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THE SUPREME COURT AND THE ANTI-RETROACTIVITY PRESUMPTION

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by
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E*x post facto* laws retroactively change the legal consequences of acts, or the legal status of facts and relationships that existed prior to the enactment of the law. Justice Joseph Story, a member of the Supreme Court in the early 19th Century, defined a retroactive statute as "taking away or impairing vested rights acquired under existing laws, or creating a new obligation, or imposing a new duty, or attaching a new disability, in respect to transactions or considerations already past." *Society for the Propagation of the Gospel v. Wheeler,* 22 F.Cas.756,767(No.13 156)(CCNH 1814). *Ex post facto* laws offend against basic principles of fairness and due process in a free and democratic society. Congress is prohibited from passing *ex post facto* laws by Article I, Section 9, of the United States Constitution, and the states are prohibited from passing such laws by Section 10 of Article I. The idea is that individuals must be given fair notice of acts that will be prohibited by the state, so that they can choose to behave in ways that conform with the laws.

Nevertheless, in a much criticized decision, *Calder v. Bull* , 3 Dall. 386, 390-391, 1 L.Ed. 648 (1798) (opinion of Chase, J.). the Supreme Court qualified the Constitutional prohibition against *ex post facto* laws, ruling that it only applies in criminal law, not in civil law. Because immigration law is part of the civil law, even when it determines the immigration consequences of criminal behavior, the legacy of *Calder v. Bull* has been of great significance for immigration law.

In 1996, Congress passed two pieces of legislation, the Antiterrorism and Effective Death Penalty Act ("AEDPA"), and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). These new laws changed the rules, the

rights and obligations, for documented, as well as undocumented noncitizens in the United States in draconian ways. One of the major issues raised by this new legislation was whether the various provisions of these laws would apply retroactively (or retrospectively - the terms are interchangeable) to noncitizens. In the case of a few provisions, notably, the expanded definition of an 'aggravated felony,' Congress had explicitly written the law to state that the new definitions would apply retroactively.[1] Ever since *Calder v. Bull,* in 1798, Congress has had the authority to designate that new civil laws will apply retrospectively, but it is required to make its intention for a retroactive application very explicit in the law itself. Otherwise, as indicated by the quotation from Justice Story above, there is a 200 year tradition of constitutional law in the United States, following upon a much longer common law tradition, supporting an anti-retroactivity presumption with regard to any new piece of civil legislation. Since the intentions of Congress were not clearly and unmistakably written into most provisions of AEDPA and IIRIRA, there has been a great deal of litigation over the past decade attempting to clarify whether particular provisions would be applied retroactively or instead merely prospectively.

Landgraf v. USI Film Products

In a landmark decision, *Landgraf v. USI Film Products,* 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), the Supreme Court reviewed the Court's long history of decisions regarding retroactive legislation, and reasserted the presumption against retroactive legislation:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 855, 110 S.Ct. 1570, 1586, 108 L.Ed.2d 842 (1990) (SCALIA, J., concurring).
> *Landgraf v. USI Film Products,* 511 U.S. at 265.

The Court also noted specific concerns raised by retroactive statutes:

> The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.
> *Landgraf v. USI Film Products,* 511 U.S. at 266.

Of course, particular immigrant groups, as well as immigrants more generally, have frequently been the object of harsh, reactive, retroactive legislation, promoted by politicians blaming foreign workers rather than more basic aspects of the American social and economic structure for economic instability and social woes. In this regard, we immediately think of the 2005 REAL ID Act, as well as IIRIRA and AEDPA, but the *Landgraf* Court offered some historical perspective, pointing to a case from 125 years ago, *Chew Heong v. United States*, involving a bi-lateral treaty between China and the United States, and legislation enacting the treaty:

> At issue in *Chew Heong v. United States,* 112 U.S. 536, 5 S.Ct. 255, 28 L. Ed. 770 (1884), for example, was a provision of the "Chinese Restriction Act" of 1882 barring Chinese laborers from reentering the United States without a certificate prepared when they exited this country. We held that the statute did not bar the reentry of a laborer who had left the United States before the certification requirement was promulgated. Justice Harlan's opinion for the Court observed that the law in effect before the 1882 enactment had accorded laborers a right to reenter without a certificate, and invoked the "uniformly" accepted rule against "giv to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature." *Id.* at 559, 5 S.Ct., at 266-267; *Landgraf,* at 271-2.

