

# Strategy Research Project

## Measuring the Effectiveness of the Military Justice System

by

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Class of 2017

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REPORT DOCUMENTATION PAGE			Form Approved--OMB No. 0704-0188		
The public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0188), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ADDRESS.					
1. REPORT DATE (DD-MM-YYYY) 01-04-2017		2. REPORT TYPE STRATEGY RESEARCH PROJECT		3. DATES COVERED (From - To)	
4. TITLE AND SUBTITLE Measuring the Effectiveness of the Military Justice System			5a. CONTRACT NUMBER		
			5b. GRANT NUMBER		
			5c. PROGRAM ELEMENT NUMBER		
6. AUTHOR(S) Colonel Jerrett W. Dunlap, Jr. United States Army			5d. PROJECT NUMBER		
			5e. TASK NUMBER		
			5f. WORK UNIT NUMBER		
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Dr. Andrew Hill			8. PERFORMING ORGANIZATION REPORT NUMBER		
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES) U.S. Army War College, 122 Forbes Avenue, Carlisle, PA 17013			10. SPONSOR/MONITOR'S ACRONYM(S)		
			11. SPONSOR/MONITOR'S REPORT NUMBER(S)		
12. DISTRIBUTION / AVAILABILITY STATEMENT    Distribution A: Approved for Public Release. Distribution is Unlimited. To the best of my knowledge this SRP accurately depicts USG and/or DoD policy & contains no classified information or aggregation of information that poses an operations security risk. <b>Author:</b> <input checked="" type="checkbox"/> <b>Mentor:</b> <input checked="" type="checkbox"/>					
13. SUPPLEMENTARY NOTES Word Count: 5045					
14. ABSTRACT This essay explores the need for standards to measures the effectiveness of the military justice system. It analyzes three potential methods for measuring the effectiveness of the military justice system: The Trial Court Performance Standards, the Long and Nugent-Borakove proposal, and the Judicial Proceedings Panel. It concludes the three Long and Nugent-Borakove effectiveness measures best allow policymakers to assess the military justice system. These three types of measures are (1) output/outcome, (2) satisfaction and quality, and (3) efficiency and timeliness. Application of these three measures will allow policymakers to evaluate the effectiveness of the military justice system as well as proposed military-justice-reforms.					
15. SUBJECT TERMS Uniform Code of Military Justice, UCMJ, Litigation, Good Order and Discipline					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES 27	19a. NAME OF RESPONSIBLE PERSON
a. REPORT UU	b. ABSTRACT UU	c. THIS PAGE UU			19b. TELEPHONE NUMBER (w/ area code)

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(5045 words)

### Abstract

This essay explores the need for standards to measure the effectiveness of the military justice system. It analyzes three potential methods for measuring the effectiveness of the military justice system: The Trial Court Performance Standards, the Long and Nugent-Borakove proposal, and the Judicial Proceedings Panel. It concludes the three Long and Nugent-Borakove effectiveness measures best allow policymakers to assess the military justice system. These three types of measures are (1) output/outcome, (2) satisfaction and quality, and (3) efficiency and timeliness. Application of these three measures will allow policymakers to evaluate the effectiveness of the military justice system as well as proposed military-justice-reforms.

## **Measuring the Effectiveness of the Military Justice System**

Since 1775, the Army has endeavored to maintain good order and discipline within its ranks. General George Washington wrote: "Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak and esteem to all."<sup>1</sup> Sounding a similar refrain, Army Chief of Staff General Mark Milley recently said history demonstrates units imbued with trust, cohesion, and esprit de corps can defeat larger and better equipped units.<sup>2</sup> Yet, General Milley warned that misconduct can "rip apart unit trust, discipline and cohesion," bringing a unit to its knees by destroying readiness.<sup>3</sup> Following World War II, Congress replaced the Articles of War with the Uniform Code of Military Justice (UCMJ) to balance the military's need for discipline with the due process rights demanded by justice.<sup>4</sup> The Manual for Courts-Martial, produced by the President, states "[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."<sup>5</sup> Congress continues its efforts to balance the demands of justice with the need to maintain good order and discipline.

In the 2017 National Defense Authorization Act, Congress mandated a program for effective prosecution and defense at courts-martial.

The Secretary concerned shall carry out a program to ensure that trial counsel and defense counsel detailed to prosecute or defend a court-martial have sufficient experience and knowledge to effectively prosecute or defend the case; and a deliberate professional developmental process is in place to ensure effective prosecution and defense in all courts-martial.<sup>6</sup>

This congressional directive does not define how experience, knowledge, or effectiveness should be measured. In fact, there is no consensus on measuring when

experience and knowledge are sufficient, nor when prosecution or defense in courts-martial are effective. This essay explores the need for standards to measure the effectiveness of military justice.<sup>7</sup> It analyzes three potential methods for measuring the effectiveness of the military justice system: the Trial Court Performance Standards, the Long and Nugent-Borakove proposal, and the Judicial Proceedings Panel approach. It concludes that the Long and Nugent-Borakove effectiveness measures best allow the Service Secretaries to assess the experience, knowledge, and professional development of court-martial counsel.<sup>8</sup>

### The Purpose of the Military Justice System

A discussion of effectiveness should begin by defining the system's purpose and what right looks like. This discussion begins by examining three subjects related to the purpose of the military justice system: good order and discipline in the armed forces, efficiency and effectiveness in the military establishment, and justice.<sup>9</sup> There are several factors that make it difficult to quantify and measure the military justice system's effectiveness. Good order and discipline, efficiency and effectiveness, and particularly justice are complex concepts. We will first examine good order and discipline.

