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OFFICIAL ACCOUNTABILITY ACT

GOVERNMENT

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HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

H.R. 8388

OFFICIAL ACCOUNTABILITY ACT

FEBRUARY 2, 1976

Serial No. 66



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OFFICIAL ACCOUNTABILITY ACT

MONDAY, FEBRUARY 2, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m. in room 2226, Rayburn House Office Building, the Honorable Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Pattison, and Wiggins.

Also present: Bruce A. Lehman, counsel; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order. This morning we are convened for the first day of a hearing on H.R. 8388, the Official Accountability Act.

At the end of World War II, the Congress, the Executive, and the public insisted that the leaders of the Axis Powers accept personal responsibility for the systematic deprivation of human rights and violations of the laws of war which had been committed under the authority of their respective governments. The Nuremberg and Tokyo trials, the Charter of the United Nations and attempts to enact a code of war crimes all reflected the basic notion that a nation's political leaders should be held personally accountable for criminal acts committed at their command.

Unfortunately, this impetus toward general acceptance of the notion of official accountability was interrupted by the cold war and the creation of a national security system within the United States and elsewhere.

However, the tragic events associated with Vietnam such as My Lai and the deliberate bombing of neutral Cambodia, followed by more recent revelations of plots to assassinate foreign leaders and subvert legally constituted governments, require that we should return to the question of embedding the fundamental principles of Nuremberg in our own national law. It is in this light that the subcommittee begins 2 days of hearings on H.R. 8388, the Official Accountability Act.

This bill, cosponsored by 24 Members of the House, would establish a code of legal responsibility for civilian officials charged with the operation of national security policy. It does so by incorporating the international laws and customs of war, to which this Nation already subscribes, into the Federal Criminal Code, and by establishing an institutional mechanism for the investigation and prosecution of viola-

tions of those laws. It, in essence, reiterates, and strengthens our national commitment to lawful international behavior. To the international community, it upholds the principle of symmetry, declaring that the standards to which the United States has held the leaders of other nations accountable shall equally be applicable to the policymakers of this Nation. To the American public, it asserts the principle of official accountability, insuring that executive officials are responsible to the limitations of laws passed by the Congress.

There are at the present no operative legal mechanisms by which civilian officials may clearly be charged with, and prosecuted for, violations of the laws of war. Members of the Armed Forces are held responsible under the Uniform Code of Military Justice, but civilian officials remain legally unaccountable.

In an era in which civilian strategists increasingly plan a more active role in devising and directing military operations, this imbalance can result in the conviction of an enlisted man for implementing an illegal plan devised by an unaccountable civilian official.

This bill would meet the pledge made at Geneva and redress this basic imbalance. It would make it far more likely that the United States would once again practice the restraints which its international treaties proclaim.

And this bill, of course, does not purport to be perfect and is certainly a vehicle for substantial dialog on a very fundamental subject. [A copy of H.R. 8388 follows:]

94TH CONGRESS
1ST SESSION

H. R. 8388

IN THE HOUSE OF REPRESENTATIVES

JULY 8, 1975

Mr. KASTENMEIER (for himself, Mr. BADILLO, Mr. BROWN of California, Mr. PHILLIP BURTON, Ms. CHISHOLM, Mr. CONYERS, Mr. DELLUMS, Mr. DIGGS, Mr. DRINAN, Mr. EDWARDS of California, Mr. HARRINGTON, Mr. HELSTOSKI, Mr. KOCH, Mr. MIKVA, Mr. MITCHELL of Maryland, Mr. MOAKLEY, Mr. RANGEL, Mr. REES, Mr. REUSS, Mr. ROSENTHAL, Ms. SCHROEDER, Mr. SEIBERLING, Mr. STARK, and Mr. STOKES) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 18 of the United States Code to provide a code of accountability and liability for Government officials engaged in making and implementing national security policy.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That this Act may be cited as the "Official Accountability
- 4 Act of 1975".

FINDINGS, DECLARATIONS, AND PURPOSE

6 SEC. 2. (a) The Congress declares—

- 7 (1) that the United States shall adhere to the
- 8 accepted norms of international behavior, and in fulfill-

1 ment of this commitment shall enforce upon its own
2 officials those international laws and customs of war to
3 which the United States subscribes;

4 (2) that this commitment upholds the constitutional
5 principle that the actions of public officials are governed
6 by law; and

7 (3) that this commitment upholds the necessary
8 principle that the legal standards which this country ap-
9 plied to officials of other nations in the past are equally
10 applicable to officials in this country.

11 (b) The Congress finds—

12 (1) that the present mechanisms for reviewing and
13 prosecuting possible violations of the laws and customs
14 of war are inadequate and inoperative; and

15 (2) that the recent history of United States involve-
16 ments abroad illustrates the necessity for a reassertion
17 of legal limitations on civilian and military officials in
18 matters of war and peace.

19 (c) The purpose of this Act is to assure that persons
20 charged with making or implementing American foreign,
21 military, and national security policy will do so according to
22 law.

1 TITLE I—NATIONAL SECURITY CRIMES

2 PUNISHMENT OF NATIONAL SECURITY CRIMES

3 SEC. 101. (a) Part I of title 18 of the United States
4 Code (relating to crimes) is amended by adding at the end
5 thereof the following new chapter:

6 **"Chapter 121.—NATIONAL SECURITY CRIMES**

"Sec.

"2551. Persons subject to this part.

"2552. Prohibitions.

"2553. Defense of superior orders or action as responsible government
official.

"2554. Sanctions.

7 **"§ 2251. Persons subject to this chapter**

8 "The following persons are subject to this chapter:

9 " (1) Any officer or employee of the United States,
10 including any member of the Armed Forces of the
11 United States.

12 " (2) Any other person who receives, directly or
13 indirectly, any compensation or remuneration from the
14 United States in any form (whether pursuant to con-
15 tract, subcontract, or otherwise) for the commission of
16 any act which is, or results in, a violation of section
17 2552.

18 **"§ 2552. Prohibitions**

19 "(a) No person subject to this chapter shall order or

1 engage in the planning of, preparation for, initiation or
2 waging of a war of aggression or a war in violation of any
3 international treaty or agreement to which the United States
4 is a party.

5 “(b) No person subject to this chapter shall order or
6 engage in the planning of, preparation for, or commission of
7 any violation of the laws and customs of war, including but
8 not limited to—

9 “(1) murdering, torturing, using as hostages, using
10 for slave labor, or confining in concentration camps any
11 prisoners of war or any civilians of another nation; and
12 “(2) pillaging public or private property; or wan-
13 tonly destroying cities, towns, or villages.

14 “(c) For purposes of subsection (b), in addition to
15 any other acts referred to in such subsection, the following
16 shall be deemed to be in violation of the laws and customs
17 of war:

18 “(1) Bombing of civilian populations for the pur-
19 pose of terrorizing such civilian populations.

20 “(2) Destroying crops, livestock, or the natural
21 habitat of another country, people, or land unless im-
22 peratively demanded by the necessities of war.

23 “(3) Overthrowing by force, violence, or bribery
24 the leadership of a nation with which the United States
25 is not at war.

1 “(4) Using biological weapons in any form.

2 “(5) Entering into agreement with any individual
3 or any entity for the purpose of perpetrating any act
4 enumerated above.

5 “(d) For purposes of this section, the term ‘laws and
6 customs of war’ means the laws and customs relating to war-
7 fare and other hostile military operations derived from—

8 “(1) treaties and agreements to which the United
9 States is a party,

10 “(2) customary international law, and

11 “(3) the standards, principles, and precedents of the
12 Nuremberg, Tokyo, and other war-crimes tribunals.

13 **“§ 2553. Defense of superior orders or actions as respon-**
14 **sible Government official**

15 “(a) No person who commits any act in violation of
16 section 2552 pursuant to an order of his Government or su-
17 perior shall be relieved of criminal liability for such violation
18 unless he did not know and could not reasonably have been
19 expected to know that the act ordered was unlawful.

20 “(b) No person who commits any act in violation of
21 section 2552 shall be relieved of criminal liability for such
22 act by reason of the fact that he was acting as a responsible
23 Government official.

24 **“§ 2554. Sanctions**

25 “(a) Notwithstanding section 7501 of title 5, upon a

1 determination, after preliminary hearing pursuant to the
2 Federal Rules of Criminal Procedure; that there is probable
3 cause to believe that any person described in section 2551
4 (1) of this title has committed a violation of section 2552
5 of this title, such person shall be given a leave of absence
6 without pay from his employment by the United States for
7 the duration of the proceedings against him.

8 “(b) Any person who violates section 2552 shall be—

9 “(1) imprisoned not less than two years and not
10 more than twenty-five years, or, in the alternative,
11 sentenced for an equivalent period of time to such
12 civilian work contributing to the maintenance of national
13 health and welfare as the court may deem appropriate;
14 and

15 “(2) ineligible for employment by the United
16 States for such period of not less than fifteen years from
17 the date on which sentence is imposed as the Court may
18 specify.

19 **“§ 2555. Prosecution exclusively by National Security So-**
20 **licitor**

21 “Notwithstanding any other provision of law, the Na-
22 tional Security Solicitor shall have the exclusive authority
23 to prosecute any violation of this chapter.”

24 (b) (1) The table of chapters for such part I is amended
25 by adding at the end thereof the following new item:

“121. National security crimes----- 2551”.

(2) The table of contents for such title 18 is amended by inserting immediately after the item relating to chapter 119, the following new item:

"121. National security crimes----- 2551".

TITLE II—ADMINISTRATION AND ENFORCEMENT

SEC. 201. (a) Part VI of title 28 of the United States Code (relating to particular proceedings) is amended by adding at the end thereof the following new chapter:

"Chapter 177.—OFFICE OF NATIONAL SECURITY AFFAIRS; ENFORCEMENT DUTIES

"Sec.

"3101. Establishment of Office of National Security Affairs.

"3102. National Security Solicitor and Deputy Solicitor.

"3103. Employees of Office; rules and regulations.

"3104. Powers and duties of Solicitor.

"3105. Injunctions.

"3106. Miscellaneous rules.

"§ 3101. Establishment of Office of National Security Affairs

"There is hereby established an independent office to be known as the Legal Office of National Security Affairs (hereafter in this chapter referred to as the 'Office') which shall be under the exclusive control and direction of the National Security Solicitor.

"§ 3102. National Security Solicitor and Deputy Solicitor

"(a) There shall be in the Office a National Security Solicitor (hereafter in this chapter referred to as the

1 'Solicitor') and a Deputy Solicitor, who shall be appointed
2 by the President by and with the advice and consent of
3 the Senate. The Deputy Solicitor shall perform such duties
4 as may be assigned to him by the Solicitor, and during the
5 absence or incapacity of the Solicitor or during a vacancy
6 in that office, shall act as Solicitor.

7 " (b) The Solicitor and Deputy Solicitor shall each—

8 " (1) hold office for a term of fifteen years;

9 " (2) be ineligible for reappointment to their re-
10 spective offices;

11 " (3) be removed from office during the term thereof
12 only by a concurrent resolution passed by both Houses
13 of Congress.

14 " (c) (1) The Solicitor shall be compensated at the
15 rate of basic pay in effect for level IV of the Executive
16 Schedule. The Deputy Solicitor shall be compensated at the
17 rate of basic pay in effect for level V of the Executive
18 Schedule.

19 " (2) Upon completion of their terms, the Solicitor
20 and Deputy Solicitor shall receive an annuity in the same
21 manner as is provided in section 303 of the Budget and Ac-
22 counting Act, 1921, in the case of the Comptroller General.
23 Such annuities shall be paid by the Office. For the purpose
24 of survivorship benefits to widows and children, the Solicitor

1 and Deputy Solicitor may make an election as provided
2 in section 319 of such Act in the case of the Comptroller
3 General, except that the annuities and refunds of deposits
4 so authorized shall be paid from the appropriations of the
5 Office.

6 **“§ 3103. Employees of Office; rules and regulations**

7 “(a) The Solicitor may employ such attorneys and
8 other employees as he deems necessary, without regard to
9 the provisions of title 5 governing appointments on the com-
10 petitive service. Such attorneys and other employees may
11 be paid without regard to the provisions of chapter 51 and
12 subchapter III of chapter 53 of such title relating to classi-
13 fication and General Schedule pay rates, except that no
14 attorney or other employee of the Office may receive com-
15 pensation in excess of the annual rate of basic pay in effect
16 for grade GS-18 of such General Schedule.

17 “(b) The Solicitor may make such rules and regulations,
18 and delegate such of his functions as may be necessary to
19 carry out this chapter.

20 **“§ 3104. Powers and duties of Solicitor**

21 “(a) The Solicitor shall enforce the prohibitions con-
22 tained in chapter 121 of title 18 (relating to national secu-
23 rity crimes) by conducting appropriate investigations and
24 any kind of legal proceedings, civil or criminal, including

1 grand jury proceedings and proceedings before committing
2 magistrates, which United States attorneys are authorized by
3 law to conduct.

4 “(b) The Solicitor shall conduct public hearings not less
5 frequently than twice per calendar year for the purpose of
6 hearing testimony and taking evidence from individuals
7 claiming to possess information relevant to any violation of
8 chapter 121 of title 18. Such hearings shall be conducted
9 pursuant to such rules and regulations and according to such
10 procedures as may be prescribed by the Solicitor.

11 “(c) The Solicitor shall, when requested by the Presi-
12 dent or the Congress, render advisory opinions on the legality
13 under chapter 121 of title 18 of any proposed action with
14 respect to which such opinion is requested. Such opinions
15 shall be compiled and published at such times and in such
16 manner as the Solicitor may determine. No opinion rendered
17 under this subsection shall be deemed to foreclose or other-
18 wise affect the prosecution of or any other action against
19 any person at any time.

20 “(d) The Solicitor shall, at the earliest possible time
21 following the enactment of this chapter, prepare and submit
22 to the Congress a report containing—

23 “(1) a complete code of war crimes, and
24 “(2) recommendations for updating the laws and
25 customs of war to which the United States subscribes.

1 **“§ 3105. Injunctions**

2 “Whenever the Solicitor has reasonable cause to believe
3 that any person described in section 2551 of title 18 is
4 engaged in any act in violation of section 2552 of such title
5 (relating to national security crimes), he may bring a civil
6 action in the appropriate United States district court by filing
7 with it a complaint signed by him setting forth the act or
8 acts alleged to be in violation of such section and requesting
9 such preventive relief, including a permanent or temporary
10 injunction, restraining order, or such other order as he deems
11 necessary. Such action shall be heard and determined by a
12 three-judge district court in accordance with section 2284 of
13 title 28.

