

Brennan Center for Justice Final Report – Human Rights Fellowship

This summer I worked at the Brennan Center for Justice at New York University School of Law on the Liberty and National Security Project. The Project focused on tackling the Bush Administration’s post 9-11 policies, taking a three pronged approach of academic analysis, advocacy, and litigation. We specialized in “high impact” or “pathmaking” work—issues that were likely to receive widespread media coverage and affect not only our particular clients, but also many others in the so-called war on terror. This report will focus on my work at the Center, and in particular the case of Omar and Munaf, using it as a foil to discuss the strengths and limitations of litigating human rights cases in U.S. courts, and the extralegal strategies available to advocates.

I. Omar and Munaf: The Facts

Half an hour after the Courts’ historic decision in *Boumediene v. Bush*, the Justices handed down another, much less favorable, ruling to detainees in the “war on terror.” Shawqi Omar and Mohammad Munaf are dual U.S. citizens who traveled to Iraq and were captured and subsequently detained by MNF-I forces. Both were deemed “security internees” and at least Mr. Omar was considered “high value” (likely to possess information regarding future terrorist or insurgent threats). MNF-I forces held the two while criminal proceedings were brought in Iraqi court against Mr. Munaf, who was convicted of orchestrating the kidnapping of three Romanian journalists. This conviction was subsequently reversed by an Iraqi Court of Appeals, which invalidated the lower court’s verdict on several grounds (including that it misidentified the defendants). Task Force 134, the U.S. arm charged with overseeing the men, claims that Iraq will re-prosecute Mr. Munaf and investigate Mr. Omar. The families approached the Brennan Center, which filed a petition of habeas corpus on behalf of both men, alleging that both were kept in what essentially amounted to indefinite preventive detention given lack

of criminal charges by the United States, and given the fact that neither had been detained pursuant to any wartime activity (such to render them combatants pursuant to the Geneva Convention). The lower courts handling the cases separately ruled they had jurisdiction, and Judge Ricardo Urbina issued an injunction preventing transfer Mr. Munaf's to Iraqi custody. The D.C. Circuit affirmed in both cases, and the U.S. Supreme Court granted certiorari.

On June 12, 2008, the Supreme Court issued a 9-0 reversal. It ruled the plain meaning of the habeas statute entitled Mr. Munaf and Mr. Omar to petition for habeas. It then took the remarkable step of proceeding to the merits, despite the fact that the district courts had not considered them in any detail and despite the clear lack of record in the case. Writing for the Court, Justice Roberts argued that neither the Due Process clause of the Constitution nor the Foreign Affairs Reform and Reconstruction Act barred transfer to Iraqi custody because Iraq had a sovereign right to prosecute the men as it deemed appropriate, even though Iraq's chosen method of prosecution might be unconstitutional. The Court left a gigantic elephant in the room: the fact that Mr. Omar and Mr. Munaf were likely to be tortured and/or executed in the Iraqi criminal justice system. In fact, under the Iraqi Penal Code, kidnappings not resulting in a fatality are death-penalty eligible, in contravention of the ICCPR and principles of customary international law. The Court claimed such issues were best resolved by the political branches and were not fit for judicial review. Notably, however, the Court explicitly claimed that there were no facts supporting the risk of torture ("Petitioners here allege only the possibility of mistreatment in a prison facility; this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway.") Further, the Court relied on the Executive's assurance that although "some sectors" of the Iraqi government were known to torture (such as the Ministry of the Interior or the Ministry of Defense), the Ministry of Justice, where Mr. Omar and Mr. Munaf were to be transferred, were not on this list. Justices Souter, Breyer, and Ginsberg

concluded in the judgment, noting that if evidence were available that either man would be tortured, it might be a violation of substantive due process to do transfer him to Iraqi custody.

II. The Aftermath

In the aftermath of the Supreme Court's ruling, our clients were left with few options – at least few judicially available options. We could petition for rehearing, arguing that the Supreme Court had fundamentally misapprehended the factual record in front of the district court and that its ruling turned on an issue that had not been fully briefed. Yet, this strategy was unlikely to bear fruit, given the unanimous nature of the opinion, and given the fact that even more egregious factual errors (such as the military statute allowing execution for sexual assaults of children in *Kennedy v. Louisiana*) often did not provoke a rehearing in other cases. We could file an amended complaint in lower court offering a more fully developed argument about the FARR act and with evidence supporting likelihood of torture in Iraqi Ministry of Justice facilities. We could secure Iraqi council and hope for the best in proceedings in front of possibly corrupt, and often U.S. influenced, Iraqi criminal courts. Or we could do as the Supreme Court suggested, and pursue extralegal solutions (e.g. involving diplomacy).

