

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: UNITED STATES, Petitioner v. WINSTAR  
CORPORATION, ET AL.

CASE NO: 95-865

PLACE: Washington, D.C.

DATE: Wednesday, April 24, 1996

PAGES: 1-60

**REVISED COPY**

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

'96 SEP 19 P3:47



C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	PAUL BENDER, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	JOE G. HOLLINGSWORTH, ESQ.	
7	On behalf of the Respondent Glendale Federal	
8	Bank	32
9	ORAL ARGUMENT OF	
10	CHARLES J. COOPER, ESQ.	
11	On behalf of the Respondents Winstar Corp.,	
12	et al.	47
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		



1 PROCEEDINGS

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 95-865, The United States v.  
5 Winstar Corporation.

6 Mr. Bender.

7 ORAL ARGUMENT OF PAUL BENDER

8 ON BEHALF OF THE PETITIONER

9 MR. BENDER: Mr. Chief Justice, and may it  
10 please the Court:

11 In 1989, Congress enacted FIRREA, the Financial  
12 Institutions Reform, Recovery and Enforcement Act in an  
13 attempt to deal with the calamity -- one might more  
14 accurately say catastrophe -- that had befallen the  
15 savings and loan or thrift industry in the United States  
16 during the decade of the 1980's largely because of a rise  
17 in interest rates at the beginning of the 1980's and then  
18 because of the risks that S&L owners took in order to make  
19 more money to deal with the losses that were caused by the  
20 rise in interest rates.

21 S&L's are invested in -- were invested in long  
22 term low interest things, mortgages. Primarily when  
23 interest rates go up their profit and loss picture tends  
24 to go down if they're stuck with those long-term debts.

25 During that decade, about a sixth of all the

1 S&L's in the United States, about 500, had to either be  
2 closed or absorbed into other S&L's because they were  
3 insolvent, because they failed. That accelerated at the  
4 end of the eighties. About half of those failures  
5 occurred in 1987 and 1988.

6 The costs of that failure are enormous. The  
7 cost in money to the insurance fund -- which is in turn,  
8 was in turn mostly financed by premiums that the banks had  
9 to pay, and so when the insurance fund loses the banks  
10 have to pay more premiums, and that spirals the losses --  
11 the cost to the insurance fund was over \$40 billion in  
12 those closings.

13 The cost in public confidence in the industry is  
14 probably even greater. Still we are familiar with runs on  
15 banks and what that can cause, and when large numbers of  
16 institutes, one in six, have to start being closed, there  
17 is an enormous problem of possibly failing public  
18 confidence. The public at the end of the eighties had  
19 \$1.3 trillion invested in S&L's, and S&L's in turn are  
20 there because Congress put them there in order to help the  
21 housing market, and the housing industry, and make housing  
22 affordable.

23 QUESTION: And I gather before FIRREA was even  
24 passed, the executive branch was concerned about this  
25 problem and induced some solvent banks to take on their

1 backs some insolvent banks in order to prevent them from  
2 failing. Isn't that what this is all about?

3 MR. BENDER: It's not clear who induced whom in  
4 these transactions.

5 QUESTION: Oh, I see.

6 QUESTION: I thought they did it in order to  
7 save the Congress from having to appropriate more money to  
8 pay the depositors who would have lost money.

9 MR. BENDER: They did it for a number of  
10 reasons. It was the policy of the Federal bank regulators  
11 during the 1980's to close as few banks as possible and to  
12 have them absorbed into other banks because the insurance  
13 fund had a limited amount of money, and if that money runs  
14 out, Congress either has to appropriate money, which it  
15 has very rarely done, or the premiums have to be raised on  
16 the insurances.

17 The fund is primarily funded by premiums that  
18 the banks pay. The banks have to pay more premiums. The  
19 problem that you have of losses becomes even greater. The  
20 policy, then, was to try to keep the banks alive.

21 QUESTION: In any case, whoever induced whom by  
22 doing what these banks did, the claims on the insurance  
23 fund were drastically reduced. They were eliminated with  
24 respect to every one of these failing banks, I take it.

25 MR. BENDER: That's true, for a while they were

1 reduced --

2 QUESTION: Yes.

3 MR. BENDER: -- but the danger was created, and  
4 it happened within that decade.

5 QUESTION: They were reduced until -- the  
6 problem in effect was deferred until FIRREA was passed.

7 MR. BENDER: Well, the problem reappeared before  
8 FIRREA was passed, because if one bank, if one S&L absorbs  
9 another, which has happened in one of these three cases,  
10 and the other two people came into the industry who hadn't  
11 been in it before, and took over a failing thrift, they  
12 then often take great risks. Those risks may turn out not  
13 to be profitable. They then -- the larger entity may then  
14 fail, and that was what was happening at the end of the  
15 eighties.

16 QUESTION: But one of --

17 MR. BENDER: Don't assume that just because one  
18 bank is absorbed by another that deals with the problem.  
19 That's a way of putting the problem off.

20 QUESTION: One of those risks was the object of  
21 the contracts in these three cases.

22 MR. BENDER: I want to talk about the contracts  
23 in these three cases, but I think the right context to  
24 talk about it in is the context of what Congress did and  
25 why they did it in FIRREA and whether that amounted to a

1 breach of any promise that had been made.

2 What Congress did in 1989 to deal with -- to try  
3 to deal with the crisis, they did a number of different  
4 things. They, for example, for the first time invested an  
5 enormous amount of money in the fund, \$100 billion to try  
6 to increase public confidence and make the money  
7 available.

8 The thing they did that's most relevant, or  
9 directly relevant to this case, is, the reason banks  
10 become insolvent is because they lack capital. I mean,  
11 that's almost a truism. These banks that -- the  
12 regulators during the eighties had permitted banks to  
13 continue to exist with zero or negative capital by  
14 counting things like the goodwill involved in this case as  
15 capital.

16 It's not capital, it's a fantasy. It's actually  
17 a loss that's on the books of the bank you acquire, but  
18 they -- you're right, that by -- the strategy was to not  
19 close the banks, and in order to do that they permitted  
20 them to count as capital things that were not capital.  
21 That is a very risky situation, because -- a number of  
22 reasons.

23 The people who own those banks, if they have no  
24 capital in them, having nothing to lose by taking risks.  
25 They lost everything they have already because they're at



1 a zero stage. They are encouraged to take more risks to  
2 make a profitable situation. By taking more risks, there  
3 are more failures. When there are more failures --

4 QUESTION: Well, that was the policy that the  
5 Government regulators permitted --

6 MR. BENDER: Right.

7 QUESTION: -- to occur. I mean, this -- they  
8 were following Government policy in having that kind of  
9 capital --

10 MR. BENDER: They were, and the question in this  
11 case is, when Congress changed the policy in 1989 to  
12 require real capital so that banks would not be operating  
13 on zero or negative capital, so that the owners of the  
14 banks would have something at stake -- several reasons for  
15 requiring real capital. The owners have something at  
16 stake. They're less likely to take risks. There's a  
17 cushion there, also. If a bank has \$10 million in real  
18 capital it can absorb \$10 million in losses before  
19 becoming insolvent. If it doesn't have that, it can't do  
20 that.

21 Congress decided, as one of the many different  
22 things it did in FIRREA as a way of dealing with this was  
23 to require real capital, require a minimum amount of real  
24 capital as a safety feature.

25 QUESTION: Well, Mr. Bender --

1 QUESTION: And this was --

2 QUESTION: No, go ahead.

3 QUESTION: And -- I was going to say, and this  
4 event, I take it it is fair to say, was exactly the event  
5 that the parties assumed might happen when they made their  
6 contracts.

7 MR. BENDER: Exactly. Congress had changed  
8 capital standards many times over the years.

9 QUESTION: Doesn't that fact defeat the  
10 Government's attempt to bring this case essentially under  
11 the impossibility doctrine, because the impossibility  
12 doctrine, if I understand it, assumes that the parties  
13 assume that the event that did happen was not something  
14 that was going to happen. They both had made an  
15 assumption that was false, whereas in this case, it seems  
16 to me, each party had made the very assumption that turned  
17 out to be true.

