JUSTICE FOR ALL?

Last June, in *Hamdan v. Rumsfeld*, the Supreme Court ruled that the president could not deny rights to Guantánamo detainees and try them in military tribunals. Charles Sipos ’94 was on the team that argued and won the case. Now an act of Congress may suspend habeas corpus for terror suspects, and Sipos is buried in paper again, preparing for round two.

by Stacey Wilson
Charles Sipos comes off a bit guarded when it comes to discussing details about *Hamdan v. Rumsfeld*, the landmark case that challenged President Bush’s power to try suspected terrorists. “I try not to say too much beyond the basic facts of the case, because when I start talking about the legal issues, I can get really worked up,” says Sipos. “After spending nearly three years of my life on this, I think it’s fair to say I feel pretty passionately about it.”

It’s a blustery November morning outside the downtown Seattle offices of Perkins Coie, one of the Northwest’s oldest law firms. Sipos, a fifth-year associate, is taking a rare moment away from his law briefs to chat in one of the firm’s conference rooms overlooking Elliott Bay. Dressed in a casual-Friday argyle sweater and jeans, his boyish appearance belies maturity and depth, qualities that put him on a team trying a case of immense civil and legal significance. “It has exceeded any realistic expectation about the type of law you could imagine practicing as a young lawyer,” says Sipos. “I have a hard time thinking that there will be a case I’ll work on that will surpass this one in terms of the overall experience.”

Since 2004, Sipos and two Perkins Coie colleagues, Harry Schneider and Joe McMillan, have been defending Salim Ahmed Hamdan, a suspected al-Qaida member captured in Afghanistan just after 9/11. The firm sued the government—including our commander in chief—challenging the assertion that suspected terrorists should not be afforded the protections outlined for prisoners in the Geneva Conventions and instead should be tried in military tribunals.

Last June, the Supreme Court ruled in favor of Hamdan, relying on U.S. military law,
along with Common Article 3 of the Geneva Conventions, which provides a minimum level of protection for anyone captured in an armed conflict—even in a nebulous and unprecedented “war on terror.” The decision was a huge win for Sipos and his colleagues, since it proclaimed that any trials of so-called enemy combatants captured in a wartime conflict must take place in a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

But the controversy didn’t end there. In September, President Bush did what the Supreme Court said in Hamdan he had to do: Go to Congress to get authorization for the commissions. The result was the introduction of the Military Commission Act of 2006 (MCA), a law that gives the president power to detain, interrogate, and try suspected terrorists held at Guantánamo Bay, Cuba, or anyone else deemed an “unlawful enemy combatant.”

The MCA could give the president, as The New York Times commented in an editorial on Sept. 28, “the power to jail pretty much anyone for as long as he wants without charging them, to unilaterally reinterpret the Geneva Conventions, to authorize what normal people see as torture, and to deny justice to hundreds of men captured in error.”

The act passed both houses of Congress and was signed into law on Oct. 17.

“This was not a welcome development,” says Sipos.

As of early November, Sipos and his colleagues were preparing to challenge the MCA because, among other problems, it may strip the federal courts of jurisdiction to hear lawsuits challenging the trial and detention of enemy combatants. In doing so, it may result in a suspension of the writ of habeas corpus: a constitutional provision that affords basic rights to people who have been detained by the United States, such as Hamdan, to challenge their imprisonment in court.

“I wholeheartedly disagree that the war on terror can’t be fought with laws that fall within constitutional limits,” says Sipos. “For me this is the Northwest for college because it was one of the few places he hadn’t lived.

At UPS Sipos chose a major in communication and ended up just one credit shy of a second major in politics and government. He admits he didn’t give the law serious consideration as a career until his senior year. “I had Professor David Sousa for several classes, and a lot of them dealt with legal issues and machinations of government,” he says. “He really challenged me and made me think critically about the law. For the first time, I was excited about what I was learning. I think it just took me longer than most people to get there.”