As in any death penalty case (or case involving a risk of execution), we chose “all of the above.” I was involved in all four parts of the strategy – from working on the petition for rehearing to outreach efforts. The bulk of my time, however, was devoted to information gathering regarding Iraqi prisons – and specifically Ministry of Justice facilities. After checking all the obvious sources (from Amnesty, to Human Rights Watch, to the State Department), it quickly became apparent that no information on this particular factual question was available – at least not in the United States or in English. So I did what most investigators do: I reached out to trusted sources. After contacting the Human Rights Center at Berkeley, as well as a variety of other contacts, we managed to speak to a number of individuals on the ground in Baghdad, in Jordan, in Germany, in Denmark, in France, and any place where individuals from

abroad might have returned. Most individuals could not share information. As a result of confidentiality concerns the ICRC, for example, will not release information on its prison visits abroad. Other individuals could share information off the record, but would not give an affidavit in support of our clients because they worried their names might get released on a U.S. court transcript and their wellbeing jeopardized abroad. In particular, individuals who worked with the Iraqi refugee population (in Jordan, for example) were very reluctant to help, even though some of the individuals with whom they worked could directly speak to their experiences in Ministry of Justice facilities. Similarly, others were unwilling or unable to help because they did not view our clients in sympathetic light. Of course, no one supported torture, but some of the facts suggested that Mr. Omar might in fact be a terrorist and handing him over to the Iraqis seemed to promote justice. Others thought that Mr. Munaf had been involved in a kidnapping episode and thus ought to be held to account for his crimes. These individuals worried what the consequences of our advocacy might be – might our efforts lead to wholesale release, and thus potentially increase the risk of terrorism? While almost everyone I spoke to seemed to support the general cause of due process and humane treatment of prisoners, many seemed to feel that the Brennan Center’s advocacy was a little *too* liberal. Speaking to concerned individuals (many of whom lived or at least temporarily resided in Iraq), I sympathized with their fears. As my boss remarked, often we didn’t want to know more about our clients, or what precisely they had done. Yet, at the same time, these comments echoed passages of the *Boumediene* opinion, where Justice Scalia attacks lawyers for Guantanamo detainees as al Qaeda supporters, and accuses them of being responsible (in at least at one case) for passing along information to operatives abroad and aiding combatants abroad. But to me, the principle that overrode these misgivings was that every human being – no matter what act he or she had committed – deserved to be treated with dignity, included not being subjected to torture. In the end, the allies that proved most reliable were other institutions we worked with on a regular basis (such as Amnesty International). And even these organizations had their fair share of misgivings. Other groups – including staunch

“defenders” of human rights – proved much more reluctant. Often they simply would not return calls or emails. Of course, much of this may have to do with being overstaffed and having to deal with an unpredictable environment abroad, but my suspicion is that at least some of the people we spoke to did not feel like spending precious “political capital” on such a sensitive case, especially when there were many other lives to be saved and people to be helped, including the near endless stream of displaced people.

The other major lesson from the information-gathering portion of my activities were our own “institutional constraints.” What does it mean to zealously represent ones’ client? It became quite clear to me early on in the investigation process that information could not be gotten in the United States and that the most reliable method of obtaining it would be to send someone to Iraq. If I’d had the Arabic skills and/or the time to get a VISA, I would have insisted that they send me. Of course, we worked with investigators on the ground in other countries – some of whom might have been able to go, work to gain access to Task Force 134, work to visit the prisons in question, or at the very least set up face-to-face meetings with Iraqi prisoner’s rights organizations (the groups’ I felt were most likely to possess information by virtue of working with the same population and most likely interviewing individuals who’d be detained by the Ministry of Justice). Yet, it was unclear how likely (if at all likely) this strategy was to bear fruit. If we’d been at a major law firm, with fairly unlimited resources, no doubt we would have pursued it more strenuously (though of course all bets are off in the current economic environment). Certainly, it constituted a gamble - especially given the Supreme Court’s dicta in the area, and given the clear undertone of respect for Iraqi sovereignty. Even if we *were* able to muster evidence of a risk of torture, would it even come from “valuable” sources? The Souter concurrence seemed to suggest that the *Executive itself* would have to admit that the prisoners would be at serious risk before the Court would consider stepping in. (Given concerns of secrecy, one must ask whether this is any realistic possibility. Would *any* administration claim with a straight face that it had custody of U.S.

citizens and that despite a known risk of torture it would hand these individuals over to their certain death? Undoubtedly, most governments would prefer to “look the other way” – just as the Bush Administration received “assurances” from other governments, including known torturers, that transferring our citizens would be perfectly safe, a scenario that has, to some extent, repeated itself in the context of Guantanamo. And while the judiciary may not be incredibly competent relative to other branches, is it too much to ask a government to produce concrete evidence that facilities are safe, since at least in this case there was no data provided, just an assertion by the State Department.) In any event, producing hard data (since it was our burden to do so) would have been incredibly expensive, more money at least than the Brennan Center was willing to spend (even to have a shot at saving a human life) at least on these individual clients. Our skilled attorneys seemed reluctant to press ahead – a reluctance that might (in part) be attributed to a fundamental conflict of interest with the client: these were no longer “pathmaking cases” – they were no longer likely to change the law, and thus have a widespread systemic impact on national security jurisprudence. Yet, bizarrely, our attorneys (or at least one of them) seemed reluctant to engage Iraqi counsel – they seemed to feel this was the responsibility of the family members. Perhaps so, especially given some were located in Iraq. But given our connections, we at the very least would be able to vet them (and partially protect them from unscrupulously and often incompetent lawyers who held themselves out as experts, as two prior Iraqi attorneys had done). In the end, the difficulty of gathering evidence reinforced what I viewed as the Supreme Court’s point in its ruling: respect for Iraqi sovereignty. Our case seemed built upon undermining it, yet from an efficiency perspective, it might be best for our client and for Iraqi society were we to recognize our constraints and help hand things off to process abroad – were our clients undoubtedly had a higher chance of success. In a strange way, deference to foreign legal systems might in fact promote, rather than undermine, human rights if implemented properly (e.g. through strategic alliances and information sharing).

