



ESSAY

Refugee Litigation in the Trump Era: Protecting Overseas Humanitarian Migrants in U.S. Courts

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Introduction

As 2017 began, thousands of refugees and other displaced persons abroad were on their paths to escaping the dangers of their home countries through one of several U.S. humanitarian migration pathways.¹ John Doe 1, an Iraqi citizen whose life was in danger because of his service as an interpreter for the U.S. Army, had been conditionally approved for refugee resettlement to the U.S., where he planned to reestablish his life with the support of his former military supervisor.² J.A., a young woman in El Salvador who had been repeatedly threatened by gang members, had completed every step of processing for her parole application under the Central American Minors program and had been told that she and her son would soon be on a flight to reunite with her mother, who has been living in the U.S. with lawful status.³

The inauguration of President Trump and the onslaught of executive actions that followed, however, trapped Doe 1, J.A., and countless others in an unforeseen nightmare. Their paths to safety were now beset with obstacles that they could not have anticipated—and for many, those paths led to dead ends, forcing them to restart at square one in seeking a safe refuge for themselves and their families.

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1. The term “refugee” as used in this Essay refers to those in overseas refugee processing. I use “refugee litigation” here to refer to litigation on behalf of refugees and other displaced persons abroad.
2. See Class Action Complaint for Declaratory and Injunctive Relief ¶¶ 7, 144-47, *Jewish Family Serv. of Seattle v. Trump*, No. 17-1707 (W.D. Wash. Nov. 13, 2017) [hereinafter *JFS Complaint*]. The pleadings for the lawsuits discussed in this Essay are available at *Litigation, INT’L REFUGEE ASSISTANCE PROJECT*, <https://perma.cc/XL93-6BAF> (archived Jan. 29, 2019).
3. See Class Action Complaint for Declaratory and Injunctive Relief ¶¶ 8, 93-97, *S.A. v. Trump*, No. 18-3539 (N.D. Cal. June 13, 2018) [hereinafter *S.A. Complaint*].

This Essay examines a crucial question: What recourse, if any, do these overseas humanitarian migrants have in U.S. courts against an executive branch gone rogue?

When the International Refugee Assistance Project (IRAP) launched its litigation department in 2017 to bring cases to protect these clients, there was limited precedent for this type of litigation and plenty of misconceptions that foreign nationals abroad have *no* enforceable rights in U.S. courts. After all, the Supreme Court had renounced responsibility for protecting foreign nationals in some of the most infamous cases in its history by invoking the plenary power doctrine—the notion that the political branches have plenary power over the admission of foreign nationals. In *The Chinese Exclusion Case*, the Court upheld Congress’s exclusion of Chinese laborers, invoking a broad view of “[t]he power of the government to exclude foreigners from the country.”⁴ In *United States ex rel. Knauff v. Shaughnessy*, the Supreme Court held that the Attorney General could, consistent with a statutory delegation of power, exclude a foreign national without a hearing, even though she was married to a U.S. citizen.⁵ The Court stated that foreign nationals abroad “who seek[] admission to this country may not do so under any claim of right.”⁶ A few years later, the Court held that a foreign national who was denied admission into the U.S. at the border and left stranded on Ellis Island for several years because no country would accept him had no statutory or constitutional right against his exclusion.⁷ The Court emphasized that even though a foreign national who has crossed the border into the U.S. has rights, “an alien on the threshold of initial entry stands on a different footing: ‘Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.’”⁸

But those cases, critically, addressed only the authority of Congress or of the executive acting consistently with the powers delegated to it by Congress. The plenary power doctrine does not grant executive agencies carte blanche to flout Congress in implementing programs intended to benefit specific populations of migrants—as the Trump Administration has done repeatedly.

This Essay describes the paths available in U.S. courts for enforcing the rights of overseas humanitarian migrants, drawing on lessons learned from four cases filed by IRAP: *Jewish Family Service of Seattle (JFS) v. Trump*, which challenges the Administration’s most recent ban on refugees;⁹ *Doe v. Nielsen*, which challenges the denial of refugee status “as a matter of discretion” to

4. See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606-07, 609 (1889).

5. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 539, 542-43 (1950).

6. *Id.* at 542.

7. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 207-08, 215 (1953).

8. See *id.* at 212 (quoting *Knauff*, 338 U.S. at 544).

9. *JFS* Complaint, *supra* note 2, ¶¶ 5, 196, 199-202.

