

## RELIGIOUS LIBERTIES: THE INTERNATIONAL RELIGIOUS FREEDOM ACT

*Thomas F. Farr, Richard W. Garnett, IV, Dr. T. Jeremy Gunn, &  
Mr. William L. Saunders\**

### PROCEEDINGS

MR. SAUNDERS: Welcome to this panel, put on by the Religious Liberties Practice Group.<sup>1</sup> Any of you who would like to join that Practice Group, you are cordially invited to do so. Welcome to the Federalist Society Annual Convention. My name is Bill Saunders. I am a Senior Fellow at the Family Research Council,<sup>2</sup> and I am the Chairman of the Religious Liberties Practice Group at the Federalist Society.

---

\* The panel discussion took place on November 20, 2008 at the National Lawyers Convention, hosted by The Federalist Society for Law and Public Policy Studies. Mr. William L. Saunders received his J.D. from Harvard Law School. He is Senior Vice President for Legal Studies with Americans United for Life and is Chairman of the Religious Liberties Practice Group of the Federalist Society. Dr. T. Jeremy Gunn is Professor of International Studies at Al Akhawayn University in Morocco. He received his Ph.D. from Harvard University and his J.D. from Boston University. Dr. Gunn is the former Director of the Program on Freedom of Religion and Belief of the ACLU. Mr. Thomas F. Farr is a Visiting Associate Professor of Religion and International Affairs at Georgetown University's Edmund A. Walsh School of Foreign Service. He is a Senior Fellow and Director of the Religion and Foreign Policy program at Georgetown's Berkley Center for Religion, Peace, and World Affairs. Mr. Farr is a former U.S. diplomat and the State Department's first Director of the Office of International Religious Freedom. Mr. Richard W. Garnett is a Professor of Law and Associate Dean at Notre Dame Law School. He received his J.D. from Yale Law School and a B.A. in philosophy *summa cum laude* from Duke University. Mr. Garnett is a former law clerk to Chief Justice Rehnquist during October term 1996 and a former law clerk to Chief Judge Richard S. Arnold of the United States Court of Appeals for the Eighth Circuit.

1. The Federalist Society: Publications—Religious Liberties Practice Group Executive Committee, <http://www.fed-soc.org/publications/id.359/default.asp> (last visited Feb. 22, 2009) [hereinafter Committee Homepage].

2. *Id.* Since this panel was held, Mr. Saunders has joined Americans United for Life (AUL) in their Washington, D.C., office as Senior Counsel.

Well, our subject today is going to be international religious liberties—the promotion or protection of religious freedom. And the reason we’re doing this panel at this Federalist Society Convention is because this year marks the tenth anniversary of what surely is a landmark federal bill, the International Religious Freedom Act.<sup>3</sup> It was passed by the Congress and signed by President Bill Clinton ten years ago.<sup>4</sup>

Many of you are from Washington, D.C., so as you will know that, as usual, the real story is behind the scenes, and I’ll just give you a little bit of the background of that. In the mid ‘90s, there were a number of people who were particularly concerned about the situation in the Sudan and some of the religious and ethnic persecution or murder that was going on there.<sup>5</sup> And there were also a number of people who worked on Capitol Hill who were involved in religious freedom work, and then there were the human rights groups here in town as well. I was working for one of those at the time, and actually, I know Jeremy Gunn from back in those days.

So there began to be a conversation in town about whether something should be done within the U.S. government to stand up for people who were being persecuted for religious faith because it seemed, to many people anyway—not to everybody but to many people—it seemed that kind of persecution was really unnoticed by the media and policymakers. It seemed to fall off the radar screen.

So there was this conversation. It grew. There became a movement to try to advance the idea of religious freedom in U.S. foreign policy. And it encountered resistance in some of the corridors of power in Washington, including, at least initially,

---

3. International Religious Freedom Act of 1998, 22 U.S.C. §§ 6401–81 (1998) (as amended).

4. U.S. DEPARTMENT OF STATE, LEGISLATION, <http://www.state.gov/g/drl/irf/c2132.html> (last visited Feb. 22, 2009).

5. See *The State Department Country Reports on Human Rights Practices for 1999: Hearing Before the H. Comm. On Int’l Relations, Int’l Operations, and Human Rights Subcomm.*, 106<sup>th</sup> Cong. (2000), (statement of Nina Shea, Dir. of the Center for Religious Freedom) available at [http://www.uscirf.gov/index.php?option=com\\_content&task=view&id=1067&Itemid=1](http://www.uscirf.gov/index.php?option=com_content&task=view&id=1067&Itemid=1) (last visited Apr. 5, 2009); see also William L. Saunders Jr. & Yuri G. Mantilla, *Human Dignity Denied: Slavery, Genocide, and Crimes Against Humanity in Sudan*, 51 CATH. U. L. REV. 715 (Spring 2002).

the Clinton administration. One of the grounds of the resistance to it was the idea, or the argument, that this made religion a more important human right than others, and it created a hierarchy of human rights, which the Clinton administration felt was inappropriate.

One of the questions behind the bill as it began to develop in Congress was, “What would the focus be of the bill?” Would it be on, say, particularly the persecution of the Christian church in Sudan or would it be broader? And most of the people supporting the bill, in my opinion anyway, supported a broad protection of religious freedom, but the bill as originally drafted became identified with “the Christian Right,” as special pleading by Christians, and eventually that bill, which had been called the Wolf-Specter Bill,<sup>6</sup> was replaced by the International Religious Freedom Act, which was passed, as I said, by Congress and signed by President Clinton.

The International Religious Freedom Act differed from the Wolf-Specter Bill, which had been the preceding bill, in a number of ways, one of which is that while Wolf-Specter had proposed there be mandatory sanctions, the International Religious Freedom Act makes them discretionary sanctions.<sup>7</sup> It has a whole series of standards, from private letters to banning any U.S. government contacts with the government.<sup>8</sup> They’re discretionary with the President as to which, if any, he wants to take.<sup>9</sup>

But to advance the idea of religious freedom, the International Religious Freedom Act did at least three things. It created an adviser on religious freedom at the National Security Council,<sup>10</sup> it created an ambassador of religious freedom in an

---

6. Nina Shea, *The Origins and Legacy of the Movement to Fight Religious Persecution*, REVIEW OF FAITH & INTL AFFS., June 14, 2008, [http://crf.hudson.org/index.cfm?fuseaction=publication\\_details&id=5690](http://crf.hudson.org/index.cfm?fuseaction=publication_details&id=5690) (last visited Apr. 5, 2009).

7. *Id.*

8. International Religious Freedom Act of 1998, 22 U.S.C. 6445 (1998) (as amended).

9. § 6441.

10. § 6436.

Office for Religious Freedom at the State Department,<sup>11</sup> and it created an independent commission called the U.S. Commission on International Religious Freedom.<sup>12</sup> In fact, our own Leonard Leo of the Federalist Society, executive vice president, is a member of the U.S. Commission on International Religious Freedom.<sup>13</sup>

The bill itself—I don't know if the speakers will get into this—but there's always been a debate in this movement to respond to the denial of religious freedom. The debate is whether the emphasis should be on responding to persecution or on the promotion of religious freedom.<sup>14</sup> Obviously, the two are closely related, but they're not exactly the same thing, and the bill itself has language that could suggest either one of those two.<sup>15</sup> It talks about, obviously, religious freedom, but tends to define it in terms of avoiding or stopping persecution.<sup>16</sup>

The Office of International Religious Freedom at the State Department was placed under the Bureau of Democracy, Human Rights, and Labor, and I think Tom Farr's going to say something about that. Both the U.S. Commission on International Religious Freedom and the State Department's Office on Religious Freedom issue annual reports in which they evaluate the state of religious freedom around the world—this is required by the International Religious Freedom Act<sup>17</sup>—and they designate countries where religious freedoms are particularly being denied, “countries of particular concern.”<sup>18</sup>

Now, this panel today is not going to talk solely or even chiefly about the International Religious Freedom Act, but we

---

11. § 6411.

12. § 6431.

13. UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, Leonard Leo, Comm'r, [http://www.uscirf.gov/index.php?option=com\\_content&task=view&id=222&Itemid=1](http://www.uscirf.gov/index.php?option=com_content&task=view&id=222&Itemid=1) (last visited Apr. 5, 2009).

14. See, e.g., Allen Hertzke & Mark O'Keefe, *Question & Answer, Ten Years of Promoting Religious Freedom Through U.S. Foreign Policy*, PEW RESEARCH FORUM ON RELIGION & PUB. LIFE, Oct. 16, 2008, <http://pewforum.org/events/?EventID=206#1>.

15. International Religious Freedom Act of 1998, 22 U.S.C. 6401 (1998) (as amended).

16. § 6402.

17. § 6412.

18. § 6432.

will to some extent talk about it. But our aim today is broader: to talk about religious freedom, to talk about whether it should be an aspect of U.S. foreign policy, how best to make it so if you believe it should be, and so we'll look at whether the International Religious Freedom Act has helped on that score or whether it's helped enough, whether it's been properly implemented, etc. But we want to look at the general question of international religious freedom and how to promote that.

Our panel—I'm happy to say I know all these three guys, and I've got extensive biographies of them, which I'm not going to read. I'll read just a little bit so you can get a feel for them. I'll give them to you in order. We're going to have, first, Tom Farr, then Jeremy Gunn, then Rick Garnett.

Tom is a Senior Fellow at Georgetown's Berkley Center for Religion, Peace, and World Affairs, where he directs their program on religion and foreign policy.<sup>19</sup> He is a former U.S. diplomat and was the State Department's first director of this Office of International Religious Freedom.<sup>20</sup> After a career of twenty-one years in foreign service, he left to research and write, and his book here is some of the fruit of that.<sup>21</sup> He got his Ph.D. in History from the University of North Carolina,<sup>22</sup> and he has taught both at the U.S. Military Academy<sup>23</sup> and the Air Force Academy.<sup>24</sup>

Jeremy Gunn, whom I mentioned I know from the days when we were both working in the human rights field—we also worked for the same law firm. Way back when, I was an associate at Covington and Burling, as was Jeremy. He is the Director of the ACLU's Program on Freedom of Religion and Belief,<sup>25</sup> and he's a Senior Fellow for Religion and Human

---

19. Georgetown University, Diplomat, Religious Freedom Expert Joins Faculty, Aug. 30, 2007, <http://explore.georgetown.edu/news/?ID=26949> (last visited Apr. 5, 2009).

20. *Id.*

21. *See id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Dr. Jeremy T. Gunn, Curriculum Vitae 1 (2008), available at [http://www.law.emory.edu/fileadmin/templates/CSLR\\_Media/PDFs/CV\\_-\\_updated\\_2008/Gunn\\_CV.pdf](http://www.law.emory.edu/fileadmin/templates/CSLR_Media/PDFs/CV_-_updated_2008/Gunn_CV.pdf) (last visited Feb. 22, 2009).

Rights at the Center for the Study of Law and Religion at Emory University Law School.<sup>26</sup> He is a member of the Advisory Council on Freedom of Religion and Belief, of the Organization for Security and Cooperation in Europe.<sup>27</sup> He received his Ph.D. in the Study of Religion from Harvard, a J.D. from Boston College,<sup>28</sup> and an A.M. in Humanities from the University of Chicago.<sup>29</sup>

His doctoral dissertation from Harvard on the historical origins of the Establishment Clause was published as *A Standard for Repair: The Establishment Clause, Equality, and Natural Rights*,<sup>30</sup> and he has a new book coming out called *Spiritual Weapons: The Cold War and the Forging of an American National Religion*,<sup>31</sup> which is either out or coming out very soon.

