

## Feingold calls Obama Out on Indefinite Detention, Sets Hearings (with poll)

by [fflambeau](#)



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In a three-page letter dated May 22, 2009, Senator Russell Feingold of Wisconsin politely but firmly drew lines in the sand with President Obama on the issues of military commissions and indefinite detention. Importantly, Feingold called indefinite detention "likely unconstitutional." Feingold, who Chairs the Senate Judiciary Subcommittee on the Constitution, also gave the Obama administration notice that his subcommittee will hold June hearings on these issues and asked the administration to "make a top official or officials from the Department of Justice available to testify." Feingold recognized that Obama's views are not fully formed on these issues but "it is important to begin this discussion immediately, before you reach a final decision." I applaud Senator Feingold's actions and believe that his subcommittee hearings will be much better than the Whitehouse subcommittee hearings were simply because Feingold will be the Chair.

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Sen. Feingold's May 22nd letter to President Obama begins very respectfully and politely and contrasts Obama's openness with the former administration's:

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.

SOURCE: <http://feingold.senate.gov/...> (same source throughout unless otherwise noted). Since this letter is a matter of public record, I quote it in almost its entirety but urge readers to look at the original.

Having begun so politely, Feingold just as politely goes on to emphasize policy differences with Obama on the issues of GITMO, military commissions (I especially like how Feingold gently reminds Obama that Obama voted against military commissions in 2006), and especially indefinite detention which Feingold describes as "likely unconstitutional":

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 Guantanimos, 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.

Feingold then puts the Obama Administration on notice that as Chairman of The Subcommittee on the Constitution of the Senate Judiciary Committee, he will hold hearings in June on these issues. He further requests that top officials from the Justice Department testify at these hearings (with a cc of the letter being sent to AG Eric Holder):

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.

John Nichols, in "Feingold Will Challenge Obama on 'Prolonged Detentions'" presents an excellent analysis of both Obama's National Archives Speech and Feingold's letter:

Barack Obama's speech last week at the National Archives, delivered with the Bill of Rights as a backdrop, eloquently expressed a president's faith that it is possible to keep the nation secure while remaining true to the rule of law.

But civil libertarians heard sour notes, and Sen. Russ Feingold, D-Wis., shares their concerns.

In fact, the chairman of the Senate Judiciary Committee's subcommittee on the Constitution has informed the president that he plans to hold hearings on aspects of the president's plan that the senator bluntly describes as violations of basic American values that are "likely unconstitutional."

SOURCE: <http://www.madison.com/...>

Nichols notes that Obama's National Archives speech was heavily criticized by the organisation that represents many detainees--the Center for Constitutional Rights--and by the ACLU. The Executive Director of the ACLU is quoted as having said:

"We welcome President Obama's stated commitment to the Constitution, the rule of law and the unequivocal rejection of torture. ...But unlike the president, we believe that continuing with the failed military commissions and creating a new system of indefinite detention without charge is inconsistent with the values that he expressed so eloquently at the National Archives today."

Same source

We are fortunate--and the people of Wisconsin are doubly so--to have an articulate, forceful and principled leader like Senator Russell Feingold to act on these issues. The Senate hearings he chairs should be even more fruitful than the Whitehouse Hearings simply because of Senator Feingold's leadership.