



# Habeas Corpus Legislation in the 111<sup>th</sup> Congress

**name redacted**

Senior Specialist in American Public Law

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## Summary

Federal habeas corpus is the process under which those in official detention may petition a federal court for their release based on an assertion that they are being held in violation of the Constitution or laws of the United States. Major habeas legislative activity in the 111<sup>th</sup> Congress fell within three areas: proposals to permit state death row inmates to seek habeas relief based on evidence that they are probably innocent (H.R. 3320 and H.R. 3986); proposals to amend federal law in response to the Supreme Court's determination that the level of judicial review afforded Guantanamo detainees failed to meet constitutional expectations (H.R. 64, H.R. 591, H.R. 630, H.R. 1315, H.R. 3728, and S. 3707); and recommendations for revision of several areas of federal habeas law from witnesses appearing before recent House Judiciary Committee hearings. The 111<sup>th</sup> Congress adjourned without further action on any of these proposals or recommendations.

Related CRS Reports include CRS Report R41010, *Actual Innocence and Habeas Corpus: In re Troy Davis*; CRS Report RL33391, *Federal Habeas Corpus: A Brief Legal Overview* (also available in abbreviated form as CRS Report RS22432, *Federal Habeas Corpus: An Abridged Sketch*); CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*; and CRS Report R40754, *Guantanamo Detention Center: Legislative Activity in the 111<sup>th</sup> Congress*.

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## Introduction

Habeas corpus is the procedure under which an individual held in custody may petition a federal court for his release on the grounds that his detention is contrary to the Constitution or laws of the United States.<sup>1</sup> It has been sought by state and federal prisoners convicted of criminal offenses and by the detainees in Guantanamo. The Supreme Court in *Boumediene v. Bush*, 553 U.S. 723 (2008), held that limitations on the judicial review of detainee status were contrary to the demands of the privilege of the writ and suspension clause.<sup>2</sup> The Court has thus far declined to hold that a state prisoner sentenced to death, but armed with compelling evidence of his innocence, is entitled to habeas relief.<sup>3</sup> Legislation was introduced in the 111<sup>th</sup> Congress to deal with both issues. Moreover, the Constitution Subcommittee of the House Committee on the Judiciary has held hearings on habeas review and received recommendations for legislation on related issues. This report is a brief overview of those recommendations and legislative proposals.

## Actually Innocent

Federal law imposes several bars to habeas relief in the interests of finality, federalism, and judicial efficiency. One of these prohibits filing repetitious habeas petitions claiming that the petitioner's state conviction was accomplished in a constitutionally defective manner.<sup>4</sup> This second or successive petition bar does not apply where newly discovered evidence establishes that but for the constitutional defect no reasonable jury would have convicted the petitioner (constitutional defect plus innocence).<sup>5</sup> But suppose the new evidence merely demonstrates the petitioner's innocence, unrelated to the manner in which he was convicted? The Supreme Court has never said that habeas relief may be granted on such a freestanding claim of innocence. It has twice said, however, that assuming relief might be granted in a freestanding innocence case, the evidence on the record before it did not reach the level of persuasion necessary to grant relief.<sup>6</sup> A third such case is now working its way through the federal court system.<sup>7</sup>

Two bills offered in the 111<sup>th</sup> Congress would have established actual innocence as a ground upon which habeas relief might be granted, the Effective Death Penalty Appeals Act (H.R. 3986) and the Justice for the Wrongfully Accused Act (H.R. 3320). Representative Moore (Kansas) introduced H.R. 3320 on July 23, 2009. Representative Johnson (Georgia) introduced H.R. 3986 on November 3, 2009, for himself and Representatives Nadler, Conyers, Scott (Virginia), Weiner, Lewis (Georgia), and Jackson-Lee.

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<sup>1</sup> 28 U.S.C. 2241, 2245.

<sup>2</sup> "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it," U.S. Const. Art.I, §9, cl.2.

<sup>3</sup> *House v. Bell*, 547 U.S. 518, 554-55 (2006).

<sup>4</sup> 28 U.S.C. 2244(b).

<sup>5</sup> 28 U.S.C. 2244(b)(2)(B).

