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Commentary: Kenneth Davidson, GPRA AND THE STREET LIGHT EFFECT: COUNTING ENFORCEMENT ACTIONS AFFECTS HOW THE FTC'S BUREAU OF COMPETITION WILL ENFORCE ITS COMPETITION MISSION

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COMMENTARY

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GPRA and the Street Light Effect

> So it's almost two in the morning when the guy leaves the bar. He sees this other guy stumbling around looking through leaves and debris on the street. He asks the other guy what he is doing. The other guy says he is looking for his car keys. The guy decides to help and asks the other guy where he lost the keys. The other guy points to a place half way down the block. The guy says, "Why are you looking here if you lost the keys over there?" The other guy says, "I am looking here because I can see better here under the street light. It's too dark to look where I dropped the keys."

Old (and by now corny) joke, but it describes a lot of current and ostensibly sophisticated behavior. Each year the Federal Trade Commission, like other government agencies, is required, pursuant to the Government Performance and Results Act (GPRA), to project the public benefits it intends to accomplish in the forthcoming year and to report on whether it has accomplished the goals it established for itself in the preceding year. Every year the FTC submits a GPRA report. The reports can be found online on the FTC website www.ftc.gov.

I participated in a minor way in the development of the FTC's GPRA criteria. I was part of a focus group charged with identifying quantifiable criteria that described the functions and accomplishments of the FTC's competition mission. To my surprise one of my colleagues in the group, a person I had known and admired for twenty years, started the

discussion by declaring that the panel was charged with a ridiculous task that could not be done. Her view was stated in a calm and convincing manner reflecting her outstanding record as an economics and law student, her many years working at the FTC in the Bureau of Competition as an investigator, litigator and advisor to the Bureau Director. She easily persuaded the group that effects of the Competition Mission of the FTC, for good or bad, were reflected in the Gross National Product of the United States but that there were so many other factors, including the parallel mission of the Antitrust Division of the Department of Justice, state antitrust authorities, private antitrust suit, and millions of economic decisions by individuals and businesses that there was no reasonable way to separate out the effect of any or all of the activities of the FTC.

The focus group was then told that even if this assertion were true, it did not matter. We (the FTC) were required to identify criteria for the GPRA report. I do not think that our meeting that day contributed very much to that result, but someone did develop criteria and the reports have been written. I continue to believe that my colleague's analysis was correct and that the development of the criteria, if they have had any effect, has been negative.

Limitations of Numbers in Budget Planning

I had previously participated in a number of experiences similar to the one that was the task of that FTC GPRA focus group. The objective, in most of these circumstances, has been understandable and well intentioned. The person paying for an agency (Congress, for example) wants to know what the agency is doing, whether its activities are worthwhile, and whether its activities should be modified, funded at a higher, lower or at the same rate.

My first formal encounter with this kind of exercise was in the early 1970s, when I was a young law professor in Buffalo, New York. I had been elected to the University Senate and the Senate was considering a reorganization plan to distribute the resources (number of employees, space, etc.) of the University more effectively. The idea was to reallocate faculty lines to departments on the basis of the number of students enrolled in each course offered by the department. Once rationalized, each department would have the same ratio of faculty FTEs (full time equivalents) to students as every other department.

The plan had been developed by a new Vice President of the university, who had previously taught in the Mathematics Department. I mention his previous job because of a comment made by a colleague of mine from the Architecture Department, the late Mike Brill. Brill was an insightful and highly idiosyncratic systems analyst. He popularized the idea that people suggested solutions based on their training – thus, to a carpenter the answer to all questions were either a hammer or a nail, to a lawyer the answer was either a contract or a lawsuit, to a doctor, an operation or a pill, etc.

The FTE allocation plan was actually very advantageous to the law school. Each law class typically had a hundred students so we could maintain a large faculty even though each faculty member generally taught only two classes a semester. Six, maybe seven

hours a week in class was less than most of our colleagues in other departments spent teaching.

The uniform FTE ratio seemed like the essence of fairness, at least to a mathematician. To many of us, who thought of ourselves as educators, it seemed loony. It might be possible for a law teacher to run an effective class with a hundred students, but the idea of a doctor doing her hospital rounds with a hundred medical students trailing along is not plausible. If I had had any sympathy for the FTE ratio plan, it evaporated when the Vice President proclaimed that running the numbers showed that several departments should be eliminated entirely. First on the chopping block was the Philosophy Department.

