OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: AARON LINDH, Petitioner v. JAMES P. MURPHY, WARDEN

CASE NO: 96-6298

PLACE: Washington, D.C.

DATE: Monday, April 14, 1997

PAGES: 1-52

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IN THE SUPREME COURT OF THE UNITED STATES

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AARON LINDH, :

Petitioner :

v. : No. 96-6298

JAMES P. MURPHY, WARDEN :

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Washington, D.C.

Monday, April 14, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

JAMES S. LIEBMAN, ESQ., New York, New York; on behalf of the Petitioner.

SALLY L. WELLMAN, ESQ., Assistant Attorney General of Wisconsin, Madison, Wisconsin; on behalf of the Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 96-6298, Aaron Lindh v. James P. Murphy.

Mr. Liebman.

ORAL ARGUMENT OF JAMES S. LIEBMAN

ON BEHALF OF THE PETITIONER

MR. LIEBMAN: Mr. Chief Justice, and may it please the Court:

The Court granted review of a single issue, whether the court of appeals properly denied Aaron Lindh's 1992 habeas petition based on a 1996 amendment to 28 U.S.C. section 2254(d).

The court below interpreted that amendment to require it to leave intact State court decisions believed to be wrong under the Constitution as long as they are not "gravely wrong." Mr. Lindh ardently opposes that interpretation, but accept it here in addressing the different issue before the Court.

I'll make two points. First, because the statute's express delineation of the pending cases to which new habeas provisions shall apply omits Mr. Lindh's pending case, the statute makes itself inapplicable here, and thus disposes of the case under Landgraf's Step 1, and also, therefore, under its clear congressional intent,

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Step 3.

Second, and alternatively, the court of appeals interpretation of section 2254(d) to attach a new legal consequence, the denial of relief, to preenactment events that previously had given Lindh an unconditional right to relief from unconstitutional custody bars section 2254(d)'s application under Landgraf's Step 2.

In Landgraf in 1994, the Court repeatedly urged Congress to exercise responsibility for fundamental policy judgments concerning the temporal reach of statutes, so Landgraf held that where Congress' intent as to the temporal reach is clear, its statute-specific policy judgments will govern, but that otherwise the courts will follow the timeless and universal rule against applying new laws to have retroactive effects. That is, against attaching to preenactment events what a court finds to be a new legal consequence.

QUESTION: It made any exception, did it not, for jurisdictional rules?

MR. LIEBMAN: Your Honor, I don't think that there is an exception under Step 2 per se for jurisdictional rules.

What the Court said was that jurisdiction oftentimes is the kind of change that does not attach new legal consequences to preenactment events. The reason is

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that in all of the court's jurisdictional retroactivity cases where Congress didn't specify the outcome it wanted, there was an alternative forum that remained, and so it wasn't a question of whether you've got to enforce your rights. It was simply a question of which forum you would be allowed to enforce your rights in.

This case is very different, because here there is no alternative remedy. There is no --

QUESTION: Well, Mr. Liebman, what rights are we talking about, the Sixth Amendment right to confront witnesses?

MR. LIEBMAN: No. The rights that we're talking about, Your Honor, are the statutory rights under 2241(c)(3).

QUESTION: All right, so you're not relying on Lindh's right to confront witnesses, but just the statutory right to habeas relief. That's all you're talking about.

MR. LIEBMAN: That's exactly right, Your Honor. What we are talking about here having become unconditional and matured before the statute went into effect was a statutory cause of action for relief upon the proof of two statutory elements of that cause of action, constitutional --

QUESTION: Mr. Liebman, you spoke in answering

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the Chief Justice's question a moment ago about there being no alternative forum here, so that the jurisdictional analysis was inapposite.

Why wasn't there an alternative forum simply in the direct method of appeal in the first instance?

MR. LIEBMAN: There are three answers to that, Your Honor. First of all, the principle that I want to stand on is that there is no remaining effective and substantial alternative. That's the language from the Crane v. Halo case.

There are three reasons, therefore, why the State process does not provide an alternative and significant or satisfactory remedy. The first one is that the -- ever since this Court's case in 1886 in Ex parte Royale the understanding has been that the violation is the leaving intact, the emplacement and leaving intact of custody by the entire State judicial system as a whole.

And so you cannot make what is part of the violation into a sufficient remedy for the violation, because it is as if in the Landgraf case someone were to say to Mrs. Landgraf that because she had tried to get relief from her employer and the employer had thought about it and said you weren't discriminated against, you wouldn't make that a sufficient remedy, and it's the same thing here. Part of the violation includes the entire

State court process leading to incarceration.

Secondly, to the extent that the direct appeal process provides an alternative remedy, it is a remedy by certiorari to this Court at the end of that direct review process, a remedy that Mr. Lindh was lulled into passing up, because at the time it was neither his last nor his best option available for plenary Federal review.

QUESTION: Well, that may go to his judgment, and it may have been a perfectly sensible judgment to make at the time, but it doesn't go to the question whether there is an alternative to the particular kind of review sought, which I assume is a question about the system rather than about his particular judgment.

MR. LIEBMAN: Well, let me give the third reason, Your Honor, because I think it speaks directly to that. In the Plaut v. Spendthrift Farm case in 1995, the Court spoke about a number of congressional statutes that take away the res judicata defense and allow, for example, soldiers on duty to reopen litigation that was concluded against them.

Now, let's assume that Congress decided to change that statute and to say, no, there is going to be a res judicata defense, but it's only going to be a res judicata defense insofar as the judgment that you're challenging was gravely wrong.

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Now, under this Court's cases it is very clear that this Court would not take away a soldier's existing and accrued right of action under this statute as it existed under a new establishment of a defense that was established --

QUESTION: Well, assuming that to be true, you're also assuming an analogy which may well be sound, but I guess it's not self-evidently sound, and that is that the cause of action that you would be speaking of in your example is the same -- is a cause of action in the same sense that there is a cause of action in habeas, and habeas is kind of a mongrelized cause of action.

Yes, it is a means of coming into court under a specific Federal statute, but it's also in fact a means of review for error as an alternative to another means of review for error.

