

Breaking Through Gridlock To Protect Human Rights: The Case For A Congressional Human Rights Committee

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ABSTRACT

Congressional gridlock does more than frustrate the populace; it has far-reaching effects, particularly for human rights abuses. From Ferguson, Missouri to Flint, Michigan, government abuses of power and civil rights violations increasingly concern those within the United States. Existing executive bodies, although able to investigate, lack the political power to force Congress to act to remedy these abuses and neither Congress nor state legislatures have offered any solutions. In response, activists have begun to approach international bodies such as the United Nations to voice their concerns, which has also allowed them to re-characterize their plights as human rights issues. If the United States government were able to follow suit, and re-characterize its systemic civil rights abuses as human rights problems, the nation would open itself up to an international conversation with a broader range of potential solutions.

The United Kingdom’s Joint Committee on Human Rights (JCHR) presents such a workable solution to congressional gridlock on human rights issues. The JCHR is a respected parliamentary committee that successfully influences all three British government branches to ensure that British legislation protects human rights. This Article shows, through empirical data and anecdotal evidence, that the JCHR’s techniques and its corresponding successes and failures can offer a prototype for a Congressional human rights committee that would provide momentum for Congress, courts, the executive, and the public to ensure that Congress can prevent or quickly correct American human rights abuses.

I. INTRODUCTION

Over the past few years in the United States, several public scandals have called into question the government’s ability to protect its citizens

from human rights abuses.¹ From police brutality in Ferguson to Flint's water crisis, Americans have become increasingly disillusioned and even hostile towards local, state, and federal governments in the face of these abuses. As a result, protests such as the Rebuild Flint March and Rally have abounded and social media assisted grassroots efforts like Black Lives Matter have surged.²

Moreover, these groups and activists have begun to seek the help of international authorities for these systemic, often racially-motivated problems. For example, although activists and members of Michael Brown's family spoke to various legislative and executive bodies at both the state and national level about police misconduct,³ they also raised these issues internationally with the United Nations Committee Against Torture.⁴ Likewise, as federal and state agencies and government bodies attempted to deal with the aftermath of the poisoned water crisis in Flint, Michigan, activists took their complaints to United Nations Commission for Social Development.⁵

Indeed, international human rights organizations have reported on the United States' recent public crises and have criticized the United States for its "human rights abuses."⁶ Several United Nations committees and commissions

1. WORLD REPORT 2015: UNITED STATES EVENTS OF 2014, HUMAN RIGHTS WATCH (Jan. 2015), https://www.hrw.org/sites/default/files/related_material/unitedstates_1.pdf [<https://perma.cc/YW5V-TAQL>].

2. Jacob Carah, *Flint Activists Say 'No Pipes, No Peace' Amid Crisis*, DETROIT NEWS (Feb. 19, 2016, 3:10 PM), <http://www.detroitnews.com/story/news/michigan/flint-water-crisis/2016/02/19/flint-water-rally/80621258/> [<https://perma.cc/6Z7A-F73U>]; Dan Frosch & Scott Calvert, *A Year After Ferguson, 'Black Lives Matter' Still Wields Influence*, WALL STREET J. (Aug. 9, 2015, 2:27 PM), <http://www.wsj.com/articles/a-year-after-ferguson-black-lives-matter-still-wields-influence-1439143426> [<https://perma.cc/3CU2-ANCU>].

3. Justin Hansford & Meena Jagannath, *Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States After Ferguson*, 12 HASTINGS RACE & POVERTY L.J. 121, 149–51 (2015).

4. *Id.* at 123.

5. Joel Kurth, *United Nations to Hear About Detroit, Flint Water Woes*, DETROIT NEWS (Jan. 26, 2016, 12:30 PM), <http://www.detroitnews.com/story/news/michigan/flint-water-crisis/2016/01/26/un-water/79349514/>.

6. See Terrence McCoy, *Amnesty International: Ferguson Police Committed Human Rights Abuses During Michael Brown Protests*, WASH. POST (Oct. 24, 2014, 12:30 PM), <https://www.washingtonpost.com/news/morning-mix/wp/2014/10/24/ferguson-police-committed-numerous-human-rights-abuses-amnesty-international-says> [<https://perma.cc/XXL5-VFXF>]; see also Amanda Klasing, *Dispatches: Why Flint's Tainted Water is a Human Rights Disaster*, HUM. RTS. WATCH (Jan. 25, 2016, 1:06 PM), <https://www.hrw.org/news/2016/01/25/dispatches-why-flints-tainted-water-human-rights-disaster> [<https://perma.cc/P79Q-D4T7>]; *US: Respect Rights of Ferguson Protesters*, HUMAN RIGHTS WATCH (Nov. 19, 2014,

also sought information from the United States government about these dilemmas, which the United States must provide under its various United Nations treaty obligations.⁷ The United Nations also recommended that the United States implement long-term systemic changes, such as improving its monitoring of police brutality, as well as more immediate, short-term changes, such as ceasing the water shutoffs in Flint.⁸ The United States has also recently re-committed itself to championing human rights internationally and domestically.⁹

By involving the United Nations, activists have not only raised the profile of these crises and invoked the power of international human rights bodies, but they have also reframed their struggles under a human rights framework, which can be exceedingly powerful.¹⁰ Additionally, these newly-framed human rights have highlighted the United States' current inability to address national human rights issues in a structured, cohesive way. In fact, although Americans do not usually discuss "human rights," much of the United States' international human rights obligations mirror domestic law requirements under the Bill of Rights or existing civil rights laws.¹¹ Human rights are not new to the United States; Americans simply call them "civil rights," "constitutional rights," or just "rights."¹² This Article, therefore, includes domestic as well as international human rights obligations when it discusses human rights as a category of rights.

Despite its longstanding domestic and international human rights obligations, the United States has no national government body charged with investigating, reporting, or recommending solutions to the United States' human rights abuses at the national, state, and local level. Specifically, although several state and federal government bodies focus on human rights issues on some level, the United States lacks a standing or special legislative committee charged with the protection of its residents' human rights. The

6:00 AM), <https://www.hrw.org/news/2014/11/19/us-respect-rights-ferguson-protesters> [https://perma.cc/9FY3-HZSP].

7. Hansford & Jagannath, *supra* note 3, at 141.

8. Kurth, *supra* note 5.

9. *Human Rights*, U.S. DEP'T OF STATE (Feb. 29, 2016), <http://www.state.gov/p/io/humanrights/> [https://perma.cc/4YKH-JWW4]. However, Trump's administration is unlikely to have such a good relationship with the UN. Adam Shaw, *UN tensions with Trump administration mount as both sides dig in*, FOX NEWS (Apr. 10, 2017), <http://www.foxnews.com/politics/2017/04/10/un-tensions-with-trump-administration-mount-as-both-sides-dig-in.html>.

10. Hansford & Jagannath, *supra* note 3, at 123.

11. *The United States' International Human Rights Obligations*, INT'L JUST. RESOURCE CTR., <http://www.ijrcenter.org/wp-content/uploads/2013/06/U.S.-Human-Rights-Obligations2.pdf> [https://perma.cc/736C-EUCM] (last visited Mar. 2, 2017).

12. See, e.g., U.S. ATTORNEY'S OFFICE, DIST. OF MINN., KNOW YOUR RIGHTS: A GUIDE TO THE UNITED STATES CONSTITUTION, <https://www.justice.gov/sites/default/files/usao-mn/legacy/2011/09/16/MN%20Civil%20Rights%20FINAL.pdf> [https://perma.cc/8SV8-YJE7] (last visited Mar. 2, 2017).

closest entities that the United States has created are the United States Commission on Civil Rights (hereinafter the “Commission on Civil Rights”) and the Civil Rights Division of the Department of Justice (hereinafter the “Civil Rights Division”). The Commission on Civil Rights advises Congress and the President on policy to eliminate racial discrimination¹³ and the Civil Rights Division enforces existing civil rights laws.¹⁴ Both entities have experienced mixed success in recent years, however, and even at their most successful, never examined the full range of human rights issues that the United States guarantees under the Constitution or must consider under United Nations treaties.¹⁵

In contrast, the United Kingdom’s JCHR is a parliamentary committee that works to ensure that the United Kingdom meets all its human rights obligations with various international bodies such as the United Nations and the Council of Europe.¹⁶ The JCHR has also adopted several techniques that quickly made it an influential voice on human rights within the British government. The JCHR therefore presents a useful model for an American human rights committee.

Moreover, although scholars have written extensively on Ferguson, Flint, and other recent public crises, this Article presents the first effort to provide a model for a human rights committee in the United States that could fully investigate and create laws to address human rights concerns. Part II of this Article will evaluate the two main government bodies that have been charged with protecting civil rights in the United States: the Commission on Civil Rights and the Civil Rights Division. Part III will discuss the history of the JCHR and use recently-gathered empirical evidence to show how it has successfully influenced all three government branches in the United Kingdom. Finally, Part IV will show some of the positive things a human rights committee could do in the United States by using the JCHR’s activities and successes as a model, including encouraging Congress to create legislation and informing the judiciary regarding human rights issues.

13. Although originally intended to be temporary, the Commission has been repeatedly reauthorized, most recently by the Kenneth L. Marcus, *The Right Frontier for Civil Rights Reform*, 19 GEO. MASON U. CIV. RTS. L.J. 77, 77–78 (2008).

14. Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 HARV. L. & POL’Y REV. 211, 212 (2008).

15. See, e.g., *id.*; Marcus, *supra* note 13, at 82.

16. JOINT COMMITTEE ON HUMAN RIGHTS, TWENTY-THIRD REPORT: THE COMMITTEE’S FUTURE WORKING PRACTICES, 2005-6, HL 239, HC 1575, at 3–4 (UK) [hereinafter THE COMMITTEE’S FUTURE WORKING PRACTICES].

II. ADVANCING CIVIL RIGHTS IN THE UNITED STATES: BEST PRACTICES

Since the 1950s, the United States has attempted to improve the civil rights of its citizens, particularly African-Americans. Beginning with the 1957 Civil Rights Act, Congress created various federal government entities to implement civil rights improvements across the country.¹⁷ However, several causes – most recently, politics – have splintered these efforts and created a gap in the protection of civil and human rights. Moreover, although the Commission on Civil Rights and the Civil Rights Division of the Department of Justice have both accomplished much and continue to advance civil rights, both entities suffer from limitations and weaknesses due to their internal structures and scope of responsibilities.¹⁸

Congress created the Commission on Civil Rights with the 1957 Civil Rights Act and assigned it investigatory and advisory functions, including subpoena powers.¹⁹ It envisioned the Commission as a bipartisan, independent executive agency that would collect data to enable Congress to create civil rights policy.²⁰ Initially, the Commission on Civil Rights investigated “race-based deprivations of voting rights and of the right to equal protection of the laws.”²¹ Criticized by both liberals and conservatives at first, the Commission on Civil Rights gathered evidence and held hearings, which ultimately led to documented evidence of racial disparity in voting rights, education, public accommodation, and housing.²² This evidence-gathering resulted in legislative recommendations that led to praise from the media, and ultimately informed several pieces of civil rights legislation, including the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.²³

During the 1970s, the Commission on Civil Rights continued to hold hearings and publish recommendations, but President Nixon’s administration

17. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (Sept. 9, 1957).

18. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-58, DOJ CIVIL RIGHTS DIVISION TRAVEL: DIVISION STRENGTHENED CONTROLS OVER TRAVEL, BUT ADDITIONAL AREAS FOR IMPROVEMENT IDENTIFIED (2015); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/HEHS-97-125, U.S. COMMISSION ON CIVIL RIGHTS: AGENCY LACKS BASIC MANAGEMENT CONTROLS (1997).

19. Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725, 733–34 (2010).

20. Marcus, *supra* note 13, at 89.

21. Jennifer Mason McAward, *The Civil Rights Legacy of Fr. Theodore M. Hesburgh*, C.S.C., 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 309, 311 (2014).

22. Jocelyn C. Frye et al., *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. C.R.-C.L. L. REV. 449, 463 (1987); McAward, *supra* note 21, at 311.

23. Frye et al., *supra* note 22, at 465; McAward, *supra* note 21, at 311–12.

frequently disregarded its recommendations.²⁴ President Reagan then began to staff the Commission on Civil Rights with conservatives;²⁵ by 2005, a majority of the Commission on Civil Rights and its Staff Director identified as conservative.²⁶ This new political makeup resulted in criticisms that the Commission maintained an overly optimistic view of racial relations²⁷ and an overly negative view of affirmative action.²⁸ The political makeup also limited its activities by creating several deadlocks.²⁹ Under President Obama, however, the Commission on Civil Rights regained some of its influence. For example, the Commission on Civil Rights published a negative report on the Akaka bill, a bill supported by Barack Obama that proposed to redistribute the state's wealth based on race.³⁰ Congress used the Commission on Civil Rights' report during floor debates in Congress and the contested bill was ultimately defeated.³¹ It is unclear what role the Commission on Civil Rights will play under Trump's administration.³²

The second relevant civil rights government body is the Civil Rights Division. Like the Commission on Civil Rights, Congress created the Civil Rights Division through the Civil Rights Act of 1957.³³ As part of the executive branch, the Civil Rights Division enforces civil rights laws, which includes investigating,³⁴ filing charges,³⁵ bringing lawsuits,³⁶ entering into

24. See Frye et al., *supra* note 22, at 467–68.

25. *Id.* at 476–77.

26. Marcus, *supra* note 13, at 77–78, 92.

27. Frye et al., *supra* note 22, at 503–04.

28. Marcus, *supra* note 13, at 80–82. In fact, the Commission's budget was reduced in 2008 because the (Democrat-controlled) Appropriations Committee doubted its commitment to fulfilling its mission. *Id.* at 80.

29. *Id.* at 95.

30. See Aloha, *Segregation: The Akaka Bill Would Create a Race-Based State in Hawaii*, WALL STREET J.: REV. & OUTLOOK (Dec. 17, 2009, 12:01 AM), <http://www.wsj.com/articles/SB10001424052970203917304574412832314714444>.

31. Marcus, *supra* note 13, at 112–13, 117.

32. Laura Santhanam, *U.S. 'Has Not Yet Reached the Mountaintop,' Says New Civil Rights Commission Chair*, PBS (Feb. 21, 2017, 4:11 PM), <http://www.pbs.org/newshour/rundown/u-s-not-yet-reached-mountaintop-says-new-civil-rights-commission-chair/> [https://perma.cc/KJ22-N288].

33. John Doar, *The Work of the Civil Rights Division in Enforcing Voting Rights Under the Civil Rights Acts of 1957 and 1960*, 25 FLA. ST. U. L. REV. 1, 1 (1997).

34. Gerald Stern et al., *Voices of the Civil Rights Division: Then and Now* (October 28, 2011), 44 MCGEORGE L. REV. 269, 272 (2013).

35. James P. Turner, *Police Accountability in the Federal System*, 30 MCGEORGE L. REV. 991, 993 (1999).

36. Doar, *supra* note 33, at 7.

consent decrees,³⁷ filing amicus curiae briefs,³⁸ publishing papers recommending institutional reforms,³⁹ and generally serving “as the federal government’s public and internal voice on civil rights, representing the United States in the nation’s courts and serving as an authority and resource for other government agencies on issues relating to discrimination.”⁴⁰ For example, in 2014, the Civil Rights Division released reports detailing its investigations of police abuses in Cleveland and Ferguson.⁴¹ Additionally, the Civil Rights Division “has been a major participant in congressional consideration of civil rights legislation, and it has worked closely with Congress in drafting nearly all of the legislation it enforces.”⁴²

However, as with the Commission on Civil Rights, the second Bush Administration undermined the Civil Rights Division when it politicized the office, which led to a breakdown in communications between political appointees and career civil servants.⁴³ Political appointees controlled hiring decisions with changed hiring practices that allowed them to ensure that all new hires shared their political affiliations and ideology.⁴⁴ Under Donald Trump, the future of the Civil Rights Division has become even more uncertain.⁴⁵

Even without politicization, the Commission on Civil Rights and the Civil Rights Division are limited in their abilities. Congress created both the Commission on Civil Rights and the Civil Rights Division to promote civil rights, not human rights, which is an issue of more than just semantics. The concept of “civil rights” is deeply embedded in American history and inextricably intertwined with the Civil Rights movement of the 1960s.⁴⁶ This concept therefore concerns itself with righting injustices, particularly

37. Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 16–17 (2009).

38. Kennedy, *supra* note 14, at 234.

39. Harmon, *supra* note 37, at 56.

40. Kennedy, *supra* note 14, at 212.

41. N. DIST. OF OHIO, U.S. ATTORNEY’S OFFICE & CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE (Dec. 4, 2014), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [<https://perma.cc/TBQ6-YSRK>]; CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/JR7D-4HCA>].

42. Kennedy, *supra* note 14, at 235.

43. *Id.* at 212.

44. *Id.* at 215–16.

45. Matt Apuzzo, *Under Trump, Approach to Civil Rights Law Is Likely To Change Definitively*, N.Y. TIMES (Jan. 19, 2017), <https://www.nytimes.com/2017/01/19/us/politics/civil-rights-justice-department-donald-trump.html>.

46. Christopher W. Schmidt, *The Civil Rights-Civil Liberties Divide*, 12 STAN. J. C.R. & C.L. 1, 21–24 (2016); *see also* Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1752 (2000).

racial injustices, so that all groups receive the same rights under the Constitution and other laws.⁴⁷ According to one commentator,

Civil rights flow from the values of those in power; human rights originate in the universal values of the peoples of the world. Civil rights are derived from a national statute or a constitution over which the oppressors might have full control; human rights are rooted in the inherent dignity of all members of the human family. Civil rights are administered within the jurisdiction of a nation-state; human rights are monitored in global forums.⁴⁸

Therefore, by focusing on “civil rights,” the United States has failed to take on other kinds of rights championed by other countries and international human rights bodies such as economic, cultural and social rights.⁴⁹ Civil rights activists including Martin Luther King, Jr. and Malcolm X first observed these lacunae in the 1960s.⁵⁰ For them, civil rights were “best understood as a sub-category within the broader category of human rights, which included not only civil rights and civil liberties, but also, most importantly, social welfare rights.”⁵¹

In addition, the concept of civil rights in the United States became chiefly defined as a fight against racial discrimination and, as racial relations have changed over time, many people believe either that racial discrimination no longer presents a problem in the United States or that policies like affirmative action constitute “reverse racism” because they disadvantage white people.⁵² Accordingly, civil rights, of which this author does not dispute the importance, may regain more general support if brought under the wider umbrella of human rights.

Indeed, American “civil rights scholars, lawyers, and activists are increasingly looking toward international human rights instruments as persuasive sources

47. Hom & Yamamoto, *supra* note 46, at 1752–54.

48. Ali Khan, *Lessons from Malcolm X: Freedom by Any Means Necessary*, 38 How. L.J. 79, 128 (1994) (footnotes omitted).

49. Hom & Yamamoto, *supra* note 46, at 1782–83.

50. Raymond M. Brown, *The Civil Rights Movement's Early Embrace of Human Rights*, 286 N.J. LAW. 54, 59 (2014); Khan, *supra* note 48, at 124–25; Schmidt, *supra* note 46, at 33.

