

By Dafna Linzer

From [TPM](#) | Original Article

The White House is preparing an Executive Order on indefinite detention that will provide periodic reviews of evidence against dozens of prisoners held at Guantanamo Bay, according to several administration officials.

The draft order, a version of which was first considered nearly 18 months ago, is expected to be signed by President Obama early in the New Year. The order allows for the possibility that detainees from countries like Yemen might be released if circumstances there change.

But the order establishes indefinite detention as a long-term Obama administration policy and makes clear that the White House alone will manage a review process for those it chooses to hold without charge or trial.

Nearly two years after Obama's pledge to close the prison at Guantanamo, more inmates there are formally facing the prospect of lifelong detention and fewer are facing charges than the day Obama was elected.

That is in part because Congress has made it difficult to move detainees to the United States for trial. But it also stems from the president's embrace of indefinite detention and his assertion that the congressional authorization for military force, passed after the 2001 terrorist attacks, allows for such detention.

After taking office, the Obama administration reviewed the detainee population at Guantanamo Bay and chose 48 prisoners for indefinite detention. Officials, who spoke on the condition of anonymity, said that number will likely increase in coming months as some detainees are moved from a transfer category to a continued detention category.

If signed by President Obama, the new order will provide added review for detainees designated for long-term detention. The order, which is being drafted jointly by White House staff in the National Security council and the White House counsel, will offer detainees in this category a minimal review every six months and then a more lengthy annual review. Detainees will have access to an attorney, to some evidence against them and the ability to challenge their continued detention.

Prisoners who have been deemed "high-value detainees," including the alleged conspirators of the 2001 attacks, have been designated for prosecution in civilian or military courts.

"It's been clear for a while that the government would need to put in place some sort of periodic review, and that it would want it to improve on the annual review procedures used during the previous administration," said Matthew Waxman, a professor at Columbia Law School who worked on detainee issues during the Bush administration.

ProPublica asked a spokesman from the National Security Council earlier Tuesday for comment but has yet to receive a response.

In 2008, Guantanamo detainees won the right to challenge the lawfulness of their detention in court. The executive order aims to create an executive branch review which would occur separately from the court review and would weigh the necessity of the detention, rather than its lawfulness, officials said.

"Perhaps the dangerousness of the detainee's country of origin could change, or the group that the detainee is affiliated with could cease to exist," one official explained.

Some detainees from Yemen may be sent home if security conditions there improve. Currently, there is a moratorium on transfers from Guantanamo to Yemen.

The official described the draft order as "an important piece of the government's approach to

Guantanamo."

At a speech on Guantanamo in May 2009, Obama said that "a thorough process of periodic review," was needed to ensure that "any prolonged detention is carefully evaluated and justified."

The White House first began work on an Executive Order in the spring of 2009 that was the subject of [a joint story by ProPublica and the Washington Post](#) [1] in June 2009. An administration official at the time said the order was under consideration but had not yet been completed. Civil rights groups which oppose indefinite detention came out strongly against the possibility of an executive order.

Weeks later, administration officials said the White House had decided to work with Congress on indefinite detention, rather than through Executive Order. But by the end of 2009, the White House had said it would not support legislation.

Then, in 2010, a government task force on Guantanamo completed a year-long review that placed 48 detainees in long-term detention. In its report, task force members said those detainees would be "subject to periodic Executive Branch review."

Bobby Chesney, a law professor at the University of Texas who worked briefly on the administration's detention task force, said an executive order would provide detainees which an additional layer of review. He also said it offered a compromise since an executive order can be withdrawn at anytime.

"The order takes on additional restraints and lasts as long as the president wants. The White House gets just what it wants, no more or less. And, unlike with legislation, the order doesn't have staying power if the next administration doesn't want it."

Jameel Jaffer, a national security lawyer at the American Civil Liberties Association, agreed that "more review is better." But he said that an executive order would only "normalize and institutionalize indefinite detention and other policies," that were set in place by the Bush

administration.