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¤ 212(C) LITIGATION: THE AFTERLIFE OF A WAIVER

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by
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The Antiterrorism and Effective Death Penalty Act ("AEDPA"), and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), passed by Congress over a decade ago, in April 1996, and in September 1996, respectively, had a number of harsh consequences for both undocumented immigrants and for legal permanent residents. For example, prior to the enactment of AEDPA and IIRIRA, the Attorney General possessed the authority under § 212(c) of the Immigration and Nationality Act (“Act") to grant discretionary waivers of deportation to aliens who met certain criteria. AEDPA placed new limits on this authority in 1996, and IIRIRA repealed § 212(c) altogether, effective, April 1997.[1]

As a consequence of AEDPA and IIRIRA, non-citizens became deportable or inadmissible for an expanded list of criminal acts, and one of the most important forms of removal relief § 212(c) was no longer available to those convicted after the laws became effective. Controversially, the government placed many non-citizens whose convictions had been prior to the enactment of AEDPA and IIRIRA in removal proceedings, asserting that even though they could have applied for § 212(c) removal relief at the time of their convictions, they were not eligible for it after AEDPA and IIRIRA. Needless to say, the proposed retroactivity of AEDPA and IIRIRA was aggressively challenged in the courts. Finally in 2001, the Supreme Court held that those aliens convicted prior to the effective dates of AEDPA and IIRIRA remained eligible for § 212(c) relief if their convictions were the result of plea bargains. *INS v. St. Cyr* , 533 U.S. 289, 325 (2001) ("*St. Cyr II*") However, the *St. Cyr* Court said nothing about § 212(c) eligibility for those convicted after trial, or about other retroactive applications of AEDPA and IIRIRA.

Remarkably, there are still legal controversies today over the availability of § 212(c) removal relief for legal permanent residents who were convicted of crimes prior to AEDPA and IIRIRA, with different Circuit Courts making different determinations on eligibility, based on different theories of retroactivity. A previous article discussed the Supreme Court's retroactivity analysis in three recent Supreme Court decisions affecting this debate.[2] However, the Circuit Courts are on the day-to-day front line in this controversy, and this article will discuss the continuing efforts of the Courts of Appeal to come to grips with the question of § 212(c) eligibility for aliens convicted of crimes prior to the effective dates of AEDPA and IIRIRA.

Landgraf and Uncompromising Anti-Retroactivity in § 212(c) Jurisprudence

Landgraf v. USI Film Products, 511 U.S.244 (1994), decided two years before the enactment of AEDPA and IIRIRA, offered an extensive reprise of the Supreme Court's historical opposition to retroactive application of laws, and a powerful reassertion of its continuing anti-retroactivity presumption.[3] The *Landgraf* Court's two step procedure for evaluating retroactivity remains the beginning point for any analysis of the applicability of § 212(c) relief. 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. *Landgraf v. USI Film Products,* 511 U.S at 280.

When Congressional intent for retroactivity is clearly written into the statute, the inquiry ends at that point. However, if the Court determines that there is no “express" command from Congress, Step Two requires evaluating the substantive effects of the statutory provision. Under *Landgraf,* a law has a retroactive effect if 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*** . *Id.* (quoting *Society for Propagation of the Gospel v. Wheeler,* 22 F.Cas. 756, 767, No. 13,156 (C.C.D.N.H. 1814) (Story, J**.))** *; see also Hughes Aircraft Co. v. United States ex. rel. Schumer,* 520 U.S.

> 939, 947 (1997) (stating that the above list is illustrative but not exhaustive).

If the statute would impair rights, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed, the traditional presumption against retroactivity teaches that it should only govern prospectively. Under the *Landgraf* anti-retroactivity presumption, substantive congressional enactments and administrative rules will not be construed to have retroactive effect unless Congress has expressly commanded it. However, not all legislation addresses or affects substantive rights. In a later decision, the Supreme Court explained the sorts of legislation that could be applied retroactively without having the retroactive effects identified above:

> Under *Landgraf,* therefore, it is appropriate to ask whether the Act affects substantive rights (and thus would be impermissibly retroactive if applied to preenactment conduct) or addresses only matters of procedure (and thus may be applied to all pending cases regardless of when the underlying conduct occurred)." *Republic of Austria v. Altmann,* 541 U.S. 677, 694 (2004).

