Aiding and Abetting Under the Antiterrorism Act: Despite Statutory Silence, Why Extending Liability to Aiders and Abettors of International Terrorism Furthers Congressional Intent to Compensate Plaintiffs and Defeat Terrorist Financial Pathways

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Jesse D.H. Snyder

I. INTRODUCTION

The May 2010 National Security Strategy makes clear that the United States is waging a global campaign to defeat terrorism and that success “requires a broad, sustained, and integrated campaign that judiciously applies every tool of American power—both military and civilian.”

Twenty years prior to the 2010 National Security Strategy, well before the attacks on September 11, 2001, Congress passed legislation that provided private citizens with a powerful tool to further these aims. Indeed, under 18 U.S.C. § 2333, the Antiterrorism Act (ATA), U.S. citizens injured by an act of international terrorism possess the legal right to bring a cause of action in federal court against those responsible for the harm. As Senator Chuck Grassley boldly stated, “With the enactment of this legislation, we set an example to the world of how the United States legal system deals with terrorism.”

Although civil actions under § 2333 are quite rare in practice, plaintiffs are now increasingly bringing suit and forcing courts to address the issue of who may be liable under the ATA. In 2002, in Boim I, the Seventh Circuit reviewed the legislative history of the ATA and concluded that Congress intended to extend civil liability to those entities that aid and abet...
Influenced by *Boim I*, several district courts in other circuits likewise extended civil liability to aided and abettors. Six years later, in *Boim IV*, the Seventh Circuit revisited the same issue and held the ATA does not provide a remedy against those that aid and abet international terrorism because “statutory silence on the subject of secondary liability means there is none.” Interestingly, notwithstanding the *Boim IV* holding, several district courts outside the Seventh Circuit continue to follow the *Boim I* analysis and recognize aiding and abetting liability. Taken together, all of these cases raise a very fundamental question that still lingers twenty years after Congress enacted the ATA—who should be held liable for acts of international terrorism?

To this end, this Paper argues that the ATA provides plaintiffs with a cause of action against those entities that aid and abet international terrorism. First, this Paper outlines the history of the ATA and examines the statutory requirements of § 2333. Second, this Paper reviews federal aiding and abetting liability and the Seventh Circuit’s holdings in *Boim I* and *Boim IV*. Finally, this Paper concludes by arguing that courts should return to the *Boim I* standard and recognize aiding and abetting liability under the ATA. Specifically, extending liability to defendants that aid and abet international terrorism supports the intent of Congress to sever terrorist financial networks and provide plaintiffs with a remedy against those entities that target victims “because they were Americans.”

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potential confusion and uncertainty that may result under the Boim IV analysis, thereby leading to more consistent outcomes across the varied fact patterns of international terrorism.

II. CIVIL REMEDIES UNDER THE ANTITERRORISM ACT—18 U.S.C. § 2333

The concept of civil litigation against acts of international terrorism is best understood by: (1) exploring the ATA’s legislative history, and (2) examining the actual text of § 2333.

A. History of the Antiterrorism Act—Klinghoffer

Until Klinghoffer, Congress largely stood on the sidelines and allowed statutes such as the Alien Tort Claims Act and the Death on the High Seas Act to suffice as remedies for plaintiffs who suffer injuries from acts of terrorism.11 As a result, plaintiffs have historically struggled to litigate against terrorist organizations—many unable to even bring their case to trial.12 The impetus for change arrived in 1985 when terrorists seized an Italian passenger ship in the Mediterranean Sea and murdered Leon Klinghoffer, a wheelchair-bound U.S. passenger.13 Consequently, Klinghoffer’s wife and daughters sued and alleged the Palestine Liberation Organization (PLO), among others, was responsible for the hijacking.14 The PLO later moved to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and nonjusticiability.15

The district court in Klinghoffer found that it had subject matter jurisdiction under both federal admiralty jurisdiction and the Death on the High Seas Act because the alleged terrorist

12 See Tel-Oren, 726 F.2d 774 (dismissing under the Alien Tort Act, 28 U.S.C. § 1350 (2006)).
13 See Schupack supra note 5, at 212 (referencing Judith Miller, Hijackers Yield Ship in Egypt; Passenger Slain, 400 are Safe; U.S. Assails Deal with Captors, N.Y. TIMES, Oct. 10, 1985, at A1.).
15 Id. at 858.
activities occurred on a ship in navigable waters.\textsuperscript{16} Moreover, the presence of the PLO’s U.N. mission in the state of New York satisfied personal jurisdiction.\textsuperscript{17} Similarly, the court found “acts of piracy” were within its jurisdiction, therefore rendering the case justiciable.\textsuperscript{18} On appeal, the Second Circuit nevertheless remanded the district court’s findings on personal jurisdiction and service of process, holding that only the PLO’s non-U.N. activities could be a basis for jurisdiction.\textsuperscript{19} After several years of litigation, the parties reportedly settled the case.\textsuperscript{20} Although many in Congress viewed the outcome in \textit{Klinghoffer} as favorable, it was inescapable that suits of this nature could only proceed under admiralty jurisdiction and fortuitous contacts with the United States.\textsuperscript{21}

To avoid fortuity as a prerequisite for litigation success, members of Congress used \textit{Klinghoffer} to springboard new legislation aimed against acts of international terrorism.\textsuperscript{22} As the legislative history indicates, the crux of the ATA was to provide plaintiffs with certainty that a valid right of action against terrorist acts would be available to vindicate their injuries.\textsuperscript{23} According to the House Report, “Only by virtue of the fact that the [Klinghoffer] attack violated certain [a]dmiralty laws and 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

\begin{footnotes}
\item[16] Id. at 858-59.
\item[17] Id. at 863.
\item[18] Id. at 860.
\item[21] See Schupack \textit{supra} note 5, at 213 (referencing H.R. REP. NO. 102-1040, at 5 (1992)).
\end{footnotes}
might not have been subject to civil action in the [United States].”

Indeed, when drafting the ATA, Congress was not only cognizant of *Klinghoffer*, but actually sought to “expand” the jurisdictional reach for plaintiffs suing against acts of international terrorism. In sum, Congress intended victims to have a “definitive” right to bring suit regardless of the incidental circumstances surrounding the terrorist act.

### B. Civil Remedies—18 U.S.C. § 2333

In 1990, Congress silenced mounting concerns that plaintiffs would be unable to recover against acts of international terrorism by passing the ATA under title 18 of the United States Code. Congress initially enacted § 2333 as part of the 1990 legislation, but later repealed the section due to a latent technical deficiency. After subsequent legislation, § 2333 became law in 1992. Compared to other statutory grants, the ATA provides injured plaintiffs with a broad cause of action against international terrorism. In particular, Congress enacted § 2333 to compensate the victims and survivors of terrorist attacks and to supplement criminal law enforcement. Historically, plaintiffs have invoked the ATA in a variety of circumstances—the September 11 attacks, U.S. embassy bombings, attacks against U.S. nationals residing in

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24 *Id.*
28 *Boim I*, 291 F.3d at 1009 n.6.
31 *Id.* at 1234.
Israel, and even attacks by al-Qaeda against U.S. military members abroad. Despite the adaptability of the ATA to cover a variety of terrorist acts, until recently, these suits were rare in the federal court system.

The text of § 2333(a) provides, “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.” Upon review, the statute contains all of the traditional elements of a common law tort: breach of duty (i.e., committing an act of international terrorism); causation (injured “by reason of”); and damages (i.e., injury to person or property). Thus, a plaintiff must satisfy the elements of a classic tort claim—fault, state of mind, foreseeability, and causation. Most notably, the statute does not explicitly address those entities that support and aid international terrorism.

Accordingly, to succeed under § 2333, a plaintiff must adequately plead an act of international terrorism caused an injury in fact to his person, property, or business; or an injury to

38 Boin I, 291 F.3d 1000, 1010 (7th Cir. 2002), abrogated en banc sub nom. Boin IV, 549 F.3d 685 (7th Cir. 2008), cert. denied, 130 S. Ct. 458 (2009).
39 Boin IV, 549 F.3d 685, 692 (7th Cir. 2008), cert. denied, 130 S. Ct. 458 (2009).
the deceased victim’s estate, heirs, or survivors. Under § 2331(1), activities must meet three statutory requirements to be considered an act of “international terrorism.” First, the act must “involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States.” Second, the act must “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.” Finally, to differentiate from domestic terrorism, the act must “occur primarily outside the territorial jurisdiction of the United States.”

