

United States Senate
WASHINGTON, DC 20510-4904

May 22, 2009

The President
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. President:

I am writing to convey my appreciation for your speech of May 21 on security and values, but also to express several concerns, particularly about your intention to design a system for what you called "prolonged detention."

On many fronts, your speech confirmed your commitment to defending our country while reversing the previous administration's numerous attacks on the rule of law. I was particularly pleased by your forceful rejection of torture, an issue on which you have backed up your campaign rhetoric with sustained action, beginning on your second day in office. I also welcome your acknowledgment that the state secrets privilege has been overused, as well as your commitment to reform. As you know, the Senate Judiciary Committee is currently considering legislation on this matter, which I hope your administration will now support. I also look forward to briefings on your administration's use of the privilege thus far, in keeping with your commitment to "voluntarily report to Congress when we have invoked the privilege and why."

In addition to these substantive matters, I was encouraged by your stated commitment to working with the judiciary and Congress as co-equal branches of government on issues of national security. This respect for our constitutional system stands in strong contrast to the approach of the previous administration. In light of the principles you have put forth, I look forward to full and open discussions between your administration and Congress on policy and legal matters. I also welcome your stated appreciation for congressional oversight and for the need for Congress to have full access to classified programs and information. As you know, the previous administration established numerous obstacles to effective oversight and I welcome your commitment to tearing down what remains of those obstacles.

In the spirit of an open, productive dialogue between your administration and Congress, I wish to lay out my concerns related to the disposition of detainees at Guantanamo Bay. I strongly supported the decision you made in January to close the detention facility at Guantanamo and continue to do so. The facility has been used as a recruiting tool by our enemies, and allowing it to remain open would pose an unacceptable threat to our national security. I look forward to considering your administration's plan for closing the facility, and I welcome your decision to bring suspected terrorists, like Ahmed Gailani, to justice.

Among the issues Congress must consider carefully is any resumption of the use of military commissions. Like you, I voted against the Military Commissions Act of 2006. I agree with you with regard to that statute's many flaws, but it is not clear to me that those flaws can be fixed, or that the other options in the current federal criminal justice and courts martial systems for bringing the detainees to justice are insufficient or unworkable. If Congress is to fully consider your proposal for military commissions, therefore, it will need access to the same information your administration is currently reviewing, including detailed, classified information on individual detainees and the extent to which other options are available.

My primary concern, however, relates to your reference to the possibility of indefinite detention without trial for certain detainees. While I appreciate your good faith desire to at least enact a statutory basis for such a regime, any system that permits the government to indefinitely detain individuals without charge or without a meaningful opportunity to have accusations against them adjudicated by an impartial arbiter violates basic American values and is likely unconstitutional. While I recognize that your administration inherited detainees who, because of torture, other forms of coercive interrogations, or other problems related to their detention or the evidence against them, pose considerable challenges to prosecution, holding them indefinitely without trial is inconsistent with the respect for the rule of law that the rest of your speech so eloquently invoked. Indeed, such detention is a hallmark of abusive systems that we have historically criticized around the world. It is hard to imagine that our country would regard as acceptable a system in another country where an individual other than a prisoner of war is held indefinitely without charge or trial.

You have discussed this possibility only in the context of the current detainees at Guantanamo Bay, yet we must be aware of the precedent that such a system would establish. While the handling of these detainees by the Bush Administration was particularly egregious, from a legal as well as human rights perspective, these are unlikely to be the last suspected terrorists captured by the United States. Once a system of indefinite detention without trial is established, the temptation to use it in the future would be powerful. And, while your administration may resist such a temptation, future administrations may not. There is a real risk, then, of establishing policies and legal precedents that rather than ridding our country of the burden of the detention facility at Guantanamo Bay, merely set the stage for future Guantanamos, whether on our shores or elsewhere, with disastrous consequences for our national security. Worse, those policies and legal precedents would be effectively enshrined as acceptable in our system of justice, having been established not by one, largely discredited administration, but by successive administrations of both parties with greatly contrasting positions on legal and constitutional issues.

I do not doubt your good faith efforts to wrestle with these complex issues, and I am confident that you would seek to use any new authorities carefully and judiciously. But, as I know you appreciate, fundamental changes to our constitutional system cannot be considered in the context of individual presidents or administrations. Whatever new regimes you and the Congress choose to enact will likely remain in place long after your administration has ended, to be used, or abused, by future presidents.

I appreciate your efforts to reach out to Congress on this important issue. In that spirit, I intend to hold a hearing in the Constitution Subcommittee of the Senate Judiciary Committee in June

and ask that you make a top official or officials from the Department of Justice available to testify. I recognize that your plans are not yet fully formed, but it is important to begin this discussion immediately, before you reach a final decision. I will be sending formal invitations in the coming weeks and look forward to hearing the testimony of your administration.

I thank you for this opportunity to convey my views and look forward to continued collaboration as we return our country to the rule of law while aggressively targeting al Qaeda and its affiliates.

Sincerely,

A handwritten signature in blue ink, appearing to read "Russell D. Feingold". The signature is fluid and cursive, with the first name "Russell" being the most prominent part.

Russell D. Feingold
United States Senator

CC: The Honorable Eric Holder
Attorney General of the United States