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TOO LATE FOR THE TRUTH? RETROACTIVITY AND APPLICATION OF THE STATUTE OF LIMITATIONS FOR FILING 28 U.S.C. § 2255 PETITIONS

I. INTRODUCTION

On April 24, 1996, President Clinton signed into law the Anti-Terrorism and Effective Death Penalty Act (hereinafter AEDPA).[1] Section 105 of the AEDPA amended 28 U.S.C. § 2255[2] to provide for a one-year statute of limitations in which petitions for habeas corpus must be filed.[3] The former § 2255 contained no statute of

1. Pub. L. No. 104-132, §105, 110 Stat. 1220 (1996) (amending 28 U.S.C. § 2255 (1994)).

2. A motion to vacate, set aside, or correct sentence brought under § 2255, although similar in many ways, is not a petition for a writ of habeas corpus. *See* United States v. Hayman, 342 U.S. 205 (1952). Section 2255 is rather a statutory supplement to writ. In re Hanserd, No. 96-8051, 1997 WL 523691 (6th Cir. Aug. 25, 1997). Congress enacted § 2255 to allow the court which imposed the sentence, as opposed to the court that happened to be near the prison in which the person was incarcerated, to hear the petition. *Id.* at *1. Furthermore, the remedy under § 2255 is more flexible than the limited scope of the traditional writ. *Id.*

3. 28 U.S.C. § 2255, as amended by Pub. L. No. 104-132 § 105, reads as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.
>
> A one-year statute of limitations shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented in making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

limitations.[4] The plain language of the amendment provides no indication as to when the amended section should take effect.[5] The result of this lack of direction has been inconsistent and often unfair application of the limitations period throughout the federal courts.

One approach taken by a number of courts has been to apply the limitations period to pre-accrued claims.[6] These courts have tolled the statute from a date prior to the effective date of the AEDPA. As a result, a prisoner who filed on April 25, 1996, but whose conviction became final in 1992, would have his petition dismissed for lack of subject matter jurisdiction. This application reflects the minority approach.

A majority of courts, including every circuit court which has addressed the issue, have provided a reasonable grace period after April 24, 1996 for prisoners to bring their claims.[7] What is deemed a reasonable time has ranged from seventy-two days to a year.[8] However, these courts have provided sparse justifications

4. Prior to the AEDPA's enactment, delays of over a decade did not bar a prisoner from seeking habeas relief. Lonchar v. Thomas, 116 S.Ct. 1293 (1996).

5. H.R. CONF. REP. No. 104-518 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944 provides the following insight into the aims of § 105 of the AEDPA: "This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases. It sets a one-year limitation on an application for a habeas writ and revises the procedures for consideration of a writ in federal court." H.R. CONF. REP. No. 104-518.

6. The following cases, three of which are from the Fourth Circuit, have applied the amended 28 U.S.C. § 2255 to bar claims which accrued before the effective date of the AEDPA: United States v. Smith, 966 F. Supp. 408 (E.D. Va. 1997); Clarke v. United States, 955 F. Supp. 593 (E.D. Va. 1997); Curtis v. Class, 939 F. Supp. 703 (D.S.D. 1996); Harold v. United States, 932 F. Supp. 705 (D. Md. 1996); United States v. Bazemore, 929 F. Supp. 1567 (S.D. Ga. 1996).

7. These courts have not barred claims filed after April 24, 1996 which accrued prior to that date: Calderon v. United States, 112 F.3d 386 (9th Cir. 1997) (applying parallel time limit found in amended 28 U.S.C. 2254); United States v. Simmonds, 111 F.3d 737 (10th Cir. 1997); Peterson v. Demskie, 107 F.3d 92 (2nd Cir. 1997) (applying identical limitation under the amended 28 U.S.C. § 2244); Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996), *rev'd on other grounds*, 117 S.Ct. 2059 (1997); United States v. Ramos, 971 F. Supp. 199 (E.D. Pa. 1997); Zuluaga v. United States, 971 F. Supp. 616 (D. Mass. 1997); United States v. Jones, 963 F. Supp. 32 (D.D.C. 1997); United States v. Ortiz, No. 91-1250, 1997 WL 214934 (E.D. Pa. Apr. 28, 1997); Smith v. United States, 945 F. Supp. 1439 (D. Colo. 1996); United States v. Rienzi, No. 96-4829, 1996 WL 605130 (E.D. Pa. Oct. 21, 1996).

