

**STATE-SANCTIONED ABUSES AT THE
U.S.-MEXICO BORDER USING THE INTER-AMERICAN
COMMISSION ON HUMAN RIGHTS TO HOLD THE
UNITED STATES TO ACCOUNT**

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ABSTRACT

In May 2010, Anastasio Hernández Rojas died after sustaining brutal injuries at the hands of U.S. Border Patrol. His death has since become one of the highest-profile incidents of Border Patrol's excessive use of force against migrants at the U.S.-Mexico border. Despite video footage released from the scene depicting abusive acts by Border Patrol and calls from Congress to investigate the incident, not a single officer was held accountable and, in 2015, DOJ declined to pursue criminal charges. But renewed hope for justice came in 2016, when the family of Anastasio Hernández Rojas took their case to the Inter-American Commission on Human Rights ("Commission"). This case is the first before the Commission to address law enforcement violence at the U.S.-Mexico border and the first to accuse U.S. law enforcement of an extrajudicial killing. This Note examines how a Commission decision against the United States in this case may encourage meaningful reform in law and policy related to border abuses in the United States. Specifically, this Note argues that a Commission decision against the United States has the power to increase international attention on abuses at the U.S.-Mexico border, facilitate activism around excessive use of force at the border, and reframe border abuses as human rights issues. Ultimately, the decision in the Anastasio Hernández Rojas case can pave the way for similarly situated victims to make use of the Commission to hold the United States accountable for state-sanctioned human rights abuses.

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INTRODUCTION

On May 28, 2010, pedestrians on a footbridge near the U.S.-Mexico border in San Diego stopped to observe a disturbing scene below: a man inside a border checkpoint was screaming “*ayúdame*,” meaning “help me,” as he lay handcuffed on the ground in fetal position, surrounded by U.S. Border Patrol officers.¹ The onlookers saw the officers tasing the man repeatedly, beating him with clubs, hitting him, kicking him, dragging him, and kneeling on him until he was unresponsive.² The onlookers recorded videos on cell phones and cameras before being forced to disperse.³ Witnesses allege that the officers began grabbing people’s cameras and deleting videos from the scene.⁴

The man on the ground was Anastasio Hernández Rojas—a 42-year-old father of five who had lived in San Diego since age 15.⁵ He had been deported to Mexico earlier in May 2010 after attempting to shoplift at a grocery store.⁶

1. Cleve R. Wootson, *Border agents beat an undocumented immigrant to death. The U.S. is paying his family \$1 million*, WASH. POST (Mar. 28, 2017), <https://perma.cc/W83B-P62A>; PBSNeedtoKnow, *Crossing the line at the border: Part I*, YOUTUBE (Oct. 22, 2012), <https://perma.cc/PCY4-73S5> [hereinafter PBS Documentary].

2. Wootson, *supra* note 1; PBS Documentary, *supra* note 1; *Estate of Anastacio Hernández Rojas et al. v. United States of America et al.*, IREDALE & YOO, APC, <https://perma.cc/8VGZ-WLF6> (last visited May 21, 2022); Additional Observations on Merits Submitted on Behalf of Petitioner, Family Members of Anastasio Hernández Rojas v. United States, Case 14.042, Inter-Am. Comm’n H.R. (2021) <https://perma.cc/D92K-BJPR> [hereinafter Petitioner’s Additional Observations].

3. Wootson, *supra* note 1.

4. *Id.*

5. PBS Documentary, *supra* note 1; Petitioner’s Additional Observations, *supra* note 2.

6. Wootson, *supra* note 1.

He was detained on May 28, upon attempting to return to the United States to reunite with his family.⁷ Later that night, officers brought Hernández Rojas to a gated checkpoint where the ultimately fatal incident occurred: he suffered five broken ribs, abrasions on the face and body, hemorrhaging of internal organs, brain damage, a heart attack, and cardiac arrest.⁸ A few days later, he was pronounced dead while on life support.⁹

The story of what happened to Anastasio Hernández Rojas has become one of the highest-profile incidents of abuse by Border Patrol at the U.S.-Mexico border and is emblematic of Border Patrol's "routine" excessive use of force against migrants and the lack of accountability for abuses.¹⁰ In the aftermath of the incident, U.S. authorities disseminated a story that contradicted what witnesses saw, describing Hernández Rojas as combative and without handcuffs and therefore requiring the officers to use a taser.¹¹ In 2012, however, PBS released a documentary with videos from the incident that corroborated witness reports.¹² One can see Hernández Rojas handcuffed on the ground while officers tase him repeatedly, remove his pants, and kneel on his neck.¹³ The documentary highlighted the lack of meaningful action from U.S. authorities to investigate the incident or hold officers accountable.

The documentary reignited domestic and international outrage over the case.¹⁴ In 2012, sixteen members of Congress wrote a letter to the Department of Homeland Security (DHS) requesting further investigation into the incident and an explanation from Border Patrol's parent organization, U.S. Customs and Border Protection (CBP), regarding their use-of-force policy.¹⁵ The letter expressed concern that CBP had a "cultural problem," evidenced by numerous allegations of deaths and abuses at the hands of Border Patrol and

7. *Id.*

8. Petitioner's Additional Observations, *supra* note 2; Anastasio Hernández Rojas, S. BORDER COMMS. COAL., <https://perma.cc/6VJ5-TWJ3> (last visited May 21, 2022).

9. Anastasio Hernández Rojas and Family v. United States, Case 14,042, Inter-Am. Comm'n H.R., Report No. 198/20, OEA/Ser.L/V/II, doc. 212 (2020), <https://perma.cc/Q6H6-JJUP> [hereinafter Report on Admissibility]; Kate Morrissey, *U.S. officials accused of cover-up in 2010 border killing in international human rights case*, L.A. TIMES (Feb. 4, 2021), <https://perma.cc/PEX7-AAG2>; *Justice for Anastasio Hernández Rojas*, S. BORDER COMMS. COAL., <https://perma.cc/6ZVT-VK2K> (last visited May 21, 2022).

10. See DANIEL E. MARTINEZ, JEREMY SLACK & JOSIAH HEYMAN, *BORDERING ON CRIMINAL: THE ROUTINE ABUSE OF MIGRANTS IN THE REMOVAL SYSTEM* (Immigr. Pol'y Ctr, ed. 2013); Brian Bennett & Joseph Tanfani, *Family asks multinational human rights panel for help in taser death at border in San Diego*, L.A. TIMES (Mar. 30, 2016, 9:58 AM), <https://perma.cc/RM6J-ZT6P>; *Fatal Encounters with CBP Since 2010*, S. BORDER COMMS. COAL., <https://perma.cc/RM6J-ZT6P> (last visited May 21, 2022).

11. Press Release, San Diego Police Department, Incident with Federal Agents Leaves One Man in Critical Condition (May 29, 2010), <https://perma.cc/M4SC-CME6>.

12. PBS Documentary, *supra* note 1.

13. *Id.*; Democracy Now!, *Family of Mexican Man "Tortured & Killed" by U.S. Border Agents Seeks Justice at Int'l Tribunal*, YOUTUBE, (Mar. 30, 2016), <https://perma.cc/8Q3A-RKSF>.

14. See Elizabeth Aguilera, *Border-death documentary helps launch national campaign*, SAN DIEGO TRIB. (Apr. 24, 2012), <https://perma.cc/Y7NE-M3A4>.

15. Letter from Members of Cong. to Charles K. Edwards, Acting Inspector General of the Dep't of Homeland Sec. (May 10, 2012), <https://perma.cc/3AZ9-GBUG> [hereinafter Congress Letter to DHS IG Edwards].

a considerable lack of transparency on its policies.¹⁶ Congress did not receive a direct response.¹⁷ To this day, CBP has not disciplined, fired, or docked the pay of any of the officers involved.¹⁸ In 2015, the U.S. Department of Justice declined to pursue criminal charges against the officers.¹⁹ While the family of Hernández Rojas received a civil settlement in 2017, the family did not view the compensation as just. Hernández Rojas' wife, Maria Puga, said “[t]his agreement is not justice. . . my husband’s life does not have a price.”²⁰

Now more than twelve years after the incident, the family of Hernández Rojas has renewed hope for justice. In 2016, after exhausting all domestic remedies, they filed a petition to the Inter-American Commission on Human Rights (“the Commission”), a principal organ of the Organization of American States (“OAS”). The Commission found the case admissible in 2020, despite U.S. objections to jurisdiction, and moved the case to the merits phase.²¹ A hearing on the merits took place on November 4, 2022.²² This is the Commission’s first case involving law enforcement violence at the U.S.-Mexico border and the first to include an accusation against U.S. law enforcement for an extrajudicial killing.²³

This case is timely. In the past few years, Border Patrol officers have continued to abuse immigrants and have shown no signs of stopping.²⁴ The violence continues despite CBP’s efforts to reform.²⁵ Moreover, efforts to pursue criminal convictions and civil liability against Border Patrol have all but failed. To this day, not a single Border Patrol officer has been convicted of a killing and very few have faced prosecution.²⁶

An international solution is needed to put an end to CBP’s abusive practices and to hold officers accountable domestically. At a high level, this Note

16. *Id.*

17. Congress did not receive a direct reply to the letter, but it should be noted that CBP undertook efforts to reform the Use of Force Policy in 2014. See discussion *infra* Part I.b; see also Elizabeth Aguilera, *Feds reviewing use-of-force along border*, SAN DIEGO TRIB. (Nov. 6, 2012), <https://perma.cc/3W98-5T95>.

