

BACKGROUND

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U.S. National Human Rights Institution: A Bad Idea

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Abstract

Human rights activists have called for creation of a U.S. National Human Rights Institution (NHRI) to promote and monitor implementation of international human rights treaties, norms, and standards in the United States. Yet any violation of human rights as such rights are understood in the U.S. legal system is already justiciable in U.S. courts. Instead, activists would use a U.S. NHRI to promote economic, social, and cultural “rights” that lack constitutional or legal foundation and have been rejected for decades by the U.S. Supreme Court. Congress should reject any attempt to create a U.S. NHRI or expand the mandate of the U.S. Commission on Civil Rights to include the enforcement of human rights.

For several years elements of the international human rights community have advocated that the United States should establish a National Human Rights Institution (NHRI) to promote and monitor implementation of international human rights treaties, norms, and standards in the United States. However, creating a NHRI is a bad idea.

Human rights activists would use a NHRI to advocate for recognition of supra-constitutional human rights norms that the U.S. has chosen not to recognize and find no support under the law. The NHRI’s central mission would be to promote economic, social, and cultural (ESC) “rights” that lack constitutional or legal foundation and have been rejected for decades by the U.S. Supreme Court and Congress. The NHRI would serve as a platform to harass U.S.

KEY POINTS

- Congress should not create a National Human Rights Institution (NHRI). Nor should it reconstitute the U.S. Commission on Civil Rights into a U.S. Commission on Civil and Human Rights.
- Human rights activists would use a NHRI to advocate for recognition of supra-constitutional human rights and “norms” that the U.S. has chosen not to recognize and that find no support under the law.
- The central mission of a NHRI would be to promote economic, social, and cultural “rights” that lack constitutional or legal foundation and have been rejected for decades by the U.S. Supreme Court and Congress.
- A NHRI would also be used to harass U.S. business and industry with subpoenas, investigations, and show hearings for allegedly violating such “human rights” as the “right to a healthy environment” and the “right to water.”

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business and industry with subpoenas, investigations, and show hearings for allegedly violating such “human rights” as the “right to a healthy environment” and the “right to water.”

Congress should neither create a U.S. NHRI nor reconstitute the U.S. Commission on Civil Rights into a U.S. Commission on Civil and Human Rights.

A U.S. Commission on Civil and Human Rights?

U.S. Commission on Civil Rights (USCCR) Chairman Martin Castro, who was appointed a year earlier by President Barack Obama, took a tentative step toward establishing a U.S. NHRI on May 18, 2012, by proposing to expand the USCCR’s mandate beyond traditional civil rights concerns to include human rights. Chairman Castro further proposed that the USCCR “become the U.S.’s national human rights institution.”¹

Republican-appointed commissioners on the USCCR raised several objections and blocked Chairman Castro’s proposal. However, the commission’s composition will soon change. Current commissioners Abigail Thernstrom and Peter Kirsanow—Republican appointees that expressed grave doubts about establishing a U.S. NHRI—will be replaced after their terms expire in December by two commissioners appointed by President Obama. The USCCR will then have six Democrat-appointed commissioners and two Republican appointees, ensuring that Chairman Castro’s idea to expand the commission’s mandate will receive sympathetic treatment.

Two years before Chairman Castro made his proposal, the idea of transforming the USCCR into a U.S. NHRI was concocted at a conclave of human rights activists convened by the Leadership Conference on Civil and Human Rights and Columbia Law School’s Human Rights Institute. The conference—which included representatives from the U.S. State

Department’s Office of Policy and Planning and the U.S. Justice Department’s Civil Rights Division as well as representatives from the American Civil Liberties Union, the U.S. Human Rights Network, and the National Association for the Advancement of Colored People (NAACP)—met in August 2010 in Bellagio, Italy, at a “Global Convening on National Human Rights Commissions” funded by the Rockefeller Foundation.

