

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1273 & 81-1472

TITLE CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED
STATES ET AL. Petitioners v. MERCK & CO., INC.; and
MERCK & CO., INC., Petitioner v. CHARLES A. BOWSHER,
COMPTROLLER GENERAL OF THE UNITED STATES AND UNITED

PLACE STATES
Washington, D. C.

DATE December 1, 1982

PAGES 1 thru 54



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CHARLES A. BOWSHER, COMPTROLLER :

4 GENERAL OF THE UNITED STATES ET AL. :

5 Petitioners, No. 81-1273

6 v. :

7 MERCK & CO., INC.; :

8 and :

9 MERCK & CO., INC., :

10 Petitioner, No. 81-1472

11 v. :

12 CHARLES A. BOWSHER, COMPTROLLER :

13 GENERAL OF THE UNITED STATES AND :

14 UNITED STATES :

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16 Washington, D.C.

17 Wednesday, December 1, 1982

18 The above-entitled matter came on for oral

19 argument before the Supreme Court of the United States

20 at 1:07 p.m.

20 APPEARANCES:

21 JERROLD J. GANZFRIED, ESQ., Office of the Solicitor

22 General, Department of Justice, on behalf of the

23 Petitioner.

23 PHILIP A. LACOVARA, ESQ., Washington, D.C.; on behalf

24 of the Respondent.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

JERROLD J. GANZFRIED, ESQ.,
on behalf of the Petitioner.

3

PHILIP A. LACOVARA, ESQ.,
on behalf of the Respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Ganzfried, you may
3 proceed whenever you are ready.

4 ORAL ARGUMENT OF JERROLD J. GANZFRIED, ESQ.

5 ON BEHALF OF PETITIONER

6 MR. GANZFRIED: Thank you, Mr. Chief Justice,
7 and may it please the Court, this case concerns the role
8 of the Comptroller General in government procurement,
9 specifically his statutory right to access to records of
10 government contractors -- books and records.

11 To put the access provisions in context, it
12 must be recalled that when Congress created the GAO in
13 1921, it directed that the Comptroller investigate all
14 matters relating to the receipt, disbursement and
15 application of public funds, and further directed the
16 Comptroller to make recommendations to Congress looking
17 for greater economy or efficiency in public expenditures.

18 Under that mandate, the Comptroller has, for
19 sixty years, examined the fiscal responsibility and the
20 manner in which federal agencies have discharged their
21 fiscal responsibilities, with an eye towards increasing
22 efficiency and promoting economy in the expenditure of
23 public funds.

24 There should be no doubt that this is
25 precisely the function Congress assigned to the GAO when

1 it included the word "application" in the 1921 Act.
2 Congressman Lutes, who proposed that addition, stated
3 that its purpose is to make sure that the Comptroller
4 General shall concern himself not simply with taking in
5 and paying out of money from an accountant's point of
6 view, but that he shall also concern himself with the
7 question as to whether it is economically and
8 efficiently applied.

9 Now following World War II, Congress
10 recognized the explosive growth in purchases from the
11 private sector required that the Comptroller be given
12 additional powers so he could discharge these
13 responsibilities properly. For this reason, Congress
14 passed the access to records statutes at issue in this
15 case. They gave the Comptroller access to records of
16 government contractors so that he would have the
17 necessary tool to examine the transactions from both
18 sides.

19 This was based on Congress' determination that
20 only with this full information could GAO discharge its
21 duties in a meaningful way. And Congress focused
22 special concern on negotiated contracts -- those that
23 were made without advertised solicitation of bids.
24 Because negotiated contracts lack the inherent
25 safeguards of advertised contracts, they are more

1 susceptible to abuse and more likely to result in waste
2 and extravagance.

3 In a word, they pose a greater risk that the
4 government will pay unreasonably high prices, and for
5 that reason Congress determined that negotiated
6 contracts require close supervision and control. In
7 fact, negotiated contracts were prohibited by law until
8 World War II.

9 In this case, GAO seeks to exercise its
10 statutory right of access to Merck's records relating to
11 only four of the many negotiated contracts Merck has
12 with the government. The objective is to determine
13 whether the procurement methods employed adequately
14 protect the government's interest or whether more
15 economical measures could be recommended.

16 To put the importance of this effort in
17 perspective, we mention in our brief that in 1973
18 government expenses for prescription drugs totaled \$1.6
19 billion, including \$252 million in direct purchases. In
20 congressional hearings in 1981, it was estimated the
21 total federal procurement, its aggregate, on
22 pharmaceuticals had blossomed to \$2.5 billion, or --
23 that is, \$2.5 billion per year, or some 25 percent of
24 total industry sales. So where you are dealing in the
25 aggregate, with a major aspect of federal spending,

1 where waste, if there is any, would be a serious drain
2 on resources.

3 But the Court of Appeals' decision cripples
4 GAO's ability to make a meaningful examination of
5 procurement practices by limiting access to records of
6 an estimated nine percent of Merck's costs. The Court
7 has prevented GAO from obtaining the bulk of the
8 information it needs --

9 QUESTION: May I ask you what the basis of the
10 nine percent figure is?

11 MR. GANZFRIED: That's the estimate in the
12 article, I believe, by Professor Reike.

13 QUESTION: Was he dealing with the prices the
14 government pays or with retail prices?

15 MR. GANZFRIED: He was dealing with -- that
16 nine percent figure is not nine percent of a price.
17 It's nine percent of total costs of the manufacturer.

18 QUESTION: How did he get these cost figures?

19 MR. GANZFRIED: I wish I knew. I don't know.

20 QUESTION: Well, you don't really know they're
21 right, then, do you? You don't know the nine percent --

22 MR. GANZFRIED: We don't know that it's nine
23 percent.

24 QUESTION: So we really shouldn't rely on the
25 nine percent figure, should we?

1 MR. GANZFRIED: The custom -- the company has
2 not indicated that it's anything higher than nine
3 percent. That is the figure on which this is -- these
4 cases have been proceeding, but it is an estimate.

5 QUESTION: But would your case be any
6 different if it were 90 percent instead of nine
7 percent? How does that affect the legal issue before
8 us?

9 MR. GANZFRIED: It affects the legal issue in
10 the sense that the Court of Appeals decision has --
11 assuming it is nine percent or something close to it --
12 prevents GAO from getting the vast majority of documents
13 that it needs in order to determine whether the
14 procurement methods involved in this case were the most
15 appropriate ones.

16 QUESTION: Your purpose is strictly to improve
17 your procurement methods?

18 MR. GANZFRIED: That's our purpose.

19 QUESTION: When you say that prevents the
20 Comptroller General from getting everything it needs,
21 you're not suggesting that Congress in Heik Verba said
22 the Comptroller General can have whatever he needs in a
23 situation like this, are you?

24 MR. GANZFRIED: No, it didn't. But it did
25 grant a broad authorization for access to records. It

1 does have certain express limitations, all of which we
2 complied with here.

3 QUESTION: And your contention is that the way
4 these costs are allocated, you would have virtually
5 unlimited access to anything because of the way the
6 funds come into the drug companies?

