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AFJAGS Podcast: Episode 8

JAG Successfully Argues before U.S. Supreme Court with Captain Thomas Govan - Part 2

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GUEST: CAPTAIN THOMAS GOVAN JR. USAF

Something that has been so beneficial to me personally through both the Air Force at large and the JAG Corps is being able to accept constructive criticism and to be able to learn what you can do better.

MAJ RICK HANRAHAN:

Welcome to part two of the interview with Captain Thomas Govan on his experience in arguing before the U.S. Supreme Court in October 2018 in the case of [Madison v. State of Alabama](#). If you didn't hear part one, please consider listening to the previous episode where we discuss an overview of the case, how Captain Govan became involved, and the preparation he took leading up to the day of oral argument. In this episode, we'll dive into his experience at the U.S. Supreme Court. Here's a highlight from this episode.

CAPT THOMAS GOVAN:

There needs to be a balance between being firm in your foundational principles, but flexible in your approach of how you carry out those principles. That's the only way you're going to get better. You don't get better from

going through easy things. You get better through facing adversity and learning how to overcome it.

ANNOUNCER:

Welcome to the Air Force Judge Advocate General's Reporter Podcast, where we interview leaders, innovators, and influencers on the law, leadership, and best practices of the day, and now to your host from the Air Force Judge Advocate General's School.

MAJ RICK HANRAHAN:

Okay, so we've gotten through briefs, oral arguments, you're prepared, it's the week before the day you got to walk in the Supreme Court. I'm assuming there was a lot of other things, maybe last-minute things you had to do to get ready. You go to Washington D.C. Who went with you, what was that experience like? And maybe

you can walk us through the morning of the day of oral argument.

CAPT THOMAS GOVAN:

Sure. And, and I'll back up a little bit. We went up, when I say we, myself and another colleague went up about a week before. The argument was on a Tuesday, I think we went up on a Wednesday to Washington D.C. and we did some other, as I mentioned before, some final moot court sessions at a law school and then another group of attorneys. And this is not just something that the state of Alabama can do, this is a routine thing for all litigants who go before the Supreme Court. It's wonderful that so many attorneys in the Washington D.C. area are willing to give their time and volunteer. But it was a lot of fun, preparing that way and having the chance to really, again, like I mentioned before, dive into a case so deeply.

This was a very challenging case. A capital case is a very serious matter, but from the pure legal perspective, it was wonderful to spend that much time working hard on an important case. So we went up, the end of the week was when we finished our last rounds of oral argument and then the weekend was spent just prepping, doing some last-minute refining of your argument. I'm not a guy, I try not to take a lot of notes up when you do an oral argument. You'll see different theories on this. Some people will bring a binder of documents up to the lectern and I try to have just one sheet of paper, maybe two, with some big bullet points on there that I might want to talk about. So the weekend was spent maybe refining that sheet and my cheat sheet for oral argument.

Then one of the best pieces of advice I got for arguing before the Supreme Court was from someone who had argued before and he told me, hopefully your argument will not be the first one that week, because he suggested to go and see an argument before your argument. And I think that's good for any litigant anywhere is to go check out, literally check out the courtroom, figure out where the bathroom is, what the setup is like, where people are going to sit. If you can, see a case before your case,

find out if you're in a new jurisdiction or something or you're in the Air Force too, just to be able to know the judge that you're going to be in front of. But that's just good preparation skills.

But in this particular case, the **Supreme Court** building is just beautiful. It's an incredible building. It's the centerpiece of our judicial system, so for a citizen, it's awe inspiring. For a lawyer, it's just, it's amazing. So this person told me to go ahead and go sit through, kind of get the awe factor out of it, but also see the surrounding. And so the Monday before my argument, I went to the Supreme Court and was able to watch the arguments that occurred there, and that was really helpful for me to just see what was going on. There's quite a lot that goes on, obviously the litigants are there in the room, but there's seating, there's separated seating for the attorneys who are arguing that day. There's also a special section of the room for members of the Supreme Court Bar. There's public seating there.

