

# STUDENT NOTES

## Reversing a Sunset: The Legality of Retroactively Enforcing Limitations Periods Extensions

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*Congress's recent amendments to the International Emergency Economic Powers Act (IEEPA) and Trading with the Enemy Act (TWEA), doubling these statutes' limitations periods, provoked much confusion and anxiety about the potentially retroactive enforcement of U.S. sanctions laws by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) and the U.S. Department of Justice (DOJ). On the civil side, months after the amendments were signed into law, OFAC released guidance indicating that it would apply the extended statute of limitations retroactively, but not to already time-barred violations. There is still no indication of U.S. sanctions authorities' enforcement intentions in the criminal sphere.*

*None of the analyses published thus far have correctly identified the applicable constitutional rules or Supreme Court precedents informing OFAC's recent position on retroactivity, or the ones that might guide DOJ's strategy. Lastly, the experience of U.S. sanctions law modifications over the last few months is instructive for any agency interpreting legislation that extends statutes of limitation.*

*This article proceeds in three parts. Firstly, it examines the applicable law in the criminal context—with a focus on the Ex Post Facto Clause—and argues that DOJ should apply the same expired-unexpired distinction to criminal limitations periods as was adopted by OFAC for civil ones in its guidance document. Secondly, it conducts a thorough analysis of all the applicable constitutional and common law precedents that likely informed OFAC's interpretation in the civil context, ranging from due process protections to the framework for evaluating retroactive legislation set forth by the Supreme Court in *Landgraf v. USI Film Products*. This analysis is equally relevant to any other civil agency interpreting legislation granting it more expansive limitations period authority. Thirdly, deriving lessons from the experience of U.S. sanctions authorities since last April, this article makes the case that agencies retroactively applying statutes of limitations extensions should refrain from seeking to revive prosecution for time-barred violations in both civil and criminal settings—though for markedly different reasons.*

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## I. INTRODUCTION

Nathaniel Hawthorne's Count Donatello once mused that "time flies over us, but leaves its shadow behind."<sup>1</sup> In the law, the shadow of an impending prosecution, brought about by wrongful acts allegedly committed in bygone days, is supposed to dissipate as time flies past. Once the limitations period lapses, night falls and the shadow disappears altogether. But what if, like Joshua in Gibeon,<sup>2</sup> we could freeze the sun in place, extending how long the shadow lingers? Or, like Abraham in front of Nimrod,<sup>3</sup> ask for the sun to move backward, resuscitating a dissipated shadow? As we explore retroactive limitations period extensions, we find ourselves grappling with a metaphysical question of sorts: Can we truly forestall the twilight of justice, or is attempting to do so a misstep into legal chaos?

Such concerns arise whenever Congress or state legislative bodies amend laws to extend the default statute of limitations for a violation, without explicitly saying that the new and improved limitations period will apply solely prospectively. For both criminal and civil offenses, the standard statute of limitations in the U.S. Code is five years, "except as otherwise expressly provided by law" or "by Act of Congress."<sup>4</sup> Legislation that changes the default period of five years by lengthening it inexorably provokes retroactivity concerns.

In a recent instantiation of this phenomenon, on April 24, 2024, President Joseph Biden signed the 21st Century Peace through Strength Act into law, which, among many other things, amended the International Emergency Economic Powers Act (IEEPA) and Trading With the Enemy Act (TWEA) to "expressly provide" for a ten-year limitations period for sanctions violations.<sup>5</sup> Until then, the aforementioned default limitations period of five years had applied to all sanctions regimes under

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1. NATHANIEL HAWTHORNE, *THE MARBLE FAUN* 217 (Belknap 2012) (1860) ("I may have known such a life, when I was younger," answered the Count gravely. "I am not a boy now. Time flies over us, but leaves its shadow behind.").

2. *Joshua* 10:12–13 ("The day the LORD delivered the Amorites over to the Israelites, Joshua prayed to the LORD before Israel: 'O sun, stand still over Gibeon! O moon, over the Valley of Aijalon.' The sun stood still and the moon stood motionless while the nation took vengeance on its enemies. The event is recorded in the Scroll of the Upright One. The sun stood motionless in the middle of the sky and did not set for about a full day.").

3. THE QUR'AN 2:258 ('Alī Qulī Qarā'ī trans., 2d ed. 2005) ("Have you not regarded him [that is, Nimrod] who argued with Abraham about his Lord, because Allah had given him kingdom? When Abraham said, 'My Lord is He who gives life and brings death,' he replied, 'I [too] give life and bring death.' Abraham said, 'Indeed Allah brings the sun from the east; now you bring it from the west.'"); *see also* AL-KULAYNĪ, *AL-KĀFI*, vol. 4, bk. 3, ch. 221 (Islamic Seminary 2015) ("['Alī] said, 'The Messenger of Allah and I once sat right there. He then laid his head in my lap and dozed off, sinking into a deep sleep. The time for the afternoon prayer came, but I did not wish to move his head...when the Messenger of Allah awoke, he said, 'O 'Alī, have you prayed?' I said, 'No.' He asked, 'Why not?' I replied, 'I disliked disturbing you.' So he rose...and said, 'O God, return the sun to its time so that 'Alī may perform his prayer.' The sun then returned to the time of prayer until I prayed the afternoon prayer. Then it set again just like a star falling from the sky.'").

4. *See* 18 U.S.C. § 3282(a) (2024); 28 U.S.C. § 2462 (2024); CONG. RSCH. SERV., RL31253, *STATUTE OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW* 2, 6 (Nov. 14, 2017), <https://perma.cc/7E3L-NNNE>.

5. H.R. 815, 118th Cong. § 3111 (2024).

U.S. law, including those outlined in IEEPA and TWEA. The amended texts of IEEPA and TWEA now both contain the following provisions:

An action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, under this section shall not be entertained unless commenced within 10 years after the latest date of the violation. . .

No person shall be prosecuted, tried, or punished for any [criminal] offense. . . unless the indictment is found or the information is instituted within 10 years after the latest date of the violation.<sup>6</sup>

To say the stakes are high would be an understatement. Because IEEPA and TWEA are the principal pieces of legislation underlying the U.S. sanctions regime, these amendments meant that the statutes of limitation for nearly all<sup>7</sup> sanctions violations had been extended by five years overnight. A change to U.S. sanctions law of this magnitude, enacted via a few sentences under the unassuming heading of “Subtitle B—Other Matters” and buried within a much larger series of bills focused on the unrelated objective of providing aid to Ukraine, Taiwan, and Israel, caught the sanctions bar, scholars in the field of sanctions, and possibly even the U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) (the principal authority enforcing U.S. sanctions in the civil context) completely off guard.<sup>8</sup> While the 21st Century Peace through Strength Act’s trade-related provisions created many implications for individuals and enterprises seeking to comply with U.S. sanctions, one of the most pressing and immediately germane problems they raised was in regard to the retroactive application of the new, ten-year statute of limitations. In the murky world of inadvertent sanctions violations, law firm advice, and the decision as to whether a multinational company should self-report a potential mistake it has discovered to OFAC, much of the cost-benefit calculus centers around how

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6. *Id.*

7. Note that the amendments to IEEPA and TWEA do not modify the limitations period for the U.S. export controls regime, which is authorized by the Export Reform Act of 2018 and Arms Export Control Act and remains at five years. It is unclear why Congress chose to modify the limitations periods for IEEPA and TWEA but not for much of the U.S. export controls regime; it may be that Congress sought to send a signal about its preference for, above all, more aggressive sanctions enforcement. *See, e.g.,* Kerry Contini et al., *US President Signs National Security Package with Provisions Doubling the Statute of Limitations for Sanctions Violations, Authorizing the Seizure of Russian Assets, Targeting Russia and Iran with Additional Sanctions, and More*, GLOBAL SANCTIONS AND EXPORT CONTROLS BLOG (Apr. 26, 2024), <https://perma.cc/7EAN-WNVT>.

