

TESTIMONY
BEFORE THE NATIONAL SECURITY SUBCOMMITTEE
OF THE
HOUSE COMMITTEE ON
OVERSIGHT AND GOVERNMENT REFORM
ON
EXAMINING THE ADMINISTRATION'S IMPLEMENTATION OF THE
INTERNATIONAL RELIGIOUS FREEDOM ACT OF 1998
AND;
ITS RECORD ON PROMOTING RELIGIOUS FREEDOM ACROSS THE WORLD

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Introduction

Mr. Chairman and members of the Subcommittee, it is an honor for me to appear before you today to testify on the vitally important subject of international religious freedom. While I appear in my personal capacity, for the past eight years I have served as the Managing Director of the International Center for Law and Religion Studies at Brigham Young University. In this capacity I have had the opportunity to learn from and serve with Professor W. Cole Durham, Jr., and other members of our Center. It is from the perspective gained from working with this group of scholars that I speak.

Since the Center's founding fourteen years ago, we have organized, sponsored and appeared in some 150 international conferences, and have had direct impact on law reform in over fifty countries, including many countries of particular concern (CPCs). Over the past 20 years we have hosted over 1000 delegates from over 120 countries at our Annual International Law and Religion Symposium. In recent years we have hosted approximately 80 delegates from about 40 countries annually. This experience provides context to my remarks today.

The Importance of the International Religious Freedom Act of 1998

Last year this Subcommittee conducted the first Congressional hearing on the efficacy of the International Religious Freedom Act of 1998 (IRFA). Conducted 15 years after its enactment, this Subcommittee heard powerful testimony emphasizing the importance of international religious freedom as a basic and essential human right guaranteed under internationally binding agreements and as a necessary predicate to peace and security throughout the world.

Yet despite the good intentions embodied in the International Religious Freedom Act, religious freedom appears to be declining significantly in most of the world. The results of recent Pew studies indicate that 75% or more of the world's population now lives in countries with high or very high restrictions on religious freedom, up significantly from only a few years ago. Recent geopolitical events demonstrate the need for much greater efforts to counteract the negative forces of religious extremism and religious intolerance worldwide. We are here today to consider how to strengthen IRFA in an effort to stem the rising tide of religious intolerance, strengthen our national security, and promote religious freedom for all.

Recommendations from Last Year's Hearing

At last year's hearing this Subcommittee heard important recommendations made by knowledgeable witnesses including Dr. Katrina Lantos Swett, Chair of the U.S. Commission for International Religious Freedom, and Dr. Thomas Farr, Director of the Religious Freedom Project at Georgetown University's Berkley Center for Religion, Peace, and World Affairs, both of whom are here again today.

The testimony of last year's witnesses made a number of important recommendations about IRFA and its implementation. In part they recommended that Congress:

1. Establish a direct reporting line from the Ambassador at Large for International Religious Freedom to the Secretary of State.¹
2. Reaffirm that the State Department annually designate the worst violators of religious freedom as "countries of particular concern" (CPCs).²
3. Require Presidential actions (i.e., sanctions) in response to religious freedom violations.³

¹ Currently IRFA specifies that the Ambassador at Large shall be the "principal adviser to the President and the Secretary of State regarding matters affecting religious freedom abroad." IRFA, H.R. 2431, §101(c)(2). However, State's current organizational chart indicates that the Ambassador formally reports to an Assistant Secretary but in actuality reports primarily to a Deputy Assistant Secretary. See GAO-13-196, Report to Congressional Committees, *International Religious Freedom Act: State Department and Commission Are Implementing Responsibilities but Need to Improve Interaction*, 21-22 (2013) (hereinafter GAO-13-196). This places the Ambassador five levels below the Secretary of State.

² IRFA affirmatively requires that "not later than September 1 of each year, the President shall . . . designate each country the government of which has engaged in or tolerated [egregious religious freedom] violations . . . as a country of particular concern for religious freedom." IRFA, H.R. 2431 §402(b)(1)(A).

