

June 2, 2020

Submitted via email to commission@state.gov

Commission on Unalienable Rights
U.S. Department of State
2201 C Street NW
Washington, D.C. 20520

Re: Submission on the Human Rights Concerns of the Commission on Unalienable Rights

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

As an international human rights organization, Robert F. Kennedy Human Rights writes to formally express our deep concern with this Commission's work to date and its plan to produce a report advising Secretary of State Pompeo which internationally recognized human rights are "unalienable" and which are "ad hoc."¹

The Commission's members share a singular, narrow view of human rights, which violates Federal Advisory Committee Act (FACA) and portends a troubling intent to erode well-established rights of women and girls, LGBTQI individuals, and other marginalized groups. If the Commission's final recommendations reflect the exclusionary ideology built into its mandate and expressed by its members, they will contradict the United States' legal obligations to respect, protect, and fulfill the human rights of all people and further equate the United States with the world's worst human rights violators.

Robert F. Kennedy Human Rights is a non-partisan, not-for-profit organization dedicated to realizing Robert Kennedy's vision of a more just and peaceful world. For decades, we have partnered with frontline advocates to defend human rights and achieve equity and social justice in the United States and around the world. We feel so strongly that the Commission's work could endanger decades of human rights progress and embolden oppressive regimes that we joined with other human rights organizations to file a lawsuit to stop it.²

I. The Commission's Narrow View of Human Rights is Contrary to Well-Established and Widely Accepted Principles of International Human Rights Law

The Commission's very purpose, to "provide fresh thinking about human rights discourse where such discourse has departed from our nation's founding principles of natural law and natural rights,"³ disregards the fact that the human rights legal framework represents a well-established

¹ 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>.

² *Human Rights Orgs Sue Sec. Pompeo for Unlawful Commission: Slanted Membership, Withheld Records and Closed-Door Meetings Violate Federal Law*, Robert F. Kennedy Human Rights (Mar. 6, 2020), <https://rfkhumanrights.org/news/human-rights-orgs-sue-sec-pompeo-for-unlawful-commission>.

³ *Department of State Commission on Unalienable Rights: Notice of Intent to Establish an Advisory Committee*, Department of State, 84 Fed. Reg. 104 (May 30, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-05-30/pdf/2019-11300.pdf>.

international consensus about the scope of human rights and the state obligations that arise from them. The nine core human rights treaties codify a set of human rights, first enshrined in the Universal Declaration of Human Rights (UDHR), under widely-recognized rules of international law and designate the bodies responsible for their interpretation. These treaties are a binding product of decades of thoughtful human rights discourse; painstaking work by social movements, scholars, civil society, and diplomats; and multilateral negotiations between states.

No state has the authority to unilaterally redefine the plain terms of international human rights law or pick and choose which human rights to respect and promote. However, based on the Commission members' areas of expertise, past statements, and comments during the Commission's public, we believe the Commission and Secretary of State seek to do just that. It is clear that the members share a narrow, exclusionary view of human rights. We are strongly concerned that any final report produced by this Commission will try to limit the scope of U.S. obligations under international human rights law and justify a ranking of rights that prioritizes some, namely the right to freedom of religion, at the expense of others – especially the reproductive rights of women and girls and the rights of LGBTQI people.

In their professional work and over the course of the Commission's public hearings, multiple commissioners have suggested that the human rights framework is poorly defined or has been stretched to cover "new" rights and that it is appropriate for the Commission to differentiate between "alleged" rights claims and those rights that are "unalienable."⁴ Yet, as many of the human rights experts and academics who have testified before the Commission have demonstrated, the rights within the human rights framework are all inalienable and plainly identified in the aforementioned core treaties.⁵ The interpretation of human rights law is assigned to the various treaty bodies (such as the UN Human Rights Committee), not individual states. If the U.S. seeks clarification about the substance of the human rights framework or its obligations under human rights law, it must engage with those bodies.

We are concerned that the Commission has mischaracterized the clarity and binding nature of the international human rights framework in order to justify narrowing U.S. legal obligations to respect and protect all of those rights equally. Some Commissioners have demonstrated a troubling reluctance to recognize economic, social, and cultural rights as "inalienable"⁶ These

⁴ 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"

⁵ 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>.

⁶ 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>.

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.

In particular, we fear that the Commission will continue disregarding this well-established principle that all human rights are universal and equal in order to justify a false and preferential hierarchy of rights based on the commissioners' personal beliefs and prejudices, not international law. Before joining the Commission, numerous members made statements denying the equal rights of LGBTQI people⁷ and denouncing a women's right to reproductive freedom.⁸ Often, Commission members have argued that the violation or infringement of these rights must be tolerated because they are in "tension"⁹ with religious freedom, a right that they mistakenly believe should be given "prioritization" over other, "lesser" rights.¹⁰

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 or the denial of rights to some people. As the Universal Declaration of Human Rights (UDHR) and subsequent human rights treaties make clear, human rights are interdependent, interrelated, and equal in importance.¹¹ The principle that all rights are equal is a

⁷ Bill Browning, *Every Member of Trump's New Human Rights Commission is an Anti-LGBTQ Activist*, LGBTQ Nation (July 11, 2019), <https://www.lgbtqnation.com/2019/07/every-member-trumps-new-human-rights-commission-anti-lgbtq-activist/>.

