

## The Flawed Implementation of the International Religious Freedom Act of 1998: A European Perspective

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### I. INTRODUCTION: UNITED STATES FOREIGN POLICY AND RELIGIOUS FREEDOM

Religious freedom has always been at the core of American life and public policy. As the first freedom enumerated in the Bill of Rights, religious freedom is a cornerstone of American liberty.<sup>1</sup> Due to the importance of this liberty, religion has had a constant presence in U.S. foreign policy debates for the last fifty years.<sup>2</sup> Just before the Second World War, President Franklin D. Roosevelt stressed the importance of religious liberty for all and identified guaranteeing this freedom as a compelling reason for Americans to join the struggle for freedom in Europe.<sup>3</sup> Many of the United States' concepts of religious freedom are also reflected in international law.<sup>4</sup> Although

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1. See Fact Sheet, Office of International Religious Freedom, Bureau of Democracy, Human Rights and Labor (April 16, 2001), <http://www.state.gov/g/drl/irf/fs/2298.htm>.

2. See Leo P. Ribuffo, *Religion in the History of U.S. Foreign Policy*, in *THE INFLUENCE OF FAITH: RELIGIOUS GROUPS & U.S. FOREIGN POLICY* 1–27 (Eliot Abrams ed., 2001) (explaining the interaction between religion and foreign relations in the United States).

3. See M.E. Parmly, Religious Freedom Across the Atlantic: Developing the Habit of Cooperation (April 26, 2001), in *REMARKS AT THE INSTITUTE OF RELIGION AND PUBLIC POLICY'S CONFERENCE ON TRANSATLANTIC CONVERSATIONS ON RELIGIOUS COEXISTENCE*, available at <http://www.state.gov/g/drl/rls/rm/2001/2486.htm>.

4. The principle of religious freedom embedded in the U.S. Constitution has long been reflected in a body of *international* law that upholds freedom of thought, expression, and religion as inherent and inalienable human rights. The following are among these various international instruments securing as an inalienable right the freedom to exercise religious beliefs: Article 18 of the Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948); Article 18 of the International Covenant on Civil and Political Rights, G.A. Res. 2200A, at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, 999 U.N.T.S. 171 (1966); Article 9 of the

the United States has a relatively modest record of ratifying international human rights treaties, it not surprisingly ratified three key international documents relating to religious freedom.<sup>5</sup> The United States was also one of the original supporters of the resolution that created the Special Rapporteur of the Commission of Human Rights on the Elimination of all Forms of Intolerance and of Discrimination based on Religion and Belief.<sup>6</sup> Despite this apparent commitment to religious freedom, however, the United States' recent efforts to protect such freedom abroad have fallen short, as illustrated by the compromised and ultimately problematic implementation of the International Religious Freedom Act of 1998 (IRFA)<sup>7</sup>. While IRFA sets out to protect international religious freedom, its enforcement is undermined by the United States' other foreign policy interests, such as the war on terrorism, and a decidedly unilateral approach to the achievement of religious liberty around the globe.

This article contains five parts. Part II outlines the United States' foreign policy commitments to international religious freedom and details the precedents of IRFA. Part III analyzes IRFA's purpose and how it currently functions, describing each annual report since the first in 1999. The purpose of examining each report is to clearly

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European Convention on the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, Europ. T.S. 9 (Nov. 4, 1950); The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief, G.A. Res. 6/55, at 171, U.N. GAOR 36th Sess., Supp. No. 51, U.N. Doc. A/36/51 (Nov. 25, 1981); and the Final Act of the Conference on Security and Cooperation in Europe, Helsinki, (Aug. 1, 1975).

5. See Natasha Fain, *Human Rights Within the United States: The Erosion of Confidence*, 21 BERKELEY J. INT'L L. 607 (2003) (discussing the history of U.S. policy regarding human rights treaties). The three international documents ratified by the United States are the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief (DEIDRB). Further, the United States has supported efforts to advance religious freedom as a member of The Organization for Security and Co-operation in Europe (OSCE). The OSCE is the largest regional security organization in the world, with fifty-five participating States from Europe, Central Asia and North America. The OSCE began in 1975 as the Conference on Security and Cooperation in Europe (CSCE) and was created to serve as a multilateral forum for dialogue and negotiations between European nations. In 1992, the name and the degree of institutionalization changed from an *ad hoc* process (a conference) to an organization. The OSCE has developed several monitoring mechanisms to protect religious freedom. The United States was admitted into the OSCE on June 23, 1975.

6. See David Weissbrodt, *The Three Theme Special Rapporteurs of the UN Commission on Human Rights*, 80 AM. J. INT'L L. 685, 695 (1986).

7. International Religious Freedom Act of 1998, 22 U.S.C. §§ 6401–6581 (2000).

establish that actions taken under IRFA are triggered by the United States' strategic and/or economic interests that do not typically correspond to severe violations of religious freedom occurring abroad. Part IV builds on this analysis and discusses the major flaws of IRFA that critics have identified, focusing heavily on the tendency of the United States to act unilaterally in its desire to promote worldwide religious liberty. Part V concludes the article by suggesting changes to rectify the bias and flaws in IRFA, which changes would subsequently enable the United States to fulfill its laudable goal of furthering religious freedom around the world.

## II. BACKGROUND: THE ORIGINS OF IRFA AND ITS FRAMEWORK FOR U.S. INVOLVEMENT ABROAD

The Secretary of State's Advisory Committee on Religious Freedom Abroad was established in November 1996.<sup>8</sup> The advisory committee was empowered with responsibility to

call attention to problems of religious persecution and other violations of religious freedom, and religious intolerance abroad and advise on how to end them; and to provide information on how to bring about reconciliation in areas of conflict, especially conflicts where religion is a factor, and promote respect for human rights so that religious freedom can be fully enjoyed.<sup>9</sup>

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8. This does not mean that the United States ignored the international protection of religious freedom until that date. Since 1976, the U.S. State Department has produced the Country Reports on Human Rights Practices, which provide human rights information, including religious freedom, on 194 countries and territories. In fact, sections on religious liberty have been broadened to include greater detail on religious persecution, incorporating information gathered from a variety of sources such as religious groups, non-governmental organizations, and other reliable groups. *See* Advisory Committee on Religious Freedom Abroad, INTERIM REPORT TO THE SECRETARY OF STATE AND TO THE PRESIDENT OF THE UNITED STATES (1998), <http://www.usconsulate.org.hk/uscn/hr/1998/0123b.htm> [hereinafter INTERIM REPORT] (released by the Bureau of Democracy, Human Rights and Labor, Washington, D.C., on January 23, 1998). President Clinton strongly supported the initiative of creating an Advisory Committee on Religious Freedom Abroad and publicly affirmed his commitment to advance religious freedom as a U.S. foreign policy priority and as an issue of concern to his administration and to the American people. *See id.* at 32.

9. *See id.* Secretary of State Madeleine Albright, in her inaugural meeting with the Advisory Committee, stressed that the issue of religious freedom belongs in any comprehensive discussion of American foreign policy. She spoke of the urgency of "doing everything we can in our time to make sure that persecution everywhere is ended, because all of us have suffered from it and there are many more who might and will suffer from it if we do not work together." *Id.* at 3.

The advisory committee brought together twenty distinguished religious leaders and academics in an effort to address the diverse perspectives within the American religious community.<sup>10</sup> During its first year, the committee focused on defining specific issues regarding religious freedom that needed to be addressed, elicited input from a wide range of experts, and prepared an interim report that outlined needed policies to promote the protection of religious freedom around the world by the United States government and multilateral organizations.<sup>11</sup> According to the preliminary interim recommendations, one of the aims of U.S. foreign policy should be “to live up to the international standards of religious freedom” and to “promot[e] a broad international coalition of nations committed to the realization of religious freedom as an inseparable element of universal human rights.”<sup>12</sup> The interim report mentioned “a wide variety of policy tools [that could] be applied to promote religious freedom,” including “incentives [that could be used to] induce governments to modify their behavior” in accordance with the interim report’s policy suggestions.<sup>13</sup> The interim report, however, shied away from using negative inducements such as sanctions to induce appropriate government policies.<sup>14</sup> Many of these ideas were adopted with the later implementation of IRFA.

In 1996 the International Operations and Human Rights Subcommittee of the House of Representatives held hearings about

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10. *Id.* at Appendix One, Charter of the Department of State Advisory Committee on Religious Freedom Abroad, III.A.

11. According to the Bureau of Democracy, Human Rights, and Labor, Governmental . . . policies aimed at protecting and expanding religious freedom were governed by four general guidelines. First, religious freedom is a universal human right. It deserves attention in its own right and not simply as an adjunct to political issues. Second, policy makers should strive for effective, results-oriented policies. . . . Third, the reactions and concerns of the local victims who are meant to be assisted by proposed policies should be fully understood and taken into account. . . . Fourth, religious freedom is often best protected in the context of a broad range of human rights objectives. . . .

*Id.* at 16–18.

12. *Id.* at 18.

13. “Incentives can be as simple as diplomatic engagement or high-level visits or as complex as the provision of foreign assistance, trade and investment.” *Id.* at 18.

14. According to the INTERIM REPORT, “negative inducements or sanctions refers to a broad range of policies. The Committee has not yet had in-depth discussion on the use of sanctions to combat religious persecution. Because the term is so broad, it is not useful to make generalizations, favorable or unfavorable about sanctions.” *Id.* at 18–19.

the worldwide persecution of Christians and Jews.<sup>15</sup> Following the hearings, Congress adopted resolutions on the persecution of Christians and Baha'is in Iran.<sup>16</sup> The concern for the persecution of Christians continued to increase, however, and some members of Congress saw need for a law requiring the United States to act.<sup>17</sup> Virginia Congressman Frank Wolf and Pennsylvania Senator Arlen Specter, both Republicans, proposed the Freedom from Religious Persecution Act in May 1997.<sup>18</sup> At the same time, media attention detailing the persecution of Christians worldwide increased public support for the bill,<sup>19</sup> prompting an intense debate within the United States government and among religious groups, human rights organizations, and the public.<sup>20</sup> The most controversial provision of the Wolf-Specter bill was its requirement that the United States automatically impose sanctions on countries found to be in violation of international religious freedom. Many critics feared that such a provision would cause more harm than good.<sup>21</sup>

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15. See *Persecution of Christians Worldwide: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the H. Comm. on Int'l Relations*, 104th Cong. (1996).

16. See T. Jeremy Gunn, *A Preliminary Response to Criticisms of the International Religious Freedom Act*, 2000 BYU L. REV. 841, 842.

