



Notre Dame Law Review

Volume 58 | Issue 5

Article 2

6-1-1983

Malmanagement Problem: Finding the Roots of Government Waste, Fraud, and Abuse

William V. Roth

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

 Part of the [Law Commons](#)

Recommended Citation

William V. Roth, *Malmanagement Problem: Finding the Roots of Government Waste, Fraud, and Abuse*, 58 Notre Dame L. Rev. 961 (1983).

Available at: <http://scholarship.law.nd.edu/ndlr/vol58/iss5/2>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

The “Malmanagement” Problem: Finding the Roots of Government Waste, Fraud, and Abuse

*William V. Roth, Jr. **

“[Great nations] may at last fail from not comprehending the great institutions which they have created.”

—Walter Bagehot¹

One of the most disturbing developments in the evolution of American democracy since World War II has been the growing distrust with which citizens hold the institutions of government. Each new public opinion poll and each new election bring fresh evidence of public dissatisfaction and disillusionment with government and with government officials. The polls detect a growing sense of public alienation from government—a feeling that government at all levels is neither responsive nor accountable to a public which, in theory and by constitutional principle, is its master.²

One explanation for the apparently deep-seated public distrust of government is found in the widespread impression that government is, by and large, ineffective in solving the nation’s problems, inefficient in carrying out its assigned functions, wasteful of the taxpayers’ dollars, and highly subject to fraudulent practices by those who work for the government and those who benefit from its programs. This impression is becoming so pervasive that the terms “bureaucrat” and “politician” have taken on a distinctly pejorative tinge, connoting to many citizens a degree of incompetence, if not outright venality, among those who in less cynical days were appreciated and respected as “public servants.”

This public image of the slothful, incompetent and corrupt politician or bureaucrat is neither accurate nor fair with respect to the majority of public officials. However, waste, inefficiency, and cor-

* Senior United States Senator from Delaware; Chairman, Senate Committee on Governmental Affairs and Permanent Subcommittee on Investigations.

1 R. SILK & M. SILK, *THE AMERICAN ESTABLISHMENT* 6 (1980).

2 The schism between citizen and government can be seen in the so-called “tax revolt,” which began with Proposition 13 in California in the late 1970’s and reached its pinnacle with the election of Ronald Reagan as President in 1980. While many factors contributed to Mr. Reagan’s election, no single element was more important than the electorate’s conviction that Mr. Reagan, if elected, would carry out his campaign promise to reduce the size and cost of government—and with it, the financial burden of government on the citizen-taxpayer.

ruption *do* exist in our institutions of government—just as they exist in *all* organizations, be they small or large, public or private. These shortcomings can never fully be eliminated from any organization, because they stem from the basic nature of organizations themselves. The problem is especially difficult when government agencies are involved, however, because most such agencies, unlike businesses or even non-profit private institutions, have no objectively identifiable “bottom line” against which to measure their performance. Thus, despite a constant drumroll of congressional statements, news media criticism, and public outrage, waste, fraud, and abuse continue to occur throughout the government. The best-intentioned efforts to solve these problems continue to run aground on the harsh shoals of reality.

If we do not begin to find better ways to deal with the problems of waste, fraud, and abuse, the deeply-felt hostility to our nation’s institutions and representatives eventually could sap the strength and vitality of our republic. An intensive and far-reaching effort must be made to find and control the root causes of government waste, inefficiency, fraud, and mismanagement.

The Senate Committee on Governmental Affairs is an ideal place to begin such an effort. The Committee traditionally has placed much of its emphasis on developing programs to mitigate government waste and mismanagement, as well as investigating and calling attention to abuses. Because its jurisdiction cuts across issue and agency boundaries and encompasses many government-wide programs and concerns, the Committee is uniquely positioned to probe for the institutional roots of waste, fraud, and abuse to find ways of minimizing their damage to our system of government. For lack of a better term, this article refers to the underlying causes of government waste, fraud, and abuse as “malmanagement.” This term suggests a much more fundamental and pervasive problem than “waste, fraud, and abuse,” “mismanagement,” or other terms which tend to focus attention on individual offenders and specific programs, which are only symptoms of the underlying disease.

I. What is Malmanagement?

The search for the root causes of government waste, fraud, and abuse cannot begin without a clearer understanding of what those terms mean and how they affect the government’s ability to carry out its functions effectively and efficiently. Lack of agreement on the definition of the symptoms—let alone on the nature and causes of the

underlying “disease”—has been largely responsible for the fragmentation and ineffectiveness of most efforts to solve these problems.

Unfortunately, waste, fraud, and abuse are often regarded as different words for the same concept—a kind of “triumvirate of corruption.”³ The terms are used so often, and so interchangeably, that they evoke a stereotype that is almost exclusively associated with large government programs, especially those run by federal agencies. The words have become so common and devoid of real meaning that one former Cabinet secretary tried to define them out of existence by circulating a memorandum requiring the phrase “program misuse and management inefficiency” to be substituted any time the words waste, fraud, or abuse appeared in departmental correspondence.⁴

Despite the common perception of interchangeability, important distinctions should be made among these terms. A more precise understanding of the terms is necessary to identify the different effects each activity has on government services and programs and to find effective remedies for these problems.

A. *Fraud*

“Fraud” is perhaps the most sinister-sounding of the triumvirate. Although fraud connotes an illegal act of some kind which deprives the government of its property or resources, no standard definition of the term exists in government today. One recent study found that the Department of Justice and each of the other federal agencies had its own list of activities which it considered to be fraud, many of which were quite different.⁵ This lack of a precise and uniform definition of fraud reflects both the large number of agencies trying to address the problem and the difficulty in establishing a definition that encompasses all potential types of fraud.