18. Wootson, *supra* note 1.

19. Press Release, U.S. Dep’t of Justice, Federal Officials Close the Investigation into the Death of Anastasio Hernández-Rojas (Nov. 6, 2015), <https://perma.cc/UMF2-DZVN> [hereinafter DOJ Press Release Closing Investigation].

20. Kristina Davis, *Judge OKs \$1-million settlement in border death case*, L.A. TIMES (Mar. 3, 2017), <https://perma.cc/4TNY-EQMJ>.

21. Report on Admissibility, *supra* note 9.

22. This is the latest update at the time of publishing. The parties now have 30 days to present any additional evidence and the commission is expected to decide the case early next year. Elizabeth Ireland, *Human Rights Tribunal Hears Case of 2010 San Diego Border Patrol Killing*, TIMES OF SAN DIEGO (Nov. 4, 2022), <https://perma.cc/Y25C-TBP5>.

23. Roxanna Altholz, *Elusive Justice: Legal Redress for Killings by U.S. Border Agents*, 27 BERKELEY LA RAZA L. J. 29 (2017).

24. See Daniel E. Martinez, Josiah Heyman & Jeremy Slack, *Border Enforcement Developments Since 1993 and How to Change CBP*, CTR. FOR MIGRATION STUD. (August 24, 2020), <https://perma.cc/W437-XPC5>.

25. See discussion *infra* Part I.b.; see also CBP Releases Use of Force Policy Handbook and Police Executive Research Forum Report, U.S. CUSTOMS AND BORDER PROT. (May 30, 2014) <https://perma.cc/4796-XXBE>.

26. See discussion *infra* Part I.b; See also Altholz, *supra* note 23, at 16; see generally *Fatal Encounters with CBP Since 2010*, *supra* note 10.

argues that the Inter-American Commission, and specifically its potential ruling in the case of *Anastasio Hernández Rojas and Family v. United States*, seems promising. As the only international human rights body with jurisdiction to adjudicate petitions filed by private individuals against the United States, the Commission's petition process provides a critical pathway for victims to seek accountability on the U.S. government where domestic mechanisms are insufficient. Although a significant drawback is that the Commission's decision on a case's merits is not legally binding on the United States, and therefore enforcement remains a challenge, this Note adopts an optimistic view on how the Commission's decisions can shape and reform U.S. law and policy. Specifically, this Note argues that the Commission's decisions against the United States can encourage domestic reform by: 1) increasing international attention on an issue; 2) facilitating activism; and 3) reframing issues in terms of human rights, which focuses on the victim's narrative rather than the perpetrator's and places the issue into a broader international law framework. In light of these hopeful prospects, this Note further argues that the case of *Anastasio Hernández Rojas and Family* is well-suited to achieve not only a sense of justice for Hernández Rojas' family, but to instigate meaningful reform of U.S. border policy. Given the case's unique attributes, there is an increased likelihood that a decision in the case will garner considerable media attention, open avenues for activism, and provide a much-needed reframing of border abuses in terms of human rights.

This Note proceeds in three parts. Part I evaluates the historic record of abuses at the hands of Border Patrol and the lack of accountability for those abuses. This history shows the insufficiency of U.S. judicial mechanisms and underscores the need for external pressure from the international legal system to hold the United States accountable. Part II examines how the Commission, as an international mechanism, can bring about this pressure. It provides an overview of the Inter-American system and the origins of the Commission, explaining its jurisdiction to review individual petitions, including those brought against the United States. It then highlights the importance of the petition process in achieving accountability on OAS member states, even with its imperfections. Finally, it examines the petition process with respect to the United States and shows that the petition process is comparatively underutilized. The Note analyzes whether the petition process with respect to the United States *should* be used more frequently, given the non-binding nature of the Commission's decisions. In concluding that the respective petition process should be used more frequently, the Note outlines three ways in which Commission decisions can engender greater accountability on the U.S. government. Part III turns back to the case of *Anastasio Hernández Rojas and Family* and considers the prospects its outcome has for influencing law and policy related to border abuses. This Part argues that the case has the potential to achieve needed justice, advance border policy reform, and help

other similarly situated victims hold the United States accountable for state-sanctioned human rights abuses.

I. U.S. BORDER PATROL ABUSES OF MIGRANTS

A. *Background*

U.S. Border Patrol has existed for almost 100 years, initially as part of the Immigration and Naturalization Service (INS) and currently as a part of U.S. Customs and Border Protection (CBP).²⁷ CBP was created in 2003, in the aftermath of the attacks on September 11, and housed under the newly-established Department of Homeland Security (DHS).²⁸ It was envisioned as a “comprehensive border security agency” that would combine Border Patrol and law enforcement components responsible for trade, customs, immigration, and agricultural protection.²⁹ CBP is the largest law enforcement agency in the United States today with more than 60,000 employees.³⁰

Despite Border Patrol’s long history, the heavily policed border we know today—complete with expansive segments of wall, razor wire, motion-sensing cameras, elaborate checkpoints, and uniformed agents—is relatively new.³¹ It can be traced back to the Reagan-era “war on drugs,” which led to the passage of the Immigration Reform and Control Act of 1986.³² The Act increased funding for border enforcement and led to an increase in the hiring of Border Patrol agents in subsequent years.³³ Then, in 1993, a pivotal moment for Border Patrol took place at the border between El Paso and Ciudad Juarez, with the implementation of “Operation Hold-the-Line.”³⁴ For the first time in Border Patrol’s history, rather than focusing on apprehending targets after entry into the United States, 400 agents were posted at the border and charged with diverting crossers outside of city limits in an effort to deter them from entry entirely.³⁵ The Operation was lauded, at least initially, for slowing illegal immigration and reducing the number of apprehensions, which in turn led to a decline in complaints of abuse.³⁶ The program was

27. *Border Patrol History*, U.S. CUSTOMS AND BORDER PROT., <https://perma.cc/72FC-6CHN> (last visited May 22, 2022).

28. *Id.*; KELLY L. HERNANDEZ, *MIGRA! A HISTORY OF THE U.S. BORDER PATROL* 231 (2010).

29. *See* U.S. CUSTOMS AND BORDER PROT., *VISION AND STRATEGY 2020: U.S. CUSTOMS AND BORDER PROTECTION STRATEGIC PLAN 6* (2020), perma.cc/4R4E-M56P (last visited Sept 30, 2022); *see About CBP*, U.S. CUSTOMS AND BORDER PROT., perma.cc/R9TG-LD6P (last visited May 21, 2022); *see also CBP Through the Years*, U.S. CUSTOMS AND BORDER PROT., perma.cc/EB8S-WARU (last visited May 21, 2022).

30. *See About CBP*, *supra* note 29.

31. Martínez, Heyman & Slack, *supra* note 24.

32. HERNANDEZ, *supra* note 28, at 231.

33. Arielle Chapnick, *Twenty-Five Percent: U.S. Customs and Border Protection’s New Challenges in Increasing Its Force*, 3 ADMIN. L. REV. ACCORD 57, 61 (2018).

34. TIMOTHY J. DUNN, *BLOCKADING THE BORDER AND HUMAN RIGHTS: THE EL PASO OPERATION THAT REMADE IMMIGRATION ENFORCEMENT* 51 (2009).

35. *See id.* at 59–60.

36. HERNANDEZ, *supra* note 28, at 229.

replicated elsewhere and shaped the system we have today.³⁷ The Operation was later criticized, however, for leading to a rise in migrant deaths from crossing in unsafe areas on the border.³⁸ It has also become clear that abuse of migrant did not slow down during this period.³⁹

The aftermath of September 11 brought about a pivotal time for Border Patrol, as the Bush administration's anti-terrorism agenda increased political support for border enforcement and led to additional increases in funding and personnel hiring, despite no evidence of terrorists crossing the southern border.⁴⁰ From 2000 to 2006, Border Patrol went from having 4,000 officers to 12,000.⁴¹ In 2021, the number climbed to 19,536, and, for the time being, the number of officers appears to have leveled off.⁴²

Throughout these periods of rapid hiring, individuals raised concerns about a lack of proper vetting of officers and the inadequacy of training procedures, which many feared could increase abuses of migrants.⁴³ Between 2001 and 2011, CBP sent officers into the field before they had completed their background checks and waived the polygraph requirement to speed up hiring.⁴⁴ The polygraph requirement was reinstated in 2010, but CBP did not retroactively test officers hired before the requirement.⁴⁵ Moreover, CBP is allowed to waive the requirement for qualified military veterans under the National Defense Authorization Act of 2017.⁴⁶ Many of the new hires since the 1990s have indeed been military veterans, now making up one third of CBP's workforce.⁴⁷ The increase in former military personnel—trained to engage in enemy combat—exacerbated concerns that migrants would face violence and abuse.⁴⁸ In addition, an increased use of military technology to police the border accompanied the uptick in hiring. Motion-sensing cameras, drones, and fencing made the border more dangerous for migrants than ever before.⁴⁹

37. See DUNN, *supra* note 34, at 16.

38. *Id.* at 6.

