

NPR Morning Edition
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Nina Totenberg,
Law Professor Beats the Odds with High Court Win

RENEE MONTAGNE, host:

This is MORNING EDITION from NPR News. I'm Renee Montagne.

STEVE INSKEEP, host:

And I'm Steve Inskeep. Good morning.

Congress and the White House are still deciding how they want to put accused terrorists on trial. The Supreme Court invalidated the Bush administration's system. Among those lobbying now for a system based on the Code of Military Justice is a young lawyer who argued and won the case.

NPR legal affairs correspondent Nina Totenberg has this profile.

NINA TOTENBERG reporting:

On the March morning the Supreme Court was to hear the landmark case of Hamdan versus Rumsfeld, Neal Katyal opened his morning paper.

Professor NEAL KATYAL (Professor of law, Georgetown University): On the right side was a teaser about the case, Hamdan case to be heard. And on the left side was, Strange Cries Emanating from Woodley Park-Zoo, and they blamed it on the baby panda. And I said, well actually that was me, my 3:00 a.m. crying because I was about to face the solicitor general of the United States.

TOTENBERG: The 36-year-old Katyal, a professor at Georgetown Law School, was about to make his first argument

in the Supreme Court, and his much respected adversary, Paul Clement, was making his 34th.

When Katyal joined the defense team as the chief appellate advocate three years earlier, no one had given him any chance of success and few thought the Supreme Court would even agree to hear the case. But as Katyal's mentor, Yale law Professor Akhil Amar puts it now...

Professor AKHIL AMAR (Professor of Law, Yale University): For this generation, Neal Katyal has become the Thurgood Marshall of his era.

TOTENBERG: In June, the Court, in a historic ruling on executive power, delivered a stinging defeat to the Bush administration - a defeat engineered by Katyal.

Katyal is the son of Indian immigrants, his mother a pediatrician, his late father a chemical engineer. Although a Hindu, he went to Catholic schools then Dartmouth undergrad and Yale Law School, followed by a Supreme Court clerkship. As a law professor, Katyal has participated in writing briefs in some big cases - Bush versus Gore for one - but until this case, his life has largely been in academia, where he's often crossed ideological lines writing articles with some of the leading conservatives of the day.

In the late '90s, Katyal took a two-year detour into government, where, at age 28, he served as a top assistant to the deputy attorney general in the Clinton administration. One of his areas of responsibility was national security. A memo he wrote in 1998 was turned up later by the 9/11 Commission. Retired Colonel Len Holley(ph), the Commission staff member who found the memo, calls it a rare and prescient gem.

Colonel LEN HOLLEY (9/11 Commission Member): Looking at it through 9/11 eyes, it turned out to be a very remarkable analysis of the terrorist threat that called for a very assertive role for law enforcement and justice. There are many smart

people in government, but few had the imagination to think about this threat as being as serious as it turned out to be.

TOTENBERG: And he did.

Col. HOLLEY: And he did.

TOTENBERG: On September 11th, 2001, Neal Katyal was out of government service, back teaching when his wife woke him up with the news of the attack.

Prof. KATYAL: The first words out of my mouth were Bin Laden. You know, my heart sank that it really fit the profile.

TOTENBERG: But when the president announced plans for military tribunals, Katyal was appalled at what he saw as a blatantly illegal and unconstitutional system. The young law professor immediately volunteered his services to the military defense team, among them Lieutenant Commander Charles Swift.

Lieutenant Commander CHARLES SWIFT (Judge Advocate General Corps, U.S. Navy): He was not the aloof academic that we expected.

TOTENBERG: But almost everyone Katyal knew tried to discourage him. His mentor, Prof. Amar, told him the case was, quote, a loser, and that it would harm his career, eroding his stellar national security credentials.

Prof. AMAR: And he said, you know, you're right about all of that. But I believe in the rule of law, I think what's going on is not lawful, and no one else is willing to take on this case. And so it's just my obligation as a lawyer.

TOTENBERG: At home, the decision wasn't popular either, almost ruining a big family Thanksgiving dinner.

