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**TOO FAR FROM HOME: WHY DAIMLER’S “AT HOME”
STANDARD DOES NOT APPLY TO PERSONAL
JURISDICTION CHALLENGES IN ANTI-TERRORISM
ACT CASES**

ABSTRACT

The Anti-Terrorism Act is a federal statute enacted to help grant recourse to United States plaintiffs who have lost family members in international acts of terrorism. Under the statute, plaintiffs may file civil claims against organizations that directly engage in, or aid and abet, terrorism. A recent handful of Anti-Terrorism Act cases have been brought in federal district court against the Palestinian Liberation Organization and the Palestinian Authority by plaintiffs whose family members were killed in terrorist attacks that occurred in Israel. A split between two federal district courts exists regarding whether personal jurisdiction over both the Palestinian Liberation Organization and the Palestinian Authority is constitutional in light of the Supreme Court’s 2014 decision in Daimler AG v. Bauman.

This Comment explores the application of personal jurisdiction under the Fifth and Fourteenth Amendments and argues that Daimler should not be applied to cases brought under the Anti-Terrorism Act. This Comment advocates for a simple solution to the lower courts’ split whereby personal jurisdiction over the Palestinian Liberation Organization and the Palestinian Authority is assessed under the federal due process standards of the Fifth Amendment, rather than under those of the Fourteenth Amendment. A more traditional assessment under Fifth Amendment standards would quash concerns about the constitutionality of personal jurisdiction over these two entities and help preserve federal policy behind the Anti-Terrorism Act’s enactment.

INTRODUCTION

Congress enacted the Anti-Terrorism Act (ATA)¹ to provide a civil cause of action for the families of United States citizens injured or killed in acts of international terrorism.²

The legislative history of the ATA reveals that Congress intended to hold terrorists accountable where it hurts them most: their funds.³ The ATA was meant to deter terrorists, and those who aid and abet terrorism, from carrying out attacks on Americans by chipping away at terrorism's financial support in the United States.⁴

Recently, a number of plaintiffs whose family members were killed in terrorist attacks abroad filed suit under the ATA against the Palestine Liberation Organization (PLO) and the Palestinian Authority (PA).⁵ In these cases, the PLO and the PA moved to dismiss plaintiffs' complaints on the grounds that federal courts now lack general jurisdiction over them in light of *Daimler AG v. Bauman*.⁶ Two federal district courts are split on the issue of whether courts now lack personal jurisdiction over the PLO and the PA in light of *Daimler*.⁷ Except in one case, the United States District Court for the District of Columbia has granted the PLO and the PA's motions for dismissal for lack of jurisdiction after

¹ 18 U.S.C. §§ 2331–2339 (2012).

² *See id.* § 2333 (“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.”); *see also* *Morris v. Khadr*, 415 F. Supp. 2d 1323, 1327 (D. Utah 2006) (“The Anti-Terrorism Act . . . evinces Congress’s intent ‘to codify general common law tort principles and to extend civil liability for acts of international terrorism to the full reaches of traditional tort law.’” (quoting *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1010 (7th Cir. 2002))).

³ 136 CONG. REC. 26717 (1990); *Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Courts and Admin. Practice of the Comm. on the Judiciary U.S. S.*, 101st Cong. 133 (1990) [hereinafter *Hearing*] (statement of Professor Wendy Collins Perdue).

⁴ *See Hearing, supra* note 3, at 78–79 (testimony of Joseph A. Morris).

⁵ *See, e.g.*, *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 239 (D.D.C. 2015), *appeal docketed*, No. 15-7034 (D.C. Cir. Apr. 8, 2015); *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 21 (D.D.C. 2015), *appeal docketed*, No. 15-7024 (D.C. Cir. Mar. 18, 2015); *Safra v. Palestinian Auth.*, 82 F. Supp. 3d 37, 39 (D.D.C. 2015), *appeal docketed*, No. 15-7025 (D.C. Cir. Mar. 18, 2015); *Gilmore v. Palestinian Interim Self-Gov’t Auth.*, 8 F. Supp. 3d 9, 11 (D.D.C. 2014); *Sokolow v. Palestinian Liberation Org.*, No. 04 Civ. 397(GBD), 2014 WL 6811395, at *1 (S.D.N.Y. Dec. 1, 2014), *appeal docketed*, No. 15-3151 (2d Cir. Dec. 9, 2014). The plaintiffs in these cases asserted civil claims against the PLO or the PA on behalf of family members killed, or seriously injured, as a result of terrorist attacks in Israel.

⁶ *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014).

⁷ *Compare Klieman*, 82 F. Supp. 3d at 250 (holding that jurisdiction over defendants PLO and PA was not proper under *Daimler*), *with Sokolow*, 2014 WL 6811395, at *2 (holding that jurisdiction was proper under *Daimler*).

Daimler.⁸ The United States District Court for the Southern District of New York, however, has denied such motions for dismissal for lack of personal jurisdiction.⁹ This Comment argues that *Daimler* does not control cases brought under the ATA for two primary reasons.¹⁰ First, the majority in *Daimler* only provided two examples of where a defendant may be subject to general jurisdiction: if the defendant is (1) an individual or (2) a corporation.¹¹ *Daimler* makes no mention of where a non-sovereign government entity may be subject to general jurisdiction.¹² Secondly, and perhaps more convincingly, the test *Daimler* articulates for assessing general jurisdiction should not apply to cases in which the plaintiff's claims are not state-specific.¹³ Even though *Daimler* was a federal question case brought in federal court, the Supreme Court assessed whether due process was constitutional under the Fourteenth Amendment.¹⁴ *Daimler* was predicated on a state-specific claim, namely, whether a defendant had such "continuous and systematic" affiliations with the state of California so as to render it essentially "at home" in California.¹⁵ In other words, *Daimler* served to answer the question of whether a state could exercise general jurisdiction based on a nonresident's contacts with the state.¹⁶ That is not the relevant inquiry facing the federal courts in recent cases against the PLO and the PA.¹⁷

⁸ See *Am. Fid. Assurance Co. v. Bank of N.Y. Mellon*, No. CIV-11-1284-D, 2014 WL 8187951, at *1, *3 (W.D. Okla. Dec. 12, 2014) (denying defendant's challenge to the court's exercise of general personal jurisdiction because defendants failed to assert the defense when it first became available in 2011 after *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011)). Compare *Klieman*, 82 F. Supp. 3d at 250, *Livnat*, 82 F. Supp. 3d at 25, and *Safra*, 82 F. Supp. 3d at 49 (cases holding that personal jurisdiction over defendants PLO and PA was no longer constitutional, per *Daimler*), with *Gilmore*, 8 F. Supp. 3d at 14 (holding that defendants waived the defense of lack of personal jurisdiction by failing to assert it in their original motion to dismiss).

⁹ See, e.g., *Sokolow*, 2014 WL 6811395, at *2.

¹⁰ This Comment expresses no opinion on the plaintiffs' factual arguments in these cases. It solely identifies and discusses a personal jurisdiction split among federal district courts.

¹¹ *Daimler*, 134 S. Ct. at 760; see *infra* Part IV.A.

¹² See *infra* Part IV.A.; see also *Safra*, 82 F. Supp. 3d at 44 (describing the PA as a non-sovereign government entity).

¹³ See *infra* Part IV.B.

¹⁴ *Daimler*, 134 S. Ct. at 751 ("The question presented is whether the *Due Process Clause of the Fourteenth Amendment* precludes the District Court from exercising jurisdiction over *Daimler* in this case, given the absence of any *California* connection to the atrocities, perpetrators, or victims described in the complaint." (emphasis added)).

¹⁵ *Id.* at 761 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

¹⁶ See Thomas C. Arthur & Richard D. Freer, *Be Careful What You Wish For: Goodyear, Daimler, and the Evisceration of General Jurisdiction*, 64 EMORY L. J. ONLINE 2001, 2002 (2014).

¹⁷ The relevant inquiry faced by both the D.C. District Court and the Southern District of New York was whether defendants PLO and PA had sufficient minimum contacts with the United States as a whole. See *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 244 (D.D.C. 2015); *Livnat v. Palestinian Auth.*, 82 F. Supp.

This Comment proceeds in four Parts. Part I discusses the personal jurisdiction standard under the Fourteenth Amendment and two Supreme Court cases that limited the general jurisdiction standard: *Goodyear Dunlop Tires Operations, S.A. v. Brown* and *Daimler*. Part I also analyzes how courts assess due process under the Fifth Amendment and argues the assessment should differ from that of the Fourteenth Amendment. Part II discusses both the statutory and constitutional bases for asserting personal jurisdiction over foreign defendants under the ATA. Part II also details how several ATA cases with jurisdictional questions were decided pre-*Daimler*. Part III introduces several recent cases brought in federal court under the ATA. The defendants in these cases, the PLO and the PA, moved to dismiss for lack of personal jurisdiction pursuant to *Daimler*. The federal district courts are split on the issue of whether to grant these motions. Part IV argues these motions should be denied for four reasons. First, *Daimler* does not apply to these cases because it does not define how personal jurisdiction is assessed for non-sovereign government entities. Second, *Daimler* considers personal jurisdiction under the Fourteenth Amendment on a state-specific claim while the cases brought under the ATA are not based on state-specific claims.¹⁸ Third, a due process analysis under *Daimler* conflates the Fourteenth Amendment Due Process Clause with the Fifth Amendment Due Process Clause. Finally, applying a due process analysis under *Daimler* to cases brought under the ATA will neither honor nor uphold the federal policy that was instrumental in the ATA's enactment.