8. For instance, in the months between the signing into law of the 21st Century Peace through Strength Act in April 2024 and OFAC’s follow-up guidance about the civil statute of limitations extension in late July 2024, many members of the private sanctions bar speculated about how OFAC and DOJ might use their newfound authority. Thus far, no one has published an analysis that considers all the various applicable precedents. *See, e.g.,* Chase D. Kaniecki & Samuel H. Chang, *Statute of Limitations for U.S. Sanctions Violations Extended from Five to Ten Years*, CLEARLY FOREIGN INVESTMENT AND INTERNATIONAL TRADE WATCH (May 2, 2024), <https://perma.cc/5CHA-MWYV>; Contini, *supra* note 7; Mahmoud Fadlallah et al., *Congress Extends Statute of Limitations for Sanctions and Certain Other National Security Programs from 5 to 10 Years and Introduces New Sanctions*, AKIN GUMP STRAUSS HAUER & FELD LLP CLIENT ALERTS (Apr. 30, 2024), <https://perma.cc/R5TX-FNRF>.

long is left before a potential violation becomes time-barred and whether it is likely that OFAC will become apprised of the underlying facts before then. With five years suddenly added to the limitations period clock for not yet time-barred violations, and the possibility that U.S. sanctions authorities could even use the extension to make previously time-barred violations live again, the issues analyzed in this article had highly significant real-world repercussions for the private sector. The legal uncertainty around an issue of such importance calls for a comprehensive analysis of the constitutional constraints that may prevent U.S. sanctions authorities from expansively interpreting the powers granted to them by the IEEPA and TWEA amendments.

In the criminal context, Article I, Section 9 of the U.S. Constitution bars Congress from passing a law that applies *ex post facto*.<sup>9</sup> The Supreme Court has interpreted this prohibition to cover “any statute which punishes as a crime an act previously committed, which was innocent when done. . . or which deprives one charged with crime of any defense available according to law at the time when the act was committed.”<sup>10</sup> Moreover, in *Landgraf v. USI Film Products*, the Supreme Court recognized the well-settled English common law presumption against statutory retroactivity and established a three-part test for courts to apply to statutes enacted subsequent to the conduct they govern.<sup>11</sup> Given these protections, it was initially not clear how OFAC and the U.S. Department of Justice (DOJ) might seek to apply the extended limitations period, because IEEPA and TWEA sanctions programs are enforced through both criminal and civil means.

Does the retroactive extension of a limitations period violate *ex post facto* protections, and can U.S. sanctions authorities thus only apply the extension prospectively (for example, beginning from April 24, 2024, when the 21st Century Peace through Strength Act was signed into law)? If U.S. sanctions authorities are permitted to retroactively extend statutes of limitation, are they only permitted to extend unexpired and not yet time-barred ones? Do *Ex Post Facto* Clause and common law protections against retroactivity extend to civil penalties? These questions provoked much anxiety in the world of sanctions law practitioners, and law firms and sanctions lawyers analyzing the potential implications of a retroactive statute of limitations extension initially struggled to provide definitive answers.<sup>12</sup> Finally, several months after President Biden signed the extended limitations periods for IEEPA and TWEA into law, OFAC issued a guidance document on July 22, 2024, titled “Guidance on Extension of Statute of Limitations,” which clarified that:

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9. U.S. CONST. art. I, § 9, cl. 3. (“No Bill of Attainder or ex post facto Law shall be passed.”).

10. *Beazell v. Ohio*, 269 U.S. 167, 169 (1925).

11. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

12. As aforementioned, for several months until OFAC released follow-up guidance about the civil statute of limitations extension in late July 2024, numerous law firms with international trade controls practice groups discussed the change in the statute of limitations on their online blogs without familiarity with the various categories of limitations period extensions and the wide range of possibly applicable precedents. *See, e.g.*, Kaniecki, *supra* note 8; Contini, *supra* note 7; Fadlallah, *supra* note 8; *see also supra* text accompanying note 8.

This new 10-year statute of limitations applies to any violation that was not time-barred at the time of its enactment. Consequently, OFAC may now commence an enforcement action for civil violations of IEEPA- or TWEA-based sanctions prohibitions within 10 years of the latest date of the violation if such date was after April 24, 2019.<sup>13</sup>

As this article demonstrates, OFAC was right to distinguish between expired and unexpired limitations periods in the civil context, and constitutional precedent likely requires DOJ to adopt the same distinction in the criminal context. This is because the Supreme Court's *Ex Post Facto* Clause jurisprudence and common law presumption against statutory retroactivity jurisprudence have only held certain retroactive enlargements of statutes of limitation to be unconstitutional. Supreme Court jurisprudence has drawn a distinction between (i) the criminal sphere, and (ii) the civil sphere, while also differentiating between (a) expired, time-barred statutes of limitation, and (b) unexpired limitations periods. In short, the Constitution's *ex post facto* protections apply only to criminal sanctions cases, and even then, only to bar the resurrection of statutes of limitation that expired prior to the amendments to IEEPA and TWEA on April 24, 2024.<sup>14</sup> Meanwhile, *Landgraf*-based common law protections apply to the civil context, but similarly only bar the revival of limitations periods that lapsed prior to April 24, 2024 (as OFAC ultimately seemed to recognize).

In other words, U.S. sanctions authorities are likely not permitted to revive prosecution for a time-barred civil or criminal sanctions violation on the basis of the new, ten-year limitations period. However, U.S. sanctions authorities are permitted to extend the statutes of limitation for offenses that were not yet time-barred by April 24, 2024 (meaning that the limitations period for a hypothetical civil or criminal sanctions offense committed on May 24, 2019, lapses on May 24, 2029, rather than on May 24, 2024). OFAC has already signaled in the recent guidance document that it will extend still-running statutes of limitation for civil violations committed prior to the amendments to IEEPA and TWEA, and this article argues that DOJ is entitled to similarly extend still-running statutes of limitation for criminal violations.<sup>15</sup>

The constitutional and common law constraints facing U.S. sanctions authorities (or any other agency interpreting extended limitations period-related legislation) are summarized in the table below:

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13. OFAC, *Guidance on Extension of Statute of Limitations*, U.S. DEP'T OF THE TREASURY (Jul. 22, 2024), <https://perma.cc/8E6G-WGDR>.

14. In other words, the constitutionally permitted approach in the criminal sphere is ultimately the same as the position adopted by OFAC for the civil sphere: DOJ can only "commence an enforcement action" for criminal sanctions violations "within 10 years of the latest date of the violation if such date was after April 24, 2019," according to constitutional protections outlined by Supreme Court case law—*i.e.*, while it can extend still-running criminal limitations periods by five years, it is not permitted to retroactively revive expired ones. *See id.*

15. That is, if DOJ pursues such retrospective investigations at all—a question on which this article does not take a stance. *See id.*

	Civil offense	Criminal offense
<b>Extending an unexpired statute of limitation</b>	Permitted (no due process or common law protections)	Permitted (no <i>ex post facto</i> protections)
<b>Resurrecting an expired, time-barred statute of limitation</b>	Probably not permitted (common law presumptions against statutory retroactivity from <i>Landgraf</i> likely apply); OFAC indicated in July 2024 that it will refrain from pursuing such resurrections	Not permitted ( <i>ex post facto</i> protections apply)

Lastly, the experience of U.S. sanctions authorities and the private sanctions bar since last April is a useful case study for any agency that stands to benefit from a legislative enlargement of the limitations periods for violations it is in charge of investigating. Constitutional and common law constraints (along with the likely approach that will be adopted by both OFAC and DOJ after months of confusion) suggest that agencies retroactively applying statute of limitations extensions should refrain from seeking to revive time-barred violations in both the civil and criminal settings—though for markedly different reasons.

