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Steven W. Feldman

Office of the Staff Judge Advocate, Fort Gordon, Georgia

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THE COMPTROLLER GENERAL'S AUTHORITY TO EXAMINE CONTRACTOR BOOKS AND RECORDS AFTER BOWSER V. MERCK AND COMPANY: THE NEED FOR LEGISLATIVE REFORM

STEVEN W. FELDMAN*

I. INTRODUCTION

In 1951, Congress amended the Armed Services Procurement Act¹ and the Federal Property and Administrative Services Act² to permit the Comptroller General to examine any books, documents, papers, or records of a contractor, or any of its subcontractors, that "directly pertain to and involve transactions relating to" negotiated government contracts.³ Government agencies require by regulation inclusion of the access provision in federal contracts. For example, Defense Acquisition Regulation 7-104.15 mandates that, with minor exceptions, the access clause be included in all negotiated defense appropriated fund contracts in excess of \$10,000.⁴ Ordinarily, the Comptroller General uses this inspection power to examine 100-150 contracts annually.⁵ As one commentator has emphasized, "It is important to note that the [access] clause does not give the Government the right to do anything more than examine . . . books, documents, papers, and records. [The clause]

* Attorney/Advisor, Civil Law Branch, Office of the Staff Judge Advocate, Fort Gordon, Georgia. B.A., SUNY at Stony Brook, 1975; J.D., Vanderbilt University, 1978. Admitted to practice in New York and Tennessee. This Article reflects only the author's personal opinions and does not represent the views of the Department of the Army or any of its instrumentalities. The author expresses his appreciation to his wife Ann Feldman, and to the personnel of the Office of the Staff Judge Advocate at Fort Gordon and, in particular, Sid Brody, LTC Ron Frankel, LTC Art Millard, CPT Jim Lynch, CPT Chuck Thebaud, Janice Neskoric, Linda Grise, and Shirley Wallace, for their advice and assistance during the preparation of this Article.

¹ The Armed Forces Procurement Act of 1947 is presently codified at 10 U.S.C. §§ 2301-14 (1976).

² The Federal Property and Administrative Services Act of 1949 is presently codified at 41 U.S.C. §§ 251-60 (1976).

³ 10 U.S.C. § 2313(b) (1976). 41 U.S.C. § 254(c) incorporates nearly identical language. The 1951 amendments can be found at 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c) respectively. These statutes constitute the United States' permanent authority and the various federal agencies have promulgated regulations implementing the applicable statute. *See, e.g.*, Defense Acquisition Regulation 1-100 *et seq.* In April, 1984, all federal agencies will adopt a uniform procurement regulation, the Federal Acquisition Regulation. *See* The Office of Federal Procurement Policy Act Amendments of 1979, 41 U.S.C. §§ 401-12 (1976 & Supp. III 1979); *Gov't. Contractor*, April 15, 1983, at 112.

⁴ *See also* Federal Procurement Regulation 1-7.103-3 (same standard in non-defense government contracts); *cf.* Army Regulation 230-1, The Nonappropriated Fund System, 2 January 1975 (allowing inspection by contracting officer of all contractor books and records in contracts exceeding \$2,500). 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c) both contain little used exceptions for certain foreign purchases and for contracts in which the agency determines the clause is unnecessary. *See* SCHNITZER, *infra* note 5, at 2.

⁵ SCHNITZER, ACCESS TO CONTRACTOR RECORDS, 79-6 GOVERNMENT CONTRACTOR BRIEFING PAPERS 6 (Dec. 1979).

does not authorize any price reductions or withholding of payments."⁶ Nonetheless, the contractor's willful failure to allow inspection may result in contractor debarment under appropriate agency regulations.⁷

The Comptroller General is the chief officer of the General Accounting Office, a unique independent agency within Congress that has general responsibility for overseeing federal expenditures.⁸ Prior to 1980, the Comptroller General could enforce the access to records statute only by suing for specific performance of the contract. Today, the General Accounting Office may rely on its subpoena power under 31 United States Code section 716 to compel enforcement in a United States district court. Also, the United States has means besides the Comptroller General's access power to audit contractor books and records.⁹

By definition, the access statutes apply only to prime negotiated contracts as opposed to formally advertised contracts.¹⁰ In *Bowsher v. Merck and Co.*,¹¹ the Court defined the two modes of contracting:

The Government employs two methods of procurement: advertised procurement, *i.e.*, formal solicitation of competitive bids, and procurement by negotiation. A negotiated procurement is the method authorized by statute for use in situations in which the formal advertising and bidding procedure is deemed impractical or unnecessary. See 10 U.S.C. § 2304(a); 41 U.S.C. § 252(c). In procuring by negotiation, the government agency discusses the terms of the procurement with one or more contractors and awards the contract to the party offering the terms most advantageous to the Government.¹²

Congress so limited the Comptroller General's inspection power because Congress believed that the major contractor abuses occurred with negotiated procurements.¹³ Although formal advertising is the preferred method of con-

⁶ *Id.* at 3.

⁷ *E.g.*, Defense Acquisition Regulation 1-605.2(b)(1).

⁸ *See generally*, Cibinic and Lasken, *The Comptroller General and Government Contracts*, 38 GEO. WASH. L. REV. 349 (1970); Comment, *The Comptroller General's Authority to Examine the Private Business of Government Contractors: Eli Lilly & Co. v. Staats*, 92 HARV. L. REV. 1148, 1148 (1979). The recently revised Title 31 of the United States Code contains the statutory authority for Comptroller General supervision over federal expenditures.

⁹ *E.g.*, Defense Acquisition Regulation 7-104.41(a) permits Department of Defense inspection of all negotiated contracts and of formally advertised contracts exceeding \$100,000. *See also* Federal Procurement Regulation § 1-3.809. For a general review of the government's audit powers, see Fenster and Lee, *The Expanding Audit and Investigative Power of the Federal Government*, 12 PUB. CONT. L.J. 193 (1982).

¹⁰ *SmithKline Corp. v. Staats*, 668 F.2d 201, 214 (3d Cir. 1981), *cert. denied*, 103 S. Ct. 1891 (1983).

¹¹ 103 S. Ct. 1587 (1983).

¹² *Id.* at 1590, n.2.

¹³ *See infra* text accompanying notes 29-30.

tracting,¹⁴ 75 percent of government contracts are actually negotiated contracts.¹⁵

Although variations exist, the government employs two basic modes of contract pricing: fixed price and cost-plus a fixed fee. "A pure fixed price contract requires the contractor to furnish the goods or services for a fixed amount of compensation regardless of the costs of performance, thereby placing the risk of incurring unforeseen costs of performance on the contractor rather than the Government."¹⁶ In a basic cost-plus contract, the Government awards the contractor a predetermined profit along with the contractor's allowable costs of performance.¹⁷ A negotiated contract may be fixed price or cost based; a formally advertised contract may be only fixed price.¹⁸

The Comptroller General's inspection power is a highly significant area of federal procurement law in light of the massive amounts of money Congress spends annually on government contracts. In fiscal year 1982, for example, the Department of Defense alone spent 124.7 billion dollars for procurement.¹⁹ The Comptroller General's power under the access statutes has also attracted a growing body of scholarly commentary.²⁰

In *Bowsher v. Merck and Co.*,²¹ the United States Supreme Court held that, as a general rule, these statutes permit the Comptroller General to inspect only those cost records directly attributable to a government contract, such as direct material, labor, or manufacturing costs.²² The Court further

¹⁴ See 10 U.S.C. § 2304(a) (1976).

¹⁵ *SmithKline Corp. v. Staats*, 668 F.2d 201, 212 (3d Cir. 1981).

¹⁶ *Bowsher v. Merck and Co.*, 103 S. Ct. 1587, 1589 n.1 (1983) (citing 1 R. NASH & J. CIBINIC, *FEDERAL PROCUREMENT LAW* 413 (3rd ed. 1977)). [hereinafter cited as NASH & CIBINIC].

¹⁷ NASH & CIBINIC, *supra* note 16, at 431-32.

¹⁸ Defense Acquisition Regulation 2-104; 3-401; Federal Procurement Regulation 1-2.104-1; 1-3.401.

¹⁹ 25 GOV'T. CONTRACTOR 114 (Apr. 1983).

²⁰ Fenster and Lee, *The Expanding Audit and Investigative Power of the Federal Government*, 12 PUB. CONT. L.J. 193 (1982); Morgan, *The General Accounting Office: One Hope for Congress to Regain Parity of Power with the President*, 51 N.C.L. REV. 1279, 1362-65 (1973); Note, *Government Contracts and the Comptroller General's Investigatory Power Under the Access-to-Records Statutes*: Bristol Laboratories v. Staats, 17 NEW ENG. L. REV. 579 (1981); Note, *Eli Lilly & Co. v. Staats: An Undue Expansion of the GAO's Investigatory Power under the Access-to-Records Statutes*, 74 NW. U.L. REV. 122 (1979); Comment, *The Comptroller General's Authority to Examine the Private Business Records of Government Contractors: Eli Lilly & Co. v. Staats*, 92 HARV. L. REV. 1148 (1979); Comment, *Government Contracts: Contractor's Obligation to Allow Examination of Records under 10 U.S.C. § 2313(b)*, 72 DICK. L. REV. 687 (1968).

²¹ 103 S. Ct. 1587 (1983).

²² *Id.* at 1596. The reported cases discuss only the Comptroller General's authority to examine contractor cost data. See *infra* note 24. The language of the access statutes would also allow Comptroller General examination of non-cost data directly pertinent to the contract. Thus, the *Bowsher* court indicated that the access statutes also would permit verification that the contract

held that the policies underlying these access statutes ordinarily forbid Comptroller General scrutiny of indirect, nonallocated costs, such as research and development, marketing, or distribution costs.²³ In reaching this statutory interpretation, the Court resolved a split among the circuits offering sharply divergent views of the Comptroller General's inspection power.²⁴

A careful analysis of these statutes and their legislative history shows no such distinction between direct and indirect contract costs. Instead, Congress intended that the Comptroller General should have records access to all contractor cost data having a substantial connection to contract price. This Article therefore argues that the *Bowsher* Court's distinction between direct and indirect contractor costs reflects an unduly restrictive interpretation of the Comptroller General's statutory audit authority. Further, the Article suggests that Congress follow Justice White's separate opinion in *Bowsher*²⁵ and amend the statutes to allow Comptroller General review of contractor cost records when (1) these costs likely had a substantial impact on contract price and (2) the Comptroller General's request is reasonable.

First, the statutes and their legislative history will be examined. Second, the majority and separate opinions in *Bowsher* will be analyzed. While giving necessary attention to lower court cases interpreting the access statutes, the Article will concentrate on the separate opinions in *Bowsher* as a vehicle for examining the Comptroller General's audit power. This emphasis is appropriate for two reasons: first, the facts are nearly identical in the reported

was performed in accordance with the terms. 103 S. Ct. at 1599. *See supra* text accompanying notes 1-21.

