POLICY CONSIDERATIONS:
The Class-Wide Scheduling of Fentanyl-Related Substances

by Lars Trautman

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Right on CRIME

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Executive Summary

Over the last decade, the dangerous evolution of fentanyl from an obscure medication to one of the leading causes of accidental drug overdose in the United States has left crippled communities and perplexed justice system and public health officials in its wake. The American public is now excruciatingly aware of fentanyl's deadly power as it is increasingly discovered in all manner of illicit and seemingly more benign drugs. The threat profile has now grown even more dangerous as drug traffickers have flooded the black market with a host of fentanyl analogues to boost their profits and stay a step ahead of law enforcement.

In response to the evolving threat presented by these designer drugs, in 2018 the Drug Enforcement Administration (DEA) temporarily categorized all fentanyl-related substances (FRS)—those substances with a chemical structure similar to fentanyl, but not individually listed on federal drug schedules—as a Schedule I controlled substance under the Controlled Substances Act (CSA; Schedules of Controlled Substances, 2018). FRS could already be prosecuted, but the DEA's temporary scheduling order simplified the process for federal prosecutors. However, the prospect of undesirable collateral consequences has stymied a longer-term resolution of this temporary scheduling order, resulting in a series of temporary extensions by Congress, with the most recent set to expire on December 31, 2024 (P.L. 117-328).

This paper seeks to inform the debate among policymakers of whether to extend, allow to expire, or modify this class-wide scheduling of FRS. It begins by delving into the treatment of fentanyl, its analogues, and FRS by federal criminal law, the history of the class-wide scheduling order, and relevant data on federal prosecutions of these substances in recent years. Next, it explores the possible benefits and negative consequences of the class-wide scheduling of FRS, followed by the options available to policymakers to improve policy outcomes in the face of either an extension or expiration of class-wide scheduling. Finally, it weighs these options and makes recommendations on how to improve federal sentencing on fentanyl, its analogues, and FRS, including measures to reorient sentencing away from drug weight and toward other sentencing enhancement factors.

Key Points

- The initial, temporary, class-wide scheduling of all fentanyl-related substances was an understandable response to the dramatic rise of designer opioids, but it has limitations as a permanent solution.
- A straight extension of the class-wide scheduling order could result in unjust prosecutions and disparate sentencing outcomes as well as inhibit valuable research.
- A simple lapse without additional policy measures would similarly miss out on any deterrent or prosecution-related benefits of class-wide scheduling.
- Policymakers could improve either an extension or a lapse of the fentanyl-related substances class-wide scheduling order by enacting supplemental measures to mitigate costs, boost prosecutions, and support research.
- The complexities of the fentanyl-related substances class-wide scheduling debate suggest that Congress should use this debate as an opportunity to revisit fentanyl sentencing more broadly.

Facts and History

Although the opioid epidemic has ravaged American communities for decades, fentanyl and other synthetic opioids only entered the picture as a significant threat in 2013 during the so-called third wave (Centers for Disease Control and Prevention, n.d.-a). From 2001 to 2013, the DEA reported fewer than 1,000 drug seizures involving fentanyl per year; in 2014, this number rose to 4,697 (U.S. Sentencing Commission, 2021b, p. 6). By 2016, the DEA reported 34,199 seizures involving fentanyl, with synthetic opioids displacing both heroin and prescription medications as the leading cause of opioid-related deaths (U.S. Sentencing Commission, 2021b, p. 6; Centers for Disease Control and Prevention, n.d.-b). This rise is more easily understood in light of fentanyl's incredible potency—around 30 times that of heroin (U.S. Sentencing Commission, 2021b, p. 8). As a result, a smaller quantity is required for the same high, making it more easily trafficked, readily mixed into other substances, and frequently hidden from its users. Further, because fentanyl is a synthetic drug, it can be produced in a laboratory (rather than grown) and its chemical structure altered to make fentanyl analogues. Both of these factors complicate law enforcement's job.

