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

## BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF THE SENATE OF THE UNITED MEXICAN STATES, THE NATIONAL ASSEMBLY OF PANAMA, MARY ROBINSON (UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, 1997-2002; PRESIDENT OF IRELAND, 1992-1997) AND LEGISLATORS FROM THE EUROPEAN PARLIAMENT AND THE COUNTRIES OF BRAZIL, BELGIUM, CHILE, GERMANY, IRELAND, JAPAN, MEXICO, SCOTLAND AND THE UNITED KINGDOM

Michael Avery
*Counsel of Record*
Suffolk Law School
120 Tremont Street
Boston, MA 02108
617-573-8551

## AMICI CURIAE

**The Senate of the United Mexican States**

**The National Assembly of Panama**

**Mary Robinson (United Nations High Commissioner for Human Rights, 1997-2002; President of Ireland, 1992-1997)**

**Legislators from the European Parliament**

Josep Borrell Fontelles, former President

Enrique Barón Crespo, former President

Miguel Ángel Martínez, Vice-President

Rodi Kratsa-Tsagaropoulou, Vice-President

Luisa Morgantini, Vice-President

Mia De Vits, Quaestor

Jo Leinen, Chair of the Committee on Constitutional Affairs

Richard Howitt, Vice-Chair of the Subcommittee on Human Rights

Guisto Catania, Vice-Chair of the Committee on Civil Liberties, Justice and Home Affairs

Willy Meyer Pleite, Vice-Chair of the Delegation to the Euro-Latin American Parliamentary Assembly

Edite Estrela, Vice-Chair of the Committee on Women's Rights and Gender Equality

Zita Gurmai, Vice-Chair of the Committee on Women's Rights and Gender Equality

Raül Romeva i Rueda, Vice-Chair of the Committee on Women's Rights and Gender Equality

Eva-Britt Svensson, Vice-Chair of the Committee on Women's Rights and Gender Equality

Ignasi Guardans Cambó, Vice-Chair of the Committee of International Trade

Adamos Adamou, Vittorio Agnoletto, Maria Badia, Sharon Bowles; Andre Brie, Wolfgang Bulfon, Philippe Busquin, Marie-Arlette Carlotti, Carlos Carnero, Richard Corbett, Gabriela Cretu, Brian Crowley, Bairbre de Brun, Elly de Groen-Kouwenhoven, Véronique De Keyser, Panayiotis Demetriou, Alexandra Dobolyi, Andrew Duff, Said El Khadraoui, Jill Evans, Robert Evans, Emanuel Jardim Fernandes, Ilda Figueiredo, Vicente Miguel Garcés, Martí Grau, Pedro Guerreiro, Umberto Guidoni, Richard Howitt; Alain Hutchinson, Sylvia-Yvonne Kaufmann, Glenys Kinnock, Jean Lambert; Caroline Lucas, Elizabeth Lynne, Jamila Madeira, David Martin, Marios Matsakis, Linda McAvan; Arlene McCarthy, Emilio Menéndez, Rosa Miguélez, Claude Moraes, Eluned Morgan, Riitta Myller, Raimon Obiols, Athanasios Pafilis, Miloslav Ransdorf, Teresa Riera Madurell, Eoin Ryan, Aloyzas Sakalas, María Isabel Salinas, Esko Seppänen, Peter Skinner, Bart Staes, Catherine Stihler, Gary Titley, Georgios Toussas, Kyriacos

Triantaphyllides, Feleknas Uca, Anne Van Lancker, Sarah Wagenknecht, Francis Wurtz

**Legislators from the National Congress of Brazil**

***Senators***

Sen. Paulo Paim, Chair of the Commission on Human Rights and Participatory Legislation, former First Vice-President of the Senate

Sen. Flávio Arns, Sen. Inácio Arruda, Sen. Eduardo Azeredo, Sen. José Nery Azevedo, Sen. Cristovam Buarque, Sen. Renato Casagrande, Sen. Fátima Cleide, Sen. Geraldo M. Júnior, Sen. João Pedro, Sen. Ideli Salvatti, Sen. Roseana Sarney, Sen. Marina Silva, Sen. Serys Slhessarenko, Sen. Eduardo Suplicy, Sen. Antonio C. Valadares, Sen. Sérgio Zambiasi.

***Deputies***

Dep. Marcondes Gadelha, Chair of the Commission on Foreign Relations and National Defense

Dep. Daniel Almeida, Chair of the Special Commission on Amnesty Law

Dep. Carlos Abicalil, Dep. Henrique Afonso, Dep. Beto Albuquerque, Dep. Chico Alencar, Dep. Marcelo Almeida, Dep. Perpétua Almeida, Dep. Ribamar Alves, Dep. Severiano Alves,

Dep. Jovair Arantes, Dep. Bernardo Ariston, Dep. Ana Arraes, Dep. Eduardo Barbosa, Dep. Jackson Barreto, Dep. Arnon Bezerra, Dep. Fátima Bezerra, Dep. Ricardo Berzoini, Dep. Antônio Carlos Biffi, Dep. Jorge Bittar, Dep. Edigar Mão Branca, Dep. Alex Canziani, Dep. Janete Capiberibe, Dep. Givaldo Carimbão, Dep. Arlindo Chinaglia, Dep. Antonio Cruz, Dep. João Paulo Cunha, Dep. Lídice da Mata, Dep. Chico D'angelo, Dep. Manuela D'ávila, Dep. Fernando de Fabinho, Dep. André de Paula, Dep. Arnaldo Faria de Sá, Dep. Flávio Dino, Dep. Cida Diogo, Dep. Luiza Erundina, Dep. Pedro Eugênio, Dep. Fernando Ferro, Dep. Dalva Figueiredo, Dep. Fernando Coelho Filho, Dep. Mendes Ribeiro Filho, Dep. Valadares Filho, Dep. Henrique Fontana, Dep. Márcio França, Dep. Gustavo Fruet, Dep. José Genoíno, Dep. Luciana Genro, Dep. Zé Geraldo, Dep. Vanessa Grazziotin, Dep. Ciro Gomes, Dep. Eduardo Gomes, Dep. Vadão Gomes, Dep. José Guimarães, Dep. Maria Helena, Dep. Ariosto Holanda, Dep. Manoel Junior, Dep. Osmar Júnior, Dep. Jorge Khoury, Dep. Carlos Alberto Leréia, Dep. Maurício Q. Lessa, Dep. Átila Lins, Dep. Átila Lira, Dep. Chico Lopes, Dep. Iriny Lopes, Dep. Geraldo Magela, Dep. Marina Maggessi, Dep. Carlos Humberto Mannato, Dep. Nelson Marquezelli, Dep. Colbert Martins, Dep. Fernando Melo, Dep. José Mentor, Dep. Moacir Micheletto, Dep. Evandro Milhomen, Dep. Armando Monteiro, Dep. Leonardo Monteiro, Dep. Jô Moraes, Dep. Laurez Moreira, Dep. Nilson Mourão, Dep. Mauro Nazif, Dep. Brizola Neto, Dep. Ciro

Nogueira, Dep. Rubens Otoni, Dep. Antonio Palocci, Dep. Antonio C. Pannunzio, Dep. Hermes Parcianello, Dep. Gonzaga Patriota, Dep. Ciro Pedrosa, Dep. Fátima Pelaes, Dep. Nelson Pellegrino, Dep. Janete Rocha Pietá, Dep. Walter Pinheiro, Dep. Nilson Pinto, Dep. Alice Portugal, Dep. Giovanni Queiroz, Dep. Leonardo Quintão, Dep. Aldo Rebelo, Dep. Osvaldo Reis, Dep. José Rocha, Dep. Paulo Rocha, Dep. Sandra Rosado, Dep. Maria do Rosário, Dep. Dr. Rosinha (Florisvaldo Fier), Dep. Carlos Santana, Dep. Alexandre Santos, Dep. Marcelo Serafim, Dep. Alexandre Silveira, Dep. Paulo Renato Souza, Dep. Hidekazu Takayama, Dep. Jilmar Tatto, Dep. Miro Teixeira, Dep. Antonio C. M. Thame, Dep. Nelson Trad, Dep. Ricardo Tripoli, Dep. Dr. Marco Aurélio Ubiali, Dep. Cândido Vaccarezza, Dep. Ivan Valente, Dep. Edmilson Valentim, Dep. Eduardo Valverde, Dep. Angelo Vanhoni, Dep. Pepe Vargas, Dep. José S. Vasconcellos, Dep. Arnaldo Vianna, Dep. Vicentinho (Vicente Paulo da Silva), Dep. Gastão Vieira, Dep. Claudio Antonio Vignatti, Dep. Leandro Vilela, Dep. Leonardo Vilela, Dep. Carlos Willian, Dep. Pedro Wilson, Dep. Eudes Xavier, Dep. Carlos Zarattini.

