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# The Drug War's Impact on Executive Power, Judicial Reform, and Federalism in Mexico

JUAN D. LINDAU

The drug war, and the Mexican government's increasingly assiduous pursuit of drug-trafficking organizations, complicates the country's institutionalization of democracy in a number of ways. The intensification of the drug war in Mexico has come during the waning decades of an authoritarian regime and the first years of a nascent democracy. The drug war hinders fundamental democratic institutional development, or more accurately, fosters the expansion of non-democratic institutions and practices. These effects come against the backdrop of genuine democratic gains during the last two decades, including the development of transparent and credible electoral procedures, the emergence of an assertive, divided legislature, judicial reforms, and increases in substantive federalism.

Juxtaposed against this real democratization, the drug war preserves certain authoritarian proclivities of the Mexican state and fosters corruption and impunity, reducing the efficacy of judicial reforms and complicating the professionalization of the judicial branch. The security crisis engendered by the drug war fosters expanded executive power. At the same time, the drug war undermines federalism, increasing the power of the central government vis-à-vis states and municipalities.

The executive branch, whose agencies conduct this war, has experienced a partial renewal of its power and scope after a decline in its authority following the country's transition to democracy. The pursuit of a security agenda, indeed the elevation of a security agenda above other functions and priorities of the government, increases the power of the least-transparent, least-accountable portions of the regime. The expanded role of the military in every facet of

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the drug war elevates its institutional centrality and strength—a significant development, given its opacity and insistence on institutional autonomy. The military’s ability to detain drug suspects and engage in asset and weapons seizures creates a parallel law enforcement apparatus that is even less accountable or transparent, because of its institutional autonomy, than the federal police forces. Though the greater institutional coherence and internal discipline of the military make it less corrupt than its counterparts in the federal police and judicial apparatus, these same traits make it ultimately less subject to civilian democratic controls.

Additionally, the drug war encourages the presidency to seek or exercise extraordinary powers, including those associated with states of emergency (*estados de excepción*), allowing greater scope for the suspension of constitutional rights. The substitution of the military and federal police agencies for police forces at the state and local level subverts federalism and acts to further impede the construction of an independent judiciary and an effective law enforcement apparatus in Mexico’s states and municipalities. Moreover, states and municipalities, rather than seeing an increase in their resources, particularly those devoted to constructing effective local law enforcement and improving the administration of justice at these levels of government, continue to suffer from a relative lack of such funding, as the center consumes these monies. All of these effects come on top of growing corruption, accelerating violence, human rights violations, and the expansion of the penitentiary and garrison functions of the state.

As both James Madison and Alexis de Tocqueville observed, war, and the reliance upon institutions designed to conduct war, increases the power of the central government, undermining federalism, while also expanding the power of the executive branch, altering the relative strength of the different branches of government.<sup>1</sup> Habeas corpus and other fundamental rights experience assaults, as well, in the climate that war engenders, particularly a seemingly perpetual and endless war. The government demands ever-greater powers to successfully conduct the war, and, in the name of providing greater security, may abandon or relax legal norms. These effects are pronounced when the war is against a ubiquitous internal and clandestine enemy. The nature of this enemy requires the state to adopt methods, including the use of informants, *agents provocateurs*, surveillance, and wiretapping that are most injurious to civil rights. The imperative need to gather information about an elusive enemy encourages the adoption of highly coercive interrogation techniques and the use of detention practices that depart from due process norms.

<sup>1</sup> James Madison, *Letters and Other Writings of James Madison, Fourth President of the United States*, vol. 4 (Philadelphia, PA: J.B. Lippincott and Co, 1865), 491; Alexis de Tocqueville, *Democracy in America*, vol. 2, Phillips Bradley, ed. (New York: Vintage Books, 1945), 284; Alexander Hamilton, *The Federalist Papers* #8, Clinton Rossiter, ed. (New York: Penguin, 1961), 66–71.

Mexico's experience in all of these regards is not unique. Other Latin American countries involved in the drug war, notably Colombia and Peru, have experienced all of these effects. In both countries, the drug war helped to encourage an expansion in the power of the central government, and particularly of the coercive organs of the state. In both, executive power increased dramatically (most notably under Alberto Fujimori in Peru and Alvaro Uribe in Colombia). Rule by decree, an increase in human rights violations, and the expansion of both a penitentiary and a garrison state marked both countries. In both, as well, and of particular consequence to this article, the drug war produced a general decline in democratic performance.<sup>2</sup> Mexico's still new and incomplete democratic institutions have felt these consequences very strongly.

The demise of Mexico's dominant-party state in the late 1990s, culminating in the election of an opposition candidate for president in the 2000 elections, left an institutional void that allowed drug cartels to flourish. As Sam Quinones notes, "Centralized control was gone but nothing effectively took its place. The vacuum unleashed new opportunities for criminality, and Mexico's institutions were not up to the new threats that emerged."<sup>3</sup> The PRI (Party of the Institutionalized Revolution), which had ruled for 70 years, used cooptation and coercion, along with a host of other practices, to construct governability. These practices governed its behavior toward drug trafficking organizations, as well, creating a set of unwritten rules that partially regulated the conduct of these organizations and their relationship (heavily tinged with corruption) with the Mexican state. Concurrently, a number of other factors allowed Mexican cartels to expand their scope and power. Finally, efficacious law enforcement measures against top drug traffickers ended a relatively oligopolistic production and distribution system, promoting the development of several rival regionally based organizations that began a violent competition with each other over markets and territory. Thus, a somewhat regulated system of production and distribution became fractured, engendering even greater incentives for these organizations to try to corrupt the Mexican government in order to gain advantage over each other, and to use escalating levels of violence in order to expand or secure their market position. This struggle led them to pursue ever more sophisticated weaponry and to recruit the best-trained and best-armed members of the Mexican law enforcement and military apparatus to act as foot soldiers in this conflict.

<sup>2</sup> Maria Clemencia Ramirez Lemus, Kimberly Stanton, and John Walsh "Colombia: A Vicious Circle of Drugs and War," in Coletta A. Youngers and Eileen Rosin, eds., *Drugs and Democracy in Latin America: The Impacts of U.S. Policy* (Boulder, CO: Lynne Rienner, 2005), 99–143. Isaias Rojas, "Peru, Drug Control Policy, Human Rights and Democracy," in Coletta A. Youngers and Eileen Rosin, eds., *Drugs and Democracy in Latin America: The Impacts of U.S. Policy* (Boulder, CO: Lynne Rienner, 2005), 185–231.

<sup>3</sup> Sam Quinones, "State of War," *Foreign Policy* (March/April 2009): 76–80, at 78.

All of these consequences, increasingly evident since the late 1960s and early 1970s became especially manifest in the last five years, attracting much international commentary in the years since 2009. Truly an *annus horribilis* for Mexico, 2009 began with the release of a report, prepared by the Joint Forces Command in the Pentagon, and presented to President Barack Obama by Dennis Blair, the U.S. Director of National Intelligence. This report concluded that Mexico was becoming a potential failed state, on a par with Pakistan. The report expressed particular concern about rapidly rising drug-related deaths in Mexico and the expansion of fiefdoms under the effective control of drug trafficking organizations. The U.S. press, both printed and electronic, widely covered this report during the month of January. The Mexican government responded to the flood of adverse publicity with strong denials of the truth of this allegation and by sending thousands of Mexican troops to assume law enforcement activities in the border cities that were the locus of most of the violence.

