

**Testimony before U.S. Commission on Unalienable Rights
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I'm delighted and honored to appear before this Commission, and to contribute, to whatever small extent I can, to the fruitfulness of its deliberations. I am by training a student of the intellectual and cultural history of the United States, a description that perhaps defines both the strengths and limitations that I bring to this enterprise. I trust that you will take both of these things, particularly the latter, into account as you listen.

The high regard for fundamental human rights that we Americans accept as a self-evident truth is, in the most literal sense of the word, exceptional. It has never been the default position of the human race, and is a position that has been only imperfectly realized even by us. "Rights" have a history, a very long

and complex history, going back at least to medieval times, and they did not achieve their current ascendancy in one fell swoop, beginning in the latter part of the eighteenth century. But history is not merely prologue; it is the process by which things are constituted and brought into being. Which means that some elements that were present at the origins of rights continue to be vitally important in their being upheld and sustained. I take it to be my role here today, not to presume to speak for the entirety of that history, but to draw upon it, in order to speak more intelligently about the way that rights, and particularly those rights we call “unalienable,” emerged in American discourse over the years, and how they might be more properly defined and understood in our own time.

Let me begin, then, by reflecting a bit on the word “unalienable,” which in our time is probably more often rendered as “in-alienable.” There is no significant difference in meaning between the two spellings. But I suspect that whoever chose the title under which this Committee’s work would be organized had something important in mind in taking the less-traveled road and using the “un” word. The “un” spelling, after all, was the one used by Thomas Jefferson and the American Founders in the great second paragraph of the Declaration of

Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” It is that word, with that spelling, in that document, that serves as such an important touchstone of our entire national enterprise. And it is precisely because that spelling has become slightly archaic to us today, that it is so useful. It is useful because the very name of this Commission serves to remind us of our debt to that primal association—our association with Jefferson, with the American Revolution, and with the specifically American contribution to the more general establishment of truly expansive and inclusive ideas of human rights. It reminds us that the story of rights, and specifically the emergence of unalienable rights as a fully developed theme in world history, is one in which the United States has played an essential role, from its very beginnings, and continues to play today.

To make this claim is not to serve up a statement of puffed-up nationalistic pride. It is a simple statement of fact. We often fail to appreciate the extent to which the Declaration itself was a great innovation, the first document of its kind to appear in human history: an innovation not only by virtue of its being an

eloquent declaration of political independence, which was itself an impressively novel act, but also an even greater innovation in combining that declaration with the assertion of an array of fundamental human rights whose protection was understood to be the principal task of any legitimate government. Or as the Declaration itself puts it, “to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”

The Declaration quickly became a model, not only for the French Declaration of the Rights of Man and of the Citizen—in the drafting of which Jefferson served as a valued advisor to his friend Lafayette—but a model for a profusion of copycat Declarations promulgated by over a hundred nations, a parade of imitators that historian David Armitage has gathered and described in his “global history” of the Declaration, a parade that continued into the twentieth century, and show no sign of being at an end in our own times. The protestors in today’s Hong Kong who carry the American flag and quote from the American Declaration are only the latest instance of this powerful international influence.

And yet, as David Armitage is at pains to point out, the Declaration’s ringing statements about the “unalienable rights” of individuals did not attract as much

immediate attention in its own day as did its justifications for independence, that is, its declaration of the political sovereignty of a distinct American political entity. Our thinking about rights lagged behind our thinking about nationhood. Arguably it was not until the emergence of Abraham Lincoln as a national political figure in the 1850s that the implications of the Declaration's rather clear linkage of the legitimacy of the state with the preservation of unalienable individual rights began to be more fully recognized.

So it took a long time for many of the implicit promises of the Declaration's great second paragraph to be realized. This should not be surprising to us. Human beings can go for a long time reading the most canonical documents, even studying them carefully and committing their language to memory, while being insensible to some portion of their plain meaning. It is a common enough human foible, one to which we become particularly susceptible when our material or circumstantial interests overtake our moral judgment.

