

June 13, 2018

The Honorable Kevin McCarthy
Majority Leader
US House of Representatives
H-107, The Capitol
Washington, DC 20515

The Honorable Nancy Pelosi
Minority Leader
US House of Representatives
H-204, The Capitol
Washington, DC 20515

cc: Chairman Goodlatte and Ranking Member Nadler; House of Representatives

Dear Majority Leader McCarthy and Minority Leader Pelosi,

We, the undersigned coalition, write to express our opposition to HR 2851, the Stop Importation and Trafficking of Synthetic Analogues (SITSA) Act of 2017.

If passed, HR 2851 will broadly expand penalties for drug offenses, concentrate power within the Department of Justice, punish people who lack criminal intent, and overcriminalize certain behavior. The legislation attempts to address the very real problem of synthetic opioid overdoses in the United States, but we believe that its methods are misguided. Instead of punishing people who use drugs and low-level dealers, legislation should focus on expanding treatment opportunities and targeting the international drug trade.

The United States' opioid epidemic is real, and overdoses are increasing year after year. Synthetic opioids such as fentanyl have played a crucial role in this increase. But HR 2851 would do nothing to fix this. This bill would disproportionately incarcerate low-level drug offenders who did not import or package the drugs, and often are unaware of the chemical composition of the drugs. Many more people would be incarcerated for selling drugs to support their own substance use disorder.

Harsh penalties do not deter people with substance use disorders from using or buying drugs. People use and buy drugs because they have a chemical dependence and believe that they will not be caught. As the Department of Justice itself has repeatedly recognized, longer sentences do not deter drug use or drug crime.¹ Believing that harsh penalties will deter drug use misunderstands addiction. Since the 1980s, we have had tough penalties for heroin use and distribution, yet heroin consumption has actually increased. Although SITSA includes a carve out for possession, it will not prevent mass incarceration of low-level drug offenders, in part because quantities that constitute possession are not defined.

Today, heroin use and overdoses are at an all-time high. Just as harsh heroin laws did not deter heroin use, harsh synthetic opioid laws will not stop synthetic opioid use. Instead of prison, treatment will better address the underlying issues that fuel the opioid epidemic.

Moreover, this legislation would concentrate power within one federal agency: the Department of Justice. Under HR 2851, the Attorney General would have the unilateral power to add substances to the federal schedule and set penalties accordingly. Currently the Dept. of Justice must work in collaboration with the Dept. of Health and Human Services to decide whether a drug should be permanently scheduled. The current process requires the Attorney General to obtain sign off from drug experts at HHS as part of the permanent scheduling process. SITSA would take away this step that screens against unnecessary scheduling actions by allowing the Attorney General to proceed without screening from drug experts unless HHS *proactively* reviews a permanent drug scheduling proposal and rules against scheduling in writing. H.R. 2851 also nearly doubles the length of time that a drug can be temporarily scheduled from a maximum of three years allowed now, to more than five years. SITSA would not give HHS authority to screen against unnecessary temporary scheduling actions, exposing more people to incarceration. SITSA would enable the Attorney General, an unelected individual, to singlehandedly determine which substances are acceptable for private citizens to consume.

Similarly, the legislation would undermine the role of the United States Sentencing Commission (USSC), an independent body which sets sentencing guidelines for federal judges. The bill would undercut the USSC's long-established, nonpartisan process through this direct amendment to the federal sentencing guidelines for certain synthetic drugs. This provision is unprecedented, establishing a confusing and complicated process for the courts, prosecutors, and defenders that requires them to refer to three different sources (the federal sentencing guidelines, the Federal Register and the legislation) in every case involving these complex synthetic drugs. This section will not bring clarity and uniformity to federal sentences. It will do the opposite – create an unnecessarily burdensome and complex process with unknown consequences to defendants.