#### MEXICO'S AUTHORITARIAN REGIME AND THE TRANSITION TO DEMOCRACY

The steady intensification of the drug war meant that the transition to democracy in Mexico occurred in tandem with a steadily deteriorating security situation. The authoritarian institutions and governing arrangements that had constructed governability in the post-Revolutionary period eroded even as the challenges facing the Mexican state grew. The post-Revolutionary regime contained a number of *sui generis* elements that reflected the need to reconcile the requirements of governability and economic development (as understood by the political elite) with the forms established by the 1917 Constitution. A number of these forms reflected a long-standing attachment to liberalism dating back to the early nineteenth century. For example, a *de jure* federal façade overlay the highly centralized post-Revolutionary regime. Although federalism, reflecting the popularity of Montesquieu's ideas among Mexican Liberals, had been part of the country's political landscape almost since independence from Spain in the early nineteenth century, federal forms lacked real substance, reflecting the need to construct governability in a highly fractured and conflictual country. The centralizing impulse that marked Mexican history gained even greater force after the Mexican Revolution. Thus, though the 1917 Constitution contained federal understandings, the practical exigencies of government robbed these forms of much substance.<sup>4</sup>

Moreover, although Liberals dominated the country's political life after the middle of the nineteenth century, they confronted a fundamentally feudal social environment. Without the social requisites for liberalism, without a

<sup>4</sup> Lorenzo Meyer and Hector Aguilar Camín, *In the Shadow of the Mexican Revolution: Contemporary Mexican History 1910–1959* (Austin: University of Texas Press, 1993).

significant property-owning class to give these forms political content, liberal elements soon became a façade overlying authoritarian ruling practices and structures. This complicated combination of liberalism and authoritarianism marked both the Porfirian dictatorship (1878–1910) and the regime that arose after the Mexican Revolution (1910–1917) that overthrew this dictatorship.

The 1917 Constitution, in addition to federalism, formally enshrined the separation of powers and included rights such as freedom of speech, movement, and assembly. Continuing conflict after the Revolution, however, led to the creation of a ruling party and an extraordinarily strong presidency, producing a much more authoritarian regime. The strength and reach of the ruling party prevented the genesis of a viable opposition, transforming elections into ratification rituals. Simultaneously, the dependence of states and localities on central government revenues ensured their continuing debility while the concentration of power in the hands of the president (who served for a six-year, non-renewable term) created a completely subordinate legislature and judicial branch.

The primacy of the president during this period was less a product of institutional design than of the dominance of the PRI.<sup>5</sup> The PRI's control of Congress and the president's control of the PRI made the executive branch extraordinarily strong, turning the legislature into a ratifying body rather than a source of law.

A number of serious political mistakes (including the repression of students in 1968) and economic deterioration during much of the 1970s and 1980s diminished the PRI's popularity and the regime's legitimacy. This forced the government to begin a gradual process of political reform in the late 1970s that accelerated in the 1980s and 1990s. These reforms allowed the opposition to contest elections ever more effectively, despite the use of widespread electoral fraud. By the late 1980s, opponents on both the left and the right were mounting ever stronger electoral challenges for the presidency. In fact, most observers concluded that the PRI had lost the 1988 elections for the presidency to the left, and only remained in power due to electoral fraud. By the late 1980s and early 1990s, two main opposition parties (and a host of smaller parties) had succeeded in altering Mexico's electoral landscape. These two parties were the PAN (National Action Party, the long-established party of the right) and the recently established PRD (Party of the Democratic Revolution, on the left).

Although the PRI managed to win the 1994 elections, opposition victories in congressional and gubernatorial elections continued to increase. This process culminated in the PRI's defeat in the 2000 presidential elections (by Vicente Fox of the PAN). Despite losing this election, the PRI retained a very

<sup>5</sup> Rogelio Hernandez Rodriguez, "Conflicto y colaboracion entre poderes. La experiencia reciente de los gobiernos divididos en Mexico," *Mexican Studies/Estudios Mexicanos* 21 (Winter 2005): 83–211, at 189.

strong presence in the legislature, allowing it, sometimes acting in conjunction with the PRD, to block many reform initiatives. The 2006 presidential elections were extraordinarily close, with the PAN's candidate, Felipe Calderon, barely securing a razor-thin and disputed victory against Andres Manuel Lopez Obrador of the PRD. Although the PRI's candidate, Roberto Madrazo, ran a distant third in the 2006 presidential elections, the party preserved its presence in the congress and in the state and local governments and surprised most observers by overwhelmingly winning the mid-term 2009 congressional elections.<sup>6</sup>

### THE DRUG WAR

The drug war effectively began in Mexico in the late 1960s and early 1970s, as the Mexican state, in response to U.S. pressures, enacted a variety of measures designed to reduce the flow of drugs crossing the border. The war intensified during the 1980s, as the administrations of Ronald Reagan and George H. W. Bush increased the domestic penalties in the United States for drug distribution and use and devoted significantly larger resources to supply reduction in drug-producing countries. Concurrently, Mexican cartels became ever more important organizations, in part because of successful U.S. government efforts to stop the flow of Colombian drugs into Florida.<sup>7</sup> Colombian drug routes shifted to Mexico, and Colombian cartels enlisted their Mexican counterparts as intermediaries. Eventually, Mexican cartels moved beyond this role, controlling a growing share of production and distribution.

Facing a deepening threat, the administration of Carlos Salinas (1988–94) embraced the U.S. definition of drug production, distribution, and consumption as a national security problem. The convergence of definitions of the problem in the late 1980s did not produce a dramatic shift in policy, although it accentuated the steady escalation of the drug war.<sup>8</sup> Successful prosecutions and extraditions to the United States of leading narcotraffickers fostered more violence as subordinates fought to control organizations and led to organizational multiplication as groups split off from each other. This process began in 1989, after the decapitation of the largest cartel (the Arellano Felix cartel). This cartel had exercised substantial control over the transshipment of drugs to the United States in the late 1970s and 1980s, dwarfing its smaller counterparts, the Rafael Caro Quintero and Enrique Fonseca organizations. Its

<sup>6</sup> Emily Edmonds-Poli and David A. Shirk, *Contemporary Mexican Politics* (Boulder, CO: Rowman and Littlefield, 2008); Daniel C. Levy and Kathleen Bruhn, *Mexico: The Struggle for Democratic Development* (Berkeley: University of California Press, 2006).

<sup>7</sup> Francisco E. Gonzalez, "Mexico's Drug Wars Get Brutal," *Current History* 108 (February 2009): 72–76, at 72.

<sup>8</sup> Ethan Nadelmann, *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (College Station: Pennsylvania State University Press, 1994); Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford: Oxford University Press, 2008).

rupture, following the arrest and incarceration of its leader, Manuel Arellano Felix, encouraged the proliferation of drug organizations.<sup>9</sup> At present, the major organizations are the Gulf Cartel, the Juarez Cartel, the Sinaloa Cartel, and *Los Zetas* (police call higher-ranking officers *Zetas*). Other somewhat more geographically confined groups, such as *La Familia*, concentrated primarily, although not exclusively, in the state of Michoacan and the central parts of the country, participate in an increasingly complex and violent struggle to control the market.

All of this has complicated law enforcement efforts, fostered more-extreme and ubiquitous violence, and drawn the Mexican police and military into ever more problematic relations with the drug cartels. By the first decade of the twenty-first century, the country found itself facing precisely the crisis that the Mexican government had sought to avoid—a profound national security threat.

#### THE EXPANSION OF THE FEDERAL NATIONAL SECURITY APPARATUS AND INCREASED EXECUTIVE POWER

In response to this threat, the federal law enforcement and national security apparatus (including the military) has grown significantly, particularly in recent years, increasing the power of the executive branch after long efforts to create a less super-presidentialist system.