**Legislators from Belgium**

**Belgium Federal Parliament**

Rep. Dirk Van der Maelen (former Vice-President of the Chamber of Representatives,

current Vice-President of the Commission on Foreign Policy, former Member of the Council of Europe)

Rep. Wouter De Vriendt, Rep. David Geerts, Rep. Katrien Partyka, Rep. Ludwig Vandenhove, Sen. Sfia Bouarfa; Sen. Geert Lambert, former Sen. Pierre Galand.

**Flemish Parliament**

Marcel Logist, Kurt De Loor, Sven Gatz, Bart Van Malderen, André Van Nieuwkerke.

**Legislators from the National Congress of Chile**

***Senators***

Sen. Carlos Ominami, former Vice-President of the Senate

Sen. Jaime Gazmuri, President of the Foreign Relations Commission

Sen. Nelson Ávila; Sen. Alejandro Navarro.

***Deputies***

Dep. Sergio Aguiló, former President of the Human Rights Commission

Dep. Alejandro Sule, Dep. Fernando Meza, Dep. Denise Pascal Allende, Dep. Marco

Enríquez-Ominami, Dep. Fidel Espinoza, Dep. Antonio Leal, Dep. Marco Antonio Núñez.

**Legislators from the Parliament of Germany (Bundestag)**

Wolfgang Neškovi, Deputy Chairman of the Committee on Legal Affairs in the Bundestag; former Judge in the Federal Court of Justice

Klaus Brandner, Parliamentary Secretary of State

Monika Griefahn, Dr. Gregor Gysi, Lothar Mark, Prof. Dr. Norman Paech, Florian Pronold, Christoph Strässer.

**Legislators from the Parliament of Ireland**

***Senators***

Sen. Dominic Hannigan, Sen. David Patrick Bernard Norris, Sen. Ivana Bacik, Sen. Deirdre de Burca, Sen. Pearse Doherty, Sen. Paschal Donohoe, Sen. Alan Kelly, Sen. Michael McCarthy, Sen. Phil Prendergast, Sen. Brendan Ryan, Sen. Alex White.

***Deputies***

T.D. Tom Kitt, former Government Chief Whip and former Minister of State at the Department of Foreign Affairs

T.D. John Browne, former Minister of State

T.D. Noel Treacy, former Minister of State

T.D. Brendan Howlin, Deputy Speaker of the Irish Houses of Parliament

T.D. Emmet Stagg, Chief Whip of Labour Party

T.D. Michael D. Higgins, 1992 recipient of the Sean MacBride Peace Prize of the International Peace Bureau, adjunct professor at the Irish Centre for Human Rights

T.D. Aengus Ó Snodaigh, Chief Whip – Sinn Fein; spokesperson on Justice, Equality & Human Rights, Housing, International Affairs for Sinn Fein

T.D. Ciaran Cuffe, spokesperson on Justice, Equality & Law Reform and Foreign Affairs for the Green Party

T.D. Charles Flanagan, spokesperson on Justice, Equality and Law Reform for the Fine Gael Party

T.D. Chris Andrews, T.D. Thomas Broughan, T.D. Joan Burton, T.D. Joe Costello, T.D. Martin Ferris, T.D. Eamon Gilmore, T.D. Ciarán Lynch, T.D. Kathleen Lynch, T.D. Finian McGrath, T.D. Mattie McGrath, T.D. Liz McManus, T.D. Arthur Morgan, T.D. John O'Mahony, T.D. Brian O'Shea, T.D. Caoimhghín Ó Caoláin, T.D. Willie Penrose, T.D. Ruarí Quinn, T.D. Pat Rabbitte, T.D. Sean Sherlock, T.D. Róisín Shortall, T.D. Jan O'Sullivan, T.D. Joanna Tuffy, T.D. Mary Upton, T.D. Jack Wall, T.D. Mary A. White.

**Legislators from the National Diet of Japan**

***Members of the House of Councillors***

Former Sen. Osamu Yatabe, former Director of the Foreign Affairs Committee of the House of Councillors

Sen. Keiko Itokazu, Sen. Masamichi Kondo, Sen. Seiji Mataichi, former Sen. Masako Owaki.

***Members of the House of Representatives***

Former Rep. Takako Doi, former Speaker of the House of Representatives and former Board Member of the Committee of Foreign Affairs

Rep. Tomoko Abe, Rep. Fumihiro Himori, Rep. Nobuto Hosaka, Rep. Tetsuo Kanno, Rep. Kantoku Teruya.

**Legislators from the House of Deputies of the Congress of the United Mexican States**

Dep. Javier González Garza, Member to the Council of Europe, President of the Political Coordination Group of the House of Deputies and the Coordinator of the Partido de la Revolución Democrática in the Congress

Dep. Raymundo Cárdenas Hernández, President of the Commission on Constitutional Issues

Dep. Alberto López Rojas, Member – Human Rights Commission

Dep. José Antonio Almazán González, Member – Human Rights Commission

Dep. Rutilio Cruz Escandón Cadenas, Member – Human Rights Commission

Dep. Sonia Nohelia Ibarra Franquez, Member – Human Rights Commission

Dep. José Jacques Medina, Member – Human Rights Commission

Dep. Jesús Humberto Zazueta Aguilar, Member – Human Rights Commission

Dep. Cuauhtémoc Sandoval Ramírez, Secretary – Foreign Relations Commission

Dep. Mario Enrique del Toro, Secretary – Foreign Relations Commission

Dep. Antonio Soto Sánchez, Member – Foreign Relations Commission

Dep. Miguel Ángel Peña Sánchez, Member – Foreign Relations Commission

Dep. Aleida Alavez Ruiz, Dep. Humberto Willfredo Alonso Razo, Dep. Carlos Altamirano Toledo, Dep. Silbestre Álvarez Ramon, Dep. Alberto Amaro Corona, Dep. Irene Aragón Castillo, Dep. Juan Dario Arreola Calderón, Dep. Armando Barreiro Pérez, Dep. Valentina Valia Batres Guadarrama, Dep. Alliet Mariana Bautista Bravo, Dep. Itzcóatl Tonatiuh Bravo Padilla, Dep. Modesto Brito González, Dep.

Amador Campos Aburto, Dep. Cuitlahuac Condado Escamilla, Dep. Claudia Lilia Cruz Santiago, Dep. Moisés Felix Dagdug Lützow, Dep. Juan Hugo de la Rosa García, Dep. Joaquín Conrado de los Santos Molina, Dep. Daniel Dehesa Mora, Dep. Adriana Díaz Contreras, Dep. Jaime Espejel Lazcano, Dep. Mónica Fernández Balboa, Dep. César Flores Maldonado, Dep. Guadalupe Socorro Flores Salazar, Dep. Fernel Arturo Gálvez Rodríguez, Dep. Juan Nicasio Guerro Ochoa, Dep. José Luis Gutiérrez Calzadilla, Dep. Sergio Hernández Hernández, Dep. María Eugenia Jiménez Valenzuela, Dep. Pedro Landero López, Dep. Juan Darío Lemarroy Martínez, Dep. Ana Yurixi Leyva Piñón, Dep. Víctor Manuel Lizárraga Peraza, Dep. Santiago López Becerra, Dep. Alejandro Martínez Hernández, Dep. Carlos Roberto Martínez Martínez, Dep. Hugo Eduardo Martínez Padilla, Dep. Octavio Martínez Vargas, Dep. Camerino Eleazar Márquez Madrid, Dep. Marcos Matías Alonso, Dep. Holly Matus Toledo, Dep. Fernando Enrique Mayans Canabal, Dep. David Mendoza Arellano, Dep. Efraín Morales Sánchez, Dep. Carlos Orsoe Morales Vázquez, Dep. Héctor Narcía Álvarez, Dep. Concepción Ojedo Hernández, Dep. Juan Adolfo Orcí Martínez, Dep. Antonio Ortega Martínez, Dep. Rosario Ignacia Ortiz Magallón, Dep. Ramón Felix Pacheco Llanes, Dep. Isidro Pedaza Chávez, Dep. Adrián Pedrozo Castillo, Dep. Raciel Pérez Cruz, Dep. Celso David Pulido Santiago, Dep. Rafael Plácido Ramos Becerril, Dep. Martin Ramos Castellanos, Dep. Gloria

Rasgado Corsi, Dep. Raúl Ríos Gamboa, Dep. Odilón Romero Gutiérrez, Dep. Salvador Ruiz Sánchez, Dep. José Antonio Saavedra Coronel, Dep. Juan Manuel San Martín Hernández, Dep. Alejandro Sánchez Camacho, Dep. David Sánchez Camacho, Dep. Eva Angelina Sánchez Valdéz, Dep. Francisco Javier Santos Arreola, Dep. Miguel Ángel Solares Chávez, Dep. Rosa Elva Soriano Sánchez, Dep. José Alfonso Suárez del Real y Aguilera, Dep. Daniel Trejo García, Dep. Pablo Trejo Pérez, Dep. Martín Zepeda Hernández.