#### Good Order and Discipline

Army commanders have long lauded the attributes of good order and discipline. General William Westmoreland described discipline while discussing military justice reform during the Vietnam War.<sup>10</sup>

Discipline is an attitude of respect for authority which is developed by leadership, precept, and training. It is a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed. Discipline conditions the soldier to perform his military duty even if it requires him to act in a way that is highly inconsistent with his basic instinct for self-preservation. Discipline markedly differentiates the soldier from his counterpart in civilian society.

Unlike the order that is sought in civilian society, military discipline is absolutely essential in the Armed Forces.<sup>11</sup>

Good order and discipline in the armed forces can also be defined as the absence of misconduct. Congress penalizes misconduct specifically named in 63 UCMJ articles.<sup>12</sup> The UCMJ's General Article also penalizes misconduct "prejudicial to good order and discipline in the armed forces," as well as service discrediting misconduct.<sup>13</sup> Accordingly, tracking criminal misconduct is one way to measure good order and discipline, or the lack thereof.

Military law recognizes five principal reasons for penalizing criminal misconduct.<sup>14</sup> The reasons are rehabilitation and punishment of the wrongdoer, protection of society, preservation of good order and discipline in the military, and deterrence.<sup>15</sup> Deterrence, when effective, works in three ways: incapacitation, specific deterrence, and general deterrence.<sup>16</sup> Incapacitation of the criminal protects society during the incarceration period.<sup>17</sup> Specific deterrence is directed toward stopping recidivism.<sup>18</sup> General deterrence is the crime-preventing effect resulting from the threat of punishment.<sup>19</sup> Given these reasons for penalizing criminal misconduct, an effective military justice system would rehabilitate and punish wrongdoers, protect society, and deter criminal misconduct, which would be reflected in the preservation of good order and discipline.

#### Efficiency and Effectiveness in the Military Establishment

The next purpose of the military justice system is promoting efficiency and effectiveness in the military establishment.<sup>20</sup> Unfortunately, the terms are not defined in the Manual for Courts-Martial. The term effectiveness is only used in this fashion in the preamble to the Manual for Courts-Martial.<sup>21</sup> The term efficiency is used occasionally in the Manual for Courts-Martial in reference to command functions, such as inspections

or the prevention of sexual offenses.<sup>22</sup> Military law also considers the adverse impact on the efficiency of the command as an aggravating factor for court-martial sentencing.<sup>23</sup> Nevertheless, the Manual for Courts-Martial uses efficiency most frequently in reference to the military justice process, such as “judicial economy and efficiency.”<sup>24</sup> As used in the Manual for Courts-Martial, an efficient and effective military establishment would expeditiously process misconduct, while minimizing adverse impact on the command.

### Promoting Justice

The final purpose of military law is to promote justice.<sup>25</sup> Justice is multifaceted in its meaning and focus. Defined as the proper administration of laws, justice can be process focused.<sup>26</sup> In this sense, justice refers to laws and procedural rights being applied consistently and fairly regardless of rank or position. We also speak of bringing a criminal to justice, a perpetrator-focused phrase intended to hold suspects accountable through the criminal justice system.<sup>27</sup> Justice can also be victim focused; defined as promoting the safety of victims and giving them a voice.<sup>28</sup> Finally, justice can be focused on promoting the safety of society at large.<sup>29</sup> A military justice system that effectively promotes justice would take all of these factors into consideration and apply them consistently and fairly to alleged victims, the suspected perpetrator, and to society at large.

The UCMJ is an attempt by Congress to balance good order and discipline with due process rights that are generally associated with justice.<sup>30</sup> Under this formulation, the national security of the United States will be strengthened if military law promotes justice, good order and discipline, and efficiency and effectiveness.<sup>31</sup> Having discussed what right looks like in the military justice system, we will now examine some of the factors that complicate measuring its effectiveness.

## Challenges to Measuring the Effectiveness of a Criminal Justice System

In theory, a perfectly functioning justice system would convict all guilty individuals, while acquitting all individuals who are not guilty. In reality, the statistical probability will always exist that an accused may be wrongly found guilty of committing a crime. This is often called a false positive, or a Type I error in statistical parlance.<sup>32</sup> Similarly, a false negative or Type II error occurs when an accused who is guilty of committing a crime is wrongly acquitted of the charges.<sup>33</sup> The desire to reduce false positives is the driver for the high standard of proof in criminal justice.

