

Katyal's Crusade

How an overachieving law professor toppled the president's terror tribunals.

By T.R. GOLDMAN

Neal Katyal, hands clasped, back straight, feet flat on the floor—his fidgeting thumbs the only movement in his body—faces a speakerphone in a near-vacant room, ready to moot.

Katyal, a law professor (and, hence, the antithesis of the standard big-firm luminaries of the Supreme Court bar), had already achieved his stunning Supreme Court victory, *Hamdan v. Rumsfeld*, nearly a month earlier. So a visitor might be forgiven if he were to grab Katyal by the collar, look straight into his bright and pleasant face, and exhort: “Neal, you won. It’s over. . . . Stop mooting!”

Katyal, presumably, would pay you no mind. He mooted his Supreme Court case the day before his March 28 argument, a move so unusual among high court advocates that, says moot team student member Haven Ward, “it freaked everyone out.”

In fact, he mooted his Supreme Court argument 15 times since the granting of cert on Nov. 17, 2005, honing his delivery skills along the way with lessons from Joshua Karton, a Los Angeles-based actor who teaches lawyers how to improve their physical presence, “to have a conversation with the justices, not an argument,” Katyal explains.

And though Katyal was steeped in the law he was arguing, he was not everyone’s first choice. He asked a prominent law professor for advice. “My real advice to you is to give up the argument,” he was told.

“Neal was in a place where he didn’t want to be underprepared,” notes Stephen Vladeck, a professor at the University of

Miami School of Law and a key moot participant. “And the best sort of means of ensuring that you’re not underprepared is to be overprepared.”

And so, on a sweltering July day, in a conference room at Georgetown Law Center, where Katyal, 36, is a tenured professor, he was spending an hour mooting his upcoming testimony before the Senate Armed Services Committee.

“Hey, guys, it’s Neal,” says Katyal into the speakerphone to his five student mooters, with a mien so calm and affable he could be your local pharmacist or grocer.

Katyal had never argued before the high court, but in *Hamdan* he literally took on George W. Bush, arguing that the military commissions the president established to try the Guantánamo Bay Naval Base detainees—including his client, Salim Hamdan, a former driver for Osama bin Laden—were illegal. The Court, in a 5-3 decision written by its senior justice, John Paul Stevens, agreed.

It was a complex case that stretched back three years, implicating not only the limits of executive power but delving into the nature of the interrelationship of all three branches of government.

“I know what I told Neal three years ago. I thought it was unwinnable,” says Katyal’s Yale Law School professor, Akhil Amar, who first met Katyal in 1992 and calls him “the most memorable student I’ve ever had.”

Katyal first argued the case Oct. 25, 2004, before Judge James Robertson of the U.S. District Court for the District of Columbia and won. Robertson was reversed by a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit, which included



soon-to-be Supreme Court Chief Justice John Roberts Jr. Finally, he won again when the Supreme Court announced its decision June 29. (Because he ruled at the appellate level, Roberts recused himself from the case.)

In the Georgetown conference room, Katyal polishes off his moot in an hour, while three students playing an unusually bright group of “senators” critique his five-minute opening statement, throwing question after skeptical question back at him. “What do you think my best points are—if any?” Katyal asks, his seeming self-effacement hard to reconcile with his command of the subject.

If the moot helped, there was scarcely anybody at the next day’s hearing—on possible congressional responses to *Hamdan*—to notice. Katyal was on the second panel, and when he delivered his testimony at noon, the only senators present in the Russell Building’s regal Caucus Room were Committee Chairman John Warner (R-Va.) and ranking member Carl Levin (D-Mich.). Still, Katyal appeared to be fine-tuning his address throughout the morning.

“It’s the first time I’ve ever laid eyes on him,” said Warner, 79, when asked about Katyal after the hearing. “But he speaks with conviction, and I loved the phrase ‘The last thing in the world I ever wanted to do was sue the president.’”

THE BRIGHTEST STAR

Lt. Cmdr. Charles Swift, an intense and talkative Navy JAG and Katyal’s co-counsel in *Hamdan*—a man everyone seems to feel comfortable calling Charlie—remembers his first meeting with Katyal, in the spring of 2003. “I’m sure Neal thought his meeting with a bunch of military lawyers would be unproductive. We, on the other hand, thought, We’re about to meet an egghead who doesn’t have a clue how the world works.”

And it’s true that Katyal’s pedigree has been almost entirely academic: a private Catholic boys school in Wilmette, just north of Chicago; a national reputation as a champion high school debater; Dartmouth College, followed by a year coaching the Dartmouth debate team; then Yale Law School, from which he graduated in 1995.

