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AFJAGS Podcast: Episode 75

A New Prosecutor's In Town: Standup of the Office of Special Trial Counsel with Lieutenant Colonel Matthew Neil

Host: Major Laura Quaco

Guest: Lieutenant Colonel Matthew Neil

In this episode, Major Laura Quaco sits down with Lieutenant Colonel Matthew Neil, the Director of Operations for the Office of Special Trial Counsel (OSTC) to discuss the historical background and development of OSTC—a major military justice reform required by the National Defense Authorization Act for Fiscal Year 2022.

[Intro music – The Air Force Song (Instrumental)]

Introductions

Major Laura Quaco:

Good morning, afternoon, and evening listeners. Welcome back to The Air Force Judge Advocate General's School Podcast. I'm Major Laura Quaco, and I'm your host for this podcast. Now, I am sitting here today in sunny Montgomery, Alabama, at Maxwell Air Force Base, with a Lieutenant Colonel Matthew Neil. I have been hunting him down for a few weeks while he's been here on temporary duty to The JAG School for back-to-back courses. And we're super lucky to have him on the show today.

So, Lieutenant Colonel Neil is actually the Director of Operations for the Office of Special Trial Counsel, which is what we're going to be talking about today. So, he's going to give us some really great background about our military justice or criminal law process, and what it's kind of historically looked like, and what changes we are seeing today and how we got here.

So, without further ado, Lieutenant Colonel Neil, thank you for being here. If you will just kind of give us a little bit of background, kind of what your duty history has been in the Air Force.

Lieutenant Colonel Matthew Neil:

Well, Major Quaco, thank you. And she has been hunting me down. I don't know how lucky you all are to have me here, but I'm happy to be here with you this morning, afternoon, evening, whatever time zone you're listening in. As Major Quaco said, I'm the Director of Operations for the Office of Special Trial Counsel. I've been a judge advocate general, which is really just a fancy way of saying an attorney in the military, for about 16 years now, and most of that time has been in military justice. That is our criminal justice side of the JAG Corps. I've been an area defense counsel, I've been a base level prosecutor, I've been a special trial counsel, I've been an appellate government counsel. And then I've also been a chief, you know, district counsel for our senior prosecutors out there. And I've also served as a staff judge advocate where I led a legal office in—in the day-to-day operations that they do before coming into the job that I'm in now.

Maj Quaco:

So, you've done almost all of the military justice jobs that are out there.

Lt Col Neil:

Pretty much.

Maj Quaco:

Just not judge.

Lt Col Neil:

That's right not judge yet. We'll see if that comes later. But I've done pretty much everything else.

Military Justice Cases

Maj Quaco:

Great. Great. Well, thanks so much for joining us. So, I want to give our listeners who aren't tracking what's going on, a little bit of background. So historically, how have we handled our cases in the military realm?

Lt Col Neil:

So historically, all cases and that is, you know, any type of offense has been handled by the command having the authority over, and we as the judge advocate generals advise command and then command makes the determination about whether or not an offense should go forward to a trial by court-martial. And it's been that way for, you know, since the 1960s when kind of the modern military justice system came into existence.

Maj Quaco:

And so—obviously, we're going to be talking about some changes today. So, can you talk a little bit about changes that were sparked and kind of what, where we're moving now?

Lt Col Neil:

Yes. So, with respect to a—it's 14 categories of what's called covered offenses, and those are kind of victim centric offenses. Your sexual assault offenses, rape, murder, child pornography, offenses such as that, are now moving away. Commanders will no longer have the authority over those cases, though, that authority is going to be given to senior prosecutors to make the determination about whether or not a case should go forward to a trial by court-martial.

Maj Quaco:

And, to the best of your knowledge, why is that?

Lt Col Neil:

There are a number of factors that kind of led to it over the course, and most of your listeners have probably seen news articles over the last several years about various senators and congressmen and congresswomen who have had issues with the way the military handled, you know, cases involving particularly sexual assault. And then there were a couple of high-profile issues that came up.

The first was the Vanessa Guillen investigation out at Fort Hood. Vanessa Guillen was murdered at Fort Hood, and this was after she had reported being a victim of sexual harassment, that really the independent report that was done in 2020 found that there were a number of leadership failures and 14 commanders that were actually disciplined as a result of the leadership failures that were found in that report.