Laws addressing only matters of procedure, and not affecting substantive rights are permissibly retroactive; all legislation affecting substantive rights is retroactive, and may only be applied prospectively, under a *Landgraf* analysis.

Surprisingly, only two circuits have, at this point, adopted the *Landgraf* Court's unqualified and uncompromising stance on retroactivity when applying the provisions of AEDPA and IIRIRA. Most recently, the Third Circuit, in *Atkinson v. Attorney General of the U.S.*, 479 F.3d 222, 227 (3d Cir. 2007), ruled that Claudius Atkinson, a legal permanent resident, convicted on December 16, 1991, of criminal conspiracy and possession with intent to distribute a controlled substance, following a jury trial, could not be precluded from applying for § 212(c) relief, insofar as applying IIRIRA's elimination of 212(c) relief “attached new legal consequences to Atkinson's conviction." *Id*.at 230. After his conviction, Atkinson had served his time, and lived uneventfully until on June 2, 1997, he received a Notice to Appear, initiating removal proceedings, from the Immigration and Naturalization Service (INS). According to the Notice, Atkinson was removable from the United States pursuant to sections 237(a)(2)(B)(i) and

237(a)(2)(A)(iii) of the Immigration and Nationality Act (INA) because he was an alien convicted of a controlled substance offense and because he was an alien convicted of an aggravated felony. There is no question that when convicted in 1991, Atkinson would have been eligible for § 212(c) relief.

The Atkinson Court's analysis is uncomplicated, beginning with a brief explanation of its understanding of the *Landgraf* holding:

> *Landgraf* teaches that, in determining if a statute applies retroactively, a court must begin with the statute. If the statute is ambiguous as to its temporal reach, the question is whether it ***attaches new legal consequences to past events.*** 511 U.S. at 282-84, 114 S.Ct. 1522. If the court determines that the statute has retroactive effect because of such consequences, that determination is applied across the board. *Atkinson* , 479 F.3d at 227.

The Atkinson Court then turns to the situation of Atkinson and other aliens like him, convicted of aggravated felonies following a jury trial at a time when that conviction would not have rendered them ineligible for § 212(c) relief, asking, “Does applying IIRIRA to eliminate the availability of discretionary relief under former section 212(c) attach new legal consequences to events completed before the repeal? We conclude that it does and that Atkinson cannot be precluded from applying for 212(c) relief." *Id.* at 230. See also, *Olatunji v. Ashcroft*, 387 F.3d 383, 393-94 (4th Cir. 2004).

St. Cyr and the Objectively Reasonable Reliance Demonstrated by Plea Bargains

It might well seem that any alien convicted of a crime for which § 212(c) relief would have been available prior to AEDPA and IIRIRA would suffer *Landgraf* retroactivity insofar as AEDPA and IIRIRA eliminated § 212(c) relief, thereby 'increasing liability for past criminal conduct.' Contrary to the rigorous anti-retroactivity presumption articulated by the *Landgraf* Court, and currently followed by the Third and Fourth Circuits, however, most Circuit Courts who have addressed this issue in the context of AEDPA and IIRIRA have required more than simply "new legal consequences" as the basis for finding retroactivity. In fact, what the *Landgraf* Court referred to simply as retroactivity is now frequently designated as "impermissible retroactivity," signaling that it has now become necessary to distinguish between impermissible and

permissible forms of retroactivity on a regular basis.

After AEDPA and IIRIRA were passed in 1996, the Immigration and Naturalization Service (INS) rushed to put into removal proceedings thousands of legal permanent residents whose convictions prior to 1996 had made them removable, but who had never been put into proceedings, at least partially because the INS calculated that their likelihood of being granted a § 212(c) waiver rendered the process pointless.[4] After IIRIRA became effective on April 1,1997, § 212(c) relief was no longer available, and courts were under great pressure to hold that legal permanent residents were removable based on convictions prior to 1996, and were no longer eligible for the § 212(c) waivers that would have been available had they been put into removal proceedings before IIRIRA. That is, courts were under pressure to find that AEDPA's narrowing and IIRIRA's elimination of § 212(c) relief applied to such individuals retroactively.