When somebody in direct appeal, for example, takes an appeal, we don't think of that person as having a cause of action to appeal, and so I suppose the so-called habeas cause of action is in that sense a different kind of cause of action from the one that you're referring to in your example, and I guess my question is, why as a matter of categorization or characterization should we refer to the habeas remedy as involving a cause of action in that classic sense.

MR. LIEBMAN: Well, Your Honor, first of all, I'm not sure it makes a difference whether you see this as a new element of the cause of action, or the establishment of a new defense, or as the dramatic changing of the standard of review, if you want to think of it that way.

Now, I think that it is much more appropriate to look at the post-enactment statute as one creating a new standard of review, but it does set up a chain of courts and tells -- in 2254(d) it says, look back to the State court and review that State court decision.

The statute never before had said that, and so under the statute as it previously existed, the rights that were given and accrued under the previous statute, there wasn't a standard of review kind of approach.

But even, Your Honor, if it was a new standard of review, the lower court cases are unanimous on the question that the imposition of a new standard of review is like the imposition of a --

QUESTION: Well, this isn't a new standard of review. I mean, that alters -- that alters the substantive right. This is just the elimination of review that used to be available and is not now available.

Let's say, what Congress did when it eliminated much of our mandatory jurisdiction and provided for recourse to this Court only by certiorari, it's your

position, I gather, that Congress could not render that action applicable to causes of action that arose before the statute was passed?

MR. LIEBMAN: Not at all, Your Honor. If Congress said specifically we want this to apply to prior judgments that had been entered as to which there was an accrued and existing right to appeal, that would be different, but if Congress did not say that, if Congress was silent -- and Your Honor, the example you give --

QUESTION: Well, now -- now, wait. You abjure any reliance on constitutional points, then. You were talking about Plaut. I don't see the relevance of Plaut --

MR. LIEBMAN: No. All I wanted --

QUESTION: -- unless you're making a constitutional argument.

MR. LIEBMAN: No. The reason I appealed to Plaut was Plaut happens to describe a series of statutes that the Court might be familiar with by remembering Plaut. It's just a series of statutes that had removed the res judicata defense.

QUESTION: But it's quite different, it seems to me, for Congress to require the courts to reexamine something that they've decided on the one hand, and that was Plaut.

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MR. LIEBMAN: Well --

QUESTION: And Congress to say on the other hand, what's been decided we're going to leave alone, and we don't want any more appeals. That's quite different.

MR. LIEBMAN: Yes.

QUESTION: I don't think the latter is an interference with the judicial function.

MR. LIEBMAN: Your Honor, I didn't mean to appeal to Plaut as a precedent. I simply meant to appeal to it as a compendium in a place in the statue of a number of statutes of a certain type to which I was drawing the analogy.

But let me be very clear in answer to Justice Souter's question. In this Court, including last term in the Gasperini case, but there's a whole series of cases -- Byrd and Stoner -- this Court has confronted the question of whether a different standard of review applied in the Federal courts and the State courts has Erie consequences. Is it substantive? Is it the kind of thing that changes the legal -- the law that applies in the two sets of courts?

And in those cases this Court has consistently said, using what is in effect a new legal consequences analysis, it's saying, are there new legal consequences attached to the forum that you pick? Here it's the new

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legal consequence attached to a temporal kind of criteria, but the analysis there makes very clear that standards of review are treated as substantive, as defining the substantive rights, and as changing the law.

QUESTION: Mr. Liebman, those Erie cases are consistent within that context, but surely not everything that would be labeled substantive for Erie is substantive for other purposes.

MR. LIEBMAN: Your Honor, I don't mean to suggest there's a one-to-one relationship. I'm simply trying to point out that the Court has recognized, including in the Gasperini case, that you get new law, a new set of legal outcomes.

In a sense, what you -- what the law had promised you in the state courts, if it instead is brought in the Federal courts you get something different, and it is exactly that that I'm pointing -- that I'm referring to.

In answer to Justice Scalia's point, I want to go back to those very statutes that you refer to, a series of statutes running from 1875 to 1891, the Everetts act, and through the judges' bill in 1925, and up through 1988.

In all of those statutes where Congress switched this Court's preexisting appeal, or writ of error jurisdiction to a certiorari jurisdiction, in each one of

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those it both -- it did two things. First of all, it said any case in the Supreme Court at the time the statute was passed will proceed under the prior statute.

Secondly, it said that any case that had reached a final judgment -- that is, in which there was an accrued and existing right to an appeal or writ of error at the time the new statute came into effect would be given a long period of time, often 6, 7, 8 months, to get into the Supreme Court under the old law, so that you'd have your appeal or your writ of error.

So even Congress seems to understand that even if it is a chain of courts connected with one kind of review versus another, that if you had an accrued, an existing right to the review because you had a final judgment against you, that you had --

QUESTION: What is your test --

QUESTION: You could say -- I mean, arguably that's one conclusion you could draw from the fact that Congress said that. The other conclusion you can draw is that Congress realized that if it didn't say that, appeal would have been cut off automatically, that it had to say that in order to preserve it.

MR. LIEBMAN: The Supreme Court, this Court itself has said the same thing in those cases that I referred to, the jurisdiction cases. There's the McCardle

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case, there's Crane v. Halo. In those cases the Court looked to see whether there was an existing efficient and substantial alternative remedy that remained before it was deemed to be appropriate, unless Congress specified, or to overcome constitutional problems, as in McCardle, to cut off that right completely, and so --

QUESTION: The reference to an alternative forum in McCardle is pretty much of an afterthought in the last paragraph of the opinion, isn't it?

MR. LIEBMAN: Well, it has been vindicated, of course. It was vindicated a few years later in the habeas corpus context at that point and then, of course, it was vindicated again in a sense, or at least as a way of avoiding a constitutional issue last year in your --

QUESTION: I thought you -- I thought we just had a discussion in which you say you're not relying on any constitutional problems here.

MR. LIEBMAN: All I --

QUESTION: I mean, I don't see this as a McCardle case at all.

MR. LIEBMAN: No. In answer to Chief Justice Rehnquist's question I just wanted to point out that in McCardle the -- they got -- obviously, there Congress wanted to withdraw the jurisdiction, but there still was a constitutional question of whether you could do it, and it

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is consistent in that case that the Court said, well, look, there is an alternative remedy.