Iranian religious minorities;¹⁰ *S.A. v. Trump*, which challenges the termination of the Central American Minors parole program;¹¹ and *Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Service to the United States v. Pompeo*, which challenges the delay in processing Special Immigrant Visas for Afghans and Iraqis who worked on behalf of the U.S.¹² The Essay first summarizes the four cases and the humanitarian migration programs involved in them. It then disentangles the confusion that often exists when analyzing standing, reviewability, and claims available to foreign nationals abroad. By examining these issues separately, it becomes clear that, despite the plenary power doctrine, U.S. courts have an important role to play in protecting overseas humanitarian migrants.

I. Four Cases Protecting the Rights of Overseas Humanitarian Migrants

Congress created several humanitarian migration pathways within the Immigration and Nationality Act (INA)¹³ that embody the American commitment to helping those in need. These pathways, though limited, permit foreign nationals facing life-threatening danger in their home countries the opportunity to apply for admission to the U.S. and make safe and orderly travel arrangements. The four cases below were filed in response to the efforts of the Trump Administration to unilaterally shut down these pathways.

A. JFS v. Trump

JFS v. Trump, consolidated with *Doe v. Trump*, challenged the latest in the Trump Administration's efforts to shut down the United States Refugee Admission Program (USRAP), America's overseas refugee program.¹⁴ To qualify as a refugee, a person must show that they are unable to return to their country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."¹⁵ Through the USRAP, the Secretary of Homeland Security has the discretion to admit any refugee who is not firmly resettled in another foreign country, is determined to be of special humanitarian concern

10. Complaint for Declaratory, Injunctive, and Mandamus Relief ¶ 1, *Doe v. Nielsen*, No.18-2349 (N.D. Cal. Apr. 18, 2018) [hereinafter *Doe v. Nielsen* Complaint].

11. *S.A.* Complaint, *supra* note 3, ¶¶ 128-50.

12. Class Action Complaint ¶¶ 1, 68-92, *Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Service to the U.S. v. Pompeo*, No. 18-1388 (D.D.C. June 12, 2018) [hereinafter *Afghan & Iraqi Allies* Complaint].

13. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of the U.S. Code).

14. *Doe v. Trump*, 288 F. Supp. 3d 1045, 1055, 1057-58 (W.D. Wash. 2017).

15. See 8 U.S.C. § 1101(a)(42) (2017).

to the U.S., and is admissible, subject to a certain numerical limitation set by the President each fiscal year.¹⁶

Refugees generally cannot choose to apply for the USRAP—rather, they are referred by the United Nations High Commissioner for Refugees or through several other designated channels.¹⁷ Once they enter the USRAP, they must clear a series of processing steps, including interviews, security checks, and medical screening.¹⁸ Fewer than 1% of the world’s refugees end up referred, and the USRAP process can take years from referral to resettlement.¹⁹

After the Trump Administration took office, it issued several successive bans to halt the USRAP.²⁰ First, within days of taking office, President Trump issued an executive order that, in addition to banning entry of citizens from seven Muslim-majority countries, suspended refugee processing for 120 days while the Administration purported to conduct a review of the USRAP.²¹ When that first executive order did not hold up in court, the President withdrew it and replaced it with a second executive order that similarly suspended refugee processing for 120 days during a review period.²² Finally, in October 2017, after the period of review initiated by the first two executive orders was over, the President proclaimed that the USRAP could resume except as ordered by the Secretary of Homeland Security and the Secretary of State—and at the same time, those Secretaries, along with the Director of National Intelligence, issued a memorandum that suspended refugee processing from certain unnamed countries for another 90 days pending *further* review.²³ These unnamed countries were reported to be, for the most part, Muslim-majority countries resembling the banned countries list in the first executive order.²⁴

16. *See id.* § 1157(c)(1).

17. *See* U.S. Citizenship & Immigr. Servs., United States Refugee Admissions Program (USRAP), <https://perma.cc/C5UX-JY4X> (archived Jan. 29, 2019).

18. *Id.*; *see also* Haeyoun Park & Larry Buchanan, *Refugees Entering the U.S. Already Face a Rigorous Vetting Process*, N.Y. TIMES (Jan. 29, 2017), <https://perma.cc/YGM6-3TN3>.

19. *See* Park & Buchanan, *supra* note 18.

20. *See generally* Doe v. Trump, 288 F. Supp. 3d 1045, 1055-59 (W.D. Wash. 2017) (summarizing the history of the executive orders as relevant to the litigation).

21. *See* Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977, 8978-79 (Jan. 27, 2017), *revoked by* Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

22. *See* Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. at 13,215.

23. *See* Doe v. Trump, 288 F. Supp. 3d at 1057-59 (summarizing the Administration’s actions); *see also* Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities, 82 Fed. Reg. 50,055, 50,056-57 (Oct. 24, 2017) (resuming the USRAP).

