

DO NOT GIVE US YOUR TIRED, YOUR POOR: HOW THE AMERICAN SAFE ACT STIFLES A NATIONAL RESPONSE TO THE SYRIAN REFUGEE CRISIS

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I. INTRODUCTION

With 129 dead and 368 wounded,¹ November 13, 2015 easily claimed the unwanted title of France's bloodiest day since the end of World War II.² The next day, the Islamic State of Iraq and Syria,³ an Islamic extremist jihadist group, claimed responsibility for the coordinated series of shootings and suicide bombings.⁴ The precise reason and goal for the Paris attack is not readily apparent.⁵ Indeed, former U.S. State Department senior adviser for countering violent extremism, William McCants, posits several plausible theories, ranging from the specific—deterrence of France's bombing of ISIS-controlled areas of Syria—to the broad—to draw the world's ire and escalate conflict in the Middle East in order to bring about The End of Days.⁶

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¹ Mary Brophy Marcus, *Injuries From Paris Attacks Will Take Long to Heal*, CBS NEWS (Nov. 19, 2015, 7:20 AM), <http://www.cbsnews.com/news/injuries-from-paris-attacks-will-take-long-to-heal/>.

² Mariano Castillo, et. al, *Paris Suicide Bomber Identified; ISIS Claims Responsibility for 129 Dead*, CNN (Nov. 16, 2015, 12:30 PM), <http://www.cnn.com/2015/11/14/world/paris-attacks/index.html>.

³ This article refers to the group by the name the “Islamic State of Iraq and Syria” and the corresponding acronym “ISIS.” The author notes that many United States agencies—as well as the Associated Press—have also referred to the group as the Islamic State of Iraq and the Levant or “ISIL.” Beyond internal consistency, no implication is to be drawn from the author's use of one name and acronym over the other. For more information on the different translation of the group's name, see Isaan Tharoor, *ISIS or ISIL? The Debate Over What to Call Iraq's Terror Group*, WASH. POST: WORLDVIEWS, (June 18, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/06/18/isis-or-isil-the-debate-over-what-to-call-iraqs-terror-group/>.

⁴ Castillo, *supra* note 2.

⁵ See William McCants, *Why Did ISIS Attack Paris?*, ATLANTIC (Nov. 16, 2015), <http://www.theatlantic.com/international/archive/2015/11/isis-paris-attack-why/416277/>.

⁶ See *id.*

While the motivations of ISIS remain opaque, reactions to the terrorist attacks have been aired publically. French president, Francois Hollande, promised that France's military response would be both "pitiless" and "merciless toward the barbarians of Islamic State group."⁷ Additionally, Hollande reaffirmed France's "humanitarian duty" to harboring those fleeing a common enemy, and announced that France would continue to accept Syrian refugees, with hopes of accommodating as many as 30,000 over the next two years.⁸

The rest of the world responded too. For instance, Canada reaffirmed its 2014 commitment to accepting Syrian refugees,⁹ and ultimately accommodated roughly 10,000 refugees by the end of 2015.¹⁰ Similarly, President Barack Obama announced that the United States would remain "steadfastly committed" to his earlier promise¹¹ of accepting and resettling at least 10,000 Syrian refugees in the 2016 fiscal year.¹²

However, the responses of the states and the Legislative Branch stand in stark contrast to the open arms of the President. Thirty governors have indicated they will not permit refugees to resettle in their states.¹³ The congressional reaction contained a

⁷ Hannah Al-Othman, *Paris Attacks: Islamic State Claims Responsibility as French President Francois Hollande Promises "Merciless" Revenge*, EVENING STANDARD (Nov. 14, 2015), <http://www.standard.co.uk/news/world/paris-attacks-french-president-francois-hollande-says-shootings-were-an-act-of-war-by-islamic-state-a3114476.html>.

⁸ Ishaan Tharoor, *France Says It Will Take 30,000 Syrian Refugees, While U.S. Republicans Would Turn Them Away*, WASH. POST: WORLDVIEWS, (Nov. 18, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/11/18/france-says-it-will-take-30000-syrian-refugees-while-u-s-republicans-would-turn-them-away/>.

