



# Leitner Center

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Dear U.S. State Department Commission on Unalienable Rights,

As a scholar and advocate, I write to express my deep concern with the Commission's work to date, and the potential harm that a final report produced by the Commission, in line with its mandate and the views expressed by several of its members, may have on internationally recognized human rights.

The Commission is ostensibly an advisory body that was organized and chartered by the Secretary of State under the Federal Advisory Committee Act ("FACA"). The purpose of the Commission, according to Secretary of State Mike Pompeo, is to identify which internationally recognized human rights are "unalienable" and which are "ad hoc," in apparent opposition to U.S. treaty and legal obligations and longstanding foreign policy positions.<sup>1</sup> From its inception, the Commission's mandate, the opaque process by which it came into being, the duplicative nature of the body vis-à-vis the State Department's legally authorized human rights bureau, the publicly-stated views of several of its members, and the lack of diversity of expertise of its membership have deeply troubled hundreds of human rights organizations, human rights scholars, and other concerned citizens,

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<sup>1</sup> See Michael Pompeo, *Unalienable Rights and U.S. Foreign Policy*, Wall Street Journal, (July 7, 2019), <https://www.wsj.com/articles/unalienable-rights-and-u-s-foreign-policy-11562526448>.

who previously asked that the Commission be disbanded.<sup>2</sup> Over the past several months, the work of the Commission has only reinforced these concerns.

To date, the Commission has held five meetings. These have been made accessible only to a small number of individuals who have been able to register in advance and dedicate up to six hours to observing the proceedings in person at the State Department in Washington, D.C. To date, the Commission has also largely ignored the procedural requirements of FACA, including by failing to make all Commission records available to the general public.

It is only through the reporting of human rights advocates that the public has been made aware of the deeply troubling views expressed by several commissioners. These views as articulated support one of our initial concerns; namely, that the Commission's objective is to produce recommendations that would narrow the scope of U.S. obligations under international human rights law and justify a ranking of rights that prioritize some, such as the right to freedom of religion, over others. Given the past statements of several commissioners, including the body's chairperson, we remain strongly concerned that the Commission's work may seek to justify the rolling back of hard-won advances in areas such as the rights of women, girls, and LGBTQ persons.

## I. Hierarchy of Rights

Based on comments made by members of the Commission during public hearings, we remain concerned that the Commission's final product will seek to reinterpret the agreed-upon international human rights framework in a manner that may seek to establish a false and preferential hierarchy of rights. Some members of the Commission have openly discussed the "prioritization" of some rights over others.<sup>3</sup> When raised, this discussion has mainly focused on prioritizing freedom of religion over other rights, such as the right to health or the right to be free from discrimination. The argument made by some individual commissioners, as well as by some of the experts testifying before it, is that freedom of religion sits atop "lesser" or subsidiary rights, and that the violation or infringement of these lesser rights must be tolerated in order to ensure the full protection of religious freedom.<sup>4</sup> Another concern is that the Commission, and some witnesses, do not

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<sup>2</sup> <https://www.humanrightsfirst.org/sites/default/files/Unalienable-Rights-Commission-NGO-Ltr.pdf>

<sup>3</sup> During the Commission's third meeting (held on 12/11/19), Commissioner David Pan responded to remarks by Michael Abramowitz of Freedom House regarding concerns over the Commission's apparent desire to create a "hierarchy of rights," asking Mr. Abramowitz if he would "support that same prioritization that we want to do." The Commission also reproduced a discussion regarding the "prioritization" of rights in the published "minutes" of the third meeting. See <https://www.state.gov/u-s-department-of-state-commission-on-unalienable-rights-minutes-3/>.

<sup>4</sup> Some members of the Commission have expressed this view repeatedly throughout their careers. For a sample of previous statements made by various commissioners, see the following articles: Jayne Huckerby, Sara Knuckey & Meg Satterthwaite, *Trump's "Unalienable Rights" Commission Likely to Promote Anti-Rights Agenda*, Just Security, (July 9, 2019), <https://www.justsecurity.org/64859/trumps-unalienable-rights-commission-likely-to-promote-anti-rights-agenda/>; Masha Gessen, *Mike Pompeo's Faith-Based Attempt to*

recognize social, economic, and cultural rights (or would relegate such rights to little if any real protection).

