

CENTER *for* REPRODUCTIVE RIGHTS

Office of the Secretary
Policy Planning Staff
U.S. Department of State
Attention: Commission on Unalienable Rights
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April 2, 2020

VIA ELECTRONIC SUBMISSION

RE: U.S. STATE DEPARTMENT COMMISSION ON UNALIENABLE RIGHTS

I. Introduction

The Center for Reproductive Rights respectfully submits this comment to the U.S. Department of State regarding the Commission on Unalienable Rights. The Center is a global human rights organization that uses the power of the law to advance reproductive rights as fundamental human rights that governments around the world are obligated to protect, respect, and fulfill. Reproductive freedom lies at the heart of the promise of human dignity, self-determination, and equality embodied in both the U.S. Constitution and the Universal Declaration of Human Rights.

The Center fully joins in the significant concerns raised by other human and civil rights organizations over the justifications underlying the creation of the Commission, its operation, and views expressed in the course of the Commission's six public hearings. In this submission, the Center raises specific concerns and seeks to supplement the record regarding: (1) the false narrative created by the Secretary of State, and perpetuated by Commission members, that there is controversy and confusion over the nature, limits, and foundations of human rights; (2) the Commission's misguided effort to resolve so-called "tensions" among rights, particularly when pertaining to the right to access sexual and reproductive health services; and (3) the improper establishment, composition, and process of the Commission itself.

The Center offers this submission to underscore the illegitimacy of the Commission, supplement the record developed during the Commission's open hearings, and directly answer the Secretary's questions posed to the Commission, in order to inform whatever recommendations the Commission may develop and to make clear the unequivocal consensus by U.N. human rights treaty bodies and independent experts that reproductive rights are human rights. The Center has a deep concern that the Commission is being used by the Administration as subterfuge for rolling back rights protections in the U.S. and globally for women, LGBTQI people, and other marginalized and vulnerable communities, and to further the Administration's

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ongoing effort to erase sexual and reproductive health and rights from the global human rights discourse. Any attempt by the State Department, through the Commission, to pick and choose which rights the United States will recognize and prioritize (through foreign and domestic policy) will compound the Administration's disengagement, de-prioritization, and rollback of human rights more generally. And it will further cede the United States' leadership in advancing the full spectrum of human rights protections within the United States and globally.

It is our recommendation that the Commission be disbanded, as its formation violates several provisions of the Federal Advisory Committee Act. In the alternative, we urge that the Commission, in whatever product or deliverable it generates, reaffirm the United States' commitment to advancing the full spectrum of human rights protections, including reproductive rights, globally and within the United States.

II. Reproductive Rights and Other Human Rights are Clearly Established and Articulated under International Law

- a. The Commission's stated purpose and subsequent open hearings advance a false narrative that there is "confusion" over the status of rights.

The stated purpose of the Commission – to assess which human rights are “real” rights – is deeply flawed. In justifying the creation of the Commission on Unalienable Rights, Secretary of State Pompeo pointed to both an alleged confusion over and a supposed proliferation of human rights and a need to clarify and confirm which claims of rights are “true.”¹ According to the Secretary, the Commission is necessary because “loose talk of ‘rights’” has resulted in human rights becoming unmoored from founding principles, “proliferating,” and being granted “ad hoc” in a way that detracts from “serious efforts” to protect fundamental freedoms,² suggesting that international human rights law has developed in a way that is unprincipled and improvised.³ Statements made by members of the Commission during public hearings reinforce this false narrative of confusion over the status of rights. For example, the Commission's Executive Secretary, Peter Berkowitz, has repeatedly cited to the “confusion and controversy swirling around human rights,”⁴ while Chairwoman Glendon has characterized so-called “confusion” allegedly “inherent” in human rights terms as a “problem [the Commission] will

¹ Michael P. Pompeo, Opinion, *Unalienable Rights and U.S. Foreign Policy*, WALL STREET J. (July 7, 2019, 3:07 PM), <https://www.wsj.com/articles/unalienable-rights-and-u-s-foreign-policy-11562526448>.

² *Id.*

³ *Id.*

⁴ Peter Berkowitz, Opinion, *Criticisms Illustrate Need for State Dept. Human Rights Panel*, REALCLEAR POLITICS (Sept. 15, 2019), *reprinted in* <https://www.state.gov/criticisms-illustrate-need-for-state-dept-human-rights-panel/>; *see also e.g.*, Policy Planning Staff, U.S. Department of State Commission on Unalienable Rights Minutes, U.S. DEP'T OF STATE (Nov. 1, 2019), <https://www.state.gov/u-s-department-of-state-commission-on-unalienable-rights-minutes-2/> (restating justification for the formation of the commission “evidenced by recent controversy and confusion over the nature, limits, and foundations of human rights”).

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have to confront.”⁵ Numerous presenters at the Commission’s public hearings have likewise promoted the inaccurate idea of a “proliferation” of human rights.⁶

This justification is simply false. Human rights have not proliferated in an ad hoc and confused fashion. Rather, as Kenneth Roth made clear during his testimony to the Commission, historically marginalized social groups have increasingly sought to ensure that the core rights contained in the UDHR and international covenants are extended to all people equally.⁷ The Commission cannot neglect well-established law to weaponize the effort to secure equal access to rights for all.

