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## The Effectiveness of Inter-American Commission's Reports on Capital Punishment Petitions against the United States: Where Do We Go from Here?

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# The Effectiveness of Inter-American Commission's Reports on Capital Punishment Petitions against the United States: Where Do We Go from Here?

BY ALEXANDRIA FAURA\*

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## I. INTRODUCTION

After an almost two-decade moratorium on federal executions, on July 25, 2019, Attorney General William P. Barr directed the Federal Bureau of Prisons to resume the process, leading to the execution of about thirteen individuals incarcerated on federal death row.<sup>1</sup> Thirteen of them were executed before President Trump was voted out of power, the most executions a U.S. President has overseen in the last 120 years.<sup>2</sup>

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\* J.D. Candidate, May 2022, Loyola Law School, Los Angeles; B.A. Political Science and Women's & Gender Studies, Wellesley College, May 2017. Many thanks to Professor Cesare Romano for all his valuable feedback and advice, and for allowing me the privilege to share the amazing work of the International Human Rights Center of Loyola Law School, Los Angeles and the stories of Lezmond Mitchell and Julius Robinson. Special thanks to the staff and editors of the *Loyola of Los Angeles, International and Comparative Law Review* for all their hard work to make this article possible. Lastly, thank you to my family and friends who supported and encouraged me throughout this process.

1. Press Release, Department of Justice, Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse> [hereinafter *Federal Government to Resume Capital Punishment*]; *Federal Execution Timeline*, STATISTA (Jan. 19, 2021), <https://www.statista.com/chart/22276/federal-executions-death-penalty/>.

2. Michael Tarm & Michael Kunzelman, *Trump Administration Carries Out 13<sup>th</sup> and Final Execution*, AP NEWS (Jan. 15, 2021), <https://www.apnews.com/article/donald-trump-wildlife-coronavirus-pandemic-crime-terre-haute-28e44cc5c026dc16472751bbde0ead50>.

Although the U.S. Supreme Court reinstated the federal death penalty in 1988, executions carried out by the U.S. federal government have been rare.<sup>3</sup> Between 1988 and 2003, only three federal executions took place.<sup>4</sup> In 2003, buckling under international pressure, including a series of cases brought against the United States before the International Court of Justice taking aim at capital punishment,<sup>5</sup> President George W. Bush declared a moratorium.<sup>6</sup> Until President Trump ordered Attorney General Barr to remove the obstacles preventing executions, there had been 16 years without executions.<sup>7</sup> Because public support for the death penalty has been at a decades-long low,<sup>8</sup> the bold move by the Trump Administration shocked the world. While the use of the death penalty continues to be at the center of national debate, it has also persisted as a topic of international controversy. In the global arena, the U.S. remains an outlier among its close allies and other democracies in continuing the use of the death penalty, with more than 70% of the world's countries having abolished it.<sup>9</sup> Unsurprisingly, the resumption of federal executions by the U.S. after a long hiatus attracted considerable international criticism, prompting many non-governmental organizations (“NGOs”) and even other countries to speak on behalf of those being executed.<sup>10</sup>

In at least two cases, petitions were filed before the Inter-American Commission on Human Rights (the “Commission”), the principal human rights organ of the Organization of American States (OAS), on behalf of those awaiting execution on federal death row, trying to stop the executioner. Two such petitions, those of Lezmond Mitchell and of Julius Robinson, were prepared by the Office of the Federal Public Defender of the

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3. Holly Honderich, *In Trump's Final Days, a Rush of Federal Executions*, BBC (Jan. 16, 2021), <https://www.bbc.com/news/world-us-canada-55236260>.

4. *Id.*

5. *See Avena and Other Mexican Nationals (Mex. v. U.S.)*, Application Instituting Proceedings, 2003 I.C.J. (Jan. 9), <https://www.icj-cij.org/public/files/case-related/128/1913.pdf>.

6. *Federal Execution Timeline*, *supra* note 1.

7. *Id.*

8. *Gallup Poll: Public Support for the Death Penalty Lowest in a Half-Century*, DEATH PENALTY INFO. CTR., (Nov. 24, 2020), <https://www.deathpenaltyinfo.org/news/gallup-poll-public-support-for-the-death-penalty-lowest-in-a-half-century> [hereinafter *Gallup Poll*].

9. *More Than 70% of the World's Countries Have Abolished Capital Punishment in Law or Practice. The U.S. is an Outlier Among its Close Allies in its Continued Use of the Death Penalty*, DEATH PENALTY INFO. CTR., <https://www.deathpenaltyinfo.org/policy-issues/international> [hereinafter *More Than 70%*].

10. Press Release, Amnesty International UK, USA: Decision to Reinstate Federal Executions ‘Outrageous’ and Must Not Proceed (July 25, 2019), <https://www.amnesty.org.uk/press-releases/usa-decision-reinstate-federal-executions-outrageous-and-must-not-proceed> [hereinafter *Decision to Reinstate Federal Executions*]; Laura Kelly, *EU condemns U.S. for resuming federal executions*, HILL (July 10, 2020), <https://www.thehill.com/policy/international/506730-eu-condemns-us-for-resuming-federal-executions>.

Central District of California, with the assistance of the International Human Rights Center of Loyola Law School, Los Angeles.<sup>11</sup>

In both cases, the Commission found the United States in violation of several articles of the American Declaration of the Rights and Duties of Man (the “Declaration”), and asked the United States to stay the executions.<sup>12</sup> Yet, Lezmond Mitchell was executed on August 26, 2020 by lethal injection at the federal penitentiary in Terre Haute, Indiana.<sup>13</sup> Julius Robinson was spared as Donald Trump was voted out of power in November 2020 and President Biden has restored the moratorium of federal executions.<sup>14</sup> Although the facts of the two cases are rather different and raise distinct human rights violations, they both focus on the key issue of the United States’ resorting to the death penalty despite repeated objections by an international human rights body.

Mitchell’s petition claimed six violations of the Declaration.<sup>15</sup> On July 2, 2017 the Commission granted precautionary measures in his favor, asking the United States to preserve Mitchell’s life while the Commission ruled on his petition.<sup>16</sup> In response, the United States gave notice that it intended to proceed with his execution in late 2019.<sup>17</sup> On August 12, 2020 the Inter-American Commission issued its report finding the United States in violation of Articles I, XVIII, XXV, and XXVI of the Declaration.<sup>18</sup>

Robinson’s petition included seven claims of violations of several articles of the Declaration of the Rights and Duties of Man.<sup>19</sup> Eventually, the Commission found the United States in violation of Articles I, II, IV, XVIII, XXV, and XXVI of the Declaration.<sup>20</sup> The Commission

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11. Mitchell v. United States of America, Petition No. P-627-17, Case 13.570, Inter-Am. Comm’n H.R., Report No. 211/20 OEA/Ser.L./V/II, doc. 225 (2020) [hereinafter Mitchell Petition]; Robinson v. United States, Case 13.361, Inter-Am. Comm’n. H.R., Report No. 210/20, OEA/Ser.L./V/II, doc. 224 (2020) [hereinafter Robinson Commission Report 2020].

12. Mitchell Petition, *supra* note 11, at 79–81; Robinson Commission Report 2020, *supra* note 11, at 27–28.

13. Hailey Fuchs, *Justice Dept. Executes Native American Man Convicted of Murder*, N.Y. TIMES (Apr. 26, 2020), <https://www.nytimes.com/2020/08/26/us/politics/lezmond-mitchell-executed.html>.

14. Hailey Fuchs, *A Pause in Federal Executions, but Uncertainty About What’s Next*, N.Y. TIMES (July 22, 2021), <https://www.nytimes.com/2021/07/16/us/politics/biden-death-penalty.html>.

15. Mitchell v. United States of America, Case 13.570, Inter-Am. Comm’n H.R., Report No. 211/20 OEA/Ser.L./V/II, doc. 225 at 2, 3 (2020) [hereinafter Mitchell Commission Report].

16. *Id.* at 1 n.1.

17. *Id.* at 13.

18. *Id.* at 27.

19. Robinson Commission Report 2020, *supra* note 11, at 3 (2020).

20. *Id.* at 27.

recommended that the United States grant Robinson effective relief, granting him a review of his trial and sentence, as well as ensuring that his sentence be commuted if he was convicted during his new trial.<sup>21</sup> The United States has yet to adopt any of the measures recommended by the Commission.<sup>22</sup>

This Comment focuses on the implications of the United States' fervent denial of the Commission's recommendations and refusal of specifically upholding Article I of the Declaration: the right to life. This Comment does not purport to address the exhaustive literature regarding the U.S.'s use of the death penalty despite international pushback; rather it uses the recent petitions of Mitchell and Robinson as examples of the costly consequences of the United States' blatant refusal to abide by the recommendations of the Commission and questions whether the Commission is an effective remedy for death row petitioners. Part I of this article will provide background about the Commission and the Inter-American system and contain a brief overview of the tenuous history between the U.S. and the Organization of American States (OAS). It will also outline the scope of the Commission's competence in hearing these cases and the issues the Commission prioritizes in assessing capital punishment petitions. Part II will go into more detail about the procedural history of Mitchell and Robinson's respective petitions. Lastly, Part III will explore whether the Commission should still be considered a useful recourse for those on death row by examining the outcomes of both Mitchell and Robinson's petitions.

## II. SETTING THE INTER-AMERICAN STAGE: THE RELATIONSHIP BETWEEN THE UNITED STATES AND THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

### A. Background on the Inter-American System

The system of protection of human rights of the OAS, also known as the Inter-American System of Human Rights (IAS), is one of the three main regional human rights systems of the world.<sup>23</sup> The OAS is a regional international organization bringing together all 35 independent States in the Western Hemisphere (including Cuba, although it does not currently

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21. *Id.* at 28.

