

The Supreme Court & the Unaccountable Racialized Security State

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For a few brief years after 9/11, the U.S. Supreme Court reined in the executive branch's most sweeping assertions of wartime power, upholding the constitutional rights of military detainees. Then the Court decided it had gone far enough. Even as the "war on terror" grew beyond spatial and temporal limits – becoming a global set of military interventions with no apparent end point – the Court regularly ruled that judges should defer to the government when it invoked national security. In cases involving everything from surveillance to immigration roundups to the "Muslim ban," the Supreme Court asserted that courts have limited authority and expertise to review the government's actions, even when there is no alternative means to hold government accountable for misconduct. These decisions reflect the Court's larger agenda of expanding presidential power and empowering law enforcement and security agencies, while weakening the state's capacity to regulate in the interest of public health, welfare, and the environment. Within and beyond "national security" contexts, attempts to insulate the carceral state from accountability draw on perceptions of nonwhite communities as threats to safety and national identity. As the second Trump administration expands the war on terror to target a still wider set of perceived foreign and domestic enemies, the same Court that has unshackled the executive will decide whether to constrain the new administration's increasingly authoritarian and lawless policies.

In its opening months, the second Trump administration designated cartels and criminal gangs as foreign terrorist organizations, invoked the Alien Enemies Act of 1798 to deport hundreds of men to a notorious prison in El Salvador, detained foreign students for pro-Palestine speech on college campuses, blew up boats in the Caribbean allegedly transporting drugs, and promised to target a large swath of groups on the left as "domestic terrorists."

These policies radically expanded a "global war on terror" that had never ended. Even after the United States withdrew from Afghanistan in 2021, it maintained counterterrorism operations in seventy-eight countries, including ground combat operations in nine and air strikes in four. By 2024, at least 905,000 people had

died directly in post-9/11 war zones and thirty-eight million people had been displaced.¹ Cost estimates of just the Afghanistan and Iraq wars (not including the costs of the broader war on terror) range from \$2.1 trillion to more than \$8.5 trillion.² And the United States bankrolled its allies' purported counterterrorism campaigns, providing a record \$17.9 billion to Israel in just the first year following the October 7, 2023, attacks to purchase the artillery shells, antitank missiles, and 2,000-pound bombs Israel used in the catastrophic destruction of Gaza.³

Even before the Trump administration returned to power, the national security apparatus waged a decades-long war on terror that reached far into the interstices of life around the world and in the United States. The National Security Agency surveilled the calls, emails, and messages of foreigners abroad without a warrant and then conducted "backdoor" searches to inspect the communications of hundreds of thousands of Americans.⁴ Terrorist watchlists, reportedly two million names long, became so normalized that it attracted little notice when U.S. citizens were interrogated and searched when returning to the country, questioned about where they prayed and how they worshipped. Immigration agencies placed thousands of green card and citizenship applications in legal limbo on the basis of vague national security concerns, disproportionately affecting individuals from Muslim-majority countries.⁵

Beyond the war on terror, and prior to Donald Trump's return to power, the security state militarized the border and treated migrants fleeing poverty or gangs as security threats. Agencies discriminated against those considered suspicious on account of great power conflicts, particularly the new cold war with China. The Justice Department prosecuted a number of Chinese American scientists on charges of spying for China, only to have investigations unravel when it appeared that ethnic profiling rather than evidence of disloyalty had instigated them.

Through drone strikes and detentions, profiling and prosecutions, the sprawling national security state institutionalized the curtailment of individual liberties – often on the basis of racialized judgments that branded particular racial, ethnic, or religious communities as dangerous. During the past quarter-century, the Supreme Court mostly shielded security agencies from accountability for these actions. Part of a broader pattern in which the Court has diminished accountability for immigration and law enforcement agencies and weakened civil rights protections, the Court's decisions provide little restraint or recourse for individuals or communities "otherized" as threats.

Now, as the Trump administration adopts increasingly draconian policies to exclude and punish migrants, banish international students whose speech it dislikes, kill suspected drug traffickers in international waters, and deploy the U.S. military inside American cities, legal challenges will head to a Supreme Court that routinely counsels deference to the executive when it asserts emergency powers or invokes "national security."