- b. International law clearly articulates fundamental human rights protections, including reproductive rights.

In addition to undermining efforts to ensure rights protection generally, the false claim of confusion over the status and proliferation of human rights is being used by the State Department and other federal agencies to undermine reproductive rights, specifically. For example, in 2018, the State Department justified its decision to eliminate reproductive rights from the State Department’s annual human rights reports in part by suggesting that there is debate and misunderstanding about the term, its meaning, and its basis in human rights.⁸ The following year, the State Department likewise asserted that it removed reproductive rights from its annual human rights reports in part because the term “reproductive rights” had become one “that people are ascribing their own meanings to.”⁹ At the September 2019 meeting of the UN General Assembly, the Administration led a joint statement opposing UN policies that promote reproductive health and rights. The statement, delivered by Secretary of Health and Human Services Alex Azar before a high-level UN meeting on universal health care, noted opposition to “ambiguous terms and expressions, such as sexual and reproductive health and rights” because they “can undermine

⁵ Policy Planning Staff, U.S. Department of State Commission on Unalienable Rights Minutes, U.S. DEP’T OF STATE (Nov. 1, 2019), <https://www.state.gov/u-s-department-of-state-commission-on-unalienable-rights-minutes-2/>.

⁶ For example, in his November 1, 2019, presentation to the Commission, Orlando Patterson characterized rights as “infinitely expandable to accommodate new kinds of claims,” and noted that the United States is “expanding rights for an ever-increasing number of people.” Policy Planning Staff, U.S. Department of State Commission on Unalienable Rights Minutes, U.S. DEP’T OF STATE (Nov. 1, 2019), <https://www.state.gov/u-s-department-of-state-commission-on-unalienable-rights-minutes-2/>.

⁷ Kenneth Roth, *Prepared Testimony to Commission on ‘Unalienable’ Rights*, HUMAN RIGHTS WATCH 2 (Jan. 10, 2020, 1:15 PM), <https://www.hrw.org/news/2020/01/10/prepared-testimony-commission-unalienable-rights> [hereinafter Roth, *Prepared Testimony to Commission on ‘Unalienable’ Rights*].

⁸ Special Briefing, Michael G. Kozak, Ambassador, Bureau of Democracy, Human Rights, and Labor, Briefing on the Release of the 2017 Country Reports on Human Rights Practices (Apr. 20, 2018), <https://www.state.gov/briefing-on-the-release-of-the-2017-country-reports-on-human-rights-practices/>.

⁹ Special Briefing, Ambassador Michael Kozak, Bureau of Democracy, Human Rights, and Labor on the Release of the 2018 Country Reports on Human Rights Practices (Mar. 13, 2019), <https://www.state.gov/ambassador-michael-kozak-bureau-of-democracy-human-rights-and-labor-on-the-release-of-the-2018-country-reports-on-human-rights-practices/>.

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the critical role of the family and promote[] practices like abortion,” and falsely stated that the right to abortion is not protected under international law.¹⁰

In adopting these positions, the United States is not recognizing legitimate ambiguity, but rather is manufacturing confusion for its own ideological purposes. There is clear and unequivocal consensus by U.N. human rights treaty bodies and independent experts that reproductive rights are human rights, grounded in the Universal Declaration of Human Rights and the core principles underlying the human rights treaties. The human rights treaty bodies have consistently recognized and protected reproductive rights as a component of and essential to the realization of fundamental human rights, including the rights to health, life, equality, information, education, privacy, freedom from discrimination and violence, and freedom from torture and cruel, inhuman and degrading treatment.¹¹

For example, the Human Rights Committee has repeatedly recognized that the state obligation to ensure reproductive autonomy arises from the right to privacy enshrined in Article 17 of the International Covenant on Civil and Political Rights (ICCPR),¹² a treaty ratified by the United States. The Committee has also made clear that the right to life, contained in Article 6 of the ICCPR, includes the right to access comprehensive reproductive health care, including safe and legal abortion without the imposition of restrictions which subject women and girls to physical or mental pain or suffering, discriminate against them or arbitrarily interfere with their privacy, or place them at risk of undertaking unsafe abortions.¹³ Indeed, the Human Rights Committee has developed significant jurisprudence regarding the right to access safe and legal abortion.¹⁴

¹⁰ Alex M. Azar II, U.S. Dep’t of Health & Human Servs., *Remarks on Universal Health Coverage*, U.N. General Assembly, New York, New York (Sept. 23, 2019), <https://www.hhs.gov/about/leadership/secretary/speeches/2019-speeches/remarks-on-universal-health-coverage.html>.

¹¹ See *Breaking Ground: Treaty Monitoring Bodies on Reproductive Rights 2020*, CTR. FOR REPROD. RTS. (2019), <https://reproductiverights.org/sites/default/files/documents/Breaking-Ground-2020.pdf>.