A prioritization of freedom of religion or belief over the enjoyment of other human rights would constitute a violation of the United States' binding obligations under human rights law. Although the international human rights framework does recognize a distinction between derogable and non-derogable rights—the former being rights that can be suspended in times of national emergency—it does not establish a hierarchy that allows for the exercise of some rights in ways that violate others. As the Universal Declaration of Human Rights (UDHR) and subsequent human rights treaties make clear, human rights are interdependent, interrelated, and equal in importance.<sup>5</sup> The principle that all rights are equal is a product of the indivisibility of human rights: the denial of one right necessarily impedes the enjoyment of other rights.

Notably, some of the expert public testimony solicited and received by the Commission undermines the argument that the exercise of certain rights, such as freedom of religion, can be prioritized over enjoyment of others. For instance, during his testimony before the Commission, Ken Roth, Executive Director of Human Rights Watch, highlighted that the Human Rights Committee (the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights (ICCPR) by its State parties) “has explained that freedom of thought, conscience, and religion does not protect religiously motivated discrimination against women or racial minorities.”<sup>6</sup>

The COVID-19 pandemic reveals how rewriting human rights law and policy to exclude certain protections is a life and death mistake. The coronavirus

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*Narrowly Redefine Human Rights*, The New Yorker (July 10, 2019) <https://www.newyorker.com/news/our-columnists/mike-pompeos-faith-based-attempt-to-narrowly-redefine-human-rights>.

<sup>5</sup> Article 5 of the 1993 Vienna Declaration specifically notes that “[a]ll human rights are universal, indivisible and interdependent and interrelated.” UN OHCHR, *Vienna Declaration and Programme of Action* (1993), available at <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>. See also Human Rights Committee, General Comment No. 12: Art. 1 (Right to Self-determination), U.N. Doc. HRI/GEN/1/Rev.6 (March 13, 1984); Committee on Economic, Social and Cultural Rights, General Comment No. 22 (right to sexual and reproductive health (Art. 12)), UN Doc. E/C.12/GC/22 (March 4, 2016).

<sup>6</sup> Ken Roth, *Prepared Testimony to Commission on ‘Unalienable’ Rights*, Human Rights Watch (Jan. 10, 2020), <https://www.hrw.org/news/2020/01/10/prepared-testimony-commission-unalienable-rights>. See also 2020 Report of the Special Rapporteur on freedom of religion or belief (Freedom of religion or belief and Gender Equality), A/HRC/43/48, available at <https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Annual.aspx>. Notably, in response, Commissioners Berkowitz, Carozza, Tollefsen, Tse-Chien Pan, and Lantos Swett criticized Roth’s assertion that the rights of women and girls to receive sexual and reproductive healthcare, including access to abortion, should not be absolutely subjugated to the rights of those who would deny such care on the basis of their religious beliefs. In contrast, none of the Commissioners suggested that Mr. Roth’s position had merit, though it is understood to be an accurate representation of international human rights law by human rights advocates and experts. Complaint, *Robert F. Kennedy Human Rights et al. v. Pompeo*, No. 1:20-cv-02002, ¶¶ 84-85 (S.D.N.Y. filed March 6, 2020) available at <https://democracyforward.org/wp-content/uploads/2020/03/Complaint-As-Filed.pdf>.

demonstrates how, in an actual global humanitarian crisis, all life-saving human rights are essential and interdependent. The right to life, considered a political right, depends on the right to universal access to affordable health care, an economic right. Health care must be given to all who need it without discrimination on the basis of wealth, race, ethnicity, gender, sexual identity and orientation, political affiliation, or immigration status. Other economic rights—to wages, leave from work, and caregiving support—will ensure that people can support themselves and their families during the crisis. Immigrants and other minorities must be protected from those who would wrongly blame them for the spread of the virus. The rights of the acutely vulnerable—children, the elderly, and the disabled—must be preserved. Religious freedom cannot be used as a basis for denying life-preserving medical care or life-sustaining economic support. There can be no disposing of any of these rights, nor is there a hierarchy among them. Since a society’s response to a pandemic is only as strong as its most vulnerable person, all of these rights must be honored to protect everyone.