I was shocked. What was a university that did not have a philosophy department? If the study of learning and knowledge had no place in the university, what studies did? My reaction was only partly ideological; it was also practical. I had recently read a book by a colleague in our Philosophy Department, Paul Deising's *Patterns of Development in the Social Sciences*, which demonstrated that much of what was believed to be empirical social science research was, instead, collecting data that merely affirmed the mathematics of a model and did nothing to support or disprove the assumptions of the model. Deising demonstrated an idea that had application to many of the departments in the university even if no student ever took a course in philosophy. That kind of rethinking of what and how we know things is fundamental to education.

In any case, the Faculty Senate rejected the plan. The reasons were numerous. It was obvious to many of us that the size of enrollments depended on whether the courses were required of all students or prerequisites for other courses. Those requirements were developed as a result of an academic agenda and could easily be skewed by academic ideology or departmental self interest. Second, it seemed clear that some, but not all, departments might become centers of excellence by attracting a sufficient core of exceptionally talented individuals in a field. Once established, that field might attract more and better professors and students and make a greater contribution to learning. Developing such departments would, at the beginning at least, require disproportionate funding. A uniform FTE ratio would make this unlikely, if not impossible.

My second formal encounter with performance criteria occurred when I was a Branch Chief in the Decisions Division at the Equal Employment Opportunity Commission (EEOC). I was approached by a friend who worked in the Commission's Office of Finance. He was working on the forthcoming budget and wanted to know how many decisions of the Commission the twelve attorneys in my branch would draft during the forthcoming fiscal year. I said that I had no idea. Most of the attorneys were new and all of them were working on novel issues. (Matters came to our office from complaints filed with District Offices only if they raised novel issues). If the issue had been previously decided, our office would cite the relevant case to the District Office and send the case back to it to decide in accordance with the earlier decision.) My friend said it did not matter if the number was precisely right, he just needed a rough estimate to include in the budget to justify the number of staff attorneys in the Branch.

I said I would think about the question and give him my thoughts when he returned that afternoon. When he returned, I told him that I thought he had asked the wrong question. He asked, what was the right question? I said that I thought the right question was how many cases would not be sent to our office from District Offices because of decisions we drafted that were issued by the Commission. I said that this distinction was very important. Before I started as Branch Manager, the decisions for the Commission had been drafted as narrowly as possible. Since my arrival, however, we had instituted a policy of grouping all cases pending on the same topic and drafting a single decision that attempted to resolve the legal issue based on a broader view of the issues. Our draft decisions would then be as comprehensive as possible to give better guidance to the District Offices and to reduce the number of cases that needed to be sent to our office for decision. He thought about this for a while and said he understood the logic of my position. In fact, he decided it was brilliant because it incorporated the objective of our work in the number.

Then he asked how to calculate the number of cases that would not have to be sent to our office. I said I had no idea. The EEOC had a backlog of more than 100,000 and there was no way to determine what issues those cases involved. He laughed and said that 100,000 was not a number that reflected the extent of employment discrimination in the United States. People filed discrimination complaints mostly as a result of EEOC publicity. If Commissioners or other officials gave a lot of speeches, more people filed complaints with the EEOC. If there was little publicity, there were few complaints. Thus even if we knew the contents of existing complaints, we would not be able to calculate the effect on discrimination. In the course of that long afternoon, we decided that the true measure of the effectiveness of my office was whether we clarified the law in a way that reduced not only the number of cases referred to the office but made the law clear enough to actually eliminate or reduce discriminatory practices. Of course the reduction of discrimination probably was going to be determined more by litigated cases and social attitudes than what we wrote in our decisions, but those decisions were our contribution to the outcome in employment that mattered. The number of decisions was surely less relevant than the way in which the decisions were written.

It was an exhilarating discussion. There were no numbers we could use that would make any sense. In the end, he decided he would go with the number of decisions per attorney that had been projected for the preceding year. No one would question whether the previously approved numbers were acceptable.

The problem that we faced at the EEOC is typical of reporting enforcement results by government agencies. In the FTC GPRA focus group, we asked those who convened our meeting, the following kinds of questions: If the number of reported arrests goes up, does that mean the police have become less effective and we are in the midst of a crime wave? Does it mean that the police have become more effective and are cracking down on crime? Does it mean that the police department has instituted a quota system requiring each police officer to make at least a minimum number of arrests? Does it mean that the public confidence in the police has increased and, as a consequence, individual reports more of the crimes that occur and are willing to identify and testify

against perpetrators? Depending on the answer to these questions, a higher number of arrests may indicate a breakdown in law and order, a successful strategy to reduce crime, or a bureaucratically inflated numerical increase. If there are more rescues by the Coast Guard, does that indicate improved performance or a failure to communicate safety warnings and procedures? If the number of tax audits by the IRS falls, does that indicate higher compliance with the rules or lower numbers of staff to conduct audits?

