

Statement of Kent A. Yalowitz,
Counsel for Plaintiffs in *Sokolow v. Palestine Liberation Organization*
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts of the
Senate Judiciary Committee

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Mr. Chairman and Members of this Subcommittee: My name is Kent Yalowitz, and I am a partner in the law firm of Arnold & Porter LLP. My firm and I are privileged to represent eleven American families whose members were victims of terrorists working at the behest of the Palestinian Authority (“PA”) and the Palestine Liberation Organization (“PLO”). Thank you for inviting me here to today to talk about that work and the lack of support for our efforts from the United States government, as represented by the Department of Justice. Indeed, the Executive branch recently made a filing in court that has undermined enforcement of the historic verdict that was handed down in favor of these victims.

Many of the terrorists responsible were so-called “security” officers of the Palestinian Authority. Those employees—and hundreds of others—were caught, tried, convicted, and sentenced for murder, attempted murder, and other crimes. Today, many of them sit in jail in Israel. Far from disowning these terrorists, the PA and PLO have kept them on the payroll and promoted them. Internal PA and PLO documents, which we introduced in evidence in court, reflect these organizations’ approval of the conduct of the terrorists and even characterize the terrorists’ heinous crimes as part of “their fight for their country.” These are current policies of the PA and the PLO.

The Lawsuit: *Sokolow v. PLO*

A decade ago, the eleven terror-victim families I represent sued the PLO and the PA in

federal court in New York under the Anti-Terrorism Act of 1992 (“ATA”).¹ The ATA extends the reach of federal law to protect any U.S. citizen injured by reason of an act of international terrorism, anywhere in the world, by providing a private right of action with treble damages to victims. The ATA garnered strong bipartisan support in the Congress because it reflected the resolve of our Government to fight terrorism and equip American victims with effective civil remedies for injuries caused by terrorists.² During hearings on the ATA, the State Department offered testimony before this Committee that the proposed anti-terrorism bill would “add to the arsenal of legal tools that can be used against those who commit acts of terrorism against U.S. citizens abroad.”³ The bill was enthusiastically signed by President George W. Bush. As both Congress and the executive branch recognized at the time of passage, the ATA’s express private right of action serves an important role in the federal enforcement scheme, creating private attorneys general who vindicate the public interest and supplement federal prosecution efforts.⁴

In *Sokolow v. PLO*, eleven families embarked on a path of seeking justice by bringing a civil action under the ATA against the PLO and PA for the brutal murder and maiming of their children, their parents, their siblings.⁵ The PLO and the PA hired top flight U.S. lawyers who pursued a scorched-earth defense. During years of arduous litigation, the Department of Justice sat by silently. No one assisted the victims in retaining lawyers. No Government agency offered to help in locating evidence and witnesses abroad, in translating thousands of pages of documents in Arabic and Hebrew, or in obtaining forensic reports overseas. As lawyers for these

¹ Pub. L. 102–572, title X (codified at 18 U.S.C. §§ 2331 *et seq.*).

² See 37 Cong. Rec. S4511-04 (daily ed. Apr. 16, 1991) (Sen. Grassley).

³ Antiterrorism Act of 1990: Hearing before the Subcomm. on Courts and Administrative Practice of the S. Comm. Judiciary, 101st Cong. 11 (1990) (statement of Alan J. Kreczko, Deputy Legal Adviser, Department of State).

⁴ Cf. *Evans v. Jeff D.*, 475 U.S. 717, 745 (1986).

⁵ No. 04-cv-397 (GBD) (S.D.N.Y.).

victims, we worked, without assistance from the federal Government, to locate and assemble the evidence of PA's and PLO's responsibility in these devastating attacks and to present that evidence to the jury.

The ATA worked as intended. In February 2015, after years of contentious litigation, the twelve-member jury unanimously found the PLO and the PA liable for acts of international terrorism against American citizens, and the court entered a treble damage judgment of \$655.5 million.

