



International Policy **BRIEF**

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The Case of the Cuban Five; US Shame and how to end it
By Wayne S. Smith
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The case of the Cuban Five is one which reflects abysmally on the U.S. juridical system, indeed, on American justice. The five, Gerardo Hernandez, Luis Medina, Antonio Guerrero, Rene Gonzalez, and Ruben Campa, were members of the Cuban Intelligence Service to be sure. They had been sent to the U.S., however, not to spy on the American government, its installations or its personnel; rather, they had been sent to penetrate Cuban exile organizations that were carrying on terrorist activities against Cuba. The idea, then, once sufficient evidence of those activities had been gathered, was to invite representatives of the FBI to come to Cuba and provide them with that evidence – in hopes that the U.S. would then take action to put a stop to such activities. In accordance with that plan, in June of 1998, three representatives of the FBI were invited to Cuba and met with Cuban counterparts. They then returned to the U.S. with some 64 folders of information on exile activities. The Cubans waited for the U.S. to take action to halt terrorist actions. They waited in vain. No action whatsoever was taken. Rather, apparently able to determine from the evidence provided who had provided it, a few months later, the FBI arrested the Cuban Five and in 2001, they were submitted to a totally biased trial in Miami – where anti-Castro sentiment was so strong that, in effect, there was no chance of empanelling an impartial jury. Defense lawyers requested a

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change of venue – that the trial be held in Ft. Lauderdale, or some place other than Miami. Indeed, they argued, only with a change of venue could there be a fair trial. Incredibly, their request was denied.

Lack of Evidence

In addition to the biased atmosphere in which the trial was held, prosecutors could present no evidence that the five had engaged in espionage or any other crime (other than being the unregistered agents of a foreign power). No evidence, so the prosecutors simply went back to the time-worn ploy of charging them with “conspiracy” to commit illegal acts. Under existing prosecutorial practices, one is usually charged with “conspiracy” to commit a given act when the government in fact has no evidence that the act was committed by the accused. That was certainly the case here. Evidence or not, all were convicted in 2001 and given long prison sentences, three even sentenced to life.¹

Worst of all was the case of Gerardo Hernandez, who was accused of “conspiracy” to commit murder and given two consecutive life sentences – this in connection with the shootdown of two Brothers to the Rescue planes in February of 1996, with the loss of four lives. Never mind that there was not a shred of evidence that he was in any way involved. Not only that, but to find him guilty of conspiracy to murder, the jury had to find beyond a reasonable doubt that he had participated in a conspiracy that had as its intention the shooting down of aircraft outside Cuban airspace. A shoot down in Cuban airspace would have been a lawful act – a defense of Cuban territory. But there was no evidence of any Cuban intention to shoot down planes in international airspace. On the contrary, Cuba consistently said it would shoot down planes that penetrated its

¹ Though in 2009, Luis Medina’s life sentence was reduced to 30 years and Antonio Guerrero’s to 22 years.

territory. Indeed, in a diplomatic note of January 15, 1996, it warned the U.S. government to put a stop to these violations of its airspace. Nothing was said about flights over international territory. And subsequently –radar evidence to the contrary --, Cuba insisted that the Brothers to the Rescue planes it shot down on February 24, 1996, had been in its airspace. That remains its position even today. How then could Hernandez have been part of a conspiracy to down planes in international airspace? There was no such conspiracy.

Court of Appeals Orders a New Trial

Not surprisingly, given all the marks against the trial having been held in Miami, on August 9 of 2005, three justices of the U.S. Court of Appeals for the Eleventh District in Atlanta overturned the Miami's court's convictions and ordered a new trial outside Miami. It should be noted that the arguments put forward by the three justices were devastating. No objective person reading them could have had any doubts as to the falseness of some of the charges and the unfairness of the trial. Unfortunately, it was an obviously less than objective person in the Bush administration who read them over. And hence, on October 31, 2005, the U.S. government, as it had a right to do, requested that the entire Appeals Court, all twelve justices, review the findings of the three justices who had overturned the Miami court decision. The writing was on the wall and in August of 2006, ten of the twelve justices reversed the ruling that had called for a new trial. On June 4, 2008, the Appeals Court upheld the convictions of the Miami court and remanded the case back to that same court.

International Criticism

By now, the case had become something of an international *cause celebre*, with widespread condemnation of the Miami court's decision and sentencing as arbitrary and

unfair. This view was put forward by 10 Nobel Prize winners, by hundreds of Jurists, members of parliaments and various organizations from all over the world, many of whom joined 12 amicus briefs asking the Supreme Court to review the case. And for the first time in history, the UN Human Rights Commission condemned a trial in the U.S., finding that “the climate of bias and prejudice against the accused” was such that the Miami court could not possibly have enjoyed “the objectivity and impartiality that is required in order to conform to the standards of a fair trial.”

U.S. Supreme Court Refuses to Hear the Case

There had been some hope that with the Bush administration now only a bad memory, and Obama in the White House, the way might be open for the case to be heard by the Supreme Court. But no, in May of 2009, Obama’s solicitor general, Elena Kagan, recommended that the request for a hearing be denied, and on June 15, it was. How very sad. The five were, to be sure, guilty of being the unregistered agents of a foreign power operating in the U.S. without the knowledge of the government. But if that were their only crime (as in fact it almost certainly is), they could have served out their sentences long ago and been back with their families. Rather than that, all have now been held some twelve years under trying conditions. In all those years, for example, Gerardo Hernandez and Rene Gonzalez have not been allowed even a single visit from their wives. That is cruel and heartless punishment without any cause. And more years stretch ahead.

Or Must They?

There may be a near-term solution, however, in which all sides could come out ahead. The President has the right, constitutionally, to commute the sentences. The way would then be open for the U.S. to release the five and allow them to return to Cuba, in return for the Cuban government’s release of the some 180 political prisoners it now

holds. Their release, it should be noted, has long been a major goal of the U.S. Neither government would suffer any adverse consequences from this reciprocal release. On the contrary, both would be applauded and their international images dramatically enhanced. On the other hand, one must ask, "what would the U.S. win by continuing to hold the Five?"

Nothing, is the answer, except for the continuing opprobrium of international public opinion.

The Case of Alan Gross

And as we are speaking here of the release of prisoners, we should include the case of Alan Gross, an American citizen and an operative of USAID, who was arrested in December of last year. Gross had been in Cuba a number of times on tourist visas and said that his purpose was to help Jewish groups on the island communicate with one another. For that reason, he was handing out to them communications equipment. Two problems. First, the leader of the main Jewish group in Havana said she had never heard of Gross. And second, these programs directed by USAID to "promote democracy in Cuba" can often look like programs aimed at bringing down the Cuban system and government, i.e., as being subversive in nature. The Cubans apparently saw Gross' activities, which included distributing satellite technology financed by the U.S. government, in that light and he was arrested. It should be noted that distributing the equipment without a license was in itself a violation of Cuban law.

The U.S. has of course protested and demanded his release, so far without any response from the Cubans. Almost certainly, the best way to bring about his release and to avoid future arrests, problems and misunderstandings, would be for the State Department and USAID to formally suspend any further programs "to promote

democracy in Cuba” that do not follow normal diplomatic protocol and have host country authorization. And we would lose almost nothing in the process, for these programs “to promote democracy” have achieved very little in terms of changing public opinion in Cuba. As some have said, they have been almost as useless as TV Marti!

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