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Civilian Patrols Along the Border: Legal and Policy Issues

April 7, 2006

Stephen R. Vina
Legislative Attorney
American Law Division

Blas Nunez-Neto
Analyst in Domestic Security
Domestic Social Policy Division

Alyssa Bartlett Weir
Law Clerk
American Law Division

Civilian Patrols Along the Border: Legal and Policy Issues

Summary

Civilian patrols along the international border have existed in a wide variety of forms for at least 150 years. Over the past 15 years, civilian border patrol groups appear to have proliferated along the U.S.-Mexico border, partly due to the increasing numbers of aliens entering the country illegally. In the spring of 2005, attention focused on these civilian patrols, when the “Minuteman Project” mobilized hundreds of volunteers along the Arizona-Mexico border to observe and report the movement of illegal aliens to the U.S. Border Patrol. Although some participants were armed, Minutemen volunteers were instructed not to engage in hostile confrontations with any illegal alien. Organizers of the Minuteman Project have expanded the Project to the other southwestern border states and Canada and have split the mission into a border defense corps and an internal vigilance operation that monitors businesses and government. A new nationwide Minuteman Project began in April 2006.

The activities of the Minutemen sparked a national debate on the legality and effectiveness of such civilian action along the border. Some questioned, for instance, the authority that allows civilians to undertake immigration-related enforcement activities and the legal status of a volunteer (i.e., private vs. federal actor). Others suggested that the Secretary of the Homeland Security should “deputize” the Minuteman volunteers or other private citizens so that they may play a larger and more regulated role. Some in the 109th Congress introduced bills that would authorize and expand civilian patrols along the border. Others in and outside of Congress were concerned with the effect that civilian border patrols might have on current border dynamics and enforcement operations.

Civilian border patrols would seem to be private actors since they are not operating under the color of federal or state law or at the behest or direction of federal or state authorities. As private actors, civilian patrols appear to have the right to gather and conduct some of their activities under a combination of constitutional and common law rights and privileges. Some of these rights and privileges have been codified in state law and provide quasi law enforcement authority. Civilian patrols would still have to abide by state and federal laws. There does not appear to be authority under the INA for the Secretary to “deputize” civilians to enforce immigration law, though some activities may not necessarily require an authorization.

This report provides a history of civilian border patrol groups, with a focus on those groups operating along the southwest border, including most particularly, the “Minuteman Project.” It also addresses some of the legal and policy issues (as mentioned above) that have surfaced from civilian activities at the border. The report concludes with summaries of legislative proposals that have been introduced in the 109th Congress that address the issue of civilian border patrol groups. This report will be updated as warranted.

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Civilian Patrols Along the Border: Legal and Policy Issues

Introduction

Civilian patrols along the international border have existed in a wide variety of forms for at least a hundred and fifty years. Over the past fifteen years, civilian border patrol organizations appear to have proliferated along the U.S.-Mexico border, partly due to the increasing numbers of aliens entering the country illegally. This trend appears to have further sharpened over the past five years with a number of highly organized groups forming and actively recruiting volunteers. Nationwide attention focused on the phenomenon in April 2005, when the “Minuteman Project” mobilized hundreds of volunteers along the Arizona-Mexico border to observe and report the movement of illegal aliens to the U.S. Border Patrol (USBP). Although some participants were armed, Minutemen volunteers were instructed not to engage in hostile confrontations with any illegal alien.

The Minuteman Project sparked a national debate on the legality and effectiveness of such civilian action at the border. From this debate, a number of legal and policy issues emerged, as parties considered the highly dangerous law enforcement nature of the mission and the overwhelming federal responsibilities in immigration matters. Some questioned, for instance, the authority that allows civilians to engage in immigration-related enforcement measures and the legal status of a volunteer (i.e., private vs. federal actor). Others suggested that the Secretary of the Homeland Security should “deputize” the Minuteman volunteers or other private citizens so that they may enforce immigration law. Indeed, some in the 109th Congress introduced bills that would authorize and expand civilian activities along the border. Others in Congress and elsewhere were concerned with the effect that such activities might have on current border dynamics and enforcement operations.

This report opens with a discussion on the federal authority to enforce immigration law at the border and some U.S. Border Patrol operations that have affected illegal migration patterns along the southwest border. Next, the report provides a history of civilian border patrol groups, with a particular focus on the “Minuteman Project” and other groups operating along the southwest border. It then highlights issues of authority that might arise, and includes, as an appendix, a table that sets forth various state laws that may be useful to civilians performing immigration-related enforcement activities. The report also addresses some of the legal and policy issues, as mentioned above, that have surfaced from civilian involvement in immigration enforcement at the border. The report concludes with summaries of legislation introduced in the 109th Congress that address the use of civilian border patrols.

Authority to Enforce Immigration Law

For decades, the administrative authority to interpret, implement, enforce, and adjudicate immigration law within the U.S. lay almost exclusively with one officer: the Attorney General. The most general statement of this power was found in §103(a)(1) of the Immigration and Nationality Act of 1952 (INA),¹ the fundamental statute regulating the entry and stay of aliens:

The Attorney General shall be charged with the administration and enforcement of the Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such other laws relate to the power, functions, and duties conferred upon the President, the Secretary of State, or diplomatic or consular officers; Provided, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

Operationally, most of this authority was delegated to, and carried out by, the Commissioner of Immigration and Naturalization Service (INS) and the INS, though the Attorney General still retained ultimate authority.

In the Homeland Security Act of 2002 (HSA; P.L. 107-296), Congress reallocated administrative authority over immigration law from the Department of Justice (DOJ) to the Department of Homeland Security (DHS). The HSA amended §103(a)(1) of the INA to place the Secretary of DHS in primary charge of the administration and enforcement of immigration laws.² Congress transferred the enforcement functions (along with authorities and personnel attendant to those functions)³ that were being conducted through the Commissioner of INS, as well as others, to the Under Secretary for Border and Transportation Security.⁴ An administrative reorganization later divided the transferred enforcement functions into two separate agencies to address priorities (1) at and near the border and (2) within the interior of the United States.⁵ A subsequent administrative reorganization appears to have consolidated the functions performed by the Under Secretary for Border and Transportation Security into a new Directorate of Policy, but made the immigration enforcement agencies free-standing entities within DHS. The HSA makes clear that all functions of all officers, employees, and organizational units of the Department of Homeland Security (DHS) are vested in the Secretary.⁶

¹ 8 U.S.C. §§1101 *et seq.*

² See P.L. 107-296, §1102, as amended by P.L. 108-7, Div. L, §105(a)(1).

³ For example, the HSA states that the term “functions” includes authorities, powers, rights, privileges, immunities, programs, projects, activities, duties, and responsibilities.

⁴ P.L. 107-296, §441.

⁵ Immigration enforcement conducted within the interior of the United States is conducted by DHS’s Immigration and Customs Enforcement. This Report does not focus on interior enforcement.

⁶ P.L. 107-296, §102(a)(3). DHS regulation 8 C.F.R. §2.1 further makes clear that all authorities and functions of DHS to administer and enforce immigration laws are vested in (continued...)

With respect to border enforcement, §103(a)(5) of the INA provides the Attorney General (now the Secretary of DHS) “shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens....”⁷ The HSA requires the Secretary of DHS (acting through the now defunct Undersecretary of Border and Transportation Security) to, among other things, prevent the entry of terrorists, secure the borders, and carry out the immigration enforcement functions vested by statute in the Commissioner of INS.⁸ Immigration enforcement at or near the border is conducted by DHS’s Customs and Border Protection (CBP). This border agency combined the inspectional workforces and broad border authorities of Customs, INS, and the Animal and Plant Health Inspection Service. Although CBP is charged with overall border enforcement, a distinction is made concerning border enforcement *at* and *between* ports of entry. Immigration enforcement responsibilities between ports of entry fall primarily on the U.S. Border Patrol (USBP), while responsibilities at the ports of entry fall on CBP inspectors.