Based on the extensive evidence presented at trial, the jury found that the terrorists who carried out the attacks were PA employees acting within the scope of their employment. The evidence demonstrated that the PA recruited known terrorists into its "security" forces, armed them, and then urged them in official PA publications to "exterminate" and "liquidate" Jews as part of a four-year terror campaign known as the "Al-Aqsa Intifada." The PA and PLO have not disowned these convicted terrorist-employees; even to this day, they remain on the PLO/PA payroll, collecting generous salaries and promotions in rank. Internal PLO and PA records detail the payments and promotions to these individuals following their public convictions in Israel, and internal PA/PLO assessments characterize these terrorists "good" in terms of "security and morals." I have provided to the Committee's staff with a few examples of the kinds of evidence in the record of the case.

The jury also found that the PLO and the PA knowingly provided material support to the terrorists and terror organizations that planned and carried out these attacks. The evidence at trial showed that PLO and PA officers provided funding, safe houses, personnel, and other resources and support to Hamas and the Al-Aqsa Martyrs' Brigades—two organizations listed as illegal terrorist organizations by the U.S. government—and that those designated terror

organizations perpetrated the attacks in this case. This funding included extensive post-attack compensation to convicted terrorists and to the families of suicide terrorists (the PLO and PA call them “martyrs”). The evidence supporting the jury’s finding also included assessment reports by the State Department itself, which concluded that “members of [PA] security forces, were frequently involved in acts of violence” in Israel against civilians.⁶ The PA/PLO’s pro-terror policies continue today.

The devastation inflicted on the victims in our case was senseless, and far too easy for those responsible. Some of the victims were killed with a bomb made from shampoo bottles filled with a home-made explosive called “Mother of Satan” and a bag of screws purchased from a local hardware store. The bomb cost almost nothing to build. Yet the cost to society of such conduct is enormous—not just those killed, but their loved ones’ lives destroyed, and increased insecurity for every member of society. American civil law is designed to shift such societal costs onto those positioned to avoid the wrongful conduct. In other words, terrorism *should* cost the PLO and the PA far more than the price of a bag of screws and a shampoo bottle filled with explosives. The jury in our case agreed.

The PLO’s Motion to Stay the Judgment

After we prevailed, the PLO and the PA asked the District Court to stay execution of the judgment pending appeal. Customarily, a defendant is required to post a bond of 111% of the judgment. The bond pending appeal is designed to insure that the delay inherent in an appeal will not be used by a defendant to dissipate assets, and that the money will be available to satisfy the judgment if the plaintiffs prevail on the appeal.

⁶ Report Pursuant to Title VIII of Pub. L. 101-246 (June 15, 2002).

The PLO and PA asked that the customary bond of 111% be waived in our case, falsely claiming that they could not afford to pay damages to the victims of the terrorist attacks they orchestrated—even though they can afford to continue to pay millions of dollars a month to convicted murderers. Indeed, contrary to their pleas, the numbers show that the PA and the PLO can afford to pay this judgment over time. The PA alone has an annual operating budget of approximately \$3.5 billion dollars and a national investment fund worth hundreds of millions of dollars. The PLO pays approximately \$60 million a year to prisoners convicted of security offenses, such as murder, attempted murder and assault on civilians.⁷ The PLO pays an additional \$4.5 million a year to released prisoners convicted of such crimes. In addition, and not included in the amounts above, the PA continues to pay the salaries of all employees convicted of terrorism crimes who were employees of the PA when they committed their crimes. There is every reason why the PA and the PLO should put this money towards paying the victims of terrorist attacks—rather than the perpetrators. But because their policy is to direct it to the perpetrators, they claim there is not enough left for the victims.

The PLO's Appeal

In conjunction with their request for a stay of execution of the judgment, the PLO and the PA have appealed the judgment of the District Court. Their chief argument on appeal is that the United States cannot constitutionally exercise personal jurisdiction over them for their conduct abroad against American citizens. That argument is a dangerous one to the interests of the United States. The PLO and the PA are asking the courts to hold that they have a constitutional

⁷ PA Ministry of Finance, Monthly Report for Dec. 2014 at Table 1, available at <http://www.pmf.ps/documents/10180/332541/Dec.2014.Eng.pdf/04f6bb61-9a3d-4fa2-9e92-51e57d225f2c>; see PA Ministry of Finance, Monthly Report for Dec. 2013, available at <http://www.pmf.ps/en/41> (budget of ~ \$3.3 billion); PA Ministry of Finance, Monthly Report for Dec. 2012, available at <http://www.pmf.ps/en/41> (budget of ~\$3.18 billion).

