

**IACHR 167th Extraordinary Period of Sessions, Bogotá, Colombia**  
**Thematic Hearing on Regulation of Gun Sales and Social Violence**  
**U.S. Remarks, Feb. 27, 2018**

**Andrew Stevenson, U.S. Mission to the Organization of American States:  
Introductory Remarks**

- Distinguished Commissioners, colleagues at the other table, and Secretariat colleagues—I am Andrew Stevenson of the U.S. Mission to the Organization of American States, and I am here with James Bischoff of the U.S. Department of State’s Office of the Legal Adviser to represent our delegation at this hearing.
- I would first like to extend the thanks of the United States Government to the Government of Colombia for hosting us and the other OAS States that are attending this Period of Sessions. We commend Colombia for its commitment to human rights, both at home and across the Hemisphere.
- I will turn the floor over to Mr. Bischoff to give some remarks specific to the subject of this hearing in a few moments. Before I do so, however, I would first like to echo the condolences of President Trump, Vice-President Pence, Florida Governor Rick Scott, and other political leaders in the United States over the tragic shooting in Parkland, Florida, on February 14. We mourn for those who lost their lives. The federal government is working closely with Florida state authorities to investigate the shooting, and it is our understanding that the

Florida authorities are proceeding with criminal charges against the alleged perpetrator.

- Next, I will take a few minutes to convey the serious concerns of my government about the Commission’s decision to convene this hearing and the next one this morning.
- Just over a month ago, the Commission sent the United States notification of its decision to hold these hearings—this one on Regulation of Gun Sales and Social Violence, and the next one on Temporary Protected Status and Deferred Action for Childhood Arrivals.
- In those notifications, the Commission said that it was convening these hearings on its own initiative, presumably under Article 61 of the Rules. We also understand that they are intended to be “Hearings of a General Nature”—or “thematic” hearings—governed by Article 66 of the Rules.
- Increasingly in recent years, the Commission seems to have made it standard practice to insert itself into ongoing domestic political discussions through the mechanism of a thematic hearing. The subjects on which the Commission convenes thematic hearings are often complex, fast-changing, the subject of significant domestic litigation or congressional consideration, and of great political sensitivity. This can make it very difficult for the United States to

meaningfully engage with the Commission about them, and reduces the value of the Commission's involvement.

- The Commission is well aware of our similar longstanding concerns about the practice of convening thematic hearings about matters in active litigation in our domestic system. As we have repeatedly told the Commission, we cannot discuss specific details on such matters while the outcome of litigation is pending. It was in part for this reason that we found ourselves unable to participate in the March 2017 hearings at all.
- The number of thematic hearings has risen sharply in recent years, and now dwarfs the number of petition-based hearings, even as the Commission's backlog of petitions continues to grow and undermine its effectiveness. Since 1996, the Commission has convened 90 hearings involving the United States. From 1996 through 2011, petition-based hearings represented 75% of all hearings, with the Commission holding 34 petition-based hearings and just 13 thematic hearings.
- By contrast, from 2012 to the present, the Commission has convened just eight petition-based hearings, contrasted with 35 thematic hearings, meaning that thematic hearings have represented over 80% of all hearings in the past six years.

- We understand the Commission's desire to provide its views on important issues of the day. But the disproportion between thematic and petition-based hearings feeds directly into a larger problem of increasing concern to the United States: the Commission has been expending an inordinate amount of its limited resources involving itself in high-profile and sensitive on-going domestic political discussions instead of taking decisive action to address the severe and growing backlog of individual petitions. As a strong supporter of the Commission and by far the Hemisphere's largest financial contributor, we are concerned that the Commission is operating outside of its mandate and not focusing its limited resources as it should.
- For the United States alone, there are nearly 100 cases open on the Commission's docket. In the vast majority of the open cases, action lies with the Commission to make a decision. Newly opened cases are typically at least five years old by the time the Commission is able to send them to the United States for a response.
- The backlog continues to grow because the number of petitions received in any given year far exceeds the number of decisions per year. The Commission usually issues one or two merits decisions per year involving the United States, typically many years after the events being complained about.

