REVISITING RETROACTIVITY ANALYSIS OF AEDPA AND IIRIRA:
TOO MUCH RELIANCE ON ACTUAL RELIANCE?

MARJORIE BALTAZAR

INTRODUCTION

Retroactive legislation presents due process concerns for individuals. Despite these concerns, Congress has the power to enact retroactive laws. While a retroactive statute is not impermissibly retroactive just because it applies to conduct that predates its enactment, it is impermissible if it attaches new legal consequences to events that predate its enactment. The general concern with retroactive legislation is that the legislature will enact legislation against unpopular groups or individuals without regard for individualized fairness considerations.\(^1\)

In 1996 Congress passed two laws, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). These laws significantly affected aliens’ rights to remain or enter the United States by expanding the number of aliens who are removable\(^2\) and constricting the number of aliens eligible from any form of relief from removal proceedings. It is widely recognized that Congress enacted these laws with the purpose of increasing the number of criminal aliens deported.\(^3\) Since their passage, the retroactive application of certain provisions of AEDPA and IIRIRA to aliens convicted prior to the statutes’ enactment has been the topic of numerous scholarly articles, cases, and debate.

Prior to the passage of AEDPA and IIRIRA, § 212(c) of the Immigration and Nationality Act ("INA") had provided discretionary relief from exclusion and deportation for certain aliens ("§ 212(c) relief"). Under § 212(c), lawful permanent
residents who had lived in the U.S. for seven continuous years were eligible for the relief. Even permanent residents who had been convicted of an aggravated felony were eligible, as long as the term of imprisonment served was less than five years. AEDPA rendered aliens convicted of aggravated felonies ineligible for discretionary relief from deportation under § 212(c). Effective April 1, 1997, IIRIRA § 304(b) repealed INA § 212(c) altogether and eliminated all possibility of relief under the old rule. IIRIRA provided for a form of discretionary relief that was available to a narrow group of aliens which did not include aliens convicted of an aggravated felony, regardless of the length of sentence served.

Five years after the passage of AEDPA and IIRIRA in INS v. St. Cyr, the Supreme Court found that the retroactive application of IIRIRA § 304(b) would have an impermissible retroactive effect on aliens who had pleaded guilty prior to the repeal of § 212(c). Therefore, the provisions of AEDPA and IIRIRA limiting an alien’s eligibility for § 212(c) relief would not apply to an alien who had pleaded guilty prior to April 1, 1997. The law in effect at the time of an alien’s plea would govern whether he is eligible for § 212(c) relief.

The facts of the St. Cyr case only dealt with a plea bargain situation. The First, Second, Fourth, Seventh, and Ninth Circuit Courts, as well as the Board of Immigration Appeals, have continued to apply AEDPA and IIRIRA retroactively to aliens convicted following a trial prior to the statutes’ passage and have refused to extend § 212(c) relief to aliens convicted following a trial prior to the passage of IIRIRA. These courts have found that St. Cyr does not apply to defendants who were convicted after a jury trial where there was no showing of reliance on the relief under § 212(c). Only the Third Circuit has extended § 212(c) relief to aliens convicted following a trial pre-IIRIRA, but only to aliens who were offered a plea agreement but
elected to go to trial. In *Ponnapula v. Ashcroft* decided June 2004, the Third Circuit rejected the actual reliance approach adopted by the other circuits and instead held that IIRIRA § 304(b) was impermissibly retroactive with respect to aliens who turned down a plea agreement and elected to go to trial in reasonable reliance on the availability of § 212(c) relief. The *Ponnapula* court suggested that the other circuits have misapplied *St. Cyr* by converting the *quid pro quo* into a rigid baseline test.

To illustrate the potential for unfairness in applying AEDPA and IIRIRA retroactively to aliens who were convicted after trial but not to those who obtained convictions after entering a plea, again consider the following hypotheticals:

(1) Pedro entered the U.S. in 1987 and became a legal permanent resident in 1991. In 1994, he was charged with trafficking controlled substances, an offense which is listed as an aggravated felony and therefore would make Pedro excludable or deportable under § 212(a) if convicted. In exchange for his testimony against his associates, Pedro was offered a plea agreement that provided for a four-year sentence. He accepted the agreement, was jailed, and was released in 1998. He was placed in removal proceedings in 2002, after *St. Cyr* was decided. During his removal proceedings, he applied for § 212(c) relief. Because he was convicted following a plea agreement at a time when § 212(c) relief was available, applying IIRIRA § 304(b)’s repeal of § 212(c) retroactively to him is impermissible according to *St. Cyr*. Therefore, Pedro is still eligible for § 212(c) relief. Pedro was granted § 212(c) relief and was allowed to remain in the U.S. He was naturalized last year and is now a citizen.

(2) Like Pedro, Juan entered the U.S. in 1987 and became a legal permanent resident in 1991. In 1994, he was charged with unlawful possession of controlled substances. This violation qualifies as “illicit trafficking of controlled substances”
and also an aggravated felony under AEDPA’s enhanced definition of “aggravated felony.” Consequently, this violation would make Juan excludable or deportable if convicted. He was not offered a plea deal, but since this is his first offense simple possession conviction, his attorney advised him that the maximum penalty he would receive is probation and a fine. Juan proceeded to trial, was convicted, fined, and ultimately served probation for one year. In 2002, he was placed in removal proceedings, during which he applied for § 212(c) relief. Although he was convicted at a time when § 212(c) relief was available, his removal proceedings were not initiated until after IIRIRA’s repeal of § 212(c) became effective. Since courts have not found that § 212(c) remains eligible for aliens convicted following a trial prior to AEDPA and IIRIRA, his request for § 212(c) relief was denied. Juan was deported back to his home country.

This paper seeks to trace the history of retroactivity analysis as applied to AEDPA and IIRIRA, explain the circuit courts’ unwillingness to extend § 212(c) relief to permanent residents like Juan, and evaluate the flaws in the circuit courts’ retroactivity analysis in order to show that § 212(c) relief should also be extended to aliens like Juan who were convicted following trial pre-IIRIRA, served sentences less than five years, and would have been eligible for § 212(c) relief had their removal proceedings commenced before IIRIRA’s effective date. Part I provides a brief background of the INA, AEDPA, and IIRIRA in order to establish how changes introduced by AEDPA and IIRIRA could have possible retroactive effects to legal permanent residents with certain criminal convictions. Part II reviews the Landgraf v. USI Film Products decision, the retroactive analysis introduced in the decision, and the Supreme Court’s application of the Landgraf analysis in INS v. St. Cyr in determining that AEDPA and IIRIRA’s repeal of § 212(c) relief is impermissibly retroactive with respect to aliens convicted after plea bargains. Part III examines
circuit court cases that have interpreted the retroactive application of AEDPA and IIRIRA in the context of aliens convicted after trial, focusing on the forms of reliance various courts have required. Part IV evaluates the retroactive application of AEDPA and IIRIRA to aliens convicted after trial using a complete Landgraf analysis and proposes that the availability of § 212(c) relief should be extended to aliens who were convicted after trial prior to AEDPA’s and IIRIRA’s enactment and who served sentences less than five years. Applying AEDPA and IIRIRA retroactively and denying § 212(c) relief to an alien convicted by trial would have an impermissible retroactive effect similar to the impermissible retroactive effect St. Cyr found in aliens convicted following a plea agreement.

I. History of the Relevant Legislation Affecting the Deportability of Legal Permanent Residents

“During its first 100 years the nation had virtually unrestricted immigration. Large numbers of people were needed in the early years to populate an enormous country and to provide the labor that building a nation demanded. Colonial attempts to limit immigration of ‘undesirable’ persons, paupers, criminals, and those inclined to become ‘public charges’ did not find their way into federal legislation until 1875. Over the years the number of qualitative controls on immigration increased steadily to include people with certain diseases, polygamists, the insane, anarchists and the feeble minded, among others. Congress also enacted overtly racist restrictions to deter immigration from particular regions of the world.”

