No. 08-987

IN THE

Supreme Court of the United States

RUBEN CAMPA, RENE GONZALEZ, ANTONIO GUERRERO, GERARDO HERNANDEZ, AND LUIS MEDINA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit CERTIORARI

BRIEF AMICUS CURIAE OF THE CENTER FOR INTERNATIONAL POLICY AND THE COUNCIL ON HEMISPHERIC AFFAIRS IN SUPPORT OF PETITION FOR CERTIORARI

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INTEREST OF THE AMICUS CURIAE

The Center for International Policy ("CIP") was founded in 1975 to promote a U.S. foreign policy based on international cooperation and respect for basic human rights. To that end it offers timely policy analysis and in-depth reports on key issues in the Western Hemisphere.

The Council on Hemispheric Affairs ("COHA") is a thirty-year-old, tax-exempt research group that monitors the full scope of U.S.-Latin American relations. It has been described on the Senate floor as one of the nation's most respected bodies of scholars and policymakers.[1]

CIP's Cuba Program is probably the most active of that of any international policy institute in the United States. The program was founded in 1992 by Wayne S. Smith, Ph.D., who has served uninterruptedly as its Director ever since.

Dr. Smith has been involved in US-Cuban relations for over fifty years, beginning with his transfer to Havana as a Foreign Service Officer in 1958 where, not long after his arrival, he witnessed Fidel Castro's entry into Havana riding on a tank. Smith was the Third Secretary in our embassy in Havana when the United States severed diplomatic

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[1] In accordance with Supreme Court Rule 37.2(a), amici CIP and COHA have obtained written consent to the filing of this brief from counsel of record for both parties. Those letters of consent are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, amici curiae certify that this brief was not authored, in whole or in part, by counsel for a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than amici curiae or their counsel.

relations with Cuba on January 3, 1961.

In 1977, Dr. Smith was part of the American diplomatic delegation that opened the bilateral talks with Cuba that led to the opening of interests sections in Washington D.C. and Havana in September of that year. Shortly thereafter, Smith became Director of Cuban Affairs in the Department of State. In 1979, he was transferred to Havana as Chief of Mission of the U.S. Interests Section. He remained in that position until 1982.

Following retirement from the Foreign Service on a point of principle involving U.S. policy toward Cuba, Smith joined the Carnegie Endowment for International Peace where he worked on US-Cuban relations. In 1983, he began teaching at the Johns Hopkins School of Advanced International Studies ("SAIS") on US-Cuban relations. While at SAIS, he published his best-known book, *The Closest of Enemies: A Personal and Diplomatic History of the Castro Years.*

Dr. Smith, both as a diplomat and as Director of CIP's Cuba Program since that program's inception, has insisted on the importance of Cuba adhering to the norms of the international law of human rights. He and CIP expect no less of the United States and are deeply concerned by the April 8, 2004 decision of the Working Group on Arbitrary Detention of the United Nations Human Rights Commission that the "climate of bias and prejudice against the accused" was so extreme that the proceedings failed to meet the "objectivity and impartiality that is required in order to conform to the standards of a

fair trial" and "confer[red] an arbitrary character on the deprivation of liberty" in this case.[2] Amicus CIP is additionally troubled by the startling fact that this is the first and only occasion that the U.N. Human Rights Commission has found a trial conducted in a United States federal court to have been unfair.

Amicus COHA shares CIP's concerns as to the fairness of the criminal trial Petitioners received. Those concerns are based on the fact that the Miami, Florida venue of Petitioners' trial made it impossible for an unbiased jury to be empanelled. This conclusion is inescapable in light of the atmosphere of pervasive anti-Castro hostility that exists as a product of history in that city.

Further, amici CIP and COHA have noted with concern for this country's standing in the hemisphere, that numerous Latin American parliaments and parliamentary committees have protested the trial of the Petitioners as fundamentally unfair. They are identified in the Appendix to the Petition for a Writ of Certiorari at 469A to 488A, and include: the Latin American Parliament, MERCOSUR Parliament, Chile's Senate Human Rights, Nationality and Citizenship Commission, Bolivia's National Senate and House of Deputies, Brazil's House of Deputies' Human Rights and Minorities Commission, the Chairs of twenty-four Parliamentary Commissions of Brazil's National Congress, Mexico's Senate, the Mexican Senate's North American Foreign Relations Committee, Mexico's House of Representatives, the

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[2] Report of the United Nations Working Group on Arbitrary Detentions, U.N. Doc.E/CN.4/2006/7/Add.1,at 65.