17. *Id.*

18. H.R. 2431, 105th Cong. (1997).

19. See KEVIN BOYLE & JULIET SHEEN, *FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT* (1997); PAUL MARSHALL, *THEIR BLOOD CRIES OUT: THE WORLDWIDE TRAGEDY OF MODERN CHRISTIANS WHO ARE DYING FOR THEIR FAITH* (1997); NINA SHEA, *IN THE LION'S DEN: A SHOCKING ACCOUNT OF PERSECUTION AND MARTYRDOM OF CHRISTIANS TODAY AND HOW WE SHOULD RESPOND* (1997); J. Goldberg, *Washington Discovers Christian Persecution*, N.Y. TIMES MAG., Dec. 21, 1997, at 46; L.J. Goodrich, *Congress Moves to Punish Religious Persecution*, CHRISTIAN SCI. MONITOR, Sept. 25, 1997, at 3.

20. For criticisms of the bill by human rights organizations, see the letter sent by Human Rights Watch, Physicians for Human Rights, Minnesota Advocates for Human Rights, Amnesty International/USA, the Robert F. Kennedy Center and the Jacob Blaustein Institute for the Advancement of Human Rights to Hon. Ben Gilman, Chairman, International Relations Committee. See 143 CONG. REC. E757, E1758 (Sept. 16, 1997). For criticisms of the bill by the National Council of the Churches of Christ in USA (NCCC), see the Letter to Congress on Legislation to address Religion Persecution from Oliver Thomas, NCCC Special Counsel, to Members of the House International Relations Committee, 143 CONG. REC. E1760, E1760-61 (daily ed. Sept. 16, 1997), available at <http://nccusa.org/assembly/letter.html>. On the other hand, religious groups that have endorsed the Wolf-Specter bill include Pat Robertson's Virginia-based Christian Coalition, the U.S. Catholic Conference, the Archdiocese of New York, the National Association of Evangelicals and the Southern Baptist Convention. See Darin W. Carlson, *Understanding Chinese-US Conflict over Freedom of Religion: The Wolf-Specter Freedom from Religious Persecution Acts of 1997 and 1998*, 1998 BYU L. REV. 563, 583.

21. One of the bill's main critics was John Shattuck, the Assistant Secretary of State for Democracy, Human Rights, and Labor. Shattuck saw the bill as "a blunt instrument that is

One opponent of the Wolf-Specter bill was Oklahoma Republican Senator Don Nickles, who feared that the required sanctions would lead to confrontations with countries found to be in violation of international religious freedom and that such confrontations could negatively impact indigenous Christians and Christian missionaries.<sup>22</sup> Consequently, Senator Nickles introduced his own bill that required an investigation and annual report on violations of religious freedom in each foreign country.<sup>23</sup>

After conducting hearings in late 1997, the House International Relations Committee worked for six months to revise the original Wolf-Specter bill. An amended version of the bill was introduced in 1998 as H.R. 2431.<sup>24</sup> This amended version passed the House on May 14, 1998 as the “Freedom from Religious Persecution Act of 1998” and was sent to the Senate. The Clinton Administration strongly opposed the proposed legislation because it believed the bill’s proposed mandatory sanctions would be counterproductive in convincing foreign governments to support religious freedom.<sup>25</sup> The administration echoed Senator Nickles’ previous concern that the sanctions would eventually lead to repercussions against minority religious groups.<sup>26</sup>

By the summer of 1998, supporters of the two bills had joined forces. Senator Nickles introduced a significantly revised version of the bill, which merged together the concepts reflected in his own previous bill and the concepts found in the Wolf-Specter bill. The

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more likely to harm, rather than aid, victims of religious persecution.” Donna Cassata, *Congress Enters Uncharted Territory with Bill on Religious Persecution*, 55 CONG. Q. WKLY. 2121, 2123. Shattuck stated that the administration feared reprisals against innocent civilians if sanctions were imposed under the legislation. *Id.*

22. Steven Wales, Comment, *Remembering the Persecuted: An Analysis of the International Religious Freedom Act*, 24 HOUS. J. INT’L L. 579, 589 (2002).

23. *Id.*

24. See T. Jeremy Gunn, *The United States and the Promotion of Freedom of Religion and Belief*, in FACILITATING FREEDOM OF RELIGION OR BELIEF 843 (2004).

25. H.R. 2431 was objectionable to the administration because it felt the bill would (1) impose automatic sanctions that could harm religious minorities and bilateral relations with allies, as well as limit presidential flexibility and raise questions regarding U.S. international obligations; (2) undermine U.S. policy to respect all human rights; (3) unravel the current refugees admissions program; and (4) create a confusing bureaucracy to promote freedom of religion. See H.R. 2431, 105th Cong. (1997).

26. *Id.*

Senate unanimously adopted this revised version on October 9, 1998 as the International Religious Freedom Act of 1998.<sup>27</sup>

The various provisions of IRFA reflect a combination of the views of religious liberty held by politicians, human rights organizations, businessmen, and religious groups. Most of the domestic political pressure to enact IRFA came from conservative Christian and evangelical groups concerned with the persecution of Christians in countries such as China, Vietnam, and Sudan.<sup>28</sup> However, this issue of religious persecution divided conservatives: “social conservatives” wanted to protect global religious freedom while “economic conservatives” sought to protect global free trade.<sup>29</sup> IRFA’s primary opponents were business groups, the National Council of Churches,<sup>30</sup> and the secular human rights community.<sup>31</sup>

Like Wolf-Specter, IRFA provides for the training of State Department and Justice Department personnel, as well as more extensive investigation and reporting of religious persecution. Rather than relying on a single entity to monitor religious persecution, IRFA uses three cooperative bodies: an Ambassador at Large for Religious Liberty, a Special Advisor on Religious Persecution, and the Commission on International Religious Liberty.<sup>32</sup> Also, like the Wolf-Specter bill, IRFA replaces the Advisory Committee on Religious Freedom Abroad with a much smaller commission.

27. International Religious Freedom Act of 1998, 22 U.S.C. § 6401–6581 (2000). Although President Clinton signed the Act on October 27, 1998, he was troubled by the passages in IRFA that required him to take various actions. See Statement on Signing the International Religious Freedom Act of 1998, 34 WKLY. COMP. PRES. DOC. 2149 (Oct. 27, 1998).

28. See Carlson, *supra* note 20, at 566; Christy McCormick, *Exporting the First Amendment: America’s Response to Religious Persecution Abroad*, 4 J. INT’L LEGAL STUD. 283, 285–86 (1998).

29. See Wales, *supra* note 22, at 589.

30. The National Council of the Churches of Christ represents thirty-three Protestant and Orthodox denominations. They opposed the legislation because of the creation of a separate White House Office and the automatic sanctions. See Cassata, *supra* note 21, at 2123. Horowitz suggests the reason the National Council of Churches opposed the bills was because the bills were supported by evangelicals: “the antipathy to evangelicals was so strong that [the National Council of Churches] literally couldn’t bring themselves to participate in our coalition.” Michael Cromartie, *The Jew Who is Saving Christians*, CHRISTIANITY TODAY, Mar. 1, 1999, available at <http://www.ctlibrary.com/ct/1999/mar1/9t3050.html>.

31. Jeffrey Goldberg notes that Shea’s “faith-based human rights insurgency sees the liberal human rights establishment, especially Human Rights Watch, as its bete noire.” Goldberg, *supra* note 19, at 46ff. Beta noire is a person or thing that is particularly disliked.

32. H.R. 2431, 105th Cong. (1997).

Finally, IRFA includes additional measures to promote religious liberty. IRFA establishes religious liberty awards, creates funding for international broadcasting about religious liberty, and provides equal access to United States embassies and missions for religious activities.<sup>33</sup>

### III. ANALYSIS

#### *A. The American System: A Closer Look at IRFA*

The U.S. Congress passed IRFA<sup>34</sup> unanimously,<sup>35</sup> and President Clinton signed it into law on October 27, 1998.<sup>36</sup> The act requires the United States to incorporate concern for religious freedom directly into its foreign policy.<sup>37</sup>

IRFA begins by repeating the findings of Congress and then asserts that “the freedom of religion undergirds the very origin and existence of the United States.”<sup>38</sup> Additionally, IRFA refers to international human rights instruments as the guiding norms by which the United States should act.<sup>39</sup> In particular, the third finding of IRFA quotes two virtually identical articles of these international

33. *Id.*

34. International Religious Freedom Act of 1998, 22 U.S.C. §§ 6401–6581 (2000).

35. The Senate voted 98–0 in favor of IRFA on October 9, 1998. U.S. Senate Roll Call Votes on H.R. 2431, 105th Cong. (1998) available at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=105&session=2&vote=00310](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=105&session=2&vote=00310). The House of Representatives unanimously approved the Senate version of IRFA by voice the following day. See Peter G. Danchin, *U.S. Unilateralism & the International Protection of Religious Freedom: The Multilateral Alternative*, 41 COLUM. J. TRANSNAT'L L. 33, 50 (2002).

36. See U.S. Senate Roll Call Votes on H.R. 2431, 105th Cong. (1998) available at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=105&session=2&vote=00310](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=105&session=2&vote=00310); T. Jeremy Gunn, *The United States and the Promotion of Freedom of Religion and Belief*, in FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK 721, 721 (Tore Lindholm et al. eds., Martinus Nijhoff Publishers 2004).

37. See Danchin, *supra* note 35, at 50.

38. 22 U.S.C. § 6401(a)(1).

39. See § 6401(a)(2). The international human rights instruments specifically mentioned by the second finding include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Helsinki Accords, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the United Nations Charter, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. See *id.* The Department of State does not officially apply American standards on freedom of religion to other countries. Commentator Jeremy Gunn is “aware of no instance where the Department of State has suggested to a foreign government that it should implement a U.S. model; rather the benchmark is always presented as the language of the international instrument.” See Gunn, *supra* note 16, at 848.

texts: Article 18 of Universal Declaration of Human Rights (UDHR) and Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR).<sup>40</sup>

The most important of IRFA's five stated purposes are the condemnation of violations of religious freedom, the promotion of religious freedom at an early stage, and the implementation of appropriate tools in the United States foreign policy apparatus. Such tools include diplomatic, political, commercial, charitable, educational, and cultural channels for promotion of religious freedom and for respect of religious freedom by all governments and peoples.<sup>41</sup>

IRFA makes three important organizational contributions to the United States government. First, IRFA establishes an Office of International Religious Freedom within the State Department.<sup>42</sup> Second, IRFA establishes a nine-member Commission on International Religious Freedom,<sup>43</sup> which reviews the annual report and makes "policy recommendations regarding international religious liberty to the president, the secretary of state, and Congress."<sup>44</sup> Third, IRFA creates a position in the National Security Council entitled Special Advisor to the President on International Religious Freedom.<sup>45</sup>

40. It is difficult to understand why IRFA isolates one sub-article without mentioning the other pertinent sub-articles, especially without the legal restrictions of religious freedom (Article 18.3). See Dominique Decherf, *Religious Freedom and Foreign Policy: The U.S. International Religious Freedom Act of 1998*, address at Harvard University (June 2001).

41. 22 U.S.C. § 6401(b)(1)-(5).

42. *Id.* § 6411(a).