A. Immigration and Nationality Act

The INA was created in 1952, as a result of the passage of the McCarran-Walter bill of 1952, Public Law No. 82-414, which organized all of the existing
statutes and provisions governing immigration laws into a single statute. The INA has been amended many times and remains the basic statute for immigration law.

The INA governs classes of aliens who may not be admitted for entry into the U.S. and classes of aliens who may be deported from the U.S. Inadmissibility and deportability are collateral consequences of some criminal convictions. Certain criminal grounds exclude an alien from being eligible to receive a visa and from admission into the U.S. at the port of entry. Similarly, certain criminal grounds render an alien already admitted in the United States deportable. Grounds for deportability include the commission of an “aggravated felony,” which was originally defined to include a list of extreme offenses. Any alien, even one admitted as a legal permanent resident, “who is convicted of an aggravated felony at any time after admission is deportable.” In order to be deported, an alien with a criminal conviction must first come to the attention of immigration authorities, who then determines whether to commence proceedings to remove the alien from the U.S.

Although § 212(a) barred certain aliens from admission, § 212(c) granted the Attorney General discretion to admit otherwise inadmissible aliens who were legal permanent residents. According to § 212(c), “[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General…” Thus, initially § 212(c) relief was even available for permanent residents who were inadmissible for having an aggravated felony conviction.

In 1990, Congress amended INA § 212(c) to add an additional requirement in order to qualify for relief under § 212(c): Relief was made unavailable to an “alien who has been convicted of an aggravated felony and has served a term of imprisonment of at
least 5 years." A permanent resident with an aggravated felony conviction, therefore, could still qualify for relief under § 212(c) as long as he served a term of imprisonment less than five years.

§ 212(c) literally applied only to returning residents in exclusion proceedings at the port of entry. However, § 212(c) relief was held to be available to permanent residents in deportation proceedings also. § 212(c) relief in deportation proceedings was available only where the ground for deportation had a substantially equivalent exclusion ground. In general, any deportable conviction could be waived under § 212(c), except for convictions involving firearms and explosives which did not have an equivalent ground for exclusion.

Qualifying permanent residents in exclusion or deportation proceedings could request a waiver under § 212(c) by establishing eligibility for relief and demonstrating that his application warrants a favorable exercise of discretion. If relief is granted by the presiding immigration judge or panel, § 212(c) relief would end the proceedings and allow the alien to remain a permanent resident. Furthermore, § 212(c) relief acted as a waiver of the ground of inadmissibility/deportability, so that the conviction can no longer be a ground for removing the alien from the U.S.

Between 1989 and 1995, § 212(c) relief was granted to over 10,000 aliens. Between 1989 and 1994, over half of the total number of applications for § 212(c) relief decided by Immigration Judges and the Board of Immigration Appeals were granted.

B. Amendments to INA § 212(c): AEDPA and IIRIRA

The passage of AEDPA on April 24, 1996 further limited the availability of § 212(c) relief from deportation. AEDPA amended INA § 212(c) by precluding §
212(c) relief from any alien “deportable by reason of having committed any criminal offense” identified in the provision.\textsuperscript{[19]} In effect, AEDPA precluded § 212(c) relief for aliens convicted of the following: (1) aggravated felonies, (2) controlled substance violations, (3) firearms offenses, (3) certain “miscellaneous crimes,” and (4) two or more crimes involving moral turpitude for which the alien was confined for one year or longer.\textsuperscript{[20]} Furthermore, AEDPA §440(d) specifically removed the § 212(c) relief “exception” for aliens convicted of aggravated felonies but did not serve a term of imprisonment of at least five years.\textsuperscript{[21]} Under AEDPA, an alien convicted of an aggravated felony, regardless of the term served, would no longer be eligible for § 212(c) relief. § 212(c) relief remained available only for aliens convicted of a single crime of moral turpitude, not amounting to an aggravated felony, committed within five years of the alien’s last entry to the U.S., and which carried a maximum one-year sentence.

Five months after AEDPA was enacted, Congress passed IIRIRA, which repealed INA § 212(c) thereby abolishing the availability of § 212(c) relief.\textsuperscript{[22]} IIRIRA provided permanent residents with a similar but narrower type of relief from removal proceedings called “cancellation of removal.”\textsuperscript{[23]} A permanent resident who is removable may qualify for cancellation of removal if he has been a permanent resident for at least five years, has resided in the U.S. continuously for seven years after being admitted in any status, and has not been convicted of an aggravated felony.\textsuperscript{[24]} IIRIRA also expanded the definition of “aggravated felony” to include more offenses such as theft or burglary carrying a prison term of one-year, crimes of violence carrying a prison term of one-year, and statutory rape.\textsuperscript{[25]} The effect of these provisions is that a larger number of immigrants are deportable, while a smaller portion is eligible for any form of relief from deportation.
Although IIRIRA indicates that the effective date for the repeal of INA § 212(c) is April 1, 1997 and specifically states that cancellation of removal is not available for an “alien whose removal has previously been cancelled… or whose deportation was suspended under section 244(a) or who has been granted relief under section 212(c), as such sections were in effect before the date of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,” IIRIRA does not contain specific provisions on whether IIRIRA’s repeal of § 212(c) applies to aliens convicted before its passage and whose removal proceedings commenced after its passage. Thus, AEDPA and IIRIRA affects the deportability of legal permanent residents convicted of an aggravated felony and who have already served sentences less than five years which would make them eligible for § 212(c) relief had removal proceedings commenced against them prior to AEDPA’s and IIRIRA’s effective dates. Whether AEDPA and IIRIRA should apply retroactively to render deportable the same legal permanent residents with aggravated felony convictions and with completed sentences pre-AEDPA and pre-IIRIRA but against whom removal proceedings were not commenced until post-AEDPA and post-IIRIRA remains a question for the courts to decide.

II. Retroactivity of AEDPA and IIRIRA

A. Standard for Retroactivity Analysis: *Landgraf v. USI Film Products*

In *Landgraf*, the Supreme Court held that § 102 of the Civil Rights Act of 1991 (“1991 Act”) did not apply retroactively to a case pending on appeal before the statute’s enactment. After addressing the legislative history and the statutory text of the 1991 Act, the Court discussed the issue of retroactivity.
The Court examined two contradictory canons of construction regarding the temporal reach of new statutes. The Court discussed the history of these canons, the various constitutional restrictions against retroactive legislation, the basis for the presumption against statutory retroactivity, and the proper application of new statutes passed after events in suit.

Citing other decisions that have identified retroactivity principles, the Court established a two-step analysis (“Landgraf analysis”) for determining whether a statute “enacted after the events in suit” has an impermissible retroactive effect. The first step is to “determine whether Congress has expressly prescribed the statute’s proper reach.” If Congress has done so, then the analysis is complete at this step since Congress has the power to enact retroactive laws. However, absent an express command, the analysis continues to the second step: “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 court determines that the statute has a retroactive effect, then “our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.” Conversely, if the court finds clear congressional intent to apply the statute retroactively, then the statute may be applied retroactively. This test is used to determine whether to apply a new law to cases that are pending or initiated after the new law was enacted, where the conduct occurred prior to the new law’s enactment.

The determination of “whether a statute operates retroactively demands a commonsense, functional judgment about ‘whether the new provision attaches new legal consequences to events completed before its enactment’” and “should be
informed and guided by ‘familiar considerations of fair notice, reasonable reliance, and settled expectation.’” A statute operates retroactively if it “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past…”

Applying the two-step analysis and the various retroactivity principles identified, the Landgraf court concluded that the new damages remedy in § 102 does not apply to events that occurred before its enactment. For step one of the analysis, the Court concluded that the 1991 Act does not contain an explicit command to authorize recovery of § 102 damages for preenactment conduct. For step two of the analysis, the Court concluded that the new damages remedy in § 102 would have a retroactive effect if applied, since the new right to compensatory damages would affect a defendant’s liabilities, impact the planning of private parties, and “attach an important new legal burden” to the defendant’s past discriminatory conduct. Because the Court did not find clear congressional intent to apply § 102 retroactively, the presumptions against retroactivity mandate that it cannot be applied to a pending case.