This is our Supreme Court building, there's a lot of tourists and visitors to D.C. who just wanted to see the building. And so there's people who are coming in and out of the building just to look. So there's quite a bit of activity going on, but it was good to get a sense of what was going on there. And so that Monday, really didn't spend a lot of time, by that point, the argument was pretty wrapped up and I mentioned before not trying to get too tightly wound and over strung so we really didn't do a whole lot of work that day. It was more just kind of resting, preparing, and also seeing the argument before that Monday.

As far as the morning of, I don't know about you, but anytime I go to court I'm not a big eater the morning before. Just, there's a lot on my mind, and this particular day was no exception. So I got up and had a little bit of a breakfast, watched the news, tried to make it as much of a normal morning as possible. But one of the things I think you—I think a natural anxiety anytime you're going to do something challenging, going to court as a JAG, someone told me one time "If you're not nervous

going to court, you probably should be worried. No matter how simple the case or how confident you are, you need to be a little bit just ready to go and not to take anything for granted.” And I certainly wasn’t taking anything for granted in the Supreme Court.

So how I coped with that was just to try to focus in on my strong points, and this is more backing up into just the general parts of preparing for the case. But going over my strongest points in my head and what I really, really wanted to get out. So I had breakfast, took a cab ride over to the Supreme Court. It was beginning of the term so when I pulled up to the Supreme Court, there was a line, a huge line outside of people, just the public, trying to get into the case. And because what happens is people just line up outside and there’s a limited number of seats in the Supreme Court, and when they are filled up, that’s all the people they can allow into the court so there was a huge line to get in. Fortunately, there was a separate entrance for the attorneys who were arguing that day, so I went into the Supreme Court and prepared that process.

Then the moment came where it was time to go in. So when you get into the Supreme Court room, there’s the podium. One of the unique things about the Supreme Court is how close the podium is to the bench where the justices are. It’s unlike any other courtroom I’ve been in, in that it’s so close. In many courtrooms that you might be in, in the JAG Corps or in the civilian world, if you’re arguing from a council table or from a podium, in my experience, you’re way back several, 20, 30 feet away. Well, you’re very close to the court in the Supreme Court, which I think kind of aids to the collegial conversational nature of arguments. To the right and to the left there’re seats for both the appellant and the appellee, and there’s two rows on each side. They’re symmetrical. The first table is for the person, the group that has the first argument, and behind them is a table for the group of attorneys who has the second argument.

We were sitting at the second table for the first argument, and once that argument was done, the attorneys

quickly move out. The court doesn’t recess, they stay right there and call the second case. When they say call the case, the Chief Justice will call out the name of the case, the case number, and then say the name of the counsel who’s going to be arguing. And that’s your cue to get up and start the argument.

MAJ RICK HANRAHAN:

So the moment comes, they call your case, and you are not the first to go, right? The opposing counsel went first. What’s going through your mind at this point as you’re listening to opposing counsel?

CAPT THOMAS GOVAN:

That’s a great question. You’re trying to do several things. One, you’re trying to go through and listen to anything new that has come up, any points or ways that maybe weren’t super clear in the brief that they’re making a point now that you really need to address. You’re trying to analyze points that the opposing counsel made that you need to work into your response, and if so, how are you going to do that? So there’s a lot going on in your mind during this point. Do I need to reorder some of the things I was planning on talking about? Do I need to say something differently? And when I say respond to what opposing counsel was saying, do I need to add that into a point I was going to already make or do I need to create a whole new line or point of emphasis that I wasn’t planning to do before?

You also need to be listening to what the justices are saying. This would be for any oral argument, but listening to the questions that the judge or justices are giving. And so I was sitting there listening to some of the questions from the justices and trying to see if I could get a preview of what they were thinking about the case when they were questioning the opposing counsel who was arguing first.

MAJ RICK HANRAHAN:

So just for our listeners, what were the main two arguments made by opposing counsel?

CAPT THOMAS GOVAN:

Well it was interesting. I mentioned there were two arguments and the first issue was that big threshold question about whether someone just remembering whether they committed a crime meant they could not be competent to be executed under the **Eighth Amendment**. That first point, when the petitioner's counsel got up, they essentially agreed that simply not remembering whether you committed a crime is not dispositive under the Eighth Amendment as to whether you could be competent. So they essentially conceded that point, which was the big legal—that was the issue of first impression that was really pending in our case, and so that was a big point, and it makes sense. You can see a lot of reasons why that might not be the case.

