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President Obama yesterday formalized indefinite detention for dozens of men held at Guantanamo Bay and announced that the Pentagon would move ahead with military trials for a handful of other detainees.

In [an executive order](#) [1], which [we first reported on in June 2009](#) [2], the White House created a board to periodically review the dangerousness of prisoners being held without charge or trial. The order says the new process will allow detainees -- some in custody for nearly a decade -- to challenge the government's determination that they pose a threat if released.

While the order is new, [most of the ideas](#) [3] it contains are not. This is the third time such a board has been created for nearly the same purpose. Two similar processes to review detainee cases were in place during the Bush administration. Like its predecessors, the Obama administration's review process will operate outside the courts and will be subject to no independent review. Also like the Bush White House, the Obama administration alone will choose all members of the review board and appoint a "personal representative" to advocate on behalf of the detainees.

The major difference is that the White House, sidestepping claims that detainees have a right to counsel, will allow them to hire private attorneys. The order states that the government will not pay legal fees. While detainees will have access to some evidence against them, the government will choose what evidence to share. The process is meant to be more adversarial than it had been under the Bush administration. Detainees can submit their own evidence to the review board but will be permitted to call only those witnesses the government determines to be reasonable. It is unclear whether a detainee can dismiss his personal representative or how the lawyer and representative will work together. The order allows a detainee to make his case for release once every three years.



Many Guantanamo detainees now have lawyers and are represented in federal court challenges of their detentions. But the standards for the executive order are different. In court proceedings, the detainees have been challenging the lawfulness of their detentions based on the government's evidence. The separate review, created by the executive order, will rely not just on evidence used in court but on additional factors brought in by the Pentagon, which acts as warden of Guantanamo. Though not spelled out in the order, factors could include a detainee's behavior while in custody.

One hour after the executive order was made public, the White House arranged a conference call for reporters with five senior administration officials to discuss it and other aspects of the administration's detention policies. Not one official spoke for the record, and no specifics about the review process were provided.

Asked about the timing of new military commissions, one official would say only that new charges would be brought within a matter of days or weeks.

All five senior officials rebuffed questions on future prosecutions of the suspected plotters in the 2001 terrorist attacks on the United States, saying they would not discuss individual cases. In November 2009, Attorney General Eric Holder announced that five detainees would be charged in federal court in New York, but that has not happened.

When asked to explain how a decision to move ahead with new trials at Guantanamo was consistent with claims that the administration is closing the facility, the officials said the commissions were consistent with presidential pledges to bring terrorists to justice.

One senior official said that an improved feature of the Obama administration's Periodic Review Boards, or PRBs, was that they would include representatives from different government agencies, as opposed to the Bush administration's review, which was run exclusively by the Defense Department. Under that process, which relied on Administration Review Boards, or ARBs, a detainee's personal representative was also a uniformed member of the U.S. military.

No White House official could say, hours after the order was published, where the personal representative would come from, what the implementing guidelines for the reviews would look like or which agency was charged with drafting the guidelines. A government official who spoke



separately confirmed that the representative would come from the military, which is also charged with drafting the review procedures.

The executive order affects only those detainees designated for indefinite detention. The board will also examine whether some cases that had been referred for prosecution are still viable. Currently, 47 of the 172 detainees at Guantanamo have been selected for indefinite detention. The list is secret -- even the detainees do not know they are on it -- and, privately, officials have said the list is likely to grow. About three dozen others could be prosecuted, but it is unclear where.

The executive order will not affect more than 60 detainees who have been cleared for transfer but remain at Guantanamo. Most of those detainees hail from Yemen, a country the Obama White House has said is too unstable to handle transfers.

The order, which was completed last December, aimed to give those facing indefinite detention a possible way out of life in prison without charge or trial. But legislative provisions passed at the end of 2010 will effectively render the review process useless to many of the detainees. Because of the congressional restrictions now in place, a detainee who wins his freedom through the review board may in fact be ineligible for release. Similarly, a detainee who wins his military commission trial or even serves a short sentence could wind up being put on a "releasable" list, but not sent out of Guantanamo.

In a May 2009 speech, Obama first signaled his embrace of indefinite detention and military commission trials. An added review for prisoners held under those conditions was welcome by many human rights activists and experts on detention policy. But there were strong concerns about the White House approach.

Jonathan Hafetz, a law professor at Seton Hall University who has represented a number of detainees, said the review process established in the executive order, "on paper at least, is a significant improvement," over the Bush system. "But if you oppose the type of prolonged, indefinite detention that has come to define Guantanamo (as I do), the order is a mixed blessing at best." Hafetz called the process "Obama's kinder, gentler approach to executive detention."

Benjamin Wittes, of the Brookings Institution, welcomed the added review but worried that the



Obama administration was opening itself up to a backlash from congressional Republicans eager for a tougher detention policy.

"This is sound policy of the sort I have been urging for many years. It is also being implemented in exactly the wrong way -- by fiat, rather than by legislation," Wittes said. "I worry that, by doing it this way, the administration will trigger a backlash that will result in much less attractive policy."

Juan Zarate, who served as a counterterrorism adviser to President Bush, noted that the order brings Obama no further toward his stated goal of closing the Guantanamo detention camp. Rather, he said, "it creates a new bureaucratic process that will be challenged, and doesn't help legitimate indefinite detention."

In a statement accompanying the order, Obama said he remained committed to closing the prison, a pledge he made on his first full day in office. That pledge, enshrined in his first executive order, was widely seen as a repudiation of the detention system his predecessor built. But the new order suggests that Obama's original pledge was more about dismantling a facility than a system.