**Statement of Ralph Nader**
**September 16, 2008**
**Before the Constitution Subcommittee**
**of the Senate Judiciary Committee**
**on**
**"Restoring the Rule of Law"**

Mr. Chairman and members of the Constitution Subcommittee of the Senate Judiciary Committee, thank you for the opportunity to submit testimony on the important and fundamental topic of "Restoring the Rule of Law" to the workings of the Executive Branch. I ask that this statement be made part of the printed hearing record and I commend you for taking the initiative to explore what steps the next President and the next Congress must take to repair the massive damage that President George W. Bush has done to the rule of law and our democracy.

When the President beats the drums of war, the dictatorial side of American politics begins to rear its ugly head. Forget democratic processes, Congressional and judicial restraints, media challenges, and the facts. All of that goes out the door. Dissenting Americans may hold rallies in the streets, but their voices are drowned out by the President speaking from the bully pulpit.

The invasion and occupation of Iraq, and the resulting quagmire, is Bush's most egregious foreign policy folly, but reflects a broader dynamic. Remember retired General Wesley Clark's stinging indictment of the administration: "President Bush plays politics with national security. Cowboy talk. The administration is a threat to domestic liberty."

President George W. Bush often uses the words and terms, "freedom," "liberty," and "our way of life" to mask his unbridled and largely unchallenged jingoism. The politics of fear sells. Cold war politics sold. The war on terrorism sells. But it's a very expensive sale for the American people. Even with the Soviet Union long gone, America's military budget amounts to half the operating federal budget. While vast resources and specialized skills are sucked into developing and producing redundant and exotic weapons of mass destruction, America's economy suffers and its infrastructure crumbles.

As the majority of workers fall behind, Bush has appointed himself ruler of Baghdad and, with the complicity of a fawning Congress, is draining billions of dollars away from rebuilding America's public works—schools, clinics, transit systems, and the rest of our crumbling

infrastructure. How does Bush sell America on this diversion of funds and focus?

With the politics of fear at his back, President Bush and company openly tout the state of permanent war. There are no limits to their hubris. The same Bush regime that applies rigid cost-benefit analysis to deny overdue government health and safety standards for American consumers, workers, and the environment sends astronomical budgets to Congress for the war on stateless terrorism. Bush's own Office of Management and Budget throws its hands up and observes that the usual controls and restraints are nowhere in sight. The Government Accountability Office (GAO) deems the Pentagon budget to be unauditable. To appropriate runaway spending in the name of homeland security, the powers-that-be need only scream one word: Terrorism!

If you ask Bush Administration officials how much this effort will cost, they recite a convenient mantra: "whatever it takes to protect the American people." In fact, trillions of dollars annually would not suffice to fully secure our ports, endless border crossings by trucks and other vehicles, the rail system, petrochemical and nuclear plants, drinking water systems, shipments of toxic gases, dams, airports and airplanes, and so forth. So "whatever it takes" is actually a prescription for unlimited spending. Much of the war on terrorism involves domestic guards and snoops. The word "terrorism," endlessly repeated by the President and his associates, takes on an Orwellian quality as a mind-closer, a silencer, an invitation to Big Brother and Bigger Government to run roughshod over a free people.

A country with numerous and highly complex vulnerable targets cannot be fully secured against determined, suicidal, well-financed and equipped attackers. That obviously doesn't mean we shouldn't take prudent measures to reduce risks, but our allocation of funds must be made realistically, and we shouldn't just throwing money at the problem. And, our policies and expenditures must address the climate in which terrorism flourishes.

Then there's the great unmentionable. If you listen to President Bush, Vice President Cheney, and the other members of their cabal, well-financed suicidal al Qaeda cells are all over the country. If so, why haven't any of them struck since September 11? No politician dares to raise this issue, though it's on the minds of many puzzled Americans. As General Douglas McArthur advised in 1957, and General Wesley Clark did much more recently, it is legitimate to ask whether our government has exaggerated the risks facing us, especially when such exaggeration serves

political purposes—stifling dissent, sending government largesse to corporate friends, deflecting attention from pressing domestic needs, and in concentrating more unaccountable power in the White House to pursue wars that provide a recruitment ground for more stateless terrorists.

