

## *Hamdan v. Rumsfeld*: Neal Katyal '95 Leads Students From Guantanamo to the Supreme Court

For Danielle Tarantolo '06 and a number of other Yale Law School students who have worked with Neal Katyal '95 over the past several years, the case of *Hamdan v. Rumsfeld* has provided the kind of hands-on learning that most students only dream of.

The upcoming issue of the Yale Law Report contains an article about Katyal's work with YLS students. The following excerpts are taken from that article.

In the fall of 2004, at the beginning of her second year of law school, Danielle Tarantolo '06 found herself in Guantanamo Bay with Georgetown law professor Neal Katyal '95, working on *Hamdan v. Rumsfeld*—a nationally publicized case regarding the detainment of “enemy combatants” and the extent of government power during times of armed conflict.

It's a case that Katyal has devoted much of the past four years to, and that a number of Yale Law students have helped him with. This past March, the years of late night research projects and hours upon hours drafting legal arguments paid off as Katyal and his law students took their “long-shot case” all the way to the Supreme Court.

The story of Katyal and his band of Yale Law students and their journey to Gitmo and the Supreme Court began in earnest in the fall of 2001.

With an impressive and varied C.V. that included clerkships for Supreme Court Justice Stephen G. Breyer and Judge Guido Calabresi of the Second Circuit Court of Appeals; a position as National Security Adviser at the DOJ; and work as co-counsel to Vice President Al Gore in the case of *Bush v. Palm Beach Canvassing Board*, Katyal had returned to the Yale School as a visiting professor that fall. He had settled back into campus, developing a repartee with his constitutional law students that included a fair amount of teasing—his students had come to the conclusion that Professor Katyal never thought anything was unconstitutional.

Then came the terror of 9/11. Just over two months later, President George Bush issued a Military Order that called for the creation of military tribunals to indefinitely detain individuals suspected of having ties with Al Qaeda. Trials for enemy combatants would allow the admission of unsworn statements in lieu of testimony, and the commissions would be allowed to exclude defendants from their own trials.

“I remember coming into my class and I said, ‘Ha! I found something that’s unconstitutional,’” Katyal recalls.



Shortly after the Military Order was issued, Katyal testified on the Hill, warning against the executive power President Bush had laid claim to, and arguing that the creation of military commissions should require congressional authorization rather than be born of executive decree. In April 2002, Katyal and Harvard professor Laurence Tribe penned an article for *The Yale Law Journal* arguing that the use of military tribunals jeopardizes separation of powers. In short order, Katyal was contacted by Navy Lt. Cdr. Charles Swift, a military lawyer who asked Katyal to orchestrate a challenge to the tribunals. Eventually, the two joined forces in defending Salim Ahmed Hamdan, a 35-year-old Yemeni-born man who had worked in Osama bin Laden's motor pool as a driver and mechanic.

...To help him build a case, in 2003 Katyal turned to his former constitutional law students at Yale and asked for their help. Katyal's request: to help him defend Hamdan, a man suspected by the government of conspiracy to commit war crimes, murder and terrorism.

...Four students worked with Katyal that first year, helping him write the initial district court complaint. As Katyal's first generation of YLS students graduated, they passed on the names of other students who they thought might be of help with the case. Katyal ran through those names with members of the Law School faculty, who in turn often provided other names. Ultimately, the hard part for Katyal was keeping the team small given the pool of interested talent at YLS. “I'm not a law firm,” Katyal says. “In essence, these students are functioning as junior partners.”

And so Tarantolo, at the end of her first year at Yale Law School, received an email from Katyal, asking her to be a part of his team.

“The email was incredible,” Tarantolo remembers. “It was friendly and intimate, in the wonderful way Neal has of talking to students as colleagues, and also solemn, in that

it conveyed the sense that this was an important project with possibly far-reaching ramifications.” Katyal wrote that he couldn’t promise “any money, or even glory,” but that Tarantolo would have an opportunity to collaborate on one of the most exciting cases in the federal court system. “For a first-year law student,” she says, “it was pretty unbelievable.”

Tarantolo was mildly aware of the case, after having participated in a Law School clinic which focuses on 9/11 issues, called Balancing Civil Liberties and National Security After September 11.

“I knew our client was an alleged terrorist,” Tarantolo says, “but from my work in the clinic, I also knew that I had a strong moral commitment to bringing cases that forced executive accountability during the War on Terror—regardless of who the client was.”

...Tarantolo volunteered for what seemed the most straightforward assignment—the Uniform Code of Military Justice’s speedy trial requirement. “Military law was, unsurprisingly, a totally foreign field to me,” Tarantolo says. “But eventually I succeeded in pulling together some decent research and draft language on the speedy trial issue.”