That just places it within, as well, the Court's retroactivity cases, where there isn't a constitutional problem. There's simply a policy problem that would arise from applying it in the past, and what the Court did in those cases was to say, it's okay to withdraw this forum, but let's make sure that there is an alternate and equally efficient remedy that is available.

QUESTION: What -- do you have a way of saying in a sentence or two what your standard for determining which procedures are determinative of the change of consequence -- you know, the language from Landgraf?

What's worrying me is every procedural change, every rule of evidence, any change anyone can think of in the court system is going to change the result in respect to some category of people.

MR. LIEBMAN: Your Honor --

QUESTION: And of course, that's determinative of legal consequence.

They say, don't look at it that way. Look at actions in the world. Does it change the consequence of actions of the world legally? No. Look at remedies. Does it change that, whether the person goes to prison or not because of a violation of -- no. Then look at

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procedures, and procedures don't -- that's the kind of way I think they want us to look at it.

Now, you're saying, no, look at those procedures. Some procedural changes do change legal consequences attached to actions, others don't. What's your test?

MR. LIEBMAN: The test, Your Honor, is when a Congress provides a standard and the intent of that standard is systematically to change the outcomes in a series of cases in favor of one of the litigants, sets of litigants to that action, and against --

QUESTION: So if, in fact, there were two levels of an administrative review, including three levels within the agency and two in court later on, and maybe three, and Congress said, I'm going to take away one level of review -- why are you doing it? We think this kind of individual is just delaying things too long.

Then you would say, because they have four levels of review instead of five, that that then fits the Landgraf test?

MR. LIEBMAN: No. No, Your Honor. If I conveyed that impression I didn't mean that at all. It has to do with Congress' effort systematically to change the outcome of the legal rights at the end of the process.

QUESTION: Oh, that's why they change four

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levels to five. It's five levels in a social security case. They only want three, and they think too many social security claimants are getting money, so they change it.

MR. LIEBMAN: But Your Honor, what I --

QUESTION: Does that, then, make the difference?

MR. LIEBMAN: What I don't understand in your example is, either side can benefit from another appeal. If you lost --

QUESTION: Do they determine systematically that they -- I mean -- do you see what I'm saying? It could happen. If it's not social security --

MR. LIEBMAN: Well, no, Your Honor, even in that situation what I would look to is the four corners of the provision itself, and to see if within the four corners of the provision itself it is designed to realign --

QUESTION: All right, so the answer to my question is yes, if there's an administrative procedure, and by looking at it you see that this procedural change was designed to help one group or one side versus the other, then it's substantive. That is your test.

MR. LIEBMAN: Well, if the statute were to say, for purposes of limiting the number of social security claimants who receive relief, yes, that would be it.

What I was struggling with is, a rule of

evidence or something like that, you never quite know in any case who it's going to help and who it's going to hurt.

QUESTION: Well, we have a change in the parole evidence rule because we feel that defendants in contracts cases by and large are winning too often. Therefore we change it so it's easier for the plaintiffs to win.

MR. LIEBMAN: Well, Your Honor, I teach evidence, but I don't have to teach the parole evidence rule because it's a substantive rule of contracts, and so yes, that would be --

QUESTION: The answer is yes.

MR. LIEBMAN: Yes. That would be --

QUESTION: Mr. Liebman, you've explained the one side of it, what would be subject to the ordinary rule of prospectivity. Can you describe the other category, these processing rules that you say that kind of change would apply to the case wherever it is?

MR. LIEBMAN: There are two aspects to this under the Landgraf rule. The first question is whether any right has matured and become unconditional. The question is whether -- the second question is whether that has happened before the statute went into effect.

Now, let's take injunctions. Injunctions, as this Court pointed out in the American Steel Foundries

case, injunctions are decided by conditions as they exist on the ground at the moment the court ruled. That's what American Steel Foundry says.

So if a case is filed and the court's trying to decide whether or not to grant an injunction, and in the middle of that, but before the injunction is ruled on, a statute changed -- changes, that becomes another one of the factors that is on the ground at the time the court rules, and it would be considered at the time the court ruled, because there was at that point no accrued and unconditional right to an injunction because injunctions are always up in the air and unstable and unsettled until the point that the court rules.

To give another example, the -- one of the amicus briefs refers to the change in 1919 where the harmless error rule was adopted by statute. Well, before that time, this Court had applied its own harmless error rule consistent with the one put in the statute but a number of courts of appeals had stopped following it and were reversing on technical error.

Well, at that point, when the new statute was passed it was applied immediately in those cases, the reason being that there was no matured and unconditional right to relief on technical errors until the Supreme Court had passed on a case where at the time for cert had

passed, because --

QUESTION: Mr. Liebman, can I ask you about the four corners of the instrument to which you're appealing?

One of your arguments, indeed, your first argument, I guess the one you rely on most, is that since Chapter 154 in its last provision says that it shall apply to cases pending on or after the date of enactment of this act -- that's on A-31 of the appendix to your blue brief. Since that is in Chapter 154, the implication is that that is not applicable to 15 -- Chapter 153.

What do you do, then, with the various provisions in Chapter 154 that rely on amended Chapter 153? For example, on page A-25 of your appendix, in section 2264(b), it says, following review, subject to subsections (a), (d), and (e) of section 2254, the Court shall rule on the claims properly before it, but according to you there will not be review subject to subsections (a), (d), and (e) of section 2254 because -- at least for those cases pending at the time, because those provisions will not apply to those cases pending at the time.

MR. LIEBMAN: No, Your Honor, actually 2264(b) in some senses is our strongest point, and let me try and explain why.

All Chapter 153 provisions apply in all habeas cases, all State prisoner habeas cases. Chapter 154 only

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applies in capital opt-in cases. So if the Chapter 153 -- if the Chapter 153 provisions were to apply to pending cases, the provision you read, 2464(b), would be superfluous, because it would say, in a set of cases in which all of the 20 -- in all -- in a set of cases in which all of the Chapter 153 provisions apply, apply some of the Chapter 153 provisions. There's only one --

QUESTION: No, wait, it isn't superfluous. It's a temporal provision. It just makes it clear that these things have to be done first. It does not prescribe that they be done. It just says, following review subject to them, the court shall rule on the claims.