George W. Bush willingly moves us toward a garrison state, through the politics of fear. We're experiencing a wave of militarism resulting in invasive domestic intelligence gathering and disinvestment in civilian economies. The tone of the President has become increasingly imperial and even un-American. As he once told his National Security Council, "I do not need to explain why I say things. That's the interesting thing about being the President . . . I don't feel like I owe anybody an explanation." The president has implied that he occupies his current role by virtue of divine providence. His messianic complex makes him as closed-minded as any president in history. Not only is he immune from self-doubt, but he fails to listen to the citizenry prior to making momentous decisions. In the months leading up to the invasion of Iraq on March 20, 2003, Bush didn't meet with a single major citizens' group opposed to the war. In the weeks leading up to the war, thirteen organizations— including clergy, veterans, former intelligence officials, labor, business, students—representing millions of Americans wrote Bush to request a meeting. He declined to meet with a single delegation of these patriotic Americans and didn't even answer their letters.

Bush's authoritarian tendencies preceded the march to Baghdad. First, he demanded an unconstitutional grant of authority from Congress in the form of an open-ended war resolution. Our King George doesn't lose sleep over constitutional nuance, especially when members of Congress willingly yield their authority to make war to an eager president. Next, Bush incessantly focused the public on the evils of Saddam Hussein (a U.S. ally from 1979–1990), specifically how his weapons of mass destruction and ties to al Queda posed a mortal threat to America. The Administration's voice was so loud and authoritative, and the media so compliant, that all other voices—of challenge, correction, and dissent—were overwhelmed. And so Bush plunged the nation into war based on fabrications and deceptions, notwithstanding notes of caution and disagreement from inside the Pentagon, the CIA, and the State Department. This was a war launched by chicken hawks, counter to the best judgment of battle-tested army officers inside and outside the government.

In retrospect, it is clear that there were no weapons of mass destruction except those possessed by the invading countries. It also seems clear that Saddam Hussein was a tottering dictator "supported" by a dilapidated army unwilling to fight for him and surrounded by far more powerful hostile nations (Israel, Iran, and Turkey). The notion that this man posed a mortal threat to the strongest nation in the world fails the laugh test. Bush's dishonest and disastrous maneuvers to take our country to war meets the threshold for invoking impeachment proceedings under Article II, Section 4 of the Constitution.

Some brave Americans did speak out against the war, or at least expressed grave reservations. The media were mostly cheerleaders—uncritical of the leader, dismissive of dissenters, indifferent to their obligation to search for truth and hold officialdom's feet to the fire.

The legal profession, except for a handful of law professors and law school deans and Michael S. Greco, a past President of the American Bar Association, provided very little organized resistance to the Bush war. The situation was even worse within government.

The system of checks and balances requires three vigilant branches, but Congress has disgraced itself from virtually the beginning of the Bush administration, assisting an extraordinary shift of power to the executive branch. In October 2001, a panicked Congress passed the Patriot Act, without proper Congressional hearings, giving the Bush administration unprecedented powers over individuals suspected (and in some cases not even suspected) of crimes. Subsequently, Congress gave the President a virtual blank check to wage a costly war.

In these respects, and others, the war on terrorism has important parallels to the Cold War. Domestically, the latter was characterized by relentless focus on a bipolar world largely dictated by the iron triangle of giant defense companies, Congress, and the military leadership, mutually reinforced with campaign contributions, lucrative contracts, new weaponry, and bureaucratic positions. A foreign policy responsive to the iron triangle produced some perverse results. The United States overthrew any number of governments viewed as too congenial to similar reforms that our own ancestors fought for—land reform, workers rights, and neutrality toward foreign countries. We replaced such governments with brutal puppet regimes. We also used our armed forces to protect the interests of the oil, timber, mining, and agribusiness industries.

