

United States Senate

WASHINGTON, DC 20510-4904

December 10, 2008

The Honorable Barack Obama
President-elect of the United States
451 Sixth Street NW
Washington, D.C. 20001

Dear President-elect Obama:

Congratulations on your historic election. You will take office in difficult times, and I wish you the best of luck with the challenges you will confront. I stand ready to help you in any way that I can.

While you will face many difficult issues in the coming months and years, I want to raise one that I believe is critical for the presidential transition: restoring the rule of law. The countless abusive policies of the past eight years and the extreme legal theories on which they were based have left our nation weaker and our constitutional framework in a precarious position. In light of this recent history, I believe that one of the most important things that you can do as President is to take concrete steps to restore the rule of law in this country – that is, to return to the White House respect for an appropriate separation and balance of powers among the branches, for the President’s important but not paramount place in our constitutional system of government, for the laws that Congress writes and the importance of its oversight functions, and for the judiciary’s crucial role in interpreting the law. I am sure that as a constitutional scholar you can appreciate that we must ensure that the Bush Administration’s views of executive supremacy do not become so ingrained in our system of government that they become the “new normal.”

As I know you recognize, we can protect our national security – in fact, we can do it more effectively – without trampling on the rights of Americans or the rule of law. I am pleased that your transition team is already working to address a number of rule of law issues, and I am confident that you are committed to undoing the damage of the past administration.

In September, I chaired a hearing in the Constitution Subcommittee of the Senate Judiciary Committee to examine concrete steps that can be taken to restore the rule of law. The subcommittee received detailed recommendations and proposals from an

December 10, 2008

Page 2

impressive array of experts, including historians, law professors and advocacy organizations. Many of these contributors are very familiar to you and are working with your transition team. I am enclosing a copy of the written record of that hearing, which you can also find on my website at www.feingold.senate.gov/ruleoflaw and on the Government Printing Office website at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:45240.pdf and http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:45240err.pdf. I hope you and your team find the hearing record useful as you prepare to take office.

All three branches of government must be engaged in the process of restoring the rule of law, but the role of the President is particularly important because turning back the excesses of the Bush Administration may be seen in some respects as contrary to the institutional interests of the presidency. That is why it is all the more important that you clearly and unequivocally renounce, early in your tenure, President Bush's extreme claims of executive authority. Indeed, stating this position in your inaugural address would affirm to the nation, and the world, that respect for the rule of law has returned to the Oval Office. I urge you to take the opportunity in your first speech as President to make a strong and clear statement of your intention to restore the rule of law in our country.

In addition, I want to draw to your attention some particularly significant recommendations for executive branch action that came out of the hearing, and that I hope will receive your serious consideration. I will be working separately to advance other, related proposals that clearly require legislative action. Most of the recommendations below can be acted on early in your administration. They fall into four categories: separation of powers; excessive government secrecy; detention and interrogation policy; and domestic surveillance and privacy.

- Separation of Powers
 - The new administration should make the restoration and advancement of the rule of law an overarching theme. This should include an explicit rejection of the extreme theory of Article II executive power that the Bush administration has used to justify torture and illegal warrantless wiretapping; a pledge to work with Congress to give priority to measures to restore public confidence in the rule of law; and an announcement of a zero tolerance policy for official misconduct.

- The new administration should recognize and cooperate with the legitimate oversight function of Congress. In certain key areas like interrogation policy and surveillance, Congress was kept in the dark for years and there remain significant impediments to congressional inquiries. I urge your administration to provide requested information on these issues to Congress as soon as possible and to cooperate with future oversight efforts.
- The new administration should view the congressional intelligence committees as a partner rather than a nuisance. It must commit to full compliance with the National Security Act, ending the abuses of the limited “Gang of Eight” notifications and ensuring that the full committees are kept fully and currently informed of all intelligence activities.
- The new administration should conduct a comprehensive review of opinions issued by the Department of Justice Office of Legal Counsel (OLC) under the Bush administration, and repudiate or revise those that overstate executive authority.
- Excessive Government Secrecy
 - The new administration should conduct a review of pending cases in which the state secrets privilege has been invoked to assess whether the invocation was proper. It should also support legislative efforts, such as the State Secrets Protection Act (S. 2533/H.R. 5607), to allow more meaningful judicial scrutiny when the privilege is invoked.
 - The new administration should rewrite President Bush’s executive order regarding classification policies and procedures (Executive Order 13292) to reinstate provisions from the previous classification order (Executive Order 12958, signed by President Clinton) that established a presumption against classification; allowed senior agency officials to declassify information in certain exceptional cases; and prohibited re-classification of properly declassified information. The new administration also should seriously consider ordering each entity with classification authority to do a thorough review of its classification policies and practices to reduce over-classification.
 - The new administration should reverse the October 2001 “Ashcroft Memorandum,” which stated that the Justice Department will defend an agency’s decision to withhold a document requested under the Freedom of Information Act if the document even arguably falls within one of FOIA’s

exemptions. Instead, the new administration should reinstate the presumption of disclosure established under a 1993 memorandum issued by Attorney General Reno, which stated that DOJ will defend an agency's decision to withhold a document only if the agency reasonably foresees that disclosure would be harmful to an interest protected by one of FOIA's exemptions.