## II. THREE POSSIBLE APPROACHES TO RETROACTIVITY

To set the stage for the discussion of the precedent applicable to the scenarios in the next few sections, this part of the article outlines—at a more abstract level—the approaches to the new, ten-year statute of limitations that were available to U.S. sanctions authorities in April 2024:

- U.S. sanctions authorities could have sought to apply the ten-year limitations period solely prospectively. In other words, the new ten-year statute of limitations would only apply to violations occurring after April 24, 2024, the date of its enactment. For violations from before its enactment, the old, five-year statute of limitations would remain in place. Offenses committed between April 24, 2019, and April 24, 2024, would therefore become time-barred between April 2024 and April 2029. This would mean that the statute of limitations for a hypothetical sanctions violation committed on May 24, 2019 (for example, a violation that occurred within the old, unexpired, and not yet time-barred five-year limitations period that was in place prior to the amendments to IEEPA and TWEA on April 24, 2024, but still in the past) would have been considered to have lapsed by the time of the publishing of this article in early 2025. Such an interpretation would have avoided *ex post facto* constitutional and

*Landgraf*-based common law presumption against statutory retroactivity concerns, and so would have fallen within the ambit of what OFAC and DOJ could have permissibly implemented. However, in July 2024, OFAC made public its intention to pursue a more aggressive interpretation of the extended limitations period by seeking at least some retroactive applications.<sup>16</sup>

- If U.S. sanctions authorities chose to retroactively apply the ten-year statute of limitations, they could have sought to apply it only to violations whose statutes of limitation were unexpired and not yet time-barred prior to the amendments to IEEPA and TWEA on April 24, 2024. This would mean that the statute of limitations for a hypothetical sanctions violation committed on May 24, 2019 (for example, a violation that occurred within the old, unexpired, and not yet time-barred five-year limitations period that was in place prior to the amendments to IEEPA and TWEA on April 24, 2024) would not have been considered to have lapsed by the time of the publishing of this article in early 2025, and would in fact run until May 24, 2029. However, this would also mean that the statute of limitations for a hypothetical sanctions violation committed on May 24, 2018 (for example, a violation already time-barred by the expiration of the old, five-year limitations period that was in place prior to the amendments to IEEPA and TWEA on April 24, 2024) **would have been considered to have lapsed**. In other words, U.S. sanctions authorities would not seek to resurrect an already-expired statute of limitations under this interpretation. As this article will demonstrate, such an interpretation would have avoided the *ex post facto* constitutional concerns that exist in the criminal context and the common law presumption against statutory retroactivity concerns that exist in the civil context,<sup>17</sup> and so would have fallen within the ambit of what OFAC and DOJ could have permissibly implemented. This was the exact position eventually adopted by OFAC in July 2024, when the civil sanctions agency indicated that it would not pursue the revival of previously time-barred claims.<sup>18</sup>

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16. OFAC, *supra* note 13 (“Consequently, OFAC may now commence an enforcement action for civil violations of IEEPA- or TWEA-based sanctions prohibitions within 10 years of the latest date of the violation if such date was after April 24, 2019.”).

17. As explained further below, *ex post facto* constitutional protections do not extend to the civil context, so U.S. sanctions authorities would face fewer restrictions in imposing retroactive civil sanctions penalties for offenses that are not time-barred yet. Other avenues of attacking such extensions, based on the common law presumption against statutory retroactivity, are also likely to fail. Hence, such an interpretation falls within the ambit of what OFAC may permissibly implement in the civil context, too. See discussion *infra* Part IV.A.ii.

18. OFAC, *supra* note 13 (“This new 10-year statute of limitations applies to any violation that was not time-barred at the time of its enactment.”).

- U.S. sanctions authorities could have sought to retroactively apply the ten-year statute of limitations without regard for whether the violation was previously time-barred. This would mean that, under this interpretation, the limitations period for both the hypothetical sanctions violations committed on May 24, 2018, and May 24, 2019, would not have been considered to have lapsed by the time of the publishing of this article in early 2025, given that both those dates are within the last ten years. However, as this article will demonstrate, such an interpretation would raise *ex post facto* constitutional concerns in the criminal context. While the law is less settled in the analogous civil context, it is likely that it would also raise common law presumptions against statutory retroactivity concerns. Without explaining which legal constraints it was recognizing, OFAC did eventually indicate that it would not pursue the revival of previously time-barred civil claims, thus insulating itself from the potential constitutional challenges mentioned above.<sup>19</sup> There is still no indication of DOJ's enforcement intentions in the criminal sphere, though it seems likely that DOJ will also respect constitutional protections and refrain from seeking to revive expired statutes of limitation.

### III. WHY DOJ SHOULD ADOPT OFAC'S EXPIRED-UNEXPIRED DISTINCTION FOR STATUTES OF LIMITATION

#### A. *Resurrecting An Expired Statute of Limitations in the Criminal Context*

This section of the article demonstrates that Supreme Court precedent on retroactive extensions of criminal statutes of limitation unambiguously forecloses the possibility of the revival of an expired limitations period.<sup>20</sup>

In American case law, the dominant opinion has long been that the *Ex Post Facto* Clause prohibits legislation reviving time-barred statutes of limitation in the criminal context, but permits retroactive extensions of unexpired criminal limitations periods.<sup>21</sup> The Supreme Court confirmed this view in 2003, in a 5-4 split decision in *Stogner v. California*.<sup>22</sup> *Stogner* was concerned about a law enacted by the California state legislature in 1993, which had effectively abolished the statute

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19. *Id.*

20. Put differently, the case law calls for the same outcome for criminal violations of U.S. sanctions law, administered by DOJ, as adopted recently by OFAC for civil violations of U.S. sanctions law. *See id.*

21. *See* CONG. RSCH. SERV. *supra* note 4, at i, 15 (“The federal courts have long held that a statute of limitations may be enlarged retroactively as long as the previously applicable period of limitation has not expired. . . . The lower federal appellate courts had long felt that a statute that extended a period of limitation before its expiration did not offend the *ex post facto* clauses, but that the clauses do ban laws that attempt to revive and extend an expired statute of limitations. Until the United States Supreme Court confirmed that view in *Stogner v. California*, however, there were well regarded contrary opinions.”).

22. *Stogner v. California*, 539 U.S. 607 (2003).

of limitations for sexual abuse against children-related crimes.<sup>23</sup> Superseding the preexisting limitations period (which, as is typical with limitations periods, ran for three years from the commission of the crime), the new California law instead used the filing of a victim's report to the police as the trigger for the commencement of a new statute of limitations.<sup>24</sup> The 1993 California law allowed prosecution as long as charges were brought within a year of the report, meaning that crimes whose limitations periods had lapsed decades prior to 1993 could now be investigated again if victims came forward.<sup>25</sup> Unsurprisingly, this legislation quickly faced retroactivity-related challenges by defendants being prosecuted for crimes committed long ago. In 1998, Marion Stogner was indicted by a California grand jury for sexual abuse against children-related crimes committed between 1955 and 1973. He moved to dismiss based on the argument that the Federal Constitution's prohibitions against *ex post facto* laws were being violated by the 1993 California legislation.<sup>26</sup>

Justice Stephen Breyer, writing for the majority, held that retroactive resurrections of expired statutes of limitation were "manifestly unjust and oppressive."<sup>27</sup> Most of the analysis concerned the below *Ex Post Facto* Clause from Article I, Section 9, Clause 3 of the U.S. Constitution:

No Bill of Attainder or ex post facto Law shall be passed.<sup>28</sup>

Past Supreme Court precedent had interpreted this prohibition to encompass "any statute which punishes as a crime an act previously committed, which was innocent when done. . . or which deprives one charged with crime of any defense available according to law at the time when the act was committed."<sup>29</sup> In *Stogner*, the majority held that a California statute's retroactive resurrection of an expired statute of limitations for child sex abuse cases ran afoul of two of the four

23. *Id.* at 609.

24. *Id.*

25. *See id.* ("The [1993 California] statute thus authorizes prosecution for criminal acts committed many years beforehand—and where the original limitations period has expired—as long as prosecution begins within a year of a victim's first complaint to the police.")

