COURTS-MARTIAL PERFORMANCE MEASURES FOR THE U.S. DEPARTMENT OF THE NAVY JUDGE ADVOCATE GENERAL CORPS

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Introduction
In the world of military justice litigation, much attention is focused on the rate of conviction as the best and only measure of good performance for the Navy JAG Corps. There are, however, numerous other indicators that can, and should, be used to measure the performance of military justice. Although securing convictions is clearly a fundamental role of the justice system, the overall goal is to ensure the fair and efficient administration of justice, which significantly broadens the types of performance measures that ought to be used. For example, achieving justice for victims cannot be measured by conviction rate alone; there must be measures of victim safety and restoration. Likewise, unfair prosecutorial practices can lead to higher conviction rates, but it is unlikely that we would want to reward these practices and thus measures that assess equal treatment and adherence to due process provide a more robust assessment of overall performance. Similarly, performance measures for defense attorneys must look at more than win-loss ratios.

In September 2010, the services of the Justice Management Institute (JMI) were retained by the U.S. Department of the Navy to develop performances measures for criminal cases handled by the Navy Judge Advocate General (JAG) Corps. The JMI, a non-profit organization, whose mission is to ensure the fair, efficient, and effective administration of justice, has nearly 20 years of experience helping court professionals (judges, prosecutors, defense attorneys, and others) examine their performance and providing sound, realistic, and proven strategies for improving effectiveness. JMI’s President, Elaine Nugent-Borakove, is a nationally recognized expert in prosecution performance measurement and is the author of numerous reports, articles, and book chapters on the subject. In this report, JMI presents a set of performance measures for use by the Department of the Navy’s JAG Corps to assess the degree to which the desired goals and objectives are being met, both at a system level and at an individual level. Recommendations for implementing these performance measures are also discussed.

Project Methodology
Good performance measures are tied to the overall goals and objectives of an agency. Such measures provide tangible indicators of the degree to which an agency, and individuals within that agency, are meeting the target goals and objectives. In order to be useful, performance measures should be:

- Quantifiable and provide specific targets against which progress is measured (e.g., compliance rates with victims’ rights)
- Measurable (i.e., that data exist or the capacity for collecting the data exists)
- Logical (i.e., that the policies and practices in place are logically expected to produce the intended outcome); and
- Easy to understand

Performance measures that do not meet these criteria, or that are too cumbersome to allow for regular monitoring, serve little purpose for agency heads and personnel within the agencies. On the other hand, well-formulated performance measures are easily translated into objective rating criteria for individual staff performance as well as overall agency performance.
The approach to developing the JAG Corps performance measures was both qualitative and iterative. JMI used a focus group methodology to develop the performance measures. This involved convening three focus groups of personnel from the trial and defense counsel of varying rank and experience, military judges, staff judge advocates, Criminal Law Division staff, staff from the Trial Counsel Assistance Program and the Defense Counsel Assistance Program, and convening authorities. The first focus group, held in November 2010, focused on the following topics:

1. Overall goals and objectives of the JAG Corps with regard to the handling of allegations of criminal misconduct
2. Step-by-step case processing activities (from inception to disposition) and intended outcomes for each step
3. Desired processes and outcomes to be measured
4. Preliminary list of performance measures for individual staff performance and overall program performance

The information obtained during the November 2010 focus group was used to prepare draft goals, objectives, and performance measures. A second focus group was held in February 2011 to review the preliminary performance measures specifically to refine the measures and to begin developing specific performance standards. A number of significant revisions were made to the preliminary measures; however because there was a lack of diverse perspectives at the meeting, a third focus group was convened in July 2011 for a final review and to establish the baseline performance targets. The participants at the third meeting included judges, trial and defense counsel, convening authorities, appellate attorneys, and commanding officers. Final revisions were made to the performance measures and targets established for many of the measures. A consensus was reached that for some measures, additional research was required to establish the baseline. The final performance measures are detailed in this report.