Rick Garnett is also a member of the Federalist Society's Religious Liberties Practice Group leadership,<sup>32</sup> where I rely on him a lot. He is a Professor of Law at the University of Notre Dame,<sup>33</sup> where he teaches and writes about criminal law, constitutional law, religious freedom, and freedom of speech. He received his B.A. in Philosophy from Duke<sup>34</sup> (I don't hold it against him; I'm a graduate of the University of North Carolina, and I try to overlook those things), and his J.D. from Yale Law School.<sup>35</sup>

At Yale, he served as Senior Editor of the *Yale Law Journal*<sup>36</sup> and as Editor of the *Yale Journal of Law and*

---

26. *Id.*

27. *Id.* at 6.

28. *Id.* at 1.

29. *Id.*

30. See T. JEREMY GUNN, *A STANDARD FOR REPAIR: THE ESTABLISHMENT CLAUSE, EQUALITY, AND NATURAL RIGHTS* (Routledge 1992).

31. See T. JEREMY GUNN, *SPIRITUAL WEAPONS: THE COLD WAR AND THE FORGING OF AN AMERICAN NATIONAL RELIGION* (Praeger 2008).

32. Richard W. Garnett, Curriculum Vitae 13 (2008), available at [http://www.law.emory.edu/fileadmin/templates/CSLR\\_Media/PDFs/CV\\_-\\_updated\\_2008/Garnett\\_CV.pdf](http://www.law.emory.edu/fileadmin/templates/CSLR_Media/PDFs/CV_-_updated_2008/Garnett_CV.pdf) (last visited Apr. 5, 2009).

33. *Id.* at 1.

34. *Id.* at 2.

35. *Id.*

36. University of Notre Dame Law School, Faculty & Administration: Richard W.

2009] *THE FEDERALIST SOCIETY—RELIGIOUS FREEDOM PANEL* 475

*Humanities*.<sup>37</sup> Before he came to Notre Dame, he was a law clerk for Chief Justice William Rehnquist<sup>38</sup> and the then Chief Judge Richard Arnold of the U.S. Court of Appeals for the Eighth Circuit.<sup>39</sup>

So, there are three panelists. We'll start with Tom, then Jeremy, and then Rick, and then we'll take questions from you guys.

Thank you.

(Applause.)

PROFESSOR FARR: Thank you, Bill. It's a pleasure to be here. I appreciate being invited. In order to distinguish myself, I want to point out that I'm the only non-lawyer on this panel. I'm not sure what that means, but we'll see.

You can count me among the enthusiasts for the International Religious Freedom Act, but you can also count me among the friendly critics of the way that the law has been implemented by the Clinton and Bush administrations over the last two decades. The nub of my critique is something that Bill mentioned briefly, and that is that over the last ten years we have not been promoting religious freedom in a political or cultural sense, but have in fact been attempting to reduce persecution.

If you think about it, they are two sides of the same coin, but they're not the same thing. Reducing or even eliminating religious persecution around the world—a goal we've come nowhere close to achieving—would be the beginning of religious freedom, not the end of it. Religious freedom means a lot more than the right not to be persecuted. It means the right to believe or not believe. It means the right to act in accord with religious beliefs. It's a right possessed not only by individuals but by religious communities. It's these last two aspects of religious liberty—the right to act on the basis of belief and the rights of religious communities—that I think our foreign policy has

---

Garnett, <http://law.nd.edu/people/faculty-and-administration/teaching-and-research-faculty/richard-w-garnett> [hereinafter Garnett CV] (last visited Feb. 22, 2009).

37. *Id.*

38. *Id.*

39. *Id.*

ignored to its peril, particularly in the area of democracy promotion.

So, I'd like to hit on two themes: one, the source of the problem and some of the consequences of the problem in our foreign policy. Two, at the end I'll offer a few positive suggestions—in this case to the Obama administration—on ways that we might remedy the problem.

I think that there is a religion deficit disorder in American diplomacy. The intellectual substructure for this disorder is the so-called secularization theory, according to which religion will move to the irrelevant margins of human existence as modernity advances.<sup>40</sup> Clearly that has not happened, and there's no sign on the horizon that it will happen. But I think it is still an unspoken, largely unexamined premise at major American universities, and it certainly remains so in the corridors of Foggy Bottom.

(Laughter.)

PROFESSOR FARR: If you look at the three schools—(comment from the audience). . . was that a former secretary of state?

(Laughter.)

PROFESSOR FARR: If you look at the three major schools of foreign policy that have been dominant in the last three administrations—namely realism, liberal internationalism, and neo-conservatism—all three of them tend instinctively to set religion aside as a category of analysis, as a way of understanding the world. Realism, represented by, for example, Henry Kissinger, likes to operate at the level of the nation-state; it's less interested in what's going on inside the nation-state.<sup>41</sup>

If you look at Kissinger's magnum opus—a magnificent book called *Diplomacy*, over 800 pages long—it has a thirty-five page index, and religion does not appear in the index.<sup>42</sup> After a few

---

40. PIPPA NORRIS & RONALD INGLEHART, SACRED AND SECULAR 1 (2004).

41. See JOHN A. VASQUEZ, THE POWER OF POWER POLITICS: FROM CLASSICAL REALISM TO NEOTRADITIONALISM 156 (1998) (explaining that the realist paradigm begins with the notion that nation-states or their official decision makers are the most important actors in international politics).

42. HENRY KISSINGER, DIPLOMACY 903 (Simon & Schuster 1994).



words about the Protestant Reformation,<sup>43</sup> religion just seems to drop out of Dr. Kissinger's understanding of history. Indeed, from the '60s through the end of the millennium, when Henry Kissinger was arguably the dominant intellectual force in American foreign policy thinking, it was as if John Paul II didn't exist. It's as if Ayatollah Khomeini was not operating in Iran, Pentecostalism was not moving around the world, or Wahhabism didn't exist in Saudi Arabia, let alone in Sunni communities worldwide. None of these things appears in his book on diplomacy.<sup>44</sup>

Liberal internationalists, on the other hand, tend to be a bit more open to the idea of religion, particularly within societies and within international law.<sup>45</sup> But being liberals, they are very suspicious of traditional religions in the public square. And so, I think they have a rather impoverished view of the role of religion in its fullest and most active sense, particularly in democracies.

Neoconservatives are thought to be married to the Christian right in some fantasies.<sup>46</sup> But look at the policy of the Bush administration in Iraq. The intellectual substructure of that effort was certainly neoconservative, but the neocons appear to have thought we were going into Iraq to create a kind of Rawlsian Muslim democracy. Talk about a contradiction in terms. We thought we were going to have people like Ahmed Chalabi<sup>47</sup> in charge, and that we would have a middle-class secular democracy with religion moved out of politics and privatized. Obviously, that didn't turn out to be the case, and I think in part our problems in Iraq were a result of the neon

---

43. *Id.* at 58–63.

44. *See generally id.* (discussing none of the above religious issues).

45. Michael W. Doyle, *Liberal Internationalism: Peace, War and Democracy*, NOBLEPRIZE.ORG, June 22, 2004, [http://nobelprize.org/nobel\\_prizes/peace/articles/doyle/index.html](http://nobelprize.org/nobel_prizes/peace/articles/doyle/index.html) (last visited Apr. 5, 2009).

46. *See, e.g.,* STEFAN HALPER & JONATHAN CLARKE, *AMERICA ALONE: THE NEO-CONSERVATIVES AND THE GLOBAL ORDER* 196 (Cambridge University Press 2005).

47. *See* Joe Klein, *Searching for Saviors in Strange Places*, TIME, Oct. 22, 2005, <http://www.time.com/time/columnist/klein/article/0,9565,1121966,00.html> (last visited Apr. 5, 2009).

failure to put religion on the policy table and think seriously about it as an aspect of politics and culture—for better or for worse.

Let me give you two other examples of this religion avoidance syndrome in U.S. religious freedom policy. The International Religious Freedom Act, as Bill said, was passed ten years ago. That law aimed to put religious freedom advocacy at the heart of U.S. foreign policy, and in order to do that it established a position for a very senior diplomatic official, an ambassador at large for international freedom, at the State Department.<sup>48</sup>

Now, an ambassador at large is not a potted plant. It is a position in the nomenclature at the State Department that is senior to assistant secretaries. Those of you who know Washington know that assistant secretaries of state are very powerful policy individuals in our foreign policy, particularly in implementing it. An ambassador at large is, nominally at least, senior to those people.

But this ambassador at large for religious freedom was put *under* an assistant secretary. And he was put in the least mainstreamed bureau at the Department of State, which is the Bureau of Democracy, Human Rights, and Labor. Despite the justice of that bureau's cause, Foreign Service Officers don't, as a rule, want to serve there. They do not seek careers that are centered on human rights. To many of them, however just they may believe the cause of human rights to be, pursuing that cause simply doesn't relate to what they think American diplomacy does. This is a killing aspect of putting the religious freedom office in that bureau, i.e., burying it bureaucratically and isolating it functionally within Foggy Bottom.

When there is a senior meeting within the State Department, or an interagency meeting, about major foreign policy issues such as Iraq or China or Russia or India, where you would expect religion would have a role, the ambassador at large for religious freedom is not there. The argument that he should be there simply doesn't compute. If there is someone about to be

---

48. International Religious Freedom Act of 1998 § 101, 22 U.S.C. § 6411 (1998) (as amended).

executed for apostasy in one of these countries, then you turn to that office.<sup>49</sup> But if you want to talk about how we promote democracy in Iraq or Afghanistan or how to consolidate democracy in places like Russia or how to get China thinking about political reform, there is no thought that religious liberty would have anything to do with these issues. It's as if there's nothing in American history to suggest that religious liberty plays any role in democracy.

But of course, there are plenty of reasons to think that, and not just in American history but in contemporary social science data, in contemporary history, in the modern history of the Roman Catholic Church, and in the travails that are being experienced in Russia with the marrying of the Russian Orthodox Church with political authoritarianism.<sup>50</sup> There are many reasons to conclude that we are not going to be able to implant democracy successfully if we fail to include religious liberty at the center of our efforts. For the past ten years, the international religious freedom office and U.S. democracy promotion efforts have been like two ships passing in the night—nothing to do with each other whatsoever. This needs to change.

A good example of this problem is Afghanistan. As you know, in 2001, we overthrew the Taliban.<sup>51</sup> By 2004, we had helped broker democratic elections and a democratic constitution which was fairly liberal.<sup>52</sup> It did have some protections for religious liberty, although they were quite weak.<sup>53</sup> But the anti-persecution mentality—the idea that “promoting religious freedom” means reducing persecution—suggested that we had won a victory in Afghanistan. We took the Afghans off of the Countries of Particular Concern list (the

---

49. See §§ 6402, 6412.

50. See Yuri Zarakhovich, *Russian Orthodox Church Loses Its Leader*, TIME, Dec. 5, 2008, <http://www.time.com/time/world/article/0,8599,1864769,00.html> (last visited Apr. 5, 2009).

51. Caroline Nasrallah Belk, *Next Friend Standing and the War on Terror*, 53 DUKE L.J. 1747, 1759 (2004).

52. *Afghanistan Passes Constitution by Consensus*, CNN.COM, Jan. 4, 2004, <http://www.cnn.com/2004/WORLD/asiapcf/01/04/afghan.constitution/>.