**Legislators from the Scottish Parliament**

Malcolm Chisholm, Former Scottish Executive Minister

Jackie Baillie, Bill Butler, Angela Constance (Member - Justice Committee), Marlyn Glen, Christopher Harvie, Hugh Henry, Jamie Hepburn, Bill Kidd, Michael Matheson, John Park, Elaine Smith, Sandra White, Dr. Bill Wilson.

**Legislators from the Parliament of the United Kingdom**

***House of Commons***

Ann Cryer, former Member - Council of Europe

John Cummings, former Member- Council of Europe

Rt. Hon. Peter Hain, former Foreign and Commonwealth Office Minister

Rt. Hon. Clare Short, former Secretary of State for International Development

Peter Bottomley, former Minister

Peter Kilfoyle, former Minister - Ministry of Defence

Rt. Hon. Sir Gerald Kaufman, former Government Minister

Rt. Hon. Richard Caborn, former Minister

Angela E. Smith, former Minister

Gavin Strang, former Minister for Transport

Rt. Hon. Nigel Keith Anthony Standish Vaz, former Minister for Europe in the Foreign and Commonwealth Office

Jenny Willott, former Shadow Minister for Justice

Jeremy Corbyn, Vice-Chair - APPG on Human Rights

Andrew Dismore, Chair - Joint Human Rights Committee

Julie Morgan, Member - Justice Committee

Dr. Nick Palmer, Member - Justice Committee

Linda Riordan, Member - Justice Committee

Sandra Osborne, Member - Foreign Affairs Committee

Ken Purchase, Member - Foreign Affairs Committee

Michael Clapham, Member - APPG on Human Rights

Virendra Sharma, Member - Joint Committee on Human Rights and Member - Justice Committee

David Anderson, John Austin, Celia Barlow, Colin Burgon, David Burrow, Ronnie Campbell, Martin Caton, David Chaytor, Katy Clark, David Clelland, Harry Cohen, Frank Cook, Michael Connarty, Jim Cousins, David Crausby, Jon Cruddas, Ian Davidson, Dai Davies, Janet Dean, Jim Devine, Jim Dobbin, David Drew, Bill Etherington, Hwyel Francis; George Galloway, Neil Gerrard, Dr. Ian Gibson, Michelle Gildernew, Andrew Gwynne, Dai Havard, David Heyes, Kate Hoey, Paul Holmes, Kelvin Hopkins, Jim Hood, Rt. Hon. George Howarth, Dr. Brian Iddon, Lynne Jones, David Kidney, Ashok Kumar, Mark Lazarowicz, John Leech, David Lepper, Tony Lloyd (Chair - Parliamentary Labour Party), Andy Love, Rob Marris, Robert Marshall-Andrews QC, Chris McCafferty, John McDonnell, Jim McGovern, Austin Mitchell, Anne Moffat, Conor Murphy, Adam Price, Gwyn Prosser, Jim Sheridan, Marsha Singh, Alan Simpson, Dennis Skinner, Ian Stewart, Rt. Hon. Graham Stringer, David Taylor, Emily Thornberry, Mark Todd, Jon Trickett, Dr. Desmond Turner, Robert Wareing, Mike Wood, Derek Wyatt.

**House of Lords**

Baroness Northover, Spokesperson for International Development in the House of Lords

Lord Rea of the House of Lords.

**Former Ministers and Members of Parliament**

Tony Benn, former Cabinet Minister and Member of Parliament

Rt. Hon. Brian Wilson, former Government Minister and Member of Parliament

Kenneth Livingstone, former Mayor of London and Member of Parliament

John Biggs, Member of London Assembly

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Other Authorities

## INTEREST OF AMICI CURIAE

Amici Curiae[1] are the Senate of Mexico, the National Assembly of Panama, the former United Nations High Commissioner on Human Rights, and legislators from the parliaments in nine of the oldest and largest democracies in the world and from the European Parliament. They have taken the unusual step of filing a brief with this Court because of the extraordinary human rights concerns that have been raised in the international arena by this case, given the centrality of the guarantee of trial by an impartial jury in any fair system of criminal justice. We describe their interests further, country by country.

### MEXICO

On February 10, 2009, the Senate of the United Mexican States took the extraordinary step of voting to appear as a body as amicus curiae before this Court, to argue against the human rights violations of the five Cuban petitioners and to urge the Court to order a new trial at a location other than Miami, Florida. The Resolution of the Mexican Senate is set forth in the Appendix to this brief in an English translation. The Resolution notes that the United States has ignored the decision of the

---

[1] This brief is filed with the written consent of all parties. No counsel for a party authored the brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief.

Working Group on Arbitrary Detentions of the Human Rights Commission of the United Nations.

Earlier, on September 28, 2006, the Senate of Mexico, in plenary session, had approved the resolution of the Working Group for Arbitrary Detentions of the Human Rights Commission of the United Nations with respect to the case of the Cuban Five and urged the Government of the United States to remedy the situation. In July 2008, the matter was presented to the Permanent Committee of the LX Legislature and referred to the North American Foreign Relations Commission for further proceedings. That Commission recommended that the Senate pass a new declaration in support of the human rights of the petitioners, based on the fact that they had not received a fair trial, as documented by the Working Group of the U.N. Human Rights Commission. As a result on October 7, 2008, the Senate again formally urged the United States to consider the Working Group decision and to respect the due process rights of these defendants, reiterated its support for the human rights of the Cuban Five, and authorized the transmittal of its resolution to the Governments of the United States and the Republic of Cuba and to all international organizations that have come out against the violation of human rights of the Cuban Five.

The brief is also signed by eighty-five Deputies of the House of Deputies of the United Mexican States (Cámara de Diputados de los Estados Unidos Mexicanos), including a Member of the Council of Europe, President of the Political Coordination Group of the House of Deputies and the Coordinator of the Partido de la Revolución Democrática in the Congress (Javier González Garza); the President of the

Commission on Constitutional Issues (Raymundo Cárdenas Hernández); the presidents of four other commissions; six members of the Human Rights Commission; and two secretaries and two members of the Foreign Relations Commission.

Mexican parliamentarians, jurists, and professors of law, human rights advocates, and representatives of other sectors of Mexican civil society share a common concern regarding the impact of the Cuban Five case on international law in general and international human rights law in particular, and more specifically on the complex web of relations between the United States, Cuba, and the United Mexican States (hereinafter Mexico). Mexico is the United States' second largest trade partner, and has been defined by U.S. policy as a strategic ally in regional efforts to combat terrorism, drug trafficking, and irregular migration, and in the promotion of a common hemispheric approach to issues regarding the rule of law and human rights. Mexico is the most populous Spanish-speaking country in the world, and the third most populous country in the Western Hemisphere. This gives it diplomatic weight in the hemisphere as a leader of Latin American countries, and in the world as a leader of developing countries.

The United States and Mexico have developed a wide variety of mechanisms for consultation and cooperation regarding the range of issues in which they interact. These include (1) periodic presidential meetings; (2) annual cabinet-level Binational Commission meetings with ten Working Groups on major issues; (3) annual meetings of congressional delegations in the Mexico-United States Interparliamentary Group Conferences; (4) NAFTA-

related trilateral trade meetings under various groups; (5) regular meetings of the Attorneys General and the Senior Law Enforcement Plenary to deal with law enforcement and narcotics matters; (6) a wide variety of bilateral border area cooperation meetings dealing with environment, health, transportation, and border crossing issues; and (7) trilateral meetings under the "Security and Prosperity Partnership (SPP) of North America" launched in Waco, Texas, in March 2005. All of this underlies amici's concerns regarding the impact of these cases on the intertwined juridical landscape shared by the United States and Mexico as a result of their convergent, increasingly interdependent status as state parties to key relevant aspects of the human rights system of the United Nations, and its regional equivalent in the Western Hemisphere, the Inter-American human rights system of the Organization of American States (OAS).

Mexico and issues involving Mexican citizens in Mexico as well as those living in the U.S., and the complex evolving convergences between the U.S. and Mexican legal systems and the relationship of both to international law and internationally recognized human rights standards have become increasingly evident in U.S. Supreme Court jurisprudence. Examples include: *Verdugo Urquidez v. United States*, 494 U.S. 259 (1990); *Alvarez Machain v. United States*, 504 U.S. 655 (1992); *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004) (three related cases arising from the activities of the U.S. Drug Enforcement Agency on Mexican territory, which gave rise to arguable violations of international law) and most recently *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (enforceability in U.S. state courts of rights to

consular assistance under Article 36 of the Vienna Convention on Consular Relations in the context of Mexican citizen sentenced to death).

