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The Case for Procedural Safeguards in the U.S. Refugee Admissions Program

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THE CASE FOR PROCEDURAL SAFEGUARDS IN
THE U.S. REFUGEE ADMISSIONS PROGRAM

*Betsy Fisher**

The U. S. Refugee Admissions Program (“USRAP”) is a humanitarian program that resettles vulnerable refugees to the United States. Though these refugees have suffered from extraordinarily high rates of trauma, the refugee admissions process does not have formal statutory or regulatory safeguards to accommodate the vulnerable nature of many applicants for resettlement. Yet, the applicants who have suffered the most trauma, including victims of sexual and gender-based violence, are the refugees most likely to be impeded by a process that largely centers on proving the severity of their trauma. To promote accurate outcomes, and to decrease the risk of retraumatization during the resettlement adjudication process, Congress should enact procedural safeguards to govern USRAP. In applications for resettlement, refugees should be guaranteed access to counsel during their interviews, access to evidence used by USRAP against the refugee, written reasons for USRAP’s adverse decisions, the opportunity to appeal, and pre-screening for, and accommodation of, vulnerable traits that might impact the adjudication process.

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INTRODUCTION

Each year, tens of thousands of refugees are admitted to the United States from overseas through the U.S. Refugee Admissions Program (“USRAP”).¹ The Program has a statutory mandate to resettle refugees of “special humanitarian concern to the U.S.”² Resettlement is available only to refugees who have been found to be extraordinarily vulnerable and in need of overseas resettlement.³ Yet, USRAP is not subject to any significant legal constraints establishing procedural safeguards by which refugee resettlement applications are adjudicated. Constitutional procedural provisions do not apply to refugee admissions procedures,⁴ and statutory and regulatory provi-

1. *History of the U.S. Refugee Resettlement Program*, REFUGEE COUNCIL USA, <http://www.rcusa.org/?page=history> (last visited Nov. 9, 2013) (“Since 1975, the United States has resettled over 3 million refugees, with annual admissions figures ranging from a high of 207,000 in 1980 to a low of 27,110 in 2002. The average number admitted annually since 1980 is 98,000.”).

2. 8 U.S.C.A. § 1157 (Westlaw through 2013 P.L. 113-31).

3. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, UNHCR REFUGEE RESETTLEMENT HANDBOOK ch. 7.2 (2011), available at <http://www.unhcr.org/refworld/docid/4ecb973c2.html> [hereinafter UNHCR] (outlining UNHCR procedures for establishing which refugees are in need of resettlement, prior to submitting their files for consideration by refugee-receiving nations). The categories of refugees who are referred for resettlement are the following: “Legal and/or Physical Protection Needs of the Refugee in the Country of Refuge,” “Survivors of Torture and/or Violence,” “Medical Needs,” “Women and Girls at Risk,” “Family Reunification,” “Children and Adolescents at Risk,” and “Lack of Foreseeable Alternative Durable Solutions.” *Id.* at ch. 6.2.

4. See *infra* Part I.A.

sions provide little guidance as to the form that refugee adjudications should take. Under agency policy, refugees deemed by the United Nations High Commissioner for Refugees (“UNHCR”) to need resettlement are referred to the U.S. Department of State (“USDOS”) for initial information gathering, after which U.S. refugee officers, trained interviewers who adjudicate refugee applications, conduct non-adversarial, in-person interviews with refugee applicants.⁵ Applicants also undergo medical screenings and a battery of security screenings before they can be admitted to the United States.⁶

In light of its humanitarian nature, the Program ought to be implemented through procedures that accomplish two goals. First, the procedures must do what the program’s statute mandates: protect applicants who most need protection. They must help refugee officers ascertain efficiently who the most vulnerable applicants are. Second, procedures must accommodate applicants’ traumatic experiences by facilitating their participation in the application process in a manner that will avoid traumatizing them further. Five specific measures for carrying out USRAP’s mandate are recommended below. Applicants should be guaranteed access to counsel during their refugee adjudication interviews, access to evidence used by USRAP against the refugee, written reasons for adverse decisions, the opportunity to appeal, and pre-screening for vulnerable traits. These safeguards should be given the force of law through regulation or statute, as opposed to agency policy, which can change at the whim of the agency head or administration.

Congress has recently shown some signs of interest in mandating additional safeguards in USRAP, though no additional measures have passed into law as of November 2013, the time this Note was finalized. S.B. 744, the comprehensive immigration reform bill which passed the Senate in June 2013, included a section that would overhaul USRAP’s procedures. S.B. 744 would amend the USRAP statute, 8 U.S.C. § 1157, to require refugee officers to maintain a record of the evidence and to allow applicants to provide their own attorney to appear during refugee adjudication interviews.⁷ A denial of an application for refugee status would be issued in writing and would state the reasons the applicant was denied, including the factual findings and the basis for a negative credibility determination.⁸ The decision would also inform the applicant of his or her eligibility to apply for a waiver of inadmissibility; that is, to inform an applicant excluded from

5. *Proposed Refugee Admissions for Fiscal Year 2013*, U.S. DEP’T OF STATE 2013 15–16 (2012), <http://www.state.gov/documents/organization/198157.pdf> [hereinafter *Proposed Refugee Admissions*].

6. *Id.*

7. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3408 (2013).

8. *Id.*

immigration eligibility by statute that they can apply for an exception allowing access to refugee resettlement.⁹ An applicant who was not approved would be expressly granted the ability to file a request for review within 120 days of the denial, and this review would be adjudicated by officers trained to reconsider such cases.¹⁰ Determinations would be issued in writing that outline the reasons for the decision.¹¹

As of November 2013, when this Note was finalized, the House of Representatives had failed to make meaningful steps to improve USRAP's procedural safeguards. This Note argues that Congress should enact procedural safeguards in USRAP both for the program's integrity and for the benefit of the applicants whose claims are being adjudicated. Three substantive Parts and a Conclusion follow this introduction. Part I explains the legal background of USRAP, how it is currently administered, and how experiences of trauma affect participation of one particularly vulnerable group of refugees: victims of gender-based violence. Part II explains the benefits of implementing procedural safeguards within USRAP. Two kinds of procedures bring two kinds of benefits. Administrative procedural safeguards promote accurate and acceptable¹² outcomes through efficient adjudications. Procedural safeguards designed to carry out humanitarian objectives account for the vulnerabilities of trauma victims, ensuring that USRAP's intended class of beneficiaries is able to access effective protection. Part III provides recommendations for the minimum procedures needed to advance USRAP's humanitarian purpose. The Conclusion explores potential objections and reiterates the need for implementation of new procedural safeguards in order to protect the goals of USRAP, the public resources spent on USRAP, and the applicants for refugee resettlement USRAP is meant to benefit.

I. BACKGROUND OF USRAP

Part I.A outlines the statutory provisions and associated regulations creating and governing the refugee admissions process, demonstrating that no binding source of law—constitutional, statutory, or regulatory—dictates *how* USRAP ought to operate. Part I.B explains how USRAP currently ad-

9. *Id.* Waivers of inadmissibility allow individuals who are ineligible for U.S. immigration status under a statutory ground to apply for admission by showing extenuating circumstances.

10. *Id.*

11. *Id.*

12. As will be explained below in Part II.A, accuracy is reaching a correct outcome under a given legal standard. Acceptability, in contrast, assesses whether the procedures protect the dignity of the applicants and whether applicants themselves have confidence in the fairness of the proceedings.

judicates claims under agency policy. It then describes one group of applicants whose claims are considered by USRAP, refugee victims of gender-based violence, demonstrating the kinds of vulnerabilities that survivors of trauma face as they navigate USRAP adjudication. It argues that rather than treating vulnerable applicants as the exception, USRAP's procedures must be formulated so that vulnerable applicants can fully and safely participate in the adjudication process.

A. *The Administration of USRAP*

At the end of 2011, 42.5 million people were displaced by conflict or persecution, with 4.3 million newly displaced in 2011 alone.¹³ While most refugees remain in their first countries of refuge, or eventually return back to their country of origin,¹⁴ UNHCR deems some refugees too vulnerable to integrate or return to their countries of origin, and refers them to refugee-receiving countries for resettlement. In 2012, UNHCR resettled 88,600 refugees to refugee-receiving countries; 66,300 refugees were resettled to the United States.¹⁵

The U.S. statutory definition of a refugee is the following:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that 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.¹⁶

This definition also includes a person who has not left her country of origin but meets all the other requirements, and is designated by the President under special circumstances to be eligible for refugee resettlement.¹⁷

The statute providing resettlement for those who fall within this definition is contained within the Immigration and Nationality Act ("INA"),¹⁸ which says nothing about the process by which individuals are selected. Sec-

13. UNHCR, *supra* note 3, at 2–3.

14. *A New Beginning in a Third Country*, UNHCR, <http://www.unhcr.org/pages/4a16b1676.html> (last visited Nov. 9, 2013).