B. INS v. St. Cyr: Retroactive Analysis of AEDPA and IIRIRA as Applied to Permanent Residents With Aggravated Felony Convictions Following a Plea Bargain

Using the Landgraf analysis, the Supreme Court held in INS v. St. Cyr that the provisions of AEDPA and IIRIRA which repealed § 212(c) relief could not be applied retroactively to aliens who pled guilty before the statutes’ effective date.

St. Cyr was a lawful permanent resident who pleaded guilty to a criminal charge that made him deportable. He would have been eligible for § 212(c) relief under the
immigration law in effect when he was convicted,[49] but he was not placed in removal proceedings until after AEDPA’s and IIRIRA’s effective dates.[50] As the Attorney General interprets AEDPA and IIRIRA, he claims those Acts withdrew his ability to grant St. Cyr discretionary § 212(c) relief.[51] The Federal District Court held that AEDPA and IIRIRA provisions restricting eligibility for § 212(c) relief do not apply to removal proceedings brought against an alien who pleaded guilty to a deportable crime before the AEDPA and IIRIRA were enacted.[52] The Second Circuit and the Supreme Court affirmed.[53] In deciding whether the statutes have an impermissible retroactive effect, the Court resolved the issue of whether IIRIRA § 304(b)’s repeal of § 212(c) relief changed the legal consequence of St. Cyr’s decision to enter a guilty plea.[54]

1. *Landgraf* Step One

The first step of the analysis calls for determining whether Congress clearly proscribed the statute’s temporal reach.[55] The Court established that the standard for finding “such unambiguous direction” is “statutory language that was so clear that it could sustain only one interpretation.”[56]

The INS argued that IIRIRA’s comprehensive revision of federal immigration law indicates that the old law should no longer be applied.[57] The Court concluded that “the comprehensiveness of a congressional enactment says nothing about Congress’ intentions with respect to the retroactivity of the enactment’s individual provision.”[58]

The INS also argued that the effective date for Title III-A of IIRIRA provided a clear statement that Congress intended to repeal § 212(c) relief retroactively.[59] In response, the Court stated that the existence of an effective date does not provide
sufficient assurance that Congress weighed the risks of retroactive legislation and therefore a “statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.”\footnote{60}

Finally, the INS argued that Congress’ clear intent is demonstrated by a “savings provision” that provided that the new statute does not apply to pending exclusion or deportation proceedings.\footnote{61} The Court again dismissed this argument, stating that the provision did not indicate “with unmistakable clarity Congress’ intention to” retroactively repeal § 212(c) relief because neither the provision nor the statute’s legislative history discuss the effect of the statute on post-IIRIRA proceedings based on convictions that occurred pre-IIRIRA.\footnote{62} Additionally, the Court noted that since Congress expressly commanded some provisions of IIRIRA to apply to prior convictions,\footnote{63} but did not do so for § 304(b), indicates that Congress did not definitively decide whether § 304(b) applies retroactively to pre-IIRIRA convictions.

Reiterating the concerns of retroactive legislation, the Court rejected the arguments made by the INS and concluded that Congress did not unambiguously indicate that IIRIRA should be applied retroactively.\footnote{64} Absent an express command from Congress regarding the statute’s temporal reach, the court must proceed to step two of the analysis.

2. \textit{Landgraf} Step Two

Repeating the retroactivity principles described in \textit{Landgraf},\footnote{65} the Court concluded that IIRIRA § 304(b)’s repeal of § 212(c) relief for people who entered into plea agreements prior to IIRIRA’s enactment has a retroactive effect.\footnote{66} Aliens who enter into plea agreements at a time when they would be eligible for § 212(c) relief

reasonably rely on the availability of such relief.\textsuperscript{167} Eliminating the possibility of attaining such relief clearly “attaches a new disability, in respect to transactions or considerations already past.”\textsuperscript{168}

Adding that “[p]lea agreements involve a \textit{quid pro quo} between a defendant and the government,”\textsuperscript{169} defendants waive numerous rights in exchange for some perceived benefit and in order to grant the government other benefits.\textsuperscript{170} One of the benefits that an alien defendant would seek in deciding whether to accept a plea offer or instead to proceed to trial is to preserve his eligibility for § 212(c) relief.\textsuperscript{171} The potential for unfairness in eliminating § 212(c) relief to people who make decisions to ensure eligibility for relief is “significant and manifest”\textsuperscript{172} and “would surely be contrary to ‘familiar considerations of fair notice, reasonable reliance, and settled expectations.”\textsuperscript{173}

Although § 212(c) relief was discretionary, aliens like St. Cyr had a significant likelihood of receiving § 212(c) relief prior to the enactment of AEDPA and IIRIRA.\textsuperscript{174} The repeal of § 212(c) relief has “an obvious and severe retroactive effect” because St. Cyr, and other aliens like St. Cyr, “almost certainly relied upon [the] likelihood” of receiving such relief in deciding whether to forgo their right to a trial.\textsuperscript{175}

The Court acknowledged that Congress may enact retroactive laws as long as it makes its intention plain.\textsuperscript{176} However, in the absence of anything in IIRIRA unmistakably indicating that Congress considered the question whether to apply its repeal of § 212(c) relief retroactively to aliens who obtained convictions through a pre-IIRIRA plea agreement, the repeal of § 212(c) relief cannot retroactively apply to such aliens.\textsuperscript{177}
III. History of Cases Interpreting the Retroactivity of AEDPA and IIRIRA

Courts have considered three distinct groups of legal permanent residents with criminal convictions before AEDPA’s and IIRIRA’s effective dates but who were not excluded or deported until after AEDPA’s and IIRIRA’s effective dates: aliens who (1) entered a plea of guilty for aggravated felony and served a sentence less than five years, (2) rejected a plea bargain, proceeded to trial, convicted of an aggravated felony following trial, and then served a sentence less than five years, and (3) were not offered a plea bargain, convicted of an aggravated felony after trial, and then served a sentence less than five years. Under the old scheme pre-AEDPA and pre-IIRIRA, aliens in all three groups would have been deportable for having been convicted of an aggravated felony but also would have been eligible for § 212(c) relief, for having served sentences less than five years, had removal proceedings commenced against them before AEDPA’s and IIRIRA’s effective dates. AEDPA and IIRIRA render the same aliens deportable and precluded from obtaining relief if the removal proceedings commence after AEDPA’s and IIRIRA’s effective dates, even if the aliens were convicted and had completed their sentence before AEDPA and IIRIRA were enacted.

A. Pre-St. Cyr: The Reliance Trend Begins

Prior to the Supreme Court’s decision in St. Cyr, circuit courts have uniformly held that AEDPA’s and IIRIRA’s effects on § 212(c) relief availability are not impermissibly retroactive. However, circuit courts diverged on their reasoning and their analysis of whether the provisions of AEDPA and IIRIRA apply to conduct that occurred prior to the statutes’ enactment.

In 1998, the Seventh Circuit used an analysis similar to the analysis in Landgraff in deciding that the procedural change created by AEDPA § 440(d) was not impermissibly retroactive. After first noting that AEDPA § 440(d) was neither expressly prospective nor expressly retroactive, the
court stated that ambiguous legislation will be applied retroactively if it creates a procedural change and prospectively if it changes primary duties. The presumption in favor of retroactive application of procedural statutes is reversed upon a showing that reasonable expectations are disturbed. No such reasonable expectations were disturbed in this case, since there was no act other than the alien’s commission of crimes that could have been influenced by reliance on the potential availability of § 212(c) relief. Thus, the AEDPA provisions barring § 212(c) relief applied to deportation proceedings that were pending when AEDPA was enacted, even though aliens were convicted by trial prior to the statute’s enactment.