18 MR. BENDER: You mean -- by the impossibility  
19 doctrine you're referring to the sovereign acts doctrine?

20 QUESTION: Well, I think sovereign acts is an  
21 element of it, yes --

22 MR. BENDER: But where the Government --

23 QUESTION: -- but the one -- I mean, I think  
24 sovereign acts makes sense within the concept of an  
25 impossibility defense, and I think the impossibility

1 defense, I understand it, rests upon the assumption that  
2 the act or event that makes it impossible to perform, and  
3 hence excuses performance, is an act or event which each  
4 party assumed would not happen, whereas in this case, each  
5 party assumed that it might very well --

6 MR. BENDER: It might very well happen. I  
7 think --

8 QUESTION: Mr. Bender, are you relying on  
9 impossibility or unmistakability?

10 MR. BENDER: We're relying on the fact that  
11 there was no promise here --

12 QUESTION: The unmistakability doctrine?

13 MR. BENDER: The unmistakability doctrine is a  
14 doctrine of construction of a contract, and that  
15 doctrine -- we don't think that doctrine needs to be used  
16 here at all. If you just read the contracts -- I'll get  
17 to that in a second -- there is no promise such as the  
18 plaintiffs say.

19 I think -- let's talk about what the plaintiffs  
20 are claiming. The plaintiffs claim --

21 QUESTION: Well, may I -- just before you leave  
22 the -- my question is -- I take it your answer is yes,  
23 we -- each side was assuming that this might very well  
24 happen, and that was part of the object of contracting.

25 MR. BENDER: Right, and because of that, these

1 contracts should be read and are only sensibly read as not  
2 making the promise that the plaintiffs say they make,  
3 namely a promise that that wouldn't change.

4 QUESTION: Well, no, it wasn't necessarily a  
5 promise that that wouldn't change. It was a promise about  
6 what would happen to these banks if it did change.

7 MR. BENDER: The promise that they allege is  
8 either that Congress would not toughen capital  
9 requirements to increase the required solvency, or that if  
10 it did, these banks would be exempted from that, and the  
11 issue in this case is whether there is a promise like  
12 that.

13 QUESTION: And you want to convince us that  
14 these bankers and lawyers who signed this agreement put  
15 themselves in a visibly insolvent state at a time when  
16 there was clearly a crisis in the S&L industry and  
17 Congress was clearly going to take some action, visibly  
18 put themselves in an insolvent condition without any  
19 commitment on the part of the Government to not count that  
20 against them for purpose of shutting them down.

21 MR. BENDER: Without any --

22 QUESTION: I mean, it is so utterly  
23 implausible --

24 MR. BENDER: No, it's not. No, it's not  
25 implausible at all. There was a tremendous amount of

1 money to be made in this industry. These people were  
2 taking a risk.

3 Take Winstar. They invested \$2 million of their  
4 own money. In return for that \$2 million they got an  
5 enormous amount of assets that they could lend out, and  
6 Congress had loosened the restrictions on what they could  
7 lend it to, that they could lend out on risky ventures.

8 They were risking their \$2 million, but the  
9 leveraging that they were getting was enormous. They  
10 could have made enormous profits.

11 Glendale, for example, turned a very large  
12 profit during that time by doing -- by taking on an  
13 insolvent institution, because Glendale got an institution  
14 with a tremendous number of assets in a totally new  
15 market, a booming market where they hoped they could lend  
16 out a lot of money --

17 QUESTION: At a time when not only they but --

18 QUESTION: When you say assets, I -- when you  
19 say assets, I assume you mean deposits which are really,  
20 in effect, a liability, as everyone knows.

21 MR. BENDER: Right, but they -- the assets are  
22 the loans, not the deposits. The deposits are the  
23 liabilities.

24 QUESTION: I find it very difficult to believe  
25 that if these documents had contained a clause that said



1 that the Government, or FSLIC, reserves the right to  
2 change capital requirements and not to count this  
3 goodwill, that these parties would have executed the  
4 agreement. I just don't believe that that would have  
5 happened.

6 MR. BENDER: If the contract said the  
7 Government --

8 QUESTION: If the contract had had a clause  
9 specifically allowing the Government to do what it's done  
10 in this case, it is impossible for me to believe that the  
11 parties would have entered into the transaction.

12 MR. BENDER: I would look at that a different  
13 way.

14 If it is so vital to these acquirers that they  
15 be guaranteed that they can continue to count this capital  
16 even though Congress changes the rules to require real  
17 capital rather than phony capital, if it's so important to  
18 them, you would think that they would get a promise to  
19 that effect. There is no promise here anything like that.

20 QUESTION: Well, isn't that where the  
21 unmistakability doctrine comes in, that people are not  
22 entitled to deal with the Government on assumptions of  
23 their own, or what reasonable people might say, it has to  
24 be unmistakable, not just what a reasonable person  
25 would --

1 MR. BENDER: Right -- I think that's -- that  
2 is --

3 QUESTION: Tell me why this is not unmistakable,  
4 Mr. Bender.

5 MR. BENDER: Right.

6 QUESTION: The provision in the Winstar  
7 agreement -- I think it's the Winstar one. The Statesman  
8 agreement. It says -- it's on page 23 of the -- set forth  
9 in full on page 23 of the Winstar brief.

10 It says, in the case of any ambiguity in the  
11 interpretation or construction of any provision of this  
12 agreement, such ambiguity shall be resolved in a manner  
13 consistent with such regulations, that is, including  
14 future regulations, and the bank board's resolution or  
15 action relating to the acquisition, the mergers, or of  
16 this agreement.

17 If there is a conflict, it says, between such  
18 regulations, which would mean future regulations, and the  
19 bank board's resolution or action relating to the  
20 acquisitions, the mergers, or this agreement, the bank  
21 board's resolution or actions shall govern.

22 In other words, the bank board's resolution that  
23 approved counting this as capital --

24 MR. BENDER: No, it --

25 QUESTION: -- shall govern.

1 MR. BENDER: For the future? No, it didn't.  
2 What --

3 QUESTION: That sentence doesn't --

4 MR. BENDER: No. There's no bank board  
5 resolution approving counting this as capital for the  
6 future. The strongest thing in Statesman's case --

7 QUESTION: Oh, I see. The bank board's  
8 resolution only applies to counting it today.

9 MR. BENDER: I think, Justice Scalia, that you  
10 were right to start with Winstar. Winstar has a  
11 forbearance letter that they rely on. There's a serious  
12 problem whether a forbearance letter should be deemed to  
13 be a promise by the Government that -- because the letter  
14 isn't in the agreement.

15 Winstar -- all these banks signed agreements.  
16 These provisions aren't in those agreements, but let's  
17 look at the letter and assume it is a promise. What does  
18 it say? It says, for purposes of reporting to the  
19 board -- I'm reading from the joint appendix at page 123.

20 QUESTION: And could you tell me, is this a  
21 different document than the document set forth in  
22 Winstar's briefs at page 23, or -- are you just reading  
23 other parts of the same document, or are you referring us  
24 to a different document?

25 MR. BENDER: No, I think I'm referring to the

1 same document.

2 QUESTION: All right.

3 QUESTION: I was reading from Statesman.

4 MR. BENDER: Oh, no, I'm not referring to what  
5 Justice Scalia --

6 QUESTION: I don't know that State -- I was  
7 talking about Statesman.

8 MR. BENDER: I know, you were talking about  
9 Statesman. No, I was talking about Winstar. There are  
10 different things in each case.

11 QUESTION: I understand.

12 MR. BENDER: Let's look at the various things.

13 QUESTION: Let's start with Statesman.

14 MR. BENDER: You want to start with --

15 QUESTION: What's wrong with Statesman? You say  
16 that there is no conflict if a future regulation  
17 contradicts -- a future regulation contradicts the  
18 regulation that the board adopted in order to approve this  
19 transaction --

20 MR. BENDER: No, let's -- and let's look at that  
21 regulation.

22 QUESTION: -- rendering that sentence almost  
23 utterly -- entirely meaningless.

24 MR. BENDER: I agree with your interpretation of  
25 that, Justice Scalia. The important thing, though, is to

1 look at the regulation or document or promise that  
2 Statesman says constitutes a promise to them that, even if  
3 Congress were to raise capital requirements, make them  
4 stronger, require real capital, that even if that were to  
5 happen, they could continue to count this nonreal capital  
6 for, in the Statesman's case, I think it was 25 years.

7 That just doesn't exist. There is no promise  
8 like that. The closest they have is with regard to  
9 capital credits, which are a different form of goodwill,  
10 and that's what is on page 362a of the Joint Appendix.