The point is that reporting these kinds of numbers does not indicate even if the agency's problems are worsening or getting better. To be sure, there are ways to investigate which interpretation is more likely to be correct, but these are not illuminated by simple numerical tests. A police policy requiring highway police to fill a monthly quota of traffic tickets might reduce speeding and reckless driving. That would be good. Or the quotas might induce police to ticket large numbers of minor violations and occupy time that would be better used to focus on more imminent threats to public safety. That would be bad. To decide which effect is larger requires a more in-depth examination of highway police activity than the numbers will provide. As a result of these considerations, our focus group concluded that the identification of specific numbers as performance criteria was a bad idea and most likely to skew staff incentives away from mission objectives and towards literal fulfillment of reporting criteria or as the AAI has said about the problem with numerical goals is, "What counts is what is counted."[1]

The notion of reporting on agency performance to Congress and the President has a long history. In one of my earliest incarnations at the FTC, when President Carter was pushing the idea of "zero-based" budgeting, I was sent by the Bureau to New York City to try to understand this new budgeting system by talking with Aaron Wildavsky, the now deceased but then budget guru and author of *The Politics of the Budgetary Process*. Wildavsky was very cordial and generous with his time explaining the process in Congress and the Executive. I had read his book, but he obviously thought I did not understand his personal view. As we walked on a starry night through the streets of Brooklyn Heights looking at lower Manhattan, he said to me: "Suppose you could do for the FTC and every other agency the kind of cost/benefit analysis that the President says he wants, what would we have?" I responded that, at least in theory, Congress would have a more informed way to make judgments about budgetary priorities. He said, "in theory, cost benefit analysis would create a calculus for the entire budget that would make Congress redundant. But nobody believes that there is a calculus that effectively compares the need for guns versus butter, not the President, not the Congress, and not the public. The Constitution gave the responsibility for spending priorities to Congress and by practice the Executive makes suggestions based on its experience. It is assumed that the budget will be a political action and it is a political action."

But, I enquired, on what basis did he think Congress actually made spending decisions? He said that, in general, agencies were funded on the basis of what they had received in the previous year plus a little more to compensate for inflation. He suggested that I should think of the budget as moving like an amoeba. It has no internal means of

[1] See, Letter of the American Antitrust Institute objecting to the way the FTC 2008 report projected numerical goals for its competition mission http://www.antitrustinstitute.org/archive/files/252.pdf.

propulsion; rather it just keeps floating along until it runs into something. If the something is bad, a scandal for example, the budget is likely to be cut. If the something is good, putting a man in space for example, then the budget is likely to be increased. But, he concluded, "Dramatic changes [in the federal budget] are rare because no one knows in advance what the outcomes will be." So I returned from New York with essentially the same insight that I had worked out with my colleague from the EEOC: tomorrow will be most likely much like today, only a little different.

Lest you think I am a mathematical Luddite who considers numbers irrelevant and having no utilitarian value, I would like to state that I frequently find numbers provocative, informative and useful. I find helpful the view stated by Peter Drucker, the business and organization theorist:

> I am a figures man . . . one of those to whom figures talk . . . . That is all right if we have the understanding, the meaning and the perception. One must spend a great deal of time outside, where the results are . . . . One has to look at markets, at customers, at society and at knowledge, all of which are outside the business, to see what is really happening. That, [numerical] reports will never tell you.

The FTC GPRA Report for Fiscal 2006

The FTC's 2006 report contains a lot of information about the Commission's maintaining competition mission. Much of the information is simply a description of what cases and studies the FTC executed during that year. That seems both sensible and appropriate, although almost all of this information is available in as great or greater detail in the FTC's Annual Report and other documents submitted to Congress. Unfortunately, most of the numerical information about "performance and results" in the GPRA report seems to be reported in accordance with the *street light effect.*

The FTC's report features six numerical categories of performance results in answer to six questions: (1) how often does the FTC take enforcement action in cases where it has used its authority under the premerger notification (HSR) act to request additional information?(2) in what percentage of matters does the FTC take enforcement action in nonmerger cases where the FTC has authorized the staff to use compulsory process? (3) what percentage of cases does the FTC obtain a remedial order in cases where it has authorized the staff to initiate an action to stop all or part of a merger? (4) in what percentage of cases does the FTC obtain a remedial order where it has authorized the staff to challenge a non merger business practice?(5) what are the total revenues in the industries affected by these enforcement actions?(6) what is the total number of times the public uses the FTC antitrust website?

