

# **Taking Cuba off the Terrorist List: A Question of National Interest**

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***Is Cuba's Refusal to Turn Over Fugitives from U.S. Justice a Valid Basis for its Continued Designation as a State Sponsor of Terrorism?***

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## **Does Cuba's Refusal to Extradite U.S. Fugitives Require the State Department to List it as a Terrorist Sponsoring Nation?**

I have been asked to comment on one of the three reasons given by the State Department for its most recent designation of Cuba as a state sponsor of terrorism:<sup>1</sup> That is, the Cuban government “continued to permit fugitives wanted in the United States to reside in Cuba and also provided support such as housing, food ration books, and medical care for these individuals.”

The State Department's stated reason for designating Cuba prompts an obvious question: Is the United States government required by law to designate a nation a supporter of terrorism on the basis of whether or not it surrenders people wanted in the U.S. on criminal charges?

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<sup>1</sup> See *Country Reports on Terrorism 2011*, at page 171, Office of the Secretary of State, Office of the Coordinator for Counter-terrorism. Available on-line at: <http://www.state.gov>.

Clearly not. Many countries have not signed extradition treaties with the U.S., leaving us unable to demand of them the return of American fugitives.<sup>2</sup> Among the dozens of nations the U.S. does not have extradition treaties with are Indonesia, the People's Republic of China, Kuwait, Vietnam and Cambodia, to name only a few. None of those countries are on the State Department's list of terrorist sponsoring nations.

So there is obviously no *requirement* that countries that do not extradite fugitives to the U.S. be listed as terrorist sponsoring countries. But can it nevertheless be a valid reason for inclusion on the list? The answer, as a matter of U.S. law, is no.

### **The Statutory Basis for Designation**

The legal authority for the State Department's designation of terrorist sponsoring countries is section 6(j) of the 1979 Export Administration Act.

Section 6(j) gives the Secretary of State the authority to determine that a country has "repeatedly provided support for international terrorism." Such a determination is prerequisite to inclusion on State Department's list of terrorist supporting countries<sup>3</sup>.

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<sup>2</sup> The right of a foreign sovereign to demand and obtain the extradition of an accused criminal is created by treaty: see *Ramon v. Diaz*, 179 F. Supp. 459, 460-61 (S.D. Fla. 1959). In the absence of a treaty there is no duty to extradite: see *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933).

<sup>3</sup> By the way, the President may, entirely at his discretion, remove a country from the Section 6(j) list in two ways. The first option is to submit a report to Congress certifying, before the removal takes effect, that: 1) there has been a fundamental change in the leadership and policies of the government; 2) the government is not supporting acts of international terrorism; and 3) the government has provided assurances that it will not support acts of international terrorism in the future. The second option is to submit a report at least 45 days before the removal of the country from the list certifying that 1) the government has not provided any support for international terrorism during the preceding 6-month period, and 2) that the government has provided assurances that it will not support acts of international terrorism in the future.

Certain fugitives from U.S. justice are permitted to reside in Cuba. Does this action on the part of Cuba *definitionally* constitute “repeated provision of support for international terrorism,” as required by section 6(j)?

Plainly not, unless two further elements can both be demonstrated: (i) The fugitives in question have committed “terrorist” acts and, (ii) those acts were “international” in character.<sup>4</sup>

I have been unable to identify a single U.S. citizen currently residing in Cuba who meets the twofold criteria of having (1) committed a terrorist act that (2) was international in nature.

### **Cuba’s Treatment of U.S. Fugitives is an Invalid Basis for Designation Under Section 6(j)**

Because none of the U.S. fugitives in Cuba are wanted in the U.S. for terroristic acts of an international character, Cuba’s inclusion on the State Department list of terrorist sponsoring nations is invalid, insofar as it rests on Cuba allowing U.S. fugitives to reside there.

Having demonstrated that Cuba’s inclusion on the terrorist list is *per se* invalid under section 6(j) I could conclude my remarks at this point. I think it worthwhile however to proceed further in order to ask:

### **Why Doesn’t Cuba Turn Non-political Fugitives Over to the U.S.?**

Under a 1904 bilateral extradition treaty non-political criminals are to be extradited on a reciprocal basis to and from Cuba and the

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<sup>4</sup> The U.S. defines “terrorism” as “premeditated, politically motivated violence perpetrated against noncombatant targets.” See 22 U.S.C. 265 6f(d)(2). “International terrorism” is defined as “acts involving the citizens or the territory of more than one country.” See 22 U.S.C. 2656f(d)(1). Therefore the criminal acts – even if terroristic - of an individual or group, if confined within a single country and aimed only at citizens of that country, would not qualify as “*international* terrorism.” This point becomes relevant later when I discuss the case of the fugitive Black Panther, Joanne Chesimard.

