

# national lawyers guild

Volume 71  
Number 2  
Summer 2014

# REVIEW

*A journal of  
legal theory  
and practice  
“to the end  
that human  
rights shall  
be more  
sacred than  
property  
interests.”*

—Preamble, NLG  
Constitution



**Local Government in Michigan:  
Democracy for the Fortunate Few** 65

John Philo

**“Anything You Post Online Can  
and Will be Used Against  
You in a Court of Law”:  
Criminal Liability and First  
Amendment Implications of  
Social Media Expression** 78

Kathryn R. Taylor

**Stephen Kimber’s *What Lies  
Across the Water*—the Definitive  
Study of the Cuban Five** 107

Arthur Heitzer

**Book Review: *Spying on Democracy:  
Government Surveillance, Corporate  
Power, and Public Resistance*** 126

Traci Yoder

211. *Id.* at 481-82.
212. *U.S. v. Elonis*, 730 F.3d 321, 332 (3d Cir. 2013). This case is currently set to be heard in the Supreme Court's October Term of 2014. The issue before the Court will address the split between the lower courts on whether the subjective intent of the speaker or the objective interpretation of the listener is controlling when it comes to discerning a "true threat," specifically over social media sites.
213. *U.S. v. Amaya*, 949 F. Supp. 2d 895, 910-11 (N.D. Iowa 2013).
214. *Id.* at 907-08.
215. *Id.* at 911.
216. *Id.*
217. *U.S. v. Cassidy*, 814 F. Supp. 2d 574, 581 (D. Md. 2011).
218. *Id.*
219. *See id.* at 584-85 (The court reasoned that the aggrieved party had the ability to protect her "own sensibilities simply by averting" her eyes or by blocking Cassidy's tweets.).
220. *Id.* at 587.
221. *Holcomb v. Commonwealth*, 709 S.E.2d 711 (Va. Ct. App. 2011).
222. *Commonwealth v. Cox*, 72 A.3d 719 (Pa. Super. Ct. 2013).
223. *Holcomb*, 709 S.E.2d at 712.
224. *Id.* at 712-13.
225. *Id.* at 713.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Holcomb*, 709 S.E.2d at 713-14.
230. *Id.* at 714.
231. *Id.* at 716-17.
232. *Id.* at 712.
233. *See id.* at 716-17.
234. *Commonwealth v. Cox*, 72 A.3d 719, 720-21 (Pa. Super. Ct. 2013).
235. *Id.* at 721.
236. *Id.*
237. *Id.* at 720.
238. *Id.* at 721.
239. *Id.*
240. *Commonwealth v. Cox*, 72 A.3d 719, 721-22 (Pa. Super. Ct. 2013).
241. *Id.* at 723.
242. *See Facebook Post That Someone Has Herpes Leads To Criminal Conviction*, IT-LEX TECHNOLOGY LAW (Aug. 13, 2013), at <http://it-lex.org/facebook-post-that-someone-has-herpes-leads-to-criminal-conviction/> (observing a number of commentators that have declared this to be a "problematic verdict" or even a "ridiculous verdict").
243. *Id.*
244. *See* 18 PA. CONS. STAT. ANN. § 2709(a)(4) (West 2003).
245. Volokh, *supra* note 91, at 790.



## Arthur Heitzer

### STEPHEN KIMBER'S *WHAT LIES ACROSS THE WATER* —THE DEFINITIVE STUDY OF THE CUBAN FIVE

It is difficult to overstate the central role that a small group of violent anti-communist Cuban expatriates have played in the pivotal threats to U.S. democracy during the past five decades. The list includes the Watergate criminal break-in and scandal that eventually brought down President Nixon in 1974; the murderous Iran-Contra conspiracy in 1985–1986, when President Reagan violated explicit U.S. legislation as well as international law, by secretly providing weapons for hostages to Iran in order to continue to arm and fund an illegal war in Nicaragua; and the unprecedented "Assassination on Embassy Row" in Washington, D.C. of both the former Chilean Foreign Minister and a U.S. citizen in 1976.<sup>1</sup> The list also includes the selection of George W. Bush to become President following the suspension by local Miami officials of their efforts to examine the 2000 Presidential ballots, when they were besieged by a threatening crowd of Cuban exiles and GOP staff, pounding on the door and successfully demanding that the officials cease their review.<sup>2</sup> And clouded in controversy but at least as troubling are the multiple links of anti-Castro paramilitary operatives in New Orleans and Dallas to the November 1963 assassination of President Kennedy, quite possibly in league with the Mafia and CIA (an unholy alliance that we do know had cooperated in failed attempts to kill Fidel Castro).<sup>3</sup>

Add to that the unparalleled fifty years or more of restrictions on our right to travel to a small neighbor which poses no military threat to the U.S. How many Americans know that this was accompanied by bombings of tour operators and travelers, some of them fatal, from at least 1976 through 1997, and most recently in 2012?<sup>4</sup> Or that U.S.-based terrorism has killed some 3,500 Cuban citizens and permanently maimed another 2,000?<sup>5</sup> Or that industrial and other sabotage were part of a campaign once fostered by the U.S. government in Operation Mongoose, but still tolerated thereafter?<sup>6</sup>

True, U. S. media occasionally mention failed CIA attempts to "Kill Fidel," a topic that is often presented in a joking manner.<sup>7</sup>

The October 1976 bombing of Cubana civilian Flight 455, killing all 73 people on board is barely known in the U.S., and even less known is the fact that the widely acknowledged perpetrators were given safe haven here, includ-

---

Arthur Heitzer chairs the National Lawyers Guild's Cuba Subcommittee, and is in private practice in Milwaukee, Wisconsin, with a concentration on employment, civil rights and Cuba travel law.

ing Luis Posada Carriles, who lives freely in Miami today. This saga is key to the general significance of the Cuban Five.

Since 2001, the central rationale of U.S. policy has been the “war on terrorism.” This has been used to justify the aggressive “shock and awe” attack on Iraq, as well as the earlier invasion of Afghanistan. It has justified a companion attack on civil liberties at home, marked by the US Patriot Act, enhanced surveillance and a series of entrapment-like prosecutions of might-be “terrorists.” It has also been used to justify “enhanced interrogation” torture and international kidnaping of mere suspects, held without charges for over a decade, most notoriously on Cuban territory that has been occupied by the U.S. for over a century as a supposed naval base at Guantanamo Bay. And the wholesale U.S. spying on international communications and the warrantless drone executions have continued and even escalated under Bush’s successor.

President Bush stated clearly in a nationally televised address on September 11, 2001: “We will make no distinction between those who committed these acts and those who harbor them.”<sup>8</sup>

And in announcing the U.S. attack on Afghanistan on October 7, 2001, our forty-third President stated unequivocally the U.S. justification for what has become the longest war in our history:

The United States of America is an enemy of those who aid terrorists . . . . This military action is a part of our campaign against terrorism . . . . Today we focus on Afghanistan, but the battle is broader. Every nation has a choice to make. In this conflict, there is no neutral ground. If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers, themselves. And they will take that lonely path at their own peril.<sup>9</sup>

Indeed, every nation does have a choice to make on the issue of terrorism. Is the U.S. treatment of the Cuban Five explainable under these standards or does it place U.S. leaders perilously close to the “lonely path” occupied by “outlaws and murderers”?