Concern over false positives and the high standard of proof increase the complexity of measuring a criminal justice system's effectiveness. The standard of proof at a court-martial is beyond a reasonable doubt.<sup>34</sup> The best evidence of a suspect's intention would come from the suspect. Yet there are strong incentives for the suspect to withhold incriminating statements that could result in punishment. While circumstantial evidence can be used to determine a suspect's intent, the outcome remains subjective, complicating quantitative measurements of guilt.<sup>35</sup>

Several equally subjective and complex factors make determining whether a crime occurred very difficult. Crimes are social constructs that are defined by federal, state, and local government. The definitions change over time as society's perception of what constitutes a crime evolves. Defining what constitutes a crime can be extremely complex, based on the acts and intention of the suspect. For example, under the UCMJ, a murder occurs when an individual kills another person without justification or excuse and one of the following four elements exist: (1) she has either a premeditated design to kill, (2) an intent to kill or cause serious bodily harm, (3) is engaged in an inherently dangerous act with wanton disregard of human life, or (4) is committing a serious crime

when she causes the unjustified death.<sup>36</sup> The intent of the suspect at the time of the act determines whether the killing constitutes murder, a lesser form of homicide such as voluntary or involuntary manslaughter, or is not a crime at all.<sup>37</sup> Crimes such as rape, sexual assault, and stalking are even more complex to define because the consent of the victim is added to the acts and intent of the suspect in defining the crime.<sup>38</sup> These examples show how complex it can be to determine whether a crime occurred. The difficulty in clearly determining whether an accused is guilty of committing a crime is one of the greatest obstacles to accurately determining whether a criminal justice system effectively minimizes false positives and false negatives.<sup>39</sup>

The inability to objectively determine guilt complicates efforts to accurately measure the effectiveness of a criminal justice system. Social scientists endeavor to use multivariate statistical research to identify theoretically relevant reasons for criminal trial outcomes.<sup>40</sup> However, their research is not able to identify and measure all factors that are relevant to the outcome.<sup>41</sup> Dr. Cassia Spohn, an independent criminologist, testified to the Judicial Proceedings Panel that court documents and other relevant data cannot account for all variables that may have influenced case outcomes, such as

- the relationship between the victim and the accused;
- whether the victim was engaging in any kind of risk-taking behavior, especially drinking or using illegal drugs;
- the credibility of the victim;
- the degree of injury to the victim;
- cooperate into the investigation and prosecution of the case;
- whether there was delay in reporting or whether the crime or the incident was immediately reported;
- whether the victim had any kind of motive to lie about the incident; and
- any indication of the presence of physical evidence or witnesses.<sup>42</sup>

These variables listed by Dr. Spohn illustrate the complex and subjective nature of data that are potentially relevant to determining the guilt of an accused.

The act of gathering and reporting crime statistics also creates many challenges to measuring a criminal justice system's effectiveness. An audit of the New York Police Department's (NYPD) crime reporting process examined the challenges related to accurately gathering and reporting crime statistics.<sup>43</sup> The report noted that "the effects of unreported crime, the subjectivity inherent in crime classifications, the shifting procedures and rules for classifying crimes, and downgrading and suppression necessarily vary in any given year."<sup>44</sup> The report also noted that overemphasis and politicization of year-over-year declines in crime statistics can undermine the integrity of the statistics and have a negative impact on law enforcement tools.<sup>45</sup>

There are few easily quantifiable measures of effectiveness in criminal justice.<sup>46</sup> The conviction rate is perhaps the most readily quantifiable and most often used measure of effectiveness.<sup>47</sup> Yet there are problems with relying on conviction rates as an accurate effectiveness-measure. Conviction rates give an incomplete picture of competence, procedures, the difficulty of cases tried, and myriad other factors.<sup>48</sup> Moreover, emphasizing conviction rates can create undesirable consequences on prosecution decisions, such as declining to prosecute hard-to-prove cases.<sup>49</sup>

Given these factors that complicate measuring a criminal justice system's effectiveness, there are points that policymakers should consider. First, leaders must recognize that general rules and intuition are insufficient when evaluating the effectiveness of the military justice system. U.S. Army War College faculty members Stephen Gerras and Leonard Wong have studied the role intuition often plays with senior policymakers.<sup>50</sup>

Although intuition and expertise are critical to leaders—when faced with volatile, uncertain, complex, and ambiguous issues—senior

decisionmakers must appreciate the limitations of applying expertise and intuition since it will often lead to close-mindedness and a tendency to dismiss dissonant information too quickly. Recent research on senior Army leaders (i.e., general officers) shows a strong inclination to trust intuition over empirical evidence when making complex decisions.<sup>51</sup>

In order to measure the effectiveness of the military justice system, policymakers should develop testable hypotheses and conduct unbiased assessments of available data in order to confirm or refute the hypotheses.<sup>52</sup>

Second, measures should relate directly to the purpose of the military justice system, namely promoting justice, maintaining good order and discipline, promoting efficiency and effectiveness in the military establishment, which will strengthen U.S. national security.<sup>53</sup> Focusing on the purpose of the military justice system will reduce the likelihood that politics or other non-justice related factors influence the selected measures. As was noted in the NYPD crime statistics audit, overemphasis and politicization of crime statistics can undermine the integrity of the measures and negatively impact law enforcement tools.<sup>54</sup> Finally, policymakers should carefully consider the consequences that may result from the effectiveness measures that are employed. For example, an emphasis on conviction rates may create reluctance in prosecutors to pursue hard-to-prove cases.<sup>55</sup> On the other hand, an emphasis on increased prosecution of sexual assault allegations may raise concerns that prosecutors are overcharging due to political pressure.<sup>56</sup>

#### Tools for Measuring the Effectiveness of the Military Justice System

This essay considers these factors when analyzing three different efforts to measure the effectiveness of criminal justice systems.