11 QUESTION: Can I ask you a question about --

12 MR. BENDER: Yes.

13 QUESTION: -- the unmistakability doctrine? I  
14 mean, my thought is that there are two courts that have  
15 said they did make a promise, at least one that gets them  
16 damages, below us --

17 MR. BENDER: And several --

18 QUESTION: -- and the issue is, is that  
19 unmistakable, and my question on the unmistakability  
20 doctrine is where -- what's the line as to where it  
21 applies and where it doesn't? That is, would you say it  
22 applies if the Government promises to sell somebody 2 tons  
23 of oil, and then what happens is an environmental reg  
24 prevents them from releasing the oil, and they come in and  
25 say, we're not paying damages?



1           Suppose the Government promises to buy a piece  
2 of property, and the law -- change a contract --

3           MR. BENDER: Probably not.

4           QUESTION: -- to buy a house, and the Government  
5 says, oh, I'm sorry, I'm not going to pay you damages,  
6 because after all, it doesn't say unmistakably, and I will  
7 pay damages if later on a regulation on property law makes  
8 it impossible for me to convey the house. Where does the  
9 unmistakable -- where does it apply, where doesn't it  
10 apply?

11           MR. BENDER: I think it applies when somebody  
12 suggests that Government officials have made a promise  
13 that Congress will or will not regulate for the public  
14 interest in a certain way.

15           It certainly applies when somebody says that  
16 Government officials or Congress have made a promise that  
17 they will or will not regulate in things that have to do  
18 with safety.

19           QUESTION: Well, wait, if the Government says --

20           QUESTION: Has anybody ever made such a promise?  
21 Do you have any case in which a member of the executive  
22 branch has promised that Congress will not do something?

23           MR. BENDER: Or that if they did --

24           QUESTION: And that is the situation in which  
25 you contend this doctrine --

1 MR. BENDER: No.

2 QUESTION: -- is inapplicable.

3 MR. BENDER: No. There --

4 QUESTION: Only in that situation.

5 MR. BENDER: No, there are two kinds of promises  
6 that they are alleging, that they could allege that would  
7 win.

8 One is that Congress won't do it, and the other  
9 is that if Congress did it, it would exempt them from the  
10 regulation, and no, I can't think of a promise like that,  
11 and it doesn't surprise me.

12 QUESTION: So, but --

13 QUESTION: Isn't there a third possibility,  
14 Mr. Bender, that even if they are not exempted in the  
15 sense of being able to enforce their agreement  
16 specifically to allow them to act contrary to the  
17 regulation, isn't there a third possibility, and that is  
18 that the risk of loss if that happens falls on the  
19 Government, not on them, and that's why it seems to me  
20 important that we're dealing with a damages action here  
21 rather than an action for specific performance.

22 MR. BENDER: I don't think so, Justice Souter,  
23 because the unmistakability doctrine is a doctrine of how  
24 you interpret contracts. That's the question in this  
25 case. Did the Government make a promise that these people

1 would be exempted from future tightening of capital  
2 requirements in the S&L industry?

3 QUESTION: Yes, but in each case, the question,  
4 I suppose, is, is it unmistakable that they either:

5 a) promised that Congress wouldn't do it? Of  
6 course not.

7 b) That if Congress did it, they would be  
8 specifically exempt from the application of the  
9 regulation? Probably not.

10 Or c), that if Congress did do it, the risk of  
11 whatever the added cost would be would have to be borne by  
12 the Government and not by them?

13 MR. BENDER: That would have to be  
14 unmistakable --

15 QUESTION: And what may be unmitake -- I mean,  
16 what might be necessary to show unmistakability in case  
17 one, which is virtually impossible, or two, unlikely, may,  
18 in fact, be quite enough in case three, if we're talking  
19 about a contract which is reasonably read simply to shift  
20 a risk.

21 MR. BENDER: Well, I don't think it is  
22 reasonably read to shift a risk, and that's what --

23 QUESTION: Mr. Bender, are you --

24 MR. BENDER: -- and that's what I'm trying to  
25 say.

1 QUESTION: Are you arguing to any extent that  
2 there was no authority in the executive branch to make  
3 such an agreement, or are you saying, yes, they could make  
4 it, but it had to be unmistakable?

5 MR. BENDER: We are arguing that there was no  
6 authority, because that also has to appear unmistakably,  
7 and that plainly did not appear here.

8 QUESTION: In other words --

9 MR. BENDER: -- and that's another reason why  
10 you don't have these --

11 QUESTION: -- are you making the argument that  
12 they couldn't do this unless Congress had said  
13 specifically, and you can guarantee to these people with  
14 whom you're contracting that they will not lose the  
15 benefit of their bargain?

16 MR. BENDER: Right.

17 QUESTION: Would Congress have had to have said  
18 that?

19 MR. BENDER: Quite clearly. Unmistakably --

20 QUESTION: Are you saying that even a risk-  
21 shifting contract was ultra vires? Not a contract that  
22 you will be specifically exempted if the regulation  
23 changes, or if the law changes, but a contract that says,  
24 if it does, the risk is on the Government, not on you?  
25 You're saying that that last case is -- would be, or was,

1 or would have been ultra vires?

2 MR. BENDER: I think so, yes, because it would  
3 be committing a future Congress to paying --

4 QUESTION: No, it's not committing a future  
5 Congress. It's committing the Government to bear the risk  
6 if a future Congress makes a change. Why is that ultra  
7 vires?

8 MR. BENDER: Because I don't -- I think it would  
9 be -- it's only ultra vires if there is no clear authority  
10 doing it. I'm not -- that authority could be given to  
11 Government officials. It was not given in this case. I'm  
12 not arguing it cannot be given, but I think you would  
13 be --

14 QUESTION: Why isn't it given in the capacity of  
15 the Government working through its insurance arm, in  
16 effect, to make agreements that preclude the Government  
17 from having to cough up on its insurance obligations?

18 MR. BENDER: Let me --

19 QUESTION: Why is that not within the capacity  
20 of the Government as an insurer?

21 MR. BENDER: It's within the capacity of the  
22 Government if Congress permits the officials to make that  
23 kind of a contract, but I think before --

24 QUESTION: But you're -- are you saying that  
25 the -- that when the insolvency of the S&L's came along,



1 that the only course that the Government, in fact, could  
2 follow with -- that the only course that the insurance --  
3 that the -- I'm trying to think of the insurance acronym  
4 and I can't do it -- you know it.

5 MR. BENDER: FSLIC.

6 QUESTION: That the only course it could follow  
7 was simply to pay up?

8 MR. BENDER: At which time are you -- to which  
9 time are you --

10 QUESTION: Prior -- at the moment these  
11 contracts were made, are you saying that in fact the  
12 Government had only one option, and that was to declare  
13 the banks insolvent and pay up the --

14 MR. BENDER: No. The Government had the option  
15 to do what it did in this case, and that is, enter into a  
16 joint venture with these people. It was to the  
17 Government's benefit, yes, because the policy at that time  
18 was to delay the closings --

19 QUESTION: But the contract as you are reading  
20 it has the Government promising virtually nothing. The  
21 Government basically, with respect to capital  
22 requirements, the Government is simply saying, on your  
23 reading, whatever we agree to, we agree to, but if there's  
24 a change, too bad.

25 QUESTION: Well, of course --

1 QUESTION: You're saying that --

2 QUESTION: -- I suppose it promised that FSLIC  
3 would continue to --

4 MR. BENDER: Right.

5 QUESTION: -- respect --

6 MR. BENDER: Right. Now, there's --

7 QUESTION: Yes, but you're saying in the same  
8 breadth that FSLIC had no authority in any effective way  
9 to continue to do that, because FSLIC would be overruled  
10 by any change in legislation, and if it was so overruled,  
11 the risk of that overruling never shifted from the three  
12 banks here to the Government.

13 MR. BENDER: The promise that they made --

14 QUESTION: That's not much of an agreement.

15 MR. BENDER: -- was that as long as the law  
16 permits this to be treated as capital for satisfying  
17 capitalization requirements, you can do certain things  
18 with it.

19 You can put it on your books, and the most  
20 important thing that went on, coming back to the Winstar  
21 agreement, for example -- they all have elements of this  
22 in them -- at that time, this capital, under existing  
23 accounting regulations, would have had to be amortized  
24 over the period that was the same as the average life of  
25 the deposits that the banks had.