**PANAMA**

The National Assembly of Panama has taken the extraordinary step of appearing before this Court as amicus curiae to urge the Court to grant the petition for certiorari. Dr. Raúl Rodríguez Arauz, President of the National Assembly, the unicameral parliament of Panama, has been authorized to file this amicus brief to demonstrate the support of the National Assembly of Panama for the proposition that the Cuban Five have been imprisoned arbitrarily and illegally, as found by the Working Group on Arbitrary Detention of the U.N. Human Rights Commission.

The National Assembly has spoken on this matter on numerous occasions, including through Resolution No. 001 of 03 October 2006 of the Committee on Foreign Affairs and The Special Declaration Of October 26, 2006, of the Inter-parliamentary Friendship Group of Panama with Cuba, where it stated "we adhere to the world growing outcry for the five, in order for them to have the right to a fair trial, an impartial jury and to ensure compliance with due process," and similar resolutions on October 20, 2007, by the Committee on Foreign Affairs, on October 10, 2007, by the Inter-parliamentary Friendship Group of Panama with Cuba, and on October 22, 2008, by the Foreign Relations Committee.

## MARY ROBINSON

Mary Robinson was the United Nations High Commissioner for Human Rights from 1997 to 2002 and the President of Ireland from 1992 to 1997. As a scholar, a barrister and an elected political leader, she has devoted her life's work to human rights and is one of the foremost advocates for human rights in the world. In 2004 she received Amnesty International's Ambassador of Conscience Award for her work in promoting human rights.

## EUROPEAN PARLIAMENT

This brief is joined by seventy-seven Members of the European Parliament (MEPs). They include two former Presidents (Josep Borrell Fontelles and Enrique Barón Crespo); three current Vice-Presidents (Miguel Angel Martinez, Rodi Kratsa-Tsagaropoulou, and Luisa Morgantini); a quaestor (Mia De Vits); the Chair of the Committee on Constitutional Affairs (Jo Leinen); Vice-Chair of the Subcommittee on Human Rights (Richard Howitt); Vice-Chair of the Committee on Civil Liberties, Justice and Home Affairs (Guisto Catania); Vice-Chair of the Delegation to the Euro-Latin American Parliamentary Assembly (Willy Meyer Pleite); Vice-Chairs of the Committee on Women's Rights and Gender Equality (Edite Estrela, Zita Gurmai, Raul Romeva i Rueda and Eva-Britt Svensson); Vice-Chair of the Committee of International Trade (Ignasi Guardans Cambó); and the chairs and vice-chairs of 19 other committees and European Parliament delegations to other countries and parliamentary bodies.

The European Parliament is the only directly elected parliamentary institution of the European

Union. It has been directly elected every five years by universal suffrage since 1979.

The Parliament is composed of 785 MEPs who serve one of the largest democratic electorates in the world and the largest transnational democratic electorate in the world (342 million eligible voters in 2004). MEPs act through seven different political groups representing the main ideological trends coexisting in Europe.

As an elected body, the Parliament not only drafts proposals addressing the functioning of the European Union, but also deals with worldwide problems and concerns, including violations of human rights wherever they occur, urging the authorities of the countries concerned to put an end to those violations. Respect for human rights and fundamental freedoms as well as for international humanitarian law are cornerstones of EU foreign policy. That includes the right of detainees to the presumption of innocence, as well as the right to have a fair trial and to exhaust all foreseen legal procedures for this purpose.

A significant group of MEPs, representing a large political and ideological spectrum of the European Parliament, has been for a long time concerned with the case of the Cuban Five as part of their commitment to the international protection of human rights. They have taken note with interest and concern of the opinions given by Amnesty International and of the decision of the Working Group on Arbitrary Detentions of the United Nations on this case. They have also been extremely concerned by the collateral effects on the Cuban Five's close relatives, particularly the wives of two of

them –Gerardo Hernández and René González— who have been refused their right to visit their husbands in prison. A Written Declaration was signed in 2007 by 187 MEPs from all the political groups, addressing the rights of these women.

Considering the international relevance and responsibility of the United States of America in upholding human rights, the signing MEPs, who represent different political groups in the European Parliament, and who enjoy leading positions in different Committees and Delegations, as well as in the highest bodies of this Chamber, ask the U.S. Supreme Court to take the case of the Cuban Five for consideration.

**BELGIUM**

This brief is joined by five Representatives and two current and one former Senator of the Belgium Federal Parliament (Federaal Parlement van België), including the Chamber of Representatives' former Vice-President, its current Vice-President of the Commission on Foreign Policy and a former Member of the Council of Europe (Dirk Van der Maelen). The brief is also joined by five Members of the Flemish Parliament (Vlaams Parlement).

**BRAZIL**

The brief is joined by seventeen Senators and one hundred, thirty-one Deputies of the National Congress of Brazil (Congresso Nacional do Basil), including the Chair of the Commission on Human Rights and Participatory Legislation in the Senate and former First Vice-President of the Senate (Paulo

Paim); the Chair of the Commission on Foreign Relations and National Defense (Marcondes Gadelha); and the Chair of the Special Commission on Amnesty Law (Daniel Almeida) in the House of Deputies as well as the chairs of twenty-two other Standing, Special, External and Joint Commissions and Working Groups in the Senate and House of Deputies, from fourteen different political parties. Brazil is the fourth most populous democracy in the world and its geographic area covers nearly half of the continent of South America.

Members of the National Congress of Brazil have expressed their concerns for the denial of the fundamental human rights of the Cuban Five formally on three occasions. In August of 2006, the Commission of Human Rights of the Brazilian House of Representatives, in conjunction with the Brazil-Cuba Parliamentary Group, passed a "motion of condemnation against the illegal and arbitrary imprisonment of Five Cubans in the United States." Aldo Rebelo, the President of the Chamber of Deputies, by order of Deputy Luiz Eduardo Greenhalgh, the President of the Committee on Human Rights and Minorities, sent this motion to Congressman Dennis Hastert, Speaker of the U.S. House of Representatives through Clifford Sobel, U.S. Ambassador to Brazil. The motion was based in part on human rights guaranteed by Article 10 of the U.N. Universal Declaration of Human Rights requiring that a person accused criminally be tried by an independent and impartial tribunal. Finally, the Committee on Human Rights and Minorities and the Brazil-Cuba Parliamentary Group passed a third motion on April 10, 2007, again in defense of the

human rights of the Five Cuban prisoners based on internationally recognized principles.

These parliamentary actions reflect the concern of Brazilian civil society with the human rights of the petitioners, as reflected in the statement supporting them passed at the 10th National Conference on Human Rights of Brazil, with the participation of 700 Brazilian public and civil society organizations.

The Order of Attorneys of Brazil, the Brazilian Bar Association with almost 700,000 lawyer members, is joining a separate amicus brief in support of the petition for certiorari. One of the guiding principles of the OAB is Article 10 of the Universal Declaration of Human Rights, discussed *infra*, providing a right to an impartial tribunal, a right it believes was violated in Petitioners' case.

**CHILE**

Four Senators and eight Deputies of the National Congress of Chile (Congreso Nacional de Chile), including the former Vice-President of the Senate (Senator Carlos Ominami); the current President of the Senate's Foreign Relations Commission (Senator Jaime Gazmuri); and the former President of the Human Rights Commission of the House of Deputies (Dep. Sergio Aguiló), join in this brief as amici.

The Human Rights Commission has requested Michelle Bachelet, the President of the Republic of Chile, to express to the Government of the United States its concern for the Five Cuban prisoners.

## GERMANY

Eight Members of the German Parliament (Bundestag), including the Deputy Chairman of the Committee on Legal Affairs in the Bundestag and former Judge in the Federal Court of Justice (Wolfgang Nešković) and a Parliamentary Secretary of State (Klaus Brandner) join this brief because of their concern for the human rights of the Cuban Five. This case has provoked considerable concern among the members of the Bundestag, who have written formal letters on July 1, 2004, June 16, 2006 and September 7, 2006, to the Members of the United States Congress to express their view that the conviction and sentences of the petitioners violated their fundamental rights to a fair and impartial trial. The deputies rely, in part, on the decision of the Working Group on Arbitrary Detention of the Commission on Human Rights of the United Nations. Fifty-three representatives, including the Bundestag Vice-president Petra Pau, signed the September 7, 2006 letter, requesting U.S. legislators to use their resources to support a new trial for the petitioners. The earlier letter of June 16, 2006, was signed by twelve representatives, including the Chairwoman of Parliamentary Commission on Human Rights and Humanitarian Aid, Professor Herta Daubler-Gmelin and the ex-Secretary General of the German Social Democratic Party (SPD), Klaus Uwe Benneter.