7 MR. GANZFRIED: Well, not to everything. The
8 fact that the company does not allocate costs of
9 particular products does make -- does present this case
10 with a certain accounting problem, but that's not
11 necessarily the legal problem that we have.

12 I think we agree with the other side that had
13 there been a full allocation of costs that we would be
14 entitled to get everything, but I don't want to leave
15 the impression that we have a claim to unlimited access
16 to every sort of record that this company has,
17 specifically. We are not interested in records of
18 non-government work. We are interested only in cost
19 records. We have no interest in strategic planning or
20 general budgetary information.

21 QUESTION: But when you say "records of
22 non-government work", wouldn't -- because of the
23 non-allocation of costs, wouldn't you necessarily get a
24 fair amount of records of non-government work under your
25 theory that you are entitled to any records that are --

1 or any records of any products that are paid for out of
2 government funds, whatever it is your claim?

3 MR. GANZFRIED: Well, the fact that they
4 co-mingle the funds --

5 QUESTION: Yes. Well, you say "co-mingle" as
6 if it is some sort of sin, but I --

7 MR. GANZFRIED: No, not at all. We certainly
8 don't intend to suggest that there is anything wrongful
9 in the comingling, simply to recognize that what we are
10 dealing here with is essentially for this company's
11 costs, as it has been described to us -- a large pool of
12 unallocated costs, so that even if we were to go in
13 under this Court of Appeals decision and look at what we
14 estimate to be some nine percent of their costs, we are
15 going to be left with a vast majority of the information
16 that it would be helpful to know whether we should
17 change our procurement methods is not going to be
18 available to us.

19 QUESTION: Well, suppose they have developed a
20 product like, say, Bufferin. I don't know whether they
21 develop it or somebody else does. But they develop a
22 product like Bufferin, sell it on the market, and never
23 sell any of it -- or say that they sell one percent of
24 it to the government under a negotiated product
25 contract, 99 percent on the open market.

1 Is it your contention you can have access to
2 all of the records dealing with Bufferin?

3 MR. GANZFRIED: We don't want the records of
4 their sales to the public other than to determine that
5 there have been substantial sales to the general public,
6 to answer that specific question.

7 QUESTION: Well, that puzzles me, because it
8 would seem to me that comparable sales to private
9 customers might be the most relevant to the
10 determination of whether the government's getting a fair
11 deal.

12 MR. GANZFRIED: Well, under the statutes there
13 is the built-in assumption that a contract that --
14 something that is sold at a catalog price item and is
15 sold in substantial quantity to the general public has a
16 built-in, oh, built-in mechanism for assuming that there
17 has been competition. Because it's sold to the public,
18 you assume that there has been competition, if the
19 government pays no higher than --

20 QUESTION: Well, then you are not interested
21 in any records pertaining to prices that are below a
22 fair market price established by a catalog or something
23 like that.

24 MR. GANZFRIED: Well, the point I was getting
25 to is that it may be, in this industry, where they

1 suggest that they pay no attention to their costs when
2 they set their prices -- a contention which I suggest is
3 belied by their answers to interrogatories -- it may be
4 that in this industry the fact that something is sold at
5 a catalog price and is sold in substantial quantities to
6 the public provides no real assurance that there has
7 been competition.

8 QUESTION: Well, either it does or it
9 doesn't. If we assume for a moment it does not provide
10 any assurance, then I should think the records you would
11 want would be the records of sales of the company to
12 other private customers who buy more or less as you do.
13 It would be the most relevant, I think.

14 MR. GANZFRIED: Well, it might be the sort of
15 thing that accountants do, where you need only some
16 relatively small sampling to be able to determine --

17 QUESTION: But you disclaim any interest in
18 those records, as I understand your argument.

19 MR. GANZFRIED: Well, to the extent that they
20 are records that could verify the records that we do
21 want, we might have some interest in sampling of them.

22 QUESTION: Do you or do you not want to see
23 records pertaining to sales by the drug company to other
24 customers?

25 MR. GANZFRIED: We would want to see some of

1 that.

2 QUESTION: So there is really no limit on your
3 demand, then, in terms of kinds of records that you are
4 seeking.

5 MR. GANZFRIED: Well, there are -- let me
6 suggest that as I understand Merck's position at this
7 point, they would be willing to give us information of
8 sales to other customers at the same prices in order to
9 substantiate the fact that they have in fact made sales
10 of substantial quantities to the general public.

11 So I don't think that sets a limit on either
12 position.

13 QUESTION: You're not satisfied with that.
14 You're not satisfied with that, as I understand it.

15 MR. GANZFRIED: No, because those aren't cost
16 records. What we're really interested in is cost
17 records.

18 Now we should keep in mind --

19 QUESTION: Would that include all sort of
20 unallocated expenses engaged in research and
21 development?

22 MR. GANZFRIED: Well, since everything that
23 they do in research and development, so far as we know,
24 is unallocated, yes, it would address that. I can give
25 you --

1 QUESTION: When you say "would address it", it
2 would take it in, wouldn't it?

3 MR. GANZFRIED: It would take it in. Now, to
4 be sure, we don't want to look at all of their
5 experiments and know what their scientific formulas are,
6 to go in and say we think you should be conducting
7 research in this area and not in that area. On the
8 other hand, we do want to know, in establishing costs
9 for particular products, whether most of their research
10 is in the pharmaceutical area at all, or whether it's in
11 the veterinary medicine area, or in the category that
12 they, for their internal allocations, call "other."

13 So we would want to have that kind of
14 breakdown.

15 QUESTION: Well, is the mission of the
16 Comptroller General to inquire into contracts with the
17 government or in terms of the pricing, or is part of his
18 mission to see whether on the open market the drug
19 companies are charging more than they should?

20 MR. GANZFRIED: The Comptroller General's
21 interest is in the price that the government pays, and
22 whether the procurement methods that are used by the
23 government are appropriate.

24 QUESTION: But the inquiry would appear, in
25 many respects, to go way beyond that.

1 MR. GANZFRIED: It may be that information is
2 obtained that has implications beyond that, but the
3 Comptroller General's purpose and his objective in
4 undertaking the study is to provide a check on the
5 procurement methods, to determine whether, for example,
6 negotiated, fixed-price contracts really are the most
7 suitable way to purchase pharmaceuticals, or whether, in
8 this industry where, so far as we can tell, the costs
9 bear no relation to the prices that are charged, we
10 might be better off going to a cost-plus system for
11 buying pharmaceuticals.

12 It may be that the assumption that we have
13 that because this is a catalog price item, that there
14 need not be any cost and pricing data submitted to the
15 government at the time of negotiation. But that's an
16 assumption that might have to be rethought in this
17 industry.

18 So these are the kind of recommendations that
19 might come out of the study. I mean, it may be that we
20 conduct the study and we find that this system is just
21 great and we wouldn't want to touch it at all and would
22 recommend that it remain in place exactly as it is. But
23 the point is, we cannot --

24 QUESTION: What authority do you have to touch
25 it anyway? Your authority is just to stop buying from

1 these people, isn't it? You say you're not going to
2 touch the way they -- what authority do you have to do
3 anything except say we won't buy anything from you any
4 more?