¹² See e.g., *Siobhán Whelan v. Ireland*, Human Rights Committee, Commc’n No. 2425/2014, para. 7.8-7.9, U.N. Doc. CCPR/C/119/D/2425/2014 (2017); *Amanda Jane Mellet v. Ireland*, Human Rights Committee, Commc’n No. 2324/2013, para. 7.7-7.8, U.N. Doc. CCPR/C/116/D/2324/2013 (2016); *K.L. v. Peru*, Human Rights Committee, Commc’n No. 1153/2003, para. 6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); *L.M.R. v. Argentina*, Human Rights Committee, Commc’n No. 1608/2007, para. 9.3, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).

¹³ Human Rights Committee, *General Comment No. 36 on the Right to Life*, para. 8, U.N. Doc. CCPR/C/GC/36 (2018) [hereinafter Human Rights Committee, *Gen. Comment No. 36*].

¹⁴ For example, in 2016 and 2017, the Human Rights Committee issued decisions in cases challenging Ireland’s abortion restriction under the ICCPR, holding that Ireland’s abortion restrictions violated the rights to be free from cruel, inhuman, or degrading treatment, to privacy, and to equality before the law. The Committee affirmed that laws that prohibit abortion and thereby force women to choose between continuing a pregnancy and travelling to another country to access legal abortion services can cause anguish and suffering, noting the financial, social, and health related burdens and hardships that are placed on women in such situations. *Siobhán Whelan v. Ireland*, Human Rights Committee, Commc’n No. 2425/2014, para. 7.5-7.7, 8, U.N. Doc. CCPR/C/119/D/2425/2014 (2017); *Amanda Jane Mellet v. Ireland*, Human Rights Committee, Commc’n No. 2324/2013, para. 7.4-7.6, 8, U.N. Doc. CCPR/C/116/D/2324/2013 (2016); see also e.g., Human Rights Committee, *Concluding Observations: Angola*, para. 21-22, U.N. Doc. CCPR/C/AGO/CO/2 (2019); *Poland*, para. 24(a), U.N. Doc. CCPR/C/POL/CO/7 (2016); *Colombia*, para. 21, U.N. Doc. CCPR/C/COL/CO/7 (2016); *L.M.R. v. Argentina*, Human Rights Committee,

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Other treaty bodies have likewise made clear that reproductive rights are human rights. The Committee on Economic, Social and Cultural Rights (CESCR Committee) has clearly articulated that the right to the highest attainable standard of health, enshrined in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, includes the right to sexual and reproductive health.¹⁵ The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has stated that the right to autonomy “requires measures to guarantee the right to decide freely and responsibly on the number and spacing of their children,”¹⁶ as reflected in Article 16 of CEDAW.¹⁷ The CEDAW Committee has moreover stated that “it is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women.”¹⁸ And the Committee Against Torture (CAT Committee) has found that denying or delaying safe abortion or post-abortion care, in particular, may amount the torture or cruel, inhuman or degrading treatment.¹⁹

c. Human rights protections begin at birth.

The Commission has also used the false claim of a proliferation of “new” rights to justify an unfounded revisiting and reframing of when “classic” human rights accrue.²⁰ Yet, there is firm and clear understanding that human rights protections, including the right to life, accrue at birth. International and regional human rights bodies, as well as courts worldwide, have clearly established that any prenatal protections must be consistent with women’s human rights.²¹

Comm’n No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011); *K.L. v. Peru*, Human Rights Committee, Comm’n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

¹⁵ CESCR Committee, *General Comment No. 22: (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, para. 11–21, U.N. Doc. E/C.12/GC/22 (2016) [hereinafter CESCR Committee, *Gen. Comment No. 22*].

¹⁶ CEDAW Committee, *Decision 57/II Statement by the Committee on the Elimination of Discrimination against Women on sexual and reproductive health: Beyond the 2014 review of the International Conference on Population and Development*, at 85, U.N. Doc. A/69/38 (2014).

¹⁷ Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, art. 16(e), G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1980), U.N.T.S. 13 (*entered into force* Sept. 3, 1981).

¹⁸ CEDAW Committee, *General Recommendation No. 24: Article 12 of the Convention (women and health)*, (20th Sess., 1999), at 4, para. 11, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008) [hereinafter CEDAW Committee, *Gen. Recommendation No. 24*].

¹⁹ CAT Committee, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, para. 46, U.N. Doc. CAT/C/GBR/CO/6 (2019).

²⁰ In January 2020 (the fourth session), while posing a question about the so-called, “proliferation of rights,” Commissioner Tollefsen noted that opposition to abortion is rooted in an understanding of “classic human rights” belonging to “every member of the human family,” including unborn children. Tollefsen further noted that one could reframe the issue as an inquiry regarding to whom do “classic rights apply.” See Meeting Notes (not for public distribution).

²¹ See *Whose Right to Life? Women’s Rights and Prenatal Protections under Human Rights and Comparative Law*, CTR. FOR REPROD. RTS. (2014), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL_3%2014%2012.pdf.