President and Vice-President of Panama's National Assembly and the President of its Commission of Foreign Relations, the Foreign Relations Commission of Panama's National Assembly, Paraguay's House of Deputies, Peru's Congress and Venezuela's National Assembly.

Amici curiaes' interest in this case arises both from their commitment to human rights throughout the Americas and from their conviction that if the United States is to speak with moral authority on that subject to the countries of this hemisphere – including Cuba – it must honor, in law, practice and spirit, the basic human right to a fair trial that is guaranteed by international law to all persons, including Cubans, who are tried as criminal defendants before this nation's courts.

SUMMARY OF ARGUMENT

The reputation of the United States as the indispensable and final guarantor of the human rights of non-citizens tried in its courts is at stake in this case.

There is an overwhelming legal and public record in support of Petitioners' contention that they were denied their fundamental right to a fair trial. They were denied a fair trial because they were refused an impartial tribunal to determine their guilt or innocence.

Their convictions were the inevitable outcome of the denial of their collective request for a change of venue. That meant that they would be tried in a community rife with ingrained hatred for the government of Cuba. Entirely predictably, that hatred jelled into a systemic bias against the Petitioners because of the charges against them in being agents of that government.

Indeed the hatred of the government of Cuba was so pervasive in Miami as to create a presumption of bias in every citizen called to jury service in this case. That presumption simply cannot be rebutted with the degree of certainty required in a matter where life sentences were sought and obtained. Further, to the extent citizens of Miami do not actually hate what is routinely referred to there as the "Castro regime," they nevertheless must be reasonably assumed to be intimidated by the ubiquity of that emotion in the community to which they must return to work and live on the completion of their jury service.

A changed venue was the *only* way in which Petitioners could have actually realized their universal human right to a fair trial. The Eleventh Circuit's

holding that Petitioners were not entitled, in the objective circumstances of the emotional climate prevailing in Miami at the time, to have their trials moved as a matter of right to Fort Lauderdale constitutes a breach of this country's obligation to honor the explicit treaty obligations it incurred as a result of its ratification of the International Covenant on Civil and Political Rights (ICCPR).

ARGUMENT

I. The United States is in Breach of its Treaty Obligations to Ensure that Petitioners Received a Fair Trial

The foundational human rights document of the modern era, the Universal Declaration of Human Rights, declares at Article 10 that "every person has an equal right to a fair and public trial, by an independent and impartial Court."[3] The Declaration's assertion of an elemental and universal human right to a fair trial – defined in this case as the right to an impartial trier of fact (i.e. an unbiased jury) – found its second expression at Article 14(1) of the International Covenant on Civil and Political Rights[4], which imposes on all parties – including, of course, the United States – the duty to provide anyone on trial for a criminal offense with "…a fair…hearing by a[n]…impartial tribunal…"

The Covenant is a treaty and therefore under the Supremacy Clause of the Constitution its obligations are a constituent part of the law of this land.[5] Thus, the denial of an impartial tribunal to Petitioners constituted a discrete violation of this country's governing law pertaining to criminal trials.

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[3] Adopted and proclaimed by General Assembly Resolution 217A (III) of December 10, 1948.

[4] Concluded at New York, Dec. 16, 1966. Entered into force, Mar. 23, 1976. 999 U.N.T.S. 171. Signed by the United States, Oct. 5, 1977. Ratified by the United States, June 8, 1992. Entered into force for the United States, Sept. 8, 1992.

[5] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby*..." U.S. CONST. art. VI, § 1 (emphasis added).

Moreover, treaties are the highest obligation of international law.[6] As Professor Louis Henkin has said, "International law is law for the United States. As such, it is obligatory upon all whose actions are attributable to the United States under international law: it is binding on Congress, and on the President and the Executive branch [and] the *federal courts,* from the Supreme Court down to the federal magistrate…"[7]

As a party to the ICCPR, the United States is subject to the principle of public international law expressed as pact sunt servanda. Article 26 of the Vienna Convention on the Law of Treaties explicitly translates that Latin to mean: "Every treaty in force is binding upon the parties and must be performed by them in good faith." [8]

The distinguished Werni Levi offers the following comment on the meaning of good faith in public international law: "In general, it [good faith] requires that a party must carry out obligations honestly, without mental reservations or deceitfulness and *must fulfill the letter and spirit of a commitment*."[9]

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[6] See Restatement, Third of the Foreign Relations Law of the United States, §102 (3) "International agreements create law for the states parties thereto …"

[7] LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION (2d ed. 1996) p. 233. (Emphasis added). See also *The Paquette Habana*, 175 U.S. 677, at 700 (1900): "…international law is part of our [U.S.] law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

[8] U.N. Doc. A/CONF. 39/27 (1969), done at Vienna on May 23, 1969; entered into force on January 27, 1980. The United States is a party to the Vienna Convention.

