

Statement of

# **The Honorable Russ Feingold**

United States Senator  
Wisconsin  
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Statement of U.S. Senator Russ Feingold  
Hearing on "The Legal, Moral, and National Security Consequences of 'Prolonged Detention'"  
Senate Judiciary Committee, Subcommittee on the Constitution

As Prepared For Delivery

"On May 21, President Obama gave an important national security speech at the National Archives. He devoted a major portion of that speech to the problem of the prison camp at Guantanamo Bay, Cuba. He reiterated that he intends to close that facility and I fully support his decision. The president was absolutely correct when he said the following:

'Rather than keeping us safer, the prison at Guantanamo has weakened American national security. It is a rallying cry for our enemies. It sets back the willingness of our allies to work with us in fighting an enemy that operates in scores of countries. By any measure, the costs of keeping it open far exceed the complications involved in closing it.'

"The president was also correct in noting the difficulties in figuring out what to do with the approximately 240 detainees still held at Guantanamo. Some of those detainees, he said, can be tried in our federal courts for violations of federal law. Others will be tried in reconstituted military commissions for violations of the laws of war. A third category of detainees have been ordered released by the courts. A fourth category the administration believes can be transferred safely to other countries.

"Finally, there is a fifth category of detainees that the president said cannot be tried in the federal courts or military commissions, but the government believes they are too dangerous to release or transfer. For this small group of detainees, the president said he is considering a new regime of what he called 'prolonged detention,' accompanied by procedural safeguards and the involvement and oversight of both the judicial and legislative branches of our government.

"I was and remain troubled by where the president seemed to be heading on this issue. The previous administration claimed the right to pick up anyone, even an American citizen, anywhere in the world; designate that person a so-called 'enemy combatant,' even if he never engaged in any actual hostilities against the United States; and lock that person up possibly for the rest of his life unless he can prove, without a lawyer and without access to all, or sometimes any, of the evidence against him, that he is not an 'enemy combatant.'

"That position was anathema to the rule of law. And while the president indicated a desire to create a system that is fairer than the one the previous administration employed, 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.

"I wrote to the president after his speech to express my concern, and I will put the full text of that letter in the record of this hearing. My letter noted that indefinite detention without charge or trial is a hallmark of abusive systems that we have historically criticized around the world. In addition, once a system of indefinite detention without trial is established, the temptation to use it in the future will be powerful.

"Thus, if the president follows through on this suggestion of establishing a new legal regime for prolonged detention to deal with a few individuals at Guantanamo, he runs the very real risk of establishing policies and legal precedents that will not rid our country of the burden of the detention facility at Guantanamo Bay, but instead merely sets the stage for future Guantanamos, whether on our shores or elsewhere, with potentially 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 a largely discredited administration, but by a successive administration with a greatly contrasting position on legal and constitutional issues.

"The fundamental difficulty with creating a new legal regime for prolonged detention is that there is a great risk, particularly because some of the detainees for whom it would be used have already been held for years without charge, that it will simply be seen as a new way for the government to deal with cases it believes it cannot win in the courts or even before a military commission. Regardless of any additional legal safeguards, such a system will not be seen as any more legitimate than the one the Bush administration created at Guantanamo.

"I do not underestimate the challenges that the president faces at Guantanamo. This is not a problem of his making, and I appreciate how difficult the situation is. The president was right when he called dealing with the fifth category of detainees 'the toughest single issue that we face.' And he recognized that creating a new system of prolonged detention 'poses unique challenges.' That is why we are here today. We have assembled a panel of distinguished witnesses to help us understand the implications of a new system of prolonged detention. Although the legality of such a system is crucial, that is not the only question. In a recent interview, Daniel Levin, who was the acting head of the Office of Legal Counsel when that office was attempting to deal with requests for legal analysis of interrogation techniques that many believe are torture, put it quite succinctly. He said, 'Obviously you can only do that which is legal, but that does not mean you should automatically do something simply because it is legal.' So we must look at this question from all angles.

"It is my view that a great deal of what was wrong with Guantanamo stemmed from an arrogance that the previous administration had about the law. It established a prison that it thought was beyond the reach of the law. And it asserted the power to put people in that prison with only the barest regard for the law. President Obama clearly wants to take a different approach. He spoke at the National Archives of 'construct[ing] a legitimate legal framework for the remaining

Guantanamo detainees that cannot be transferred.' This goal is admirable. But we must be very careful not to create a legal framework that is inconsistent with the very reasons we need a legal framework--to be true to our values and to regain the respect of the world for our approach to this conflict.

"One final note, and then I will turn to the ranking member. When I wrote the president, I indicated that I would invite a representative of his administration to testify at this hearing. On reflection, I decided that to do so would be to ask the administration to publicly defend a position that it has not yet taken. Consideration of these very difficult questions is undoubtedly ongoing, and so I decided to hold this hearing as a way to help inform the administration's thinking and help make sure it has full information about the consequences of its decision. I would, of course, welcome any response to the testimony and discussion we will hear today. And I look forward to an open dialogue on these very difficult and important questions as the time for closing Guantanamo approaches."

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