But it should be fair warning to us today, that the ringing words of the Declaration are not self-enacting and have never been self-enforcing. There needs to be a robust political, legal, and moral culture upholding and

empowering the intentions behind such words, or they will be worse than empty. All the major totalitarian powers in modern times have managed to include expansive protections of rights built into the body of their constitutions. The presence of such words do not seem ever to get in the way of these regimes' doing as they please. Which is why any culture, including our own, that is prepared to begin making broad exceptions for the protection of unalienable rights, is a culture in which almost any abrogation of those rights becomes first thinkable, and then possible.

That is one problem, then, to which this Commission will want to address itself: how do we arrive at and maintain sufficient vigilance about the preservation of our fundamental rights, over against those economic, cultural, and political forces that might be inclined, whether out of moral error, inconvenience, or strictly material considerations, to give them short shrift?

But the erosion of those rights—or, in many parts of the world, the inability to establish them in the first place—is not the only problem facing us. There is an equal and opposite problem, concentrated for now in the most advanced parts of the developed world, but slowly spreading elsewhere. And that is not the

absence of rights, but the hypertrophy of rights. The steady proliferation of rights claims, the expansion of the language of rights into more and more extensive territory, whether through legislative action, or (more often) through judicial fiat or executive action, not to mention through sheer cultural assertion, is just as much of a problem. By failing to distinguish on the one hand between the small core of truly fundamental and unalienable rights, such as those Jefferson enumerated, and on the other hand those rights (such as the right to health care, or the right to marry, or the right to a guaranteed basic income, or the rights of animals or trees, or any of a hundred other putative rights) that do not have the same power, cogency, or universality, we weaken the binding force of inalienable rights incalculably, by introducing a note of contingency and questionability to all such rights claims. If everything comes to be regarded as a right, then it becomes an easy step to saying that nothing is.

When we come to believe that declarations of our individual or group rights form an unanswerable moral justification for our actions, we conflate rights with entitlements, and we set ourselves on a course toward expanding their scope beyond all reason, in ways that are heedless of the needs of our common life. Ultimately the brandishing of a language of rights unrestrained by

countervailing forces of community association becomes a cultural solvent, against whose power the solidarity of the social order is helpless to maintain itself. Traditions, customs, mediating institutions, all the other fragile and vulnerable usages that form the warp and woof of a rooted and established common life—all must make way for the imperial and inexorable forward march of rights.

So the battle for the protection of unalienable rights as one of the pillars of our civilization has to be a fight on two fronts. It will require us not only to resist the erosion (or absence) of fundamental rights in much of the world, but also to combat the hypertrophy of lesser rights claims—to separate out and distinguish those claims that do not warrant the status of “unalienable.”

In order to preserve the integrity of the rights “brand,” we will need to curtail the promiscuous use of the word. But how are we to do that effectively, especially in a culture in which rights-talk has become the most potent currency of moral legitimation, and fresh rights-claims seem to arise almost every day? How are we to distinguish which rights-claims are illegitimate, or culturally specific, or of merely passing or subordinate importance, and which ones are or

ought to be considered as universal and enduring in character? In a world in which the fundamental dignity of the human person is under stress in so many places and in so many ways—and that notwithstanding the existence of the United Nations Charter, the Universal Declaration of Human Rights, and other famous parchment barriers designed to underwrite that dignity—how do we protect the irreducible minimum, the low but solid foundation upon which all else must rest? Particularly when the United Nations, which recently admitted Mauritania, a nation in which it is estimated that 20 percent of the population is enslaved, to its Human Rights Council—there to join such stalwarts as Sudan, Libya, China, and Venezuela, has proven an irredeemable failure in this regard?

I'll return to these questions in a moment. But first I think it's important to reflect a bit further on the meaning of the word, *unalienable*, quite apart from the way one chooses to spell it. To alienate is to separate, whether that means a landowner being separated from his real property or a husband being estranged from the affections of his wife. An unalienable right is one that cannot be separated from its possessor, cannot be taken away, whether by force or by consent, by the government or by any person or persons.