22. *Id.* at 27.

23. *A Rough Guide to the Regional Human Rights Systems*, UNIVERSAL RTS. GRP. INSIGHTS BLOG, <https://www.universal-rights.org/human-rights-rough-guides/a-rough-guide-to-the-regional-human-rights-systems/> (last visited Jan. 13, 2022) [hereinafter *URG Human Rights Guide*].

participate).<sup>24</sup> It was created during the 1948 Ninth International Conference of American States (Bogotá) for the purpose of promoting peace and security throughout the region.<sup>25</sup>

The IAS was created at the same conference where the OAS was born, through the adoption of two international legal instruments: the OAS Charter and the American Declaration.<sup>26</sup> The OAS Charter is the constitutive legal instrument of the organization. It established the organization's goals, basic principles, stricter, organs and their powers, and since 1948, it has been revised four times.<sup>27</sup> The OAS Charter made express reference to the protection of "fundamental rights of the individual without distinction as to race, nationality, creed, or sex" as one of the Organization's goals.<sup>28</sup>

The American Declaration, a statement of fundamental human rights everyone in the region enjoys, was adopted in the form of a non-binding, hortative, resolution.<sup>29</sup> It was the first international regional human rights document of the modern era,<sup>30</sup> and its words inspired the subsequent and better-known Universal Declaration of Human Rights.

As the American Declaration was not binding, in the mid 1960s, the OAS member States decided that a binding legal instrument was needed to buttress the IAS, leading to the adoption in 1969 of the American Convention of Human Rights ("The Convention"), which entered into force in 1978.<sup>31</sup> The Convention differs from the Declaration in that it was

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24. Nat'l Museum of Am. Dipl., *U.S. Permanent Mission to the Organization of American States*, DIPL. EXPLORER, <https://www.diplomacy.state.gov/places/u-s-permanent-mission-to-the-organization-of-american-states/> (last visited Jan. 13, 2022); *Member States*, ORGANIZATION OF AMERICAN STATES, [https://www.oas.org/en/member\\_states/default.asp](https://www.oas.org/en/member_states/default.asp) (last visited Apr. 2, 2022).

25. Diana Contreras-Garduño, *The Inter-American System of Human Rights*, in THE SAGE HANDBOOK OF HUMAN RIGHTS 597 (Anja Mihr & Mark Gibney eds., 2014).

26. *What is the IACHR?*, Section in *IACHR*, ORG. OF AM. STATES, <https://www.oas.org/en/IACHR/jsForm?File=/en/iachr/mandate/what.asp> (last visited Jan. 13, 2022).

27. Charter of the Organization of American States, art. 3.1, Feb. 27, 1967, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, Inter-Am. Comm'n H.R., OEA/Ser.L/V/I.4, rev.12 at 115 (June 10, 1993), *available at* [https://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-41\\_charter\\_OAS.asp](https://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp).

28. *Id.* at art. 3.

29. CLAUDIO M. GROSSMAN, AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN (1948), (Oxford Pub. Int. L. Oct. 2010) at 1 [hereinafter GROSSMAN – AMERICAN DECLARATION].

30. *Id.* at 2.

31. *Id.* at 6.

designed to impose specific legally binding obligations on the States that ratified it.<sup>32</sup>

To ensure the implementation of the obligations contained in the various IAS legal instruments, OAS member States created two bodies: the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights (“Inter-American Court”). The Commission is an autonomous body of the OAS. It was created in 1959 and was tasked by the OAS to “promote the observance and protection of human rights and to serve as a consultative organ of the [OAS] in these matters.”<sup>33</sup> As such the Commission has both quasi-adjudicative and promotional roles.<sup>34</sup> The Inter-American Court, on the other hand, was established by the Convention in 1969 as a regional court meant to exercise contentious jurisdiction and adjudicate claims with respect to the States that have ratified the Convention.<sup>35</sup>

By virtue of ratification of the OAS Charter, all 35 member States accept to comply with the set of human rights obligations described in the American Declaration.<sup>36</sup> More than half of those States opted to expand those obligations by ratifying the Convention and accepting the jurisdiction of the Inter-American Court, but neither the United States nor Canada have done so.<sup>37</sup> Although the United States signed the Convention, it has not ratified it, nor accepted the contentious jurisdiction of the Inter-American Court.<sup>38</sup> However, the U.S. ratified the OAS Charter in 1951, which subjects it to the quasi-adjudicatory jurisdiction of the Commission with respect to the full scope of human rights obligations enshrined in the American Declaration.<sup>39</sup> Although the American Declaration does not carry any legal weight on its own, it codifies human rights norms that have arguably become customary international law.<sup>40</sup> Persons within the jurisdictional boundaries of the United States at the time of the alleged violation can therefore bring human rights complaints in front of the Commission for any violations of the rights recognized under the

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32. Organization of American States, American Convention on Human Rights, July 18, 1978, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, <http://www.oas.org/juridico/english/treaties/b-32.html> [hereinafter American Convention].

33. Charter of the Organization of American States, *supra* note 27, at art. 106.

34. GROSSMAN – AMERICAN DECLARATION, *supra* note 29, at 1.

35. American Convention, *supra* note 32, at art. 52–59.

36. *Id.* at art 1.

37. Contreras-Garduño, *supra* note 25, at 611.

38. HUM. RTS. INST., COLUMBIA L. SCH., HUMAN RIGHTS IN THE UNITED STATES: PRIMER ON RECOMMENDATIONS FROM THE INTER-AMERICAN HUMAN RIGHTS COMMISSION & THE UNITED NATIONS at 11 (2015) [hereinafter HUMAN RIGHTS IN THE US].

39. GROSSMAN – AMERICAN DECLARATION, *supra* note 29, ¶ 13.

40. *Id.* ¶ 11.

American Declaration.<sup>41</sup> Although the United States often argues that the Declaration, as a non-treaty, creates no binding obligations, it is a reliable participant in the petition process in front of the Commission, substantively briefing and arguing questions posed by the claimants.<sup>42</sup>

The Commission, headquartered in Washington D.C., is composed of seven members, elected in their personal capacity, who serve four-year terms and can be re-elected, but only once.<sup>43</sup> The commissioners are proposed by the member States and are elected by the OAS General Assembly.<sup>44</sup> After its inception in 1959, in 1965 the Commission's mandate was broadened to allow it to examine individual petitions alleging human rights violations by any OAS member State.<sup>45</sup> That gave it the power to decide whether the State in question had violated human rights and, if so, recommend the State to provide the victim certain remedies.<sup>46</sup> Today, the Commission receives nearly one thousand petitions each year.<sup>47</sup> After receiving a petition, the Commission conducts a preliminary evaluation and notifies the appropriate State.<sup>48</sup> It then decides the petitions' admissibility by analyzing whether the petitioner has fulfilled the formal requirements set forth in the Commission's Rules and Statute.<sup>49</sup> Once the petition has been deemed admissible, a case is opened, after which the Commission may hold hearings, make recommendations, issue precautionary measures (usually for immediate action in urgent cases), facilitate settlements, or make decisions on the merits of the petition.<sup>50</sup>

### *B. The United States and the OAS: A Turbulent Affair*

The United States has been said to have a paradoxical relationship with international human rights law. On one hand, the U.S. was a key initial contributor to the human rights regime coming off the Holocaust and has supported the enhancement of human rights and democracy as a

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41. American Declaration on the Rights and Duties of Man, art. 24, O.A.S. Doc. OEA/Ser.L./V./I.4 (1948), *reprinted* in Basic Documents Pertaining to Human Rights in the Inter-American System, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.82 Doc. 21 Rev. 1, at 17 (1992); *see also* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

42. Richard J. Wilson, *The United States' Position on the Death Penalty in the Inter-American Human Rights System*, 42 SANTA CLARA L. REV. 1159, 1185 (2002).

43. Contreras-Garduño, *supra* note 25, at 599.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Statistics*, INTER-AM. COMM'N H.R., <https://www.oas.org/en/iachr/multimedia/statistics/statistics.html>.

48. Contreras-Garduño, *supra* note 25, at 602–03.

49. *Id.*

50. *Id.* at 603.

core aspect of its foreign policy.<sup>51</sup> Yet despite these strong human rights commitments, the U.S. has appeared to renounce the domestic application of human rights norms.<sup>52</sup> This double standard has continued to plague the U.S. 's relationship with the international human rights movement and is visible in the U.S. 's interactions with the OAS and the Commission.<sup>53</sup>

In 1948, the United States helped found the OAS to establish a multilateral forum in which the nations of the Western Hemisphere could engage with one another and solve issues concerning the region.<sup>54</sup> At the onset, the relationship between the U.S. and the OAS was one of mutual benefit. OAS decisions were often reflective of U.S. policy as many member states sought to maintain strong relations with the dominant power at the time.<sup>55</sup> This was most apparent during the early period of the Cold War, when the U.S. was able to secure OAS support for controversial initiatives, such as a 1962 resolution to exclude Cuba from participation because of its ties to the communist bloc.<sup>56</sup>

However, over the past two decades, as a result of multiple factors, the U.S. 's once lofty influence in the Western Hemisphere has clearly declined.<sup>57</sup> First, many OAS member States, throughout Latin America and the Caribbean, have elected ideologically diverse leaders, breaking the "post-Cold War policy consensus."<sup>58</sup> Next, many of the States in the region have had considerable economic success, allowing them the confidence to seek out commercial and diplomatic relations often adverse to the U.S., or to reject liberal macroeconomic policies and a dollarized economy.<sup>59</sup> Lastly, the U.S. 's invasion and occupation of Iraq following the terrorist attacks in the United States on September 11, 2001 drew sharp criticism by other OAS member states.<sup>60</sup> As U.S. influence within the OAS has waned, Congress continues to debate whether the OAS still has a role in advancing American objectives within the Western

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51. Amy C. Harfeld, *Oh Righteous Delinquent One: The United States' International Human Rights Double Standard - Explanation, Example, and Avenues for Change*, 4 CITY UNIV. N.Y.C. L. REV. 59, 64-65 (2001).

