

to constructing a wall along the southern border. After Congress refused to provide the desired level of funding to build the wall, Trump declared a national emergency at the southern border on February 15 in order to access additional emergency funds.⁵⁸ On April 5, the House of Representatives filed a lawsuit arguing that the Trump administration's attempts to circumvent Congress in using funding appropriated for other purposes violated the Appropriations Clause of the Constitution and the Administrative Procedure Act.⁵⁹ On June 3, the House of Representatives' motion for a preliminary injunction was denied for lack of standing and subject matter jurisdiction.⁶⁰ A separate challenge to the Trump administration's border wall was filed in the Northern District of California, leading a federal district court to grant a permanent injunction on June 28 against construction of portions of the wall.⁶¹ Although the Ninth Circuit denied the government's motion for a stay of the injunction,⁶² the Supreme Court overturned this decision and stayed the injunction on July 26.⁶³ The litigation is currently pending in the Ninth Circuit.

Secretary of State Establishes Commission on Unalienable Rights
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On July 8, 2019, Secretary of State Mike Pompeo established a Commission on Unalienable Rights. The Commission will “provide the Secretary of State advice and recommendations concerning international human rights matters . . . [and] provide fresh thinking about human rights discourse where such discourse has departed from our nation's founding principles of natural law and natural rights.”¹ The Commission has an initial two-year mandate. Democratic lawmakers have raised concerns that the Commission will circumvent existing structures and challenge LGBTQ+ protections and reproductive rights.

In May 2019, Pompeo gave formal notice of his intent to establish a Commission on Unalienable Rights, pursuant to the Federal Advisory Committee Act.² On July 8, he announced the creation of the Commission.³ The Commission will study the Universal

⁵⁸ Proclamation No. 9844, 84 Fed. Reg. 4,949 (Feb. 15, 2019); *see also* Asylum Story, *supra* note 1.

⁵⁹ U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8 (D.D.C. 2019).

⁶⁰ *Id.*

⁶¹ *Sierra Club v. Trump*, No. 19-CV-00892-HSG, 2019 WL 2715422 (N.D. Cal. June 28, 2019).

⁶² *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019).

⁶³ *Trump v. Sierra Club*, No. 19A60, 2019 WL 3369425 (U.S. July 26, 2019).

¹ Department of State Commission on Unalienable Rights, 84 Fed. Reg. 25109 (May 30, 2019).

² *Id.*; *see also* 5 U.S.C. App. § 9 (2018) (setting conditions on the establishment of advisory commissions, including that notice of their establishment be published in the Federal Register).

³ U.S. Dep't of State Press Release, Michael R. Pompeo, Secretary of State, Remarks to the Press (July 8, 2019), at <https://www.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3> [<https://perma.cc/V6MZ-TATP>] [hereinafter Pompeo Remarks].

Declaration of Human Rights and Founding-era documents to produce a written guide that, as Pompeo describes it, “the State Department and every American can stare at and say this is consistent with American history.”⁴ The Commission will automatically be dissolved after two years unless “it is formally determined to be in the public interest to continue it for another two years.”⁵

Pompeo emphasized that the Commission is intended to ensure that “human rights discourse not be corrupted or hijacked or used for dubious or malignant purposes,” explaining:

It’s a sad commentary on our times that more than 70 years after the Universal Declaration of Human Rights, gross violations continue throughout the world, sometimes even in the name of human rights. International institutions designed and built to protect human rights have drifted from their original mission. 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. . . .

I hope that the commission will revisit the most basic of questions: What does it mean to say or claim that something is, in fact, a human right? How do we know or how do we determine whether that claim that this or that is a human right, is it true, and therefore, ought it to be honored? How can there be human rights, rights we possess not as privileges we are granted or even earn, but simply by virtue of our humanity belong to us? Is it, in fact, true, as our Declaration of Independence asserts, that as human beings, we—all of us, every member of our human family—are endowed by our creator with certain unalienable rights?⁶

In a newspaper editorial published around the same time, Pompeo wrote:

[A]fter the Cold War ended, many human-rights advocates turned their energy to new categories of rights. These rights often sound noble and just. But when politicians and bureaucrats create new rights, they blur the distinction between unalienable rights and ad hoc rights granted by governments. Unalienable rights are by nature universal. Not everything good, or everything granted by a government, can be a universal right. Loose talk of “rights” unmoors us from the principles of liberal democracy. . . . Rights claims are often aimed more at rewarding interest groups and dividing humanity into subgroups. . . . The commission’s work could also help reorient international institutions specifically tasked to protect human rights, like the United Nations, back to their original missions.⁷

The Commission currently consists of ten individuals appointed by Pompeo.⁸ The Commission’s chair is Mary Ann Glendon, a Harvard Law professor and former ambassador

⁴ U.S. Dep’t of State Press Release, Teleconference Interview by Sebastian Gorka with Michael R. Pompeo, Secretary of State (July 12, 2019), at <https://www.state.gov/interview-with-sebastian-gorka-of-america-first> [<https://perma.cc/59FL-TYXM>].

