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Can Banks Be Liable for Aiding and Abetting Terrorism?: A Closer Look into the Split on Secondary Liability Under the Antiterrorism Act

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CAN BANKS BE LIABLE FOR AIDING AND ABETTING TERRORISM?: A CLOSER LOOK INTO THE SPLIT ON SECONDARY LIABILITY UNDER THE ANTITERRORISM ACT

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The Antiterrorism Act of 1990 (ATA) explicitly authorizes a private cause of action for U.S. nationals who suffer an injury "by reason of an act of international terrorism." ATA civil litigation has increased dramatically following September 11, 2001—and banks, because of their deep pockets, have emerged as an increasingly popular target. Courts are divided concerning the scope of liability under the statute, specifically over whether the ATA authorizes a cause of action premised on secondary liability. Under a secondary liability theory, a plaintiff could argue that a bank, through providing financial services to a terrorist client, aided and abetted an act of international terrorism.

This Note examines the conflict over secondary liability under the ATA, applies this conflict to banks specifically, and concludes that the legislative history of the ATA civil provision is not enough to support such a cause of action. This Note ultimately finds, however, that the absence of any kind of secondary liability route for plaintiffs diminishes the ATA's power as a deterrent against terrorism financing and also has interesting repercussions for primary liability cases. As a result, this Note argues that Congress should amend the ATA to explicitly permit secondary liability. However, in order to guard against excessive suits against innocent banks, courts should only permit claims premised upon secondary liability in extreme cases where the bank manifested intent or extreme recklessness in their dealings with terrorist clients.

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INTRODUCTION

Bank *A* handles millions of accounts worldwide. It provides routine financial services to clients across six continents. As a result of a bank employee's negligence, the bank transfers funds through a computerized system to a U.S.-designated terrorist group in the Middle East. This money is used to procure a suicide vest, which a member of the group puts on and detonates in a street in Iraq. One of the innocent bystanders killed is an American.

Bank *B* does not possess the same level of business as Bank *A*. Instead, it knowingly provides both routine *and* nonroutine services to a terrorist organization. For instance, Bank *B* delivers personalized payments to the

families of suicide bombers after their deaths. The terrorist group linked to the bank launches an attack abroad that kills an American.

Bank *C* conducts business with many countries—including Iran, a country on the U.S. State Sponsors of Terrorism list ("SST list").[1] The extensive business with Iran is in violation of U.S. Office of Foreign Asset Control (OFAC) sanctions.[2] Some of the funds the bank transfers to Iran are traced to the terrorist group Hezbollah. The group launches an attack in Israel that kills an American citizen.[3]

The civil provision of the Antiterrorism Act[4] (ATA) expressly provides U.S. nationals with a private right of action for injury to person, property, or business, "by reason of an act of international terrorism."[5] In enacting the ATA, codified at 18 U.S.C. § 2333(a), the government has enlisted private plaintiffs in the fight against terrorism, and § 2333(a) has become yet another weapon in the United States' counterterrorism arsenal.[6]

Although it is clear that the ATA permits plaintiffs to name as defendants the terrorist organizations or persons directly responsible for committing an act fitting within the definition of international terrorism,[7] U.S. federal courts are split over whether the ATA provides for suits under a secondary liability theory.[8] As secondary liability often presents a different set of

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1. *See infra* Part I.C.2.

2. See *infra* Part I.B.2 for further discussion on OFAC and its regulation of U.S. financial transactions involving foreign nations.

3. These hypothetical scenarios bear some resemblance to the three categories of Antiterrorist Act (ATA) banking cases addressed in 2 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 9:42 (1986).

4. *See* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, Title X, § 1003(a)(4), 106 Stat. 4522 (codified as amended at 18 U.S.C. §§ 2331–2338 (1992)); Antiterrorism Act of 1990, Pub. L. No. 101-519; 104 Stat. 2250 (codified as amended at 18 U.S.C. §§ 2331–2338 (1990)). The 1990 Act was removed for technical reasons and reinstated in 1992 with the same language. *See infra* note 50.

5. 18 U.S.C. § 2333(a) (2012). This Note will refer to 18 U.S.C. § 2333(a) as the ATA civil provision, as the ATA private cause of action, or simply as § 2333(a). The entirety of the ATA is codified at 18 U.S.C. §§ 2331–2338, which contains the civil and criminal provisions that this Note will collectively refer to as the ATA. Title 18 U.S.C. § 2339A–D contains the material support provisions, which were added in later years, and are discussed as part of the ATA in this Note. *See infra* Part I.A.3. This Note will collectively refer to the material support amendments as the "material support law."

6. *See* Brief of Petitioners-Appellants at 1, *In re* Terrorist Attacks on Sept. 11, 2001, 714 F.3d 118 (2d Cir. 2013) (No. 13-318) ("Both Congress and other federal courts have confirmed that the provision of the ATA at issue is essential to deterring and punishing the financing and material sponsorship of terrorism."); *see also* Debra Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common-Law Suits*, 38 VAND. J. TRANSNAT'L L. 679, 739 (2005) ("The testimony supporting [the ATA] legislation placed much emphasis on the deterrent effect that these statutes would have on the commission of acts of international terrorism against U.S. citizens.").

7. See *infra* Part I.A.1 for greater consideration of this definition, which is codified at 18 U.S.C. § 2331(1).

8. *See* Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 54 (D.D.C. 2010) (noting that at the time of the 2010 *Wultz* ruling "circuits [were] split on the issue" of ATA secondary liability). With regard to banks, this Note will typically refer to aiding and abetting liability (a form of secondary liability) and the more general concept of secondary liability interchangeably.

requirements than primary liability, the availability of secondary liability is of great importance to terrorism victim plaintiffs.[9] In many cases, an aiding and abetting suit against a bank, based upon allegations that the bank provided financial services to a client terrorist group, may be a victim's best chance for relief where suing under a primary liability theory is not possible.[10] In addition, as this Note discusses, the outcome of the secondary liability debate also could have powerful ramifications for the application of primary liability in banking cases.

Under the varying standards applied across circuits today, ATA litigation against the above hypothetical banks could engender inconsistent results.[11] In understanding these disparate outcomes in ATA banking cases, it is helpful to consider banks as entities possessing "mental states" across a spectrum—ranging from negligence, to knowledge, to recklessness, to intent—despite the fact that these are institutions rather than individuals. Courts are in conflict over what the requisite mental state should be for both secondary liability and primary liability.[12]

In the case of Bank *A*—where the bank is merely negligent—it is likely (and arguably proper) that the bank will avoid liability; primary liability is not a viable option for plaintiffs, and success under a secondary liability theory is uncertain at best.[13] Courts are much more likely to find Bank *B* liable under primary liability because, regardless of the requisite mental state for liability, Bank *B* arguably demonstrated intent to aid the terrorist group. It is Bank *C* that illustrates the most ambiguous case. In doing business with a state sponsor of terrorism, was the bank demonstrating intent to aid terrorists? At what point should a bank *know* that its services are aiding a terrorist organization? This Note considers these questions and examines where the scope of ATA liability for banks stands today.

Although the ATA private cause of action has been in place for over twenty years, plaintiffs did not begin to take full advantage of its potential until its second decade of life.[14] The September 11, 2001, attacks on the United States precipitated both a spike in terrorism-related lawsuits and the

9. *See infra* Part I.B.

10. Primary liability was the basis of a recent successful lawsuit and trial centered upon Arab Bank, PLC. *See* Linde v. Arab Bank, PLC, No. 04-cv-2799, 2014 WL 4913320 (E.D.N.Y. Sept. 22, 2014) (verdict form); Linde v. Arab Bank, PLC, No. 04-cv-2799 (BMC) (VVP), 2015 WL 1565479, at *27 (E.D.N.Y. Apr. 8, 2015) (upholding the jury's verdict and discussing the nature of ATA liability). In September 2014, a jury in *Linde v. Arab Bank* found Arab Bank liable for violating § 2333(a). *Linde*, 2014 WL 4913320. The plaintiffs had advanced the theory that the bank was primarily liable for material support to terrorism and that violating this crime supported liability under the ATA civil provision. *See* Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 578–79 (E.D.N.Y. 2005). See *infra* Parts II and III for further discussion of the use of the material support law as a substitute for aiding and abetting liability.

11. *See generally* 2 NANDA & PANSIUS, *supra* note 3.

12. *See infra* Part II.

13. *See infra* Part III.

14. *See* Geoffrey Sant, *So Banks Are Terrorists Now?: The Misuse of the Civil Suit Provision of the Anti-Terrorism Act*, 45 ARIZ. ST. L.J. 533, 534 (2013).

U.S. government's increased efforts to stanch the flow of funding to terrorism groups abroad.[15]

The phrase "terrorism financing" typically refers to the act of knowingly providing some resource to an individual or organization that takes part in terrorist activity.[16] The U.S. government has estimated that plotting and executing the September 11 attacks required only between $400,000 and $500,000.[17] Actual terrorist operations constituted a comparatively small portion of al Qaeda's budget at the time.[18] The organization required funding for training, salaries for jihadists, and arms and vehicles before attacks could even be carried out.[19] It is often difficult for governments to differentiate between funds used for attacks and funds used to support a terrorist group's social or political purposes.[20] Furthermore, terrorist funding often comes from legitimate sources—such as charities and donors—as opposed to criminal activities.[21]

An extensive and long-established fundraising network fueled al Qaeda's spread.[22] Although al Qaeda as an organization likely did not use formal financial practices to transfer or store money after 1996, al Qaeda fundraisers continued to work within the means of traditional financial systems.[23] It is likely that some of the banks linked to al Qaeda supporters were aware of their ties with terrorist organization fundraisers.[24] The lack of financial regulation in Pakistan and the United Arab Emirates (UAE) in particular contributed to al Qaeda's pre–September 11 financing success, and al Qaeda cells worldwide took advantage of susceptibilities within formal banking systems.[25]

The United States began to take terrorism funding more seriously following the 1998 bombings on the U.S. embassies in Nairobi and Tanzania.[26] President Bill Clinton's National Security Council recommended that the United States issue sanctions against al Qaeda and Osama bin Laden under the International Emergency Economic Powers Act[27] (IEEPA), which authorized the President to levy sanctions against countries or entities that posed a national security threat to the United States. Under the IEEPA, OFAC froze al Qaeda assets within the U.S.

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15. *See infra* Part I.C.2.

16. *See Terrorist Financing*, U.S. ATTORNEY'S BULL., July 2013, at 7.

17. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 169 (1st ed. 2004).

18. *See id.* at 171.

19. *See id.*

20. *See Terrorist Financing*, *supra* note 16, at 7.

21. *Id.*

22. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 17, at 169–70; *see also* JOHN ROTH ET AL., MONOGRAPH ON TERRORIST FINANCING 18 (2004).

23. *See* ROTH ET AL., *supra* note 22, at 25–26.

24. *See id.* at 26.

25. *Id.* ("[T]he September 11 hijackers and their co-conspirators had bank accounts and credit cards, made extensive use of ATM cards, and sent and received international wire and bank-to-bank transfers.").

26. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 17, at 185.

27. Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified at 50 U.S.C. §§ 1701–1705 (1977)).

financial system.[28] After the United States formally designated al Qaeda a terrorist organization in October 1999, banks were legally required to seize the group's funds and block its transactions.[29]

This Note explores private suits against banks for their alleged involvement in terrorist attacks overseas, with a particular focus on secondary liability. Part I presents background on the ATA's language and legislative history, as well as a discussion of secondary liability in general and the ways in which courts have applied this form of liability in other areas of the law. Part I also discusses the distinction between routine and nonroutine bank services and addresses several other aspects of banking regulation. Part II delves into the conflict over whether secondary liability applies under the ATA's private cause of action and briefly addresses this issue's relevance to primary liability. Part III argues that the absence of secondary liability under the ATA produces some intolerable consequences. As a result, Part III argues that Congress should amend the ATA to permit a secondary liability private cause of action in extreme cases where a bank manifests recklessness or intent—for example, by conducting extensive business with a U.S.-designated state sponsor of terrorism.

I. THE ANTITERRORISM ACT, SECONDARY LIABILITY, AND THE EMERGENCE OF TERRORISM SUITS AGAINST BANKS

Part I.A focuses on the ATA itself, including the material support for terrorism crime that courts have sometimes incorporated into § 2333(a) via a theory of primary liability.[30] Part I.B clarifies the important characteristics of these types of liability, as well as highlights how courts have handled similar secondary liability issues in private securities fraud suits and civil suits brought under Racketeer Influenced and Corrupt Organizations Act (RICO). Finally, Part I.C provides some background related to ATA banking cases in particular, focusing on the difference between routine and nonroutine banking services and the United States' implementation of lists to monitor terrorist individuals, groups, and sovereign states.

A. The Antiterrorism Act

This section summarizes the ATA civil provision's language and legislative history. This discussion is at the heart of the secondary liability issue and provides a necessary context for understanding how courts have responded to increased ATA litigation targeting banks. This section also addresses the ATA's material support law, which plaintiffs have sometimes used as the basis for primary liability in banking cases.

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28. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 17, at 185.

29. *See id.* at 185 n.81 (citing 18 U.S.C. § 2339B). See *infra* Part I.C for an explanation of how OFAC utilizes lists to identify terrorist threats.

30. This Note, although focused on secondary liability, seeks to demonstrate that secondary and primary liability are closely intertwined in ATA banking cases.

1. The ATA's Statutory Language

The ATA explicitly establishes a civil remedy for victims of international terrorism.[31] Section 2333(a) states:

> Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.[32]

The statute expressly empowers U.S. nationals to file a claim.[33] However, the phrasing of "by reason of an act of international terrorism" is somewhat ambiguous.[34] For instance, some courts have held that this language requires the fulfillment of a proximate cause element.[35]

Other areas of the ATA help illuminate the civil provision's language. Section 2331(1) defines "international terrorism" as activities that:

> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
>
> (B) appear to be intended—
>
> (i) to intimidate or coerce a civilian population;
>
> (ii) to influence the policy of a government by intimidation or coercion; or
>
> (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
>
> (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to

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31. *See* 18 U.S.C. § 2333(a) (2012).

32. *Id.* See *infra* note 66 for a discussion of the phrase "threefold the damages," or treble damages.

33. *Id.* Non-U.S. nationals have sought to use the Alien Tort Statute (ATS) as a means for civil redress for terrorism crimes, although following the Supreme Court's holding in *Kiobel v. Royal Dutch Petroleum Co.*, foreign plaintiffs must now demonstrate that their claims "touch and concern" the United States to a degree that "displace[s] the presumption against extraterritorial application" in order to sue under the ATS. *Kiobel*, 133 S. Ct. 1659, 1669 (2013).