Although the enforcement of immigration law within the proximity of the border rests with CBP and the USBP, the Secretary of DHS appears to have the authority to delegate these enforcement functions to following individuals:

- **Any Employee of CBP, ICE, or DHS.** Section 103(a)(4) of the INA authorizes the Secretary to require or authorize any employee of CBP, ICE, or DHS to perform or exercise any of the powers, privileges, or duties conferred or imposed by the INA or regulations issued thereunder.
- **Any Employee of the United States.** Section 103(a)(6) of the INA authorizes the Secretary to confer or impose upon any employee of the United States, with the consent of the head of the department under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by the INA or regulations issued thereunder upon officers or employees of CBP or ICE.
- **State and Local Law Enforcement Officers.** Section 103(a)(8) of the INA allows the Secretary of DHS, in the event the Secretary determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, to authorize any State or local law enforcement officer, with the consent of the head of the department under whose jurisdiction the individual is serving, to perform or exercise

⁶ (...continued)
the Secretary.

⁷ The HSA effectuated the transfer of immigration authority in statutory language that is separate and apart from the INA itself (i.e., it did not amend the INA). Consequently, many forms of authority, including Executive Orders, rules, regulations, directives, and the INA, still refer to the Attorney General or other DOJ components. The HSA remedies this situation in §456, §1512(d), and §1517 by making all references in the above-mentioned forms of authority relating to an agency that was transferred “deemed to refer” to the appropriate agency or employee in DHS. Accordingly, this Report refers to the Secretary or applicable DHS component.

⁸ P.L. 107-296, §402.

any of the powers, privileges, or duties conferred or imposed by the INA or regulations issued thereunder upon officers or employees of CBP or ICE.⁹

Individual enforcement authority stems from §287 and §235 of the INA.¹⁰ Section 287 of the INA gives any officer or employee of the former Immigration and Naturalization Service (INS — now employees of the DHS) authorized under regulation prescribed by the Attorney General (now the Secretary of DHS) the general power, without a warrant, to interrogate aliens, make arrests, conduct searches, board vessels, and administer oaths.¹¹ For example, §287(a)(3) authorizes immigration officers to have access to private lands (but not dwellings) within a distance of twenty-five miles from the border for the purpose of patrolling the border and preventing the illegal entry of aliens. Section 235 authorizes “immigration officers” to inspect all aliens who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States. The combination or cross-designation of inspectors from Customs, the INS, and the U.S. Department of Agriculture within DHS’s Bureau of Customs and Border Protection, however, may allow the use of other enforcement authorities depending on the circumstance.

The term “immigration officer” is statutorily defined in the INA to mean any employee or class of employees of the INS or of the United States as designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by the INA.¹² DHS has implemented regulations clarifying the meaning of “immigration officer” with respect to DHS personnel. The regulation (8 C.F.R. §103.1(b)) designates various categories of CBP and ICE officials and even other officers or employees of DHS or of the U.S. as designated by the Secretary as immigration officers authorized to exercise the powers and duties of such officers as specified by the INA and applicable regulations.¹³

⁹ See also INA §287(g) (authorizing the Secretary of DHS to enter into agreements with state and local law enforcement officers to carry out the investigation, apprehension, or detention of aliens in the United States).

¹⁰ 8 U.S.C. §1357 and §1225.

¹¹ References to the Attorney General, the Commissioner of the former INS, and INS are now deemed to refer to the Secretary of DHS, his delegates, or appropriate component in DHS. See P.L. 107-296, §§102(a), 441, 1512(d), and 1571; 8 C.F.R. §2.1, §103.1.

¹² 8 U.S.C. §1101(a)(18).

¹³ The following DHS employees including senior or supervisory officers of such employees have been designated “immigration officers” pursuant to 8 C.F.R §103.1(b): immigration officer, immigration inspector, immigration examiner, adjudications officer, Border Patrol agent, aircraft pilot, airplane pilot, helicopter pilot, deportation officer, detention enforcement officer, detention officer, investigator, special agent, investigative assistant, immigration enforcement agent, intelligence officer, intelligence agent, general attorney (except with respect to CBP, only to the extent that the attorney is performing any immigration function), applications adjudicator, contact representative, legalization adjudicator, legalization officer, legalization assistant, forensic document analyst, fingerprint specialist, immigration information officer, immigration agent (investigations), asylum officer, other officer or employee of the Department of Homeland Security or of the

(continued...)

U.S. Border Patrol Practices

In the 1990s, the United States Border Patrol began implementing a policy of “Prevention Through Deterrence” with the goal of placing USBP agents and resources directly on the border to detect and deter the entry of illegal aliens, rather than attempting to arrest aliens after they had already entered the country. The policy was applied nationally after the perceived successes of the “Hold the Line” program in El Paso, Texas, and of Operation Gatekeeper in San Diego, California.¹⁴ In addition to placing more agents directly on the border, these operations utilized landing mat fencing,¹⁵ stadium lighting, cameras, and sensors to deter and detect unauthorized aliens. Additionally, the policy reflected the USBP’s goal of rerouting the illegal migration patterns away from traditional urban routes such as San Diego towards less populated and geographically isolated areas, providing USBP agents with a tactical advantage over illegal border crossers and smugglers.¹⁶

In practice, the prevention through deterrence strategy has succeeded in shifting the migration pattern of unauthorized aliens. Throughout the late 1990s apprehensions decreased significantly in the traditional high-traffic areas along the California and Texas border, instead pushing would-be migrants out into the harsh conditions of the Arizona desert along the Tucson sector.¹⁷ In FY1997, the California section of the border accounted for 31% of the 1.38 million apprehensions made by the USBP, while Arizona accounted for 22%. In FY2005, Arizona accounted for 49% of the 1.19 million apprehensions made by the USBP, while California accounted for 15%. Whether the strategy has succeeded in reducing the overall number of people attempting to enter the country illegally is a matter of much debate. USBP apprehensions increased steadily through the late 1990s, reaching a peak of 1.65 million in FY2000. From FY2000 to FY2003 apprehensions declined steadily, reaching a low of 905,065 in 2003. Apprehensions increased over the last two fiscal years, reaching 1.19 million apprehensions in FY2005.

¹³ (...continued)

United States as designated by the Secretary of Homeland Security as provided in §2.1 of this chapter.

¹⁴ For a more detailed discussion of the “Hold the Line” program and Operation Gatekeeper, please refer to CRS Report 97-989, *U.S. Border Patrol Operations*, by William Krouse (archived — available from author).

¹⁵ Landing mat fencing is constructed from surplus Vietnam War era landing mats used to set up temporary landing strips for airplanes.

¹⁶ U.S. Government Accountability Office, *Border Security: Agencies Need to Better Coordinate Their Strategies and Operations on Federal Lands*, GAO-04-590, June 2004, pp. 10-11; see also “Combating Illegal Immigration: Progress Report” Hearing before the House Committee on the Judiciary, Subcommittee on Immigration and Claims, 105th Cong., (Apr. 23, 1997) (testimony of George Regan, Acting Associate Commissioner, Enforcement, Immigration and Naturalization Service).

¹⁷ For a more in depth analysis of the U.S. Border Patrol, please refer to CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*, by Blas Nuñez-Neto.

Civilian Border Patrol Organizations

The phenomenon of civilians taking it upon themselves to patrol the border has existed in a wide variety of forms for at least a hundred and fifty years. Some are informal or *ad hoc* groupings of citizens, while others are highly organized and well funded groups that actively recruit members. Over the past fifteen years civilian border patrol organizations appear to have proliferated along the U.S.-Mexico border. Though the reasons for their formation vary, many of the groups were organized in response to an apparent lack of federal resources at the border and to the significant increases in illegal entries. Not surprisingly, civilian border patrol groups have tended to follow the trends of unauthorized migration. In the 1980s and early 1990s, the majority of these groups operated along the San Diego border, which up to then had been the flash-point for unauthorized migration. As unauthorized migration was pushed eastward after the advent of the Prevention Through Deterrence policy and Operation Gatekeeper in California, a number of civilian border patrol organizations began to grow along the Arizona border. The following paragraphs further describe some of the types of civilian operations that have occurred along the border.