Stephen Kimber’s book, *What Lies Across the Water: The Real Story of the Cuban Five*, is about Cuba’s attempt to monitor the sources of these plots and deter further death and destruction. It is certainly not the whole story of those efforts, but is a carefully researched review of the most publicized aspect, a case in which five Cubans were convicted in Miami based on their intelligence activities for Cuba, directed primarily at Cuban exiles with terrorist histories.

It is important to know that Kimber was not selected or vetted by the Cubans in advance of his project. He achieved access to many, but not all, of the players whom he wanted to interview, after many persistent attempts during some three years of research. As a well-established Canadian author, he was able to undertake the massive research he devoted to this book with academic and cultural underwriting from Canadian institutions—not from the U.S., and not from Cuba.

Known as the Cuban Five, the five men were arrested on September 12, 1998, convicted by a Miami jury of every charge presented against them, and then sentenced to prison terms ranging from 15 years to double life plus 15 years. Most of the charges were conspiracy claims, which do not require actually committing the underlying crime, but merely that there was an agreement to do so in the future and that at least one concrete action was taken to effectuate the agreement—even if it was an otherwise legal act such as renting an apartment or buying a cellphone, computer or camera. All five were convicted of charges based on working for Cuba as unregistered agents of a foreign power. There were no more serious charges for two of the five, who were recently released. One of them, Fernando Gonzalez, also had charges based on using false identification for his alias in his undercover work.

The three still imprisoned were all originally sentenced to life in prison for “conspiracy to commit espionage” in a case where no classified U.S. information was even allegedly involved. Ramon Labanino and Antonio Guerrero had their sentences reduced to 30 years and to 21 years, 10 months, respectively, pursuant to their appeal. Gerardo Hernandez, viewed as leader of the operation and also convicted of “conspiracy to commit murder” based on Cuba’s shoot-down of two planes which illegally flew from Florida to near Havana, still has two life sentences plus 15 years. Regarding the other two, Rene Gonzalez was allowed to return to Cuba in June, 2013, after serving nearly 15 years, and upon renouncing his (dual) U.S. citizenship; and Fernando Gonzalez was released from prison on February 27, 2014, and promptly repatriated to Cuba on completion of his full sentence (minus a credit for “good time”).

The author of eight previous books, Canadian journalism professor Stephen Kimber planned to write his second novel based on a love story taking place in Cuba and Halifax, but then came across “the truth-is-stranger-but-way-more-interesting story of the Cuban Five.” Kimber’s expertise is in making nonfiction read like a novel, a technique he has fully applied here to the complex facts and interwoven plots from Miami and Havana. After he was told by his guide in Cuba that unless this case is resolved, any hope that President Barack Obama would move to significantly improve relations with Cuba was a pipe dream, Kimber decided to delve into this story. He not only found a legal case in which some eleven Nobel prize recipients called for the release of the Five, but a tale of intrigue which directly involves yet another Nobel laureate, Gabriel García Márquez, as an intermediary between his friend Fidel Castro and his admirer Bill Clinton, in a triangle of failed opportunities and even betrayal.

Kimber had not previously focused on either U.S. or Latin American politics, a weakness he turned into a strength, especially given the hyperbolic exchanges within the U.S. and its Cuban American community about anything related to Cuba. (As an example, recall the furor over a simple on-camera Presidential

handshake between Barack Obama and Raul Castro at Nelson Mandela's memorial on December 11, 2013.<sup>10</sup> The same act of civility between Bill Clinton and Fidel Castro at the UN in 2000 took place off camera, allowing the White House to promptly deny it, and only to grudgingly acknowledge it later on.<sup>11</sup>

Now a career journalist has taken a fresh look at the situation. Kimber is no leftist. Judging the credibility of the various players, he occasionally notes whether they “drank the kool aid” of the Revolution. Is this a backhanded put-down of committed revolutionaries, an attempt at dispassionate analysis, or perhaps both? Perhaps it doesn't matter.

What does matter is whether this book, clearly the most detailed and definitive study of this case, can help the U.S. and Cuba to move beyond the current stalemate of holding on to each other's citizens until their own “hostage” (as the U.S. calls Alan Gross) or “heroes” (as the Cubans describe the Five) can be released.

Kimber's book was initially received rather guardedly in Cuba—until former National Assembly President Ricardo Alarcon strongly embraced it. (Now a Spanish translation is in process in Cuba, with international publishing rights to be negotiated.) Like the case of the Cuban Five itself, the book has entered the U.S. below the radar of major U.S. news and literary media.<sup>12</sup>

Alan Gross, a U.S. citizen, was arrested in Cuba in December 2009, at age 60 on his fifth trip there. He was working covertly as a contractor for the U.S. Agency for International Development (AID), whose mission is to promote democracy outside of the U.S. In the Cuban context this clearly means to try to encourage an opposition to fulfill the official U.S. commitment to “regime change.” Specifically, Gross was paid some \$500,000 in U.S. AID funds to set up satellite communications networks in Cuba which could not easily be traced, supposedly to aid Cuba's Jewish communities.<sup>13</sup>

In the larger picture, the Cuban position is objectively quite different than that of the U.S. Cuba has no sanctions or embargo against the U.S. to lift, and has long favored normal relations without imposing preconditions based on demanding changes in the internal policies of the other nation. But Cuba does want the prompt return of the remaining members of the Five in U.S. prisons. The Gross case has been linked to their fate—even more so since the Obama administration achieved the release of U.S. prisoner of war Bowe Bergdahl from Afghanistan, while allowing five Taliban leaders to leave Guantanamo for at least a year's custody in Qatar.<sup>14</sup>

The U.S. has long pursued a policy of regime change in Cuba. Since 1960, the official U.S. assessment was that since “[t]he majority of Cubans support Castro . . . [t]he only foreseeable means of alienating internal support is through disenchantment and disaffection based on economic dissatisfaction and hardship,” justifying a U.S. policy seeking “to bring about hunger, desperation

and overthrow of government.”<sup>15</sup> This is not just an old abandoned policy. According to a release from the National Securities Archive on January 18, 2013, based on court papers filed that week in a U.S. lawsuit brought by Alan Gross against the agencies that sent him to Cuba, the U.S. government has “between five to seven different transition plans” for Cuba, and the USAID-sponsored “Democracy” program aimed at the Castro government, which funded Gross's actions in Cuba, is “an operational activity” that demands “continuous discretion,” rather than open disclosure.<sup>16</sup>

### **Miami and its media: The perfect place for these convictions**

Kimber was scheduled to be interviewed on Southern Florida's major NPR outlet, WRLN-FM, in September, 2013, but then the invitation was withdrawn because, according to the Station Manager's September 18, 2013 “Open Letter on Cuba to Our Community and Partners,” Kimber's findings had been “deemed too ‘incendiary’ for this community to hear.” (In response to criticisms, another show on the same station agreed to include him, but only after the Station Manager issued his defensive statement, promising its listeners and donors that it would confront Kimber with “hard questions,” and then follow up with “an expert to rebut these claims.”)<sup>17</sup>

Kimber quite reasonably viewed this latest example of paranoia and censorship as further proof that the trial of the Five should never have been held in Miami, where the jury in what has been described as the longest criminal trial in U.S. history convicted all five defendants on all charges after five days of deliberation.