Prof. KATYAL: My mom said, oh, you should tell Auntie so-

and-so about what you've been doing, and so I told her. And her fork dropped and she said, you're doing what?

TOTENBERG: For Katyal, the case was also a learning experience, his first exposure to the professionalism of the military legal system. And he eventually changed his mind on a key point, agreeing that the trials should be in regular military courts not civilian courts, as he had previously argued. Commander Swift.

Lt. Cmdr. SWIFT: He had to change. He had to accept a different argument after having been convinced and writing a law review article. And Neal Katyal did that.

TOTENBERG: For a year and a half, Katyal worked with the military lawyers positioning the issue so that the Supreme Court would grant review. Although he knew he would take a PR hit in a case involving Osama bin Laden's driver, Katyal chose Salim Hamdan's case as the vehicle because there was no evidence Hamdan had taken up arms.

Finally, on November 6, 2004, Katyal met his client for the first time.

Prof. KATYAL: Hamdan kicked everyone out of the room except me and the translator, and I thought I was going to be yelled at.

TOTENBERG: Instead, Hamdan gave Katyal a few prized sweets, a date and some raisins.

Prof. KATYAL: He literally gave me the only possessions he had and said thank you for doing this. And then he asked me why are you doing this? I said, I'm doing it for you because my parents came from India to America because of a simple reason: Because America doesn't treat people differently because of where they come from.

We fought a civil war in part about the idea that all people are

guaranteed certain rights, and chief among those is a right to a fair trial.

TOTENBERG: For the next year and a half, Katyal would be the major domo of the case, coordinating some 1,000 people working on it in one form or another, all of them wanting a piece of Katyal's time. No week went by without at least 3,500 e-mails showing up on Katyal's Blackberry.

He not only wrote the main brief, he arranged for some 40 separate friend of the court briefs to be filed and coordinated so that different points were made in each one. Briefs not just from human rights groups but from retired military brass, historians, even 400 British Parliament members. And when there was a congressional attempt to strip jurisdiction from the courts, Katyal launched a counter campaign.

A core group of 50 students and high-level lawyers of all political stripes were Katyal's war counsel. One of those, Supreme Court advocate Tom Goldstein, says the task facing Katyal was like herding cats in the middle of an avalanche.

Mr. TOM GOLDSTEIN (Co-Founder, Goldstein & Howe): You've got a million different pieces of the puzzle in the middle of a torrential storm in which you can't see straight, and you can't possibly hope to accomplish any one thing in a day. And the clock is always ticking because there are 1,000 people trying to get in touch with you.

TOTENBERG: Preparing for the argument, Katyal made a list of the lawyers who intimidated him most all over the country and flew out to do dry run arguments in front of them. In all, he did 15 moot court arguments. The issues were incredibly complex, ranging from military and constitutional law to international law.

And Katyal had to resolve conflicting opinions on how to frame the arguments. By all accounts, he was invariably courteous, patient and driven. Commander Swift:

Lt. Cmdr. SWIFT: It is December 25th. I am on the way to meet my wife to have dinner with my parents. We have just walked into the restaurant when my cell phone starts buzzing. It is Neal. Neal has read a section of my argument and is no longer pleased with it. In fact, he feels it should be rewritten. Now would be a good time.

TOTENBERG: In the end, Katyal defied the odds, winning on almost every major point. Even those on the other side are full of admiration for the way he conducted the case. Former Bush White House Associate Counsel Bradford Berenson:

Mr. BRADFORD BERENSON (Former White House Associate Counsel): That's what makes his advocacy in this case heroic, is that he took a view of the law and he pushed it all the way through the court system. He rolled the boulder all the way up to the top of the hill and got the highest court in the land to agree with him.

TOTENBERG: Katyal's victory was not without some personal cost. For over a year he slept no more than four hours a night as he tried to be husband, father, teacher and Hamdan case honcho. And he spent \$40,000 of his own money on the case. But he says:

Prof. KATYAL: It's something I had to do, and I feel, you know, enormously privileged to be able to do it.

TOTENBERG: Nina Totenberg, NPR News, Washington.

INSKEEP: You can read the history of the Supreme Court case and hear the oral arguments before the Supreme Court by going to npr.org.