## IRELAND

This brief is joined by eleven Senators and thirty-three Deputies of the House of Representatives of the Parliament of Ireland (Tithe an Oireachtais), including three former Ministers of State, one of

them the former Government Chief Whip (Tom Kitt, John Browne and Noel Treacy); the Deputy Speaker of the Irish Houses of Parliament (Brendan Howlin); the Chief Whips of the Labour and Sinn Fein Parties (Emmet Stagg and Aengus Ó Snodaigh); the spokesperson on Justice, Equality & Law Reform and Foreign Affairs for the Green Party (Ciaran Cuffe); the spokesperson on Justice, Equality & Human Rights, Housing, International Affairs for the Sinn Fein Party (Aengus Ó Snodaigh); and the spokesperson on Justice, Equality and Law Reform for the Fine Gael Party (Charles Flanagan).

The Republic of Ireland is a parliamentary democracy governed by the Oireachtas which consists of the President and two houses, the Dáil Éireann and the Seanad Éireann. This amicus brief evidences the fact that since 2002 Irish parliamentarians have been consistently outspoken about the case of the Cuban Five. Most recently, two prominent Cabinet members, John Gormley, Minister for the Environment from the Green Party; and Barry Andrews, Minister for Children from Fianna Fáil, signed letters on their behalf along with 56 members of the Dáil Éireann, including all 20 Members of the Labour Party and all 4 Members of Sinn Fein.

On September 12, 2008, the 10th anniversary of the arrest of the Five Cubans, five members of the Oireachtas published a letter to the editor in the *Irish Independent* newspaper, concluding that the legal process in the case "falls short of the norms of international justice and appears to display evidence of political interference and anti-Cuban prejudice."

In February of 2006, 49 members of the Irish Parliament, including 8 senators, requested the release of the Five in a letter addressed to Attorney

General Alberto Gonzales, following an original letter to the Attorney General in September of 2005, in which 50 members of the Irish Parliament from various political parties had called for their release. In November 2003, a petition calling for the release of the Five and a new trial was signed by 51 members of the Irish Parliament including 26 members of Ireland's Labour Party. Emmet Stagg, Labour Party Whip, signed on behalf of all Labour Party T.D.s and Senators.

**JAPAN**

This brief is joined by three current and two former Members of the House of Councillors and Five current and one former Representatives of the House of Representatives of the National Diet of Japan, including the former Speaker of the House of Representatives and Board Member of the Committee of Foreign Affairs (Takako Doi) and the former Director of the Foreign Affairs Committee of the House of Councillors (Osuma Yatabe).

**SCOTLAND**

This brief is joined by fourteen Members of the Scottish Parliament, including a former Scottish Executive Minister (Malcolm Chisholm).

**UNITED KINGDOM**

Ninety Members of the House of Commons join this brief to convey the broad interest in the United Kingdom in this case. More than 110 members of the British Parliament signed an open letter to the Attorney General of the United States on February 8, 2006, in support of the petitioners. The signatories included 97 Labour Party MPs, 10 Liberal

Democrats, 1 Conservative, 2 Plaid Cymru and 1 Respect MP. The letter requested the immediate release of the petitioners, known in the U.K. as the Miami Five. It noted that the convictions had been declared illegal by the Working Group on Arbitrary Detentions of the Human Rights Commission of the United Nations. In addition to parliamentarians, Nobel Prize winner Harold Pinter, then London mayor Ken Livingstone and 15 general secretaries of British unions joined 10,000 other English citizens who signed the letter.

This brief is consistent with the Parliamentary Early Day Motion, signed by 112 members of the House of Commons on November 21, 2002. The Early Day Motion #174 found that the nature of the charges, the location of the trial in Miami, Florida in an atmosphere of media and public intimidation, and the length of the sentences subsequently handed down, called into question the propriety of the judicial process. The motion called on the United States Government to support the petition for a retrial and to ensure that it is held in a venue that guarantees a fair trial.

The shared common law legal history and legal culture of the United Kingdom and the United States give the members of Parliament in the United Kingdom a special interest in urging the United States Supreme Court to maintain the highest standards of due process in criminal proceedings.

In addition to the interests expressed by those who have formally joined this brief, the amici note that numerous regional and national parliaments and parliamentary committees, as well as numerous individual parliamentarians, have protested the trial

of the petitioners as fundamentally unfair. They are identified in the Appendix to the Petition at 469A to 488A, and include: the Latin American Parliament;[2] MERCOSUR Parliament;[3] Latin American and Caribbean Parliamentarians;[4] more than 50 members of the 113th General Assembly of the Inter-Parliamentary Union; the Vice-President of the African, Caribbean and Pacific Parliamentary Assembly; 20 Deputies of Argentina's House of Deputies; the Human Rights, Nationality and Citizenship Commission of the Senate of Chile; 35 Members of Belgium's Flemish Parliament; Bolivia's National Senate and House of Deputies; the House of Deputies' Human Rights and Minorities Commission of the Congress of Brazil; the Chairs of 24 Parliamentary Commissions of Brazil's National Congress; 118 Deputies and 14 Senators in Brazil's National Congress; 56 Members of Canada's Parliament; Russia's Parliament (State Duma); 39 Senators of Italy's Senate, including the former Vice-President of the Senate and former Chairperson of the Judiciary Committee; former Speaker of the

---

[2] Established by treaty. The Latin American Parliament consists of representatives elected by the parliaments of 22 Latin American and Caribbean countries: Argentina, Aruba, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Netherlands-Antilles, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.

[3] Established by the Republics of Argentina, Brazil, Paraguay, Uruguay and Venezuela.

[4] Meeting of parliamentarians from fifteen countries in Latin America and the Caribbean as well as parliamentarians from five regional parliaments.

Japanese House of Representatives; Mali's National Assembly; Namibia's National Assembly; the 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; 27 Deputies from Paraguay's House of Deputies; Peru's Congress; 48 Members of Switzerland's Federal Assembly; the Grand National Assembly of Turkey's Friendship with Cuba Parliamentary Group; and Venezuela's National Assembly.

## SUMMARY OF ARGUMENT

The United States Constitution has long served as a model for the rest of the world with respect to the protection of individual rights and the guarantee of due process of law in criminal trials. Yet amici are concerned that the record in this case reflects serious breaches of the rights of the petitioners at their trial in Miami. Petitioners were tried in a community hostile to them and to their government and in an atmosphere of barely repressed violence that made a fair trial before an impartial tribunal impossible.

International norms and the rule of law in all civilized nations require a trial before an impartial tribunal as an essential element of due process. The Working Group of the Human Rights Commission of the United Nations has found that petitioners' trial was in violation of the International Covenant on Civil and Political Rights. The historic mission of the United States Constitution requires this Court to review this case to insure that due process requirements are observed.

## ARGUMENT

### I. MEMBERS OF PARLIAMENTS IN OTHER COUNTRIES ARE LEGITIMATELY CONCERNED ABOUT THE HUMAN RIGHTS ISSUES PRESENTED IN THE PETITION FOR CERTIORARI.

In 1988, a leading British barrister, Anthony Lester, Q.C., writing in the Columbia Law Journal, declared:

> [T]he Bill of Rights is more than an historical inspiration for the creation of charters and institutions dedicated to the protection of liberty. Currently, there is a vigorous overseas trade in the Bill of Rights, in international and constitutional litigation involving norms derived from American constitutional law. When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C., or the State of Washington, or Springfield, Illinois.[5]

The instant case raises major concerns about whether the defendants received a fair trial before an

---

[5] Anthony Lester, "The Overseas Trade in the American Bill of Rights," 88 Colum. L. Rev. 537, 541 (Apr. 1988). For the influence of U.S. law abroad, see also, Richard B. Lillich, "The Constitution and International Human Rights," 83 Am. J. Int'l. L. 851 (Oct. 1989).

impartial jury that go the heart of the guarantee of due process of law. That such serious human rights issues would concern government officials and jurists from other countries is hardly surprising. As has been frequently noted, "the U.S. Constitution has served as a model for human rights guarantees around the world."[6]

The tremendous influence of the United States in the immediate post World War II period has, of course, been tempered by the fact that as constitutionalism has spread, numerous sources of law have developed. Puisne Justice Claire L'Heureux-Dube of the Supreme Court of Canada has said that this has led to a world-wide conversation about human rights:

> [A]s courts look *all* over the world for sources of authority, the process of international influence has changed from *reception* to *dialogue*. Judges no longer simply *receive* the cases of other jurisdictions and then apply them or modify them for their own jurisdiction. Rather, cross-pollination and dialogue between jurisdictions is increasingly occurring. As judgments in different countries increasingly build on each other, mutual respect and dialogue are fostered among appellate courts. Judges around the world look to each other for persuasive authority, rather than some judges being "givers" of law while others are "receivers." Reception is turning to

---

[6] Mark C. Rahdert, "Comparative Constitutional Advocacy," 56 Am. U. L. Rev. 553, 566 (Feb. 2007).

dialogue.[7]

This conversation has developed, in part, because the challenges that many countries face create common legal problems. Prof. Rahdert explains, "In the twenty-first century, economic and technological developments, demographic changes, political, social, cultural, or religious issues, and world events often cross national boundaries, creating the same sorts of constitutional friction in more than one constitutional system."[8] He points out that nations committed to free speech share the problem of "saturated media coverage of high-profile criminal trials."[9] Thus the risks posed by the trial of the Cuba 5 in Miami are not unique to the United States, but might occur in any nation where a free press covered a criminal trial raising controversial issues in a community where passions ran extraordinarily high.

