

1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -X  
3   FRANCONIA ASSOCIATES, ET AL.,       :  
4                   Petitioners               :  
5               v.                               :  
6   UNITED STATES;                       :  
7   and                                       :   No. 01-455  
8   GRASS VALLEY TERRACE, ET AL.,       :  
9                   Petitioners               :  
10               v.                               :  
11   UNITED STATES.                       :  
12   - - - - -X  
13   Washington, D.C.  
14   Monday, April 15, 2002  
15               The above-entitled matter came on for oral  
16   argument before the Supreme Court of the United States at  
17   11:01 a.m.  
18   APPEARANCES:  
19   JEFF H. ECKLAND, ESQ., Minneapolis, Minnesota; on behalf  
20       of the Petitioners.  
21   MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor  
22       General, Department of Justice, Washington, D.C.; on  
23       behalf of the Respondent.  
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23  
24  
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C O N T E N T S

ORAL ARGUMENT OF	PAGE
JEFF H. ECKLAND. ESQ.	
On behalf of the Petitioners	3
MATTHEW D. ROBERTS, ESQ.	
On behalf of the Respondent	29
REBUTTAL ARGUMENT OF	
JEFF H. ECKLAND, ESQ.	
On behalf of the Petitioners	56

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
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P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
next in No. 01-455, Franconia Associates v. the United  
States, and the Grass Valley Terrace v. United States.

Mr. Eckland.

ORAL ARGUMENT OF JEFF H. ECKLAND

ON BEHALF OF THE PETITIONERS

MR. ECKLAND: Mr. Chief Justice, and may it  
please the Court:

This Court has held that statutes of limitations  
involve fundamental considerations of fairness.  
Petitioners submit that the cases before Your Honors this  
morning involve precisely that.

In these two civil actions, petitioners seek  
fair compensation for continuing to be bound to the  
Section 515 housing program and continuing to house low-  
income tenants for up to 50 years. Petitioners can  
succeed in obtaining that fair compensation only if this  
Court continues to apply the same ordinary principles of  
law to the United States Government that it applies to  
United States citizens.

The ordinary principles of law and their  
continuing application to the United States Government  
that are at issue here are, first, that a breach of

1 contract claim does not accrue until the date of breach;  
2 that is, until the time for performance by the defendant  
3 arrives and the defendant fails to perform.

4 QUESTION: Mr. Eckland, you -- you began by  
5 saying you're seeking fair compensation for something.  
6 Which is it? Are you seeking fair compensation for the  
7 Government's violation of the Constitution by impairing  
8 the obligation of contracts, or are you simply seeking  
9 your contractual rights? Are you seeking a contract  
10 claim? Which -- what do we have before us?

11 MR. ECKLAND: We are -- Justice Scalia, we are  
12 seeking compensation for the breach of contract.

13 QUESTION: Okay. So, it's a -- it's a simple  
14 contract case.

15 MR. ECKLAND: Very much so, Your Honor. I mean,  
16 included in the compensation that the petitioners are  
17 seeking, it was not merely the lost income because of  
18 their lost right to opt out, but given the situation,  
19 petitioners are not receiving really sufficient income to  
20 even cover the costs of maintaining the housing for their  
21 current tenants.

22 QUESTION: Do you think you have a separate  
23 cause of action for the Government's violation of the  
24 Constitution, assuming that -- that you're correct that  
25 that's what it's done?

1           MR. ECKLAND: Under the takings claim, Justice  
2   Scalia?

3           QUESTION: Well, no, not the takings. But --  
4   but impairing the obligation of contracts.

5           MR. ECKLAND: Oh, quite so, Your Honor, yes. We  
6   believe that although it's for purposes --

7           QUESTION: This is a -- this is a Federal  
8   contract?

9           MR. ECKLAND: It is with the Department of  
10   Agriculture, Your Honor, through the Farmers Home  
11   Administration.

12          QUESTION: So, the impairment clause doesn't  
13   apply.

14          MR. ECKLAND: Well, it -- it comes -- no. That  
15   only applies to the States.

16          QUESTION: My difficulty with your argument is  
17   that if you have -- your whole property claim here rests  
18   upon the contract. And if you have a contract claim, then  
19   your contract will be enforceable. If you don't have a  
20   contract claim, then I'm not sure what the source of your  
21   property taking is on the -- on the unconstitutionality  
22   claim.

23          MR. ECKLAND: Well, petitioners pled, Justice  
24   Souter, the takings claim in the alternative to the breach  
25   of contract claim. And in fact, the lower courts have

1 held that there is no enforceable contract here.

2 QUESTION: Well, if -- if they are correct, then  
3 I don't see how you've got a taking because your -- your  
4 whole property interest -- the only property interest  
5 you're asserting is an interest under that contract. And  
6 if you haven't got the -- if you have no breach of  
7 contract, then I don't see what's being taken from you.

8 MR. ECKLAND: What's being taken, Justice  
9 Souter, is the expected use of the petitioners'  
10 properties. What happened is they volunteered to a  
11 certain period of time --

12 QUESTION: If you don't have a contract for it,  
13 you have no right to expect it.

14 MR. ECKLAND: But there were representations by  
15 the Government that created a reasonable investment-backed  
16 expectation on the part of --

17 QUESTION: Why did the lower courts find that  
18 there was no contract claim? Because of the statute.

19 MR. ECKLAND: Because of the -- one judge, in  
20 particular, because of the unmistakability doctrine.

21 QUESTION: Because of the --

22 MR. ECKLAND: In other words, the contract was  
23 not clear enough to constitute an enforceable contract  
24 with the Government.

25 QUESTION: I thought the Federal Circuit went on

1 the statute of limitations. Isn't that what you're  
2 opposing, that the statute of limitations didn't expire?

3 MR. ECKLAND: Yes, Your Honor. The lower court  
4 opinions were denying our motion for summary judgment, so  
5 we've not been able to get to trial on the existence of  
6 the contract. Assuming for the purposes of our case that  
7 there is a contract, the Federal Circuit did affirm the  
8 dismissal on the basis of the statute of limitations.

9 QUESTION: Yes. The question you presented is  
10 whether a breach of contract claim accrues for purposes of  
11 section -- when Congress enacts a statute alleged to  
12 abridge a contractual right to freedom from regulatory  
13 covenants upon prepayment of Government mortgage loans.  
14 Basically the -- the court held that your -- the statute  
15 of limitations barred your contract claim, didn't it?

16 MR. ECKLAND: That is true, Your Honor.

17 QUESTION: And that's the case we have here.

18 MR. ECKLAND: Well, in -- yes. Yes, it is,  
19 Judge, a statute of limitations case.

20 In our case, the petitioners alleged that their  
21 claims accrued when they tried to prepay and when the  
22 Farmers Home Administration failed to accept their  
23 prepayment requests and refused to release them from the  
24 regulatory covenants imposed by the Section 515 program.  
25 Petitioners all commenced suit within 6 years of that

1 date, and therefore they maintain here that their claims  
2 are timely.

3 Now, the Government maintains that the  
4 petitioners' claims accrued not on the date dictated by  
5 the ordinary principles of law, breach of contract and  
6 takings, but rather automatically in the enactment of the  
7 1988 legislation. But if you look at -- closely at the  
8 1988 legislation, it's clear that it has no immediate  
9 impact whatsoever on the owners. All of its commands,  
10 directives, requirements, and authorizations are directed  
11 solely at the agency.

12 QUESTION: Didn't the Federal Circuit rely on  
13 anticipatory breach?

14 MR. ECKLAND: No, Your Honor. They maintained  
15 that the actual passage of the -- of the statute  
16 constituted an automatic breach. They did not rely on the  
17 anticipatory breach.

18 QUESTION: You were relying on anticipatory  
19 breach, as I understand it.

20 MR. ECKLAND: We do not either, Your Honor,  
21 although the petitioners here have the option of suing --  
22 assuming -- suing before the breach, assuming that they  
23 had the ability to perform at that time -- and there's  
24 nothing in the record --

25 QUESTION: You rely on the notion that before



1     they went to pay it off, it was an anticipatory breach.

2             MR. ECKLAND:  No, Judge.  We are relying on the  
3     actual breach.  All petitioners --

4             QUESTION:  I'm sorry.  Then I'm confused.  I  
5     thought that your argument was that the reason the statute  
6     of limitations doesn't arise, doesn't start to run prior  
7     to the time that they paid it off, is because prior to  
8     that time, there was no actual breach.  There was only an  
9     anticipatory breach.

10            MR. ECKLAND:  Correct, yes.

11            QUESTION:  All right.  That's what I thought  
12     Justice Ginsburg was asking.

13            MR. ECKLAND:  Yes.

14            QUESTION:  Now, but you take the position that  
15     your clients could have filed suit soon after the passage  
16     of ELIHPA.

17            MR. ECKLAND:  Justice O'Connor, not necessarily.  
18     Under the doctrine of anticipatory repudiation, they did  
19     have a option to sue before.  But as we pointed out in  
20     footnote --

21            QUESTION:  Well, that's what I'm asking you.  
22     You take the position -- let's be clear about your --  
23     please -- that after the enactment of the statute, your  
24     clients could have filed suit for breach of contract on an  
25     anticipatory breach theory?

1           MR. ECKLAND: Yes, but only if they had the  
2 ability to prepay at that time. One of the requirements  
3 of -- of the contract is that the petitioners had the  
4 requisite funds to prepay before submitting a prepayment  
5 request.

6           QUESTION: Well, no, no, no, no, no.

7           MR. ECKLAND: That is --

8           QUESTION: You -- you don't -- you don't -- no.  
9 You have to -- you say for anticipatory breach you have to  
10 show that you're ready to --

11          MR. ECKLAND: Ready, willing, and able, Judge.

12          QUESTION: -- to perform when -- when the  
13 obligation to perform comes. You -- you don't have to  
14 show that you're ready for immediate performance.

15          MR. ECKLAND: You do have to show that you're --  
16 but for the repudiation, you do have to show that you are  
17 able to perform.

18          QUESTION: But performance here -- what you're  
19 talking about here in performance means the ability to  
20 prepay. And I take it your argument is we couldn't have  
21 prepaid because we didn't have the money, and therefore we  
22 couldn't have proved damages. Is -- is that it?

23          MR. ECKLAND: Essentially so, Your Honor. We  
24 don't rely on --

25          QUESTION: I have a contract to deliver 100,000

1 widgets 3 years from now. The party who -- the party who  
2 is committed to buy those widgets announces I am not going  
3 to buy those widgets, and you say there is no anticipatory  
4 breach unless I have on hand the 100,000 widgets, which I  
5 have no obligation to deliver until 3 years from now.  
6 That's -- that's how you envision the -- the law of  
7 anticipatory breach? I'm sure that's wrong.

8 MR. ECKLAND: Well, no. Well, footnote 23. We  
9 address this in our reply brief, Your Honor.

10 QUESTION: The whole purpose of anticipatory  
11 breach -- most people use it not to get damages but to  
12 relieve themselves of the obligation of -- of remaining in  
13 -- in the status of being able to perform the contract.  
14 The person who would sue in the case that I gave you would  
15 be suing so that he wouldn't have to go and acquire the  
16 100,000 -- the 100,000 widgets. It's never the case that  
17 he's ready -- or almost never the case that he's ready  
18 here and now to perform.

19 MR. ECKLAND: But, Your Honor, if the person who  
20 had the obligation to accept the delivery did not have the  
21 funds, for example, even to purchase them, then that would  
22 be sort of almost a fraudulent --

23 QUESTION: He didn't need the funds until 3  
24 years from now. He has no obligation to purchase until 3  
25 years from now.

1                   QUESTION: Could we agree to this?  
2    Could we agree to this, that so far as the element of an  
3    anticipatory breach claim involves the act of the  
4    Government, you had that element, and at least to that  
5    extent, you could have brought an anticipatory breach  
6    claim when the statute was passed? Maybe you didn't have  
7    other elements. That's what we're arguing about, but you  
8    had the -- you had the -- the Government's fault element.  
9    Is that correct? Do you agree?

10                  MR. ECKLAND: Well, certainly, Justice Souter,  
11    the --

12                  QUESTION: But you're saying, whether I could  
13    have sued then or not, I certainly can sue at the point at  
14    which I would claim my right to redeem without these  
15    various conditions, and they refused to honor it. You're  
16    saying, even if I could have sued when the statute was  
17    passed, I can also under contract principles sue when the  
18    moment comes that I want to exercise my right to prepay.

19                  MR. ECKLAND: Correct, Your Honor.

20                  QUESTION: Okay.

21                  MR. ECKLAND: And -- and the doctrine does not  
22    require you to sue until that date. It's merely an option  
23    to sue prior to that date.

24                  QUESTION: So, you're arguing for total control  
25    then over timing because your client could say, we're not

1 ready after 5 years, we're not ready after 7 years, we're  
2 not ready after 10 years. So, the statute would -- would  
3 never run. In other words, you're asking for any time  
4 from the earliest, which is when the law is passed, until,  
5 say, 20 years later.

6 MR. ECKLAND: Yes, Your Honor, we are.

7 QUESTION: So, you could --

8 MR. ECKLAND: Because the Government negotiated  
9 option terms up to 50 years.

10 QUESTION: That was the deal.

11 MR. ECKLAND: That was the deal.

12 QUESTION: Yes.

13 MR. ECKLAND: And the owners relied on that when  
14 they signed up, and they had, you know, a clear  
15 expectation that at some point in time they would be able  
16 to prepay, opt out, and convert their markets --

17 QUESTION: May -- may I interrupt you?

18 MR. ECKLAND: -- to market rate -- yes.

19 QUESTION: Did they have a right to assume right  
20 after the -- the day after the statute was passed, did  
21 they continue to have a right to prepay --

22 MR. ECKLAND: The right --

23 QUESTION: -- without any objection?

24 MR. ECKLAND: Well, the right still existed,  
25 Your Honor, but it wasn't -- it was repudiated at the time

1 of the statute.

2 QUESTION: Well, it wasn't just -- it's not like  
3 a private citizen saying, I don't intend to perform 3  
4 years from now. You have a law passed that takes away a  
5 certain contract right. Was there a breach when the law  
6 was passed?

7 MR. ECKLAND: Well, Your Honor, petitioners  
8 maintain that the right was not eliminated. It was, if  
9 you will, conditioned --

10 QUESTION: Do you maintain there was no breach  
11 at the time the law was passed?

12 MR. ECKLAND: That's correct, Your Honor.  
13 That's merely repudiation. The breach did not occur  
14 unless and until the prepayment request was submitted and  
15 denied.

16 QUESTION: But you would concede that the  
17 statute changed your rights.

18 MR. ECKLAND: The statute did condition them,  
19 and that conditioning, or fettering as the Government  
20 says, is a repudiation, but like any other situation in  
21 the private sector, when you repudiate a right, the breach  
22 doesn't occur until the time for performance comes due.

23 QUESTION: The repudiation --

24 QUESTION: Well, that's because a private party  
25 has the right to change his mind.

1           MR. ECKLAND: Correct. Right, the defendant  
2 could change their mind or the petitioner here could, in  
3 fact, be able to --

4           QUESTION: Doesn't the Government have the right  
5 to change its mind? Couldn't the Government pass another  
6 statute going back to what the situation was before this  
7 one?

8           MR. ECKLAND: Yes, Justice Scalia.

9           QUESTION: In fact, it did that at one point,  
10 didn't it?

11          MR. ECKLAND: They could and they did.

12          QUESTION: They did at one point, didn't they?

13          MR. ECKLAND: In 1979 they initially conditioned  
14 the right, and in 1980 they repealed it, retracted it.  
15 Now, under the Government's proposed rule, if -- if the  
16 statute of limitations began to run immediately upon the  
17 enactment of the statute, all of the petitioners here  
18 would have been compelled to file their suit within 6  
19 years of 1979, i.e., by 1985.

