

IT’S ABOUT TIME: RECONSIDERING WHETHER LACHES SHOULD LIE AGAINST THE GOVERNMENT

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Throughout all facets of life, private parties experience deadlines and suffer the consequences if they fail to meet them. The law, too, has various forms of deadlines that preclude parties from filing suits or asserting claims when a certain amount of time has passed. The particular legal deadline known as laches allows the court to dismiss a claim if the filing party’s unreasonably delayed filing unduly prejudices the other party. This Note examines the historical policy that precludes parties from raising the defense of laches against the government when it is bringing the suit.

*This Note discusses the longstanding assumption that the laches defense cannot be asserted against the government while highlighting a growing trend that has begun to question this assumption. In light of Judge Richard Posner’s declarations in *United States v. Administrative Enterprises*, this Note examines possible solutions to the question of whether laches should be asserted against the government. This Note recommends that courts abandon the long held view that the laches defense is inapplicable against the government and permit the defense under certain circumstances.*

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when an employee makes excuses and blames traffic, when a game show participant answers a question just milliseconds after the time has expired, when a shopper sees the shelves empty of a discounted good and asks a worker if there are any more in the back, four simple words are sufficient to explain the gravity of the situation: “too little, too late.” To this response, the tardy party has no retort. In the courtroom, most parties must play by the same rules.

If a private party delays filing a suit against another party, principles of equity may prevent him from prevailing on his claim.¹ For example, if the statute of limitations on a matter has passed, the claim will likely not survive a motion to dismiss;² too little, too late. Sometimes, even when an existing statute of limitations has not yet run, a private citizen’s claim may still be dismissed if the court accepts an opposing party’s affirmative defense of laches.³ Too little, even though it is technically not too late. The doctrine of laches gives the court discretionary power to dismiss a claim when the party who has brought the suit has unreasonably delayed filing it in such a manner that unduly prejudices the other party.⁴ Time and tide wait for no man.

Time and tide do, however, wait for the state. While states can and do raise the defense of laches when claims are unpunctually brought against their government agencies, courts have long held that the equitable defense of laches may not be raised in a suit being brought by the government,⁵ even if the government has caused the other party to suffer additional harms or the other party’s ability to defend itself in the claims has been adversely affected by the state deferring bringing the suit.⁶ The main rationale supporting this distinction is the government’s role in protecting all of its citizens.⁷ Therefore, the laches of some of the government’s agents should not be allowed to injure the very public rights and public property that the government was instituted to protect.⁸ Recent

1. 30A C.J.S. *Equity* § 139 (2014).

2. *Id.*; Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607, 612 (2008) (“If the plaintiff misses just one deadline, the plaintiff’s claim is extinguished. Late filing by as little as one day results in the loss of the entire value of the plaintiff’s claim.”).

3. *See infra* Part II.A.3.

4. *Gardner v. Pan. R.R. Co.*, 342 U.S. 29, 30 (1951).

5. *See, e.g., Costello v. United States*, 365 U.S. 265, 281 (1961) (“It has consistently been held in the lower courts that delay which might support a defense of laches in ordinary equitable proceedings between private litigants will not bar a denaturalization proceeding brought by the Government.”); *United States v. Summerlin*, 310 U.S. 414, 416 (1940) (“It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights.”); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) (“As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest.”); *United States v. Beebe*, 127 U.S. 338, 344 (1888) (“The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest, is established past all controversy or doubt.”).

6. *See infra* Part III.A.

7. *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 294 (1983).

8. *Id.*

opinions, however, have suggested that courts are open to softening this hardline stance.⁹ Still, courts have yet been reluctant to apply the doctrine against the state.¹⁰

As with a dismissal for failing to initiate a claim within the prescribed statute of limitations, a dismissal under the doctrine of laches does not take into consideration the merits of the case.¹¹ Therefore, an otherwise valid claim might not be heard due to the passage of time.¹² At first glance, throwing out a compelling claim on the ground that time has passed seems extreme, but the doctrine of laches requires more than just the mere passage of time.¹³

In addition to showing that there has been an unreasonable delay, a successful pleading of laches also requires a showing that the affected party has suffered as a result of the other party's delay in bringing the suit.¹⁴ The prejudiced party can show either that its defense case against the claim has been unduly handicapped as a result of the delay or that it has endured harms that could have been avoided had the claim been filed more quickly.¹⁵ Therefore, the doctrine of laches allows courts to dismiss a case when the harms suffered by the party by the delay outweigh the interests of the party who untimely brought the suit in having its case brought before the court.¹⁶

This Note proposes revisiting the long standing notion that the government is immune from the same deadlines that each of its citizens must follow. The irony that the government is able to rely upon the doctrine of laches to dispose of a suit filed against it while effortlessly evading the same outcome in a suit that it files against another party needs to be corrected. This Note argues that the equitable defense of laches ought to be available in suits against the government in certain circumstances. This Note illustrates why the public policy concerns that have thus far generated reluctance by courts to firmly state that the doctrine may be used against the government are outweighed by the prejudice to opposing parties. "Equity may be described as 'a system of positive jurisprudence

9. See *infra* Part III.B.

10. See *infra* Part III.C.

11. *Env'tl. Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 481 (5th Cir. 1980) ("Laches is a clement doctrine. It assures that old grievances will some day be laid to rest, that litigation will be decided on the basis of evidence that remains reasonably accessible and that those against whom claims are presented will not be unduly prejudiced by delay in asserting them. Inevitably it means that some potentially meritorious demands will not be entertained. But there is justice too in an end to conflict and in the quiet of peace.").

12. See *id.*

13. *Gallagher v. Cadwell*, 145 U.S. 368, 371–72 (1892) ("And the question of laches turns not simply upon the number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during that lapse of years.").

14. *Id.* at 372.

15. See *infra* Parts II.B.1–2.

16. *Sandvik v. Alaska Packers Ass'n*, 609 F.2d 969, 973 (9th Cir. 1979) ("Even the presence of prejudice does not necessarily require dismissal. It may be outweighed by the strength of the excuse for the delay.").

founded upon established principles which can be adapted to new circumstances where a court of law is powerless to give relief.”¹⁷ This Note argues that courts should begin to hold the government accountable for their laches. It is about time.

In support of this proposition, Part II of this Note explores the existing beneficial role of the affirmative defense in suits among private parties by examining the two primary types of harms that the doctrine seeks to avoid: evidentiary prejudice and expectations based prejudice. Part II also compares other equitable defenses that vary in their applicability in suits against the government. Part III reviews the evolution of courts’ stances on the applicability of laches in suits against the government. It focuses on the recent acceptance by some courts of the possibility that laches should be available against the Government in certain circumstances, leading to a lingering question in the court system: can laches ever lie against the sovereign? Part III continues with an overview of the possible solutions to the unanswered question. Finally, Part IV outlines conditions under which the doctrine should be accepted in suits against the government.

II. BACKGROUND

Laches is an equitable defense that may be raised against a party that has unreasonably delayed bringing a suit in a manner prejudicial to the party against whom relief is being sought.¹⁸ The defense recognizes that “equity aids the vigilant and not those who sleep on their rights, without showing excuse, to the detriment of the opposing party under circumstances where he or she earlier might have asserted such rights in the exercise of due diligence.”¹⁹ The application of laches to any given case is up to the discretion of the trial court.²⁰

Generally, the defense of laches is only available in courts of equity, and not in suits brought by the government, including in criminal cases.²¹ While courts have begun to embrace the possibility, laches has not been used against the state in a criminal court, in part due to the existence of statutes of limitations that already perform a similar task.²² Therefore, it is likely neither necessary nor proper to open the door to laches against

17. *Associated Inv. Co. v. Williams Assocs. IV*, 645 A.2d 505, 511 (Conn. 1994) (quoting *Harper v. Adametz*, 113 A.2d 136 (Conn. 1955)).

18. BLACK’S LAW DICTIONARY 953 (9th ed. 2009).

19. 27A AM. JUR. 2D *Equity* § 108 (2015).

20. *Gardner v. Pan. R.R. Co.*, 342 U.S. 29, 30 (1951).

21. *Moore v. Am. Fin. Sys.*, 225 S.E.2d 17, 19 (Ga. 1976) (“Laches is a defense peculiarly applicable to equitable suits and has no relevancy to the case at bar involving a motion to set aside a judgment upon a legal ground.”). *But see*, S.E.R., *Jobs For Progress, Inc. v. United States*, 759 F.2d 1, 8–9 (Fed. Cir. 1985) (“[W]e do not think that the thrust of the decisions is that laches is always inapplicable *per se* in any contract or other claim where a legal rather than an equitable remedy is sought.”).

22. *See, e.g.*, *United States v. Batson*, 608 F.3d 630, 633 (9th Cir. 2010) (“Like the Second Circuit, [w]e have found no case applying a laches defense in the criminal context.”) (alteration in original) (quoting *United States v. Milstein*, 401 F.3d 53, 63 n.3 (2d Cir. 2005) (per curiam)).

the state in criminal proceedings with clearly defined time limits that have been set by the legislature.

A. *Discussion of Other Equitable Defenses That are Available to Parties*

While similar to other equitable defenses, laches is distinct from estoppel, statute of limitations, and acquiescence.²³ The similarities and differences of each are briefly discussed here.