There appears to be a special emphasis on the activities of the FTC concerning mergers. This is reflected in the section's title, which is *Prevent Anticompetitive Mergers and Other Anticompetitive Business Practices in the Marketplace.* Why do mergers, that is, anticompetitive mergers, receive more prominent billing than all "other" anticompetitive practices? Do mergers pose a greater threat to competition than other business practices?

I know of no study that would suggest such a conclusion. Indeed, the current consensus (with which I do not agree) is that mergers are by and large good for the economy. Why then are mergers featured so prominently? The answer could be, because there is more or better information about mergers and agency actions about mergers as a result of the HSR law which requires that all mergers meeting certain criteria must be reported to the FTC and the Department of Justice before they are consummated. In other words, the light on mergers is better.

No one knows how many "other" practices occur, what percentage of these are anticompetitive, or how serious those threats are compared to mergers. There are some ways we might follow Professor Drucker's advice to look "outside" to consider the importance of merger enforcement relative to other anticompetitive practices. For example, when developing nations are urged by the US to pass competition laws, the evil effect of price fixing (an "other" anticompetitive practice) is usually the primary example of why a law is needed. Indeed, under US law, the Department of Justice brings criminal penalties only against price fixers.

Consider that Commission orders that find violation for an "other" anticompetitive practice normally forbids any continuation of the business practice; whereas merger orders, most typically, permit the merger with modifications such as requiring the divestiture of a small part or parts of the proposed acquisition. Does that imply a qualitative difference in harm from the "other" business practice?

Consider the contents of the ABA's annually updated *Antitrust Law Developments* that totals as much as 1800 pages. Of the five chapters that describe antitrust law, only one is devoted to merger law. These descriptive chapters generally total about 500 pages of which the merger chapter normally occupies 100 pages, or a little more. The Areeda *Antitrust Law* casebook that I used when teaching devoted one of its seven chapters to merger topics.

Why then this focus on mergers? Historically, that is prior to the 1978 HSR premerger notification act, a much smaller proportion of the competition activities of the FTC focused on mergers. Prior to that act, the agency did not know anything about most mergers, had little basis to decide whether to investigate, found it difficult to get the information in investigations, and found courts reluctant to order effective remedies where two companies had integrated their operations. As a consequence, only a small proportion of the competition enforcement activities involved mergers. All that changed in 1978, when the HSR Act went into effect. Suddenly, the agency was receiving hundreds and then thousands of premerger filings. There were lots of transactions to review and powerful tools for investigation and an obligation to report on the HSR program annually to Congress. The annual report listed not only how many filings were received, but how many resulted in full investigations, how many proposed mergers were challenged, and how many mergers were stopped or altered as a result of investigations.

As a result of putting this spotlight on merger activity, the Bureau of Competition was reorganized. The Bureau has six litigation divisions, four of these are now designated as

merger units. In addition, another division is solely responsible for answering questions about the notification rules and processing the filings before they are investigated and the Compliance Division spends much of its time working on formulating merger remedies, enforcing merger orders and investigating compliance with notification obligations. The effect on cases brought by the Bureau was dramatic. From the beginning of fiscal 1996 to March 1999, 115 of a total of 142 enforcement actions brought at the recommendation of the Bureau involved mergers. More recently, from the beginning of fiscal 2003 to March 2006, 47 of the 88 enforcement actions involved mergers. The fact that the Bureau spends so many resources on merger enforcement seems to be the best explanation of why mergers are featured so prominently in the GPRA report.[2]

Was this a carefully designed reallocation of resources of the Bureau or simply the result of putting more light on mergers? Was the distribution of resources better before the Bureau had so much information about mergers? The answer is that no one knows. No one even knows if the orders in merger cases that the FTC has issued have maintained or improved competition in those industries or whether of the failure of the FTC to stop mergers has hurt competition. The little we know comes from the 1999 *Study of the Commission's Divestiture Process* that concluded, almost twenty years after the HSR Act went into effect, that most FTC ordered divestitures of all or part of a business did succeed in staying in business when divested.