Ad Hoc Groups

Examples of ad hoc groups along the border are many and varied, but they tend to lack a formal organizational structure. These groups are typically comprised of local citizens reacting to increasing numbers of unauthorized immigrants crossing into the country through their land. For example, in 1997, one rancher near Campo, California, organized nighttime operations on his property in which volunteers were equipped with camouflage fatigues and semi-automatic rifles.¹⁸ While many civilian border patrol groups resent the label of vigilantism that some have given them, this rancher reveled in being characterized as a vigilante: “a vigilante is, by definition, a citizen upholding the law in the absence of law enforcement. That’s the way we out here look at it.”¹⁹ Also in 1997, ranchers in Eagle Pass, Texas engaged in a shootout with armed aliens in which more than 30 rounds were fired. Many of the ranchers in Maverick County, Texas reportedly carried handcuffs and semi-automatic weapons in order to deter and apprehend unauthorized aliens.²⁰

As unauthorized migration patterns have shifted from California to Arizona, a number of ad hoc groups of Arizonans have begun operating along the border. For example, in 2000 an anonymous flyer was posted in public areas around Douglas inviting volunteers to form posses to track down unauthorized aliens.²¹ One of the more known Arizona ranchers to become involved in border operations is Roger

¹⁸ The nearby Campo USBP station reportedly saw a 3,000% increase in apprehensions between 1994 and 1997.

¹⁹ Ted Conover, “Border Vigilantes,” *New York Times*, May 11, 1997.

²⁰ Thaddeus Herrick, “Armed on the Border; Ranchers along Rio Grande take on Illegal Intruders Themselves,” *Houston Chronicle*, Nov. 2, 1997.

²¹ Geoffrey Mohan, “Arizona Ranchers Move to Limit Border Crossings,” *The Times Union*, May 28, 2000.

Barnett, who owns a 22,000 acre²² ranch near Douglas. On March 10, 1999, Barnett and 20 other landowners in the area signed a proclamation which noted “if the government refuses to provide security, then the only recourse is to provide it ourselves.”²³ Barnett started patrolling his ranch in 1998 and typically dresses in camouflage and carries a sidearm.²⁴ He claims to have apprehended over 10,000 unauthorized migrants during the course of these patrols.²⁵ Roger Barnett and his brother, Don, have sometimes been accused of using force to apprehend migrants, a claim they vehemently deny.²⁶ They were accused of impersonating federal agents in a suit brought by the human rights organization Border Action Network in 2003,²⁷ one of three suits pending against Barnett in October of 2005.²⁸

Organized Civilian Patrol Groups

In addition to these ad hoc groups, there are a number of more organized groups operating along the border with the stated goal of addressing the issue of unauthorized immigration. These groups tend to feature formal organizations that actively recruit members, raise funds, and issue press releases, in addition to patrolling the border. The following is a selection of the largest and most organized of these entities. As with the ad hoc groups above, some of these organized groups began operating in California and many others have proliferated in Arizona as the patterns of migration shifted.

Voices of Citizens Together/American Patrol. This organization was founded in 1992 by Glenn Spencer, one of the leading voices in the civilian patrol movement.²⁹ Inspired by the race riots that broke out in Los Angeles in 1992, Spencer formed a neighborhood organization, Valley Citizens Together, that was subsequently renamed as interest expanded. Spencer launched a newsletter which linked the various social problems facing Los Angeles, including poverty, violence,

²² Of the 22,000 acres, 15,000 are apparently leased from the state of Arizona, as reported by: Max Blumenthal, “Vigilante Injustice,” *Salon.com*, May 22, 2003. This lease was recently renewed by the state for 10 years with a proviso voiding the contract if any terms of the lease were violated. As reported by: Arthur Rotstein, “Border Rancher’s State Lease Renewed Despite Protests,” *Associated Press*, Oct. 25, 2005.

²³ Max Blumenthal, “Vigilante Injustice,” *Salon.com*, May 22, 2003.

²⁴ Alan Zarembo, “Coyote Inc.,” *Newsweek*, Aug. 30, 1999.

²⁵ Michael Riley, “Tired of Flow of Migrants, Vigilantes Go Out on Patrol,” *Denver Post*, Oct. 20, 2003.

²⁶ See Bill O’Reilly, “Impact: Chaos on the Mexican Border,” *Fox News Network*, July 14, 2000.

²⁷ Arthur Rotstein, “Ranchers Accused of Impersonating Federal Agents Near Border Sued,” *Associated Press*, Dec. 10, 2003.

²⁸ Arthur Rotstein, “Border Rancher’s State Lease Renewed Despite Protests,” *Associated Press*, Oct. 25, 2005.

²⁹ Michael White, “Illegal Immigrants Becoming Target of Violence as Resentment Grows,” *The Associated Press*, Aug. 23, 1993.

illiteracy, and white flight, to illegal immigration.³⁰ Spencer's organization was an active participant in the "Save our State" movement, a loose coalition of anti-illegal immigration organizations that advocated for the mass deportation of illegal immigrants. The movement culminated with Proposition 187, which would have expelled illegal immigrants from public schools and denied them health and social services. Voices of Citizens Together gathered 40,000 signatures to help put Proposition 187 on the ballot; in 1994 Proposition 187 passed as a referendum with widespread support. However, a federal district court halted implementation of Proposition 187 in 1994, and California Governor Gray Davis subsequently pursued mediation in 1999 rather than an appeal, which effectively nullified its provisions.³¹

American Border Patrol. In 2002, Glenn Spencer moved to Arizona and formed this organization to actively patrol the border. American Border Patrol uses cameras, sensors, "hawkeye" spotters, and unmanned aerial vehicles³² to identify suspected border intruders. Once identified, the intruders are videotaped whenever possible and reported to the USBP. Video of their aerial patrols of the border are also available on the organization's website.³³ According to Spencer, American Border Patrol differs from other civilian patrol groups operating in Arizona in that their volunteers do not carry firearms and do not attempt to detain migrants, but rather focus on documenting border intrusions.³⁴ Despite this disclaimer, however, Spencer was sentenced to a year of probation and fined \$2,500 for recklessly firing a gun after a neighbor discovered bullets had been fired into her garage door.³⁵

Ranch Rescue. This organization was formed in Texas by Jack Foote in June of 2000 in order to protect the property rights of ranchers along the border. Foote, who moved to the state in 1997, reportedly does not own any property in Texas, however.³⁶ According to published accounts, Foote drew the inspiration for his organization from accounts of migrant captures undertaken by Roger Barnett. Ranch Rescue drew a significant amount of press coverage due to its penchant for actively recruiting volunteers, organizing pseudo-military style operations featuring armed camouflage-clad volunteers, and allegedly using violence. In 2002, *Soldier of Fortune* magazine helped Ranch Rescue assemble "a heavily armed tactical team of

³⁰ Patrick J. McDonnell, "Brash Evangelist: Thanks to an Obsession with Immigration, Glenn Spencer has Ended up on a List of Hate Groups. Is His a Courageous Voice in the Wilderness — or the Whine of a Hatemonger?," *The Los Angeles Times Magazine*, July 15, 2001. (Hereafter cited as McDonnell, "Brash Evangelist".)

³¹ Ibid.

³² The organization has outfitted three model airplanes with cameras which are designed to home in on ground sensors triggered by people walking in the desert.

³³ American Border Patrol, available at [<http://www.americanborderpatrol.com/>].

³⁴ Austin Bunn, "Homegrown Homeland Defense," *New York Times Magazine*, June 1, 2003.

³⁵ Tyche Hendricks, "Militias Round Up Illegal Aliens in Desert," *San Francisco Chronicle*, May 31, 2004.

³⁶ Thomas Korosec, "Soldiers of Misfortune: Ranch Rescue Finds its Welcome Mat Withdrawn," *Houston Press*, Sept. 18, 2003.

