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AFJAGS Podcast: Episode 7

JAG Successfully Argues before U.S. Supreme Court with Captain Thomas Govan - Part 1

HOST: MAJOR RICK HANRAHAN, USAF

GUEST: CAPTAIN THOMAS GOVAN JR. USAF

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MAJ RICK HANRAHAN:

In this episode we interview Captain Thomas Govan on his experience in successfully arguing before the U.S. Supreme Court in October of 2018 in the case of [Vernon Madison v. State of Alabama](#), where he argued on behalf of the State of Alabama. The case centered around whether the [Eighth Amendment to the U.S. Constitution](#), barring cruel and unusual punishment, prohibits executing a person for a crime they do not remember.

This episode is the first part of the two part interview. In this first part we discuss an overview of the case, how Captain Govan became involved and selected to present oral argument, and the preparation he took leading up to the day of oral argument. In part two, we focus on his

experience at the U.S. Supreme Court in oral argument. Here's a highlight from part one of today's show.

CAPT THOMAS GOVAN:

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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:

Welcome to another episode from the Air Force Judge Advocate General's School. I'm your host Major Rick Hanrahan. Remember, if you like the show, please subscribe on [iTunes](#) and leave a review. This helps us to grow in outreach to the JAG Corps and beyond.

Well, I am personally looking forward to today's interview with Captain Thomas Govan on his experience in presenting oral argument before the U.S. Supreme Court last year on October 2nd, 2018 in the case of *Madison v. Alabama*, where he successfully argued on behalf of the State of Alabama.

Captain Govan, it's a pleasure to have you in studio today.

CAPT THOMAS GOVAN:

Thank you very much. I'm glad to be here. It's a pleasure. Thank you.

MAJ RICK HANRAHAN:

Captain Govan is an assistant staff judge advocate for the 42nd Airbase Wing at [Maxwell Air Force Base](#), Alabama. The Maxwell Air Force Base legal office provides legal services to the 42nd Airbase Wing and it's 51 mission partners while serving the greater River Region here in Montgomery, including a client population over 51,000 individuals.

Captain Govan received a bachelor of science in accounting from the University of Alabama in 2004 and a JD from Alabama in 2007. From 2007 to 2018, Captain Govan served as a deputy attorney general for the Alabama Attorney General's office, and from 2015 to 2018, he served as the Chief of the Capitol Litigation Division.

Captain Govan received a direct commission as an Air Force Reserve Judge Advocate in July, 2016, and more recently in 2018, he transitioned to become an assistant United States attorney for the Middle District of Alabama where he prosecutes a wide range of cases.

Today's topic is entitled, "JAG successfully argues before the U.S. Supreme Court." So, Captain Govan, perhaps you could provide a brief overview of the case, *Madison v. Alabama*, how you became involved, and ultimately selected for oral arguments.

CAPT THOMAS GOVAN:

Well thanks, I'd be happy to. So, to start, *Madison v. Alabama*, obviously was a case that ultimately reached the Supreme Court last year but starts back over 30 years prior to that. This case was a capital murder case where the defendant, Vernon Madison, was convicted of capital murder and he was ultimately sentenced to be executed. It was actually a horrible case in 1985 he murdered a police officer, [Officer Julius Schulte](#) of the Mobile police department in Mobile, Alabama. There were several years of appeals and a few years ago, the Alabama Supreme Court set his execution date.

Prior to that he filed a petition in state court alleging that he was incompetent to be executed, and both an Alabama Statute and some Eighth Amendment law from the federal courts stating that someone cannot be incompetent and be executed—the standard, there's some Supreme Court cases that have set out the standard, two cases in particular at the time.

One was called [Ford](#) and the other is [Panetti](#), and they basically hold that you have to have a rational understanding of why you're being executed, to be executed, for a variety of reasons, to be consistent with our goals for punishment, and to comport with the Eighth Amendment. And so, Mr. Madison filed that petition. There was a hearing in state court where there was a court appointed expert and he had his own expert. It came down to the question of whether he was competent to be executed. After the hearing, and just as a backup, generally, to have a rational understanding, that means you have to understand that you were convicted of murder and that you're going to be punished for that murder specifically, you're, going to be executed, and that you're going to die when you're executed.

The standard is actually kind of a fairly straightforward standard. It's not a huge threshold, but the courts and society wants to make sure that we're carrying out this really important punishment, serious punishment on the people who truly understand that they're being punished.

So, what transpired in the court below was his expert said he understands that he's convicted of murder, and I'm paraphrasing here, but essentially that he understands he's going to be executed because of that murder, but he did not believe he understood why he was going to be executed because Madison's experts said that Madison did not remember committing the crime. The state court ultimately denied that, found that he had a rational understanding, and he could be executed. Madison then filed what's called a Federal Habeas Petition in federal court now, challenging the state court's ruling.