The Second Circuit, in *St. Cyr v. I.N.S.*, 229 F.3d 406 (2d Cir. 2000), was the first U.S. Court of Appeals to consider whether applying IIRIRA § 304(b) (eliminating § 212(c) relief) to pre-enactment convictions was impermissibly retroactive. However, the *St. Cyr* Court lists a number of decisions by sister courts considering the similar question of whether AEDPA § 440(d) (narrowing grounds for § 212(c) relief) was retroactive as applied to criminal convictions prior to its effective date.*Id.* at 417. What is evident from this list of decisions is that Circuit Court rulings cover the spectrum of possible results: 1) the Tenth, Fifth, and Third Circuits adopt the Service's position that there are no impermissible retroactive effects of AEDPA 440(d); 2) the Fourth Circuit rules to the contrary, in *Tasios v. Reno*, 204 F.3d 544 (4th Cir. 2000) that all applications of AEDPA 440(d) would be impermissibly retroactive; 3) the First, Seventh and Ninth Circuits take an intermediate stance on retroactivity, identifying particular circumstances in which there would be impermissible retroactivity in applying AEDPA 440(d). *Id*.

Interestingly, the Second Circuit in St. Cyr, offers the rationale of the Fourth Circuit, that "***application of the bar to relief would upset settled expectations and change the legal effect of prior conduct***," but chooses not to adopt its blanket rule against retroactive application of the statute at hand. Instead, the Second Circuit follows the First, Seventh, and Ninth Circuits, in concluding that like AEDPA 440(d), IIRIRA 340(b) is impermissibly retroactive only if there has

been a pre-enactment guilty plea. *St. Cyr*, 229 F.3d at 417-18. Of course, it would seem obvious that AEDPA 440(d) and IIRIRA 340(b) change the legal effect not merely of a plea bargain, but also of the original criminal actions that led to the conviction, however it came about, and so are impermissibly retroactive when applied to any conviction occurring prior to the adoption of the statutes. However, it is at this point that the Court adds ***a reliance requirement*** for a determination of impermissible retroactivity. Approvingly citing the Seventh and Ten Circuits, the St. Cyr Court reasons that

> It would border on the absurd to argue that these aliens might have decided not to commit drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation. *St. Cyr*, 229 F.3d at 418, citing *Jurado-Gutierrez v. Greene,* 190 F.3d 1135,1150-51 (10th Cir. 1999)(quoting *LaGuerre v. Reno* ,164 F.3d 1035,1041 (7th Cir. 1998)).

It is not enough for a new law to change the legal liabilities for particular criminal conduct, unless we are persuaded the alien would have changed his behavior given the different liability. The *St. Cyr* court reasons that an alien who would plead guilty in order to receive a lighter sentence so long as § 212(c) removal relief was available, would be unwilling to plead guilty if § 212(c) relief ceased to be available. Thus, the behavior of this individual would change with the elimination of § 212(c) relief, showing reliance upon § 212(c) relief. *Id*. at 419. The Second Circuit concludes that it is only through such a guilty plea that the alien shows reliance on the prior availability of § 212(c) relief, rendering IIRIRA 340(b) elimination of this relief impermissibly retroactive.[5]

The Supreme Court granted certiorari when the government appealed this ruling, and ultimately its decision built directly upon the reasoning of the Second Circuit's majority opinion. Emphasizing the significant reliance upon § 212(c) relief demonstrated by those individuals who pled guilty to crimes for which they were removable prior to 1996, the Court found that this made the retroactive effects of applying IIRIRA 304(b) to them particularly “obvious and severe." *INS v. St. Cyr*, 533 U.S. 289, 325 (2001) ("St. Cyr II") Stressing that the “potential for unfairness in the retroactive application of IIRIRA § 304(b) to people like Jideonwo and St. Cyr is significant and manifest," the Court held that

"applying IIRIRA § 304(b) to aliens who pleaded guilty or *nolo contendere* to crimes on the understanding that, in so doing, they would retain the ability to seek discretionary § 212(c) relief would retroactively unsettle their reliance on the state of the law at the time of their plea agreement." *Id.* at 323, 325. Insofar as most criminal convictions, some 90%, are the result of plea bargains, the Supreme Court's ruling made IIRIRA 304(b)'s elimination of § 212(c) relief impermissibly retroactive with respect to the great majority of criminal convictions prior to AEDPA and IIRIRA. *Id*., at 324.