**JAG Corps Goals and Objectives for Criminal Cases**

Much of the initial discussions in the first focus group were centered on whether or not goals and objectives, and ultimately performance measures, were intended to measure the entire criminal process or simply the trial stage. A good portion of the response to criminal allegations falls outside the control of the JAG Corps, such as the NCIS investigation; as such, the decision was made to focus the goals, objectives, and performance measures on the trial stage. During all three focus groups, there were several recurring themes that emerged, which formed the foundation of the overall goals and objectives for the JAG Corps in handling criminal cases. The themes included:

- Timeliness of the process
- Quality of representation
- Experience and professional improvement
- Due process
- Victims’ rights and safety
- Offender accountability
According to commanding officers (COs) and convening authorities (CAs), a major issue is how quickly criminal matters are resolved. From this perspective, cases in which the accused is held in custody or a criminal matter has not been resolved impacts their ability to manage their manning requirements. As such, there is an expectation on the part of CAs and COs that cases will be handled expeditiously so that an accused is either removed from the manning roster (because of conviction or administrative separation) or put back on duty. A related concern among CAs is that the system operate with transparency so that it is responsive to CAs’ needs.

One of the major recurring themes was ensuring that prosecutorial and defense trial counsel are adequately trained for and have experience handling a wide variety of cases. Because the volume of serious offenses is relatively small, particularly in some of the regional offices, there is not necessarily an opportunity to gain the type of senior level experience one might otherwise see in the civilian justice system, for example. As a result, several measures were developed in an effort to ensure that counsel have access to and receive training and that there are mechanisms in place to facilitate mentoring and monitoring by senior counsel.

Two other dominant themes related to the process—due process and victims’ rights/safety—also emerged. All of the participants emphasized that the system must be fair and impartial and that the victims are kept informed about their cases and afforded protection, when appropriate.

After some debate, offender accountability emerged as the final theme. There were mixed views about whether or not it was appropriate to try to capture accountability in the performance measures since the ability to hold offenders accountable is influenced by a number of factors outside the control of the JAG Corps. Ultimately, the group agreed that offender accountability is an element of performance that must be measured.

Based on these themes, two goals were articulated:

1. To ensure that the process for responding to criminal allegations are timely and fair to both the alleged victim(s) and the accused; and
2. To ensure that dispositions are fair, supported by the evidence, appropriate for the circumstances of the case, and consistent with good order and discipline.

To attain these goals, a number of objectives must be met. These objectives include:

- Adherence to due process of law and the rights of the accused throughout the process
- Operation of an efficient and transparent system that is accessible and responsible to Convening Authorities
- Assurance of victims’ rights, safety, and support needs throughout the process
- Accountability for the accused for substantiated allegations through the imposition of sanctions that are appropriate for the offense(s) and the offender
- Timely consideration and disposition of allegations
- Experienced trial and defense counsel who are advised by competent mentors
- Zealous advocacy by trial and defense counsel
• Professional collaboration between prosecutors and inter-disciplinary investigators, including cross-
  training and joint inter-disciplinary training
• Communication with and advice to decision makers throughout the system on criminal matters

JAG Corps Performance Measures
The performance measures developed by JMI are organized into six main categories that correspond with the
nine objectives outlined above. The six performance measurement categories are as follows:

• Due Process: measures focused on adherence to due process of the law and the rights of the accused as
  well as the operation of an efficient and transparent system that is accessible and responsive to CAs
• Victims’ Rights and Safety: measures related to the assurance of victims’ rights, safety, and support
  needs throughout the process
• Accountability: measures that capture the accountability of the accused for substantiated allegations
• Timeliness: measures intended to assess the efficiency of the system and in particular the timely
  consideration and disposition of allegations
• Competency: measures aimed at assessing the experience of trial and detailed counsel and their
  advisement by competent mentors, zealous advocacy, professional collaboration, and training
• Communication: measures focused on communication with and advice to decision makers throughout
  the system on criminal matters

Within each of these categories, JMI has proposed two sets of measures. The first set of measures are called
system measures and focus on macro-level performance of the JAG Corps overall. These measures are intended
to capture performance and produce standards that promote improvement in the military justice system with
regard to the handling of criminal matters, the intended objectives, and the overall goal attainment. The second
set of measures, called individual measures, are essentially indicators of the extent to which individual
performance is contributing to the attainment of overall JAG Corps goals and objectives. The measures offered
by JMI are consistent with industry standards for performance measurement in the civilian adjudication system.
(For more detail about performance measurement for criminal case processing in the civilian system, see for
example Dillingham, Nugent, and Whitcomb, Prosecution in the 21st Century: Goals, Objectives, and Performance
Measures, available at http://www.ndaa.org/pdf/prosecution_21st_century.pdf.) However, because of
differences between the military and civilian systems, many of the specific measures identified here are unique
to the military system.