20          QUESTION: So, we're arguing about whether a  
21 statute itself, without any action from the agency, can be  
22 a repudiation.

23          MR. ECKLAND: We believe it can be a  
24 repudiation, yes, Mr. Chief Justice. But the breach does  
25 not ripen, if you will, unless and until the prepayment

1 request is denied.

2 QUESTION: Does the repudiation give you the  
3 right to the same damages that you would receive for a  
4 total breach of the contract?

5 MR. ECKLAND: In our case, no. The petitioners  
6 maintain that since the housing is within a restricted  
7 program, it really has no market value unless and until a  
8 petitioner actually attempts to prepay. But even  
9 assuming, Your Honor, that there was some type of damage  
10 caused by the enactment of the statute, still the  
11 limitations period would not commence to run until the  
12 time for performance came and was not rendered.

13 QUESTION: I think it's usually the case, is it  
14 not, that when there's an anticipatory repudiation, it's  
15 -- it's very difficult for the -- the other party to  
16 determine what his damages are going to be.

17 MR. ECKLAND: Very difficult.

18 QUESTION: Which is why he uses the doctrine to  
19 get out of the contract rather than to seek damages. In  
20 the widget case I gave you, who knows? Who knows what 3  
21 years from now the price of widgets will be? So -- so you  
22 use it to get out of the contract.

23 MR. ECKLAND: Petitioners here, being in the  
24 Court of Federal Claims, have as their only remedy the  
25 monetary judgment. And -- and they are seeking damages



1 starting only as of the date that their prepayment request  
2 was denied by the agency. So --

3 QUESTION: So are you -- you're saying that  
4 there was a claim, or you're saying that -- that your  
5 claim really doesn't accrue until you -- until you have  
6 the -- the wherewithal to prepay. So, you don't really  
7 have a ripe claim until then?

8 MR. ECKLAND: We're saying the petitioners would  
9 at least have to have the money to prepay. They would  
10 have to have the ability to perform. You couldn't have a  
11 situation, for example, where someone was unable to  
12 prepay, they experienced repudiation and a breach, a later  
13 breach, and then say, well, we would have performed if you  
14 hadn't repudiated.

15 QUESTION: Well --

16 MR. ECKLAND: They have to have the honest  
17 intent to perform and have the ability to perform.

18 QUESTION: I have a problem with that.

19 MR. ECKLAND: Yes.

20 QUESTION: But let's get -- if we can get -- for  
21 the same reason Justice Scalia mentioned. But let's  
22 assume you had cash in the bank that would allow you to  
23 prepay, and then there's a repudiation.

24 MR. ECKLAND: Sure.

25 QUESTION: At that point, can't you show your

1 damages? You don't want to prepay, but can't you say --  
2 have an expert in and say, this property has a certain  
3 value and part of the value is the right at any time to  
4 prepay the -- the loan and use it for another use? And  
5 this can be valued in the real estate market. It's worth  
6 more if I can prepay than if -- if I can't, and you have  
7 some expert come in and tell you the difference in the  
8 values. And you do that at the moment the repudiation  
9 occurs.

10 MR. ECKLAND: But here, Justice Kennedy, a 50-  
11 year option exists. Petitioners don't know, frankly --  
12 they didn't know in 1979 and many didn't know in 1988 what  
13 the value of their properties would be, given interest  
14 rate structures and other market conditions at any given  
15 point in time --

16 QUESTION: Well, you mean 50-year options are  
17 not subject to valuation? Experts do this all the time.

18 MR. ECKLAND: Well, but even so, even if you  
19 could come up with a damage theory to cover this, still  
20 it's clear that under the law, the breach would not be  
21 deemed to accrue for limitations purposes until the time  
22 for performance has arrived and performance failed.

23 I mean, if you take a hypo of the GSA leasing  
24 some space in a building --

25 QUESTION: You're -- you're just getting me

1 confused again. I thought we established that you thought  
2 a suit could have been filed for anticipatory breach of  
3 some kind after the statute was enacted.

4 MR. ECKLAND: If they're able to perform, yes,  
5 Your Honor.

6 QUESTION: And now you're saying no. It's just  
7 very confusing. I don't know what in the world you're  
8 arguing.

9 MR. ECKLAND: Justice O'Connor, no. If the  
10 petitioners had the ability to pay, they could have  
11 brought an anticipatory breach claim --

12 QUESTION: Only if they had the ability to pay,  
13 you say.

14 MR. ECKLAND: According to Corbin and the case  
15 law that we cite at footnote 23 of our brief, yes. But if  
16 we get beyond that, okay --

17 QUESTION: Footnote 23 just says that ordinary  
18 contract law applies to this kind of case. We still --  
19 but we still -- we still have to figure out what ordinary  
20 contract law is. Footnote 23 doesn't shed any light on  
21 that that I saw.

22 MR. ECKLAND: But in this case --

23 QUESTION: And -- and I might add that on page  
24 27 of the blue brief, you say that the law constituted an  
25 anticipatory repudiation and petitioners had the option of

1 suing immediately.

2 MR. ECKLAND: In general, yes, that's true, Your  
3 Honor. But here the petitioners sued within 6 years of  
4 the actual breach.

5 QUESTION: And in fact, you did not sue until  
6 after the passage of 6 years.

7 MR. ECKLAND: From the statute, yes, Your Honor.

8 QUESTION: From the enactment of the statute.

9 MR. ECKLAND: But -- but all petitioners  
10 commenced suit within 6 years of the date of the actual  
11 breach, which is the date that the prepayment requests  
12 were denied.

13 QUESTION: So, what apparently the Government's  
14 arguing -- does it matter if we call this anticipatory  
15 repudiation or anticipatory breach? I guess  
16 technically --

17 MR. ECKLAND: Technically --

18 QUESTION: -- we should say anticipatory  
19 repudiation?

20 MR. ECKLAND: Yes, Your Honor.

21 QUESTION: Fine. And so, what they say, in  
22 part, which I'd like to hear your response, is if you're  
23 right that where there is anticipatory repudiation of a  
24 contract, the other side, if it's a private contract, has  
25 a choice. They can either sue immediately if conditions

1 X, Y, and Z are fulfilled, or they wait until the contract  
2 is actually breached. But we are the Government and we  
3 have to interpret this statute strictly, and therefore we  
4 interpret it to mean that even if where you're dealing  
5 with a private person, you'd have your choice; here  
6 there's no choice.

7 Now, your response is what?

8 MR. ECKLAND: Well, here, Your Honor, although,  
9 yes, we need to construe the statute strictly, we cannot  
10 do so in such a manner, however, to narrow the waiver of  
11 sovereign immunity that has already occurred under the  
12 Tucker Act. As this Court held in Irwin and in Bowen  
13 against New York, the tolling -- equitable tolling  
14 principles at issue in those cases, which applied to the  
15 private sector, were nonetheless deemed to apply to the  
16 Government, despite the strict construction of the statute  
17 of limitations involved in those cases. Here there is --  
18 although there's a conditioning of the right at the point  
19 of the repudiation, no breach occurs until the performance  
20 comes due and is not rendered.

21 If -- again, if you look at the statute, under  
22 ELIHPA, page 74 of our appendix 4a, all of its directives  
23 are towards the Secretary. For example, the Secretary  
24 shall make reasonable efforts to enter into an agreement  
25 with the borrower to extend the term of the -- of the

1 contract. It's the Secretary that needs to make those  
2 reasonable efforts. There's no directive directly to the  
3 owner that the owner participate in that process.

4 QUESTION: If -- if that's the -- I mean, I  
5 really do think that your takings claim, which is the  
6 reason you're going into this thing -- well, it was just a  
7 conditioning of the right; it wasn't an elimination of the  
8 right; it just reduced it -- you do all of that to -- to  
9 support your takings claim. But -- but it just -- it  
10 confuses your -- your primary claim, which is the contract  
11 claim. I don't see why there -- if it's only a  
12 conditional reduction and if it's only a direction to the  
13 agency, I don't see why there was an anticipatory breach  
14 then. It seems to me that what you need for a taking, you  
15 need for an anticipatory breach. I don't see how you can  
16 say it was enough for an anticipatory breach, but it  
17 wasn't enough for a taking.

18 MR. ECKLAND: You are correct, Your Honor. It  
19 does not have to be repudiation. We maintain that that's  
20 the most that it can be. If it's not a repudiation, the  
21 breach here then occurs on the adverse agency action, and  
22 all petitioners maintain --

23 QUESTION: And that's why you were confusing  
24 Justice O'Connor, because you're not really ready to say  
25 there was an anticipatory breach, because in order to

1 sustain your takings claim, you don't really want to say  
2 there was an anticipatory breach because they didn't  
3 really, absolutely break the contract. They just gave a  
4 direction to the agency and it didn't entirely eliminate  
5 the right, it just conditioned it.

6 MR. ECKLAND: Justice Scalia --

7 QUESTION: You're carrying water on both  
8 shoulders, it seems to me, and you're spilling a lot.

9 MR. ECKLAND: Well, Your -- Your Honor, no. At  
10 the point of the denial of the prepayment request, there  
11 is a definite breach and that's where the damages occur.  
12 But the takings --

13 QUESTION: And you say in every breach there's  
14 also a taking?

15 MR. ECKLAND: Oh, no, Your Honor.

16 QUESTION: I don't understand that. Why weren't  
17 you satisfied with a breach of contract claim?

18 MR. ECKLAND: Well --

19 QUESTION: What -- what are you adding with this  
20 so-called takings claim?

21 MR. ECKLAND: Well, in the event that the lower  
22 courts do not rule in the petitioners' favor on the  
23 contract claim, they have their wholly independent takings  
24 claim, which is based not -- it's not predicated on the  
25 existence of a contract. It's simply the unilateral

1    ^Fextension by the Government of restrictions on the use  
2    of the petitioners' property.  They -- they --

3               QUESTION:  The property being buildings?

4               MR. ECKLAND:  The buildings and their land.  
5    Before they entered into the program voluntarily, they had  
6    the full use of their buildings and land.  And they  
7    voluntarily --

8               QUESTION:  Suppose you win on the first claim.  
9    Suppose you win on the contract claim.  Then do you want  
10   us to go and answer the other question which, as far as I  
11   can see, is going to take me into outer space?

12              (Laughter.)

13              QUESTION:  But -- and I'd worry about what I'd  
14   write on that.  What's your view on that?

15              MR. ECKLAND:  Well, there are differences  
16   between the claims, Your Honor.  There are potential  
17   differences --

18              QUESTION:  I know there are differences.  I  
19   asked you a specific question.  If you win on the contract  
20   claim, do you want us, nonetheless, to go on and answer  
21   the second question?  It's either yes or no.

22              MR. ECKLAND:  Petitioners do, Your Honor, yes,  
23   because damages are different.  In fact, the dates could  
24   be different.  The taking could take place, for example,  
25   at the end of the for sale procedure that's involved in --



1 in the prepayment process, which would be 6 months, at  
2 least, after the denial of the prepayment request.

3 QUESTION: May I --

4 QUESTION: You've gotten the full benefit of  
5 your contract, which is what would happen if you win on  
6 your contract's claim. What possible taking could there  
7 have been?

8 MR. ECKLAND: If -- in practical terms, Justice  
9 Scalia, if we do prevail on the contract claim at trial, I  
10 don't see that we would pursue the takings.

11 QUESTION: That's fine, except what you're  
12 asking us to do then is to write a little essay on a  
13 matter that affects millions of other people in a very  
14 serious way, in a case which doesn't seem completely to  
15 present the issue. If that's what you want us to do, and  
16 I guess you have a right to do it.

17 MR. ECKLAND: On behalf of the petitioners, I  
18 mean, we would not abandon --

19 QUESTION: Well, we have a right to dismiss it  
20 too, I suppose.

21 (Laughter.)

22 MR. ECKLAND: Yes, you do.

23 QUESTION: May I ask, because I have to confess,  
24 I get -- am getting a little confused, too? Just tell me  
25 precisely -- forget the contract claim for a minute. All

1 we've got before us is the takings claim. What is it that  
2 was taken and when?

3 MR. ECKLAND: Prior to the time that the owners  
4 entered into this program, they owned their land. Many  
5 owned the buildings.

6 QUESTION: I understand, and then they --

7 MR. ECKLAND: Then they voluntarily agreed to  
8 these restrictions on the use, only a certain level of  
9 rent, only a certain income of tenants. The  
10 representations by the Government, even though they may  
11 not have arisen to a contract, nonetheless stated that --  
12 or gave the owners the expectation that at some point in  
13 time they could prepay and opt out of the program.

14 QUESTION: Well, would you tell me what you  
15 think was taken? Is it the right to prepay that was  
16 taken?

17 MR. ECKLAND: If there is no contract right,  
18 then no, that was not taken, Your Honor.

19 QUESTION: What -- what --

20 MR. ECKLAND: What was taken is their -- is --  
21 is the permitted use of the property under their  
22 reasonable investment-backed expectation. It's clearly --  
23 it's -- it's a regulatory taking where the properties  
24 experience a diminution in value because they can no  
25 longer be used once the owner decides to -- to leave the

1 program in the manner in which they had been used prior to  
2 their voluntary entry into the program.

3 QUESTION: It's a regulatory taking of the right  
4 to make use of the property the way you wanted. Which  
5 occurred when?

6 MR. ECKLAND: Which occurred prior to the time  
7 that they voluntarily agreed to participate in the  
8 program.

9 QUESTION: You mean before -- even before they  
10 signed the contract?

11 MR. ECKLAND: Well, at or about the same time.  
12 I mean, if it's a contract, yes, but we -- you know, it  
13 was pled in the alternative. So far, the courts have held  
14 there are no contracts. So, what we have is just a  
15 written representation --

16 QUESTION: I've been trying to ask the question  
17 that's --

18 MR. ECKLAND: Yes.

19 QUESTION: Assume you never made a contract  
20 claim. What -- I'm trying to find out what your taking  
21 claim would be, and I frankly don't understand.

22 MR. ECKLAND: It's just their inability to go  
23 back to using their property the way they were because of  
24 the passage of ELIHPA and the regulations that compelled  
25 them to continue charging only a certain level of rent.

1 They could not raise their rent.

2 QUESTION: Now, can we go back a little? Did  
3 your clients borrow some money from the Federal Government  
4 at low interest rates?

5 MR. ECKLAND: Yes. Well --

6 QUESTION: Yes.

7 MR. ECKLAND: The construction loan, Your Honor,  
8 in many cases was initially from a private mortgage  
9 lender. Then that would be taken out upon the entry into  
10 the contract by the Farmers Home Administration. And that  
11 was a low interest rate loan effectively --

12 QUESTION: To develop the property.

13 MR. ECKLAND: Yes, Your Honor. Yes. And that  
14 was a low interest loan, but it devolved to the benefit of  
15 the tenants in the form of low rents. It didn't go into  
16 the pockets of the owners. They were able to charge  
17 low --

18 QUESTION: Well, to get the loan, the borrower,  
19 your clients, had to execute a loan agreement and a  
20 promissory note --

21 MR. ECKLAND: Yes, Your Honor.

22 QUESTION: -- and enter into a mortgage.

23 MR. ECKLAND: Yes.

24 QUESTION: And was the right of prepayment  
25 spelled out in any of those agreements?

1           MR. ECKLAND: The prepayment right itself was in  
2 the promissory note, yes, Your Honor.

3           Mr. Chief Justice, I see that most of my time is  
4 spent. If I may reserve the rest for rebuttal.

5           QUESTION: Very well, Mr. Eckland.

6           Mr. Roberts, we'll hear from you.

7           ORAL ARGUMENT OF MATTHEW D. ROBERTS

8           ON BEHALF OF THE RESPONDENT

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

11           Petitioners' claims are barred because they  
12 weren't filed within 6 years of when they first accrued,  
13 on the enactment of ELIHPA. Petitioners allege that their  
14 contracts gave them the option to prepay their mortgages  
15 at any time subject to only those legal restrictions in  
16 place when the contracts were made. They're, thus,  
17 alleging that the Government promised not to impose  
18 additional legal restrictions on their option to prepay  
19 and ELIHPA itself breached any such promise because ELIHPA  
20 itself imposed additional legal restrictions on  
21 prepayment. Petitioners' contracts claims accrued at the  
22 time of that present breach.