The light had other effects on merger enforcement. From the beginning, it was clear that very few mergers provoked close examination for possible anticompetitive effects; consequently there were almost immediate complaints about how costly it was to submit the notification and how costly the delays were to the overwhelming number of businesses that proposed to consummate lawful mergers. The Commission responded by computing how long it took to review most mergers that presented no obvious merger issue – two thirds of those filings were resolved in less than two weeks. Futhermore, the FTC hired a University of Virginia law professor as an outside consultant to interview a random sample of businesses that had filed. He reported that the consensus was that most companies felt the premerger review process was a benefit because it lessened the chance that the antitrust agencies would initiate a costly and lengthy challenge to the merger after it was complete.

GPRA and Second Requests

If the light on premerger notification filings helped resolve some complaints about the new program, the statistics also generated others. In particular, the businesses that received a request for additional information (commonly referred to as a Second Request) have consistently complained that too many have been issued and the demands for information have been overly broad and therefore unduly burdensome. Because a full

[2] It is also possible that mergers are emphasized because the fees that accompany merger filings make up a large part of the budget allocated to the Federal Trade Commission and the Antitrust Division of the US Department of Justice. However, neither the FTC nor DOJ try to justify the fees based on the costs of merger enforcement activity. In fact the fees far exceed those costs and are used to support broader competition enforcement activity of both agencies.

response to a Second Request may take months to prepare and may require the submission of thousands of boxes of documents, compliance with these requests clearly slows transactions that are not ultimately challenged and the submissions are certainly expensive, absolutely, although not as a percentage of the price of the intended transaction. Whether the scope of the Second Requests creates an undue burden is a separate matter that has been the subject of much debate between the agencies and the private antitrust defense bar. In any case the format has changed somewhat over the years and procedural mechanisms have been established for persons receiving Second Requests to challenge the obligation to submit all or part of the requested documents.

The GPRA report reflects this controversy over Second Requests by including two kinds of data. The first identifies the percentage of Second Requests that result in enforcement actions. The performance goal is that between 60 and 80 percent of the Second Requests should result in enforcement actions. The percentage set for this performance goal has increased over the years in response to continued complaints about the undue burden on firms whose transactions are found to be entirely lawful, or at least are not challenged. The current goal is justified on the grounds that investigating transactions where fewer than 60 percent become enforcement actions would be unfair to "competitively benign transactions" and a percentage in excess of 80 might "suggest that the agency is focusing too narrowly and thus potentially allowing problematic business practices to go forward without sufficient review." The 2001-2006 statistics suggest that the agency almost always meets these goals.

I have always felt that this percentage goal is poorly thought through and has the potential for perverse results. How the goal has been set is entirely mysterious. Second Requests are issued, by design, where the filing is insufficient to determine whether a merger is or is not unlawful. Premerger notification submissions almost never contain sufficient information to make this determination. Most actions that dispose of notifications without a Second Request rely on the knowledge of the staff or voluntary submissions of additional information. Obtaining some Second Request-type information on an informal basis is therefore common and frequently not objected to by private attorneys representing the businesses. The issuance of a formal Second Request changes this dynamic greatly. Because of the percentage goal, the issuance of a Second Request is expected to result in an enforcement action.

Woe to the staff members who acquire a reputation for recommending Second Requests to learn more about an industry because they are unfamiliar with its structure but then fail to uncover information leading to an enforcement action. Their recommendations may be reasonable as a matter of screening mergers, but they risk defeating the goal set by the Commission to reduce the burden on persons filing notifications. The FTC does not like to fail to meet its goals. I remember this issue arose even before GPRA. An exceptionally talented head of a merger unit was pressured to resign because he consistently recommended Second Requests when the staff lacked sufficient knowledge about an industry to determine the competitive risks posed by a merger. He did not limit his recommendations to proposed deals where he felt the investigation would result in a Commission Order finding that the merger could be deemed unlawful. This personnel

action together with fixed GPRA goals puts great pressure on the staff to find a violation if a Second Request is issued and not to issue a Second Request unless the transaction will be resolved in a formal Commission action.

