use could change.

III. A NEW POLICY TO BREAK THE MEXICAN CARTELS

In the summer of 2011, the Obama administration somewhat clarified its approach to the Mexican Situation. Instead of creating a government-wide national strategy that focused specifically on the Mexican Situation, the Administration addressed transnational criminal organizations (“TCOs”) worldwide, issuing a new *Strategy to Combat Transnational Organized Crime* in July 2011.¹²⁴ This approach recognized that a government-wide strategy is

¹¹⁸ Thompson, *supra* note 22.

¹¹⁹ Finnegan, *supra* note 8.

¹²⁰ See KILLEBREW & BERNAL, *supra* note 31, at 16.

¹²¹ Leech Statement April 2009, *supra* note 38.

¹²² See 18 U.S.C. § 2339 (2006).

¹²³ See § 2329.

¹²⁴ See THE PRESIDENT OF THE UNITED STATES, STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME: ADDRESSING CONVERGING THREATS TO NATIONAL SECURITY (2011), available at http://www.whitehouse.gov/sites/default/files/Strategy_to_Combat_Transnational_Organized_Crime_July_2011.pdf. The Strategy defines “transnational organized crime” as:

needed to address the TCOs, staying away from bringing the cartels and the Mexican Situation into the terrorism framework.¹²⁵ Accordingly, instead of using existing authorities related to terrorism to block assets of the cartels, the President issued new Executive Order 13581¹²⁶ to block the property of several TCOs, including Los Zetas.¹²⁷

The *Strategy* is a start. On one hand, it at least serves the purpose of articulating what the current policy approach is towards the Mexican cartels—continue to treat them as sophisticated criminal organizations—but recognizes that their activities have an impact on the security of the United States. It also raises the profile of government efforts against TCOs, and signals to the international community that the United States considers this issue important and is devoting resources and new investigative, security, intelligence, and information-sharing initiatives to improve our success in degrading the capabilities and influence of TCOs.

But the *Strategy* focuses on TCOs worldwide, and therefore the Mexican cartels are just one aspect of the effort. By including the Mexican cartels as just one of many TCOs involved in all sorts of criminal activity—not just drug trafficking, but money laundering, human smuggling, cybercrime, arms trafficking, and intellectual property theft—the *Strategy* necessarily is at a very high level of generality. As government veterans know, these types of bird’s eye strategic plans are difficult to translate into measurable results on the ground.

The U.S. Government needs to get serious about breaking the Mexican cartels. The Mérida Initiative and its implementation have had a number of tactical successes, but the cartels remain strong. We need a new, transparent, coordinated, strategic approach that melds law enforcement tools with additional investigative, intelligence, and military resources and abilities that would come from adopting a comprehensive homeland security approach. There are several places to start.

At a strategic level, the new policy would recognize that increased involvement in the Mexican Situation is important for U.S. homeland security

[T]hose self-perpetuating associations of individuals who operate transnationally for the purpose of obtaining power, influence, monetary and/or commercial gains, wholly or in part by illegal means, while protecting their activities through a pattern of corruption and/or violence, or while protecting their illegal activities through a transnational organizational structure and the exploitation of transnational commerce or communication mechanisms.

Id.

¹²⁵ A distinguishing feature the Administration highlights is that TCOs “have economic gain as their primary goal” as opposed to the political goals of terrorist groups such as al Qaeda, or Hamas, which seek to alter the geo-political landscape through the destruction of the United States, and Israel, respectively. *See id.*

¹²⁶ Exec. Order No. 13,581, 76 Fed. Reg. 44,757 (July 24, 2011).

¹²⁷ Interestingly, the other Mexican cartels were not included in the order, again supporting the argument that current U.S. policy is not aggressively trying to defeat the Mexican cartels. *See* Chelluri, *supra* note 4. Similarly, La Familia was separately designated a “significant foreign narcotics trafficker” under the Kingpin Act. *See* Foreign Narcotics Kingpin Designation Act, 21 U.S.C. §§ 1901-08 (2006); *see also* Finnegan, *supra* note 8.

interests, as well as humanitarian reasons in Mexico. The U.S. Government should adopt a whole-of-government strategic plan tailored specifically to the challenge of breaking the Mexican cartels. The United States has a strong tradition—one that is fundamental to our modern national identity—of law enforcement, intelligence and/or military involvement when innocent civilians are living in terror.¹²⁸ To date, official U.S. statements generally stop short of acknowledging the severity of the Mexican Situation.

Under this new approach, the United States would need to attack the cartels financially, with all available means. This would mean giving serious consideration to allowing the State and Treasury Departments to designate Mexican cartels as terrorist organizations, and using all existing laws and investigative authorities available. Alternatively, all of the major Mexican cartels should be designated under Executive Order 13581. The piecemeal approach that appears to be taken so far is far less effective as a signal of seriousness of purpose as a full court press. In order to have a meaningful effect, the financial enforcement should be part of an overall strategy, instead of incremental designations of cartel leaders or facilitators. And, the financial enforcement should be as robust as the law permits.