For example, there's a lot of defendants who never admit that they committed a crime. So whether you remember something or not doesn't necessarily mean you don't understand why you're in the situation you're in. So that was a big point that came out in that argument. Petitioners' arguments were really focused more on the second point, that whether under the existing standards **Ford** and **Panetti**, whether the fact that this Mr. Madison had vascular dementia would mean that he was incompetent to be executed. Again, a point that we later did not dispute, potentially someone, no matter what the disease they have, whether it's vascular dementia or some type of psychosis that could cause someone to potentially not be competent to be executed under the Eighth Amendment. But in our case, we believe that the evidence showed and what the state trial court found was that Mr. Madison's dementia did not rise to a level where he could not understand the reasons he was going to be executed. So the argument from opposing counsel really focused on that second point and whether those facts had been properly considered by the state court below.

MAJ RICK HANRAHAN:

So as you're listening, was there anything that caught you off guard or surprised you either from opposing counsel or from the court?

CAPT THOMAS GOVAN:

Well, we were not exactly sure what their positions were going to be on the first two issues, what they were going to argue, so clarifying the first question was somewhat surprising, but we thought we had good arguments on that first issue anyway. So in that sense, that kind of changed what the focus of my argument was going to be. And because of the issue not being as contested on the first issue, we realized the questions we would get would probably be—well, I sitting there thinking before the time would probably be more related to the second issue.

MAJ RICK HANRAHAN:

So opposing counsel finishes their opening argument. It's your turn. What are you thinking at this point and how did you determine where to start?

CAPT THOMAS GOVAN:

I can remember this vividly when opposing counsel sat down and the Chief Justice then looks at me and says, "Mr. Govan." That was, just that split second, you kind of have the flashing before your eyes moment. And I remember thinking, "I'm actually arguing before the Supreme Court, this is actually happening." But a neat thing happens once you stand up and you move to the podium, I think it's like any competitor in a sporting event or something like that, you just go back to your training and it's game time. And I imagine that someone playing a football game, whether they're playing before 10 people or 100,000, they're not going to know in the moment because they're just prepared to do what they've been trained to do.

So thankfully, that kind of momentary distraction passed away and I just began my argument, and attempted to begin with the introduction we had prepared and hopefully I was going to get a chance to focus more in on the second issue and really highlight the fact that that was the pertinent issue and why we thought that the state trial court had correctly decided that issue, had considered the evidence of Mr. Madison's dementia, and that it made good factual findings in its order to support

that. That was an amazing moment, to be able to get up and start your argument. And I will say this, when you're up there arguing, like I said before, thankfully it was—I won't say like it's any other argument because obviously it wasn't, but you start to be able to converse and talk with the justices in a way like you would in any of your arguments. It's extremely difficult, it's a lot more challenging. But for me at least I was able to talk in the same manner that I would in most of my oral arguments.

MAJ RICK HANRAHAN:

So are you saying that I think in this case, eight on one can be a little challenging, right? Because Justice Kavanaugh was not currently sitting on the bench.

CAPT THOMAS GOVAN:

That is correct. And that makes this one kind of a unique scenario, that Justice Kavanaugh had not yet been confirmed. So obviously there's nine justices on the Supreme Court now, but at the time we argued there was just eight, and so there was an empty chair sitting there facing the bench on my right. There was no chair there for Justice Kavanaugh. And just as an aside, for many of the listeners might know, but the way the court is set up, it's all based on seniority. So Chief Justice Roberts was sitting directly in front of me and then to his either side where the more senior justices like Justice Thomas and Justice Ginsburg, and it fans out to the side.

So for example, Justice Gorsuch was sitting to my left, the farthest on the left, because he was the most recent justice who had been appointed. And then Justice Kavanaugh eventually sits on the far right.

MAJ RICK HANRAHAN:

So from my review of the transcript of the oral argument and listening to some of the recording as well, it appeared to be pretty hot bench that day. In fact, it looks as if you basically introduced yourself, started off with your first issue, didn't even get to your second and were immediately questioned by the court.