20 for Operation Hawk,” near Nogales, Arizona, which led to the capture of 280 pounds of marijuana.³⁷ In March of 2003, two Ranch Rescue volunteers were arrested for allegedly assaulting two Salvadoran migrants. One of these volunteers, Casey Nethercott, is currently serving a five-year prison sentence in connection with the incident, for being an ex-felon in possession of a firearm. The jury deadlocked on the more serious charge of assault that stemmed from the incident. Foote and Nethercott also received a \$1.35 million default judgment against them for not responding to a civil lawsuit filed over the incident.³⁸ In August of 2005, Casey Nethercott’s ranch in Douglas, Arizona was given to the two Salvadoran migrants in a settlement stemming from the default judgement.³⁹

Civil Homeland Defense. Chris Simcox drew his inspiration for founding this group during a two and half month long camping session in the Arizona desert after the terrorist attacks of 9/11, during which he claimed to have observed five paramilitary groups of drug dealers. Incensed by the border’s insecurity, Simcox moved to Tombstone, Arizona and bought the local newspaper, *The Tumbleweed*, for \$50,000. Civil Homeland Defense began in 2003 when Simcox and some friends offered to serve as private security guards for ranchers in the area. According to Simcox, the only membership requirement was a concealed gun permit from the state of Arizona in order to “screen out the criminals and loonies.”⁴⁰ Civil Homeland Defense volunteers carry searchlights and portable radios in addition to their guns, and typically do not dress in camouflage.⁴¹ In 2004, Simcox was convicted of carrying a concealed weapon on federal land and lying to a federal law enforcement officer about it; he was sentenced to two years of probation.⁴²

The Minuteman Project

Founded by retired California businessman James Gilchrist in October of 2004, the “Minuteman Project” was organized with the help of Chris Simcox and placed hundreds of volunteers along a 64-mile stretch of the Arizona border for the month of April 2005. In press interviews leading up to the deployment of the Minuteman volunteers, Gilchrist sought to distance himself from the activities of Roger Barnett and Ranch Rescue by stressing that the goal of the project was not to make

³⁷ Mark Lisher, “Vigilante Chief Longs to Lead U.S. Border War; Armed Group Says Missions Defend Property; Others Call Campaign ‘Virulent Racism,’” *Austin American Statesman*, Nov. 2, 2003.

³⁸ Jesse Borgan, “With Vigilante Jailed, Officials Have ‘One Less Worry,’” *San Antonio Express-News*, May 4, 2005.

³⁹ Beth DeFalco, “Border Ranch Turned Over to Immigrant Border Crossers,” *Associated Press*, Aug. 19, 2005.

⁴⁰ Dan Baum, “Patriots on the Borderline; Toting Guns, Cameras, and Mighty Convictions, Small Bands of Americans are Patrolling the Southwest in Search of Illegal Immigrants,” *Los Angeles Times*, Mar. 16, 2003.

⁴¹ Michael Riley, “Tired of Flow of Migrants, Vigilantes Go Out on Patrol,” *Denver Post*, Oct. 20, 2003.

⁴² Thaddeus Herrick, “Armed on the Border; Ranchers Along Rio Grande Take on Illegal Intruders Themselves,” *Houston Chronicle*, Nov. 2, 1997.

apprehensions: “[w]e will be recording. We’ll chronicle all these reports that are going to Border Patrol from our outposts and our foot patrols and our air wing. We will record whether the Border Patrol is reacting or not, whether there has been an interception or not.”⁴³

During April 2005, approximately 900 volunteers from across the country gathered near the border in Arizona to take part in the Minuteman Project. The Project, in part, was designed to demonstrate that an increase in the manpower placed directly along the United States-Mexico border could successfully reduce the number of illegal aliens entering the country. The volunteers were unpaid and traveled to Arizona at their own expense. The volunteers were instructed by their leaders to “assist” USBP agents patrolling the border, and not to do anything other than alert the proper authorities of the presence of illegal aliens. Though some of them carried rifles or other firearms, the volunteers were instructed to “abide by the rules of no contact and no engagement,” never confront the illegal aliens, use their weapons only in self defense, and comply with the laws of Arizona.⁴⁴ Organizers told volunteers that they could not chase, restrain, or talk to the suspected illegal aliens. The volunteers were organized into groups of four to eight people. These groups set up observation posts on or near the border, and notified the Border Patrol when aliens were seen crossing the border illegally.⁴⁵

According to Chris Simcox, Minuteman Project volunteers “assisted” the Border Patrol with locating and apprehending 349 aliens entering the United States illegally. Also, no injuries or major incidents were reported, though even proponents agree that “[i]t is dubious that these standards could be maintained over time with an unpaid volunteer organizational structure.”⁴⁶ According to published reports, “Mr. Gilchrist said the number of aliens crossing where Minuteman volunteers had set up observation posts dropped from an average of 64,000 a month to an expected 5,000 this month.”⁴⁷ The Project also claimed that the Border Patrol reported a 65% drop from the previous year during the same time period in the number of apprehensions

⁴³ Sean Hannity and Alan Colmes, “Interview With James Gilchrist,” *Fox News: Hannity and Colmes*, Jan. 26, 2005.

⁴⁴ The Minuteman Project, Standard Operating Procedure (hereafter cited as “Standard Operating Procedure”) available at [<http://www.minutemanhq.com/hq/sop.php>].

⁴⁵ Congressional Immigration Reform Caucus, Results and Implications of the Minuteman Project (May 18, 2005) (hereafter referred to as “Field Report”). The Field Report, according to a Press Release by Congressman Tom Tancredo, is a draft document that does “not fully represent the views of Immigration Reform Caucus members. The report merely was meant to describe the trip taken by staff members who observed the Minutemen operation.” See Press Release, Rep. Tom Tancredo, Statement on Draft Minutemen Report (May 23, 2005) available at [<http://tancredo.house.gov/pressers/0523TancredoIssuesStatementOnDraftMinutemenReport.htm>].

⁴⁶ Field Report, at 4. The report did note two violations of these rules. In two separate incidents volunteers interacted with illegal immigrants in such a way as to give rise to a question of “possible illegal detention,” but both local government and the Border Patrol did not find any evidence of wrongdoing.

⁴⁷ Jerry Seper, “Minutemen Join New Organization,” *Washington Times*, Apr. 21, 2005.

of illegal aliens in the Naco section of the border. The USBP contested this claim. Agency officials pointed out that while apprehensions in eastern Arizona, where the Minutemen were deployed, declined from 24,842 in April of 2004 to 11,128 in April of 2005, apprehensions in western Arizona increased from 18,052 in April of 2004 to 25,475 in April of 2005.⁴⁸ DHS officials attributed the decrease in apprehensions in eastern Arizona to increased patrolling on the Mexican side of the border by Mexican police and military authorities.⁴⁹ At the same time, USBP officials also stated that the Minutemen volunteers were disrupting their operations by unwittingly tripping sensors deployed along the border, forcing agents to respond to false alarms.⁵⁰

After the completion of the thirty-day test period, the organizers and supporters of the Project called on Congress for the immediate “deployment of the National Guard, and/or Homeland Security Grants for authorized State Defense Forces to assist the Border Patrol.” Some supporters estimate that 36,000 additional personnel are needed to “seal” the U.S-Mexican border.⁵¹ Today, the Minuteman Project has split into two loosely related wings: Chris Simcox leads the Minuteman Civil Defense Corps, which focuses on continuing to place volunteers along the border, while James Gilchrist has focused on using the Minuteman Project to expose employers who hire unauthorized immigrants.

The Minuteman Civil Defense Corps has expanded the project to the other U.S. — Mexico border states — Texas, New Mexico, and California — as well as certain states bordering Canada. For example, the group conducted a border watch operation in Texas during the month of October 2005,⁵² and a month long observation of the Canadian border near Blaine, Washington in November 2005. According to published reports, 31 volunteers participated in the northern border observation which yielded one citation when an American crossed over to Canada illegally to impress his girlfriend by calling her from Canada. The city-councils of Bellingham and Blaine passed resolutions protesting the group’s presence.⁵³

The other wing of the Minuteman Project has targeted employers in the interior of the country. One prominent example of their activities occurred in Herndon,

⁴⁸ Gail Gibson, “For Minutemen, Chance to Patrol a Porous Border,” *Baltimore Sun*, May 1, 2005, p.1A.