²³ *Id.* Contractor costs can be direct or indirect, allocable or nonallocable. Direct costs have a close relationship to a particular product or service and they are, by definition, attributable or allocable to a particular contract. Indirect costs have a more remote relationship to a product or service and usually are nonallocable to a particular contract under traditional accounting practices. If, however, the contractor makes a special effort to assign its indirect costs to a particular product, these indirect costs become allocable to that contract. Defense Acquisition Regulation 15-202 and 203. Defense Acquisition Regulation 15-201.4(iii) expands the traditional definition of "allocability" to include costs necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown. Further, it bears emphasis that no distinction exists between "allocated" and "allocable" costs. Both data are equally discoverable. *See Bowsher v. Merck and Co.*, 103 S. Ct. at 1597 n.18 (White, J., concurring and dissenting).

²⁴ *See SmithKline Corp. v. Staats*, 668 F.2d 201 (3rd Cir. 1981), *cert. denied*, 103 S. Ct. 1891 (1983); *Merck and Co. v. Staats*, 665 F.2d 1236 (D.C. Cir. 1981) (*per curiam*), *aff'd sub nom.*; *Bowsher v. Merck and Co.*, 103 S. Ct. 1587 (1983); *Bristol Laboratories v. Staats*, 620 F.2d 17 (2d Cir. 1980) (*per curiam*), *aff'd by an equally divided Court*, 451 U.S. 400 (1981); *United States v. Abbott Laboratories*, 597 F.2d 672 (7th Cir. 1979); *Eli Lilly and Co. v. Staats*, 574 F.2d 904 (7th Cir.), *cert. denied*, 439 U.S. 959 (1978); *Hewlett-Packard Co. v. United States*, 385 F.2d 1013 (9th Cir. 1967), *cert. denied*, 390 U.S. 988 (1968). The above is a complete listing of the circuit cases interpreting the access statutes. For a discussion of these divergent views, *see infra* note 71.

²⁵ 103 S. Ct. at 1599. Justices Powell, Rehnquist, Burger and Brennan joined Justice O'Connor's majority opinion. Justice White joined by Justice Marshall wrote a separate opinion as did Justice Blackmun joined by Justice Stevens.

cases; and second, the *Bowsher* opinions contain the most complete analyses of the competing legal and policy arguments. Finally, the Article proposes a model inspection statute that strikes a more reasonable accommodation between the Comptroller General's need to evaluate government procurement techniques and the contractor's right to business privacy.

II. THE ACCESS STATUTES AND THEIR LEGISLATIVE HISTORY

The access statute which applies to all Department of Defense contracts states in pertinent part:

[E]ach contract negotiated under this Chapter shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract.²⁶

The access statute which applies to most other government contracts states in pertinent part:

All contracts negotiated without advertising shall include a clause to the effect that the Comptroller General of the United States . . . shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors related to such contracts or subcontracts.²⁷

The Comptroller General's statutory inspection power originated from an amendment to emergency legislation passed during the Korean War to assist defense contractors faced with defaulting on fixed-price contracts because of runaway inflation and severe shortages in raw materials. In January, 1951, Congress alleviated the problem by giving President Truman emergency authority to renegotiate government contracts. Concomitantly, Congress enacted an access to records clause to prevent contractors from exploiting the increased prices granted under the emergency authority.²⁸ This legislation was only temporary, however, and Congress soon considered a permanent version of the Comptroller General's inspection power.

Representative Hardy was the sponsor of both the temporary and permanent codifications of the Comptroller General's audit authority. Representative Hardy was greatly concerned that government contracting officers were negotiating contract changes under the permanent procure-

²⁶ 10 U.S.C. § 2313(b) (1976).

²⁷ 41 U.S.C. § 254(c) (1976). The Comptroller General's right of access under this statute and 10 U.S.C. § 2313(b) (1976) starts before "final payment", which payment occurs when the contract is substantially completed. SHNITZER, ACCESS TO CONTRACTOR RECORDS, 79-6 GOVERNMENT CONTRACTOR BRIEFING PAPERS 5 (Dec. 1979). The three year period may be tolled, however, for records relating to disputes or litigation. See, e.g., Defense Acquisition Regulation 7-104.15.

²⁸ Act of January 12, 1951, Pub. L. No. 921, 64 Stat. 1257-58.

ment statutes while lacking the authority to inspect contractor books and records.²⁹ During the debates on this legislation in October, 1951, Representative Hardy explained the purposes of his bill:

In normal times, competitive bidding generally operates as a brake on the price which a contractor can demand from the government for his goods and services. However, these are not normal times, and it should be obvious to all of us concerned with the expenditures of billions of dollars for national defense that we must establish every reasonable safeguard against waste and extravagance in the spending of these vast sums. Under conditions as they now exist, competitive bidding has little or no effect upon contracts which are negotiated without advertising. As a result, when a contract is being negotiated, here is a typical illustration of what usually happens. A contractor with years of experience comes to the conference table accompanied by a highly competent accountant and an equally competent lawyer. The government representative on the other side of the table will, in a great majority of the cases, be at a tremendous disadvantage from the standpoint of both training and experience, no matter how conscientious and honest he may be. So, aside from any intentional liberality on the part of the Government contracting officer, there is every chance in the world that the government will come out on the short end of the deal. The bill would at least enable the agent of the Congress to check the transactions from both the Government records and the contractor's books.

The major purposes of the bill are two-fold: one, to give the Comptroller General the proper tools to do the job Congress has instructed him to do, and, two, to provide a deterrent to improprieties and waste in the negotiation of contracts.³⁰

This excerpt from the legislative history demonstrates "(t)hat Congress envisioned use of the access authority as an adjunct to the Comptroller General's statutory responsibility to 'investigate . . . all matters relating to the receipt, disbursement, and application of public funds' and to 'make recommendations looking to greater economy or efficiency in public expenditures.'"³¹

Representative Hoffman opposed the original bill, which provided Comptroller General access to "pertinent records involving transactions related to the contract."³² He voiced a general concern that this language would permit the General Accounting Office to examine company records totally unrelated to its government contracts.³³ Representative Hoffman therefore introduced

²⁹ 97 CONG. REC. 13198 (1951).

³⁰ *Id.* Representative Hardy then gave some examples illustrating the breadth of his proposed legislation.

³¹ *Bowsher v. Merck and Co.*, 103 S. Ct. 1587, 1593 (1983) (citing 31 U.S.C. § 53(a) (1974) and 31 U.S.C. §§ 60, 65(a) (1976)).

³² 97 CONG. REC. 13371 (1951).

³³ *Merck and Co. v. Staats*, 665 F.2d 1236, 1249 (D.C. Cir. 1981) (Mikva, J., concurring and dissenting) (analyzing legislative history), *aff'd sub nom.*, *Bowsher v. Merck and Co.*, 103 S. Ct. 1587 (1983).

a floor amendment modifying "pertinent records" to "directly pertinent records."³⁴ Representative Hardy agreed to the amendment and the bill passed without debate.³⁵ Significantly, contrary to later statutory interpretations, no legislator proposed a direct cost/indirect cost dichotomy as a limit on the Comptroller General's audit powers.

Despite the vigorous debate surrounding this legislation, the statute lacked extensive judicial interpretation for more than fifteen years.³⁶ In 1967, however, a United States Senate subcommittee began conducting hearings on profits in the pharmaceutical industry that would set the stage for a legal battle that would continue for more than a decade.

III. BOWSHER *v.* MERCK AND CO.

A. *Prelude*

In 1967, a United States Senate subcommittee initiated hearings on competition in the drug industry.³⁷ During those hearings, the Comptroller General appeared as a witness in 1971 and Senator Nelson suggested to him that the General Accounting Office should use its audit power to investigate whether the drug companies were making excess profits under government contracts. By 1974, the General Accounting Office and subcommittee staffers commenced a joint effort to obtain company cost and profit data pursuant to a general economic study of the industry. After the General Accounting Office failed to obtain the information from the companies voluntarily, the Comptroller General issued identical demands to six drug companies—Eli Lilly and Company, Abbott Laboratories, Bristol Laboratories, Merck and Company, SmithKline Corporation, and Hoffman-LaRoche—requiring access to:

All books, documents, papers and other records directly pertinent to the contracts, which include, but are not limited to (1) records of experienced costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the Government, and

³⁴ 97 CONG. REC. 13377 (1951).

³⁵ *Id.*

³⁶ In 1967, the United States Court of Appeals for the Ninth Circuit analyzed the Comptroller General's statutory inspection powers in *Hewlett-Packard Co. v. United States*, 385 F.2d 1013 (9th Cir. 1967), *cert. denied*, 390 U.S. 988 (1968). In *Hewlett-Packard*, the facts were practically identical to those in *Bowsher*: The Air Force had awarded Hewlett-Packard (HP) four negotiated firm fixed price supply contracts containing the standard access to records clause. These contracts provided for the sale of standard commercial items HP sold in substantial quantities to the general public. The contract price was based on the company's previously established catalog price minus a volume discount. The Comptroller General subsequently requested inspection of HP's cost and pricing data and supporting documentation. The Ninth Circuit affirmed the district court's decision that the company's records of direct materials, direct labor and overhead costs were "directly pertinent" to HP's government contracts.

³⁷ *Hearings on Competition Problems in the Drug Industry Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business*, 92d Cong., 1st Sess. 20, 8020 (1971).

(3) such other information as may be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests.³⁸

The first five companies ultimately sought to enjoin the General Accounting Office inquiry; the sixth company, Hoffman-LaRoche, settled the demand without litigation.³⁹

Merck and Company (Merck) requested declaratory and injunctive relief in the United States District Court for the District of Columbia to prevent the Comptroller General from examining the requested cost data.⁴⁰ The district court first analyzed the nature of the contracts. As in the procurements with the other companies, Merck and the United States had entered into several negotiated firm fixed price supply contracts containing the standard access to records provision. The products manufactured under these contracts were standard commercial items the company sold to the public in substantial quantities. The contract price was based on Merck's catalog price and there were no actual negotiations on price.⁴¹ Under these circumstances, Merck's cost and pricing data were exempt from the Renegotiation Act and the Truth in Negotiations Act.⁴²

³⁸ *Bowsher v. Merck and Co.*, 103 S. Ct. at 1590. For a more detailed account of the history leading to the instant litigation, See *id.*, *supra* note 23, at 586 n.4; *SmithKline Corp. v. Staats*, 483 F. Supp. 712, 716-17 (E.D. Pa. 1980), *vacated on other grounds*, 668 F.2d 201 (3rd Cir. 1981), *cert. denied*, 103 S. Ct. 1891 (1983).

³⁹ Comment, *The Comptroller General's Authority to Examine the Private Business Records of Government Contractors: Eli Lilly and Co. v. Staats*, 92 HARV. L. REV. 1148, 1150 n.12 (1979).