In 2001, the Seventh Circuit adopted the Landgraf analysis but ended the analysis at step one in holding that Congress clearly intended IIRIRA § 304(a), which outlined eligibility for cancellation of removal, to apply to all aliens in removal proceedings brought after IIRIRA’s effective date. Congressional intent was found in the statute’s scheme of transitional and permanent provisions that specified certain provisions applicable at certain times and which exempted other aliens from other provisions. The detailed scheme indicated that Congress contemplated the retroactive application of the statute. This scheme, coupled with IIRIRA’s effective date provision which is more than “a mere effective date,” suggests Congress’ intent to apply IIRIRA retroactively.

The same court indicated that even if Congress’ intent regarding the application of IIRIRA § 304(a) was ambiguous, the same outcome would be reached in this case under step two of the Landgraf analysis. The court identifies the commission of crimes as the alien’s only relevant prior act that could possibly have been influenced by reliance on § 212(c) relief, and since this conduct would not really be affected by the availability of discretionary relief, his settled expectations were not sufficiently upset “to trigger the presumption against retroactivity.” In dicta, the court identified only two circumstances where there could be a retroactive effect, both of which required a showing that the alien performed an act or gave
something up in reliance on the potential availability of § 212(c) relief: “(1) where the alien has conceded deportability, forgoing a colorable defense to deportability, in reliance (at least in part) on the potential availability of § 212(c) relief, and (2) where the alien pled guilty to the underlying criminal offense in reliance (at least in part) on the availability of § 212(c) relief.”

Other courts, in order to find AEDPA and IRIIRA impermissibly retroactive, affirmatively required aliens convicted after trial to show reliance on the availability of § 212(c) relief. The Ninth Circuit has held that “absent a showing of specific reliance, AEDPA [§ 440(d)’s restriction on § 212(c)] applies to those aliens who were convicted of crimes prior to the enactment of AEDPA, but who were not placed in deportation or exclusion proceedings until after AEDPA’s effective date.” This reliance is absent in aliens who plead not guilty and exercise their right to trial by jury but may be displayed in aliens who plead guilty or nolo contendere. Thus, AEDPA § 440(d) applies retroactively to an alien with a pre-AEDPA conviction but whose deportation case was initiated after AEDPA’s effective date unless the alien can show he pled guilty or nolo contendere upon reliance on § 212(c) relief.

Aliens who pleaded guilty may have entered a plea in exchange for assurances that the plea would not have any adverse immigration consequences, and retroactively applying a new law which would impact their immigration status adversely would “severely disturb their settled expectations.” The application of AEDPA § 440(d) to aliens who were convicted after a jury trial does not result in a retroactive effect because these aliens cannot plausibly claim that they would have acted any differently had they known about “the potential for future adverse deportation consequences.”

B. Post-St. Cyr: Forms of Reliance
With the exception of one circuit, the trend of requiring a showing of reliance to trigger impermissible retroactivity continued after the Supreme Court’s decision in St. Cyr. The Seventh Circuit has continued to hold that Congress clearly prescribed IIRIRA’s retroactivity.\footnote{1071}

1. **Permanent Residents Convicted After Trial Without a Plea Bargain**  
**Offer: No Quid Pro Quo Exchange, No Reliance**

The First, Second, Fourth, Ninth, and Eleventh Circuits have required a showing of reliance on the availability of § 212(c) relief.\footnote{1081} The Second and Fourth Circuits have decided the issue after utilizing step two of the Landgraf analysis.\footnote{1091} These courts have emphasized the *quid pro quo* exchange inherent in plea agreements and reasoned that the reliance interest lies in pleading guilty solely for the purpose of ensuring qualification for § 212(c) relief.\footnote{1100} Aliens’ expectations of attaining certain benefits of a plea agreement would be disrupted if IIRIRA and AEDPA were applied retroactively to deny them § 212(c) relief.\footnote{1101} An alien convicted after trial does not face the same substantial change in expectations as an alien who enters a plea agreement because an alien who proceeds to trial does not act in reliance of preserving eligibility for § 212(c) relief.\footnote{1102} The Second Circuit has even required aliens to identify conduct and to show actual detrimental reliance.\footnote{1103} Thus, even if Congress did not clearly direct the temporal reach of AEDPA and IIRIRA, the statutes were not impermissibly retroactive because there was no showing of reliance on the availability of § 212(c) relief when an alien chooses to proceed through trial.

At least one circuit has decided the issue without utilizing the Landgraf retroactivity analysis. In *Armendariz-Montoya v. Sonchik*, the Ninth Circuit articulated the Landgraf two-step analysis but merely adopted previous courts’ holdings to satisfy both prongs.\footnote{1104} To satisfy the first prong of Landgraf, the Ninth Circuit observed its
previous holding in *Magana-Pizano* that Congress did not clearly prescribe whether AEDPA § 440(d) should be applied retroactively.\textsuperscript{105}\footnote{105} Although stating the holding in *St. Cyr*, the Ninth Circuit relied on its own pre-*St. Cyr* holding\textsuperscript{106}\footnote{106} and a Seventh Circuit pre-*St. Cyr* holding\textsuperscript{107}\footnote{107} to satisfy *Landgraf*’s second prong. Aliens convicted by trial cannot claim that they would have changed their conduct if they knew they would not be eligible for § 212(c) relief.\textsuperscript{108}\footnote{108}

In *Dias v. INS*, the First Circuit did not even articulate the *Landgraf* test. In this case, the First Circuit briefly discussed the holding and reasoning in *St. Cyr* and adopted its own holding in a case which predated *St. Cyr*.\textsuperscript{109}\footnote{109} That previous case held that “the retroactivity analysis must include an examination of reliance in a guilty plea situation.”\textsuperscript{110}\footnote{110} Thus, a conviction after trial precludes any retroactivity analysis\textsuperscript{111}\footnote{111} and therefore AEDPA’s restrictions on the availability of § 212(c) do not have an impermissible retroactive effect as to aliens convicted after trial.\textsuperscript{112}\footnote{112}

In deciding that it did not have jurisdiction to review a direct appeal from the Board of Immigration Appeals regarding a purely statutory question of retroactivity, the Eleventh Circuit has found that IIRIRA § 304(b) could be retroactively applied to an alien convicted of an aggravated felony following jury trial.\textsuperscript{113}\footnote{113} In its discussion, the Eleventh Circuit reiterated that there is a distinction between aliens who plead guilty and those convicted after trial.\textsuperscript{114}\footnote{114} Aliens who enter into a *quid pro quo* plea agreement rely upon the terms of the plea, and this reliance does not exist for individuals who plead guilty.\textsuperscript{115}\footnote{115}

### 2. Permanent Residents Convicted By Trial After Rejecting a Plea Bargain

#### a. No Detrimental Reliance, No Impermissible Retroactivity
At least one circuit has held that the repeal of § 212(c) relief was not impermissibly retroactive since, as a matter of law, the decision to go to trial forecloses any argument of detrimental reliance on the availability of § 212(c) relief, even if an alien affirmatively turned down a plea agreement. In *Swaby v. Ashcroft*, the Second Circuit extended *Rankine’s* application of detrimental reliance to the context of aliens who proceed to trial after rejecting a plea agreement. *Swaby* states that any alien who proceeds to trial, even one who rejects a plea offer relies on the opportunity to prove his innocence and therefore does not detrimentally rely on continued eligibility for § 212(c) relief.

b. Reasonable Reliance, Impermissibly Retroactive

In a decision that directly contradicted *Swaby*, the Third Circuit in *Ponnapula v. Ashcroft* rejected the actual reliance approach of the other circuits and held that IIRIRA § 304(b) was impermissibly retroactive with respect to aliens who affirmatively turned down a plea agreement and elected to go to trial in reasonable reliance on the availability of § 212(c) relief. The *Ponnapula* court reasoned that the existence of a *quid pro quo* in plea agreements do not create an additional requirement necessary to establish retroactive effect, but merely serves to highlight the obvious and severe retroactive effect of applying IIRIRA to aliens who pleaded guilty. The *Ponnapula* court suggested that the other circuits have misapplied *St. Cyr* by converting the *quid pro quo* into a rigid baseline test. Requiring such a showing of actual reliance heightens the bar for triggering the presumption against retroactivity.