In addition, some courts suggest that a “chain of incorporations” exists between § 2333 and other ATA criminal statutes. As such, under § 2339A, it is a crime to provide “material support or resources . . . knowing or intending that they are to be used in preparation for, or in carrying out” a terrorist act. Although not an exhaustive list, a terrorist act may include killing a U.S. national, using a weapon of mass destruction against a U.S. national, or bombing a place of public use. Importantly, “material support or resources” includes “financial services.” Similarly, § 2339B criminalizes knowingly providing “material support or resources to a foreign terrorist organization.” Further, this section does not criminalize the terrorist attack itself, but rather the “aid that makes the attacks more likely to occur.”

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42 Id. § 2331(1)(A).
43 Id. § 2331(1)(B).
44 Id. § 2331(1)(C).
47 Id. § 2332(a).
48 Id. § 2332a(a)(1).
49 Id. § 2332f(a)(1).
50 Id. § 2339A(b)(1).
51 Id. § 2339B(a)(1).
§ 2339C makes it a crime to knowingly collect funds that support acts intended to intimidate populations or coerce government action.\textsuperscript{53}

Successful parties under ATA may pursue expansive remedies including treble damages, fees, and court costs.\textsuperscript{54} In addition, some courts recognize non-pecuniary damages such as mental anguish and suffering.\textsuperscript{55} Even so, property damages are limited to the diminution in value of government property.\textsuperscript{56} Despite a variety of compensable damages, some courts have noted that an award of treble damages necessarily precludes the possibility of punitive damages.\textsuperscript{57} As a bit of irony, plaintiffs who fail to obtain treble damages may actually receive a warmer welcome by overseas courts more willing to assist with the collection of assets, thus avoiding some of the enforcement problems generally encountered when U.S. courts award heavy damages.\textsuperscript{58}

Although Congress clearly intended to provide plaintiffs with broad rights under the ATA, there are several statutory limitations to this cause of action. First, to be eligible for civil relief, a plaintiff must be a U.S. citizen or survivor of a U.S. citizen.\textsuperscript{59} Second, there is a four-year statute of limitations period subject to a tolling provision if the defendant is absent from the United States.\textsuperscript{60} Third, plaintiffs may not sue “a foreign state, an agency of a foreign state, or an officer or employee of a foreign state.”\textsuperscript{61} Fourth, the ATA bars any action to recover losses by

\textsuperscript{53} 18 U.S.C. § 2339C(a)(1).
\textsuperscript{54} 18 U.S.C. § 2333(a).
\textsuperscript{55} Goldberg v. UBS AG, 690 F. Supp. 2d 92, 98 (E.D.N.Y. 2010).
\textsuperscript{56} § 2332b(b)(1)(D).
\textsuperscript{60} 18 U.S.C. § 2335.
\textsuperscript{61} Id. § 2337(2).
an act of war. Finally, civil litigation and discovery may not interfere with ongoing criminal investigations or national security operations related to the incident.

As national security interests increasingly implicate private citizens, civil litigation over terrorist acts has attracted a lot of recent attention. In the absence of a definitive ruling from the Supreme Court, courts have reviewed and continue to interpret what classes of actions fall within an “act of international terrorism” the under ATA. Specifically, the Seventh Circuit addressed twice in the past ten years whether § 2333 extends liability to those entities that aid and abet international terrorism. Although the Seventh Circuit implicitly overruled itself in a span of six years, both appellate opinions proved extremely persuasive among the other circuits and currently serve to define which defendants may be liable for acts of international terrorism.

III. **Boim: The Seventh Circuit’s Holdings in 2002 and 2008**

As a case of first impression, the Seventh Circuit addressed and then revisited whether the ATA provides plaintiffs a right to sue aiders and abettors of international terrorism. In 2002, in *Boim I*, the Seventh Circuit held that aiders and abettors could be liable under the ATA, even though the statute was silent on the issue. After a complicated procedural history, in 2008, the Seventh Circuit sitting *en banc* addressed the same issue again and reached the

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62 *Id.* § 2336(a).
63 *Id.* § 2336(b).
64 *White House, supra* note 1, at 2.
66 *See, e.g.*, *Boim I*, 291 F.3d 1000 (7th Cir. 2002), *abrogated en banc sub nom.* *Boim IV*, 549 F.3d 685 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).
67 *Id.*
68 *See, e.g.*, *In re Terrorist Attacks on September 11, 2001, No. 03 MDL 1570 (GBD)*, 2010 U.S. Dist. LEXIS 96597, at *94 (S.D.N.Y. Sept. 13, 2010) (“A defendant cannot be held secondarily liable, under § 2333, for the material support provided by others to a designated foreign terrorist organization.”); *In re Chiquita Brands Int’l, Inc. Alien Tort Statute and S’holder Derivative Litig.*, 690 F. Supp. 2d 1296, 1309-10 (S.D. Fla. 2010) (holding that plaintiffs stated a claim for civil aiding-and-abetting under the ATA); Morris v. Khadr, 415 F. Supp. 2d 1323, 1330 (D. Utah 2006) (holding that civil liability under the ATA extends to aiders and abettors who provide money to terrorists).
69 *Boim I*, 291 F.3d at 1021; *Boim IV*, 548 F.3d at 689.
70 *Boim I*, 291 F.3d at 1019.
opposite conclusion.\textsuperscript{71} To understand the evolution of aiding and abetting liability under the ATA, this Part of the Paper reviews: (1) aiding and abetting liability under federal law; (2) the substantive and procedural history of the Boim proceedings; (3) the Boim I opinion and rationale; and (4) the Boim IV opinion and rationale.

A. Aiding and Abetting Generally under Federal Law

Large scale terrorist acts are rarely the product of individual efforts alone.\textsuperscript{72} Among the collective acts of wrong-doers, aiding and abetting is the typical way in which a secondary actor can contribute to an underlying offense.\textsuperscript{73} Generally, aiding and abetting is associated with liability as an accessory and often denotes an actor of lesser importance—apart from the actual perpetrator of the offense—who offers assistance to the primary actor.\textsuperscript{74} Aiding and abetting in the civil context is actually rooted in the doctrine of criminal aiding and abetting.\textsuperscript{75} In criminal law, there is little federal uniformity on the mental state and causation requirements for liability under the legal theory of aiding and abetting. While some courts require the aider and abettor to specifically intend the primary actor to commit the underlying crime, other courts only require knowledge of the offense.\textsuperscript{76} Likewise, the actual causation standard that plaintiffs must satisfy has been the subject of debate.\textsuperscript{77}

\begin{thebibliography}{9}
\bibitem{Boim IV} Boim IV, 548 F.3d at 689.
\bibitem{Compare} \textit{Compare} United States v. Bancalari, 110 F.3d 1425, 1430 (9th Cir. 1997) (holding a plaintiff must show a defendant aider and abettor “specifically intended” to aid in the commission of the principal’s crime.), \textit{with} United States v. Ortega, 44 F.3d 505, 508 (7th Cir. 1995) (requiring a plaintiff to only prove knowledge that act may assist in perpetration of a crime).
\end{thebibliography}
Compared to the criminal field, aiding and abetting liability in the context of civil litigation is even more uncertain. In contrast to federal criminal law, Congress has not enacted a federal civil aiding and abetting statute. As a result, federal courts ultimately developed divergent standards in this vacuum of statutory law. Even the Restatement (Second) of Torts has failed to gain widespread acceptance among the courts on this subject. Another challenge associated with civil aiding and abetting is separating tort standards from criminal principles when civil liability is linked to the actual criminal conduct. Consequently, civil aiders and abettors who defend against less favorable evidentiary burdens may also suffer large penalties and endure the social condemnation associated with criminal activity. Given the potential for a limitless class of defendants, choosing which parties may be liable is often “politically charged” and “implicate[s] issues of social policy.”

