THE PERMANENT REPRESENTATIVE
OF THE
UNITED STATES OF AMERICA
TO THE
ORGANIZATION OF AMERICAN STATES

WASHINGTON, D.C.
September 21, 2017

Dr. Paulo Abrão
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

Re: Lezmond C. Mitchell, Petition No. P-627-17
Response to Petition

Dear Dr. Abrão:

The United States Government has the honor of addressing the Inter-American Commission on Human Rights in regard to the above-referenced Petition filed on behalf of Lezmond C. Mitchell. Your office, having received the Petition on April 12, 2017, transmitted it to the United States on July 19, 2017 via a letter dated July 18, 2017. Please find enclosed the United States' response to the Petition. We trust this information is useful to the Commission and thank the Commission for its attention to this matter.

Please accept renewed assurances of my highest consideration.

Sincerely,

Kevin K. Sullivan
Interim Permanent Representative

Annexes:

Selected Domestic Proceedings Relating to Petitioner Lezmond C. Mitchell

1. United States v. Mitchell (U.S. Court of Appeals for the Ninth Circuit 2007) (direct appeal of criminal conviction)
2. Mitchell v. United States (U.S. District Court for the District of Arizona 2010) (petition for post-conviction *habeas corpus* relief)
3. Mitchell v. United States (U.S. Court of Appeals for the Ninth Circuit 2015) (appeal from the District Court's denial of post-conviction *habeas corpus* relief)

PETITION NO. P-627-17, LEZMOND C. MITCHELL
RESPONSE OF THE UNITED STATES OF AMERICA

The Government of the United States appreciates the opportunity to submit these observations on the April 12, 2017 "Petition Alleging Violations of Human Rights of Lezmond C. Mitchell … with Request for an Investigation and Hearing on the Merits and Urgent Request for Precautionary Measures under Article 25.1 of the Commission's Regulations" ("Petition"), forwarded by the Inter-American Commission on Human Rights ("Commission") via a letter dated July 18, 2017, as Petition No. P-627-17, *Lezmond C. Mitchell v. United States*. The Petition alleges various violations of provisions of the American Declaration of the Rights and Duties of Man ("American Declaration" or "Declaration"), including the right to life, the right to equality before the law, and rights related to due process and a fair trial, resulting from Lezmond Mitchell's ("Mr. Mitchell" or "Petitioner") conviction and death sentence in a federal criminal case.[1]

The Petition is inadmissible and does not demonstrate a failure by the United States to live up to its commitments under the American Declaration. Accordingly, the United States respectfully requests that the Commission find the Petition inadmissible. Should the Commission nevertheless declare the Petition admissible and examine its merits, or should it defer its examination of the Petition's admissibility until its review of the merits under Article 36(3) of the Rules of

[1] The United States has consistently maintained that the American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on member states of the Organization of American States ("OAS"). U.S. federal courts of appeals have independently held that the American Declaration is nonbinding and that the Commission's decisions do not bind the United States. *See* Garza v. Lappin, 253 F.3d 918, 925 (7th Cir. 2001); *accord, e.g.*, Flores-Nova v. Attorney General of the United States, 652 F.3d 488, 493–94 (3rd Cir. 2011); In re Hicks, 375 F.3d 1237, 1241 n.2 (11th Cir. 2004). As explained by the U.S. Court of Appeals for the Seventh Circuit in *Garza*, "[n]othing in the OAS Charter suggests an intention that member states will be bound by the Commission's decisions before the American Convention goes into effect. To the contrary, the OAS Charter's reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members. The language of the Commission's statute similarly shows that the Commission does not have the power to bind member states." *Accord* Commission Statute, art. 20 (setting forth recommendatory but not binding powers). For a further discussion of the U.S. position regarding the nonbinding nature of the American Declaration, see Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988, *available at* http://www1.umn.edu/humanrts/iachr/B/10-esp-3.html.

As the Commission is aware, the United States respects its political commitment to uphold the American Declaration. As a result of the nonbinding nature of the American Declaration, the United States understands the term "violation" in reference to the American Declaration as meaning an allegation that a country has not lived up to its political commitment to uphold the Declaration.

Procedure ("Rules"), the United States urges it to find the Petition without merit and deny the Petitioner's request for relief.

The United States acknowledges that the Commission requested precautionary measures in this matter on July 2, 2017, in a transmission designated as PM-250-17, and notes the request for precautionary measures set forth in the Petition. The United States reiterates its consistent and longstanding position that the Commission does not have the authority to require that States not party to the American Convention on Human Rights ("American Convention") adopt precautionary measures and respectfully requests that the Commission withdraw its recommendation.[2]

A. FACTUAL AND PROCEDURAL BACKGROUND

On October 28, 2001, Mr. Mitchell and 16-year-old accomplice Johnny Orsinger abducted and killed Alyce Slim and her nine-year-old granddaughter. Mr. Mitchell and Orsinger stabbed Slim 33 times, causing her death. They then drove Slim's pickup truck into the mountains where they slit her granddaughter's throat twice and, when the girl did not die, took turns dropping large rocks on her head. Mr. Mitchell and Orsinger left the murder scene, but later returned to dismember their victims, bury their heads and hands, and burn their clothing and personal effects.[3]

Three days later, on October 31, 2001, Mr. Mitchell and two accomplices drove the pickup truck stolen from Slim to a trading post on the Navajo Reservation. The three men entered the trading post wearing masks, and Mr. Mitchell carried a 12-gauge shotgun. When an employee said she did not know the combination to the safe, one of the men responded, "If you lie to me or you don't cooperate with us, we are going to kill you." After making off with $5,530 from the safe and registers, the robbers drove the stolen pickup truck to a secluded area and set it on fire.[4] Mr. Mitchell was arrested on November 4, 2001, at the home of accomplice Gregory Nakai, by a team of Federal Bureau of Investigation (FBI) and

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2 The reasons for this position are discussed in detail below at Section C.

