

Transport planes come and go at all times at Guantánamo Bay, Cuba. The week this photograph was taken, detainees were transported back to Afghanistan. July 16, 2004; (opposite) Hamdan's attorney, Neal Katyal '95, addresses the media following the Supreme Court hearing in March.



Hamdan v. Rumsfeld Neal Katyal Leads Students from Guantánamo to the Supreme Court by Kaitlin Thomas

Guantánamo Bay, Cuba—nicknamed Gitmo from its military abbreviation GTMO—is a mystery to most of the world. Just 400 air miles from Miami, the naval station located on the southernmost tip of Cuba is now home to approximately 500 “enemy combatants” held on suspicion of being associated with Al Qaeda. Gitmo is largely off limits to civilians, and so it is through a handful of photographs and news reports that the world imagines and debates its legitimacy.



Not so for Neal Katyal '95 and Danielle

Tarantolo '06. In the fall of 2004, at the beginning of her second year of law school, Tarantolo found herself at Gitmo with Georgetown law professor Katyal, 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 U.S. Supreme Court. The news for Katyal's team got even better on June 29 when—three months and one day after the oral argument—the Supreme Court voted 5-3 in *Hamdan's* favor.

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 '58 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 Law 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 W. 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.

Katyal’s two immediate non-constitutional objections about the military commissions—that the government created a “legal Frankenstein” in invoking wartime powers without giving the full rights of the Geneva Convention to detainees, and that the commissions are being used for what he calls “small fry” targets rather than known Al Qaeda leaders—were epitomized by *Hamdan*. But for Katyal, the case was about more than one man—it was a chance to vindicate the nation’s ideals.

“Even this person from Yemen with a fourth-grade education can challenge the most powerful people on the planet. This is a fundamental tenet of what is great about America,” he explains.

Katyal’s other criticisms of the commissions are similarly based, he says, in his sense of patriotism. He believes that the government’s interpretation of the Geneva Conventions and the Uniform Code of Military Justice threaten U.S. troops who, Katyal warns, are more likely to face war crime trials and other treatment under loose interpretations of international standards. And, he says, the very existence of military tribunals undermines America’s “position as a leader of the rule of law.”

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.

The value of working on real-world legal cases as a student is something that Katyal knows firsthand. Katyal himself was drawn to Yale Law School as a student because of (now Dean) Harold Hongju Koh’s work. As a 1L,

Katyal helped 2L and 3L students in what he calls “a very minor way” with *Haitian Centers Council v. McNary*, a case that gained national attention. He also worked in the Landlord-Tenant Clinic (co-taught that year by Robert Ellickson ’66, Walter E. Meyer Professor of Property and Urban Law) and on *Skaggs v. Carle* with Sterling Professor of Law and Political Science Bruce Ackerman ’67. All are experiences, Katyal says, that helped form his own legal philosophy.

It seemed to Katyal, then, a natural fit to use the energy and ingenuity of law students when he began working on the case that would become *Hamdan v. Rumsfeld*. 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.” His ideal law student: accurate, creative, collaborative, and industrious.

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.”

A bit intimidated and overwhelmed by the magnitude of the case (and by a theoretical and complicated legal debate Katyal had been carrying on with other law students on an email listserv), Tarantolo volunteered for what seemed the most straightforward assignment—the Uniform Code of Military Justice’s speedy trial requirement. “Military law

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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.” Katyal incorporated some of Tarantolo’s research into the petition, and she assumed her work with *Hamdan* was finished.

But with her return to New Haven for her second year at the Law School, Tarantolo started to wonder about the case. “One evening in September, I wrote Neal a casual email saying hello, please keep us updated, and oh—if there’s anything I can do to help, let me know,” Tarantolo remembers. Two hours later, Tarantolo’s email inbox contained a reply from Katyal—a reply that included an extensive research assignment due the next day by 3 p.m. Tarantolo stayed up all night finishing that assignment. As soon as she sent it to Katyal, he had more work for her. “That is basically how I spent the rest of the fall—getting assignments late at night, on unfamiliar topics, with tight turnaround times. It was possibly the time in my legal education that I learned the most about what it’s like to be a lawyer,” Tarantolo says. “The greatest thing I learned was how to approach a totally unfamiliar problem, educate myself on it, focus the question, and find an answer—which is, of course, what good lawyers do best.”

