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THE UNITED STATES' POSITION ON THE DEATH PENALTY IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

Richard J. Wilson*

I. INTRODUCTION

The following chronicles the record of the United States government on death penalty issues in the Inter-American system for the protection of human rights.

Article I of the American Declaration of the Rights and Duties of Man ("American Declaration") states, "Every human being has the right to life, liberty and the security of his person." Individuals under sentence of death in the United States have invoked this article and others in the American Declaration in petitions to the Inter-American Commission on Human Rights ("Commission"), established in 1960. The Commission is one of the principal organs of the Organization of American States ("OAS"), of which the United States is a member. The American Declaration has been interpreted, on several occasions, to create binding legal obligations on all OAS member states. The United States government, how-

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ever, "categorically rejects" any contention "that the American Declaration ... has acquired legally binding force for all OAS countries."

Article 4 of the American Convention on Human Rights ("American Convention") contains several provisions limiting the application of the death penalty. These limitations include the imposition of the death penalty only for "the most serious crimes;" a prohibition on extension of the death penalty to crimes to which it does not apply at the time of treaty ratification; no reestablishment once the death penalty has been abolished; prohibition for political offenses; and prohibition of the penalty's application to persons under eighteen or over seventy at the time the crime was committed, and pregnant women. The United States signed the American Convention in 1977 but has not taken any serious steps toward its ratification. Because of non-ratification, the United States cannot submit to the jurisdiction of the Inter-American Court of Human Rights, which hears cases referred to it by the Commission or by governments.

The Protocol to the American Convention on Human Rights to Abolish the Death Penalty ("Protocol") entered into force on August 28, 1991, for the eight OAS countries that ratified it. The Protocol is similar to Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), to which all forty-three member states of the Council of Europe adhere, and ratification of which is a condition of future membership


5. Id. at 50. Under Article 62.1 of the American Convention, a State party to the Convention may recognize the binding jurisdiction of the Inter-American Court of Human Rights. See id. at 42.


in the Council. The United States has not signed or ratified the Protocol on the death penalty.

The United States government has been the subject of numerous individual contentious petitions before the Inter-American Commission challenging U.S. procedures in the application of the death penalty. The United States has prevailed in such cases on only one occasion, where the petition was declared inadmissible. The United States has never recognized the validity of a decision against it by the Commission in any capital case, nor has it taken any steps to comply with recommendations made by the Commission.

There is only one case in which the United States has appeared before the Inter-American Court of Human Rights. In that case, Mexico invoked the advisory jurisdiction of the Court to raise a question about the interpretation of the Vienna Convention on Consular Relations. The Mexican government asked the Court to interpret the Vienna Convention so as to clarify issues of United States compliance with that treaty in regard to the many Mexican nationals under sentence of death in ten states of the United States. The U.S. government sent a delegation of four senior attorneys from the State Department and the U.S. Department of Justice. The delegation noted at the outset that the request of Mexico "is patently an attempt to subject the United States to the contentious jurisdiction of this Court, even though the United States is not a party to the American Convention and has not accepted the Court's contentious jurisdiction." The delegation argued, inter alia, that "Mexico has presented a contentious case in the guise of a request of an advisory opinion," and that the Vienna Convention "is neither a human rights treaty nor a treaty 'concerning' the protection of human

12. Id. ¶ 26 (providing, inter alia, a summary of the Brief of the United States of June 1, 1998).
In virtually all petitions against the United States in capital cases, the Commission issues precautionary measures under Article 25 of its Rules of Procedure. Precautionary measures are issued "to prevent irreparable harm to persons," and without prejudice to a decision on the merits of the case. The Commission typically asks the U.S. government to forestall the execution to permit the Commission the time to consider the petition. The United States government has concluded that precautionary measures from the Commission are "non-binding in nature," and has failed or refused to give precautionary measures any legal effect in domestic law.

This article provides an overview of death penalty litigation against the United States in the Inter-American human rights system. In that context, it reviews the claims raised in petitions filed with the Inter-American Commission by death row inmates in the United States, how the U.S. government defends the decisions of domestic courts in those cases, and how the Commission has evolved in its resolution of capital issues. On at least one occasion, the United States appeared before the Inter-American Court of Human Rights to defend its practices in capital litigation. That litigation, too, is examined here.

The overall practice of the U.S. government in this international litigation, as suggested above, demonstrates that it actively avoids assuming new treaty obligations that limit application of the death penalty. It negates interpretations of international law that adversely affect its defense of the death penalty. When it becomes a defendant in international
litigation, the U.S. government typically invokes, vigorously and energetically, procedural protections that can only be characterized as "technicalities" at all stages of that litigation. It aggressively contests the alleged violations, whether they be raised by countries, such as Paraguay or Germany in the International Court of Justice ("ICJ"), or individual death row petitioners before the Commission. The issue here is not, however, whether the government lawyers are doing their jobs as advocates; they act with high technical proficiency, and their advocacy for their client is aggressive. It is, instead, the contrast of the posture of the government in litigation with that of its willingness to comply with the decisions it so vigorously contests. It seems incongruous, at least, and arrogant, at worst, to respect the forum enough to accept its procedures and engage in debate about the appropriate application of its norms, but not to respect the outcome when it is not favorable to the government. When the Commission, or even the ICJ, issues a decision, report or order, the U.S. government simply ignores, declines, or refuses to comply with it. In short, the U.S. legal position in international capital litigation can be summarized as follows: resist new obligations, vigorously contest everything and comply with nothing.

A review of capital cases against the United States in the Inter-American system is important for several reasons. First and foremost, while U.S. death penalty litigation at the Commission in the 1980s involved only two cases, increases in the number of petitions by death row inmates against the United States and many of the Caribbean countries make it one of the most significant areas of Commission activity. It

18. I mention capital litigation involving the Caribbean countries here because there are a large number of capital cases pursued by petitioners from those countries to international tribunals. Disagreements about the interpretation of international obligations involving the death penalty have led to the withdrawal of Jamaica and Trinidad and Tobago from the Optional Protocol to the International Covenant on Civil and Political Rights, and in Trinidad and Tobago's case, from the Inter-American Convention on Human Rights as well. See David A. C. Simmons, Conflicts of Law and Policy in the Caribbean – Human Rights and the Enforcement of the Death Penalty – Between a Rock and a Hard Place, 9 J. TRANSNAT'L L. & POLY 263, 282 (2000); Natasha Parassaran Concepcion, The Legal Implications of Trinidad & Tobago's Withdrawal from the American Convention on Human Rights, 16 AM. U. INT'L L. REV. 847 (2001); cf., Natalia Schiffirin, Jamaica Withdraws the Right of Individual Petition under the International Covenant on Civil and Political Rights, 92 AM. J. INT'L L. 563 (1998). Those topics, however, lie outside the scope of this article.
is important to document the history and breadth of that jurisprudence. Second, the U.S. position at the Commission exposes broader and deeper conflicts in diplomacy and law, and in foreign policy and international legal positions of the U.S. with regard to human rights. In the Inter-American system, while the United States always has been a strong political supporter of its human rights enforcement mechanisms, it has blanched at assuming treaty obligations or in complying with the decisions against it by those same mechanisms. This double standard threatens U.S. credibility in demanding human rights compliance by other governments, not only in the Americas but also throughout the world. Third, and more personally, the United States is the most frequent focus of petitions filed at the Commission by law students enrolled in American University's International Human Rights Law Clinic, which I founded in 1990. Most of those cases involve the death penalty.

