

Questions for the Record
Comprehensive Immigration Reform

Senator Mike Lee

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Q 1. By what metric is “border security” currently determined? Is this metric effective? Is the same metric used in the bill?

Today there exists no definition of “border security”. However, there are at least three versions currently in government circles which are stated as measuring border security.

- The first is “**operational control**”, a legal term which requires the border be maintained to keep out illegal aliens, terrorists and contraband across 100 percent of the border. This definition is set out in the Secure Fence Act of 2006. Prior to its legal definition, “operational control” was a term used within the Border Patrol to allocate resources to areas so that the Border Patrol could determine what was necessary to be operational in that locale. That term, whether the Border Patrol has decided to use another measure or not, remains law. I discuss that term and its meaning below at length.
- The second is **lower apprehension numbers**. Secretary of Homeland Security Napolitano has stated numerous times that lower apprehension numbers indicate that the border is as secure as it has ever been.
- The third is what I will call a “**we feel safe**” measure, a relatively new metric that remains undefined, is not in law, and has no objective measure to make the determination as to whether the border is secure. In fact, the measure does not describe nor help determine whether the actual border is secure, or safe, or under operational control as defined in the Secure Fence Act, at all. Border Patrol Chief Mike Fisher testified before the House in February 2013 about this new measure, which is not law, as follows:

We are here today to discuss what a secure border looks like. ... For border communities, a secure border means living free from fear in their towns and cities. It means an environment where businesses can conduct cross-border trade and flourish. For other American communities, it means enjoying the benefits of a well-managed border that facilitates the flow of legitimate trade and travel. *See*

<http://docs.house.gov/meetings/HM/HM11/20130226/100300/HHRG-113-HM11-Wstate-FisherM-20130226.pdf>, from House hearing, 'What Does a Secure Border Look Like?' 2/26/13

In contrast to the limiting measure of “low apprehensions” and amorphous measure of “we feel safe”, there is a metric the measure the Border Patrol traditionally understood and built its resources upon, known as “**operational control**”. That is defined clearly and succinctly under the **Secure Fence Act of 2006**, PL 109-367 [<http://www.gpo.gov/fdsys/pkg/PLAW-109publ367/html/PLAW-109publ367.htm>]. This is not the metric in S. 744.

The White House Fact Sheet for the Secure Fence Act of 2006 (and the 2006 outline of comprehensive immigration reform) is here [<http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061026-1.html>].

The Secure Fence Act makes clear the definition of “operational control” (my emphasis added below):

SEC. 2. <<NOTE: 8 USC 1701 note.>> ACHIEVING OPERATIONAL CONTROL ON THE BORDER.

*(a) <<NOTE: Deadline.>> In General.--Not later than 18 months after the date of the enactment of this Act, the Secretary of Homeland Security shall take all actions the Secretary determines necessary and appropriate to **achieve and maintain operational control over the entire international land and maritime borders of the United States**, to include the following--*

*(1) **systematic surveillance** of the international land and maritime borders of the United States through more effective use of personnel and technology, such as unmanned aerial vehicles, ground-based sensors, satellites, radar coverage, and cameras; and*

*into (2) **physical infrastructure enhancements** to prevent unlawful entry by aliens the United States and facilitate access to the international land and maritime borders by United States Customs and Border Protection, such as additional checkpoints, all weather access roads, and vehicle barriers.*

*(b) **Operational Control Defined.**--In this section, the term “operational control” means the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.*

*(c) **Report.**--Not later than one year after the date of the enactment of this Act and annually thereafter, the Secretary shall submit to Congress a report on the progress made toward achieving and maintaining operational control over the entire international land and maritime borders of the United States in accordance with this section.*

Top Ten Reasons Why the S. 744 Border Security Metric is Unnecessary and Unhelpful

1. The S. 744 “**effectiveness rate**” metric only requires the Secretary of Homeland Security to assure Congress via reporting that the border is secure, not actually secure the border. On numerous occasions, including before the Senate Judiciary Committee, the current Secretary Napolitano has asserted that the border is more secure than it ever has been and that the metric for security the Secretary has been using -- apprehensions statistics - are down.