The dust-up over Kimber's few minutes on public radio in Miami—and on almost no other broadbased U.S. media so far—is reflective of our media's coverage of the case to date. One notable exception was the *Washington Post's* decision to publish Kimber's 2,000-word article on the case prominently in its Sunday October 6, 2013 edition, entitled “The Cuban Five were fighting terrorism. Why did we put them in jail?”<sup>18</sup>

Despite the unique aspects of this trial, the treatment of the case by the U.S. mass media has generally been deplorable. Outside of southern Florida, the case was virtually ignored, even though it is the only domestic trial in U.S. history cited as being unfair by both Amnesty International and the relevant body of the United Nations (the Working Group on Arbitrary Detention, established as an arm of the former UN Commission on Human Rights).<sup>19</sup>

When mentioned at all, most U.S. media, have consistently but inaccurately referred to the Five as “convicted spies.” In fact, only three were convicted even of *conspiracy* to commit espionage—meaning that the jury in Miami accepted that they *would* have spied on the U.S., not that they actually had *done* so. In reporting the release of Rene Gonzalez to Cuba on May 3, 2013, the *New York Times* described him as “a convicted spy” despite the fact that he

was never charged with nor convicted of of *conspiracy* to commit espionage, let alone of *actual* espionage.<sup>20</sup>

In Miami however the story was different. The media covered their case heavily, even hysterically, and not very accurately even regarding the basic facts such as the Five's actual charges and convictions.<sup>21</sup> Kimber recounts "a frenzy of hostility and hysteria against the accused Cuban spies," right after they were charged, including an *El Nuevo Herald* story by Pablo Alfonso, who asserted, without offering any evidence, that their arrests "may be an action aimed at preventing a possible collaboration between the Cuban government and countries involved in terrorist actions against the United States." Another story by Alfonso asserted that sending "Cuban spies en masse to Miami" was essentially a Soviet plot. And another by Ariel Remos added that their arrest "could be" connected not only to spies but also "drug traffickers," since it was "obvious" that Castro "has been significantly involved in drug trafficking," again without any evidence.<sup>22</sup>

Kimber reported that after the attacks on New York's Twin Towers on September 11, 2001, Fidel Castro for the Cuban government was among the first foreign leaders to express condolences, but he also claimed a right to speak on behalf of the many Cubans who had been hurt, killed or terrorized by bombs targeting Cuba. "On a day like today, we have a right to ask, what will be done about Luis Posada Carriles and Orlando Bosch, the perpetrators of that monstrous, terrorist act?" He was referring to the October 1976 bombing of the Cubana airliner, killing all 73 on board, as well as to the more recent hotel bombings in Havana.<sup>23</sup>

Kimber notes that "the response from Washington was a deafening silence," but in Florida, as the Five were awaiting sentencing, it "was anything but silence." *El Nuevo Herald*, the Spanish language sister to the *Miami Herald*, "attempted to hike the hostility level," by running a baseless story on November 14 linking Mohammed Atta with Cuba, under the headline "They Affirm that Atta Met in Miami with Cuban Agent." Kimber describes the decision to run this "unsourced, unconfirmed possibility" as being journalistically irresponsible. The story's publication allowed Congressman Lincoln Diaz-Balart to issue a statement the next day, treating it as the Gospel that "Al Qaeda terrorists have been linked to Cuban intelligence operatives."<sup>24</sup>

Of course the Five were all admitted agents of the Cuban government, and less than a month later they received a series of maximum sentences.

Well after the trial, it came out that reporters creating these stories were at the same time being paid thousands of dollars by the U.S. government to prepare anti-Cuba propaganda, including Pablo Alfonso and Ariel Remos. Alfonso received over \$58,000 and Remos \$11,750.<sup>25</sup> This was material for the U.S. government's Radio and TV Marti, beamed to Cuba to try to undermine

the revolution, but meanwhile subsidizing with our tax dollars the unique industry in Miami planning the future for the people of Cuba, and seemingly also violating the Smith Mundt Act of 1948 which prohibited U.S. government propaganda that is beamed to a domestic audience in the U.S., as Kimber notes.<sup>26</sup> (TV Marti can be seen on cable television in Miami, and has virtually no audience in Cuba.)

Even without knowledge of these government payments, a unanimous three judge Federal Court of Appeals panel ruled in August 2005 that holding the trial of the Five in Miami was unfair, due to a "perfect storm" of anti-Castro hostility and prosecutorial misconduct.

Referencing a community where even suggesting dialogue with the Cuban government had resulted in bombings and maiming, not to mention boycotts, ostracism and loss of business, the unanimous panel added:

On 13 March 2001, the court noted that the day before, cameras were focused on the jurors as they left the building. Despite the court's arrangements to prevent exposure to the media, jurors were again filmed entering and leaving the courthouse during the deliberations and that footage was televised. Some of the jurors indicated that they felt pressured....

During the deliberations, members of the jury were filmed entering and leaving the courthouse, and the media requested the names of the jurors. Jurors expressed concern that they were filmed 'all the way to their cars and [that] their license plates had been filmed.'<sup>27</sup>

The original three judge panel decision was hailed as high mark in judicial recognition of venue concerns, but was short-lived. Despite the unanimous decision, the Bush administration filed a request for its reconsideration by the entire 11th Circuit *en banc*. Although this maneuver is generally disfavored and such requests are rarely granted, it was granted in this case,<sup>28</sup> resulting in a contrary conclusion which upheld the original venue.<sup>29</sup>

### **If the Cuban Five were nonviolent, why a murder conspiracy charge?**

The most controversial and problematic count is the conviction of Gerardo Hernandez for "conspiracy to commit murder," which resulted in one of his life sentences, and also directly contributed to maintaining his other life sentence (for "conspiracy to commit espionage"), not to mention his additional 15 years on related charges, which were all upheld on appeal.<sup>30</sup> This charge was added much later to the original complaint, and differs from the other charges. It is based on the February 24, 1996 shoot-down of two planes that had flown from Florida to Cuba illegally as part of a campaign of harassment, overflying Havana, dropping anti-Castro flyers over the city. On that date, after a series of warnings from Cuba to the U.S. that further incursions would not be tolerated, Cuban MiGs shot down two of the three planes in the area. The Cubans claimed they had been in Cuban airspace. The U.S. claimed otherwise. The "conspiracy

to commit murder” charge was based on the theory that Hernandez was “in” on a plan to shoot down and kill the pilots.<sup>31</sup>

This charge is problematic for the Five. Aside from their ultimately unavailing change-of-venue argument (challenging the trial court’s insistence on holding the trial in Miami), the defense’s greatest hope on appeal was to get this conviction knocked out.

In what may be the final appellate ruling in this case, one judge from the original panel (Phyllis Kravitch, a Carter appointee) held that the evidence presented did not support the conviction. But joining a Bush II appointee (Judge William Pryor) who replaced one of the original judges, was Judge Stanley Birch (a Bush I appointee) who cast the deciding vote on what he called “a very close case.” Judge Birch ultimately agreed to let the conviction stand, despite the fact that this conclusion was based on a high degree of deference to the jury’s verdict, and this same judge reiterated in his same special concurrence that the case should not have gone to that Miami jury because “[t]he defendants were subjected to such a degree of harm based upon demonstrated pervasive community prejudice that their convictions should have been reversed.” Judge Birch then respectfully suggested “that this case provides a timely and appropriate opportunity for the [Supreme] Court to address the issue of change of venue in this internet and media permeated century.”<sup>32</sup> The U.S. Supreme Court declined the invitation to take the case on appeal, on June 15, 2009, despite amicus briefs filed by ten Nobel prize laureates and many others.<sup>33</sup>

Aside from the humanitarian aspect of this judicial decision that Gerardo should die in prison, that count is also politically the most troublesome for the defense. It not only muddies explanation of the case with a complicated tangent, but also allows for “real victims” (the widows of the four slain pilots) to be presented publicly, whereas the other charges appear to be “victimless crimes.”