52. *Id.* at 63.

53. *Id.* at 67.

54. PETER MEYER, CONG. RSCH. SERV., R42639, *ORG. OF AM. STATES: BACKGROUND AND ISSUES FOR CONG.* (2018).

55. *Id.* at 1.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Thomas A. O'Keefe, *The Inter-American System in an Era of Declining United States Hegemony*, 4 MIDDLE ATL. REV. LATIN AM. STUD. 2, 199 (2020).

Hemisphere.<sup>61</sup> The Commission and its decisions have often been at the forefront of these disputes.

The tones of these debates have fluctuated given the differing attitudes towards international human rights across presidential administrations. For example, the Bush administration expressed a general support of the Commission's work but failed to engage on a substantive level.<sup>62</sup> During the Obama administration there was more substantive engagement.<sup>63</sup> Representatives of various agencies, who had better knowledge of the merits and issues under consideration, often participated in the hearings.<sup>64</sup> The U.S. State Department even facilitated several investigatory missions, and in 2015, the U.S. itself requested a hearing at the Commission on criminal justice and race.<sup>65</sup> The trend towards increasing U.S. engagement with the Commission reached a halt during the 2016 presidential election. The Trump administration's rejection of multilateralism and the embracing of the "American first" policy had detrimental consequences for the U.S.'s position within the Inter-American system and the international community. Most notably, in 2017, U.S. State Department representatives failed to attend the Commission's scheduled hearings about the Trump administration's travel ban and immigration enforcements.<sup>66</sup> This caused international outcry as it demonstrated a sharp shift in the U.S.'s attitude towards human rights and governing international bodies. Until then, the U.S. had always appeared before the Commission.<sup>67</sup> On January 20, 2021, President Joe Biden took office, replacing Donald Trump and signaling perhaps a new era for human rights. However, with the Biden administration's recent clashes with the Commission over immigration policy, including the expulsion of asylum seekers, cooperation with the Commission seems to still remain a goal unrealized.<sup>68</sup>

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61. *Id.* at 200.

62. Michael Camilleri & Danielle Edmonds, *An Institution Worth Defending: The Inter-American Human Rights System in the Trump Era 2* (Jun. 2017) (working paper) (on file with Rule of Law Program at the Inter-American Dialogue).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 3.

67. Jorge Contesse, *Resisting the Inter-American Human Rights System*, 44 YALE J. INT'L L.J. 179, 181 (2019).

68. Since March of 2020, the U.S. government announced it would begin interpreting section 265 of the Public Health Service Act to expel asylum seekers from the United States. Department of Health and Human Services, Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 57, 16559 (Mar. 24, 2020) [hereinafter Control of Communicable Diseases]; see also 42 U.S.C. § 265. Since February 2021, the Biden administration has used Title 42 more than 700,000 times at the U.S. southern border to expel migrants. See U.S. Customs

### C. The Death Penalty in American Law and the Inter-American System

The Commission views the death penalty as a crucial human rights issue. While the majority of States in the world have abolished capital punishment, including almost every State in the Western Hemisphere, the U.S. is part of the minority that still retains it. The first time the Commission found the U.S. in violation of Article I of the Declaration was in March of 1987, when it heard the cases of James Roach and Jay Pinkerton, each of whom was 17 years old when they were sentenced to death.<sup>69</sup> This was also the first time an intergovernmental body found the United States in violation of any international human rights norm.<sup>70</sup> Since then, the United States has been one of the States against which human rights complaints are filed most often, with death penalty petitions being the largest category of petitions.<sup>71</sup> Most recently, the 2019 Annual Report indicated 111 petitions filed against the U.S.<sup>72</sup> With the death penalty as the subject of a growing number of petitions before the Commission, it begs to evaluate what petitioners stand to gain by appearing in front of it. Recognizing the potential benefits the Commission can provide is important to understanding the Commission's approach in evaluating death penalty petitions.

Over the last 15 years, the Commission has focused its efforts on examining the standards and application of capital punishment in the U.S. and other countries that continue to implement it.<sup>73</sup> It has refrained from determining whether the death penalty in and of itself violates the American Declaration. In doing so, it has focused on three key issues that have formed the basis for its approach for addressing individual petitions challenging the use of the death penalty.<sup>74</sup> First, the Commission has developed a well-established practice to apply a heightened standard of strict scrutiny in capital punishment cases.<sup>75</sup> Second, the Commission has focused on the conditions on death row, often evaluating the treatment of

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and Border Protection, "Nationwide Encounters," <https://www.cbp.gov/newsroom/stats/nationwide-encounters> (last visited Oct. 3, 2021).

69. Christina M. Cerna, *U.S. Death Penalty Tested before the Inter-American Commission on Human Rights*, 10 NETH. Q. HUM. RTS. 155, 155-56 (1992).

70. *Id.* at 155.

71. Richard J. Wilson, *The United States' Position on the Death Penalty in the Inter-American Human Rights System*, 42 SANTA CLARA L. REV. 1159, 1174 (2002).

72. Inter-Am. Comm'n H.R., *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*, OEA/Ser.L/V/II., doc. 68 ¶ 40 (Dec. 31, 2011). <https://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf> [hereinafter *Death Penalty in IACHR*].

73. *Id.* at 12.

74. *Id.*

75. *Id.*

those incarcerated from the initial point of custody.<sup>76</sup> Lastly, the Commission has continued to emphatically condemn and work to prevent the practice of executing those sentenced to death even after the Commission has issued its precautionary measures.<sup>77</sup> These three issues provide insight to the framework the Commission used to address challenges to capital punishment and are imperative to understanding the Commission's decisions in the petitions of Mitchell and Robinson.

### 1. The Standard of Review in Death Penalty Cases: Strict Scrutiny

Article I of the Declaration states: "Every human being has the right to life, liberty and the security of his person."<sup>78</sup> Although it does not go into greater detail as to the context of this right, the Commission has found Article I does not preclude the death penalty altogether, rather it prohibits its application "when doing so would result in an arbitrary deprivation of life or would otherwise be rendered cruel, infamous or unusual punishment."<sup>79</sup> This interpretation of Article I is rooted in the Commission's position that the right to life holds a special place, if not primacy, in human rights systems and that any infringement upon that right should be evaluated under the highest level of scrutiny.<sup>80</sup> The Commission has explained that this standard of review is necessary particularly for the "need for reliability in determining whether a person is responsible for a crime that carries a penalty of death."<sup>81</sup>

### 2. The Conditions on Death Row

The Commission has dedicated special attention to monitoring the conditions of those incarcerated on death row. This is a priority for the Commission because there have been many instances of inhumane treatment, such as conditions of physical deprivation, that have been serious enough to be considered human rights violations.<sup>82</sup> Indeed, the Commission even established a Rapporteurship on the Rights of Persons Deprived of Liberty in 2004, which focuses on the rights of those on death row

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76. *Id.* at 14.

77. *Id.*

78. American Declaration on the Rights and Duties of Man, art. 1, O.A.S. Doc. OEA/Ser.L/V/II.4 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.82 Doc. 21 Rev. 1, at 17 (1992), available at <https://www.cidh.oas.org/basicos/english> (last visited Oct. 3, 2021) [hereinafter Declaration].

79. *Death Penalty in IACHR*, *supra* note 72, ¶ 10.

80. *Id.* ¶ 13.

81. *Goodman v. Bahamas*, Case 12.265, Inter-Am. Comm'n H.R., Report No.78/07, OEA/Ser.L/V/II.130, doc. 22 rev. 1 ¶ 34 (2007).

82. *Death Penalty in IACHR*, *supra* note 72, ¶¶ 44–45.

through working visits, reports, and precautionary measures.<sup>83</sup> When evaluating the treatment of those incarcerated on death row, the Commission starts at the point in which the State takes over as the guarantor of rights for the person in custody.<sup>84</sup> In 2018, the Commission ruled that lengthy stays on death row are “excessive and inhuman” punishment and a violation of the Declaration.<sup>85</sup>

### 3. Use of the Death Penalty in Violation of Precautionary and Provisional Measures

Although the Commission did not expressly institutionalize the use of precautionary measures until 1980, it historically implemented the practice of urging States to adopt measures regarding violations.<sup>86</sup> The majority of these precautionary measures have been implemented in cases of high urgency, such as death penalty cases.<sup>87</sup> In capital case petitions against the U.S., the Commission has issued precautionary measures pursuant to Article 25 of its Rules of Procedure.<sup>88</sup> Petitioners may request precautionary measures to address “serious and urgent cases” and “prevent irreparable harm to persons.”<sup>89</sup> Precautionary measures are akin to the remedy of injunctive relief in domestic court proceedings, as they call on government actors to either refrain from taking a particular action or to take an immediate action to prevent a human rights violation.<sup>90</sup> The issuing of precautionary measures begins with a finding of imminent harm, after which the process is expedited on the premise that the underlying reason for the measures must be addressed immediately.<sup>91</sup> The Commission will then issue the precautionary

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83. *Id.* ¶ 44.