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Article 1 of the UDHR states that “[a]ll human beings are born free and equal in dignity and rights.”²² Significantly, the history of negotiations indicates that the word “born” was used intentionally to exclude a prenatal application of the rights protected in the Declaration.²³ The drafters of the Declaration rejected a proposal to delete “born,” and the resulting text of the Declaration conveys intentionally that the rights of the Declaration are “inherent from the moment of birth.”²⁴ The International Covenant on Civil and Political Rights (ICCPR) rejects the proposition that the right to life, enshrined in Article 6(1), extends to prenatal life.²⁵ The drafters of the ICCPR specifically rejected a proposal to amend this article to provide that “the right to life is inherent in the human person from the moment of conception, this right shall be protected by law.”²⁶

Additionally, treaty monitoring bodies, through general comments, concluding observations, and decisions in individual cases, consistently emphasize the importance of protecting women’s rights, and assert that to guarantee women’s fundamental rights to life and health, among others, States must remove barriers to the full enjoyment of those rights, including the denial of safe and legal abortions. The Human Rights Committee has further clarified that the ICCPR’s Article 6 right to life protections may be violated when women are exposed to a risk of death from unsafe abortion as a result of restrictive abortion laws.²⁷ The CEDAW Committee has further expressed concern that women’s rights to life and health may be violated by restrictive abortion laws.²⁸

And while the American Convention (a regional human rights treaty) is the only human rights instrument that contemplates that the right to life may attach prenatally, the Inter-American Court of Human Rights has made explicit that the American Convention’s right to life protections are not absolute. In the case of *Artavia Murillo et al. (“in vitro fertilization”) v. Costa Rica*, the Inter-American Court struck down Costa Rica’s ban on the use of in vitro fertilization, which Costa Rica attempted to justify as a measure to protect the right to life prior to birth.²⁹ In that case, the Court determined that, under the American Convention, the “right to life should not be understood as an absolute right, the alleged protection of which can justify the total negation of other rights”³⁰ and that disproportionate restrictions on the exercise of other

²² Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, art. 1, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) [hereinafter Universal Declaration].

²³ U.N. GAOR 3rd Comm. 99th mtg., para. 110-124, U.N. Doc. A/PV/99 (1948).

²⁴ *Id.*

²⁵ International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, art. 6.1, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR].

²⁶ U.N. GAOR Annex, 12th Session, Agenda Item 33, para. 96, 113, 119, U.N. Doc. A/C.3/L.654 (1957).

²⁷ Human Rights Committee, *Gen. Comment No. 36*, *supra* note 13, para. 8, 26.

²⁸ *See, e.g.*, CEDAW Committee, *Concluding Observations: Belize*, para. 56, U.N. Doc. A/54/38/Rev.1, GAOR, 54th Sess., Supp. No. 38 (1999); *Colombia*, para. 393, U.N. Doc. A/54/38/Rev.1, GAOR, 54th Sess., Supp. No. 38 (1999); *Dominican Republic*, para. 337, U.N. Doc. A/53/38/Rev.1, GAOR, 53rd Sess., Supp. No. 38 (1998); *Paraguay*, para. 131, U.N. Doc. A/51/38, GAOR, 51st Sess., Supp. No. 38 (1996).

²⁹ *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, Preliminary objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Nov. 28, 2012).

³⁰ *Id.* at para. 258.

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human rights due to absolute protection of the right to life “would be contrary to the protection of human rights.”³¹ The Court ruled that the term “in general” in the American Convention’s protection of the right to life was intended “to allow, as appropriate, an adequate balance between competing rights and interests.”³² This decision affirmed the Inter-American Commission’s decision over two decades earlier in the case of *Baby Boy v. United States*, in which it held that a law permitting abortion without restriction as to reason was compatible with the American Declaration and the American Convention, because they do not provide absolute protection of the right to life prior to birth.³³ Similar conclusions can be attained from the Court’s *B. v. El Salvador* provisional measures, where the Court ordered El Salvador to adopt measures to protect the rights to life and personal integrity of *B.*, including the anticipated termination of her pregnancy.³⁴

III. International Law Provides Well-established Guidance When There is So-called “Tension” Among Rights, Particularly Pertaining to the Right to Access Sexual and Reproductive Health Services

Secretary of State Pompeo has also justified the Commission as necessary to resolve purported “tension” and alleged conflict between rights.³⁵ Commission members have echoed these alleged concerns at public hearings. Members of the Commission have both questioned whether the U.S. should “prioritize all rights equally, or choose some over others,”³⁶ as well as described rights in competitive, zero sum terms.³⁷ Yet this inquiry, too, is flawed. A fundamental principle of human rights is that all rights are indivisible, such that “the improvement of one right facilitates advancement of the others and, likewise, the deprivation of one right adversely affects the others.”³⁸ Human rights experts have provided clear guidance on how to appropriately balance rights, particularly with respect to access to sexual and reproductive health services.

³¹ *Id.* at para. 259.

³² *Id.* at para. 263.

³³ *Baby Boy v. United States*, Resolution 23/81, Case 2141, Inter-Am. Comm’n H.R., Resol. No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1, para. 30 (Mar. 6, 1981).

³⁴ *B. v. El Salvador*, Provisional Measures, Resolution, Inter-Am. Ct. H.R. (May 29, 2013).