1           And even though mortgages are like, 30-year  
2 mortgages or 15-year mortgages, the average life of those  
3 was about 10 years, so under the accounting principles at  
4 the time, this goodwill that they got would have had to be  
5 amortized over 10 years, which would mean they'd have to  
6 take one-tenth of it off each year.

7           The Winstar forbearance letter said, we forbear  
8 from applying that. You can do it over 35 years, a much  
9 longer period of time, much more to the benefit of them.  
10 That was a promise that was made.

11           QUESTION: But the extent of the Government's  
12 authority to make that contract would have been, as it  
13 were -- as you view it would have been made explicit if  
14 those provisions had been followed by a further sentence  
15 saying, the Government may nonetheless, through an act of  
16 Congress, place you in insolvency at any moment after the  
17 signing of this agreement, and in effect you're saying  
18 that's the extent of their contracting authority in these  
19 circumstances.

20           MR. BENDER: I think it would have to say -- I  
21 would agree with you except it would be that Congress  
22 could, by changing the requirements --

23           QUESTION: Yes.

24           MR. BENDER: -- of capitalization, yes, place  
25 you in insolvency, and they were taking a risk.

1 QUESTION: Why just Congress? Why not the  
2 agency? I thought you say there's no agreement here at  
3 all. Do you --

4 MR. BENDER: No, I did not say that.

5 QUESTION: -- say that there's an agreement not  
6 to change our regs unless we're forced to change it by  
7 law? Is there that much of an agreement?

8 MR. BENDER: No, I don't think there's that --

9 QUESTION: There's not even that agreement?

10 MR. BENDER: No.

11 QUESTION: Just for today --

12 MR. BENDER: No --

13 QUESTION: -- we'll say you can do it for 40  
14 years --

15 MR. BENDER: No, it's not --

16 QUESTION: -- but tomorrow we may change our  
17 mind.

18 MR. BENDER: No. I think if the definition of  
19 what could be counted as capital did not change, there is  
20 a promise that you can amortize it over 35 years rather  
21 than over 10 years.

22 QUESTION: So no promise at all even with  
23 respect to their own changing of their own regulations the  
24 next day?

25 MR. BENDER: Right, because at that time

1 Congress had delegated to them the primary -- Justice  
2 Scalia, think of a hypothetical that's I think a lot like  
3 this.

4 Suppose that hospitals were acting in unsafe  
5 ways, and a number of them had to close because of the  
6 large number of claims upon them.

7 The hospital regulatory agency decided that the  
8 way to try to deal with that, because we needed the  
9 hospitals, was to have other hospitals absorb them and  
10 promise to maintain certain minimum safety regulations as  
11 a condition of absorbing them, and suppose they signed  
12 contracts like, to do that. Say it was a condition of  
13 this you're going to have to have this many nurses, this  
14 many operating rooms, this many this and this many that.

15 After that happens, hospitals continue to have  
16 real safety problems, and in the next 5 years there are  
17 lots of suits against them, lots of people are injured or  
18 die, and the legislature decides to increase those safety  
19 requirements.

20 Would anybody want to read a contract that said,  
21 you can do this if you meet these minimum safety  
22 requirements?

23 QUESTION: Certainly not, because there's no  
24 relationship between the safety requirements and the risk  
25 of insolvency which the hospitals have acquired by taking



1 these hospitals that are being sued upon their back.

2 QUESTION: Mr. Bender --

3 QUESTION: Here, there is such a relationship.

4 MR. BENDER: I wasn't talking about the  
5 insolvency there. I was talking about the safety problem.  
6 There, the Government is trying to deal with a safety  
7 problem. Here, the Government --

8 QUESTION: Are you saying, Mr. Bender, that  
9 FSLIC was powerless to include the terms that the  
10 respondents now claim is a necessary part of their  
11 contract?

12 MR. BENDER: That is our position, although I  
13 don't think you have to reach that, because --

14 QUESTION: There was no way -- there was no form  
15 of language, there was no provision that FSLIC was  
16 authorized to include which would reach the result that  
17 these respondents seek here?

18 MR. BENDER: Insofar as what they seek is to  
19 say -- when you say reach the result, you mean that they  
20 get -- that they --

21 QUESTION: To treat the capital the same --

22 MR. BENDER: No, I'm sorry, I take that back.  
23 If all you're asking about is the remedy that they  
24 could -- that they could, for example, get the --

25 QUESTION: I'm asking about FSLIC's authority to

1 make the contract that the respondents here assert was  
2 made. Are you saying that FSLIC could -- if all of this  
3 had been on the table in the bargaining session, if we had  
4 known about this problem, that FSLIC would have been  
5 powerless to include a provision that gives them the  
6 relief they now want?

7 MR. BENDER: No, they wouldn't have been  
8 powerless to include a provision that gives them the  
9 relief they want. If the relief they want, for example,  
10 is return of their investment, FSLIC would have been able  
11 to put in a provision saying if the capital rules change  
12 within the next 10 years, you can get your invest -- you  
13 can wash out the agreement and get your investment back.

14 That's not what the -- what is involved in this  
15 case. What's involved in this case is a claim that the  
16 contract was made that they would be exempted from any  
17 changes in the capital requirements, and they're asking  
18 not just to get that money back, they're asking for breach  
19 of contract damages.

20 There is a possibility in this case, and they  
21 have made these claims -- they're not involved in this  
22 proceeding. This is just the breach of contract part.  
23 There is a possibility of them arguing frustration of  
24 purpose.

25 If, for example, Justice Scalia, the next day

1 they will close down, I would think that would be a very  
2 powerful claim. That --

3 QUESTION: But Mr. Bender, isn't your answer  
4 predicated on the fact not that they would be able to get  
5 their investment back by suing on their contract, they  
6 would be able to get their investment back on the theory  
7 that the contract was a nullity, and if that's the  
8 answer -- I don't think that's the answer -- I don't think  
9 that's the point of Justice Kennedy's question, because  
10 you're still -- you're not saying that they would have  
11 authority to make a contract. You're saying that the law  
12 would give them restitution if the contract turned out to  
13 be a nullity.

14 MR. BENDER: Right.

15 QUESTION: So you're still in the position of  
16 saying -- I think the answer to Justice Kennedy's question  
17 on your position is, it would have been ultra vires for  
18 them to do that.

19 MR. BENDER: No, I think if there had been a  
20 provision in the contract saying what the law would  
21 probably give anyway -- that is, if the contract's  
22 frustrated you can get your investment back -- that would  
23 not have been ultra vires.

24 That -- I really need to stress that. That is  
25 not what they're arguing here. They are arguing that they

1 had a contract that they should be excluded from the  
2 changes in capital regulations, and that they have a right  
3 to breach of contract damages, which are more than just  
4 getting their money back. It is the profit that they  
5 would have made in the future.

6 If they bring -- brought a suit for frustration  
7 of purpose, either on the theory of implied frustration in  
8 the contract or Justice Kennedy's example of an explicit  
9 frustration of purpose provision, which I think -- I'm  
10 sorry if I misspoke before. I think that is a provision  
11 that could have been included in these contracts -- that's  
12 a different case.

13 QUESTION: Mr. Bender, isn't any contract, not  
14 only by the Government but by a private person, subject to  
15 the condition which you say this must have been subject  
16 to, namely, if what I have promised becomes unlawful, of  
17 course I won't do it?

18 I mean, to say that this agency, if it was a  
19 promise, would have been conditioned upon that, is to say  
20 what every contract is conditioned upon.

21 MR. BENDER: I thought Justice Kennedy's example  
22 and Justice Souter's example were more than that. It was  
23 not that, I won't do it. It's that, one of the parties  
24 will get their money back, which is what the frustration  
25 of purpose doctrine I think would do in this case, or the

1 provision that Justice Kennedy mentioned.

2 Thank you very much.

3 QUESTION: Thank you, Mr. Bender.

4 Mr. Hollingsworth, we'll hear from you.

5 ORAL ARGUMENT OF JOE G. HOLLINGSWORTH

6 ON BEHALF OF THE RESPONDENT GLENDALE FEDERAL BANK

7 MR. HOLLINGSWORTH: Mr. Chief Justice, and may  
8 it please the Court:

9 What Mr. Bender refers to and what his reply  
10 brief referred to, and it did so by referencing a law  
11 review article in a 1993 Government report, is a  
12 hypothesized thrift which does not exist on this record.