After graduating in May 1994, he was hired by Perkins Coie, Seattle’s largest law firm, as a document clerk in the litigation department, which at the time was “the lowest level job you could have at the firm,” says Sipos. “But actually, carrying briefcases for those lawyers was a great introduction to this business.”

A year later, Sipos moved to Korea for a job at a law firm in Seoul and later traveled throughout Asia with then girlfriend and now wife, Nicole Martin ’94. (The two were married in 1999 and have a son, Henry, who was born in April 2006.) Sipos and Martin returned to Seattle in the fall of 1996, and he resumed working at Perkins, but this time as a paralegal.

In the fall of 1999 he applied to law schools and the following summer moved with Martin to Tennessee, where the two attended graduate school at Vanderbilt University: he at the law school, she in a master of education program. “We went there because it was a good school for both of our fields,” he says, “but also to experience a new place together, away from the Northwest. A chapter in life all to ourselves.”

While at Vanderbilt, Sipos says he took “pretty much every constitutional law course the school had to offer.” He was enthralled with the examination of the separation of powers and structural constitutional issues. “But it wasn’t something I had too much expectation of being able to carry over into practice,” he says. “At least not on a day-to-day level.” Sipos continued doing contract work for Perkins throughout law school and ultimately scored a much-coveted summer associate position for three months in 2001, where, he says, “I got some really interesting pro bono work and also made up my mind that Seattle, and Perkins in particular, is where I wanted to practice.” Sipos soon received a formal offer from Perkins and, after receiving his J.D. in
May 2002, moved back to Seattle and started as a first-year associate that fall.

By this time, a Yemeni man in his early 30s named Salim Ahmed Hamdan, a former driver and alleged bodyguard for Osama bin Laden, had been captured by indigenous forces loyal to the Northern Alliance in Afghanistan (in November of 2001) and turned over to the U.S. military for a $5,000 bounty. After months of detention in Afghanistan, he was sent to the Guantánamo Bay Naval Base in Cuba in 2002, tried only accepted war crimes that took place on the battlefield or immediately after battle. Hamdan’s situation just didn’t fit either the history of commissions or the congressional statute that limits their jurisdiction.”

Hamdan admitted only that he worked for hire as Osama bin Laden’s driver and has denied ever joining al-Qaida or engaging in jihadist training. But with little else to support it beyond the admission to being bin Laden’s chauffeur, President Bush issued an RTB, in the Seattle offices of Perkins Coie. (Katyal was familiar with the firm because one of his former students, David East, worked there.) Filed in Seattle because Swift lived there before joining the military, the case was transferred to federal court in Washington, D.C., in the summer of 2004. But the Perkins lawyers stayed on board.

Harry Schneider, Perkins Coie’s senior partner on the case, tapped colleagues Joe McMillan, 46, and David East, 30 (who’s now with the firm McNaul Ebel), and Sipos to join him. “I decided at the very outset that this case needed to be staffed with the best possible team I could assemble,” says Schneider. “Charles had worked on cases for me before he went to law school, so I had a long track record with him that convinced me he had the ideal combination of intellectual talent, appetite for hard work, and teamwork skills necessary for a case that had the potential to go all the way to the U.S. Supreme Court.”

The main challenges raised by the suit, filed in the United States District Court in Seattle on April 6, 2004, were whether military commissions as outlined by President Bush complied with military law, the Geneva Conventions, and constitutional checks on the separation of powers. “Really what we were saying,” Sipos explains, “is that the president was trying to exceed the powers afforded to him by Congress and the Constitution. This was wrong.”

Over the next two and a half years, the lawyers at Perkins logged thousands of pro bono hours on the Hamdan case, services that Sipos estimates to be worth “well over $1 million, if the firm were getting paid.”

Concurrent with his work on Hamdan, Sipos also continued intellectual property litigation, his primary practice area, although he admits Hamdan is “really what I’m most excited to go to work for every day.”