5 MR. GANZFRIED: The only authority that the
6 Comptroller General has is to make recommendations to
7 the procuring agencies and to Congress.

8 QUESTION: Right. I mean, you said you're not
9 going to touch the way they do business. I don't see
10 how you've got any --

11 MR. GANZFRIED: If they -- well, for example,
12 if they want to charge the prices that they charge and
13 we feel that it's not a price that we ought to pay,
14 there's not going to be a deal. If they want to
15 continue to maintain their books of accounts on an
16 unallocated basis, they can continue to do that.

17 QUESTION: Couldn't you do that anyway?
18 Couldn't you say we won't buy from you unless you show
19 us your records?

20 MR. GANZFRIED: That might be one of the
21 recommendations that would come out of this.

22 QUESTION: And you've had several years to
23 think up that one.

24 MR. GANZFRIED: Well, unfortunately, we have
25 had all too many years in this case before we have

1 gotten any information.

2 But I think what I'd like to focus in on are
3 the particular aspects of the cost items that the Court
4 of Appeals has barred us from getting, and those are,
5 briefly, advertising, which you would think would be
6 easily allocated, general administration, distribution
7 and research and development, and since these --

8 QUESTION: You are runinng a little fast for
9 me. You are saying advertising, which can easily --
10 easily -- be allocated. A great many --

11 MR. GANZFRIED: You would think that the
12 company would know what it's spending, what products
13 it's spending its advertising on.

14 QUESTION: Oh, a great many companies just
15 advertise the company.

16 MR. GANZFRIED: Fine.

17 QUESTION: Television and newspapers and
18 magazines constantly have Exxon or Weyerhaeuser -- no
19 particular product -- and these are all conglomerates
20 now. Now how would you allocate that?

21 MR. GANZFRIED: Well, accountants can
22 certainly do it. First of all, you take out of that
23 group the advertising that is product-specific, and
24 certainly you could apply it to particular products.
25 And then, once you are left with the bulk that you would

1 call this corporate name or image advertising -- if I
2 can call it that --

3 QUESTION: Well, that's not -- your answer now
4 is different from your previous statement.

5 MR. GANZFRIED: Then, you see, you'd be able
6 to allocate it. Well, I don't know how Merck's
7 advertising breaks down, whether it is product-specific
8 or whether it is the corporate name and the image that
9 is being projected. But that is something we would want
10 to find out.

11 Now I think one of the unfortunate --

12 QUESTION: How is this going to help the
13 Comptroller General? He probably has a right to lots of
14 things, maybe even if they don't help him, but at least
15 part of your argument seems to be that it's going to be
16 of genuine assistance to get these figures.

17 How is it going to help the Comptroller
18 General in advising the agencies whether or not to
19 purchase from Merck or Congress whether to pass some law
20 specifying purchasing policies how much Merck spends on
21 advertising?

22 MR. GANZFRIED: Well, the interest in
23 advertising is only a halfway measure to getting a
24 notion of what their total costs are for their
25 products. If we find out, for example, that on a

1 per-thousand-pill basis the products involved in this
2 case cost the government from a range of \$21 for Diuril
3 to \$49 to \$50 for Aldomet, if we were to find out, for
4 example, that the company's costs for Aldomet are \$2 per
5 thousand and they are charging us \$50, well, that may
6 well be an area where the Comptroller General would want
7 to make recommendations either to the procuring agencies
8 and, possibly, to Congress as well for changes in the
9 procurement system.

10 QUESTION: Suppose they sell an item for \$2 to
11 the government and they advertise Merck as a great
12 druggist and mention no product. How much of that would
13 be allotted to the product?

14 MR. GANZFRIED: Well, the accountants would
15 have to decide. It may be that you look at how many
16 products would be covered when you say they are
17 advertising their --

18 QUESTION: Maybe. You just don't know where
19 you are, do you?

20 MR. GANZFRIED: Excuse me?

21 QUESTION: You just don't know where you are,
22 do you, when you get into the advertising business?

23 MR. GANZFRIED: Oh, sure we do. There are
24 certainly ways that accountants can allocate --

25 QUESTION: Well, how do the people collect so

1 much up on Madison Avenue if you know too?

2 MR. GANZFRIED: Well --

3 QUESTION: There are certain fields it seems
4 that are very impossible of delineation and I think
5 advertising is a great one.

6 MR. GANZFRIED: But the accountants certainly
7 have a way to do it.

8 QUESTION: You have a man who's in a moving
9 picture and he picks up a bottle of Coca Cola. That's
10 advertising and they pay for it.

11 MR. GANZFRIED: And it's Coca Cola, and you
12 know what the product is.

13 QUESTION: If Coca Cola were selling you
14 products, you would look into that?

15 MR. GANZFRIED: Well, the point is that
16 accountants can make these kind of delineations, and let
17 me give you two examples.

18 QUESTION: If you give me two, I can give you
19 22. I mean, we all know about them. I just don't
20 understand what precise --

21 MR. GANZFRIED: If it's the corporate name
22 that's being advertised, that Merck is a great company --

23 QUESTION: Right.

24 MR. GANZFRIED: And you can break that down on
25 the basis of how many products Merck has. You can

1 allocate --

2 QUESTION: You also have to find out how many
3 products he sells.

4 MR. GANZFRIED: That's right.

5 QUESTION: And how much he gets for them.

6 MR. GANZFRIED: We wouldn't have to know how
7 much he gets for them. We would only have to know how
8 much he pays for the advertising.

9 QUESTION: Well, how else could you know?
10 Well, if you aren't interested in how much he gets for
11 them, then you have no interest at all. You are
12 interested in how much you pay for it.

13 MR. GANZFRIED: We are interested in what he
14 gets for the products that he is selling to the
15 government.

16 QUESTION: That's what I'm talking about.

17 MR. GANZFRIED: That's -- then we are in
18 agreement. Then we're in agreement.

19 QUESTION: You and I are in agreement?

20 MR. GANZFRIED: On that point.

21 QUESTION: You want to bet?

22 MR. GANZFRIED: At least we both, I hope,
23 understood that we were talking about the same point.
24 That is the agreement that I was referring to.

25 Let me refer the Court to an antitrust case

1 between SmithKline and Eli Lilly that's reported at 427
2 Federal Supplement, and at pages 1107 and 1108 of that
3 opinion, Judge Higginbotham and the parties had no
4 difficulty in determining, for individual products in
5 the pharmaceutical industry, their promotional expenses,
6 research costs, costs of goods, profit margins, and
7 pre-tax return on sales. The fact is that in this
8 industry allocations can be made.

9 Another example comes from the Pfizer case
10 that was before this Court in 1972 and decided in 404
11 U.S. Pfizer's brief in that Court -- in that case -- at
12 page 71 recites the fact that during the grand jury
13 investigation which led to the present indictment each
14 defendant supplied to the government cost studies
15 prepared on principles determined by independent public
16 accountants which showed total costs for each dosage
17 form of each of the drugs involved, and that from these
18 studies actual profitability of each item could be
19 ascertained.