14 **“§ 3106. Miscellaneous rules**

15 “(a) Notwithstanding any other provision of law or
16 rule of law (including any privilege or other constraint upon
17 disclosure), all officers and employees of the United States
18 (including White House staff and officers and employees in
19 the Executive Office of the President) shall furnish to the
20 Solicitor such information regarding their official activities,
21 plans, and proposals as he may require of them, on the basis
22 of his need to know in order to enforce the provisions of
23 chapter 121 of title 18. For purposes of securing any infor-
24 mation the Solicitor shall have access to, and the right to
25 examine, any book, document, paper, record, or other mate-

1 rial of any agency or department of the United States, in-
2 cluding the White House staff and Executive Office of the
3 President.

4 “(b) Notwithstanding any other provision of law or
5 rule or regulation, no person shall be punished in any man-
6 ner under any authority for disclosing any information to
7 the Solicitor or any attorney or employee of the Legal Office
8 of National Security Affairs.”.

9 (b) (1) The table of chapters for such part VI is
10 amended by adding at the end thereof the following new
11 item:

“177. Office of National Security Affairs; Enforcement Duties---- 3101”.

12 (2) The table of contents for such title 28 is amended
13 by adding at the end thereof the following new item:

“177. Office of National Security Affairs; Enforcement Duties---- 3101”.

Mr. KASTENMEIER. Our first witness this morning, I'm pleased to call, is Mr. Mark Raskin, who is the current codirector of the Institute for Policy Studies, and incidentally, many, many years ago, a member of my own staff; and also Mr. Robert Borosage, director of the Center on National Security Studies in Washington, D.C. Gentlemen, you are both welcome.

TESTIMONY OF MARCUS RASKIN, CODIRECTOR OF THE INSTITUTE FOR POLICY STUDIES

Mr. RASKIN. Thank you, Mr. Chairman. It is a great pleasure to be here and I count it as a great privilege to be here this morning testifying on the Official Accountability Act, H.R. 8388, and identical bills to it.

It seems to me that this piece of legislation is even more timely than it was when it was introduced in July of 1973. My understanding of H.R. 8388 is that it is meant to address three kinds of activities of the state: War by Congressional declaration, war by executive fiat, and war-like acts and engagements which are conducted covertly or overtly by executive agencies or their operatives.

The war in Indochina, the Watergate affair, the publication of national security crimes and illegal behavior has brought into focus two questions. One is what kind of society and government we intend to have over the next generation and the second is whether a wrong fork in the road was taken after World War II which can now be corrected by such legislation as H.R. 8388.

To answer these questions requires a bit of your indulgence and reflection on different trends in American governing. As the United States became the dominant world power after World War II, officials and Presidents, generals and advisors found themselves legitimizing military and paramilitary incursions in other nations while routinizing and rationalizing the Executive's usurped power of war-making.

The conduct of foreign policy fused with national security policy and, as often as not, foreign policy and diplomacy degenerated to a series of threats, uses of force, meddling and terror of other people. Thus, for example, the terror bombing of North Vietnam in December of 1972 in an undeclared war, Operation Mongoose, in which plans were made to use chemical and biological warfare against the Cuban sugar workers in the early 1960's, and working with criminal gangs for the purpose of bribing or overthrowing the leadership of countries which particular American leaders, elected, or selected, decided they didn't like.

This series of events, not isolated by any means, but part of a continuum of policy, has resulted in a systematic whittling of the constitutional authority of Congress. And just as important, it has resulted in the systematic exclusion of the people from the process of making fundamental decisions around questions of war and peace or the manner in which the United States will conduct foreign policy and protect its national security.

In 1947, with the National Security Act, the American Government blurred the distinction between civilian and military operations in

national security and foreign policy. The Federal Government found itself transformed into a national security State as the militarized civilians employed the resources of the society for covert operations, war-making, and nuclear war development. The militarized civilians escaped any code of law under which they could be held accountable by the citizenry or the Congress.

If this were the only trend in American statecraft in the 20th century, if there were no other direction which was attempted by American leaders, we would be in a sorry state with no rudder or possible alternative to which we could relate. But this is not the case. There is a second theme in American policymaking and international law which will not go away, just as the doubts which the people have about the CIA's activities or undeclared wars will not be erased.

After World War I, there was a trend in American statecraft which viewed war itself and the making and planning of war as a crime. This attitude carried over into the entire area of intervention. Such statesmen as Secretary of State Frank Kellogg signed the Kellogg-Briand Pact on outlawing war, while making clear that a nation must have the right to defend itself.

By World War II, the American leaders proclaimed that the dog of war and militarism had to be eradicated. To this end, the United States outlined its primary peace aims as the development of the rule of law, the demilitarization of Germany and Japan, and the holding to account of war criminals.

Indeed, Government officials, men of the caliber of Justice Jackson, said that in future times American citizens would have to be able to hold their leaders, their Government, personally accountable for actions which they undertook, especially having to do with war, quasi-war, and peace.

As Justice Jackson said, "while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose, it must condemn aggression by any other nations, including those which sit here now in judgment."

Most important, he noted that, "We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law."

Jackson said about the Nuremberg Tribunal that, "The legal posture which the United States will maintain, being thus based on the common sense of justice," that is, "We must not permit it to be complicated or obscured by sterile legalisms developed in the age of imperialism to make war respectable." This comment, in my view, is important for two reasons. One is that he makes clear that we must transcend the age of imperialism. This can be accomplished, in part, through the law, where limits and alternative value standards are set forth for Government officials who might otherwise believe that the only way for the United States to live in the world is through imperial activities of the kind alluded to at the beginning of my statement.

Second, Jackson is also saying that we must not be blinded by legalisms which obscure from us the real character of criminal behavior. I would urge upon you this standard in comparing, for example, making information public of activities such as the Mongoose program or covering them up under an official secrets act. It used to be

said in the Government that the higher the secrecy classification, the more likely the information offended the moral and legal standards of the American public.

The question in Government is not only whistle blowing, as Ralph Nader would say, it is how to say "no" to orders which are criminal in their nature. Part of the reason for a bureaucratic inability to say "no" is that there is neither the legal machinery or law which would make clear to Government officials that there are certain activities that are proscribed from Government activity in the national security area. Thus, for example, the actions surrounding the successful intervention in Chile or the Dominican Republic would have been proscribed, I would think, under H.R. 8388, section 2252, had that bill been law.

The character of the Indochina war would have been different. Leaving aside the moral defect that it was not a declared war, the character of various aspects of military and paramilitary prosecution of that war would have been proscribed under the terms of H.R. 8388. Thus, the Phoenix program, which was a systematic attempt to destroy through assassinations, burnings, et cetera, the NFL local leadership in the villages would not have been encountered under the terms of this legislation. It should be noted that the standards which the United States, the State Department with full agreement from the Justice Department and the Joint Chiefs of Staff laid onto the Germans and Japanese at the end of World War II made clear that such behavior was not to be countenanced.

At that time, we said, "anyone who in any form whatever participated in killings, torture, or other cruelties in a concentration camp, a labor camp," et cetera, "qualified as a war crimes offender," as did anyone who "exploited his position, his influence, or his connections to impose force and utter threats, to act with brutality and to carry out oppressions or otherwise unjust measures."

It is painful for all of us to read about the degeneracy of our Government as reflected in the Senate Intelligence Committee's Assassination Report which a generation earlier the U.S. Government condemned similar actions when undertaken by German and Japanese leaders and civil servants.

Programs such as Phoenix and Mongoose would not have occurred had there been an Official Accountability Act. I want to add a personal note. Almost 15 years ago, after I left the staff of Congressman Kastenmeier, I joined the special staff of the National Security Council. A bill such as the one discussed today would have strengthened members of the NSC staff to criticize particular courses of action because they would have known that they were personally accountable for their judgments and actions. They would not have had the fig leaf of secrecy or the defense of superior orders to hide behind. And indeed, they would have had a different value system to repair to.

I would like to comment very briefly on some of the statements which were made to the committee by the Department of Justice and the Department of State. The Department of State feels that the bill goes too far and yet is not far enough. It should be noted that the bill is not limited to war, but is meant to take account of situations which are short of war declaration but where the Executive undertakes plans and operations that are warlike.

The terrifying fact is that prohibitions which supposedly attach to war seem not to attach to a time of "peace." Thus, for example, the case of overthrowing foreign governments without a declaration of war. Such activities are exactly the kind in which a National Security Solicitor should be empowered to act.

The Solicitor is not someone who appears as Minerva full blown from Zeus' head. He or she is a Presidential appointment with responsibility to Congress. We should be long past the point of thinking that executive or bureaucratic power must not be bridled and we should be long past the point where we assume that law serves power rather than the other way around.

In this sense, the task of the Solicitor to "render advisory opinions on the legality" of any proposed action can hardly be seen as unconstitutional. The Department of State is reaching when it suggests that the proposed Solicitor could stop a President who operated under a declaration of war. This does not appear to be contemplated in the bill. There is, however, a situation which would be contemplated in the bill that might give rise to injunctive relief which is much closer to home.

It is where agents within the CIA continue to supply arms to a foreign country for the purpose of civil war after Congress had clearly intended that the United States should not intervene. Department of Justice response appears faulty for several reasons. It states that the history of warfare makes it untenable that there be a prohibition against overthrowing "the leadership of another nation by force, violence or bribery." The question which the Justice Department must ponder is whether such activities are proscribed in peacetime where no war declaration exists.

Justice states that there are "serious questions" about the constitutionality of a Solicitor having prosecutorial powers. While the notion may be administratively threatening to the Department of Justice and novel, it is hard to see how a constitutional question is raised. Congress has the power to create just such a body if it so wishes.

The current crisis of governing is that much Government activity appears to border on a criminal enterprise. We are witnessing dark times, where wrongdoers appear to benefit from their actions and continue their control over governmental life.

In the Constitution of Athens, Aristotle pointed out that the friends of the tyrants, "with the usual lenience of a democracy," allowed them to remain in the city of Athens. But even in Athens they were not rewarded with continued control over the democracy and a bending of the law until it became a wholesale justification for wrongdoing.

The responsibility of Congress is now quite awesome. Succinctly stated, it is, "Can it stop a dual state?" In the last generation we have seen the emergence of the concept of the dual state in which legal concepts are not applicable to the political sphere, "which is," as Professor Bernard Schwartz has said, "regulated by arbitrary measures, in which the dominant officials exercise unfettered discretionary prerogatives."

If Congress allows the national security apparatus to operate under its own rules and regulations, unrelated to law or its own procedures and untrammelled by either the Judiciary or Congress, there will be no turning away from the world of coverup, counterfeiting, assassination, and continuous war—in other words, the imperial mode.

The first step in creating a revitalized democratic society is the development of a system of laws which sets the limits of actions for leaders and bureaucracies. And these laws should be clearly stated and understood as having real force behind them. In other words, they must be supported by enforcement procedures and the recognition of value shifts. The second must be the adoption of procedures for removing from office those who breach that system of laws. This bill gives us a chance to set out such a framework. Thank you.

Mr. KASTENMEIER. Thank you, Mr. Raskin. Mr. Borosage?

TESTIMONY OF ROBERT L. BOROSAGE, DIRECTOR OF THE CENTER FOR NATIONAL SECURITY STUDIES

Mr. BOROSAGE. Gentlemen, it is a great privilege for me to appear here before you to voice my personal views in support of the measures encompassed in H.R. 8388. It is a particular pleasure to do so following a colleague who has been perhaps the major teacher in my own education. And while Mr. Raskin may well be determinative of my sensibilities on these questions, he is not at all responsible for my testimony.

I have a statement for the record, which I will submit, and I'd just like to use it to talk off of in some brevity.

Mr. KASTENMEIER. Without objection, your statement in its entirety will be accepted for the record.

[The prepared statement of Mr. Borosage follows:]

STATEMENT OF ROBERT L. BOROSAGE, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES

Mr. Chairman, it is a great privilege for me to appear before you to voice my personal views in support of the measures encompassed in H.R. 8388. I do so in the strong belief that this legislation can provide a signpost for a new direction and purpose for our country.

Few words need be devoted to detailing the failure of the national security institutions and policies over the past years. The agony of a President in Watergate, the disgrace of the intelligence agencies in public light, the travail of the nation in Vietnam need only be mentioned to call into mind the tragic and wrenching effects of our past policies. Few still doubt that these events are but the direct and logical expression of the national security perspectives which have guided our relations with the world for over thirty years. Like Caliban from his mirror, we shrink from our reflection, so painfully disfigured.

It has become a cliché to speak of the widespread loss of confidence in the United States, or to describe the growing sense of purposelessness, or to bemoan the lost sense of decency which was the better part of American exceptionalism. Too often, however, it is simply overlooked that the feeling of corruption and indecency is not unfounded. Indeed, we now know that behind a veil of secrecy, executive officials set out intentionally to act in an indecent manner abroad. Even as many citizens were ostracized as "Un-American" at home, government officials were secretly preparing to violate American precepts abroad. In the words of a special Presidential committee meeting in 1954, "There are no rules . . . Hitherto acceptable norms of human conduct do not apply . . . Long standing American concepts of American fair play must be reconsidered."¹

The hallmark of this disregard of limits was lawlessness, consciously adopted to wage the cold war struggle abroad. Nor is this attitude simply a relic of former years. When asked if the CIA's "de-stabilization" of the Allende government in Chile violated international law (which includes, *inter alia*, the Rio

¹ Senate Select Committee to Study Governmental Operations with Respect to Intelligence Agencies, *Interim Report: Alleged Assassination Plots Involving Foreign Leaders*, United States Senate, 94th Congress, 1st Session (1975), at 259.