1. *Acquiescence*

First, “‘acquiescence’ relates to inaction during performance of an act, ‘laches’ to delay after an act is done.”²⁴ In other words, a party acquiesces if it does not take action during the disputed occurrence and then later may encounter the defense of laches if it does not timely file a suit in such a manner that prejudices the other party.²⁵ Therefore, it is possible that a single claim has grounds for both the defense of acquiescence, as well as laches, depending on when the party filing the suit first had notice of a possible claim and how long it delayed in filing.²⁶ There are times when the defenses overlap or their requisite elements and desired outcomes are indistinguishable.²⁷

2. *Estoppel*

Next, “‘laches’ is not, on the one hand, limitations; nor, on the other, is it estoppel, though it partakes of the characteristics of both.”²⁸ Laches sometimes resembles estoppel when the prejudice being alleged is an expectations based prejudice.²⁹ To be sure, laches is occasionally referred to as “estoppel by laches.”³⁰ In these cases, the court generally

23. 30A C.J.S. *Equity* § 139 (2014). There have been various definitions of “equitable defenses” over time. William Haywood Moreland, *Equitable Defenses*, 1 WASH. & LEE L. REV. 153, 153 (1940). This Note uses the term “equitable defenses” to refer to what has been termed “remedial equitable defenses.” Eric Fetter, *Laches at Law in Tennessee*, 28 U. MEM. L. REV. 211, 213 (1997).

24. 30A C.J.S. *Equity* § 139 (2014).

25. *See id.*

26. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 29 cmt. c (1995).

27. *See, e.g., Westco-Chippewa Pump Co. v. Del. Elec. & Supply Co.*, 64 F.2d 185, 187 (3d Cir. 1933) (“[Laches cases] proceed on the theory that the plaintiff knows his rights and has had ample opportunity to establish them in the proper forum; that, because of delay, the defendant has good reason to think that the plaintiff believes his asserted rights to be worthless or that he has abandoned them.”) (citing *Gallihier v. Cadwell*, 145 U.S. 368, 372 (1892)).

28. *Wilder’s Ex’x v. Wilder*, 72 A. 203, 206 (Vt. 1909).

29. *See infra* Part II.B.2.

30. *N. Pac. R.R. Co. v. Boyd*, 228 U.S. 482, 509 (1913) (“But the doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations.”); *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 461 (4th Cir. 1996) (“In a trademark case, courts may apply the doctrine of estoppel by laches to deny relief to a plaintiff who, though having knowledge of an infringement, has, to the detriment of the defendant, unreasonably delayed in seeking redress.”); *Georgia-Pac. Corp. v. Great Plains Bag Co.*, 614 F.2d 757, 763 (C.C.P.A. 1980) (“It is well settled that one who charges estoppel by laches must also show that it suffered or will suffer detriment as a result of inaction by the party against which laches is charged.”).

means to say “laches,” as is evidenced by the elements the court requires, which differ from those of “estoppel.”³¹

As was the case with acquiescence, a single claim may also have sufficient basis for a defense of both estoppel as well as laches, in this case depending on when the party began to rely on the inaction of the other party.³² Likewise, occasionally both of the defenses will overlap and be proven by the same requisite elements.³³

3. *Statutes of Limitations*

There exist substantial differences between the equitable principles of statutes of limitations and laches.³⁴ Statutes of limitations are bars on a claim after a *specific* and *predetermined* time period has passed from the date of the incident giving rise to the suit.³⁵ In determining whether a suit facing a statute of limitations defense should be dismissed, the court need only look at whether the amount of time that has passed exceeds the fixed time set by the statute.³⁶ While courts may not dismiss a suit under a statute of limitations defense before the limitations period has run,³⁷ a court may apply equitable principles to allow a case to continue after the statute of limitations has passed.³⁸

Conversely, claims may be dismissed under the doctrine of laches only when enough time has passed that a detrimental effect is suffered by the party against whom the claim is being brought.³⁹ Stated differently, not only is there not a specific time period after which the doctrine of laches automatically applies, but there is also an additional element of prejudice caused by the delay that must be present.⁴⁰ Courts may exercise judicial discretion in determining the applicability of laches.⁴¹ Courts often employ a sliding scale when determining whether to apply the doc-

31. See, e.g., *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 461 (4th Cir. 1996) (“Estoppel by laches [is] defined as that type of delay in filing suit which causes prejudice to defendant and when weighed with all other relevant equitable factors, results in a bar to relief, either injunctive or monetary, or both.”) (citation omitted).

32. *Wilder’s Ex’x*, 72 A. at 206.

33. *Id.*

34. *Yates v. Smith*, 271 F. 27, 33 (D.N.J. 1920), *aff’d*, 271 F. 33 (3d Cir. 1921) (“The length of time during which a person neglects to assert his rights before they will be defeated on the ground of laches varies with the particular circumstances of each case, and is not, like the statute of limitations, subject to arbitrary rules.”).

35. 30A C.J.S. *Equity* § 139 (2014) (“Laches differs from limitations in that limitations are concerned with the fact of delay, laches with the effect of delay. Laches is not, like limitations, merely a matter of time, but is principally a question of the inequity of permitting a claim to be enforced.”).

36. *Id.*

37. *Fetter*, *supra* note 23, at 216.

38. *Id.* at 217.

39. *Gallihier v. Cadwell*, 145 U.S. 368, 371–72 (1892) (“And the question of laches turns not simply upon the number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during that lapse of years.”).

40. *Id.*

41. *Fetter*, *supra* note 23, at 216.

trine of laches.⁴² The longer that the plaintiff has delayed in filing the suit, the less prejudice that must be shown by the defendant in order to succeed on the defense of laches.⁴³ Conversely, if the delay by the plaintiff was more minor, the prejudice that must be shown by the defendant is greater.⁴⁴

One important similarity exists between the defense of laches and statutes of limitations. Just as a government's case is immune to the defense of laches, a suit brought by the state can withstand a challenge from the defendant that the suit was filed after the statute of limitations has run.⁴⁵ Even though the concepts are distinctly different, they are also undeniably related. Courts, however, are divided on the exact nature of the relationship between the two.

a. Viewpoint That the Defense of Laches Is Unavailable when There Is a Statute of Limitations

Some courts take the position that when the legislature has provided a limitations period within which a claim must be brought that the court should not overstep the separation between the legislative and judicial branches by applying laches to override the judgment of the lawmakers.⁴⁶ Their position is that a time limit explicitly specified by the legislature is definitive, and courts may not use their discretionary power to dismiss cases within the time period.⁴⁷ The legislative branch typically establishes statutes of limitations in the penal code.⁴⁸ Conversely, if the legislature does not identify a statute of limitations, proponents of this viewpoint feel that this is the realm for which the doctrine of laches was created.⁴⁹

Having a statute of limitations that controls when a defense of laches may be raised provides parties with a stable and clear understanding of the deadline for when a suit must be filed.⁵⁰ If there is a statute of limitations, then parties must file their claims within the time frames outlined

42. Smith v. Caterpillar, Inc., 338 F.3d 730, 733–34 (7th Cir. 2003).

43. *Id.*

44. Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 807 (8th Cir. 1979).

45. Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355, 378 (1977) (“[In] a suit brought by the United States in its sovereign capacity, . . . it is clear state limitations period do not apply.”).

46. See, e.g., United States v. Mack, 295 U.S. 480, 489 (1935) (“Laches within the term of the statute of limitations is no defense at law.”); Lyons P’ship, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 798 (4th Cir. 2001) (“Consequently, when considering the timeliness of a cause of action brought pursuant to a statute for which Congress has provided a limitations period, a court should not apply laches to overrule the legislature’s judgment as to the appropriate time limit to apply for actions brought under the statute.”).

47. Holmberg v. Armbrrecht, 327 U.S. 392, 395 (1946) (“If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive.”).

48. *Id.*

49. United States v. Admin. Enters., Inc., 46 F.3d 670, 672 (7th Cir. 1995) (“When there is no statute of limitations in the picture, the law, including federal common law, relies upon the doctrine of laches to protect the recipient of the summons from unreasonable delay in enforcement.”).

50. Tandy Corp. v. Malone & Hyde, Inc., 769 F.2d 362, 365 (6th Cir. 1985).

by the legislature. Using statute of limitations as the laches period would clarify and stabilize the law by applying a clear rule in a balanced, as opposed to discretionary, manner.⁵¹ If there is not a statute of limitations, however, the answer is more complicated.

In a suit filed by a private party, the doctrine of laches is perfectly applicable.⁵² When the claim is being brought by the state, however, the answer has many more facets. Part III of this Note will analyze whether the court should be able to freely exercise its discretion and apply the doctrine in deciding whether a suit has been timely filed.