His law school internships each summer could not have been more propitious. Summer No. 1: a legal intern in the office of Vice President Al Gore. Summer No. 2: a legal intern in the Office of the Solicitor General. Katyal spent his third summer at Washington’s Hogan & Hartson, where he worked specifically for Supreme Court litigator and now-Chief Justice Roberts. (“‘Go work for John G. Roberts,’” Katyal says he was told by Miguel Estrada, an assistant solicitor general when Katyal worked in the office. “‘The G,’ Estrada added, ‘is for ‘God.’”)

After law school, Katyal spent two years clerking, first for Guido Calabrese, the former Yale Law School dean who had recently been named a judge on the U.S. Court of Appeals for the 2nd Circuit, then for Supreme Court Justice Stephen Breyer. “It was nonstop typing all day,” says Carolyn Shapiro, who clerked with Katyal and shared an office with him. “He’d just zoom in and pound out stuff,” adds Shapiro, now a law professor at Chicago-Kent College of Law.

Katyal’s 1996-97 Supreme Court term was a banner year, with 80 signed opinions, including *Clinton v. Jones* (a sitting president could be sued), *Printz v. United States* (imposing limits on the fed-

eral government’s authority), and *Washington v. Glucksberg* (no constitutional right to have a physician help you die).

At age 27, just after his Breyer clerkship, Katyal joined the law school faculty at Georgetown, a job he deferred until the fall of 1999 so he could be the adviser for national security affairs in the Clinton Justice Department.

Katyal was recommended for the DOJ job by Kumiki Gibson, the former Gore counsel whom Katyal got to know during that first summer internship.

Katyal was the point person at the DOJ during the year in which the independent counsel statute, which gave Bill Clinton investigator Kenneth Starr his job, was set to lapse. Katyal and a small team crafted the attorney general’s special counsel regulations that are now on the books. “Laws like the independent counsel statute are a real interference with the clean lines the Founders intended,” Katyal says.

During his 18 months at the DOJ, where in his national security role he had his first experiences with military lawyers, Katyal also worked his way through the legal conundrum of how the United States could return to Pakistan several hundred million dollars for 28 F-16s that Pakistan paid for in 1989 but never received. “I enjoy figuring my way out of a maze,” says Katyal. “If somebody says we can’t do x or y, I like figuring out a way to do x or y.”

“It was a funny thing,” he muses. “An Indian figuring out a way to give money back to Pakistan.”

A FUNKY KINDA DUDE

Katyal’s parents emigrated separately from India’s Punjab region in the early 1960s, and while Katyal rarely wears his Indian roots on his sleeve, he does not consciously cover them up, either. His parents did not know each other before they returned to India in 1968 for an arranged marriage. Katyal, following Hindu tradition, arrived at his own wedding in New York state on a horse.

The elder Katyal, who died after Neal took the *Hamdan* case but before it reached the Supreme Court, was a petroleum engineer; his mother is a pediatrician.

It was a relatively secular household, as were many Hindu households in that first wave of Indian immigrants to the United States. But it was socially conscious. “My father was very invested in politics—he loved to watch the news, to think about what was going on in the world,” says Katyal’s only sibling, Sonia Katyal. “He treated Neal and I like adults.”

Katyal says he was never drawn to litigation as a career, but he is not a model of the cloistered academic, either.

He’s an indie-music fan whose students make him CD compilations and a regular at the 9:30 Club in the District’s U Street corridor. Katyal just started writing a wine column for *The Indian-American* magazine. He’s also written for *Slate* and other mainstream publications. He gave an interview to the relatively hip Web site *dcist*, which chronicles the local political, sports, and arts scenes, noting that he celebrated his Supreme Court victory by drinking a Belgian beer, Leffe Brune.

And he pulled six minutes last week on “The Colbert Report,” fending off questions like, “How old were you when you said to yourself, ‘I am taking this country down?’” by responding with a lecture on the principle of rule under law.

He is surrounded by the law; while his wife is a doctor, his

brother-in-law is Jeffrey Rosen, a journalist for *The New Republic* and a George Washington University law professor. His sister is a law professor at Fordham University.

For the past year and a half, Katyal's also been represented by International Creative Management's lecture department, alongside about 100 other people, ranging from Alan Alda to Frank Gehry to Pete Hamill to Patti LaBelle. "I'm probably the last person on their Web site," he says dismissively, adding that so far he's gotten only a handful of lectures from the deal, although he now expects the speaking gigs to pick up, perhaps considerably.

As might the hate messages, which Katyal says are often no more than expletive-laden rants accusing him of siding with the enemy. For every one piece of hate mail, however, "there are 10 supportive e-mails from [American] troops, saying, 'Thank you for defending me and my cause, because if I'm caught in some other country, what's going to save me from a beheading, except for the fact that the U.S. plays by rules,'" Katyal says.