The federal court denied that, but ultimately, on appeal, the 11th Circuit stayed the execution and reversed the lower courts decision than the State of Alabama appealed to the Supreme Court, and because this case was in Federal Habeas, there's kind of some legal procedural rules that apply. And basically the Supreme Court reversed the 11th Circuit that it stayed the execution and said, no, under Federal Habeas Law, this was not an unreasonable application of our prior precedence, *Ford* and *Panetti*, for the State Court to say he's competent.

So, go back down again. There was another hearing, another execution date set, another hearing takes place where Madison files another competency petition, but doesn't present any new evidence, basically just kind of relies on what we had presented before. The state court this time, based on the same record says, no, there's nothing has changed. I find that you're competent to be executed and they appealed directly to the Supreme Court.

So, the issue is presented squarely to the Supreme Court. There's no other kind of procedural, interesting hurdles to overcome. And that's where I came into the case, which is an incredible opportunity. Capital cases are very challenging, but to be in the Supreme Court was just a dream of a lifetime, such an incredible experience. For me, as you mentioned, I was the Chief of the Capital Litigation Division and that division at the Attorney General's Office in Alabama oversees all the capital cases that come up on appeal and post-conviction litigation. Normally when a case reaches the Supreme Court from a state case, a state criminal case, many of the state attorney general's offices have solicitor generals who are specialized. These incredible lawyers who have backgrounds that really lend themselves to oral advocacy on appellate issues and have experience in the federal appellate courts. Alabama has one, a solicitor general as well, fantastic lawyers.

For a variety of reasons, he was not able to handle that particular case. And so for me, it fell to me as the chief, to argue that case in the Supreme Court. So, it was a kind of a little bit of the right place at the right time to have that opportunity. But also just, it was within the scope of the division that I was overseeing at the time. And so, when the case came to me, I jumped at the chance to have the chance to be in the Supreme Court.

MAJ RICK HANRAHAN:

So what was that conversation like going back to tell your wife?

CAPT THOMAS GOVAN:

Well that was a pretty big moment. I remember coming home and saying, honey, I've got something to talk with you about. And we of course talk about my work all the time, and my wife is not a lawyer, so, but even she got that this is kind of a big deal, to say the least. And so, that was a, another just personally great thing for me was she was able to come to the oral argument. and I, I think generally for a lot of litigants who don't routinely practice in front of the Supreme Court, it's common for them to bring their family or a spouse or

something like that to witness it. Because obviously the case is important, but for you personally, as a lawyer, it's a pretty incredible achievement.

MAJ RICK HANRAHAN:

Fascinating. So, now you, you've been essentially detailed to represent the state of Alabama in oral argument. What are some of the first steps you took in preparation for oral argument?

CAPT THOMAS GOVAN:

Well, you know, obviously the first, and I was involved with this case a little bit below, but for oral argument in general, and then especially in the Supreme Court, every lawyer probably has heard this in their training at some point, but to know the facts cold. And so, it was kind of like maybe taking a step back into JASOC, or to law school, where you get the chance to spend time to really dive into a case and focus just on that case. And so, I spent considerable time reviewing the transcripts, reviewing all, the entire record to where you would know that record pretty much cold. And then also reviewing the pertinent cases.

I mentioned the two seminal cases earlier, *Ford* and *Panetti*, but then all the cases that kind of have spurred off of those decisions both in the Federal Circuit. So, the first step is just to do all your research and do a ton of reading. And then for me, the second thing is, after that you read the briefs obviously and just spend some time thinking about the case.

Again, that was one of the luxuries of being able to prepare for a case like this that many times in lawyers busy practices, you don't have time to spend a month getting ready for one case. But in this case, you did. And, to spend time thinking, thinking about what are the big themes that we need to address? What are our main points? Why do we win? What are our weaknesses? What are the weak spots of our case? How do we need to address those? What are the answers we're going to have? Anticipating the arguments from the other side, from the petitioner side, and what would our responses

be for that? And then, also then starting to think what are some of the questions we would get most importantly from the justices on the Supreme Court, and what our responses would be to that.

MAJ RICK HANRAHAN:

So maybe for our listeners, could you frame what the two issues were in this particular case?

CAPT THOMAS GOVAN:

Certainly, yes. There were two issues. And I mentioned before, one of the things that came out in the state court hearing was that the petitioner, Vernon Madison, claimed that he could not remember committing the crime. So, the first issue was kind of this global, bigger Eighth Amendment question is whether someone can be executed and as competent be executed simply because they can't remember committing their particular crime.

