



International Policy **BRIEF**

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Report on the Conference to Call for Cuba's Removal from the Terrorist List

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**At the University of California's Washington Center
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By Wayne Smith, Peter Kornbluh, Robert Muse and Elizabeth Newhouse

Summary

The Export Administration Act of 1979 authorized the secretary of state to designate countries that have "repeatedly provided support for international terrorism" and to place them on an annual list. Although there has never been any evidence that Cuba sponsors terrorism, that in fact it regularly condemns it and has signed all twelve UN anti-terrorist resolutions, the U.S. placed Cuba on the list in 1982 and has kept it there for the past twenty-eight years without any credible evidence. Inclusion has serious consequences, and never more so than now, with the added security measures called for by the U.S. in the wake of the attempted bombing of a U.S. airliner landing in Detroit on Christmas eve. To spotlight the gross injustice of including Cuba – and the damage that does to U.S. credibility—the Center for International Policy (CIP) held a conference on January 28, 2010, to review the record and strongly urge that Cuba be taken off the list. Hosted by Wayne Smith, the director of CIP's Cuba Program, the conference's other panelists were Peter Kornbluh of the National Security Archives, and Robert L. Muse, a Washington attorney and a specialist on U.S. laws relating to Cuba.

Speakers

Peter Kornbluh opened his presentation by pointing out the importance of raising this issue now, while the 2010 list is being finalized in the State Department. The

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issue's political dimensions have apparently been discussed in State and the White House, leading him to predict that removing Cuba this year is improbable. Members of Congress, he pointed out, recently received a letter from the State Department dated December 28, 2009, stating that Cuba "remains on the list of State Sponsors of Terrorism because the Cuban Government continues to harbor members of foreign terrorist organizations within its territory," some of whom "pose a threat to the security of U.S. citizens and to the broader interests of the U.S. Government."

Kornbluh recalled the circumstances that placed Cuba on the terrorist list in 1982. Only weeks before, Secretary of State Alexander Haig, whose position could be summarized by his belief that the U.S. should "turn Cuba into a parking lot," secretly went to Mexico to meet with Cuban Vice President Carlos Rafael Rodriguez. The secret meeting was arranged at the behest of the Mexicans, who hoped to help ease U.S.-Cuba tensions. Haig told Rodriguez that Cuba had to get out of Central America, and threatened serious consequences if it continued to supply arms to guerrillas in El Salvador and Guatemala. Haig returned to the U.S. convinced that Cuba would not comply, and eight weeks later Cuba appeared on the State Department list, along with such outliers as Iraq, Libya, South Yemen, and Syria.

Cuba was put on the list so that the Reagan administration could obfuscate the difference between support for revolutionary movements and support for international terrorist activities. A presence on this list curtails U.S. aid, trade, and military assistance, and can be inconvenient at times. Iraq had to be removed before the U.S. could legally send its government arms against Iran, said Kornbluh. In Central America, Cuba was not involved in international terrorism, but in supporting revolutionary movements. By equating revolution with international terrorism, however, the U.S. could add Cuba to the State Department list.

Kornbluh pointed out that Cuba has remained on the list year after year, even though the circumstances which led to it being placed on the list have completely changed. As early as 1992, at the Havana conference marking the 30th anniversary of the Cuban Missile Crisis, Fidel Castro publicly stated that Cuba no longer was involved in supporting revolutionary movements abroad. U.S. intelligence confirms that statement.

After 9/11, Kornbluh noted, the rationale for keeping Cuba on the list focused on what Cuba was *not* doing, e.g. not being cooperative enough in President Bush's war on terror, not extraditing from Cuba leftists from Spain and Colombia (though both countries knew of and agreed to the presence of those citizens). Cuba tried to allay U.S. concerns with its own counterterrorism efforts and by not making a major issue of Guantanamo's use by the U.S. as a terrorist prison.