23           QUESTION: Well, was -- do you -- do you concede  
24 or should we take this case on the assumption that there  
25 was a contract? Do -- do we --

1                   MR. ROBERTS:  We're -- for --

2                   QUESTION:  -- do we assume it for purposes of  
3   deciding this case?

4                   MR. ROBERTS:  For the purposes of deciding the  
5   statute of limitations question, yes.

6                   QUESTION:  And that the contract included a  
7   right of prepayment.

8                   MR. ROBERTS:  Included a right of prepayment and  
9   not only a right of prepayment, because if the contract  
10   just said you can prepay at any time, it like all  
11   contracts would be presumed to be subject to subsequent  
12   legislation.  So, the -- that right to prepayment had to  
13   also include a promise that the Government wouldn't change  
14   the rules and impose additional legal restrictions on --

15                  QUESTION:  When I have my contract to` pay a  
16   million dollars when my ship -- when the ships with grain  
17   come in, I say, a year in advance, ha-ha, I'll never pay.  
18   I'll never pay.  And therefore, I then have breached the  
19   contract to carry out what I promised.

20                  MR. ROBERTS:  No.  In that circumstance, it  
21   would be anticipatory repudiation.  But -- but here you  
22   have legislation, not a statement by a private party.

23                  QUESTION:  So -- so what?

24                  MR. ROBERTS:  Well, two things.  One,  
25   legislation itself alters the legal rights, and two --

1           QUESTION: Well, the Government -- the  
2 Government cannot -- cannot break a contract then.

3           MR. ROBERTS: No. The Government --

4           QUESTION: The Government can always act by  
5 legislation, can't it?

6           MR. ROBERTS: Yes. Yes, Your Honor, and the  
7 Government --

8           QUESTION: So, the Government --

9           MR. ROBERTS: -- can breach the contract and --  
10 and be responsible for damages. And we're not arguing  
11 that -- that they can't.

12          QUESTION: So long as it does it by legislation,  
13 it's okay.

14          MR. ROBERTS: No. No, no, Your Honor. The  
15 Government --

16          QUESTION: I thought that was your point, that  
17 this -- this breach is different because it was done by  
18 legislation.

19          MR. ROBERTS: That doesn't mean -- that -- that  
20 doesn't mean that it's not a breach, but what it means is  
21 that the breach is occurring at the time the legislation  
22 is passed.

23          QUESTION: So, fine. The legislation says, ha-  
24 ha, we won't pay. You know, I just want the legislation  
25 to say precisely what the private person said. Now, you

1 say we reach a different result because it's in the form  
2 of legislation?

3 MR. ROBERTS: Yes.

4 QUESTION: Okay. Now, one thing -- I'm just  
5 curious to get into that a little bit -- is, I don't  
6 understand why the Government is taking the position it  
7 does, as well as what the position is. That is to say,  
8 wouldn't you, if you win -- and this will help me  
9 understand it -- have millions of people who have entered  
10 into contracts with the Government poring over every law  
11 that is passed, and probably every regulation, to decide  
12 whether or not that law and that regulation will somehow  
13 10 or 15 years from now impact on a real estate contract  
14 they have with the Government? A whole industry of  
15 anticipatory breach, not really, lawyers will develop in  
16 order to bring those claims immediately in the Court of  
17 Claims because we might lose them later even though  
18 everything would have been worked out.

19 Now, if you can explain that to me, I suspect  
20 I'll have a better time understanding your argument.

21 MR. ROBERTS: Okay. What -- what we're -- what  
22 we're asking for is that people who believe that their  
23 contractual rights have been injured -- have been  
24 infringed by a statute give the Government reasonably  
25 prompt notice, in accordance with the statute of



1 limitations, of their claims. And the benefit of the  
2 ability to have a prompt accounting outweighs, in the  
3 Government's view, any additional lawsuits that may  
4 result.

5           And we don't think that there will be a  
6 significant number of additional lawsuits because, as the  
7 Court was explaining before, there's an ability to sue  
8 immediately on the anticipatory repudiation theory. So,  
9 it isn't that the petitioners -- or that the Government is  
10 not going to be subject to suit or --

11           QUESTION: But what would the damages be when I  
12 haven't got the wherewithal to pay?

13           MR. ROBERTS: The -- the damages are that  
14 petitioners had a loan that they allege gave them an  
15 unfettered option to prepay at any time. And after ELIHPA  
16 was passed, that loan no longer had that unfettered option  
17 to prepay. And a loan that has an -- has an absolute  
18 prepayment option is worth more than a loan with a  
19 severely restricted prepayment option. The difference in  
20 the value of the loan is reflected in the difference of  
21 the value of the property that's encumbered by the loan,  
22 and it's -- it's easy to measure by comparing the --

23           QUESTION: Easy to measure? You -- you'd bet  
24 your life on that? I mean, the -- the reason -- the  
25 reason contract law has developed the option of suing for

1 anticipatory breach as just an option is precisely because  
2 it is often so difficult to anticipate what your damages  
3 will be. And so, it leaves it up to the innocent party  
4 who hasn't broken the contract to either sue immediately,  
5 if he can calculate his damages and get them, or to wait  
6 until the -- the time for performance comes.

7           And what the Government is doing with this  
8 theory is forcing everybody who has a contract with the  
9 Government to come in with -- with speculative damages and  
10 hoping that some court will find a difference between the  
11 value of this contract now and what it would be 50 years  
12 from now. I -- I think it's a -- I don't know why you  
13 would want to impose this kind of a regime upon  
14 contractors with the Government.

15           MR. ROBERTS: The damages, first of all, can be  
16 measured, as I said. Second of all, the -- the  
17 Government, as reflected in the statute of limitations,  
18 has a -- has a prompt -- has an interest in prompt  
19 resolution of the claims.

20           QUESTION: Well, I'm not --

21           QUESTION: I mean, anything can be measured. I  
22 mean, you know, my life expectancy can be measured, but I  
23 wouldn't bet a whole lot of money on it.

24           MR. ROBERTS: That -- that's right --

25           QUESTION: You know, you -- you can come up with

1 a guess for -- for anything. But -- but the reason we  
2 give the option to the innocent party is precisely because  
3 it's a guess. It may be, you know, an educated guess, but  
4 it's a guess.

5 MR. ROBERTS: With -- with due respect, Your  
6 Honor, I -- I don't think that's the reason why the law  
7 gives the -- the option to the innocent party. The law  
8 gives the option to the innocent party so that the -- the  
9 party has the ability -- the opportunity to convince the  
10 defendant to retract its wrongful repudiation.

11 QUESTION: But if -- if it is an option, why  
12 should the innocent party be penalized by having the  
13 statute of limitations start to run then?

14 MR. ROBERTS: It's not an option here because  
15 the statute is a present breach. And -- and to understand  
16 that --

17 QUESTION: Well, are you --

18 MR. ROBERTS: -- it's important to understand  
19 the nature of the promise that's -- that's at issue here,  
20 I think, and if -- if I could try to go back to -- to do  
21 that.

22 QUESTION: Yes. I was going to ask -- I -- I  
23 think it's consistent with the Chief Justice's inquiry.  
24 Are you saying that there's only one cause of action here,  
25 or do you concede that there are two causes of action, one

1 for repudiation or anticipatory breach and the other for  
2 the actual breach?

3 MR. ROBERTS: Our position is that there is an  
4 actual breach at the time that the statute is passed, and  
5 it's a breach of -- of the promise that the Government  
6 made that it wouldn't impose additional legal restrictions  
7 on prepayment.

8 QUESTION: Even though --

9 MR. ROBERTS: It's different from --

10 QUESTION: Even though performance is not yet  
11 due.

12 MR. ROBERTS: Performance on that promise is  
13 due, Your Honor. Performance on that promise is -- is due  
14 throughout the life of the loan.

15 QUESTION: No. But you can make that argument  
16 with respect to any contract that is ever made. You're  
17 saying there is always an implicit term that they won't  
18 monkey around with the terms of the contract, and whenever  
19 in anticipation they do so, there's an immediate breach.  
20 And if you follow that analysis, then in fact the  
21 distinction between repudiation and anticipatory breach on  
22 the one hand and actual breach on the other will disappear  
23 in every contract, public or private.

24 MR. ROBERTS: No, Your Honor, because -- because  
25 the -- the difference is between legislation and the --

1 and the role that legislation has under background  
2 principles of contract law and other actions.

3 QUESTION: The background principle of contract  
4 law is that we try to treat the Government and a private  
5 contracting party together.

6 MR. ROBERTS: Yes.

7 QUESTION: And you're saying the fact that the  
8 Government can speak through legislation, whereas a  
9 private party cannot, alters that rule. If so, then that  
10 rule is going to have a remarkably short life because the  
11 Government can do anything it wants to across the street  
12 and displace the rule.

13 MR. ROBERTS: The -- the distinction, Your  
14 Honor, is that -- is -- is twofold. The legislation  
15 changes the legal rights and so there isn't an ability  
16 anymore to perform.

17 QUESTION: Why does it change the legal rights  
18 if the contract exists? It may -- it may convert one  
19 right into a -- a right to damages as opposed to a right  
20 to performance, but the theory of contract is that by  
21 repudiation you can't just change the legal rights.

22 MR. ROBERTS: It does -- it does exactly that.  
23 That's what I mean by changing the legal rights, that it  
24 changes -- there's no longer a -- a right to performance.  
25 There's only a right to the damages. If it was a contract

1    --

2                   QUESTION:  All right.  If that is so, then  
3    exactly the same thing is true in a private contract when  
4    there has been an anticipatory breach.

5                   MR. ROBERTS:  No.  No, Your Honor, there might  
6    be a right to specific performance if it was the kind of  
7    contract that you could specific performance, but we would  
8    submit that you couldn't get specific performance once the  
9    Government --

10                  QUESTION:  How does the fact that you cannot --

11                  MR. ROBERTS:  -- precluded the performance by  
12    law.  You could only get damages.

13                  QUESTION:  Let's assume you're right.  How does  
14    the fact that you may not get specific performance against  
15    the Government affect the right to damages, which you  
16    perfectly can get against the Government, as -- as against  
17    any other private contract?

18                  MR. ROBERTS:  The -- what it does is show that  
19    there's -- that there's a change and an -- an injury right  
20    at the time that the legislation is passed.

21                  QUESTION:  Then that gets back to the original  
22    point.  If that's so, then the same argument is going to  
23    apply in every contract, public or private.

24                  MR. ROBERTS:  It -- it's not going to apply in a  
25    private context because there isn't going to be a breach

1 by virtue of -- of legislation unless there's a promise by  
2 the private party that --

3 QUESTION: You -- you have invented --

4 MR. ROBERTS: -- that the laws aren't going to  
5 change.

6 QUESTION: I understand. You have invented a  
7 promise that I won't change the laws. You can invent in  
8 -- in private contracts an implicit promise that I will  
9 not repudiate, and therefore, when you repudiate  
10 anticipatorily, you have broken the contract and, bingo,  
11 there is a breach of contract and you must sue at once.

12 MR. ROBERTS: You -- you have --

13 QUESTION: You no longer have the option.

14 MR. ROBERTS: You have --

15 QUESTION: You could do it. I mean, it's just  
16 -- you know.

17 MR. ROBERTS: You have no need to invent that.  
18 You have no need to -- to have that additional promise in  
19 the private contract because -- because there isn't the  
20 presumption. There -- there isn't the presumption in that  
21 circumstance that the contract is subject to legislation  
22 even though the Government is -- has the ability to  
23 legislate.

24 QUESTION: I see your point.

25 QUESTION: Well, what is -- what is your

1 authority for the proposition that the -- an -- an  
2 anticipatory breach not accepted by the other party starts  
3 the statute of limitations running? I mean, what case?

4 MR. ROBERTS: My -- my argument is not that this  
5 is an anticipatory breach. The -- our -- our principal  
6 submission is that this is a present breach, but -- but  
7 it's a present breach of a promise that the Government --

8 QUESTION: What --

9 MR. ROBERTS: -- that has to be there in a  
10 contract with the Government because of the  
11 Government's --

12 QUESTION: What if we disagree with you that  
13 it's a present breach? Do you still say that an  
14 anticipatory breach starts the statute running?

15 MR. ROBERTS: That -- that's not our principal  
16 submission. We -- but you could read the statute -- you  
17 could read the statute that providing first accrues to  
18 mean that the first -- that when a plaintiff can first  
19 bring suit, that that's when the statute of limitations  
20 starts to run --

21 QUESTION: Even though that's not the law as  
22 between private parties.

23 MR. ROBERTS: Yes, given the principles of  
24 sovereign immunity and the principle that the statute  
25 should be narrowly construed. But -- but --



1           QUESTION: But that -- that narrow construction  
2   notion, or construed strictly notion, applies to deciding  
3   whether there's a waiver by the Government of any  
4   privilege of sovereign immunity. And once we've decided  
5   yes, the Government did waive it, the Government has said  
6   it can be sued, we don't continue to look at every issue  
7   and say, oh, it's the Government, we're going to strictly  
8   construe it somehow.

9           MR. ROBERTS: The Court -- the Court has held  
10 several times that statutes of limitations, as conditions  
11 on the Government's waiver of its sovereign immunity,  
12 should themselves be -- be narrowly construed and has  
13 applied it in -- in cases, for instance, involving a  
14 situation where a private party claimed that the  
15 limitations period didn't run until an administration --  
16 administrative determination had been made that there  
17 wouldn't be -- that there was a -- was a loss and --

18          QUESTION: Well, in this sense -- in this sense,  
19 the Government actually needs less protection than the  
20 private party because the Government at least is in the  
21 position where it can always pass a statute of  
22 limitations --

23          MR. ROBERTS: Yes, the Government --

24          QUESTION: -- which -- and if you're -- you're  
25 concerned about your liability 50 years out or something,

1 I suppose you could pass a statute of limitations.

2 MR. ROBERTS: The Government can do that and has  
3 done it here, and the statute of limitations provides that  
4 when the action first accrues, there are 6 years to sue.  
5 And if -- if --

6 QUESTION: Well, but again, I'm back to the  
7 problem. It -- it seems to me that on contract law there  
8 are two causes of action, anticipatory repudiation,  
9 anticipatory breach, and breach. And you're conflating  
10 the two.

11 MR. ROBERTS: In the -- in the ordinary  
12 situation, if a private party -- let's -- if -- if I may,  
13 let's -- can I pose a hypothetical? If -- if a -- if a  
14 private party had promised that you could prepay, that the  
15 other party could prepay at any time, and Congress passed  
16 a statute that imposed restrictions on prepayment, that  
17 statute would be neither an anticipatory repudiation or a  
18 breach, but would provide a discharge.

19 And -- but if the private party had promised,  
20 subsidiary to the promise that it would be prepaid at any  
21 time, that there -- that notwithstanding passage of  
22 legislation, that if -- if there was legislation passed  
23 that -- that -- excuse me -- that the private party had  
24 promised that legislation wouldn't be passed or had  
25 promised to indemnify, notwithstanding the passage of

1     legislation, then there would be a breach at the time the  
2     legislation is passed.

3             And the Government has to make that promise, and  
4     petitioners have alleged that the Government made that  
5     promise here. That's what -- that's what they lost on the  
6     summary judgment motion in the -- in the lower court about  
7     on the merits --

8             QUESTION: I see that. I think I understand  
9     your argument. It doesn't work with the private party.  
10    Your analogy isn't so great because it's not the private  
11    party who can pass the law.

