The General Accounting Office's Access to Government Contractors' Records

The federal government spends over one hundred billion dollars every year through an extensive system of military and civilian procurement.¹ The General Accounting Office (the "GAO"), headed by the Comptroller General, was established in 1921 as an independent agency within the legislative branch² and is responsible for overseeing and improving the procurement process.³ Federal law requires that each negotiated procurement contract⁴ con-

¹ In Fiscal Year 1980, reported federal government procurement (excluding intragovernment arrangements) totaled \$73.5 billion for Defense Department procurement, OFFICE OF THE SECRETARY OF DEFENSE, DEPARTMENT OF DEFENSE PRIME CONTRACT AWARDS, FIRST HALF FISCAL YEAR 1981, at 6-25 (1981) (Table 15), and \$27.9 billion for procurement by civilian agencies, GENERAL SERVICES ADMINISTRATION, PROCUREMENT BY CIVILIAN AGENCIES FOR THE PERIOD OCT. 1, 1979 TO SEPT. 30, 1980 (pt. 1), at 1 (1981).

The manpower requirements of the procurement system are also considerable, engaging the services of about 60,000 federal employees. GENERAL ACCOUNTING OFFICE, AN ORGANIZED APPROACH TO IMPROVING FEDERAL PROCUREMENT AND ACQUISITION PRACTICES 1 (1977).

² Budget and Accounting Act, ch. 18, § 301, 42 Stat. 20, 23 (1921) (codified at 31 U.S.C. § 41 (1976)). See also Cibinic & Lasken, *The Comptroller General and Government Contracts*, 38 GEO. WASH. L. REV. 349, 349 & nn.2-3 (1970). Although most independent agencies are part of the executive branch, the GAO was established specifically to provide Congress, not the President, with information about the government's financial activities. Furthermore, the Comptroller General reports to Congress and may be removed from office only for cause and only by joint resolution of Congress. See *id.* at 349-50. This unique status has led some to conclude that the GAO "operat[es] on the hazy borderline between legislative and executive powers." *Id.* at 350.

³ See 31 U.S.C. § 53(a) (1976) ("The Comptroller General shall investigate . . . all matters relating to the receipt, disbursement, and application of public funds . . . [and] he shall make recommendations looking to greater economy or efficiency in public expenditures.").

⁴ Government procurement takes two forms: formal solicitation of bids (advertised procurement) and procurement by negotiation. 10 U.S.C. § 2304(a) (1976) (defense procurement); 41 U.S.C. § 5 (1976) (civilian procurement). In the case of advertised procurement, the agency formally advertises the availability of a contract and solicits secret bids on a competitive basis. When procuring by negotiation, the agency negotiates terms with one or more prospective contractor and awards the contract to the party offering the most advantageous terms. Nash, *Risk Allocation in Government Contracts*, 34 GEO. WASH. L. REV. 693, 694 nn.2-3 (1966); Case Comment, *The Comptroller General's Authority to Examine the Private Business Records of Government Contractors: Eli Lilly & Co. v. Staats*, 92 HARV. L. REV. 1148, 1148 n.1 (1979).

Procurement by advertising is preferred by law, see 10 U.S.C. § 2304(a) (1976) (advertising to be used "in all cases in which the use of such method is feasible and practicable"); 41 U.S.C. § 5 (1976) (advertising to be used "unless otherwise provided"), and has been described as the "usual method" of government procurement, 1B J. McBRIDE & T. TOUHEY, GOVERNMENT CONTRACTS § 9.10[1] (1981). Negotiation may be used only when specified by

tain a clause granting the Comptroller General the right to inspect all records "directly pertinent" to the contract.⁵ Neither the statute nor the legislative history, however, defines "directly pertinent," leaving the scope of the Comptroller General's inspection powers unclear.⁶

statute. 41 U.S.C. § 5 (1976). For examples of provisions specifying procurement by negotiation, see 10 U.S.C. § 2304(a) (1976) (defense procurement by negotiation allowed when the dollar amount involved does not exceed \$10,000, when there is only one source of supply, or when public exigencies require immediate performance); 41 U.S.C. § 5 (1976) (same for civilian procurement). Procurement by negotiation is not insignificant: it constitutes about three-fourths of all government procurement contracts. Nash, *supra*, at 694 n.3. In Fiscal Year 1980, the total dollar amount involved in negotiated procurement reached almost \$89 billion. See GENERAL SERVICES ADMINISTRATION, *supra* note 1, at 1; OFFICE OF THE SECRETARY OF DEFENSE, *supra* note 1, at 6-25 (Table 15).

⁵ The civilian procurement statute provides that

[a]ll contracts negotiated without advertising . . . shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts.

41 U.S.C. § 254(c) (1976). The defense counterpart provides that

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

10 U.S.C. § 2313(b) (1976).

The two statutes, though now worded differently, have the same meaning. See MACHINERY and ALLIED PRODUCTS INSTITUTE and COUNCIL FOR TECHNOLOGICAL ADVANCEMENT, THE GOVERNMENT CONTRACTOR AND THE GENERAL ACCOUNTING OFFICE 92-93 & n.13 (1966). References herein to a single statute are applicable to both unless otherwise specified.

⁶ One might characterize GAO inspection of corporate records as a search and, as such, limited by the fourth amendment's prohibition of unreasonable searches and its requirement of search warrants based upon probable cause. See U.S. CONST. amend. IV. Even if the inspections are in fact searches, however, they do not violate the fourth amendment. Each contractor consents by contract to allow inspection, and he thereby waives his constitutional rights. But because such consent is a prerequisite to doing business with the government, it may constitute an unconstitutional condition; by placing a condition on selling to the government, the government may not do indirectly (conduct an unreasonable or warrantless search) what it is prohibited from doing directly. See, e.g., *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); see also *Lefkowitz v. Turley*, 414 U.S. 70, 83-84 (1973) (doctrine of unconstitutional conditions applies to relations with government contractors). Even as direct searches, however, the inspection statutes are probably unobjectionable. In *Donovan v. Dewey*, 452 U.S. 594 (1981), the Supreme Court indicated that the fourth amendment interests of a commercial enterprise "may . . . be adequately protected by regulatory schemes authorizing warrantless inspections." *Id.* at 599 (citation omitted). To satisfy the constitution, such regulatory schemes must be authorized by law or be necessary for the furtherance of a federal interest, and they must not require unpredictable intrusions. See *id.* GAO inspection of corporate records is authorized explicitly by statute, 10 U.S.C. § 2313(b) (1976); 41 U.S.C. § 254(c) (1976), furthers the government's interest in the efficient use of tax revenues, see *infra* notes 38-42 and accompanying text, and, because the contractor agrees to

There has been little litigation over GAO access to records, but the few cases on point have reached inconsistent results. In particular, two opposing definitions have emerged in a series of cases involving drug manufacturers,⁷ and the issue will soon be addressed by the Supreme Court.⁸ The dispute centers on records of costs, such as research and development, marketing, and general administrative costs, that the manufacturers do not allocate to any particular product or contract:⁹ must relevant but unallocated cost data be disclosed? All courts addressing the issue have ordered disclosure of some such data. Yet the majority test, though not clearly articulated in these terms, appears for the most part to limit GAO inquiry to allocated cost data and to withhold unallocated cost

provide access to its records for only three years after the last payment under the contract, is predictable.

A constitutional objection to GAO inspection has been raised in only one case, and it was rejected because the inspection was reasonably related to an investigation within the GAO's jurisdiction. *Eli Lilly & Co. v. Staats*, 574 F.2d 904, 917 (7th Cir.), *cert. denied*, 439 U.S. 959 (1978). See Morgan, *The General Accounting Office: One Hope for Congress to Regain Parity of Power with the President*, 51 N.C.L. Rev. 1279, 1362 (1973) (government contractors have "no constitutional protection" against disclosure of records to the GAO).

⁷ Compare *SmithKline Corp. v. Staats*, 668 F.2d 201, 213 (3d Cir. 1981) ("directly pertinent" records primarily are those concerning "direct" (i.e., allocated) costs), *petition for cert. filed sub nom. Bowsher v. SmithKline Corp.*, 50 U.S.L.W. 3936 (U.S. May 10, 1982) (No. 81-2082) and *Merck & Co. v. Staats*, 665 F.2d 1236, 1237 (D.C. Cir. 1981) (same), *cert. granted sub nom. Bowsher v. Merck & Co.*, 102 S. Ct. 1968 (1982) and *Bristol Laboratories Div. of Bristol-Myers Co. v. Staats*, 620 F.2d 17, 18 (2d Cir. 1980) (same), *aff'd mem. by an evenly divided court*, 451 U.S. 400 (1981) with *United States v. Abbott Laboratories*, 597 F.2d 672, 674 (7th Cir. 1979) ("directly pertinent" records are all those concerning "significant inputs" (quoting *Ely Lilly & Co. v. Staats*, 574 F.2d 904, 914-15 (7th Cir.), *cert. denied*, 439 U.S. 959 (1978))) and *Eli Lilly & Co. v. Staats*, 574 F.2d 904, 914-15 (7th Cir.), *cert. denied*, 439 U.S. 959 (1978). The *Lilly* formulation was adopted by Judge Mikva in his separate opinion in *Merck & Co. v. Staats*, 665 F.2d at 1237-50 (Mikva, J., concurring in part, dissenting in part).