Fentanyl and its analogues are highly restricted under the CSA, and federal law provides for substantial criminal penalties connected to their illegal possession and distribution. The CSA provides that substances may be placed on one of five "schedules" based on their risk of abuse and known medical uses, with their use and transfer restricted accordingly. Ordinarily, each substance is assessed and potentially scheduled on an individual basis; class-wide scheduling involves placing a whole category of substances on a schedule based on a shared core chemical structure. Although fentanyl and many of its analogues share a high risk of abuse, the legitimate medical uses for fentanyl, such as the treatment of severe pain in advanced cancer cases, mean that it is on Schedule II while fentanyl analogues appear on the more restrictive Schedule I, with the exception of a few individually listed analogues with known medical uses, generally as treatments for pain (U.S. Sentencing Commission, 2021b, p. 6). Criminal penalties similarly reflect a lighter treatment of fentanyl versus its analogues. Mandatory minimum penalties for fentanyl trigger at 40 grams (5-year minimum prison sentence) and 400 grams (10-year minimum prison sentence) whereas analogues trigger at only 10 grams (5-year minimum prison sentence) and 100 grams (10-year minimum prison sentence; 21 U.S.C. 841). To qualify as an analogue and open a person to potential prosecution under the Federal Analogue Act, a substance must (a) have a substantially similar chemical structure to a controlled substance in Schedule I or II and (b) either have a substantially similar stimulant, depressant, or hallucinogenic effect on the central nervous system or the defendant must intend or represent that it does have such a substantially similar effect (21 U.S.C. 802(32)).

The number of fentanyl-related prosecutions at the federal level has tracked the dramatic uptick in DEA seizures. In four years, the number of federal fentanyl cases exploded by 3,592%, from a mere 24 in fiscal year 2015 to 886 in fiscal year 2019 (U.S. Sentencing Commission, 2021b, p. 2). The increase in fentanyl analogue cases has been even more dramatic: a 5,725% increase (from 4 to 233 cases) between fiscal years 2016 and 2019 (p. 4). The sentences connected to fentanyl and its analogues have diverged, however. As of 2019, those convicted of fentanyl-related charges typically face shorter prison terms (74 months on average) than those convicted of fentanyl analogue–related charges (97 months on average; p. 39). The demographics of these offenders show that fentanyl and fentanyl analogue offenders are overwhelmingly male (84.1% for fentanyl, 90.1% for fentanyl analogues), more likely to be U.S. citizens than other drug offenders (85.1% for fentanyl, 96.1% for fentanyl analogues, and 78.3% for other drugs), less likely to be Hispanic (33.9% for fentanyl, 9.1% for fentanyl analogues, and 44.9% for other drugs), and more likely to be Black (40.5% for fentanyl, 58.9% for fentanyl analogues, and 26.5% for other drugs; p. 24).

At the end of 2017, the DEA filed notice that it intended to temporarily schedule all FRS, including those not yet discovered, as Schedule I substances, thereby bypassing the test under the Federal Analogue Act for all FRS. The DEA justified leveraging its temporary scheduling authority—which allows it to schedule a substance without congressional approval for a two-year period, with the possibility of a one-year extension—on the need to combat a dramatic rise in new fentanyl analogues (Schedules of Controlled Substances, 2018). Congress has since been unable to resolve the question of whether to permanently extend this order or allow it to expire, instead passing a series of short-term extensions. The current congressionally ordered class-wide scheduling expires on December 31, 2024 (P.L. 117-328).

The FRS class-wide scheduling order has coincided with a substantial decrease in the number of FRS encounters reported by the DEA. In 2016 and 2017, law enforcement reported 7,058 encounters with fentanyl analogues not individually scheduled by name; in 2018 and 2019 this

figure dropped to 787, though that number does not take into account another 5,065 reports of 11 analogues that were individually scheduled around the time of the class-wide scheduling order (and thus qualified for the 2016–17 totals, but were not included in those for 2018-19; U.S. Government Accountability Office, 2021, pp. 54–55). However, this timely decrease does not necessarily demonstrate causality, with other factors, such as a crackdown in China—the largest supplier of these drugs at the time of the DEA order—likely contributing. Finally, as of December 2020, U.S. Attorneys offices had prosecuted only eight cases under the new class-wide scheduling of FRS (p. 19).

Potential Benefits of Class-Wide Scheduling of FRS

Deterrence

One of the primary motivations behind the class-wide scheduling of FRS is deterrence. Specifically, supporters of class-wide scheduling argue that covering an entire family of substances removes any ambiguity regarding the criminal treatment of FRS under federal law, thereby reducing the incentive for criminal organizations to develop new FRS (Schedules of Controlled Substances, 2018, p. 5190). Any new variants will be unequivocally criminalized, and their prosecution streamlined, eliminating any prosecution-related benefit to defendants of possible new FRS.