However, internal DHS documents, received on a daily basis by DHS, show that for two years the apprehension numbers on the southwest border are going up. Considering that S. 744 focuses on the southwest border, the fact that border apprehensions have risen for two years, not declined, would have been helpful to the nation’s consideration of whether we are ready for comprehensive immigration reform.

What we now know is that internal Department of Homeland Security documents produced daily by the Border Patrol make clear that as of April 2, 2013, southwest apprehensions across nine Border Patrol sectors rose during this same time frame in both 2011 and 2012. More specifically, the **FY2103 compared to FY 2012 shows a 13 percent increase in apprehensions (from 170,223 to 192,298) and a 16 percent increase in apprehensions comparing FY2013 to FY2011 (from 165, 244 to 192,298).**

Here are excerpts from DHS extensive data highly relevant to the debate today pertaining to the southwest border:

U.S. BORDER PATROL STATISTICAL DATA 4/2/13

Southwest Border Apprehensions (9 USBP Sectors)

FY2013 YTD Cumulative	192,298
FY2012 YTD Cumulative	170,223
FY2011 YTD Cumulative	165,244
FY2013 compared to FY2012:	13 % increase
FY2013 compared to FY2011:	16 % increase

Total U.S. Border Patrol Apprehensions

FY2013 YTD Cumulative	195,287
FY2012 YTD Cumulative	174,187
FY2013 compared to FY2012:	12 % increase

Total Year to Date U.S. Border Patrol Drug Seizures

FY2013 YTD Marijuana Totals 1,331,512

FY2012 YTD Marijuana Totals 1,272,456

5 % increase

(Note: Data shows total apprehensions down in northern and coastal sectors)

2. As I stated in my testimony, the 90 percent “effectiveness rate” laid out in S. 744 to measure border security depends on a **100 percent detection rate** of illegal aliens crossing the border. As Secretary Napolitano has agreed in her April 23, 2013 testimony before this Committee, the ability to detect 100 percent of illegal crossings is not occurring today, and likely is not possible due to geographic constraints. Thus the metric’s construction fails because the denominator (detections) can not be accurately measured.
3. The S. 744 border security metric **only measures Border Patrol activity (apprehensions) and not results** (actual reduction in illegal crossings and contraband, and enhanced national security and public safety). A sole focus on apprehension numbers both (1) focuses on what the Border Patrol is doing and not on results; (2) reduces accountability to Congress and the American people as to how secure the border actually is; and (3) excludes from the definition what the Secure Fence Act includes “means the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.” I

I have written much on terrorist entry and need not repeat it here, but any metric that only considers numbers of apprehensions important when one terrorist can attack and kill Americans, does not make much sense. Neither does ignoring contraband, weapons or drugs. Nor does ignoring special considerations when surges occur in illegal crossings from those from Special Interest Countries (which does not include any of the former Soviet Republics, but most other countries known to harbor terrorists).

4. The GAO [<http://www.gao.gov/assets/660/652331.pdf>.] agrees that the sole focus of the DHS on apprehensions means **Congress cannot adequately provide oversight of DHS activities, nor of DHS headquarters over CBP**. Here is an excerpt from GAO February 2013 testimony before the House Homeland Security Committee:

Since fiscal year 2011, the Department of Homeland Security (DHS) has used changes in the number of apprehensions on the southwest border between ports of entry as an interim measure for border security as reported in its annual performance plans. In fiscal year 2011, DHS reported a decrease in apprehensions, which met its goal to secure the southwest border.

...

At the end of fiscal year 2010, DHS reported achieving varying levels of operational control of 873 (44 percent) of the nearly 2,000 southwest border miles. In fiscal year 2011, citing a need to establish new goals and measures that reflect a more quantitative methodology and an evolving vision for border control, DHS transitioned to using the number of apprehensions on the southwest border as an interim goal and measure. As GAO previously testified, this interim measure, which reports on program activity levels and not program results, limits DHS and congressional oversight and accountability.