19. The Commission does not publish specific information about names of petitioners or the nature of their claims. Due to the International Human Rights Law Clinic's activity in this area, however, as well as requests for assistance in filing from U.S. petitioners, there are at least thirty-four cases against the United States to which I can refer by name. Seventeen of those involve petitioners sentenced to death and challenge some aspect of their convictions, with many more pending, according to the Commission's own recently published statistics, which are examined in the text. For a brief summary of capital and non-capital cases against the United States, see Richard J. Wilson, The United States in the Inter-American Human Rights System (2001) (unpublished paper presented at a conference on the Inter-American human rights system held at Northwestern University, April 21, 2001).

20. The location of the Clinic and the Commission in Washington, D.C., combined with the broad provisions on standing to file petitions and who may represent petitioners before the Commission in its Rules of Procedure (see Article 23), make it an ideal venue for student practice. I am the founding director of the Clinic, which began its work in 1990. This academic year, there are four faculty members supervising the casework of twenty-six students in human rights and political asylum cases. Clinic students and faculty have litigated more than twenty cases in the Inter-American human rights system. Clinic students have appeared in contentious litigation, in friendly settlement discussions and follow-up, and in country situation working sessions at the Commission. The latter sessions occur when the Commission holds hearings "on the human rights situation in one or more States" of a general nature, and multiple perspectives may be offered. See Commission's Rules of Procedure, supra note 14, Article 64(1). Students and faculty have collaborated in the work at the Inter-American Court of Human Rights, in San Jose, Costa Rica. Students have prepared written pleadings and I have represented petitioners or amici in several hearings in three cases there. I have also written about the capital litigation in the clinic on several occasions. See, e.g., Richard Wilson, Race, Criminal Justice and the Death Penalty, 15 WHITTIER L. REV. 395, 403 (1994); Richard J.
II. THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: A BRIEF OVERVIEW

The human rights system of the OAS consists of the Commission, with headquarters in Washington, D.C., and the Inter-American Court of Human Rights (the "Court"), which sits in San Jose, Costa Rica. The OAS was created and the American Declaration was approved in Bogotá, Colombia, in 1948, some months before the United Nations approved the Universal Declaration on Human Rights. The Commission was created in 1959 and elected its first members, seven independent experts in the field of human rights, in 1960. It began to examine individual petitions in 1966 and became a principal organ of the OAS under the 1967 Protocol of Buenos Aires. The OAS General Assembly approved the current Statute of the Commission in 1979, making clear in Article 20 the Commission's jurisdiction over member States of the OAS that are not parties to the American Convention.

The meager Commission budget permits its members to hold only two ordinary sessions a year in Washington, D.C., each lasting about three weeks. During the rest of the year, the Commissioners work from their respective home bases, while the small Commission staff continues to receive and review individual petitions and carry out the other powers and duties of the Commission. The mandate of the Commission is broad, permitting it, among other things, to make in loco visits to countries where it is invited and to make reports and recommendations on individual countries or issues, as it may wish. In addition, at the Court, the Commission shifts its position from that of tribunal to prosecutor, representing victims before that tribunal.

The Commission's own caseload of individual petitions always has been high, and recent statistics show that the upward trend continues. In 1999, the Commission received 581 new petitions, had 945 petitions in process at year's end, and

21. See BASIC DOCUMENTS, supra note 1, at 1-5.
22. Id. at 7-8.
23. Id. at 9-10.
24. As to the functions and powers of the Commission, see generally, American Convention on Human Rights, Articles 41, 57 and 61(1), as well as the more detailed Statute (especially Articles 18 and 19) and Rules of Procedure of the Commission.
issued 52 precautionary measures in pending cases.\(^{25}\) In 2000, new cases rose with 681 new filings, but the overall situation stayed about the same with 930 petitions in process and the same number of precautionary measures issued as in the previous year.\(^{26}\) This was all on a budget of $2.9 million, which represents less than 3.7% of the total OAS budget.\(^{27}\) The Association of the Bar of the City of New York, after reviewing the Commission’s budget in the early 1990s, concluded that it was “a scandal.”\(^{28}\)

Historically, the United States government was an active participant in the creation of the Inter-American human rights system, and the U.S. continues to be one of its most important political supporters. It played an active role in the drafting of both the American Declaration and the American Convention.\(^ {29}\) It contributes a significant proportion of the funding for the OAS itself, as well as for the Commission.\(^ {30}\) Members of the Commission are appointed as independent experts in human rights, and the United States consistently has supported the nomination of superior and independent candidates to both the Commission and the Court.

The U.S. government, then, has taken steps to assert its political position about the need for the existence of the


\(^ {28}\) Veronica Gomez, The Interaction between the Political Actors of the OAS, the Commission and the Court, in the Inter-American System of Human Rights 173, 201 & n.174 (David J. Harris & Stephen Livingston eds. 1998).


\(^ {30}\) See, e.g., Press Release No. 5/00, Inter-American Commission on Human Rights, Organization of American States (Apr. 25, 2000) (indicating a voluntary contribution from the United States in the amount of $640,000 “to fund part of the activities of the [Commission] and of the Rapporteur for Freedom of Expression”).
Commission and Court to aggressively address the problems of human rights in the Western hemisphere. The U.S. government takes an entirely different posture, however, when it asserts the legal position of the United States in defense of human rights practices with regard to the death penalty.

III. EARLY COMMISSION CASES INVOLVING THE DEATH PENALTY IN THE UNITED STATES

A. Two Commission Death Penalty Decisions in the 1980s

There are several decisions involving the United States during the period of the 1970s and 1980s. However, there are only two published “reports,” as Commission decisions are referred to in their rules, dealing with the death penalty. The first such decision was the 1987 report in Roach & Pinkerton v. United States. The Commission reviewed the cases of James Terry Roach and Jay Pinkerton, each of whom was seventeen years old at the time of his conviction for murder and sentence to death in South Carolina and Texas, respectively. The Commission found by a vote of five to one that their executions, each of which occurred while their cases were pending before the Commission, were a violation of the American Declaration’s Article I right to life. The Commission also found, by the same vote, a violation of Article II of the Declaration, which deals with equality before the law.