Pact, a treaty ratified by the United States Senate promising non-interference in the internal affairs of signatory nations, including Chile), President Ford replied:

I'm not going to pass judgment on whether it is permitted or authorized under international law. It is a recognized fact that historically as well as presently such actions are taken in the best interests of the countries involved...²

The general assumption for over a quarter century has been that executive lawlessness would apply only beyond the water's edge. In April, 1950, the leading government officials of the Truman Administration approved NSC 68, a central documents in the cold war build-up, which noted:

The integrity of our system will not be jeopardized by any measures, covert or overt, violent or non-violent, which serve the purpose of frustrating the Kremlin design, nor does the necessity for conducting ourselves so as to affirm our values in actions as well as words forbid such measures...³

We are only now beginning to discover how wrong that prediction was. If nothing else, Watergate demonstrated that the instrumental view of law—as something to be ignored or discarded when inconvenient—cannot simply be isolated to behavior abroad. Increasingly, we find that national security bureaucrats operate only upon one principle—that of superior orders, acknowledging no legal authority outside of a bureaucratic superior. When asked why he continued the domestic mail opening program for twenty years in spite of an explicit criminal statute prohibiting mail tampering, the director of the CIA's Counter-intelligence Staff, James Angleton replied, in pale reflection of President Ford: "I feel it inconceivable that a secret intelligence agency of the government has to comply with all of the overt orders of the government . . ." ⁴ For Mr. Angleton, the criminal law was simply an "overt order," superseded easily by the secret "web of perceived authority" upon which CIA bureaucrats normally operate.⁵

In the wake of the policy bankruptcy and failure witnessed over the past few years, Congress and the citizenry look for a new sense of direction, and struggle to recapture the illusive sense of decency and honor which once was part of this country's heritage. In this process, the Congress is aided by the current political climate. The post-war consensus founded on fear and suspicion has dissipated, a victim of military defeat abroad and public shame at home. Moreover, a new political generation has come into maturity, a generation whose political consciousness was forged not in reaction to the Depression, but to the nuclear bomb, not at Munich but at Selma, not in McCarthyite purges but in free speech movements, not in the "back alley" struggles of the cold war, but in the street and barracks protests of the anti-war movement. By standing with this new, politically energetic consciousness, men and women of good will in the Congress can begin to define a new direction for the country.

One need not believe, with Mark Twain, that Congress is "the *only* native American criminal class" to suggest that the Congress will find it difficult to define and initiate a new direction, particularly in a time of political change and confusion. Too often, the Congress unavoidably reflects the new imperial perspective, now increasingly "normal" in light of the past thirty years. Thus, in the name of reform, the Senate Select Committee on Intelligence recommended legislation prohibiting the assassination of *leaders* of other countries, except in time of war, apparently unaware that assassination of *anyone* is a war crime, recognized by the Army Field Manual on *The Law of Land Warfare*.

Often, the Congress justifiably finds complete prohibition of illegal practices which have continued for thirty years to be too unsettling, and seeks instead to limit and restrain them. Often, this process merely ratifies the very practices and institutions which the Congress seeks to limit or condemn. Thus the War Powers Bill is said to authorize Presidential war-making, and is invoked to

² Presidential News Conference 9/16/1974, 10 *Weekly Compilation of Presidential Documents* 1157, 1162.

³ Quoted in Barton J. Bernstein, "The Road to Watergate and Beyond: the Growth of Executive Authority Since 1939," paper delivered to CNSS-Duke University Conference on Executive Power.

⁴ *Washington Post*, October 23, 1975.

⁵ *Assassination Report*, *supra* at 319.

lend the congressional imprimatur to the deplorable Mayaguez incident. Similarly, the Freedom of Information Act is claimed as a ratification of the classification system; the Omnibus Crime Bill as authority for warrantless wiretapping; the Hughes-Ryan Amendment as the legal basis for covert action abroad.

Finally, the Congress often acts simply to acquire a seat behind the curtain of secrecy, without requiring public dialogue about the executive play. Present oversight legislation designed to control the intelligence agencies would require only that the President inform a handful of congressional representatives about his covert intervention abroad. As the secret war in Angola demonstrated, the only public debate that can take place when executive officials undertake actions clearly violative of congressional prerogatives or sensibilities is through leaks, or through a representative violating his or her secrecy pledge and going public. In either case, the Congress will then face the inevitable charges of irresponsibility, used to confuse the public debate about the merits of the policy. Too often, the long-term result is to create a structure which simply folds a handful of legislators into the executive, legitimating decisions made in secret in the executive, while eroding the public policy-making responsibilities of the Congress.

H.R. 8388 offers, I believe, a prudent and constructive path out of this dilemma. It provides for the enforcement of international laws and treaties as the law of the land, to be applied to even civilian officials in the executive. In doing so, it avoids the pitfalls of other reform attempts.

First, the bill defines international standards as a limit upon the actions of executive officials, beginning what must be a long national dialogue about limits, of what government officials can and cannot do in pursuit of national ends. Only through a growing discussion of limits can we hope to find a way to abrogate the present exchange of national suicide pacts known as nuclear deterrence. Notice also, that by seeking to define limits, the Congress does not ratify other deplorable practices. The inevitable process of compromise, both the bane and the virtue of the Congress, will not lead to worse results than those pertaining at the beginning of the reform effort.

H.R. 8388 chooses international laws to which this nation adheres as the source for substantive limits on the behavior of executive officials. Although the standards of law are even less exacting than those of morality, international law comes close to inculcating the minimal standards of human decency which should be respected by civilized peoples. Moreover, it is American statesmen and jurists who took the lead in developing and refining these standards over the years. Thus, H.R. 8388 provides the possibility that the consciousness and political energy of a new generation will be integrated with a traditional and honorable theme of American statecraft, one abruptly disowned in the cold war. By seeking the new direction in an old tradition, the legislation offers greater legitimacy to the process of fundamental change.

Finally, H.R. 8388 represents an end to the hypocrisy, the "bad faith," which has been so painful in a country often openly violating the very standards which it developed and enforced upon others in the past, and which its diplomats espouse to others in the present. If H.R. 8388 were passed, it would provide notice that the most powerful nation in the world no longer stands for the proposition that the mighty do what they will, and the weak what they must.

H.R. 8388 would establish a permanent special prosecutor—the National Security Solicitor to investigate and prosecute violations of the act. The question of a permanent special prosecutor has been before the Congress since Watergate, although in a slightly different form. Many serious scholars and analysts have provided serious arguments both for and against the mechanism. These arguments need not be reviewed here, but a few more specific comments are in order.

If not confirmed by habit, legal limitations are not effective unless the possibility of enforcement exists. H.R. 8388 establishes standards which contradict long-standing practices in the executive. The widespread assumption that national security officials operate above the law will not be shaken until a few officials find themselves the target of a criminal investigation and prosecution, which tends, like hanging, to concentrate the mind.

To this day, the Justice Department has abdicated any prosecutorial role for national security crimes. Indeed, the Attorney General more often acts as the President's "house counsel," defending his actions from the lances of outside legal critics. In the case of the Central Intelligence Agency, this abdication

was formal, sealed by an exchange of letters.⁶ For other agencies and other practices, it has been customary, reflected in the absence of prosecutions.

Nor need one question the continuing need for prosecution until "right habit confirms itself." The record of this Congress now details many illegalities committed by executive officials abroad. During the Vietnam War, of course, appropriate cases were legion, as even so judicious and temperate a scholar as Telford Taylor has emphasized.⁷ Let one example suffice. In December 1972, the United States unleashed its bombers against Hanoi, in the infamous "Christmas bombings." The architect of the bombing was current Secretary of State Henry Kissinger, at that time also the President's special assistant for national security affairs. Kissinger's purpose was, as a detailed study by Tad Szulc has suggested, "to induce (President) Thieu (our South Vietnamese ally) to sign the Paris Agreement, the price being the 'brutalizing' of the North . . ."⁸

Article 6(b) of the Charter of the International Military Tribunal following World War II defined war crimes as "violations of the laws or customs of war. Such violations shall include, but not be limited to . . . wanton destruction of cities, towns or villages, or devastation not justified by military necessity."⁹ This provision is incorporated in H.R. 8388. Sanford Levinson, a professor of law writing in the reputable Stanford Law Review, has concluded that "It is almost inconceivable that one could deny that at least a prima facie case has been established that Kissinger is a war criminal."¹⁰ It goes without saying that no investigation was initiated or even considered by the Department of Justice.

I would therefore suggest that all of the standards normally required for a special prosecutor now exist: the existence of violations, the apparent conflict of interest in the normal prosecutor, and the need for special attention and resources. I urge the committee give serious consideration to creation of the special prosecutor with the restricted jurisdiction defined in this bill. While a National Security Solicitor may impinge upon the previous authority of the Justice Department, he or she will certainly not interfere with much of the Department's on-going work.

One final note. It is most important in this time of redefinition that the Congress find ways of limiting executive officials without being coopted into the national security apparatus. To do so, the Congress must begin a process of defining absolute limits on what government officials may do, while developing ways to engage the citizenry in dialogue about these questions. If the Congress cannot find ways to develop a new relationship with the citizens, we face but a ratification of the present course of executive lawlessness abroad, and disdain for the public and the Congress at home. Mr. Justice Brandeis once wrote that "government, for better or for worse, is the great powerful teacher of its citizens." For too long, our government has instructed us in fear, lawlessness and violence. The instruction must now improve before the pupils absorb the lesson too well.

Mr. BOROSAGE. I don't think we need to repeat the failure that we see in our national security institutions and policy over the past 25 years. Even by their own standards of fighting communism and socialism throughout the world, I would say that they are a failure. But more importantly, as we witness the agony of a President in Watergate, the disgrace of the intelligence agency is now brought to public light.

In our own personal and moral travail as a nation in Vietnam, we need only mention these events to understand how wrenching this failure has been for our country. Now, it has become a cliché to talk about a widespread loss of purpose, a widespread sense of corruption and indecency in the United States, to bemoan the loss of our own special sense that was part of the American belief in its own exceptionalism.

⁶ Letters on file with the Center for National Security Studies.

⁷ See generally, Richard Falk, ed., *The Vietnam War and International Law*, III.

⁸ Szulc, "Behind the Vietnam Cease-Fire Agreement, 15 *Foreign Affairs* 21 (1974), at 67.

⁹ Levinson, *Fidelity to Law and the Assessment of Political Activity*, 27 *Stanford Law Review* 1185 (1975) at 1189.

¹⁰ *Ibid.*

It's often overlooked, however, that this sense of indecency is not unfounded. In fact, as we find more and more, as more documents are revealed, government officials in the early fifties and late forties set out intentionally to violate American precepts as they acted abroad.

In the words of the special Presidential committee meeting in 1954, "There are no rules . . . Hitherto acceptable norms of human conduct do not apply . . . Longstanding American concepts of American fair play must be reconsidered." Now, the hallmark of this effort was the attempt to free executive officials from the limits of law as they acted abroad in the cold war.

It was generally done with the assumption that lawlessness would remain beyond the water's edge, that it would not come home and affect our own polity. And now, as we reveal one after another of the intelligence agencies and the activities which they have taken in direct contravention of our own domestic laws at home, we understand how wrong this assumption was.

Watergate demonstrated rather dramatically that the instrumental view of the law held by executive officials abroad—that it is something to be ignored or discarded when inconvenient—cannot simply be isolated abroad, but increasingly comes home to affect our own domestic situation.

When James Angleton, the Director of the CIA's counterintelligence staff, was asked why he continued the domestic mail-opening program for 20 years, in spite of an explicit criminal statute prohibiting mail tampering, he replied, "I find it inconceivable that a secret intelligence agency of the Government has to comply with all of the overt orders of the Government . . ."

For Mr. Angleton, the criminal law was simply an "overt order," superseded easily by the "secret" orders which CIA bureaucrats normally operated upon. In the wake of the failure and of the increasing public sense of dismay over the past years, Congress and the citizens must stand together to try to find a way out of our dilemma. And it is a difficult task which faces Congress. One need not believe with Mark Twain that Congress is "the only native American criminal class"—certainly there must be others—to suggest that Congress and the citizenry will find it difficult to find and initiate a new direction which will put an end to the illegal activities abroad and give a new sense of purpose to our country.

Too often the Congress finds itself reflecting the imperial perspective which increasingly many of us find routine and normal in the light of the past 30 years. For example, in the name of reform, the Senate Select Committee on Intelligence recommended legislation prohibiting the assassination of leaders in other countries, except in time of war.

But they did so in apparent ignorance of the fact that assassination of anyone is a crime of war during a time of war, a crime recognized by our own Army Field Manual. Moreover, often Congress finds it impossible to limit illegal practices without ratifying them. Too many practices have begun simply by executive initiative without legislative authorization *de novo*. And when the Congress attempts to limit them, their own act of limitation is said to constitute a ratification.

Thus, the war powers bill is said to authorize Presidential war-making; the Freedom of Information Act, ironically, to ratify the

classification system; the omnibus crime bill is the authority for warrantless wiretapping; the Ryan amendment, the only legislative authorization of covert political action abroad.

Finally, the Congress often finds itself in a position of attempting simply to acquire information upon which it can act, to acquire a seat behind the executive curtain of secrecy through oversight, by which it can get information to legislate.

The problem with oversight legislation, however, is that as soon as Congressmen and Congresswomen go behind the executive secrecy curtain, they are separated from their own colleagues and from the people. As the secret war in Angola demonstrated in its early weeks, the only public debate that could then take place results either from leaks by Congressmen or executive officials, or by a Representative openly violating his or her secrecy pledge in going public.

In either case, Congress will find that inevitable charges will be levied against it of irresponsibility and these used to confuse the public debate about the merits of policy. Too often, the long-term result is to create a structure which simply folds a handful of legislators into the executive, legitimating decisions made in secret in the executive, while eroding the public policymaking responsibilities of the Congress.

H.S. 8388 offers, I believe, a constructive alternative to this dilemma. It begins by requiring a dialog on the limits of what executive officials can do abroad in the pursuit of national ends. A discussion of limits is the only way we can begin to create controls upon executive officials that can, in fact, limit their activities without ratifying their deplorable practices.

The inevitable process of compromise, which is the basis of the congressional process, will thus not lead to worse results through ratification than those pertaining at the beginning of the reform effort.

H.R. 8388 chooses international laws as the source for substantive limits on the behavior of executive officials. I believe this important because international law comes as close as any legal system to inculcating minimal standards of morality of human decency, which should be respected by civilized peoples.

Moreover, as my colleague has testified, it is a traditional theme of American statecraft, and it is American statesmen and jurists who have taken the lead over the past years in developing and refining these standards.

One final note: H.R. 8388 would establish a permanent special prosecutor, the National Security Solicitor, to investigate and prosecute violations of this act. The question of a permanent special prosecutor has been before the Congress since Watergate, although in a slightly different form. Many serious scholars and analysts have provided arguments both for and against the mechanism. These need not be reviewed here.