⁵ U.S. Dep’t of State, Commission on Unalienable Rights Charter, at 3 (2019), available at <https://www.just-security.org/wp-content/uploads/2019/06/charter-commission-unalienable-rights.pdf> [<https://perma.cc/T873-TLQR>].

⁶ Pompeo Remarks, *supra* note 3.

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

⁸ Pompeo Remarks, *supra* note 3.

to the Vatican.⁹ Glendon stated that, under her leadership, the Commission will focus on “principle[s], not polic[ies],” drawn from the “distinctive rights tradition of the United States of America.”¹⁰

The Commission’s creation dismayed a substantial number of Democratic members of Congress, who described its premises as an “Orwellian twist to defend the indefensible”¹¹ and characterized it as an “attempt to make an end run around career experts, statutorily established State Department structures, and widely accepted interpretations of human rights law to push a narrow, discriminatory agenda that decides whose rights are worth protecting and whose rights the Administration will ignore.”¹² They also criticized Pompeo for withholding information about the Commission from Congress until the day he publicly announced the creation of the Commission.¹³ And they questioned the redundancy of the Commission in light of the “career, non-partisan human rights experts” at the State Department Bureau of Democracy, Human Rights and Labor (DRL) and the Office of the Legal Adviser.¹⁴ The lawmakers further warned that the Commission could be used to denigrate LGBTQ+ and reproductive rights.¹⁵ In addition to vocalizing their objections, Democratic legislators are seeking to block funding for the Commission through Congress’s power of the purse.¹⁶

⁹ Harvard Law School, *Mary Ann Glendon Faculty Profile*, at <https://hls.harvard.edu/faculty/directory/10311/Glendon> [<https://perma.cc/4CGK-43HH>]; Pompeo Remarks, *supra* note 3.

¹⁰ U.S. Dep’t of State Press Release, Mary Ann Glendon, Chairwoman, Comm’n on Unalienable Rights, Remarks to the Press (July 8, 2019), at <https://www.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3> [<https://perma.cc/V6MZ-TATP>].

¹¹ Letter from 23 Democratic U.S. Senators to Mike Pompeo, Secretary of State, at 1 (July 23, 2019), *available at* <https://www.foreign.senate.gov/imo/media/doc/07-23-19%20Dems%20letter%20re%20Commission%20on%20Unalienable%20Rights.pdf> [<https://perma.cc/L9LH-ZLXP>] [hereinafter Senate Letter].

¹² Letter from 50 Democratic U.S. Representatives to Mike Pompeo, Secretary of State, at 1 (July 18, 2019), *available at* https://foreignaffairs.house.gov/_cache/files/2/9/294cc9ed-3391-4fa2-968a-424f8e687dac/6B92FE10FE738FAEB3A6FB2BB7E69BC9.doc139.pdf [<https://perma.cc/7XHZ-QY28>] [hereinafter House Letter]. Separately, a coalition of 178 organizations and various individuals (including some prominent figures from the Obama administration) signed a public letter urging that the Commission be disbanded because it promoted a “hierarchy of rights,” reminiscent of those commonly found in autocratic governments. *See generally* Letter from Coal. Opposing the Comm’n on Unalienable Rights to Michael Pompeo, Secretary of State (July 23, 2019), *available at* <https://www.humanrightsfirst.org/sites/default/files/Unalienable-Rights-Commission-NGO-Ltr.pdf> [<https://perma.cc/7Z77-5TWR>]. By contrast, the United States Commission on International Religious Freedom, an independent commission lodged in the State Department, praised the creation of the Commission on Unalienable Rights as a “way of ensuring that the protection of these fundamental rights—the most foundational of which is freedom of religion or belief—is a core element of strategic policy discussions.” U.S. Comm’n on Int’l Religious Freedom Press Release, USCIRF Statement on State Department’s Creation of “Commission on Unalienable Rights” (July 8, 2019), at <https://www.uscifr.gov/news-room/press-releases-state-uscifr-statement-state-department-s-creation-commission> [<https://perma.cc/3N63-K6AT>].

¹³ House Letter, *supra* note 12, at 2; *accord* Senate Letter, *supra* note 11, at 1.

¹⁴ House Letter, *supra* note 12, at 1.

¹⁵ Senate Letter, *supra* note 11, at 2. *But see* Carol Morello, *State Department Launches Panel Focused on Human Rights and Natural Law*, WASH. POST (July 8, 2019) (quoting an unnamed State Department official as stating that the Commission “will not make any pronouncements on gay marriage and abortion”).

¹⁶ An appropriations bill passed by the House of Representatives for the State Department’s next fiscal year would ban the use of its funds for the Commission. Labor, Health and Human Services, Education, Defense, State, Foreign Operations, and Energy and Water Development Appropriations Act, 2020, H.R. 2740, 116th Cong. § 7070 (2019). As of late September 2019, this bill remained pending in the Senate. *All Actions H.R. 2740 — 116th Congress (2019–2020)*, CONGRESS.GOV, at <https://www.congress.gov/bill/116th-congress/house-bill/2740/all-actions?q=%7B%22search%22%3A%5B%22H.R.+2740%22%5D%7D&cs=7&r=1> [<https://perma.cc/5W44-Q8TZ>].