The second question was more, I guess facts specific. A little bit more narrow factual question, whether this particular, and I should back up and say the reason why Mr. Madison was claiming he could not remember committing the crime was because he suffered from vascular dementia. And so, *Ford* and *Panetti*, those cases dealt with different types of mental illnesses. And so, the question on the second issue presented was whether because of Mr. Madison's vascular dementia, whether that prevented him from having a rational understanding that is required for someone to be competent to be executed under the Eighth Amendment of the Constitution.

MAJ RICK HANRAHAN:

So as you're preparing, you're reading all the briefs, reading the seminal cases. Did you have a team that assisted you in this?

CAPT THOMAS GOVAN:

Yes. And, anybody who goes before, I think the Supreme Court, one of the blessings is just the incredible team that works with you. And yes, I had one or two lawyers.

Mainly one who really kind of worked side by side with me in the case and we spent a considerable time just thinking and talking about the case. And, for this particular lawyer, you have to also know the facts, and the legal arguments, and the briefs, and the cases just as well as the advocate who's going to be oral arguing.

And so, for us about two weeks before we started doing several moot court rounds, which just the listeners, a moot court is basically a practice session where we would have people, first it's with within the Alabama Attorney General's Office, different attorneys who would read the briefs and you would actually pretend like they were justices and, and I would get up and run through a mock argument what I'm going to potentially say on the day that I do the argument, and the mock judges or justices would then ask questions just like hopefully the justices would on the Supreme Court, those types of questions.

It allowed me to, provide several reasons. One, for me to just get used to handling questions on this particular case, but B, start refining your argument a little bit more, and I think that's one of the most helpful things. I said before, sometimes in cases you don't have the chance, the luxury to spend that much time really tuning in and fine tuning your argument. In this case I did. And so, we did multiple rounds of moot courts. First with people, just colleagues at our office. And then later, in Washington D.C., there's a group of volunteer attorneys. We did one at a law school, another National Attorney General's group has a panel of volunteer attorneys who are very gracious to give up their time to moot other advocates before the Supreme Court.

MAJ RICK HANRAHAN:

Can I just interject for a second? How many rounds of moot court approximately did you do you go through prior to oral argument?

CAPT THOMAS GOVAN:

We did probably about, for me, four or five. This is actual kind of serious mock court rounds, where we're actually setting a timer, there's a time limit you have in the Supreme Court. And so, we would actually emulate that in our mock round competitions and time you. That's not to say that there were just countless sessions where we would just talk with different colleagues and attorneys about the issues, kind of more informal moot setting. But as far as the number, we find about four or five. And there's a balance, because you want to make sure you've vetted every possible argument, but you don't want to over prepare too much where you're starting to second guess yourself, or redoing things that don't need to be redone.

There's a nice kind of happy medium to preparing for a case where you don't want to be too finely, too finely tuned, but you also want to have that experience too, to hear from different perspectives about the arguments. So, it's helpful to find people who don't know anything about the case. Obviously attorneys, but maybe people who practice in a different area, because you never know what types of questions are they're going to think of after reading the briefs in the case and hearing about the facts. You don't want to be in an echo chamber of just having people who helped you write the brief, and so are thinking like you do. It's helpful to have people from a different perspective to give you comments and give you feedback and give you questions that, hey, I never thought about that before.

I thought this argument sounded great the first three times. But, the fourth time I made this argument someone brought up a point that really kind of cuts a whole my point, or maybe someone that I've been talking to in a moot court round is used to my style, and someone in a subsequent moot court round thought that the way I was answering a certain question or the tone of my voice kind of detracted from an argument.

I say that to say one of the important things I think for preparing for any oral argument, but also particularly in the Supreme Court, is just to have a variety of feedback and not to be afraid of looking for that constructive criticism or going outside your comfort zone and outside your box of comfort and how you like to prepare.

MAJ RICK HANRAHAN:

I think we had talked about that a bit offline before we went on an air today about how do you receive constructive feedback? What's some tips you could provide for our listeners on how to do that effectively?

CAPT THOMAS GOVAN:

Well, you hit the nail on the head. I think that applies obviously in the legal world, but just in life. To not dodge feedback. Particularly in my case, I got some pointed, very pointed comments in preparing over the weeks and months, preparing for the argument, where some of the guest instructors just flat out did not like a particular point I was making, or thought it sounded weak, or the way I was delivering a certain, just the tone I was giving might had been improved. You don't need to shy away from that, because they're not trying to put you down, they're trying to make you a better, they're trying to make you a better advocate, and help you in your particular case.

For me, what I would do, is I would soak up and have someone else writing down the notes along with me so I wouldn't miss anything. But to then take every single thing that was given in those sessions back, and maybe get with another colleague and go through them and discern yourself how you thought—because again, you know the case better than someone else.