39. See *id.* at 134; HUMAN RIGHTS WATCH, BRUTALITY UNCHECKED: HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO (1992).

40. Martínez, Heyman & Slack, *supra* note 24.

41. HERNANDEZ, *supra* note 28, at 232.

42. *On a Typical Day in Fiscal Year 2021, CBP...*, U.S. CUSTOMS AND BORDER PROT., <https://perma.cc/8YZ5-PLNA> (last visited May 21, 2022).

43. Chapnick, *supra* note 33, at 63.

44. *Id.* at 64 n.45.

45. *Id.* at 64.

46. *Id.*; *Polygraph Exam FAQs*, U.S. CUSTOMS AND BORDER PROT., <https://perma.cc/ED54-ARPR> (last visited May 22, 2022).

47. *Veterans*, U.S. CUSTOMS AND BORDER PROT., <https://perma.cc/Y7M5-VHJY> (last visited May 22, 2022); Ricardo D. Martínez-Schuldt & Jacqueline Maria Hagan, *Abusing Immigrants: An Analysis of Immigrant Enforcement and Mexican Migrant Claims of Human Rights Violations by Agents of the United States*, 43 HUM. RTS. Q. 70, 72 (2021).

48. Jeremy Slack, Daniel E. Martínez, Alison E. Lee & Scott Whiteford, *The Geography of Border Militarization: Violence, Death and Health in Mexico and the United States*, 15 J. OF LATIN AM. GEOGRAPHY 7, 10–11 (2016); Martínez-Schuldt & Hagan, *supra* note 47, at 72.

49. See Slack, Martínez, Lee & Whiteford, *supra* note 48, at 10; Martínez-Schuldt & Hagan, *supra* note 47, at 91; Martínez, Heyman & Slack, *supra* note 24.

In line with predictions, data made publicly available in recent years has shown that abuses of migrants at the border are common and have trended upward over the past several decades as Border Patrol has expanded.⁵⁰ Reported abuses include physical abuse, excessive use of force (including killings), sexual assault, rape, due process violations, and discrimination.⁵¹ A report on 160 complaints of misconduct filed between 2016 and 2021, obtained through a FOIA request, described migrants being grabbed by their hair, pushed into walls, hit and kicked, called pejorative names, threatened with death, sexually abused, and denied access to food, medical care, and adequate assistance for asylum applications.⁵² Alarming, these abuses appear to be ongoing. In 2022, a Border Patrol officer fatally shot a migrant at the border in Arizona,⁵³ migrant deaths by high-speed car chase have increased,⁵⁴ and there have been near-weekly reports of other misconduct.⁵⁵

Abuses are also likely underreported. Prior to 2014, CBP did not have a unified reporting mechanism for complaints of abuse, which led to considerable undercounting.⁵⁶ While it created a streamlined process in 2014, incidents of abuse are still likely unreported, especially since precarious immigration statuses may disincentivize migrants from speaking out, and language and technology barriers may impede complaint filing.⁵⁷ A report on incidents of misconduct between 2012 and 2015 conservatively estimated that there were 2,178 formal complaints during a three-year period.⁵⁸ With the number of migrants crossing the U.S.-Mexico border rising to the all-time high of nearly 1.7 million in 2021, organizations documenting trends of mistreatment and abuse suggest that formal reports “barely scratch the surface on the ‘everyday’ abuses” migrants face.⁵⁹

50. See Martinez-Schuldts & Hagan, *supra* note 47, at 91; Martinez, Heyman & Slack, *supra* note 24.

51. HUMAN RIGHTS WATCH, “THEY TREAT YOU LIKE YOU ARE WORTHLESS”: INTERNAL DHS REPORTS OF ABUSES BY US BORDER OFFICIALS (2021) [hereinafter HRW 2021 REPORT ON BORDER ABUSES]; GUILLERMO CANTOR & WALTER EWING, AM. IMMIGR. COUNCIL, STILL NO ACTION TAKEN: COMPLAINTS AGAINST BORDER PATROL AGENTS CONTINUE TO GO UNANSWERED 4 (2017) [hereinafter STILL NO ACTION TAKEN].

52. HRW 2021 REPORT ON BORDER ABUSES, *supra* note 51.

53. *Migrant fatally shot by Border Patrol in Arizona identified*, ASSOCIATED PRESS (Feb. 24, 2022), <https://perma.cc/5A3G-GQ2Q>.

54. Eileen Sullivan, *A Rise in Deadly Border Patrol Chases Renews Concerns About Accountability*, N.Y. TIMES (Jan. 9, 2022), <https://perma.cc/TM7E-VVET>.

55. See *Border Oversight Database*, WOLA, <https://perma.cc/2A6B-FT3U> (last visited May 22, 2022).

56. See DANIEL E. MARTINEZ, GUILLERMO CANTOR & WALTER EWING, NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE 3 (2014) [hereinafter NO ACTION TAKEN].

57. *Id.*

58. STILL NO ACTION TAKEN, *supra* note 51, at 7.

59. Adam Isacson, *Border Oversight: Monitoring Conduct and Accountability in U.S. Border Law Enforcement*, WOLA (Apr. 28, 2022), <https://perma.cc/JTF8-CQ8K>.

B. *Impunity for Abuses*

Abuses have gone almost entirely unpunished. Neither CBP's internal investigation system nor the U.S. justice system have proven adequate in holding officers accountable or in achieving meaningful justice for victims. CBP itself has been described as fostering a "culture of impunity."⁶⁰ Evidence of this has amassed in recent years: in 2014, a whistleblower described CBP as seeing itself above the law, like a paramilitary group.⁶¹ He alleged that the agency is marred by corruption and that officers frequently acted to change or distort facts to hide wrongdoing in order to provide a basis for dismissing complaints of abuses or allegations related to fatal shootings.⁶² A study of 1,255 victim complaints where CBP issued a formal decision between January 2012 and October 2015 found that 96% resulted in "no action" against the accused officer.⁶³ Although CBP undertook an effort to increase transparency and accountability in 2014 and the years that followed, which included measures such as publishing use-of-force incidents, reforming training, and releasing its use-of-force policy, progress has not been apparent.⁶⁴ In 2016, an independent review panel found that CBP had a "broken disciplinary process."⁶⁵

The lack of accountability within CBP can be traced, in part, to its use-of-force policy and related training.⁶⁶ In 2014, CBP released a revised *Use of Force Policy Handbook*, informed by external and internal review, that deemed excessive force "strictly prohibited" and indicated that officers "shall only use objectively reasonable and necessary force to effectively bring an incident under control."⁶⁷ The policy states that the use of deadly force is considered necessary when the officer "has a reasonable belief that the subject of such force poses an imminent danger of death or serious bodily injury to the officer/agent or to another person."⁶⁸

The "reasonableness" standard, borrowed from Supreme Court Fourth Amendment jurisprudence, has been widely criticized for allowing law

60. Chris Rickerd, *Whistleblower Says CBP Has Culture of Impunity and Violence*, ACLU (Aug. 15, 2014), <https://perma.cc/HS9M-KMDJ>.

61. Rickerd, *supra* note 60; Andrew Becker, *Ousted chief accuses border agency of shooting cover-ups, corruption*, REVEAL (Aug. 14, 2014), <https://perma.cc/HG2A-7NN3>.

62. *Id.*

63. STILL NO ACTION TAKEN, *supra* note 51, at 15.

64. *Id.* at 4; John Burnett, *Combating Corruption: U.S. Customs And Border Protection Seeks Deep Reform*, NPR (Oct. 29, 2016), <https://perma.cc/65Y4-4AEN>.

65. HOMELAND SECURITY ADVISORY COUNCIL, FINAL REPORT OF THE CBP INTEGRITY ADVISORY PANEL 2 (2016), <https://perma.cc/4VQD-ZUSG>.

66. See Burnett, *supra* note 64.

67. U.S. CUSTOMS AND BORDER PROTECTION, CBP USE OF FORCE – ADMINISTRATIVE GUIDELINES AND PROCEDURES HANDBOOK i (2021), <https://perma.cc/9RW5-RK7U> [hereinafter CBP USE OF FORCE POLICY]; Sarah Childress, *Amid Criticism, Border Patrol to Change Use-of-Force Policy*, PBS FRONTLINE (Sept. 25, 2013), <https://perma.cc/38EM-R7XU>.