## Trial Court Performance Standards

We begin by considering the National Center for State Courts' effort to measure the effectiveness of the civilian court system.<sup>57</sup> Beginning in the 1970s, there were several efforts to measure the effectiveness of the civilian court system, which generally focused on process.<sup>58</sup> In 1987, the National Center for State Courts developed the Trial Court Performance Standards (TCPS) to establish performance standards for state trial courts.<sup>59</sup> The TCPS focus on the quality of performance, rather than on process.<sup>60</sup> The five TCPS areas are: (1) access to justice; (2) expeditiousness and timeliness; (3) equality, fairness, and integrity; (4) independence and accountability; and (5) public trust and confidence.<sup>61</sup> Within these five TCPS areas, twenty-two specific performance standards are linked to sixty-eight performance measures.<sup>62</sup> Examples of some of the twenty-two performance standards include: ensuring that court facilities are safe, accessible, and convenient to use (Standard 1.2); establishing and complying with guidelines for case processing (Standard 2.1); taking responsibility for the enforcement of court orders (Standard 3.5); ensuring the trial court is perceived to be independent and accountable (Standard 5.3).<sup>63</sup> Examples of the sixty-eight performance measures include a measure of the ratio of case disposition to case filings (Measure 2.1.2), the assessment of the court's media policies and practices (Measure 4.4.2), or surveys of various reference groups, such as attorneys, court employees, and the general public (Measure 3.3.3).<sup>64</sup> While some of these standards and performance measures have general applicability to the military justice system, many of them are not applicable.

The five TCPS performance areas were designed to be customer oriented, focused on performance and outcome rather than on structures, and based on reliable data rather than on reputation.<sup>65</sup> An implicit reason for establishing TCPS was the

recognition that existing judicial and support resources could only effectively handle growing caseloads through a more focused approach.<sup>66</sup> The TCPS are designed to function as a blueprint for improving the administration of justice in state trial courts.

### Long and Nugent- Borakove

The second effort to be considered was proposed by Jennifer Long and Elaine Nugent-Borakove to measure the effectiveness of the civilian criminal system.<sup>67</sup> Long and Nugent-Borakove (LNB) recommend three types of measures.<sup>68</sup> The first are *outcome/output* measures; outcomes define the organization's broader goals and outputs are the tangible product produced by the organization.<sup>69</sup> In prosecution, ensuring justice is achieved is typically considered the outcome, while the output is the case disposition.<sup>70</sup> Long and Nugent-Borakove also point out "[t]o be useful as a performance measure, justice must be defined—is it safety of victims, overall public safety, holding offenders accountable, that the appropriate procedures were followed, or something else?"<sup>71</sup>

The second LNB type of effectiveness measures are *satisfaction and quality* measures, which "focus on perceptions of victims and/or the community about how cases are handled and their outcomes."<sup>72</sup> The *satisfaction and quality* measures examine the processes used to realize outcomes and outputs.<sup>73</sup> The third LNB type of effectiveness measures are *efficiency and timeliness* measures, which look at timing, length of time, and the level of effort and resources required to bring about outcomes and outputs.<sup>74</sup> Long and Nugent-Borakove describe the utility of efficiency and timeliness measures.

Efficiency and timeliness measures are particularly useful in that the length of time it takes to produce an output or outcome has a bearing on successful performance in the other types of measures. For example,

faster case disposition can lead to increased satisfaction among victims about the process; swifter responses to criminal activity can help reduce recidivism.<sup>75</sup>

The LNB measures effectively move beyond simply looking at conviction rates and look at the complex task of measuring the effectiveness of a criminal justice system.

### Judicial Proceedings Panel

The final effort to measure effectiveness comes from the Judicial Proceedings Panel (JPP). The JPP was created by Congress to measure the effectiveness of the military justice system's treatment of sexual assault cases.<sup>76</sup> Congress implemented several UCMJ-reforms relating to rape, sexual assault, and other sexual misconduct in the 2012 National Defense Authorization Act.<sup>77</sup> Congress later tasked the JPP to assess the UCMJ-reforms and make recommendations for improving them.<sup>78</sup> Additional JPP duties include reviewing and evaluating current trends in response to sexual assault crimes, identifying punishment-trends in sexual assault cases, and assessing trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases together with the impact of those trends.<sup>79</sup> To date, the JPP has produced four reports related to sexual assault in the military.<sup>80</sup> The Judicial Proceedings Panel's *Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses* is a particularly useful tool to evaluate the effectiveness of the military justice system's adjudication of sexual assault.

### Comparing Effectiveness-Measurement Approaches

We will now compare these three approaches and determine which is most appropriate for measuring the effectiveness of the military justice system. As discussed above, the TCPS has five broad areas: (1) access to justice; (2) expeditiousness and timeliness; (3) equality, fairness, and integrity; (4) independence and accountability; and

(5) public trust and confidence.<sup>81</sup> However, the twenty-two standards and sixty-eight performance measures are specific to the state court system, which limits the applicability of many of the standards and performance measures with regard to the military justice system. For example, many of the standards and performance measures relate to *civil law* matters that are not present in the military justice *criminal law* system. There is also significant overlap between the five TCPS areas and the three LNB types of measures; (1) *output/outcome*, (2) *satisfaction and quality*, and (3) *efficiency and timeliness*.<sup>82</sup> The LNB proposal was initially designed to measure success in sexual assault prosecution, but the measures they propose remain applicable to the military justice system because of their breadth. The three LNB types of measures have greater applicability to the military justice system than the TCPS's twenty-two standards and sixty-eight performance measures. The LNB measures also more closely reflect the purpose of the military justice system.<sup>83</sup> This makes the LNB proposal a better effectiveness-measure than the TCPS standards and performance measures.