Kimber makes the salient point that Hernandez was tried and targeted as a proxy for charging Raul Castro with murder as head of the Cuban military at the time of the February 1996 shoot-downs, which obviously raised the stakes in his case.<sup>34</sup> Kimber also notes that the “conspiracy to commit murder” conviction led to calls that Fidel Castro be indicted for the same “murder,” including a letter delivered by Jeb Bush to his brother, then President George W. Bush.<sup>35</sup> And the *Miami Herald* reported that this “murder” case was still open 10 years later, with the comment that “turning” Gerardo Hernandez was the “best hope” to bring charges against Raul Castro. Hernandez characterized this as “their wild dream, the true reason behind their psychological torture [of me].” In a letter to Kimber in 2010, he added that “it explains why they haven’t let me see my wife for 12 years like every other prisoner, why they haven’t let me write an email to her like every other prisoner, etc., etc.”<sup>36</sup>

Kimber concludes that the evidence that led to Hernandez’ conviction for “conspiracy to commit murder” is not convincing, given the extreme com-

partmentalization of Cuban intelligence—with information only supplied on a “need to know” basis, which certainly would not include sharing any special plans by Cuban military defense forces with an intelligence agent in Miami. Kimber also notes that Hernandez did not testify in his own defense at trial, allowing the jury to run away with inferences from circumstantial evidence at best. But Kimber conceded that, regardless of that decision, it was very unlikely that there would have been a different outcome in a Miami trial against an admitted Cuban government agent.

### Kimber’s book exposes U.S. terrorist contacts at the highest level

Without a doubt, this is the most definitive study of the Cuban Five case. It is based on exhaustive research, including Kimber’s study of the full 20,000 page trial transcript, the trial exhibits, and other documents that were not introduced (including materials that the Cuban government says it provided to the FBI in June 1998). Kimber also interviewed the numerous participants in person or by correspondence, chiefly in Florida and Cuba, but wherever he could find them. He compared these to the contemporary intelligence reports and exchanges, and to available court records from related cases. His research included study of the mass media and alternative press coverage in southern Florida and in Cuba.

It would be wrong to view this as a book only on the case of the Cuban Five, as important as that case is. *What Lies Across the Water* also describes a number of the plots and attacks against Cuba, much as the initial Eleventh Circuit decision did in 2005. But that court record, sobering as it is, was incomplete since the trial judge limited the evidence to acts against Cuba perpetrated from 1994 to 1998, while Kimber includes major acts of terror before, during, and after the alleged actions for which the Five were tried.

Kimber documents many sabotage and assassination plots (some successful, but most prevented or otherwise failed), virtually all hatched in greater Miami. These continued well past the 1960s and ’70s, during which mass murder and assassinations took place, including the aforementioned killing of 73 civilians on board Cubana Flight 455. Indeed, he documents an assassination attempt that took place in the midst of the Cuban Five’s trial:

Ironically, some of those same exile terrorists continued to make the Cubans’ argument for them. In April 2001—in the middle of the trial—three more Miami exiles were arrested trying to sneak into Cuba aboard a vessel filled with weapons. Cuban television even broadcast a telephone call the Cubans had recorded between one of those arrested and Santiago Alvarez, a prominent Miami exile with close ties to Luis Posada. Alvarez had mused about going ahead ...with the scheme to set off a bomb at the Tropicana [nightclub – A.H.].<sup>37</sup>

But much more sobering is Kimber’s clear documentation that the politically powerful lobby, the Cuban American National Foundation (CANF) was also involved in terrorism. This had been Cuba’s repeated claim, either ignored or

dismissed as wild propaganda by the U.S. media. These Cuban claims were accurate, as he demonstrates, relying not just on Cuban sources, but on Miami press and court records, as well as some arrests in the U.S. (which generally lacked any followup prosecutions).

Kimber cites the Coast Guard's 1997 interception of a boat off of Puerto Rico, with a hidden compartment containing "an assassin's treasure trove" including two semi-automatic, armor piercing 50-caliber assault rifles equipped with night scopes, boxes of ammunition, military fatigues, and so on. One of the men on board announced to the Coast Guard inspectors: "They are weapons for the purpose of assassinating Fidel Castro." The owner of the boat was a member of CANF's board, Jose Antonio Llama, one of the assault rifles was owned by the CANF President, and the destination set on the boat's computer was where Fidel Castro was scheduled to meet at a summit of Latin American leaders on the Venezuelan island of Margarita.<sup>38</sup>

Kimber also includes the 2006 announcement of a lawsuit in Miami by this same former CANF Director, Jose Antonio Llama, asserting that he had helped finance the CANF's "often denied paramilitary wing."<sup>39</sup> This was consistent with the testimony of Percy Alvarez, who infiltrated the CANF and then testified in Cuba regarding CANF's funding and sponsorship of paramilitary, terrorist operations—a story that the New York Times was given but never printed.<sup>40</sup>

Kimber finds that the Cuban communist "state-controlled" media was more forthcoming and accurate on these issues of illegality, terrorism and political influence in the U.S., than was our much-heralded "free press."

These issues are not a matter of merely local or regional importance. Apart from the pivotal role that Florida has played in U.S. presidential elections, CANF has virtually dictated our nation's policies concerning Cuba, often down to the details. And it was not just conservatives such as Ronald Reagan (whose national security team encouraged the founding of CANF, modeled explicitly on the Israeli lobby, AIPAC) and the two Bush Presidents, but also Barack Obama, who most recently appeared at a fundraiser at the home of the current CANF president on November 8, 2013, as Bill Clinton had done earlier.<sup>41</sup>

Is it newsworthy that our presidents consort at home with terrorists and have relied directly on a group that, if the U.S. terrorist list had any credibility, should be on it? Only in South Florida apparently—where such links are considered to be a political asset.

Kimber is at his best in treating the nuanced "yellow light" law enforcement approach to illegal terrorist plots directed against Cuba and their representatives. On page 208 he relies on a report by Juan Tamayo in the Miami Herald, "Anti-Castro Plots Seldom Lead to Jail in U.S." (July 23, 1998, less than two months before the Cuban Five were arrested):

Anti-Castro militant Tony Bryant still chuckles when he recalls the FBI agents who interviewed him after a 14-foot boat, loaded with high explosives and

registered in his name, turned up near Havana. They said, 'You could hurt someone. Don't do it again,' said Bryant, a former member of the Commando L paramilitary group. 'I promised not to do it again, and they went away.'