⁹ See Michael Martinez, *Syrian Refugees: Which Countries Welcome Them, Which Ones Don't*, CNN (Sept. 10, 2015, 5:22 PM), <http://www.cnn.com/2015/09/09/world/welcome-syrian-refugees-countries/>.

¹⁰ See Lee Berthiaume & Mark Kennedy, *Liberals to Resettle 10,000 Syrian Refugees By Year-End, 15,000 Fewer Than Election Promise*, NAT'L POST (Nov. 24, 2015), <http://news.nationalpost.com/news/canada/liberals-to-resettle-10000-syrian-refugees-by-year-end-15000-fewer-than-election-promise>.

¹¹ Alex Altman, *This Is How the Syrian Refugee Screening Process Works*, TIME (Nov. 17, 2015), <http://time.com/4116619/syrian-refugees-screening-process/>.

¹² Amy Pope, *How We're Welcoming Syrian Refugees While Ensuring Our Safety*, WHITE HOUSE: WHAT'S HAPPENING (Nov. 17, 2015, 3:16 PM), <https://www.whitehouse.gov/blog/2015/11/17/how-were-welcoming-syrian-refugees>.

¹³ Lauren Gambino, et al., *Syrian Refugees in America: Separating Fact From Fiction in the Debate*, GUARDIAN (Nov. 19, 2015, 2:21 PM),

similar message: less than a week after the attack, the House of Representatives passed the provocatively titled “American Security Against Foreign Enemies Act of 2015” (also known as the American SAFE Act of 2015).¹⁴ The American SAFE Act would require several government agencies to undertake additional investigative efforts before any individual Syrian resident may be admitted to the United States as a refugee.¹⁵

This article discusses the current United States policy on accepting Syrian refugees and analyzes whether that policy can be squared with the pending American SAFE Act. This article concludes that the American SAFE Act, if signed into law, would virtually eviscerate the United States’ ability to accept Syrian refugees, entirely frustrating the current policy of the Executive Branch.

II. LEGAL BACKGROUND

A. *The Syrian Refugee Crisis*

At the outset, it is worth mentioning that the unrest, civil war, tremendous bloodshed, and influx of Syrian refugees are all the result of local and global histories too complex to be discussed in due detail within this article.¹⁶ However, the discrete genesis of the current Syrian refugee crisis can be traced back about five years.¹⁷ In March 2011, several teenagers were arrested and tortured after painting “revolutionary slogans” and messages on a school wall in Deraa, Syria.¹⁸ In response, pro-democracy protests “erupted” in the city;¹⁹ government security forces ultimately used lethal force against the demonstrators, killing three.²⁰ The following months were marked by nationwide unrest: by July of the same year, “hundreds of thousands were taking to the streets

<http://www.theguardian.com/us-news/2015/nov/19/syrian-refugees-in-america-fact-from-fiction-congress>.

¹⁴ See American SAFE Act of 2015, H.R. 4038, 114th Cong. (2015).

¹⁵ See *id.*

¹⁶ For a more robust history of the Syrian conflict, see generally REESE ERLICH, *INSIDE SYRIA: THE BACKSTORY OF THEIR CIVIL WAR AND WHAT THE WORLD CAN EXPECT* (2014); MICHAEL WEISS & HASSAN HASSAN, *ISIS: INSIDE THE ARMY OF TERROR* (2015).

¹⁷ See Lucy Rodgers, et al., *Syria: The Story of the Conflict*, BBC (Mar. 11, 2016), <http://www.bbc.com/news/world-middle-east-26116868>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Middle East Unrest: Three Killed at Protest in Syria*, BBC (Mar. 18, 2011), <http://www.bbc.com/news/world-middle-east-12791738>.

across the country” to demand Syrian President Bashar al-Assad’s resignation.²¹ Just as they had in Deraa, protests spread across the country and increasing amounts of military forces were employed to quell the protestors.²² As the violence and oppression against demonstrators grew more severe, groups opposing al-Assad’s rule banded together, adopted a more formal identity, and armed themselves in an effort both to defend their homes and to proactively expel military forces from local areas.²³