8. *See Peterson*, 107 F.3d at 93 (allowing a petition filed 72 days after the effective date of the AEDPA to proceed).

for granting the grace period. Furthermore, none of these courts have adequately addressed the thorny question of retroactivity which is central to the proper resolution of this issue.

In response to the judicially mandated grace period, the Attorney General ordered the Department of Justice to impose a one-year grace period before raising the statute of limitations as a bar to petitions for habeas corpus.[9] Nevertheless, at least one court, the District Court for the Eastern District of Virginia, has refused to recognize the grant.[10]

This comment addresses the issue of whether the one-year statute of limitations should control a petition filed after the effective date of the AEDPA but based on a conviction which became final more that one year prior to the effective date of the act. By analyzing both the minority and majority approaches, this comment demonstrates that the minority has misapplied the recent Supreme Court opinion in *Landgraf v. USI Film Products*.[11] Furthermore, the purpose of this comment is to suggest the correct framework for determining the proper temporal reach of this statute.

II. Discussion

A. *The Landgraf Decision*

In order to understand the rationale behind the various applications of the statute of limitations at issue, a discussion of *Landgraf v. USI Film Products*, the Supreme Court's most recent and definitive opinion on retroactivity, is necessary.[12] In *Landgraf*, the Court addressed the issue of whether amendments to the Civil Rights Act of 1964, creating a right to recover compensatory and punitive damages for Title VII violations, applied to cases pending when the amendments were enacted. The court held that the amendments applied only to cases which were filed after the enactment of the statute.[13]

The Court set forth the following test for determining when a statute should be applied retroactively. First the court must

9. A sub-issue beyond the scope of this article is whether the Attorney General can order the AEDPA not to be applied as enacted by Congress. Under the Constitution, the executive branch is neither vested with the authority to interpret or rewrite legislation, rather they are limited to enforcement.

10. *See* United States v. Smith, 966 F. Supp. 408 (E.D. Va. 1997).

11. 511 U.S. 244 (1994).

12. *Id.*

13. *Id.*

determine whether Congress has prescribed the proper temporal reach of the statute. If it has, "then there is no need to resort to judicial default rules" and the statute is to be applied as written.[14] However, if the statute contains no express command, the court must decide whether it 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."[15] Finally, if the statute will operate retroactively, "it does not govern absent clear congressional intent favoring such a result."[16]

The final prong of the test is based on equity and fairness. "The presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies . . . elementary considerations of fairness [that] 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."[17]

The Court was careful to explain that a statute does not apply retroactively merely because it applies in a case arising from actions antedating the statute's enactment.[18] Rather, a court must discern whether the provision attaches new legal consequences to events completed before its enactment. The Court stated that the determination is the conclusion of a process of judgment concerning the "nature and extent of change in the law and the degree of connection between the operation of the new rule and a relevant past event."[19]

The Court noted three instances where applying a statute to past events would not have a retroactive effect. First, the Court stated that injunctive relief operates "in futuro" and, therefore, provisions relating to such laws can properly be applied to pending cases.[20] Second, the Court noted that it has regularly applied statutes affecting jurisdiction because application of such a rule usually "takes away no substantive right."[21] Finally, procedural rules can be applied without raising retroactivity concerns

14. *Id.* at 280.
15. *Id.*
16. *Id.*
17. *Landgraf*, 511 U.S. at 265. (citing General Motors v. Romein, 503 U.S. 181 (1992); Karser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 842 (1990)).
18. *Id.* at 269.
19. *Id.* at 270.
20. *Id.* at 273-274.
21. *Id.* at 274. (citing Hallowell v. Commons, 239 U.S. 506, 508 (1916)).