5. **A metric that measures apprehensions and turnbacks only, but ignores surges and lulls in activity, does not represent actual illegal activity.** I lay out a series of examples in my testimony, which focuses on the surge currently taking place over the Arizona central border region. This area, representing most of the Tucson Sector, had a 494 percent surge in illegal crossings and activity from August 2012 to December 2012, and Border Patrol pilot audio from March 1, 2013 state that pilots are seeing group sizes of crossings now that has those in the field stating they are being “inundated”. Yet the numbers for actual apprehensions for the first four months of 2103 in Tucson are -1%. Does that make sense? Perhaps there is an explanation, but the apprehension metric does not reflect or explain this type of data. Rather, the DHS apprehension data appears to contradict it. Thus, the metric appears to be incomplete at best, and misleading at worst.
6. **The secure border definition of “operational control” already exists in the Secure Fence Act.** This definition is comprehensive yet flexible, and one which the Border Patrol was working to achieve in past years, if not fully implemented. The current definition creates a clear standard and mission that is inclusive of what it takes to preserve our national security, expanded to include lessons learned from 9/11 and terrorist travel studies I subsequently conducted after the 9/11 Commission.

Maintaining the DHS mission of seeking operational control of the border, and a continued build-out of creating an accurate metric from within the Border Patrol, approved by CBP and authenticated at the DHS headquarters level, is the best option to do so. CBP has been on this path for some time, continued to improve its “operational control” metrics which are reflected in part in the vast data they produce to determine where to allocate resources currently. Allowing them to continue to do so -- while encouraging DHS headquarters to support that mission with technology, infrastructure and sound enforcement policy -- is the best option for securing the border.

“High risk sectors” in the bill are an arbitrary, capricious, limiting and unhelpful added element that micro-manages the Border Patrol’s ability to realign resources in sectors that may be under significant threat. To be clear, I do not see the problem of achieving border security as residing with the current law’s definition of “operational control”. Changing the law now will not create better border security, but likely exacerbate current problems.

7. Requiring “effective control” in only *three* high risk sectors does not align with current Border Patrol data regarding apprehensions, and does not reflect the need for flexibility in order to be effective to the ebb and flow well known to exist in smuggling operations that can concentrate in one sector or spread out, contract again, etc., all in relatively short time frames. Right now four Texas sectors are surging in activity while Tucson remains at nearly double the others in apprehensions, indicating that only requiring three sectors to be secure to declare an “effectively” secure border to trigger a second wave of legalization, is out of sync with data and any common sense approach to determining whether a border is operationally under control and secure.

These short time frames are made stiff and stringent in S. 744, with only annual reviews of “effective” sectors.

According to the internal documents shared within the Border Patrol and with headquarters on a daily basis, as of April 2, 2013, *four* Texas sectors have seen a significant increase in apprehension numbers in comparison to the same time frame last year, and *one*, Tucson has remained almost the same producing almost twice the illegal apprehensions than any other sector.

The chart below breaks down apprehensions with percentage change across the southwest border sectors. Note in my testimony that at least in major portions of the Tucson sector, we know the Border Patrol is not detecting all illegal activity across the border, and not all smuggling operations are pursued.

Sector	Percent Change	FY2012 to date	FY2013 to date	FY13 to date daily average
San Diego	-9%	14,654	13,332	72
El Centro	-26	11,773	8,686	47
Yuma	-21	4,140	3,255	18
Tucson	-1	65,354	64,514	351
El Paso	+24	4,484	5,554	30
Big Bend	-5	2,117	2,001	11
Del Rio	+27	8,971	11,381	62
Laredo	+22	20,026	24,428	133
Rio Grande Valley	+53	38,704	59,147	321