15. *Displacement: The New 21st Century Challenge*, UNHCR 3 (2012), http://unhcr.org/globaltrends/june2013/UNHCR%20GLOBAL%20TRENDS%202012_V05.pdf.

16. 8 U.S.C.A. § 1101(a)(42)(A) (Westlaw through 2013 P.L. 113-31).

17. 8 U.S.C.A. § 1101(a)(42)(B) (Westlaw through 2013 P.L. 113-31).

18. 8 U.S.C.A. § 1157 (Westlaw through 2013 P.L. 113-31).

tion 1157(a)(2) allows the President to determine how many refugees to admit, and Section 1157(e) requires the President to conduct “appropriate consultation” with the Judiciary Committees of both houses of Congress to discuss the numbers of refugees to be admitted. Elsewhere, the INA provides that one year after arrival in the United States, refugees can adjust their status to lawful permanent resident.¹⁹ Finally, the INA’s admissibility requirements for all immigrants also apply to refugee applicants.²⁰ However, to find any guidance on the procedural requirements for an individual refugee’s admission, one must turn to the Code of Federal Regulations (“CFR”), which lists the following requirements for refugee processing: an in-person interview, a medical examination, and the sponsorship of a responsible person or organization.²¹ Once a refugee’s application is approved, she is to be admitted to the United States within four months.²² The denial of refugee status may not be appealed.²³

This process is not constrained by constitutional due process requirements because these requirements only arise once a protected life, liberty, or property interest is at risk in a government proceeding.²⁴ Even the most grandiose descriptions of due process expressly state that non-citizens outside U.S. territory are not entitled to this protection:²⁵ “[f]rom its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons *within its borders*.”²⁶ Non-U.S. nationals who are not in the United States do not have claims to due process in refugee adjudication, nor do they have access to judicial review of their claims.²⁷ In *U.S. ex re. Knauff v. Shaughnessy*, the Supreme Court bluntly announced that “[w]hatever the procedure authorized by Congress [for admission of non-

19. 8 U.S.C.A. § 1159 (Westlaw through 2013 P.L. 113-31).

20. 8 U.S.C.A. § 1182 (Westlaw through 2013 P.L. 113-31). But note that §§ 1182(4), 1182(5) and 1182(7)(A), providing for inadmissibility of public charges, manual laborers, and individuals without travel documents, do not apply to refugees. 8 U.S.C.A. § 1157(c)(3)(Westlaw through 2013 P.L. 113-31).

21. 8 C.F.R. § 207.2 (Westlaw through 2013).

22. 8 C.F.R. § 207.4 (Westlaw through 2013).

23. *Id.*

24. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569 (1972).

25. Some grants of jurisdiction do apply for non-citizens outside the United States *See, e.g.*, 18 U.S.C.A. §§ 1595–96 (Westlaw through 2013 P.L. 113-31) (creating a civil remedy for victims of human trafficking, including crimes committed outside the United States, if the offender is a U.S. national, a permanent resident, or is currently present in the United States).

26. *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970) (emphasis added).

27. *See Haitian Refugee Ctr., Inc., v. Baker*, 953 F.2d 1498, 1508 (11th Cir. 1992) (holding that aliens seeking asylum in the United States do not have a right to asylum prior to reaching U.S. soil).

citizens] is, it is due process as far as an alien denied entry is concerned.”²⁸ In doing so, the Court articulated what has become known as the entry doctrine; that is, “that an alien arrives at the border without an interest in the right to enter.”²⁹ Refugees outside the United States, then, are not entitled to constitutional due process protections.

Left without constitutional protections, refugees likewise have no recourse to statutory procedural rights. Their applications for resettlement are processed by government administrative agencies. In general, these agencies are procedurally constrained by the Administrative Procedure Act (“APA”)³⁰—but not when it comes to processing applications for refugee resettlement. The Supreme Court has affirmed that the INA has displaced the APA as the source of procedure for all immigration applications and processing.³¹ And, as demonstrated above, the INA and associated regulations provide little guidance as to the procedural form that those admissions decisions should take. The CFR requires only an in-person interview, medical screening, and sponsorship; it also specifies that denial of refugee admission is not subject to appeal.³²

The refugee admissions process is thus purely a matter of agency policy. As administered, USRAP involves not just U.S. government agencies but also the U.N. and affiliated NGOs.³³ Once an individual has fled her country of origin, UNHCR determines whether the individual is a refugee.³⁴ UNHCR screens those determined to be refugees for particular vul-

28. U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

29. Ethan A. Klingsberg, *Penetrating the Entry Doctrine: Excludable Aliens’ Constitutional Rights in Immigration Processes*, 98 YALE L.J. 639, 644 (1989). However, if an alien has an interest that is distinct from the right to enter, the alien may receive due process protections. For instance, an alien seeking to prove that she was a returning resident was deemed to have an interest in the right to reenter the United States, as distinct from the right to initially enter the United States. *Landon v. Plasencia*, 459 U.S. 21, 31 (1982). Additionally, a U.S. citizen or permanent resident who files a petition for resettlement of an alien relative for family reunification may have a due process right in having that claim adjudicated. See 8 U.S.C.A. § 1154 (Westlaw through 2013 P.L. 113-31).

30. Note that, as a matter of practice, some elements of the APA may be implemented with regard to immigration claims. For example, U.S. Citizenship and Immigration Services grants Freedom of Information Act requests for many immigration applications, a process established through the APA under 5 U.S.C.A. § 552 (Westlaw through 2013 P.L. 113-31). See Memorandum from Scott R. Anderson to the Iraqi Refugee Assistance Project 8 (May 20, 2009), available at, http://refugeerights.org/wp-content/files/Memo_re_Right_to_Counsel_under_the_APA.pdf.

31. *Ardestani v. INS*, 502 U.S. 129, 134 (1991).

32. 8 C.F.R. § 207.2 (Westlaw through 2013).

33. *U.S. Refugee Admissions Program*, U.S. DEP’T OF STATE, <http://www.state.gov/j/prm/ra/admissions/index.htm> (last visited Nov. 9, 2013) [hereinafter *Refugee Admissions*].

34. See UNHCR, *supra* note 3.

nerability indicating a need to be resettled because those refugees will probably not be able to return home safely or wait for a safe return within their country of asylum.³⁵ Categories include victims of torture and those in immediate need of physical protection.³⁶ UNHCR (or, much less often, a U.S. embassy or qualified NGO) then refers applicants who are deemed to be in need of resettlement to refugee-receiving countries, including the United States.³⁷ Upon referral, each application is initially processed by an international organization operating under USDOS, referred to as Resettlement Support Centers (“RSCs”).³⁸ RSCs conduct initial information gathering and screening before sending applications on to U.S. Citizenship and Immigration Services (“USCIS”).³⁹

USCIS then reviews the RSC’s documentation, initiates security screenings, and holds in-person, non-adversarial interviews conducted by members of the Refugee Corps, who are trained officers within USCIS deployed to adjudicate refugee claims.⁴⁰ Refugees who are approved in the interview process and clear initial security checks then undergo medical screenings.⁴¹ Those who clear all of these steps are given a brief cultural orientation before flying to the United States, where each refugee is sponsored by an approved organization that assists refugees in transitioning to their new lives in the United States.⁴² Denied applicants are sent a notice informing them of the denial, which contains check boxes indicating several possible grounds for denial.⁴³

These procedures do not adequately advance USRAP’s mandate. By failing to provide basic procedural safeguards, such as an affirmative right to present evidence or appeal an erroneous decision, and by failing to provide basic measures that facilitate participation by victims of trauma, these processes fall short of basic principles of fairness. Furthermore, even these current, inadequate processes are subject to revocation at any time, because they are a matter of agency policy rather than regulation or statute carrying

35. *See id.* at 308.

36. *See id.* at 243.

37. *See id.* at ch. 7.2.

38. *Proposed Refugee Admissions*, *supra* note 5, at 16. Certain categories of refugees, designated by the President as being of particular concern to the United States, can bypass UNHCR and the referral process and apply for resettlement directly to an RSC. *Refugee Admissions*, *supra* note 33.

39. *Proposed Refugee Admissions*, *supra* note 5, at 17.

40. *Id.* at 14–15.

41. *Refugee Admissions*, *supra* note 33.

42. *Id.*

43. USCIS Ombudsman, *Recommendation Regarding the Adjudication of Applications for Refugee Status*, U.S. DEPARTMENT OF HOMELAND SECURITY 1, 5 (Apr. 14, 2010), http://www.dhs.gov/xlibrary/assets/cisomb_recommendation_43_adjudication_refugee_status.pdf.

the force of law. The humanitarian mandate of the refugee admissions process is further undermined because no external legal provision—constitutional, statutory, or regulatory—guarantees reconsideration or redress for applicants denied by erroneous adjudications.