34. 18 U.S.C. § 2333(a).

35. *See* Rothstein v. UBS AG, 708 F.3d 82, 95 (2d Cir. 2013) (relying on the reasoning of RICO cases to hold that the "by reason of" language in § 2333(a) indicates a proximate cause requirement in primary liability claims); *see also* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 265–68 (1992) (finding that the "by reason of" language in RICO's civil provision suggested that both "but for" causation and proximate causation were required elements); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 36 F. Supp. 2d 560, 569 (E.D.N.Y. 1999) ("'By reason of' has been interpreted by courts to require something more than 'but for' causation."); *infra* Part I.B.2.a–b (discussing RICO and the *Rothstein* ruling, respectively).

> intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . .[36]

This provision defines international terrorism in terms of "acts" that "involve violent acts or acts dangerous to human life" that are in violation of U.S. criminal law, or would be if committed within U.S. jurisdiction.[37] Individuals must also commit these acts with the intent to coerce or intimidate civilians or a government, or affect government conduct.[38] Finally, the act must occur primarily outside of the United States or "transcend national boundaries."[39]

In addition, the ATA civil provision does not identify *whom* a private individual may sue—the language is open-ended.[40] The definition of terrorism in § 2331(1) also does not describe the terrorism actor, instead it focuses on the nature of the acts.[41] As a result, victims of terrorist attacks abroad have attempted to use this provision to hold banks, corporations, and countries liable for terrorist acts.[42] Such cases have succeeded on some occasions, particularly when the defendant was a state sponsor of terrorism.[43] Section 2333(a)'s ambiguous language has consequently opened the door for plaintiffs to sue also under the theory that banks are secondarily liable for acts of international terrorism.[44]

2. The ATA's Legislative History

The U.S. Constitution grants Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the

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36. 18 U.S.C. § 2331(1). This definition is the same as the definition for international terrorism provided in the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. § 1801); *see also* Nick Harper, *FISA's Fuzzy Line Between Domestic and International Terrorism*, 81 U. CHI. L. REV. 1123, 1138 (2014) ("The ATA essentially adopted FISA's definition of international terrorism."); Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 256 (2004) ("The definition of 'international terrorism' . . . is a verbatim copy of the FISA definition . . . .").

37. 18 U.S.C. § 2331(1)(A).

38. *Id.* § 2331(1)(B).

39. *Id.* § 2331(1)(C). For instance, the Southern District of New York has held that the September 11 attacks, while occurring on U.S. soil, nonetheless qualify as acts of international terrorism because the attacks transcended national boundaries in their magnitude and impact. *See* Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1435–36 (2004) (citing Smith v. Islamic Emirate of Afghanistan, 262 F. Supp. 2d 217, 221–22 (S.D.N.Y. 2003)).

40. 18 U.S.C. § 2333(a).

41. *See id.* § 2331(1).

42. *See infra* Part II.

43. *See* Wultz v. Islamic Republic of Iran, 864 F. Supp. 2d 24, 32–37 (D.D.C. 2012) (holding Syria and Iran liable under the ATA).

44. *See infra* Part II.B.

Law of Nations."[45] This clause, known sometimes as the Define and Punish Clause, has served as a basis for antiterrorism legislation.[46]

The ATA was first enacted in 1987.[47] At that point, the legislation was predominantly focused on the Palestinian Liberation Organization (PLO).[48] The act designated the PLO as a terrorist organization and instituted certain restrictions on transactions and dealings with the group.[49] In 1990, Congress enacted a second version of the ATA that created several new provisions, including the ATA's civil provision and the detailed definition of international terrorism that remains part of the ATA today.[50] Congress continued to pass further antiterrorism legislation over the years, particularly following the September 11 attacks.[51]

Tel-Oren v. Libyan Arab Republic[52] was the first case in which a court considered civil liability for terrorist acts and likely helped spark the movement toward a private cause of action for victims of international terrorism.[53] In this case, the plaintiffs sued the Libyan government, the PLO, and PLO-linked nongovernmental organizations under the Alien Tort Statute (ATS).[54] The ATS had recently emerged as a tool for providing redress to victims of crimes in violation of international norms.[55] However, on appeal, the D.C. Circuit affirmed the lower court's dismissal of the case,

45. U.S. CONST. art. I, § 8, cl. 10.

46. *See* Patrick L. Donnelly, Note, *Extraterritorial Jurisdiction over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599, 608–09 (1987) (describing the congressional powers authorized under the Define and Punish Clause).

47. Antiterrorism Act of 1987, Pub. L. No. 100-204, §§ 1001–1005, 101 Stat. 1406 (codified at 22 U.S.C. §§ 5201–5203 (1987)); *see also* Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 266 (E.D.N.Y. 2007) (discussing the evolution of the ATA's civil provision).

48. 22 U.S.C. § 5202.

49. For instance, it is unlawful to receive "anything of value" (excluding informational material) from the PLO, expend funds from the PLO, or establish facilities on behalf of the PLO. *Id.*

50. *See supra* note 35. In 1991, Congress repealed the ATA due to a technical issue. *See* Goldberg v. UBS AG, 660 F. Supp. 2d 410, 414 n.5 (E.D.N.Y. 2009). However, in 1992, Congress reenacted all of the 1990 Act's substantive provisions in the Federal Courts Administration Act of 1992. *See id.*; Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 266 (E.D.N.Y. 2007).

51. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001); Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996). See *infra* Part I.A.3 for a discussion of the material support law, codified at 18 U.S.C. §§ 2339–2339(d).

52. 517 F. Supp. 542, 549–51 (D.D.C. 1981), *aff'd*, 726 F.2d 774 (D.C. Cir. 1984) (per curiam). The case arose from a Palestinian Liberation Organization (PLO) attack in 1978 in Haifa, Israel. *Tel-Oren*, 726 F.2d at 776. The PLO took 121 civilian hostages, and before the Israeli police were able to resolve the crisis, twelve children and twenty-two adults had been killed, with eighty-seven injured. *Id.*

53. *See* Beth Van Schaack, *Finding the Tort of Terrorism in International Law*, 28 REV. LITIG. 381, 285, 388 (2008).

54. *Id.* at 385–86.

55. *Id.* at 385. The ATS provides that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2012).

holding that under the ATS there was no private cause of action for victims of international terrorism.[56]

Klinghoffer v. S.N.C. Achille Lauro[57] also sheds light on the genesis of the ATA's private cause of action. In 1985, members of the PLO commandeered the Achille Lauro, an Italian cruise ship, on its journey through the eastern Mediterranean Sea.[58] The perpetrators murdered Leon Klinghoffer, a U.S. citizen, during the attack.[59] The Klinghoffer family was able to bring its claims against the PLO in U.S. federal court only because the crime took place in international waters and therefore was subject to federal admiralty jurisdiction.[60] If the terrorist act had occurred on land, it is unlikely that any court would have upheld jurisdiction in the wake of *Tel-Oren*.[61] Congressional records from 1991 indicate that *Klinghoffer* was instrumental in spurring Congress's enactment of a private cause of action for terrorism cases.[62] In enacting the ATA, Congress sought to provide a more reliable form of relief for U.S. victims of international terrorism.[63]

Courts have also scrutinized the legislative history of the ATA in order to better understand § 2333(a)'s language.[64] In a 1991 statement before the Senate, Senator Charles Grassley, one of the ATA's sponsors, noted that the statute enabled plaintiffs to circumvent "jurisdictional hurdles" and "empower[ed] victims with all the weapons available in civil litigation."[65] He also stated that the ATA "accords victims of terrorism the remedies of

56. *See Tel-Oren*, 726 F.2d at 798; *see also* Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 NOTRE DAME L. REV. 1645, 1647 (2014); Van Schaack, *supra* note 53, at 386.

57. 739 F. Supp. 854 (S.D.N.Y. 1990), *vacated by* 937 F.2d 44 (2d Cir. 1991).

58. *Id.* at 856.

59. *Id.*

60. *Id.* at 858–59.

61. *See* Boim v. Quranic Literacy Inst. (*Boim I*), 291 F.3d 1000, 1010 (7th Cir. 2002) (citing *Klinghoffer*, 739 F. Supp. at 858–59) ("The district court found that [Klinghoffer's] survivors' claims were cognizable in federal court under federal admiralty jurisdiction and the Death on the High Seas Act because the tort occurred in navigable waters."); *see also* Strauss v. Credit Lyonnais, 242 F.R.D. 199, 214 (E.D.N.Y. 2007). For purposes of clarity, this Note will refer to the Seventh Circuit's decision in 2002, which held that there is a secondary liability cause of action under § 2333(a), as *Boim I*, and the Seventh Circuit's en banc decision in 2008 (overturning *Boim I* and holding against permitting secondary liability) as *Boim III*. Boim v. Holy Land Found. for Relief and Dev. (*Boim III*), 549 F.3d 685, 705 (7th Cir. 2008) (en banc).

62. *See* H.R. REP. NO. 102-1040, at 5 (1992) ("The recent case of the Klinghoffer family is an example of this gap in our efforts to develop a comprehensive legal response to international terrorism.").

63. *See* Goldberg v. UBS AG, 660 F. Supp. 2d 410, 421 (E.D.N.Y. 2009); *see also* H.R. REP. NO. 102-1040, at 5 ("Only by virtue of the fact that the [Klinghoffer] attack violated certain Admiralty laws and that the organization involved—the Palestinian Liberation Organization—had assets and carried on activities in New York, was the court able to establish jurisdiction over the case. A similar attack occurring on an airplane or in some other locale might not have been subject to civil action in the U.S. In order to facilitate civil actions against such terrorists the Committee [on the Judiciary] recommend[ed] [this bill].").

64. *See, e.g.*, *Boim I*, 291 F.3d at 1010; Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 55–57 (D.D.C. 2010).

65. *See* 137 CONG. REC. 4511 (1991). Senator Grassley cited banking information and subpoenas for financial records as examples of such tools. *Id.*

American tort law, including treble damages and attorney's fees."[66] Previously, Senator Grassley had stated that, with the ATA, "terrorists will be held accountable where it hurts them most: at their lifeline, their funds."[67]

In a hearing before the Subcommittee on Courts and Administrative Practice of the Committee on the Judiciary, Professor Wendy Perdue advocated for the inclusion of a civil remedy that not only held liable terrorist organizations, but also "the organizations, businesses and nations" that aided these organizations and likely had reachable assets.[68] However, Perdue acknowledged that § 2333(a) would likely lead to confusion regarding the subject of secondary liability.[69] Senator Grassley brought these concerns to the attention of Joseph A. Morris, then–General Counsel of the Information Agency, who also testified at the ATA Senate hearings.[70] Morris responded that "as drafted [the ATA] is powerfully broad" and that it was intended to "bring [in] all of the substantive law of the American tort law system."[71] Morris added that traditional tort law had a principle similar to criminal law's doctrine of aiding and abetting; he claimed that this principle would therefore apply to the ATA civil provision and suggested that the provision could be used against negligent defendants.[72]

Finally, a July 1992 post-enactment Senate Committee Report discussed the purpose of the ATA, noting that in providing for compensatory and treble damages and "impos[ing] . . . liability at any point along the causal chain of terrorism," the ATA "would interrupt, or at least imperil, the flow of money" to terrorist organizations.[73]

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66. *See id.*; *see also* Goodrow v. Lane Bryant, Inc., 732 N.E.2d 289, 299 (Mass. 2000) (discussing treble damages' punitive nature). Courts differ on the statutory predicate required for treble damages. *See, e.g.*, Bangert v. Harris, 553 F. Supp. 235, 239 (M.D. Pa. 1982) (holding that specific statutory authorization was needed for a court to award treble damages).

67. 136 CONG. REC. 14279–84 (1990).

68. *See* Brief for the United States As Amicus Curiae Supporting Affirmance at 14, *Boim I*, 291 F.3d 1000 (7th Cir. 2002) (Nos. 01-1969, 01-1970) [hereinafter *Boim I* Brief] (citing *Antiterrorism Act of 1990: Hearing Before the Subcomm. on Courts and Admin. Practice*, 101st Cong. 136 (1990) (statement of Professor Wendy Perdue)).

69. 136 CONG. REC. 14279–84.

70. *Boim I* Brief, *supra* note 68, at 13–14.

71. *See* Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 56 (D.D.C. 2010) (citing *Antiterrorism Act of 1990: Hearing before the Subcommittee on Courts and Administrative Practice*, 101st Cong. 136 (1990) (statement of Joseph A. Morris, General Counsel, U.S. Information Agency)); *see also Boim I* Brief, *supra* note 68, at 14.

72. *See Boim I* Brief, *supra* note 68, at 14 (quoting Morris as stating that "[t]he tort law system has similar rules [to criminal law's vicarious liability] where liability attaches to those who knowingly or negligently" aid another actor in severely injuring another, and that "as [the ATA civil provision] is drafted, it brings all of that tort law potential into any of these civil suits").

73. S. REP. NO. 102-342, at 22 (1992). In January 2013, Congress amended the ATA's statute of limitations provision, extending the time period from four years to ten years. *See* 18 U.S.C. § 2335 (1992); National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632; *see also* Linde v. Arab Bank, PLC, 950 F. Supp. 2d 459, 460 (E.D.N.Y. 2013) (holding that courts must apply the amended ten-year statute of limitations retroactively to cases that were pending during or commenced following the amendment

Currently, there is a potentially game-changing bill before Congress called the Justice Against Sponsors of Terrorism Act[74] (JASTA). If passed in its current form, the bill would explicitly permit a private ATA cause of action predicated upon a theory of secondary liability.[75] The bill would amend § 2333 by adding the following: "In an action arising under subsection (a), liability may be asserted as to the person or persons who committed such act of international terrorism or any person or entity that aided, abetted, or conspired with the person or persons who committed such an act of international terrorism."[76]

However, the bill is not entirely focused on the secondary liability issue—a significant portion of the text revolves around stripping sovereign immunity from countries that engage in acts of terrorism, regardless of whether they are considered a state sponsor of terrorism.[77] JASTA passed the Senate in December 2014 and in January 2015 was referred to the House Subcommittee on the Constitution and Civil Justice.[78]

3. The Crime of Material Support to Terrorism

In its current form, the material support law is the product of multiple attempts to cut off the flow of money and resources to international terrorist organizations.[79] The material support law was first codified in 18 U.S.C. § 2339A in reaction to the 1993 World Trade Center bombings.[80] At the time, the law did not criminalize material support to terrorist groups where the funding party did not specifically intend the groups to use the support for terrorist attacks or operations.[81]

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date); Abecassis v. Wyatt, No. H-09-3884, 2013 WL 5231543, at *4 (S.D. Tex. Sept. 16, 2013).