13 It's this Court's purpose now to determine what  
14 the intent of the parties was in 1981, and the  
15 hypotheticals about what a Government report said the  
16 intent of other thrifts besides Glendale was in 1981 are  
17 not admissible.

18 QUESTION: Well, doesn't the unmistakability  
19 doctrine, Mr. Hollingsworth, require a little bit  
20 different focus on that?

21 I mean, as I understand the doctrine, it would  
22 mean that even though, if you take the reasonable man  
23 theory of contracts, this is what reasonably -- that's not  
24 enough in this case to hold the Government liable for  
25 damages. You have to show something more.



1 MR. HOLLINGSWORTH: Mr. Chief Justice, the  
2 unmistakability doctrine requires a clear promise, and  
3 clear authority, and interpreting the clear promise, this  
4 Court's precedents have held that the Court can look to  
5 the plain meaning and can interpret the plain meaning of  
6 what the parties intended from the language of the  
7 contract and from the circumstances under which the  
8 contract was made.

9 QUESTION: Then what does the unmistakability  
10 doctrine add to the ordinary law of contracts, then?

11 MR. HOLLINGSWORTH: It requires a clear promise,  
12 a clear promise in a contract where you're dealing with  
13 the Government where there is a regulatory promise at  
14 issue, and of course --

15 QUESTION: Does that rule out any promise by  
16 implication?

17 MR. HOLLINGSWORTH: No, it does not, Your Honor,  
18 and if the Court refers to page 32 of our brief, the Court  
19 will see the references to cases in which the course of  
20 dealing with the parties is also used to construe the  
21 plain meaning of the contract.

22 QUESTION: Well --

23 MR. HOLLINGSWORTH: Now, that may not be the  
24 same as implication. We're not arguing here that there is  
25 some implied contract, or implied warranty, or implied

1 indemnity. We're showing the Court that there was an  
2 expressed contract here, that its terms were in the  
3 clearest possible terms, as both lower courts held, and  
4 that the Government had authority to do what it did.  
5 That's the --

6 QUESTION: What's the clearest language you  
7 have?

8 MR. HOLLINGSWORTH: The clearest language we  
9 have, Your Honor, is that the integration clause makes  
10 the --

11 QUESTION: Can you tell us where it's found in  
12 the brief, or in the --

13 MR. HOLLINGSWORTH: Yes, I can, Your Honor. The  
14 integration clause appears at page 599 of the Joint  
15 Appendix. That clause, Your Honor, makes the  
16 resolution -- and the resolution page I'm referring to is  
17 at page 607 of the Joint Appendix.

18 That clause, the integration clause, makes the  
19 resolution a "agreement between the parties," and the  
20 resolution sets forth the promise of the parties that  
21 goodwill would be treated as an asset for purposes of  
22 determining regulatory capital, and that promise is set  
23 forth in the requirement that goodwill shall be  
24 established based on --

25 QUESTION: Walk me through that, would you? You

1 begin at page 599?

2 MR. HOLLINGSWORTH: Yes, I will, sir.

3 QUESTION: Okay.

4 MR. HOLLINGSWORTH: At page 599 --

5 QUESTION: Right.

6 MR. HOLLINGSWORTH: -- is the integration clause  
7 and the supervisory action agreement.

8 QUESTION: Okay. Where's that -- how does that  
9 read?

10 MR. HOLLINGSWORTH: That clause says that the  
11 agreement of the parties is -- is final. Prior agreements  
12 are superseded except for --

13 QUESTION: Excepting only --

14 MR. HOLLINGSWORTH: Except for, Justice Scalia,  
15 letters and resolutions entered contemporaneously with the  
16 agreement by the Federal Home Loan Bank Board and that  
17 resolution appears at page 607 of the Joint Appendix,  
18 Justice Scalia, and --

19 QUESTION: Okay, and then we go to 607, and what  
20 do we see there?

21 MR. HOLLINGSWORTH: And we see at 607, in  
22 paragraph 3, a requirement that Glendale shall submit a  
23 letter from its independent accountant that shall justify  
24 the use of purchase method accounting which allows  
25 Glendale to use goodwill as an asset, which shall set

1     forth the amount of goodwill in accordance with the  
2     accountant's opinion, and which shall set forth the  
3     duration or amortization period under which goodwill shall  
4     operate.

5             And the second thing that's important on page  
6     607, Justice Scalia, is a requirement that Glendale shall  
7     submit a stipulation, a stipulation that goodwill  
8     resulting from this merger shall be determined, which  
9     means shall be determined now and for the future in  
10    accordance with a regulation, memorandum R31b, in effect  
11    at the time.

12            QUESTION: Well, the letter from -- a letter  
13    from Glendale's accountant doesn't really sound like what  
14    would be a binding, explicit promise on the Government.

15            MR. HOLLINGSWORTH: Well, the Government  
16    requires that Glendale's accountant, Glendale's agent  
17    memorialize, in effect, Mr. Chief Justice, what the  
18    parties agreed to. That is --

19            QUESTION: Well --

20            MR. HOLLINGSWORTH: -- what is goodwill --

21            QUESTION: -- that's a very strange provision in  
22    an agreement, that it's not contained in the agreement  
23    itself, but it's -- one of the parties' accountants  
24    furnishes a memorial of it.

25            MR. HOLLINGSWORTH: Well, Your Honor, it would

1 be as if you were entering a contract to build a house,  
2 and you agreed with the contractor that an architect's  
3 certificate would be provided, and the parties would be  
4 bound by that, notwithstanding that it's a third party,  
5 and in Government contract law, Your Honor --

6 QUESTION: But an architect is generally a  
7 neutral party as between the parties. Here, it's one of  
8 the parties' accountants.

9 MR. HOLLINGSWORTH: Well, it is a certified  
10 public accountant the opinion of which both parties agreed  
11 would finally memorialize what the final determination of  
12 the amount of goodwill was, that is, the number of  
13 liabilities of Broward which exceeded the assets of  
14 Broward, and the justification for the 40-year term under  
15 purchase method accounting, which is authorized by the  
16 regulation, which is adopted by reference.

17 QUESTION: Mr. Hollingsworth, may --

18 QUESTION: Is the goodwill that you seek to  
19 amortize here the goodwill that's referred to in  
20 subparagraph 4 at page 607, or is that something else?

21 MR. HOLLINGSWORTH: No, Your Honor, it is the  
22 goodwill that is referred to both in paragraph 3 and  
23 resulting amortization periods, which means goodwill for  
24 the future, and in paragraph 4, in which the stipulation,  
25 which means a term of agreement of the parties, shall say



1 that goodwill is amortized pursuant to the Government's  
2 regulation, which is memorandum R31b.

3 QUESTION: May I ask you a question similar to  
4 the Chief Justice's? This paragraph describes an  
5 obligation of Glendale. It says that the approval is  
6 conditioned on Glendale doing these things. How do you  
7 translate that into a commitment by the Government that if  
8 you do these things you're protected for 40 years?

9 MR. HOLLINGSWORTH: Your Honor, this is a  
10 promise. This is a promise that was made as part of a --

11 QUESTION: No, what -- the promise, though, that  
12 you referred to describes an obligation of Glendale,  
13 paragraphs 3 and 4 on page 607.

14 MR. HOLLINGSWORTH: Paragraph 4 is an obligation  
15 that becomes an obligation of both parties. When that  
16 regulation --

17 QUESTION: How does that happen?

18 MR. HOLLINGSWORTH: When that regulation is read  
19 into the contract as adopted by reference, as our -- as  
20 the case is cited in --

21 QUESTION: As describing what Glendale must do?

22 MR. HOLLINGSWORTH: As describing what the  
23 parties have agreed --

24 QUESTION: Glendale must do.

25 MR. HOLLINGSWORTH: As what Glendale must do and

1 what the parties have agreed is a requirement --

2 QUESTION: Where is the provision on which you  
3 rely describing what the obligation of the Government is  
4 when Glendale does that?

