Constitutional Costs of the War on Drugs: Limited government as a casualty of war

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Opinions here offered are the author’s and do not represent an institutional position
Death toll of different causes in Mexico

*As deaths related to drugs, this graph only includes those deaths directly attributable to intoxication, i.e. overdose. Illicit drugs aggregated were marijuana, opiates and cocaine; licit drugs were tobacco and alcohol. Although other diseases (like asthma or bronchitis) are deemed "drug related deaths" according to SINAIS, it is unclear that such deaths are directly caused by the use or abuse of drugs or otherwise caused.

Source: Prepared by the author based on SINAIS, INEGI, CIDE-PPD.
Main causes of death in Mexico 2009

<table>
<thead>
<tr>
<th>Order</th>
<th>Total</th>
<th>0 – 4 years</th>
<th>5 – 14 years</th>
<th>15 – 29 years</th>
<th>30 – 44 years</th>
<th>45 – 59 years</th>
<th>60 years</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td></td>
<td></td>
<td>8.9%</td>
<td>20.4%</td>
<td>13.8%</td>
<td></td>
<td></td>
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<tr>
<td>2</td>
<td></td>
<td></td>
<td>13.7%</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>3</td>
<td></td>
<td></td>
<td>5.8%</td>
<td>6.2%</td>
<td></td>
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</tr>
<tr>
<td>4</td>
<td></td>
<td></td>
<td>4.2%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td></td>
<td></td>
<td>4.1%</td>
<td></td>
<td>3.2%</td>
<td></td>
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</tr>
<tr>
<td>6</td>
<td>3.5%</td>
<td>3.8%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td></td>
<td>1.0%</td>
<td>2.8%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td></td>
<td>0.9%</td>
<td>2.8%</td>
<td>2.5%</td>
<td>2.6%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td></td>
<td>0.8%</td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>2.2%</td>
<td>2.0%</td>
<td>2.2%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Cervantes, 2011.
Two mutually reinforcing processes

**Violence:**
- Criminal violence
- State violence

**Stripping of the Constitution:**
- Rights
- Checks and balances

WAR ON DRUGS
Undermining the constitution
Constitutional Costs

(Undermining of)

**Constitutional Commitments:**
Principles, rights and institutions

**Shared commitments**
- Democracy
- Federalism
- Laicism
- Civil government

**Boundaries of citizenship**
- Who we are and who we are not
  - Citizen $\rightarrow$ Criminal
  - Foreigner $\rightarrow$ Enemy

What makes us “us”?
Democracy

Civilian government

Due process

Presumption of innocence

Federalism

Free speech

Right to privacy

Republican government

U.S.

Them

Alien

Criminal

Enemy
Carving out exceptions to rights: arraigo
Democracy
Civilian government
Due process
Presumption of...
Right to privacy
Federalism

free speech
Republican government
Criminal

Alien
Citizen

Them

U S
2008 Constitutional amendments

- Presumption of innocence
- Adversarial system
- Victim’s rights
- Oral trials
- Enhanced judicial supervision
- Prison close to home

- Detention without charges (Arraigo)
- Incommunication
- “Special” detention measures
- Special prisons
- Plenary proof of police file
- Long etc.

All except... organized crime

Article 21: Constitutional ban on military involvement in public security
Arraigo

• In theory: house arrest (except at an undisclosed location).

• Borrowed from Colombia (except for up to 80 days).

• Struck down in 2005 by the Supreme Court (incompatible with 8 fundamental rights).

• Reinserted with the 2008 amendment package.

• No crime needed; no charges needed.

• For Organized Crime only, except not.
The expansive thrust of the special regime


27% of sentenced federal prison population reports having been subjected to arraigo

Only 14% are sentenced for Organized Crime

Source: Madrazo and Guerrero, 2012; INEGI and PGR.
Sentenced subjected to arraigo by type of drug crime

Source: Rodríguez and others, 2016.
Organized crime vs. arraigo

Criminals sentenced for organized crime in federal prisons
Sentenced federal prisoners subjected to arraigo

Source: Rodríguez and others, 2016.
Mistreatment and torture: 
Sentenced beaten during detention

Source: Rodríguez and others, 2016.
Conflation of functions:
militarization of public security
Security and criminal institutions: conflation of Functions

LSN 2005: “threats to national security” include “actions that obstruct combating organized crime” including “military and naval operations.”