Notwithstanding these concerns, civil aiding and abetting remained relatively on the outskirts of mainstream litigation, first gaining prominence in the field of securities litigation. In Central Bank, a case that ultimately proved very influential to courts interpreting the ATA, the Supreme Court held that liability under section 10(b) of the Securities Exchange Act of 1934 did not extend to those entities that aided or abetted a practice prohibited by the statute. Section

78 Takteyev, supra note 72, at 1544.  
79 Cent. Bank of Denver, 511 U.S. at 182.  
80 Nathan Isaac Combs, Note, Civil Aiding and Abetting Liability, 58 Vand. L. Rev. 241, 249 (2005) (“There is no clearly defined test for civil aiding and abetting liability because courts apply different tests and often obfuscate their analyses.”).  
81 See RESTATEMENT (SECOND) OF TORTS § 876 (1979) (“For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.”).  
82 Takteyev, supra note 72, at 1545.  
84 Takteyev, supra note 72, at 1545-56.  
85 Combs, supra note 80, at 246 n.6, 263.  
10(b) prohibited, *inter alia*, an entity from manipulating, deceiving, or contravening the rules and regulations promulgated by the Security Exchange Commission. The plaintiff alleged that Central Bank aided and abetted a wrongful bond sale by failing to order a new valuation of a lien when it had reason to believe the old valuation was inadequate. The Court noted the absence of a federal statute on civil aiding and abetting and held “when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant’s violation of a statutory norm, there is *no general presumption that the plaintiff may also sue aiders and abettors*.”

The Court contrasted the statutory silence in section 10(b) with other federal statutes that expressly stated a cause of action and reasoned, “Congress [knows] how to impose aiding and abetting liability [and failed to do so].” The Court further noted an absence of documented congressional intent to reach aiders and abettors because the legislative history was completely void of any evidence that Congress intended aiders and abettors to be liable under section 10(b). Important to the ATA analysis, the Court concluded by noting that imposing aiding and abetting liability in this situation would create: (1) uncertain legal standards; (2) lead to fact-intensive inquiries; (3) and result in excessive litigation. Beyond this, the Court acknowledged that competing policy arguments may be advanced and limited its ruling to this specific statute.

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88 Id. at 168.
89 Id. at 182 (emphasis added).
91 Id. at 183-84.
92 Id. at 188-89.
93 Id. 189-90 (“The point here, however, is that it is far from clear that Congress in 1934 would have decided that the statutory purposes would be furthered by the imposition of private aider and abettor liability.”).
Apart from the securities context, aiding and abetting has gained traction under the Alien Tort Claims Act (ATCA).94 Although there is no dispositive ruling from the Court, most lower courts recognize civil aiding and abetting liability under the ATCA.95 Notably, the Second Circuit recently held a district court erred in concluding the ATCA did not provide federal jurisdiction over claims that alleged aiding and abetting violations of customary international law.96 In a 2-to-1 decision, in separate opinions, the majority justified aiding and abetting liability on the basis of federal common law and international customary law.97

All told, although authority on aiding and abetting liability is far from definitive, case law reveals that the general presumption against such liability is not bulletproof and may be rebutted.

B. Substantive and Procedural Facts of the Boim Proceedings

In the Boim proceedings, Seventh Circuit analyzed as an issue of first impression whether aiders and abettors could be liable under § 2333 of the ATA.98 David Boim was a seventeen-year-old student with dual Israeli-U.S. citizenship.99 In 1996, he was living in Israel while studying at a yeshiva.100 On May 13, 1996, David was murdered near the West Bank during a shooting attack that targeted students at a school bus stop.101 He was struck by bullets fired from a passing car and pronounced dead within an hour of the shooting.102

As a result of these attacks, his parents sued a number of individuals and organizations in federal court under the ATA, including alleged Hamas supporters Muhammad Salah, the Quranic...

95 See, e.g., Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1202-03 (9th Cir. 2007); Cabello v. Fernandez-Larios, 402 F.3d 1148, 1158 (11th Cir. 2005); Doe v. Rafael Saravia, 348 F. Supp. 2d 1112, 1148-49 (E.D. Cal. 2004).
96 Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007) (per curiam), aff’d for lack of quorum sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza, 128 S. Ct. 2424 (2008) (“We hold that in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the ATCA.”).
97 Id. at 264, 286 (Katzman & Hall, JJ., concurring).
98 Boim I, 291 F.3d 1000, 1007-08 (7th Cir. 2002), abrogated en banc sub nom. Boim IV, 549 F.3d 685 (7th Cir. 2008), cert. denied, 130 S. Ct. 458 (2009).
99 Boim I., 291 F.3d at 1002.
100 Id.
101 Id.
102 Id.
Literacy Institute (QLI), the Holy Land Foundation for Relief and Development (HLF), the Islamic Association for Palestine (IAP), and the American Muslim Society (AMS).\textsuperscript{103} The plaintiffs alleged that Salah was the leader of a military wing of Hamas and that HLF supplied funds to Hamas.\textsuperscript{104} The plaintiffs further alleged that both AMS and IAP—later found to be the same legal entity—supported Hamas through HLF.\textsuperscript{105} In addition, the plaintiffs alleged that QLI was an organization that acted as a “front” for Hamas and employed Salah as a leader.\textsuperscript{106}

In 2002, the Seventh Circuit granted an interlocutory appeal on several legal issues and ruled, \textit{inter alia}, that aiders and abettors may be liable under the ATA (\textit{Boim I}).\textsuperscript{107} In 2004, the district court entered a jury verdict against QLI and granted summary judgment against HLF, AMS, IAP, and Salah (\textit{Boim II}).\textsuperscript{108} The jury later awarded $52 million in damages, which the district court trebled to $156 million.\textsuperscript{109} In 2007, on direct appeal, the Seventh Circuit again addressed the issue of aiding and abetting under the ATA (\textit{Boim III}).\textsuperscript{110} In a 2-to-1 decision, the same panel that heard the interlocutory appeal ruled that aiding and abetting was a valid cause of action under the ATA and that the district court erred by failing to require the plaintiffs to show the defendants’ actions were a cause in fact of David’s death.\textsuperscript{111}

In 2008, the Seventh Circuit vacated \textit{en banc} the panel’s decision (\textit{Boim IV}).\textsuperscript{112} Revisiting the issue of liability under the ATA, Judge Posner, writing for the majority, noted that

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\textsuperscript{104} \textit{Boim III}, 511 F.3d 707, 712-13 (7th Cir. 2007) (2-1 decision), vacated \textit{en banc}, 549 F.3d 685 (7th Cir. 2008), \textit{cert. denied}, 130 S. Ct. 458 (2009).

\textsuperscript{105} Id.

\textsuperscript{106} Id. at 713-14.

\textsuperscript{107} \textit{Boim I}, 291 F.3d at 1021. This interlocutory appeal arose from Boim v. Quranic Literacy Institute, 127 F. Supp. 2d 1002 (N.D. Ill. 2001).

\textsuperscript{108} \textit{Boim II}, 340 F. Supp at 931; \textit{Boim III.}, 511 F.3d at 710, 719 (summarizing the proceedings in \textit{Boim II}).

\textsuperscript{109} \textit{Boim III}, 511 F.3d at 710, 719.

\textsuperscript{110} Id. at 710, 741.

\textsuperscript{111} Id. at 741.

\textsuperscript{112} \textit{Boim IV}, 549 F.3d 685, 705 (7th Cir. 2008), \textit{cert. denied}, 130 S. Ct. 458 (2009).
since § 2333 did not expressly contain an aiding and abetting provision, “statutory silence on the subject of secondary liability means there is none.”

Rather, through “a chain of explicit statutory incorporations by reference,” the Seventh Circuit found “that a donation to a terrorist group that targets Americans outside the United States may violate” the ATA. Ultimately, the court upheld the judgments against AMS, IAP, and QLI because each entity knew it was giving money to Hamas. Nevertheless, the court reversed the judgment against Salah because he was in an Israeli prison between the effective date of the statute and David’s murder.

As subsequent case law highlights, both Boim I and Boim IV have proved quite influential as diverging views of liability under the ATA. Just as notable, the Seventh Circuit remains the only federal appellate court to review this issue.

