



American Civil Liberties Union of Arizona

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Sheriff Dever,

The American Civil Liberties Union of Arizona writes to encourage affirmative action on your part to ensure that the laws of our State and Nation are applied to all. A lack of government intervention has allowed Cochise County to become a gathering point for those who would place all of our society's ills on a group of individuals they do not take the time to personally know. The Minuteman Project is simply another example of such individuals who come to Arizona and violate both State and Federal laws.

Since 1999, there has been ample evidence of illegal activity to allow you to detain individuals who unlawfully imprison and mistreat migrants. Yet you have not made a single arrest. Instead of applying the law, you attend meetings sponsored by these groups 'warning' them not to engage in illegal activity, while patting them on the back for 'bringing attention to a problem.'

I wholeheartedly agree with you that they are bringing attention to a problem. Through my eyes, the problem is that what occurs on the U.S.-Mexico Border is one of the grossest human rights violations in the history of the United States. Here in our backyard human beings have to face death and hatred in their pursuit of work that this country offers.

The Minutemen are an overt manifestation of the misunderstanding and fear that persist throughout our country towards people from Latin America. This misunderstanding and fear is the attitude that allows the American public to turn a blind eye as hundreds of individuals who are in pursuit of the American Dream die excruciating deaths in the middle of the desert each year. This is the problem that needs to be addressed.

The migration by our Southern neighbors is not an invasion. Despite the mythology surrounding immigration to this country, it has always been true that a majority of immigrants, including those from Europe, have come to our land for economic opportunity. History is simply repeating itself and our nation continues to benefit from immigrants who reinforce what the basic tenets of what our society should be. People come with the notion that if they

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work hard, stay out of trouble, and stay committed to their task that they will be rewarded. Contrary to what the leaders of the Minuteman Project want us to believe, our nation is not being ‘devoured and plundered by the menace of tens of millions of invading illegal aliens.’ Immigrants believe in the American Dream and they are strengthening our country.

Our nation will someday be stronger when we see these individuals as human beings worthy and deserving of participation in our society, but until that day comes we must ensure that the laws of our nation are applied equally to all.

When those who lack the proper documents to enter this country are apprehended by the appropriate federal agency, they are sent back to their country of origin in accordance with our laws. However, when the vigilantes and their ilk illegally detain people in the middle of the desert they are not held accountable for their actions.

Chris Simcox and his cohorts he likes to call “Civil Homeland Defense” have for years demonstrated a pattern and practice of confining individuals to a specific area. On their missions they approach individuals and wait with the group until Border Patrol Agents arrive. If these individuals decide they want to leave they are followed by Simcox and his friends. Apparently, somebody has advised Mr. Simcox that this activity is illegal and he is calling for a no contact policy for the Minuteman volunteers that are set to arrive in Cochise County from April 1-30, 2005. Despite his recent attempt to change his actions and stay within the bounds of the law, those who come to participate in the Minuteman project will still be engaging in illegal activity.

### **I. The Minutemen's Activities Violate A.R.S. § 13-1303 (False Imprisonment)**

The Minutemen are supposedly clamoring for the rule of law, so let them have it. Private citizens are guilty of unlawful imprisonment when they take it upon themselves to enforce our federal immigration laws.

A.R.S. §13-1303 states that a person commits unlawful imprisonment by knowingly restraining another person. There are three elements of restraint: without consent, without legal authority, and in a manner that substantially interferes with the victim’s liberty. State of Arizona v. Styers 177 Ariz. 104 (1993).

Simcox lacks the consent of those he detains and Minuteman volunteers will find themselves in the same situation. A.R.S. § 13-1301 states that restraint is without consent if it is accomplished by

- (a) physical force, intimidation, or deception, or
- (b) any means including acquiescence of the victim if the victim is a child less than eighteen years old or an incompetent person and the victim’s lawful custodian has not acquiesced in the movement of confinement.