Despite wide variations in usage and meaning, fraud is more fully defined than either of its two notorious companions. A definition developed by the Department of Defense typifies those now in use:

[Fraud is] any willful act of conscious wrongdoing that adversely affects the Government's interests. It includes, but is not limited to,

3 Address by former Comptroller General of the United States Elmer Staats before the Town Hall of California (Jan. 13, 1981).

4 Intradepartment order by Patricia Harris, reported by Charles Osgood, CBS Radio Network broadcast (March 11, 1980).

5 U.S. GENERAL ACCOUNTING OFFICE, *FRAUD IN GOVERNMENT PROGRAMS: HOW EXTENSIVE IS IT? HOW CAN IT BE CONTROLLED?*, Comptroller General's Report to Congress (May 7, 1981).

acts of dishonesty which contribute to a loss or injury to the Government.⁶

While the popular view of fraud is often limited to such crimes as using false identification to obtain government benefits or stealing government property, defrauding the government can take many other forms. Other examples of fraud include charging personal expenses to a government contract, submitting false claims to an agency for reimbursement, intentionally misallocating project costs, suppressing the truth, and a variety of regulatory and statutory violations, including bribery, graft, and conflict of interest. Although such wide variations complicate the problem of formulating a standard definition, the kinds of illegal actions that constitute fraud are generally understood.

B. *Waste*

"Waste" is a much more difficult term to define, for no definition of waste fits everyone's notion of what constitutes wasteful activity. One person may find waste in an unnecessary or low-priority program; another may see it in the duplication of effort between two or more agencies; still another may consider poor management the best example of waste. The definition of waste depends largely on the individual's opinion as to what is, and is not, a proper government activity, as well as the standard of efficiency to which an agency is held. Defense expert Edward Luttwak points out that in contrast to fraud, waste is "a question of opinion rather than law."⁷ The identification of waste is often highly subjective, making the problem much more difficult to combat.

Despite the inherent difficulties in establishing a standard definition of waste, some generally understood aspects of the problem can form a basic and useful formulation. Waste is usually thought to occur in the *administration* of programs in executive agencies. The term is seldom used in connection with a legislative decision to approve or disapprove a particular program, although specific legislative decisions obviously can be considered wasteful. Waste usually occurs when funds are not used efficiently to fulfill the stated goals of a particular program. In sum, waste can be equated with the limited concept of "mismanagement," primarily denoting inefficiency in an

⁶ *Id.* at 2.

⁷ Luttwak, *Why We Need More Waste, Fraud and Mismanagement in the Pentagon*, 73 COMMENTARY 17, 18 (Feb. 1982).

agency's use of the taxpayer's dollars to fulfill the functions or to reach the objectives assigned to it.

C. *Abuse*

The third symptom of government malmanagement is perhaps the most difficult to understand. The *American Dictionary of the English Language* defines abuse as a "wrong or improper use" of a person or object. Often abuse in government does not involve an illegal act, but rather results from an attempt to "stretch" or broadly interpret the meaning or intent of a law or regulation. As one expert noted in recent testimony before a congressional committee, "abuse in governmental programs involves taking advantage of loosely written statutes, poorly written regulations, failure to check out eligibilities to receive governmental assistance, and so on."⁸

As this description reveals, abuse can take many different forms and usually occurs where the rules used to guide a program are poorly drawn or difficult to understand. In most such cases, funds are unnecessarily spent on activities which, while legal, add nothing to the effectiveness or credibility of a program while diverting scarce resources from assigned objectives.

D. *Cost of Malmanagement*

All three elements of the "triumvirate of corruption" contribute substantially to the financial burden, both actual and perceived, that government places on the individual citizen. Given the definitional problems outlined above, however, it is extremely difficult to establish the actual severity or cost of these symptoms of government malmanagement, other than in very general terms.

In the late 1970's, for example, Attorney General Benjamin Civiletti estimated that the government lost between \$2.5 billion and \$25 billion *each year* through careless (wasteful) or fraudulent actions.⁹ A recent report by the General Accounting Office found that the loss to the Government from *fraud alone* amounted to some \$220 million in a two and one-half year period.¹⁰ Another GAO review estimated that a *half billion dollars* is wasted every year due to poor

8 *Ways To Reduce Government Spending: Hearings Before the Senate Comm. on Appropriations, 97th Cong., 1st Sess. (1981)* (statement of Elmer Staats, Comptroller General of the United States).

9 THE ISSUE OF 1982: A BRIEFING BOOK (D. Jones & L. Webb eds. 1982) (derived from the Conference on Alternative State and Local Policies).

10 See FRAUD IN GOVERNMENT PROGRAMS, *supra* note 5, at i.

management in just one federal program.¹¹ Just servicing the outstanding debts owed the federal government by delinquent debtors costs the American taxpayers \$14 million *per day*.¹²

As these rather startling numbers reveal, the financial burden imposed on taxpayers by waste, fraud, and abuse is substantial, and the need to address the problem in a systematic and effective way is urgent. Given the large number of government programs (estimates range from 2,000 to 10,000), the inadequacy of management controls in many of those programs, and the continuing growth of the federal budget, the opportunities for waste, fraud, and abuse are numerous and growing. The agencies and departments of the Executive Branch are doing far too little to curb fraud and abuse and improve internal management systems.

E. *Causes of Malmanagement*

There are probably as many factors contributing to government waste, fraud, and abuse as there are definitions for the terms. One of the most easily identified factors, and the one that may be most difficult to control, is the sheer size of the institution of government. A recent article pointed out how rapidly the federal government has grown since colonial times:

When George Washington's first Administration was inaugurated in 1790, it functioned with nine single executive units and approximately 1,000 employees. A century later, the 1891 census recorded that over 150,000 civilians were working in the Harrison Administration. During its first 100 years, the American government had grown nearly 10 times as fast as the population. By 1979, the executive branch employed over 2,800,000 civil servants. The assistant administrator for Water and Hazardous Materials (a division of EPA) presided over a staff larger than Washington's first administration. When Jimmy Carter entered office, one in every 75 Americans was employed by the executive branch (compared with one per 463 in 1891 and one per 4,000 in 1790).¹³

The scope and depth of the nation's budgetary problems, and the recent proliferation of federal bureaus and agencies, are all too familiar to any citizen with even a passing interest in news of the federal government. A recent report by the Advisory Commission on

¹¹ See note 8 *supra*.