⁸ Certiorari was granted in *Bowsher v. Merck & Co.*, 102 S. Ct. 1968 (1982), and a petition for certiorari is pending in *Bowsher v. SmithKline Corp.*, 50 U.S.L.W. 3936 (U.S. May 10, 1982) (No. 81-2082).

The issue was before the Court two years ago, *Staats v. Bristol Laboratories Div. of Bristol-Myers Co.*, 451 U.S. 400 (1981) (Stewart, J., not participating), *aff'g mem. by an evenly divided court* 620 F.2d 17 (2d Cir. 1980) (adhering to direct cost test), but because the Court was evenly divided, its decision has no precedential force, see *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

⁹ See *supra* note 7. Costs incurred to develop or sell a particular product, such as raw material costs, are considered "allocated." Costs relating to several products, such as the costs of research to develop technology used in many product lines, are considered "unallocated." See *Bristol Laboratories Div. of Bristol-Myers Co. v. Staats*, 428 F. Supp. 1388, 1389-91 (S.D.N.Y. 1977), *aff'd per curiam*, 620 F.2d 17 (2d Cir. 1980), *aff'd mem. by an evenly divided court*, 451 U.S. 400 (1981). All courts agree that the GAO may obtain records concerning costs that have been allocated to products the government has purchased, and all agree that the GAO may not inspect records of unallocated costs that are not relevant to the costs of a government contract.

data from GAO scrutiny.¹⁰ The minority test would allow the GAO to inspect records of any costs, allocated or not, if the costs were "significant inputs" in the government's contract price.¹¹

This comment will evaluate the competing interpretations of "directly pertinent" by examining the language, history, and pur-

¹⁰ See, e.g., *Bristol Laboratories*, 428 F. Supp. at 1389-90, 1391. *Bristol* allowed the GAO access to records of manufacturing costs (including raw and packaging materials, labor and fringe benefits, quality control and supervision), manufacturing overhead (including plant administration, production planning, warehousing, utilities, and security), royalty expenses, and delivery costs. The court denied access to records pertaining to the costs of research and development, marketing and promotion, and distribution and administration (except as included in the records to which access was granted). *Id.*

Bristol's decision as to which cost data to disclose and which to withhold was not based on whether the costs were allocated. The court did make available some unallocated data, and it conceded that the manufacturer's failure to allocate a cost should not determine whether the GAO may inspect records concerning the cost, but the court did not explain how the data it made available differed from the data it withheld: because the court found the GAO's alternative unacceptable, it granted the GAO access only to the data that *Bristol Laboratories* was willing to make available. *Id.* at 1391. Later courts adhering to the majority view have permitted GAO inspection of the same cost categories made available in *Bristol* without further explanation and without regard to the cost allocations of the manufacturer involved. See, e.g., *SmithKline*, 668 F.2d at 212-13.

It may not be obvious, therefore, why one should distinguish the majority position as one following an allocated/unallocated breakdown, but there is good reason to do so. *Bristol Laboratories* and the *Bristol* court apparently assumed at the outset that *Bristol* must open to the GAO records concerning at least the costs *Bristol* allocated to particular products (labeled "direct" costs). They then added a few other cost categories without explanation. See *Bristol*, 428 F. Supp. at 1391. The most recent court to follow *Bristol* has said that "the standard formulated in *Bristol* . . . for the most part relies on the distinction between direct and indirect costs." *SmithKline*, 668 F.2d at 213. Moreover, *Bristol's* adding the few unallocated cost categories could not have enlarged the GAO's access rights much, for the data released by the court left 91% of the drugs' costs unexplained. See Rucker, *Public Policy Considerations and the Pricing of Prescription Drugs in the United States*, 4 INT'L J. HEALTH SERVICES 171, 173 (1974) ("indirect factors, such as research and development, promotion, general administrative expense, taxes, and profit," consume a median of 91% of drug companies' revenues). It appears, therefore, that at least in the drug industry the *Bristol* test is the functional equivalent of one that discloses only allocated costs. See *Merck & Co.*, 665 F.2d at 1246 n.24 (Mikva, J., concurring in part, dissenting in part) ("Th[e] framework [of the direct/indirect distinction] appears to correspond to Merck's distinction between its 'allocated' and 'unallocated' costs."). Because there is so little to distinguish *Bristol's* test from an allocated/unallocated standard, and because there is so little else that describes the majority's position, this comment will discuss the *Bristol* test as based on an allocated/unallocated distinction.

There is also a practical reason for identifying the majority position in this manner. Because the statute speaks in terms of "directly pertinent" records, *Bristol's* disclosure of "direct" cost data tends to prejudge the issue: access to "direct" costs should be all the statute requires. "The similarity of these phrases, though seductive, cannot substitute for analysis." *Merck & Co.*, 665 F.2d at 1247 (Mikva, J., concurring in part, dissenting in part). Use of the allocated/unallocated formulation will avoid any such temptation and will promote reasoned analysis.

¹¹ *Eli Lilly & Co. v. Staats*, 574 F.2d 904, 914-15 (7th Cir.), cert. denied, 439 U.S. 959 (1978).

poses of the statute and by considering several policy concerns. The comment concludes that the "significant inputs" interpretation is truer to the goals of the statute, but that the access procedures would be improved if the GAO included in standard government contracts more specific information about the records to which it expects access.

I. BACKGROUND

Beginning in 1967 and continuing into the early 1970's, a subcommittee of the Senate Select Committee on Small Business conducted a far-ranging study of profits and competition in the drug industry.¹² It was suggested that the GAO access-to-records statute be used to assist the investigation.¹³ In 1974, the GAO attempted to invoke the provisions to obtain cost data from pharmaceutical companies that had government contracts.¹⁴ Although initially cooperative, five of the six companies targeted for study eventually rejected all or part of the GAO requests.¹⁵ A flurry of litigation ensued in which the "allocated/unallocated" and "significant inputs" tests arose.¹⁶

The differences between the two tests are especially acute in the drug cases because only a small portion, perhaps as little as nine percent, of the costs of pharmaceuticals are traceable to allo-

¹² See *Competitive Problems in the Drug Industry: Hearings Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business* (pt. 1), 90th Cong., 1st Sess. *passim* (1967). In addition to examining government procurement of drugs, these hearings studied diverse topics ranging from oral contraceptives and psychotropic drugs to drug company practices in labeling and promoting prescription drugs sold in Latin America. *Id.* The goal of the hearings was to develop "an objective and useful record that will serve as a source of information to Congress in the event legislation is indicated." *Id.* at 1 (remarks of Sen. Nelson).

¹³ *Competitive Problems in the Drug Industry: Hearings Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business* (pt. 20), 92d Cong., 1st Sess. 8020 (1971) (statement of Sen. Nelson) ("I realize it may be a very complicated matter, but it would seem to me that all companies ought to be served notice that the GAO is going to utilize this [1951 access-to-records] statute. I think we ought to take a look at some of these costs."). See generally *Eli Lilly & Co. v. Staats*, 574 F.2d 904, 921-22 (7th Cir.) (reprinting district court's findings of fact concerning negotiations about drug investigation between the GAO and the subcommittee staff), *cert. denied*, 439 U.S. 959 (1978); Note, *Eli Lilly & Co. v. Staats: An Undue Expansion of the GAO's Investigatory Power under the Access-to-Records Statutes*, 74 Nw. U.L. Rev. 122, 124-25 (1979).

¹⁴ *SmithKline Corp. v. Staats*, 668 F.2d 201, 203 (3d Cir. 1981), *petition for cert. filed sub nom. Bowsher v. SmithKline Corp.*, 50 U.S.L.W. 3936 (U.S. May 10, 1982) (No. 81-2082).

¹⁵ The sixth company settled with the GAO. Case Comment, *supra* note 4, at 1150 n.12.

¹⁶ See *supra* notes 7-10 and accompanying text.

cated costs.¹⁷ In arriving at the different tests, the courts have emphasized this fact and two competing legislative concerns. The access-to-records statute was enacted to assist the study and improvement of government procurement practices;¹⁸ at the same time, Congress was concerned that the GAO not be given a license to engage in "snooping."¹⁹ The courts favoring the significant inputs test argue that if the government is allowed to inspect data for only the allocated nine percent of a product's cost, no meaningful procurement study will be possible.²⁰ Conversely, the courts that limit the GAO to inspection of allocated costs argue that if the statute is construed to require GAO access to data on the remaining ninety-one percent of costs, then virtually all aspects of the manufacturer's operations are open to the GAO, which would allow exactly the sort of "snooping" that Congress meant to forbid.²¹

The dominance of unallocated costs in the pharmaceuticals industry apparently makes the industry unusual.²² Other industries with high research and development expenditures, a major portion of the unallocated costs in the drug industry,²³ also sell their products to the government. The nature of government procurement

¹⁷ *Eli Lilly & Co. v. Staats*, 574 F.2d at 913 (citing *Rucker*, *supra* note 10, at 173). See *supra* note 10.

¹⁸ See *infra* notes 57-65 and accompanying text.

¹⁹ See *infra* notes 71-78 and accompanying text.