Before reaching those conclusions, however, the Commission made three important findings. First, and perhaps most importantly, it found that international obligations of the United States within the OAS derive not from the American Convention, but from its ratification of the Charter of the OAS, and from the “acquired binding force” of the American Declaration and the Statute and Regulations of the Commission. Second, it found that within the OAS member States,

33. Id. ¶¶ 23-33.
34. See supra note 1 and accompanying text.
35. Roach & Pinkerton, Inter-Am. C.H.R. ¶¶ 64-65. Article II provides, in full: “All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.” American Declaration, supra note 1, art. II.
“there is a recognized norm of *jus cogens* which prohibits the State execution of children.” Because of the existence of this *jus cogens* norm—a peremptory norm from which no derogation is permitted—U.S. objection to a customary norm barring the execution of children was unavailing to avoid a violation.

Third, the Commission concluded that the “patchwork scheme of legislation” in the states of the United States made the imposition of the death penalty on juveniles “dependent, not primarily, on the nature of the crime committed, but on the location where it was committed.” This gave rise, the Commission concluded, to violations of Articles I (right to life) and II (right to equality) of the American Declaration. The reasoning of the Commission in this case has been severely criticized within the academic community, particularly as to the existence of a *jus cogens* norm in the Americas.

The second death penalty case to be adjudicated by the Commission came two years later, with the 1989 report in *Celestine v. United States*. In any contentious case before the Commission, as is true with all international human rights bodies, the petitioner must pass through two procedural stages. First, the petitioner must show that the case is admissible, that is, that it meets those procedural requirements that allow the Commission to invoke its jurisdiction. The most significant factor in admissibility, in turn, is the exhaustion of domestic remedies or the successful invocation of one of the exceptions to exhaustion. If the case is found to be admissible, the case proceeds to a decision on the merits, meaning that the Commission decides the substantive claims that are presented. The new procedural rules of the Commis-

37. *Id.* ¶ 55.
38. *Id.* ¶¶ 52-55.
39. *Id.* ¶ 62.
42. See Rules of Procedure, supra note 14, arts. 30-34. The Rule on exhaustion of domestic remedies is Article 31.
sion make clear that these two stages of litigation will be decided by separate written decisions, barring exceptional circumstances.43

In Celestine, the Commission applied its rules to declare that the case was inadmissible for failure to state facts that constitute a violation of the rights set out in the American Declaration.44 The petitioner, who had been sentenced to death in Louisiana, offered statistical evidence to establish that racial discrimination in capital sentencing was so widespread as to shift the burden of proof to the government to prove the absence of discrimination.45 Data was offered from several states, but the data offered from Louisiana was typical. It showed that capital defendants who kill white rather than black victims are three times as likely to receive a death sentence, and that whites who kill blacks never receive the death penalty.46 During the pendency of the petition at the Commission, the United States Supreme Court decided McClesky v. Kemp,47 which rejected an appeal based on the same set of data in the domestic context.

Although other claims were raised, the Commission largely followed the reasoning of McClesky in concluding that the petitioner had not presented sufficient evidence to show that Willie Celestine’s own conviction had resulted from racial discrimination. The Commission concluded that the statistical studies did not “make a prima facie case to prove the allegations of discrimination.” The Commission also found that “this is a poor case upon which to recommend a reversal of the U.S. criminal justice practice,” given the brutality and “particularly heinous” nature of the crime.48

In both Roach & Pinkerton49 and Celestine,50 the Commis-

43. Id. arts. 37, 43, 45. Exceptional circumstances occur when the Commission decides to defer the decision on admissibility to the time of the decision on the merits. See id. art. 37(3).
44. Celestine, Inter-Am. C.H.R. ¶ 45.
45. Id. ¶¶ 14-15, 17.
46. Id. ¶¶ 13-15.
49. Case 9647 (Roach & Pinkerton v. United States), Inter-Am. C.H.R. 147, ¶¶ 9, 17, OEA/ser.L/VII.71, doc. 9 rev. 1 (1987). The Secretary General of the OAS also cabled an appeal on Terry Roach’s behalf, urging the governor of South Carolina to “follow the current tendency of almost all the countries in the hemisphere and to stay the execution.” Id. ¶ 12.
sion intervened by cable or telegram with the U.S. Secretary of State and the state governors seeking a stay pending the outcome of the Commission's investigation. In both cases, the government did not honor the precautionary measures and the defendants were executed. These executions took place long before any decision on the cases at the Commission. That sad pattern still holds true today for virtually all petitioners in death penalty cases.

B. Legal Positions Asserted by the U.S. Department of State in Commission Proceedings

In proceedings at the Commission, the Office of the Legal Advisor, an office of the United States Department of State, represents the United States government. The Office "furnishes advice on all legal issues, domestic and international, arising in the course of the Department's work." That work includes "assisting . . . in formulating and implementing the foreign policies of the United States, and promoting the development of international law and its institutions as a fundamental element of those policies." In proceedings at the Commission, the Legal Advisor files pleadings and appears at oral hearings as the official representative of the U.S. government on contentious petitions. As of the end of 2001, there were approximately 130 permanent attorneys working in the Office under the direction of the Legal Advisor. The Legal Advisor holds the rank of Assistant Secretary of State and reports to the Secretary. There are four Deputy Legal Advisors under the Legal Advisor's direction who supervise the work of attorneys in the various functions of the office.

All but one of the U.S. cases at the Commission involving the imposition of the death penalty arise from convictions in state courts. The governments of the various states, however, have no formal voice in Commission proceedings.


54. On at least one occasion in the cases handled by the Clinic at the Com-
Legal Advisor presents the position of the United States government. The "voice" of the United States in foreign affairs is the federal government because the states are excluded from such matters under the U.S. Constitution. Doctrines of federal preemption and supremacy combine to give the federal executive branch primacy in this area. Article I, section 10 of the Constitution sets out "a catalogue of prohibitions and limitations upon the states, and most of them relate or are relevant to foreign affairs."

From the start, the United States government was an active, engaged and vigorous party opponent to the individual petitions by death row inmates in the United States. It always has submitted carefully crafted, prompt and sometimes quite extensive written pleadings in such litigation. It does take, however, an extremely narrow view of the assumption of legal obligations by the United States in the field of human rights generally, and in the death penalty in particular. While the field of foreign relations presents a complex array of diplomatic and legal questions, one might ask two simple questions at the outset of this review. Why does the United States government seek so aggressively to limit or bar the application of international human rights norms that might benefit individuals seeking the protection of these norms? What foreign affairs concern of the U.S. government is served by this narrow interpretation of individual rights in international human rights law?

In *Roach & Pinkerton*, the United States government argued the validity of sources of international law, the jurisdiction of the Commission, and the merits of the claim that international human rights law bars the execution of children under the age of eighteen. The government argued that "the [American] Declaration is not a treaty and it is not binding on the United States" and that "the Declaration was not drafted with the intent to create legal obligations, therefore the Commission should take special care . . . not to overturn that
meaning." It also argued that the Commission's interpretive powers prohibited it from looking to any instrument other than the American Declaration as a source of legal obligations. Finally, it argued that there is no customary norm of international human rights law that prohibits the execution of children. If there is, it argued, the U.S. has dissented from that norm to such an extent that it is a persistent objector in international law, which exempts it from the norm.