Unlike the TCPS areas or the LNB measures, the JPP measures focus narrowly on sexual assault in the military justice system.<sup>84</sup> While the LNB measures were motivated by a desire to improve sexual assault prosecution, the measures are broad enough to apply to all type of UCMJ offenses.<sup>85</sup> The JPP was not designed to look at the broader effectiveness of the military justice system.<sup>86</sup> While the JPP sexual-assault-data may be extrapolated as a sample of the system, the performance measures employed by the JPP are too narrow to directly measure the whole military justice system. In comparison to the JPP's areas of focus, the three LNB-measures provide a more holistic way of evaluating the effectiveness of the military justice system. Another

limitation of the JPP's approach is the fact that specific duties were developed by Congress for political purposes, rather than being developed specifically for evaluating the effectiveness of the whole military justice system. The three LNB measures are superior to the TCPS or JPP approach, because they can be used to measure the effectiveness of the military justice system as a whole, without being burdened with irrelevant measures.

Finally, the LNB measures are consistent with the three points that policymakers should consider in measuring the military justice system's effectiveness, discussed above. The LNB-effectiveness-measures allow policymakers to develop hypotheses and assess data to test the hypotheses.<sup>87</sup> The LNB measures also relate to the military justice system's purpose of promoting justice, maintaining good order and discipline, as well as promoting efficiency and effectiveness in the military establishment.<sup>88</sup> Finally, the LNB measures allow policymakers to mitigate unwanted consequences that may result from the effectiveness measures that are employed. By employing broad, balanced measures of *output/outcome*, *satisfaction and quality*, and *efficiency and timeliness*,<sup>89</sup> policymakers can avoid damaging the military justice process by creating overemphasis on a particular measure and politicization.<sup>90</sup>

#### Applying the LNB Performance Measures to Military Justice Reform Efforts

Policymakers can apply the LNB measures, *output/outcome*, *satisfaction and quality*, and *efficiency and timeliness*,<sup>91</sup> to assess the effectiveness of the current military justice system and proposed reform-efforts. The LNB performance measures will allow the Service Secretaries and members of Congress to measure the effectiveness of the military justice system, the sufficiency of counsel's experience and

knowledge, and to determine whether a service's professional developmental process for trial and defense counsel is effective.<sup>92</sup>

### Proposals to Reform the Military Justice System

Examination of proposals to reform the military-justice system through the LNB lens shows the utility of the measures. In one example of a proposed reform, Mr. Charles "Cully" Stimpson of the Heritage Foundation proposed that all services should adopt a career litigation track.<sup>93</sup> Mr. Stimpson's proposal would have the Army and Air Force adopt the Navy's litigation track model, where approximately ten percent of Navy Judge Advocates are placed almost exclusively in criminal litigation positions.<sup>94</sup> The proposed litigation track would increase the level of trial experience of those in the litigation track because they would remain in litigation throughout their career. Mr. Stimpson bases his argument on the assertion that there is "no amount of training, book learning, or conversations over coffee that can overcome lack of real experience in a courtroom handling real, contested cases as a prosecutor or defense attorney."<sup>95</sup> Mr. Stimpson then uses an anecdotal example of a civilian district attorney working in a large district attorney's office, who tries significantly more cases than any member of the Judge Advocate General's Corps over their career.<sup>96</sup> Mr. Stimpson concludes by arguing the services should follow the examples of civilian district attorney's offices with regard to case management and training by adopting a career litigation track that maximizes experience.<sup>97</sup>

Another military justice reform proposal by Major Jeffrey Gilberg envisions a comprehensive reorganization of the Army military justice system "to better utilize the litigation experience within the Corps, while simultaneously improving the development of junior judge advocates, the quality of the Army's litigation practice, and the degree of

justice delivered to all.”<sup>98</sup> While Major Gilberg’s proposal looks to improve professional development, the quality of litigation practice, and the delivery of justice, he focuses on experience level of counsel, measured by number and type of cases tried, as the method of measuring the effectiveness of counsel.<sup>99</sup>

Mr. Stimpson and Major Gilberg should be lauded for their efforts to improve the military justice system. Scholarly endeavors are necessary to improve the system and are a worthy goal that all should support. The proposals by Mr. Stimpson and Major Gilberg both focus on the experience level of counsel as the primary criterion. This focus is too narrow to adequately measure the proposed reforms. At a basic level, both Mr. Stimpson and Major Gilbert employ circular reasoning by proposing to increase the experience level of counsel and using experience as the prime criterion to measure the proposal’s effectiveness. Furthermore, while the experience level of counsel is a factor that Congress, scholars, and practitioners all mention as being relevant to an effective military justice system, none of them identify what level of experience is sufficient to “ensure effective prosecution and defense in all courts-martial.”<sup>100</sup> There is no accepted number of cases-tried that serve as a benchmark indicating a counsel has sufficient experience to be effective. Experience alone, as measured by the number and type of cases tried, is not sufficient to ensure effectiveness. There are countless examples of experienced counsel who are not effective in terms of competence, efficiency, ethics, or other outcomes related to criminal justice.<sup>101</sup> While most would agree that more experience is better, all other things being equal, some studies indicate that gains in experience may not always lead to gains in effectiveness.<sup>102</sup>

Mr. Stimpson's analysis also raises concerns because it is based largely on general rules, anecdotes, and intuition, which are insufficient when evaluating the effectiveness of the military justice system.<sup>103</sup> While Major Gilbert gathers data related to the number of cases tried by military counsel to quantitatively measure experience, his analysis does not look to criteria beyond experience. Focusing on one factor alone significantly limits the scope of effectiveness that can be measured. His analysis does not measure the broader purpose of military law and does not consider potential unanticipated consequences that may result.