C. Boim I—Legislative Intent to Provide a Legal Right Against Aiders and Abettors

In Boim I, the Seventh Circuit distinguished the Court’s ruling in Central Bank and held that civil liability under the ATA extended to defendants that aid and abet international terrorism because the legislature intended to incorporate general tort principles into the statute and sought to cut off the flow of terrorist financing. In distinguishing Central Bank, Boim I first noted that the Court narrowly tailored its holding to a specific statute and that aiding and abetting

\[113\] Id. at 689.
\[114\] Id. at 691.
\[115\] Id. at 701 (reversing the verdict against HLF on procedural grounds because the district court erred by estopping HLF from challenging a D.C. Circuit finding that it had funded Hamas).
\[116\] Id. at 691.
\[117\] See, e.g., In re Terrorist Attacks on September 11, 2001, No. 03 MDL 1570 (GBD), 2010 U.S. Dist. LEXIS 96597, at *94 (S.D.N.Y. Sept. 13, 2010) (“A defendant cannot be held secondarily liable, under § 2333, for the material support provided by others to a designated foreign terrorist organization.”); In re Chiquita Brands Int’l, Inc. Alien Tort Statute and S’holder Derivative Litig., 690 F. Supp. 2d 1296, 1309-10 (S.D. Fla. 2010) (holding that plaintiffs had stated a claim for civil aiding-and-abetting liability under the ATA); Morris v. Khadr, 415 F. Supp. 2d 1323, 1330 (D. Utah 2006) (holding that civil liability under the ATA extends to aiders and abettors who provide money to terrorists).
\[118\] Boim I, 291 F.3d 1000, 1017-21 (7th Cir. 2002), abrogated en banc nom. Boim IV, 549 F.3d 685 (7th Cir. 2008), cert. denied, 130 S. Ct. 458 (2009).
liability may be appropriate under certain federal statutes. To be sure, the general presumption against liability when a statute is silent on the issue is still rebuttable.

To rebut the Central Bank presumption, the court emphasized that both the language and legislative history of § 2333 support the conclusion that Congress intended to import general tort principles into the statute. Specifically, the court found the Congressional Record replete with statements evincing a concerted effort on behalf of Congress to provide plaintiffs with ample remedies generally associated with “American tort law.” Moreover, the court held that the definition of international terrorism and the complementary criminal statutes “embrace” liability to the extent aiding and abetting involves violence.

Similarly, the court held that failing to impose liability on aiders and abettors would “thwart [Congress’s] clearly expressed intent to cut off the flow of money to terrorists at every point along the causal chain of violence.” The court reasoned that compensating plaintiffs for acts of terrorism simply could not be realized without recognizing liability beyond those directly involved in the acts of violence. The court concluded by invoking the policy concerns that gave rise to the ATA:

Also, and perhaps more importantly, there would not be a trigger to pull or a bomb to blow up without the resources to acquire such tools of terrorism and to bankroll the persons who actually commit the violence. Moreover, the organizations, businesses and nations that support and encourage terrorist acts are likely to have reachable assets that they wish to protect. The only way to imperil the flow of money and discourage the financing of terrorist acts is to impose

119 Id. at 1019.
120 Id. at 1019-20.
121 Id. at 1020.
123 Id.
124 Id. at 1021.
125 Id.
liability on those who knowingly and intentionally supply the funds to the persons who commit the violent acts.\textsuperscript{126}

In addition, \textit{Boim I} required a plaintiff to prove that an aider and abettor \textit{knowingly} and \textit{intentionally} sought to aid the success of terrorist activities, and that such actions \textit{proximately caused} the plaintiff’s injuries.\textsuperscript{127}

In sum, \textit{Boim I} emphasized the ATA’s legislative history to distinguish \textit{Central Bank} and held that liability under § 2333 extended to aiders and abettors of international terrorism.\textsuperscript{128}

D. \textit{Boim IV—Statutory Silence on Liability Means No Liability}

Six years after \textit{Boim I}, the Seventh Circuit sitting \textit{en banc} revisited the issue of liability under the ATA and held that plaintiffs may not sue aiders and abettors of international terrorism because the statute does not expressly provide a cause of action against these parties.\textsuperscript{129} Judge Posner began the court’s analysis by noting § 2333 does not plainly state “someone who assists in an act of international terrorism is liable.”\textsuperscript{130} Therefore, under \textit{Central Bank}, “statutory silence on the subject matter of secondary liability means there is none.”\textsuperscript{131} The court further reasoned that to extend liability to aiders and abettors would enlarge the court’s jurisdiction beyond the intent of Congress as expressed in the statute.\textsuperscript{132} Notably, unlike \textit{Boim I}, the court in \textit{Boim IV} focused its analysis entirely on the text of the statute and failed to mention the legislative history of the ATA.

Although settling the issue of aiding and abetting liability, the \textit{Boim IV} court further held that donors of international terrorism may still be within the grasp of § 2333 through a “chain of

\begin{footnotes}
\item[126] \textit{Id.}
\item[127] \textit{Id.} at 1012, 1021, 1023.
\item[128] \textit{Id.}
\item[129] \textit{Boim IV}, 549 F.3d 685, 689 (7th Cir. 2008), \textit{cert. denied}, 130 S. Ct. 458 (2009).
\item[130] \textit{Id.}
\item[131] \textit{Id.}
\item[132] \textit{Id.} at 689-690.
\end{footnotes}
incorporations” between the various statutes under the ATA—including § 2339A which prohibits material support to international terrorism. Specifically, the court ruled that a donation to a terrorist group that targets U.S. citizens abroad may violate § 2333. As a matter of policy, the court reasoned that damages are most effective against financial institutions that fund terrorism, as opposed to the actual terrorist actors. Interestingly, the court held that a chain of statutory incorporations imposed “primary liability” with the “character of secondary liability” to donors of international terrorism. Therefore, a donor to terrorist activities may be liable under § 2333 without the need to impose secondary liability.

After holding a donor to terrorist activities could be liable under § 2333, the Boim IV court continued its analysis by addressing the requirements to bring an action under the ATA. To be liable in tort, a person who provides material assets to a terrorist organization has not committed intentional misconduct unless he either knew there was a “substantial probability” that the organization engages in acts of international terrorism, or is simply indifferent to its role as a terrorist organization. Importantly, this is a subjective test—otherwise an objective test under a standard of reasonableness would impose liability for mere negligence. While Boim I required proof of actual intent, in Boim IV, a donor to international terrorist activities is only liable if he knew the character of that organization.

Similarly, the court “relaxed” the standard for causation and held plaintiffs are not required to show donors proximately caused their injuries because money is “fungible” and may

133 Id. at 690 (“By this chain of incorporations by reference (section 2333(a) to section 2331(1) to section 2339A to section 2332), we see that a donation to a terrorist group that targets Americans outside the United States may violate section 2333.”).
134 Id.
135 Id. at 690-91.
136 Id. at 691.
137 Id. at 691.
138 Id. at 693.
139 Id.
140 Id. at 695.
be used for a variety of purposes that ultimately strengthen the aims of terrorism. The court likened modern donors of terrorism to classic tort cases involving multiple fires joining together, multiple hunters firing in the same direction, and multiple firms polluting groundwater because of the uncertain causal connection between the wrongful conduct among all potential tortfeasors and the actual injury. As such, the court ruled that when a party knowingly contributes to an organization that engages in terrorist activities, there is a substantial probability that such a donation will enhance the risk of a terrorist act. This action, in itself, satisfies the causation element. All told, the court justified “relaxed” causation on the grounds that the plaintiff’s burden would be too onerous otherwise to prove which wrongdoer actually inflicted the injury.