5 MR. HOLLINGSWORTH: The obligation of the  
6 Government is to treat that goodwill --

7 QUESTION: Where?

8 QUESTION: Where? I want you to point me to the  
9 language on which you rely for that obligation.

10 MR. HOLLINGSWORTH: That obligation appears in  
11 memorandum R31b, which permits the use of purchase method  
12 accounting and amortization over a period of years, and it  
13 appears, sir, in the accountant's letter, Mr. Justice  
14 Stevens, at page 623 in which the accountant --

15 QUESTION: That's a commitment of the  
16 accountant.

17 QUESTION: That's not --

18 QUESTION: That's a commitment of the  
19 accountant.

20 QUESTION: Right.

21 QUESTION: Would you look at page 610? What  
22 does the Resolved, the second Resolved further, on page  
23 610 of the appendix, mean?

24 That is to say that the Secretary, Assistant  
25 Secretary is authorized and directed to send to Glendale a

1 letter concerning scheduled items attributed to Broward  
2 and the forbearance of the FSLIC and the bank board with  
3 respect to certain regulatory requirements, a copy of  
4 which letter is in the minute exhibit file. What does  
5 that letter cover?

6 MR. HOLLINGSWORTH: That letter covered the  
7 discount of assets other than the goodwill.

8 QUESTION: Other than the goodwill.

9 MR. HOLLINGSWORTH: Yes, Your Honor, that's  
10 correct.

11 QUESTION: Getting back to paragraph 4 on page  
12 607 -- because I'm still, as the Chief Justice and Justice  
13 Stevens were inquiring, interested as to the Government's  
14 obligation -- Glendale shall submit a stipulation. Is  
15 that some sort of a document that's signed by the  
16 Government and Glendale?

17 MR. HOLLINGSWORTH: That is a stipulation which  
18 was --

19 QUESTION: What is a stipulation?

20 MR. HOLLINGSWORTH: A stipulation, according to  
21 Black's dictionary, is an agreement of the parties, a  
22 stipulation that goodwill will be treated at that point in  
23 accordance with the regulation. That --

24 QUESTION: Was a stipulation submitted that  
25 required the Government's signature?

1 MR. HOLLINGSWORTH: That stipulation was made by  
2 virtue of this agreement, to which the parties both agreed  
3 by virtue of the integration clause --

4 QUESTION: Answer Justice Kennedy's question.  
5 He asked you whether there was a signed stipulation.

6 MR. HOLLINGSWORTH: Your Honor, the supervisory  
7 action agreement is signed by the parties. It adopts a  
8 resolution. There is no stipulation that I know of that  
9 is signed by the Government, other than the reference in  
10 this contract to the fact that the parties had stipulated.

11 QUESTION: And stipulation is not some term of  
12 art in savings and loans, it's just the Black's Law  
13 Dictionary definition.

14 MR. HOLLINGSWORTH: Not that I know of. It's a  
15 term of law in contracts which imports an agreement  
16 between the parties --

17 QUESTION: Well, I --

18 MR. HOLLINGSWORTH: -- and this stipulation  
19 was --

20 QUESTION: It doesn't always mean an agreement.  
21 I mean, I can say right now I'll stipulate that I --

22 MR. HOLLINGSWORTH: Well --

23 QUESTION: You often say, he stipulated that. I  
24 mean, it's a concession, certainly, by one party.

25 MR. HOLLINGSWORTH: A stipulation is a bilateral

1 connotation, I think that's certain. A stipulation is  
2 bilateral, and the parties involved here --

3 QUESTION: Well, how can Glendale submit a  
4 bilateral document? I mean --

5 MR. HOLLINGSWORTH: Because -- well, because --  
6 well, this document --

7 QUESTION: I mean, if it said Glendale shall  
8 submit and the board shall accept, and the board shall  
9 sign, then you would have something.

10 MR. HOLLINGSWORTH: The board had the right to  
11 reject the accountant's letter, and it didn't. For 8  
12 years its course of conduct was to operate in accordance  
13 with the accountant's letter, to deduct goodwill, to allow  
14 goodwill as an asset for purposes of regulatory capital,  
15 and they had the right to overturn that or reject that  
16 accountant's letter by this contract, and, of course, they  
17 did not, but the stipulation draws into the contract the  
18 regulation.

19 At pages 21 to 24 of our brief we cite this  
20 Court's opinions and Government contract opinions in  
21 particular in which adoption by reference is standard  
22 operating procedure. That's what this --

23 QUESTION: Would you have been in violation of  
24 the then-applicable regs of the board if that stipulation  
25 did not also constitute a commitment by the board?



1 MR. HOLLINGSWORTH: The then -- I don't think we  
2 would have been in violation of the then-applicable regs  
3 of the board, Justice Scalia, but we would not have had a  
4 contract had we not had a stipulation adopting this  
5 regulation and fixing it in time and agreement as to the  
6 amount of goodwill, as to the duration in which goodwill  
7 could be amortized.

8 QUESTION: Well, that clearly obligated Glendale  
9 to comply with those regulations, but I find -- I'm trying  
10 to find -- I'm sure there's -- it's in here somewhere, but  
11 I'm trying to find what it is that obligated the  
12 Government not to change the regulations.

13 MR. HOLLINGSWORTH: What obligated the  
14 Government not to change the regulations is two things,  
15 Justice Stevens. First, it is a stipulation which fixes  
16 this regulation and puts the burden, or puts the risk of  
17 nonperformance on the Government. Secondly, there is  
18 another clause --

19 QUESTION: And where is that?

20 MR. HOLLINGSWORTH: That is at page 607. By  
21 stipulating that the regulation becomes a part of the  
22 contract, the risk of nonperformance of that regulation --

23 QUESTION: But there is no stipulation. I mean,  
24 you can't cite here in the record a written document --

25 MR. HOLLINGSWORTH: This document --

1 QUESTION: -- to which this refers?

2 MR. HOLLINGSWORTH: This document, resolution  
3 81-710, refers to a stipulation on the bank board  
4 regulation which appears at Joint Appendix 571. That  
5 becomes a part of the contract.

6 QUESTION: I don't under --

7 QUESTION: I'm not talking about the memorandum.  
8 I'm talking about the stipulation. Where is the  
9 stipulation that was submitted? Where is that? Is that  
10 here in the appendix somewhere?

11 MR. HOLLINGSWORTH: The stipulation that was  
12 submitted is the one Your Honor is looking at. The  
13 accountant's letter memorialized the parties' agreement on  
14 the amount of goodwill and the duration under which  
15 goodwill was to be treated.

16 QUESTION: I'm -- maybe you don't understand my  
17 question. It says, Glendale shall submit a stipulation.  
18 I assume a stipulation was submitted. Where is that?

19 MR. HOLLINGSWORTH: That stipulation was  
20 submitted as part of the accountant's letter. The  
21 accountant was Glendale's agent, and that's --

22 QUESTION: Where is it? I'd like to read it.  
23 I'd like to read it.

24 MR. HOLLINGSWORTH: That letter, Your Honor --

25 QUESTION: Is it in here?

1 MR. HOLLINGSWORTH: That letter appears at the  
2 Joint Appendix page 623 and 624.

3 QUESTION: 623 --

4 MR. HOLLINGSWORTH: Actually, that is an  
5 attachment to the accountant's letter, and if Your Honor  
6 will look at page 623, 623 states that this determination  
7 of the amount of goodwill and the duration of goodwill is  
8 made pursuant to the supervisory action agreement, and I'm  
9 looking in the middle of the page, Justice Scalia, at page  
10 623. That is the stipulation that the resolution refers  
11 to.

12 QUESTION: Mr. Hollingsworth, with respect to  
13 31b, which you point out is set out starting on 571, is  
14 that otherwise expressly incorporated into the contract,  
15 or is it refer -- or is its only reference through the  
16 stipulation paragraph that we've been talking about?

17 MR. HOLLINGSWORTH: Your Honor, that is  
18 expressly incorporated into the contract by virtue of the  
19 stipulation we've been referring to.

20 QUESTION: But it has -- in any case, its  
21 incorporation has to come through paragraph 4 here.

22 MR. HOLLINGSWORTH: Absolutely --

23 QUESTION: Okay.

24 MR. HOLLINGSWORTH: -- and it is expressly  
25 incorporated thereby. Also, there are uncontradicted

1 facts in the record below, including affidavits and a  
2 statement of uncontradicted facts, that make that clear as  
3 well, sir.

4 QUESTION: If it is unmistakable, if it isn't  
5 unmistakable, what is that to do with us? I thought that  
6 the -- I may be wrong. I thought that the lower courts  
7 held the historical understanding of the unmistakable  
8 doctrine is not applicable to this issue, and therefore,  
9 if we think it is applicable, we have to send it back --

10 MR. HOLLINGSWORTH: I think that the --

11 QUESTION: -- and if we think it isn't  
12 applicable, then I guess you'd win. I thought that was  
13 the issue, whether it is applicable or whether it isn't  
14 applicable.