Chris Simcox and his cohorts have for years intimidated people into stopping and waiting for the Border Patrol because they see firearms on their waistbands and technological equipment that presumably only government agents would have. Additionally, Simcox often encounters minors in the middle of the desert and thus would not need to have used physical force, intimidation, or deception. The ‘no contact’ policy the Minuteman are supposed to follow does not make their activities legal. The Arizona Supreme Court has stated that false arrest or imprisonment does not require physical detention—the tort may be committed by intimidation. Gortarez v. Smitty’s 140 Ariz. 97 (1984). The Minutemen’s website makes it clear that they will be intimidating individuals.

By legal means we will surprise *ILLEGAL* immigrants on trails heading north. By legal means we will suggest that people sit and wait for USBP (Customs and Border Protection Border Patrol Agent) to come and pick them up.

If a group of people walking through the desert are suddenly ‘surprised’ by a group of individuals carrying firearms and using high-tech equipment and then given the ‘suggestion’ from these armed individuals that they are to sit and wait, this undoubtedly constitutes false imprisonment. There is also a high possibility that Minuteman volunteers will encounter children less than eighteen who will stop when they see these armed individuals in the middle of the desert.

Private citizen’s lack any legal authority to detain individual’s for violations of 8 U.S.C. § 1324<sup>1</sup>, § 1325<sup>2</sup>, and § 1326<sup>3</sup>. Of these sections, only 8 U.S.C. § 1324 contains any authorization for individuals other than federal immigration agents to make immigration arrests, and that authorization explicitly disallows so-called citizens’ arrests. Title 8, Section 1324(c) provides:

No officer *or person* shall have the authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other *officers* whose duty it is to enforce criminal laws.

(Emphasis added) While section § 1325 and § 1326 lack such a provision, when discussing section § 1324(c) the 9<sup>th</sup> Circuit stated, “...it [Congress] implicitly made the enforcement authority as to all three statutes identical.” Gonzales v. City of Peoria 722 F.2d 468 (9<sup>th</sup> Cir. 1983), *overruled on other grounds*, Hodgers-Durgin v. De La Vina 199 F.3d 1037 (9<sup>th</sup> Cir. 1999). In Gonzales the 9<sup>th</sup> Circuit refused to accept plaintiff’s argument that because sections § 1325 and § 1326 lacked such a provision that Congress meant to imply that local and state law enforcement officials lacked the authority to arrest for violations of those sections.<sup>4</sup> Since the Ninth Circuit has stated that enforcement

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<sup>1</sup> Bringing in and Harboring Certain Aliens

<sup>2</sup> Improper Entry by Alien

<sup>3</sup> Reentry of Removed Aliens

<sup>4</sup> The American Civil Liberties Union finds this holding untenable under basic principles of statutory construction. *See, e.g., INS v. Cardoza Fonseca*, 480 U.S. 421, 432 (1987) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) Nonetheless, when the 9<sup>th</sup> Circuit decides to overrule this provision it will prohibit both private citizens *and*

authority as to all three statutes are identical, this means that private citizens lack the authority to detain individuals for a violation of section § 1325 and § 1326.

The actions of the vigilantes substantially interfere with a person's liberty because they are confining people to a certain area. It may turn out that the individual's detained by the vigilantes lack an entry visa. Despite this possibility, it is important to note that A.R.S. § 13-1303 states that a person commits unlawful imprisonment by knowingly restraining another *person*. (emphasis added) This law protects the right of individuals to be free from intimidation that results in restraint of their personal liberty and does not discriminate based on whether or not an individual has an entry visa. Regardless of any sense of superiority felt by Minuteman volunteers, the only individuals who have a right to confine these *persons* are law enforcement officials.