United States.<sup>5</sup> However, U.S. breaches of the treaty have put it into a state of suspension - that is, Cuba has refused to extradite U.S. citizens as a direct response to the U.S. treatment of *its* requests for Cuban citizens to be returned to Cuba. Its position is fully consistent with public international law.<sup>6</sup>

**(i) How the U.S. has responded to Cuban Requests for Extradition of Fugitives from that Country's Criminal Justice System**

On January 7, 1959 Cuba sought, by standart diplomatic request, the extradition of a number of Cubans who had fled to the U.S. following the collapse of the Batista government one week before. The men sought included embezzlers from the Cuban national treasury, torturers and plain gangsters.

Over the next few months Cuba supplemented its requests with dossiers of supporting evidence. Cuba never received a reply to those requests for extradition.

Moreover, on several occasions Cuba has asked the U.S. to detain and return to Cuba individuals it alleges were involved in such terrorist activity as blowing up a Cuban civil airliner in mid-air. Again, no response.

In sum, Cuban officials maintain that not one of dozens of diplomatic notes requesting the U.S. to turn over Cuban fugitives of all

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<sup>5</sup> See Treaty of Extradition between the United States and Cuba, signed at Washington April 6, 1904. 33 Stat. 2265; TS 440; 6 Bevans 1128. The treaty is included in the most recent edition of State Department's annual publication, *Treaties in Force. Treaties in Force* describes itself as "a publication [that] lists treaties and other international agreements of the United States on record in the Department of State which had not expired by their terms or which had not been denounced by the parties, replaced or superseded by other agreements, or otherwise definitely terminated."

<sup>6</sup> See Article 60 of the *Vienna Convention on the Law of Treaties*: "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as grounds for terminating the treaty or *suspending* its operation in whole or in part." (Emphasis added).

kinds has ever been answered.<sup>7</sup> As a result, a senior Cuban foreign ministry official commented that the U.S. has no “moral right” to ask Cuba to extradite anyone, whether they are political fugitives or ordinary criminals.<sup>8</sup>

### **Political Fugitives in Cuba: The Legal Dimension**

As previously mentioned, the State Department’s most recent report accusing Cuba of supporting international terrorism says: the Cuban government “continued to permit fugitives wanted in the United States to reside in Cuba and also provided support such as housing, food ration books, and medical care for these individuals.”

In earlier reports the odd comment appears:

*“The salient feature of Cuba’s behavior in this arena, however, is its refusal to render to U.S. justice any fugitive whose crime is judged by Cuba to be political.”*(Emphasis Added).

That comment calls into question whether U.S. officials are aware that an extradition treaty exists between the U.S. and Cuba, much less that the treaty explicitly prohibits the extradition of persons whose crimes are of “political character.” I’ll return to this point in a moment. But, first, how many “political” fugitives from U.S. justice are actually in Cuba? According to various U.S. sources, approximately seventy U.S. citizens either convicted of or charged here with crimes of all types live in Cuba today. Cuba claims that figure to be an exaggeration and puts the number at approximately twenty-five. The

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<sup>7</sup> See *Declaration by the Cuban Ministry of Foreign Affairs: Cuba has Nothing to Hide and Nothing to be Ashamed of*, April, 2002. Available on-line at [www.cuba.cu/gobierno/documentos/2003/ing/d020503i.html](http://www.cuba.cu/gobierno/documentos/2003/ing/d020503i.html)

<sup>8</sup> Remarks of Vice Minister of Foreign Relations Rafael Dausa, October, 2004.

crimes that most of these individuals are accused of are non-political in nature.

According to the Council on Foreign Relations published several years ago, eight U.S. nationals reside in Cuba whose crimes may be deemed “political.” Joanne Chesimard is the one person in this category actually named in a State Department annual report. For that reason her case is worth examining in some detail.