15 MR. HOLLINGSWORTH: I think Your Honor is  
16 referring to a provision in the lower court's opinion  
17 which dealt with what I refer to as a second promise  
18 theory, which I don't think any decision of this Court or  
19 any other court has recognized.

20 What the lower court did, however, was find and  
21 apply the unmistakability doctrine correctly in accordance  
22 with this Court's prior rulings in the cases the  
23 Government relies on, and it did so and found that the  
24 contract between Glendale and the Government was stated in  
25 the, quote, clearest possible terms. They did so in

1 accordance with meeting the requirements of the  
2 unmistakability doctrine.

3 QUESTION: Mr. Hollingsworth, your time has  
4 expired. You probably can't see it because your thing is  
5 over the red light.

6 MR. HOLLINGSWORTH: Excuse me, Your Honor.  
7 Thank you.

8 QUESTION: Mr. Cooper, we'll hear from you.

9 ORAL ARGUMENT OF CHARLES J. COOPER

10 ON BEHALF OF THE RESPONDENTS

11 WINSTAR CORPORATION, ET AL.

12 MR. COOPER: Thank you, Mr. Chief Justice, and  
13 may it please the Court:

14 Justice Scalia, I would like to open by  
15 returning to the examination of the contract documents in  
16 the Statesman case -- I represent Statesman and Winstar --  
17 and you earlier referred to page 23 of our brief. I'd  
18 like to pick up where you left off, if I may.

19 Justice Scalia, you quoted one of the two  
20 sentences that are italicized.

21 QUESTION: Are you now reading from page 23 of  
22 your brief?

23 MR. COOPER: Of my brief, yes, Your Honor, and  
24 you'll note in the block quote there that the last two  
25 sentences of that block quote are italicized. Justice



1 Scalia quoted a sentence that in fact the Government  
2 omitted from its discussion of this provision, which is  
3 absolutely critical to understanding the importance of  
4 this provision.

5 If there is a conflict between such regulations  
6 and the bank board's resolution or action relating to the  
7 acquisition, the mergers for this agreement, the bank  
8 board's resolution or action shall govern.

9 Your Honor, Mr. Bender responded that, well,  
10 that means the regulations at the time, not future  
11 regulations, and that's why we've also italicized the  
12 following sentence: For purposes of this section, the  
13 accounting principles in governing regulations shall be  
14 those in effect on the effective date as subsequently  
15 changed, amended, clarified, or interpreted by the bank  
16 board.

17 Your Honor, the parties anticipated this very  
18 dispute, and they decided it right then and there at the  
19 closing table. They decided among themselves.

20 QUESTION: Mr. Cooper, there's one thing that  
21 I'd like you to distinguish for me. There have been, I  
22 think, cases involving consent decrees both in the  
23 environmental area and the civil rights area, consent  
24 decrees signed by the Government and the complaining  
25 party, and then when the administration changed, the

1 argument was made, well, yes, the Government, the then-  
2 administrators of X agency, signed that document, but  
3 that's not the policy of the current administration, and  
4 one administration can't bind another to a policy even in  
5 a written agreement filed in the court and made a part of  
6 a consent judgment.

7 Now, I take it you must regard this situation as  
8 entirely discrete from that.

9 MR. COOPER: Your Honor, I do, because we are  
10 not seeking to hold the Government to continue to count  
11 our goodwill, to continue to count our capital credit.  
12 That is not part of our claim. It couldn't be done now in  
13 any event.

14 We're simply suggesting, as Justice Souter, I  
15 think, has correctly read this very provision, that it  
16 placed the risk -- the parties understood that this could  
17 happen, but this was a life-and-death term for my clients,  
18 and so --

19 QUESTION: In other words, in those consent  
20 decrees, at least as the Government's argument went, there  
21 would be no responsibility on the Government's part. It  
22 could walk away from the agreement as if it had never been  
23 made.

24 But that's not what you're saying here. You  
25 are, of course, recognizing Congress' authority to

1 legislate. However, you're saying my client must get the  
2 benefit of the bargain that was made.

3 MR. COOPER: The Government can't break this  
4 agreement without any cost, exactly. They can't visit on  
5 my client's shoulders alone --

6 QUESTION: Well, that's what -- where you're  
7 saying there's a difference between at least the argument  
8 that was made that the Government could walk away from a  
9 consent decree without any cost.

10 MR. COOPER: Well, Your Honor, I'm -- I suspect  
11 that those consent decrees are not involved in the world  
12 of commerce, which is what these contracts were involved  
13 in.

14 We had the Government acting as an insurer of  
15 deposits. It was the one who was on the hook for untold  
16 millions of dollars if these thrifts that we took off  
17 their hands happened to fail, and they had to pay off the  
18 depositors. We came to the table with cash that they  
19 wanted.

20 Your Honor, if we had added in the next sentence  
21 of this clause that I've been reading to you a liquidated  
22 damages clause, surely no one would -- I can't imagine the  
23 proposition that that would be invalid as well, but of  
24 course that is the necessary implication of the  
25 Government's argument, and --

1 QUESTION: What about your other client? Just  
2 to be sure that I have -- what about the agreement for  
3 Winstar?

4 MR. COOPER: Yes, Your Honor. Your Honor --

5 QUESTION: This was the Statesman contract,  
6 right?

7 MR. COOPER: That's the Statesman contract.

8 QUESTION: What about Winstar?

9 MR. COOPER: With respect to this particular  
10 provision, Winstar had a virtually identical provision.  
11 The wording of the two sentences that I've just read to  
12 you is, I think, identical. It's certainly not in any  
13 material way different, so --

14 QUESTION: And what about the bank board's  
15 resolution to which this refers? Where does that appear,  
16 and how does that close the loop?

17 MR. COOPER: Yes, Your Honor. On the next page  
18 we've set that out as well, page 24 of our brief, and it  
19 carries over to page 25. The block quote begins at the  
20 bottom of the page there, and the -- the wording, again,  
21 that I'd like to call the Court's attention to, this whole  
22 provision is key, obviously. It contains in, I think the  
23 courts below were quite correct, the clearest possible  
24 terms, the nature of the regulatory capital promises that  
25 the Government agreed with us that we could rely upon.

1           But the wording that I want to call the Court's  
2 attention to is in the first paragraph there. It provides  
3 that the acquisition shall be accounted for and shall  
4 report to the bank board and the FSLIC in accordance with  
5 generally accepted accounting principles as accepted  
6 modified, clarified, or interpreted by applicable  
7 regulations of the bank board and the FSLIC, okay, so they  
8 had to report according to GAAP, except to the extent that  
9 their regulations changed GAAP. The next phrase --

10           QUESTION: From time to time, presumably.

11           MR. COOPER: From time to time, but the next  
12 phrase, again, is key, indicating we anticipated future  
13 changes, except to the extent of the following departures  
14 from GAAP, so again -- and these departures --

15           QUESTION: What does the except clause modify,  
16 in your view?

17           MR. COOPER: Your Honor, I think it modified the  
18 phrasing that went before it. It modifies the --

19           QUESTION: Yes, but there's several pieces of  
20 phrasing that go before it. Is that except clause, does  
21 that modify the entire paragraph, or just the thing that's  
22 already excepted?

23           MR. COOPER: Your Honor, I think it modifies the  
24 entire provision that goes before it. In other words, the  
25 parties agreed that GAAP would control unless they



1 regulated a difference in GAAP, but that these particular  
2 regulatory promises would remain constant, because  
3 again --

4 QUESTION: Now, these provisions are different  
5 from those in the contract and agreement of Glendale, I  
6 take it?

7 MR. COOPER: Your Honor, I think that is true.  
8 I don't represent Glendale, but I don't believe that  
9 contract has these particular provisions, but --

10 QUESTION: May I also ask you, do you -- have  
11 you sought any other relief under the Takings Clause, or  
12 have you sought relief by way of rescission of the  
13 agreement or anything?

14 MR. COOPER: Your Honor, our complaint in this  
15 case outlines counts under theories of frustration of  
16 purpose as well as under the Takings Clause and the Due  
17 Process Clause. The courts below didn't need to get to  
18 constitutional issues. We had a contract. The Government  
19 waived its sovereign immunity for breaches of contract in  
20 the Tucker act, and here we are.