right to be free of accountability in a United States federal court of law—even though they killed Americans as part of a terror campaign intended to influence U.S. foreign policy toward Israel. Such a holding would severely weaken, if not completely eviscerate, the ATA. It would also threaten the ability of U.S. law enforcement officials to enforce U.S. law for conduct occurring abroad, for the Federal Government often prosecutes or regulates conduct abroad in which the only jurisdictional connection to the United States is the fact that the victim of the crime was a citizen of the United States, or that the defendant intended the crime to affect the United States.⁸

Moreover, such a holding would be inconsistent with the statute itself. When Congress passed the ATA, it wisely included a service of process provision that provided that a federal court can exercise personal jurisdiction over a defendant if the defendants' agent is served within the United States.⁹ That is how the plaintiffs effected service in this case. If the courts accept the PLO's argument, they will effectively be declaring that provision unconstitutional. Where the constitutionality of a federal statute has been challenged, the Department of Justice is expected to appear in court and defend the statute.

The Statement of Interest

The Department of Justice has not appeared in court to defend the constitutionality of asserting of personal jurisdiction over the PLO and the PA in accordance with the ATA's nationwide service of process provision. As noted above, the Department has never provided help in the prosecution of the case. But on August 10 of this year, after the plaintiffs won their hard-fought, long-delayed measure of justice in court, the Department of Justice filed a

⁸ For a comprehensive list of relevant statutes, see Charles Doyle, Congressional Research Service, "Extraterritorial Application of American Criminal Law" (Feb. 15, 2012) at 40 et seq., available at <http://fas.org/sgp/crs/misc/94-166.pdf>.

⁹ 18 U.S.C. § 2334(a); *see* Fed. R. Civ. P. 4(k)(1)(C).

Statement of Interest in the case. Unfortunately, the Statement of Interest did not come out on the side of the ATA. It *weakened* the ability of the plaintiffs to collect on their judgment. The unfortunate content of the filing was contrary to the direct pleas of the victims and of several members of Congress, including Senator Schumer, to whom we are very grateful for his strong and unwavering support for our case.¹⁰

The Statement of Interest declined to address the merits of the case or of the legal issues that will be raised in the appeal. Rather, the Department of Justice limited its comments to the issue of a bond pending appeal. On this limited issue, the Department of Justice asked the District Court not to impose a bond that would “severely compromise” the PA’s ability to operate as a governmental authority. The Statement of Interest then laid out in detail the purported potential for crisis that would occur if the PA were to “collapse.” Although the Statement of Interest also mentioned the Government’s strong support for the rights of victims of terrorism to vindicate their interests in federal court and to receive just compensation, the overall impression was that the Government had put a thumb on the scale in favor of the PLO’s and PA’s motion for a stay. Notably, contrary to customary practice, the United States Attorney for the Southern District of New York did not sign the Statement of Interest.

The Government’s message in the Statement of Interest resulted in the District Court ordering a bond that leaves the victims severely under-secured, which the Second Circuit affirmed. Specifically, the PLO and PA were ordered to post a mere \$10 million up front, and \$1 million monthly payments going forward—to secure a \$655.5 million judgment. At that rate, it will take the plaintiffs 54 years to secure the judgment. This for a pair of entities that is responsible for countless terror attacks and that has billions of dollars in revenue every year.

¹⁰ Letter from Charles E. Schumer to Loretta E. Lynch and John F. Kerry (Aug. 5, 2015); Letter from Mark I. Sokolow et al. to Loretta E. Lynch (Aug. 3, 2015).

The Government's Statement of Interest has thus undermined the ability of the American families in this case to enforce their rights to a measure of justice for the devastating tragedy that was inflicted upon them. It has pushed off the inevitable day of reckoning and provided the PLO and PA with false hope that they will never have to pay for murdering and maiming United States citizens. It has led to the disturbing public specter of our Government choosing to stand against terror victims in favor of the terror-supporting Palestinian Authority to delay justice.