12            But I think your argument is that unlike private  
13    contracts, many, many, many Government contracts have the  
14    following problem in them which was in Mobil. Are the  
15    parties here saying that if Congress passes a law, that  
16    that -- all bets are off? Are they saying the Government  
17    promises to do this, Congress's law to the contrary in the  
18    future notwithstanding? What's the promise?

19            And here you're saying the promise was in their  
20    view we will do this irrespective of Congress's new law  
21    and their -- your view is, no, it was conditioned on  
22    Congress not passing a law. Is that right? Or maybe I  
23    have it backwards. But you're -- you're saying that in  
24    Government contracts, there is a promise and there is an  
25    issue whether the Government means that promise

1       irrespective of what Congress does in the future.

2               MR. ROBERTS:   Yes.   That --

3               QUESTION:   That's an issue.

4               MR. ROBERTS:   That's an issue, and then there's  
5       a separate --

6               QUESTION:   And therefore, they're saying what  
7       the Government meant was irrespective of what Congress  
8       does, and you're saying no, it meant only if Congress  
9       doesn't do to the contrary.

10              MR. ROBERTS:   On -- on the merits -- on the  
11       merits, yes.   But -- but --

12              QUESTION:   On the merits.   And you're saying  
13       that kind of a contract issue is breached when Congress  
14       passes the law to the contrary.

15              MR. ROBERTS:   Yes.

16              QUESTION:   Okay.   And that's special for  
17       Government.

18              And now all I would like on that is:   A, does  
19       that apply to administrative regulations too; and B,  
20       what's the authority for that?

21              MR. ROBERTS:   Okay.   It would apply to  
22       administrative regulations if -- if that was the -- the  
23       issue whether the promise -- if -- if the issue was there  
24       wouldn't be regulations -- different regulations that  
25       imposed restrictions on prepayment.   It would apply to

1     that and it would be breached at the time the regulations  
2     were promulgated. They have the effect of law.

3             The authority for that is the -- is the  
4     background principle that's -- that's recognized in the  
5     Winstar case, that's recognized in Bowen v. Posse, that's  
6     recognized in --

7             QUESTION: All right. But if it's just a  
8     background principle, I would worry about the practical  
9     consequence being of people, particularly in real estate  
10    contracts, having to study every regulation, every statute  
11    in order to tell their clients what to do. Real estate  
12    investors are nervous people sometimes. And -- and they  
13    would say, my God, I better bring a lawsuit and the lawyer  
14    would say, don't worry about it. This condition is never  
15    going to arise anyway. Who cares? And if it does, sue  
16    then.

17            Now, that -- that's the practical thing I brought up  
18    at the beginning, and if we're trying to say what's the  
19    right legal principle, I think that practical problem is  
20    relevant.

21            MR. ROBERTS: Okay. And then to return to the  
22    -- to practical considerations that -- that we think argue  
23    in our favor on that side, that's because the Government  
24    has a prompt interest in -- has a -- has a strong interest  
25    in a prompt accounting of the costs of legislative action.

1 And it's particularly important that -- it's -- it's  
2 important that, one, that -- that a Congress close to the  
3 Congress that enacts a statute be able to address the  
4 consequences of the enactment. And it's also important  
5 that Congress --

6 QUESTION: Which it could enact by repealing --

7 MR. ROBERTS: -- be able to cause a --

8 QUESTION: It could enact -- the -- the Congress  
9 that's close to the first one could say, okay, we'll  
10 repeal it. And that's, Mr. Roberts, one of the major  
11 problems I have with your argument. You seem to say that  
12 legislation is magic, and you can't have an anticipatory  
13 repudiation because when Congress has spoken, that's it.  
14 But in this very case, Congress goes back and forth a  
15 couple of times.

16 MR. ROBERTS: Yes. Congress can repeal the  
17 legislation, but it doesn't change the fact that during  
18 the -- the period the legislation was in effect that  
19 there's an alteration of legal rights, and there's also,  
20 if there was a promise that -- that the -- that the rights  
21 wouldn't be changed, a breach during that time.

22 And although Congress did -- although Congress  
23 did repeal the statute here, it -- it's far less likely in  
24 the ordinary situation that Congress is going to repeal  
25 statutes than it is that a private party is going to

1 change its mind about its intention to repudiate a -- a  
2 contract, and --

3 QUESTION: Well, Mr. -- Mr. Roberts, in the case  
4 in which the Government, we'll assume, doesn't change its  
5 mind, your argument in -- in response to Justice Breyer's  
6 question seems to boil down to something like this. Pity  
7 the poor Government as the contract breaker because it may  
8 not know just how much damage it's causing. Therefore,  
9 put a burden on the people harmed by the Government's  
10 breach of contract to run in in a hurry and let the  
11 Government know early on just how much damage it has  
12 caused.

13 Why should the burden of the Government's breach  
14 of contract be shifted entirely for limitations purposes  
15 to the victims of the breach?

16 MR. ROBERTS: When -- when there's a present --  
17 when there's a breach, the general principle is the  
18 statute of limitations starts to run at the time of the  
19 breach. It doesn't wait to run until --

20 QUESTION: No, but your -- no, but your  
21 argument, as I understand it, is that because of the  
22 Government's peculiar power to pass legislation, the  
23 Government should not be in the position of the usual  
24 contract breaker who may be subject to an anticipatory  
25 breach claim or an actual breach claim later. You're

1 saying the Government should be subject only to one claim  
2 at the first moment that an anticipatory breach claim  
3 should be brought. And your argument for saying that is  
4 the Government ought to have a right to make its victims  
5 come in and tell it as early as possible how much damage  
6 it has caused. Why does the Government, simply because it  
7 has a legislative power, have that kind of a moral claim  
8 that the private contract breaker does not have?

9 MR. ROBERTS: There's this -- there's a -- a  
10 very strong interest in permitting the Government to -- in  
11 permitting Congress to decide it wants to wrap up the  
12 costs of improvident Federal contracts that they have --

13 QUESTION: Then why don't we let Congress -- why  
14 don't we let Congress survey through the departments of  
15 the Government how many contracts it has entered into or  
16 guaranteed and tote up the damages in advance? The  
17 Government has access to this information if it wants to  
18 get it.

19 MR. ROBERTS: The -- the Government doesn't know  
20 who's going to sue, for one. And so -- so it -- what this  
21 rule does is --

22 QUESTION: In other words, the Government may  
23 get off a little cheaper if it puts the burden on the  
24 victims.

25 MR. ROBERTS: Well -- well, it -- there's a



1     dispute here as to whether the contract made this promise  
2     or not, and the Government doesn't -- doesn't know how  
3     that dispute is going to be resolved. We don't believe  
4     that -- that there was a promise that prepayment would not  
5     be subject to subsequent legislation.

6             QUESTION: Well, certainly general contract law  
7     is not -- you know, you could say it from the point of  
8     view of general contract law, it's important that people  
9     who breach contracts know as soon as possible how much  
10    damage they've done, but obviously that doctrine has not  
11    commended itself in the area of general contract law.

12            MR. ROBERTS: Well, when they breach a contract  
13    and it's a breach, the statute of limits does start to run  
14    and the rule is that even if the damages can't be fully  
15    ascertained, that -- that the statute of limitations run.  
16    And that's true with -- if -- if there was a contract  
17    between one party to -- to employ another party for the  
18    other party's life and that contract was breached, the  
19    statute of limitations would run at the date of breach  
20    even though it wouldn't be possible with certainty to know  
21    the length of the damages. A -- a contract for a breach  
22    of warranty of merchantability --

23            QUESTION: I think it's so hard to look at this  
24    as an actual breach if we take it on the assumption there  
25    was a contractual right of prepayment on demand by the

1 borrower. I would think normally you would wait and see  
2 if and when there was a request for repayment -- or early  
3 payment, and you wouldn't really know that, of course,  
4 with a -- the owner of real estate who goes out and he  
5 gets a low interest loan from the Government to develop  
6 it. Now, if interest rates decline below that low rate in  
7 the future within the 20-year period, then he might well  
8 want to go have early payment so he can get an even better  
9 deal. But if interest rates are going higher, there's no  
10 incentive for him to. I wouldn't think you'd treat it as  
11 an immediate breach because the Congress attached new  
12 conditions to the circumstances of the prepayment.

13 MR. ROBERTS: Even under the scenario you posed  
14 that -- that there wasn't an incentive to prepay right at  
15 the moment, there's still a -- a change in what -- in --  
16 in the loan that petitioners have, and it's a loan where  
17 they no longer have that option to prepay with unfettered  
18 --

19 QUESTION: No. As I read the legislation, there  
20 still is consideration of the possibility of prepayment,  
21 but there are some new conditions imposed whereby the  
22 Government tries to assure itself that there will still be  
23 a certain number of low-income housing units out there on  
24 the market.

25 MR. ROBERTS: Yes, Your Honor, but petitioners

1 here aren't complaining about the fact that they're  
2 ultimately not able to prepay. They're really complaining  
3 about the -- about the restriction in the circumstances  
4 under which they prepaid, and -- and that's revealed by  
5 their complaint where not all -- even -- petitioners have  
6 -- have submitted requests for prepayment. And some of  
7 them have accepted incentives with -- and withdrawn their  
8 requests. So, if they were complaining about not being  
9 able to prepay, they would have gone through the whole  
10 ELIHPA process to see whether they -- they could prepay.

11 QUESTION: Well, apparently at some point there  
12 was a request to prepay. Right?

13 MR. ROBERTS: Some petitioners have made  
14 requests to prepay. Not all petitioners have made  
15 requests to prepay.

16 QUESTION: The -- but -- but petitioners -- some  
17 of the petitioners in this case.

18 MR. ROBERTS: Some have but not all petitioners.

19 QUESTION: Have made a request to prepay and  
20 it's been refused. Now, at that point, presumably, we can  
21 see a breach.

22 MR. ROBERTS: At that point, there's an  
23 exacerbation in our view of the -- of the previous breach  
24 because it's an application of the restrictions that were  
25 imposed and that were imposed, according to petitioners'

1     allegations, in violation of the Government's promise not  
2     to impose them.   But --

3             QUESTION:   Could you seek declaratory relief to  
4     determine your liability?

5             MR. ROBERTS:   At the time of the --

6             QUESTION:   The legislation is passed.   You're  
7     concerned that it might cause some monetary liability some  
8     years hence.   You seek declaratory relief that this is not  
9     a breach of the contract.

10            MR. ROBERTS:   I suppose that the Government  
11     could -- could do that.   I'm not -- I -- you know, I don't  
12     know for sure, but I don't know any reason why -- why --

13            QUESTION:   Let's see if this is a quick analogy,  
14     and you may not know the answer.   I promise you in a  
15     contract to give you an option to lease my beach house  
16     every year for the next 15 years, and I also promise not  
17     to make a contract disabling myself from carrying that  
18     out.   I enter into a contract with him that does disable  
19     myself from carrying that out.   Is that an immediate  
20     breach or is it anticipatory?

21            MR. ROBERTS:   An immediate breach, Your Honor.

22            QUESTION:   It is immediate?

23            MR. ROBERTS:   It's an immediate breach.   Do I  
24     have something that -- that says --

25            QUESTION:   Yes.   I mean, that's pretty

1     analogous.

2             MR. ROBERTS:  No.

3             QUESTION:  That's pretty analogous to the

4     case --

5             MR. ROBERTS:  Yes.  I don't --

6             QUESTION:  -- that you were bringing up.

7             MR. ROBERTS:  I don't think that -- that the

8     case -- I don't have a case one way or the other on that

9     proposition.

10            QUESTION:  I think you'll find it's an

11     anticipatory breach.

12            MR. ROBERTS:  But -- but ordinarily --

13            QUESTION:  If that is an anticipatory breach --

14            MR. ROBERTS:  If you didn't make any -- any

15     other promise at all, it would be an anticipatory breach.

16     I agree with you.  But you wouldn't have need to make that

17     other promise because the -- because it would be presumed

18     that you wouldn't take action that would -- you wouldn't

19     be excused by taking action that makes it impossible for

20     you to perform.  But -- but that presumption doesn't apply

21     in the case of the Government and legislation because of

22     the --

23            QUESTION:  And your whole case hinges on that,

24     that the Government --

25            MR. ROBERTS:  Well --

1           QUESTION:  -- is really different because of  
2   this.  Now, if I believed that the Government -- and I'm  
3   not -- I'm not saying I do -- that the Government was  
4   really different for that reason, then this is a unique  
5   kind of case and maybe we should have a different rule as  
6   to when you have to sue.  I mean, if it's unique for that  
7   purpose, maybe it ought to be unique as to whether these  
8   people who don't know what their damages are at this point  
9   have to sue right away or it can wait until -- until they  
10  -- they submit their request for prepayment.

11           If it's unique, we'll adopt a unique rule for  
12  it.  Would that make you happy?

13           MR. ROBERTS:  All -- all I can say to that, Your  
14  Honor, is that -- that there are many situations in which  
15  damages cannot be ascertained fully.  In fact, there are  
16  situations in which courts have confronted situations  
17  where the damages can't -- no measurable damages could be  
18  found at all at the time of breach, and they hold that it  
19  -- it runs from the breach.

20           And the -- the policy arguments on our side are  
21  the -- the Government's interest in a prompt accounting,  
22  in being able to wrap things up and in not having --

23           QUESTION:  Well, but the Government has --

24           MR. ROBERTS:  -- to wait for 50 years to know --

25           QUESTION:  But the Government should want to

1 have some rules out there that would encourage it to be  
2 able to deal with people on a commercial basis in some  
3 areas. You might want to be able to buy certain things  
4 from the private sector or to engage in loan agreements.  
5 And to adopt the kind of proposal you're making  
6 discourages anyone from dealing with the Government. It's  
7 a very peculiar rule.

8 MR. ROBERTS: I -- I don't think it discourages  
9 them, Your Honor, because they -- they can sue and their  
10 damages are measurable, and they can get the damages. The  
11 likelihood that interest rates are going to go up or that  
12 interest rates are going to go down and -- and other  
13 possibilities are -- are reflected in the -- in the change  
14 in the value of the loans and they're measurable at that  
15 time.

16 And -- and if petitioners think they might be  
17 able to prepay later, subject to the restrictions, so they  
18 wouldn't be injured in that way, they can sue, get their  
19 damages and then they'll be subject to the restrictions in  
20 the program.

21 And if they prepay and -- and the restrictions  
22 don't prevent them in any way from prepaying or don't  
23 impose any limitations on them, then they've gotten the  
24 damages for what they've lost and they also get the  
25 ability to prepay.

1 QUESTION: Thank you, Mr. Roberts.

2 Mr. Eckland, you have 2 minutes remaining.

3 REBUTTAL ARGUMENT OF JEFF H. ECKLAND

4 ON BEHALF OF THE PETITIONERS

5 MR. ECKLAND: Thank you, Mr. Chief Justice. May  
6 it please the Court:

7 The Government has not been able to cite to one  
8 case in which a congressional statute has been treated  
9 differently, in other words, that it constitutes an  
10 immediate breach of a contract.

11 In the petitioners' briefs, we have a total of  
12 six cases that make the distinction between a  
13 congressional statute as being merely a repudiation and  
14 the breach not occurring until there has been some adverse  
15 agency action. In the Court of Federal Claims, we've got  
16 Plaintiffs in Winstar-Related cases, Bank of America, and  
17 Conoco. The Federal Circuit Court of Appeals, Far West,  
18 Schism, and Stone Forrest. And two of those cases,  
19 Plaintiffs in Winstar-Related cases and Bank of America,  
20 dealt with the statute of limitations and have ruled in  
21 favor of the petitioners' position advocated here.