43. *Id.* § 6431(a); see Leila Nadya Sadat, *Religious Freedom and American Foreign Policy: The United States Commission on International Religious Freedom*, 9 NEW ENG. J. INT'L & COMP. L. 1, 1-15 (2003) (describing the nine-member Commission on International Religious Freedom). The "Commission" referred to throughout the remainder of this Article is this Commission established by IRFA.

44. 22 U.S.C. § 6432(a).

45. Section 6402(12) of IRFA provides that "[t]he term 'Special Adviser' means the Special Adviser to the President on International Religious Freedom described in section 101(i) of the National Security Act of 1947, as added by section 301 of this Act [50 U.S.C. § 402(i)]." 22 U.S.C. § 6402(12). Section 301 of Pub. L. 105-292 provides the following:

Section 101 of the National Security Act of 1947 (50 U.S.C. 402) is amended by adding at the end the following new subsection: (i) It is the sense of the Congress that there should be within the staff of the National Security Council a Special Adviser to the President on International Religious Freedom, whose position should be comparable to that of a director within the executive office of the president. The Special Adviser should serve as a resource for executive branch officials, compiling and maintaining information on the facts and circumstances of violations of religious

The Office of International Religious Freedom is headed by the Ambassador at Large for International Religious Freedom.<sup>46</sup> The President appoints the ambassador-at-large,<sup>47</sup> who then acts as “a principal adviser to the president and the secretary of state regarding matters affecting religious freedom abroad.”<sup>48</sup> “The ambassador’s primary duty is the preparation of an annual report<sup>49</sup> describing the status of religious freedom and the extension of violations of religious freedom in each foreign nation and what has been done or should be done to promote this freedom in places where it is lacking.”<sup>50</sup> IRFA defines these “violations of religious freedom” as follows:

“[V]iolations of religious freedom” are defined as “violations of the internationally recognized right to freedom of religion and belief and practice” and include simple violation such as arbitrary prohibition on, restrictions of, or punishment for (a) assembling for

freedom (as defined in section 3 of the International Religious Freedom Act of 1998), and making policy recommendations. The Special Adviser should serve as liaison with the Ambassador at Large for International Religious Freedom, the United States Commission on International Religious Freedom, Congress and, as advisable, religious nongovernmental organizations.

50 U.S.C. § 402 (2000). As indicated, this language was adopted in a new 50 U.S.C. § 402(i); however, § 402 already had a sub-section (i), so this language is found in the *second* sub-section (i), which follows sub-section (j). The sub-section (i) added by IRFA is referred to as either § 402(i) or § 402(k).

46. 22 U.S.C. § 6411(c)(2).

47. *Id.* In May 1999, Robert A. Seiple was sworn in as the first ambassador-at-large. *See* Briefing, Release of the 1999 Annual Report on International Religious Freedom (Sept. 9, 1999), [http://www.state.gov/www/policy\\_remarks/1999/990909\\_seiple\\_koh\\_irf.html](http://www.state.gov/www/policy_remarks/1999/990909_seiple_koh_irf.html).

48. 22 U.S.C. § 6411(c)(2) (2000).

49. The Annual Report contains the following information:

- (1) a description of the status of religious freedom in each foreign country,
- (2) an assessment and description of the nature and extent of violations of religious freedom in each foreign country,
- (3) a description of United States actions and policies in support of religious freedom in each foreign country engaging in or tolerating violations of religious freedom,
- (4) a description of any binding agreement with a foreign government entered into by the United States under [IRFA], and
- (5) a description of [refugee-related or asylum-related guidelines and the training provided to various government officials].

*See id.* § 6412(b)(1).

50. *See* Wales, *supra* note 22, at 593 (citing 22 U.S.C. § 6411(c)(1)). By statute, the ambassador is expected to work in conjunction with the Secretary of State in creating the annual report, and the report must “tak[e] into consideration the recommendations of the Commission [on International Religious Freedom].” 22 U.S.C. § 6412(b)(1).

peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements; (b) speaking freely about one's religious beliefs; (c) changing one's religious beliefs and affiliation; (d) possession and distribution of religious literature, including Bibles; or (e) raising one's children in the religious teaching and practices of one's choices. The term "particularly severe violations" of religious freedom means systematic, ongoing, egregious violations of religious freedom.<sup>51</sup>

When an annual report determines that a country is in violation of religious freedom, IRFA requires presidential action.<sup>52</sup> The President has three options: take one or more of fifteen enumerated actions,<sup>53</sup> take a commensurate action,<sup>54</sup> or enter into a binding

51. 22 U.S.C. § 6402(11). "Particularly severe violations' of religious freedom" includes violations such as the following: "(A) torture or cruel, inhuman, or degrading treatment or punishment; (B) prolonged detention without charges; (C) causing the disappearance of persons by abduction or clandestine detention of those persons; or (D) other flagrant denial of the right to life, liberty, or the security of persons." *Id.* "The term 'violations of religious freedom' means violations of the internationally recognized right to freedom of religion and religious beliefs and practice, as set forth in the international instruments referred to in § 6401(a)(2) of this title and as described in § 6401(a)(3)." *Id.* § 6402(13); *see also id.* § 6402(13) (providing more meanings of the term "violations"); *id.* § 6402(11).

52. *See id.* § 6441(a)(1)(B), (b)(1) (violations of religious freedom); *id.* § 6442(a)(1)(B), (c)(1)–(2) (particularly severe violations of religious freedom). However, the President may grant a waiver under certain circumstances "if the President determines and so reports to the appropriate congressional committees that (1) the respective foreign government has ceased the violations giving rise to the Presidential action; (2) the exercise of such waiver authority would further the purposes of this Chapter; or (3) the important national interest of the United States requires the exercise of such waiver authority." *Id.* § 6447.

53. *See id.* § 6441(a)(1)(B) (presidential action required for violations); *id.* § 6442(c)(1)(A) (presidential action required for particularly severe violations). The enumerated actions are:

- (1) A private demarche; (2) an official public demarche; (3) a public condemnation;
- (4) a public condemnation within one or more multilateral fora; (5) the delay or cancellation of one or more scientific exchanges; (6) the delay or cancellation of one or more cultural exchanges; (7) the denial of one or more working, official, or state visits; (8) the delay or cancellation of one or more working, official or state visits; (9) the withdrawal, limitation or suspension of United States development assistance in accordance with section 116 of [the Foreign Assistance Act of 1961]; (10) directing the Export-Import Bank of the United States, the Overseas Private Investment Corporation, or the Trade and Development Agency not to approve the issuance of . . . guarantees, insurance, extensions of credit, or participations in the extension of credit . . . ; (11) the withdrawal, limitation, or suspension of United States security assistance in accordance with section 502B of [the Foreign Assistance Act of 1961]; (12) consistent with section 701 of [the International Financial Institutions Act of 1977], directing the United States executive directors of international financial institutions to oppose and vote against [specified] loans . . . ; (13) ordering the

agreement with the government of the country found in violation of religious freedom.<sup>55</sup> The President has some discretion as to which action to take; however, the President does not have “the discretion not to act.”<sup>56</sup> The President, in choosing what action to take, must consider “the nature and severity of the violations of religious freedom.”<sup>57</sup> IRFA also requires that he “target action as narrowly as practicable with respect to the [entity] responsible for such violations” and pursue entrance into a binding agreement with the violating country.<sup>58</sup>

When the President determines that “the government of a foreign country has engaged in or tolerated *particularly severe* violations of religious freedom,” the President designates that

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heads of the appropriate United States agencies not to issue any . . . specific licenses, and not to grant any other specific authority . . . to export any goods or technology to the specific foreign government . . . ; (14) prohibition [of] any United States financial institution from making loans or providing credits totaling more than \$10,000,000 in any 12-month period to the specific foreign government . . . ; (15) prohibiting the United States Government from procuring or entering into any contract for the procurement of, any goods or services from the foreign government . . . .

*Id.* § 6445(a).

54. *See id.* § 6402(4); *id.* § 6441(b)(1)(A) (violations); *id.* § 6442(c)(1)(B) (particularly severe violations); *id.* § 6445(b). “[C]ommensurate action” means actions taken by the President under section 6445(b) of this title.” *Id.* § 6402(4). This section states that the President may substitute any other action authorized by law to obtain the cessation of the violations for any action described in paragraphs (1) through (15) of subsection (a) of this section if such action is commensurate in effect to the action substituted and if the action would further the policy of the United States. *See id.* § 6445(b). If commensurate action is taken, the President shall report such action, together with an explanation for taking such action, to the appropriate congressional committees. *Id.*

55. *See id.* § 6441(b)(1)(B) (violations); *id.* § 6442(c)(2) (particularly severe violations); *id.* § 6445(c).

The President may negotiate and enter into a binding agreement with a foreign government that obligates such government to cease, or take substantial steps to address and phase out, the act, policy, or practice constituting the violation of religious freedom. The entry into force of a binding agreement for the cessation of the violations shall be the primary objective for the President . . . .

*Id.* § 6445(c). IRFA also points out that the President shall make every reasonable effort to conclude a binding agreement in countries with which the United States has diplomatic relations.

56. Wales, *supra* note 22, at 594. In fact, IRFA states the requirement of presidential action: “Whenever the President determines that the government of a foreign country has engaged in or tolerated particularly severe violations of religious freedom, the President shall oppose such violations and promote the right to religious freedom through one or more of the actions described in subsection (c).” 22 U.S.C. § 6442(a)(2).

57. 22 U.S.C. § 6441(c)(1)(A).

58. *Id.* § 6441(c)(1)(B)–(C).

country “as a country of particular concern for religious freedom.”<sup>59</sup> The President’s options in responding to these countries of particular concern (CPCs), are more limited and more specifically prescribed than are his options when dealing with countries that have merely violated religious freedom. Specifically, in cases of CPCs, the President must take at least one of the last seven enumerated actions under IRFA,<sup>60</sup> take a commensurate action, or enter into a binding agreement with the CPC.<sup>61</sup>

After designating a country as a CPC but before taking presidential action, the President must “request [a] consultation with the [CPC] regarding the violations giving rise to designation of that country as [a CPC].”<sup>62</sup> Furthermore, if the President determines it to be appropriate, such consultations may occur in a multilateral forum. For such a multi-lateral form, the President must consult with members of the international community, including appropriate foreign governments, to achieve a coordinated international policy with respect to the CPC.<sup>63</sup> Humanitarian and religious organizations also must be consulted to assess the social impact of U.S. policies on the promotion of religious freedom in the CPC.<sup>64</sup> Finally, interested U.S. parties are to be consulted about the potential impact such action may have upon other homeland interests.<sup>65</sup> This provision is critical since the President can waive punitive economic measures if the violating nation has remedied the abuses of religious liberty within its borders or if it is in the “important national interest of the United States” to do so.<sup>66</sup> Therefore, an “important national

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59. *Id.* § 6442(a)(2)–(b)(1)(A). The description of particularly severe violations targets the most horrendous offenses—those the statute calls “systematic, ongoing, egregious violations of religious freedom.” *Id.* § 6402(11).