Indeed, such policies long preceded the Cold War. No one articulated it more clearly or candidly than Marine General Smedley Butler, whose provocative eyewitness accounts rarely made their way into our history books:

> I spent 33 years in the Marines, most of my time being a high-class muscle man for big business, for Wall Street and the bankers. In short, I was a racketeer for Capitalism. I helped make Mexico, especially Tampico, safe for American oil interests in 1914. I helped make Haiti and Cuba a decent place for the National City Bank boys to collect revenues in. I helped in the raping of half a dozen Central American republics for the benefit of Wall Street. The record of racketeering is long. I helped purify Nicaragua for the international banking house of Brown Brothers in 1909–1912. I brought light to the Dominican Republic for American Sugar interests in 1916. In China I helped to see to it that Standard Oil went its way unmolested.

"War is a racket," Butler wrote, noting that it tends to enrich a select few. Not the ones on the front lines. "How many of the war millionaires shouldered a rifle?" he asked rhetorically. "How many of them dug a trench?"

Butler devoted a chapter of his long-ignored book, *War Is a Racket*, to naming corporate profiteers. He also recounted the propaganda used to shame young men into joining the armed forces, noting that war propagandists stopped at nothing: "even God was brought into it." The net result? "Newly placed gravestones. Mangled bodies. Shattered minds. Broken hearts and homes. Economic instability."

Does this all sound familiar? The September 11 attack gave rise to a corporate profiteering spree, including a demand for subsidies, bailouts, waivers from regulators, tort immunity, and other evasions of responsibility. Before the bodies were even recovered from the ruins of the World Trade Center, the Wall Street Journal was editorializing that its corporate patrons should seize the moment.

Foreign policy amounts to more than national defense, and national defense amounts to more than a mega-business opportunity for weapons and other contractors. All too often, corporate sales priorities have driven defense priorities, leading to militarization of foreign policy.

Consider the 1990's "peace and prosperity" decade, possibly the greatest blown opportunity of the twentieth century. In 1990, the Soviet Union collapsed in a bloodless implosion. Suddenly, we faced the prospect of an enormous "peace dividend," an opportunity for massive savings or newly directed expenditures since the main reason for our exorbitant military budget had

disappeared. Not so fast, said the military-industrial complex, there must be another major enemy out there—maybe Communist China, or a resurgent Russia, or some emerging nation developing nuclear weapons. We allegedly needed to prepare for the unknown, hence went full-speed ahead with tens of billions for missile defense technology, considered unworkable by leading physicists.

In the battle for budget allocations, what chance did the "repair America" brigades have against the military-industrial complex? More B-2 bombers or repaired schools? F-22s or expansion of modern health clinics? More nuclear submarines or upgraded drinking water systems? We know who won those battles. And after 9/11, it was no contest.

As the perceived threat shifted from the Soviet Union to stateless terrorism, the weapons systems in the pipeline from the Cold War days moved toward procurement. On top of that is the chemical, biological, surveillance, detection, and intelligence budgets to deal with the al Qaeda menace. Everything is added, almost nothing displaced. We are constantly told by politicians and the anti-terrorist industry that 9/11 "changed everything."

This sentiment suggests the lack of proportionality of our new permanent war. It's also a sentiment that must make Osama bin Laden ecstatic. Bin Laden wanted to strike fear in America. He did so, and then watched as the first response to this fear was a sweeping crackdown on people with a Muslim or Arab name or visage. Thousands were detained or arrested or jailed on the flimsiest of suspicions, opening the Bush administration up to the charge of hypocrisy when we challenge Islamic nations about due process violations. All of this created more contempt for America among young people throughout the Middle East, no doubt helping the recruiting efforts of our enemies.

Bin Laden must have delighted in attempting to push America toward becoming a police state and sowing discord among us. He must have been thrilled by red and orange alerts, inconvenience at airports, and all kinds of excessive expenditures damaging our economy. And bin Laden must have taken perverse delight in press reports that Bush believes he was put on this earth by God to win the war on terrorism. If he wished to inspire a clash of civilizations, he apparently found a willing collaborator in Bush, who invaded Iraq, prompting Bush's retired anti-terrorism expert Richard A. Clarke to write in his book, *Against All Enemies*, that by invading and occupying Iraq, "We delivered to al Qaeda the greatest recruitment propaganda imaginable..."

Bin Laden must have been very pleased to hear the news about Bush's war of "shock and awe".