CAPT THOMAS GOVAN:

That's correct. It was a fairly hot bench that day and sometimes people are stopped even faster than I was, but you're right, I had got up my first point wasn't even able to get up my second point before a question came in, and that can be tough where you are automatically thrown off, and the question that comes may not be something that you were planning to talk about in that sequence. And you mentioned it before but it's difficult, eight different justices asking you questions. It's difficult enough when you're dealing with one judge who's asking you questions in a trial court level case or appeals court where there may be three or five judges or a different amount depending on what jurisdiction you're in, but in this case eight was very challenging.

And one of the arts to advocacy is being able to stay on track and to take the question, answer the question that the judge or justice is asking you, address it but also being able to work your way back to the point that you need to make or turn that question in being responsive to the justices' question, turn that into response that's helpful for your point of view. You want to answer the question but you can't just get dialed in and focused on that particular question. You have to get back to what your points are, what you want to get out, and also respond to what the other side argued, that your opposing counsel in the first argument, and it's a difficult skill to develop.

I think it just takes practice and not to say I did that perfectly here, because you look back and you think, "I wish I had answered that question a little bit differently." You've got to take in account many layers and larger aspects to answering a question in the Supreme Court. For example, a justice might ask you a question early in the argument and then another question comes out later and you never got a chance to really fully answer that first question. So in answering that second question, you want to answer the question but if there's a way you can tie it back in to what you were arguing back before to a strong point that you really want to emphasize, that may be a way for you to be a good advocate is to

guide the court back into the discussion either about something that was occurring before or something you haven't had a chance to say yet.

Because as you noted from the transcript, questions in this case came fast and furious, and that's like in most cases and so you may not be able to get the answers out the way you want. One thing that I find for me in arguing is be very detailed in response. Sometimes as you know in legal questions, it's complicated. There's not an easy answer. But in that setting I think it's important, you don't have a lot of time to set up the framework for why you're going to answer it. You want to get the answer up front. So for me personally, I try, if I get a question from a judge or justice in particular in the Supreme Court is to give them a yes or no answer if I can right up front. So if there's a question, it's a 30 second question, and it's very challenging and layered, I want to tell the court yes or no, or "It depends," right out so they know the answer.

Then what I like to try to do as well is say "Yes, for two reasons" or "No, for two reasons," that way, and then tell quickly what those two reasons are so at least I've gotten the question out, the answer to the question out, the big points. Now hopefully I'll have time to get into what those first and second reasons were for why the answer is yes or why the answer is no, and at least the court knows, "Hey, he's got two points that he wants to talk about" that highlight to the court, maybe they either will give you time to respond that way or they'll come back and ask you again, "Hey Counsel, you mentioned you had two points, we'd like to hear about your second point." But I think that's an effective technique that I try to do, maybe the best I could in this argument, but in particular a case like that where you're going to get a lot of hot questions, to highlight the answer quickly to the question and tell the court why and give them a preview of the layers of your response if it's one of those situations where the answer is going to be confusing and long-winded, to be as direct and to the point as possible, but allow the court the opportunity to come back and clarify based on the fact that you've provided multiple answers to the question.

MAJ RICK HANRAHAN:

So we could probably go on for hours on this topic, but how did you feel when you were done overall on your performance?

CAPT THOMAS GOVAN:

Well, I was kind of relieved to be done, but so many different emotions; relieved, thankful, excited about the chance to do it. Like any, I think good lawyer, you're already second guessing, wondering what you could have done better, curious about the outcome of the case. Quite frankly, I wish I could have done it again. I wish I could've got right back up and thought about it for a second and argued again because it was such an enjoyable experience. And looking back on it, after seeing the way the argument came down, I thought I maybe could've done it better. And as I mentioned the questioning really came down more on the second issue, whether the petitioner's vascular dementia met the standard that had been announced in *Ford* and *Panetti*, and so obviously in hindsight I would loved to have talked more about that particular question and paired down more on that more factual, narrow question.

At the end, it was just the argument's done, and at that point I was able to actually enjoy the fact that I had just argued in the Supreme Court and that was just, that was fantastic. Again, this was a very serious case that demanded a lot of work and it was serious consequences at issue. But again, from the personal perspective, it was just such a treat to be able to argue in that court.

MAJ RICK HANRAHAN:

And for our listeners, what was the ultimate result of the case?