Mexico's transition to democracy produced a *de facto* even more than a *de jure* decrease in the power of the Mexican president.<sup>10</sup> The development of a more fractious legislature complicated the passage of difficult legislation. Legislative gridlock and a more contentious relationship between the President and Congress marked and in many ways defined the administration of Vicente Fox. The resulting political paralysis on major issues, notably fiscal and energy reforms, highlighted the declining power of the presidency after the 2000 elections. The PAN, long the harshest critic of the scope of presidential power during the decades of PRI dominance, began to favor the expansion of executive power, now that it controlled the presidency.

The legislative paralysis that marked the Fox presidency, and the embrace of a security agenda, led Felipe Calderon to pursue efforts to expand his power. This effort has included a variety of initiatives, many connected to the drug war and the pursuit of security. Additionally, the executive's control over the national security agencies of the Mexican government has increased the weight of this branch of government. Although the legislative branch, as a product of the country's democratization, now exercises real control over the approval of the federal budget, the depth of the security crisis engendered by

<sup>9</sup> Tony Payan, "The Drug War and the U.S.-Mexico Border: The State of Affairs," *South Atlantic Quarterly* 105 (Fall 2006): 863–880, at 865.

<sup>10</sup> Stephen Haber, Herbert Klein, Noel Maurer, and Kevin Middlebrook, *Mexico Since 1980* (Cambridge: Cambridge University Press, 2008), 201.



the drug war creates an environment that encourages (and indeed almost requires) ever greater federal outlays (and the legislative ratification of such outlays) for the national security agencies tied to the executive branch.

Over the last decade, the drug war has prompted the expansion of certain parts of Mexican law enforcement tied to the executive branch, and a reallocation of resources within the national security apparatus. Although the size of the Federal Attorney General's office (PGR) increased by roughly 25 percent during the late 1990s, it remained relatively constant for a long time, oscillating between 20,000 and 22,000 personnel until 2008.<sup>11</sup> In 2009, however, even in the midst of an economic crisis, it expanded by roughly 10 percent to 24,725 and rose again, to 26,898 in 2010.<sup>12</sup>

For its part, the Secretaria de Seguridad Publica (Ministry of Public Security) more than doubled in size from 16,810 to 39,840 personnel between 2001 and 2009 and grew by almost 18 percent in 2010 to 46,873.<sup>13</sup> At the same time, the rubric devoted to "Order, Security and Justice" in the Mexican federal budget grew from 37.25 billion pesos in 2003 to 70.83 billion pesos in 2008.<sup>14</sup> In 2009, it increased to 85.56 billion pesos and to 89.6 billion pesos in 2010.<sup>15</sup> Most importantly, the portion of this spending directly controlled by the executive branch expanded most rapidly of all, increasing from 18.7 billion pesos in 2003 to 39.98 billion pesos in 2008, 54.13 billion in 2009, and 55.6 billion in 2010.<sup>16</sup> The budget of the National System of Public Security, part of the last rubric, has risen, as well, from 2.781 billion pesos in 1998 to 8.05 billion pesos in 2008.<sup>17</sup> The growth of funding for the federal law enforcement apparatus reflects the drug war's impact on federal spending, even in the midst of an economic crisis marked by falling revenues and a more constricted federal budget.

Additionally, the Mexican military has received much greater funding and has grown in size. It first became part of the drug war during the 1970s, initiating the Permanent Campaign against Drug Trafficking, which involved the deployment of tens of thousands of Mexican troops into drug-producing areas, where they engaged in eradication and interdiction activities. The military's

<sup>11</sup> Felipe Calderon, "Estadísticas Nacionales," *Segundo Informe Presidencial*: Oficina de la Presidencia, Gobierno Federal de Mexico, 16 September 2008, accessed at [www.informe.gob.mx](http://www.informe.gob.mx) 63, 10 June 2009.

<sup>12</sup> Felipe Calderon, "Estadísticas Nacionales," *Tercer Informe Presidencial*: Oficina de la Presidencia, Gobierno, Federal de Mexico, 16 September 2009, accessed at [www.informe.gob.mx](http://www.informe.gob.mx): 69, 10 December 2009. Felipe Calderon, "Estadísticas Nacionales" *Cuarto Informe Presidencial*: Oficina de la Presidencia, Gobierno Federal de Mexico, 16 September 2010, accessed at [www.informe.gob.mx](http://www.informe.gob.mx), 14 April 2011.

<sup>13</sup> Calderon, "Estadísticas Nacionales" *Tercer Informe Presidencial*: 69. Calderon "Estadísticas Nacionales" *Cuarto Informe Presidencial*, 73.

<sup>14</sup> *Ibid.*, 67.

<sup>15</sup> Calderon, "Estadísticas Nacionales" *Tercer Informe Presidencial*: 67. Calderon, "Estadísticas Nacionales" *Cuarto Informe Presidencial*, 71.

<sup>16</sup> Calderon, "Estadísticas Nacionales," *Segundo Informe Presidencial*, 61. Calderon, "Estadísticas Nacionales" *Cuarto Informe Presidencial*, 71.

<sup>17</sup> Calderon, "Estadísticas Nacionales" *Cuarto Informe Presidencial*, 72.

role in the drug war has contributed to a significant expansion of the institution. Over the last 30 years, it has more than doubled in size, from 102,975 members in 1980 to 258,875 members in 2010.<sup>18</sup> Military spending is divided into two rubrics, one for the Secretariat of National Defense (SEDENA) and one for the Secretariat of the Navy (SEMAR). Felipe Calderon, signaling the primacy of the security agenda that would characterize his administration, boosted defense spending shortly after coming into office. His first budget, in 2007, increased funding for the military by 25 percent. In 2008, military spending rose by an additional 13 percent.<sup>19</sup> Despite the government's sharply constrained circumstances, produced by the economic crisis in 2008, the 2009 budget proposal submitted to the Mexican Congress by Agustin Carstens, the Secretary of the Treasury, reflected the continuing high priority accorded to military spending. The budget proposed raising funds accorded to SEDENA to 42.4 billion pesos (from 36.4 billion in 2008), an increase of 16 percent. Proposed spending on SEMAR increased to 15.7 billion pesos (from 14 billion in 2008), a rise of 12 percent.

However, the further insertion of the military into the drug war raises a number of serious issues. Although the democratization of the polity in the last decade has increased legislative control over the military's budget, the institution's independence allows it to avoid accountability and resist transparency. Moreover, the growing use of the military as a law enforcement body inserts it into an area that properly belongs to civilian judicial authorities in a democratic polity.

#### EXECUTIVE POWER, *ESTADOS DE EXCEPCIÓN*, THE DRUG WAR, AND THE USE OF THE MILITARY

The Calderon administration's use of *estados de excepción* provides a particularly trenchant example of the impacts of the drug war on the exercise of executive power. On the one hand, the President sought legislative approval of a law that would increase the executive's ability to unilaterally declare *estados de excepción*, an important indication of respect for democratic procedure. On the other hand, the proposed law sought to make the executive exclusively sovereign over a decision that involves the suspension of civil rights and constitutional protections, a domain reserved by the 1917 Constitution for the legislature. Moreover, beyond the effort to secure greater power over the de jure declaration of *estados de excepción*, President Calderon's use of the military in drug-producing areas of the country constitutes a de facto use of this power with serious implications for Mexico's constitutional order.

<sup>18</sup> Ibid., 83.

<sup>19</sup> "Defence Budget Mexico," *Jane's Sentinel Country Risk Assessment—Central America and the Caribbean*, 25 June 2009, accessed at [www.sentinel.janes.com](http://www.sentinel.janes.com): 1, 1 October 2009.