... While Tarantolo was spending late nights working on *Hamdan*, so, too, were other Yale students. Though Katyal only enlisted four Yale students in 2003, that number had jumped to seven in the 2004-05 academic year and 10 students this past year. In addition to the YLS students, a highly skilled group of Georgetown students have volunteered on the case as well.

After the first round of students helped research and draft the original complaint, the second crop of students helped fetter out the argument and preparations for the military commission trials. This past year was devoted to the argument for the Supreme Court. Students wrote portions of the briefs, they helped with wordsmithing, and organized moot courts to prepare Katyal for the oral argument.

...November 2004 marked what was to be Hamdan’s military commission trial. Tarantolo accompanied Katyal to Gitmo as a legal researcher that fall. It is a place that she is forbidden to describe in all but the vaguest of terms. “Guantanamo Bay—because of its history but particularly because of the uses to which it’s currently being put—has a feel that is unlike anywhere in the world,” she says.

“The area where the actual commission was set up was particularly surreal,” she adds. “There it was, in a squat, nondescript building, yet inside this strange building was a room set up with all the pomp and circumstance of a courtroom—mahogany bench, American flag.”

Because her security clearance had not been completed,

Tarantolo wasn’t permitted to meet Hamdan. But seeing him during the brief time the commission was in session gave her new perspective on the significance of the case.

“Frequently when you work on ‘impact cases’ like this one, your client is only someone you read about and think about as a legal construct—not a real man, who has spent a real number of years in a real detention camp on a real American military base. It’s critical to remember that this is a person’s life that is at stake,” she says.

...That trip to Cuba also marked the first time Katyal met with Hamdan. It was a meeting that became a clarifying moment for Katyal.

“When I went down to Guantanamo for the first time and I went to see Hamdan, he—in the first few minutes we were there—kicked everyone out of the room except for me and the translator,” Katyal remembers. “I thought he was going to chew me out. He had already been detained for two and a half years...And he asked me, ‘Why are you doing this? Why are you here?’ I paused for a few moments because I hadn’t really thought about that,” Katyal continues. “And then I told him, ‘I’m here because my parents came to America because they saw America as the land of opportunity.’ And I really do believe that. I don’t think there’s any other country where you could wind up new on its shores and your son could go to Yale Law School and clerk for the Supreme Court. I’m deeply patriotic. And I thought that the [Military] Order was really in deep tension with the American ideal.”

...In July of 2005, the team suffered a setback when the U.S. Court of Appeals ruled against *Hamdan*. But Katyal petitioned successfully for a writ of certiorari and, on March 28, he and U.S. Solicitor General Paul Clement appeared in front of the Supreme Court to argue *Hamdan v. Rumsfeld*.

Besides the help from students, Katyal’s preparations for the oral argument were assisted by a number of Yale faculty and alumni who have done everything from answering research questions to co-writing four of the 42 amicus briefs for *Hamdan*. Katyal’s former professors Bruce Ackerman ’67 (Sterling Professor of Law and Political Science) and Akhil Amar ’84 (Southmayd Professor of Law) helped with advice about the case, as did Judith Resnik (Arthur Liman Professor of Law), who offered her expertise on federal courts, William Eskridge, Jr. (John A. Garver Professor of Jurisprudence), Jonathan Freiman (visiting lecturer in law), and Dean Koh who mooted Katyal three weeks before the March argument. (“He did exactly what I asked him to do—which was to be tough,” Katyal says of Koh.)

Tarantolo's decision to go to D.C. to watch Katyal make the oral argument was an easy one. She had started with the case when it was in a different district under a different name and with largely different emphases. She had watched and helped the case evolve as it moved through the federal court system and into the public arena. She had heard the oral argument in the district court and circuit court, and had seen Hamdan at the opening of pre-trial proceedings at Gitmo. "I was not about to miss the Supreme Court," she says.

Neither were her law school peers. Katyal's entourage traveled from New Haven to D.C. Some of them even camped outside the Supreme Court in order to secure tickets. When the court came to order, a row of Georgetown and Yale Law School students sat in the audience, hanging on every word.

"We ask this Court to preserve the status quo to require that the President respect time-honored limitations on military commissions," Katyal began. "These limits, placed in articles 21 and 36 of the Uniform Code of Military Justice, require no more than that the President try offenses that are, indeed, war crimes and to conduct trials according to the minimal procedural requirements of UCMJ and the laws of war themselves."

An hour and a half later, Katyal and Clement had finished their arguments and the Court had adjourned...

*The complete text of this article will appear in the Summer 2006 issue of the Yale Law Report.*