I. PERSONAL JURISDICTION UNDER THE FOURTEENTH AND FIFTH AMENDMENTS

This Part explores how the Supreme Court has most recently assessed personal jurisdiction under both the Fourteenth and Fifth Amendments. Section A describes the Fourteenth Amendment analysis and the limiting effects two recent cases had on general jurisdiction. Section B analyzes how personal jurisdiction is commonly assessed under the Fifth Amendment, despite a dearth of existing case law.¹⁹ Section B also argues for a broader interpretation of personal jurisdiction under the Fifth Amendment with fewer restrictions than

3d 19, 25 (D.D.C. 2015); *Safra*, 82 F. Supp. 3d at 43; *Sokolow v. Palestinian Liberation Org.*, No. 04 Civ. 397(GBD), 2014 WL 6811395, at *2 (S.D.N.Y. Dec. 1, 2014).

¹⁸ See *supra* note 17 and accompanying text.

¹⁹ See David S. Welkowitz, *Beyond Burger King: The Federal Interest in Personal Jurisdiction*, 56 *FORDHAM L. REV.* 1, 14–16 (1987) (highlighting the failure of the federal courts to close the gap in this area of the law).

those felt by the states under the Fourteenth Amendment.²⁰ Specifically, it asserts the idea that personal jurisdiction over a defendant under the Fifth Amendment should be constitutional on the basis of a defendant's aggregate contacts with the United States.²¹

Personal jurisdiction refers to a court's authority to adjudicate a claim against a person.²² There are two commonly referred to types of personal jurisdiction, specific jurisdiction and general jurisdiction.²³ Specific jurisdiction refers to cases in which there is a connection between a cause of action in a particular state and a defendant's contacts or activities within that state.²⁴ For example, if a Nevada corn supplier breached an agreement to deliver corn to a buyer in Colorado, such breach would give Colorado courts specific jurisdiction over that Nevada corn supplier. On the other hand, general jurisdiction refers to situations in which there is not a connection between a cause of action in a particular state and a defendant's contacts or activities within that state.²⁵ For example, say a non-resident of Nevada sues a foreign corporation in Nevada for securities fraud. Although that foreign corporation conducts business in Nevada, the cause of action did not arise in Nevada, nor does it relate to the corporation's activities there.²⁶ In this circumstance, a court may find general jurisdiction over that foreign corporation proper in Nevada.

To assert personal jurisdiction over a defendant, whether specific or general, a plaintiff must satisfy both a statutory and a constitutional requirement.²⁷ The statutory requirement is usually satisfied by a state's long-arm statute or a federal

²⁰ See Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455, 456 (2004).

²¹ See *id.* (arguing that jurisdiction over foreign defendants under the Fifth Amendment should be constitutional solely on the basis of effects in the United States, without a requirement of "purposeful availment").

²² *Personal Jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²³ See Arthur & Freer, *supra* note 16, at 2003 (noting that *International Shoe* first authorized these forms of personal jurisdiction based on minimum contacts).

²⁴ *Id.*

²⁵ See RICHARD D. FREER, CIVIL PROCEDURE § 2.4 (3d ed. 2012).

²⁶ See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952) (holding that a Philippine mining corporation was subject to general jurisdiction in Ohio where it carried on "a continuous and systematic, but limited, part of its general business").

²⁷ See *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) ("[B]efore a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons."). For an analytical framework for assessing personal jurisdiction, see FREER, *supra* note 25, at § 2.6.

long-arm statute.²⁸ Long-arm statutes are created by the legislature and give courts power to assert jurisdiction over a defendant.²⁹ In cases where defendants violate federal law and do not consent to the jurisdiction of any state but have sufficient contacts with the United States for federal courts to apply federal law, Federal Rule of Civil Procedure 4(k)(2) may be used as the statutory basis for asserting jurisdiction over defendants.³⁰

The constitutional requirement for satisfying personal jurisdiction derives from the Due Process Clause and is the subject of vast case law.³¹ The Due Process Clause “protects an individual’s right to be deprived of life, liberty, or property only by the exercise of lawful power.”³² The Supreme Court has spoken about Fourteenth Amendment Due Process limitations on personal jurisdiction, but has provided less guidance with respect to those of the Fifth Amendment.³³ Although the pertinent language of the two amendments is nearly identical,³⁴ commentators have mixed opinions about whether the limits imposed on the people by the Fifth Amendment are analogous to those imposed on the states by the Fourteenth Amendment.³⁵ This Comment argues that the limits imposed under each are, in fact, different.³⁶

²⁸ See JOSEPH W. GLANNON, *CIVIL PROCEDURE: EXAMPLES AND EXPLANATIONS* 25–26 (6th ed. 2008) (“The due process clause does not actually confer any jurisdiction on state courts; it only defines the outer bounds of permissible jurisdictional power. . . . It is up to the legislature of each state to actually grant the power . . . through jurisdictional statutes.”); LUTHER L. MCDUGAL, III, ROBERT L. FELIX & RALPH U. WHITTEN, *AMERICAN CONFLICTS LAW* 75 (5th ed. 2001) (“[I]f process is to be constructively served outside a state on a defendant, there must be special statutory authorization for the service.”).

²⁹ GLANNON, *supra* note 28, at 25.

³⁰ See FED. R. CIV. P. 4(k)(2) advisory committee’s note to 1993 amendment (describing the specific problem Rule 4(k)(2) was meant to address).

³¹ See generally 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, *FEDERAL PRACTICE AND PROCEDURE* § 1069.1 (4th ed. 2015).

³² *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 879 (2011).

³³ See *Perdue*, *supra* note 20, at 456 (“The Supreme Court has never squarely considered what limits the Fifth Amendment imposes on assertions of personal jurisdiction in federal court.”); see also *Welkowitz*, *supra* note 19, at 1–2 (remarking on the lack of federal case law on this topic).

³⁴ The Fifth Amendment provides in pertinent part: “No person shall be . . . deprived of life, liberty, or property without due process of law.” U.S. CONST. amend. V. With emphasis on the states, the Fourteenth Amendment provides in pertinent part: “No state shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

³⁵ Compare *Perdue*, *supra* note 20, at 457 (arguing that the limits imposed by the Fifth Amendment are not comparable to those imposed by the Fourteenth Amendment), with Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 15 (1985) (arguing the fact that the Supreme Court’s personal jurisdiction cases have not interpreted the Fifth Amendment is of little significance because the Court has interpreted the two clauses as imposing similar restraints).

³⁶ WRIGHT, MILLER & STEINMAN, *supra* note 31, at § 1068.1, at 699 (“When a federal court adjudicates a federal question claim, it exercises the sovereign power of the United States and no federalism problem is presented. The Fourteenth Amendment function of protecting the several states’ status as coequal sovereigns

A. *Personal Jurisdiction Under the Fourteenth Amendment*

Due process under the Fourteenth Amendment acts to ensure a defendant is not subject to suit in a state in which he does not have sufficient minimum contacts or has not conducted substantial activity.³⁷ At its core, the Fourteenth Amendment Due Process Clause is a doctrine meant to uphold state sovereignty and serve as a check on the courts of each state.³⁸

1. *Pre-Goodyear and Daimler Standard*

The seminal Supreme Court case of *International Shoe Co. v. Washington*³⁹ articulated the modern test for evaluating specific jurisdiction. Under the Fourteenth Amendment, specific jurisdiction is permitted over a defendant if two conditions are met.⁴⁰ First, the defendant must have sufficient minimum contacts with the state in which he is being sued.⁴¹ Second, subjecting the defendant to litigation in that state must not offend “traditional notions of fair play and substantial justice.”⁴² In applying the standard for general jurisdiction, courts have generally applied the test set forth in *International Shoe* but focused more on whether a defendant’s activities in the relevant state are “continuous and systematic.”⁴³ General jurisdiction is commonly thought of as a balance between the nature of a defendant’s contacts in the forum and the fairness of subjecting the defendant to suit in the forum.⁴⁴

seemingly ought to be of no relevance to the parallel analysis under the Due Process Clause of the Fifth Amendment.”).

³⁷ See Stephen E. Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U. L.Q. 1291, 1292 (1983).

³⁸ Perdue, *supra* note 20, at 457. The Court in *Pennoyer v. Neff* first articulated the importance of state sovereignty to a personal jurisdiction analysis. See *Pennoyer v. Neff*, 95 U.S. 714, 722–23 (1877).

³⁹ 326 U.S. 310 (1945).

⁴⁰ *Id.* at 320.

⁴¹ *Id.*

⁴² *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

⁴³ *Id.* at 317. Although *International Shoe* was a case of specific jurisdiction, its framework has been applied to both specific and general jurisdiction cases. Arthur & Freer, *supra* note 16, at 2003. In the forty years after *International Shoe*, the Court only decided two general jurisdiction cases and applied the same test it had used to decide cases of specific jurisdiction (i.e. “continuous and systematic contacts”). In *Perkins v. Benguet Consol. Mining Co.*, the Court found the defendant had carried out “continuous and systematic” business activities in the forum state and was thus subject to jurisdiction in that state. 342 U.S. 437, 448 (1952). In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, the Court held one trip taken to the forum state by an executive officer did not constitute “continuous and systematic” contacts with the forum state and could not support the exercise of general jurisdiction over the defendant. 466 U.S. 408, 416 (1984).

⁴⁴ Welkowitz, *supra* note 19, at 3; Walter H. Heiser, *Civil Litigation as a Means of Compensating Victims of International Terrorism*, 3 SAN DIEGO INT’L L.J. 1, 7 (2002) (discussing how the fairness factors may weigh in favor of courts asserting personal jurisdiction over foreign defendants).