In the drug-producing areas of the country under the control of the military, normal constitutional guarantees remain effectively suspended, although the government did not declare an *estado de excepción* before dispatching troops to these regions. The 1917 Constitution delineates the procedures and criteria that govern the declaration of *estados de excepción* and specifies the military's functions in such an emergency. The provisions that govern civil/military relations are contained in Articles 29, 89, and 129 of the Mexican Constitution.<sup>20</sup> Article 29 establishes the criteria for decreeing *estados de excepción* and discusses the role of the armed forces in such an exigency. It permits a temporary announcement of an *estado de excepción* only when there is "a grave perturbation of public peace" and requires legislative approval for such a declaration.<sup>21</sup> Article 129 establishes the boundaries between military and civilian authorities, asserting that "in time of peace, no military authority can exercise larger functions than those connected with military discipline."<sup>22</sup>

In a number of the areas of the country that are the locus of the drug war, the military has often replaced local law enforcement and uses search and seizure and other tactics that violate habeas corpus and other Mexican constitutional protections. As a consequence, its activities represent a de facto suspension of constitutional guarantees without the legislative approval required by Article 29. Additionally, the law enforcement functions it exercises exceed the limits imposed by Article 129. This has set off a constitutional debate in Mexico regarding the constitutional legality of the military's role. John M. Ackerman, for example, writes that "Article 129 categorically prohibits the Armed Forces from supplanting or taking the place of civilian authorities .... A careful reading of the text of the jurisprudence...reveals that the [Supreme] Court only allows the military to assist civilian authorities [but] never to replace them."<sup>23</sup> In contrast, President Calderon has asserted that Article 129 does allow the military to take over public security and that such acts do not require legislative approval.

President Calderon submitted a bill to Congress in 2009 designed to grant the executive exclusive control over the declaration of *estados de excepción*. This law sought to grant the Consejo de Seguridad Nacional (National Security Council), an executive branch body composed of presidential appointees, the right to declare *estados de excepción*. Vesting this entity with the power to declare an *estado de excepción* would have abandoned legislative approval, one of Article 29's requirements. According to the proposed law, the Consejo de Seguridad Nacional could issue such a declaration if "interior security were affected"—a broad and imprecise criterion. Following this declaration, the

<sup>20</sup> *Constitucion Politica de los Estados Unidos Mexicanos*, accessed at [www.info4.juridicas.unam.mx/ijure/fed/9](http://www.info4.juridicas.unam.mx/ijure/fed/9), 5 June 2009.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

military could intervene in a wide array of public activities, and the president, among other things, could suspend freedom of speech, assembly, and movement and engage in the widespread monitoring of private communications.<sup>24</sup> The requirement, imposed by Article 29, that such a declaration be temporary, was also absent from the proposed law.

The suspension of democratic guarantees that accompanies an *estado de excepción* subverts the protection of civil rights and retards efforts to construct juridical equality and end impunity. This is particularly true when an *estado de excepción* is established in a de facto fashion. Its existence, in the absence of a formal declaration that defines its limits and purposes, allows for its potentially indefinite perpetuation and removes democratic checks while raising a number of serious constitutional issues.

Moreover, the Mexican military has particularly broad powers in areas where de facto *estados de excepción* exist. These powers are especially problematic because of the institution's resistance to outside scrutiny. Additionally, the military has not proved immune, despite its greater institutional insularity, from corruption. *Los Zetas* and other drug organizations recruit actively in the military, have penetrated the ranks of the institution, and find a further field of ready recruits among the roughly 100,000 troops who have deserted from the military over the past decade.

The quality of training of some of these recruits makes them more lethal when they join the drug cartels. In the 15-year period between 1980 and 1995, nearly 1,500 Mexican soldiers received training at U.S. military academies. This number rose to over 1,000 per year in 1997 and 1998 under a special program to train the so called GAFEs (Special Forces Airmobile Groups).<sup>25</sup> In the subsequent decade, between 500 and 1,000 Mexican troops trained in the United States each year.<sup>26</sup>

The use of military personnel to exercise law enforcement functions began in earnest under President Ernesto Zedillo in the 1990s. In a foretaste of things to come, his administration, in 1995, initiated the Chihuahua Pilot Project, where military men replaced 120 Federal Judicial Police agents in Chihuahua. The government extended this practice, placing military officers in PGR offices in drug-producing regions.<sup>27</sup> This expansion of the program occurred even though allegations of corruption surfaced immediately. The penetration of the military into civilian police functions during the Zedillo administration included the 1999 establishment of the Federal Preventive Police, a body heavily composed of former military police.<sup>28</sup>

<sup>24</sup> John Ackerman, *Proceso*, 29 April 2009, accessed at [www.proceso.com.mx](http://www.proceso.com.mx), 5 June 2009.

<sup>25</sup> Laurie Freeman and Jorge Luis Sierra, "Mexico: The Militarization Trap," in Coletta A. Youngers and Eileen Rosin, eds., *Drugs and Democracy in Latin America: The Impacts of U.S. Policy* (Boulder, CO: Lynne Rienner, 2005), 280.

<sup>26</sup> *Ibid.*, 280.

<sup>27</sup> *Ibid.*, 278.

<sup>28</sup> *Ibid.*, 278.

Reflecting the military's increased role in the drug war, the Ministry of Defense issued the General Plan to Combat Drug Trafficking and the Azteca Directive. These two documents specified the military's permanent campaign against drugs, emphasized its role in eradication and drug confiscation, and granted it a broad mandate to fight organized crime. As a consequence, the military began to engage in asset and weapons seizures, and annually arrested thousands accused of involvement in the drug trade.<sup>29</sup>

Under President Fox, hundreds of military officers were appointed to positions in the PGR, overseeing a variety of different areas of the Attorney General's Office related to the drug war. For his part, President Calderon, shortly after assuming office in December 2006, deployed approximately 36,000 troops into nine Mexican states, including Michoacan, Guerrero, and the epicenter of drug production and trafficking—Sinaloa, Durango, and Chihuahua—the areas where *de facto estados de excepción* now exist.

Reports and evidence of military corruption have routinely surfaced, involving personnel from all levels of the institution. For example, in February 2007, gunmen wearing military uniforms opened fire with AK-47s on two police stations in the city of Acapulco, killing seven.<sup>30</sup> On patrol with a Mexican army unit in Reynosa, Marc Lacey, a *New York Times* reporter, learned that informers within the military were alerting drug cartels about military movements.<sup>31</sup>

Moreover, the military still does not reveal much information about its operations. The institution's opacity is a product of many factors, but, most importantly, of the set of implicit agreements that led to its removal from politics in the 1930s and 1940s and its continuing non-interference in civilian political life. While the country's steadily deteriorating security situation led to larger military budgets, the organization preserved much of its institutional independence because of these agreements. In exchange for remaining on the political sidelines and being subordinate to the authority of the civilian president, the military retained its autonomy and concomitant lack of transparency.

The expansion of the drug war makes this opacity even more problematic. Allegations of human rights abuses and corruption are the purview of a separate system of military justice that is exempt from external review or accountability. This system, designed to make the institution sovereign over disciplinary matters and shield it from political interference, even grants the military justice system jurisdiction over crimes committed by military members against civilians.<sup>32</sup> However, the fundamental problem does not lie in the separate

<sup>29</sup> Calderon, "Estadísticas Nacionales," *Segundo Informe Presidencial*, 70.

<sup>30</sup> Bill Weinberg, "Guns: The U.S. Threat to Mexican National Security," *Nacla Report on the Americas* (March/April 2008): 21–26, at 26.

<sup>31</sup> Marc Lacey, "In Drug War, Mexico Fights Cartels and Itself," *The New York Times*, 30 March 2009.