Additionally, since the approach centered on the presence or absence of a statute of limitations removes some of the discretionary power from the court—a power that can dispose of a case in its entirety—it increases the rationality and objectivity of the justice system.⁵³ The court's function is simply to determine when the clock should have started running on the statute of limitations and whether that deadline has passed. Under this approach, courts cannot subjectively dismiss a case on grounds of unreasonable delay in order to avoid having to answer a difficult question on the merits.⁵⁴

b. Viewpoint That the Statute of Limitations Is Only One Factor in Determining Whether a Finding of Laches Is Supported

Other courts believe the relationship between the statute of limitations and laches is less restrictive.⁵⁵ Whereas statutes of limitations are comparatively rigid,⁵⁶ the doctrine of laches is “versatile, flexible, and serviceable.”⁵⁷ These courts do not entirely dismiss the statute of limitations when assessing a defense of laches; rather the limitations period only part of the consideration and not conclusive.⁵⁸ In other words, a finding that the statute of limitations has run may be insufficient to dismiss a case under the doctrine of laches.⁵⁹

Conversely, a court may dismiss a case for the laches of a party even when it has acted before the statute of limitations has passed,⁶⁰ although

51. *Id.*

52. *Admin. Enters., Inc.*, 46 F.3d at 672.

53. *Id.*

54. *Id.*

55. *Gardner v. Pan. R.R. Co.*, 342 U.S. 29, 30–31 (1951) (“[L]aches . . . should not be determined merely by a reference to and a mechanical application of the statute of limitations.”).

56. *First Nat'l Bank v. Wise*, 177 So. 636, 639 (Ala. 1937) (“It is well settled that the doctrine of laches is not a hidebound rule like a statute of limitations, prescribed by the lawmaking power, but is a creature of courts of equity, founded upon common sense and natural justice.”).

57. *Admin. Enters., Inc.*, 46 F.3d at 672.

58. *Czaplicki v. Hoegh Silvercloud*, 351 U.S. 525, 533 (1956) (“This does not mean, of course, that the state statutes of limitations are immaterial in determining whether laches is a bar, but it does mean that they are not conclusive, and that the determination should not be made without first considering all the circumstances bearing on the issue.”).

59. *Id.* at 534.

60. *See, e.g., Teachey v. Gurley*, 199 S.E. 83, 88 (N.C. 1938) (“Whenever the delay is mere neglect to seek a known remedy or to assert a known right, which the defendant has denied, and is without reasonable excuse, the courts are strongly inclined to treat it as fatal to the plaintiff's remedy in

this result is not surprisingly uncommon.⁶¹ Proponents of this viewpoint would still require a showing of prejudice in addition to an unreasonable delay in order to bar relief.⁶²

In 2003, the Court of Appeals of Tennessee affirmed the ruling of a lower court that dismissed a claim when the statute of limitations had not yet run.⁶³ In *Dennis Joslin Co. v. Johnson*, defendant Johnson had taken three loans totaling \$68,000 from First American National Bank.⁶⁴ After Johnson failed to timely repay the loans, the bank took possession of several pieces of collateral from Johnson.⁶⁵ The bank was able to sell one of the pieces of collateral before obtaining a judgment in December 1990 from the chancery court for the outstanding principal and interest owed on the loans as well as attorney's fees.⁶⁶

Several months after the judgment, the bank was only able to sell one additional item of collateral, leaving all of the remaining items unsold and unaccounted for.⁶⁷ At the end of that month, Johnson conducted an auction for the sale of some of the remaining farm equipment still in his possession.⁶⁸ When the bank learned about the auction, it sent a representative to attend the auction with the belief that the bank might have a lien on some of the auction items.⁶⁹ The bank decided it would let the auction continue and determine afterwards to which, if any, of the proceeds it was entitled.⁷⁰ After the auction ended, however, neither the bank nor any of its successors pursued any claims on the proceeds of the auction.⁷¹

No additional action was taken by the bank in pursuit of judgment for over nine years. In July 2000, the bank, which had at that point merged with another bank, assigned the December 1990 judgment against Johnson to the plaintiff, Dennis Joslin Co.⁷² Two months later, and nearly ten years after the original judgment against Johnson had been entered, Joslin filed suit to enforce the judgment.⁷³ Johnson argued, and the lower court agreed, that even though the applicable Tennessee code allowed a party ten years to enforce a judgment,⁷⁴ the doctrine of

equity, even though much less than the statutory period of limitations, if an injury would otherwise be done to the defendant by reason of the plaintiff's delay.").

61. *Shouse v. Pierce County*, 559 F.2d 1142, 1147 (9th Cir. 1977).

62. *Gardner v. Pan. R.R. Co.*, 342 U.S. 29, 31 (1951).

63. *Dennis Joslin Co. v. Johnson*, 138 S.W.3d 197, 201 (Tenn. Ct. App. 2003).

64. *Id.* at 198.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 198–199.

71. *Id.*

72. *Id.* at 199.

73. *Id.*

74. "The following actions shall be commenced within ten (10) years after the cause of action accrued: (1) Actions against guardians, executors, administrators, sheriffs, clerks, and other public officers on their bonds; (2) Actions on judgments and decrees of courts of record of this or any other

laches should prevent any recovery due to the unreasonable delay by the bank.⁷⁵

On appeal, the Court of Appeals of Tennessee first acknowledged that laches “requires more than mere delay.”⁷⁶ The delay must be “unreasonable,” and the determination of what is unreasonable “depends on the facts and circumstances of each individual case.”⁷⁷ The court turned to a 1929 case from the Supreme Court of Tennessee, which held that “the right of a defendant in equity to resist relief sought against him on the ground of long delay, although short of the statutory period of limitation, is in the nature of defense, and is not taken away from him by such statutes.”⁷⁸ The Court of Appeals of Tennessee found that the Supreme Court of Tennessee’s analysis “clearly establishe[d]” that a claim filed before the running of a statute of limitations is not an immediate bar to the defense of laches.⁷⁹

Rather than holding that the statute of limitations has no bearing on the availability of the doctrine of laches, the court clarified that, in cases where the statute of limitations has not yet run, the defense should only be applied where there is “gross laches in the prosecution of the claim.”⁸⁰ Turning then to that analysis, the court noted the prolonged delay by the bank and their inability to explain why it did not bring the action sooner.⁸¹ Additionally, Johnson was able to show that the delay hindered his ability to defend the claim⁸² due to both evidentiary prejudices⁸³ and expectation based prejudices.⁸⁴ In affirming the ruling of the lower court, the Court of Appeals of Tennessee held that it was therefore not an abuse of discretion to apply the doctrine of laches in a case where a statute of limitations had not yet run.⁸⁵

B. Breakdown of the Different Types of Prejudice That May Support a Finding of Laches

Generally, the defense of laches seeks to protect parties from the types of prejudice that have resulted from the delay in a party bringing a suit.⁸⁶ The mere passage of time is insufficient to support a finding of

state or government; and (3) All other cases not expressly provided for.” TENN. CODE ANN. § 28-3-110(a) (West 1990).

75. *Dennis Joslin Co.*, 138 S.W.3d at 199.

76. *Id.* at 200.

77. *Id.*

78. *Carpenter v. Wright*, 13 S.W.2d 51, 55 (Tenn. 1929).

79. *Dennis Joslin Co.*, 138 S.W.3d at 201.

80. *Id.* (citing *Clark v. Am. Nat'l Bank & Trust Co.*, 531 S.W.2d 563 (Tenn. Ct. App. 1974)).

81. *Id.*

82. *Id.*

83. *See id.*; *see also* discussion *infra* Part II.B.1.

84. *See Dennis Joslin Co.*, 138 S.W.3d at 201; *see also* discussion *infra* Part II.B.2.

85. 138 S.W.3d at 201.

86. *Brown v. County of Buena Vista*, 95 U.S. 157, 161 (1877) (“The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof.”).

laches.⁸⁷ Courts have recognized two primary forms of prejudice which the doctrine of laches resolves: evidentiary prejudice and expectations based prejudice.⁸⁸

Evidentiary prejudice refers to the difficulties a party faces that relate to the evidence it would present in defending an unduly overdue claim, such as “death or unavailability of an important witness, dulling of memories, [and] loss of relevant records.”⁸⁹ Expectations based prejudices are those in which a party is harmed because “circumstances have changed in a way that would not have occurred had [the other party] sued earlier.”⁹⁰ In other words, evidentiary prejudices hinder the defendant’s ability to defend itself against the plaintiff’s claim, and expectations based prejudices are either other harms caused by the plaintiff’s delay or other reasons why the suit being brought is no longer appropriate.

1. *Evidentiary Prejudices That May Support a Finding of Laches*

Laches is particularly appropriate to avoid the evidentiary prejudice a party suffers when one of the parties to the transaction in question has died.⁹¹ If the party against whom a claim is being brought has died after an unreasonable delay in bringing the suit, a court might dismiss the claim under the doctrine of laches.⁹² Similarly, the death of a key witness would have the same detrimental effect.⁹³ For example, in *Dennis Joslin Co.*, a lower court dismissed the enforcement of a judgment from nearly ten years earlier due to, inter alia, the death of potential defense witnesses.⁹⁴ The Court of Appeals of Tennessee affirmed the dismissal upon a finding that the lower court did not abuse its discretion in deciding that the death of at least three potential witnesses prejudiced the defendant.⁹⁵

The inability of the party to testify in defense of the claim may be a sufficient harm to warrant dismissal.⁹⁶ Short of the death of a witness, the mere unavailability of a witness as a result of an unreasonable delay in bringing suit may be considered an evidentiary prejudice.⁹⁷ If a witness

87. *Gardner v. Panama R. Co.*, 342 U.S. 29, 31 (1951) (“Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief.”).