24. Ted Hesson, *Trump Targets 11 Nations in Refugee Order*, POLITICO (updated Oct. 24, 2017, 11:22 PM EDT), <https://perma.cc/VZU6-GD9E>; Yeganeh Torbati & Mica Rosenberg, *Under Trump Plan, Refugees from 11 Countries Face Additional U.S. Barriers*, REUTERS (Oct. 24, 2017, 10:13 AM), <https://perma.cc/F4BM-XWPU>.

The memorandum also suspended the follow-to-join refugee family reunification program under USRAP.²⁵

In *JFS v. Trump* and *Doe v. Trump*, the plaintiffs—a group of refugees abroad, family members and others in the U.S., and organizations that have been awaiting the arrival of refugees—argued that the suspension of the USRAP violated the Administrative Procedure Act (APA) and the Constitution.²⁶ A district court in the Western District of Washington issued a preliminary injunction on December 23, 2017, restraining the Trump Administration from enforcing the USRAP suspension, finding it likely unlawful under the APA.²⁷ Notably, the court found the dispute to be reviewable and found that family members and organizations in the U.S. had standing to raise the dispute, despite the government’s objections that the executive has plenary discretion over the refugee program.²⁸

B. *Doe v. Nielsen*

Doe v. Nielsen challenged the denial of refugee status to a group of Iranian religious minorities who had been invited by the U.S. government to abandon their homes in Iran and travel to Vienna, Austria, to complete processing of their refugee applications under the Lautenberg and Specter Amendments.²⁹ The Lautenberg Amendment, as amended by the Specter Amendment in 2004, affords special protections to Iranian religious minorities in recognition of the Iranian government’s severe violations of religious freedom.³⁰ It lowers the evidentiary burden for establishing refugee status and requires that any denial of refugee status be explained “to the maximum extent feasible.”³¹

The refugee program for Iranian religious minorities had operated successfully for years, with nearly a 100% admission rate.³² Nevertheless, in February 2018, nearly ninety Iranian religious minorities who were already in Vienna on their way to the U.S. were issued denials, many of them identical form denials rejecting their refugee applications “as a matter of discretion,” with no further explanation.³³

25. See *Doe v. Trump*, 288 F. Supp. 3d at 1058.

26. See *JFS* Complaint, *supra* note 2, ¶¶ 9, 196-203.

27. See *Doe v. Trump*, 288 F. Supp. 3d at 1076-77, 1086.

28. See *id.* at 1063-72, 1068 n.13.

29. See *Doe v. Nielsen* Complaint, *supra* note 10, ¶¶ 1-4.

30. See Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. E, tit. II, § 213, 118 Stat. 3, 253 (codified at 8 U.S.C. § 1157 note (2017)); see generally ANDORRA BRUNO, CONG. RESEARCH SERV., RL31269, REFUGEE ADMISSIONS AND RESETTLEMENT POLICY 9-10 (2018) (discussing the legislative history of the Lautenberg and Specter Amendments).

31. See 8 U.S.C. § 1157 note.

32. See Nina Shea, *America Shouldn’t Send Endangered Religious Minority Refugees Back to Iran*, HUDSON INST. (Mar. 14, 2018), <https://perma.cc/2XTG-6Q87>.

33. See *id.*; see also *Doe v. Nielsen*, No. 18-2349, slip op. at 6, 12-13 (N.D. Cal. July 10, 2018) (finding purported class members to be ascertainable and sufficiently numerous for class).

In *Doe v. Nielsen*, the refugee plaintiffs in Vienna and their U.S. family members who sponsored and paid for their applications challenged these denials, arguing that they lacked the explanation required by the Lautenberg Amendment and were based on arbitrary and capricious changes to the Lautenberg program.³⁴ Plaintiffs won class certification and partial summary judgment on July 10, 2018, with the court holding that both the Lautenberg Amendment and the defendants' own regulations required more of an explanation to deny the Lautenberg applications than simply stating the denials were "a matter of discretion."³⁵ The court found standing for both the refugees in Vienna and their family members in the U.S. It also found the dispute reviewable despite the government's argument that no aspect of refugee processing, and thus no aspect of the case, was judicially reviewable.³⁶

C. *Afghan and Iraqi Allies v. Pompeo*

Afghan and Iraqi Allies v. Pompeo challenged the delay in processing of Special Immigrant Visas (SIVs) for Afghans and Iraqis who provided "faithful and valuable" service to the U.S., often as employees of government contractors, and whose lives are now in danger in their home countries because of that service.³⁷ Afghans and Iraqis who qualify can apply for the SIVs and follow a multistep process created by the Department of State for processing. If they clear all of the steps, they can finally travel to the U.S.³⁸ To ensure that processing occurs quickly and efficiently given the situation that the visa applicants live in, Congress specified that the Department of State and the Department of Homeland Security must "improve the efficiency by which applications for [SIVs] . . . are processed so that all steps under the control of the respective departments . . . should be completed not later than 9 months" after the date on which an applicant submits an application and accompanying materials for such visa application.³⁹

certification on the basis that at least thirty-eight, and as many as eighty-seven, refugee applicants received identical denials).