On the eve of President Jimmy Carter's 2002 visit to Cuba, the first for a former U.S. president, Under Secretary of State John Bolton made a speech at the Heritage Foundation. He accused Cuba of supporting a "biological warfare research and development effort." Rather than allow his trip to be undermined, Carter courageously refuted the statement, revealing that in his own briefing with the CIA he was told there was no evidence of a biological weapons threat in Cuba.

With President Obama's election, many people expected that one of his first -and easiest-foreign policy gestures would be to remove Cuba from the terrorist list. This did not happen in 2009, in part, Kornbluh suggested, because of a clause in the original law establishing the list stating that Congress must be notified 30 days in advance before a country is removed. Now that the Obama administration has just placed Cuba on the longer list of countries requiring added security measures as a result of the Christmas day bombing attempt over Detroit, it is hard to see how the door can be opened to removing it from this year's list. A letter from the State Department to Congressman James McGovern and others, in response to their urging a change in policy, reiterated the same discredited arguments that have been used to keep Cuba on the list for nearly three decades.'

In ending his presentation, Peter Kornbluh noted, "the terrorism issue hangs over Cuba relations, but very differently from what is suggested by the list." To the extent there has been any danger, it comes not from flights from Cuba but from Cuban exiles organizing threats against Cuba. He reminded the audience that Luis Posada Carriles, who U.S. intelligence identifies as one of the masterminds of the October 1976 bombing of Cubana flight 455, was to go on trial in El Paso on March 1. That has now been postponed. No new date has been set for charges that include lying about his role in a series of hotel bombings in Havana in 1997.

Wayne Smith, of CIP, noted that he had been Chief of the U.S. Interests Section in Havana when Secretary Haig met with Carlos Rafael Rodriguez in late 1981 on the issue of Cuba's supply of arms to guerrillas in Central America. As Smith learned later, the Cuban had pressed for dialogue, but Haig's response, as described by Peter Kornbluh above, had been that the U.S. wanted actions, not words. Thus, when the Cubans informed Smith in late December of 1981 that they had in fact suspended all arms shipments to Central America, Smith assumed this was their response to the "action" called for by Haig. He reported the conversation to the Department of State and asked if it had evidence to the contrary, i.e., of continuing shipments. If not, perhaps the U.S. should indeed begin the dialogue the Cubans were now obviously ready for. It took five cables and several weeks to get an answer out of the Department of State and when it came it was most disappointing. The Department acknowledged that it had no evidence to the contrary, i.e., of continuing shipments, but noted that that made little difference. In other words, even if the Cuban shipment of arms to Central America had been halted, the U.S. had no interest in a dialogue with Cuba. Shortly thereafter, the U.S. began taking new measures against Cuba – one of which was to put Cuba on the terrorist list – , and indicated that it was doing so because of "increased" Cuban support for guerrillas in Central America and because Cuba refused to negotiate seriously with the U.S. Smith noted that both were cynical misrepresentations of the true facts.

CIP's 2004 report, "Cuba Should Not Be on the Terrorist List," points up the complete lack of evidence to justify the U.S. position. Spurious accusations against Cuba include that it has friendly relations with North Korea. Perhaps, but unless that involves terrorist activity (and there is no indication that it does), it provides no grounds whatever for Cuba's inclusion on the list. Nor does the fact that members of ETA, FARC and the ELN are in Cuba, not unless their presence there is linked to terrorist activities and at the time the governments of Spain and Colombia said this is not the case. The 2006 State Department report itself stated that in Cuba "there is no information concerning terrorist activities by these or other terrorist groups."

The 2009 State Department report also brought up – as it does every year -- the matter of U.S. fugitives in Cuba, principally hijackers who have served their time. Again, their presence is not in any way a cause to keep Cuba on the terrorist list, as their acts

were not committed while in Cuba – nor is failure to extradite fugitives a valid reason in itself for placing a country on the terrorist list. That would require specific conditions, which do not apply to any of the U.S. fugitives in Cuba.

