

RESEARCH REPORT



# THE “INVISIBLE” MILITARY BASES AT THE BORDER

STEPS CONGRESS CAN TAKE TO PROTECT  
CIVIL LIBERTIES IN THE BORDERLANDS

# WHY IT MATTERS

- More than 40% of land along the U.S.-Mexico border has been converted to restricted military zones.
- Federal judges have been swamped with cases alleging trespassing in those zones, with one judge in New Mexico assigned more than 400 cases in less than a month.
- The Department of Justice is trying to circumvent the law by pursuing novel arguments for conviction even if people have no idea where the restricted zones are located.

## EXECUTIVE SUMMARY

In 1961, at the height of the Cold War, an aviation incident brought Goldsboro, North Carolina, to the brink of a nuclear catastrophe. A B-52 bomber carrying two thermonuclear weapons was soaring through the skies when it broke apart mid-air over private farmlands. One of the bombs underwent all but one of the arming steps for detonation, transmitting a firing signal when it hit the ground.

The Air Force established a secured perimeter around the crash site. Put another way, the military exercised temporary control over the landowners' property, deciding who could get in and who could leave. The need could hardly have been more extreme; there were nuclear bombs on the site.

The military's internal guidance for creating restricted areas generally has anticipated scenarios like the Goldsboro incident.

**Now a very different reality has emerged.** Over the past year, the federal government has stretched the use of what the military has sometimes called "National Defense Areas" (NDAs) beyond all recognition.

In a broadly overlooked but deeply alarming expansion of executive power, **the federal government has converted more than 40% of land along the U.S.-Mexico border into restricted military zones.** That includes about 110,899 acres that had previously been Bureau of Land Management (BLM) public lands. The

establishment of these National Defense Areas along the border is unprecedented.

Through the conversion of such land to military control, the government has developed a scheme of bringing military trespass charges against people crossing the border who unknowingly enter these restricted zones. **President Trump's Department of Justice (DOJ) is aggressively asserting that it should be able to prosecute these individuals – even though federal judges have made clear that the military trespass charges cannot be proven unless someone knew that they were entering an NDA.**

With this new phase of militarization of the border, the U.S. government has entered uncharted territory. **The implications for fundamental civil liberties are significant.** The government may be positioning itself to deter people from arriving at the border in the future. But the government's approach has been deeply alarming — cutting out Congress, restricting access to huge tracts of once-public lands, and giving federal prosecutors a dangerously overbroad tool for filing criminal charges.

# TIMELINE OF CREATION

April 2025

May 2025

June 2025

August 2025

December 2025

NEW MEXICO

WEST TEXAS

SOUTH TEXAS

ARIZONA

CALIFORNIA

First zone created by the Trump Administration.

## Creeping Expansion of National Defense Areas

Starting in April 2025, the Trump administration began transferring public lands along the U.S.-Mexico border to the Department of Defense (DOD). It referred to these vast new military zones as National Defense Areas (NDAs).

The New Mexico NDA was the first to be created. West Texas followed shortly thereafter, in May 2025. Then, in June 2025, the government created an NDA in South Texas, and in August 2025 another in Arizona. Most recently, in December 2025, an NDA has been established in California.

## Commandeering Public Lands for Military Use

The federal government has undertaken an unprecedented process to create the NDAs along the U.S.-Mexico border, avoiding checks and balances along the way.

### First, Call It an Emergency.

As soon as President Trump took office, he declared a national emergency at the U.S.-Mexico border. The proclamation, relying on the National Emergencies Act of 1976, stated that “it is necessary for the Armed Forces to take all appropriate action” to assist the Department of Homeland Security in border enforcement. President Trump paired that with an Executive Order instructing the DOD to “seal” the border.

The DOD set up the Joint Task Force–Southern Border, in March 2025, to implement these directives. This set the stage for heightened military involvement along the U.S.-Mexico border.

### Second, Take the Land.

In April 2025, President Trump issued a National Security Presidential Memorandum (NSPM-4) directing the transfer of federal lands to the DOD. Federal agencies were instructed to arrange for the land transfers and designate the lands as “National Defense Areas.” The DOD was directed to exclude people from the transferred lands in the name of maintaining security.