Tamayo went on to quote unnamed current and former prosecutors who told him there was an "unspoken policy . . . to gather intelligence and demobilize these people, to disrupt rather than arrest." That "yellow light" approach to law enforcement, they said, had "given comfort to people who should otherwise feel insecure about engaging in illegal activities."<sup>42</sup>

This forgiving approach to terrorism contrasts with how the FBI and prosecutors have treated discontented African Americans and Haitians in Miami who may have been willing to consider using violence to express their grievances. For example, on June 22, 2006, in what became known as the case of the "Liberty City Seven" or "The Plot to Bomb the Sears Tower in Chicago" the FBI conducted a series of raids, arresting and putting seven men through three trials before they were able to achieve any convictions, in what "law enforcement officials" initially described as "plotting in its early stages, . . . no weapons or explosives had been seized from the searched locations.... FBI Special Agent Richard J. Kolko in Washington said in a statement that the Miami operation was a 'terrorist-related matter' but that 'the individuals arrested posed no immediate threat to the U.S.'"<sup>43</sup>

This "aspirational" plot was the topic of press conferences and speeches by both the U.S. Attorney General and the head of the FBI, with widespread press coverage internationally.<sup>44</sup> Yet it was on the same day that the former director of the CANF, Jose Antonio Llama, announced his plan to file a lawsuit alleging essentially a "failure to perform" promised terrorism against Cuba despite his having invested over a million dollars to fund it. This was reported in the Miami Herald, with no prosecutions or notable publicity beyond that. (He also admitted then that the 1997 incident in which Coast Guard inspection of his boat off of Puerto Rico yielded hidden assault rifles, was in fact an attempt assassinate Fidel Castro, as one of the perpetrators had admitted during the inspection, but this was excluded from evidence at trial. Those who were involved were acquitted after they claimed they merely wanted to demonstrate peacefully against Castro's presence.)<sup>45</sup>

### **Kimber and the Five on the U.S. legal system**

Kimber is a journalist and not a lawyer. He is obviously a keen and detailed investigator as well. So his comments on journalistic aspects of this case perhaps should carry more weight than his analysis of legal issues, though both are thoughtful and revealing.

On the legal front Kimber notes that separate trials for each of the Five would have been advisable based on the generally presumed goal of trying to minimize risk of convictions. But the Five all stood together as one, both at trial and since. This may or may not turn out to be politically wise in the

long run, but it surely showed solidarity. As a matter of legal strategy, it also allowed evidence against each one of them to be presented to the jury in their consideration of the charges against the others.

His discussion of the jury contains enough detail to clearly understand why a change of venue should have been granted, even to an adjacent county, if a fair trial was really the objective. The case went to trial in the immediate wake of the armed seizure of six-year-old Elian Gonzalez from his relatives who refused to obey orders to allow him to be returned to his father, residing in Cuba. Elian had miraculously survived a failed rafting journey from Cuba to Florida on Thanksgiving Day, 1999 when his mother and all the others drowned. Passions were inflamed to the point of open violence and defiance, centered in Miami's Cuban American community, against anyone who supported his father's right to raise his son, in Cuba.<sup>46</sup>

While the jury in the trial of the Five did not include any Cuban Americans, a study based on a survey and other data, developed by a Cuban-American sociologist at Florida International University, indicated that "the possibility of selecting 12 citizens of Miami-Dade county who can be impartial in a case involving acknowledged agents of the Cuban government is virtually zero...even if the jury were composed entirely of non-Cubans." The person who became the jury's foreperson proudly described himself as being "anti-communist," and the August 2005 11th Circuit decision shows this was not an atypical response. Fully 10 percent of the original jury pool said they personally knew the dead pilots shot down by Cuba or proposed trial witnesses of the shoot-down.<sup>47</sup> In sum, as Kimber quoted attorney Leonard Weinglass in petitioning the Supreme Court to review this case, jurors had ample reason "to fear for their (and their families') safety, livelihoods and community standing, if they acquitted."<sup>48</sup>

The analysis of the trial itself is written clearly, for easy understanding by a lay reader, summarizing the main points of the extensive trial, and awarding "points" for each side as he does so.

On my initial read, the book was at its weakest when Kimber reported rather briefly the legal perspective of the late Roberto Gonzalez,<sup>49</sup> a defense lawyer in Cuba who was born in Chicago, and the brother of Cuban Five defendant Rene Gonzalez. Gonzalez, through Kimber, compared the legal systems of Cuba and the U.S.: "The objective in each system is the same," Gonzalez told Kimber, "but the procedures are very different." Yet most of what Kimber then attributes to Gonzalez seems to call his initial observation into question.

While any detailed analysis is beyond the scope of this review, I will note that the systems are indeed different. Ours is based on an adversarial model, in which neither side necessarily has the truth as its goal. Instead the primary goal is to win the case. The discovery of truth is the object of the judge or jury, so the theory goes. Cuba relies on a much stronger procurator/investigator model, to determine the facts before trial, while the final trial is much less

adversarial. Kimber quoted Roberto Gonzalez as saying that U.S. trials go on at such length (he personally observed the seven-month trial of the Five) because "the discovery goes on at trial."

Initially I believed that conclusion was not entirely accurate, since the U. S. Supreme Court established a defendant's right to pretrial discovery, in *Jencks v. United States*,<sup>50</sup> a prosecution of a union official who was alleged to be a member of the Communist Party, where the Court held that the prosecution may withhold prior statements of witnesses it relies on only at the cost of dismissing the case against the defendant, even where national security interests are asserted; and *Brady v. Maryland*,<sup>51</sup> which held that due process requires that a defendant's request for exculpatory evidence be complied with prior to trial.

In discussing this critique with Fernando Gonzalez in February 2014, Gonzalez pointed out that this right was severely curtailed since the passage of the Classified Information Procedures Act (CIPA) in 1980. The primary purpose justifying CIPA was to limit the practice of graymail by criminal defendants in possession of sensitive government secrets. "Graymail" refers to the threat by a criminal defendant to disclose classified information during the course of a trial. The graymailing defendant essentially presents the government with a dilemma: to either allow disclosure of the classified information or to dismiss the indictment.<sup>52</sup> CIPA thus appears to limit the holdings in *Jencks* and *Brady*, though it is claimed to be merely procedural and that it "neither adds to nor detracts from the substantive rights of the defendant or the discovery obligations of the government. Rather, the procedure for making these determinations is different in that it balances the right of a criminal defendant with the right of the sovereign to know in advance of a potential threat from a criminal prosecution to its national security."<sup>53</sup>

However, as Fernando Gonzalez pointed out in the case of the Five, the defendants did not possess classified information, and no such evidence was claimed nor produced by the prosecution at trial. Tens of thousands of pages of defendants' own documents were seized, including the full hard drives of their computers, and defense counsel were only given limited access to them. Security clearances were required of all attorneys, the documents were kept under lock and key in the courthouse basement, they could only be accessed during certain hours by advance appointment, and neither copies nor notes were allowed to be taken out. Further, the defense had to give the prosecution advance notice of its intent to use any of these documents at trial. Thus as a practical matter at least, such discovery was made very difficult, and the application of CIPA also gave tactical advantage to the prosecution.

Fernando Gonzalez stated he could understand this in a case where the defendants had classified documents which the government could not risk being made public, but here these restrictions were applied to a case where defendants had no such documents.



Kimber also includes Roberto Gonzalez' cogent observation regarding U.S. trials that "what is important in that sort of trial is not truth or facts, but theatre. The outcome has to do with the acting capacity of the lawyers, the personality of the witnesses."<sup>54</sup> There is certainly much truth in that.

### Kimber reveals some dirty laundry on both sides

Kimber's balanced and nuanced approach includes topics and observations that some Cuba supporters may not appreciate. Did the FBI arrest the Five (and others who subsequently made deals) in September 1998, based on the information Cuba gave to the FBI in June 1998, as some supporters have implied? Not likely, as the FBI was monitoring at least some of the Five already. Also potentially discomfiting to U.S. activists is the question of whether there is any truth to the claim of Cuban expatriates, and echoed loudly by the mass media in Miami, that any outrageous acts in that community are the result of Cuban agent provocateurs seeking to make trouble? No doubt an exaggerated perception, but Kimber does show that Cuban agents have successfully penetrated elements in that community, and their presence was not always linked to imminent acts of terrorism. Of course one may not know in advance what a group or its members were really planning.