- The IACHR's statistics website indicates much larger numbers for other OAS Member States such as Mexico, Colombia, and Peru. Although we applaud recent efforts to streamline case management, you face a monumental task simply in addressing the cases currently before you.
- The Commission's strength and credibility in the region depend on its ability to operate effectively and efficiently in a constrained budgetary environment. It must demonstrate to States, civil society, and individuals that it is an efficient and effective institution. The severe backlog of individual petitions, and the long amount of time that elapses between the filing of a petition and the case's ultimate resolution, significantly diminishes this perception.
- To be sure, dealing with individual petitions is tedious, requires examination of alleged abuses that occurred years ago, and occurs mostly out of public view. But as you of course appreciate, it is indispensable work on which many individuals across the Hemisphere hang their hopes.
- In sharp contrast, the topics to be discussed at the hearings today are not the subject of a petition before the Commission. Nor do they lack full and transparent debate and consideration in all relevant democratic and judicial fora in the United States. They were instead convened at the Commission's own

initiative, using a rarely invoked provision of the Rules, at least with respect to the United States.

- We understand that you may disagree with the views we have just set forth. We respect your independence and will, of course, listen to your point of view and to that of civil society.
- Nevertheless, it remains the position of my government that the Commission should not have convened hearings on these issues, especially absent a petition. Each time the Commission convenes yet another thematic hearing on a hotly contested political issue that is the subject of robust debate in democratic institutions or a matter in active litigation, the United States finds itself reevaluating the utility of participating in hearings. Despite these concerns, we ultimately decided it was important to come here and relate our concerns to you, and to convey our desire to continue this discussion in Washington at a mutually convenient time.
- Turning now to the topic of this hearing, I will give the floor to my colleague from the Office of the Legal Adviser, Mr. Bischoff.

***James Bischoff, Office of the Legal Adviser***

- Distinguished Commissioners, good morning. My name is James Bischoff, and today I will discuss the Commission's lack of competence to consider the domestic regulation of firearms and private violence perpetrated by firearms. I will then discuss the constitutional right to bear arms in the United States, U.S. laws and regulations on firearms, and prosecutions of those who violate gun laws.

***Lack of competence***

- As provided under Article 20 of its Statute, the Commission has the competence to examine allegations that the United States, which has not chosen to ratify the American Convention on Human Rights, has failed to live up to its commitments in the American Declaration of the Rights and Duties of Man.
- This year marks the 70th anniversary of the Declaration, a proud moment the Commission is celebrating at this Period of Sessions. It was truly a groundbreaking instrument that set forth, months before the Universal Declaration on Human Rights, key human rights commitments that States of the Americas undertook voluntarily to respect, as well as duties that individuals owe toward one another and to society—such as the duty to obey the law. Many

of the Declaration's rights reflected rights contained in our own Constitution's Bill of Rights, another groundbreaking document at the time of its adoption.

- Despite the importance of the Declaration as a statement of moral and political commitments, the commitments in it are, in the United States' longstanding view, nonbinding. By the same token, the Commission has recommendatory but not binding powers, as the terms of the Commission's Statute make clear—in particular, Articles 18 and 20 thereof.
- We of course understand that the Commission and the Inter-American Court take the view that the Declaration is a source of legal obligation. Yet while we have great respect for the Commission and the Court, the United States has never accepted this view, and is not bound by it as a matter of international law.
- While we recognize the good intentions of those who would wish the Declaration had binding force, it would seriously undermine the process of international lawmaking, by which sovereign States voluntarily undertake specified legal obligations, to impose legal obligations on States where no obligation has been accepted, through some form of *ipse dixit*. This is precisely how this jurisprudence originated in the Commission's *Baby Boy* decision back in 1981, backed up by a Court advisory opinion in 1989.
- Contrary to the Commission's and Court's assertions in those two decisions, it is not the case that the States that negotiated and ratified the OAS Charter or its



amendments or the States that adopted the Commission's Statute, intended the Commission to apply the American Declaration as a binding source of international law.

- This basic fact holds true no matter how many times the Commission restates the view that the Declaration has binding force, and it does so frequently. But as far as we are aware, neither the Commission nor the Court has ever seriously reconsidered the legal reasoning underlying this view.
- Nevertheless, we continue to make our objections known. As a sovereign State, the United States voluntarily undertakes international law obligations, and it takes those obligations seriously. But we have never undertaken an obligation that would render the Declaration binding—not when it was adopted and not since then. And we have persistently objected to any such notion in scores of written and oral submissions since at least 1979.
- In sum, the Declaration remains, after 70 years, one of the key blueprints for the protection and promotion of human rights in the Americas. But as a matter of international law, it also remains nonbinding, just as those who negotiated and adopted it intended 70 years ago. While the United States and the Commission disagree on this basic issue, we always do so in a spirit of respectful dialogue.