68. CBP USE OF FORCE POLICY, *supra* note 67, at 15.

enforcement to easily justify its use of force by calling any actions reasonable.⁶⁹ One scholar suggests that CBP's training and messaging around the use of force has specifically reinforced officers' broad reign to justify their actions.⁷⁰ Namely, CBP emphasizes, and overstates, the dangerousness of the job and the necessity of using force. Lethal force is permitted in instances of rock-throwing, for example, despite no officer ever having died from being hit with a rock.⁷¹ Lethal force was, in fact, used in February 2022 when a CBP officer shot and killed an Arizona man who was said to have been brandishing a rock.⁷² Moreover, CBP trains officers to understand reasonable force as an individual inquiry, where the amount of justified force is going to look different from officer to officer.⁷³ Such training is at odds with its stated "objective" standard and underscores CBP's view of reasonableness as highly malleable.⁷⁴

Apart from its use-of-force policy exacerbating impunity, CBP has more recently been criticized for its internal Critical Incident Teams ("CITs") that exist to investigate officers involved in use-of-force incidents. The CITs have been accused of destroying and withholding evidence to cover up abuses and of tampering with witnesses.⁷⁵ In May 2022, in response to criticism, CBP took a step forward in announcing that it would be abolishing the CITs in October 2022 and delegating their responsibility to the Office of Professional Responsibility (OPR). While the abolition of the CITs has been seen as a welcomed first step, activists have said it is not enough, criticizing CBP for hiring former border patrol agents as OPR employees and calling on CBP to do more to investigate and address the prior incidents of misconduct.⁷⁶

The U.S. justice system has likewise not held CBP and its officers accountable. In the entire history of Border Patrol, not a single agent or officer has been convicted of a killing while on duty.⁷⁷ Very few have even faced prosecution.⁷⁸ One of the few criminal cases arose in 2018 when CBP officer

69. Altholz, *supra* note 23, at 22; Irene I. Vega, "Reasonable" Force at the U.S.-Mexico Border, 69 SOC. PROBS. 1154, 1162 (2021).

70. Vega, *supra* note 69, at 6.

71. *Id.* at 10.

72. Alisa Reznick, *Sheriff: Migrant shot by Border agent was brandishing a rock*, ARIZ. PUB. MEDIA (Mar. 1, 2022), <https://perma.cc/4A3J-HTKE>.

73. Vega, *supra* note 69, at 10.

74. *Id.* at 9; CBP USE OF FORCE POLICY, *supra* note 67, at i.

75. Letter from Southern Border Communities Coalition to Members of Congress, *Request for congressional investigations and oversight hearings on the unlawful operation of the U.S. Border Patrol's Critical Incident Teams (BPCITs)*, SBCC (Oct. 27, 2021) <https://perma.cc/5JZD-P3T5>; Ari Sawyer, *Border Agents Can't Police Themselves*, NEWSWEEK (Nov. 19, 2021), <https://perma.cc/QZB2-P24G>; Jenn Budd, *I was a border patrol agent. The experience was horrifying*, THE GUARDIAN (June 14, 2022), <https://perma.cc/3D2A-UJA5>.

76. Letter from Southern Border Communities Coalition to Members of Congress, *New information that raises the stakes on the investigation of Border Patrol Critical Incident Teams (BPCITs) and implicates other parts of CBP*, SBCC (Aug. 11, 2022), <https://perma.cc/9VGL-7XN8>; Adam Isacson, *Capacity, Security, and Accountability at the U.S.-Mexico Border's Western Edge*, WOLA (May 18, 2022), <https://perma.cc/Z5S3-NQ4P>.

77. *Fatal Encounters with CBP Since 2010*, *supra* note 10.

78. Altholz, *supra* note 23, at 16.

Lonnie Swartz went to trial on murder and manslaughter charges for the 2012 fatal shooting of 16-year-old Jose Antonio Elena Rodriguez. Swartz shot Rodriguez across the U.S.-Mexico border, aiming his gun through a fence and into the Mexican city of Nogales; he struck Rodriguez with 10 bullets.⁷⁹ Juries in two trials, however, found Swartz not guilty on either charge.⁸⁰ Prosecutorial discretion and politics, in addition to the lenient reasonableness standard, may explain the lack of charges brought against the majority of Border Patrol officers for killings and other excessive uses of force.⁸¹

In 2020, the Supreme Court reviewed the prospect of civil accountability for border officers involved in cross-border shootings in *Hernandez v. Mesa*.⁸² The case was a *Bivens* action filed on behalf of 15-year-old Sergio Adrián Hernández Güereca, the victim of a 2010 cross-border shooting sharing similar facts to the *Rodriguez* case. *Bivens* actions allow victims to seek damages against federal officers for violations of the U.S. Constitution.⁸³ In *Hernandez*, the Court declined to extend *Bivens* to cross-border shootings by border patrol agents, effectively eliminating prospects for civil liability in border abuse cases through its dicta.⁸⁴ Its reasoning was threefold: decisions involving foreign policy should be left to the political branches, an extension of *Bivens* to this arena could interfere with Border Patrol's ability to protect national security interests, and Congress has consistently refrained from authorizing damages for injuries inflicted abroad.⁸⁵ While the decision was ostensibly limited to this cross-border incident, nearly all Border Patrol abuses could be framed as matters of "national security," which suggests the Supreme Court could decline any *Bivens* action brought against border officials. While a *Bivens* action filed in the *Rodriguez* case was upheld by the Ninth Circuit in 2018, the Supreme Court remanded it on appeal in light of its ruling in *Hernandez*, suggesting that it will ultimately fail.⁸⁶ Unlike in the *Rodriguez* case, the United States did not pursue criminal charges against the officer involved in the *Hernandez* shooting. Although the officer was charged with murder in Mexico, the United States denied his extradition.⁸⁷

The outcome of Anastasio Hernández Rojas' case in the United States, with DOJ declining to pursue criminal charges, underscores Border Patrol's

79. Rory Carroll, *Border Patrol agent found not guilty of murder in Mexican teen's 2012 death*, THE GUARDIAN (Apr. 24, 2018), <https://perma.cc/WPG9-3WCF>.

80. Julia Jacobs, *Border Patrol Agent Who Shot Mexican Teenager Is Acquitted of Involuntary Manslaughter*, N.Y. TIMES (Nov. 21, 2018), <https://perma.cc/U2SQ-K9WG>; Astrid Galvan, *Feds won't pursue third trial against Border Patrol agent*, AP NEWS, (Dec. 6, 2018), <https://perma.cc/4NCK-5R65>.

81. See Altholz, *supra* note 23, at 16.

82. *Hernandez v. Mesa*, 140 S. Ct. 735, 739 (2020).

83. Altholz, *supra* note 23, at 7; see also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

84. Madiba K. Dennie, *Supreme Court just made it much harder to hold border agents accountable*, WASH. POST (Mar 2, 2020), <https://perma.cc/UH4T-6GFZ>.

85. *Hernandez*, 140 S. Ct. at 744–48.

86. See *Rodriguez v. Swartz*, 899 F.3d 719, 748 (9th Cir. 2018) (upholding *Bivens* action against Swartz); *Swartz v. Rodriguez*, 140 S. Ct. 1258 (2020) (remanding case in light of *Hernandez*).

87. *Hernandez*, 140 S. Ct. at 740.

multi-layered impunity. The family of Hernández Rojas alleges that Border Patrol obstructed the criminal investigation by covering up and destroying evidence. Specifically, the controversial CIT was the first investigative unit on the scene—before police—and the family of Hernández Rojas alleged in its filings before the Commission that CIT agents took various improper steps to cover up evidence, including taking medical evidence from the hospital that interfered with the chain of custody, unlawfully subpoenaing medical records, withholding surveillance footage from the San Diego Police Department, and later recording over the footage that existed so that nothing was available by the time police were involved.⁸⁸ In June 2022, a former border patrol agent who is now involved in helping the family of Hernández Rojas with their case before the Commission said that the manner in which the CIT withheld surveillance video from the San Diego Police and eventually erased it was a “common stall tactic.”⁸⁹ The family of Hernández Rojas further alleged in Commission filings that CBP authorities worked together to spin a narrative of Hernández Rojas as combative throughout the entire incident and falsely stated in an official report that only one officer was involved in using force.⁹⁰ CBP’s narrative was directly contradicted by eye-witness accounts and now-available video footage from the scene.⁹¹

These allegations of internal corruption and obstruction of justice did not face scrutiny by the DOJ, which adopted the CBP version of events in dismissing the Hernández Rojas case in 2015. DOJ said that it could not “disprove the agents’ claim that they used reasonable force in an attempt to subdue and restrain a combative detainee so that he could be placed inside a transport vehicle.”⁹² Such a statement speaks to the structural difficulty in achieving justice in the United States under the reasonableness standard and demonstrates considerable deference to the determinations of CBP officers.

Although domestic efforts to reform CBP and hold officers to account within the U.S. judicial system are critically important and should continue, a lack of progress is palpable. The use-of-force culture of CBP and the malleable reasonableness standard applied to CBP officers’ use of force, coupled with a narrowing pathway for victims to seek accountability for abuses in the U.S. judicial system, highlight that the United States cannot on its own achieve meaningful justice and accountability for human rights abuses at the border.

88. Petitioner’s Additional Observations, *supra* note 2, at 18–20; *see also* Eileen Sullivan, *Democrats in Congress Seek Review of Teams within the Border Patrol*, N.Y. TIMES (Jan. 24, 2022), <https://perma.cc/5RN2-7HEM>.

89. Budd, *supra* note 75.

90. *See* Petitioner’s Additional Observations, *supra* note 2, at 14–16.

91. *See* PBS Documentary, *supra* note 1.