And then in 2021, the Secretary of Defense, Secretary Austin, ordered a 90-day review by an independent review commission on the military's handling of sexual assault cases, and that report that they issued in 2021, which was called *Hard Truth The Time for Change*. It indicate—had several recommendations for how we handle victim centric offenses. And one of those was to take that authority away from the command. And that's ultimately what led to the fiscal year 2022 National Defense Authorization Act, which is just how Congress, you know, appropriates funds for the military, which required the establishment of the Office of Special Trial Counsel.

Maj Quaco:

So, with this new program and kind of what we would say is taking away that authority from the commanders, is it something that we saw—I mean, was the military necessarily handling these cases worse than, say, our civilian counterparts?

Lt Col Neil:

I don't think so. I think that there might be a perception or perspective out there and there might be some who you had that thought. But, you know, in my experience, and again, I've been doing this for 16 years, I don't believe that the military was handling these worse than in the civilian sector. But the difference is, in the civilian sector, it was prosecutors making the determination and not commanders who don't have kind of that legal training, that legal background. Even though our commanders were receiving advice from their staff judge advocates, the thought was that we could improve the perception of the military justice system, the trust and faith of victims

in the military justice system, if we put the decision in the hands of the prosecutors, who would be prosecuting those cases.

Commander Involvement

Maj Quaco:

Okay. And so, now going into the actual program. Will commanders be entirely removed, or will they still get some involvement?

Lt Col Neil:

The commanders will still have significant involvement. And as we're prepping, as we've been building the Office of Special Trial Counsel, preparing for exercising that exclusive authority, we wanted to make sure that there was that built in integration, coordination with commanders. Commanders for both the accused in an offense, and the victim have the right to submit input on what that disposition would be. It's not binding input. It's not dispositive, but it's input that the Office of Special Trial Counsel is required to consider before making a determination. Commanders will also still have primary responsibility for any of the administrative actions that come with an investigation like the removal of security clearance, things like moving the victim or the accused to different units to ensure that they can deconflict and that victims don't go through additional trauma as the investigation progresses.

Office of Special Trial Counsel (OSTC)

Maj Quaco:

Right. Right. And so how is the Office of Special Trial Counsel, OSTC, actually going to look?

Lt Col Neil:

So, the way it's going to look is we're going to have a small headquarters contingent at Joint Base Anacostia-Bolling that will be led by an O-7, and that's a brigadier general in the United States Air Force. The 2022 National Defense Authorization Act required each Office of Special Trial Counsel to be led by an O-7. That's a general officer in the Air Force and Army and the Marines, and it's an admiral in the Navy.

We will also have six in the Air Force—the Department the Air Force will have six geographically separated district offices. Three are within the continental United States, and then we will have one in Europe and one in the Pacific. And they will be responsible for their areas of operation, which will actually be broken down by Major Command. For the listeners who aren't in the Air Force or in the military, that's just a way of saying that they're broken down by particular mission sets. So, they have bases that are part of the same command, will be within that district and we will have special trial counsel at each of those district offices who are responsible for guiding investigations, for guiding legal offices, as well as for prosecuting those cases if they actually go forward to trial.

Maj Quaco:

Okay. And so, in the civilian sector, we know a lot of times prosecutors will kind of start at the misdemeanor level and work their way up. Is it going to be similar? Will your special trial counsel have a greater level of experience for these types of cases?

Lt Col Neil:

They will. And I'll even note they have so far. Right now, kind of where we exist right now, we have what have historically been called circuit trial counsel who have served in base legal office assignments, they go through, and most often go to an area defense counsel position or a victim's counsel position, and then come over after gaining that experience, and proving their competence with special victims cases, they come to be senior prosecutors.

And the same will be true in the Office of Special Trial Counsel. Our special trial counsel, who the first, that first group of them that will be moving over to those jobs is actually going through a qualification course right now. That's why I'm here, and you were able to hunt me down and find me, because they're going through that course. It's at a two-week long course of rigorous training with actual objective measurements to make sure that they are actually going to be able to receive that

certification and take the responsibility for these types of cases. Each of our individuals that are chosen to be special trial counsel are vetted, and we take a look at their previous training experience, their previous experience with courts-martial, as well as their performance in the course, and through an interview process to determine if they are capable of handling that responsibility.

Maj Quaco:

And at what point in the process will you all get involved with a case.

