

In the

# Supreme Court of the United States

ELMER B. STAATS, COMPTROLLER )  
GENERAL OF UNITED STATES )  
ET AL., )

PETITIONERS, )

No. 80-264

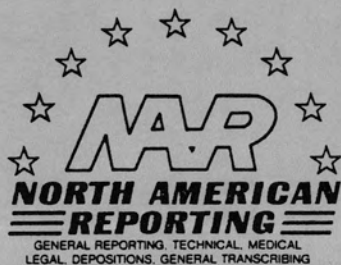
V. )

BRISTOL LABORATORIES DIVISION )  
OF BRISTOL-MYERS COMPANY )

Washington, D.C.  
March 24, 1981

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BRISTOL LABORATORIES DIVISION :  
OF BRISTOL-MYERS COMPANY :  
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Washington, D. C.  
Tuesday, March 24, 1981

The above-entitled matter came on for oral ar-  
gument before the Supreme Court of the United States  
at 2:18 o'clock p.m.

APPEARANCES: **CONTENT**

MARK I. LEVY, ESQ., Assistant to the Solicitor  
General, U. S. Department of Justice, Washington,  
D.C. 20530; on behalf of the Petitioners.  
  
GILBERT H. WEIL, ESQ., Bristol Laboratories Division  
of Bristol-Myers Company, 60 East 42nd Street,  
New York, N.Y. 10165; on behalf of the Respondent.

C O N T E N T S

ORAL ARGUMENT OF

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MARK I. LEVY, ESQ.,  
on behalf of the Petitioners

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GILBERT H. WEIL, ESQ.,  
on behalf of the Respondent

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MILLERS FALLS  
ERASE  
COTTON CONTENT



P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in *Staats v. Bristol Laboratories*. Mr. Levy, I think now you may proceed, if you're ready.

ORAL ARGUMENT OF MARK I. LEVY, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. LEVY: Thank you, Mr. Chief Justice, and may it please the Court:

This case is here on writ of certiorari to the United States Court of Appeals for the 2nd Circuit. The sole question presented by our petition is whether the Comptroller General of the United States in discharging the statutory responsibility to determine the reasonableness of the price charged the Government in a negotiated contract is authorized by law to examine records of a contractor's unallocated costs that are an integral and significant part of a contractor's business and are defrayed from funds that include the Government's payments under the contract.

The relevant facts are straightforward and uncontested. In 1973 and 1974 respondent Bristol Laboratories entered into three contracts with the Department of Defense and into one contract with the Veterans Administration for the sale of pharmaceutical products to the Government. All four were negotiated fixed price contracts for the total price of approximately \$2 million.



1           As required by 10 USC 2313(b) and 41 USC 254(c)  
2 each of the contracts contained a standard access-to-records  
3 clause in which respondent agreed that the Comptroller  
4 General shall have access to and right to examine any direct-  
5 ly pertinent books and records of respondent involving  
6 transactions related to the contract.

7           Pursuant to these statutory and contractual provi-  
8 sions, the Comptroller General in August, 1974, made a timely  
9 request to respondent for access to all books and records  
10 directly pertinent to the contracts, including records of  
11 experienced costs, support for the prices charged the Govern-  
12 ment, and such other information as may be necessary for  
13 us to review the reasonableness of the contract prices, and  
14 the adequacy of the protection afforded the Government's  
15 interests.

16           The Comptroller General explained that GAO was re-  
17 viewing the increasing federal procurement of drug products  
18 and that the requested records were necessary to that review.  
19 Respondent agreed that it was obligated to make available  
20 certain of its cost records but it refused to produce the  
21 remainder of the requested materials. Thereafter, in March,  
22 1975, it commenced the present action against the Comptroller  
23 General for declaratory and injunctive relief.

24           The United States intervened as a defendant and  
25 filed a counterclaim for access to the records sought by the

1 Comptroller General. Following discovery, the District Court  
2 granted respondent's motion for summary judgment and denied  
3 the Government's cross-motion. The court concluded that  
4 respondent had reasonably construed the access provisions by  
5 offering to furnish records of its direct manufacturing costs,  
6 manufacturing overhead, royalty expenses, and delivery costs;  
7 all of which respondent had allocated to individual products  
8 and had expressly considered in setting its prices.

9 The court also agreed with respondent that the  
10 access provision did not extend to records concerning  
11 respondent's costs of research and development, advertising  
12 and promotion, distribution, and administration. In addition  
13 the court subsequently granted respondent's request for a  
14 protective order as agreed upon by the parties.

15 On the Government's appeal the Court of Appeals af-  
16 firmed in a per curiam opinion for the reasons stated by the  
17 District Court.

18 QUESTION: Mr. Levy, to what extent, if any, do you  
19 disagree with Judge Lasker's conclusion that we have to deal  
20 with this case in a contractual context rather than a statu-  
21 tory context?

22 MR. LEVY: We think Judge Lasker fundamentally mis-  
23 conceived the question before the Court. We think it is ex-  
24 clusively a question of statutory construction.

25 First, it's clear, I believe, that the contractual

1 provision that was included in the contracts was meant to be  
2 coterminous and synonymous with the requirements of the  
3 statute; the language is virtually identical and no one could  
4 have intended anything else. But, apart from whatever the  
5 intent of the parties might have been at the time in a con-  
6 temporaneous understanding, apart from that question, we  
7 think it's a matter of law with the construction of the statute  
8 which governs this case rather than the subjective intentions  
9 of the parties, and we think that is a statement of general  
10 applicability, as we cite to Professor Corbin and others in  
11 our reply brief.

12 So the sole question before the Court, in our view,  
13 is the construction of the access-to-records statutes.

14 The Court of Appeals in affirming Judge Lasker's  
15 opinion specifically declined to follow the intervening deci-  
16 sions of the 7th Circuit in the Eli Lilly and Abbott Labs  
17 cases which had rejected the holding of the District Court  
18 in the present case and had sustained access requests by GAO  
19 that were identical to the request it made of respondent.

20 Accordingly, the single issue presented in this case  
21 is the Comptroller General's right of access to records with-  
22 held by respondent pertaining to its costs of research and  
23 development, advertising and promotion, administration, and  
24 distribution.

25 Respondent does not dispute that these costs are an



1 integral and significant part of its pharmaceutical business.  
2 Indeed, it has been generally estimated that indirect costs  
3 like these constitute as much as 91 percent of the price of a  
4 drug product, and the pharmaceutical companies spend approxi-  
5 mately 12 percent of sales revenues on research and develop-  
6 ment alone. It is also clear that payments by the Government  
7 under the contracts in question here were used as part of  
8 respondent's general revenues to defray these costs of doing  
9 business.

10 Nevertheless, respondent contends the records of  
11 these costs are categorically outside the scope of the access  
12 provisions. Although his position is not entirely clear,  
13 respondent seems to advance two different interpretations.  
14 First, that access is authorized only for records of costs  
15 that are computed or allocated on a product basis and are  
16 expressly taken into account in setting the prices for  
17 the items sold to the Government. Or, second, that the right  
18 of access is limited to records of manufacturing and other  
19 costs specifically incurred in performing the particular  
20 contracts.

21 QUESTION: May I interrupt just to get something  
22 on the table? Would you in the course of your argument tell  
23 us why it's important for the Government to know how the  
24 money spent on research and development was spent? I mean,  
25 why do you want that information?

1 MR. LEVY: We need that information in order to  
2 determine the full costs of the products that the Government  
3 bought.

4 QUESTION: Would you challenge the fact that they  
5 spent as much as they say they spent on research?

6 MR. LEVY: We don't know how much they spent on it.  
7 If they were able to tell us, for example --

8 QUESTION: Don't they even given you the percentage  
9 of their total expenditures that go into research and develop-  
10 ment?

11 MR. LEVY: I'm not aware that we have even that  
12 information, and if that information were available --

13 QUESTION: If they give you a balance sheet figure  
14 that this year we spent \$97 million on research and develop-  
15 ment, would that satisfy you?