¹² Harper, Keynote Address to Symposium sponsored by the American Society of Public Administration, 11 BUREAUCRAT 13 (1982).

¹³ Porter, *Parkinson's Law Revisited: War and the Growth of American Government*, 60 PUB. INTEREST, Summer 1980, at 50.

Intergovernmental Relations notes, "During 1961-1973 a total of 141 new agencies were created (nearly 36% of the 394 existing in 1973), and none disappeared during that time . . . through this cumulative process, the federal government has become much more complex."¹⁴ The Advisory Commission also pointed out that the growth in federal programs and agencies has created situations in which federal responsibilities overlap and sometimes conflict with each other. In the area of foreign trade policy, for example, twenty-five agencies have been given responsibility for some aspect of international commerce, causing confusion and inefficiency.¹⁵ Unlike competition in the private sector, which generally promotes efficiencies, competition among government agencies promotes deficiencies in policy and waste in management.

Even those measures of the size of government cited above do not truly reflect the pervasive influence of the federal enterprise on American society. Increasingly, the federal government has enlisted the efforts of other levels of government, as well as the private sector, in attaining national objectives. As Lester M. Salamon pointed out:

[A] significant transformation has taken place in the way the federal government goes about its business—a shift from direct to indirect or "third party" government, from a situation in which the federal government ran its own programs to one in which it increasingly relies on a wide variety of "third parties"—states, cities, special districts, banks, hospitals, manufacturers, and others—to carry out its purposes instead.¹⁶

In 1981, the federal government spent more than \$220 billion on payments to federal contractors and state and local governments.¹⁷ At the same time, the number of people *indirectly* employed by the federal government through federally sponsored programs has grown to eight million.¹⁸

These two factors—size and the expenditure of vast sums of money through third parties—make the federal government highly

14 ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *The Federal Role in the Federal System: The Dynamics of Growth*, No. A-77, at 44 (July 1980).

15 R. Ahearn & D. Driscoll, *Executive Branch Organization to Formulate and Implement U.S. Foreign Trade and Investment Policy* (Congressional Research Service Aug. 25, 1981).

16 L. Salamon, *Rethinking Public Management*, working paper prepared for the 1980 American Political Science Association annual meeting, at 2, published in URBAN INSTITUTE.

17 OFFICE OF MANAGEMENT AND BUDGET, *Proposal for a Uniform Federal Procurement System*, at v (Feb. 26, 1982); *Federal Aid to State and Local Governments*, Special Analysis H at 3 (Feb. 1982).

18 NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *A Presidency for the 1980's*, Panel Report on Presidential Management (Nov. 1980).

susceptible to waste, fraud, and abuse. The attorney in Kurt Vonnegut's *God Bless You, Mr. Rosewater*, understood full well the fees to be derived from seizing the "magic moment" when large sums of money are about to change hands. In the same way, every time federal funds are spent for such activities as grant and procurement programs, the likelihood increases that some of those funds will be wasted or stolen. The growth of the federal work force has magnified the difficulties of establishing effective management controls and procedures to minimize misspending and illegal activities.

II. Is Anybody Accountable Anymore?

The ultimate effect of increasing government size and reliance on third parties is to diffuse responsibility and accountability for the operation of federal programs. This loss of accountability makes it nearly impossible to assign either credit or blame for the administration or maladministration of government programs to any person or, in some cases, to any single agency.

As used here, accountability refers to mechanisms designed to encourage or force federal agencies to carry out given policies or programs in the ways intended by Congress, with a minimum of waste or unnecessary expenditures. The textbooks tell us that good management requires the effective delegation of authority among well-trained agency employees who are accountable to their supervisors. Ideally, these employees report to top-level managers who must in turn appear before Congress and be held responsible for the proper operation of programs under their control. The ultimate accountability, in theory at least, is the election process, through which Congress is held to account for its actions by the American public.

This idealized accountability scheme, however, is greatly complicated by several factors besides the size of government and its increasing reliance on third parties. One such factor is the lack of any strong incentives for the bureaucracy to operate programs efficiently or sanctions with which to punish poor management. As one recent study noted:

Economists long ago pointed out the differences between the incentive structure faced by private sector providers of private goods and public sector providers of public goods. Bureaus and agencies are not profit-making entities. Thus, their performance is not judged by the usual private sector standards. Indeed, for many agencies it is difficult to make even the roughest estimate of the overall benefits and costs of their activities. How are public goods like defense and

education to be valued?¹⁹

The author goes on to say that the lack of incentives for improving program management and the unwillingness of managers to take responsibility for program results is not just an insidious conspiracy among bureaucrats hell-bent on spending federal funds as they please. Rather it results, in part at least, from the inherent difficulties involved in attempting to measure the effectiveness of federal programs—difficulties often compounded by unclear or conflicting objectives contained in much legislation. It is extremely difficult to hold someone accountable for reaching an objective which has never been clearly defined and which has no quantifiable measure of achievement.

Unfortunately, as the foregoing discussion suggests, good management may not always—or ever—hold as high a place on an agency's list of priorities as, for example, the annual rite of insuring that all appropriated funds are spent before the end of the fiscal year. With few if any well-defined standards by which to judge program effectiveness, many managers seem to resist saving money out of concern that cost reductions will result in smaller appropriations for the following year. Managing dollars thus takes a back seat to pushing the money out the door and planning a still-bigger agency budget in the next fiscal year.

