

“The Cuban Five”: The NYT Supports a Prisoner Swap, Constitutional Presidential Pardon

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The New York Times editorialized on November 2, 2014 in favour of a prisoner swap with Cuba. It writes that the three remaining prisoners of the group known as the Cuban Five should be released in a swap for the American Alan Gross who is in a Cuban prison. For the swap to take place, according to the NYT, “President Obama would need to commute” the three Cubans’ sentences. This would be similar in practical terms to presidential pardon, according to the U.S. Constitution, as it would free the Cubans. It is a significant step as far as the media in the U.S. is concerned. [The full NYT Editorial Board opinion is here.](#)

For further information on presidential pardon based on the U.S. Constitution that President Obama has at his disposal as well as the precedents set by Presidents Abraham Lincoln and Jimmy Carter, see my letter to President Obama dated February 4, 2013, reproduced below:

February 4, 2013

President Barack Obama

The White House

1600 Pennsylvania Avenue NW Washington, DC 20500

Dear President Obama,

I am writing today to request that you employ your constitutional presidential power to grant pardons to the Cuban Five and immediately send them back to their country and families. These prisoners are Gerardo Hernández, Ramón Labañino, Antonio Guerrero, Fernando González and René González.[i]

Article 2, Section II of the Constitution provides you with the “Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” This article carries a humanitarian feature and exists in most countries of the world. One can say that it is virtually universal. Let us highlight a few positive examples that bring out the best of the American people. President Abraham Lincoln pardoned 264 of 303 members of the Dakota Indigenous people who defended themselves against settler expansion in the Sioux Uprising of 1862. More recently, in 1977, President Jimmy Carter in his first day of office granted unconditional pardons to hundreds of thousands of men who had evaded the draft during the U.S. war against Vietnam by fleeing the country or by failing to register for military duty.

There are also instances of leaders granting pardon in other countries. In 2010, Cuba

released the prisoners tried and convicted of crimes against the security of the Cuban state. Many U.S. commentators suggested that this would result in “a thaw” in U.S.-Cuban relations. Despite this, there has been no gesture from you to date to pardon the five Cuban prisoners.

Furthermore, in December 2011, the Cuban government announced through Raúl Castro that the Council of State, over which he presides, “has agreed to pardon more than 2,900 prisoners. Not included in this pardon, with very few exceptions, are individuals convicted of crimes of espionage [and] terrorism.” One may respond by claiming that Cuba did not pardon most individuals for “crimes of espionage” and thus why should the U.S. free the Cuban Five? Yet, the U.S. government has never actually accused them of espionage, nor has it affirmed that real acts of espionage were carried out, as no classified document was confiscated from the Five. For this reason, they were charged with conspiracy to commit espionage and conspiracy to commit murder, because actual espionage or murder could not be proven. In law, “conspiracy” facilitates a conviction compared to actual conspiracy; nonetheless, the sentences received were greatly disproportionate to any “conspiracy” conviction.

The Cuban government, compared to the U.S. government, even further “agreed to pardon” among the more than 2,900 prisoners “certain individuals convicted of crimes against the security of the state, who have completed a large portion of their prison terms with good behavior.” The Cuban Five, in contrast, were never convicted of crimes endangering the security of the state, as no proof could be found to this effect. The five Cuban prisoners are also known for their good behaviour in prison. Therefore, President Obama, I urge you to join the tradition of some of your own predecessors, such as Lincoln and Carter. This humanitarian policy is preferable to your most recent statement on this issue. On January 30, 2013 in an interview on Telemundo, you stated that “in order for us to see an actual normalization of the relations between the United States and Cuba that we have to do something about all those political prisoners who are still there.” Clarification would be in order regarding “political prisoners” in Cuba; the facts suggest that the only “political prisoners” left in Cuba are those in Guantanamo prison.

In the U.S. Constitution’s Article 2, Section II, the President is vested with the powers to grant pardon, with the exception of “Cases of Impeachment.” Impeachment refers to people within the U.S. political system itself who have committed wrongdoings that merit accusations of impeachment. This is considered the worst offense and thus only those convicted of impeachment are exempt from any possible presidential pardon. Clearly, this “impeachment” exception does not apply to these five prisoners. Once again, I request that you pardon them.

Amendment 8 of the U.S. Constitution excludes the use of “cruel and unusual punishment.” In the case of Gerardo Hernández, for example, he has been sentenced to two consecutive prison life terms plus fifteen years for crimes he maintains that he did not commit and that the government could not prove. While at the same time, during all this period for over fourteen years since his arrest, the State Department has denied an entry visa to his wife Adriana Pérez to visit him. Is this is not an example of “cruel and unusual punishment”? In a similar manner, Olga Salanueva, the wife of René González, another of the Cuban Five, has also been denied an entry visa to visit her husband in the U.S.

Therefore, I am asking you to enforce the relevant portions of the U.S. Constitution that can

be characterized as being humanitarian. I implore you to sit down with the Cuban government and work out a humanitarian solution to this problem of prisoners so that the normalization of relations between the two countries can be established and flourish. A compassionate outlook is a hallmark of democracy. Cuba has already exhibited this twice in the case of prisoners. And let us not forget Alan Gross, held in a Cuban prison, who appears to have been abandoned by your government.

It is time to turn the situation around. The decisions by Lincoln and Carter to pardon may not have been popular with everyone in the U.S. at the time, but these stands have gone down in history as being positive examples.

Thank you in advance for considering my appeal.

Sincerely,

Arnold August, Montreal

[i] Note that since the time of writing, Rene González and Fernando González have served their entire terms and have returned home, thus leaving three of the Cuban Five imprisoned at this time. The three remaining are: Gerardo Hernández, Antonio Guerrero and Ramón Labañino.

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