



International Policy **BRIEF**

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More Chicanery in the Cases of the Cuban Five

By Wayne S. Smith

At a press conference on March 22, new exculpatory evidence was presented in the cases of two of the Cuban Five. Many Americans seem to believe the now-famous Cuban Five were spies working for Havana against the United States and therefore deserve what they got – years in prison. But that is far from the truth. In fact, while they were indeed members of the Cuban Intelligence Service, they had been sent to the U.S. not to spy on the U.S. government or any of its entities but, rather, to penetrate certain Cuban exile organizations and gather information on the terrorist activities they were conducting against Cuba. The idea was then to provide that information to the FBI so that it could move to halt those activities, as it should have done.

Three representatives of the FBI were indeed invited to Cuba in June of 1998 to receive what the Cuban agents had come up with and returned with sixty-four folders of pertinent information. The Cubans had rather expected that the U.S. would then quickly take action against the terrorists.

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They were to be disappointed. Rather, apparently able to determine the identity of the sources from the information they had been handed, they arrested the Cuban Five, who in 2001 were put on trial in Miami—a hotbed of anti-Castro sentiment. In hopes of beginning in a more impartial atmosphere, the Defense asked for a change of venue. But it was denied.

In addition to the biased atmosphere, the Prosecution could present no evidence that the five had been guilty of anything other than being the unregistered agents of a foreign power. And so prosecutors fell back to charging the accused with “conspiracy” to commit espionage and other illegal acts -- what one does if one has no hard evidence. But evidence or not, all were convicted in 2001 and given long prison sentences.

Worst of all was the case of Gerardo Hernandez, accused of conspiracy to commit murder in connection with the shootdown in February of 1996 of two Brothers to the Rescue planes with the loss of four lives—and then convicted on the basis of no evidence at all and given two consecutive life sentences. (More on Gerardo’s case below).

Given the highly questionable nature of the case against the five, it was not surprising when in August of 2005 three judges of the US Court of Appeals for the Eleventh District in Atlanta overturned the Miami court’s convictions and ordered a new trial. But that was not to the liking of the

Bush administration and so on October 31 of 2005 it was ordered that the entire appeals court, all twelve judges, review the findings of the three. This was done and on June 4, 2008, the entire appeals court upheld the original convictions of the Miami court and remanded the case back to it. The will of the White House had been done.

The next year, however, with a new President in the White House, it had been thought the way might be open for the case to be heard by the Supreme Court. But in May of 2009, Barack Obama's solicitor general, Elena Kagan, recommended that the request for a hearing be denied. How unfortunate, and sad. Injustice was not to be undone – at least at that point. There is now another chance for at least its partial undoing. In an affidavit filed by Gerardo Hernandez before the U.S. District Court of the Southern District of Florida, he has pointed out that he was never informed that he could have a separate trial on the charge of conspiracy to commit murder, a separate trial at which he would have had the right to testify on his own behalf. Had he known, had he ever been informed, he would have insisted on this separate trial and could have given testimony to establish his innocence. In his affidavit, he then provides some of that testimony – which knocks the Prosecution's case for a loop. If his affidavit does not lead to his release, Rule of Law will have been dealt another blow.

And Antonio Guerrero's memorandum, presented at the same time as Gerardo's affidavit, what of it? It provides evidence that government sources paid a number of the members of the press to publish unfavorable stories about the defendants and their case. This fundamentally violated the premises of a fair trial.

On the basis of these legal briefs, both Gerardo and Antonio should be given new trials and their unjust convictions overturned. In view of past history, however, one cannot be optimistic. But at some point, justice must be done, the cases of all five must be dismissed and this stain on the honor of the U.S. System of Justice thus be removed.

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