²⁰ *United States v. Abbott Laboratories*, 597 F.2d 672, 674 & n.1 (7th Cir. 1979); *Eli Lilly & Co. v. Staats*, 574 F.2d at 913-14. See *Merck & Co. v. Staats*, 665 F.2d 1236, 1247 (D.C. Cir. 1981) (Mikva, J., concurring in part, dissenting in part), *cert. granted sub nom. Bowsher v. Merck & Co.*, 102 S. Ct. 1968 (1982).

²¹ *E.g.*, *Bristol Laboratories Div. of Bristol-Myers Co. v. Staats*, 428 F. Supp. 1388, 1390 (S.D.N.Y. 1977), *aff'd per curiam*, 620 F.2d 17 (2d Cir. 1980), *aff'd mem. by an evenly divided court*, 451 U.S. 400 (1981).

²² See *SmithKline Corp. v. Staats*, 668 F.2d at 214 ("the pharmaceutical industry presents special characteristics"); *Eli Lilly & Co. v. Staats*, 574 F.2d at 913-14 (unlike in other industries, "research and other costs not immediately attributable to one product form such a large portion of the costs of a pharmaceutical product that their import to . . . [the government] contract seems inescapable"). See also GENERAL ACCOUNTING OFFICE, GOVERNMENT CONTRACT PRINCIPLES 4-26 (3d ed. 1980) ("It should be noted also that unallocated overhead items are limited to industries, such as the pharmaceutical industry, in which such costs constitute a large portion of the total cost of supplying the item.").

²³ Detailed industry-by-industry data on the allocation of costs are not available. The relation of one allocated cost of production (the cost of raw materials, see *Bristol Laboratories*, 428 F. Supp. at 1389) to the value of the various products provides the basis for a rough comparison. Such a comparison, using census data, is presented below. Although "cost of materials" as defined by the Census Bureau may include some unallocated costs and may not include some costs that are allocated, the records made available under the *Bristol* standard also related to some unallocated costs, see *supra* note 10. Moreover, there is no reason to assume that any distortions in the census data would affect the pharmaceutical industry disproportionately. A sampling of these data from 1977 reveals the following ratios:

practices in those industries, however, tends not to create access-to-records disputes.²⁴ In most other industries with which the gov-

<u>Industry/Product Category</u>	<u>Cost of Materials (incl. fuel) as Percentage of Value of Shipments</u>
Pharmaceutical Preparations	29.6
Biological Products	39.0
Synthetic Rubber	69.5
Petroleum & Coal Products	83.8
Small Arms Ammunition	42.0
Ordnance & Accessories	31.7
Office Machines & Typewriters	39.6
Motor Vehicles & Car Bodies	76.0
Aircraft	45.5
Aircraft Engines & Engine Parts	44.0
Guided Missiles & Space Vehicles	31.8
Shipbuilding & Repairing	41.1
Tanks & Tank Components	63.2
Engineering & Scientific Instruments	35.4

SOURCE: DEPARTMENT OF COMMERCE, 1977 CENSUS OF MANUFACTURERS 7-5 to 8-7 (1981) (Table 2, Selected Statistics for Operating Manufacturing Establishments by Type of Operation and Legal Form of Organization, for Major Industry Groups and Industries: 1977).

A 1980 survey of industry research and development (nongovernment-funded) as a percentage of sales reveals the following:

<u>Industry Group</u>	<u>Private R & D Spending as Percentage of Sales</u>
Drugs (ethical & proprietary; medical supplies)	4.9
Aerospace (airframes, general aircraft, parts)	4.5
Appliances	1.8
Automotive (cars, trucks)	4.0
(parts, equipment)	1.9
Electrical	2.8
Electronics	2.9
Food, Beverages	0.6
General Machinery (machine tools, industrial machinery, mining equipment)	1.6
Instruments (measuring devices, controls)	4.2
Natural Resources (oil service, supply)	1.6
Information Processing (computers)	4.6
(offices equipment)	4.3
Telecommunications	1.0
Textiles, Apparel	0.5
Tires & Rubber	1.8
Industry Composite	2.0

SOURCE: *Spending for Research Still Outpaces Inflation*, BUS. WK., July 6, 1981 at 61-75 (table entitled "R & D Scoreboard, 1980"). See also F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 410 (2d ed. 1980); NATIONAL SCIENCE FOUNDATION, *RESEARCH & DEVELOPMENT IN INDUSTRY*, FEBRUARY, 1978, at 10 (Table B-2), 22 (Table B-18) (1981).

²⁴ First, some contracts in these fields would be competitively bid rather than negotiated, and thus the access-to-records statute would not apply. See *supra* note 4. Second, although the statute applies to all negotiated contracts, it is controversial only with respect

ernment has negotiated procurement contracts, the portion of the product's price represented by allocated costs is larger than in the pharmaceutical industry.²⁵ As the portion represented by allocated costs increases, the difference between the allocated/unallocated test and the significant inputs test tends to disappear.

Although there is reason to believe that the pharmaceutical litigation is unusual, the choice between the allocated/unallocated test and the significant inputs test is still important for two reasons. First, the dispute is important in its own right: drug purchases represent a significant portion of all government procurement, approaching one billion dollars annually.²⁶ Second, although the two tests tend to converge where, as in most industries, allocated costs encompass a greater portion of all costs, the tests do not necessarily overlap. There may be instances where industries would not object to government inspection of data concerning unallocated costs or where courts would order such records produced if the test were "significant inputs."²⁷ If the Supreme Court adopts the allocated/unallocated test,²⁸ even though the statute does not require such a narrow reading, the government may be

to negotiated "fixed-price" contracts. For those contracts in which the contractor's payment is cost-based (e.g., a cost-plus-fixed-fee arrangement), the incentive is upon the contractor to disclose the *maximum* amount of cost information to ensure complete reimbursement; these contractors will attempt to allocate all costs to their contract items. Accordingly, the choice between the significant inputs and allocated/unallocated tests is irrelevant to the cost-based contracts that predominate in the other industries with high research and development costs. In these high technology fields, costs tend to be volatile, thus making it hard for either party to predict the costs in advance. Cost-based contracts are a logical response because they insure that neither party will be disproportionately affected by drastic market changes. See generally GENERAL ACCOUNTING OFFICE, *supra* note 22, at 4-21 to 4-24 (listing of various fixed-price and cost-based contract variations used by the government).

²⁵ See generally *supra* notes 22-23.

²⁶ Merck & Co. v. Staats, 665 F.2d 1236, 1247 (D.C. Cir. 1981) (Mikva, J., concurring in part, dissenting in part), *cert. granted sub nom.* Bowsher v. Merck & Co., 102 S. Ct. 1968 (1982). This represents nearly one percent of total federal procurement. See *supra* note 1 and accompanying text.

²⁷ The only case litigated under the access-to-records statutes, other than the pharmaceutical industry cases, is Hewlett-Packard Co. v. United States, 385 F.2d 1013 (9th Cir. 1967), *cert. denied*, 390 U.S. 988 (1968). This dearth of litigation suggests that most government contractors are willing to allow the GAO substantially greater access to their records than are the drug companies, although it is also possible that the GAO does not often invoke the statutes.

²⁸ Although the test adopted in *Bristol* did not adhere completely to an allocated/unallocated breakdown, the Court could rule in favor of an allocated/unallocated test because one issue presented by the GAO in its petition for certiorari is whether "costs . . . not allocated by contract . . . [or] product basis" may be inspected by the government. *Bowsher v. Merck & Co.*, 50 U.S.L.W. 3774 (U.S. Mar. 23, 1982) (No. 81-1273) (summary of *cert.* petition).

excluded unnecessarily from data that could help it improve the way it spends public funds.

II. STATUTORY INTERPRETATION

GAO access to contractor records is based upon a clause in procurement contracts, but the clause exists because it is required by statute.²⁹ In seeking to fix the meaning of "directly pertinent,"³⁰ therefore, one should look to the intent of the enacting Congress and not to the contracting parties' intent.³¹ Unfortunately, the language and history of the access-to-records statute provide little evidence of the meaning of those two words.

The initial impetus for the legislation was congressional concern over possible fraud in the renegotiation of government contracts during the Korean War.³² The pharmaceutical companies have claimed³³ that the sole purpose of the legislation was to detect fraud in negotiations³⁴ and that "directly pertinent" relates

²⁹ See 10 U.S.C. § 2313(b) (1976); 41 U.S.C. § 254(c) (1976).

³⁰ See *supra* note 5.

³¹ *Merck & Co. v. Staats*, 665 F.2d at 1248 & n.28 (Mikva, J., concurring in part, dissenting in part); *Eli Lilly & Co. v. Staats*, 574 F.2d 904, 918 (7th Cir.), *cert. denied*, 439 U.S. 959 (1978). *But see* *Bristol Laboratories Div. of Bristol-Myers Co. v. Staats*, 428 F. Supp. 1388, 1390-91 (S.D.N.Y. 1977) (following intent of contracting parties), *aff'd per curiam*, 620 F.2d 17 (2d Cir. 1980), *aff'd mem. by an evenly divided court*, 451 U.S. 400 (1981).

³² See *Merck & Co. v. Staats*, 665 F.2d at 1243 (Mikva, J., concurring in part, dissenting in part). The combination of severe inflation and increased demand for materials caused by the war placed tremendous strains on many companies performing under fixed-price government contracts. See generally *id.* To alleviate these pressures, Congress gave the President temporary authority to renegotiate government contracts. Act of Jan. 12, 1951, ch. 1230, 64 Stat. 1257 (expired by own terms). The access-to-records provisions were initially included as part of this emergency legislation in order to provide a check on the renegotiation process. See 96 CONG. REC. 17,123 (1951) (remarks of Rep. Celler) (access provision likened to "a Damoclean sword that will hang over the heads of the contractors whose contracts are changed").