MR. LIEBMAN: But -- but --

QUESTION: It's a question of when it rules.

MR. LIEBMAN: But, Your Honor, under Chapter 153 each of those provisions says themselves that when you come to review a habeas corpus case you -- if it's a factual question you look at 2254(e). If it's a legal question, you look at 2254(d). Those provisions say that already.

So what 2264(b), Your Honor, is doing, is saying there are some parts of 225 -- or of Chapter 153 --

QUESTION: Well --

MR. LIEBMAN: Some parts that we want to apply to pending cases. Everything in Chapter 154 applies to

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pending cases. We refer by reference to some of the 153 sections in Chapter 154 and therefore, by virtue of 107(c), we make those applicable to --

QUESTION: Mr. Liebman, the --

MR. LIEBMAN: -- pending capital cases.

QUESTION: A very subtle way to do it, Mr. Liebman.

QUESTION: And the Seventh Circuit disagreed with that interpretation of 2264(b). Judge Easterbrook rejected it, and so does your opposing counsel. They don't agree that this has a temporal reference. They say, this is a which, which ones in 2254?

MR. LIEBMAN: Can I explain why that is an irrational reading of this statute?

The understanding of the lower court is that this is designed to read exhaustion out of the statute by leaving -- by negative implication leaving 2254(b) out.

However, Your Honor, if you look a couple of pages before at a provision called 2263(b)(2) -- it's on page A-24 -- under that provision the State always has the --

QUESTION: What provision are you reading, Mr. Liebman?

MR. LIEBMAN: I'm sorry. It's 2263(b)(2). It is right smack in the middle of page A-24, with the (2)

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before it.

QUESTION: From the date on which?

MR. LIEBMAN: Yes. This is a tolling provision, and what it says is, there shall be no tolling of the very short statute of limitations for second or successive State post conviction cases.

If the State does not want a case to go back for exhaustion, it simply says, you go back and exhaust. We assert the statute of limitations. You'll never get back into Federal court. And so at that point exhaustion is over because there's no effective remedy.

On the other hand, if the State wants exhaustion -- because if it wants exhaustion -- it may want exhaustion because the only way it's going to get the hearing to be held in State court instead of Federal court, the only way it's going to get a set of fact-findings in State court that will bind in Federal court, the only way it's going to get section 2254(d) to apply, because 2254(d) does not apply unless there was an adjudication on the merits in the State court, is by saying, we'll waive the statute of limitations, insist upon exhaustion, you go back to State court, and we're going to get our State fact-findings there and we're going to get the benefit of 2254(d).

The theory that the lower court used and that

the State asserts is a theory that would withdraw from States the right to get State court fact-findings that are binding in Federal court, and the right to have 2254(d) itself apply to any case in which the petitioner shows up in Federal court with the newly available claim. New law, new facts, and the petitioner can say, I never have to go back to State court.

Under the lower court's interpretation here and the State's interpretation, the States are going to be howling when they find out their payment, their repayment for having paid for counsel in State post conviction proceedings, which this act is supposed to give them an incentive to do, is the withdrawal of their capacity to force these cases back into State court to get State court fact-findings, have State hearings, and to have 2254(d) apply. Their reward for providing counsel is to lose those defenses.

We have a reading that is not irrational in that way. It gives the States the choice. If you don't want exhaustion, assert 2263(b)(2). If you do want exhaustion, waive the statute of limitations and insist upon exhaustion.

That means that 2264(b) is -- the only purpose it has is on the assumption that the Chapter 153 provisions do not apply to pending capital locked-in cases

on their own bottom, and so they had to be incorporated by reference.

I'll reserve the rest of my time.

QUESTION: Very well, Mr. Liebman.

Ms. Wellman, we'll hear from you.

ORAL ARGUMENT OF SALLY L. WELLMAN

ON BEHALF OF THE RESPONDENT

MS. WELLMAN: Mr. Chief Justice, and may it please the Court:

The State asks this Court to hold that 2254(d), which limits the circumstances in which the Federal court may exercise its jurisdiction to grant habeas relief, applies to petitions pending on the date of 2254(d)'s enactment.

It applies to cases pending on the date of enactment because 1) it goes to the jurisdiction of the Federal court to grant relief. 2) When we're talking about habeas, we're talking first and foremost about a reviewing process. Although it's different from an appeal, it's like an appeal in that one --

QUESTION: Ms. Wellman, there are microphones, and I think we could hear you even if you didn't speak quite as loudly.

MS. WELLMAN: Oh, I'm sorry. Thank you, Your Honor.

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It's a reviewing process that reviews what the -- what a lower court decision has already done, so it's not reviewing in the -- it's not determinating rights and responsibilities and duties and obligations between parties in the first instance. It's reviewing the judgment and decision rendered by the State court.

In that sense also it is forward-looking. It's injunctive in the sense that the right to habeas relief is a right for the custody to end. It does not go back and give damages if the petitioner had been confined unconstitutionally for 20 years, he does not get damages for that.

It imposes no liability against the State in that sense, but rather it ends the custody. From this day forward you are released from custody unless the State retries you, so it is forward-looking in that sense, and in that sense, until the Federal court has reached that determination of whether it will order that custody shall cease or not, 2254(d) is not applying backwards in any sense.

QUESTION: Ms. Wellman, on that point I am confused. I thought that there's a big difference between an injunction, which is indeed prospective, from this day forward, and habeas, which says, you should not be where you are. It's, I thought, backward-looking, because you

don't give a person -- release a person based on some future activity but you say, you should not be here today, you should not have been there yesterday. There's no legal authority to hold you. So it seems to me habeas is backward-looking, not forward-looking.

