

# The Burger Court Opinion Writing Database

*Bowsher v. Merck & Co.*

460 U.S. 824 (1983)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

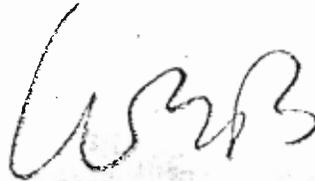
February 26, 1983

Re: No. 81-1273, Powsher v. Merck, & Co.  
No. 81-1472, Merck, & Co. v. Powsher

Dear Sandra:

I join.

Regards,



Justice O'Connor

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

March 31, 1983

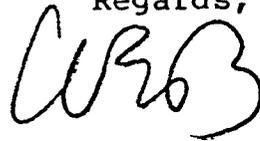
MEMORANDUM TO THE CONFERENCE

RE: 81-1273) - Bowsher v. Merck  
81-1472) - Merck v. Bowsher

Dear Sandra:

I join.

Regards,

A handwritten signature in black ink, appearing to be 'WROB', written in a cursive style.

Justice O'Connor

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

December 23, 1982

RE: Nos. 81-1273 & 81-1472 Bowsher v. Merck & Co., Inc.

Dear Bill:

In reference to our telephone conversation yesterday, I now learn that John believes he was misunderstood as to his votes in the above cases. I had him to affirm with you, Byron and me in No. 81-1472. I am told I am in error - that his vote was to reverse in that case and to affirm in No. 81-1273.

Doubtless you've seen Byron's note of December 22 that he will dissent in both cases. I gather, however, that his dissent in No. 81-1472 is not on the same ground that you and I thought that case should be affirmed. Would you be able to undertake a statement on our views?

Sincerely,



Justice Rehnquist

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

February 23, 1983

RE: Nos. 81-1273 and 1472 Bowsher v. Merck & Co., Inc.

Dear Bill:

Please join me in your opinion in the above.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Justice Rehnquist  
Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

March 16, 1983

RE: Nos. 81-1273 and 81-1472 Boswher v. Merck & Co.

Dear Sandra:

Like Bill Rehnquist, I join in your latest circulation.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill", written in black ink.

Justice O'Connor

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 22, 1982

Dear Bill:

I was alone in No. 81-1273, Bowsher  
v. Merck & Co., Inc., and, as presently  
advised, I shall write a dissent in that  
case and also in No. 81-1472, Merck &  
Co., Inc., v. Bowsher, if what I  
understand to be a somewhat tentative  
vote in that case holds together.

Sincerely,



Justice Brennan

cc: Justice Rehnquist

Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice White**

Circulated: FEB 17 1983

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-1273

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
OF THE UNITED STATES, ET AL.,  
PETITIONERS

81-1273

v.  
MERCK & CO., INC.

MERCK & CO., INC., PETITIONER

81-1472

v.  
CHARLES A. BOWSHER, COMPTROLLER GENERAL  
OF THE UNITED STATES AND  
UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[February —, 1983]

Memorandum of JUSTICE WHITE.

The preliminary vote at conference in these cases was to adopt Merck's position and hold that the GAO is not entitled to access to *any* of Merck's cost records. Merck's theory has been emphatically rejected by every Court of Appeals that has considered it,<sup>1</sup> and, in my view, we should do likewise,

<sup>1</sup>In addition to the opinion below in the present case, 665 F. 2d 1236 (CADC 1981), see *SmithKline Corp. v. Staats*, 668 F. 2d 201 (CA3 1981), cert. pending, No. 81-2082; *United States v. Abbott Laboratories*, 597 F. 2d 672 (CA7 1979); *Eli Lilly & Co. v. Staats*, 574 F. 2d 904 (CA7), cert. denied, 439 U. S. 959 (1978); and *Hewlett-Packard Co. v. United States*, 385 F. 2d 1013 (CA9 1967), cert. denied, 390 U. S. 988 (1968). Apparently recognizing the untenability of the argument advanced here by Merck, the

To: The Chief Justice  
 Justice Brennan  
 ✓ Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice White**

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_ 1983

— SUBSTANTIAL CHANGES THROUGHOUT —

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-1273

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
 OF THE UNITED STATES, ET AL.,  
 PETITIONERS

81-1273

v.