Next, the U.S. Government should enhance the physical security on the border with a priority on stopping drug trafficking. This may involve providing more substantial military assistance to border patrol efforts on the southern border and/or reallocating resources to enhance border patrol operations. It is hard to believe that the U.S. Government is not physically capable of securing our own border; it is more likely that the problem is that the harder the force we use the more impact there will be on the flow of people and commerce. Opting on the side of enabling the free flow of people and commerce, we have chosen to limit our border protection efforts to the use of civilian and law enforcement forces. Alternatively, we could use U.S. Armed Forces or the National Guard to secure the border, which would have an actual, as well as a deterrent effect. And, once we acknowledge publicly that we are ramping up our efforts against the Mexican cartels, we could quietly increase our use of intelligence resources to support that effort.

Further, increased use of Intelligence Community and overall intelligence collection efforts should be assessed at a senior policy level, and then implemented. Currently there are many initiatives, task forces, designation efforts and operations, but there does not appear to be—at least from an outsider's optic—a coordinated implementation of a strategy specifically aimed at breaking the Mexican cartels. Domestically, an additional step we could take

¹²⁸ An unanticipated and potentially nightmarish bureaucratic scenario could arise if Mexican citizens, tired of living in terror, filed en mass for political asylum in the United States. *See* Fix et al., *supra* note 32, at 751 (stating that “[a]lthough the approval rate for Mexicans seeking asylum currently lies at two percent despite rampant violence at the borders, immigration courts are worried that an increase in the number of applications might completely overwhelm a system that is already overloaded.”).

is to leverage existing state and local fusion centers to play a larger role in supporting counter-drug and counter-cartel operations and related information sharing. Post-9/11, local and state law enforcement authorities set up fusion centers.¹²⁹ The centers were originally conceived as locations where federal, state, local and tribal officials would come together to share information concerning potential terrorist threats.¹³⁰ Drug interdiction, gang investigation, information sharing, and breaking the cartels could serve as an effective use of fusion centers for the next five to ten years.¹³¹ And as a critical homeland security issue, the effort would fit appropriately under the DHS umbrella. Drug related crime and information sharing is a good example of an effort that requires a combined effort of state, local, tribal, and federal law enforcement, in addition to intelligence and military involvement—just the type of function the fusion centers can provide. And a main advantage is that the groundwork has already been laid at fusion centers to share information and work towards a common homeland security problem.¹³²

Finally, the United States should launch a new domestic effort against illegal drug use. Over at least the last half century, the country has gradually accepted illegal drug use as a fact of American life. Legalization, which was generally a fringe view in the 1980s and 1990s, is increasingly becoming accepted as a legitimate proposal and, at the end of 2012, initiatives to legalize have passed in two states.¹³³ A new education and public awareness campaign

¹²⁹ See *State and Major Urban Area Fusion Centers*, HOMELAND SECURITY, <http://www.dhs.gov/state-and-major-urban-area-fusion-centers> (last visited Dec. 21, 2012). Fusion centers were a logical reaction to a post-9/11 environment where information sharing was difficult in the counterterrorism arena. The centers, however, were set up in a decentralized manner with varying funding sources, goals, and objectives. DHS was the federal agency that took the lead on overseeing fusion centers, but it did not actually direct and control the centers itself. Although DHS and DOJ issued recommended guidelines, the guidelines were not mandatory. DHS provided a funding source, but did not fund a hundred percent of center activity. So, in the years subsequent to 9/11, each fusion center developed organically in its own way—some created at the state level, some at the local level. Some adopted a primary goal of counterterrorism, others of deterring general crime. Over the years, some fusion centers have moved towards an “all crimes, all hazards” mission, vice a counterterrorism mission. *Id.*

¹³⁰ *Id.*

¹³¹ In addition to the dozens of post-9/11 state and local fusion centers, there are already several fusion centers or other joint environments in existence that are dedicated to counternarcotic efforts, such as the Organized Crime Drug Enforcement Task Force Fusion Center and the International Organized Crime Intelligence and Operations Center, both which are run by the Department of Justice, and the Bulk Cash Smuggling Center, run by ICE. The mainstay has been DEA’s El Paso Intelligence Center (EPIC), which was created in 1974 and is an original model for fusion centers. See THE PRESIDENT OF THE UNITED STATES, *supra* note 124. Consideration should be given to assessing whether these various centers and task forces are duplicating efforts, or whether there are too many different task forces and functional fusion centers that would be more effective if they were part of a clear counter-cartel national strategy and operational plan.

¹³² See Benjamin Wittes, *Carrie Cordero on Fusion Centers*, LAWFARE (Nov. 6, 2012, 7:03 AM), <http://www.lawfareblog.com/2012/11/carrie-cordero-on-fusion-centers/>.

¹³³ See Charlie Savage, *Administration Weighs Legal Action Against States That Legalized Marijuana Use*, N.Y. TIMES, Dec. 7, 2012, at A20.

should be launched to protect the growing generation from not only ruining their own lives and families through drug use, but contributing to a security threat within the United States, and to the disintegration of a stable government and thriving society in Mexico.