⁴⁹ Michael Coronado, “Minutemen Monitor, Get Monitored at Arizona-Mexico Border,” *Orange County Register*, Apr. 14, 2005.

⁵⁰ Arthur Rotstein, “Border Patrol Complains That Volunteers Are Tripping Sensors Used to Detect Illegal Crossers,” *Associated Press*, Apr. 5, 2005.

⁵¹ Field Report, at 4. According to the Report, a successful permanent replication of the Minuteman Project would require an average 12-24 enforcement personnel per mile, or around 36,000 total additional personnel to adequately secure the entire 2,000 mile southern border. *Id.*

⁵² Minuteman Civil Defense Corps, *Minuteman Corps Texas*, available at [<http://www.minutemanhq.com/tx/>].

⁵³ Jon Gambrell, “Minuteman Project Wraps Up On Northern Border,” *Bellingham Herald*, Nov. 9, 2005.

Virginia where the local municipality decided to fund a day-laborer center in order to move day laborers from the convenience store parking lot where they had been congregating to a more controlled location behind a former police station. A Minuteman chapter opened in Virginia in October of 2005, and volunteers had been photographing employers hiring unauthorized immigrants to work as day-laborers at the convenience store twice a week. The chapter plans to send volunteers to the new publicly financed day-laborer center every day, turning the information over to “several local and state agencies as well as the Internal Revenue Service.”⁵⁴ The group has focused its efforts on the companies that hire day laborers and are allegedly operating without the proper licenses.

A new nationwide Minuteman project is set to begin in April 2006, according to Chris Simcox.⁵⁵ The campaign, “Secure Our Borders,” is to consist of 6,500 civilian volunteers stationed along 800 miles of U.S. border with Mexico and Canada.

Civilian Patrols and the Law

Legal Rights

Civilian border patrols do not operate under the color of a federal or state authorization because they are (presumably) not federal or state actors (see later discussion). As private persons, members of civilian border patrols do not appear to need statutory “authority” to conduct their volunteer border activities. Such persons would be operating much like a volunteer “neighborhood watch,” albeit a very proactive one regarding an issue of primarily federal concern. The federal government often receives volunteer information and services from the public without an explicit authorization. The right of private persons to assemble, carry weapons, report potentially illegal activities and to protect their property and themselves in some instances stems independently under a combination of constitutional and common law rights and privileges.

The First Amendment protects the freedom of expression and the right of persons to peacefully assemble and to petition the government for a redress of a grievance. While some may question whether the Minuteman Project is a peaceful assembly (since they are armed and performing *quasi* law enforcement functions), there seemed to be few, if any, transgressions. There is also little doubt that the Minuteman Project has formed, in part, to send a message to law makers that more needs to be done to secure the border. At common law, persons generally enjoy[ed], among others, the right to defend their property and themselves in cases of intrusion or attack. Private persons were (are) also allowed to make “citizen’s arrests” to facilitate the prompt suppression of certain offenses. Citizen arrest authority

⁵⁴ Timothy Dwyer, “Where Herndon Day Laborers Go, The Dogged Minutemen Will Follow,” *The Washington Post*, Dec. 13, 2005, p. B01.

⁵⁵ Jerry Seper, “Minutemen Announce April Border Campaign,” *The Washington Times*, Feb. 17, 2006.

generally permits a private person to arrest another without a warrant for misdemeanors that amount to a “breach of the peace” and felonies committed in his presence.⁵⁶

Some of these rights and privileges have been codified in state law. For example, state law often outlines when a private person may make an arrest, carry weapons, or use self-defense and deadly force. These laws would be pertinent to a civilian attempting to perform enforcement-related measures along the border. Because these laws generally vary from state to state, civilian groups that operate in more than one state must also be mindful of gradations in state law. **Appendix 1** summarizes the state laws of Arizona, California, New Mexico, and Texas governing the authority of a civilian to make arrests, claim self-defense, and use deadly force. State militia laws may also provide authority for state residents to conduct border enforcement activities or to participate in certain law enforcement type activities at the direction of the governor.⁵⁷

Legal Scope

Though civilian border patrols do not appear to operate under any explicit federal or state authorization, they must still abide by state and federal laws. At the federal level, because there are many national parks along the southwest border that illegal aliens often cross, civilian border patrol groups must be mindful of laws that make it a crime to trespass or carry a firearm on federal lands.⁵⁸ Also, there have been some reports that certain civilians and organizations have attempted to take on a more official law enforcement appearance, using uniforms, badges and official sounding names.⁵⁹ These actions may run afoul of federal laws that make it a crime to impersonate an officer or employee of the United States.⁶⁰ Relatedly, civilian border patrol groups must also abide by any special requirements that exist on Indian

⁵⁶ See 5 Am Jur. 2d §56 Arrest. After making an arrest, a private citizen generally has a duty to promptly deliver the alleged offender to the proper authorities. Illegal entry is a misdemeanor and a felony under the INA (§275), while illegal presence (§237) is a civil violation. Some proposals in the 109th Congress (H.R. 4437, §203) would make illegal presence a felony. For a discussion on the implications of criminalizing unlawful presence, see CRS Report RS22413, *Criminalizing Unlawful Presence: Selected Issues*, by Michael J. Garcia

⁵⁷ See, e.g., Ariz. Rev. Stat. §26-172 (authorizing the governor to mobilize the national guard or the unorganized militia upon proclamation of an emergency or whenever deemed necessary); Ariz. Rev. Stat. §26-174 (authorizing the governor to establish an armed force for the safety and protection of the lives and property of the citizens of Arizona, if the national guard of Arizona or major portion thereof is called into active federal service).

⁵⁸ See, e.g., 36 C.F.R. §2.4 (prohibiting weapons in National Parks).

⁵⁹ Jessica Conaway, Comment, Reversion Back to a State of Nature in the United States Southern Borderlands: A Look at Potential Causes of Action to Curb Vigilante Activity on the United States/Mexico Border. 56 MERCER L. REV. 1419, 1425 (2005).

⁶⁰ 18 U.S.C. §912 and §913.

reservations and territories that are near the border.⁶¹ Civilian border volunteers must also be cautious not to impede or interfere with the work of federal immigration officials in violation of federal law.⁶²

With respect to state crimes, assault, false arrest or imprisonment, trespass, disorderly conduct, and manslaughter are among offenses that could arise in the context of a civilian conducting *quasi* law enforcement duties along the often violent international border. For instance, while immigration officers would be authorized under the INA to enter onto private land within twenty-five miles of the border, private persons could be *trespassing* if they do not have proper permission. State law may also regulate the use or possession of a firearm or make it a crime for some people to use or carry a weapon. As previously mentioned, members of American Border Patrol and Ranch Rescue were arrested and fined for firearm violations. Some states also have anti-militia laws that might be applicable.⁶³ For instance, in Texas, a body of persons (other than the regularly organized state militia) may “not associate as a military company or organization or parade in public with firearms.”⁶⁴

Members of civilian patrol groups could also be liable for civil damages under state tort principles. For example, there are reportedly several pending lawsuits against citizens who patrolled the border for assault, battery, infliction of emotional distress, and other torts.⁶⁵ As private citizens, they would probably not be protected by the immunity, or treated with the typical deference, that is often granted to law enforcement and government personnel. However, civilians would not necessarily be bound by the same federal and constitutional restraints (e.g., Fourth Amendment) that are generally imposed on government officials (see discussion below). This is *not* to say that they may use an unreasonable amount of force. As several courts have concluded, only force that is reasonable under the circumstances may be used to restrain the individual arrested pursuant to a citizen’s arrest.⁶⁶ The amount of force that is reasonable is generally a fact-sensitive question.