## **II. IHRL framework already adequately defines human rights**

As invited speakers informed the Commission from the outset, the concept of “unalienable rights” has neither a clear legal nor Constitutional meaning. Indeed, the preamble of the UDHR refers to all human rights as “inalienable,” which is also reflected in the working papers of the drafters of the UDHR. Undercutting Secretary Pompeo’s rationale for why the Commission supposedly need exist, the international human rights law framework already adequately identifies the scope, content, and obligations that arise from the human rights contained within the framework. The UDHR and the nine core human rights treaties, particularly the ICCPR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), codify a set of human rights under widely-recognized rules of international law. These treaties are the product of decades of multilateral negotiations and represent an international consensus regarding the scope of human rights that bind the states that have ratified them. No state has the authority to unilaterally pick and choose between these rights and redefine the plain terms of the treaties.

Over the course of the Commission’s public hearings, some commissioners have suggested that the human rights framework is poorly defined or has been stretched to cover “new” rights. Some have also suggested that it is up to the Commission to differentiate between “alleged” rights claims and those rights that are “unalienable.”<sup>7</sup> Yet, many of the various human rights experts and academics who have testified before the Commission have demonstrated that the rights of the human rights framework are both inalienable and clearly identified in the aforementioned core human rights treaties, and that the various treaty bodies (such

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<sup>7</sup> During the Commission’s second meeting (held 11/1/2019), the Chair of the Commission, Mary Ann Glendon, stated that it was the responsibility of the Commission “to help the U.S. to think more clearly about alleged human rights . . . .”

as the UN Human Rights Committee) have an important role in the interpretation and application of the human rights provided by these treaties.<sup>8</sup>

Some members of the Commission have also demonstrated a reluctance to recognize economic, social, and cultural rights as “inalienable,”<sup>9</sup> or as having equal status to civil and political rights, even though international law provides clear guidance on how States must implement their various treaty obligations equally. Those commissioners’ stated positions are the product of a false dichotomy that views civil and political rights as independent and severable from economic, social, and cultural rights. The human rights movement has long rejected this narrative, recognizing political and civil rights, as well as economic, social, and cultural rights, as indivisible and interdependent.

### III. So-called proliferation of rights.

Secretary Pompeo and several of the commissioners have justified the Commission’s work by arguing that a “proliferation” of human rights claims has undermined “fundamental” individual rights, namely freedom of religion and freedom of speech.<sup>10</sup> This argument is deeply misguided, and supports widespread concerns within the human rights advocacy community that the Commission’s work will be cited as support for policies that would limit rights, including those of women and/or LGBTQ individuals.

The development of human rights law since 1948 is the result of the extension of the rights enshrined in the UDHR to more people throughout the world. Through the painstaking work of social movements, scholars, civil society, and diplomats, the international community has adopted nine core human rights treaties. These

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<sup>8</sup> See Sunstein, Cass R. “Rights and Citizenship.” U.S. Department of State’s Commission on Unalienable Rights Meeting, November 1, 2019. See also Ken Roth, *Prepared Testimony to Commission on ‘Unalienable’ Rights*, Human Rights Watch (Jan. 10, 2020),

<https://www.hrw.org/news/2020/01/10/prepared-testimony-commission-unalienable-rights>; Michael Abramowitz, Prepared Testimony, *US Leadership in the Reinforcement of Human Rights*, Freedom House (Dec. 11, 2019), <https://freedomhouse.org/article/us-leadership-reinforcement-human-rights>.