For four years beginning in 2004, it appeared that the Supreme Court was doing something that it had rarely done at the height of past wars: rejecting the executive branch's broad invocations of national security powers, despite the wartime context. In 2004, two months after photos of U.S. soldiers abusing detainees at Iraq's Abu Ghraib prison tarnished America's image around the world, the Court ruled that a U.S. citizen detained as an enemy combatant had due process rights to challenge his detention and that noncitizen detainees at Guantánamo could file habeas corpus petitions in federal court. Twice more, the Supreme Court ruled against the Bush administration and Congress's attempts to strip habeas rights, culminating in the 2008 *Boumediene v. Bush* decision holding that Guantánamo inmates had a constitutional right to challenge the lawfulness of their detentions. "Liberty and security can be reconciled," the Court proclaimed, "and in our system they are reconciled within the framework of the law."⁶

At the time, many commentators considered these cases a watershed moment in both the war on terror and with respect to the Court's willingness to intervene in wartime. Historically, the Supreme Court has largely deferred to the government's national security claims, especially during wars and perceived emergencies. But in its early post-9/11 interventions, the Supreme Court not only rejected the Bush administration's assertions of executive power but also resisted Congress's attempts to statutorily deny habeas review to Guantánamo detainees – upholding rights claims despite opposition from both political branches. Some legal scholars heralded a new trend of "foreign relations normalization," arguing that the Court was rejecting sharp distinctions between domestic and foreign affairs in determining the judicial role.⁷

But the Court apparently decided that it had gone as far as it should – or, indeed, perhaps too far. Hundreds of Guantánamo detainees challenged their detentions following *Boumediene*, represented by over one thousand lawyers and advocates around the country; within a year of the decision, district courts granted habeas corpus to three-fourths of the detainees whose petitions they heard. But a hostile D.C. Circuit Court of Appeals "eviscerated *Boumediene*'s promise of meaningful judicial scrutiny of the president's detention decisions" and reversed every win below.⁸ Rather than intervene in the face of what many saw as open defiance of its rulings, the Supreme Court declined to review nearly all of the D.C. Court of Appeals' decisions.⁹ As a result, the Supreme Court left in place a restrictive jurisprudence that made it impossible for many detainees to meaningfully contest their detention.

In subsequent cases in which the government invoked national security interests, the Court routinely deferred to the executive branch, in some cases extending executive authority rather than simply reverting to old patterns. As the 9/11 attacks receded into the past, the government more often predicated appeals to deference on temporally unlimited assertions of national security, not war or

emergencies. Historian Mary Dudziak has argued that, traditionally, invocations of “wartime” exceptions from the ordinary rule of law were premised on wars ending; but as the war on terror continued with no end in sight, the law shifted to a “newly configured, peace-less era, a new kind of normal.”¹⁰

In that new normal, the idea that courts should defer to the executive when it asserts national security concerns manifested in a variety of legal doctrines. The Supreme Court promoted three forms of national security deference: first, refusing to hear a case or claims altogether; second, hearing a case but applying a lenient legal standard that made it easier for the government to prevail; and third, deferring to the executive’s view on a question of fact even while claiming to apply a standard legal test.

Thus, in the first category, the Supreme Court ruled in a 2012 case that legal and human rights organizations lacked standing to challenge an extensive new surveillance law because they couldn’t prove that national security agencies would necessarily surveil them.¹¹ Of course, few can prove the certainty of secret surveillance when that surveillance is secret by definition. This largely immunized the surveillance program – and other government programs that individuals could not prove for certain were targeting them – from legal challenge.

And in several decisions, the Court gutted the ability of individuals to sue federal officials for monetary damages in constitutional cases when a statute doesn’t specifically authorize it, stating that only Congress should decide whether to allow damages claims implicating national security. The Court had limited the ability of people to sue federal officers for constitutional violations for some time, across substantive contexts, but these cases went further in curtailing such claims and, in the process, embraced a sweeping definition of national security. Thus, the Court rejected the claims not only of Muslim immigrants detained within the United States after 9/11 but also those of a fifteen-year-old shot to death by a Border Patrol agent just across the U.S.-Mexico border and those of a U.S. citizen roughed up by a Border Patrol agent outside his own home.¹² In the last of these decisions, the Court barred all damages claims against Border Patrol – one of the largest U.S. law enforcement agencies and one that operates well inside U.S. borders – on the grounds that the agency’s mission relates to national security. The Court made it nearly impossible for individuals to sue federal officials for damages in the absence of a statute, leaving it to a majoritarian, often-dysfunctional institution (Congress) to decide whether to authorize suits protecting constitutional rights. The result is that for many kinds of misconduct by federal security, law enforcement, or immigration officials, including the masked ICE agents now descending on immigrant communities, there is no longer any remedy available from a court.

In the second category of national security deference, courts hear a case but apply a lenient standard to assess the legality of the executive’s conduct on the grounds that the case implicates national security. In 2018, the Court did just that,

upholding the Trump administration's travel ban excluding citizens from a number of predominantly Muslim countries. Trump had spent two years excoriating Muslims, including repeating with relish an apocryphal story of a World War II general who shot Muslims with bullets dipped in pig's blood. But the Court refused to look behind the government's stated justifications for the travel ban to determine whether discriminatory animus was the real reason for the policy. The Court declared that its "inquiry into matters of entry and national security is highly constrained," suggesting that it would ignore evidence of racial or religious bias when federal agencies offered a security pretext.¹³