16 MR. LEVY: Subject to the need to verify the accu-  
17 racy of that figure and any internal allocation --

18 QUESTION: Well, say they gave you their tax  
19 returns that showed it was accurate?

20 MR. LEVY: Assuming that that's the same relevant  
21 definition of research and development --

22 QUESTION: What I'm asking you is do you really want  
23 to look at how much they spent on different kinds of experi-  
24 ments and --

25 MR. LEVY: No, we don't --

1 QUESTION: Do you really know what you're looking  
2 for here is why I'm asking these questions?

3 MR. LEVY: What we're looking for is defined by the  
4 purpose of the statutes, I believe. In order to determine  
5 the reasonableness of the price charged the Government, it  
6 is necessary at least in this kind of a case where respondent  
7 doesn't fully allocate its costs, in order for the Comptroller  
8 General to construct a measure of the aggregate cost for the  
9 items that are sold the Government.

10 This essentially consists of an effort to determine  
11 the portion of the total costs of respondent's pharmaceutical  
12 business that's assignable to the items purchased by the  
13 Government.

14 QUESTION: Well, they tell you what's assignable  
15 to it. They tell you all their direct costs and manufacturing  
16 costs, as I understand it. The only thing they don't tell  
17 you is the unallocated costs.

18 MR. LEVY: They don't. Those unallocated costs  
19 consist of --

20 QUESTION: I don't know why you -- I still don't  
21 understand why it's important to you to go behind some kind  
22 of a lump sum figure on all of those.

23 MR. LEVY: Because we don't have a lump sum figure  
24 on the totality of their costs. We only have a figure on  
25 certain select portions of their costs.



1 QUESTION: If they charged you \$10 for a product  
2 and they say, we can show that \$2.90 is attributable to direct  
3 cost. The other \$7.10 is either unallocated costs or profit.

4 MR. LEVY: And the Comptroller General needs to  
5 determine the reasonableness of that price in relation to the  
6 full cost.

7 QUESTION: Would it matter if, of the \$7.10 in my  
8 hypothetical, if \$1 was profit and \$7 research or -- I don't  
9 understand what difference it makes. It seems to me you might  
10 well say, if your direct costs are less than 20 percent or  
11 something, the price is out of line. But I don't know why  
12 you care about how they, what they do about the other 80  
13 percent.

14 MR. LEVY: We care because we need to determine  
15 what the full cost is of the products we buy. If there were  
16 some way of determining from the direct costs, if it were  
17 invariably true that direct costs were always exactly 10  
18 percent, then we might be able to make that extrapolation.

19 QUESTION: You always will know what the percentage  
20 of price that the direct costs represent.

21 MR. LEVY: I don't believe so. We won't know what  
22 portion of the remainder is attributable to other costs that  
23 are fairly assignable to the cost of doing business.

24 QUESTION: They say none of it's assignable to the  
25 product.

1 MR. LEVY: They say none of it is allocated, but  
2 Bristol is conducting a pharmaceutical business here. Its  
3 profits from the sales to the Government and to other pur-  
4 chasers have to fund the ongoing expenses of general overhead,  
5 advertising and promotion, and so on.

6 QUESTION: Well, isn't the allocation what the  
7 Comptroller General is trying to find out about?

8 MR. LEVY: That's exactly what the purpose of the  
9 inquiry is.

10 QUESTION: You can't answer it without seeing it,  
11 can you?

12 MR. LEVY: That's right. If it turns out that a  
13 fair allocation under generally accepted accounting principles  
14 shows that these other costs of doing business constituted  
15 a very small addition to the direct manufacturing costs, the  
16 difference between the cost and the price would be exorbitant,  
17 the margin would be unreasonable, and GAO could well bring  
18 this to the attention of Congress or to the procuring agencies  
19 in order to change the way in which the Government procures  
20 its pharmaceutical products.

21 On the other hand, if these other costs of doing  
22 business turn out to constitute most of the price leaving a  
23 reasonable difference between the cost and the price, then  
24 the present system is adequate to protect the Government's  
25 interest and no change may be in order. But it's exactly to

1 determine the answer to that question that it's necessary to  
2 inquire into the costs at least here where there is such a  
3 large proportion of unallocated cost, the cost, that is, that  
4 Bristol itself does not allocate.

5 That does not mean that the costs are not attribut-  
6 able to this product and all other products and it's the divi-  
7 sion, the allocation of those general costs that's the  
8 burden of the accountants who've gone in and looked at the  
9 records.

10 QUESTION: Mr. Levy, were these drugs standard  
11 drugs that were available for purchase by the public gener-  
12 ally?

13 MR. LEVY: As I understand it, they were what are  
14 called ethical pharmaceuticals which require a prescription.  
15 Yes, with a doctor's prescription, they were standard items.

16 QUESTION: And did the Government pay the same  
17 price that the public paid?

18 MR. LEVY: I believe it paid the standard wholesale  
19 price that Bristol offers.

20 QUESTION: Was there any suggestion that there was  
21 any conspiracy to maintain prices at an improper level?

22 MR. LEVY: We did not allege that and we don't  
23 think that access depends on any antitrust theory.

24 QUESTION: The statute, I take it, gives you the  
25 right to inquire in order to satisfy yourselves without just



1 taking anybody's word on that?

2 MR. LEVY: I think that's one purpose and it may  
3 serve -- the fact that this is a standard item sold to the  
4 public in substantial quantities gives some assurance, no  
5 question, that the price was reasonable. But this access to  
6 records statute gives us a way of checking that assurance.

7 QUESTION: This is quite different, isn't it, from  
8 negotiating a contract to build a submarine or aircraft car-  
9 rier or to buy an airplane or a tank?

10 MR. LEVY: I presume it is different from those;  
11 that is correct.

12 QUESTION: Mr. Levy, at least don't you have some  
13 assurance when you just acknowledged that the price to the  
14 Government is comparable to what is charged other purchasers  
15 on a wholesale basis?

16 MR. LEVY: I think that is some assurance, but  
17 Congress determined that the market mechanism is not suffi-  
18 cient assurance to make sure that the public funds were not  
19 being unnecessarily expensed and that the prices charged the  
20 Government were not excessive. There may be a number of rea-  
21 sons wholly apart from any antitrust violation why the prices  
22 charged the Government might be unreasonable even though they  
23 were based on standard catalog price.

24 QUESTION: Well, isn't it possible too that Govern-  
25 ment could get a lower wholesale price?

1 MR. LEVY: That might be possible.

2 QUESTION: If they had full knowledge, as the  
3 statute seems to authorize them to do.

4 MR. LEVY: Exactly, because of the Government's  
5 unique position it might be able to better procurement tech-  
6 niques to obtain a price more favorable than that customarily  
7 charged the general public.

8 QUESTION: May I ask one other question? Question about  
9 the rate. Judge Lasker analyzed your theory and he concluded  
10 that under their allocation -- there are no excludable  
11 records under your theory. You have to see everything. Do  
12 you disagree with his appraisal of the request in this case?

13 MR. LEVY: We do disagree with that.

14 QUESTION: What is it that they would not have to  
15 show you?

16 MR. LEVY: It's hard for me to identify document  
17 by document since GAO hasn't yet had the opportunity to study  
18 the record-keeping system of Bristol. The actual audit that  
19 is conducted --

20 QUESTION: Well, you've had some opportunity. They  
21 did tender some records, didn't they?

22 MR. LEVY: They did but no inspection has yet  
23 occurred, pending the outcome of this litigation. The actual  
24 audit to be conducted will depend very heavily on the nature  
25 of respondent's record-keeping system. It may be the case,

1 for example, that the records will show that certain costs  
2 are exclusively borne by or can be completely allocated to  
3 a non-government purchaser, in which event they would not  
4 be assignable to the government contracts and would not need  
5 to be examined here except, as I say, for purposes of veri-  
6 fication.