because these rules regulate secondary as opposed to primary conduct.[22] The Court noted that reliance interests in matters of procedure are also not substantial.[23]

B. *Post-Landgraf Retroactivity.*

In *Lindh v. Murphy,*[24] the Supreme Court resolved the issue of whether Chapter 153 of the AEDPA, addressing petitions for habeas corpus relief in non-capital cases, governs applications that were pending when the act was passed. The specific section at issue altered the standard under which the prior judgment is evaluated. The statute of limitations provision was not addressed. However, the Court elaborated on the proper application of the *Landgraf* test.[25] The holding in *Lindh* states that "[i]n determining whether a statute's terms would produce a retroactive effect, and in determining a statute's temporal reach generally, our normal rules of construction apply."[26]

Applying traditional rules of construction, the Court reasoned that the provisions at issue were made expressly applicable to pending capital cases, and so by negative implication, the amendments were not meant to apply to pending noncapital cases where there was no express command for such application.[27] This conclusion was bolstered by the fact that the portions of the AEDPA treated differently were considered simultaneously when the language raising the implication was added.[28] The majority concluded that the section at issue applied only to noncapital cases filed after the effective date of the AEDPA.

C. *The Minority Approach*

To date, only a handful of district courts have applied the shortened limitations period to pre-accrued claims.[29] However, the majority of the these cases are from the Fourth Circuit. *Curtis v. Class*[30] and *Clarke v. United States* [31] provide the most thor-

22. *Landgraf*, 511 U.S. at 275.
23. *Id.*
24. Lindh v. Murphy, 117 S. Ct. 2059 (1997).
25. *Id.* at 2060.
26. *Id.* at 2063.
27. *Id.* at 2068. (The amendments include the one year limitations period. However, the Court left open the question of whether application of the statute to cases filed after enactment is permissible.).
28. *Id.*
29. *See supra* note 6 for a list of these cases.
30. *Curtis*, 939 F. Supp. 703.

ough justification for applying the amendment to bar pre-accrued claims. Applying the *Landgraf* test, the *Curtis* court first found no intent as to when the amendments were to take effect. Therefore, the court proceeded to analyze whether the statute would "increase . . . liability or impose new duties."[32] Two reasons were put forth as to why the statute was not retroactive under *Landgraf*: 1) the amendments governing habeas relief are prospective in nature; and 2) the amendments are procedural and regulate secondary conduct only.[33] Citing a number of Eighth Circuit cases which applied new statutes of limitations to claims accrued but not filed, the court held the application of the new statute to §2255 claims filed after enactment is not impermissibly retroactive.[34]

In *Clarke*, the court relied upon *Landgraf's* primary/secondary conduct distinction and found the statute of limitations to address only secondary conduct.[35] The court analogized the AEDPA statute of limitations to the Civil Rights Act of 1991 statute of limitations, which was applied to bar pre-accrued claims in the Fifth, Sixth, and Second Circuits under a *Landgraf* analysis.[36] The Virginia court did not resolve the related issues of fairness and reliance, limiting its determination instead to a literal reading of the *Landgraf* test. The conduct addressed by the statute was not found to be the primary conduct of the defendant and application of the statute neither increased liability for past conduct, imposed new duties, nor impaired the rights a party possessed at the time he acted.[37]

The same court in *United States v. Smith*[38] upheld its earlier decision and addressed the Department of Justice's self-imposed one-year grace period.[39] The court was troubled by what it considered a usurpation of Congressional power by the Attorney General.[40] The court held that it would continue to bar petitions filed after April 24, 1996 when the convictions were final for over a year.

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31. *Clarke*, 955 F. Supp. 593.
32. *Curtis*, 939 F. Supp. at 707.
33. *Id.*
34. *Id.* at 708.
35. *Clarke,* 955 F. Supp. at 596.
36. *Id. See also* Garfield v. J.C. Real Estate, 57 F.3d 662 (8th Cir. 1995); Vernon v. Cassadaga Valley Cent. Sch. Dist., 49 F.3d 886 (2d Cir. 1990).
37. *Clarke*, 955 F. Supp. at 596.
38. 966 F. Supp. 408 (E.D. Va. 1997).
39. *Id.*
40. *Id.* at 410.