3 *See* Mitchell v. United States, 790 F.3d 881, 883 (9th Cir. 2015). This opinion is appended to this response as Annex 3.

4 *Id*.

Navajo Nation law enforcement officers executing a tribal warrant. Mr. Mitchell was held in a tribal jail, where he voluntarily waived his *Miranda* rights,[5] took a polygraph examination, and consented to interviews with FBI and Navajo investigators. A federal indictment was issued on November 21, 2001, and Mr. Mitchell was transferred out of tribal custody on November 29, 2001. A superseding indictment was returned on July 2, 2002.[6]

A jury in the U.S. District Court for the District of Arizona ("district court") convicted Mr. Mitchell of 11 federal counts, including two first-degree murders, carjacking resulting in death, and multiple robberies. Following the trial, the judge conducted a separate sentencing hearing to determine Mr. Mitchell's punishment, before the same jury that determined his guilt. While federal law precluded the U.S. government from seeking a sentence of death for the two first-degree murders, the prosecution pursued the death penalty for the charge of carjacking resulting in death. After weighing the aggravating and mitigating factors, the jury unanimously recommended that Mr. Mitchell be sentenced to death. The district court accepted this recommendation and sentenced Mr. Mitchell to death on September 15, 2003.[7]

Mr. Mitchell subsequently appealed. He argued, *inter alia*, that because the Navajo Nation never opted into the federal capital punishment scheme, imposing a sentence of death in his case violated tribal sovereignty. The U.S. Court of Appeals for the Ninth Circuit considered Mr. Mitchell's claims in detail and issued an opinion on September 5, 2007, affirming Mr. Mitchell's conviction and sentence.[8] On June 9, 2008, the U.S. Supreme Court denied Mr. Mitchell's petition for *certiorari*.[9]

Mr. Mitchell next pursued post-conviction *habeas corpus* relief with the district court, seeking to vacate his conviction by claiming, *inter alia*, that he received ineffective assistance of counsel at both the guilt and penalty phases of his

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5 *Miranda* rights are rights to an attorney and against self-incrimination under the U.S. Constitution as detailed in the U.S. Supreme Court decision of *Miranda v. Arizona*, 384 U.S. 436 (1966).

6 United States v. Mitchell, 502 F.3d 931, 945 (9th Cir. 2007). This opinion is appended to this response as Annex 1.

7 Mitchell v. United States, 2010 WL 3895691, *1 (D. Ariz. Sept. 30, 2010). This opinion is appended to this response as Annex 2.

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

9 Mitchell v. United States, 553 U.S. 1094 (2008).

trial. Mr. Mitchell also sought an evidentiary hearing on the claims raised in his motion. On September 30, 2010, in a thoroughly considered order, the district court denied his motion to vacate his conviction and sentence as well as his motion for an evidentiary hearing.[10]

Mr. Mitchell then appealed the district court's denial of *habeas corpus* relief to the U.S. Court of Appeals for the Ninth Circuit and, on June 19, 2015, the Ninth Circuit issued an affirmance of the judgment, limited to issues for which the district court had granted a certificate of appealability.[11] Mr. Mitchell unsuccessfully sought reconsideration of the Ninth Circuit's June 19, 2015 decision and again sought review with the U.S. Supreme Court. On October 3, 2016, the Supreme Court denied Mr. Mitchell's application for *certiorari*.[12]

Mr. Mitchell's second denial of *certiorari* ended the avenues for direct and *habeas* judicial review of his criminal conviction. However, Mr. Mitchell has pursued other avenues of post-conviction relief. On July 8, 2014, he joined a lawsuit in the U.S. District Court for the District of Columbia by another death-row inmate against various U.S. government officials, claiming that the means by which the government seeks to implement the death penalty in his case would violate the U.S. Constitution as well as federal law.[13] On January 13, 2012, the U.S. District Court for the District of Columbia ordered that the civil case be stayed pending the Federal Bureau of Prisons' issuance of a revised lethal injection protocol.[14] The litigation remains stayed, and no execution will be carried out against Mr. Mitchell until "revision of the lethal injection protocol is complete."[15]

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10 Mitchell v. United States, 2010 WL 3895691 (D. Ariz. Sept. 30, 2010).

11 Mitchell v. United States, 790 F.3d 881 (9th Cir. 2015). In order to appeal a final order in a federal *habeas* proceeding, an applicant must obtain a certificate of appealability by making "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c).

12 Mitchell v. United States, 137 S. Ct. 38 (2016).

13 Robinson v. Mukasey et al., CV 07-02145, Dkt. Nos. 11 and 12.

14 Robinson v. Mukasey et al., No. 1:07-cv-02145-RWR, U.S. District Court for the District of Columbia.

15 Robinson v. Mukasey et al., No. 1:07-cv-02145-TSC, Dkt. No. 9.

B. DISCUSSION

The Petition Is Inadmissible Under Article 34(a) of the Commission's Rules for Failure to State Facts That Tend to Establish a Violation of the American Declaration, Is Meritless, and Is Unreviewable Under the Fourth Instance Formula

For a petition to be admissible before the Commission, it must satisfy the requirements of the Rules. Article 34(a) of the Rules provides that "[t]he Commission shall declare any petition or case inadmissible when … it does not state facts that tend to establish a violation of the rights referred to in Article 27 of these Rules of Procedure … ." Article 27, in turn, directs the Commission to "consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments … ." For the United States, the American Declaration is the only "applicable instrument."[16]

Mr. Mitchell raises two primary arguments. First, he argues that the United States violated the sovereignty of the Navajo Nation by seeking the death penalty in Mr. Mitchell's case.[17] Second, he argues that Mr. Mitchell's rights related to due process and a fair trial were violated as a consequence of alleged collusion between the U.S. government and tribal law enforcement, ineffective assistance of counsel, and the decisions of the federal courts in his own *habeas* proceedings.[18] As explained below, the Commission should declare the Petition to be inadmissible because Petitioner has not stated facts that tend to establish a violation of any rights in the American Declaration. Additionally, the arguments presented in the Petition are unreviewable in light of the Commission's "fourth instance formula" as they amount to a mere disagreement with determinations of domestic courts on these same issues, rendered in compliance with the American Declaration.

