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"Why We Fight"

The Importance of Advocacy Training at The Judge Advocate General's School

BY LIEUTENANT COLONEL CHARLES G. WARREN*

What good is being a subject matter expert in the administration of military justice if you cannot convince your colleagues, your commanders, and when it comes down to it, the court-martial members, that your application of the law is not only the correct one, but the just one.

Shortly after the United States entered World War II, the United States government commissioned renowned Hollywood director, Frank Capra, to create a series of films to convince American troops of the righteousness of the war. The name of the series was *Why We Fight*. In time, it was used to convince not only American troops, but the American people, of the righteousness of our cause. It was also one of the most successful documentaries commissioned by the United States government because it provided motivation for an entire nation as to why the contributions of all were necessary for America and our democratic values to prevail. In commemoration of my time as the Chief of the Military Justice Division for The Air Force Judge Advocate General's School (AFJAGS), I offer a *Why We Fight* type explanation on the prominence we place on advocacy training at AFJAGS to our field of multi-talented judge advocates, many of whom specialize in areas *outside* of military justice.

Think back to JASOC . . . remember your mock trial? Some of you may have loved it, some of you probably hated it, but you all had to go through it. The question is WHY?

Many of you may not have litigated a court-martial since the completion of your second base legal assignment. Some of you may not do much criminal litigation after "certification" depending upon your base of assignment and the ops tempo there. So, why take the time, effort, and "pain" of pushing you through the crucible of the courtroom for a skillset you may only use for the first few years of your career? Well, the answer is simple: whether you are in or out of the courtroom, **litigation skills are leadership skills**. As judge advocates, our profession demands and deserves both.

Advocacy is a force multiplier for the application of all of the other subject matters we endeavor to impart. After all, what

good is being a subject matter expert in the administration of military justice if you cannot convince your colleagues, your commanders, and when it comes down to it, the court-martial members, that your application of the law is not only the correct one, but the just one.

Accordingly, there are three primary reasons AFJAGS dedicates itself so intently to military justice advocacy training:

Reason #1: Advocacy is our core identity as judge advocates

Reason #2: Excellence takes time and advocacy takes practice

Reason #3: Litigation skills are leadership skills

In turn, these are reasons why fellow judge advocates should accept the challenge of military justice advocacy training early in your career as part of your “core curriculum” for what it means to be a judge advocate.

WHY WE FIGHT

REASON #1: ADVOCACY IS OUR CORE IDENTITY AS JUDGE ADVOCATES

“Judge” and “advocate”—it’s right there in the name. When you boil it all down, the core competency of a “JAG” is to “judge” the legal and operational environment of a given situation, and then to “advocate” with and for his or her clients and commanders to reach the optimal outcome for the mission under the law. Advocacy isn’t just what we do, in a very real sense, it’s **who we are.**

Looking back at the [history of judge advocates](#), beginning with the appointment of the very first judge advocate to the Continental Army in July 1775, advocacy has always been our stock-in-trade.[1]

After all, it was Colonel John Laurence, second Judge Advocate General of the Continental Army, who personally prosecuted British Major John Andre in connection with the treason and defection of [General Benedict Arnold](#) in September 1780.[2] Judge advocates prosecuted the con-

spirators in the President Lincoln assassination at a military tribunal in May-June 1865.[3] It was judge advocates assisting the international prosecution team at the Japanese and Nuremberg War Crimes tribunals following World War II.[4] Honing our advocacy skills is essential to keeping faith with our fundamental identity as judge advocates, which still includes a functional working knowledge of military justice and courts-martial. That said, while our mission was originally primarily military justice, obviously ours and all sister service JAG Corps have evolved as our military mission and the complex government actions they support have evolved. Thus, what began as an imperative to develop advocacy in the courtroom now requires advocacy, just as confidently and competently, across the legal spectrum.