And in the third category of national security deference, the Court accepts the government's factual conclusions on the grounds that judges have limited competence to question determinations on national security threats. In 2010, the Supreme Court upheld a prohibition on material support to designated terrorist organizations, deferring to congressional and executive findings that funding even these organizations' lawful activities would end up supporting their violence. It thus rejected the First Amendment claims of groups that wanted to advocate on behalf of Kurdish and Tamil organizations and to teach them how to use international law to resolve conflicts nonviolently, finding that even such forms of speech could be banned as material support to terrorism.¹⁴

The Supreme Court has also fortified doctrines that cut across these forms of deference. For instance, it strengthened the state secrets privilege, which allows the government to withhold evidence that it claims might harm national security, sometimes leading to the outright dismissal of cases. In 2022, the Court extended state secrets protection to information that was by then widely known – the location of a detention site where the CIA waterboarded a man eighty times – in order to shield a foreign intelligence agency's covert cooperation with the United States, even when the purpose of that cooperation was to facilitate torture.¹⁵ In the same term, in a case involving FBI surveillance of Southern California Muslims, the Court made it harder for other individuals to access the evidence they need to demonstrate standing and prove their cases when the government invokes state secrets.¹⁶

Interestingly, there was one exception to the government's winning streak of asserting national security at the Supreme Court. The Court twice allowed cases to move forward when Americans challenged terrorist watchlists, holding that they could sue for damages under the Religious Freedom Restoration Act and that a case isn't "moot" merely because the FBI promised it wouldn't return a person to the watchlist based on existing information.¹⁷ It's plausible that a majority of justices were concerned about preserving the ability of conservatives to challenge policies outside the national security context through religious liberty or constitutional claims. These justices likely also felt confident that other deference doctrines would protect the government in the watchlist litigation itself.

On the whole, however, the Supreme Court has shielded the national security state from accountability in court. Some victims of unlawful detentions, discriminatory profiling, and overbroad surveillance still managed to prevail in lower courts.¹⁸ For instance, in late 2024, a federal jury awarded \$42 million in damages to several Iraqi men who had alleged abuse at the Abu Ghraib prison in Iraq, the first time a U.S. military contractor was found liable for the abuse of detainees there.¹⁹ That case managed to survive multiple jurisdictional challenges over the course of sixteen years.²⁰ Such cases had to run a gauntlet of jurisdictional, substantive, and procedural obstacles created by the Supreme Court, and avoid Supreme Court review that could too easily undo a lower court victory at the executive's behest. In 2025, lower federal courts rejected Trump administration national security arguments in numerous cases involving the imposition of global tariffs, the transfer of detainees under the Alien Enemies Act, the deployment of the military in U.S. cities, and the ideological deportation of international students.²¹ The Supreme Court will likely revisit several of these legal challenges in the coming months.

When courts refuse to hear cases or otherwise defer to executive assertions of national security, they undermine justice for racial, ethnic, and religious minorities who are more likely to be treated as collective threats.²²

As a growing body of scholarship has demonstrated, neither policymakers nor the courts conceptualize national security in a colorblind fashion. Rather, race and identity shape conceptions of the “nation” to be secured – and who that nation ought to be protected *from*.²³ Moreover, racialized conceptions of security have historically gone hand in hand with judicial deference to the political branches of government. In one of the earliest Supreme Court cases declaring broad judicial deference in immigration and foreign affairs, the Court made clear that the very presence of nonwhite foreigners could be viewed as a national security threat. If the U.S. government “considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed,” the Court held in the 1889 “Chinese Exclusion Case,” which legitimated decades of subsequent anti-Asian immigration restrictions.²⁴

Half a century later, the Court upheld curfew and exclusion orders that led to the incarceration of over 110,000 Japanese and Japanese Americans during World War II. The Court invoked deference to military judgments as the basis for sustaining the mass incarceration, despite evidence that military officials were relying on rank racist assertions to infer disloyalty of the group.²⁵

The U.S. response to 9/11 at home and abroad showed that tendencies to “otherize” nonwhite, non-Christian populations remain deeply ingrained within po-

litical and popular culture. As constitutional law scholar Baher Azmy has written, the Bush administration consolidated executive power after 9/11 by “braiding together two narratives”: first, the need to defer to the executive in wartime and, second, “the specter of a shadowy, fanatical, global enemy threatening the American way of life.”²⁶ That narrative presented Muslim communities, at home and abroad, as a collective and even existential threat, drawing on centuries-old Orientalist ideas, a decades-long counterterrorism framework directed at Palestinians, Arabs and Muslims, and post–Cold War academic theories of a “clash of civilizations” between Western and Islamic civilizations.²⁷