Conflict between the Syrian military and rebel forces then escalated rapidly into a full-blown civil war that spanned the country.²⁴ By June 2013, the United Nations estimated that over 90,000 Syrians had been killed.²⁵ By 2015, a confluence of new, dangerous dimensions—many far beyond the conflict’s binary pro/anti al-Assad origins—clashed to produce a death toll exceeding 250,000 lives.²⁶

Perhaps one inevitable factor was the injection of money, arms, and manpower by nearby countries, transforming the internal conflict into a proxy war involving several world powers.²⁷ For example, while Iran, Russia, and Lebanon all offered support to the al-Assad regime, the governments of nearby Turkey, Saudi Arabia, Qatar, and Jordan supported the Syrian rebels.²⁸ As the civil war raged on, an entirely new threat emerged from the years of chaos: the Islamic State of Iraq and Syria.²⁹ The group, also commonly known as “ISIS” or the “Islamic State” is a jihadist group operating within Iraq and Syria with the stated mission of “eradicat[ing] obstacles to restoring God’s rule on Earth.”³⁰ To effectuate these goals, ISIS has consistently employed extreme, brutal tactics they believe to be mandated by their religion; these infamously include the use of [b]eheadings, crucifixions and mass shootings to terrorize their enemies.³¹ By mid-2014, ISIS had taken control of large areas of Syria.³²

²¹ Rodgers, et al., *supra* note 17.

²² *Id.*

²³ *See id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See id.*

²⁷ *See* Rodgers, et al., *supra* note 17.

²⁸ *Id.*

²⁹ *See id.*

³⁰ *What is 'Islamic State'?*, BBC (Dec. 2, 2015), <http://www.bbc.com/news/world-middle-east-29052144>.

³¹ *Id.*

³² *Id.*

As the complex, multifaceted conflict rages on, the role of the civilian population of Syria seems to be relegated to tragedy and collateral damage.³³ Both sides of conflict have stifled what little international aid is available for Syrians still residing in their country.³⁴ For those who have not yet fled, staying in Syria remains an increasingly difficult and dangerous choice.³⁵

B. Current Executive Branch Policy on Syrian Refugees

“Syrian refugees, by definition under U.S. and international law, are those persons who fled Syria in the face of a well-founded fear of prosecution by the Islamic State group . . . on account of their political opinions [or] religion . . . and are unable to return due to such a fear of persecution.”³⁶ This group consists of approximately nine million people, many of whom are children, who have left their country since 2011.³⁷

The public image the Executive Branch of the United States has projected is that the country is one that welcomes this vulnerable population with open arms.³⁸ Amy Pope, the Deputy Assistant to the President for Homeland Security, days after the Paris attacks, stressed that “slam[ming] the door in [the refugees] faces” would be “un-American.”³⁹ That same day, the official White House Facebook page debuted the supportive social media hashtag “#RefugeesWelcome.”⁴⁰

³³ See Elizabeth Dickinson, *After 4 Years of War, Why Are So Many Fleeing Syria Now? For Many, Support Just Ran Out*, HUFFINGTON POST: THE WORLD POST (Oct. 22, 2015, 9:38 AM), http://www.huffingtonpost.com/elizabeth-dickinson/fleeing-syria-now-support-ran-out_b_8352146.html.

³⁴ See Rodgers, et al., *supra* note 17.

³⁵ See Dickinson, *supra* note 33.

³⁶ Christian Sundquist, *Op-Ed: Despite Dark History of Exclusion, Laws Demand U.S. Accepts Refugees*, NAT'L L.J., Nov. 30, 2015, <http://www.nationallawjournal.com/id=1202743430576/OpEd-Despite-Dark-History-of-Exclusion-Laws-Demand-US-Accepts-Refugees>.

³⁷ Janell Ross, *The Politics of the Syrian Refugee Crisis, Explained*, WASH. POST: THE FIX (Sept. 11, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/09/11/the-politics-of-the-syrian-refugee-crisis-explained/>.

³⁸ See Pope, *supra* note 12.