Our trial advocacy training—it’s not just for the courtroom

You may be thinking: *Well, that explains why we focused on trial advocacy training in the past, but why do we focus on it in the present?* Briefly, **trial advocacy doesn’t just train litigators; it trains “advocates,”** writ large. We use trial advocacy training as a tool to hone the advocacy instincts and prowess of our judge advocates. [Lieutenant General Rockwell](#), The Judge Advocate General, pointed this out to me in the spring of 2016, as I was preparing JASOC Class 16-B for their military justice exam review. I addressed the students as “litigators” since they had just successfully completed a fully-litigated general court-martial mock trial—surviving their initial “trial by fire.” Then-Major General Rockwell smiled and gently corrected me in front of the class, as he explained, **“you don’t all have to be litigators, but you are all advocates.”**[5]

His statement really stuck with me. It brought home one of the underlying purposes of our trial advocacy training—it’s not just for the courtroom; it’s for the conference room, the war room, and wherever JAGs are called upon to give on-time/on-target legal advice for our mission. In training our judge advocates in advocacy, we aren’t just training them

to accomplish a single mission (*i.e.* military justice), we are training them to help accomplish **all our missions**.

REASON #2: EXCELLENCE TAKES TIME AND ADVOCACY TAKES PRACTICE

The second reason why we focus so intently on advocacy training at AFJAGS is simple, excellence takes time. Investing the time will ultimately build the **confidence** and **competence** resulting in solid **credibility** for all of our judge advocates. Think of it like investing. We're all told to begin investing for retirement as early as we possibly can after we begin our adult careers. Early investments create a solid base that pays dividends down the road with compound interest. On top of the initial investment, establishing momentum early on sets us up for financial success. The same effect can be seen with early advocacy training.

Candidly, it's all the more important to start advocacy training from the very start of our careers as judge advocates because, for many, it is something they may not seek out on their own. In each of my eight JASOC courses, I took an informal poll on day one of the military justice curriculum to see who had an interest in litigation. For every JASOC, the number hovered around 50 percent. Those results beg an interesting question: if "advocacy" (including basic competence in court-martial litigation) is a core mission of the Corps and directly linked to our historic identity as a Corps, why is there only middling interest? Based on my experience as a young advocate and drawing upon my observations of over 350 young lawyers, I think I have an answer—fear of failure and personal embarrassment.

By focusing on the "needs of the case" rather than my own personal needs (*i.e.* to avoid embarrassment), it gave me new boldness and purpose.

Of course, there's only one way to overcome that fear—face it. Our young judge advocates don't avoid trial advocacy because they are looking to "duck work." Far from it; they

joined to serve their country. They want to thrive; they want to be value-added. Ironically, it's the desire to thrive that sometimes creates a performance-paralyzing fear. They are afraid that they will fail in the courtroom because it is new to them, and they don't want to let themselves, their office, and our Air Force down. All of these are natural concerns, properly harnessed, can actually fuel performance.

As a young JAG, I was terrified of losing my cases and embarrassing myself in the courtroom. I wasn't "good enough" by my own personal standards. I was paralyzed by fear, and it was hurting my performance. I didn't know it at the time, but I needed to change my perspective. That change came for me toward the middle of my first assignment. I was neck deep preparing my first fully-litigated, general court-marital. The case involved sexual assault at the Air Force Academy and had received national media attention. As I contemplated how to navigate through the trial without screwing up, I realized I was asking the wrong question. Being a judge advocate meant embracing our core Air Force values, one of which is "**service before self.**" I realized that by focusing on my fear of embarrassment, I had inadvertently been placing "self before service." I began to shift to a better mindset: "**what are the needs of the case?**" By focusing on the "needs of the case" rather than my own personal needs (*i.e.* to avoid embarrassment), it gave me new boldness and purpose. I became less self-centered, and more case centered. It made all the difference. I didn't become a better advocate overnight, but it cleared the way for improvement. We learn by doing, not by avoiding.

Applying the principle of doing, our AFJAGS training regime takes into consideration the vast majority start at "ground zero" in terms of trial advocacy experience. Rome wasn't built in a day. So we've endeavored to build a tiered training approach to developing advocates, brick by brick. Great advocates only make it LOOK easy; they got there the same way—step by step.

TIER 1: JASOC. The JASOC mock trial and commander advice exercises lay the groundwork for our in- and out-of-the-courtroom advocacy skills.