53. AFG. CONST. art. II.

worst persecutors) because persecution had dramatically dropped<sup>54</sup>—and that is true; it had. But there was then, and there is now, nothing like religious freedom in Afghanistan for mainstream Muslims, let alone the Jews and Christians, Baha'is, Hindus, and others, and the Shiite Muslim minority.

A Sunni Muslim journalist or jurist who wants to publish an article about why in Afghanistan it is not necessary, according to the Koran, to execute apostates for blasphemy will himself be charged with blasphemy. This happens all the time.<sup>55</sup> Our reaction to this is to treat it as a humanitarian problem and to try to get these people out of jail or to get the charges dropped. We're not seeing the forest for the trees. The issue is that Afghanistan, whether we have the Taliban as a security issue or not, will always be an incubator of Islamist terrorism and radicalism as long as we do not get the Afghans to engage seriously on these issues of religious freedom.

What can we do about this problem in American diplomacy? There's a lot to be said here, and I'm obviously painting in broad strokes. I would say three things. First, a principle: we need to get our foreign policy establishment to adopt the principle that religion is normative in human behavior. It's not epiphenomenal. It's not an add-on. It's not simply a private matter like sex used to be.

(Laughter.)

PROFESSOR FARR: It is normative to human behavior and it needs to be put on the policy table.

Secondly, we need to see, as I mentioned before, religious liberty as necessary to the rooting of democracy. You can have political liberties without it. You can even have a fine constitution without it. But a constitution that protects religious freedom only in words becomes a parchment barrier, as James Madison once put it. You have to have religious freedom protected in law and culture, or democracy will not be stable. It

---

54. Robert Marus, *State Department Report Identifies Global Religious-Freedom Problems*, ASSOCIATED BAPTIST PRESS, Nov. 8, 2005, [http://www.abpnews.com/index.php?option=com\\_content&task=view&id=774&Itemid=118](http://www.abpnews.com/index.php?option=com_content&task=view&id=774&Itemid=118).

55. See, e.g., Nina Shea, *Sharia Calling: America, We Have a Problem*, NATIONAL REVIEW ONLINE, Mar. 24, 2006, <http://www.nationalreview.com/comment /shea200603240704.asp> (last visited Apr. 5, 2009).

2009] *THE FEDERALIST SOCIETY—RELIGIOUS FREEDOM PANEL* 481

will not endure. In order to encourage other countries to succeed in this endeavor, we need to elevate the authority of the ambassador at large and his office within the State Department, as the law, I believe, requires.

As Bill said, the ambassador at large for religious freedom is the principal advisor to the president of the United States and the secretary of state on matters of religious liberty.<sup>56</sup> He should not be buried under the Human Rights Bureau. We should have new training for our diplomats. We should have career opportunities that encourage them to get into this field. We should have a subspecialty on religion and religious freedom under the existing career tracks of politics, economics and public diplomacy.

Economics and religious freedom—that's a very interesting issue. We should be talking to the Chinese and the Vietnamese and others about why their economic performance will improve if they adopt religious liberty. Let me tell you, our economic officers don't think about this any more than our political officers do. Our public diplomacy needs to have a subspecialty in religion. I think these are very important steps that the Obama administration needs to look at.

And finally, we need to develop religious freedom arguments and strategies that overcome the presumption out there in the Arab world, the larger Muslim world, Russia, China, and elsewhere, that all we're trying to do is make the world safe for American missionaries and undermine the majority religious communities in each of these countries. This is what they believe. They also believe, in fact, that we're trying to privatize religion.<sup>57</sup> In fact, they think we're French. I mean, that's a real abomination.

(Laughter.)

PROFESSOR FARR: They think that we are trying to peddle a form of religious liberty that is like this command-

---

56. International Religious Freedom Act of 1998 § 101(c)(2), 22 U.S.C. § 6411(c)(2) (1998) (as amended).

57. THOMAS F. FARR, *WORLD OF FAITH AND FREEDOM: WHY INTERNATIONAL RELIGIOUS LIBERTY IS VITAL TO AMERICAN NATIONAL SECURITY* 18 (Oxford Univ. Press 2008).

based privatization of religion that you find in France.<sup>58</sup> We need to overcome this perception by developing strategies and arguments, the most important of which is this: there's plenty of evidence that if you want democracy to work, you must struggle with and resolve this very difficult issue of religious liberty.

So, in sum, this issue is not simply a humanitarian issue for the United States. It is that. We need to stand with the persecuted. It's in accord with our values as a nation. My most gratifying experiences as an American official were those that helped people who were in harm's way. But this approach to religious liberty is like trying to empty the ocean with an eyedropper, once a day. There are millions of people suffering because of their religious beliefs or the religious beliefs of their tormentors. We must get in front of this problem and begin to attack the structures of persecution by advancing the institutions and the habits of religious liberty. It will serve the people of the world, but most importantly, it will serve the national interests of the United States.

Thanks.

(Applause.)

PROFESSOR GUNN: It's a pleasure for me to be here today. As someone coming from the ACLU, I feel quite at home here today with so many like-minded admirers of James Madison, Alexander Hamilton, and George Washington. I won't say anything about Thomas Jefferson because I don't know how much in accord we are with that particular person.

It's a pleasure to be here. I am delighted to have this sign that says, "Jeremy Gunn, Federalist Society." I'm going to be taking it back to my office and putting it on my door.

(Laughter.)

PROFESSOR GUNN: I'm not sure how long it will last, but I will at least enjoy the process of doing that.

Tom Farr and I knew each other back at the State Department when we were both working there. I actually worked at the Office of International Religious Freedom before Tom arrived, and I was, in fact, the first full-time person working for Ambassador Robert Seiple at the State Department.

---

58. *Id.*

2009] *THE FEDERALIST SOCIETY—RELIGIOUS FREEDOM PANEL* 483

I was in his tiny little office about the size of two of these tables put together at the time that the International Religious Freedom Act was voted on, and I watched that and the congratulatory speeches by members of Congress.

I agree with many of the things that Tom said. Not all of them—and he and I have an ongoing sparring about a few issues. But I think on some of the major points which he just made I'm quite in agreement with, though I have a somewhat different take on several issues. I think that it's important that religion should not be looked upon as a private activity, depending on what "private" means (and private can mean lots of different things). Two different meanings of the term "private" that can cause confusion are, first, "private" as something that should be behind closed doors and in secret; something we don't want to talk about in public; something that's a little bit embarrassing; we want to keep that private. That's one sense of private.

But there's another sense of "private," which means that the government should not be involved. So private enterprise is not something we keep hidden behind closed doors, it's very much in the public domain. We have the ambiguities not only with the word "private," but the word "public" as well. Private businesses can be public corporations. So, these words—"public" and "private"—can mean different things depending on the context. And I would urge careful attention to how they're being used so that negative associations and connotations with one context—that is, behind closed doors—are used to suggest that somehow something like the government should be involved in the business of promoting religion because religion should be in the public domain. That's where I think we might have a disagreement on an issue that is of concern.

Rather than talking about religion and private matters, what I'd like to talk about is religion and political matters, when politics is used to politicize religion and religion is used to politicize politics. I assume that in many ways, we will agree with some of the basic issues involved with the International Religious Freedom Act, so I assume that we would probably all mostly agree that it is constitutional for the U.S. government to

be involved in promoting the freedom of religion, just as the United States government could be involved in promoting other kinds of freedom.

But promoting *freedom* of religion is a very different thing from the United States government being involved in promoting *religion* because people believe that religion is a good thing. I'm not taking a point of view on whether religion is a good thing or a bad thing; religion, like fire, can be used for many different purposes. I'm not particularly keen on Wahhabism<sup>59</sup> as a religion, for example, and some of the ways that it is used for interpretation of the Qu'ran, I think, are harmful. This doesn't mean that *religion* is bad. I would suggest that the United States government should not be in the business of promoting religion, but that it may go into the business of promoting religious *freedom*—and I assume, probably to some extent, we agree that religious freedom itself is a good thing. Whether a person is religious or not religious, freedom of religion is a good thing, and there are many reasons for emphasizing this. Religious freedom is a good thing because it respects the dignity of the human being to make decisions about his or her own particular life, about what is important, and those are foundational and important moral decisions. People should be accorded the dignity to be able to decide about religion and to live religious lives as they choose.

I think freedom of religion—partly, as Tom was suggesting—also is good for the stability of society. While I think that at this moment, when the American economy is suffering a serious (even if short-term) decline, it would not be well received or effective for the U.S. government to go to China and Japan and have diplomats talk about how freedom of religion is good for business. But the concept is still important. Protecting religious freedom, like protecting other forms of freedom, is part of how a well-governing society operates. So, I hope we share many of these underlying concerns. Nevertheless, because I come from the ACLU and many of you are with the Federalist

---

59. Wahhabism is an Islamic revivalist movement which is commonly regarded as inherently radical. See Roger Hardy, *Analysis: Inside Wahhabi Islam*, BBCNEWS.COM, Sept. 30, 2001, [http://news.bbc.co.uk/2/hi/middle\\_east/1571144.stm](http://news.bbc.co.uk/2/hi/middle_east/1571144.stm) (last visited Apr. 5, 2009).



2009] *THE FEDERALIST SOCIETY—RELIGIOUS FREEDOM PANEL* 485

Society, we don't want too much Kumbaya. So let's get down to business and have a little bit of fun.

(Laughter.)

PROFESSOR GUNN: We're accustomed to presidents of the United States giving speeches of the sort that I would now like to quote from a presidential address:

"Our religion . . . is a positive force that impels us to affirmative action."<sup>60</sup> This is the president of the United States speaking, not a religious leader: "We are under divine orders—not only to refrain from doing evil, but also to do good and to make this world a better place in which to live."<sup>61</sup> Is it the role of the president to be talking about divine orders? Let's continue:

More than this, religion should establish moral standards for the conduct of our whole Nation, at home and abroad. We should judge our achievements, as a nation, in the scales of right and wrong. The democracy we cherish and our free institutions depend upon the observance of the moral code—in private life and also in public life . . . . Freedom for the human soul is, indeed, the most important principle of our civilization.<sup>62</sup>

The President goes on to say: "we must apply moral standards to our national conduct. At the present time our nation is engaged in a great effort to maintain justice and peace in the world. An essential feature of this effort is our program to build up the defenses of our country."<sup>63</sup> So, we are supporting peace, justice, freedom, freedom for religion, and part of that is we need to have strong military forces.

In American struggles abroad, the president continued, "[w]e are defending the religious [freedoms] upon which our Nation and our whole way of life [were] founded. We are defending the right to worship God—each as he sees fit according to his own conscience."<sup>64</sup> In our battles abroad, "[w]e are defending the right of people to gather together, all across

---

60. Harry S. Truman, President, Address at the Cornerstone Laying of the New York Avenue Presbyterian Church (Apr. 3, 1951), <http://www.presidency.ucsb.edu/ws/index.php?pid=14048> (last visited Apr. 5, 2009).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

our land [and others], in churches such as this one,”—this speech was actually delivered in a church—”[f]or the danger that threatens us in the world today is utterly and totally opposed to all these things. [Our opponents’ actions are] based on a fierce and terrible fanaticism.”<sup>65</sup> The president who delivered this speech was not, as you might have thought, George W. Bush in 2001, but Harry S. Truman in a speech in April 1951 at the dedication of the New York Avenue Presbyterian Church in Washington, D.C., and the enemy he’s talking about is not Al-Qaeda in Iraq, but communists in Korea.<sup>66</sup>

I believe that this language that mixes moral causes with religion, with politics, with freedom of religion, with U.S. foreign policy, and with wars abroad can be a very dangerous thing. Let me give you two examples.