The purpose of the Bellagio conference, inter alia, was to produce “a roadmap to guide the process of establishing a U.S. Civil and Human Rights Commission that effectively monitors human rights and protects and promotes the rights of individuals and groups.”² The conference issued a report titled *The Road to Rights: Establishing a Domestic Human Rights Institution in the United States*.³

The Roadmap: *The Road to Rights*

According to *The Road to Rights*, the U.S. record of protecting the human rights of its citizens is severely lacking. Despite the comprehensive U.S. statutory framework outlawing discrimination based on race, gender, disability, and other criteria; the multitude of federal agencies tasked with enforcing those statutes; and the accessibility of the judicial system to redress claims of discrimination, the report complained of major “gaps” between America’s “ideals” and its actual practices:

The existing domestic legal framework, largely concerned with protecting civil and political rights and using litigation as a remedy for discrimination and inequality, however admirable, has failed to provide protection to vast segments of the population. Existing law and policy do not adequately address increasing social and economic inequality and the social programs that do exist are often regressive in nature and in contradiction to human rights principles.⁴

1. U.S. Commission on Civil Rights, meeting transcript, May 18, 2012.

2. Columbia Law School, “Global Convening on Human Rights Commissions,” <http://web.law.columbia.edu/human-rights-institute/global-convening-human-rights-commissions> (accessed October 8, 2013).

3. Bellagio Conference, *The Road to Rights: Establishing A Domestic Human Rights Institution in the United States*, Columbia Law School, Human Rights Institute, and The Leadership Conference, May 2012, <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/The%20Road%20to%20Rights%20Final.pdf> (accessed October 8, 2013).

4. *Ibid.*, p. 11.

The existence of “gaps” in the U.S. legal system and the alleged lack of protection for “rights” that are not recognized under U.S. law (i.e., economic, social, and cultural rights) are themes repeated throughout *The Road to Rights*.

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The participants in the Bellagio conference were in agreement that a U.S. NHRI’s mandate must “address the full panoply of indivisible and independent human rights, including economic, social and cultural rights.”⁵ The convening group specifically warned against limiting the U.S. NHRI’s mandate to merely protecting against discrimination:

A limited mandate, such as one based purely on discrimination, may prohibit a commission from engaging on a multitude of human rights issues, such as poverty that results from economic policy or practices that are not discriminatory *per se* but result in disparate treatment. This has led to an ongoing international effort to strengthen the role that NHRIs play in promoting and protecting economic, social and cultural rights.⁶

The Road to Rights recommends empowering a U.S. NHRI with a “broad mandate, defined in terms of international standards.”⁷ Such a broad mandate would be necessary to deal with “the complex manifestations of 21st century racism and the pressing domestic human rights concerns of the day,” such as the government’s response to Hurricane Katrina and the “disparate impact” of the 2008 financial crisis.⁸

The Road to Rights further described the breadth of the mandate for a U.S. NHRI by favorably quoting a 2001 report by Amnesty International:

NHRIs should enjoy the broadest possible mandate to address human rights concerns as set out in international human rights law and standards. The mandate should not be defined solely in terms of those rights that are specifically provided for in the country’s constitution.... Rather NHRIs should take as their frame of reference the definitions of human rights as set out in international human rights instruments and standards, whether or not the state has ratified the relevant treaties. The mandate should include the power to protect and promote economic, social and cultural rights, as well as civil and political rights.⁹

The consensus of the Bellagio conference was that this broad mandate should be granted to an existing institution—the U.S. Commission on Civil Rights—thereby transforming it into the U.S. Commission on Civil and Human Rights (USCCHR).¹⁰ In the opinion of the Bellagio conference, there are clear advantages to transforming the rather moribund U.S. Commission on Civil Rights into a U.S. NHRI. The USCCR already has commissioners, staff, a bureaucratic structure, and a steady stream of funding from Congress. Most importantly, the USCCR has the power to issue subpoenas and have them enforced by the U.S. Department of Justice if the subpoenaed party does not comply.

Needless to say, the commission endorsed in *The Road to Rights* is wrongheaded at its conception. It would marginalize the U.S. Constitution, disregard decisions by the United States not to ratify certain controversial human rights treaties, and promote economic, social and cultural rights. Its “major

5. Ibid., p. 19.

6. Ibid., p. 20.

7. Ibid.

8. Ibid., p. 40.

9. Ibid., p. 19, note 63, citing Amnesty International, “National Human Rights Institutions: Amnesty International’s Recommendations for Effective Protection and Promotion of Human Rights,” September 30, 2001, <http://www.amnesty.org/en/library/info/IOR40/007/2001> (accessed October 8, 2013).

10. “There are many avenues to establishing a human rights institution, including working within the existing institutional landscape and/or creating a wholly new federal body. It was the consensus of those at the convening that, at present, transforming the existing U.S. Commission on Civil Rights (USCCR) into a Civil and Human Rights Commission is the preferred path to establishing a human rights body within the United States.” Bellagio Conference, *The Road to Rights*, p. 9.

thrust”¹¹ would be to further “compliance with human rights norms by translating international standards into local practice.”

