



How the U.S. Border Patrol Persuaded Congress to Legalize Unfettered Searches in Wide Border Zones

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Aggressive immigration enforcement by the administration of President Donald Trump has drawn attention to the wide zones along the nation's international borders within which the U.S. Customs and Border Protection agency asserts authority to conduct searches and stops without normal legal approvals. Created by policymakers in the 1940s, the special border zone extends 100 miles inland from the nation's land and sea boundaries and includes nearly two-thirds of the United States population. Inside such areas the Border Patrol recently questioned a Spanish-speaking United States citizen at a store in Montana, checked the identifications of passengers on a Greyhound bus in Florida, and set up immigration checkpoints on highways in New Hampshire and northern Maine.

In response to critics pointing to arbitrary actions seemingly based on racial profiling, the Border Patrol defends such operations as essential to the maintenance of law and order. But the agency has not always been so certain about the legality of such operations. My research on the Immigration and Naturalization Service shows that the 100-mile border zone was created to legalize immigration checks known to be of dubious legality and thus protect agency employees from lawsuits. Contrary to the Trump administration's claims, this zone was not founded in response to public demands or following any deep review of Constitutional considerations. It emerged instead after Border Patrol leaders persuaded Congress to legalize controversial informal practices.

The Immigration and Naturalization Service in the Early 20th Century

Officials of the Immigration and Naturalization Service officials have long questioned the legality of operations beyond the U.S.-Mexico boundary. Although they have clear legal authority to make arrests and conduct searches and seizures without warrant at international boundaries, they were uncertain about the reach of that authority into the interior. Immigration laws and statutes referring to the Border Patrol failed to illuminate this issue. By 1933, such ambiguities led Commissioner General William MacCormack to comment that the agency often conducted apprehensions "without due regard for our constitutional procedure and that there is, in many of the cases, distinct lawlessness." As part of a broader effort to reform the Immigration and Naturalization Service and protect agency employees from liability, MacCormack ordered the Border Patrol to end vehicular stops beyond the border and stop arresting immigrants without warrant — except in certain special cases.

Border Patrol officials in the Southwest railed against the new orders, arguing that they flew in the face of practices exercised since the unit's founding 1924. Specifically, Border Patrol inspectors claimed that warrantless detentions of undocumented immigrants were necessary to extract the evidence necessary to issue warrants.

A New Legal Step

Although local Border Patrol officials paid lip service to the prohibition on warrantless arrests in the 1930s, by the 1940s Immigration and Naturalization Service leaders in Washington, D.C. gave in to the unprecedented logistical demands of the Bracero Program — a series of laws and agreements that allowed Mexican laborers to enter the United States temporarily to work in seasonal agriculture. Lacking the money and manpower to manage the dramatic increase in undocumented entries triggered by this program, local Border Patrol officials took steps to tighten enforcement.

During the 1940s, southwestern Immigration and Naturalization Service officials openly criticized MacCormack's previous reforms. They claimed that warrant rules reduced the effectiveness of the agency by reducing Border Patrol apprehensions by half. In 1942, El Paso District Director Grover C. Wilmoth started to pursue legislative amendments aimed at reversing MacCormack's bans so that the Border Patrol actions on highways and private property would be able to skirt Fourth Amendment prohibitions against warrantless arrests and unreasonable searches and seizures. During this campaign, immigration officials admitted that, despite apparent legal limits on searches without clear reasonable cause, patrol officers had been stopping vehicles since 1924 within an area 100 miles north of the border. Such stops had long persisted despite questions about their legality. Rather than train officers to abide by reasonable cause standards, Wilmoth, instead sought a legislative amendment to legitimize the longstanding informal procedures. He worked with the attorney general's office to draft what Congress enacted as Public Law 613 in 1946, with very little debate.

Clearing the Way for Arbitrary Action

Public Law 613 gave southwestern Immigration and Naturalization Service officials nearly everything they demanded. It reversed the reforms of the 1930s and authorized practices that agency officials themselves had previously characterized as lawless. Specifically, the new statute authorized immigration officials to arrest undocumented immigrants beyond the border without a warrant. It also freed Border Patrol officers from determining probable cause or reasonable suspicion of a crime prior to stopping a car. Instead, Border Patrol agents enjoyed almost unfettered authority to conduct stops and searches within a "reasonable distance from any external boundary of the United States." A year after the law passed, the agency specified this "reasonable distance" as 100 miles.

To win approval for the border zone highway searches, Wilmoth and the Attorney General's office dropped an amendment that would have allowed the Border Patrol to conduct warrantless searches of private property. But the agency continued to push for that amendment, and in 1951 Congress passed a law that authorized private property searches without warrants within a 25-mile zone adjacent to the border.

The history of the 100-mile border zone disproves Trump's claims that the zone and the laws that Border Patrol follow within it are the result of public demands or deep review of Constitutional considerations. To the contrary, Border Patrol leaders persuaded Congress to legalize informal practices that they had long recognized as controversial. Rather than accept Trump's "law and order" narrative, politicians and activists must rethink and push to reform the laws that govern and legitimize the 100-mile zone.

Read more in S. Deborah Kang, *The INS on the Line: Making Immigration Law on the US-Mexico Border, 1917-1954* (Oxford University Press, 2017).