Although the initial access-to-records legislation, along with the renegotiation authority, was of limited duration, Congress soon passed a permanent version of this legislation. See Act of Oct. 31, 1951, Pub. L. No. 245, 65 Stat. 700 (codified at 10 U.S.C. § 2313(b) (1976), 41 U.S.C. § 254(c) (1976)). Representative Hardy, the sponsor of both the temporary and permanent legislation, noted that the provision for GAO access to records was designed not solely to prevent fraud, but also to help safeguard against unfairness due to a perceived advantage in bargaining power of contractors over government procurement agents. 97 CONG. REC. 13,198 (1951) (remarks of Rep. Hardy) (constructing scenario of an experienced contractor negotiating with a less accomplished government representative, with the government coming out "on the short end of the deal").

³³ See *SmithKline Corp. v. Staats*, 668 F.2d 201, 204-05 (3d Cir. 1981), *petition for cert. filed sub nom. Bowsher v. SmithKline Corp.*, 50 U.S.L.W. 3936 (U.S. May 10, 1982) (No. 81-2082); *Eli Lilly & Co. v. Staats*, 574 F.2d at 915.

³⁴ A similar argument was made by analogy to the Truth-in-Negotiations Act of 1962, 10 U.S.C. § 2306 (1976), and the Renegotiation Act of 1951, 50 U.S.C. app. §§ 1211-1233

only to records actually relied upon in negotiating contract prices.³⁵

(1976). The Truth-in-Negotiations Act, for example, provides as follows:

For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the [government agency] shall have the right, until the expiration of three years after final payment . . . to examine all books, records, documents, and other data of the contractor or subcontractor related to the negotiation, pricing, or performance of the contract or subcontract.

10 U.S.C. § 2306(f)(4) (1976) (applicable only to military procurement). *See also* 41 C.F.R. §§ 1-3.807 to 1-3.807-1.2 (1981) (similar regulations governing civilian procurement). Both the Truth-in-Negotiations Act and the Renegotiation Act contain exemptions for contracts whose subjects are standard commercial items with prices based on standard catalogue prices. 10 U.S.C. § 2306(f) (1976); 50 U.S.C. app. § 1216(e) (1976). The drug companies have argued that this exemption should be read into the 1951 statute to exempt them from GAO inspection: their contracts' prices are based on catalogue prices. *See, e.g., Eli Lilly & Co. v. Staats*, 574 F.2d at 916.

The courts uniformly have rejected this contention. First, they note that the other statutes serve a more limited purpose than the 1951 access-to-records statute because those statutes are concerned with pricing, largely fraudulent pricing, during the negotiation process. The courts then conclude that the absence of an explicit standard commercial goods exemption in the 1951 statute shows that Congress did not intend to limit the access-to-records law in that manner. *See SmithKline Corp. v. Staats*, 668 F.2d at 208; *Merck & Co. v. Staats*, 665 F.2d at 1244-45 (Mikva, J., concurring in part, dissenting in part); *Eli Lilly & Co. v. Staats*, 574 F.2d at 916. *See also Hewlett-Packard Co. v. United States*, 385 F.2d 1013, 1016 (9th Cir. 1967) (arguing that if Congress had intended to limit the application of the access statute, it would have done so explicitly), *cert. denied*, 390 U.S. 988 (1968).

Indeed, the scope of GAO access allowed under these statutes suggests that Congress intended the 1951 statute to have a broad sweep. The Truth-in-Negotiations Act and the Renegotiation Act are conceded to have the narrower purpose of preventing waste and fraud in negotiations. Under the Truth-in-Negotiations Act, the government is allowed access to pricing data whenever there is a "logical nexus" between the data and the possibility of a lower negotiated contract price. *Sylvania Elec. Prods., Inc. v. United States*, 479 F.2d 1342, 1348 (Ct. Cl. 1973). *See GENERAL ACCOUNTING OFFICE, supra* note 22, at 4-20 (contractors must disclose "all facts reasonably available to the contractor up to the time of agreement which might reasonably be expected to have a significant effect on the price negotiation"). If the more narrow statute allows greater access to records than the allocated/unallocated test would under the broader 1951 statute, one suspects that the allocated/unallocated test may be too restrictive. Although the 1951 statute is limited in some fashion by the "directly pertinent" language, it would confound the statutory scheme to allow less access to records under a statute designed to serve broader purposes.

³⁵ None of the costs of the contract were negotiated; the contract prices are based on catalogue prices. *See SmithKline Corp. v. Staats*, 668 F.2d at 208; *Eli Lilly & Co. v. Staats*, 574 F.2d at 907; Shnitzer, *The Comptroller General's Right of Access to Contractors' Records—The Hewlett-Packard Case*, 2 PUB. CONT. L.J. 298, 299 (1969) (noting that all items purchased in *Hewlett-Packard* had been or were soon listed in the company's catalogue). Because the costs were not the subject of negotiations, the contractors have argued that they are not directly pertinent. The courts have all rejected this contention. *See infra* note 36 and accompanying text. It is worth noting, however, that the only case decided under the access-to-records statute before the pharmaceuticals litigation had established the precise point: although a contract's prices are established solely on the basis of catalogue prices, the GAO is allowed to inspect records pertinent to "the general subject matter," which in the case of procurement contracts is "the procurement of described property by

The courts uniformly have rejected this narrow reading of the statute's purpose,³⁶ for the legislative history demonstrates that the detection of fraud was only one of several concerns that inspired the statute.³⁷ Committee reports in both the House and Senate called for "broad application" of the access-to-records provision.³⁸ Representative Porter Hardy Jr., the sponsor of the bill, stated that "there are a lot of other situations besides those involving fraud which might be uncovered" through use of the access-to-records clause.³⁹ The provision may also be used to deter waste

the Government." *Hewlett-Packard Co. v. United States*, 384 F.2d at 1016. Because of *Hewlett-Packard*, the pharmaceutical manufacturers did not argue that the GAO is excluded from inspecting all records, but more generally that the anti-fraud purposes of the statute require that the GAO be allowed access only to direct cost records. *See supra* notes 33-35 and accompanying text.

³⁶ *See SmithKline Corp. v. Staats*, 668 F.2d at 205; *Merck & Co. v. Staats*, 665 F.2d at 1238-41 (Mikva, J., concurring in part, dissenting in part); *Eli Lilly & Co. v. Staats*, 574 F.2d at 910-11. The Supreme Court, however, has granted certiorari on the question whether access is limited to those documents actually relied on by the contracting parties in negotiations. *Bowsher v. Merck & Co.*, 102 S. Ct. 1968 (1982) (granting cert.); *id.*, 50 U.S.L.W. 3774 (U.S. Mar. 23, 1982) (No. 81-1472) (summary of cert. petition).

³⁷ *See supra* note 32 and accompanying text.

³⁸ H.R. REP. NO. 791, 82d Cong., 1st Sess. 2 (1951); S. REP. NO. 603, 82d Cong., 1st Sess. 2 (1951). *See generally* *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1280 n.1 (9th Cir. 1980) (courts interpreting ambiguous statutory provision may consider statements of purpose in committee reports) (citing *Commissioner v. Bilder*, 369 U.S. 499 (1962)).

³⁹ 97 CONG. REC. 13,199 (1951) (remarks of Rep. Hardy). *See generally* *Lewis v. United States*, 445 U.S. 55, 63 (1980) (court interpreting statute gives weight to sponsor's statement of bill's purpose); *Simpson v. United States*, 435 U.S. 6, 13 (1978) (same).

In debate, Hardy cited several examples of potential uses of the clause. One case involved an inefficient market structure in which a government agency purchased automotive parts from a seller who bought from a distributor who in turn had bought from a tool shop. Hardy denounced these "profits upon profits and completely wasteful administrative and handling costs" and concluded that GAO detection of the situation would be "difficult, if not impossible," without the access-to-records provision. 97 CONG. REC. at 13,198.

Another example was contractor abuse of contractual price-redetermination clauses. Such a clause allows price adjustment during the course of contract performance. Hardy noted that government contracting officers were sometimes lax in their scrutiny of these adjustments, and he asserted that the "[k]nowledge that the GAO may later examine these books and records cannot help but make for more careful operations" by these officers. *Id.*

Further, Hardy noted situations in which contractors holding both a fixed-price and a cost-plus-fixed-fee contract had (intentionally or accidentally) reallocated some costs from the fixed-price contract to the cost-plus contract, and thus maintained a profit margin on both contracts. Hardy stated that this type of practice could go undetected without an access-to-records provision. *Id.*

See also id. (remarks of Rep. Hardy) ("The major purposes of this bill are twofold: One, to give the Comptroller General the proper tools to do the job the Congress has instructed him to do; and two, to provide a deterrent to improprieties and wastefulness in the negotiation of contracts."); Note, *supra* note 13, at 126 (research study connected with evaluation of government procurement is a proper purpose for invoking provision). *But see* Casenote, *Government Contracts: Contractor's Obligation to Allow Examination of Records under 10 U.S.C. § 2313(b)*, 72 DICK. L. REV. 687, 691 (1968) (questioning the use of access-to-records

and inefficiency on the part of contractors,⁴⁰ to keep government contracting officers on their guard for such practices,⁴¹ and to assist the GAO generally in its goal of improving the procurement process.⁴²

Because the statute was intended to do more than simply help detect fraud, the courts have not limited access to those records actually relied upon in negotiations. The broad purposes of the statute would be served by broad access to records.⁴³ The statute, however, limits the Comptroller General's access to "directly pertinent" records. Although there is a substantial legislative history documenting the general purpose for the access legislation, there is very little to explain the import of "directly pertinent."