The activities of civilian border patrols may present some novel legal issues for the courts, particularly if civilian volunteers attempt to do more than merely *report*

⁶¹ The following four Indian reservations are contiguous with the Mexican border: (1) the Tohono O’odham Nation (AZ); (2) the Cocopah Tribe (AZ); (3) the Kickapoo Traditional Tribe (TX); and (4) the Quechan Tribe of the Fort Yuma Indian Reservation (CA/AZ). There are also two tribes that are very close but not actually on the border: the Campo Band of Diegueno Mission Indian tribe in California and the Ysleta Del Sur Pueblo tribe in Texas.

⁶² 18 U.S.C. §111. As previously discussed, there were some reports of tripped sensors by the Minutemen.

⁶³ See, e.g., Ariz. Rev. Stat. §26-123(a) (makes it a felony for a person, partnership, or corporation to maintain troops under arms). See also *Conaway*, 56 MERCER L. REV. 1419, 1451.

⁶⁴ Tex. Gov’t Code Ann. §431.010.

⁶⁵ Border Action Network, Civil Lawsuits Pending Against Roger, Donald and/or Barbara Barnett, available at [<http://www.borderaction.org/images/3%20lawsuits.pdf>].

⁶⁶ See, e.g., *Whitten v. Cox*, 799 S.2d 1 (Miss. 2000); *Carter v. State*, 506 S.E.2d 124 (Ga. 1998); *State v. Rogers*, 330 N.E. 2d 674 (Ohio 1974).

illegal entries (e.g., search and arrest). For example, the extent to which a civilian may use a state's citizen's arrest authority to apprehend, detain, and arrest an illegal alien is not clear.⁶⁷ Moreover, the fact that civilian border groups are proactively putting themselves in harm's way may affect claims of self-defense.⁶⁸ Immigration law is also distinctly a federal issue and many experts still disagree on the extent to which even *state and local law enforcement* officers may enforce immigration law.⁶⁹ Notwithstanding these unresolved legal matters, civilian border patrol volunteers have used and continue to use many of the rights and state laws described above to protect private property from criminal trespassers coming from across the border and to report illegal entries to the USBP.

Legal and Policy Issues

While President Bush has asked the public to be vigilant and mindful of suspicious activities, he and others in the Administration have been wary of citizen patrols for a number of reasons, including the potentially violent nature of such activities along the border. Still, as the Minuteman Project and the other groups detailed in this report demonstrate, many civilians have continued to gather along the border region irrespective of the admonitions. In Congress, many have introduced bills that would authorize and enhance the use of civilians for immigration purposes along the border. The enhanced use of civilian patrols along the border may present a number of legal and policy issues due to the law enforcement nature of the mission and the overwhelming federal responsibilities in immigration matters. The following paragraphs explore a number of these issues, including (1) whether there is authority to “deputize” private persons to enforce immigration law; (2) the extent to which private persons might be considered federal immigration officers; (3) whether a large presence of civilians at the border could interfere with or otherwise impact on the USBP's ability to execute its mission; and (4) whether the presence of armed civilians at the border will create a situation that could lead to further hostilities.

“Deputizing” Civilians

As earlier paragraphs illustrated, the Secretary of DHS appears to have the authority under the INA to authorize any employee of DHS, the federal government or in certain circumstances, a state or local law enforcement agency to enforce immigration law. As such, the Secretary of DHS would seem to have the authority to shift personnel from DHS or request the help of other federal or state departments

⁶⁷ There is some case law, however, discussing the authority of Customs and immigration officers to make warrantless citizen's arrests for felonies or misdemeanors, while the respective officer lacks authority (i.e., not in jurisdiction or is off-duty). *See, e.g., United States v. Sealed Juvenile 1*, 255 F.3d 213 (5th Cir. 2001) (off-duty Customs agent stopping a person for driving erratically was found to be a valid citizen's arrest).

⁶⁸ Generally, the right of self-defense may not be invoked by an aggressor. *See* 5 AM. JUR. 2D *Arrest* §109 (2004).

⁶⁹ *See* CRS Report RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by Lisa M. Seghetti, Stephen R. Viña, and Karma Ester.

and agencies to address illegal immigration concerns along the international borders. Indeed, DHS regulation 8 C.F.R. §287.5(b) already authorizes a number of immigration personnel to patrol the border in addition to the Border Patrol, including (1) special agents, (2) seaport immigration inspectors, (3) seaport adjudications and deportation officers, (4) supervisory and managerial personnel for those listed above, and (5) immigration officers who need the authority to patrol the border under INA §287(a)(3) as designated by the Secretary. Despite these existing authorities, there has been a recent push to authorize or “deputize” civilians to enforce immigration law.

There does not appear to be, however, authority under the INA for the Secretary of DHS to authorize or deputize *civilians* to enforce immigration law. INA regulations seem to further reflect this absence of authority.⁷⁰ The apparent lack of authority to formally deputize civilians with all the powers of an immigration officer, of course, does not prevent the federal government from cooperating with civilians. DHS, for instance, has stated that “it would accept and investigate information from the Minuteman like it does from the general public.”⁷¹ Indeed, DHS currently receives aid from civilian volunteers through Citizen Corps, an organization coordinated by DHS which helps plan preparedness activities nationwide. DHS officials still recognize that the border presents an extremely dangerous environment and that they would “never encourage members of the public to conduct law enforcement activities on their own.”⁷²

Civilians, however, might be allowed to perform activities that fall short of the actual full enforcement of immigration law, in which case authorization in statute might not be required. For example, a current Citizen Corps program known as Volunteers in Police Service (VIPS) builds on local programs in which civilian volunteers help local police departments to perform non-sworn functions, freeing up police officers to perform vital front-line duties in times of emergency.⁷³ CBP officials have indicated some support for the use of volunteers at the border ranging from clerical work to “something akin to a Border Patrol auxiliary,” where they would organize and train the individuals to provide support.⁷⁴ DHS, however, later

⁷⁰ See 8 C.F.R. §2.1 and §103.1 (authorizing the Secretary to delegate INA authority to any DHS employee or employee of the federal government).

⁷¹ Dominic Bonaiuto, “Minutemen to Begin Surveillance of Laborers,” *The Times Community*, (Oct. 26, 2005) available at [http://www.timescommunity.com/site/tab5.cfm?newsid=15455954&BRD=2553&PAG=461&dept_id=511691&rfti=6].

⁷² *Id.*

⁷³ Volunteers may be allowed to do, among other things, the following: check homes of residents on vacation; enter data; assist with typing reports, filing, answering phones, and other office tasks; participate in search-and-rescue activities; and, assist with fingerprinting. See [<http://www.policevolunteers.org/volunteer/what.cfm>].

⁷⁴ “Securing our Borders: What have we Learned from Government Initiatives and Citizen Patrols?” Hearing before the House Committee on Government Reform, 109th Cong. (May 12, 2005) at pp. 45 and 72 (statements by Robert C. Bonner, Commissioner, U.S. Customs (continued...))

stated that there were no plans by the Department to use civilian volunteers.⁷⁵ Without more information on the types of activities or organizations that might be developed for border enforcement activities, it is difficult to determine whether legislative action would be required. Nonetheless, it seems feasible to argue that the more oversight provided by the federal government and the more law enforcement support assumed by volunteers, the better the argument for explicit authorization.

Some have suggested that there is already appropriate authority for organizing volunteers to support border security under 32 U.S.C. §109(c), which allows a state to maintain a State Defense Force (SDF).⁷⁶ An SDF is a volunteer state force, in addition to its National Guard, that is regulated under state law, and is under the command of the governor.⁷⁷ Members of an SDF generally do not receive pay for training but *may* be paid for active duty under state control. SDFs do not receive federal funds but may use armories, train on military installations, and receive in-kind support, provided the state complies with federal standards for the National Guard.⁷⁸ Proponents argue that border security would be an ideal mission for a State Defense Force, and that an SDF is an effective vehicle to integrate the active participation of volunteers into the mission. States, however, may be reluctant to use such authority without more federal support, particularly because of the federal nature of immigration, additional administrative burdens, and existing budget constraints. The states of Arizona and New Mexico, for example, declared national emergencies to become eligible for federal support after reportedly exhausting available state resources combating illegal immigration.⁷⁹

Private Actors or Agents of the Government?