According to the Third Circuit, the decision whether to accept a plea agreement, not the decision to actually accept it, is the relevant conduct where reliance interests arise. The court distinguished between aliens who went to trial after declining a plea
agreement and aliens who went to trial without being offered a plea agreement. Pointing out that aliens who were not offered a plea agreement had no opportunity to change their conduct, the Third Circuit found that it is unlikely that such aliens have a reliance interest that would make IIRIRA § 304(b)’s repeal of § 212(c) impermissibly retroactive.\footnote{123}

The court points out that “[t]he reasonable reliance question turns on the nature of the statutory right and the availability of some choice affecting that right, not on the particular choice actually made.” Additionally, “[a]n individual can rely or have settled expectations about a state of affairs without having to enter into an exchange to secure or assure it.” Therefore, if an alien was offered a plea agreement, it is as reasonable for an alien to rely on the availability of § 212(c) relief in declining a plea agreement as it is for the same alien to have the same reliance interest in accepting a plea agreement. Although the Third Circuit found that Ponnapula “demonstrated clear and reasonable actual reliance on the former statutory scheme in making the decision to go to trial,” the court premised its holding on Ponnapula having satisfied the requirement of reasonable reliance.\footnote{124} The Third Circuit’s requirement that only reasonable reliance needs to be shown directly contradicts the Second Circuit’s requirement of demonstrated detrimental reliance in \textit{Swaby}, leaving open the question of which reliance requirement to adopt.

3. The Form of Reliance That Should Be Applied in Retroactivity Analysis

\textit{St. Cyr}, using \textit{Landgraf} principles, did not stand for the proposition that a showing of actual reliance is required to trigger retroactivity. On the contrary, both \textit{St. Cyr} and \textit{Landgraf} formulate the reliance required to trigger the presumption against retroactivity as “reasonable reliance.” In a \textit{quid pro quo} agreement, actual reliance is shown if an alien is actually aware of the immigration consequences of entering his
plea. *St. Cyr* presumed that aliens who enter into plea negotiations were informed of the immigration consequences of entering a guilty plea and generalized the rule that AEDPA and IIRIRA may not be retroactively applied to all aliens who enter a plea before AEDPA and IIRIRA became effective. Therefore, only reasonable reliance is needed, since not all aliens can actually show that they were informed about the immigration consequences during plea negotiations and subsequently relied on the government’s promise that they would still be eligible for § 212(c) relief. Other circuits’ requirement of showing detrimental reliance is too extreme. Moreover, *St. Cyr*’s holding extended to all aliens who had accepted plea agreements, even aliens who accepted a plea bargain that did not necessarily guarantee § 212(c) eligibility. It would be unfair to only allow § 212(c) relief to aliens who are able to point to a record showing they knew about immigration consequences of their convictions.

As the Third Circuit stated in *Ponnapula*, a quid pro quo agreement only highlights the severe and obvious retroactive effects of retroactively applying § 212(c) restrictions on aliens convicted at a time when they would be eligible for § 212(c) relief. It is not the sole way of showing that AEDPA and IIRIRA have retroactive effects. An alien can rely or have settled expectations about a state of affairs without having to actually enter into an exchange to secure or assure it. The Third Circuit approach of applying a reasonable reliance standard follows a line of Supreme Court cases that have articulated a reasonable reliance formulation in retroactivity analysis.

### IV. Correct Application of Landgraf Analysis and Retroactivity Principles Would Extend Availability of Former § 212(c) Relief to those Convicted After Trial
The First and Second Circuit’s limitation of retroactivity analysis only to plea bargain situations is too narrow. The concerns of retroactive legislation mandate undergoing a thorough retroactivity analysis utilizing all facts, absent clear indication from Congress of its intent to apply a statute retroactively. This analysis includes looking at reasonable reliance, as opposed to actual detrimental reliance, and other determinative conduct where legal consequences could attach. A thorough analysis reveals that retroactively applying AEDPA’s and IIRIRA’s restrictions on § 212(c) relief has impermissible effects.

A. Congress Did Not Expressly Prescribe Temporal Reach of IIRIRA’s Repeal of § 212(c) Relief

The Seventh Circuit incorrectly stops its analysis at Landgraf step one. There is no express provision in either AEDPA or IIRIRA articulating retroactive application of restrictions on § 212(c) relief to aliens convicted when § 212(c) relief was available. Because the temporal reach of the statutes is ambiguous, the analysis must proceed to step two.

B. AEDPA and IIRIRA Have Retroactive Effects

1. Familiar Considerations of Reasonable Reliance, Impaired Settled Expectations and Fair Notice

Reliance interests in the legal sense arise because some choice is made demonstrating reliance. Thus, some sort of choice is necessary in order to determine the existence of a law’s retroactive effects. The choice to commit crimes is not determinative conduct for the purposes of AEDPA and IIRIRA retroactivity because the legal consequence of deportability does not attach at that point. The legal consequence of deportability attaches when an alien enters a guilty plea or is
convicted for a criminal ground of deportability. However, although legal
consequences attach at the point of conviction, courts have generally agreed that a
conviction is not determinative conduct for the purposes of AEDPA and IIRIRA
retroactivity because it is not an act by the alien.

2. Pre-Trial Decisions: To Accept or Not to Accept a Plea Bargain

The determinative act of entering a guilty plea in order to preserve eligibility for §
212(c) relief has been found by courts to render AEDPA and IIRIRA impermissibly
retroactive with respect to aliens who enter guilty pleas. However, The Third Circuit
decision in *Ponnapula* adds that the act to reject a plea bargain can also be
determinative conduct for triggering the presumption against
retroactivity. The *Ponnapula* court suggested that the other circuits have
misapplied *St. Cyr* by converting the *quid pro quo* into a rigid baseline test. Instead,
courts should look at the decision whether to accept a plea agreement as the relevant
conduct where reasonable reliance interests arise, not on the particular decision to
actually accept the plea agreement.

The court distinguished between aliens who went to trial after declining a plea
agreement and aliens who went to trial without being offered a plea agreement. The
court concluded that aliens who were not offered a plea agreement had no opportunity
to change their conduct in reliance on the availability of § 212(c) relief, and therefore
it is unlikely that such aliens have a reliance interest that would make IIRIRA §
304(b)’s repeal of § 212(c) impermissibly retroactive.

3. Post-trial Decisions: To Concede or Not to Concede Deportability Prior to
AEDPA’s and IIRIRA’s Effective Date
Even if aliens who were not offered a plea agreement could not change their conduct in reliance on the availability of § 212(c) relief, legal consequences do not attach only to decisions that could be made pre-trial. Legal consequences also attach to decisions that could be made after a trial has concluded. Under the INA pre-IIRIRA and pre-AEDPA, when an alien is convicted for an aggravated felony and then serves a sentence less than five years he is also eligible for § 212(c) relief from deportability. IIRIRA and AEDPA eliminated this option for aliens who served their time prior to the statutes’ enactment but who were not placed in removal proceedings until after the statutes’ enactment. After an alien is released from a prison term of less than five years, the legal consequence of eligibility for § 212(c) relief from deportation also attaches in addition to the consequence of deportation. The alien no longer needs to act in order to preserve eligibility for § 212(c) relief, since he would already qualify for such relief if he served a sentence less than five years for an aggravated felony. There is no determinative conduct to point to in order for the alien to preserve eligibility, since he would already be eligible for it, and so eliminating the possibility of relief for aliens convicted before trial, merely because the Service did not commence deportation proceedings before them prior to the passage of AEDPA and IIRIRA, clearly changes the legal consequences with respect to transactions already past.