Even as it became apparent that white supremacists and far-right antigovernment activists were responsible for a growing share of political violence within the country, the influence of racial politics minimized that threat while expanding the military, surveillance, intelligence, and criminal authorities arrayed against Muslims and nonwhite communities. Security agencies applied disparate legal regimes to “international” and “domestic” terrorism, with broader surveillance, more sweeping criminal charges, and greater punishment for those deemed international terrorists. Agencies defined these categories primarily by the identity and ideology of perceived threats rather than their actual geography. For instance, the FBI categorized Muslim Americans within the United States as part of an international threat if they merely shared the beliefs of overseas terrorist groups, while they treated white Americans who traveled abroad to connect with white supremacists or train in foreign wars as, at most, a “domestic” threat.²⁸

In the summer of 2020, as racial justice protests swept the country, the first Trump administration and its allies invoked the specter of terrorism to decry those protesting police brutality as enemies of the state. Republican political leaders called for sending in the 101st Airborne Division to quash “Antifa terrorists” in U.S. cities and to “hunt them down like we do those in the Middle East.”²⁹ Meanwhile, law enforcement agencies failed to prevent the January 6, 2021, assault on the U.S. Capitol – the largest-scale political violence threatening U.S. democracy in generations – despite prior indications that groups of people were mobilizing to prevent the certification of the 2020 election by force.³⁰ Federal law enforcement agencies during the Biden administration ultimately prosecuted more than 1,300 people in connection with trespassing, assaulting police, or other crimes that day.³¹ But even before President Trump pardoned or commuted the sentences of everyone accused of these crimes, most Republicans thought the events had been exaggerated, with perceptions of the January 6 attack linked to racial attitudes.³²

U.S. states made their own moves to brand protests associated with people of color and the left as terrorism. Georgia prosecutors charged over forty people protesting a police training facility under a new state domestic terrorism law, elevating trespassing, vandalism, or other property crimes to offenses with steep penalties.³³ Elected officials in at least thirty states introduced legislation to curb

protests of oil and gas pipelines, including by defining protest-related activity as terrorism, after the Standing Rock Sioux tribe and environmental activists challenged the Dakota Access Pipeline.³⁴

After returning to power, the Trump administration cast nonwhite people as threats to public safety and national security with renewed ferocity. At his administration's direction, ICE agents detained and sought to deport international students as "terrorists" merely because they had advocated for Palestinians on their college campuses.³⁵ President Trump ordered the military to U.S. cities, painting a racialized specter of urban crime and protests against ICE raids in largely Black and Brown communities to justify the unprecedented deployment.³⁶ Reviving a Reagan-era discourse on "narco-terrorists," the administration designated cartels and gangs as foreign terrorist organizations, summarily deported hundreds to El Salvador's brutal "Terrorism Confinement Center," and carried out lethal strikes on boats in the Caribbean suspected of carrying drugs, despite the lack of any imminent threat to the United States or inability to intercept the vessels.³⁷ Following the assassination of right-wing activist Charlie Kirk, the administration promised to target a broader swath of the political left as domestic terrorists. While the identification of political enemies went beyond nonwhite communities, age-old racial scripts made it easy to cast the widest net over communities of color. Like a host of other legal doctrines devised to limit accountability for law enforcement, national security deference particularly harms immigrants and Brown and Black communities so often treated as threats to the security – and the identity – of the nation.

While the Supreme Court has fortified national security deference over the past fifteen years, it has simultaneously weakened administrative agencies charged with protecting public health, the environment, workers, consumers, and social welfare. In other words, the Court's decisions empower law enforcement and national security agencies – the carceral side of the state – at the same time as they dismantle the executive branch's ability to regulate businesses in the interest of public health and welfare. While many legal and political commentators have bemoaned the Court's weakening of the administrative state, they less often note that it has occurred in parallel with the strengthening of national security agencies against civil rights challengers.

In 2024, the Supreme Court overturned a forty-year-old precedent, *Chevron U.S.A. v. Natural Resources Defense Council*, that required courts to defer to agencies' reasonable interpretations of ambiguous federal statutes.³⁸ Business interests opposed "*Chevron* deference" because the doctrine gave greater room for agencies to regulate in response to new conditions and favored agency interpretations of their authority over those of judges who might seek to constrain it. Legal scholars expect that the end of *Chevron* deference will undermine environmental protections,

public health rules, and other regulations in a wide variety of areas, though they debate just how large the impact will be.

While the end of *Chevron* deference may mean the Court will not defer to executive agency interpretation in areas of conventional health and welfare, we shouldn't expect this lesser deference to constrain national security policies. In deferring to national security agencies, courts typically don't rely on *Chevron* but postulate other formalist or functional reasons not to second-guess security decisions. And in overturning *Chevron*, the Court specifically reaffirmed a different principle (known as "*Skidmore* deference") that enables judges to consider agencies' "body of experience and informed judgment" in interpreting the law.³⁹ Given that the Court has so often declared that national security agencies have experience and expertise on security matters that judges lack, courts will almost certainly continue to cite that reasoning in deferring to national security decisions.⁴⁰ Though skeptical of agency expertise to regulate businesses in the interest of public health or the environment, the Court has shown little skepticism toward agencies that label, punish, and exclude people – generally racialized "outsiders" – as security threats.