60. *Id.* § 6441(a)(1)(B). *See* actions (9)–(15), *supra* note 53.

61. *Id.* § 6442(c) (limiting presidential action to options (9)–(15) in 22 U.S.C. § 6445(a)).

62. *Id.* § 6443(b)(1)(A). The President, prior to taking any presidential actions, shall request consultation with the government of such country regarding the violations giving rise to designation of that country as CPC. *Id.* These consultations may occur privately or publicly and may also occur in a multilateral forum. *See* Nichol J. Starr, *Who Asked You?: The Appropriateness of U.S. Leadership in Promoting Religious Freedom Worldwide*, 33 VAND. J. TRANSNAT’L L. 987, 1005 (2000).

63. 22 U.S.C. § 6443(b). The appropriate foreign governments are those more suitable for the purposes of achieving a coordinated international policy on actions that may be taken with respect to that country. *See id.* § 6443(b)(2).

64. *See id.* § 6443(c).

65. *See id.* § 6443(d).

66. *Id.* § 6447(a)(3).

interest” at the very core of foreign policy can prevent the U.S. government from acting against even severe international religious freedom violations. Also, according to this language of IRFA, the United States is permitted to overlook severe “religious violations when other relationships, such as trade, are deemed to be more beneficial.”<sup>67</sup>

After consulting with the various parties and organizations, “the president must submit a report to Congress, detailing . . . the violations, the violators, and the actions to be taken.”<sup>68</sup> The report must confirm that all “noneconomic policy options designed to bring about cessation of the particularly severe violations of religious freedom have reasonably been exhausted.”<sup>69</sup>

### B. *The Annual Report*

A major feature of IRFA is the requirement of an annual report detailing the condition of religious freedom in each country around the world. Section 6412 of IRFA requires the Secretary of State, “with the assistance of the Ambassador at Large, and taking into consideration the recommendations of the Commission,” to prepare and submit to Congress an annual report on the state of religious freedom worldwide.<sup>70</sup> The State Department has submitted an annual report every year since 1999. In accordance with IRFA, the reports describe the “status of religious freedom in each foreign country” and list particular violations of religious freedom.<sup>71</sup> The reports also include an Executive Summary describing actions taken by the United States to foster international religious freedom during the previous year.<sup>72</sup>

The Commission has an important role in the preparation of the annual reports: it is responsible for the annual and ongoing review of the facts and circumstances of religious freedom violations presented in the annual reports. The Commission has recommended a variety of policy tools for the President’s consideration since he is required by IRFA to oppose religious freedom violations based upon the Commission’s findings and recommendations.

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67. Starr, *supra* note 62, at 1008.

68. Wales, *supra* note 22, at 596; *see* 22 U.S.C. § 6444(a)(5).

69. 22 U.S.C. § 6444(a)(5).

70. *Id.* § 6412(b)(1).

71. *Id.* § 6412(b)(1)(A)–(B).

72. *See id.* § 6412(b)(1)(F); *see also* Danchin, *supra* note 35, at 58–59.

The reports give notice of religious freedom violations abroad and offer possible responses to those violations. However, responsive action by the United States is still necessary for the reports to ultimately prove effective in combating religious persecution. Inaction by the United States renders the reports and suggestions contained therein futile. A review of the reports and subsequent action, or lack thereof, since 1999 will demonstrate the United States' unfortunately consistent pattern of neglecting to fully enforce principles of religious freedom abroad if the violating nations possess economic or strategic value for the United States. Where a violating nation can potentially be mined for some other benefit, the United States generally turns a blind eye to violations of religious liberty.

*1. 1999 Annual Report*

The State Department released its first Annual Report on Religious Freedom almost a full year after IRFA was passed.<sup>73</sup> The approximately one-thousand-page report evaluates 194 countries.<sup>74</sup> The report's executive summary specifies five categories of nations prone to religious persecution: (1) totalitarian or authoritarian nations that attempt to control religious belief or practice;<sup>75</sup> (2) nations that are hostile to minority or non-approved religions;<sup>76</sup> (3) nations that neglect or ignore discrimination against or persecution of minority or unapproved religions;<sup>77</sup> (4) nations with policies or legislation disadvantaging certain religions;<sup>78</sup> and (5) democratic nations that discriminate by identifying minority religions as "sects" or "cults."<sup>79</sup> This summary described the possible range of discrimination with which IRFA should be concerned and established a classification system for subsequent reports.<sup>80</sup>

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73. Briefing, *supra* note 42.

74. *See* Wales, *supra* note 22, at 599.

75. Examples of such regimes include Afghanistan, Burma, China, Cuba, Iran, Iraq, and Vietnam. *See* U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM FOR 1999, EXECUTIVE SUMMARY (1999), available at [http://www.state.gov/www/global/human\\_rights/irf/irf\\_rpt/1999/irf\\_exec99.html](http://www.state.gov/www/global/human_rights/irf/irf_rpt/1999/irf_exec99.html) [hereinafter 1999 EXECUTIVE SUMMARY]; *see also* Wales, *supra* note 22, at 600.

76. Such nations included Pakistan, Saudi Arabia, Serbia, and Sudan. *See* 1999 EXECUTIVE SUMMARY, *supra* note 75.

77. Uzbekistan, Egypt, India, and Indonesia. *See id.*

78. Russia and Turkey. *See id.*

79. Belgium, France, and Germany. *See id.*

80. *See* Wales, *supra* note 22, at 600.

The inaugural report itself did not identify any nations as countries of particular concern (CPCs), but the State Department released a report a week after the release of the annual report designating five countries as CPCs: China, Iran, Iraq, Sudan, and Burma.<sup>81</sup> The State Department report also listed the government of Serbia and the Taliban movement in Afghanistan, though not actually sovereign states, as “particularly severe violators of religious freedom.”<sup>82</sup>

Despite these concerns, a number of obvious violators of religious liberty were absent from both the annual report and the State Department’s report. The U.S. Commission on International Religious Freedom had previously focused its report on three particular violators: China, Russia and Sudan; yet Russia was conspicuously absent from the State Department’s official report. Also noticeably missing from the 1999 list of CPCs were nations with “[t]otalitarian . . . regimes . . . [that] seek to control thought and expression,” namely Cuba, Laos, and Vietnam.<sup>83</sup> Other countries with particularly troubling religious rights records absent from the list of CPCs were Saudi Arabia,<sup>84</sup> Uzbekistan, and Turkmenistan.<sup>85</sup>

The 1999 annual report did not list any specific actions taken by the President, but it did recite some of the actions taken by various other United States officials and agencies.<sup>86</sup> The majority of these actions involved U.S. officials speaking with officials of other nations to facilitate cooperation between the United States and those nations: “No less important is the tone and context set by senior [United States] officials when they speak publicly on the subject of religious freedom, or privately with foreign heads of government and other policy makers.”<sup>87</sup> No sanctions were suggested or imposed on

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81. *See id.* at 609.

82. *Id.* (quoting *State Department Lists 5 Nations as Violators of Religious Freedom*, WASH. TIMES, Oct. 7, 1999, at A15).

83. *See* 1999 EXECUTIVE SUMMARY, *supra* note 75.

84. Many consider Saudi Arabia to be “the most oppressive of all Muslim countries in the world.” McCormick, *supra* note 28, at 306–07 (detailing the substantial religious liberty violations that occur within Saudi Arabia).

85. *See* Danchin, *supra* note 35, at 113. Danchin asserts that these countries are not listed as CPCs because they are “of obvious economic and strategic importance to the United States.” *Id.*

86. *See* 1999 EXECUTIVE SUMMARY, *supra* note 75.

87. *See id.*

any nation according to the 1999 annual report.<sup>88</sup> All things considered, the 1999 annual report revealed a somewhat lackluster beginning for IRFA; unfortunately, the situation has not improved with time.

## 2. 2000 Annual Report

Before the report's publication, the Commission recommended that each country on the original list of CPCs remain on the list.<sup>89</sup> Following the basic structure of the 1999 report, the Executive Summary of the 2000 annual report separated countries into the same five categories as the 1999 annual report. Although the 2000 annual report did recategorize some countries from the previous year,<sup>90</sup> there were no major changes. The report included a section detailing the improvements achieved during the previous year.<sup>91</sup> Disappointingly, and despite ample evidence that other nations had met the statutory threshold to be designated as CPCs, no additional countries were listed alongside China, Iran, Iraq, Sudan, and Burma in 2000.<sup>92</sup> Furthermore, no additional sanctions had been levied against violators of religious freedom.<sup>93</sup>

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88. See Wales, *supra* note 22, at 609.

89. See U.S. Commission on International Religious Freedom, *2001 Report of the United States Commission on International Religious Freedom* 20 (May 1, 2001), available at <http://uscirf.gov/countries/publications/currentreport/2001annRpt.pdf>.

90. For example, Iran and Iraq changed from countries where totalitarian regimes seek to control religious belief to countries where the state is hostile to minority religions. Compare 1999 EXECUTIVE SUMMARY, *supra* note 75, with U.S. DEP'T OF STATE, 2000 ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, EXECUTIVE SUMMARY (Sept. 5, 2000), available at [http://www.state.gov/www/global/human\\_rights/irf/irf\\_rpt/irf\\_exec.html](http://www.state.gov/www/global/human_rights/irf/irf_rpt/irf_exec.html) [hereinafter 2000 REPORT].

91. The report cites Azerbaijan and Laos as being countries where significant improvements had occurred. "Noteworthy" improvements also occurred in other countries. See *id.*; see also Wales, *supra* note 22, at 613. The Commission noted that the reporting of such "improvements" must be carefully handled in order to avoid misrepresentation of the conditions of religious freedom. See *2001 Report of the United States Commission on International Religious Freedom*, *supra* note 89.

92. See *2001 Report of the United States Commission on International Religious Freedom*, *supra* note 89.

93. See Wales, *supra* note 22, at 615. In September 2000, following the redesignation of Burma, China, Iran, Iraq and Sudan as CPCs, the State Department reported in a letter to the U.S. Congress that the Secretary had decided to take no action with respect to these countries since the action taken the previous year for each of the countries in question was still in effect. See *2001 Report of the United States Commission on International Religious Freedom*, *supra* note 89.

“[I]t is instructive to consider the actions that have been actually taken under [IRFA] against five countries that were designated by the Secretary of State in 1999 and 2000 as being of ‘particular concern’ and against the Taliban regime in Afghanistan.”<sup>94</sup> Nowhere in the 2000 annual report does the State Department mention the sanctions it could have imposed as a result of a country’s designation as a CPC. Indeed, the United States’ actions under IRFA have been limited to expressions of criticism, or at most, to special visits to the regions in question.<sup>95</sup> A review of the 2000 annual report confirms this assessment and reveals that U.S. policies and actions do not reflect the gravity of the situation in several key countries where significant religious freedom violations occur.