⁴⁰ *Merck and Co. v. Staats*, 529 F. Supp. 1 (D.D.C. 1977), *aff'd*, 665 F.2d 1236 (D.C. Cir. 1981), *aff'd sub nom.*, *Bowsher v. Merck and Co.*, 103 S. Ct. 1587 (1983). The drug companies' strong opposition to Comptroller General inspection of their indirect costs probably reflects the companies' resentment that the Comptroller General was attempting to invade their management prerogatives as opposed to his auditing traditional accounting data. See SHNITZER, *supra* note 5, at 5.

⁴¹ The *Bowsher* Court later observed that the Government had:
no reason to suspect that Merck had engaged in any fraud or impropriety in connection with the negotiation or performance of these contracts . . . Nor does the Government have any reason to believe that prices charged under these contracts were unreasonable in any way . . . In fact, the prices under each of the contracts were the lowest price at which Merck sold each of the products at the time the contracts were awarded.
103 S. Ct. at 1598 n.21.

⁴² Under the former Renegotiation Act, 50 U.S.C. app. §§ 1211-24 (1970 & Supp. V 1975), which expired in 1978, the United States had a general right to demand inspection of contractor books and records in contracts exceeding \$100,000 so that the Government could detect and recover excess profits. In 1954, the Act was amended to exempt contracts involving standard commercial items. 50 U.S.C. app. § 1216(e)(1)(A) and 4(B). This mandatory exemption was predicated on the belief that "[t]here is in most cases no basis or need for renegotiation since cost and pricing experience has already been acquired and prices made in a competitive market." *Hewlett-Packard Co. v. United States*, 385 F.2d 1013, 1014 n.2 (9th Cir. 1967), *cert. denied*, 390 U.S. 988 (1968). The Act also contained other mandatory and permissive exemptions. See 50 U.S.C. app. § 1216 (1970 and Supp. V 1975).

Under the Truth in Negotiations Act, 10 U.S.C. § 2306 (1980), contractors have a general

Following the reasoning in the related case of *Bristol Laboratories v. Staats*⁴³, the district court granted the Comptroller General access to all books and records relevant to the company's direct costs, including Merck's "manufacturing costs (including raw and packaging materials, labor and fringe benefits, quality control and supervision), manufacturing overhead (including plant administration, production, planning, warehousing, utilities and security), royalty expenses, and delivery costs."⁴⁴ The district court prohibited the Comptroller General from examining the company's indirect costs, including Merck's data relating to research and development, marketing and promotion, distribution, and administration, except as these costs were allocable to a particular government contract.⁴⁵ The district court

obligation to offer the Government accurate, complete and current actual or estimated cost and pricing data for negotiated contracts exceeding \$500,000 or for the modification of any contract or subcontract over \$500,000. The Act contains permissive exemptions, 10 U.S.C. § 2306(f), for contracts where the price is based on adequate competition, set by law or regulation, or stems from the established catalog price for a standard commercial item sold in substantial quantities to the general public. *See Merck and Co. v. Staats*, 665 F.2d 1236, 1245 (D.C. Cir. 1981) (Mikva, J., concurring and dissenting), *aff'd sub nom.*, *Bowsher v. Merck & Co.*, 103 S. Ct. 1587 (1983) (citing *Sperry Flight Systems Div. of Sperry Rand Corp. v. United States*, 548 F.2d 915, 920-21 (Ct. Cl. 1977)) (noting permissive nature of exemption). Defense Acquisition Regulation 3.807.3(d), which implements the Act, authorizes contracting officers to obtain this data in negotiated contracts valued between \$25,000 and \$500,000. Furthermore, the statute contains its own examination of records clause as well as a provision for reducing contract payments to reflect the contractor's improper failure to furnish appropriate data. 10 U.S.C. § 2306(f).

The Truth in Negotiations Act and various criminal and civil statutes are the United States' other major tools to remedy contractor fraud, waste, and extravagance. *See, e.g.*, The False Claims Act, 18 U.S.C. § 287 (1976); The False Statements Act, 18 U.S.C. § 1001 (1976); and The Forfeiture of Fraudulent Claims Act, 28 U.S.C. § 2514 (1976). *See also* Army Defense Acquisition Regulation Supplement 1-608.50 (authorizing contracting officer to withhold payments incident to ongoing contract if he suspects contractor fraud).

⁴³ 428 F. Supp. 1388 (S.D.N.Y. 1977), *aff'd*, 620 F.2d 17 (2d Cir. 1980), *aff'd by an equally divided Court*, 451 U.S. 400 (1981).

⁴⁴ By definition, "direct costs" are those costs directly attributable to a particular contract. *Bowsher v. Merck and Co.*, 103 S. Ct. at 1597. *See also supra* note 23. Every court of appeals similarly had ruled that the Comptroller General has the right to inspect contractor costs attributable to a government contract. *Bowsher v. Merck and Co.*, 103 S. Ct. at 1599 n.1. (White, J., concurring and dissenting) (analyzing cases).

⁴⁵ 529 F. Supp. at 3. Other indirect costs commonly include company taxes and profits. *Merck and Co. v. Staats*, 665 F.2d 1236, 1247 (D.C. Cir. 1981) (Mikva, J., concurring and dissenting), *aff'd sub nom.*, *Bowsher v. Merck and Co.*, 103 S. Ct. 1587 (1983).

The allocation problem arises when the company maintains cost records for all contracts without any breakdown for government or nongovernment contracts. For example, if Company A spends one million dollars annually for advertising all of its products, and the company fails to keep a record of how much it spent for a particular product, it would seem impossible to determine how much money the company spent advertising any single product. A commentator explains the difficulty of attributing nonallocated indirect costs to a particular product:

No doubt some portion of the data contained in the records would be relevant to costs associated with producing items for government contracts. Isolating that small portion, however, may be impossible.

It is legitimate to assume that costs often will be unallocable. Businesses faced with

further ordered that the Comptroller General ensure the confidentiality of Merck's price data and prohibited public disclosure of Merck's books and records with limited exceptions.⁴⁶

On appeal, the United States Court of Appeals for the District of Columbia affirmed the lower court's decision in a one page per curiam opinion.⁴⁷ While noting the growing body of case law and the divergent views among the circuits,⁴⁸ the court concluded that "conflicts in these decisions must be resolved by the Supreme Court, not by us, and we believe that nothing would be gained by a reploting of the field."⁴⁹ Judge Mikva, concurring in part and dissenting in part, undertook an extensive analysis of the Comptroller General's inspection power under 10 United States Code section 2313(b) and 41 United States Code section 254(c).⁵⁰ Judge Mikva concluded that these statutes and their legislative history supported the Comptroller General's request to examine all records of contractor costs having a significant connection to contract price, including the company's indirect cost data.⁵¹

The United States thereafter sought certiorari to the United States Supreme Court, arguing that Merck's indirect cost records were also subject to the Comptroller General's statutory inspection power. Merck similarly re-

the task of assigning research and development costs to products must grapple with the fact that these costs may have no discernible relationship to particular products. Indeed, a survey conducted by the National Association of Accountants found that, while some businesses do assign research and development cost to particular products, they are forced to use broad and arbitrary bases for allocation. Many other companies do not assign these costs at all because the arbitrary method of allocation that would be necessary would not provide a useful guide for determining pricing or product profitability.

Insofar as meaningful allocation is not possible, the GAO's demand for certain cost records inevitably would require the contractor to divulge aggregate cost data pertaining to a wide range of products, nor just those relevant to the governmental transaction.

Note, *Eli Lilly & Co. v. Staats: An Undue Expansion of the GAO's Investigatory Power Under the Access-to-Records Statutes*, 74 NW. U.L. REV. 122, 132-33. *Accord*, *Bristol Laboratories v. Staats*, 428 F. Supp. 1388, 1390 (S.D.N.Y. 1977), *aff'd*, 620 F.2d 17 (3d Cir. 1981), *aff'd by an equally divided Court*, 451 U.S. 400 (1981).

⁴⁶ The *Merck* district court implicitly held that Merck's confidential proprietary data and trade secrets were also subject to General Accounting Office review. 529 F. Supp. at 4. The district court allowed possible public disclosure of Merck's data if the information could be disseminated without identifying Merck as the manufacturer or if Congress issued a lawful written request to the Comptroller General for receipt of these materials. *Id.* Similar confidentiality restrictions on Comptroller General review can be found in other cases. *E.g.*, *SmithKline Corp. v. Staats*, 668 F.2d 201, 207 n.4 (3d Cir. 1981), *cert. denied*, 103 S. Ct. 1891 (1983).

⁴⁷ *Merck and Co. v. Staats*, 665 F.2d 1236 (D.C. Cir. 1981), *aff'd sub nom.*, *Bowsher v. Merck and Co.*, 103 S. Ct. 1587 (1983).

⁴⁸ *Id.* at 1237; *see supra* note 24.

⁴⁹ 665 F.2d at 1237.

⁵⁰ *Id.* at 1237-50 (Mikva, J., concurring and dissenting).

⁵¹ *Id.*

quested certiorari, contending that the Comptroller General's access demand was unconnected to any congressionally authorized purpose and that the company's direct cost records were not "directly pertinent" to the contracts at issue.

B. *The Majority Opinion*

Justice O'Connor's five-member majority opinion initially focused on the language of the statutes and the meaning of the phrase "directly pertain to and involving transactions relating to the contract."⁵² The majority determined this language meant simply that there must be "some close connection between the type of records sought and the particular contract."⁵³ Concluding that the statutory language contains no further guidance on the class of discoverable records, Justice O'Connor turned to the "[w]ell-settled canon of statutory construction that, where the language does not dictate an answer to the problem before the Court, we must analyze the policies underlying the statutory provision to determine its proper scope."⁵⁴ The majority opinion therefore examined the statutes' legislative history to determine the congressional intent.

The Court interpreted the legislative history as containing two equivalent and conflicting statutory purposes: one, giving the General Accounting Office extensive powers to detect fraud, waste, and extravagance in federal procurement and, two, limiting General Accounting Office intermeddling in the contractor's private business affairs.⁵⁵ Accordingly, the Court balanced these conflicting policies in addressing the specific contentions raised by the parties.

Justice O'Connor first analyzed the Government's contention that Merck's indirect costs⁵⁶ were directly pertinent to these fixed-price negotiated contracts. She also noted the Government's reasoning that "Merck's indirect costs are directly pertinent . . . because Merck uses the payments made under these contracts to defray indirect expenses."⁵⁷ Nevertheless, the majority rejected this argument, reasoning that the Government's interpretation would "completely eviscerate the congressional goal of protecting the privacy of the contractor's business records."⁵⁸ Under the Government's definition of "directly

⁵² *Bowsher v. Merck and Co.*, 103 S. Ct. at 1592.

⁵³ *Id.*

⁵⁴ *Id.* at 1592 n.7 (quoting *Rose v. Lundy*, 455 U.S. 509, 517 (1982)).

⁵⁵ 103 S. Ct. at 1593. Several contractors previously had argued without success that the legislative history evidences only a narrow, anti-fraud objective. *See Merck and Co. v. Staats*, 665 F.2d 1236, 1240 (D.C. Cir. 1981) (Mikva, J., concurring and dissenting). The *Bowsher* Court finally put this contention to rest. 103 S. Ct. 1592-93, 1598-99.