TIER 2: ISALC/TRIALS. All base level JAGs, Area Defense Counsel (ADC), and Special Victims' Counsel (SVC) should attend one of the Intermediate Sexual Assault Litigation Course (ISALC) and Training by Reservists in Advocacy and Litigation Skills (TRIALS) courses. The TRIALS course in particular is a great opportunity to receive pointed feedback from senior, skilled litigators on discrete aspects of trial advocacy skills and collaborate with others. It's laid out like the JASOC advocacy seminars; breaking the trial down into component parts and then providing individualized performance feedback.

TIER 3: TDAC. The Trial and Defense Advocacy Course (TDAC) is designed for second assignment trial counsel and sitting ADC. They receive the benefit of instruction from a combined all-star cadre of AFJAGS, STCs, and SDCs. They're also called upon to litigate MRE 412, 413, 513, and 514 issues while integrating them into their trial plan. TDAC has also been revamped to include 30 percent "on your feet" litigation time in a seminar format where participants learn in small groups from fellow students and instructors. Seminars provide helpful demonstrations and personal critiques on performance. While not everyone can attend TDAC, everyone should try. There are 36 student slots available each TDAC, and many times vacant slots open up.

TIER 4: ATAC/ASALC. The top tier of advocacy training at AFJAGS is the Advanced Trial Advocacy Course (soon to be renamed "Strategic Trial Communication" course (STC)) and the Advanced Sexual Assault Litigation Course. ATAC is designed for persons identified for STC and SDC assignments. ASALC is designed for persons identified for SSVc, STC, and SDC assignments. These courses are offered once per year, and there are 18 student slots available for each. However, particularly for ATAC, there are generally more slots available than Air Force students that sign up. ATAC propels litigators to get out of their "comfort zone" and challenges them to become more relatable with court-martial members. Participants are challenged to implement storytelling techniques;

incorporate selective application of pitch, tone, and cadence; and improve nonverbal communication in movements/gestures/facial expressions to maximize persuasiveness and project authenticity that enhances credibility and connectivity with an audience.

The takeaway to tiered training is this: all JAGs should/must complete tiers 1-2, and tier 3 should likewise be at least aspirational for all JAGs. The training you receive will not only make you better litigators, but better JAGs as discussed below. And for those of you who think you've acquired all the practical training you need in your court-martial experiences, please heed this friendly word of warning: complacency is the first step to mediocrity. The will to win is the will to prepare—so prepare for excellence with us at AFJAGS. Remember, excellence isn't a "goal" in the Air Force—it's the standard. And excellence takes time, so invest that time in yourself and our JAG Corps.

As judge advocates, we must never forget that we are called upon to be both officers and attorneys. Officership requires leadership.

REASON #3:

LITIGATION SKILLS ARE LEADERSHIP SKILLS

Bringing it all together, we focus on trial advocacy skills at AFJAGS because **litigation skills are leadership skills**. Don't believe me? Consider this: exceptional advocates excel in a common set of characteristics: (1) preparation; (2) goal-orientation; (3) processing/synthesizing information; and (4) strategic planning. These characteristics are essential to effective leadership as well. Trial advocacy creates and hones leadership by challenging advocates to: develop the ability to think on their feet; communicate persuasively; organize facts and prioritize key tasks; stay cool under pressure; and act decisively even with imperfect and incomplete information. The last may be the most important military attribute.

By way of example, consider the leadership applicability for some of the skills required to thrive at various critical aspects of a court-martial.

Opening Statement: *Empathy/Narrative.* A great leader understands how to connect and communicate with their audience. Effective leaders craft their message by meeting their team/audience where they are. This requires they understand their audience's biases and "filters," while helping guide them to the best outcomes. That's precisely what an advocate does in opening statement, enhanced by using relatable language to weave a compelling "narrative" (*i.e.* story) the members can connect with and understand.

Direct Examination: *Organization/Emphasis.* Advocates understand direct examination is not just a recitation of everything the witness knows, but rather a carefully choreographed focus on key facts the witness has to support that attorney's theme and theory of the case. This teaches young advocates the importance of both organization and emphasis. Organizing the key points in a manner that makes sense (chronologically or thematically) and then developing tools to emphasize the respective information (signposting, looping, etc.).