Constitutional problems in the administration of criminal justice are of course of great concern in any civilized society. And trial before an impartial fact finder is universally perceived to be a baseline requirement of constitutional fairness. For example, the European Convention on Human Rights, Art. 6, Para. 1, provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public

---

[7] Claire L'Heureux-Dube, "The Importance Of Dialogue: Globalization And The International Impact Of The Rehnquist Court", 34 Tulsa L.J. 15, 17 (Fall 1998).

[8] Rahdert, 56 Am. U. L. Rev. at 568.

[9] Id.

hearing within a reasonable time by an independent and impartial tribunal established by law."

International law demonstrates that these concerns are of international significance. The Universal Declaration of Human Rights, Article 10, provides: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."[10]

The specific legal issues raised by the petitioners in this case are the subject of international law, in particular the International Covenant on Civil and Political Rights,[11] which the United States has ratified. Article 9 of the International Covenant on Civil and Political Rights provides that, "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Article 14 specifically provides, in pertinent part:

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a

---

[10] Universal Declaration of Human Rights adopted and proclaimed by General Assembly Resolution 217A (III) of December 10, 1948.

[11] 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.

> competent, independent and impartial tribunal established by law.

Pursuant to the International Covenant on Civil and Political Rights, the Working Group of the Human Rights Commission of the United Nations examined the case of the instant petitioners. The Government of the United States was given an opportunity to respond to the complaint that the trial of the defendants had not complied with the guarantees of the International Covenant, and the Government furnished information within its control to the Working Group. Based upon "the climate of bias and prejudice against the accused in Miami" that "helped to portray the accused as guilty from the beginning" and the fact that "one year later [the Government] admitted that Miami was an unsuitable place for a trial as it proved almost impossible to select an impartial jury in a case linked with Cuba," and other factors, the Working Group concluded:

> The deprivation of liberty of Mr. Antonio Herreros Rodriguez, Mr. Fernando Gonzalez Llort, Mr. Gerardo Hernández Nordelo, Mr. Ramón Labaniño Salazar and Mr. René González Schweret is arbitrary, being in contravention of article 14 of the International Covenant on Civil and Political Rights and corresponds to category III of the categories applicable to the examination of the cases submitted to the Working Group.[12]

---

[12] Opinion No. 19/2005 (United States of America), Para. 32, Adopted, May 27, 2005. The Opinion is included in the Appendix to this brief.

This is the first time since it was formed in 1991 that the United Nations Human Rights Commission has condemned a trial in the United States as unfair.

Given the centrality of the guarantee of an impartial tribunal in any legal systems and the significance of the guarantees provided by article 14 of the International Covenant on Civil and Political Rights, amici urge this Court to make an unequivocal statement about the commitment of the United States to this overriding principle of due process of law by accepting this case for review.

## II. THIS COURT SHOULD REVIEW THE EXCEPTIONALLY HIGH BARRIERS TO A CHANGE OF VENUE ERECTED BY THE ELEVENTH CIRCUIT COURT OF APPEALS.

Amici support the argument made by petitioners that the decision of the Eleventh Circuit failed to protect their right to an impartial jury by sustaining the trial court's denials of their repeated motions for a change of venue and for a new trial. Without rehearsing that argument in its entirety, amici would emphasize some concerns of particular significance.

The record more than amply documented the existence in Miami of a large and very active community of people virulently opposed to the current government of Cuba, and the fact that the views of this community had infected public debate and discussion in the wider community to the extent

that virtually no one who lives in Miami could be unaware of or unaffected by them. *United States v. Campa*, 459 F.3d 1121, 1156-1161 (dissenting op. by Birch, J.). As petitioners have argued, the decision by the court below to hold that this evidence was categorically irrelevant to the fair trial claim is indefensible. Such a ruling is particularly inexplicable given that the prejudice against the current Cuban government and its agents was not merely passive, but as petitioners point out, "manifested itself in a pattern of violence directed at those deemed not sufficiently hostile to the Castro regime." (Cert. Pet., 26-27). Moreover, as Judge Birch explained, much of the evidence at trial discussed in detail the clandestine activities "of the various Cuban exile groups and their paramilitary camps that continue to operate in the Miami area," with the result that, "The perception that these groups could harm jurors that rendered a verdict unfavorable to their views was *palpable*." 459 F.3d at 1177 (emphasis added).[13]

The damage caused by this constant reinforcement of the Miami jurors' previous sensibilities about the Cuban émigré community simply was not and could not have been satisfactorily addressed through voir dire questioning in advance of trial. A change of venue was required to remedy the "perfect storm" created by "pervasive community sentiment," "extensive publicity both before and during the trial," prosecutorial misconduct and "the

---

[13] The evidence regarding groups such as Alpha 66, BTTR and others is described in some detail at 459 F.3d 1165-1168.

prospect of violence from an already impassioned and emotional community possessed of firearms and bombs." 459 F.3d at 1179 (dissenting op. by Birch, J.).

Amici are particularly concerned that such a flagrant violation of the right to a trial before an impartial tribunal occurred in a prosecution of foreign nationals in the United States. The international community has a particular stake in protecting the rights of its members who may find themselves accused of serious criminal charges in a foreign country, and in insuring that they are not tried before jurors who run the risk of being terrorized by local purveyors of violence.

It is essential that the highest Court in the land review this case. Citizens of the United States would expect no less if this were occurring elsewhere in the world. The errors in the Eleventh Circuit Court of Appeals decision demand review, and nothing less will constitute an appropriate response to the Opinion of the Working Group of the Human Rights Commission of the United Nations and the extraordinary level of concern this case has generated in the world community. A failure of the Supreme Court to review this matter would not only leave a discreditable decision on the books and the petitioners in prison, but would seriously diminish the role of the United States as a model for other nations with respect to due process of law in criminal cases. The historic mission of the United States Constitution requires more. It requires this Court to grant the petition for certiorari.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael Avery
*Counsel of Record*
Suffolk Law School
120 Tremont Street
Boston, MA 02108
617-573-8551

# APPENDIX

## A. DECISION OF THE WORKING GROUP ON ARBITRARY DETENTIONS OF THE HUMAN RIGHTS COMMISSION OF THE UNITED NATIONS, MAY 27, 2005

UNITED NATIONS

Economic and Social Council
Distr. GENERAL

E/CN.4/2006/7/Add. 1
19 October 2005

ENGLISH

Original: ENGLISH/FRENCH/SPANISH

COMMISSION ON HUMAN RIGHTS
Sixty-second session
Item 11 (b) of the provisional agenda

**CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF TORTURE AND DETENTION**

Opinions adopted by the Working Group on Arbitrary Detention

The present document contains the opinions adopted by the Working Group on Arbitrary Detention at its forty-first, forty-second and forty-third sessions, held in November/December 2004, May 2005 and September 2005, respectively. A table

listing all the opinions adopted by the Working Group and statistical data concerning these opinions are included in the report of the Working Group to the Commission on Human Rights at its sixty-second session (E/CN.4/2006/7).

CONTENTS

* * * *

Adopted on 26 May 2005 OPINION No. 19/2005
(UNITED STATES OF AMERICA)

Communication addressed to the Government of the United States of America on 8 April 2004.

Concerning Mr. Antonio Herreros Rodríguez, Mr. Fernando González Llort, Mr. Gerardo Hernández Nordelo, Mr. Ramón Labaniño Salazar and Mr. René González Schweret.

The State is a party to the International Covenant on Civil and Political Rights.

1. (Same text as paragraph 1 of opinion No. 20/2004.)

2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information in good time.

3. (Same text as paragraph 3 of opinion No. 20/2004.)

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comments.

5. The Working Group considered this case during its fortieth session and decided, in accordance with paragraph 17 (c) of its revised methods of work, to request additional information. It has received responses both from the Government and the source.

6. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the cases, in the context of the allegations made and the response of the Government thereto, as well as the observations by the source.

7. The source informed the Working Group about the following persons:

(a) Mr. Antonio Guerrero Rodriguez, American citizen, born in Miami, Florida, on 16 October 1958, resident of South Florida, a poet and graduate in aerodrome construction engineering of the University of Kiev, Ukraine;

(b) Mr. Fernando González Llort (Rubén Campos), Cuban citizen, born in Havana, on 18 August 1963, resident of Oxford, Florida, a graduate in international political relations of the Higher

Institute of International Relations attached to the Cuban Ministry for Foreign Affairs;

(c) Mr. Gerardo Hernández Nordelo (Manuel Viramontes), Cuban citizen, born in Havana, on 4 June 1965, married to Adriana Pérez O'Connor, a writer and cartoonist who has exhibited in various galleries and published articles in the Cuban press, a graduate in international political relations and resident of Lompoc, Florida;

(d) Mr. Ramón Labanino Salazar (Luis Medina), Cuban citizen, born on 9 June 1963 in Havana, a graduate in economics of the University of Havana and resident of Beaumont, Florida; and

(e) Mr. René González Sehwerert, American citizen, born on 13 August 1956 in Chicago, married to Olga Salanueva, a pilot and flight instructor and resident of Bradford, Florida.

8. It was reported that these five persons were arrested in September 1998 in Florida on charges of spying for the Government of Cuba. They did not offer resistance at the time of their arrest. It was also reported that they were denied the right to bail and were held for 17 months in solitary confinement. During the 33 months they spent in preventive detention, they were unable to communicate among themselves or with their families.

9. In June 2001, these five persons were tried in Miami Dade County. Lawyers for the defendants requested that the trial be conducted in another city in Broward County, because they considered that impartiality could not be guaranteed in Miami. It was reported that several anti-Cuban

Government right-wing organizations are based in that city and that many people there have biased, prejudiced and strongly held feelings against the Government of Cuba. According to the source, these organizations have created in the city such feeling against the Government of Cuba that it is impossible for artists and athletes from Cuba to perform or compete in Miami.

10. The lawyers' request was, however, rejected. The District Attorney opposed the application for a change of venue and argued that Miami has a heterogeneous and non-monolithic population in which the bias and prejudice which could exist in the community could be diffused.

11. According to the source, the trial was conducted in an emotionally charged atmosphere of media and public intimidation and in an environment virulently opposed to the defendants. Unknown individuals appeared in the courthouse with paramilitary-style uniforms. Outside the courtroom, noisy demonstrations were organized by Cuban-American organizations. Relatives of the four persons killed during the incident of 24 February 1996, in which two civilian aircraft were shot down by the Cuban Air Force, gave press conferences on the courthouse steps while jurors were arriving for hearings.

12. Antonio Guerrero Rodriguez was sentenced to life imprisonment plus 10 years; Fernando González Llort was sentenced to 19 years' imprisonment; Gerardo Hernández Nordele was sentenced to two life sentences plus 15 years; Ramón Labanino Salazar was sentenced to life imprisonment

plus 18 years; and René González Sehwerert to 15 years' imprisonment.

13. The Government replied to the source's allegations by informing the Working Group that the FBI had arrested 10 people in September 1998 in connection with their covert activity in the United States on behalf of the Cuban Directorate of Intelligence. Of those 10, 5 admitted guilt, cooperated with the prosecution, were convicted and served their sentences. The other five were convicted by a jury in United States Federal Court in 2001. It was established in an open public trial that three of the five were "illegal officers" of the Directorate of Intelligence.

14. The Government stated that the defence at the trial did not deny the defendants' covert service with the Directorate of Intelligence, but rather attempted to present the defendants' activities as fighting terrorism and protecting Cuba against "counter-revolutionaries". Nearly three months of the seven-month trial were devoted to the presentation of evidence by the defence, including video depositions taken by the defence in Cuba.

15. It is stated that the accused received the full protection of the United States legal system, including counsel, investigators and experts provided at the expense of the United States Government. The jury, chosen following a week-long selection process, reflected Miami's diverse population. The defence attorneys had the opportunity to remove potentially biased jurors, and they used that opportunity to ensure that no Cuban-Americans served on the jury.

16. All five men are now serving their sentences in Federal penitentiaries, held among the

general prison population. They are allowed to receive visits by family members, Cuban Government officials and their lawyers, and they have the same privileges available to the general prison population. They have in fact received numerous, lengthy visits from family members. Sixty visas had been issued for them. The only family members to whom the United States Government has not issued visas are the wives of two of the accused.

17. The Government stated that evidence presented at the trial revealed that one of the wives was a member of the Wasp Network; she was later deported from the United States for engaging in activity related to espionage and was ineligible for return. The other wife was a candidate for training in Cuba to become an intelligence agent when the United States authorities broke up the network. All of their appeals concerning the issuance of visas are pending before the United States Eleventh Circuit Court of Appeals.

18. In a very extensive submission in reply, the source denounces arbitrary acts committed in the course of the trial. It reiterates that the defendants did not enjoy a fair trial, pointing out primarily that they were denied access to a lawyer during the first two days following their arrest and that they were under pressure to confess their guilt. Subsequently, they were kept in solitary confinement during the 17 months preceding the trial.

19. The source alleges that because the case has been declared to fall under the Classified Information Procedures Act (CIPA), all the documents constituting the evidence against the accused persons were classified as secret. Thereby,

the effective exercise of the right to defence was impaired.

20. The source adds that all the documents in the case file seized from the defendants were declared classified, including cooking recipes and family and other papers. Such classification under CIPA allegedly had a negative impact on the right to defence, as the defendants were thereby limited in the choice of their lawyers to lawyers approved by the Government, and both lawyers' and defendants' access to the evidence was limited.

21. It is alleged that before and during the trial, all the evidence in the case file was kept in a room under the court's control, and that the defence lawyers could access this room only after going through a bureaucratic procedure. The defence lawyers were also prohibited from making copies of the documents in evidence and from taking notes about them in order to analyse them. Moreover, the defence lawyers were prevented from taking part in the establishment of the criteria for the selection of evidence, as they were excluded from an ex parte conference between the prosecution and the court in which such criteria were defined.

22. According to the source, during the defence preparatory stage the documents presented as evidence by the Government side were identified with a specific code, which was changed in an arbitrary manner a few days before the start of the trial, damaging the work of defence counsel.

23. The source insisted that holding the trial in an inappropriate place affected the partiality of the jury because the jury members were under considerable pressure from the Miami American-

Cuban community. The source added that only a year after the sentencing of the accused, the same United States Government, in another case where it was itself accused, asked for a change of venue, presenting the argument that Miami was an inappropriate place for a trial because it was almost impossible to empanel an impartial jury for a trial concerning Cuba, given the prevailing strong opinions and feelings over this issue.

24. In accordance with its methods of work, the Working Group decided at its fortieth session to address the Government of the United States and the petitioners on three questions that would facilitate the work of the Group:

(a) How was the Classified Information Proceeding Act (CIPA) applied in this case?

(b) Did the eventual application of the Act affect the case in terms of access to evidence?

(c) If a case is classified as a national security case, what are the criteria for selecting evidence? The Working Group has received information from both the Government and the source on these questions.

25. The Government indicated that CIPA provides for an appellate review of decisions made by the trial court (as in this case) and that CIPA as such is only a procedural statute that neither adds to nor detracts from the substantive rights of the defendant and the discovery of evidence obligations of the Government. Rather, it balances the rights of a criminal defendant with the right of the Government to know in advance of a potential threat, from a criminal prosecution, to its national security. The

CIPA provisions are designed to prevent unnecessary or inadvertent disclosures of classified information and to advise the Government of the national security risk in going forward with proceedings.

26. The source replied that it had never contested the validity of the law, but rather its incorrect enforcement. It states that after collecting over 20,000 pages of documents (non-classified) through the above process, all of which were documents of the defendants, the Government classified each and every page "Top Secret" as if they were secret Government documents. Then the Government invoked the provisions of CIPA, which allowed the Government to restrict the access of the defence to the defence's own documents and thereby control the evidence available at trial.

27. The Working Group must decide, in the light of what precedes, if in this trial there has been an adherence to the international norms of a fair trial. The competence of the Working Group, therefore, does not imply either any pronouncement concerning the guilt of the individuals deprived of their liberty or the validity of the evidence, and even less replacing the Appellate Court that is handling the case. To have full information about the case, the Working Group would have preferred to see the judgement of the Appellate Court; however, since the appeals have been delayed the Working Group cannot postpone any longer the opinion that it has been asked to issue within the terms of its mandate.