The Seventh Circuit in Lara-Ruiz recognized two types of conduct where consequences could attach: (1) where an alien pled guilty and (2) where an alien conceded deportability. Thus, the Seventh Circuit recognized that an alien could concede deportability in order to evince reliance on the old law. Aliens who would have been eligible for § 212(c) relief could have conceded deportability, by somehow bringing themselves to the attention of the immigration authorities, in order to secure § 212(c) relief. However, even when courts have found that AEDPA and IIRIRA are
impermissibly retroactive with respect to aliens who entered guilty pleas, courts have never required that they affirmatively secure § 212(c) relief by conceding deportability.

The decision to concede deportability demonstrates actual reliance, just as the decision to accept a plea agreement demonstrates actual reliance. As discussed previously, an alien does not need to demonstrate actual reliance and instead only needs to demonstrate reasonable reliance. The Ponnapula court suggested that aliens could reject a plea bargain in reasonable reliance on the availability of § 212(c) relief. Thus, the decision to not concede deportability prior to AEDPA’s and IIRIRA’s effective dates demonstrates a parallel reasonable reliance. Aliens who were already eligible for § 212(c) relief (for having been convicted of an aggravated felony but served a term less than five years, all before AEDPA and IIRIRA became effective) could have reasonably relied on the state of the old laws in deciding not to concede deportability if they reasonably believed that the old laws would still apply to them and they would continue to be eligible for § 212(c) relief even after AEDPA’s and IIRIRA’s effective dates.

This decision to not concede deportability exists in all aliens who were convicted following trial, regardless of whether or not they were offered a plea bargain, and placed in removal proceedings after AEDPA and IIRIRA. Thus, AEDPA and IIRIRA should be uniformly applied to all aliens, whether they entered a plea of guilty or rejected a plea bargain or were found guilty following trial without being offered a plea bargain, who would have been eligible for § 212(c) relief prior to the passage of AEDPA and IIRIRA, since reasonable reliance interests exist for those aliens.

C. Presumption Against Retroactivity Governs
Absent express command from Congress to apply a statute retroactively and absent clear congressional intent that a statute should be applied retroactively, a statute may not be applied if it has retroactive effects. Congress did not expressly prescribe that AEDPA and IIRIRA should be applied retroactively. Additionally, with the exception of the Seventh Circuit, courts have been unable to find clear congressional intent to apply AEDPA and IIRIRA retroactively. The Supreme Court in *St. Cyr* has concluded that the comprehensiveness of a statutory scheme, the existence of an effective date, and the existence of a savings provision do not clearly indicate Congress’ intent to apply a statute retroactively. AEDPA and IIRIRA have severe retroactive effects on aliens who were convicted after trial and who served sentences at a time when they would have been eligible for § 212(c) relief. Having satisfied both prongs of the *Landgraf* analysis, the presumption against retroactivity governs. § 212(c) relief should remain available to all aliens who obtained convictions, whether through entering a plea or through a trial conviction, prior to the effective dates of AEDPA and IIRIRA.

**CONCLUSION**

With the exception of the Third Circuit, circuit courts have been unwilling to extend § 212(c) relief to permanent residents who were found guilty following trial. Some circuit courts have interpreted the Supreme Court’s holding in *St. Cyr* to be limited in its application and have refused to undergo retroactivity analysis outside the plea agreement context. However, absent an express directive from Congress or any clear indication of congressional intent to apply a statute retroactively, the concerns of retroactive legislation mandate a court to undergo a thorough retroactivity analysis. A thorough analysis includes considering other determinative conduct where legal
consequences could attach and reasonable reliance, as opposed to actual or detrimental reliance, could arise.

The legal consequence of deportability attaches when an alien pleads guilty or is convicted following trial. Additionally, when an alien pleads guilty in order to secure a sentence of less than five years, the alien thereby also ensures eligibility for § 212(c) relief. The legal consequence of eligibility for § 212(c) relief also attaches whenever the alien is released from a term less than five years. An alien who was convicted following trial pre-AEDPA/IIRIRA and who served a sentence less than five years and was released pre-AEDPA/IIRIRA would have been eligible for § 212(c) relief if he had been deported pre-AEDPA/IIRIRA. The fact that the alien was not placed in removal proceedings until after AEDPA and IIRIRA were passed attaches a new disability with respect to transactions already past. Aliens could have chosen to concede deportability prior to the effective dates of AEDPA and IIRIRA in order to secure eligibility for § 212(c) relief. This affirmative act of conceding deportability demonstrates actual reliance. Aliens also could have chosen to forgo deportability in reasonable reliance on continued eligibility for § 212(c) relief.

A thorough retroactivity analysis reveals that retroactively applying AEDPA’s and IIRIRA’s restrictions on § 212(c) relief has impermissible effects. Absent an express directive from Congress or a clear indication of congressional intent, AEDPA and IIRIRA should not be applied retroactively to aliens who were convicted and who served terms less than five years before AEDPA and IIRIRA were passed. § 212(c) relief should be extended to aliens who were convicted following trial pre-IIRIRA, who served sentences less than five years, and who would have been eligible for § 212(c) relief had their removal proceedings commenced before IIRIRA’s effective date.
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*, 511 U.S. 244, 266 (1996).

Inadmissible and excludable aliens refer to aliens seeking admission to the U.S. Deportable aliens refer to aliens who are physically in the U.S. Since exclusion proceedings and deportation proceedings were combined into “removal proceedings,” the terms “inadmissible”/”excludable” and “deportable” have also been combined into the single term “removable.” *See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996)* [hereinafter AEDPA].

*See e.g., Brooks v. Ashcroft*, 283 F.3d 1268, 1271 (11th Cir. 2002).

*Stephen Yale-Loehr, Basic Immigration Law 2005, Overview of Immigration Law, Practising Law Institute PLI Order No. 6306 (March 23, 2005).*


*Id.* Although the INA stands alone as a body of law, it is also codified in 8 U.S.C. § 1101, et seq.


The term “aggravated felony” was originally defined to include only murder, illicit trafficking in firearms and destructive devices, illicit trafficking in controlled substances, crimes relating to laundering of monetary instruments, and crimes of violence for which the term of imprisonment is at least five years, or any attempt or conspiracy to commit any such act. *See Id.* § 101 (a)(43), 8 U.S.C. § 1101(a)(43) (1995). The term also applied to offenses in violation of state or federal law and any violation of foreign law for which the term of imprisonment was completed within the previous fifteen years.


*Id.* § 212(c), 8 U.S.C. § 1182(c).


*See Francis v. INS*, 532 F.2d 268 (2d. Cir. 1976) and *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976) (adopting Francis to apply uniformly in deportation proceedings nationwide).


*Id.*


Id.

Id.


Eligibility for cancellation of removal is defined in IIRIRA § 304(a).

Id. § 304(a), 110 Stat. 3009.

Id. § 321, 110 Stat. 3009.

Although IIRIRA was enacted on September 30, 1996, its effective date for the repeal of INA § 212(c) is April 1, 1997. (IIRIRA § 309(a) provides that IIRIRA “shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act”).

Id. § 304(a), 110 Stat. 3009.