Thirty-five years after *International Shoe*, the Court revisited another Fourteenth Amendment personal jurisdiction question.⁴⁵ In *World-Wide Volkswagen v. Woodson*, the Court reinforced how strongly the Due Process Clause of the Fourteenth Amendment operates among the states.⁴⁶ The Court reiterated that the minimum contacts test set forth in *International Shoe* “ensure[s] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”⁴⁷ The Court then added an additional consideration to the *International Shoe* minimum contacts test.⁴⁸ Not only must a defendant have sufficient minimum contacts with the state and demonstrate “continuous and systematic” activity within the state, but he must also “purposefully avail” himself of that state.⁴⁹ Additionally, jurisdiction over a defendant must not “offend ‘traditional notions of fair play and substantial justice.’”⁵⁰ The phrase “purposeful availment” requires that a defendant *purposefully* engage in conduct directed towards the residents of the state in which the lawsuit is filed.⁵¹ Without this conduct, a defendant cannot be subject to litigation in that state.⁵² For example, a perfume company based in New York that markets and sells its fragrances all over the United States cannot necessarily be sued in Maine by a Maine resident who had an adverse reaction to a fragrance. In this hypothetical scenario, a perfume company that does nothing to specifically target Maine or those who live there

⁴⁵ See *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 287 (1980) (determining whether a corporate automobile wholesaler and retailer defendant had such minimum contacts with the state of Oklahoma so as to be subject to suit in Oklahoma).

⁴⁶ *Id.* at 294 (“[E]ven if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.”). *World-Wide Volkswagen* involved a tragic car explosion that occurred in Oklahoma as the plaintiffs drove through the state on their way to Arizona. *Id.* at 288. The plaintiffs sued the car’s wholesaler and retailer in Oklahoma. *Id.* The Court held that jurisdiction over the defendants in Oklahoma was improper because the defendants did not conduct activity in Oklahoma and did not purposefully avail themselves of any privileges or benefits of Oklahoma law. *Id.* at 299.

⁴⁷ *Id.* at 291–92.

⁴⁸ *Id.* at 297.

⁴⁹ *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

⁵⁰ *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945). The Court in *World-Wide Volkswagen* provided five factors to help evaluate whether asserting personal jurisdiction over a defendant is fair: (1) “the burden on the defendant”; (2) “the forum state’s interest in adjudicating the dispute”; (3) “the plaintiff’s interest in obtaining convenient and effective relief”; (4) “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies”; and (5) “the shared interest of the several States in furthering fundamental substantive social policies.” FREER, *supra* note 25, at § 2.4, at 88 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

⁵¹ *World-Wide Volkswagen*, 444 U.S. at 297 (quoting *Hanson*, 357 U.S. at 253).

⁵² *Id.* at 297 (“The Due Process Clause, by ensuring the ‘orderly administration of the laws’ gives a degree of predictability to the legal system” (citations omitted)); see also *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011).

cannot be subject to suit in Maine. With the addition of *World-World Volkswagen* to the Court's specific jurisdiction cache, only activities that are *purposefully* directed at or within a particular state can justify a sovereign state's exercise of power over a resident of another sovereign state.⁵³

2. *Goodyear and Daimler*

Most recently, the Supreme Court narrowed the scope of when a nonresident defendant may be subject to general jurisdiction in a particular state with two cases: *Goodyear* and *Daimler*. These cases could have simplified the *International Shoe* minimum contacts analysis.⁵⁴ In reality, *Goodyear* and *Daimler* had the opposite effect.⁵⁵ In *Goodyear*, the Court answered the question of whether foreign subsidiaries of a United States corporation could be sued in state court on claims unrelated to any in-state activity.⁵⁶ The case involved two boys from North Carolina who were killed in a bus accident in France, resulting from a defective tire manufactured abroad in one of Goodyear's foreign subsidiary plants.⁵⁷ The parents of the boys sued Goodyear and its subsidiary in North Carolina state court.⁵⁸ Both the trial court and the North Carolina Court of Appeals held that North Carolina courts had general jurisdiction over Goodyear's subsidiary, whose tires had reached the State through "the stream of commerce."⁵⁹ In reversing the judgment, the Supreme Court held that Goodyear's foreign subsidiaries were in no sense "*at home*" in North Carolina.⁶⁰ Their connections to North Carolina "[fell] far short of the 'continuous and systematic general business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State."⁶¹ Thus, with *Goodyear*, the Court articulated a specific standard for asserting general jurisdiction over a defendant—for a defendant to be subject to

⁵³ See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 481–82 (1985) (holding that the limits on state power under the Fourteenth Amendment are designed to protect individuals by providing them with fair notice that their activities will render them liable to suit in a particular forum).

⁵⁴ For a discussion on *Goodyear* and *Daimler*'s shortcomings, see Arthur & Freer, *supra* note 16, at 2005–15.

⁵⁵ *Id.* at 2002.

⁵⁶ *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915, 918 (2011).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 919–20 (citations omitted).

⁶⁰ *Id.* at 929 (emphasis added).

⁶¹ *Id.* (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)).

personal jurisdiction in a particular area, the defendant must be “at home” in that area.⁶²

Three years later in *Daimler*, the Court again addressed an issue of general jurisdiction.⁶³ The case involved Argentinian residents who brought suit against Daimler, a German corporation, in California, alleging criminal activity by the corporation’s Argentinian subsidiary.⁶⁴ The plaintiffs filed suit in California, stating that jurisdiction was based on the California contacts of Daimler’s American subsidiary.⁶⁵ Although the Ninth Circuit determined that it had general jurisdiction over the defendants in California, the Supreme Court reversed that holding. The Court concluded that general jurisdiction was not proper because Daimler could not be subject to suit in California for the alleged criminal activity of a foreign subsidiary that took place abroad.⁶⁶

Although the case was filed in federal court, the issue to which the Supreme Court granted certiorari was whether “the Due Process Clause of the *Fourteenth Amendment* preclude[d] the District Court from exercising jurisdiction over Daimler.”⁶⁷ The issue in *Daimler* was state-specific, requiring the Court to determine whether jurisdiction over the corporation was constitutional in California.⁶⁸

The Court concluded that due process did not permit the exercise of general jurisdiction over Daimler in California because Daimler was not “at home” in California.⁶⁹ Thus, with *Goodyear* and *Daimler*, the Court narrowed the scope of when general jurisdiction is constitutional under the Due Process Clause of the Fourteenth Amendment.⁷⁰ The cases redefined “continuous and systematic” ties with the forum state to mean “at home” in the forum state.⁷¹

⁶² *Id.* at 919.

⁶³ *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014).

⁶⁴ *Id.* at 748.

⁶⁵ *Id.*

⁶⁶ *Id.* at 762.

⁶⁷ *Id.* at 751 (emphasis added).

⁶⁸ *Id.*

⁶⁹ *Id.* The Court relied upon its instruction in *Goodyear* in determining Daimler was not “at home” in California. *Id.*

⁷⁰ *See id.* at 761–62.

⁷¹ *Id.* at 762 n.20 (“General jurisdiction . . . calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them.”). *See* Arthur & Freer, *supra* note 16, at 2005. Professors Arthur and Freer also point out how Justice Ginsburg, writing for the majority in *Daimler*, utterly disregards the “fairness” factors of *International Shoe*, indicating the “fairness factors” have nothing to do with general jurisdiction. *Id.* at 2004–05.

To aid future courts' analysis, *Daimler* provided two guiding examples of where a defendant is "at home": (1) individuals are "at home" where domiciled⁷²; and (2) corporations are "at home" where incorporated and where they conduct their principal place of business.⁷³ Despite these guidelines, the Court provided no further insight for other entities, such as non-sovereign government entities, which are neither individuals nor corporations.⁷⁴

B. *Personal Jurisdiction Under the Fifth Amendment*

Personal jurisdiction over a defendant in federal court is governed by the Due Process Clause of the Fifth Amendment.⁷⁵ The Fifth Amendment Due Process analysis is less clear than the Fourteenth Amendment analysis.⁷⁶ Several commentators maintain the position that Fifth Amendment Due Process standards should be broader than Fourteenth Amendment Due Process standards.⁷⁷ Courts take varying positions with respect to the scope of United States sovereignty in a jurisdictional context.⁷⁸ While some courts believe that the analysis for constitutional due process under the Fifth Amendment should be the same as that under the Fourteenth Amendment,⁷⁹ others have found that due process under the Fifth Amendment permits a "national contacts" approach

⁷² Domicile is defined as "[t]he place at which a person has been physically present and that the person regards as . . . [his] true, fixed, principal, and permanent home . . ." *Domicile*, BLACK'S LAW DICTIONARY, *supra* note 22.

⁷³ *Daimler*, 134 S. Ct. at 760 (citations omitted).

⁷⁴ See Sokolow v. Palestinian Liberation Org., No. 04 Civ. 397(GBD), 2014 WL 6811395, at *1 (S.D.N.Y. Dec. 1, 2014), ("Defendants by their own admission are not foreign corporations and therefore are not subject to the traditional analysis of determining a defendant's place of incorporation or principal place of business."); Arthur & Freer, *supra* note 16, at 2005.

⁷⁵ *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 100 (1987).

⁷⁶ See *Perdue*, *supra* note 20, at 460 n.34 ("The Supreme Court has never decided what limits the Fifth Amendment might impose with respect to personal jurisdiction.")

⁷⁷ See Marilyn J. Berger, *Acquiring In Personam Jurisdiction in Federal Question Cases: Procedural Frustration Under Federal Rule of Civil Procedure 4*, 1982 UTAH L. REV. 285, 313–14; Thomas F. Green, Jr., *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 VAND. L. REV. 967, 986 (1961).

⁷⁸ Compare *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 291 (3d Cir. 1985) (holding personal jurisdiction over West German manufacturer could not be founded on his aggregated contacts with United States), with *Holt v. Klosters Rederi A/S*, 355 F. Supp. 354, 357 (W.D. Mich. 1973) ("[T]he appropriate inquiry to be made in a federal court where the suit is based upon a federally created right is whether the defendant has certain minimal contacts with the United States, so as to satisfy due process requirements under the Fifth Amendment."). For a comprehensive overview on whether the scope of United States judicial authority is parallel to, or broader than, the scope of individual state authority, see generally *Perdue*, *supra* note 20.