Of course, opponents can always cite reasons not to grant additional rights or safeguards to immigrants. If all forty-two million displaced persons were granted full hearings to determine their eligibility for resettlement in the United States, the result would be unworkable. It may be argued that creating additional “rights” for overseas refugee processing uses public resources to help people to whom the United States has no legal obligation.⁴⁴ In turn, a politician or agency head who grants additional “rights” to refugees risks appearing dangerously accommodating to immigration. Yet, beyond helping applicants, improved procedural safeguards could provide numerous benefits to the government, including outcomes better aligned with USRAP’s goals, non-admittance of unqualified applicants, and advancement of the legislature’s articulated reason for creating USRAP: protecting the world’s most vulnerable refugees.

B. Vulnerable Refugees: Victims of Gender-Based Persecution

USRAP must implement procedural safeguards that account for trauma and other vulnerabilities of refugees. There are at least three reasons why decision makers should approach adjudications presuming that the refugee has suffered trauma, rather than presuming that experiences of trauma are the exception among applicants.

First, by definition (as established in the INA), refugees have a well-founded fear of persecution.⁴⁵ For many refugees, this fear of further persecution is substantiated by past persecution.⁴⁶ Experiences of persecution, and living with a well-founded fear of persecution, are often traumatic.⁴⁷ The UNHCR maintains that Posttraumatic Stress Disorder (“PTSD”) prev-

44. In fact, the United States does not have an international legal obligation to resettle refugees. The 1951 Refugee Convention obliges State parties to recognize refugees within their own borders, but not to resettle refugees outside their own territory. *See* Convention Relating to the Status of Refugees, July 28 1951, 189 U.N.T.S. 137, available at <http://www.refworld.org/docid/3be01b964.html>. However, providing durable solutions for refugees, including resettlement, promotes the humanitarian objectives of the Convention. *See id.* at prmb.

45. 8 U.S.C.A. § 1101(a)(42)(A) (Westlaw through 2013 P.L 113-31).

46. 8 C.F.R. § 1208.13(b)(1) (Westlaw through 2013).

47. *See, e.g.*, Pilar Hernández, *Trauma in War and Political Persecution: Expanding the Concept*, 72 AM. J. ORTHOPSYCHIATRY 16, 16 (2002); Claudia Maria Vargas, *War Trauma in Refugees: Red Flags and Clinical Principles*, 3 VISIONS J. 12, 12–13 (2007); Andrés J. Pumariega et al., *Mental Health of Immigrants and Refugees*, 41 COMMUNITY MENTAL HEALTH J. 581, 588 (2005).

alence rates in refugee groups range between 39% and 100%, as opposed to 1% among general populations.⁴⁸ PTSD may persist even after refugee displacement and safe relocation.⁴⁹ Therefore, most refugees have suffered traumatic experiences that make retelling their story a painful and possibly traumatic event in itself.⁵⁰

Second, applicants for refugee resettlement tend to be even more likely to have experienced trauma than the general refugee population. Most applicants for resettlement in the United States are referred from UNHCR, which addresses the needs of extremely vulnerable groups of refugees, like survivors of torture and refugees in need of physical protection.⁵¹ Those groups of refugees, with ongoing fears of persecution and histories of severely traumatic experiences, are even more likely to present symptoms of PTSD and to face other obstacles to effective participation in an adjudication process that turns upon discussions of those very experiences.⁵² Third, USRAP's statutory objective to resettle refugees of special humanitarian concern demands a consideration of the traumatic experiences suffered by many applicants. A program that aims to help the most vulnerable refugees but which has no procedural safeguards by which it may consider the circumstances that make refugees most vulnerable cannot fairly be said to be achieving its objective.

Survivors of persecution in the form of gender-based violence constitute one group of refugees USRAP has arguably failed. They are considered presently in order to illustrate the kinds of difficulties that traumatic experiences can pose during the adjudication of a refugee claim. Refugees who have experienced gender-based persecution are not the only refugees who have suffered trauma, but do represent the kind of applicants that USRAP

48. UNITED NATIONS HIGH COMMISSIONER OF REFUGEES, REFUGEE RESETTLEMENT: AN INTERNATIONAL HANDBOOK TO GUIDE RECEPTION AND INTEGRATION 233 (2002), available at <http://www.refworld.org/docid/405189284.html>.

49. Elisa E. Bolton, *PTSD in Refugees*, U.S. DEPARTMENT OF VETERANS AFF. (July 5, 2007), <http://www.ptsd.va.gov/professional/pages/ptsd-refugees.asp>.

50. See Romy Reading & Lisa R. Rubin, *Advocacy and Empowerment: Group Therapy for LGBT Asylum Seekers*, 17 *TRAUMATOLOGY* 86, 86–87 (2011) (describing the “risks of retraumatization inherent in the asylum process”); RAI0 Directorate, *Interviewing Survivors of Torture and Other Severe Trauma*, U.S. CITIZENSHIP & IMMIGRATION SERVICES 21 (2013), [http://www.uscis.gov/USCIS/About%20Us/Directorates%20and%20Program%20Offices/RAIO/Interviewing%20-%20Survivors%20of%20Torture%20LP%20\(RAIO\).pdf](http://www.uscis.gov/USCIS/About%20Us/Directorates%20and%20Program%20Offices/RAIO/Interviewing%20-%20Survivors%20of%20Torture%20LP%20(RAIO).pdf) (explaining that torture survivors may not trust individuals in power, including immigration authorities).

51. See UNHCR, *supra* note 3, at 243.

52. Mary Anne Kenny, *Psychosocial Support in RSD*, FAHAMU REFUGEE PROGRAMME, <http://www.refugeelegalaidinformation.org/psychosocial-support-rsd> (last visited Sept. 13, 2013) (outlining the ways in which trauma can affect an asylum-seeker throughout the asylum process).

must consider when formulating appropriate procedural safeguards to resettle refugees of special humanitarian concern.

Victims of gender-based persecution have often experienced acute forms of trauma that are conceived of as private and are therefore difficult to talk about, such that some applicants may not be able or willing to effectively articulate the reasons they are claiming refugee status.⁵³ The first time many applicants discuss the traumatic events leading to their refugee claims will be during the refugee adjudication process.⁵⁴ The inability of victims of gender-based violence to explain their persecution and traumas, or their reticence to do so, can be explained, at least in part, by feelings of shame, humiliation, and PTSD.⁵⁵

Victims of persecution on the basis of LGBTI status, one subset of victims of gender-based violence, are the targets of various forms of violence and discrimination around the world.⁵⁶ Having experienced such violence and discrimination, some LGBTI applicants may have deeply internalized feelings of shame, and even homophobia, which can affect their ability to articulate their refugee claim or admit the true form of persecution they fear or have suffered.⁵⁷ To successfully apply for resettlement, LGBTI applicants should present, and present consistently, a narrative that exposes an identity that, in many cases, applicants have spent a lifetime hiding or suppressing.⁵⁸ Some applicants, after enduring this stigmatization, will be reluctant to reveal their LGBTI status, especially if the interview includes an interpreter from their own society.⁵⁹

Besides feelings of shame, traumatized victims of gender-based violence are likely to suffer from PTSD, depression, anxiety, or other disturbances.⁶⁰ These kinds of disorders can result in an applicant being “unable to testify about [a traumatic event] in any credible fashion, or even remem-

53. Laurie Berg & Jenni Millbank, *Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants*, 22 J. REFUGEE STUD. 195, 196 (2009).

54. *Id.* at 201.

55. UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 3, U.N. Doc. HRC/GIP/12/09 (Oct. 23, 2012), available at <http://www.unhcr.org/refworld/docid/50348afc2.html> [hereinafter *Gender Guidelines*]; Lara Stemple, *Male Rape and Human Rights*, 60 HASTINGS L.J. 605, 613–14 (2009) (stating that male victims of rape may decline to report their assault due to feelings of shame or humiliation).

56. *Gender Guidelines*, *supra* note 55, at ¶ 2.

57. *Id.* at ¶ 59.

58. Berg & Millbank, *supra* note 53.

59. *Id.*

60. See *The Application Process: Working with Asylum Seekers*, IMMIGR. EQUALITY, <http://immigrationequality.org/issues/law-library/lgbth-asylum-manual/working-with-asylum-seekers> (last visited Nov. 9, 2006).

ber it all.”⁶¹ Even if an applicant can recount the event to an advocate, the client may find reencountering the trauma so distasteful she will avoid retelling it in a formal adjudication.⁶² Some applicants may recount traumatic events in ways that seem inappropriate to observers, such as recounting the event without any trace of emotion.⁶³ Therefore, the traumatic events most likely to indicate that the applicant most needs protection may, at the same time, harm the applicant’s ability to succeed in the adjudication process. In tort and criminal proceedings in the United States, victims of sexual assault are able to present expert testimony on the effect of trauma on the victim to uphold the victim’s credibility as a witness at trial.⁶⁴ When refugee claimants have suffered similar experiences with similar effects in other legal contexts, they ought to be given similar accommodations. Without such protections, their claims will not be adjudicated fairly, even if only compared to those of other, non-traumatized claimants.