For example, regarding violence between Christians and Muslims in Indonesia, the report states that “President Clinton and other senior government officials raised concerns with their Indonesian counterparts on numerous occasions.”<sup>96</sup> Similarly, with respect to Saudi Arabia, “On March 5 embassy officers conducted a meeting with and delivered a demarche on religious freedom to the Ministry of Foreign Affairs official in charge of human rights, including freedom of religion.”<sup>97</sup> Such meetings and criticisms—little more than advice to the offending nations—represented the most aggressive actions taken by the United States on behalf of religious freedom abroad.

The chairman of the House Subcommittee on International and Human Rights, Christopher H. Smith, criticized the 2000 annual report because “the Administration would not name any additional nations to the list of CPCs in spite of abundant evidence of severe violations.”<sup>98</sup> Similarly, the Human Rights Watch argued that

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94. Danchin, *supra* note 35, at 59.

95. *See id.* at 60–61.

96. 2000 REPORT, *supra* note 90.

97. *Id.*

98. Wales, *supra* note 22, at 616; *see also State Department Annual Report on International Religious Freedom for 2000: Hearing Before the Subcomm. on Int’l Operations and Human Rights of the H. Comm. on Int’l Relations*, 106th Cong. 48–50 (2000). The Commission was very disappointed that the Secretary of State did not name Laos, the Democratic People’s Republic of Korea (DPRK), Saudi Arabia, and Turkmenistan as CPCs. In addition to these four countries, the Commission advised the Secretary of State that another four governments are close to earning the CPC label for their countries: India, Pakistan, Uzbekistan, and Vietnam. *See 2001 Report of the United States Commission on International Religious Freedom*, *supra* note 89.

Uzbekistan should have been designated as a CPC.<sup>99</sup> The Commission itself criticized the report for not implementing all of its recommendations.<sup>100</sup> Dr. Firuz Kazemzadeh, vice chairman of the Commission, levied several criticisms, including the need for context in country reports, the problem of significant omissions in the report, the lack of new additions to the list of CPCs, and the handling of sanctions by the State Department.<sup>101</sup> He also noted that “the 2000 Report described many countries where the status of religious freedom had worsened,” but State Department policies toward those countries did not adjust accordingly.<sup>102</sup>

Finally, the 2000 annual report added something new—a section entitled in part “Improvements in Respect for Religious Freedom,” which catalogued certain improvements in religious freedom that had been significant and others that were noteworthy. With this new section, the State Department tried to maintain consistency with the approach that IRFA should take; namely, it should focus on the promotion of religious freedom rather than focus on punishment.<sup>103</sup>

### 3. 2001 Annual Report

Prior to the release of the 2001 report, the Commission recommended that the State Department name ten nations as CPCs.<sup>104</sup> Sudan, in particular, received special emphasis due to its record of religious freedom violations.<sup>105</sup> After conducting hearings on Sudan, the Commission recommended “unprecedented . . . market sanctions to stop American investors from . . . funding a war.”<sup>106</sup> The Commission included these sanctions in the Sudan Peace Act.<sup>107</sup> Shortly after the September 11th attacks, however, the Sudan Peace Act abruptly died in spite of the Commission’s protests.

99. See Wales, *supra* note 22, at 617.

100. See *id.* at 618–19.

101. See *id.* at 619.

102. *Id.* at 620. Examples include Turkmenistan, China, and France. *Id.* at 621.

103. See 2000 REPORT, *supra* note 90.

104. Wales, *supra* note 22, at 622. The ten suggested nations were the Taliban of Afghanistan, Myanmar, China, Iran, Iraq, Laos, North Korea, Saudi Arabia, Turkmenistan, and Sudan. *Id.*

105. See *id.* at 622–23.

106. *Id.* at 623.

107. *Id.* at 624. See Press Release, U.S. Commission on International Religious Freedom, Commission Issues New Recommendations on Sudan (Mar. 21, 2001) <http://www.uscirf.gov/mediaroom/press/2001/march/03212001%5Fcommission.html>.

A possible explanation for the act's sudden demise is suggested when, referring to the war on terrorism, a member of the Commission declared, "Sudan must be seen as [an] essential piece of the puzzle."<sup>108</sup> In the post-9/11 war against terrorism, Sudan's newfound value as an ally afforded it a measure of immunity as to its severe religious freedom violations, thereby allowing it to evade sanctions that would have otherwise likely been levied.

The 2001 report adhered to the same format as the two previous years' reports: violators of religious freedom were divided into the same five categories, positive developments were cited, and the United States' actions to promote religious freedom were described.<sup>109</sup> One major change in the 2001 report was North Korea's inclusion as a CPC for the first time.<sup>110</sup> Other countries that were among the ten identified by the Commission—Pakistan, Saudi Arabia, Turkmenistan, and Uzbekistan—escaped the CPC designation because of their alliance with the United States in the war on terror. Instead, these nations were listed in a lesser category identifying nations that are "hostile to certain minority religions."<sup>111</sup>

The omission of countries so blatantly violating religious freedom from CPC designation provoked several reactions: "The State Department was accused of sparing anti-terrorism allies such as Saudi Arabia, Turkmenistan and Uzbekistan,"<sup>112</sup> and Human Rights Watch noted that the three countries were part of the United States' coalition against terrorism and were hosts of United States military bases.<sup>113</sup> In addition, the new chairman of the Commission, Michael Young, expressed his own concerns. "If we abandon our values [such as the commitment to religious freedom] to fight this battle, the terrorists will already have won."<sup>114</sup>

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108. See *id.* (citing Jim Lobe, *Officials Say Sudan Moving Quickly to Cooperate*, INTERPRESS SERVICE, Sept. 20, 2001).

109. See U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR 2001, EXECUTIVE SUMMARY, (Dec. 2001) available at <http://www.state.gov/g/drl/rls/irf/2001/5531.htm> [hereinafter 2001 Report].

110. See Wales, *supra* note 22, at 635.

111. See *id.* at 635–36.

112. *Id.* at 638 (quoting Steven Mutson, *U.S. Cites 6 Nations in Report on Religious Intolerance*, WASH. POST, Oct. 27, 2001, at A28).

113. See Danchin, *supra* note 35, at 61. Danchin also states that a "review of the actions taken under [IRFA] towards other countries in which the United States has important strategic or military interests reveal[ed] that despite 'widespread violations of religious freedom,' the Report only recommended diplomatic caution." *Id.* at 61–62.

114. See Wales, *supra* note 22, at 639.

Scholars drew interesting preliminary conclusions after the release of the first three annual reports—the primary, and most scathing, conclusion being that the actions taken under IRFA depend primarily on the United States’ strategic or economic interests rather than on the severe violations of religious freedom. Hence, to the degree significant U.S. security and strategic interests are reliant on offending nations, the less likely it is that substantive actions will be taken under IRFA.<sup>115</sup>

Additionally, the first three reports all identified various nations as severe violators of religious freedom but failed to designate them as CPCs. Instead of receiving sanctions, those countries were beneficiaries of training, educational and exchange cooperation, and support.<sup>116</sup>

#### 4. 2002 Annual Report

In the introduction to the 2002 annual report, the State Department offered four reasons for the United States to promote religious freedom.<sup>117</sup> The fourth reason states that the United States’ “religious freedom policy is a means of fighting the war on terrorism.

115. Danchin explains:

First, where relatively minor U.S. strategic or economic interests are at stake, economic sanctions and harsher punitive measures are more likely than not to be imposed, as has been the case with Burma. Second, where more significant U.S. economic interests but fewer strategic concerns are at stake, political or diplomatic foreign policy tools are more likely to be employed . . . as has been the case with Indonesia and China. Third, where both greater U.S. strategic and economic interests are at stake, little substantive action will be taken under IRFA other than at the level of rhetoric, as has been the case with Saudi Arabia, Egypt, and Israel. . . . Fourth, in the case of countries considered to be “rogue states” . . . (and where strategic and economic interests may also be involved), the wider and shifting concerns of U.S. foreign policy will be paramount, as has been the case with Iran, Iraq, North Korea, and Sudan.

Danchin, *supra* note 35, at 62–63.

116. In October 2002, President Bush signed legislation lifting the existing sanctions against Pakistan as a reward for its support of the U.S. military campaign against terrorism. Regarding Israel, the reports discuss the issue of religious freedom in the occupied territories separately. In relation to Indonesia and Egypt, the reports indicate a range of diplomatic, training, educational and exchange activities between the U.S. and these countries. Saudi Arabia, which has long been a key ally of the U.S. as an oil exporter and as host of military bases available to the United States in the region, remains the top buyer of U.S. arms exports among developing countries. See *Human Rights in Saudi Arabia: A Deafening Silence*, in HUMAN RIGHTS WATCH BACKGROUNDER 1 (Dec. 2001).

117. See U.S. DEP’T OF STATE, 2002 INTERNATIONAL RELIGIOUS FREEDOM REPORT, INTRODUCTION (2002) available at <http://www.state.gov/g/drl/rls/irf/2002/13607.htm> [hereinafter 2002 INTRODUCTION].

The events of September 11, 2001 have had significant implications for that policy.”<sup>118</sup> Interestingly, none of the previous reports had advanced such a rationale for promoting religious freedom. This new addition to the introduction demonstrated one of the ways in which the events of September 11th had changed U.S. foreign policy.

The executive summary of the 2002 report followed the same format as in previous years, beginning with a description of the five categories of governments that permit religious persecution.<sup>119</sup> It redesignated Burma, China, Iran, Iraq, North Korea, and Sudan as CPCs.<sup>120</sup> The most drastic actions taken by the U.S. Government during the previous year as explained in the 2002 report were economic actions imposed against Burma.<sup>121</sup> Per usual procedure, actions taken against other CPC countries were limited to U.S. officials meeting with various leaders, giving speeches, and collecting data.<sup>122</sup> Those countries again avoided any substantial financial, economic, or diplomatic actions.

The policies described in the 2002 report ignited as much debate as the previous reports for not designating certain violating countries, such as Turkmenistan, as CPCs.<sup>123</sup> One author described the severe violations of religious freedom occurring in Turkmenistan as particularly harrowing. “[O]fficials have arrested and tortured members of minority religious groups [and have] . . . engaged in and tolerated gross violations of religious freedom such as rape, severe

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118. *Id.*

119. *See supra* notes 89–93 and accompanying text.

120. *See* 2002 INTRODUCTION, *supra* note 117.

121. *See id.*

The United States has discontinued bilateral aid to the Government, suspended issuance of licenses to export arms to the country, and suspended the generalized system of preferences and Export-Import Bank financial services in support of U.S. exports to the country. The U.S. Government also has suspended all Overseas Private Investment Corporation (OPIC) financial services in support of U.S. investment in the country, ended active promotion of trade with the country, and halted issuance of visas to high government officials and their immediate family members. It also has . . . opposed all assistance to the Government by international financial institutions, and urged the governments of other countries to take similar actions.