## **II. Detentions Not Authorized by A.R.S. § 13-3884 (Civilian Arrest)**

Even if the Minutemen's activities were authorized by federal law, they would still not be authorized under Arizona State law.<sup>5</sup> Arizona Revised Statute § 13-3884 authorizes a private person to make an arrest for a misdemeanor only when the misdemeanor amounts to a breach of the peace and it is committed in the presence of the private citizen. Section § 1325 of Title 8 makes it a crime for an alien to enter the United States at a time or place other than as designated by immigration officers. An individual's first violation is a *misdemeanor* and not a felony. Therefore Minutemen could only be justified in detaining someone if a violation of Section 1325 was committed in their presence *and* amounted to a breach of the peace. It appears the Minutemen will be stopping individual's miles away from the border and never witnesses anyone cross an international line. As mentioned above, the privilege to arrest for misdemeanors without a warrant is limited to those misdemeanors which constitute a breach of the peace. Gortarez v. Smitty's, 140 Ariz. 97 (1984) (Shoplifting found not to amount to breach of the peace.) Even if private citizens were to witness an individual crossing an international line in the middle of the desert, this misdemeanor would not amount to a breach of the peace. In State v. Gortarez, 103 Ariz. 395 (1968), the Arizona Supreme Court stated:

[Breach of the peace] occurs where a person maliciously and wilfully disturbs the peace or quiet of a neighborhood, family or person by loud or unusual noise; tumultuous or offensive conduct; threatening, traducing, quarreling, challenging to fight or fighting; or applying any violent, abusive or obscene epithets to another.

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state and local officers whose duty it is to enforce criminal laws from enforcing 8 U.S.C. § 1325 and 8 U.S.C. § 1326.

<sup>5</sup> It is important to note that the above discussion made it clear the private citizen's can not detain people for a violation of 8 U.S.C. § 1325, the following discussion is only meant to show that even if Congress was to change the law to allow detentions by private citizens, these detentions would still not be authorized under Arizona law.

Individuals crossing the border are trying to avoid detection and do not engage in any of the above mentioned activities that would result in a breach of the peace.

Minuteman volunteers can not use an ignorance of the law to avoid punishment for their intentional tort of unlawful imprisonment. The supreme court's [Arizona] holding following the general rule that, if a person commits an intentional tort, 'such as trespass to land, battery, or false imprisonment, it will be no excuse...that [the person] was mistaken as to something justifying his conduct. *Torrez v. Knowlton* 205 Ariz. 550 (CrtAppAZ 2003), quoting *Prosser and Keeton on The Law of Torts* §17 at 111 (5<sup>th</sup> ed. 1984). These individuals are not above the law and should be held accountable.

### Conclusion

Vigilantes will argue they are adhering to the law by following a no contact policy and only locating, reporting, and alerting Border Patrol. Regardless of their statements, their actions will result in the Minutemen knowingly intimidating individuals into stopping, thereby committing unlawful imprisonment.

It is also important to note that Mr. Simcox has stated that he will likely return to his previous pattern and practice. "Future efforts will likely involve the tracking and containment of groups of people who have entered our country illegally."<sup>6</sup> He has engaged in this illegal activity for years, and his effort to postpone his illegal activities should not take away from the fact that the current operating standards for the Minuteman project will result in illegal activity.

These vigilantes should not simply be dismissed as evil racists, rather they should be seen as victims of the society we live in. A society made up of individuals who are more compassionate and understand the important role that immigrants have had, and continue to play, within our society is the ultimate goal. Until that day arrives we must be sure that our laws are respected, not simply by those in search of work to support themselves economically, but also those motivated by misunderstanding and fear.

You clearly have the legal authority to arrest Mr. Chris Simcox and his cohorts for violating A.R.S. § 13-1303.

You should immediately inform Simcox and potential Minutemen volunteers that their actions will more then likely result in unlawful imprisonment and their own arrest.

If I can be of further assistance in this manner please do not hesitate to contact me.

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<sup>6</sup> [http://www.civilhomelanddefense.us/html/minuteman\\_project\\_standard\\_ope.html](http://www.civilhomelanddefense.us/html/minuteman_project_standard_ope.html)

Sincerely,

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