³⁵ “As human rights claims have proliferated, some claims have come into tension with one another, provoking questions and clashes about which rights are entitled to gain respect.” Secretary of State Michael R. Pompeo Remarks to the Press (July 8, 2019), <https://www.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3/>.

³⁶ During the Commission’s fourth public hearing, Commissioner David Pan asked whether a U.S. foreign policy approach should prioritize all rights equally, or choose some over others. *See* Meeting Notes (not for public distribution).

³⁷ Commissioner Katrina Lantos Swett noted she is “troubled by suggestion that very fundamental right of conscience could be ‘overwritten’ by need to provide an abortion in rural areas, where people don’t have other venues to exercise their reproductive rights.” Meeting Notes (not for public distribution). Peter Berkowitz contrasted rights of woman to terminate her pregnancy versus the right of the “unborn child.” *See* Meeting Notes (not for public distribution).

³⁸ U.N. Office of the High Commissioner of Human Rights, *What are Human Rights*, <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx> (last visited Apr. 1, 2020).

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- a. International Law has clearly established that human rights are interdependent and indivisible.

It is a fundamental tenet of human rights that all rights are universal, equal, interdependent, and interrelated.³⁹ The preamble of the Universal Declaration of Human Rights (UDHR) begins by declaring that recognizing the “equal and inalienable rights” of all members of humanity is the “foundation of freedom, justice, and peace.” The UDHR makes clear that each of the thirty articles in the Declaration are equally important and that no State or individual can decide that some rights are more important than others.⁴⁰ As Kenneth Roth, the Executive Director of Human Rights Watch, pointed out in testimony to the Commission, “rather than human rights working against each other, the deprivation of rights in one area tends to create conditions for the deprivation of rights in others.”⁴¹

- b. International law provides clear guidance on how States are to approach situations in which rights appear to be in “tension,” including in the context of access to sexual and reproductive health care.

Repeatedly during the Commission’s public hearings, Commissioners raised concern over potential conflict between people seeking reproductive health care, including abortion care, and the rights of health care providers and others to refuse such services on grounds of religious or conscience belief. Yet, when rights do appear to be in “tension,” international law provides guidance on how States should ensure the protection of rights for all, including in the context of access to sexual and reproductive health care.

Article 18 of the ICCPR is the relevant source of international law for the right to religious freedom and belief.⁴² Article 18 expressly states that the right to religious freedom and belief is not absolute and may be subject to limitations for the purpose of, among other things, protecting the fundamental rights and freedoms of others.⁴³

Additionally, human rights treaty bodies and experts consistently emphasize that the right to freedom of thought, conscience, and religion is not unfettered.⁴⁴ It does not provide for the

³⁹ “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.” U.N. General Assembly, *Vienna Declaration and Programme of Action*, adopted June 25, 1993, art. 5, U.N. Doc. A/CONF.157/23 (1993); see also UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein, Statement at 37th Session of the Human Rights Council (Feb. 29, 2018), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22726&LangID=E>.

⁴⁰ Universal Declaration, *supra* note 22, art. 30.

⁴¹ Roth, *Prepared Testimony to Commission on ‘Unalienable’ Rights*, *supra* note 7.

⁴² ICCPR, *supra* note 25, art. 18.

⁴³ *Id.* at art. 18.3.

⁴⁴ See, e.g., Human Rights Committee, *General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18)*, para. 8, U.N.Doc. CCPR/C/21/Rev.1/Add.4 (1993) (“Article 18.3 permits restrictions on the freedom to manifest religion or belief if limitations are prescribed by law and are necessary to protect public safety,

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manifestation of conscience or religion in a manner that gives rise to gender discrimination or jeopardizes or nullifies the rights of others to timely access quality sexual and reproductive health care, and it cannot serve as a justification for stigmatizing or discriminating against people seeking access to these services.⁴⁵ Refusals of care may have dire consequences for the health and human rights of women and girls, particularly where the State fails to ensure access to sexual and reproductive health care. State failures can lead to violations that include discrimination, including intersecting and compounding forms of discrimination, and can cause stigma, undue delays in obtaining services, and can even be life-threatening. The Special Rapporteur on freedom of religion or belief recently reiterated that “[i]nternational law is clear that the manifestation of religion or belief may be limited by States in situations where doing so is necessary to protect the fundamental rights of others, including the right to non-discrimination and equality, a principle upon which all human rights, including the right to freedom of religion or belief depends.”⁴⁶

The UN Special Rapporteur on freedom of religion or belief has noted concern with the particular ways in which institutions, including within the U.S., seek exemptions to laws and policies that protect gender equality and non-discrimination, on the ground that compliance conflicts with their faith. Examples of this phenomenon include refusals to perform abortions, fill prescriptions for contraceptives, or perform gender affirming care, as well as refusals to provide services consistent with antidiscrimination laws.⁴⁷ The Special Rapporteur urges Governments to reaffirm that religious considerations do not justify human rights violations; ensure that laws allowing people to manifest their religious belief in healthcare settings do not have discriminatory effects; and in all cases, ensure the right to physical and mental integrity as well as the right to health, including reproductive health, in line with international standards.⁴⁸

Indeed, human rights treaty monitoring bodies have made clear that human rights require States to ensure that individuals are able to access lawful reproductive health services without hindrance, delay, or stigma, including those caused by refusals of care based on conscience or religion.⁴⁹ The treaty bodies and other human rights experts have repeatedly stated that where, as a matter of domestic law and policy, States choose to allow medical professionals to refuse to

order, health or morals, or the fundamental rights and freedoms of others In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26.”).