Should the Commission nevertheless declare the Petition admissible and choose to examine the claims presented by Mr. Mitchell on their merits, or should

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[16] Article 20 of the Commission's Statute and Article 23 of the Rules identify the American Declaration as an applicable instrument with respect to nonparties to the American Convention. Although Article 23 of the Rules lists several additional instruments, the United States is not a party to any of those other instruments.

[17] *See* Petition at 32–38 ("Claim I" citing, in relevant part, Articles I, II, III, XIII, XIX, and XXVI of the American Declaration).

[18] *Id.* at 38–70 ("Claim II" through "Claim V," citing, in relevant part, Articles I, II, XVIII, XXV, and XXVI of the American Declaration).

it defer its examination of the Petition's admissibility until its review of the merits under Article 36(3) of the Rules, it should deny the requested relief because the Petition does not demonstrate a failure by the United States to uphold its commitments under the American Declaration. The reasons the Petition is inadmissible under Article 34(a), the reasons the Commission lacks competence to review it, and the reasons it is meritless in any event are discussed in tandem throughout this brief.

1. Mr. Mitchell's Allegation of Infringement on Navajo Sovereignty Is Beyond the Commission's Competence to Review and He Has Not Effectively Demonstrated this Allegation In Any Event

In 1994, Congress passed the Federal Death Penalty Act ("FDPA"), creating 60 capital offenses under federal law.[19] In a show of respect for tribal self-determination, the law provided that unless a tribe opted in to the federal death penalty, "no person subject to the criminal jurisdiction of an Indian tribal government" could be sentenced to death for crimes where federal jurisdiction derived from the offense having been committed on tribal land.[20] Mr. Mitchell alleges that applying the FDPA in his case violates the tribal sovereignty of the Navajo Nation. He further claims that because the tribe never opted into the federal death penalty and recommended against its use in Mr. Mitchell's case, the government's decision to pursue a death sentence was "contrary to then-existing federal policy and contrary to evolving standards of decency."[21] As explained below, however, in reviewing Mr. Mitchell's claim, the Commission must limit itself to the American Declaration, an instrument setting forth individual rights that makes no mention of the collective rights of indigenous peoples. Moreover, Mr. Mitchell's sentencing was entirely lawful because federal jurisdiction over the crime for which he received the death penalty was not dependent on it having taken place on tribal land and therefore the provision of the FDPA requiring a tribe to opt in did not apply.

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19 Federal Death Penalty Act of 1994, codified at 18 U.S.C. §§ 3591–98.

20 18 U.S.C. § 3598.

21 Petition at 38.

a. The American Declaration Does Not Speak to Collective Rights and the Commission Lacks Competence to Expand Its Review Beyond the Declaration

The Commission may not review Mr. Mitchell's claim that the United States infringed on the Navajo Nation's sovereignty by imposing the death penalty with respect to crimes committed by Indians in Indian Country,[22] because this claim goes beyond the scope of the American Declaration. Mr. Mitchell supports this claim by reference to specific articles of the American Declaration and general references to the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") and the American Declaration on the Rights of Indigenous Peoples ("OAS DRIP"), as well as the Commission's merits report in the *Dann* case and a decision of the Inter-American Court of Human Rights.[23]

The American Declaration sets forth human rights, fundamental freedoms, and duties of individuals, not of collectives. This fact is evidenced in the Declaration's plain text. The articles cited in the Petition begin with the words "[e]very human being,"[24] "[a]ll persons,"[25] "[e]very person,"[26] or "[e]very accused person."[27] All of the other rights, and all of the duties, similarly begin with language referring to individual persons.[28] As such, these articles, on their face, do not set forth rights pertaining to the Navajo Nation.

Moreover, the Commission must decline to review the Petition through the rubric of the UNDRIP or the OAS DRIP because it lacks competence to apply any instrument beyond the American Declaration with respect to the United States.[29]

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22 "Indian Country" means all land within the limits of any Indian reservation under U.S. government jurisdiction, all dependent Indian communities within U.S. borders, and all allotments, the Indian titles to which have not been extinguished. *See* 18 U.S.C. § 1151 (containing additional stipulations).

23 Petition at 32, 38.

24 American Declaration, art. I.

25 *Id*. at art. II.

26 *Id*. at art. III, XIII, XIX.

27 *Id*. at art. XXVI.

28 Because the United States is not a party to the American Convention, the Commission's jurisdiction with respect to the United States is limited to claims grounded in the American Declaration. *See, e.g.*, Commission Statute, art. 20. Even if the Commission were to look to the American Convention, it would have to conclude that the American Convention is similarly limited to safeguarding the human rights and fundamental freedoms of individual human beings, and does not apply to collectives such as indigenous peoples. American Convention, art. 1(2) (defining "person" as every human being).

29 *See, e.g.*, U.S. Hearing Presentation, Ameziane v. United States, Case No. 12.865, 164th Period of Sessions, Mexico City, Sept. 7, 2017 ("*Ameziane* U.S. Hearing Presentation"), *available at*

A fortiori, the Commission lacks competence to apply provisions in such instruments setting forth collective rights, such as the many articles of the UNDRIP and OAS DRIP declaring collective rights of indigenous peoples—*pueblos indígenas*. These collective rights, while important, must be contrasted with the human rights enjoyed and exercised by indigenous *individuals* and all other individuals by virtue of having been "born free and equal, in dignity and in rights, … endowed by nature with reason and conscience," and which are the rights recognized and protected by the American Declaration.[30]

Furthermore, both the UNDRIP and the OAS DRIP are aspirational statements of political and moral commitment, and are not binding under international law. Neither instrument was intended to create new international law, nor are they reflections of states' existing obligations under conventional or customary international law.[31]

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https://www.youtube.com/watch?v=sbN4tBcBbtQ (U.S. delegation providing legal reasons for Commission's lack of competence over extraneous instruments).

