

# OBAMA TAKES A POSITION TO THE RIGHT OF CONGRESS ON INDEFINITE DETENTION

Back when I reported on Obama's stated intent to interpret the good part of the NDAA—the part requiring a meaningful review for all detainees held by DOD—to mean DOD could decide how long to hold people before it gave them the review mandated by Congress, I complained that Obama would hold detainees more than 6 months before granting detainees this review.

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?

It turns out I was far, far too optimistic. As Daphne Eviatar reports, Obama plans to hold detainees for three years before giving them this congressional mandated review.

On April 5, the Defense Department quietly sent a report to Congress indicating how it intends to implement a new law requiring lawyers and judges for detainees held in long-term U.S. military custody. As expected, DoD largely wrote the new rights out of

existence, ensuring they'd be accorded to few, if any, detainees. What's more, it severely limited the scope of judicial review even that small number will receive.

[snip]

Here's how it works. According to the new regulations:

The combatant commander with responsibility for the theater of operations in which the unprivileged enemy belligerent is detained will ensure that a determination by the DRB or analogous review that the 1024(b) process is applicable is made as soon as practicable but **not later than 18 months** after the detainee is captured by, or transferred to the custody and control of, the Department of Defense. Additionally, the combatant commander will ensure that a Section 1024(b) review is conducted as soon as practicable after such a determination is made, but **not later than 18 months** after such a determination is made.

**Eighteen months plus 18 months equals three years.** So any newly-captured suspect is not entitled to a hearing by a military judge and represented by military defense counsel until three years after his initial detention.

What's more:

A military judge will conduct a hearing for the purposes of determining whether the detainee is a covered person as defined in subsection (b)

of Section 1021 of the Act.  
The review will be limited to this status determination; it will not include an assessment of the level of threat the detainee poses, nor will it serve as a substitute for the judgment of the combatant commander as to the appropriate disposition of a detainee lawfully detained by the Department of Defense.

In other words, the judge will decide only if the suspect is appropriately classified as an “unprivileged enemy belligerent” – that is, any person “who was part of or substantially supported al Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners.” The judge will not decide whether that person actually poses a threat to U.S. forces. Yet under international law, that’s a critical part of determining whether someone can be lawfully detained in a war against insurgent groups. That critical determination will continue to be made secretly by a military commander in the field, not by the more neutral judge following an open hearing.

Someone who did laundry, cooked meals or provided medical assistance for a member of al Qaeda, the Taliban or unidentified “associated forces” could therefore continue to be detained indefinitely even after his judicial review if the commander deems him dangerous. And the commander doesn’t have to explain that decision to anyone. [my emphasis]

Those Bedouin women and children we killed in a missile strike and then excused our war crime by saying the Bedouins had been selling AQAP?

They're the kind of people that this order would include.

So in response to Congress—Congress!!!!—trying to put all our military detainees on some kind of legitimate legal footing, Obama (the guy who ran on closing Gitmo), basically blew them off and embraced still more indefinite detention.