Of course, Sipos says, the level of public scrutiny meant increased pressure to perform. “It’s not as though I came to the case with a lot of experience litigating the legality of military commissions,” he says. “On the other hand,
commissions had been a dead letter for the past 50 years, so there wasn’t really anyone else who did either.”

Getting past the notion of representing a suspected terrorist at Guantánamo and the anti-patriotic stigma associated with it, another aspect of Hamdan called into question Sipos’ and his firm’s loyalties during wartime. Last March, a U.S. military official at Guantánamo said it seemed more than odd that a corporate law firm, whose clients include a major defense contractor like Boeing, was working for free for a suspected terrorist.

“Yes, we did hear that comment: ‘Oh isn’t it ironic that law firms representing defense contractors are now working pro bono to defend terrorists,’” says Sipos, who co-wrote an editorial with McMillan for The Seattle Times, criticizing the commissions authorized by the MCA last fall. “But I think that’s a bankrupt argument on a lot of levels. Overall, the response from our clients and the community has been very favorable, and I’m certainly not aware of any internal controversy at Perkins about us taking the case.”

Katyal charged Sipos with the research and briefing on why the rules of evidence used in
Even if we’d lost Hamdan, I could still walk away feeling like we were correct to take on an issue as important as the erosion of constitutional liberty, particularly during a time when people might be more tolerant because it’s been packaged for them as something that’s “necessary to meet the objective.”

The 185-page ruling, with the majority opinion written by Justice Stevens, sided 5–3 with Hamdan and agreed with Katyal’s argument that the procedures for the commissions did not comply with military law and were in violation of Common Article 3 of the Geneva Conventions: If Hamdan were to be tried, it must be in a court that provided him “judicial guarantees which are recognized as indispensable by civilized peoples.”

It’s rare for the Supreme Court to hear cases challenging the president’s power to convene commissions. “And it’s even rarer for the court to tell the president that he’s acting outside the authority that’s been granted to him by Congress,” says Sipos. “I believe the Hamdan opinion will be read by future courts to require that whatever regime is put in place to deal with enemy combatants in the war on terror, it must comply with constitutional restraints.”

Never one for self-congratulation, Sipos says he is looking ahead to the challenges presented by the Military Commission Act and finishing briefs to challenge that law back at the district court in D.C. “Now the issue is, yes, Congress indeed has the power to legislate regarding the laws of war,” he says, “but, of course, Congress has no power to pass laws that are unconstitutional.”

As for Hamdan, news reports have suggested the government may recharge and try him (along with the nine others previously charged under the president’s now defunct military order) under the MCA. Those trials might take place as early as summer 2007. As the federal civil case moves forward, Sipos awaits government approval of the necessary security clearance papers so he can visit his client for the first time, ideally before the new year. Although it’s really just a regular client meeting, Sipos admits it will be rather unusual seeing Hamdan since the meeting has been three years in the making.

In the meantime, he’s heartened by the response and reaction his firm’s work on Hamdan has garnered in Seattle and beyond. “There was a mention of the case in the paper one Sunday,” he says. “And we got 100 e-mails over the weekend from people all over the U.S. commending the firm, Professor Katyal, and Commander Swift for taking the case. It was very heartening to see that there are people out there who recognize that this story is more important than, say, Paris Hilton’s DUI.”

He says this kind of support has helped him avoid the trap of hopelessness, apathy, or cynicism that these difficult times can foster. “We need to remember that the U.S. is the envy of the world in terms of the fairness and rigor with which people are defended here,” he says. “Even if we’d lost Hamdan at the Supreme Court, I could still walk away from the case feeling like we were correct to take on an issue as important as the erosion of constitutional liberty, particularly during a time when people might be more tolerant of it because it’s been packaged for them as something that’s necessary to meet the objective.”

He pauses again, smiling. “Like I said, I do feel pretty passionately about it.”

Stacey Wilson, a 1996 Puget Sound graduate, is a correspondent for People and frequent contributor to Portland Monthly magazine.