But I would like to make a few specific comments. It is clear that if not confirmed by habit, legal limitations are not effective unless they are enforced. H.R. 8388 establishes standards which contradict long-standing practices in the executive. The widespread assumption that national security officials operate above the law will not be shaken until a few officials find themselves the target of criminal investigation and prosecution. For prosecution tends, like hanging, to concentrate the mind.

To this day, the Justice Department has abdicated its prosecutorial role for national security crimes. Indeed, the Attorney General is often called upon as house counsel to defend the President's actions and to explain them to outside critics.

In the case of the Central Intelligence Agency, we now know that this abdication was formal, sealed by exchange of letters in the late forties. For other agencies and other practices, it has simply been customary, reflected in the absence of prosecutions.

One need not question the need for such legislation until right habit confirms itself. The record of this Congress now details many illegalities committed by executive officials abroad, not simply in the Vietnam war, but even in times of peace throughout the cold war period.

I therefore suggest that all of the standards normally required for a special prosecutor now exist. The existence of violations, the apparent conflict of interest in the normal prosecutor, the Justice Department, and the need for special attention and resources.

I urge the committee give serious consideration to the creation of the special prosecutor with the restricted jurisdiction defined in this bill. While a National Security Solicitor may impinge upon the previous authority of the Justice Department, he or she certainly will not interfere with much of the Justice Department's ongoing work.

A final note: It seems to me most important in this time of redefinition that Congress find ways of limiting executive officials without being coopted into the national security apparatus. To do so, it must begin with a dialog, defining absolute limits on what Government officials may do in our name, while developing ways to engage citizens in the discussion about these questions.

And if Congress cannot find ways, new ways, to develop a new relationship with its own citizens, we may face but a ratification of the present course of executive lawlessness abroad and the disdain for the public and the Congress, so amply reflected at home. Mr. Justice Brandeis once wrote that "government, for better or for worse, is the great powerful teacher of its citizens." For too long, our Government has instructed us in fear, lawlessness, and violence. The instruction must now improve before the pupils absorb the lesson too well.

Thank you.

Mr. KASTENMEIER. Thank you, Mr. Borosage. I have several questions. H.R. 8388, among other things, talks about engaging in the planning of preparation for initiation or waging of a war of aggression. This is a vexing question in terms of definition, particularly in a nuclear age, where strategies presumably devised or relied upon are so complex. How would a Government official know what an "aggressive war" is? Is there any standard? After all, we certainly would agree that civilians and military leaders would need to plan, make contingency plans, for wars in defense of the Republic.

But at what point does such planning, particularly when it involves many options and complex nuclear strategies, constitute an aggressive war?

Mr. RASKIN. I agree with you, Mr. Chairman, that it's a very complicated question. But I think that there are certain standards that one could begin to apply. One is that you could begin to take a look at the Defense budget and, in effect, rewrite the Defense budget so that you would say, "What forces and personnel are required for the

alliance system; what forces, personnel and strategy is needed for the defense of the United States? What strategies and defense forces are required for other purposes?" In this way we would begin to get straight what, in fact, is required for the United States, as against alliance requirements or whatever.

Second, it should be noted that over 100 years ago—I guess 125 years ago—there was a case in the Supreme Court, *Fleming v. Page*, which stated that the United States could, under no circumstances, fight aggressive war, that the United States could only undertake to fight defensive war. So that, in a sense, there remains an unchallenged legal view that the United States could only respond to an attack on its own shores.

The third point of view is that no war should be undertaken unless there is a war declaration, which in effect, then, would begin to distinguish very clearly imperial activities or covert activities or wars like the Indochina war, which involve us in an undeclared war, et cetera.

Now, in terms of the nuclear strategy question, this, I think, turns out to be an absolutely crucial one. The first problem with nuclear war is that, by its nature, it borders on genocide. In other words, if it was a last-ditch effort, whatever, that in fact, what we would begin to see is whole groups of people destroyed in the Soviet Union or wherever they might be.

The United States has now passed the Genocide Treaty and one of the considerations now is how that Genocide Treaty, in fact, is to be enforced. And I would see the discussion and the passage possibly of H.R. 8388 as giving a clue as to what the limits of war activity and war preparation would be.

In this regard, finally, the purpose of this bill is, as you pointed out and as we've suggested, is meant to open up the entire question of limits, and proscriptions so that such disasters as nuclear war will not occur. There is no question in my mind that over a period of time H.R. 8388 would affect the present reliance which officials have placed on nuclear weapons and missiles. The bill clearly cast doubt on strike and first use of nuclear weapons. And indeed, an argument could be made, given the way the bill is presently written, as also affecting the use of nuclear weapons as an ultimate act of self defense.

Mr. KASTENMEIER. I would think that that question would have to be precisely answered. I don't know whether it's possible for us to, referring to all of the treaties to which this country is a party, have the Office of the National Security Solicitor extrapolate from that and build a code at National Security Council meetings, or that he could advise whether certain plans constituted an "aggressive war" within the meaning of international treaties to which we are already parties.

I know that part of the executive branch's opposition to the bill is based on the fact that we are already parties to a number of treaties, conventions, charters, and the like, which forbid much of that, which is forbidden by this bill. The difficulty is that we have, of course, done nothing to internalize that so that our own policy planners are internally accountable. And if that could be, I suppose, codified in some reasonable way and still not affect the defense of this country, it would be well to be so done.

Mr. RASKIN. If I may just respond to part of that, it is a very sad thing that treaties or treaty obligations are not discussed in the National Security Council as a means of saying, "Look, there are certain things that we can't do," nor, indeed, so far as I can tell, does the CIA feel itself bound or the other national security agencies feel themselves bound, to those treaties, or indeed, finally, to that series of directives which once existed about what was appropriate and inappropriate behavior according to international law.

The example, in my view, of the Phoenix program, is an especially grievous case, where over 20,000 people were killed, assassinated, et cetera, in such a way as to leave the lawminded speechless with horror. This program flew in the face of the judgments which had been made 20 years earlier by American Government officials as to how to act in the world and the judgments at the various war crimes trials in Germany and Japan.

Mr. KASTENMEIER. Mr. Borosage, the bill creates an Office of National Security Affairs—and National Security Solicitor and Deputy Solicitor, much apparently in the same model as that which was proposed tentatively by the Congress in response to Watergate to institutionalize the office of Special Prosecutor.

The Congress found some difficulties with that. There were some constitutional questions which arose. I think the proponents felt that they had answered those satisfactorily. But there are a number of problems, such as accountability, appointive source accountability, the identification with a branch or another branch of Government. All of this would seem to have more or less the same problems connected with it.

My question is, however, a different one. If the Congress were considering an office of Special Prosecutor, would you feel that this office, this Solicitor, ought to be part of or separate from such an office? In other words, should we be creating special entities to prosecute the executive branch for one thing and another entity to prosecute the executive branch, let us say, for something else, or would you see a merging of these forces?

Mr. BOROSAGE. Well, I think it's important that political pressure and the opinion of the people be focused on the Justice Department to keep executive officials in obedience to domestic laws. That's the function of the Justice Department. It seems to me, well, one might want to create a special Attorney General within the Justice Department to focus on Government violations, that that's a harder question as to setting up a Special Prosecutor's Office.

But here we're talking about a body of laws, treaties, international law, et cetera, which substantively have been very different than the normal scope of the Justice Department's work and require very different kinds—not different kinds of skills—but certainly a different kind of training and a different kind of sensitivity. And I think that there are very good arguments in terms of the different body of law, the different expertise, et cetera, that would lead you to want to create a Special Prosecutor in this area, even if you did not as to domestic law.

It strikes me that the kind of process of translating international laws into a domestic criminal code and then enforcing them on ex-

ecutive officials is one particularly conducive to a special office. And that would be my answer to that.

As to the problems of the office in terms of its relation to other branches, I don't think that exists particularly in this bill. If I understand it, the Solicitor will be appointed by the President with advice and consent of the Senate, which is the normal way. He does serve a term of office for 15 years. But terms of office are traditionally provided by the Congress and legislature for various executive officials.

So I don't think it raises the questions raised, for instance, by the Election Commission where the attempt was made to appoint officials by the Congress, which the Court found of dubious constitutionality.

Mr. KASTENMEIER. At this point, I think I will yield to my colleagues. The gentleman from California, Mr. Wiggins.

Mr. WIGGINS. Mr. Chairman, I don't know what to say about this. The bill is patently unconstitutional in several respects and yet I noticed your name is on it. And I don't know whether to take out after you or after these gentlemen or what. I think I'll just keep my mouth shut.

Mr. KASTENMEIER. Well, of course, the gentleman has a perfect right to do either. I appreciate his judgment. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. I have no questions. I thank both of you gentlemen for your presentation.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. I want to thank, Mr. Chairman, these gentlemen for appearing. I wonder about the advisability of a provision that by concurrent resolution this prosecutor could be removed by the Congress. I have great difficulty with that. I think that scrambles up the division of Government. It states here on page 8 that he may "be removed from office during the term thereof"—15 years—"only by a concurrent resolution passed by both Houses of Congress."

Well, I could foresee a situation where this gentleman, the Solicitor, would be making very unpopular opinions and causing waves, and I would not want him to be removable by a concurrent resolution of both Houses. And, in fact, I don't think that any prosecutor appointed by the Executive should be subjected to that. Mr. Raskin, is it?

Mr. RASKIN [nodding head]. Well, I appreciate your point.

And so the question, then, is: Are we saying that there is no means for Congress or the President to deal with the Solicitor? Or would you see him in a quasi-judicial position?

Mr. DRINAN. No. I think he could be removed for a cause and that if he's not doing his job and all. But now, on line 12, when it says that, he may be removed "only by a concurrent resolution," does that mean that the President may not remove him for 15 years, that any President during that period may not? I assume that it does. But what was the rationale for refusing this power and then giving Congress the power to do so?

Mr. Chairman, I mean, if you have any enlightenment on that—what was the rationale why the concurrent resolution of the Congress could remove this individual?

Mr. RASKIN. I could perhaps shed some light on it.

Mr. WIGGINS. Maybe I can suggest an answer.

Mr. KASTENMEIER. I'm sorry. I wasn't listening to the gentleman. I assume the gentleman was——

Mr. DRINAN. Well, if you want to comment on the question of why, on page 8, does the bill provide that the Prosecutor or Solicitor may be removed from office by a concurrent resolution passed by both Houses of Congress?

Mr. WIGGINS. If the gentleman will yield——

Mr. DRINAN. Yes.

Mr. WIGGINS. I think it represents a disagreement on the part of the drafters of the bill with *Myers v. United States*, which is part of the constitutional law of this country. And I can understand why people don't agree with that decision and that we can amend the Constitution as interpreted by the Supreme Court by legislation.

That provision, among several others, would seem to be clearly unconstitutional, if the *Myers* case is still a precedent. Maybe it no longer is a precedent.

Mr. KASTENMEIER. Well, obviously, the problem is—and the gentleman is a cosponsor of this bill and can answer his own question—the problem is that you cannot have the solicitor removed by the executive branch because this particular solicitor polices the executive branch.

We were trying to avoid the same thing we avoided with the Special Prosecutor, with Mr. Cox. And yet, it may indeed be the case that such a person be removed. And so this mechanism was relied upon to achieve that rather than to have to impeach the individual—and that this is more or less the same or has the same effect as impeachment, I suppose, but without the same cause need having to be shown.

Mr. DRINAN. All right, I thank you.

Mr. DANIELSON. Would the gentleman yield?

Mr. DRINAN. Yes, sir.

Mr. DANIELSON. This would repeal the impeachment clause, I assume. Is that——

Mr. KASTENMEIER. No. It could not.

Mr. DANIELSON. You could not impeach?

Mr. KASTENMEIER. Oh, yes. You could.

Mr. DANIELSON. Well, it says here, that he can only be removed by joint resolution.

Mr. KASTENMEIER. It could not possibly, in my view, affect the impeachment clause. It merely suggests that pursuant to statute, that there be this additional, really I suppose, more ready means for removal. It doesn't——

Mr. DRINAN. I guess the point that bothers me is that there's no reason set forth here. It doesn't say "for good cause" or it doesn't say for the reasons ordinarily given in impeachment. And it suggests that both Houses, if they just didn't like their rulings, could come down hard and then remove him.

In any event, let me move to another point with which I have difficulty, too, that "The Solicitor shall"—on page 10—"render advisory opinions on the legality" and also somewhere else in the bill it says that he shall collect all of the laws that he feels are applicable to his office. Well, I had trouble with the latter concept particularly because we're the legislature and we're supposed to be telling him what laws

he should be enforcing. Isn't that a bit of a contradiction—where he collects the laws that he thinks that he should be enforcing?

Mr. RASKIN. If I'm not mistaken, Congressman, it states on page 10, line 21, "The Solicitor shall, at the earliest possible time following the enactment of this chapter, prepare and submit to the Congress a report containing," so that, in effect, we would see this as a suggested code rather than something the Solicitor would undertake on his own initiative.

But it would be a means wherein Congress would be directing the Solicitor to come up with a definition of what war crimes, in fact, would be applied. The current discussions at the Diplomatic Conference on the development of International Humanitarian Law helps in setting the meaning of proscribed activity. The State Department is participating in these talks. It should be noted that the bill contemplates that the Solicitor bears responsibility to Congress similar to the way the Comptroller General of the United States bears responsibility to Congress.

Mr. BOROSAGE. I think there is Supreme Court authority dating back from the early 1800's that the Congress, in making war crimes part of the domestic criminal code, need not specify in detail each of the war crimes—that it can do so by incorporation and through general legislation.

Mr. WIGGINS. Would the gentleman tell me where the case is, so I can take a look at this?

Mr. BOROSAGE. It's cited in the memorandum accompanied in Chairman Kastenmeier's statement in the Congressional Record. I'm sorry. I don't have it with me. I think it's Quiran, Q-u-i-r-a-n, but I don't have it with me. I'm sorry.

Anyway, the code then would simply be an attempt to give clear notice about what laws the Congress had, in fact, incorporated through the legislation to govern the activities of executive officials.

Mr. DRINAN. Well, how would both of you react to the contention by the Department of Justice that that body of war crimes or international law is simply too heterogeneous to be incorporated into our Federal Criminal Code?