Lt Col Neil:

So it will be at the beginning, at the outset. The way it will work is because the Office of Special Trial Counsel has the exclusive authority to determine whether or not an offense is in fact a covered offense, we have to be involved at the outset. And so, bases are required to notify us within 24 hours. And that's a base legal office or an installation legal office, within 24 hours of receiving an allegation that may be a covered offense, they have to notify our office so that we can take a look at it and have a counsel assigned early to aid in that investigation, to guide the investigation, and make sure that all those steps to preserve perishable evidence to make sure that the OSI or security forces, if it's a more minor domestic violence case, is actually performing those investigative steps that are necessary for us to have a thorough and efficient investigation.

Maj Quaco:

And, so, let's say you go through all that, you assist with the investigation, we get a report of investigation, and you're deciding what to do, how to go forward. How do you make that determination?

Lt Col Neil:

So, there will be a number of factors. So, there is, we will have, at some point when it's signed, we'll have an executive order that will provide the referral standard. And that's kind of what's going to guide our view of the case and the evidence to determine if there's enough evidence to go forward to trial. We will have a number of

STC, special trial counsel, who are assigned to that case, who look at that and then provide a recommendation to where our disposition authority is. The disposition authority is just the person that makes the decision about whether or not a case should go forward to trial or should not go forward to trial. And that will be withheld to certain levels. Some offenses that will be at the lieutenant colonel, O-5 level, chief special trial counsel for the particular district, and then other more serious offenses will be withheld to either the deputy lead special trial counsel, who is a colonel an O-6, or to the lead special trial counsel, the brigadier general at headquarters level, to make that ultimate determination. But they will be basing that determination on the evidence in the case, as well as the recommendation from the special trial counsel actually worked the investigation.

Maj Quaco:

And so, what if it's determined that, hey, maybe we do have enough evidence to go forward to a court-martial, but the victim doesn't want to participate, and we can't go forward without the victim. Will there be other options beneath a court-martial?

Lt Col Neil:

There certainly will be. And those will not be options that the Office of Special Trial Counsel can take, because the Office of Special Trial Counsel is a prosecutorial function and is a prosecutorial arm. And I'll start off, and to go back, when you said victim might not be participating, the first thing that our special trial counsel will do is actually look at whether or not there is sufficient evidence without the victim's participation to prove up the offense. And if there is, we will look to actually pursue that case, if it's appropriate to go to a court-martial without the victim's participation.

If victim is not participating or otherwise, we don't have sufficient evidence to move forward with a court-martial, the case will be what's called deferred back to command. And that's effectively just saying we aren't taking this to court. We're sending it back to the command who

has, you know, all of the administrative options available to them. So administrative paperwork, an LOC, a letter of counseling, a letter of admonishment, a letter of reprimand, or they could even offer what's called non-judicial punishment, an Article 15, to the member. The one thing that a commander cannot do is take a covered offense to a special or general court-martial if they wish they, or if they wanted to do that, they can't take it to a special or general court-martial if the Office of Special Trial Counsel decides they are not taking it to court.

Non-Judicial Punishment

Maj Quaco:

Okay. And so, I don't want to get too into the weeds here, but for our listeners who are not military, can you just briefly explain what is non-judicial punishment?

Lt Col Neil:

Non-judicial punishment is a forum. It's a way that a commander can handle an offense without taking it to a court. And it's more than a, just an administrative paperwork because it gives a commander the option to determine the punishment to be things like reduction in grade or rank, a fine, effectively a fine taking money away from an individual or from an airman or guardian who is accused of the offense. And it's a forum that is offered to the person who commits the offense. And what it may do is the commander becomes the judge and the jury effectively on it, and decides both guilt or not guilty, not guilty and what the punishment should be if the person accused of the offense accepts that forum.

Maj Quaco:

Right. And isn't there something that that person can do, though?

Lt Col Neil:

There is. That person, because I said that person has to accept the Article 15 forum, they can turn it down and demand trial by court-martial. And that's one of the big reasons why that coordination between the Office of Special Trial Counsel and the command is so important,

because the commander doesn't want to offer a 15 if someone's going to effectively call that bluff and then the Office of Special Trial Counsel says, sorry, we're not doing anything with that.

So, if someone turns down an Article 15 for a covered offense, there will be an ability for the command to ask for reconsideration from the Office of Special Trial Counsel to say, we know you weren't going to take this to court before, this individual's turned down the non-judicial punishment and demanded trial by court-martial, will you take this to a court-martial? And in situations where, for instance, the Office of Special Trial Counsel determined there was sufficient evidence but didn't think that the offense was severe enough to warrant trial by court-martial, the Office of Special Trial Counsel would consider whether or not to prosecute that offense. If it was a situation where there was simply just not enough evidence to go to court, maybe we don't have a participating victim, it's likely a situation where the Office of Special Trial Counsel would not be able to take that to court, even if the individual demanded trial by court-martial.