Chesimard was a member of the Black Panther Party.<sup>9</sup> She was convicted in 1973 of killing a New Jersey state trooper. In 1979 she escaped prison and has been in Cuba since then.

Joanne Chesimard has been described by a Cuban official as someone whose case was investigated and found to merit treatment as a political offense. As a result of that determination, Cuba’s position is that she is not extraditable.

Is Cuba legally justified in taking this position? As deplorable and reprehensible as the killing of New Jersey State Trooper Werner Foerster was, the answer is yes.

The 1904 Extradition Treaty between the U.S. and Cuba says, at Article VI: “A fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded be of a political character...If any question shall arise as to whether a case comes within the provisions of this article, the decision of the authorities of the government on which the demand for surrender is made...shall be final.”

The political offense exception of the 1904 U.S. - Cuba Extradition Treaty is found in most bilateral extradition treaties.<sup>10</sup> For

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<sup>9</sup> The Black Panthers were a militant political faction born in Oakland, California in 1966. They advocated and practiced the principle that “oppressed peoples” should take up a revolutionary war against the U.S. government. As a result the Black Panthers were involved in several violent confrontations with state and federal law enforcement officers. At times those confrontations resembled combat operations.

example, until 1987 when the U.S. and the United Kingdom amended their joint extradition treaty, members of the Irish Republican Army (IRA) were routinely determined by U.S. courts to be exempt from extradition under the political offenses exception of an earlier treaty.<sup>11</sup>

It's worth exploring whether a U.S. court find Joanne Chesimard exempt from extradition under the political offense exception of the 1904 treaty with Cuba. Federal case law suggests it would.

The historical development of the political offense exception is grounded in a belief that individuals have a “right to resort to political activism to foster political change.”<sup>12</sup> Violent political action is specifically covered by the exception.<sup>13</sup>

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<sup>10</sup> See *Quinn v. Robinson*, 783 F. 2d. 776 (9<sup>th</sup> Cir. 1986), “The political offense exception [is] now almost universally accepted in extradition law.” See also *Analysis of the U.S.-U.K. Supplementary Treaty on Extradition*, The International Lawyer, Summer 1987: “Virtually every extradition treaty contains a provision banning extradition for a “political offense.”

<sup>11</sup> See for example, *In the Matter of the Requested Extradition of Joseph Patrick Thomas Doherty by the Government of the United Kingdom*, 599 F.Supp. 270 (1984) where extradition was refused by a New York court in the case of a member of the Provisional Irish Republican Army who killed a British Army officer in an ambush in Belfast and grievously assaulted prison guards while escaping from prison. In similar vein a U.S. court held that a Sikh militant’s murder of three men in India he considered “pro-police” was a political offense: see *Barapind v. Enomoto*, 360 F.3d 1061 (9<sup>th</sup> Cir. 2004). Barapind in the end was extradited to India to stand trial for crimes the court determined were non-political.

<sup>12</sup> *American Courts and Modern Terrorism: The Political Extradition*, 13 N.Y.U.J. Int’l Law & Pol. 617, 622 (1981).

<sup>13</sup> “A political offense... must involve an “uprising” or some other violent disturbance.” *Garcia-Guillern v. United States of America*, 450 F.2d 1189(5<sup>th</sup> Cir. 1971). During the 1986 debates in the U.S. Senate over amending the extradition treaty with the U.K. to exclude such crimes as murder opponents of both parties argued that the elimination of the political offense exception for certain crimes ran counter to the United States’ venerable tradition of providing a haven for political refugees and freedom fighters. Drawing an analogy to the American Revolution, Senator Jesse Helms (R-NC) argued for the existence of a “right to rebel” that must be respected in all circumstances. For example, he said, “If this [amended extradition] treaty had been in effect in 1776,...[its] language would have labeled the boys who fought at Lexington and Concord as terrorists. There is no question that the British authorities in 1776 would have considered the guerilla operations of the Americans to be murder and assault. Their offenses included the use of bombs, grenades, rockets,

U.S. courts have often required a crime to meet a two-fold test for it to be considered political: (1) the occurrence of an “uprising or other violent political activity” at the time of the offense and (2) the offense must be “incidental to,” “in the course of” or “in furtherance of the uprising.”<sup>14</sup>

Judging from the case law, there is a good chance that a U.S. court would find the Black Panther Party in a state of revolt against the U.S. government in 1973 and Chesimard’s violent attempt to avoid capture as “incidental” to that revolt.<sup>15</sup>

We can deplore Chesimard’s crime while at the same time conceding that Cuba’s treatment of her as a political fugitive has a sound legal basis in the international law of treaties in general and in U.S. jurisprudence in particular.