As noted above, the Commission rejected the first of the U.S. government's claims asserting that the American Declaration did not create legal obligations. The Commission has maintained and expressed this position, over repeated U.S. government objections, in all subsequent cases in which such claims have been invoked. Nonetheless, the Commission's interpretation of the Declaration's obligations have not been given domestic legal effect in the United States.

The Commission also rejected the government's second assertion that the Declaration was the only source on which the Commission could rely as a source of law. That interpretation would have required the Commission to conclude that the Declaration was a static legal document. On many sub-

58. Id. ¶ 38(e).
59. Id. ¶ 38(g)-(i). The doctrine of persistent objection has received little scholarly attention in the United States. See, e.g., Lynn Loschin, The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework, 2 U.C. DAVIS J. INT'L L. & POL'Y 147 (1996). It is likely that this will change, however, as the validity of the execution of juveniles under international law takes on increasing importance. The question of the validity of the execution of juveniles is not yet settled as a matter of domestic law in the United States, but the issue has gone to the United States Supreme Court on one occasion, and is likely to appear again. In Domingues v. State, the Nevada Supreme Court held by a narrow majority that the International Covenant on Civil and Political Rights does not create a binding legal obligation on the United States to bar the execution of children under the age of eighteen. Domingues v. State, 961 P.2d 1279, 1280 (Nev. 1998). Mr. Domingues sought review by writ of certiorari in the United States Supreme Court. In its brief to the Supreme Court urging denial of certiorari, the Solicitor General of the United States adopted a legal position quite similar to that asserted by the U.S. government in Roach & Pinkerton. See Brief for the United States as Amicus Curiae, Domingues v. Nevada, No. 98-8327 (U.S. 1999). The Supreme Court subsequently denied the writ. Domingues v. Nevada, 528 U.S. 963 (1999). Because of the prevalence of death sentences and execution of children by the states, this issue is likely to be presented to the Supreme Court again in the near future.

60. See sources cited supra note 2.
sequent occasions, the Commission has read the Declaration as an evolving source of law, noting that its application of the Declaration is consistent with those by the Inter-American Court of Human Rights and the European Court of Human Rights. In Garza v. United States, a U.S. capital case decided by the Commission last year, for example, the Commission stated as follows:

[In interpreting and applying the Declaration, it is necessary to consider its provisions in the context of the international and inter-American human rights systems more broadly, in the light of developments in the field of human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged.]

Interestingly, there is no evidence on the face of the reports in either Roach & Pinkerton or Celestine that the Commission invoked its authority to issue precautionary measures, as its rules permit it to do, and as Terry Roach specifically requested. Instead, the Commission wrote telegrams or cables to state and federal officials. In each instance in which such messages were conveyed to the government, responses differed. In the case of Terry Roach, the State Department replied that "the matter is now in the hands of authorities for the State of South Carolina and, under the U.S. federal system, there are no legal grounds for executive intervention in the implementation of the sentence." In the case of Jay Pinkerton, the State Department again asserted that "there are no domestic legal grounds [...] for executive intervention in the implementation of Mr. Pinkerton's sentence." The Commission noted that the governor of Texas did not respond to its request for a stay of execution.


64. Id. ¶ 18.

65. Id.
In Celestine, where telegrams were sent to both the Secretary of State and the governor of Louisiana, the Commission states only that "these requests were ignored" and Mr. Celestine was executed shortly thereafter.  

The record is silent as to the conversations between federal and state officials regarding a response to the requests for stay from the Commission. But it begs credulity to suggest that the governors of the states in question would allow executions to proceed in the face of a request for stay from an international body, without ascertaining the views of the State Department in this matter. It also appears true that the State Department, both formally and informally, viewed the choice to abide by a request for stay by the Commission as one that lay exclusively with state officials rather than the federal government. That position of international law seems incongruous, at best, with the aforementioned doctrines of federalism and preemption of the states in this area, doctrines that have consistently applied since the founding of the nation. It would seem difficult, therefore, for the State Department to justify inaction by the federal government based on the assertion that these matters are outside of its purview in federal-state relations. The issue would arise again in later litigation with the United States at the Commission, as discussed below.

IV. UNITED STATES DEATH PENALTY LITIGATION AT THE COMMISSION SINCE 1990

The 1980s jurisprudence of the Commission on the death penalty in the United States provides only a limited picture of the issues presented under international human rights law. In recent years, however, the United States has become one of the most frequent states against which human rights complaints are filed. Data first published in the 1999 Annual Report of the Commission show twenty-seven petitions against the United States in process, with fifty-six new petitions re-

67. See supra text accompanying notes 55-56. See also JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 92 (1996) ("Ever since Ware v. Hylton, [3 U.S. (3 Dall.) 199 (1796),] the supremacy of international law (treaty-based, customary, or that based on executive agreement) over state law has been complete.").
ceived in 1999, the third highest number of any state.\textsuperscript{68} The 2000 Annual Report indicates that there were thirty-five cases being processed against the United States, with seventy-six new petitions received against the United States in that same time period, again making it the third ranked country in number of new filings in each of the two years in question.\textsuperscript{69} Staff sources at the Commission indicate that some sixty to seventy percent of the petitions raise challenges to the application of the death penalty, and that virtually all American petitioners are represented by counsel.

The Commission process generally is slow to reach resolution on the merits, with some cases pending against the United States for several years before final resolution.\textsuperscript{70} This fact, combined with the requirement of exhaustion of domestic remedies, conspire to make it extremely difficult to obtain a decision on the merits from the Commission prior to execution, where it might be able to be invoked in domestic courts to greatest legal effect. In the \textit{Garza} case, however, that goal was achieved, as will be discussed in this section.

Decisions on precautionary measures, on the other hand, are issued early in the process, sometimes within days of the filing of the petition. The precautionary measures process can be invoked by the Commission, according to its rules, "[i]n

\textsuperscript{68} \textit{ANNUAL REPORT} 1999, supra note 25, ch. III, sec. B.

\textsuperscript{69} \textit{ANNUAL REPORT} 2000, supra note 26, ch. III, sec. B. Differences between the large number of cases received in 1999 (fifty-six) and the relatively small number of cases in process during 2000 (thirty-five) are most likely explained by the slow process of "opening" a case at the Commission. Under prevailing rules at the time, a case was not counted as part of the Commission's docket until it was formally "opened." Opening constituted a recognition by the Commission staff that the case satisfied, \textit{prima facie}, the requirements for admission, such as sending pertinent parts of the petition to the government of the country against which the petition was filed. Opening can be delayed, particularly if there are serious questions as to the exhaustion of domestic remedies. For an excellent discussion of this process, see Christina Cerna, \textit{The Inter-American Commission on Human Rights: Its Organization and Examination of Petitions and Communications}, in \textit{THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS}, supra note 28, at 65, 79-80.