<sup>9</sup> During the Commission’s second meeting (held 11/1/2019), commissioner Soloveichik pushed back against Professor Cass Sunstein’s assertion that the founding generation recognized certain economic rights as “unalienable,” noting that economic rights, such as the right to healthcare, can “clash with individual liberty” such as freedom of religion. Additionally, in a February 2019 article, Chairwoman Glendon advocated for the prioritization of “basic” set of rights that are “universal” in nature and articulated a list that did not include a single economic, social or cultural right. See Mary Ann Glendon, Seth Kaplan, *Renewing Human Rights*, First Things, (2019), <https://www.firstthings.com/article/2019/02/renewing-human-rights>.

<sup>10</sup> During the Commission’s second meeting (held on 11/1/2019), chairwomen Glendon noted that the Commission was created to address the “proliferation” of rights and stated that “[t]his is one of the reasons to go back to basics, what rights are fundamental, it is right to say that proliferation of rights can lead to a situation where you’re either in paralysis or the currency is devalued where truly fundamental rights become meaningless. In his Wall Street Journal op-ed, Secretary Pompeo argued that a “proliferation of rights claims” has “unmoor[ed] us from the principles of liberal democracy.” See Michael Pompeo, *Unalienable Rights and U.S. Foreign Policy*, Wall Street Journal, (July 7, 2019), <https://www.wsj.com/articles/unalienable-rights-and-u-s-foreign-policy-11562526448>.

treaties address the rights challenges faced by women, children, racial and ethnic minorities, persons with disabilities, migrants, and other marginalized groups, and represent a global consensus that certain groups face unique barriers to the full realization of the rights enshrined in the UDHR.

The adoption of human rights treaties, as well as the interpretation of the scope of the rights recognized by them, has not resulted in new rights claims. The only “proliferation” that has occurred as a result of these conventions is that of greater equality for women, people with disabilities, LGBTQ individuals, children, and racial and ethnic minorities, among other populations. Contrary to the assertions of the members of the Commission, the adoption and implementation of these treaties has allowed the human rights framework to protect the rights, including civil and political rights, of more people than ever before.

#### **IV. Supposed “tension” between rights**

During the Commission’s various public meetings, some commissioners have argued that a tension exists between the exercise of religious freedom and the promotion and protection of other rights.<sup>11</sup> Comments and questions from members of the Commission have demonstrated a belief that this tension should be resolved in favor of the exercise of religious freedom. The necessary consequence of the Commission’s logic is that discrimination against women, LGBTQ individuals, and other minorities would be permissible under international human rights law if based on a supposed claim of religious freedom.

Human rights bodies have provided some guidance on how to avoid such tensions, ensuring people’s access to health is not deterred. In its General Comment No. 36 on the right to life, adopted in October 2018, the Human Rights Committee said that, “States parties should not introduce new barriers and should remove existing barriers that deny effective access by women and girls to safe and legal abortion, including barriers caused as a result of the exercise of conscientious objection by individual medical providers.”<sup>12</sup> In its concluding observations, the committee has repeatedly provided guidance on how to avoid such barriers (for example, to Colombia, Lebanon, Poland, Romania) by instructing states to enhance the effectiveness of referral mechanisms in cases of conscientious objection by medical practitioners, in order to ensure access to abortion services and to ensure that women are not obliged, as a consequence of conscientious objection on the part of medical staff, to resort to unsafe abortions. Likewise, the Committee on Economic, Social and Cultural Rights (CESCR), in its General Comment No. 22 on the right to

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<sup>11</sup> During the Commission’s fourth meeting (held 1/10/20), Commissioners Peter Berkowitz, Christopher Tellefsen, and Katrina Lantos Swett, each suggested that a “tension” exists between women’s reproductive health rights and the free exercise of religion.