The creation of a U.S. NHRI as envisioned by the Bellagio conference and described in *The Road to Rights* would be a radical and unprecedented event. Never before has the United States created a government commission to advocate for the ratification of human rights treaties and promote supra-constitutional human rights norms that the U.S. has chosen to reject.

Promoting Nonexistent Economic and Social “Rights”

Instead of monitoring compliance with federal civil rights statutes—i.e., the central mandate of the U.S. Commission on Civil Rights—the U.S. Commission on Civil and Human Rights as contemplated in *The Road to Rights* would have the authority to look beyond the Constitution and existing U.S. law to enforce international norms and rights that have never been recognized or adopted by the United States.

The rights most Americans recognize—civil rights and individual liberties—are already protected by the U.S. Constitution (e.g., the Bill of Rights) and comprehensive federal legislation. Investigating abuses of those rights would become of secondary interest to USCCHR commissioners because such rights are already justiciable in U.S. courts and have been explicated through U.S. Supreme Court jurisprudence. Rather, the USCCHR would likely focus its resources on pushing for the recognition and enforcement of rights that do not exist under the Constitution or U.S. law.

Among the human rights that progressive activists most want to be recognized are economic, social, and cultural “rights.” Any USCCHR would certainly focus on alleged “violations” of these “rights.” The ESC rights listed in the International Covenant on Economic, Social and Cultural Rights (ICESCR) include, but are not limited to, “the right of everyone

to an adequate standard of living for himself and his family, including adequate food, clothing and housing,” and “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹²

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Human rights organizations, such as the National Economic & Social Rights Initiative (NESRI), have interpreted the provisions of the ICESCR to include the “right to food,” the “right to health,” the “right to housing,” and the “right to work,” wherein the government guarantees every American “the opportunity to have fulfilling and dignified work under safe and healthy conditions with fair wages affording a decent living for oneself and one’s family” as well as “freedom from unemployment.”¹³ Similarly, the Center for Economic and Social Rights (CESR) states:

Economic, social, and cultural rights include the human right to work, the right to an adequate standard of living, including food, clothing, and housing, the right to physical and mental health, the right to social security, the right to a healthy environment, and the right to education.¹⁴

Fortunately, a major hurdle is stymying the desires of the Bellagio conference and organizations like NESRI and CESR: ESC rights do not exist under the U.S. Constitution or federal law. In fact, the executive director of NESRI has lamented that ESC rights “are virtually unrecognized” in the United States.¹⁵

11. Ibid., p. 7.

12. International Covenant on Economic, Social and Cultural Rights, arts. 11 and 12.

13. For example, see National Economic & Social Rights Initiative, “What Are Economic and Social Rights?” <http://www.nesri.org/human-rights/economic-and-social-rights> (accessed October 8, 2013).

14. Center for Economic and Social Rights, “CESR’s Basic Primer on ESC Rights,” <http://www.cesr.org/article.php?id=275> (accessed October 8, 2013).

15. Catherine Albisa and Sharda Sekaran, “Realizing Domestic Social Justice Through International Human Rights,” *New York University Review of Law & Social Change*, Vol. 30 (2006), p. 351.

The United States has a long record of consistently rejecting recognition of ESC rights. The U.S. Senate has never given its consent to ratification of the ICESCR. President Jimmy Carter, who made human rights a key component of his foreign policy, signed the ICESCR in 1977, but the Senate Foreign Relations Committee has not held a hearing on the treaty since 1979, and no action has been taken on the treaty since.¹⁶ No U.S. President since Carter has shown the slightest interest in advocating for ratification of the ICESCR. Even President Obama's October 2011 Treaty Priority List listed the ICESCR as a treaty upon which "the administration does not seek senate action at this time."¹⁷

Nor does the judicial branch recognize ESC rights, as related with dismay by law professor Cass Sunstein. During the 1970s the Supreme Court issued a series of decisions that, according to Sunstein, made it clear "that social and economic rights do not have constitutional status outside of certain restricted domains."¹⁸ Those decisions included *Dandridge v. Williams* (where the court upheld an upper limit on the amount of grants under a state welfare program), *Lindsay v. Normet* (where the court rejected the idea that the "need for decent shelter" was a fundamental interest under the Constitution), and *San Antonio School District v. Rodriguez* (where the court upheld the practice of local financing of public schools, even though that practice allegedly produced geographical disparities in per-pupil expenditures). Sunstein characterized the court's decision in *Rodriguez* as "the death knell for social and economic rights in the United States."¹⁹

The creation of a USCCHR as contemplated by *The Road to Rights* would be an effective tool to resurrect ESC rights from the grave. A government-funded, subpoena-wielding commission with carte blanche to pursue investigations as it deems fit is the perfect vehicle to promote the recognition and enforcement of ESC rights across the nation. It would be of little or no relevance to USCCHR commissioners such as Martin Castro that such rights

are not recognized by the Constitution or that the United States has eschewed ratification of the ICESCR for more than 30 years.