#### Application of LNB Types of Measures

Before implementing these proposals, policymakers should test the underlying hypotheses that restructuring litigation within the Department of Defense will increase the experience level of military counsel and thereby improve the effectiveness of the military justice system.<sup>104</sup> Use of the three LNB types of measures can be an effective method to measure the reform proposals offered by Mr. Stimpson and Major Gilbert. Beginning with *outcome/output* measures, policymakers should use available data to examine how the proposed reforms change outcomes and outputs. The *outcomes/output* measures should focus on data that reflects the military justice system's broader goals.<sup>105</sup> As discussed in detail above, these goals include promoting justice, maintaining good order and discipline, promoting efficiency and effectiveness in the military establishment.<sup>106</sup> The *satisfaction and quality* measures should focus on victims and community perceptions, as well as processes used to bring about outcomes and outputs.<sup>107</sup> Finally, the *efficiency and timeliness* measures should look at the time and resources required to bring about outcomes and outputs.<sup>108</sup>

Table 1. Sample Military Justice System Performance Measures<sup>109</sup>

Type of Performance Measure	Purpose of Measure	Specific Performance Measure
Outcome Measures	Promoting Justice-Fair/consistent process Good Order and Discipline	Trial/Appellate procedural violations Cross-rank sentence comparison Recidivism
Output Measures	Rehabilitation Punishment Retribution Deterrence	Rehabilitation efforts Conviction Incarceration Sentence
Satisfaction and Quality Measures	Public perceptions Victim perceptions Victims have a voice	Restitution Victim satisfaction Victim safety Surveys (public, attorneys, witnesses, victims, etc)
Efficiency and Timeliness Measures	Promoting Efficiency	Timeliness of adjudication Pretrial processing times Post-trial processing times

Table 1 is an example of the types of specific performance measures that policymakers could employ to measure the effectiveness of the military justice system. Much of the data is available through the herculean-efforts of the JPP.<sup>110</sup> Other data is regularly reported through the military justice system. To test Mr. Simpson’s proposal, policy makers could compare the relevant data relating to the Navy’s litigation track with the Army and Air Force military justice systems to see if there is a significant difference between the *outcomes/output* measures of the services. For example, the JPP’s extensive sexual-assault-related data could be analyzed.<sup>111</sup> Dr. Spohn’s analysis of the differences in outcomes by military service, used by the JPP, is summarized as follows.

As these results show, there were significant differences in outcomes by military service for penetrative offenses (because of small cell sizes, we could not calculate statistical significance for cases involving contact offenses). For cases in which the most serious charge was a penetrative offense, the overall conviction rate (i.e, convicted of a penetrative offense + convicted of a contact offense + convicted of a non-sex offense) was

61.7% for the Coast Guard, 55.1% for the Army, 51.7% for the Marine Corps, 47.3% for the Navy and 44.2% for the Air Force. The odds of being convicted of a penetrative offense were highest for the Army (28.0%), lowest for the Marine Corps (16.9%). The likelihood that the accused would be acquitted of all charges was lowest for the Marine Corps (8.8%) and highest for the Air Force (26.1%); by contrast, the likelihood that the case would be dismissed without further action was lowest for the Army (9.0%) and highest for the Coast Guard (26.5%). The services also differed in their use of alternative dispositions.<sup>112</sup>

These outcomes could be a starting point to fully analyze a proposed reform.

While data for all specific performance may not be readily available to policymakers, there is real value in analyzing multiple types of relevant data, rather than focusing on generalizations, intuition, or only one factor.

### Conclusion

The recent efforts to reform the military justice system have received significant interest by the public, the media, and members of Congress.<sup>113</sup> Policymakers and practitioners should fully support efforts to reform and improve the military justice system. Yet care should be exercised to achieve the balance between justice, good order and discipline, and due process rights that Congress intended when it enacted the UCMJ.<sup>114</sup> While progress in seeking justice for victims and society remains an important goal, care must be taken to ensure the pendulum of justice does not swing too far from the due process rights of servicemembers.<sup>115</sup> Application of the LNB performance measures is an appropriate method to measure the effectiveness of the military justice system, improve the performance of counsel, and protect the balance between justice and due process. Current exertions to improve military justice are consistent with the Army's efforts since 1775 to instill discipline, which General Washington said "is the soul of an army."<sup>116</sup>

## Endnotes

<sup>1</sup> U.S. Army Center of Military History, "Washington Takes Command of Continental Army in 1775," June 5, 2014, <https://www.army.mil/article/40819> (accessed February 6, 2017).