<sup>6</sup> *House v. Bell*, 547 U.S. 518, 554-55(2006)("House urges the Court to answer the question left open in *Herrera* and hold not only that freestanding innocence claims are possible but also that he has established one. We decline to resolve this issue. We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petition has not satisfied it"); see also *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

<sup>7</sup> *In re Davis*, 130 S.Ct. 1 (2009)(transfer an original habeas petition to the district court); see also *Actual Innocence and Habeas Corpus*: in re Troy Davis, CRS Rept. Rxxxx.

## **H.R. 3986**

The Johnson bill would have amended the statutory bar on second or successive habeas petitions filed by either state or federal convicts to permit petitions which include:

A claim that an applicant was sentenced to death without consideration of newly discovered evidence which, in combination with the evidence presented at trial, could reasonably be expected to demonstrate that the applicant is probably not guilty of the underlying offense. Proposed 28 U.S.C. 2244(b)(5), 2255(h)(3).

The proposal's probability standard was one favored by the Supreme Court in second or successive petition cases where the petitioner claimed he was innocent of the underlying offense.<sup>8</sup> The Court favored a clear and convincing evidence standard in cases where the petitioner challenged not his conviction but claimed he was innocent of the aggravating factor that justified imposition of the death penalty.<sup>9</sup> The statutory provisions, established in the Antiterrorism and Effective Death Penalty Act, now favor a clear and convincing evidence standard in the constitutional defect plus innocence exception to the second or successive petition bar.<sup>10</sup>

The Johnson bill would also have carried state death row inmates, who claimed innocence, over another statutory habeas bar. Under existing habeas law, federal courts are bound by state court determinations and application of federal law, unless the decisions are contrary to clearly established federal law, constitute an unreasonable application of such law to the facts, or constitute unreasonable finding of facts.<sup>11</sup> Faced with evidence of the petitioner's probable innocence, the Johnson bill would have released federal habeas courts from the binding impact of such state court determinations: They would have no longer been bound by a state court decision that "resulted in, or left in force, a sentence of death that was imposed without consideration of newly discovered evidence which, in combination with the evidence presented at trial, demonstrates that the applicant is probably not guilty of the underlying offense," proposed 28 U.S.C. 2254(d)(3). The 111<sup>th</sup> Congress adjourned without further action on the Johnson bill.

## **H.R. 3320**

The Moore bill would have focused its innocence exception to the second or successive petition bar on the evidence tending to establish innocence of state prisoners, death row or otherwise. Moreover, while it would have eased the limitation on filing a second or successive habeas petition, it would have left the standards barring such petitions in place and unchanged.

Existing law requires federal courts to dismiss second or successive petitions unless they are based on retroactively applicable new law or are based on newly discovered facts that establish constitutional defect plus innocence.<sup>12</sup> Such a petition, however, may be filed only with the permission of the appropriate court of appeals upon a prima facie showing that the petition meets

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<sup>8</sup> *Kuhlmann v. Wilson*, 477 U.S. 436, 454-55 (1986).

<sup>9</sup> *Sawyer v. Whitley*, 505 U.S. 333, 350 (1992).

<sup>10</sup> 28 U.S.C. 2244(b)(2)(B)(ii), 2255(h)(1).

<sup>11</sup> 28 U.S.C. 2254(d).

<sup>12</sup> 28 U.S.C. 2244(b)(2).

either the new law or newly discovered evidence exception.<sup>13</sup> The bill would have excused the requirement of appellate court approval “if the second or subsequent application rests solely on a claim of actual innocence arising from – (i) newly discovered evidence from forensic testing; (ii) exculpatory evidence withheld from the defense at trial; or (iii) newly discovered accounts by credible witnesses who recant prior testimony or establish improper action of State or Federal agents,” proposed 28 U.S.C. 2244(b)(3)(F). It would have left unchanged the requirement that such petitions be dismissed unless they satisfy the new rule or newly discovered evidence exception.

The bill would also have amended existing law to specifically permit a court to receive forensic evidence, exculpatory evidence, and evidence of official misconduct – in support of the petitioner’s claim of actual innocence, proposed 18 U.S.C 2243. Testimony of witnesses who testified at trial would be limited to recantations or evidence of impermissible official action, id.