Mr. RASKIN. Well, the suggestion—I don't think it's quite that heterogeneous. So it's just a matter of difference of opinion on the law itself. But beyond that, the notion would be for serious study on the part of the Solicitor, obviously in discussion with people in the executive, to begin working on the preparation of what particular war crimes would, in fact, be the basis upon which actions could be brought against individuals and upon which a Federal law would be written.

My own view is that this issue, indeed, is not quite as complicated as the Department of State opines. There are a great number of rules which, unfortunately, are hardly ever honored at this point. But they could be brought together and they could be made the basis of new legislation. I might add that the U.S. State Department has signed onto a far-reaching protocol which would eliminate the terrorizing of prisoners or civilian populations.

Mr. BOROSAGE. I think there probably is a lot of heterogeneity in the law. On the other hand, this country applied war standards against the countries that it defeated in World War II and their leaders and

tried people in criminal courts, internationally convened, and sentenced them to punishments up to and including the punishment of death.

Moreover, the Constitution of this country says that the international treaties that we sign are part of the laws of the land. It seems to me that it's the responsibility of the country to apply it to our own officials. Also, it strikes me as something of an anomaly in that there is at least the attempt to apply war crimes to our military officers, as people who fought in Vietnam came to understand. And yet there is no attempt to apply them to our civilian officials who are the ones who are, in fact, ultimately responsible generally for the policies carried out by those military officials.

And this bill would rectify that injustice.

Mr. DRINAN. Thank you very much, gentlemen.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. If we could move on beyond the constitutional questions, which I'm sure are substantial, I'd like to ask you some questions about some of the specific prohibitions. I'm troubled, No. 1, about the defining of a war of aggression. I think the literature of every country, just about, when you look at the literature of the country as it relates to a war that they were in, pretty much uniformly blames the other side for starting the war, no doubt done in good faith. But who started the various Israeli wars that we've had over the last 15 years or so?

If you look at the literature of the other country, no one admits that they started the war. And that's one question I have. I think viewing that in hindsight is rather difficult to square with normal concepts of the law. And then when you get into subsection B, you get into some very broad terms of "murdering, torturing, using as hostages, using for slave labor, or confining in concentration camps any prisoners of war or any civilians of another nation; and pillaging public or private property; or wantonly destroying cities, towns, or villages."

And I'm not sure what those things mean. I think I have a pretty good idea of what murdering means in ordinary civilian criminal law, but I'm not sure I know what torturing means and slave labor, I'm not sure what that means. And I suppose that's working without pay, involuntarily. And the prisoners-of-war suggestion—I wonder what we do with people that we capture. We obviously can't murder them. Do we send them back?

And I would like your comments on those rather substantive questions and particularly in view of the problem of applying those when the war is over, which is obviously the only time you can apply these things, except injunctively perhaps.

Mr. BOROSAGE. Right. In terms of a war of aggression, the United States recognizes the concept of a war of aggression and articulates it in opposition to the policies of other countries. Thus, the United States condemned the North Koreans for a war of aggression in South Korea and it was one of the justifications for our action with the U.N. in that war.

Similarly, the United States condemned the Israelis, the British, and the French for a war of aggression in 1956. Since we recognize—it is at best ironic that, having recognized the juridical concept in condemnation of others, we find it difficult to define when we're thinking about applying it to ourselves.

Now, there's been an ongoing debate in the U.N. and among commissions, which I'm sure Tom Farer can testify with greater exactitude than I, about the definition of a war of aggression. And it has been thus far inconclusive, although I'm told they've made progress in the last year or so.

On the other hand, much of the debate is around the edges. There clearly is such a thing as a war of aggression, which we can plainly identify and define ahead of time and put officials on notice that that is a war of aggression and let the questions around the edges wait until they are resolved by the international community.

In terms of the other language, "murdering, torturing, using as hostages or slave labor, any prisoners of war or any civilians of another nation," that is language tracking the language of international law around which there is case law. There are juridical decisions, and there is quite a history of interpretation which, like our own criminal law, uses murder and other kinds of definitions as prohibitions, defined with some exactitude as to what it means.

"Concentration camps" is not, as far as I know, a term of art in international law and, on the other hand, it seems to raise a very distinct image in everyone's mind about the difference between a concentration camp and a prison-of-war camp. Again, I would defer personally to Richard Falk and Tom Farer, who I understand will be testifying before you, who have far greater experience in these kinds of detailed questions than I.

Mr. PATRISON. So in terms of prisoners of war, the device is a concentration camp, apparently. I mean, this doesn't prohibit holding prisoners of war.

Mr. BOROSAGE. Right.

Mr. RASKIN. No. Let me try to answer part of your question, Congressman. This question has to be viewed not only in the context of what we would ordinarily see as a war—that is, a war between the United States and Indochina, whether or not it was declared—but it also should be viewed that these sorts of considerations would apply to continuous engagement of the United States in different areas of the world. So, for example, the U.S. attempt in the 1960's, through Operation Mongoose, is a case in point, to get rid of Castro and the leadership of Cuba and doing so through a wide variety of methods, apparently also including the poisoning of the sugar crops.

We have a condition of "peace" where warlike activities are undertaken in the context of permanent engagement. We are not only talking, therefore, about what we would usually bring to our mind—the images of great wars—but warlike activities and covert operations. They would be covered by this bill.

Now, in terms of the definition of war of aggression, the last 15 or so years have been spent in the United Nations attempting to define it, with the United States trying very hard not to define the definition of aggression. My understanding is that the United States has been the one most interested, up to the last several years, in not defining what aggression means. So that, in a sense, this would undertake to put our own feet to the fire on the question of definition around aggression.

In terms of the language which is used here, it is not only found in the international law, but also it was used in Joint Chiefs of Staff's directives in cases applying to Germany and Japan at the end of the

Second World War, so that you would be able to go back and find essentially the same language used during that period of time which was used as the standard by the United States on the bureaucracies of those two nations.

Mr. KASTENMEIER. Well, if there are no other questions, gentlemen, the committee thanks you both for your appearance here this morning, Mr. Raskin, and Mr. Borosage.

Mr. RASKIN. Thank you, sir.

Mr. BOROSAGE. Thank you, sir.

Mr. KASTENMEIER. The Chair is informed that the next two witnesses—Mr. Farer needs to return to catch a plane and that while on the schedule the Department of Justice and Mr. Robert Keuch appear as the next witnesses, Mr. Keuch has graciously consented to defer so that Mr. Farer could testify and leave.

Mr. Farer, and with Mr. Farer, Mr. Richard Falk. Mr. Farer is a professor of law at Rutgers University and Mr. Falk is a professor of international relations at Princeton University, both distinguished scholars and citizens.

Gentlemen, you are most welcome. You may proceed.

TESTIMONY OF PROF. THOMAS J. FARER, PROFESSOR OF LAW AT RUTGERS UNIVERSITY

Mr. FARER. Thank you very much, Mr. Chairman. I, too, very much appreciate the opportunity to appear before you today to testify on this bill. I have some prepared remarks, Mr. Chairman, which I'd like to supplement briefly.

Mr. KASTENMEIER. Without objection, your statement will be received and you may modify it as you wish.

Mr. FARER. Thank you very much, Mr. Chairman.

[The prepared statement of Prof. Thomas J. Farer follows:]

STATEMENT OF PROF. THOMAS J. FARER, RUTGERS UNIVERSITY

Détente, Secretary Kissinger has said, is not a unilateral American exercise in philanthropy. It is rather an exchange resting on hardheaded calculations of mutual benefit. The same, I think, can be said of the laws of war. Authored by the diplomats and soldiers of the world's greatest military powers, they reflect the judgment that violence, even where it may be justified as an act of legitimate defense, must not be allowed to degenerate into uncontrollable spasms of brutality.

International law is sometimes accused of being hazy and uncertain in its content. And whatever the accuracy of that generalization, it hardly applies to the laws of war which have, in significant measure, been codified with a precision rivaling the Uniform Commercial Code. And behind the codified rules, in all their particularity, rest a few great principles whose existence is universally acknowledged. For our purposes two are paramount. One is the principle of discrimination between military targets on the one hand (the armed forces, their transportation infrastructure and the war industries), and the civilian population together with its basic support systems, on the other. A second paramount principle is respect and compassion for the enemy soldier who has been rendered *hors de combat*.

The first principle unequivocally enjoins indiscriminate attacks on the civilian population, such as the Christmas Bombing of Hanoi. Whether designed to assuage the concerns of Mr. Thieu, or to convey a message to the Government of North Vietnam, it remains a clear breach of the fundamental principle, a crime of war. Equally criminal, of course, under the principle of discrimination, as well as specific provisions of the Geneva Conventions, was the massacre of the inhabitants of My Lai. Specific language of the Conventions, stemming from the second paramount principle, condemns the acts of torture which appear to have

been employed with disturbing frequency as a means of extracting intelligence from enemy prisoners particularly immediately following their capture.

In responding to your request for comment on the proposed legislation, the Department of Justice assured us that the necessary apparatus of enforcement is solidly in place. Indeed, the Department's spokesman implied concern that the legislation would tend to undermine the existing excellent structure. Surely he is to be congratulated for a subtle sense of humor if not necessarily for his candor. Even Mr. Sherlock Holmes, were he with us today, might have difficulty finding much evidence to support the Department's position.

During the entire twelve-year history of our Indo-Chinese intervention, there were a mere handful of court martials for acts of brutality perpetrated against either the civilian population of Indo-China or enemy forces. And in the rare case of an indictment and conviction, the penalties were generally derisory. Some of you will recall the bestial mass rape and murder of a Vietnamese girl recounted by Daniel Lang in the *New Yorker*. The ringleader was paroled within three years. The others involved in the crime served far briefer periods. But the most significant element in Lang's careful and gut-wrenching account of the case was the heavy resistance encountered by one member of the patrol who ultimately decided to report the act. Only after it was clear to the officers who received his report that he would not allow the matter to drop did they grudgingly activate the prosecutorial machinery.

That case pales beside My Lai, a graveyard rescued from historical obscurity to allow the claim of war crimes into the respectable forums of our society. No one any longer questions the elemental fact that a platoon of American soldiers entered this village and murdered in cold blood every man, woman and child they could find. Only one, Lieutenant Calley, was ever convicted. Several of his fellow murderers had already returned to civilian life where lawyers generally agreed they were utterly immune to trial either by court martial or in the civil courts. Calley's superior, Captain Medina, who by his own testimony was within a few yards of the killing ground, and had available constant radio communication with the platoon, was held not guilty after the court martial jury was erroneously charged by the military judge advocate that they could not find the Captain guilty of anything unless they were satisfied beyond a reasonable doubt that he had actual knowledge of the killings before they were completed. Nor was Medina indicted for his self-admitted effort to conceal what had occurred. If that were not a sufficient testament to the Military's extant capacity for self-policing where crimes of war are involved, we have as well the Peers Commission and its aftermath. Following a thorough investigation of the initial failure to investigate the massacre, General Peers and his colleagues recommended charges against fourteen officers for conscious participation in a conspiracy of concealment. In thirteen cases the charges were dismissed without so much as a trial. Only one man, Colonel Henderson, was charged; yet it would have taken a fine eye indeed to distinguish clearly between his role and those attributed to his fellow officers by members of a committee whose ability, objectivity, and patriotism has never been questioned.

If we accept the veracity of even a quarter, even a tenth, of the former servicemen and war correspondents who have recorded eyewitness accounts of war crimes—the torture of prisoners, the indiscriminate destructions of villages, the forced transplantation of peasants to refugee camps barely able to sustain life, the summary execution of suspected enemy cadres—then the incongruity between the number of crimes and the overall number of prosecutions would itself raise the most serious doubts about the efficacy of the existing machinery of enforcement.

But to support legislation along the lines here proposed, we do not have to rely on that gross disparity. My Lai was a paradigm case. The facts did not admit to contradiction. The crime was awful. The response contemptible. Having failed so dismally in that instance, the existing institutions of enforcement cannot enjoy the confidence of men and women seriously concerned about enforcing the laws of war.

In the light of this failure and the reasons behind it, Mr. Rakestraw's claim that there is "no demonstrable reason" for creating new enforcement machinery is an earnest either of ignorance or of contempt for efforts to bring our behavior into line with our legal commitments, our national interests and our aspirations as a great people.

The endorsement of new machinery does not lead ineluctably to unqualified support of the proposed legislative initiative. Despite a pervasive odor of re-

flexive bureaucratic antagonism to any proposals for reform which are not internally hatched, the comments of the Department of State unlike those of the Department of Justice, which it is hard to take very seriously, do raise serious doubts about a number of its specific features, though not its general thrust. In the first place, in my judgment, the armed forces should retain primary responsibility for the prevention and, failing that, the detection, prosecution and punishment of war crimes. On this point, legislation must speak with absolute clarity.

If, despite their ancestry, the laws of war come to be perceived as alien to the military fraternity remember that the enforcement will become more difficult than it is today. No outside agency can operate effectively unless in the generality of cases it enjoys the cooperation of the armed forces. Relieved of legal responsibility to police themselves they will have no incentive to assist and many to resist an external agency. That is the lesser difficulty with any proposal which might be read to shift primary responsibility to a new venue. The greater one springs from the fact that the threat of conviction is nowhere near as effective a means of law enforcement as a community spirit hostile to violation. And this, I think, is particularly true in hierarchical associations characterized by a high degree of professionalism. Whatever its present condition, the requisite respect for the honor of the military profession can only attenuate further in the event of a frontline shift in enforcement responsibility.

What the armed forces evidently do need, however, is an incentive to greater vigilance. Knowledge that their behavior will be monitored by an agency directly accountable to Congress and empowered to initiate prosecutions if it concludes that the armed forces have been unduly dilatory or have otherwise failed to meet their responsibilities, might provide that incentive.

As for the agency itself, Congress must endow the agency with the powers appropriate to a body that will combine monitoring and, in the last resort, prosecutorial functions. It must be able to command the presence of witnesses, both members of the armed forces and civilians, and the production of documents. Its chief officials should be subject to removal only with the consent of Congress. However, I would argue that it must have authority to prosecute both civilian officials and former members of the armed forces who return to civilian life before their crimes are discovered. Thus, it will fill both *de facto* and formal lacunae in the existing scheme of enforcement.

In addition to monitoring enforcement of the laws of war during periods of armed conflict, the agency should as well engage in the prophylactic activity of reviewing proposals for new weapons systems and, more important, modes of deployment to assure their legal propriety. In particular, the agency must be alert to weapons that by their nature will cause unnecessary suffering in the process of disabling an opponent or, like the latest developments in the anti-personnel field, tend to be grossly indiscriminate. Yet more in need of systematic review are proposed tactics and strategies concerning, for instance, the use of firepower and the choice of weapons, particularly in heavily populated areas. Once incorporated in formal and informal guidelines, as well as programs of instruction, they may be exceedingly hard to alter once conflict erupts.