Cross Examination: *Decisiveness/Target Identification.* Cross examination trains advocates to get to the heart of the matter. No need to rehash all the myriad of inconsistencies or incongruences—you'll likely lose the members along the way. Learning how to identify the key points from the standpoint of what is most significant to your audience is a key skill in and out of the courtroom. It trains JAGs to be responsive to the informational needs of the commander, rather than an exhaustive cataloging of all the issues which may potentially exist. Cross examination teaches the "BLUF" (bottom line up front), or the facts most salient to the commander's decision making.

Closing Argument: *Distilling/Clarifying Information.* Every JAG should pride themselves on being a "closer." This means someone who is able to distill a complicated

situation—be it a contract, civil law, legal assistance, or a military justice issue—into a clear course of action for a decision maker. You will receive no better training at this key skill than in compiling a closing argument that synthesizes hundreds of pages, dozens of hours of witness interviews, and days of court-martial into a focused distillation of the key decision points in a case. Developing a "closer's mentality" will make you the "go-to JAG" our commanders want and need.

As judge advocates, we must never forget that we are called upon to be both officers and attorneys. Officership requires leadership. In turn, advocacy aids us in both pursuits because leaders must be able and willing to advocate for the course of action they believe the mission demands. Once again, this is where AFJAGS advocacy training focus comes in—because if you're going to have an advocate's mindset, then you need to have an advocate's toolbox. So long as the practice of law involves not just the recitation of citations, but the providing of advice and counsel, our fundamental need for advocacy in all aspects of the profession will be paramount.

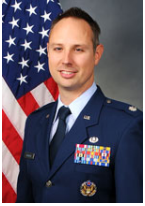
CLOSING

Justice, in all its forms (civil, criminal, military), cannot be obtained without advocacy.

The next time you're tempted to ask "why we fight," or why we feature military justice advocacy training so prominently at AFJAGS, look no further down than the badge proudly displayed on your chest. Justice, in all its forms (civil, criminal, military), cannot be obtained without advocacy. Our commanders deserve attorneys with both the **judgment** to know the best course of action and the **advocacy** skills to secure it. Finally, as Lieutenant General Rockwell reminded that JASOC class back in 2016, embrace your role as an advocate: it's an irreducible part of who we are as individuals and as a Corps!

*This article is dedicated to the 366 judge advocates it was my honor to train in JASOC classes 16-A through 18-B from October 2015 to April 2018. The drive, dedication, and enthusiasm of these students was and is an inspiration to our JAG School and our JAG Corps. To all of my former students I say with great affection: “stay in the fight, JASOC!”

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- **General Leadership Blog:** Wisdom learned from bomb squad experts and their commanders
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- **TEDx, Nancy Duarte:** Common structure of greatest communicators (18:11)
- **TEDx, Simon Lancaster:** Speak like a leader (18:47)

ENDNOTES

- [1] *A History of the Judge Advocate General's Corps, 1775-1975*, ARMY LAWYER 7 (1975), https://www.loc.gov/rr/frd/Military_Law/pdf/lawyer.pdf (last visited Oct. 1, 2018) [hereinafter ARMY LAWYER]. (Congress appointed the very first judge advocate, Lieutenant Colonel William Tudor, to the Continental Army on 29 July 1775, a mere 26 days after General George Washington assumed command of that fledgling force. Moreover, it was none other than General Washington himself who identified trial advocacy as one of the primary reasons for an attorney on his general staff, noting that courts-martial were sitting everyday in his new command and that the expertise of a skilled trial lawyer were “sorely needed.” *Id.* at 12.)
- [2] WILLIAM F. FRATCHER, HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, UNITED STATES ARMY, 4 MIL. L. REV. 89, 90 (1959). (Demonstrating the zealous advocacy that would become the hallmark of our Judge Advocate General's Corps writ large, it was in this famous court-martial that Colonel Laurence uttered his now immortalized phrase to Maj John Andre during cross examination of the accused: “*You, Sir, are a spy!*” *Id.* at 17-18.)
- [3] ARMY LAWYER, *supra* note 1, at 63. (The Judge Advocate General of the Army, Brig Gen Joseph Holt, served as lead prosecutor for the military commissions trying the Lincoln assassination conspirators. A staff of other judge advocates joined Brig Gen Holt, including Maj Henry L. Burnett (also counsel of record in the Supreme Court case *Ex parte Milligan* (1866), *Id.* at 54), and Maj John Bingham (an eight-term Congressman from Ohio who interrupted his Congressional service to serve as an Army judge advocate during the Civil War. Upon returning to Congress after the war, he also served as one of the principal drafters of the Fourteenth Amendment, *Id.* at 54-55). In all, the judge advocate prosecution team would go on to prosecute all eight conspirators in a month and a half long trial resulting in death sentences for four of the eight convicted conspirators. *Id.* at 63.)