84. *Id.* ¶ 46.

85. *At Least 1,300 Prisoners are on U.S. Death Rows in Violation of U.S. Human Rights Obligations*, DEATH PENALTY INFO. CTR. (June 22, 2020) <https://www.deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-special-reports/dpic-analysis-at-least-1-300-prisoners-are-on-u-s-death-rows-in-violation-of-u-s-human-rights-obligations> [hereinafter *U.S. Death Row*].

86. Felipe Gonzalez, *Urgent Measures in the Inter-American Human Rights System*, 13 SUR-INT'L J. HUM. RTS. 51, 52 (2010).

87. *Id.* at 61.

88. See e.g., Inter-Am. Comm'n H.R., Res. 10/2022, Precautionary Measure No. 1170-21: Melissa Lucio Regarding the United States of America, at 1 (Feb. 18, 2022), [https://www.oas.org/en/iachr/decisions/mc/2022/res\\_10-22\\_mc\\_1170-21\\_us\\_en.pdf](https://www.oas.org/en/iachr/decisions/mc/2022/res_10-22_mc_1170-21_us_en.pdf). See also Inter-Am. Comm'n H.R., Rules of Procedure of the Inter-American Commission on Human Rights, art. 25 (Aug. 1, 2013), available at <http://www.oas.org/en/iachr/mandate/basics/rulesiachr.asp> [hereinafter IACHR Rules of Procedure].

89. IACHR Rules of Procedure, *supra* note 88, at art. 25.

90. *Id.*

91. COLUMBIA L. SCH. HUM. RTS. INST., HUMAN RIGHTS IN THE UNITED STATES: PRIMER ON RECOMMENDATIONS FROM THE INTER-AMERICAN HUMAN RIGHTS COMMISSION & THE UNITED NATIONS 1, 14 (2015) [hereinafter IACHR Primer].

measures in a report to the government and publish them in a press release.<sup>92</sup> Once the precautionary measures have been issued, the Commission continues to monitor state compliance with the measures, often the most challenging aspect of the petition process, particularly in death penalty cases.<sup>93</sup>

Although precautionary measures are not binding in law, they should be given due consideration, at least as a matter of comity and respect for the Commission and the OAS. Yet, the U.S. routinely disregards them. In dozens of cases, the U.S. has proceeded with the execution of individuals even after the Commission has issued precautionary measures requesting a stay on said executions.<sup>94</sup> The U.S. has routinely pointed to the Commission's "lack of jurisdiction to issue precautionary measures" to decline following the Commission's reports.<sup>95</sup> This lack of compliance has become a crucial focus for the Commission as it deems the execution of a person under precautionary measures to be an aggravated violation of the right to life.<sup>96</sup> Further, when a State does not observe precautionary measures, it obstructs the Commission's ability to effectively investigate and disrespects the entire petition process.<sup>97</sup> Indeed, in its report in another capital case, *Garza v. United States*, the Commission stated:

[T]hat it recognizes and it is deeply concerned by the fact that its ability to effectively investigate and determine capital cases has frequently been undermined when states have scheduled and proceeded with the execution of condemned prisoners despite the fact that those prisoners have proceedings pending before the Commission.<sup>98</sup>

The issue of executions in contempt of precautionary measures is by far the most critical issue facing death penalty petitions heard by the Commission, as the tendency for the U.S. to ignore them undermines the decisions of the Commission.

### III. THE PETITIONS OF LEZMOND MITCHELL AND JULIUS ROBINSON

While both the petitions of Mitchell and Robinson claimed several violations of the Declaration, this Comment seeks to focus on the violations to Article I of the Declaration, the right to life. The three key principles mentioned above help to frame the decisions the Commission made

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92. *Id.*

93. *Id.*

94. *Death Penalty in IAHR*, *supra* note 69, at 14–15.

95. Contesse, *supra* note 64, at 212.

96. *Death Penalty in IAHR*, *supra* note 69 at 14, ¶ 48.

97. *Id.*

98. *Garza v. United States*, Case 12.243, Inter-Am. Comm'n H.R., Report No. 80/13 ¶ 66 (2001).

regarding each petition. This Part will detail the relevant procedural history of each respective petition and the steps taken by both the Commission and the United States.

#### *A. Inter-American Commission Petition of Lezmond Mitchell*

Lezmond Mitchell, a Navajo man, was convicted of murdering two Navajo women on Navajo reservation land in 2001.<sup>99</sup> On October 28, 2001, Mitchell and his co-defendant, Johnny Orsinger, killed 63-year-old Alyce Slim and her nine-year-old granddaughter, Tiffany Lee, after being picked up as hitchhikers on their way to New Mexico.<sup>100</sup> Mitchell and Orsinger killed Slim on sight before driving her truck into the mountains where they killed Lee, and disposed of both victim's bodies in shallow graves before stealing Slim's car.<sup>101</sup> Three days later, Mitchell and two accomplices carried out an armed robbery of a trading post on the Navajo reservation using Slims truck. Mitchell was eventually arrested by a Federal Bureau of Investigation (FBI) team on November 4.<sup>102</sup>

Mitchell's case represents the only time in modern history the United States sought the death penalty over the objection of a Native American tribe when the criminal conduct in question occurred on tribal land.<sup>103</sup> The Navajo Nation has consistently maintained its position against the use of the death penalty generally and as applied to Mitchell.<sup>104</sup> As mentioned previously, Mitchell raised six violations to the Declaration in his petition to the Commission, one of which was a violation of Article I, the right to life.<sup>105</sup> Mitchell's case was not a typical capital case. The Government used a legal loophole to circumvent the Navajo Nation's rejection of the death penalty and to secure a death sentence against Mitchell.<sup>106</sup> The Government's arbitrary decision to subject Mitchell to capital punishment over the objections of the Navajo Nation and its later carrying out said sentence were both violations of Article I of the Declaration.

#### 1. The Procedural and Legal History of Mitchell's Case

Under the Major Crimes Act, 18 U.S.C § 1153(a), the federal government is permitted to prosecute serious crimes, such as murder and

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99. Mitchell Petition, *supra* note 11, at 2.

100. *Id.* at 7.

101. *Id.* at 7, 10–11.

102. *Id.* at 38.

103. *Id.* at 34.

104. *Id.* at 36.

105. Mitchell Petition, *supra* note 11, at 5.

106. *Id.* at 2.

manslaughter, even if they are committed on tribal land regardless of whether the victim is a Native American or a non-Native American.<sup>107</sup> But in 1994, the U.S. Congress enacted a small but important development toward tribal self-determination with regard to federal government prosecution of crimes committed on tribal lands.<sup>108</sup> The “tribal option” allowed Native American tribes to decide whether the death penalty applied to crimes committed by a Native person against another Native person on tribal lands.<sup>109</sup> In relevant part, representatives of the Navajo Nation explained to Congress:

It is incumbent upon the federal government to allow Indian tribes the choice of whether the death penalty should be extended to our territory. . . . [T]he death penalty is counter to the cultural beliefs and traditions of the Navajo people who value life and place great emphasis on the restoration of harmony through restitution and individual attention. The vast majority of major crimes committed on the Navajo Nation and within other Indian reservations are precipitated by the abuse of alcohol. The death penalty will not address the root of the problem; rather rehabilitation efforts will be more effective.<sup>110</sup>

Thus, although the federal government still has jurisdiction over crimes that would qualify for a death sentence committed by tribal members on tribal land, the tribes are still able to retain the right to “opt in” to the use of the death penalty as applied to their members.<sup>111</sup> This provision is still limited, as tribal consent does not prevent Native Americans from being sentenced to death.<sup>112</sup> In particular, tribes are not given the option to “opt in” when a murder occurs in conjunction with other certain federal crimes such as carjacking, kidnapping, or the killing of a federal officer on tribal land.<sup>113</sup> These are crimes of general applicability meaning the federal government has jurisdiction over the offenses regardless of if they took place on tribal land.<sup>114</sup> In Mitchell’s case, the Government charged Mitchell with carjacking resulting in death, since Mitchell and his accomplice took the victim’s vehicle after the murder and used it as a mode of

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107. 18 U.S.C. § 1153(a) (2011).

108. *Mitchell v. United States*, 790 F.3d 881, 895 (9th Cir. 2015).

109. 18 U.S.C. § 3598 (1994).

110. *Crime Prevention and Criminal Justice Reform Act of 1994: Hearings on H.R. 3315 Before the Subcommittee on Crime and Criminal Justice of House Judiciary Committee*, 103rd Cong. (1994) (statement of Helen Elaine Avalos, Assistant Att’y Gen., Navajo Dep’t of Justice, on behalf of Peterson Zah, President of the Navajo Nation).

111. Felicia Fonseca, *Most American Indian Tribes Opt Out of Federal Death Penalty*, AP NEWS (Aug. 21, 2017), <https://www.apnews.com/article/86b9734f456846e9b0df9faa0237122f>.