Ease of Prosecution and Incapacitation of Offenders

Closely related to the deterrence argument is the reduction of the burden of prosecuting FRS offenses, thereby improving public safety by more efficiently incapacitating offenders. A prosecution of an analogue under the Federal Analogue Act requires additional resources beyond those required in a prosecution involving a substance scheduled by name, including extensive expert testimony about the chemical structure and pharmacological effects of the substance in question (U.S. Government Accountability Office, 2021, p. 59). This increases the costs of prosecution (and defense) while introducing additional uncertainty regarding the outcome of the case. Class-wide scheduling eliminates these issues since there is no need to prove beyond a reasonable doubt the similarity of chemical structure or pharmacological effect, which allows prosecutors to pursue these cases with fewer resources and greater confidence. Further, these benefits potentially trickle down to the state level since many states explicitly reference federal drug schedules in their own drug laws (see, e.g., Mass. Gen. Laws Ch. 94C §31; Tenn. Code § 39-17-403; Texas Health and Safety Code 481.034). Federal class-wide scheduling effectively becomes state class-wide scheduling in many of these instances. Given that state prosecutors typically labor with fewer resources to begin with, this class-wide scheduling may have an outsized impact on their ability to pursue FRS-related cases effectively.

Consistent Criminal Treatment of Substances

Effectively removing the question of whether a substance qualifies as an FRS from jury consideration has the added benefit of consistency. Under the Federal Analogue Act, there is no precedential value to a conviction; a guilty verdict in one case does little to prevent a future jury from acquitting a different defendant for the same substance. Assuming that this split was not the result of the intent prong of the Federal Analogue Act, such a result would represent a manifest injustice. Class-wide scheduling eliminates this possibility for FRS. This benefit, however, is likely to be quite limited. There is no evidence that jury splits of this nature are frequent occurrences—indeed, it is unclear whether they have even occurred—and thus far, federal prosecutors have pursued relatively few cases subject to the class-wide scheduling authority (U.S. Government Accountability Office, 2021, pp. 57–58). The U.S. Department of Justice (DOJ), however, further suggests that, regardless of such splits, removing this question from juries is still valuable because juries are simply unqualified to make these kinds of highly technical judgments (U.S. Department of Justice, 2021, p. 3). Finally, DOJ notes that class-wide scheduling provides greater notice to individuals in the U.S. as to exactly which substances are illegal.

Potential Drawbacks of Class-Wide Scheduling of FRS

Deterrent Effect May Be Minimal

The actual deterrent value of class-wide scheduling is difficult to determine and may well be quite low , as it frequently is for sanctions-based deterrence policy (Paternoster, 2010; Tonry, 2008). As already noted, although the number of FRS contacts reported to the DEA declined significantly following the class-wide scheduling order, other factors may explain some or all of this drop, particularly new policies in China that nearly eliminated the flow of fentanyl, fentanyl analogues, and FRS from that country. Further, the possibility of using a new FRS to elude prosecution is not the only reason that a criminal organization might wish to experiment with new FRS formulas. Other rationales untouched by the class-wide scheduling order include the possibility of creating a more potent (and thus more profitable) alternative or one that is more difficult for law enforcement to detect in the first place.

Unnecessary for FRS Prosecutions

One of the primary arguments against the class-wide scheduling of FRS is that it is driven by perceived efficiency rather than necessity. After all, class-wide scheduling was advanced not because prosecutors were unable as a matter of law to pursue FRS prosecutions, but because the resources required were deemed excessive and the uncertainty of outcomes considered undesirable. Aside from concerns around the difficulties of a lay jury to assess expert testimony, the Federal Analogue Act may prove the superior legal vehicle for FRS prosecutions in many instances. It contains a flexible definition of related substances while requiring prosecutors to then prove similar effect or intended effect. In so doing, it permits prosecutors to pursue a wide range of dangerous substances while preserving additional due process safeguards for the defense. In short, it provides a prosecutorial framework that will typically be more accurate at identifying wrongdoing, though it will also be more expensive as a result.