³ IRFA requires the President to take one or more actions (from a list of 15 sanctions), or substitute a "commensurate action" for such sanction or enter into a "binding agreement" for improvement, against or with a country that "engages in or tolerates violations of religious freedom." IRFA, H.R. §401(b)(1)-(2). Such actions are to be imposed "as expeditiously as practicable." IRFA, H.R. §§401(a)(1)(B), 401(b)(1). The most severe sanctions

4. Create a director level position on religious freedom at the National Security Council.⁴
5. Require augmented religious freedom training for State Department personnel.⁵
6. Compile and publish a list of prisoners persecuted or held abroad on account of their religious identity or beliefs.⁶
7. Compile and publish a list of individual religious freedom violators.⁷

from that list are required for CPCs. See IRFA, H.R. §402. An annual deadline for these sanctions is imposed with short-term delay mechanisms. IRFA, H.R. §§401(b)(2)-(3), 402(c)(3). However, IRFA seems to allow broad executive discretion in deciding whether to issue sanctions. This is because IRFA 1) seems to make sanctions discretionary for non-CPC violations of religious freedom, see IRFA, H.R. §403(a) (“[a]s soon as practicable after the President *decides* to take action under section 401”) (emphasis added); see also, IRFA, H.R. §404(a), 2) allows the President to take into account existing sanctions in the case of CPCs, see IRFA, H.R. 2431 §402(c)(4), 3) does not require the termination of U.S. government assistance even for CPC countries, see IRFA, H.R. 2431 §402(d), 4) seeks to minimize the collateral impact of sanctions on innocent persons, see IRFA, H.R. §401(c), and 5) prohibits judicial review of Presidential actions, see IRFA, §410.

⁴ Currently IRFA merely states it is “the sense of Congress” that “a Special Advisor to the President” be designated at the National Security Counsel. IRFA, H.R. 2431 §301.

⁵ Currently IRFA requires the creation of religious freedom courses, see IRFA, H.R. 2431 §104, but the few courses that have been created are optional for State personnel.

⁶ Currently the Secretary of State is required to “prepare and maintain . . . on a country-by-country basis, . . . lists of persons believed to be imprisoned, detained, or placed under house arrest for their religious faith”. IRFA, H.R. §108(b). However, State efforts in this regard are inconsistently reported or incomplete.

⁷ Currently IRFA specifies that for each designated CPC “the President shall seek to determine the agency or instrumentality thereof and the specific officials thereof that are responsible for the particularly severe violations of religious freedom engaged in or tolerated by that government in order to properly target Presidential actions.” IRFA, H.R. 2431 §402(b)(2). The President is to notify Congress of this specific information. IRFA, H.R. 2431 §402(b)(3). However, because State has failed to consistently name CPCs,

8. Require the State Department to respond in writing to USCIRF recommendations.⁸
9. Provide a “feedback loop” to religious communities for government responses to the State Department’s annual report.⁹

Not mentioned last year, but obviously necessary today, is reauthorization of the United States Commission on International Religious Freedom (USCIRF). See United States Commission on International Religious Freedom Reauthorization Act of 2014, H.R. 4653 (May 9, 2014).

With the exception of the recommendations dealing with CPCs and sanctions I will not review these recommendations further. However, I have analyzed above in footnotes the existing statutory authority for each recommendation to show that in most cases authority currently exists for their current implementation. Subject to my own comments below, I commend these recommendations to this Subcommittee.

Without wanting in any way to detract from the significance of the above recommendations, I would like to submit the following additional policy recommendations for your consideration.

these responsibilities have been avoided. Further, even when CPCs have been named, specific government offices or individuals responsible for severe violations have frequently been omitted.

⁸ Currently IRFA requires USCIRF to annually provide policy recommendations to State for each “foreign country the government of which has engaged in or tolerated violations of religious freedom, including particularly severe violations of religious freedom.” IRFA, H.R. 2431 §202(b). The President is required to take these recommendations into account in assessing what Presidential action should be taken. IRFA, H.R. 2431 §§401(a)(2), 402(b)(1)(B). However, IRFA contains no requirement that State publicly respond to those recommendations so it is unclear if the recommendations are accepted or rejected and the basis for this determination.

⁹ Currently IRFA indicates the President “should consult with “appropriate humanitarian and religious organizations” and “shall, as appropriate, consult with United States interested parties” regarding the potential impact of U.S. policies and Presidential actions. See IRFA, H.R. 2431 §§403(c), (d). These provisions make any feedback to impacted religious communities optional.

Policy Goals of IRFA

To help achieve international religious freedom, IRFA specifies that its first policy goal is “[t]o condemn violations of religious freedom.” IRFA, H.R. 2431 § 2(b)(1). This important policy goal is repeated numerous times throughout the Act.¹⁰ It is foundational to many other provisions of IRFA and undergirds the annual reporting and sanctioning regime IRFA establishes. Because of the strategic importance of this policy goal to the success of IRFA, my comments will focus almost entirely on this goal. Ultimately, it is my view that the policy goal of condemnation should be buttressed by placing greater emphasis on positive incentives rather than primarily negative sanctions.