We believe that this is a gross overreach for one agency within one branch of government, and likely violates the separation of powers.² Simply put, Congress, our elected legislature charged with passing laws and creating the federal criminal code, should not delegate the power to enact new criminal punishments to a federal law enforcement agency. It has been well-documented that federal agencies create laws that lead to overcriminalization; this bill would take us further down this problematic path.

Congress has already given the Attorney General sweeping powers to ban synthetic drugs. This was demonstrated earlier this year when the Attorney General used his emergency scheduling powers to place illicit fentanyl analogues not already regulated by the Controlled Substances Act into Schedule I for a period of three years.³ This emergency scheduling action encompassed all known fentanyl analogues, as well as analogues that have not been invented yet but *may exist in the future*.

But even if the Attorney General was not granted broad power to schedule chemical substances in this act, we still oppose the enumerated expansion of penalties for synthetic drugs, as it punishes individuals who lack criminal intent. In December 2017, Robert Perez, U.S. Customs and Border Patrol, testified that “[t]he majority of U.S. trafficked illicit fentanyl is produced in other countries such as China, and is principally smuggled through international mail facilities (IMFs), express consignment carrier facilities (ECCFs; e.g., FedEx and UPS), or through POEs along the Southern land border.”⁴ By the time low-level dealers acquire the drug, most do not know that it contains fentanyl. The customers who buy these drugs are likewise oblivious to the true content of their purchase, and in many cases would not purchase it if it contained fentanyl. We believe that any criminal offense should require a culpable mental state. Nevertheless, HR 2851 would enact harsh penalties for conduct lacking any *mens rea*.

While discussing the opioid epidemic and synthetic opioid penalties, we believe that it is important to consider the potential costs to taxpayers. If HR 2851 passes, taxpayers would be forced to pay for the increased prison population, law enforcement, and criminal justice fees that accompany increases in arrests and prison sentences. History has shown us that harsh drug penalties do not deter drug use or sales, and with more people in jail, many communities will be robbed of productive citizens. Instead, we ask that you consider remedies that will address the opioid epidemic while enabling people with substance use disorders to live healthy, productive lives.

On June 12, 2018, the House Committee on Rules made a number of amendments in order that will be considered when HR 2851 moves to the floor. Although some of the amendments would marginally improve the bill if accepted, they do not come close to alleviating the main concerns regarding this bill.

The House of Representatives recently passed the bipartisan FIRST STEP Act, acknowledging that the federal criminal justice system is in dire need of reform. We believe that Congress should continue its work with criminal justice reform, not revert to ineffective and harsh drug laws. We ask that instead of expanding penalties against people suffering from substance use disorders, that this Committee consider legislation that will allow people with substance use disorders to become productive citizens, not expensive inmates.

Sincerely,

The American Civil Liberties Union
Drug Policy Alliance
Families Against Mandatory Minimums
Federal Public and Community Defenders
FreedomWorks
Friends Committee on National Legislation
Harm Reduction Coalition
Human Rights Watch

The Leadership Conference on Civil and Human Rights
NAACP
National Association of Criminal Defense Lawyers
National Council of Churches
The Sentencing Project
T'ruah: The Rabbinic Call for Human Rights
The United Methodist Church General Board of Church and Society

¹ U.S. Department of Justice, Office of Justice Programs, Nat'l Inst. of Justice, *Five Things About Deterrence 1* (2016), <https://www.ncjrs.gov/pdffiles1/nij/247350.pdf>; U.S. DOJ, *An Analysis of Non-Violent Drug Offenders With Minimal Criminal Histories*, Executive Summary (Feb. 4, 1994), https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/useful_reports/1994-doj-study-part-1.pdf.

² See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155-57 (10th Cir. 2016) (Gorsuch, J.).

³ <https://www.dea.gov/divisions/hq/2018/hq020718.shtml>

⁴ "U.S. Sentencing Commission Public Hearing on Fentanyl, Fentanyl" 5 Dec. 2017, <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20171205/Perez.pdf>. Accessed 8 Feb. 2018.