MERCK & CO., INC.

MERCK & CO., INC., PETITIONER

81-1472

v.

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
 OF THE UNITED STATES AND  
 UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1983]

JUSTICE WHITE, dissenting.

The Court wholeheartedly accepts Merck's contention that, when the terms and conditions of a government contract "are not expressly tied to the contractor's costs and the contractor makes no representations regarding its costs during the course of negotiations, none of the contractor's cost records is subject to inspection by the Comptroller General." *Ante*, at 2. Merck's theory has been emphatically rejected by every Court of Appeals that has considered it,<sup>1</sup> and, in my

<sup>1</sup>In addition to the opinion below in the present case, 665 F. 2d 1236 (CADC 1981), see *SmithKline Corp. v. Staats*, 668 F. 2d 201 (CA3 1981), cert. pending, No. 81-2082; *United States v. Abbott Laboratories*, 597 F. 2d 672 (CA7 1979); *Eli Lilly & Co. v. Staats*, 574 F. 2d 904 (CA7), cert.

Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice White**

Substantial changes throughout

Circulated: \_\_\_\_\_

Recirculated: MAR 21 1983

  
1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 81-1273 AND 81-1472

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
OF THE UNITED STATES, ET AL.,  
PETITIONERS

81-1273

v.  
MERCK & CO., INC.

MERCK & CO., INC., PETITIONER

81-1472

v.  
CHARLES A. BOWSHER, COMPTROLLER GENERAL  
OF THE UNITED STATES AND  
UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1983]

JUSTICE WHITE, with whom JUSTICE MARSHALL joins,  
concurring in part and dissenting in part.

I join Part V of the Court's opinion, and I concur in the remainder to the extent it upholds the GAO's right to inspect Merck's "direct" cost records.<sup>1</sup> I dissent to the extent the

<sup>1</sup>The Court correctly rejects Merck's contention that *none* of its cost records are subject to inspection by the GAO. Merck's theory has been emphatically rejected by every Court of Appeals that has considered it. In addition to the opinion below in the present case, 665 F. 2d 1236 (CADDC 1981), see *SmithKline Corp. v. Staats*, 668 F. 2d 201 (CA3 1981), cert. pending, No. 81-2082; *United States v. Abbott Laboratories*, 597 F. 2d 672 (CA7 1979); *Eli Lilly & Co. v. Staats*, 574 F. 2d 904 (CA7), cert. denied, 439 U. S. 959 (1978); and *Hewlett-Packard Co. v. United States*, 385 F. 2d

Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice White**

Circulated: \_\_\_\_\_

Recirculated: MAR 25 1983

- pp. 13-14 & stylistic changes -

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 81-1273 AND 81-1472

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
 OF THE UNITED STATES, ET AL.,  
 PETITIONERS

81-1273

v.

MERCK & CO., INC.

MERCK & CO., INC., PETITIONER

81-1472

v.

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
 OF THE UNITED STATES AND  
 UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1983]

JUSTICE WHITE, with whom JUSTICE MARSHALL joins,  
 concurring in part and dissenting in part.