The Court has also undercut the executive's power to regulate on pressing social and economic issues through a revamped "major questions doctrine," but once again, it's unclear whether this doctrinal change will make a difference in cases in which the executive invokes national security. Two years ago, the Court overturned the Biden administration's pandemic-era evictions moratorium, stayed a vaccination mandate on large employers, and limited the Environmental Protection Agency's ability to regulate carbon emissions.⁴¹ In doing so, the Court articulated a major questions doctrine that makes it harder for agencies to regulate on issues of major "economic and political significance" without a clear statement from Congress authorizing such regulation. Whereas in traditional national security contexts courts cite the high stakes of decisions and the speed of crises as reasons to defer to the executive, in these cases, the Court didn't hesitate to curtail executive power to address the colossal threats presented by the rapidly unfolding pandemic or climate change.⁴²

The scope and impact of this newly invigorated major questions doctrine are still unclear. But there are several reasons to think that the Court may not apply it to cases it views as implicating foreign affairs or traditional national security concerns, especially those involving terrorism, foreign threats, or the targeting of noncitizens. Although the Federal Circuit recently invalidated President Trump's worldwide tariffs, in part on the grounds that interpreting the International Emergency Economic Powers Act to give the president such far-reaching authority would violate the major questions doctrine, the Supreme Court will review the decision this fall.⁴³ Justice Kavanaugh recently opined in a different case that the major questions doctrine does not "translate" to "national security and foreign policy contexts," and several justices otherwise critical of broad congress-

sional delegations of power to the executive have voiced support for a foreign-affairs exception to a related doctrine.⁴⁴

Even if the Court does not create a formal exception to the major questions doctrine for national security or foreign affairs, it ultimately gets to decide which questions involve major “economic and political significance” or which statutes clearly delegate power. Moreover, to the extent that security agencies target discrete groups of unpopular or marginalized people – such as noncitizens labeled “alien enemies” – they are unlikely to generate the economic impact that the doctrine appears to require, even when these policies are unprecedented or deeply consequential. All this gives the Court ample doctrinal room to pursue an agenda of constraining economic and social regulation while unleashing the national security state against the administration’s self-identified enemies.

If the Court’s approach to national security in recent years has deviated from its broader approach to administrative power, a closer parallel exists in its treatment of civil rights claims against the police and other law enforcement officers. The Court has intensified a decades-long trend of making it difficult to sue state, local, and federal law enforcement officers for civil rights violations, such as excessive force or racial discrimination. While the Court in the 1960s and 1970s interpreted the law to allow new civil rights claims, it soon afterward began curtailing their use through a variety of substantive and procedural decisions. The effects of this limited accountability, predictably, fall hardest on the Black and Brown communities most often subject to policing and police violence.

One legal barrier that has garnered notoriety is qualified immunity. This is the Supreme Court–created doctrine that requires those suing police for constitutional violations to show not only that police officers violated the Constitution, but that they violated a “clearly established” constitutional right in a way that any reasonable police officer would have recognized as unlawful.⁴⁵ As the Court has interpreted this rule, this often means that a victim of police violence has to prove not just that the police used excessive force in violation of the Fourth Amendment, but also that a previous court has *already found* a violation in an earlier, precedent-setting case involving nearly identical facts.⁴⁶ And the Court has stymied the development of any such precedent in the first place: since 2001, the Court has allowed judges to dismiss cases on qualified immunity grounds without reaching the merits of the constitutional question. It’s especially hard for plaintiffs to point to precedent when comparable precedent-setting cases are dismissed outright.⁴⁷ And when a plaintiff can’t show a favorable legal decision in the past resulting from a similar set of facts, the officer is off the hook. What’s more, when the Supreme Court *has* agreed to review qualified immunity cases, it has almost exclusively reviewed cases in which police officers lost in the lower courts – in order to overturn those decisions.⁴⁸ The signal to lower courts – and the public – is that

the Court is more committed to immunizing police than to protecting victims of police brutality.

Qualified immunity is not the only legal doctrine to strip many victims of police misconduct of the ability to hold the officers or their agencies accountable in court. The Court has ratcheted up the standard for holding municipal police departments responsible for misconduct by their officers, a legal hurdle that new research shows is at least as much of a barrier as qualified immunity.⁴⁹ And cases seeking structural reform of police departments face other hurdles, like standing and class action doctrine, that limit the ability to obtain court-ordered reforms in response to systemic violations.⁵⁰