In many (most?) cases, Second Requests are issued because the staff is confident that the merger as proposed is unlawful. But suppose the Second Request documents do not establish a strong case. The staff has an incentive to pursue an enforcement action (in the form of a Consent Order settlement) in order to avoid gaining a reputation for recommending unnecessary Second Requests. The businesses may also have an incentive to agree to a Consent Order even if they believe the government lacks a winnable case. A merger lawsuit is likely to be expensive and will delay the merger while the litigation continues. So if a settlement can be agreed upon that requires the divestiture of a relatively small and perhaps unimportant part of the transaction to the business, then it will be in the interest of both the staff and the private parties to settle even if the antitrust merits are not entirely clear.

Do such settlements occur? It is not possible to know without looking at the evidence in each case, which is normally never made public. It is a fact, however, that most enforcement actions are resolved by Consent Orders. It is also true that, over my years at the FTC, more than one private lawyer has told me that his client agreed to sign a Consent Order, against the recommendations of the lawyer, because the business did not want the delay of litigation and did not care about the to-be-divested assets. How often does staff pursue Consent Orders primarily to avoid a reputation for unproductive Second Requests? I can say for certain only that the incentives exist.

Do the GPRA goals make such settlements more likely? I think so. First, because by committing to a specific percentage and by raising that percentage to its current high level, the pressure on the staff to obtain a settlement is increased in every case where a Second Request is issued. Second, the GPRA report indicates the FTC is sensitive where it has not met its goals. In the one instance where a goal was not met, the 2006 GPRA report contains an extended discussion of how if the measures were calculated slightly differently the goal would have been met or will be met.

Non-Merger Cases

Early GPRA reports did not contain such goals for "other" actions, but the experience with merger statistics set an attractive measuring standard and encouraged the FTC to look for an analogous early action by the Commission in non merger cases. It now uses the Commission's authorization to staff to require submission of documents and testimony in non-merger cases as the equivalent of issuing a Second Request in merger cases. Accordingly, the incentive to always bring an enforcement action has been re-created for non merger cases once the staff has been authorized to use compulsory process.

The Victory Target

The second goal of the competition mission concerns the percentage of wins the FTC expects the staff to obtain after the FTC has authorized an enforcement action. The target is 80 percent. If that 80 percent goal is supposed to reflect that the FTC will challenge mergers on which reasonable persons might disagree, the results are embarrassingly high. For the years 2001-2006, most years the results for mergers were 100 percent wins and the lowest was 95 percent. One of my former colleagues at the FTC commenting on this result asked, "How surprising is this when all or almost all of these actions are presented to the Commission as signed Consent Orders?" However, if we were to look only at the FTC's recent merger win record for preliminary injunctions in Federal District Court, the percentage of litigated wins would not meet the 60-80 percent goal.

What evidence does the GPRA report present about the effectiveness (significance) of these wins? The answer is, no evidence. Instead the FTC goal is expressed in terms of the amount of commerce that exists in the industry to which the order applies. I suppose if we assume that each order will have an industry-wide impact, it might be fair to consider the size of the industry. But given that we know little about the impact of the orders, it is hard to understand why the industry size is relevant.

The third goal concerns the number of times the FTC's antitrust web site is visited. The goal is to have 10 million hits a year and has been met most years. If the assumption behind this goal is that voluntary compliance is a very important factor in maintaining competitive markets in the United States, then it is sensible to look at the FTC's educational efforts: guidelines, speeches, conferences, reports, studies and the multitude of other information that is included on the website. However, without looking "outside" to find what use persons make of the website and what effect the information has on their behavior, the number of hits seems to be too crude a measure to be meaningful as a performance result.

My comments on the GPRA reports and government budgeting and performance analysis may seem harsh. If they are, that is because I care about the programs. Mechanical mathematical criteria that purport to measure performance do not work and too often create unintended and/or perverse consequences. As Drucker says, to understand the numbers you have to look outside the organization at reality.

John Flynn, a law professor at Utah expressed the problem with reliance on bare numbers in a footnote to one of his law review articles. The footnote concerns the use of quantifiable data (such as body counts, number of bombs dropped, number of villages "pacified," etc.) during theViet Nam War which is described as "MacNamara's Fallacy" for the reasons described below:

> The first step is to measure whatever can be easily measured. This is okay as far as it goes. The second step is to disregard that which can't be measured or give it an arbitrary quantitative value. This is artificial or misleading. The third step is to presume that what can't be measured easily really isn't very important. This is blindness. The fourth step is to say that what can't be easily measured really does not exist. This is suicide. (125 U. Pa. L. Rev 1182 at n. 9)

I have carried a copy of this footnote in my wallet for over 25 years.