I join Part V of the Court's opinion, and I concur in the re-  
 mainder to the extent it upholds the GAO's right to inspect  
 Merck's "direct" cost records.<sup>1</sup> I dissent to the extent the

<sup>1</sup>The Court correctly rejects Merck's contention that *none* of its cost records are subject to inspection by the GAO. Merck's theory has been emphatically rejected by every Court of Appeals that has considered it. In addition to the opinion below in the present case, 665 F. 2d 1236 (CADC 1981), see *SmithKline Corp. v. Staats*, 668 F. 2d 201 (CA3 1981), cert. pending, No. 81-2082; *United States v. Abbott Laboratories*, 597 F. 2d 672 (CA7 1979); *Eli Lilly & Co. v. Staats*, 574 F. 2d 904 (CA7), cert. denied, 439 U. S. 959 (1978); and *Hewlett-Packard Co. v. United States*, 385 F. 2d

FOR THE CHIEF JUSTICE  
 Justice Brennan  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

stylistic changes only

*4th draft*

From: Justice White

**SUPREME COURT OF THE UNITED STATES**

Proposed: \_\_\_\_\_

Nos. 81-1273 AND 81-1472

Recirculated: APR 18 1983

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
 OF THE UNITED STATES, ET AL.,  
 PETITIONERS

81-1273

v.

MERCK & CO., INC.

MERCK & CO., INC., PETITIONER

81-1472

v.

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
 OF THE UNITED STATES AND  
 UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April 19, 1983]

JUSTICE WHITE, with whom JUSTICE MARSHALL joins,  
 concurring in part and dissenting in part.

I join Part V of the Court's opinion, and I concur in the remainder to the extent it upholds the GAO's right to inspect Merck's "direct" cost records.<sup>1</sup> I dissent to the extent the

<sup>1</sup>The Court correctly rejects Merck's contention that *none* of its cost records are subject to inspection by the GAO. Merck's theory has been emphatically rejected by every Court of Appeals that has considered it. In addition to the opinion below in the present case, 665 F. 2d 1236 (CA DC 1981), see *SmithKline Corp. v. Staats*, 668 F. 2d 201 (CA3 1981), cert. pending, No. 81-2082; *United States v. Abbott Laboratories*, 597 F. 2d 672 (CA7 1979); *Eli Lilly & Co. v. Staats*, 574 F. 2d 904 (CA7), cert. denied, 439 U. S. 959 (1978); and *Hewlett-Packard Co. v. United States*, 385 F. 2d

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 3, 1983

Re: No. 81-1273 and 81-1472 - Bowsher v. Merck,  
and Merck v. Bowsher

Dear Byron:

Please join me in your dissent.

Sincerely,

*J.M.*

T.M.

Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 24, 1983

Re: No. 81-1273 - Bowsher v. Merck & Co., Inc.  
No. 81-1472 - Merck & Co., Inc. v. Bowsher

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

cc: The Conference

HA

March 11, 1983

Re: No. 81-1273, Bowsher v. Merck & Co., Inc.  
No. 81-1472, Merck & Co., Inc. v. Bowsher

Dear Sandra:

This is meant to be a humorous addendum to my other letter of today concerning these cases. Before you arrived here, I advised the then "Brethren" that I would never join an opinion in which the misused word "parameter" appeared. See page 9 line 8 of your circulation of March 8. I adhere to that posture. Henry Lind and I are fighting all out war on this field of battle and, thus far, it has been successful though the carnage at times is great. See the Court's Style Manual, page 148. I feel particularly sensitive about this because of my immersion in mathematics during college years long, long ago.

Sincerely,

HAB

Justice O'Connor

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 11, 1983 .

Re: No. 81-1273, Bowsher v. Merck & Co., Inc.  
No. 81-1472, Merck & Co., Inc. v. Bowsher

Dear Sandra:

I joined your first circulation of February 17. Having read your revised position in your circulation of March 8, I have concluded, as of now, to remain with my original vote, that is, to affirm in part and to reverse in part. Thus, if you obtain a Court for your revised opinion, as I believe you will, I shall be in partial dissent.