Finally, LGBTI applicants may apply for resettlement without having solidified their own LGBTI identity.⁶⁵ Many LGBTI applicants will not even understand foreign LGBTI terminology, because their home countries do not have terms for sexual minorities other than slurs.⁶⁶ Furthermore, theories positing linear sexual identity formation, in which LGBTI individuals are thought of as moving from identity confusion to acceptance and finally synthesis, are not universally descriptive of LGBTI individuals.⁶⁷ Requiring applicants to explain their sexual identity assumes that a refugee will be applying for resettlement only at the end of their identity formation, having already resolved internal questions regarding their sexual orientation.⁶⁸ Not only is this expectation unreasonable, it is also irrelevant to the legal standard that a successful applicant must meet.

While a governmental process should always strive for fairness and efficiency, processes should also be formed out of consideration for the class whose interests are being adjudicated. In the context of a humanitarian program that resettles the most vulnerable applicants, procedural safeguards

61. *Id.*

62. *Id.*

63. *Id.*

64. *See, e.g.*, *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1302 (11th Cir. 2001) (admitting expert testimony in sexual harassment trial to explain common responses of victims of harassment); *People v. Brown*, 777 N.Y.S. 2d 508, 510 (2004) (admitting expert testimony in rape trial to explain seemingly unusual victim behavior).

65. *See* Berg & Millbank, *supra* note 53, at 216.

66. *Draft Model LGBT Asylum Guidance*, IMMIGR. EQUALITY 1, 11, <http://www.immigrationequality.org/wp-content/uploads/2011/07/ImEq-Draft-Model-LGBT-Asylum-Guidance-2010.pdf> (last updated 2010).

67. Berg & Millbank, *supra* note 53, at 207.

68. *Id.*

must reflect the needs of the program's intended class of beneficiaries. In crafting appropriate process protections, then, decision-makers must account for the experiences and vulnerabilities of victims of trauma and design measures that will allow such applicants to participate effectively.

II. BENEFITS OF PROCEDURAL SAFEGUARDS IN USRAP

This Part demonstrates the benefits of implementing additional procedures in USRAP. The kinds of procedural safeguards that should be adopted fall into two categories. First, USRAP should adopt measures that model administrative procedural safeguards, which serve to promote accurate and efficient outcomes. Administrative procedural safeguards protect both the applicant and the public resources spent on the process. Second, USRAP should be implemented through measures that account for the extreme vulnerability and traumatic experiences of many applicants. Both kinds of benefits, in turn, ensure that the stated goal of USRAP, resettlement of those of "special humanitarian concern,"⁶⁹ is achieved.

A. Benefits of Administrative Procedures

Unless additional safeguards are implemented, refugee admissions procedures risk inflicting two kinds of harms on refugee applicants: deciding a particular case wrongly because of arbitrary decision making, and, by failing to account for the vulnerabilities of applicants, conducting adjudications in ways that retraumatize refugees. Additionally, to the extent that adjudication results in arbitrary outcomes, USRAP may waste public funds in its adjudications. Procedural safeguards are necessary to ensure that those of special humanitarian concern have had an adequate opportunity to demonstrate their qualifications to a trained adjudicator.

As a general matter, procedural safeguards have been required in administrative contexts in accordance with the principle of the rule of law—that agencies be bound by some sort of intelligible principle.⁷⁰ In *Yick Wo v. Hopkins*, the Supreme Court observed that principles of government "do not mean to leave room for the play and action of purely personal and arbitrary power. . . . And the law is the definition and limitation of power."⁷¹ Governmental decisions should always be implemented through some sort of procedure designed to limit arbitrary outcomes.⁷² Beyond pro-

69. 8 U.S.C.A. § 1157 (Westlaw through 2013 P.L. 113-31).

70. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530–55 (1935).

71. *Yick Wo v. Hopkins*, 118 U.S. 356, 369–70 (1886).

72. See Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 176 (2011); Richard B. Saphire, *Specifying Due Process Values: Toward A More Responsive Approach to Procedural Protection*, 127 U.

viding limiting principles for their own sake, administrative procedures provide three practical benefits to adjudicators and applicants: promoting accurate rather than arbitrary outcomes,⁷³ adjudicating efficiently, and guarding the dignity of the person whose interests are being adjudicated.⁷⁴ Of course, accuracy in adjudication is a matter of degree, since “any adjudicative decision—certainly questions of fact and questions of law, but exercises of discretion as well—carry some inherent risk of error.”⁷⁵ In the context of refugee admissions, referring agencies have already determined that applicants meet the definition of a refugee,⁷⁶ and that the stakes of non-admission may therefore include persecution—or worse. Accuracy is not just a goal that applicants desire but one that promotes USRAP’s mission and prevents the admission of unqualified applicants.

The second benefit of better administrative procedures is efficiency, which includes avoiding delays, protecting applicants’ resources, and safeguarding government resources such as public officials’ time.⁷⁷ While extensive procedural safeguards may be wasteful,⁷⁸ basic procedural safeguards

PA. L. REV. 111, 117 (1978). Other instances of the Court discussing the purpose of due process include: *FCC v. Fox Television Stations*, 556 U.S. 502, 536 (2009) (Kennedy, J., concurring) (explaining that the exercise of law without limitation might violate constitutional principles such as the separation of power); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (describing due process as a means of prevention against arbitrary abrogation of state-created rights); *Morrissey v. Brewer*, 408 U.S. 471, 499 (1972) (Douglas, J., dissenting) (explaining that due process is essential to “restore faith that our society is run for the many, not the few, and that fair dealing rather than caprice will govern the affairs of men”); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952) (describing due process as protection against governmental action that is “patently arbitrary or discriminatory”); and *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring) (writing that due process manifests a “profound attitude of fairness”).

73. See Roger Cramton, *Administrative Procedure Reform: The Effects of S.1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 111–12 (1964); Stephen H. Legomsky, *An Asylum Seeker’s Bill of Rights in a Non-Utopian World*, 14 GEO. IMMIGR. L.J. 619, 622 (2000).

74. See Cramton, *supra* note 73 (arguing that accuracy, efficiency, and acceptability are the three requirements of administrative procedure); see also Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1313–14 (1986) (applying Cramton’s three requirements in an immigration context).

75. Legomsky, *supra* note 73.

76. See UNHCR, *supra* note 3.

77. Legomsky, *supra* note 73, at 623.

78. But formality in proceedings is not, by definition, wasteful. William Funk, *Close Enough for Government Work?—Using Informal Procedures for Imposing Administrative Penalties*, 24 SETON HALL L. REV. 1, 5 (1993) (stating that, in the context of EPA penalty proceedings, more formal proceedings had not been proven to be slower or more expensive than less formal proceedings).

ensure that public resources used in adjudications are put to good use by promoting rational operations.⁷⁹ To the extent that an adjudicative system reaches arbitrary results, the public resources expended in that adjudicative system are wasted. Without any procedural protections in refugee admissions, the risk of wasting resources on arbitrary outcomes is extremely high. For applicants fleeing persecution, an arbitrary outcome resulting from the absence of procedural safeguards is not just a waste of resources and time but also potentially exposes the applicant to significant harm.⁸⁰ Even routine delays can bring about such harm while the applicant awaits a decision from the United States Citizenship and Immigration Services (“USCIS”).⁸¹

Third, better procedures also protect the “dignity of those individuals . . . adversely affect[ed by a particular outcome] by making that outcome acceptable.”⁸² Stakeholders “should feel a sense of confidence in the process even when they are dissatisfied with particular results.”⁸³ “[F]airness in government-individual relations can never be defined solely in terms of outcomes, nor even in terms of the fact-producing mechanisms upon which those outcomes depend; rather, the processes of interaction themselves are always important in their own right.”⁸⁴ The refugee applicant should thus be given the opportunity to speak and explain herself. She should also be able to expect respectful treatment from government officials and procedural protection at each step in the process.

B. Benefits of Humanitarian Safeguards

Procedural safeguards in the refugee admissions process also ensure that refugees of special humanitarian concern, including victims of trauma, are capable of participating in refugee admission adjudication. Legally, US-

79. In APA contexts, courts demand to know the “factors that were considered” and the agency’s “construction of the evidence” to assist in judicial review of the arbitrary and capricious standard—in essence, to verify that a decision is rational. *See, e.g., Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1972).

80. U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR’S FIELD MANUAL app. 15-2 (2013), available at <http://www.uscis.gov> (search “adjudicator’s field manual”; then follow the first hyperlink) (“An applicant or beneficiary wrongly found ineligible for the benefit sought may suffer significant economic or personal consequences.”).