Even top political appointees, armed with strong mandates from the President to eliminate waste, fraud, and abuse, have run aground while attempting to institute changes and establish incentives to strengthen the management of their agencies. One reason for this is turnover; many of these officials serve for only brief periods of time before moving to other positions or returning to the private sector, making it nearly impossible for them to gain effective control of their agencies. A recent study on U.S. defense planning explains:

Education and experience prepared few top officials to participate effectively in the defense strategy formulation process over the past 36 years. Fast turnovers allowed little time for the brainiest incumbents to become proficient. Average tenures are so short that even fully qualified civilians and military men customarily found it almost impossible to promulgate cohesive policies and programs, much less pursue them to successful conclusions. Those who fathered failures rarely remained in place long enough to take responsibility.²⁰

19 M. Fiorina, *Bureaucratic Failures: Causes and Cures*, CENTER FOR THE STUDY OF AMERICAN BUSINESS no. 43, at 13-14 (Oct. 1981).

20 J. Collins, *U.S. Defense Planning: A Critique* (Congressional Research Service July 1982).

Strong, sustained leadership is needed from the top levels of any agency to insure that programs to minimize waste, fraud, and abuse are strictly enforced.²¹ Rapid and continuous changes in top leadership can impossibly complicate such efforts.

To confuse the issue still further, a substantial majority of federal employees believe little will be accomplished even if they do participate in efforts to reduce waste, fraud, and abuse. A recent survey by the Merit Systems Protection Board found that 53 percent of federal employees surveyed believed that "nothing would be done" if they were to report incidents of mismanagement or fraudulent activity to their supervisors.²² Agency employees are the most likely group among all those involved in federal programs to encounter instances of waste, fraud, and abuse. If they have little faith that top management will act to correct specific incidents of mismanagement, it is that much less likely that employees will work enthusiastically to implement management initiatives against fraud and waste, even when such programs are espoused by the President.

Many of the factors contributing to the high incidence of waste, fraud, and abuse in federal programs stem directly from the relationship between the agencies of the Executive Branch and Congress. Because of the inherent problems of short tenure, lack of objectively identifiable performance measures, and others noted above, the Executive Branch is presently unable to eliminate, or even substantially reduce, the amount of waste, fraud, and abuse afflicting government programs. Ideally, where internal reforms are insufficient, Congress should be able to step in and finish the job. Aside from policy directives and changes in funding levels, both of which affect agency operations, Congress can also attempt to hold agencies accountable for their actions through the use of oversight hearings and investigations. Well-planned oversight hearings can prod agencies to improve their performance and can spotlight the need for management reforms and continued emphasis on anti-fraud efforts.

Unfortunately, the oversight mechanism is not working nearly as well as it should. The structural reasons for the breakdown in congressional oversight will be discussed later in this paper. For now, suffice it to point out that the number of hearings held by committees of the House of Representatives, many of which are oversight

21 See FRAUD IN GOVERNMENT PROGRAMS, *supra* note 5, at 16-17.

22 OFFICE OF MERIT SYSTEMS REVIEW AND STUDIES, *Do Federal Employees Face Reprisal for Reporting Fraud, Waste, or Mismanagement?*, Preliminary Report by the U.S. Merit Systems Protection Board, at 3 (Apr. 1981).

hearings, has declined dramatically over the past few years—from more than 7,000 committee meetings in the 96th Congress to roughly 5,500 meetings in the 97th.²³ Activity in Senate committees, while not dropping as precipitously as in the House, has also shown a marked decline. Without built-in incentives to encourage management efficiency and vigorous anti-fraud efforts in the agencies, and without forceful congressional prodding, it is not difficult to understand why recent efforts to combat the “triumvirate of corruption” have faltered.

III. Coping in the Short Term

Despite the difficulties of mounting a comprehensive attack on waste, fraud, and abuse—let alone finding a cure for the underlying disease of which they are only symptoms—a number of short-term improvements have been suggested which may reduce, if not eliminate, some of the most troublesome manifestations of the malmanagement problem. These “tactical” measures, which include legislative remedies, stepped-up oversight of specific examples of waste, fraud, and abuse, and more vigorous anti-fraud efforts by the Executive Branch, are focused primarily on maintaining congressional pressure on the immediate problems until a long-range, “strategic” approach to expose and control the more fundamental and pervasive problem of malmanagement can be developed.

Most of the short-term remedies now being developed or implemented are intended to enhance the accountability of federal agencies and employees to top-level management and to Congress. Most are designed to institutionalize the overall effort to minimize waste and prevent fraud and abuse. Short-term measures seek to create new incentives for agencies to devote more of their attention and resources to dealing with the problems of waste, fraud, and abuse.

None of these tactical improvements, nor all of them together, can eliminate the *causes* of waste, fraud, and abuse. These measures may, however, improve the efficiency with which selected programs are administered, despite the roadblocks to good management which stand in the way. At least the improvements may make it easier for conscientious managers to steer around the existing roadblocks to efficient administration.

A major structural impediment to effective controls on waste, fraud, and abuse is the lack of effective mechanisms for *preventing*

²³ N. Ornstein, T. Mann, M. Malbin & J. Bibby, *Vital Statistics on Congress*, AM. ENTERPRISE INST. 130-33 (1982).

fraud and mismanagement in most federal agencies. Instead, the dominant system is "management by exception," in which problems in program operations are dealt with only *after* they have erupted.

Effective internal control systems would greatly assist in improving agency management and reducing fraud. Internal controls are standard mechanisms built into agency management processes, and operate routinely to insure efficient operations. Such mechanisms range from sophisticated computer programs which do not allow incorrect or incompatible entries to be made in agency accounts to simple regulations which prevent an employee who is authorized to approve an invoice from also overseeing the actual payment of the invoice.