Even so, not all of the Seventh Circuit judges agreed with Judge Posner’s interpretation of § 2333. Both Judges Rovner and Wood advocated that the court return to the Boim I analysis and recognize aiding and abetting liability under the ATA. Judge Rovner criticized the majority opinion for eliminating the plaintiff’s burden of proving causation by “declar[ing] as a matter of law that any money knowingly given to a terrorist organization . . . is a cause of terrorist activity, period.” Judge Wood likewise argued that a plaintiff should have the burden to show proximate cause under § 2333. Finally, Judge Rovner expressed concerns that only

141 Id. at 691, 698.
142 Id. 695 (citing Chicago & N.W. Ry., 211 N.W. 913 (Wis. 1927)).
143 Id. 696 (citing Summers v. Tice, 199 P.2d 1 (Cal. 1948)).
144 Id. (citing Michie v. Great Lakes Steel Div., 495 F.2d 213 (6th Cir. 1974)).
145 Id. at 695-97.
146 Id. at 697-98.
147 Id. at 691, 698.
148 Id. at 697.
149 Id. at 707 (Rovner & Wood, JJ., dissenting).
150 Id. at 705, 709 (Rovner, J., dissenting).
151 Id. at 724 (Wood, J., dissenting).
requiring a plaintiff to prove knowledge of terrorist activities without intent to further those ends may implicate First Amendment rights and freedoms.\textsuperscript{152}

Although \textit{Boim IV} implicitly overruled \textit{Boim I} on the issue of aiding and abetting liability,\textsuperscript{153} the divergent analysis that the Seventh Circuit adopted in each of its opinions shows that there are reasonable grounds to differ on this issue. In \textit{Boim I}, the court exhaustively reviewed the legislative history of the ATA and concluded plaintiffs may bring a cause of action against aiders and abettors.\textsuperscript{154} Conversely, the \textit{Boim IV} court only reviewed the statute on its face and determined that statutory silence forecloses any argument that Congress intended such a legal right to exist.\textsuperscript{155} In addition, whereas \textit{Boim I} required proof of intent and proximate cause, \textit{Boim IV} relaxed both the mental state and causation requirements to broaden the scope of primary liability.\textsuperscript{156} At first glance, it is worth pondering if \textit{Boim IV} simply repackaged the same result that would be reached following \textit{Boim I}—just under different analysis? To the contrary, subsequent case law suggests an analytical distinction because of the confusing standards imposed by \textit{Boim IV}. Although \textit{Boim IV} is controlling law within the Seventh Circuit, ensuing case law demonstrates a growing split of authority among the other circuits as some district courts disregard \textit{Boim IV} and continue to apply the \textit{Boim I} rationale.\textsuperscript{157}

IV. WHY COURTS SHOULD REJECT \textit{BOIM IV} AND RECOGNIZE AIDING AND ABETTING LIABILITY

\textsuperscript{152} \textit{Id.} at 713 (Rovner, J., dissenting).
\textsuperscript{153} \textit{Id.} at 689-90 (majority opinion).
\textsuperscript{154} \textit{Boim I}, 291 F.3d 1000, 1021 (7th Cir. 2002), abrogated en banc sub nom. \textit{Boim IV}, 549 F.3d 685 (7th Cir. 2008), cert. denied, 130 S. Ct. 458 (2009).
\textsuperscript{155} \textit{Boim IV}, 549 F.3d at 689.
\textsuperscript{156} Compare \textit{Boim I}, 291 F.3d at 1012, 1021, 1023, with \textit{Boim IV} 549 F.3d at 695-99.
In the wake of the Seventh Circuit’s holding in *Boim IV*, subsequent case law interpreting liability under the ATA has splintered, creating recognizable splits of authority.\(^{158}\) These splits are further exacerbated by a six-year time span between the Seventh Circuit’s rulings, allowing for a considerable amount of jurisprudence to develop in favor of aiding and abetting liability.\(^{159}\) As tension in this area continues to grow with increasing lawsuits,\(^{160}\) courts going forward should recognize the legal right to sue aiders and abettors of international terrorism under the ATA. Specifically, courts should reject the confusing *Boim IV* analysis and return to the former *Boim I* standard for aiding and abetting liability. Applying subsequent case law, a cause of action against aiders and abettors under § 2333 is valid because: (1) the legislative history is uniform and rebuts the *Central Bank* presumption by clearly evincing an intent to provide a full range of tort remedies against those entities that support terrorism; and (2) despite the *Central Bank* policy concerns, imposing aider and abettor liability is more practical and avoids the potential for inconsistent outcomes that could deny recovery to otherwise successful plaintiffs.

**A. A Legislative Intent-Based Argument for Aiding and Abetting**

Courts should recognize an aiding and abetting cause of action under the ATA because the legislative history of the statute evinces the congressional intent to afford plaintiffs with a full range of tort remedies and to sever support to terrorist organizations. Applying the Court’s guidance in *Central Bank*, there is no general presumption that plaintiffs may sue aiders and

\(^{158}\) *See* Wultz, 2010 U.S. Dist. LEXIS 111469, at *112 (noting a circuit split of authority on aiding and abetting liability under the ATA).

\(^{159}\) *See* Morris v. Khadr, 415 F. Supp. 2d 1323, 1330 (D. Utah 2006) (citing *Boim I* and holding that civil liability under the ATA extends to aiders and abettors who provide money to terrorists); Stutts v. De Dietrich Group, No. 03-CV-4058 (ILG), 2006 U.S. Dist. LEXIS 47638 (E.D.N.Y. 2006) (mem. op.) (approving the theory of aiding and abetting liability under the ATA, but dismissing claim for insufficient allegations of causation); Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005) (holding that aiding and abetting liability and civil conspiracy liability are available under the ATA).

\(^{160}\) *See* Schupack *supra* note 5, at 213 (“Use of the ATA was infrequent however, until recently.”).
abettors for the violation of a federal civil statute silent on the issue of liability.\textsuperscript{161} Even so, this presumption may be rebutted by examining “whether aiding and abetting is covered by the statute.”\textsuperscript{162} Although a statute may not expressly provide for aiding and abetting liability, this does not prevent courts from recognizing liability under this legal theory.\textsuperscript{163} The Second Circuit’s 2007 interpretation of the ATCA supports this premise.\textsuperscript{164} Although the actual text of a statute is always the starting point for statutory interpretation and analysis, \textit{Central Bank} ultimately requires courts interpreting civil liability under a federal statute to determine what Congress intended when it enacted the statute.\textsuperscript{165} Generally, courts review a statute’s legislative history to ascertain legislative intent.\textsuperscript{166} The legislative history includes the original bill, amendments, reports, transcripts of debates, and other published records.\textsuperscript{167} These documents form the basis for courts to rebut the \textit{Central Bank} presumption and recognize aiding and abetting liability under the ATA.\textsuperscript{168}

Beginning with the \textit{Congressional Record}, the legislative history of the ATA reflects a conscious intent to incorporate general tort principles and extend civil liability against acts of terrorism “to the full reaches of common law.”\textsuperscript{169} Specifically, “The [ATA] affords victims of terrorism the remedies of American tort law, including treble damages and attorney’s fees.”\textsuperscript{170} The goal of providing general tort remedies to plaintiffs is further supported by congressional

\begin{itemize}
\item \textsuperscript{162} Id. at 177.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} \textit{Cent. Bank of Denver}, 511 U.S. at 173, 181 (“We thus have had ‘to infer how the 1934 Congress would have addressed the issue[s] had the 10b-5 action been included as an express provision in the 1934 Act.’”).
\item \textsuperscript{166} Id. at 175, 183-90; \textit{DAVIS S. ROMANTZ & KATHLEEN ELLIOTT VINSON, LEGAL ANALYSIS: THE FUNDAMENTAL SKILL} 94 (2nd 2009).
\item \textsuperscript{167} Id.
\item \textsuperscript{168} \textit{Cent. Bank of Denver}, 511 U.S. at 181.
\item \textsuperscript{169} \textit{Boim I}, 291 F.3d 1000, 1010 (7th Cir. 2002), \textit{abrogated en banc sub nom. Boim IV}, 549 F.3d 685 (7th Cir. 2008), \textit{cert. denied}, 130 S. Ct. 458 (2009) (citing 137 \textit{CONG. REC. S}4511-04 (1991)).
\item \textsuperscript{170} 137 \textit{CONG. REC. S}4511-04 (1991).
\end{itemize}
hearing testimony that, “The bill as drafted is powerfully broad, and its intention . . . is to . . . bring [in] all of the substantive law of the American tort law system.” 171

To complement these ends, the Senate Report notes “the substance of [an action under § 2333] is not defined by the statute, because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts. This bill opens the courtroom door to victims of international terrorism.” 172 This statement, in itself, highlights two important principles: first, it acknowledges the scope of terrorism is unpredictable; and second, because of this unpredictability, it is not practical to legislate every right of action since acts of international terrorism evolve over time. To underscore these principles, the same report offers, “[The ATA’s] provisions for compensatory damages, treble damages, and the imposition of liability at any point along the causal chain of terrorism” would “interrupt, or at least imperil, the flow of money.” 173 This “causal chain of terrorism” necessarily implicates aiders and abettors.