The government relied on two mechanisms to transfer land to the DOD:

- **Withdrawals of land by the Department of the Interior (DOI):** The government invoked an emergency provision of the Federal Land Policy and Management Act to transfer land in New Mexico, Arizona, and California. The DOI made a determination that “an emergency situation exists and that emergency measures must be taken to preserve values that would otherwise be lost.” That allowed the DOI to avoid having to obtain Congressional authorization for the land transfers.
- **Designation of excess land by the United States Section of the International Boundary and Water Commission (USIBWC):** The government used an obscure provision of the Federal Property and Administrative Services

Act to effectuate the land transfers for the NDAs in Texas. The International Boundary and Water Commission, which is responsible for implementing agreements between the U.S. and Mexico, identified certain lands as “excess,” reported the “excess” lands to the General Services Administration, and transferred the lands to the DOD. This administrative process of transferring lands between federal agencies did not require any Congressional approval.

The presidential declaration of an emergency, paired with these administrative workarounds avoiding Congressional authorization requirements, allowed the federal government to carry out these land transfers unilaterally without scrutiny.

**And while the land transfers were done abruptly and without input, they may now be practically permanent.** The “emergency” DOI land transfers will last for at least three years, while the handoff of “excess” International Boundary and Water Commission land is irreversible unless the agencies go through an entirely new transfer process through the General Services Administration.

### Third, Call It a Military Base.

Once the DOD had obtained land along the border, the department announced the establishment of the NDAs — starting with New Mexico. Each NDA is nominally connected to an existing military base, although those bases are geographically distant and not contiguous to the NDAs.

- **New Mexico:** The DOD announced in April 2025 that the New Mexico NDA had been established. The department stated that the New Mexico NDA was “part of the U.S. Army Fort Huachuca installation.” Fort

Huachuca is in southeast Arizona.

- **West Texas:** The DOD announced the creation of the NDA in West Texas in May 2025, as an “extension of Fort Bliss.”
- **South Texas:** The DOD announced in June 2025 that the NDA in South Texas had been established, managed by the Air Force, and administered as “part of Joint Base San Antonio.”
- **Arizona:** In August 2025, the DOD announced the creation of the Yuma NDA, as “part of the Marine Corps Air Station Yuma.”
- **California:** The DOD announced the creation of the NDA in California in December 2025, managed by the Department of the Navy.

Effectively, the DOD treats the NDAs as extensions of military bases. But they bear no resemblance to ordinary military installations: they are not fenced-in or well-marked by signage, and the military is not putting them to any apparent use. The limited signage that does exist is printed on small placards, written only in English and Spanish, and often set well back from the actual boundary of the NDA.



ABOVE: Soldiers lay signage near Deming, NM in May of 2025. Source: DVIDS

The lack of visible markers on-the-ground for the boundaries of the NDAs, combined with the DOD’s failure to publish accurate maps showing those boundaries, has created an Orwellian environment of “intangible” military properties along the U.S.-Mexico border.

Further, some of the NDAs are in fact a “patchwork” of small segments of land adjacent to private property, state property, and other public lands. This puts individuals traversing private or public land at risk of unknowingly crossing into restricted military areas without notice.

## Overwhelming Federal Courts with Military Trespass Charges

Since April 2025, when the NDA in New Mexico was created, migrants crossing the U.S.-Mexico border and entering the New Mexico NDA have been arrested and charged with several violations:

- A misdemeanor violation of 8 U.S.C. § 1325 for entering the U.S. unlawfully, if it is their first time entering; or a felony violation of 8 U.S.C. § 1326 if they re-enter the U.S. unlawfully after having been deported;
- A misdemeanor violation of 50 U.S.C. § 797 for “willfully” violating a defense property security regulation; and
- A petty misdemeanor violation of 8 U.S.C. § 1382 for going onto a military property for “any purpose prohibited by law.”

The § 797 and § 1382 charges are referred to together as the “military trespass” charges.

Prior to the creation of the NDAs, the military trespass charges had been used infrequently and as one may expect — primarily to charge individuals who had set foot on an actual military base without permission, after being told not to enter, oftentimes during protest activities.