The practical effects of the Supreme Court's ruling in St. Cyr were very broad. As a consequence of this decision, § 212(c) relief remained available to 90% of those aliens with criminal convictions prior to 1996. However, the ruling was quite specific in its focus upon those aliens who had accepted plea bargains prior to the IIRIRA and AEDPA, and in its holding that the retroactive consequences of IIRIRA 304(b) were particularly obvious insofar as such individuals had shown reliance upon § 212(c) in deciding to plead guilty to a crime for which they would become removable. The *St. Cyr* II decision did not hold that objective reliance, of the sort it identified with all those who pleaded guilty to crimes for which they were removable prior to 1996, was necessary for a finding that IIRIRA 304(b) was retroactive. Indeed, it did not find that any form of reliance was necessary in order to demonstrate that IIRIRA 304(b), or any other law operated retroactively.

Similarly, while the *St. Cyr* Court held that those who had accepted plea bargains at a time when § 212(c) relief was available would suffer (impermissible) retroactive effects if IIRIRA's repeal of § 212(c) relief was applied to them, it did not hold, or even suggest that those who proceeded to trial during the same period of time would not suffer (impermissible) retroactive effects under IIRIRA 304(b). (Unlike the Second Circuit's *St. Cyr* opinion ("St. Cyr I"), the Supreme Court did not even make reference to those who had proceeded to trial rather than pleading guilty.) Lower courts have proceeded to rule in highly diverse ways on each of these issues.

From Restrepo to Walcott: the Second Circuit's Requirement of an Individualized Showing of Actual Reliance

While the Supreme Court did not follow the Second Circuit's lead in St. Cyr I, in holding, or even suggesting that IIRIRA 340(b) is (impermissibly) retroactive only if there has been a pre-enactment guilty plea, *St. Cyr*, 229 F.3d at 417-18, it left

open that possibility, insofar as it said nothing about those who proceeded to trial and were convicted prior to IIRIRA. The Second Circuit duly ruled in *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003) that IIRIRA's repeal of § 212(c) relief did not have an impermissible retroactive effect upon aliens who were convicted after a trial rather than a guilty plea prior to IIRIRA's April 1,1997 elimination of § 212(c) relief.

The court offered two grounds for denying the retroactive effects of IIRIRA § 304(b) upon those who went to trial: 1) those who went to trial did not show “detrimental reliance" upon 212(c) relief insofar as they did not admit guilt based upon belief in the availability of 212(c) relief; 2) those who went to trial could not point to conduct reflecting an intention to preserve eligibility for 212(c) relief. *Rankine*, 319 F.3d at 99-100. The Court points to rulings in a number of other circuits that have similarly concluded that “the lack of detrimental reliance on 212(c) by those aliens who chose to go to trial puts them on a different footing than aliens like St. Cyr." *Id*. at 102.

A year later, in *Restropo v. McElroy*, 369 F.3d 627 (2d Cir. 2004), the court held that there was an alternative way in which an alien who was convicted after going to trial could show detrimental reliance upon § 212(c) relief. Insofar as an alien had delayed his application for § 212(c) relief in order to strengthen his record of rehabilitation and community ties, before applying for the waiver, his conduct would demonstrate reasonable reliance and settled expectations that would be disrupted by retroactive application of AEDPA's elimination of this relief. *Restropo,* 369 F.3d at 633-4. The Court remanded the case for a finding as to whether the Petitioner's conduct demonstrated such reliance.

Despite having written the Restopo majority opinion, Judge Calabresi wrote a concurring opinion summing up the law on AEDPA and IIRIRA retroactivity at that point, and discussing whether the new rule regarding detrimental reliance after conviction at trial should be applied categorically or only on a case-by-case basis. The Second Circuit in *St. Cyr* 1 and the Supreme Court in *St. Cyr II* upheld the categorical approach with regard to those who had accepted plea bargains, and Judge Calabresi believes that categorical approach is preferable with regard to this alternative theory of § 212(c) reliance for those who have been convicted after trial, as well.