51. Schmidt, *supra* note 46, at 33.

52. See, e.g., Scott Jaschik, *Poll: Public Opposes Affirmative Action*, INSIDE HIGHER ED (July 8, 2016), <https://www.insidehighered.com/news/2016/07/08/poll-finds-public-opposition-considering-race-and-ethnicity-college-admissions> [https://perma.cc/6MCM-NZUU]; Janell Ross, *White Americans Long For the 1950s, When They Didn't Face So Much Discrimination*, WASH. POST (Nov. 17, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/11/17/white-americans-long-for-the-1950s-when-they-werent-such-victims-of-reverse-discrimination/>.

for legal strategies to address a broad range of advocacy issues presented by social and economic discrimination.”⁵³ Prominent members of the Commission on Civil Rights have previously suggested expanding the Commission’s remit to include human rights, which, they argued, would restore the Commission’s reputation, bolster the United States’ leadership in human rights issues, and allow the Commission to ensure that the United States meets its international human rights obligations.⁵⁴ Accordingly, there is increasing interest in creating a government body that can focus on human rights and not just civil rights.

To that end, a standing or special congressional committee could either supplement or replace the work that the Commission on Civil Rights and Civil Rights Division does for the executive branch. A congressional committee would be a valuable tool to promote human rights because Congress would support the committee and the committee could perform the same duties as the current Commission on Civil Rights. A human rights-focused entity in Congress would also arguably have more weight in both chambers because it would be perceived as an internal, rather than external, agency.

In addition, Congress confers wide-ranging powers to its committees that would benefit a human rights body.⁵⁵ Specifically, in addition to writing reports and scrutinizing bills, congressional committees can investigate and hold hearings.⁵⁶ Congressional committees also hold broad subpoena powers. Standing committees in both houses can investigate anything within their jurisdiction and s automatically have subpoena power.⁵⁷ Select and special committees may receive subpoena power through a resolution from whichever house of Congress created them.⁵⁸

These committees also have wide discretion to obtain whatever evidence they deem necessary so long as a legislative purpose for the investigation exists. Legislative purposes include gathering information to determine

53. Hom & Yamamoto, *supra* note 46, at 1779–80; *see also* Kenneth L. Marcus, *Fixing the Civil Rights Commission*, 11 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 9, 10 (2010) (noting recent human rights remarks by President Obama and Secretary Hillary Clinton).

54. *See* Lisa Crooms & Dawinder S. Sidhu, *The Future of the United States Commission on Civil Rights*, 159 U. PA. L. REV. 127, 129–30 (2010); Marcus, *supra* note 53, at 10. Indeed, several international human rights conventions directly address various forms of discrimination such as the 1979 Convention on the Elimination of All Forms of Discrimination Against Women and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. Hom & Yamamoto, *supra* note 46, at 1779–80.

55. *See* James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1121 (2007).

56. *Id.* at 1121–24.

57. *See id.* at 1124–26.

58. *Id.* at 1125. Only committees can issue subpoenas; Congress itself cannot. *Id.* at 1126–27.

whether to legislate in a given area, conducting oversight over the executive, and providing information about the workings of government.⁵⁹ Further, committee hearings have multiple purposes including informing Congress's legislative decisions and presenting issues for public discourse.⁶⁰ A committee could use all of these powers to advance human rights issues within Congress and, therefore, a congressional human rights committee could ensure that legislation sufficiently protects human rights. As shown below, the JCHR provides substantial evidence that a human rights committee can effectively advocate for human rights within the government.

III. THE JOINT COMMITTEE ON HUMAN RIGHTS: A MODEL OF SUCCESS

Like the United States, the United Kingdom is bound by several international human rights treaties. In addition to adopting various United Nations instruments, the United Kingdom ratified the European Convention on Human Rights (hereinafter, the "European Convention") in 1951, and, in 1966, allowed its citizens to bring a private right of action before the European Court of Human Rights.⁶¹ In 2000, the United Kingdom implemented the Human Rights Act (HRA), which gave British citizens the right to sue the British government in British courts for alleged infringement of the rights contained in the European Convention.⁶²

The JCHR was first formally proposed in connection with the HRA. In its initial draft, the HRA included a provision that stated that the JCHR should assist Parliament in playing a larger role with respect to human rights.⁶³ When Parliament debated the HRA, several commentators and the Home Office stated that Parliament should take the leading role in protecting human rights⁶⁴ and repeatedly cited the future JCHR as a way

59. *Id.* at 1122.

60. A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 384, 387 (2001).

61. *Human Rights: The European Convention*, BBC NEWS (Sept. 29, 2000, 3:19 PM), http://news.bbc.co.uk/2/hi/uk_news/948143.stm [<https://perma.cc/BX5N-5WP2>].

62. Janet L. Hiebert, *Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?*, 4 INT'L J. CON. LAW 1, 2 (2006).

63. *Id.* at 14.

64. HOME DEPARTMENT, RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL, 1997, Cm. 3782, ¶ 3.6 (UK), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf [<https://perma.cc/4KC8-MQ83>]; Keith D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 MOD. L. REV. 79, 97 (1999); Janet L.

for Parliament to have a strong role in human rights protection, primarily through scrutinizing proposed legislation.⁶⁵ Accordingly, legislative scrutiny was one of the JCHR's duties, though no one formally settled the exact form that scrutiny would take.⁶⁶ Further, parliamentary debates clearly demonstrated that Parliament intended that the JCHR would go beyond mere legislative scrutiny to educate the public and promote a human rights culture.⁶⁷

Once Parliament passed the HRA, proposals for the duties of the JCHR became closely aligned with its eventual terms of reference.⁶⁸ The JCHR's terms of reference are (1) "to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases),"⁶⁹ (2) consider "proposals for remedial orders made under Section 10," and (3) decide whether to draw Parliament's attention to draft remedial orders and remedial orders.⁷⁰ This remit gives the JCHR the power to do almost anything relating to human rights in the United Kingdom.⁷¹ According to the JCHR's first chair, Baroness Jean Corston, Parliament gave her a "blank piece of paper" and allowed her to decide what the focus of the JCHR would be.⁷²

Hiebert, *Interpreting a Bill of Rights: The Importance of Legislative Rights Review*, 35 BRIT. J. POL. SCI. 235, 251 (2005); Hiebert, *Parliament and the Human Rights Act*, *supra* note 62, at 14; Jack Straw & Paul Boateng, *Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law*, 1 EUR. HUM. RTS. L. REV. 71, 79 (1997).

65. 582 Parl Deb HL (5th ser.) (1997) col. 1240, 1300 (UK) (Lord Lester); 585 Parl Deb HL (5th ser.) (1998) col. 406–07 (UK) (Lord Irvine); HOUSE OF LORDS, THE HUMAN RIGHTS BILL [HL], BILL 119 OF 1997–98: SOME CONSTITUTIONAL AND LEGISLATIVE ASPECTS, RESEARCH PAPER 98/27, at 5, 34 (Feb. 13, 1998).

66. 306 Parl Deb HL (5th ser.) (1998) col. 855 (UK) (Mike O'Brien, Parliamentary Under-Secretary of State for the Home Office); Straw & Boateng, *supra* note 64, at 79.

67. 582 Parl Deb HL, *supra* note 65, at col. 1228, 1234 (Lord Irvine), 1290 (Lord Bethell), 1309 (Lord Williams).

68. 322 Parl Deb HL (5th ser.) (1998) col. 604 (UK). Despite this clearer vision, the JCHR was not created until January 2001 after lobbying by NGOs and the Human Rights Task Force. Francesca Klug, Professorial Research Fellow, Ctr. for the Study of Human Rights, Address at the London School of Economics: Parliament and Human Rights in the UK: Two Years On (Nov. 2002), http://www.lse.ac.uk/humanRights/events/Parliament_Human_Rights.aspx; 621 Parl Deb HL (5th ser.) (2001) col. 11–12 (UK) (Lord MacKay).

69. This restriction means that the JCHR cannot provide advice regarding cases that are currently pending or have been litigated in court.

70. JOINT COMMITTEE ON HUMAN RIGHTS, FIRST SPECIAL REPORT: CRIMINAL JUSTICE AND POLICE BILL, 2000–1, HL 42, HC 296 (UK).

71. During the debate in the Commons on the JCHR's terms of reference, then Deputy Leader of the House, Paddy Tipping MP, remarked that the JHCR's powers were wide, and, in respect of the Committee's consideration of remedial orders, were wide enough to allow the Committee to do "virtually what it wants." 361 Parl Deb HC (5th ser.) (2001) col. 150 (UK) (Lord Tipping).

72. Interview with Jean Corston, Former Chair of the Joint Committee on Human Rights (Oct. 15, 2008).

Despite this freedom, the JCHR's task was not an easy one because of the HRA's controversial nature. Some Conservative Members of Parliament questioned why the United Kingdom needed a bill of rights and criticized the European foundation of the specific rights incorporated into the HRA.⁷³ Several media outlets likewise panned the HRA and, although many prominent NGOs supported the HRA, the public certainly did not cry out for it.⁷⁴ The JCHR therefore needed to win over the government and the public to promote human rights within the United Kingdom.

It certainly has done so. Over time, the JCHR has become a central entity through which the United Kingdom addresses human rights issues, despite the continuing controversial nature of the HRA itself.⁷⁵ The JCHR therefore presents a useful model for an American human rights committee. As discussed more fully below, all three government branches have, to varying degrees, deferred to the JCHR's expertise and used its recommendations to change existing and future laws. It is likely that a congressional human rights committee could do the same.

IV. A ROLE FOR A HUMAN RIGHTS COMMITTEE

In the United Kingdom, the JCHR has impacted human rights laws through its reports and investigative powers. Specifically, the JCHR has influenced the creation of legislation through focusing parliamentary debates, convincing the executive to create or amend legislation, influencing judicial decisions, and organizing responses to relevant court cases. The JCHR has also been a strong influence in the creation of a culture of human rights within the government and the public. If an American human rights committee could replicate the JCHR's accomplishments, it would be a major asset in the United States' struggle to advance human rights.

A. Focusing Congressional Criticism on Pending Legislation

One benefit of a human rights committee would be that it could report on the human rights impact of proposed legislation during Congressional debates. By doing so, a human rights committee could provide Congress with information, including the likely impact of prior Supreme Court judgments,

73. JoAnne Sweeny, *The United Kingdom's Human Rights Act: Using Its Past to Predict Its Future*, 12 LOY. J. PUB. INT. L. 39, 41, 63 (2010).

74. *Id.* at 71–72, 76–77.

75. *Id.* at 78–80.

as well as statements made by the cabinet, the bill's proponents, NGOs, and other experts, which Congress could use to inform its debates and argue for amendments to a bill. Substantial evidence supports the notion that Congress needs a source of information of how legislation will impact human rights, particularly after September 11, when fear of future terrorist attacks led to anti-terrorism laws that have been heavily criticized as infringing upon human rights.

For example, after the Supreme Court struck down President Bush's program of using military commissions to try detainees who were suspected of terrorism,⁷⁶ Congress passed the Military Commission Act in 2006, which basically re-authorized the program. One of the major criticisms levelled against the Military Commissions Act by members of Congress, NGOs⁷⁷ and even law school deans,⁷⁸ was its prohibition on habeas corpus review for anyone who the military previously deemed "properly detained as an enemy combatant or . . . awaiting such determination."⁷⁹ Despite these criticisms, the bill received bipartisan support and passed both houses with wide margins: 65–34 in the Senate and 253–168 in the House.⁸⁰ During the debates, Democrats argued against the bill on constitutionality grounds, noting the Act's effective elimination of habeas corpus.⁸¹ The Supreme Court ultimately agreed with the Democrats in Congress but was unable to hear the case and issue a decision until 2008.⁸²

While it is reassuring that the Supreme Court eventually corrected the unconstitutional habeas restrictions in the Military Commissions Act, it took two years for the Court to decide the issue, and several other controversial parts of the Act remain. A human rights committee may have made a difference

76. *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006); Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT'L. L. 322, 325 (2007).

77. *FAQs: The Military Commissions Act*, CTR. FOR CONSTITUTIONAL RIGHTS (Oct. 17, 2007), <http://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/faqs-military-commissions-act> [<https://perma.cc/5TG3-3539>].

78. 152 CONG. REC. S10357 (Sept. 28, 2006).

79. 10 U.S.C. § 950g (2012). The Act gives detainees the ability to appeal to the D.C. Circuit but the appeal is limited to whether the detention is proper under the Military Commissions Act, as well as the Constitution and other United States laws, "to the extent applicable." Bradley, *supra* note 76, at 330.

80. Charles Babington, *House Approves Bill on Detainees*, WASH. POST (Sept. 28, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/27/AR2006092701287.html> [<https://perma.cc/WX84-AQ35>]. The bill passed 65–34 in the Senate and 253–168 in the House, with 34 Democrats joining 219 Republicans (all but seven) who voted in favor of it. "Senators also began debating the measure yesterday and defeated, along party lines, a Democratic-sponsored amendment that would have expanded detainees' legal rights." Babington, *supra*.

81. *Id.*

82. *Boumediene v. Bush*, 553 U.S. 723, 733 (2008).

while Congress debated the Military Commissions Act and could have even prevented some of the controversial aspects of the bill from gaining bipartisan support. To that end, the United Kingdom's JCHR shows the ways a human rights committee can increase and focus debates on human rights concerns so that legislation is less likely to breach human rights.

According to David Feldman, the JCHR's former legal advisor, the JCHR has "taken on a significant responsibility for furnishing each house the information and advice needed to undertake . . . [legislative] scrutiny."⁸³ Unlike in the United States, the British executive branch introduces the vast majority of legislation and Parliament then debates the legislation.⁸⁴ Parliament also traditionally limits its scrutiny of legislation because it has limited time, information, and no powers of investigation absent committee intervention. For that reason, parliamentary committees commonly provide information to Parliament and the JCHR's reports therefore fit within existing parliamentary culture and role perceptions.

Members of both Houses of Parliament use the JCHR's reports to further their understanding of human rights issues so they can have a more informed debate on bills. Anecdotal evidence suggests that once the JCHR began reporting on bills, parliamentary debates concerning human rights issues became more thorough and sophisticated. According to the former Minister of the Department of Constitutional Affairs, Harriet Harman, the JCHR "bec[a]me an important part of the constitutional and Parliamentary architecture."⁸⁵ As some commentators have put it, the JCHR has become the legal advisor to Parliament on human rights issues.⁸⁶

The JCHR has the most influence in the House of Lords, which is traditionally the revising chamber of Parliament.⁸⁷ The Lords clearly rely upon the JCHR and its reports when scrutinizing legislation. For example, the Lords requested and received assurances from the executive branch

83. David Feldman, *Parliamentary Scrutiny of Legislation and Human Rights*, 2002 PUB. L. 323, 324 [hereinafter Feldman, *Parliamentary Scrutiny*].

84. *Parliament and the Government*, PARLIAMENT, <https://www.parliament.uk/about/how/role/relations-with-other-institutions/parliament-government> (last visited Mar. 8, 2017).

85. JOINT COMMITTEE ON HUMAN RIGHTS, MINUTES OF EVIDENCE, LETTER TO THE JCHR CHAIR FROM HON HARRIET HARMAN, MP (Mar. 6, 2006). As discussed below, Ms. Harman is now the chair of the JCHR.

86. 636 Parl Deb HL (5th ser.) (2002) col. 1122 (UK) (Lord Lester); Dawn Oliver, *Constitutional Scrutiny of Executive Bills*, 4 MACQUARIE L.J. 33, 49 (2004).

87. To combat this unequal influence, the JCHR purposefully decided to have its chair be from the Commons so that it would have more impact on that House. Interview with Raymond Plant, Member of the House of Lords (July 17, 2008).

that the JCHR would have sufficient time to report on the Antiterrorism, Crime and Security Bill 2001 before they needed to vote on it.⁸⁸ Similarly, and in a situation strikingly similar to the Military Commissions Act, the JCHR's reports on the Asylum and Immigration (Treatment of Claimants, etc.) Bill in the 2003–04 Parliamentary Session generated such strong parliamentary opposition that the executive ultimately decided to “water down” the provisions that excluded judicial review of almost all immigration proceedings.⁸⁹

Perhaps the most memorable clash between the Lords and the executive came about because of the executive's proposed amendment to the Counter-terrorism Bill in 2008. Despite the JCHR's concerns about the human rights implications of several provisions in the Counter-terrorism Bill — as well as the United Kingdom's existing anti-terrorism legislation—the executive decided to amend the bill to increase the amount of time the police can hold a suspect without charge from twenty-eight to forty-two days.⁹⁰ However, the amended bill barely passed the Commons, and the Lords, using the JCHR's reports, voted overwhelmingly—309 votes to 118—to amend the bill to remove the forty-two days provision.⁹¹ That vote ultimately caused the Minister to remove the provision.⁹²

Reading parliamentary debates also demonstrates the influence of JCHR reports. The executive often refers to JCHR's reports when the JCHR finds that a bill complies with the HRA, and the Opposition highlights the reports when the JCHR finds noncompliance.⁹³ For example, when the JCHR wrote positively about the Marriage Act 1949 (Remedial) Order 2006 in two of its reports, the Parliamentary Under-Secretary of State, Department of Constitutional Affairs, Baroness Ashton of Upholland brought both of these reports to the House of Lords' attention when the Lords debated the bill.⁹⁴

88. Feldman, *Parliamentary Scrutiny*, *supra* note 83, at 345.

89. David Feldman, *Injecting Law into Politics and Politics into Law: Legislative and Judicial Perspectives on Constitutional Human Rights*, 34 COMMON L. WORLD REV. 104, 118 (2005) [hereinafter Feldman, *Injecting Law into Politics*]; Oliver, *supra* note 86, at 35.

90. JOINT COMMITTEE ON HUMAN RIGHTS, TWENTY-FIRST REPORT: COUNTER-TERRORISM AND HUMAN RIGHTS (ELEVENTH REPORT): 42 DAYS AND PUBLIC EMERGENCIES, 2007–8, HL 116, HC 635 (UK).

91. 704 Parl Deb HL (5th ser.) (2008) col. 542–43 (UK).

92. Sam Coates, House of Lords Deals Fatal Blow to 42-Day Terror Detention Plans, TIMES (London), Oct. 14, 2008, at 15. For a full discussion of the evolution of the United Kingdom's anti-terrorism laws (and the political battles that led to its various iterations), see JoAnne M. Sweeny, *Indefinite Detention and Antiterrorism Laws: Balancing Security and Human Rights*, 34 PACE L. REV. 1190, 1230 (2014).