The third aspect of my work involved advocacy. As mentioned, the Supreme Court viewed the issue as a “political question” not fit for judicial resolution. Of course, this perspective made a lot of sense – if the judiciary were to “pierce the veil” and start examining the activities of the U.S. military (or our allies) with any kind of scrutiny, well, it might invite other countries to do the same, and it might hinder military commanders’ ability to make quick decisions. However, there is an obvious difference between evidence gathering “in the fog of war” (e.g. involving combat operations) and between scrutinizing long-term consequences of prison management, detainee treatment. Just as Guananamo is within U.S. jurisdiction – and thus subject to scrutiny – it does not seem too much to ask the U.S. military (or even our allies) to adhere to minimum human rights standards. In fact, this is a larger “value” question particularly apt for judicial resolution rather than a tactical, or strategic, political question (for example involving where and what to do with prisoners). Regardless of whether or not the court is “institutionally competent” to be asking value laden questions (such as whether or not torture is prohibited), questions can often (and perhaps always) be phrased politically. In Mr. Omar and Mr. Munaf’s case, instead of asking whether torture was prohibited by the U.S. constitution (as the Court could have done), it framed the issue about this *particular* release of prisoners. The Court seemed blind to the longer term implications its decision might have on other foreign prisons – and the incentive structure its decision might create to intentionally transfer U.S. citizens (or non-citizens) out of our custody, to governments that are known to torture in order to extract information (in other words, to “outsource torture.”) And since the composition of the judiciary – or at least the Supreme Court – is unlikely to change in the near future (in the political sense of the word), the Brennan Center wisely pursued other options. Yet, unfortunately, many of these avenues were closed to us by the very lawyers who had argued we should pursue “political solutions.” When we attempted to coordinate with Task Force 134 – the group of military lawyer’s overseeing prison conditions in Camp Cropper (where Mr. Omar and Mr. Munaf were housed) – we were “referred” to the Department of Justice, which meant we

were stonewalled. Similarly, our inquiries to the State Department were rebuffed, suggesting that the “political process” rationale of the Court was specious. And, as mentioned above, human rights organizations (even reputedly “neutral” ones) were unwilling to intervene to help speedy resolution through the political process.

III. Lessons Learned for Human Rights Advocates

What should we learn from cases like Omar and Munaf’s for human rights advocacy? It is easy to become cynical or burned out as a human rights advocate, especially when your work seems to be going nowhere and your clients seem unlikely to gain relief through normal channels. It is tempting to conclude that either litigation or advocacy efforts will not work – to simply resign oneself to the fact that there are some problems too difficult (or too costly) to fix. Yet, I think there is another lesson to be learned and that is taking a long term perspective, and reflecting how the case might have been litigated differently, or how we might have used to diplomatic tools at our disposal, to reach a different outcome in future cases. First – and this is perhaps the most bitter pill to swallow – the Supreme Court had a valid point. There is a reason our clients lost 9-0, with 3 justices forming a slender concurrence. That reason is fundamental respect for Iraqi sovereignty and the desire to see a country ours has poured so many resources into succeed on its own. This is quite a laudable goal, and, had we seen the path ahead (and perhaps not been quite so bent on “making” U.S. law) we might have invested time at the outset in helping the families secure competent Iraqi counsel, which might have avoided a conviction for Mr. Munaf, and possibly could have resulted in the release of both men. Second, if we had secured competent Iraqi council (and especially bilingual council) in the beginning of the proceedings, we might have been able to dovetail our efforts, such that there would not have been such a perceived conflict of interest between Iraqi sovereignty and U.S. sovereignty. We might have even been able to show that Iraq had little desire to prosecute these men – and that in fact it was only doing so as a result of U.S.

prodding (a fact that we suspected all along). Third, we might have been able to locate potential exculpatory evidence sooner and would have been able to make an informed estimate of its relative value. We also might have been able to make a more persuasive case to the State Department about why these individuals ought to be released, or at least be given minimum assurances as to their safety. All of these solutions, however, would have required placing far more faith in an unfamiliar legal system, and in possibly untested advocates (by the time we were able to locate Iraqi counsel, several cases, including cases involving the Associated Press reporters had already been handled, and thus we had a pool of expertise to rely upon). In sum, as human rights advocates we needed to think far more internationally, and realize that we are part of a coalition of lawyers – all of whom have different strengths (for example, Arabic fluency) that might be brought to the table. Likely, we might have gotten commercial lawyers at major New York law firms to become involved in these cases, had we needed additional resources, such as investigators. Likely, too, we might have been able to use their political connections to at least grease the wheels and start them turning.