## Charging to Avoid Scrutiny

Prior to the creation of the NDA, migrants crossing the U.S.-Mexico border typically had been charged with § 1326 or (less commonly, depending on prosecutorial discretion) § 1325 violations, but the military trespass charges were new and different.

The DOJ can generally bring federal criminal charges in three ways: by indictment, complaint, or information. When the DOJ seeks an indictment, a grand jury is responsible for determining whether “probable cause” exists. When the DOJ charges criminal violations by way of a complaint, a magistrate judge is required to conduct an initial review for “probable cause,” and the defendant is entitled to a preliminary hearing. But when the DOJ brings charges using another type of document called an “information,” the judge is not allowed to do a preliminary “probable cause” review.

Historically, it is unusual for criminal charges involving potential incarceration to be brought by way of an “information.” They were used primarily for minor violations.

Initially, the DOJ was charging defendants accused of military trespass violations by way of a complaint — the standard way. Magistrate judges conducted initial “probable cause” reviews.

But the government did not like the results it was getting.

## New Mexico’s Federal Judges Push Back

In May 2025, when the New Mexico NDA military trespass charges first appeared in courts, New Mexico’s federal magistrate judges started finding that the government did not have probable cause for military trespass violations.

The judges were especially concerned **because the government was not asserting that migrants**

**knew they had entered an NDA or that they knew they should not be there.**

In the U.S., criminal violations generally involve two elements: an unlawful “act” and an unlawful “state of mind.” Criminal law usually specifies if the required “state of mind” for an offense is that it was done purposely, knowingly, recklessly, or negligently.

It is unusual for a criminal offense not to require proof of a particular “state of mind,” and if no “state of mind” is required, the statute will usually say so.

The judges in New Mexico understood the military trespass offenses to require “knowledge” on the defendant’s part.

The DOJ was effectively arguing otherwise: that they did not have to prove any “state of mind.” According to the DOJ, the fact that the defendant entered the NDA should be enough on its own.

In May 2025, New Mexico’s chief federal magistrate judge ruled that:

- **Section 797** requires that a person have “knowledge” that their conduct is unlawful. Specifically, for the charges to stick, the defendant had to know that they had entered an NDA, and the defendant had to know that their entry onto the NDA was unauthorized.
- **Section 1382** required that a person have “knowledge” that they were entering a military property.

The government could not show that migrants

charged with military trespass violations knew that they had entered an NDA. Accordingly, the New Mexico federal judges found, in initial “probable cause” reviews, that the government had not established probable cause for the military trespass charges. **The charges were dismissed across the board for many defendants.**

*“As the United States concedes, the NMNDA spans over 180 miles of ‘often difficult and mountainous terrain.’ Consequently, the mere fact that some ‘signs’ were posted in the NMNDA provides no basis on which to conclude that the Defendant could have seen, let alone did see, the signs.” – J. Wormuth*



*“I am having a real hard time understanding how the Government can argue that someone does not have to know the nature, the character of the land they’re entering is military land to be subject to increased penalties ... and twice the penalty that they would face just for coming into the United States unlawfully. ... Just saying, ‘Well, because we said he came in unlawfully and he knew that, it’s sufficient,’ I don’t buy it.” – J. Davenport*

## The Government Side-Steps the Courts

But the government did not stop there. In an unprecedented move, the DOJ switched from charging the military trespass offenses by way of a complaint to charging them by way of an “information.”

Even in cases originally charged by complaint where the judge found, in the initial review, that the government had not established probable cause, the government re-filed the same military trespass charges by way of an “information.”

This move deprived federal judges of the opportunity to review up front whether the charges were supported by probable cause. Instead, cases — even those in which the judges had already found a lack of probable cause — were surging forward and being set for jury trials.

### **The rules of federal criminal procedure were not equipped to handle this scenario.**

The New Mexico federal judges were not pleased. Judicial resources were being chewed up unnecessarily. Judges’ schedules were getting filled with jury trials for charges that they had already told the government they would be unable to prove.

*“This case is one in an enormous series representing a new prosecutorial strategy against individuals who enter the United States unlawfully at the southern border. ... The Undersigned alone has been assigned over 400 of these new cases in less than a month.” – J. Strickland*

Federal judges started throwing out the military trespass charges wherever they could.