The following section provides the performance measures within each of the six categories at both the system
and individual levels. Where appropriate, additional discussion is provided to establish the context for how and
why certain measures were selected. In addition, from some of the measures, specific performance targets are
enumerated (e.g., 100 percent of cases). For a number of measures, it was impossible to establish a
performance target since the data have not been captured historically in a way that would provide a baseline
against which performance could be measured.

Measures of Due Process
The table below shows the measures intended to capture how well the JAG Corps ensures due process
protections are provided and the Constitutional rights of the accused are afforded. At the system level, the
focus is on cases in which there were reversals based on concerns of due process violations, including reversals for factual errors or legal insufficiency as well as reversals for discovery violations. In addition, because harmless legal error can be an indicator of potential due process violations, a measure of the percent of cases in which such errors were found is included.

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<tr>
<th>Objective</th>
<th>System Performance Measures</th>
<th>Individual Performance Measure</th>
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<tr>
<td>Due Process</td>
<td>• Percent of cases reversed for factual errors and/or legal insufficiency</td>
<td>• Percent of cases that violated speedy trial rules</td>
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<td>• Percent of cases in which harmless legal error was found</td>
<td>• Average number of days for authentication of trial record</td>
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<td>• Percent of appellate reversals for discovery violations</td>
<td>• Percent of cases in which there are discovery violations</td>
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<td>• Percent of cases in which the appellate court found that the accused's rights had been violated (target: 0%)</td>
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<tr>
<td></td>
<td></td>
<td>• Percent of cases reversed for factual errors and/or legal insufficiency</td>
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<tr>
<td></td>
<td></td>
<td>• Percent of cases in which harmless legal error was found</td>
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At the individual level, the due process measures focus on the extent to which due process is followed. In particular, measures related to the timeliness of case processing, provision of discovery, and violations of defendants' right are included. Measures that mirror the system measures of reversals for errors are also included to capture the extent to which individual counsel are contributing to the overall system performance related to due process.

**Victims' Rights & Safety Measures**

As with measures of due process, the measures related to victims' rights and safety are intended to ensure that both the system overall and the individual counsel are ensuring the legal rights of victims. In addition, there are several measures, particularly in the individual category that assess performance in responding to victims' needs.
Accountability Measures

The issue of accountability is perhaps the most complex in the context of JAG Corps performance measurement. As there is little control by attorneys within the JAG Corps about which cases are preferred, there were some sentiments expressed during the focus groups that traditional measures of accountability, such as convictions and acquittals, should not be included. While convictions and acquittals are by no means the only measures of accountability, it is nonetheless important that such measures be included as they are most certainly of interest to managers, victims and defendants, the public, Naval leadership, and Congress.

In addition to the common measures of convictions and acquittals, individual measures intended to capture the competency of counsel in preparing sound cases that are likely to produce desired case outcomes are included.
Measures of Timeliness
A significant concern of Commanding Officers and Convening Authorities was the timeliness of criminal case processing. The table below shows measures related to the timely consideration and disposition of criminal allegations. Most of the system measures capture the extent to which case processing time standards are met. The individual measures shown are intended to assess whether or not trial and defense counsel actions contribute to the system's ability to meet the time standards.

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| Timeliness | • Percent of cases preferred within 60 days of receipt of complaint by cognizant RLSO (target: 95%)  
• Percent of cases scheduled for an Article 32 hearing within 30 days of preferral (target: 95%)  
• Percent of cases resulting in findings or dismissal within 90 days of preferral (target: 95%)  
• Percent of cases exceeding time standard for post-trial processing for appellate review (target: 0%)  
• Percent of cases dismissed for violation of RCM 707 (target: 0%)  
• Percent of cases in which counsel is not detailed by NLSO within 48 hours (target: 0%)  
• Percent of cases in which trial counsel record is sent to CCA within 30 days of CA action (target: 100%) | • Percent of cases dismissed for violation of RCM 707 (target: 0%)  
• Percent of cases in which trial counsel record is sent to CCA within 30 days of CA action (target: 100%)  
• Percent of cases with continuances granted during trial for discovery delay  
• Percent of cases where charges are dismissed, redrafted, or re-preferred following an Article 32 hearing |

Competency Measures
CO's and CA's, as well many of the senior counsel, raised concerns about the experience level of trial and defense counsel. As a result, two separate categories of competency measures were developed. The first focuses on the experience and qualifications of counsel; the second is designed to measure training.