Two years ago, in testimony before Congressman Fraser's Subcommittee on International Organizations and Movements, it was revealed that neither the Army Judge Advocate nor the Office of the General Counsel in the Department of Defense was required to pass on the legality of proposed weapons systems. Shortly thereafter, the Deputy General Counsel of the Department Mr. Neddle-liner stated in a letter to Congressman Fraser that the Department planned to initiate systematic review. I do not know whether this has in fact, occurred. To say the least, it would be belated and obviously not self-generated. Moreover, the review as described would not extend to proposed modes of deployment, but only to the weapons themselves. Beyond all those caveats, however, is the difficulty I experience, as a former Special Assistant to a distinguished Pentagon General Counsel, imagining that office exercising an effective veto over proposals emanating from the services and the office of research and development.

Those are, I would submit, sufficient functions to attach to this new agency at its birth. The proposed legislation goes much further. It would also authorize the National Security Solicitor to enjoin aggressive wars and to prosecute our highest elective and appointive officials for initiating the use of force for purposes outlawed by international law.

The purpose is admirable. But as the State Department's comments indicate, the proposed statutory means is hounded by institutional and normative difficulties. I endorse the basic judgment that in order to restrain the Executive's enor-

mous power to involve the United States in armed conflicts even against the will of a majority of the people and their Congressional representatives, an effort must be made to use the judicial branch to redress the balance. The concept of aggressive war is surrounded by a wide penumbra of uncertainty. But there is, nevertheless, a hard core of agreed meaning, a set of standards sufficiently precise to allow judicial review in certain extreme cases. The Court will always retain the option of abstaining from the constitutional fray by invoking the political question doctrine.

While endorsing the end, I am uncertain whether it is best pursued through the medium of a Federal agency. One problem that the scheme suggested may be rejected by the Court as an oblique effort to secure the sort of advisory opinions to which our entire Constitutional history is firmly opposed.

At least in the case of major wars, the end can be sought on safer legal ground by allowing civilians to resist conscription on the grounds of the conflict's illegality.

Whether it would be consistent either with our national security, our jurisprudence, or our institutional balances to go further is an issue towards which I still feel uncommitted. I suspect that many others will share my uncertainty. For that reason I fear that an effort to impose this additional function on the proposed new agency is likely to defeat the entire enterprise.

Let us begin in the area where consensus is far broader, the law more clear, the institutional need virtually self-evident. Success there will be in itself a great victory for the best traditions of our nation. Nor will it leave the dangers of illegal recourse to force wholly unaffected. For if it is clear that we are serious about limiting the kind of force that can be deployed, that in itself will limit its occasions. We will find, I suspect, far less inclination to regard the use of violence as little more than the conduct of diplomacy by other means.

Mr. FARER. Chairman, détente, as Secretary Kissinger has said, is not a unilateral exercise in philanthropy. It is rather an exchange resting on hardheaded calculations of mutual benefit. The same, I think, can be said of the laws of war. Authored by the diplomats and soldiers of the world's greatest military powers, they reflect the judgment that violence, even where it may be justified as an act of legitimate defense, must not be allowed to degenerate into uncontrollable spasms of brutality.

International law is sometimes accused of being hazy and uncertain in its content. Whatever the accuracy of that generalization, it hardly applies to the laws of war which have, in significant measure, been codified with a precision rivaling the Uniform Commercial Code. And behind the codified rules, in all their particularity, rest a few great principles whose existence is universally acknowledged—that is, they are part of the customary law.

For the purposes of this legislation two of those principles are paramount. One is the principle of discrimination between, on the one hand, military targets—the Armed Forces, their transportation infrastructure and the war industries—and, on the other hand, the civilian population together with its basic support system.

A second paramount principle is that of respect and compassion for enemy soldiers who have been rendered hors de combat, either by being wounded or taken prisoner.

The first principle unequivocally enjoins indiscriminate attacks on the civilian population as such, such as the Christmas bombing of Hanoi. Whether it was designed to assuage the concerns of Mr. Thieu or to convey a message to the Government of North Vietnam, it remains a clear breach of the fundamental principle, a crime of war.

Specific language of the Conventions stemming from the second paramount principle condemns the act of torture which appear to have been employed with disturbing frequency during the Vietnamese war

as a means of extracting intelligence from enemy prisoners, particularly in the immediate aftermath of their capture.

In responding to your request for comment on the proposed legislation, the Department of Justice assured us—I'm referring now to Mr. Rakestraw's response last year—he assured us that the necessary apparatus of enforcement is solidly in place. Indeed, he implied concern that the legislation would tend to undermine the existing excellent structure. Surely he is to be congratulated for a subtle sense of humor, if not necessarily for his candor. For even Mr. Sherlock Holmes, were he with us today, might have difficulty finding much evidence to support the Department's position.

During the entire 12 years of our Indochinese intervention, there were a mere handful of courts-martial for acts of brutality perpetrated either against the civilian population or against enemy forces. And in the rare case of an indictment and conviction, the penalties were generally derisory.

If I might interpolate just for a moment, Mr. Chairman, I am concerned about the penalties which are contained in this particular statute. As applied to some of the most severe acts enumerated in the legislation, they too could be regarded as derisory.

Some of you will recall the bestial mass rape and murder of a Vietnamese girl recounted by Daniel Lang in the *New Yorker*. The ring-leader was paroled within 3 years. The others involved in the crime served far briefer periods. But the most significant element in Lang's careful and gut-wrenching account of the case was the heavy resistance encountered by the one member of the patrol who ultimately decided to report the act. Only after it was clear to the officers who received his report that he would not allow the matter to drop did they grudgingly activate the prosecutorial machinery.

That case pales besides My Lai. No one any longer questions the elemental fact that a platoon of our soldiers entered a village and murdered in cold blood every man, woman, and child they could find. Only one member of the platoon, Lieutenant Calley, was ever convicted. Several of his fellow murderers had already returned to civilian life where, lawyers generally agreed, they were utterly immune to trial either by court-martial or in the civil courts.

Calley's superior, Captain Medina, who by his own testimony was within a few yards of the killing ground and had available constant radio communication with the platoon, was held not guilty after the court-martial jury was erroneously charged by the military judge advocate that they could not find the captain guilty of anything unless they were satisfied beyond a reasonable doubt that he had actual knowledge of the killings before they were completed.

Nor was Medina indicted for his self-admitted effort to conceal what had occurred. If that were not a sufficient testament to the military's existing capacity for self-policing where crimes of war are involved, we have as well the Peers Commission and its aftermath.

Following a thorough investigation of the initial failure to investigate the massacre, General Peers and his colleagues recommended charges against 14 officers for conscious participation in a conspiracy of concealment. In 13 cases the charges were dismissed without so much as a trial. Only one man, Colonel Henderson, was charged; yet it would have taken a fine eye, indeed, to distinguish clearly between his role

and those attributed to his fellow officers by members of a committee whose ability, objectivity, and patriotism have never been questioned.

If we accept the veracity of even a quarter, even a tenth, of the former servicemen and war correspondents who have recorded eyewitness accounts of war crimes, then the incongruity between the number of crimes and the overall number of prosecutions would itself raise the most serious doubts about the efficacy of the existing machinery of enforcement.

But to support legislation along the lines here proposed, we do not have to rely on that gross disparity. My Lai was a paradigm case. The facts did not admit to contradiction. The crime was awful. The response contemptible. Having failed so dismally in that instance, the existing institutions of enforcement cannot enjoy the confidence of men and women seriously concerned about enforcing the laws of war.

The endorsement of new machinery does not lead reluctantly to unqualified support of the proposed legislative initiative. Despite a pervasive odor of reflexive bureaucratic antagonism to any proposals for reform which are not internally hatched, the comments of the Department of State, unlike those of the Department of Justice, which it is hard to take very seriously, do raise serious doubts about a number of the specific features of this legislation, although not its general thrust.

In the first place, in my judgment, the Armed Forces should retain primary responsibility for the prevention and, failing that, the detection, prosecution, and punishment of war crimes. On this point, legislation must speak with absolute clarity.

If, despite their ancestry, the laws of war come to be perceived as alien to the military fraternity—and remember that the laws of war emerge from the military fraternity's own sense of honor and that the first codification of the laws of war was drafted to guide the Union Army during the American Civil War—if these laws become perceived as alien to the military fraternity, enforcement will be more difficult than it is today.

No outside agency can operate effectively unless in the generality of cases it enjoys the cooperation of the Armed Forces. Relieved of legal responsibility to police themselves, they will have no incentive to assist, and many to resist, an external agency. That is the lesser difficulty with any proposal which might be read to shift primary responsibility to a new venue.

The greater one springs from the fact that the threat of conviction is nowhere near as effective a means of law enforcement as a community spirit hostile to violation. And this, I think, is particularly true in hierarchical associations characterized by a high degree of professionalism which is, of course, the case of the Armed Forces.

Whatever its present condition, the requisite respect for the honor of the military profession can only attenuate further in the event of a frontline shift in enforcement responsibility.

What the Armed Forces evidently do need, however, is an incentive to greater vigilance. Knowledge that their behavior will be monitored by an agency directly accountable to Congress and empowered to initiate prosecutions, if it concludes that the Armed Forces have been unduly dilatory or have otherwise failed to meet their responsibilities, might provide that incentive.

As for the agency itself, it seems to me Congress must endow it with the powers appropriate to a body that will combine monitoring and, in the last resort, prosecutorial functions. It must be able to command the presence of witnesses, both members of the Armed Forces and civilians, and the production of documents. Its chief officials should be subject to removal only at the initiative of the President and with the consent of Congress.

I believe—and again, I'm interpolating—that the Constitution does allow a congressional veto of removal in the case of a position like the one under consideration. As interpreted by the Supreme Court, the Constitution draws a distinction between the traditional agencies of Government, the Department of State, for example, where it is very unlikely that the Congress can limit the President's power to remove officials, and new agencies, particularly one established to assist the Congress in monitoring the behavior of executive branch personnel.

It is arguable that the kind of agency proposed here is so like the Justice Department, one of the traditional agencies of government, that the precedent cited by Congressman Wiggins would be controlling. But my personal judgment is that the Supreme Court would find otherwise. But one has to concede that this is a difficult, problematical matter.

Finally, the new institution must have authority to prosecute both civilian officials and former members of the Armed Forces who return to civilian life before their crimes are discovered. Thus, it will fill both *de facto* and formal lacunae in the existing scheme of enforcement.

In addition to monitoring enforcement of the laws of war during periods of armed conflict, the agency should as well engage in the prophylactic activity of reviewing proposals for new weapon systems and, more important, modes of deployment to assure their compliance with international law. In particular, the agency must be alert to weapons that, by their nature, would cause unnecessary suffering in the process of disabling an opponent or, like the latest developments in the anti-personnel field, tend to be grossly indiscriminate. But more in need of systematic review are proposed tactics and strategies concerning, for instance, the use of new weapons and the choice of weapons, particularly in heavily populated areas.

Once incorporated in formal and informal guidelines, as well as programs of instruction within the armed services, tactics and strategies may be exceedingly hard to alter after conflict erupts.

Two years ago, in testimony before Congressman Fraser's Subcommittee on International Organizations and Movements, it was revealed that neither the Army Judge Advocate nor the Office of the General Counsel in the Department of Defense was required to pass on the legality of proposed weapons systems. Shortly thereafter, the Deputy General Counsel of the Department stated in the letter to Congressman Fraser that the Department planned to initiate systematic review.

I do not know whether this has, in fact, occurred. To say the least, it would be belated, and obviously it would not be self-generated. Moreover, the review as described by the Department would not extend to proposed modes of deployment, but only to the weapons themselves.

And beyond all of those caveats is the difficulty I personally experience, as a former special assistant to a distinguished Pentagon general counsel, imagining that office exercising an effective veto over proposals emanating from the services and the office of research and development.

Those are the minimum functions I would attach to this agency at its birth. The proposed legislation goes much further. It would also authorize the solicitor to enjoin aggressive wars and to prosecute our highest elective and appointive officials for initiating the use of force for purposes outlawed by international law.

The purpose is admirable. But as the State Department's comments indicate, the proposed statutory means is hounded by institutional and normative difficulties. I endorse the basic judgment that in order to restrain the Executive's enormous power to involve the United States in armed conflicts, even against the will of a majority of the people and their congressional Representatives, an effort must be made to use the judicial branch to redress the balance.

The concept of aggressive war is surrounded by a wide penumbra of uncertainty. But I would agree with Mr. Raskin: There is a hard core of agreed meaning, a set of standards sufficiently precise to allow judicial review in certain extreme cases. And the Court will always retain the option of abstaining from the constitutional fray by invoking the political question doctrine.

Mr. Chairman, I would just like to conclude by referring to the prohibitions, enumerated in section 2552, which have already aroused considerable comment. I know Congressman Pattison was particularly concerned about them.

It seems to me that this is the bill's point of maximum vulnerability. After all, we are dealing with a criminal statute, although it also provides for certain civil remedies. And I'm not sure that Mr. Raskin's comments always were careful to draw that distinction—between a set of instructions to the Executive limiting his power and a set of rules which will be used ultimately for criminal prosecution.

If we're going to have a criminal statute—and I believe it should be a criminal statute—the prohibitions must be set out with great precision. Rather than incorporating, by reference, vast bodies of law in the diverse forms of treaty, custom, and precedent, it would be far better for the Congress to draw upon those sources in constructing a list of the grave delinquencies that ought to be at the center of concern.

Let me exemplify. There is reference to a war of aggression or a war in violation of any international treaty or agreement to which the United States is a party. By using that language, the legislation invites a finding of unconstitutional vagueness. In addition, it ignores the more precise codification which is incorporated in the War Powers Act. Having determined to limit unilateral recourse to force by the Executive, Congress would be well advised to add penal teeth to its prohibitions, regardless of international law. In fact, your prohibitions are an effort to take the essence of international law and to make it part of domestic law.