74. *See* H.R. 3143, 113th Cong. (2013), *available at* https://www.congress.gov/bill/113th-congress/house-bill/3143/all-actions.

75. *See id.*

76. *See id.*

77. *See id.* The passage of JASTA would consequently permit plaintiffs to go after countries such as Saudi Arabia, which is not on the SST list but has faced accusations of funding the September 11 attacks. *Id.*

78. *See id.*; *see also* S. 1535, 113th Cong. (2013), *available at* https://www.congress.gov/bill/113th-congress/senate-bill/1535/actions.

79. *See* Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 4 (2005) ("The material support law is one part of a matrix of terrorism-support laws that have accrued over many years through the painstaking efforts of individuals in the executive and legislative branches intent on putting a stop to the phenomenon of U.S. persons providing support, well-intentioned or otherwise, to foreign terrorist organizations.").

80. *Id.* at 12; *see also* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 18 U.S.C. § 2339A (1994)). The law was since amended to define "material support or resources" as including the provision of services and items falling into four categories: (1) funding; (2) tangible equipment; (3) logistical support; and (4) personnel. *See* 18 U.S.C. § 2339(A)(b) (2012); *see also* Chesney, *supra* note 79, at 12 n.69.

81. *See* Chesney, *supra* note 79, at 13. Under this original version of the material support law, an individual could donate to a terrorist group as such as Hezbollah, for example, as long as she believed that the money would only be used for the group's social or political activities. *Id.*

To expand the reach of the law, Congress enacted 18 U.S.C. § 2339B.[82] The new law, while applying only to those providing material support to groups designated as terrorist organizations by the U.S. Secretary of State, does not require specific intent to aid acts of terrorism.[83] The U.S. Supreme Court affirmed this interpretation of § 2339B in *Holder v. Humanitarian Law Project*.[84]

Section 2339B also contains a civil liability provision.[85] However, this provision does not extend to private plaintiffs—only the government can bring an action for civil fines in addition to criminal liability.[86] Therefore, any chance of relief for private plaintiffs who were victims of terrorist attacks lies solely in § 2333(a).[87]

Civil remedies for criminal acts can serve as a useful deterrent to criminal activity.[88] In addition, some courts have suggested using the material support law as the base crime in suits against entities that allegedly provided money or other resources to terrorist organizations.[89] The Supreme Court in *Holder* confirmed that § 2339B did not require that the defendant specifically intend to further terrorist activities—it was sufficient for a party to know that the group in question was a terrorist group.[90] As Part III discusses, this aspect of *Holder* is in tension with the ATA's definition of international terrorism.[91]

B. Secondary Versus Primary Liability, and Why the Difference Matters

This section explains how courts have applied—or chosen not to apply—secondary liability in different areas of the law.[92] This section also briefly addresses the ways in which victims of terrorism can harness the material

82. *Id.* at 15–18. However, Chesney notes that the law is narrower in the sense that § 2339A can apply to aid given to anyone, while § 2339B is specific to aid given to terrorist groups. *Id.* at 18. *Compare* 18 U.S.C. § 2339B (1996) (criminalizing *knowingly* providing material support to a U.S.-designated terrorist organization and foregoing a specific intent requirement), *with* 18 U.S.C. § 2339A (1994) (permitting charges where the group is not a U.S.-designated terrorist organization).

83. *See* Chesney, *supra* note 79, at 18.

84. 561 U.S. 1, 8 (2010); *see also infra* Part II.B.1.

85. 18 U.S.C. § 2339B(b).

86. CHARLES DOYLE, CONG. RESEARCH SERV., R41334, TERRORIST MATERIAL SUPPORT: A SKETCH OF 18 U.S.C. 2339A AND 2339B, CRS REPORT FOR CONGRESS 5 (2010).

87. *See id.*

88. *See* Halberstam v. Welch, 705 F.2d 472, 489 (D.C.C. 1983).

89. *See Boim III*, 549 F.3d 685 (7th Cir. 2008). See *infra* Part II.B.1 for further discussion of Judge Richard Posner's "chain or incorporations" approach to holding organizations secondarily liable under the ATA.

90. Holder v. Humanitarian Law Project, 561 U.S. 1, 17–18 (2010). Defendants have often challenged this absence of a specific intent requirement as unconstitutional. *See generally id.*; United States v. Al Kassar, 582 F. Supp. 2d 488, 498 (S.D.N.Y. 2008) ("Defendants contend that because Section 2339B does not require a showing of specific intent to further the illegal activities of a foreign terrorist organization, it violates the due process clause of the Fifth Amendment.").

91. *See infra* Part III.A.2.

92. In particular, the ruling in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), which concerned secondary liability in private securities fraud suits, has strongly influenced ATA banking cases. *See infra* Part I.B.2.a.

support provision in primary liability causes of action. As Part II demonstrates, courts have invoked the following theories frequently in discussing whether or not banks should be held secondarily liable under the ATA civil provision.

1. The Nature of Secondary Liability

It is crucial to consider the differences between secondary and primary liability in both civil and criminal law. Many states have accepted the definition of secondary civil liability articulated in the Second Restatement of Torts, although this acceptance is by no means unanimous.[93] According to the Restatement, an individual may be secondarily liable for a tort when that individual (a) commits a tortious act "in concert" with a principal, (b) knows that the principal's conduct is tortious and gives substantial assistance or encouragement to the principal, or (c) gives such "substantial assistance" to the principal and separately breaches a duty to the third person.[94]

This Note is primarily concerned with subsection (b) of the Restatement's definition, which serves as the civil equivalent of aiding and abetting liability.[95] The Restatement establishes a three-pronged test for aiding and abetting liability: (1) the principal committed tortious conduct; (2) the aider had knowledge of the principal's conduct; and (3) the aider gave substantial assistance or encouragement to the principal.[96] However, the Restatement does not explicitly mention any mental state requirement.[97]

There is no single universal test for civil aiding and abetting liability.[98] Nevertheless, in 1983, the D.C. Circuit in *Halberstam v. Welch*[99] provided some clarity. The Supreme Court would later describe *Halberstam* as a "comprehensive opinion on the subject" of civil aiding and abetting

93. *See* RESTATEMENT (SECOND) OF TORTS § 876(b) (1979); *see also* Will Rice, *American & British Insurers and Courts As Aiders and Abettors of Commercial Terrorism*, 6 ST. MARY'S L. REV. ON MINORITY ISSUES 1, 44–47 (2003). In specific relation to aiding and abetting civil liability, Rice noted that "[a]lthough many jurisdictions have recognized civil liability for aiding and abetting in some circumstances where there is proof of 'substantial assistance,' not all have formally adopted Restatement (Second) of Torts § 876(b)." *Id.* at 44 n.190.

94. RESTATEMENT (SECOND) OF TORTS § 876.

95. *See* Nathan Isaac Combs, Note, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 254–55 (2005).

96. *See* Kevin Bennardo, *The Tort of Aiding and Advising?: The Attorney Exception to Aiding and Abetting a Breach of Fiduciary Duty*, 84 N.D. L. REV. 85, 85 (2008) (citing RESTATEMENT (SECOND) OF TORTS § 876(b)); *see also In re* Chiquita Brand Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig., Inc., 690 F. Supp. 2d 1296, 1310 (S.D. Fla. 2010) (citing Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983), and applying the test to the ATA civil provision).

97. *See* Combs, *supra* note 95, at 289–90.

98. *See id.* at 278 ("With the dearth of coherent precedent and the increasing importance of civil aiding and abetting, courts need a clearer test for liability.").

99. 705 F.2d 472 (D.C. Cir. 1983).

liability.[100] In *Halberstam*, the court relied on the Restatement's view when upholding civil aiding and abetting liability and conspiracy liability in a case where a woman had both knowingly and substantially assisted in a murder.[101] The woman had acted as a banker, bookkeeper, and secretary for the murderer with the knowledge that her activities helped him in the commission of illegal acts.[102] The court did not require that the prosecution demonstrate that the defendant specifically intended the principal to commit murder.[103]

On the other hand, criminal secondary liability, codified at 18 U.S.C. § 2, is more clear-cut.[104] This statute provides that "whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."[105] An aider must manifest specific intent to be liable for aiding and abetting a crime; this differs from criminal conspiracy liability (another form of secondary liability), and of course civil aiding and abetting liability.[106] Criminal aiding and abetting also does not require a completed crime, whereas civil aiding and abetting requires the actual commission of a tort.[107] However, as the next section demonstrates, courts have interpreted the Supreme Court's ruling in *Central Bank of Denver v. First Interstate Bank of Denver*[108] as barring the application of § 2(a) to private causes of action.[109]

2. Statutory Secondary Liability Analogies: Securities Fraud and RICO

This section considers two statutory analogies that courts have commonly invoked in evaluating the viability of secondary liability suits against banks under the ATA.

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100. Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 181 (1994). See *infra* Part I.B.2.a for an in-depth discussion of this case's handling of secondary liability under federal securities law.

101. *Halberstam*, 705 F.2d at 487–89.

102. *Id.*

103. *Id.* at 488.

104. 18 U.S.C. § 2 (2012).

105. *Id.* § 2(a). Title 18 U.S.C. § 2(b) also provides that "whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

106. *See* Nye & Nissen v. United States, 336 U.S. 613, 619 (1949); United States v. Turner, 583 F.3d 1062, 1067 (8th Cir. 2009). Conspiracy to provide material support to terrorism occurs when a party agrees to provide such support; it is an inchoate crime, meaning that mere planning is sufficient and the actual completion of an act is unnecessary for liability. *See* DOYLE, *supra* note 86, at 2. Furthermore, conspirators may be held liable for the original scheme as well as any foreseeable consequences carried out in the commission of the scheme. *Id.* This Note, however, focuses on aiding and abetting liability as opposed to conspiracy.

107. *See* Combs, *supra* note 95, at 280.

108. 511 U.S. 164 (1994).

109. *See, e.g.*, Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 656 (3d Cir. 1998) (citing Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 181–82 (1994)).

a. Central Bank *and Secondary Liability in Securities Fraud Cases*

In 1994, the Supreme Court held in *Central Bank* that section 10(b) of the Securities Exchange Act of 1934[110] did not provide for secondary liability claims in private securities fraud suits.[111] As a result, the plaintiffs were unable to sue on the theory that the defendant, the Central Bank of Denver, had aided and abetted the other defendants in committing securities fraud.[112]

The plaintiffs, the First Interstate Bank of Denver and Jack K. Naber, had purchased $2.1 million in bonds from the Colorado Springs-Stetson Hills Public Building Authority.[113] The Central Bank of Denver served as the indenture trustee for the bonds at issue, and the public building authority defaulted soon afterward.[114] Before the default, the bank discovered that the land used to secure the bonds was possibly insufficient, thereby necessitating a new appraisal on the bonds.[115] However, no such appraisal ever took place.[116]

The District of Colorado granted the Central Bank of Denver's motion for summary judgment; however, the Tenth Circuit reversed the decision on the basis that the circuit had previously permitted private aiding and abetting actions under section 10(b) of the Securities Exchange Act.[117] It is illegal to "directly or indirectly" engage in conduct meeting the elements of securities fraud under section 10(b), as well as Securities Exchange Commission Rule 10b-5.[118] Other federal courts had also permitted private

110. Pub. L. No. 73-291, 48 Stat. 881.
111. *See generally Cent. Bank*, 511 U.S. 164.
112. *Id.* at 191.
113. *Id.* at 167–68.
114. *Id.*
115. *Id.* at 167.
116. *Id.* at 167–68.
117. *Id.* at 166–168. Section 10(b) is the general antifraud provision of the 1934 Act. *Id.* at 171. The Tenth Circuit rule permitted a section 10(b) aiding and abetting cause of action consisting of the following elements: "(1) a primary violation of § 10(b); (2) recklessness by the aider and abettor as to the existence of the primary violation; and (3) substantial assistance given to the primary violator by the aider and abettor." *Id.* at 168. The 1934 Act generally regulates post-distribution trading, while its predecessor, the Securities Act of 1933, regulates the initial distribution of securities. *Id.* at 171 (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 752 (1975)); *see also* Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881; Securities Exchange Act of 1933, Title I, Pub. L. No. 73-22, 48 Stat. 74.
118. Section 10(b) of the 1934 Act states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe.

15 U.S.C. § 78j(b) (2012). Rule 10b-5 contains similar language and also lacks an explicit private right of action. *See* 17 C.F.R. § 240.10b-5 (2014).

aiding and abetting claims under section 10(b).[119] These interpretations relied upon the argument that Congress had enacted the 1934 Act to meet broad policy objectives, and that permitting private secondary liability actions would be in line with such objectives.[120] The tide began to turn in the years before the Supreme Court's *Central Bank* holding, as some federal appellate courts began to question other circuits' earlier rulings in favor of secondary liability.[121]

In its *Central Bank* decision, the Supreme Court sought to resolve the split among the circuits respecting a private cause of action for secondary liability under section 10(b).[122] The Supreme Court itself had previously inferred a private right of action in securities fraud cases.[123] However, Congress never advised courts on how far to extend private liability.[124] Therefore, in *Central Bank* the Court was extremely hesitant to infer a private right of action based on secondary liability without clear statutory language establishing any private right in the first place.[125] Writing for the Court, Justice Anthony Kennedy held that Congress did not intend to create an aiding and abetting private cause of action under section 10(b).[126]

The plaintiffs in *Central Bank* used the "directly or indirectly" language of section 10(b) and Rule 10b-5 to assert that the statutory text supported secondary liability.[127] The Court found this argument unpersuasive.[128] The Court also looked to those sections of the 1933 and 1934 Acts that *did* expressly provide for a private right of action to further support its

119. *See, e.g.*, Cleary v. Perfectune, Inc., 700 F.2d 774, 777 (1st Cir. 1983); Kerbs v. Fall River Indus., Inc., 502 F.2d 731, 740 (10th Cir. 1974); Brennan v. Midwestern United Life Ins. Co, 259 F. Supp. 673 (N.D. Ind. 1966), *aff'd*, 417 F.2d 147 (7th Cir. 1969).