7 For example, in the advertising category, if  
8 Bristol has a contract with an advertising firm on a retainer  
9 basis or in some other way, and therefore, as it happens,  
10 advertises nothing but a certain product and that product is  
11 not one that the Government purchased under these contracts,  
12 then when the auditors look at that charge from the advertising  
13 company, that expense, and they convince themselves that there  
14 is no relationship whatever to the products that the Government  
15 purchased, then that cost would not need to be examined any  
16 further.

17 QUESTION: In other words your purpose is to see  
18 if you cannot allocate costs to non-government business.  
19 You'd have to do a rather thorough audit.

20 MR. LEVY: The thoroughness of the audit will  
21 depend in large part on the record-keeping that the respondent  
22 maintains. We haven't seen that yet, and so it's hard to know.

23 QUESTION: You haven't looked at what they've  
24 given you yet, either.

25 MR. LEVY: Excuse me, Your Honor?



1 QUESTION: You have not looked at what they've given  
2 you yet?

3 MR. LEVY: We have not, as I say, pending the out-  
4 come of this litigation. So it's hard to answer categori-  
5 cally, but it does seem to us that it cannot be said that  
6 consistent with the statute these entire categories of records  
7 should be outside the scope of the review, which is the posi-  
8 tion that the respondent takes here. We are not at the posi-  
9 tion in which we're trying to decide whether a particular  
10 subclass of cost or whether a particular document is rele-  
11 vant to the inquiry or not. That will be subject to the  
12 informal negotiations and give-and-take of the audit process,  
13 just as in civil discovery or subpoena demands, for example.

14 The question here is whether these types of cost  
15 records are to be entirely outside the bounds of GAO --

16 QUESTION: Well, Mr. Levy, you do have the prob-  
17 lem, I gather, that when Congress amended this statute to  
18 add "directly pertains to" it had some purpose in mind in the  
19 way of limitation, didn't it?

20 MR. LEVY: I'll confess it's hard to know what  
21 Congress had in mind, but, no, we --

22 QUESTION: No, no, but doesn't this language on its  
23 face suggest Congress was imposing a limitation?

24 MR. LEVY: I don't believe so.

25 QUESTION: Oh.

1 MR. LEVY: Because, first, I don't think that the  
2 language "directly pertinent," on the face of the statute --

3 QUESTION: Well, if that was added to the statute?

4 MR. LEVY: -- the modifier "directly" was added  
5 as a floor amendment --

6 QUESTION: And isn't there some legislative history  
7 that suggests it was added because Congress wanted to limit  
8 it?

9 MR. LEVY: The legislative history is very sparse.  
10 The amendment was proposed by Representative Hoffman.

11 QUESTION: Why do you think Congress added that  
12 word?

13 MR. LEVY: I think the word serves only as one of  
14 emphasis to underscore to GAO --

15 QUESTION: Congress went to all this trouble just  
16 to add that word?

17 MR. LEVY: Well, it wasn't all that much trouble.  
18 The legislative history is as follows. The Hardy amendment,  
19 the Hardy bill, which is the principal basis for the sta-  
20 tutes, included the requirement that the records be pertinent.  
21 On the floor of the House the word "directly" was added as a  
22 floor amendment by Representative Hoffman. There was no  
23 discussion or debate upon that provision. It was an amend-  
24 ment to which Representative Hardy did not disagree; he was  
25 fully willing to accept it. And it followed closely the

1 rejection of another amendment offered by Representative  
2 Harvey that sought to accomplish a significant narrowing of  
3 the statute in much the same way the respondent urges here.  
4 That amendment was opposed by Representative Hardy and it  
5 was defeated by a voice vote in the House. So we think, in  
6 those circumstances, the addition, the inclusion of the  
7 modifier directly in front of "pertinent" does not indicate  
8 that Congress had in mind any significant different purpose  
9 or any difference in character than the bill that was  
10 originally introduced by Representative Hardy.

11 QUESTION: And what do you say Congress' purpose  
12 was?

13 MR. LEVY: We think its purpose there was simply to  
14 emphasize to GAO that it should have a legitimate need before  
15 undertaking examination of a contractor's records and should  
16 not, in the language of the Representative introducing the  
17 amendment, should not go "snooping" without reason. We think  
18 that purpose in all probability would have been adequately  
19 served by the word "pertinent." But Congress, to make sure  
20 that message was clear to GAO and recognizing the likely  
21 objections by the business community, added the modifier to  
22 emphasize the point. We don't think it changes the meaning  
23 of the statute in a significant way, as I say. Representative  
24 Hardy was fully amenable to it.

25 QUESTION: What would you do to them if they don't



1 give you this information?

2 MR. LEVY: Well, what has happened here is we've  
3 brought lawsuits, or where a drug company is involved --

4 QUESTION: I thought they brought the lawsuit.

5 MR. LEVY: Well, in one or two cases we commenced  
6 litigation and in the others the drug companies did.

7 QUESTION: To do what?

8 MR. LEVY: Usually to seek declaratory and injunc-  
9 tive relief, either to enforce our rights under the contract-  
10 ing statute or to prevent GAO's inspection.

11 QUESTION: Now, assuming that they tell you,  
12 we're not going to give you the information, what can you  
13 do about it?

14 MR. LEVY: We would initiate litigation. If we  
15 prevailed --

16 QUESTION: And to make them give it to you under  
17 pain of going to jail?

18 MR. LEVY: Oh, I fully believe so if they  
19 violated a court order that construes the statutes in accor-  
20 dance with our --

21 QUESTION: But you're not under a court order yet.  
22 I said, you would sue them for an injunction?

23 MR. LEVY: Yes, and if we prevailed, then we would  
24 have a court order that could be imposed.

25 QUESTION: And your only basis for it is what?

1           MR. LEVY: The language of the statutes, the  
2 legislative history, and it would be based on GAO's legal  
3 right to review these records in order to determine the  
4 Government procurement system is working efficiently and eco-  
5 nomically in its expenditure of public funds.

6           QUESTION: Suppose, Mr. Levy, that for whatever rea-  
7 sons the Department of Justice reached the point where it  
8 thought that there were some problems. Is there any barrier  
9 to their sending the FBI accountants in to this company and  
10 going to them from attic to basement?

11          MR. LEVY: I must say I don't know what the authority  
12 of the FBI is. We're concerned here only with GAO's author-  
13 ity. If there were some legitimate reason to suspect criminal  
14 activity or something else --

15          QUESTION: Would it have to be criminal?

16          MR. LEVY: Something within the legitimate domain  
17 of the Federal Bureau of Investigation.

18          QUESTION: It could be here or it could be a civil  
19 claim, a potential civil claim against the company for over-  
20 charges, or --

21          MR. LEVY: If this were a claim that were subject  
22 to renegotiation and if that's a proper purpose of the Federal  
23 Bureau of Investigation, certainly they could investigate it.  
24 But what Congress did here was add the --

25          QUESTION: Well, as a matter of fact, couldn't we

1 take judicial notice that that's precisely what the Depart-  
2 ment of Justice does and has done for many, many years?

3 MR. LEVY: I believe the Court could take notice of the  
4 function of the agency. I believe that's correct but what Congress  
5 said here is that it specifically delegated to GAO as its arm -- GAO  
6 is a body under the control of Congress rather than the Executive  
7 Branch -- and it vested special authority in the Comptroller  
8 General to determine the reasonableness of the contract  
9 price in negotiated contracts and to assess the adequacy of  
10 the protection afforded the Government's interest. Congress  
11 has always been concerned and its concern is manifested in  
12 the legislative history of this statute that negotiated con-  
13 tracts require close supervision and control.

14 QUESTION: Mr. Levy, let me ask you one question.  
15 I forget about this. Are these contracts subject to renego-  
16 tiation if the prices were excessive or do you want the infor-  
17 mation for future negotiated contracts?

