JUST SECURITY
A FORUM ON LAW, RIGHTS, AND U.S. NATIONAL SECURITY

Congress Tackles the "100-Mile" Border Zone for Federal Checkpoints

Patrick Eddington

July 30, 2019

The migrant crisis along America's southwest border has, with good reason, received a lot of attention this year, including the Trump administration's use of what have been appropriately described as concentration camps for those fleeing violence and poverty in the lands of their birth. But another long-festering issue affecting the entire U.S. border on the north, south, east, and west is finally getting congressional attention: the so-called "100-mile border zone" that has existed under regulation for more than 50 years. A still controversial 1976 Supreme Court decision, *U.S. v Martinez-Fuerte*, essentially validated the federal law enforcement practice of stopping and questioning motorists in a broadly defined "border zone" about their citizenship status—a decision I have sharply criticized.

The Border Zone Reasonableness Restoration Act of 2019 (S. 2180, offered by Senator Patrick Leahy (D-VT), and H.R. 3853, offered by Rep. Peter Welch (D-VT)) would reduce the "border zone" from 100 miles to 25 miles into the United States from the physical border, within which the Department of Homeland Security (DHS) may make vehicle stops and searches, and from 25 miles to 10 miles for DHS access to private property.

Thus far in the Senate, only Leahy's Democratic colleague Patty Murray of Washington state has signed onto the bill. Welch's House version is also a Democrats-only affair to date, with Reps. Chellie Pingree (D-ME), Ann Kirkpatrick (D-AZ), James P. McGovern (D-MA), Pramila Jayapal (D-WA), and Ann M. Kuster (D-NH) having signed on.

As I've noted previously, the DHS Customs and Border Patrol (CBP) internal checkpoints these bills are designed to limit have led to frequent confrontations with local residents in southwestern border states, as well as litigation over Fourth Amendment rights violations. Indeed, earlier this month the issue of commercial bus lines allowing CBP to stop and search their buses and passengers resurfaced as another flashpoint in the ongoing controversy over "border zone" immigration enforcement operations.

If enacted, would the Leahy-Welch bill at least reduce the number of people encompassed by the "border zone"? Not significantly, which speaks to one of the larger problems with the bill.

A CityLab analysis of "border zone" population density conducted last year illustrates the point. Reducing the zone from 100 to 25 miles would still leave nearly all of the major cities well inside the "border zone"—Chicago, New York, Washington, Norfolk, Charleston, Miami,

Houston, San Diego, Los Angeles, San Francisco, and Seattle. And even the Leahy-Leach 10-mile limit for access to private property would have the same effect.

The bill also contains a disturbing provision allowing the Secretary of Homeland Security to expand the zone from 25 to 100 miles for up to five years via certifications to Congress of the need to do so. However, the bill does establish a private right of action to challenge in court such certifications by persons "with an interest that is, or may be, adversely affected by the maximum distance limitations established" by such a certification.

Granted, even if Leahy and Welch had limited the zone to just one mile from the border, the area would still encompass millions in the very cities cited above. But such a tight geographic restriction would have the positive effect of reducing the zone to the point that far fewer persons in the areas at the epicenter of America's "immigration war" (i.e., the southwestern border states) would have to deal with fixed or mobile CBP checkpoints on a daily basis. The larger problem underlying the Leahy-Welch approach is the idea of permitting *any* geographic zone to exist—in statute—that allows fundamental constitutional rights to be suspended in the name of border security.

Given GOP control of the Senate and the more immediate (and proper) focus on ending the Trump concentration camp system targeting migrants, it's highly unlikely that the Leahy-Welch bill will move during this Congress. I do worry, however, about the precedent being set by the mere introduction of a bill that would, if enacted, create a statutorily-sanctioned slice of America where you can be stopped, asked to prove your citizenship, and possibly be detained or even assaulted and held by federal agents for refusing to answer their questions. To that end, let me offer some workable alternatives to the current Leahy-Welch approach.

The first principle should be the dismantlement of fixed or semi-permanent checkpoints more than one mile from the international border.

Doing so would free up CBP agents currently manning checkpoints for redeployment to the border itself, where they would be far more likely to actually catch illegal border crossers. Eliminating checkpoints more than a mile from the border also would de-escalate confrontations with local residents opposed to such checkpoints, as has occurred in places like Aravaca, Arizona for years.

Second, CBP should be required to document stops at immigration checkpoints that last longer than 10 minutes.

As revealed in CBP internal documents I obtained via a Freedom of Information Act lawsuit (which is ongoing), CBP acknowledges, "Just the fact that someone is refusing to answer questions or is being otherwise passively noncompliant, absent exigent circumstances, does not equate to a violation of law."

In most situations, those who CBP deems "noncompliant" are American citizens asserting their constitutional rights at a checkpoint. Rather than escalating the situation, CBP should simply wave those motorists through. If they elect not to and demand the motorist submit to "secondary" screening, they should be forced to document the alleged probable cause justifying the detention, as the *Martinez-Fuerte*court ruled.

In the last Congress, Senator Kirsten Gillibrand (D-NY) introduced the DATA Act, which would require documentation for stops that exceed "a brief and limited inquiry." Having that kind of requirement hanging over their head would likely make most CBP agents think twice about stopping someone being "noncompliant" absent a truly valid reason.

Leahy and Welch are smart, experienced legislators. I appreciate that they're trying to tackle this very serious problem, which has been neglected by Congress for decades. I commend them for it. I just hope that they'll consider revising their approach. A call to Senator Gillibrand would be a good first step.

Patrick G. Eddington is a research fellow in homeland security and civil liberties at the Cato Institute. He is also Adjunct Assistant Professor at Georgetown University's Center for Security Studies.