88. *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 955 (9th Cir. 2001).

89. *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 831 F. Supp. 202, 220 (D. Mass. 1993).

90. *Jackson v. Axton*, 25 F.3d 884, 889 (9th Cir. 1994).

91. *Bobin v. Tauber*, 360 N.E.2d 368, 373 (Ill. App. Ct. 1976) (citing *Pyle v. Ferrell* 147 N.E.2d 341 (Ill. 1958)).

92. *Id.*

93. *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. 386, 390 (1868) (“This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth.”).

94. *Dennis Joslin Co. v. Johnson*, 138 S.W.3d 197, 201 (Tenn. Ct. App. 2003).

95. *Id.*

96. *Wilmes v. U.S. Postal Serv.*, 810 F.2d 130, 134 (7th Cir. 1987) (upholding a lower courts holding that laches barred a claim in part due to the defendant having “been prejudiced through the loss of [a witness’s] memory and her consequent inability to testify”).

97. *Smith v. Caterpillar, Inc.*, 338 F.3d 730, 734 (7th Cir. 2003).

who had previously been able to testify can no longer be found, the same rationale would apply as above when a witness dies. Similarly, even if a witness is able to testify, if enough time has passed that he or she is no longer able to recall details of the transaction in question, an application of the doctrine of laches may be appropriate.⁹⁸

In August 1999, Rebecca Smith filed a gender discrimination and retaliation suit against her former employer, Caterpillar, Inc.⁹⁹ Smith began working for Caterpillar in January 1991.¹⁰⁰ After her sixty day performance review, Smith was fired for unsatisfactory performance.¹⁰¹ Later that month, Smith filed gender discrimination charges through the state administrative process.¹⁰² Over the next five years, Smith's charges were investigated, until the Illinois Department of Human Rights ultimately found that there was substantial evidence for her charges.¹⁰³ Smith then filed a formal complaint with the Illinois Human Rights Commission, and both parties commenced discovery on the case.¹⁰⁴ In January 1998, however, Smith decided to dismiss her state claims and instead pursue the case in federal court.¹⁰⁵

After Smith finally filed her complaint in federal court in August 1999, Caterpillar filed a first motion for summary judgment, arguing that it suffered prejudices due to Smith's delay in filing her lawsuit.¹⁰⁶ Caterpillar offered three distinct harms it suffered as a result of the postponement: (1) memories of Caterpillar's witnesses of the alleged misconduct had diminished, (2) relevant records that Caterpillar could present in its defense had been destroyed, and (3) Caterpillar could be unfairly liable for years of back pay that had accrued.¹⁰⁷ Although the district court found that Smith's over eight year delay in bringing the suit was "inexcusable,"¹⁰⁸ the court did not find that the prejudices shown by Caterpillar were sufficient to support a finding of laches and the motion was denied.¹⁰⁹

Caterpillar subsequently filed a second motion for summary judgment, supplementing the first with the additional harm suffered by Caterpillar by key witnesses having "died, retired, or moved out of state."¹¹⁰ The district court denied the motion with the instruction that the unavailability of these witnesses was insufficient without a further showing

98. *Id.* at 734-35.

99. *Id.* at 731.

100. *Id.* at 732.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 732.

109. *Id.*

110. *Id.*

that the witnesses were also “unwilling to testify.”¹¹¹ Caterpillar then filed a third motion for summary judgment with more specific information regarding the faded recollections and unavailability of relevant witnesses and the loss of relevant personnel records.¹¹² After the district court granted Caterpillar’s motion, Smith appealed.¹¹³

The Seventh Circuit grouped the prejudices suffered by Caterpillar into four categories: three evidentiary prejudices and one expectation based prejudice.¹¹⁴ The three evidentiary prejudices are explored here, while the expectation based prejudice will be defined and discussed separately in Subsection 2.

First, the district court found that Caterpillar suffered evidentiary harm because of changes in the availability of key witnesses that occurred during the delay by the plaintiff.¹¹⁵ The court found demonstrable prejudice to Caterpillar due to the fact that relevant Caterpillar employees had either died, moved away, or left the company without maintaining lines of communication.¹¹⁶ As the court noted, a defendant need not show that a witness is absolutely unavailable.¹¹⁷ That important witnesses are difficult to locate is enough to suggest material prejudice.¹¹⁸

Second, the district court found that Caterpillar suffered evidentiary harm due to the faded memories of witnesses who were no longer able to testify to facts relevant to the case.¹¹⁹ As with any prejudice being presented in support of a defense of laches, a defendant must show both that the prejudice occurred and that the plaintiff’s delay caused it.¹²⁰ A defendant need not show, however, that the memory loss was caused entirely by the plaintiff’s delay.¹²¹ That the plaintiff’s delay was a contributing factor in witnesses’ memory loss is sufficient.¹²²

Third, the district court found that Caterpillar suffered evidentiary harm because relevant documents that previously were available were no longer accessible for a variety of reasons.¹²³ Aside from a loss of relevant testimony as a result of death, unavailability, or the loss of memory of a witness, the loss of evidence during the unreasonable delay in bringing the suit is an evidentiary prejudice.¹²⁴ A defendant faces evidentiary prejudice when evidence is lost or destroyed as well as if evidence has deteri-

111. *Id.* at 732–33.

112. *Id.* at 733.

113. *Id.*

114. *Id.*

115. *Id.* at 733.

116. *Id.* at 734.

117. *Id.*

118. *Id.*

119. *Id.* at 733.

120. *Id.* at 734 (citing *EEOC v. Massey-Ferguson*, 622 F.2d 271, 275 (7th Cir. 1980)).

121. *Id.* at 735.

122. *Id.*

123. *Id.* at 733.

124. *Whitfield v. Anheuser-Busch, Inc.*, 820 F.2d 243, 245 (8th Cir. 1987).

orated or is otherwise no longer as effective as it would have been had the suit been timely filed.¹²⁵

In *Smith v. Caterpillar, Inc.*, the district court found that evidentiary prejudice could be found whether documents were lost through “inadvertent loss, or even intentional destruction in the course of business.”¹²⁶ The court found that important records and materials had either been misplaced over the years or intentionally destroyed by Caterpillar as part of their regular record maintenance.¹²⁷ Smith argued that Caterpillar needed to show that it did not destroy the records purposefully.¹²⁸ The court decided, however, that Smith’s lengthy delay played enough of a contributing factor to outweigh her concern.¹²⁹

2. *Expectation Based Prejudices That May Support a Finding of Laches*

Expectations based prejudices reflect the notion that courts should work to quickly resolve claims so that parties can proceed accordingly.¹³⁰ A party may successfully plead the defense of laches if the other party’s unreasonable delay in filing a claim has changed the circumstances in such a way that the suit is no longer proper.¹³¹

While in some circumstances, the death of a party to the claim is an evidentiary prejudice, such a death may also be an expectations based prejudice. These situations arise when the remedy being sought may no longer be appropriate or possible due to the death of either the party seeking relief or the party against whom relief is being sought.¹³² If either of the parties in a suit die, however, the suit could likely be dismissed as moot on grounds other than laches.

A party may also be entitled to the dismissal of a delayed claim when they have suffered a change in economic position.¹³³ If the delay has caused the party against whom relief is being sought to suffer eco-

125. *Smith*, 338 F.3d at 733.

126. *Id.*

127. *Id.* at 735.

128. *Id.*

129. *Id.*

130. *Brundage v. United States*, 504 F.2d 1382, 1384 (Ct. Cl. 1974) (“The doctrine of laches is based upon considerations of public policy, which require, for the peace of society, the discouragement of stale demands. It recognizes the need for speedy vindication or enforcement of rights, so that courts may arrive at safe conclusions as to the truth.”).

131. *United States ex rel. Arant v. Lane*, 249 U.S. 367, 372 (1919) (“Under circumstances which rendered his return to the service impossible, except under the order of a court, the relator did nothing to effectively assert his claim for reinstatement to office for almost two years. Such a long delay must necessarily result in changes in the branch of the service to which he was attached and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him, renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy.”).

132. *Hammond v. Hopkins*, 143 U.S. 224, 250 (1892) (“The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible.”).

133. *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1033 (Fed. Cir. 1992).

conomic losses that they could have otherwise avoided had the suit been filed earlier, a court may choose to dismiss the suit.¹³⁴ For example, in *Dennis Joslin Co. v. Johnson*, a lower court dismissed the enforcement of a judgment from nearly ten years earlier due to, inter alia, the “unnecessary and preventable increased financial obligations” caused by the plaintiff’s delay.¹³⁵ The Court of Appeals of Tennessee affirmed the dismissal upon a finding that the lower court did not abuse its discretion in deciding that the accrual of thousands of additional dollars in interest that occurred due to the delay in pursuing the judgment prejudiced the defendant.¹³⁶

Similarly, if a patentee discovers an alleged infringer’s activities but waits several years until deciding to bring suit, the alleged infringer may be able to raise the defense of laches on the grounds that his investments and expenditures on the product during the delay could have been avoided had the patentee filed suit immediately upon noticing the possible infringement.¹³⁷

In May 1921, Arthur W. Burks completed a patent application for a rotary pump design that he had invented.¹³⁸ Mr. Burks travelled to Davenport, Iowa to meet with representatives of the plaintiff, the Westco-Chippewa Pump Company, to sell them his invention.¹³⁹ The plaintiff’s attorney informed Mr. Burks that after he filed his patent application in the Patent Office, the defendant, Delaware Pump Company, would be prevented from manufacturing any rotary pumps with Mr. Burks’ design.¹⁴⁰

Nevertheless, the defendant entered into an agreement with Mr. Burks in September 1921 to begin manufacturing rotary pumps in return for royalties.¹⁴¹ The defendant began manufacturing rotary pumps with Mr. Burks’ design in September 1921, slowly at first, but gradually expanding over the years.¹⁴²

In December 1921, the defendant conferred with its own attorney to determine whether they were infringing upon Mr. Burks’ patent.¹⁴³ The defendant was twice told by its attorney that it could continue producing

134. *Id.*

135. 138 S.W.3d 197, 201 (Tenn. Ct. App. 2003).