In January of 1954, in a meeting of the National Security Council led by President Eisenhower—that was a time when “the National Security Council” meant the principals of the National Security Council, not the staff—there was a problem at Dien Bien Phu (in northern Vietnam).<sup>67</sup> The French military at Dien Bien Phu was surrounded by the Vietminh, which was led by General Giáp.<sup>68</sup> In January 1954, it didn’t look good for the French who were surrounded and outnumbered, but the battle hadn’t yet started.

President Eisenhower, a five-star General, was asked whether he thought American troops should be sent to fight in Asia, and Eisenhower said at this classified meeting of the National Security Council, “Absolutely not. I will never send American troops to fight in Asia.” A couple of months later, he said the same thing publicly at a press conference.<sup>69</sup> Vice

---

65. *Id.*

66. *See id.*

67. MELANIE BILLINGS-YUN, *DECISION AGAINST WAR: EISENHOWER AND DIEN BIEN PHU* 25 (Columbia Univ. Press 1988).

68. *The Fall of Dienbienphu*, *TIME*, May 17, 1954, <http://www.time.com/time/magazine/article/0,9171,860710-3,00.html> (last visited Apr. 5, 2009). The details of the origins of American involvement in the war in Vietnam and the role that religion played in it are recounted in GUNN, *SPIRITUAL WEAPONS*, *supra* note 31, at 155–96.

69. *See* Dwight D. Eisenhower, President, President’s News Conference (Feb. 10,

President Richard Nixon also made the same statement.<sup>70</sup> John F. Kennedy, then just a lowly senator from Massachusetts, also made a similar statement in 1954, “American combat troops should never be sent to Vietnam.”

A month later, at the next meeting of the National Security Council in February 1954, the situation was looking increasingly dire for the French. Again, President Eisenhower was asked, “Are you willing to send American troops or do we want to aid the French in their battle against Communism?” and Eisenhower said something quite interesting at that meeting. He said that what we need is a Buddhist Joan of Arc in Vietnam to lead the struggle against Communism.<sup>71</sup> Then President Eisenhower said, “Could we find a Buddhist Joan of Arc?”<sup>72</sup> Quaker Vice President Nixon, jokingly said, Well, we don’t want the Buddhist because they’re all pacifists and the —

(Laughter.)

PROFESSOR GUNN:—the transcript of the meeting of the National Security Council puts “laughter” in there.<sup>73</sup>

(Laughter.)

PROFESSOR GUNN: Allen Dulles, Director of Central

---

1954), <http://www.presidency.ucsb.edu/ws/index.php?pid=10130> (“I would just say this: no one could be more bitterly opposed to ever getting the United States involved in a hot war in that region that I am”). See also Dwight D. Eisenhower, President, Radio News Conference (Feb. 10, 1954), <http://www.mtholyoke.edu/acad/intrel/pentagon/ps9.htm> (“I say that I cannot conceive of a greater tragedy for America than to get heavily involved now in an all-out war in any of those regions”).

70. See *The Third Kennedy-Nixon Debate* (Oct 13, 1960), <http://www.kiva.net/~jsagarin/sports/kenix03.htm> (last visited Apr. 5, 2009) (showing transcript of the presidential debate where Vice President Nixon stated that he supported the Administration’s position and thought that that position had been correct in regards to dealing with the Communists in Indochina); *President Richard Nixon’s Role in the Vietnam War*, <http://www.vietnamwar.com/presidentnixonrole.htm> (last visited Apr. 5, 2009) (discussing the Nixon Doctrine and how the U.S. would aid Asia by providing aid and arms, but would not provide troops); *President Nixon and Vietnam*, <http://www.sagehistory.net/vietnam/docs/nixonvietnam1.htm> (last visited Apr. 5, 2009) (stating President Nixon’s approach to Vietnam was to gradually withdraw American troops while slowly turning the war over to the Vietnamese government).

71. See SETH JACOBS, *AMERICA’S MIRACLE MAN IN VIETNAM* 48 (Duke Univ. Press 2004); and Gunn, *op cit*.

72. See JACOBS, *supra* note 71.

73. *Id.* at 48.

Intelligence of the United States, then said, “Well, there are a lot of Catholics in Vietnam; maybe we can find a good Catholic to lead this struggle.”<sup>74</sup> Within four months from that time, the United States promoted Ngo Dinh Diem, a fiercely devout Roman Catholic and a fierce anti-Communist, to be the new Vietnamese Prime Minister.<sup>75</sup> For the following ten years, the United States supported Ngo Dinh Diem, its chosen “Catholic,” to be the leader of the predominantly Buddhist country of Vietnam. The United States supported this man, who became widely reviled by American political leaders by 1963 because he was both ineffectual and a tyrant, with one of the arguments being used throughout the years 1954 to 1963 that he was a Catholic who would protect the rights of religious believers in Vietnam.<sup>76</sup> The political leaders of the United States chose a religious man to lead a war against Communism because it was thought that Catholicism would be an effective tool against the atheists.<sup>77</sup>

Ngo Dinh Diem came to the United States in 1957 and received a triumphal welcome by the people of the United States.<sup>78</sup> Go back and read *Time* magazine<sup>79</sup> or the *New York Times*<sup>80</sup> during the time of Diem’s visit in May 1957. President Eisenhower uncharacteristically went to what was then the national airport—I don’t remember what the name of it is now—  
(Laughter.)

---

74. *Id.*

75. *Id.* at 52.

76. *See id.* at 219–22 (referring to Diem as America’s Miracle Man and quoting several people in the U.S. media crediting Diem as a Catholic who hated tyranny and loved freedom).

77. *See id.* at 48–49 (inferring the theme of cultivating a religious leader to lead a war on Communism based on notes from the Undersecretary of State and studies prepared by the Operations Coordinating Board).

78. *Id.* at 256.

79. *See Foreign Aid Repaid*, *TIME*, May 20, 1957, <http://www.time.com/time/magazine/article/0,9171,809482,00.html> (last visited Apr. 5, 2009) (illustrating Diem’s warm welcome to the U.S. and speeches thanking the U.S. for the outpouring of aid to the Vietnamese people).

80. *See JACOBS*, *supra* note 71, at 254–56 (quoting a *New York Times* article published the day after Diem’s arrival which hails Diem for his work in Asia and welcomes “a good friend” to the United States).

PROFESSOR GUNN:—to personally greet Ngo Dinh Diem.<sup>81</sup> Within the next four years, however, Diem’s problems finally became widely recognized—problems that had been raised by some perceptive people within the State Department and by some CIA officials as early as 1954: that Diem was a dictator who suppressed Buddhism in Vietnam and tragically promoted his version of Catholicism.<sup>82</sup> But what the American press read about up until 1960—before the true story about Diem started becoming a part of the American dialogue—was that Diem was defending religious freedom in Vietnam.<sup>83</sup>

Well, he wasn’t, and it became very clear when the Buddhists—remember those pacifist Buddhists that we laughed about in 1954—when the pacifist Buddhists started engaging in acts of nonviolent resistance in 1963, including self-immolation.<sup>84</sup> Seven Buddhists self-immolated, to the increasing horror of Americans who *finally* began to ask questions that they should have been asking years earlier.<sup>85</sup> The troops of Ngo Dinh Diem cracked down and shot at unarmed Buddhist protesters. These photographs of unarmed Buddhists being suppressed by the troops, yet supported by the United States, ostensibly in the name of religious freedom, turned the American people against Diem.<sup>86</sup> President Kennedy in 1963

---

81. *Id.* at 219, 256.

82. *Id.* at 13 (stating that Eisenhower continued to support Diem despite reports that he failed to “cultivate a base of popular support and was, in fact, a dictator who regularly ordered the execution of political opponents . . . and violated every article in South Vietnam’s constitution.”).

83. *See id.* at 267 (“The crimes of the Diem regime, including torture, mass imprisonment, and execution without trial, were not reported in America’s mainstream newspapers and magazines until the early 1960’s”). *See also id.* at 268 (calling the American press “mute” and the administration “indifferent” to Diem’s repressive policies).

84. *Id.* at 268–69 (illustrating the gruesome accounts of Buddhist monk, Thich Quan Duc, dousing himself with gasoline and lighting a match to protest Diem’s government). He had previously notified international media and soon the pictures and videos of his burning body spread across the world. *Id.*

85. *See id.* (stating that “a series of public Buddhist [self immolation] suicides came in rapid succession”).

86. *See id.* (asserting that the horrific images of Buddhist torch suicides forced Americans to reconsider their impressions of Diem’s policies and quoting Kennedy who, after viewing one such photograph, told Ambassador Henry Cabot Lodge that “no news

finally gave the go-ahead for a coup but not the go-ahead for an assassination—which nevertheless occurred.<sup>87</sup>

The United States used “religious freedom” to help put into power a man who suppressed religious freedom. The United States gave military weapons to a man who used them to suppress not only religious freedom but other freedoms. It was religion that put Diem into power, and it was religion that took Diem out of power.

A similar event—if I could go back to 1954 again where we started with Diem—occurred in Guatemala, also in 1954. On June 14, 1954—Flag Day in the United States, the day that “under God” was put into the Pledge of Allegiance—CIA planes flew over Guatemala City, dropping leaflets that said the following.<sup>88</sup> I’ll read it to you. Although it went out under the name of Mariano Rossell y Arellano, who was the Archbishop of Guatemala City, the document was in fact written by the CIA.<sup>89</sup> Although the Archbishop did approve the document, it was written by the CIA.<sup>90</sup>

American planes flying over Guatemala City dropped the following leaflet:

We raise our voice to alert Catholics at this moment, when the worst atheistic doctrine of all time—anti-Christian Communism—continues its brazen inroads in our country, masquerading as a movement of social reform for the needy classes . . . . The people of Guatemala must rise as one man against this enemy. Our struggle against Communism must be . . . a crusade of prayer and sacrifice as well as intensive spreading of the social doctrine of the church and a total rejection of Communist propaganda—for the love of God and Guatemala.<sup>91</sup>

---

picture in history has generated so much emotion around the world as that one.”)

87. *Id.* at 276.

88. *Anti-Red Crusade*, *TIME*, Apr. 26, 1954, <http://www.time.com/time/magazine/article/0,9171,860645,00.html> (last visited Apr. 5, 2009). For a detailed discussion of the events in Guatemala, see GUNN, *SPIRITUAL WEAPONS*, *supra* note 31, at 133–54.

89. See JON LEE ANDERSON, *CHE GUEVARA: A REVOLUTIONARY LIFE* 142 (Grove Press 1997).

90. See *id.*

91. *Anti-Red Crusade*, *supra* note 88.