22 Congress makes policy. It directs agencies what  
23 to do, and petitioners maintain that in that sense it is  
24 no real different than a board of directors of a  
25 corporation. A board of directors can direct the CEO or a



1 program manager not to perform a contract, but that  
2 directive or that change in bylaw by a board of directors  
3 does not constitute a breach. It's merely a repudiatory  
4 act. The -- the breach does not ripen unless and until  
5 the program manager or CEO actually fails to perform at  
6 the time that performance comes due.

7 Here it's clear that since the petitioners can  
8 reach their central right of opting out of this program  
9 upon prepayment -- and the statistics show that -- it  
10 can't be that the statute is an immediate breach. A  
11 breach occurs only if and when the agency acts and denies  
12 a prepayment request.

13 In closing, Your Honors, petitioners here  
14 understand that as U.S. citizens they have an obligation  
15 to follow the law and to know the law. But here the  
16 Government enticed the petitioners into this program by  
17 holding out a 50-year option term, only to withdraw it  
18 upon the time that the petitioners built the properties.

19 If the Government is not willing to give the  
20 petitioners the benefit of their bargain, fundamental  
21 considerations of fairness at least require that they get  
22 the benefit of the doubt and that these ordinary  
23 principles of law regarding the accrual of breach of  
24 contract and takings claims should be able to be invoked  
25 by the petitioners such that they do not need to file suit

1 unless and until their claims accrue.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
3 Eckland.

4 The case is submitted.

5 (Whereupon, at 12:02 p.m., the case in the  
6 above-entitled matter was submitted.)

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<p><b>abandon</b> 25:18  <b>ability</b> 8:23 10:2,19 17:10,17 19:10,12 33:2,7 35:9 37:15 39:22 55:25  <b>able</b> 7:5 10:11,17 11:13 13:15 15:3 19:4 28:16 46:3,7 51:2,9 54:22 55:2,3,17 56:7 57:24  <b>above-entitled</b> 1:15 58:6  <b>abridge</b> 7:12  <b>absolute</b> 33:17  <b>absolutely</b> 23:3  <b>accept</b> 7:22 11:20  <b>accepted</b> 40:2 51:7  <b>access</b> 48:17  <b>accounting</b> 33:2 45:25 54:21  <b>accrual</b> 57:23  <b>accrue</b> 4:1 17:5 18:21 58:1  <b>accrued</b> 7:21 8:4 29:12,21  <b>accrues</b> 7:10 40:17 42:4  <b>acquire</b> 11:15  <b>act</b> 12:3 21:12 31:4 57:4  <b>action</b> 4:23 15:21 22:21 35:24,25 42:4 42:8 45:25 53:18,19 56:15  <b>actions</b> 3:15 37:2  <b>acts</b> 57:11  <b>actual</b> 8:15 9:3,8 20:4,10 36:2,4,22 47:25 49:24  <b>add</b> 19:23  <b>adding</b> 23:19  <b>additional</b> 29:18,20 30:14 33:3,6 36:6 39:18  <b>address</b> 11:9 46:3  <b>administration</b> 5:11 7:22 28:10 41:15  <b>administrative</b> 41:16 44:19,22  <b>adopt</b> 54:11 55:5  <b>advance</b> 30:17 48:16  <b>adverse</b> 22:21 56:14  <b>advocated</b> 56:21  <b>affect</b> 38:15  <b>affirm</b> 7:7  <b>agencies</b> 56:22  <b>agency</b> 8:11 15:21 17:2 22:13,21 23:4 56:15 57:11  <b>agree</b> 12:1,2,9 53:16  <b>agreed</b> 26:7 27:7  <b>agreement</b> 21:24 28:19  <b>agreements</b> 28:25 55:4  <b>Agriculture</b> 5:10  <b>AL</b> 1:3,8  <b>allegations</b> 52:1  <b>allege</b> 29:13 33:14  <b>alleged</b> 7:11,20 43:4  <b>alleging</b> 29:17  <b>allow</b> 17:22  <b>alteration</b> 46:19  <b>alternative</b> 5:24 27:13  <b>alters</b> 30:25 37:9  <b>America</b> 56:16,19</p>	<p><b>analogous</b> 53:1,3  <b>analogy</b> 43:10 52:13  <b>analysis</b> 36:20  <b>announces</b> 11:2  <b>answer</b> 24:10,20 52:14  <b>anticipate</b> 34:2  <b>anticipation</b> 36:19  <b>anticipatorily</b> 39:10  <b>anticipatory</b> 8:13,17,18 9:1,9,18,25 10:9 11:3,7,10 12:3,5 16:14 19:2,11 19:25 20:14,15,18,23 22:13,15,16,25 23:2 30:21 32:15 33:8 34:1 36:1,21 38:4 40:2,5,14 42:8,9,17 46:12 47:24 48:2 52:20 53:11,13,15  <b>anymore</b> 37:16  <b>anyway</b> 45:15  <b>apparently</b> 20:13 51:11  <b>Appeals</b> 56:17  <b>APPEARANCES</b> 1:18  <b>appendix</b> 21:22  <b>application</b> 3:24 51:24  <b>applied</b> 21:14 41:13  <b>applies</b> 3:21 5:15 19:18 41:2  <b>apply</b> 3:20 5:13 21:15 38:23,24 44:19 44:21,25 53:20  <b>April</b> 1:14  <b>area</b> 49:11  <b>areas</b> 55:3  <b>argue</b> 45:22  <b>arguing</b> 12:7,24 15:20 19:8 20:14 31:10  <b>argument</b> 1:16 2:2,7 3:3,7 5:16 9:5 10:20 29:7 32:20 36:15 38:22 40:4 43:9,12 46:11 47:5,21 48:3 56:3  <b>arguments</b> 54:20  <b>arisen</b> 26:11  <b>arrived</b> 18:22  <b>arrives</b> 4:3  <b>ascertained</b> 49:15 54:15  <b>asked</b> 24:19  <b>asking</b> 9:12,21 13:3 25:12 32:22  <b>asserting</b> 6:5  <b>Assistant</b> 1:21  <b>Associates</b> 1:3 3:4  <b>assume</b> 13:19 17:22 27:19 30:2 38:13 47:4  <b>assuming</b> 4:24 7:6 8:22,22 16:9  <b>assumption</b> 29:24 49:24  <b>assure</b> 50:22  <b>attached</b> 50:11  <b>attempts</b> 16:8  <b>authority</b> 40:1 44:20 45:3  <b>authorizations</b> 8:10  <b>automatic</b> 8:16  <b>automatically</b> 8:6  <b>a.m</b> 1:17 3:2</p>	<p><b>B</b> 44:19  <b>back</b> 15:6 27:23 28:2 35:20 38:21 42:6 46:14  <b>background</b> 37:1,3 45:4,8  <b>backwards</b> 43:23  <b>bank</b> 17:22 56:16,19  <b>bargain</b> 57:20  <b>barred</b> 7:15 29:11  <b>based</b> 23:24  <b>Basically</b> 7:14  <b>basis</b> 7:8 55:2  <b>beach</b> 52:15  <b>began</b> 4:4 15:16  <b>beginning</b> 45:18  <b>behalf</b> 1:19,23 2:4,6,9 3:8 25:17 29:8 56:4  <b>believe</b> 5:6 15:23 32:22 49:3  <b>believed</b> 54:2  <b>benefit</b> 25:4 28:14 33:1 57:20,22  <b>bet</b> 33:23 34:23  <b>bets</b> 43:16  <b>better</b> 32:20 45:13 50:8  <b>beyond</b> 19:16  <b>bingo</b> 39:10  <b>bit</b> 32:5  <b>blue</b> 19:24  <b>board</b> 56:24,25 57:2  <b>boil</b> 47:6  <b>borrow</b> 28:3  <b>borrower</b> 21:25 28:18 50:1  <b>bound</b> 3:16  <b>Bowen</b> 21:12 45:5  <b>breach</b> 3:25 4:1,12 5:24 6:6 7:10 8:5,13 8:16,17,19,22 9:1,3,8,9,24,25 10:9 11:4,7,11 12:3,5 14:5,10,13,21 15:24 16:4 17:12,13 18:20 19:2,11 20:4,11 20:15 21:19 22:13,15,16,21,25 23:2 23:11,13,17 29:22 31:9,17,20,21 32:15 34:1 35:15 36:1,2,4,5,19,21,22 38:4,25 39:11 40:2,5,6,7,13,14 42:9,9 42:18 43:1 46:21 47:10,13,15,17,19 47:25,25 48:2 49:9,12,13,19,21,24 50:11 51:21,23 52:9,20,21,23 53:11 53:13,15 54:18,19 56:10,14 57:3,4,10 57:11,23  <b>breached</b> 21:2 29:19 30:18 44:13 45:1 49:18  <b>break</b> 23:3 31:2  <b>breaker</b> 47:7,24 48:8  <b>Breyer's</b> 47:5  <b>brief</b> 11:9 19:15,24  <b>briefs</b> 56:11  <b>bring</b> 32:16 40:19 45:13  <b>bringing</b> 53:6  <b>broken</b> 34:4 39:10  <b>brought</b> 12:5 19:11 45:17 48:3  <b>building</b> 18:24  <b>buildings</b> 24:3,4,6 26:5</p>
	B	

<b>built</b> 57:18 <b>burden</b> 47:9,13 48:23 <b>buy</b> 11:2,3 55:3 <b>bylaw</b> 57:2 <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <b>C</b> 2:1 3:1 <b>calculate</b> 34:5 <b>call</b> 20:14 <b>cares</b> 45:15 <b>carry</b> 30:19 <b>carrying</b> 23:7 52:17,19 <b>case</b> 4:14 7:6,17,19,20 11:14,16,17 16:5,13,20 19:14,18,22 25:14 29:24 30:3 40:3 45:5 46:14 47:3 51:17 53:4 53:8,8,21,23 54:5 56:8 58:4,5 <b>cases</b> 3:13 21:14,17 28:8 41:13 56:12 56:16,18,19 <b>cash</b> 17:22 <b>cause</b> 4:23 35:24 46:7 52:7 <b>caused</b> 16:10 47:12 48:6 <b>causes</b> 35:25 42:8 <b>causing</b> 47:8 <b>central</b> 57:8 <b>CEO</b> 56:25 57:5 <b>certain</b> 6:11 14:5 18:2 26:8,9 27:25 50:23 55:3 <b>certainly</b> 12:10,13 49:6 <b>certainty</b> 49:20 <b>change</b> 14:25 15:2,5 30:13 37:17,21 38:19 39:5,7 46:17 47:1,4 50:15 55:13 57:2 <b>changed</b> 14:17 46:21 <b>changes</b> 37:15,24 <b>changing</b> 37:23 <b>charge</b> 28:16 <b>charging</b> 27:25 <b>cheaper</b> 48:23 <b>Chief</b> 3:3,9 15:24 29:3,9 35:23 56:5 58:2 <b>choice</b> 20:25 21:5,6 <b>Circuit</b> 6:25 7:7 8:12 56:17 <b>circumstance</b> 30:20 39:21 <b>circumstances</b> 50:12 51:3 <b>cite</b> 19:15 56:7 <b>citizen</b> 14:3 <b>citizens</b> 3:22 57:14 <b>civil</b> 3:15 <b>claim</b> 4:1,10 5:1,17,18,20,22,24,25 6:18 7:10,15 12:3,6,14 17:4,5,7 19:11 22:5,9,10,11 23:1,17,20,23,24 24:8,9 24:20 25:6,9,25 26:1 27:20,21 47:25 47:25 48:1,2,7 <b>claimed</b> 41:14 <b>claims</b> 7:21 8:1,4 16:24 24:16 29:11,21 32:16,17 33:1 34:19 56:15 57:24 58:1 <b>clause</b> 5:12 <b>clear</b> 6:23 8:8 9:22 13:14 18:20 57:7	<b>clearly</b> 26:22 <b>client</b> 12:25 <b>clients</b> 9:15,24 28:3,19 45:11 <b>close</b> 46:2,9 <b>closely</b> 8:7 <b>closing</b> 57:13 <b>come</b> 18:7,19 30:17 34:9,25 48:5 <b>comes</b> 5:14 10:13 12:18 14:22 21:20 34:6 57:6 <b>commands</b> 8:9 <b>commence</b> 16:11 <b>commenced</b> 7:25 20:10 <b>commended</b> 49:11 <b>commercial</b> 55:2 <b>committed</b> 11:2 <b>comparing</b> 33:22 <b>compelled</b> 15:18 27:24 <b>compensation</b> 3:16,19 4:5,6,12,16 <b>complaining</b> 51:1,2,8 <b>complaint</b> 51:5 <b>completely</b> 25:14 <b>concede</b> 14:16 29:23 35:25 <b>concerned</b> 41:25 52:7 <b>condition</b> 14:18 45:14 <b>conditional</b> 22:12 <b>conditioned</b> 14:9 15:13 23:5 43:21 <b>conditioning</b> 14:19 21:18 22:7 <b>conditions</b> 12:15 18:14 20:25 41:10 50:12,21 <b>confess</b> 25:23 <b>conflating</b> 42:9 <b>confronted</b> 54:16 <b>confused</b> 9:4 19:1 25:24 <b>confuses</b> 22:10 <b>confusing</b> 19:7 22:23 <b>Congress</b> 7:11 42:15 43:15,22 44:1,7,8 44:13 46:2,3,5,8,13,14,16,22,22,24 48:11,13,14 50:11 56:22 <b>congressional</b> 56:8,13 <b>Congress's</b> 43:17,20 <b>Conoco</b> 56:17 <b>consequence</b> 45:9 <b>consequences</b> 46:4 <b>consideration</b> 50:20 <b>considerations</b> 3:12 45:22 57:21 <b>consistent</b> 35:23 <b>constitute</b> 6:23 57:3 <b>constituted</b> 8:16 19:24 <b>constitutes</b> 56:9 <b>Constitution</b> 4:7,24 <b>construction</b> 21:16 28:7 41:1 <b>construe</b> 21:9 41:8 <b>construed</b> 40:25 41:2,12 <b>context</b> 38:25 <b>continue</b> 13:21 27:25 41:6 <b>continues</b> 3:20 <b>continuing</b> 3:16,17,24 <b>contract</b> 4:1,9,12,14 5:8,18,18,19,20	5:25 6:1,5,7,12,18,22,23 7:6,7,10,15 8:5 9:24 10:3,25 11:13 12:17 14:5 16:4,19,22 19:18,20 20:24,24 21:1 22:1,10 23:3,17,23,25 24:9,19 25:5,9 25:25 26:11,17 27:10,12,19 28:10 29:25 30:6,9,15,19 31:2,9 32:13 33:25 34:4,8,11 36:16,18,23 37:2,3 37:18,20,25 38:3,7,17,23 39:10,11,19 39:21 40:10 42:7 44:13 47:2,7,10,14 47:24 48:8 49:1,6,8,11,12,16,18,21 52:9,15,17,18 56:10 57:1,24 <b>contracting</b> 37:5 <b>contractors</b> 34:14 <b>contracts</b> 4:8 5:4 27:14 29:14,16,21 30:11 32:10 39:8 43:13,13,24 45:10 48:12,15 49:9 <b>contractual</b> 4:9 7:12 32:23 49:25 <b>contract's</b> 25:6 <b>contrary</b> 43:17 44:9,14 <b>control</b> 12:24 <b>convert</b> 13:16 37:18 <b>convince</b> 35:9 <b>Corbin</b> 19:14 <b>corporation</b> 56:25 <b>correct</b> 4:24 6:2 9:10 12:9,19 14:12 15:1 22:18 <b>costs</b> 4:20 45:25 48:12 <b>couple</b> 46:15 <b>course</b> 50:3 <b>court</b> 1:1,16 3:10,11,20 7:3,14 16:24 21:12 29:10 32:16 33:7 34:10 41:9,9 43:6 56:6,15,17 <b>courts</b> 5:25 6:17 23:22 27:13 54:16 <b>covenants</b> 7:13,24 <b>cover</b> 4:20 18:19 <b>created</b> 6:15 <b>curious</b> 32:5 <b>current</b> 4:21 <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <b>D</b> 1:21 2:5 3:1 29:7 <b>damage</b> 16:9 18:19 47:8,11 48:5 49:10 <b>damages</b> 10:22 11:11 16:3,16,19,25 18:1 23:11 24:23 31:10 33:11,13 34:2 34:5,9,15 37:19,25 38:12,15 48:16 49:14,21 54:8,15,17,17 55:10,10,19 55:24 <b>date</b> 4:1 8:1,4 12:22,23 17:1 20:10,11 49:19 <b>dates</b> 24:23 <b>day</b> 13:20 <b>deal</b> 13:10,11 50:9 55:2 <b>dealing</b> 21:4 55:6 <b>dealt</b> 56:20 <b>decide</b> 32:11 48:11 <b>decided</b> 41:4 <b>decides</b> 26:25 <b>deciding</b> 30:3,4 41:2
---	--	---