136. *Id.* at 201–02.

137. *Westco-Chippewa Pump Co. v. Del. Elec. & Supply Co.*, 64 F.2d 185, 187–88 (3d Cir. 1933). As is the case with the field of patent law as a whole, much has been written about the availability of laches in patent disputes. *See generally* Emily A. Calwell, Note, *Can the Application of Laches Violate the Separation of Powers?: A Surprising Answer from a Copyright Circuit Split*, 44 VAL. U. L. REV. 469 (2010) (exploring differing views of the constitutionality of the doctrine of laches in copyright infringement cases); Gregory J. Carlin & Kimberlynn B. Davis, *The Key to Prosecution Laches*, 18 J. INTEL. PROP. L. 533 (2011) (discussing prosecution laches in patent infringement cases before and after *Cancer Research Technology Ltd. v. Barr Laboratories*, 625 F.3d 724 (Fed. Cir. 2010)).

138. *Westco-Chippewa Pump Co.*, 64 F.2d at 187.

139. *Id.*

140. *Id.*

141. *Id.* at 187–88.

142. *Id.* at 187.

143. *Id.*

the rotary pumps without problem.¹⁴⁴ Although the plaintiff discovered that the defendant had been manufacturing the pumps, the plaintiff did not suggest the possibility that the defendant was infringing upon the patent until May 1925.¹⁴⁵ Aside from a few fruitless discussions, the plaintiff did not take any actions to stop the defendant's infringement until July 1929, when it brought suit against the defendant.¹⁴⁶

After the district court held that the plaintiff had been guilty of laches and dismissed the complaint, the plaintiff appealed.¹⁴⁷ The circuit court of appeals first decided that the plaintiff could not justify the lengthy delay¹⁴⁸ before turning to the question of whether this caused the defendant any prejudice.¹⁴⁹

In addition to paying royalties to Mr. Burks from 1921 until at least when the suit was filed, the defendant had raised \$85,000 through the sale of stocks to sixty businessmen in Chicago.¹⁵⁰ The factory and equipment the defendant owned to manufacture the rotary pumps were worth \$250,000, and the defendant manufactured 27,000 of the rotary pumps, selling 25,000 of them.¹⁵¹ The court of appeals was satisfied in the district court's finding that because the plaintiff delayed filing an action, the defendant faced a material change that was prejudicial, and that the doctrine of laches was appropriately applied to avoid the inequity of stripping the defendant of his financial and time investments.¹⁵²

When economic losses are being used to make a showing of expectation based prejudice, it might also take the form of fines and penalties that are unreasonably larger than a party would have faced had the claim been filed earlier.¹⁵³ For example, consider a fine charged by a governmental agency for violations of a worker safety code. Suppose that during an inspection of Company A, the government inspector notices an infraction but does not take any action in response to it. If Company A assumes the reasonable belief that its working conditions meet the required standards and continues without addressing the unknown infraction, it may be subject to larger fines and penalties when the state files a lawsuit years down the line than it would have if the government had done so immediately. The doctrine of laches can remedy this by giving the court discretion to dismiss the case and relieve Company A of the responsibility of paying the gratuitously bloated fines.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 186.

148. *Id.* at 187.

149. *Id.*

150. *Id.* at 188.

151. *Id.*

152. *Id.*

153. See *Lloyd A. Fry Roofing Co. v. U.S. Env'tl. Prot. Agency*, 554 F.2d 885, 891 (8th Cir. 1977) ("Plaintiff can protect itself from the unconscionable accumulation of large fines, however, by invoking the equitable doctrine of laches if the [a]gency fails to act promptly to seek enforcement.").

III. ANALYSIS

There is a widely held belief that the applicability of the doctrine of laches against the state has long been well settled, and there is no shortage of precedent which echoes this sentiment.¹⁵⁴ There are, however, an increasing number of courts that view the issue as one that is continuing to evolve.¹⁵⁵ These emerging viewpoints, which support revisiting the question of the applicability of the doctrine of laches against the government, are not surprising, because the doctrine of laches is one that gives courts an additional weapon with which they can dismiss a suit with nearly full discretion.¹⁵⁶ As such, courts are not likely to go out of their way to issue opinions that limit their own power, especially if they can decide the case on other issues.¹⁵⁷

A. *Courts Have Long Held That the Doctrine of Laches May Not Be Asserted Against the Government*

The common law has long accepted the principle that the doctrine of laches may not be asserted against the government because the government acts for the benefit of the citizenry as a whole.¹⁵⁸ Courts accepted the principle of *nullum tempus occurrit*, the rule that the king is not bound by statutes of limitation, from English law.¹⁵⁹ This principle was validated on the view that (1) no laches can be charged to a faultless king, (2) the king cannot be expected to look over each individual citizen because his duty is to the population as a whole, and (3) the king should not be penalized for the negligence of his officers.¹⁶⁰ The latter two arguments against the availability of laches against the king were used by courts in adopting the rule in the United States.¹⁶¹

154. See generally *United States v. Admin. Enters., Inc.*, 46 F.3d 670, 672–73 (7th Cir. 1995) (providing case law addressing the availability of the doctrine of laches against the government).

155. *Id.*

156. Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitations and the Doctrine of Laches*, 1992 BYU L. REV. 917, 918–19 (1992).

157. See *id.*

158. *Inhabitants of Stoughton v. Baker*, 4 Mass. 522, 528 (1808) (“This limitation, being for the benefit of the public, is not extinguished by any inattention or neglect, in compelling the owner to comply with it. For no laches can be imputed to the government, and against it no time runs so as to bar its rights.”).

159. *Guar. Trust Co. of New York v. United States*, 304 U.S. 126, 132 (1938).

160. See *id.* at 132, 141.

161. *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 294 (1983) (O’Connor, J., dissenting) (“In this country, courts adopted the rule . . . because of the public policies served by the doctrine. The public interest in preserving public rights and property from injury and loss attributable to the negligence of public officers and agents, through whom the public must act, justified a special rule for the sovereign.”); *United States v. Kirkpatrick*, 22 U.S. 720, 735 (1824) (“The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions.”); *United States v. Hoar*, 26 F. Cas. 329, 330 (C.C.D. Mass. 1821) (“The true reason, indeed, why the law has determined, that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right, though sometimes asserted to be, because the king is always busied for the public good, and, therefore, has not leisure to assert his right within the times limited to subjects, is to be found in the

The rule has remained through the years on the idea that the benefit of granting the government this immunity is enjoyed by all, including parties whose attempts at raising the defense are frustrated, and therefore outweighs the minor harms experienced by the few.¹⁶² This argument, however, conveniently casts aside the harm to the defendants in the name of the greater good. As this Note will expand upon in Part IV, using this blanket rule without exception runs contrary to the purpose of equitable defenses.

Furthermore, because the doctrine of laches depends heavily on the “wisdom and good faith of the trial judge,” foreclosing the availability of the affirmative defense of laches ensures that the citizens are not harmed by the sluggishness of a government official who failed to file a suit in a timely manner or by a judge who chooses to dismiss a suit in order to avoid having to decide a case on the merits.¹⁶³

When the citizenry is potentially affected, as is often the case in a suit filed by the government, eliminating the doctrine of laches might produce more optimal results by avoiding the risk of a judge abusing his discretion and dismissing the case without considering the merits.¹⁶⁴ “When judicial wisdom and good faith fail us, as they sometimes do, highly discretionary doctrines like laches fail us too.”¹⁶⁵ If a case is dismissed for the laches of a plaintiff, the standard of review is abuse of discretion.¹⁶⁶ Therefore, a judge’s decision to throw out a case for the laches of the plaintiff can only be overturned if the judge made an unreasonable judgment in weighing the factors.¹⁶⁷

B. More Recently, Courts Are Open to the Defense of Laches Against the Government

Courts have begun to open up to the possibility of allowing the defense of laches to be raised in suits brought by the government. In *NLRB v. P*I*E Nationwide*, Judge Richard Posner started by laying out the general principle that “government suits in equity are subject to the principles of equity.”¹⁶⁸ Judge Posner continued by bluntly stating that “laches is generally and we think correctly assumed to be applicable to suits by government agencies as well as by private parties.”¹⁶⁹ Even before Judge Posner boldly attacked the longstanding notion of government immunity

great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers.”) (internal citation omitted).