⁵⁶ *See supra* note 45 and accompanying text.

⁵⁷ 103 S. Ct. at 1594.

⁵⁸ *Id.*

pertinent", the Court reasoned, the contractor must allow inspection of such remote costs as the purchase of raw materials for totally unrelated products.⁵⁹ "In short, the Government's proposed definition of the statutory language admits of no doctrinal limitation, effectively reading the Hoffman limiting language and its 'anti-snooping' policy out of the statute."⁶⁰

The majority next examined the Government's argument that "GAO's consistent and long-standing interpretation of its authority under the access to records statutes supports the view that indirect cost records are subject to examination under the fixed price contracts in question"⁶¹ In making this argument, the Government was relying on the established principle that a court will give great deference to an administrative agency's construction of a statute within its mandate unless the agency's interpretation is clearly incorrect.⁶² Justice O'Connor rejected this argument on two bases. First, the Court pointed to legislative history indicating that the General Accounting Office on several occasions had admitted serious doubts about its statutory power to examine contractor indirect cost data.⁶³ Second, the Court ruled that, even conceding the agency's long-standing interpretation, the agency's position conflicted with the terms of 10 United States Code section 2313(b) and 41 United States Code section 254(c).⁶⁴

⁵⁹ *Id.* Opponents of broad Comptroller General inspection powers have added that government contracts often constitute a minuscule portion of a company's business and therefore the company should be free of "limitless governmental foraging." *United States v. Abbott Laboratories*, 597 F.2d 672, 675 (7th Cir. 1979) (Pell, J., concurring).

⁶⁰ 103 S. Ct. at 1595.

⁶¹ *Id.*

⁶² *Securities and Exchange Comm'n v. Sloan*, 436 U.S. 103, 117 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). Further, Congress presumably both knows of the agency's interpretation and adopts the agency's position as its own. *United States v. Board of Comm'rs*, 435 U.S. 110, 131 (1978); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

⁶³ The Court noted that in 1967, the Comptroller General had concluded that the access statutes contain no authority for the General Accounting Office to examine contractor records concerning nongovernment business, even if this inquiry would help to determine whether a contractor sold a catalog price item in substantial quantities to the general public. 103 S. Ct. at 1595. In 1969, the General Accounting Office informed Congress that the statutory inspection authority excluded review of a contractor's nongovernment business and that a legislative amendment was necessary to conduct an industry profit study. *Id.* (quoting 115 Cong. Rec. 25800-01 (1969)). Further, in 1970, the General Accounting Office circulated an internal memorandum expressing the agency's belief that a statutory amendment was necessary to examine contractor indirect cost records. 103 S. Ct. at 1596.

The *Bowsher* Court acknowledged that the General Counsel of the General Accounting Office in 1963 had claimed broad authority to audit all relevant contractor cost data. *Id.* (analyzing *Hearings on Relation of Cost Data to Military Procurement Before the Subcomm. for Special Investigations of the House Comm. on Armed Services*, 88th Cong., 1st Sess. 3 (1963)). Also, the Comptroller General had rendered a broad reading of his inspection powers in an unpublished 1962 opinion. Comp. Gen. Dec. B-149259 (7 Dec. 1962) (unpublished).

⁶⁴ 103 S. Ct. at 1595.

The Court next discussed Merck's contention that direct costs were not "directly pertinent" to the contracts because these agreements were not cost-based and because the contracts were negotiated without regard to price.⁶⁵

Direct costs certainly pertain directly to even a fixed price contract, for direct costs are, by definition, readily identifiable as attributable to the specific product supplied under the contract. Consequently, as a rational businessman, the contractor will have some regard for these costs in setting even a catalog price in order to avoid a loss on the product. Because these costs therefore have a very direct influence on the price charged the Government, the GAO would need to examine records of these costs to determine whether the contractor is making an excessively high profit or [whether] the Government is getting a "fair deal" under the contract.⁶⁶

⁶⁵ *Id.* at 1597. In other cases, the contractor supplemented this contention by arguing that the access statutes should be construed narrowly because the former Renegotiation Act and the Truth in Negotiations Act would have excluded the contracts at issue. See *SmithKline Corp. v. Staats*, 668 F.2d 201, 208 (3d Cir. 1981), *cert. denied*, 103 S. Ct. 1891 (1983); *Eli Lilly and Co. v. Staats*, 574 F.2d at 916. In making this argument, the company was citing the rule that "inter-related statutory provisions should be given harmonious construction." *SmithKline Corp. v. Staats*, 668 F.2d at 208; *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (stating rule). Other courts had rejected this contention, reasoning that if Congress wished to harmonize these statutes, it would have done so expressly. See *Merck and Co. v. Staats*, 665 F.2d 1236, 1245 (Mikva, J., concurring and dissenting) (citing *Eli Lilly and Co. v. Staats*, 574 F.2d at 916), *aff'd sub nom.*, *Bowsheer v. Merck and Co.*, 103 S. Ct. 1587 (1983)).

Indeed, a better application of the *Belford* principle would be to interpret the access statutes broadly in light of the Comptroller General's wide-ranging fiscal responsibilities under 31 U.S.C. §§ 53, 60, 65 and 67 (1980). *Accord*, *Eli Lilly & Co. v. Staats*, 574 F.2d at 910-12. The *Eli Lilly* court further highlighted the anomaly of denying inspection under the access statutes by stating "it is likely that the Government could compel the same disclosure . . . in discovery proceedings even in litigation in which [Eli Lilly] is not a participant." *Id.* at 916.

⁶⁶ 103 S. Ct. 1597. See also *Hewlett-Packard Co. v. United States*, 385 F.2d 1013, 1016 (9th Cir. 1967), *cert. denied*, 390 U.S. 988 (1968):

Production costs directly pertain to that subject matter [of the contract], because if out of line with the contract price, the contract may have been an inappropriate means of meeting this particular procurement need of the Government. While this appraisal could not affect these particular contracts, it could lead to the use of other methods of meeting future procurement needs. Production costs involve transactions relating to the contract, because they encompass business arrangements made by the contractor in obtaining the materials, labor, facilities, and the like required by it in fulfilling its commitment with reference to the subject matter of the contract.

Unlike most courts, the *Hewlett-Packard* court contrasted the meaning of the statutory language "directly pertinent to the contract" and "involving transactions relating to the contract." *Id.* Taken literally, the latter phrase has broader application because it contains no words of limitation. The above passage from *Hewlett-Packard* demonstrates that these phrases are very close in meaning and overlap to a great extent. In *Bowsheer*, the Supreme Court treated these phrases as expressing one concept. 103 S. Ct. at 1592. Nonetheless, analyzing these terms as a unitary concept violates the rule that a court generally will give meaning to every word in a statute. *American Textile Mfr. Inst. Inc. v. Donovan*, 452 U.S. 490, 513 (1982) (stating principle).

While the Court acknowledged that indirect costs also could substantially influence contract price, the Court distinguished indirect cost records on two grounds. First, following the *Bristol* test, the Court concluded that under generally accepted accounting principles, the Comptroller General would find it nearly impossible to attribute with any degree of certainty the portion of unassigned indirect costs allocable to a specific government contract.⁶⁷ Consequently, the Court reasoned, the Comptroller General would derive only a marginal benefit from this inspection because allocation of such indirect costs is largely arbitrary by definition.⁶⁸ Second, the Court stated that Comptroller General examination of these indirect cost records necessarily entails wide-ranging inspection of the contractor's unrelated business affairs. "We therefore conclude that the appropriate balance of public and private interests in this situation weighs in favor of access to direct cost records but against access to Merck's indirect cost records."⁶⁹

The majority opinion then dismissed the government's objection that prohibiting General Accounting Office access to indirect cost records hampers the General Accounting Office from improving the procurement process. The Government argued that this lack of access was particularly acute in the instant case because direct costs constituted only nine percent of the contract price, thereby precluding Comptroller General review of most contract costs.⁷⁰ While recognizing the potential benefits of General Accounting Office scrutiny in this situation, the Court answered that the "directly pertinent" language foreclosed Comptroller General review of indirect costs. "[A]ny impediment that our holding places in the path of the GAO's power to investigate fully government contracts is one Congress chose to adopt, and any

⁶⁷ 103 S. Ct. at 1597; *supra* note 45.

⁶⁸ 103 S. Ct. at 1597.

⁶⁹ *Id.* The *Bowsher* Court conceded the artificial nature of its "bright-line distinction" between direct and indirect costs and the Court stated in dicta that the Comptroller General could discover indirect costs in limited situations. First, following *Bristol*, the Court would allow such inspection where the contractor previously allocated these costs to a particular government contract. *Id.* at 1596. Second, the Court would allow such inspection with cost-based contracts:

By claiming from the Government full reimbursement for these costs under the cost-based contract, the contractor represents that these costs are justified as attributable to the performance of the government contract, and not to any nongovernmental transactions. Therefore, the public interest served by permitting the GAO to inspect records supporting these claims clearly outweighs any privacy interests the contractor possesses in those records.

Id. at 1597 n.17.

In his concurring opinion, Justice White observed that the Court also would probably permit Comptroller General inspection of contractor indirect cost data when the Government enters a fixed price contract based on the contractor's cost representations. *Id.* at 1606 n.21 (White, J., concurring and dissenting). In this situation, the contract is similarly cost-based. *Id.*

⁷⁰ 103 S. Ct. at 1597 n.20. Judge Mikva noted in his opinion below that the federal government spends more than one billion dollars annually on pharmaceuticals. 665 F.2d at 1236. Consequently, the *Bowsher* decision precludes review of the remaining nine hundred million dollars.

arguments that this situation be changed must be addressed to Congress, not the courts."⁷¹

Finally, Justice O'Connor discussed Merck's contention that the General Accounting Office's request was improper because the Comptroller General's demand was unrelated to a congressionally authorized purpose. The Court rejected this view, concluding that the statutes' legislative history established that the General Accounting Office may conduct a broad-based study of a particular industry to improve government procurement techniques.⁷² The Court also dismissed the company's argument that the Comptroller General's request was tainted because two senators encouraged the Comptroller General to invoke his inspection authority. "If the records sought by the GAO are within the scope of the access to records statute, the fact that the Comptroller General's request had its origin in the requests of congressmen or that the GAO reported the data to Congress does not vitiate its authority."⁷³

C. Justice White's Opinion

Justice White, joined by Justice Marshall, wrote an opinion concurring in the Court's holding permitting General Accounting Office inspection of contractor direct cost records but dissenting from the majority's prohibiting General Accounting Office access to Merck's indirect cost data.⁷⁴ Like the majority, Justice White first examined the statutory language. He reached a broader interpretation of "directly pertinent," arguing: "It is hard to imagine anything more directly related to a contract than the cost of producing the items covered by it or the matters going into the makeup of the price."⁷⁵

⁷¹ *Id.* at 1598. Before *Bowsher*, the Seventh Circuit was the only circuit expressly allowing Comptroller General review of contractor indirect cost data. *United States v. Abbott Laboratories*, 597 F.2d 672 (7th Cir. 1979); *Eli Lilly and Co. v. Staats*, 574 F.2d 904 (7th Cir.), *cert. denied*, 439 U.S. 959 (1978). The *Eli Lilly* court reasoned that indirect costs could be directly pertinent to a government contract when they were a "significant input" in the cost of the product. *Id.* at 914-15. The Seventh Circuit thus required contractor disclosure of indirect costs regardless of allocation. *Id.* The *Eli Lilly* court further acknowledged that the direct pertinence of such data necessarily varies from case to case. *Id.* at 914.