93. See, e.g., 457 Parl Deb HC (6th ser.) (2007) col. 1322 (UK) (Edward O'Hara) (criticizing the Tribunals, Courts and Enforcement Bill 2007).

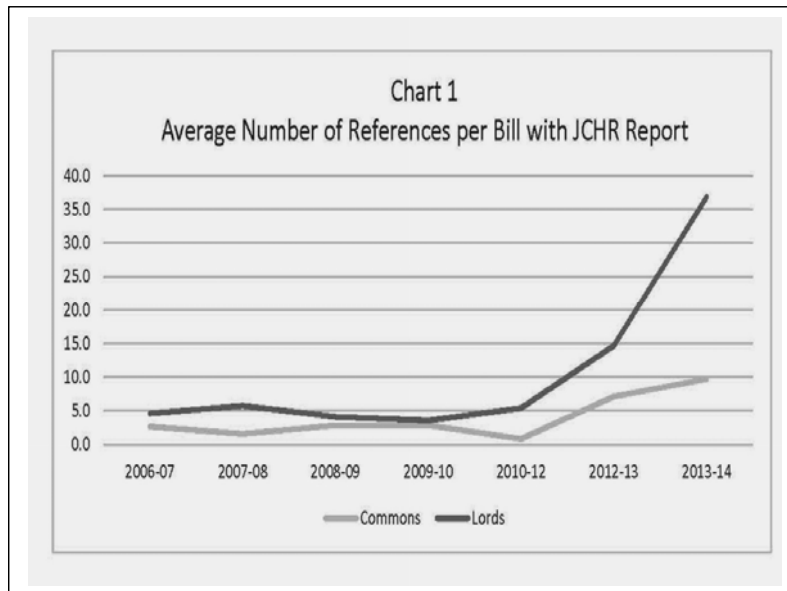
94. 688 Parl Deb HL (5th ser.) (2007) col. 1301–02 (UK).

In addition to anecdotal evidence, empirical evidence shows that the JCHR's reports are influential because of the frequency of references to JCHR reports during parliamentary debates. To study the nature and frequency of parliamentary references to JCHR Reports, the data used in this Article was collected by reading parliamentary debates from the 2006–07 Parliamentary Session through the 2013–14 Parliamentary Session, focusing only on legislative scrutiny debates.⁹⁵ This data has been further broken down and analyzed to isolate and parse several variables, including party affiliation and JCHR membership. This data, therefore, presents a sophisticated picture of how the JCHR influences parliamentary debates.

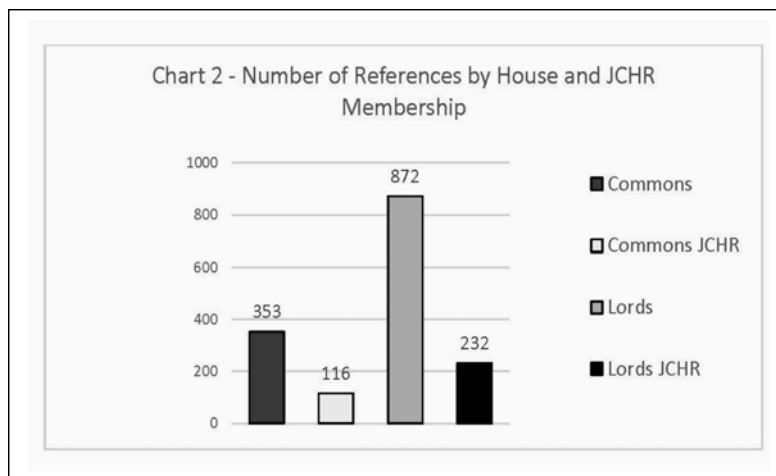
Chart 1 shows the average number of JCHR references per bill with a JCHR report,⁹⁶ which was calculated by looking at each parliamentary session and simply dividing the number of JCHR references by the number of bills with a JCHR report. As the data shows, during the time period studied, the House of Lords always referred more frequently to the JCHR than the Commons, which reflects the Lords' legislative scrutiny role. The average number of JCHR references per bill appears fairly constant in both Houses until the 2012–13 session, where the average number of JCHR references began to increase for both Houses.

95. This data was collected by the author and two student research assistants reading parliamentary debates in Hansard and searching for either "Joint Committee on Human Rights" or "JCHR." Other scholars have collected similar data for different time periods with slightly differing criteria. See MURRAY HUNT, HAYLEY HOOPER & PAUL YOWELL, ARTS & HUM. RES. COUNCIL, PARLIAMENTS AND HUMAN RIGHTS: REDRESSING THE DEMOCRATIC DEFICIT 7–8 (Apr. 2012), <http://www.ahrc.ac.uk/documents/project-reports-and-reviews/ahrc-public-policy-series/parliaments-and-human-rights-redressing-the-democratic-deficit/> [<https://perma.cc/MMA3-5UMP>]; Francesca Klug & Helen Wildbore, *Breaking New Ground: The Joint Committee on Human Rights and the Role of Parliament in Human Rights Compliance*, 2007 EUR. HUM. RTS. L. REV. 231, 242.

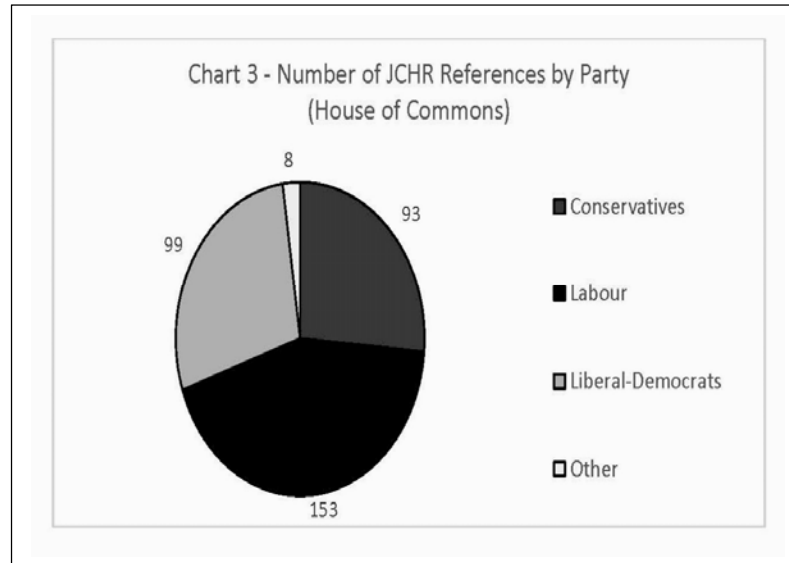
96. Due to factors such as timing or a bill's unlikely impact on human rights, the JCHR does not issue a report on every bill introduced into Parliament.



As shown in Charts 2, 3, and 4, it is not just JCHR members or a few Lords who discuss the JCHR and its reports. As the data in Chart 2 shows, the number of JCHR references from JCHR members is less than half of the references made by non-JCHR members in the House of Commons—and the numbers are starker for the House of Lords. Clearly, JCHR members are not the only ones who use JCHR reports during legislative debates.



Party affiliation is another potential confounding variable. Some political parties have historically been more interested in human rights issues, which may mean that those parties dominate human rights discussions while the parties that are uninterested in human rights issues remain silent and do not use JCHR reports. As the data below shows, however, this is not the case; members of all political parties use JCHR reports.



As shown in Chart 3, for the Commons, the Conservatives made the fewest references to the JCHR, which is unsurprising because the Conservative Party opposed the HRA. In contrast, Labour and the Liberal-democrats had the highest and second-highest number of JCHR references in the Commons, respectively. This result is also not surprising because the Labour party created the HRA and the Liberal-democrats championed the legislation; therefore, their members are arguably more likely to discuss the HRA and the JCHR. However, as the data shows, the number of Conservative references to the JCHR is still quite high; only slightly below Liberal-Democrat references.

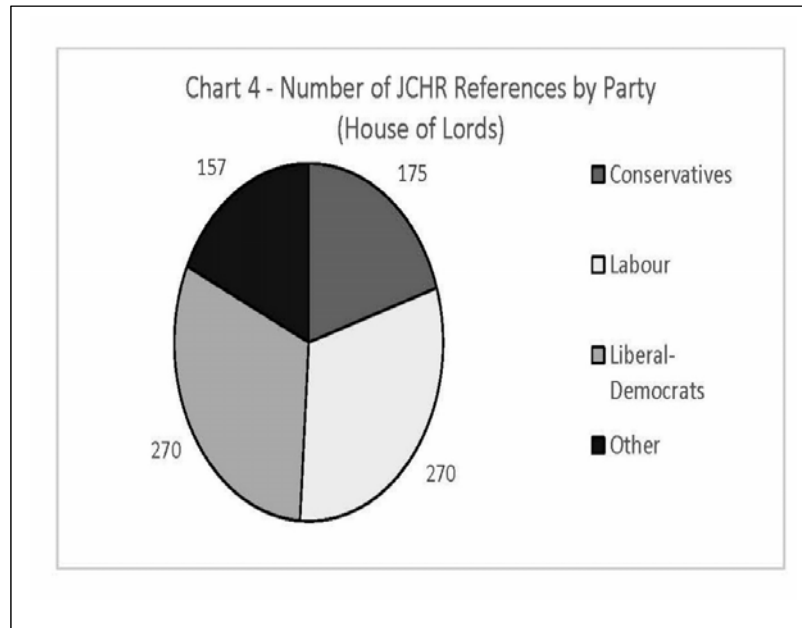
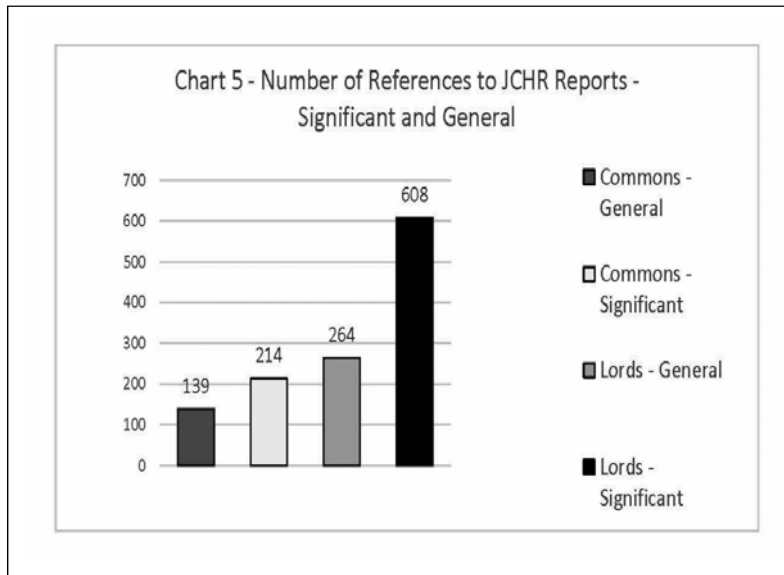


Chart 4, which focuses on the party affiliation of the Lords, provides an interesting counterpoint. As with the Commons, Labour and the Liberal-democrats most frequently refer to the JCHR, while the Conservatives invoke the JCHR a little more than half as often as members of those two political parties. However, several Lords do not affiliate with a party and their references to the JCHR—almost as many as Conservative Lords—are therefore less likely to be politically motivated. This data shows that although party affiliation has some impact on JCHR references—Labour and Liberal-democrats consistently reference the JCHR most often—both Conservatives and unaffiliated members also have a large amount of JCHR references. Overall, these results show that many different Members of Parliament and Lords make JCHR references—not just JCHR members, or Members of Parliament or Lords from one particular party.

Of course, in order to measure influence, it is not enough to note how often the JCHR was referenced. The nature of those references must be ascertained. In their 2006 report on the JCHR, Francesca Klug and Helen Wildbore noted how many of the references made to the JCHR's reports during the 2005–06 Parliamentary Session had a “significant impact,” which they defined as “relying on JCHR reports to (1) scrutinize a bill, (2) ask questions

or, (3) engage substantively in debate.”⁹⁷ This analysis was replicated here for the 2006–07 through 2013–14 Parliamentary Sessions.⁹⁸



As Chart 5 shows, both the Lords and the Commons are much more likely to make a significant use of a JCHR Report than to just mention the JCHR in passing. In the Lords, significant references are over twice as likely as insignificant ones. These results demonstrate that, in agreement with the anecdotal data provided above, Parliament not only recognizes the JCHR’s work but also uses its reports to inform Parliament’s legislative scrutiny. Accordingly, the JCHR has considerable power to raise human rights issues for debate and can use this discourse to affect passage of Bills, especially in the House of Lords, where party affiliation is weaker.⁹⁹ Even

97. THE COMMITTEE’S FUTURE WORKING PRACTICES, *supra* note 16, at 83 tbl.4 & n.2.

98. For example, in the 2007–08 Session, a “significant” reference was when Mr. Gibb used the JCHR’s scrutiny report on the Education and Skills Bill to ask the executive when the guidance the JCHR requested for the Bill would be made available. 483 Parl Deb HC (6th ser.) (2008) col. 75 (UK). Insignificant references include when a Peer or MP mentioned his or her membership in the JCHR or mentioned that the JCHR had reported on an issue without further reference to the report or its conclusions.

99. See R.M. PUNNETT, BRITISH GOVERNMENT AND POLITICS 304 (5th ed. 1987); Interview with Jean Corston, *supra* note 72.

in the Commons, the JCHR can give the Opposition something to focus on to rally resistance to proposed legislation.¹⁰⁰ Consequently, the JCHR greatly influences the legislature and assists it in focusing on human rights issues.

These results reveal a lot of potential for a congressional human rights committee. Moreover, because of the strong separation of powers in the United States, a congressional human rights committee could exercise greater influence than the JCHR. In the United States, a Congressional committee could begin influencing legislation, an even earlier stage because Congress proposes legislation instead of the executive. Moreover, as discussed below, the executive does not control Congress through strong party allegiance, allowing Congress more freedom to propose amendments to legislation that run against the executive's wishes or even the bill's proponents' wishes. With these freedoms, a human rights committee could speak with a powerful voice within Congressional debates.

B. Prompting the Creation or Amendment of Legislation

Congress' approval ratings have remained below thirty percent since October 2009,¹⁰¹ partially because voters are disillusioned with Congress, believe their representatives do not actually represent them, and are willing to sell their votes.¹⁰² The public also faults Congress' refusal to pass legislation.¹⁰³ In addition to refusing to pass budgets or vote on Supreme Court nominees, Congress recently failed to act on several human rights

100. For example, as noted above, the Lords used the JCHR's reports to oppose the executive's proposed amendment to the Counter-terrorism Bill that would lengthen the amount of time that police can hold a suspect without charge to forty-two days. 703 Parl Deb HL (5th ser.) (2008) col. 200 (UK) (Lord Judd).

101. Justin McCarthy, *U.S. Congress Approval Remains Low*, GALLUP (Apr. 13, 2016), <http://www.gallup.com/poll/190598/congress-approval-remains-low.aspx>; Frank Newport, *Congress Approval Jumps to 28%, Highest Since 2009*, GALLUP (Feb. 7, 2017), http://www.gallup.com/poll/203606/congress-job-approval-jumps-highest-2009.aspx?g_source=CONGRESS&g_medium=topic&g_campaign=tiles.

102. *Congressional Performance: Voters Still Down on Congress*, RASMUSSEN REP. (July 8, 2016), http://www.rasmussenreports.com/public_content/politics/mood_of_america/congressional_performance [<https://perma.cc/54ZF-5KPP>].

103. McCarthy, *supra* note 101.

issues including police misconduct,¹⁰⁴ water safety,¹⁰⁵ and gun control.¹⁰⁶ As a result, citizens formed several public interest groups to push these issues forward and both state and federal governments began varying attempts to investigate or report on these human rights issues.¹⁰⁷ However, comprehensive legislation in these areas remains elusive.

Obstructionist members of Congress occasionally stymie even sizeable numbers of their colleagues. For example, Congress's failure to act on gun control legislation has been reported in the news every time there has been a mass shooting, most recently culminating in a sit-in by Democratic Senators and their allies.¹⁰⁸ Despite their pleas for legislation and public

104. Gabrielle Levy, *Congress Left Behind in Rush for Police Reform*, U.S. NEWS & WORLD REP. (May 5, 2015, 4:23 PM), <http://www.usnews.com/news/articles/2015/05/05/congress-left-behind-in-rush-for-police-reform> [https://perma.cc/GL2Q-DCJA].

105. MICH. CIVIL RIGHTS COMM'N, *THE FLINT WATER CRISIS: SYSTEMIC RACISM THROUGH THE LENS OF FLINT* (Feb. 17, 2017), http://www.michigan.gov/documents/mdcr/MDCR_Flint_Water_Crisis_Report_552190_7.pdf [https://perma.cc/2RCZ-Q8SC]; Rebecca Shabad, *Why Congress Still Isn't Helping Flint*, CBS NEWS (May 5, 2016, 5:50 AM), <http://www.cbsnews.com/news/why-congress-still-isnt-helping-flint-water-crisis/> [https://perma.cc/Q58J-EW6D].

106. Tom LoBianco et al., *Senate Rejects Series of Gun Measures*, CNN (June 20, 2016, 8:47 PM), <http://www.cnn.com/2016/06/20/politics/senate-gun-votes-congress/> [https://perma.cc/6VUX-N3PV].

107. For lists of public interest groups, see Kate Abbey-Lambertz, *The Flint Crisis Will Last Decades, and These Groups Are in It for the Long Haul*, HUFFINGTON POST (Feb. 9, 2016, 6:00 AM), http://www.huffingtonpost.com/entry/flint-water-lead-crisis-donations_us_56b47a30e4b04f9b57d927dc [https://perma.cc/2E66-D9VF], and 9 *Organizations Making Progress Towards Gun Control*, GREAT NONPROFITS BLOG (Jan. 6, 2016), <http://greatnonprofits.org/nonprofitnews/9-organizations-making-progress-towards-gun-control/> [https://perma.cc/TLX4-PRZ2], and *Organizations Addressing Police Accountability and Racial Justice*, FUNDERS FOR JUSTICE, <http://fundersforjustice.org/organizations/> [https://perma.cc/QG6B-S885] (last visited Nov. 3, 2016). For examples of investigations into these crises, and the hurdles these investigations have to overcome, see Mark Berman, *Chicago to Release Evidence from 100 Investigations into Alleged Police Misconduct*, WASH. POST (May 28, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/05/28/chicago-to-release-evidence-from-100-investigations-into-alleged-police-misconduct/?utm_term=.f6960486b5b6 [https://perma.cc/UHP4-B6DU], and Emanuella Grinberg, *Baltimore Police have Racial Bias, Justice Department Reports*, CNN (Aug. 10, 2016, 9:35 PM), <http://www.cnn.com/2016/08/09/us/baltimore-justice-department-report/> [https://perma.cc/G9KY-H7J5], and Chad Livengood, *Schuetz, Snyder Spar over Flint Water Investigations*, DETROIT NEWS (June 3, 2016, 4:05 PM), <http://www.detroitnews.com/story/news/politics/2016/06/03/schuetz-snyder-spar-flint-water-investigations/85359654/> [https://perma.cc/KSJ5-HFEE].