120. *See, e.g.*, SEC v. Seaboard Corp., 677 F.2d 1301, 1311 n.12 (9th Cir. 1982).

121. *See, e.g.*, Akin v. Q-L Invs., Inc. 959 F.2d 521, 525 (5th Cir. 1992) (noting the "powerful argument" that "aider and abettor liability should not be enforceable by private parties pursuing an implied right of action"); Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 495 (7th Cir. 1986) (effectively eliminating secondary liability in securities cases through its holding that a deceptive or manipulative act was required for section 10(b) liability).

122. Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 170 (1994).

123. *See* Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) (finding an implied private right of action under section 10(b)).

124. *Cent. Bank*, 511 U.S. at 173 ("Congress did not create a private § 10(b) cause of action and had no occasion to provide guidance about the elements of a private liability scheme.").

125. *Id.*

126. *See id.* at 177.

127. *Id.* at 175–76.

128. *Id.* at 176. The court noted that there was "a basic flaw with this interpretation." *Id.* For example, permitting an aiding and abetting action extends the statute to persons who do not engage in fraud or deception at all, "but who give a degree of aid to those who do." *Id.* Such an interpretation would also do away with the established reliance element of Rule 10b-5. *Id.* at 180 ("Our reasoning is confirmed by the fact that respondents' argument would impose 10b–5 aiding and abetting liability when at least one element critical for recovery under 10b–5 is absent: reliance." (citing Basic Inc. v. Levinson, 485 U.S. 224, 243 (1988))). The Court concluded that "the text of the 1934 Act does not itself reach those who aid and abet a § 10(b) violation. Unlike those courts [recognizing an aiding and abetting action], however, we think that conclusion resolves the case." *Id.* at 177.

conclusion.[129] Finding that these sections failed to address aiding and abetting liability, the Court concluded that Congress had not intended aiding and abetting liability under section 10(b).[130]

Finally, the Court rejected the plaintiffs' argument that the Acts' legislative history supported an aiding and abetting private cause of action, finding that neither section 10(b)'s text nor history implied that aiding and abetting was included in the Act.[131] The plaintiffs argued that Congress had intended to imbue the 1933 and 1934 Acts with general tort law principles and asserted that aiding and abetting liability was "well established in both civil and criminal actions by 1934."[132] After analyzing aiding and abetting liability under both tort and criminal law theory, the Court dispatched this argument as well.[133] The Court, in the end, found that there was no general presumption in favor of aiding and abetting liability and that the plaintiffs had not provided sufficient evidence of congressional intent to rebut this presumption.[134]

As Part II discusses in detail, since *Central Bank* many courts have analogized private securities fraud suits to private suits under the ATA civil provision.[135] Part II demonstrates how *Central Bank* has served as the cornerstone for arguments against holding banks secondarily liable under the ATA, while proponents of secondary liability have instead attempted to distinguish section 10(b) from § 2333(a).[136]

b. RICO and Secondary Liability

In 1970, Congress enacted RICO via the Organized Crime Control Act.[137] The statute provides for both criminal and civil penalties on entities or individuals engaged in racketeering activity, which the law broadly defines to include many kinds of criminal activity.[138] At the time, the law primarily targeted organized crime throughout the United States.[139] RICO makes illegal many kinds of racketeering activity performed "directly or indirectly," including, under certain circumstances, investing income derived from racketeering or participating in the conducting of an

129. *Id.* at 178.
130. *Id.* at 179.
131. *Id.* at 183–84.
132. *Id.* at 180–81 (citing Brief for SEC As Amicus Curiae on behalf of Petitioner-Appellants at 10, *Cent. Bank*, 511 U.S. 164 (No. 92-854)).
133. *Id.* 181–83.
134. *Id.* at 182.
135. *See infra* Part II.B.
136. *See infra* Part II.
137. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (codified at 18 U.S.C. § 1961–1968 (1970)).
138. Under 18 U.S.C. § 1961, "racketeering activity" includes crimes such as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . which is chargeable under State law and punishable by imprisonment for more than one year" as well as an extensive list of other crimes under Title 18 of the U.S. Code.
139. *See* 2 OTTO G. OBERMAIER & ROBERT G. MORVILLO, WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES § 11.03, at 11-6 (2006).

enterprise's affairs through a pattern of racketeering activity.[140] The RICO civil provision states that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit."[141]

Although prosecutors did not initially harness the full potential of RICO, today the law is used against various types of crime and not necessarily organized crime.[142] The initial targeting of mob crime has been expanded to include white collar crime and terrorism.[143] There is ongoing debate over whether civil RICO should be primarily applied to organized crime groups or further extended to include corporate entities, such as banks.[144]

In recent years, some courts have sought to limit civil RICO's breadth.[145] As with the ATA, and as Part II discusses further, courts have limited the application of aiding and abetting liability in civil RICO suits using the Supreme Court's *Central Bank* ruling, comparing the RICO civil provision to private securities fraud suits under section 10(b).[146] For example, in 1996, a court in the Southern District of New York held that civil aiding and abetting liability was not permissible under the RICO civil provision, finding, as the Supreme Court did in *Central Bank*, that the provision's silence on secondary liability was likely intentional.[147] The Third Circuit, in *Rolo v. City Investing Co. Liquidating Trust*,[148] also held that courts should not infer aiding and abetting liability in civil RICO suits.[149]

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140. 18 U.S.C. § 1962.

141. *Id.* § 1964. The provision adds that such recovery shall include reasonable attorney's fees, but with the qualification that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962." *Id.* This securities fraud exception does not stand, however, with regard to any person criminally convicted for such fraud. *Id.*

142. *See* 2 OBERMAIER & MORVILLO, *supra* note 139.

143. *See* H.J. Inc. v Nw. Bell Tel. Co., 492 U.S. 229, 248 (1989) (recognizing that although RICO is focused on targeting organized crime, it is not limited to organized crime); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 (1985) (holding that RICO applies to all criminals, not only those involved in organized crime).

144. *See Sedima*, 473 U.S. at 499 (noting that RICO civil suits "are being brought almost solely against [business enterprises], rather than against the archetypal, intimidating mobster").

145. This includes the Supreme Court. *See* Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 453 (2006) (relying on Holmes v. Sec. Investor Protection Corp., 503 U.S. 258 (1992), to limit civil RICO's applicability only to those victims who could prove a direct injury resulting from a RICO violation).

146. *See generally* 8 JEROLD S. SOLOVY & R. DOUGLAS REES, BUSINESS & COMMERCIAL LITIGATION IN FEDERAL COURTS § 96 (Robert L. Haig ed., 3d. ed. 2005).

147. Dep't of Econ. Dev. v. Andersen, 924 F. Supp. 449, 475–77 (S.D.N.Y. 1996) (finding that "there is no reason to believe that the omission of language in RICO covering aiders and abettors was inadvertent"). *But see In re* Melridge, Inc. Sec. Litig., No. 93-36184, 1996 WL 138468, at *1 (9th Cir. Mar. 27, 1996) (finding that the Supreme Court's decision in *Central Bank* was only relevant to Rule 10b-5 and not RICO).

148. 155 F.3d 644 (3d Cir. 1998).

149. *Id.* at 657 ("We conclude that the same analysis [as the Court used in *Central Bank*] controls our construction of the civil RICO provision."); *see also* Pa. Ass'n of Edwards Heirs v. Rightenour, 235 F.3d 839, 844 (3d Cir. 2000) (affirming *Rolo* and clarifying that *Rolo* also applied in common law–based RICO cases).

Courts have also interpreted RICO civil suits to require clear evidence of proximate cause.[150] As Part II demonstrates, this has impacted courts' understanding of ATA primary liability requirements.[151]

C. Some Background on Banks

This section considers background information on the banking industry that is particularly relevant to secondary liability civil suits against banks under the ATA.

1. Routine Versus Nonroutine Banking Services

As discussed in this Note's Introduction, whether a bank provides a terrorist entity with routine services versus nonroutine services could determine the outcome of an ATA civil suit.[152] Routine banking services include the maintenance of bank accounts, the collection and transmission of funds, and the provision of account credit card services for clients.[153] Nonroutine banking services extend beyond the realm of typical bank services, suggesting a more hands-on approach with greater client interaction and involvement.[154]

Some courts have declined to hold negligent banks liable for injuries linked to funds provided through routine banking services.[155] In *In re Terrorist Attacks on September 11, 2001*,[156] the Second Circuit pointed to the bank's use of routine banking services only as evidence that the link between the bank and the injury was too tenuous to afford the plaintiffs

150. *See supra* note 35 and accompanying text; *see also* Reynolds v. E. Dyer Dev. Co., 882 F.2d 1249, 1253 (7th Cir. 1989); Brandenburg v. Seidel, 859 F.2d 1179, 1189 (4th Cir. 1988) ("Civil RICO is of course a statutory tort remedy—simply one with particularly drastic remedies. Causation principles generally applicable to tort liability must be considered applicable. These require not only cause-in-fact, but 'legal' or 'proximate' cause as well, the latter involving a policy rather than a purely factual determination: 'whether the conduct has been so significant and important a cause that the defendant should be held responsible.'" (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 42, at 272 (5th ed. 1984))).

151. See *infra* Part II.B.2.a for discussion of *Rothstein*'s holding on primary liability.

152. *See supra* Introduction.

153. Jason Binimow, Annotation, *Validity, Construction, and Application of 18 U.S.C.A. § 2333(a), Which Allows U.S. Nationals Who Have Been Injured "By Reason of Act of International Terrorism" to Sue Therefor and Recover Treble Damages*, 195 A.L.R. FED. 217 (2004). In *Weiss v. National Westminster Bank PLC*, the defendant bank argued that the material support provision did not include routine banking services as a prohibited activity; the court found this particular argument unpersuasive. 453 F. Supp. 2d 609, 624–25 (E.D.N.Y 2006).

154. For additional discussion of such non-routine measures as explained in *Linde v. Arab Bank*, see *infra* notes 163–66.

155. *See In Re* Terrorist Attacks on September 11, 2001, 714 F.3d 118 (2d Cir. 2013); Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 109 (D.D.C. 2003) ("Plaintiffs offer no support, and we have found none, for the proposition that a bank is liable for injuries done with money that passes through its hands in the form of deposits, withdrawals, check clearing services, or any other routine banking service.").

156. 714 F.3d 118 (2d Cir. 2013).

relief.[157] However, the fact that a bank provided services considered to be routine commercial transactions does not per se exempt a bank from liability.[158] Although some routine banking services might qualify to establish primary liability for material support to terrorism, courts must still consider whether the services met the threshold for "substantial assistance" when evaluating under a secondary liability theory.[159] In other words, although the routine nature of a bank's actions is not necessarily dispositive, activities that are regarded as typical day-to-day services can demonstrate that the bank had no knowledge that it was aiding a terrorist act.[160]

Alternatively, the presence of more unusual and specific services can suggest just the opposite—that the bank knew that its services were aiding terrorism.[161] The court in *Linde v. Arab Bank*[162] found that the defendant bank's alleged actions far exceeded what is considered routine.[163] The Jordan-based Arab Bank has been at the center of many civil suits aimed at bringing justice to terrorism victims.[164] In *Linde*, the plaintiffs, who were victims or family of victims killed in Hamas-orchestrated terrorist attacks, filed a lawsuit charging the Arab Bank with violating § 2333(a).[165] The plaintiffs alleged that the banks had knowingly provided banking services to Hamas, charities that financially supported the terrorist groups Palestinian Islamic Jihad (PIJ) and Hamas, as well as the Saudi Committee in Support of the Intifada al Quds, a group that the plaintiffs alleged provided martyr insurance to the families of Hamas suicide bombers.[166]

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157. *Id.* at 123–25. The court relied on *Rothstein*'s holding that plaintiffs must demonstrate proximate cause to advance a primary liability cause of action under § 2333(a). *Id.*; *see also infra* Part II.B. Although the court here was dismissing a primary liability claim against the bank, Parts II and III of this Note further explain how the primary liability requirements also relate to ATA secondary liability.

158. *See* Sabine Michalowski, *No Complicity Liability for Funding Gross Human Rights Violations?*, 30 BERKELEY J. INT'L L. 451, 507 (2012) (citing *In re* Terrorist Attacks on September 11, 2001, 349 F. Supp. 2d 765, 832–34 (S.D.N.Y. 2005)); *see also In re* Terrorist Attacks on September 11, 2001, 718 F. Supp. 2d 456, 489 (S.D.N.Y. 2010); Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 291 (E.D.N.Y. 2007); Weiss v. Nat'l Westminster Bank PLC, 453 F. Supp. 2d 609, 625 (E.D.N.Y. 2006); Strauss v. Credit Lyonnais, S.A., No. CV-06-0702 (CPS), 2006 WL 2862704, at *12 (E.D.N.Y. Oct. 5, 2006); Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 588 (E.D.N.Y. 2005).

159. *See* Michalowski, *supra* note 158, at 487; *see also* Goldberg v. UBS AG, 660 F. Supp. 2d 410, 425 (E.D.N.Y. 2009) (holding that the defendant's performance of three wire transfers for a terrorist group's fundraising organization did not fulfill the "substantial assistance" element of tort aiding and abetting liability).

160. *See* Michalowski, *supra* note 158, at 487.

161. *See id.*

162. 384 F. Supp. 2d 571 (E.D.N.Y. 2005).

163. *See id.* at 588 ("Given plaintiffs' allegations regarding the knowing and intentional nature of [Arab] Bank's activities, there is nothing 'routine' about the services the Bank is alleged to provide.").

164. *See Anti-Terrorism Act Liability for Financial Institutions*, SULLIVAN & CROMWELL LLP, Sept. 24, 2014, at 2, *available at* http://www.sullcrom.com/siteFiles/Publications/SC_Publication_Anti_Terrorism_Act_Liability_for_Financial_Institutions.pdf.

165. *See Linde*, 384 F. Supp. 2d at 575.