92. DOJ Press Release Closing Investigation, *supra* note 19.

II. AN INTERNATIONAL SOLUTION: THE INTER-AMERICAN COMMISSION

Unending abuses of migrants at the U.S.-Mexico border and impunity for those abuses illustrate the need for an international solution—one that can both put increased pressure on the United States to reform and give victims hope for justice. The Inter-American Commission, as the only international human rights body with jurisdiction over petitions filed against the United States, can play this role. Namely, petitions against the United States and the subsequent Commission decisions can 1) garner widespread international media attention, which can elevate human rights issues to the top of legislative agendas in the United States; 2) can establish a body of precedent that facilitates activism by giving advocates a platform on which to stake human rights claims; and 3) can reframe issues in terms of human rights, which centers the victim’s narrative rather than the perpetrator’s and plugs the issue into the vast body of international law around human rights, further facilitating activism.

A. *Background on the Commission*

The Commission is one of two primary institutions that serve to promote human rights in the Americas region. The other is the Inter-American Court of Human Rights (“the court”). Together, these institutions make up the “Inter-American system of human rights,” complementing each other but serving distinct roles.⁹³ The Commission is housed under the Organization of American States (“OAS”) although it acts autonomously, under the leadership of seven commissioners.⁹⁴ Its origin can be traced back to the 1948 Ninth International Conference of American States in Bogotá, where states of the Americas region—including the United States—met to adopt the Charter of the Organization of American States (“OAS Charter”) and the American Declaration of the Rights and Duties of Man (“American Declaration”).⁹⁵ The OAS Charter formally codified the existence of the OAS as a governing body for the Americas, charged with promoting peace, justice, and security throughout the region. Its mandate also included promoting “a system of individual liberty and social justice based on respect for the essential rights of man.”⁹⁶ The American Declaration went hand-in-hand with the Charter, affirming the essential nature of human rights in the development of law in the Americas.⁹⁷ The Commission was formed ten years later as the body that would interpret and enforce the American Declaration and act as an advisory body on human rights for the OAS.⁹⁸

93. *What is the IACHR?*, ORG. OF AM. STATES, <https://perma.cc/J7VR-2P73> (last visited Oct. 2, 2022).

94. *Id.*

95. Robert K. Goldman, *History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights*, 31 HUM. RTS. Q. 856, 859–62 (2009).

96. *Id.* at 859.

97. *See id.* at 860.

98. *Id.* at 862.

The American Declaration is considered the first human rights instrument of its kind, adopted seven months before the Universal Declaration of Human Rights (“UDHR”).⁹⁹ It guaranteed rights similar to those found in the U.S. Constitution and constitutions of other American states: equal protection, due process, and freedom to assemble and worship; but it also went further, guaranteeing rights to health and well-being, work, leisure time, and the benefits of culture.¹⁰⁰ Its scope was extensive, bold, and aspirational.¹⁰¹ It was adopted by all 21 states at the conference, including the United States,¹⁰² but, like the UDHR, it was considered “non-binding” on states.¹⁰³

While the Commission’s role in enforcing the American Declaration was taking shape, regional debate was ongoing about establishing a legally binding treaty on human rights that would include enforcement mechanisms. The product was the American Convention on Human Rights (“the Convention”), which entered into force in 1978 with 11 states ratifying it.¹⁰⁴ The instrument was even more ambitious than the American Declaration, including more “elaborate and specific” civil and political rights.¹⁰⁵ It also created the court as a means for their protection and established the dual structure of the Inter-American human rights system with the Commission and the court working together to address human rights violations.¹⁰⁶ With respect to the Commission, the Convention reaffirmed its existence and enhanced its effectiveness by giving it authority to review individual petitions brought against state parties to the Convention and make determinations on referrals to the court.¹⁰⁷

Indirectly, the Convention also granted the Commission jurisdiction over petitions brought against non-state parties to the Convention. Article 39 of the Convention directed the Commission to form its own statute and establish its own regulations. In creating this statute, the Commission codified the Convention’s enhancements and made them applicable to all OAS member states.¹⁰⁸ Specifically, the Commission asserted its ability to review individual petitions brought by state parties to the Convention as well as non-state

99. *Id.* at 859.

100. American Declaration of the Rights and Duties of Man, *adopted* May 2, 1948 O.A.S.T.S. No. 36; Goldman, *supra* note 95, at 860.

101. See Bogdan Ghidirmic, *The American Declaration of the Rights and Duties of Man: An Underrated Gem of International Human Rights Law*, 4 J.L. & PUB. ADMIN. 50, 55 (2018); Goldman, *supra* note 95, at 863.

102. *Our History*, ORGANIZATION OF AMERICAN STATES, <https://perma.cc/KAR4-7TDX>.

103. Goldman, *supra* note 95, at 863.

104. *Id.* at 865.

105. *Id.* at 866.

106. American Convention on Human Rights, art. 33, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention].

107. *Id.* art. 41; Simon Zschirnt, *Justice for All in the Americas? A Quantitative Analysis of Admissibility Decisions in the Inter-American Human Rights System*, 10 LS. 1, 2 (2021) (“The quasi-judicial IACHR is the decision-maker of first instance in the system and is responsible for the initial processing of petitions”).

108. See Organization of American States, Statute of the Inter-American Commission on Human Rights, art. 1, Oct. 1, 1979.

parties to the Convention who are otherwise members of the OAS and party to the American Declaration.¹⁰⁹ With respect to non-state parties, the Commission cannot refer cases to the court but can still review the merits and issue recommendations to the member state.¹¹⁰ In a way of equalizing its legitimacy to review petitions over both kinds of parties, the Commission has since 1967 interpreted the American Declaration to be a “normative instrument” that became legally binding on OAS member states when it was incorporated into the OAS charter.¹¹¹ The United States has not adopted this position.¹¹²

The United States is not a party to the Convention, as it has signed but not ratified the Convention.¹¹³ The United States is, however, an OAS member state, subject to the American Declaration, meaning that the Commission can review petitions filed against the United States and issue recommendations, provided the petitions meet the standards for admissibility.¹¹⁴ The Commission is the only international human rights body with adjudicatory jurisdiction over individual petitions against the United States.¹¹⁵

B. *The Petition Process*

While the Inter-American Commission provides many important functions for the OAS and its member states—including conducting in-country fact-finding missions, writing country reports, liaising with government representatives, and promulgating human rights standards—the petition process is a powerful and direct avenue for victims to hold member states accountable.¹¹⁶ It has been called the “lifeblood” of the Inter-American system for its ability to empower victims and catalyze human rights reform throughout the region.¹¹⁷

The petition process is open to any individual, group, or organization with a claim against an OAS member state, whether or not they are themselves the

109. *See id.* arts. 19, 20, 23 and 24.

110. Zschirnt, *supra* note 107, at 2.

111. Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1, 16 (1988); Christina M. Cerna, *Reflections on the Normative Status of the American Declaration of the Rights and Duties of Man*, 30 U. PA. J. INT’L L. 1211, 1213 (2009).

112. Cerna, *supra* note 111, at 1220.

113. *Id.*; *History*, INTER-AM. CT. OF HUM. RTS., <https://perma.cc/5TH4-GBPR>.

114. Ethan Kate, Comment, *A “Supreme” Court?: How an Unfavorable Ruling In the Inter-American Commission on Human Rights Should Impact United States Domestic Violence Jurisprudence*, 28 WISC. INT’L L. J. 430, 437 (2010).

115. Altholz, *supra* note 23, at 29.

116. *Mandate and Functions*, ORGANIZATION OF AMERICAN STATES, <https://perma.cc/AFX3-NQZM>.

117. Par Engstrom & Peter Low, *Mobilising the Inter-American Human Rights System: Regional Litigation and Domestic Human Rights Impact in Latin America*, in *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: IMPACT BEYOND COMPLIANCE* 23, 24 (Par Engstrom ed., 2018).

aggrieved party.¹¹⁸ The petition is also free and accessible online.¹¹⁹ Once filed, a typical case goes through three phases: pre-admissibility, admissibility, and merits. At the pre-admissibility stage, the Commission seeks to weed out petitions that are “clearly inadmissible.”¹²⁰ For efficiency, this review is outsourced to members of the OAS Secretariat, rather than the Commission itself.¹²¹ This process has been the subject of criticism given that the vast majority of cases received are dismissed at this stage and decisions for this informal dismissal are not publicly recorded.¹²² In 2020, of 2448 petitions filed, 80% were screened out during this phase; only 359 of 2448 made it to the formal admissibility review.¹²³

At the admissibility phase, the Commission conducts a comprehensive review of the remaining cases to determine if they meet the standards of admissibility and complementarity under the regulations set forth in the Rules of Procedure.¹²⁴ In contrast to the preliminary review phase, the majority of cases formally reviewed for admissibility are found admissible.¹²⁵ For a petition to be admissible, the claim must be brought against an OAS member-state and must state facts tending to establish a violation of rights as set forth in either the American Convention, American Declaration, or other applicable instrument.¹²⁶ In addition, the petitioner must have exhausted local remedies or proven such exhaustion impossible.¹²⁷ The Rules also impose a statute of limitations, requiring claims to be filed within six months of the exhaustion of domestic remedies.¹²⁸ Establishing that a claim meets these requirements may involve the Commission requesting evidence or other information from the petitioner and can include long delays.¹²⁹ Reports on both admissibility and inadmissibility are then made public.