³⁹ *Id.*

⁴⁰ See The White House, FACEBOOK (Nov. 17, 2015), <https://www.facebook.com/WhiteHouse/videos/vb.63811549237/10153904826504238/?type=2&theater>.

However, acceptance of Syrian refugees into the United States did not begin after the Paris attacks.⁴¹ Indeed, since the initiation of the Syrian Civil War in 2011, over 2,200 Syrian refugees have been successfully resettled in the United States.⁴² Even before the November 13 attacks in Paris, the Obama administration announced its commitment to resettling 10,000 additional refugees from Syria within the 2016 fiscal year—and the Administration has not backed down from this promise in light of the tragedy.⁴³

While President Obama and the Executive Branch remain steadfast in increasing the role of the United States as a safe haven for refugees, the state governments and Congress have both vocally opposed the President's ideas.⁴⁴ The events in Paris have been surrounded by unclear circumstances and unanswered questions about whether the terrorists used the country's refugee program to enter France.⁴⁵ Fear of similar attacks occurring within the United States quickly resulted in a partisan split on the prudence of President Obama's refugee program.⁴⁶

C. Reaction of the States

As the Executive Branch's mission is to continue accepting Syrian refugees with relatively open arms; however, Congress and the state governments do not share this position. Indeed, this

⁴¹ See Press Release, U.S. Department of State, Myths and Facts: Resettling Syrian Refugees (Nov. 25, 2015), <http://www.state.gov/r/pa/prs/ps/2015/11/250005.htm>.

⁴² *Id.*

⁴³ Pope, *supra* note 12; see also Gardiner Harris, et al., *Obama Increases Number of Syrian Refugees for U.S. Resettlement to 10,000*, N.Y. TIMES, Sept. 10, 2015, <http://www.nytimes.com/2015/09/11/world/middleeast/obama-directs-administration-to-accept-10000-syrian-refugees.html>.

⁴⁴ See discussion *infra* Part II-C.

⁴⁵ Compare Christiane Amanpour & Thom Patterson, *Passport Linked to Terrorist Complicates Syrian Refugee Crisis*, CNN (Nov. 15, 2015, 12:24 PM), <http://www.cnn.com/2015/11/15/europe/paris-attacks-passports/> (implying the terrorists entered the country with fake passports), with Ishaan Tharoor, *Were Syrian Refugees Involved in the Paris Attacks? What We Know and Don't Know*, WASH. POST: WORLD VIEWS, (November 17, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/11/17/were-syrian-refugees-involved-in-the-paris-attacks-what-we-know-and-dont-know/> (suggesting the fake passport may have been planted by ISIS to create a panic).

⁴⁶ See Theodore Schleifer & Eugene Scott, *2016 Hopefuls Express Alarm Over Refugees After Paris Attacks*, CNN (November 14, 2015, 5:40 PM), <http://www.cnn.com/2015/11/13/politics/paris-terror-attacks-2016-candidates/index.html>.

election has provided an abundance of candid insight into the motivations of these two groups on this heated issue.

More than half of the United States governors have stated that they will not allow Syrian refugees to relocate into their states.⁴⁷ These politicians include Ohio Governor, John Kasich, who personally contacted President Obama to request that no refugees be relocated in Ohio, and Louisiana Governor, Bobby Jindal, who signed an executive order preventing Louisiana resettlement.⁴⁸ New Jersey Governor, Chris Christie, did not comment on state-level policy, but notoriously quipped that if elected president, he would deny entry of all Syrian refugees to the United States, even “orphans under age 5.”⁴⁹

In one sense, these threats are hollow. United States governors have no authority over the admission of refugees into the United States.⁵⁰ However, these governors certainly do have tools to disrupt and discourage refugee resettlement within their states.⁵¹ Most frequently, this involves diverting funding away from programs that provide aid to refugees, including language classes and job training.⁵² Illustrating this hostility, Governor Christie claimed that the seven members of a refugee family that settled in New Jersey “shouldn’t have come in the first place.”⁵³ Even in the absence of formal executive action, governors like Christie remain able to send an unwelcoming message—standing in stark contrast to the actions of other world leaders, such as the Canadian Prime Minister, Justin Trudeau, who personally greeted 163 Syrian refugees as they arrived in Toronto in December.⁵⁴

⁴⁷ Gambino, *supra* note 13.