108. Deirdre Walsh et al., *Democrats End House Sit-In Protest over Gun Control*, CNN (June 24, 2016, 1:08 PM), <http://www.cnn.com/2016/06/22/politics/john-lewis-sit-in-gun-violence/> [https://perma.cc/D6JT-FT5K].

support for several gun control measures, however, Congress still failed to pass or even seriously debate any gun control bill.¹⁰⁹

The water crisis in Flint, Michigan likewise failed to generate any federal legislation, despite it being far less controversial. A single Senator perpetrated the most recent gridlock when he objected to how the relief for Flint would be funded.¹¹⁰ In contrast, Congress actively sought out whom to blame for the disaster, holding multiple hearings and issuing reports, but none of those hearings led to any tangible relief for Flint citizens and Congress quietly closed the hearings in 2016.¹¹¹ In addition, although both civil and criminal lawsuits have been initiated against Michigan officials who have been deemed responsible,¹¹² according to the EPA, 5300 waterways in the United States violate lead rules¹¹³ and the water situation in Flint still has not been resolved.¹¹⁴

Clearly, there has been a failure to help both the citizens of Flint and all the people affected by tainted water throughout the country. The EPA, tasked with protecting the environment, has been criticized not only for failing

109. Carl Hulse, *Gun Control Wall, Bolstered by Republicans, Shows a Crack*, N.Y. TIMES (June 29, 2016), http://www.nytimes.com/2016/06/30/us/politics/gun-control-republicans-congress.html?_r=0.

110. Ted Barrett, *Lawmakers Keep Flint Money out of Energy Bill*, CNN (Apr. 14, 2016, 10:37 AM), <http://www.cnn.com/2016/04/13/politics/congress-flint-michigan-water-funding/> [<https://perma.cc/M3HL-FPS2>].

111. *Congress Grills Michigan Governor, EPA Head over Flint Water Crisis*, PBS NEWSHOUR (Mar. 17, 2016, 7:26 PM), <http://www.pbs.org/newshour/bb/congress-grills-michigan-governor-epa-head-over-flint-water-crisis/> [<https://perma.cc/6WC4-5RQB>]; Sara Ganim, *Flint Water Crisis: Did EPA Keep Memo About Lead Levels Under Wraps?*, CNN (Mar. 14, 2016, 12:11 AM), <http://www.cnn.com/2016/03/14/health/flint-water-epa-investigation/> [<https://perma.cc/8WB7-64CT>]; *House GOP Quietly Ends Flint Water Investigation*, CBS NEWS (Dec. 16, 2016, 5:43 PM), <http://www.cbsnews.com/news/flint-water-investigation-house-gop-quietly-ends/>; Jonathan Oosting & Keith Laing, *House Democrats Focus on Snyder's Role in Flint Crisis*, DETROIT NEWS (Mar. 15, 2016, 6:04 PM), <http://www.detroitnews.com/story/news/michigan/flint-water-crisis/2016/03/15/watch-10-flint-water-congressional-hearings/81801706/> [<https://perma.cc/U6PV-YXRM>].

112. Stephanie Gosk, et al., *'Failed Us All': 3 Officials Hit with Charges in Flint Water Crisis*, NBC NEWS (Apr. 20, 2016, 11:13 AM), <http://www.nbcnews.com/storyline/flint-water-crisis/3-officials-charged-over-flint-water-crisis-n559186>; *NAACP Files Lawsuit over Flint Water Crisis*, NAACP (May 18, 2016), <http://www.naacp.org/latest/naacp-files-lawsuit-flint-water-crisis/> [<https://perma.cc/TT4V-DK5V>].

113. Sara Ganim, *5,300 U.S. Water Systems Are in Violation of Lead Rules*, CNN (June 29, 2016, 6:50 AM), <http://www.cnn.com/2016/06/28/us/epa-lead-in-u-s-water-systems/> [<https://perma.cc/LX7T-ZUAS>].

114. Matthew Dolan, *Flint Water Woes Reach Beyond Lead in Drinking Supply*, DETROIT FREE PRESS (June 5, 2016, 10:24 PM), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/06/05/flint-water-woes-reach-beyond-lead-drinking-supply/85288850/> [<https://perma.cc/8GKE-DX7G>]; *Feds Say Filtered Flint Drinking Water Is Safe to Drink*, NBC NEWS (June 23, 2016, 4:27 PM), <http://www.nbcnews.com/storyline/flint-water-crisis/feds-says-filtered-flint-drinking-water-safe-drink-n597876> [<https://perma.cc/J9SX-AZAG>].

to help Flint, but not properly investigating, reporting on, or stopping these legal violations from continuing across the country.¹¹⁵ Despite some media coverage on the EPA's failures, again sparked by the Flint disaster, Congress shows no inclination to pass any legislation regarding water purity, or even to call the EPA to task for its failure to enforce its own regulations.¹¹⁶

Some of Congress' inaction may be due to the perception that water purity is an environmental issue and not a human rights one. In addition, the fact that Congress failed to create a committee to report on these issues likely created another obstacle to any lasting change on this issue. For these reasons, a congressional human rights committee would fill a major gap and would convince Congress to pass legislation that improves the human rights of Americans. Such a committee could become a central location for other agencies, NGOs and the public to provide information to Congress on human rights abuses. A human rights committee could also hold hearings and gather evidence on human rights issues and use its persuasive ability to convince Congress to act.

The JCHR shows how a legislative human rights committee can convince a legislature to act on human rights issues. In the United Kingdom, the executive proposes nearly all legislation and, without executive support, Parliament will probably not pass the bill due to the strong party system in the United Kingdom. In this environment, the JCHR influences the creation of legislation because it convinces Ministers to justify their bills on human rights grounds and amend legislation so that it will conform to European Convention rights. The JCHR encourages the executive either through direct communication with the relevant Minister or by informing Parliament, which can lobby for changes. The JCHR does this primarily through its thematic and legislative scrutiny reports.

The JCHR often uses its thematic reports, which discuss broad areas of human rights concerns such as treatment of prisoners,¹¹⁷ to convince the executive to change its policies. The House of Commons in particular

115. Ganim, *supra* note 113.

116. Moreover, under Donald Trump and Secretary Scott Pruitt, there have been indications that the EPA's activities may be curtailed or the agency may be abolished altogether. Arthur Nelsen, *Donald Trump 'Taking Steps to Abolish Environmental Protection Agency'*, *GUARDIAN*, (Feb. 1, 2017, 8:13 PM), <https://www.theguardian.com/us-news/2017/feb/02/donald-trump-plans-to-abolish-environmental-protection-agency> [<https://perma.cc/YFYG-4HWM>].

117. JOINT COMMITTEE ON HUMAN RIGHTS, *THIRD REPORT: DEATHS IN CUSTODY, 2004-5*, HL 137-I, HC 137-I (UK).

uses the JCHR's thematic reports in its debates.¹¹⁸ The JCHR also monitors and publishes the Minister's response to its thematic reports. Some Ministerial responses to JCHR reports, such as the Justice Department's response to the JCHR's concerns regarding the executive's proposals to reform judicial review, take the form of lengthy reports that answer the JCHR's concerns point by point.¹¹⁹ Moreover, if the JCHR deems the Minister's response insufficient, the JCHR has shown itself capable of vigorous response.¹²⁰

With regard to its legislative scrutiny reports, early on, the JCHR decided to make scrutiny of bills its main priority as part of its "responsibility" to Parliament.¹²¹ The process for reviewing new proposed legislation is a complicated one; legal advisors review all bills to determine their human rights implications, the chair corresponds with the relevant Ministers, and the committee produces reports and publishes them to the public.¹²² Since 2006, the JCHR has used a sifting process that reports on bills only if they have "significant" human rights implications.¹²³ The committee examines five criteria: (1) the importance of the affected right, (2) the impact's seriousness, (3) the strength of the interference's justification, (4) the number of people affected, and (5) the vulnerability of the affected people.¹²⁴

118. JOINT COMMITTEE ON HUMAN RIGHTS, MINUTES OF EVIDENCE, *supra* note 70, at Letter to the Chair from Harriet Harman MP; Interview with Anthony Lester, Member of the House of Lords (May 19, 2008). The Commons has less time for legislative scrutiny than the Lords but it has a greater interest in wider policy concerns, which is exactly what the JCHR's thematic reports highlight. In addition, most major bills start in the Commons, with the consequence that in a lot of cases the JCHR's legislative scrutiny reports on those bills have not been published in time to influence debate there. Thematic reports, on the other hand, are not under such time pressure and can be considered by Members of Parliament in more depth.

119. MINISTRY OF JUSTICE, GOVERNMENT RESPONSE TO THE JOINT COMMITTEE ON HUMAN RIGHTS: THE IMPLICATIONS FOR ACCESS TO JUSTICE OF THE GOVERNMENT'S PROPOSALS TO REFORM JUDICIAL REVIEW (July 2014), http://www.parliament.uk/documents/joint-committees/human-rights/Cm8896_Draft%20JCHR%20Response_110714_FINAL_WEB.PDF [<https://perma.cc/E7VM-A5UL>].

120. For example, the JCHR issued several reports and worked with the British Institute of Human Rights to publicize the executive's lack of response to a court decision that severely limited what entities would be subject to the HRA as "public authorities." *See infra* p. 70 and accompanying notes.

121. JOINT COMMITTEE ON HUMAN RIGHTS, FOURTEENTH REPORT: SCRUTINY REPORT ON PRIVATE MEMBERS' BILLS AND PRIVATE BILLS, 2001-2, HL 93, HC 674 (UK); JOINT COMMITTEE ON HUMAN RIGHTS, NINETEENTH REPORT: THE WORK OF THE COMMITTEE IN THE 2001-2005 PARLIAMENT, 2004-5, HL 112, HC 552, at 46 (UK).

122. JOINT COMMITTEE ON HUMAN RIGHTS, THIRD SPECIAL REPORT: SCRUTINY OF BILLS, 2000-1, HL 73, HC 448 (UK); Hiebert, *Parliament and the Human Rights Act*, *supra* note 62, at 16-17; Interview with Murray Hunt, Legal Advisor to the Joint Committee on Human Rights (May 19, 2008).

123. *Id.* at annex 1.

124. THE COMMITTEE'S FUTURE WORKING PRACTICES, *supra* note 16, at 27.

When examining a bill, the JCHR looks to whether its provisions themselves constitute a risk of violating human rights and whether the bill leaves any gaps so that inadequate safeguards for rights exist on the face of the bill.¹²⁵ The JCHR's reports discuss human rights issues in terms of the potential risk of a court, either a domestic court or the European Court of Human Rights, finding it incompatible with the European Convention. The JCHR also seeks and receives evidence from third parties affected by the bill at issue such as charities and human rights NGOs.¹²⁶ The JCHR often attaches advice from NGOs to assist members of Parliament during debates. In this way, the JCHR also acts as a liaison between the government and public interest groups.¹²⁷ The JCHR also communicates with the Equality and Human Rights Commission to seek its views on legislation.¹²⁸

In addition to bill scrutiny, the JCHR also scrutinizes remedial orders, which are "fast track" pieces of legislation that correct a legislative incompatibility with the European Convention, and monitors the executive's responses to Declarations of Incompatibility, which are declarations by the judiciary that a statute is incompatible with the European Convention.¹²⁹ In addition, the JCHR reviews the United Kingdom's implementation of European Court of Human Rights judgments and considers United Nations treaty bodies' observations and conclusions.¹³⁰ As a result of its wide-ranging powers, the JCHR's influence in the creation or amendment of legislation comes primarily through the JCHR's ability to obtain information about a bill from the executive while Parliament debates a bill, and its effectiveness in proposing amendments to bills.

125. Feldman, *Injecting Law into Politics*, *supra* note 89, at 111.

126. Anthony Lester, *Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998*, 33 VICTORIA U. WELLINGTON L. REV. 1, 13 (2002).

127. Janet Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?*, 82 TEX. L. REV. 1963, 1978 (2003) [hereinafter Hiebert, *New Constitutional Ideas*].

128. See, e.g., Letter from Baroness O'Neill, Chair, Equality and Human Rights Commission, to Hywel Francis, Chair, Joint Committee on Human Rights (Nov. 21, 2012), <http://www.parliament.uk/documents/joint-committees/human-rights/Baroness-ONeill-on-Enterprise-Regulatory-Reform-Bill.pdf> [https://perma.cc/WX2U-F3UT].

129. THE COMMITTEE'S FUTURE WORKING PRACTICES, *supra* note 16, at 6.

130. *Id.*

1. Requesting Information—Section 19 Statements of Compatibility

Under Section 19 of the HRA, when a Minister introduces any Bill into Parliament, he or she must state either that the bill corresponds with European Convention rights or that the bill is not compatible but the Minister wishes Parliament to proceed with it anyway.¹³¹ The statement of compatibility does not explicitly prohibit the executive from proposing legislation that may violate human rights, but it does present significant political obstacles such as increased parliamentary scrutiny—especially from the JCHR and the Opposition—and public disapproval.¹³²

According to former Home Secretary Jack Straw, legal advisors will only recommend that the minister make a statement of compatibility if “it is more likely than not that the provisions of the Bill will stand up to challenge on European Convention grounds before the domestic courts and the European Court of Human Rights in Strasbourg.”¹³³ The statement of compatibility therefore ensures that the executive analyses the human rights impact of a bill before it presents the bill to Parliament because the Minister must draft and issue the statement of compatibility before a Bill’s second reading.¹³⁴ The executive must also take into account possible questioning by the JCHR, and any debates that this questioning may provoke.¹³⁵ However, Section 19 does not dictate what must be in the statement or that the statement must be justified or explained.¹³⁶

131. Human Rights Act 1998, c. 42 § 19 (Eng.) <http://www.legislation.gov.uk/ukpga/1998/42/section/19> [<https://perma.cc/RQE3-3DBV>]; RODNEY BRAZIER, CONSTITUTIONAL PRACTICE: THE FOUNDATIONS OF BRITISH GOVERNMENT 10 (3d ed. 1999).

132. Ewing, *supra* note 64, at 96–97; Murray Hunt, *The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession*, 26 J.L. & SOC. 86, 89–90 (1999).

133. 330 Parl Deb HC (6th ser.) (1999) col. 371 (UK) (Written Answers).

134. Human Rights Act 1998, c. 42, § 19(1).

135. Francesca Klug has implied that statements of compatibility are insufficient to ensure that the executive will comply with the HRA because the government may repeatedly enact violating legislation and then deny it. FRANCESCA KLUG, VALUES FOR A GODLESS AGE: THE STORY OF THE UNITED KINGDOM’S NEW BILL OF RIGHTS 173–74 (2000); *see also* Hiebert, *Parliament and the Human Rights Act*, *supra* note 64, at 12. In such situations, it is up to the Joint Committee on Human Rights and Parliament (the Opposition, most likely) to bring all elements of the Bill to light so that the full implications of the Bill may be discussed and weighed.

136. Despite Parliament’s attempts to amend the HRA to require Ministers to give reasons for their Section 19 statements, the executive refused. 583 Parl Deb HL (5th ser.) (1997) col. 1163 (UK) (Lord Irvine); 317 Parl Deb HC (6th ser.) (1998) col. 1350 (UK) (Mike O’Brien); 321 Parl Deb HC (6th ser.) (1998) cols. 1–2 (UK) (Written Answers) (Fiona Mactaggart); 595 Parl Deb HL (5th ser.) (1998) cols. 1–2 (UK) (Written Answers) (Lord Mackenzie of Framwellgate); 595 Parl Deb HL (5th ser.) (1998) col. 116 (UK) (Written Answers) (Lord Lester); HOUSE OF LORDS, *supra* note 83, at 36. Interestingly, the Under-Secretary of State for Home Department, Mike O’Brien, MP, suggested that a

Section 19 perhaps would have remained of no consequence if the JCHR had not seized upon it and used it as a tool to make the executive more accountable. Through the JCHR's growing influence, it persuaded the executive to give more thorough explanations in its Section 19 statements,¹³⁷ though some departments still require the JCHR to repeatedly ask for a statement of compatibility.¹³⁸ According to the Cabinet Office's most recent Guide to Making Legislation, the executive made "a commitment to give an assessment of the most significant human rights issues thought to arise from each bill."¹³⁹ The Guide also states that:

the assessment of the impact of the bill's provisions on the European Convention rights should be as detailed as necessary, setting out any relevant case law and presenting the executive's reasons for concluding that the provisions in the bill are either compatible with the European Convention or why if unable to make a statement of compatibility, the [executive] nevertheless wishes the House to proceed with the Bill.¹⁴⁰

joint committee could inquire regarding Section 19 statements and report to Parliament to better inform its debates. 317 Parl Deb HC (6th ser.) (1998) col. 1350 (UK). However, this comment was never followed up with any questions or further statements and appears to have been largely forgotten by the time the HRA was enacted.

137. 630 Parl Deb HL (5th ser.) (2001) col. 43 (UK) (Written Answers); 643 Parl Deb HL (5th ser.) (2003) col. 154 (UK) (Written Answers); Feldman, *Parliamentary Scrutiny*, *supra* note 83, at 339.

138. JOINT COMMITTEE ON HUMAN RIGHTS, LEGISLATIVE SCRUTINY UPDATE, 2012-13, HL 157, HC 1077, ¶¶ 73-75 (UK), <http://www.publications.parliament.uk/pa/jt201213/jtselect/jtrights/157/15707.htm#a20> [<https://perma.cc/2YWD-LGMT>] [hereinafter LEGISLATIVE SCRUTINY UPDATE].

139. CABINET OFFICE, GUIDE TO MAKING LEGISLATION, 2015, ¶ 11.80, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450239/Guide_to_Making_Legislation.pdf [<https://perma.cc/MN9P-UZ42>].