26. *Id.* at 609–610 ("Without the new statute allowing revival of the State's cause of action, California could not have prosecuted Stogner. The statute of limitations governing prosecutions at the time the crimes were allegedly committed had set forth a 3-year limitations period. And that period had run 22 years or more before the present prosecution was brought.")

27. *Id.* at 611 (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)).

28. U.S. CONST. art. I, § 9, cl. 3; note that another *Ex Post Facto* Clause elsewhere in the Constitution similarly prohibits the states from passing *ex post facto* laws. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts."). The *ex post facto* defense sustained by the Stogner Court was based on the clause from §10, since the case dealt with the extension of a statute of limitations under a state law; *See Stogner v. California*, 539 U.S. 607, 610 (2003). However, the two *Ex Post Facto* Clauses have identical wording related to retroactive laws and are viewed as placing the same restrictions on both state and federal governments; *See, e.g., id.* ("The Constitution's two *Ex Post Facto* Clauses prohibit the Federal Government and the States from enacting laws with certain retroactive effects.")

29. *Beazell v. Ohio*, 269 U.S. 167, 169 (1925).

“categorical descriptions of *ex post facto* laws set forth by Justice [Samuel] Chase more than 200 years ago in *Calder v. Bull*.”<sup>30</sup> The majority primarily relied on the second category, relating to “law[s] that aggravate[] a crime, or make[] it greater than it was, when committed”; Justice Chase interpreted this category later in his opinion to include “inflict[ing] punishments, where the party was not, by law, liable to any punishment.”<sup>31</sup> The *Stogner* court held that California’s revival of an expired statute of limitations “[fell] within the literal terms of Justice Chase’s second category,” since it “‘inflicted punishment’ for past criminal conduct that (when the new law was enacted) did not trigger any such liability.”<sup>32</sup>

Since this decision in 2003, it has been settled law that Congress may not reimpose criminal liability after the limitations period for a criminal offense that has lapsed.<sup>33</sup> Hence, DOJ would be constitutionally prohibited under the *Ex Post Facto* Clause from reviving prosecution for criminal sanctions offenses committed prior to April 24, 2019 (for example, violations already time-barred by the expiration of the old, five-year statute of limitations period that was in place before the amendments to IEEPA and TWEA on April 24, 2024).

### B. Extending An Unexpired Statute of Limitations in the Criminal Context

This section of the article demonstrates that *Stogner*, along with other case law, indicates that the prohibition on revivals of expired criminal limitations periods does not extend to the lengthening of still-running ones.<sup>34</sup>

While the *Stogner* court deemed retroactive resurrections of expired statutes of limitation to be “manifestly unjust and oppressive,” it also took pains to distinguish from its holding any legislation targeted at extending still-running limitations periods.<sup>35</sup> On several occasions, Justice Breyer explained that the logic from *Calder* applicable to expired statutes of limitation did not extend to unexpired ones. He extolled congressional action extending unexpired limitations periods as “a tailored approach. . . that has also been taken in modern statutes,”<sup>36</sup> and explicitly recognized that “courts have upheld extensions of *unexpired* statutes of limitations. . . extensions that our holding today does not affect.”<sup>37</sup> Later in the opinion, he approvingly cited a lengthy list of opinions from a variety of

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30. *Stogner*, 539 U.S. at 611.

31. *Id.* at 613 (quoting *Calder*, 3 U.S. (3 Dall.) at 389–90).

32. *Id.* at 615.

33. See, e.g., Cong. Rsch. Serv., *Statutes of Limitations and Procedural Due Process*, CONSTITUTION ANNOTATED, <https://perma.cc/DT7D-ML8G>; Cong. Rsch. Serv., *Imposing Criminal Liability and Ex Post Facto Laws*, CONSTITUTION ANNOTATED.

34. Once again, this is analogous to the approach recently adopted by OFAC for civil violations of U.S. sanctions law, in which the retroactive enlargement of statutes of limitation for violations not yet time-barred is pursued. See OFAC, *Guidance on Extension of Statute of Limitations*, U.S. DEP’T OF THE TREASURY (Jul. 22, 2024), <https://perma.cc/2UKT-XYD9> (“This new 10-year statute of limitations applies to any violation that was not time-barred at the time of its enactment.”).

35. See, e.g., *Stogner*, 539 U.S. at 611–12 (using the phrase “manifestly unjust and oppressive”); *id.* at 616–18 (discussing the broader concept of extending still-running limitations periods).

36. *Id.* at 617.

37. *Id.* at 618.

American state and federal courts upholding retroactive enlargements of existing limitations periods.<sup>38</sup> Even the four justices who dissented in *Stogner*, led by Justice Anthony Kennedy, had no issue with the majority's holding that legislatures could extend unexpired statutes of limitation—to the contrary, these justices would have gone even further to rule that the government could lawfully revive time-barred limitations periods.<sup>39</sup>

The distinction between expired and unexpired limitations periods in *Stogner* has repeatedly been recognized in other courts. As the Congressional Research Service explains, “the federal courts have long held that a [criminal] statute of limitations may be enlarged retroactively as long as the previously applicable period of limitation has not expired.”<sup>40</sup> Hence, DOJ would be constitutionally permitted under the *Ex Post Facto* Clause to retroactively extend the statute of limitations for criminal sanctions offenses committed between April 24, 2019, and April 24, 2024 (for example, violations not yet time-barred by the expiration of the old, five-year statute of limitations period that was in place prior to the amendments to IEEPA and TWEA on April 24, 2024). Put differently, the limitations period for a criminal sanctions offense committed on April 25, 2019, would lapse on April 25, 2029, rather than on April 25, 2024, as is the case in the civil sphere since OFAC's issuance of limitations period-related guidance in July 2024.<sup>41</sup>

### *C. Summary Analysis on the Appropriate Approach for DOJ in the Criminal Context*

In light of these constitutional protections and the unambiguous and controlling Supreme Court precedent on retroactive extensions of limitations periods, DOJ should adopt the same distinction between expired and unexpired criminal statutes of limitation that has recently been embraced by OFAC in the civil sanctions context—in other words, while DOJ can pursue the extension of limitations periods for criminal sanctions violations committed in the past that are not yet time-barred if it so wishes, it should mirror OFAC's restraint in declining to seek retroactive revivals of time-barred sanctions offenses.<sup>42</sup> A more aggressive approach is likely to run into significant constitutional problems.

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38. *Id.* at 618–19.

39. *See id.* at 633–53.

40. CONG. RSCH. SERV., RL31253, STATUTE OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW I, at summary (2017).

41. *See* OFAC, *Guidance on Extension of Statute of Limitations*, U.S. DEP'T OF THE TREASURY (Jul. 22, 2024), <https://perma.cc/2UKT-XYD9> (“Consequently, OFAC may now commence an enforcement action for civil violations of IEEPA- or TWEA-based sanctions prohibitions within 10 years of the latest date of the violation if such date was after April 24, 2019.”).

42. For OFAC's analogous policy in the civil sanctions sphere, *see id.* (“This new 10-year statute of limitations applies to any violation that was not time-barred at the time of its enactment.”).

#### IV. THE PRECEDENT THAT LIKELY INFORMED OFAC'S RECENT GUIDANCE

##### A. *Resurrecting An Expired Statute of Limitations in the Civil Context*

This section of the article outlines the various threads of case law used by defendants to demonstrate that the revival of an expired civil limitations period is unlawful. It also argues that the success of many *Landgraf*-based common law claims in various courts is what likely discouraged OFAC from seeking the revival of time-barred sanctions violations via its expanded limitations period authority.<sup>43</sup>

*Ex Post Facto* Clause protections do not apply in civil cases. American courts have uniformly restricted *ex post facto* protections against retroactivity to the criminal context, and the only court to have found a civil violation of the *Ex Post Facto* Clause was promptly overruled by the Ninth Circuit.<sup>44</sup> Instead, retroactivity-based challenges to limitations period modifications in the civil setting utilize one of two paths: (i) the argument that reviving an expired civil limitations period amounts to an unfair deprivation of property under the Fourteenth Amendment's Due Process clause, and (ii) the argument that reviving an expired civil limitations period has a genuinely retroactive effect under Supreme Court precedent established by *Landgraf v. USI Film Products* and, therefore, violates the well-settled English common law presumption against statutory retroactivity.