Prosecutions of Nonhazardous Drugs

A related criticism leveled against the class-wide scheduling of FRS is its overbreadth. By criminalizing a whole category of substances based purely on chemical structure, the order will inevitably include numerous substances with no inherently harmful effect, unlike fentanyl. As a result, individuals could, in theory, be incarcerated for lengthy periods of time for possessing inert substances with no relationship to public safety or health . While one might hope that law enforcement would exercise discretion against bringing cases in these instances, if they do not have an incentive to determine the possible effects of a given substance, then they may not even realize that they are pursuing cases based on inert substances. Less scrupulous government officials may also use the presence of one of these innocuous FRS simply to leverage a guilty plea or longer sentence in a case involving other drugs , similar to how prosecutors can unduly skew plea negotiations in their favor through overcharging or threatening defendants with charges with mandatory minimum sentences. Furthermore, the aforementioned relationship between federal drug schedules and state drug prohibitions means that these potential negative effects could, once again, trickle down to the state level as well.

Disparate Treatment and Disproportionate Sentences

Although the class-wide scheduling order for FRS does not alter the mandatory minimum sentencing regime currently in place for fentanyl analogues, expanding the list of criminalized substances and making FRS prosecutions easier nevertheless risks exacerbating preexisting issues related to fentanyl analogue sentencing. FRS are frequently mixed with other substances, and the full weight of the mixture—whether it is 100% FRS or less than 1% FRS—serves as the relevant weight for mandatory minimum sentencing. As a result, a defendant may effectively get sentenced harshly due to the weight of adulterants rather than the FRS. For example, a defendant with 9 grams of pure FRS will not trigger a mandatory minimum, while one with 0.1 grams of FRS mixed with 10 grams of adulterant will trigger it. The specter of a mandatory minimum itself can create the problem of undue prosecutorial leverage, with the prosecutor able to creatively drum up and then drop charges during plea negotiations. This, in turn, creates a risk that an innocent person will plead guilty to avoid a substantial minimum sentence or that a guilty one will feel unduly pressured into giving up their constitutional rights.

Further, the triggering thresholds for FRS are lower than many other dangerous drugs, such as fentanyl and heroin. The presence of a detectable amount of FRS, even if very small relatively speaking, will turn into a sentencing enhancement in these cases. In addition, data from the U.S. Sentencing Commission suggest that this enhancement has a racial skew in practice , given that individuals convicted of fentanyl analogue offenses are much more likely to be Black than those convicted of fentanyl or other drug offenses (U.S. Sentencing Commission, 2021b, p. 24). Such disparate sentences for what, in many instances, is essentially the same drug bears an unfortunate and striking resemblance to one of the more significant mistakes of the War on Drugs: the unjustified disparity between crack and powder cocaine sentences. Despite these two forms of cocaine producing an almost identical pharmacological effect, Congress established mandatory minimum sentences that originally set in at a 100:1 weight ratio (500 grams for powder cocaine and 5 for crack cocaine), resulting in a disproportionate number of Black defendants receiving very lengthy sentences (U.S. Sentencing Commission, 2007).

Research Inhibition

In addition to its criminal justice effects, the class-wide scheduling of FRS has ramifications for research. In particular, the possibility that criminalizing all FRS will deny the public a life-saving or other beneficial drug that happens to be in the FRS family. In particular, research organizations have highlighted the potential for FRS to be used in pain or overdose treatment (U.S. Government Accountability Office, 2021, pp. 36–37). Researchers who wish to study a substance that is placed on Schedule I must undergo a more rigorous process than for substances on

the other drug schedules (U.S. Government Accountability Office, 2021). These additional burdens may disincentivize research into these Schedule I substances, limit which researchers have access to them, and otherwise slow or stymy these research objectives (U.S. Government Accountability Office, 2021, pp. 44–47; Comer, 2020. p. 5).

Policy Considerations for Permanently Resolving FRS Scheduling

The substantial arguments offered in support and opposition of the class-wide scheduling of FRS suggest that a simple extension or lapse of the class-wide scheduling order alone will not fully resolve the issue. Without additional measures, undesirable consequences or missed opportunities will result from either action. As such, Congress should consider supplemental policies that could help improve outcomes on either side of the class-wide scheduling divide; indeed, the ability of these policies to mitigate some of the negative effects of extension or lapse should itself factor into that underlying scheduling decision itself.