Good internal controls commonly exist in most well-run businesses, but such controls are sadly lacking in the majority of federal agencies. To correct that deficiency, the Governmental Affairs Committee recommended and Congress passed legislation in the 97th Congress, which was subsequently signed into law, intended to provide agencies with incentives to improve their internal controls. The legislation requires each federal agency to perform an annual assessment and report to Congress on the condition of its internal controls.²⁴ The new law, known as the Federal Managers' Financial Integrity Act, also seeks to improve agency accountability by requiring agency heads to personally *certify* that their agency's internal control systems are sound, and if they are not, to explain what will be done to correct the shortcomings. While there has been a law on the books since 1950 requiring agencies to maintain internal control systems, the new law marks the first effort since that date to force agency heads, including Cabinet secretaries, to focus their attention on management systems and to stand publicly accountable for their adequacy or inadequacy.²⁵ The first reports under the new law are due in December of 1983.

Another law designed to enhance agency efforts to reduce waste, fraud, and abuse is the Inspector General Act, enacted in 1978.²⁶ This law complements the Federal Managers' Financial Integrity Act. One of its purposes is to strengthen and consolidate agency auditing and investigative resources in order to identify fraud and waste in ongoing agency programs. The Act, and similar laws, estab-

24 Federal Managers' Financial Integrity Act of 1982, Pub. L. No. 97-255, 96 Stat. 814 (1982).

25 See FRAUD IN GOVERNMENT PROGRAMS, *supra* note 5, at 24.

26 Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, 5 U.S.C.A. App. I (West Supp. 1983).

lished Inspectors General in fifteen federal departments and agencies. These officials are responsible not only for auditing and investigating the effectiveness of agency expenditures, but also for recommending improvements in management and internal control systems and establishing overall audit policies. The Inspector Generals are independent from the agencies in which they work, and are required to regularly and directly report on their activities to Congress.

Until recently, a major weakness in the Inspector General Act was the absence of a statutorily established Office of Inspector General in the Department of Defense. Because the Pentagon spends more than 24 percent of the Federal budget and about 75 percent of all government procurement funds,²⁷ the absence of such an office left a major portion of the government without a strong, coordinated audit and investigative arm.

This defect was remedied last year when Congress adopted my amendment to the 1982 Defense Authorization Act creating an Office of Inspector General in the Defense Department.²⁸ This new office will help coordinate the work of some 18,000 auditors and investigators already in the Department.

The statutory provisions discussed above lay the groundwork for improvements in the internal control and management systems of the agencies. Both the Federal Managers' Financial Integrity Act and the Inspector General Act establish accountability mechanisms, one making agency heads directly responsible for their management systems and the other creating special offices to oversee efforts to reduce waste, fraud, and abuse. While these laws are important steps, they will be useless if they are not implemented effectively. Strong congressional oversight of these laws is essential to insure sustained agency interest in carrying them out.

One major factor in the recent decline of congressional oversight has been Congress' preoccupation with budgetary issues. Over the last few years, the budget process, as established under the Congressional Budget Act of 1974, has come to dominate the congressional policymaking process. The schedule for considering the congressional budget and related funding matters has critically cut into the time available for other important legislative activities, including oversight.²⁹ If some aspects of the budgetary and appropriations pro-

27 See *Proposal for a Uniform Federal Procurement System*, *supra* note 17, at 1.

28 Department of Defense Authorization Act, Pub. L. No. 97-252, § 1117, 96 Stat. 718 (1982).

29 Tate, *Use of Omnibus Bills Burgeons Despite Members' Misgivings; Long-Term Impact Is Disputed*, 40 CONG. Q. NO. 39, at 2379-83 (Sept. 25, 1982).

cess could be combined or eliminated, additional time would be available for the other vital responsibilities of Congress, especially oversight hearings and investigations.

To correct this imbalance in congressional responsibilities, I have proposed legislation which would institute a two-year budget cycle, thus reducing the demands of the budget process and increasing the time available for oversight.³⁰ The bill would require, at the beginning of each Congress, a single, binding budget resolution setting revenue and spending targets for the following two years. The start of the fiscal year would be changed from October 1 to January 1 to give Congress a full year to complete budget actions. In addition, the thirteen separate appropriations bills would be combined into a single, two-year appropriations measure. This bill also would be agreed to in the first year of each Congress. Concentrating budget decisions in the first year would permit Congress to spend most of the second year of each cycle on authorization measures and oversight. The proposed bill would lay the groundwork for a deliberative and stable legislative process, allowing congressional committees to more carefully plan their oversight activities.

Stronger congressional oversight provides incentive for agencies to step up their anti-fraud and management improvement efforts. Waste, fraud, and abuse will never be substantially reduced, however, unless agency heads are given sufficient opportunity to press for improvements in program management and fraud prevention. The high turnover of political appointees noted earlier prevents accountable, high-level officials from gaining effective control over their agencies during their normal tenure in office.

Little can be done to eliminate rapid changes in the political hierarchy of the Executive Branch; change in agency leadership is one method used by all Presidents to realign their policies and priorities. A great deal *can* be done, however, about the paucity of effective management information systems which greet most new political appointees when they assume office. The Senate Committee on Governmental Affairs learned in recent hearings, for example, that almost no effective system exists in any of the civilian agencies to provide up-to-date information on the cost, schedule, and projected completion dates of major acquisition projects.³¹ Furthermore, very little historical data was available to show how particular agency

30 S. 2629, 97th Cong., 2d Sess., 128 CONG. REC. S6799 (daily ed. June 15, 1982).

31 *Federal Agency Acquisition Management: Hearings on S. 2397 Before the Senate Comm. on Governmental Affairs*, 97th Cong., 2d Sess. (1982).

projects had progressed since their inception, despite the fact that many of these projects cost billions of dollars.

Since most major acquisitions take years to complete, cost, scheduling, and historical information would be highly useful—if not essential—to political appointees assuming top-level management positions. Effective information systems which could quickly provide such information on major agency acquisitions would allow new managers to gain control of these programs in a short time and to pursue management improvement efforts. The lack of this data is often one of the chief stumbling blocks preventing political appointees from properly managing the procurement operations for which they are responsible.