In addition to the documented intent to provide plaintiffs with broad remedies, Congress also realized the practical implications of assessing damages. Intuitively, if § 2333 creates a right of action for plaintiffs to seize terrorist assets, damages are simply less effective against the terrorists themselves when compared to their aiding and abetting financiers. 174 As the Congressional Record states, “If terrorists have assets within our jurisdictional reach, American citizens will have the power to seize them.” 175 Furthermore, “Anything that could be done to deter money-raising in the United States, the repose of assets in the United States, and so on,

173 Id. at 22 (emphasis added).
174 Boim IV, 549 F.3d 685, 690-91 (7th Cir. 2008), cert. denied, 130 S. Ct. 458 (2009).
would not only help benefit victims, but would also help deter terrorism.” If the terrorist themselves have few assets and are truly dependent on “financial angels” as Boim IV noted, it only seems logical that the best way to further congressional intent, as expressed in the legislative history, is to afford plaintiffs with a remedy under § 2333 against aiders and abettors. Indeed, as noted in the 1992 House Report, “while we have made a start in prosecuting the perpetrators of terrorist acts, it is still unfortunately the case that victims generally remain uncompensated.” Extending liability to aiders and abettors addresses the concerns of the House Report.

Although legislative documents at the time of enactment are superior to ex post facto evidence, analysis of statutory meaning is still susceptible to contemporary comparisons and further supports aiding and abetting liability under § 2333. In Lichter, Justice Burton offered the following as rationale for upholding the Renegotiation Act of 1942, “In peace as in war it is essential that the Constitution be scrupulously obeyed. . . . In time of crisis nothing could be more tragic and less expressive of the intent of the people than so to construe their Constitution that by its own terms it would substantially hinder rather than help them in defending their national safety.” Although the Supreme Court in Lichter interpreted the Constitution, as opposed to a statute, the guiding principles remain the same—especially in the post-September

176 Antiterrorism Act of 1990: Hearing Before the Subcomm. on Courts and Admin. Practice of Comm. on the Judiciary, 101st Cong. 76 (1990) (statement of Joseph Morris); see also id. at 17 (statement of Alan Kreczko) (“Few terrorist organizations are likely to have cash assets or property located in the United States that could be attached and used to fulfill a civil judgment. The existence of such a cause of action, however, may deter terrorist groups from maintaining assets in the United States, from benefiting from investments in the U.S. and from soliciting funds within the U.S.”).
177 Boim IV, 549 F.3d at 690-91.
179 ROMANTZ & VINSON, supra note 166, at 94.
180 Compare Carter v. Carter Coal Co., 298 U.S. 238, 300 (1936) (holding the test to determine if a law is valid under the Commerce Clause is whether the effect is direct or indirect in a sequence of events. “Commerce succeeds to manufacture.”), with NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (holding that test to determine that validity of a law under the Commerce Clause is “necessarily one of degree.”).
Following the tragic terrorist attacks on September 11, President George W. Bush declared, “We will not only deal with those who dare attack Americans, we will deal with those who harbor them and feed them and house them.” The President vowed no distinction would be made between those who commit terrorist acts and those who support them. Similarly, in response to the September 11 attacks, Congress passed a joint resolution authorizing the President to “use all necessary and appropriate force against those . . . he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.” Although Congress largely confined this joint resolution to the September 11 attacks, it is interesting that our legislature chose the word “aided.” Fast-forward nine years, the May 2010 National Security Strategy both empowers citizens and declares “[w]e are at war with a specific network, al-Qa’ida, and its terror affiliates who support efforts to attack the United States, our allies, and partners.” Although these statements are years removed from when Congress enacted the ATA, as Justice Burton suggested, interpretation and meaning are susceptible to contemporary review when national security is at stake.

Subsequent case law as recent as the year 2010 further supports the position that plaintiffs may sue aiders and abettors of international terrorism. In Wultz, the plaintiffs brought five claims against the Bank of China, Ltd. (BOC), including an allegation that BOC aided and abetted international terrorism. On April 17, 2006, a Palestinian suicide bomber allegedly

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185 WHITE HOUSE, supra note 1, at 2.
attacked a restaurant in Tel Aviv, Israel.\(^{188}\) As a result of the attack, Daniel Wultz suffered severe injuries and later died.\(^{189}\) His parents brought suit under the ATA and alleged that prior to the date of the attack, “BOC executed dozens of dollar wire transfers for the [Palestinian Islamic Jihad], totaling several million dollars.”\(^{190}\) The district court noted a circuit split on the issue of aiding and abetting liability under the ATA and ruled that such liability does indeed exist because Congress provided an express private action under the ATA and intended to incorporate general tort principles into the action.\(^{191}\) To support this ruling, the court reviewed both the ATA’s statutory text and extensive legislative history, and concluded this evidence was sufficient to rebut the \textit{Central Bank} presumption against aiding and abetting liability.\(^{192}\) In its reasoning, the court was strongly persuaded by the analytic framework set forth in \textit{Boim I} as well as similar district court cases that extended liability to secondary actors under the ATA.\(^{193}\) Notably, the court both acknowledged \textit{Boim IV} and then rejected its reasoning on aiding and abetting liability.\(^{194}\)

Similar to \textit{Wultz}, the district court in \textit{In re Chiquita Brands} confronted the same issue of liability under the ATA, and again ruled in favor of aiding and abetting liability.\(^{195}\) The plaintiffs were heirs and survivors of U.S. citizens allegedly kidnapped, held hostage, and murdered by the Columbian terrorist group Fuerzas Armadas Revolucionaries de Colombia (FARC) from 1993 to

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\(^{188}\) Id. at *4.
\(^{189}\) Id.
\(^{190}\) Id.
\(^{191}\) Id. at *114-15.
\(^{192}\) Id. at *118-20.
\(^{193}\) Id. at *118-19 (citing Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005) (holding that aiding and abetting liability is available under the ATA); Stutts v. De Dietrich Group, No. 03-CV-4058 (ILG), 2006 U.S. Dist. LEXIS 47638 (E.D.N.Y. 2006) (mem. op.) (holding aiding and abetting liability under the ATA is a valid claim); Morris v. Khadr, 415 F. Supp. 2d 1323, 1330 (D. Utah 2006) (citing \textit{Boim I} and holding that civil liability under the ATA extends to aiders and abettors who provide money to terrorists).
\(^{194}\) Id. at *119.
\(^{195}\) \textit{In re Chiquita Brands Int’l, Inc. Alien Tort Statute and S’holder Derivative Litig.}, 690 F. Supp. 2d 1296, 1309 (S.D. Fla. 2010).
1997—totaling twenty-three kidnappings and several murders. On March 19, 2007, Chiquita pled guilty in a separate proceeding to violating antiterrorism laws and acknowledged that it had made payments to FARC in the process. As a result, the plaintiffs subsequently brought suit against Chiquita for aiding and abetting international terrorism. Specifically, the plaintiffs pled Chiquita concealed its relationship with FARC and funneled monthly payments ranging from $20,000 to $100,000 to support terrorist activities.

Although partially granting Chiquita’s motion to dismiss for failure to state a claim, the district court in In re Chiquita Brands gave strong deference to prior case law from other circuits and ruled that plaintiffs may sue aiders and abettors under the ATA. Like Wultz, the court acknowledged Boim IV as a court proceeding that refused to recognize aiding and abetting liability. Interestingly, the court reviewed Boim IV and found that upholding a claim against donors of terrorism through a “chain of incorporations” was essentially secondary liability—just under a different name. The court drew support from Judge Rovner’s dissent that described the majority opinion as “straddl[ing] both primary and secondary liability.” Therefore, at least for this district court, aiding and abetting liability is alive and well under the ATA and Boim IV does nothing to diminish this.