Condemnation of Religious Freedom Violations

IRFA is best known for its policy goal, condemnation of religious freedom violations. Such condemnation occurs primarily through the State Department’s annual International Religious Freedom Report that systematically evaluates each country in the world to determine its religious freedom record and subsequent designation of a small number of countries as “countries of particular concern” (CPC’s).

Last year witnesses before this Subcommittee lauded the annual International Religious Freedom Report for its remarkable success in laying out the facts of religious oppression worldwide. As Dr. Farr noted during last year’s testimony, the Report represents the “gold standard” in evaluating religious freedom protections throughout the world. Policy makers, academic researchers, and religious leaders rely on the Report for its accuracy, reliability and timeliness. The State Department should be applauded for its successful efforts in producing this Report.

Besides the obvious benefit of having a Report with reliable facts that identify the most egregious religious freedom problems worldwide, the Report also provides an internal catalyst to the State Department to engage in

¹⁰ For example, the primary responsibility of the Ambassador at Large shall be 1) “to denounce the violation of that right, and to recommend appropriate responses by the United States Government when this right is violated” and 2) “to advance the right to freedom of religion abroad.” IRFA, H.R. 2431 §101(c)(1). Similarly, in response to violations of religious freedom, including particularly severe violations, the President should “oppose violations of religious freedom” and “promote the right to freedom of religion.” IRFA, H.R. §§401(a)(1), 402(a)(1)-(2).

religious freedom issues. Every embassy works on the Report, which requires engagement with government leaders, religious communities, NGOs and others who provide information about religious freedom violations to help establish the facts ultimately reported. This effort provides an advocate within each U.S. embassy for the persecuted in all foreign countries.

Yet the annual Report has important limitations. As noted last year, the Report is largely a narrative that, while shining a spotlight on the fate of the persecuted, contains few prescriptive recommendations to improve religious freedom. Some of last year's witnesses critiqued the Report for not making a meaningful difference in the status of international religious freedom worldwide. They wondered whether the Report leads persecutors to change their behavior.

Other witnesses criticized the State Department's failure to consistently use the Report to make CPC designations.¹¹ The State Department has only designated CPCs in three of the last seven years (with 2014 pending) even though it is required to make annual CPC designations under IRFA. Further, even when a country has been designated as a CPC, sanctions (called "Presidential actions" by IRFA) have been limited.

¹¹ USCIRF also produces an annual report that highlights the countries with the worst records on religious freedom. USCIRF's annual report evaluates the worst offenders of religious freedom and recommends countries to the Secretary of State for designation as CPCs when their religious freedom violations are "systematic, ongoing and egregious." IRFA, H.R. 2431 §3(11). USCIRF has consistently recommended more countries be designated as CPCs than has State. Most recently, in its 2014 report, published April 30, 2014, USCIRF recommended that State re-designate the 8 countries it last designated as CPCs in 2011 (Burma, China, Eritrea, Iran, North Korea, Saudi Arabia, Sudan, and Uzbekistan) and also recommended that 8 additional countries be designated CPCs (Egypt, Iraq, Nigeria, Pakistan, Syria, Tajikistan, Turkmenistan, and Vietnam). State apparently agreed with one of USCIRF's CPC recommendations in its 2013 report, published July 28, 2014. For the first time State designated Turkmenistan as a CPC, as recommended by USCIRF in its prior report. State re-designated all other countries previously designated as CPCs along with the additional designation of Turkmenistan.

Countries not meeting the threshold for CPC designation may also be identified and designated by USCIRF as "Tier 2" religious freedom violators. In its 2014 report USCIRF identified 10 countries as Tier 2 violators because they met at least one of the three statutory criteria for being a CPC (Afghanistan, Azerbaijan, Cuba, India, Indonesia, Kazakhstan, Laos, Malaysia, Russia and Turkey).

According to last year's witnesses, only one specific religious freedom sanction has ever been imposed on a CPC country (Eretria) under IRFA. Saudi Arabia and Uzbekistan, two CPCs, have received indefinite waivers as allowed under the Act. See IRFA, H.R. 2431 §407. All other sanctions issued against CPCs have apparently been double counted with existing sanctions already in place.¹²

Yet the State Department's reluctance to designate countries as CPCs and impose punitive sanctions is not totally irrational. State must balance many competing national interests in determining punitive actions. Even more fundamentally, negative incentives may not be very effective or appropriate in encouraging compliance with international religious freedom standards. Nevertheless, the stated policy goal of IRFA to "condemn" religious freedom violations reflects a bias toward negative incentives. In fact, under IRFA all Presidential actions that may be taken in response to a religious freedom violation are negative sanctions.