28. From the information received, the Working Group observes the following:

(a) Following their arrest, and notwithstanding the fact that the detainees had been

informed of their right to remain silent and have their defence provided by the Government, they were kept in solitary confinement for 17 months, during which communication with their attorneys and access to evidence and, thus, possibilities of an adequate defence were weakened;

(b) As the case was classified as a matter of national security, access by the detainees to the documents that contained evidence was impaired. The Government has not contested the fact that defence lawyers had very limited access to evidence because of this classification, which affected their ability to present counter-evidence. This particular application of the legal provisions of CIPA, as the information available to the Working Group reveals, has also undermined the equal balance between the prosecution and the defence;

(c) The jury for the trial was selected following an examination process in which the defence attorneys had the opportunity, and availed themselves of the procedural tools, to reject potential jurors, and ensured that no Cuban-Americans served on the jury. Nevertheless, the Government has not denied that, even so, the climate of bias and prejudice against the accused in Miami persisted and helped to portray the accused as guilty from the beginning. It was not contested by the Government that one year later it admitted that Miami was an unsuitable place for a trial as it proved almost impossible to select an impartial jury in a case linked with Cuba.

29. The Working Group notes that it arises from the facts and circumstances in which the trial took place and from the nature of the charges and the harsh sentences handed down to the accused that the

trial did not take place in the climate of objectivity and impartiality that is required in order to conform to the standards of a fair trial as defined in article 14 of the International Covenant on Civil and Political Rights, to which the United States of America is a party.

30. This imbalance, taking into account the severe sentences received by the persons under consideration in this case, is incompatible with the standards contained in article 14 of the International Covenant on Civil and Political Rights which guarantee that each person accused of a crime has the right, in full equality, to all the facilities adequately to prepare his/her defence.

31. The Working Group concludes that the three elements enunciated above, combined together, are of such gravity that they confer an arbitrary character on the deprivation of liberty of these five persons.

32. In light of the preceding, the Working Group issues the following opinion:

The deprivation of liberty of Mr. Antonio Herreros Rodríguez, Mr. Fernando González Llort, Mr. Gerardo Hernández Nordelo, Mr. Ramón Labaniño Salazar and Mr. René González Schweret is arbitrary, being in contravention of article 14 of the International Covenant on Civil and Political Rights and corresponds to category III of the categories applicable to the examination of the cases submitted to the Working Group.

33. Having issued this opinion, the Working Group requests the Government to adopt the necessary steps to remedy the situation, in

conformity with the principles stated in the International Covenant on Civil and Political Rights.

## B. RESOLUTION OF THE SENATE OF MEXICO, FEBRUARY 10, 2009 (ENGLISH VERSION)

[SEAL]

Senate of the Republic

LX Legislative Session

MOTION THAT THE SENATE MEMBERS OF THE EXECUTIVE COMMITTEE OF THE SENATE OF THE REPUBLIC PRESENT SO THAT A REQUEST BE MADE TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA, BY WAY OF AN "AMICUS CURIAE", THAT IT ACCEPT AND APPROVE THE APPEAL PRESENTED BY THE DEFENSE LAWYERS OF THE FIVE CUBAN PRISONERS IN THAT COUNTRY.

HONORABLE ASSEMBLY:

We, the senators of the Executive Committee of the Senate of the Republic, submit to the consideration of this Honorable Assembly, the following Point of Agreement, and also request that it be considered as an urgent and obvious resolution, as follows:

BACKGROUND

This past September 12th of 2008 was the 10-year anniversary of the unjust imprisonment in the USA of Gerardo Hernández, Ramón Labañino, Antonio Guerrero, Fernando González and René

González, five Cubans who monitored terrorist plans organized by groups of exiled Cubans in Florida against Cuba.

"The Five" Cubans have been condemned to long sentences that were the result of a politicized trial held in the city of Miami, and they have remained isolated in maximum security prisons and continue to suffer unjust imprisonment in different states of the United States.

The families of "The Five" live in Cuba, and in order to be able to travel and visit their imprisoned relatives they must obtain visas that are granted to them only after torturous procedures. Three of them, Ramón, Fernando and Antonio, have not even had one visit per year; Gerardo and René have been denied, without reasons, the right to be visited by their spouses, who have not been able to visit them at all during these long 10 years.

An appeal of the disproportional sentences was filed. On August 9, 2005, the panel of the Appeals Court in Atlanta ruled unanimously to revoke the sentences and to order a new trial.

Parallel to the appeals process, the Working Group on Arbitrary Detentions of the UN Commission on Human Rights issued an opinion that depriving the Five of their freedom violates Article 14 of the United Nations International Covenant on Civil and Political Rights and is therefore arbitrary, and on May 27, 2005, it asked the Government of the United States to take the measures necessary to remedy the situation.

The two bodies cited above recognize the right of "The Five" Cubans to be judged impartially in a non-hostile environment and to receive a fair trial as mandated by the Constitution of the United States of America.

The government of the United States ignored the request of the Working Group on Arbitrary Detentions of the UN Commission on Human Rights and appealed the decision of the court of Atlanta, which was reversed by the plenary of the Court in a split decision.

On June 4, 2008, another panel of three judges found that the arguments of the defense "lacked merit" and upheld the guilty verdicts of the Five Cuban antiterrorists and two of the sentences: that of René González Sehwerert (15 years) and Gerardo Hernández Nordelo (two life sentences plus 15 years).

In addition, it annulled three of the sentences: that of Ramón Labañino Salazar (life sentence plus 18 years), Antonio Guerrero Rodríguez (life sentence plus 10 years) and Fernando González Llort (19 years), remanding them to the Court of Miami for new sentences to be issued by the judge, Joan Lenard, the same judge who committed irregularities in the trial and imposed the disproportional sentences.

On January 30, 2009, the lawyers for the defense presented an appeal of the case to the Supreme Court of the U.S.A., the highest court in the land and last legal recourse.

We in this Honorable Senate of the Republic have remained active and in solidarity in order to achieve the release of "The 5" Cuban prisoners, for

which reason we approved various motions in 2006 and 2008.

In 2007, along with Nobel Prize winners, politicians, intellectuals, and artists, as well as women and men from around the world, we signed a call for the freedom of the five Cuban prisoners in the United States.

The concept of "amicus curiae" (friend of the court) is an appeal filed by third parties who are not party to the lawsuit and who voluntarily present their opinion on a certain point in order to help the court resolve the matter underlying the lawsuit. It consists of a legal opinion, a testimony not requested by the parties, or a legal argument in the case.

The decision whether to admit an amicus curiae in this case is at the total discretion of the Supreme Court of the United States of America.

An amicus curiae is normally filed in trials in which individual rights are at stake or in cases of special importance in which the matter under consideration affects human rights.

Even though the United States is one of the countries that uses the amicus device most often, only around 1% of the cases that come up for review are accepted. In international law the amicus curiae has a place of prominence and is accepted by, among other organizations, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and the European Court of Human Rights.

For the above reasons we consider it just and in keeping with what has been expressed repeatedly that we appear before the Supreme Court of the

United States of America by way of an "AMICUS" to request that it accept and approve the appeal filed by the defense of "The Five."

Based on the provisions of Articles 58 and 59 of the Rules of Procedure for the internal governance of the General Congress of the United Mexican States, we submit to the consideration of this Assembly the following Point of Agreement, which we request be considered as requiring urgent and obvious resolution:

POINT OF AGREEMENT:

SOLE POINT: We, the Senators of the Congress of the Union, respectfully request that the Supreme Court of the United States of America, by means of an "amicus", accept and approve the appeal filed by the defense of "the Five Cubans held prisoners in the United States", that they be given a new trial outside of Miami, with all procedural guarantees.

Given in the Assembly Hall of the Senate of the United Mexican States on the 10th day of the month of February of two thousand and nine.

[signature]

POINT OF AGREEMENT THAT, BY WAY OF AN "AMICUS", THE APPEAL IN FAVOR OF THE FIVE CUBAN PRISONERS IN THE UNITED STATES BE ACCEPTED.

EXECUTIVE COMMITTEE

[Signature]
Sen. Gustavo Madero Muñoz
President

[Signature]
Sen. José González Morfín
Vice President

[Signature]
Sen. Francisco Arroyo Vieyra
Vice President

[Signature]
Sen. Yeidckol Polevnsky Gurwitz
Vice President

[Signature]
Sen. Adrián Rivera Pérez
Secretary

[Signature]
Sen. Renán Cleominio Zoreda Novelo
Secretary

[Signature]
Sen. Claudio Sofía Corichi García
Secretary

[Signature]
Sen. Ludivina Menchaca Castellanos
Secretary

[Signature]
Sen. Gabino Cué Monteagudo
Secretary