112. *Id.*

113. *Id.*

114. *Mitchell* Petition, *supra* note 11 at 2.

transportation.<sup>115</sup> Accordingly, the Government was able to seek and obtain the death penalty for this charged carjacking which resulted in death.<sup>116</sup>

In 2001, the United States Attorney's Office for the District of Arizona ("USAO") contacted the Navajo Nation regarding Mitchell's case, specifically inquiring whether the Navajo Nation would support a capital prosecution for his murder charges.<sup>117</sup> On January 22, 2002, Levon Henry, the Attorney General for the Navajo Nation, wrote Paul Charlton, the U.S. Attorney for the District of Arizona at the time, explaining that the Public Safety Committee of the Navajo Nation Council was in the process of holding public hearings on capital punishment.<sup>118</sup> Henry further explained that while the Commission had not yet finished the hearings, the Public Safety Committee of the Navajo Nation Council and the Judiciary Committee of the Navajo Nation Council maintained "the historic position of ...opposing the sentencing option of capital punishment."<sup>119</sup> After receiving this input from the Navajo Nation, the local USAO recommended to the Department of Justice not to seek the death penalty against Mitchell.<sup>120</sup> Then-Attorney General John Ashcroft overrode the recommendation and the Navajo Nation's position and instructed the USAO to seek the death penalty against Mitchell.<sup>121</sup> Due to the Navajo Nation's position, the USAO was unable to seek capital punishment on the murder charges, and instead sought the death penalty under the charge of "carjacking resulting in death" notwithstanding the objections of the Navajo Nation and even the victims' family.<sup>122</sup>

In 2003, a jury convicted Mitchell of first-degree murder, felony murder, carjacking resulting in death, and related federal crimes.<sup>123</sup> During the penalty phase, Mitchell was given a death sentence on the charge of carjacking resulting in death in accordance with the jury's verdict.<sup>124</sup> Mitchell later appealed his conviction and sentence arguing that because the Navajo Nation did not "opt in" to the federal punishment scheme, the death sentence violated tribal sovereignty.<sup>125</sup> The Ninth Circuit later affirmed his conviction and sentence and in 2008, the Supreme Court

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115. *Id.* at 7.

116. *Id.* at 2.

117. *Id.* at 33.

118. *Id.*

119. *Id.*

120. Mitchell Petition, *supra* note 11 at 34.

121. Mitchell, 790 F.3d at 896.

122. Mitchell Petition, *supra* note 11, at 2.

123. See United States v. Mitchell, 502 F.3d 931, 945 (9th Cir. 2007).

124. *Id.* at 946.

125. *Id.*

denied Mitchell's petition for certiorari.<sup>126</sup> Mitchell then moved to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.<sup>127</sup> The Court denied his motion and the Ninth Circuit affirmed.<sup>128</sup>

## 2. The Inter-American Commission's Findings and Recommendations

After exhausting his domestic remedies, Mitchell filed a petition with the Commission on April 3, 2017.<sup>129</sup> The United States filed its response to Mitchell's petition on September 21, 2017.<sup>130</sup> On August 12, 2020, the Commission later issued its report on the admissibility and merits of Mitchell's petition and found the United States responsible for violations of Article I, XVIII, XXV, and XXVI of the Declaration and asked the United States to stay Mitchell's execution.<sup>131</sup>

### a. Right of Protection from Arbitrary Arrest

The Commission began by evaluating Mitchell's claim of violation of Article XXV of the Declaration, which provides for protection against unlawful or arbitrary detention or arrest.<sup>132</sup> In determining whether an arrest violated this provision, the Commission first determines whether the detention was legal under the domestic law of the State in question.<sup>133</sup> It then analyzes the domestic law in the context of the provisions established by Inter-American human rights instruments, in this case the Declaration.<sup>134</sup> Lastly, it evaluates whether the detention and applicable law in this specific case was arbitrary.<sup>135</sup>

Mitchell alleged in his petition that he was unlawfully detained for a misdemeanor that did not call for jail time and was subsequently held illegally in custody for weeks while being interrogated by the FBI without counsel.<sup>136</sup> The U.S. claimed that Mitchell's claim was meritless because he failed to offer evidence that he had asked for counsel during any of the

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126. *Id.* at 931; *Mitchell v. United States*, 553 U.S. 1094, 2902–03 (2008).

127. *Mitchell v. United States*, No. CV-20-8217-PCT-DGC (D. Ariz. Aug. 13, 2020) (amended Aug. 22, 2020).

128. *Mitchell v. United States*, No. CV-09-8089-PCT-MHM, 2010 WL 3895691, at \*43 (D. Ariz. Sept. 30, 2010), *aff'd*, 790 F.3d 881 (9th Cir. 2015); *Mitchell*, 790 F.3d at 887.

129. *Mitchell* Petition, *supra* note 11.

130. *Mitchell v. United States*, Petition No. P-627-17, Inter-Am. Comm'n H.R., Response of the United States (Sept. 21, 2017).

131. *Mitchell* Commission Report, *supra* note 15, at 3.

132. *Id.* at 15.

133. *Id.* at 16.

134. *Id.*

135. *Id.*

136. *Id.* at 16.

interrogation or that he ever requested a trial hearing on this issue.<sup>137</sup> Mitchell had originally been arrested by the FBI and Navajo Nation Police on a misdemeanor charge of vandalism of tribal property, which he later pled guilty to before a tribal judge.<sup>138</sup> The Commission found that Mitchell's arrest was unlawful because the misdemeanor did not warrant jail time, yet he was held in tribal custody for 17 days.<sup>139</sup> Further, Commission noted that it was during this unlawful detention that FBI agents interrogated Mitchell regarding his involvement with the murder he was later charged with.<sup>140</sup> The Commission concluded that the U.S. violated Mitchell's right to not be illegally arrested under Article XXV.<sup>141</sup>

#### b. Right to a Fair Trial and Due Process of Law

The Commission next reviewed Mitchell's claim for violation of Article XVIII and XXVI.<sup>142</sup> In assessing the merits of this claim, the Commission provided an overview of the scope of protection of indigenous law and jurisdiction within the Declaration. In relevant part, the Commission explained that in prior cases regarding the rights of indigenous people, the Declaration recognized the right of ethnic groups to special protection and that States must ensure the full exercise and enjoyment of rights for members of indigenous communities.<sup>143</sup> Further, it explained that the Declaration on the Rights of Indigenous Peoples adopted in 2016 recognizes the right to autonomy and self-governance as well as the right to the protection of cultural identity.<sup>144</sup> It is within this context that the Commission analyzed the imposition of the death penalty despite clear objection by the Navajo Nation.

The Commission observed that absent the charge of carjacking resulting in death, Mitchell would not have been eligible for the death penalty.<sup>145</sup> It is this charge that prevented the Navajo Nation to opt against the application of the federal death penalty because carjacking is exempt from this provision.<sup>146</sup> The Commission also observed that although the U.S. Court of Appeals for the Ninth Circuit affirmed the denial of Mitchell's motion, several of the judges were highly critical of the U.S.'s

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137. Mitchell Commission Report, *supra* note 15, at 16.

138. *Id.*

139. *Id.* at 17.

140. *Id.*

141. *Id.*

142. *Id.* at 17 nn.62–63.

143. Mitchell Commission Report, *supra* note 15, at 18.

144. *Id.* at 18.

145. *Id.* at 19.

146. *Id.* at 19.

method in seeking the death penalty against Mitchell.<sup>147</sup> In its conclusion, the Commission held that seeking the death penalty over the repeated rejection by the Navajo Nation for a charge of carjacking, which had a minimal legal interest, was arbitrary and without justification.<sup>148</sup>

Under this analysis, the Commission evaluated the legal representation Mitchell received during his initial trial.<sup>149</sup> At trial, Mitchell was represented by two federal public defenders and by an attorney in private practice who joined the defense team a few months later.<sup>150</sup> The Commission first sided with the U.S. in concluding that Mitchell's right to counsel was not violated since he had properly waived his *Miranda* rights while he was interrogated by the FBI.<sup>151</sup> This reasoning differs from that of the Commission's finding of a violation of Article XXV, illegal arrest, because the issue was his detention for a misdemeanor that did not warrant jail time.<sup>152</sup>

However, the Commission still found Mitchell's trial counsel inadequate under the standard of strict scrutiny.<sup>153</sup> Although the U.S. asserted that Mitchell's trial counsel had conducted a thorough investigation and he had been examined by a team of experts, the Commission observed that his counsel was inexperienced and had failed to present key mitigation evidence and jury instructions during the penalty phase of his trial.<sup>154</sup> A key determining factor for the Commission's decision was that despite evidence that Mitchell was intoxicated during the time of the murders, his counsel chose to not present an intoxication defense or request a jury instruction on impaired capacity as a mitigating factor.<sup>155</sup> Given the high standard of strict scrutiny the Commission applies to death penalty cases, the possibility of a different outcome if an intoxication defense had been raised was enough for the Commission to conclude that the U.S. violated Mitchell's right to due process and a fair trial.<sup>156</sup> The Commission also found that Mitchell did not have access to effective remedy to assert this claim, since the district court had denied his motion to vacate his conviction and sentence, and his request for an evidentiary hearing to contest

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147. *Id.* at 20.

148. *Id.* at 20–21.

149. Mitchell Commission Report, *supra* note 15, at 22.

150. *Id.* at 22.

151. *Id.* at 21.

152. *Id.* at 17.

153. *Id.* at 23.