Sincerely,



Justice O'Connor

cc: The Conference

Justice Brennan  
Justice White  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Blackmun**

Circulated: APR 11 1983

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 81-1273 AND 81-1472

**CHARLES A. BOWSHER, COMPTROLLER GENERAL  
OF THE UNITED STATES, ET AL.,  
PETITIONERS**

81-1273

*v.*

**MERCK & CO., INC.**

**MERCK & CO., INC., PETITIONER**

81-1472

*v.*

**CHARLES A. BOWSHER, COMPTROLLER GENERAL  
OF THE UNITED STATES AND  
UNITED STATES**

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

[April —, 1983]

**JUSTICE BLACKMUN, concurring in part and dissenting in part.**

The question before us is the proper construction of the access-to-records clauses required by law to be inserted in various Government contracts. These clauses authorize the Comptroller General to inspect any records that "directly pertain to and involve transactions relating to" the contract into which the clause was inserted. 10 U. S. C. §2313(b); see 41 U. S. C. §254(c) (permitting access to "directly pertinent" records "involving transactions related to" the contracts). The Court now holds that these clauses permit access to certain cost records, even when the contract is not cost-based and was negotiated without regard to costs. I

Justice White  
 Justice Marshall  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Blackmun**

Circulated: \_\_\_\_\_

Recirculated: APR 13 1983

40.1

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 81-1273 AND 81-1472

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
 OF THE UNITED STATES, ET AL.,  
 PETITIONERS

81-1273

*v.*  
 MERCK & CO., INC.

MERCK & CO., INC., PETITIONER

81-1472

*v.*  
 CHARLES A. BOWSHER, COMPTROLLER GENERAL  
 OF THE UNITED STATES AND  
 UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April —, 1983]

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, |  
 concurring in part and dissenting in part.

The question before us is the proper construction of the access-to-records clauses required by law to be inserted in various Government contracts. These clauses authorize the Comptroller General to inspect any records that "directly pertain to and involve transactions relating to" the contract into which the clause was inserted. 10 U. S. C. §2313(b); see 41 U. S. C. §254(c) (permitting access to "directly pertinent" records "involving transactions related to" the contracts). The Court now holds that these clauses permit access to certain cost records, even when the contract is not cost-based and was negotiated without regard to costs. I

February 28, 1983

81-1273 and 81-1472 The Merck & Co., Inc. Cases

Dear Sandra:

After reviewing over the weekend the three opinions that have been circulated, I have concluded reluctantly that we should affirm the Court of Appeals in both of these cases.

At the time of our Conference and sharing your concern as to "unrestricted snooping" by government auditors, I voted tentatively to reverse in 81-1472. You make a strong argument for reversal, and I agree with it as a matter of policy. But I now find it difficult to get away from the statutory language - language incorporated into Merck's contract with the government. No exception is made for "fixed price contracts", and at best the legislative history is ambiguous.

Based on research by my clerk, there does not appear to be any Court of Appeals authority for reading this exception into either the statute or this type of contract. There are opinions to the contrary by CA2 and CA3, as well as CADC in this case.

Bill Rehnquist's position now seems correct to me, and I probably will join him though I may suggest that he expressly include the holding of the District Court that access is barred "with respect to research and development, marketing and promotion, distribution, and administration".

I particularly regret my decision as it is evident that you have put a great deal of effort into your opinion.

Sincerely,

Justice O'Connor

lfp/ss

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 10, 1983

81-1273 and 81-1472 Merck & Co. Cases

Dear Sandra:

Although I will be happy to join your alternative draft of March 8, it may be desirable to state expressly that we agree with the holding of the District Court that access is barred "with respect to research and development, marketing and promotion, distribution, and administration" costs, except to the extent such data fairly may be included in costs directly related to the particular contract. I think this is a correct reading of the DC opinion and order. See Pet. for Cert., pp. 39a-40a.

I also suggest omission of the first full sentence on page 17. If this Court says that "our holding will impede the GAO . . .", the GAO may think we are suggesting it should ask Congress to amend the statute. I would hesitate to invite changes in the statute.

You are to be commended on accomplishing what I think is a sound revision in a remarkably short period of time.

Sincerely,

*Lewis*

Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 17, 1983

81-1273 Bowsher v. Merck

Dear Sandra:

This will confirm my join.