162. *Guar. Trust Co. of New York*, 304 U.S. at 132.

163. Heriot, *supra* note 156, at 920.

164. *Id.*

165. *Id.*

166. *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1039 (1992). An appellate court may also reverse a decision if the judge erroneously interpreted the law or based his decision on clearly erroneous facts. *Id.*

167. *Id.*

168. 894 F.2d 887, 894 (7th Cir. 1990).

169. *Id.*

from equitable principles, courts had hinted that possible situations could exist under which the doctrine of laches should be available to be raised against the state.¹⁷⁰

C. Courts Are Reluctant to Conclude That the Defense of Laches May Be Asserted Against the Government

While the predominant view is still the long held view that laches does not lie against the sovereign, the growing number of courts touching on the possibility of loosening the rule has created a setting where the rule is not yet clear.¹⁷¹ Many courts have acknowledged that the government should be subject to the doctrine of laches under certain circumstances, but all of these courts have taken the safer approach by deciding their cases on separate grounds.¹⁷²

In *Costello v. United States*, the U.S. Supreme Court considered the possibility of a defense of laches against the government.¹⁷³ In 1925, Frank Costello applied for, and was granted, citizenship in the United States.¹⁷⁴ As part of the application process, he filled out a Preliminary Form for Naturalization, on which he falsely indicated that his occupation was in real estate, rather than in his true occupation in the illegal business of bootlegging.¹⁷⁵ Costello made the same false statement before a Naturalization Examiner.¹⁷⁶

In 1925, Costello was indicted for conspiracy to violate the liquor laws.¹⁷⁷ In 1938, Costello admitted to a government agent that he had engaged in bootlegging from around 1923 until about 1931.¹⁷⁸ On separate occasions in 1939 and 1943, Costello admitted, before a grand jury, that he had previously been involved in bootlegging in the 1920s.¹⁷⁹ In front of the latter grand jury, he further admitted that most of his approximately \$305,000 in income around the 1920s came from bootlegging.¹⁸⁰ The United States compiled additional corroborating evidence from Costel-

170. *Hickey v. Ill. Cent. R.R. Co.*, 220 N.E.2d 415, 426 (Ill. 1966) (“[T]he reluctance to apply equitable principles against the State does not amount to absolute immunity of the State from *laches* and estoppel under all circumstances.”).

171. *JANA, Inc. v. United States*, 936 F.2d 1265, 1269 (Fed. Cir. 1991) (“At the outset we note that it is not entirely clear whether the defense of laches may be asserted against the government.”).

172. See, e.g., *United States v. Mandycz*, 447 F.3d 951, 965 (6th Cir. 2006); S.E.R., *Jobs For Progress, Inc. v. United States*, 759 F.2d 1, 6–7 (Fed. Cir. 1985) (“In two recent cases the courts have stated that some relaxation of the traditional rule against the application of laches may be developing, and implied that exceptions to the rule might be approved in certain cases. However, in both it was held that the facts there being considered did not justify the invocation of such a defense against the Government.”).

173. 365 U.S. 265, 281 (1961).

174. *Id.* at 266–67.

175. *Id.* at 267.

176. *Id.*

177. *Id.* at 274.

178. *Id.* at 273.

179. *Id.*

180. *Id.*

lo's associates.¹⁸¹ In 1959, Costello's citizenship was revoked for the willful misrepresentations he made during the naturalization proceedings.¹⁸²

Costello appealed and argued, inter alia, that the government's twenty-seven year delay in bringing denaturalization proceedings ought to bar them.¹⁸³ Costello argued that the government knew about his misrepresentation as early as the 1925 indictment.¹⁸⁴ The Supreme Court first acknowledged the consistent opinions of the lower courts in holding that a defense of laches could not be brought against the government in a denaturalization proceeding¹⁸⁵ and the Supreme Court's unwavering adherence to the same.¹⁸⁶ The Court did, however, continue by entertaining a hypothetical situation where it could apply.¹⁸⁷

To the extent that the government did delay in bringing the suit, the Supreme Court did not find that the delay prejudiced Costello in any way.¹⁸⁸ Indeed, it found the opposite case to be true: that only the Government was harmed by its own delay in bringing the suit by the diminished memories of witnesses with relevant testimony.¹⁸⁹ In any case, without a finding of prejudice against Costello, his claim of laches against the government was rejected.¹⁹⁰

Granted, the defendant would not have been able to successfully plead a defense of laches in many of the cases where the court has hinted that it is amenable to opening the door to the defense of laches against the government,¹⁹¹ but the courts' refusals to directly address the issue points towards the need for a clear answer.

D. Several Possible Answers to the Question of Whether Laches Should Lie Against the Sovereign

Five years after Judge Posner made his declaration that laches should be generally applicable against the government, he outlined several possible solutions in *Administrative Enterprises* to break the stale-

181. *Id.* at 273–75.

182. *Id.* at 266–67.

183. *Id.* at 281.

184. *Id.* at 282.

185. *Id.* at 281.

186. *Id.*

187. *Id.* at 282.

188. *Id.* at 282–83.

189. *Id.* at 283.

190. *Id.*

191. *Id.* at 282 (“However, even if we assume the applicability of laches, we think that the petitioner failed to prove both of the elements which are necessary to the recognition of the defense.”); *Bhutani v. FDA*, 161 F. App’x 589, 593 (7th Cir. 2006) (“But in this case, even if there were an unreasonable delay and even assuming that laches can be invoked against the federal government, Bhutani can’t show he was prejudiced.”) (internal citation omitted); *United States v. Admin. Enters., Inc.*, 46 F.3d 670, 673 (7th Cir. 1995) (“We need not pursue the question of the existence and scope of a defense of laches in government suits to resolve this case.”); *JANA, Inc. v. United States*, 936 F.2d 1265, 1270 (Fed. Cir. 1991) (“Hence, without deciding whether in a contract case laches or estoppel could be asserted against the government on other facts, we hold that neither is established here.”).

mate of indecision plaguing the courts.¹⁹² The first possible solution was to allow “only the most egregious instances of laches [to] be used to abate a government suit.”¹⁹³ A second solution was to limit the use of laches against the government to suits where no prescribed statute of limitations exists regarding the contested issue.¹⁹⁴ A third solution involved determining whether the government suit is seeking to enforce sovereign rights or private rights and allowing the defense of laches to be raised only in the latter case and not the former.¹⁹⁵ Rather than detailing what each of the solutions entailed or debating which one should be used, however, Judge Posner decided he had sufficiently discussed the “mysteries of laches”¹⁹⁶ and left the question unanswered, thereby implicitly stating a fourth solution: retaining the status quo.

1. *The Defense of Laches Should Be Allowed Against the Government if Its Laches Were Egregious*

The idea of allowing a party to argue laches in a suit against the government was suggested by *Heckler v. Community Health Services of Crawford County, Inc.*¹⁹⁷ and *United States v. Lindberg Corp.*¹⁹⁸

In *Heckler*, the court suggested that there may be situations when equitable defenses may be raised against the government.¹⁹⁹ While the court did not outline specifics, it did imagine that these situations would arise when the government’s actions were “outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.”²⁰⁰ The *Heckler* court concluded with the reminder that the requisite elements of the equitable defense still needed to be present.²⁰¹

In a concurring opinion, however, then Justice Rehnquist and Chief Justice Burger attempted to close the door that the majority opinion had opened but not yet walked through.²⁰² Justice Rehnquist cited to five previous situations when the Supreme Court had also entertained the idea of making an exception to the general rule immunizing the government from the laches or neglect of its officers.²⁰³ Justice Rehnquist noted that, in all five cases, the court considered the potential outcome if it were to apply an equitable defense against the government but did not find that the facts were sufficient to support dismissing any of the cases on those

192. *Admin. Enters, Inc.*, 46 F.3d at 673.

193. *Id.*

194. *Id.*

195. *Id.*

196. *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 894 (7th Cir. 1990).

197. 467 U.S. 51, 60–61 (1984).

198. 882 F.2d 1158, 1163 (7th Cir. 1989).

199. 467 U.S. at 60–61.

200. *Id.* at 61.

201. *Id.*

202. *Id.* at 68 (Rehnquist, J., concurring).

203. *Id.* at 67.

grounds.²⁰⁴ Finally, Justice Rehnquist suggested that the door allowing the defense against the government in future suits be all but shut completely.²⁰⁵

The *Lindberg* court acknowledged the possibility that equitable defenses might be raised against the government under circumstances of “extreme unfairness.”²⁰⁶ In *Lindberg*, the court assumed for purposes of argument only that the defense was available, but, not surprisingly, that the facts in the record did not support a finding of laches, especially not one that was egregious.²⁰⁷

2. *The Defense of Laches Should Be Allowed in a Suit Being Brought by the Government when There Is No Statute of Limitations*

The doctrine of laches has most frequently been considered in cases where there is no governing statute of limitations.²⁰⁸ The rationale is that absent a predefined timeframe during which a party should be on alert for possible claims, the doctrine of laches allows a court to instead exercise its discretion in determining when a party can reasonably conclude that it is safe from future claims.²⁰⁹

When the legislature has specified express limitations on the time within which a suit may be brought under a particular statute, both potential plaintiffs and potential defendants are put on notice.²¹⁰ Plaintiffs may reasonably rely on the specified limitations period as the timeframe during which they need to file their suit.²¹¹ Similarly, defendants should understand that they may potentially face a lawsuit during the timeframe explicitly identified by the statute.²¹² A defendant would be hard pressed to convince a judge that it faced any expectation based prejudices before the clearly defined statute of limitations has passed.²¹³

In *Martin*, the Seventh Circuit addressed the proposition that the defense of laches should be available against the state when there is no relevant statute of limitations.²¹⁴ The court first identified the prevalent position that the government should not be subject to equitable defenses when a statute of limitations exists, because it “would frustrate federal

204. *Id.*

205. *Id.* at 68 (“I think that the Court's treatment of that question gives an impression of hospitality towards claims of estoppel against the Government which our decided cases simply do not warrant. . . . [O]ur cases have left open the possibility of estoppel against the Government only in a rather narrow possible range of circumstances.”) (internal citation omitted).