166. *See id.* at 576–77. The court noted that although the plaintiffs occasionally referred to the payments to the bombers' families as insurance, the "scheme is not alleged to be a

In a similar case, *Almog v. Arab Bank*,[167] the plaintiffs also alleged the bank's involvement with the Saudi Committee.[168] In both cases, the Arab Bank argued that such services were merely routine—and in both cases, the court did not agree.[169] The court in *Almog* explained that the difference between routine and nonroutine was tied to the "knowing and intentional nature of the Bank's activities."[170] This conclusion supports the understanding that the type of services that a bank provides a terrorist group is not automatically indicative of knowledge or intent but can help create a strong presumption of the institution's mental state.[171]

2. Reliance on List-Making Post–September 11

After September 11, the United States succeeded in enacting some of the changes to the financial system that it had struggled to implement before the terrorist attacks.[172] The government was assertive in identifying terrorism's financial backers and freezing these entities' assets.[173] In 2004, the 9/11 Commission reported that the majority of U.S. financial institutions had cooperated extensively with the government to patch up vulnerabilities in the U.S. financial system.[174] Yet, with these successes came other consequences—terrorist organizations proved adaptable at finding other methods of raising money where traditional systems had failed.[175]

Following the USA PATRIOT Act's enactment in 2001,[176] the Treasury Department promulgated several regulations to more stringently monitor money laundering and terrorism financing.[177] Post–September 11, the U.S. approach to regulating terrorism financing has largely centered upon a practice of list-making.[178] The U.S. Secretary of State places groups on the

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traditional pooled risk insurance plan," but rather a reward for those who committed suicide attacks. *Id.* at 577.

167. *See* Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257 (E.D.N.Y. 2007).

168. *Id.* at 262–63; Michalowski, *supra* note 158, at 488–89.

169. *See* Michalowski, *supra* note 158, at 488–89.

170. *Almog*, 471 F. Supp. 2d at 291.

171. *See supra* note 160 and accompanying text.

172. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 17, at 381.

173. *Id.* at 382.

174. *Id.*

175. *Id.* at 383.

176. President George W. Bush signed the PATRIOT Act on October 26, 2001, which criminalized terrorism financing. Congress has renewed and added to the Act since then, and it remains in effect today. *See supra* note 51 and accompanying text; *see also* Pub. L. No. 107-56, 115 Stat. 272 (2001); *USA PATRIOT Act*, U.S. DEP'T OF TREASURY, FIN. CRIMES ENFORCEMENT NETWORK, http://www.fincen.gov/statutes_regs/patriot/index.html?r=1&id=352#352 (last visited Apr. 23, 2015) (identifying and explaining the PATRIOT Act sections affecting financial institutions).

177. The crime of money laundering occurs when individuals or organizations make their illegally obtained funds appear to be legally obtained; in other words, when an entity makes "dirty money" appear to be clean. *See* 18 U.S.C. §§ 1956–1957 (2012). The crime requires a predicate offense, which can be, but is not limited to, murder, kidnapping, arson, robbery, bribery, extortion, and drug dealing. *Id.*

178. *See Terrorist Financing*, *supra* note 16, at 9.

Designated Foreign Terrorist Organizations list ("FTOs list"), while OFAC, under IEEPA authority, maintains the Specially Designated Global Terrorists list ("SDGT list").[179]

The SDGT list was born out of an executive order that grants OFAC the authority to freeze the bank accounts and block the assets of entities appearing on this list.[180] It applies only to U.S. persons and U.S. financial institutions.[181] The SDGT list incorporates the State Department's FTO list as well as numerous other individuals and groups.[182] OFAC also maintains a master list called the Specially Designated Nationals and Blocked Persons list ("SDN list"), which combines OFAC and State Department lists, including the SST list.[183]

The SST list was created under the authority of section 6(j) of the Export Administration Act, which empowers the Secretary of State to designate certain countries as state sponsors of terrorism.[184] A country is designated a state sponsor of terrorism when the U.S. Secretary of State determines that the country's government "repeatedly provided support for acts of international terrorism."[185] As of early 2015, the SST list includes only Iran, Sudan, Syria, and Cuba.[186] OFAC has consequently enacted counterterrorism sanctions against these countries.[187]

3. Are Banks the Best Chance of Redress for Victims of Terrorism?

The ATA's legislative history indicates that Congress intended to provide victims of international terrorism with tools for civil redress.[188] Parts of this history directly address terrorism financing.[189] In an amicus brief submitted on behalf of the plaintiffs-petitioners in *Boim v. Quranic Literacy Institute* (*Boim I*),[190] the United States argued that secondary liability would

179. *See id.* at 9–11; *see also* 50 U.S.C. §§ 1701–1702 (2012) (permitting the prosecution of individuals who willfully conduct financial transactions with groups or individuals whom the President considers to be a national security threat).

180. *See Terrorist Financing*, *supra* note 16, at 11; *see also* Exec. Order No. 13,224, 15 C.F.R. pt. 744.12 (2001).

181. *See id.*; *see also* Weiss v. Nat'l Westminster Bank, PLC, 936 F. Supp. 2d 100, 118 (E.D.N.Y. 2013), *vacated and remanded*, 768 F.3d 202 (2d Cir. 2014).

182. *See Terrorist Financing*, *supra* note 16, at 11.

183. *See* U.S. DEP'T OF TREASURY, OFFICE OF FOREIGN ASSETS CONTROL SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS LIST (Jan. 2, 2015), *available at* https://www.treasury.gov/ofac/downloads/t11sdn.pdf; *see also* AUDREY KURTH CRONIN ET AL., CONG. RESEARCH SERV., RL32120, THE "FTO LIST" AND CONGRESS: SANCTIONING DESIGNATED FOREIGN TERRORIST ORGANIZATIONS, CRS REPORT FOR CONGRESS 4–5, *available at* http://www.fas.org/irp/crs/RL32120.pdf.

184. 50 U.S.C. § 2405(j); *see also* Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified as amended at 50 U.S.C. §§ 2401–2420).

185. *See* 28 U.S.C. § 1605A(h)(6) (2012).

186. *See State Sponsors of Terrorism*, U.S. DEP'T OF STATE, http://www.state.gov/j/ct/list/c14151.htm (last visited Apr. 23, 2015).

187. *See* Levin v. Bank of N.Y., No. 09 CV 5900 RPP, 2011 WL 812032, at *13 (S.D.N.Y. Mar. 4, 2011).

188. *See supra* Part I.A.2.

189. *See supra* note 73.

190. 291 F.3d 1000 (7th Cir. 2002).

better promote Congress's objective of compensating terrorism victims and deterring international terrorism.[191] In enacting the ATA, Congress may have intended to deter not only terrorist organizations themselves but also terrorism's financial backers.[192]

Secondary liability for banks under the ATA arguably provides the best chance of redress for terrorism victims.[193] This argument is typically based on the understanding that banks have "deep pockets" and therefore are capable of paying damages awards.[194] Notably, most plaintiffs have been unable to collect court judgments against state sponsors of terrorism.[195] State defendants have generally defaulted, and their assets have typically been unreachable.[196] For example, in 2012 in *Wultz v. Islamic Republic of Iran*,[197] a federal district court ordered Iran and Syria (both U.S.-designated state sponsors of terrorism)[198] to pay the plaintiffs $300 million in punitive damages.[199] Given that the likelihood of recovery from terrorist states is dim, victims may prefer a judgment against a bank.[200]

The court in *Boim v. Holy Land Foundation for Relief and Development* (*Boim III*) noted the difficulty in collecting judgments against terrorists or their organizations directly.[201] The court concluded that suing the financial backers of terrorism would have a more powerful deterrent effect and would serve to "cut the terrorists' lifeline."[202] In addition, the court found that providing financial aid to a terrorist group, while not inherently violent, could be considered dangerous to human life, as "[g]iving money to Hamas" was "like giving a loaded gun to a child."[203] *Boim I* also noted that

191. *Boim I* Brief, *supra* note 68, at 18–19.

192. Van Schaack, *supra* note 53, at 392–93 ("The hope was that allowing civil liability would provide an extra measure of deterrence, especially for entities that might financially support acts of terrorism while not engaging in violent acts directly.").

193. *See* Jack D. Smith & Gregory J. Cooper, *Disrupting Terrorist Financing with Civil Litigation*, 41 CASE W. RES. J. INT'L L. 65, 80 (2009).

194. *See* Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 61 (D.D.C. 2010).

195. *See* Smith & Cooper, *supra* note 193, at 79.

196. *See* JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL31258, SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM, CRS REPORT FOR CONGRESS (2008), *available at* http://www.fas.org/sgp/crs/terror/RL31258.pdf ("The limited availability of defendant States' assets for satisfaction of judgments has made collection difficult."); *see also Boim III*, 549 F.3d 685 (7th Cir. 2008).

197. 755 F. Supp. 2d 1, 61 (D.D.C. 2010).

198. *See supra* note 186 and accompanying text.

199. Wultz v. Islamic Republic of Iran, 864 F. Supp. 2d 24, 42 (D.D.C. 2012). The court reviled Syria and Iran, stating: "When a state chooses to use terror as a policy tool—as Iran and Syria continue to do—that state forfeits its sovereign immunity and deserves unadorned condemnation. Barbaric acts like [the suicide attack that killed Daniel Wultz] have no place in civilized society and represent a moral depravity that knows no bounds." *Id.* at 43.

200. *See* Smith & Cooper, *supra* note 193, at 80.

201. *See Boim III*, 549 F.3d at 690 ("Damages are a less effective remedy against terrorists and their organizations than against their financial angels."). For other examples demonstrating the difficulty in collecting such judgments, see generally *Ungar v. Palestine Liberation Organization*, 402 F.3d 274, 276 (1st Cir. 2005); *Biton v. Palestinian Interim Self-Government Authority*, 252 F.R.D. 1, 1 (D.D.C. 2008); *Knox v. Palestine Liberation Organization*, 248 F.R.D. 420, 423 (S.D.N.Y 2008).

202. *Boim III*, 549 F.3d at 691.

203. *Id.* at 690.

it would be "bizarre" for Congress to enact a statute where collecting damages would be so unlikely.[204]

Finally, the burden of proof in civil suits is lower than in criminal cases.[205] Thus, civil suits likely provide a better opportunity to hold terrorism aiders and abettors accountable than criminal prosecutions.[206]

There are also potential arguments against propping up banks as a potential target in terrorism suits.[207] U.S. plaintiffs suing foreign banks may lead to complicated issues of international diplomacy.[208] One argument is that Congress did not intend for banks to be included as a potential defendant class under § 2333(a).[209] Furthermore, banks have defended themselves against civil suits by arguing that they complied with the regulations of the country where the bank was located.[210] Finally, in pursuing banks under a secondary liability theory, there exists a risk that courts could impose unjust costs on innocent financial institutions that provide necessary economic services to society.[211]

II. THE CONFLICTING CASE LAW ON ATA SECONDARY LIABILITY

This part looks closer at the split among federal courts on ATA secondary liability in private civil suits. Part II.A presents the most significant case law in favor of secondary liability, focusing on *Wultz* and *Boim I*.[212] Part II.B then presents the case law holding against secondary liability, with a focus on the Second Circuit's ruling in *Rothstein v. UBS AG*[213] and the Seventh Circuit's overturning of *Boim I* in *Boim III*, its en banc rehearing of the case.

A. The Case Law Permitting Private ATA Suits Under a Secondary Liability Theory

This section addresses those courts that have held in favor of secondary liability. Although the defendant in the *Boim* case was a charity, and not a

204. *Boim I*, 291 F.3d 1000, 1021 (7th Cir. 2002).

205. *See* Smith & Cooper, *supra* note 193, at 74. The standard for civil suits is "clear and convincing evidence" or a "preponderance of evidence" rather than proof "beyond a reasonable doubt." *Id.*

206. *See* Adam B. Weiss, *From the Bonannos to the bin Ladens: The Reves Operation or Management Test and the Viability of Civil RICO Suits Against Financial Supporters of Terrorism*, 110 COLUM. L. REV. 1123, 1165 (2010).

207. *See generally* Sant, *supra* note 14 (presenting several reasons why banks should not be targeted under the ATA).

208. *See, e.g.*, Linde v. Arab Bank, PLC, 950 F. Supp. 2d 459, 460 (E.D.N.Y. 2013).

209. *Id.* at 535, 544–45 (arguing that the ATA civil provision was enacted as a largely symbolic law, intended to target terrorist actors and not banks).

210. *See, e.g.*, Gill v. Arab Bank, PLC, 893 F. Supp. 2d 523, 538 (E.D.N.Y. 2012) (finding that "[c]ompliance with Lebanese law sheds light on the Bank's mental state"); Weiss v. Nat'l Westminster Bank, 936 F. Supp. 2d 100, 111, 116–117 (E.D.N.Y. 2013) (discussing Natwest's argument that it should not be held liable under the ATA, as it had not conducted business with any U.K.-designated terrorist groups).

211. *See* Sant, *supra* note 14, at 599.

212. *Boim I*, 291 F.3d 1000 (7th Cir. 2002).

213. 708 F.3d 82 (2d Cir. 2013).

bank, courts have applied the *Boim I* and *Boim III* rulings on secondary liability to cases involving banks.[214] While the Seventh Circuit eventually shifted its stance in *Boim III*, its original holding in *Boim I* laid the framework for other holdings permitting secondary liability. This section focuses on the D.C. District Court's ruling in *Wultz*.

The *Boim* story began with the 1996 killing of David Boim, a dual American and Israeli citizen, near Jerusalem.[215] In 2000, David's parents filed a lawsuit against the Holy Land Foundation for Relief and Development and other defendants.[216] The family alleged that Hamas was responsible for David's death and that the defendants had provided financial support to the organization in violation of § 2333(a).[217] The district court denied the defendants' motion to dismiss the complaint, and the Seventh Circuit affirmed the district court's ruling, finding that the ATA civil provision provided for a secondary liability private cause of action.[218]

The *Wultz* court frequently refers to the *Boim I* ruling.[219] In 2006, sixteen-year-old Daniel Wultz was eating at a restaurant in Tel Aviv, Israel, with his father when a member of PIJ approached the restaurant.[220] When a security guard at the restaurant's entrance stopped the man, he detonated five kilograms of explosives, killing himself and ten others, including Daniel.[221]

In 2008, Daniel's parents filed a $300 million civil suit under the ATA against Iran, Syria, and Bank of China.[222] The plaintiffs argued that Bank of China aided and abetted PIJ in its execution of the terrorist attack that killed their son.[223] Under this theory, the plaintiffs contended that Bank of China should be held liable because its provision of financial services to the

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214. *See infra* Part II.A–B.

215. *Boim I*, 291 F.3d at 1002.

216. *Id.* at 1003. The family also sued the Quranic Literacy Institute, the American Muslim Society, and Muhammad Salah, a former employee of the Quranic Literacy Institute. *See* Mike Robinson, *Court Upholds $156M Palestinian Terror Verdict*, USA TODAY (Dec. 3, 2008), http://usatoday30.usatoday.com/news/nation/2008-12-03-3866513362_x.htm.