The legal formalities were much less developed in 1880, but essentially, Congress was attempting to change the conditions of reentry for a Chinese laborer after he had left the country. Pursuant to a treaty between the United States and China, signed on November 17, 1880, insofar as Chew Heong was a Chinese laborer residing in the United States on that day, he acquired unrestricted rights of reentry upon leaving the country. Chew Heong duly left

for Honolulu, in the Kingdom of Hawaii on June 18, 1881, and returned to San Francisco on September 22, 1884, but was barred from reentry and detained on the ship. While he was gone, Congress had ratified the treaty in 1882, and approved an amended version of the treaty on July 5, 1884, requiring a certificate from all Chinese laborers who had left the United States by sea prior to May 6, 1882, and returned after July 5, 1884. Essentially the law required Chew Heong to have procured before he left the United States, a certificate (what we would today refer to as an advance parole document) for which the law, at that time, made no provision. *Chew Heong*, 112 U.S. at 539. Echoing Justice Story, Justice Harlan readily dismissed this retroactive requirement for a certificate, stating that courts "uniformly refuse to give to statutes a retrospective operation whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature." Id. at 559.

It is somewhat discomfiting, of course, that legal statements repudiating retroactive statutes as unfair, are qualified by the court's acknowledgement that insofar as Congress provides strong and clear language expressing its intention for retrospective application of a particular law, the Court must honor those intentions. Happily, clear and unequivocal statements of Congressional intentions are not common.

The Two Step Retroactivity Analysis of Landgraf

Not all retroactive applications of new laws are disadvantageous to the individuals affected by the new law.[2] The petitioner, Barbara Landgraf, had been found the victim of sexual harassment and a hostile work environment in violation of Title VII of the Civil Rights Act of 1964. But she was found not entitled to equitable relief by the District Court, and that was the only form of relief allowed by Title VII at that time. However, she appealed her case, and while the appeal was pending, the Civil Rights Act of 1991 was signed into law, and this new legislation allowed jury trials and both compensatory and punitive damages, for which Landgraf would have been eligible. The question in *Landgraf v. USI* was whether the appeals court should have applied the law in effect at the time of the discriminatory conduct, as they did, or instead should have applied the law in effect at the time of its decision in July 1992, allowing Petitioner to recover damages for her injuries.

The *Landgraf* Court finally decided that even this statute should not be applied retroactively. But because this statute is a remedial statute rather than a statute imposing a new penalty, the questions of where justice lies are very difficult ones.[3] Perhaps because of this context, the *Landgraf* Court analysis of the various grounds for rejecting retroactive statutes is nuanced and finally uncompromising.

The *Landgraf* decision is frequently cited as the source for a two-step analysis of whether a statute will have a retroactive application. Step One focuses on Congressional Intent:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. *Landgraf v. USI Film Products,* 511 U.S at 280.

When Congressional intent is clearly written into the statute, the inquiry ends at that point. Of course, there is frequently room for legal disagreement over the quality of Congressional intent. In any case, if the Court determines that Congressional intent is not sufficiently clear, Step Two involves evaluating the substantive effects of the statutory provision:

> When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. *Id.*

In the case at hand, the *Landgraf* Court determined that Congressional intent was not clear, and that insofar as the new compensatory damages provision in the 1991 Civil Rights Act imposed a new liability on the employer, "fairness concerns would not be absent" if the damages provision of the new act were to apply to events preceding its enactment. So it was the kind of provision that would not apply to events antedating its enactment in the absence of clear congressional intent. *Landgraf* at 283.