⁷⁹ See, e.g., *Abelesz v. OTP Bank*, 692 F.3d 638, 656 (7th Cir. 2012) ("The proper inquiry is not . . . whether a defendant's contacts 'in the aggregate are extensive.'" (citation omitted)); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 418 (9th Cir. 1977) (refusing to aggregate national contacts); *Superior Coal Co v. Ruhrkohle, A.G.*, 83 F.R.D. 414, 418–20 (E.D. Pa. 1979) (rejecting a national contacts theory).

to personal jurisdiction.⁸⁰ Under a national contacts approach to personal jurisdiction, a defendant's minimum contacts with the state in which he is being sued are still assessed under the *International Shoe* framework, but the inquiry is not limited to the contacts the defendant has in the state where the district court sits.⁸¹ This is so because the fairness inquiry set forth in *International Shoe* is a reflection on the "territorial limitations on the power of an individual state."⁸² The notion of minimum contacts originated from cases that examined the jurisdictional reach of the individual states.⁸³ Thus, the Fourteenth Amendment Due Process analysis, which seeks to prevent encroachment by one state upon the sovereignty of another, should, by implication, have no bearing on the adjudication of a federal claim in federal court.⁸⁴

The Supreme Court has twice failed to answer whether a federal court can constitutionally exercise personal jurisdiction over a defendant based on an aggregation of the defendant's contacts with the nation, rather than its contacts with the state in which the federal court sits.⁸⁵ In *Asahi Metal Industry Co. v. Superior Court of California*,⁸⁶ the Court examined whether personal jurisdiction in California over a Japanese company was proper based on a valve stem manufactured in Japan that allegedly malfunctioned in California, causing a motorcycle crash and injuring the plaintiff.⁸⁷ The Court analyzed whether due process over Asahi was constitutional under the Fourteenth Amendment.⁸⁸ The Court concluded that it was not.⁸⁹ In a footnote, the Court acknowledged the Fifth Amendment Due Process Clause, but did not opine whether a foreign company's contacts with the United States could be aggregated nationwide for

⁸⁰ See, e.g., *Eng'g Equip. Co. v. S.S. Selene*, 446 F. Supp. 706, 710 (S.D.N.Y. 1978) (identifying that a foreign defendant can rarely prefer one district over another); *Engineered Sports Prods. v. Brunswick Corp.*, 362 F. Supp. 722, 728 (D. Utah 1973) (holding that the Utah District Court could consider the aggregate presence of the defendant alien's business in the United States as a whole).

⁸¹ Harvard Law Review Assoc., Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470, 475 (1981).

⁸² *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290, 294 (1985); cf. *J. McIntyre Mach. Ltd., v. Nicastro*, 564 U.S. 873, 884 (2011) ("Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.").

⁸³ WRIGHT, MILLER & STEINMAN, *supra* note 31, at § 1068.1, at 694.

⁸⁴ *Max Daetwyler Corp.*, 762 F.2d at 294 (citing *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)).

⁸⁵ *Asahi Metal Indus. v. Super. Ct. Cal.*, 480 U.S. 102, 113 n.* (1987) (the Court failed to decide a Fifth Amendment issue); *Omni Capital Int'l. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987).

⁸⁶ 480 U.S. 102 (1987).

⁸⁷ *Id.* at 105–06.

⁸⁸ *Id.* at 108. While the Court remained divided on the question of whether the minimum contacts requirement was satisfied by the stream of commerce theory articulated by the California Supreme Court, eight Justices agreed that asserting jurisdiction over Asahi would violate fair play and substantial justice. *Id.* at 116.

⁸⁹ *Id.*

jurisdictional purposes.⁹⁰ While the Court concluded that Asahi did not maintain sufficient minimum contacts with the state of California, perhaps an examination of the company's contacts nationwide would have rendered personal jurisdiction over Asahi in federal court proper. In *Omni Capital International v. Rudolf Wolff & Co.*, the plaintiffs brought a case under a federal statute asserting that "a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole."⁹¹ For reasons left unanswered, the Court declined to decide that particular issue.⁹²

Despite a lack of guidance from the Supreme Court, several courts and scholars have asserted that a due process analysis should be more flexible under the Fifth Amendment than under the Fourteenth Amendment.⁹³ They maintain that a more flexible assessment is warranted because there is no overarching concern with state sovereignty under the Fifth Amendment.⁹⁴ With respect to international litigation, this Comment asserts that a due process analysis should be even more flexible under the Fifth Amendment because the interests of a foreign defendant need to be balanced with the interests of the United States itself.⁹⁵ Particularly in cases where Congress has enacted a federal statute that allows the United States to assert jurisdiction over a defendant, federal policy

⁹⁰ *Id.* at 113 n.* ("We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits.").

⁹¹ *Omni Capital Int'l v. Rudolf Wolff Co.*, 484 U.S. 97, 102 n.5 (1987).

⁹² *Id.* ("We have no occasion' to consider the constitutional issues raised by this theory." (quoting *Asahi*, 480 U.S. at 113 n.*)).

⁹³ See, e.g., Robert Haskell Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 34 (1982) ("[A]s to foreign affairs . . . there are acknowledged 'differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs'" (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936))); Perdue, *supra* note 20, at 460–61 (noting that in the international law context, the burdens and state interest should be analyzed differently than in the interstate context).

⁹⁴ *J. McIntyre Mach., Ltd., v. Nicastro*, 564 U.S. 873, 884 (2011) ("For jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of an individual State. That would be an exceptional case[. . .]"); *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 294 (3d Cir. 1985); *Handley v. Ind. & Mich. Elec. Co.*, 732 F.2d 1265, 1271 (6th Cir. 1984).

⁹⁵ See *Asahi*, 480 U.S. at 113–14 (holding that in order to determine whether jurisdiction over a defendant is reasonable under the Fifth Amendment, the Court must weigh the burden on the defendant in litigating in the forum, the federal interest in the litigation, and the plaintiff's interest in obtaining relief); Perdue, *supra* note 20, at 468–70.

behind the statute's enactment should be given consideration in a due process analysis.⁹⁶

II. ASSERTING JURISDICTION OVER FOREIGN DEFENDANTS UNDER THE ATA

As discussed in Part I, a court must have both a statutory and a constitutional basis for asserting personal jurisdiction over a defendant.⁹⁷ Victims of international terrorism often have difficulty securing personal jurisdiction over the organizations that contributed to their loss. Federal Rule of Civil Procedure 4(k)(2)⁹⁸ helps these plaintiffs assert a statutory basis for jurisdiction.⁹⁹

A. *Statutory Basis*

The statutory basis for foreign defendants—when they are outside the reach of a federal long-arm provision or a state long-arm statute—is granted by Federal Rule of Civil Procedure 4(k)(2).¹⁰⁰ Rule 4(k)(2) requires the plaintiff asserting jurisdiction over a defendant to satisfy three elements: (1) the claim arises under federal law; (2) no state court of general jurisdiction has personal jurisdiction over the defendant; and (3) the federal court's exercise of personal jurisdiction is "consistent with the Constitution or other federal law."¹⁰¹ Plaintiffs who bring claims under the ATA must satisfy each of these three requirements.¹⁰² Thus, Rule 4(k)(2) serves as a statutory basis for asserting jurisdiction in federal court over foreign defendants that have allegedly committed terrorist attacks abroad.¹⁰³ Each requirement is addressed in turn.

⁹⁶ Perdue, *supra* note 20, at 469 ("[S]tatute[s] should be afforded substantial weight as a legislative articulation of federal social policy." (quoting WRIGHT, MILLER & STEINMAN, *supra* note 31, at § 1068.1, at 625)).

⁹⁷ See *supra* Part I.

⁹⁸ See *supra* Part I (discussing the implication of Rule 4(k)(2)).

⁹⁹ See *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 304 F. Supp. 2d 232, 239 (D.R.I. 2004) (quoting *Hearing*, *supra* note 3, (testimony of Joseph A. Morris)).

¹⁰⁰ FED. R. CIV. P. 4(k)(2) ("*Federal Claim Outside State-Court Jurisdiction*. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws.").

¹⁰¹ *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76, 92 (D.R.I. 2001) (first citing *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 38 (1st Cir. 1999); then citing Fed. R. Civ. P. 4(k)(2)).

¹⁰² Federal Rule 4(k)(2) "fill[s] a gap in the enforcement of federal law for courts to exercise personal jurisdiction over defendants with sufficient contacts with the United States generally, but insufficient contacts with any one state in particular." *Burnett v. Al Baraka Inv. & Dev. Corp. (In re Terrorist Attacks on September 11, 2001)*, 349 F. Supp. 2d 765, 807 (S.D.N.Y. 2005) (quoting FED. R. CIV. P. 4(k)(2) advisory committee's note).

¹⁰³ *Mwani v. bin Laden*, 417 F.3d 1, 10 (D.C. Cir. 2005).

1. Claim Arising Under Federal Law

First, Federal Rule 4(k)(2) requires that the plaintiff's claim arise under federal law.¹⁰⁴ The ATA is a federal law that grants plaintiffs a civil cause of action for bringing tort claims against terrorists or entities affiliated with terrorism.¹⁰⁵ Thus, United States plaintiffs who bring claims under the ATA against foreign defendants satisfy the first requirement of Federal Rule 4(k)(2).