##### 1. Due Process Challenges

Since *ex post facto* protections are unavailable in the civil context, challenges to civil statutes of limitation modifications often hinge on the Fourteenth Amendment procedural due process claims.<sup>45</sup> However, due process jurisprudence has imposed very few limits on legislation extending (or even altogether eliminating) civil statutes of limitation. The Supreme Court has held that legislation may "extend the time in which civil suits may be brought in its courts and may even entirely remove a statutory bar to the commencement of litigation."<sup>46</sup> It has ruled in a variety of cases, ranging from debt-related property disputes to anti-fraud state securities laws, that retroactive adjustments of limitations statutes do not amount to taking away "property without due process of the law."<sup>47</sup>

The *Stogner* dissent outlined these holdings, stating that "the Court's later case law has rendered...[the interpretation that expired civil statutes of limitation could not be revived] questionable";<sup>48</sup> that the Court has "held that expired

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43. See *id.* ("This new 10-year statute of limitations applies [only] to any violation that was not time-barred at the time of its enactment.")

44. See Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 KY. L.J. 323, 324 (1992).

45. See Cong. Rsch. Serv., *Statutes of Limitations and Procedural Due Process*, CONSTITUTION ANNOTATED, <https://perma.cc/4BRH-6ATA>.

46. *Id.*

47. See, e.g., *Campbell v. Holt*, 115 U.S. 620, 623 (1885) (enslaved person at issue); *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304, 314-16 (1945).

48. *Stogner v. California*, 539 U.S. 607, 638 (2003).

statutes of limitations can be repealed to revive a civil action”;<sup>49</sup> that “in the civil context. . . expired statutes of limitations do not implicate fundamental rights under the [Due Process] Clause”;<sup>50</sup> and that, even though “these holdings were made in the areas of contracts and investments where reliance does exist and does matter,” the Court has nevertheless “allow[ed] the civil wrong to be vindicated nonetheless.”<sup>51</sup> On the other hand, the *Stogner* majority cited to dicta in some of the same civil cases, alluding to the potentially unconstitutional infringement on “vested rights” that could occur through a hypothetical, targeted resurrection of an expired civil limitations statute.<sup>52</sup> However, even in these cited cases, the Supreme Court allowed retroactive extensions of the limitations periods actually before them—for instance, in *Chase Securities Corp. v. Donaldson*, it declared that “certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment.”<sup>53</sup> Similarly, in dealing with an unrelated statute of limitations concern in the 1995 decision of *Plaut v. Spendthrift Farm*, the Supreme Court acknowledged that “a statute of limitations. . . can be extended, without violating the Due Process Clause, after the cause of the action arose and even after the statute itself has expired.”<sup>54</sup>

The Supreme Court has only narrowly proscribed retroactive enlargements or removals of limitations periods in the civil context under the Due Process Clause. In particular, it held that when “a right of action to recover property has been barred by a statute of limitations and title as well as real ownership have become vested in the possessor. . . [a later modification of the limitations period] would be void as attempting an arbitrary transfer of title.”<sup>55</sup> However, as that holding came in an 1880s case concerning landed property from an inheritance dispute—and discussed property transfers in a context in which human beings were still treated as inheritable possessions—its subject matter is sufficiently distinguishable from the domain of sanctions and civil administrative enforcement.<sup>56</sup> It is highly unlikely that a court today would view a civil sanctions penalty imposed by U.S. sanctions authorities under IEEPA or TWEA to be facilitating an “arbitrary

49. *Id.* at 651.

50. *Id.* at 653.

51. *Id.* at 651.

52. *Id.* at 631–32.

53. *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304, 316 (1945) (emphasis added).

54. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 229 (1995).

55. Cong. Rsch. Serv., *Statutes of Limitations and Procedural Due Process*, CONSTITUTION ANNOTATED, <https://perma.cc/PQ72-4JUN>; *accord Campbell*, 115 U.S. at 623 (enslaved person at issue).

56. *Campbell*, 115 U.S. at 620–21 (enslaved party) (explaining how the dispute was over “the allegation that Malvina Stamps, afterwards Holt, inherited from her mother, Henrietta Stamps, the wife of John Stamps, an interest in lands and negroes which her mother owned at the time of her death. . . the land was sold by her father, John Stamps, who received the money and converted it to his own use, and. . . he also received the hire and profits of the negroes so long as they remained slaves under the laws of Texas.”).

transfer of title” via the manipulation of limitations periods, especially by analogizing to a case with such an antiquated fact pattern.

Lower courts have sometimes reached similar holdings to the position outlined in the *Stogner* dissent and the aforementioned Supreme Court cases allowing revivals of expired civil limitations statutes. For instance, the Ninth Circuit cited *Chase Securities Corp.* in ruling in *United States v. Falcon* that the Department of Education and its agencies could revive student debt collection actions for even time-barred loans without violating the debtors’ due process protections.<sup>57</sup>

Therefore, it is likely that OFAC would not face constitutional issues under the Due Process Clause in seeking to revive prosecution for previously time-barred civil sanctions offenses.<sup>58</sup> Put differently, due process restrictions do not have an effect, one way or the other, on limitations periods for civil sanctions offenses committed anytime in the last ten years (*e.g.*, anytime between July 2014 and the time of the publishing of this article in early 2025). Hence, they likely did not inform OFAC’s recent decision to refrain from pursuing revivals of time-barred civil limitations periods.<sup>59</sup>

## 2. Landgraf-based Genuinely “Retroactive Effect” Challenges

Despite the likely absence of constitutional due process protections in this context, some courts have nevertheless struck down revivals of expired civil claims as having an impermissibly “retroactive effect” under the test for statutory retroactivity articulated by the Supreme Court in its 1994 *Landgraf* decision.<sup>60</sup> Some of these courts have held that when—as with the amendments to IEEPA and TWEA—Congress has not unambiguously called for the retroactive application of the law, the well-settled English common law presumption against statutory

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57. *United States v. Falcon*, 805 F.3d 873, 875–76 (9th Cir. 2015). The Eighth and Tenth Circuits have also reached identical holdings on the issue of Higher Education Technical Amendments of 1991 (HETA) reviving otherwise untimely actions to collect on federal student loans. *See United States v. Hodges*, 999 F.2d 341, 342 (8th Cir. 1993); *see also United States v. Distefano*, 279 F.3d 1241, 1244 (10th Cir. 2002). Note, however, that neither of these circuit court opinions—published after the Supreme Court’s 1994 *Landgraf* decision—discussed the *Landgraf*-based presumption against statutory retroactivity, and it does not appear as though *Landgraf*-related issues were even briefed in these cases. For an explanation of how the *Landgraf* framework could apply in this context, *see* discussion *infra* Part IV.A.ii.

58. Note that before it issued clarifying guidance in July 2024, OFAC indicated on several occasions that it did not yet have instructions on how it would apply the limitations period and that guidance was still in the works. *See, e.g.*, Janet Kim et al., *Takeaways from Baker McKenzie’s Webinar with Associate Director for Compliance and Enforcement Lawrence Scheinert, US Treasury Department’s Office of Foreign Assets Control*, Global Sanctions And Export Controls Blog (Jun. 25, 2024), <https://perma.cc/A8TK-QZA8> (“OFAC is working through the relevant legal issues and plans to issue guidance for the compliance community about how this SOL [statute of limitations] change will be implemented.”).

59. *See* OFAC, *Guidance on Extension of Statute of Limitations*, U.S. DEP’T OF THE TREASURY (Jul. 22, 2024), <https://perma.cc/8E6G-WGDR> (“This new 10-year statute of limitations applies [only] to any violation that was not time-barred at the time of its enactment.”).