\textsuperscript{70} The petition in \textit{Andrews v. United States}, Case 11.139, Inter-Am. C.H.R., OEA/ser.L/V/II.98, doc. 6 rev. (1998), for example, took nearly six years to achieve a final decision, the initial petition having been filed in July of 1992, with a decision by the Commission on the merits in March of 1998. The petition in \textit{Sankofa v. United States}, Case 11.193, Inter-Am. C.H.R. 387, OEA/ser.L/V/II.111, doc. 20 rev. (2001), was filed in April of 1993 and has not yet been decided on the merits. A decision on admissibility was published in June of 2000.
serious and urgent cases, and whenever necessary according to the information available.\textsuperscript{71} The rules thus seem to permit \textit{ex parte} action, although the Commission sometimes requests views from the government on its issuance of such measures. The dynamic tension between the Commission's long-term effectiveness in decisions on the merits and its potential short-term impact through the issuance of precautionary measures will be the subject of analysis below.

A. \textit{Cases Resolved Against the United States: Merits and Admissibility}

Since \textit{Celestine}, the Commission has issued two decisions on the merits in capital cases and two decisions on admissibility. As indicated above, the docket is now heavy with U.S. capital cases, with perhaps as many as fifty awaiting admissibility or merits decisions. The direction of capital litigation at the Commission has changed fundamentally, as have the responses of the United States government.

The first of the cases to be decided on the merits was \textit{Andrews v. United States}.\textsuperscript{72} The original petition was filed on July 27, 1992 by the International Human Rights Law Clinic at American University and several co-counsel. The defendant in the domestic case, William Andrews, had been on death row in Utah since 1974, a period of some eighteen years. He was scheduled for execution three days later, on July 30, 1992. His lawyers asked for precautionary measures; in response the Commission sent notes to the U.S. State Department and the governor of Utah seeking a stay of the proceedings. The U.S. government replied by asserting that "the petitioner did not have standing to file a petition which was not filed in a timely fashion, and that it failed to establish any violation of the American Convention, that the American Declaration of the Rights and Duties of Man was not legally binding, and that the case was inadmissible pursuant to Article 41 of the Commission's Regulations."\textsuperscript{73} The defendant was executed as scheduled.

The petition was amended after the execution to include the following claims before the Commission: violations of Ar-

\begin{footnotesize}
\begin{enumerate}
\item Rules of Procedure, \textit{supra}, note 14, art. 25.1.
\item \textit{Id.} \textsuperscript{14}, \textsuperscript{15}.
\end{enumerate}
\end{footnotesize}
ticle I of the American Declaration, regarding the right to life; Article II, regarding the protection of racial equality; and Article XXVI, regarding the right to an impartial hearing and protection against "cruel, infamous or unusual punishment" for his eighteen-year wait on death row, during which at least eight warrants for his execution were issued.\textsuperscript{74}

The heart of the petition raised the question that had not been answered in the \textit{Celestine} case, nearly a decade before. \textit{Celestine} suggested that if the petitioner could provide enough evidence of racial discrimination, the burden of proof would shift to the state to prove its absence. \textit{Andrews} was such a case.

William Andrews was an African-American man sentenced to death in a Salt Lake City courtroom where all of the jurors were white, where the victims were all white, and where the official tenets of the Mormon faith in 1974 held that Black persons were "damned to death by God."\textsuperscript{75} The factual issue revolved around an incident at trial. While the jurors in his case were sitting at lunch during the guilt-determination phase of the trial, one of the jurors handed a court bailiff a napkin on which were the hand-written words, "Hang the nigger's [sic]." Beside the words was a drawing of a black stick figure hanging from a gallows. The bailiff reported the incident to the trial judge during a later hearing on sequestration of the jury. Over the objections of defense counsel, accompanied by a motion for mistrial, the trial continued, with the judge admonishing the jury only to "ignore communications from foolish people." There was no effort to ascertain who wrote the note, who among the jury had seen it, or indeed, if one of the jurors may have written the note.\textsuperscript{76}

Although there had been many appeals in Andrews' case, no reviewing court in the United States had ever addressed the error regarding the napkin incident, nor had a fact-finding hearing ever been granted on the questions it raised.\textsuperscript{77} On denial of \textit{certiorari} by the United States Supreme Court in 1988, Justice Thurgood Marshall's dissent called the napkin incident "a vulgar incident of lynch-mob racism reminiscent

\textsuperscript{74} \textit{Id.} ¶¶ 9-10.
\textsuperscript{75} \textit{Id.} ¶ 3, 29.
\textsuperscript{76} \textit{Id.} ¶¶ 24-26.
\textsuperscript{77} \textit{Id.} ¶ 37.
of Reconstruction days."  

In its pleadings before the Commission, the State Department reiterated its "categorical rejection" of any assertion that those instruments had acquired binding legal force in the OAS. The government quoted at length from a statement made to the OAS General Assembly by a State Department representative:

The United States accepts and promotes the importance of the American Declaration. It is a solemn moral and political statement of the OAS member states, against which each member state's respect for human rights is to be evaluated and monitored, including the policies and practices of the United States . . . . The United States does not believe, however, that the American Declaration has binding force as would an international treaty.

On admissibility and on the merits, the United States relied almost exclusively on domestic law, arguing that domestic courts had provided sufficient review to Mr. Andrews. Moreover, on admissibility, the government argued such technical issues as whether the petitioners had standing to file the petition, whether the petition was timely filed within six months after notification of a final ruling from which relief was sought, whether domestic remedies had been exhausted, and whether the petition should be dismissed because of petitioner's delay in filing a rebuttal to the government. The Commission rejected each of these arguments in turn, giving each short shrift.

The Commission found that all of the alleged violations of the American Declaration had been proven.