[30] American Declaration, pmbl. ¶ 1. *See also, e.g.*, "U.S. Announcement of Support for the United Nations Declaration on the Rights of Indigenous Peoples," *reprinted in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 265 (Elizabeth R. Wilcox ed., 2010) ("U.S. Announcement of Support"), *available at* https://www.state.gov/documents/organization/179316.pdf:

> [T]he United States is committed to serving as a model in the international community in promoting and protecting the collective rights of indigenous peoples as well as the human rights of all individuals. The United States underlines its support for the Declaration's recognition in the preamble that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess certain additional, collective rights. The United States reads all of the provisions of the Declaration in light of this understanding of human rights and collective rights.

See also, e.g., U.N. GAOR, 61st Sess., 107th plen. mtg. at 21, U.N. Doc. A/61/PV.107 (Sept. 13, 2007) ("UNDRIP Vote Record Part I") (United Kingdom at UNDRIP's adoption stating that "since equality and universality are the fundamental principles underpinning human rights, we do not accept that some groups in society should benefit from human rights that are not available to others," and that "[w]ith the exception of the right to self-determination, we therefore do not accept the concept of collective human rights in international law"); *id.* at 24–25 ("The Swedish Government has no difficulty in recognizing collective rights outside the framework of human rights law" but "it is the firm opinion of the Swedish Government that individual human rights prevail over the collective rights mentioned in the Declaration."); U.N. GAOR, 61st Sess., 108th plen. mtg. at 5, U.N. Doc. A/61/PV.108 (Sept. 13, 2007) ("UNDRIP Vote Record Part II") (Slovakia stressing that "international human rights protection is based on the principle of the individual character of human rights"; that the UNDRIP "clearly distinguishes between the individual character of the human rights of indigenous individuals and the collective rights indispensable for their existence, well-being and integral development as peoples"; and that "[t]hose collective rights should not be considered as human rights").

[31] *See e.g.*, U.S. Announcement of Support, *supra* note 30, at 264 ("The United States supports the Declaration, which—while not legally binding or a statement of current international law—has both moral and political force."); "American Declaration on the Rights of Indigenous Peoples," DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 251–52 (CarrieLyn D. Guymon ed., 2016) ("U.S. Objections to OAS DRIP") (noting that the OAS DRIP is not legally binding and does not create new law), *available at* https://www.state.gov/documents/organization/272128.pdf. *See also, e.g.*, UN Vote Record Part I, *supra* note

With respect to the OAS DRIP in particular, the United States has persistently expressed objections to that instrument, and dissociated from consensus upon the Organization of American States ("OAS") General Assembly's adoption of it in June 2016.[32] As the Commission will recall, the United States strongly disagreed with the Commission's assertion in the *Dann* merits report that "aspects of" the OAS DRIP, which was at that time still a draft, "reflect[ed] general international legal principles" and could thus be considered in interpreting and applying the American Declaration in the context of indigenous peoples.[33]

With respect to the UNDRIP, the United States supports that instrument as explained in its December 2010 Announcement of Support, recognizes its significant moral and political force, and looks to the principles of the UNDRIP in its dealings with federally recognized tribes.[34] But U.S. support for the UNDRIP did not change the U.S. domestic legal framework with respect to tribal rights, and there is no domestic law that precludes the United States from imposing the death penalty for federal crimes committed by Indians in Indian Country. Furthermore, Mr. Mitchell points to no provision of the UNDRIP that would provide him the substantive relief he seeks.

b. The U.S. Government's Decision to Seek the Death Penalty for Mr. Mitchell Was Consistent with U.S. Domestic Law

In addition, the decision to seek the death penalty for Mr. Mitchell did not contravene any provision of U.S. domestic law. Under U.S. law, American Indian tribes possess a unique legal status as "domestic dependent nations" by virtue of the fact that they existed as sovereign nations prior to European settlement of North America. A "federally recognized tribe" is one that has a documented

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30, at 12–15, 17, 22, 26 (United Kingdom, Colombia, Guyana, Australia, Canada, and New Zealand stating that UNDRIP is not binding); *id*. at 12–13, 17 (Australia, Colombia, and Canada adding that UNDRIP does not reflect customary international law); UN Vote Record Part II, *supra* note 30, at 3, 5 (Nepal and Turkey delegates stating that UNDRIP is not binding).

[32] On June 15, 2016, the OAS General Assembly adopted the OAS DRIP. OAS G.A. Res. 2888 (XLVI-O/16) (June 15, 2016). The United States stopped actively participating in the process of negotiating the text in 2007 due to deadlocked negotiations around key issues. It also registered its concerns at the adoption of the OAS DRIP by stating that it had persistently objected to the text. *See id.* at n.1 (footnote to General Assembly resolution explaining U.S. objections); U.S. Objections to OAS DRIP, *supra* note 31, at 251–52 (reprinting those objections).

[33] *See* Mary & Carrie Dann v. United States, Case No. 11.140, Observations of the Government of the United States to the Inter-American Commission on Human Rights Report No. 113/01 of October 15, 2001, Dec. 17, 2001, at 14–15 *available at* https://www.state.gov/s/l/38647.htm.