Smith said he believed that until President Obama removes Cuba from the terrorist list, which he can do with the stroke of a pen, the U.S. will remain in a dishonest position. No other country supports the U.S. position. The false arguments we bring forward to support it make us look cynical and undermine our moral authority in the fight against terrorism. Further, U.S. political hardliners use State's designation of Cuba as a "terrorist state" to justify their opposition to engagement. The political consequences are real and damaging.

Robert L. Muse noted that the State Sponsors of Terrorism List was created by the Export Administration Act of 1979. Obviously the list is punitive in design, so designation of a particular nation as a state sponsor of terrorism has distinctly adverse economic consequences. For example, being listed as a sponsor of international terrorism restricts bilateral assistance in U.S. annual foreign assistance appropriations acts. It also makes it nearly impossible for a listed country to receive exports of anything but food and medical products from the U.S. Moreover, Section 502 of the Trade Act of 1974 makes a country ineligible for the Generalized System of Preferences (GSP) if it is on the terrorism list. This means a designated country's products are subject to crippling high duties if an attempt is made to import into the U.S.

However, the economic sanctions that Cuba is subject to as a result of its designation as a terrorism sponsoring nation sound worse than they actually are. This is so because the U.S. embargo on Cuba already prohibits trade with Cuba. Whenever the decision is made to relax the embargo, a President has the authority to simultaneously rescind any restrictions imposed by Cuba's inclusion on the terrorist list by simply revoking its designation.

But, there is another consequence that follows from Cuba's designation as a state sponsor of terrorism that is not so easily remedied. Once on the list, a country is subject to suits in U.S. courts that would otherwise be dismissed on the basis of sovereign immunity. It is the court judgments resulting from such suits that have long-term implications for U.S.-Cuba relations.

Basically a country that is designated a state sponsor of terrorism may be sued under the Foreign Sovereign Immunities Act for “extra-judicial” killings if it was (i) designated as a sponsor of terrorism *at the time of the killing* and (ii) the victim was a U.S. citizen at time of death. Nearly a billion dollars has been awarded against Cuba as a result of lawsuits that do not meet the first of those criteria.

The cases began with *Weiniger* and *McCarthy* in 2006. They involved the deaths of two men who, respectively, (i) bombed and strafed Cuba in a B-26 painted in Cuban Air Force colors and (ii) entered Cuba loaded with incendiary bombs that were to be detonated during the Bay of Pigs landing. Both were killed in 1961-Cuba was first designated a state sponsor of terrorism in 1982.

As bogus as the *Weiniger* and *McCarthy* cases were, they nevertheless emptied the bank accounts of the Government of Cuba that had been frozen in New York since the early 1960s. They also demonstrated to greedy attorneys in Miami that Cuba’s designation on the terrorism list was enough to generate massive awards against Cuba in the Florida courts, even if the requirements of the Foreign Sovereign Immunities Act were not met. Hence new cases continue to be filed.

The lawyers filing those cases hope to collect their large contingency fees out of seizures of Cuban-owned property that enters the U.S. They also intend to have their court judgments espoused by the U.S. government in the course of the claims settlement negotiations between the U.S. and Cuba that must occur in any normalization of relations between the two countries. But the awards are so utterly without legal basis under controlling U.S. law as to cause Cuba to simply refuse to pay them if they are raised by the U.S. in a future normalization of relations context.

However, a refusal by Cuba to pay the U.S. court awards will leave every agency or instrumentality of the Cuban government (and any private entity in a joint venture or contractual relationship with Cuba or one of its agencies) at risk of someday having any and all of its property that enters the U.S. attached in execution of those awards. (E.g. Cubana Airline’s planes; ships; cigars from Cuba’s state tobacco monopoly; bank accounts set up to pay for U.S. exports, etc., etc.).