Arguably, the Ninth Circuit in *Hewlett-Packard* also had followed the *Eli Lilly* view. See *Merck and Co. v. Staats*, 665 F.2d 1236, 1248 n.27 (D.C. Cir. 1981) (Mikva, J., concurring and dissenting), *aff'd sub nom.*, *Bowsher v. Merck and Co.*, 103 S. Ct. 1587 (1983). The Second Circuit and the Third Circuit adopted the *Bristol* distinction between direct and indirect costs. *Bristol Laboratories Div. of Bristol Myers Co. v. Staats*, 620 F.2d 17 (2d Cir. 1980), *aff'd by an evenly divided Court*, 451 U.S. 400 (1981); *SmithKline Corp. v. Staats*, 668 F.2d 201 (3d Cir. 1981), *cert. denied*, 103 S. Ct. 1891 (1983).

⁷² 103 S. Ct. at 1598. *Accord*, *SmithKline Corp. v. Staats*, 668 F.2d at 206; *Eli Lilly and Co. v. Staats*, 574 F.2d at 909-10. Examples of such improvements would be obtaining greater competition in future similar procurements or negotiating contracts more carefully. *Bowsher v. Merck and Co.*, 103 S. Ct. at 1600 (White, J., concurring and dissenting).

⁷³ *Id.* at 1599. *Accord*, *SmithKline Corp. v. Staats*, 668 F.2d at 207.

⁷⁴ *Bowsher v. Merck and Co.*, 103 S. Ct. at 1599-1606 (1983).

⁷⁵ *Id.* at 1600-01 (quoting *Eli Lilly and Co. v. Staats*, 574 F.2d at 913). Justice White also

Justice White thus concluded that the statutory language standing alone could support the Comptroller General's demand for Merck's indirect cost data because "[i]n some instances indirect costs have a critical bearing on the makeup of the contract price."⁷⁶

Although he believed such examination unnecessary, Justice White turned to the statutes' legislative history. He agreed with the majority that one broad congressional purpose was to enable the Comptroller General to evaluate government procurement techniques.⁷⁷ Additionally, Justice White quoted several portions from the legislative debates indicating that Representative Hoffman's amendment was largely insignificant and might have been a "sop to the bill's opponents."⁷⁸ In contrast to the majority, Justice White indicated that Representative Hoffman's amendment represented a subsidiary congressional purpose, namely, to prevent General Accounting Office access to contractor cost data having no significant impact on government contracts.⁷⁹

Justice White took particular issue with the majority's adoption of the *Bristol* indirect cost/direct cost dichotomy. He fully agreed with the Government's position that the indirect cost/direct cost test creates an artificial distinction frequently restricting the Government's ability to examine critical price data.⁸⁰ Justice White therefore proposed another interpretation of "directly pertinent to the contract": "the records are of costs that likely

criticized the majority for failing to apply its definition of "directly pertinent" to nonallocable cost records: "[T]here is of course no reason why the records of all indirect costs inherently lack the requisite "close connection." 103 S. Ct. at 1601 (White, J., concurring and dissenting). See also *Eli Lilly and Co. v. Staats*, 574 F.2d at 914:

The mere fact that, as plaintiff asserts, it does not or even could not allocate costs such as research and development to an individual contract does not undercut the proposition that those costs are directly pertinent to an individual contract but merely indicates that they are directly pertinent to more than one individual contract.

⁷⁶ 103 S. Ct. at 1601.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1603. The majority responded to this argument by observing that the "[Congressional] majority voted for the Hoffman amendment and we must give weight to the expressed will of a legislative majority." *Id.* at 1594 n.10.

⁷⁹ *Id.* at 1603.

⁸⁰ *Id.* at 1604. Justice White gave an example of how the *Bristol* standard impairs the Comptroller General's ability to remedy extravagance or inefficiency in government procurement: "[T]he *Bristol* test might not allow the GAO to examine a contractor's records of advertising costs. One would imagine that, if the GAO were aware that a great percentage of the cost of the products of a certain company went to support a large advertising campaign, rather than, say, to maintain quality control, the GAO might recommend to the contracting agency that it not deal with the company in the future. Yet, under the *Bristol* test, the GAO might not be able to obtain the information needed to make such a recommendation.

Id. at 1604 n.17.

had a direct and substantial impact on the price charged to the Government under the contract."⁸¹

Finally, Justice White justified his reading of the access statutes by noting that the fourth amendment to the Constitution restricts the government's subpoena power over corporate documents by limiting General Accounting Office access to those records "reasonably related" to the agency's requirements.⁸² In this regard, he commented that Merck could successfully modify the General Accounting Office's demand if the company established that government inspection would involve either undue company expense or unwarranted interference with its operations.⁸³ Based on the foregoing reasoning, he offered the following standard for General Accounting Office access to contractor cost records: "1) the records sought by the GAO related

⁸¹ *Id.* at 1605. The majority rejected Justice White's formulation in part because his approach was "unworkable for both the Government and the contractors." *Id.* at 1597 n.18. The Court failed to document this assertion, except to speculate that Justice White's test would lead to the collateral problem of "protracted litigation." *Id.* Additionally, the Court's response gives insufficient deference to agency judgment in matters committed to its special expertise. *See SEC v. Wheeling Pittsburgh Steel Corp.*, 648 F.2d 118 (3d Cir. 1981); *Dresser Indus. v. United States*, 596 F.2d 1231 (5th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980) (stating rule). *See also Merck and Co. v. Staats*, 665 F.2d at 1249 (Mikva, J., concurring and dissenting) ("The test of 'directly pertinent' is not the number of documents an industry must furnish, or the relative burden of doing so, but whether those documents will assist the government to determine whether its negotiating practices sufficiently protect it from wasteful, fraudulent, or inefficient procurement practices.")

In turn, Justice White criticized the majority's bright line cost distinction as creating the possibility "that the contractor can avoid a GAO examination of even product-specific records in those areas by arbitrarily refusing to attribute these costs to the specific products." 103 S. Ct. at 1605 n.18. The majority responded to this point by observing that the Government obtains a "windfall" when the contractor makes the extra effort of identifying indirect costs attributable to a government contract. *Id.* at 1596-97 n.16. "Given this added benefit to the Government, it is anomalous to argue that its access authority is being 'limited' by the contractor's accounting method." *Id.* *See also infra* note 131 (discussing contractor's general obligation in negotiated procurements to distinguish and allocate direct and indirect costs).

⁸² 103 S. Ct. at 1605-06. The majority rejected this analysis, commenting "If, however, Congress had intended that GAO demands be limited only by the Fourth Amendment, it need not have concerned itself with requiring that records be directly pertinent to the contract." *Id.* at 1594 n.10. This critique misstates Justice White's position because he clearly saw the fourth amendment as an *additional* safeguard rather than as a restatement of the phrase "directly pertinent." *Id.* 1605-06.

The fifth amendment privilege against compulsory self-incrimination offers little assistance to companies contesting a General Accounting Office subpoena. Corporations have no privilege against self-incrimination, *Andresen v. Maryland*, 427 U.S. 463 (1976), and the "dual purpose" doctrine permits enforcement of a subpoena, despite a wrongful purpose, if the agency also shows a valid justification. *Lynn v. Biderman*, 536 F.2d 820 (9th Cir.), *cert. denied*, 429 U.S. 920 (1976). Accordingly, the General Accounting Office could enforce the subpoena if the request has a single valid civil purpose, even if the request also was intended to gather information for a possible criminal prosecution, *cf. id.*; *United States v. LaSalle National Bank*, 437 U.S. 298 (1978).

⁸³ 103 S. Ct. at 1606.

to costs that likely had a direct and substantial impact on the [contract price] and 2) the request is reasonable in scope and would not unduly burden [the contractor]."⁸⁴

D. Justice Blackmun's Opinion

Justice Blackmun, joined by Justice Stevens, wrote an opinion concurring in the Court's refusal to allow General Accounting Office inspection of Merck's indirect cost data but dissenting from the Court's holding authorizing Comptroller General review of the contractor's direct cost records.⁸⁵ Justice Blackmun agreed with Merck that cost records were not "directly pertinent" to these non-cost based contracts because the government never requested any cost data and the agreements were negotiated without regard to costs.⁸⁶ Like Justice White, Justice Blackmun saw little need to consult the statutes' legislative history. By contrast, however, he argued that the statutory language "gave the Comptroller General access to a narrow category of records: those directly pertinent to the contracts between the Government and its contracting partner."⁸⁷ Consequently, Justice Blackmun would permit Comptroller General access only when the request relates "to the contract's negotiation, its terms, or its performance."⁸⁸

Justice Blackmun then criticized the majority for using an expansive definition of "contract" in holding that direct cost data fall within the inspection statutes. Noting that the majority opinion used the terms "contract" and "product" interchangeably,⁸⁹ he argued that the word "contract" must be interpreted as taking the ordinary legal meaning because the statutes contain nothing to the contrary.⁹⁰ In Justice Blackmun's view, the majority's expansive definition allows unwarranted General Accounting Office access: the traditional definition of "contract" would permit government inspection of only those items directly related to the contract's negotiation, terms, or its performance.⁹¹ By expanding "contract" to include "product", Justice Blackmun believed that the majority opinion allows General Accounting Office inquiry into matters "[n]ot mentioned in the bargaining process and play[ing] no part in the agreement ultimately reached."⁹² Thus, he saw little

⁸⁴ *Id.*

⁸⁵ *Id.* at 1606 (Blackmun, J., concurring and dissenting).

⁸⁶ *Id.* at 1607 and 1610.

⁸⁷ *Id.* at 1607.

⁸⁸ *Id.* at 1608.

⁸⁹ *Id.* at 1607.

⁹⁰ *Id.* at 1608 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)) ("unless otherwise defined, statutory terms take on their ordinary legal meaning"). In its ordinary legal meaning, "a contract is a legally enforceable bargain formed by mutual consent and supported by consideration." 103 S. Ct. at 1608 (Blackmun, J., concurring and dissenting) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 17 (1979)).

⁹¹ 103 S. Ct. at 1608.