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82. Id. ¶¶ 100-10.
83. Id. ¶¶ 146, 184-87.
its conclusions, the Commission mentioned that it had received an “Amicus Commisae” brief from Rights International, although it did not indicate that it had relied on it in its conclusions.\textsuperscript{84} The Commission applied the internationally-recognized standard on the issue of judge and jury impartiality, that of “an objective test based on reasonableness, and the appearance of impartiality.”\textsuperscript{86} The Commission’s application of the standard, referring to authority from both the European Court of Human Rights and the United Nations Committee to Eliminate Racial Discrimination, made it clear that once the defendant has introduced evidence (“a suspicion”) that a juror might be biased, it is incumbent on the government to investigate and to demonstrate that impartiality had been maintained.\textsuperscript{86} Under the facts of this case, the Commission concluded that the failure to conduct an evidentiary hearing of the jury following the evidence of racial bias present in trial constituted violations of Articles XXVI and II, which deprived Mr. Andrews of “an impartial trial in the United States Courts.”\textsuperscript{87}

Finally, the Commission found a violation of the Article XXVI provisions against “cruel, infamous or unusual” punishment, noting that Mr. Andrews “spent eighteen years on death row, and was not allowed to leave his cell for more than a few hours a week. During that time he received notice of at least eight execution dates and was executed by the State of Utah in July of 1992 . . . .”\textsuperscript{88} Although it did not explicitly refer to the decision, the Commission’s conclusion arose from an allegation that this case raised the issue of the “death row phenomenon,” which had given rise to a similar finding of cruel, inhuman or degrading treatment by the European Convention of Human Rights in \textit{Soering v. United Kingdom}.\textsuperscript{89}

After making its findings, the Commission recommended

\begin{footnotes}
\footnotetext[84]{Id. ¶¶ 138-39.}
\footnotetext[85]{Id. ¶ 159.}
\footnotetext[86]{Id. ¶¶ 159-61.}
\footnotetext[87]{Id. ¶¶ 171-74.}
\footnotetext[88]{Id. ¶ 178.}
\end{footnotes}
that the United States "must provide adequate compensation to Mr. William Andrews' next of kin" for the violations it had found.\textsuperscript{90} It also asked the U.S. government to inform it of the measures it had taken to comply with its recommendations.\textsuperscript{91} The U.S. government’s response, by letter, stated that “Mr. Andrews received an impartial trial free of racial bias,” and that it "cannot agree with the Commission’s findings, or carry out its recommendations."\textsuperscript{92} No domestic judicial action was taken to enforce the Commission’s recommendations.

The only other case to be resolved on the merits was Garza v. United States, decided in April of 2001.\textsuperscript{93} The case was noteworthy from the outset for two significant reasons. First, this was the first federal death penalty case to reach the Commission, and, at the time of its filing, was the first federal case to complete review in the United States after broad expansion of the penalty at the federal level in 1988, 1994 and 1996.\textsuperscript{94} If the highly public “voluntary” execution of Timothy McVeigh, the alleged Oklahoma City federal building bomber had not taken precedent, Garza would have been the first federal execution in thirty-five years. Due to the controversial nature of the issues in the case, President Clinton granted two temporary reprieves in Garza’s case, first in August of 2000 and again in December of that year, which also contributed to its being overshadowed by the McVeigh appeals.\textsuperscript{95} A second noteworthy aspect of this case was that

\textsuperscript{90} Andrews, Inter-Am. C.H.R. ¶ 188.
\textsuperscript{91} Id. ¶ 189.
\textsuperscript{92} Id. ¶ 190.
\textsuperscript{94} Id. ¶ 74, in which the Commission notes that President Ronald Reagan signed into law the Anti-Drug Abuse Act of 1988, rendering the death penalty available as a possible punishment for certain drug-related offenses. Subsequently, in September 1994, the Federal Death Penalty Act was enacted, which provided that over 40 offenses could be punished as capital crimes, and in 1996, the Anti-terrorism and Effective Death Penalty Act came into effect that further extended the list of Federal capital crimes to include additional Federal offenses.
\textsuperscript{95} Id. The Report of the Commission in Garza indicates that the reprieve of August 2000 was granted “until the U.S. Department of State had completed drafting guidelines for seeking presidential clemency in such cases.” Id. ¶ 10. The reprieve of December 2000 was granted to permit the U.S. Department of Justice to complete a study of possible racial and regional bias in the imposition of the death penalty in the federal system. See Michelle Mittelstadt, Clinton
the Commission decided it over a period of only sixteen months, thus allowing domestic lawyers to argue, for the first time, that the ruling of the Commission on the merits should be enforced in domestic federal court, while the death row inmate was still alive.

The petitioner argued at the threshold that capital punishment should be regarded as contrary to Article I of the American Declaration, which protects the right to life. Alternatively, the petitioner argued that the worldwide trend is toward abolition and that international law requires states to progressively restrict the death penalty. The Commission, however, while "deeply troubled" by the re-introduction of the federal death penalty after thirty-five years, and by its extension to additional crimes, found no violation of Article I. The Commission concluded that it "does not find before it sufficient evidence establishing the existence of an international legal norm binding upon the United States, under Article I of the Declaration or customary international law, that prohibited the extension of the death penalty to Mr. Garza's crimes, provided that they are properly considered to be of a 'most serious' nature." It did find that the re-introduction of the death penalty into U.S. federal law was "inconsistent with the spirit and purpose of numerous international human rights instruments to which the State is a signatory or a party, and [is] at odds with a demonstrable trend toward more restrictive application of the death penalty." One Commissioner, Helio Bicudo, expressed in a concurring opinion that "the death penalty has already been abolished by the evolution of the normative standards of the Inter-American system."

The Commission also found violations of Articles XVIII (right to a fair trial) and XXVI (right to due process of law), concluding that the sentencing jury improperly had found that Mr. Garza had committed four unadjudicated murders in Mexico. The Commission recommended commutation of the

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97. Id. ¶ 94.
98. Id. ¶ 95. The Commission explicitly found, in the same paragraph, that Garza's murder convictions constituted "most serious crimes," as required by international law.
99. Id. ¶ 94.
100. Id. (Commissioner Helio Bicudo, concurring).
101. Id. ¶¶ 102-10.
death sentence as an appropriate remedy, and suggested that if the United States proceeded with Garza's execution, such action "would give rise to its responsibility for serious and deliberate violations of its international obligations under the OAS Charter and the American Declaration."\footnote{102}

The United States government did not respond publicly to the Commission's final recommendations, and plans for Mr. Garza's execution proceeded. The petitioners sought to enforce the decision of the Commission in both the federal district court and the U.S. Circuit Court of Appeals for the Seventh Circuit.\footnote{103} The attempt at enforcement was rejected, and the execution of Mr. Garza proceeded on June 19, 2001, after certiorari was denied by the U.S. Supreme Court.\footnote{104}