In 2008 the Foreign Sovereign Immunities Act was amended to add a new subsection which allows for the attachment and execution on *any* property of a foreign

state with a §1605A judgment against it (i.e. a judgment against a “terrorist sponsoring nation”), even if the government instrumentality that finds its assets in the U.S. attached had no connection to the events that were the basis for the court’s award, and even if there are other non-state joint or beneficial owners of that property. As a result, attorneys for families with judgments against Cuba have tried to seize telephone royalties Cuba owed U.S. telecommunications companies. They have also tried to seize money from U.S. airlines that fly to Cuba claiming it will be paid to that country as landing fees. Finally, they have tried to seize Cuban-owned trademarks for rum and cigars.

The judgments against Cuba go beyond rendering Cuban assets subject to seizure in the U.S. and thereby blocking bilateral trade. They will also operate as a powerful disincentive for Cuba to ever normalize its relations with the U.S. For several reasons, claims settlements have been described as the “*sine qua non* of normalized relations between two countries.” *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 245 (1983). So, to the extent the judgments end up as unresolved claims of U.S. citizens against Cuba, their unsuccessful espousal by the Department of State could well preclude a normalization of relations between the U.S. and Cuba.

A brief review of a few of the more recent judgments against Cuba illustrated their infirmities. In April 2008 a jury awarded the representative of the estate of a man named Rafael Del Pino \$230 million. Not long after, a judge awarded the family of a man named Aldo Sera \$94.6 million. Both judgments were entered in Miami-Dade County Court.

In the first case it was alleged in a very confused and almost semi-literate complaint (e.g., “At all times relevant hereto, Rafael Del Pino was executed by hanging”) that Del Pino, who had been “a friend of Fidel Castro and was involved in the Cuban Revolution,” was “executed” in 1979. According to Hugh Thomas’ history of Cuba, Del Pino acted as a paid informant for the Batista government. (He informed Batista’s agents of the location of an arms cache stored in a house in Mexico that was to be used in Castro’s Sierra Maestra campaign).¹ According to Thomas, Del Pino left for the U.S. after the incident in Mexico. He returned to Cuba, again according to Thomas, “in 1959

¹ Cuba: *The Pursuit of Freedom*.

to lead an abortive expedition against Castro and to receive a thirty-year sentence.” Evidently he died while in prison.

In the second case, Aldo Vera was the “former Chief of Police of Havana” whose relatives claimed he was murdered by “Cuban agents” in Puerto Rico in 1976. Before his death he organized and ran a paramilitary group (the Fourth Republic) with the objective of overthrowing the Cuban government.

In 2007, \$400 million was awarded to the family of a Cuban/U.S. dual national (Fuller) who was born and lived his entire life in Cuba where his grandparents had immigrated in the early 20th century. In 1960, he went to Florida to organize an “invasion of Cuba” by four Americans and twenty-three Cubans. He was apprehended and executed in October of that year.

Another case in 2007 awarded a Cuban plaintiff named Jerez \$200 million. He was imprisoned in 1964. It is unclear when he was released, but the judgment states that he moved to the United States in 1980 and was naturalized as a U.S. citizen in 1993.

Added together the four judgments entered in the past year total nearly \$850 million. Interest on those awards under Florida law is an astonishing 11% per year until satisfied.² (I should point out that it is difficult to arrive at a final figure for current Dade County Court awards against Cuba. The judgments I have just described (i) appeared in media I routinely monitor for Cuba-related stories (e.g. *The Miami Herald*), or (ii) have been discovered by a periodic review of the Dade County Circuit Court’s docket).

Again, Cuba was not designated by the State Department until 1982. That means it was not susceptible to suit until three years after Del Pino died; six years after Vera’s death and at least twenty years after the death and maltreatment alleged in the 2007 cases of Jerez and Fuller.

The courts of Florida have failed to require litigants to demonstrate that they qualify to sue Cuba. Therefore the President must, in the U.S. national interest, remove Cuba from the list of terrorism sponsoring nations if he is to preserve the option of normalized relations with that country some day.

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² See §55.03 of the Florida Code.