20 QUESTION: But that's something they do when
21 they are told to do by a court or when they are trying
22 to plead a case.

23 MR. GANZFRIED: They weren't told to do it.
24 They had an interest in doing it and they did it.

25 QUESTION: Right. But now certainly you're

1 not suggesting that the Comptroller General has the same
2 authority to tell them to allocate.

3 MR. GANZFRIED: Absolutely not.

4 QUESTION: You're saying give us the
5 information and we will allocate.

6 MR. GANZFRIED: Exactly right. Just as we
7 don't tell them that they should take accelerated
8 depreciation for tax purposes but straight line
9 depreciation in their reported financial statements.
10 The point is that you can have -- that accounting that
11 is done for one purpose doesn't have to be carried over
12 for all other purposes.

13 QUESTION: Do I understand correctly that the
14 government does not make any claim that Merck is guilty
15 of any impropriety in any of the contracting?

16 MR. GANZFRIED: That's correct.

17 QUESTION: And --

18 MR. GANZFRIED: Or is that necessary for us to
19 get access.

20 QUESTION: You concede that there is no
21 suggestion of unreasonableness about the contracts?

22 MR. GANZFRIED: As to the methods of the
23 contract or the prices of the contract?

24 QUESTION: Both.

25 MR. GANZFRIED: As to the methods, they

1 followed the methods and procedures that were in place
2 and should have been used. As to the prices, that's one
3 of the reasons we'd like to conduct the study. We have
4 not prejudged anything.

5 QUESTION: This is not like a case where the
6 government, as it does sometimes, suspects bid-rigging
7 in competitive bidding and wants to inquire. No one
8 would question that.

9 This is just a broad-scale inquiry in how do
10 you handle your pricing. Now, as Justice Stevens
11 suggested, isn't there a simpler, cheaper, quicker way
12 to just simply say companies that don't give us this
13 information are on the black list or they are off the
14 negotiable contract list?

15 MR. GANZFRIED: Well, I understand that there
16 are some cases that suggest that the government would
17 not be in a position simply to blacklist companies. But
18 we don't know whether it would even be a good idea at
19 this point.

20 QUESTION: There are cases. I wrote one in
21 the Court of Appeals that was to the effect that you
22 can't blacklist them without a reason. But if you said
23 a condition of being eligible for negotiated contracts
24 was that you open your books on prices, that would be
25 quite a different matter.

1 MR. GANZFRIED: Well, that may be one of the
2 recommendations that comes out of the study. There are,
3 in the Truth in Negotiation Act, which was passed after
4 a proposal by the Comptroller General, that did require
5 submission of cost and pricing information in certain
6 circumstances. Whether that is going to come out of
7 this study, we don't know. That's precisely why we're
8 here. We need the information before we know what
9 recommendations we're going to make.

10 QUESTION: May I ask this question since
11 you're speaking of recommendations that might be made?

12 Suppose the government is considering buying a
13 drug product that is marketed by two companies and one
14 of the companies spends ten percent on research and
15 development and five percent of that is on pure research
16 and development, trying to reach out ten, twenty years
17 from now to find a cure for cancer, for example, and the
18 other company spends only two percent on total research
19 and development.

20 Obviously, the latter's costs are going to be
21 somewhat less. The government, would it feel compelled
22 to buy only from the company that did two percent
23 research and development, foreclosing or penalizing a
24 company that spent enormous percentage, comparatively,
25 on research that might be of enormous benefit to the

1 government as well as other people?

2 MR. GANZFRIED: The answer to that is that the
3 government's purpose is not to tell companies that they
4 are spending too much or too little on research or to
5 penalize companies for spending too much or too little
6 on research.

7 What we're trying to find out is just what it
8 costs the companies to make the products that we're
9 paying for.

10 QUESTION: What are you going to do with it
11 after you find out?

12 MR. GANZFRIED: Anything from saying that the
13 system works fine to saying that there are significant
14 changes that ought to be made. But until we have the
15 information which we are entitled to have, we don't know
16 what those recommendations are going to be. I hope I
17 have suggested to you some of the range of
18 possibilities, but I do want to make clear that nothing
19 has been prejudged and that we need the information
20 before any of those judgments can be made.

21 QUESTION: Would you concede that there are
22 some industries, including those dealing with the
23 government, who don't want anyone to know how much they
24 are spending on pure research, that that in itself is a
25 trade secret?

1 MR. GANZFRIED: There may be some industries
2 in which that's the case. I'm not aware of any at the
3 moment and I certainly don't believe that the
4 pharmaceutical industry would be one of them.

5 QUESTION: On the contrary, it would occur to
6 me that, as Justice Powell has just suggested, the
7 pharmaceutical people would probably be doing more pure
8 research than Detroit with automobiles and other
9 companies.

10 MR. GANZFRIED: They may. But they certainly
11 have not kept any great secret about how much they spend
12 on it. They certainly may keep secret what they are
13 working on and we're not interested in the scientific
14 formulas. We're not going in to find out are you
15 working on cardiovascular drugs or are you working on
16 analgesic drugs.

17 That's not the --

18 QUESTION: Well, if you take those examples,
19 might those facts not be matters that the company
20 legitimately would not want anyone to know about, just
21 as during the early part of World War I we were spending
22 billions of dollars in atomic research, and if it had
23 been known how much was being spent that might have been
24 an important factor to other countries?

25 Now in competitors, is it not a legitimate

1 trade secret to keep secret how much you're spending on
2 pure research?

3 MR. GANZFRIED: We're not talking about --
4 we're not talking about disclosure of any information to
5 competitors. There is a confidentiality order in this
6 case. The government will abide by it in fact. Despite
7 the suggestion to the contrary in Merck's reply brief,
8 the government proposed the confidentiality order and as
9 early as its interrogatory answers in September of 1976
10 acknowledged its willingness to provide confidentiality
11 to the company, just as we proposed a consent to such
12 orders in all the other cases involving pharmaceutical
13 companies.

14 QUESTION: Who would enforce the
15 confidentiality order -- the Comptroller General's
16 office?

17 MR. GANZFRIED: And the Court. It's a Court
18 order.

19 QUESTION: What about those that you don't
20 have a court order?

21 MR. GANZFRIED: In all of the cases that have
22 been litigated in the pharmaceutical --

23 QUESTION: Well, how about all of the cases
24 that haven't been litigated? Is there any
25 confidentiality order on those?

1 MR. GANZFRIED: In this particular set of
2 requests there was only one that was not litigated and I
3 don't know what the status of --

4 QUESTION: Well, are there any that weren't
5 litigated?

6 MR. GANZFRIED: There was one that was not
7 litigated.

8 QUESTION: Well, that doesn't have a -- in
9 other words, the only way you get the confidentiality
10 order is to go to court?

11 MR. GANZFRIED: Not necessarily.

12 QUESTION: Well, how else?

13 MR. GANZFRIED: It may be that it could be
14 negotiated at the time that the request is issued. That
15 would be one possibility.