⁴⁸ Claude Brodesser-Akner, *Christie: No Syrian Refugees, Not Even ‘Orphans Under Age 5’*, NJ.COM (Nov. 17, 2015, 5:03 PM), http://www.nj.com/politics/index.ssf/2015/11/christie_reverses_earlier_call_to_accept_syrian_re_1.html.

⁴⁹ *Id.*

⁵⁰ Gambino, *supra* note 13. Indeed, entry of refugees into the United States is the sole province of the federal government. *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Jim Dwyer, *Pint-Size Diplomacy at Play in U.N. Ambassador’s Penthouse*, N.Y. TIMES, Dec. 29, 2015, <http://www.nytimes.com/2015/12/30/nyregion/un-ambassadors-good-will-served-over-pasta-and-salad.html>.

⁵⁴ *See Id.*

D. Reaction of Congress

The Congressional response came as swiftly as the deluge of comments and rhetoric from the presidential hopefuls. On November 19, 2015, less than a week after the Paris attacks, the American SAFE Act was introduced in the House of Representatives.⁵⁵ The American SAFE Act generally requires supplemental certifications and investigations to be completed before any Syrian refugee can be admitted to the United States.⁵⁶ The bill passed easily, enjoying both near unanimous Republican support supplemented by the votes of forty-seven House Democrats; the final vote was 289 to 137.⁵⁷ President Obama has promised to veto the bill despite the looming threat of a veto-proof majority in the House of Representatives.⁵⁸

At the time of writing, the American SAFE Act has not yet been taken up in the Senate. Senate Minority Leader Harry Reid intimated that Senate Democrats would likely “use the power of their 46 seats to block the House bill from getting the 60 votes it would need to clear procedural hurdles in the Senate.”⁵⁹ While the President has shown no intention of going back on his promise to welcome Syrian refugees, a repeat of events in the House of Representatives⁶⁰ would all but assure that the American SAFE Act is signed into law.

III. ANALYSIS

A. Current Screening Procedures

Before delving into the SAFE Act’s text, it is essential to know the procedures it is intended to supplement. Generally, the White House stands by the idea that all refugees, including those from Syria, “undergo more rigorous screening than anyone else . . .

⁵⁵ Deirdre Walsh & Ted Barrett, *House Passes Bill That Could Limit Syrian Refugees*, CNN (Nov. 19, 2015, 8:43 PM), <http://www.cnn.com/2015/11/19/politics/house-democrats-refugee-hearings-obama/>.

⁵⁶ See American SAFE Act of 2015, H.R. 4038, 114th Cong. (2015).

⁵⁷ Ben Jacobs, *House Passes Bill Adding Barriers For Syrian and Iraqi Refugees Entering US*, GUARDIAN (Nov. 19, 2015, 1:54 PM), <http://www.theguardian.com/us-news/2015/nov/19/house-passes-bill-adding-barriers-for-syrian-and-iraqi-refugees-to-us>.

⁵⁸ See Walsh & Barrett, *supra* note 55.

⁵⁹ *Id.* Specifically, a sixty-vote “super-majority” is needed for a bill to be considered in the Senate under Senate rules. Jacobs, *supra* note 55.

⁶⁰ See Walsh and Barrett, *supra* note 55.

allow[ed] into the United States.”⁶¹ Due to the current political climate, potential Syrian refugees are subjected to additional screening measures.⁶² This enhanced scrutiny remains in place even though none of the “2,234 Syrian refugees admitted to the United States since October 1, 2010 . . . have been arrested or removed on terrorism charges.”⁶³