CAPT THOMAS GOVAN:

Sure. So as I mentioned, the State won on the first issue, that big issue, the first impression about whether just memory of an event, of committing a crime, prevented you from being executed in the Eighth Amendment. So

we won that legal issue. The Court ultimately decided on the second issue that it wasn't clear, that more fact finding needed to be had on the issue of what evidence had been presented to the trial court on the vascular dementia and whether the court had considered that properly in its order. We of course argued at the argument that it had, that it had considered all that evidence and had fully fleshed that out in its orders below. But the Court disagreed with us and so it was remanded back down for additional fact finding to consider Mr. Madison's vascular dementia.

The case, as far as I know, is still pending in the below in the lower state courts. So it was a win, sort of a tie in the sense that the case was going to continue. But we ultimately prevailed on the larger, when I say we, the State of Alabama did at the time, prevailed on the larger legal issue but had to go back down, did not ultimately win the case because the case was remanded back down for additional fact finding.

MAJ RICK HANRAHAN:

So you've been a practicing law since 2007 and came into the JAG Corps I believe in 2016. How have you been able to take this experience and perhaps leverage this either into the JAG Corps or vice versa with your JAG experience where you've been a Reserve JAG here for about three years into your civilian practice?

CAPT THOMAS GOVAN:

Well, right off the bat, I think we talked before about preparing for the argument and the rounds of new court practice rounds that we did and the critiques we got from that, and the number one thing off the bat that I think works both ways, it's a two way street with my JAG Reserve career and with my civilian career is accepting criticism. That's something I think that for me has been so beneficial to me personally through both the Air Force at large and the JAG Corps is being able to accept constructive criticism and to be able to learn what you can do and to do better. One of the great things in the Air Force is you're striving for excellence, and as an officer you need to be a leader and to bring

out those leadership capabilities in whatever your career field is and particularly as JAGs, that's important for us.

So one of the great things that has really helped me as a person, as an attorney, as a citizen, is the training, back through officer training and both at the JAG school is critiquing yourself. That's the only way you're going to get better. You don't get better from going through easy things. You get better through facing adversity and learning how to overcome it. Just the critiques you get through, your officer training and your training as a JAG, that process really—and I'll back up, I don't think a lot of people in their civilian worlds get that direct attention, or at least get the attention and critiquing where the person who's giving you the critiquing wants you to succeed, wants you to get better. So that was such a huge accentuation for me when I joined the Air Force in 2016, and playing into my preparation for this argument, that was a huge piece of what we had to do, where we would give, I mentioned before, very direct feedback on, "Hey, don't do this in your argument, do this" or "I don't like what you're doing here."

Again, it was not meant to insult somebody, we're all good attorneys in the room, we're just trying to get a little bit better at what we're doing and be that much more effective in our arguments. And so those things I think now helped me in my career, both as a JAG and as a civilian attorney to look for someone to give you very pointed advice. It's so much easier to go through the day and just get our job done, file everything, but it takes some effort to go out and find someone, a mentor or someone to look over your work or come with you to court and suggest ways to do things better. That takes effort, and it's also not sometimes pleasant, but that's going to make you a better attorney, that's going to make you a better leader, and just in your personal life, it's going to make you a better family member, a better friend, a better citizen, to try to make yourself just better and recognize the ways you could do a particular job better. What you do well, but also what you could do better.

MAJ RICK HANRAHAN:

Any final thought or takeaway and or any other maybe resources that you could provide for our listeners on your experience in arguing before the U.S. Supreme Court?

CAPT THOMAS GOVAN:

Well, I will just say number one, if you're an attorney, when you go to Washington D.C., you should try to stop by. It's an incredible court. Just the history of that building's amazing. If you're lucky enough to be able to see an argument, please do. They're fantastic, just the level of knowledge, it's incredible that the breadth of cases that come before the Supreme Court and the questions that you get, the depth of research is incredible. Do that.

Secondly, I would just say another big takeaway point that I think applies to advocacy in front of the Supreme Court but also just in life is balance, and what do I mean by that? Well, I think for me in how I structure my arguments and how you can structure just in any career for you to have is there needs to be a balance between being firm in your foundational principles but flexible in your approach of how you carry out those principles, to where you're going to have a core—and this could apply to anything in your Air Force career, in your civilian career, but in the Air Force we have core values that we're going to follow and a mission that we're going to follow. How we execute that may depend on the situation we're in.