16 QUESTION: And if they say no, what happens?

17 MR. GANZFRIED: If they say no, then you've
18 got to go to court in order to get the records. Of
19 course, as of 1980 we have an additional remedy, and
20 that is that we can issue subpoenas under the amendments
21 to the General Accounting Office Act of 1980. We can
22 get subpoenas.

23 QUESTION: I just don't see how the court
24 ordered confidentiality protects the statute in this
25 case, which doesn't mention court. It just says you

1 have a right to go in there and do it without a court
2 order, don't you?

3 MR. GANZFRIED: That's correct. When the
4 company --

5 QUESTION: That's what's before us, isn't it?

6 MR. GANZFRIED: Is the statute that says that
7 the contracts are to provide that the Comptroller
8 General has the right to go in.

9 QUESTION: Which statute has no
10 confidentiality provision in it at all.

11 MR. GANZFRIED: That statute does not. There
12 are other statutes, the citations of which I can find --
13 I don't have them offhand -- that do afford some
14 protections for companies as to trade secrets that might
15 be disclosed.

16 QUESTION: Can you subpoena post-1980 records
17 of Merck now under the 1980 amendment?

18 MR. GANZFRIED: Under -- I believe that's
19 right.

20 QUESTION: Has the Comptroller General started
21 doing it?

22 MR. GANZFRIED: He has not. The scope of
23 access under the subpoena power is precisely the same as
24 the scope of access under the provisions that are at
25 issue here.

1 QUESTION: So really the 1980 Act doesn't give
2 you anything, I guess, that you don't have now.

3 MR. GANZFRIED: It gives us an additional
4 remedy. The hope in Congress was that it would speed up
5 the process. In fact, the pharmaceutical cases that --
6 this case and the Bristol case which was before this
7 Court 18 months ago -- were specific examples that were
8 cited to Congress as providing the need for having
9 additional power and Congress did provide the subpoena
10 power to the Comptroller General.

11 QUESTION: May I ask you one -- one legal
12 question? At the end of Judge Mikva's opinion below he
13 has this sentence: "One must come to statutes such as
14 this with a pro-disclosure bias." Do you think that's a
15 correct statement of the law? I notice you didn't cite
16 that sentence in your brief.

17 MR. GANZFRIED: Well, I think that given that
18 this statute -- I think one must come to this statute
19 with a pro-disclosure bias or one must certainly come to
20 that conclusion after reading the statute because it's a
21 broad authorization.

22 QUESTION: Just if you make an impartial
23 approach to it, maybe you don't win. Is that what
24 you're saying?

25 MR. GANZFRIED: No, I think whether one makes

1 a partial or impartial approach, the only --

2 QUESTION: He says he must come to it with a
3 pro-disclosure bias. That seemed to me he regards that
4 as kind of part of his legal analysis, but you don't
5 subscribe to that.

6 MR. GANZFRIED: Well, I think he had already
7 reached his -- he had provided his analysis before he
8 made that statement and having come to his conclusion he
9 addressed it that way.

10 QUESTION: Saying this is a biased conclusion.

11 MR. GANZFRIED: I think it's certainly an
12 appropriate conclusion to come to and it's a conclusion
13 that we suggest -- we submit that this Court should
14 reach.

15 Thank you.

16 CHIEF JUSTICE BURGER: Mr. Lacovara?

17 ORAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.

18 ON BEHALF OF RESPONDENT

19 MR. LACOVARA: Thank you, Mr. Chief Justice,
20 and may it please the Court.

21 This is a statutory construction case. The
22 argument that has just been presented on behalf of the
23 government emphasizes why the Comptroller General or his
24 counsel today believes that it might be a fine idea for
25 the Comptroller General to have access to the extensive

1 cost records of government contractors, even where costs
2 played no part in the negotiation or pricing of the
3 contract for the goods sold to the government.

4 That position may make sense. It may not make
5 sense as a matter of policy. I don't know what the
6 right answer to that question is. All I know is that in
7 1972 before he was finally forced into pursuing this
8 exercise, when, as the Third Circuit recently put it, he
9 concluded -- "he", the Comptroller General -- that he
10 had no viable option but to do what Senator Nelson had
11 urged him, the Comptroller General personally testified
12 before Senator Nelson's Committee that this very
13 exercise would be, in his words, "a waste of time."

14 And he said at that point -- and the passage
15 is quoted on pages three and four of our brief -- that
16 since the government always buys pharmaceutical products
17 below the cost at which these products are sold in
18 substantial quantities to the general public, he, as he
19 put it, "found it a little hard on its face to say that
20 the government is not getting good prices."

21 QUESTION: Well, isn't that a little bit like
22 a prosecutor saying "We don't think we have much cause
23 to prosecute X," and then a Senator calls up the
24 prosecutor and the prosecutor says, "Okay, we're going
25 to go ahead and prosecute X."

1 A court looks at the merits of that sort of a
2 claim. They don't go into all the motivations and that
3 sort of thing.

4 MR. LACOVARA: Justice Rehnquist, I think this
5 case is a little bit different because we're talking
6 here about the use of a coercive power given under a
7 statute that we think was given by Congress for a very
8 limited purpose. The purpose was, as the legislative
9 history would show and I think the language of the
10 statute would show, to allow the Comptroller General to
11 conduct audits of individual contracts to see whether
12 the parties on either side had abused the process.

13 The Comptroller General said that was not
14 something that he thought he was interested in doing in
15 this industry, or something that he thought would be
16 useful.

17 QUESTION: But is Mr. Bowsher bound by Mr.
18 Staats' subjective feelings on the thing?

19 MR. LACOVARA: I think it's not quite whether
20 he's bound by that, Justice Rehnquist, but whether or
21 not when one passes beyond the scope of access that the
22 government is demanding one gets to the question whether
23 this was a bona fide or legitimate inquiry in the first
24 place.

25 There is case law. LaSalle National Bank is

1 one such case -- there are others, of course, in the
2 lower courts -- in which this Court and others have said
3 that if demand for access to private records under
4 summons power or subpoena powers or otherwise is not
5 motivated by the purpose for which that power was
6 granted, then the demand should not be enforced.

7 I do want to emphasize, though, that is not
8 the principal point of Merck's argument here this
9 afternoon.

10 QUESTION: If the inquiry were directed at a
11 search of all the cost-plus contracts that Merck had,
12 would you have any problem?

13 MR. LACOVARA: Your Honor, no, we would not.
14 That is --

15 QUESTION: That would be part of the audit
16 function, would it not?

17 MR. LACOVARA: Exactly. If the price of the
18 contract had been negotiated on the basis of cost,
19 because Merck represented that it would incur a certain
20 level of costs in performing the contract, or if the
21 contract price itself was left open to be based upon the
22 costs actually incurred, then there is no question
23 whatsoever that that would be within the traditional
24 audit function that the Comptroller General has and that
25 this access statute permits him to enforce.