81. For reports discussing the kinds of harms particular refugee populations face while awaiting a durable solution, see, for example, Sara Pavanello et al., *Hidden and Exposed: Urban Refugees in Nairobi, Kenya*, HUMANITARIAN POL’Y GROUP (Mar. 2010), <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5858.pdf>; *More than a Nightmare: Delays in Refugee Family Reunification*, CANADIAN COUNCIL FOR REFUGEES (Nov. 2004), <http://ccrweb.ca/nightmare.pdf>.

82. Saphire, *supra* note 72.

83. Legomsky, *supra* note 73, at 623; *see also* Cramton, *supra* note 74.

84. Saphire, *supra* note 72.

RAP is an explicitly humanitarian operation,⁸⁵ and, as a practical matter, the United Nations High Commissioner for Refugees (“UNHCR”) refers to the United States only those already determined to be refugees in need of resettlement because of their extreme vulnerability.⁸⁶ Failing to address challenges related to applicants’ traumatic histories impedes the congressional purpose of USRAP by denying resettlement to those most likely to deserve it while exposing applicants to a risk of further trauma. USCIS already acknowledges that some groups may require procedural safeguards in light of their traumatic experiences. In December 2011, USCIS’s Refugee, Asylum, and International Operations Directorate released a manual entitled *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims* manual.⁸⁷ This manual focuses primarily on the legal grounds for refugee claims based on LGBTI status, but also includes guidance on how to interview an LGBTI refugee applicant appropriately. The manual instructs that “[t]o the extent that personnel resources permit, requests for an interviewer of a particular sex should be honored” and that applicants should be allowed to testify with a relative present if they so prefer.⁸⁸ The manual cautions that testimony about sensitive issues such as sexual orientation and HIV status may not be explained as clearly through an interpreter if the interpreter is uncomfortable with such issues or if the applicant is reluctant to discuss the issues with someone from a similar background.⁸⁹

When questioning the applicant, interviewers are instructed to “[b]e particularly sensitive” about issues of sexual assault because the “combination of shame and feelings of responsibility and blame for having been victimized in this way” can “seriously limit an LGBTI applicant’s ability to discuss or even to mention such experiences.”⁹⁰ Interviewers are also told not to ask about particular sexual practices, not to disbelieve narratives that seem implausible, and not to make assumptions that an applicant is familiar

85. 8 U.S.C.A. § 1157(a)(1), (b), (c)(1) (Westlaw through 2013 P.L. 113-31).

86. UNHCR, *supra* note 3, at ch. 6.2.

87. RAIO Directorate, *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex Refugee and Asylum Claims*, U.S. CITIZENSHIP & IMMIGRATION SERVS., (Dec. 28, 2011), <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf>. Large portions of the USCIS manual are lifted verbatim from the NGO Immigration Equality’s Draft Model LGBT Asylum Guidance 2010. See *Draft Model LGBT Asylum Guidance*, *supra* note 66.

88. RAIO Directorate, *supra* note 87, at 27–28.

89. *Id.* at 28.

90. *Id.* at 30.

with U.S.-based LGBTI subcultures and terminology.⁹¹ When an applicant discloses her sexual orientation or gender identity late in the adjudication process, refugee officers are told not to reject the application outright due to this inconsistency but to interview applicants about their experiences.⁹² The manual states further that “[a]s with all other credibility determinations, you must give the applicant the opportunity to explain any inconsistencies or omissions in his or her case.”⁹³

These instructions are needed and welcome, but are too narrow and thus insufficient. LGBTI refugees are illustrative of applicants who are most likely to benefit from procedural protection in the refugee admissions process. But by holding out LGBTI applicants as exceptional applicants, the manual fails to acknowledge that many, if not most, refugee applicants have experienced acute trauma requiring special care on the part of the refugee officer to assure that the adjudication does not lead to an inaccurate outcome or retraumatization. Implementing basic principles of effective interviewing can enhance applicants’ ability to articulate their refugee claim, thereby increasing the accuracy of adjudicative outcomes.⁹⁴ At the same time, sensitive adjudication of refugee resettlement claims can prevent further psychological or emotional trauma.⁹⁵ Adjudicating the claims of applicants who may have memory loss or extreme reactions to the memories of the events leading to their refugee claims is inevitably challenging. But, simple measures promoting applicants’ dignity, coupled with common-sense administrative procedures, will vastly improve the quality of USRAP’s adjudication process.

III. PROPOSAL FOR PROCEDURAL SAFEGUARDS

Part III.A explores the sources of law and agency policy that can inform a revised formulation of procedures. Part III.B describes the portions of current USRAP procedures, implemented as policy, which ought to be

91. *Id.* at 32–34.

92. *Id.* at 41–42.

93. *Id.* at 44.

94. U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 80 (“Due to the potential consequences of incorrect determinations, it is incumbent upon officers to conduct organized, focused, and well-planned, non-adversarial interviews to elicit sufficient facts to make intelligent and well-informed decisions.”).

95. See Denise E. Elliott et al., *Trauma-Informed or Trauma Denied: Principles of Implementation of Trauma-Informed Services for Women*, 33 J. OF COMMUNITY PSYCHOL. 461, 463 (2005); Roger D. Fallot & Maxine Harris, *Creating Cultures of Trauma-Informed Care (CCTIC): A Self-Assessment and Planning Protocol*, COMMUNITY CONNECTIONS 1–2, available at <http://www.healthcare.uiowa.edu/icmh/documents/CC-TICSelf-AssessmentandPlanningProtocol0709.pdf>.

retained or expanded. Finally, Part III.C recommends six specific reforms of current policy to ensure that USRAP's humanitarian goal is met.

A. Relevant Sources of Law and Agency Policy

In light of the flexible nature of procedure,⁹⁶ safeguards from other relevant contexts should be considered and adapted to USRAP to best achieve its goals. The most obvious point of reference for additional procedures is asylum law, the law of 'onshore' refugee programs. Refugee resettlement and asylum applicants are adjudicated under the same legal standard.⁹⁷ The asylum program's procedures are set out in 8 U.S.C. § 1158 (2009), which, along with administrative regulations, enumerates in great detail how to adjudicate an asylum application. Affirmative asylum applications, those filed by individuals whose legal presence in the United States is not currently contested by the government, are adjudicated through non-adversarial interviews with asylum officers.⁹⁸ Because refugee applicants are adjudicated in a different context, asylum procedures need not be adopted wholesale, but should be treated as reference points.

Other contexts also provide helpful indications of what procedural safeguards ought to be mandated in USRAP. The United States Citizenship and Immigration Services ("USCIS") Adjudicator's Field Manual⁹⁹ presents the instructions that USCIS already deems appropriate to provide its officers during general USCIS training sessions. USCIS's LGBTI Refugee Manual contains procedures that USCIS has implemented with regard to some of its most vulnerable applicants for resettlement, albeit without the force of law.¹⁰⁰ The Administrative Procedures Act, while superseded in many immigration contexts, set a congressionally-mandated minimum on the procedures necessary for agency action to be fair.¹⁰¹ Outside U.S. law, The United Nations High Commissioner for Refugees ("UNHCR") man-

96. Due process is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 499 (1972).

97. See 8 U.S.C.A. § 1157(c)(1) (Westlaw through 2013 P.L. 113-31) ("[T]he Attorney General may . . . admit any refugee . . ."); 8 U.S.C.A. § 1158(b)(1)(A) (Westlaw through 2013 P.L. 113-31) ("The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who . . . is a refugee within the meaning of section 1101(a)(42)(A) of this title."); 8 U.S.C.A. § 1101(a)(42) (Westlaw through 2013 P.L. 113-31).

98. *The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov> (last visited Nov. 9, 2013) (search "affirmative asylum process"; then follow the first hyperlink).

99. U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 80.

100. RAO Directorate, *supra* note 87.

101. 5 U.S.C.A. §§ 500, 551-59 (Westlaw through 2013 P.L. 113-31).

ual entitled *Procedural Standards for Refugee Status Determination* (“RSD”)¹⁰² describes another overseas process conducted with refugee populations. This is particularly pertinent because most applicants must go through UNHCR’s RSD procedures before applying for U.S. resettlement.¹⁰³ These sources consistently provide similar procedural safeguards, which strongly indicates that they are fair, accurate, and efficient procedures.