8. **30,000 apprehended per year is not a number Congress should be requiring as a threshold.** Border control should be measured by a broader array of elements as the Secure Fence Act does-- terrorists, contraband, weapons and drugs-- which requires the Border Patrol to not just measure apprehensions and recidivism (although helpful), but also Special Interest Country aliens and Other Than Mexican statistics. The Border Patrol should be free to make that determination about threat, risk and allocation of resources. Having an arbitrary number set at 30,000 proscribed in law is a stiff calculation that is arbitrary and capricious, and limits the ability of the Border Patrol to respond in an appropriate and timely manner.
9. **Just because a sector does not see an increase in apprehensions does not mean it is not high risk;** if illegal crossings are always high, then that sector as well is a high risk sector. If certain special interest aliens are known to use a certain sector, than that area could also be considered high risk.
10. **The border security portion of S. 744 does require a border fencing strategy, but it neither (1) builds out on the requirements of the Secure Fence Act to maintain some level of consistency in infrastructure; (2) nor actually requires any fence to be built.** It will be nearly impossible for the Border Patrol to increase apprehensions and achieve effectiveness without necessary infrastructure in place such as double fencing where geographically feasible. Note that only a small portion of the over 2,000 miles of southwest border is fenced today. According to the CBP website [\[http://www.cbp.gov/xp/cgov/border_security/ti/ti_news/sbi_fence/\]](http://www.cbp.gov/xp/cgov/border_security/ti/ti_news/sbi_fence/), 652 miles of the project begun under the Bush administration has been completed.

Of these 652 miles, only 352 of these miles is pedestrian fence. The 299 miles of vehicle fence does nothing to stop either pedestrian or vehicular traffic, and really only acts as a boundary demarcation. To be clear, the Obama administration did not, as far as I know, ever begin undertaking any new fencing, but rather completed contracts already in place during the Bush administration. In addition, much of the pedestrian fence is not doubled or reinforced to prevent cut-throughs or climb-overs as in San Diego or Arizona's Yuma Sector which has extremely successful fencing. Thus, while a fencing strategy in S. 744 is a helpful start to maintaining border integrity and supporting the Border Patrol mission, it is not that helpful. Requiring the infrastructure to be in place is what is actually helpful.

10. **Low risk sectors are largely ignored in S. 744.** There is a requirement, which is helpful, in Sec. 5(a)(5)(C)(iii) that requires that semi-annual border security reports submitted by CBP to Congress include (I) each sector's effectiveness rate; (II) number of recidivist apprehensions by sector; and (III) that recidivism rate meted out by criminal consequence. While helpful, that does not mean a reallocation of resources or support to any sector outside the top three as far as I can tell.

Q 2. When calculating total illegal entries, besides watching someone cross the border without apprehending them, how does DHS decide that an illegal entry has occurred?

Here is what the GAO [<http://www.gao.gov/assets/660/652331.pdf>] says about determining illegal border crossing activity:

We defined these illegal entries as estimated “known” illegal entries to clarify that the estimates do not include illegal entrants for which Border Patrol does not have reasonable indications of cross-border illegal activity. These data are collectively referred to as known illegal entries because Border Patrol officials have what they deem to be a reasonable indication that the cross-border activity occurred. Indications of illegal crossings are obtained through various sources such as direct agent observation, referrals from credible sources (such as residents), camera monitoring, and detection of physical evidence left on the environment from animal or human crossings.

Q 3. What specific border security measures does this bill require in the non-high-risk sectors?

I do not see that S. 744 requires border security measures in the six sectors on the southwest border not labelled high risk. Please see Answer no. 1, reason 10.

Q 4. If, five years after the enactment of the bill, one of the current non-high-risk sectors becomes “high-risk” due to an increase in illegal crossings, do the border security requirements for those sectors also increase?

It appears that the language of the bill only requires three sectors at a time to qualify for “high risk”. If one shifts into high risk, it appears to me that another will shift out and mandate a reallocation of resources no matter what the current circumstances include. I may be inaccurate in my analysis, but that is what appears to me to be the case under the language I have reviewed.