Some newly erected barriers originate in cases deemed relevant to national security but are designed to apply to “ordinary” civil rights litigation as well. In the months after September 11, 2001, the FBI arrested hundreds of mostly Muslim immigrant men, often based on racial and religious profiling, many of whom were detained in harsh conditions that included physical abuse by prison guards. In 2009, the Court chose the case of *Javaid Iqbal*, a former detainee, to tighten a procedural standard used to determine whether to allow a claim to proceed in court.⁵¹ Holding that it wasn’t “plausible” that high-level government officials discriminated against post-9/11 detainees, the Court required *all* plaintiffs henceforth to show the plausibility of their claims early in the litigation, without the benefit of discovery from the other side. Such a rule can particularly disadvantage civil rights plaintiffs, who often need proof of discriminatory intent that they can’t get without discovery and who must also overcome the unconscious biases of federal judges whose life experiences may lead them to minimize the likelihood of rights violations.⁵²

Since 2017, the Court chose the same factual context of post-9/11 detentions – and then two other scenarios involving Border Patrol – to scale back the ability to sue federal law enforcement officers for damages for constitutional violations. As noted above, though these decisions were premised on curtailing damages suits in the national security and border contexts, the reasoning of these decisions would limit courts from allowing such suits for constitutional violations almost across the board. If Congress hasn’t specifically authorized damages suits, victims of violations may have no recourse to vindicate constitutional rights in court, whether they allege violations by agents of the FBI, Drug Enforcement Agency, or various immigration agencies. Just this summer, the Court summarily reversed a lower court decision allowing a man held in solitary confinement to sue prison officials for using excessive force against him.⁵³

Cases purportedly raising national security concerns sometimes present the most politically palatable set of facts through which to strip rights. But the move to limit civil rights litigation in court predated the war on terror and is part of a broader effort to insulate law enforcement officials from supposedly excessive civil rights litigation against them. Across these contexts, the Court opines that permitting lit-

igation would unduly deter government officials from “doing their job.” Of course, one could alternatively envision “the job” of law enforcement and security officials to include vigorously protecting the rights and safety of people from state violence. Instead, the Court has embraced a vision of the security state as having largely unfettered authority to wield the most powerful tools at its disposal *against* people at home and abroad. Far from a neutral set of technical legal rules, the Court’s doctrines on security, administrative law, and civil rights enforcement imperil non-white communities characterized as threatening the nation.

In the longer arc of its history, the Court has stepped in at pivotal moments to constrain national security powers: it ruled that President Truman could not take control over steel mills to prevent a labor strike during the Korean War, that the First Amendment prohibited President Nixon from preventing the publication of the classified “Pentagon Papers” during the Vietnam War, and that executive agencies could not conduct electronic surveillance of a domestic security threat without a warrant.⁵⁴ In the last of these cases, the Court specifically recognized that the “danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect ‘domestic security.’” Citing that decision, the Court later warned that “the label of ‘national security’ may cover a multitude of sins.”⁵⁵ A posture of blind deference to the executive’s national security assertions is neither historically inevitable nor constitutionally foreordained. As the Trump administration asserts national security powers to target foreign and domestic enemies at unprecedented scale, the Supreme Court will have to decide whether there truly are no limits to the racialized security state it has unleashed.

AUTHOR’S NOTE

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- ¹⁵ *United States v. Husayn (Abu Zubaydah)*, 142 S. Ct. 959 (2022). For a discussion of these cases, see Shirin Sinnar, “A Label Covering a ‘Multitude of Sins’: The Harm of National Security Deference,” *Harvard Law Review* 136 (1) (2022).

