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U.S. State Department
Commission on Unalienable Rights
Sent via email to: commission@state.gov

April 3, 2020

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

As a human rights lawyer, 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, U.S. foreign policy, and the international human rights movement.

The concept of "unalienable rights" has neither a clear legal nor Constitutional meaning. Indeed, the preamble of the Universal Declaration of Human Rights (UDHR) refers to all human rights as "inalienable," which is also reflected in the working papers of the drafters of the UDHR. Undercutting Secretary of State Michael Pompeo's rationale for the Commission, 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 International Covenant on Civil and Political Rights (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.

Why did the Secretary of State choose *unalienable*, and not the contemporary, universally used *inalienable* in referring to rights? While the two may be considered synonymous, the Founding Fathers themselves debated the terms.¹ The rough draft of the Declaration of Independence included *in—*; the final parchment written in Adams' hand had *un—*; other versions written in Jefferson's hand included *in—*.² Not surprisingly, both appear in printed versions. Politicians and other rhetoricians use *unalienable*, but almost exclusively in quoting or referring to the Declaration of Independence. Otherwise, *inalienable* is common usage. (A clever "ngram" shows *unalienable*'s use reached its zenith in 1784; overtaken in 1833 by *inalienable*, which has remained the preferred use to the present day.³)

¹ Valerie Strauss, *Are our rights 'inalienable' or 'unalienable'?* Washington Post, July 4, 2015, <https://www.washingtonpost.com/news/answer-sheet/wp/2015/07/04/are-our-rights-inalienable-or-unalienable/?noredirect=on>.

² *The Declaration of Independence, The Want, Will, and Hopes of the People- Unalienable / Inalienable*, Independence Hall Association, <https://www.ushistory.org/declaration/document/unalienable.html>.

³ See, Inalienable vs. unalienable, <https://grammarist.com/usage/inalienable-unalienable/>.

What's more, *inalienable* is the language of international human rights law.

Synonyms or not, there is an insidious aspect of the designation that is characteristic of this administration. In his novel, *Nineteen Eighty-Four*, George Orwell made (in)famous the importance of language and thought in relation to the public's acceptance of state control. The Orwellian term "doublethink" is not only familiar to us, it characterizes the manner in which the Trump administration governs. Doublethink means "the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them."⁴ Totalitarian regimes manipulate the truth, and make people say things they know to be untrue, until they are complicit in the doublethink and lose track of truth.

The media uses the term *gaslighting* – a manner of applying doublethink by manipulating a person (or a society) into doubting the evidence of their own senses with constant, subtle denials of the truth.⁵ Dissembled truth hangs around like a shadow until people forget what was criticized or challenged, and it seems as if the obscurity has always been the truth.

The choice of *unalienable* is consistent with Secretary Pompeo's desire to refocus the rights discourse with the late eighteenth century notions of rights. It is not just that *unalienable* is anachronistic; its use is intended to call into question the legality of an entire body of international law. The choice of terminology calls attention to an objective in forming this Commission: to weaken or disregard the corpus of human rights law negotiated, codified, ratified, elucidated, implemented over decades by the international community. To distract the American people from these concrete legal obligations. Natural law refers to a narrow set of civil and political rights unhinged from the social and economic rights that constitute half the corpus. It is another example of the doctrine of American exceptionalism; that the U.S. need not abide by international treaties and obligations.

Among its duties, the Commission will guide U.S. diplomats and foreign policy decisions and actions with respect to human rights in international settings.⁶ Secretary of State Michael Pompeo announced the Commission is needed to "make sure we have a solid definition of human rights upon which to tell all our diplomats around the world."⁷ This it will do by focusing on the "nation's founding principles, on natural law and natural rights".⁸

The choice of *unalienable* resurrects natural law when only white, Anglo-Saxon men with property and/or other wealth had rights. It relegates LGBTQ persons, people of color, non-Christians,

⁴ <https://www.goodreads.com/quotes/164965-to-know-and-not-to-know-to-be-conscious-of>

⁵ Preston C. Ni, "7 Stages of Gaslighting in a Relationship, How gaslighters emotionally manipulate, traumatize, and exploit victims," Psychology Today, April 30, 2017, <https://www.psychologytoday.com/us/blog/communication-success/201704/7-stages-gaslighting-in-relationship>.

⁶ U.S. Department of State, Charter for the Commission on Unalienable Rights, <https://www.state.gov/charter-for-the-commission-on-unalienable-rights/>, para. 4.

⁷ U.S. Department of State, Remarks to Traveling Press, Michael R. Pompeo, Secretary of State, Joint Base Andrews, May 30, 2019, <https://www.state.gov/remarks-to-traveling-press-13/>.

⁸ Charter of the Commission, para. 3.

immigrants, the poor, women, once again invisible, and worse – it has the capacity and even the intention to render them *unpersons*.⁹

Another purpose of the Commission, according to Secretary of State 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.¹⁰ 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, who previously asked that the Commission be disbanded.¹¹ Over the past several months, the work of the Commission has only reinforced these concerns.

I am also concerned that the Commission has largely ignored the procedural requirements of the Federal Advisory Committee Act (FACA), including by failing to make Commission records available to the general public and meetings accessible to more than a small number of individuals who were able to register in advance.¹² 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.”¹³ The only expertise represented by commissioners seems to be religious freedom or public ethics. There are no experts on poverty and inequality, women’s rights, children’s rights, reproductive freedom, LGBTQ rights, immigrants’ rights, or asylum protections, and no specialists on how rights are impacted by climate change.

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.

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 corroborate the concern 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.¹⁴

⁹ Defined in the Merriam-Webster dictionary as “an individual who usually for political or ideological reasons is removed completely from recognition or consideration”, <https://www.merriam-webster.com/dictionary/unperson>.

¹⁰ 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>.

¹¹ <https://www.humanrightsfirst.org/sites/default/files/Unalienable-Rights-Commission-NGO-Ltr.pdf>

¹² 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>. 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.” 5 U.S.C. App. 2 § 10(b). 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. *Food Chem. News v. Dep’t of Health & Human Servs.*, 980 F.2d 1468, 1472 (D.C. Cir. 1992).

¹³ 41 CFR § 102-3.30, “What policies govern the use of advisory committees?,” para. (c).

¹⁴ 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, Sectary Pompeo

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.

Based on comments made by members of the Commission during public hearings, I am 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. Given the past statements of several commissioners, including the body's chairperson, I share the concern of many 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.

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 UDHR and subsequent human rights treaties make clear, human rights are interdependent, interrelated, and equal in importance.¹⁵ 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.

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

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 treaties address the rights challenges faced by women, children, racial and ethnic minorities, persons with disabilities, migrants, and other marginalized groups, and represent a

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>.

¹⁵ 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).

global consensus that certain groups face unique barriers to the full realization of the rights enshrined in the UDHR.

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.

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.

Sincerely,

A handwritten signature in blue ink that reads "Deena R. Hurwitz". The signature is written in a cursive, flowing style.

Deena R. Hurwitz