<sup>32</sup> *Constitucion Politica de los Estados Unidos Mexicanos*, accessed at [www.info4.juridicas.unam.mx/ijure/fed/9](http://www.info4.juridicas.unam.mx/ijure/fed/9), 5 June 2009.

system of justice but in this system's lack of transparency. The Mexican military provides little information about the proceedings or results of this system. As Hugo Concha Cantu notes, "In general, very little is known about the functioning of military justice in specific cases."<sup>33</sup> Indeed, the opacity and secrecy of the system of military justice promotes impunity.

Frequent complaints against military personnel for human rights violations result in very infrequent, if any, prosecutions of accused soldiers. As Human Rights Watch notes, this problem with the military justice system arises because "the Secretary of Defense exercises both executive and judicial authority over the armed forces; because military judges are not guaranteed permanence in their positions and could reasonably fear that they could be removed if they issue judgments that the Secretary does not share; because review by civilian authorities of decisions taken military tribunals is very limited; and because there is virtually no public scrutiny of military investigations and trials."<sup>34</sup> The paltry record of prosecutions compared to the number of credible human rights complaints led the United Nations to assert that "military personnel [in Mexico] appear to be immune from civilian justice and generally protected by military justice."<sup>35</sup>

The military's performance in this regard was no better after the election of Vicente Fox in 2000. Writing about the Fox administration, Laurie Freeman and Jorge Luis Sierra assert that "the military continue[s] to commit human rights violations with little fear of punishment. No efforts to make the military more transparent or accountable are in view..."<sup>36</sup> These problems persist. Allegations against the military include claims of rape, torture, and murder. In 2007, for example, two women and three children died when soldiers shot up their car after it failed to stop at a military checkpoint. In April 2009, Human Rights Watch issued a report sharply criticizing the Mexican military for failing to adequately prosecute soldiers accused of committing crimes against civilians. The report discussed 70 victims of serious crimes. These abuses included torture, rape, homicide, and dozens of instances of arbitrary detentions.<sup>37</sup> As Vanda Felbab-Brown notes, "For the past two years, allegations of civilian deaths (even if occasionally

<sup>33</sup> Hugo Alejandro Concha Cantu, "The Justice System: Judiciary, Military and Human Rights," in Laura Randall, ed., *Changing Structure of Mexico* (New York: M.E. Sharpe, 2006), 378.

<sup>34</sup> Human Rights Watch Report, "Mexico: Los militares deben responder por sus abusos," 29 April 2009, accessed at [www.hrw.org](http://www.hrw.org), 9 June 2009.

<sup>35</sup> UNESCO, "Question of the Human Rights of All Persons Subjected to any Form of Detention or Imprisonment, in Particular: Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; UN Doc.E/CN.4/1998/38/Add.2, 14 January 1998, para. 86 accessed at [www.un.org/en/documents](http://www.un.org/en/documents), 10 September 2009.

<sup>36</sup> Freeman and Sierra, "Mexico: The Militarization Trap," 270.

<sup>37</sup> *Human Rights Watch Report*, "Impunidad uniformada: Uso indebido de la justicia militar en Mexico para investigar abusos cometidos durante operativos contra el narcotrafico y la seguridad publica," 29 April 2009, accessed at [www.hrw.org](http://www.hrw.org), 9 June 2009.

compensated by the state) long term detentions incommunicado and without charge and house searches without warrants keep surfacing. Given Mexico's recent transition to democracy and the lack of institutionalized public accountability, such complaints, while not surprising, are worrisome."<sup>38</sup> The Mexican National Human Rights Commission, for its part, reported that it had received 172 claims of arbitrary detentions by the army in just the first three months of 2009, compared to 311 for all of 2008.<sup>39</sup> The most serious charges were allegations by two mothers that soldiers had abducted their two sons, torturing one and beating the other to death. The military denied this accusation and the army's spokesman, Enrique Torres, declared that "in these cases there was no involvement of either soldiers or federal police."<sup>40</sup> In his appearance before the Mexican Congress on 14 July 2009, Jose Luis Soberanes, the national human rights ombudsman, declared that "the situation in Ciudad Juarez is an example of the necessity for the federal government to [alter] its public security strategy.... The use of federal forces has not stopped the violence generated by organized crime and narcotrafficking. On the contrary, it has resulted in innumerable complaints about alleged abuses against innocent people."<sup>41</sup>

Despite the ubiquity of these allegations about military abuses of human rights and a paltry record of prosecutions, there is no sign that the institution is reforming its justice system. President Calderon, because of his close relationship with and ever greater reliance upon the military, does not seem inclined to press for change in this area. For its part, the military hierarchy, concerned with safeguarding the institution's independence, has not promoted greater transparency or the more aggressive prosecution of military personnel accused of human rights violations. Finally, the Mexican judicial system has effectively recused itself from intervening in this issue following an August 2009 Supreme Court decision. In its ruling, the Mexican Supreme Court validated the jurisdictional authority of military courts when it dismissed an appeal against the practice of allowing military courts to judge soldiers involved in crimes against civilians. On a number of technical grounds, the Court rejected an appeal from a woman whose husband was shot by soldiers in Sinaloa in 2008. The practical consequence of this decision was to eliminate recourse to the civilian court system when military personnel were accused of crimes against civilians, and to prevent any kind of civilian judicial oversight of the determinations of the military justice system. Given the extraordinary scope of military power in areas where *de facto estados de excepción* operate, this absence of external reviews constitutes another challenge to the preservation of individual rights.

<sup>38</sup> Vanda Felbab-Brown, "The Violent Drug Market in Mexico and Lessons from Colombia," (Brookings Foreign Policy Paper Series, Number 13, 22 March 2009), 20.

<sup>39</sup> Mica Rosenberg, "Mexican Army Tortures Surge: Rights Body," *Reuters*, 23 April 2009.

<sup>40</sup> *Ibid.*

<sup>41</sup> John Ackerman, *Proceso*, 21 July 2009, accessed at [www.proceso.com.mx](http://www.proceso.com.mx), 1 June 2009.

## THE IMPACT OF THE DRUG WAR ON THE REFORM OF THE MEXICAN JUDICIARY AND THE POLICE

During the decades of dominant-party rule and executive control of the polity, the judicial branch's subordination, absence of professionalism, and lack of transparency contributed to a number of serious problems that undermined the administration of justice. Widespread corruption tainted both the police and the court system, fostering impunity. The prevalence of arbitrary practices and abuses reduced the prestige of the judiciary and produced a lack of public trust in all features of the administration of justice. The capriciousness of the system encouraged corruption, and corruption promoted arbitrariness. For all of these reasons, the judiciary did not serve as a guarantor of individual rights and became a central barrier to the construction of a *Rechtstadt*.

In recognition of these problems, judicial reform became a central focus of democratizing efforts, beginning in the 1990s. These reforms, designed to construct an effective, independent judiciary, have had to contend, however, with the continuing effects of the drug war on this branch of the Mexican government. Most problematically, the drug war has encouraged the corruption and concomitant impunity that these reforms have been designed to reduce.

Attempts to strengthen the judiciary's independence and efficacy began with reforms, in the mid-1990s, of the powers of the Supreme Court. These changes were designed to enable it to establish binding precedents, review the constitutionality of federal and state laws, and decide conflicts between different levels and branches of government.<sup>42</sup> Before these reforms, the Supreme Court could not check the power of the president (acting, in fact, as his extension). Although the 1917 Constitution granted a substantial amount of autonomy to the Supreme Court, including lifetime tenure and congressional appointment of judges, a series of reforms, beginning in 1928, coincident with the rise of the ruling party, substantially reduced this autonomy.<sup>43</sup> The 1928 reform substituted presidential appointment with senate ratification for congressional appointment. A further reform, in 1934, replaced lifetime appointment with six-year terms coincident with presidential terms. Although the government restored lifetime appointment in 1944, the judiciary, by then, had been effectively subordinated to the executive branch.<sup>44</sup> Between 1934 and 1994, most presidents appointed more than 50 percent of the justices during their terms and almost 40 percent of justices lasted less than five years in office.<sup>45</sup> The 1994 reform granted Supreme Court justices tenure lasting 15 years, freeing them from the presidential cycle, and reducing their subordination to the executive

<sup>42</sup> Haber, Klein, Maurer, and Middlebrook, *Mexico Since 1980*, 206.