Unrelated to any claim of innocence, the Moore bill also would have addressed the bar imposed for failure to exhaust state remedies. Habeas relief may not be granted state prisoners under existing law, when effective corrective state procedures remain untried.<sup>14</sup> The bill would have permitted habeas relief notwithstanding the existence of such unexhausted state procedures, if “the application is based on a claim that the police or prosecution withheld exculpatory, impeachment, or other evidence favorable to the defendant,” proposed 28 U.S.C. 2254(b)(4). The 111<sup>th</sup> Congress adjourned without further action on the Moore bill.

## ***Boumediene* and Guantanamo Detainees**

The Supreme Court’s decision in *Boumediene* stimulated several proposals in the 111<sup>th</sup> Congress relating to the judicial review for the Guantanamo detainees.<sup>15</sup> The proposals included the:

- Military Commissions Habeas Corpus Restoration Act of 2009 (H.R. 64), introduced by Representative Jackson-Lee (Texas);
- Interrogation and Detention Reform Act of 2008 (H.R. 591), introduced by Representative Price (North Carolina) for himself and Representatives Holt, Hinchey, Schakowsky, Blumenauer, Miller (North Carolina), Watt, McGovern, Olver, DeLauro, and Larson (Connecticut);
- Enemy Combatant Detention Review Act of 2009 (H.R. 630), introduced by Representative Smith (Texas) for himself and Representatives Boehner, Sensenbrenner, Franks (Arizona), Lundgren (California), Gallegly, Jordan (Ohio), Poe (Texas), Harper, Coble, and Rooney;
- Terrorist Detainees Procedures Act of 2009 (H.R. 1315), introduced by Representative Schiff;
- Detainment Reform Act of 2009 (H.R. 3728), introduced by Representative Hastings (Florida); and

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<sup>13</sup> 28 U.S.C. 2255(b)(3).

<sup>14</sup> 28 U.S.C. 2254(b).

<sup>15</sup> *Boumediene* and associated habeas issues involving the Guantanamo detainees are discussed in greater detail in CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*.

- Terrorist Detention Review Reform Act (S. 3707), introduced by Senator Graham.

The Court in *Boumediene v. Bush* held that foreign nationals detained at Guantanamo were entitled to the privilege of the writ of habeas corpus.<sup>16</sup> They could be denied the benefits of access to the writ only under a suspension valid under the suspension clause, U.S. Const. Art. I, §9, cl.2, or under an adequate substitute for habeas review.<sup>17</sup>

Section 7 of the Military Commissions Act stripped all federal courts of habeas jurisdiction relating to foreign, enemy combatant detainees; and except as provided in the Detainee Treatment Act, it also stripped them of jurisdiction to review matters relating to such individuals and concerning their detention, treatment, transfer, trial, or conditions of detention.<sup>18</sup> The Court did not feel that the Detainee Treatment Act provided an adequate substitute for detainee habeas review and consequently concluded that section 7 “effect[ed] an unconstitutional suspension of the writ.”<sup>19</sup>

The Court found it unnecessary to discuss the extent to which habeas review might include an examination of the conditions of detention.<sup>20</sup> It also made it clear that its decision did not go to the merits of the detainees’ habeas petitions.<sup>21</sup>

## **Proposals for Judicial Review of the Lawfulness of Detention**

Each of the bills, other than the Hastings and Graham bills, would have repealed section 7 of the Military Commissions Act,<sup>22</sup> which unsuccessfully sought to strip the federal courts of jurisdiction to entertain habeas petitions from the Guantanamo detainees.

The Smith, Hastings, and Graham bills would have vested the U.S. District Court for the District of Columbia with authority to review the lawfulness of the detention of enemy combatants (Smith), threatening individuals (Hastings), or unprivileged enemy belligerents (Graham). The Smith and Graham bills would have established new habeas provisions applicable to detained enemy combatants, H.R. 630, proposed 28 U.S.C. 2256; S. 3707, proposed 2856. The Hastings bill would have established a substitute procedure for judicial review procedure, H.R. 3728, §§402, 202, 203, 103. The 111<sup>th</sup> Congress adjourned without further action on any of these proposals.