The screening process is divided into several discrete stages handled by various groups and agencies, with multiple opportunities for a pending refugee to be rejected from resettlement in the United States.⁶⁴ The first stage requires refugees to identify themselves and file an application with the United Nations Refugee Agency (“UNHCR”).⁶⁵ At this stage, UNHCR uses this data both to remove obvious threats—such as former military combatants—and to determine which applicants are most in need of resettlement in the United States.⁶⁶ Documentation regarding applicants’ “biodata” (such as name, address, and date of birth) is reviewed for all applicants.⁶⁷ For Syrians, the Department of Homeland Security conducts further “biological screening,” including fingerprinting and scans of the iris.⁶⁸ This first stage removes nearly ninety-nine percent of applicants from the pool⁶⁹ and may include “survivors of torture, victims of sexual violence, targets of political persecution, the medically needy, families with multiple children and a female head of household.”⁷⁰ To date, less than two percent of all admitted refugees have been single men of “combat age.”⁷¹

⁶¹ Amy Pope, *Infographic: The Screening Process for Refugee Entry into the United States*, WHITE HOUSE: WHAT’S HAPPENING (Nov. 20, 2015, 7:09 PM), <https://www.whitehouse.gov/blog/2015/11/20/infographic-screening-process-refugee-entry-united-states/>.

⁶² Altman, *supra* note 11.

⁶³ Press Release, U.S. Department of State, *supra* note 41. More broadly, the United States has admitted approximately 750,000 refugees via similar screening processes since September 11, 2001. Altman, *supra* note 11. Though no individual of this group has ever been arrested on domestic terrorism charges, two individuals in Kentucky were charged with aiding the al-Qaeda terrorist group. *Id.* These individuals constitute 0.0000027% of this refugee population to date.

⁶⁴ See Pope, *supra* note 61.

⁶⁵ *Id.*

⁶⁶ Altman, *supra* note 11.

⁶⁷ Pope, *supra* note 61.

⁶⁸ Altman, *supra* note 11.

⁶⁹ See Pope, *supra* note 61.

⁷⁰ Altman, *supra* note 11.

⁷¹ *Id.*

All of the collected data on a resettlement candidate is then sent to several United States security agencies including the National Counterterrorism Center, the Federal Bureau of Investigation (“FBI”), and the State Department, each of which conducts a separate investigation.⁷² For example, the United States Citizenship and Immigration Services (“USCIS”) (which is itself part of the Department of Homeland Security⁷³) conducts in-person interviews with all candidates before referring potentially-fraudulent cases to the Fraud Detection and National Security Directorate of USCIS, while the security agencies compare collected biometric data with their individual databases.⁷⁴

The process typically takes between eighteen and twenty-four months.⁷⁵ During this time, applications continue to be checked and updated to ensure that “new, relevant terrorism information has not come to light.”⁷⁶ Candidates who have passed the background screening also undergo medical examinations, cultural orientation classes, and are matched with a suitable location within the United States based on familial or medical needs.⁷⁷ The International Organization for Migration then organizes refugees’ travel to the United States.⁷⁸ Before actually crossing the border, refugees are screened a final time by the National Targeting Center-Passenger (“NTC-P”) Office of the United States Customs and Border Protection.⁷⁹ After arriving in the United States, refugees must apply for a green card within a year of arrival during which additional screening will occur.⁸⁰

B. The American SAFE Act

Compared with the lengthy, labor-intensive procedures already in place for screening Syrian refugees, the American SAFE

⁷² See Pope, *supra* note 61.

⁷³ For a list of all offices within the Department of Homeland Security, see U.S. Department of Homeland Security, Operational and Support Components (Feb. 29, 2016), <http://www.dhs.gov/components-directorates-and-offices/>.

⁷⁴ See Pope, *supra* note 61.

⁷⁵ Altman, *supra* note 11.

⁷⁶ Pope, *supra* note 61.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* NTC-P is responsible for conducting “field-level” anti-terrorism efforts and uses biometric data to vet international travelers (including refugees) for terrorism-related alerts. *Cargo and Person Screening*, INFORMATION SHARING ENVIRONMENT, <https://www.ise.gov/cargo-and-person-screening> (last visited Apr. 3, 2016).

⁸⁰ Pope, *supra* note 61.

Act is relatively short.⁸¹ Its primary function is to add an additional layer of screening and certification on top of the preexisting screening process.