34. See *Doe v. Nielsen* Complaint, *supra* note 10, ¶¶ 5-9, 81-84, 95-96.

35. See *Doe v. Nielsen*, slip op. at 1.

36. See *id.* at 22-25, 33-34.

37. See *Afghan & Iraqi Allies* Complaint, *supra* note 12, ¶ 1.

38. See *Special Immigrant Visas for Afghans—Who Were Employed by/on Behalf of the U.S. Government*, U.S. DEP'T ST.—BUREAU CONSULAR AFF., <https://perma.cc/2EJ2-2B8D> (archived Jan. 29, 2019); *Special Immigrant Visas for Iraqis - Who Were Employed by/on Behalf of the U.S. Government*, U.S. DEP'T ST.—BUREAU CONSULAR AFF., <https://perma.cc/K8NY-E24G> (archived Jan. 29, 2019).

39. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1218-19, 127 Stat. 672, 910, 913-14 (2013) (codified at 8 U.S.C. § 1101 note) (emphasis added).

Despite this clear congressional language, processing of SIVs has lagged far longer than nine months.⁴⁰ In 2015, IRAP filed *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Service to the United States v. Kerry* on behalf of individual plaintiffs whose applications had been in government hands for well over nine months.⁴¹ The court ruled that plaintiffs had standing and stated a justiciable claim of unreasonable delay, prompting the defendants to settle.⁴² *Afghan & Iraqi Allies v. Pompeo* was filed as a follow up to *Nine Iraqi Allies*, as a class action on behalf of all Afghan and Iraqi applicants whose SIV applications have been pending with the U.S. government for over nine months.⁴³ On January 30, 2019, the *Afghan & Iraqi Allies v. Pompeo* court followed *Nine Iraqi Allies* and held that plaintiffs have standing to raise the unreasonable delay claims in the case.⁴⁴

D. *S.A. v. Trump*

S.A. challenged the termination of the Central American Minors (CAM) parole program.⁴⁵ The Secretary of Homeland Security has case-by-case discretion to parole in foreign nationals for “urgent humanitarian reasons” or “significant public benefit.”⁴⁶ Parole permits temporary lawful presence in the U.S., though unlike refugee status it does not offer a path to permanent immigration status.⁴⁷ In response to humanitarian crises in the past, the U.S. government set up dual refugee-parole programs, in which individuals who

40. See *Afghan & Iraqi Allies* Complaint, *supra* note 12, ¶¶ 44-48 (citing and explaining the processing times presented by the Administration in Dep’t of State & Dep’t of Homeland Sec., Joint Department of State/Department of Homeland Security Report: Status of the Afghan Special Immigrant Visa Program (Jan. 2018), <https://perma.cc/6AG4-RV4T>; and Dep’t of State & Dep’t of Homeland Sec., Joint Department of State/Department of Homeland Security Report: Status of the Iraqi Special Immigrant Visa Program (Jan. 2018), <https://perma.cc/QGS3-S2N7>).

41. See Complaint for Writ of Mandamus and for Order Compelling Agency Action Unreasonably Delayed ¶¶ 1-7, *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Service to the U.S. v. Kerry*, No. 15-0300 (D.D.C. Feb. 27, 2015).

42. See *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Service to the U.S. v. Kerry*, 168 F. Supp. 3d 268, 280-82, 292, 295, 298 (D.D.C. 2016).

43. See *Afghan & Iraqi Allies* Complaint, *supra* note 12, ¶¶ 1-12.

44. *Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Service to the U.S. v. Pompeo*, No. 18-1388, 2019 WL 367841, at *7-10 (D.D.C. Jan. 30, 2019).

45. See *S.A.* Complaint, *supra* note 3, ¶ 1.

46. See 8 U.S.C. § 1182(d)(5)(A) (2017). Section 1182(d)(5)(A) refers to the Attorney General; authority was later transferred to the Secretary of Homeland Security. See *S.A. v. Trump*, No. 18-3539, 2018 WL 6470253, at *3 n.4 (N.D. Cal. Dec. 10, 2018).