⁹² *Id.*

difference in granting the Comptroller General access to direct or indirect cost data: "Because the Government chose not to make costs an issue during the negotiations, the terms of the contract would have been the same whether Merck's costs represented one percent, ten percent, or one hundred percent of the price the Government agreed to pay."⁹³

Justice Blackmun concluded his opinion by stating:

I would hold that when the terms of the contract are not tied to costs and the contractor makes no representations about costs during its negotiations with the Government, cost records do not "directly pertain to and involve transactions relating to the contract" and are not subject to inspection by the Comptroller General. The only records "directly pertinent" to such a contract would be those necessary to verify the terms of the contract and the representations upon which the contract was based.⁹⁴

IV. ANALYSIS OF *BOWSHER v. MERCK AND CO.*

A. *The Majority Opinion*

Following precedent, Justice O'Connor correctly focused on the wording of the access to records statutes as the first step in ascertaining the legislative intent.⁹⁵ The majority quickly concluded that the words "directly pertinent and involving transactions relating to the contract" lack specificity and the Court therefore resorted to the congressional debates and related legislative history. Other courts, however, had concluded that the language of the access statutes does provide helpful guidance. In *Eli Lilly and Co. v. Staats*,⁹⁶ the Seventh Circuit implicitly relied on the axiom that Congress ordinarily intends that words take on their usual legal meaning in legislative enactments.⁹⁷ The *Eli Lilly* court indicated that the word "direct", although difficult to apply in specific situations, usually denotes that something has a "logical, causal, and consequential relationship" to the ultimate issue.⁹⁸ Since the *Bowsher* Court conceded that Merck's nonallocated costs had a substantial connection to contract price, the Court should have given more heed to "direct's" traditional legal meaning.⁹⁹

The majority opinion gave undue weight to Representative Hoffman's amendment and his comments during the legislative debates. The Court

⁹³ *Id.* at 1609.

⁹⁴ *Id.*

⁹⁵ *E.g.*, Bread Political Action Comm. v. FEC, 455 U.S. 577 (1982); Dawson Chem. Co. v. Rohm and Haas Co., 448 U.S. 176, 187 (1980) (statutory construction begins with the statutory language).

⁹⁶ 574 F.2d 904 (7th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979).

⁹⁷ *Id.*

⁹⁸ *Id.* at 914.

⁹⁹ The customary meaning of a statutory term takes on even greater importance where, as here, the legislative history is arguably ambiguous. NLRB v. Plasterers' Local Union No. 79, 404 U.S. 116 (1971).

termed "authoritative" his statements on the "anti-snooping" policy behind his amendment.¹⁰⁰ By contrast, other courts and commentators had concluded that Representative Hoffman's "anti-snooping" comments are actually highly ambiguous.¹⁰¹ Further, the Court's reliance on his comments contravenes established canons of statutory construction. The Court has observed on other occasions that the "contemporaneous remarks of a single legislator who sponsors a bill are not to be controlling in analyzing legislative history."¹⁰² Contrary to the *Bowsher* analysis, the correct mode is to examine all aspects of a bill's progress through Congress, giving appropriate weight to all relevant considerations.¹⁰³ In this case, the total record shows that Representative Hoffman was basically an opponent—not a sponsor—of this bill¹⁰⁴ and his comments as an opponent should carry little weight in determining the legislative meaning.¹⁰⁵ Indeed, Representative Hoffman's sole contribution as "sponsor" was to insert "directly" before "pertinent"; the full record establishes that Representative Hoffman's sole reason for proposing this change was to prevent General Accounting Office rummaging in contractor business minimally relevant to government contracts.¹⁰⁶ As Judge Mikva stated in his opinion below, Representative Hoffman's amendment actually restated Representative Hardy's own position.¹⁰⁷ Consequently, the majority distorted the legislative history by terming the Hoffman amendment a *dual* aim of the access statutes. On the contrary, the total legislative history shows that Congress' *paramount* reason for enacting this bill was to allow the Comptroller General to examine all matters having a significant impact on

¹⁰⁰ The Court supported this assertion with the rule that a sponsor's explanation of the statutory language "is an authoritative guide to the statute's construction." 103 S. Ct. at 1593 (quoting *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982)).

¹⁰¹ In actuality, Representative Hoffman's references to Comptroller General "snooping" and related matters are unclear. *Eli Lilly and Co. v. Staats*, 574 F.2d at 916 n.8; Note, *Eli Lilly and Co. v. Staats*, *supra* note 20, at 136. Indeed, at one point, Representative Hoffman stated that he wished to "limit the snooping that may be carried on under this bill *which we do not have the votes to defeat*." *Merck and Co. v. Staats*, 665 F.2d at 1249 (Mikva, J., concurring and dissenting) (quoting 97 CONG. REC. 13377 (1951)) (emphasis added by the court). Thus, the legislative history arguably supports the conclusion that Congress gave little, if any, weight to Representative Hoffman's "anti-snooping" concerns.

¹⁰² *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 118 (1980).

¹⁰³ *Id.*; see also *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

¹⁰⁴ See 97 CONG. REC. at 13373-77 (1951).

¹⁰⁵ *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 639-40 (1967); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951).

¹⁰⁶ See *supra* text accompanying note 33; *Bowsher v. Merck and Co.*, 103 S. Ct. at 1603 (White, J., concurring and dissenting).

¹⁰⁷ *Merck and Co. v. Staats*, 665 F.2d at 1249 (Mikva, J., concurring and dissenting). In fact, strong evidence exists that *Representative Hardy*, not Representative Hoffman, originated the "directly pertinent" modification. *Bowsher v. Merck and Co.*, 103 S. Ct. at 1602 n.6 (White, J., concurring and dissenting) (analyzing 97 CONG. REC. at 13377).

government procurement; the *secondary* goal was to prohibit General Accounting Office infringement of contractor business privacy.¹⁰⁸

Given this reading of the legislative history, the Court properly could have relied on several other maxims of statutory construction to allow broad Comptroller General inspection. In *Platt v. Union Pacific Railroad Company*,¹⁰⁹ the Supreme Court ruled that a court may give determinative weight to a statute's primary goal as opposed to a secondary policy where implementation of the latter objective would impair the basic operation of the statute.¹¹⁰ Other canons support a similar result.¹¹¹ Thus, even assuming that the words "directly pertinent" have a limiting affect, the *Bowsher* Court had ample precedent to effectuate the inspection statute's primary policy over its secondary motive.

While stating that a sponsor's comments are "authoritative", the majority opinion also gave insufficient weight to Representative Hardy's explanations during the debates on these statutes. As primary sponsor, Representative Hardy offered several examples demonstrating the extremely broad reach of the Comptroller General's audit powers. For instance, Representative Hardy discussed a hypothetical situation in which the government bought parts from an automobile dealer who in turn purchased these parts from another dealer. According to Representative Hardy, his bill would enable the Comptroller General to inspect the prime contractor's "administrative" and handling costs as well as the subcontractor's profits.¹¹² This example shows conclusively that Representative Hardy envisioned Comptroller General access to all cost records having a substantial connection to contract price, including the very same indirect "administrative" costs the *Bowsher* Court excluded from statutory coverage. Although the majority opinion quoted the above example to illustrate the legislative purpose,¹¹³ the Court failed to apply the underlying principle in the instant case.

Justice O'Connor pointedly criticized the government's definition of

¹⁰⁸ 103 S. Ct. at 1601-03 (White, J., concurring and dissenting).

¹⁰⁹ 99 U.S. 48 (1878).

¹¹⁰ *Id.* at 65-66.

¹¹¹ *Rhodes v. Iowa*, 170 U.S. 412, 421-22 (1897) (A statute should be interpreted in light of its fundamental rule and policy and the remedy it was designed to create; a court should apply this rule rather than regarding the subtle signification of words and the niceties of verbal distinctions); *Peyton v. Rowe*, 391 U.S. 54, 65 (1968) (A remedial statute should be broadly construed); *Bob Jones University v. United States*, 103 S. Ct. 2017, 2025 (1983) ("[A] court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute")

¹¹² 97 CONG. REC. 13198 (1951). See also *id.* at 13372. (Representative Hardy indicating General Accounting Office's broad authority to examine a government subcontractor's complete records unless subcontractor supplied a minimally relevant item incident to primary contract).

¹¹³ 103 S. Ct. at 1593 n.9.

"directly pertinent" as containing "no doctrinal limitation."¹¹⁴ The Court might have mischaracterized the government's position because the General Accounting Office conceded that indirect costs must relate to the contract.¹¹⁵ More accurately, the government's formulation might be overbroad because its definition often has few *practical* limitations: the Comptroller General frequently needs total access to a contractor's cost records because the company's records may contain no breakdown for government and nongovernment contracts.¹¹⁶ This accounting practice thus presents a dilemma for the courts. As one commentator points out, "there can be no accommodation of the competing interests" when the Comptroller General requests inspection of indirect costs; "the GAO gets all of the information or it gets none of it."¹¹⁷ Since the statutes preclude a compromise solution, the Court should have allowed inspection in light of the statutes' overriding "pro-disclosure bias."¹¹⁸

The Court adopted the *Bristol* distinction between direct and indirect costs in construing the Comptroller General's audit powers.¹¹⁹ The Court also stated that it was analyzing the Comptroller General's inspection authority as a matter of statutory interpretation as opposed to examining the intention of the parties.¹²⁰ These two statements are inconsistent because the *Bristol* test is founded on an erroneous attempt to ascertain the intent of the contractor and the United States. As the *Bristol* court stated:

Although the access to records clause has its origins in statute, it is nevertheless a contractual provision. We are thus confronted with the task of construing the contracts, a task which turns on the intent and understanding of the parties regarding the import of the access to records clause at the time the contract was entered.¹²¹

The *Bristol* court's emphasis on the intent of the parties is incorrect because "[w]hen a clause is included [in a contract] by reason of congressional com-

¹¹⁴ *Id.* at 1595.

¹¹⁵ *Id.*

¹¹⁶ See *supra* note 45 and accompanying text.

¹¹⁷ Note, *Eli Lilly and Co. v. Staats*, *supra* note 20, at 139.

¹¹⁸ *Merck and Co. v. Staats*, 665 F.2d at 1250 (Mikva, J., concurring and dissenting).

¹¹⁹ 103 S. Ct. at 1596-97.

¹²⁰ *Id.* at 1591 n.6. *But see id.* at 1604 n.13 ("[C]ontractors like Merck . . . had no reason to expect that consenting to inclusion of the access-to-records clause would subject their business to [inspection of indirect cost records]"). This passage tracks similar language in *Bristol*. See *infra* note 121 and accompanying text.

Assuming that the contractor's intention is relevant, the company entered the agreement with knowledge of the clause and constructive knowledge, at least, of the Government's interpretation in *Hewlett-Packard*. *Merck and Co. v. Staats*, 665 F.2d at 1248 (Mikva, J., concurring and dissenting); *Eli Lilly and Co. v. Staats*, 574 F.2d at 918.