206. *United States v. Lindberg*, 882 F.2d 1158, 1164 (7th Cir. 1989) (“[A] court may, under some circumstances, ‘apply equitable principles against the government in a case where extreme unfairness [is] shown.’” (quoting *In re Am. Pouch Foods, Inc.*, 769 F.2d 1190, 1196 (7th Cir. 1985)).

207. *Id.*

208. *Fox v. Millman*, 45 A.3d 332, 342 (N.J. 2012).

209. *Id.*

210. *Martin v. Consultants & Admins., Inc.*, 966 F.2d 1078, 1090–91 (7th Cir. 1992).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

statutes and infringe upon Congress' exclusive authority to make law."²¹⁵ On the other hand, it naturally follows that this infringement would not be present when there is no statute of limitations in place, a sentiment shared by the Supreme Court.²¹⁶

The *Martin* court hypothetically applied the facts on the record towards a defense of laches against the government but was unable to find that the elements were met.²¹⁷ Nevertheless, the court's opinion is notable for declining to establish a precedent completely disclosing the idea of applying the doctrine of laches against the government in the future, regardless of whether the legislature included a statute of limitations.²¹⁸

3. *The Defense of Laches Should Be Allowed Against the Government when It Is Seeking to Enforce Private Rights Rather Than Sovereign Rights*

The third option envisioned by Judge Posner would allow a party to raise the defense when the government is seeking to enforce private rights.²¹⁹ Judge Posner first entertained the thought in his concurring opinion in *Martin*.²²⁰ This proposed solution to the applicability of laches against the State directly addresses the concerns that when the defense is successfully raised that the citizenry would be injured. By limiting the availability of the defense to suits where the government is only looking to enforce the rights of a private party, there can be no harm to outside parties if the suit never comes to fruition.²²¹

In 1936, Clair A. Barner performed some work for the Works Progress Administration.²²² In April 1936, a check for \$24.20 from the Treasurer of the United States was mailed to her for services.²²³ The check was, however, intercepted by an unknown third person who was able to successfully present the check in exchange for cash and merchandise at a J.C. Penney department store.²²⁴ J.C. Penney in turn endorsed the check over to Clearfield Trust Co., who then in turn collected the check from the United States through a federal reserve bank.²²⁵

215. *Id.* at 1091. The court did acknowledge that "there is authority for applying laches in cases governed by a statute of limitations." *Id.* (citations omitted).

216. *Id.* at 1090 (citing *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 373 (1977)).

217. *Id.* at 1091.

218. *Id.* ("Given these cases, we hesitate to declare that laches can never be applied against the government in an ERISA case simply because Congress has codified a statute of limitations.")

219. *United States v. Admin. Enters., Inc.*, 46 F.3d 670, 673 (7th Cir. 1995).

220. 966 F.2d at 1101 (Posner, J., concurring) ("In an ERISA suit, . . . the invoking of laches to bar the government's suit would not take money out of the U.S. Treasury or interfere with the government's operations. It would not even deprive the government of a financial expectancy. Any money it won in this case would be paid into the pension plans against which the defendants committed a breach of trust.")

221. *See Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943).

222. *Id.* at 364.

223. *Id.*

224. *Id.* at 364-65.

225. *Id.* at 365.

In May 1936, Barner contacted the Works Progress Administration to alert them that she had not yet received any payment for her services.²²⁶ In November 1936, Barner alleged in an affidavit that the name endorsed on the check was a forgery.²²⁷ Clearfield Trust was not notified of the forgery, however, until January 1937, and the United States first asked for a reimbursement from Clearfield Trust in August 1937.²²⁸ Eventually, in 1939, the United States brought a suit against Clearfield Trust.²²⁹ The district court dismissed the case due to the unreasonable delay by the United States, and the circuit court of appeals reversed.²³⁰

On appeal, the U.S. Supreme Court acknowledged that while the government is generally not subject to the laches of its agents, when the government “enters the domain of commerce,”²³¹ it is subject to the same laws as any citizen.²³² In the business world, the government is not treated any differently than any business would be treated.²³³ After deciding that the doctrine of laches might be applied to the government when it conducted business, the Court addressed the issues required to make a showing of laches.²³⁴ It should come as no surprise that the Court in *Clearfield Trust* was able to find that the facts did not support a finding of laches with the facts on the record.²³⁵ The Court found instead that because Clearfield Trust Co. could still easily recover from J.C. Penney, the United States’ delay did not prejudice it.²³⁶

4. *Retain the Status Quo and Retain a Blanket Prohibition Against the Defense in Suits Against the Government*

Finally, as is clear by the multitude of courts that have either been unable to, or are otherwise unwilling to, hold that a fact pattern supports a finding of laches against the government, courts could continue down their current path of idleness. By saying there are narrow circumstances under which a defense of laches may be appropriate but never finding facts which warrant an application of the defense, courts seem to be advocating continuing the bar against raising the defense in suits brought by the state.

In 1990, the IRS issued Principal Services, Inc., a summons requesting information regarding any transactions with two customers whom the IRS was investigating.²³⁷ Even though Principal Services did not respond

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 366.

231. *Cooke v. United States*, 91 U.S. 389, 398 (1875).

232. *Id.*

233. *Clearfield Trust Co.*, 318 U.S. at 369 (“The United States does business on business terms.” (quoting *United States v. Nat’l Exch. Bank of Baltimore*, 270 U.S. 527, 534 (1926))).

234. *Id.* at 369–70.

235. *Id.* at 370.

236. *Id.*

237. *United States v. Admin. Enters, Inc.*, 46 F.3d 670, 671 (7th Cir. 1995).

to the summons, the IRS did not take any additional actions in pursuit of the information until three and a half years later, when it sought the assistance of a U.S. District Court.²³⁸ Principal Services argued that, although it did not respond to the initial claim, at some point during the three and a half year lull, it began to reasonably believe that the government was no longer interested in the information.²³⁹ Furthermore, due to this belief, Principal Services may have destroyed some documents, thereby unfairly subjecting it to sanctions, an expectation based prejudice.²⁴⁰

First, the court acknowledged that the doctrine of laches is a “versatile, flexible, and serviceable doctrine.”²⁴¹ After deciding that the threshold question was whether the defense could be invoked against the government,²⁴² the court determined that it would not be necessary to answer the question.²⁴³ Nevertheless, the court did make an unfruitful attempt to apply the doctrine of laches against the government, finding that the harms element of a defense of laches was not supported by the record.²⁴⁴

The ultimate decision to decide the *Administrative Enterprises* case on grounds other than the laches defense was a decision by Judge Posner to leave the question unanswered.²⁴⁵ While it is certainly possible that a suitable set of facts has not yet come before the court to allow it to hold the government accountable for the laches of its agents, it is more likely that courts are taking a cautious approach by not opening the door to the defense of laches against the government and creating too broad a rule.²⁴⁶ Maintaining the status quo, which has been in place in the United States since at least the early nineteenth century,²⁴⁷ is certainly the easiest course of action for the court. Courts should, however, relax their concerns when doing so would be just and equitable for the defendant. “Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention.”²⁴⁸

IV. RECOMMENDATION

Equitable defenses are grounded in the principal of “fundamental fairness.”²⁴⁹ Additionally, equitable defenses are meant to be malleable in

238. *Id.*

239. *Id.* at 672.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 673 (“We need not pursue the question of the existence and scope of a defense of laches in government suits to resolve this case.”).

244. *Id.*

245. *Id.* at 673–74.

246. *See id.*

247. *See, e.g.,* *Inhabitants of Stoughton v. Baker*, 4 Mass. 522, 528 (1808).

248. *Times-Mirror Co. v. Superior Court*, 44 P.2d 547, 557 (Cal. 1935).

249. 30A C.J.S. *Equity* § 2 (“The foundation of equity is good conscience. Fundamental fairness is the hallmark of all equity jurisprudence.”).

order to accommodate the inevitable change of the legal environment.²⁵⁰ Therefore, not only does an equitable defense evolve over time, it is also flexible if the facts of an individual case present a particular need for fairness that is not otherwise covered by then existing law.²⁵¹ These maxims should be applied in cases where a party seeks to raise a defense of laches against the government. Holding firm to an ancient rule that automatically precludes the defense from being raised defies the purpose of equitable defenses. Because the current stance of courts to immediately disregard the defense if raised against the state is so concrete, government plaintiffs are able to indefinitely ignore the passage of time.