Once declared admissible, cases are reviewed on the merits, which involves a back-and-forth process. The Commission can request evidence

118. Inter-Am. Comm’n H.R. [IACHR] & ORGANIZATION OF AMERICAN STATES, INFORMATIONAL BOOKLET, PETITION AND CASE SYSTEM 16 (2022) <https://perma.cc/QDW2-UJBP> [hereinafter INFORMATIONAL BOOKLET].

119. *Welcome to the Inter-American Commission on Human Rights*, ORGANIZATION OF AMERICAN STATES, <https://perma.cc/U6PM-562B>.

120. Zschirnt, *supra* note 107, at 3; see also Dinah Shelton, *The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System*, 5 NOTRE DAME J. OF INT’L & COMPAR. L. 1, 10 (2015).

121. Zschirnt, *supra* note 107, at 3.

122. *Id.*; Shelton, *supra* note 120, at 10.

123. Zschirnt, *supra* note 107, at 3.

124. See Organization of American States, Rules of Procedure of the Inter-American Commission on Human Rights, arts. 30 and 31, adopted on Aug. 1, 2013, <https://perma.cc/H4JD-V7HK> [hereinafter Rules of Procedure].

125. Zschirnt, *supra* note 107, at 3 (8% of cases found inadmissible in 2014).

126. Rules of Procedure, *supra* note 124, at art. 27.

127. *Id.* at arts. 28, 31.

128. *Id.* at art. 32.

129. Álvaro Paúl, *The Inter-American Commission on Human Rights’ Initial Review of Petitions, Its Backlog, and the Principle of Subsidiarity*, 49 THE GEO. WASH. INT’L L. REV. 19, 29 (2016); Shelton, *supra* note 120, at 10–12.

from the parties and can convene hearings.¹³⁰ Parties are also allowed to negotiate with one another to reach a friendly settlement before the Commission issues its ruling.¹³¹ Decisions ultimately handed down by the Commission include not only a determination on the member state's culpability but several recommendations ranging from direct actions owed to the petitioner or victim to broad policy changes. Petitioners can exercise a great deal of influence over what recommendations are sought by specifying them in their briefs.¹³² If the Commission deems it appropriate, and there is jurisdiction, it can subsequently choose to refer the case to the court.

This process is not without criticism. The Commission is slow to process petitions and has been accused of biased decision-making and haphazard dismissals of petitions at the pre-admissibility stage. Former Commissioner Dinah Shelton has suggested that the structure of the Inter-American human rights system is to blame for some of the inefficiency and legitimacy concerns.¹³³ The Commission is the gatekeeper for all petitions, including those that will be ultimately referred to the court, which means it receives many. Even with outsourcing pre-admissibility review to the OAS Secretariat—a practice that in and of itself is the subject of concern—a considerable backlog has built up. In 2014, the Commission was just beginning to address petitions it declared admissible in 2009.¹³⁴ The delays can be attributed to the Commission's multi-step review process that involves communication with the parties and requests for evidence.¹³⁵ Given the backlog, the Commission has at times selected cases more quickly when the issues seem particularly important, despite the fact that they are supposed to review petitions chronologically, inviting criticism of bias.¹³⁶ That said, the Commission has undertaken efforts to reform and improve its review system over the past several years and claims it is now reviewing petitions in real time.¹³⁷

While structural and procedural issues remain, the Commission also does a lot correctly by way of its petition system and its importance should not be discounted.¹³⁸ Hearings at the merits stage can provide petitioners with a unique platform to be heard and achieve justice. For example, Jessica Lenahan's hearing before the Commission in her case against the United States for failing to protect her from domestic violence was her first

130. INFORMATIONAL BOOKLET, *supra* note 118, at 21.

131. *Id.*

132. *See, e.g.*, Caroline Bettinger-Lopez, *Introduction: Jessica Lenahan (Gonzales) v. United States: Implementation, Litigation, and Mobilization Strategies*, 21 AM. U. J. OF GENDER, SOC. POL'Y & L. 207, 218 (2012).

133. Shelton, *supra* note 120, at 10.

134. Paúl, *supra* note 129, at 29.

135. *Id.*; Shelton, *supra* note 120, at 10–12.

136. Shelton, *supra* note 120, at 11; *but see* Zschirnt, *supra* note 107, at 21 (stating that claims of bias are often wholly baseless or outdated).

137. Press Release, Organization of American States, IACHR Reports Good Results in 2020, the Fourth Year of its Program to Overcome Procedural Backlog (Feb. 1, 2021), <https://perma.cc/5T8L-A8KK>.

138. Shelton, *supra* note 120, at 28.

opportunity to tell her story in a court setting.¹³⁹ In her U.S. case, a motion to dismiss at the trial level and subsequent *certiorari* granted by the Supreme Court meant that she never got her moment to testify.¹⁴⁰ The Commission hearings were thus very significant for her and her family.¹⁴¹

The petition process also provides individuals and groups with tools to advance political positions and advocacy efforts.¹⁴² In many states throughout the Latin America region, significant human rights reform can be traced back to the petition process.¹⁴³ This is especially true where the cases were referred to the court.¹⁴⁴ In the late 1980s, the Commission reviewed cases pertaining to disappearances of Hondurans at the hands of the government and referred the cases to the court. The court found Honduras responsible, and the practices of disappearances ended nearly instantaneously.¹⁴⁵ Even where cases do not go to the court and decisions are non-binding, however, receiving a report on the merits from the Commission has served to validate claims of human rights violations for the individual petitioners and has become an important advocacy tool.¹⁴⁶ In the case of Peru's Fujimori regime, a merits decision from the Commission helped to undermine the regime's legitimacy and contribute to its downfall.¹⁴⁷ Where cases do move to the merits phase, the potential for meaningful impact is expansive.

C. *The Petition Process as a Path to Holding the United States Accountable*

In comparison to other member states, the petition process has infrequently been used to condemn state-sanctioned human rights abuses in the United States. In the past 15 years, the Commission has received an average of 87 petitions per year against the United States.¹⁴⁸ By comparison, it has received an average of 419 petitions against Colombia and 506 against Mexico.¹⁴⁹ Moreover, since 1981, the Commission has only published approximately 50 reports on the merits in cases brought against the United States.¹⁵⁰

The infrequent use of the petition system to hold the United States accountable could be due to the fact that the petition process is not well known to

139. Bettinger-Lopez, *supra* note 132, at 219.

140. *Id.*

141. *Id.* at 219–20.

142. See discussion *infra* Part III.

143. Engstrom & Low, *supra* note 117, at 51.

144. Ellen Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 633, 640–41, 49 (2000).

145. *Id.* at 650.

146. Engstrom & Low, *supra* note 117, at 51.

147. *Id.* at 39.

148. *Statistics by Country*, INTER-AM. COMM'N H.R., <https://perma.cc/DQN9-RTMZ> (last visited Sept. 15, 2022).

149. *Id.*

150. *Merits Reports*, INTER-AM. COMM'N H.R., ORG. OF AM. STATES, <https://perma.cc/39H2-JS7G> (last visited Sept. 15, 2022).

U.S.-based victims and relatively unfamiliar to U.S. lawyers.¹⁵¹ There are also, of course, instances where domestic mechanisms are able to adequately resolve human rights violations and the petition process is not needed.¹⁵² Where domestic mechanisms fail, however, victims could use this system. At the same time, the non-binding nature of Commission decisions begs practical questions: Can these petitions influence U.S. law or policy in the same way they have influenced law and policy throughout the Latin America region? Can Commission decisions achieve meaningful justice for victims in the United States? *Should* more victims consider using the petition process to adjudicate claims against the United States?

With relatively low case numbers, there is not a lot of data on how Commission decisions have impacted the United States. In nearly all 50 decisions it has issued, the Commission has ruled against the United States, but there is very little by way of black and white signals that indicate that these decisions have made a difference. The vast majority of the cases taken to the Commission involve the death penalty—a matter the Inter-American system has long condemned—which makes Supreme Court precedent on the death penalty a good starting place for evaluating the importance of Commission decisions in the United States.¹⁵³

In an optimistic view, scholars have suggested that Commission decisions played a role in the decision to overturn the juvenile death penalty in *Roper v. Simmons*.¹⁵⁴ Writing for the majority, Justice Kennedy said that international condemnation of the death penalty “confirm[ed]. . . the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”¹⁵⁵ Although not named explicitly, Commission decisions can be understood as part of the body of international law to which Kennedy makes reference.¹⁵⁶ Scholars have also suggested that the invocation of international law in death penalty cases signals hope for the Commission to influence other areas of U.S. law.¹⁵⁷

151. Bettinger-Lopez, *supra* note 132, at 215–16.

152. Zschirnt, *supra* note 107, at 16.

153. Carly Baetz-Stangel, Note, *The Role of International Law in the Abolition of the Juvenile Death Penalty in the United States*, 16 FLA. J. INT’L L. 955, 960 (2004); *see also* A-53: Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Jun. 8, 1990. (The few non-death penalty cases include issues of abortion, domestic violence, and historic atrocities like Japanese internment camps and the U.S. military invasion in Panama.) *See, e.g.*, Isamu Carlos Shibayama et al. v. United States, Case 12.545, Inter-Am. Comm’n H.R., Report No. 26/20, OEA/Ser.L/V/II, doc. 36 (2020); Jose Isabel Salas Galindo and Others v. United States, Case 10.573, Inter-Am. Comm’n H.R., Report No. 121/18, OEA/Ser.L/V/II.169, doc. 138 (2018).

