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Detainee Review Proposal Is Prepared for President

By CHARLIE SAVAGE
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WASHINGTON — President Obama's advisers have been drafting an executive order that would set up a system for periodically reviewing the cases of the 48 Guantánamo detainees the government intends to keep holding without trial, officials said.

The draft order, which has not yet gone to the president for approval, would establish something like a parole board to evaluate whether each detainee poses a continued threat or whether he should be released.

An administration official said that such an order has long been under consideration, pointing out that Mr. Obama had described such a process in a May 2009 speech when he laid out a plan in which some detainees would most likely continue to be held without ever going to trial.

"We must have clear, defensible and lawful standards for those who fall in this category," Mr. Obama said in that speech, which he delivered at the National Archives. "We must have fair procedures so that we don't make mistakes. We must have a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified."

The existence of the draft executive order was first reported on the Web site of The Washington Post on Tuesday evening.

In broad strokes, the proposal appears to echo the "annual review boards" that the Bush administration had used to revisit its decision to hold each prisoner. In that system, a panel of military officers periodically reviewed the accusations and talked to each prisoner, who was not represented by a lawyer, before voting on whether he was still a threat.

The Bush administration set up its annual review board system during its unsuccessful fight to prevent the Supreme Court from granting the detainees a right to have their cases reviewed by federal judges, who could ultimately order their release if the evidence against them was weak.

When Mr. Obama became president in 2009, the new administration suspended the Bush-era policies at the prison in Guantánamo Bay, Cuba, and began a yearlong review of each of the 240 detainees then remaining at the prison.

It was in the midst of that review that Mr. Obama said at the National Archives that

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some detainees would probably continue to be held without trials. Others would be tried in federal court or before a military commission, while some would be sent to other countries.

Some who are deemed too dangerous to release would never be brought to trial because evidence against them might not be admissible in court. Others could not be shown to have participated in specific plots or to have acted to support [Al Qaeda](#) after October 2001, when laws criminalizing the provision of material support to terrorist groups were extended to apply to foreigners overseas.

Currently, 174 prisoners remain at the base, 48 of whom the administration has decided to keep holding indefinitely without trial.

In some of those cases, federal judges have agreed that holding them as wartime prisoners is lawful.

Civil liberties and human rights groups — many of whom dislike any policy that involves holding prisoners without trial — reacted with ambivalence to the report that the Obama team has been working on an executive order to establish formal reviews.

Tom Malinowski, the Washington advocacy director for [Human Rights Watch](#), said such an order could provide additional safeguards, but worried that it could be used to entrench the idea of detention without trial.

“My sense and my hope is that it would be limited to the detainees whom Obama inherited from the Bush administration, rather than serving as a permanent regime for the detention of anyone the government may decide is dangerous in the future,” he said.

But Kate Martin, director of the [Center for National Security Studies](#), said there was nothing wrong with holding enemy fighters without trial during a war, and she praised the idea of issuing such an order.

“What is happening at Guantánamo is law-of-war detention, and the Supreme Court approved the detention under longstanding laws of war as part of the war in Afghanistan, which continues to this day,” she said. “As described, the executive order would give these detainees more due process than required under the laws of war or than they currently get in the habeas proceedings.”

The news of the draft order comes as Congress is considering a bill that would bar the transfer of any Guantánamo detainee to the United States — even for the purpose of prosecution.

That measure, which the administration opposes, would effectively end its proposal to bring some of the Guantánamo detainees to a maximum-security facility in Illinois and to prosecute others in federal court rather than in [military commissions](#).

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