

THE WEEK

Is Trump trying to unleash the Border Patrol on all of America?

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Two in three Americans live in the "border zone," a 100-mile stretch inland where some constitutional due process and privacy protections are functionally canceled in the name of border security. The zone includes entire states — Delaware, Florida, Hawaii, nearly all of New England, and all but a tiny sliver of Michigan — as well as about three in four of our 20 largest metro areas. Is the Trump administration trying to make it bigger?

The prospect seems obviously attractive to immigration hawks like White House senior adviser Stephen Miller, known to be the president's chief influence on border policy. Yet the possible suggestion of interest in expanding the border zone comes not from Miller but acting Commissioner of U.S. Customs and Border Protection (CBP) Mark Morgan, who joined President Trump on stage at a law enforcement conference in Chicago this week.

"We will be building 450 miles of big, beautiful wall by the end of 2020," Morgan said, implausibly. "With every mile of wall that's being built, I promise you, it's not just the cities and towns on the border. I always say: Every town, every city, every state is a border town, a border city, and border state."

Is that just a figure of speech? Because it's blatantly untrue — unless the border zone goes national.

My suspicion here may seem unfounded, and I hope it is. But I think there are two good reasons to be wary.

The first is the nature of the border zone, which too few Americans realize exists. The Fourth Amendment protects our right "to be secure in [our] persons, houses, papers, and effects, against unreasonable searches and seizures" and requires specific probable cause before search warrants are issued. But at the border, CBP agents are allowed to conduct searches of bags and vehicles without meeting those requirements. And in 1953, the Justice Department issued a regulation saying these relaxed rules apply within a "reasonable distance" from the actual border, a term the DOJ defined as 100 miles.

The 100-mile decision was made by unelected administrators. It wasn't open to public input, nor was it determined by our representatives in Congress. Nevertheless, the Supreme Court upheld the rule in 1976 in *U.S. v Martinez-Fuerte*, where the 7-2 majority wrote that usually law enforcement must have "individualized suspicion" to breach someone's privacy, but as long as the Border Patrol checkpoints are "reasonably located" (i.e. within the 100-mile range), agents can stop, search, and question motorists without any particular cause.

As the minority opinion noted, there's "no principle in the jurisprudence of fundamental rights which permits constitutional limitations to be dispensed with merely because they cannot be

conveniently satisfied." The fact that CBP agents typically won't be able to establish probable cause by looking at a moving vehicle should not mean they get to ignore the Constitution. That's not how rights work, and this "papers, please" style of law enforcement is fundamentally un-American.

Yet even if you agree with the theory of the 100-mile rule, the practice is a disaster and sees CBP authority expanded well past what *Martinez-Fuerte* permitted. As Cato Institute scholar and former CIA analyst Patrick Eddington has detailed, CBP agents "elect to ignore the court's admonition in the *Martinez-Fuerte* ruling that 'any further detention ... must be based on consent or probable cause.'" They've "used violence to remove motorists from their vehicles when they decline to answer questions after asserting their rights;" expanded their searches to planes, buses, and trains; and used the checkpoints in service to the wars on drugs and terror. (No terrorists have ever been arrested this way.)

The upshot, as the ACLU has reported in its extensive coverage of the border zone, is CBP "agents are stopping, interrogating, and searching Americans on an everyday basis with absolutely no suspicion of wrongdoing, and often in ways that our Constitution does not permit." And in the years since the 100-mile rule was created, Border Patrol agents have grown from a force of 1,100 to around 21,000, with an estimated 170 permanent "interior checkpoints." What may have been relatively innocuous at the start is now a major problem.

That brings us to the second reason to be worried by Morgan's remark: The border zone as it exists today was implemented with remarkably little pushback. The Border Zone Reasonableness Restoration Act of 2019 would reduce the zone to 25 miles, but that would still include most major cities in the current designation — and it has no legislative traction anyway.

If neither Congress nor the Supreme Court objects to this status quo, why would we expect them to object to extending the border zone to include the final third of the population? If it's fine to have CBP infringing around 200 million people's Fourth Amendment rights, what's another 100 million?

It's not true that every town, every city, every state is a border town, a border city, and border state. The unchallenged corruption of the border zone gives us good cause to be leery of any talk that suggests they are.