*Id.*

122. *See id.*

123. *See, e.g.*, Juan E. Mendez, *Human Rights Policy in the Age of Terrorism*, 46 ST. LOUIS U. L.J. 377 (2002); John Shattuck, *Religion, Rights, and Terrorism*, 16 HARV. HUM. RTS. J. 183 (2003).

beatings, imprisonment, and forced deportation.”<sup>124</sup> The United States’ justification for not labeling Turkmenistan as a CPC “points to a flaw in the United States foreign policy: namely, the United States favors actual and potential anti-terrorism allies at the expense of human rights and religious freedom.”<sup>125</sup> Despite its gross violations of religious freedom, Turkmenistan was an important ally in the war on terrorism and consequently escaped U.S. action under IRFA.<sup>126</sup> The United States also failed to designate important allies Saudi Arabia and Uzbekistan as CPCs, despite the egregious violations of religious freedom perpetrated within their borders.<sup>127</sup> According to critics, the failure of the United States government to designate such countries as CPCs “reduce[d] the effectiveness of United States efforts to promote such religious freedom.”<sup>128</sup>

##### 5. 2003 Annual Report

The 2003 report details two unique situations: the disturbing increase in anti-Semitism in several European countries and the changing situation in Iraq.<sup>129</sup> The U.S. Secretary of State designated Iraq as a CPC “due to the Saddam Hussein Government’s severe violations of religious freedom,” just as it did in 1999, 2000, and 2001.<sup>130</sup> However, since Operation Iraqi Freedom began on April 9, 2003, and since the establishment of the Coalition of Provisional Authority in May 2003, a government more tolerant of all religions and ethnicities had begun to develop.<sup>131</sup>

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124. Christina M. Kelly, *The United States and Turkmenistan: Striking a Balance Between Promoting Religious Freedom and Fighting the War Against Terrorism*, 15 PACE INT’L L. REV. 481, 507 (2003).

125. *Id.* The Commission, concerned about this fact, urged the U.S. Government to promote religious freedom as an integral part of the war on terrorism. Its recommendations on Afghanistan and the worldwide effort to fight terrorism have played an important role in shaping U.S. policy. See U.S. DEP’T OF STATE, 2002 ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, EXECUTIVE SUMMARY (2002), available at <http://www.state.gov/g/drl/rls/irf/2002/13608.htm> [hereinafter 2002 REPORT].

126. Kelly, *supra* note 124, at 508; see Wales, *supra* note 22, at 638.

127. See Wales, *supra* note 22, at 638.

128. Kelly, *supra* note 124, at 507.

129. See U.S. DEP’T OF STATE, 2003 INTERNATIONAL RELIGIOUS FREEDOM REPORT, EXECUTIVE SUMMARY (2003), available at <http://www.state.gov/g/drl/rls/irf/2003/27185.htm> [hereinafter 2003 EXECUTIVE SUMMARY].

130. *Id.*

131. *Id.*

The report described the principle barriers to international religious freedom using the same five categories as the previous reports. It redesignated six countries as CPCs—Burma, China, Iran, Iraq, North Korea, and Sudan<sup>132</sup>—but failed to add any new countries to the CPC list. The Commission had unsuccessfully recommended that each of those countries remain listed and that India, Laos, Pakistan, Saudi Arabia, Turkmenistan, and Vietnam be added.<sup>133</sup> Those recommendations, however, went unheeded. Further, the United States' actions to promote international religious freedom did not include any economic or financial action against two of the main violators of religious freedom—China and Sudan.<sup>134</sup> For the fourth consecutive year, the United States suspended trade and investments in Burma, making it the only nation to consistently feel any actual effect of the United States' efforts to promote religious freedom.<sup>135</sup>

As in the introduction to the 2002 report, the 2003 report highlighted the special importance of religious freedom in the wake of the September 11th attacks: "Promoting religious freedom is of special importance in the ongoing war against terrorism. All too often, countries that violate religious liberty also contribute to terrorism, intentionally or unintentionally."<sup>136</sup> Ambassador at Large John Hanford further noted in the release of the 2003 annual report that "[i]n some cases, those governments that are hostile to religious liberty have also been hospitable to terrorism."<sup>137</sup>

The United States has tried to clarify in the last two reports that expanding religious freedom is a tool the administration plans to use to fight terrorism.<sup>138</sup> The United States views religion—in its best

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132. Unfortunately, in the report on Sudan there continues to be no mention of the role of oil development in the government's previous policies of forced displacement of people from oil areas. *Id.*

133. See 2003 *Annual Report of the United States Commission on International Religious Freedom* (May 2003), available at <http://www.uscirf.gov/countries/publications/currentreport/finalReport050203.pdf>.

134. See 2003 EXECUTIVE SUMMARY, *supra* note 129.

135. See *id.*

136. U.S. DEP'T OF STATE, 2003 INTERNATIONAL RELIGIOUS FREEDOM REPORT, INTRODUCTION (Dec. 18, 2003), available at <http://www.state.gov/g/drl/rls/irf/2003/27183.htm> [hereinafter 2003 INTRODUCTION].

137. *Id.*

138. President Bush has stated that "Religious freedom reinforces the development and strength of civil societies, and it dampens the appeal of religious extremism and religion-based terrorism." See 2003 EXECUTIVE SUMMARY, *supra* note 129.

form—as an antidote to terrorism rather than its cause.<sup>139</sup> Finally, the 2003 report used the same language to address the relation between religion and terrorism as the 2002 report had used; in fact, the executive summaries of the two reports are virtually identical. In the absence of significant changes, the 2003 report is susceptible to the many of the same criticisms levied against the 2002 report, including that Saudi Arabia—where the report stated religious freedom is nonexistent—was not included in the CPC category<sup>140</sup> and that there continued to be a lack of stronger actions taken against China.<sup>141</sup>

#### 6. 2004 Annual Report

The 2004 report mirrored earlier reports in many ways. First, the introduction reiterated that the promotion of religious freedom is an important tool in the ongoing fight against terrorism.<sup>142</sup> Second, the executive summary is divided into three main parts: a classification of the policies and actions of countries that restrict religious freedom, a list of countries that have “taken significant steps to promote or protect religious freedom,” and a list of U.S. actions to promote religious freedom.<sup>143</sup>

There are two significant differences, however, between the 2004 report and its predecessors. First, the 2004 report omits Iraq as a

139. *See id*; *see also* L. Davidson, *Allies' Stand on Religion Questioned*, DESERET NEWS, Nov. 27, 2001, at A1.

140. In March 2003, the Secretary of State failed to designate Saudi Arabia as a CPC. When asked why, State Department Spokesman Boucher said,

There is no religious freedom in Saudi Arabia. It's a country that, based on the guidelines in the law, came very close to the threshold of being listed. However, it was the recommendation of all the experts involved in the government that we continue the same listing as last year and that we look for ways of working with the Saudi Government to try to take advantage of any opportunities there might be to improve the state of religious freedom in Saudi Arabia.

2003 Annual Report of the United States Commission on International Religious Freedom, *supra* note 133.

141. The Commission repeatedly has criticized the U.S. Government for not taking enough action against China. In its 2003 annual report, the Commission objected to the United States not choosing to introduce a resolution condemning the Chinese government's violations of religious freedom and other human rights at the 2003 session of the UN Commission on Human Rights. *See id*.

142. U.S. DEP'T OF STATE, 2004 INTERNATIONAL RELIGIOUS FREEDOM REPORT, INTRODUCTION (2004), *available at* <http://www.state.gov/g/drl/rls/irf/2004/35337.htm> [hereinafter 2004 INTRODUCTION] (“[S]trategies to promote religious freedom . . . further[] the war against terrorism.”).

143. *Id*.

CPC.<sup>144</sup> Perhaps more importantly, after years of criticism, the 2004 report finally designated Saudi Arabia as a CPC<sup>145</sup> due to its “particularly severe violations of religious freedom.”<sup>146</sup> Perhaps the inclusion of Saudi Arabia as a CPC—despite its continuing value to the United States as an ally in the war on terror—indicates a step towards the inclusion of extreme violators of religious liberty as CPCs despite economic or strategic interests the United States may otherwise have in those violating countries.<sup>147</sup> Such a step would concomitantly indicate actual enforcement of IRFA.

Unfortunately, the State Department chose not to include other countries that the Commission had recommended for the CPC list. In February 2004, the Commission wrote to Secretary of State Colin Powell to recommend that eleven countries be designated as CPCs. It identified six countries not previously designated by the U.S. government: Eritrea, India, Pakistan, Saudi Arabia, Turkmenistan, and Vietnam.<sup>148</sup> Finally, the State Department redesignated the five countries that were designated the previous year and also designated three additional countries: Eritrea, Saudi Arabia and Vietnam. India, Pakistan, and Turkmenistan again evaded such designation.

#### *7. A cumulative assessment of the reports*

Viewing the annual reports collectively, it is possible to make three observations. First, the reports remain a substantial source of information on conditions of religious freedom around the world; they are very useful in highlighting the most significant violations of this right and in maintaining religious freedom’s prominent position on the foreign policy agenda. In addition, the State Department’s annual reports are very instructive for measuring the United States’

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144. Noting the omission of Iraq from the list of CPCs, the executive summary states that “[i]n keeping with State Department precedent, we do not report on our own governance but welcome the scrutiny of other responsible reporters.” 2004 INTRODUCTION, *supra note* 142. In June 2004, the secretary acted to remove Iraq’s designation as a CPC. The Transitional Administrative Law in Iraq, ratified in March 2004, included provisions for freedom of religion, including the right to freedom of thought, conscience, and religious beliefs and practice. *Id.*

145. *Id.*

146. *Id.*

147. 2004 *Annual Report of the United States Commission on International Religious Freedom* (May 2004), available at <http://www.uscirf.gov/countries/publications/currentreport/2004annualRpt.pdf>.

148. *Id.*

progress in meeting the goals of IRFA. Two important goals of IRFA are the designation of CPCs and the statutory requirement to set forth in the annual report what steps were taken as a result of the CPC designation. However, in spite of the latter mandate, the State Department has not publicized the decisions responding to particularly severe violations of religious freedom in CPCs made pursuant to IRFA, with the exception of those actions relying on already existing sanctions.<sup>149</sup> In those cases, the State Department has not submitted to Congress the required evaluation of the effectiveness of the prior actions against CPCs.

The second observation is that the executive summaries in the annual reports contain lists of isolated actions that the State Department or others in the U.S. government have taken in order to underreport the policies that the State Department has adopted. Also, on many occasions, the annual reports do not adequately describe the results of the particular actions taken, such as meetings with foreign government officials.<sup>150</sup>

Third, since IRFA is meant to encourage the U.S. government to take affirmative steps to promote religious freedom, the annual reports should explain *how* that promotion of religious freedom is advanced in particular countries through U.S. policies on: (1) foreign aid, (2) public diplomacy, and (3) participation in international organizations.<sup>151</sup>

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149. Although relying on preexisting sanctions may be technically permissible under the statute, it is an indefensible policy in the case of China and Sudan because in both countries the situation continues to deteriorate. See Annual Reports of the United States Commission on International Religious Freedom, <http://www.uscirf.gov/countries/index.html>.