So in my argument to the Supreme Court, there were very specific key points we wanted to get out, the strongest points to our case, that the case law was on our side we believed, and the legislative history, the common law was on our side, but how we argue those points, the big foundational points of why we would win might need to change, and that's where all the moot courts came in where our technique might be refined. How I said certain things might be refined, the order we would say certain things might be refined, and to not be married to a particular way you want to say something or order you want to say something because someone might have a better idea of how to do that. But you don't

want to get too far on the changing things up scale and alter everything. There's some main points you're going to make in your argument that aren't going to change, the important points to your case, you've got to find a way to get those out one way or the other.

So I think just in life too, as a JAG, that's something we can apply to everything that we do, that there's going to be some foundational principles that were going to oversee everything we do, but the way we carry those out, the way we can be efficient in our mission can be different. There can be varied approaches to doing that.

MAJ RICK HANRAHAN:

Well Captain Govan, thank you for coming in today. Fascinating discussion. Congratulations on your success before the U.S. Supreme Court and that'll be it for today.

CAPT THOMAS GOVAN:

Thank you so much. It was a pleasure and thank you for having me.

MAJ RICK HANRAHAN:

That concludes our interview with Captain Thomas Govan on his experience in arguing before the U.S. Supreme Court.

SUMMARY:

MAJ RICK HANRAHAN:

In summary, for the case of *Madison v. State of Alabama*, the U.S. Supreme Court held in a five to three decision that the Eighth Amendment permits a state to execute a prisoner who no longer remembers the crime. However, **the Court held** that a state cannot execute an individual who fails to rationally understand the reason for execution, whether that reason is due to psychosis or dementia as is the case with Mr. Madison. Justice Kagan authored the Court's majority opinion and was joined by Chief Justice Roberts and Justice Ginsburg, Breyer, and Sotomayor. The dissent included Justices Thomas, Alito, and Gorsuch. Justice Kavanaugh had not yet taken the bench.

The majority opinion followed the precedents set in the seminal cases of *Ford v. Wainwright* and *Panetti v. Quarterman* where the Court held the Eighth Amendment prohibits executing a prisoner who is deemed insane, in that executing one who has no capacity to understand the crime or punishment simply offends humanity.

TAKEAWAYS

My three key takeaways from the interview with Captain Govan include, **one, know your case and facts cold.** There is no substitute for knowing your case and knowing it well, whether that be for trial or appellate argument. That involves reviewing the entire record, the seminal cases, and other relevant cases and information.

Then, spend some time thinking about your case. You likely won't have as much time to prepare as one would for a U.S. Supreme Court argument. However, take some time to think about questions such as what are the weaknesses and strengths? What will opposing counsel likely do? What areas might you be willing to concede if necessary? And where will you quote unquote "draw the line" on your foundational arguments?

Number two, be open to constructive feedback. This also involves working with a team, i.e., your co-counsel, case paralegal, supervisor, and others. Conduct a moot or mock argument and do so before those who are not as familiar with the case to expose yourself to a wider range of views. We traditionally call this a "murder board" in preparation for trial at the base legal office. This is your opportunity to hone in on your case and improve upon it.

And number **three, strive for balance in your preparation.** Balance means the ability to discern what feedback is fundamental to your case in argument versus what feedback is extraneous. This is both an art and a science. It requires knowing your case well and taking constructive feedback, but not overdoing it. As Captain Govan mentions, this requires to be firm in your foundational principles, but flexible in the approach of how you

carry out those principles. It also means not second-guessing yourself on every issue. At some point, it's quote unquote "game time" and you will never know it all, but you should strive to reach a sense of familiarity and comfort in your case where you and your team feel adequately prepared. This is different for everyone, so part of finding that quote unquote "balance" is getting to know what that means or is expected of for you.

With that, thank you for listening to another podcast episode from the Air Force Judge Advocate General's School. If you liked this episode, please consider subscribing in [iTunes](#) and leaving a review. This helps us to grown outreach for the Air Force and JAG Corps. We'll see you on the next episode.

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