

## **Current Command-Based Military Justice Process** (See Chart 1)

*This flow chart describes the prosecution decision-making process in the Air Force for penetrative sexual assault allegations--a process centered on the military chain of command, while cutting out military prosecutors. Although service branch-specific, this process is representative of the military as a whole.*

*This chart and explanation provide only an overview of the major steps of the process. For clarity, not every step of the process has been included.*

1. A sexual assault report may be “restricted” or “unrestricted”. Either type may be made by a victim who is a service member or an adult dependent of a military member, but other individuals may only make unrestricted reports. A restricted report entitles a victim to support services but is not investigated, and can be made only to certain non-law enforcement agencies, such as medical providers. A report to anyone other than those authorized to take restricted reports is considered unrestricted and must be investigated by one of the military’s criminal investigation units, such as the Air Force Office of Special Investigation (OSI). A victim can choose to convert a restricted report to an unrestricted report at any time.
2. Each service has its own investigative agency. After an investigation is complete, the agency provides a Report of Investigation (ROI) to the **suspect’s immediate commander** and to the legal office of the **special court-martial convening authority (SPCMA)**. The ROI is also reviewed by the chief of justice (COJ), who coordinates with the SPCMA’s staff judge advocate (SJA), and the COJ then recommends to the immediate commander whether the suspect should be charged. The immediate commander may not dismiss the charges. If the **commander** charges (prefers charges) the suspect (now the accused), he forwards the charges to the **SPCMA** with a recommendation of how the charges should be processed.
3. The **SPCMA**, in consultation with his SJA, may order the charges to an Article 32 hearing (a probable cause hearing) to determine whether the charges should be referred to a general court-martial, or the SPCMA may dismiss the charges. If the charges are dismissed, the **GCMA** will review that decision and may agree to dismiss or order the charges to an Article 32 hearing.

The **SPCMA** is a commander and is not a lawyer. The SJA is a lawyer, but likely has minimal experience prosecuting sexual assault cases. Neither the SJA nor the SPCMA are prosecutors, and by law are not allowed to act in that role.

4. The purpose of an Article 32 hearing is to determine if there is probable cause, i.e. enough evidence to proceed to trial. The hearing is adversarial and attended by the accused and his counsel. The hearing officer is typically a military attorney, but his experience may be very limited. After reviewing the evidence, the hearing officer makes a nonbinding recommendation to the **SPCMA** (or, if the case was referred by the GCMA, to the **GCMA**) as to whether to proceed to court-martial and, if so, on which charges. The recommendation comes in the form of a lengthy report to the SPCMA, his SJA and the accused and his counsel. The SJA then recommends in writing whether the case should be forwarded to the **GCMA** or dismissed. The **SPCMA** then sends the case to the **GCMA** with a recommendation to either refer the charges to trial or to dismiss the case.

5. The **GCMA** may either dismiss the case or refer the case to a general court-martial. He must receive legal advice from his SJA. This SJA is not a prosecutor and likely has not served as prosecutor in at least 15 years. The **GCMA** is not an attorney and will usually serve in this role for less than two years.

At this point, the case may proceed in one of four ways:

- a) If the SJA determines the charges are not warranted by the evidence, the **GCMA** cannot refer the case to trial. In this situation, the case is reviewed by a **higher GCMA** in the chain of command, who, in consultation with his SJA, determines whether to dismiss the case or convene a court-martial.
- b) If the SJA recommends a case proceed to trial, and the **GCMA** agrees, the **GCMA** may convene a court-martial. However, the **GCMA's** role is not over. The **GCMA** will then select the court members (jury) for the trial. Any pretrial agreement (plea bargain), the withdrawal of charges, and/or the addition of new charges need to be approved by the **GCMA**. The trial counsel (prosecutor) will almost never communicate or meet with the **GCMA**. The **GCMA** receives his legal advice from his SJA, not the prosecutor.
- c) The **GCMA** may dismiss the case even when an SJA recommends that it proceed to trial. In this situation, the dismissal is reviewed by the **Secretary of the service branch**, who ultimately decides whether to dismiss the case or proceed to court-martial.
- d) If the **GCMA** dismisses a case but the trial counsel disagrees, the trial counsel may bring the issue to the attention of the Chief Prosecutor of the service. The Chief Prosecutor may then request higher level review, in which case the **Secretary of the service branch** will decide whether to dismiss the case or proceed to court-martial.

In each of the above steps, the central role of the commander--rather than an independent prosecutor--creates many barriers to effective, efficient justice. The convening authority system causes massive delays in investigation and adjudication, leads to cases being lost at trial or overturned on appeal due to errors, and discourages victims from coming forward due to the pervasive distrust of the chain of command.