154. *Roper v. Simmons*, 543 U.S. 551 (2005); Christina M. Cerna, *The Abolition of the Imposition of the Death Penalty on Persons who Were Juveniles When They Committed Their Crimes*, 41, HUM. R. QUARTERLY 143, 146 (2019) (“[I]t appears evident to this observer that the US Supreme Court considered these decisions at least in one Supreme Court judgment.”); *see also* Baetz-Stangel, *supra* note 153, at 960 (noting that the Commission declared the death penalty contrary to *jus cogens* in discussing the body of international law that helped repeal the juvenile death penalty).

155. *Roper*, 543 U.S. at 575.

156. Baetz-Stangel, *supra* note 153, at 960.

157. Kate, *supra* note 114, at 463.

In a less optimistic view, other scholars have pointed to the fact that the death penalty remains constitutional for adults in the United States as evidence that the Commission's decisions, or international law more generally, have not had such a strong impact.¹⁵⁸ The non-binding nature of these decisions has led to a clear enforcement challenge and pessimistic dismissal of the Commission as an avenue for change.

But Supreme Court precedent is not the only metric for measuring how Commission decisions have impacted, and can potentially impact, the United States. A look at the effect on victims, advocates, and U.S. law and policy more broadly suggests reason to be hopeful. Commission decisions can achieve greater accountability on the United States as well as justice for victims by 1) increasing international attention on issues, 2) facilitating activism, and 3) reframing issues in terms of human rights.

1. *International Attention*

The exceedingly public nature of Commission decisions allows them to increase international attention on issues. Not only does the Commission publish its decisions on the merits, but it publishes the complaints it receives as well as its determinations on admissibility and inadmissibility.¹⁵⁹ At a minimum, media attention and the resulting increased international concern can have a “naming and shaming” effect that can push the United States to correct course.¹⁶⁰ Non-compliance in the face of such public shaming can lead to “embarrassment or a blow to reputation.”¹⁶¹ This effect can be observed in *Roper*, where international consensus eventually served to confirm the outdatedness of U.S. law in terms of the juvenile death penalty.¹⁶² Kennedy's *Roper* opinion reflects an air of embarrassment at the reputational costs of continuing to uphold the juvenile death penalty.

But beyond judicial influence, increased international awareness of an issue can impact policymakers by pushing issues to the top of the legislative agenda.¹⁶³ Following the Commission's decision against the United States in *Lenahan (Gonzales) v. United States*, for instance, domestic violence reform rose to the top of legislative agendas in various cities and reforms were

158. Veronica Gomez, *The Inter-American System: Recent Cases*, 1 HUM. RTS. L. REV. 319, 321 (2001) (noting that the United States has rejected the notion it is bound by norms set in the American Declaration when it comes to the death penalty); see also Sandra Babcock, *The Limits of International Law: Efforts to Enforce Rulings of the International Court of Justice in U.S. Death Penalty Cases*, 62 SYRACUSE L. REV. 183, 184 (2012) (noting that U.S. law has not shifted on the death penalty with respect to foreign nationals despite decisions from the Commission).

159. Reid Peyton Chambers & William F. Stephens, *Principles of International Law That Support Claims of Indian Tribes to Water Resources*, 63 UCLA L. REV. 1530, 1558 (2016).

160. Engstrom & Low, *supra* note 117, at 26.

161. Lutz & Sikkink, *supra* note 144, at 641.

162. See *Roper v. Simmons*, 543 U.S. 551, at 575 (2005).

163. See BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS INTERNATIONAL LAW IN DOMESTIC POLITICS* 149 (2009) (theorizing that signing international human rights treaties contributes to domestic “agenda setting”).

passed into law.¹⁶⁴ Three years later, DOJ issued guidance on preventing gender-biased policing in law enforcement's response to sexual assault and domestic violence.¹⁶⁵ Although the correlation is not explicit, the issuance of this guidance was an express recommendation of the Commission in its merits decision and an advocacy goal of Lenahan and her counsel.¹⁶⁶

Increasing international attention on issues may be especially productive in the current moment of the Biden Administration. The Biden Administration has made a point to improve the reputation of the United States abroad, following Donald Trump's damaging legacy.¹⁶⁷ Efforts by the Biden Administration to engage more deeply with the international community and enact human rights policies "at home," suggest that there is hope that international attention, and condemnation of abuses, can have an impact.¹⁶⁸

2. *Facilitating Activism*

Connected to the function of increasing international attention on issues is the ability for Commission decisions to provide victims and advocates with a concrete tool for activism, including domestic litigation and policy battles. Advocates play a crucial role in capitalizing on increased international attention from a Commission decision and ensuring it is put before policy makers to engender change. Following the decision in *Lenahan*, attorney Caroline Bettinger-Lopez and clinic students sprang into action, using the decision as a tool to press for domestic violence reforms. In conjunction with increased international attention, their advocacy efforts were critical in the passing of resolutions in Cincinnati, Baltimore, and Miami, and are responsible for the fact that the Baltimore and Miami resolutions make specific reference to the *Lenahan* decision.¹⁶⁹ The *Lenahan* decision has also been used in federal civil rights litigation, constitutional litigation, and family court litigation involving domestic violence as a way of educating judges on violence against women as a human rights violation.¹⁷⁰ Increased international attention on an

164. Bettinger-Lopez, *supra* note 132, at 225–26.

165. Press Release, U.S. Department of Justice, Justice Department Issues Guidance on Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence (Dec. 15, 2015), <https://perma.cc/4B86-9Q67>.

166. See Bettinger-Lopez, *supra* note 132, at 225–26; Jessica Lenahan (Gonzalez) v. United States, Case 12-626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).

167. David E. Sanger, *The End of 'America First': How Biden Says He Will Re-engage With the World*, N.Y. TIMES (Nov. 9, 2020), <https://perma.cc/6XJ3-8BXF>.

168. See Press Release, The White House, Remarks by President Biden on America's Place in the World (Feb. 4, 2021) <https://perma.cc/MVZ8-DFJD>; Cleve R. Wootson, *Biden: U.S. Leadership on Human Rights Depends on Our Record at Home*, WASHINGTON POST (Oct. 15, 2021), <https://perma.cc/8A4V-CS8N>.

169. See Bettinger-Lopez, *supra* note 132, at 226.

170. See *id.*; Elizabeth M. Schneider, Caroline Bettinger-Lopez, Julie Goldscheid, Sandra Park, Ejim Dike, Lisalyn Jacobs, Margaret Drew & Mary Haviland, *Implementing the Inter-American Commission on Human Rights' Domestic-Violence Ruling*, 46 CLEARINGHOUSE REV. 113, 116 (2012); see also SIMMONS, *supra* note 163, at 150 (discussing the ways treaties can be leveraged in litigation, which finds parallel here).

issue, coupled with effective advocacy, can achieve tangible law and policy reforms.¹⁷¹

3. *Human Rights Framing*

Commission decisions also reframe issues in terms of human rights, which can further help victims and advocates achieve justice and accountability in the United States. While “human rights” is a term used frequently in international legal discourse, it is not dominant in U.S. legal discourse.¹⁷² Human rights framings place the victim at the center of the narrative and ask whether that victim’s fundamental rights—including rights to basic needs not necessarily enumerated in the U.S. Constitution, like healthcare, housing, education, and social and cultural participation—are being respected.¹⁷³ Moreover, given the frequent international usage of “human rights” in legal discourse, framing an issue as a human rights violation can help plug the issue into the international system more broadly, making additional human rights treaties and resources applicable to that issue and helping to establish international consensus around it.¹⁷⁴ In an amicus brief filed on behalf of various international human rights organizations in *Roper*, advocates framed the juvenile death penalty as a human rights violation and applied a massive body of international human rights law to the issue, including the American Declaration.¹⁷⁵ This tactic proved effective, as the Court acknowledged the international consensus around the issue.¹⁷⁶ Similarly, the Commission’s *Lenahan* decision framed domestic violence as a human rights issue and advocates used it, in conjunction with other international material like the findings of the UN Special Rapporteur on Violence Against Women, in their efforts to present judges with an “emerging global consensus” that violence against women is a human rights violation.¹⁷⁷ Commission decisions on the merits, which necessarily interpret issues in light of the human rights norms established in the American Declaration or American Convention, can help advocates broaden discourse on an issue, find useful language for launching policy or litigation efforts, and encourage policymakers and judges to adopt a human rights framework in enacting reforms or judicial decisions.

171. See Emilie M. Hafner-Burton, Brad L. LeVeck & David G. Victor, *How Activists Perceive the Utility of International Law*, 78 J. OF POL. 167, 171 (2016).

172. See Maria Lorena Cook, *The Advocate’s Dilemma: Framing Migrant Rights in National Settings*, 4 STUD. SOC. JUST. 145, 149 (2010).