*“The Government’s inattention to statutory and constitutional rights has been a consistent throughline through these hundreds of cases. ... Dismissal without prejudice is not sufficient here, as the Government has proven by its actions in the 800-odd cases it has brought to the Las Cruces*

*federal courthouse. The Government’s demonstrated pattern of casual disregard for constitutional and statutory rights—a pattern that has persisted despite repeated warnings from this Court—merits stronger medicine.” – J. Strickland*

*“Furthermore, the Government has repeated this course of action despite knowing of the rights violations it causes. ... As the Government acknowledged, these charges are currently the subject of ongoing litigation as to their propriety as a matter of law. Several judges of this Court, and others, have expressed extreme skepticism as to whether the factual basis as alleged by the Government could legally sustain a conviction under these statutes.”– J. Strickland*

*“[T]he public interest in prosecuting the [military trespass] charges in this case is not weighty. ... The interests served by the Court’s exercise of its supervisory powers to dismiss the charges with prejudice in this case (remediating constitutional rights violations and deterring illegal conduct) are by themselves significant, and become all the more so against the comparatively weak interest of the public in continuing the prosecution.”– J. Strickland*

## Government Doubles Down

Instead of heeding the warnings of the federal judiciary, the DOJ doubled down.

In a case involving a border-crossing migrant from Uzbekistan, Komiljon Toirov, who does not read English or Spanish, the DOJ pushed its novel argument about the military trespass charges up to the federal appellate level — the Tenth Circuit, which covers New Mexico.

**This case is emblematic of the government’s most extreme interpretation of the law.** There is no argument that Mr. Toirov knew he had entered the NDA. He had no idea he had entered a restricted area. It was his first time crossing the border. No one had advised Mr. Toirov about the

NDA. Even if he had seen the posted signs, he could not have read them. The government conceded, in fact, that Mr. Toirov had no actual knowledge of having entered the NDA.

*“I find wholly unpersuasive the government’s argument that the willfulness requirement of 50 U.S.C. § 797 can be sufficiently shown by Defendant’s simultaneous illegal entry into the United States in violation of 8 U.S.C. § 1325, and that his entry into the NMNDA while unlawfully entering the United States violates the plain text of 18 U.S.C. § 1382 with no further proof of knowledge. While the government has not said it outright, their legal theory is tantamount to asserting these are strict liability crimes.”* – J. Davenport

*“[T]he government [concedes] that it cannot prove the two pending charges in this case if it must bear the burden of proving the elements as they have been determined by this Court. Thus, under this proof requirement, the government’s case is fatally flawed....”* – J. Davenport

But the government wanted the charges to stick, even under these circumstances.

Before the Tenth Circuit, the government argued that Mr. Toirov did not need to know that he was entering a restricted military area. They argued that it was sufficient that Mr. Toirov had entered the United States itself by crossing the border. In so doing — they asserted — Mr. Toirov was not “engaged in apparently innocent conduct” because his entry into the U.S. was allegedly undertaken with a “bad purpose.” **Therefore, the DOJ said, the fact that he unknowingly entered the NDA when he entered the U.S. should be all that the court needs to know.**

*“In this case, the crux of the government’s argument ... [is] that proof that the defendant was committing some crime at the time he entered the New Mexico National Defense Area (NM NDA) is sufficient to prove beyond a reasonable doubt that he also*

*willfully violated 50 U.S.C. § 797 and 18 U.S.C. § 1382, collectively referred to as ‘the military trespass statutes.’ The defense bar and every judge in the Las Cruces district courthouse disagrees with the government on the mens rea requirements of these two statutes.”* – J. Davenport

*“As opposed to recognizing that they have a difficult prosecution and may lose but should pursue the charges nonetheless, when the government concedes that they cannot prove their case, they ordinarily dismiss the charges on their own to assure that justice is done, even in the face of losing their case. Justice and winning do not always go hand-in-hand.”* – J. Davenport

So far, the Tenth Circuit has declined to issue a decision on the question the government is posing, about whether the charges can stick under these circumstances. The government has already put the question to the Tenth Circuit twice via “interlocutory” appeals during Mr. Toirov’s case.

