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The P.L.O. Has an Unlikely Supreme Court Ally: The Trump Administration

By ADAM LIPTAK

WASHINGTON — Last June, the Supreme Court asked the Trump administration to file a brief. The justices wanted advice on whether to hear an appeal from victims of terrorist attacks in Israel.

The request seemed unwelcome, and months passed without a response.

In late October, two dozen senators — including Ted Cruz, Republican of Texas, and Elizabeth Warren, Democrat of Massachusetts — wrote to Attorney General Jeff Sessions and Secretary of State Rex W. Tillerson. Get moving, the senators said.

“We urge the administration to demonstrate its resolve to combat international terrorism and put American victims first by avoiding any unnecessary delay and responding as soon as possible to the Supreme Court’s request,” the letter said.

Two more months passed. In December, President Trump recognized Jerusalem as the capital of Israel and said he would move the United States Embassy there. But still no brief.

The plaintiffs in the case are American families who were the victims of terrorist attacks in and near Jerusalem. They won a \$655.5 million court judgment in federal court in Manhattan against the Palestine Liberation Organization and the Palestinian Authority. But an appeals court threw out the judgment, saying that Congress had overstepped its authority in enacting a law that allowed the families to sue.

At the Supreme Court, another two months elapsed without a brief, and with them the possibility of having the case decided in the term that will end this June. Finally, after an extended internal debate that included officials from the Justice Department and a short-handed State Department, Solicitor General Noel J. Francisco filed the requested document last month.

In the end, the administration sided with the P.L.O.

Mr. Francisco’s brief was a model of lawyerly minimalism. It urged the justices to turn down the victims’ appeal, saying it did not “warrant this court’s intervention at this time.” But the brief took no position on whether the plaintiffs’ legal arguments were correct.

This did not sit well with Theodore B. Olson, a lawyer for the victims who served as solicitor general in the George W. Bush administration. In a brief filed last week, Mr. Olson called the administration's position "astonishing" and "disturbingly disingenuous."

In an interview, Mr. Olson said his team had urged the solicitor general's office to move fast enough to allow a decision this term. "We got no explanation" for the delay, he said. "It seemed unconscionably long."

"We've got 11 families who are victims of terrorism and who have suffered a lot," Mr. Olson said. "This is so painful and difficult for them."

The families had sued the two Palestinian groups under the Antiterrorism Act of 1992, which was designed to allow such suits by giving federal courts jurisdiction over acts of international terrorism against Americans. After a seven-week jury trial in 2015 in Manhattan, the plaintiffs won \$218.5 million, which was automatically tripled under the 1992 law.

The United States Court of Appeals for the Second Circuit, in New York, threw out the award, saying the trial court had lacked jurisdiction over the Palestinian groups because they did not have a substantial presence in the United States and had not set out specifically to kill and injure Americans.

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Kerri Kupec, a spokeswoman for the solicitor general's office, said the administration was committed to fighting terrorism.

"The United States condemns acts of terror in the strongest terms, and the Department of Justice is committed to prosecuting those who commit terrorist attacks against innocent human beings to the fullest extent that the law allows," she said in a statement. "The United States sympathizes deeply with the American families who, in 2004, sued the Palestinian Authority and the Palestine Liberation Organization for acts of terrorism committed against their loved ones between 2002 and 2004."

"The court of appeals decided, however," she said, "that the suit was not consistent with due process under the Constitution, and its decision does not meet the usual standards for Supreme Court review. We will continue to support wherever possible all lawful actions to fight terrorism and provide redress to the victims of terrorist attacks and their families."

When the Supreme Court asks the solicitor general for his or her views on whether to hear an appeal, as it does about 25 times each term, it presumably wants to know both whether the case warrants the justices' attention and whether the party seeking review is right.

Mr. Francisco gave only half an answer, taking no position on whether the appeals court's decision was correct. According to Mr. Olson's brief, "research revealed only one other instance since 2014 in which the solicitor general did not state a view on the merits" in similar circumstances.

The two sides disagree about how many cases will be thwarted by the appeals court's ruling. "It is far from clear that the court of appeals' approach will foreclose many claims that would otherwise go forward in federal courts," Mr. Francisco wrote for the administration.

The entire House of Representatives and 23 senators disagreed. In briefs filed last April, they said the appeals court's ruling had cut the heart out of the statute, effectively nullifying it.

When a federal court strikes down parts of a federal law, the solicitor general typically defends the statute. In his brief, Mr. Olson, a former solicitor general, used unusually harsh words in criticizing the current one for taking a different approach.

"The United States' argument that this court should not address this issue is, to put it bluntly," he wrote, "a blatant abdication of duty."

Those are harsh words, and they will get the justices' attention when they meet in private next week to discuss whether to hear the case, *Sokolow v. Palestine Liberation Organization*, No. 16-1071, almost 13 months after the plaintiffs filed their petition seeking review.