<sup>2</sup> David Vergun, "Three Ways to Derail Sexual Assault, Harassment, According to Gen. Milley," December 12, 2016, [https://www.army.mil/article/179413/three\\_ways\\_to\\_derail\\_sexual\\_assault\\_harassment\\_according\\_to\\_gen\\_milley](https://www.army.mil/article/179413/three_ways_to_derail_sexual_assault_harassment_according_to_gen_milley) (accessed February 6, 2017).

<sup>3</sup> Ibid.

<sup>4</sup> John S. Cooke, "Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition," *Military Law Review* 165 (September 2000): 8.

<sup>5</sup> Manual for Courts-Martial (MCM), Preamble, I-1 (2012).

<sup>6</sup> 10 U.S.C. § 542 (2016).

<sup>7</sup> Measures of Effectiveness (MOEs) is a term of art for the Joint Force. Joint Publication 3-0 states MOEs are used in joint operations to help answer the question, "Are we creating the effect(s) or conditions in the [operational environment] that we desire?" U.S. Joint Chiefs of Staff, *Joint Operations*, Joint Publication 3-0 (Washington DC: U.S. Joint Chiefs of Staff, January 17, 2017), II-11. While there are similarities between the doctrinal term MOE and the measures of effectiveness discussed in this essay, they are not synonymous.

<sup>8</sup> 10 U.S.C. § 542.

<sup>9</sup> MCM, Preamble, I-1.

<sup>10</sup> William C. Westmoreland, "Military Justice—A Commander's Viewpoint," *American Criminal Law Review* 10 (1971-1972): 5.

<sup>11</sup> Ibid.

<sup>12</sup> Uniform Code of Military Justice (UCMJ), Art. 80-133 (2012).

<sup>13</sup> Ibid., Art. 134.

<sup>14</sup> U.S. Department of the Army, *Military Judge's Benchbook*, Army Pamphlet 27-9 (Washington, DC: U.S. Department of the Army, September 10, 2014), 64.

<sup>15</sup> Ibid.

<sup>16</sup> Daniel S. Nagin, "Deterrence in the Twenty-First Century," *University of Chicago: Crime and Justice* 42 (2013): 200.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> MCM, Preamble, I-1.

<sup>21</sup> Ibid.

<sup>22</sup> MCM, *Analysis of the Military Rules of Evidence*, Rules 313 and 412, Appendix 22.

<sup>23</sup> Rule for Court Martial (RCM), 1001(b)(4) (2012).

<sup>24</sup> See, e.g., MCM, *Analysis of the Military Rules of Evidence*, Rule 703, Appendix 21.

<sup>25</sup> MCM, Preamble, I-1.

<sup>26</sup> *Black's Law Dictionary*, 6th ed. (St. Paul, MN: West Publishing 1990), 864.

<sup>27</sup> Guy Walters, *Hunting Evil: The Nazi War Criminals Who Escaped and the Quest to Bring Them to Justice* (New York: Broadway Books, 2009) 1.

<sup>28</sup> Jennifer G. Long and Elaine Nugent-Borakove, "Beyond Conviction Rates: Measuring Success in Sexual Assault Prosecutions," *Strategies*, April 2014, 4-5, <http://www.aequitasresource.org/beyond-conviction-rates.pdf> (accessed February 5, 2017).

<sup>29</sup> Ibid., 5.

<sup>30</sup> Anthony J. Ghoitto, "Back to the Future with the Uniform Code of Military Justice: The Need to Recalibrate the Relationship Between the Military Justice System, Due Process, and Good Order and Discipline," *North Dakota Law Review* 90 (2014): 485.

<sup>31</sup> MCM, *Preamble*, I-1.

<sup>32</sup> Charles Whellan, *Naked Statistics* (New York: Norton, 2013), 161-62.

<sup>33</sup> Ibid.

<sup>34</sup> RCM, 918(c).

<sup>35</sup> Ibid., 918(b).

<sup>36</sup> UCMJ, Art. 118.

<sup>37</sup> Ibid., Art. 119.

<sup>38</sup> Ibid., Art. 120.

<sup>39</sup> Whellan, *Naked Statistics*, 161-62.

<sup>40</sup> Judicial Proceedings Panel, *Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses* (Arlington, VA: Judicial Proceedings Panel, April 1, 2016), 15.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid., 16.

<sup>43</sup> Crime Reporting Review Committee, *The Reporting of the Crime Reporting Review Committee to Commissioner Raymond W. Kelly Concerning COMPSTAT Auditing* (New York: New York Police Department, April 8, 2013), 1.

<sup>44</sup> Ibid., 54.

<sup>45</sup> Ibid.

<sup>46</sup> Long and Nugent-Borakove, "Beyond Conviction Rates," 1-2.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Stephen J. Gerras and Leonard Wong, *Changing Minds in the Army: Why It is so Difficult and What to Do about It* (Carlisle Barracks, PA: U.S. Army War College Press, October 28, 2013), 14-15, citing Glenn K. Cunningham, *A Phenomenological Study of the use of Intuition among Senior Military Commanders*, Ph.D. diss. (Minneapolis, MN: Capella University, 2012), 160.

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<sup>52</sup> Ibid., 24.

<sup>53</sup> MCM, Preamble, I-1.

<sup>54</sup> Crime Reporting Review Committee, *COMPSTAT Auditing*, 54.

<sup>55</sup> Long and Nugent-Borakove, "Beyond Conviction Rates," 1-2.