Recognizing that retroactive application of a remedial statute like the one in the 1991 Civil Rights Act might well appeal to our sense of justice, the *Landgraf* Court was very definite in rejecting such additional arguments as essentially irrelevant:

> It will frequently be true, as petitioner and *amici* forcefully argue here, that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity. *Landgraf*, 285-6

For the *Landgraf* Court, the presumption against retroactivity is qualified only by Congressional intent to the contrary.

I.N.S. v. St. Cyr

Just two years after the *Landgraf* decision, Congress passed AEDPA and then IIRIRA, and given a lack of Congressional clarity in many provisions of these statutes, major debates ensued over whether their application should be prospective only, or instead retroactive. Finally, in 2001, in *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court addressed the retroactivity issue in AEDPA and IIRIRA. St. Cyr had pled guilty to a crime for which he was deportable in March 1996. But in March 1996, he was also eligible for a § 212(c) waiver of deportation. The question for the Court was whether St.Cyr remained eligible for the 212(c) relief after IIRIRA went into effect in April 1997, given the fact that IIRIRA eliminated 212(c) waivers.

Regarding Step One of the *Landgraf* analysis, the St. Cyr Court found no clearly expressed congressional intent as to whether the elimination of § 212(c) relief is to be applied retroactively. The Court emphasized the demanding standard for finding such intent: "Cases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation." *St. Cyr* at 316-17 (2001); *quoting Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997). The Court finds no such clarity in the language of AEDPA or IIRIRA.

With regard to Step Two of the *Landgraf* analysis, the *St. Cyr* Court emphasized that their aim was,

> to determine whether depriving removable aliens of consideration for § 212(c) relief produces an impermissible retroactive effect for aliens who,

> like Respondent, were convicted pursuant to a plea agreement at a time when their plea would not have rendered them ineligible for § 212(c) relief." *St. Cyr* at 230.

Justice Stevens, writing for the Court, as he did in *Landgraf,* readily finds that people like St. Cyr, who entered plea agreements rather than going to trial, may be presumed to have done so with expectations that 212(c) relief would be available to them if necessary. So, IIRIRA's elimination of 212(c) waivers, if applied retroactively to people like St. Cyr, would clearly attach "a new disability, in respect to transactions or considerations already past." *St. Cyr*, 533 U.S. at 321.

By contrast with the *Landgraf* Court's entirely formal presumption that the possibility for compensatory damages under the 1991 Civil Rights Act imposed new liabilities on the employer and so created an unacceptable retroactive effect, the *St.Cyr* Court is more diligent in explaining the quality of the new disability imposed by giving IIRIRA retroactive effects. The Court here emphasized the *quid pro quo* of criminal defendants who give up their right to trial and plead guilty in exchange for settled expectations of their punishment, and in this case, of their eligibility for 212(c) waivers of deportation for the crimes they pled guilty to. *Landgraf* at 322. The Court emphasized the objective fact of reliance upon the availability of a 212(c) waiver for all those who entered plea agreements for crimes that made them deportable or removable. *Id.* at 323-4. Focusing much more on the quality of the disability than did the *Landgraf* Court, the *St. Cyr* Court concluded:

> Because respondent, and other aliens like him, almost certainly relied upon that likelihood in deciding whether to forego their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.*at 325.

Under considerable pressure to find a defensible retroactive effect, even though they had found no clear Congressional intent in this regard, the Court held firm and explained in detail the quality of disability imposed on individuals who have made plea agreements with the expectation of 212(c) availability. However, by introducing the language of an "impermissible retroactive effect," the Court has now suggested there may be permissible retroactive effects. The unconditional rejection of retroactive applications of statutes when not clearly

prescribed by a legislature found in *Landgraf* has been eroded somewhat in *St. Cyr*.