The crux of the above decisions is that the amendments are procedural and do not affect substantive rights and therefore, the statute of limitations falls within *Landgraf's* exception for procedural laws. For example, the *Clarke* court relied upon a line of cases outside the Fourth Circuit which applied the Age Discrimination in Employment Act (ADEA)[41] statute of limitations as amended by the Civil Rights Act of 1991.[42] Most influential was the Fifth Circuit's rationale in *St. Louis v. Texas Worker's Compensation Commission*.[43] There, the court cited *Landgraf* for the proposition that procedural changes should be applied to suits arising before enactment due to the diminished reliance interests and because procedural rules govern secondary, rather than primary conduct.[44] The court stated that the statute of limitations addressed only the power of the court to hear the case and not the conduct of the defendant.[45] The *St. Louis* court further stated that the issue was not technically one of retroactivity.[46]

D. The Majority Approach

A majority of courts have granted grace periods before enforcing the AEDPA's statute of limitations for § 2255 petitions.[47] The most substantive analysis is found in the circuit court opinions, several of which have relied upon portions of the *Landgraf* opinion for their holdings.

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41. 29 U.S.C. § 621 (1985).

42. The former statute of limitations allowed for a charge to be filed within two years of the date of discrimination alleged in the charge. The amendment eliminated the two year limit and requires that an ADEA lawsuit be filed any time after 60 days after a charge is filed until 90 days after the receipt of notice that the Equal Employment Opportunity Commission (EEOC) has completed action on the charge. *See Clarke*, 955 F. Supp. at 596-597.

43. 65 F.3d 43 (5th Cir. 1995).

44. *Id.* at 46.

45. *Id.*

46. The court stated:

> Indeed, although the defendant frames the issue as one of retroactivity, the issue is not technically one of retroactivity, where a change in the law overturns a judicial adjudication of rights that has already become final. In this case, the statute of limitations is applied to conduct that occurred after the statute's enactment—the plaintiff's filing of the complaint—not to the allegedly discriminatory acts of the defendant. The only issue is which law to apply to the plaintiff's acts.

Id.

47. *See supra* note 4.

In the Seventh Circuit's *Lindh v. Murphy*[48] opinion, the court in dicta stated that application of the amended § 2255 could "attach new legal consequences to events other than the crime and the state's legal processes and judgment."[49] The petitioner in that case filed his petition within one year of the final decision of the state supreme court.[50] However, citing reliance interests, the court stated that if he had not, the statute of limitations would not bar his petition.[51] The court noted, "we do not doubt that the Court would give a plaintiff who files after the enactment a reasonable post-amendment time to get litigation underway."[52] The court found that a reasonable time and the one-year statutory period coalesce and therefore no petition filed prior to April 24, 1997 may be dismissed.[53] The Second Circuit has also used this reasonable time approach, but granted only seventy-two days instead of a year.[54]

The Tenth Circuit's opinion in *United States v. Simmonds*[55] was guided by the fairness concerns articulated by the *Landgraf* Court.[56] Admitting that a change in the statute of limitations usually does not bring up retroactivity concerns, the court cautioned that such statutes cannot be so unfair as to bar suit before the claimant has had a reasonable opportunity to bring it.[57] Applied literally to the plaintiff's case, the court stated that the new limitations period would result in a severe instance of retroactivity and strip the petitioner of his rights without prior notice.[58]

In *Calderon v. United States District Court for the Central District of California*,[59] the Ninth Circuit cited the Seventh Circuit's *Lindh* decision and the *Landgraf* opinion for the proposition that application of § 2244's new statute of limitations would be

48. 96 F.3d 856 (7th Cir. 1996), *rev'd,* 117 S. Ct. 2059 (1997).