Sincerely,



Justice O'Connor

lfp/ss

cc: The Conference

To: The Chief Justice

- Justice Brennan
- Justice White
- Justice Marshall
- Justice Blackmun
- Justice Powell
- Justice Stevens
- Justice O'Connor

From: **Justice Rehnquist**

FEB 22 1983

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 81-1273 AND 81-1472

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
OF THE UNITED STATES, ET AL.,  
PETITIONERS

81-1273

v.

MERCK & CO., INC.

MERCK & CO., INC., PETITIONER

81-1472

v.

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
OF THE UNITED STATES AND  
UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[February —, 1983]

JUSTICE REHNQUIST concurring in the judgment in part  
and dissenting in part.

Our task in this case is to construe the words "directly per-  
tain to . . . the contract." 10 U. S. C. §2313(b). I believe  
these words were not intended to restrict the General Ac-  
counting Office as much as the Court holds, and that they  
have more restrictive force than JUSTICE WHITE would give  
them. I am persuaded that the courts below acted properly  
in giving the GAO access to all records of "direct costs." Ac-  
cordingly, I concur in the judgment in No. 81-1273 and dis-  
sent in No. 81-1472.

It is not necessary here to set out again the legislative his-  
tory explored by the Court and by JUSTICE WHITE. The

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

March 15, 1983

Re: Nos. 81-1273 & 81-1472 Bowsher v. Merck & Co.

Dear Sandra:

Please join me in your latest circulation.

Sincerely,



Justice O'Connor

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

February 18, 1983

Re: 81-1273 - Bowsher v. Merck & Co.;  
81-1472 - Merck & Co. v. Bowsher

Dear Sandra:

Please join me.

Respectfully,



Justice O'Connor

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

April 12, 1983

Re: 81-1273 & 811472 - Bowsher v. Merck

Dear Harry:

Please join me in your separate writing.

Respectfully,



Justice Blackmun

Copies to the Conference

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: **Justice O'Connor**

Circulated: FEB 17 1983

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 81-1273 AND 81-1472

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
OF THE UNITED STATES, ET AL.,  
PETITIONERS

81-1273

*v.*

MERCK & CO., INC.

MERCK & CO., INC., PETITIONER

81-1472

*v.*

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
OF THE UNITED STATES AND  
UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[February —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

The issue before the Court is the scope of the authority of the Comptroller General of the United States to examine the records of a private contractor with whom the Government has entered into fixed-price<sup>1</sup> negotiated contracts. We

<sup>1</sup> A pure fixed-price contract requires the contractor to furnish the goods or services for a fixed amount of compensation regardless of the costs of performance, thereby placing the risk of incurring unforeseen costs of performance on the contractor rather than the Government. See 1 R. Nash and J. Cibinic, *Federal Procurement Law* 413 (3d ed. 1977). Variations on the pure fixed-price contract may contain some formula or technique for adjusting the contract price to account for unforeseen cost elements. See *id.*, at 413-415 (discussing fixed-price contract with escalation clause,

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

March 3, 1983

<sup>1273</sup>  
No. 81-1283 Bowsher v. Merck & Co., Inc.  
No. 81-1472 Merck & Co., Inc. v. Bowsher

MEMORANDUM TO THE CONFERENCE

The draft I circulated in this case has attracted only four votes, although at our Conference the tentative votes indicated it would provide a majority. Because the issue is one of practical importance in the day-to-day supervision of government contracts, I think it is desirable to resolve it in a way which will produce at least five votes.

I can live with a "middle ground" approach along the lines of that proposed by Bill Rehnquist, if that would produce a majority. I will prepare a revised draft along those lines and circulate it also to see whether either the original approach or the alternative can produce a Court.

Sincerely,

*Sandra*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

March 8, 1983

No. 81-1273 Bowsher v. Merck & Co., Inc.  
No. 81-1472 Merck & Co., Inc. v. Bowsher

MEMORANDUM TO THE CONFERENCE

Attached is a draft of an alternative approach in this case. If four others can join it, I will withdraw the original version I circulated.