<b>declaratory</b> 52:3,8 <b>decline</b> 50:6 <b>deemed</b> 18:21 21:15 <b>defendant</b> 4:2,3 15:1 35:10 <b>definite</b> 23:11 <b>deliver</b> 10:25 11:5 <b>delivery</b> 11:20 <b>demand</b> 49:25 <b>denial</b> 23:10 25:2 <b>denied</b> 14:15 16:1 17:2 20:12 <b>denies</b> 57:11 <b>denying</b> 7:4 <b>Department</b> 1:22 5:9 <b>departments</b> 48:14 <b>despite</b> 21:16 <b>determination</b> 41:16 <b>determine</b> 16:16 52:4 <b>develop</b> 28:12 32:15 50:5 <b>developed</b> 33:25 <b>devolved</b> 28:14 <b>dictated</b> 8:4 <b>difference</b> 18:7 33:19,20 34:10 36:25 <b>differences</b> 24:15,17,18 <b>different</b> 24:23,24 31:17 32:1 36:9 44:24 54:1,4,5 56:24 <b>differently</b> 56:9 <b>difficult</b> 16:15,17 34:2 <b>difficulty</b> 5:16 <b>diminution</b> 26:24 <b>direct</b> 56:25 <b>directed</b> 8:10 <b>direction</b> 22:12 23:4 <b>directive</b> 22:2 57:2 <b>directives</b> 8:10 21:22 <b>directly</b> 22:2 <b>directors</b> 56:24,25 57:2 <b>directs</b> 56:22 <b>disable</b> 52:18 <b>disabling</b> 52:17 <b>disagree</b> 40:12 <b>disappear</b> 36:22 <b>discharge</b> 42:18 <b>discourages</b> 55:6,8 <b>dismiss</b> 25:19 <b>dismissal</b> 7:8 <b>displace</b> 37:12 <b>dispute</b> 49:1,3 <b>distinction</b> 36:21 37:13 56:12 <b>doctrine</b> 6:20 9:18 12:21 16:18 49:10 <b>doing</b> 34:7 <b>dollars</b> 30:16 <b>doubt</b> 57:22 <b>due</b> 14:22 21:20 35:5 36:11,13,13 57:6 <b>D.C</b> 1:13,22	<b>early</b> 47:11 48:5 50:2,8 <b>easy</b> 33:22,23 <b>Eckland</b> 1:19 2:3,8 3:6,7,9 4:4,11,15 5:1,5,9,14,23 6:8,14,19,22 7:3,16,18 8:14,20 9:2,10,13,17 10:1,7,11,15,23 11:8,19 12:10,19,21 13:6,8,11,13,18 13:22,24 14:7,12,18 15:1,8,11,13,23 16:5,17,23 17:8,16,19,24 18:10,18 19:4,9,14,22 20:2,7,9,17,20 21:8 22:18 23:6,9,15,18,21 24:4,15,22 25:8,17,22 26:3,7,17,20 27:6,11,18 27:22 28:5,7,13,21,23 29:1,5 56:2,3,5 58:3 <b>educated</b> 35:3 <b>effect</b> 45:2 46:18 <b>effectively</b> 28:11 <b>efforts</b> 21:24 22:2 <b>either</b> 8:20 20:25 24:21 34:4 <b>element</b> 12:2,4,8 <b>elements</b> 12:7 <b>ELIHPA</b> 9:16 21:22 27:24 29:13,19,19 33:15 51:10 <b>eliminate</b> 23:4 <b>eliminated</b> 14:8 <b>elimination</b> 22:7 <b>employ</b> 49:17 <b>enact</b> 46:6,8 <b>enacted</b> 19:3 <b>enactment</b> 8:6 9:23 15:17 16:10 20:8 29:13 46:4 <b>enacts</b> 7:11 46:3 <b>encourage</b> 55:1 <b>encumbered</b> 33:21 <b>enforceable</b> 5:19 6:1,23 <b>engage</b> 55:4 <b>enter</b> 21:24 28:22 52:18 <b>entered</b> 24:5 26:4 32:9 48:15 <b>enticed</b> 57:16 <b>entirely</b> 23:4 47:14 <b>entry</b> 27:2 28:9 <b>envision</b> 11:6 <b>equitable</b> 21:13 <b>ESQ</b> 1:19,21 2:3,5,8 <b>essay</b> 25:12 <b>Essentially</b> 10:23 <b>established</b> 19:1 <b>estate</b> 18:5 32:13 45:9,11 50:4 <b>ET</b> 1:3,8 <b>event</b> 23:21 <b>everybody</b> 34:8 <b>exacerbation</b> 51:23 <b>exactly</b> 37:22 38:3 <b>example</b> 11:21 17:11 21:23 24:24 <b>excuse</b> 42:23 <b>excused</b> 53:19 <b>execute</b> 28:19 <b>exercise</b> 12:18 <b>existed</b> 13:24	<b>existence</b> 7:5 23:25 <b>exists</b> 18:11 37:18 <b>expect</b> 6:13 <b>expectancy</b> 34:22 <b>expectation</b> 6:16 13:15 26:12,22 <b>expected</b> 6:9 <b>experience</b> 26:24 <b>experienced</b> 17:12 <b>expert</b> 18:2,7 <b>Experts</b> 18:17 <b>expire</b> 7:2 <b>explain</b> 32:19 <b>explaining</b> 33:7 <b>extend</b> 21:25 <b>extent</b> 12:5
<b>F</b>		
		<b>fact</b> 5:25 15:3,9 20:5 24:23 36:20 37:7 38:10,14 46:17 51:1 54:15 <b>failed</b> 7:22 18:22 <b>fails</b> 4:3 57:5 <b>fair</b> 3:16,19 4:5,6 <b>fairness</b> 3:12 57:21 <b>far</b> 12:2 24:10 27:13 46:23 56:17 <b>Farmers</b> 5:10 7:22 28:10 <b>fault</b> 12:8 <b>favor</b> 23:22 45:23 56:21 <b>Federal</b> 5:7 6:25 7:7 8:12 16:24 28:3 48:12 56:15,17 <b>fettering</b> 14:19 <b>Fextension</b> 24:1 <b>figure</b> 19:19 <b>file</b> 15:18 57:25 <b>filed</b> 9:15,24 19:2 29:12 <b>find</b> 6:17 27:20 34:10 53:10 <b>fine</b> 20:21 25:11 31:23 <b>first</b> 3:25 24:8 29:12 34:15 40:17,18,18 42:4 46:9 48:2 <b>follow</b> 36:20 57:15 <b>following</b> 43:14 <b>footnote</b> 9:20 11:8 19:15,17,20 <b>forcing</b> 34:8 <b>forget</b> 25:25 <b>form</b> 28:15 32:1 <b>Forrest</b> 56:18 <b>forth</b> 46:14 <b>found</b> 54:18 <b>Franconia</b> 1:3 3:4 <b>frankly</b> 18:11 27:21 <b>fraudulent</b> 11:22 <b>freedom</b> 7:12 <b>fulfilled</b> 21:1 <b>full</b> 24:6 25:4 <b>fully</b> 49:14 54:15 <b>fundamental</b> 3:12 57:20 <b>funds</b> 10:4 11:21,23 <b>future</b> 43:18 44:1 50:7

<p style="text-align: center;"><b>G</b></p> <p><b>G</b> 3:1  <b>general</b> 1:22 20:2 47:17 49:6,8,11  <b>getting</b> 18:25 25:24  <b>Ginsburg</b> 9:12  <b>give</b> 16:2 32:24 35:2 52:15 57:19  <b>given</b> 4:18 18:13,14 40:23  <b>gives</b> 35:7,8  <b>go</b> 11:15 24:10,20 27:22 28:2,15 35:20  50:8 55:11,12  <b>God</b> 45:13  <b>goes</b> 46:14 50:4  <b>going</b> 11:2 15:6 16:16 22:6 24:11 33:10  35:22 37:10 38:22,24,25 39:4 41:7  45:15 46:24,25 48:20 49:3 50:9 55:11  55:12  <b>gotten</b> 25:4 55:23  <b>Government</b> 3:21,24 6:15,24 7:13 8:3  12:4 13:8 14:19 15:4,5 21:2,16 24:1  26:10 28:3 29:17 30:13 31:1,2,3,4,7,8  31:15 32:6,10,14,24 33:9 34:7,9,14  34:17 36:5 37:4,8,11 38:9,15,16  39:22 40:7,10 41:3,5,5,7,19,20,23  42:2 43:3,4,13,16,24,25 44:7,17  45:23 47:4,7,11,23 48:1,4,6,10,15,17  48:19,22 49:2 50:5,22 52:10 53:21,24  54:2,3,23,25 55:6 56:7 57:16,19  <b>Government's</b> 4:7,23 12:8 15:15 20:13  33:3 40:11 41:11 47:9,13,22 52:1  54:21  <b>grain</b> 30:16  <b>Grass</b> 1:8 3:5  <b>great</b> 43:10  <b>GSA</b> 18:23  <b>guaranteed</b> 48:16  <b>guess</b> 20:15 25:16 35:1,3,3,4</p>	<p>16:9 19:5 20:3,7,20 21:8 22:18 23:9  23:15 24:16,22 26:18 28:7,13,21 29:2  31:6,14 35:6 36:13,24 37:14 38:5  50:25 52:21 54:14 55:9  <b>Honors</b> 3:13 57:13  <b>hoping</b> 34:10  <b>house</b> 3:17 52:15  <b>housing</b> 3:17 4:20 16:6 50:23  <b>hurry</b> 47:10  <b>hypo</b> 18:23  <b>hypothetical</b> 42:13</p>	<p><b>invoked</b> 57:24  <b>involve</b> 3:12,14  <b>involved</b> 21:17 24:25  <b>involves</b> 12:3  <b>involving</b> 41:13  <b>irrespective</b> 43:20 44:1,7  <b>Irwin</b> 21:12  <b>issue</b> 3:25 21:14 25:15 35:19 41:6  43:25 44:3,4,13,23,23  <b>i.e</b> 15:19</p>
<p style="text-align: center;"><b>H</b></p> <p><b>H</b> 1:19 2:3,8 3:7 56:3  <b>ha</b> 31:23,24  <b>hand</b> 11:4 36:22  <b>happen</b> 25:5  <b>happened</b> 6:10  <b>happy</b> 54:12  <b>hard</b> 49:23  <b>harmed</b> 47:9  <b>ha-ha</b> 30:17  <b>hear</b> 3:3 20:22 29:6  <b>held</b> 3:11 6:1 7:14 21:12 27:13 41:9  <b>help</b> 32:8  <b>higher</b> 50:9  <b>hinges</b> 53:23  <b>hold</b> 54:18  <b>holding</b> 57:17  <b>Home</b> 5:10 7:22 28:10  <b>honest</b> 17:16  <b>honor</b> 4:15 5:5,10 7:3,16 8:14,20 10:23  11:9,19 12:15,19 13:6,25 14:7,12</p>	<p style="text-align: center;"><b>I</b></p> <p><b>immediate</b> 8:8 10:14 36:19 50:11 52:19  52:21,22,23 56:10 57:10  <b>immediately</b> 15:16 20:1,25 32:16 33:8  34:4  <b>immunity</b> 21:11 40:24 41:4,11  <b>impact</b> 8:9 32:13  <b>impairing</b> 4:7 5:4  <b>impairment</b> 5:12  <b>implicit</b> 36:17 39:8  <b>important</b> 35:18 46:1,2,4 49:8  <b>impose</b> 29:17 30:14 34:13 36:6 52:2  55:23  <b>imposed</b> 7:24 29:20 42:16 44:25 50:21  51:25,25  <b>impossible</b> 53:19  <b>improvident</b> 48:12  <b>inability</b> 27:22  <b>incentive</b> 50:10,14  <b>incentives</b> 51:7  <b>include</b> 30:13  <b>included</b> 4:16 30:6,8  <b>income</b> 3:18 4:17,19 26:9  <b>indemnify</b> 42:25  <b>independent</b> 23:23  <b>industry</b> 32:14  <b>information</b> 48:17  <b>infringed</b> 32:24  <b>initially</b> 15:13 28:8  <b>injured</b> 32:23 55:18  <b>injury</b> 38:19  <b>innocent</b> 34:3 35:2,7,8,12  <b>inquiry</b> 35:23  <b>instance</b> 41:13  <b>intend</b> 14:3  <b>intent</b> 17:17  <b>intention</b> 47:1  <b>interest</b> 6:4,4,5 18:13 28:4,11,14 34:18  45:24,24 48:10 50:5,6,9 54:21 55:11  55:12  <b>interpret</b> 21:3,4  <b>interrupt</b> 13:17  <b>invent</b> 39:7,17  <b>invented</b> 39:3,6  <b>investment-backed</b> 6:15 26:22  <b>investors</b> 45:12</p>	<p style="text-align: center;"><b>J</b></p> <p><b>JEFF</b> 1:19 2:3,8 3:7 56:3  <b>judge</b> 6:19 7:19 9:2 10:11  <b>judgment</b> 7:4 16:25 43:6  <b>Justice</b> 1:22 3:3,9 4:11 5:1,23 6:8 9:12  9:17 12:10 15:8,24 17:21 18:10 19:9  22:24 23:6 25:8 29:3,9 47:5 56:5 58:2  <b>Justice's</b> 35:23</p> <p style="text-align: center;"><b>K</b></p> <p><b>Kennedy</b> 18:10  <b>kind</b> 19:3,18 34:13 38:6 44:13 48:7  54:5 55:5  <b>know</b> 13:14 18:11,12,12 19:7 24:18  27:12 31:24 34:12,22,25 35:3 39:16  47:8,11 48:19 49:2,7,9,20 50:3 52:11  52:12,12,14 54:8,24 57:15  <b>knows</b> 16:20,20</p> <p style="text-align: center;"><b>L</b></p> <p><b>land</b> 24:4,6 26:4  <b>Laughter</b> 24:12 25:21  <b>law</b> 3:21,23 8:5 11:6 13:4 14:4,5,11  18:20 19:15,18,20,24 32:10,12 33:25  35:6,7 37:2,4 38:12 40:21 42:7 43:11  43:15,17,20,22 44:14 45:2 49:6,8,11  57:15,15,23  <b>laws</b> 39:4,7  <b>lawsuit</b> 45:13  <b>lawsuits</b> 33:3,6  <b>lawyer</b> 45:13  <b>lawyers</b> 32:15  <b>lease</b> 52:15  <b>leasing</b> 18:23  <b>leave</b> 26:25  <b>leaves</b> 34:3  <b>legal</b> 29:15,18,20 30:14,25 36:6 37:15  37:17,21,23 45:19 46:19  <b>legislate</b> 39:23  <b>legislation</b> 8:7,8 30:12,22,25 31:5,12  31:18,21,23,24 32:2 36:25 37:1,8,14  38:20 39:1,21 42:22,22,24 43:1,2  46:12,17,18 47:22 49:5 50:19 52:6  53:21  <b>legislative</b> 45:25 48:7  <b>lender</b> 28:9  <b>length</b> 49:21</p>