Although organizers of the Minuteman Project have prohibited volunteers from detaining or searching the illegal aliens that they encounter, questionable situations

⁷⁴ (...continued)
and Border Protection).

⁷⁵ Jeremiah Marquez, Associated Press, *Gov't Backs off Idea of Civilian Patrol* (July 21, 2005) available at [<http://www.minutemanhq.com/hq/print.php?sid=17>].

⁷⁶ James Jay Carafano, The Heritage Foundation, Backgrounder, *Safeguarding America's Sovereignty: A "System of Systems" Approach to Border Security* (Nov. 28, 2005).

⁷⁷ SDFs generally support National Guard units or replace them as they are called to active duty. For example, during WWII, roughly 200,000 state guardsmen (with War Dep't support) replaced the mobilized National Guard. Some SDFs were recently used in the wake of the Hurricane Katrina disaster. Twenty-three states currently maintain SDFs, totaling about 14,000 nationwide. See James Jay Carafano & John R. Brinkerhoff, The Heritage Foundation, Backgrounder, *Katrina's Forgotten Responders: State Defense Forces Play a Vital Role* (Oct. 5, 2005).

⁷⁸ *Id.*

⁷⁹ State of Ariz., Declaration of Emergency, *Arizona — Mexico International Border Security Emergency* (Aug. 20, 2005) available at [<http://www.governor.state.az.us/press/August05/DE%7E081605%7EAZMEXBorderSecurity.pdf>]; N.M. Exec. Order No. 2005-040 (Aug. 12, 2005) available at [<http://www.governor.state.nm.us/press.php?id=119>].

have happened⁸⁰ or could easily occur during exigent circumstances. A search by a private person, however, does not implicate the protections afforded by the Fourth Amendment against unreasonable searches and seizures unless he acts as an “instrument or agent of the government.”⁸¹ For a private person to be considered an agent of the government, courts generally look for two critical factors: (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the private actor’s purpose was to assist law enforcement efforts rather than to further his own ends.⁸² The first part of this test examines the government’s level of involvement, while the second looks to the citizen’s motivations and independence from a governmental purpose. Volunteers acting as government agents could raise liability issues for the federal government and the volunteer and complicate issues of authority. The following paragraphs provide more detail on these prongs using the Minuteman Project as an example.

With respect to prong one, courts have generally held that a private citizen’s acts are not acts of the government if based on merely “de minimis or incidental contacts between the citizen and law enforcement agents prior to or during the course of a search or seizure.”⁸³ Thus, a general exchange of information, or mere cooperation with authorities would probably not make the Minutemen agents of the government.⁸⁴ But, if it is perceived that the volunteers acted on the direction or suggestion of immigration officials, the first prong of the government actor test could be met.⁸⁵ Moreover, if immigration officials take an active role in encouraging or assisting the Minuteman volunteers in some way, such as by offering rewards, this might qualify as sufficient government involvement.⁸⁶ Satisfying this prong of the test will vary

⁸⁰ The Minuteman Project included two potential infractions by volunteers that could have been perceived as detentions. *See* Field Report, at 8.

⁸¹ *United States v. Steigler*, 318 F.3d 1039 (11th Cir. 2003). *See generally* 6A C.J.S. *Arrests by Private Persons* §11 (2004). The Fourth Amendment establishes that a search or seizure conducted by a governmental agent must be reasonable, and that probable cause support any judicially granted warrant. The Supreme Court has interpreted the Fourth Amendment to include a presumptive warrant requirement on all searches and seizures conducted by the government, and has ruled that any violations of this standard will result in the suppression of any information derived therefrom. *See Katz v. United States*, 389 U.S. 347 (1967).

⁸² *Steigler*, 318 F.3d 1039.

⁸³ *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982).

⁸⁴ *United States v. Koenig*, 856 F.2d 848 (7th Cir. 1988) (finding a previous history of cooperation and contact between the Federal Express and the DEA insufficient to create an agency relationship); *United States v. Mendez-de-Jesus*, 85 F.3d 1, 2-3 (1996) (finding the seizure and transportation of two illegal aliens to the police station insufficient to create an agency relationship because there was no suggestion that the government initiated or participated in the citizen action).

⁸⁵ *United States v. Pierce*, 893 F.2d 669, 673 (5th Cir. 1990) (finding determinative the fact that there was no evidence that the package in question was opened at the direction, or even the suggestion, of the DEA).

⁸⁶ *See, e.g., United States v. Walther*, 652 F.2d 788 (9th Cir. 1981) (finding that an airline employee who opened a package with the expectation of being paid by the DEA satisfied (continued...))

with the amount and type of contact between the government and the Minutemen, and who initiated the contact. From what has been reported, it appears that the USBP is not engaging in activities that normally satisfy this first prong.

As to the second element, courts generally examine whether the private actor had the “mental state” of a government employee⁸⁷ or again analyze the exercise of governmental power over the private entity, to determine whether “the private entity may be said to have acted on behalf of the government rather than for its own, private purposes.”⁸⁸ Here, there is little doubt that the Minuteman volunteers wanted to help the federal government; indeed, they claim that they are doing “the job the government should be doing.”⁸⁹ But there is also some indication that the volunteers might be motivated by more personal goals — from protecting personal property to creating a type of symbolic or civil movement.⁹⁰ In cases where dual motives were shown, some courts have concluded that being motivated in part by a desire to aid law enforcement does not in and of itself transform the person into a government agent.⁹¹ Ultimately, this analysis would hinge on the state of mind of the accused.

Border Dynamics

Interactions with the USBP. During the month of April 2005, when the Minuteman Project deployed its volunteers along the Arizona border, USBP Chief David Aguilar noted that “anything that taxes our resources takes away from our capability to secure our nation’s borders.”⁹² The Minuteman Project’s volunteers inadvertently set off sensors and other motion detectors as they manned their posts along the border. When these sensors are tripped, regardless of whom or what trips them, USBP agents are deployed to investigate. A potential issue could include whether the existence of civilian border patrol groups may inhibit the USBP’s ability

⁸⁶ (...continued)

the requisite mental state of an “instrument of the government,” and, thus, implicated Fourth Amendment protections); *United States v. Souza*, 223 F.3d 1197, 1201-02 (10th Cir. 2000) (observing that the police must “instigate, orchestrate, encourage or exceed the scope of the private search to trigger application of the Fourth Amendment” for a private search).

⁸⁷ *Walther*, 652 F.2d at 791 (concluding that because the employee had the “mental state” of a government agent, his search was subject to Fourth Amendment limitations).

⁸⁸ *Koenig*, 856 F.2d at 849.

⁸⁹ Standard Operating Procedure.

⁹⁰ *Id.* (“Our efforts will change the course of history and ignite others to stand with courage to make a change. Many are waiting for the outcome and will themselves be motivated with a new sense of activism; we will be leaders who will make a difference, role models who will influence future generations.”).

⁹¹ *United States v. Smith*, 383 F.3d 700, 705 (8th Cir. 2004) (search by FedEx employee motivated by intent to aid the officers and desire to ensure that her company was not being used as a vehicle in the drug trade found to be a private search).

⁹² “Border Security Technology,” Joint Hearing before the Subcommittee on Immigration, Border Security, and Citizenship and the Subcommittee on Terrorism, Technology, and Homeland Security, 109th Cong., (Apr. 28, 2005) (Testimony of David Aguilar, U.S. Border Patrol Chief).

to execute its mission effectively. Possible policy options could include some coordinating mechanism that would allow volunteer organizations to avoid inadvertently setting off sensors. CBP officials, for example, have suggested that training and organizing the volunteers or allowing them to do clerical work could be helpful.