18 MR. LEVY: In this case the contracts are not sub-  
19 ject to the Renegotiation Act, which in any event has now  
20 expired.

21 QUESTION: Don't you have another remedy? If they  
22 didn't give you enough information, you could say, well,  
23 we're just not going to give you any more contracts because  
24 these, on the face of them, look outrageous.

25 MR. LEVY: Prospectively, that would be true, but



1 I think we have a right even as to contracts that are in exis-  
2 tence now and have been previously executed, and I thought  
3 that was the question Mr. Justice Marshall was addressing to  
4 me.

5 QUESTION: Of course, some courts of appeals' opin-  
6 ions have held that that they can't "blacklist" a contractor  
7 without some kind of notice and hearing. I don't think this  
8 Court has ever --

9 MR. LEVY: I don't think at all that this is black-  
10 listing. If Congress had required that a provision be included  
11 in a contract and a contractor refuses to accede to that, to  
12 adhere to that congressional requirement, I think it would  
13 be incumbent upon GAO, the procuring agency, not to enter  
14 into any further contracts with that contractor.

15 QUESTION: Well, Mr. Levy, if you've got everything  
16 you wanted and then it was determined that the price was  
17 25 cents too high, would you be able to recoup it from the --

18 MR. LEVY: Not in this case, as I say, these con-  
19 tracts are not subject to the Renegotiation Act which expired  
20 in 1976, in any event. But if a 25 percent excessive pricing  
21 here was on a base of five or ten cents and represented  
22 a 250 percent markup or excessive profit, that could well be  
23 the basis for recommendations to the procuring agencies or to  
24 Congress itself for changes in the procurement process.

25 QUESTION: But you wouldn't be able to get that

1 excess back, would you?

2 MR. LEVY: Not for the previously expended monies.

3 QUESTION: Incidentally, we have no constitutional  
4 question here at all?

5 MR. LEVY: There is no constitutional question, as  
6 I say, I believe it's solely a statutory question.

7 QUESTION: It's nothing but the statute?

8 MR. LEVY: That's correct.

9 QUESTION: Is this a public company, by the way?

10 MR. LEVY: A public company under the Securities  
11 and Exchange Act?

12 QUESTION: Yes, do they have publicly available  
13 financial statements?

14 MR. LEVY: Yes. I know they have 10-K's and other  
15 registration statements, that sort of thing. And my under-  
16 standing is that the respondent in this case, Bristol  
17 Laboratories, is an unincorporated division of Bristol-Myers  
18 Corporation.

19 QUESTION: I see, so they may not have division  
20 accounting?

21 MR. LEVY: Exactly, but Bristol-Myers is the parent  
22 of the unincorporated division and is a publicly registered  
23 corporation. The courts of appeals prior to this case in  
24 the Hewlett-Packard and Eli Lilly decisions have construed  
25 the legislative history of the access statutes to which I

1 referred a moment ago to effectuate the congressional intent  
2 of permitting the Comptroller General to determine the rea-  
3 sonableness of the contract price and the adequacy of the  
4 protection afforded the Government's interests. These courts  
5 recognized that Congress intended an inquiry by the Comptroller  
6 General into whether costs are excessive in that if the costs  
7 were out of line with the contract price, the Comptroller  
8 General could recommend other methods of meeting future  
9 procurement needs. In the same way, virtually all commenta-  
10 tors have recognized that the broad remedial rights that the  
11 access provisions vest in the Comptroller General to evaluate  
12 the economy and efficiency of negotiated procurements.

13 QUESTION: Well, it's a little bit like a congres-  
14 sional investigation, isn't it? Because after all the  
15 Comptroller General represents Congress. A committee of  
16 Congress could certainly call witnesses to determine pricing  
17 and government procurement policies.

18 MR. LEVY: I'm sure a committee of Congress could  
19 do that. We think the statute here has authorized GAO to  
20 do much the same thing. It may turn out to be the case in  
21 some or many of these instances that the Comptroller General  
22 concludes that the price charged was reasonable. It may  
23 turn out that that's not the case. We simply don't know.  
24 And without that information it's not possible to propose  
25 or to adopt changes in the procurement system that may be



1 necessary in order to protect the Government's legitimate  
2 interest. On the other hand, if we make changes in the  
3 procurement system that are unnecessary to address any real  
4 problem, we may add increased burden and expense and delay  
5 to the procurement process. In other words, it's only by  
6 having full access to the information that Congress envi-  
7 sioned when it enacted the access statutes that the Control-  
8 ler General can fulfill the congressional objective to pro-  
9 mote efficient and effective procurement techniques by the  
10 Government.

11 QUESTION: When you ask for full access, I guess  
12 you really want to read the words "directly pertinent" -- I  
13 mean, the statute, as though those words just weren't in the  
14 statute?

15 MR. LEVY: No, we think that wording in the statute --

16 QUESTION: Because you haven't suggested to me any  
17 limit on what you want to see, which you have the right to  
18 see. I mean, as you go into it and say, we need a little  
19 more, you could ask for an entire audit of the entire company,  
20 if I understand you.

21 MR. LEVY: I don't think that would be at all  
22 necessary. As I say, it's difficult for --

23 QUESTION: Well, Judge Lasker thought it would  
24 be in this case. You don't know because you haven't looked at  
25 the record, but don't we have to assume that in order to

1 satisfy yourselves you may need to look at everything?  
2 Because I don't -- or can you tell me one category of records  
3 that you would say you would never want to look at?

4 MR. LEVY: I think I can. First, let me emphasize  
5 that this is limited to respondent's domestic ethical pharma-  
6 ceutical business, and not any other businesses he engages in  
7 such as veterinary products or other things. Second, we're  
8 seeking here --

9 QUESTION: Would you say that even if research and  
10 development is combined for all those other divisions in this  
11 division?

12 MR. LEVY: Then there would be an allocation of  
13 the total pool.

14 QUESTION: Who would make it? They wouldn't --  
15 say they don't make it, they just say, we have research and  
16 development, we have our foreign business, our veterinary  
17 business, and all the rest, it's \$97 million.

18 MR. LEVY: And they say they're unable to allocate  
19 it?

20 QUESTION: They just as a matter of accounting  
21 practice don't allocate it.

22 MR. LEVY: Okay. If they don't but they could and  
23 we were --

24 QUESTION: They always could. I mean, a good ac-  
25 countant can always --

1 MR. LEVY: We would accept that allocation subject  
2 to verification --

3 QUESTION: But you would want to be able to verify it  
4 by looking at the records of the foreign business and the  
5 veterinary business.

6 MR. LEVY: If it were necessary to do that --

7 QUESTION: So there is really no category you don't  
8 want to have the right to look at if you think it's necessary  
9 in order to make a proper allocation.

10 MR. LEVY: Only if it's necessary to verify the  
11 information that we have been otherwise provided.

12 QUESTION: Well, they say, we don't allocate, and  
13 you say, you have a duty to allocate, and if you don't do it  
14 yourself we want to look at the records that will enable us  
15 to do it.

16 MR. LEVY: Then we would take a look at the total  
17 for all and allocate the portion that's representative to the  
18 pharmaceutical industry.

19 QUESTION: That you determine as representative.

20 MR. LEVY: In consultations, as GAO always does in  
21 accordance with standard practice, with the respondent --

22 QUESTION: Incidentally, was "directly" added to  
23 254(c) the same time "directly" was added to 2313(b)?

24 MR. LEVY: Yes, they were a part of that same  
25 common statute that were enacted at the same time.



1 QUESTION: Mr. Levy, you said that even if there  
2 were no allocation the company would have to do it. Research  
3 and development comes up with a wonder product that helps  
4 cure cancer. How do they allocate that between drugs they  
5 sell abroad and those they sell in the United States,  
6 the cost of research and development?