The only direct clue to the meaning of the phrase is a brief discussion concerning a floor amendment. As originally introduced, the access legislation would have permitted GAO inspection of all "pertinent" records.⁴⁴ The chief opponent of the bill, Representative Clare E. Hoffman, offered an amendment which altered the wording to allow access to "directly pertinent" records.⁴⁵ Hoffman stated that the purpose of his amendment was "to limit the 'snooping' that may be carried on under this bill."⁴⁶ Representative

clause for anything but detection of fraud).

⁴⁰ 97 CONG. REC. at 13,198 (remarks of Rep. Hardy). See also F. MOSHER, *THE GAO: THE QUEST FOR ACCOUNTABILITY IN AMERICAN GOVERNMENT* 153-54 (1979) (noting GAO use of access provision to police waste and congressional approval of that use).

⁴¹ 97 CONG. REC. at 13,198 (remarks of Rep. Hardy).

⁴² See cases cited *supra* note 36.

⁴³ For example, abuse of the price-redetermination clause, see *supra* note 39, would be difficult to detect without broad access because the contractor could hide the improprieties in some records held inaccessible. Similarly, the dual purpose of the bill—"to give the Comptroller General the proper tools to do the job . . . and . . . to provide a deterrent," 97 CONG. REC. at 13,198—suggests that the "tool" was meant to be powerful, not timid. See generally *supra* note 39.

⁴⁴ See H.R. REP. NO. 791, 82d Cong., 1st Sess. 1 (1951); S. REP. NO. 603, 82d Cong., 1st Sess. 1 (1951).

⁴⁵ See 97 CONG. REC. at 13,377. Examples of Hoffman's opposition to the bill may be found throughout the House debate. See *id.* at 13,371-77.

⁴⁶ *Id.* at 13,377. The full debate is set forth below:

Mr. HARDY: I personally have no objection to the amendment.

Mr. HOFFMAN of Michigan: I understand the other day when I discussed it with the gentleman, that while this amendment was not all that it should be, it was the best that he could think of. Certainly, it was the best—well, I was rather forced to accept it and to agree with him. The purpose is to limit the "snooping" that may be carried on under this bill which we do not have the votes to defeat.

Mr. HARDY: I have no objection to the amendment.

Mr. HOFFMAN of Michigan: In that case I will not argue.

The Chairman: The question is on the amendment offered by the gentleman from Michigan [Mr. HOFFMAN].

The amendment was agreed to.

Hardy, the bill's sponsor, did not oppose the amendment, and it was adopted without further debate.⁴⁷

The Hoffman amendment and its history do little to give affirmative content to "directly pertinent." All one can tell from the Hoffman-Hardy colloquy is that Hoffman was against the bill, that he was especially concerned with "snooping," and that Hardy was willing to accept an amendment that would clarify that the bill was not meant to be a license for government snooping.⁴⁸ There is no further elucidation of what snooping the amendment would exclude or which records "directly pertinent" might include. Because of this ambiguity, courts must determine how the antisnooping language should consist with the broader investigatory purposes of the statute.

III. CONGRESSIONAL PURPOSES AND OTHER POLICY CONSIDERATIONS

A. Internal Limitations

The access provisions apply only to negotiated contracts and the GAO may inspect records for only three years after the final payment under a contract.⁴⁹ Moreover, the GAO's regulations exempt procurement contracts totalling less than \$10,000 from the access provisions.⁵⁰ One court has suggested that these limitations evince a congressional intent to limit the scope of GAO inquiries and that limiting GAO access to allocated cost records would be consistent with this intent.⁵¹

These limitations on when the GAO may have access to records, however, are of little relevance to the question of which records the GAO may inspect. First, limiting inspection to negotiated contracts is consistent with the fact that the impetus behind

Id. (brackets in original).

⁴⁷ *Id.*

⁴⁸ See *supra* note 46 and accompanying text. This issue is discussed further *infra* at notes 71-96 and accompanying text.

⁴⁹ 10 U.S.C. § 2313(b) (1976); 41 U.S.C. § 254(c) (1976).

⁵⁰ 41 C.F.R. § 1-16.901-32 (1981) (§ 10 of standard form contract prescribing examination of records by Comptroller General).

⁵¹ In *SmithKline Corp. v. Staats*, 668 F.2d 204, 211 (3d Cir. 1981), *petition for cert. filed sub nom. Bowsher v. SmithKline Corp.*, 50 U.S.L.W. 3936 (U.S. May 10, 1982) (No. 81-2082), the court recited these limiting provisions and, just before concluding that the GAO could have access primarily to allocated cost records, expressed its belief that it was not "free to ignore these limitations in trying to assure that GAO has meaningful access to the contractors' records." See generally *supra* note 10.

the statute was a problem involving contract renegotiation.⁵² This limitation may well reflect a belief that negotiated contracts pose a greater risk of abuse because they are not checked by competitive bidding.⁵³ Second, the three-year limit was adopted to indicate to contractors how long they had to retain the pertinent records.⁵⁴ Third, although the \$10,000 limit was not imposed by Congress⁵⁵ and thus is not a binding interpretation of the statute, it provides a sensible way for the GAO to allocate scarce manpower.⁵⁶ Finally, although these provisions limit the GAO's investigatory powers, they do so by limiting the contracts that are subject to inquiry; not by restricting the related records to which the GAO may have access. It is perhaps more consistent with this sort of targeted inquiry, therefore, to allow an in-depth investigation of all "significant inputs" than to limit the investigation solely to allocated costs.

B. Procurement Study

Supporters of the access-to-records statute intended that the statute be used to collect information about contractors and industries to help improve government procurement practices.⁵⁷ The study of government procurement policy is still in its infancy,⁵⁸ and its growth is essential to the improvement of spending practices.⁵⁹ Although all courts addressing the scope of GAO access to records have agreed on this point,⁶⁰ the competing judicial definitions of "directly pertinent" will have substantially different effects on the GAO's ability to fulfill this purpose.

The allocated/unallocated test, as applied in the pharmaceuticals cases, could strip the GAO of the ability to achieve the statute's investigatory purposes because some of the cost data withheld are vital to the proper functioning of a GAO audit. For example, the prices the government has agreed to pay for pharmaceuticals have been based on the companies' "civilian" catalogue prices.⁶¹ Among the unallocated pharmaceutical costs that

⁵² See *supra* note 32 and accompanying text.

⁵³ See 97 CONG. REC. 13,198 (1951) (remarks of Rep. Hardy).

⁵⁴ *Id.* at 13,199 (remarks of Rep. Burton).

⁵⁵ See *supra* note 50 and accompanying text.

⁵⁶ 97 CONG. REC. at 13,198 (remarks of Rep. Hardy) (scarce GAO manpower).

⁵⁷ See *supra* notes 37-41 and accompanying text.

⁵⁸ See GENERAL ACCOUNTING OFFICE, *supra* note 1, at 2-8 (1977).

⁵⁹ *Id.* at 9-12.

⁶⁰ See, e.g., *SmithKline Corp. v. Staats*, 668 F.2d at 214.

⁶¹ See *supra* note 35.

could be excluded from GAO scrutiny are "marketing and promotion" costs,⁶² which presumably include the costs of advertising and sales calls to physicians and hospitals, distribution of samples, attendance at medical conventions, and other traditional marketing devices. It seems reasonable that the government, as a special customer,⁶³ may not be the target of some or any of these activities. Further, the government may not believe it should have to pay a share of these "civilian" marketing costs. Yet under the allocated/unallocated test, the GAO would be unable to gather the data necessary to develop an informed policy in this area.⁶⁴

Courts and commentators have argued that the allocated/unallocated test nevertheless is required by the statute because when unallocated costs are related to several contracts, they are not directly pertinent to any one contract: only a fraction of any unallocated cost category is borne by each contract.⁶⁵ The facts of the drug cases, however, suggest the opposite conclusion. Although the government's contracts were among a larger group of contracts that benefitted from pooled expenditures, the unallocated costs not disclosed arguably were directly pertinent because they accounted for ninety-one percent of the sales price in each government contract.⁶⁶ That the manufacturer chose not to allocate the costs among products or contracts does not mean that they are unallocable, and it should not diminish the direct relevance of the data to several contracts.⁶⁷ By itself, failure to allocate costs should not be permitted to prevent meaningful procurement studies.⁶⁸

⁶² Bristol Laboratories Div. of Bristol-Myers Co. v. Staats, 428 F. Supp. 1388, 1390 (S.D.N.Y. 1977), *aff'd per curiam*, 620 F.2d 17 (2d Cir. 1980), *aff'd mem. by an evenly divided court*, 451 U.S. 400 (1981).

⁶³ The fact that the contracts are negotiated indicates that the government is not buying in a competitive market. See *supra* note 4.