The terror victims felt betrayed and disappointed in our Government's decision to protect the interests of the entities responsible for their devastating injuries. They were very troubled to learn that, after all the years we fought for justice, the Department of Justice asked the court to protect the PLO and PA and to minimize the protection afforded to the victims.

The Statement of Interest was also disappointing in that it did not present a fair and balanced picture of the interests at stake. It ignored the very real impact of Palestinian terrorism on American interests. After all, the State Department had already determined for itself that "members of [PA] security forces, were frequently involved in acts of violence" in Israel against innocent civilians,¹¹ and that such terrorism "threatens the security of U.S. nationals or the national security, foreign policy, or economy of the United States."¹² Back in 2007, the Secretary of State herself had urged the PLO and the PA to "respond to U.S. legal proceedings in good faith and a timely manner."¹³ The Government's Statement of Interest, on the other hand, ignored our evidence that—even today—the PLO and the PA are inciting and continuing to support terrorism with payments and promotions to convicted terrorists. While silent on the merits, the Statement of Interest went on at length about the potential negative consequences of a

¹¹ Report Pursuant to Title VIII of Pub. L. 101-246 (June 15, 2002).

¹² 67 Fed. Reg. 14761 (March 25, 2002).

¹³ Letter from Hon. Condoleezza Rice to Mahmoud Abbas (Jan. 12, 2007).

collapse of the PA—even though the plaintiffs told the Department of Justice and the District Court expressly and clearly that they were not suggesting that the PLO and PA write a check for the full amount of the judgment in a single payment:

To be clear, our lawyers have not asked (and do not plan to ask) Judge Daniels to order the PLO and the PA to pay the judgment in full immediately. Instead, they have asked Judge Daniels to order the PLO and the PA to pay small monthly installments. This is a very practical solution that will allow us to ensure that over time the funds will be available to satisfy our judgment without destroying their ability to function.

Shockingly, the proof at trial established that the PLO and the PA actually keep convicted terrorists on their payroll as a matter of policy. If they would simply stop paying convicted terrorists, that alone would free up tens of millions of dollars every single year. The U.S. Government should be ashamed that it is even considering telling an American court that the PLO and the PA can afford to pay convicted terrorists but cannot afford to pay the victims of those very same terrorists.¹⁴

When held up to the light of the actual facts—the PA’s very real ability to pay the amounts being requested as security for the judgment—the Statement of Interest was woefully inadequate to protect American interests.

While we certainly appreciate that the Statement of Interest declared in no uncertain terms that the Department of Justice “strongly supports the rights of victims of terrorism to vindicate their interests in federal court and to receive just compensation for their injuries,” we expected more from our Government. Being a citizen of the United States of America should mean the full and unwavering support of the United States Government against evils like terrorism.

In sum, the Justice Department’s failure to take a position on the merits of the case, combined with the unbalanced picture of U.S. interests at stake on the bond vis-à-vis Palestinian

¹⁴ Letter from Mark I. Sokolow et al. to Loretta E. Lynch (Aug. 3, 2015).

terrorism, suggested that the Statement of Interest may have been more of a political statement than a legal one. This was a missed opportunity to support American victims of terror and the interests of the United States as most Americans would perceive them and as reflected in the ATA.

In a letter to one of the plaintiffs in our case—the father of a woman killed by a terrorist’s bomb—Attorney General Eric Holder expressed “sincere sympathy” for the pain and suffering that he and his family continue to endure from the acts of terrorists and assured them that “the United States is committed to seeking justice for our citizens victimized by terrorism whether at home or abroad.” He said that “the dedicated employees of the Justice Department come to work every day committed to pursuing justice for victims”¹⁵

Although our Government did not live up to that promise when it filed its statement on the bond issue, we are hopeful that the assurances of Attorney General Holder and others will be fulfilled. We are hopeful that the victims and their families will have the full and unconditional support of the United States on the remaining issues that we are likely to face on appeal. We are hopeful that our government will fight for the terror victims and not against them. We are hopeful that the Administration will stand up to terror.

Thank you for this opportunity to testify. I stand ready to answer any of your questions.

¹⁵ Letter from Hon. Eric H. Holder, Jr. to Dr. & Mrs. Larry Carter (Jan. 12, 2012).