21 QUESTION: You concede that it has to be  
22 unmistakable.

23 MR. COOPER: I beg your pardon?

24 QUESTION: You concede that to win you have to  
25 show the promise is unmistakable.

1 MR. COOPER: Yes, Your Honor, and I think that  
2 the courts below well and correctly understood what  
3 unmistakable means.

4 The unmistakable doctrine, unmistakability  
5 doctrine, Your Honor, truly, if reduced to a sound bite,  
6 is simply that the Government cannot be held to promises  
7 that it doesn't make.

8 QUESTION: So the only issue before us is  
9 whether or not --

10 QUESTION: No, that's --

11 QUESTION: Is that any different --

12 QUESTION: That's no different from ordinary  
13 contract --

14 QUESTION: -- than any contract.

15 MR. COOPER: Well, Your Honor, if you look at  
16 the unmistakability cases that they rely -- Merrion. What  
17 was at issue there? A tax exemption alleged to flow in  
18 connection with a lease for oil --

19 QUESTION: Well then, are you --

20 MR. COOPER: -- and there was nothing in the  
21 contract about taxes, Your Honor.

22 QUESTION: Are you saying, Mr. Cooper, then,  
23 that the unmistakability doctrine really does -- is not --  
24 have any substantive content, that entirely apart from  
25 that doctrine you simply interpret the contract and decide

1 who prevails?

2 MR. COOPER: Well, Your Honor, I think that it  
3 is a canon of construction designed to aid this Court and  
4 other courts in divining the true and genuine intent of  
5 the contracting parties.

6 QUESTION: Well, then it should be applied to  
7 everybody. Why limit it just to Government, if it aids in  
8 determining the true intent of the parties?

9 MR. COOPER: Well, Your Honor, I think the one  
10 feature that it does bring is that when you are talking  
11 about a contract such as what was alleged in Merrion and  
12 what was alleged in the POSSE case, which they rely  
13 prominently on, that is, a contract that would, indeed,  
14 surrender a sovereign authority, there the taxing  
15 authority in Merrion, the Court approaches that with some  
16 skepticism, and so it requires that a clear expression of  
17 that promise take place.

18 Your Honor, I am happy to live with the  
19 unmistakability doctrine in no matter how rigid a  
20 formulation except theirs. Theirs is a doctrine invented,  
21 Your Honor, for the purpose of saying a clear and plain  
22 promise, even coupled with provisions like I have read to  
23 you, is inadequate, because it isn't also coupled with the  
24 further promise that we will not breach those promises.

25 We -- Congress is committed not to enact a law

1 that changes this deal, or if it does --

2 QUESTION: You say Congress is committed.

3 MR. COOPER: -- you're immunized. That's  
4 their --

5 QUESTION: May I ask you, who is the party to  
6 the contract? Who is the party to the contract that  
7 you're suing?

8 MR. COOPER: Your Honor, the sovereign was  
9 the --

10 QUESTION: Did the sovereign make the contract?  
11 I thought an agency --

12 MR. COOPER: The sovereign's agent, Your Honors,  
13 FSLIC and the bank board, authorized --

14 QUESTION: Which is no longer in existence, I  
15 guess.

16 MR. COOPER: Well, you know, these contracts  
17 also recognized that possibility, too, and suggested that  
18 these provisions were binding on their successors.

19 But Your Honor, surely the Congress can't avoid  
20 it's contractual -- or the sovereign can't avoid its  
21 contractual obligations by simply eliminating and  
22 extinguishing its agents.

23 QUESTION: May I ask just one other --

24 QUESTION: It does by eliminating sovereign  
25 immunity, by reinstating sovereign immunity.

1 MR. COOPER: And Your Honor, if FIRREA had  
2 repealed the Tucker act for these purposes, I would have a  
3 much tougher case here.

4 QUESTION: May I ask, just to save me time  
5 looking for it, you say there's -- you relied heavily in  
6 the Statesman contract, the stuff on page 23.

7 MR. COOPER: Yes.

8 QUESTION: Where do I find the corresponding  
9 language in the Winstar contract, just so I don't --

10 MR. COOPER: Your Honor, we don't set that out  
11 in our brief because the --

12 QUESTION: Because it's probably a little  
13 different.

14 MR. COOPER: -- or at least the accounting  
15 principles clause -- that is, the one on page 23 --

16 QUESTION: But what are you relying on?

17 MR. COOPER: -- is virtually identical.

18 QUESTION: Just so I know where to find the  
19 corresponding --

20 MR. COOPER: Yes, Your Honor. Okay, at page 108  
21 of the parties' appendix, Your Honor.

22 QUESTION: Okay, thank you.

23 MR. COOPER: It is marked as section 10 at the  
24 bottom of the page. It begins there. That's the Winstar  
25 accounting principles.



1           QUESTION: I don't want to use your time up. I  
2 just wanted to know where it was.

3           MR. COOPER: Yes.

4           QUESTION: Thanks.

5           MR. COOPER: I see that my time has almost  
6 expired, so let me close by simply saying this. The  
7 question before the Court is whether these contracting  
8 parties are simply going to remain in the places that they  
9 are, with the Government holding \$24 million of my  
10 client's money in its pocket, and with my clients with a  
11 \$24 million lesson in the value of the Government's solemn  
12 contractual oath.

13           If there are no additional questions --

14           QUESTION: Precisely what did the Government  
15 promise? Precisely, the Government promised to let you  
16 continue to do -- what it boils down to is, they promised  
17 to let you continue doing business as a bank so long as  
18 you maintained that minimum level of capital that these  
19 accounting principles would produce. Is that the essence  
20 of the promise?

21           MR. COOPER: They promised to calculate our  
22 regulatory capital in --

23           QUESTION: I mean, I don't care how they  
24 calculate it. You care that they let you continue to do  
25 business as a bank, so you're saying they gave you a sort

1 of a charter, a promise that your bank charter wouldn't be  
2 yanked so long as you kept your capital the way these  
3 accounting principles --

4 MR. COOPER: Yes, Your Honor.

5 QUESTION: -- would require.

6 MR. COOPER: That's right.

7 QUESTION: Mr. Cooper, if you seek damages for  
8 frustration, restitution, you still have to show a  
9 contract, don't you? That is to say, the measure of  
10 damages doesn't particularly help us here, does it? In  
11 either case there has to be a contract that was A,  
12 breached, or B, frustrated?

13 MR. COOPER: Yes, Your Honor. You at least have  
14 to show that the parties attempted but failed to enter  
15 into a binding contract.

16 QUESTION: So is the contractual inquiry and the  
17 unmistakability inquiry the same in either case, case A,  
18 breach, damages for breach, case B, restitution?

19 MR. COOPER: Your Honor, I think that even if  
20 Mr. Bender is right in everything that he says and we  
21 don't have a contract, and this effort was -- died -- was  
22 a failure at the closing table, and that they could have,  
23 as they say they could have, said as we left the closing  
24 table \$21 million for these banks is not enough, we want  
25 more capital, and we would have no protection against

1 that, and again he's right in everything he says, I still  
2 surely am entitled, under frustration of this effort to  
3 make a contract, to my money back.

4 QUESTION: Well, under what theory? You still  
5 have to have a contract, don't you?

6 MR. COOPER: Your Honor, I think --

7 QUESTION: Can you sue the Government for unjust  
8 enrichment and restitution under the --

9 MR. COOPER: No, Your Honor. In fact, in the  
10 final pages of our brief we cite cases that make clear  
11 that the Government can't -- even if this contract was  
12 void in its beginning, it was illegal, there was no  
13 authority under FSLIC and he's right, then I am entitled  
14 at least to the return of the benefits that I've given  
15 them under the pretense of this false contract.

16 CHIEF JUSTICE REHNQUIST: I think you've  
17 answered the question, Mr. Cooper.

18 MR. COOPER: Thank you.

19 CHIEF JUSTICE REHNQUIST: The case is submitted.

20 (Whereupon, at 11:02 a.m., the case in the  
21 above-entitled matter was submitted.)  
22  
23  
24  
25

## CERTIFICATION

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

UNITED STATES, Petitioner v. WINSTAR CORPORATION, ET AL.  
CASE NO. 95-865

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

BY Ann Marie Federico

(REPORTER)