As all this suggests, America's response to 9/11 was not only disproportionate but also counterproductive. A Washington think-tank fellow said something sensible: "When you are fighting terrorism, you want to do it in a way that does not produce more of it." Are we doing that? Terrorism takes many forms, as in the Sudan, as in the Rwanda rampage that claimed 800,000 lives, the state terrorism of dictators, the added terrorism of hunger, disease, sex slavery, and man-made environmental disasters. With no major state enemy left, what can we do to prevent and diminish these various forms of terrorism, as well as deter more suicidal attacks from fundamentalists? Perhaps we need to redefine national security, redirect our mission, reconsider our relations with other countries.

All in all, the failures of Congress and the judiciary to reign in an out-of-control Executive Branch significantly contributed to the erosion of the "rule of law." And, working to restore the "rule of law" will require Congress to embrace its duties as a co-equal branch of government.

Throughout our nation's history, we have witnessed sacrifices in civil liberties that went too far. We should not get swept away by rhetoric and exaggerations suggesting that the current threat is greater than those we faced before -- rhetoric routinely employed throughout history to justify curtailment of civil liberties.

The "war on terrorism" does present one new aspect. Unlike all of the nation's previous wars (with the partial exception of the Cold War), it is "limitless in duration and place," which has major ramifications for our civil liberties. In the past, the arguably extra-constitutional powers assumed by government in war-time (such as the suspension of habeas corpus during the Civil War and the internment of the Japanese during World War II) were understood as temporary measures, with a return to the status quo ante expected as soon as hostilities ceased. The same cannot be said about our current concern with terrorism.

In the absence of a time when we clearly revert from war back to peace and reclaim our usual civil liberties, we need to be particularly careful about the "temporary" surrender of these rights. Inertia is a potent force and we run the risk of forfeiting liberties we never reclaim, especially when fighting a war that may never end. This may be a good reason to drop the nomenclature "war on terrorism." It's certainly good reason to sunset laws that compromise civil liberties.

Here, as so often, we can learn from the founders. The nation's first law that dangerously curtailed civil liberties, the infamous Sedition Act in late 1799, lasted only a few years. Contrary to the conventional wisdom, it was not repealed by Thomas Jefferson's Democrat-Republican Party after he and it came to power in 1801. They didn't have to take action: the act was, by its own terms, to expire after two years unless reauthorized.

In a similar vein, Congress should attach to each law that materially diminishes our freedoms an automatic expiration in two or four years unless, after the designated period, Congress determines that the act: 1) achieved enough in terms of security to justify its diminution of our freedom, and 2) remains necessary. Similarly, civil liberties-diminishing executive orders should automatically expire unless renewed by the president or through legislative enactment. Holding Congress accountable for the ongoing suspension of civil liberties is indispensable for preventing abuses.

Yale Law professor Bruce Ackerman recently devoted a book to essentially a single proposition: the need for a mechanism to ensure that, following any major terrorist attack, responsive measures that limit civil liberties be temporary. (Ackerman terms his proposal an "emergency Constitution," but it is actually a statutory approach requiring no constitutional amendments.) Ackerman proposes many specifics - for example, that all emergency powers subside after two months, and every reauthorization require a higher degree of congressional support (60% the first time, 70% the next time, and so forth), but the specifics are less important than the insight that animates it: liberties taken in times of crisis will not necessarily be returned after the crisis subsides. Government officials may be sanguine about retaining powers seized during a national emergency, and, regrettably, the American people may become accustomed to diminished liberty.

Courts provide a degree of protection, but Ackerman emphasizes the courts' dangerous tendency to lump all wars together and allow precedents derived from earlier wars to dictate decisions in very different circumstances. Thus emergency measures enacted for a major threatening war like World War II are invoked as justification for sweeping governmental powers during far more limited engagements. Not all wars are created equal, and Ackerman argues that the war on terrorism does not pose a threat to America's existence like the Civil War. The biggest

difference between the battle against terrorism and other major engagements is not the nature of the threat as much as its duration (although, again, the Cold War suggests that this, too, is not unprecedented). Ackerman rightly emphasizes this point. Because the present state of hostilities could last decades, it is imperative that we not casually accept all curtailments of liberty enacted in its name.