⁴⁵ See *id.*; Human Rights Committee, *Gen. Comment No. 36 (2018)*, *supra* note 13, para. 8; CESCR Committee, *Gen. Comment No. 22*, *supra* note 15, para. 14, 43; CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 18, para. 11; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Interim rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, para. 24, 65(m), U.N. Doc. A/66/254 (2011) [hereinafter *SR Health, 2011 Interim Report*].

⁴⁶ Human Rights Council, *Freedom of religion or belief- Report of the Special Rapporteur on freedom of religion or belief*, para. 70, U.N. Doc. A/HRC/43/48 (2020).

⁴⁷ *Id.* at para. 44-45.

⁴⁸ *Id.* at para. 77(i)-(ii), (vi).

⁴⁹ CESCR Committee, *Gen. Comment No. 22*, *supra* note 15, para. 11- 21, 43; Human Rights Committee, *Gen. Comment No. 36*, *supra* note 13, para. 8; CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 18, para. 11, 13; *SR Health, 2011 Interim Report*, *supra* note 45, para. 22, 24.

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provide legal abortion care or other forms of reproductive health care on grounds of conscience or religion, they must establish and implement effective regulatory, oversight, and enforcement frameworks so as to ensure that such refusals do not undermine or hinder women’s access to legal reproductive health care in practice.⁵⁰

IV. The Improper Establishment, Composition, and Process of the Commission Raises Significant Concerns Under United States Federal Law

The establishment of the Commission raises serious concerns as to whether the Department of State followed all the necessary protocols outlined by United States law, the Federal Advisory Committee Act (FACA). In order for an advisory committee to be formed the committee must be “essential to the conduct of agency business and... the information to be obtained is not already available through another advisory committee or source within the Federal Government.”⁵¹ In addition, FACA contains other requirements designed to ensure that the makeup of advisory committees are balanced. The Commission on Unalienable Rights violates FACA for the following reasons: it is duplicative of an existing government bureau; the State Department failed to follow FACA requirements in the formation of the Commission; and as a consequence the Commission does not have a balanced membership.

- a. The Commission violates FACA because another source for the information sought by the creation of the Commission is already available within the Department of State.

The establishment of this Commission is clearly duplicative of an existing source within the Department of State—the Bureau of Democracy, Human Rights, and Labor (DRL). DRL’s established objective is to address “the fundamental freedoms set forth in the founding documents of the United States and the complementary articles of the Universal Declaration of Human Rights and other global and regional commitments.”⁵² The purpose of the Commission, according to its charter, is remarkably similar to the purpose of the existing government bureau, the DRL. The Commission’s charter states that its purpose is to “provide advice and recommendations on human rights to the Secretary of State, grounded in our nation’s founding principles and the 1948 Universal Declaration of Human Rights.”⁵³ On June 12, 2019, five U.S. Senators—Robert Menendez, Patrick Leahy, Richard Durbin, Christopher Coons, and Jeanne Shaheen—sent a letter to Secretary of State Pompeo raising concerns about “the process and

⁵⁰ See, e.g., Human Rights Committee, *Gen. Comment No. 36*, *supra* note 13, para 8, 26; CESCR Committee, *Gen. Comment No. 22*, *supra* note 15, para. 14, 43; CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 18, para. 11, 13; SR Health, *2011 Interim Report*, *supra* note 45, para. 65(m); see also, e.g., CEDAW Committee, *Concluding Observations: Italy*, para. 41(d), 42 (d), U.N. Doc. CEDAW/C/ITA/ CO/7 (2017); *Argentina*, para. 33(c), U.N. Doc. CEDAW/C/ARG/ CO/7 (2016); *Poland*, para. 37(b), U.N. Doc. CEDAW/C/POL/ CO/7-8 (2014).

⁵¹ Federal Management Regulation, 41 C.F.R. § 102-3.30(a) (2019).

⁵² About Us – Bureau of Democracy, Human Rights, and Labor, U.S. DEP’T OF STATE, <https://www.state.gov/about-us-bureau-of-democracy-human-rights-and-labor/> (last visited Mar. 30, 2020).

⁵³ U.S. DEP’T OF ST., CHARTER DEPARTMENT OF STATE COMMISSION ON UNALIENABLE RIGHTS (2019), *available at* <https://www.state.gov/wp-content/uploads/2019/10/Charter-Commission-on-Unalienable-Rights.pdf>.

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intent behind” the Commission, including this same concern that another source for the information already exists within the federal government.⁵⁴ The letter asserted that, “it is hard to envision what work the Department’s proposed Commission would conduct that DRL could not carry out.”⁵⁵ Because the Commission’s mandate could be accomplished by DRL, the Commission is unnecessary and should therefore be disbanded.