Sincerely,



To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens

Alternative Draft  
 Changes Throughout

From: **Justice O'Connor**

Circulated: MAR 8 1983

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 81-1273 AND 81-1472

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
 OF THE UNITED STATES, ET AL.,  
 PETITIONERS

81-1273

v.

MERCK & CO., INC.

MERCK & CO., INC., PETITIONER

81-1472

v.

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
 OF THE UNITED STATES AND  
 UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

The issue before the Court is the scope of the authority of the Comptroller General of the United States to examine the records of a private contractor with whom the Government has entered into fixed-price<sup>1</sup> negotiated contracts. We con-

<sup>1</sup> A pure fixed-price contract requires the contractor to furnish the goods or services for a fixed amount of compensation regardless of the costs of performance, thereby placing the risk of incurring unforeseen costs of performance on the contractor rather than the Government. See 1 R. Nash and J. Cibinic, *Federal Procurement Law* 413 (3d ed. 1977). Variations on the pure fixed-price contract may contain some formula or technique for adjusting the contract price to account for unforeseen cost elements. See *id.*, at 413-415 (discussing fixed-price contract with escalation clause,

Supreme Court of the United States  
Washington, D. C. 20543  
March 11, 1983

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

Re: No. 81-1273, Bowsher v. Merck & Co., Inc.  
No. 81-1472, Merck & Co., Inc. v. Bowsher

Dear Lewis,

I appreciate your thoughts on the alternative draft and plan to accommodate both requests in the next draft.

With respect to your suggestion that we include the District Court's language, I plan to revise the language at the top of page 15 of the opinion as follows:

"Thus, under the four fixed-price contracts in question, the Comptroller General should be permitted access to records of direct costs. He should be barred, however, from inspecting records of costs incurred in the areas of research and development, marketing and promotion, distribution, and administration, except to the extent the contractor has allocated these costs as attributable to the particular contract."

To be consistent, I will also plan to add the "except" language used by the District Court to the quotation of the District Court language on page 5 of the opinion. That sentence would then read:

"The court barred access, however, to records 'with respect to research and development, ~~marketing and~~ promotion, distribution, and administration (except to the extent such data may be included in the cost items listed above).'"

I will also add to the definition of direct costs in footnote 14 a cross reference to the District Court's definition of direct costs quoted on page 5 of the opinion.

Sincerely,



Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

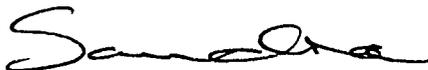
March 21, 1983

No. 81-1273 Bowsher v. Merck & Co., Inc.  
No. 81-1472 Merck & Co., Inc. v. Bowsher

MEMORANDUM TO THE CONFERENCE

It appears that the second version of the draft opinion will have a court. Accordingly, I will withdraw the original version which I circulated.

Sincerely,



pp. 5, 15, 17

Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens

From: **Justice O'Connor**

Circulated: \_\_\_\_\_

Recirculated: MAR 21 1983

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 81-1273 AND 81-1472

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
 OF THE UNITED STATES, ET AL.,  
 PETITIONERS

81-1273

*v.*

MERCK & CO., INC.

MERCK & CO., INC., PETITIONER

81-1472

*v.*

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
 OF THE UNITED STATES AND  
 UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

The issue before the Court is the scope of the authority of the Comptroller General of the United States to examine the records of a private contractor with whom the Government has entered into fixed-price<sup>1</sup> negotiated contracts. We con-

<sup>1</sup> A pure fixed-price contract requires the contractor to furnish the goods or services for a fixed amount of compensation regardless of the costs of performance, thereby placing the risk of incurring unforeseen costs of performance on the contractor rather than the Government. See 1 R. Nash and J. Cibinic, *Federal Procurement Law* 413 (3d ed. 1977). Variations on the pure fixed-price contract may contain some formula or technique for adjusting the contract price to account for unforeseen cost elements. See *id.*, at 413-415 (discussing fixed-price contract with escalation clause,

4 P. 15

Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens

From: Justice O'Connor

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_ 23

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 81-1273 AND 81-1472

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
 OF THE UNITED STATES, ET AL.,  
 PETITIONERS

81-1273

v.