⁸ 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/>; see, e.g., Christopher O. Tollefsen, *Pope Francis, the Zika Virus, and Contraception*, Public Discourse (Feb. 23, 2016), <https://www.thepublicdiscourse.com/2016/02/16517/>; Christopher O. Tollefsen, *Contraception and Catholicism*, National Review (Feb. 16, 2012), <https://www.nationalreview.com/2012/02/contraception-and-catholicism-christopher-tollefsen/>.

⁹ 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.

¹⁰ 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 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>. 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/>.

¹¹ 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).

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 explicitly pointed out the inaccuracy in Commission members' arguments 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, explained that Article 18 of the International Covenant on Civil and Political Rights (ICCPR), which codifies the right to freedom of thought, conscience and religion, 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. Mr. Roth also highlighted that Human Rights Committee (the body of independent experts that monitors implementation of the 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."¹² International human rights law makes it clear that states cannot curtail the rights to reproductive freedom and equal treatment for LGBTQI people in the name of protecting religious liberty.

Ultimately, the narrow approach to human rights and prioritization of freedom of religion or belief over the enjoyment of other rights advocated for by the commissioners would constitute a violation of the United States' binding obligations international under human rights law. State Department adoption of the Commission's restrictive view would undermine U.S. authority on the international stage by signaling to other countries that the U.S. disregards the agreed upon foundations of international law. Not only would this limit the power of U.S. diplomacy, it would also set a dangerous precedent that the international human rights framework is open to unilateral re-interpretation by authoritarian regimes looking to justify their repressive policies and trample on the rights of women and girls, LGBTQI people, and other marginalized groups.

II. The Commission's Unbalanced Membership and Lack of Transparency Violate the Federal Advisory Committee Act

Since its inception, the Commission has been in flagrant violation of the Federal Advisory Committee Act (FACA). FACA requires any outside advisory group that provides recommendations or advice to a federal agency maintain a balanced membership, fulfill a public interest need and operate transparently. The Commission is violating all of these requirements.

¹² 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>.

First, members of the Commission were chosen without input from mainstream human rights groups or career human rights experts within the State Department's Bureau of Democracy, Human Rights, and Labor (DRL), who have advised administrations of both political parties about U.S. human rights commitments and the role they should play in foreign policy. Unsurprisingly, the Commission created through this insulated process is nowhere near meeting the FACA requirement that it be "fairly balanced in its membership in terms of the points of view represented."¹³

While many members' expertise lies in religious freedom or public ethics, the body contains no experts on other important areas of human rights, such as 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. And notably, the Commission does not include any representatives from DRL, 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."¹⁴ 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.¹⁵

Disregarding these FACA requirements, the Commission has operated in a deliberately opaque fashion. 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 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.¹⁶

¹³ 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>.

¹⁴ 5 U.S.C. App. 2 § 10(b).

¹⁵ *Food Chem. News v. Dep't of Health & Human Servs.*, 980 F.2d 1468, 1472 (D.C. Cir. 1992).

¹⁶ 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->

We find the secrecy surrounding the Commission's work 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 and that is precisely why we filed a lawsuit challenging the Commission's many violations of the FACA statute.

Robert F. Kennedy Human Rights speaks out to hold government's accountable when they violate human rights. We have been¹⁷ and remain alarmed by the abdication of America's leadership on human rights under the current administration. The U.S. Department of State should be a global champion for human rights, not an ally for oppressive regimes. Instead of trying to curtail widely accepted human rights standards, the Secretary of State should respect and actively participate in the international legal framework established to interpret and promote them. To that end, Robert F. Kennedy Human Rights has sought to work with the current Department of State to enhance accountability for human rights violations around the world¹⁸ and would welcome a balanced, good faith review of the role of human rights in U.S. policy.

However, as long as the Commission on Unalienable Rights seeks to legitimize the Trump administration's discriminatory views and regressive agenda, Robert F. Kennedy Human Rights will challenge its existence and its work. We will continue to speak truth to power in order to protect and advance the human rights of *all* people.

Sincerely,



Wade McMullen
SVP Programs and Legal Strategy
Robert F. Kennedy Human Rights

[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/>.

¹⁷ Kacey Mordecai, *America Abdicates Its Leadership On Human Rights*, Robert F. Kennedy Human Rights (Mar. 3, 2017), <https://rfkhumanrights.org/news/america-abdicates-its-leadership-on-human-rights>.

¹⁸ *Robert F. Kennedy Human Rights Joins Letter Urging Secretary Pompeo to Prioritize Human Rights During Visit to Mexico*, Robert F. Kennedy Human Rights (July 11, 2018), <https://rfkhumanrights.org/news/robert-f-kennedy-human-rights-joins-letter-urging-secretary-pompeo-to-prioritize-human-rights-during-visit-to-mexico>.