- Turning now to the substance of the Declaration and the topic of this hearing, there is no article in the Declaration addressing the right of individuals to bear arms, in contrast to the United States Constitution, where as our friends at the other table mentioned, the right is set forth in the Second Amendment of our Constitution. The constitutional right to bear arms is the starting point for any discussion of firearms in the United States.
- Furthermore, the Declaration is silent on any right to be free from private violence, including violence inflicted by firearms.
- More broadly, as we have explained in numerous submissions over the years, the United States does not recognize that OAS Member States, by pledging support for the Declaration or joining subsequent OAS instruments, undertook a commitment—much less an obligation under international law—to prevent private violence.
- Those who unjustifiably use guns against other individuals certainly fail to respect their duty to obey the law. But there is no provision in the Declaration or in the other governing instruments of the Commission that would permit such private conduct to be imputed to the State.
- Of course, as a matter of domestic law and policy, the United States government takes very seriously its responsibility to prevent and punish crime.

- However, as a matter of international human rights, questions of private gun violence and States' regulation of firearms and States' actions to address private violence lie beyond the Commission's competence to consider.

### ***Right to bear arms***

- Despite this lack of competence, I will briefly discuss for the Commission's benefit some aspects of the U.S. domestic legal regime related to the right to bear arms and firearm regulation.
- As noted above, the Second Amendment of the U.S. Constitution states that "the right of the people to keep and bear Arms[] shall not be infringed."
- This right has been explained by the U.S. Supreme Court, in the case *District of Columbia v. Heller*, as "guarantee[ing] the *individual* right to possess and carry weapons."<sup>1</sup> The Court also held that this right extends to "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding [of the United States]."
- The Second Amendment means that governments at all levels of our federal system are prohibited from outright banning ownership, possession, and sale of firearms, because to do so would run afoul of the Constitutional right to bear arms.

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<sup>1</sup> *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (emphasis added).

### *Firearm regulation and efforts to combat gun violence*

- However, the existence of the right does not mean that governments are powerless to regulate firearm sale and possession. As the Supreme Court has also recognized, governments may lawfully impose prohibitions on the possession of firearms by, for example, felons and the mentally ill. Governments may also, as two more examples given by the Supreme Court, forbid the carrying of firearms in schools or government buildings; and impose conditions on the commercial sale of arms.
- Both federal and state laws address firearms possession and use. And the federal government has recently undertaken a number of important efforts to ensure violent offenders—including those who criminally misuse firearms—are held accountable.
  - In March 2017, Attorney General Sessions sent a memorandum to Department of Justice prosecutors, ordering them to prioritize cases against the most violent offenders, those who are driving the violence in the most violent places in the United States.<sup>2</sup> In October, he reinvigorated the Department’s Project Safe Neighborhoods program, directing federal prosecutors to partner with law enforcement at all levels

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<sup>2</sup> Department of Justice Press Release dated March 8, 2017, <https://www.justice.gov/opa/pr/attorney-general-sessions-directs-federal-prosecutors-target-most-significant-violent>

of government, along with the communities they serve, to develop localized plans to reduce violent crime.<sup>3</sup>

- In 2017, federal prosecutors brought cases against the greatest number of violent criminals in at least a quarter century – the most since the Department began tracking a “violent crime” category. And they prosecuted more defendants on federal firearms charges than they have in a decade.

### ***Conclusion***

- Distinguished Commissioners, that concludes our presentation today. We look forward to your comments.

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<sup>3</sup> Department of Justice Press Release dated October 5, 2017, <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-reinvigoration-project-safe-neighborhoods-and-other>

Drafted: James Bischoff & Kathryn Bacharach, L/HRR, Feb. 2018

Approved: Kevin Sullivan, USOAS

Cleared:

Andrew Stevenson, USOAS (ok)

Rachel Owen, USOAS (ok)

Christine Sanford, L/HRR (ok)

Jeff Kovar, L/WHA (ok)

Taryn Frideres, S/P (ok)

Catherine Newling, DRL (info)

Ryan Higginbotham & others, DOJ (ok)

White House DPC (ok)