Taken together, the legislative history of the ATA, contemporary policy, and subsequent case law all support the proposition that § 2333 provides plaintiffs a right to bring suit against

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196 Id. at 1300-02.
197 Id. at 1303.
198 Id. at 1299-1300.
199 Id. at 1302.
201 Id.
202 Id.
203 Id. (citing Boim IV, 549 F.3d 685, 707 n.5 (7th Cir. 2008), cert. denied, 130 S. Ct. 458 (2009) (Rovner, J., dissenting)).
aiders and abettors of international terrorism and rebuts the *Central Bank* presumption. While statutory interpretation through text alone is certainly valid,\(^{204}\) to ignore the ATA’s extensive uniform legislative history is folly and may deprive intended plaintiffs of their day in court.

**B. A Practical Argument for Aiding and Abetting: Why the Central Bank Counterarguments Fail**

In addition to the legislature’s documented intent to provide a cause of action against aiders and abettors under the ATA, courts should return to the *Boim I* standard for liability because the Seventh Circuit’s opinion in *Boim IV* provides a confusing standard and creates the potential for bona-fide aiders and abettors of international terrorism to walk away free from liability. Specifically, in light of the *Central Bank* policy concerns against secondary liability, recognizing the right for a plaintiff to bring suit against aiders and abettors under § 2333 does not represent: (1) a lack of deference to Congress; (2) uncertainty in the law; (3) substantial litigation costs; or (4) excessive litigation in general.\(^{205}\)

First, to the extent imposing aiding and abetting liability under the ATA encroaches on congressional authority,\(^{206}\) these arguments neglect the practical implication of forcing the legislature to move its hand with each statutory ambiguity. While supporters of strict statutory construction may assert that if Congress wished an aiding and abetting action to exist, it would have expressly created one—\(^{207}\) as articulated in *Central Bank*, this is merely a rebuttable presumption.\(^{208}\) Indeed, to sweepingly declare that “statutory silence on the subject of secondary liability means there is none,”\(^{209}\) misinterprets the Court’s guidance in *Central Bank*. Moreover,

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\(^{204}\) Romantz & Vinson, *supra* note 166, at 87.


\(^{206}\) *Boim IV*, 549 F.3d at 689 (noting the after *Central Bank*, Congress enacted a statute providing relief to aiders and abettors).

\(^{207}\) *Id.*

\(^{208}\) *Cent. Bank of Denver*, 511 U.S. at 182 (holding “when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant’s violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.”).

\(^{209}\) *Boim IV*, 549 F.3d at 689.
to force the legislature to express every intention—foreseen and unforeseen—in a statute ignores
the reality of passing laws designed to protect our nation from asymmetric and ever-changing
threats.210 Just as statutory silence on aiding and abetting liability under the ATCA was not fatal
to the Second Circuit,211 the legislative history of the ATA evinces the intent to provide a similar
remedy to plaintiffs. Although interpreting a statute through its text alone is the starting point for
any court’s analysis,212 recognizing aider and abettor liability under the ATA does not diminish
the rules of statutory construction. Moreover, in areas of the law where our nation must be most
agile and nimble, excessive formalism can be deadly.213

Second, insofar as considerable uncertainty surrounds the area of federal aider and
abettor law, to apply the Boim IV standard of primary liability through a “chain of
incorporations”214 only invites more confusion and leads to a standard that could result in
inconsistent outcomes for innocent victims of terrorist attacks. Under the ATA, there is
divergent authority among the courts on the standards of causation (“relaxed” or “proximate
cause”) and the requisite mental state for aiders and abettors (“knowingly” or “intentionally”).215
The Boim IV majority imposed a legal standard where aiding and abetting is evaluated through
the lens of primarily liability, reasoning that those who provide financial support to terrorist
organizations are themselves committing an act of terrorism and can be held liable under §

210 WHITE HOUSE, supra note 1, at 15, 21, 24, 27, 42.
211 Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 268, 287-88 (2d Cir. 2007) (per curiam), aff’d for lack of
212 Boim IV, 549 F.3d at 689; see also ROMANTZ & VINSON, supra note 166, at 87.
214 Boim IV, 549 F.3d at 690.
215 See, e.g., id. at 694-97 (applying “relaxed” causation and knowledge as a mental state requirement); In re
Terrorist Attacks on September 11, 2001, No. 03 MDL 1570 (GBD), 2010 U.S. Dist. LEXIS 96597, at *96-98
(S.D.N.Y. Sept. 13, 2010) (applying “modified” causation and knowledge as a mental state requirement); In re
2010) (applying knowledge as a mental requirement); Rothstein v. UBS AG, 647 F. Supp. 2d 292, 294-95 (S.D.N.Y
2009), aff’d, 2010 U.S. Dist. LEXIS 139104 (2011) (applying “proximate” causation and intent to sponsor terrorist
acts as the mental state); Takteyev, supra note 72, at 1544.
In comparison, Judge Rovner’s dissent described the majority’s opinion as “straddl[ing] both primary and secondary liability.” Further, Judge Rovner concluded that although the majority rejected aiding and abetting liability, these concepts still have some uncertain “continued relevance.” This “continued relevance” is far from clear to some district courts. Like Judge Rovner, several district courts outside the Seventh Circuit have questioned the Boim IV holding and, as a result, returned to the Boim I analysis.

The ATA is not the first statute to suffer from confusing interpretations of the law. In fact, under the Foreign Intelligence Surveillance Act (FISA), courts wrestled with the procedural distinction and resulting “wall” between surveillance involving “foreign policy” and “criminal prosecution.” In In re Sealed Case, the FISA Court of Review examined this issue and held that “the line [Truong and its progeny] sought to draw was inherently unstable, unrealistic, and confusing.” Specifically, the court emphasized that the field of counterintelligence necessarily involved efforts to halt espionage and that subsequent criminal prosecution was interrelated with foreign policy concerns in this area. Just as the FISA courts abandoned “confusing” distinctions, courts ruling under the ATA should reject a standard that recognizes liability for donors of terrorism, but somehow denies a cause of action against aiders and abettors.

In addition to imposing a confusing standard, any argument that the Boim IV analysis will still hold donors of terrorism liable as primary actors ignores the practical application of a

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216 Boim IV, 549 F.3d at 690-93.
217 Id. at 707 n.5 (Rovner, J., dissenting).
218 Id. (Rovner, J., dissenting).
219 In re Chiquita Brands, 690 F. Supp. 2d at 1309.
221 In re Sealed Case No. 02-001, 02-002, 310 F.3d 717, 721, 743 (FISA Ct. Rev. 2002) (referencing United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980)).
222 Id. at 743.
223 Id.
224 Id.
rigorous legal test under tort law. Since ATA suits are rare in nature, it is difficult to predict how courts will react in the future to holding donors of terrorism liable under a theory of primary liability. As noted by some commentators on the Central Bank decision, denying aiding and abetting liability only invites clever plaintiffs to craft their pleadings under a guise of primary liability when the action truly falls under aiding and abetting. As a result, courts will be forced to sift through even more confusing lawsuits and parse whether entities are primary or secondary actors. At best, courts will interpret Boim IV as still recognizing aider and abettor liability, just under a different name. At worst, the rights of plaintiffs will turn on a court’s interpretation of “donor” without the legal theory of aiding and abetting to support consistent judicial analysis. As a result, plaintiffs may be denied a legal right otherwise supported by the statute’s legislative history. Although these lawsuits are often the subject of legal and political maneuvering, courts that uniformly apply aiding and abetting liability will ease this tension.

