

OBAMA'S DETAINEE WAIVERS EXEMPT ASPIRATIONAL TERRORISTS FROM MILITARY DETENTION

During the debate on the NDAA, I noted that Obama could just issue an order saying the military primacy required by the law would only kick in after a civilian trial.

Nothing in the bill allows Congress to override the procedures developed by the Administration; it only requires that Congress get a copy of them.

Which would seem to permit the Administration to issue the following procedures:

- 1. The persons authorized to make determinations whether or not someone is a "Covered Person" are Article III jurors and/or jurists.*
- 2. The process by which it will be determined whether or not someone is a "Covered Person" will be a civilian trial.*

That would seem to render the effect of the most noxious part of the detainee provisions minimal: rather than imprisoning convicted terrorists at Florence SuperMax, those terrorists will be detained at Leavenworth. But they won't be transferred to military custody until after they get a civilian trial.

While Obama does carve out significant swathes of detainees who will be exempt from presumptive military detention, the order he released yesterday doesn't go as far as requiring trials to determine if someone is a "covered person;" instead, it uses probable cause.

I'll have a number of things to say about his order, but for the moment, look at how he defines "attempted attack;"

An "attempted attack" means an overt act or acts beyond substantial step when (a) performed with specific intent to commit an attack; and (b) no further step or act by the individual would be necessary to complete the attack.

"No further act would be necessary to complete the attack."

While most of the aspirational terrorists the FBI arrests would be exempted as citizens or lawful permanent residents, this definition would also exempt people like Khalid Ali-M Aldawsari—the Saudi who ordered chemicals to build a bomb, but had many further steps to go before his attacks would have been completed—from presumptive military custody. And while Aldawsari's case is already really attenuated, the acts of someone like Najibullah Zazi would not have qualified either. (Note, I hope to return to this post on Aldawsari, but in the meantime, recommend you go read it.)

Mind you, I think that's a good thing—the fewer people stuck in Lindsey Graham's military briggs the better. But it does betray that DOJ charges as attempted attacks acts that, under this directive, don't qualify as attempted attacks.