Maj Quaco:

Right. And having been a former victim's counsel, I know sometimes victims are like, hey, I know we've got the evidence, but I don't want to have to go through that testimony. So, let's do an Article 15. And if he or she turns it down, then yeah, I'll participate in a court-martial. So maybe a situation like that.

Lt Col Neil:

Exactly. And as you know, being a former victim's counsel, justice for victims differs in every single case. And some victims, they don't want to have to testify and don't want someone to be tried by court-martial. They simply want them to be held accountable. They want there to be a record. They want there to be some punishment for that. And in those situations where a victim has, you know, professed desire that an alternative forum, but if this had to go to a court-martial, they would participate. That would certainly be one that the Office of Special Trial

Counsel would potentially be able to prosecute if there was a turn down.

Timely Process

Maj Quaco:

Right. Because it can be a long and arduous process. And speaking of that, do we expect timelines to differ at all from what they currently are based on this new program?

Lt Col Neil:

Maybe. We—our hope in our, and as we're building this process is that we will have timely and efficient prosecutions. What we don't want this process to become is just another bureaucratic layer that just adds time to the process, which isn't good for victims. It's not good for command. It's also not good for accused who are just sitting around. So, our goal in building this is to build a timely process. There is currently a working group looking at what the timeline should look like in the world where the Office of Special Trial Counsel has authority over these offenses. So, to be determined what those timelines will be. But our plan as we're building it, is that these operations will be efficient and timely.

Effective Date

Maj Quaco:

Right. And so, you said this was, you know, based on the NDAA. Was there an effective date set or are y'all already in place?

Lt Col Neil:

Well, both. So, there was an effective date that was set and that is 27 December 2023 is when each of the services' Office of Special Trial Counsel is required to be in place. The Office of Special Trial Counsel's authority currently does not apply to any covered offenses committed before 28 December 2023, though, so it only applies to offenses committed on or after 28 December 2023. That doesn't mean that we've just been sitting around waiting for December of 2023. We stood up, the Department of the Air Force stood up the Office of Special Trial Counsel on 15 June 2022, and in an initial operational capability,

and that is we had individuals certified as special trial counsel. We had my boss, Colonel Dennis, was the acting lead special trial counsel until Brigadier General Brown was confirmed and in place. And we started building the structure for it and the standard operating procedures that we're going to use in prosecuting these cases. We also started the, our roadshow, communicating out to the field, to the communities out there that currently have these cases, what the changes will look like when the Office of Special Trial Counsel has authority over those cases. And we're continuing that.

This summer, summer of 2023, we are going to actually be moving all of our personnel in place and moving the Office of Special Trial Counsel out into an independent organization reporting directly to the Secretary of the Air Force. And they will continue to assist in prosecuting cases that occurred prior to 28 December 2023, even before the Office of Special Trial Counsel's authority vests.

Direct Reporting

Maj Quaco:

And could you share what is the reason for the direct reporting to the Secretary of the Air Force?

Lt Col Neil:

The direct reporting is because when the IRC looked at the way we conduct military justice, part of the issue was removing command influence from the decision to prosecute or not prosecute a case. By making them an independent organization, reporting directly to the Secretary, there is no intervening authority. So, The Judge Advocate General's Corps and the command does not have any undue influence on the decision either to prosecute or not prosecute a case, because part of the IRC's recommendations is, or were, to have independent prosecutors making that determination. And if you had a prosecutor, you said they were independent, but you allowed the command or the Judge Advocate General's Corps to be rating officials for them, to exercise supervision over them, there's still that potential for influence. So, it was important

to make them independent and report directly to the Secretary of the Air Force.

Differences In Other Services

Maj Quaco:

Right. Right. And you mentioned this is applicable to other services. So, is there any differences in how, say, the Army, the Navy, others are handling it? Is there some discretion there?

Lt Col Neil:

There is discretion, now, and that was intended and that was intentional. When Congress drafted the 2022 NDAA to have each service establish their own Office of Special Trial Counsel because there are cultural structural differences between the services that one size doesn't fit all. So, there will be some differences in terms of how they're set up, and how we go about our operations.