217. *Boim I*, 291 F.3d at 1002–03.

218. *See id.* at 1021.

219. *See generally* Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1 (D.D.C. 2010).

220. *See* Wultz v. Islamic Republic of Iran, 864 F. Supp. 2d 24, 27 (D.D.C. 2012). Palestinians living in the Gaza Strip formed PIJ in the 1970s with the purpose of establishing an Islamic state and launching attacks against Israeli civilian and military targets; Iran is the main financial backer of the group. *See Palestinian Islamic Jihad (PIJ)*, NAT'L COUNTERTERRORISM CENTER, http://www.nctc.gov/site/groups/pij.html (last visited Apr. 23, 2015).

221. Raphael Ahern, *US Court Orders Syria to Pay $330 Million to Bereaved Family of 2006 TA Bombing Victim*, TIMES OF ISRAEL (May 15, 2012), http://www.timesofisrael.com/us-court-orders-syria-to-pay-330-million-to-bereaved-family-of-2006-ta-suicide-bombing/. Following his death, Abu Nasser, one of the leaders of a terrorist group linked with the PIJ, declared Daniel the "best target combination we can dream of—American and Zionist." *See* Aaron Klein, *Comatose Florida Teen 'Best Target We Can Dream Of,'* WORLDNETDAILY (Apr. 27, 2006), http://www.wnd.com/2006/04/35925/.

222. *See Wultz*, 755 F. Supp. 2d at 18. The plaintiffs pleaded in the alternative that Bank of China was directly liable under the ATA as well as liable under Israeli law. *Id.*

223. *Id.* at 19.

PIJ furthered an act of international terrorism.[224] The plaintiffs claimed that prior to the attack that killed Daniel, Bank of China had executed dozens of wire transfers for a PIJ agent that amounted to millions of dollars.[225] They also contended that the bank had known that it was providing services to a terrorist group but had persisted with its actions anyway.[226] Bank of China contended that an aiding and abetting cause of action did not exist under the ATA and moved to dismiss for failure to state a claim.[227]

The *Wultz* court held for the plaintiffs.[228] The court's ruling hinged on its determination that courts should treat the ATA civil provision differently than the Supreme Court had treated the 1934 Act's section 10(b) in *Central Bank*.[229] The *Wultz* court noted that it was wary of inferring aiding and abetting liability following *Central Bank*.[230] Nevertheless, the court drew the same line between the ATA and private securities fraud suits that the *Boim I* court had drawn previously.[231]

Bank of China argued that the court should interpret *Central Bank* as totally precluding any secondary liability reading when such a theory was not explicitly laid out in the statute.[232] The court agreed that there was a general presumption against aiding and abetting liability when the statute did not expressly provide for such liability.[233] However, the court determined that this presumption was rebuttable where there was strong evidence of congressional intent to permit secondary liability.[234]

Wultz's rationale for rebutting *Central Bank*'s presumption arose directly from *Boim I*'s analysis.[235] *Boim I* found that *Central Bank*'s holding "provide[d] guidance but [was] not determinative" because it addressed a

224. *Id.* at 54. This theory contrasts with the plaintiffs' simultaneously pleaded theory that the bank's provision of funds was in itself an act of terrorism under the ATA. *Id.* at 19.

225. *Id.* at 44–45; Jesse D. H. Snyder, *Reading Between the Lines: Statutory Silence and Congressional Intent Under the Antiterrorism Act*, 1 BRIT. J. AM. LEGAL STUDIES 265, 286 (2012).

226. *Wultz*, 755 F. Supp. 2d at 46 ("Israeli officials allegedly informed China, which informed [Bank of China], that the transfers were enabling the terrorist activities of the PIJ.").

227. *Id.* at 54. Bank of China only argued that the secondary liability claim did not exist under the ATA and did not alternatively argue that the plaintiffs failed to plead the necessary elements of the claim, should it exist. *Id.* at 57.

228. *Id.* at 82.

229. *Id.* at 54–56. See *supra* Part II.B.2.a for an overview of *Central Bank*'s holding on secondary liability for private securities fraud claims.

230. *Wultz*, 755 F. Supp. 2d at 54. See *supra* Part I.B.2.a for a discussion of *Central Bank*.

231. *Wultz*, 755 F. Supp. 2d at 54.

232. *Id.*

233. *Id.* at 55 (citing Cent. Bank of Denver v. First Interstate of Denver, 511 U.S. 164, 182 (1994)).

234. *Id.* at 57. Similarly, other courts have applied secondary liability in the face of statutory silence despite *Central Bank*. *See, e.g.*, Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 282 (2d Cir. 2007) (holding that *Central Bank*'s presumption was rebutted by an international norm recognizing claims of aiding and abetting violations of international law).

235. *Wultz*, 755 F. Supp. 2d at 55; *see also* Gill v. Arab Bank, PLC, 893 F. Supp. 2d 474, 500 (E.D.N.Y. 2012) (observing that *Wultz* relied on *Boim I*'s reasoning and finding that § 2333(a) provided for secondary liability).

statute that only *inferred* a private right of action, whereas § 2333(a)'s private right of action was explicit.[236] Such reasoning suggests that the difference between implied and express private rights of action is sufficient to distinguish *Central Bank* from ATA civil litigation.[237]

Wultz likewise determined that Congress had intended for the ATA to be construed broadly using traditional tort law principles; for this reason, the D.C. District Court permitted the aiding and abetting claim against Bank of China.[238] This argument is closely linked with those courts' assertions that the ATA is distinguishable from the 1933 and 1934 Acts and is therefore outside of *Central Bank*'s control.[239]

The court in *Boim I* insisted that the ATA's legislative history evinces clear intent to incorporate the full apparatus of traditional tort law into the ATA.[240] *Wultz* also relied on Senator Grassley's statement that the ATA provides victims of international terrorism with "all the weapons" available to civil plaintiffs[241] as well as the "remedies of American tort law"[242] as evidence that Congress intended to include secondary liability in the statute.[243] Logic would seem to dictate that if Congress intended the ATA to incorporate all of the elements of traditional tort law, then it must have intended aiding and abetting theory—viable under traditional tort law—to apply to cases involving banks and international terrorism.[244] The legislature's discussion of the "causal chain of terrorism" would necessarily include aiders and abettors.[245]

The court in *Goldberg v. UBS AG*[246] noted that the ATA's legislative history and language reflect an intention to give U.S. nationals broad opportunities for relief.[247] The courts in *Wultz* and *Boim I* also made such a connection, arguing that Congress's intent supported an accurate interpretation of the ATA's language.[248] *Wultz* found that the ATA civil provision did not place any limits on a potential defendant because the language only required that the plaintiff be injured "by reason of an act of international terrorism."[249] In supporting this conclusion, the court cited

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236. *Boim I*, 291 F.3d 1000, 1019 (7th Cir. 2002).

237. *Gill*, 893 F. Supp. 2d at 500 (discussing the *Wultz* argument in favor of distinguishing ATA cases from *Central Bank*).

238. *See Wultz*, 755 F. Supp. 2d at 55; *see also Boim I*, 291 F.3d at 1019.

239. *See supra* Part II.A.

240. *Boim I*, 291 F.3d at 1010 (citing 137 CONG. REC. 4511 (1991)).

241. *See supra* note 65 and accompanying text.

242. *See supra* notes 65–66 and accompanying text.

243. *Wultz*, 755 F. Supp. 2d at 56 (citing 137 CONG. REC. 4511).

244. *See, e.g.*, *id.* at 55; *Boim I* Brief, *supra* note 68, at 9–10.

245. *See supra* note 73 and accompanying text; *see also Boim I* Brief, *supra* note 68, at 17.

246. 660 F. Supp. 2d 410 (E.D.N.Y. 2009).

247. *Id.* at 422 (finding that the ATA's "legislative history as well as the language of the statute" suggested an intent to provide plaintiffs with "broad remedies in a procedurally privileged U.S. forum"). However, *Goldberg* did not rule directly on the question of whether the ATA provided for secondary liability.

248. *Wultz*, 755 F. Supp. 2d at 55.

249. *Id.*; *see also supra* note 35 and accompanying text. This "by reason of" language is common to a number of statutes, including RICO; in such cases, courts have found this

Molzof v. United States[250] for the proposition that a statute's language should be discerned in light of the common law principles Congress intended to apply to the statute.[251]

Boim I similarly looked to the ATA's language in considering secondary liability.[252] The court focused on the definition of international terrorism provided at § 2331(1) and the meaning of the word "involve" in the context of § 2333(a).[253] *Wultz* concurred with *Boim I*'s conclusion that this definition, and the pointed reference to criminal law, meant that Congress intended to make the ATA's civil provision "at least as extensive as criminal liability."[254] *Boim I* and *Wultz* therefore concluded that where criminal secondary liability would be available (through 18 U.S.C. § 2), civil secondary liability must follow.[255]

Once the *Wultz* court determined that secondary liability existed under the ATA, it applied the standard to evaluating civil aiding and abetting liability established in *Halberstam*.[256] In following the *Halberstam* approach, which incorporated the Restatement, a plaintiff must demonstrate that the defendant (1) was "generally aware of his role as part of an overall illegal or tortious activity at the time that" the assistance was provided and (2) "knowingly and substantially" assisted in the violation.[257]

In applying tort law principles to a secondary liability claim, the *Wultz* court emphasized the importance of establishing a causal link between Bank of China and the terrorist attack in question.[258] The court noted that where there was no allegation that a bank had direct ties to a terrorist group or had the requisite knowledge that it was aiding a terrorist group, the "mere provision of routine banking services that benefited" the group in a "general, nondescript manner" would not establish jurisdiction over the bank.[259] While this point directly addresses jurisdiction, it also suggests that a simply negligent bank does not form a strong enough nexus between a defendant bank and the terrorist act to warrant ATA liability.[260] On the other hand, the court would likely require that a bank manifest some degree of knowledge.[261] Such a connection is also necessary to establish that the

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language to establish a proximate cause requirement when a plaintiff pleads primary liability. *See supra* note 35.

250. 502 U.S. 301 (1992).

251. *Id.* at 305–07.

252. *Boim I*, 291 F.3d 1000, 1009 (7th Cir. 2002) ("We look to the language in order to determine what Congress intended, and we also look to the statute's structure, subject matter, context and history for this same purpose.").

253. *Id.* at 1009–10; *see also* 18 U.S.C. § 2333(a) (1992).

254. *Wultz*, 755 F. Supp. 2d at 55 (quoting *Boim I*, 291 F.3d at 1020).

255. *See Boim I*, 291 F.3d at 1020; *Wultz*, 755 F. Supp. 2d at 55.

256. *See supra* Part I.B.1; *see also Wultz*, 755 F. Supp. 2d at 57.

257. *Wultz*, 755 F. Supp. 2d at 57 (quoting Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983)); *see also supra* notes 101–03 and accompanying text (discussing *Halberstam*'s facts and the Supreme Court's description of the opinion as "comprehensive").

258. *See Wultz*, 755 F. Supp. 2d at 34.

259. *Id.* (quoting *In re* Terrorist Attacks on September 11, 2001, 718 F. Supp. 2d 456, 488–90 (S.D.N.Y. 2010)).

260. *Id.*

261. *Id.*

bank knowingly provided substantial assistance to those who carried out the terrorist attack.[262]

The *Wultz* court contrasted the case against Bank of China[263] with *Licci v. American Express Bank*.[264] In *Licci*, the court dismissed negligence claims under the ATA civil provision on the basis that the defendant bank had only provided routine banking services, including wire transfers, that allegedly aided Hamas in executing a terrorist attack.[265] The *Licci* court found that it was not reasonably foreseeable that routine banking services would result in rocket attacks in Israel.[266] The *Wultz* court rejected Bank of China's argument that its case was analogous to *Licci*, because the plaintiffs alleged that Bank of China had provided banking services to PIJ with the knowledge that the services would aid the group in carrying out terrorist attacks.[267] The court found that this allegation of knowledge suggested the bank had conducted nonroutine services, therefore fulfilling the proximate cause element.[268]

The *Wultz* court's analysis therefore permits ATA secondary liability and suggests that, for a claim predicated upon such a theory to succeed against a bank, the bank in question must manifest a more culpable mental state than negligence.[269]

B. Courts Against Secondary Liability Under the ATA

This section examines courts that have come out on the other side, holding that no such claim is possible under the ATA. This section begins with the Seventh Circuit's holding in *Boim III*, in which the court rejected *Boim I*'s attempt to distinguish the ATA from *Central Bank* and instead offered a "chain of incorporations" theory that plaintiffs could potentially use to hold banks liable under a primary liability theory—albeit one that bears some resemblance to secondary liability. This section then shifts its focus to the Second Circuit's recent ruling against secondary liability in *Rothstein v. UBS AG*, where the court found no space for a secondary liability cause of action and required a showing of proximate cause for primary liability claims.

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262. *Id.* at 66. The *Wultz* court found that whether such a connection existed was a factual matter for trial, as the plaintiffs had adequately pleaded the connection in the complaint. *Id.*

263. *Id.*

264. 704 F. Supp. 2d 403 (S.D.N.Y. 2010), *vacated in part by* Licci *ex rel.* Licci v. Lebanese Canadian Bank, 732 F.3d 161 (2d Cir. 2013).

265. *Id.* at 410–11.

266. *Id.*

267. *Wultz*, 755 F. Supp. 2d at 66.

268. *Id.* ("The banking services allegedly provided by BOC to the PIJ are, therefore, by no means the *routine* sort of services provided by the correspondent bank to the Lebanese bank [in *Licci*].").

269. *Id.* at 57.