154. *Id.*

155. Mitchell Commission Report, *supra* note 15, at 23.

156. *Id.*

the factual issues related to his claim of ineffective assistance of counsel.<sup>157</sup>

c. Right to Not Receive Cruel, Infamous, or Unusual Punishment

The Commission focused on two main points in its discussion of Articles XXV and XXVI of the Declaration: the method of execution and long deprivation on death row.<sup>158</sup> Articles XXV and XXVI establish the right to humane treatment and protection against torture, or cruel, inhuman and degrading treatment.<sup>159</sup> The Commission explained that in capital cases the State has an enhanced obligation to provide the person sentenced to death with all the relevant information regarding how he or she is going to die.<sup>160</sup> The Commission noted that other international bodies have requested the U.S. review its execution methods and protocol, in particular lethal injection, to prevent severe pain and suffering.<sup>161</sup> The Commission observed that Mitchell joined a federal law suit in 2014 in the U.S. District Court for the District of Columbia claiming that the means by which the government seeks to implement the death penalty would violate the U.S. Constitution.<sup>162</sup> Although the Ninth Circuit stayed Mitchell's execution pending the resolution of an appeal, there was no information regarding the U.S.'s new federal lethal injection protocol.<sup>163</sup>

The Commission also considered the length of time that Mitchell had already been waiting on death row, which at the time of the report had already been 18 years.<sup>164</sup> The Commission indicated that it had already found in prior cases that "prolonged solitary confinement on death row" constituted inhuman treatment, and Mitchell's case was no different.<sup>165</sup> The 18 year wait compounded by the uncertainty of when the death sentence could be carried out was a violation under Articles XXV and XXVI. This decision by the Commission is important to note, as a

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157. *Id.* at 24.

158. *Id.* at 24–26.

159. *Id.* at 26.

160. *Id.* at 24.

161. *See* Comm. Against Torture, Considerations of Reps. Submitted by State Parties under Art. of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. CAT/C/USA/CO/2, ¶ 31 (July 25, 2006).

162. Mitchell Commission Report, *supra* note 15, at 25.

163. *Id.*

164. *Id.* at 26.

165. *See* Bucklew v. United States, Case 12.958, Inter-Am. Comm'n H.R., Report No. 71/18, OEA/Ser.L/V/II.168, doc. 81 ¶¶ 86-90 (2018) (finding that 20 years on death row was inhuman and excessive); *see also* Saldaño v. United States, Case No. 12.254, Inter-Am. Comm'n H.R., Report No. 24/17, OEA/Ser.L/V/161, doc. 31 ¶ 246 (2017) (citing Aitken v. Jamaica, Case No. 12.275, Inter-Am. Comm'n H.R., Report No. 58/02 ¶¶ 133-34) (holding that four years of solitary confinement was inhuman treatment).

prolonged wait on death row is almost expected in the U.S. in light of the moratorium that was in place prior to the Trump Administration.

#### d. Right to Life

Notably, the Commission's reasoning regarding Mitchell's right to life was limited to only three paragraphs.<sup>166</sup> As mentioned before, the Commission carefully delineated the limits of its decisions, noting that the use of the death penalty in and of itself is a decision left to the State to decide. However, the Commission still found the U.S. had violated Mitchell's right to life.<sup>167</sup> The Commission's disapproval of the imposition of the death penalty in Mitchell's case was shored in the fact that he had already spent 18 years on various death rows awaiting execution.<sup>168</sup> The prolonged expectation of a death sentence, coupled with the Commission's previously mentioned violations, constituted a "serious violation" of Mitchell's right to life.<sup>169</sup>

Subsequently, the Commission requested that the U.S. provide effective relief to Mitchell and, if a new trial results in a conviction, that his sentence be commuted.<sup>170</sup> Shortly after the Commission issued its report, on August 20, 2020, Mitchell moved in the United States District Court for the District of Arizona to vacate, set aside, or correct his sentence.<sup>171</sup> The Commission's report was brought to the attention of the District Court, where Mitchell argued that the decision by the Commission "created rights . . . under international law that are binding on the United States for two reasons: (1) because they are derived directly from the OAS Charter, a treaty within the meaning of the U.S. Constitution; and (2) because they are derived, through the OAS Charter, from the American Declaration, a statement of human rights norms the United States has not only adopted, but helped to draft."<sup>172</sup> The District Court denied the motion on the merits and denied a certificate of appealability.<sup>173</sup> A certificate of appealability may be issued only if the applicant has made a show that jurists of reason could disagree with the district court's resolution of his [case] or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.<sup>174</sup> On August 23, 2020,

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166. Mitchell Commission, *supra* note 15, at 26.

167. *Id.* at 26.

168. *Id.*

169. *Id.*

170. *Id.* at 26.

171. Mitchell v. United States, 971 F.3d 1081 (9th Cir. 2020) (per curiam).

172. *Id.* at 1083.

173. *Id.*

174. Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

Mitchell petitioned the United States Court of Appeal for the Ninth Circuit for a certificate of appealability, and the Court denied his petition holding that “reasonable jurists” would not find the district court’s conclusion that the Commission’s decision was not binding, to be debatable.<sup>175</sup> Three days later, Lezmond Mitchell was executed.<sup>176</sup>

### *B. The Inter-American Commission Petition of Julius Robinson*

Following a jury trial in the U.S. District Court for the Northern District of Texas, Julius Robinson, a Black man, was sentenced to death for his alleged participation in a drug trafficking conspiracy, during which three homicides occurred.<sup>177</sup> Robinson was alleged to be directly involved in two of the three homicides.<sup>178</sup> The government’s use of the death penalty in Robinson’s case was a steep departure from the typical sentence given to similarly situated White individuals convicted of the same crimes, and signaled a regional racial bias towards Black defendants. While Black people make up only about 13% of the population of Texas,<sup>179</sup> they account 36.1% of its executions.<sup>180</sup> In fact, since 1988 in the Northern District of Texas —where Robinson’s trial took place— all the individuals against whom prosecutors have sought and obtained the death penalty have been Black.<sup>181</sup> It is this arbitrary disparity of practice in applying the death penalty that formed the basis of Robinson’s Article I claim.<sup>182</sup>

#### 1. The Procedural and Legal Background of Robinson’s Case

Robinson appealed his conviction on several grounds, most notably on the claim that his death sentence was improperly predicated on certain aggravating factors such as his race.<sup>183</sup> On April 14, 2004, the U.S Court

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175. *Mitchell*, 971 F.3d at 1084.

176. Fuchs, *supra* note 13.

177. *Robinson v. United States*, No. 4:00-CR-260-Y-2, 2008 WL 4906272, at \*1 (N.D. Tex. Nov. 7, 2008).

178. *Id.*

179. *Quick Facts: Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045215/48>.

180. *Executions by Race and Race of Victim*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim>.

181. Kevin McNally, *Declaration of Kevin McNally Regarding the Geographic Location of Cases, the Frequency of Federal Death Sentences and the Race and Gender of Defendants and Victims*, FED. DEATH PENALTY RES. COUNS. PROJECT at Exhibit A (June 17, 2016), [https://www.fdprc.capdefnet.org/sites/cdn\\_fdprc/files/Assets/public/project\\_declarations/race\\_gender/declaration\\_regarding\\_geographic\\_location\\_and\\_frequency\\_and\\_race\\_6-17-16.pdf](https://www.fdprc.capdefnet.org/sites/cdn_fdprc/files/Assets/public/project_declarations/race_gender/declaration_regarding_geographic_location_and_frequency_and_race_6-17-16.pdf).

182. *Robinson Commission Report 2020*, *supra* note 11, at 11–12.

183. *United States v. Robinson*, 367 F.3d 278, 282 (5th Cir. 2004).

of Appeals for the Fifth Circuit affirmed Robinson's conviction and sentence on direct appeal.<sup>184</sup> Robinson later sought review of the appellate decision, but the U.S. Supreme Court denied his petition for certiorari.<sup>185</sup>

Thereafter, on November 29, 2005, Robinson filed a habeas corpus petition to vacate his conviction and sentence, but the district court denied Robinson's motion to vacate.<sup>186</sup> Robinson again appealed the decisions, but the Fifth Circuit denied his application to appeal, despite the U.S. Government's concession that a certificate of appealability should be issued.<sup>187</sup> After, Robinson sought review by the U.S. Supreme Court but his petition for certiorari in the habeas corpus action was denied again.<sup>188</sup>

## 2. The Inter-American Commission's Findings and Recommendations

Six months after the U.S. Supreme Court's denial, Robinson filed his petition in front of the Commission setting forth several claims, including a violation of Article I of the Declaration and requesting a series of precautionary measures, including a stay of execution.<sup>189</sup> The Commission granted the precautionary measures and sent a request to the United States to provide the Commission with information within two months from receiving the notice.<sup>190</sup> The U.S. failed to provide the Commission with any response by the two month deadline and instead did not respond until more than a year later.<sup>191</sup>

It took the U.S. Government four years from when Robinson initially filed his petition to respond to any of the allegations against it.<sup>192</sup> The U.S. rejected Robinson's petition claiming it should be inadmissible because it failed to "state facts that tend to establish a violation of . . . the Declaration."<sup>193</sup> In particular, the U.S. claimed the basis of Robinson's Article I claim, the arbitrary racial disparity in the application of the death penalty, was an *actio popularis* claim, meaning that it was a challenge against substantive norms, and that a "thematic hearing before the Commission" would be better suited for such a type of claim.<sup>194</sup> The U.S. would not respond to another of the Commission's reports until April 3,

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184. *Id.* at 278, 293.

185. *Robinson v. United States.*, 543 U.S. 1005 (2004).

186. *Robinson*, 2008 WL 4906272, at \*1.

187. *United States v. Robinson*, No. 09-70020 (5th Cir. June 8, 2010).

188. *Robinson v. United States*, 565 U.S. 827 (2011).

189. *Robinson Commission Report 2020*, *supra* note 11.

190. *Id.* at 3 n.1.

191. *Id.* at 27.

192. *Id.* at 8–9 nn.15,17.

193. *Id.* at 27.

194. *Id.* at 4.

