

INTERNATIONAL COMMISSION  
OF INQUIRY INTO THE CASE OF THE



**Testimony of PETER SCHEY,**

**President of the Center for Human Rights and Constitutional Law.**

**Given at the International Commission of Inquiry into the case of the Cuban Five on Saturday the 8th of March 2014, 11:20 to 12:50, Session 5: Report on the unfairness of the trial against the Cuban Five – Part I.**

**1. Litigation against the US National Geospatial-Intelligence Agency under the US Freedom of Information Act**

This is a Summary of Section III(6) of the [draft] report entitled *The Case Of The Cuban Five: How The Government Of The United States Secured Unjust Convictions Of The Cuban Five And Why The Remaining Members Of The Five In US Prisons Should Now Be Repatriated To Cuba* by Peter Schey, President, Center for Human Rights and Constitutional Law.

The Center for Human Rights and Constitutional Law (CHRCL) has initiated several requests under the US Freedom of Information Act (FOIA) seeking access to US Government records that may show (1) what the US Government knew about the likelihood for a confrontation between Cuba and BTTR planes in 1995-96, and (2) what the US Government could have done to prevent the February 24th, 1996 shoot-down incident. The Center also is seeking satellite images of the BTTR shoot-down site and related documents from select government agencies. Satellite data is critically important because the US Government claims that its radar data shows that the February 24th, 1996 BTTR shoot-down took place in international airspace (a fact used to convict Gerardo Hernandez of conspiracy to commit murder), while Cuban radar data showed that the shoot-down took place in Cuban airspace.

At the trial of the Cuban Five, an expert witness – retired American Air Force Colonel George Buchner – suggested the only way to definitively determine exactly where the BTTR planes went down would be to examine images of the area that may have been taken that day by United States satellites. “It is my expert opinion,” Buchner

testified, “that the [United States] government has satellite photos that would resolve this whole issue.” Over defense objections, the judge ordered Buchner’s remarks stricken from the record.

On December 29th, 2009, the CHRCL and Leonard Weinglass, the deceased former lead counsel for the Cuban Five, filed a satellite FOIA request with the US National Geospatial Intelligence Agency (NGA) seeking copies of satellite images, satellite imagery, satellite photographs, or satellite video images, and documents of the area in which the BTTR shoot-down took place on February 24th, 1996.

The NGA responded by refusing to admit or deny that it possessed the requested satellite images.

A lawsuit was then filed against the NGA in the US federal courts. On March 14th, 2011, the federal district court entered a judgment in favor of the NGA because of the “near-blanket protection the National Security Act accords information pertaining to intelligence methods, as well as the NGA’s good faith and detailed affidavit stating that the information sought would tend to reveal such methods...” The federal court concluded: “The NGA has met its burden of showing that it acted permissibly in determining that acknowledging the existence or nonexistence of records responsive to plaintiffs’ request might disclose sources or methods of foreign intelligence and harm national security.”

On May 6th, 2011, the Center appealed to the US Ninth Circuit Court of Appeals. In 2013, the Court of Appeals ruled in favor of the Center, finding that “The district court erred in granting summary judgment without requiring the [NGA] to submit a classified declaration for in camera review. The government’s unclassified declaration failed to provide ‘reasonably specific detail’ that would show why merely acknowledging the existence of records might reveal intelligence sources or methods, or affect our foreign relations.” The Appeals Court stated that under the NGA’s approach to the CHRCL’s request for satellite images “the government would be free to [refuse to confirm or deny the existence of records] in practically every case involving satellite images and records, as well as many other surveillance activities.” The Court of Appeals remanded the case and ordered that the NGA must “provide a classified more detailed declaration for in camera review by the district court...” This case remains pending before the district court. The CHRCL is also initiating several new requests for satellite imagery and related records of the BTTR shoot-down from other US intelligence and military agencies.

## **2. Gerardo Hernández’s conviction for conspiracy to commit murder manifests an extreme miscarriage of justice**

This is a Summary of Section III(3) of the [draft] report entitled *The Case Of The Cuban Five: How The Government Of The United States Secured Unjust Convictions Of The Cuban Five And Why The Remaining Members Of The Five In US Prisons Should Now Be Repatriated To Cuba* by Peter Schey, President, Center for Human Rights and Constitutional Law.

Gerardo Hernández was charged with conspiracy to commit murder for providing information on Brothers to the Rescue (BTTR) flights as part of an alleged plan to shoot-down two BTTR planes in US jurisdiction, which extends to the international airspace between the United States and Cuba, on February 24th, 1996. His trial, held in a United States District Court in Miami, Florida, home to over half a million Cuban exiles, began on November 26th, 2000 and concluded on June 8th, 2001.