[34] *See* U.S. Announcement of Support, *supra* note 30, at 264.

government-to-government relationship with the United States. There are currently 567 such tribes, of which the Navajo Nation is one. The U.S. Supreme Court has long acknowledged that federally recognized tribes retain inherent powers of self-government by virtue of their preexisting sovereignty, but these powers may be limited by federal law.[35] For instance, some federal criminal statutes apply, by operation of federal law, to crimes between Indians in Indian Country ("enclave crimes"). However, others apply throughout the United States, including in Indian Country, to Indians and non-Indians alike. Federal jurisdiction over such "crimes of general applicability" derives from Congress's plenary power under the U.S. Constitution to regulate interstate commerce.[36]

Carjacking resulting in death is a crime of general applicability. As Mr. Mitchell himself concedes, the Federal Death Penalty Act only requires a tribe to opt into the death penalty where federal jurisdiction is grounded in the crime having been committed on tribal land. Thus, Mr. Mitchell was not, and could not have been, sentenced to death for murder.[37] For this reason, the U.S. government was within its legal rights to pursue a death sentence for the carjacking resulting in death charge.

Mr. Mitchell asserts that in at least 20 other instances of murder on tribal land, the U.S. government has ultimately declined to pursue the death penalty, "apparently based on the tribe's opposition to capital punishment."[38] Here too, the prosecution requested the Navajo Nation's input regarding the possibility of the United States seeking the death penalty in Mr. Mitchell's case. The Navajo Nation held public hearings to gauge tribal members' position, after which the Attorney General of the Navajo Nation communicated the tribe's opposition in a letter dated January 22, 2002 to the United States Attorney for the District of Arizona.[39] The

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35 *See e.g.*, Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960) (stating that "a general statute in terms applying to all persons includes Indians and their property interests").

36 *See* Mitchell v. United States, 790 F.3d 881, 883–84 (9th Cir. 2015) (citing to William C. Canby, Jr., AMERICAN INDIAN LAW IN A NUTSHELL 185–87 (6th ed. 2015)).

37 Petition at 36, fn. 1.

38 *Id*. at 34–35. The entire death penalty protocol process is privileged and confidential to the Department of Justice and creates no substantive rights for defendants. *See generally* U.S. Attorney's Manual § 9-10.050, *available at* https://www.justice.gov/usam/usam-9-10000-capital-crimes; *United States v. Fernandez*, 231 F.3d 1240, 1247 (9th Cir. 2000); *United States v. Furrow*, 100 F. Supp. 2d 1170, 1178 (C.D. Cal. 2000). Mr. Mitchell's argument as to why the Attorney General ultimately rendered a decision not to seek the death penalty in other cases is thus necessarily speculative.

39 Petition at 35–36; Petition, Attachment A: Letter from Levon Henry, Attorney General of the Navajo Nation.

tribe had ample opportunity to articulate its cultural opposition to the death penalty before the penalty phase of Mr. Mitchell's case, and it did so. But there was no requirement under U.S. law for federal prosecutors to defer to the tribe's preferences. Nor was there any requirement to do so under any binding international instrument to which the United States is a party,[40] and, as discussed above, the provisions of the nonbinding UNDRIP do not apply to these circumstances. Even if they did, the United States does not interpret the UNDRIP to require tribal consent to the death penalty. If the U.S. government did exercise prosecutorial discretion to decline to seek the death penalty in past tribal cases, it was no guarantee that the death sentence would never be lawfully pursued in the future.

As such, Mr. Mitchell's claims fail to state facts that tend to establish a violation of the Declaration under Article 34(a) of the Rules, and the Commission lacks competence to review allegations of violations of collective rights under the American Declaration or any claims under the UNDRIP or OAS DRIP. The claims are meritless in any event.

2. Mr. Mitchell Has Not Effectively Demonstrated a Lack of Procedural Protections in His Prosecution that Tend to Establish a Violation of the American Declaration

Mr. Mitchell argues that his rights related to a fair trial and due process were violated due to: (1) "collusion" between the U.S. government and Navajo law enforcement; (2) ineffective assistance of counsel; and (3) insufficient opportunities to present his claim for *habeas* relief. As explained below, Mr. Mitchell's domestic proceedings were conducted in compliance with the rights set forth in the American Declaration and U.S. law. Mr. Mitchell had an opportunity to present his case, to rebut the government's case, to challenge the evidence presented against him, and to marshal legal arguments, both during the guilt and

[40] Neither the Declaration nor customary international law prohibits capital punishment. *See* Rogovich v. United States, Petition No. P-1663-13, Response of the United States, Feb. 12, 2016 ("*Rogovich* U.S. Response"), at 23–25, *available at* https://www.state.gov/s/l/2016/ch7/271817.htm. A number of countries retain the death penalty in one form or another. The Declaration is intentionally silent on the death penalty (in fact, language prohibiting capital punishment except in exceptional circumstances was deleted during the drafting process). *See* Project of Declaration of the International Rights and Duties of Man, formulated by the Inter-American Juridical Committee, for consideration by the Ninth International Conference of American States, Pan American Union, Washington, 1948, art. I.

sentencing phases of trial and, thereafter, at three levels of the judiciary. Because these claims fail to state facts that tend to establish a violation of the American Declaration, they are inadmissible under Article 34(a) of the Rules, and the claims are meritless in any event.

a. Arrest and Questioning by Federal and Tribal Law Enforcement Did Not Violate Mr. Mitchell's Due Process or Fair Trial Rights

Mr. Mitchell's first contention is that the FBI and Navajo Nation law enforcement colluded to deprive him of his due process rights during his arrest and pre-trial questioning.[41] Specifically, Mr. Mitchell alleges that Navajo law enforcement kept him in tribal custody on a minor vandalism charge "to allow the FBI to repeatedly interrogate him, without counsel present … and acquire significant incriminating evidence against him."[42] He relies heavily on the Commission's admissibility report in *Garza*, where the Commission held Garza's petition admissible on due process grounds because the defendant was interrogated despite asserting his right to counsel.[43]

Mr. Mitchell's pretrial due process claim is without merit for several reasons. Unlike Garza, Mr. Mitchell offered no evidence that he ever asked for counsel.[44] In rejecting Mr. Mitchell's claim that his post-arrest statements were involuntary and taken in violation of his constitutional rights, the U.S. Court of Appeals for the Ninth Circuit noted that he requested and received a trial hearing on the issue of voluntariness.[45] Mr. Mitchell did not raise a collusion claim at this hearing; instead, he testified that he knowingly cooperated with police and waived his *Miranda* rights in the hope of receiving a lighter sentence.[46]

Consequently, Mr. Mitchell's pretrial due process claim should be rejected as inadmissible under Article 34(a) of the Rules because it does not state facts that tend to establish a violation of the American Declaration, and is without merit.