<p><b>let's</b> 9:22 17:20,21 38:13 42:12,13 52:13</p> <p><b>level</b> 26:8 27:25</p> <p><b>liability</b> 41:25 52:4,7</p> <p><b>life</b> 33:24 34:22 36:14 37:10 49:18</p> <p><b>light</b> 19:20</p> <p><b>likelihood</b> 55:11</p> <p><b>limitations</b> 3:11 7:1,2,8,15,19 9:6 15:16 16:11 18:21 21:17 30:5 33:1 34:17 35:13 40:3,19 41:10,15,22 42:1 42:3 47:14,18 49:15,19 55:23 56:20</p> <p><b>limits</b> 49:13</p> <p><b>little</b> 25:12,24 28:2 32:5 48:23</p> <p><b>loan</b> 18:4 28:7,11,14,18,19 33:14,16,17 33:18,20,21 36:14 50:5,16,16 55:4</p> <p><b>loans</b> 7:13 55:14</p> <p><b>long</b> 31:12</p> <p><b>longer</b> 26:25 33:16 37:24 39:13 50:17</p> <p><b>look</b> 8:7 21:21 41:6 49:23</p> <p><b>lose</b> 32:17</p> <p><b>loss</b> 41:17</p> <p><b>lost</b> 4:17,18 43:5 55:24</p> <p><b>lot</b> 23:8 34:23</p> <p><b>low</b> 3:17 28:4,11,14,15,17 50:5,6</p> <p><b>lower</b> 5:25 6:17 7:3 23:21 43:6</p> <p><b>low-income</b> 50:23</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>magic</b> 46:12</p> <p><b>maintain</b> 8:1 14:8,10 16:6 22:19,22 56:23</p> <p><b>maintained</b> 8:14</p> <p><b>maintaining</b> 4:20</p> <p><b>maintains</b> 8:3</p> <p><b>major</b> 46:10</p> <p><b>making</b> 55:5</p> <p><b>manager</b> 57:1,5</p> <p><b>manner</b> 21:10 27:1</p> <p><b>market</b> 13:18 16:7 18:5,14 50:24</p> <p><b>markets</b> 13:16</p> <p><b>matter</b> 1:15 20:14 25:13 58:6</p> <p><b>MATTHEW</b> 1:21 2:5 29:7</p> <p><b>mean</b> 4:15 18:16,23 21:4 22:4 25:18 27:9,12 31:19,20 33:24 34:21,22 37:23 39:15 40:3,18 52:25 54:6</p> <p><b>means</b> 10:19 31:20 43:25</p> <p><b>meant</b> 44:7,8</p> <p><b>measurable</b> 54:17 55:10,14</p> <p><b>measure</b> 33:22,23</p> <p><b>measured</b> 34:16,21,22</p> <p><b>mentioned</b> 17:21</p> <p><b>merchantability</b> 49:22</p> <p><b>merely</b> 4:17 12:22 14:13 56:13 57:3</p> <p><b>merits</b> 43:7 44:10,11,12</p> <p><b>million</b> 30:16</p> <p><b>millions</b> 25:13 32:9</p> <p><b>mind</b> 14:25 15:2,5 47:1,5</p> <p><b>Minneapolis</b> 1:19</p>	<p><b>Minnesota</b> 1:19</p> <p><b>minute</b> 25:25</p> <p><b>minutes</b> 56:2</p> <p><b>Mobil</b> 43:14</p> <p><b>moment</b> 12:18 18:8 48:2 50:15</p> <p><b>Monday</b> 1:14</p> <p><b>monetary</b> 16:25 52:7</p> <p><b>money</b> 10:21 17:9 28:3 34:23</p> <p><b>monkey</b> 36:18</p> <p><b>months</b> 25:1</p> <p><b>moral</b> 48:7</p> <p><b>morning</b> 3:14</p> <p><b>mortgage</b> 7:13 28:8,22</p> <p><b>mortgages</b> 29:14</p> <p><b>motion</b> 7:4 43:6</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>N</b> 2:1,1 3:1</p> <p><b>narrow</b> 21:10 41:1</p> <p><b>narrowly</b> 40:25 41:12</p> <p><b>nature</b> 35:19</p> <p><b>necessarily</b> 9:17</p> <p><b>need</b> 11:23 21:9 22:14,15 39:17,18 53:16 57:25</p> <p><b>needs</b> 22:1 41:19</p> <p><b>negotiated</b> 13:8</p> <p><b>neither</b> 42:17</p> <p><b>nervous</b> 45:12</p> <p><b>never</b> 11:16,17 13:3 27:19 30:17,18 45:14</p> <p><b>new</b> 21:13 43:20 50:11,21</p> <p><b>normally</b> 50:1</p> <p><b>note</b> 28:20 29:2</p> <p><b>notice</b> 32:25</p> <p><b>notion</b> 8:25 41:2,2</p> <p><b>notwithstanding</b> 42:21,25 43:18</p> <p><b>number</b> 33:6 50:23</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>O</b> 2:1 3:1</p> <p><b>objection</b> 13:23</p> <p><b>obligation</b> 4:8 5:4 10:13 11:5,12,20,24 57:14</p> <p><b>obtaining</b> 3:19</p> <p><b>obviously</b> 49:10</p> <p><b>occur</b> 14:13,22 23:11</p> <p><b>occurred</b> 21:11 27:5,6</p> <p><b>occurring</b> 31:21 56:14</p> <p><b>occurs</b> 18:9 21:19 22:21 57:11</p> <p><b>oh</b> 5:5 23:15 41:7</p> <p><b>okay</b> 4:13 12:20 19:16 31:13 32:4,21 44:16,21 45:21 46:9</p> <p><b>once</b> 26:25 38:8 39:11 41:4</p> <p><b>opinions</b> 7:4</p> <p><b>opportunity</b> 35:9</p> <p><b>opposed</b> 37:19</p> <p><b>opposing</b> 7:2</p> <p><b>opt</b> 4:18 13:16 26:13</p>	<p><b>opting</b> 57:8</p> <p><b>option</b> 8:21 9:19 12:22 13:9 18:11 19:25 29:14,18 33:15,16,18,19,25 34:1 35:2,7,8,11,14 39:13 50:17 52:15 57:17</p> <p><b>options</b> 18:16</p> <p><b>oral</b> 1:15 2:2 3:7 29:7</p> <p><b>order</b> 22:25 32:16 45:11</p> <p><b>ordinarily</b> 53:12</p> <p><b>ordinary</b> 3:20,23 8:5 19:17,19 42:11 46:24 57:22</p> <p><b>original</b> 38:21</p> <p><b>ought</b> 48:4 54:7</p> <p><b>outer</b> 24:11</p> <p><b>outweighs</b> 33:2</p> <p><b>owned</b> 26:4,5</p> <p><b>owner</b> 22:3,3 26:25 50:4</p> <p><b>owners</b> 8:9 13:13 26:3,12 28:16</p> <p><b>O'Connor</b> 9:17 19:9 22:24</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>P</b> 3:1</p> <p><b>page</b> 2:2 19:23 21:22</p> <p><b>paid</b> 9:7</p> <p><b>part</b> 6:16 18:3 20:22</p> <p><b>participate</b> 22:3 27:7</p> <p><b>particular</b> 6:20</p> <p><b>particularly</b> 45:9 46:1</p> <p><b>parties</b> 40:22 43:15</p> <p><b>party</b> 11:1,1 14:24 16:15 30:22 34:3 35:2,7,8,9,12 37:5,9 39:2 40:2 41:14 41:20 42:12,14,15,19,23 43:9,11 46:25 49:17,17</p> <p><b>party's</b> 49:18</p> <p><b>pass</b> 15:5 41:21 42:1 43:11 47:22</p> <p><b>passage</b> 8:15 9:15 20:6 27:24 42:21,25</p> <p><b>passed</b> 12:6,17 13:4,20 14:4,6,11 31:22 32:11 33:16 36:4 38:20 42:15,22,24 43:2 52:6</p> <p><b>passes</b> 43:15 44:14</p> <p><b>passing</b> 43:22</p> <p><b>pay</b> 9:1 19:10,12 30:15,17,18 31:24 33:12</p> <p><b>payment</b> 50:3,8</p> <p><b>peculiar</b> 47:22 55:7</p> <p><b>penalized</b> 35:12</p> <p><b>people</b> 11:11 25:13 32:9,22 45:9,12 47:9 49:8 54:8 55:2</p> <p><b>perfectly</b> 38:16</p> <p><b>perform</b> 4:3 8:23 10:12,13,17 11:13,18 14:3 17:10,17,17 19:4 37:16 53:20 57:1,5</p> <p><b>performance</b> 4:2 10:14,18,19 14:22 16:12 18:22,22 21:19 34:6 36:10,12 36:13 37:20,24 38:6,7,8,11,14 57:6</p> <p><b>performed</b> 17:13</p> <p><b>period</b> 6:11 16:11 41:15 46:18 50:7</p> <p><b>permitted</b> 26:21</p>
--	---	--

<p><b>permitting</b> 48:10,11  <b>person</b> 11:14,19 21:5 31:25  <b>petitioner</b> 15:2 16:8  <b>petitioners</b> 1:4,9,20 2:4,9 3:8,13,15,18  4:16,19 5:23 6:9 7:20,25 8:4,21 9:3  10:3 14:7 15:17 16:5,23 17:8 18:11  19:10,25 20:3,9 22:22 23:22 24:2,22  25:17 29:11,13,21 33:9,14 43:4 50:16  50:25 51:5,13,14,16,17,18,25 55:16  56:4,11,21,23 57:7,13,16,18,20,25  <b>Pity</b> 47:6  <b>place</b> 24:24 29:16  <b>plaintiff</b> 40:18  <b>Plaintiffs</b> 56:16,19  <b>please</b> 3:10 9:23 29:10 56:6  <b>pled</b> 5:23 27:13  <b>pockets</b> 28:16  <b>point</b> 12:13 13:15 15:9,12 17:25 18:15  21:18 23:10 26:12 31:16 38:22 39:24  49:7 51:11,20,22 54:8  <b>pointed</b> 9:19  <b>policy</b> 54:20 56:22  <b>poor</b> 47:7  <b>poring</b> 32:10  <b>pose</b> 42:13  <b>posed</b> 50:13  <b>position</b> 9:14,22 32:6,7 36:3 41:21  47:23 56:21  <b>Posse</b> 45:5  <b>possibilities</b> 55:13  <b>possibility</b> 50:20  <b>possible</b> 25:6 48:5 49:9,20  <b>potential</b> 24:16  <b>power</b> 47:22 48:7  <b>practical</b> 25:8 45:8,17,19,22  <b>precisely</b> 3:14 25:25 31:25 34:1 35:2  <b>precluded</b> 38:11  <b>predicated</b> 23:24  <b>prepaid</b> 10:21 42:20 51:4  <b>prepay</b> 7:21 10:2,4,20 12:18 13:16,21  16:8 17:6,9,12,23 18:1,4,6 26:13,15  29:14,18 30:10 33:15,17 42:14,15  50:14,17 51:2,9,10,12,14,15,19 55:17  55:21,25  <b>prepaying</b> 55:22  <b>prepayment</b> 7:13,23 10:4 14:14 15:25  17:1 20:11 23:10 25:1,2 28:24 29:1  29:21 30:7,8,9,12 33:18,19 36:7  42:16 44:25 49:4,25 50:12,20 51:6  54:10 57:9,12  <b>present</b> 25:15 29:22 35:15 40:6,7,13  47:16  <b>presented</b> 7:9  <b>presumably</b> 51:20  <b>presumed</b> 30:11 53:17  <b>presumption</b> 39:20,20 53:20  <b>pretty</b> 52:25 53:3  <b>prevail</b> 25:9</p>	<p><b>prevent</b> 55:22  <b>previous</b> 51:23  <b>price</b> 16:21  <b>primary</b> 22:10  <b>principal</b> 40:5,15  <b>principle</b> 37:3 40:24 45:4,8,19 47:17  <b>principles</b> 3:20,23 8:5 12:17 21:14  37:2 40:23 57:23  <b>prior</b> 9:6,7 12:23 26:3 27:1,6  <b>private</b> 14:3,21,24 20:24 21:5,15 28:8  30:22 31:25 36:23 37:4,9 38:3,17,23  38:25 39:2,8,19 40:22 41:14,20 42:12  42:14,19,23 43:9,10,12 46:25 48:8  55:4  <b>privilege</b> 41:4  <b>probably</b> 32:11  <b>problem</b> 17:18 42:7 43:14 45:19  <b>problems</b> 46:11  <b>procedure</b> 24:25  <b>process</b> 22:3 25:1 51:10  <b>program</b> 3:17 7:24 16:7 24:5 26:4,13  27:1,2,8 55:20 57:1,5,8,16  <b>promise</b> 29:19 30:13 35:19 36:5,12,13  39:1,7,8,18 40:7 42:20 43:3,5,18,19  43:24,25 44:23 46:20 49:1,4 52:1,14  52:16 53:15,17  <b>promised</b> 29:17 30:19 42:14,19,24,25  <b>promises</b> 43:17  <b>promissory</b> 28:20 29:2  <b>prompt</b> 32:25 33:2 34:18,18 45:24,25  54:21  <b>promulgated</b> 45:2  <b>properties</b> 6:10 18:13 26:23 57:18  <b>property</b> 5:17,21 6:4,4 18:2 24:2,3  26:21 27:4,23 28:12 33:21  <b>proposal</b> 55:5  <b>proposed</b> 15:15  <b>proposition</b> 40:1 53:9  <b>protection</b> 41:19  <b>proved</b> 10:22  <b>provide</b> 42:18  <b>provides</b> 42:3  <b>providing</b> 40:17  <b>public</b> 36:23 38:23  <b>purchase</b> 11:21,24  <b>purpose</b> 11:10 54:7  <b>purposes</b> 5:6 7:6,10 18:21 30:2,4 47:14  <b>pursue</b> 25:10  <b>put</b> 47:9  <b>puts</b> 48:23  <b>p.m</b> 58:5</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>question</b> 4:4,13,22 5:3,7,12,16 6:2,12  6:17,21,25 7:9,9,17 8:12,18,25 9:4,11  9:14,21 10:6,8,12,18,25 11:10,23  12:1,12,20,24 13:7,10,12,17,19,23  14:2,10,16,23,24 15:4,9,12,20 16:2</p>	<p>16:13,18 17:3,15,18,20,25 18:16,25  19:6,12,17,23 20:5,8,13,18,21 22:4  22:23 23:7,13,16,19 24:3,8,10,13,18  24:19,21 25:3,4,11,19,23 26:6,14,19  27:3,9,16,16,19 28:2,6,12,18,22,24  29:5,23 30:2,5,6,15,23 31:1,4,8,12,16  31:23 32:4 33:11,23 34:20,21,25  35:11,17,22 36:8,10,15 37:3,7,17  38:2,10,13,21 39:3,6,13,15,24,25  40:8,12,21 41:1,18,24 42:6 43:8 44:3  44:6,12,16 45:7 46:6,8 47:3,6,20  48:13,22 49:6,23 50:19 51:11,16,19  52:3,6,13,22,25 53:3,6,10,13,23 54:1  54:23,25 56:1  <b>quick</b> 52:13  <b>quite</b> 5:5</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>R</b> 3:1  <b>raise</b> 28:1  <b>rate</b> 13:18 18:14 28:11 50:6  <b>rates</b> 28:4 50:6,9 55:11,12  <b>reach</b> 32:1 57:8  <b>read</b> 40:16,17 50:19  <b>ready</b> 10:10,11,14 11:17,17 13:1,1,2  22:24  <b>real</b> 18:5 32:13 45:9,11 50:4 56:24  <b>really</b> 4:19 16:7 17:5,6 22:5,24 23:1,3  32:15 50:3 51:2 54:1,4  <b>reason</b> 9:5 17:21 22:6 33:24,25 35:1,6  52:12 54:4  <b>reasonable</b> 6:15 21:24 22:2 26:22  <b>reasonably</b> 32:24  <b>rebuttal</b> 2:7 29:4 56:3  <b>receive</b> 16:3  <b>receiving</b> 4:19  <b>recognized</b> 45:4,5,6  <b>record</b> 8:24  <b>redeem</b> 12:14  <b>reduced</b> 22:8  <b>reduction</b> 22:12  <b>reflected</b> 33:20 34:17 55:13  <b>refused</b> 7:23 12:15 51:20  <b>regarding</b> 57:23  <b>regime</b> 34:13  <b>regulation</b> 32:11,12 45:10  <b>regulations</b> 27:24 44:19,22,24,24 45:1  <b>regulatory</b> 7:12,24 26:23 27:3  <b>REHNQUIST</b> 3:3 58:2  <b>release</b> 7:23  <b>relevant</b> 45:20  <b>relied</b> 13:13  <b>relief</b> 52:3,8  <b>relieve</b> 11:12  <b>rely</b> 8:12,16,25 10:24  <b>relying</b> 8:18 9:2  <b>remaining</b> 11:12 56:2  <b>remarkably</b> 37:10</p>
---	--	---