140. *Id.* § 11.80, at 86. Since 1998, there have been only two statements of incompatibility under Section 19(b). David Feldman, *The Impact of Human Rights on the UK Legislative Process*, 25 STATUTE L. REV. 91, 98-99 (2004). The first bill was the Local Government Bill 1998 wherein the House of Lords blocked the Commons' attempt to section 28, which had forbidden the promotion of homosexuality. The executive warned that this amendment could be incompatible with the Convention and required a statement of incompatibility. Section 28 was later removed in the Local Government Act 2003. The other bill, the Communications Bill 2003, was later approved by the JCHR (after the executive explained its reasoning) and upheld by the Law Lords as not violating the Convention. *R* (on the application of Animal Defenders International) v. Secretary of State for Culture, Media and Sport [2008] UKHL 15 (appeal taken from Eng.), <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080312/animal.pdf> [<https://perma.cc/D7NK-GMVH>]; 395 Parl Deb HC (6th ser.) (2002) col. 789 (UK); Tom Lewis, *Political Advertising and the Communications Act 2003: Tailored Suit or Old Blanket?*, EUR. HUM. RTS. L. REV. 290, 292 (2005). The European Court of Human Rights recently agreed that the Communications

One commentator has suggested that due to Section 19, a number of bills include provisions so that the minister could certify the bill's compatibility "because otherwise the minister would have had to draw Parliament's attention to what was incompatible with the Convention."¹⁴¹

In addition, since 2006, the JCHR has increased its role in pre-legislative scrutiny.¹⁴² Due to its efforts, executive departments sometimes consult with the JCHR before publishing a bill or amendment. For example, before proposing amendments to the Crime (International Co-operation) Bill that was before the Lords, the Home Office wrote to the JCHR to explain the amendments.¹⁴³ Additionally, civil servants sometimes contact the legal advisor to the JCHR to ascertain whether the bill they are working on will be acceptable to the JCHR.¹⁴⁴ Further, over time, the executive has submitted a significant number of draft bills for public consultation and JCHR reporting, such as the Draft Communications Bill, the Draft Extradition Bill and the Draft Inheritance and Trustees' Powers Bill.¹⁴⁵ According to Feldman, due to early communications between the JCHR and executive Departments, the executive introduces more bills with fewer or no potential human rights concerns.¹⁴⁶ There has also been an increase in legislation that improves human rights, such as the Equality Act 2006, which created the Commission for Equality and Human Rights.

Act did not violate the Convention. See Tom Lewis, *Animal Defenders International v United Kingdom: Sensible Dialogue or a Bad Case of Strasbourg Jitters?*, 77 MOD. L. REV. 460, 460–474 (2014).

141. Interview with Judicial Studies Board member (May 8, 2008). However, the bare fact that a Minister made a statement of compatibility does not guarantee that the legislation complies with the HRA. Quite a few times, the executive has stated that a bill comports with the HRA even though the JCHR and courts later disagree. The Prevention of Terrorism Act is a good example of this effect. See Sweeny, *supra* note 73, at 1221–29.

142. THE COMMITTEE'S FUTURE WORKING PRACTICES, *supra* note 16, ¶ 55.

143. Feldman, *The Impact of Human Rights on the UK Legislative Process*, *supra* note 140, at 110; Letter from Lord McNally, Minister of State, to Lord Hywel Francis, JCHR Chair (Mar. 2013), http://www.parliament.uk/documents/joint-committees/human-rights/Ld_McNally_Draft_Inheritance_and_Trustees_Powers_Bill.pdf [<https://perma.cc/KX2E-U6A5>].

144. Oliver, *supra* note 86, at 43; Interview with Jean Corston, *supra* note 72; see also Letter from Theresa May, Home Sec'y, to Hywel Francis, JCHR Chair (June 13, 2013), http://www.parliament.uk/documents/joint-committees/human-rights/Theresa_May_Draft_Communications_Data_Bill.pdf [<https://perma.cc/C7Y5-9PHW>] (executive inviting JCHR to participate in pre-legislative scrutiny); Letter from Lord McNally, Minister of State, to Hywel Francis, JCHR Chair, *supra* note 143. The Home Office even created a parliamentary clerk who regularly liaises with the JCHR about existing bills and the Home Office's future legislation plans. Feldman, *Injecting Law into Politics*, *supra* note 89, at 117.

145. Feldman, *The Impact of Human Rights on the UK Legislative Process*, *supra* note 140, at 92–93.

146. *Id.* at 93.

2. Recommendations for Amendments

In addition to seeking information, the JCHR also recommends to Ministers that they amend proposed legislation to conform to the European Convention's requirements after the executive introduces bills into Parliament.¹⁴⁷ During the 2007–08 Parliamentary Session, the JCHR began to propose specific amendments to bills it scrutinized instead of simply suggesting that Parliament make changes to conform to the JCHR's general recommendations.¹⁴⁸ It did so with the intention that these amendments would be more persuasive and would allow JCHR members to table and argue for these amendments in both Houses.¹⁴⁹ The executive initially resisted this endeavor and spoke against it during parliamentary debates.¹⁵⁰ In response, the JCHR resolved to continue proposing amendments despite the executive's "reluctance to engage with our amendments on the floor of the House," declaring that the Minister's reaction was "encouragement to continue."¹⁵¹ Since those initial scuffles, the JCHR has continued to propose amendments and the controversy of doing so appears to have died down.

The JCHR has also influenced Parliament to block or delay a bill, which forces the executive to make changes. Because Parliament must pass a bill during each parliamentary session or the executive must reintroduce the legislation, time pressure can kill a bill. For example, the House of Lords forced the executive to include additional safeguards in the Criminal Justice and Police Bill because the Lords delayed the bill's passage and the executive wanted to pass the legislation before the 2001 general election.¹⁵²

147. JOINT COMMITTEE ON HUMAN RIGHTS, SEVENTEENTH REPORT: LEGISLATIVE SCRUTINY: 1) EMPLOYMENT BILL; 2) HOUSING AND REGENERATION BILL; 3) OTHER BILLS, 2007-8, HL 95, HC 501, ¶¶ 1.29–1.30 (UK).

148. JOINT COMMITTEE ON HUMAN RIGHTS, SIXTH REPORT: THE WORK OF THE COMMITTEE IN 2007 AND THE STATE OF HUMAN RIGHTS IN THE UK, 2007-8, HL 38, HC 270, ¶¶ 36–40 (UK).

149. *Id.*; JOINT COMMITTEE ON HUMAN RIGHTS, FIFTEENTH REPORT: LEGISLATIVE SCRUTINY, 2007-8, HL 81, HC 440, ¶¶ 3.3–3.4 (UK) [hereinafter FIFTEENTH REPORT: LEGISLATIVE SCRUTINY].

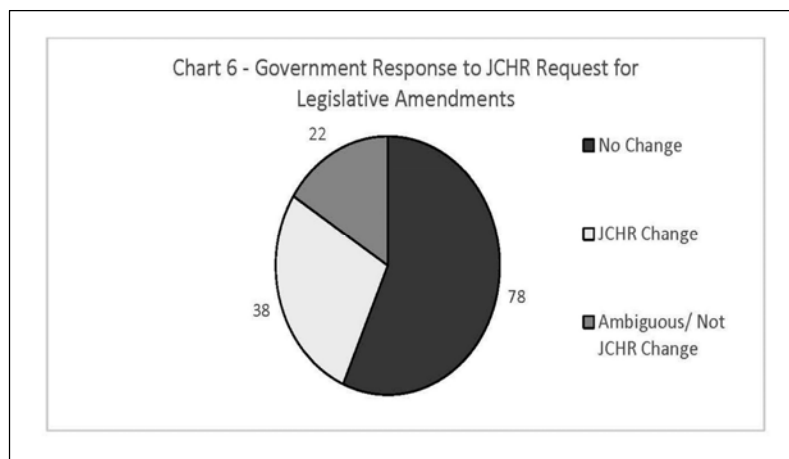
150. *Id.*

151. *Id.*

152. Feldman, *Parliamentary Scrutiny*, *supra* note 83, at 341; Feldman, *The Impact of Human Rights on the UK Legislative Process*, *supra* note 140, at 104. As noted above, the Lords' vote to remove the 42-days provision from the Counter-terrorism bill caused the executive to remove the provision. Coates, *supra* note 92.

Empirical data can also be used to calculate the JCHR's ability to convince the executive to propose amendments to legislation.¹⁵³ The following data was gathered by focusing on the 2001–02 to 2013–14 Parliamentary Sessions and reading JCHR legislative scrutiny reports, Parliamentary debates discussing all bills that the JCHR recommended be amended, and all of the versions of those same bills to see if they were actually amended. Although the results depend on external factors such as the JCHR's changing practices, the subject matter of the legislation, and the Department from which the legislation came, some useful observations can be made regarding the interactions between the JCHR and the executive.

Chart 6 shows how often the executive made a change to a bill that the JCHR recommended be amended. Some changes could be specifically attributed to the JCHR through a statement made during a parliamentary debate, in a JCHR report, or in correspondence between the JCHR and the relevant Minister. Other changes were coded as “ambiguous” because there was no direct link to the JCHR. In addition, any amendment to a bill was coded as a “change” to the bill even if the executive did not include some of the JCHR's requested amendments. On the other hand, the addition of guidance or other assurances that did not affect the text of the bill were not recorded as “changes” to the bill.



153. Other measures of the JCHR's effectiveness have been suggested by academics such as “encouraging ‘civil society’ to participate in public debate about the appropriateness or justification of government action.” Hiebert, *Parliament and the Human Rights Act*, *supra* note 62, at 37.

On average, the executive was slightly less likely to amend a bill than not, but JCHR changes were more likely than non-JCHR changes. Specifically, the JCHR has an average of a 28% success rate in convincing the executive to make at least one change to a proposed bill. In contrast, non-JCHR or ambiguous efforts were a little over half as effective at 16%.

However, this data presents only a partial picture. This data cannot capture the informal pressure the JCHR can place on the executive generally; without an explicit request for a change by the JCHR and a response by the executive, there is no official record of the JCHR's influence on the executive. Similarly, any bills that the executive altered before being presented to Parliament could not be included in this data. On the other hand, the data does not show how satisfied the JCHR was with the changes to each bill¹⁵⁴ or whether the changes resulted in a combined effort from the JCHR and Parliament.¹⁵⁵

All in all, although this data presents only a partial picture, it is still a promising one. Because the executive is extremely unlikely to be forced to amend legislation by members of Parliament, any change the JCHR has convinced the executive to make therefore represent a substantial success for the JCHR. Moreover, the fact that almost twice as many legislative changes can be explicitly attributed to the JCHR than to any other reason shows that the JCHR is significantly influencing the executive.

Moreover, the effectiveness of a human rights committee would likely be even greater in the United States, where there is a stronger system of checks and balances. Instead of merely delaying a bill, members of Congress in either House can fully block a bill's passage. A strong human rights committee¹⁵⁶ can use this dynamic to ensure that a bill that negatively affects human rights does not reach the President for signature. At the very least, such a committee could raise enough concerns that a Presidential veto may be more likely.

154. As noted by the JCHR's former legal advisor, the amendments that are made by the executive typically do not change the substance of the bill and only put in minor safeguards such as review or sunset clauses. Feldman, *Parliamentary Scrutiny*, *supra* note 83, at 346.

155. See Feldman, *Injecting Law into Politics*, *supra* note 89, at 117; Oliver, *supra* note 86, at 35.

156. The qualities that could make a human rights committee stronger and more influential in Congress are discussed more fully in Part IV. See *infra* Part IV, section D.

C. Influencing the Judiciary

In addition to influencing Congressional debates, a human rights committee also could educate and influence the judiciary to ensure that American laws better protect human rights. Specifically, a human rights committee could: (1) argue for a more human-rights compatible interpretation of ambiguous legislation or provide a more robust legislative history for courts to use when considering a statute's intended impact on human rights, and (2) organize a response to court judgments that either positively or negatively impact human rights so Congress can fix the problem by amending existing legislation or creating new laws.

1. Influencing Judicial Decisions

When interpreting legislation, courts often used the legislative record created by committee reports and hearings. In the United States, courts commonly examine a bill's legislative history to determine Congress's intent, and courts will strike down federal statutes on the basis of an insufficient legislative record.¹⁵⁷ For example, the Supreme Court held that the Religious Freedom Restoration Act was beyond Congress's enforcement powers because Congress failed to show in the statute's legislative history that an actual problem with religious bigotry existed for Congress to address.¹⁵⁸ When making its decision, the Supreme Court specifically looked at and criticized testimony presented to a congressional committee as to the justification for the statute.¹⁵⁹ Accordingly, a congressional human rights committee could assist in creating an adequate record for legislation that affects human rights. As discussed below, the JCHR shows how a human rights committee can create a legislative record that can influence judicial opinions on human rights issues.

In the United Kingdom, courts increasingly use the JCHR's reports as either persuasive authority or to generally inform their judgments. Under the seminal case *Pepper v. Hart*, the British judiciary may consider a statute's legislative history only if the statute is ambiguous.¹⁶⁰ In such situations, JCHR reports have been useful to courts because the JCHR has often already considered the human rights compatibility issue before the court. When introduced into evidence, courts may use the JCHR's reports to access the JCHR's opinions on compatibility, the Minister's responses to the JCHR's

157. Feldman, *Parliamentary Scrutiny*, *supra* note 83, at 330.

158. *Id.* at 347 (discussing *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

159. *Id.* Commentators have shown concern that Congress may divert too many resources to ensuring that its committee hearings and reports create a record that will satisfy the judiciary, instead of fulfilling their other functions such as informing the public. *Id.* at 388.

160. [1992] UKHL 3.

questions, and the extensive parliamentary debates the report inspired.¹⁶¹ Perhaps most importantly, the JCHR includes evidence in its reports regarding the Minister's purposes for the legislation, which may contradict the Minister's later statements during later litigation.¹⁶²

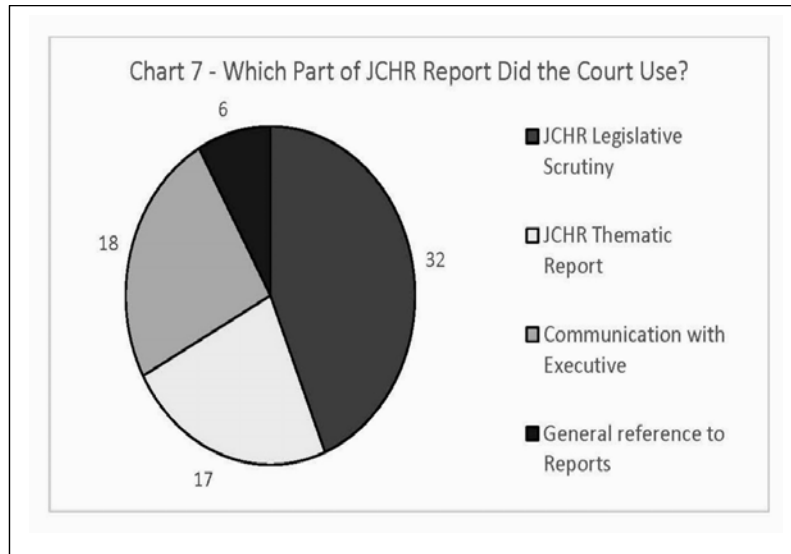
Looking at British court cases shows that courts do use the information provided by the JCHR to inform their judgments. The following data was gathered by searching British court cases for the terms "JCHR" or variations on "Joint Committee on Human Rights" during the years 2000–14. All references to the JCHR were considered, including references to the JCHR's thematic reports. Only cases where HRA issues were seriously considered and discussed in some detail were included.¹⁶³ In addition, if multiple courts considered the same case, each court that referenced the JCHR was included, even if that case was later reviewed by a higher court.

As shown in Chart 7, courts used many different kinds of information provided by the JCHR. Courts cite legislative scrutiny reports, thematic reports, and the JCHR's correspondence with the executive.

161. Interview with Murray Hunt, *supra* note 122.

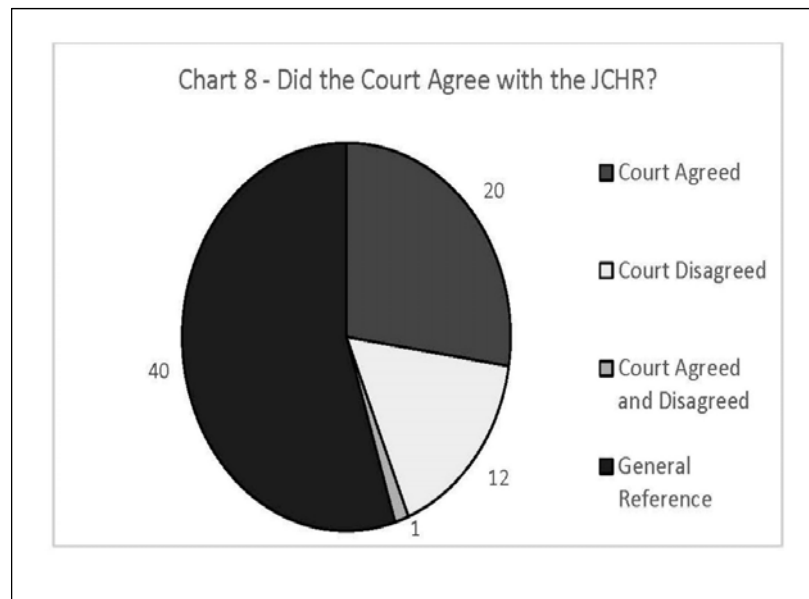
162. In the past, Parliamentary authorities attempted to prevent courts from considering the JCHR's reports and, more specifically, the executive's statements that are appended to those reports, under a theory of protecting Parliament's right to free speech under Article 9 of the Bill of Rights 1689. Interview with Hunt, *supra* note 122; Interview with Lester, *supra* note 118. Some courts have upheld this reasoning for other parliamentary reports but none have done so for the JCHR. See *The Queen on the application of Henry Bradley, Robin Duncan, Andrew Parr, Thomas Waugh v. Secretary of State for Work and Pensions* [2007] EWHC 242, [35] (Admin); *Office of Government Commerce v. Information Commissioner* [2008] EWHC 737, [30], [61] (Admin); *The Queen (on the application of Wheeler) v. Office of the Prime Minister, Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 1409, [53]–[54] (Admin). However, the Law Lords continue to use the JCHR's reports as persuasive evidence, see *R (on the application of Animal Defenders International) v. Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [14], and it appears that this argument is not being pursued any longer, at least with respect to the JCHR's reports.

163. This restriction is not used in a similar analysis contained in the Arts and Humanities Research Council's recent report, which led to, unsurprisingly, a larger number of reported cases where the JCHR was mentioned. Hunt, Hooper & Yowell, *supra* note 95, at 46.



Generally, the JCHR's legislative scrutiny reports appear as the most popular source of information for courts and litigants. The second most popular part of JCHR reports are their communications with the executive. Interestingly, almost as popular as communications with the executive are thematic reports, which do not focus on a particular statute. Instead, these reports focus on general human rights issues in the United Kingdom, which courts clearly find informative when deciding cases. Similarly, courts also sometimes reference the general existence of JCHR reports on a topic without examining what the reports said. These shallower references, although they appear dismissive, actually may indicate that courts will use JCHR reports as a general source of information, even if there is no specific report on the legal issue in question.

Perhaps the best indication of the JCHR's influence over the courts is how often the courts agree with the JCHR's conclusions. Chart 8 provides that information.



As Chart 8 shows, courts were more likely to agree with the JCHR's conclusions than disagree. However, courts are far more likely to use a JCHR report in a way that is not directly applicable to the court's holding. Courts may make these references to executive communications with the JCHR where the court makes no reference to the JCHR's actual findings, or they may reference the general discussion of JCHR reports on a wider topic than the one at issue. Either way, as discussed above, the "general reference" findings suggest that courts use JCHR reports for information or to signify that the JCHR addressed related issues in a report, which indicates that courts know about JCHR reports even if the reports do not directly relate to the cases they are deciding. Instead, the JCHR and its reports make up the general legal landscape when a case involves human rights issues.