2019, almost three years later, arguing again against the admissibility of Robinson's petition.<sup>195</sup> Shortly after the Commission issued its report on admissibility and merits and found the United States in violation of Articles I, II, XVII, XVIII, and XXVI of the Declaration, it was later published on August 12, 2020.<sup>196</sup>

a. Right to Equality before the Law and Access to an Effective Remedy

The Commission began by evaluating Robinson's claims under Article II and XVIII of the Declaration, which provide for equal treatment under the law and access to an effective remedy, respectively.<sup>197</sup> These two claims were central to Robinson's petition as they were connected to disparate and racially biased use of the death penalty in his case. The Commission highlighted the fact that this was not the first time it had been tasked with determining racial discrimination in a capital case.<sup>198</sup> Indeed, in 1989 the Commission was to evaluate whether statistics alone were enough to prove racial discrimination in a death penalty case, but ultimately never reached that level of analysis since the case was deemed inadmissible due to the petitioner's failure to provide sufficient evidence that his sentence was a result of racial discrimination.<sup>199</sup> In later cases and reports, the Commission has observed "the impact of racism in the criminal justice system in the region" and reiterated that "the use of race and skin color as grounds to set and adjust a criminal sentence are banned by the Inter-American system of human rights protection."<sup>200</sup> The Commission also found troubling the lack of any prohibitions on disparate impact in the criminal justice system in the U.S.<sup>201</sup> It cited to two different U.S. Supreme Court decisions where studies confirmed the presence of racial discrimination in the jury selection and sentencing process in death penalty cases but did not do more than note it.<sup>202</sup>

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195. Robinson v. United States, Petition No. P-561-12, Inter-Am. Comm'n H.R., Further Observations of the United States (Apr. 3, 2019) [hereinafter *Further Observations of the United States*].

196. Robinson v. United States, Case 13.361, Inter-Am. Comm'n. H.R., Report No. 162.19, OEA/Ser.L/V/II.174, doc. 182 at 25 (2019) [hereinafter Robinson Commission Report 2019]; see Robinson Commission Report 2020, *supra* note 11.

197. Robinson Commission Report 2019, *supra* note 196, at 13 n.38.

198. *Id.* at 14.

199. *Id.*

200. *The Situation of People of African Descent in the Americas*, Inter-Am. Comm'n H.R., OEA/Ser.I/V/II, doc. 62 ¶ 189 (2011).

201. Robinson Commission Report 2019, *supra* note 196, at 13 n.38.

202. *Id.* at 15.

In Robinson's case, the venire panel at his trial was made up of 125 people, only ten of which were Black.<sup>203</sup> Three of these potential jurors were eliminated using peremptory strikes, meaning without reason, against which the defense counsel raised *Batson* challenges.<sup>204</sup> In *Batson*, the U.S. Supreme Court held that once a defendant has made a showing that the prosecution excluded a member of the jury solely on the basis of race, the government must provide a race-neutral explanation.<sup>205</sup> Here, the prosecution had two reasons for the peremptory strike against a Black venire member, one of which was based on her views of the death penalty, which was later proven wrong since the prosecutor looked at the incorrect juror questionnaire.<sup>206</sup> The court also failed to inquire further about that specific juror's views and overruled the three *Batson* challenges raised by defense counsel.<sup>207</sup> This resulted in a jury of eleven White people and one lone Black juror.<sup>208</sup> The Commission found that, "given the accepted existence of statistical disparities based on race during the stages of the criminal justice process," the courts were on notice and were obligated to ensure a fair jury selection process.<sup>209</sup> It was on this basis the Commission found the United States in violation of Articles II and XVIII of the Declaration.<sup>210</sup>

#### b. Right to a Fair Trial and Right to Due Process of Law

The Commission next evaluated the prosecution's use of unadjudicated offenses and future dangerousness during Robinson's trial and the effectiveness of his counsel. The Commission had already held in a prior case before it, which also involved a death penalty trial in Texas, that the use of adjudicated offenses during the punishment phase of capital proceedings was a violation of the right to due process of law under Articles XVIII and XXVI of the Declaration.<sup>211</sup> Additionally, Texas is one of two states in the United States that requires juries to find that defendants pose a continuing threat to society before they can impose the death penalty.<sup>212</sup>

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203. *Id.* at 65.

204. *Id.*

205. *See* *Batson v. Kentucky*, 476 U.S. 79 (1986).

206. *See* Robinson Commission Report 2019, *supra* note 196, at 16.

207. *Id.* at 16.

208. *Id.*

209. *Id.* at 17.

210. *Id.*

211. *Garza v. United States*, Case No. 12.243, Inter-Am. Comm'n H.R., Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 110 (2001).

212. *Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness*, ACLU, <https://www.aclu.org/other/deadly-speculation-misleading-texas-capital-juries-false-predictions-future-dangerousness> [hereinafter *Deadly Speculation*].

The Commission already stated in prior reports that evidence of future dangerousness is problematic given that it is highly discretionary and allows the jury to consider other possible discriminatory factors such as race.<sup>213</sup> Therefore, the Commission found the U.S. in violation of Articles XVIII and XXVI. Similarly, Robinson claimed in his petition that his counsel failed to investigate and rebut this type of evidence during the penalty phase, an omission which constituted a failure of performance by counsel and prejudiced his case.<sup>214</sup> The Commission ultimately found that Robinson's trial counsel failed to proffer evidence that could have served to rebut the prosecutor's evidence of future dangerousness.<sup>215</sup> Given the Commission's use of strict scrutiny in death penalty cases, the sole possibility of a different outcome during Robinson's penalty phase warranted a failure that should have been corrected by the courts and thus was also a violation of Articles XVIII and XXVI.<sup>216</sup>

c. The Right to Access to Information with Respect to Death Penalty Decision-Making

The right to access information is a fundamental right protected by Article IV of the American Declaration. It includes access to information about oneself.<sup>217</sup> The Commission noted that Robinson was twice denied access to information necessary for his case.<sup>218</sup> The first information request was a discovery request regarding the government's decision-making in death penalty cases.<sup>219</sup> The second was regarding the lethal injection protocol, as well as critical deposition testimony that revealed the qualifications, training, and procedures used by the personnel involved in the lethal injection process.<sup>220</sup> The Commission noted that both information requests were essential in Robinson's case and were held as violations to Articles IV, XVIII, and XXVI.<sup>221</sup>

d. The Right to Not Receive Cruel, Infamous or Unusual Punishment

As was mentioned earlier, the Commission further emphasized the state's obligation to ensure that a person sentenced to death has access to

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213. See Robinson Commission Report 2019, *supra* note 196, at 18.

214. *Id.* at 20.

215. *Id.* at 21.

216. *Id.*

217. *Id.* at 22.

218. *Id.*

219. See Robinson Commission Report 2019, *supra* note 196, at 22.

220. *Id.*

221. *Id.*

all the relevant information regarding the way he or she is going to die.<sup>222</sup> This is crucial because the Commission holds that any person who is subject to the death penalty must have the opportunity to challenge every aspect of the execution procedure.<sup>223</sup> The Commission considered a 2007 federal civil lawsuit that Robinson was a party to in which he claimed the lethal injection protocol the government used violated the U.S. Constitution as well as federal law.<sup>224</sup> The Commission also considered the fact that Robinson had already spent 20 years on death row.<sup>225</sup> In other cases the Commission has held that this type of prolonged solitary confinement on death row amounts is considered cruel, infamous or unusual punishment and amounts to a violation in Articles XXV and XXVI.<sup>226</sup>

#### e. The Right to Life

Lastly, the Commission considered Robinson's claim for a violation of Article I, the right to life.<sup>227</sup> While the Commission was careful to note that its role is not to interpret and apply national law, it reiterated the fact that it must ensure the imposition of the death penalty complies with the requirements of the American Declaration.<sup>228</sup> In its report, the Commission had already established that the United States failed to fully respond to the claims of racial discrimination raised by Robinson, Robinson lacked adequate legal representation, and the 20 years he had already spent on death row constituted cruel and inhuman treatment.<sup>229</sup> Under these circumstances, the Commission held that executing a person after the occurrence of these violations would be a deliberate violation of Robinson's right to life under Article I.<sup>230</sup>

After the Commission's report was published, Robinson submitted an amended petition for writ of habeas corpus with the United States District Court for the Southern District of Indiana on December 4, 2020.<sup>231</sup> The petition included several claims for relief, including the Commission's report on the merits finding the State's treatment of Robinson in

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222. *Id.*

223. *Id.*

224. *Id.* at 23.

225. See Robinson Commission Report 2019, *supra* note 196, at 23.

226. *Bucklew*, Report No. 71/18 ¶ 85.

227. See Robinson Commission Report 2019, *supra* note 196, at 24.

228. *Id.*

229. *Id.*

230. *Id.* at 25.

231. Amended Petition for Writ of Habeas Corpus, Robinson v. Warden, No. 2:20-cv-00640-JPH-MG (S.D. Ind. Dec. 4, 2022).

violation of the Declaration.<sup>232</sup> The court's decision is still pending in this matter.

As of now, Robinson is still awaiting execution on federal death row at the United States Penitentiary in Terre Haute, Indiana.<sup>233</sup> While his execution has not been scheduled, the Department of Justice has issued a formal moratorium on federal executions.<sup>234</sup> Robinson's future remains unclear as the United States has still failed to comply with the Commission's report.

#### IV. THE EFFECTIVENESS OF THE INTER-AMERICAN COMMISSION FOR DEATH ROW PETITIONERS

The petitions of Mitchell and Robinson highlight the uncertain future that lies ahead for other death penalty petitioners. Although there has been a change in administration, it remains to be seen whether future Presidents will continue to defy the Commission and the Inter-American system the U.S. helped build. While the United States claims to have an interest in the international promotion of human rights, this has not been reflected in the U.S.'s dealings with the Commission. The U.S.'s reluctant attitude towards the Commission renders the Inter-American system inoperable as a matter of recourse for American citizens to have their human rights claims effectively heard and remedied. In particular, the rights of those on death row are subject to the changing tides of political philosophy and future American petitioners must reflect on whether, because of this, if the Inter-American Commission is the most effective avenue for seeking relief in death penalty cases.