49. *Id.* at 865.

50. *Id.* at 866.

51. *Id.*

52. *Id.*

53. *Id.*

54. Peterson v. Demskie, 107 F.3d 92, 93 (2nd Cir. 1997) (stating that there was no proof Congress intended to cut off access to federal courts by state prisoners who lacked notice of the new limitations period).

55. 111 F.3d 737 (10th Cir. 1997).

56. *Id.* at 745.

57. *Id.*

58. *Id.*

59. 112 F.3d 386 (9th Cir. 1997).

retroactive and would "attach new legal consequences to events completed before its enactment."[60]

The ultimate result of the above cases is that the statute of limitations as applied to pre-accrued claims is impermissibly retroactive and consequently, prisoners must be allowed a reasonable time to file their claims. To justify this result, both *Calderon* and *Simmonds* rely upon the Supreme Court's rationale in *Texaco v. Short*.[61] In *Texaco*, the Court addressed an Indiana statute which destroyed mineral rights not used in the last twenty years unless the mineral owner filed a statement of claim in the local recorder's office.[62] The Court relied upon *Wilson v. Iseminger*[63] for the proposition that new statutes of limitations must allow a reasonable time after they take effect for the commencement of suits upon existing causes of action.[64] The Ninth and Tenth Circuits were guided by the *Wilson* rationale combined with the underlying fairness considerations found in *Landgraf* in determining how to apply the amended § 2255.

III. ANALYSIS

The two competing approaches to § 2255's statute of limitations have very different outcomes for one seeking a writ of habeas corpus who delayed for more than a year before filing his or her petition. Therefore, it is necessary to analyze both rationales,

60. *Id.* at 389 (quoting Landgraf v. USI FILM Prods., 511 U.S. 244, 270 (1994)).

61. 454 U.S. 516 (1982). The statute in question allowed an owner to refile his claim and in effect gave the owner another 20 year period. Therefore, the statute did not abolish vested rights without notice.

62. *Id.*

63. 185 U.S. 55 (1902).

64. It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrary, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action.

Id. at 62. The statute at issue in *Wilson* was similar to the act discussed in *Texaco*. Even though the statute acted to abolish a fee simple interest in land it was held valid because the statute contained a grace period in which owners could protect their rights. *Texaco*, 454 U.S. at 526.

seek alternatives and adopt the approach that carries out Congress's intended reforms in the least draconian manner.

A. *Analysis of the Minority Approach*

As noted above, the courts which apply the statute of limitations to bar claims which accrued prior to the effective date of the statute rely exclusively on *Landgraf* or its interpretation by other courts. However, this rationale is erroneous for three reasons. First, cases applying *Landgraf* to the ADEA statute of limitations are distinguishable; second, these courts have overlooked important underlying considerations which support the presumption against the retroactive application of laws such as fairness and reliance; and finally, the shortened limitations period affects more than the power of the court to hear a petition.

1. *Case Law Cited By The Minority View Is Distinguishable.*

The ADEA statute of limitations and § 2255's limitation period are not similar so as to be interpreted the same for retroactivity purposes. Therefore, cases which involve these two statutes have fact patterns which raise different concerns.

For example, a comparison of the respective plaintiffs in *United States v. Clarke*[65] and *St. Louis v. Texas Worker's Compensation Commission*[66] reveals important dissimilarities. In *St. Louis*, the plaintiff filed his charge on July 8, 1991, the alleged discrimination occurring earlier that year.[67] On November 21, 1991 the ADEA statute of limitations was amended by the Civil Rights Act of 1991. The plaintiff received his right to sue letter on July 17, 1992.[68] The letter included language warning the plaintiff that the two-year statute of limitation was no longer in effect.[69] Despite the warning of the change in law, the plaintiff failed to file suit within the required time.[70]

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65. 955 F. Supp. 593 (E.D. Va. 1997).
66. 65 F.3d 43 (5th Cir. 1995).
67. *Id.* at 44.
68. *Id.*
69. The letter contained the following language:
> Because it is not clear whether this amendment applies to instances of alleged discrimination occurring before November 21, 1991, if Charging party decides to sue, a lawsuit should be brought within two years of the date of the alleged discrimination and within ninety days of receipt of this letter, whichever is earlier, in order to assure the right to sue.

