

AN INSTITUTION WORTH DEFENDING

The Inter-American Human Rights System in the Trump Era

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La *Silla Vacía*. The Empty Chair. For students of Latin American history, the term evokes a scene during the ill-fated Caguán peace talks of the late 1990s, when FARC guerrillas could not be bothered to show up for scheduled negotiations with Colombian President Andrés Pastrana. In March of this year, the Trump Administration brought new meaning to the phrase when, for the first time in memory, it left the United States delegation's seats unoccupied at hearings of the Inter-American Commission on Human Rights (IACHR). The Administration explained its absence by citing ongoing domestic litigation regarding the issues under

consideration, but the early boycott of Commission hearings raised serious questions and concerns. Was it indicative of a new administration finding its feet, or a harbinger of things to come?

It's complicated: A short history of the United States and the IACHR

The IACHR has earned its reputation as the human rights watchdog of the Americas. From documenting disappearances in the 1970s and 1980s to buttressing democratic transitions and defending indigenous and LGBTI communities from discrimination in more recent times, the Commission's work is woven into the fabric of a hemisphere that defines itself as a community of democracies. Though imperfect and chronically under-resourced, the IACHR continues to be a bulwark against the worst abuses, backed by the official imprimatur of the Organization of American States (OAS) and wielding a suite of Inter-American human rights treaties.

The IACHR's contributions to democratic governance in the Americas have led successive US administrations,

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both Republican and Democrat, to express strong support for its work in Latin America and the Caribbean. Across administrations, the United States government has been the Commission's leading donor and one of its most vocal supporters. When it comes to the Commission's work on human rights in the United States, however, the story gets complicated.

As an OAS member, the US falls under the Commission's jurisdiction, and indeed the Commission has long scrutinized US human rights practices in areas such as the death penalty, immigration, racial justice, and the detention center in Guantánamo Bay, Cuba. However, the United States never ratified the principal OAS human rights treaty, the American Convention on Human Rights, a prerequisite to joining the separate Inter-American Court of Human Rights. As a result, the US government considers Commission decisions on US matters mere recommendations and, in practice, rarely takes serious steps to comply with decisions. Nonetheless, the US has perceived a strategic interest in the IACHR's efforts

decisions. Change was incremental, but unmistakable. During the George W. Bush Administration, the Commission's thematic hearings on US human rights issues regularly featured State Department officials delivering *pro forma* statements of support for the Commission's work but failing to engage on substance. During the Obama years, such hearings—roughly ten per year—came to include representatives of not just the State Department but federal (and in some case state) departments and agencies who could address the merits of the issues under consideration. In 2015, for the first time, the US government actually requested a hearing itself, on the issue of criminal justice and race.

The State Department also facilitated several fact-finding missions by the Commission. In 2014, the IACHR visited New York State and the District of Columbia to assess juvenile detention facilities as well as the US southern border to monitor the human rights situation of unaccompanied children. In 2015, the Commission visited Florida, Louisiana, and Missouri to research issues of race and the criminal justice system. Indeed, over this two-year period the IACHR conducted more visits to the United States than any other country in the hemisphere. And the United States maintained its longstanding status as the primary funder of the IACHR—even though, at under \$6 million in 2016, this support amounts to roughly the cost of a single Black Hawk helicopter.

This engagement has paid diplomatic dividends, allowing the United States to advance its interest in a strong Commission in other ways. In competitive elections, OAS member states elected prominent US legal scholars to serve on the Commission—George Washington University law professor Dinah Shelton in 2009 and Stanford law professor James Cavallaro in 2013. Also

in 2013, the OAS political bodies concluded discussions on “strengthening” the IACHR that often threatened to weaken its independence and effectiveness. The US was a consistent defender of the Commission's prerogatives in these discussions, but only by leveraging the increased credibility gained through its deepening engagement with the Commission was it able to play a meaningful role—with Mexico and others—in defeating the most damaging reform proposals put forward, the most notable by Ecuador.

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to monitor, denounce, and address human rights violations in the Americas—notably in countries like Venezuela and Cuba—and an associated interest in conveying respect for the Commission, including by facilitating the Commission's work on domestic human rights issues.