2. No State Court Has Jurisdiction

Second, Federal Rule 4(k)(2) requires that there be no state in which a defendant is subject to personal jurisdiction constitutionally.¹⁰⁶ Courts vary regarding which party has the burden of proof on this issue.¹⁰⁷ Some federal circuits place this burden on the defendant, meaning that a defendant who contends he cannot be subject to suit in a particular state and does not concede to jurisdiction in another state may be statutorily subjected to Rule 4(k)(2) in federal court.¹⁰⁸ In recent cases brought against the PLO and the PA in federal district court, neither the PLO nor the PA conceded to jurisdiction in any state.¹⁰⁹ Thus, plaintiffs who brought claims under the ATA satisfied the second requirement of Federal Rule 4(k)(2).

3. Consistent with the Constitution or Other Federal Law

Third, Federal Rule 4(k)(2) requires that the court's exercise of personal jurisdiction is consistent with the Constitution or other federal law. Courts make this determination based on the defendant's aggregate contacts with the United States.¹¹⁰ An aggregate contacts analysis should thereby apply when due process

¹⁰⁴ FED. R. CIV. P. 4(k)(2).

¹⁰⁵ 18 U.S.C. § 2333 (2012).

¹⁰⁶ FED. R. CIV. P. 4(k)(2).

¹⁰⁷ See FREER *supra* note 25, at 157 & nn.77–78. Some courts require the plaintiff to show that the defendant is not subject to personal jurisdiction in any state. *Id.* The majority of courts, however, shift the burden to the defendant and require the defendant to identify any state in which he would be subject to personal jurisdiction. *Id.*

¹⁰⁸ See *Mwani*, 417 F.3d at 11. The D.C. Circuit adopted the view employed by the Fifth and Seventh Circuits that “so long as a defendant does not concede to jurisdiction in another state, a court may use 4(k)(2) to confer jurisdiction.” *Id.* (quoting *Adams v. Unione Mediterranea Di Sicurtà*, 364 F.3d 646, 651 (5th Cir. 2004)).

¹⁰⁹ See *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 239 (D.D.C. 2015); *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 21 (D.D.C. 2015); *Safra v. Palestinian Auth.*, 82 F. Supp. 3d 37, 39 (D.D.C. 2015); *Gilmore v. Palestinian Interim Self-Gov’t Auth.*, 8 F. Supp. 3d 9, 12 (D.D.C. 2014); *Sokolow v. Palestinian Liberation Org.*, No. 04 Civ. 397(GBD), 2014 WL 6811395, at *1 (S.D.N.Y. Dec. 1, 2014).

¹¹⁰ See *Mwani*, 417 F.3d at 11 (“Whether the exercise of jurisdiction is consistent with the Constitution turns on whether a defendant has sufficient contacts with the nation as a whole to satisfy due process.”).

is assessed under the Fifth Amendment.¹¹¹ Thus, in order to satisfy Fifth Amendment Due Process requirements, plaintiffs in ATA cases only need to show that defendants have minimum contacts with the United States, rather than any one particular state.¹¹²

In addition to finding a statutory basis, a court must also find a constitutional basis for asserting jurisdiction over a defendant.¹¹³

B. Constitutional Basis

In federal question cases involving foreign defendants, district courts should assess the constitutionality of personal jurisdiction over a defendant under the Fifth Amendment Due Process Clause.¹¹⁴ Under this clause, courts should determine whether jurisdiction is proper based on a foreign defendant's aggregate contacts with the United States.¹¹⁵ This Comment argues that constitutional authority derived from the Fifth Amendment Due Process Clause should be broader than that derived from the Fourteenth Amendment Due Process Clause. This is so because the Fifth Amendment is rooted in federal, not state, sovereign power.¹¹⁶

C. Previous ATA Cases

Courts have examined previous claims under the ATA (asserted against defendants other than the PLO and the PA) by assessing a defendant's contacts with the United States as a whole.¹¹⁷ Doing so has afforded American plaintiffs the opportunity to litigate their cases in the United States. For example, in *Wultz*

¹¹¹ *Id.*

¹¹² *In re Terrorist Attacks* on Sept. 11, 2001, 349 F. Supp. 2d 765, 807 (S.D.N.Y. 2005).

¹¹³ *See supra* Part I.

¹¹⁴ *See, e.g., Mwani*, 417 F.3d at 11; *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 304 F. Supp. 2d 232, 248 (D.R.I. 2004).

¹¹⁵ *E.g., Mwani*, 417 F.3d at 11 (“Whether the exercise of jurisdiction is ‘consistent with the Constitution’ for purposes of Rule 4(k)(2) depends on whether a defendant has sufficient contacts with the United States as a whole to justify the exercise of personal jurisdiction under the Due Process Clause of the Fifth Amendment.” (citation omitted)); *Ungar*, 153 F. Supp. 2d at 87.

¹¹⁶ *See United States v. Bennett*, 232 U.S. 299, 306 (1914) (holding that the constitutional barriers that border the states and keep them from infringing on the rights of other states do not apply to the United States government, which has broader powers by virtue of its sovereignty); Ronan E. Degan & Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 818 (1988) (“Constitutional authority is premised on sovereign territorial power over the defendant through his contacts with the nation.”).

¹¹⁷ *E.g., Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 33 (D.D.C. 2010); *Morris v. Khadr*, 415 F. Supp. 2d 1323, 1334–36 (2006); *In re Terrorist Attacks*, 349 F. Supp. 2d at 806–07.

v. Islamic Republic of Iran, family members of an American citizen killed in a suicide bombing in Israel brought an action under the ATA against a Chinese bank alleged to have executed wire money transfers for the terrorist organization responsible for the bombing.¹¹⁸ The court found general jurisdiction over the bank constitutional on the basis that the bank did business with and held assets in the United States.¹¹⁹ Similarly, in *Morris v. Khadr*, an American soldier wounded in Afghanistan, along with the heirs of a soldier killed in the same attack, sued a member of al Qaeda under the ATA.¹²⁰ The Utah District Court held that general personal jurisdiction over the defendant was constitutional because he had the requisite minimum contacts with the United States.¹²¹ Lastly, in *In re Terrorist Attacks on September 11, 2001*, family members, heirs, and insurance carriers of the victims lost in the September 11 terrorist attacks brought actions under the ATA against al Qaeda and entities that allegedly provided support to al Qaeda.¹²² Distinguishing state due process concerns from those of federal due process, the Southern District of New York held that “[t]he exercise of personal jurisdiction under Rule 4(k) require[d] contacts with the United States as a whole pursuant to the Fifth Amendment.”¹²³

The next Part of this Comment discusses recent cases brought by United States plaintiffs under the ATA and the bases used by two district courts for asserting jurisdiction over common defendants, the PLO and the PA.

III. CURRENT CASES UNDER THE ATA

A. *Factual Backgrounds*

In the span of thirteen years, United States plaintiffs have filed five civil lawsuits on behalf of American family members killed abroad in Israel while vacationing or residing in the country.¹²⁴ The claims brought under the ATA

¹¹⁸ 755 F. Supp. 2d at 18.

¹¹⁹ *Id.* at 33 (“The alleged jurisdictional fact that BOC does extensive business in the United States through its own branches supports a finding of general personal jurisdiction.”).

¹²⁰ *Morris*, 415 F. Supp. 2d at 1326.

¹²¹ *Id.* at 1335–36 (“In terrorism cases, courts have employed the ‘effects doctrine’ to establish the requisite minimum contacts for personal jurisdiction. Under this doctrine, ‘jurisdiction may attach if the defendant’s conduct is aimed at or has an effect in the forum.’” (quoting *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998))).

¹²² 349 F. Supp. 2d at 779–80.

¹²³ *Id.* at 810.

¹²⁴ See *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 239 (D.D.C. 2015); *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 20–21 (D.D.C. 2015); *Safra v. Palestinian Auth.*, 82 F. Supp. 3d 37, 39 (D.D.C. 2015);

against the PLO and the PA are under a theory of vicarious liability for aiding and abetting international terrorism.¹²⁵ The plaintiffs allege that the PLO and the PA supported terrorism in and near Israel to influence United States public opinion and policy.¹²⁶ Of the five lawsuits filed against the PLO and the PA, four were filed in the D.C. District Court. The plaintiffs chose this particular forum because the defendants have offices, conduct public relations campaigns, and fundraise nationally in Washington, D.C.¹²⁷ The only case not filed in the D.C. District Court was filed in the Southern District of New York.¹²⁸ The PLO maintains an office and an agent in New York.¹²⁹

The procedural history of these cases is significant because it shows the evolution of the defendants' challenges to personal jurisdiction. In 2006, the D.C. District Court in *Estate of Klieman v. Palestinian Authority* first determined it could exercise general personal jurisdiction over the PLO and the PA based on their "continuous and systematic" contacts with the United States.¹³⁰ In 2008, the defendants in *Klieman* moved to reconsider the court's decision.¹³¹ Their motion for reconsideration was denied.¹³² In 2015, the defendants again moved for reconsideration on the personal jurisdiction rulings based on the Supreme Court's decision in *Daimler*.¹³³ This time, the court dismissed the case with prejudice in favor of the defendants.¹³⁴

In *Gilmore v. Palestinian Interim Self-Government Authority*, the D.C. District Court ultimately denied defendants PLO and PA's motion to dismiss for lack of personal jurisdiction after twelve years of contentious litigation, holding that defendants failed to assert their jurisdictional defense—not being "at home" in the forum—when such a defense first became available under *Goodyear*.¹³⁵

Gilmore v. Palestinian Interim Self-Gov't Auth., 8 F. Supp. 3d 9, 11 (D.D.C. 2014); *Sokolow v. Palestine Liberation Org.*, 583 F. Supp. 2d 451, 454–55 (S.D.N.Y. 2008).

¹²⁵ See *Klieman*, 82 F. Supp. 3d at 239; *Livnat*, 82 F. Supp. 3d at 21; *Safra*, 82 F. Supp. 3d at 39; *Gilmore*, 8 F. Supp. 3d at 11; *Sokolow*, 583 F. Supp. 2d at 454.