47. *In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors - CAM)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 6, 2017), <https://perma.cc/7TCS-Y5R4> (accessed by searching for “<https://www.uscis.gov/CAM>” in the Internet Archive Wayback Machine).

could not meet the strict definition of a refugee under the INA but who merit humanitarian assistance could be admitted to the U.S. as parolees.⁴⁸

The CAM parole program was one example of a program set up in this way. It addressed the crisis of young children fleeing the violence of the Northern Triangle countries of Honduras, Guatemala, and El Salvador and arriving at the southern border. Under this program, parents already legally present in the U.S. with children in a Northern Triangle country could request refugee status for their children. If the children were found ineligible for refugee status, they would then be considered for parole so that they and any other eligible family members could travel safely to the U.S.⁴⁹

Soon after taking office, however, the Trump Administration shut down processing of CAM parole, but without so much as informing anyone of the suspension.⁵⁰ Then, in August 2017, the Secretary of Homeland Security terminated parole without any explanation for its termination, including for people who had already been conditionally approved for parole and could travel to the U.S. so long as they passed medical checks, security checks, and purchased a flight ticket.⁵¹

In *S.A. v. Trump*, plaintiffs—the children in the Northern Triangle countries, their parents in the U.S., and an organization that helped many parents file the applications—challenged the termination of the parole program under the APA and the Constitution.⁵² On December 10, 2018, the court found standing based on harm to the parents living in the U.S. and proceeded to review the claims. The court applied a standard APA analysis, holding that the government acted arbitrarily and capriciously in terminating the program for the children who were conditionally approved for parole.⁵³

48. CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, RECOMMENDATION ON THE CENTRAL AMERICAN MINORS (CAM) REFUGEE/PAROLE PROGRAM 13-14 (2016), <https://perma.cc/SKY7-SY6Y>.

49. Central American Minors (CAM) Program, U.S. DEP'T ST. (Aug. 6, 2017), <https://perma.cc/5TN3-EU75> (accessed by searching for "https://www.state.gov/j/prm/ra/cam/index.htm" in the Internet Archive Wayback Machine); *In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors - CAM)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 6, 2017), <https://perma.cc/7TCS-Y5R4> (accessed by searching for "https://www.uscis.gov/CAM" in the Internet Archive Wayback Machine).

50. See S.A. Complaint, *supra* note 3, ¶ 48 (describing internal Trump Administration emails cancelling CAM interviews prior to formal suspension of CAM parole program).

51. See Termination of the Central American Minors Parole Program, 82 Fed. Reg. 38,926, 38,927 (Aug. 16, 2017).

52. See S.A. Complaint, *supra* note 3, ¶¶ 7-14.

53. See *S.A. v. Trump*, No. 18-3539, 2018 WL 6470253, at *20-22, *33 (N.D. Cal. Dec. 10, 2018).

II. Strategies for Bringing Refugee Litigation

Litigation in the four cases described above illustrates that, despite the plenary power doctrine, overseas humanitarian migrants can seek some form of protection from U.S. courts.⁵⁴ In each of the four cases above, plaintiffs were not asking the courts to adjudicate their right to be admitted in the U.S. but to prevent the executive from distorting and destroying the process that existed for their admission. In explaining why these legal challenges avoid the hurdles of the plenary power doctrine, it is helpful to disentangle standing, reviewability, and the availability of claims.

A. Standing

As an initial matter, the plenary power doctrine does not undermine the Article III standing of foreign nationals abroad who experience harm. In fact, in a case involving a foreign corporation at the turn of the last century, the Supreme Court proclaimed that foreign nationals, “by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights.”⁵⁵

This norm of court access also applies to overseas humanitarian migrants.⁵⁶ To gain that access, they, like all plaintiffs, must satisfy the same standard of showing a personal stake in the legal challenge: an injury in fact that is traceable to the challenged conduct and that can be redressed by a favorable decision.⁵⁷ Humanitarian migrants whose lives are upended by executive action can readily meet this standard: They have lost an avenue that they had to escape violence and persecution and that would, for many, lead to a reunion with their families.⁵⁸ Even where the benefit—the final decision on whether they will be

54. Although beyond the scope of this Essay, these challenges can also be brought, as many were, by persons in the U.S.—either by individuals who were counting on the humanitarian migration program to help them reunite with their family members in danger abroad or by U.S.-based organizations. The refugees and other persons being assisted through these migration programs are often no strangers to the U.S.; they are mothers and daughters of U.S. citizens, brothers and sisters of permanent residents, or clients of U.S. organizations. Assault on a U.S. humanitarian migration program does not just result in consequences felt abroad, but in concrete damage, emotional and economic, here in the United States. *See, e.g., Doe v. Trump*, 288 F. Supp. 3d 1045, 1063-67 (W.D. Wash. 2017) (finding standing both for parents of children abroad and for organizations devoted to resettling refugees).

55. *See Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578 (1908).