1 That, however, is not what we have here
2 today. I'm not sure whether Merck has any cost-plus
3 contracts with the government. I rather doubt that it
4 does. There is nothing in the record to indicate that
5 there are any such contracts, and one would have thought
6 that if there had been any the Comptroller General,
7 knowing that this whole dispute concerned the industry's
8 position that cost records are highly confidential and
9 that they are not relevant to non-cost-based records, if
10 the Comptroller knew of any such cost-based contracts in
11 the industry he would have selected those as the
12 predicate for his access demands.

13 He didn't, and what we have here is an access
14 demand that lists four specific, non-cost-based
15 contracts, all of which the government admits are for
16 standard commercial items sold to the general public at
17 catalog prices or otherwise based on prices that are set
18 in the competitive marketplace.

19 I might at this point pick up on one of the
20 colloquys that was held during my colleague's discussion
21 with the Court about whether the GAO has any belief or
22 any suspicion that the prices for these contracts were
23 not reasonable in any sense. The GAO, when it answered
24 interrogatories, expressly denied that it had any reason
25 to suspect any impropriety in any part of the

1 negotiation process or had any reason to doubt the
2 reasonableness of the price.

3 When the senior GAO official who is involved
4 in this matter, Mr. Ahart, the Director of the Manpower
5 and Welfare Division, was being deposed, I asked him the
6 question. Is there any specific reason to believe that
7 Merck made excessive or unreasonable profits on any of
8 the four contracts in question? This is page 76-A of
9 the Joint Appendix.

10 The answer in full is: "No. The General
11 Accounting Office has no reason to believe that Merck
12 made unreasonable or excessive profits on the four
13 contracts."

14 All of this, however, should be considered, I
15 think, in the context --

16 QUESTION: Of course, if that's the fact, why
17 didn't you give them the profit margins?

18 MR. LACOVARA: Pardon me?

19 QUESTION: If that's the fact, what's the big
20 secret?

21 MR. LACOVARA: The secret, Justice Stevens, is
22 that the government wants not the records that Merck has
23 offered, which are the records to show that the prices
24 that were agreed upon in these contracts were actually
25 based upon catalog prices at which these products were

1 sold to the government.

2 They have said under this statute, which has,
3 we think, not only limited language but a purpose, a
4 background of legislative intent that shows a narrow
5 range of authority, that they want access to all of
6 Merck's cost records, except to the extent -- and it's a
7 little hard to pin down precisely what the theory is
8 since it has shifted a bit -- except to the extent, as
9 we understand it -- and this picks up on Justice --
10 Judge Mikva's dissenting opinion in the lower court --
11 that Merck bears the burden of showing that costs are
12 specifically allocated by the company to some other
13 product.

14 Now that's an interesting inversion of the
15 statutory language, which says the Comptroller General
16 may only get access to records that are directly
17 pertinent to and involve transactions relating to a
18 specific contract. What that means, Justice Stevens, in
19 this case is that since these clauses must be included
20 in any contract for the purchase of more than \$10,000 in
21 goods, even for off-the-shelf kinds of standard
22 commercial items, under the government's theory -- and
23 this is the way it has expressly articulated it again
24 this afternoon -- the government, through the GAO, is
25 entitled to examine all of the costs that Merck has

1 incurred for an indefinite period of time -- Mr. Ahart
2 said maybe as much as 20 years.

3 Merck, in a year in which these contracts were
4 signed, had costs of about \$1 billion, including about
5 \$100 million in research and development costs. Today,
6 the numbers have jumped to over \$2 billion for general
7 costs and \$300 million for research and development.
8 The government's theory is that it's entitled to access
9 to all of those costs under this authority.

10 QUESTION: Well, I understand their request is
11 very broad. Supposing you had for internal management
12 purposes set a figure that said what your costs are on
13 every product you sell. A lot of companies do. I don't
14 know whether you do or not. And they just said we want
15 to know what, for internal management purposes, you
16 treat the cost of these four items as. That's all we
17 want to know.

18 I suppose you wouldn't tell them that either,
19 would you?

20 MR. LACOVARA: Well, what we would do on a
21 cooperative basis, Justice Stevens, is another matter.
22 As you know from looking at the record here, Merck was
23 one of the companies that came forward voluntarily when
24 GAO was interested in doing an economic study and we
25 said we will give you access to a lot of information if

1 you'll keep it confidential.

2 The record makes perfectly clear, as every
3 court that has addressed this question has recognized,
4 that the GAO said it was prepared to give the industry
5 this kind of commitment of confidentiality for some of
6 the reasons that emerged in the Chief Justice's colloquy
7 with opposing counsel. But Senator Nelson and his staff
8 said we want you to get individual product cost
9 information to give to us so that we can disclose it.

10 It's in the Joint Appendix. Mr. Ahart
11 testified that the only reason the GAO did not give the
12 confidentiality pledge when Merck and the other
13 companies said they would produce the costs was the
14 refusal of the Senators to accede to it.

15 QUESTION: Does that mean that your underlying
16 interest is not so much in keeping the information from
17 GAO as the danger that it might become -- fall into the
18 public domain?

19 MR. LACOVARA: That's one concern. When we
20 filed the complaint, Justice Stevens, we said that the
21 scope of the demand made by the Comptroller General
22 proposed to injure Merck in two respects. One was the
23 danger to the confidentiality of this information, and
24 it is highly important, as I think the Chief Justice's
25 question suggested, whether competitors know how a

1 particular pharmaceutical company is concentrating its
2 research and development activities. That is of
3 enormous use. Industrial intelligence is highly
4 specialized in this way.

5 But the other purpose that we said motivated
6 the suit to block the sweeping access that was demanded
7 was the sheer cost and burden. This is not simply a
8 counsel's flight of fancy or a parade of horrors
9 constructed for litigation. The record shows that, as
10 my opposed counsel said, one of the six companies on
11 whom these demands were simultaneously served decided it
12 would try to acquiesce rather than fight. That was
13 Hoffman-LaRoche.

14 It allowed access in July 1975. When I asked
15 Mr. Ahart on deposition what was the status of that
16 inquiry, he testified -- and this can be found in the
17 Joint Appendix -- that the -- a team of GAO auditors had
18 been on site at Hoffman-LaRoche's headquarters for 15
19 months and were expected to be there a few more months.
20 It turned out that in July 1975, two years later, the
21 team was still there, and after some of the lower courts
22 began to rule that the GAO had overstepped its bounds,
23 Hoffman-LaRoche finally said enough is enough. That
24 would appear on Joint Appendix 127-A, Justice Stevens.

25 So what we have here is a demonstrated track

1 record that if GAO has what it claims in this case it
2 can send teams of accountants to live at the
3 headquarters of a contractor, spend years there -- far
4 more than outside auditors find it necessary to spend
5 time to do the annual certifications for the SEC. I
6 think that makes it perfectly evident that the position
7 of contractors like Merck and the others that this
8 demand is not only abstractly in excess of the GAO's
9 legal authority but is in fact a real substantial threat
10 to the company's functioning.