60. *Landgraf*, 511 U.S. at 249.

retroactivity applies, and “prospectivity remains the appropriate default rule.”<sup>61</sup> This case law may well have informed OFAC’s recent guidance.<sup>62</sup>

*Landgraf* did not deal directly with limitations period extensions but rather with the Civil Rights Act of 1991’s “seachange in employer liability for Title VII violations.”<sup>63</sup> Barbara Landgraf, a victim of workplace sexual harassment, attempted to have her ongoing case remanded so the changes to the compensatory damages provisions of Title VII could apply to her set of facts.<sup>64</sup> The Supreme Court granted certiorari on the limited question of whether the Civil Rights Act of 1991’s amendments to Title VII could apply retroactively to cases pending when the legislation became law.<sup>65</sup> In discussing this more general concept of legislation<sup>66</sup> with potentially retroactive effects, the justices in the majority of the 8-1 *Landgraf* decision established a three-part test for courts to apply to statutes enacted subsequent to the conduct they govern.<sup>67</sup> To begin with, “a court’s first task is to determine whether Congress has expressly prescribed the statute’s proper reach”—in other words, is their wording to indicate clear congressional intent for retroactive application?<sup>68</sup> If so, the statute applies irrespective of how retroactive it may seem.<sup>69</sup> Absent such intent, however, the court must proceed to the second step of the test and determine whether the new statute would have a genuinely “retroactive effect.”<sup>70</sup> Importantly, a statute does not have this sort of effect “merely because it is applied in a case arising from conduct antedating the statute’s enactment”<sup>71</sup> or “merely because it draws upon antecedent facts for its operation”<sup>72</sup>—it must go beyond that to “attach[] new legal consequences to events completed before its enactment.”<sup>73</sup> Courts have sometimes held that the determination of a genuinely retroactive effect turns on “an inquiry into whether

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61. See, e.g., *Glaser v. Enzo Biochem, Inc.*, 303 F. Supp. 2d 724, 733 (E.D. Va. 1993); *Landgraf*, 511 U.S. at 272. Note that “prospectivity” in this sense does not mean that the statute cannot apply to “antecedent facts,” such as to further extend an unexpired civil statute of limitations. *Landgraf*, 511 U.S. at 271–72 n.24 (quoting *Cox v. Hart*, 260 U.S. 427, 435 (1922)); see also *supra* notes 48–50 and accompanying text.

62. See OFAC, *supra* note 59 (“This new 10-year statute of limitations applies [only] to any violation that was not time-barred at the time of its enactment.”).

63. *Landgraf*, 511 U.S. at 249.

64. *Id.* at 248–50.

65. *Id.* at 249–50.

66. The *Landgraf* test applies both to legislative enactments, as here, and to the civil administrative action setting. The majority cited approvingly to past decisions which declared that “congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.” *Id.* at 272 (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988)).

67. *Id.* at 280.

68. *Id.*

69. *Id.*

70. *Id.* at 277.

71. *Id.* at 269.

72. *Id.* at 271–72 n.24 (quoting *Cox*, 260 U.S. at 435).

73. *Id.* at 269–70. This qualification means that, for instance, modifications to unexpired civil statutes of limitation which seem “retroactive” in the conventional sense of the word do not run afoul of the presumption against statutory retroactivity as set forth in *Landgraf*. See discussion *infra* Part IV.A.ii.

the statutory change affects substantive or procedural rights.”<sup>74</sup> *Landgraf* defined this inquiry to consist of determinations on “whether [the potentially retroactive statute] 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.”<sup>75</sup> In the final step, if such a genuinely retroactive effect is found to be present, “our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result”—in other words, the longstanding common law presumption against statutory retroactivity applies and the statute is assumed to operate solely prospectively.<sup>76</sup>

The Supreme Court has not, in *Landgraf* or elsewhere, decided whether limitations period modifications have a genuinely retroactive effect. Nevertheless, lower courts have occasionally applied the *Landgraf* framework to rule that reviving a stale civil claim via a statute of limitations modification alters the substantive rights of the party and “increase[s] a party’s liability for past conduct,” thereby creating a genuinely retroactive effect under *Landgraf*’s step two.<sup>77</sup> For instance, in the context of the 2002 Sarbanes–Oxley Act’s enlargement of a civil statute of limitations for securities fraud litigation, at least three circuits held that using the extension to revive time-barred claims violates the common law presumption against statutory retroactivity.<sup>78</sup> There has yet to be a circuit definitively holding otherwise.<sup>79</sup> Different cases applying *Landgraf* to revived civil statutes of limitation have held that such resurrections “result in manifest injustice,”<sup>80</sup> “alter [parties’] substantive rights,”<sup>81</sup> “increase . . . liability for past conduct,”<sup>82</sup> “put[] defendants back at risk at a point when defendants reasonably believe they

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74. See, e.g., *Aetna Life Ins. Co. v. Enter. Mortg. Acceptance Co., LLC*, 391 F.3d 401, 411 (2d Cir. 2004). See generally Sarah J. Greenberg, *Darn Your SOX: Exploring Retroactive Application of Extended Statutes of Limitation and Repose in Securities Fraud Litigation* 16 (Bepress Legal Series, Working Paper No. 1379, 2006) (describing several cases where courts have drawn or considered drawing a substantive-procedural distinction).

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

76. Note, once again, that “prospective” application in this sense does not mean that the consequences of past conduct (for instance, a still-running and not yet time-barred statute of limitations) are entirely off limits, but only that a law cannot “attach[] new legal consequences to events completed before its enactment.” *Id.* at 269–70; see discussion *infra* Part IV.A.ii.

77. *Id.* See *supra* notes 55–59 and accompanying text for many examples of such cases.

78. See, e.g., *Aetna*, 391 F.3d at 411 (the Second Circuit ruling that “in our view, the resurrection of previously time-barred claims has an impermissible retroactive effect”); *Foss v. Bear Stearns & Co., Inc.*, 394 F.3d 540, 542 (7th Cir. 2005) (citing to the Second Circuit’s opinion in *Aetna* and declaring that “we find it persuasive and have nothing to add to the second circuit’s explanation”); *In re ADC Telecomms., Inc. Sec. Litig.*, 409 F.3d 974, 978 (8th Cir. 2005) (citing to both the Second Circuit and Seventh Circuit’s opinions and agreeing with them, stating that “our decision today is in accord with the majority of courts that have addressed this issue”). See also Greenberg, *supra* note 74, at 20–23 (tracking the development of this jurisprudence).

79. See Greenberg, *supra* note 74, at 23–24 (explaining the then-ongoing litigation in the Eleventh Circuit that also considered retroactivity questions).

80. *Chenault v. U.S. Postal Serv.*, 37 F.3d 535, 538 (9th Cir. 1994) (quoting *Bradley v. School Bd. Of Richmond*, 416 U.S. 696, 711 (1974)).

81. *In re Heritage Bond Litig.*, 289 F. Supp. 2d 1132, 1148 (C.D. Cal. 2003) (quoting *Chenault*, 37 F.3d at 539).

82. *Aetna*, 391 F.3d at 406.

are immune from litigation,<sup>83</sup> and cannot be permitted “unless Congress specifically provides for retroactive application.”<sup>84</sup>

However, some scholarship has pushed back against the idea that limitations period modifications can be seen as having a genuinely retroactive effect under *Landgraf*'s step two.<sup>85</sup> As aforementioned, *Landgraf* did not explicitly discuss whether post hoc adjustments to limitations periods have a necessarily “retroactive effect.” One critique of the cases extending the *Landgraf* framework to limitations periods points out the tension with the case law outlined in Part IV.A.i above.<sup>86</sup> Those due process cases largely reach the opposite conclusion on whether there should be retroactive bars to the resurrection of expired civil statutes of limitation.<sup>87</sup> For instance, due process case law states that the Fourteenth Amendment does not *per se* outlaw the “lifting [of] the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time” and that there is no “vested right” present when a limitations period is changed.<sup>88</sup> Moreover, the traditional arguments against statutory retroactivity, which are often based on fair notice, do not apply when statutes of limitation are at issue.<sup>89</sup>

If a court nevertheless deems the *Landgraf* framework applicable to the 21st Century Peace through Strength Act's amendments to IEEPA and TWEA to provide for a ten-year limitations period, it would begin by considering whether Congress has clearly demonstrated an intent to apply the new statute of limitations retrospectively. Here, there does not seem to be any explicit intent from Congress to have the limitations statute apply in the past, in either the statutory text or its legislative history. OFAC, the principal sanctions authority benefitting from the extended statute of limitations, repeatedly indicated in the months between April and July 2024 that it did not yet have instructions on how it would apply the limitations period and that guidance was still in the works.<sup>90</sup> (OFAC

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83. *Id.* at 410 (quoting *Winfree v. N. Pac. Ry. Co.*, 227 U.S. 296 (1913)).