In the Indian-American community, Katyal is already a hero. A lengthy profile last fall in *Indian Life and Style* magazine describes Katyal like this: "Belying his over-six-foot frame, muscular build and an authoritative Greco-Roman nose, Katyal speaks surprisingly softly even on issues he feels passionately about." Says Katyal, who is 5 feet 10 inches: "It was ridiculous. My mom didn't even believe everything in there."

A BIG-DEAL REQUEST

If Katyal was looking for a maze to master, *Hamdan* was it. The case was intensely political, and for someone with possible aspirations to return to a Democratic administration, ideally as the national security adviser, representing bin Laden's driver didn't make any sense. The case was notably complex, as well.

"We were out there on questions of law," notes Joseph McMillan, a partner in Seattle's Perkins Coie who was integrally involved in the case. "We're citing commentaries to the Geneva Convention and Winthrop's *Military Law and Precedents* from 1920," says McMillan. "This was not a case where there was a well-developed body of precedent."

Hamdan, in fact, dealt with six specific areas of law, explains Amar, the Yale Law School scholar: "Habeas, retroactivity, military justice, jurisdiction-stripping, the law of war, and international relations and the Geneva Convention—each of which is not even taught in most law schools."

Katyal says that when he first read the White House news release announcing the establishment of the military commissions, he thought it was a hoax. "I'm a presidential deferentialist, but I went into my classroom and said, 'Hah. I've found something that's totally unconstitutional.'"

He wrote a *Yale Law Journal* article with Harvard law professor Lawrence Tribe in April 2002, arguing the commissions were illegal, and in early 2003, got in touch with the Office of Military Commissions' then-acting chief defense counsel, Col. Will Gunn.

"Neal made me aware of the law review piece and told me he just wanted to be of assistance," recalls Gunn, who retired from the Air Force last year and is now president of the Boys and Girls Clubs of Greater Washington. Civilian lawyers are permissible under the commissions' rules.

Gunn, in turn, put two of his defense counsel, Lt. Cmdr.

Swift and Lt. Cmdr. Philip Sundel, in touch with Katyal. They hit it off.

Things really got rolling in November 2003, when the Supreme Court granted cert in *Rasul v. Bush*, the case that would determine whether the Guantánamo detainees could sue in U.S. court.

Swift says the day cert was granted, he got a call from Katyal. "Dude, you're not going to believe this; they got cert. We have to file a [amicus] brief," says Swift, recalling his conversation with Katyal.

At that time, none of the commission defense counsel had even been assigned clients. But they had potential clients, and early on, it was clear the first step in representing those clients was to challenge the legality of the commissions themselves. And they knew a bad decision in *Rasul* could preclude that option.

Their gambit: In a Nov. 24, 2003, letter, five defense counsel, including Swift and Sundel, told Gunn's superior, Department of Defense Deputy General Counsel Paul Koffsky, that they planned to retain Katyal in one week as a civilian counsel in order to file an amicus brief in the *Rasul* case. It was, says Gunn, "a big-deal request. We were a brand-new office, and we were assigned to the office of the [DOD] general counsel, which doesn't have a history of taking positions contrary to the interests of the U.S."

The tactic worked, and permission was granted to file the amicus "if you determine that such a course of action is necessary for the zealous representation of clients of your office," Koffsky wrote Gunn on Dec. 30, 2003.

On June 28, 2004, almost two years to the day before *Hamdan* was decided, the Supreme Court ruled that the Guantánamo detainees could file habeas petitions in federal court. "The deal was done in the letter of Nov. 24, when they cc'd Neal Katyal," says Gunn. Adds Swift, "If they had tried to shut us up, Neal would have continued."

Katyal never left, however, eventually becoming *Hamdan*'s civilian co-counsel and ultimately managing a case that had 45 law firms working on about as many amicus briefs. He mooted the case up and down the East Coast, spending one \$15,000 grant and several tens of thousands of dollars more of his own money (each of the five round-trip flights to Guantánamo Bay to talk with *Hamdan*, for example, ran \$800).

And he continued to work with Karton, the California advocacy expert. "I'd built up a sort of formality, a lot of layers, that weren't conducive [to a court presentation]," Katyal explains. "Josh talks very slowly, and he looks you right in the eye, and he says, 'Tell me the argument you want to make to the justices—and hold my hand while you do it.'"

On July 4, five days after the high court's ruling, Katyal and Swift flew to Guantánamo to explain the decision to *Hamdan*, a Yemeni national with a fourth-grade education. "I was going over the case with him and I said, 'In 50 to 100 years, law students will be reading this case and reading your name.'"

Katyal, who says he never quotes *Hamdan* directly because the Department of Defense might think his client is passing on coded messages, says *Hamdan*'s response was something like this: "Maybe I'll change my name. I just want to go home."

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