<sup>43</sup> Julio Ríos-Figueroa, "Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002," *Latin American Politics and Society* 49 (Spring 2007): 31–57, at 36.

<sup>44</sup> *Ibid.*, 36.

<sup>45</sup> *Ibid.*, 36.



branch. As Julio Rios-Figueroa notes, “The 1994 reform made the Supreme Court independent from political pressures, equal to the other organs of government and thus capable of exercising checks and balances. The reform also created legal instruments that allowed the court to participate in policy issues and political disputes.”<sup>46</sup>

The upper levels of the federal judiciary, as a result of these reforms, gradually began to acquire greater prestige and institutional weight, becoming more independent of the executive and helping to foster the invigoration of checks and balances at the federal level.<sup>47</sup> However, as Pilar Domingo notes, “At the same time, the increased protagonism of judicial decisions in Mexico does not signify better justice administration, greater judicial impartiality or better access to justice.”<sup>48</sup>

In recognition of these problems, reforms of the judiciary have continued, including a series of constitutional reforms approved by the Mexican Congress in 2008. These changes, which seek to further improve transparency and accountability in the administration of justice, include the introduction of public proceedings with oral arguments, the presumption of innocence, sentencing based on evidence produced during trials, and the establishment of a panel of justices charged with ruling expeditiously on requests for search warrants.<sup>49</sup>

Juxtaposed against these substantial reforms, the exigencies of the drug war prompted the Mexican government to enact an important exclusion to these measures. This exclusion allows it to hold suspects accused of being part of organized crime (drug trafficking organizations) for 80 days without having to present charges against them. This practice allows for the abuse of state power (given the latitude accorded to judicial authorities to decide who can be subjected to this treatment). Additionally, it further attenuates Mexico’s still very incomplete enactment of due process.

Moreover, federal reforms exceed changes at the state level. State judiciaries face serious resource constraints and suffer from a lower degree of professionalism than their federal counterparts. As Miguel Carbonell notes, “Local courts lack decent budgets and the means to carry out their work with dignity, while federal courts have good resources and their members enjoy high salaries.”<sup>50</sup> While some states, notably Nuevo Leon, have enacted very significant reforms, little progress has occurred in most of the country.

<sup>46</sup> Ibid., 38.

<sup>47</sup> David A. Shirk and Wayne A. Cornelius, eds., *Reforming the Administration of Justice in Mexico* (South Bend, IN: University of Notre Dame Press, 2007).

<sup>48</sup> Pilar Domingo, “Judicialization of Politics or Politicization of the Judiciary: Recent Trends in Latin America,” *Democratization* 11 (February 2004): 104–126, at 119.

<sup>49</sup> Stephanie Hanson, “Mexico’s Drug War,” *Council on Foreign Relations*, 20 November 2008, accessed at [www.cfr.org](http://www.cfr.org), 1 June 2009, 1–4, at 3.

<sup>50</sup> Miguel Carbonell, “Judicial corruption and impunity in Mexico,” *Global Corruption Report 2007*, accessed at [www.transparency.org](http://www.transparency.org), 10 December 2009, 225–228, at 228.

Additionally, efforts to strengthen the prestige, professionalism, fairness, and transparency of the federal judiciary and police must contend with the deeply entrenched corruption that the drug war engenders. Drug-related corruption scandals involving the federal, state, and local police and the judiciary have surfaced routinely since the 1970s. The most famous of these cases was the 1985 kidnapping, torture, and killing of a U.S. drug enforcement administration agent, Enrique Camarena Salazar, and his pilot, Alfredo Avelar, by Mexican federal and state police in the pay of drug traffickers. Police involvement in the Camarena Salazar killing highlighted a widespread and enduring problem—extensive drug cartel penetration of the law enforcement apparatus.

In an effort to sanitize the police, the presidency of Miguel de la Madrid (1982–1988) undertook the first serious purge and reorganization of the federal police forces, the locus of some of the most problematic corruption. After a short period, however, the new federal police force created in the wake of this reorganization evidenced the same problems as its predecessor.

The drug cartels have penetrated even the most-elite anti-narcotics agencies. For example, General Jesus Gutierrez Rebollo was found, in 1997, to have accepted bribes from drug traffickers. At the time, he was the head of the National Institute to Combat Drugs, the Salinas administration's newly created lead agency in the drug war, staffed with carefully screened and "incorruptible" agents.

Presidents Salinas and Zedillo continued the de la Madrid administration's effort to purge and reorganize the federal police. Both, however, confronted the same difficulties that had undermined efforts at police reform during the de la Madrid presidency. Purged members of these agencies became even more directly and extensively involved with drug cartels, and ubiquitous evidence of corruption surfaced in the reorganized federal police.

These problems plagued both the Fox and Calderon administrations. Both adopted their predecessors' policies, as well, toward the police and law enforcement apparatus. The Fox administration disbanded the Federal Judicial Police, creating in their stead the AFI (Federal Investigations Agency). In addition, purging of corrupt agents continued throughout Fox's tenure. For example, the PGR suspended or fired 2,600 federal law enforcement officials in just the first few years of his presidency. Given the recruitment practices and capacity of the drug cartels, these former agents often became highly trained foot soldiers in these organizations. For its part, the AFI soon proved just as problematic as its predecessors. In 2005, the PGR revealed that nearly 1,500 of the AFI's 7,000 agents were under investigation for suspected criminal activity, with 457 facing charges. In May 2007, soldiers at a checkpoint in Michoacan exchanged fire with 20 gunmen equipped with AR-15s who were wearing bulletproof vests and AFI uniforms.<sup>51</sup> More recently, in 2008, the head

<sup>51</sup> Weinberg, "Guns: The U.S. Threat," 26.

of the Sub-Prosecutor for Special Investigations into Organized Crime (SIEDO) was investigated for receiving bribes from the Sinaloa cartel, as were two successive heads of Interpol in the country.

The scope of this corruption presents a continuing challenge to judicial reform, continually undermining the administration of justice even as reforms seek to improve this process. Judicial reforms of the magnitude that Mexico has undertaken, involving both changes in procedures and the professionalization of personnel, are very difficult under normal circumstances, since they must confront deeply ingrained and long-established sets of practices and transform an institutional culture. The drug war makes this even more difficult by encouraging the very practices that these reforms seek to eradicate. Drug traffickers, because of the vastness of their resources and coercive capacity, use monetary temptations and the threat of violence (*plata o plomo*)—money or bullets—to undermine the administration of justice. While the police are most-subject to these inducements and threats, court personnel are not immune from these pressures. As Jorge Fernandez Martinez notes, “*Plata o plomo* ... is the question asked in drug trafficking circles to assess how amenable a judge might be to corruption when it comes to sentencing. This ‘choice’ is repeated at every level of investigation throughout the police and judicial systems.”<sup>52</sup> While a number of increasingly effective procedures, including the establishment of a Federal Judicial Council that reviews court decisions for evidence of corruption and tampering, have created much greater transparency and accountability, the sheer magnitude of drug-related corruption acts against these measures.