1. The Seventh Circuit in *Boim III*

The defendants again appealed after the *Boim I* ruling, at which point the Seventh Circuit vacated the judgment and remanded to the district court.[270] Finally, the plaintiffs petitioned for a rehearing with the Seventh Circuit en banc.[271] The en banc court in *Boim III* then held that the ATA did not provide a secondary liability cause of action, overruling the Seventh Circuit's holding in *Boim I*.[272] However, *Boim III*'s approach to primary liability has left the door open to liability for banks using a statutory chain of incorporations by reference, an approach that has similar characteristics to secondary liability.[273]

Courts have found that it is *Central Bank*'s reasoning—not its subject matter—that applies to ATA cases where a plaintiff seeks to use a secondary liability theory.[274] Judge Richard Posner, in his opinion for *Boim III*, disagreed with the finding in *Boim I* that the instant case was distinguishable from *Central Bank*.[275] In his opinion, the *Boim I* court gave too much weight to the fact that a private cause of action in section 10(b) cases was implicit while the ATA's was explicit.[276] Judge Posner considered this comparison irrelevant because the *Central Bank* holding extended to government suits as well as private suits.[277] Judge Posner noted that section 10(b) expressly authorized SEC suits.[278] He therefore concluded that, in the context of the ATA, "statutory silence on the subject of secondary liability means there is none."[279]

As support for this finding, Judge Posner cited congressional action taken shortly after the Supreme Court's *Central Bank* ruling.[280] The year following the ruling, Congress enacted a law that permitted the SEC to pursue those who aided and abetted securities fraud.[281] Judge Posner concluded that this legislation demonstrated that, even though the SEC possessed an express cause of action, secondary liability was not permissible until Congress expressly authorized such liability.[282]

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270. *Boim III*, 549 F.3d 685, 688 (7th Cir. 2008).
271. *See id.*
272. *See id.* at 685.
273. *See id.* at 690.
274. *See* Gill v. Arab Bank, PLC, 893 F. Supp. 2d 474, 499 (E.D.N.Y 2012) (citing Freeman v. DirectTV, Inc., 457 F.3d 1001, 1006 n.1 (9th Cir. 2006)).
275. *See Boim III*, 549 F.3d at 689.
276. *See id.*; *see also Boim I*, 291 F.3d 1000, 1019 (7th Cir. 2002).
277. *See Boim III*, 549 F.3d at 689 (citing Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 200 (1994) (Stevens, J., dissenting)).
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.* The provision states that

> any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.

15 U.S.C. § 78t(e) (2012).
282. *Boim III*, 549 F.3d 685, 689 (7th Cir. 2008).

Furthermore, in 2008 the Supreme Court reaffirmed its *Central Bank* holding and stated clearly that the decision also applied to SEC suits, not merely private actions.[283]

In its dismissal of the secondary liability interpretation, *Boim III* offered as an alternative the "chain of incorporations" theory of primary liability available under the material support provision.[284] This court, as well as many others, has concluded that the material support crime as pleaded under § 2339B constitutes an act of "international terrorism."[285]

Boim III's logic presupposes a seamless combination of the ATA civil provision, the material support provisions, and the ATA's definition of international terrorism under § 2331(1). The court argued that Congress had intended courts to play these provisions off of one another.[286] According to the court in *Boim III*, in using the material support crime in conjunction with § 2333(a), plaintiffs would be combining the secondary liability nature of the material support provision (which explicitly incorporates criminal secondary liability) with a primary liability theory under the ATA civil provision.[287] According to Judge Posner "primary liability in the form of material support to terrorism has the character of secondary liability."[288] Thus, he argued, Congress had in fact expressly imposed liability on a class of aiders and abettors via a statutory "chain of incorporations by reference."[289]

Under this theory, a plaintiff begins at § 2333(a), which provides that a plaintiff must have been injured "by reason of an act of international terrorism."[290] A plaintiff could then move to § 2339B, which prohibits knowingly providing support to a terrorist organization or attempting or conspiring to do so.[291] Furthermore, because the Supreme Court in *Humanitarian Law Project* held that the material support provision's knowledge requirement only extended to knowledge that the material

283. *See* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 156–59 (2008). Judge Posner also suggested that to permit a secondary liability private action under the ATA would overextend federal courts' extraterritorial jurisdiction. *Boim III*, 549 F.3d at 689–90.

284. *Boim III*, 549 F.3d at 690.

285. *See Boim I*, 291 F.3d 1000, 1015 (7th Cir. 2002); Abecassis v. Wyatt, 704 F. Supp. 2d 623 (S.D. Tex. 2010); Goldberg v. UBS AG, 690 F. Supp. 2d 92, 114 (E.D.N.Y. 2010); *In re* Chiquita Brand Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig., 690 F. Supp. 2d 1296, 1309 (S.D. Fla. 2010); Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 268 (E.D.N.Y. 2007); Weiss v. Nat'l Westminster Bank, PLC, 453 F. Supp. 2d 609, 613 (E.D.N.Y. 2006); *In re* Terrorist Attacks of September 11, 2001, 392 F. Supp. 2d 539, 564–65 (S.D.N.Y. 2005).

286. *Boim III*, 549 F.3d at 690. Judge Posner's majority opinion asserted that "[§§ 2333 and 2331(1)] are part of the same statutory scheme." *Id.* (citing Perry, *supra* note 35, at 257)).

287. *Id.*

288. *Id.* at 691.

289. *Id.* at 692.

290. 18 U.S.C. § 2333(a) (2012).

291. *Id.* § 2339B.

support would go to a designated terrorist organization, a defendant need not know that its support was specifically going toward terrorist acts.[292]

Other courts have considered this possibility as a potential alternative to permitting secondary liability under the ATA on the basis of the statute's language and legislative history.[293] For instance, in September 2014, the Second Circuit in *Weiss v. National Westminster Bank*[294] reversed the Eastern District of New York's grant of summary judgment to National Westminster Bank of Scotland ("Natwest"), in a case where the material support law served as the basis for primary liability under the ATA.[295] The plaintiffs had accused Natwest of providing material support to Hamas via transferring funds and maintaining accounts on behalf of a group called Interpal.[296] The Second Circuit reversed and remanded to the lower court on the basis that the court should have incorporated into § 2333(a) the mental state required of material support criminal suits—in other words, knowledge that the group was a terrorist organization, as established in *Humanitarian Law Project*.[297] While Interpal was located on OFAC's SDGT list, neither the British government nor the European Union had designated the group as a terrorist organization.[298] As the SDGT only applies to U.S. financial institutions and U.S. persons,[299] it remains unclear whether OFAC sanctions against a state sponsor of terrorism or the presence of a group or individual on an OFAC list serves as constructive notice for foreign banks providing services to such entities.[300] Perhaps, as the district court in *Weiss* suggested, such a question is "better suited for the political branches of government."[301]

2. The Second Circuit's Take on Secondary Liability

Until 2012, the Second Circuit served as fertile ground for secondary liability suits against banks.[302] Then, two decisions, one in the Second Circuit and one in the Eastern District of New York, took apart secondary liability but in different ways. In *Rothstein*, the Second Circuit overturned years of case law and indicated a turning of the tide against secondary

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292. Holder v. Humanitarian Law Project, 561 U.S. 1, 16–18 (2012).

293. *See, e.g.*, Weiss v. Nat'l Westminster Bank, PLC, 936 F. Supp. 2d 100 (E.D.N.Y. 2013); Linde v. Arab Bank, PLC, 950 F. Supp. 2d 459, 460 (E.D.N.Y. 2013); Abecassis v. Wyatt, 704 F. Supp. 2d 623, 645–47 (S.D. Tex. 2010).

294. 936 F. Supp. 2d 100, 118 (E.D.N.Y. 2013), *vacated and remanded*, 768 F.3d 202 (2d Cir. 2014).

295. *Weiss*, 768 F.3d 202.

296. *Id.* at 204.

297. *Id.* at 207–08.

298. *See Weiss*, 936 F. Supp. 2d at 111.

299. *See* Exec. Order No. 13,224, 15 C.F.R. pt. 744.12 (2001).

300. *Id.*

301. *Weiss*, 936 F. Supp. 2d at 118; *see supra* Part III (considering the merits of this "chain of incorporations" approach and whether it provides a realistic avenue for plaintiffs to hold banks liable for the actions of their clients).

302. *See, e.g.*, Linde v. Arab Bank, PLC, 950 F. Supp. 2d 459, 460 (E.D.N.Y. 2013); Strauss v. Credit Lyonnais, S.A., 242 F.R.D. 199 (E.D.N.Y. 2007).

liability. In *Gill v. Arab Bank*,[303] a court in the Eastern District found Congress did not intend for secondary liability under the ATA.

a. Rothstein *Raises the Bar*

The plaintiffs in *Rothstein* were U.S. citizens who pleaded that they had been injured, or their relatives had been injured, in terrorist attacks in Israel spanning from July 30, 1997 to July 22, 2006.[304] Hamas and Hezbollah were responsible for the attacks, which consisted of five bombings and multiple rocket launchings.[305] The plaintiffs alleged that UBS AG , a Swiss bank with U.S. offices, had facilitated U.S. currency transactions with Iran,[306] which, in turn, funded Hamas, Hezbollah, and PIJ with the intent to aid in the commission of terrorist attacks.[307] They brought a claim under § 2333(a) that the bank had aided and abetted international terrorism.[308]

In 2013, the Second Circuit upheld the decision of the district court to dismiss plaintiffs' secondary liability claim against UBS, finding that such a claim predicated upon § 2333(a) did not exist.[309] *Rothstein* found that the ATA's implementation of criminal provisions established a form of aiding and abetting liability but did not expressly address *Boim III*'s "chain of incorporations" approach.[310] The court observed that, given Congress's express provision for secondary liability in other areas of the law, the civil provision's silence on the issue was likely intentional.[311] The court noted that Congress could take action to explicitly create a secondary liability private cause of action under § 2333(a) in the future.[312]

The court also dismissed the plaintiffs' attempt to hold UBS liable under a primary liability theory, finding that the plaintiffs had not demonstrated

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303. 893 F. Supp. 2d 474 (E.D.N.Y. 2012).

304. Rothstein v. UBS AG, 708 F.3d 82, 85 (2d Cir. 2013).

305. *Id.* at 87.

306. The plaintiffs alleged that Iran pursued an official policy targeting Israelis and the State of Israel. *Id.* at 85.

307. *Id.* at 86.

308. *Id.* at 88. The plaintiffs also initially alleged that UBS had aided and abetted violations of customary international law; the district court dismissed this claim in its entirety, holding that it was preempted by the ATA. *See* Rothstein v. UBS AG, 647 F. Supp. 2d 292, 296 (S.D.N.Y. 2009).

309. *Rothstein*, 708 F.3d at 97–98 (discussing the application of *Central Bank* to ATA cases and agreeing with *Boim III*'s holding that the ATA did not provide an aiding and abetting cause of action).

310. *Id.* The court did note, however, that the chain of causation alleged by the plaintiffs was too tenuous to provide for proximate cause, which the court identified as a pleading requirement for ATA primary liability. *See id.* at 88; *see also* Brief of Petitioners-Appellants at 3 n.1, *In re* Terrorist Attacks on Sept. 11, 2001, 714 F.3d 118 (2d Cir. 2013) (No. 13-318). Additionally, in a recent opinion upholding the jury's verdict in the *Linde v. Arab Bank* case, a judge in the Eastern District of New York explicitly endorsed *Boim III*'s "chain of incorporations" approach. Linde v. Arab Bank, PLC, No. 04-cv-2799 (BMC) (VVP), 2015 WL 1565479, at *27 (E.D.N.Y. Apr. 8, 2015).

311. *Rothstein*, 708 F.3d at 98.

312. *Id.* ("It of course remains within the prerogative of Congress to create civil liability on an aiding-and-abetting basis and to specify the elements, such as mens rea, of such a cause of action." (emphasis omitted)).

the necessary proximate cause linking the bank with the terrorist attacks.[313] The court supported this holding by analogizing the ATA's language to the language in the RICO civil provision, which also incorporated the "by reason of" phrase.[314] This finding contrasts with *Boim III*, which made no mention of a proximate cause requirement.[315]

b. Gill v. Arab Bank

In *Gill*, a case out of the Eastern District of New York, the court methodically dismantled the *Wultz* and *Boim I* approach to secondary liability. The *Gill* court instead sided with *Boim III*, finding little difference conceptually between ATA cases and *Central Bank*.[316] The *Gill* court viewed the issue as whether federal courts have the power to infer secondary liability in a civil statute where Congress made no mention of it.[317]

The court in *Gill* gave greater consideration to *Wultz* and *Boim I*'s emphasis on the ATA's legislative history than did the courts in *Boim III* or *Rothstein*.[318] The *Gill* court cautiously weighed the argument that Congress intended the ATA private cause of action to include secondary liability and ultimately dismissed this analysis.[319] The court argued that *Wultz*'s reliance on legislative history was "contrary to the realities of the legislative process."[320] The court claimed that *Wultz* wrongfully assumed that Congress, in enacting the ATA, acted on a unified front on a point of law that was not addressed in the statute's text itself.[321]

The court also scrutinized certain aspects of the congressional record.[322] For instance, in his testimony, Joseph Morris indicated that he believed secondary liability could be found when an entity was *negligent*.[323] However, *Gill* noted that this understanding of the law was inconsistent with the ATA's provision of treble damages, which are generally not available in negligence cases.[324] *Gill* also suggested that to apply § 2333(a) to *all* aspects of civil litigation would be unreasonable—and argued that

313. *Id.* at 88–89.
314. *See supra* note 35 and accompanying text.
315. *See generally Boim III*, 549 F.3d 685 (7th Cir. 2008). In addition, Judge Diane Wood in *Boim III* suggested that the majority's holding would permit plaintiffs to charge banks without any demonstration of proximate cause. *Id.* at 724 (Wood, J., concurring in part and dissenting in part).
316. Gill v. Arab Bank, 893 F. Supp. 2d 474, 500 (E.D.N.Y 2012).
317. *Id.* at 497.
318. *Id.* at 501.
319. *Id.* at 500–01 (finding that it was "irrelevant" that *Central Bank*'s private right of action was implied).
320. *Id.* at 501 (citing Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent As Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992)).
321. *Id.*
322. *Id.*
323. *See supra* note 72 and accompanying text.
324. *Gill*, 893 F. Supp. 2d at 501.

even proponents of secondary liability have essentially recognized this fact, as they have not attempted to pursue the tort theory of strict liability.[325]

Gill also challenged *Boim I*'s assertion that Congress intended § 2333(a) to be as extensive as criminal liability in terrorism cases.[326] The court argued that, instead, Congress's enactment of a general criminal secondary liability statute shows that Congress knows how to provide for such liability if it wants to.[327] According to the court, the absence of such a statutory provision demonstrated that Congress did not intend to create secondary liability under the ATA.[328]

III. RESOLVING THE SECONDARY LIABILITY CONUNDRUM

The case law on secondary liability under the ATA has posed a number of questions: Are these banks innocent institutions wrongfully swept up in litigation over heinous crimes they did not commit? Or are banks part of the larger problem of terrorism financing, and the most practical source of relief for terrorism victims?