Two capital cases from the United States have been found admissible and will proceed to decisions on the merits. The first is \textit{Sankofa v. United States}, admitted before the Commission just prior to Mr. Sankofa's scheduled execution in Texas in June of 2000.\footnote{105} This case arose in Texas, where Shaka Sankofa was known as Gary T. Graham before he assumed a Muslim name. He was seventeen years old at the time of the alleged crime. In addition to his youth as a bar to execution, Mr. Sankofa challenged his conviction based on a claim that he could produce evidence proving his innocence of the offense, evidence that he had not been able to produce earlier because he had been represented by ineffective counsel.\footnote{106} The Texas courts held that he was procedurally barred from raising his claims because he could not reach the "actual innocence" threshold set by the decision of the U.S. Supreme Court in \textit{Herrera v. Collins}.\footnote{107} Despite repeated issuance of precautionary measures by the Commission, as well as a strongly worded press release, Mr. Sankofa was executed on June 22, 2000.\footnote{108}

\begin{thebibliography}{9}
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\item 102. \textit{Id.} \S 118.
\item 103. \textit{Garza v. Lappin}, 253 F.3d 918 (7th Cir. 2001).
\item 106. The procedural history of Mr. Sankofa's claim of actual innocence is set out in some detail in the summary of the procedural history of the petitioner's case in the Commission's decision on admissibility. \textit{See id.} \S 31.
\item 107. 113 S.Ct. 853 (1993).
\item 108. \textit{John Aloysius Farrell \\& Patricia Kilday Hart, Texas Executes Inmate as}
\end{thebibliography}
The second case declared admissible by the Commission was that of *Martinez-Villareal v. United States*, admitted on December 4, 2000. Mr. Martinez-Villareal is a Mexican national sentenced to death in Arizona in 1983. He argues violations of Articles I, XVIII and XXVI (rights to life, fair trial and due process) of the American Declaration by virtue of his denial of consular access under the Vienna Convention on Consular Relations. In addition, he argues violations of the same provisions due to his denial of the right to effective counsel and his mental illness, which renders him incompetent to stand trial or to be sentenced to death. He argues violations of Articles XVIII and XXVI because of the delay in rendering a final decision in his case, and violation of the right to equality before the law under Article II "because of the manner in which the death penalty is administered by the states of the United States."

B. *The Evolving Legal Position of the U.S. State Department*

The State Department Legal Advisor's positions at the Commission in recent cases continue, in some respects, its pattern of resistance to the authority of the Commission. In other ways, however, the Office's positions have become less overtly hostile to the Commission's review.

The Office has continued to rely excessively on domestic law in capital litigation before the Commission, grounding its responses largely in a litany of domestic appellate cases deciding issues against the petitioners in *Andrews*, *Sankofa*, and *Martinez-Villareal*.

Until the Garza case, the United States seems also to have adhered to hackneyed arguments that the decisions of
the Commission were not binding, and that failure to exhaust domestic remedies prevents the petitioner from invocation of the jurisdiction of the Commission. Exhaustion of domestic remedies in capital cases is always a difficult process, with ongoing and complex multiple reviews by appellate and trial courts of the United States, particularly as execution grows near. Remarkably, however, in Garza, the United States made neither of these claims, whatever may have been the reasoning of its lawyers. Instead, the United States contended that the claim was manifestly ill-founded and failed to state a claim for which relief could be granted. The different approach by the government may well have been the key to the Commission's decision to push for speedy resolution of the case prior to the petitioner's execution.

The U.S. government also has been more active in recent years in oral proceedings before the Commission. In my early years in litigation against the United States there, the State Department routinely sent a student intern to observe and report back what happened at hearings. In the last several hearings involving capital litigation against the United States at the Commission, more than one well-prepared lawyer from the Legal Advisor's office (and sometimes unidentified minions from other departments, usually the Department of Justice) has appeared to defend the United States.

C. Pending Cases Against the United States: Issues with Enforcement of Precautionary Measures

In early death penalty cases against the United States, the Commission did not use the formal device of precautionary measures to prevent an execution. Instead, the Commission would send cables or notes to the government to seek a stay of domestic proceedings pending Commission review. All of that changed in the last five years.

Since 1996, the Commission has sought precautionary measures in at least fourteen reported capital cases against


115. In Andrews v. United States, for example, the Commission notes that at a February 1994 hearing, the "representative of the government observed the hearing, but did not participate in the same." Case 11.139 (Andrews v. United States), Inter-Am. C.H.R. ¶ 17, OEA/ser.I/V/II.98, doc. 6 rev. (1998).
the United States, ten of which occurred in 2000. As the caseload against the United States rises, it will almost certainly find itself the recipient of increasing numbers of such requests, all of which, to date, have been ignored or, as in the past, left to the discretion of the states.

The United States has strongly reiterated, as recently as April of 2001 in Garza v. United States, that it believes the precautionary measures issued by the Commission to be non-binding. In Garza, precautionary measures had been requested by the Commission on January 27, 2000. In its report on the merits, the Commission expressed at length and in its strongest language to date, its displeasure with the United States for failing to honor the Commission's request for precautionary measures:

The Commission recognizes and 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. It is for this reason that the Commission requests

116. The following cases are noted in the Annual Reports of the Commission from 1996 onward as having resulted in the issuance of precautionary measures: Richard Steven Zeitvogel v. United States, precautionary measures sought on December 6, 1996, no response from the state; Allan J. Bannister v. United States, Case No. 11.817, precautionary measures sought on October 15, 1997, the United States reported that it had forwarded the measures to the Office of the Attorney General of Missouri, petitioner executed October 23, 1997; Sean Sellers v. United States, executed in Oklahoma on February 4, 1999 after issuance of precautionary measures in January; David Leisure v. United States, Case No. 12.201, Missouri defendant executed on September 1, 1999 after issuance of precautionary measures on August 27, 1999. In the 2000 Annual Report, supra, n. 26, the Commission issued precautionary measures in ten cases, all of which were opened and are pending before the Commission: Douglas Christopher Thomas, Case No. 12.240, precautionary measures issued on January 6, 2000; Juan Raul Garza, Case No. 12.243, precautionary measures issued on January 27, 2000; Shaka Sankofa, Case No. 11.193, precautionary measures issued on February 4, June 15 and June 22, 2000; Victor Saldano, Case No. 12.254, precautionary measures issued on March 13, 2000; Michael Dominguez, Case No. 12.285, precautionary measures issued on May 26, 2000; Johnny Paul Penry, Case No. 12.340, precautionary measures issued on November 8, 2000; James Wilson Chambers, Case No. 12.341, precautionary measures issued on November 10, 2000; Alexander Williams, Case No. 12.348, precautionary measures issued on December 16, 2000; and Jose Jacobo Amaya Ruiz, Case No. 12.351, precautionary measures issued on December 15, 2000.

precautionary measures pursuant to Article 29(2) of its Regulations, as it has in Mr. Garza's case, to require a state to stay a condemned prisoner's execution until the Commission has had an opportunity to investigate his or her claims. Anything less effectively deprives condemned prisoners of their right to petition in the inter-American human rights system and causes them serious and irreparable harm. Accordingly, the Commission has on numerous occasions called upon the United States and other OAS member states to comply with the Commission's requests for precautionary measures in cases involving threats to the right to life and thereby properly and fully respect their international human rights obligations.  

The United States has faced increasingly hostile treatment in other international tribunals with regard to its failure to abide by preliminary orders from those bodies. In the judgment of the International Court of Justice on the merits in the LaGrand Case (Germany v. United States of America), the Court concluded, for the first time in its history, that its own provisional measures are binding. The LaGrand case also arose in the death penalty context. The German government had sought review in the International Court of Justice to settle a dispute with the United States with regard to its obligations under the Vienna Convention on Consular Relations. On March 3, 1999, the Court issued provisional measures to the United States ordering it not to execute Mr. LaGrand during the pendency of proceedings before the Court.