## **Other Issues**

Witnesses who submitted statements for the House Judiciary Committee’s recent habeas hearings criticized other aspects of federal habeas law – issues which do not appear to have been the

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<sup>16</sup> *Boumediene v. Bush*, 553 U.S. 723, 770-71 (2008).

<sup>17</sup> *Id.*

<sup>18</sup> P.L. 109-366, §7, 120 Stat. 2635 (2006), 28 U.S.C. 2241(e).

<sup>19</sup> *Boumediene v. Bush*, 553 U.S. at 792.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 798.

<sup>22</sup> H.R. 64, §2; H.R. 591, §303(g); H.R. 630, §2(b); H.R. 1315, §5(a).

subject of legislative proposals in this Congress.<sup>23</sup> Each of the witnesses – Justice Gerald Kogan, retired Chief Justice of the Florida Supreme Court; Professor John H. Blume of Cornell University Law School; and Mr. Stephen F. Hanlon, a partner in the law firm of Holland and Knight and appearing on behalf of the American Bar Association – were critical of the impact of the one-year statute of limitations in 28 U.S.C. 2244(d). They expressed concern over the complexity of the provisions under which being tardy can be fatal.<sup>24</sup>

They also agree that the binding effect given state court determinations of federal law is unfortunate, generally.<sup>25</sup> Two of the witnesses were critical of the “opt in” provisions under which

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<sup>23</sup> Impact of Federal Habeas Corpus Limitations on Death Penalty Appeals: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the House Comm. on the Judiciary, 111<sup>th</sup> Cong., 1<sup>st</sup> sess. (2009) (House Hearing), available at [http://judiciary.house.gov/hearings/hear\\_091298\\_1.html](http://judiciary.house.gov/hearings/hear_091298_1.html).

<sup>24</sup> *House Hearing*, statement of Prof. Blume at 1 (“There are several complicated tolling provisions. Due to the lack of clarity in the statute, even today, thirteen years after AEDPA’s enactment, there is still substantial confusion as to when a petition must be filed ... While it is not unreasonable to want to prevent ‘stale’ or untimely claims, AEDPA’s statute of limitations has resulted in numerous shocking and unfair results. Numerous death sentenced inmates, and literally thousands of non-capital habeas petitioners, have been deprived of any federal review of their convictions and death sentences because a federal court determined the habeas petition was not filed on time”).

*House Hearing*, statement of Chief Justice Kogan at 6 (“Illustrations of attempts to fix things that are not broken combined with poor drafting are not far to seek. The best example may be § 2244(d)(1) which established exacting time limits for filing federal petitions. Everyone is aware that postconviction litigation is time consuming, and it made sense in 1996 at least to consider measures to speed things up. But there was no evidence that delays occurred between the conclusion of state court proceedings and the filing of federal habeas corpus petitions. Certainly, there was no reason to think that prisoners deliberately postponed federal petitions. It was argued that a prisoner under sentence of death might put off going to federal court merely to keep litigation going as long as possible. That argument was questionable in capital cases. In non-capital cases, it made no sense at all. A prisoner serving a term of years has every incentive to hasten litigation that might set him free. Understand that the time limits fixed by § 2244(d)(1) apply to all habeas cases, capital and non-capital alike. In any event, the law as it stood before AEDPA already provided for dismissing tardy petitions if the delay compromised the state’s ability to respond. Nevertheless, § 2244(d)(1) introduced precise time periods. I cannot tell you how much effort has been wasted over these time limits. The books are filled with long and meticulous judicial opinions on how the time periods are to be computed and when they are suspended. By my rough count, the Supreme Court has itself decided a dozen cases on these matters alone”).

*House Hearing*, statement of Mr. Hanlon at 5-6 (“For the first time ever, AEDPA created a one-year statute of limitations for the filing of post-conviction appeals and instituted an arcane set of procedures that made the federal habeas process much more complex. Unfortunately, that same year Congress eliminated all federal funding for the resource centers that had handled state post-conviction proceedings for death row prisoners. As a result many death row prisoners were left without counsel at all, and risked losing all potential claims on appeal when the statute of limitations period ended. Since ADEPA [sic] was enacted, many death row prisoners have lost their right to seek federal court review because their lawyers missed AEDPA’s filing deadline; several have already been executed without any federal judicial review of their convictions and sentences of death”).