7 MR. LEVY: Are you asking how Bristol has held --

8 QUESTION: How any company; how would you do it?  
9 You have a research and development department that serves  
10 wherever you sell products all over the world, you have a  
11 division that serves the United States, you have a division  
12 that serves abroad. Research and development serves all of  
13 them.

14 MR. LEVY: That's right, and that's exactly the  
15 reason why an allocation is necessary.

16 QUESTION: How do you allocate it? You've spent  
17 \$100 million over 20 years developing a cure for cancer.  
18 How are you going to allocate it between the United States  
19 and abroad?

20 MR. LEVY: The records in question here would only  
21 relate to the period when the contracts were in question.  
22 and when respondent incurred the cost of performance, not 20  
23 years ago. But beyond that, the allocation could be done  
24 in several ways consistent with generally accepted accounting  
25 principles. It could be done on the basis of net sales, it

1 could be done on the basis of gross sales, it could be done  
2 on the basis of square footage of research space, there are a  
3 number of ways to do it. But that's essentially an accounting  
4 problem that will be worked out in consultation with the  
5 contractor in each individual case.

6 QUESTION: But in each case they say, well, we  
7 don't do it. You have to do it, you're going to decide  
8 how to do it, you're going to decide whether to use square  
9 footage or gross sales or overhead or --

10 MR. LEVY: In accordance with established account-  
11 ing principles.

12 QUESTION: There are a lot of established, you know,  
13 acceptable accounting practices, there are all sorts of  
14 alternatives that are available.

15 MR. LEVY: There are, and that's why we need to  
16 discuss it fully with the contractor and --

17 QUESTION: It seems to me it's always true that  
18 when they don't allocate themselves you're going to have to  
19 look at everything to decide what method of allocation you're  
20 going to think is the proper one.

21 QUESTION: That sort of investigation could take  
22 years, with dozens of accountants, in a great corporation  
23 like this one. I don't understand why there isn't some limi-  
24 tation to the records that you would insist on seeing.

25 MR. LEVY: We think there is the limitation.

1 We've limited ourselves to cost and pricing records, we  
2 haven't asked to see any of the vast categories of other  
3 kinds of documents that a large corporation invariably main-  
4 tains.

5 QUESTION: Well, in this case, you've been limited  
6 to that extent, but your principle has no limit.

7 MR. LEVY: I think it does. The limit is set by  
8 the purpose of the inquiry. The purpose is to determine the  
9 reasonableness of the price. The application of that general  
10 standard, that in varying standard, will depend on the  
11 record-keeping system of the contractor in each case.

12 If for example Bristol had fully allocated all of  
13 its costs of doing business and could say that the cost of  
14 selling products to the Government were X amount, 10 cents  
15 a pill, and we spot check that on one or two items to make  
16 sure these figures are accurate and they told us their ac-  
17 counting method, we would say, thank you, very much, and we  
18 would leave, and that would be the end of it.

19 QUESTION: It would be the end of it if they said, we allo-  
20 cate 90 percent of our research and development to the Government  
21 contracts, you don't think you'd go behind that?

22 MR. LEVY: If we have reasons to suspect it then --

23 QUESTION: Well, you would have reason to suspect it.

24 MR. LEVY: Only if there's some question about it.  
25 If Bristol acts in a good faith manner, as we fully expect



1 him to do, then we think it would be limited to a spot check  
2 and verification of selected items with an explanation of  
3 their accounting practices.

4 QUESTION: Who decides what's pertinent, though?

5 MR. LEVY: I think in the end that's a question of  
6 law that the Court would decide.

7 QUESTION: As between the contractor and the Govern-  
8 ment, who decides what's pertinent?

9 MR. LEVY: I think that's worked out in an informal  
10 negotiation procedure, as it is in civil discovery or subpoena  
11 requests. It depends on each individual case. If the  
12 negotiations come to impasse it will be brought to litigation  
13 and the district judge will decide. But we think that's  
14 exactly the kind of application that should be left open and  
15 these categories of records shouldn't be absolutely ex-  
16 cluded from review by the Comptroller General as respondent  
17 proposes.

18 QUESTION: Well, isn't one of the broad objectives,  
19 to go to the objectives, to determine whether there is a mis-  
20 allocation, that is allocating to some of the Government con-  
21 tracts costs which in good sound practice should be allocated  
22 elsewhere?

23 MR. LEVY: Certainly, and that happens all the  
24 time in cost-based contracts where the contractor seeks reim-  
25 bursement on the basis of his costs allocable to the

1 Government's contract. No different methodology is required  
2 here simply because it's GAO rather than the contractor that  
3 seeks to do the accounting technique.

4 QUESTION: And when we had the contract renegotia-  
5 tion statute and the Renegotiation Board, that was the whole  
6 object of that enterprise, was it not?

7 MR. LEVY: Exactly, although my understanding there  
8 was that it was not done on a contract basis as we would do  
9 here but it was done on a broad or corporate basis, but  
10 I think in principle it's much the same.

11 QUESTION: Do we judge this case on the -- is it  
12 submitted on the assumption by one or both sides that research  
13 and development costs were a part of the costs of the  
14 Government's products or not?

15 MR. LEVY: We think it's incontrovertible that the  
16 Government's payments -- that the research and development expenses  
17 incurred at the relevant time were borne by the Government --

18 QUESTION: Your opponent says that they -- those  
19 costs did not directly contribute to the Government's costs.

20 MR. LEVY: What they say is that they didn't  
21 expressly consider them in setting the prices in the day and  
22 their business practices don't allocate them. I think they  
23 recognized though that the Government's payments as part of  
24 their general revenues are used to defray all their overhead  
25 expenses of the relevant period. There's no doubt that a part

1 of this commingled general revenue is our money and other  
2 purchasers' money was used to pay the costs of research and  
3 development, advertising and promotion, and the rest.

4 QUESTION: Well, what if it was? There have been  
5 two groups of contracts with this same company, one a cost-  
6 plus contract and this kind of contract?

7 MR. LEVY: I believe that the respondent concedes  
8 that if this were a cost-based contract, we would be entitled  
9 to audit the records in order to determine whether the  
10 reimbursement was properly charged.

11 QUESTION: Well, you'd just audit what they've  
12 put down as their cost.

13 MR. LEVY: And we would make sure --

14 QUESTION: If they made, if they put down, if they  
15 didn't put down any, and didn't allocate any research and  
16 development cost to it, to your cost, you wouldn't audit  
17 their research and development.

18 MR. LEVY: I think it's inconceivable that in  
19 claiming reimbursement on any cost-based --

20 QUESTION: That may be; that may be, but as I under-  
21 stand their submission here that they say they didn't --

22 MR. LEVY: If they elect to forego reimbursement for  
23 those costs in a cost-based contract --

24 QUESTION: Oh, they're going to get their money out  
25 for -- but they aren't going to get it from the Government.



1 MR. LEVY: We wish them well in that endeavor, then,  
2 but when it's the Government's interest that is being pro-  
3 tected by the Comptroller General's investigation, we think  
4 that their decision on what they do with cost-based contracts  
5 is not controlling.

6 QUESTION: So you're saying you can't in this, on  
7 the facts here, you just can't tell whether or not their  
8 research and development costs entered into the price charged  
9 the Government, and therefore you must be able to find out.

10 MR. LEVY: I think the ambiguity is where you say,  
11 "entered into the price charged the Government." Bristol  
12 recovers its costs of doing business from its sales, including  
13 its sales to the Government. In that sense, in the sense that  
14 the Government's payments were used to bear these expenses,  
15 it did enter into the price. On the other hand, Bristol never  
16 sat down and said, we need to charge 72 cents a pill in order  
17 to cover research and development costs of \$100 million a  
18 year. In that sense they never expressly considered, just as  
19 in Hewlett-Packard or Eli Lilly it was never consciously con-  
20 sidered expressly and exclusively in reaching a pricing  
21 decision.