In fact, his arguments for a categorical approach to reliance by aliens convicted at trial reveal that for Judge Calabresi, all such aliens have "*Landgraf interests*,"

regardless of whether they can demonstrate a delayed application based on a desire to make a stronger case for a § 212(c) waiver:

> I think it quite plausible that many aliens in fact relied on the continued existence of 212(c) relief when they opted not to seek that relief when it was available to them.... In other words, the alien would act *in reliance on* and *in expectation of* the continued availability of 212(c) relief, regardless of whether he delayed in order to make his 212(c) case stronger or to take advantage of the fact that the INS was, famously, slow and inconsistent in bringing deportation cases. As far as *Landgraf* is concerned, both motivations, it seems to me, are ones that are reasonably based on the expectation that 212(c) relief would be available. It is this kind of stake in the existing legal regime that *Landgraf* intended its presumption against retroactivity to protect. *See Landgraf,* 511 U.S. at 265 (stating that this presumption is rooted in the principle that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly"). *Restropo,* Concurring Opinion, at 645.[6]

Not all members of the Second Circuit agreed with Judge Calabresi, and two years later, in *Wilson v. Gonzalez,* 471 F.3d 111 (2d Cir. 2006), the Court adopted the Government's argument that an alien convicted at trial had to make an individualized demonstration of reliance. Judge Oakes reiterated and reasserted the *Rancine* requirement that an alien's conduct demonstrate detrimental reliance upon § 212(c) relief. While the recent Supreme Court decision on IIRIRA retroactivity, *Fernandez-Vargas v. Gonzales,* 126 S.Ct. 2422 (2006), addressed a different provision of IIRIRA, Judge Oakes cited the Court's suggestion that 'proven reliance on the pre-existing law (regarding reinstatement of removal) might have produced a different result' as support for the Second Circuit's requirement for an individual demonstration of detrimental reliance. *Wilson,* at 121.[7]

In a recent decision, *Walcott v. Chertoff*, 2008 WL 425792 (2d Cir. 2008), the Court applies the *Wilson* "individualized reliance" requirement, remanding the case for Petitioner to provide evidence that he himself had delayed applying for § 212c relief in order to strengthen his equities for a later application.

Conclusion

§ 212(c) litigation will come to an end when the Government ceases to attempt to remove non-citizens for conduct that occurred prior to the enactment of AEDPA and IIRIRA. There is no end in sight, at this point. Courts have encouraged these removal efforts by the Department of Homeland Security insofar as they have raised the bar for showing (impermissible) retroactivity of AEDPA § 440(d) and IIRIRA § 304(b), requiring a demonstration of either objectively reasonable reliance or subjective, individual reliance in order to remain eligible for a 212(c) waiver, or for other forms of relief available prior to AEDPA and IIRIRA. By contrast, a basic *Landgraf* analysis, like that done by the Third and Fourth circuits, readily finds that AEDPA and IIRIRA *impair rights possessed by non-citizens when they acted prior to AEDPA and IIRIRA, and increase the non-citizen's liability for past conduct***,** and so find all such aliens eligible for § 212(c) waivers, discouraging further litigation of the issue.

Landgraf's anti-retroactivity analysis has been selectively read and applied, and even ignored in the retroactivity litigation and jurisprudence regarding AEDPA and IIRIRA, but it has not been overruled or undermined by succeeding case law. If the next Congress, or the next, enacts major new immigration law, more generous in the removal relief it offers, and in its provisions for adjustment of status, we may see a rapid flight back to a rigorous application of *Landgraf's* anti-retroactivity presumption.

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[1] See AEDPA Pub.L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (Apr. 24, 1996). Under the amended version, a waiver could not be granted to an alien convicted of certain enumerated offenses including a drug-related crime, two

or more offenses involving moral turpitude, and an aggravated felony, regardless of time served in prison, See IIRIRA, Pub.L. No. 104-208, § 304(a),(b), 110 Stat. 3009, 3009, 594-97 (Sept. 30, 1996).The permanent provisions of IIRIRA repeal INA § 212(c) altogether and consolidate prior “suspension of deportation" relief and aspects of former § 212(c) relief into an entirely new form of relief. See 8 U.S.C. § 1229b(a)(3) (1999). Section 304(a) of IIRIRA, entitled “Cancellation of removal for certain permanent residents," found at INA § 240A, 8 U.S.C. § 1229b(a)(3) (1999). Section 304(a) of IIRIRA, entitled “Cancellation of removal for certain permanent residents," found at INA § 240A.