<sup>12</sup> Human Rights Committee, General Comment No. 36: Art. 6 (Right to Life), U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

sexual and reproductive health, gives guidance on how states can appropriately regulate conscientious objection in healthcare settings to ensure that it does not inhibit anyone's access to sexual and reproductive health care, including by requiring referrals to an accessible provider capable of and willing to provide the services being sought, and that it does not inhibit the performance of services in urgent or emergency situations.<sup>13</sup>

Despite there being guidance on how to respect all rights, to support their position, members of the Commission have relied on Article 18 of the UDHR for the definition of the right to religious freedom.<sup>14</sup> Although some consider the UDHR binding as a matter of customary international law, the members of the Commission are likely aware that the relevant source of positive law for the right to religious freedom is Article 18 of the ICCPR, which the U.S. has both signed and ratified. Unlike the UDHR, the ICCPR expressly states that the right to religious freedom is not absolute, and may be subject to limitations for the purpose of, among other things, protecting the fundamental rights and freedoms of others. As Human Rights Watch Executive Director Ken Roth explained during his testimony before the Commission, ICCPR Article 18 makes clear that the right to freedom of thought, conscience, and religion cannot be used to excuse religiously motivated discrimination under international law and cannot justify denying women and girls access to reproductive healthcare.

## **V. Authoritarian regimes may benefit from the Commission's work**

The Commission's work sends a signal to the international community that the U.S. government views the international human rights framework as malleable and open to unilateral re-interpretation. The Commission's willingness to question the basic foundations of the human rights framework risks emboldening populist and authoritarian regimes actively promoting revisionist and culturally relativist interpretations of this framework to justify their repressive policies.

As an illustrative example, during the Commission's third public meeting, a member of Brazil's diplomatic delegation applauded the Commission's efforts to redefine the rights framework, and called on the commissioners to reject "new human rights" that are "anti-human." More broadly, the Chinese government has long promoted a revisionist and hierarchical approach to human rights in which the right to development and the related right to subsistence are taken as "the primary basic human rights," trumping all other rights.<sup>15</sup>

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<sup>13</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 22 (right to sexual and reproductive health (Art. 12)), UN Doc. E/C.12/GC/22 (March 4, 2016).

<sup>14</sup> Commissioner Katrina Lantos Swett specifically cited Article 18 of the UDHR as the definition of the right to religious freedom during the Commission's fourth meeting, noting specifically that there is no "limitation in Article 18" and that it represents "a broad expression" of the right of religious freedom and belief.

<sup>15</sup> See The Beijing Declaration adopted by the First South-South Human Rights Forum, available at <http://www.chinadaily.com.cn/a/201712/08/WS5a2aaa68a310eefe3e99ef85.html>.

This damaging precedential aspect of the Commission's work, even if unintended, threatens to undermine hard-won gains and embolden the world's worst human rights violators. Authoritarian regimes have already followed the United States' lead in spuriously denouncing "fake news" and violating the rights of refugees to seek asylum from persecution. The United States' adoption of a restrictive foreign policy on human rights would close more doors in terms of what U.S. diplomats could advocate on overseas.

## VI. Procedural Inadequacies (FACA violations)

The Commission has flagrantly ignored the procedural requirements imposed by FACA.

The composition of the Commission violates rules requiring that federal advisory committees be "fairly balanced in its membership in terms of the points of view represented."<sup>16</sup> While many members' expertise lies in religious freedom or public ethics, the body contains no experts on women's rights, children's rights, reproductive freedom, LGBTQ rights, immigrants' rights, or asylum protections. There are critics of reproductive rights and LGBTQ rights, but no advocates of such rights. There are no experts on poverty and inequality, and no specialists on how rights are impacted by climate change. Of the 12 commission members, only three are women and two are people of color. Additionally, the body includes two members of the State Department's Office of Policy Planning, but no representatives from the Department's Bureau of Democracy, Human Rights, and Labor, whose assistant secretary is required by law to lead in advising the Secretary of State on human rights matters.