And so, there may be a really good point that one of the guests judges made, or guest moot instructors made that you still think you might be able to take that criticism a different way or, maybe they brought up a point, see a problem with your argument, but you still think that's a point you have to make, whether you got the bad feedback or not.

So I would try to take all those comments back, sit with another colleague, go over with them and say, yes, I think this particular point is a good one. We might want to figure out a way to say this better. No, I know we got this critique from this one attorney, but I think we have to continue to say this point the certain way, despite what this comment was. Or, hey, this is the second time we got this feedback, or this question. Let's figure out a way to affirmatively ward off this particular issue. Because, this seems to be a consistent question we're getting. And that must mean that we're not doing a good enough job on the front end of answering this question or road mapping the issue a certain way.

So, taking everything holistically, but then having some discernment, not taking every single criticism to heart, but trying to find the one or two nuggets that might really need to be fixed. Because when you're in the situation, you might be getting comments from four or five different attorneys. If they give you four or five comments, it's kind of hard to take all of those things to heart, but to find the ones that really seem to matter to the heart of the issue.

MAJ RICK HANRAHAN:

So how did your argument change or materialize from the beginning when you were in your initial stages of preparation, to maybe a few days before you walked into the Supreme Court?

CAPT THOMAS GOVAN:

Quite practically, we had several drafts and my introduction that we kind of crafted changed after every single moot session that we had. And generally, there's many different thoughts on how, and a lot depends on the type of case you have, but there's many different thoughts on how you want to start an oral argument. How we ultimately decided we are going to do it was, again, there were two issues. Kind of the bigger issue, just whether or not remembering committing a crime violates the Eighth Amendment, and the second more kind of narrow factual issue.

And, we ultimately decided to kind of bring an introduction out that would address those two issues right up front and tell the Court exactly what we were thinking on those two issues and try to get two sentences out, basically. Generally, you've got a little bit of time, it just depends on each argument, but you're not going to be able to talk for five minutes before you start getting questions, because the time is limited.

So, we wanted to address quickly that the law was on our side, on the first issue, on the Eighth Amendment kind of larger issue. And then the second issue, the more kind of factual issue that the trial court had considered all that evidence, and while our case fell under *Ford* and *Panetti*, the trial court had properly addressed those facts, and made factual findings that were consistent and should not be overturned. So, we wanted to really get those facts out as fast as we could to make it clear what our position was before we started getting some of the questions that would come from the justices, and also be responsive to what the other attorney was arguing.

MAJ RICK HANRAHAN:

Could you also speak a little bit about the brief. I know you were prepping for oral argument. Where was the brief in this kind of context? When was it due? How do you submit it to the Supreme Court? Was that also, I'm assuming, changing in real time in conjunction with your oral argument preparation?

CAPT THOMAS GOVAN:

Sure, that's a great question. So, in the Supreme Court, there's a little bit more time involved than your average case. Our argument was in October of 2018 and certiorari already had been granted months before. For those just listening, certiorari is the way the court decides what cases they're going to hear. So, the Supreme Court gets petitions from parties all the time, but the Court only grants a very small number of those each year. And so, the Madison Case was one of the cases that was granted. After that process, the petitioner, which in this case was Mr. Madison, files a brief. Then the State of Alabama filed a responsive brief about a month or so later, and then

Mr. Madison would have the chance to file a reply brief. After that, that was actually earlier in the year in 2018 when that occurred and the Court does not hold oral arguments during the summer.

So, the first day of the term was actually October 1st of that year. We were scheduled the second day of the term, October 2nd. So, the brief had been done several months before. But, in preparing, it's helpful because you've already gotten your strongest arguments. Hopefully you've got your strongest arguments out there in your brief and you're going to be able to argue and understand the points that the other side is making.

That's one of the neat things about appellate practice is there's generally not a lot of surprises. You're going to have the time to really prepare and understand the arguments and research everything thoroughly. And so, the legal arguments and the facts are set out in the brief. The part of oral argument that you're trying to do is to be persuasive, to show why your legal arguments are correct, and to address any questions remaining. Outstanding questions that might come up from the justices, and to really advocate your side. Hopefully they should know the party's positions by the time the briefs are filed, and you just want oral argument to clear up any outstanding questions, and also really drive home and persuade why you're right on the law and the facts in your particular case.

MAJ RICK HANRAHAN:

Well that concludes part one of the interview with Captain Govan. We hope you enjoyed it. In part two, we dive into his oral argument experience at the U.S. Supreme Court. Thank you for listening to another podcast episode from the Air Force Judge Advocate General's School. If you like this episode, please consider subscribing on [iTunes](#) and leaving a review. This helps us to grow in outreach, for the betterment of the Air Force, and JAG Corps. See you on the next episode.

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