Id.
70. *Id.*

Therefore, the plaintiff in that case had notice of the change in law and an opportunity to file suit after the statute of limitations was shortened. The petitioner in *Clarke*, however filed suit on October 21, 1996, six months after the AEDPA was signed into law.[71] The court dismissed his petition given the fact that his conviction became final in 1990.[72] It is clear that Clarke relied upon existing law which allowed an unlimited amount of time to file, had no notice of the new limitation until after his period had run, and was not permitted to file after the change in law. The application of the *St. Louis* rationale to Clarke's petition resulted in the destruction of a substantive right without notice, the very result the *Landgraf* Court sought to avoid. Given the dissimilar positions of the two respective plaintiffs before and after the limitations periods were shortened, the *Clarke* court reached the wrong conclusion by following the *St. Louis* rationale.

2. *Overriding Considerations Of Reliance And Fairness Must Be Addressed.*

Justice Stevens, writing for the majority in *Landgraf,* noted that, "the presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact."[73] Therefore, fairness should be a central concern when deciding the temporal reach of a statute where Congress has not made its intent clear. By discussing procedural laws, the Court was not holding that all laws that could be deemed procedural should be applied retrospectively.[74] Rather, the Court was merely depicting one example where application of new law to past events would not have a truly retroactive effect. As the Court stated, "traditional retroactivity concerns are present in some procedural statutes."[75] Therefore, the minority's conclusion that the statute of limitations in question is procedural does not end the issue. The court must go further and determine whether vested rights are affected.[76]

The *Landgraf* Court also cited diminished reliance interests in matters of procedure as a justification for applying such rules to

71. *Clarke*, 955 F. Supp. at 594.

72. *Id.*

73. *Landgraf*, 511 U.S. at 270.

74. *Id.* at 275 n.29.

75. *Id.* The court noted, "[n]or do we suggest that concerns about retroactivity have no application to procedural rules." *Id.*

76. *Id.*

events antedating enactment.[77] However, as the Seventh Circuit noted in *Lindh v. Murphy*,[78] an inmate's reliance interest in an unlimited amount of time to file could be substantial.[79] Prisoners are given limited access to law library facilities and it may often take the uneducated inmate much study to discover the basis for his habeas petition. Furthermore, such prisoners may be transferred or forced to rely upon the expertise of other inmates in developing their arguments. Such conditions serve only to increase one's reliance on the status quo, unlike one in less confining circumstances.

3. The Shortened Statute Of Limitations Affects More Than The Power Of The Court To Hear A Petition. A Statute Of Limitation Is More Than A Jurisdictional Requirement Or A Mode Of Procedure.

The relevant conduct regulated by the amended § 2255 is not only the subject matter jurisdiction of the court, but the actions of the inmate in filing his petition. The statute essentially forces a prisoner to file within one year or lose his opportunity. Therefore, the fact that the amended § 2255 controls the subject matter jurisdiction of the court serves as scant justification for imposing it retrospectively.

Furthermore, this issue is not a "clean" retroactivity analysis due to the fact that the plaintiff filed his claim after the new law came into effect. The initial application of the *Landgraf* test was conducted on a pending case, in which the defendant was the party most affected by the change in law. Therefore a court could properly apply the three test factors to the change in the law: (1) increase in liability; (2) imposition of new duties; or (3) impairment of rights that a party possessed when he acted.[80] However, to apply this rationale to a plaintiff petitioning for habeas corpus is awkward unless one assumes that the conduct burdened is the prisoner's inaction. It is equally tenuous to argue that the right to file a habeas corpus petition is a right subject to impairment that

77. *Landgraf*, 511 U.S. at 275 (citing Ex Parte Collett, 337 U.S. 55, 71, (1949)).