But that is not all. We tend to forget that an unalienable right is also one that cannot legitimately be *given* away. We cannot willingly part with it, cannot choose to sell it, and cannot choose to forfeit it or abandon it. Such a right, in short, has to be thought of as *inherent* to our being, so much so that we not only do not have the capacity to lose it, but we do not have the power to relinquish it. It is so deeply and indelibly stamped on our natures that its denial is tantamount to a violation of the law of noncontradiction. We would cease to be what we are, were we to attempt, vainly, to discard it or elect not to exercise it. In other words, the term “unalienable,” understood in its fullness, reflects a fundamental view of human anthropology, of the human person and the underlying logic of human life, one that asserts about us something very congruent with the Biblical (Jewish and Christian) understanding of the human person as a bearer of the divine image—an endowment that can neither be taken away by others nor refused by oneself.

It is *not* congruent, therefore, with the modern libertarian idea of radical self-ownership, a position that even so stalwart a rights enthusiast as John Locke drew back from taking. On the contrary, the belief in “unalienable” rights means accepting that in some very fundamental sense, our lives are not entirely our

own. To bear that impress, that stamp we bear as beings endowed with rights, also means that we bear inherent responsibilities. Or to put it slightly differently, to be the kind of creatures who have rights means that we also are the kind of creatures who have duties, *including duties to ourselves*. This easy collocation of rights and duties can be found in abundance in the rhetoric of our nation's early history, but it has been largely absent in recent decades. Our sense of rights has become alienated from our sense of duties. If we are to recover a general understanding of what we mean by unalienable rights, we will need to recover that lost language of duties as well. Otherwise our rights will be harder and harder to secure, since we will continue to saw off the branch on which we have all along been perched.

Such thinking goes against the grain of modern conceptions of rights, which envision them as radically individual in character, grounded in nothing beyond the primacy of the individual will, and our ability to create ourselves, free of all duties and unanswerable to any norms, even those regularities that would seem to be dictated by nature. Or, as a Supreme Court Justice famously put it, that Jeffersonian concept of "liberty" has now become "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human

life.” It also goes against our current tendency to relentlessly expand the number and extent of rights and to insist upon their inviolability. It seems clear that the unalienable rights we should seek to defend and uphold will have to be few in number and extremely well-defined. The extremes to either side of that position are clearly unsustainable.

The advice of historian Brian Tierney, perhaps the most distinguished scholar of the medieval origins of rights, is well taken in this regard. Warning against the current tendency toward a “luxuriant array of rights” that “erode any sense of the community and the common good,” Tierney nevertheless cautions that “we would be unwise to diminish” the role of rights in our political discourse. “If, instead, we continue to insist upon a few true human rights as a universal heritage, we shall preserve what is best in our tradition, and we might even hope to ameliorate...the condition of mankind in the coming millennium.”

Lest this approach to rights sound penurious and stingy to our freewheeling American ears, let me conclude with perhaps the best example of such an unalienable right, and one that inspired many of the American Revolutionaries and dominated their debates about rights: the freedom of conscience. For a

country that was in large measure founded by fervent religious dissidents, few rights were more important. And perhaps the single most memorable statements of that freedom was put forward in James Madison's Memorial and Remonstrance Against Religious Assessments, published in June of 1785. It is memorable not only because it is so well-expressed, but because it connects this most fundamental of rights with the most fundamental of duties:

[W]e hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to

him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.

It is not so difficult to construe other fundamental rights, such as the now much-controverted freedom of speech, in similarly dutiful, deontic terms; not necessarily as duties to God, but as duties to the community, according to which we contribute our speech not to a Hyde Park cacophony of expressive liberty, but to a deliberative process whereby the truth and the common good are sought and discerned and tested. Our speech is free precisely because we dutifully yield its fruits to this larger process. It may be precisely in restoring the notion that our duties are part and parcel of our rights, and vice versa, both of them flowing from our obligations to God and to others, that we can also find the right balance moving forward, so far as our conceptions of rights are concerned. It may also be the way that our understanding of the human person can be elevated and made more complete, moving beyond the inadequate abstractions of pure libertarian individualism and pure communitarian embeddedness.

But at this point I think it best that I stop and yield the rest of my time to the Commissioners, so that we can begin our discussion. Thank you very much for your time and attention.