84. *Glaser*, 303 F. Supp. 2d at 733 (quoting *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 950 (1997)); *INS v. St. Cyr*, 533 U.S. 289, 371 (2001)).

85. *See, e.g.*, Greenberg, *supra* note 74, at 28–30.

86. In other words, the Fourteenth Amendment-based cases from the “Due Process Challenges” section of this article. *See* discussion *supra* Part IV.A.i.

87. *See, e.g. supra* notes 55–59 and accompanying text.

88. *See, e.g.*, Sarah J. Greenberg, *Darn Your SOX: Exploring Retroactive Application of Extended Statutes of Limitation and Repose in Securities Fraud Litigation* 16, at 28–30 (Bepress Legal Series, Working Paper No. 1379, 2006) (quoting *Chase*, 325 U.S. at 316; *Landgraf*, 511 U.S. at 297 (Blackmun, J., dissenting)).

89. A succinct form of common arguments against retroactivity follows: retroactivity is abhorred because “elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and conform their conduct accordingly.” *Landgraf*, 511 U.S. at 265. However, in the limitations period context, the offender did in fact have an opportunity to know the law and the chance to conform their conduct to it when they committed the offense—even if a different statute of limitations applied at the time. *See* Greenberg, *supra* note 87, at 29.

90. *See, e.g.*, Kim et al., *Takeaways from Baker McKenzie's Webinar with Associate Director for Compliance and Enforcement Lawrence Scheinert, US Treasury Department's Office of Foreign Assets Control*, GLOBAL SANCTIONS AND EXPORT CONTROLS BLOG (Jun. 25, 2024), <https://perma.cc/6EAB-AC89> (“OFAC is working through the relevant legal issues and plans to issue guidance for the compliance community about how this SOL [statute of limitations] change will be implemented.”).

ultimately issued its “Guidance on Extension of Statute of Limitations” on July 22, 2024, clarifying that it would only pursue the extension of still-running limitations periods and would not seek to revive time-barred ones; however, this came several months after the amendments to IEEPA and TWEA and cannot be used as evidence of congressional intent).<sup>91</sup> Since there is no explicit congressional intent present, the main question under *Landgraf* is whether a court would rule the 21st Century Peace through Strength Act’s extension of IEEPA and TWEA limitations periods to be having a “genuinely retroactive effect” by “attach[ing] new legal consequences to events completed before its enactment” under step two.<sup>92</sup> Given that many circuits have by now extended *Landgraf*-based protections against retroactivity to enlargements of civil limitations periods—such as those enacted by the 21st Century Peace through Strength Act—it seems likely that courts would rule a hypothetical OFAC revival of an expired civil sanctions limitations period to be creating a genuinely retroactive effect under *Landgraf*.

In sum, plenty of case law now exists to support the contention that such resurrections of expired civil statutes of limitation have a genuinely retroactive effect; colorable arguments are also present to support the opposite finding under due process-style reasoning. U.S. sanctions authorities could have tried to distinguish cases that revive plaintiffs’ claims against companies, such as in the aforementioned Sarbanes–Oxley Act context, from the executive branch’s authority under delegation from Congress to conduct investigations in a national security-adjacent domain. Ultimately, they did not. On July 22, 2024, OFAC issued a guidance document on the statute of limitations extension, electing not to pursue the revival of time-barred violations.<sup>93</sup>

Given the established *Landgraf*-based case law and the lack of explicit indication of retroactive congressional intent in the 21st Century Peace through Strength Act’s amendments to IEEPA and TWEA, it seems that OFAC was prescient in recognizing that courts could have, without difficulty, held it to be violating the common law presumption against statutory retroactivity. Put differently, OFAC predicted that courts would prohibit U.S. sanctions authorities from reviving prosecution for civil sanctions offenses committed prior to April 24, 2019 (for example, violations already time-barred by the expiration of the old, five-year statute of limitations period that was in place prior to the amendments to IEEPA and TWEA on April 24, 2024).

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91. See OFAC, *Guidance on Extension of Statute of Limitations* (Jul. 22, 2024), <https://perma.cc/BC3W-D92Y> (“This new 10-year statute of limitations applies [only] to any violation that was not time-barred at the time of its enactment.”).

92. See *Landgraf*, 511 U.S. at 277.

93. See OFAC, *Guidance on Extension of Statute of Limitations* (Jul. 22, 2024), <https://perma.cc/BC3W-D92Y> (“This new 10-year statute of limitations applies [only] to any violation that was not time-barred at the time of its enactment.”).

### 3. Summary Analysis of Expired Civil Statutes of Limitation

Despite some allusions to the possibility that hypothetical, targeted revivals of expired civil statutes of limitation could violate the Fourteenth Amendment's Due Process Clause, due process case law has, up to the present, been extremely hesitant to create retroactivity prohibitions for civil offenses. However, challengers have found more fruitful recourse to the *Landgraf*-based line of cases, opining that civil limitations period-modifying legislation violates the common law presumption against statutory retroactivity. This likely informed OFAC's recent decision not to interpret its extended statute of limitations authority as allowing it to revive time-barred civil cases. Moreover, this analysis is instructive whenever a civil agency benefits from legislation granting it broader statute of limitations powers without explicit congressional indication of retroactive application. In such scenarios, even when they arise outside of the sanctions context, an attempt by an agency to use an enlargement of a limitations period to revive time-barred claims would likely be struck down by courts under *Landgraf*.

#### *B. Extending An Unexpired Statute of Limitations in the Civil Context*

The previous section's analysis concerning retroactive applications of expired civil limitations periods applies here, too, to the less objectionable situation in which the civil statute of limitations is yet unexpired. Hence, just as for revivals of expired civil limitations periods, there are no due process protections under the Fourteenth Amendment, which deems limitations period extensions to amount to taking away "property without due process of the law."<sup>94</sup> Similarly, for the *Landgraf* impermissible retroactivity analysis, courts have consistently held that, while legislation extending unexpired statutes of limitation may operate to change expectations for conduct from the past, it does not have a truly "retroactive effect" as defined in *Landgraf*. This is because extensions do not "attach new legal consequences to events completed before its enactment" and do not upset "familiar considerations of fair notice, reasonable reliance, and settled expectations."<sup>95</sup> Similarly, enlargements of unexpired civil statutes of limitation do not "increase a party's liability for past conduct" or "impose new duties with respect to transactions already completed."<sup>96</sup> As a result, numerous courts have upheld penalties based on legislation extending unexpired limitations periods.<sup>97</sup> No court

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94. See, e.g., *Campbell*, 115 U.S. at 623 (enslaved person at issue); *Chase*, 325 U.S. at 314–16.

95. *United States v. Nader*, 425 F. Supp. 3d 619, 631 (4th Cir. 2017) (quoting *Landgraf*, 511 U.S. at 269–70).

96. *Landgraf*, 511 U.S. at 266.