Under the Obama Administration, this engagement grew fairly robust. To be sure, the US did not ratify the American Convention on Human Rights or join the Inter-American Court. Nor did the US begin complying with all Commission

Two steps back

The trend toward increasing US engagement with the IACHR hit a speed bump on March 21, 2017. The IACHR was scheduled to hold hearings on the Trump administration's travel ban and immigration enforcement expansions, but US government representatives failed to materialize. A State Department spokesman explained the absence saying "it is not appropriate for the United States to participate in these hearings while litigation on these matters is ongoing in US courts."

Experienced advocates are skeptical of this reasoning. Certainly, while specific legal issues remain unresolved in US courts it can be necessary for government lawyers to tread lightly on such issues before the Commission. But in a letter to Secretary of State Rex Tillerson, some thirty US-based human rights organizations observed that, "ongoing litigation has not precluded US participation in hearings

before the Commission in the past, nor should it in the future." A quick YouTube search of past hearings proves their point. For example, in an October 2015 hearing on renditions, detention, and interrogation, the United States delegation noted that it could not comment on specific cases under litigation that were raised by the petitioners, but nonetheless addressed the issues in a general manner and mentioned multiple investigations into allegations of torture conducted by the Department of Justice. Similarly, in a December 2016 hearing on indigenous persons and extractive industries, the US delegation made caveats about ongoing investigations but nonetheless discussed efforts by the government to de-escalate conflicts related to the construction of the Dakota Access Pipeline and to incorporate Native American leaders in the decision-making of future infrastructure projects.

Human rights advocates and observers of hemispheric affairs were quick to note the broader implications of the US absence at Commission hearings. *The New York Times* called the decision an "abdication on human rights,"



EMPTY CHAIRS OF THE US DELEGATION DURING AN IACHR HEARING ON MARCH 21, 2017

Source: Comisión Interamericana de Derechos Humanos / Flickr / CC BY 2.0

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arguing that the “misguided decision will make it easier for neighboring governments to disregard principles and commitments enshrined in the O.A.S. charter.” Andres Oppenheimer echoed the point in *The Miami Herald*, accusing the Administration of handing a “propaganda victory to Cuba and other authoritarian populist regimes that often boycott the commission’s hearings.” The concern is that by undermining its own standing on human rights, the United States may diminish its diplomatic effectiveness on pressing issues such as growing authoritarianism and human rights abuses in Venezuela—on which the Trump Administration, to its credit, has been vocal.

One step forward

The US decision to back out of Commission hearings stands in contrast with its decision just two weeks earlier to nominate Douglas Cassel, a Notre Dame law professor and well-regarded expert on hemispheric human rights issues and the Inter-American system, to serve on the IACHR. Cassel is known for his independence, having been nominated for prior international posts by both Republican and Democratic administrations. As such, the Trump Administration’s decision to nominate him suggested an



CANDIDATES FOR COMMISSIONER OF THE IACHR SPEAKING AT THE INTER-AMERICAN DIALOGUE ON MAY 5, 2017

Source: Irene Estefanía González / Inter-American Dialogue

appreciation for the seriousness of the role of the IACHR, and contrasted favorably with the 2003 decision of the Bush Administration to nominate a politically connected but poorly qualified candidate—to this day the only US candidate to lose a race for the IACHR (the Bush Administration remedied its error two years later, successfully nominating Notre Dame law professor Paolo Carozza to serve on the Commission). The vote at the 2017 OAS General Assembly in Mexico is likely to be hotly contested, with six candidates vying for three seats. If Cassel is elected, it will be due precisely to his expertise and independence, vindicating the decision to put him forward as the individual best prepared and able to preserve US representation on the Commission.

An uncertain future

It remains too early to draw conclusions about the Trump Administration's posture toward the IACHR. Scheduled hearings in October will offer the Administration the chance to further consider its approach. Perhaps faced with additional time to weigh the implications of undercutting the IACHR and passing up the opportunity to explain its own policies, the Administration will opt for a strategy of constructive engagement with the Commission. Certainly, continuing strong Congressional interest in hemispheric human rights issues—including from prominent Republicans—may generate pressure to support the hemisphere's human rights watchdog rather than mimic the disregard shown the Commission by the region's less democratically minded governments.