· With this problem in mind, I introduced legislation last year designed to improve agency acquisition management by forcing the Executive Branch to upgrade its information systems. The bill, known as the Cost Reduction in Major Procurements Act (S. 2397), would require all civil agencies to develop standard reporting systems on their major acquisition projects and to report annually to Congress on the status and cost growth of these projects. The reporting system would be similar to that now required of the Department of Defense; several studies have found that the Pentagon's reports to Congress on the acquisition of major weapons systems have helped to improve the way those projects are managed.³²

Procurement is one of the fastest-growing segments of the federal budget. It is therefore important not only to keep track of the cost growth of specific projects, but also to insure that all government acquisitions are purchased at the lowest possible price. One of the best ways to keep costs down is to insist on open and fair competition on as many government contracts as possible. Some studies have shown that competitive procurement can save as much as 30 percent of the cost of each contract.³³

Unfortunately, Executive Branch agencies have shown little interest in using effective competitive procurement techniques. The General Accounting Office has found that only 35 percent of all Defense Department contracts were competed for during a one year pe-

32 For a good description of the Selected Acquisition Reporting System, see U.S. GENERAL ACCOUNTING OFFICE, "SARs"—DEFENSE DEPARTMENT REPORTS THAT SHOULD PROVIDE MORE INFORMATION TO CONGRESS, Comptroller General's Report to Congress (May 9, 1980).

33 *Acquisition Process in the Department of Defense: Hearings Before the Senate Comm. on Governmental Affairs*, 97th Cong., 1st Sess. 432-33 (1981) (The Analytic Sciences Corporation, *An Analysis of the Impact of Dual Sourcing of Defense Procurements*, Aug. 7, 1981).

riod; the rest were granted on a "sole-source" basis to a particular company.³⁴

Lack of competition in agency contracting is almost always wasteful. In some cases, it leads to abuse of the procurement laws as agencies seek to take advantage of loopholes in order to "sole-source" their contracts, despite congressional intent to the contrary.

Legislation designed to encourage greater levels of competition in agency contracting was introduced in the 97th Congress. The Competition in Contracting Act, S. 2127, continues the statutory preference for competition but also requires agencies to justify, in writing, any use of noncompetitive procurement. While this bill would not stop *all* noncompetitive procurement, it would cause the agencies to consider each procurement action more carefully, eliminating at least some of the waste inherent in noncompetitive procurement.

Several other legislative initiatives have resulted from hearings conducted by the Senate Permanent Subcommittee on Investigations, an arm of the Governmental Affairs Committee. The Subcommittee has focused much of its attention on specific examples of fraud in federal programs, such as the Department of Labor's \$780-million-a-year federal workers' compensation program,³⁵ the Medicare home health care program administered by the Department of Health and Human Services,³⁶ and the use of false identification to commit Social Security fraud and other fraud in federal and state benefit programs.³⁷ The Subcommittee has also looked at and recommended improvements in the management of the Department of Energy's research and development facilities,³⁸ and has examined the problem of widespread fraud in commodities future trading.³⁹

34 U.S. GENERAL ACCOUNTING OFFICE, *DOD Loses Many Competitive Procurement Opportunities*, Comptroller General's Report to Rep. Stephen Solarz (July 29, 1981).

35 *Federal Workers' Compensation Fraud and Abuse: Hearing Before the Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 97th Cong., 1st Sess. (1981); *Federal Workers' Compensation Fraud and Abuse, Part Two: Hearings Before the Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 97th Cong., 2d Sess. (1982).

36 *Home Health Care Fraud and Abuse: Hearings Before the Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 97th Cong., 1st Sess. (1981). See also S. Rep. No. 210, 97th Cong., 1st Sess. (1981).

37 *Federal Identification Fraud: Hearing Before the Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 97th Cong., 2d Sess. (1982).

38 *Oversight of Department of Energy Research and Development Facilities: Hearings Before the Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 97th Cong., 2d Sess. (1982).

39 *Commodity Investment Fraud: Hearing Before the Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 97th Cong., 2d Sess. (1982). See also S. Rep. No. 495, 97th Cong., 2d Sess. (1982).

IV. The Search for Long-Term Solutions

All of the congressional hearings and legislative and administrative initiatives previously discussed are important in holding agency managers to stricter standards of accountability, as well as focusing congressional and public attention on specific instances of waste, fraud, and abuse. By themselves, however, these efforts are inadequate to deal with the underlying cause of the problems—the phenomenon referred to earlier as “malmanagement.” The short-term, narrowly focused *tactics* must therefore be coupled with an overall *strategy* for controlling the roots of waste, fraud, and abuse. That strategy must recognize the complex interrelationships among these symptoms and deal with them as a single, unified problem instead of as discrete issues.

Malmanagement encompasses the entire spectrum of fraudulent, wasteful, abusive, and poorly conceived or badly managed government activities. The concept provides a point of departure from which to begin unifying what had traditionally been a badly fragmented and only sporadically effective congressional attack on waste, fraud, and abuse.

Many congressional functions are currently performed by a wide variety of highly autonomous committees and subcommittees. Some of these committees concern themselves with the authorization of government programs, a function which usually encompasses both the establishment—or, much less frequently, the disestablishment—of programs, and the “oversight” necessary to insure that the executive agencies are carrying out their assigned functions efficiently and in the way Congress intended. Other committees are responsible for shaping the outline of the federal budget and for appropriating funds from that budget to the executive agencies and to the various activities administered by those agencies. Still other committees concentrate on the development of broad, government-wide or national legislation. These committees frequently have no direct role in either oversight or the apportionment of funds to agency activities.

This structure, which has gradually evolved over the years as the functions of Congress have grown and become more specialized, is ill-suited to deal with government “malmanagement.” The fragmentation of committee responsibilities makes it difficult, if not impossible, for oversight committees to significantly contribute either to the development of government-wide policies which may be directly relevant to the operations of the overseen agency, or to the appropriations process through which the agencies are funded and which

constitutes the only continuing, direct source of rewards and sanctions available to Congress in directing the work of the Executive Branch.