As the experience with the U.S.A. Patriot Act suggests, an attack on the United States sets in motion irresistible pressure for immediate action. The U.S.A. Patriot Act permits federal agents to search our homes and businesses without even notifying us, simply by asking a court for a warrant -- a court that almost never says no. It permits the government to find out from libraries and bookstores what we've been reading and prohibits the librarian or store owner from telling us about the snooping. The Act permits government to listen in on conversations between lawyers and their clients in federal prisons, and to access our computer records, e-mails, medical files, and financial information on what is essentially an enforcement whim. It eviscerates the great constitutional restraint called "probable cause." Without probable cause, government agents can covertly attend and monitor public meetings, including at places of worship.

The enhanced government powers were not narrowly tailored to prevention of terrorist attacks. Rather, as Professors Laurence Tribe and Patrick Gudridge observed, under the guise of preventing another 9/11, Congress took action affecting "the most commonplace bureaucratic and policing decisions . . . not only at obvious focal points of precaution like airports but also at other, seemingly unconnected institutions such as public libraries," expanding government power "in the everyday settings of general police procedures and criminal prosecutions of defendants charged with strictly domestic crimes." We witnessed, in their apt phrase, the "bleeding of emergency into non-emergency, of extraordinary into ordinary."

Note that Bruce Ackerman's "emergency Constitution" does not prevent the President and Congress from responding fully to the initial attack and doing whatever is necessary to ward off subsequent attacks. To the contrary, it clarifies and codifies the emergency powers needed to achieve these goals. But, critically, it also clarifies and codifies that such a response will not permanently curtail civil liberties.

During periods of relative calm, it is hard to realize what may transpire when times cease to

be calm. We need to remember that President Roosevelt herded the Japanese Americans into camps during World War II. Ackerman rightly asks us to consider whether we can be certain that millions of Arab Americans won't be interned if Muslim extremists strike us again. Of course, any preexisting restraints may be swept aside in the post-attack environment, but that is no reason not to do everything we can to put the breaks on future over-reaction now, while things are relatively calm. Ackerman reminds us that we needn't choose between giving presidents the authority to handle emergencies and safeguarding civil liberties during normal periods. We can and must do both.

Three days after the terrorist attacks on September 11, 2001, Congress passed the Authorization for Use of Military Force (AUMF), permitting the President to "use all necessary and appropriate forces against those nations, organizations or persons he determined planned, authorized, committed or aided the terrorist attacks of 9/11, or harbored such organizations, or persons." At that point, the Bush administration and Congress did not know which nations played a role in assisting those who attacked us. The U.S. government just wanted to do whatever was necessary to punish the perpetrators of the attacks.

The most open-ended terms in AUMF, "appropriate" and "aided," present an obvious risk. What about nations that may have provided minimal aid to bin Laden? At one point or another, at least a dozen nations may have given safe haven to him or members of his organization - out of indifference, inertia, or domestic political calculation, not to help him launch an assault on America. Such assistance may be something for us to protest and actively discourage in the future, and there are numerous diplomatic and economic means for doing so, but AUMF appears to authorize the President to wage all-out war against any such nations if he elastically interprets the phrase "aided the terrorist attacks of 9/11."

We needn't speculate that a president might interpret the authorization elastically. Under the guise of using necessary and appropriate force against persons and organizations that may have played some role in the attack, the Bush administration engaged in extensive eavesdropping on telephone calls by and to American citizens. Such surveillance may be necessary to help capture terrorists or thwart specific attacks, but the Foreign Intelligence Surveillance Act (FISA) already exists for that purpose and FISA courts have been overwhelmingly compliant with requests for

warrants to wiretap. Under the guise of AUMF's authorization of "necessary and appropriate force" to fight those involved in the 9/11 attack, the administration ignored FISA's requirement of a warrant, which is a felony under FISA's terms.

Can AUMF reasonably be read to trump FISA? Conservative columnist George Will notes that "[n]one of the 518 legislators who voted for the AUMF has said that he or she then thought that it contained the permissiveness the administration now discerns in it." The argument that it nevertheless trumps FISA, observes Will, is "risible coming from [an] administration" that purports to demand strict construction of statutes to ensure conformity to legislative intent.