42 U.S.C.A. § 1981a. The provisions at issue were § 102(a) and § 102(c). § 102(a) allowed a party to recover compensatory and punitive damages for intentional discrimination, in violation of Title VII. § 102(c) authorized a party to demand a jury trial if damages are claimed under § 102(a). Although § 102 was at issue in *Landgraf v. USI Film Products*, the Court noted that accepting the argument to apply § 102 retroactively “would make the entire Act (with two narrow exceptions) applicable to conduct that occurred, and to cases that were filed, before the Act’s effective date.” 511 U.S. at 250.

Barbara Landgraf brought suit against her former employer, alleging that she had been subject to sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964. The court found that although sexual harassment existed that created a hostile work environment, USI Film Products had taken remedial steps and therefore Landgraf was not constructively discharged. See Id. at 248. The district court dismissed her complaint because there was no Title VII violation entitling her to equitable relief and because there was no other form of relief available under Title VII. See Id. at 249. Landgraf appealed. While the case was pending on appeal, Congress passed the Civil Rights Act of 1991. See Id. On appeal, Landgraf argued that the new provisions should apply to her case. See Id. The Fifth Circuit held that the provisions did not apply retroactively. See Id.

The Court points out that the 1991 Act is in part a response to recent Supreme Court decisions which have interpreted the Civil Rights Act of 1866 and 1964. See Id. at 250. In 1990, a similar comprehensive civil rights bill was passed in Congress but was vetoed by the President. See Id. at 255-56. The bill expressly provided that many of its provisions should be applied to cases arising before its enactment. See Id. at 255. The President cited the bill’s “unfair retroactivity rules” as one reason for the veto. See Id. The 1991 Act did not contain language providing for retroactive application, which the Court deduced could not be attributed to oversight or to unawareness of the issue of retroactivity. See Id. at 256. The Court reasoned that the omission of retroactivity language is not dispositive of Congress’ intent that the law only be applied prospectively, but merely could have been a compromise to get the bill passed. See Id.
The only provision in the 1991 Act that addresses the issue of retroactive or prospective application of the 1991 Act is § 402(a), which states that “[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.” See Id. at 257. The Court noted that “[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.” See Id. Landgraf argued that the “except as otherwise specifically provided” clause in § 402(a) referred to two other provisions in the 1991 Act which provided for prospective application in limited contexts. See Id. at 258. Along with § 402(a), the “other provisions” created “a strong negative inference that all sections of the Act not specifically declared prospective” apply retroactively. See Id. Landgraf argued that unless the introductory clause of § 402(a) refers to either of the two “other provisions,” the introductory clause is superfluous and creates redundancy among the different provisions of the statute. See Id. at 259. The Court rejected the argument that Congress would have chosen to resolve the prospectivity/retroactivity issue through “negative inferences,” given the “high stakes of the retroactivity question, the broad coverage of the statute, and the prominent and specific retroactivity provisions in the 1990 bill.” See Id. Adding that it would be surprising for Congress to take “an indirect route to convey an important and easily expressed message concerning the Act’s effect on pending cases,” the Court decided that the statutory text of the 1991 Act did not express Congress’ intent with respect to the retroactive application of the statute. See Id. at 262.


The first canon is that “a court is to apply the law in effect at the time it renders its decisions”. Landgraf, 511 U.S. at 264. (Quoting Bradley v. School Bd. Of Richmond, 416 U.S. 696, 711 (1974)). The second is that “[r]etroactivity is not favored in the law,” and its corollary that “congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.” Id. (Quoting Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988)).

See Trueworthy, supra note 32, at 1722.

Landgraf, 511 U.S. at 280.

Id.

Id.

The Court recognized that although retroactive statutes raise special concerns, Congress has the power to enact laws retrospectively within constitutional limits. See Id. at 268. However, a statute may not be applied retroactively absent a clear indication from Congress that it intended for the statute to be retroactive. See Id. at 272-73. “Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.” Id.

Id.

Id.

Id. at 270.


Landgraf, 511 U.S. at 269 (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.))

Id. at 286.
See Id. at 281. In its dismissal of a potential *ex post facto* issue, the Court stated that the 1991 Act does not punish past acts because the 1991 Act does not contain an explicit command authorizing punitive damages for past conduct. *Id.* Since punitive damages and compensatory damages are addressed in the same provision, § 102, the 1991 Act also does not contain an explicit command regarding compensatory damages.

*Id.* at 282-83.

*Id.* at 286.

See *Id.*

*St. Cyr*, 522 U.S. at 326. The Court also decided a jurisdictional issue raised by St. Cyr’s habeas petition, which is beyond the scope of this paper.

*St. Cyr* had resided continuously in the U.S. since being admitted as a permanent resident in 1986. *Id.* at 293. On March 8, 1996, he pleaded guilty in a state court to a charge of selling a controlled substance, which is a deportable offense. *Id.*

Removal proceedings against St. Cyr were not commenced until April 10, 1997. *Id.*

*Id.*

*Id.*

*Id.*

See *Id.* at 315.

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

*St. Cyr*, 522 U.S. at 316-17.

*Id.* at 317.

*Id.*

*Id.*

*Id.* at 317.

See *Id.* at 317. The provision referred to is IIRIRA § 309(c)(1).

*Id.*

One such provision where Congress expressly commanded retroactive application is its amendment of the “aggravated felony” definition in s§ 321(b), which states that it applies to “conviction[s] … entered before, on, or after” IIRIRA’s enactment date. See *Id.* at 318-19.

*INS v. Cardoza—Fonseca*, 480 U.S. 421, 449 (1987), forecloses the conclusion that, in enacting § 304(b), ‘Congress itself’
has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.’” *Id.* at 320.

[65] “The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about ‘whether the new provision attaches new legal consequences to events completed before its enactment.’” *St. Cyr*, 522 U.S. at 321 (quoting *Landgraf*, 511 U.S. at 270); “A statute has retroactive effect when it ‘“takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past…”’ *St. Cyr*, 522 U.S. at 321 (quoting *Landgraf*, 511 U.S. at 269); “[T]he judgment whether a particular statute acts retroactively ‘should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.’” *St. Cyr*, 522 U.S. at 321 (quoting *Landgraf*, 511 U.S. at 270).


[67] *Id.* at 324.

[68] *Id.* at 321 (quoting *Landgraf*, 511 U.S. at 269).

[69] *Id.*

[70] Defendants waive constitutional rights, including the right to a trial, and the government gains rights such as conserving prosecutorial resources. *Id.* at 321-22.

[71] *Id.* at 323. The Court presumes that alien defendants considering whether to enter into a plea agreement are aware of the immigration consequences of their conviction and therefore would factor in preserving their right to remain in the U.S. in deciding whether to enter into a plea agreement. *See Id.* at 322. The Court did not require St. Cyr to demonstrate that he knew and relied upon the availability of § 212(c) relief as it existed prior to AEDPA’s and IIRIRA’s enactment.

[72] *Id.* at 323.

[73] *Id.* (quoting *Landgraf*, 511 U.S. at 270). Applying IIRIRA’s repeal of § 212(c) relief “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 325 n.55.

[74] *See Id* at 325.

[75] *Id.*

[76] *Id.* at 325 n.55.

[77] *Id.* at 326.

[78] *See Lara-Ruiz*, 241 F.3d 934 (7th Cir. 2001); *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998); *U.S. v. Herrera-Blanco*, 232 F.3d 715 (9th Cir. 2000).

[79] *LaGuerre*, 164 F.3d at 1041.

[80] *Id.* The court used the following rule: “The relevant rule is that statutes which change primary (out of court) duties, for example statutes that impose new tort liabilities, are applied prospectively, while statutes that change
merely procedures are applied retroactively.” Id. The same principle was also articulated in Landgraf. See generally 511 U.S. 244.

[81] Id. at 1041.

[82] “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.” Id.

[83] Id. at 1040.

[84] Lara-Ruiz, 241 F.3d at 944.