[2] *See* Patricia S. Mann, "The Supreme Court and the Anti-Retroactivity Presumption," December 29, 2007, www.cyrusmehta.com, discussing the Court''s retroactivity analysis in *Landgraf v. USI Film Products,* 511 U.S. 244 (1994); *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001); and *Fernandez-Vargas v. Gonzalez, 126 S.Ct.2422 (2006)*

[3] *T*he retrospective or retroactive application of laws, i.e., *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 U.S. Constitution, and the states are prohibited from passing such laws by Section 10 of Article I. Nevertheless, in *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. Ever since *Calder v. Bull,* in 1798, Congress has had the authority to designate that new civil laws will apply retrospectively, However, given the presumptive injustice of retroactive applications of any law, Congress is required to explicitly mandate retroactive applications; otherwise Courts will only enforce laws prospectively. See my previous article, footnote 1.

[4] See *Thom v. Ashcroft*, 369 F.3d 158, 166 (2d Cir. 2004), where Judge Calabresi quotes from *Matter of Gordon,* 17 I. & N. Dec. 389, 392, 1980 WL 121901 (BIA 1980) (noting that an INS District Director “has every right, in fact, a duty, to exercise his prosecutive judgment whether or not to institute a deportation proceeding against an alien .... If, in screening the file of, and possibly after consultation with, such an alien, it appears to him that a deportation proceeding would surely result in a grant of section 212(c) relief ... it would be pointless to institute an expensive, vexatious, and needless deportation

proceeding."), suggesting this as a likely scenario prior to IIRIRA and AEDPA.

[5] It is worth noting that in 1993, prior to *Landgraf*, the Second Circuit considered a 1990 amendment to INA 212(c) which narrowed the grounds of 212(c) applicability, and in *Buitrago-Cuesta v. INS*, 7 F.3d 291, (2d Cir. 1993) ruled that it could be applied retroactively. This was a case in which the petitioner had been convicted after a jury trial. The *St. Cyr* court refers at some length to this previous case, and concludes that insofar as *Buitrago-Cuesta* did not plead guilty, but was convicted after a jury trial, the current ruling "does not contradict our earlier ruling in *Buitrago-Cuesta*." *St. Cyr*, at 420. The Court's emphatic distinction between those who accept a plea bargain and those who proceed to trial is clearly affected by its *Buitrago-Cuesta* ruling in support of retroactivity. However, the Buitrago decision was based on a finding that "the plain language of the statute indicates a congressional intent that apply retroactively." Id. at 295. It would have satisfied Step One of a Landgraf analysis.

[6] In *Thom v. Ashcroft*, decided a month after *Restropo,* Judge Calabresi stated his belief that, were it not for Second Circuit precedents, AEDPA and IIRIRA should apply prospectively only, and his expectation that the Supreme Court would so rule in the future. "Speaking only for myself: If I were judging on a clean slate, I would read the Supreme Court's seminal decision on civil retroactivity, *Landgraf v. USI Film Prods.,* 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)-at a minimum-to say that, where Congress has not made its intent clear, courts should presume that any civil statute that would be considered *ex post facto* in the criminal context was meant to apply prospectively only. (This reading would be particularly appropriate in cases where, as here, the civil law in question imposes consequences very like those of criminal penalties. *See, e.g., Fong Haw Tan v. Phelan,* 333 U.S. 6, 10, 68 S.Ct. 374, 92 L.Ed. 433 (1948) ("eportation is a drastic measure and at times the equivalent of banishment or exile.").) Indeed, I believe *Landgraf* goes even further and that its anti-retroactivity presumption is triggered by statutes whose retroactive application, while not the equivalent of criminal *ex post facto,* nevertheless would run afoul of "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf,* 511 U.S. at 270, 114 S.Ct. 1483. And, I would expect that the Supreme Court's future decisions in this field will confirm such readings of *Landgraf.* 309 F.3d 158, 163 n.6 (2d Cir. 2004)

[7] Justice Stevens, author of the majority opinions in *Landgraf* and *St. Cyr*, wrote a vehement dissent in *Fernandez-Vargas*, signaling a major shift in the retroactivity analysis of the *Fernandez-Vargas* Court. According to Justice Stevens, "Only the Court's unfortunately formalistic search for a single "past act tha