MS. WELLMAN: It is in that sense, but it is not backward-looking in the sense of tort action, in that the remedy to a person or the liability to a person, you're not -- the State is not going to pay in the sense of damages. It's not backward-looking in that sense. Certainly whether custody shall continue or not depends on what happens before, but that cannot be the test of whether there are retroactive effects, because --

QUESTION: But it is reviewing -- I mean, in order to grant relief it is reviewing past actions, whereas in a classic injunctive case I suppose the question is, at the present time, now, is the defendant doing something defendant ought not to do, and yet in -- as Justice Ginsburg's question suggests, in the habeas case it's the -- the consequence is entirely a consequence of something that happened in the past. The person was either properly convicted or not properly convicted, so in that sense it is backward-looking.

MS. WELLMAN: That's right. It's not a perfect analogy, and as Landgraf recognized most of these

categories that the law has drawn are not drawn with perfect philosophical clarity, but it is like an injunction in the sense that it says, henceforth custody must cease. It is like an appeal remedy in the sense that it's reviewing what a court has already done.

In both of those senses it is adjudic -- we're looking, we're really focusing on the adjudicative process of the Federal court itself. We're not focus --

QUESTION: Could you at some point at your convenience go into a question that's bothering me? If Congress said nothing about it, now, it could be just applying to all new habeas petitions or ones that have already been filed.

If it's the first, we at least know how to do it. If it's the second, I was wondering about the very large number, what seemed like a large number of permutations and combinations as there are existing habeas petitions at dozens of different stages.

There are first, second, third. There are those on appeal. There are those that they've got, issued CPC's but -- probable cause to appeal -- but not -- haven't heard it. There are those that they've argued it at a hearing or just about ready to release.

There are dozens of combinations, some filed initially within the 1 year, some filed not within the 1

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year. Is it plausible or possible that Congress wanted the courts to go into each of those permutations and combinations and figure out somewhat different rules as we try to work out how to apply this thing retroactively?

That's the thing that worries me about it the most, because it seems to me -- it can't be true, for example, that a person who's already on appeal, who's argued his case, and the judge is just about to release the decision, or has released it but the mandate hasn't come down, is now supposed to go back to stage 1 and -- or is he?

I mean, suppose that he filed his initial petition 1 year and 5 days after the conviction took place. Does it count? I mean, my mind began to swim with possible combinations and so I wondered if Congress really intended us to do all that.

MS. WELLMAN: I think that you must do that because Congress was silent, and when Congress is silent, then the Court has to do the Landgraf analysis as to the particular provision at issue.

However, I don't think --

QUESTION: Did Congress know about the Landgraf analysis? I mean, was the Landgraf analysis the recitation of a formula that we had used for a century or so and Congress was quite familiar with, or was it a new

analysis?

MS. WELLMAN: Well, certainly Landgraf had been decided before this was -- became law by about 2 years.

QUESTION: But Landgraf is a long opinion, and suppose the Member of Congress got only up to page 242, where it --

(Laughter.)

QUESTION: Where it says, but while the constitutional impediment to retroactive civil legislation, constitutional impediments are now modest, prospectivity remains the appropriate default rule. Okay, that's what the Member of Congress fastens on, prospectivity remains the appropriate default rule, period. We didn't say anything. It's prospective. Why isn't --

MS. WELLMAN: Well, I think we have to assume that if Congress knew about Landgraf, they understood the entire decision, and as I understand Landgraf, and as we argue, what it clarifies is that there are two default rules.

The court deciding a case shall apply the rule in existence at the time of decision unless giving the particular provision at issue would have a retroactive effect, and it defines --

QUESTION: Then you're saying that later parts

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of the opinion take this back, that prospectivity is not the default rule.

MS. WELLMAN: I --

QUESTION: Something else is the default rule.

MS. WELLMAN: I think when you read that what you have to understand is that when the Court -- starting with Landgraf, when the Court says the default rule is prospective for a retroactive statute it means statutes that have a retroactive effect as they define it in Landgraf, which is, attach new legal consequences to conduct completed before enactment, and new legal consequences means only in paravested rights that had become a right before, under the existing law, impose new liabilities on conduct that had already occurred and was completed, or impose new duties on transactions that were already completed.

QUESTION: Ms. Wellman, you don't concede that the position you're arguing for is retrospective application, do you? Don't you take the position that your position is prospective?

MS. WELLMAN: That's --

QUESTION: I mean, the crucial issue is, prospective from when?

MS. WELLMAN: From when and after what?

QUESTION: Or retrospective from when.

MS. WELLMAN: That's right. If, for example --

QUESTION: That's the hard question. Where do you begin?

MS. WELLMAN: Where do you begin, and where you begin as to 2254(d), which tells the Federal court under the situations in which it can grant relief, if the State court decision is contrary to or an unreasonable application of U.S. Supreme Court precedent, as long as that decision and determination has not been made yet, then applying the statute to that decision is prospective.

QUESTION: Well, does -- I mean, my real -- the real thrust of my question, to be a little facetious about it, is if all the rules of construction and cases and silences and everything balance out exactly equally, should we presume Congress intends to do that which makes more sense, you see.

(Laughter.)

QUESTION: And so therefore -- therefore, I'm asking you really about what makes sense in terms of the application, and what I wonder is, well, I can understand how to apply a rule to new habeas petitions. Even I can figure that one out. If it's a new one you apply it. If it's an old one you don't.

And what I'm worried about, and wonder about -- I don't have a view. I want to get your view. What I'm

worried and wonder about is what kind of a mare's nest -- what kind of a complexity are we getting into if we try to apply it retro or post -- however you want to put the word, if you try to apply it to the set of cases that have already been filed and are at various stages of proceeding.

For example, I take it that a judge who is about to decide under this new rule would at least have to give the habeas petitioner a chance to go back and reargue and possibly introduce new witnesses, wouldn't he, before applying a new standard?

That's the kind of thing that's worrying me, and that's why I'd appreciate your addressing that kind of point.

MS. WELLMAN: Yes, I think it -- I understand your concern, and I think it's well-taken. What we do is, we look at the proceedings at the point -- as to all petitions that had already been filed. Whatever stage that particular petition was at on April 24, 1996, is where we pick up and apply the new law.

So as with Mr. Lindh his appeal was pending, the Seventh Circuit had not reached a decision yet, it was to apply 2254(d), and it did indeed ask the parties to rebrief both retroactivity and what the new statute means and how it applies to his case.