Interactions with Aliens. Apart from the widely reported incident involving Ranch Rescue, there have been no credible reports of civilian border patrol organizations engaging in violence against migrants. However, every year there are numerous reports of migrants being abused by individuals near the border.⁹³ Although no major incidents occurred during the Minuteman Project's month-long observation of the U.S. border, even proponents note that it is a real possibility with a predominantly volunteer organization whose members have not been screened. Many of these civilian patrol groups (including a reported 40 percent of the Minutemen) carry firearms. In performing their duties, however, civilian patrol groups and other members of the public also provide humanitarian and medical assistance to the aliens crossing the border. A possible issue might be whether an enhanced civilian presence at the border could create the potential for violent confrontations between civilian patrol groups and aliens. On the other hand, more civilians patrolling the border may also increase the presence of humanitarian assistance.

Violence at the Border. A number of armed smuggling organizations operate along the U.S.-Mexico border. The surge in violence and smuggling along the border was cited by New Mexico Governor Bill Richardson and Arizona Governor Janet Napolitano when they issued state of emergency declarations for counties bordering on Mexico. Additionally, there have been a number of widely reported incidents in the past years concerning armed incursions into the United States by persons from Mexico. According to published reports, "the crossings involved police officers or soldiers in military vehicles and were among 231 such incidents recorded by the U.S. Border Patrol in the last 10 years."⁹⁴ DHS Secretary Chertoff confirmed that these incursions have been taking place during a press conference, but suggested that they had decreased in number over the past few years and that there was no way to know whether the individuals involved were in fact linked to the Mexican military or law enforcement.⁹⁵ A possible issue could involve whether deploying civilian patrols to the border would impinge on the safety of the individuals involved or create issues of liability, given the number of armed groups operating along the border. If these civilian patrols are armed, as some of the

⁹³ See Embassy of Mexico, "Mexico condemns any and all types of violence against Mexican migrants on the border," Jan. 2, 2006, available at [http://www.embassyofmexico.org/eng/index.php?option=com_content&task=view&id=160&Itemid=2] and U.S. Commission on Civil Rights, "Summary of Migrant Civil Rights Issues Along the Southwest Border," Dec. 2003, available at [<http://www.usccr.gov/pubs/migrant/summary.htm>].

⁹⁴ Richard Marosi, Robert J. Lopez and Rich Connell, "Reports Cite Incursions on U.S. Border," *Los Angeles Times*, Jan. 26, 2006.

⁹⁵ Todd Gillman, "Chertoff Confirms Mexican Troop Incursions into U.S. Homeland Chief Says Hundreds of Crossings Aren't Cause for Concern," *Dallas Morning News*, Jan. 19, 2006.

Minutemen volunteers were, the potential for confrontations between civilian patrols and armed smugglers could quickly escalate.

Congressional Action

A number of bills in the 109th Congress would create or enhance the use of civilian border patrol organizations. Each bill has been referred to their relevant committees and awaits further action. The following bullets discuss each in some detail.

- **Illegal Immigration Enforcement and Empowerment Act (S. 1823).** This bill would establish a pilot Volunteer Border Marshal Program. This program would use volunteer state peace officers who would be assigned to the Border Patrol and charged with assisting in “identifying and controlling illegal immigration and human and drug trafficking.”
- **Border Security and Modernization Act of 2005 (S. 2049).** This bill would establish a Deputy Border Patrol Agent Program that would be made up of retired law enforcement officers. The bill would direct the Secretary to utilize these deputies to provide whatever border security functions DHS deems are appropriate. S. 2049 would authorize appropriations of \$10 million from FY2007-FY2011 for this program.
- **Protecting America Together Act of 2005 (H.R. 3704).** This bill would create a Border Patrol Auxiliary that would be deployed to the border and charged with notifying the Border Patrol about unauthorized aliens attempting to cross into the United States. These auxiliaries would be vested with the same powers as Border Patrol agents. DHS would be charged with recompensing members of the Auxiliary for their travel, subsistence, and vehicle operation expenses.
- **Border Protection Corps Act (H.R. 3622).** This bill would authorize state governments to create a militia called the Border Protection Corps (BPC) in order to prevent the illegal entry of individuals and take individuals who have entered illegally into custody. DHS would be responsible for recompensing the states for all expenses incurred in the establishment and operation of their BPCs.
- **Homeland Security Volunteerism Enhancement Act of 2005 (H.R. 4099).** This bill would establish a Citizen Corps within the USA Freedom Corps and charge the new organization with coordinating homeland security volunteer activities. The bill would also create the Border Corps as an organization within the Citizen Corps that would be administered by CBP. Members of the Border

Corps would be unpaid volunteers and would be charged with assisting the USBP in carrying out its mission, with a primary focus on helping with surveillance, communication, transportation, and administrative support. The bill would also authorize annual appropriations of \$50 million for the Citizen Corps and \$20 million for the Border Corps for FY2007-FY2012.

- **State Defense Force Improvement Act of 2005 (H.R. 3401).** This bill would recognize State Defense Forces (SDF) as an integral military component of the Nation's homeland security effort. It would also authorize the Secretary of Defense to coordinate with, and to provide assistance to, an SDF as requested by a state. The Secretary of Defense may allow an SDF to use property, arms, and equipment and can also transfer excess equipment to an SDF. Any direct costs to the Department of Defense for training an SDF must be reimbursed by the state.

Appendix 1. Table of Selected State Authorities

	Arizona	California	New Mexico	Texas
Citizen's Arrest	A private person may make an arrest: (1) when the person to be arrested has in his presence committed a misdemeanor amounting to a breach of the peace, or a felony; or (2) when a felony has been committed and he has reasonable grounds to believe that the person to be arrested has committed it. Ariz. Rev. Stat. §13-3884.	A private person may arrest another: (1) for a public offense committed or attempted in his presence; (2) when the person arrested has committed a felony, although not in his presence; or (3) when a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it. Cal. Penal Code §837.	Not Codified. A person may arrest another upon good-faith, reasonable grounds that a felony had been or was being committed, or a breach of the peace was being committed in the person's presence. State v. Johnson, 930 P.2d 1148 (N.M. 1996).	A private citizen may make an arrest for a felony or offense against the public peace if they are committed in his presence. Tex. Code Crim. Proc. Ann. art. §14.01.
Self-Defense	A person is justified in threatening or using physical force against another when a reasonable person would believe that physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful physical force. Ariz. Rev. Stat. §13-404.	Resistance sufficient to prevent the offense may be made by the party about to be injured: (1) to prevent an offense against his person, or his family, or some member thereof; and (2) to prevent an illegal attempt by force to take or injure property in his lawful possession. Cal. Penal Code §693. Any necessary force may be used to protect from wrongful injury the person, his property, or his family. Cal. Civ. Code §50.	Not codified. The essential elements necessary before a self-defense instruction can be given are: (1) an appearance of immediate danger of death or great bodily harm to the defendant; (2) the defendant was in fact put in such fear; and (3) a reasonable person would have reacted in a similar manner. New Mexico v. Martinez, 622 P.2d 1041 (N.M. 1981).	A person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. Tex. Penal Code §9.31.

	Arizona	California	New Mexico	Texas
Use of Deadly Force	A person is justified in using deadly force against another if such a person would be justified in using threatening or physical force and when a reasonable person would believe that deadly physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly physical force. Ariz. Rev. Stat. §13-405.	Homicide is justifiable when: (1) resisting murder, a felony, or great bodily injury upon any person; (2) committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony; (3) committed in the lawful defense of a person or family member when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; or (4) necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace. Cal. Penal Code §197.	Homicide is justifiable to defend one's life, family, or property or when there is a "reasonable ground" to believe that there is an imminent danger of an injury to another, or when "necessarily committed" in attempting to apprehend a person who one witnessed committing a felony, or "in necessarily and lawfully keeping and preserving the peace." N.M. Stat. Ann. §30-2-7.	A person is justified in using deadly force against another: (1) if he would be justified in using self defense (under §9.31); (2) if a reasonable person in the actor's situation would not have retreated; and (3) when and to the degree he reasonably believes the deadly force is immediately necessary to protect himself against the others use or attempted use of unlawful deadly force or to prevent the other's imminent commission of various named felonies (e.g., murder). Tex. Penal Code §9.32.