150. For example, of all countries mentioned in the executive summary of the 2001 annual report, only reports on China, Egypt, Indonesia and Vietnam attempt any kind of systematic explanation of U.S. policies and how the actions taken by the U.S. government during the reporting period further those policies. This type of explanation is absent in the reports where serious religious freedom violations occur, such as in Saudi Arabia, India, Pakistan, Nigeria, Sudan, and Laos, with whom the U.S. has diplomatic relations. See *2002 Annual Report of the U.S. Commission on International Religious Freedom* (May 2002), available at <http://www.uscirf.gov/countries/publications/currentreport/2002report.pdf>. In the same way, the Commission points out in the 2003 annual report that of the thirty-three countries mentioned in the executive summary of that annual report, only the reports on China, Egypt, Indonesia, and Vietnam attempt any kind of systematic explanation of U.S. policies; meanwhile, this explanation is notably absent in the reports on India, Laos, Nigeria, Pakistan, Saudi Arabia, Sudan, and Uzbekistan (all countries with whom the U.S. keeps diplomatic relations). See *2003 Annual Report of the United States Commission on International Religious Freedom*, *supra* note 133.

151. See the 2002, 2003, and 2004 Annual Reports of the U.S. Commission on International Religious Freedom, <http://www.uscirf.gov/countries/index.html>.

## IV. THE MAIN CRITICISMS LEVIED AGAINST IRFA

The United States' decision to unilaterally use its power to promote international religious freedom in an unprecedented manner provoked criticism both at home and abroad.<sup>152</sup> Domestic reactions to the proposed legislation contained in IRFA have been harsh since its conception.<sup>153</sup> As mentioned above, many religious and human rights groups refused to support legislation establishing the United States as "the religious police of the world" or as a "moral watchdog."<sup>154</sup> Also, the "potential economic consequence[s] attached to imposing" economic or diplomatic sanctions led some domestic critics to accuse the United States of being a "global busybody."<sup>155</sup> They claimed that the United States' "religious freedom advocacy ha[d] nothing to do with the 'vital strategic or economic interests' of the United States and that it frustrated the separation between church and state."<sup>156</sup>

The State Department considered some initial criticisms of the first two annual reports in drafting the third annual report.<sup>157</sup> However, critics continued to assail IRFA on numerous points.<sup>158</sup> This section will discuss four of the most salient, recurring, and valid criticisms.

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152. See Peter Danchin, *supra* note 35; Matthew L. Sandgren, *Extending Religious Freedom Abroad: Difficulties experienced by minority religions*, 9 TULSA J. COMP. & INT'L L. 251 (2001); Starr, *supra* note 62; Michael Young, *External Monitoring of Domestic Religious Liberties*, 1998 BYU L. REV. 501. Some of the strongest criticism of IRFA came from abroad, predominantly from Muslim countries. See Matthew L. Fore, *Shall Weigh Your God and You: Assessing the Imperialistic Implications of the International Religious Freedom Act in Muslim Countries*, 52 DUKE L.J. 423 (2002).

153. See *supra* Part II.

154. See Rns, *Religious Freedom Act Gets Wide Acclaim*, CHRISTIAN CENTURY, NOV. 1998, at 1015.

155. Starr, *supra* note 62, at 1010.

156. *Id.* at 1009–10.

157. See *2001 Report of the United States Commission on International Religious Freedom*, *supra* note 89.

158. See, e.g., Danchin, *supra* note 35, at 103–15 (criticizing unilateral approach of IRFA); Mendez, *supra* note 123, at 401 (arguing that taking responsibility for some of the human rights disasters in the report will increase U.S. credibility abroad); David M. Smolin, *Exporting the First Amendment?: Evangelism, Proselytism, and the International Religious Freedom Act*, 31 CUMB. L. REV. 685 (2001) (arguing that the United States should not export its beliefs on freedom of religion through IRFA); Wales, *supra* note 22, at 643–45 (stating that the United States should be honest in its reporting of violations and disregard political concerns when designating countries as CPCs).

The first criticism of IRFA is that it promotes a particular understanding of freedom of religion that is based on American ideas of separation of church and state and that does not conform to the histories, traditions, and cultures of other societies.<sup>159</sup> By advocating the “universal principles” underlying religious freedom, IRFA provokes strong opposition among offending countries. This opposition is rooted in IRFA’s perceived failure to recognize the necessary intertwining of freedom of religion and belief with each country’s particular identity, traditions, and culture. Aware of this flaw, the executive summary in both the 2002 and 2003 annual reports asserts that the reports should consider the effects of history, culture, and tradition when analyzing religious freedom in foreign countries.<sup>160</sup>

Despite these attempts to take into account the background of other countries in the reports, foreign critics still perceive IRFA as a uniquely American document. The authors of IRFA took care to avoid this problem: while IRFA praised “the domestic protection of freedom of religion that ‘undergirds the very origin and existence of the United States,’” it did not identify the First Amendment as the source of that protection worldwide.<sup>161</sup> On the contrary, IRFA cited the international human rights instruments as the guiding norms by which the act should proceed.<sup>162</sup> Thus, IRFA itself does not maintain as its basis the United States’ definition of religious freedom; rather, it consciously chose the definition of religious freedom accepted by the international community. Despite these efforts, problems nevertheless arise with its implementation because IRFA is interpreted and implemented by a U.S. commission whose members are appointed by the U.S. government. Thus it is difficult, if not impossible, for IRFA not to be influenced by the American historical experience regarding freedom of religion.<sup>163</sup>

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159. This criticism is reinforced by the fact that many of the early supporters of IRFA were reacting against persecutions of Christians. Arab-American and American Muslim opposition to IRFA was based on the clear signs of ideological bias in the rhetoric of the legislation. See Fore, *supra* note 152, at 448.

160. See 2002 REPORT, *supra* note 125; 2003 EXECUTIVE SUMMARY, *supra* note 129; Young, *supra* note 152, at 506.

161. See Craig B. Mousin, *Standing with the Persecuted: Adjudicating Religious Asylum Claims After the Enactment of the International Religious Freedom Act of 1998*, 2003 BYU L. REV. 541, 542 (quoting 22 U.S.C. § 6401(a)(1) (2000)).

162. See 22 U.S.C. § 6401(a)(3).

163. A good example is the comparison between American and international attitudes toward religious psychic injury. Smolin states,

The second main criticism of IRFA is that the United States affords religious freedom greater importance than other human rights. Danchin argues that “IRFA, by isolating *one* right and developing special machinery by which to protect it, has created an irrational hierarchy of human rights in U.S. foreign policy with religious freedom at the apex.”<sup>164</sup> Gunn counters, however, that while many of the people responsible for preparing the annual reports feel strongly about religious freedom, “IRFA and the Department of State do not assert that religion is the *most* important human right, nor do they emphasize the importance of religious freedom to exclude other rights.”<sup>165</sup>

Despite Gunn’s reassurances, IRFA has indirectly contributed to the creation of a hierarchy of human rights within the United States’ foreign policy. The United States discriminately implements human rights by investing enormous legislative efforts to promote the freedom of religion abroad while undermining other human rights within its own borders.<sup>166</sup> In addition, the United States has taken

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American law gives no protection to the religious feelings of individuals in relationship to non-governmental hate speech, blasphemy, or expression that demeans or desecrates their religion. . . . Paradoxically, however, American constitutional law is hyper-sensitive toward psychic injury that may be caused by gently pro religious speech in certain contexts: particularly public schools.

. . . .

The approach of other nations to religious psychic injury is often quite different. The punishment of blasphemy expresses an interest of the society in not allowing the religion fundamental to social order to be publicly desecrated or indecently mocked. . . . On the other hand, government is often permitted to openly espouse religious beliefs and values, even within public schools.

Smolin, *supra* note 158, at 697–98.

164. See Danchin, *supra* note 35, at 104 (emphasis added).

165. See Gunn, *supra* note 16, at 856–57 (emphasis added). Assistant Secretary of State John Shattuck did acknowledge these dangers in a prior version of the bill that eventually became IRFA. He stated during a committee hearing on an initial version of the bill that the legislation would create a de facto hierarchy of human rights violations under U.S. law that would severely damage our efforts to ensure that all aspects of basic civil and political rights, including freedom of religion, are protected. It would differentiate between acts motivated by religious discrimination and similar acts based on other forms of repression or bias.

*Hearing on Freedom From Religious Persecution Act of 1997, Part I Before the H. Comm. On Int’l Relations*, 105th Cong. (1997) (statement of John Shattuck, Asst. Sec. of State), available at [http://commdocs.house.gov/committees/intlrel/hfa44976.000/hfa44976\\_0.htm](http://commdocs.house.gov/committees/intlrel/hfa44976.000/hfa44976_0.htm).

166. For example, the Bush administration has amended federal criminal procedure and immigration laws to authorize racial and religious profiling, secret detentions and immigration hearings, and prolonged arbitrary detention. See Fain, *supra* note 5, at 616–29; Mendez, *supra* note 123, at 383–85.

measured and deliberate steps through IRFA to protect the international freedom of religion while neglecting to sign other international human rights instruments.<sup>167</sup> Even if IRFA is largely ineffective in achieving its expressed goals, its very presence on the international landscape serves as an emphatic assertion that the United States supports religious freedom to a greater extent than those other rights for which the United States has established no such presence. By protecting religious freedom abroad, at least nominally in the form of IRFA, but refusing to take similar actions on behalf of other human rights, the United States' implicitly elevates religious freedom above other important rights.

Third, the actual enforcement of IRFA is deeply flawed. The Wolf-Specter bill, IRFA's precursor, would have automatically imposed sanctions on countries with a high record of religious persecution.<sup>168</sup> As has been shown, the threat of such an automatic imposition generated strong opposition from various groups.<sup>169</sup> Unlike Wolf-Specter, IRFA does not impose automatic sanctions.<sup>170</sup> The language of the Act does not contain the word "sanction" but "action."<sup>171</sup> It provides the President with a menu of fifteen enumerated "presidential actions."<sup>172</sup> Numbers nine to fifteen on the list are specifically addressed to those countries classified as CPCs.<sup>173</sup> Rather than resulting in the "automatic" imposition of sanctions that

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167. See, e.g., Sarah Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE L.J. 1, 69, 69 (2001); Fain, *supra* note 5, at 608-11; Mendez, *supra* note 123, at 389-90. It is important to note that the United States' efforts to combat international religious persecution through IRFA are no less important than the United Nations' efforts to reduce race discrimination and protect the rights of women and children. Each of these human rights has merit and deserves protection. However, in expending enormous effort on behalf of one right to the exclusion of others, such a hierarchy is inevitably created.

168. See Gunn, *supra* note 16, at 857.

169. See *id.* The National Council of Churches opposed the Wolf-Specter bill because it imposed automatic sanctions. See Eleonora Giddings Ivory, *Religious Freedom Bill Revised*, Washington Report to Presbyterians, vol. 20, no. 2 (March/April 1998). See also *supra* notes 20-21, 25-26, 29-31 and accompanying text. For the Clinton Administration's position on sanctions, see *Testimony Before the S. Comm. on Foreign Relations*, 105th Cong. (July 1 1998) (testimony of Stuart E. Eizenstat, Under Sec. of State), available at <http://www.un.int/usa/99eiz71.htm>.