22 MR. CHIEF JUSTICE BURGER: Now I think we'd better  
23 hear from your friend. Mr. Weil.

24 ORAL ARGUMENT OF GILBERT H. WEIL, ESQ.,

25 ON BEHALF OF THE RESPONDENT

1 MR. WEIL: Mr. Chief Justice, and may it please the  
2 Court:

3 With the Court's permission, rather than go into  
4 things that we have gone into in our briefs, I'd just like  
5 to track the Government's oral argument.

6 Mr. Levy started by saying that the Comptroller  
7 General's duty which is attempted to be implemented by what's  
8 involved in this case is to determine the reasonableness  
9 of the contract prices paid by the Government to Bristol.  
10 I dispute that. In the entire legislative history of the  
11 statutes involved here, there is no reference to authorizing  
12 the Comptroller General to explore the question of reason-  
13 ableness. The entire legislative history concerns itself  
14 with protection of the Government against fraud, impropriety,  
15 abuse, and overreaching.

16 QUESTION: Well, doesn't that hurt you rather than  
17 help you? Because the statute on its face simply grants an  
18 outright authorization without regard to purpose.

19 MR. WEIL: That is correct, but if we're searching  
20 for a legislative intent --

21 QUESTION: Maybe the legislature wanted to have the  
22 Government have access to all of your records in any of these  
23 kinds of contracts, for whatever purpose the Government sought.

24 MR. WEIL: If the Congress had said that, there'd be  
25 no question about it, but the Congress did not say that.

1 QUESTION: But the statute it passed places only  
2 the limits "directly pertinent to."

3 MR. WEIL: These open the question of, pertinent  
4 to what? Mr. Levy is claiming it means pertinent to reason-  
5 ableness of the price. I maintain that when one looks into  
6 the legislative history one finds that the pertinency relates  
7 to fraud, overreaching, impropriety, and abuse. It was not  
8 intended to empower the Comptroller General to explore for  
9 better ways of negotiating contracts.

10 QUESTION: Well, let's take the overreaching now.  
11 If a substantial amount of research and development was allo-  
12 cated to the particular contract when in fact it was demon-  
13 strable that it was a covert allocation, would that not be  
14 relevant?

15 MR. WEIL: I agree thoroughly on those facts, but  
16 those are not the facts of this case, Your Honor.

17 QUESTION: I'm talking about the purpose of the  
18 statute, as you were.

19 MR. WEIL: Yes.

20 QUESTION: Now, that's the Comptroller General's  
21 mandate from the Congress, to inquire into that.

22 MR. WEIL: Yes, and Your Honor's question is di-  
23 rected again to pertinency, pertinency for the prices that  
24 were charged the Government and what went into determining  
25 those prices. Now, if research and development costs had



1 been taken into account, factored into the prices charged  
2 the Government on these contracts, then we would agree --

3 QUESTION: I suppose you and I would agree on the  
4 basis of experience that sometimes research and development  
5 simply cannot be allocated with precision.

6 MR. WEIL: Most times.

7 QUESTION: That you just don't know. The account-  
8 ants do the best they can, usually having in mind what's the  
9 best for the client, isn't that correct?

10 MR. WEIL: Yes. That is absolutely correct, and  
11 it's quite pertinent here, Your Honor. You're absolutely  
12 correct as to the difficulty of allocating R&D expenses.  
13 For example, in the field that Bristol is in, much R&D turns  
14 out to be fruitless. It doesn't even result in a product.

15 QUESTION: Isn't that true of almost all R&D?

16 MR. WEIL: I suspect that it is. Therefore, how  
17 can one allocate to products that are being successfully mar-  
18 keted a cost for research and development --

19 QUESTION: Well, even conceding its difficulty,  
20 would you agree that there could be a deliberate misalloca-  
21 tion in the interest of the producer?

22 MR. WEIL: There could be theoretically. Abso-  
23 lutely. But that would pertain primarily to cost-plus con-  
24 tracts, which are not involved here.

25 QUESTION: Why would you limit it to cost-plus

1 contracts? Doesn't that shed light on future contracts in  
2 the same area?

3 MR. WEIL: Oh, but the statutory provision, Your  
4 Honor, relates to the particular contract that contains the  
5 clause that is the subject of this case. Therefore, the  
6 directly pertinent to this contract is what counts. It ex-  
7 cludes matters that might be pertinent to other contracts or  
8 to no contracts at all. It is only those matters, those  
9 transactions, in the terms of the statute and then the con-  
10 tractual clause which relate, which are directly pertinent to  
11 the contract that contains the clause. Everything else is  
12 outside those perimeters.

13 QUESTION: Well, Mr. Weil, suppose you've got, you  
14 do have R&D expense and let's suppose that to develop certain  
15 products, A, B, C., which you are selling to the Government,  
16 you did have research and development costs. Let's just  
17 assume that. I'm not saying that's the case here, but if you  
18 assume that but you just haven't allocated your research and  
19 development costs to these, there are no records of alloca-  
20 tion but nevertheless you just know that there were research  
21 and development costs involved in coming up with these succes-  
22 ful products that you're now selling the Government --

23 MR. WEIL: Yes.

24 QUESTION: Now, how about those research and  
25 development costs? If you did approach the job of

1 allocation, ordinary accounting practice would say, why, of  
2 course, part of this should be allocated to these products  
3 A, B, and C.

4 MR. WEIL: May I -- and I did point this out in  
5 our brief, but I think it would bear reiteration here: try to  
6 be prophylactic against an ambiguity in the term "allocate."  
7 There are two stages at which allocation of R&D expenses might  
8 be made. One would be in arriving at the price to be charged  
9 the Government in a given contract where in addition to the  
10 direct manufacturing, labor costs, and such, Bristol could  
11 -- but has not -- say, we also have to recapture in this con-  
12 tract some portion of what we've been expending for R&D.

13 If they did that, then Bristol would give the C.G.  
14 access to those records, but Bristol did not. Now --

15 QUESTION: Then you don't allocate them?

16 MR. WEIL: We don't allocate them to the price, and  
17 it's price that counts here. Mr. Levy has referred frequently  
18 to costs. It's not costs, it's price to the Government that counts.

19 QUESTION: Is there some finding, as a matter of  
20 fact, that you did not allocate them to price?

21 MR. WEIL: Oh, yes, yes. In fact, I don't think  
22 that's disputed.

23 QUESTION: And that you certainly recover your R&D  
24 cost from somebody?

25 MR. WEIL: We do it eventually out of the general



1 pool, but we do not --

2 QUESTION: Including the profits you make on the  
3 Government contract?

4 MR. WEIL: As with any business, all revenue even-  
5 tually is available to meet any expense of the business.

6 QUESTION: Like getting interest on bank loans?

7 MR. WEIL: Anything; anything becomes available  
8 to meet an expense, if it's needed. Judge Lasker said that  
9 the only expenses the only Bristol Labs. costs that would be  
10 excludable under the Government's theory would be those that  
11 are recoverable solely from nongovernmental business.  
12 I think he was incorrect even in that. Because, suppose that  
13 the revenue from nongovernmental business was not enough to  
14 cover the total costs of the business. Bristol would have to  
15 draw from governmental contracts --

16 QUESTION: In order to make up the loss.

17 MR. WEIL: They've got to make it up somewhere.  
18 And that's why there's no limit to the records as has been  
19 indicated by Mr. Justice Powell, I believe, and by Mr. Justice  
20 Stevens. There's no limit.

21 QUESTION: As you develop this, would you tell us  
22 in a little more detail what records you are willing to tender  
23 to the Government?

24 MR. WEIL: Yes, we have that in our brief. All  
25 direct manufacturing costs including manufacturing overhead,

1 the specific distribution expenses.

2 QUESTION: Do they know, for example, what your  
3 aggregate research and development costs are?

4 MR. WEIL: Well, they can -- no, they don't, Your  
5 Honor, but by simple arithmetic subtraction of the price they  
6 pay, from the price that the Government pays, of the costs  
7 that we do give them, they know that the residue has to be  
8 all the unallocated costs, namely, general overhead and  
9 administration, general distribution, and research and  
10 development, and promotion and advertising.