CA 2008: “la policía” to “las policías.”

By 2012, 90% of investigative police were assigned to body guard or custody duty.

Source: Ley de Seguridad Nacional, 2005; Reforma constitucional, 2008; Ley de la Policía Federal, 2009.
Who detains?

<table>
<thead>
<tr>
<th>Authority</th>
<th>Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Police/AFI</td>
<td>37%</td>
</tr>
<tr>
<td>Army</td>
<td>25%</td>
</tr>
<tr>
<td>County Police</td>
<td>12.5%</td>
</tr>
<tr>
<td>State Police</td>
<td>11.6%</td>
</tr>
<tr>
<td>Navy</td>
<td>1.6%</td>
</tr>
<tr>
<td>Others</td>
<td>18.4%</td>
</tr>
<tr>
<td>Unidentified</td>
<td>2.2%</td>
</tr>
</tbody>
</table>

Source: Magaloni, 2015.
Lethality indexes in clashes involving federal forces (press)

| Year | SEDENA | | | Federal Police | | | Navy | | |
|------|--------|--------|--------|--------|--------|--------|--------|--------|
|      | Civilians killed | Civilians injured | Lethality Index | Civilians killed | Civilians injured | Lethality Index | Civilians killed | Civilians injured | Lethality Index |
| 2008 | 44     | 13     | 3.4    | 44     | 19     | 2.3    | 44     | 19     | 2.3    |
| 2009 | 95     | 24     | 4.0    | 74     | 17     | 4.4    | 24     | 6      | 4.0    |
| 2010 | 327    | 40     | 8.2    | 35     | 9      | 3.9    | 50     | 2      | 25.0   |
| 2011 | 526    | 27     | 19.5   | 92     | 3      | 30.7   | 103    | 7      | 14.7   |
| 2012 | 370    | 23     | 16.1   | 162    | 13     | 12.5   | 36     | 1      | 36.0   |
| 2013 | 225    | 19     | 11.8   | 65     | 16     | 4.1    | 33     | 2      | 16.5   |
| 2014 | 168    | 23     | 7.3    | 51     | 2      | 25.5   | 74     | 1      | 74.0   |
| Total| 1755   | 169    | 10.4   | 523    | 79     | 6.6    | 320    | 19     | 16.8   |

*No clashes involving the Navy were found in 2008

Source: Silva and others, 2015.
# Lethality in wars

<table>
<thead>
<tr>
<th>Source</th>
<th>Year</th>
<th>Wounded</th>
<th>Killed</th>
<th>Wounded to killed ratio</th>
<th>Killed to Wounded ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>United States</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Second world war (Italy)</td>
<td>1944-45</td>
<td>76,351</td>
<td>27,953</td>
<td>2.7</td>
<td>0.37</td>
</tr>
<tr>
<td>Vietnam (Marine Corps)</td>
<td>1964-73</td>
<td>51,399</td>
<td>12,944</td>
<td>4.0</td>
<td>0.25</td>
</tr>
<tr>
<td>Panama</td>
<td>1989</td>
<td>325</td>
<td>25</td>
<td>13</td>
<td>0.08</td>
</tr>
<tr>
<td>Mogadishu raid</td>
<td>1993</td>
<td>70</td>
<td>18</td>
<td>3.9</td>
<td>0.26</td>
</tr>
<tr>
<td><strong>United Kingdom</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Malaya (rifles)</td>
<td>1952-53</td>
<td>388</td>
<td>204</td>
<td>1.9</td>
<td>0.53</td>
</tr>
<tr>
<td>Northern Ireland (British army)</td>
<td>1970-80</td>
<td>1,700</td>
<td>300</td>
<td>5.7</td>
<td>0.18</td>
</tr>
<tr>
<td>Low velocity bullets</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>High velocity bullets</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Northern Ireland (British army)</td>
<td>1970-84</td>
<td>612</td>
<td>216</td>
<td>2.8</td>
<td>0.35</td>
</tr>
<tr>
<td><strong>Israel</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lebanon</td>
<td>1982</td>
<td>1,599</td>
<td>351</td>
<td>4.5</td>
<td>0.22</td>
</tr>
<tr>
<td><strong>Croatia</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Former Yugoslavia</td>
<td>1991-92</td>
<td>78</td>
<td>15</td>
<td>5.2</td>
<td>0.19</td>
</tr>
<tr>
<td>Average Mexican Army War on Drugs</td>
<td>2008-11</td>
<td>540</td>
<td>3181</td>
<td>0.17</td>
<td>5.89</td>
</tr>
</tbody>
</table>