78. 96 F.3d 856 (7th Cir. 1996), *rev'd,* 117 S. Ct. 2059 (1997).

79. *Id.* at 866. The Court noted, "[a] prisoner's decision to defer filing—perhaps while doing legal research or while waiting for the Supreme Court to decide a case that could influence the selection of issues—is the sort of event to which the amended statute would attach new legal consequences." *Id.*

80. *Landgraf*, 511 U.S. at 280.

a criminal possessed when he broke the law. Under a literal application of the *Landgraf* test, this type of reasoning would be necessary to determine whether a statute of limitations had a truly retroactive effect. It is therefore clear that the three-part *Landgraf* test should be confined to the context of a new law that affects a defendant in a pending case. However, the fairness concerns should not be overlooked under any circumstances.

B. *Analysis of Majority Approach*

The courts which have granted a reasonable grace period after April 24, 1996 in which to file § 2255 petitions have reached their conclusion through a variety of means.[81] For example, the Ninth and Tenth Circuits rely upon notions of equity and the Supreme Court's holding in *Wilson* v. *Iseminger*.[82] The Seventh Circuit in *Lindh*, however, made no mention of statute of limitations specifically; rather they chose to support their decision on the view that one's right to rely upon existing law is paramount.[83] However, several courts have adopted a grace period with no explanation at all.[84] It is the conclusion of this comment that the majority approach is consistent with Supreme Court decisions construing the proper application of statute of limitations; however, clarification is necessary.

In *Terry v. Anderson*,[85] the Supreme Court held that "statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect."[86] Therefore, the issue when addressing a

81. *See* United States v. Ramos, 971 F. Supp. 199 (E.D. Pa. 1997). The court, concerned with unidentified "constitutional implications," refused to dismiss the petitioner's motion based on a 1993 final conviction where the petition was filed three months after the effective date of the AEDPA.

82. 185 U.S. 55 (1902).

83. *Lindh*, 96 F.3d at 866. It is unclear why the Seventh Circuit chose to allow a one-year grace period. The court stated that if the petitioner's (Lindh) claim had not been timely filed under a literal application of the statute, it would not be dismissed for reliance reasons. However, the court went on to state that "Lindh lacks any reliance interests nearly that strong." *Id.*

84. *See*, United States v. Jones, 963 F. Supp. 32 (D.D.C. 1997); Smith v. United States, 945 F. Supp. 1439 (D. Colo. 1996) (finding literal application of the AEDPA statute of limitations to be "intolerable").

85. 95 U.S. 628 (1877).

86. *Id.* at 632-33. A suit was brought to enforce the liability of stockholders of a bank under a provision in the banks charter. Subsequent to the banks insolvency, a law was passed which shortened the period in which to bring suit for the liability. The Court held that the plaintiffs were provided with a

legislatively shortened limitations period is whether the new limit allows the plaintiff to bring suit.[87] The *Landgraf* decision was not intended to change the rather uninterrupted Supreme Court history of allowing a reasonable time to file suit after a legislatively shortened statute of limitations is enacted.[88] The Court's justification for the Landgraf analysis is fairness and equity and lends support to the earlier holdings in *Wilson* and *Terry*.

As noted earlier, a literal application of the *Landgraf* test in the context of a statute of limitations can result in tortured reasoning and unwarranted results.[89] The Fifth Circuit rationale in *Hartford Casualty Insurance Co. v. F.D.I.C.*,[90] is the proper synthesis of the *Landgraf* opinion with prior Supreme Court jurisprudence.[91] There, the court differentiated between procedural rules which affect a plaintiff's conduct and those which merely affect the court. The court held that they would only apply procedural changes to existing causes of action where those changes did not deprive a litigant of his day in court.[92] In such circumstances, the

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reasonable time to bring their suit. *Id.* Furthermore, the Court held that parties to a contract have no vested interest in a particular limitation and that the legislature may change them at its discretion, provided adequate means of enforcing the right remain." *Id.* at 633.