### **Conclusion**

A casual reading of the State Department’s report results in the conclusion that there is no legal or factual basis for the annual designation of Cuba as a state sponsor of terrorism. President Bill Clinton’s former special advisor on Cuba, Richard Nuccio, said over ten years ago, “Frankly, I don’t know anyone in or outside of government who believes in private that Cuba belongs on the terrorist list. People who defend it know it is a political

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firearms, and incendiary devices, endangering persons, as may be demonstrated by reference to our National Anthem.” 132 *Congressional Record*, S9161 (daily ed. July 16, 1986). See also the remarks of Senator Chris Dodd (D-CT) from the other side of the aisle: “The underlying proposition in this [extradition] agreement is that all acts of political violence are wanton crimes and acts of terrorism. It equates all political violence with terrorism, and that is a bogus proposition. It’s as bogus as equating political opposition to sedition or treason.” 132 *Congressional Record*, S9252 (daily ed. July 17, 1986).

<sup>14</sup> See *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986)

<sup>15</sup> See *Quinn, supra.*: “It is clear that various “non-military” offenses, including acts as disparate as stealing food to sustain the combatants, killing to avoid disclosure of strategies, or *killing simply to avoid capture*, may be incidental to or in furtherance of an uprising.” (Emphasis added).



calculation. It keeps a certain part of the voting public in Florida happy, and it doesn't cost anything".<sup>16</sup>

The political calculations referred to by Mr. Nuccio force the State Department to annually defend its inclusion of Cuba on the list of countries that sponsor international terrorism. Because no factual basis exists to keep Cuba on the list, it is forced to resort to pretexts.<sup>17</sup>

The allegation that Cuba "hosts dozens of fugitives from U.S. justice" is as much a pretext as the other accusations advanced by the State Department. As I mentioned at the outset, even if true, Cuba's conduct with respect to fugitives is simply inapplicable to deciding whether or not it meets the explicit criteria for designation under section 6(j) - that is, does it "provide support for international terrorism?"

Given that its conduct in repeatedly breaching the 1904 Extradition Treaty is responsible for the present bilateral suspension of cooperation regarding fugitives, the first move in remedying the situation must be that of the U.S. If this country is sincere in wishing to see non-political fugitives returned from Cuba it must as an initial step inform that country of its willingness to honor the 1904 treaty in the future. Alternatively it could negotiate a new extradition treaty with Cuba that abolishes the political offense exception, as the U.S. did with the U.K. in 1987.

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<sup>16</sup> "Experts Debate Taking Cuba off Terrorist List," *Orlando Sentinel*, April 7, 2002

<sup>17</sup> For example, one of the allegations relied upon to designate Cuba in 2004 is that it "remained opposed to the U.S.-led Coalition prosecuting the global war on terrorism and condemned many associated U.S. policies and actions throughout 2003." The same could of course be said of France, Germany and a majority of other countries. None are on the State Department's list. It follows that the inclusion of Cuba on the terrorist list on such a basis can therefore be nothing *but* pretextual.

## **A Note on Treatment of International Terrorists Under the 1904 Extradition Treaty**

In a 2002 Declaration,<sup>18</sup> Cuba's Foreign Ministry complained that "recognized terrorists...have walked the streets of Miami for years without anyone bothering them, with total impunity and privileges." The declaration named fifteen men as such terrorists, including individuals implicated in blowing up a Cuban airliner in mid-air and organizing the planting of bombs in Cuban hotels.

If the 1904 U.S.-Cuba Extradition Treaty were reactivated, would the alleged terrorists Cuba names in the 2002 Declaration be able to avail themselves of the "political offenses" exception of the treaty? The answer is no.

In *Quinn v. Robinson*, 783 F. 2d 776 (9th Cir. 1986) the Court held unequivocally that "The political offense exception...was not designed to protect international political coercion or the exportation of violence and strife to other locations – even to the homeland of an oppressor nation."

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<sup>18</sup> See footnote 7.