11 Now opposing counsel also said that we in our
12 reply brief had mistakenly said that the GAO had opposed
13 a confidentiality provision in this case. In fact, I
14 think the Court should be aware, looking at record
15 reference 58, when Merck moved for the addition of
16 confidentiality provisions to the judgment, a motion
17 that was subsequently granted, the GAO opposed that
18 motion, saying it was prepared to agree to
19 confidentiality only if the District Court granted the
20 full relief that the government had been seeking, but
21 that since the District Court had allowed access only to
22 direct production cost records the government thought
23 that it should be under no obligation to preserve the
24 confidentiality of those records. So I refer the Court
25 for this I think largely irrelevant dispute to record

1 item 58.

2 The key point, though, in this case is that
3 it's a statutory construction case. The statute printed
4 in the government's certiorari petition has in it at
5 least four explicit terms of limitation. Page two of
6 the government's petition for certiorari says, in
7 relevant part, "The Comptroller General and his
8 representatives are entitled" -- first limitation --
9 "until the expiration of three years after final payment
10 to examine any books or papers" -- that is number two --
11 "directly pertaining to" -- number three -- "and
12 involved transactions relating to" -- and then, number
13 four -- "the contract."

14 In the clause that implements this statutory
15 requirement, which is in the record and is also quoted
16 in the government's answer to the complaint in the Joint
17 Appendix, the government has refined that to make it
18 clear that access is to be granted only to records that
19 are directly pertinent to and involving transactions
20 relating to this contract.

21 So if the English language means anything, it
22 means that both the statutory grant of authority and the
23 contract clause which implements the authority focus
24 directly, narrowly, specifically on the transactions
25 involving that contract. That, we think, logically,

1 naturally suggests that what the government is entitled
2 to are records relating to the negotiation of the
3 contract, the performance of the contract, and the
4 support for payment under the contract.

5 Other procurement statutes make that pattern
6 manifest. We refer to three or four of them -- the
7 Renegotiation Act, the Truth in Negotiations Act, the
8 agency access statute enacted in 1968 to give the
9 agencies, as the Congress was told, the same power of
10 access that the GAO had been given in 1951, and the cost
11 account -- the government cost accounting standards
12 statute.

13 All of those are congressional manifestations
14 of the view that where a product being sold to the
15 government is a standard commercial item sold to the
16 general public at a catalog price or in some other
17 competitive setting, the government does not have any
18 legitimate interest in knowing what the contractor's
19 costs are. The government's interests, as the
20 Comptroller General testified in 1972, are protected
21 when the government is assured -- and Merck is prepared
22 to give these records to the GAO -- that the price at
23 which the government purchased the items was based on
24 and not more than the catalog price at which the same
25 products were sold to the public.

1 We, both sides, exhaustively discussed the
2 legislative history, what is suggested by the language
3 of the statute and what the legislative history shows.
4 There has also been a debate about whether the GAO has
5 consistently interpreted the statute since 1951 or
6 whether, as several courts and commentators have said,
7 at best it's interpretation is checkered.

8 I think it is worthwhile, though, to see what
9 the GAO told Congress it thought the statute meant when
10 the amendment to the permanent procurement statutes in
11 the fall of 1951 was being considered.

12 QUESTION: Mr. Lacovara, you haven't yet
13 covered in your oral argument, have you, your objections
14 to what the District Court did give to the Comptroller
15 General?

16 MR. LACOVARA: Well, I'll deal with that right
17 now.

18 QUESTION: Well, no, I just meant to keep
19 track of you in a way.

20 MR. LACOVARA: I should have given you an
21 outline of where I wanted to go, and I apologize for not
22 having done that.

23 The thrust of what I was suggesting a moment
24 ago about how the language of the statute reads
25 underlies what we think is the objection to the District

1 Court's holding. The District Court, as you know, held
2 in this case -- and we recognize that three circuits, at
3 least -- well, four circuits, including the
4 Hewlett-Packard decision in the Ninth Circuit -- have
5 held that under this statutory authority the Comptroller
6 General can get access to direct production costs, even
7 for -- under a non-cost-based contract.

8 Our view is that the proper reading of the
9 statute is that no cost records are directly pertinent
10 to a contract if the contract is not cost-based, either
11 because there were no representations made about costs
12 during the negotiation of the price or because the price
13 itself does not vary with costs.

14 If there is to be a conclusion -- and one
15 cannot blink the fact that at least four circuits have
16 held that some costs are directly pertinent, but they
17 have drawn the line at direct production costs -- if
18 some costs are pertinent, then that seems to be, as
19 these four courts have held, a reasonable place to draw
20 the line.

21 But our submission this afternoon is that when
22 you look at the terms of the statute, consider the
23 purpose of the statute, which was to enable the GAO to
24 see whether the contracting officers or the government
25 or the sales agents for the suppliers had overstepped

1 their bounds either by making false, inadvertently
2 mistaken, or inaccurate predictions about cost, or
3 whether the contracting officer from the government
4 standpoint had neglected, as the GAO has found in some
5 instances is the case, to ask for cost information when
6 that information should have been provided, then that's
7 the situation in which cost records may be pertinent.

8 Otherwise, cost records are simply not
9 directly pertinent and do not involve transactions
10 relating to the contract.

11 QUESTION: Is it not true that even in the
12 kind of contract we have here you do have the clause in
13 your contract, though, so we're not necessarily confined
14 to knowing what the statute means or even if it was just
15 intended to apply primarily to other contracts. You did
16 agree to this provision in these contracts.

17 MR. LACOVARA: Yes, that's correct, Justice
18 Stevens. It's -- the statute requires it to be
19 included. Generally what happens is -- and this is
20 shown by the record -- there's a lot of forms that are
21 issued in connection with contracts and the contracting
22 officer just checks a box. In fact, in one or two of
23 the contracts this clause was not physically included,
24 but we're not arguing that that has any legal
25 significance.

1 Appropos of that point, though, the three or
2 four circuits that have now concluded that the GAO's
3 argument exceeds the statutory language have reasoned
4 that not only is this in excess of what the statute
5 provides but that because this authority comes in
6 through a contract no government contractor could
7 reasonably construe the language to be as broad as the
8 government now argues it is.

9 I think it's relevant also in that connection
10 to note that before this dispute arose the government
11 had never, as far as we can tell, sought to obtain
12 indirect cost information in connection with any
13 non-cost-based contract. The Hewlitt-Packard case,
14 which until this dispute was the high water mark in this
15 area, granted the Comptroller General access only to
16 direct production costs, far short of what is being --

17 QUESTION: Mr. Lacovara, it would seem to me
18 that it would make it difficult for the government to
19 know that Merck's position was correct, that the price
20 of the goods bore no relation whatever to cost of
21 production, without giving the government access to
22 enough of the records to check the veracity of that
23 proposal by Merck.

24 MR. LACOVARA: The position, Justice O'Conner,
25 is that this access authority is designed to let the GAO

1 check and see whether the contractor and the purchasing
2 agent on behalf of the government did something improper
3 or negligent in the course of negotiating the contract.
4 Under the procurement statutes there is an elaborate
5 formal record that is established about the basis on
6 which the price being offered to the government was
7 being based.