56. *See, e.g., Cardenas v. Smith*, 733 F.2d 909, 913 (D.C. Cir. 1984) (“For purposes of Article III standing, Cardenas’ status as a nonresident alien does not obviate the existence of her injury; it is the injury and not the party that determines Article III standing.”); *Silva v. Bell*, 605 F.2d 978, 984-85 (7th Cir. 1979) (holding that analysis of injury for standing purposes is not affected by nonresidence in the country and granting standing for noncitizen plaintiffs outside the country despite prudential concerns).

57. *See Cardenas*, 733 F.2d at 912-13.

58. *See Doe v. Trump*, 288 F. Supp. 3d at 1063-64 (holding that prolonged family separation is a cognizable harm for Article III purposes).

permitted to travel to the U.S. as a refugee, a parolee, or a visa recipient—is discretionary, this opportunity loss is in itself a concrete harm that courts recognize for Article III purposes.⁵⁹

B. Reviewability

Whereas the plenary power doctrine does not affect Article III standing, it *does* affect the separate inquiry of judicial reviewability because the crux of the plenary power doctrine is limited review of the executive’s exercise of discretionary authority in the realm of immigration.⁶⁰ Thus, for example, consular nonreviewability, a species of nonreviewability articulated through circuit court law (though never adopted by the Supreme Court), holds that a consular officer’s decision to grant or deny a visa is not judicially reviewable because of the discretion the law gives to officers to make that determination.⁶¹ Although consular nonreviewability itself does not apply to decisions that are made by government officials other than consular officials (such as refugee determinations), courts have considered discretionary decisions on the admission of each refugee to also fall under the broader umbrella of nonreviewability.⁶²

However, even accepting this application of nonreviewability,⁶³ the principle does not give the executive free rein to do what it wants in all aspects of managing humanitarian migration programs.⁶⁴ The historical cases most

59. *See, e.g.,* *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998) (holding that the lost opportunity to receive an immigrant visa is a cognizable Article III injury), *superseded on other grounds by statute*, Pub. L. No. 104-208, 110 Stat. 3009 (1996), *as recognized in* *Brown v. Holder*, 763 F.3d 1141, 1148 (2014); *Nat’l Venture Capital Ass’n v. Duke*, 291 F. Supp. 3d 5, 13-15 (D.D.C. 2017) (recognizing injury from foreign parties’ loss of opportunity to obtain parole status, although parole itself is discretionary).

60. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 539, 542-43 (1950).

61. *See, e.g.,* *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1164 (D.C. Cir. 1999) (applying doctrine of consular nonreviewability to conclude federal district court did not have authority to review denial of visa for foreign national); *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir. 1986) (same). The Supreme Court also did not reach the reviewability question in *Trump v. Hawaii*, as it assumed, without deciding, that the dispute was reviewable. *See* 138 S. Ct. 2392, 2407 (2018).

62. *See, e.g.,* *Doe v. Nielsen*, No. 18-2349, slip op. at 24 (N.D. Cal. July 10, 2018) (noting in dictum that the court “lack[ed] authority to review the ultimate decision to grant or deny refugee applications”).

63. There are reasons to question the continued applicability of the plenary power doctrine and nonreviewability principle, but those critiques are beyond the scope of this Essay.

64. In addition to the exceptions listed below, courts have permitted limited review of admission decisions despite consular nonreviewability “when ‘a U.S. citizen’s constitutional rights are alleged to have been violated by the denial of a visa to a foreigner’ without a ‘facially legitimate and bona fide reason’ for the denial.” *Rivas v. Napolitano*, 714 F.3d 1108, 1110 (9th Cir. 2013) (quoting *Bustamante v. Mukasey*, 531 F.3d 1059, 1060 (9th Cir. 2008)); *see also* *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in the judgment) (reiterating that “an executive officer’s decision denying a visa that burdens a citizen’s own

often cited for the plenary power doctrine spoke only of nonreviewability of executive decisions to admit or exclude a foreign national where Congress authorized the executive to exercise that power.⁶⁵ Courts have thus recognized at least two circumstances where nonreviewability does not apply.

First, plaintiffs can challenge immigration policies promulgated and executed by the President and his agencies. This is because such cases challenge overarching agency policy rather than nonreviewable individual admission decisions.⁶⁶ The challenge to the Trump Administration's successive bans on the admission of foreign nationals from several majority-Muslim countries and the challenge to the most recent refugee ban in *JFS* were reviewable because they were challenges to overarching executive policy.⁶⁷ Plaintiffs argued that the challenge to the CAM parole termination in *S.A.* was similarly reviewable because it was a programmatic challenge, and the court reviewed the termination without expressing any concerns about reviewability.⁶⁸ In this context, winning the claim does not result in the remedy of admission, but it does unblock one obstacle to admission.