As specified in the Act negative sanctions include:

1. A private demarche.¹³
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 U.S. development assistance.
10. Directing the Export-Import Bank of the United States, the Overseas Private Investment Corporation, or the Trade and Development Agency not to approve any credit extension, guarantees or other benefits.
11. The withdrawal, limitation, or suspension of U.S. security assistance.

¹² Perhaps because of the failure to issue separate sanctions under IRFA, Congress passed specific legislation sanctioning Iran based on religious freedom violations in the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, 22 U.S.C. §8501(6).

¹³ "A demarche is a formal diplomatic representation of one government's official position, views, or wishes on a given subject to an appropriate official in another government or international organization." GAO-13-196, at 6 n.8.

12. Directing U.S. executive directors of international financial institutions to oppose and vote against loans benefiting specific foreign governments.
13. Ordering the heads of U.S. agencies not to issue licenses or authority to export goods or technology to a specific foreign government.
14. Prohibiting U.S. financial institutions from making loans in excess of \$10 million during a 12-month period.
15. Prohibiting the U.S. Government from procuring any goods or services from the foreign government.

IRFA, H.R. §405(a)(1)-(15).

Other negative sanctions specified in IRFA include diplomatic inquiries, diplomatic protests, official public protests, imposition of targeted or broad trade sanctions, and withdrawal of the chief of mission. IRFA, H.R. §202(b).

Of course negative incentives are needed as a last resort for the worst state actors. I am not advocating their removal. However, negative sanctions are often inappropriate for international diplomacy. The fact that in 16 years only one specific religious freedom sanction under IRFA has ever been imposed on a CPC country suggests something is fundamentally wrong with this negative approach. With such a limited record of sanctions it should be clear that the success of international religious freedom guarantees cannot depend primarily upon the fear of sanctions from the United States.

Recommendations for Specific Positive Incentives

Recognizing the limitations of negative incentives under IRFA, I propose supplementing negative condemnation with greater emphasis on positive incentives. In my view positive incentives will generally be more effective and should be much more frequently employed. While negative sanctions may still be appropriate or necessary in some circumstances, most often positive incentives will be a better approach. Because they are more likely to attract positive responses, I suggest they will better promote international religious freedom.

For this to occur, it may be useful to amend IRFA to make it more clear that such positive measures are an important policy priority that should supplement the existing annual State Department Reports.

Fortunately, this reorientation in policy is already suggested within IRFA. When Congress drafted IRFA it wisely and carefully considered the benefit of positive incentives. My review of IRFA's detailed provisions

indicates that the Act already contains a surprisingly robust set of positive incentives available for use by the State Department. Examples of specific positive incentives are discussed briefly below.

1. Recognizing and rewarding countries making important religious freedom progress

Countries with difficult religious freedom records should be recognized for significant progress in meeting defined goals or showing other signs of courageous advancement of religious freedom. IRFA already requires that the annual State Report note in its executive summary the “identification of foreign countries the governments of which have demonstrated significant improvement in the protection and promotion of the internationally recognized right to freedom of religion.” IRFA, H.R. 2431 §102(b)(1)(F)(ii). To my knowledge such recognition is not frequently bestowed by the State Department.

Similarly, IRFA already specifies that USCIRF may recommend a wide range of positive incentives for “countries found to be taking deliberate steps and making significant improvement in respect for the right of religious freedom.” IRFA’s prescribed positive incentives include:

- Private commendation,
- Diplomatic commendation,
- Official public commendation,
- Commendation within multilateral fora,
- An increase in cultural or scientific exchanges, or both,
- Termination or reduction of existing Presidential actions (i.e., negative sanctions),
- An increase in certain assistance funds, and
- Invitations for working, official, or state visits.

IRFA, H.R. §202(c). Unfortunately, this broad list of positive incentives appears not to be used with sufficient frequency.

In my view Congress should use its oversight authority to determine the extent to which these positive incentives have been or are being used to encourage their robust recommendation by the Commission and their application by the State Department in the future.

2. Recognize meritorious or distinguished religious freedom service by State Department employees.

State employees who exhibit exemplary service promoting religious freedom should be rewarded to recognize their efforts and to show an example to others to do the same. IRFA already allows for performance pay to State employees who are particularly effective in promoting internationally recognized human rights including religious freedom. IRFA, H.R. 2431 §504(a), codified at 22 U.S.C. §3965. Additionally, IRFA recommends that the President “establish a system of awards to confer appropriate recognition of outstanding contributions to the Nation by members of the Service” who promote “internationally recognized human rights, including the right to freedom of religion.” IRFA, H.R. §504(b), codified at 22 U.S.C. §4013.

In my view Congress should investigate the extent to which these positive service awards have been implemented in the past and should encourage the State Department to use them more liberally as part of a conscientious effort to promote religious freedom.