<sup>25</sup> *House Hearing*, statement of Chief Justice Kogan at 3-5 (“The most important policy change adopted in AEDPA was a novel restriction on the federal courts’ authority to award habeas corpus relief on the basis of constitutional claims the federal courts find to be meritorious. Under 28 U.S.C. § 2254(d)(1), a federal court typically must deny relief, even if the court determines that a prisoner was convicted and sentenced in violation of the Constitution. The statute has lots of complicating bells and whistles, but roughly speaking the idea is this, if a state court previously rejected a constitutional claim on the merits, a federal court can award relief only if the federal court determines that the state court decision was not only erroneous, but unreasonable.... The experience with § 2254(d)(1) has not been good. Consider two points. First, § 2254(d)(1) deprives federal courts of the ability to vindicate constitutional rights.... Second, § 2254(d)(1) exacerbates friction between federal courts and state courts. State courts are used to the idea that their judgments may be effectively upset if federal courts conclude that they have made a mistake. State courts are not used to being told that their judgments are so far from the mark as to be unreasonable”).

*House Hearing*, statement of Prof. Blume at 2-3 (“This particular section of AEDPA has produced draconian results. When § 2254(d) was being debated in Congress, its proponents assured members who expressed skepticism that meritorious constitutional claims would still be vindicated under § 2254(d).... In many cases, however, that promise has been broken.... Furthermore, § 2254(d) has created a perverse incentive system. Because it has been construed to focus (continued...)



states gain the advantage of streamlined habeas procedures in capital cases, if they satisfy the provision of counsel standards. Chief Justice Kogan would repeal the provisions, fearing that amendment would only introduce further “confusion, waste, and wheel-spinning.”<sup>26</sup> Mr. Hanlon urged alternatively that the role of gatekeeper – the determination of whether a state is qualified to opt in, now vested in the Attorney General – be returned to the federal courts.<sup>27</sup>

Professor Blume and Chief Justice Kogan also urged modification of the habeas “procedural default” bar under which a prisoner’s federal habeas petition is barred because of his failure to comply with an applicable state procedural requirement for consideration of his claim at the state level.<sup>28</sup>

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only on the state court result, and not necessarily the reasoning used by the state courts, AEDPA has created what is effectively a reward system for state courts to say as little as possible about the merits of a particular individual’s federal constitutional claims. If the state court says nothing, most circuits have construed § 2254(d) as creating a presumption that the state courts correctly identified and applied controlling Supreme Court precedent even when there is no objective reason to believe they did so. Summary adjudications by state courts thus are treated more deferentially than are detailed and carefully reasoned state court decisions”).

*House Hearing*, statement of Mr. Hanlon at 8-9 (“Three broad reforms should be a priority for Congress and the Obama Administration in the near future: . . . Amend the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) so that prisoners have better access to federal court review, eliminate the requirement of federal courts to defer to state court decisions ...”).

The Johnson “actually innocent” bill makes a similar but more modest proposal; it would deal with state deference only in the context of actual innocence and only in capital cases.

<sup>26</sup> *House Hearing*, statement of Chief Justice Kogan at 9 (“One might have thought that at least in this instance AEDPA was addressed to something that warranted attention. Think again. In all this time, the provisions in Chapter 154 have not been applied. The reason is that Chapter 154 is a so-called ‘opt-in’ arrangement. Its various provisions, almost all of them helpful to the state, are triggered only if the state provides competent counsel to indigent prisoners in previous postconviction proceedings in state court. The states have been unwilling to do that, so all the provisions ostensibly designed to deal with capital cases have been idle to this day. One may speculate about why Chapter 154 has been ineffective. What is important to understand now is that it has been unsuccessful and stands, accordingly, as another example of AEDPA’s failures. One might think that the proper course now is to tweak the ‘opt-in’ arrangement in a way that encourages states to cooperate. I caution you against that response. If chapter 154 comes into play, lawyers and courts will be forced to deal with another layer of poorly conceived and drafted provisions. I am afraid we will have another generation of confusion, waste, and wheel-spinning”).