¹²¹ 428 F. Supp. 1388, 1390-91 (S.D.N.Y. 1977), *aff'd*, 620 F.2d 17 (2d Cir. 1980), *aff'd by an equally divided Court*, 451 U.S. 400 (1981).

mand, rather than as the result of contractual negotiations, the proper focus of inquiry is the intent of Congress."¹²²

The *Bristol* test is also unsatisfactory because its direct/indirect cost dichotomy is uncertain, overly mechanical and encourages contractors to adjust their books to frustrate Comptroller General review. Regarding the uncertainty, the *Bristol* test by definition includes overhead as a direct cost of manufacturing the particular item.¹²³ Like indirect costs, however, overhead is usually non-allocable to any one product.¹²⁴ By definition, the *Bristol* test avoids any examination of the facts or equities of a particular case.¹²⁵ Consequently, the *Bowsher* decision clearly obligates future courts to apply its holding in a mechanical manner.¹²⁶ This rigidity is highly questionable because the phrase "directly pertinent" indicates great flexibility.¹²⁷ The *Bristol* test also encourages contractor circumvention of the statute because the test contains one large exception for indirect costs the company previously attributed to a government contract.¹²⁸ This exception opens a possible loophole because contractors might then adjust their books to lump together costs of government and nongovernment contracts.¹²⁹ The instant litigation exemplifies how companies even with million dollar contracts fail to maintain separate books on their accounts.¹³⁰ The *Bowsher* decision thus provides companies with even less incentive to maintain separate indirect cost data for items produced incident to federal contracts.¹³¹

¹²² *Merck and Co. v. Staats*, 665 F.2d at 1248 (Mikva, J., concurring and dissenting). In support of this statement, Judge Mikva cited *G.L. Christian & Assoc. v. United States*, 320 F.2d 345 (Ct. Cl.), *cert. denied*, 375 U.S. 954 (1963). In *Christian*, the court held that a contractor was subject to a statutorily-required clause that the government contracting officer inadvertently had omitted from the solicitation. The *Christian* court read the clause into the contract as a matter of law, even though the parties obviously never actually contemplated its application. *Id.* By its terms, the *Christian* doctrine would almost certainly require the incorporation of the access to records clause if the agency omitted it from the solicitation. *Id.*

¹²³ 428 F. Supp. at 1389-91.

¹²⁴ *Eli Lilly and Co. v. Staats*, 574 F.2d at 913.

¹²⁵ *SmithKline v. Staats*, 668 F.2d at 212.

¹²⁶ 103 S. Ct. at 1596 and 1597 n.18.

¹²⁷ See *supra* notes 48 and 112 and accompanying text.

¹²⁸ 428 F. Supp. at 1390-91.

¹²⁹ *Bowsher v. Merck and Co.*, 103 S. Ct. at 1597 n.18 (White, J., concurring and dissenting). The government must normally accept the contractor's accounting system when this procedure accords with generally accepted accounting principles. Cf. Department of the Army Pamphlet 27-153, Procurement Law, p. 6-3 (stating standard).

¹³⁰ Judge Mikva noted in his opinion below that Merck had performed profitability accounting studies on other products regarding unallocated costs, even though the company disclaimed them as "essentially arbitrary." 665 F.2d at 1250 n.33. This case illustrates that Merck attempted allocation of indirect costs only when such studies served the company's best interests.

¹³¹ 103 S. Ct. at 1596. *But see* the Defense Production Act of 1950, 50 U.S.C. app. §§ 2061-2169 (1976) which subjects most negotiated prime and subcontract acquisitions exceeding \$100,000 to uniform cost accounting standards. *Id.* at § 2168. One standard is that defense contractors must

Finally, the majority opinion failed to give sufficient weight to the principle that the courts will give great deference to the long-standing construction of a statute by the agency charged with its enforcement unless the agency is clearly wrong.¹³² The Court avoided this principle in part because the General Accounting Office had allegedly rendered inconsistent interpretations of its statutory powers before Congress.¹³³ The Seventh Circuit in *Eli Lilly and Co. v. Staats*¹³⁴ had examined the same legislative history and reached a contrary assessment that the Comptroller General's views were consistent.¹³⁵ The *Bowsher* Court also avoided the rule of deference by stating that the Comptroller General's interpretation "is inconsistent with the statutory language."¹³⁶ This comment contradicts the Court's earlier statement that "the statutory language does not tell us exactly which records are subject to GAO examination."¹³⁷

B. Justice White's Opinion

In contrast to the majority and Justices Blackmun and Stevens, Justice White consistently employed a functional interpretation of the Comptroller General's inspection power. Justice White's broad reading of the access statutes accords with another established canon of statutory construction: if a statute has two valid interpretations, a court should adopt that interpretation closest to the policies of the enactment and mischief it seeks to prevent.¹³⁸

Justice White initially criticized the majority for devoting inadequate attention to the literal wording of the statute.¹³⁹ Although the majority termed

disclose in writing their cost accounting practices, including the contractor's method of distinguishing direct and indirect costs. *Id.* Merck's books were outside the Act because the statute contains an exemption for catalog or market price items sold in substantial quantities to the general public. *Id.* at § 2168(g). Of course, a contractor may properly nonallocate certain indirect costs to government contracts if this practice accords with generally accepted accounting principles. *See supra* notes 45 and 129.

The *SmithKline* court commented that the *Bristol* test would have little effect on the Comptroller General's ability to inspect contractor cost records "in industries where direct costs are the prime component of the price, where firms are producers of only one product, or where the firms sell almost everything they make to the government" 668 F.2d at 213 n.8.

¹³² *See supra* note 62.

¹³³ *See supra* note 63.

¹³⁴ 574 F.2d 904 (7th Cir. 1978).

¹³⁵ *Id.* at 915. (General Accounting Office had made a consistent interpretation of its access authority). *But see* *Bowsher v. Merck and Co.*, 103 S. Ct. at 1604 n.13 (White, J., concurring and dissenting) (agreeing with majority that the General Accounting Office had rendered inconsistent interpretations).

¹³⁶ 103 S. Ct. at 1595.

¹³⁷ *Id.* at 1592 n.7.

¹³⁸ *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 75-76 (1838).

¹³⁹ 103 S. Ct. at 1600 (White, J., concurring and dissenting).

"legislation" Justice White's interpretation of "directly pertinent,"¹⁴⁰ the majority's own analysis of the phrase is equally subject to this criticism. The statutes fail to detail the class of discoverable records and the statutes certainly contain no express distinction between direct and indirect costs. Justice White's closer reading of the full legislative history also discloses the secondary importance of Representative Hoffman's amendment and its true intention to prohibit only Comptroller General inspection of cost data minimally relevant to government procurement.¹⁴¹

Justice White's statutory construction is superior to the majority's version. His proposed formulation of the Controller General's audit power finds greater support in the statutes and their history and his standard is more realistic than the majority's rigid direct cost/indirect cost distinction. Justice White's test recognizes the realities of modern business because indirect costs can play a far more critical role than direct costs in determining contract price.¹⁴² Justice White's interpretation also gives adequate protection to contractor business privacy concerns, requiring the General Accounting Office to establish a substantial relationship between the requested record and the contract and to refrain from causing the company-undue expense or disruption during a Comptroller General audit.¹⁴³ In sum, Justice White's

¹⁴⁰ *Id.* at 1594 n.10. In rejecting Justice White's interpretation, the Court relied on Congress' rebuff in the 1970's of several bills expanding General Accounting Office access authority. *Id.*; *see also id.* at 1595 n.12. Other courts, however, have noted the canon of statutory construction that subsequent legislative history ordinarily carries very little weight in the interpretation of an earlier statute. *Eli Lilly and Co. v. Staats*, 574 F.2d at 916; *SmithKline Corp. v. Staats*, 668 F.2d at 206 (citing *United States v. UMW*, 330 U.S. 258, 281-82 (1947)); *City of Milwaukee v. Illinois*, 451 U.S. 304, 332 n.24 (1981) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980)).

¹⁴¹ 103 S. Ct. 1602-03 (White, J., concurring and dissenting). Justice White never squarely addressed the majority's argument that the words "directly pertinent" limit the Comptroller General's access power based on the principle that a reviewing court will give effect, if possible, to every word of a statute. 103 S. Ct. at 1593 (quoting *Fidelity Federal Savings and Loan Ass'n v. De La Cuesta*, 102 S. Ct. 3014, 3022 (1982)). The response would be that the "directly pertinent" language has a secondary meaning in light of the statute's predominant disclosure policy. *See supra* text accompanying notes 109-120.

¹⁴² *Id.* at 1601, 1604-05. *Accord*, *Eli Lilly and Co. v. Staats*, 574 F.2d at 913. Justice White noted that in the drug industry, direct costs amount to as little as nine percent of the contract price. 103 S. Ct. at 1604. Denying the Comptroller General access to the great preponderance of the company's cost data thus makes it "[i]mpossible for the GAO to make an accurate assessment of the fairness of the prices and . . . the adequacy of the Government's procurement technique." *Id.*; *accord*, *Merck and Co. v. Staats*, 665 F.2d at 1247 (Mikva, J., concurring and dissenting).

¹⁴³ 103 S. Ct. at 1606 (White, J., concurring and dissenting). Justice White would place the burden on the government of proving the pertinence of contractor cost records. *Id.* at 1605. This burden allocation would frequently defeat government access because "the burden of showing that such costs are irrelevant must fall on [the company] because only [it] has all the data necessary to make such a showing." *Merck and Co. v. Staats*, 665 F.2d at 1250 (Mikva, J., concurring and dissenting).

Justice White failed to consider that a broad Comptroller General inspection power could

practical reading of the access statutes supports the statutes' remedial intent and his proposed standard deters contractors from obtaining an unfair advantage during the procurement process, the very mischief the statutes seek to prevent.¹⁴⁴

C. Justice Blackmun's Opinion

Justice Blackmun employed a formalistic approach that obstructs the broad congressional purpose of "equaliz[ing] the relationship between the government and private contractors."¹⁴⁵ Justice Blackmun properly criticized the majority for interchanging "contract" with "product" and he correctly noted that the latter term would allow broader Comptroller General access.¹⁴⁶ Nevertheless, his technical criticisms of the majority analysis have only limited validity. He neglected to mention that the majority clearly tied direct cost records to contract price,¹⁴⁷ which is indeed a term of the contract. Consequently, direct cost data fall within even Justice Blackmun's definition of discoverable records under the statutes.

Justice Blackmun's narrow reading of the access statutes is weak in other areas. Justice Blackmun adopted Merck's theory that the Comptroller General may inspect contractor cost records only when the contract is cost based or when the parties discussed costs during contract negotiations.¹⁴⁸ This test conflicts with the statute, which evidences no limitation to cost-based contracts or to contracts negotiated with reference to costs.¹⁴⁹ The *Eli Lilly* court had specifically rejected this latter argument, commenting:

prompt potential contractors to avoid bidding on government contracts or to raise their prices to comply with the increased scope of potential General Accounting Office audits. *See Comment, Private Business Records, supra* note 20, at 1159 n.70. This result is unlikely, however, because government contracts are usually quite profitable and contractors know that the Comptroller General audits only a small percentage of all government procurements. *See supra* note 5.

¹⁴⁴ A related situation as yet unaddressed concerns contractor cost data with inextricably intermixed discoverable and nondiscoverable information. In this setting, the Comptroller General should have total access authority to effectuate the statutory purpose. *Cf. SCHNITZER supra* note 5 at 9 (noting similar result in Department of Defense audits).