The USCCHR conceived by the Bellagio conference would, however, set out to remedy that perceived discrepancy by advocating for ratification of the ICESCR and other human rights treaties.

Championing Unratified Human Rights Treaties

In addition to promoting the enforcement of ESC rights, the USCCHR's mission would include pushing the Senate to give its consent for ratification of human rights treaties to which the United States is not currently party.

Rather than conducting investigations and holding hearings regarding the enforcement of federal civil rights laws already on the books, the USCCHR's mission would include promoting new laws. *The Road to Rights* specifically contemplates this role for the U.S. NHRI:

With regard to treaties, [NHRIs] can bridge the domestic and international spheres in several explicit ways. They can review international agreements and make recommendations about which to sign and ratify as well as assessing any packages of reservations, understandings and declarations (RUDs) proposed by the government.²⁰

The Bellagio conference apparently perceived no conflict of interest in establishing a taxpayer-funded commission that would insert itself into highly charged and often partisan debates over treaties in the Senate. The U.S. NHRI would have the discretion to join the ranks of progressive U.S. and international activist groups to urge the U.S. President to sign new human rights treaties and pressure the Senate to give its consent to ratification. This should come as no surprise since the Bellagio conference was well attended by progressive activist groups, such as the ACLU and the U.S. Human Rights Network.

16. U.S. Senate, Committee on Foreign Relations, "International Covenant on Economic, Social and Cultural Rights: 095-19," <http://www.foreign.senate.gov/treaties/095-19> (accessed October 8, 2013).

17. U.S. Department of State, "Treaty Priority List for the 112th Congress," October 5, 2011.

18. Cass R. Sunstein, "Why Does the American Constitution Lack Social and Economic Guarantees?" University of Chicago *Public Law and Legal Theory Working Paper* No. 36, January 2003, p. 15, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=375622 (accessed October 8, 2013).

19. *Ibid.*, p. 15.

20. Bellagio Conference, *The Road to Rights*, p. 27.

The United States is party to several human rights treaties. However, the U.S. has signed but has thus far refused to ratify several other treaties, including the Convention on the Rights of Persons with Disabilities, which was signed by President Obama in 2009 and rejected on the Senate floor in December 2012. Other controversial human rights treaties include the ICESCR; the Convention on the Elimination of All Forms of Discrimination against Women, signed by President Carter in 1980; and the Convention on the Rights of the Child, which has never been transmitted to the Senate even though President Clinton signed it in 1995.²¹

The Bellagio conference apparently perceived no conflict of interest in establishing a taxpayer-funded commission that would insert itself into highly charged and often partisan debates over treaties in the Senate.

Establishing a U.S. taxpayer-funded commission to promote these treaties and effectively serve as an official government propaganda arm of human rights activists is a bad idea. Yet a USCCHR might make the most mischief by targeting U.S. business and industry operating in the United States and in foreign countries.

Harassing U.S. Business and Industry

What grave human rights abuses would be investigated by a commission dominated by appointees of President Obama and empowered to enforce vague and unrecognized human rights “norms” and standards? Human rights activists consider almost all forms of manufacturing, resource extraction, and energy intensive industry to violate human rights,

such as the “right to health,” “the right to a healthy environment,” and even “third-generation” human rights such as the “right to natural resources” and “the right to water.”

Few industries would escape a USCCHR’s broad mandate because almost any major business creates an “impact” on the environment, which the new commission would deem to be a violation of human rights. According to the 2003 book, *Linking Human Rights and the Environment*, “Everything and anything that influences the environment directly influences our human condition, and a violation of the environment is a violation of our human rights.”²² The USCCHR would have little difficulty finding major environmental “human rights violations” to investigate in the United States. For example:

- **Keystone XL pipeline.** Faith Spotted Eagle, an Ithanktonwan Dakota Grandmother, recently described the Keystone XL pipeline as “one of the biggest human rights violations in this country” because it infringed upon “thousands” of Native American cultural sites and threatened drinking water.²³
- **Hydraulic fracturing.** In February 2011, the Center for Constitutional Rights wrote a “letter of advisement” to the U.N. Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation highlighting the ways that hydraulic fracturing violates “the human right to water.”²⁴ Also in 2011, the Oregon-based Environment and Human Rights Advisory (EHRA) prepared “A Human Rights Assessment of Hydraulic Fracturing for Natural Gas” for the New York State Department of Environmental Conservation. The EHRA reported that hydraulic fracturing violates a number of human rights norms

21. In addition to the traditional human rights treaties to which the United States is not party, the USCCHR would likely advocate for U.S. membership in certain treaties that have human rights implications, including the Convention on Cluster Munitions, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, and the U.N. Arms Trade Treaty.

22. Romina Picolotti and Jorge Daniel Taillant, eds., *Linking Human Rights and the Environment* (Tucson, AZ: University of Arizona Press, 2003), p. 123.

23. Peaceful Uprising, “More Moccasins on the Ground: What Solidarity Looks Like!” August 8, 2013, <http://www.peacefuluprising.org/MoreMoccasins> (accessed October 8, 2013).

24. Center for Constitutional Rights, “CCR Advocacy Around Hydraulic Fracturing and the Human Right to Water,” <http://ccrjustice.org/ourcases/current-cases/human-right-water-and-hydraulic-fracturing-advocacy> (accessed October 8, 2013).

including “the family’s right to protection” and “the right of the child to the highest standard of health.”²⁵

Moreover, *The Road to Rights* asserts that a USCCHR need not limit its investigations to the actions of U.S. businesses operating within the United States. Specifically, the report describes the mandate of a U.S. NHRI “to address all human rights issues pertaining to all people within the United States and subject to U.S. authority.” The report explained that one purpose of such a broad mandate “would ensure that the body has the flexibility to promote and protect the rights of individuals and groups that in the past have been outside the scope of civil rights protections, whether due to national origin, citizenship status, *the site of alleged mistreatment or other limitation in domestic law protections.*”²⁶ The clear intent of that mandate is to provide extraterritorial jurisdiction to the proposed USCCHR.

U.S. businesses are regularly accused of gross violations of human rights overseas. Allegations of human rights abuse have been leveled at a variety of U.S. companies, including:

- Nike for “exploiting workers in sweatshops”;
- Blackwater USA, a private security contractor, for the deaths of civilians in Iraq;
- Caterpillar, Inc., a construction equipment company, for selling bulldozers to Israel “knowing they would be used to destroy homes and injure or kill the inhabitants”; and
- Dow Chemical for selling Agent Orange to the United States.²⁷

The Supreme Court recently restricted (and perhaps ended completely) the ability of plaintiffs to bring lawsuits against U.S. companies for alleged violations of the law in foreign countries,²⁸ but the USCCHR, as conceived in *The Road to Rights*, would provide a sympathetic forum and a platform to seek extrajudicial intimidation of U.S. companies and their executives.

No Stealth “Norm” Enforcement

Under no circumstances should the mandate of the U.S. Commission on Civil Rights be expanded to include the enforcement of vague international human rights norms that have no support under the Constitution. American taxpayers should not be forced to fund a commission that will advocate for human rights treaties and economic, social, and cultural “rights” that the United States has rejected for decades.

Anything that qualifies as a violation of human rights as understood in the U.S. legal system is already justiciable in U.S. courts. The purpose of establishing a U.S. National Human Rights Institution is not to shed light on human rights abuses in the United States. Rather, human rights activists aim to create a commission to serve as a vehicle to advocate for recognition of supra-constitutional human rights norms that the U.S. has chosen not to recognize and that find no support under the law.

Congress should reject any attempt either to create a U.S. National Human Rights Institution or reconstitute the U.S. Commission on Civil Rights into the U.S. Commission on Civil and Human Rights.

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25. Environment and Human Rights Advisory, “A Human Rights Assessment of Hydraulic Fracturing for Natural Gas,” December 12, 2011, p. 4, http://www.earthworksaction.org/files/publications/EHRA_Human-rights-fracking-FINAL.pdf (accessed October 8, 2013).

26. Bellagio Conference, *The Road to Rights*, p. 19 (emphasis added).

27. Center for Constitutional Rights, “Corporate Human Rights Abuses,” http://ccrjustice.org/files/CCR_Corp.pdf (accessed October 8, 2013), and Global Exchange, “Top 10 Corporate Criminals List,” <http://www.globalexchange.org/corporateHRviolators> (accessed October 8, 2013).

28. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).