The Bush Administration also cited a second legal basis for the eavesdropping program: the President's inherent war-making authority under Article II of the Constitution. On this interpretation, surveillance required no Congressional authorization.

The dangers of this monarchical doctrine, and its disregard for separation of powers, are too obvious to belabor. Congress should not assist the executive in a power-grab by providing additional war-making weapons that amount to a blank check. Admittedly, it is hard to thwart a president hell-bent on expanding executive powers and willing to mangle the Constitution in the process. George Will jokingly proposes that when Congress passes laws authorizing executive power, it should "stipulate all the statutes and constitutional understandings that it does not intend the act to repeal or supersede." A more realistic approach is for Congress to accompany its grant of power with a straightforward stipulation that it is "subject to the limitations of existing law." Moreover, Congress should accompany such legislation with a definitive procedure for consultation on whatever war-related powers the executive chooses to exercise. In fact, Congress should never authorize the president to use all "necessary and appropriate force" without a declaration of war.

The notion that the Administration was listening to whatever conversations it wanted without any need to show any basis for suspicion, and would happily have done so indefinitely (the American people and most members of Congress were unaware of the surveillance program until it leaked), because years earlier Congress authorized use of "necessary and appropriate force" against those who assisted a terrorist attack - this notion vividly illustrates the dangers of an open-ended authorization of force. Permitting the Executive Branch exclusive power to define its

own authority virtually guarantees the supplanting of the rule of law by the rule of men. That this may happen in practice, with the executive branch ignoring or circumventing legal restraints, is no excuse for Congress to create the monster itself.

Vice President Cheney suggested that surveillance is solely a means of keeping tabs on known terrorists, not a matter of eavesdropping on ordinary Americans for no reason. This view would allow the government to employ surveillance against anyone about whom it has some suspicion, however remote. A more alarming peril is that surveillance will be used as part of a campaign to discredit, harass or intimidate political opponents. This possibility is just the kind of abuse the founding fathers saw the Fourth Amendment as safeguarding against.

The 1763 British case of Wilkes v. Wood is worth noting. John Wilkes was a popular member of Parliament who authored an anonymous pamphlet attacking the King. The ministry proceeded to break into Wilkes' house and seize his private papers. It also rounded up many of his friends as well as the publishers and printers of the offending pamphlet. The Fourth Amendment's protection against unreasonable searches and seizures represented a response to such politically-motivated abuse of power.

If the founders saw the need for protection against this sort of thing, history vindicated their judgment. Richard Nixon notoriously ordered illegal wire-tapping of political groups and persons whom he considered hostile, and his administration wasn't the first. It was a Democratic attorney general under Democratic presidents who engaged in illegal surveillance of Dr. Martin Luther King. Of course, Nixon, John and Robert Kennedy, and J. Edgar Hoover did not see themselves as engaged in unjustified, undemocratic behavior. Rather, people in power tend to rationalize such misconduct, convincing themselves that their opponents are actually disloyal and dangerous to America. In other words, the risk is not that an administration will decide it wants to hear innocent conversations between citizens, but rather the conversations of certain political adversaries. On the flimsiest or most attenuated evidence, officials may convince themselves that such persons present a threat to the nation.

Moreover, as the framers well understood, the power to search, seize, and harass tends to be exercised by government officials below the public's radar. Legal scholar John Hart Ely notes that the Fourth Amendment was motivated by "a fear of official discretion," a recognition that in

exercising powers over individuals based on suspicion, "law enforcement officials will necessarily have a good deal of low visibility discretion."

This observation suggests the fallacy of those who minimize concern about civil liberties and offer reassurance that only phone calls involving terrorists will be monitored. That might be the case if all relevant decisions were made by accountable officials, but the reality on the ground is often different. Some of the worst abuses of civil liberties will inevitably result from the clandestine actions of unaccountable, lower-level officials. They mustn't be supplied with the means unnecessarily.

Nor must we acquiesce in the intuition of many innocent laypeople, stoked by politicians' rhetoric, that those who obey the law have nothing to fear. Again, as the founders well understood, the world isn't neatly divided between innocent citizens and Osama bin Laden, with the government interested in using surveillance solely to disrupt the latter. In our much messier world, vigilance against governmental abuse should not be swept aside by naïve or disingenuous rhetoric.