11 QUESTION: And maybe just a hair of profit?

12 MR. WEIL: Well, we hope so. I've got to get paid.  
13 What Bristol has said it would give are its manufacturing  
14 cost -- this appears at page 6 of our brief -- manufacturing  
15 costs such as raw and packaging materials, labor and fringe  
16 benefits, quality control and supervision, then manufacturing  
17 overhead such as plant administration, production, planning,  
18 warehousing, utilities, and securities, royalty expense, and  
19 in a general way the cost of delivery to the sites specified  
20 in the contract.

21 May I point out, in some of the statements by GAO  
22 representatives they have cited the necessity of getting into  
23 the costs that are incurred in order to fulfill the Government  
24 contracts. In other words, these would be the incremental  
25 costs involved in the contract. The kind of costs that we're

1 talking about today, the R&D, the general administration,  
2 and the like, are costs that Bristol would incur even if it  
3 didn't have these contracts. They are not incurred in order  
4 to perform the obligations under these contracts. They would  
5 be there and they would be exactly the same regardless of  
6 these contracts. So that they don't affect the price that  
7 is charged to the Government. Therefore we say, they are not  
8 directly pertinent.

9 Now, the amendment, the Hoffman Amendment that put  
10 the word directly into the statute. While the legislative  
11 history on it may be rather brief, it is not sparse in meaning  
12 because it followed a very strong movement in the committee to  
13 curtail the powers of the Comptroller General because of fear  
14 of snooping. The Harvey Amendment was rejected but it had a  
15 very sizeable constituency and that constituency was then  
16 called upon, of course, to pass upon the final Hardy Amend-  
17 ment. Mr. Hoffman representing that constituency and its  
18 still abiding concerns, spoke for adding the word "directly"  
19 in order to prevent what he called "snooping."

20 QUESTION: Well, but Mr. Weil, would you not agree  
21 that sometimes you cannot make a determination whether it is  
22 directly related until after you see them all?

23 MR. WEIL: Well, that might be, but I think there  
24 is some --

25 QUESTION: The Comptroller General can't demonstrate



1 that in advance, can he?

2 MR. WEIL: Well, that would mean then, Your Honor,  
3 I fear, that the Comptroller General would be able to see  
4 everything he wants to see even though he is not entitled to  
5 see it. I think these are issues that would have to be  
6 decided by a court, just as they are presented today.  
7 We have stated -- and don't forget, please, that pursuant to  
8 Judge Lasker's order, the Comptroller General was given full  
9 ability to depose the Bristol Laboratories people to find out  
10 exactly how they do allocate, what they don't allocate, how  
11 they arrive at the prices they charge the Government. Having  
12 that information, they then come back with the facts that are  
13 now on the record, and based on those facts I think our argu-  
14 ment is a perfectly sound one, that the judiciary is in a  
15 position to say that within the meaning of "directly perti-  
16 nent" as it appears in the contracts -- and I do want to get  
17 back to the contract thing again -- but as it appears in the  
18 contracts, and in the statute itself, does not embrace costs  
19 of Bristol that in no way affected or went into or were fac-  
20 tored into determining the prices charged the Government.  
21 They were not directly pertinent to that.

22 QUESTION: Well, Mr. Weil, from what you've said so  
23 far I take it you think that some cost figures are required by  
24 the statute?

25 MR. WEIL: Yes, and we've agreed that the Govern-

1 Government can have them.

2 QUESTION: They you don't agree with some of the  
3 amicus views that --

4 MR. WEIL: We don't disagree with them.

5 QUESTION: Well, I take it, it is submitted by some-  
6 thing I read that no cost figures in a fixed price contract  
7 is required by the statute to be turned over.

8 MR. WEIL: I think that is their argument where the  
9 prices in the fixed contract do not result from negotiations  
10 that discussed or took into account any particular costs.

11 QUESTION: If you don't submit any cost figures to the  
12 Government, you don't have to verify them?

13 MR. WEIL: In the course of negotiation, and I  
14 believe that is the way --

15 QUESTION: Is that true here?

16 MR. WEIL: We did not submit any costs to the  
17 Government.

18 QUESTION: So that, if you agreed with your, with  
19 the amicus that I read, there wouldn't be any cost figures  
20 called for by the --

21 MR. WEIL: Under that theory and the type of con-  
22 tract we're dealing with here, there would be no cost  
23 figures.

24 QUESTION: You don't urge us to adopt that position?  
25 The way it stands now?

1 MR. WEIL: I don't disagree with it either. I think  
2 there's a very plausible argument to be made for it. I don't  
3 want to attempt to make amici's arguments for them, I might  
4 not do them justice. But we do not disagree with them.

5 QUESTION: At least it's not your case?

6 MR. WEIL: It is not our case.

7 QUESTION: Well, it is in the sense that you didn't  
8 submit any cost figures.

9 MR. WEIL: It would be if we didn't submit, but we  
10 have agreed that we will submit the cost figures --

11 QUESTION: But you didn't submit them in the course  
12 of negotiations?

13 MR. WEIL: Oh, no, no. I don't believe we did.

14 QUESTION: Let me take you back to that amendment.  
15 The inserting the word "directly," which you suggest is a  
16 limiting word and must mean something. That's followed by  
17 "pertaining to" and "involve" transactions relating to the  
18 contract or subcontract. Now, isn't that something of a  
19 giving with one hand and taking away with another? If "di-  
20 rectly" narrows it, then the language relating to "cer-  
21 tainly" is almost open-ended, if it relates to.

22 MR. WEIL: Your Honor, respectfully, I would read  
23 it the other way as being a further constriction that there  
24 must be direct pertinence to transactions which relate to  
25 the contract. And as I have just pointed out, the R&D



1 expenses, all these so-called unallocated expenses do not  
2 relate to the contract that is in issue here. Because they  
3 would be the same if there were no such contract.

4 QUESTION: The Comptroller says that's what he wants  
5 to find out, whether they're related to and whether they are  
6 directly.

7 MR. WEIL: And that's my point. Do we give him  
8 the right to look into records that he may have no right to  
9 look into in order to find out whether he's got a right to  
10 look into them? This is exactly why Judge Lasker handled the  
11 deposition, the discovery process in the District Court the  
12 way he did. He gave full right to the Comptroller General's  
13 representatives to depose to their heart's content the Bristol  
14 Laboratories personnel as to all their methods of fixing the  
15 prices, but not the details, not the arithmetic or financial  
16 details: the methods of keeping their books, the methods of  
17 doing their accounting, the methods of doing their pricing to  
18 the Government. With all of that information they come back  
19 and then the District Court makes the factual decision which  
20 was affirmed by the Court of Appeals, and I think at times  
21 this Court has said, when the two lower courts are in agree-  
22 ment on the facts, the Supreme Court becomes very reluctant  
23 to upset them. We do have that total agreement with the two  
24 courts.

25 QUESTION: Mr. Weil?

1 MR. WEIL: Yes, sir?

2 QUESTION: There's been a good deal of talk about  
3 R&D expenses. Did I understand you to say that they were not  
4 made public by your company?

5 MR. WEIL: I don't believe they are separately  
6 broken out.

7 QUESTION: Most pharmaceuticals, I had thought, were  
8 very proud of their R&D expenditures and reported them, either  
9 in their annual reports or in their 10-K's.

10 MR. WEIL: I hesitate to give a firm answer, Your  
11 Honor, because I just don't know. It has been my impression  
12 that they are not separately broken out.

13 QUESTION: Well, perhaps not. I don't think it --

14 MR. WEIL: And if they were, they might be broken  
15 out on a total corporate basis rather than by Bristol Labora-  
16 tories Division of Bristol-Myers.