B. *Commendable Features of Current Procedure*

The purpose of this Note is not to argue that USRAP’s procedures must be scrapped. Rather, the purpose is to argue that current procedures need to be *strengthened*. Current procedural policy sets a foundation on which further safeguards can be built. First, the nonadversarial nature of the refugee interview¹⁰⁴ is especially appropriate for USRAP, since adversarial hearings are likely to impede rather than facilitate the discovery of information from a vulnerable applicant.¹⁰⁵ Adversarial hearings would also waste public resources by requiring government employees to serve as adversarial parties. An informed adjudicator is more likely to arrive at the core of a refugee claim through open-minded questioning than through adversarial cross-examinations that are likely to intimidate a vulnerable applicant.¹⁰⁶

Current policy mandates that refugee applicants be given notice of the time and place of the interview.¹⁰⁷ In this respect, it fulfills one of the most fundamental elements of adjudicatory fairness. Refugee interviews, similar to asylum adjudications,¹⁰⁸ must be conducted by adjudicators who have been trained in human rights law, nonadversarial interview techniques, refugee law, and the conditions of the applicant’s country of origin. Interpreters for interviews are provided by the U.S. government, facilitating participation for those who are unable to obtain a high-quality interpreter for their interviews.¹⁰⁹ Refugee applicants are allowed to present evidence, though unlike in asylum adjudications,¹¹⁰ they are not allowed to present witnesses. The current implementation of these procedures is encouraging and sup-

102. UNHCR, PROCEDURAL STANDARDS FOR REFUGEE STATUS DETERMINATION UNDER UNHCR’S MANDATE (Nov. 20, 2003), available at <http://www.unhcr.org/refworld/docid/42d66dd84.html> [hereinafter PROCEDURAL STANDARDS].

103. *Refugee Admissions*, *supra* note 33.

104. *Proposed Refugee Admissions*, *supra* note 5.

105. David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1347–50 (1990); Legomsky, *supra* note 73, at 638.

106. U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 80; Elliott et al., *supra* note 95; Fallot & Harris, *supra* note 95.

107. U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 80, at § 15.41(b)(2).

108. 8 C.F.R. § 208.1(b) (Westlaw through 2013).

109. U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 80, at § 15.7.

110. 8 C.F.R. § 208.9(b) (Westlaw through 2013).

ports the notion that procedural integrity is important in the refugee admissions process, is worthy of the resources that procedural safeguards consume, and ought to be retained. These procedures can serve as a foundation for fully adequate ones, enacted through statute or promulgated as regulations, as suggested in the following Section.

C. *Recommendations for Procedural Safeguards*

Current refugee admission procedural safeguards are not ill-conceived, nor does this Note contend that they are administered in bad faith. Current procedural safeguards are, quite simply, inadequate. Provided below are recommendations for simple changes that would build on current procedures to improve the accuracy, efficiency, and acceptability of refugee admissions decisions, while promoting the participation and protection of vulnerable refugee applicants.

1. Access to Counsel in Interviews

Asylum applicants are allowed to secure counsel at their own cost.¹¹¹ Such a representative is not actively involved in the interview, but may present a statement upon its completion.¹¹² The USCIS Adjudicator's Field Manual mandates that all applicants who are required to appear in an interview are allowed to provide their own counsel.¹¹³ Allowing applicants to provide their own counsel creates more efficient adjudications. Programs giving asylum applicants access to counsel have been shown to increase efficiency by preparing applicants for adjudication, minimizing the pursuit of frivolous claims, and encouraging the crafting of narrow appeals, thereby reducing the overall time spent on adjudications.¹¹⁴ According to the American Bar Association, in immigration courts,

[t]he lack of adequate representation diminishes the prospects of fair adjudication for the noncitizen, delays and raises the costs of proceedings, calls into question the fairness of a convoluted and complicated process, and exposes noncitizens to the risk of abuse and exploitation. . . . In addition, representation can speed the process of adjudication, reducing detention costs. Increased representation for noncitizens thus would lessen the burden on im-

111. *Id.*

112. 8 C.F.R. § 208.9(d) (Westlaw through 2013).

113. U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 80, at § 12.1(a).

114. *Statement for Hearing: Building an Immigration System Worthy of American Values*, LUTHERAN IMMIGR. & REFUGEE SERVICE (March 20, 2013), <http://lirs.org/press-inquiries/press-room/032013statement/>.

migration courts and facilitate the smoother processing of claims. In short, enhancing access to quality representation promises greater institutional legitimacy, smoother proceedings for courts, reduced costs to government associated with pro se litigants, and more just outcomes for noncitizens.¹¹⁵

Despite USCIS's own declarations that counsel is important in a wide variety of adjudicatory contexts, refugee applicants are not allowed to bring a counselor into their interview.¹¹⁶ Allowing applicants to provide their own counsel would provide a sound balance between protecting the rights of the applicant and ensuring procedural efficiency.

This safeguard would not require the government to provide representation, but only to allow applicants who can secure representation to have their counsel with them at their interview. Applicants with counsel, like represented applicants in deportation proceedings, will be better prepared for the interview and are more likely to understand the process, thereby speeding up the adjudicatory process and easing the fact-finding and legal research burdens on refugee officers. Allowing counsel to object at the interview based on procedural unfairness and comment briefly in the interview can address irregularities that would lead to reinterview or appeal, promoting efficiency and good use of resources while also protecting the applicant's procedural rights. Allowing counsel to take notes can give the applicant better information upon which to draw in case of a negative decision. This, in turn, should lead to more focused appeals, rather than wide-ranging appeals that raise every possible ground for denial.¹¹⁷

2. Access to Evidence

Asylum applicants have access to evidence brought against them unless the evidence is classified.¹¹⁸ By contrast, refugee applicants have no such

115. Comm'n on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, A.B.A. ES39-40 (2010), http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf (citation omitted).

116. 8 C.F.R. § 292.5(b) (Westlaw through 2013); U.S. CITIZENSHIP & IMMIGRATION SERVS., REVISIONS TO ADJUDICATOR'S FIELD MANUAL ch. 12 & 15 (2012), *available at* <http://www.uscis.gov/USCIS/Laws/Memoranda/2012/May/AFMs5-23-12.pdf>.

117. USCIS Ombudsman, *supra* note 43, at 11; *see also* *Renewing U.S. Commitment to Refugee Protection: Recommendations for Reform on the 30th Anniversary of the Refugee Act*, HUM. RTS. FIRST 21 (Mar. 2010), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/30th-AnnRep-3-12-10.pdf>.

118. 8 C.F.R. § 208.11(c) (Westlaw through 2013).

right. Even if the applicant requests reconsideration of her initial application, a refugee does not have access to the record of the initial interview, nor even to a written decision of the reason for denial.¹¹⁹ As is the case in asylum applications,¹²⁰ country-of-origin information and other intelligence on the applicant should be provided to refugee applicants. General country-of-origin information may not apply to the applicant, and confidential information may provide derogatory information on her—yet no legal principle requires USRAP to share that information with the applicant. Making this information available allows her to prepare to comment on the evidence, explain why country-of-origin information should not be read to apply to her, or explain derogatory information against her. If evidence cannot be disclosed for safety or security reasons, partial or redacted information should be disclosed, or the information should be disclosed without indicating its source.¹²¹ These situations should be the exception rather than the norm:

. . . adjudicators will not be able to reach reliable assessments of applicant credibility if the applicant cannot review the record of their interview for errors or misunderstandings, and [adjudicators] may unknowingly underestimate the risks to a person's life if the person cannot respond to evidence. . . . [L]egal advocates will not be able to adequately advise clients or advocate for them if they do not know all of the evidence being considered. Reasons for rejection will often be incomprehensible if the applicant and her lawyer cannot review them in light of the evidence that was considered. Without access to evidence, rejected applicants, even with trained lawyers, will have to rely on guesswork to file effective appeals.¹²²

As an extension of the principle of giving applicants access to evidence relevant to their case, adjudicators should summarize their findings from the interview prior to concluding it.¹²³ This allows the applicant to respond to any perceived inconsistencies, and gives her and her counsel the opportunity to add any additional relevant information. This quick step can resolve inconsistencies prior to the appeals stage. Given the difficulty of explaining

119. USCIS Ombudsman, *supra* note 43, at 11.

120. 8 C.F.R. § 208.11(b) (Westlaw through 2013).

121. *Disclosure of Evidence in UNHCR's Refugee Status Determination Procedures: Critique and Recommendations for Reform*, ASYLUM ACCESS 11–12 (June 20, 2008), <http://asylumaccess.org/AsylumAccess/wp-content/uploads/2011/08/080620Disclosure-of-Evidence-in-UNHCR-RSD.pdf>.

122. *Id.* at 2.

123. Required in UNHCR RSDs. PROCEDURAL STANDARDS, *supra* note 102, at § 4–14.

traumatic events through an interpreter in a foreign context, the equivalent of a redirect at trial better ensures that the refugee officer understands the information presented to her and that the applicant understands the information utilized by the refugee officer.