3. Link humanitarian and other U.S. aid to religious freedom progress.

U.S. aid to foreign countries is very extensive, providing an opportunity for meaningful religious freedom incentives. In 2012 our government gave over \$48 billion in foreign assistance to countries around the world, including \$5 billion in humanitarian aid, \$26 billion in other developmental aid, and over \$17 billion in military assistance.¹⁴ IRFA currently recommends increasing assistance funds to countries exhibiting religious freedom protections. See IRFA, H.R. 2431 §202(c). IRFA also explicitly ties U.S. monetary and military assistance to positive compliance with religious freedom norms. See IRFA, H.R. 2431 §§421, 422.

In my view Congress should use its oversight power to investigate the extent to which this large amount of U.S. aid has been linked to religious freedom compliance as called for by IRFA. Congress should also encourage the State Department and other government agencies to affirmatively link the amount, timing or existence of U.S. aid to measurable progress on religious freedom rights.

4. Link U.S. economic incentives to religious freedom progress.

¹⁴ See www.usaid.gov and www.globalhumanitarianaid.org.

Most countries are eager to achieve greater economic prosperity. The U.S. has many tools that it can wield to reward countries making religious freedom progress. These tools could include U.S. support for WTO membership, economic assistance from the World Bank, OECD accession, beneficial treaty arrangements, or even enhanced trade agreements with the U.S. IRFA implicitly recognizes that tying economic benefits to improved religious freedom would be beneficial. IRFA currently allows the “termination or reduction” of Presidential actions when countries make progress on guaranteeing religious freedom rights. See IRFA, H.R. §202(c). Since many Presidential actions are based on curtailing economic incentives, eliminating these negative incentives suggests replacing them with positive ones. Thus, stated positively, the economic incentives already implicitly recognized by IRFA include:

- U.S. development assistance,
- Credit extensions at the Export-Import Bank, the Overseas Private Investment Corporation, or the Trade and Development Agency,
- Loan support from international financial institutions,
- Licenses or other authority to export goods, and
- Contracts by the U.S. Government to procure goods or services from the foreign government.

See IRFA, H.R. 2431 §§405(a)(9)-(15). IRFA also specifies that the export of crime control instruments and multilateral assistance should be tied to religious freedom improvements. IRFA, H.R. 2431 §§422, 423.

In my view, Congress should investigate the extent to which the vast economic incentives of the United States have been linked to religious freedom initiatives in the past. Congress should also amend IRFA to explicitly state that the above economic incentives be used by the State Department to promote religious freedom, rather than relying on the implicit language of IRFA discussed above.

5. Conduct country-specific consultations with tailored goals and incentives.

The State Department has experience conducting religious freedom consultations with foreign countries. IRFA requires consultations when a country is designated a CPC. See IRFA, H.R. §403. However, rather than only engaging in a consultation to discuss religious freedom violations, see

IRFA, H.R. §403(b)(1)(A), these consultations should be designed to create positive incentives for improvement. IRFA recognizes the beneficial possibilities of a country specific consultation and offers special protections so that these consultations may be either public or private. IRFA, H.R. §403(b)(3). IRFA also permits limited disclosure of religious freedom violations when it facilitates the goals of IRFA. Thus, reports to Congress on sanctions may be withheld from the public, IRFA, H.R. 2431 §404(a)(4)(B), and publication in the Federal Registrar of the individuals responsible for severe violations of religious freedom may also be limited, see IRFA, H.R. 2431 §408(b).

In my view Congress should investigate the extent to which the State Department conducts consultations to positively promote adherence to religious freedom principles and should encourage the positive use of consultations.

Conclusion

The above list of positive incentives was clearly contemplated by Congress when it passed IRFA. They should not be neglected. Congress should take steps, either through use of its oversight power or through possibly adding more explicit reference to using positive measures by revising the language stating IRFA's objectives, to encourage greater use of positive measures. This refocused policy would help reinvigorate IRFA's effectiveness as a tool to encourage religious freedom compliance. Regardless whether any changes are made in the actual language of IRFA, Congress should use its oversight authority to investigate and thereby encourage the State Department to utilize positive incentives to more effectively encourage adherence to international religious freedom rights under IRFA.

As stated explicitly in IRFA, the policy of the United States shall be "to use and implement appropriate tools in the United States foreign policy apparatus, including diplomatic, political, commercial, charitable, educational, and cultural channels, to promote respect for religious freedom by all governments and peoples." IRFA, H.R. 2431 §2(b)(5). Utilizing the kind of positive tools noted above will help advance religious freedom internationally as originally envisioned by IRFA.