It did not go back and say, well, we have to look at was your petition filed within 1 year or not. It did not go back and look and say, well, did you have the new certificate of appealability. Those things that are already done are done and over, and you just start where you are. If --

QUESTION: Suppose -- suppose he had won. Suppose Lindh had won in the district court. Here he lost, and so he was up on appeal, but in line with Justice Breyer's question, what happens when he wins and the warden is appealing and it gets to the Seventh Circuit and everything else is the same, the new law passes. Does that -- well, you tell me what happens.

MS. WELLMAN: The Seventh Circuit would have to apply new 2254(d), because that's governing that court's decision whether to grant or deny habeas, and the reason for that is a little bit unlike a normal appeal, because the habeas law has always recognized that the Court of Appeals of the Seventh Circuit is not just reviewing what the district court did and whether it did it right, but it is independently determining whether to grant a habeas writ.

QUESTION: Then, suppose the petitioner says, well, if only I'd realized that would happen, I would have introduced three new witnesses who -- and I would have

ma0de seven different new arguments. Does he get a chance to do that?

MS. WELLMAN: He -- for the trans -- he would get the chance to make the new arguments, I believe, as the Seventh Circuit did here.

QUESTION: Well, what about new witnesses?

MS. WELLMAN: Well, what we're determining here is whether the State court's decision on the facts as known in the State court -- he never offered before to offer new evidence. He never challenged the presumption of correctness of the State court findings, so we're dealing with a set issue of facts and the law as under this --

QUESTION: There was no request for a hearing, then, in the district court in the habeas proceedings?

MS. WELLMAN: Absolutely not. There never was, and he never challenged the presumption of correctness as to the facts found by the Wisconsin supreme court, so in that situation all you're doing is you're -- as a reviewing court you're looking at was the Wisconsin supreme court's decision, which is the final decision in the State court, contrary to clearly established U.S. Supreme Court precedent or an unreasonable application?

At that point, except for making those arguments to the Court, which he certainly was entitled to do and

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did here, there is nothing different he could have done at any stage. What would he have argued differently to the State supreme court to try to get an unreasonable decision so he can win on habeas? That just makes no sense.

QUESTION: Ms. Wellman, I'd like to be clear about what we're discussing currently here. Am I wrong that what we're discussing is whether Congress should be deemed to have said X rather than Y because if it said X, the rule which we have developed concerning retroactivity would be very difficult to apply and create a whole lot of complexity, and therefore Congress should be deemed to have said X rather than X? Is that the argument --

MS. WELLMAN: No. I don't think --

QUESTION: -- that you're addressing?

MS. WELLMAN: I'm sorry. I don't think we're discussing whether Congress said X or Y. We're discussing what this Court does under Landgraf when Congress --

QUESTION: No --

MS. WELLMAN: -- is silent as to 2254(d).

QUESTION: But what concerns Justice Breyer is that if we accept your conclusion on this matter you're going to have to decide each case by applying to it the Landgraf standards, and that's very complicated, whereas if we agree with your opponent in this case it's all very simple and we don't have to get into that complexity.

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MS. WELLMAN: Well, it seems to me that -- two things. 1) I don't think it's that complicated because we're taking out all of the problems of what happened up till now. If he's filed his petition, he's okay. If he's gotten a certificate of probable cause, he's okay. If he's gotten a special hearing, he's okay.

If a final decision had been rendered by the Seventh Circuit on April 22 and this new law came down, we would not have been able to go back in --

QUESTION: How do you -- why do you distinguish -- if he filed his thing on time under the old rules but not if he won under the old rules? You would allow him to preserve the filing time, so that's one thing from the old system, but you would not allow him to preserve winning on the merits. How do you put one in one category and the other in another?

MS. WELLMAN: Because as this Court explained in Landgraf, whenever a new statute comes into effect that involves the proceedings, an ongoing proceeding, we start with the point at which we're at when the new law comes into effect, for example, if a statute case gave -- took away a right to a jury trial. If the case was in the middle of a jury trial I don't think anyone would say, oh, let's stop. Let's send the jurors home and let's start over and have a trial to the court.

If it had not proceeded to a jury trial yet, if the case had been filed and you were in the early stages, he wouldn't have a right to a jury trial even though when he did the underlying conduct, when he made his decision what court to file in and what to make the cause of action, even though he expected to get a jury at that point. So that part I think is fairly straightforward.

In addition, I don't think the flip is true that the rule that Mr. Liebman would ask us to apply is easy, because what he's saying is that because 154 -- yes, because 107(c) of 154 says that the statute applies to 154 cases pending on or after the date of enactment, it means that 153 does not apply to cases pending on or after the date of enactment, but it doesn't tell us then when does it start applying.

QUESTION: But that's his -- one of his arguments. It isn't engaged directly with your argument about what is the default rule.

Let me ask you this. It's clear that Congress can say what it wants, and that's what the court does.

MS. WELLMAN: Right.

QUESTION: The problem is when the Congress doesn't speak. The object of Landgraf was to give Congress a default rule so it would know when it says nothing how the court is going to respond to that.

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Now, it seems to me that making the rule hard to apply, maybe we were not successful in Landgraf. Maybe Landgraf needs to be modified so that Congress will have -- it will know what this Court will do, what it will instruct lower courts to do when Congress is silent.

MS. WELLMAN: Well, that's certainly possible, because what Landgraf did, although I do think it certainly clarifies the prior law, it does still in essence need two different default rules.

One is, if it is the type of statute that falls within the class of cases that has a retroactive effect, then it will be presumed not to apply. If it does not fall within that class of cases, however, then it does apply, so you still have to determine at some point which class does it fall in.

One way to look at that, I think, is to say if it's jurisdictional, if it goes primarily to what the Court does, not the parties, if it's procedural, as it is here, if it's a secondary layer of conduct as it is here, adjudication is secondary as opposed to primary conduct, if it's one of those things, then you simply don't do the Landgraf analysis.

QUESTION: May I ask you a question about something you said a minute ago? Under your view, if the court of appeals 2 days before the enactment of this

statute had affirmed a judgment in favor of a petitioner, would the State have had an automatic right to have us on review vacate that judgment and say, try it under the new standard?