These findings, although not conclusive proof, imply that American courts would likewise use a congressional human rights committee's reports when considering human rights issues. Indeed, American courts are more likely to consider a legislative committee report because American courts may consider legislative history without limitation, unlike British courts. Further, not only would a human rights committee report on Congress' reason for enacting legislation that impacts human rights, but the committee's

general findings on human rights issues would also help courts grapple with these often-complex issues. Moreover, as shown below, a human rights committee could also monitor court decisions impacting human rights and bring its findings to Congress, which would be especially useful if a court decision negatively impacted human rights in a way Congress did not intend.

2. *Organizing Responses to Court Judgments*

Even with the most thorough legislative history, sometimes courts still interpret statutes in a way of which the legislature disapproves. When the Supreme Court issues a decision that negatively impacts human rights, the only recourse is for Congress to pass legislation—or a constitutional amendment—to override the decision. For instance, the Lilly Ledbetter Fair Pay Act overrode the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, which held that an employee was time-barred from filing a discrimination claim with the EEOC for any employment decision that occurred more than 180 days before the EEOC filing, even if the employee discovered the disparate treatment after the 180-day filing time period.¹⁶⁴

Congress did not intend that result and it eventually took action with the Lilly Ledbetter Fair Pay Act. It drafted The Fair Pay Act shortly after the Supreme Court decision in *Ledbetter*, which explicitly abrogated the Supreme Court’s holding by stating that, with regard to compensation, an unlawful employment practice occurs every time a person receives that discriminatory compensation.¹⁶⁵ The statute’s legislative history—and its name—makes it very clear that this statute was intended to overrule the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*¹⁶⁶

However, despite Congress’ clear intention to remedy what it perceived as a wrong decision by the Supreme Court, the passage of the Fair Pay Act was far from smooth. Instead, the Fair Pay Act languished in Congress for months during the Bush Administration and Bush stated he would veto

164. 431 U.S. 553, 553–55 (1977).

165. Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

166. H.R. REP. 110-237, 1–2 (2007) (“The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05–1074 (May 29, 2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.”).

the Act if Congress passed it during his tenure.¹⁶⁷ It was only passed by Congress after President Obama came into office; President Obama proudly signed it as his first piece of legislation.¹⁶⁸

Although the Fair Pay Act is an example of Congress successfully “correcting” a Supreme Court decision that negatively impacted civil rights, Congress likely could have proceeded more effectively and swiftly with the support of a human rights committee. As shown by the work of the JCHR, after a court issues a harmful decision, a human rights committee can focus the efforts of the legislature and keep sustained pressure on the executive to ensure that the negative effects of the judicial decision are ameliorated as soon as possible.

In the United Kingdom, the JCHR monitors court decisions that impact human rights and reports on them to Parliament and the executive, either to convince Parliament to enforce or build upon the court’s decision, or to abrogate it with legislation. For example, after the JCHR wrote to the Minister of Health regarding the proposed amendments to the Mental Health Act 1983—after it was declared incompatible with the European Convention by the Law Lords—the Minister withdrew the draft Bill and substituted it with a “fast-track” remedial order as the JCHR suggested.¹⁶⁹

In addition, when a court issues a decision that the JCHR believes negatively impacts human rights, the JCHR moves just as quickly to repair the damage. For example, in *YL v. Birmingham City Council and Others*, the Law Lords narrowly defined “public authority” in the HRA so that private care homes did not fall under the remit of the HRA – even though those homes exercised duties similar to those formerly conducted by the city council – because the homes undertook those duties for a different purpose and not under any statutory duty.¹⁷⁰ Even before the court decided *YL*, the JCHR published a thematic report on the issue, noting that courts inconsistently defined “public authority” and warning that a narrow definition—which was later adopted in *YL*—could result in the inadequate

167. Lori Montgomery, *White House Threatens to Veto Discrimination Bill*, WASH. POST (Apr. 23, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/22/AR2008042202696.html>.

168. Charles A. Sullivan, *Raising the Dead?: The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 509 (2010); Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES (Jan. 29, 2009), http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html?_r=0.

169. JOINT COMMITTEE ON HUMAN RIGHTS, SIXTH REPORT: MENTAL HEALTH ACT 1983 (REMEDIAL) ORDER 2001, 2000-1 HL 57, HC 472 (UK) [hereinafter SIXTH REPORT: MENTAL HEALTH ACT 1983 (REMEDIAL) ORDER 2001].

170. [2007] UKHL 27.

protection of human rights.¹⁷¹ The JCHR report also criticized the executive for failing to take any action on this matter.¹⁷²

Also before *YL* was decided, the JCHR organized a conference on the subject with the British Institute of Human Rights, which generated some publicity.¹⁷³ Additionally, the JCHR's chair introduced a bill in Parliament to clarify the meaning of public authority and, although the executive did not support the bill, the Under Secretary of State at the Ministry of Justice did state that if the Law Lords did not correct the problem in *YL*, the executive would take action that same year.¹⁷⁴

After *YL* was decided, the executive proposed the Health and Social Care Bill, which did not address the "public authority" controversy. However, the JCHR used the introduction of that bill, which discussed related issues, as an opportunity to correspond with the relevant Minister and publish multiple legislative scrutiny reports criticizing the executive for failing to address *YL* or the JCHR's earlier thematic report. For example, in its first report on the Health and Social Care Bill, the JCHR summarized the *YL* decision, criticized it and the executive's failure to take the promised action, and recommended legislative amendments to the Health and Social Care Bill.¹⁷⁵

As Parliament debated the Health and Social Care Bill, JCHR members proposed amendments to the bill that correlated with the JCHR's prior report.¹⁷⁶ The executive did not agree to adopt the proposed amendments, but it again promised to fully consider the matter as Parliament debated.¹⁷⁷ In response to the executive's criticisms of the JCHR's proposed amendments, the JCHR proposed new amendments to the bill in a subsequent legislative scrutiny report.¹⁷⁸ As a result of its persistence, the executive at last proposed an amendment to the Health and Social Care Bill specifically designed to

171. JOINT COMMITTEE ON HUMAN RIGHTS, NINTH REPORT: THE MEANING OF PUBLIC AUTHORITY UNDER THE HUMAN RIGHTS ACT, 2006-7, HL 77, HC 410, ¶¶ 39, 41, 47, 138 (UK).

172. *Id.* ¶ 11.

173. SIXTH REPORT: THE WORK OF THE COMMITTEE IN 2007 AND THE STATE OF HUMAN RIGHTS IN THE UK, *supra* note 148, ¶ 79; Samuel Mithran, *Minister to Assess Wrongful Evictions*, COMMUNITY CARE (Jan. 31, 2008), <http://www.communitycare.co.uk/2008/01/30/minister-to-assess-wrongful-evictions/> [https://perma.cc/6PV9-FBZT].

174. JOINT COMMITTEE ON HUMAN RIGHTS, EIGHTH REPORT: LEGISLATIVE SCRUTINY: HEALTH AND SOCIAL CARE BILL, 2007-8, HL 46, HC 303, ¶ 1.10 (UK).

175. *Id.* ¶¶ 1.07–1.21.

176. FIFTEENTH REPORT: LEGISLATIVE SCRUTINY, *supra* note 149, ¶¶ 1.2–1.3.

177. *Id.*

178. *Id.* ¶¶ 3.13–3.18.

overrule *YL*, which expanded the definition of public authority for certain private entities that provide social care services.¹⁷⁹

This anecdotal evidence shows that the JCHR presents a good model for a congressional human rights committee. By following relevant court cases and keeping pressure on Congress, a human rights committee can ensure that Congress protects human rights if the courts fail to do so. Moreover, a congressional human rights committee can ensure that courts fully understand Congress' intentions with regard to the protection of human rights in legislation by preserving a full legislative history that courts can use when interpreting federal statutes.

3. *Using Judicial Decisions to Influence Future Legislation*

A human rights committee can also use the threat of judicial intervention to ensure that proposed legislation sufficiently protects human rights. In the United States, the Constitution's framers intended to create conflict between the three branches of government, and the judiciary has been a check on the power of Congress and the President since *Marbury v. Madison*.¹⁸⁰ However, state officials, members of Congress and, more recently, the President, have seemed surprised at the ability of courts to determine the constitutionality of legislation or executive orders.¹⁸¹

In contrast, both the JCHR and the British executive appear very much aware that courts will ultimately decide whether a statute comports with the European Convention and when they negotiate regarding a bill's amendments, court disapproval is a constant background threat that both sides use. For example, in response to the JCHR's criticisms, the executive frequently argues that a statute that gives wide regulation-making power will not violate the HRA because judges can rule a regulation invalid if it does.¹⁸² In addition, there have been a few instances where the executive

179. JOINT COMMITTEE ON HUMAN RIGHTS, TWENTY-THIRD REPORT: LEGISLATIVE SCRUTINY: GOVERNMENT REPLIES, 2007-8, HL 126, HC 755 (UK).

180. Theodore B. Olson, *Remembering Marbury v. Madison*, 7 GREEN BAG 2d 35, 42 (2003).

181. See, e.g., Kevin Liptak, *Trump Just Got Checked and Balanced*, CNN POLITICS (Feb. 4, 2017, 3:44 PM), <http://www.cnn.com/2017/02/04/politics/donald-trump-travel-ban/>; S.M., *Can Congress Over-Ride a Supreme Court Decision?*, ECONOMIST (July 28, 2015), <http://www.economist.com/blogs/democracyinamerica/2015/07/rights-and-legislation> [<https://perma.cc/94MM-5W6B>].

182. The executive has also repeatedly refused to place specific guidance on the face of a bill and has instead chosen to rely on public authorities to comply with the HRA because

resisted taking the JCHR's advice and instead chose to wait to see if the judiciary would find a bill incompatible with European Convention rights.¹⁸³ The executive, therefore, appears to be willing to let the judiciary curb any abuses instead of crafting legislation that will minimize them.¹⁸⁴ By doing so, the executive may be allowing the judiciary to deal with unpopular and controversial issues so that the executive can maintain popular support.¹⁸⁵

On the other hand, when the European Court of Human Rights hands down a judgment against the United Kingdom, the executive shows itself to be very aware that it must respond.¹⁸⁶ The JCHR has consequently adopted a judicial style of assessing compatibility of bills that focuses heavily on the whether or not British courts or the European Court of Human rights will find a bill incompatible with the HRA.¹⁸⁷ This approach has the benefit of the support of the judiciary and the threat of a Declaration

of their general section 6 duties to do so. This approach has been criticized as being less reliable protector of human rights. Feldman, *The Impact of Human Rights on the UK Legislative Process*, *supra* note 140, at 103–04.

183. For example, the executive informed the JCHR that it would not seek to bring forth new anti-terrorism legislation, despite the JCHR's concerns with the existing Prevention of Terrorism Act, until the Supreme Court had ruled on the issue. JOINT COMMITTEE ON HUMAN RIGHTS, TWELFTH REPORT: COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: DRAFT PREVENTION OF TERRORISM ACT 2005 (CONTINUANCE IN FORCE OF SECTIONS 1 TO 9) ORDER 2006, 2005-6, HL 122, HC 915 (UK).

184. This technique was particularly evident in the wake of legal challenges to the Antiterrorism, Crime and Security Act 2001. JOINT COMMITTEE ON HUMAN RIGHTS, FIFTH REPORT: CONTINUANCE IN FORCE OF SECTIONS 21 TO 23 OF THE ANTI-TERRORISM, CRIME AND SECURITY ACT 2001, 2002-3, HL 59, HC 462 (UK); JOINT COMMITTEE ON HUMAN RIGHTS, SIXTH REPORT: ANTI-TERRORISM, CRIME AND SECURITY ACT 2001: STATUTORY REVIEW AND CONTINUANCE OF PART 44, 2003-4, HL 38, HC 381 (UK). The executive's reliance on the courts may be a good strategy because, as noted by some commentators, British courts have been very deferential to the executive whereas the JCHR can be quite critical. *See, e.g.*, MERRIS AMOS, HUMAN RIGHTS LAW 15–33 (2d. ed. 2014); Janet L. Hiebert, *The Human Rights Act: Ambiguity About Parliamentary Sovereignty*, 14 GERMAN L.J. 2253, 2257 (2013) (citing JOINT COMMITTEE ON HUMAN RIGHTS: SIXTEENTH REPORT: MONITORING THE GOVERNMENT'S RESPONSE TO COURT JUDGMENTS FINDING BREACHES OF HUMAN RIGHTS, 2006-7, HL 128, HC 728 (UK)).

185. Unsurprisingly, the JCHR objects to this strategy, particularly because by relying on courts to fix compatibility problems, a violation will necessarily already have taken place. NINETEENTH REPORT, THE WORK OF THE COMMITTEE IN THE 2001–2005 PARLIAMENT, *supra* note 121, at 82.

186. Letter from Chris Grayling, Lord Chancellor, to Hywel Francis, JCHR Chair (Nov. 22, 2012), http://www.parliament.uk/documents/joint-committees/human-rights/Letter_from_Mr_Grayling_on_Prisoner_Voting.pdf [https://perma.cc/44YR-WETV].

187. Lester, *supra* note 126, at 16–17. It has been argued that the JCHR has limited itself by relying so heavily on the United Kingdom's existing legal obligations to determine whether human rights are implicated. *See, e.g.*, Carolyn Evans & Simon Evans, *Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights*, 2006 PUBLIC LAW 785, 803; Klug & Wildbore, *supra* note 95, at 243; Danny Nicol, *The Human Rights Act and the Politicians*, 24 LEGAL STUD. 451, 454 (2004).

of Incompatibility—a non-binding declaration that a statute is incompatible with the European Convention—or unwanted judicial interpretation as a coercive tool against the executive.¹⁸⁸ At the very least, the threat of a legal challenge forces the executive to consider human rights issues more closely as it drafts legislation.¹⁸⁹ This effect can even trickle down to employees of public authorities when they implement legislation.¹⁹⁰ The courts also play into this dynamic by citing the JCHR's reports as well as existing British and European Court of Human Rights case law when they find a bill to be incompatible with the European Convention.

In addition, if courts and the JCHR agree that a piece of legislation does not comport with the requirements of the European Convention, they can combine to induce the executive to change that legislation. The combination of the JCHR's publicity and the threat of imminent court disapproval is often more persuasive than just one of these branches acting alone. This combination is even more effective for laws that have already been struck down or ruled incompatible either by British courts or the European Court of Human Rights. If the JCHR correctly predicted a court ruling and the executive suffered a judicially-imposed public embarrassment, the executive has been more likely to listen to the JCHR when it amends the incompatible legislation or legislates again on the same topic.¹⁹¹

188. Feldman, *Injecting Law into Politics*, *supra* note 89, at 115. Moreover, at least in the beginning, the JCHR, by citing case law and statutes, was able to show its expertise and therefore garnered more respect from Parliament and the executive. Feldman, *The Impact of Human Rights on the UK Legislative Process*, *supra* note 140, at 112. The JCHR has also justified this approach on the grounds that it avoids overlap with other parliamentary committees. NINETEENTH REPORT, THE WORK OF THE COMMITTEE IN THE 2001–2005 PARLIAMENT, *supra* note 121, at 34.

189. The executive has shown it wants JCHR involvement when drafting legislation following an adverse ruling from the European Court of Human Rights. Letter from Chris Grayling, Lord Chancellor, *supra* note 186.

190. The Ministry of Justice has published a report designed to help officials in public authorities understand their duties under the Human Rights Act. MINISTRY OF JUSTICE, MAKING SENSE OF HUMAN RIGHTS: A SHORT INTRODUCTION, Oct. 2006, DCA 45/06 (UK) <https://www.justice.gov.uk/downloads/human-rights/human-rights-making-sense-human-rights.pdf> [<https://perma.cc/2PAS-NE3C>].

191. For example, as mentioned above, after the Mental Health Act 1983 was declared incompatible by the Law Lords, the executive removed a draft bill and substituted it with a remedial order as per the JCHR's suggestions. SIXTH REPORT: MENTAL HEALTH ACT 1983 (REMEDIAL) ORDER 2001, *supra* note 169. However, the executive may still choose to ignore the JCHR and take advantage of the delay in obtaining a final judicial ruling. It can take four to five years for a case to reach the Law Lords, and European Court of Human Rights rulings can take even longer. While a case winds its way through the courts, the statute

Further, the executive has shown that it wants JCHR involvement when drafting legislation following an adverse ruling from the European Court of Human Rights.¹⁹² For example, the JCHR repeatedly used negative British and European court judgments regarding anti-terrorism law to convince the executive to create more safeguards and fewer movement restrictions for suspected terrorists.¹⁹³ The JCHR's efforts were particularly important in this area because the executive initially resisted any change, even in the face of negative court decisions.¹⁹⁴ The road was bumpy, to say the least, but the JCHR consistently spoke out and eventually succeeded in many of the areas it brought to the executive's attention.¹⁹⁵

Consequently, the JCHR's use of court-centric reports appears effective. Moreover, the threat of judicial intervention is much stronger in the United States than in the United Kingdom because the Supreme Court can actually strike down legislation for being incompatible with the rights held in the Constitution. If a human rights committee can point to Supreme Court precedent to argue that the Court will probably strike down the proposed law as unconstitutional, Congress would likely seriously consider amending it to avoid that result.

Alternatively, a human rights committee can also show how a proposed law would violate international human rights law or precedent set by the International Court of Justice and, although those judgments are not binding on the United States,¹⁹⁶ the Supreme Court sometimes finds international court decisions, including decisions from the European Court on Human Rights, persuasive.¹⁹⁷ In addition, a human rights committee could also publicize

will remain in force. The executive also has many tools that it can use (and has used) to delay the implementation of a court ruling with which it does not agree. Hiebert, *The Human Rights Act: Ambiguity About Parliamentary Sovereignty*, *supra* note 184, at 2265.

192. Letter from Lord Chancellor, Chris Grayling, *supra* note 186.

193. JOINT COMMITTEE ON HUMAN RIGHTS, NINTH REPORT: COUNTER-TERRORISM POLICY AND HUMAN RIGHTS (EIGHTH REPORT): COUNTER-TERRORISM BILL, 2007-8, HL 50, HC 199, ¶¶ 55-73 (UK); JOINT COMMITTEE ON HUMAN RIGHTS, NINTH REPORT: PREVENTION OF TERRORISM BILL: PRELIMINARY REPORT, 2004-5, HL 61, HC 389, ¶¶ 5-13 (UK); JOINT COMMITTEE ON HUMAN RIGHTS, TENTH REPORT: PREVENTION OF TERRORISM BILL, 2004-5, HL 68, HC 334, ¶¶ 13-14 (UK).