<sup>56</sup> Marisa Taylor and Chris Adams, "Military's Newly Aggressive Rape Prosecution has Pitfalls," *McClatchy DC Bureau Online*, November 28, 2011, <http://www.mcclatchydc.com/news/nation-world/national/national-security/article24719683.html> (accessed March 22, 2017).

<sup>57</sup> George F. Cole, "Performance Measures for the Trial Courts, Prosecution, and Public Defense," in *Performance Measures for the Criminal Justice System*, Discussion Papers (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics-Princeton University Study Group on Criminal Justice Performance Measures, October 1993), 96.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid., 87-89.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid., 98.

<sup>62</sup> Nancy E. Gist, *Trial Court Performance Standards and Measurement System* (Washington, DC: Bureau of Justice Assistance), <https://www.ncjrs.gov/pdffiles/tcps.pdf> (accessed February 9, 2017).

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Cole, “Performance Measures for the Trial Courts,” 98.

<sup>66</sup> Gist, “Trial Court Performance Standards,” Factsheet.

<sup>67</sup> Long and Nugent-Borakove, “Beyond Conviction Rates,” 5.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid., 6.

<sup>75</sup> Ibid.

<sup>76</sup> Judicial Proceedings Panel, *Charter: Judicial Proceedings Since Fiscal Year 2012 Amendments Panel* (Arlington, VA: Judicial Proceedings Panel, June 20, 2016), 1.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid. Congress also tasked the Judicial Proceedings Panel with multiple duties directly related to specific sexual assault related provisions of the UCMJ and Military Rules of Evidence. Ibid.

<sup>80</sup> Judicial Proceedings Panel, *Report on Restitution and Compensation for Military Adult Sexual Assault Crimes* (Arlington, VA: Judicial Proceedings Panel, February 1, 2016); Judicial Proceedings Panel, *Report on Article 120 of the Uniform Code of Military Justice* (Arlington, VA: Judicial Proceedings Panel, February 1, 2016); Judicial Proceedings Panel, *Report on Retaliation Related to Sexual Assault Offenses* (Arlington, VA: Judicial Proceedings Panel, February 1, 2016); Judicial Proceedings Panel, *Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses* (Arlington, VA: Judicial Proceedings Panel, April 1, 2016).

<sup>81</sup> Cole, “Performance Measures for the Trial Courts,” 98.

<sup>82</sup> Long and Nugent-Borakove, "Beyond Conviction Rates," 5.

<sup>83</sup> MCM, Preamble, I-1.

<sup>84</sup> Judicial Proceedings Panel, *Charter*, 1.

<sup>85</sup> Long and Nugent-Borakove, "Beyond Conviction Rates," 6.

<sup>86</sup> Judicial Proceedings Panel, *Charter*, 1.

<sup>87</sup> Gerras and Wong, "Changing Minds in the Army," 24.

<sup>88</sup> MCM, Preamble, I-1.

<sup>89</sup> Long and Nugent-Borakove, "Beyond Conviction Rates," 5-6.

<sup>90</sup> Crime Reporting Review Committee, *COMPSTAT Auditing*, 54.

<sup>91</sup> Long and Nugent-Borakove, "Beyond Conviction Rates," 5-6.

<sup>92</sup> 10 U.S.C. § 542.

<sup>93</sup> Charles Stimpson, "Army and Air Force JAG Corps Need Career Litigators Now," *The Daily Signal Online*, May 2, 2016, [http://dailysignal.com/print?post\\_id=263111](http://dailysignal.com/print?post_id=263111) (accessed February 8, 2017).

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> Major Jeffrey Gilberg, "The Secret to Military Justice Success: Maximizing Experience," *Military Law Review* 220 (Summer 2014): 4.

<sup>99</sup> *Ibid.*

<sup>100</sup> 10 U.S.C. § 542.

<sup>101</sup> See, e.g., Jordan Smith, "Anatomy of a Snitch Scandal: How Orange County Prosecutors Covered Up Rampant Misuse of Jailhouse Informants," *The Intercept Online*, May 14, 2016, <https://theintercept.com/2016/05/14/orange-county-scandal-jailhouse-informants/> (accessed February 8, 2017); Michael Powell, "Misconduct by Prosecutors, Once Again," *New York Times*, August 13, 2012.

<sup>102</sup> Dean A. Shepherd, Andrew Zacharakis, and Robert A. Baron, "VCs' Decision Processes: Evidence Suggesting More Experience May Not Always be Better," *Journal of Business Venturing* 18, no. 3 (May 2003): 301.

<sup>103</sup> Gerras and Wong, "Changing Minds in the Army," 14-15.

<sup>104</sup> Ibid., 24.

<sup>105</sup> Long and Nugent-Borakove, "Beyond Conviction Rates," 5.

<sup>106</sup> MCM, Preamble, I-1.

<sup>107</sup> Long and Nugent-Borakove, "Beyond Conviction Rates," 6.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid., 5.

<sup>110</sup> Judicial Proceedings Panel, *Report on Statistical Data*, 76.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid., 62.

<sup>113</sup> Taylor and Adams, "Prosecution has Pitfalls."

<sup>114</sup> Ghoitto, "Back to the Future with the UCMJ," 485.

<sup>115</sup> Taylor and Adams, "Prosecution has Pitfalls."

<sup>116</sup> U.S. Army Center of Military History, "Washington Takes Command."