The United States often reveres its constitutional system as being one of the best, if not the best, systems for guaranteeing fundamental freedoms and human rights. It is against this backdrop that the U.S. has often dismissed external fora of dispute settlement, such as the Commission. Senator Jesse Helms best described this attitude by saying that, "[w]e would put the international community on notice that we regard our system as a superior protection of human rights than [sic] any other system in the world."<sup>235</sup> Indeed this dangerous mentality of "constitutional exceptionalism" has served only to obfuscate progress for human rights in

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232. *Id.* at 6.

233. Fuchs, *supra* note 14.

234. U.S. Dep't of Justice, Off. of the Att'y Gen., Memorandum on Moratorium on Federal Executions Pending Review of Policies and Procedures (July 1, 2021), <https://www.justice.gov/opa/page/file/1408636/download>.

235. Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution be an Obstacle to Human Rights*, 23 HASTINGS CONST. L.Q. 727, 751 (1996).

the U.S. and hold the U.S. back from effective diplomatic engagement in the IAS.

While much of the literature focuses on the need for U.S. compliance with Commission recommendations as a general principle for productive foreign policy, compliance may not be enough to address the unique issues found in capital punishment petitions. Both Robinson and Mitchell's cases demonstrate that any argument for compliance can be rendered moot by a change in administration or a change in law. Therefore, in the case of death penalty petitions, the argument should not be so one dimensional. The cases of Robinson and Mitchell highlight two questions future petitioners must consider going forward: (1) is the Commission an effective course for addressing the arbitrary use of the federal death penalty in the United States; and (2) if not, where do petitioners go from here?

*A. Making the Inter-American Commission Decisions Binding in Federal Court*

The Commission has played a crucial role in establishing international standards concerning the death penalty. For decades the Commission held that the death penalty was "incompatible with the rights to life, humane treatment, and due process" that are enshrined in the Declaration.<sup>236</sup> With each report issued, the Commission has created an extensive body of precedent that petitioners seeking relief from the use of the death penalty have relied on to further their claims. This body of precedent has been effective in creating change across many OAS member states, with several abolishing their capital punishment policies as a result of the Commission's decisions.<sup>237</sup> This continues to be an important reason why U.S. petitioners on death row seek the help of the Commission; however, the Commission's extensive review of the death penalty has rarely held up in American courts. This is because the U.S. fails to recognize the Commission or its decisions as legally binding and refuses to ratify many OAS treaties.

While extensive analysis of the arguments for U.S. ratification of the various OAS treaties is outside the scope of this article, the appellate decisions in both Mitchell and Robinson's cases provide insight into potential avenues for U.S. reform that can increase the effectiveness of the Commission. As mentioned previously, Mitchell sought a motion to

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236. Press Release, *The IACHR Stresses Its Call for the Abolition of the Death Penalty in the Americas On the World Day Against the Death Penalty*, INTER-AM. COMM'N ON H.R. (Oct. 9, 2020), [https://www.oas.org/en/iachr/media\\_center/PReleases/2020/248.asp](https://www.oas.org/en/iachr/media_center/PReleases/2020/248.asp).

237. *Death Penalty in IAHC*, *supra* note 72, ¶¶ 26–28.

vacate his conviction and death sentence in light of the Commission's final report. The Ninth Circuit denied this motion days before the U.S. Government would later execute him. Mitchell had argued that the report by the commission created rights binding on the U.S. "(1) because they are derived directly from the OAS Charter, a treaty within the meaning of the U.S. Constitution; and (2) because they are derived, through the OAS Charter, from the American Declaration, a statement of human rights norms the United States has not only adopted but helped draft."<sup>238</sup> While the Ninth Circuit ultimately rejected this argument, its reasoning illuminated a pathway to strengthen the decisions of the Commission in so far as to make them binding in the future. In relevant part, the Court held that it agreed with the District Court's ruling that the Commission's decisions are not binding in federal court because the OAS Charter is not "self-executing" and there is no U.S. statute that implements it.<sup>239</sup> Moreover, the American Declaration was not a treaty and created no binding legal obligations nor did the Commission's "governing statute, the Statute of Inter-American Commission on Human Rights ... give the [Commission] power to make binding rulings with respect to nations, like the United States, that have not ratified the American Convention."<sup>240</sup> Robinson used a similar argument in his amended petition for writ of habeas corpus citing to the Commission's report on the merits finding the United States in violation of the American Declaration in its treatment of Robinson.<sup>241</sup> His case is still pending before the United States District Court for the Southern District of Indiana.

As the Ninth Circuit's opinion in Mitchell's case shows, a focus on mere compliance with the Commission reports fails to address the lack of teeth the Commission still has in federal court. If the report is not considered to be a binding document, the use of the Commission as an avenue for relief for those on death row seems to be fruitless. The U.S.'s failure to ratify the relevant instruments or view international decisions like the Commission reports as binding blunts the Commission's power.

### *B. Change Begins at Home: A Shift in Focus to a Uniform Decision on Capital Punishment*

Although the U.S. Government formally issued a moratorium on federal executions on July 1, 2021, no further action has been taken to address the complex issues raised in the petitions of Mitchell and

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238. *Mitchell*, 2020 WL 4921988, at \*3.

239. *Id.* at \*5.

240. *Id.* at \*5–6 nn.7, 9.

241. *Robinson*, No. 2:20-cv-00640-JPH-MG, at 153.

Robinson.<sup>242</sup> Additionally, forty-four individuals are still awaiting execution within the federal system.<sup>243</sup> As the case of Mitchell shows, there is no guarantee this present moratorium will not be lifted during the next administration. This is where the future for petitioners begins to turn murky. While legitimizing the role of the Commission through ratification may provide a route to better compliance with Commission recommendations, petitioners are still left vulnerable to a change in political ideology. A push for domestic accountability by the present administration and a definitive ban on the application of the federal death penalty would lessen the pressure on the Commission being petitioners only opportunity for relief.

The United States has yet to address the issues of tribal sovereignty which were raised by Mitchell's sentence and execution and analyzed in the Commission's report. The U.S. Government has failed to take any measures recommended by the Commission to acknowledge the violation of the Navajo Nation's rights and the subsequent use of the death penalty despite their repeated objections. In January 2021, President Biden appointed Deb Haaland as U.S. Secretary of the Interior, the first Native American to serve as a cabinet secretary.<sup>244</sup> Although Secretary Haaland has already taken several initiatives to improve relations between Native American tribes, nothing has been done to either repair or acknowledge the violation of sovereignty raised in Mitchell's petition.<sup>245</sup> Likewise, while Robinson's life may have been temporarily spared due to the change in administration and the reinstatement of the moratorium, it is unclear what changes the Department of Justice or the Biden Administration plans to implement any of the Commission's findings. The lack of any form of accountability or acknowledgement in either case presents a problem that goes beyond a lack of compliance.

The ever-changing nature of the U.S. policy on the federal death penalty leaves death row petitioners in limbo without recourse internationally or domestically. In the case of Robinson, absent an impending execution date, the Commission's decision has effectively been rendered

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242. Press Release, U.S. Dep't of Just., Attorney General Merrick B. Garland Imposes a Moratorium on Federal Executions; Orders Review of Policies and Procedures (July 2, 2021), <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-imposes-moratorium-federal-executions-orders-review>.

243. *List of Federal Death Row Prisoners*, DEATH PENALTY INFO. CTR., <https://www.death-penaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners>

244. Nathan Rott, *Deb Haaland Confirmed as First Native American Interior Secretary*, NPR (Mar. 15, 2021, 6:21 PM), <https://www.npr.org/2021/03/15/977558590/deb-haaland-confirmed-as-first-native-american-interior-secretary>.

245. *Id.*

moot and unable to attain any relief. Furthermore, despite polling data indicating the lowest level of American support for the death penalty since 1976, the Biden administration has yet to make any definitive move towards abolition.<sup>246</sup> As University of North Carolina political science professor Frank R. Baumgartner noted, “if Biden wanted . . . he could halt the federal death penalty for a generation with the stroke of a pen by commuting the sentences of [those] now on federal death row.”<sup>247</sup> This type of act would pave the way for a different future for those currently on death row and allow them a safer and more certain measure of relief than the petition process in front of the Commission.

## V. CONCLUSION

There is no denying the important role the Inter-American Commission on Human Rights has played in safeguarding human rights in the Western Hemisphere. However, the cases of Robinson and Mitchell demonstrate that for those incarcerated on death row in America, the Commission’s recommendations fall short of ensuring the full protection of these vulnerable petitioners, and the Commission is not to be blamed for that. The focus should remain on the United States’ role in these cases specifically: a lack of consistent policy in both the application of the federal death penalty and the legality of international law still puts petitioners at risk. A greater emphasis on domestic changes in the U.S. is imperative for the Commission to remain an effective remedy for those on death row.

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246. *As Biden Administration Mulls Federal Death-Penalty Policy, Study Finds U.S. Support for Capital Punishment at Lowest Point Since 1960s*, DEATH PENALTY INFO. CTR. (Aug. 4, 2021), <https://www.deathpenaltyinfo.org/news/as-biden-administration-mulls-federal-death-penalty-policy-study-finds-u-s-support-for-capital-punishment-at-lowest-point-since-1960s>.

247. *Id.*