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## The Inadequate Substitute

### Guest Blogger

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Wednesday's Supreme Court argument in the Guantanamo detainee cases (*Boumediene v. Bush* and *Al Odah v. United States*) will presumably focus on the alternative review scheme Congress and the administration created in place of habeas corpus. Assuming the Guantanamo detainees are protected by the Constitution's Suspension Clause (as I have argued they are), the question will then be whether review by the D.C. Circuit under the Detainee Treatment Act (DTA) of Combatant Status Review Tribunal (CSRT) findings is an "adequate and effective" substitute for habeas. It is difficult to take seriously the notion that the DTA-CSRT scheme is an "adequate" or "effective" substitute for anything, let alone for the centuries-old writ praised by Blackstone and Hamilton as the "bulwark" of individual liberty.

List the factors that make a hearing unfair and put them all together: that's the CSRT on a good day. In brief, the CSRT relies predominantly on evidence a detainee cannot see; affirmatively prohibits the assistance of counsel; freely admits statements gained by torture and other coercion; and routinely refuses detainees' requests to call witnesses or present exculpatory evidence. In addition, the CSRT's panels of mid-level officers lack any structural guarantees of independence. All of the detainees had already been designated "enemy combatants" by the tribunal's superiors, all the way up to the Secretary of Defense and the President. The CSRT disagreed with those determinations only on rare occasions (about 5 percent of the time). And, on several of those occasions, the tribunal's superiors ordered "do-overs" until the tribunal reached the desired result.

The DTA makes it impossible to remedy the CSRT's flaws. It limits judicial review to whether the CSRT followed its own rules and whether those rules satisfy the Constitution and laws of the United States (to the extent applicable). Exactly what DTA review means is the subject of separate litigation in the D.C. Circuit (*Bismullah v. Gates*). But one thing is certain: DTA review is confined to the CSRT record, and cannot supply the independent judicial fact-finding that habeas can. For that reason, the DTA-CSRT process will ultimately remain one of garbage in, garbage out.

In one sense, comparing this scheme with habeas corpus is unfair. The DTA-CSRT was never meant to provide an adequate or effective substitute for habeas. This fact alone should make a constitutional difference. When the

**Supreme Court previously suggested that the Suspension Clause might be satisfied by an “adequate and effective” substitute for habeas, it was considering the constitutionality of alternative review measures that Congress intended to be commensurate with habeas: post-conviction review for federal prisoners under 28 U.S.C. § 2255 in *United States v. Hayman* and under the D.C. Code (for D.C. prisoners) in *Swain v. Pressley*. Congress, however, intended DTA review of CSRT findings to be much more circumscribed than habeas, not commensurate with it. Unlike in *Hayman* and *Swain*, Congress did not intend to replicate habeas in another forum with the DTA. Rather, Congress set out to create an inferior process for a class of individuals it believed had no right to habeas corpus (or to anything else for that matter). Trying to make the DTA-CSRT into a substitute for habeas is like trying to fit a square peg in a round hole.**

**The government seeks to divert attention from the DTA-CSRT’s failings by invoking the idea of agency review. The DTA, the government reassures, merely adopts the familiar model of the modern administrative state: limited appellate review of agency fact-finding. But even assuming this model could pass constitutional muster for cases of indefinite executive detention, the underlying process would have to be full and fair – everything the CSRT is not. And, any suggestion that errors can be corrected on DTA review from a one-sided and non-adversarial CSRT process is a fantasy. Whether an agency model might suffice in another time and another place, it cannot replace habeas for these detainees, who have languished at Guantanamo for six years without a fair hearing, be it military, administrative, or judicial.**

**In a 2005 speech to the NSA, former Deputy Attorney General James Comey called for a commitment to “Intelligence Under the Law.” Comey explained why the United States must adhere to its legal obligations when gathering intelligence. Guantanamo presents another side of the problem: what to do when the United States has imprisoned people (without charge) based upon intelligence gained outside the law – in many cases through torture and other coercion.**

**In his insider account of the CSRT process, Lieutenant Colonel Stephen Abraham, a 26-year-veteran of military intelligence, demolishes any pretence that the CSRT could ever be part of a system of intelligence under law. The tribunals made decisions, Abraham says, based upon a haphazard collection of generic information that rarely related to the detainee in question and that “lacked even the most fundamental earmarks of objectively credible evidence.” In a subsequent declaration, Abraham explains how the CSRT had no ability, incentive, or means to assess the reliability or accuracy of the intelligence on which it was relying in the jerry-rigged process that has come to define the detention system at Guantanamo.**

**If the United States is to move towards the goal of “Intelligence Under the Law” (as it must do if it is ever to develop a rights-respecting national security policy), it needs to do more than gather intelligence lawfully. It must make certain that no individual is deprived of his liberty without a meaningful fact-finding process to test and to probe that intelligence so that mistakes are exposed and corrected. Both judges and lawyers must play an active role in that fact-finding process, the very role habeas corpus promises and that the DTA-CSRT precludes.**