At trial, the Government introduced an intercepted communication from Cuban intelligence headquarters to a Cuban intelligence officer in South Florida stating that on February 24th-27th, 1996, two Cuban intelligence officers who had penetrated the BTTR organization should not join BTTR flights because if BTTR provoked Cuba (as it had previously done by illegally penetrating Cuban airspace) it may result in a “confrontation of counter-revolutionary actions of Brothers to the Rescue.” Hernández maintains that he did not even have the decoding program to read this message when it was sent. *But in any event, all it did was warn Cuban intelligence officers in South Florida that a confrontation with BTTR planes could take place on the designated dates if BTTR planes penetrated Cuban airspace.* The US Government argued that Hernández’s guilt is shown by a coded message to Cuba after February 24th stating, “the operation to which we contributed a grain of salt ended successfully.” Hernández has always maintained this message did not to involve the BTTR shoot-down, but to the success of the operation to return another agent to Cuba.

Hernández did *not* in any way encourage the BTTR pilots to fly on February 24th, 1996, the day two of their planes were shot down by a Cuban MiG. Hernández did *not* inform the Cuban Government when the BTTR planes took off from Florida on February 24th, 1996. *The US Government informed the Cuban Government when the BTTR planes took off.* Hernández gave no orders involving the shoot-down nor was he in any way consulted about the decision to shoot down the BTTR planes. *The US Government, not Hernández, was in a position to block the BTTR flights because BTTR pilots previously had repeatedly filed false flight plans with the US Federal Aviation Administration (FAA).* The US Government (not Hernández) monitored the BTTR flights on radar and could have recalled the planes when it saw that Cuban MiGs were in the area. The BTTR pilots were warned by Cuban air control authorities that they were in danger but ignored those warnings. Even if Hernández had been warned that a BTTR provocation on February 24th, 1996 would lead to a “confrontation,” such a confrontation could have involved trying to force the BTTR planes to land, or firing warning shots to force them to leave Cuban airspace, etc. On the other hand, the US Government had been specifically warned that a “shoot-down” was possible and this information was communicated to the BTTR pilots who were willing to risk the dangers involved in their mission. *Gerardo Hernández had virtually nothing to do with the shoot-down, and certainly had less to do with it than the US Government itself.* Hernández is innocent of the conspiracy to commit murder charge and his conviction and life sentence are a major and egregious miscarriage of justice.

**3. The sentences of Gerardo Hernández, Antonio Guerrero, and Ramón Labañino were excessive and disproportionate to their involvement in any criminal conduct**

This is a Summary of Section III(4) of the [draft] report entitled *The Case Of The Cuban Five: How The Government Of The United States Secured Unjust Convictions Of The Cuban Five And Why The Remaining Members Of The Five In US Prisons Should Now Be Repatriated To Cuba* by Peter Schey, President, Center for Human Rights and Constitutional Law.

The sentences of the Cuban Five are unusually harsh given that nothing they did involved any significant threat to the national security of the United States. It is undisputed that the Cuban Five were primarily engaged in what the Cuban Government and the Five considered “counter-terrorist” activities, penetrating anti-Castro groups like Alpha 66, the F4 Commandos and Brothers to the Rescue. However, the sentences imposed violate both US and international doctrine of proportionality and fairness.

Three of the Five (Gerardo Hernández, Antonio Guerrero, and Ramón Labañino) were charged with and convicted of “conspiracy” to violate the Espionage Act and Guerrero was eventually sentenced to 21 years and 10 months in prison, Labañino to 30 years in prison, and Hernández to life in prison. The US courts refused to reconsider Hernández’s life sentence since he had already been sentenced to life in prison based on his conviction for conspiracy to commit murder in the February 24th, 1996 BTTR shoot-down. The report *The Case of the Cuban Five* discusses in detail Gerardo’s innocence on the murder charge.

Antonio Guerrero worked as a civilian employee at Boca Chica Naval Air Station in a series of menial jobs. Antonio basically counted planes landing and taking off to infer whether or not there was an increase in military aircraft that may signal a potential attack on Cuba. This information was available to the public simply by driving along US Highway 1 and observing the planes taking off and landing. He also provided Cuban authorities with drawings of certain buildings that civilian employees could enter without security clearances. Ramón Labañino observed the number of planes landing and leaving MacDill Air Force Base in Tampa, Florida. He also supervised other agents reporting on matters of public information regarding the US Southern Command and the neighborhood in which this Command was located. It is undisputed that none of the information gathered was intended to be used in any aggression against the US. Military experts at the Cuban Five’s trial, including President Obama’s Director of National Intelligence, James Clapper, testified that the Cuban Five presented no substantial threat to national security.

The sentences of Gerardo Hernández , Antonio Guerrero, and Ramón Labañino are disproportionate to other similar cases of espionage tried in the United States and far exceed the scope of their intelligence activities and the insignificant harm it did to US national security. The principle of proportionality – that the punishment should be proportional to the seriousness of the crime – is a fundamental tenet of international human rights law.

This principle is embodied in Article 5 of the Universal Declaration of Human Rights (“No one shall be subjected to ... cruel, inhuman or degrading ... punishment”), Articles 7 and 9 of the ICCPR (“No one shall be subjected to ... cruel, inhuman or degrading ... punishment” and “No one shall be subjected to arbitrary ... detention”),

and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

End of testimony.