17 QUESTION: Would you -- first of all, is the con-  
18 tract in the record somewhere or other? I haven't seen it.  
19 I don't want you to look --

20 QUESTION: No, I don't believe the full contract is  
21 there but the Joint Appendix does show an identification of  
22 the contracts. I think there's an affidavit by Mr. Ahart  
23 that shows, that identifies the contracts that have in them  
24 the specific clauses that we are talking about.

25 QUESTION: Does the contract indicate what types of

1 drugs beyond being prescription? Are they drugs that are sub-  
2 ject to competitive conditions in the market, and if they're  
3 prescription drugs perhaps you have them patented, but are  
4 they competing drugs?

5 MR. WEIL: I think that virtually all of them would  
6 be competing in the sense that if the identical formula is  
7 not available that alternates would be available to achieve  
8 the same pharmacological results.

9 QUESTION: And these are priced --

10 MR. WEIL: There's considerable elasticity.

11 QUESTION: These are wholesale prices that are  
12 published? Are they available to any purchaser by wholesale?

13 MR. WEIL: I believe they are; yes. They run -- yes  
14 -- they run on usually about five percent below the prices  
15 to retail establishments, direct sales to retail establish-  
16 ments.

17 QUESTION: So, as Mr. Levy said, the competitive  
18 market would be a restraint on any holding up of the Govern-  
19 ment.

20 MR. WEIL: Well, on that point, and on Mr. Justice  
21 Blackmun's question about whether there isn't some assurance  
22 from the competitive aspect that the prices are right, we can  
23 turn again to the legislative history. You see, this came up  
24 when Congress found itself in the midst of the Korean crisis  
25 and there was a necessity of getting supplies for the Armed



1 Services, and at the same time inflation was rearing its  
2 very ugly head, as we know it today. So that suppliers were  
3 being caught in a bind. They would make a contract price  
4 and then when they went to their sub-suppliers, they were  
5 paying higher and higher amounts than what they had figured  
6 on. This began to present a very difficult problem for satis-  
7 factory procurement for the Armed Services, which gave rise  
8 to the renegotiation statute.

9 And then Congressman Hardy, in connection with rene-  
10 gotiation, wanted some protection for the Government, that  
11 these things just couldn't be run wild on the renegotiation.  
12 And hence his amendment which he said, and which Congressman  
13 Celler as well, said would serve as a deterrent against a  
14 sword of Damocles hanging over the suppliers heads which  
15 would deter them from engaging in abusive, fraudulent, and  
16 overreaching practices.

17 But Mr. Hardy at page 97, Congressional Record,  
18 page 13198, explaining the rationale behind all of this, said:  
19 "In normal times competitive bidding generally operates as a  
20 brake on the price which a contractor can demand from the  
21 Government for his goods and services." In normal times.

22 So this was an emergency. Actually, this entire  
23 statutory provision was generated to cope with an emergency  
24 situation that does not exist today, which may come up later.  
25 But certainly as of today the competitive bidding situation

1 to which reference has been made does serve as a brake and  
2 does serve as a protection and an assurance that the prices  
3 are not overreaching or fraudulent.

4 Fraud comes in with a cost-plus again, which we're  
5 not dealing with here, fraudulent representation as to what  
6 costs are. But where certain costs have not even been taken  
7 into account in reaching the price, even though later when  
8 for accountancy purposes or for analytical purposes retro-  
9 spectively the business wants to see how has it done, why has  
10 it done what it has done, can it improve its methods of opera-  
11 tion? This is a retrospective analysis. It has nothing to  
12 do with fixing the prices to the Government in the first  
13 place. That's why I say this term "allocate" can be a  
14 little bit equivocal, and misleading, if we don't keep clearly  
15 in mind the difference between allocating for the purpose of  
16 reaching the prices to the Government and allocating later on  
17 for purposes of analyzing the operations of the business,  
18 which has nothing to do with fixing the price to the Govern-  
19 ment except on future contracts. But not on the contracts,  
20 as the statute provides, that are involved in this case.

21 I would like to address this question that was  
22 raised by the Bench early on with Mr. Levy about whether this  
23 is a case involving statutory construction or interpretation  
24 of a contract. It is very clear in the legislative history  
25 and we have the quotations at pages three and four of our

1 brief, that Congress deliberately and advisedly put the rela-  
2 tionship between the Comptroller General and the supplier on  
3 to a contractual basis. Congress realized the difference.  
4 In one exchange, and this appears in two exchanges, and the  
5 first one, you can find at page four of our brief, where one  
6 of the Congressmen, Mr. Eberharter, said to Mr. Hardy,  
7 "Now, I would like to ask one question. Does this refer"  
8 -- namely, the Hardy Amendment -- "Does this refer to con-  
9 tracts that have been made in the past?"

10 Mr. Hardy: "It could not refer to contracts that  
11 have been made in the past because it requires the insertion  
12 of a clause in contracts."

13 Mr. Eberharter; "I see. I notice that you give  
14 power to the Comptroller General."

15 Mr. Hardy: "It does not give him power to inspect  
16 the books and records but requires that a clause be inserted  
17 in the contracts permitting him to inspect."

18 A clear differentiation in the sponsor's mind be-  
19 tween a statutory power and whatever permission he might ob-  
20 tain via a contract, namely, via the application of law of  
21 contracts, contract principles.

22 Then, a little bit later, Congressman -- at page  
23 13376 of 97 Congressional Record -- said that the Comptroller  
24 General's right of access "is given him in the contract. The  
25 right is not given him in the bill."



1       Therefore, if we are looking for congressional  
2 intent, while there may be some question as to what Congress  
3 had in mind by the term "directly pertinent" -- and that is  
4 not all too clear; Congress never defined that -- one thing  
5 is clear beyond any question, that Congress did not intend  
6 access powers to flow from the statute to the Comptroller  
7 General, but intended only that there go to the Comptroller  
8 General such permission for access as might come to him from  
9 a contract, and that would have to be in accordance with the  
10 principles that govern contracts.

11               So that I submit that Judge Lasker was 100 percent  
12 correct when he approached this case on the basis of a  
13 contract. But I would say that even on a basis of statutory  
14 construction, if the word "pertain" is a word of some limita-  
15 tion, "directly pertain" has to be even more limiting,  
16 and if it has to be directly pertinent to transactions that  
17 are related to the particular contract, you have a very nar-  
18 rowly circumscribed area.

19               QUESTION: May I ask just one question about the  
20 statute? Does the statute provide a remedy in the event  
21 that the Company wrongfully refuses to make the records  
22 available?

23               MR. WEIL: No, it does not. I understand that  
24 there's been an amendment which will become effective in the  
25 future, which would give the Comptroller General subpoena

1 power.

2 QUESTION: And how did this suit arise? Did it  
3 arise by the Government -- ?

4 MR. WEIL: No, no. Bristol brought a declaratory  
5 judgment and injunction action, and then the Government  
6 counter-claimed.

7 QUESTION: But they have no remedy. If you just  
8 said, no, they have no statutory remedies unless there's some  
9 kind of an implied cause of action; they would have no right  
10 to --

11 MR. WEIL: Well, it would be more than an implied  
12 cause of action, or they'd have an action on contract. They  
13 sue on the contract.

14 QUESTION: So it has to be breach of contract,  
15 unless there's a --

16 MR. WEIL: There has to be; yes. That's the whole  
17 thrust of Congress was in that direction. I think it's  
18 unmistakable, Your Honor. Thank you very much, Your Honors.

19 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.  
20 The case is submitted.

21 (Whereupon, at 3:21 o'clock p.m., the case in the  
22 above-entitled matter was submitted.)

23

24

25

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 80-264

ELMER B. STAATS, COMPTROLLER GENERAL  
OF UNITED STATES ET AL.

V.

BRISTOL LABORATORIES DIVISION  
OF BRISTOL-MYERS COMPANY

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY:

Will T. Wilson



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