Section 2(a) of the bill speaks directly to the background investigations currently performed.⁸² The language contemplates the preexisting screening performed by the Secretary of Homeland Security⁸³ and requires that the Director of the FBI take

⁸¹ The relevant portions of the bill's text are reproduced below:

(a) **BACKGROUND INVESTIGATION.** In addition to the screening conducted by the Secretary of Homeland Security, the Director of the Federal Bureau of Investigation shall take all actions necessary to ensure that each covered alien receives a thorough background investigation prior to admission as a refugee. A covered alien may not be admitted as a refugee until the Director of the Federal Bureau of Investigation certifies to the Secretary of Homeland Security and the Director of National Intelligence that each covered alien has received a background investigation that is sufficient to determine whether the covered alien is a threat to the security of the United States.

(b) **CERTIFICATION BY UNANIMOUS CONCURRENCE.** A covered alien may only be admitted to the United States after the Secretary of Homeland Security, with the unanimous concurrence of the Director of the Federal Bureau of Investigation and the Director of National Intelligence, certifies to the appropriate Congressional Committees that the covered alien is not a threat to the security of the United States.

....

(e) **DEFINITIONS.** In this Act:

(1) **COVERED ALIEN.**

The term "covered alien" means any alien applying for admission to the United States as a refugee who:

(A) is a national or resident of Iraq or Syria;

(B) has no nationality and whose last habitual residence was in Iraq or Syria; or

(C) has been present in Iraq or Syria at any time on or after March 1, 2011.

American SAFE Act of 2015, H.R. 4038, 114th Cong. (2015)

⁸² See H.R. 4038 § 2(a).

⁸³ See discussion *infra* Part II-B.

additional action to ensure all “covered aliens”⁸⁴ applying for refugee status have been investigated thoroughly.⁸⁵ The FBI director must then personally certify to the Secretary of Homeland Security and the Director of National Intelligence that each individual refugee has received “a background investigation that is sufficient to determine whether the covered alien is a threat to the security of the United States.”⁸⁶

Once this initial certification is made, the American SAFE Act then requires the Secretary of Homeland Security and the Director of National Intelligence to unanimously concur with the FBI director’s earlier certification that the refugee in question is not a security threat.⁸⁷ This certification is made to “the appropriate Congressional Committees.”⁸⁸

Current refugee screening procedure involves many discrete United States agencies completing independent investigations, but all having the power to reject a refugee.⁸⁹ The procedures are intricate, lengthy, and constant.⁹⁰ The thrust of the American SAFE Act is to demand that high-ranking individuals within each agency take a personal stake in each and every refugee case. As the number of cases is set to increase five-fold in the 2016 fiscal year,⁹¹ the burden would be enormous.

Key figures implicated by the bill, like James Comey, Director of the FBI, were quick to respond.⁹² Comey explained that despite the language of the American SAFE Act, the practical effect of requiring additional scrutiny would make it “impossible” for the United States to accept Syrian refugees.⁹³ Jeh Johnson, the Secretary of the Department of Homeland Security, would also be saddled with additional obligations if the American SAFE Act were passed and spoke out against the legislation: “This bill . . . is

⁸⁴ A “covered alien” is defined as any Syrian and Iraqi national, former resident of those two countries, as well as any person present in either country after March 2, 2011. H.R. 4038 § 2(e)(1).

⁸⁵ H.R. 4038 § 2(a).

⁸⁶ *Id.*

⁸⁷ H.R. 4038 § 2(b).

⁸⁸ *Id.* The “appropriate Congressional Committees” refers to twelve committees, six from the House of Representatives and six from the Senate. *See* H.R. 4038 § 2(e)(2)(A)–(L).

⁸⁹ *See* Pope, *supra* note 61; *see also* discussion *supra* Part III-B.

⁹⁰ *See generally* Pope, *supra* note 61.

⁹¹ *See* Altman, *supra* note 11.

⁹² *See* Evan Perez, *FBI Director James Comey Balks at Refugee Legislation*, CNN (Nov. 19, 2015, 1:51 PM), <http://www.cnn.com/2015/11/19/politics/fbi-director-james-comey-refugee-legislation/>.