Ultimately, the class-wide scheduling decision is not a zero-sum game with law enforcement and public safety on one side and research and civil liberties on the other. With sufficient modifications in place, Congress could reasonably choose either an extension or lapse of class-wide scheduling for FRS, treading a middle ground that captures most of the benefits of each path. However, despite being a close question, the costs of class-wide scheduling combined with shortcomings in possible ameliorating modifications of such an order ultimately give the edge to a lapse accompanied by supplemental measures.

Policy Modifications to an Extension

In 2021, an interagency working group with representatives from the Office of Drug Control Policy, the Department of Health and Human Services, and the Department of Justice outlined a class-wide scheduling extension proposal that sought to neutralize the primary objections to the class-wide scheduling of FRS (White House, 2021). It addressed the conviction for a nonhazardous FRS problem by recommending a process to challenge such convictions and sentences based on later evidence on the nonhazardous nature of the FRS in question. It likewise recommended new authorities streamlining the delisting of medically useful or inert FRS. It similarly suggested excluding FRS from all mandatory minimum sentences, except those involving a drug-related serious injury or death, in order to avoid exacerbating the negative effects of mandatory minimums and disparate sentencing outcomes. It also outlined steps to streamline research applications involving FRS to reduce the burdens associated with a substance's placement on Schedule I.

The Biden administration's interagency plan demonstrates the difficulties inherent in attempting to limit unwanted consequences from class-wide scheduling. Excluding FRS cases from mandatory minimum sentences reduces the risks of disproportionate and unjust sentences that those can create, yet this grants FRS favored status compared to individually listed fentanyl analogues, and thus may make the development and trafficking of FRS more attractive. Permitting an individual to challenge their conviction or sentence based on later evidence that the substance is medically useful or inert is likewise an incomplete remedy. It cannot undo any harm already caused by the conviction or period of incarceration that has already been served while permitting this type of challenge during the pendency of a case would undermine the whole purpose of class-wide scheduling to begin with. In addition, these mitigation measures would not extend to any state prosecutions commenced pursuant to state law dependent on the federal drug schedules.

Policy Modification to a Lapse

While modifications to an extension aim to counter the negative consequences of that decision, modifications to a lapse must instead attempt to replicate the benefits of class-wide scheduling. Since prosecutors already possess the ability to pursue FRS prosecutions under the Federal Analogue Act, policymakers could aim to improve deterrence and ease of prosecution through provisions that strengthen these prosecutions. Specifically, Congress could consider reducing the burden of these prosecutions by enacting legislation stating that FRS automatically qualify as "substantially similar" substances under the Federal Analogue Act, thereby eliminating one of the prongs that prosecutors must prove—but not both of them as class-wide scheduling does. Similarly, appropriators could reallocate funding—and attach restrictions, if need be—for DOJ to pursue and prioritize these cases. With state prosecutions also potentially affected by any scheduling decision, they could extend greater aid to these efforts as well. Likewise, Congress could expand the government's capabilities to individually schedule substances so that it could more rapidly schedule FRS as necessary. Finally, the problem of consistent criminal treatment of a substance could be addressed, in part, by enacting a rule requiring the temporary scheduling of any substance resulting in a federal conviction as an analogue with a substantially similar effect.

Distributing fentanyl and its harmful analogues creates an inherently dangerous situation, whether anyone ends up actually overdosing on a given batch or not. Sentencing policy should work to discourage the creation of this environment as well as anything that makes it even more risky than it already is.

These policy modifications appear able to mimic many of the effects of class-wide scheduling, without similar negative consequences. Additional resources and a possible slight amendment to the Federal Analogue Act, for example, would likely replicate many of the ease of prosecution benefits. Active use of temporary scheduling authorities and more aggressive and well-resourced permanent scheduling could likewise make the risk of inconsistent jury verdicts much smaller, though it would have a lesser effect on the uncertainty of jury verdicts more generally in these cases. This, of course, still leaves deterrence. However, it is difficult to determine the deterrent value of class-wide scheduling, let alone how that might compare to a policy of ensuring that no FRS case is left behind under the Federal Analogue Act.