Many of the Trump Administration's early steps and statements, however, suggest a Washington wedded to a more hands-off approach to human rights enforcement in the Americas and around the world. With a few exceptions—Venezuela among them—the administration has shown itself in word and deed to prioritize hard power over soft, “America first” over collective action, and realpolitik over a foreign policy underpinned by democratic values. Secretary of State Tillerson, in a speech to State Department employees, indicated the U.S. must recognize the difference between values and policy. President Trump reiterated these sentiments in his speech in Saudi Arabia, where, before an audience of mainly autocratic Arab leaders, he said, “America will not seek to impose our way of life on others.” The proposed budget for Fiscal Year 2018 effectively affirms this posture, cutting foreign aid programs, including contributions to international organizations, to make room for a \$54 billion increase in military spending.

American exceptionalism is not new to US foreign policy. But whether on NATO, the Trans-Pacific Partnership, or the Paris Climate Accord, the current administration appears to be particularly skeptical of the efficacy of supporting global cooperative arrangements, particularly if such arrangements hamstring domestic policy. The IACHR's early critiques of the Administration's policies on immigration issues such as the border wall and the temporary ban on entry for citizens of seven predominantly Muslim nations may not have gone unnoticed.

US administrations have differed in how they respond to international scrutiny. Some have seen the critiques as a threat to US sovereignty, and pull back. Others see a chance to lead by example, and lean in.

International scrutiny of US human rights practice is also hardly novel. When President Obama addressed the UN General Assembly in 2014, for example, he acknowledged the world's deep concern over the events roiling Ferguson, Missouri at the time. US administrations have differed, however, in how they respond to this scrutiny. Some have seen the critiques as a threat to US sovereignty, and pull back. Others see a chance to lead by example, and lean in. Experience has shown that the US is secure in either case: with a free press, independent judiciary, and robust civil society, the United States' own institutions are generally far more exacting than anything the international community can muster. History has also shown, however, that when the United States pulls back, its international standing and ability to advance its regional and global interests suffer. Canny foreign governments have used perceptions of double standards and lack of engagement to undermine US diplomacy and the international institutions, including the IACHR, that the United States supports.



**IACHR VISTINGING AYOTZINAPA, GUERRERO, MEXICO IN
SEPTEMBER, 2015**

Source: Comisión Interamericana de Derechos Humanos / Flickr / CC BY 2.0

STRATEGIC REASONS FOR US ENGAGEMENT WITH THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

- Strong, accountable democratic governance furthers the US interest in a peaceful, stable, and prosperous hemisphere. The IACHR is a proven low-cost, high-return investment in a better neighborhood for the United States.
- Precisely because of the IACHR's effectiveness, countries critical of US influence in the Americas have sought to promote alternative, toothless human rights mechanisms in sub-regional fora such as UNASUR in order to weaken the IACHR and lessen scrutiny of their democratic shortcomings. A US pullback from the IACHR plays into their hands.
- The appearance of hypocrisy or double standards, especially on issues of human rights, can undermine US standing in the Americas (and beyond). In a region with long memories of heavy handed US interventionism, effective 21st century leadership most often requires leading by example. Failing to do so undercuts US legitimacy and any effort to push for democratic reforms and human rights protections in other countries.
- As the Trump administration saw after the March missed hearings, such actions are likely to bring far more noise and criticism than maintaining the status quo. The Commission will not cease examining US human rights practices; boycotting IACHR proceedings simply deprives the US government an opportunity to present its side of the story.
- In the past, the staunchest critics of the United States in Latin America—especially Venezuela—have been among those with the worst human rights records. US abdication on the IACHR would undermine the Commission at precisely the moment the Inter-Americans system is seeking to mobilize an effective response to Venezuela's violations of hemispheric democracy and human rights norms.

In the months ahead, the Trump Administration may be uncertain of the value proposition of the Inter-American human rights system or tempted by the ease and simplicity of self-segregation. Cooler heads will know that engagement with the IACHR has proven strategically important and represents a low-cost, high-reward opportunity for the US to buttress democratic governance in the Americas. While Secretary Tillerson is correct that US interests and values are at times in tension, the Trump Administration would do well to realize both are better advanced through a policy of continued engagement with the crown jewel of the Inter-American System. Full-fledged US participation in the Inter-American human rights system, through ratification of the American Convention on Human Rights and membership in the Inter-American Court, is likely to remain out of reach politically for the foreseeable future. But there remain a number of incremental, achievable options for demonstrating continued US engagement and support for the IACHR. Showing up would be a good place to start.



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