<b>remedy</b> 16:24 <b>rendered</b> 16:12 21:20 <b>rent</b> 26:9 27:25 28:1 <b>rents</b> 28:15 <b>repayment</b> 50:2 <b>repeal</b> 46:10,16,23,24 <b>repealed</b> 15:14 <b>repealing</b> 46:6 <b>reply</b> 11:9 <b>representation</b> 27:15 <b>representations</b> 6:14 26:10 <b>repudiate</b> 14:21 39:9,9 47:1 <b>repudiated</b> 13:25 17:14 <b>repudiation</b> 9:18 10:16 14:13,20,23 15:22,24 16:2,14 17:12,23 18:8 19:25 20:15,19,23 21:19 22:19,20 30:21 33:8 35:10 36:1,21 37:21 42:8,17 46:13 56:13 <b>repudiatory</b> 57:3 <b>request</b> 10:5 14:14 16:1 17:1 23:10 25:2 50:2 51:12,19 54:10 57:12 <b>requests</b> 7:23 20:11 51:6,8,14,15 <b>require</b> 12:22 57:21 <b>requirements</b> 8:10 10:2 <b>requisite</b> 10:4 <b>reserve</b> 29:4 <b>resolution</b> 34:19 <b>resolved</b> 49:3 <b>respect</b> 35:5 36:16 <b>Respondent</b> 1:23 2:6 29:8 <b>response</b> 20:22 21:7 47:5 <b>responsible</b> 31:10 <b>rest</b> 29:4 <b>restricted</b> 16:6 33:19 <b>restriction</b> 51:3 <b>restrictions</b> 24:1 26:8 29:15,18,20 30:14 36:6 42:16 44:25 51:24 55:17 55:19,21 <b>rests</b> 5:17 <b>result</b> 32:1 33:4 <b>retract</b> 35:10 <b>retracted</b> 15:14 <b>return</b> 45:21 <b>revealed</b> 51:4 <b>right</b> 4:18 6:13 7:12 9:11 12:14,18 13:19,19,21,22,24 14:5,8,21,25 15:1 15:4,14 16:3 18:3 20:23 21:18 22:7,8 23:5 25:16,19 26:15,17 27:3 28:24 29:1 30:7,8,9,12 34:24 37:19,19,19 37:24,25 38:2,6,13,15,19 43:22 45:7 45:19 48:4 49:25 50:14 51:12 54:9 57:8 <b>rights</b> 4:9 14:17 30:25 32:23 37:15,17 37:21,23 46:19,20 <b>ripe</b> 17:7 <b>ripen</b> 15:25 57:4 <b>Roberts</b> 1:21 2:5 29:6,7,9 30:1,4,8,20 30:24 31:3,6,9,14,19 32:3,21 33:13	34:15,24 35:5,14,18 36:3,9,12,24 37:6,13,22 38:5,11,18,24 39:4,12,14 39:17 40:4,9,15,23 41:9,23 42:2,11 44:2,4,10,15,21 45:21 46:7,10,16 47:3,16 48:9,19,25 49:12 50:13,25 51:13,18,22 52:5,10,21,23 53:2,5,7 53:12,14,25 54:13,24 55:8 56:1 <b>role</b> 37:1 <b>rule</b> 15:15 23:22 37:9,10,12 48:21 49:14 54:5,11 55:7 <b>ruled</b> 56:20 <b>rules</b> 30:14 55:1 <b>run</b> 9:6 13:3 15:16 16:11 35:13 40:20 41:15 47:10,18,19 49:13,15,19 <b>running</b> 40:3,14 <b>runs</b> 54:19	<b>Solicitor</b> 1:21 <b>soon</b> 9:15 49:9 <b>sorry</b> 9:4 <b>sort</b> 11:22 <b>source</b> 5:20 <b>Souter</b> 5:24 6:9 12:10 <b>sovereign</b> 21:11 40:24 41:4,11 <b>so-called</b> 23:20 <b>space</b> 18:24 24:11 <b>speak</b> 37:8 <b>special</b> 44:16 <b>specific</b> 24:19 38:6,7,8,14 <b>speculative</b> 34:9 <b>spelled</b> 28:25 <b>spent</b> 29:4 <b>spilling</b> 23:8 <b>spoken</b> 46:13 <b>start</b> 9:6 35:13 49:13 <b>starting</b> 17:1 <b>starts</b> 40:2,14,20 47:18 <b>stated</b> 26:11 <b>statement</b> 30:22 <b>States</b> 1:1,6,11,16 3:5,5,21,22,24 5:15 <b>statistics</b> 57:9 <b>status</b> 11:13 <b>statute</b> 6:18 7:1,2,8,11,14,19 8:15 9:5 9:23 12:6,16 13:2,20 14:1,17,18 15:6 15:16,17,21 16:10 19:3 20:7,8 21:3,9 21:16,21 30:5 32:24,25 34:17 35:13 35:15 36:4 40:3,14,16,17,19,24 41:21 42:1,3,16,17 45:10 46:3,23 47:18 49:13,15,19 56:8,13,20 57:10 <b>statutes</b> 3:11 41:10 46:25 <b>Stone</b> 56:18 <b>street</b> 37:11 <b>strict</b> 21:16 <b>strictly</b> 21:3,9 41:2,7 <b>strong</b> 45:24 48:10 <b>structures</b> 18:14 <b>study</b> 45:10 <b>subject</b> 18:17 29:15 30:11 33:10 39:21 47:24 48:1 49:5 55:17,19 <b>submission</b> 40:6,16 <b>submit</b> 3:13 38:8 54:10 <b>submitted</b> 14:14 51:6 58:4,6 <b>submitting</b> 10:4 <b>subsequent</b> 30:11 49:5 <b>subsidiary</b> 42:20 <b>succeed</b> 3:19 <b>sue</b> 9:19 11:14 12:13,17,22,23 20:5,25 33:7 34:4 39:11 42:4 45:15 48:20 54:6,9 55:9,18 <b>sued</b> 12:13,16 20:3 41:6 <b>sufficient</b> 4:19 <b>suing</b> 8:21,22 11:15 20:1 33:25 <b>suit</b> 7:25 9:15,24 15:18 19:2 20:10 33:10 40:19 57:25 <b>summary</b> 7:4 43:6
--	--	---

<b>support</b> 22:9 <b>suppose</b> 24:8,9 25:20 42:1 52:10 <b>Supreme</b> 1:1,16 <b>sure</b> 5:20 11:7 17:24 52:12 <b>survey</b> 48:14 <b>suspect</b> 32:19 <b>sustain</b> 23:1	<b>unable</b> 17:11 <b>unconstitutionality</b> 5:21 <b>understand</b> 8:19 23:16 26:6 27:21 32:6 32:9 35:15,18 39:6 43:8 47:21 57:14 <b>understanding</b> 32:20 <b>unfettered</b> 33:15,16 50:17 <b>unilateral</b> 23:25 <b>unique</b> 54:4,6,7,11,11 <b>United</b> 1:1,6,11,16 3:4,5,21,22,24 <b>units</b> 50:23 <b>unmistakability</b> 6:20 <b>use</b> 6:9 11:11 16:22 18:4,4 24:1,6 26:8 26:21 27:4 <b>uses</b> 16:18 <b>usual</b> 47:23 <b>usually</b> 16:13 <b>U.S</b> 57:14	<b>widget</b> 16:20 <b>widgets</b> 11:1,2,3,4,16 16:21 <b>willing</b> 10:11 57:19 <b>win</b> 24:8,9,19 25:5 32:8 <b>Winstar</b> 45:5 <b>Winstar-Related</b> 56:16,19 <b>withdraw</b> 57:17 <b>withdrawn</b> 51:7 <b>words</b> 6:22 13:3 48:22 56:9 <b>work</b> 43:9 <b>worked</b> 32:18 <b>world</b> 19:7 <b>worry</b> 24:13 45:8,14 <b>worth</b> 18:5 33:18 <b>wouldn't</b> 11:15 30:13 32:8 34:23 36:6 41:17 42:24 44:24 46:21 49:20 50:3 50:10 53:16,18,18 55:18 <b>wrap</b> 48:11 54:22 <b>write</b> 24:14 25:12 <b>written</b> 27:15 <b>wrong</b> 11:7 <b>wrongful</b> 35:10
<b>T</b>		
<b>T</b> 2:1,1 <b>take</b> 9:14,22 10:20 18:23 24:11,24 29:24 49:24 53:18 <b>taken</b> 6:7,8 26:2,15,16,18,20 28:9 <b>takes</b> 14:4 <b>takings</b> 5:1,3,24 8:6 22:5,9 23:1,12,20 23:23 25:10 26:1 57:24 <b>talking</b> 10:19 <b>technically</b> 20:16,17 <b>tell</b> 18:7 25:24 26:14 45:11 48:5 <b>tenants</b> 3:18 4:21 26:9 28:15 <b>term</b> 21:25 36:17 57:17 <b>terms</b> 13:9 25:8 36:18 <b>Terrace</b> 1:8 3:5 <b>Thank</b> 56:1,5 58:2 <b>theory</b> 9:25 18:19 33:8 34:8 37:20 <b>thing</b> 22:6 32:4 38:3 45:17 <b>things</b> 30:24 54:22 55:3 <b>think</b> 4:22 16:13 22:5 26:15 33:5 34:12 35:6,20,23 43:8,12 45:19,22 49:23 50:1,10 53:7,10 55:8,16 <b>thought</b> 6:25 9:5,11 19:1,1 31:16 <b>time</b> 4:2 6:11 8:23 9:7,8 10:2 13:3,15,25 14:11,22 16:12 18:3,15,17,21 26:3,13 27:6,11 29:3,15,22 30:10 31:21 32:20 33:15 34:6 36:4 38:20 42:15,21 43:1 45:1 46:21 47:18 52:5 54:18 55:15 57:6,18 <b>timely</b> 8:2 <b>times</b> 41:10 46:15 <b>timing</b> 12:25 <b>tolling</b> 21:13,13 <b>total</b> 12:24 16:4 56:11 <b>tote</b> 48:16 <b>treat</b> 37:4 50:10 <b>treated</b> 56:8 <b>trial</b> 7:5 25:9 <b>tried</b> 7:21 <b>tries</b> 50:22 <b>true</b> 7:16 20:2 38:3 49:16 <b>try</b> 35:20 37:4 <b>trying</b> 27:16,20 45:18 <b>Tucker</b> 21:12 <b>two</b> 3:15 30:24,25 35:25 42:8,10 56:18 <b>twofold</b> 37:14 <b>type</b> 16:9	<b>V</b>	
	<b>v</b> 1:5,10 3:4,5 45:5 <b>Valley</b> 1:8 3:5 <b>valuation</b> 18:17 <b>value</b> 16:7 18:3,3,13 26:24 33:20,21 34:11 55:14 <b>valued</b> 18:5 <b>values</b> 18:8 <b>various</b> 12:15 <b>victims</b> 47:15 48:4,24 <b>view</b> 24:14 33:3 43:20,21 49:8 51:23 <b>violation</b> 4:7,23 52:1 <b>virtue</b> 39:1 <b>voluntarily</b> 24:5,7 26:7 27:7 <b>voluntary</b> 27:2 <b>volunteered</b> 6:10	
<b>W</b>		
	<b>wait</b> 21:1 34:5 47:19 50:1 54:9,24 <b>waive</b> 41:5 <b>waiver</b> 21:10 41:3,11 <b>want</b> 12:18 18:1 23:1 24:9,20 25:15 31:24 34:13 50:8 54:25 55:3 <b>wanted</b> 27:4 <b>wants</b> 37:11 48:11,17 <b>warranty</b> 49:22 <b>Washington</b> 1:13,22 <b>wasn't</b> 13:25 14:2 22:7,17 50:14 <b>water</b> 23:7 <b>way</b> 25:14 27:4,23 53:8 55:18,22 <b>went</b> 6:25 9:1 <b>weren't</b> 23:16 29:12 <b>West</b> 56:17 <b>we'll</b> 3:3 29:6 46:9 47:4 54:11 <b>we're</b> 12:7,25 13:1,1 15:20 17:8 30:1 31:10 32:21,22 41:7 45:18 <b>we've</b> 7:5 26:1 41:4 56:15 <b>whatsoever</b> 8:9 <b>wherewithal</b> 17:6 33:12 <b>wholly</b> 23:23	
<b>X</b>		
	<b>X</b> 1:2,12 21:1	
<b>Y</b>		
	<b>Y</b> 21:1 <b>year</b> 18:11 30:17 52:16 <b>years</b> 3:18 7:25 11:1,5,24,25 13:1,1,2,5 13:9 14:4 15:19 16:21 20:3,6,10 29:12 32:13 34:11 41:25 42:4 52:8,16 54:24 <b>York</b> 21:13	
<b>Z</b>		
	<b>Z</b> 21:1	
<b>0</b>		
	<b>01-455</b> 1:7 3:4	
<b>1</b>		
	<b>10</b> 13:2 32:13 <b>100,000</b> 10:25 11:4,16,16 <b>11:01</b> 1:17 3:2 <b>12:02</b> 58:5 <b>15</b> 1:14 32:13 52:16 <b>1979</b> 15:13,19 18:12 <b>1980</b> 15:14 <b>1985</b> 15:19 <b>1988</b> 8:7,8 18:12	
<b>2</b>		
	<b>2</b> 56:2 <b>20</b> 13:5 <b>20-year</b> 50:7 <b>2002</b> 1:14 <b>23</b> 11:8 19:15,17,20	
<b>U</b>		
	<b>ultimately</b> 51:2	

<b>27</b> 19:24 <b>29</b> 2:6 <hr/> <b>3</b> <hr/> <b>3</b> 2:4 11:1,5,23,24 14:3 16:20 <hr/> <b>4</b> <hr/> <b>4a</b> 21:22 <hr/> <b>5</b> <hr/> <b>5</b> 13:1 <b>50</b> 3:18 13:9 18:10 34:11 41:25 54:24 <b>50-year</b> 18:16 57:17 <b>515</b> 3:17 7:24 <b>56</b> 2:9 <hr/> <b>6</b> <hr/> <b>6</b> 7:25 15:18 20:3,6,10 25:1 29:12 42:4 <hr/> <b>7</b> <hr/> <b>7</b> 13:1 <b>74</b> 21:22		
---	--	--