- b. The Commission violates FACA because it does not have balanced representation and the process establishing the Commission contained no safeguards to ensure balanced representation.

The purpose of FACA is to regulate the use of advisory committees to ensure a balanced representation on such committees. A House Report issued at the time of FACA’s enactment stressed that “[o]ne of the great dangers in this unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns . . . ,” thus resulting in committees composed not only of individuals with similar viewpoints, but in committees situated to use their recommendations to promote specific, agreed upon agendas.⁵⁶ Indeed, FACA contains a series of requirements⁵⁷ to ensure potential influence by special interests is mitigated. The Commission on Unalienable Rights, from conception to present day, flies in the face of these well-established, long-respected requirements.

First, FACA requires that a committee’s membership be “. . . fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.”⁵⁸ A majority of the Commission’s ten members are proponents of natural law, believing that human rights can only be found in natural law and, in turn, rejecting positive law, in which much reproductive rights and LGBTQI advocacy work is grounded.⁵⁹ From a diversity perspective, most members are also either members of the clergy or academics who have staunchly opposed

⁵⁴ Letter from Sen. Robert Menendez et al., U.S. Senate, to Sec’y. Michael Pompeo, U.S. Dep’t of St., (Jun. 12, 2019), <https://www.foreign.senate.gov/imo/media/doc/06-12-19%20Unalienable%20rights%20commission%20letter%20signed.pdf>.

⁵⁵ *Id.*

⁵⁶ H.R. REP. NO. 92-1017, at 6 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3491, 3496.

⁵⁷ 5 U.S.C. App. II, § 5(c); 5 U.S.C. App. II, § 3(2).

⁵⁸ 5 U.S.C. App. II, § 5(b)(2).

⁵⁹ *See e.g.*, Ali Rogin, *Members of new Pompeo task force have previously praised human-rights abusers*, PBS NEWS HOUR (Mar. 31, 2020), <https://www.pbs.org/newshour/world/members-of-new-pompeo-task-force-have-previously-praised-human-rights-abusers>; Masha Gessen, *Mike Pompeo’s Faith-Based Attempt to Narrowly Redefine Human Rights*, THE NEW YORKER (Jul. 10, 2019) <https://www.newyorker.com/news/our-columnists/mike-pompeos-faith-based-attempt-to-narrowly-redefine-human-rights>; Jayne Huckerby & Sarah Knuckey, *Pompeo’s “Rights Commission” is Worse Than Feared: Part I*, JUST SECURITY (Mar. 13, 2020) <https://www.justsecurity.org/69150/pompeos-rights-commission-is-worse-than-feared-part-i/>; Lisa Haugaard, *Searching for Rights to Alienate: The Trump Administration’s New Unalienable Rights Commission*, MEDIUM (Jul. 16, 2019) https://medium.com/@lisah_31342/https-medium-com-lisah-31342-searching-for-rights-to-alienate-f2c7a578d93d.

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reproductive and LGBTQI rights.⁶⁰ The very clear professional focus of the majority of Commission members is religious freedom.⁶¹ However, a near unique focus on religious freedom comes at the expense of the other, equally vital, enshrined rights in the Universal Declaration of Human Rights, as an exclusive focus on and prioritization of any of those rights would.

While any one of the members' aforementioned positions is problematic to a Commission tasked with concluding which human rights are 'true' rights, it is not the positions themselves that place the Commission on Unalienable Rights at ends with the fairly balanced requirement: it is that nearly every member of the Commission holds extremely similar, if not identical views. The Commission on Unalienable Rights is therefore the antithesis of a fairly balanced committee.

Second, the process of establishing the Commission was improper. FACA requires that legislation establishing an advisory committee "contain appropriate provisions to ensure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgement."⁶² While there was no legislation establishing the Commission, there was likewise no document that contributed to meeting this requirement. The two documents that perhaps come closest to legislation that established the Commission are the Commission's Charter and the notice in the Federal Register announcing Secretary Pompeo's intent to establish the Commission. The Commission's Charter includes sections on 'Membership and Designation' and 'Subcommittees,' neither of which include any guardrails established to mitigate special interest.⁶³ Meanwhile, the notice has nothing on Commission membership at all, let alone provisions to mitigate undue influence.⁶⁴ The Commission on Unalienable Rights falls woefully short of meeting yet another FACA standard.

Finally, FACA Implementing Regulations⁶⁵ require a Membership Balance Plan to ensure "that, in the selection of members of the advisory committee, the agency will consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the advisory committee."⁶⁶ Secretary Pompeo's Commission neglected to comply with the Membership Balance Plan guidance. The Commission did not explain how its membership selection achieved the necessary balance "of the points of view represented and the functions to be performed by the Federal advisory committee."⁶⁷ Rather than fulfill required

⁶⁰ Letter from 178 Non-Gov't Orgs. and 251 Individual Signatories to Sec'y. Michael Pompeo, U.S. Dep't of St., (Jul. 23, 2019), available at <https://www.humanrightsfirst.org/sites/default/files/Unalienable-Rights-Commission-NGO-Ltr.pdf>.