170. The principal supporters of the Wolf-Specter bill were strongly opposed to IRFA because, in part, it did not include sufficient sanctions provisions. See Jeremy Gunn, *American Exceptionalism and Globalist Double Standards: A More Balanced Alternative*, 41 COLUM. J. TRANSNAT'L L. 137, 142 (2002).

171. 22 U.S.C. § 6445(a) (2000).

172. *Id.*

173. *Id.* § 6442(c)(1)(A).

Wolf-Specter threatened, actions taken under IRFA have been very limited, if existent at all. As this Article's analysis of the presidential actions taken by the United States against countries classified as CPCs has shown, except for Burma—which has little to offer the United States in terms of either economic or strategic value and has consequently felt the brunt of U.S. sanctions abroad—IRFA has not been used to impose sanctions on CPCs.<sup>174</sup>

Inherent in this criticism is that IRFA has been enforced in an uneven and selective manner.<sup>175</sup> Until the 2004 report, each of the previous annual reports excluded “egregious violators of religious freedom such as Saudi Arabia, Uzbekistan, and Turkmenistan.”<sup>176</sup> Despite the ongoing severe violations in Turkmenistan and Uzbekistan,<sup>177</sup> these countries have *still* not been classified as CPCs.<sup>178</sup> Pakistan, Egypt, Indonesia, and Israel, meanwhile, have all received “considerable development, training, educational and exchange cooperation, and support” despite their continued violations of religious freedom.<sup>179</sup>

This deferential application of presidential actions<sup>180</sup> “exacerbate[s] the impression of U.S. manipulation of the rhetoric of human rights to serve its own political purposes.”<sup>181</sup> Many in the

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174. See *supra* Part III.B.1–7. Ironically, one of the harshest criticisms of IRFA is that the “United States has used it as a guise to impose punitive sanctions.” See Danchin, *supra* note 35, at 113–15.

175. See Danchin, *supra* note 35, at 113–15; see also, Cleveland, *supra* note 167, at 74–75; Mendez, *supra* note 123, at 394–97.

176. Danchin, *supra* note 35, at 113; see also, Wales, *supra* note 22, at 638.

177. See Kelly, *supra* note 124, at 481 (discussing violations in Turkmenistan and admonishing the administration to list Turkmenistan as a CPC); McCormick, *supra* note 28, at 299–300, 306–09 (listing violations in Uzbekistan and Saudi Arabia).

178. Saudi Arabia was added to the list of CPCs in the 2004 Introduction. See 2004 INTRODUCTION *supra* note 142.

179. Danchin, *supra* note 35, at 113.

180. The enforcement of IRFA through economic actions or “sanctions” is not unusual or illegal. The United States has used sanctions and executive orders against the Republics of Serbia and Montenegro for continuing to repress ethnic Albanians in Kosovo and against India and Pakistan for violations of the Nuclear Proliferation Prevention Act of 1994. See William M. McGlone & Timothy P. Trenkle, *Economic Sanctions and Export Control*, 33 INT'L LAW. 257, 261 (2001). Additionally, such measures comply with customary international law and the U.N. Charter. See Cleveland, *supra* note 167, at 49–52 (noting neither the U.N. Charter nor customary international law bar unilateral economic measures to promote human rights compliance).

181. Danchin, *supra* note 35, at 141; see also, Mendez *supra* note 123, at 393. Mendez explains,

international community believe that the United States has ignored human rights violations, even including religious violations, since the September 11th attacks, choosing instead to fight the war on terror.<sup>182</sup> Although U.S. rhetoric may strongly support religious freedom, actual enforcement inevitably yields to the United States' other foreign and domestic interests.

Finally, the fourth criticism of IRFA challenges the legitimacy of the United States acting unilaterally in the promotion of international religious freedom.<sup>183</sup> Through IRFA, the United States has unilaterally monitored freedom of religion in other nations as part of its foreign, political, and economic relations.<sup>184</sup> While IRFA is a unilateral mechanism, however, its language does not exclude bilateral and multilateral measures. In fact, IRFA actually recommends multilateral actions and contact with non-governmental organizations (NGOs) and religious groups.<sup>185</sup> Furthermore, the Act encourages the United States to negotiate and enter into bilateral agreements with countries that violate religious freedom prior to taking any presidential actions.<sup>186</sup> As attested to by the leniency afforded to violating nations that double as valuable U.S. allies, however, the language of IRFA and the way that it is actually applied can diverge dramatically. IRFA may *encourage* multi-lateral measures, but if the United States applies IRFA unilaterally—intentionally or not—IRFA's actual language is rendered moot.

A related concern is the effectiveness of achieving religious freedom through this form of unintentional unilateral pressure.<sup>187</sup> Literature on the use of economic sanctions against nations such as

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The risk is therefore high that human rights will be used only when convenient to other interests; the fear is that they will be put aside when they are thought to be in conflict with the "national interest of the U.S.," however vaguely defined; and that they will be rhetorically twisted and manipulated to serve as an argument for policies abroad that bear little resemblance to human rights promotion and protection.

*Id.*

182. See, e.g., Marjorie Cohn, *Human Rights: Casualty of the War on Terror*, 25 T. JEFFERSON L. REV. 317 (2003); Fain, *supra* note 5, at 613–26; Mendez, *supra* note 123, at 378–82, 392–94.

183. See Danchin, *supra* note 35, at 73.

184. See generally Wales, *supra* note 22, at 598–642 (describing the 1999–2001 reports).

185. See 22 U.S.C. §§ 6401(b)(4); 6414; 6435a(a) (2000); Gunn, *supra* note 170, at 147–48.

186. See *id.* §§ 6441(b)(1)(B), (c)(1)(C); 6442(c)(2); 6445(c).

187. See, e.g., Danchin, *supra* note 35, at 115–18 (arguing that the unilateral approach may do more harm than good). *But see* Cleveland, *supra* note 167, at 4–7, 87 (arguing that unilateral sanctions are an important aspect of a multi-tiered approach).

Iraq or Cuba reveals that the most vulnerable segment of the population—often the same segment affected by the violations that trigger the sanctions—is the one affected by such policies.<sup>188</sup> Given this counterproductive result, it would be necessary to redefine the sanctions to be applied as what are known as “smart sanctions.”<sup>189</sup> “Smart sanctions” are sanctions that narrowly target decision makers and that do not permit the decision makers to shift the burden of sanctions to the general population. “Smart sanctions” could include measures such as freezing the assets of abusive leaders or governments and denying visas and residency permits to such officials.<sup>190</sup>

## V. SOLUTIONS

All things considered, with the passage of IRFA, the United States created more problems than it solved. In an effort to promote religious liberty around the world, the United States instead exposed its fondness of unilateralism and its predisposition to focus only on economic and strategic concerns rather than on human rights and freedom of religion. To alleviate these negative externalities of IRFA, this Article proposes a number of solutions that will allow the United States to be an active and forceful player in the expansion of religious liberty across the globe without the negative effects currently associated with IRFA.

First, the language in IRFA demonstrates the objective to motivate a multinational effort to enforce international religious freedom; indeed, IRFA is based upon international human rights documents. This objective, as expressed in the language of IRFA, must be attained. The United States needs to fully recognize and utilize IRFA as an international act with international applications.

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188. See Danchin, *supra* note 35, at 115. But see McCormick, *supra* note 28, at 329 (noting the lack of evidence that sanctions will harm persecuted minorities more than they are already being harmed).

189. See generally Peter L. Fitzgerald, *Managing “Smart Sanctions” Against Terrorism Wisely*, 36 NEW ENG. L. REV. 957, 960–62 (2002). Fitzgerald explained, “Blacklisting particular individuals and entities is at the heart of smart sanctions . . . [by] narrowly targeting the controls at the individual or entity concerned. This level of precision is becoming increasingly important as concern mounts over the humanitarian costs on innocent civilian populations of broader . . . sanctions.” *Id.* at 960–61. But see Molly Beutz, *Functional Democracy: Responding to Failures of Accountability*, 44 HARV. INT’L L.J. 387, 420–21 (2003) (noting that smart sanctions do not always work).

190. See Kenneth Roth, Testimony Before Senate Task Force on Economic Sanctions (September 8, 1998), available at <http://www.hrw.org/press98/sept/sanct909.htm>.

As has been discussed above, the enforcement of IRFA has been primarily unilateral.<sup>191</sup> In order to prevent this tendency, the United States must try to reach a binding agreement with the country found to be a religious freedom violator, thereby encouraging additional consultations with other foreign governments “for purposes of achieving a coordinated international policy on actions that may be taken with respect to an offending country.”<sup>192</sup> Furthermore, the United States should petition for and accept the assistance of the international community in protecting religious freedom so that it does not act as the moral police of the world. Moreover, the assistance of the international community would engage the United States in serious discussions with the international community regarding the international standard of religious freedom and would concomitantly take into account the manner in which the identity, history, traditions, and culture of a nation shape its meaning of religious freedom.

Second, in order to answer criticisms that the United States is acting as the moral police of the world, IRFA should include a self-assessment of the status of religious freedom within U.S. borders. The United States should effectively add itself to the list of nations examined in the annual reports and the Report of the Commission on International Religious Freedom. In so doing, the United States can demonstrate that rather than imposing its own unique concept of religious freedom abroad, it is instead assuring the maintenance of international standards worldwide and even at home. IRFA is incapable of inspiring legitimacy and validity in the international arena if the United States applies different standards at home and abroad to violations of religious freedom.<sup>193</sup>

Finally, the United States must be consistent and exceedingly cautious in applying sanctions. The marked differences in applying sanctions have led critics to stress that U.S. policies for imposing sanctions, far from being motivated by respect for international norms, instead reflect the whims of U.S. domestic politics. Consequently, as more significant U.S. economic, security, and

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191. See *supra* text accompanying notes 200–07.

192. See Starr, *supra* note 62, at 1006.

193. Former Ambassador Seiple has criticized the United States for its failure to do a self-assessment: “It suggests an inclination to report only on others, refraining from any sort of self-criticism.” See Robert Seiple, *Religious Liberty: How Are We Doing?*, CHRISTIANITY TODAY, Oct. 22, 2001, at 99.

strategic interests develop, less substantive actions will be taken under IRFA. The United States should look to sanction all rogue states, including even its allies in the war on terrorism. However, the United States should hesitate to impose sanctions where the life or livelihoods of religious minorities will be threatened as a result of sanctions. Any sanction should be subject to a congressional report with a detailed justification.

IRFA is not terminally flawed. Rather, many of the difficulties stem from the enforcement of IRFA and not from the language of the Act itself. By adopting the suggested changes, it is possible that the United States can more effectively achieve its laudable goal of assuring religious freedom around the world.