[9] WERNI LEVI, CONTEMPORARY INTERNATIONAL LAW (1991) p. 195. (Emphasis added). See also JOHN F. O'CONNOR, GOOD

At the risk of belaboring something so plain, as a party to the International Covenant on Civil and Political Rights the United States is inescapably bound to honor – in truly good faith – the letter and the spirit of Article 14(1) of that treaty. The Eleventh Circuit's holding that Petitioners were not entitled to a change of venue – the only protection available to them from the bias engendered by a palpably ambient hostility in Miami – fails the obligation of good faith required of this country as a result of its ratification of the ICCPR. Both the letter and spirit of Article 14(1) required, in view of the Petitioners' obvious vulnerability, a change of venue.[10]

II. The Failure of the United States to Ensure that the Petitioners Received a Fair Trial Has Important Foreign Policy Implications that Warrant the Grant of Certiorari

President Obama promised in his campaign to pay greater positive attention to Latin America by

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FAITH IN INTERNATIONAL LAW (1991) p. 124, where Professor O'Connor concludes that: "The principle of good faith in international law is a fundamental principle … directly related to honesty, fairness and reasonableness."

[10] The fact that the jury in this case found Petitioner Hernandez guilty of conspiracy to murder puts every other verdict in this case in extreme question. Because of its sheer absurdity the conviction of Hernandez on that charge is proof that the jury would convict anyone charged with being an agent of the Cuban government of anything. To find him guilty of conspiracy to murder, the jury had to find beyond a reasonable doubt that he participated in a conspiracy that had as its intention the shooting down of aircraft outside of Cuban airspace. Not only was there no evidence of such an intention, there is no logic to support such a ridiculous plan. It is public record that Cuba was angered at the time by penetrations of its airspace and no doubt intended to greet the next one with MIGS. But under what conceivable theory would it be preferable for Cuba to shoot planes down in international air space, rather than its own?

engaging with the region on terms of mutual respect. Many countries in the hemisphere have criticized the United States attitude toward Cuba and have signaled that, as part of any U.S. review of its overall policy toward Latin America, they specifically wish to see a change of policy toward Cuba from one of constant confrontation to one of constructive engagement. For example, in an open message to the United States, within two weeks of President Obama's election, the Rio Group of Latin American nations approved Cuba as the organization's twenty-third member.[11]

The desire of Latin America for a shift of U.S. policy toward Cuba is further corroborated by the fact that seven Latin American presidents have visited Cuba since the beginning of this year. Those visits must be seen as a demonstration of support for that country in the face of what is widely viewed as the punitive policy (chiefly, the current embargo) of the United States.[12] Meanwhile the State Department has issued its 2008 Human Rights Report on Cuba.[13] Among the "human rights problems" it identifies is the "denial of fair trial[s]." When the United States is seen to be guilty of "do as I say, not as I do" conduct, this country's reputation and influence suffer, which is precisely what has happened throughout the hemisphere in what is referred to popularly as the case of "the Cuban Five." In short, this case has important foreign policy implications

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[11] See *Rio Group accepts Cuba*, Latin American Herald Tribune, November 15, 2008. Other members are Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Chile, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, the Dominican Republic, Uruguay, and Venezuela.

[12] Each head of state denounced the U.S. embargo during his or her visit to Cuba.

[13] http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119155.htm

for the United States at a critical time in its relations with Latin America.

The foreign policy implications of this case are confirmed by the number of Latin American parliaments and parliamentarians (identified on pages 3 and 4, supra) that have protested Petitioners' trial as unfair. It is not the role of the Supreme Court to decide issues of foreign policy with respect to Cuba or any other country. However, as Petitioners argue in their Brief, certiorari should be granted when the actual disposition of a case "implicates serious issues of foreign relations." (*JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.,* 536 U.S. 88, 91 (2002); *see also Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 407 (1964)).

CONCLUSION

For the foregoing reasons and those set forth in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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