⁶¹ *Id.*

⁶² 5 U.S.C. App. II, § 5(b)(3) (1972).

⁶³ U.S. Dep't of St., *supra* note 53.

⁶⁴ U.S. Dep't of St., *Department of State Commission on Unalienable Rights*, 84 Fed. Reg. 25109, 25109 (May 30, 2019) <https://www.govinfo.gov/content/pkg/FR-2019-05-30/pdf/2019-11300.pdf>.

⁶⁵ *See*, 41 C.F.R. § 101-6 (2019); 41 C.F.R. § 102-3 (2019).

⁶⁶ 41 C.F.R. § 102-3.60 (2019).

⁶⁷ U.S. GEN. SERV. ADMIN., OFFICE OF COMMITTEE AND REG. MGMT., FEDERAL ADVISORY COMMITTEE

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elements of a Membership Balance Plan, which includes a selection process that will result in an opinions-balanced committee and how selected members will be not only qualified to present their opinions on relevant issues, but are themselves affected by those issues, the Plan provided only the four categories from which Committee members would be chosen, namely legal and non-legal scholars, leaders in the nonprofit and research arenas, and former government officials, with no explanation.⁶⁸

There is no doubt that the Commission on Unalienable Rights was improper in its formation, just as there can be no question that it violates FACA. Although enacted in 1972, FACA was amended in 1977 to, in part, incorporate The Government in the Sunshine Act, thereby pulling back the curtain on the federal government's covert dependency on partisan committees.⁶⁹ The Commission on Unalienable Rights, in failing to meet FACA requirements, has put the operations of portions of the federal government back in the shadows, a move which stands to have grave national and international human rights consequences. As evidenced by the more than 400 NGOs, legal advocates, former senior government officials, faith-based leaders, scholars, and educators, running the spectrum of political identities, who recently sent a letter to Secretary Pompeo expressing grave concern about the Commission makeup,⁷⁰ the consequences of disregarding FACA cannot be understated.

V. Conclusions and Recommendations

The Commission on Unalienable Rights is a solution in search of a problem. With its asserted purpose of examining human rights in light of “foundational documents” to clarify which rights are “real” and which have been granted in an ad hoc way,⁷¹ the Commission furthers the false narrative that certain rights, including reproductive rights, have no basis in international human rights as a way of undermining rights protections for all. Yet, international human rights law makes clear that reproductive rights are human rights. The prioritization of the right to freedom of thought, conscience, and religion over other human rights, including reproductive rights, violates international law and undermines or nullifies the rights of others, including the right reproductive health care services free from barriers, discrimination, stigma, or coercion.

MEMBERSHIP BALANCE PLAN (2011), *available at* https://www.gsa.gov/cdnstatic/MembershipBalancePlanGuidance-November_2011.pdf.

⁶⁸ U.S. DEPT OF ST., CHARTER DEPARTMENT OF STATE COMMISSION ON UNALIENABLE RIGHTS (2019) (unpublished draft) *available at* <https://www.justsecurity.org/wp-content/uploads/2019/06/charter-commission-unalienable-rights.pdf>.

⁶⁹ MEGHAN M. STUESSY, CONG. RESEARCH SERV., R44523, FEDERAL ADVISORY COMMITTEES: AN INTRODUCTION AND OVERVIEW (2016), *available at* <https://crsreports.congress.gov/product/pdf/R/R44253>.

⁷⁰ Letter to Sec'y. Michael Pompeo, *supra* note 60.

⁷¹ Secretary of State Michael R. Pompeo Remarks to the Press (July 8, 2019), <https://www.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3/>. The Federal Register notice of intent to establish the Commission states that the Commission “will provide fresh thinking about human rights discourse where such discourse has departed from our nation’s founding principles or natural law and natural rights.” Department of State Commission on Unalienable Rights, 84 Fed. Reg. 25,109 (May 30, 2019), <https://www.federalregister.gov/documents/2019/05/30/2019-11300/department-of-state-commission-on-unalienable-rights>.

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Any effort to pick and choose which rights the United States protects would undermine the core tenets of universality and interrelatedness and erode rights protections for marginalized and vulnerable communities around the world. Human rights are not specific to a particular country, and they do not exist in the eye of the beholder. Such a pick-and-choose approach would compound the Administration's disengagement, de-prioritization, and rollback of human rights and further cede its leadership in advancing the full spectrum of human rights protections within the United States and globally.

Moreover, the Commission undermines principles of transparency and accountability, as required under United States federal law. The Commission runs afoul of federal law and regulations by unnecessarily duplicating an existing government bureau and by failing to follow required process. As a result of its failure to follow the appropriate process, the Commission does not have the balanced membership required by federal law.

Given the inherent illegitimacy of the Commission, we recommend that it be immediately disbanded. In the alternative, we urge that any outcome document produced by the Commission reaffirm the United States' commitment to advancing the full spectrum of human rights protections, including reproductive rights, globally and within the United States. The Commission should affirm that human rights protections extend to all people, including women, LGBTQI people, people with disabilities, immigrants, and other marginalized and vulnerable communities.