- [4] Army Lawyer, *supra* note 1, at 181. (Judge advocates were at the tip of the spear of war crimes prosecutions even prior to the cessation of hostilities in World War II. In a letter dated September 25, 1944, Subject: "Punishment of War Criminals," the Secretary of War, Henry L. Stimson (himself a former Army judge advocate during World War I), directed The Judge Advocate General to establish an office agency under his direction which would at once collect all evidence of cruelties, atrocities and acts of oppression against members of our armed forces and other Americans; examine and sift through such evidence; arrange for the apprehension and prompt trial of persons against whom a prima facie case was made out; and provide for the execution of sentences which might be imposed.

Nuremburg War Crime Tribunals: In April of 1945, The Judge Advocate General of the US Army assumed the responsibility for sending some 60 legal officers to Germany to assist the Theater Commander in investigating and prosecuting war criminals. After cessation of hostilities, the evidence accumulated of atrocities committed by enemy personnel was correlated and, except for the trial of certain major war criminals who were brought before international military tribunals established by international agreement (i.e. the Nuremburg International War Crime Tribunal, see below), by order of President Truman, the Judge Advocate General's Department supervised the trial of more than 2,500 war criminals by military commission and military government court. *Id.* at 181-184 and Executive Order 9679: "Amendment of Executive Order No. 9547 of May 2, 1945, Entitled *Providing for Representation of the United States in Preparing and Prosecuting Charges of Atrocities and War Crimes Against the Leaders of the European Axis Powers and Their Principal Agents and Accessories*," 450 (16 January 1946) https://www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf.

Furthermore, while the prosecution of those most notorious Nazi war criminals was spearheaded by United States Supreme Court Justice Robert Jackson who lead the American legal team at Nuremburg, his staff included dozens of judge advocates, including most prominently Colonel Robert Story, US Army judge advocate, who acted as his executive counsel, and Brig Gen Telford Taylor, who served as Justice Jackson's Deputy Chief Counsel. *Id.* at 183. In sum, judge advocates made up the plurality of the American legal team, comprising 289 of the 654 person legal and administrative staff drawn from all government departments: War, Navy, State, and Justice, performing the essential work of researching the files of suspected war criminals, summarizing voluminous records; and framing allegations. Justice Jackson praised this staff work as indispensable in his report to the President in 1946. *Report of Robert H. Jackson, Representative of the United States to the International Conference on Military Trials*, 452-53, 455 (7 October 1946) https://www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf.

Japanese War Crime Tribunals: Army judge advocates actually drafted the charge and specifications and served as prosecutors and military defense counsel in the military commission against Japanese General Tomoyuki Yamashita, former commanding general of the Japanese Fourteenth Army Group in the Philippines. General Yamashita's forces engaged in systematic war crimes against American military personnel and Philippine civilians. After a robust defense, and representation by six defense counsel, General Yamashita was convicted and sentenced to death. The Supreme Court of the United States affirmed the findings and sentence (and the overall legality of the underlying military commissions process) in the landmark case, *In re Yamashita*, 327 U.S. 1 (1946). See generally, *The Case of General Yamashita, A Memorandum* (22 November 1949), Brig Gen Courtney Whitney, USA, https://www.loc.gov/rr/frd/Military_Law/pdf/Yamashita.pdf.)

- [5] Lt Gen Jeffrey Rockwell, (then) Deputy Judge Advocate General, United States Air Force, Personal remarks at the Air Force Judge Advocate General's School (13 March 2015))