Unsurprisingly, the answers to these questions depend on the specific facts of each case. While ATA cases involving banks vary,[329] organizing them into three general categories allows for helpful analysis of the secondary liability issue: (1) cases where the defendant bank engaged in routine financial services and demonstrated negligence, at most; (2) cases where the bank's activities extended beyond routine services to the point where the bank could potentially be liable under a primary liability theory; and (3) cases where the connection between the terrorist group and the bank was likely too tenuous for primary liability, yet the bank intentionally and extensively engaged with a state sponsor of terrorism or a party on OFAC's SDGT list.[330]

Part III of this Note argues that the language of the ATA civil provision does not extend to secondary liability, and therefore banks, under current law, cannot be charged with aiding and abetting terrorist attacks. Part III.A explains why legislative history does not rebut the presumption against secondary liability that the Supreme Court established in *Central Bank*.[331] Terrorism victims will therefore have no course of redress against the first category of banking cases, as primary liability will not be an option without the kinds of red flags that indicate the bank's knowledge that it is directly aiding a terrorist entity. Part III.A also demonstrates why the ATA currently does not provide for bank liability in the second or third category of banking cases. The absence of a viable cause of action in these cases, where the defendant bank's conduct goes far beyond routine financial services, is arguably undesirable. Accordingly, Part III.B suggests that

325. *Id.*
326. *See id.* (citing *Boim I*, 291 F.3d 1000, 1019 (7th Cir. 2002)).
327. *Id.*
328. *Id.*
329. *See supra* Introduction.
330. *See supra* Introduction.
331. *See supra* Part I.B.2.a.

Congress amend the ATA to expressly permit secondary liability suits. This Note proposes that such an amendment should incorporate a mental state threshold of extreme recklessness or intent, and that courts should apply the *Halberstam* standard of requiring "substantial assistance" to the tortfeasor.[332] While this concept is embedded within JASTA, that bill has other features upon which this Note does not directly comment.[333] This Note refrains from completely endorsing JASTA and only speaks to the secondary liability issue under the ATA.

A. The ATA Does Not Provide a Viable Avenue for Holding Banks Liable for Acts of International Terrorism

Part III.A addresses why courts should not follow the *Wultz* court's finding that the ATA civil provision permits secondary liability private actions. This section additionally explains the often-overlooked implications of the ATA's definition of "international terrorism" at § 2331(1).[334] As this section demonstrates, this definition includes an intent requirement that is at odds with a "chain of incorporations" theory based upon the ATA's material support provision. As a result, only defendant banks that have committed acts that conform to the current definition of "international terrorism" should be held liable under the ATA.

1. The ATA's Legislative History Does Not Overcome the *Central Bank* Presumption Against Secondary Liability

Wultz, in permitting secondary liability claims under the ATA, relied heavily upon legislative history.[335] In particular, *Wultz* relied on Senator Grassley's statement that the purpose of the ATA was to supply terrorism victims with all of the weapons available to civil plaintiffs under traditional tort law theory.[336] As a sponsor of the ATA, Grassley's statement should bear some weight, and aiding and abetting liability *is* a traditional tort law principle.[337]

However, the presumption against secondary liability that the Supreme Court established in *Central Bank* is difficult to overcome.[338] As the Eastern District noted in *Gill*, the issue in *Central Bank* was whether federal courts generally had the power to infer secondary liability when a statute was silent on the topic.[339] The Supreme Court in *Central Bank* offered no indication that its ruling was only limited to securities fraud private suits.[340]

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332. *See supra* Part I.B.1.
333. *See supra* notes 74–78.
334. *See supra* note 35.
335. *See supra* Part II.A.
336. *See supra* notes 65–66 and accompanying text.
337. Note, however, that while the Supreme Court has endorsed the *Halberstam* model, there is not unanimity on the precise elements of tort law aiding and abetting liability. *See supra* note 100 and accompanying text.
338. *See supra* notes 233–34.
339. *See supra* notes 316–18 and accompanying text.
340. *See supra* Part I.B.2.a.

In fact, the Court held that there was generally no presumption in favor of reading aiding and abetting into a statute that was silent on the issue of secondary liability.[341] Congress could have easily indicated in § 2333(a) that secondary liability was available. Many courts, including the Second Circuit in *Rothstein*, have reached this conclusion in recent years.[342]

The *Boim III* court rightly pointed out that the Supreme Court's ruling in *Central Bank* applied not only to the implied private right of action under section 10(b) but also to the expressly granted government right of action.[343] This fact significantly diminishes *Boim I*'s argument that courts should treat civil secondary liability in ATA and securities fraud cases differently. In addition, the language of the ATA is very much in line with the statutory language of the RICO civil provision, which states: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit."[344] If courts have generally applied *Central Bank* to civil RICO, it makes sense to apply its reasoning to ATA aiding and abetting as well.[345]

Furthermore, while there is evidence in the ATA's legislative history to suggest that Congress intended plaintiffs to use the civil provision against terrorism financers,[346] legislative history can be unreliable and should not override hard textual evidence.[347] While the ATA's more general goals might be clear from the legislative history,[348] it is far more difficult to identify a unified congressional purpose on the more specific issue of secondary liability.[349] The *Gill* court illuminated the kinds of inconsistencies that can arise from an overzealous reliance on legislative history.[350] For instance, Joseph Morris's testimony in favor of holding negligent defendants liable for aiding and abetting acts of terrorism is starkly at odds with other evidence, including § 2333(a)'s explicit treble damages provision.[351]

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341. *See supra* note 134 and accompanying text.

342. *See supra* Part II.B.2.a.

343. *See supra* notes 274–79 and accompanying text.

344. *See supra* note 249 and accompanying text. *Compare* 18 U.S.C. § 2333(a) (2012) (providing plaintiffs with a private cause of action when injured "by reason of" international terrorism, with treble damages as a potential remedy), *with* 18 U.S.C. § 1964 (providing plaintiffs with a private cause of action when injured "by reason of" a § 1962 RICO violation, with treble damages as a potential remedy).

345. *See supra* notes 147–48 and accompanying text.

346. *See supra* Part I.A.2.

347. *See supra* note 128 (explaining that the Court in *Central Bank* found that the lack of textual evidence of secondary liability was enough to resolve the case in defendants' favor); *supra* note 320 (discussing that the *Gill* court found that *Wultz*'s strong reliance on legislative history was "contrary to the realities of the legislative process").

348. These goals include offering private plaintiffs a chance for justice and deterring terrorism. *See infra* Part III.B.

349. *See supra* note 321 and accompanying text.

350. *See supra* Part II.B.2.b.

351. *See supra* notes 66, 71–72. As treble damages are punitive in nature, they do not apply to negligence cases.

Even evidence suggesting that banks were intended as an ATA target can cut the other way—such discussions demonstrate that Congress was aware that the ATA did not clearly permit a secondary liability cause of action.[352] Thus, one can presume that confusion surrounding the secondary liability issue was apparent to Senator Grassley.[353] Congress had the chance to explicitly provide for secondary liability in the ATA but chose not to do so. Finally, *Tel-Oren* and *Klinghoffer*, two of the cases that spawned the ATA, were not banking cases.[354] In these instances, Congress wanted to give plaintiffs an opportunity to obtain civil damages from the actual terrorist organizations that funded and supported the attacks.[355]

The *Wultz* court asserted that Bank of China's alleged knowledge that it was providing financial services to terrorists overcame the benefit of the doubt often applied to routine services.[356] However, this point alone is not enough to rebut the ATA's language and permit secondary liability. The routine or nonroutine nature of a bank's services to a terrorist group should be considered only if the civil provision granted secondary liability in the first place. For the reasons above, the ATA does not appear to provide for a secondary liability cause of action.

2. Applying the Material Support Law to § 2333(a) Creates Inconsistencies

As discussed in Part II.B, Judge Posner in *Boim III* proposed using a "chain of incorporations" theory to hold liable organizations that provide financial services to terrorist organizations.[357] Plaintiffs have frequently invoked this theory to attempt to hold banks primarily liable under the ATA when a secondary liability theory has failed.[358] If the court considers § 2339B to qualify as an act of international terrorism, it would then apply the mental state standard established in *Humanitarian Law Project*; as a result, a defendant would only be required to know that he or she was dealing with a terrorist organization and would not be required to specifically intend to aid terrorism.[359]

At first glance, this solution to the secondary liability issue appears quite feasible, but upon further inspection, it raises certain problems. The trouble concerns the clash between the Supreme Court's holding in *Humanitarian Law Project* and the text of the current definition of international terrorism. This Note argues that courts are often incorrect in applying the material support law as a basis for primary liability under the ATA civil provision. For the reasons below, the "chain of incorporations" method is not a viable alternative to ATA secondary liability for banks.

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352. *See supra* notes 67–68 and accompanying text.
353. *See supra* note 70 and accompanying text.
354. *See supra* notes 52–63 and accompanying text.
355. *See supra* notes 52–63 and accompanying text.
356. *See supra* Part II.A.
357. *See supra* Part II.B.1.
358. *See supra* note 293 and accompanying text.
359. *See supra* Part II.B.1.

The material support crime does not completely fit the definition of international terrorism at § 2333(1).[360] The crime could feasibly fulfill § 2331(1)(A); while funding terrorists is not a violent act in itself, courts have found that financing terrorism *is* dangerous.[361] The inconsistency between the definition and *Humanitarian Law Project* arises at § 2331(1)(B). This subsection states that an act of international terrorism must also "appear to be intended" to intimidate or coerce civilians, influence a government's policy by coercion or intimidation, or impact a government's conduct through assassination, mass destruction, or kidnapping.[362]

The implications of this failure of the "chain of incorporations" approach are significant. In cases such as *Linde v. Arab Bank*, where there is persuasive evidence that the bank had extensive knowledge of its dealings with a terrorist group, this knowledge would not be a sufficient basis for primary liability—a plaintiff would need to demonstrate the defendant's specific intent pursuant to § 2331(1)(B).[363] While it is possible that a plaintiff could meet this threshold of proof, this standard would frequently prove insurmountable.[364]

B. Congress Should Pass Legislation Amending the ATA

Due to public policy interests in providing an effective civil remedy for terrorism victims against banks that knowingly aid terrorists, Congress should amend the ATA to provide for aiding and abetting liability for acts of international terrorism. This bill could provide a workable solution to the conflict arising from the ATA's vague current language.

Particularly in cases where the actual terrorists are beyond the reach of the American judicial system, or where state sponsors of terrorism have defaulted, victims of terrorism may have no source of relief without the ability to pursue those who conducted business with these parties.[365] Following the *Tel-Oren* and *Klinghoffer* cases, the American public became keenly aware of terrorism victims' limited options for redress.[366] The ATA was enacted to fix this problem—it is therefore unlikely that Congress would be satisfied with the law existing as an empty shell, without any real power to bring plaintiffs relief.

Although Congress's intent cannot alter the text of the ATA in hindsight, it can inform actions moving forward. The ATA's goals were to provide

360. *See supra* note 35 and accompanying text.

361. *See supra* note 203. Judge Posner compares "[g]iving money to Hamas" to "giving a loaded gun to a child." *Boim III*, 549 F.3d 685, 690 (7th Cir. 2008).

362. 18 U.S.C. § 2331(1)(b) (2012). See *supra* note 35 and accompanying text for the full statutory definition of international terrorism.

363. See *supra* Part I.C.1 for discussion of the *Linde* case.

364. Consider the cases discussed in Part II, where knowledge was often alleged but demonstrating actual intent was difficult or impossible. See also *supra* Part I.C.1 and its discussion of routine and nonroutine banking services and what such services indicate about a bank's mental state.

365. *See supra* Part I.C.

366. *See supra* Part I.A.2.

relief to plaintiffs and to deter terrorism.[367] In cases where the bank was merely negligent, it is unlikely that the threat of a lawsuit under an ATA aiding and abetting liability theory will deter terrorism financing—in fact, such a threat could potentially wreak havoc on financial systems as well as diplomatic relations.[368] On the other hand, in cases where a bank persistently conducted business with nations included on the SST list, the bank arguably had constructive notice and a stronger nexus exists between the bank and the terrorist attack.[369] Such a link should not automatically result in bank liability; in applying secondary liability under the ATA, courts should incorporate the *Halberstam* standard, based on the Restatement, which requires knowledge and substantial assistance.[370]

In banking cases, a plaintiff therefore should be required to demonstrate that the bank was extremely reckless in its handling of terrorist-linked accounts. For example, continued engagement with businesses within a state sponsor of terrorism, such as Iran, could establish such a mental state.

This careful application of aiding and abetting charges only will be possible once Congress takes action to permit secondary liability under the ATA. Congress could arrive at a similar result by altering the ATA's definition of terrorism so that it better matches the material support law's knowledge standard, which would render *Boim III*'s "chain of incorporations" approach more feasible.[371] However, as this definition serves as the basis for other provisions aside from § 2333(a),[372] its text is probably best left unaltered. An amendment to the ATA to permit secondary liability, applied as described above, would solve the complicated issue of how and when to hold banks liable for acts of international terrorism.

CONCLUSION

When the assets of a terrorist organization or its state sponsor are unreachable, where should plaintiffs turn? Banks have emerged as an attractive target. For many plaintiffs, suing a bank and pleading under a civil aiding and abetting theory may represent the best chance for relief. Nevertheless, this Note agrees with the Second and Seventh Circuits that the ATA's text does not provide for secondary liability in civil suits.

To end the analysis here, however, would render an incomplete picture of the current scope of liability under the ATA. Courts that do not permit secondary liability have often misapplied the material support to terrorism law as an alternative to aiding and abetting liability. Congress should

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367. *See supra* Part I.A.2, I.C.

368. *See generally* Sant, *supra* note 14.

369. *See supra* Part I.C.2 (discussing OFAC and the State Department's process of list-making).

370. *See supra* Part I.B.1.

371. *See supra* Part III.A.2 (identifying the problems with the "chain of incorporations" approach).

372. This definition also mirrors the definition of international terrorism in other federal statutes. *See* Harper, *supra* note 35, at 1138.

amend the ATA to include secondary liability because the ATA, interpreted correctly, does not provide a viable avenue for relief for private plaintiffs in cases where banks demonstrate extreme recklessness without clear evidence of intent. However, courts should only permit aiding and abetting claims against banks where there is overwhelming evidence that the bank's involvement went beyond providing routine financial services, either due to its extensive interaction with a state sponsor of terrorism or some other red flag. Through applying this strict standard, courts can maintain the delicate balance between serving national security interests and protecting legitimate financial institutions from unjust persecution.