3. Written Reasons for Adverse Decisions

The refugee officer's decision should be made based on clear and consistent burdens and standards of proof that are public and made known to the applicant.¹²⁴ The decision to deny an asylum application should be given in writing stating the reason for the denial.¹²⁵ Currently, refugees whose resettlement applications are denied receive only a form with check boxes listing grounds for denial, one or more of which are checked.¹²⁶ These check boxes include extraordinarily broad categories such as "credibility," "admissibility," ineligibility under the refugee definition, and "other."¹²⁷ The refugee officer should be able to articulate specific, legal reasons that the applicant does not meet the requisite criteria. Approval decisions should also be issued in writing.¹²⁸ Positive decisions should inform applicants of the rights that the decision conveys and the next steps in the procedure.¹²⁹ The decision should be provided in English along with an accurate translation of the decision in the applicant's preferred language.¹³⁰ Negative decisions should describe the criteria that the applicant was required to meet in order to qualify, the evidence considered in the applicant's case, why the evidence failed to meet the requisite criteria, the outcome, and information alerting the applicant of her right to appeal.¹³¹

Currently, refugee adjudicators are required to confirm that they have discussed potential grounds of denial with the applicant.¹³² Yet, a 2010 in-

124. Required in U.S. asylum interviews, immigration hearings, USCIS adjudications, and UNHCR RSDs. 8 C.F.R. §§ 208.14(c), 208.19 (Westlaw through 2013); U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 80, at §§ 2.7, 10.3(h); PROCEDURAL STANDARDS, *supra* note 102, at §§ 1-2, 6-1.

125. 8 C.F.R. § 208.19 (Westlaw through 2013).

126. USCIS Ombudsman, *supra* note 43, at 4-7.

127. *Id.* at 5.

128. Required in U.S. asylum interviews, immigration hearings, USCIS adjudications and UNHCR RSDs. 8 C.F.R. §§ 208.14(c), 208.19 (Westlaw through 2013); U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 80, at §§ 2.7, 10.3(h); PROCEDURAL STANDARDS, *supra* note 102, at § 6-1.

129. Required in UNHCR RSDs. PROCEDURAL STANDARDS, *supra* note 102, at § 6-1.

130. Required in USCIS adjudications and UNHCR RSDs. *Id.*; U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 80, at § 10.7.

131. Required in USCIS adjudications and UNHCR RSDs. U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 80, at § 10.7; PROCEDURAL STANDARDS, *supra* note 102, at § 6-1.

132. USCIS Ombudsman, *supra* note 43, at 10.

ternal review of USCIS stated that “[d]espite the fact that the current USCIS standard for interviewing officers requires them to notify applicants of the reason for denial, cases consistently lack such identification.”¹³³ While the ombudsman found that USCIS was training its adjudicators to explain and record grounds for denial on the refugee notice of decision, “the spaces are routinely left blank.”¹³⁴ Despite an internal review advising that USRAP provide applicants with better notification of reasons for denial, a 2012 report to Congress indicated that these improvements had not yet been implemented.¹³⁵

Informing applicants of the basis for their rejection is necessary for procedural integrity. Information about the reason for rejection is also vital for preparing an adequate appeal. Without knowing why they were rejected, applicants and their counsel are left to negate any possible basis for rejection, leading to lengthy appeals that will waste the time of the applicants, their counsel, and the adjudicators who have to read the appeals.¹³⁶

4. Opportunity to Appeal

Basic principles of fairness require that an applicant have the right to raise concerns about her initial adjudication.¹³⁷ In particular, those who suffer from memory loss or PTSD may seem to present inconsistent testimony in an interview, which can be easily corrected when the applicant is allowed to present written documentation and evidence clarifying his experience and demonstrating the validity of his claim.

Asylum applicants are already given several layers of formal appeal.¹³⁸ Asylum applicants whose presence is not contested by the U.S. government first assert their claim to an asylum officer; if they are unsuccessful at the affirmative stage, asylum applicants are referred to an immigration court for adversarial removal proceedings.¹³⁹ The immigration judge then issues a written decision either granting or denying asylum.¹⁴⁰ Further layers of re-

133. *Id.*

134. *Id.* at 5–6.

135. *The Ombudsman’s Annual Report to Congress*, DEP’T OF HOMELAND SECURITY 40 (June 25, 2012), <https://www.dhs.gov/ombudsmans-annual-report-congress>.

136. USCIS Ombudsman, *supra* note 43, at 11.

137. The right to an appeal is required in asylum interviews, immigration hearings, and UNHCR RSDs. 8 U.S.C.A. § 1252 (Westlaw through 2013 P.L. 113-31); 8 C.F.R. § 1003.38 (Westlaw through 2013); PROCEDURAL STANDARDS, *supra* note 102, at § 7-1.

138. 8 C.F.R. § 240.70(f)(2)(Westlaw through 2013).

139. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Mar. 10, 2011), <http://www.uscis.gov/humanitarian/refugees-asylum/asylum-obtaining-asylum-united-states>.

140. 8 C.F.R. § 208.19 (Westlaw through 2013).

view include an administrative appeal to the Board of Immigration Appeals (BIA), possible certification by the Attorney General, and, in the case of a final order of removal, appeal to a federal circuit court of appeals.¹⁴¹ These extensive layers of appeal may not be necessary in the refugee context, but some level of appellate review is vital to ensuring administrative fairness.

Currently, regulation forbids refugee applicants from appealing a denial of refugee status.¹⁴² Refugees are able to submit a Request for Reconsideration (“RFR”), under which USCIS can, at its discretion, revisit its initial decision.¹⁴³ This process is far from perfect: the remedy is discretionary, applicants are not routinely informed of the original grounds for denial, and applicants are not given access to interview notes or records.¹⁴⁴ Withholding information about original adjudications makes the reconsideration process more burdensome for applicants, their representatives, and adjudicators. According to USCIS’s internal review, “[w]ithout specific information on how to prepare RFRs, attorneys and individuals spend hours discussing and compiling overly-inclusive requests in an effort to address what they infer the problem to have been. Lengthy filings burden USCIS adjudicative resources, further taxing already limited resources abroad.”¹⁴⁵ Thus, total non-disclosure actually harms the goal of protecting government resources, and it also conflicts with the basic principles of procedural fairness.

At this point, it should be clear that these kinds of safeguards are mutually reinforcing: the ability to appeal will assist refugees significantly when they are given reasons for their denial and the record of their initial adjudication. If the record includes any information that threatens national security or any individual’s safety, only as much information as can be safely included should be, or the information should be included without disclosing its source.¹⁴⁶ An applicant should have the right to submit evidence and testimony demonstrating that the initial decision was made on an incorrect basis or that the initial interview was procedurally flawed. The reconsidera-

141. 8 U.S.C.A. § 1252 (Westlaw through 2013 P.L. 113-31); 8 C.F.R. §§ 1003.1(d), 1003.1(h) (Westlaw through 2013).

142. 8 C.F.R. § 207.4 (Westlaw through 2013).

143. USCIS Ombudsman, *supra* note 43, at 7.

144. USCIS Ombudsman, *supra* note 43, at 11–12.

145. *Id.* at 12.

146. Required in immigration hearings, USCIS adjudications, and UNHCR RSDs. 8 C.F.R. § 1003.46 (Westlaw through 2013); U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 80, at § 10.2; PROCEDURAL STANDARDS, *supra* note 102, at §§ 2-2, 4-25.

tion of the applicant's case must be conducted by a new officer, as is the case in asylum interviews.¹⁴⁷

Providing refugee applicants with an opportunity to appeal may be seen as a needless waste of resources, and it would require a modification of, rather than simply an addition to, a current regulation. Yet, an appeal process will appropriately balance the interests of applicants and USRAP. First and foremost, the possibility of appeal and reversal increases the quality of initial decisions, "encouraging thoughtful deliberation at the initial hearing stage."¹⁴⁸ Second, this right to reconsideration will create limited additional expense, as it does not automatically trigger judicial review in an Article III court. This formal review may not be necessary to achieve the safeguards of a review process. An appeal should be provided as an additional, simple, and necessary safeguard that gives applicants the opportunity to demonstrate that their initial hearing was wrongly decided.

5. Pre-Screening of All Applicants

To ensure that all vulnerable refugees are given equal access to protection, all applicants should be screened prior to the refugee interview for particular vulnerabilities that would impact the process of adjudication.¹⁴⁹ UNHCR, prior to conducting RSDs, screens for individuals who are members of vulnerable groups such as victims of torture, women with special needs, and unaccompanied minors.¹⁵⁰ At the time an application is filed, all USRAP applicants should likewise be screened to ask if they fall into a particular category of vulnerable applicants and to allow applicants to express a preference as to the gender of the staff who will interview them.¹⁵¹ Some victims may feel uneasy or even experience trauma if they are asked to explain the basis of their refugee claim to men or to government officials, especially in a small and confined room.¹⁵² Applicants who fall into a category of special vulnerability should be interviewed expeditiously to determine whether their needs warrant accelerated processing or resettlement.