Let me suggest one possible, not very elegant, but still possible way of approaching the problem, which I think is far superior to what's been proposed. It would be something like this. "No person subject to this chapter shall order the use or engage in a conspiracy to use or attempt to use or use the official Armed Forces of the United States or forces, military or paramilitary, recruited, trained, equipped, or paid by the United States"—and then an important qualification—"other than the armed forces of another sovereign state, except in the ways, under the circumstances and for such purposes as are set out in the

War Powers Act or any subsequent act of Congress either limiting or authorizing the use of force."

That, I think, comes a good deal closer to a criminal standard, although it has its problems as well. Now a second lack of precision in the statute that bothers me a great deal. In conventional parlance, as both the State Department and the Justice Department indicate, the term "violations of the laws and customs of war" would never include overthrowing by force, violence, or bribery, the leadership of a nation with which the United States is not at war. They are two entirely different bodies of law.

If the means used to overthrow the foreign government is force or violence, then the case would generally fall under the proscription that I've just suggested and would fall in a much more precise way under that proscription. Therefore, it doesn't need a separate accounting.

Even certain of the specific prohibitions relating to the laws of war are illusory in their precision. They tend, moreover, to create hopelessly onerous burdens of proof for the prosecution and finally, and paradoxically in a statute which tries to reach very far indeed, they are irrationally underinclusive, at least in one respect.

Let me give you an example of underinclusiveness. While the use of biological means is included, there is no reference to either lethal toxins or to poison gas and other chemical killers whose use is equally without question a violation of the laws of war and of our own internal directives.

As far as the burden of proof is concerned, in the face of contradictory testimony by various authorities on tactics and strategies, can you really imagine many prosecutors satisfactorily convincing a jury that the destruction of crops was not imperatively demanded by the necessities of war?

If we're going to protect the civilian population, it is necessary to preclude certain acts absolutely. Another example of imprecision—and, you see, there's an intimate relationship between the imprecision and the fantastically onerous burden of proof—is the reference to concentration camps, a very tendentious and fuzzy word. After all, there's no question about the propriety of keeping prisoners of war in detention centers.

In a criminal statute, rhetorical invocations are finally self-defeating. The question is: What kinds of behavior in connection with the administration of those camps or centers should respectively be prohibited or demanded? I would restrict subparagraph 1 to murder, mayhem, and more broadly, to coercive interrogation. We could make it a crime, for example, to use force, or the denial of adequate food, shelter, or medical attention, or the threat thereof, in order to extract information. That's a fairly clear prohibition.

Finally, Mr. Chairman, in a separate subparagraph I believe the legislation should deal with the abusive use of fire power against the civilian population. We could incorporate proposals made by a number of the smaller states at the recent series of conferences on the law of war.

I would recommend the following two, which I do think meet the requirements of precision. The first one—and I have modified them slightly to make them still more precise—the first one would read as follows: "Foodstuffs and food-producing areas, crops, cattle, water re-

sources and constructions intended for the regulation of such resources, including dams and dikes, shall never be subjected to attacks directly launched against them."

Second, a prohibition, the substance of which is actually contained in the laws of war incorporated by the Federal Republic of Germany in the Code of Conduct for its own military is the following: "Attacking as one sole objective, by means of bombardment or any other methods, an area comprising several military objectives which are some distance from each other and situated in populated regions is prohibited." In other words, "carpet-bombing"—where, in order to take out a few military objectives, you simply kind of flatten half of the city in order to somewhat more economically manage your objective—would be out.

But I would have to conclude with this caveat: As long as deterrence remains our principal strategy for avoiding nuclear war, it will be necessary to establish retaliation against nuclear attack as an exception to both prohibitions. Otherwise, deterrence would be precluded by the language that I proposed.

I want to thank you very much, Mr. Chairman, for listening to these somewhat extended remarks. I hope they are of some use to the committee.

Mr. KASTENMEIER. Thank you, Professor Farer. Professor Falk?

TESTIMONY OF PROF. RICHARD FALK, PROFESSOR OF INTERNATIONAL RELATIONS AT PRINCETON UNIVERSITY

Mr. FALK. Mr. Chairman and members of the committee, I too, am very grateful for this opportunity to participate in these hearings and to have this opportunity to address some comments to the bill that is before this committee, which I regard as an undertaking of great importance.

I also want to apologize to the committee for not having a prepared statement, partly a result of somewhat short notice and partly a consequence of my own schedule. And I shall try to make my remarks as clear as I can under these circumstances. And if you desire, I can submit a prepared statement subsequent to this appearance.

Mr. KASTENMEIER. Thank you, Professor Falk. Actually, it is noted by the committee as well that originally you were scheduled to be here tomorrow, but because tomorrow's hearing has been preempted by a full committee meeting, it's not possible and you have kindly consented, accordingly, to appear today to fill in today's agenda.

And I certainly can understand why you would not have a prepared statement today.

Mr. FALK. Thank you very much. I would like to concentrate my remarks upon that portion of House Resolution 8388 that does go to the question of legal accountability for the highest civilian authorities in our Government. And I do this partly because I feel this is the most important and distinctive feature of this proposed legislation and also because it does, to a degree, complement and illuminate, I hope, the disagreements that I have with the last portion of Professor Farer's presentation that has just been made.

In my judgment, the effort of liberal democratic societies, from the time of the Magna Carta onward, has been to try to impose limits on the exercise of discretion by governments and by rulers, and that no

course of legal reform is more important nor is more at the basis of Western constitutional tradition than the attempt to devise new limitations upon governmental authority as circumstances change and the character of those limitations appropriately alters.

And in that spirit, it is my conviction that in the nuclear age no abuse of political discretion is more grave than those abuses that drag one's own society and other societies into unwarranted warfare or that involve a defiance of those legal limits on warfare that have been created through so much effort and on the basis of such terrible experience with wars of the past.

And I believe, furthermore, that no illusion is more dangerous than the one which suggests that our own humanity stops at our territorial boundaries and that foreign victims of governmental abuse, if situated beyond these boundaries, are of no concern to us as Americans. Indeed, I believe the effort to create for ourselves and communicate to others the fact that our concerns are global, so far as the restraints of law are involved, is perhaps the most fundamental justification for legislation of this sort.

And it is for this reason, I think, that our recent constitutional history suggests the imperative necessity for some kind of legislative initiative of this sort. Because if one looks back on Vietnam and on Watergate, we find a persistent Executive tendency that has been more or less endorsed by the Congress to insist that the rule of law does apply in domestic affairs, but to more or less acknowledge the notion that foreign affairs occupy or occur in a realm of lawlessness.

The Vietnam debate was carried on exclusively in official institutions on political and pragmatic terms despite the massive lawlessness of official policies. President Nixon's behavior in the White House was subject to legal scrutiny eventually. But the House Judiciary Committee refused to regard the secret, deceptive bombing of Cambodia peasants to be included in the bill of indictment.

The rationale may have been persuasive under the circumstances. Congress had, itself, endorsed all phases of the war. It was important to proceed with the impeachment proceedings on the basis of a maximum political consensus. But behind these notions there was left for our citizenry and our leaders the underlying notion that White House horrors were beyond the reach of law, if only their locus was beyond our territorial boundaries. And the victims of such White House horrors were without the standing of American citizens.

It is my view that such a conception of law is both unsound and self-defeating at this stage in our national history. But I feel that more than this reinforces the claim of such a legislative initiative as the one before this committee. Because since Watergate and Vietnam, our leaders have continued to act as if legal restraints on their foreign behavior, even if enacted into valid law by congressional action, are not binding.

Consider, for instance, the Secretary of State's attitude toward congressional limits on military aid to Turkey. Consider also the persistent pattern of noncompliance with the provisions of the Case Act requiring the transmission of even secret executive agreements to the Senate Foreign Relations Committee.

It seems to me a very serious indictment of the Congress itself that it acquiesces in the failure by the Executive authorities of this country

to comply with its own legislation. And we now have evidence, including evidence in this morning's paper, that our highest authorities failed to transmit to Congress the secret understandings between our Head of State and the heads of state in North and South Vietnam that accompanied the Paris Agreements in 1973. In my judgment, this was a patent violation of enacted legislation. And what is more significant is that it suggests the degree to which the notion of creating a rule of law for our political leaders, as it applied to foreign policy as well as to domestic affairs, has not caught hold to any significant degree.

And in that sense, I think, very fundamental notions about the separation of powers and checks and balances are at stake in a positive sense; namely, one needs such legislation as this precisely to repair what seem to me to be the continuing excesses of what has been called the imperial presidency.

So I think it is clearly essential from this narrow point of view of creating lawful government that Congress take steps to show that it means what it says, to uphold its authority by regarding officials of this country as personally responsible for violations of law in the context of national security behavior.

Finally by way of background, the effort in international law to restrain violence in world society is one that is of utmost importance, despite the setbacks that have been received. And it is one that, in my judgment, is vital to the national well-being of our own people and to human survival more generally considered. In the past the United States has played a prominent and constructive role in this process. It has taken the leadership, as is well known, in the formulation of the basic prohibitions against aggressive uses of force that were first embodied in the Kellogg-Briand Pact in 1929. It took the lead in urging the legal prosecution of German and Japanese war criminals after World War II. It participated in the drafting of a charter of the United Nations and the creation of the United Nations organization itself, given the primary task of trying to prevent aggressive uses of force.

And it was the United States that took the lead in urging the endorsement by the United Nations, which occurred unanimously, of the Nuremberg principles as a basis for future state conduct. Therefore, it seems to me, that House Resolution 8388 is a vital further step in this slow, often frustrating, but nevertheless indispensable process. The great weakness in the Nuremberg tradition of accountability arises from failures of implementation.

Nuremberg was itself compromised by its failure to consider the crimes of the victorious powers in World War II, especially the carpet bombing of cities and the use of atomic bombs against Hiroshima and Nagasaki.

International society continues to lack either the will or the capability to implement the Nuremberg restraints. Therefore, the future of accountability with respect to this whole effort to restrain uses of force depends on self-enforcement, or implementation, in other words, by domestic institutions of governance.

There are two points of substance, then, both of which underlie the Nuremberg initiative and are at the center of the rationale for House Resolution 8388. First, the necessity for personal accountability of top civilian leadership, if one is serious about introducing the role of law

into critical areas of national security policy. Second, the applicability of standards of accountability to all states including one's own.

Both of these points were eloquently underscored by Justice Robert Jackson in his eloquent opening statement to the Nuremberg Tribunal on November 21, 1945, where he made very clear that the essence of what was being sought by the U.S. Government and by the Allied Powers was to impose some form of legal accountability on the political leadership of a society that was fundamentally responsible for waging illegal warfare, and second, that this initial effort to hold accountable German war leaders was intended to create the premise for a general effort at accountability that would apply not only to Germany but henceforth to all states.

Now, as we know, the historical record since Nuremberg has been very poor. Nevertheless, it seems to me that the very pooriness of the record requires just the kind of additional legal effort that is implied by this kind of legislation that seeks to implement, on a domestic level, the kinds of standards that have been established and embodied in international law on a global level as a consequence of Nuremberg itself and subsequent endorsements of it in a formal legal form.

Now, it is true, and it has been alluded to already, that there are several lines of objection to House Resolution 8388 and I would like briefly, in concluding my remarks, to deal with some of the principal lines of objection.

The first line of objection, which I find not a very serious one, is that such legislation is not really needed because adequate provision already exists within our legal code. Now, that may be in a formal sense true—that we have in our domestic legal code already the kind of provisions that are needed to deal with war crimes that emanate from military undertakings and that are committed by members of the military establishment, by members of the Armed Forces, such as shooting prisoners of war, and indiscriminate slaughter of civilians, the very sort of activities that were at the center of the My Lai events. But this misses, in my view, the main thrust of this legislation, which is to set up a reasonable procedure by which to ready top officials, to make them aware of their own legal accountability, and to provide standards that would, in that ultimate circumstance, potentially lead to their legal responsibility and accountability.

So I feel that it is not a very serious objection to suggest that our law already includes the kind of undertakings that are contained in this proposed legislation.

A second line of objection is that it is impractical at this stage to impose this kind of legal accountability. And in part of this allegation of impracticality is that other governments don't hold their leaders so accountable and especially the main rival of the United States in world society, the Soviet Union, certainly subjects its leaders to no legal scrutiny whatsoever, whether they act domestically or internationally.

But the rationale for House Resolution 8388 is that such accountability serves our self-interest as a country and is consistent with our domestic notions of the rule of law. The Soviet Union and other authoritarian societies don't operate according to law in any sphere of their activity, but this, it seems to me, makes no case whatsoever that such behavior on their part warrants emulation on our part.

A third line of objection is that such legislation is futile. No domestic procedure is going to proceed against its own leadership during a period of national tension. The Vietnam experience could be invoked to demonstrate this. Virtually every Congressperson who opposed the war continued to be unwilling to deny appropriations by which to fight it.

I think this is true and regrettable. But it seems to me that it provides an occasion to learn from Vietnam rather than regard ourselves as bound forever to repeat the course of events that led to its tragic circumstances. Obviously, no legal arrangement can guarantee compliance with normative standards in a period of pressure, whether domestically or internationally. But it can be so designed to deter lawlessness and to insure some reasonable prospect of effectiveness. And I believe House Resolution 8388 has made this attempt in a serious and constructive way by means of the creation of an independent office of National Security Affairs with an office of National Security Solicitor.

A further line of objection—and in my view the most substantial one—is that the bill, as drafted, is technically defective. Some of these defects have been dealt with with admirable clarity and persuasiveness by Professor Farer, though I believe, in my judgment, he has exaggerated the degree of defectiveness that inheres in the present formulations.

Essentially, the argument here is that the provisions are too vague, that they are disconnected from prevailing legislation, that they lack the kind of legal specificity needed for criminal offenses, that they encroach upon existing jurisdictional authorities, and that they are superfluous jurisdictionally, and hence, involve the unnecessary re-delegation of legal authority within our Government.

Now, in my view, part of this objection based on technical defectiveness is somewhat hypocritical, in light of the general satisfaction that all major elements of our society did view the Nuremberg judgment itself with, which proceeded on a basis of much greater vagueness and which was endorsed subsequently to the judgment by very formal legal institutions.

It seems to me that the magnitude of the undertaking, the importance to the future of civilization of finally bringing war under some kind of legal regime is so great, and the efforts to do so are so rudimentary, that we have to expect the slow accretion of legal specificity in dealing with these fundamental offenses.