87. Calvin Corman, LIMITATIONS OF ACTIONS § 2.4.3, at 153-154 (1991).

88. *See Landgraf*, 511 U.S. 244. No where in the Court's opinion are statutes of limitation specifically addressed. The historical allowance of a reasonable grace period is found in Wilson v. Iseminger, 185 U.S. 55 (1902), Terry v. Anderson, 95 U.S. 628 (1877), and United States v. Morena, 245 U.S. 392 (1918). In *Morena*, the Court interpreted a Federal law which stated that aliens must petition for citizenship within seven years of declaring their intent to become citizens. *Id.* at 393. Morena, an alien, had declared his intent to become a citizen before enactment of the statute but had waited more than seven years to file his petition for citizenship. The Court, citing *Wilson*, held that aliens who declared before the statute took effect had seven years from the date of enactment to petition for citizenship. *Id.* at 397. The Court stated: "A limitation of time even upon the assertion of a right theretofore having no limitation upon its assertion, or a different limitation, is not infrequent, and its legality is unquestionable if a time reasonable, in view of the subject-matter, be given." *Id.*

89. A shining example is the Fifth Circuit's opinion in *St. Louis* in which the court stated that the issue was not one of retroactivity but nevertheless proceeded to apply the *Landgraf* test. *St. Louis,* 65 F.3d at 45.

90. 21 F.3d 696 (5th Cir. 1994).

91. *Id.* The court held that the section of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, imposing a 60-day time limit on request for review of final determinations by the FDIC did not apply retroactively.

92. *Id.* at 701. "When Congress adopts statutory changes while a suit is pending, the effect of which is not to eliminate substantive rights but rather to 'change the tribunal which will hear the case', those changes - barring

substantive rights of the parties are not affected.[93] This case was decided after the *Landgraf* decision, and construes the Court's discussion of the proper application of statutory procedural rules in light of the underlying fairness considerations which support the presumption against retroactivity.[94]

Applied to a petition filed a year or more after a prisoner's final conviction but within a reasonable time after the enactment of the AEDPA, the rationale in *Hartford Casualty* leads to the proper result by adopting the most coherent approach. Assuming arguendo that the change in law is procedural or jurisdictional, *Hartford Casualty* requires a court to consider the rights affected by the party subject to the change in law and avoids a rigid, inappropriate application of the *Landgraf* test. As discussed earlier, these requirements are implicit in the *Landgraf* opinion; however, courts that have barred pre-accrued claims have justified their conclusion solely on a literal application of the three-part test.

IV. CONCLUSION

The rationale in *Hartford Casualty* is the most enlightened and plausible justification for the majority approach. The change in § 2255's limitation period as applied to pre-accrued claims changes a great deal more than which tribunal can hear the case. As applied by the minority, the change wipes out a substantive right arbitrarily and without notice. Such an extinction of rights flies in the face of existing Supreme Court precedent and is manifestly unjust.[95]

Over a year has passed since the enactment of the Anti-Terrorism and Effective Death Penalty Act. Therefore, prisoners who have not filed and whose statutory period expired before the AEDPA was enacted should be barred from filing in order to carry out Congress's intent of reducing the number of frivolous petitions for habeas corpus filed in federal court. However laudable the goal, such a result can not come at the expense of substantive

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specifically expressed intent to the contrary - will have immediate effect." *Id.* (quoting Turboff v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 867 F.2d 1518, 1521 (5th Cir. 1989) (quoting Hallowell v. Commons, 239 U.S. 506, 508 (1916))).

93. *Id.*

94. *Hartford Casualty Ins.* Co., 21 F.3d at 700.

95. *See* Bradley v. School Board, 416 U.S. 696 (1974). Therein the Court stated that changes in the law should not be applied which would infringe upon or deprive a person of a right that had matured and would impose unanticipated obligations upon a party without notice or an opportunity to be heard. *Id.* at 720.

rights. Those unlucky few who filed their petitions shortly after the statute was signed into law should not be made into martyrs in the war against judicial inefficiency.

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