[85] See Id. The Court adopts the reasoning of a Ninth Circuit case in stating that “Congress intended the whole of IIRIRA’s permanent provisions to apply to every alien as of April 1, 1997, except where it expressly exempted those provisions that were not meant to apply as of that date. The provision repealing §212(c) was not one of them.” Richards-Diaz v. Fasano, 233 F.3d 1160, 1164 (2000) (quoting St. Cyr v. INS, 229 F.3d 406, 422 (2nd Cir. 2000) (Walker, J., dissenting)).

[86] See generally Lara-Ruiz, 241 F.3d 934.

[87] IIRIRA § 309(a) provides the effective date for §§ 301-09 would be April 1, 1997.

[88] Id. (quotations omitted).

[89] The Court further notes that since IIRIRA abandoned “exclusion” and “deportation” proceedings in favor of a scheme which provides for “removal” proceedings, the § 212(c) relief from deportation is not available to aliens in removal proceedings. Id.

[90] See generally Id. at 944.

[91] The Court articulated the same reasoning as in LaGuerre: “It would border on the absurd to argue that an alien would refrain from committing crimes or would contest criminal charges more vigorously if he knew that after he had been imprisoned and deported, a discretionary waiver of deportation would no longer be available to him.” Id.

[92] Id. The first circumstance requires that the alien concede deportability prior to IIRIRA’s effective date. After IIRIRA, an alien can only concede removability.

[93] Herrera-Blanco, 232 F.3d at 719 (quoting Magana-Pizano v. INS, 200 F.3d 603, 614 (9th Cir. 1999)).

[94] Id.

[95] Magano-Pizano, 200 F.3d at 612-13. The court cites several cases indicating that aliens factor the immigration consequences in deciding whether to enter a plea agreement or proceed to trial. See Id. at 612.

[96] Magana-Pizano, 200 F.3d at 612. The court presumes that the only relevant past act by an alien who proceeds to trial is the commission of the crime. Aliens who choose to enter a plea have can point to that conduct as the basis for where the new law attaches legal consequences.

[97] In 2004, the Seventh Circuit adopted the Lara-Ruiz analysis in holding that Congress intended to repeal INA § 212(c) as of April 1, 1997 (IIRIRA’s effective date) and that relief under INA § 212(c) is not available to aliens
whose removal proceedings were brought after that date, even though the alien committed his crime and was convicted prior to IIRIRA’s passage. Montenegro v. Ashcroft, 355 F.3d 1035 (7th Cir. 2004).

[95] Dias v. INS, 311 F.3d 456 (1st Cir. 2002); Theodoropoulos v. INS, 313 F.3d 732 (2d Cir. 2002); Rankine v. Reno, 319 F.3d 93 (2d Cir. 2003); Chambers v. Reno, 307 F.3d 284 (4th Cir. 2002); Brooks v. Ashcroft, 283 F.3d 1268.

[96] Theodoropoulos and Chambers acknowledge that St. Cyr has resolved the first step of the analysis in that IIRIRA and AEDPA are ambiguous as to retroactive application. See Theodoropoulos, 313 F.3d at 738, Chambers, 307 F.3d at 289; Rankine, 319 F.3d at 98.

[100] See generally Theodoropoulos, 313 F.3d at 739; Chambers, 307 F.3d at 291; Rankine, 319 F.3d at 100.

[101] See generally Theodoropoulos, 313 F.3d at 739; Chambers, 307 F.3d at 290; Rankine, 319 F.3d at 100 (The expectation of § 212(c) relief is created when an alien chooses to forgo fighting his criminal charges and enter a plea.).

[102] See generally Theodoropoulos, 313 F.3d at 739-40 (An alien who proceeds to trial relies on the expectation of defeating any possibility of removal if found not guilty, rather than on the potential availability of § 212(c) relief); Chambers, 307 F.3d at 290-91 (An alien who proceeds to trial risks the certainty of being eligible for § 212(c) relief by risking getting a sentence higher than five years. Additionally, in contrast to aliens who plead guilty, aliens convicted after trial do not make any decisions that adversely impact their immigration status); Rankine, 319 F.3d at 100 (They do not surrender any rights that would give rise to a reliance interest comparable to those who enter plea agreements. Also, aliens who proceed to trial risk receiving a sentence over five years.).

[103] Rankine, 319 F.3d at 99-100. (An alien who proceeds to trial does not “detrimentally change[] his position in reliance on continued eligibility for § 212(c) relief. Unlike aliens who entered pleas, the petitioners made no decision to abandon any rights and admit guilt – thereby immediately rendering themselves deportable – in reliance on the availability of the relief offered prior to IIRIRA.”)

[104] Armendariz-Montoya v. Sonchik, 291 F.3d 1116 (9th Cir. 2002); See also Brooks, 283 F.3d 1268.

[105] Armendariz-Montoya, 291 F.3d at 1121 (referring to Magana-Pizano, 200 F.3d at 612).

[106] Applying § 440(d)’s restrictions on § 212(c) availability to aliens convicted after a jury trial does not result in a retroactive effect. Armendariz-Montoya, 291 F.3d at 1121 (referring to U.S. v. Herrera-Blanco, 232 F.3d 715).

[107] Id. (referring to LaGuerre, 164 F.3d 1035).

[108] Id.


[110] Id. at 458 (referring to Mattis v. Reno, 212 F.3d 31 (1st Cir. 2000).

[111] Id. at 458. The court notes that there was not, and could not have been, reliance on the availability of § 212(c) relief after a trial.

[112] Id.

[113] See generally Brooks, 283 F.3d 1268.
Brooks, 283 F.3d at 1273. The court repeated that aliens who “enter into a plea agreement are acutely aware of the immigration consequences of their convictions.” Id. at 1274. See also Magana-Pizano, 200 F.3d at 612.

Id. at 1274.

Swaby v. Ashcroft, 357 F.3d 156 (2d Cir. 2004).

See Swaby, 357 F.3d at 161 (discussing Rankine). Note that Rankine points out that the decision to go to trial, standing alone, has no impact on an alien’s immigration status. Rankine, 319 F.3d at 99. Note also that this standard of requiring affirmative showing of detrimental reliance varies greatly from the Second Circuit’s earlier acknowledgment that “an alien’s failure to demonstrate reliance on pre-IIRIRA law might not foreclose a claim that the post-IIRIRA version of the INA operates retroactively.” Chambers, 307 F.3d at 293.

Id. at 162.

Ponnapula v. Ashcroft, 373 F.3d 480 at 501 (3d Cir. 2004). Ponnapula was indicted for grand larceny in the first degree and falsifying business records in the first degree. He was offered a plea deal but turned it down. He was convicted and ultimately sentenced to the mandatory minimum term of one to three years imprisonment for a New York State “B” felony, but the judge recommended him for an early work release program. Ponnapula’s conviction was considered an aggravated felony which rendered him deportable.

Id. at 499.

Id. at 499.

Id. at 491.

Id. at 494. Although the Ponnapula court highly doubted these aliens have a reliance interest, the court specifically “[d]id not explicitly hold” on this issue.

Id. at 497. Ponnapula was offered a plea deal in which he would plead guilty to a misdemeanor with a probationary sentence. He turned down the plea because his counsel advised him that even if he was convicted, he would likely receive the minimum sentence of one to three years’ imprisonment, which would not disqualify him from § 212(c) relief eligibility. In declining the plea agreement, Ponnapula actually relied on the state of the law.

See Id. at 493 n.11. St. Cyr accepted a plea that provided for a ten-year sentence, with execution suspended after five years. St. Cyr’s holding would likewise allow § 212(c) relief to an alien who accepted a plea agreement providing a ten-year sentence but a release in five years for good behavior.

See Id. at 491-93 (discussing Landgraf, Hughes Aircraft, Hadix, and St.Cyr)

Restatement (Second) of Contracts § 90 (1981).