That being said, our offices meet, each of the services offices of special trial counsel have a meeting monthly to discuss those areas where we can be consistent, and we can have, you know, very like minds on particular areas. So, for instance, things like disposition authority, at what level that disposition authority is going to be. That's one of the things that we wanted to have, kind of parity between the services, because we didn't want to have one service who was having, you know, junior, you know, captain, O-3, or major special trial counsel referring murder cases to trial, whereas another service withheld that to the O-7 level.

And so, by talking with them, we've been able to share ideas, share thoughts for how this should work. And it helps each of the services' Office of Special Trial Counsel, kind of refine their standard operating procedures.

Maj Quaco:

And will you have the ability to further refine them, say, hey, this is, you know, it's go in December of 2023, you figure some things out within six months. Can—is there room for change?

Lt Col Neil:

There is. There's always room for change. And we expect there will be change, because in some ways we're kind of building the plane as we fly. And, so, we're going to see where those issues, and as we stress test them, as we as we work through these procedures, we'll find inflection points. We'll find gaps where we need to change. And it's expected that we do that. And that's one of the reasons why we had the course here this week and we bring all of our personnel in to stress test some of the standard operating procedures that we've built. And we hold tabletops monthly with the field to further stress test those. We do that with installation legal offices, with major command legal offices, with numbered air force legal offices, as well as military criminal investigators to determine where we might be missing something, some blind spots we might have, and refining those as we go.

Final Thoughts

Maj Quaco:

Great. Anything else you want to add? Any kind of implications or thoughts you might have?

Lt Col Neil:

I do. So, I would say I already highlighted that our hope here is that we're going to build an efficient and timely process, but we also want to build trust in the system. Trust in the system from victims, trust in the system from accused, there have been a number of reports from the Government Accountability Office as well as from the IRC that talked about, the Independent Review Commission, that talked about the lack of faith, the lack of trust in the system. And we want to build that, we want to build that trust.

But I'd also like to highlight two more points. The first is we've got to have time to see how these changes will actually affect things. And, so, when we are, when we have constant change, it makes it difficult and it presents challenges as we're building this system out. As an example of that, there were, and this was the largest, the fiscal year 2022 National Defense Authorization Act

was the largest sea change in military justice in known memory in terms of the way we prosecute these cases and investigate these cases; significant changes. And then there were additional changes in the fiscal year 23 National Defense Authorization Act, which kind of changed some of our foundational principles that we had for how we were building the office in terms of staffing, in terms of how we were going to operate. And so, it's important for us to be able to actually implement these changes, and see how they, how they actually take effect and how they work before we have more significant changes, because that presents significant challenges to us.

And the last point I would like to make is, the Department of the Air Force is committed to the recommendations of the Independent Review Commission, but one thing that I would take exception with is the claims by the Independent Review Commission about the professionalism and experience of our litigators. In my 16 years, I would put Department of the Air Force litigators against U.S. civilian prosecutors, civilian defense counsel any day of the week. And I've prosecuted a lot of cases that had civilian defense counsel on there. And I thought that the individual that was accused, by and large, would have gotten the same, if not better service from military defense counsel that represented them. We have professional, experienced counsel that litigate these cases. And what we're doing now is just continuing to build on that experience. And the Department of the Air Force has established our career litigation development program, which simply codifies what I think we've previously done, as that is allow individuals to pursue a path in litigation, and build their military justice experience, build their litigation abilities, and will continue to have professional and experienced litigators trying these cases.

Closing

Maj Quaco:

Well, thank you so much for sharing all that information on the Office of Special Trial Counsel. It sounds like y'all

put in a lot of work putting this office together and excited to see the things that you are doing in the future. So, thank you, Colonel Neil, for joining us.

Lt Col Neil:

Oh, thank you, Major Quaco. I'm also excited to see how it all plays out and what the effects of the changes will be.

Maj Quaco:

Great. Thank you, sir.

Lt Col Neil:

Thank you.

Maj Quaco:

All right, listeners, that's all I have for you today. I hope you enjoyed that interview with Lieutenant Colonel Neil. As always, please feel free to review, rate, and subscribe. I'll take any feedback that you have. And with that, this podcast is in recess. [Gavel bangs]

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Major Victoria Smith:

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Glossary

- **IRC:** Independent Review Commission
- **JAG:** judge advocate general
- **LOC:** letter of counseling
- **NDA:** National Defense Authorization Act
- **OSI:** Office of Special Investigations
- **OSTC:** Office of Special Trial Counsel
- **STC:** Special Trial Counsel

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