¹²⁶ See, e.g., *Safra*, 82 F. Supp. 3d at 41 n.6. Plaintiffs alleged that by continuing to orchestrate acts of terror against American citizens in Israel, the PA was trying to force the United States into pressuring Israel to make peaceful concessions with the PA. *Id.*

¹²⁷ See *Klieman*, 82 F. Supp. 3d at 245; *Livnat*, 82 F. Supp. 3d at 30; *Safra*, 82 F. Supp. 3d at 48–49.

¹²⁸ See *Sokolow*, 583 F. Supp. 2d at 451.

¹²⁹ *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1461 (S.D.N.Y. 1988).

¹³⁰ 82 F. Supp. 3d at 239.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 250.

¹³⁵ An interesting question exists as to whether defendants in these ATA cases should have been tipped off to a new standard of general jurisdiction after *Goodyear*. See *Gilmore*, 8 F. Supp. 3d at 15 ("In *Goodyear* . . .

In *Klieman*, the D.C. District Court had previously *denied* the PA's motions to dismiss for lack of personal jurisdiction up until *Daimler*.¹³⁶ After *Daimler*, the D.C. District Court *granted* the PA's motions to dismiss for lack of personal jurisdiction, finding that neither the PLO nor the PA was "at home" in the United States.¹³⁷ Finally, in *Sokolow v. Palestine Liberation Organization*, the Southern District Court of New York *denied* defendants PLO and PA's motions for dismissal and summary judgment for lack of personal jurisdiction, finding that defendants were, in fact, "at home" in the United States.¹³⁸ All of these five cases are currently up for appeal.¹³⁹

B. Federal District Court Split on the Issue of General Jurisdiction over the PLO and the PA

A split between the D.C. District Court and the Southern District Court of New York has emerged on whether jurisdiction over defendants PLO and PA is proper in light of *Daimler*.¹⁴⁰ The D.C. District Court maintains the position that jurisdiction over defendants PLO and PA is improper under *Daimler* because the PLO and the PA are not "at home" in the United States.¹⁴¹ The D.C. District Court held the relevant forum for assessing personal jurisdiction was the United States, but did not find the PLO or the PA to have sufficient contacts with the United States so as to render the organizations "at home" in the United States.¹⁴²

the Supreme Court made crystal clear that a foreign defendant's 'continuous activity of some sorts within a state . . . is not enough to support' general jurisdiction unless that activity is so 'continuous and systematic' as to render [it] *essentially at home* in the forum State." (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 927 (2011))). The D.C. District Court asserted that Defendants waived their right to assert their jurisdictional defense by failing to file a motion to dismiss in 2011 when *Goodyear* announced the "at home" standard. *Id.* By waiting to file their motion to dismiss two and a half years after *Goodyear*, and relying on *Daimler* as intervening change in the law, the D.C. District Court in *Gilmore* held that defendants had forfeited their jurisdictional defense. *Id.* at 17. *But see* 7 W. 57th St. Realty Co. v. Citigroup, Inc., No. 13 CIV. 981 PGG, 2015 WL 1514539, at *6 (S.D.N.Y. Mar. 31, 2015) (holding that *Daimler* marked an intervening change in the law and thus made available a previously unavailable personal jurisdiction defense).

¹³⁶ *Klieman*, 82 F. Supp. 3d at 241.

¹³⁷ *Id.* at 246; *see also* *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 29–30 (D.D.C. 2015); *Safra v. Palestinian Auth.*, 82 F. Supp. 3d 37, 48 (D.D.C. 2015).

¹³⁸ No. 04 Civ. 397(GBD), 2014 WL 6811395, at *2 (S.D.N.Y. Dec. 1, 2014).

¹³⁹ *See supra* note 5.

¹⁴⁰ *Compare* *Sokolow*, 2014 WL 6811395, at *2 (holding jurisdiction over defendants was proper), *with* *Klieman*, 82 F. Supp. 3d at 250 (holding jurisdiction over defendants was not proper).

¹⁴¹ *See Klieman*, 82 F. Supp. 3d at 246; *Livnat*, 82 F. Supp. 3d at 29; *Safra*, 82 F. Supp. 3d at 48 (all holding that personal jurisdiction over the PLO and the PA was unconstitutional in light of *Daimler*). The D.C. District Court denied one personal jurisdiction challenge in *Gilmore*, holding that the defendants waived the right to assert this defense when it first became available after *Goodyear*. *See supra* note 135 and accompanying text.

¹⁴² *See infra* note 172 and accompanying text.

Conversely, the Southern District of New York in *Sokolow* ruled that personal jurisdiction over the PLO and the PA was proper not only under *Daimler*, but also under another case decided within the Second Circuit, *Gucci America, Inc. v. Weixing Li*.¹⁴³ In *Gucci*, the Second Circuit reiterated *Daimler*'s holding, but made reference to certain instances, or "exceptional case[s]," whereby *Daimler*'s framework may be inapplicable.¹⁴⁴ The Southern District of New York determined that the plaintiff's lawsuit in *Sokolow* was an "exceptional case" of the kind *Daimler* and *Gucci* specifically reference.¹⁴⁵ The court held that because defendants were not foreign corporations, they could not be subject to a personal jurisdiction analysis that based jurisdiction on their place of incorporation or principal place of business.¹⁴⁶ Thus, the court determined that jurisdiction over the PLO and the PA was constitutional under both *Daimler* and *Gucci* based on defendants' "continuous and systematic business and commercial contacts within the United States" as a whole.¹⁴⁷

The D.C. District Court's application of *Daimler* to ATA cases differs from that of the Southern District of New York's.¹⁴⁸ Although both districts cite *Daimler* as precedent, they come out differently on the law.¹⁴⁹ According to the D.C. District Court, the Southern District of New York misinterpreted the question *Daimler* poses and incorrectly placed the jurisdictional burden on defendants to assert a home outside the United States, which they could not do.¹⁵⁰ Since defendants could not articulate a place where they were "more at

¹⁴³ *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122 (2d Cir. 2014); *Sokolow*, 2014 WL 6811395, at *2.

¹⁴⁴ See *Gucci*, 768 F.3d at 135 ("Aside from an 'exceptional case' . . . a corporation is at home (and thus subject to general jurisdiction, consistent with due process) only in a state that is the company's formal place of incorporation or its principal place of business." (citing *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 & n.19 (2014))); *Fed. Home Loan Bank of Boston v. Ally Fin., Inc.*, No. 11-10952-GAO, 2014 WL 4964506, at *1 (D. Mass. Sept. 30, 2014) (holding that no exceptional case existed for a defendant corporation that was not incorporated in Massachusetts and did not have its principal places of business there); see also *supra* note 94 (discussing the idea of an exceptional case).

¹⁴⁵ *Sokolow*, 2014 WL 6811395, at *2.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at *2. The court noted that "ATA litigation often involves foreign individuals and entities, and thereby, a statutory cause of action for international terrorism exists. There is a strong inherent interest of the United States and Plaintiffs in litigating ATA claims in the United States." *Id.* at *2 n.1.

¹⁴⁸ See *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 246 (D.D.C. 2015); *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 31 (D.D.C. 2015); *Safra v. Palestinian Auth.*, 82 F. Supp. 3d 37, 49 (D.D.C. 2015).

¹⁴⁹ The Southern District of New York takes the position that under *Daimler*, personal jurisdiction over defendants PLO and PA is proper. The D.C. District Court disagrees. See *supra* notes 140–41.

¹⁵⁰ See *Klieman*, 82 F. Supp. 3d at 246; *Safra*, 82 F. Supp. 3d at 49. For a discussion on the issue of which party carries this burden, see FREER, *supra* note 107.

home” than the United States, the Southern District of New York concluded that general jurisdiction over the defendants was proper.¹⁵¹

IV. DAIMLER IS THE INCORRECT STANDARD TO APPLY TO CASES BROUGHT UNDER THE ATA

This Part discusses why *Daimler*’s holding does not apply to the recent cases brought under the ATA. First, section A describes how *Daimler* only discussed what constitutes being “at home” for individuals and corporations, categories of which the PLO and the PA do not belong. Section B explains that *Daimler* answered a question about the personal jurisdiction limitations imposed by the Due Process Clause of the Fourteenth Amendment.¹⁵² This distinction matters because, as section C demonstrates, personal jurisdiction over the PLO and the PA in cases brought under the ATA should be analyzed under the Fifth Amendment Due Process Clause. Finally, section D discusses the United States’ strong federal interest in adjudicating ATA claims in its courts. Section D also argues that important policy considerations would be overlooked if *Daimler* controlled the jurisdictional issues in ATA cases.

A. *Daimler Only Illustrates the Law for Individuals and Corporations*

As mentioned in Part I.A.2, *Daimler* provided two illustrations for when a defendant is “at home” in the forum and thus subject to general jurisdiction.¹⁵³ For an individual, it is his or her domicile;¹⁵⁴ for a corporation, it is the corporation’s place of incorporation and the principal place of business.¹⁵⁵ The Court did not suggest or provide a framework for identifying where any other type of entity may be subject to general jurisdiction.¹⁵⁶

Daimler stands for the proposition that out-of-state corporations should be immune from suit in the United States unless they are “at home” in the United

¹⁵¹ *Sokolow*, 2014 WL 6811395 at *2. The PLO identified various contacts outside of the United States, such as “several embassies, missions and delegations that were larger than the PLO Delegation [in the United States].” *Id.* The PLO still concludes “that the PLO is not at home in any one of those countries, nor does the PLO make such a claim.” *Id.*

¹⁵² *See Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014) (“The question presented is whether the Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over *Daimler* in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint.”).

¹⁵³ *See* Part I.A.2.