- ¹⁶ *FBI v. Fazaga*, 595 U.S. 344 (2022).
- ¹⁷ *Tanzin v. Tanvir*, 592 U.S. 43 (2020); and *Federal Bureau of Investigation v. Fikre*, 601 U.S. 234 (2024). For a description of what the *Tanzin v. Tanvir* lawsuit meant for the individuals who brought it, see “Reflection on *Tanzin v. Tanvir*: Q&A With the Plaintiffs,” *Harvard Law Review* 135 (1) (2021).
- ¹⁸ See Shirin Sinnar, “Procedural Experimentation and National Security in the Courts,” *California Law Review* 106 (4) (2018): 991–1060; and Steve Vladeck, “The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation,” *Drake Law Review* 64 (2016): 1035.
- ¹⁹ Salvador Rizzo, “Jury Says Defense Contractor Must Pay \$42 Million Over Abu Ghraib Abuses,” *The Washington Post*, November 12, 2024.
- ²⁰ For instance, see *Al Shimari v. CACI Premier Tech., Inc.*, 684 F. Supp. 3d 481 (E.D. Va. 2023) (denying motions to dismiss on jurisdictional grounds and recounting prior unsuccessful attempts to dismiss case under Alien Tort Statute, political question doctrine, and other grounds).
- ²¹ These lower court decisions include *V.O.S. Selections, Inc. v. Trump*, 149 F.4th 1312 (Fed. Cir. 2025), cert. granted, No. 25-250, 2025 WL 2601020 (U.S. Sept. 9, 2025) (tariffs); *W.M.M. v. Trump*, 2025 WL 2508869 (5th Cir. Sept. 2, 2025), reh’g en banc granted, opinion vacated, No. 25-10534, 2025 WL 2784957 (5th Cir. Sept. 30, 2025) (Alien Enemies Act transfers); *Newsom v. Trump*, No. 25-CV-04870-CRB, 2025 WL 2501619 (N.D. Cal. Sept. 2, 2025) (deployment of National Guard and Marines in California); and *American Association of University Professors v. Rubio*, 2025 WL 2777659 (D. Mass., Sept. 30, 2025) (ideological deportations).
- ²² Of course, arguments for national security deference are not confined to cases involving or affecting individuals from such communities. For instance, a 1988 case often cited for its broad view of presidential power over national security involved an employee denied a security clearance, and the Court’s decision limiting outside review of such decisions affects employees of all races and backgrounds. *Department of the Navy v. Egan*, 484 U.S. 518 (1988).
- ²³ See Matiangai V. S. Sirleaf, “Confronting the Color Line in National Security,” in *Race and National Security*, ed. Matiangai V. S. Sirleaf (Oxford University Press, 2023) (introducing an edited volume of essays on the interrelationship between race and national security); and E. Tendayi Achiume and Asli Bâli, “Race and Empire: Legal Theory Within, Through, and Across National Borders,” *UCLA Law Review* 67 (2021) (introducing symposium essays on race and empire).
- ²⁴ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (“The Chinese Exclusion Case”).
- ²⁵ *Korematsu v. United States*, 323 U.S. 214 (1944) (Frank Murphy, dissenting).
- ²⁶ Azmy, “Crisis Lawyering in a Lawless Space,” 33.
- ²⁷ Amna Akbar, “Policing ‘Radicalization,’” *UC Irvine Law Review* 3 (4) (2013): 809; Sahar Aziz, *The Racial Muslim: When Racism Quashes Religious Freedom* (University of California Press, 2021); and Darryl Li, “Anti-Palestinian at the Core: The Origins and Growing Dangers of U.S. Antiterrorism Law” (Palestine Legal and Center for Constitutional Rights, 2024). For a recent account of the influence of the “clash of civilizations” thesis, see Jordan Michael Smith, “Samuel Huntington’s Great Idea Was Totally Wrong,” *The New Republic*, October 19, 2023.

- ²⁸ Shirin Sinnar, “Separate and Unequal: The Law of ‘Domestic’ and ‘International’ Terrorism,” *Michigan Law Review* 117 (7) (2019): 1333–1404; and Shirin Sinnar, “Questioning the ‘Domestic’ and ‘International’ in Biden’s Counterterrorism Strategy,” *Just Security*, July 26, 2021, <https://www.justsecurity.org/77557/questioning-the-domestic-and-international-in-bidens-counterterrorism-strategy>.
- ²⁹ Shirin Sinnar, “Invoking ‘Terrorism’ Against Police Protestors,” *Just Security*, June 3, 2020, <https://www.justsecurity.org/70549/invoking-terrorism-against-police-protestors>.
- ³⁰ Luke Broadwater, “Senate Report Details Jan. 6 Intelligence and Law Enforcement Failures,” *The New York Times*, June 27, 2023.
- ³¹ Alan Feuer, “Capitol Attack Prosecutions Have Ensnared Over 1,380 People,” *The New York Times*, April 16, 2024.
- ³² Rachel Weiner, “Republican Loyalty to Trump, Rioters Climbs in 3 Years after Jan. 6 Attack,” *The Washington Post*, January 2, 2024; and Jesse Rhodes and Tatishe Nteta, “The New Racial Spillover: Donald Trump, Racial Attitudes, and Public Opinion Toward Accountability for Perpetrators and Planners of the January 6 Capitol Attack,” *Political Science Quarterly* 139 (2) (2024): 159–176, <https://doi.org/10.1093/psquar/qqa010>.
- ³³ Sean Keenan and Rick Rojas, “‘Cop City’ Prosecutions Hinge on a New Definition of Domestic Terrorism,” *The New York Times*, February 26, 2024. See also the discussion in Azadeh Shahshahani and Sofía Verónica Montez, “Colonialism Turned Inward: Importing U.S. Militarism into Local Police Departments,” *Dædalus* 154 (4) (Fall 2025): 274–294, <https://www.amacad.org/daedalus/colonialism-turned-inward-importing-us-militarism-local-police-departments>.
- ³⁴ Nicholas Kusnetz, “Harsh New Anti-Protest Laws Restrict Freedom of Speech, Advocates Say,” *The Washington Post*, August 22, 2018. The camps themselves were surveilled, roadblocks and checkpoints were manned by police, and people in the camps or visiting them were denied the ability to take food, water, and other supplies to protesters.
- ³⁵ *American Association of University Professors v. Rubio*, 2025 WL 2777659 (D. Mass., Sept. 30, 2025).
- ³⁶ Matt Brown, “Trump’s D.C. Rhetoric Echoes History of Racist Narratives about Urban Crime,” PBS News, August 12, 2025.
- ³⁷ Charlie Savage, “U.S. Military Attacked Boat Off Venezuela, Killing Four Men, Hegseth Says,” *The New York Times*, October 3, 2025.
- ³⁸ *Loper Bright Enterprises v. Raimondo*, 603 U.S. ____ (overturning *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 [1984]).
- ³⁹ The Court cited the case *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) for the idea that “courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations ‘constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance’ consistent with the [Administrative Procedures Act].”
- ⁴⁰ See Kristen Eichensehr, “Foreign Affairs Deference After *Chevron*,” *Just Security*, June 28, 2024, <https://www.justsecurity.org/97317/supreme-court-chevron-loper-bright>.
- ⁴¹ *Alabama Association of Realtors v. United States Department of Health & Human Services*, 141 S. Ct. 2485, 2490 (2021) (*per curiam*); *National Federation of Independent Business v. United States Department of Labor, Occupational Safety & Health Administration*, 142 S. Ct. 661, 666 (2022) (*per curiam*); and *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2616 (2022).