Fragmentation of congressional committees effectively allows government agencies to conduct many, if not most, of their activities in a "business-as-usual" manner, including the elements of those activities which constitute waste, fraud, and abuse. This fragmentation inevitably leads to serious distortions in the congressional oversight process. Because oversight committees have virtually exclusive jurisdiction over particular agencies and departments, and spend much of their time conducting oversight and authorization hearings involving those agencies, committee members and staff tend to develop close working relationships with agency officials. This understandable and natural tendency too often leads committees to treat agency officials with kid gloves, thereby compromising the oversight process and rendering it much less effective than it could or should be.

Attacking the roots of government waste, fraud, and abuse under the rubric of malmanagement would provide much greater unity and effectiveness in congressional oversight. The concept can provide a point of reference to help all congressional committees focus their efforts and attention on those governmental structures and activities which create additional and needless financial burdens on an overtaxed public.

The unified perspective for attacking malmanagement contains four major elements:

- (1) Oversight. How can Congress learn whether an agency is carrying out its functions efficiently and effectively?
- (2) Enforcement. What can Congress do to insure that deviations from congressional intent, poor management practices, or other undesirable activities are corrected?
- (3) Guidance. How can Congress insure that agencies understand the intent of Congress in the first place?
- (4) Reforms. How can the underlying causes of wasteful, fraudulent, or abusive agency activities be identified and mitigated?

The first three elements in this list are tactical, dealing mainly with immediate responses to existing problems. Reforms, however, are geared to the future; they constitute a kind of preventive medicine designed to correct the underlying causes of past and present problems. Such reforms include reorganizations, changes in agency charters, authorization of new programs, and the creation of new organizations.

In order to deal with the complex malmanagement issues which underlie the surface manifestations of waste, fraud, and abuse, these four elements of congressional control must be coordinated to a much greater extent than they have been in the past. The activities of the committees involved in each function must be closely integrated. For example, proper enforcement to insure agency compliance with congressional guidance requires close coordination and communication between and among the oversight and appropriations committees. The oversight function, in turn, would be much more effective if it were able to more directly influence the general guidance which is given to the agencies. Committees dealing with reorganizations and changes in agency charters should have continuing communication with their oversight and enforcement counterparts.

The suggested cooperation and communication will require new attitudes and approaches on the part of virtually every congressional committee—changes which will take place only gradually and, in some instances, only after much initial resistance has been overcome. There are, however, some immediate steps that can be taken to help lay the groundwork for this new approach. For example, a substantial amount of government malmanagement stems from Congress' inability to provide proper guidance to the Executive Branch with respect to legislative intent. This element of malmanagement is often overlooked, and even more often misunderstood. Thorough scrutiny of the shortcomings of congressional guidance by the Governmental Affairs Committee would help to acquaint Congress with the need for improving this vital aspect of congressional control.

In a very general sense, the guidance under which agencies operate takes the form of "policies." As used here, however, policies are not just opinions. If they are to have any value, policies must obligate individuals or organizations to act in a certain way, usually in a way that they would otherwise not be inclined to act.

Policies take many forms, such as laws, regulations, executive orders, directives, and court decisions. Whatever their form, however, policies that can effectively influence behavior must have the following characteristics:

- 1) The guidance must be unambiguous and easily understood.
- 2) The guidance must be adequate to deal with the activity to which it pertains.
- 3) The guidance must be necessary, and not be gratuitous or done simply for political effect.

4) The guidance must be, from the perspective of the agency officials who are bound by it, reasonable, practical, and "do-able."

5) The guidance must be made available to the agencies that are obligated to follow it in a way that cannot escape the notice of responsible agency officials.

6) The guidance must be issued by adequate and appropriate authority.

7) The guidance must be supported by adequate resources to allow for efficient and effective implementation.

Much of the misunderstanding of guidance centers on the point dealing with authority. As noted earlier, a policy is not the same as an opinion. When the President of the United States proposes legislation to the Congress, or instructs the Solicitor General to make representations before the Supreme Court on an important case, he is *not* setting national policy. In such cases, the President is merely expressing his opinion as to the way the legislation should be formulated, or the way the judicial opinion should be rendered. National policy, by and large, is set by the Congress, and through delegation, by the independent regulatory agencies. The Judicial Branch is charged with applying such "national policies" to specific cases. The Executive Branch is responsible for enforcing these policies, and, by delegation, for implementing policy through the promulgation of detailed regulations.

The President has not only the authority, but the clear obligation, to set *federal* policy. As the Chief Executive Officer of the United States, the President is expected to manage the Executive Branch, which constitutes the bulk of the federal government. Congress may, and sometimes does, set general constraints, but the norm calls for the President to develop guidance covering specific Executive Branch agency activities.

This understanding of the concept of "policy" is essential if government malmanagement is to be brought under control, because *all government activities are bounded and defined by policies*. To more easily visualize this fact, government activities can be viewed as a matrix. The top, or horizontal, dimension consists of "structural" policies, while the side, or vertical, dimension consists of "behavioral" policies.

Structural policies define and guide agencies' broad missions, the functions they have been created and authorized to carry out. Examples include defending the nation from enemy attack, enforcing the domestic laws, creating and maintaining a healthy economy, promoting the national interest abroad, providing a reasonable level of

general social welfare, and providing an education for all Americans. The fact that many of these missions correspond closely to the statutory charters of the various Executive Branch departments and agencies is no accident, since mission-oriented policies are designed to state *why* an agency exists in the first place.