194. Stephen Howard, No Freedom for Detainees; Government Defies Law Lords' Ruling, DAILY POST (Liverpool), Dec. 17, 2004, at 4; Neil Mackay, Home Secretary Charles Clarke is Already Embroiled in a Battle Between Law Lords and the Government. At Stake is British Democracy, SUNDAY HERALD (Glasgow), Dec. 19, 2004, at 13.

195. Sweeny, *Indefinite Detention and Antiterrorism Laws*, *supra* note 92, at 1236.

196. *Medellin v. Texas*, 552 U.S. 491, 513 (2008).

197. *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558, 573 (2003). There has been resistance to courts looking outside of the United States for sources of persuasive authority, particularly at the state level. Aaron Fellsmith, *International Law and Foreign Laws in the U.S. State Legislatures*, ASIL INSIGHTS (May 26, 2011), <https://www.asil.org/insights/volume/15/issue/13/international-law-and-foreign-laws-us-state-legislatures> [<https://perma.cc/FMU4-MLTR>].

existing relevant international court cases to put informal political pressure on Congress to change the law. Accordingly, a United States human rights committee should focus on likely court judgment outcomes when legislation or government policies have human or civil rights implications.

As the above analysis indicates, courts and Congress do not interact perfectly. The judiciary sometimes criticizes statutes' incomplete legislative histories and has even struck statutes as a result.¹⁹⁸ Human rights legislation is too important to risk such a result, which makes the need for a human rights committee even more pressing. A human rights committee would force Congress to fully develop the Congressional record with regard to human rights concerns for all legislation, which would give courts a rich source of legislative history when considering the purpose, intent, and constitutionality of those statutes. Moreover, although Congress has shown itself capable of responding to—and correcting—court decisions, it has been limited by the whims of its members and the executive and could, therefore, use the help of a dedicated human rights committee. As the work of the JCHR shows, a human rights committee can strengthen the dialogue between courts and the legislature because the committee can form a stable link between them.

D. Other Benefits: Creating A Human Rights Language and Focus

In addition to influencing government branches individually, a human rights committee could provide a nexus for members of multiple government branches, as well as the public, to meet to combine their efforts to improve human rights.

1. Creating a Human Rights Culture Within the Government

In addition to interacting with each government branch directly, a human rights committee could also foster a dialogue between different government branches to ensure that legislation upholds human rights. In order to do so, a human rights committee must garner respect from all three government branches. Again, in this area, the JCHR provides a good model for a congressional human rights committee. With regard to human rights issues, the JCHR made itself the center of the dialogue between government

198. See *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997) (“RFRA’s legislative record lacks examples of modern instances of generally applicable laws . . .”).

branches because each branch uses the JCHR's reports for guidance.¹⁹⁹ By doing so, the JCHR helped foster a culture of human rights within the British government where all government branches consider the human rights implications of proposed and existing British law. This awareness of human rights and desire to avoid their infringement—whether due to fear of JCHR criticism, parliamentary delays that JCHR members or its reports instigate, or court reprisals based on JCHR findings and reports or as predicted by the JCHR—may end up as JCHR's most important impact on the government.

Because the JCHR is an advising committee, it must rely upon its persuasiveness to achieve any of its goals.²⁰⁰ The JCHR's influence comes in part from the thoroughness and persuasiveness of its reports and its diligence and persistence in questioning Ministers. The JCHR meets at least once per week while Parliament is in session and prolifically publishes its reports.²⁰¹ In its reports, the JCHR pays particular attention to detail; it not only looks at the text of the statute but also the guidance, training, and controls that each bill provides for in order to ensure that those aspects of the bill contribute to a culture of human rights.²⁰²

Due to its diligence, Parliament, the executive, the judiciary, and the legal community hold the JCHR in high regard.²⁰³ The JCHR produces thorough reports and, when the situation demands it, can create them very quickly. For example, while Parliament considered the 2005 Prevention of Terrorism

199. Feldman, *Injecting Law into Politics*, *supra* note 89, at 112.

200. David Feldman has repeatedly noted that some executive Departments are very cooperative, others seem unaware of their duties under the HRA's Section 19, and some essentially stonewall the JCHR because they believe that the JCHR should simply accept that the bill is compatible because the executive said so. Feldman, *Parliamentary Scrutiny*, *supra* note 83, at 340; Feldman, *The Impact of Human Rights on the UK Legislative Process*, *supra* note 140, at 106; Feldman, *Injecting Law into Politics*, *supra* note 89, at 116. The JCHR's continuing frustration with inadequate Explanatory Notes is manifest in its reports. LEGISLATIVE SCRUTINY UPDATE, *supra* note 137.

201. Twenty-six reports were published in its first full term, nineteen in the 2002–03 term, twenty-three in the 2003–04 term, nineteen in the 2004–05 term, thirty-two in the 2005–06 term, twenty-one in the 2006–07 term, thirty-two in the 2007–08 term, twenty-eight in the 2008–09 term, sixteen in the 2009–10 term, twenty-four in the 2010–12 term, nine in the 2012–13 term, and fourteen in the 2013–14 term. *Publications from Previous Parliaments—Joint Committee on Human Rights*, PARLIAMENT, <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/publications/previous-sessions> [https://perma.cc/JXS2-PL5G] (last visited Mar. 8, 2017).

202. Feldman, *Injecting Law into Politics*, *supra* note 89, at 112.

203. Klug & Wildbore, *supra* note 95, at 242. Indeed, the Joint Committee on Human Rights serves as a model for other Commonwealth countries. See ANJALI SAKARIA & STEPHANIE AIYAGARI, COMMONWEALTH HUMAN RIGHTS INITIATIVE, THE PARLIAMENTARY COMMITTEE AS PROMOTER OF HUMAN RIGHTS: THE UK'S JOINT COMMITTEE ON HUMAN RIGHTS (2007) http://www.humanrightsinitiative.org/publications/hradvocacy/parliamentary_committee_as_promoter_of_hr.pdf [https://perma.cc/WFQ4-DQQW].

Bill, the JCHR produced reports at each of the bill's stages even though the bill went through Parliament quickly and received royal assent approximately eighteen days after the executive introduced it into the House of Commons.²⁰⁴ In doing so, according to Lord Plant, the JCHR "provided an authority for dissent."²⁰⁵

Perhaps the most important reason for the JCHR's influence is that it monitors and attempts to increase its own efficacy.²⁰⁶ For example, the JCHR, in its quest to be more useful to Parliament, began publishing more thematic reports because Parliament and the executive deemed them more influential.²⁰⁷ Further, the JCHR has produced three substantial reports that analyzed its own influence and detailed how it can and will improve itself.²⁰⁸ Finally, the JCHR also created working methods to "ensure that its legitimacy and influence are likely to be maximized both inside Parliament and the wider human rights community."²⁰⁹

The JCHR also does not limit itself to the rights contained in the HRA and works to ensure that the United Kingdom also fully complies with its other international rights obligations, again making the JCHR the focal point for human rights discussions in the United Kingdom.²¹⁰ In fact, even after the Equality and Human Rights Commission was created in 2007, the JCHR arguably still needed to investigate abuses and promote a culture of rights, particularly in the face of criticisms that the new commission did

204. TENTH REPORT: PREVENTION OF TERRORISM BILL, *supra* note 193; NINTH REPORT: PREVENTION OF TERRORISM BILL: PRELIMINARY REPORT, *supra* note 191; ALEXANDER HORNE & GAVIN BERMAN, CONTROL ORDERS AND THE PREVENTION OF TERRORISM ACT 2005, at 1 (2011).

205. Interview with Raymond Plant, *supra* note 87.

206. NINETEENTH REPORT, THE WORK OF THE COMMITTEE IN THE 2001–2005 PARLIAMENT, *supra* note 121, at 38. Lord Lester refers to the JCHR as a "watchdog and a bloodhound." Lester, *supra* note 126, at 2.

207. SIXTH REPORT: THE WORK OF THE COMMITTEE IN 2007 AND THE STATE OF HUMAN RIGHTS IN THE UK, *supra* note 148, at 73; THE COMMITTEE'S FUTURE WORKING PRACTICES, *supra* note 16, at apps. 1, 11.8(i).

208. NINETEENTH REPORT: THE WORK OF THE COMMITTEE IN THE 2001–2005 PARLIAMENT, *supra* note 121 (discussing the JCHR's history and working relationships with the three government branches); THE COMMITTEE'S FUTURE WORKING PRACTICES, *supra* note 16 (discussing a strategy for improving the JCHR's efficacy); SIXTH REPORT, THE WORK OF THE COMMITTEE IN 2007 AND THE STATE OF HUMAN RIGHTS IN THE UK, *supra* note 148 (identifying recurring problems with legislative scrutiny of bills).

209. Feldman, *The Impact of Human Rights on the UK Legislative Process*, *supra* note 140, at 113.

210. Ewing, *supra* note 64, at 97–98; Hiebert, *Parliament and the Human Rights Act*, *supra* note 62, at 18; Hiebert, *New Constitutional Ideas*, *supra* note 127, at 1978.

not do enough to promote human rights or the HRA.²¹¹ Indeed, the JCHR itself voiced some of these criticisms.²¹²

Finally, the JCHR created a culture of rights in the United Kingdom due to the respect its members command. JCHR members are highly regarded and the JCHR is jointly controlled so that its opinions are less likely to be—or at least less likely to appear to be—politically motivated.²¹³ The JCHR consistently attempts to reach a consensus view, which adds to the JCHR reports' value.²¹⁴ Moreover, JCHR members are often human rights activists themselves, which lends further authority to the JCHR's conclusions and recommendations. These members take a keen interest in the JCHR's activities, contribute substantially to their meetings, and actively attempt to further the JCHR's interests within Parliament. Knowledgeable members can also more effectively raise and answer on the JCHR's reasoning and human rights in general during debates.

In addition, the JCHR's persistence in its communications with the executive and its impressive output of reports would not be possible without its leaders' personal commitments. Although the Chair of the JCHR has repeatedly changed over the past few years, all of the JCHR's Chairs have shown themselves committed to advancing human rights, no matter what their political affiliations. Moreover, the JCHR's current legal advisor, Murray Hunt, is also very proactive.²¹⁵ Hunt describes himself as a legal activist who does not "believe that legal advisors are just sort of passive people who answer tricky legal questions when they come up."²¹⁶ He offers suggestions on what the JCHR should do, how it should go about its work and what it should look at. Hunt is particularly concerned with the JCHR's effectiveness with regard to parliamentary debates and executive policy changes.²¹⁷ This strong belief in the HRA and the JCHR by both its Chair and legal advisor that makes the JCHR more powerful.

As the JCHR shows, the government needs to create a respected, bipartisan human rights committee to ensure the committee's efficacy. In contrast, as noted above, both the Commission on Civil Rights and the Civil Rights Division have been criticized for being ineffective due to politicization.

211. Interview with John Wadham, July 30, 2014.

212. JOINT COMMITTEE ON HUMAN RIGHTS, THIRTEENTH REPORT: EQUALITY AND HUMAN RIGHTS COMMISSION, 2009-10, HL 72, HC 183, ¶¶ 26, 83 (UK); JOINT COMMITTEE ON HUMAN RIGHTS, MINUTES OF EVIDENCE: THE WORK OF THE EQUALITY AND HUMAN RIGHTS COMMISSION, 2013-14, HC 1294, at 31, 32 (UK).

213. Hiebert, *Parliament and the Human Rights Act*, *supra* note 62, at 16-17.

214. According to the JCHR's legal advisor, there is never much disagreement among members as to a report. Interview with Murray Hunt, *supra* note 122.

215. Interview with Anthony Lester, *supra* note 118.

216. Interview with Murray Hunt, *supra* note 122.

217. *Id.*

Moreover, the history of the Commission on Civil Rights shows that the ideology of its members, particularly its chair, can definitively determine whether a human rights body succeeds in its mission.²¹⁸ Indeed, some have argued that the Commission on Civil Rights initially succeeded because its first six commissioners agreed on complex issues even though they were all from diverse geographic backgrounds and party affiliations, which added to the Commission on Civil Rights' perceived impartiality.²¹⁹ Similarly, it has been argued that both the Commission on Civil Rights and the Civil Rights Division should amend their appointment or hiring practices to ensure that political concerns should not interfere.²²⁰

A successful United States human rights committee would need careful staffing to ensure that it could create and maintain a nonpartisan image. In order to be in accord with the United Nations General Assembly Resolutions, a human rights committee—or any human rights institution—must appoint its members using “a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation.”²²¹ The Commission on Civil Rights' current composition is too easily manipulated by politics to satisfy these requirements.²²² In fact, three United Nations bodies have expressed concerns that the United States has no national, independent human rights institution.²²³

Additionally, a human rights committee needs a full commitment from its members and unanimity in its reports to ensure that its message remains focused and protected from attacks painting the committee as political or

218. Marcus, *supra* note 13, at 92.

219. McAward, *supra* note 21, at 311; Robert B. McKay, *Report of the United States Commission on Civil Rights* Washington, 60 COLUM. L. REV. 755, 755 (1960).

220. See Frye et al., *supra* note 22, at 481, 483 (noting that the Commission's current appointment procedures—four members appointed by the president, four by the House, and four by the Senate—has led to polarized and deadlocked Commissions that have a slim chance of publishing unanimous reports.); Kennedy, *supra* note 14, at 228 (“The Division should adopt permanent safeguards against political interference in personnel matters. It should routinely provide all applicants for career positions with a written statement of laws and personnel rules forbidding consideration of political affiliation in hiring, inform them how to report violations, and ask applicants to certify that they have not been asked about their political loyalties during the screening process.”).

221. Crooms & Sidhu, *supra* note 54, at 131 (quoting Paris Principles, G.A. Res. 48/134, at 4-5, U.N. Doc. A/RES/48/134 (Mar. 4, 1994)).

222. Crooms & Sidhu, *supra* note 54, at 131–32.

223. *Id.*

partisan. Strong, respected leaders could also ensure that the work of a human rights committee would gain the respect of the government and the public at large. Any government entity seeking to promote human rights would need to counteract the government and the public's ignorance of, and even resistance to, the incorporation of human rights into public discourse. As the JCHR has shown, strong leaders who take an active role in how a human rights committee operates can create a good reputation for the committee and, by extension, emphasize the importance of human rights to the government and the public.

Moreover, despite the partisan culture in Congress, the creation of a well-respected, bipartisan committee is possible in the United States. In fact, one already exists: the Congressional Budget Office (CBO). Congress created the CBO in 1974 as part of the Budget Act, which,

reasserted the Congress's constitutional control over the budget by establishing new procedures for controlling impoundments and by instituting a formal process through which the Congress could develop, coordinate, and enforce its own budgetary priorities independently of the President.²²⁴

The CBO's main task is to "provide the budget committees and the Congress with objective, impartial information about budgetary and economic issues."²²⁵ To that end, the CBO reports on the likely economic effects of proposed legislation and produces annual reports of the economic impact of existing legislation.²²⁶ The CBO also reports on measures such as legislative amendments and committee reports even when not required to do so.²²⁷

The CBO prides itself on its transparency and states that its excellent reputation is based in part on its practices of providing clear reasoning for its conclusions.²²⁸ Members of Congress and their staff members often confer with the CBO to better understand its reports.²²⁹ The CBO also persuades with its perceived objectivity. Even when criticized, the CBO's impartiality is generally not called into question, only the evidentiary support of its conclusions.²³⁰ Further, in order to preserve its appearance

224. CONG. BUDGET OFFICE, AN INTRODUCTION TO THE CONGRESSIONAL BUDGET OFFICE 1 (Nov. 2012), <http://www.cbo.gov/sites/default/files/cbofiles/attachments/2012-IntroToCBO.pdf> [<https://perma.cc/6YW6-3GFA>].

225. *Id.*

226. Gregory Dolin, *Speaking of Science: Introducing Notice and Comment into the Legislative Process*, 2014 UTAH L. REV. 243, 266.

227. Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1143 (1997).

228. CONG. BUDGET OFFICE, *supra* note 224, at 9–10.

229. *Id.* at 11.

230. See Garrett, *supra* note 227, at 1149. But see Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1031–32 (2011) (arguing that Congress pressured the CBO to determine that the PAYGO tax proposal would have no negative impact on the budget).

of impartiality, the CBO has strict rules about its appointment procedures and the ability of its staff to engage in political activities.²³¹

According to the CBO itself, the CBO “is widely acknowledged both on and off Capitol Hill . . . [for] providing nonpartisan and thoughtful analysis to the Congress.”²³² However, the CBO also emphasizes that it does not make policy recommendations.²³³ Despite this self-imposed limitation, the CBO’s conclusions about the budget impact of proposed legislation often persuade members of Congress, who frequently use its reports during debates to argue for or against a proposal.²³⁴ According to one scholar, “Congress often ‘drafts in the shadow’ of these CBO budget scores.”²³⁵ A 2011–12 survey of congressional staffers found that CBO reports feature prominently in their minds when drafting legislation.²³⁶ These congressional staffers also reported that they would repeatedly redraft and resubmit a piece of proposed legislation until the CBO no longer reported that the bill would have a negative budgetary score.²³⁷ Indeed, even though the CBO’s reports are not binding, if a politician wants to argue for a legislative proposal that the CBO indicated would have a negative

231. Dolin, *supra* note 226, at 266–68 (“The CBO ensures that it remains a neutral arbiter (and is perceived as such) by limiting the political activities of its staff, requiring that the Speaker of the House and President pro tempore of the Senate appoint the Director of the Office after consultations with the members of the committees having jurisdiction over the budgetary matters, giving the Director a fixed four-year term (irrespective of the political vicissitudes of the individuals originally responsible for the Director’s appointment), and seeking input from a variety of outside experts.”) (footnotes omitted).

232. CONG. BUDGET OFFICE, *supra* note 224, at 9.

233. *Id.* at 1.

234. Dolin, *supra* note 226, at 268; Markus Heintzen & Stephen Utz, *Public Debt in the United States and Germany: A Constitutional Perspective*, 29 CONN. J. INT’L L. 71, 98 (2013) (“CBO scoring continues to be one of the more important discussion points in congressional bargaining.”). The House of Representatives was recently criticized for refusing to wait for the CBO’s report on the American Health Care Act before voting to pass the measure. Dan Mangan, *House Obamacare replacement ‘can’t pass Senate without major changes,’ says GOP senator*, CNBC (Mar. 9, 2017, 12:37 PM ET), <http://www.cnbc.com/2017/03/09/house-obamacare-replacement-cant-pass-senate-without-major-changes.html>.

235. Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81, 125 (2015). See also Bruce M. Owen, “To Promote the General Welfare”: Addressing Political Corruption in America, 5 BRIT. J. AM. LEGAL STUD. 3, 32 (2016) (“Members of Congress generally accept the [CBO’s score] as an authoritative bipartisan constraint on deficit spending.”).

236. Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 731, 764 (2014).