MS. WELLMAN: I think -- yes. I think as long as we were in the direct review line --

QUESTION: So under your view, all judgments in favor of the petitioner that were still not final in the sense that our opportunity for review or review in the court of appeals had not expired, would have to be reopened?

MS. WELLMAN: Well, only if this Court accepted -- I'm sorry. Only if this Court accepted cert in that case.

QUESTION: Yes, but assuming that the -- we would really have a duty to do it under your view, if the case had been decided under the wrong standard.

MS. WELLMAN: Well, you -- I don't agree with that. I mean, you deny certs all the time --

QUESTION: Yes, I understand.

MS. WELLMAN: -- without looking at the individual case.

(Laughter.)

QUESTION: But normally if there's a clear precedent that controls the disposition, we send it back

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for a second look under the new rule.

MS. WELLMAN: But I think it's important that we look at whether -- when a decision was final here, and that's --

QUESTION: But in any event -- move it back one stage. If a petitioner had prevailed in the district court, it is clear that in the court of appeals under your view they would have to send it back for a new proceeding under the new standard.

MS. WELLMAN: Well, I don't think they'd have to send it back. I think they would decide it under the new standard as the Seventh Circuit did here.

QUESTION: What they're going to say immediately is -- I mean, maybe not in this case, but the petitioner will say, but I didn't argue the Supreme Court cases, or whatever the standard is, and I didn't produce the witnesses because I had this circuit precedent that was perfect for me, so I want another hearing. I want another hearing and I want to produce 10 more witnesses. Does he not get that?

MS. WELLMAN: He does not get that.

QUESTION: Well, what theory of retroactivity would be that you reverse them all for the new standard, but if the person says I didn't know about the new standard and would have conducted my hearing differently

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had I known about it, he's denied relief?

MS. WELLMAN: Because in the habeas case the Seventh Circuit itself is determining whether to grant habeas or not. If it were just reviewing whether the district court was right or wrong, you might have a different answer, but the Seventh Circuit is not limited to that, but it is itself, the court of appeals, determining whether to grant habeas and to make that decision it will apply the new law.

Otherwise, what we're saying is that at any moment in time in which the defendant or petitioner has the law in his favor, he wins for all time no matter how it changes, and Lockhart v. Fretwell teaches us that that cannot be so.

QUESTION: Well, I take it you do agree, though, that it might be a lot simpler if the law just applied to new petitions for Federal habeas.

MS. WELLMAN: It's --

QUESTION: That would simplify a lot of these issues.

MS. WELLMAN: Well, it would simplify it on a superficial level, but if I understand petitioner's argument as to why you would do that, you would only do that if it has a retroactive effect, and since he's saying that part and parcel of this whole thing is that the State

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court decision was wrong, the State supreme court, it seems to me that you need to start behind the filing of the petition.

The filing of a lawsuit in and of itself never controls the "retroactivity question." It's, does the law at the time of decision apply, or the law at the time of conduct? Conduct is not the filing of the lawsuit that we're talking about. It either has to be the time of the crime, which was almost 10 years ago now, or at least the time of the State court's decision, which is 1991, to be consistent with any theory of retroactive effect.

In Landgraf they never looked at -- I'm not sure you even mentioned -- when she filed her lawsuit. The question was, does the law at the time of our decision, the court in question's decision, or the law at the time of the discriminatory conduct apply?

QUESTION: Or at the time the State court took it on collateral review.

MS. WELLMAN: That's possible. I mean, you could have --

QUESTION: Which would make for a fairly simple rule.

MS. WELLMAN: Well --

QUESTION: In other words, you wouldn't have to go back --

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MS. WELLMAN: But you would have to go back to at least whatever that point in time was.

QUESTION: Yes. You wouldn't be going back very far. I mean, you wouldn't be going back to the date of the indictment, or the date of the conduct, or to the date of the trial.

MS. WELLMAN: Well -- I'm sorry.

QUESTION: It would be a fairly short term of reference.

MS. WELLMAN: Well, but here we're talking at least -- '91, '96 -- it's about 6 years.

In Felker, you would have had to go back many, many years in Felker because nobody thought about it in terms of do we go back to the underlying -- I mean -- I guess -- I lost my train of thought. I'm sorry.

QUESTION: May I ask, just to be sure I have your whole view on it, we started out with the 107(c), which says the effective date of Chapter 154 shall be on and after, and your reading of the statute would really be that this entire statute shall apply to all cases pending.

What is your view of why Congress just explicitly described 154 and didn't mention 153? What's your basic theory on that?

MS. WELLMAN: Well, I think the most likely explanation is that 154 speaks in language that sounds

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futuristic.

It says, if a State court establishes procedures for competent counsel at post conviction hearings, and if they establish this and establish that, and I think someone late in the game realized a concern. Oh, that sounds like if a State already has what would pass under 154, then they won't get the benefits of 154, and we don't want that to happen, so we want to make sure that anyone already in compliance gets the benefits of 154.

As to 153, there are any number of inferences which is why the negative inference that petitioner wants you to draw cannot be controlling, because there are too many possibilities. Maybe they didn't think about it. Maybe they didn't agree. Maybe --

QUESTION: Well, let's -- may I interrupt you just --

MS. WELLMAN: Surely.

QUESTION: -- before you get too far afield. Let's assume that we disagree with you there, and then we say, well, these provisions were enacted simultaneously, and that certainly is a circumstance that leads to a strong rather than a weak negative inference.

Is it your position that if we say yes, there does seem to be a strong legitimate negative inference to be drawn here, that we still could not give effect to

that, or we could not recognize that inference, because under Landgraf it still was not an express provision?

MS. WELLMAN: Yes. I --

QUESTION: Is that your position?

MS. WELLMAN: It is my position that a negative inference is not an express prescription of the temporal reach of the statute. That much I think Landgraf made very, very clear.

QUESTION: What would be the reason for our displacing -- what would be the good reason for our displacing a fairly sound rule of construction -- we'll say a strong negative inference rule. What would be our reason for displacing that from this particular subject matter of interpretation?