In the discourse on the tradeoff between freedom and security, "patriotism" has been hijacked by those most willing to sacrifice civil liberties. Samuel Johnson famously considered patriotism "the last refuge of a scoundrel" but his biographer Boswell, who passed along that judgment, added that Johnson "did not mean a real and generous love of our country, but that pretended patriotism which so many, in all ages and countries, have made a cloak of self-interest." If patriotism is the love of country, then making one's country more lovely is the mark of a true patriot. Blind obedience fails to help a country fulfill its promise.

When Congress moved hastily in the aftermath of the 9/11 attacks to take measures enhancing security, without carefully considering the dangers of over-reacting and over-curtailing civil liberties, it cleverly titled its legislation the "U.S.A. Patriot Act." Talk about seizing the rhetorical high ground! But Senator Feingold, the sole Senator to oppose the Act (because he saw certain provisions, among others, as needlessly authorizing the invasion of innocent citizens' privacy), was no less patriotic than his peers. To the contrary, Senator Feingold acted in a great American tradition.

Thomas Jefferson was a far-sighted founder who understood the value of political dissent.

While sharing his fellow founders' instinctive aversion to political parties (he allegedly remarked that if "I could not go to heaven but with a party, I would not go there at all"), he nevertheless inspired and led the first opposition party. That party came to power in 1800 in large part because Jefferson appreciated that criticism of the government must be tolerated - indeed, welcomed. The Sedition Act, employed by the Adams administration to punish dissent, reminds us that war fever tends to produce a crackdown on freedom. But it also reminds us that the framers, subject to the same frailties as their successors, were wise enough to provide protection against those frailties. Jefferson and his political allies opposed the Act because it ran afoul of the spirit and letter of the Constitution.

The affronts to the rule of law can come in a variety of forms. Congress allowed President Bush to mislead Congress and to engage in an undeclared war. In a September 3, 2007 oped which appeared in the Los Angeles Times, Mario M. Cuomo, the former governor of New York wrote:

> The war happened because when Bush first indicated his intention to go to war against Iraq, Congress refused to insist on enforcement of Article I, Section 8 of the Constitution. For more than 200 years, this article has spelled out that Congress -- not the president -- shall have "the power to declare war." Because the Constitution cannot be amended by persistent evasion, this constitutional mandate was not erased by the actions of timid Congresses since World War II that allowed eager presidents to start wars in Vietnam and elsewhere without a "declaration" by Congress.
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> Nor were the feeble, post-factum congressional resolutions of support of the Iraq invasion -- in 2001 and 2002 -- adequate substitutes for the formal declaration of war demanded by the founding fathers.

The Bush Administration sanctioned warrantless wiretapping, and supported wide-ranging violations of privacy. The use of torture, unconstitutional detention policies, suspension of habeas corpus, and immunity for illegal wiretapping by telephone companies, have all brought shame on our country.

And, the Bush Administration's questionable claims of executive privilege and the presumption that excessive government secrecy is almost always justifiable and beneficial undermine our country's moral authority to promote democracy. In testimony in July of this year before the Judiciary Committee of the House of Representatives, former Member of Congress

Bob Barr said that the "state secret privilege" should "be treated as qualified, not absolute." He added, "Congress could assist the judiciary by holding hearings and drafting legislation clarifying the authority of judges, procedures to be used to adjudicate executive claims of state secrecy, and sanctions to be imposed for the executive branch's refusal to comply." This small, but consequential suggestion, if followed, would do much to avoid the misdeeds that can proliferate when transparency is obscured.

The Bush Administration's attempt to increase the power of the Executive Branch at the expense of Congress through signing statements even prompted the reserved American Bar Association to adopt a resolution opposing this overreaching abuse. The resolution states:

> That the American Bar Association opposes as contrary to the rule of law and our Constitutional system of separation of powers, the misuse of presidential signing statements by claiming the authority or stating the intention to disregard or decline to enforce all or part of a law the President has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress...

Much of what has been done by the Bush Administration to undermine the rule of law can best be remedied by Congressional action. The next President can, however, start to immediately right the egregious wrongs of the Bush Administration by issuing appropriate Executive Orders to clarify government policies on issues such as torture and abuses of civil liberties.