⁶⁴ This example is, of course, merely illustrative. One might also consider how the *Bristol* rule would affect the GAO's ability to monitor the "cost-shifting" of a contractor with both a fixed-price and a cost-plus contract, as noted in the legislative history. See *supra* note 39. These and other legislative purposes would all be stymied by a narrow construction of the statute. Even the *SmithKline* court conceded the limiting effect of its holding on monitoring industry pricing practices. *SmithKline Corp. v. Staats*, 668 F.2d at 213 & n.8.

⁶⁵ See, e.g., *SmithKline Corp.*, 668 F.2d at 211; Note, *supra* note 13, at 132.

⁶⁶ See *supra* note 17 and accompanying text.

⁶⁷ Cf. *Exxon Corp. v. Department of Revenue*, 447 U.S. 207, 221 (1980) (company's internal accounting system not binding on state for tax purposes); *Bristol Laboratories Div. of Bristol-Myers Co. v. Staats*, 428 F. Supp. at 1391 ("the issue should not depend entirely on a contractor's bookkeeping method").

⁶⁸ See *Merck & Co. v. Staats*, 665 F.2d 1236, 1247 (D.C. Cir. 1981) (Mikva, J., concurring in part, dissenting in part), *cert. granted sub nom. Bowsher v. Merck & Co.*, 102 S. Ct. 1968 (1982); Reply Memorandum for Petitioners on petition for Certiorari at 7, *Staats v. Bristol Laboratories Div. of Bristol-Myers Co.*, 620 F.2d 17 (2d Cir. 1980), *aff'd mem. by an*

In contrast to the allocated/unallocated test, the significant inputs test is more responsive to the statute's investigatory purposes. The GAO is interested in monitoring expenditures of public funds, and these expenditures result directly from all of the cost components, allocated or not, in the government's contract price. Rather than relying for its limits on the contractor's potentially unrealistic or atypical accounting allocation scheme,⁶⁹ the significant inputs test allows access to data on all costs that have a significant effect on the government's price, and it thereby permits the wide-ranging studies contemplated by the statute's sponsors.⁷⁰

C. Government Snooping

During the floor debate in the House, the access-to-records bill was amended to limit GAO access to "directly" pertinent records.⁷¹ It is an elementary rule of statutory construction that effect be given to every word in a statute "so that no part will be inoperative or superfluous."⁷² Similarly, a sponsor's statement of purpose is usually to be considered an indication of congressional intent.⁷³ It is not controversial, therefore, that the clause should be construed in a way that will serve the sponsor's purpose of preventing "snooping" by the government.⁷⁴ The further conclusion of some courts that this purpose is best served by limiting GAO access primarily to allocated cost data⁷⁵ is controversial.

The argument in favor of the allocated/unallocated test based

evenly divided court, 451 U.S. 400 (1981). See generally GENERAL ACCOUNTING OFFICE, *supra* note 22, at 4-24 to 4-25 (setting out general purposes for GAO contract audits).

⁶⁹ See *supra* note 67 and accompanying text.

⁷⁰ Similarly, the two tests would have different people deciding whether records are directly pertinent since most cases will not be brought to court. If the allocated/unallocated test is used, contractors, through their accounting practices, will have greater influence in determining the pertinence of records; if significant inputs is used, the government will have greater influence.

⁷¹ See *supra* notes 44-47 and accompanying text.

⁷² 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (C. Sands 4th ed. 1973).

⁷³ *E.g.*, *Lewis v. United States*, 445 U.S. 55, 63 (1980); *Simpson v. United States*, 435 U.S. 6, 13 (1978).

⁷⁴ See *supra* note 46 and accompanying text. *But cf.* Shnitzer, *supra* note 35, at 308: The degree to which the addition of the word "directly" may limit right of access is problematical. It is difficult offhand to visualize a record which is pertinent but not directly pertinent. Pertinency in this sense may be similar to pregnancy in that the condition is essentially the same regardless of the preceding modifier.

⁷⁵ See *SmithKline Corp. v. Staats*, 668 F.2d 201, 211-12 (3d Cir. 1981), *petition for cert. filed sub nom. Bowsher v. SmithKline Corp.*, 50 U.S.L.W. 3936 (U.S. May 10, 1982) (No. 81-2082); see also *Bristol Laboratories Div. of Bristol-Myers Co. v. Staats*, 428 F. Supp. at 1390-91.

on the Hoffman amendment is that the added word, "directly," must be given meaning: only direct cost data should be accessible. Because all allocated costs are directly attributable to the contract and unallocated costs are not, "directly" should be defined almost exclusively as "allocated."⁷⁶ Moreover, in the case of the drug companies, if the GAO is allowed access to records concerning all costs that affect the government's price, the companies would be "required to make available virtually all [corporate] books and records, because although it is impossible to trace the use of government dollars, those dollars contribute to the fund from which all of the company's expenses are paid."⁷⁷ In such circumstances, "directly" would impose no limit on the GAO, a result contrary to the limiting intent of the sponsor. If Congress had intended "to allow such unusual and unfettered government inspection of . . . business records, it would have done so explicitly."⁷⁸

Although this argument has some plausibility, it loses much force in the face of the House's defeat of another amendment designed to prevent similar consequences for "a supplier of material to a primary contractor[, which supplier] is not a subcontractor."⁷⁹ The amendment would have exempted such suppliers from the access requirements.⁸⁰ The sponsor of the amendment, Representative Harvey, described the situation that he thought the bill would allow and that the amendment would prevent:

Some little contractor or manufacturer who may be using only 10 percent of his capacity for the production of goods for the prime contractor, but because of that—and he cannot afford to keep a separate set of books for that 10 percent—it means that every section of his books will have to come under the complete scrutiny of the GAO.⁸¹

The bill's sponsor, Representative Hardy, acknowledged that the bill would permit such inspections, but because of limited GAO resources, he did not anticipate that the GAO "could possibly go into all of these things."⁸² If the GAO had reason to look into the supplier's records, however, he wanted them to be able to do so, and

⁷⁶ See cases cited *supra* note 75. See also *supra* note 10.

⁷⁷ *Bristol Laboratories Div. of Bristol-Myers Co. v. Staats*, 428 F. Supp. at 1390.

⁷⁸ *Id.*

⁷⁹ 97 CONG. REC. 13,376 (1951) (amendment offered by Rep. Harvey); see also *id.* at 13,377 (amendment defeated 83-69).

⁸⁰ *Id.* at 13,376.

⁸¹ *Id.* (remarks of Rep. Harvey).

⁸² *Id.* at 13,377 (remarks of Rep. Hardy).

under the bill "they would have the right to do it."⁸³ The amendment was rejected, the short colloquy on Hoffman's anti-snooping amendment followed, and Hoffman's amendment was accepted.⁸⁴

That the Harvey amendment was rejected just before Hoffman's amendment was accepted suggests that the "snooping" to be avoided was not that which Harvey's amendment was meant to prevent. Harvey sought to preclude the sort of situation presumed to justify the allocated/unallocated test in the drug cases: a company forced to disclose virtually all its records to the GAO because it was unable to keep separate books for data related to a government contract.⁸⁵ If anything, Harvey's example provides a more compelling argument for nondisclosure than do the drug cases: the companies Harvey was concerned about were only suppliers to primary contractors, not general contractors or even subcontractors; in the pharmaceuticals cases, the records belong to primary contractors. In a suitable case, Congress was willing to subject all of a supplier's records to GAO scrutiny.⁸⁶ It is hard to imagine that it was any less willing to allow GAO access to the records of a primary contractor.

In this context, "directly pertinent" has a different significance. Hoffman apparently had little attachment to the word "directly"; although "directly" was "not all that it should be, it was the best he could think of I was rather forced to accept it"⁸⁷ "Directly" was added not for its own peculiar meaning, but to import the antisnooping concern.⁸⁸ Snooping connotes sly or sneaky prying into matters not subject to legitimate inquiry.⁸⁹ Indeed, the House may have accepted the Hoffman amendment to ensure that the GAO would inspect records only for legitimate purposes. Given a legitimate purpose, it was intended that the GAO have access to all records necessary to make a meaningful study. The Harvey amendment apparently was rejected⁹⁰ precisely because it could have made "it impossible frequently to obtain infor-

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Compare *supra* text accompanying note 81 with *supra* text accompanying notes 77-78.

⁸⁶ See *supra* notes 82-83 and accompanying text.

⁸⁷ 97 CONG. REC. at 13,377 (remarks of Rep. Hoffman).

⁸⁸ See *id.* ("The purpose is to limit the 'snooping' that may be carried on under this bill").

⁸⁹ To "snoop" is defined as "[t]o appropriate . . . in a clandestine manner," or "[t]o go around in a sly or prying manner." 9 OXFORD ENGLISH DICTIONARY 327 (1933) (emphasis in original).