Fernandez-Vargas v. Gonzales, 2006

The most recent Supreme Court decision on retroactivity, *Fernandez-Vargas v. Gonzalez, 126 S.Ct.2422 (2006),* dealt with a particularly harsh provision of IIRIRA,

Reinstatement of Removal.[4] Petitioner, Fernandez-Vargas, had come to the United States in the 1970s, and been deported several times. After his last illegal reentry in 1982, he married, had a child and starting a trucking business, and lived a productive life for the next twenty years in Utah. Only when he applied to adjust status in 2003, based on a relative visa petition filed by his wife, did immigration authorities begin proceedings. They reinstated his 1981 deportation order, based upon a reinstatement provision created by IIRIRA, leaving Fernandez-Vargas ineligible for any relief. The question was whether the IIRIRA Reinstatement provision should apply to those who reentered prior to the April 1,1997 date when IIRIRA's reinstatement provision first became effective. As usual, Congressional intentions were not made clear in the written law.

Justice Stevens, who had written the majority decisions in *Landgraf* and *St. Cyr*, found that this IIRIRA reinstatement provision had very obvious, very serious adverse consequences for Fernandez-Vargas, and thus clear retroactive effects. He concluded that it should not apply to preenactment reentries, like that of Fernandez-Vargas. *Fernandez-Vargas at 2436, 2434 (2006).* However, Justice Stevens was dissenting in this case. Justice Souter wrote the majority opinion, holding that the IIRIRA Reinstatement provision did apply, even to preenactment reentries that took place fifteen years before IIRIRA came into existence, like that of Fernandez-Vargas in 1982. The majority reasoned that this provision had no retroactive effect, insofar as "it is the conduct of remaining in the country after entry that is the predicate action; the statute applies to stop an indefinitely continuing violation that the alien himself could end at any time..." *Fernandez-Vargas* at 2431.

Towards a Jurisprudence of Permissible Retroactive Effects?

Obviously, Fernandez-Vargas did not have the same 'contractual moment of reliance' upon the past regime as did St. Cyr and others who made plea agreements prior to April 1997. On the other hand, what Justice Souter refers

to as "the new and less generous legal regime" of IIRIRA clearly results in a "new disability" and adverse consequences for Petitioner, as Justice Stevens emphasized in his dissent. The *Landgraf* Court's unconditional rejection of retroactive statutory applications not clearly prescribed by Congress, qualified somewhat in *St.Cyr*, is further eroded in this decision. The majority in *Fernandez-Vargas* has, in effect, begun to develop a jurisprudence of 'permissible retroactive effects.'

In a future article, recent decisions of various Circuit Courts of Appeals will be discussed, and jurisprudential possibilities in a time of political strife and confusion will be considered.

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[1] A criminal conviction that is characterized as an aggravated felony renders the noncitizen deportable and also disqualifies him or her from most forms of relief against deportation. § 237(a)(2)(A)(iii) of the Immigration and Nationality Act provides a ground of deportability based on an aggravated felony conviction. The various offenses that are defined as aggravated felonies are listed under §101(a)(43).

[2] *SeeEg.* Cyrus D. Mehta, "BIA Rules that Child Status Protection Act Retroactively

Applies to Children of US Citizens," February 9, 2007, www.cyrusmehta.com, discussing the fact that the retroactive application of the CSPA benefits children who aged out before August 6, 2002.

[3] Justice Stephens explained that this case involved an apparent conflict between various different rules or canons. First, was a conflict between the rule that "a court is to apply the law in effect at the time it renders its decision," and the contrary axiom that "retroactivity is not favored in the law... and congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." In addition, there was conflict between two further canons of statutory construction: 1) remedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such a construction; 2) A statute imposing a new penalty or forfeiture or a new liability or disability, or creating a new right of action will not be construed as having a retroactive effect; citing Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed," 3 Vand.L.Rev.395 (1950). *Landgraf,* at 264, FN 16.

[4] See Cyrus D. Mehta, "Reinstatement of Removal," May 13, 2005, www.cyrusmehta.com.