173. See Bettinger-Lopez, *supra* note 132, at 228; Natsu Taylor Saito, *Beyond Civil Rights: Considering Third Generation International Human Rights Law in the United States*, 28 U. MIAMI INTER-AM. L. REV. 387, 405–6 (1996).

174. See Saito, *supra* note 173, at 407; Cook, *supra* note 172, at 148.

175. See Brief for the Human Rights Committee of the Bar of England and Wales, Human Rights Advocates, Human Rights Watch, and the World Organization for Human Rights USA as Amici Curiae in Support of Respondent at *2, *Roper v. Simmons*, 543 U.S. at 551 (2005) (No. 03-633) 2004 WL 1628523.

176. See *Roper*, 543 U.S. at 575.

177. Bettinger-Lopez, *supra* note 132, at 226.

These ways in which Commission decisions can impact the United States suggest that the answer to the question of whether more individuals *should* consider bringing petitions to the Commission is a resounding “yes.” While outcomes are not always reflected in Supreme Court decisions or made explicit in policy reforms, the decisions can engender myriad positive reforms that work toward moving the dial forward for greater human rights protections in the United States.

III. USING THE COMMISSION TO PRESSURE BORDER PATROL REFORM

The Commission presents a viable avenue for victims of Border Patrol abuses hold the United States accountable where domestic mechanisms fail. The case of *Anastasio Hernández Rojas and Family*—the first of its kind before the Commission—has great potential to engender positive reform on border policy in the United States by increasing international attention on the issue, facilitating activism, and reframing border abuses in terms of human rights. Moreover, with the case likely to be resolved against the United States, it can pave the way for victims of future Border Patrol abuses, or other law enforcement abuses, to seek recourse through the Commission.

First, as one of the highest-profile incidents of border abuse in recent history, the international attention the decision is likely to get has the potential of being highly influential. Over the years, the story has captured the attention of all major news outlets in the United States, as well as Congress, and continues to be referenced in news related to Border Patrol abuses.¹⁷⁸ Many within and outside of the United States will be watching the outcome which will put reputational pressure on the United States to reform.¹⁷⁹ Reputational pressure may be especially powerful during the Biden Administration. Not only has the Administration endeavored to fix Trump’s legacy abroad—which could include increased cooperation with the Inter-American system more broadly¹⁸⁰—it has endeavored to fix the Trump Administration’s record on the border.¹⁸¹ The Biden Administration has not been successful on the latter to date and therefore has faced criticism for leaving much of Trump’s legacy in place.¹⁸² Increased international condemnation may push border reform higher on the Biden Administration’s legislative agenda and encourage faster positive reform.

178. See, e.g., Sullivan, *supra* note 88 (article from 2022 referencing the Commission’s Hernández Rojas case).

179. See discussion *supra* Part II.c.1.

180. Ashley Collins, *Revisiting the Region: Evaluating US Engagement with the Inter-American Human Rights System* (Dec. 17, 2021) (final paper for United States & Human Rights Seminar, Georgetown University Law Center) (on file with author).

181. Amna Nawaz & Saher Khan, *Biden vowed to fix America’s immigration system. Here’s what he achieved in his first year*, PBS (Jan. 20, 2022, 6:40 PM), <https://perma.cc/39CJ-JL48>.

182. Ashley Parker, Nick Miroff, Sean Sullivan & Tyler Pager, ‘No end in sight’: Inside the Biden administration’s failure to contain the border surge, WASH. POST (Mar. 20, 2021, 4:24 PM), <https://perma.cc/4YLS-LXL4>; Ted Hesson, *Analysis: Biden kept a Trump-era border policy in place - that was a mistake, allies say*, REUTERS (July 7, 2021, 6:03 PM), <https://perma.cc/PG75-AFP7>.

Unfortunately, the Biden Administration missed its December 2021 filing deadline in the Hernández Rojas case, which attorneys for Hernández Rojas suggested points to a failure on the Administration's part to be the leader it has said it wants to be in terms of human rights and democracy on an international stage.¹⁸³ After petitioners filed their brief on the merits, the United States had four months to reply, with the possibility of an extension up to six months.¹⁸⁴ The Commission indicated that no further extension would be granted and the deadline has come and gone.¹⁸⁵ A lack of comment on the merits, however, may not necessarily reflect disinterestedness. When the Trump Administration responded to the Commission in 2017, it urged dismissal of the case for lack of jurisdiction, suggesting that the civil settlement awarded to the family was an effective remedy.¹⁸⁶ The lack of a response from the Biden Administration may reflect an opposing view from that of the Trump Administration: recognition of wrongdoing by the United States and a willingness to allow this case to move forward. Because there has not been a response on the merits from the United States, the facts as laid out by the petitioner have been accepted as uncontested.¹⁸⁷

Second, the *sui generis* nature of this case suggests it can serve an important role in facilitating activism. This is the first Commission case to involve an extrajudicial killing by a U.S. law enforcement officer or border abuse more broadly. The *Lenahan* case was in a similar position in 2011, as the first of its kind related to domestic violence, and spawned important advocacy efforts in subsequent years.¹⁸⁸ A precedent related to border patrol abuses could fill a gap in advocacy efforts by giving victims of border abuses much-needed fodder to raise arguments before U.S. judicial bodies and policymakers, including the argument that border abuses rise to the level of human rights abuses.

Third, going hand-in-hand with advocacy efforts, this case can play a powerful role in reframing border abuses in terms of human rights. When the Commission accepted the case in 2020, it wrote that U.S. Border Patrol's alleged actions rose to the level of torture and extrajudicial killing.¹⁸⁹ A merits decision will likely affirmatively find the United States responsible for these egregious human rights abuses.¹⁹⁰ This language starkly contrasts language issued by the Supreme Court and the DOJ that frames border abuses as part and parcel of "national security." In *Hernandez v. Mesa*, the Supreme Court hid behind national security, counterterrorism, and safety and security of the border in deciding against the interests of the victim shot and killed by Border Patrol.¹⁹¹ This kind of narrative is

183. Kate Morrissey, *U.S. misses filing deadline in international human rights case over killing at border*, SAN DIEGO TRIB. (Dec. 1, 2021), <https://perma.cc/AG2F-QQ3A>.

184. Letter from the Inter-Am. Comm'n H.R. to Petitioner Anastasio Hernández Rojas and family (Apr. 13, 2021), <https://perma.cc/3KJZ-HYE7>.

185. *Id.*

186. Petitioner's Additional Observations, *supra* note 2, at 4.

187. Morrissey, *supra* note 183.

188. Bettinger-Lopez, *supra* note 132, at 221.

189. Report on Admissibility, *supra* note 9, at 4.

190. *See* Zschirnt, *supra* note 107, at 16.

191. 140 S.Ct. 735 (2020); DOJ Press Release Closing Investigation, *supra* note 19.

dehumanizing and highly damaging to migrant interests.¹⁹² The Commission's framing of the issue as torture and extrajudicial killing places Hernández Rojas in the center of the narrative, rather than U.S. interests, and can serve to reframe other border atrocities as human rights violations.

In its brief on the merits filed in 2021, Petitioners asked for remedies from the United States ranging from a public apology and compensation for the family to lofty public policy reforms like an amendment to the use-of-force policy and legislation to prevent CBP from investigating its own incidents of death and serious injury. They also asked for a release of public records related to the CIT and internal investigations into use of force.¹⁹³ Although these remedies are aspirational and are unlikely to be enforced in full in the United States, there is hope that at least some can be accomplished, especially in light of the decision's unique potential to increase international attention on the issue, facilitate activism, and reframe border abuses as human rights violations.

CONCLUSION

When domestic remedies are exhausted and reform stagnates in the United States, the Commission petition process presents a valuable avenue for victims to achieve justice and accountability for state-sanctioned human rights abuses. This is especially true in the context of abuses at the hands of Border Patrol. Repeatedly, the United States has proven incapable of reforming the Border Patrol system and has allowed abuses of migrants to continue with impunity. This moment in the Biden Administration is particularly ripe for advocacy on human rights reform, including for Border Patrol. A ruling against the United States in the case of *Anastasio Hernández Rojas and Family* has the potential to put pressure on the Biden Administration to make those human rights reforms now.

This case not only presents hope for reform but can serve as a useful indicator of the Commission's potential to engender change and can pave the way for future victims to make use of the Commission as a resource. Regardless of the outcome in this case, more victims of border abuses—and other human rights abuses at the hands of law enforcement in the United States—should consider using the Commission petition process to pursue their claims against the United States. An increasingly robust international record of condemnation of human rights violations by law enforcement could go far toward encouraging tangible reform in the United States. The petition process presents a much-needed and hopeful avenue for victims of state-sanctioned human rights abuses to pursue their cases outside of the United States when domestic mechanisms fail.

192. Amanda Warnock & James McCann, *The Dehumanization of Immigrants and Refugees: A Comparison of Dehumanizing Rhetoric by All Candidates in Three U.S. Presidential Elections*, 9 J. OF PURDUE UNDERGRADUATE RSCH. 49, 53 (2019).

193. Petitioner's Additional Observations, *supra* note 2, at 75–76.