⁹⁰ See *supra* notes 79-84 and accompanying text.

mation which would be vital in a [legitimate] study of a contract.”⁹¹

It is not necessary to adopt the allocated/unallocated test to make “directly” serve a limiting function. It may well be snooping (and therefore improper), for example, for the GAO to invoke the access clause to investigate a corporation’s or industry’s compliance with the corporate disclosure requirements of the federal securities laws,⁹² even if the requested data concern only allocated costs that would also be relevant to a study of a negotiated contract. It would not be snooping, however, for the GAO to collect data, whether on allocated or unallocated costs, if these would enhance a study designed to improve government procurement practices.⁹³

The significant inputs test is able to accommodate both the investigatory purposes and the snooping concerns of the access statute. The test focuses on the relevance of the requested data to the government contract and on the relation of the GAO study to the purposes of the statute.⁹⁴ It would prevent “fishing trips,” such as the securities law investigation hypothesized, but it would permit meaningful pursuit of what all courts have agreed is a legitimate study of the pharmaceuticals industry.⁹⁵ The test should not be rejected because it might require disclosure of virtually all the

⁹¹ 97 CONG. REC. at 13,376 (remarks of Rep. Hardy concerning the Harvey amendment). Judge Mikva drew a similar conclusion from Rep. Hoffman’s remarks concerning the Harvey amendment: “Representative Hoffman feared . . . that GAO would inspect direct costs of production . . . even when the production was not relevant to government procurement at all.” *Merck & Co. v. Staats*, 665 F.2d 1236, 1249 (D.C. Cir. 1981) (Mikva, J., concurring in part, dissenting in part), *cert. granted sub nom. Bowsher v. Merck & Co.*, 102 S. Ct. 1968 (1982). *Cf. Eli Lilly & Co. v. Staats*, 574 F.2d 904, 916 n.8 (7th Cir.) (“Attempting to cull the meaning of the word ‘snooping’ from other comments by Congressman Hoffman . . . is a difficult task because the Congressman voiced so many concerns that there is no logical way to identify which one or ones he regarded as the ‘snooping’ that he sought to limit.”), *cert. denied*, 439 U.S. 959 (1978).

⁹² See generally 15 U.S.C. §§ 77f-77k, 77l-77r (1976).

⁹³ Conceivably, therefore, the GAO’s requests in the drug cases were unsupportable because they were made for the improper purpose of aiding the Senate inquiry. If that were so, then none of the data, not just the unallocated cost data, should have been accessible. The argument of improper purpose was advanced in some of the drug cases, but the courts rejected it. The GAO’s own purpose was to study wastefulness in procurement and as such was legitimate; “[t]hat United States senators encourage and influence GAO to use its powers to the fullest extent allowed by law, and that GAO heeds those senators, is irrelevant.” *SmithKline Corp.*, 668 F.2d at 207; see also *Merck & Co. v. Staats*, 665 F.2d at 1239-42 (Mikva, J., concurring in part, dissenting in part); *Eli Lilly & Co. v. Staats*, 574 F.2d at 907-12. But see Case Comment, *supra* note 4, at 1151-53, 1159 (arguing that court should have found improper purpose in *Eli Lilly & Co.*); Note, *supra* note 13, at 125-30 (same).

⁹⁴ See *Eli Lilly & Co. v. Staats*, 574 F.2d at 914-16.

⁹⁵ See *supra* note 93.

records of the drug companies; when the end is legitimate, Congress apparently found extensive disclosure to be a tolerable investigatory tool, not intolerable government snooping.⁹⁶

D. Corporate Confidentiality

Just as Congress was concerned with snooping, contractors subject to the access statute may be concerned that government access to their records will imperil confidential and proprietary business information.⁹⁷ This concern will be present regardless of which of the current standards for "directly pertinent" is adopted. There is no avoiding the fact that the statute gives the government the power to inspect records that contractors may well prefer to keep secret.

Because the significant inputs test would expose more records to the GAO, however, and because these might include records from highly proprietary areas, such as research and development,⁹⁸ it may be less desirable than the allocated/unallocated test. Only the Seventh Circuit, which created the significant inputs test in *Eli Lilly & Co. v. Staats*,⁹⁹ has addressed the confidentiality problem directly.¹⁰⁰ The court dismissed the contractor's concerns because the GAO had indicated its intention not to identify the source of any information, to give data only to appropriate congressional bodies, and to notify Lilly before it disclosed any information.¹⁰¹ Confident that the GAO was "properly cognizant of plaintiff's need for confidentiality,"¹⁰² the Seventh Circuit instructed the district court to include these confidentiality guarantees in its order on remand granting GAO access.¹⁰³

In principle, such protective orders ought to be sufficient. Courts are capable of evaluating and protecting claims of confidentiality, as is demonstrated by their regularly handling requests

⁹⁶ See *supra* notes 85-86 and accompanying text.

⁹⁷ See *Eli Lilly & Co. v. Staats*, 574 F.2d at 917.

⁹⁸ See *Eli Lilly & Co. v. Staats*, 574 F.2d at 908 (noting district court's concern "that the records sought by the Comptroller General contain confidential business information and secrets of plaintiff which, if made public, would cause plaintiff irrevocable competitive injury"). See also Note, *supra* note 13, at 136.

⁹⁹ 574 F.2d 904 (7th Cir.), *cert. denied*, 439 U.S. 959 (1978).

¹⁰⁰ *Id.* at 917.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 918. See also *Merck & Co. v. Staats*, 665 F.2d 1236, 1239 n.6 (D.C. Cir. 1981) (Mikva, J., concurring in part, dissenting in part) (district court had added "protective conditions" to its order granting access), *cert. granted sub nom. Bowsher v. Merck & Co.*, 102 S. Ct. 1968 (1982).

under Federal Rule of Civil Procedure 26(c) for protection from discovery.¹⁰⁴ If in practice such protective orders are not fully satisfactory,¹⁰⁵ it is not a result of the significant inputs test.¹⁰⁶

IV. THE NEED FOR CERTAINTY

The significant inputs test allows for the sort of procurement studies contemplated by the access statute's sponsors without jeopardizing their intention not to facilitate government snooping and without unreasonably risking compromise of corporate confidentiality. Some courts have criticized the test, however, for imposing an unfairly indefinite obligation on government contractors.¹⁰⁷ Reasonably certain identification of the records to which the GAO will have access is important for three reasons: to allow the contractor to weigh the disclosure responsibilities in his negotiations and performance, to provide the GAO with a fair estimate of its available data sources, and to avoid lengthy litigation. These needs are accommodated no better by the allocated/unallocated test than by the significant inputs test.

A. Certainty and the Allocated/Unallocated Test

The majority position concerning GAO access was articulated

¹⁰⁴ See, e.g., *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir. 1977) (refusing to order production of confidential faculty records in employment discrimination case), *cert. denied*, 434 U.S. 904 (1977); *Brink v. DaLesio*, 82 F.R.D. 664, 676-78 (D. Md. 1979) (refusing to lift judicial seal on documents in grand jury's possession); *Financial Gen. Bankshares, Inc. v. Lance*, 80 F.R.D. 22, 22-23 (D.D.C. 1978) (refusing to grant protective order). See also C. WRIGHT & A. MILLER, 8 *FEDERAL PRACTICE & PROCEDURE* § 2043 (1970) (discussing protective orders and confidential business information). Cf. *Eli Lilly & Co. v. Staats*, 574 F.2d at 916 ("it is likely that the Government could compel the same disclosures from plaintiff in discovery proceedings even in litigation in which plaintiff is not a participant" (citation omitted)).

¹⁰⁵ For example, confidentiality is not always guaranteed by not identifying the source of data. Indeed, much information may be distinctive enough to be "self-identifying," particularly to those familiar with the industry (who of course pose the greatest competitive danger). Also, the limitation of disclosure to authorized members of Congress and congressional committees may be of little comfort to a contractor: the expressed intent of some members of Congress to publicize drug company data precipitated this litigation. *Eli Lilly & Co. v. Staats*, 574 F.2d at 921-24 (district court's summary judgment reprinted as appendix to dissenting opinion of Pell, J.).

¹⁰⁶ Whichever test is used, the GAO might add stronger confidentiality guarantees to the standard form government contract. See 41 C.F.R. § 1-16.901-32 (1981). A contractor concerned about confidentiality also might be able to have greater protective language included in its particular contract.

¹⁰⁷ See, e.g., *SmithKline Corp. v. Staats*, 668 F.2d 201, 212 (3d Cir. 1981), *petition for cert. filed sub nom. Bowsher v. SmithKline Corp.*, 50 U.S.L.W. 3936 (U.S. May 10, 1982) (No. 81-2082).

first by the District Court for the Southern District of New York in *Bristol Laboratories Division of Bristol-Myers Co. v. Staats*.¹⁰⁸ The court agreed to limit access to the cost categories, primarily reflecting allocated costs, that Bristol Laboratories had offered to disclose.¹⁰⁹ Later courts have adopted *Bristol Laboratories'* listing of cost categories that must be disclosed,¹¹⁰ so the test gives the appearance of certainty.

The appearance of certainty in the pharmaceuticals cases is a result of the fact that all of the cases involved contracts for comparable products in the same industry. But the federal government procures products from a wide array of industries with highly varied cost structures.¹¹¹ If the limits to GAO access derived in the pharmaceuticals cases were applied in other industries, certainty might result, but the data produced would not necessarily bear any relation to the data that are directly pertinent to the contract involved. Moreover, the cost records made available because allocated in the drug industry might not actually be allocated in the industry in question. A strict application of the allocated/unallocated test as applied in the pharmaceuticals cases, therefore, could lead to one or both of two absurd results: it could produce data not relevant to the inquiry, and it could produce data on unallocated costs in proportions far beyond those contemplated in *Bristol Laboratories*.¹¹²

These problems could be resolved in any of several ways. First, the test could be modified to require access to cost data that the contractor has actually allocated to the government's contract. This would produce perfect certainty for the contractor, for he will always know which of his costs are allocated, but it would produce perfect uncertainty for the government, because the government would not be able to ascertain the records to which it would have access until after a contract has been signed. Moreover, contractors with similar cost structures could be treated differently simply because they have different accounting practices, something wholly irrelevant to the pertinence of the records to the government

¹⁰⁸ 428 F. Supp. 1388 (S.D.N.Y. 1977), *aff'd per curiam*, 620 F.2d 17 (2d Cir. 1980), *aff'd mem. by an evenly divided court*, 451 U.S. 400 (1981).