God and country—the same language that General Douglas MacArthur famously used during the same period in American history—combined with United States military power, to support a coup that overthrew the government of Guatemala<sup>92</sup>—one of the three democratically-elected governments south of Mexico at the time. One of the persons on whom the United States relied in its effort to support “religious freedom” in Guatemala was Anastasio Samoza, the now universally despised dictator of Nicaragua.<sup>93</sup>

One of the principal arguments that was used in support of this invasion, part of the public rhetoric—you can read it in the *New York Times*, *Time* magazine, *U.S. News & World Report* at the time—was that the Guatemalan government had seized the lands of American private enterprise in Guatemala. The United States denounced the land reform of Jacobo Arbenz for being Communist-inspired,<sup>94</sup> and as a redistribution of wealth.<sup>95</sup> It was Communist-inspired and Communist-influenced. That became the justification used publicly in support of the coup that led to the overthrow of the government of Guatemala.<sup>96</sup>

This evil to be overcome—taking land from the rich and giving it to the poor—was seen as being something that was wrong and was against freedom and against democracy and against religion. But those making that argument in 1954 should have noticed what, just a few years earlier, General Douglas “God and Country” MacArthur had done in Japan.<sup>97</sup>

---

92. See Megan K. Donovan, *The International Commission Against Impunity in Guatemala: Will Accountability Prevail?*, 25 ARIZ. J. INT'L & COMP. L. 779, 782 (2008).

93. Gerald K. Haines, CIA and Guatemala Assassination Proposals 1952–1954 (1994), [http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB4/cia-guatemala1\\_1.html](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB4/cia-guatemala1_1.html) (last visited Apr. 5, 2009) (detailing Samoza's participation in the CIA operation codenamed PBSUCCESS).

94. See Philip C. Roettinger, *Third World Column: Fighting Talk / Recollections of the 1954 Overthrow of President Arbenz in Honduras*, THE GUARDIAN, July 18, 1986 (stating that after Arbenz took over unused land belonging to the United Fruit Company in an effort to transform Guatemala into a “modern capitalist state,” the CIA used this argument to support that the land reform was Communist-inspired).

95. *Id.*

96. *Id.*

97. Samantha Sheppard, *Japan As A Model for South African Land Reform*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 553, 563 (outlining General Douglas MacArthur's

As the post-war military governor of Japan, General MacArthur proposed, and the Japanese Diet did not have much choice in the matter, a major land seizure and redistribution program in Japan.<sup>98</sup> According to MacArthur's biographer, the land reform program was probably the general's greatest achievement in Japan, because it eliminated the chief source of peasant discontent in the country.<sup>99</sup> MacArthur himself described this land seizure as being extraordinarily successful.<sup>100</sup> The amount of compensation later given by Guatemala's left-leaning government—that the United States found to be so offensive at the time—was much higher than what General MacArthur instituted for the lands that the American government helped seize and redistribute in Japan just a few years earlier.

As written by a person who did analysis of this land-reform program, each redistributed acre of land in Japan was purchased at a price equivalent of a pack of black market carton of cigarettes.<sup>101</sup> The former tenants of the seized lands were invited to purchase the land at the same rate.<sup>102</sup> The sum could be repaid over a thirty-year period at 3.2%.<sup>103</sup> In 1954, the American government secretly helped overthrow what it denounced as the pro-Communist, anti-religion government of Guatemala because it seized land to redistribute to the peasants of the country. Yet that same form of land redistribution was looked upon as being necessary to support democracy in Japan—when Americans controlled Japan.

And I would invite you to look at what happened in Japan and what happened in Guatemala in the ten years or the fifteen

---

radical land reform policy implemented between 1946–1950 whereby all land owned by absentee and tenant landlords was subject to compulsory purchase at government-set purchase prices).

98. *Id.*

99. See FRANK KELLEY, *MACARTHUR—MAN OF ACTION* 136 (1950).

100. Douglas MacArthur, General, General Douglas MacArthur's Address to Congress (Apr. 19, 1951), <http://aboutusajapan.usembassy.gov/e/jusa-macarthur-speech.html> (last visited Apr. 5, 2009).

101. RICHARD J. BARNET, *THE ALLIANCE—AMERICA, EUROPE, JAPAN: MAKERS OF THE POSTWAR WORLD* 72 (Simon & Schuster 1983)

102. *Id.*

103. *Id.*



2009] *THE FEDERALIST SOCIETY—RELIGIOUS FREEDOM PANEL* 493

years that followed those two efforts at land redistribution—the successful redistribution in Japan and the one in Guatemala aborted by the American-sponsored coup.<sup>104</sup> During the next twenty years, 200,000 people, principally Mayans, were executed by gangs inside of Guatemala supported by shipments of American weapons.<sup>105</sup>

So now, in both cases, Guatemala and Vietnam, and in other cases—as we’ve already heard, in Afghanistan and Iraq—we hear the language of religion, religious freedom, religion being a good thing, and atheism being a bad thing all being used to justify American policy. This is where the danger lies. Not in “religious freedom”, but in using language about the goodness of religion and religious freedom while deploying military force to promote other objectives.

Thank you.

(Applause.)

PROFESSOR GARNETT: Thanks very much. This conference is a wonderful opportunity for members of the Federalist Society to take a break from the hard work of overseeing the vast right-wing conspiracy and to put down for a while the burdens of running the world.

(Laughter.)

PROFESSOR GARNETT: It was very clever, I thought, for Gene Meyer to engineer the election to the presidency of a liberal constitutional law professor. That should really throw the *Times* off his trail.

As for Jeremy Gunn, he is so charming that, I confess, I have given him all the secret handshakes and codes. Jeremy, you’re in; you can go ahead and hang up that sign.

For starters, I should say that most of what I know about the International Religious Freedom Act I learned from reading Tom Farr, Jeremy Gunn, and Bill Saunders. I am going to go way out on a limb and do what academics rarely do, namely,

---

104. See Donovan, *supra* note 92, at 782.

105. Becky W. Evans, *The New Immigrants: Chapel in Guatemala a Testament to Civil War Horrors*, S. COAST TODAY, June 29, 2008, available at <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20080629/SPECIAL/806290301/-1/SPECIAL62> (last visited Apr. 5, 2009).

admit that I am not an expert—at least, not regarding the Act’s history or implementation. And so, instead of talking about these matters, I will share with you a few thoughts about religious freedom generally—about its content, implications, and importance—in the hope that this will help us as we think more specifically about the Act and its future application.

But first, step back with me for a moment to kinder, gentler days. In 1988, twenty years ago, while out on the campaign trail, then Vice President George H.W. Bush was recalling his experiences being shot down as a young fighter pilot over the South Pacific.<sup>106</sup> Imagine if you can that I am now speaking in a Dana Carvey type voice:

Was I scared floating in a little yellow raft off the coast of an enemy-held island, setting a world record for paddling? Well, of course I was. And what sustains you in times like that? Well, you go back to fundamental values. I thought about Mother and Dad and the strength I got from them, and I thought about God and faith and the separation of Church and State.<sup>107</sup>

(Laughter.)

PROFESSOR GARNETT: Mother, God, faith, and the separation of church and state.

Now to be sure, this train of thought is absurd, but it is also, I think, entirely American. That God and faith could not be invoked by a would-be president as fundamental values without this kind of awkward addition of “and the separation of church and state” says a lot, for better or worse, about how we think about the content and the implications of religious freedom.

Now, fast-forward ten years, to 1998, when, as we heard, Congress enacted the IRFA and declared it to be the policy of the United States to “condemn violations of religious freedom, and to promote, . . . the fundamental right to freedom of religion”.<sup>108</sup> As Tom Farr has put it, this declaration has its roots in the “American passion for religious liberty . . . [in our belief] that

---

106. Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 NOTRE DAME J.L. & RELIGION 101 (2007).

107. Cullen Murphy, Op-Ed., *War Is Heck*, WASH. POST, Apr. 8, 1988, at A21.

108. International Religious Freedom Act of 1998, 22 U.S.C. §§ 6401–81 (1998) (as amended).

every human being has, by virtue of his or her existence, the inviolable right to seek religious truth[s], . . . [and in our conviction] that [t]his right is not granted by the state, but exist[s] prior to governments and [to] society.”<sup>109</sup>

Well, is this policy and are these convictions consistent with the “separation of church and state” that inspired the first President Bush as he was floating in the South Pacific? Are they appropriate for a government that is constrained by the no-establishment provision of our First Amendment? After all, this is a provision that, according to some, not only outlaws a formally established church but also mandates a secular civil order and a God-free political conversation. Some have complained that the Act singles out religious freedom for special care and thereby establishes a hierarchy of freedoms.<sup>110</sup> Are they right? If they are, does our Constitution permit this kind of special solicitude?

When thinking about such questions, I start from the bedrock premise that, as President Clinton put even before the enactment of the IRFA, religious freedom is literally our first freedom.<sup>111</sup> This is not merely because it is listed first in the Bill of Rights, but because it really was central to the Founders’ vision of, and hopes for, the American Experiment.

Judge John Noonan has argued that religious liberty as we understand it today was an American invention,<sup>112</sup> and we should not be afraid to emphasize or celebrate this fact. We believed from the outset that, as Madison put it, our bold

---

109. Tom Farr, *Roots of the International Religious Freedom Report*, 6 ISSUES OF DEMOCRACY 8 (2001).

110. Eugenia Relano Pastor, *The Flawed Implementation of the International Religious Freedom Act of 1998: A European Perspective*, 2005 BYU L. REV. 711, 740 (2005).

111. William J. Clinton, President, Remarks on Signing the Religious Freedom Restoration Act of 1993 (Nov. 16, 1993), <http://www.presidency.ucsb.edu/ws/index.php?pid=46124> (last visited Apr. 5, 2009).

112. JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 2–3 (Univ. of Cal. Press 1998).

experiment in religious freedom would make us stand out for the better, that it would add “luster to our country.”<sup>113</sup> The Framers, just like Americans today, did not always agree about what precisely freedom of religion means. We know that Jefferson and Washington and Adams and Madison all had different views about religious freedom. But they knew, as we do, that it matters. They knew, as I hope we do, that, unless our most sacred things are protected from the grubby goals of state functionaries, all of our freedoms are vulnerable.

This point cannot be emphasized enough, whether we are talking about the Act specifically or about religious liberty more generally. The protections that are afforded to religious freedom in our constitutional traditions are not accidents or leftovers. They’re not anomalies, anachronisms, or lingering aberrations in our secular state.<sup>114</sup>

In our traditions, religious freedom is cherished as a basic and non-negotiable aspect of human dignity. Being from the University of Notre Dame, I cannot resist noting that the American insight into the centrality of religious freedom was embraced at the Second Vatican Council, in the Declaration on Religious Liberty, in which the late Pope Paul VI said that, “A sense of the dignity of the human person has been impressing itself more and more deeply on the consciousness of contemporary man, [and that as a result,] . . . the human person has a right to religious freedom, . . . a right that has its foundation in the very nature of the human person.”<sup>115</sup>

Our Constitution does not regard, and therefore our

---

113. James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *James Madison: Writings* 29–36 (Jack N. Rakove ed., 1999), [http://www.stephenjaygould.org/ctrl/madison\\_mr.html](http://www.stephenjaygould.org/ctrl/madison_mr.html) (last visited Apr. 5, 2009).

114. See, e.g., John Courtney Murray, S.J., *Declaration on Religious Freedom: Commentary*, in *AMERICAN PARTICIPATION AT THE SECOND VATICAN COUNCIL* 668, 668–76 (Vincent A. Yzermans ed., 1967), <http://woodstock.georgetown.edu/library/Murray/1967c.htm> (last visited Apr. 5, 2009).