Additionally, under the FACA statute, executive branch advisory committees are required to open all of their official meetings to the general public and publicly disclose all advisory committee documents in a manner that facilitates meaningful public participation. The document disclosure requirement covers any "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda [and] other documents ... made available to or prepared for the committee."<sup>17</sup> Additionally, federal courts have held that when practical, advisory committees must provide the general public with relevant materials and documents *before* public committee meetings are held.<sup>18</sup>

To date, the Commission has neglected to disclose publicly the vast majority of documents covered by FACA's disclosure requirement. It has yet to release the full records of the Commission's meetings, and has only released inaccurate and partial

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<sup>16</sup> See 41 CFR § 102-3.30, "What policies govern the use of advisory committees?," available at <https://www.law.cornell.edu/cfr/text/41/102-3.30>.

<sup>17</sup> 5 U.S.C. App. 2 § 10(b).

<sup>18</sup> *Food Chem. News v. Dep't of Health & Human Servs.*, 980 F.2d 1468, 1472 (D.C. Cir. 1992).



minutes from the first three meetings. The Commission has also failed to release publicly any of the documents that the members of the Commission have relied on in preparation for public meetings, or the external submissions by third parties, including those solicited by the Commission. Based on comments made by various commissioners, it is also clear that the Commission has held several “closed preparatory sessions” and “working group” (subcommittee) meetings that have been closed to the public, in violation of FACA.<sup>19</sup>

Secrecy surrounding the Commission’s work remains deeply troubling. The body’s apparent violations of FACA demonstrate a disregard for a law that is intended to ensure government transparency and accountability on behalf of both Congress and the American public. Once finalized, the Commission’s recommendations could be used by various executive agencies to further roll back the U.S. government’s role as a global leader in the promotion and protection of *all* human rights for *all* people. This seismic shift in U.S. policy should not be undertaken in the dark.

## **VII. What a review of human rights in US foreign policy should look like**

As has been widely documented by many of our organizations, the Trump administration has produced an abysmal policy record concerning internationally recognized human rights. Under the leadership of President Trump, Secretary Pompeo, and other cabinet members, the administration that chartered the Commission on Unalienable Rights has detained migrant children and separated them from their parents; denied individuals their legal right to seek asylum; facilitated widespread Saudi and Emirati war crimes in Yemen; downplayed human rights abuses in countries from North Korea to Central Asia to the Persian Gulf; actively rolled back reproductive health rights at home and abroad; verbally attacked the concept of a free press and individual reporters; and undermined America’s independent judiciary, among other actions.

Unlike the work of the Commission thus far, a good faith review of the role of human rights in U.S. government policy would necessarily focus on how the U.S. could both improve its human rights record at home and promote greater protections for *all* human rights abroad. Such a commission would start by reaffirming the U.S. government’s commitment to the international human rights

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<sup>19</sup> Chairwoman Glendon has openly acknowledged the existence of several “working groups,” which she has interchangeably referred to as “subcommittees,” each of which is comprised of a subset of commissioners and tasked with composing a specific component of the Commission’s final written product. According to the published minutes of the first meeting, Chairwoman Glendon publicly announced during the meeting that commissioner Hanson would join the “Terms and Concepts” Working Group, chaired by commissioner Tollefsen. *See* U.S. Dep’t of State Commission on Unalienable Rights Minutes (Oct. 23, 2019), <https://www.state.gov/u-s-department-of-state-commission-on-unalienable-rights-minutes/>. The public minutes of the third meeting also include a specific reference to commissioner Carozza’s chairmanship of a “working group that will focus on the international human rights principles the U.S. has ascribed since World War II. *See* U.S. Dep’t of State Commission on Unalienable Rights Minutes (Dec. 11, 2019), <https://www.state.gov/u-s-department-of-state-commission-on-unalienable-rights-minutes-3/>.

framework as defined by the UDHR and the subsequent human rights treaties. The commission would make clear that the rights recognized in both the ICCPR and ICESCR are indivisible, interdependent, and enjoyed by all people, regardless of where they come from, what they look like, or who they love. Finally, a properly constituted commission would also recognize that it is in the U.S. government's national interest to make the promotion and protection of human rights a cornerstone of U.S. foreign policy, and would recommend appropriate changes to Trump administration policy.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Flaherty', written in a cursive style.

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