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41 Petition at 38–41.

42 *Id*. at 40.

43 *See* Petition at 41, citing Garza v. United States, Case No. 12.243, Report No. 80/13, Sept. 16, 2013, ¶ 29.

44 United States v. Mitchell, 502 F.3d 931, 962 (9th Cir. 2007).

45 *Id*. at 959–60.

46 Mitchell v. United States, 2010 WL 3895691, *11 (D. Ariz. Sept. 30, 2010).

b. Mr. Mitchell's Ineffective Assistance of Counsel Claim Is Without Merit and Was Carefully Considered by Domestic Courts, Consistent with Due Process

Mr. Mitchell devotes much of his brief to the claim that the conduct of his trial counsel violated his due process rights, as set forth in Articles XVIII and XXVI of the American Declaration. Specifically, Mr. Mitchell alleges that his trial counsel provided ineffective assistance by failing to (1) assert an intoxication defense at the guilt phase, and (2) competently investigate, prepare, and present mitigating evidence at the penalty phase.[47] Mr. Mitchell claims that because he was charged with several "specific-intent" crimes, any reasonable attorney would have argued that intoxication precluded him from forming the requisite intent. Mr. Mitchell also claims that a proper investigation into his mental health, history of substance abuse, and troubled upbringing would have probably led "at least one juror" to strike "a different balance between life and death."[48]

Mr. Mitchell's ineffective assistance of counsel claim is without merit and was previously addressed by domestic courts. In analyzing and rejecting Mr. Mitchell's ineffective assistance of counsel claim, the domestic courts carefully considered the steps taken by Mr. Mitchell's trial counsel to prepare and present Mr. Mitchell's case, fully consistent with due process commitments under the American Declaration.[49]

For example, in addressing Mr. Mitchell's claim that his attorneys should have further investigated Mr. Mitchell's dysfunctional childhood and mental health, the district court noted that Mr. Mitchell's trial counsel employed an experienced mitigation specialist and conducted a thorough investigation.[50] Mr.

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47 Petition at 43–68.

48 *Id*. at 68.

49 In order to establish ineffective assistance of counsel under U.S. law, one must demonstrate both that counsel's performance was deficient and that such deficit in performance actually prejudiced the final judgment. Strickland v. Washington, 466 U.S. 668, 687 (1984). U.S. courts determine whether the performance of counsel was deficient "by examining whether the challenged representation fell below an objective standard of reasonableness." Cotton v. Cockrell, 343 F.3d 746, 752 (5th Cir. 2003) (citing Kitchens v. Johnson, 190 F.3d 698, 701 (5th Cir. 1999)).

50 In this regard, Mr. Mitchell's case is distinguishable from the case of Moreno Ramos, which Mr. Mitchell cites. *See* Petition at 42–43 (citing Moreno Ramos v. United States, Case No. 12.430, Report No. 1/05, Merits, Jan. 28, 2005). Unlike in Mr. Mitchell's case, in the case of *Moreno Ramos*, the Commission found that "there [was] no information indicating that his trial counsel conducted a mitigation investigation, and a review of the transcript from Mr. Moreno Ramos' prosecution indicates that his counsel presented absolutely no mitigating evidence to the jury pertaining to Mr. Moreno Ramos' personal history or otherwise … ." *Id.* at ¶ 53.

Mitchell's trial counsel interviewed Mr. Mitchell's mother, grandmother, uncle, extended family, friends, acquaintances, football coach, teachers, and other school employees.[51] Mr. Mitchell was also examined by a team of experts, including a psychiatrist, a neurologist, and a neuropsychologist. A psychologist diagnosed Mr. Mitchell as sociopathic and cautioned counsel against calling him to testify.[52] The district court explained that "[c]ounsel have substantial leeway … and are not required to present every conceivable mitigation defense if … they conclude that it is not in their client's best interest to do so."[53] Because the excluded evidence offered weak mitigation and detracted from trial counsel's life worth saving defense, the district court concluded that Mr. Mitchell's counsel made a reasonable strategic decision in keeping potentially damaging facts from the jury.[54]

Following the denial of Mr. Mitchell's *habeas* petition by the district court, Mr. Mitchell received further review of his ineffective assistance of counsel claim by the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit, like the district court, concluded that Mr. Mitchell's trial counsel performed his duties consistent with standards of professional competence and did not fall below an "objective standard of reasonableness."[55] For example, the Ninth Circuit concluded that trial counsel did "just the opposite" of ignoring a potential intoxication defense. Instead, counsel determined that the manner in which the crime was committed, coupled with Mr. Mitchell's "impeccable recall" in recounting the crime and leading investigators back to its desolate scene made a jury unlikely to find that Mr. Mitchell was unaware of where he was and what he was doing when the crimes were committed.[56] Similarly, the Ninth Circuit noted that given the brutal, premeditated nature of the crime and Mr. Mitchell's refusal to attend the trial's penalty phase, the fact that the jury found several mitigating factors at all was a "remarkable tribute to Mitchell's lawyers."[57] The possibility that rejected

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51 *See Mitchell*, 2010 WL 3895691, at *24.

52 *Id.* at *25–26.

53 *Id.* at *32 (citing Darden v. Wainwright, 477 U.S. 168 (1986)).

54 *Id.* at *32 (citing Williams v. Woodford, 384 F.3d 567, 616 (9th Cir. 2004)).

55 *Mitchell*, 790 F.3d at 893–94 (noting that even if another lawyer might have preferred a different strategy, "there is no showing that Mitchell's lawyers' strategy was unreasonable.").