⁹³ *See id.*

a bad bill because it seeks to micromanage the process in a way that is counter productive to national security . . . and the overall ability to focus on Homeland Security.”⁹⁴

Despite the bill’s name, any actual safety benefit conferred on the American people by the American SAFE Act is suspect. During the American SAFE Act congressional debates, Charles Albert “Dutch” Ruppertsberger, the United States Representative for Maryland’s Second District and former Ranking Member of the House Permanent Select Committee on Intelligence, was highly skeptical of any benefits the American SAFE Act would confer on the American people.⁹⁵ Specifically, Congressman Ruppertsberger highlighted that the need for would-be terrorists to enter the United States as refugees is obviated by “far easier” ways of legal entry, including tourist visas and visa waiver programs.⁹⁶ Further, the limited scope of the American SAFE Act⁹⁷ excludes countries like Yemen, Nigeria, or Afghanistan, where terrorist networks just as dangerous as ISIS are known to be active.⁹⁸

All things considered, then, the practical effect of the American SAFE Act seems to exist only to stymie resettlement of refugees from very particular areas of the world. Speaking in opposition to the bill, Congresswoman Lucille Roybal-Allard suggested that the bill works solely to “effectively shut[] down the refugee resettlement program for Syrian . . . nationals . . . until a new vetting program is established.”⁹⁹ However, given the current program’s success rate¹⁰⁰ the legislation’s only plausible motive is less about function and more about fear and exclusion.

Commentators have noted that the United States’s long history of welcoming foreigners is matched by a history of xenophobic exclusion under the name of national security.¹⁰¹ Oftentimes, those excluded are among the most vulnerable. For example, during World War II, a majority of Americans opposed

⁹⁴ *Id.* (internal quotations omitted).

⁹⁵ *See* 161 CONG. REC. E1672 (daily ed. Nov. 30, 2015) (statement of Rep. Ruppertsberger).

⁹⁶ *Id.*

⁹⁷ Only refugees, or recent visitors, of Iraq and Syria are covered by the Act. *See* American SAFE Act of 2015, H.R. 4038, 114th Cong. (2015).

⁹⁸ 161 CONG. REC. E. 1672 (daily ed. Nov. 30, 2015) (statement of Rep. Ruppertsberger).

⁹⁹ 161 CONG. REC. E1672 (daily ed. Nov. 30, 2015) (statement of Rep. Roybal-Allard).

¹⁰⁰ *See supra* text accompanying note 63.

¹⁰¹ Sundquist, *supra* note 36.

resettlement of Jewish refugees.¹⁰² When the facially neutral language of the Act is duly considered and explored, it is clear this regrettable, misguided motivation has surfaced yet again, with the American SAFE Act poised to join these chapters of exclusion.

IV. CONCLUSION

The Syrian Civil War is a complex conflict with complex consequences, and the events that occurred in Paris, France on November 13, 2015 were indisputably horrific. The world may never know whether the ISIS members who spilled so much innocent blood onto the Parisian streets did so after entering France under the guise of refugee status. Regardless of the answer to that question, there is nothing wrong with considering additional scrutiny of those who seek to enter the United States. But of all the options, the American SAFE Act of 2015 should not be the solution, for it is hardly a solution. The interests of national security are only marginally advanced by a law that is prejudiced and unworkable by design. At a time when the United States should be voting to protect those most vulnerable, passage of the American SAFE Act would instead be a symbolic vote against them.

Inscribed on a plaque at the base of the Statute of Liberty is an excerpt from American poet Emma Lazarus's sonnet "The New Colossus." It reads: "Give me your tired, your poor / Your huddled masses yearning to breathe free, / The wretched refuse of your teeming shore. / Send these, the homeless, tempest-tossed, to me: / I lift my lamp beside the golden door."¹⁰³ The American SAFE Act is not only misguided and mean-spirited; it is a blunt instrument that slams that "golden door" in the face of those who most desperately need to cross its threshold.

¹⁰² *Id.*

¹⁰³ For access to this poem, see EMMA LAZARUS: SELECTED POEMS AND OTHER WRITINGS (Gregory Eiselein, ed. 2002).