<sup>27</sup> *House Hearing*, statement of Mr. Hanlon at 7, 8-9 (“These amendments authorized the U.S. Attorney General, rather than federal courts, to determine which counsel systems qualified for the opt-in procedures, but did not do anything meaningful to require improvement to the quality and availability of counsel in state post-conviction proceedings. The plain effect of shifting the decision-making authority from the independent federal courts to the Attorney General (who is the nation’s chief prosecutor and subject to only the most nominal judicial review) is to make certification easier by demanding less proof of a competent counsel system. This shift also virtually eliminates oversight of a state’s compliance with the opt-in requirements. Perhaps most troubling, the retroactive application of the certification would immediately throw many death row defendants out of court because the new, shorter statute of limitations would have already run in their cases.... Three broad reforms should be a priority for Congress and the Obama Administration in the near future: . . . Amend the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) so that prisoners have better access to federal court review ... and eliminate or revise the USA PATRIOT ACT amendments to restore the appropriate role of federal courts in the opt-in certification process”).

<sup>28</sup> *House Hearing*, statement of Prof. Blume at 2 (“In the current habeas system, a tremendous amount of time and attorney and judicial resources are expended wrangling over issues related to the procedural default doctrine.... This is not only time consuming and wasteful, it frequently obscures what should be the most important consideration: was there a violation of the petitioner’s constitutional rights? The process would be simplified and streamlined by the elimination of procedural default. Cases would move faster and more fair and just results would be achieved”).

*House Hearing*, statement of Chief Justice Kogan at 10 (“Second, we need to address long-standing questions about whether or when a federal court should decline to consider a federal constitutional claim on the ground that the prisoner failed to raise it properly in state court and thereby forfeited an opportunity for state court adjudication. The ‘procedural (continued...)”).

Mr. Hanlon alone recommended federal funding of capital defender organizations and suspension of “all federal executions pending a thorough data collection and analysis of racial and geographical disparities and the adequacy of legal representation in the death penalty system.”<sup>29</sup>

Chief Justice Kogan also had concerns not mentioned in the statements of the other witnesses, *i.e.*, the *Teague* rule, harmless error, and deference to state fact finding. With two exceptions, the *Teague* rule denies the use of federal habeas to establish, or to retroactively claim the benefits of, a new rule, that is, an interpretation of constitutional law not recognized before the end of the period for the petitioner’s direct appellate review of his state conviction and sentence.<sup>30</sup> From Chief Justice Kogan’s perspective, “The chief problem is deciding what counts as ‘new’ in these circumstances.”<sup>31</sup> He expressed the view that habeas treatment of harmless constitutional errors committed at the state level “warrants serious attention.”<sup>32</sup> Finally, he pointed to the apparent incongruity of section 2254(e)(1), which asserts that a state court’s finding of facts is presumed correct, and section 2254(d)(2), which asserts that habeas must be denied with respect to a claim adjudicated in state court unless the state court’s decision was based on an unreasonable determination of the facts.<sup>33</sup>

If the history of habeas reform debate holds true, each of the points made by the three witnesses is likely to find a counterpoint in any future debate. The 111<sup>th</sup> Congress adjourned without further action on these matters.

## Author Contact Information

(name redacted)  
Senior Specialist in American Public Law  
[redacted]@crs.loc.gov, 7-....

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default’ issue comes up in many cases and often forecloses federal court treatment of what may be meritorious constitutional claims”).

<sup>29</sup> *House Hearing*, statement of Mr. Hanlon at 8-9.

<sup>30</sup> *O’Dell v. Netherland*, 521 U.S. 151, 156-57 (1997), citing inter alia, *Teague v. Lane*, 487 U.S. 288, 301 (1989).

<sup>31</sup> *House Hearing*, statement of Chief Justice Kogan at 10 (“Surprisingly, as things now stand, a claim is said to turn on a ‘new’ rule of law unless the precedents in existence at the time the prisoner’s conviction and sentence became final made it unreasonable to determine the claim against him even then. By this account, ‘new’ rules are a lot more common than one would suppose. The *Teague* doctrine effectively reproduces the idea in § 2254(d)—namely, that a federal court must defer to a reasonable state court decision on the merits of a federal claim, even when the federal court concludes that the prisoner’s constitutional rights were violated”).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 5.

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