Among measures related to experience, the system measures are intended to capture the extent to which cases are handled by experienced counsel. So, for example, as shown in the table below, the ideal situation in contested GCM cases is that at least one of the counsel is MJLQ. The idea behind this measure is that the MJLQ represents the standard of experience that is expected to produce optimum system performance. Other measures, such as having experienced counsel observing in the courtroom and eliminating the assignment of first-tour counsel to locations that do not have co-located senior counsel, were designed in response to concerns that less experienced counsel or first tour counsel have access to more senior and experienced mentors.
At the individual level, the experience measures are intended to capture the individual counsel’s experience prosecuting and defending contested cases and the extent to which counsel have enough experience to understand and comply with specific case processing requirements. A specific measure was added for senior counsel to assess their capacity (as measured by sitting co-chair) to help build appropriate competency levels among less experienced counsel.

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<th>Individual Performance Measure</th>
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<tr>
<td>Competency</td>
<td><strong>Experience Measures</strong></td>
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<td>• Percent of cases in which at least one counsel of record on a contested GCM case is MJLQ (target: 100%)</td>
<td>• Percent of guilty pleas by GCM and SPCM</td>
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<td>• Percent of contested cases that were boarded by senior counsel (target: 100%)</td>
<td>• Percent of contested cases by GCM and SPCM</td>
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<td>• Percent of cases in which supervisory counsel are observing in the courtroom during trial (target: 100%)</td>
<td>• For senior counsel, percent of contested cases sitting as co-counsel</td>
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<td>• Percent of first tour counsel assigned to cases without co-located senior counsel (target: 0%)</td>
<td>• Compliance with pretrial motion filing requirements (target: 100%)</td>
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<td>• Compliance with case management orders (target: 100%)</td>
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<td>• Compliance with trial notebook requirements (target: 100%)</td>
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<td>• Compliance with discovery (target: 100%)</td>
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<td><strong>Training Measures</strong></td>
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<td>• Percent of trial counsel completing requisite number of hours required for PQS (target: 100%)</td>
<td>• Number of relevant subject matter training hours for JAGs</td>
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<td></td>
<td>• Percent of substantiated ineffective assistance of counsel cases (target: 0%)</td>
<td>• Percent of cases in which trial notebooks prepared in accordance with mandated SOP</td>
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<td>• Percent of substantiated cases of prosecutorial misconduct for harmless error (target: 0%)</td>
<td>• Percent of cases in which the appellate court found IAC</td>
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<td>• Percent of substantiated cases of prosecutorial misconduct for bad faith (target: 0%)</td>
<td>• Percent of cases in which the court found prosecutorial misconduct</td>
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<td>• Percent of cases where record of trial is sent back to CA for modification (target: 0%)</td>
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The training measures shown in the table above measure two elements of trainings – how much training has been received and outcomes that can be affected through appropriate training. For example, at the system level, appropriate training of counsel should result in few, if any, instances of substantiated ineffective
assistance of counsel cases. Similarly, at the individual level, counsel with appropriate training should have few, if any, instances of prosecutorial misconduct for example.

Communication Measures
The next set of measures related to competency and efficiency are the measures of communication. In order for JAG Corps goals and objectives to be met, it is important that communication occur in a timely manner and among the various actors. The system measures of communication capture the percentage of communications that occur within defined time standards. These same measures are mirrored in the individual performance measures. However, other measures related to communication with clients and victims are also included.

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<th>Objective</th>
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| Communication | • Written requests forwarded to CA within 72 hours of receipt by trial counsel (or in a timely manner) (target: 100%)  
• Percent of cases in which trial counsel meets with NCIS and CA within 30 days of case initiation  
• Percent of requests for pretrial agreement responded to within 72 hours (target: 100%)  
• Requests for CA pretrial decisions submitted within 72 hours (target: 100%) | • Written requests forwarded to CA within 72 hours of receipt by trial counsel (target: 100%)  
• Percent of cases in which meeting with NCIS and CA is held within 30 days of case initiation  
• Percent of requests for pretrial agreement that are responded to within 72 hours (target: 100%)  
• Requests for CA action submitted within 72 hours (target: 100%)  
• Percent of cases overturned for IAC based on failure to advise client (target: 0%)  
• Percent of cases in which court concluded that trial counsel failed to provide disclosure (target: 0%)  
• Percent of cases in which trial counsel complied with VWAP |