### THE IMPACT OF THE DRUG WAR ON MEXICAN FEDERALISM

The drug war has had important impacts, as well, on efforts to construct greater federalism, although its effect in this regard has been more subtle and confined to those states that are the locus of the struggle against drug trafficking organizations. Efforts to give genuine substantive content to Mexico’s federal structure began, as did so many other incipient democratic reforms, in the 1980s and 1990s.<sup>53</sup> Presidential administrations during this period began to gradually devolve both responsibilities and limited resources to states and municipalities. States and municipalities acquired greater responsibilities but faced serious and continuing resource and other constraints.

<sup>52</sup> Jorge Fernandez Martinez, “Mexico: the traffickers’ judges,” *Global Corruption Report 2007*, accessed at [www.transparency.org](http://www.transparency.org), 10 December 2009, 77–79, at 77.

<sup>53</sup> Victoria Rodriguez, *Decentralization in Mexico: From Reforma Municipal to Solidaridad to Nuevo Federalismo* (Boulder, CO: Westview, 1997); Robert H. Wilson, Peter M. Ward, Peter K. Spink, and Victoria Rodriguez, *Governance in the Americas: Decentralization, Democracy and Sub-national Government in Brazil, Mexico and the USA* (South Bend, IN: Kellogg Institute of International Studies, University of Notre Dame Press, 2008).

Nonetheless, this process advanced steadily, if fitfully, in the decade after 2000, as well.

If problems of design, implementation, and resources complicated the construction of federalism, the process faced some of its greatest challenges because of the intensification of the drug war. The drug war consumed federal resources, constraining transfer payments. This has impacted both institution building and social development at the subnational level. The use of federal agencies, and particularly the military, to substitute for and replace state and local forces has undermined their development and professionalization. Moreover, most crimes connected to the drug war are a federal jurisdiction, marginalizing state and local forces from the most important judicial functions. Although Mexican federalism remains much stronger and more vibrant than it was in the first six decades after the Revolution, there is no doubt that the drug war has further undermined the situation of many states and municipalities and increased the power of the central government and particularly of the executive branch.

In 1947, the adoption of a centralized fiscal system formalized the already long-extant resource capacity and concomitant power of Mexico's national government. The implementation of the National Fiscal Coordinating System (SNCF) in 1980 further enshrined this centralization. The SNCF created a value-added tax and required states to surrender their remaining tax collection powers in exchange for greater distributions from the central government.<sup>54</sup>

A general revenue-sharing system, established in 1950, apportioned fiscal resources to states and municipalities based on their population size. This transfer amounted to 18 percent of federal revenue and was disbursed in a non-discretionary manner. Remaining federal disbursements, however, were more discretionary.<sup>55</sup> The next couple of decades witnessed a gradual movement, first toward decentralization, and then toward the sharing of resources.

The movement toward greater federalism began in the 1980s in the midst of an economic crisis and the steady diminution in the popularity and legitimacy of the post-Revolutionary regime. In 1983, President de la Madrid introduced a constitutional reform to Article 115 of the 1917 Constitution designed to increase the power of local governments (*municipios*) relative to the states and the federal government. This reform granted *municipios* the ability to levy property taxes and other fees and granted them greater administrative authority. However, this reform bore little fruit, since these sources of revenue were very limited, and the municipalities lacked the administrative capacity to assume the responsibilities suddenly thrust upon them.

<sup>54</sup> Alain de Remes, "Democratization and Dispersion of Power: New Scenarios in Mexican Federalism," *Mexican Studies/Estudios Mexicanos* 22 (Winter 2006): 175–204, at 192.

<sup>55</sup> Peter M. Ward and Victoria E. Rodriguez, "New Federalism, Intra-Governmental Relations and Co-governance in Mexico," *Journal of Latin American Studies* 31 (October 1999): 675–710, at 678.

This decentralization resulted, as Joseph Klesner aptly observes, from “a devolution of power from above...and...a series of challenges to the former ruling party emanating from opposition victories at the local and state levels in the 1980s and 1990s.”<sup>56</sup> In northern Mexico, demands for genuine, reinvigorated federalism reflected widespread resentment resulting from the central government’s taxing and revenue-sharing policies. These policies took money from the northern, wealthiest part of the country, and distributed it to the poorest regions in the south, leading the richest states to embrace federalism. The federal government responded to these demands by steadily expanding revenue sharing with the states.

This process acquired impetus during the Salinas and Zedillo administrations (1988–2000). By the early 1990s, states and localities received the authority to largely administer numerous anti-poverty federal development programs, such as National Solidarity Program (PRONASOL). Insufficient resources, however, and a lack of much discretionary power limited the reach of these reforms. The government amended Article 115 again in 1999. This amendment increased the autonomy of municipalities, giving them the authority to set rates for property taxes and user fees, subject to the approval of state legislatures.

The states’ responsibilities grew and their share of federal resources increased, although they continued to lack sufficient taxing power. While the federal government still collected 95 percent of all taxes, the share disbursed to state and municipal governments rose from 25 percent to 38 percent between 1993 and 2003.<sup>57</sup> Distributions to states and localities of the portion of federal income derived from taxation grew even more dramatically during this period, from 43 percent to 70 percent.<sup>58</sup>

A Fiscal Coordination Law (LCF) formalized the process. According to this law, states relinquished their power to collect income and sales taxes in exchange for a share of the total tax revenue collected by the federal government. This included a share of the money collected from the national value-added tax and access to some of the tax earnings produced by petroleum exports. Additionally, municipalities are given 20 percent of federal transfer income. Although participation in the LCF is voluntary, all 31 Mexican states have chosen to be part of the agreement.

Federal transfers fall into two categories, (*aportaciones*)—Ramo 33 in the federal budget and (*participaciones*)—Ramo 28. *Aportaciones* are conditional transfers disbursed based on population size and level of poverty and are to be used for poverty alleviation. Poverty alleviation includes spending on public health, infrastructure, schools, etc. The federal government, however, decides the priority and scope of these different initiatives, undermining the power of

<sup>56</sup> Joseph Klesner, “Institutionalizing Mexico’s New Democracy,” in Laura Randall, ed., *Changing Structure of Mexico* (New York: M.E. Sharpe, 2006): 400–401.

<sup>57</sup> Haber, Klein, Maurer, and Middlebrook, *Mexico Since 1980*, 206.

<sup>58</sup> de Remes, “Democratization and Dispersion of Power,” 192.

subnational governments. *Participaciones* are unconditional transfers, but, because of the resource debility of states and municipalities, operating expenses consume these funds, leaving subnational governments with little latitude for discretionary budgeting.

Other manifestations of increased federalism accompanied the democratization of the country in the late 1990s and early 2000s. In 1999, opposition governors from the PRD formed ANAGO (National Association of Governors) to secure greater federal revenues and to improve the provision of state services, particularly education and health care. In 2002, governors from the PRI (who were now part of the opposition) joined them and formed CONAGO (National Conference of Governors). Although governors from the PAN did not join the organization, they participated from the outset as observers. During this same period, in another sign of growing federalism, the National Conference of Municipalities of Mexico (CONAMM), an organization designed to give voice to the needs of municipal governments, developed. CONAMM and CONAGO both represented powerful initiatives to articulate demands for greater resources and responsibilities at the state and local level.

Negotiations between CONAGO and the federal government at the National Treasury Convention held in 2002 led the president to agree to send 2 percent of the value-added tax to the states and 1 percent to municipalities. Although the Mexican Congress subsequently voted down this agreement, state and local politicians had clearly become much more important actors than they had been in the past.