115. Pope Paul VI, Declaration on Religious Freedom *Dignitatis Humanae* on the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious Promulgated by His Holiness, Dec. 7, 1965, [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/index.htm](http://www.vatican.va/archive/hist_councils/ii_vatican_council/index.htm) [hereinafter Declaration on Religious Freedom] (last visited Apr. 5, 2009).

government should not regard, religious faith with a grudging suspicion or as a bizarre quirk, or as something left over from our simpler past. The goal of the First Amendment, as I see it, is to protect religion from government so that it will flourish.<sup>116</sup> It is not to push religion to the margins and to wait for it to wither. As my former colleague, now the Dean at Boston College, John Garvey, put it, our law protects the freedom of religion because the law thinks religion is a good thing. This is true notwithstanding the fact, which Jeremy emphasized earlier, that sometimes bad things are done in the name of religion and by religious people.<sup>117</sup>

However, and with all due respect to John Garvey, doesn't every law student learn that American governments must be neutral toward religion, that they may not endorse religion, and that they may not advance it or single it out? Isn't it black-letter law that all legislation must have a secular purpose?<sup>118</sup> My friend Andy Koppelman has argued that this secular-purpose requirement follows directly from a principle that is at the core of the Establishment Clause, namely, that governments cannot declare religious truth.<sup>119</sup>

With all of these claims and questions in mind, what should we make of the Act's earlier-quoted purposes? In response to the critics who say that the Act unconstitutionally singles out religion for special protections or inappropriately elevates religious liberty to the top of the human rights heap,<sup>120</sup> the Act's defenders are quick to insist that it does not do that, that it does not make one right more important than others.<sup>121</sup> As Jeremy has put it,<sup>122</sup> the Act does not signify that religion should be placed at the top of a hierarchy. It signifies only that religious freedom is a right that has been relatively neglected by

---

116. See U.S. CONST. amend. I.

117. See John H. Garvey, *The Real Reason for Religious Freedom*, FIRST THINGS (Mar. 1997), [http://www.firstthings.com/article.php3?id\\_article=3662](http://www.firstthings.com/article.php3?id_article=3662) (last visited Apr. 5, 2009); Gunn, *supra* text at 27–28.

118. See *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

119. See Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 89 (2002).

120. See Pastor, *supra* note 110.

121. *Id.* (citing Gunn).

122. Gunn, *supra* text at 27–28.

governments and therefore needs greater protection. The government is not giving religion special privileges so much as attempting to lift and to prevent the imposition of special burdens. Maybe that is right. Maybe that works.

But still, there are those who continue to doubt that there is any principled secular reason for singling out religion even in this way. Jim Nichol, for example, has written a provocative article called “Who Needs Freedom of Religion?”<sup>123</sup> His point is not that religion is unimportant, only that it does not need any special protection, because we can provide religion all the protection it needs and all the protection it deserves simply by protecting liberty in general. In a similar vein, Chris Eisgruber and Larry Sager have argued recently that there is no principled basis for providing religion either special privileges or special disabilities.<sup>124</sup> Distinctive treatment of religion is justifiable not because of something special about religion, but only when it is necessary to secure the equal liberty to which we are all entitled under the Constitution.<sup>125</sup>

Well, to make a long story short, I think it is a mistake to reduce religion in this way, and to assimilate religious freedom to equality or liberty more generally. And so, taking to heart the various criticisms that Tom Farr has set out,<sup>126</sup> I am inclined to be an enthusiast for the Act and for its stated purposes as well. It seems to me, as it does to Dean Garvey,<sup>127</sup> that our Constitution treats, and therefore our government may and should treat, religion as a good thing. Or, to put the matter a little bit differently, again quoting the Declaration on Religious Liberty, “government[s] therefore ought indeed to take account of the religious life of the [people] and,” perhaps more

---

123. James W. Nickel, *Who Needs Freedom of Religion*, 76 U. COLO. L. REV. 909 (2005).

124. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007).

125. *Id.*

126. *See generally* Farr, *supra* note 109.

127. *See* Garvey, *supra* note 117.

2009] *THE FEDERALIST SOCIETY—RELIGIOUS FREEDOM PANEL* 499

controversially, “show it favor.” “They ought to create conditions favorable to the fostering of religious freedom, religious activity, and religious life.”<sup>128</sup>

To say this is not to question in any way the importance of the “separation of church and state,” the cherished principle that once kept a future president floating. This principle, properly understood, is a crucial dimension of the very religious freedom that the Act ought to promote, celebrate, and protect. We need to remember, though, that the aim of church-state separation properly understood is not to radically privatize religion or to impose a no-religion rule on conversations about public concerns. It is, instead, to affirm the independence of religious institutions from government control and supervision.

This independence, this separation, protects everyone’s freedoms, those of believers and nonbelievers alike, because when the state respects the distinctiveness—the separation of religious communities, authorities, and laws—it thereby concedes, as it should, the limits on its own power. It admits that there are things that are not Caesar’s. It acknowledges that there are some things that the state cannot do. As a historical matter, this concession, as George Weigel has written, created the social and cultural conditions for the very possibility of what a later generation of lawyers and democrats would call the limited state.<sup>129</sup>

So, contrary to the clumsy claims of some activists, the separation of church and state is not a lie or a trick, something conjured up by Jeremy and his friends at the ACLU. In fact, as figures from St. Augustine to Roger Williams taught us, church-state separation is a vital dimension of religious freedom.<sup>130</sup> Pope Benedict XVI could not have been more clear in his recent

---

128. Declaration on Religious Freedom, *supra* note 115.

129. George Weigel, *The Catholic Human Rights Revolution*, *CRISIS*, July/Aug. 1996, <http://www.ewtn.com/library/CHISTORY/HRREVOLU.TXT> (last visited Apr. 5, 2009).

130. Richard Garnett, *An Unassuming Decision*, *NAT’L REV. ONLINE*, Feb. 23, 2006, <http://www.nationalreview.com/comment/garnett200602230812.asp> (last visited Apr. 5, 2009).

encyclical letter that fundamental to Christianity is the distinction between what belongs to Caesar and what belongs to God.<sup>131</sup>

Now, as I mentioned earlier, some would argue today that the separation of church and state requires governments to scrub clean the public square of all religious residue. Those who hold that view might suggest that the International Religious Freedom Act crosses the line in stating that it is a purpose of American foreign policy to protect religious freedom. But this understanding of church-state separation is mistaken. It is untrue to the vision of our founders and to the text of the Constitution. To quote John Courtney Murray, arguments like these stand the First Amendment on its head, “[a]nd in that position, it [can only] gurgle juridical nonsense.”<sup>132</sup>

Thank you.

(Applause.)

MR. SAUNDERS: If you have some questions, we have a microphone up here, and if you would just come line up. . . Before we have any questions from the floor, do any of the panelists want to respond in particular to one another on anything?

(No response.)

MR. SAUNDERS: Okay. And if everybody—you know, we’ve got about twenty-five minutes or so, so if you would just state your question briefly.

AUDIENCE PARTICIPANT: I think that Jeremy and Tom described to us really opposite sides of the same point—how we failed to fully and neutrally promote religion before the Act in Jeremy’s case, and after the Act was passed in Tom’s case.

What I wonder in a way is the harder question of reconciling cultures that don’t, have not traditionally and may not accept, the separation of church and state. Are there models under

---

131. Encyclical Letter from Pope Benedict XVI to the Bishops, Priests, and Deacons, Men and Women Religious, and All the Lay Faithful on Christian Love (Dec. 25, 2005) (on file with the Libreria Editrice Vaticana), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20051225\\_deus-caritas-est\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html) (last visited Apr. 5, 2009).

132. John Courtney Murray, *Law or Prepossessions?*, 14 *LAW & CONTEMP. PROBS.* 23, 33 (Winter 1949).



2009] *THE FEDERALIST SOCIETY—RELIGIOUS FREEDOM PANEL* 501

which yet they could still be conceived to promote religious liberty?

MR. SAUNDERS: Okay. Any of the panelists.

PROFESSOR FARR: I was just going to say that I noticed that people started nodding off to sleep when Jeremy was talking, and I don't think that had to do anything with him. It was after lunch.

PROFESSOR GUNN: I didn't notice that.

(Laughter.)

PROFESSOR FARR: Are there models for other cultures' use on religious liberty? It's a terribly important question. It's really a question about Islam, although we could ask about . . .

PANELIST: Well, England for instance.

PROFESSOR FARR: Well, so far they're not a national security threat to the United States.<sup>133</sup> I say this is a question about Islam because I think that is the key issue. And I think the answer is there'd better be patterns that can be employed from the heart of Islam.

I think that American religious freedom policy needs to be engaging Islamic communities that are capable of seeing Islam this way, not to be theologians but to be able to discern where there are Islamists and Islamic political and religious leaders who do believe religious liberty is as important as Islam.<sup>134</sup> They do exist, but they have their heads down because it is a very dangerous position to take.

And so, without getting into Islamic theology, I'm sure there's someone here who will challenge the notion that Islam is capable of such a thing, but I would simply answer them by saying there are fifty-odd Islamic-majority countries in the world.<sup>135</sup> There are 1.3 billion Muslims in the world.<sup>136</sup> We had

---

133. See U.S. DEPARTMENT OF STATE, STATE SPONSORS OF TERRORISM, <http://www.state.gov/s/ct/c14151.htm> (last visited Apr. 5, 2009) (not listing England as a threat to U.S. security).

134. See generally Magdi Abdelhadi, *What Islam Says on Religious Freedom*, BBCNEWS.COM, Mar. 27, 2006, [http://news.bbc.co.uk/2/hi/south\\_asia/4850080.stm](http://news.bbc.co.uk/2/hi/south_asia/4850080.stm) (last visited Apr. 5, 2009) (citing Islamic thinker Gamal al-Banna).

135. See CIA WORLD FACTBOOK, RELIGIONS, available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2122.html> (last visited Apr. 5, 2009) (listing countries' predominant religious practices).

darned sure better hope that they can get this issue right if, in fact, it is necessary—as I argue it is—for a stable democracy to exist.

PROFESSOR GUNN: Islam is certainly the salient example, so we can see that, and we would be pretending if we didn't recognize that. But, I think the problem is less Islam, and more political majorities that have a dominant religious belief and want to use that religious belief to construct the character of the society.

This problem applies whether it is the Russian Orthodox Church in Russia promoting classes in public schools to teach Slavic identity—by which they mean the Russian Orthodox Church<sup>137</sup>—or small communities in the United States, where public schools could be used to promote a particular religious belief. Here in the United States, some people receive death threats when they challenge policies at public schools that are designed to promote Christianity.<sup>138</sup> I do not understand why people insist on erecting Ten Commandments monuments in front of government while ignoring, for example, the injunction to keep the Sabbath day holy. It is as if erecting a graven image substitutes for obeying the commandments—including the commandment not to worship graven images. That's in the United States, where a political majority is saying that this is a Christian country.<sup>139</sup> It's the problem of people using their preferred religion to control the society. While we see salient examples in Muslim-majority countries, it is a problem that is much broader.

---

136. Luke Baker, *Research Explores What 1.3 Billion Muslims Think*, REUTERS, Apr. 7, 2008, <http://www.reuters.com/article/lifestyleMolt/idUSL0768852020080407> (last visited Apr. 5, 2009).

137. Clifford J. Levy, *Welcome or Not, Orthodoxy is Back in Russia's Public Schools*, N.Y. TIMES, Sept. 23, 2007, <http://www.nytimes.com/2007/09/23/world/europe/23russia.html> (last visited Apr. 5, 2009).

138. Tom Weber, *ACLU Sues TiZA Charter School* (Minn. Public Radio broadcast Jan. 21, 2009), [http://minnesota.publicradio.org/display/web/2009/01/21/aclu\\_to\\_sue\\_tiza\\_charter\\_school/?refid=0](http://minnesota.publicradio.org/display/web/2009/01/21/aclu_to_sue_tiza_charter_school/?refid=0) (last visited Apr. 5, 2009).

139. AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, *Is America a Christian Nation?: Religion, Government and Individual Freedom*, FAITH & FREEDOM SERIES, [http://www.au-oc.org/pdf-files/Is\\_the\\_United\\_States\\_a\\_Christian\\_nation.pdf](http://www.au-oc.org/pdf-files/Is_the_United_States_a_Christian_nation.pdf) (last visited Apr. 5, 2009).

As to what might happen within Islam, I would hope that Muslims themselves would appeal to two sources within their own traditions. One of them is to appeal to Islamic history, where if we go back before the 16th century and before, Islam was the *relatively* tolerant religion.<sup>140</sup> While there was not freedom of religion in the Muslim-dominated countries,<sup>141</sup> and we should not have that romantic notion that somehow that existed. It was relatively tolerant compared to Christianity,<sup>142</sup> but later much of the Muslim world slowed, or reversed, while the Western world progressed. But there is a real and serious tradition to be evoked.

The second appeal is to the position of Muslim minorities living in non-Muslim countries, because religious minorities understand, without any difficulty at all, the principle of religious freedom.<sup>143</sup> Muslims living in the United States or Europe or in Australia will understand religious freedom, and they will understand what it is like to be a minority in a country where the laws or customs may discriminate against them, and they are those best situated to make the case to Muslims in living as majorities.

PROFESSOR FARR: If I could just add one thing in addition to what Jeremy has said, with which I agree—I think it's true of Russian orthodoxy and majority Muslim communities. I mentioned this in my remarks but did not go into it. I think we need to learn how to make the argument to those countries that are trying to make transitions to democracy that if you don't

---

140. The University of Calgary, *The Islamic World to 1600: The Timurid Empire*, [http://www.ucalgary.ca/applied\\_history/tutor/islam/mongols/timurid.html](http://www.ucalgary.ca/applied_history/tutor/islam/mongols/timurid.html) (last visited Apr. 5, 2009).

141. See e.g., Christopher Landau, *Battling For Religious Freedom*, BBCNEWS.COM, Nov. 3, 2008, <http://news.bbc.co.uk/2/hi/europe/7703011.stm> (last visited Apr. 5, 2009).

142. *Unlearning Intolerance: Confronting Islamophobia*, UN CHRONICLE ONLINE ED., <http://www.un.org/Pubs/chronicle/2004/issue4/0404p30.html> (last visited Apr. 5, 2009).

143. See Charles C. Haynes, *Commentary: A Muslim in the House Advances Religious Freedom*, <http://www.firstamendmentcenter.org/commentary.aspx?id=17967> (last visited Apr. 5, 2009).

grapple with this issue, you're not going to have democracy work. It will either collapse into autocracy or theocracy or chaos or religious violence.

This, it seems to me, is a pretty powerful argument that goes to the self-interest of majority religious communities and whether or not they can flourish. If those communities do not want democracy, then of course we have a different problem.

MR. SAUNDERS: Hey, Tom, I want to ask you one thing, if you could add a little bit on this point. You mentioned in your talk the importance of religion for democracy, and you mentioned some of the social science research in passing. Could you say a couple more words about that?

PROFESSOR FARR: Sure. There are sociologists such as Brian Grim at the Pew Forum on Religion—what is it? Religion—

PROFESSOR GUNN: Religion and Public Life.

PROFESSOR FARR: Public Life here in Washington<sup>144</sup>—Roger Finke at Penn State,<sup>145</sup> Rodney Stark at Baylor,<sup>146</sup> economists such as Robert Barro and Rachel McCleary at Harvard,<sup>147</sup> Rick Garnett's colleague at Notre Dame, Dan Philpot, who's an IRS specialist.<sup>148</sup> If you take the work of these and other social scientists put together, and they asked the questions, "What makes democracy root? What does religious freedom have to do with it?" the data is almost incontrovertible.

Religious liberty, along with the other fundamental freedoms, acts as a linchpin. If the linchpin is removed, then the other fundamental freedoms—we all know what they are—can't

---

144. See, e.g., Brian J. Grim & Roger Finke, *International Religion Indexes: Government Regulation, Government Favoritism, and Social Regulation of Religion*, 2 INTERDISC. J. OF RES. ON RELIGION 1 (2006).

145. See, e.g., *id.*

146. See, e.g., Rodney Stark, *How Christianity Led to Freedom, Capitalism, and the Success of the West*, <http://www.catholiceducation.org/articles/history/world/wh0109.html> (last visited Apr. 5, 2009) (detailing Stark's view that Christianity created many of the positive aspects of Western Society).

147. See, e.g., Robert J. Barro & Rachel M. McCleary, *Which Countries Have State Religions?* (2005), available at <http://www.economics.harvard.edu/faculty/barro/files/state%20religion%2001-05.pdf>.

148. See, e.g., Daniel Philpot, *Explaining the Political Ambivalence of Religion*, 101 AM. POL. SCI. REV. 505, 505 (2007).

2009] *THE FEDERALIST SOCIETY—RELIGIOUS FREEDOM PANEL* 505

do their work because they collapse into religious violence, conflict, persecution, and religious extremism. So, the social science data—Brian Grim in particular has been using the religious freedom reports from the State Department.<sup>149</sup> He's had scores of people come in and code this data, and it's striking to see what's coming out of this study. I think it provides some ammunition for those of us who want to argue to the United States government and to the Russian Orthodox Church or the other majority religious communities—if you don't get this right, democracy is not going to endure in your country.

PROFESSOR GARNETT: It seems to me that a challenge for religious communities and traditions is to develop arguments for religious freedom that are rooted in those communities and traditions. That is, if arguments for religious freedom are perceived as Western impositions or as godless restraints on religion, they are less likely to take. The argument for religious freedom has to be grounded in religion's own claims.

The Second Vatican Council of the Catholic Church got this right.<sup>150</sup> The Council's argument for religious freedom was not merely baptized Lockeanism.<sup>151</sup> It is a Catholic argument.<sup>152</sup> My sense is that the Muslim world, for example, needs a similar argument.

MR. SAUNDERS: Okay.

AUDIENCE PARTICIPANT: Question for Dr. Gunn, but also for the other panelists: do you think that agnosticism and secularism and atheism are religions, and do you think that the state should refrain from promoting them?

PROFESSOR GUNN: I think that some people can speak about atheism or agnosticism in a way that sounds as though it's a religion, just as people could be Freudians or Marxists and become missionaries for their brand. So there certainly are human beings promoting that.

---

149. See U.S. DEP'T OF STATE, COUNTRY REPORTS, <http://www.state.gov/g/drl/irf/rpt/index.htm> (last visited Apr. 5, 2009).

150. Declaration on Religious Freedom, *supra* note 115.

151. *Id.*

152. *Id.*

I think that when we're trying to look at the United States and the public square, the problem is not that there is any serious threat of the public square being stripped of all symbols related to religion, which is the cry that we often hear. While there may be people who believe that religion should not be visible in public,<sup>153</sup> there are so few that they're certainly not much of a danger.

The constitutional issue is not whether secular symbols or religious symbols are visible. The constitutional issue is whether government institutions are promoting them.<sup>154</sup> So I draw a constitutional distinction between the enormous cross that is on the campus of Pepperdine College, which is visible from Malibu Highway and visible for miles around, and the large cross on federal property on Mount Soledad in San Diego. The Pepperdine cross is constitutionally protected speech, even though it is very visible to the "public".

The cross on top of Mount Soledad, which is on federal land, is government-sponsored religion.<sup>155</sup> From my perspective, one cross that is prominently visible in the public domain is completely constitutionally protected, and another one is constitutionally impermissible because the government should not be in the business of deciding which sacred symbols should be erected on government property. That's the difference. It's not whether it is "in public," it's whether the government is the sponsor.

PROFESSOR GARNETT: In my view, agnosticism and atheism are clearly not religions, but agnostics and atheists just as clearly do enjoy the protection that religious freedom provides. That is, they enjoy the freedom to not be religious. I think it can distract us to ask, is atheism a religion? The answer, for most purposes, really does not matter. Atheists enjoy religious freedom just like everybody else does. Religious freedom includes the freedom to say no.

---

153. See, e.g., Rabbi Levi Brackman, *Religious Symbols Unwelcome in Golden*, ROCKY MOUNTAIN NEWS, <http://www.rockymountainnews.com/news/2008/nov/12/brackman-religious-symbols-unwelcome-in-golden/> (last visited Apr. 5, 2009).

154. See *McCreary County, Kentucky v. ACLU*, 545 U.S. 844, 866–67 n.14 (2005).

155. See, e.g., *United States v. Morrison*, 93 F.3d 627 (1996).

2009] *THE FEDERALIST SOCIETY—RELIGIOUS FREEDOM PANEL* 507

PROFESSOR FARR: I agree that they are not religions. I also agree with Rick Garnett and John Garvey that the American understanding of religious freedom is grounded in the notion that religion is good. If our system of religious freedom were grounded in agnosticism or atheism, we would have no protection for religious people under that rubric of religious freedom, or certainly less protection.

PROFESSOR GUNN: I strongly disagree with that. The grounding of our rights is not based on whether the sponsors are religious or not. Some religious people have established regimes that are hostile to other religions and that are opposed to religious freedom. Some people who were not particularly religious—I think of some American founding-fathers strongly support the right of human beings to choose religion or to follow none. Again, for me it goes to the point—and I say this from a nonreligious perspective—it is respecting the dignity of human beings to be making these decisions for themselves, and you don't need the belief in one God or five gods or no god in order to believe that human beings have the right to make and exercise those decisions.

PROFESSOR GARNETT: I will assume the “thoughtful moderate” role and say that even a political community that did not agree with John Garvey about the goodness of religion could and should still provide meaningful protections to religious freedom, for the reasons that Jeremy says.

That said, a political community that sees religion as part of human flourishing, as a basic human good, is more likely to provide better protection to religious freedom.

MR. SAUNDERS: Okay. Next.

AUDIENCE PARTICIPANT: In studying Islam, I was struck by the discrepancy between the (inaudible) successful demands by Muslims in the West for equal, in some cases even preferential, treatment and the absolute lack of equal treatment for members of other religions in most Muslim countries, which of course is underpinned by the fact that under traditional Islam, the idea of a secular state ruled by man-made laws under which Islam is merely one of many equal religions just does not exist.

I'd like to ask the panel, what teeth, if any, do you think the Religious Freedom Act should be given or how should it be applied to make countries like Saudi Arabia or Pakistan or Egypt, over whom we might have some influence, comply with its provisions? Should it be trade sanctions? Should it be applying some principle of reciprocity as in trade negotiations—if you don't allow non-Muslim churches, we will not allow you to spend billions here to establish Wahhabi centers—or something else?

PROFESSOR FARR: Well, in fact—I'm sure Jeremy will want to comment on this—but in fact, the Religious Freedom Act does provide for this kind of thing, and economic sanctions that can be, but never have been, levied against Saudi Arabia or some of these other countries, such as Iran.<sup>156</sup> In order to produce reciprocity, you put it in to achieve other ends. And not that I say we had it as a possibility. When you're put on one of these lists, the Countries of Particular Concern list,<sup>157</sup> the Secretary of State must consider strong economic sanctions of the kind you're suggesting. They have been considered; they've never been used.