The federal government has already taken some steps to address the impact of trauma on refugee applications, including the aforementioned LGBTI manual, and the issuance of a 2011 presidential memorandum or-

147. Required in asylum interviews, removal proceedings, and UNHCR RSDs. 8 U.S.C.A. § 1252 (Westlaw through 2013 P.L. 113-31); PROCEDURAL STANDARDS, *supra* note 102, at § 7-1, 7.2.

148. Legomsky, *supra* note 73, at 640.

149. Required in UNHCR RSDs. PROCEDURAL STANDARDS, *supra* note 102, at § 1.

150. *Id.*, at §§ 1, 3.4.

151. Required in RAIO adjudications with LGBT applicants and UNHCR RSDs. RAIO Directorate, *supra* note 87, at 27.

152. Berg & Millbank, *supra* note 53, at 198; RAIO Directorate, *supra* note 87, at 41-42.

dering the Departments of State and Homeland Security to “enhance their ongoing efforts to ensure that LGBTI refugees and asylum seekers have equal access to protection and assistance, particularly in countries of first asylum.”¹⁵³ A policy requiring additional protection for LGBTI applicants so that they may have “equal access to protection” belies the fact that all victims of trauma may need additional procedural safeguards in order to have equal access to protection. Thus, measures recommended for LGBTI refugees should be available to all applicants, either as an automatic mechanism or when screening suggests that additional measures are necessary.

Applicants who have experienced trauma should be allowed to present evidence from a mental health counselor or psychiatrist documenting reasons for inconsistent or blurred memories.¹⁵⁴ This will help ensure that victims of trauma are not rejected based on the effects of experiences that demonstrate their need for protection. For each adult derivative applicant, staff should provide written material or a brief explanation that adults can apply individually.¹⁵⁵ This step ensures that adult applicants, who may suffer from domestic abuse or simply prefer to be resettled independently, are given the opportunity to make decisions independent from family members about their own resettlement process. These simple steps do not fall within the kinds of measures we might consider to be administrative due process, but they are vital to ensuring that survivors of traumatic experiences have equal access to protection.

6. Implementation with the Force of Law

Even the limited protections currently in place are implemented solely as agency policy. Given a change of agency leadership or a change in administration, these policies can be modified or abandoned wholesale with or without notice to current or future applicants.¹⁵⁶ By contrast, asylum procedures are implemented in basic form in the United States Code and in

153. Office of the Press Sec’y, *Presidential Memorandum—International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons*, THE WHITE HOUSE § 2 (Dec. 6, 2011), <http://www.whitehouse.gov/the-press-office/2011/12/06/presidential-memorandum-international-initiatives-advance-human-rights-l>.

154. Kenny, *supra* note 52 (discussing the importance of coordinating legal and psychosocial services in the asylum process).

155. Required in UNHCR RSDs. PROCEDURAL STANDARDS, *supra* note 102, at §§ 3:3–3:4.

156. See *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (“Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”).

greater detail in the Code of Federal Regulations.¹⁵⁷ Refugee admission procedures should also be laid out in statute and in regulations.

Requiring these procedural safeguards as law will bring several benefits. First, a clear congressional mandate expressing the need for process protections formally binds the agencies, which currently have no legal obligation binding them to comply with their own policies.¹⁵⁸ Second, given that current agency policy can be revoked at any time,¹⁵⁹ enactment as statute gives the safeguards greater permanence. Third, enactment and promulgation means that the procedural safeguards are a matter of public record and that interested parties can determine the current procedures and also remain informed of any changes to them.¹⁶⁰ Finally, as a secondary result, when applicants know what to expect in a proceeding, the applicant may be more likely to be able to participate fully in the adjudication without experiencing renewed trauma. For example, for an applicant whose refugee claim rests on traumatic events, assurance that the adjudicator will not force the applicant to discuss the assault in graphic detail, and that an attorney can accompany the applicant at the interview, might make the applicant more likely to raise the true grounds of her claim from the outset.¹⁶¹

D. Answering Objections

These procedures, when adopted together, will provide mutually reinforcing safeguards that protect the applicant from mistaken denial and further trauma, advance the humanitarian purpose of the program, and protect public resources expended through adjudication. Implementation of the recommended measures is likely to be resisted for a few reasons: on the grounds that no duty is owed to applicants, that greater leeway could risk admitting applicants who are national security risks, and that new checks would require greater resources.

157. See *supra* Part I.A.

158. Agencies generally have an obligation to comply with their own regulations. United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954). However, where agency policy does not carry the force of law, as with agency manuals, courts will decline to enforce 'regulatory estoppel.' Schweiker v. Hansen, 450 U.S. 785, 789 (1981)(contrasting with the holding of Morton v. Ruiz, 415 U.S. 199, 235 (1974) which stated that agencies must follow their own procedures "[w]here the rights of individuals are affected."). See Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own "Laws"*, 64 TEX. L. REV. 1, 77 (1985).

159. *Christensen*, 529 U.S. at 587.

160. 5 U.S.C.A. § 553 (Westlaw through 2013 P.L. 113-31).

161. Kenny, *supra* note 52, at 3 (stating that an attorney's presence and preparation can ease participation in an asylum interview).

First, it is true that, under U.S. and international law, the United States does not owe refugee applicants the opportunity to resettle,¹⁶² nor has the U.S. Constitution been interpreted to require due process in admissions proceedings. Yet, USRAP's organic statute clearly states a humanitarian objective, further necessitating safeguards to ensure that qualified individuals are not turned away and that all applicants are treated in a manner that accords with a humanitarian purpose. Thus, procedural safeguards are necessary even if nothing is owed to the applicants.

To the second objection, concern about admitting risky applicants, the adjudication process listed here is only one portion of the process of admitting applicants. In addition to the interview process, which adjudicates whether an applicant is qualified, a separate battery of security tests determines whether an applicant is a security risk.¹⁶³ These security screenings are so thorough that human rights groups have criticized USRAP over its extensive delays and rejections of refugee applicants.¹⁶⁴ While security questions may be raised during the interview process, the purpose of the interview is to verify that an applicant meets the refugee definition and needs to be resettled, not to determine whether an applicant is a security risk. If the interview were the only way for the program to identify security issues, then perhaps a more lenient interview policy would raise security concerns. However, the interview process is not intended to identify security issues and instituting additional procedural safeguards would likely enhance, rather than dampen, the fact-finding ability of the adjudicator.

Finally, the measures described above are unlikely to drain public resources. Allowing applicants to provide their own counsel is likely to streamline the application process and lead to better prepared applicants, actually reducing the costs of administering USRAP. Providing access to evidence and access to counsel during the interviews will enhance the accuracy and acceptability of initial decisions, and written reasons for denial will

162. Under a literal reading of 8 U.S.C.A. § 1157, it appears that the President, after required consultations with Congress, could set the number of refugees to be admitted at zero. State parties to the 1951 Refugee Convention are required to recognize refugees already within a country's border, not those outside their borders. *See* Convention Relating to the Status of Refugees, *supra* note 44. As indicated above, though, providing opportunities for resettlement promotes durable solutions in keeping with the overarching humanitarian purpose of the Convention. *See id.* at prmb.

163. *See* UNHCR, THE EFFECTS OF NEW U.S. SECURITY MEASURES FOR REFUGEES 1 (2012), available at <http://intranet.hias.org/uploaded/file/2c9dcb26c594d0ccdf9554741afd1304.pdf>.

164. *How to Repair the U.S. Asylum and Refugee Resettlement Systems: Blueprint for the Next Administration*, HUM. RTS. FIRST 14 (Dec. 2012), http://www.humanrightsfirst.org/wp-content/uploads/pdf/asylum_blueprint.pdf.

sharpen the focus of appeals, thereby minimizing the time it takes to adjudicate them. An appeals process is likely to further promote careful decisions in initial applications. These measures, when implemented fully, will not only promote fairness to the applicant, they will also promote principled adjudications that reduce the need for appeals and reinterviews. The overall effect will be decreased costs.

CONCLUSION

No government program can meet its own goals perfectly, nor can any government adjudicatory system reach correct results every time. For this reason, procedural safeguards must be put in place to ensure that adjudications approximate the correct outcomes to the greatest extent possible. This is equally true for the administration of USRAP. Some necessary measures are already in place as a matter of agency policy rather than as federal statute or regulation. That these measures have already been implemented is encouraging, and also supports the notion that procedural protections are appropriate in the refugee admissions process.

In light of the humanitarian nature of USRAP, as well as the universal need for accurate, efficient, and acceptable outcomes in government adjudications, the current, inadequate procedural safeguards must be enhanced. The stated humanitarian objective of USRAP's organic statute (8 U.S.C. § 1157) demands a consideration of the adjudication's impact on the applicant, who should be assumed to have experienced traumatic events. Implementation of adequate procedural safeguards will benefit applicants and promote effective use of public resources used in adjudications. ❀