MERCK & CO., INC.

MERCK & CO., INC., PETITIONER

81-1472

v.

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
 OF THE UNITED STATES AND  
 UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

The issue before the Court is the scope of the authority of the Comptroller General of the United States to examine the records of a private contractor with whom the Government has entered into fixed-price<sup>1</sup> negotiated contracts. We con-

<sup>1</sup> A pure fixed-price contract requires the contractor to furnish the goods or services for a fixed amount of compensation regardless of the costs of performance, thereby placing the risk of incurring unforeseen costs of performance on the contractor rather than the Government. See 1 R. Nash and J. Cibinic, *Federal Procurement Law* 413 (3d ed. 1977). Variations on the pure fixed-price contract may contain some formula or technique for adjusting the contract price to account for unforeseen cost elements. See *id.*, at 413-415 (discussing fixed-price contract with escalation clause,

4 p. 6

Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: **Justice O'Connor**

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 81-1273 AND 81-1472

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
OF THE UNITED STATES, ET AL.,  
PETITIONERS

81-1273

v.

MERCK & CO., INC.

MERCK & CO., INC., PETITIONER

81-1472

v.

CHARLES A. BOWSHER, COMPTROLLER GENERAL  
OF THE UNITED STATES AND  
UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

The issue before the Court is the scope of the authority of the Comptroller General of the United States to examine the records of a private contractor with whom the Government has entered into fixed-price<sup>1</sup> negotiated contracts. We con-

<sup>1</sup> A pure fixed-price contract requires the contractor to furnish the goods or services for a fixed amount of compensation regardless of the costs of performance, thereby placing the risk of incurring unforeseen costs of performance on the contractor rather than the Government. See 1 R. Nash and J. Cibinic, *Federal Procurement Law* 413 (3d ed. 1977). Variations on the pure fixed-price contract may contain some formula or technique for adjusting the contract price to account for unforeseen cost elements. See *id.*, at 413-415 (discussing fixed-price contract with escalation clause,

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

April 25, 1983

MEMORANDUM TO THE CONFERENCE

Cases Held for No. 81-1273, Bowsher v. Merck & Co., Inc.,  
and No. 81-1472, Merck & Co., Inc. v. Bowsher

No. 81-2082, Bowsher v. SmithKline Corp.  
No. 81-2268, SmithKline Corp. v. Bowsher

In this case, SmithKline Corp. entered into five fixed-price contracts for the sale of pharmaceuticals to the Defense Supply Agency and the Veterans Administration. Each contract contained the standard access-to-records clause granting the Comptroller General the right to examine any directly pertinent records involving transactions relating to the contract. SmithKline Corp. was one of the six companies, including Merck & Co., Inc., that received a formal demand letter from the GAO in August 1974 for access to all records directly pertinent to the contracts, including information regarding costs, support for prices charged, and any other information necessary to review the reasonableness of the contract prices. Like Merck & Co., Inc., SmithKline brought an action for declaratory and injunctive relief challenging the access demand.

In the decision below, CA3 granted the GAO access to records with respect to manufacturing costs, manufacturing overhead, royalty expenses and delivery costs, but barred access to records with respect to research and development, marketing and promotion, distribution and administration, except to the extent these costs may be included in the manufacturing costs. CA3 further concluded that the GAO had not exceeded its statutory authority simply because it sought the records for the purpose of conducting a general study of procurement techniques or an economic survey of the profitability of the pharmaceutical industry. This holding is consistent with our decision in Bowsher v. Merck & Co., Inc. I recommend the petition and cross-petition be denied.

Sincerely,

*Sandra*