THE WORST PART OF THE SIGNING STATEMENT: SECTION 1024

As I explained here, Obama's signing statement on the defense authorization was about what I expected. He included squishy language so as to pretend he doesn't fully support indefinite detention. And he basically promised to ignore much of the language on presumptive military detention.

But there was one part of the signing statement I (naively) didn't expect. It's this:

> Sections 1023-1025 needlessly interfere with the executive branch's processes for reviewing the status of detainees. Going forward, consistent with congressional intent as detailed in the Conference Report, my Administration will interpret section 1024 as granting the Secretary of Defense broad discretion to determine what detainee status determinations in Afghanistan are subject to the requirements of this section. [my emphasis]

Section 1024, remember, requires the Defense Department to actually establish the provisions for status reviews that Obama has promised but not entirely delivered.

> SEC. 1024. PROCEDURES FOR STATUS DETERMINATIONS.
>
> (a) IN GENERAL.—Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the appropriate committees of Congress a report setting forth the procedures for determining the status of persons detained pursuant to the

> Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) for purposes of section 1021.
>
> (b) ELEMENTS OF PROCEDURES.—The procedures required by this section shall provide for the following in the case of any unprivileged enemy belligerent who will be held in long-term detention under the law of war pursuant to the Authorization for Use of Military Force:
>
> (1) A military judge shall preside at proceedings for the determination of status of an unprivileged enemy belligerent.
>
> (2) An unprivileged enemy belligerent may, at the election of the belligerent, be represented by military counsel at proceedings for the determination of status of the belligerent.
>
> (c) APPLICABILITY.—The Secretary of Defense is not required to apply the procedures required by this section in the case of a person for whom habeas corpus review is available in a Federal court.

As I've noted, Lindsey Graham (and other bill supporters, both the right and left of Lindsey) repeatedly insisted on this review provision. Lindsey promised every detainee would get real review of his status.

> I want to be able to tell anybody who is interested that no person in an American prison—civilian or military—held as a suspected member of al-Qaida will be held without independent judicial review. We are not allowing the executive branch to make that decision unchecked. For the first time in the history of American warfare, every American combatant held by the executive branch will have their day in Federal

> court, and the government has to prove by a preponderance of the evidence you are in fact part of the enemy force. [my emphasis]

And yet, in spite of the fact that Section 1024 includes no exception for those detained at Bagram, Obama just invented such an exception.

Section 1024 was one of the few good parts of the detainee provisions in this bill, because it would have finally expanded the due process available to the thousands of detainees who are hidden away at Bagram now with no meaningful review.

But Obama just made that good part disappear.

Update: I'm still trying to figure out where Obama gets the Congressional intent to let the Defense Secretary pick and choose which detainees 1024 applies to. The managers' statement says this about 1024:

> The Senate amendment contained a provision (sec. 1036) that would require the Secretary of Defense to establish procedures for determining the status of persons captured in the course of hostilities authorized by the Authorization for Use of Military Force (Public Law 107-40), including access to a military judge and a military lawyer for an enemy belligerent who will be held in long-term detention.
>
> The House bill contained no similar provision.
>
> The House recedes with an amendment clarifying that the Secretary of Defense is not required to apply the procedures for long-term detention in the case of a person for whom habeas corpus review is available in federal court.
>
> Because this provision is prospective, the Secretary of Defense is authorized to determine the extent, if any, to

> which such procedures will be applied to detainees for whom status determinations have already been made prior to the date of the enactment of this Act.
>
> The conferees expect that the procedures issued by the Secretary of Defense will define what constitutes "long-term" detention for the purposes of subsection (b). The conferees understand that under current Department of Defense practice in Afghanistan, a detainee goes before a Detention Review Board for a status determination 60 days after capture, and again 6 months after that. The Department of Defense has considered extending the period of time before a second review is required. The conferees expect that the procedures required by subsection (b) would not be triggered by the first review, but could be triggered by the second review, in the discretion of the Secretary. [my emphasis]

This seems to be saying two things. First, DOD doesn't have to go back and grant everyone they've given the inadequate review process currently in place a new review. The 3,000 detainees already in Bagram are just SOL.

In addition, this says DOD gets to decide how long new detainees will have to wait before they get a status review with an actual lawyer—and Congress is perfectly happy making them wait over six months before that time.

Obama seems to have taken that language and pushed it further still: stating that DOD will get broad discretion to decide which reviews will carry the requirement of a judge and a lawyer.

It sort of makes you wonder why the Obama Administration wants these men to be held for over six months with no meaningful review?