¹⁵⁴ *Daimler*, 134 S. Ct. at 760.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 761–62 (expressing its concern with allowing “exorbitant exercises of all-purpose jurisdiction”).

States.¹⁵⁷ The PLO and the PA, however, are not out-of-state corporations.¹⁵⁸ The PA is considered a non-sovereign government entity that is controlled by the PLO, a political organization.¹⁵⁹ District courts have previously treated both groups as unincorporated associations.¹⁶⁰ Therefore, even if this characterization is accurate, *Daimler* makes no mention of how to treat such entities.¹⁶¹ Assuming, arguendo, that *Daimler* applies to the cases brought under the ATA, the D.C. District Court has nonetheless expanded *Daimler*'s holding to include an assessment of where a non-sovereign government entity, treated as an unincorporated association, is "at home."¹⁶²

B. *Daimler Is a Fourteenth Amendment Due Process Case*

Daimler involved a foreign plaintiff who sued a foreign defendant in California based on foreign conduct.¹⁶³ In light of those facts, the Court answered the question of whether general jurisdiction over *Daimler* in California was proper.¹⁶⁴ In determining it was not, the Court relied on the Fourteenth Amendment Due Process Clause.¹⁶⁵ As discussed in Part I.A., the Fourteenth Amendment Due Process Clause serves as a check on the states to ensure one state does not encroach upon the power of another state.¹⁶⁶ *Daimler* did not

¹⁵⁷ Stephen B. Kinnaird et al., *Supreme Court in Daimler AG v. Bauman Limits General Jurisdiction over Foreign Companies*, 53 INFRASTRUCTURE (Spring 2014), http://www.americanbar.org/publications/infrastructure/2013-14/spring/supreme_court_daimler_ag_v_bauman_limits_general_jurisdiction_over_foreign_companies.html.

¹⁵⁸ See, e.g., *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 228 F. Supp. 2d 40, 49 (D.R.I. 2002).

¹⁵⁹ *Id.*

¹⁶⁰ It has been determined that the PLO fits the bill of an unincorporated association because "[i]t is composed of individuals, without a legal identity apart from its membership, formed for specific objectives." *Ungar*, 153 F. Supp. 2d at 89 (quoting *Klinghoffer v. S.N.C. Achille Lauro Ed.*, 739 F. Supp. 854, 858 (S.D.N.Y. 1990)); see *Sokolow v. Palestinian Liberation Org.*, No. 04 Civ. 397(GBD), 2014 WL 6811395, at *2 (S.D.N.Y. Dec. 1, 2014); *Estate of Klieman v. Palestinian Auth.*, 467 F. Supp. 2d 107, 113–14 (D.D.C. 2006).

¹⁶¹ See *Daimler*, 134 S. Ct. at 760.

¹⁶² The District Court for the District of Columbia likens the application of the *Daimler/Goodyear* framework in these cases to the application in another case within its circuit, *Toumazou v. Turkish Republic of N. Cyprus*, 71 F. Supp. 3d 7 (D.D.C. 2014). According to the *Toumazou* court, the plaintiff's allegations indicated that the Turkish Republic of Northern Cyprus (TRNC) was a democratic republic, unrecognized by the United States, and was "at home" in Northern Cyprus, not the District of Columbia. *Id.* at 15. The *Safra* court analogized the PA to the TRNC, claiming that because the plaintiff's allegations in *Safra* were premised on the PA's control over a religious site in the West Bank, the PA was therefore "at home" in the West Bank. *Safra v. Palestinian Auth.*, 82 F. Supp. 3d 37, 48 (D.D.C. 2015). Interestingly, the plaintiffs in *Safra* never tried to make a prima facie showing that the PA was "at home" in the District of Columbia. See *id.*

¹⁶³ See *supra* Part I.A.2.

¹⁶⁴ *Daimler*, 134 S. Ct. at 760.

¹⁶⁵ See *supra* note 67 and accompanying text.

¹⁶⁶ See *supra* Part I.A.

consider whether the federal government has the power to assert jurisdiction over a foreign entity under the Fifth Amendment.

The five cases brought in federal district court under the ATA specifically require federal courts to address whether the federal government has the power to assert jurisdiction over the PLO and the PA *under the Fifth Amendment*.¹⁶⁷ None of these cases require the courts to determine whether the PLO and the PA are “at home” in either the District of Columbia or New York.

In *Safra*, *Livnat*, and *Klieman*, the D.C. District Court applied the *Goodyear/Daimler* Fourteenth Amendment framework to federal cases concerning the Fifth Amendment.¹⁶⁸ In reaching its ultimate conclusion, the D.C. District Court stated that prior to the Supreme Court’s decisions in *Goodyear* and *Daimler*, courts within the D.C. Circuit exercised general jurisdiction over a foreign corporation if its “contacts with the District [were] so continuous and systematic that it could [have] foresee[n] being haled into a court in the District of Columbia.”¹⁶⁹ But rather than ask whether defendants PLO and PA could now be considered “at home” in the District of Columbia, per *Daimler* and *Goodyear*, the D.C. District Court asked whether the PLO and the PA were “at home” in the *United States*.¹⁷⁰ By assessing defendant’s contacts with the United States as a whole, the D.C. District Court implicitly agreed that the relevant jurisdictional inquiry was under the Fifth Amendment, yet nonetheless applied a Fourteenth Amendment framework to arrive at its conclusion.¹⁷¹

C. *Pre-Daimler, District Courts Asserted General Jurisdiction over the PLO and the PA Under the Fifth Amendment*

Prior to *Daimler*, every federal court that examined whether the PLO and the PA have sufficient minimum contacts with the United States as a whole to satisfy

¹⁶⁷ See e.g., *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 25 (D.D.C. 2015) (“Whether the exercise of jurisdiction is “consistent with the Constitution” for purposes of Rule 4(k)(2) depends on whether a defendant has sufficient contacts with the United States as a whole to justify the exercise of personal jurisdiction under the Due Process Clause of the Fifth Amendment.’ . . . Accordingly, the inquiry in this case is whether the Palestinian Authority has sufficient contacts with the United States as a whole.” (quoting *Mwani v. bin Laden*, 417 F.3d 1, 11 (D.C. Cir. 2005))).

¹⁶⁸ See *supra* note 148.

¹⁶⁹ *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 242 (D.D.C. 2015) (quoting *AGS Int’l Servs. S.A. v. Newmont USA Ltd.*, 346 F. Supp. 2d 64, 74 (D.D.C. 2004)).

¹⁷⁰ See, e.g., *id.* at 245.

¹⁷¹ See *Safra v. Palestinian Auth.*, 82 F. Supp. 3d 37, 46 (D.D.C. 2015) (“The only question is how to properly apply this standard to an organization like the Palestinian Authority, not whether the ‘essentially at home’ standard is the correct standard.”).

due process under the Fifth Amendment has concluded they do.¹⁷² In *Biton v. Palestinian Interim Self-Government Authority*, two American plaintiffs brought actions under the ATA against the PLO and the PA for involvement in a school bus bombing in the Gaza Strip.¹⁷³

The D.C. District Court concluded that it had general jurisdiction over both the PLO and the PA because both entities had sufficient minimum contacts with the United States as a whole.¹⁷⁴ Likewise, in *Estates of Ungar ex rel. Strachman v. Palestinian Authority*, administrators of the Ungars' estates brought an action under the ATA against the PLO and the PA.¹⁷⁵ Concluding that jurisdiction was proper, the Rhode Island District Court determined both defendants had minimum contacts with the United States as a whole.¹⁷⁶ Although the D.C. District Court acknowledged that cases brought under the ATA should be analyzed under Fifth Amendment Due Process standards,¹⁷⁷ it nonetheless failed to follow its own precedent in light of *Daimler*. The D.C. District Court mistakes the fundamental principles of Fourteenth Amendment Due Process jurisprudence with those of the Fifth Amendment, which in turn has drastic effects on the outcome of plaintiffs' cases.

Both the D.C. District Court and Southern District of New York allow a case that cites Fourteenth Amendment Due Process considerations to control their holdings in Fifth Amendment ATA cases. By citing *Daimler* as controlling law in *Sokolow*, *Klieman*, *Safra*, *Livnat*, and *Gilmore*, both the D.C. District Court and the Southern District of New York conflate the federal government's power under the Fifth Amendment with that of the state's under the Fourteenth Amendment.¹⁷⁸ Although the Southern District of New York in *Sokolow* ultimately held that general jurisdiction over the PLO and the PA was

¹⁷² See *Sokolow v. Palestinian Liberation Org.*, No. 04 Civ. 397(GBD), 2014 WL 6811395, at *1 (S.D.N.Y. Dec. 1, 2014) (holding that “[t]his Court . . . agree[d] with every federal court to have considered the issue that the totality of activities in the United States by the PLO and the PA justify[d] the exercise of general personal jurisdiction.” (citation omitted)); see, e.g., *Knox v. Palestine Liberation Org.*, 229 F.R.D. 65, 67–68 (S.D.N.Y. 2005); *Biton v. Palestinian Interim Self-Gov’t Auth.*, 310 F. Supp. 2d 172, 179–80 (D.D.C. 2004); *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76, 91 (D.R.I. 2001).

¹⁷³ 310 F. Supp. 2d at 175–76.

¹⁷⁴ *Id.* at 179. In determining the PA had sufficient minimum contacts with the United States, the court found that the PA maintains offices and agents in the United States, conducts extensive activities within the United States, has employed lobbying groups in the United States, and had entered into a contract with a United States IT corporation. *Id.* at 179–80.

¹⁷⁵ 153 F. Supp. 2d 76, 82 (D.R.I. 2001).

¹⁷⁶ *Id.* at 91.

¹⁷⁷ See *supra* note 167 and accompanying text.