Kimber also documents at least one situation where one of the Cuban Five defendants acted to calm down and help reconcile Castro opponents who were feuding with each other. One effect of this was to increase his credibility and acceptance, and thus further his work.

Kimber acknowledges that some of the Five monitored U.S. military preparations (without focusing on or obtaining any U.S. classified information), but excuses that as being reasonable given U.S. invasions and violent covert actions in other nations south of its border, like Haiti, Grenada, Chile, and Nicaragua to name a few, and the ongoing commitment of U.S. government to "regime change" in Cuba. This history is factually irrefutable, but it is more obvious to a Canadian than to a consumer of mainstream U.S. media and political dialogue.

Kimber concludes that "The truth is—everybody lies," citing first the example of the initial Cuban official denials of any connection to the Five, who thereafter were openly acknowledged to be agents working for Cuba.<sup>55</sup> U.S. authorities lied, claiming that the Cubans gave them no significant intelligence in June 1998; Kimber has seen those extensive records (provided by the Cubans as part of his research), but these were not admitted for the jury to review. The FBI lied, denying that they have any documents related to those disclosures. And finally terrorists such as Posada lied, who admitted in a recorded interview for the New York Times that he ran the 1997 bombing campaign which killed the Canadian Italian businessman Fabio Di Celma, and that he was funded by CANF. Later he denied both admissions.<sup>56</sup>

Kimber is careful and detailed when explaining which versions he chose to credit. He concludes that the narrations of the Cuban Five and their supporters

in Cuba was corroborated by available records, with a single exception, which he indicates may be understandable under the circumstances.<sup>57</sup>

Despite the venom and at least attempted overt censorship directed at his work in Miami—which may be inconsequential compared to the "benign neglect" so far shown by most national media in the U.S.—it is clear that Kimber did not drink anybody's Kool-Aid. He has however, spent three years doing the most exhaustive research and writing project to date on this case, and his conclusions seem both well reasoned and convincing. This is a very readable, fact-filled story of intrigue.

*What Lies Across the Water* deserves to be widely read. It should be on the shelves in every library. It is a detailed revelation of how distorted the U.S. justice system can become when extreme ideological battles influence decisions such as whom to arrest, ignore, or warn, and what sentences to impose.

### NOTES

1. In all three cases, the direct perpetrators of the Watergate break-in, the illegal funneling of arms, and the assassinations in Washington were anti-Castro Cuban operatives. This includes three of the Watergate "plumbers" (burglars) who were veterans of the 1961 Bay of Pigs invasion of Cuba; see JANE FRANKLIN, *CUBA AND THE UNITED STATES: A CHRONOLOGICAL HISTORY* 100-101 (1997).  
During the Iran-Contra operation, Cuban American Felix Rodriguez was a close liaison to then-Vice President (and former head of the CIA) George H. W. Bush; Rodriguez had been a Paramilitary Operations Officer from the CIA's Special Activities Division, and a key asset during the Bay of Pigs operation, who was also involved in the assassination of Che Guevara. See Robert Parry, *Memoirs of the Man the White House Said Didn't Exist*, WASH. MONTHLY, Nov. 1, 1989; see also Michael Ratner & Michael Steven Smith, *WHO KILLED CHE?* (2011). Cuban Americans Max Gomez and Ramon Medina were among those identified as having helped arrange clandestine arms shipments to anti-government rebels in Nicaragua in a period when the CIA was legally banned from assisting in such operations. *Hasenfus tempers comments on CIA*, N.Y. TIMES, Nov. 3, 1986.  
Former Chilean Foreign Minister Orlando Letelier and U.S. citizen Ronni Moffitt were killed in Washington at the apparent behest of Chilean intelligence under Augusto Pinochet. The action involved at least five Cuban American operatives, Guillermo Novo Sampol, Ignacio Novo Sampol, Virgilio Paz, Jose Dionisio Suarez Esquivel, and Alvin Ross Diaz, based on a report of the original 1979 trial court findings, at <http://www.latinamericanstudies.org/belligerence/78-cr-367-aer.htm>. Two of them were acquitted of the most serious charges in a re-trial two years later; see *Two Acquitted of Murder in Letelier Case*, WASH. POST, May 31, 1981, available at <http://www.latinamericanstudies.org/chile/letelier-acquital.htm>. See also JOHN DINGES & SAUL LANDAU, *ASSASSINATION ON EMBASSY ROW* (1980).
2. See Posting of Felix Martinez et al. to Afro Cuba Web, *The Miami Machine: Cuban American Terrorists Triumph in Election 2000*, Dec. 13, 2000, at <http://afrocubaweb.com/miamimachine.htm>; but see John Lantigua, *Miami's rent-a-riot*, SALON.COM, Nov. 28, 2000, [http://www.salon.com/2000/11/28/miami\\_8/](http://www.salon.com/2000/11/28/miami_8/).
3. See, e.g. *Who Was Lee Harvey Oswald?*, PBS FRONTLINE, Nov. 19, 2013, at <http://www.pbs.org/wgbh/pages/frontline/biographies/oswald/transcript-52/index.html#neworleans>. Ocean Press has published Cuba's own report on the Kennedy assassination by Fabián Escalante, Cuba's former head of intelligence, who directed Cuba's investigation. FABIÁN ESCALANTE, *JFK: THE CUBA FILES: THE UNTOLD STORY OF THE PLOT TO KILL KENNEDY* (2006); also FABIÁN ESCALANTE, *EXECUTIVE ACTION: 634 WAYS TO KILL FIDEL CASTRO* (2006) (hereinafter ESCALANTE, *EXECUTIVE ACTION*).