¹⁰⁹ *Id.* at 1391. See also *supra* note 10.

¹¹⁰ See, e.g., *SmithKline Corp. v. Staats*, 668 F.2d at 212-13.

¹¹¹ See GENERAL ACCOUNTING OFFICE, *supra* note 1, at 13 ("Procurement" includes "all purchases by Federal Agencies that range from standard commercial supplies and services to the most complex national systems, such as defense weapons . . . and space systems."); *supra* notes 22-25 and accompanying text.

¹¹² See generally *supra* note 10.

contract.¹¹³

Second, the courts, the GAO, or the Congress could fabricate feasible cost allocations on an industry-by-industry basis.¹¹⁴ Allowing access to records that may feasibly be allocated—even if not actually allocated—would produce certainty for contractors and the GAO, but this also would be an inadequate solution. To create such industry standards would require access to precisely the data that are at issue. Further, creating the standards would be a difficult and time-consuming endeavor. It is difficult to justify developing reasonable standards for cost allocation instead of developing more explicit definitions of “directly pertinent . . . records.”

The third resolution would be to determine which general cost categories are directly pertinent to government contract studies on an industry-by-industry basis. Contractors and the GAO could each use these determinations to predict which records would have to be made available under a proposed contract. Whatever certainty this might produce would be due not to the allocated/unallocated criteria, however, but to the new tests of direct pertinence. Moreover, once the focus reverts to criteria of direct pertinence, there is no reason to limit the inquiry to allocated costs. The same tests of direct pertinence could also be applied to unallocated costs with equal certainty.

B. Certainty and Significant Inputs

The significant inputs test is not much more definite than the allocated/unallocated test. All that is certain, based on the cases to date, is that data concerning ninety percent of the contract price are significant.¹¹⁵ The courts have not been called upon to determine how much less than ninety percent is still significant. A contractor contemplating selling goods to the government, therefore, cannot be certain which records he may have to expose to the gov-

¹¹³ See generally *supra* notes 67-68 and accompanying text.

¹¹⁴ It may be that this is what the *Bristol* court intended when it promulgated its rule, but if so it gives no guidance to courts considering GAO access to records in other industries: the *Bristol* court without explanation capitulated to the constraints on disclosure suggested by Bristol Laboratories. See *supra* notes 108-09 and accompanying text. Moreover, at least one court that followed *Bristol* did so because “Congress intended the words [directly pertinent] to acquire some common meaning,” *SmithKline Corp. v. Staats*, 668 F.2d 201, 212 (3d Cir. 1981), *petition for cert. filed sub nom. Bowsher v. SmithKline*, 50 U.S.L.W. 3936 (U.S. May 10, 1982) (No. 81-2082), which suggests that it would apply the *Bristol* test to other industries.

¹¹⁵ See *Eli Lilly & Co. v. Staats*, 574 F.2d 904, 913-14 (7th Cir.), *cert. denied*, 439 U.S. 959 (1978).

ernment until he signs a contract and faces a specific request, and the GAO cannot be sure of its data resources until it receives either data from the contractor or an adverse ruling from the courts.

The significant inputs test would be made more certain if ad hoc limits were placed on the percentage of costs still considered significant, but ad hoc limits are inconsistent with the statutory concept of a test of relevance or direct pertinence of the records to the government's contract.¹¹⁶ The test could be made more certain through judicial refinement, but this is a lengthy process. As with the allocated/unallocated test, the significant inputs test could be made more certain if either Congress or the GAO were to establish fixed guidelines to determine what sorts of records are "directly pertinent."¹¹⁷

C. GAO Guidelines

Both the allocated/unallocated and significant inputs tests would be improved by GAO guidelines designed to determine which records may be considered directly pertinent under the statute. The GAO can promulgate such guidelines as part of its regulations concerning government standard-form contracts.¹¹⁸ The GAO's expertise in procurement audits is required for that task, and the GAO may be assisted through voluntary data disclosure by government contractors.¹¹⁹ Although proposing specific guidelines is beyond the scope of this comment, some general observations may be helpful.

The GAO's guidelines should consist of industry-based listings of standard cost categories. For each cost category within each industry, the GAO should set a percentage of total contract costs above which records concerning those costs would have to be made

¹¹⁶ Cf. *supra* notes 94-96 and accompanying text.

¹¹⁷ It is not clear, however, that such guidelines could be enforced if the Supreme Court should adopt the allocated/unallocated test: if a contractor is able to shield more records from government scrutiny under the allocated/unallocated test than under new GAO guidelines, and if the Court has explicitly adopted the former, the contractor will be unlikely to comply with more demanding GAO guidelines. Having determined that allocated cost data are a fair approximation of "directly pertinent" records, the Court would be hard pressed to require more. Even if the Court should opt for the allocated/unallocated test, therefore, it ought to leave some flexibility in its opinion to allow the GAO to write guidelines that would improve the test.

¹¹⁸ Standard Form 32, listing the general provisions for government supply contracts, is found at 41 C.F.R. § 1-16.901-32 (1981). Clauses 10(b) and 10(c) contain the same "directly pertinent" language found in the 1951 access statute. *Id.*

¹¹⁹ See generally *supra* note 27.

available to the GAO.¹²⁰ It is conceivable that the GAO would have to develop cost categories on a basis smaller than an entire industry if the products of the industry are sufficiently diverse.

The GAO should evaluate as many factors as possible in setting the levels of cost significance. For example, the average size of government contracts in a given industry might be relevant. In an industry where government contracts have always been measured in millions of dollars, costs representing a small percentage of the total contract price might still be considered "significant" and accessible, although the same percentage would be insignificant in an industry where the average contract size is under \$100,000.

Similarly, the GAO should consider the need for procurement studies and the degree of detail required to make the studies meaningful.¹²¹ In an industry from which the government has only recently begun purchasing items, for example, detailed studies of costs and procurement options could produce great economies for the government and might justify setting a low figure as the threshold for significant inputs, allowing the GAO access to larger amounts of relevant information.

Another factor to consider in formulating numerical definitions of "significant inputs" is the cost that detailed government study might impose on contractors. If, for example, a very low threshold were set in an industry where the government had multi-million-dollar contracts, the costs to the contractor of disclosing records on all phases of production might be large. In such a case, a higher percentage might be proper.¹²²

Similarly, the risk of improper use or disclosure of proprietary or confidential information should be considered in formulating the guidelines. For example, if a particular cost category is likely to include confidential information, the GAO might set a higher

¹²⁰ One way to amend the standard form contract, *see supra* note 118, would be to retain the "directly pertinent" language in clause 10 and add a definition of that phrase in clause 1, the definitions clause. A new clause might be added to provide: "The term 'directly pertinent books, records, etc.' means all cost records except those which, taken singly, comprise less than X% of the contract price." An appended table could provide a list of figures to be substituted for X, depending on the industry and type of contract involved.

¹²¹ *Cf. supra* notes 57-70 and accompanying text.

¹²² The debate on the Harvey amendment, *see supra* notes 79-86 and accompanying text, supports considering the costs imposed by disclosure. Representative Harvey's motivation was in part to reduce such costs. Representative Hardy, the sponsor of the access bill, acknowledged that GAO access might be costly, but he pointed out that the GAO's resources are limited, and he expressed his belief that the GAO would undertake a study only when it had a reasonable expectation that the study would produce benefits sufficient to offset the costs to the GAO and the contractors. 97 CONG. REC. 13,376-77 (1951).

threshold for the category to ensure that access is necessary and that the value of GAO access outweighs whatever harms disclosure risks. In addition, the GAO should provide some form of confidentiality guarantee in the standard-form contract regulations.¹²³

Although this discussion has not been exhaustive, it is indicative of how the GAO might be able to formulate guidelines to promote certainty for the agency and for contractors. These guidelines would permit meaningful procurement studies and help ensure equitable treatment of contractors.

CONCLUSION

Determination of the proper scope of the GAO's access to a government contractor's records requires a balancing of the interests of the government against those of the contractor. The government's interest, clearly shown in the legislative history of the access statute, is to provide the GAO with the tools it needs to review both the propriety of individual procurement contracts and the functioning of the procurement process in general. The contractor's interests include freedom from excessive government snooping into primarily civilian business matters, protection of confidential business data, and certainty in the scope of GAO access.

This comment has shown that the significant inputs standard of access, strengthened by GAO guidelines, best achieves a balance of these interests. Unlike the competing allocated/unallocated standard, "significant inputs" is fully responsive to the purposes of the access-to-records legislation. It surmounts the narrow confines of the pharmaceuticals industry dispute to provide a definition more generally applicable to government procurement.

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¹²³ See *supra* notes 97-106 and accompanying text.