Germany's intervention arose in defense of a German national, Walter LaGrand, who had been sentenced to death in Arizona without the benefit of consultation with his consulate. The German government sought to file an original ac-

118. Id. ¶ 66. In a footnote, the Commission noted that it had issued press releases in the cases of both Sankofa v. United States and Miguel Angel Flores, calling on the U.S. "and other OAS member states" to respect their international human rights obligations. Id. ¶ 66 n.27.  
120. Id. ¶ 109.  
tion in the United States Supreme Court to enforce the preliminary measures order of the International Court of Justice, which directed the United States to prevent Arizona's imminent scheduled execution of Mr. LaGrand. Noting that the U.S. Solicitor General had filed a letter that opposed any stay, the Supreme Court denied Germany's motions, with dissents by Justices Breyer and Stevens. Walter LaGrand was executed that same day.

The U.S. State Department, through the same office of the Legal Advisor, defended U.S. government actions before the ICJ on much the same basis as it had before the Commission. It argued that once it had received the provisional measures from the Court, it "immediately transmitted the Order to the Governor of Arizona," thereby placing "the Order in the hands of the one official who, at that stage, might have had the legal authority to stop the execution." The government argued that two central factors constrained its actions: shortness of time and "the character of the United States of America as a federal republic of divided powers."

The ICJ was not persuaded. It observed that "the mere transmission of the Order to the Governor of Arizona without any comment, particularly without even so much as a plea for temporary stay and an explanation that there is no general agreement on the position of the United States that orders of the International Court of Justice on provisional measures are non-binding, was certainly less than could have been done even in the short time available." The ICJ concluded "the various competent United States authorities failed to take all the steps they could have taken to give effect to the Court's order." The Commission has a similar argument with respect to the adequacy of steps taken by the United States government following issuance of its own precautionary

125. Final Judgment, supra note 119, ¶ 95.
126. Id.
127. Id. ¶ 112.
128. Id. ¶ 115. The ruling also suggests that the government's abstention position may also have been overstated. For a position arguing that subnational units can and should be held responsible for human rights violations, see Peter J. Spiro, The States and International Human Rights, 66 FORDHAM L. REV. 567 (1997).
measures.¹²⁹

D. Advisory Opinion of Inter-American Court Rejecting the U.S. Position

The United States government has appeared once in proceedings before the Inter-American Court of Human Rights. In 1999, the Court issued its Advisory Opinion OC-16.¹³⁰ The United States appeared to defend its treatment of foreign nationals on death row in the United States.¹³¹ Mexico had invoked the advisory jurisdiction of the Court to clarify obligations of OAS states with regard to providing detainees in the host state for consular access under the provisions of the Vienna Convention on Consular Relations. The Court roundly rejected the U.S. government's position in virtually all respects. Most importantly, it found that the Vienna Convention did create personal rights held by the detainee; that compliance with the Vienna Convention contributes to effective implementation of the right to due process of law as set forth in Article 14 of the International Covenant on Civil and Political Rights, to which the United States is a party; that strict observance of due process is required in order to avoid the arbitrary deprivation of life by application of the death penalty; and that the consequences for failure to notify a foreign national of the right to seek consular assistance affects due process guarantees; the violations of which give rise to international responsibility and the obligation to provide reparations.¹³²

¹²⁹ This is not to suggest that the Commission has the same powers or jurisdiction over the United States as does the World Court, but only to suggest the parallel of U.S. inaction in the two contexts. For other discussions of the binding effects of the World Court's provisional measures, see Alison Dusbury, Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights, 31 CAL. W. INT'L L. J. 141 (2000); Eva Reiter, Interim Measures by the World Court to Suspend the Execution of an Individual: the Beard Case, 16 NETHERLANDS Q. HUM. RTS. 475 (1998).
¹³⁰ Advisory Opinion OC-16/99, supra note 11.
¹³¹ The Death Penalty Information Center indicates that as of February 6, 2002, there were 119 identified foreign nationals on death row in 33 states, with 53 from Mexico. Death Penalty Information Center, Foreign Nationals and the Death Penalty in the United States (Feb. 6, 2002), available at http://www.deathpenaltyinfo.org/foreignnatl.html, visited on February 18, 2002.
V. CONCLUSION: U.S. EXCEPTIONALISM IN LITIGATION AS ABERRATION FROM EXPRESS FOREIGN POLICY AND THE COMMUNITY OF NATIONS

In the Garza report by the Commission, the petitioners mounted a frontal assault on the abolition of the death penalty, arguing that international law had evolved to the point that capital punishment was no longer permissible. One Commissioner agreed with that position, and others may follow. In Garza, the Commission also took note of evidence that suggests "the existence of an international trend toward restrictive application of the death penalty," as well as assertions by the Inter-American Court of Human Rights that the only fair reading of the American Convention is one which will "reduce the application of the [death] penalty to bring about its gradual disappearance." Other scholars have argued that the death penalty is now an inhuman punishment, or that the entire structure of treaty law on the death penalty is moving the world toward certain abolition.

The United States government holds firm to its legal position that the death penalty is not a violation of international law as the circle of death's defenders grows smaller and smaller. For now, it ignores the reports and provisional measures of the Inter-American Commission on Human Rights issued against it.

This rigid legal position flies directly in the face of expressed U.S. foreign policy on consistency in the application of human rights obligations in the region. In May of 1992, for example, the U.S. Ambassador to the OAS, Luigi R. Einaudi, stated publicly that while the U.S. had not ratified the American Convention, "We have never argued, however, that nonratification exempts us from the Commission's criticism. When we affirm support for the Commission, we express our readiness to have its judgments applied to ourselves." Simi-
larly, in 1999, then-U.S. Ambassador to the OAS, Victor Marrero, stated the following to a committee of the OAS: “We have never argued that we are exempt from criticism by virtue of our failure to ratify [the American Convention on Human Rights]. . . . We affirm no standard that we are not prepared to have applied to ourselves and our support is for a process to which we ourselves have submitted.”\(^{139}\) The consistent practice of the Legal Advisor’s office to negate absolutely any invocation of legal authority by the Commission seems to undermine our stated diplomatic position that we are full partners in the assumption of human rights responsibilities in the Americas.

Whether the legal effects of the Commission’s decisions are denied or accepted by the United States, however, each ruling of the Inter-American Commission on Human Rights makes the position of the United States in defense of capital punishment less tenable. Each ruling creates additional stigma for the United States, further isolating it in the world community. Each ruling provides greater juridical precision to international law on the death penalty and narrows the terrain in which the U.S. government can justify its actions. Each decision is a victory for the universal application of human rights norms, and each decision strongly signals the will of the international community against the continued practices of the United States.\(^{140}\) If the Commission contributes that, that is enough.

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140. I am grateful to Doug Cassel for a borrowed construct in this closing paragraph. See Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHICAGO J. INT’L L. 121 (2001).