¹⁴⁵ *Merck and Co. v. Staats*, 665 F.2d at 1247 (Mikva, J., concurring and dissenting). Conceivably, Justice Blackmun's opinion and, to a lesser extent, the majority opinion's narrow reading of the Comptroller General's inspection authority reflects the "generalized perception, among scholars and businessmen alike, that the GAO has come to exercise more authority . . . than was ever intended by Congress." *Comment, Private Business Records, supra* note 20, at 1158. The courts also have recognized the General Accounting Office's uncertain legal authority over private parties and even over members of the Executive Branch. *Id.* at 1155-56 nn. 56-57 (collecting cases).

¹⁴⁶ 103 S. Ct. at 1607-08 (Blackmun, J., concurring and dissenting). Justice Blackmun also remarked that the Ninth Circuit in *Hewlett-Packard* had used a similarly broad definition of contract. *Id.* at n.2.

¹⁴⁷ *Id.* at 1597 ("these costs . . . have a very direct influence on the price charged the Government . . .") (emphasis added).

¹⁴⁸ *Id.* at 1607.

¹⁴⁹ *E.g., Merck and Co. v. Staats*, 665 F.2d at 1243 (Mikva, J. concurring and dissenting);

[Eli Lilly's] proposed method of defining pertinence by analyzing what was negotiated would not serve even its interests in the long run because such a standard once adopted would simply encourage the Government to protract the negotiations by raising any conceivable issue which it later might want information and would allow the Government to make an issue pertinent simply by introducing it in the negotiations.¹⁵⁰

In effect, Justice Blackmun's proposed test for cost data narrows the Comptroller General's statutory inquiry from " 'directly pertinent' to the contract" to "'directly pertinent' to the negotiation."¹⁵¹ Contrary to Justice Blackmun's technical interpretation, Judge Mikva in his lower court opinion emphasized the business reality that contracts negotiated without regard to costs create a prime danger that the government will suffer a tremendous competitive disadvantage.¹⁵² Economists have noted that standard commercial prices can be a faulty guarantee of fair pricing because standard prices frequently result from non-competitive oligopolistic practices.¹⁵³ Finally, Justice Blackmun's proposed standard is deficient because the terms of Merck's contract contained the statutory requirement that the company include the access statute as a provision in its subcontracts.¹⁵⁴ "The express requirement concerning access to subcontract records is manifestly a cost and pricing item, and should have made Merck aware that cost records would be considered pertinent to its negotiated, fixed price contract."¹⁵⁵

Hewlett-Packard Co. v. United States, 385 F.2d 1013, 1016 (9th Cir. 1967), *cert. denied*, 390 U.S. 988 (1968); SmithKline Corp. v. Staats, 668 F.2d at 208.

¹⁵⁰ 574 F.2d at 914.

¹⁵¹ *Id.* The absence of competition can be particularly acute in the drug industry, especially considering the large number of patented items belonging to single companies. For example, in *Eli Lilly*, the court noted that six of the contracts were negotiated on a sole source basis. 574 F.2d at 907. In a sole source procurement, the government activity determines, after testing the market, that only one offeror can meet the government's minimum needs on a particular acquisition. Defense Acquisition Regulation 3-210; California Microwave, Inc., B-180954, 74-2 CPD 181 (1974). By definition, therefore, price considerations are nearly absent in sole source procurements. One authority has noted that sole source procurements amounted to 79.2 billion dollars in fiscal year 1982, more than half of all procurement dollars spent in that time period. See PERLMAN, SOLE SOURCE CONTRACTS, GOVERNMENT CONTRACTOR BRIEFING PAPERS 1 (July 1983).

¹⁵² Merck and Co. v. Staats, 665 F.2d at 1241 (Mikva, J., concurring and dissenting). Judge Mikva also commented:

No single purchaser of drugs is anywhere near as large or as non-competitively situated as is the United States government . . . It is too little appreciated that government, in a number of ways, may often require far greater protection in the marketplace than private individuals . . . [T]he inherent non-corrupt, non-fraudulent disadvantages that government often has in dealing with private contractors are only beginning to be understood. The very size of government purchases, and the necessity thereof, may make the traditional marketplace shields ineffective.

Id. at 1245-46.

¹⁵³ *Id.* at 1245 and n.23. *Accord*, *Eli Lilly and Co. v. Staats*, 574 F.2d at 915.

¹⁵⁴ See *supra* notes 26 and 27 and accompanying text.

¹⁵⁵ Merck and Co. v. Staats, 665 F.2d at 1244 n.19 (Mikva, J., concurring and dissenting); *ac-*

V. PROPOSED STATUTE

The following proposed statute incorporates the reforms suggested throughout this Article:

Subject to dollar thresholds set by agency regulations, all government contracts shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that likely have a substantial connection to the contract.

(1) The Comptroller General and his representatives may examine the above materials regardless of whether the contractor or subcontractor previously allocated its costs to a particular contract.

(2) The Comptroller General's right of access may include but is not limited to such matters as costs of material, labor, manufacturing, overhead, advertising, royalties, delivery, research and development, marketing and promotion, distribution, administration, and taxes.

(3) Contractor or subcontractor materials may be discoverable under this section although these materials are intermixed with otherwise non-discoverable materials.

(4) The contractor or subcontractor has the burden of showing by a preponderance of the evidence that the requested materials are outside the scope of this Section.

(5) If the contractor or subcontractor contests in whole or part a Comptroller General inspection demand, a United States district court may limit in its discretion the Comptroller General's right of access to the above materials if the contractor or subcontractor offers evidence that the Comptroller General's demand would entail unreasonable expense, undue disruption of its business operations, or both.

A. *Commentary*

The proposed statute corrects existing deficiencies in 10 United States Code section 2313(b) and 41 United States Code section 254(c). On their face, the present access statutes cover all negotiated government contracts even though agency regulations typically set a \$10,000 threshold. The proposal eliminates some confusion by referring expressly to pertinent agency regulations. Second, the proposal includes both negotiated and formally advertised contracts. This reform is necessary because the Comptroller General presently has no effective means to inspect contractor cost records incident to

cord, SmithKline Corp. v. Staats, 668 F.2d at 208-09. The term "subcontractor" covers only first tier subcontractors. SHNITZER, *supra* note 5, at 5. Although the access statutes exclude formally advertised prime contracts, the statutes cover subcontracts regardless of contract type. *Id.* at 6. The clause may be excluded, however, for subcontracts concerning general inventory items or contracts below \$10,000. *Id.* If a prime contractor improperly omitted the clause from a subcontract, a court would very likely include the clause in the subcontract as a matter of law under the *Christian* doctrine. *Id.*; see *supra* note 122.

formally advertised prime government contracts.¹⁵⁶ Although the statutes exclude these contracts because Congress believed that the greater competition guarantees fair pricing, the courts now realize that market prices can also be unreasonable.¹⁵⁷ Further, this reform finds support in other regulations and statutes. For example, Defense Acquisition Regulation 7-104.41 (a) grants the Department of Defense the right to audit all formally advertised contracts over \$100,000.¹⁵⁸ Also, the access statutes themselves permit Comptroller General examination of subcontractor cost records relative to formally advertised subcontracts.¹⁵⁹ Thus, the proposal broadens the Comptroller General's inspection powers consistent with his statutory fiscal responsibilities.¹⁶⁰

The model statute also improves on current law by rejecting the *Bristol* test and by incorporating Justice White's suggestion that the Comptroller General have access to all cost data that likely had a substantial impact on contract price. Although Justice White used the phrase "direct and substantial impact" on contract price, the proposal drops "direct" because this word is potentially misleading and indeed allowed the *Bowsher* Court to employ a narrow construction of the access statutes. The proposal further recognizes the contractor's right to business privacy by excluding Comptroller General review of records minimally relevant to government procurement. Similarly, the proposal permits the district court discretion to modify the Comptroller General's access if the contractor establishes that the General Accounting Office demand is unreasonable. Finally, the model statute places the burden on the contractor of showing that the requested records are outside the boundaries of the Comptroller General's audit authority. This reform recognizes the impracticality of placing this burden on the Comptroller General because only the contractor has the data necessary for such a showing.¹⁶¹

VI. CONCLUSION

The access statutes and their legislative history evidence a "pro-

¹⁵⁶ The federal government may also audit contractor records under such statutes and regulations as the Truth in Negotiations Act, 10 U.S.C. § 2306(f) (1976), Defense Acquisition Regulation 7-104.41(a), and Federal Procurement Regulation 1-3.809. Unfortunately, the agencies involved have the major responsibility of enforcing these directives, which are also fairly limited in coverage. *See supra* note 42. Thus, the Comptroller General presently faces substantial barriers in conducting systemic reviews of federal procurement.

The federal government lost a substantial deterrent to contractor fraud, waste, and abuse with the demise of the Renegotiation Board. *See supra* note 42. The government's diminished ability to recoup excess profits now makes the Comptroller General's inspection power an even more important weapon in the arsenal against improper contractor practices. *See also id.* (discussing other civil and criminal sanctions against contractors).

¹⁵⁷ *See supra* note 153 and accompanying text.

¹⁵⁸ *See supra* note 4 and accompanying text.

¹⁵⁹ *See supra* note 155 and accompanying text.

¹⁶⁰ *See supra* notes 1-3.

¹⁶¹ *See supra* note 143.

disclosure bias."¹⁶² As Judge Mikva stated in his lower court opinion, "The public business ought to be public; the government's right to know the costs incurred by its contractors is as important as the public's right to know the costs incurred by its government."¹⁶³ The *Bowsher* Court's adoption of the *Bristol* test is an inadequate reconstruction of the legislative intent. The Court's test therefore frustrates the overriding Congressional purpose of allowing Comptroller General scrutiny of contractor cost data having a significant connection to contract price.¹⁶⁴

Justice White's basic formulation better advances the avowed legislative purpose of equalizing the competitive relationship between the federal government and private contractors. The proposed statute also attempts to improve on Justice White's test in several ways. First, the model statute applies to all procurements regardless of contract type. Second, the proposal requires the contractor to show the unreasonableness of the Comptroller General's demand because only the contractor has access to the requisite information.

Finally, the *Bowsher* majority opinion indicated that Congress could overrule the decision by enacting appropriate legislation.¹⁶⁵ In the author's view, Congress should accept the challenge and modify the access statutes to enhance the Comptroller General's inspection power commensurate with his legislative mandate.

¹⁶² *Merck and Co. v. Staats*, 665 F.2d at 1250 (Mikva, J., concurring and dissenting).

¹⁶³ *Id.*

¹⁶⁴ It bears emphasis that *Bowsher* decided only the scope of Comptroller General review in fixed price negotiated government contracts. *See supra* notes 40-42. In dicta, the Court indicated that the Comptroller General has far greater inspection power in cost based procurements. *See supra* note 69.

¹⁶⁵ 103 S. Ct. at 1598. Indeed, the *Bowsher* Court indicated that the Government could properly require total inspection of a contractor's books as a condition of the contract. *Id.* at 1591 n.6.