- Past and future memoranda and opinions issued by the Department of Justice Office of Legal Counsel should be made available to the public to the maximum extent possible. In addition, public release early in your administration of some of the more controversial OLC opinions governing interrogation policy and warrantless wiretapping (redacted, if necessary, to protect sources and methods) would help assure Congress and the American people that the new administration is committed to transparency and the rule of law.
- The new administration should revoke Executive Order 13233, issued in November 2001. This executive order limited public access to presidential records by allowing former presidents and their heirs to block access to presidential records, and by creating a new vice presidential privilege. Revoking it would simply give effect once again to the longstanding regulations of the National Archive and Records Administration governing the release of presidential records.
- Detention and Interrogation Policy
 - The new administration should express its unqualified commitment to enforcing the ban against torture and cruel, inhuman and degrading treatment, and should establish as a matter of policy a single, government-wide standard of humane detainee treatment. I have supported efforts in Congress to make the Army Field Manual on Human Intelligence Collector Operations that standard. The new administration should revoke all existing orders and legal opinions authorizing cruel interrogations, including Executive Order 13440 and any relevant opinions of the OLC.
 - The new administration should commit to providing timely notification of and access to the International Committee of the Red Cross for any and all detainees held in U.S. custody anywhere in the world.
 - The new administration should close the facility at Guantanamo Bay, as you have pledged to do. Closing Guantanamo raises a number of complex

questions, many of which were addressed in the hearing submissions. I hope those submissions can serve as a resource to your administration in addressing these difficult issues. As you tackle the Guantanamo problem, however, I urge you not to establish an entirely new preventive detention regime based on concerns about a very small number of difficult cases.

- The new administration should reject the flawed military commission trial system being used at Guantanamo Bay.
- The new administration should develop effective means of enforcing the ban against rendering individuals to countries where they have a credible fear of being tortured.
- Domestic Surveillance and Privacy
 - As an early demonstration of the new administration's commitment to transparency and cooperation with Congress, I urge you to declassify basic information about the implementation of controversial provisions of the USA Patriot Act to allow more open consideration and debate when that legislation is reauthorized in 2009. I can discuss with your transition team in a classified setting some of the information that I believe can be declassified without compromising national security.
 - The new administration should support significant legislative changes to domestic surveillance authorities as part of the 2009 Patriot Act reauthorization process, including reforms to the National Security Letter statutes and others. It should commit to working collaboratively with Congress on this legislation, rather than in the counter-productive adversarial posture that the Bush administration has so frequently adopted.
 - I believe that Congress should undertake a comprehensive review of domestic intelligence activities and authorities to assess the most effective ways to prevent a terrorist attack and collect other critical intelligence while also protecting the rights of Americans – and it will be critical to have the cooperation of the new administration if such a review goes forward. This review should include an assessment of the threat inside the U.S., an evaluation of all current laws and their implementation, and a review of the respective roles of relevant agencies and departments.

December 10, 2008

Page 6

- The new administration should support significant legislative changes to the FISA Amendments Act to ensure that it is effective in combating terrorism and collecting foreign intelligence while also protecting the privacy of innocent Americans. At the same time, the new administration should incorporate more privacy protections – such as stronger minimization procedures to limit the use of information gathered about Americans – into its implementation of the legislation. I can make more specific suggestions in a classified setting for important changes in implementation that can be made by the executive branch without congressional action.
- The new President and Attorney General should reconsider the new Attorney General Guidelines governing FBI investigations that went into effect on December 1, 2008, to make sure the FBI is devoting its limited resources to the greatest threats and not wasting its time investigating people who have done nothing wrong. In particular, investigations based on ethnic or racial profiling or the First Amendment-protected activities of the targets should not be countenanced.

Finally, I want to raise with you the need for a detailed accounting of what happened over the past eight years, and how the outgoing administration came to reject or ignore so many of the principles on which this nation was founded. It seems to me that we must fully understand the mistakes of the past in order to learn from them, address them, and prevent them from recurring. At the same time, there need not be a focus on retribution or pay-back, and such an effort should not be used to score partisan points. There are a range of options for ensuring that this very important endeavor takes place. I hope you agree that this kind of accounting is needed and would welcome your input on the most efficient and credible way to bring it about.

I and my staff would be happy to discuss these issues in further detail if it would be helpful. I look forward to working with you on this and many other initiatives in the coming years.

Sincerely,

A handwritten signature in black ink, appearing to read "Russ Feingold". The signature is written in a cursive, flowing style.

Russell D. Feingold
United States Senator