Let me conclude by saying Congress has been far too docile in dealing with the Bush Administration's corruption of the rule of law. Indeed, Congress has also been derelict in its duties by resisting consideration of impeachment proceedings.

Prominent Constitutional law experts believe President Bush has engaged in at least five categories of repeated, defiant "high crimes and misdemeanors", which separately or together would allow Congress to subject the President to impeachment under Article II, Section 4 of the Constitution. The sworn oath of members of Congress is to uphold the Constitution. Failure of the members of Congress to pursue impeachment of President Bush is an affront to the founding fathers, the Constitution, and the people of the United States.

In July of this year Elizabeth Holtzman, a former Member of Congress, testified before the House Judiciary Committee. In her testimony she made a compelling case for impeachment. She said:

But sad as the responsibility to deal with impeachment is, it cannot be shrugged off. The framers put the power to hold presidents accountable in your hands. Our framers knew that unlimited power presented the greatest danger to our liberties, and that is why they added the power of impeachment to the constitution. They envisioned that there would be presidents who would seriously abuse the power of their office and put themselves above the rule of law. And they knew there had to be a way to protect against them, aside from waiting for them to leave office.

Her advice to the Committee on the Judiciary of the House of Representatives merits consideration by the House of Representatives, even at this late date. Ms. Holtzman said:

> I understand the great time constraints and the virtual impossibility of completing a full-blown impeachment inquiry before this session of Congress is over. Nonetheless, there are compelling, pragmatic reasons--as well as a constitutional imperative--to commence an inquiry now, and pursue it in a meaningful and, constructive way over the few remaining months.
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> Even if an impeachment inquiry is not completed or does not result in an impeachment vote in the House or the Committee, it still should be undertaken. It is warranted and since impeachment inquiries cannot be evaded by citing executive privilege, initiating an inquiry now would accomplish several valuable purposes:
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> a) It would send a clear message to the American people and future presidents that the actions engaged in by top Administration officials are serious enough on their face to warrant an impeachment inquiry. It would create a precedent whereby executive privilege does not effectively vitiate a president's accountability to Congress, as this Administration has sought to do. This would create a deterrent to future administrations. So would the historic nature of impeachment. Opening an impeachment inquiry would put this Administration in a very small category along with only three others in US history that have been the subject of such an inquiry.
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> b) Because there is no executive privilege in an impeachment inquiry, [pursuing] one would allow the Committee to obtain additional material on presidential and vice presidential conduct which the Administration has until now refused to provide. That material would disclose the details about Administration actions that are currently secret. Those details would better inform Congress about what the appropriate response to this Administration's actions should be. They would also better inform it about how to avert abuses of power by future presidents. That in itself would be an important outcome of new disclosures. Alternatively, if the Administration still refuses to provide the information and documents requested as part of an impeachment inquiry, that refusal would itself be an impeachable offense under the precedent established in the Nixon proceedings, with the bi-partisan adoption of the third article of impeachment holding that the refusal to respond to

committee subpoenas in an impeachment proceeding was an impeachable offense; and

c) It would allow a serious, sober and respectful discussion, in the appropriate and constitutionally mandated forum, of whether or not specific Administration officials committed impeachable offenses. The discussion would include a full and fair airing of evidence and argument on both sides, both allegations and defenses. As I understand it, such a discussion cannot be fully and satisfactorily conducted under House rules without a real impeachment inquiry.

One of the best ways for Congress to prevent future administrations from trampling the Constitution and the rule of law is to use the impeachment powers when necessary. The Bush Administration's criminal war of aggression in Iraq, in violation of our constitution, statutes and treaties, the arrests of thousands of individuals in the United States and their imprisonment without charges, the spying on Americans without judicial warrant, systematic torture, and the unprecedented use of defiant signing statements should prompt Congress to act immediately after the Presidential elections, when it has more than seventy-five days before the inauguration of the next President.

Let us hope that we have all learned lessons from the overreaching of the Bush Administration that will serve to prevent future destructions of the rule of law – the essence of a just and orderly society.

Thank you.