8 QUESTION: Of course, if you limit -- if
9 that's the limited purpose, you have already won your
10 lawsuit, I guess.

11 MR. LACOVARA: That's one ground for us to
12 win, Justice White. But we have never denied that the
13 government, through the GAO, can come in to examine the
14 representations that were made to the contracting
15 officer that the price being quoted was a catalog price
16 and that the price actually being offered to the
17 government was below the price at which these items have
18 been sold.

19 GAO has conceded in interrogatories and on
20 deposition that in fact the -- these items were priced
21 on the basis of catalog price lists or on the basis of
22 other price competition and there was no actual
23 negotiation. Our suggested interpretation of the
24 statute is that in a non-cost-based contract, the
25 Comptroller General has no function beyond verifying

1 that.

2 There are examples, however, where he does
3 look at records --

4 QUESTION: Just the point is simply that the
5 verification might take you into some areas that are
6 more in keeping with the District Court and the Court of
7 Appeals order, wouldn't it?

8 MR. LACOVARA: We agree that the GAO would
9 have the right to examine records that show that the
10 government was getting the products that it contracted
11 for. To some extent, that might include records showing
12 that what was being produced was the product involved,
13 and so there might be access through that mechanism,
14 Justice O'Conner, to direct production costs showing
15 that materials and packaging and the rest were as
16 represented.

17 But the principal argument is that costs are
18 not directly pertinent to and do not involve
19 transactions relating to the contract when it is a
20 category called a non-cost-based contract.

21 QUESTION: If you -- these are negotiated
22 contracts.

23 MR. LACOVARA: Negotiated in a technical sense
24 only, Justice White. The procurement law says anything
25 other than a contract arrived at through simultaneous

1 sealed bids is negotiated.

2 QUESTION: And do they actually negotiate?

3 MR. LACOVARA: The evidence is that there was
4 no negotiation about price. That is, the contracting
5 agency says we would like to buy this product. What
6 price will you sell it at? Merck submits its price and
7 in all the four instances that was the price accepted.

8 QUESTION: Yes. Well, I suppose the
9 government would like to know if they couldn't have
10 gotten it cheaper and that they might have if the costs
11 were low enough.

12 MR. LACOVARA: That's in part what the --

13 QUESTION: Would it be legal for the
14 government to say, even though it isn't a cost-plus
15 contract and it isn't a bid contract, if they refuse to
16 deal with anybody unless they tell them their costs?

17 MR. LACOVARA: Oh, no, nothing illegal about
18 that at all.

19 QUESTION: So the government could tell Merck,
20 well, look, don't send us any -- when you send us your
21 bids, send us your costs or we won't deal.

22 MR. LACOVARA: There's nothing illegal about
23 that, Justice White.

24 QUESTION: What do you think Merck would do
25 then?

1 MR. LACOVARA: Oh, the record shows what Merck
2 would do or has done.

3 QUESTION: They would say we'll sell it
4 someplace else.

5 MR. LACOVARA: If you look at record reference
6 23 attached to the affidavits of Merck's general
7 counsel, Mr. Banse, are copies of correspondence with
8 the government on this very point. Various contracting
9 officers said we'd like to know what your costs are for
10 these pharmaceuticals. In every case Merck said these
11 are confidential. We will not supply them, and finally
12 Colonel Brafogel --

13 QUESTION: And then the government didn't call
14 your bluff.

15 MR. LACOVARA: That's correct. Colonel
16 Brafogel, in fact, who is in charge of all
17 pharmaceutical procurement for the Defense Department,
18 wrote back and said we recognize your industry position
19 and we will not in the future ask for cost information.
20 That's record reference 23.

21 So this matter was expressly thrashed out and
22 the government decided it would rather buy at the price
23 Mr. Staats said was protected because it was established
24 in the marketplace rather than say we won't buy unless
25 you give us your cost information.

1 The government's theory, I suggest, has very
2 little relationship to the language of the statute or
3 any of the purposes that one could possibly glean from
4 the legislative history. If any records are pertinent,
5 then, as several courts have said, we can go no further
6 than direct production costs.

7 But the notion that under this authority the
8 government is entitled to demand access to what, from
9 the Roche experience and the government's own
10 articulation, might be billions of dollars worth of cost
11 records because a contractor sold off the shelf a
12 standard commercial item worth \$10,000, that seems to
13 have very little connection with the language of the
14 statute or its purpose.

15 I would also like to emphasize in my
16 conclusion that despite the predictions that the heavens
17 will fall unless the various Circuits are repudiated on
18 this subject, this case is truly unprecedented. The
19 government, as far as the record shows, has never
20 obtained access to indirect cost records in connection
21 with a cost -- non-cost-based product. Hewlett-Packard
22 only allowed access to direct production costs.

23 The amicus brief of the Aerospace Industries
24 Association, whose members have \$60 billion a year in
25 government contracts, have said that in their experience

1 the Comptroller General has never tried to get access to
2 cost records under non-cost-based contracts.

3 In this record, GAO first said it used its
4 access authority to audit \$800 million in contracts in
5 1974 and '75. When we asked were any of these
6 non-cost-based contracts, the answer came back, somewhat
7 sheepishly, well, no, they were all cost-based. So
8 either accepting the decision of the Court of Appeals in
9 this case or Merck's somewhat broader position would
10 have no impact on the use of this statute as the GAO has
11 actually asserted it over the past 30 years.

12 The same conclusion applies to the argument
13 that this power can be used to conduct economic studies
14 of industries in order to see how the procurement
15 process is working. When we asked have you ever used
16 this power for that purpose, back came the answer, yes,
17 on five occasions. But, as the record shows, when you
18 look at each of those, they turned out to be individual
19 contract audits of cost-based contracts or, in one
20 instance, what the government refers to as the HY-80
21 steel plate industry. The government was simply
22 auditing a decision by the Navy Department to accept a
23 contractor's representation that steel plates for
24 nuclear submarines were commercial products.

25 There was no cost audit involved. The Navy

1 was properly chastised for having been gulled into
2 thinking that nuclear submarine plates were consumer
3 items. That's the limit to which the Comptroller
4 General has attempted to push this power in the last 31
5 years. We think that's the most eloquent demonstration
6 that this case is a regrettable sport because, as the
7 Third Circuit said, after several years of trying to
8 hold the line against Senator Nelson, the Comptroller
9 General concluded he had no viable alternative but to
10 push ahead.

11 We ask, therefore, that the judgment either be
12 affirmed or that summary judgment be granted for Merck.

13 Thank you.

14 CHIEF JUSTICE BURGER: Thank you, gentlemen.
15 The case is submitted.

16 (Whereupon, at 2:07 o'clock p.m., the case in
17 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES ET AL
Petitioners v. MERCH & CO., INC., # 81-1273 and

MERCK & CO., INC., Petitioner v. CHARLES A. BOWSHER, COMPTROLLER
GENERAL OF THE UNITED STATES AND UNITED STATES # 81-1472

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

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