Source: Coupland and Meddings, 1999.
Mistreatment/torture by authority

<table>
<thead>
<tr>
<th></th>
<th>Army</th>
<th>AFI/Federal Police</th>
<th>State Police</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Before Calderón</strong></td>
<td><strong>During Calderón</strong></td>
<td><strong>Before Calderón</strong></td>
<td><strong>During Calderón</strong></td>
</tr>
<tr>
<td>Kicking</td>
<td>2.03%</td>
<td>23.10%</td>
<td>9.14%</td>
</tr>
<tr>
<td>Asphyxia</td>
<td>2.70%</td>
<td>26.64%</td>
<td>7.72%</td>
</tr>
<tr>
<td>Electric Shocks</td>
<td>2.42%</td>
<td>30.30%</td>
<td>9.09%</td>
</tr>
</tbody>
</table>

Source: Magaloni, 2015.
## Mistreatment/torture by crime

<table>
<thead>
<tr>
<th></th>
<th>Kidnapping</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Before Calderón</td>
<td>During Calderón</td>
<td>Before Calderón</td>
<td>During Calderón</td>
<td>Before Calderón</td>
<td>During Calderón</td>
</tr>
<tr>
<td>Kicking</td>
<td>5.58%</td>
<td>2.79%</td>
<td>7.11%</td>
<td>1.27%</td>
<td>10.66%</td>
<td>37.31%</td>
</tr>
<tr>
<td>Asphyxia</td>
<td>6.95%</td>
<td>3.09%</td>
<td>8.49%</td>
<td>1.54%</td>
<td>9.27%</td>
<td>37.45%</td>
</tr>
<tr>
<td>Electric Shocks</td>
<td>6.06%</td>
<td>1.82%</td>
<td>6.67%</td>
<td>1.21%</td>
<td>7.88%</td>
<td>44.85%</td>
</tr>
</tbody>
</table>

Source: Magaloni, 2015.
The decision before us: further militarization
A long time coming

• Introduced as special new chapter of National Security 2009 (during influenza crisis).

• Stopped by 2011, by academics and victim’s rights movement.

• Reintroduced in fall of 2016 (6 initiatives up to now; central ones are functionally equivalent).

• “Seguridad Interior” as a bypass on military ban on public security.

• As of December: personal crusade of Secretary of Defense.
What it does? (highlights)

• Broad scope (“acts inclined to obstruct... federally funded programs...”).
• Unilateral decision by Executive to deploy Military or Federal Police (Congress cannot request information, only receive it).
• Delegates public security and criminal investigation powers, “or any other action deemed necessary.”
• Indefinitely renewable.
• Total opacity: all information generated is reserved.
• Authorizes “any means” of information gathering.
• Authorizes “lethal force” even in case of “non-aggressive resistance.”
Militarization is bad policy
Causality

• For every additional drug war battle there is a 6% increase in local (county) violence (homicide) in the short term (3 months).

• If Armed Forces are involved in the battle, violence increases by 8%.

• If specifically the Army is involved in the battle, local violence raises by 9%.

Source: Atuesta, 2017.
Combats

Activity of public forces as a trigger
- Physical presence
  - Inside the facilities
  - Outside the facilities
- Information provided by third parties
  - Complaint
  - Call
  - Report
- Previous activity
  - Investigation
  - Operatives
  - Court order
  - Others
- Undetermined
- Anonymous
- Identifiable
- Undetermined

Passivity of public forces as a trigger
- Atentado
- Ambush
- Ataque
- Patrol
- Persecution
- Eradication
- Undetermined
- Flagrance
- Order of presentation
- Search
- Apprehension
- Re-apprehension
What is role of authorities on the ground?