237. *Id.* at 764.

impact on the budget, he or she will most likely acknowledge the CBO's report and argue for why Congress pass the law anyway.²³⁸

The CBO presents an American model for the respect a human rights committee could generate in the United States. Although human rights may be considered controversial, in recent years the federal budget has also been the subject of contentious debates,²³⁹ which shows that a properly staffed and dedicated human rights committee can command respect in Congress, just as the JCHR has in the United Kingdom. Moreover, by creating a culture that embraces the concept of human rights within the government, a human rights committee can more easily create a culture of human rights within the general public.

2. *Promoting Public Awareness and Respect for Human Rights*

In the United States, some of the public at large consider the concept of human rights to be controversial. For example, although the public sympathetically views the plight of the citizens of Flint, the accusations of systemic racism and police brutality in Ferguson and other communities has been fraught with controversy and counter-protests.²⁴⁰ In order to ensure its success, a human rights committee will need to educate the public about human rights and the work of the committee.

Indeed, a human rights committee could harness public opinion, either directly or through the media, to ensure that the government meets its human rights goals. As shown in the United Kingdom, human rights issues can generate substantial media attention, particularly when different rights conflict and create controversial issues. Due to sometimes partisan portrayals of human rights laws, a respected legislative committee can be a voice of reason in the public dialogue by either warning of imminent human rights infringements or debunking myths about human rights that the press or government officials perpetuate.

The JCHR shows how this can be done. In the United Kingdom, although the public knew the phrase “human rights” prior to the enactment of the

238. Dolin, *supra* note 226, at 267.

239. Kelsey Snell, *Congress Returns with One Goal: No Government Shutdown*, WASH. POST (Sep. 6, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/09/06/congress-returns-with-one-goal-no-government-shutdown/?utm_term=.58d725169808.

240. See, e.g., Jessica Chasmar, *Black Lives Matter Leader Explains Why ‘All Lives Matter’ Is a Racial Slur*, WASH. POST (Feb. 25, 2016), <http://www.washingtontimes.com/news/2016/feb/25/marissa-johnson-black-lives-matter-leader-explains/>; Kurtis Lee & Matt Pearce, *Thunderstorms, Counter-Protesters and Calm on Ferguson’s Streets*, L.A. TIMES (Aug. 21, 2014, 12:10 AM), <http://www.latimes.com/nation/la-na-ferguson-rainy-protest-20140820-story.html>. Similarly, over time, the public’s views on racial inequality changed and the Commission’s work began to seem more controversial and less relevant, which has undermined its persuasiveness. Marcus, *supra* note 13, at 89.

HRA, the United Kingdom had never had a bill of rights that specifically set out the rights of citizens. The rights contained in the HRA, moreover, are those found in the European Convention, which many British people perceive as foreign to them. Consequently, in order to gain public support, the JCHR had to overcome the British people's resistance to a European model of rights as well as make the public aware that they could sue the British government in British courts. To achieve these goals, the JCHR has always welcomed media coverage and public attention, published press reports, employed a press officer, and informally kept track of when the media used its reports.²⁴¹

In return, the media was quick to use the JCHR's reports in its coverage of human rights issues. Almost since the JCHR's inception, the newspaper broadsheets reported on most of the JCHR's legislative scrutiny reports, particularly for the more controversial subjects such as crime, terrorism, immigration and mental health.²⁴² This media coverage is generally factual in nature with the journalists quoting JCHR's statements as the opinions of an "influential" or "cross-party" parliamentary committee and as evidence of the controversial nature of the bills under consideration.²⁴³ In addition, the JCHR's oral and written questions, posed to relevant Ministers, assist the media because the answers provided by key executive actors often produce sound-bites for the media to quote.²⁴⁴

Further, although the right-wing press has generally been dismissive of the HRA, it almost uniformly reports on the JCHR in a neutral or even positive

241. Klug & Wildbore, *supra* note 95, at 242.

242. See, e.g., Robert Ford, *Blunkett Plan on Asylum Education 'Like Apartheid,'* TIMES (London), June 22, 2002; Chris Green, *Grayling's Young Offenders' Bill Will Put Lives at Risk, Say Critics,* INDEPENDENT, June 11, 2014; Matthew Hickley, *Law to Seize Profits of Crime 'May Breach Human Rights,'* DAILY MAIL, Feb 12, 2002; Philip Johnston, *Bill 'Could See Girls Detained for Immorality,'* DAILY TELEGRAPH, Nov. 12, 2002; *Scrap Jail-Without-Trial Law,* WESTERN MAIL, Aug. 5, 2004.

243. See, e.g., Green, *supra* note 242; *Inquests Without Juries 'Alarming,'* DAILY TELEGRAPH, Feb. 8, 2008.

244. See, e.g., Nigel Morris, *Blasphemy Law to Be Consigned to History,* INDEPENDENT, Nov. 15, 2001, at 11, Factiva, Doc. No. ind0000020011115dxbf0005t (Home Office Minister's statements to the JCHR); Nicholas Watt, *No 10 Pleads with Labour to Save Gay Marriage Bill: Tory Rebellion on Amendment Will 'Cost Pounds 4bn and Take Two Years,'* GUARDIAN, May 20, 2013, at 1, LEXIS (Minister explaining costs of legislative amendment that would grant civil partnerships to heterosexual couples); *X-rays to Beat Age Lies,* EVENING STANDARD, Feb. 21, 2007, at 6, 2007 WLNR 3423499 (Minister explaining how x-rays can weed out "bogus asylum seekers" pretending to be children).

manner, which has allowed the JCHR to reach a wider audience.²⁴⁵ Like right-wing publications, the tabloid press does not show the hostility to the JCHR that it shows to the HRA.²⁴⁶ Indeed, the fact that the tabloids largely refrain from attacking the JCHR indicates that the JCHR already has some prestige, if not influence, in the real world.

The JCHR's coverage in both broadsheet and tabloid media gives it a line of communication directly to the public, which has undoubtedly increased its influence within the executive. Publicity of the executive's shortcomings, particularly with regards to the rights of its citizens, can and has been deeply embarrassing.²⁴⁷ The executive has also shown that it will respond to media queries regarding critical JCHR reports,²⁴⁸ which gives the JCHR more publicity and highlights its existing influence within the executive.

The JCHR cannot force Parliament to use its reports in its debates, the executive to amend policies, or the judiciary to use its findings when deciding cases with human rights implications. Instead, the JCHR exerts influence through political pressure within the government and more informal pressure from the media and general public. A United States human rights committee would do well to build on this model and use the other government branches as well as public pressure and the media to advance its goals.

245. Vincent Moss, *New Blow to School Reforms*, SUNDAY MIRROR, Feb. 5 2006, at 4, 2006 WLNLR 2018856; *Police 'Did Not Respect Human Rights' During G20 Protests*, LONDON PAPER, July 28, 2009; Rosa Prince, *Shame of OAP Care*, MIRROR, Aug. 15, 2007, at 20, 2007 WLNLR; "Secrecy" of Ministers in Torture Row, DAILY MAIL, Aug. 4, 2009, 2009 WLNLR 15042386; *Tap Call in Terror Trials*, SUN, Aug. 1, 2006, at 2, Factiva, Doc. No. THESUN0020060801e28100001. The one exception is *The News of the World* which has criticized the JCHR as protecting pedophiles, illegal immigrants and asylum-seekers. Jamie Lyons & Euan McColm, *Rights Threat to School Paedo Ban*, NEWS WORLD, Aug. 13, 2006, LEXIS; Jamie Lyons, '2,050 Free to Stay,' NEWS WORLD, Nov. 12, 2006, LEXIS; Jamie Lyons, *It's Asylum Lunacy*, NEWS WORLD, July 22, 2007, LEXIS. However, *The News of the World* did present the JCHR's investigation into the torture of Iraqis by British troops neutrally but briefly. *Torture Mystery*, NEWS WORLD, July 27, 2008, LEXIS.

246. Some tabloids have even managed to criticise the HRA while presenting the JCHR in a completely neutral manner as just doing its job. A. Porter, *Schools Bid Is 'Hit by Rights'*, SUN, May 27, 2006, at 2, Factiva, Doc. No. THESUN0020060516e25g000y.

247. See, e.g., Niall Firth, *British Security Services Have 'Dubious Record on Human Rights'*, *Says Court Ruling Ministers Tried to Suppress*, Daily Mail (Apr. 9, 2010, 15:13 EDT), <http://www.dailymail.co.uk/news/article-1253958/MI5-dubious-human-rights-record-Binyam-Mohamed-case-says-court.html>.

248. See, e.g., Joe Churcher, *MPs 'Misled over Army Torture'*, INDEPENDENT, July 28, 2008, Factiva, Doc. No. IND0000020080728e47s0003k ("Mr Browne said: 'The committee has acknowledged that many of the concerns it has raised in its report may be investigated by the inquiry.'"); Michael Clarke, *Straw's Curfews on Children 'Breach Their Human Rights'*, DAILY MAIL, Apr. 27, 2001, at 33, LEXIS ("The Home Office said it believed the Bill 'as drafted' was compatible with the Human Rights Act but it would consider the recommendations.").

Again, the CBO presents a good model for what a congressional committee can do to effectively interact with the public both directly and indirectly. Although its reports are not formally subjected to public notice and comment,²⁴⁹ the CBO makes its official reports public on the internet immediately after it publishes them and members of the CBO often speak at professional conferences so they can directly interact with experts in the field.²⁵⁰ In addition, members of Congress also use CBO reports—and the CBO’s nonpartisan reputation—to argue for their positions to the press.²⁵¹

The press is particularly important in the United States where human rights are generally not given much media attention. Currently, the media quickly focuses on civil rights scandals such as Flint or Ferguson but gives little coverage to the reports of the Commission or the Civil Rights Division.²⁵² Moreover, as discussed above, the typical American does not think about human rights at all; the public uses the phrase “civil rights” for issues that the rest of the world calls “human rights.” In addition to the limitations of the phrase “civil rights” discussed above, the American public’s failure to connect with human rights is problematic because, in addition to domestic civil rights law, the United States has ongoing international human rights obligations that the media and public often ignores.

Although seldom discussed, the United States ratified several human rights treaties including the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Slavery Convention, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Convention on the Prevention and Punishment of Crimes Against International Protected Persons.²⁵³ Several of these conventions contain

249. Nou, *supra* note 235, at 125.

250. CONGRESSIONAL BUDGET OFFICE, *supra* note 224.

251. Jeffrey Branstetter & Darleen Druyun, *An Evolving Case Study in Corruption, Power, and Procurement*, 34 PUB. CONT. L.J. 443, 452–53 (2005) (detailing how John McCain used a CBO report to argue that the United States should buy instead of lease tankers from Boeing).

252. There is some evidence that the Commission in the United States has successfully used the media to further its agenda, but those efforts have by no means been consistent. Marcus, *supra* note 13, at 89.

253. The United States has also signed but not ratified several other treaties such as the Convention relating to the Status of Refugees and the Convention on the Rights of the Child. For a complete list of international human rights treaties and the United States’ status with regard to those treaties, see

reporting requirements, including the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).²⁵⁴

These reporting requirements, though periodic, are quite robust and are currently handled by the State Department.²⁵⁵ The United States submitted its most recent report under the ICCPR to the Human Rights Committee of the United Nations in 2011 and supplemented the report in 2015 in response to questions from the UN.²⁵⁶ Similarly, the United States submitted its most recent CERD report in 2013, and it was reviewed and received a report in response in 2014.²⁵⁷ The United Nations has shown continuing concerns with the United States' reports, particularly with regard to racial disparities and racial profiling.²⁵⁸

These reports show that the international community perceives the United States' civil rights concerns as human rights issues. The United States appears to view them this way as well. In its latest report to the United Nations ICCPR Committee, the United States specifically mentioned investigations by the Department of Justice into police misconduct in Ferguson and Cleveland—and the Department of Justice's findings of a pattern of racially-motivated misconduct—as evidence that the United States is continuing its work to meet its obligations under the ICCPR.²⁵⁹

– USA, UNIV. OF MINN. HUMAN RIGHTS LIBRARY, <http://hrlibrary.umn.edu/research/ratification-USA.html> [<https://perma.cc/7XYR-DR2U>] (last visited Mar. 13, 2017).

254. See *U.S. Treaty Reports*, U.S. DEP'T OF STATE, <http://www.state.gov/j/drl/reports/treaties/index.htm> [<https://perma.cc/MRF5-GFRU>] (last visited Mar. 13, 2017) (“United Nations human rights treaties require that States Parties report periodically on their implementation of their treaty obligations.”).

255. See *id.* (“These comprehensive reports involve substantial coordination with relevant U.S. Government agencies.”).

256. *Report Concerning the International Covenant on Civil and Political Rights* <http://www.state.gov/j/drl/rls/c16069.htm> [<https://perma.cc/XH36-NLSB>] (last visited Mar. 13, 2017).

257. Committee on the Elimination of Racial Discrimination (CERD) Report, U.S. Dep't of State, http://www.state.gov/j/drl/rls/cerd_report/ [<https://perma.cc/R67C-J2JC>] (last visited Mar. 13, 2017).

258. See Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reps. of the U.S., at 2–4, U.N. Doc. CERD/C/USA/CO/7-9 (Aug. 29, 2014), http://www.ushrnetwork.org/sites/ushrnetwork.org/files/cerd_concluding_observations2014.pdf [<https://perma.cc/PV3N-XCEC>]; Hum. Rts. Comm., ICCPR: Concluding Observations on the Fourth Periodic Rep. of the U.S., at 3, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014), <http://www.state.gov/documents/organization/235641.pdf> [<https://perma.cc/WPX7-X3QJ>].

259. See U.S. DEP'T OF STATE, ONE-YEAR FOLLOW-UP RESPONSE OF THE UNITED STATES OF AMERICA TO PRIORITY RECOMMENDATIONS OF THE HUMAN RIGHTS COMMITTEE ON ITS FOURTH PERIODIC REPORT ON IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, at 4–5, <http://www.state.gov/documents/organization/242228.pdf> [<https://perma.cc/3YSE-52ZW>].

Although these conventions are unlikely to directly impact domestic law, they can be used by a human rights committee to put political pressure on Congress and the President, but only if the media and public opinion are used effectively. Currently, the media seldom covers United States' reports under its international human rights obligations, even when they touch on major national scandals like police misconduct in Ferguson.²⁶⁰ Although the media has occasionally reported on the United Nations' concerns with the Flint water crisis and racial profiling and police misconduct,²⁶¹ it does not report on what the United Nations' concerns could mean for the United States or the United States' reports to the United Nations. These gaps in media coverage and the public's corresponding ignorance of what role human rights can play in addressing civil rights issues emphasizes the need for a human rights committee that could tie these strands together and inform the public.

For example, the JCHR uses the media as described above for its reports on the United Kingdom's international human rights obligations.²⁶² The JCHR's reports on the United Kingdom's compliance with United Nations treaties have led to parliamentary debates, official statements to the press, and enhanced media coverage.²⁶³ A congressional human rights committee like the JCHR could likewise become a central location for all human rights

260. In contrast, Michael Brown's family's plea before the United Nations and Obama's statements before the United Nations General Assembly that referred to Ferguson and other civil rights issues, have been reported. Mark Berman, *A Day of Unrest in Ferguson Ends with Protesters and Police Facing Off*, WASH. POST, Dec. 30, 2014, at 1, 2014 WLNR 36895912; *Ferguson One Year Later: The People, Places and Ideas that Came to Prominence over the Past Year*, ST. LOUIS POST-DISPATCH, Aug. 9, 2015, at 2, 2015 WLNR 23534626.

261. Todd Spangler, *UN Experts Raise Human Rights Concerns in Flint*, DETROIT FREE PRESS (May 3, 2016, 6:17 PM), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/05/03/united-nations-human-right-flint/83884390/> [<https://perma.cc/TK9U-2UKU>]; Justin Worland, *U.N. Panel Sharply Criticizes Police Brutality in U.S.*, TIME (Nov. 28, 2014), <http://time.com/3609811/police-brutality-united-states-un-ferguson-torture/> [<https://perma.cc/BBF4-HTBE>].

262. See, e.g., JOINT COMMITTEE ON HUMAN RIGHTS, EIGHTH REPORT: THE UK'S COMPLIANCE WITH THE UN CONVENTION ON THE RIGHTS OF THE CHILD, 2014-15, HL 144, HC 1016 (UK) (United Kingdom's compliance with the United Nations' Convention on the Rights of the Child).

263. See, e.g., Owen Bowcott, *Austerity Has Hit Disadvantaged Children Hardest, MPs and Peers Say*, GUARDIAN (Mar. 24, 2015, 8:01 PM), <https://www.theguardian.com/society/2015/mar/24/austerity-has-hit-disadvantaged-children-hardest-mps-and-peers-say> [<https://perma.cc/UZM4-4JD7>] (JCHR's report on UK's compliance with United Nations' Convention on the Rights of the Child); Henry Porter, *No One's Fooled – We Colluded in Torture*, GUARDIAN (Aug. 2, 2009, 7:05 PM) <https://www.theguardian.com/commentisfree/2009/aug/02/henry-porter-torture> [<https://perma.cc/MZ2N-9KSE>] (JCHR's Report on torture of suspected terrorists linked to United Nations Convention Against Torture).

concerns. Such a committee could use the media to publicize what the United States is doing to improve human rights under domestic or international law and what it still needs to improve. At the very least, Congress would pay more attention to congressional committee reports on human rights during debates, which would provide more fodder for the media.

V. CONCLUSION

The JCHR can provide valuable lessons to the United States if it endeavors to create a human rights committee. Most importantly, the JCHR shows that such a committee can be successful in improving human rights legislation as well as identifying larger human rights issues that the government may need to address. Even without the ability to implement its recommendations on its own, the JCHR provides an excellent example of what can be accomplished through persuasion and working with each government branch to develop the country's human rights laws. The JCHR has improved human rights law within the United Kingdom by influencing legislative debates so that Parliament fully scrutinizes bills for human rights law compliance, convincing the executive to draft or amend bills so that they conform to the country's human rights obligations, providing a source of information for courts deciding human rights issues, creating momentum in the legislature after a negative court decision, and fostering a culture of rights within the government and public. Although not always successful, the JCHR has done much to enhance the human rights of British citizens and residents.

The JCHR's success in influencing British legislation and court decisions in such a short period of time makes it a valuable point of comparison for any American effort to create a congressional committee to investigate and advise the government regarding human rights laws in the United States. There are some systemic differences between the United Kingdom's parliamentary system and the United States' presidential system—most notably, the United States' strong separation of powers—which will likely impact whether all of the JCHR's practices would be effective in the United States. Future research should, therefore, focus on these institutional and cultural differences to ascertain which of the JCHR's techniques would be most effective in the United States. However, despite whatever differences may exist, the United States would be wise to further study the JCHR to ensure that, if the United States does create a human rights committee, it can be as influential as possible.