- ⁴² The Supreme Court did allow a narrower Biden administration rule requiring vaccination for health care workers at hospitals and other facilities receiving Medicare or Medicaid funding to go into effect. *Biden v. Missouri*, 595 U.S. ____ (2022). The Court vacated lower court decisions on a vaccination mandate for military personnel as moot after the Biden administration rescinded that vaccine mandate. See Zach Schonfeld, “Supreme Court Wipes Rulings on Federal Employee, Military Vaccine Mandates,” *The Hill*, December 11, 2023, <https://thehill.com/policy/healthcare/4353550-supreme-court-wipes-rulings-federal-employee-military-vaccine-mandates>.
- ⁴³ *V.O.S. Selections, Inc. v. Trump*, 149 F.4th 1312 (Fed. Cir. 2025), cert. granted, 2025 WL 2601020 (U.S. Sept. 9, 2025).
- ⁴⁴ *Federal Communications Commission v. Consumers’ Research*, 606 U.S. ____ (2025) (Brett Kavanaugh, concurring). In *Gundy v. United States*, 588 U.S. 128 (2019), the Court rejected an effort to revive the dormant nondelegation doctrine, which would invalidate certain broad delegations of power to the executive, but Justice Gorsuch authored a dissenting opinion (joined by Justices Roberts and Thomas) that proposed revitalizing the doctrine but limiting its applicability in foreign affairs. The opinion argued that Congress could “assign the President broad authority regarding the conduct of foreign affairs or other matters where he enjoys his own inherent Article II powers.” With respect to the major questions doctrine specifically, other lower courts outside the tariffs context are also considering whether the doctrine applies when the government asserts security concerns. In one recent case, a district court ruled that whether Congress had authorized the terrorist watchlist *did* constitute a “major question” because of the watchlist’s “political significance,” but went on to rule for the government that Congress had clearly authorized the list. *Kovac v. Wray*, 660 F. Supp. 3d 555, 569 (N.D. Tex. 2023). The Fifth Circuit affirmed the decision without considering whether a major question was involved because it found clear congressional authorization for the watchlist. *Kovac v. Wray*, 109 F.4th 331, 342 (5th Cir. 2024).
- ⁴⁵ *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); and *Anderson v. Creighton*, 483 U.S. 635 (1987).
- ⁴⁶ See Joanna Schwartz, *Shielded: How the Police Became Untouchable* (Viking, 2023).
- ⁴⁷ *Saucier v. Katz*, 533 U.S. 194 (2001).
- ⁴⁸ See Will Baude, “The Supreme Court’s Double Standard for Qualified Immunity Cases,” *The Washington Post*, April 24, 2017.
- ⁴⁹ Joanna C. Schwartz, “Municipal Immunity,” *Virginia Law Review* 109 (6) (2023): 1181.
- ⁵⁰ See generally Sunita Patel, “Jumping Hurdles to Sue the Police,” *Minnesota Law Review* 104 (2020): 2257.
- ⁵¹ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
- ⁵² Ramzi Kassem, “Implausible Realities: *Iqbal*’s Entrenchment of Majority Group Skepticism Towards Discrimination Claims,” *Pennsylvania State Law Review* 114 (4) (3030): 1443.
- ⁵³ *Goldey v. Fields*, 606 U.S. ____ (2025)
- ⁵⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Steel Seizure Case); *New York Times Co. v. United States*, 403 U.S. 713 (1971); and *United States v. U.S. District Court*, 407 U.S. 297 (1972) (“Keith Case”).
- ⁵⁵ *United States v. U.S. District Court*, 407 U.S. 314 (1972); and *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985).