- Public forces were active: 84%
- Physical presence: 63%
- Previous work: 12%
- Information provided by third parties: 9%
- Undetermined: 9%
- Public forces were passive: 7%
Directed operations 8%

Other 2%

Intelligence 3%

Judicial Order 2%

Anonymous call 8%

Stop-and-search 4%

Outdoors undetermined 25%

In fraganti 3%

Undefined moving 7%

Chase 3%

Patrols 31%

Other authority (informal) report 1%

Citizen/victim formal report 1%

Undetermined call 1%

Identifiable call 1%

Source: Madrazo and others, 2017.
Relative Importance of selected activities

Source: Madrazo and others, 2017.
Incalculable Lethality Events (ILE) by public force involved

- Neither death nor injured: 46%
- ILE: 37%
- Injured: 10%
- Death and injured: 7%

Source: Madrazo and others, 2017.
ILE by public force involved

Source: Madrazo and others, 2017.
Incalculable lethality and civilian deaths

Source: Madrazo and others, 2017.
What is the military in charge of already?

- Public security (de facto).

- All ports (as of last fall, law states the Navy set to substitute the Merchant Marine).

- Drug use prevention (internal agreement between MoH and Army).

- Scene-of-crime preservation (formerly, the exclusive domain of Public Ministry).

- Navy leak (2017): corruption, environmental threats, gender violence...
References


• Ana Laura Magaloni, “La arbitrariedad como método de trabajo: La persecución criminal durante la administración de Felipe Calderón,” in De la detención a la prisión. La justicia penal a examen, edited by Catalina Pérez Correa, 29-54 (México: CIDE, 2015).

• Catalina Pérez Correa, Elena Azaola, Juan Salgado and others, Primera Encuesta a Población Interna en Centros Federales de Readaptación Social 2012. Available at: http://biiacs-dspace.cide.edu/handle/10089/16531.


Thank you.
Drug regulation
(Ley de narcomenudeo)
Ley de narcomenudeo: centralizing policy & decentralizing execution

<table>
<thead>
<tr>
<th>Federal Criminal Code And federal jurisdiction</th>
<th>Large-scale drug dealer</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Produce, traffic, transport, trade, supply, prescribe, introduce in and out of the country, promote and channel inputs or funding. 10 to 25 years (article 194, CPF).</td>
<td></td>
</tr>
<tr>
<td>• Possess with the intention of one of the previous conducts. 5 to 15 years (article 195, CPF).</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>General Health Law and local jurisdiction</th>
<th>“Heavy” user</th>
<th>Small-scale dealer</th>
<th>“Would be” small-scale dealer</th>
</tr>
</thead>
<tbody>
<tr>
<td>• When possession cannot be considered with the intent to deal or supply.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• 10 months to 3 years (article 477, LGS).</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Dealing or supplying, (even for free).</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• 4 to 8 years (article 475, LGS).</td>
<td></td>
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</tr>
<tr>
<td>• When possession is with the intent to deal or supply.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• 3 to 6 years (article 476, LGS).</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>General Health Law and local jurisdiction</th>
<th>User</th>
<th>Drug dependent</th>
<th>Micro-dealer?</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Any user that does not present any symptoms of dependence.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Quantities lower than those fixed in the Table.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Treatment is suggested.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Article 192bis and 478, LGS.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Anyone who presents a symptom of dependence.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Quantities lower than those fixed in the Table.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Treatment is mandatory.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Article 192bis and 478, LGS.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Deals or supplies but in quantities lower than those fixed in the Table.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• This conduct does not exists in the law, but it would have to be equated.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Federal Attorney General assumes jurisdiction when:
• Organized crime
• On demand
Federal sentenced prison population

- **Drug crimes**: 30,206
- **Weapons crimes**: 12,293
- **Property crimes**: 7,326
- **Organized crime**: 7,326
- **Homicide**: 6,421
- **Kidnapping**: 3,111

60% were sentenced for drug crimes

Criminalization of consumers: federal sentenced prison population by drug crime

- **Transport**: 40%
- **Possession**: 25%
- **Wholesale**: 9%
- **Traffic**: 6%
- **Retail**: 4%
- **Consumption**: 1%
- **Others**: 14%

Criminalization of consumers: federal drug crime prisoners by type of drug

Drug criminals by value of drugs in USD

- More than $76,000: 29%
- $7,600 – $76,000: 30%
- $400 – $7,600: 21%
- Less than $400: 20%