Nonetheless, Mexican federalism, despite all of the reforms discussed above, remains truncated. Emily Edmonds-Poli, writing about the Fox administration, asserts that

to say that Mexico is now a decentralized federal polity is somewhat misleading. Indeed, despite high expectations for change, it is not clear that Fox has succeeded any more than his immediate predecessor in strengthening the power of other branches or levels of government. Although the legislature and the judiciary now enjoy greater authority and independence than they did before, they have not achieved the same ability to check and balance the executive that exists in countries with similar political institutions. Likewise, while some states and municipalities exercise greater spending and decision-making authority, on the whole, subnational governments are still highly dependent upon the federal government for administrative and financial resources, and therefore do not enjoy the independence afforded subnational governments in other federal arrangements.<sup>59</sup>

Under the Calderon administration, states and municipalities remain extraordinarily dependent on federal transfers. Roughly two-thirds of municipal income comes from federal transfers, a reliance that is even greater at the

<sup>59</sup> Emily Edmonds-Poli, "Decentralization under the Fox Administration: Progress or Stagnation," *Mexican Studies/Estudios Mexicanos* 22 (Summer 2006): 387–416, at 390.

state level. Even the wealthiest Mexican states rely on the federal government for three-quarters of their income, and poorer states receive more than 90 percent of their funds from the central government.<sup>60</sup>

The budgetary frailty of Mexican states and municipalities worsened during 2009. The country's economic crisis led to a precipitous decline in federal tax receipts. Federal income fell by 6.9 percent during the first five months of the year, leading to a 7 percent cut in transfers to states and municipalities. As a result, CONAMM, in 2009, asserted that roughly 80 percent of Mexican municipalities were insolvent. Moreover, states in drug-producing zones have faced additional burdens. Even though federal authorities have jurisdiction over crimes related to drug trafficking, state and local authorities must still confront many of the costs and consequences of the pursuit of the drug war. The drug war creates a generalized atmosphere of violence, increasing the incidence of other types of crime. Gun usage, although primarily connected to the drug war, spills over into other areas, increasing the violence and seriousness of other sorts of crime. Social services provided by state and municipal governments consequently feel an additional strain on their resources, since they must deal with many of the costs that impact hospitals and other providers of services that see increased needs because of the conflict. The violence attendant to the drug war negatively impacts commerce and business activity and reduces tourism, shrinking the revenue base of states and municipalities. Although drug production and trafficking do engender some economic activity (accounting for perhaps as much as 20 percent of the economy of a state such as Sinaloa), the black market nature of the trade limits the resources that it provides to state and local governments.

States at the center of the drug war confront an additional set of challenges to their power and independence. The central government's use of the military to supplant state and local police forces subordinates state and local officials to their central government counterparts. Initially, the end of the post-Revolutionary regime weakened the federal government's control over law and order at the state and local level.<sup>61</sup> President Calderon has reasserted this power, particularly through his use of the military.

The existence of *de facto estados de excepción* where military rule effectively operates leaves these subnational governments with little real power over a host of their primary functions. Soldiers can disband and replace their police forces at any time. The military, operating under the rules of these *de facto estados de excepción*, can ignore local authorities. The military's assumption of authority over large swathes of the territory of these states in effect creates enclaves normally the province of state and local authorities, where

<sup>60</sup> Ibid., 401.

<sup>61</sup> Wayne A. Cornelius, Todd Eisenstadt, and Joel Hindley, eds., *Subnational Politics in Mexico* (La Jolla: Center for U.S.-Mexican Studies, University of California-San Diego, 1999).

federal military jurisdiction applies and where decision-making authority lies primarily with non-elected military officers rather than with civilian personnel. In sum, the war on drugs has exacerbated the most-problematic aspect of Mexican federalism, the resource weakness of states and municipalities. It has also robbed these localities in drug-producing areas of the country of the jurisdictional authority and the concomitant decision-making independence that lie at the heart of real federalism.

## CONCLUSION

The drug war engenders a host of practices that challenge democratic governance and that act against Mexico's substantial efforts to promote democratic institutional development. Ubiquitous corruption, a virtually inevitable consequence of the drug war, complicates efforts to construct greater transparency and accountability. After decades of escalating measures against drug trafficking, Mexico's roughly 400,000 police (including federal, state, and local forces) remain tainted by widespread corruption—especially those at the lower branches of government. Repeated efforts to create elite, incorruptible, anti-narcotics forces have foundered as well. Furthermore, the addition of ever more sophisticated U.S. training and weaponry makes the corrupt members of these forces even more formidable paramilitary members of drug-trafficking organizations.

The security crisis accompanying the drug war forces the Mexican government to rely upon the military, despite its relative absence of accountability and resistance to outside scrutiny. The drug war also exercises an effect on reforms designed to create an effective judiciary by fostering precisely the kind of disregard for constitutional protections and guarantees that complicate the development of a *Rechtstadt* and affect the administration of justice, even as the federal judiciary becomes more transparent and accountable as a result of a series of important reforms.

Additionally, the drug war (like all wars) increases the power of the central government, diminishing state and local governments thus complicating the construction of federalism, particularly in those parts of the country that are the locus of this conflict. Finally, and most problematically, the drug war has led to the use of de facto *estados de excepción* and efforts to vest the executive with greater powers to declare de jure *estados de excepción*.

While Mexico's substantial and increasing expenditures on its national security apparatus may have been necessary and inevitable, given the country's security situation, these allocations constrain federal spending in other areas. The even more serious resource constraints confronting the Mexican government since the outbreak of the economic crisis in 2008, conjoined to its need to increase funding for the security apparatus, even in the midst of this crisis, have only worsened these problems.

The violence and absence of security accompanying the drug war also act on public attitudes toward democracy. According to the 2009 *Latinobarometro*



poll, Mexicans were more ambiguous about democracy than citizens of other countries in the region except Guatemala.<sup>62</sup> In the poll, only 42 percent of Mexicans, and 41 percent of Guatemalans, preferred democracy over any other system of government. Moreover, the same poll revealed that support for democracy in Mexico had declined by 9 percent since 1996, the largest drop in the region.<sup>63</sup> Mexicans were also among the least-opposed to military government (only Peruvians, Paraguayans, and Guatemalans were less willing to countenance this sort of rule).<sup>64</sup> The poll showed that 44 percent of Mexicans were willing to support military rule under certain circumstances. The 2010 *Latinobarometro* poll indicated an improvement in support for democracy, from 42 to 47 percent, although Mexico still lagged behind regional norms and was still only trailed by Guatemala and tied by Paraguay.<sup>65</sup> As in 2009, the 2010 *Latinobarometro* poll indicated that a larger percentage of Mexicans than most other Latin Americans—44 percent—continued to support military rule under certain circumstances.<sup>66</sup>

While these numbers are a product of a number of factors, including historical legacies and the country's macroeconomic and other difficulties in the last decade, they also reflect the impact of Mexico's security crisis on citizen attachment to democratic norms. Rapidly escalating violence and growing insecurity promote the desire for a strong government capable of confronting these threats even at the potential cost of individual rights.

The difficult task of constructing the rule of law, of institutionalizing an effective judiciary, and of expanding democratic accountability and transparency must, consequently, proceed in a climate marked by pervasive violence, de facto military jurisdiction over parts of the country, the steady expansion of the coercive organs tied to the executive branch of the Mexican government, and relatively low public support for democracy. Deepening and expanding already-impressive reforms in the midst of this security crisis constitutes one of the central challenges to Mexican democratization.

<sup>62</sup> Latinobarometro, 2009, accessed at [www.latinobarometro.org](http://www.latinobarometro.org), 2009, 8 January 2010, 22.

<sup>63</sup> Ibid., 12.

<sup>64</sup> Ibid., 15.

<sup>65</sup> Latinobarometro, 2010, accessed at [www.latinobarometro.org](http://www.latinobarometro.org) 2010, 14 April 2011 26–28.

<sup>66</sup> Ibid., 36.