¹⁷⁸ For a discussion on the reasons why the due process limitations under the Fifth and Fourteenth Amendments should be viewed separately, see *Perdue*, *supra* note 20, at 456–70.

constitutional, the court arrived at its conclusion through *Daimler*.¹⁷⁹ By determining the PLO and the PA could not identify any other place where it was “‘at home’ based on greater business and commercial activities than are conducted in the United States,” the court determined that general jurisdiction was thus proper.¹⁸⁰ Still imputing *Daimler*’s “at home” language into its analysis, the *Sokolow* court ruled that the record in the case was “insufficient to conclude that [the PLO or the PA] was ‘at home’ in a particular jurisdiction other than the United States.”¹⁸¹

To alleviate this confusion, the D.C. District Court and Southern District of New York should have implemented a more traditional Fifth Amendment national contacts approach to their analysis.¹⁸² An assessment of whether a defendant’s national contacts with the United States are sufficiently “continuous and systematic” to justify the assertion of jurisdiction should be the focus of the national contacts approach under the Fifth Amendment.¹⁸³ An additional consideration should be whether the forum is fair and reasonable.¹⁸⁴ The D.C. District Court and Southern District of New York never should have mentioned *Daimler*, except to state that it does not control the application of personal jurisdiction over defendants in ATA cases. This approach not only would have set the record straight for future district courts faced with these jurisdictional questions, but it also would have given due weight to the policy considerations underlying ATA cases.

D. Policy Considerations

The United States holds a strong interest in granting victims of international terrorism the chance to litigate their civil claims in court.¹⁸⁵ The legislative

¹⁷⁹ *Sokolow v. Palestinian Liberation Org.*, No. 04 Civ. 397(GBD), 2014 WL 6811395, at *2 (S.D.N.Y. Dec. 1, 2014).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² See *supra* notes 117–23 and accompanying text.

¹⁸³ See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952).

¹⁸⁴ *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 292 (3d Cir. 1981) (Gibbons, J., dissenting) (“The fifth amendment requires only that the forum be a fair and reasonable place at which to compel the defendant’s appearance, and that he have notice and a reasonable opportunity to be heard.”).

¹⁸⁵ See *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 474, 492 (E.D.N.Y. 2012) (“[B]oth the Executive and Legislative Branches have expressly endorsed the concept of suing terrorist organizations in federal court.” (quoting *Klinghoffer v. S.N.C. Achille Lauro Ed.*, 937 F.2d 44, 49 (2d Cir. 1991))).

history of the ATA reveals just how strong that interest is.¹⁸⁶ As stated in the Senate Judiciary Committee's report in its discussion of § 2333, the ATA was enacted to open the "courthouse door to victims of international terrorism."¹⁸⁷ In particular, the case of *Klinghoffer v. S.N.C. Achille Lauro Ed*¹⁸⁸ was a major impetus in the statute's drafting.¹⁸⁹ Up until *Klinghoffer*, the United States lacked a comprehensive legal response to international terrorism.¹⁹⁰ *Klinghoffer* involved a terrorist attack aboard a cruise ship in international waters.¹⁹¹ At the time, the sole reason the United States was able to assert jurisdiction over defendant PLO was because of maritime law.¹⁹² After *Klinghoffer*, Congress acted to ensure United States citizens were able to seek redress in their own country's courts by opening the doors to jurisdiction as widely as possible under the Fifth Amendment.¹⁹³

Applying *Daimler*'s "at home" standard to cases under the ATA would virtually ensure that victims of international terrorism never achieve civil justice in United States courts. The ATA cases, unlike *Daimler*, all involve United States plaintiffs.¹⁹⁴ Under *Daimler*, it would be exceedingly difficult for a

¹⁸⁶ Although Congress acknowledged that "[e]nactment of the bill would marginally increase the number of cases in U.S. District Courts," it was still important to "allow any U.S. national injured in his person, property, or business by an act of international terrorism to bring a civil action in a U.S. District Court." *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 421 (E.D.N.Y. 2009) (quoting H.R. REP. NO. 102-1040, at 5, 9 (1992)).

¹⁸⁷ S. REP. NO. 102-342, at 45 (1992).

¹⁸⁸ 937 F.2d 44 (2nd Cir. 1991).

¹⁸⁹ See *Goldberg*, 660 F. Supp. 2d at 421 ("An essential inspiration for the ATA was a then-recent case of *Klinghoffer v. S.N.C. Achille Lauro* . . . in which relatives of an individual murdered during the hijacking of the Achille Lauro cruise ship brought suit against the Palestine Liberation Organization . . . for its alleged responsibility for the hijacking.").

¹⁹⁰ See *Gill*, 893 F. Supp. 2d at 494 ("The Committee believes that there is a need for a companion civil legal cause of action for American victims of terrorism." (quoting H.R. REP. NO. 102-1040, at 5 (1992))). Senator Charles Grassley, keenly aware of the jurisdictional hurdles barring a robust legal response to international terrorism, reintroduced the ATA to provide victims with the necessary legal tools. See 137 CONG. REC. S4511-04 (1991) (statement of Sen. Grassley) ("The ATA removes the jurisdictional hurdles in the courts confronting victims and it empowers victims with all the weapons available in civil litigation, including: [s]ubpoenas for financial records, banking information, and shipping receipts—this bill provides victims with the tools necessary to find terrorists' assets and seize them.").

¹⁹¹ *Klinghoffer*, 937 F.2d at 46.

¹⁹² See H.R. REP. NO. 102-1040, at 5 (1992) ("Only by virtue of the fact that the [Klinghoffer] attack violated certain Admiralty 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. . . . In order to facilitate civil actions against such terrorists the Committee recommends [this bill].").

¹⁹³ See *Hearing, supra* note 3, at 17 (statement of Alan Kreczko) ("[F]ew 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 benefitting from investments in the U.S. and from soliciting funds within the U.S.").

¹⁹⁴ See *supra* Part IV.B.

plaintiff to allege facts sufficient to show that any organization which funds or supports terrorism abroad is “at home” in the United States. Should *Daimler* control Fifth Amendment Due Process concerns brought under the ATA, the very purpose of the ATA’s enactment would go unfulfilled. A complete obstruction of the ATA’s legislative intent in favor of *Daimler*’s “at home” standard is an extreme, but ultimately undeniable, consequence of the D.C. District Court’s decision in *Safra, Livnat, and Klieman*. Although the court came out the other way in *Sokolow* regarding whether the PLO the PA are “at home” in the United States, the Southern District of New York still cited *Daimler* in its application.¹⁹⁵ The danger to the ATA’s future in *Sokolow* comes from the court’s application of *Daimler*. The *Sokolow* court implied that if the PLO could identify any other country in which it is “‘at home’ based on greater business and commercial activities than are conducted in the United States,” then jurisdiction in the United States would no longer be proper.¹⁹⁶

To avoid complete destruction of the ATA, future courts should examine the issue by applying a due process analysis that respects and upholds Congress’s intent in forming the statute.¹⁹⁷ There is little sense, legislative or otherwise, in creating a claim if jurisdiction does not go with it. Although the ATA should not be used to assert jurisdiction over defendants who have no contacts with the United States, it should be allowed to serve as the basis for jurisdiction so long as the defendant has “continuous and systematic contacts” with the United States.¹⁹⁸

CONCLUSION

Applying *Daimler* to cases brought under the ATA will eventually eviscerate the federal statute. United States plaintiffs whose lives have been affected by terrorism deserve to have their day in court. The ATA guarantees them that right. Defendants in a court of law are also guaranteed a right: the right to due process. This Comment suggests an approach to cases of general jurisdiction brought under the ATA in which neither right is compromised.

Post-*Daimler*, the federal district courts’ approach to general jurisdiction cases brought under the ATA has conflated the Fourteenth and Fifth Amendment

¹⁹⁵ *Sokolow v. Palestinian Liberation Org.*, No. 04 Civ. 397(GBD), 2014 WL 6811395, at *2 (S.D.N.Y. Dec. 1, 2014) (“Under a post-*Daimler* and *Gucci* analysis, this court has personal jurisdiction . . .”).

¹⁹⁶ *Id.*

¹⁹⁷ See 18 U.S.C. §§ 2331, 2333 (2012).

¹⁹⁸ See *supra* note 43 and accompanying text; Part I.A.

Due Process considerations.¹⁹⁹ Fourteenth Amendment Due Process considerations should apply to cases in which there is a state-specific claim, whereas Fifth Amendment Due Process considerations should apply where federal interests are at stake.²⁰⁰ Cases brought under the ATA are of federal concern, and thus a defendant's right to due process in these cases should be assessed under the Fifth Amendment. *Daimler* was not a Fifth Amendment case.²⁰¹ As such, its inapplicability to cases brought under the ATA by United States plaintiffs cannot be overstated.

Courts can readily adopt a consistent approach to assessing jurisdictional issues in ATA cases. The first step in doing so requires that *Livnat*, *Safra*, and *Klieman* be overturned on appeal. The second step requires that the United States Court of Appeals for the Second Circuit affirm the Southern District of New York's decision in *Sokolow*. The final step involves the articulation of a clearly delineated approach for assessing personal jurisdiction under the Fifth Amendment. Such an approach should assess whether defendants have such "continuous and systematic" contacts or business activities with the United States as a whole to render jurisdiction in the United States proper. The PLO and the PA have already satisfied that test based on their contacts and activities in the District of Columbia and New York.²⁰² Adhering to the test of "continuous and systematic" contacts with the United States nationwide in ATA cases will not only provide clarity to this area of the law, but will also advance the goals of United States federal policy.

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¹⁹⁹ See *supra* Part IV.B.

²⁰⁰ See *supra* Part I.A and B.

²⁰¹ See *supra* Part IV.B.

²⁰² See *supra* Part IV.C.

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