Second, plaintiffs can challenge "the authority of [an executive branch official] to take or fail to take an action as opposed to a decision within [their] discretion."⁶⁹ Even where Congress has granted executive agencies the ultimate discretion to grant or deny admission, it has often required the agencies to make that discretionary decision within a certain framework. For example, in the case of the SIV program for Afghans and Iraqis, Congress specified that the SIV process should be completed in nine months; in *Nine Iraqi Allies*, the court found that it could review the government's failure to take the

constitutional rights is valid *when* it is made 'on the basis of a facially legitimate and bona fide reason'" (emphasis added) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972))).

65. See, e.g., *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).

66. See *Hawaii v. Trump*, 878 F.3d 662, 680 (9th Cir. 2017) (holding that consular nonreviewability "shields from judicial review only the enforcement 'through executive officers' of Congress's 'declared [immigration] policy,' not the President's rival attempt to set policy" (alteration in original) (internal citation omitted) (quoting *Sing v. United States*, 158 U.S. 538, 547 (1895))), *rev'd on other grounds*, 138 S. Ct. 2392 (2018); see also *Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir. 1988) (rejecting application of consular nonreviewability where the challenge was to the authority of the Secretary of State to set rules regarding registration dates); *Int'l Union of Bricklayers v. Meese*, 761 F.2d 798, 801 (D.C. Cir. 1985) (rejecting application of consular nonreviewability and holding that "[t]he federal courts have jurisdiction . . . to assure that the executive departments abide by the legislatively mandated procedures").

67. See *Hawaii v. Trump*, 878 F.3d at 679; *Doe v. Trump*, 288 F. Supp. 3d 1045, 1068 (W.D. Wash. 2017).

68. See *S.A. v. Trump*, No. 18-3539, 2018 WL 6470253, at *21-22, *33 (N.D. Cal. Dec. 10, 2018); Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Dismiss at 9-10, *S.A.*, 2018 WL 6470253 (No. 18-3539).

69. See *Rivas*, 714 F.3d at 1110 (quoting *Patel v. Reno*, 134 F.3d 929, 931-32 (9th Cir. 1997)); see also *Singh v. Clinton*, 618 F.3d 1085, 1088 (9th Cir. 2010).

required action.⁷⁰ Similarly, in *Doe v. Nielsen*, the court found that it could review the plaintiffs' claim that the defendants failed to follow the congressional directive in the Lautenberg Amendment that they "[shall,] to the maximum extent feasible, provide the reason for the denial."⁷¹ As the court concluded there, "[the Department of Homeland Security] retains an enormous amount of authority and discretion to adjudicate refugee applications, but [it] do[es] not have the discretion to violate the law."⁷²

C. Availability of Claims

Another hurdle to litigating on behalf of foreign nationals abroad is the limitation on the availability of certain claims. With respect to constitutional claims, for example, the Supreme Court has rejected the application of the Fifth Amendment to enemy prisoners held and tried in overseas military tribunals, emphasizing that courts have historically accorded constitutional protections to foreign nationals only when they were present in the territorial jurisdiction of the U.S.⁷³ More recently, the Supreme Court held that the Fourth Amendment right against unreasonable searches and seizures did not apply to a foreign national in Mexico with no voluntary attachment to the U.S. The Court noted that, in previous cases, constitutional rights have been extended only to those who have come within the territory of the U.S. and developed substantial voluntary connections to the country.⁷⁴

These limitations, however, do not apply to APA claims. The APA is a statute that was intended to curtail abuse of power by executive agency officials; its provisions balance the need for such officials to exercise discretion in carrying out their duties with the need to protect the rights of parties who are subject to the expanding power of those officials in the modern administrative state.⁷⁵ The APA contains a strong presumption of judicial review for "[a] person suffering legal wrong because of agency action" or "adversely affected or aggrieved by agency action within the meaning of a relevant statute."⁷⁶ The term "person" is not limited to U.S. persons, and foreign nationals aggrieved by

70. See *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Service to the U.S. v. Kerry*, 168 F. Supp. 3d 268, 290-92 (D.D.C. 2016).

71. See *Doe v. Nielsen*, No. 18-2349, slip op. at 23-25 (N.D. Cal. July 10, 2018) (quoting 8 U.S.C. § 1157 note (2017)).

72. See *id.* at 25.

73. See *Johnson v. Eisentrager*, 339 U.S. 763, 777-78, 781 (1950).

74. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-69, 271 (1990).