56 *Id*. at 886–887.

57 *Id*. at 893.

evidence could have helped Mr. Mitchell's case was nothing more than a challenge to a reasonable trial strategy "with the benefit of hindsight."[58]

Multiple layers of careful judicial review, both state and federal, provided Mr. Mitchell extended opportunities to challenge his trial and conviction, and he fully availed himself of these opportunities. Consequently, the claim should be rejected as inadmissible under Article 34(a) of the Rules because it does not state facts that tend to establish a violation of the American Declaration, and is without merit.

c. Mr. Mitchell's Habeas *Petition Received Extensive Review, Consistent with U.S. Domestic Law and the American Declaration*

Finally, Mr. Mitchell argues that the United States domestic courts violated his due process rights by providing him insufficient opportunities to pursue *habeas* relief. Specifically, he argues that the district court's denial of a hearing on his *habeas* petition and the court of appeals' subsequent affirmation resulted in a violation of Articles XVIII and XXVI of the American Declaration.

Article XVIII of the American Declaration provides the right to seek judicial redress for violations of individual rights. Article XXVI provides that "[e]very accused person is presumed to be innocent until proved guilty" and declares the right to a fair and impartial trial. In the United States, these guarantees of due process and a fair trial before an impartial jury are embodied in the Fifth and Sixth Amendments to the U.S. Constitution.

The protections afforded individuals in the U.S. criminal justice system are among the strongest and most expansive in the world. The U.S. Constitution—which governs all federal criminal proceedings—establishes a wide range of rights and legal protections for individuals charged with criminal offenses, as do other laws and regulations. Failure to honor these protections and guarantees in a U.S. criminal proceeding can be corrected through appeals or other judicial remedies. This review process ensures that defendants' trials are fair and impartial, that convictions are based on substantial evidence, and that sentences are proportionate to the crime.

[58] *Id*.

In this matter, the United States has provided Mr. Mitchell with a comprehensive and expansive system of review. Over many years, his claims have been reviewed through both direct appeals and the *habeas* procedure, at each of three levels of the federal court system: the U.S. District Court for the District of Arizona, the U.S. Court of Appeals for the Ninth Circuit, and the U.S. Supreme Court. This public record demonstrates that the United States has allocated substantial time and resources to thoroughly and impartially considering Mr. Mitchell's claims and afford him judicial review. Consequently, in presenting his meritless claim that the United States domestic courts provided him insufficient opportunities to pursue *habeas* relief, Mr. Mitchell has failed to set forth facts that tend to establish a violation of the American Declaration under Article 34(a) of the Rules.

3. The Commission Lacks Competence to Review Mr. Mitchell's Claims Under the "Fourth Instance Formula"

In addition, the Commission should dismiss Mr. Mitchell's claims because the Commission lacks competence to sit as a court of fourth instance. The Commission has repeatedly stated that it may not "serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction"—a doctrine the Commission calls the "fourth instance formula."[59]

The fourth instance formula recognizes the proper role of the Commission as subsidiary to States' domestic judiciaries,[60] and indeed, nothing in the American Declaration, the OAS Charter, the Commission's Statute, or the Rules gives the Commission the authority to act as an appellate body. The Commission has elaborated on the limitations that underpin the fourth instance formula in the following terms: "The Commission … lacks jurisdiction to substitute its judgment for that of the national courts on matters that involve the interpretation and explanation of domestic law or the evaluation of the facts."[61]

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[59] Marzioni v. Argentina, Case No. 11.673, Report No. 39/96, Inadmissibility, Oct. 15, 1996, ¶ 51 ("*Marzioni* Inadmissibility Report").

[60] *See* Castro Tortrino v. Argentina, Case No. 11.597, Report No. 7/98, Admissibility, Mar. 2, 1998, ¶ 17.

[61] Macedo García de Uribe v. Mexico, Petition No. 859-03, Report No. 24/12, Inadmissibility, Mar. 20, 2012 ("*Macedo* Inadmissibility Report"), ¶ 40. The Commission has interpreted and applied the fourth instance formula in the same way for OAS Member States that are parties to the legally binding American Convention

It is not the Commission's place to sit in judgment as another layer of appeal, second-guessing the considered decisions of a state's domestic courts in weighing evidence and applying domestic law, nor does the Commission have the resources or requisite expertise to perform such a task.

The United States' domestic criminal process, including the availability of appellate and collateral review of trial and sentencing proceedings, affords those convicted of serious crimes the highest level of internationally recognized protection. Mr. Mitchell has—in numerous courts, over an extended period of time, and on many legal grounds—challenged the legality of his conviction and sentence. Multiple layers of careful judicial review provided Mr. Mitchell extended opportunities to raise and argue his challenges, and he fully availed himself of these opportunities and continues to do so.

Dissatisfied with the outcome of his domestic proceedings, Mr. Mitchell now asks the Commission to reexamine claims that the U.S. District Court for the District of Arizona and the U.S. Court of Appeals for the Ninth Circuit, acting in full conformity with the due process protections reflected in the American Declaration, each independently determined are baseless under the laws of the United States. These decisions are cited throughout this response, and some of them are appended as annexes, so that the Commission may see for itself the rigor and thoroughness that characterized the domestic courts' consideration of Mr. Mitchell's many claims. The Commission has long recognized that "if [a petition] contains nothing but the allegation that the decision [by a domestic court] was wrong or unjust in itself, the petition must be dismissed under [the fourth instance] formula."[62]

The Commission must consequently decline Petitioner's invitation to sit as a court of fourth instance. Acting to the contrary would amount to the Commission

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and for those, including the United States, for which review is instead undertaken pursuant to the nonbinding American Declaration, where there must be even more deference. *See, e.g.*, *id*. at ¶ 40 (emphasis added) ("The judicial protection afforded by the [American] Convention [on Human Rights] includes the right to fair, impartial, and prompt proceedings which give rise to the possibility, *but never the guarantee*, of a favorable outcome. Thus, the interpretation of the law, the relevant proceeding, and the weighing of the evidence is, among others, a function to be exercised by the domestic jurisdiction, which cannot be replaced by the IACHR.").