**In January 2026, the government finally filed a motion to dismiss the military trespass charges against Mr. Toirov.** In that motion, the government acknowledged that it could not prove the charges because it could not show that Mr. Toirov knew he was entering the NDA. The court granted the government’s motion and entered an order dismissing the charges.

Then, in an incredibly unusual move, the government filed yet another appeal to the Tenth Circuit of the order dismissing the charges that the government itself had sought. **The government apparently intends to once again argue it did not need to show that Mr. Toirov knew he was entering an NDA.** The appeal is pending.

## Uneasy Standoff

The federal judiciary now finds itself in an uneasy standoff with the DOJ over these military trespass charges. The DOJ persists in bringing charges against migrants who enter the NDA. The local U.S.

Attorney's Office in southern New Mexico has even boosted its staffing to expand its capacity to litigate these cases. It brought in additional attorneys on special assignment, including some from the DOD, who are now prosecuting these cases.

The judges continue to expend valuable time and resources on the military trespass charges, as does the Federal Public Defender's office. The migrants caught up in this charade continue to be dragged into court and charged with crimes that the government knows it cannot prove.

## Experimenting on Southern New Mexico ... Again

This is not the first time that southern New Mexico has been at the epicenter of the federal government's most ambitious and inhumane

experiments in border enforcement.

- The federal court in Las Cruces, New Mexico, was at the heart of one of the darkest chapters in recent U.S. history—the **federal government's notorious Zero Tolerance Policy**. Under the first Trump administration, federal officials forcibly separated thousands of children from their parents. Parents charged with immigration-related offenses appeared in the Las Cruces courthouse, desperate to find their children.
- New Mexico federal courts endured extremely heavy caseloads during the federal government's experimentation with Operation Streamline, a mass prosecution scheme in which people charged with border-crossing violations were marched into court, dozens at a time. **This was an accelerated version of**



ABOVE: A sign posted near Yuma, AZ. Source: DVIDS



# RECOMMENDATIONS

## OVERSIGHT

The appropriate congressional committees should investigate, hold hearings, conduct on-site visits, and take further steps to conduct meaningful oversight regarding:

- The legal authorities for the establishment of the NDAs, including the sufficiency of justifications invoked to avoid congressional authorization for land transfers or withdrawals;
- The DOD's administration of the NDAs, with particular attention to relevant regulations, policies, rules, and guidance, including the DOD's interpretation of its authority to conduct apprehensions, detentions, and searches of individuals within the NDAs, and the DOD's adherence to the Posse Comitatus Act;
- The DOJ's pursuit of criminal charges for alleged trespass onto the NDAs, with particular attention to relevant policies, rules, and guidance, including the DOJ's use of charging by "information;"
- The DOJ's use of funds and personnel, including special assistant U.S. attorneys and legal support staff from the DOD, to prosecute military trespass cases;
- The impact of the military trespass charges on the federal courts and the Federal Public Defender, including any failure to ensure parity of resources between the prosecution and public defense;
- Congress should direct the DOD and the DHS to provide periodic reports on the NDAs including statistics on apprehensions, detentions, and prosecutions, disaggregated by location, nationality, agency involved, and other relevant metrics.

## TRANSPARENCY

- The DOD should proactively publish and maintain updated versions of accurate maps depicting the boundaries of the NDAs available to the public.
- The federal government should proactively publish all operative versions of agency policies, procedures, rules, instructions, and other guidance relating to the NDAs.

## REFORM

- Bar associations and other stakeholders should develop proposed amendments to the Federal Rules of Criminal Procedure to guard against the abusive use of charging by "information."
- Congress should reform the Federal Land Policy and Management Act and the Federal Property and Administrative Services Act to put in place meaningful safeguards against the overbroad and unjustified use of "emergency" land transfers and transfers of "excess" land by federal agencies.
- Congress should prioritize reforms to the 1976 National Emergencies Act to impose stronger congressional oversight and control over presidential emergency declarations, mandate detailed reporting about the use of emergency powers, and establish other critical safeguards against the abuse of emergency powers.