



International Policy **BRIEF**

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The U.S., the Supreme Court and the Case of the Cuban Five

By Wayne S. Smith

Without a word of explanation, on June 15, the Supreme Court declined to hear the case of the so-called Cuban Five, the five Cuban agents sent to Miami to spy on Cuban exile groups that were carrying out terrorist acts against Cuba.

In refusing to hear the case, the Supreme Court ignored the massively expressed opinion that the Miami court's decision and sentencing in 2001 were arbitrary and unfair, the result of a prejudicial atmosphere in which the defendants could not possibly have had a fair trial. 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 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 enjoy "the objectivity and impartiality that is required in order to conform to the standards of a fair trial."

These views had earlier been expressed by the U.S. Court of Appeals for the Eleventh Circuit in Atlanta, three justices of which on August 9 of 2005 had overturned the Miami court's convictions and ordered a new trial outside of Miami. It should be noted that the arguments put forward by the Court of Appeals were devastating. No

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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 requested that the entire Appeals Court 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, the entire Appeals Court reversed the ruling that had called for a new trial. On June 4, 2008, it upheld the convictions of the Miami court and remanded the case back to that same court.

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, President Obama's solicitor general, Elena Kagan, recommended that the request for a hearing be denied! How sad.

The five were, to be sure, guilty of being the unregistered agents of a foreign power operating in the U.S. without knowledge of the government. But if that were their only crime (as in fact it probably is), they could have served out their sentences long ago and been back with their families. But given the phony charges against them, and the U.S. justice system's unwillingness to undo the wrong against them, they must spend many more years in prison.

We do not have the space to examine each case individually, so let us take perhaps the worst case as an example – the case of Gerardo Hernandez, who is charged with “conspiracy to murder” and is serving two life sentences, supposedly for being instrumental in the shutdown of two Brothers to the Rescue (BTTR) aircraft on February 24, 1996. Note that he is charged with “conspiracy to murder,” not with murder.

Under existing prosecutorial practices, one is usually charged with “conspiracy” to commit a given act when the government in fact has no evidence that a criminal act was committed by the accused. That is the certainly the case here. The government has no evidence at all that Hernandez was instrumental in the shootdown.

BTTR aircraft had been frequently overflying Cuba. I was in Havana on January 9 of 1996 with a delegation and saw one of the planes over the *Malecon* scattering leaflets. That evening, we met with Castro. Inevitably, the overflight came up. Castro expressed anger and said that he would shortly be issuing a statement warning that further flights over Cuba would be shot down. Another leaflet overflight came on January 13. Furious, the Cuban government indeed issued a statement, as Castro had promised, saying its patience was exhausted and that any further violations of Cuba airspace would meet with a shootdown. In a diplomatic note dated January 15, it again warned the U.S. government to put a stop to these violations.

And what measures had the United States taken over a two-year period to curb these repeated penetrations? And what measures did it take in response to the Cuban warning of January 15? None at all. Although the Chicago Convention on International Airways stipulates that each country must prevent the planes of its registry from violating its neighbors’ airspace, the U.S. in this case made no effort to do so.

Thus, when three BTTR aircraft filed phony flight plans and headed south on February 24 of 1996, the stage was set. As they approached Cuban airspace, Havana tower warned them that they were entering a dangerous zone. They ignored the warning. One aircraft, piloted by Jose Basulto, was definitely in Cuban airspace. Cuba maintained then and still maintains that the other two were also in Cuban airspace. The U.S. says its

radar indicates the downed two were in international airspace. The U.S. seems to have been right, but it was a close call as to where they were when they were shot down.

To prove that Hernandez conspired to commit murder, i.e., an “unlawful killing,” the government had to prove beyond a reasonable doubt that the conspirators **planned** the shutdown to take place in international airspace rather than over Cuba. A shutdown in Cuban airspace would have been a lawful (if regrettable) act – a defense of Cuban territory.

The government could not of course produce any evidence that the so-called conspirators had planned to have the shutdown occur in international airspace. What it did was to bring forward evidence that after the shutdown, Hernandez had congratulated the Cuban government on a successful operation. And so, the prosecution reasoned, since the “successful” operation had been in international airspace, that must mean the conspirators had planned for it to be so.

Nothing of the sort. The Cubans maintained all along that the planes were in Cuban airspace. The Cuban note of January 15 had warned that any planes that violated Cuban airspace would be shot down. Nothing was said about those in international airspace.

The government simply did not have the evidence it was required to have that the Cubans had all along planned to have the planes downed in international airspace.

Strangely, the Solicitor General’s brief mentioned above tries to provide such evidence.

According to the brief:

“Petitioners argue (Pet.31-32) that the fact that Hernandez and his co-conspirators characterized their operations as a response to a BTTR’s

‘provocation’ shows that they intended to only shoot down the planes if they provoked Cuba by invading its sovereign airspace. The evidence showed, however, that the operation was a direct response to the leaflet drops BTTR executed a month before the shutdown. Pet. App 4a,48a. Viewed in the light most favorable to the government, the evidence showed that none of the BTTR planes entered Cuban airspace during those drops. *Id. at 75a-76a*. The jury could therefore infer that because BTTR’s most recent ‘provocations’ were committed in international airspace, the planned confrontation was also to occur in international airspace.”

What utter nonsense! As indicated above, I was in Havana and saw the planes, as did other members of our party. The planes had without doubt entered Cuban airspace and thus the Cuban warning of January 15, 1996.

That Hernandez and the others remain in prison on the basis of such phony evidence and reasoning is shameful – a blot on the honor and reputation of the U.S. system of justice. And not just on the system of justice. The whole episode reflects poorly on the U.S. government. Tired of the terrorist attacks on Cuba on the part of exile groups in Miami, against which the U.S. government was lifting not a finger, the Cuban government decided in the mid-1990s to send up agents to penetrate those groups and provide information on their activities. The plan was then to provide that information to the American authorities, in hopes that would persuade them to take action against the terrorists. This was done. The agents were sent and information gathered. Representatives of the FBI were then invited to Cuba and provided with evidence of the activities of the

groups in Miami. Cuban authorities then waited for some action on the American side against those groups. There was none. No action at all resulted against the exile groups; rather, in September of 1998, the Cuban agents who had penetrated those groups and provided the information against them, were arrested, i.e., under President Clinton. They were then tried, convicted, sent to prison – and kept there -- under President Bush. And now key officials in the Obama administration have recommended that the Supreme Court not hear their case.

What we have here is a tragic miscarriage of justice that reflects poorly on us as a nation committed to law. The only partial remedies that come to mind are a presidential pardon or a commutation of the sentences imposed – perhaps as part of a prisoner exchange, i.e., some of those held as political prisoners in Cuba and their families, in return for the Cuban Five. But, as suggested, that would only be a partial remedy. The fact would even then remain that we held the Five all these years illegally.

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