Among other assignments, Katyal tasked Tarantolo with crafting an argument for bringing experts in international law to testify before the commission in Guantánamo. Tarantolo had never taken evidence and knew nothing about the standards of expert testimony. There wasn’t even any applicable legal precedent for military commissions for her to refer to. “It was assignments like these that were the most challenging, the most creative, and the most exciting,” she says.

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 jumped to seven in the 2004-05 academic year and ten 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 flesh 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, helped with word-smithing, and organized moot courts to prepare Katyal for the oral argument.

“At both Yale and Georgetown, I’m working with some of the most interesting, creative students,” Katyal says. “It’s almost as if I’m raiding the top firms in D.C. and cherry picking.” Though they may not have had prior knowledge about the case, Katyal’s acolytes learned quickly. And the diversity of experience and political leaning (the president of Georgetown’s Federalist Society is among Katyal’s student team-members working on *Hamdan*) has proven to be a boon to the case. Katyal spent two and a half years working on a brief about separation of powers until a fresh-faced student looked at the problem from an angle Katyal himself had not considered. “Here comes a student, with little prior knowledge, and he has a different way of looking at it. That kind of help is immeasurable,” he says.

Katyal’s students, unsurprisingly, have similarly high praise for their mentor. “He somehow managed to challenge us, encourage us, respect us, make us feel needed, make us feel appreciated, make us defend our positions, make us rethink our positions, and inspire us to achieve for ourselves and our causes, all at once,” Tarantolo says.

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. “Guantánamo 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,



A group of YLS students who have worked on Hamdan gathered in Washington, D.C., to support Katyal at the Supreme Court in March. From left: Kimberly Gahan '07, Steve Vladeck '04, Neal Katyal '95, Ariel Lavinbuk '06, Danielle Tarantolo '06, Aron Ketchel '06, Stephen Townley '06.

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.

Tarantolo's most memorable moment in Cuba came just as the pretrial proceedings were scheduled to start, when the commission building received news that Judge Robertson of the District Court of D.C. had issued an order enjoining Hamdan's commission from carrying forward. When the news reached the building, chaos broke loose. "The Commission members hastily retired to consult with one another, while those of us in the audience looked on with confusion," she remembers. "Soon we realized that we had won in the district court, and a few moments later they announced that the commissions would be indefinitely

recessed. I had the sense of watching a historical moment take place."

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 Guantánamo 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

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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.”

It is that ideal that has kept Katyal going back to Gitmo every couple of months at his own expense and has helped him—despite a full-time faculty position and three young children at home—carry the case all the way to the Supreme Court.

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 the case, as did Judith Resnik, Arthur Liman Professor of Law; William Eskridge, Jr. ’78, John A. Garver Professor of Jurisprudence; Jonathan Freiman ’98 (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.

“Neal was absolutely fantastic—his delivery was confi-

dent, coherent, precise, and rhetorically compelling,” Tarantolo says. “Moreover, some key justices seemed to agree with certain of his important points. All in all, we left the argument tremendously hopeful—more hopeful than I’ve felt at any other point in this entire case.”

On June 29, the Supreme Court handed down its decision in favor of Hamdan. The ruling was the last of the court’s term, and arguably, the most anticipated and contentious of the year.

Tarantolo, who graduated this year and will be clerking for Judge Sonia Sotomayor ’79 of the Second Circuit Court of Appeals beginning in the fall, is just grateful to have been part of the process. “The law—which is really just people and the arguments and papers they produce—can effect substantial change in this country,” she says. ♣

YALE LAW STUDENTS WHO HAVE HELPED WITH THE CASE

Joseph Blocher ’06
Josh Block ’05
Zach Bray ’05
Nola Breglio ’04
Anisha Dasgupta ’06
Cary Franklin ’05
Steve Fuzesi ’04
Kimberly Gahan ’07
Johanna Kalb ’06
Derek Kaufman ’05
Aron Ketchel ’06
Jonathan Kravis ’04
Ariel Lavinbuk ’06
Lisa Marshall ’05
Alan Schoenfeld ’06
Matt Spence ’06
Danielle Tarantolo ’06
Stephen Townley ’06
Steve Vladeck ’04
Steven Wu ’05