MS. WELLMAN: Well, I think there are two reasons. One reason is that in order for a negative inference to ever be the equivalent of an express command it would have to be the only reasonable inference you could draw, and I don't believe you could do that here.

Assuming that --

QUESTION: Well, let's assume -- let me make it easier. Let's assume that we say well, we did use the word express, but we really didn't mean it in quite so starchy a sense as you mean it. We mean provisions that are reasonably ascertainable from the text of the statute.

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Do you think there is a good reason why, if that is to be our standard, we shouldn't apply a negative inference rule in a case in which the inference can be drawn quite strongly?

MS. WELLMAN: I think what you're going to be doing is doing a lot more of generalized statutory intent construction, statutory -- concerning the statutory intent before you ever get to retroactivity analysis.

And I think that in Landgraf what we wanted to do was to get to the heart of the matter, and the heart of the matter is, Congress, if you've thought this through and you've done the balancing of interests, and you know what you want, tell us and that's what we'll do.

If you haven't, we're going to look at this statute, what does it do, what is the change, what is the degree of connection between the change and the conduct regulated, and if that has a retroactive effect impairing a vested right, attaching new liabilities, we won't apply it, so at least someone is doing that balancing process, and Congress may do it.

You can encourage Congress to do it, but whereas here if they don't do it, then you -- the Court should be doing that balancing process, and if you just do your generalized statutory maximums about intent and negative inference, you're never going to get to that point.

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QUESTION: Well, as Justice Breyer has pointed out, we might say, well, we're going to have a very Procrustean rule on a Landgraf model saying you've got to be express in this abundantly obvious way or we're not going to recognize it, and the argument for that would be, well, it keeps the analysis simple.

But Justice Breyer's question shows that if in fact we took that position we would then land ourselves in this particular case, or land all of the Federal courts that have to pass on these things, in a situation in which a lot of very complicated case-by-case analysis is going to have to go on, so maybe it would be better to sort of confront intent at the front end under our normal rules, assuming there's a textual basis in the statute for the application of some interpretive rule, and have a simpler result in applying the statute in individual cases. Wouldn't that be a good argument?

MS. WELLMAN: No. I don't meant -- but I don't mean to sound circular, but it seems to me that if you're going to do that -- I mean, all we're talking about here is whether 2254(d) applies, and if -- what you're saying is because they say 154 applies to all cases pending, then none of 153 applies to cases pending. It seems to me that that's too many different things to draw a negative inference from, that there may be reasons why Congress

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would want the statute of limitations not to apply to pending cases.

QUESTION: But I mean, that argument in effect is you cannot soundly draw a negative influence.

MS. WELLMAN: That's right. That's right.

QUESTION: Yes.

MS. WELLMAN: There are just too many choices, too many variables.

QUESTION: Ms. Wellman, just so long -- so I'm clear about it, is it your position that Chapter 153 does apply to all cases pending on and after the date of enactment of the act?

MS. WELLMAN: It's my position that 2254(d) does.

QUESTION: But what is your answer to his question?

MS. WELLMAN: I don't know that we can say that the entire chapter does, and if by that you would mean that if you have already filed your petition and you're well into the case, but it wasn't within the 1 year, we're going to kick you out. Or if you're already in the court of appeals and we're ready to decide your case in the court of appeals we're going to kick you out because you don't have a certificate of appealability.

QUESTION: Thank you, Ms. Wellman.

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MS. WELLMAN: Thank you.

QUESTION: Mr. Liebman, you have 3 minutes remaining.

QUESTION: Mr. Liebman, just clarify for us, suppose the petition in Federal habeas had not been filed, what's the applicability of Chapter 153?

REBUTTAL ARGUMENT OF JAMES S. LIEBMAN

ON BEHALF OF THE PETITIONER

MR. LIEBMAN: Under section 107(c), if the Court reads section 107(c), the same negative implication that says if your case was pending, 153 does not apply to you, that same implication would say that if your case was not pending, then -- but you file it immediately after the statute came into effect, then Chapter 153 would apply. It is --

QUESTION: But in your view the filing date controls?

MR. LIEBMAN: Under 107(c), because the words of the statute are cases pending. Under the retroactivity analysis I do not say that the filing date would control. What controls there are the three conditions that have to be in place in order for a habeas action to become matured and unconditional.

There has to be exhaustion of State remedies, the time for cert has to have passed, or the Supreme Court

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has denied cert. That's 2244(c), which says if the Supreme Court acts on the merits habeas is over and done with.

And then the third point is, you have to be in custody. Custody is measured under the Carafas case at the point of filing, so in some cases the third thing that will happen will be that you're in custody at the moment the court says to look to see if you're in custody, but in some cases exhaustion occurs after you file, or the denial of cert occurs after you file in habeas.

It's when all three of those things have happened that you --

QUESTION: Mr. Liebman, your position as I understand it is that this affects prior conduct within the meaning of Landgraf if the procedural rule, although on its surface procedural, benefits one side. Is that --

MR. LIEBMAN: If it is designed to change the outcome in the series of cases such that you can say the law, what Congress wants to happen --

QUESTION: What do you do about the jury trial example mentioned by Ms. Wellman? Surely the jury trial, the ability to have a jury trial is always in favor of the defendant, because if he wants it, he can get it, and if he doesn't want it, he doesn't get it.

Now, would you say that the denial of a jury

trial must, if there's no other indication that we must assume that it does not apply to, what, to conduct entered into before the provision was adopted?

MR. LIEBMAN: Your Honor, I'd need to see the exact provision in the exact setting, but many, many cases, the actual procedures that are going to be used, they could benefit one person in this case --

QUESTION: No, the jury trial always benefits the defendant, and I've always assumed that if you have a -- you know, no more jury trial for this class of cases, it simply applies when this case comes up, and your position is that it wouldn't.

MR. LIEBMAN: No, well, in the Daubert case the argument was the jury trial is always better for the criminal defendant, but it's sometimes better for plaintiffs in civil cases. I don't think you can predict, and that's the -- the question is whether the legislature set about changing the arrangement of rights by trying systematically to take rights away from the outcome of the suit, not --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Liebman. I think you've answered the question.

The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

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CASE NO. 96-6298

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BY Ann Marie Federico

(REPORTER)