4. See Bob Guild, Venceremos Brigade, National Lawyers Guild International Committee, Cuba Travel Fact Sheet, at <http://www.nlginternational.org/news/article.php?nid=585>; [http://www.nlginternational.org/report/Cuba\\_Travel\\_Fact\\_Sheet\[1\].pdf](http://www.nlginternational.org/report/Cuba_Travel_Fact_Sheet[1].pdf). This goes through the the Venceremos Brigade's 40th Anniversary in 2009. Much more recently a Florida travel agency which booked 700 people to visit Cuba at the time of Pope Benedict's 2012 pilgrimage was firebombed and destroyed shortly thereafter, on April 27, 2012; *Travel agent finds forgiveness following arson*, ARCHDIOCESE OF MIAMI (website), Jul. 3, 2012, [http://www.miamiarch.org/ip.asp?op=Article\\_1273163942243](http://www.miamiarch.org/ip.asp?op=Article_1273163942243).
5. By official count of the Cuban government, "3,478 Cubans . . . have died and . . . 2,099 . . . have become permanently disabled due to terrorist acts carried out against our homeland during half a century that add[s] up 5,577 victims." Army General Raul Castro Ruz, President of the Council of State and of Ministers, Remarks at the Ceremony Commemorating the Victims of State Terrorism Day, Oct. 6, 2010, available at <http://www.cuba.cu/gobierno/rauldiscursos/2010/ing/r061010i.html> (last visited Mar. 23, 2014).
6. See KEITH BOLANDER, VOICES FROM THE OTHER SIDE: AN ORAL HISTORY OF TERRORISM AGAINST CUBA (2010); JANE FRANKLIN, CUBA AND THE UNITED STATES: A CHRONOLOGICAL HISTORY (1997), (check index for Operation Mongoose); available at <http://www.janefranklin.info/>; see also FABIAN ESCALANTE, THE CUBA PROJECT: CIA COVERT OPERATIONS 1959-62 (2004).
7. See, Stacy Conratt, *10 Ways the CIA Tried to Kill Castro*, MENTAL FLOSS, Feb. 16, 2012, <http://mentalfloss.com/article/30010/10-ways-cia-tried-kill-castro>. See also the British documentary *638 Ways to Kill Castro* (DVD: Silver River Productions, 2007) with related resources and interviews on the DVD; and in book form the Cuban account by its former head of intelligence, Fabián Escalante. ESCALANTE, EXECUTIVE ACTION, *supra* note 3.
8. *Bush: No Distinction Between Attackers and Those Who Harbor Them*, AMERICAN FORCES PRESS SERVICE (Sep. 11, 2001), available at <http://www.defense.gov/news/newsarticle.aspx?id=44910>.
9. George W. Bush, President of the United States, Address to the Nation, Oct. 7, 2001, available at <http://www.johnstonsarchive.net/terrorism/bush911d.html>. On March 24, 2006, George W. Bush stated, "If you harbor a terrorist, if you feed a terrorist, you're as equally guilty as the terrorist." And Dick Cheney, Mar. 7, 2006: "[S]ince the day our country was attacked, we have applied the Bush Doctrine: Any person or government that supports, protects, or harbors terrorists is complicit in the murder of the innocent, and will be held to account." Robert Parry, *Bush's Hypocrisy: Cuban Terrorists*, CONSORTIUM NEWS, available at <http://www.consortiumnews.com/2006/042606.html>.
10. Uri Friedman, *Just how big a deal is the Obama-Castro handshake?*, THE ATLANTIC, Dec. 10, 2013, available at <http://www.theatlantic.com/international/archive/2013/12/just-how-big-a-deal-is-the-obama-castro-handshake/282200/>.
11. *Clinton shook Castro's hand*, BBC, Sep. 8, 2000, at <http://news.bbc.co.uk/2/hi/americas/915415.stm>. (last accessed Mar. 27, 2014).
12. The print version has been available from Amazon.com in the U.S. irregularly (except for Kindle and from re-sellers, often at exorbitant prices), but it remains available from amazon.ca, which ships to the U.S.; or directly from the publisher, at <http://fernwoodpublishing.ca/What-Lies-Across-the-Water/>. The NLG Cuba Subcommittee, 633 W. Wisconsin Ave., Suite 1410, Milwaukee, WI 53203 (414 273-1040), also has copies available for the post paid discounted total price of \$25.
13. See Salim Lamrani & Wayne S. Smith, *The Cases of Alan Phillip Gross and the Cuban 5*, HUFF. POST, Feb. 2, 2012, [http://www.huffingtonpost.com/salim-lamrani/the-cases-of-alan-gross-a\\_b\\_1224817.html](http://www.huffingtonpost.com/salim-lamrani/the-cases-of-alan-gross-a_b_1224817.html); see also Desmond Butler, *AP Impact: USAID contractor work in Cuba detailed*, BLOOMBERG BUSINESSWEEK (Feb. 13, 2012).
14. The Cuban government may see its hold on Gross as a bargaining chip for their release, as well as a deterrent against continuation of the U.S. policy of destabilization. Indeed, the Associated Press documented in April 2014 that shortly after Gross's arrest in Cuba, USAID

launched a "fake twitter" project aimed at secretly identifying to the U.S. government the political inclinations of tens of thousands of unsuspecting Cuban cell phone users, with the goal to promote dissension in Cuba. See Desmond Butler, Jack Gillum & Alberto Arce, *US secretly created 'Cuban Twitter' to stir unrest*, THE BIG STORY, <http://bigstory.ap.org/article/us-secretly-created-cuban-twitter-stir-unrest>.

The week after that revelation, Gross himself began a brief hunger strike to protest this provocative action by USAID, and the lack of progress for his release by both the U.S. and Cuban governments. *Former USAID worker Alan Gross goes on hunger strike in Cuban prison*, GUARDIAN, <http://www.theguardian.com/world/2014/apr/08/usaid-worker-alan-gross-cuba-hunger-strike>. And then in August, 2014, the AP revealed USAID Program Used Young Latin Americans to Incite Cuba Rebellion, which also operated after Gross's arrest in Cuba for his USAID work; *USAID Program Used Young Latin Americans to Incite Cuba Rebellion*, GUARDIAN, <http://www.theguardian.com/world/2014/aug/04/usaid-latin-americans-cuba-rebellion-hiv-workshops>.

Before either revelation, an editorial in the *Washington Post* demanded that until Alan Gross is released, there be no improvement in "relations between Cuba and the United States ... they ought to get worse." And it dismissed as unjustified Cuba's commitment to secure the return of their agents. See, *U.S. shouldn't hand Cuba an Alan Gross-for-spies deal*, WASH. POST (editorial) (Dec. 5, 2012) available at [http://www.washingtonpost.com/opinions/no-alan-gross-for-spies-swap/2012/12/05/fee0314-3f0e-11e2-ae43-cf491b837f7b\\_story.html](http://www.washingtonpost.com/opinions/no-alan-gross-for-spies-swap/2012/12/05/fee0314-3f0e-11e2-ae43-cf491b837f7b_story.html).

Despite the fact that the Bergdahl release generated much criticism, a number of commentators suggested that releasing the remaining three Cubans in order to free Mr. Gross would be a much better U.S. achievement, as there is no basis to believe these Cubans would pose a threat to the U.S. See Ruth Marcus, *After Bowe Bergdahl, what about Alan Gross?* WASH. POST (May 3, 2014), at [http://www.washingtonpost.com/opinions/ruth-marcus-after-bowe-bergdahl-what-about-alan-gross/2014/06/03/e5c1b4c6-eb39-11e3-9f5c-9075d5508f0a\\_story.html](http://www.washingtonpost.com/opinions/ruth-marcus-after-bowe-bergdahl-what-about-alan-gross/2014/06/03/e5c1b4c6-eb39-11e3-9f5c-9075d5508f0a_story.html); and William McGurn, *The other captive Americans—will Obama trade for them?* N.Y. POST (Jun. 13, 2014), available at <http://nypost.com/2014/06/13/the-other-captive-americans-will-obama-trade-for-them/>.