Sentencing Enhancements

The complexities underlying the FRS class-wide scheduling decision point toward the need to revisit sentencing policies for the entire category of fentanyl and fentanyl analogue substances, particularly the overreliance on the weight of drugs involved in a case. At best, the weight of drugs involved is only a rough indicator of the severity of criminal conduct at issue; a drug courier, for example, typically handles much more than the leader of a drug trafficking organization, yet the latter individual clearly bears more responsibility. In fentanyl and fentanyl analogue cases, however, the relationship between drug weight and the severity of conduct is frequently even more attenuated. This is due to the incredible potency of these substances and the fact that drug weight is calculated based on the overall weight of a mixed substance. So long as fentanyl or a fentanyl analogue is detectable, its purity is irrelevant to weight-based enhancements. Thus, the mandatory minimum sentencing thresholds are not triggered by the weight of the fentanyl; indeed, someone trafficking a more concentrated batch will actually be less likely to trigger this sentencing enhancement. Current sentencing policy incentivizes the creation of more powerful alternatives that can more readily slip under these thresholds as well as the trafficking of more potent mixtures—a clearly undesirably policy outcome .

De-emphasizing drug weight by eliminating or reducing the frequency with which these mandatory minimum sentences trigger and instead dealing with drug weight through the more flexible sentencing level system avoids these pitfalls and better match sentences to wrongfulness. Other worthwhile factors already considered under the federal sentencing level system, such as the possession of a dangerous weapon, involving minors in the offense, and attempts to counterfeit or mislead individuals about the presence of fentanyl, would gain newfound relative strength once drug weight becomes less dominant in the sentencing calculus (U.S. Sentencing Commission, 2021a). To the extent that relevant factors are not included within the existing level allocations, or Congress determines they do not adequately reflect the severity of the conduct in question, Congress should direct the U.S. Sentencing Commission to revise them accordingly. Indeed, the assignment of the same offense score level increase (2) to nearly every enhancement—equating, for example, the use of violence in a drug offense with the distribution of an anabolic steroid to an athlete—strongly suggests this kind of rebalancing may be overdue.

Congress may similarly wish to revisit the treatment of cases involving drug distributions resulting in serious injury or death. Distributing fentanyl and its harmful analogues creates an inherently dangerous situation, whether anyone ends up actually overdosing on a given batch or not. Sentencing policy should work to discourage the creation of this environment as well as anything that makes it even more risky than it already is. This means targeting actions such as misrepresenting the contents of a substance, thereby inducing an individual to unknowingly ingest fentanyl or its analogues, or altering a mixture in such a way as to make it more deadly. At present, however, the 20-year mandatory minimum associated with distribution resulting in serious injury or death means that bad luck can alter a sentence more than malice and more dangerous behavior (21 U.S.C. § 841). Congress could thus better align policy with desired outcomes by narrowing the mandatory

minimum to those cases involving misrepresentation or other indicators that the defendant willfully increased the odds of an overdose, or by converting the enhancement entirely into a series of sentencing level enhancements that could address the issue with greater nuance.

Conclusion

The rise of fentanyl and fentanyl analogues results in considerable damage to American communities and continues to create a host of challenges for law enforcement and public health authorities. The prospect of ever evolving chemical compounds is concerning and the 2018 temporary class-wide scheduling order for FRS was a rational initial response to the problem of designer drugs. However, the consequences of this order and its subsequent extensions are complex and show that the issue cannot be resolved simply through its permanent extension or a return to the prior status quo without creating unnecessary harms. While Congress could advance its policy aims through either an extension or lapse, with the appropriate additional policy modifications in either instance, a close examination suggests that a lapse with modifications strategy may do so more successfully.

At the same time, the considerations necessary for either course of action on the class-wide scheduling order demonstrate that Congress should not content itself with merely resolving the issue of that order's sunsetting. Instead, it should use this opportunity to reconsider sentencing relating to the fentanyl family of substances more broadly and attempt to better align it with the severity of conduct in each case. Sentencing alone, of course, cannot resolve this crisis. Yet, it is an important piece of the puzzle and one that Congress should ensure better fits into an effective, comprehensive response to this ongoing public health emergency.

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Trautman earned his B.A. in political science from Johns Hopkins University, his M.A. in politics and international studies from Uppsala University in Sweden, and his J.D. from the University of Virginia School of Law. He lives in Austin, TX, with his wife and two children.

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