Third, just as recognizing aiding and abetting liability under the ATA bolsters certainty in the law, any assertion that litigation expenses may be too steep to maintain a legitimate cause of action fails to recognize that Congress anticipated these suits would necessarily require fact-intensive inquiries to successfully combat terrorism. As noted in the congressional hearings, “American victims seeking compensation for physical, psychological, and economic injuries naturally turn to the common law of tort. American tort law in general would speak quite

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225 Stratton, supra note 36, at 32 (2004) (noting prior to 2002, only two published opinions explored the scope of the ATA); see also Strauss, supra note 36, at 684 (2005).
226 Takteyev, supra note 72, at 1544.
227 See, e.g., In re Terrorist Attacks on September 11, 2001, No. 03 MDL 1570 (GBD), 2010 U.S. Dist. LEXIS 96597, at *94 (S.D.N.Y. Sept. 13, 2010) (“A defendant cannot be held secondarily liable, under § 2333, for the material support provided by others to a designated foreign terrorist organization.”).
228 John D. Shipman, Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism, 86 N.C. L. REV. 383, 383 (2004).
effectively to the facts and circumstances of most terrorist actions not involving [acts by foreign
governments].”231 The facts and circumstances that Congress anticipated also underscore a grim
reality of what is at stake—experts estimate that the underground terror economy ranges from
$600 billion to $1.5 trillion. Put in perspective, this figure is more than five percent of the total
legitimate world economy232 and exceeds the Gross Domestic Product of the United Kingdom as
well as many of the world’s smaller national economies.233 Indeed, many legitimate
governments and corporations unknowingly conduct business with these underground entities.234
Realizing the sheer amount of financial assets that organizations funnel simply to bring
destruction, the burden of a fact-intensive inquiry may be exactly what the world needs.

Similarly, by providing plaintiffs with a right of action under the ATA against aiders and
abettors, injured parties have access to the deep-pocketed parties that make up this massive
underground economy. It must never be forgotten, “A terrorist, for reasons nobody understands,
for reasons beyond the concept of humanity, blows a plane out of the air or hijacks a ship or
shoots a father, murders a wife, husband, sister or brother.”235 Accordingly, a district court’s
ability to treble damages against organizations that aid and abet terrorism will likely have
financially crippling effects.236 In addition, perhaps motivated by notions of justice and
economic compensation, plaintiffs would be encouraged to supply resources toward researching,
finding, and seizing terrorist assets.237 This may even have a synergistic effect that further
stimulates government activity in this area.238 Moreover, similar to the qui tam statutes of old,239

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231 Id.
233 Id.
234 Id.
237 Stratton, supra note 36, at 54.
238 Id.
the ATA inspires “private attorney generals” to find and hold accountable the aiders and abettors of terrorism. Although aiding and abetting liability may lead to extensive and costly litigation, these fact-intensive suits are the only way to penetrate an underground economy so vast and powerful. Moreover, it is a necessary inquiry to further justice.

Fourth, analogous to the unavailing arguments of unwieldy fact-intensive suits, recognizing aiding and abetting liability under the ATA will not open the flood gates of litigation because these suits are rare in practice and buffered with substantive and procedural safeguards. While Congress intended to protect victims who “died because they were Americans,” it did so in a narrowly defined way. First, only U.S. citizens or survivors of U.S. citizens may bring suit. Second, there is a four-year statute of limitations period with a limited tolling provision. Third, plaintiffs may not bring suit against a foreign state, agency, or officer. As a final measure, the ATA affords no recovery for injuries suffered by an act of war. These statutory limitations are furthered underscored by the ATA’s legislative history that acknowledged these suits would be rare: “It may be that, as a practical matter, there are not very many circumstances in which the law can be employed. To our knowledge . . . few terrorist organizations are likely to have cash assets or property located in the United States that could be attached and used to fulfill a civil judgment.”

239 The Latin phrase *qui tam* is short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning a person “who pursues this action on our Lord the King’s behalf as well as his own.” Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. at 765, 769 (referencing 3 WILLIAM BLACKSTONE, COMMENTARIES *160).
240 Flast v. Cohen, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting) (in *qui tam* actions, the courts have “repeatedly held that individual litigants, acting as private attorneys-general, may have standing as ‘representatives of the public interest’” (quoting Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14, (1942))).
244 Id. § 2335.
245 Id. § 2337(2).
246 Id. § 2336(a).
In addition to these statutory limitations, plaintiffs must also contend with the typical procedural hurdles to bring suit in federal court. For example, in *Gilmore*, family members of an American citizen killed during a terrorist shooting in Jerusalem brought an action under the ATA against the PLO and various other organizations and individuals.\(^{248}\) While the court held that the plaintiffs stated a claim under the ATA, it ultimately dismissed the suit for want of personal jurisdiction under minimum contacts analysis.\(^{249}\)

Similarly, in *Rothstein*, the district court dismissed an action brought on behalf of victims injured or killed by six Hamas and Hezbollah attacks in Israel between 1997 and 2006.\(^{250}\) The plaintiffs alleged UBS AG (UBS) indirectly assisted the government of Iran in financially supporting Hamas and Hezbollah.\(^{251}\) The court dismissed the case because the plaintiffs lacked standing and failed to state a claim for relief.\(^{252}\) In particular, the plaintiffs did not have standing because the links between UBS’s transfer of funds to Iran and the terrorist acts of Hamas and Hezbollah were too attenuated.\(^{253}\) Moreover, the court found the plaintiffs failed to sufficiently plead that providing assets to Iran proximately caused their injuries because there was no indication that UBS knew or otherwise intended its funding to support Hamas and Hezbollah.\(^{254}\)

Finally, failing these contentions, this Paper concludes by arguing in the alternative that Congress should amend § 2333 and expressly provide a cause of action against aiders and abettors of international terrorism.\(^{255}\) In the face of an overwhelming consensus that suing an individual terrorist alone offers *de minimus* value when compared to attacking the financial

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\(^{248}\) *Gilmore v. Palestinian Interim Self Gov’t Auth.*, 422 F. Supp. 2d 96 (D.C. Cir. 2006).

\(^{249}\) *Id.* at 103.


\(^{251}\) *Id.*

\(^{252}\) *Id.* at 294-95.

\(^{253}\) *Id.* at 294.

\(^{254}\) *Id.* at 295.

centers that fuel these acts, the only meaningful way to arrive at Congress’s intent of imposing “liability at any point along the causal chain of terrorism,” is to allow plaintiffs to sue the aiders and abettors of international terrorism. Notwithstanding the ATA’s uniform legislative history and supporting case law in favor of liability against aiders and abettors, an expressed statutory provision would silence strict construction critics and validate what the courts and legislature already know—dismantling financial support networks further the global campaign against terrorism to a much greater extent than targeting the actual terrorist actors alone.

All told, the Central Bank counterarguments against aiding and abetting under the ATA fail on all accounts. To recognize such liability does not encroach on the authority of Congress. Indeed, the legislative history of § 2333 provides ample support for a plaintiff’s right to sue aiders and abettors of international terrorism. Moreover, the Boim IV standard actually creates more uncertainty in the judicial system. Furthermore, the fact-intensive nature of ATA actions is necessary to combat terrorism and the infrequent nature of these suits eases concerns of excessive litigation. Finally, even if courts ultimately refuse to recognize aiding and abetting liability, Congress should amend the ATA and provide plaintiffs with an express right to sue the aiders and abettors of international terrorism.

V. CONCLUSION

“The power to wage war is the power to wage war successfully.” The global war on terrorism is no different. The ATA provides plaintiffs with expansive rights to bring a civil action against those responsible for acts of international terrorism. Just how far this right

256 Id. at 690-91; see also NAPOLEONI, supra note 232, at 198.
extends is debatable, resulting in diverging case law. While the Seventh Circuit’s holding in *Boim IV* failed to recognize aiding and abetting liability as a cause of action under § 2333, this ruling ignored both Congress’s intent to incorporate common law tort principles into the ATA and the administrative difficulties of parsing through which entities should ultimately be liable. As subsequent case law suggests, courts that adopt the *Boim I* standard and apply aiding and abetting principles to § 2333 further the congressional intent to provide plaintiffs with a full array of tort remedies and ease judicial administration and application in a very complex area of the law. Furthermore, courts that validate aiding and abetting liability under the ATA also recognize the reality of fighting terrorism—the violent display of an ideology is only as powerful as those who support the act. While ideological motives will always be difficult to defeat, severing the financial support to these motives is a different matter entirely.

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