And if there's anything worse than unilateral economic sanctions, which in my own view don't work, it is threatening them and never using them. It debases the coinage and it's really sort of a spent force in my view—this whole CBC process.<sup>158</sup>

But I think the real answer to your question is that we're never going to get the lands of Islam to adopt religious freedom by these kinds of measures. We have got to do what Rick Garnett was referring to, and that is to find those who can speak from the heart of their own claims and who can see it within their own interest to move in this direction. I think they exist in

---

156. International Religious Freedom Act of 1998 § 202(a)(2)(b), 22 U.S.C. § 6432(a)(2)(b) (1998) (as amended).

157. § 6442.

158. See, e.g., U.S. STATE DEPARTMENT, *US Delays Decision on Religion Sanctions on Saudi Arabia*, VOICE OF AMERICA, <http://www.voanews.com/english/archive/2005-09/2005-09-30-voa66.cfm> (last visited Apr. 5, 2009).



2009] *THE FEDERALIST SOCIETY—RELIGIOUS FREEDOM PANEL* 509

every country, including Saudi Arabia, but we don't have the discernment, we don't have the policy, we don't have the understanding to do that.

It's so hard that only a fool would try it unless it were in our national security interest, and I believe it to be.

PROFESSOR GARNETT: We have been talking about the Muslim world, but it strikes me that at the top of any list of religious freedom violators would have to be China. It seems unlikely, though, looking at the last couple of decades, that there is the political will to do anything more than say "please, pretty please" during Olympics commercials to try to get China to improve its record on religious freedom.

PROFESSOR GUNN: I also am skeptical about the use of force or threat of force to try and get countries to change domestic policies. You know, just look at the United States. How well would the United States respond to one or more foreign countries saying to us that we should change our constitution, or if we don't, they will boycott us. I think the reaction from most Americans would be to say, "to hell with you;" it wouldn't be, "okay, let's see how we can change our laws so that they conform with your wishes." And I think when you get to something related to religion, which goes often very close to the core of the national identity, including in the United States, for one country to lecture another to "change your identity in order for you to have our good graces"—is not likely to be successful.

The key would be, we're not going to observe religious freedom in China, or in Sudan, or in Saudi Arabia until the people of those countries themselves want that to be, and the goal of the United States should be to take steps to help people within the countries to do exactly that—while recognizing that this could be a long road, and we're not going to have much to show for it possibly for a long time.

One last point. The argument that you make about many Islamic countries not respecting freedom of religion is the kind of counterexample that I would make to the argument that, countries that have a deep respect for religion are more likely to have religious freedom. To that, I say, no, that's not true. Government supported religion typically is anathema to religious freedom, and many majority-Muslim countries

illustrate this point perfectly. There is more respect for religious freedom in the United States, which is relatively less religious than is Saudi Arabia, and thank God for that, relatively less religious but more respectful of human dignity, which I think once again is the goal. And it's the human dignity that gives people the opportunity to believe in God and to manifest belief in God, just as it is the respect for human dignity that allows others to say "I don't believe in God." Society needs to be protecting both equally.

PROFESSOR GARNETT: Jeremy's answer underscores a very important point, which is that the project of promoting and protecting religious freedom around the world should not be, and need not be, seen as the United States demanding that other countries change their identities. In many cases, all we are doing is asking them to comply with international agreements to which they are already signatories.

PROFESSOR FARR: I want to add just two things. Perhaps the chief reason that the Wolf-Specter Bill failed and we ended up with the International Religious Freedom Act was because Wolf-Specter had mandatory sections,<sup>159</sup> and the business community and others in the U.S. just turned out in force, you know, to stop it.<sup>160</sup> So practically, you know, could you have tougher sanctions? It's hard to get them through the Congress of the United States.

But I think—remember, whatever you decide about what you want to do with this religious freedom issue—part of the background of this is that it is being treated the same way that other human rights were being treated in the U.S. government's promotion and protection of those rights. And so, just don't section it off. If you support sanctions for some other human rights violations, it seems to me you should also do the same for religious freedom violations.

AUDIENCE PARTICIPANT: Well, I have a related question, I guess, for Mr. Farr. I see the text or the subtext of your

---

159. Shea, *supra* note 6.

160. Joshua Green, *God's Foreign Policy: Why the Biggest Threat to Bush's War Strategy is Not Coming From Muslims but From Christians*, WASH. MONTHLY, Nov. 2001, at 26(8), <http://www.washingtonmonthly.com/features/2001/0111.green.html> (last visited Apr. 5, 2009).

remarks as saying that it's the mission of the United States to make the world safe for democracy, and one way to do that is to promote religious freedom. And I'd like you to explain why it's the mission of the United States to make the world anything other than safe for America.

And secondly, in terms of the boots on the ground, we've been in Iraq for five years now, over five years;<sup>161</sup> and is a Christian better off now or better off under Saddam Hussein?

PROFESSOR FARR: It's the submission of the United States to advance American interests and protect the security of the American people. Democracy promotion after 9/11, in my view, became far more of a national security imperative than it was in 1982 when President Reagan gave the famous Westminster speech in which he said it was a national security issue.<sup>162</sup> I believe that President George W. Bush was right to this extent in his democracy promotion freedom agenda;<sup>163</sup> that the only way we're going to defeat Islamist terrorism over the long run is to plant stable democracies in those countries where it is incubated and exported. If we don't succeed in doing that, then we are not defending ourselves as we should.

Now, if you don't buy that, then you won't buy my argument. My argument is that we are not going to succeed in highly religious societies in advancing democracy unless we put religious freedom at the center of the effort. So, we may disagree. It's not a matter of making the world safe for democracy; it is a matter of making America safe by encouraging democracies in those countries where 9/11-type events germinate.

---

161. President Bush declared war against Iraq in 2003. *See Bush Declares War*, CNN.COM, Mar. 19, 2003, <http://www.cnn.com/2003/US/03/19/sprj.irq.int.bush.transcript/> (last visited Apr. 5, 2009).

162. Ronald Reagan, President, Promoting Democracy and Peace: Speech to the British Parliament (June 8, 1982) [http://www.iri.org/history\\_ReaganSpeech.asp](http://www.iri.org/history_ReaganSpeech.asp) (last visited Apr. 5, 2009).

163. One of President Bush's goals in foreign diplomacy was to promote freedom worldwide. *See U.S. DEPT OF STATE, OFFICE OF THE SPOKESMAN, Institutionalizing the Freedom Agenda: President Bush Calls on Future Presidents and Congresses to Continue Leading the Cause of Freedom Worldwide*, <http://www.usaid.gov/press/factsheets/2008/fs081009.html> (last visited Apr. 5, 2009).

As far as Iraq is concerned, clearly Christians are far worse off today than they were under Saddam Hussein. There's no question about it. There were, I don't know, 1,800,000 Christians in Iraq under Saddam Hussein.<sup>164</sup> Maybe half of those have fled the country.<sup>165</sup> A few are coming back, but for the most part, those that can leave have left.<sup>166</sup> They are under terrible stress, and I think it was one of the unfortunate failures of the previous administration not to have given this issue more emphasis than it did.

But over the long run, the only solution—and I'm sure you would agree—is not to return to the kind of autocracy that Saddam Hussein represented, but to move Iraq toward a country that does respect religious freedom. That is not going to happen unless our diplomacy changes. It is not simply a matter of American troops on the ground.

MR. SAUNDERS: Okay. Next please.

AUDIENCE PARTICIPANT: Hi. I have a question for the panel, but also for Professor Farr in particular. I also had a question about Iraq. And I was curious, in light of what you said about how we have to work with countries and acknowledge that they have a religious base, what you thought about the Sharia Clause in the Iraqi Constitution.<sup>167</sup> Does that comport or violate the International Religious Freedom Act? And also, could you comment a little bit about the tensions of that particular clause on the democracy clause that follows it?

PROFESSOR FARR: Well, I think you're referring to the clause that says no law can be—what's the phrase?

AUDIENCE PARTICIPANT: No law can be passed that's inconsistent with Sharia.<sup>168</sup>

---

164. See *Iraq: Minorities Living Tormented Days Under Sectarian Violence*, ALERTNET.ORG, Jan. 4, 2007, <http://www.alertnet.org/thenews/newsdesk/IRIN/e27c1cd1c833a5cf1bac0330fb97ea04.htm> (last visited Apr. 5, 2009) (stating that, according to the last census done under Hussein's rule, there were 1.4 million Christians in Iraq).

165. *Id.*

166. *See id.*

167. The Iraqi Constitution contains a clause proclaiming that laws cannot conflict with the laws of Islam, thus making Islamic law supreme. IRAQ CONST. art. 2.

168. *Id.*

PROFESSOR FARR: Yes, there's another word for it, but yes, inconsistent with Sharia, inconsistent with Islam. Clearly, this is a contravening of international commitments to religious freedom, to any sane understanding of religious freedom. It says, in effect—the Afghan Constitution is the same thing—it says everyone in this country has religious freedom, period, except to the extent that it contravenes Islamic law.<sup>169</sup> And then of course the question is who decides. And here, we get into a problem of American jurisprudence as well. It tends to be judges who decide this, and in the case of Iraq it is those trained in Islamic jurisprudence rather than in the broader kinds of training that decide. In my point of view, this question should be decided by legislatures anyway. That kind of clause should not be there.

We accepted it—we, the United States Government—accepted it. I'm going to praise the State Department. They tried to fight this a bit,<sup>170</sup> but at the end of the day, it simply wasn't going to happen. You aren't even going to have the other phrases in there, the other protections for religious liberty, without this inconsistency clause.

So, the question is, can we move forward from here? Can we get the Iraqis to see that this as a problem for them? That's the issue. That's the goal. It is a problem for them unless they not only get that clause out of their constitution but, far more importantly, understand that if they continue to have these severe restrictions on religious liberty, they're always going to have religious violence in that country. They're never going to have a stable democracy. I hope that answers—

AUDIENCE PARTICIPANT: Well, am I incorrect in my understanding that it was the idea of Noah Feldman and President Bush to insert this? Am I incorrect on that?

PROFESSOR FARR: No, I would blame Noah Feldman for a number of things, but not for that.

(Laughter.)

AUDIENCE PARTICIPANT: He's taken credit for it.

---

169. AFG. CONST. art. 3.

170. Ashley S. Deeks & Matthew D. Burton, *Iraq's Constitution: A Drafting History*, 40 CORNELL INT'L L.J. 1, 40 (2007).

PROFESSOR FARR: For those of you who don't know Noah Feldman, who's now at Harvard, he was an advisor to the constitutional group under the early Bush administration, under Jerry Bremer and his predecessor there. And I think, in retrospect, he has tried to make the case that this is not a contravention of fundamental understandings of religious freedom.<sup>171</sup> What he wants to do is reinterpret Sharia in a positive sense.<sup>172</sup> I mean, I'm all for that too. I think that Muslims have to do that, but I don't think you do it by putting in the Constitution. It's going in the back door. It's the wrong way to do it.

AUDIENCE PARTICIPANT: Okay. Thank you.

MR. SAUNDERS: Okay, everybody. It's perfect. Thank the panel please.

(Applause.)

(Panel concluded.)

---

171. See Noah Feldman, *Shari'a and Islamic Democracy in the Age of al-Jazeera*, in *SHARI'A: ISLAMIC LAW IN THE CONTEMPORARY CONTEXT* 104 (ABBAS AMANAT AND FRANK GRIFFEL ED., 2007).

172. See *id.*