15. Memorandum from Lester B. Mallory, Deputy Asst. Secretary of State for Inter-American Affairs, Apr. 6, 1960, quoted in SALIM LAMRANI, THE ECONOMIC WAR AGAINST CUBA, 72-73 (2013).
16. ALAN GROSS CASE LIFTS VEIL OF SECRECY U.S. DEMOCRACY PROGRAMS IN CUBA, NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 411, Jan. 18, 2013, available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB411/> also posted at <http://nlginternational.org/news/article.php?nid=510>.
17. John Labonia, *An Open Letter To Our Community And Partners On Cuba*, <http://wlrn.org/post/open-letter-our-community-and-partners-cuba>. See also Juan Tamayo, *WLRN cancels interview with author of book that questions conviction of Cuban spies*, MIAMI HERALD, Sept. 17, 2013, available at <http://www.miamiherald.com/2013/09/17/3633553/wlrn-cancels-interview-with-author.html#storylink=cpy>.
18. This can be found at [http://www.washingtonpost.com/opinions/the-cuban-five-were-fighting-terrorism-why-did-we-put-them-in-jail/2013/10/04/37c556a6-1fca-11e3-b7d1-7153ad47b549\\_story.html](http://www.washingtonpost.com/opinions/the-cuban-five-were-fighting-terrorism-why-did-we-put-them-in-jail/2013/10/04/37c556a6-1fca-11e3-b7d1-7153ad47b549_story.html). Kimber's essay generated not only dozens of posted comments, primarily critical of U.S. Cuban policy, but also a critique by a lobbyist for groups seeking to maintain U.S. sanctions against Cuba. Kimber responded to that, and both make interesting reading, accessible at <http://cubanfive.ca/2013/10/capitol-hill-cubans-let-us-compare-facts>.
19. After indicating that it had studied the case for a number of years Amnesty International (AI) issued a statement on January 17, 2007 criticizing the denial of family visitation as "unnecessarily punitive," <http://www.thecuban5.org/wordpress/voices-of-support/amnesty-international/>, (last accessed Mar. 25, 2014). An AI Press Release of October 13, 2010 and a 22-page report on the case asked the Obama administration to release the Five, <http://www.amnestyusa.org/document.php?id=ENGUSA20101013001&lang=e>, and <http://www.amnesty.org/en/library/asset/AMR51/093/2010/en/9911673a-a171-49db-b757-581f2bdfef11/amr510932010en.pdf>.

- The UN finding from April 8, 2004, OPINION NO. 19/2005 (UNITED STATES OF AMERICA), can be found at <http://thecuban5.org/wordpress/voices-of-support/united-nations>.
20. Damien Cave, *Judge Allows René González, One of ‘Cuban Five’ Spies, to Stay in Cuba*, N.Y. TIMES, May 3, 2013, <http://www.nytimes.com/2013/05/04/world/americas/judge-allows-rene-gonzalez-one-of-cuban-five-spies-to-stay-in-cuba.html?emc=tnt&tntemail=y>. When promptly asked by the writer of this review to correct this clear mis-statement of fact, the *Times* took 26 days to decline, without defending the accuracy of their report, since it said “these men were all part of what has been *widely described as a spy ring*.” (Emphasis added); May 30, 2013 email from Zach Johnk, Assistant to the Senior Editor, Standards to Arthur Heitzer. Johnk added that this was also based on the opinion of “our foreign editors” that “the activity they were found to have engaged in was spying, even though the specific charges varied.” This email exchange is available at <http://nlginternational.org/news/article.php?nid=586>.
  21. See, e.g., *WLRN cancels interview with author of book that questions conviction of Cuban spies* MIAMI HERALD, Sept. 17, 2013, *supra* note 17, indicating that all five were convicted of conspiracy to commit espionage.
  22. STEPHEN KIMBER, *WHAT LIES ACROSS THE WATER: THE REAL STORY OF THE CUBAN FIVE* 235-236 (2013).
  23. *Id.* at 246.
  24. *Id.*
  25. *Id.* at 236 & n. 14.
  26. *Id.* at 236.
  27. 419 F.3d 1219, at 1256-1257.
  28. *United States v. Ruben Campa, et. al*, 429 F.3d 1011 (11th Cir., 2005). The National Lawyers Guild filed one of the several amicus briefs in this case.
  29. *United States v. Ruben Campa, et. al*, 459 F.3d 1121 (11th Cir. en banc, 2006). The National Lawyers Guild filed one of the several amicus briefs in this case.
  30. *United States v. Ruben Campa, et. al*, 529 F.3d 980, 1018 (11th Cir., 2008). By the time the case was returned to the original three judge panel and decided almost three years after its first decision, one of the original panel members was replaced by Judge William Pryor a controversial 2002 appointee of George W. Bush who had been filibustered before being narrowly approved by the U.S. Senate; he then wrote the decision of the court, upholding the conviction on this count and all others. The National Lawyers Guild filed one of the several amicus briefs in this case.
  31. Ironically, the prosecution had sought an emergency appeal, so that it could withdraw that charge from the jury because it said, with reference to the Court’s jury instruction (that the prosecution had to prove that there was a plan in advance to shoot down the planes over international waters), that “in light of the evidence presented in this trial,” this “presents an insurmountable hurdle for the United States in this case, and will likely result in the failure of the prosecution.” Well not to worry: the jury proceeded to convict on this as well as on all of the other charges. KIMBER, *supra* note 21 at 232-233.
- A powerful summary of the defense argument re this murder conspiracy claim is contained in Atty. Peter Schey’s “Letter to Obama,” dated March 5, 2013, posted at <http://www.thecuban5.org/wordpress/2013/03/04/us-lawyer-peter-schey-sends-a-letter-to-obama>.
32. 529 F.3d at 1018-1019.
  33. KIMBER, *supra* note 21 at 248.
  34. *Id.* at 242.
  35. *Id.* at 242, 243.
  36. *Id.* at 242.
  37. *Id.* at 241.
  38. *Id.* at 164-65.
  39. *Id.* at 243, n. 25.

40. *Id.* at 213-214.
41. *Obama Tells Dissidents He’s Begun To See ‘Changes’ In Cuba*, EFE, Nov. 9, 2013, at <http://latino.foxnews.com/latino/politics/2013/11/09/obama-tells-dissidents-begun-to-see-changes-in-cuba/> (last accessed Mar. 25, 2014).
42. KIMBER, *supra* note 21 at 208.
43. Peter Whoriskey & Dan Eggen, *7 Held in Miami in Terror Plot Targeting Sears Tower*, WASH. POST, Jun. 23, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/22/AR2006062201546.html>. Deputy Director of the Federal Bureau of Investigation John S. Pistole described the group’s plot as more “aspirational than operational”; the group did not have the means to carry out attacks on such targets. The group had no weapons and did not seek weapons when they were offered. The group had no communication with any actual al-Qaeda or other terrorist operatives. Julianne Gage, *2nd mistrial in ‘Liberty 7’ case*, WASH. POST, Apr. 17, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/16/AR2008041603607.html>.
44. Whoriskey & Eggen, *supra* note 42.
45. *Scandal among Miami Terrorists: Cuban emigre admits anti-Cuba terror plots*, CUBA SOLIDARITY CAMPAIGN (June 23, 2006), <http://www.cuba-solidarity.org/news.asp?index=1516>,
46. KIMBER, *supra* note 21 at 235.
47. *Id.* at 237 & N. 16.
48. *Id.* at 248.
49. Roberto Gonzalez was a strong advocate for the Five throughout. He spoke on the case at an NLG Convention (as a dual U.S. citizen, he could travel to the U.S. without needing a U.S. visa), and the NLG also granted him honorary membership on March 12, 2012, shortly before he died.
50. 353 U.S. 657 (1957). Jencks was an organizer in New Mexico for the progressive International Union of Mine, Mill and Smelter Workers. Later he played himself in the internationally acclaimed but domestically blacklisted film classic, *Salt of the Earth*, set in Silver City, New Mexico.
51. 373 U.S. 83 (1963).
52. See [http://en.wikipedia.org/wiki/Classified\\_Information\\_Procedures\\_Act](http://en.wikipedia.org/wiki/Classified_Information_Procedures_Act).
53. U.S. DEPT. OF JUSTICE UNITED STATES ATTORNEYS MANUAL, TITLE 9, CRIMINAL RESOURCE MANUAL 2054.
54. KIMBER, *supra* note 21 at 244.
55. Kimber regards them as trained agents, not amateurs, functioning under false narratives and some under false names.
56. KIMBER, *supra* note 21 at 263.
57. *Id.* at 264.