75. See Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENVTL. L. REV. 207, 224 (2016).

76. See Pub. L. No. 79-404, § 10(a), 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. § 702 (2017)).

agency actions, including foreign corporations and organizations, have been permitted to challenge those actions where otherwise appropriate.⁷⁷

A foreign national abroad can therefore bring an APA claim so long as they were “adversely affected or aggrieved by agency action within the meaning of a relevant statute.”⁷⁸ This context-specific inquiry, which asks whether a plaintiff’s interest fall within the “zone of interests protected by the law invoked,”⁷⁹ is not “especially demanding” in the context of APA cases.⁸⁰ Where the APA challenge is brought by a foreign national who has applied for a humanitarian migration benefit available precisely to help people like them—refugees, SIV applicants, and other vulnerable populations that Congress intended to assist—this low bar is readily satisfied.⁸¹

Although there are barriers to review under the APA for discretionary decisions—similar to the consular nonreviewability principle—these bars do not apply to actions that do not challenge the ultimate decision to deny the discretionary benefit. First, while the APA precludes judicial review of agency action “committed to agency discretion by law,”⁸² the Supreme Court has emphasized that this is a “very narrow exception” that applies to rare categories of administrative actions.⁸³ Second, while the APA also precludes judicial review if the statute that is being enforced precludes judicial review, the statute at issue in these cases, the INA, is not broadly preclusive.⁸⁴ The INA precludes review of decisions “specified . . . to be in the discretion of the Attorney General or the Secretary of Homeland Security.”⁸⁵ Although Congress in numerous instances specified that the ultimate decision to admit or deny immigrants is in the discretion of the Secretary of Homeland Security, it did not extend that

77. *See Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183, 1190-91 (D.C. Cir. 1972) (noting that APA review is afforded to “any person,” not “any citizen,” and permitting a nonresident Honduran corporation to maintain action against the Agency for International Development); *see also* *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 308-10 (D.D.C. 2016) (suit by Tanzanian bank against U.S. Treasury Department).

78. *See* 5 U.S.C. § 702.

79. *See* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388-89 (2014) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

80. *See id.* at 1389 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012)).

81. *See, e.g., Doe v. Nielsen*, No. 18-2349, slip op. at 34 (N.D. Cal. July 10, 2018) (“DHS does not dispute that Plaintiffs fall within the Lautenberg Amendment’s ‘zone of interests,’ as the statute explicitly includes Iranian religious minorities as a category of individuals entitled to special protections.”); *see also* *Movimiento Democracia, Inc. v. Johnson*, 193 F. Supp. 3d 1353, 1368 (S.D. Fla. 2016) (holding that Cuban migrants seeking to invoke the benefits of the Cuban Adjustment Act are within the zone of interests of that Act).

82. *See* 5 U.S.C. § 701(a)(2).

83. *See* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

84. *See* 5 U.S.C. § 701(a)(1).

85. *See* 8 U.S.C. § 1252(a)(2)(B)(ii).

grant of discretion to how the Secretary manages and implements the programs created by Congress—as the courts in *JFS* and *Doe v. Nielsen* held.⁸⁶

In other words, Congress knows how to say so when it wants to deny judicial review and when it wants such review available. The interaction of the APA and the INA strongly indicates that Congress envisioned a role for the judiciary in ensuring that executive agencies cannot single-handedly destroy migration pathways that Congress created. There have been a limited number of cases up until now to test this principle,⁸⁷ but the four cases described above establish the emerging consensus that executive agencies do not have the unreviewable discretion to do whatever they want, even in the world of humanitarian migration programs where those agencies enjoy broad discretion.

Conclusion

Separately examining the questions of standing, reviewability, and the availability of claims makes clear that U.S. courts have a role in adjudicating APA cases that challenge arbitrary and discriminatory executive actions that harm overseas humanitarian migrants and undermine processes created by Congress. To be sure, overseas humanitarian migrants have limited rights within the U.S. legal system and no right to be admitted to the country. But at minimum, they have the right to be treated in accordance with the dignity and the process that Congress afforded them. The fundamental notion that the judiciary can act to enforce congressional dictates on the executive makes the U.S. the safe and stable home that refugees and other displaced persons seek: a nation of laws where the executive branch can and will be held accountable.

86. See *Doe v. Trump*, 288 F. Supp. 3d 1045, 1071-72 (W.D. Wash. 2017) (holding that the Refugee Act provides the Secretary of Homeland Security with discretion over the outcome of the refugee application but does not grant the Secretary discretion to suspend adjudication of applications); *Doe v. Nielsen*, No. 18-2349, slip op. at 25 (N.D. Cal. July 10, 2018).

87. In *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498, 1506-09 (11th Cir. 1992), the Eleventh Circuit held that Congress intended to preclude judicial review for refugees seeking admission from outside the U.S., citing agency discretion and absence of procedures for judicial review in the Refugee Act. But this analysis flips on its head the well-established APA analysis, which allows judicial review absent a strong indication to the contrary.