97. Courts from a variety of jurisdictions have come to the same conclusion on this issue. See, e.g., *Frontier-Kemper Constructors, Inc. v. Dir.*, OWCP, United States DOL, 876 F.3d 683, 689 (4th Cir. 2017) ("a statute has no retroactive effect where the conduct being regulated begins before a statutory change occurs and continues after that change has taken effect."); *Cruz v. Maypa*, 773 F.3d 138, 145 (4th Cir. 2014) ("applying the . . . extended limitations period to claims that were unexpired at the time of its enactment does not give rise to an impermissible retroactive effect under *Landgraf*."); *Weingarten v. United States*, 865 F.3d 48, 57–58 (2d. Cir. 2017) ("The vast weight of retroactivity decisions . . . support that view [that retroactively extending the limitations period for still-viable claims is lawful even when

has ever held that retroactive enlargements of still-running filing periods have a *Landgraf* step two impermissible retroactivity effect.<sup>98</sup>

Additionally, since it is established in the criminal sphere—including by unequivocal Supreme Court precedent—that constitutional protections against retroactivity do not extend to extensions of unexpired limitations periods, it follows that there cannot be such protections in the civil context, either. As explained in Part III, in the criminal context, both the Supreme Court and the lower federal courts have uniformly recognized the legality of retroactive enlargements of unexpired criminal limitations periods.<sup>99</sup> Given that the Court always affords broader constitutional protections against retroactivity for criminal defendants than for analogous civil ones, it necessarily follows that retroactive enlargements of unexpired civil limitations periods are also lawful.<sup>100</sup> As Justice Breyer puts it in the *Stogner* majority opinion, “it is difficult to believe that the Constitution grants greater protection from unfair retroactivity to property than to human liberty.”<sup>101</sup>

OFAC eventually adopted a guidance document in July 2024 reflecting this position, declaring its intention to “commence. . . enforcement action[s] for civil violations of IEEPA- or TWEA-based sanctions prohibitions. . . [committed] after April 24, 2019”—in other words, to pursue retrospective extensions of still-running civil sanctions limitations periods.<sup>102</sup> This stance was likely informed by the extension-permitting case law outlined in this section of the article.

#### V. BROADER LESSONS ON THE RETROACTIVITY ANALYSIS APPLICABLE TO LIMITATIONS PERIODS

The findings presented in this article apply to any field of law in which legislative changes may operate to modify the duration of statutes of limitation. While most of this article focused on U.S. sanctions law—given the recent amendments to IEEPA and TWEA—the principles derived here are broadly relevant.

Agencies interpreting legislation that extends limitations periods must carefully consider constitutional and common law constraints, such as the *Ex Post*

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retroactively revoking a vested statute of limitations defense is not.]”); *United States v. Piette*, 45 F.4th 1142, 1161 (10th Cir. 2022) (“By extending the unexpired statute of limitations, Congress did not increase [the defendant’s] exposure to prosecution retroactively. It did not raise the penalty for the charged offense. It did not redefine the offense to make it easier to establish. . . it merely altered the ongoing charging period for the conduct. . . Ex Post Facto Clause cases echo both this conclusion and the import of this distinction in the broader retroactivity context.”); *State v. Morales*, 148 N.M. 305, 310 (N.M. 2010) (“our conclusion is supported by New Mexico case law holding that, in the civil context, statutory amendments to unexpired statutes of limitation” are not generally deemed to be retroactive.).

98. See *Weingarten*, 865 F.3d at 58 (“Had Weingarten prevailed on this retroactivity theory, the District Court would have been the first court to hold that retroactively extending a filing period for live charges is a presumptively impermissible retroactive effect under *Landgraf*. That novel holding would have been in direct conflict with [decisions in the Ninth Circuit.]”).

99. See discussion *supra* Part III.

100. *Cruz*, 773 F.3d at 145 (employing similar logic).

101. *Stogner*, 539 U.S. at 638.

102. OFAC, *Guidance on Extension of Statute of Limitations* (Jul. 22, 2024), <https://perma.cc/BC3W-D92Y>.

*Facto* Clause in criminal cases and the *Landgraf*-based common law presumption against statutory retroactivity in civil cases. An analysis of these protections, which have by now accumulated a significant accretion of case law in the lower courts, is vital to ensuring that any retroactive application of extended statutes of limitation does not infringe upon established legal rights or expose the agency to litigation that it will probably ultimately lose. As was demonstrated above, courts' treatment of both civil and criminal cases reveal a marked distinction between expired and unexpired statutes of limitation. The precedent set by OFAC's recent guidance, which avoids reviving time-barred civil sanctions violations but allows extensions of limitations periods for still-running ones, provides a valuable framework for other civil agencies.<sup>103</sup> For criminal prosecutions, while DOJ's approach to time-barred criminal sanctions violations has not been stated publicly, the case law similarly militates against seeking limitations statute revivals, though on account of the Supreme Court's separate *ex post facto* clause juris prudence. By adhering to this expired-unexpired distinction to statutes of limitation, agencies can navigate the complexities of retroactive legislation without overstepping constitutional or common law bounds.

Lastly, this article's analysis of U.S. sanctions law over the past few months demonstrates the necessity for articulating a clear congressional intent whenever legislators seek to grant agencies the power to revive expired civil limitations periods. Absent explicit legislative guidance to this effect, agencies are forced to tread carefully. As demonstrated by the example of OFAC this year,<sup>104</sup> agencies in such a situation will likely avoid seeking limitations period revivals to ensure that they do not face retroactivity-based lawsuits that will, in all likelihood, succeed in the modern courts.

## VI. CONCLUSION

Our journey through the labyrinthine corridors of retroactivity-related rules brings us to at least a handful of certain conclusions on how much of a "shadow" (in the form of live limitations periods) civil and criminal offenses leave behind as they fly into the past.<sup>105</sup> Constitutional *Ex Post Facto* Clause and Due Process Clause prohibitions against retroactivity, along with the common law presumption against statutory retroactivity based on Supreme Court precedent in *Landgraf v. USI Film Products*, do not place limitations on authorities' ability to retroactively extend unexpired civil and criminal statutes of limitation—for instance, through the new, ten-year limitations period for IIEPA and TWEA enacted by Congress in the 21st Century Peace through Strength Act on April 24, 2024. However, the *Ex Post Facto* Clause prohibits the resurrection of criminal statutes of limitation that expired prior to the enactment of limitations period-

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103. *See id.*

104. *See* OFAC, *Guidance on Extension of Statute of Limitations* (Jul. 22, 2024), <https://perma.cc/BC3W-D92Y> ("This new 10-year statute of limitations applies [only] to any violation that was not time-barred at the time of its enactment.").

105. NATHANIEL HAWTHORNE, *THE MARBLE FAUN* 217 (Belknap 2012) (1860).

extending legislation. While the law is less settled in the analogous civil context, it is likely that *Landgraf* and the common law presumption against statutory retroactivity similarly prohibit the resurrection of civil statutes of limitation that expired prior to the enactment of limitations period-extending legislation.

This article dealt mostly with U.S. sanctions law. Several months after the amendments to IEEPA and TWEA were signed into law, OFAC released guidance on July 22, 2024, indicating that it would apply the extended statute of limitations retroactively but not to already time-barred violations.<sup>106</sup> This position reflects lessons drawn from the *Landgraf*-based case law, which distinguishes between expired and unexpired limitations statutes. Moreover, in the criminal sphere, this article argued that DOJ should adopt an OFAC-style strategy of prosecuting cases whose limitations periods have been retroactively extended,<sup>107</sup> but refrain from reviving prosecution for time-barred violations on account of the Supreme Court's *ex post facto* jurisprudence. Lastly, while the analysis here mostly concerned the sanctions context, the broader lessons outlined in this article provide valuable guidance for any agency scrutinizing legislation that grants it enlarged limitations period power. By applying the lessons outlined in this article—chief among them the recommendation that resurrections of time-barred civil and criminal offenses not be pursued—any such agency can ensure that it adopts a balanced approach to retroactivity, upholding constitutional and common law protections while insulating itself from legal challenges.

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106. OFAC, *Guidance on Extension of Statute of Limitations* (Jul. 22, 2024), <https://perma.cc/BC3W-D92Y>.

107. That is, if DOJ pursues such retrospective investigations at all—a question on which this article does not take a stance.