Behavioral policies, on the other hand, guide *how* an agency is to carry out its mission. Behavioral policies are much more numerous than structural policies, simply because they generally apply to *all* government agencies. Examples of behavioral policies include placing maximum reliance on the private sector in government procurements; acquiring goods and services competitively, respecting the proper separation of federal from state and local government function (a concept now being discussed under the general topic of “federalism”), respecting the individual citizen’s right to privacy, and providing the citizen with adequate access to information about government activities.

Even with these structural and behavioral policies defining the bounds of legitimate agency activities, agency managers still enjoy a generous degree of discretion to take into account any specific factors unique to varying situations. When an agency manager abuses this discretion and causes the agency to operate outside of its assigned mission (as defined by the appropriate structural policy), such an action would, by definition, be wasteful. Similarly, when an agency ignores the behavioral policies relating to competitive procurement or to placing maximum reliance on the private sector, the activity in question would, in all likelihood, cost the taxpayers more than if the policies had been followed—again creating a form of waste or abuse.

As the foregoing discussion indicates, the root causes of government waste, fraud, and abuse cannot be dealt with through a series of relatively narrow and specific measures, important as those measures may be in dealing with short-term problems. Far-ranging and fundamental changes are needed in the structure, as well as the management, of the federal government. One way to bring about such changes would be to establish a blue-ribbon commission to study and propose reforms in the basic structure of our federal system of government.

The last comprehensive reviews of the American government were made by the two Hoover Commissions in the late 1940’s and in the 1950’s. Since these reviews were made, the organization and operation of the federal government has undergone constant change. There has yet been no effort to determine how those changes have

improved or weakened the management of the public's business. Instead, efforts at government reform have moved in fits and starts toward no clear conclusion. The haphazard, uncoordinated evolution of government over the past twenty years has contributed substantially to the complexity, inefficiency, and malmanagement of our government today.⁴⁰

An independent, high-level commission, modeled after the earlier Hoover Commissions, is badly needed to review the present structure of government and to recommend comprehensive, integrated proposals to improve government performance and accountability. My legislation in the 97th Congress to create such a commission, S. 10, would have established a bi-partisan, eighteen-member citizen's commission composed of distinguished Americans knowledgeable about government. The Commission would not perform a *de nouveau* "study" of government as such, but instead would use the massive body of information which now exists on government performance and draw up a series of conclusions and recommendations. If the Commission performs as envisioned, its report would provide the basis of a comprehensive reform in the structure and functioning of government.⁴¹ The Commission would also serve to establish a consensus on needed reforms, many of which are already recognized as important but remain unimplemented because of a lack of sustained public support.

Skeptics will ask whether another report by another government commission can really make a difference in stimulating government reforms. Many of the most basic reforms in our government have resulted from commissions or study committees, including the Budget and Accounting Act of 1950, the Federal Property and Administrative Services Act of 1949, the Reorganization Act, and even the Congressional Budget Act of 1974.

The structure of government must clearly be reformed to make it more manageable and efficient. Current reform efforts lack a general agreement on what those reforms should be and how they should be implemented. A Citizen's Commission is an ideal mechanism for determining the best approach and for building public support for a fundamental restructuring of our government.

40 R. Moe, *The Federal Executive Establishment: Evaluation and Trends* (Congressional Research Service Oct. 16, 1979).

41 See generally Porter, *supra* note 13, for one of the best of these studies.

V. Conclusions

As Congress gradually moves to better understand the significance and dynamics of the complex policy structure which underlies all government activities, it will also begin to realize that "waste, fraud, and abuse," as symptoms of the deeper problem of malmanagement, cannot be separated from one another and dealt with as individual problems. To help further this understanding, I intend to focus the long-range activities of the Governmental Affairs Committee on addressing the broader, more fundamental problem of malmanagement. In one sense, that focus will represent no substantial change; the Committee will continue to carry out its oversight functions, and it will continue to develop legislative measures designed to improve government accountability.

As previously discussed, these activities are essentially tactical, dealing primarily with limited or short-term responses to relatively narrow and immediate problems. This tactical approach, for the most part, deals with problems only after they have become serious enough to come to congressional attention, and only after, in many cases, resources have been irretrievably lost.

A parallel, strategic attack on the problem of malmanagement is needed to supplement this tactical approach. Viewing Executive Branch activities from a broader and deeper perspective will reveal impending problems and potential sources of waste, fraud, and abuse at a much earlier stage than revealed by the more traditional authorization, appropriations, and oversight activities. This approach will enable Congress to move from maintaining an essentially reactive posture, responding haphazardly to the "issue of the week," toward achieving a greater ability to anticipate and deal with potential problems before they turn into crises. Steps toward establishing this strategic oversight perspective have begun only recently, and the effectiveness of this approach remains to be tested. However, the potential for marked improvements in congressional ability to identify, anticipate, and eliminate waste, fraud, and abuse throughout the government is enormous.

The strategic perspective enables planning and foresight. Identifying the fundamental structural flaws that underlie immediate problems should enable the Senate Governmental Affairs Committee to work with other congressional committees to help insure that their efforts are coordinated and effective. Congressional hearings will become more comprehensive, more broadly based, and more focused on the fundamental concepts and structural anomalies underlying

federal programs, thus improving the consistency, depth, and objective detachment of the entire congressional oversight process.

This two-pronged approach to malmanagement problems—combining the tactical with the strategic—will enable the Senate Governmental Affairs Committee, and ultimately Congress as a whole, to confidently anticipate the issues which will rise to highest priority in the future, and to begin dealing with them in a way that will minimize the adverse effects of malmanagement on the taxpayers and on society as a whole. This function is one of the most important responsibilities Congress can perform as the representative of the American people. As John Stuart Mill has noted:

The idea of a rational democracy is, not that the people themselves govern, but that they have security for good government. This security they cannot have by any other means than by retaining in their own hands the ultimate control. If they renounce this, they give themselves up to tyranny.⁴²

42 1 J. MILL, *DISSERTATIONS AND DISCUSSIONS* 470-71 (London 1859).