Courts should strive towards the consistent availability of this equitable defense regardless of whether the suit is being brought by a private citizen against the government or vice versa. Parties should be allowed the use of the doctrine of laches against the government under certain circumstances. If the defense of laches “serves to protect defendants from prejudice caused by stale evidence, prolonged uncertainty about legal rights and status, and unlimited exposure to liability damages,”²⁵² a defendant should be allowed the opportunity to argue why the State’s failure to timely file a suit should not expose them to these same harms just as they would be able to in a nongovernment suit.

At the very least, courts should allow laches against the government when the laches are “egregious.” While it remains unclear as of yet what degree of laches may be viewed as “egregious,” this is not necessarily a shortcoming. Because the ultimate decision regarding the laches defense has always rested with the discretion of the judge,²⁵³ so too should the determination of what types of delay and accompanying prejudices warrant being labeled as egregious. Likewise, judges should be free to decide when the defense of laches may be used against the government.

In the face of such a change, government entities are likely to counter by referencing the tried and true maxims that have perpetuated the existing rule eliminating the defense of laches from suits brought by the government.²⁵⁴ Their main argument would be an appeal to their duty to the citizenry; namely, that allowing the defense of laches would impede the government’s ability to protect the people from the laches of one negligent agent.²⁵⁵ This argument ignores the fact that individual citizens are instead harmed due to the neglect of a government employee. Allowing the government to thwart a defense of laches on account of the popu-

250. *Id.* (“Another hallmark of equity is its capacity of expansion beyond the common law, so as to keep abreast of each succeeding generation and age. There are no established rules and fixed principles laid down for application of equity.”).

251. *Id.* (“Rather, equity depends essentially upon the particular circumstances of each individual case. Moreover, all rules in equity must necessarily be sufficiently elastic to do equity in the case which may be under consideration.”).

252. *Smith v. Caterpillar, Inc.*, 338 F.3d 730, 733 (7th Cir. 2003).

253. *Gardner v. Panama R.R. Co.*, 342 U.S. 29, 30 (1951).

254. *Inhabitants of Stoughton v. Baker*, 4 Mass. 522, 528 (1808).

255. *Id.*

lation as a whole should be the exception rather than the rule. In other words, courts should hold that the defense of laches is readily available in suits brought by the government, but it should consider the potential harms to the citizenry as part of the existing laches analysis. In suits against the government then, a defense of laches should succeed when the harms caused by the government's delay to the defendant outweigh the government's reasons for the delay as well as any harms that would be suffered by the citizens if the suit were to be dismissed.

Furthermore, the argument that the government's job is to protect its citizens cuts just as much in favor of allowing the defense. Consider a lawsuit being brought by the government against a power plant for excessive pollution. Assume that the pollution is ongoing until the government files a suit. Because the government's responsibility is to its people, the greater the damage being done by the pollution, the more diligent the citizenry should expect the government to be in filing the suit. This should necessarily mean adding additional layers of government resources to ensure that the suit is timely filed. Conversely, if the harms being caused by the power plant's pollution are only negligible, it may be appropriate for the government to prioritize other issues.

Based on the multitude of cases cited in this Note where courts hypothetically applied the doctrine of laches in vain against the state, choosing to retain the status quo may seem to be the best choice at first glance. There is certainly a bevy of case law and analysis that would support a finding that even if the doctrine of laches were to be allowed in suits brought by the government that the outcome would be the same. This view, however, ignores the external effects that a change would have on government agencies.

A policy of allowing the doctrine of laches to be used only in cases where the laches of the government are egregious is self-enforcing. After the government determines how harmful to the citizenry the pollution from the power plant is, it should perform a risk-benefit analysis. If it then decides to delay filing a claim, it does so with the understood risk that the deferral may result in prejudices that outweigh the harms. When the delay continues long enough that the effects of the government's actions unduly prejudice the power plant, the doctrine of laches is appropriate and should be allowed.

In all cases, of course, the existing requirements regarding the equitable defense of laches remain unchanged. The mere passage of time will never suffice,²⁵⁶ and a dismissal under the doctrine of laches must come from a finding that the delay caused prejudices to the party that could have otherwise been avoided had the government timely filed.²⁵⁷ These prejudices must also still outweigh the potential harms caused to the citizenry if the state is not allowed to go forward with its claim.²⁵⁸

256. *Gallagher v. Cadwell*, 145 U.S. 368, 371–72 (1892).

257. *See id.* at 273.

258. *Sandvik v. Alaska Packers Ass'n*, 609 F.2d 969, 973 (9th Cir. 1979).

Laches might also be found to be egregious when there is a finding of acquiescence.²⁵⁹ As above, if after performing the analysis, the government decides to forego pursuing a claim until a later date, it does so with the added risk that the inaction of the government may lead the opposing party to believe its actions are permissible or not prohibited. If the inaction of the government leads the opposing party to believe that its actions are permissible, the additional costs incurred as a result of this reliance or the additional penalties that the opposing party faces for continuing to act could support a finding that the laches were egregious, especially if they are unreasonably larger than they would have been had the government acted sooner.²⁶⁰ The discretion should continue to be left to the trial judge to determine whether the prejudice sufficiently supports a finding of laches.

None of this, of course, forecloses the ability of a government agency to place the opposing party on notice that continuing its actions may lead to the filing of a suit. A party on notice who continues to act in a way that would be potentially detrimental to itself in the event of a suit by the government works against its ability to present a defense of laches. Under this proposal, however, both the government and the private party can be penalized for their inaction: the government for not timely filing suit and the private party for not acting to minimize damages by changing its behavior.

V. CONCLUSION

The doctrine of laches gives the court discretionary power to dismiss a claim when the party who has brought the suit has unreasonably delayed filing it in such a manner that unduly prejudices the other party.²⁶¹ The doctrine of laches continues to exist in the legal system in order to foster timely resolution of claims.²⁶² The goal is to achieve justice by not allowing the filing party to delay in such a manner that either unjustifiably increases the chances of the plaintiff's success or decreases the ability of the defendant to defend itself.²⁶³

Some equitable defenses exist to ensure that claims have an expiration date and that parties need not operate under the constant fear that an ancient claim will be resurrected after that date has passed. The word "deadline" originally referred to an actual line at prison camps that could not be crossed; any prisoners that did go past the "deadline" would be

259. See *supra* Part II.A.1.

260. See *supra* Part II.B.2.

261. 30A C.J.S. *Equity* § 139.

262. Jason R. Swartz, Comment, *When the Door Closes Early: Laches as an Affirmative Defense to Claims of Copyright Infringement*, 76 U. CIN. L. REV. 1457, 1459 (2008) ("The contemporary purpose of laches is to encourage prompt prosecution of claims.").

263. *Id.* at 1459–60 ("By forcing claimholders to file promptly or be barred from bringing the claim, the judicial system reduces the likelihood of events prejudicial to the defendant like the death of witnesses, loss of evidence, or further economic investment.").

shot.²⁶⁴ The doctrine of laches is available to dispatch of a claim after its deadline has passed. Currently, however, suits brought by the government are immune to the passage of time and therefore unfairly immortal. While the court's justification for granting the state this immunity is grounded in a logical argument, the rationale should not be applied blindly to all suits raised by the state.

When the delaying party is the state, the other party should have the power to invoke the doctrine of laches when its harms outweigh the harms that would occur if the suit were dismissed. In the instances where these harms would affect the interests of the citizenry as a whole, the bar would likely remain very high. The court should not, however, immediately close the door to the defense when the nation's population may potentially be harmed. Instead, the court should apply the same balancing test that it does on every other occasion that the defense of laches is raised. The harm to the people should be weighed against the harm to the defendant. Furthermore, to the extent that the harm to the citizens takes into account future harms in future lawsuits that may be foreclosed due to a precedent set by the court's opinion, the court should be required to consider the future harms to other defendants who would be forced to operate under a continuing cloud of uncertainty. Equitable doctrines, such as the defense of laches, are beneficial to everyone.

When the suit affects only the interests of private parties, however, or when the harms to the other party are so egregious, the party should be allowed to present the defense of laches. In these situations, the court's fallback argument and the government's main contention against the doctrine of laches are not applicable. Therefore, the balancing test is much clearer. The court need only consider, as it does in any laches defense, whether the harms to the defendant outweigh the causes of the plaintiff's delay. In some cases the harms will outweigh; in others, they will not. This Note proposes only that the defense be part of the defendant's toolbox against a government suit when equitable considerations warrant its availability.

When a private party is late in turning in a project, late to a meeting, late to answering a trivia question for a jackpot prize, or late in filing a lawsuit, it must accept the consequences for its own tardiness. In the case of an untimely filed lawsuit against the government, the government may ask the court to enforce these penalties on the offending party. When the government, however, is in the wrong, the court has historically turned the other cheek or excused its behavior on other grounds. Courts should begin to hold that time and tide wait for neither man nor government by consistently applying the doctrine of laches to either. It's about time.

264. Christine Ammer, *Fighting Words: Inspiration From Annihilation*, HISTORYNET (Aug. 7, 2009), <http://www.historynet.com/fighting-words-civil-war.htm>.