IMPLEMENTING THE RECOMMENDATIONS
The process of performance measurement is only partially completed with the development of draft performance measures. In order to implement the measures, there are a number of additional activities that JMI recommends be undertaken. First, for performance measures to be useful, there must be an articulation of performance targets. For example, to assess how well the counsel has been trained, simply measuring the number of training hours received provides only a limited understanding of performance. A more precise and useful measure is one that establishes a performance target and then measures how the program is performing relative to that target – for example, X hours of the required 40 hours of annual training. In the performance measures proposed above, there are several that have performance targets attached (e.g., 100% of cases). For other measures without such targets, there will need to be additional work to define the appropriate performance target. Definition and selection of performance targets should not be arbitrary but rather should be empirically based – either using a Delphi method, which is a survey of key stakeholders on what the targets
ought to be, with follow-up surveys narrowing down the range, until a final number is decided upon, or by using the preferred method of empirically-derived targets.

Empirically-driven targets are simply determined using available data about the measures in question. Thus, for example, a review of the data on substantiated ineffective assistance of counsel cases over a several year period can be used to establish an average number per year. This average can be used either as the performance target, in the sense of "not to exceed," or it can be used to make judgments about whether the average is too high and if the performance target should be lower than the current average. So, if the average number of substantiated ineffective assistance of counsel cases is 13 per year, the Navy and the JAG Corps may decide that this is too high and that a more appropriate target is no more than 5 cases per year, or 0 cases per year.

For measures in which no data are readily available, it may be necessary to turn to other sources of data. For instance, Code 20 (Criminal Division) has engaged in a number of different types of case reviews that provide a wealth of information about what is routine and average and can be expected for a large majority of criminal allegations in terms of time, communication, compliance with VWAP, etc. This knowledge can also be used to establish a performance target.

Second, once performance targets have defined, baseline data for each measure should be collected. Collecting these data serves two purposes. First, it allows for a “pilot test” of the system—are the requisite data available, are they available in a usable form (i.e., electronic or hard copy), etc. Second, it is an imperative for establishing progress—actual performance cannot be assessed if there is no information about performance prior to the implementation of the measures.

Third, it is important to define the target audiences for the performance measures. System measures are typically intended for external audiences such as Congress or the Government Accounting Office, the Secretary of the Navy, or the public at large. For these audiences, the system measures are appropriately used in support of funding requests or new policy development/legislation, for the evaluation of performance, and to build public trust and confidence in the JAG Corps. The individual measures are typically used for audiences that are internal to the JAG Corps community—JAGC leadership, supervising JAGC officers, judges, and trial and defense counsel. The individual measures can be used in a variety of ways—for performance assessment, to identify training and staffing needs, in support of new policy development, and in the preparation of budget requests.

JMI also recommends that consideration be given to the process by which performance data will be collected and how it will be shared. The data collection process will depend in large part on the availability of data in electronic format. To the extent automated reports can be generated, it will allow for more frequent performance data reporting. For internal audiences, collection of performance data would ideally occur quarterly or semi-annually, allowing sufficient time to identify any potential performance weakness and to take corrective action. For external audiences, semi-annual or annual performance reporting is generally sufficient and consistent with industry standards. Regardless of the audience for whom the performance data are being reported, it is important that the information be reported in a clear and easily understood manner. Although there is no right or wrong way to report performance, JMI suggests consideration of the following:
• Whenever possible, use graphic displays of data to include data tables, bar charts, pie charts, or line charts.
• In graphic displays, provide legends and data labels to clearly identify what information is being presented.
• Take care not to present too much information in a single graphic display.
• Use short narrative descriptions to help the audience interpret the data—explain what conclusions can be drawn from the data. Making the reader do the interpretation can lead to inaccurate and inconsistent conclusions being drawn.
• Present both the performance measure (the target, such as 100% compliance with VWAP) and the actual score (95% compliance with VWAP).
• Provide context for the interpretation that might include discussion of why performance targets were or were not met and recommendations for performance improvement or maintenance.
• Provide trend information—how does the current performance period compare to previous performance periods.

Finally, once the performance measures are implemented and on-going monitoring/reporting mechanisms are established, it will be important to conduct periodic reviews of both the performance targets and the performance measures. Over time, it may be desirable to change performance targets. For example, if a target of 50% reduction is achieved consistently for several years, it may be useful to establish higher or more aggressive performance targets. Likewise, as policies and practices change, some measures may become less relevant, whereas new measures may be needed. Establishing a process for conducting these reviews prior to, or in conjunction with implementation, is highly recommended.