62 *Marzioni* Inadmissibility Report, *supra* note 59, ¶ 51; *accord* Maldonado Manzanilla v. Mexico, Petition No. 733-04, Report No. 87/07, Inadmissibility, Oct. 17, 2007, ¶ 58 (reiterating that "the fact that the outcome was unfavorable … does not constitute a [rights] violation") (quoting and citing Rodríguez v. Argentina, Case No. 10.382, Report No. 6/98, Inadmissibility, Feb. 21, 1998, ¶ 71).

second-guessing the legal and factual determinations of U.S. federal courts at all levels, conducted in conformity with due process protections under U.S. law, U.S. commitments under the American Declaration, and otherwise in accordance with U.S. commitments and obligations under international human rights instruments. It would also require the Commission to reweigh evidence, something the Commission, by its own admission, cannot do.[63]

Mr. Mitchell was guaranteed, and received, abundant due process protections in his domestic proceedings. He was not guaranteed, and did not receive, a favorable result.[64] While Mr. Mitchell is unhappy with his sentence, the domestic criminal justice system functioned as it should have in this matter. This is a compelling case for the application of the fourth instance formula.

C. PRECAUTIONARY MEASURES

In its letter dated July 2, 2017, and without first asking for U.S. views, even though the "immediacy of the threatened harm" did not "admit of no delay" as would be required for the Commission to disregard Article 25(5) of the Rules, the Commission requested that the United States "adopt the necessary measures to preserve the life and physical integrity of Mr. Lezmond Mitchell … so as not to render ineffective the processing of his case before the Inter-American system."[65] In addition to that request for precautionary measures, Mr. Mitchell has petitioned the Commission to request that the U.S. government: (1) suspend execution of his sentence in order to allow him to challenge the government's lethal injection protocol and/or file a clemency petition; and (2) make evidence available as needed to file a petition before the Commission regarding the federal government's lethal injection protocol.[66]

There was no basis for the Commission's issuance of precautionary measures in this matter. The United States reiterates that Mr. Mitchell is a party to an active lawsuit filed against the United States, in which he alleges that the means by which the government seeks to implement the death penalty in his case violates

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63 *Macedo* Inadmissibility Report, *supra* note 61, ¶ 40.

64 *Id*.

65 Mitchell v. United States, PM 250-17, Resolution 21/2017, July 2, 2017, ¶ 21.

66 Petition at 71–79.

the U.S. Constitution as well as federal statutory law.[67] Mr. Mitchell's case is pending and, pursuant to the government's representations in the course of that suit, it will not seek an execution warrant or carry out an execution until revision of the lethal injection protocol is completed. Thus, Mr. Mitchell is not in danger of immediate execution, and his challenge to the federal government's lethal injection protocol remains unexhausted.[68]

The United States also reiterates its position that international and U.S. law do not grant prisoners a right to clemency proceedings, and that clemency proceedings are not included as a component of the due process right in the American Declaration.[69]

Finally, the United States respectfully reaffirms its longstanding position that the Commission lacks the authority to require that States adopt precautionary measures. We refer the Commission to past submissions, which state the reasons for the U.S. position on precautionary measures in detail.[70] Because the United States is a not a State Party to the American Convention, the Commission has only the authority "to make recommendations … to bring about more effective observance of fundamental human rights."[71] As such, the United States has taken due note of the Commission's recommendation with respect to precautionary measures.

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67 Robinson v. Mukasey et al., No. 1:07-cv-02145-RWR, U.S. District Court for the District of Columbia.

68 Mr. Mitchell's request also exceeds the boundaries of Article 25 of the Rules. Article 25(1) provides that precautionary measures "shall concern serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the inter-American system." A request for the production of evidence does not meet this definition.

69 *See* Rogovich U.S. Response, *supra* note 40, at 23–25. As explained therein:

> International and U.S. law do not grant prisoners a right to clemency proceedings. Clemency proceedings are fundamentally different than judicial proceedings: they are not judicial proceedings to which due process protections can apply but instead involve an exercise of the discretionary power of the executive that is not subject to judicial review. As a result, the U.S. Supreme Court has never recognized a case in which clemency proceedings conducted pursuant to a state's executive powers have implicated due process. Instead, in U.S. state and federal courts, defendants can present mitigating evidence that allows judges and juries to take such evidence into account when determining guilt or innocence and sentencing, within the bounds of the law. Once convicted and sentenced, prisoners can, inter alia, challenge their sentences as being unduly harsh and can argue against any exclusion of mitigating evidence during direct appeal and during state and federal habeas review.

Id. at 23.

70 *See, e.g.*, Kadamovas et. al. v. United States, Petition No. P-1285-11, Response of the United States, Sept. 2, 2015, § D, *available at* https://www.state.gov/documents/organization/258153.pdf; *Ameziane* U.S. Hearing Presentation, *supra* note 29.

71 Commission Statute, art. 20(b).

D. CONCLUSION

The criminal justice system in the United States embodies the protections enumerated in the American Declaration and Petitioner manifestly benefited from such safeguards in this case at his trial and through multiple layers of judicial review. The Commission should declare the Petition to be inadmissible because Petitioner has failed under Article 34(a) of the Rules to state facts that tend to establish a violation of the American Declaration. Additionally, the arguments presented in the Petition are unreviewable under the Commission's fourth instance formula as they amount to a mere disagreement with determinations of domestic courts, rendered in compliance with the American Declaration. Should the Commission nevertheless declare the Petition admissible, or should it defer its examination of the Petition's admissibility until its review of the merits under Article 36(3) of the Rules, the United States urges it to find the Petition without merit and deny Mr. Mitchell's request for relief. The United States reserves the right to submit additional observations on the merits should this Petition reach the merits stage.