Now, I do believe that the prohibitions sections of the bill could be redrafted and strengthened considerably. I would, in very general form, think that it would improve the acceptability and the clarity of this legislation considerably to redraft the three provisions of section 2552 into two main provisions, A and B. In what I would argue would be a desirable reformulation of 2552A, it would seem to me desirable to adhere much more closely to the three categories of Nuremberg crimes that could then be more or less formulated in the language of the Nuremberg principles that have been endorsed, to a large degree, by the International Law Commission, and unanimously endorsed by the General Assembly of the United Nations.

And then, it seems to me, desirable in a second section to add a set of specific acts of the sort that Professor Farer has already alluded to.

And I do think that present enumeration of specific acts is very inadequate for many of the same reasons that he feels them to be inadequate and I do agree that it would be extremely important to try to focus on the two categories of specific undertakings that he enumerated in his closing remarks, specifically those crimes of war involving the denial of food sustenance to the civilian population, including such infrastructure of agriculture as dams and dikes, and second, the indiscriminate bombing offense which seems to me to be the essence of terrorism embodied into high technology warfare.

So I feel, in conclusion, that this kind of legislation does aim at a constitutionally necessary and historically critical set of goals, that there is before this committee a fundamentally appropriate means to accomplish that result, but that these means could be greatly strengthened in order to enhance both the legal acceptability of the means that are used and to improve the quality of the legislation itself.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Falk.

Apparently we are unanimous about one thing, namely, that H.R. 8388 is not a perfect legislative vehicle.

Mr. FARER, do you think that it was anticipated that following Nuremberg that this country or that any other of the Western countries would have done anything internally in terms of their own laws to effect accountability of their own leadership with respect to war crimes or potential war crimes?

Mr. FARER. That's a very hard thing to say, Mr. Chairman. I've looked at Nuremberg very closely, in part to rebut the cynics. I don't use the word "cynic" altogether pejoratively; there are grounds for cynicism about Nuremberg. After all, the Soviet Union was a participant and it, too, could have been indicted for some rather serious crimes. Indeed, we ourselves were open to attack for dropping the second nuclear bomb.

On the other hand, it is significant that we did not indict the Germans, or the Japanese I believe, certainly we did not indict the Germans for city bombing, since we ourselves were vulnerable on that point.

I think those figures within the U.S. Government who took the leading role did think that this was a very important legal precedent. And I think that that helps to explain why we did not charge the Germans with indiscriminate bombardment, and why, although we indicted Admiral Doenitz for unlimited submarine warfare, we eventually dropped the charge after Admiral Nimitz testified that we started unlimited submarine warfare in the Pacific the day after Pearl Harbor.

All of this suggests that we thought of this as a serious legal precedent and we wanted it to be fair. So my judgment is that fueled by the enthusiasm, optimism, and euphoria, which surrounded victory, there was a feeling that this was a precedent—it was just not a one-shot affair.

If I could add a note to that. Under the Geneva Conventions of 1949, we are obligated, as are all signatories, to take effective measures internally to assure the proper enforcement of the conventions. And one can argue, particularly in the wake of the Vietnamese war, that we have not entirely satisfied that obligation and that some

further steps are necessary. In other words, legislation along the lines proposed may well be required to meet our existing international legal commitments. That's as much as I can usefully say on that point.

Mr. KASTENMEIER. Thank you. The purpose, of course, of this hearing—and I must say there is very little likelihood that this bill will, unamended, whisk through the Congress, through both bodies, and be signed by President Ford before spring—I can't think of anything more unlikely.

So it serves principally as a focus for a dialog on the question, not so much to revitalize the sins of the past or to inspire a new public debate on Vietnam or other involvements on the part of this country, but rather to see if there is some more reliable mechanism for holding American officials at a high level to account, consistent with Nuremberg and as that which would be further developed by subsequent history.

And I appreciate personally your own reservations and suggestions for change in this particular bill. Yet if one rejects this bill, there still is a notion that something ought to be done—and I'm not sure it's merely strengthening the Code of Military Justice—other than existing law or vague reference to treaties or international obligations, to let American officials know that there is a degree of accountability, in fact, embedded in the law, in its code, particularly since we're apparently in the process of revising title 18. And you could go in the other direction, as at least one formulation of that would suggest.

Well, I thank you both. I'm going to yield, because of the time, to my friend from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman. I want to thank both of you, too, Mr. Farer and Mr. Falk. Really your presentation was inspiring. I can't think of any more urgent moral issue before the Congress and the country than which you've talked about. And it's discouraging when one contemplates the apathy, I suppose, here and elsewhere on this.

And the thought that keeps coming back to me is this—that could one or both of you describe something that has been done by other nations in connection with the Nuremberg principles? Is there any hope that gradually other nations might accept the basic Nuremberg principles as a part of their law since now they are international law?

Mr. FARER. Well, perhaps we both want to speak to this. I think, having recently served in the State Department—I'm back in academic life now—one should not discount the enormous influence of the United States in all sorts of ways. We are still the dominant power in the world, the dominant influence in the world.

If we were to adopt some legislation along these lines, it seems to me very likely that it would inspire comparable legislation in other countries in the Western alliance, at least in the NATO alliance. I don't refer to that large amalgam of countries, sometimes referred to as the Free World Alliance, most of whom are not free.

The trouble, of course, is that the countries likely to adopt and enforce this kind of legislation are the democracies. And one would have said a few years ago that these are the countries least likely to need this kind of legislation. I'm not sure I would have said that. I think when it comes to war and peace issues, great states, even dem-

ocratic ones, necessarily concentrate enormous power in the hands of a few people. I think that's always been true. It's not really a peculiarity of the nuclear age and the temptation to resolve international problems through the exploitation of this enormous power is very great. So I think it would be important, even if only the democracies and perhaps other countries sort of on the fringe of our influence, some of the Latin American states, for example—and several of them are democracies or quasi-democracies—were to adopt this.

The tensions among states are growing. In places like Latin America, which in the past we've thought of as a zone of peace, the tensions among states—border disputes, resource disputes—are becoming more prevalent. There's every reason to want to act to restrain the use of force.

And if I could just, as a final word, clarify what I said earlier, I'm inclined to agree with Professor Falk that there would be a great deal of symbolic force in placing within this special office not only the power to prosecute war crimes, but also the power to restrain the Executive from illegal recourse to force if we can find a very limited, very precise definition, whether along the lines I propose or along other lines.

However, even if we are only prosecuting or threatening with prosecution our senior officials for violation of the Geneva and Hague Conventions, that itself would be of enormous symbolic significance and, as Mr. Raskin and Professor Falk suggested, I believe, would very much heighten awareness of these kinds of constraints within the National Security Council and other forums where high security policy is made.

And it's true from my own experience—and I've had some experience—that questions of norms and laws tend to operate at a pretty low level of consciousness and concern. If we could raise that level, that, I think, might be the great achievement of this office. We might never have any prosecutions, and yet the creation of the office might have real consequence.

Mr. DRINAN. I wonder if Professor Falk would want to comment on that?

Mr. FALK. Yes. Let me just say first, Congressman Drinan, that your role in raising these kinds of moral issues throughout the Vietnam war and since then has been a great source of inspiration to those of us outside Government in the hope that official institutions would be responsive to these fundamental issues.

Let me try to respond first by suggesting that I think that there's a tendency, because of the immediate pragmatic outlook for legislation of this sort to be too defensive about it and too passive in its assertion. And I really think that since it is the right kind of legislative restraint on political authority, that one shouldn't be too intimidated by the whole political atmosphere that makes it difficult to envision its early embodiment in binding law.

You see, if one raises the opposite question, and that is: Why do we want to leave our highest elected officials free to commit illegal activity of this sort? Why does it serve our national interest or the interests of our people to allow the leadership to engage in aggressive warfare? I mean, I think that one has to pose that kind of question because implicit in the rejection of this kind of legislative initiative is some notion to that effect—that it somehow serves our national interest

to be able to proceed free from these kinds of legal constraints when we engage in foreign policy.

And I would maintain that even from a rather pragmatic point of view, when the United States has abandoned the restraints of international law in pursuing its objectives abroad, it has done very badly in realizing those objectives and has had the disastrous effect on the polity back here in the United States.

So I feel that the case for the assertion is so overwhelming that one shouldn't be apologetic or defensive in trying to achieve this result. But coming specifically to the question of what others have done with the Nuremberg precedent, I very much share what Professor Farer said to the effect that the United States, as the leading creator of Nuremberg itself, is in a very strong position to influence what others do or don't do.

And I do think that the Indochina experience, if nothing else, has revealed a certain lack of seriousness about Justice Jackson's pledge to the future, that this would apply to Americans as well as to Germans. And so we are viewed in that context by those who take these questions seriously at all as having been somewhat hypocritical.

But beyond that, I do think there is some nonlegislative experience in other societies that is very relevant and that is that many leading international law bodies and leading international lawyers have contended that the Nuremberg principles form part of *jus cogens* in contemporary international law, which in nontechnical terms means that these principles are binding on governments, independent of what their domestic law may be and independent even of subsequent international law.

In other words, that these principles are so fundamental in the legal order of world society, that they have a standing equivalent to natural law, being immutable and being of validity under all circumstances regardless of what governments do. So this really brings me, in a sense, to the point where I started this response, and that is, that it seems to me so clearly that the principles embodied in this legislation serve the well-being of this country and of the world in general, that we should pursue this line of legislative action for its own sake and that it is of vital importance that these kinds of restraints be achieved and that we really do need a Magna Carta for foreign policy in the nuclear age. And that until we get that, it will be a very dangerous world for ourselves to live in, as well as for all others. Thank you.

Mr. DRINAN. Thank you, Professor Falk, for an eloquent statement. You've been very, very helpful. Thank you.

Mr. KASTENMEIER. The gentleman from New York? Mr. —

Mr. DANIELSON. Mr. Chairman, could I excuse myself? I hate to miss —

Mr. KASTENMEIER. Yes, of course.

Mr. DANIELSON [continuing]. Congressman Pattison's questions.

Mr. PATTISON. No. I was just going to thank you for being here and for engaging in this discussion. It has been very helpful to me and I have no particular questions.

Mr. KASTENMEIER. The committee thanks you both for your appearance here this morning.

Mr. FALK. Thank you very much.

Mr. FARER. Thank you very much.

Mr. KASTENMEIER. I hope you catch your plane.

Last, the Chair would like to call Mr. Robert Keuch, who is Chief of the Special Litigation Section of the Criminal Division and who, the Chair is advised, has been recently appointed Deputy Assistant Attorney General. We are very pleased to hear that.

Mr. Keuch, you have a relatively short statement that we have. You may proceed with it.

TESTIMONY OF ROBERT L. KEUCH, CHIEF, SPECIAL LITIGATION SECTION, CRIMINAL DIVISION OF THE DEPARTMENT OF JUSTICE

Mr. KEUCH. Thank you, sir.

Mr. Chairman and members of the subcommittee, I am pleased to have the opportunity to present the views of the Department of Justice on H.R. 8388, a bill to amend title 18 of the United States Code to provide a code of accountability and liability for Government officials engaged in making and implementing national security policy and to be cited as the Official Accountability Act of 1975.

This bill, which is similar to H.R. 9214 introduced in the 93d Congress—Mr. Chairman, at this point, if I could depart from my statement for a moment, in view of your time schedule, and since the next few paragraphs really describe the provisions of the bill and I'm sure we're all familiar with those, it might be appropriate, without objection, if I skipped over to the bottom of page 2 of my prepared text and just insert the description of the bill in the record.

Mr. KASTENMEIER. Without objection, your statement in its entirety will be made part of the record.

Mr. KEUCH. Thank you, sir.

[The prepared statement of Mr. Keuch follows:]

STATEMENT OF ROBERT L. KEUCH, CHIEF, SPECIAL LITIGATION SECTION, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman and members of the subcommittee: I am pleased to have the opportunity to present the views of the Department of Justice on H.R. 8388, a bill "to amend title 18 of the United States Code to provide a code of accountability and liability for Government officials engaged in making and implementing national security policy" and to be cited as the "Official Accountability Act of 1975."

This bill, which is similar to H.R. 9213 introduced in the 93rd Congress, would establish "an independent office" with jurisdiction to proceed against any officer or employee of the United States (including any member of our armed forces) or any other person who receives directly or indirectly any compensation or remuneration from the United States if he commits national security crimes as specified in section 101(a) of the bill, at pages 3-5. The head of the Office of National Security Affairs, the National Security Solicitor, would be granted exclusive authority to prosecute any violation of the prohibitions set out in the bill, notwithstanding any other provision of law.

The bill prohibits Federal officers and employees (and others, as indicated above) from "engaging in the planning of, preparation for, or initiation or waging of, a war of aggression, as well as planning, preparing or committing any violation of" the laws and customs of war, including murder, torture, use of hostages, pillaging, destroying crops, using biological weapons and overthrowing by force, violence, or bribery the leadership of a nation with which the United States is not at war. "The laws and customs of war" is defined to include all rules relating to military hostilities derived from (1) treaties and agreements to which the United States is a party, (2) customary international law, and (3) the standards, principles, and precedents of the Nuremberg, Tokyo, and other war crimes tribunals.

The National Security Solicitor and the Deputy Solicitor would be appointed by the President, by and with the advice and consent of the Senate, for a single term of fifteen years and would be removable during their term only by a concurrent resolution of both Houses of Congress. Besides conducting investigations and handling criminal and civil proceedings, the Solicitor would be required to hold public hearings at least twice a year to take testimony from persons claiming to possess information relevant to national security violations. The Solicitor would also be obliged, as early as possible, to prepare and submit to the Congress a complete code of war crimes and recommendations for updating the laws and customs of war. All federal officers and employees would be required to furnish the Solicitor any information about their official duties and any papers, records, or other material the Solicitor wanted, notwithstanding any other provision of law (including any privilege or other constraint upon disclosure), and the officer or employee would not be punishable for disclosing the information.

In the view of this Department, H.R. 8388 contains basic constitutional defects in the machinery it would provide for enforcing its prohibitions. There are, moreover, other reasons for our opposition to the legislation. These stem from the incorporation by reference into H.R. 8388 of the body of international law relating to warfare. That body of international law is simply a too heterogeneous mass to be incorporated into our federal criminal code.

A principal defect in the bill is its creation of an "independent" office apart from the executive branch of government. In distributing the powers of government among the three branches, the Constitution of the United States refers to the power to prosecute criminal violators in the general injunction in Article II, Section 3, that the President "shall take care that the laws be faithfully executed." It is axiomatic that the prosecution of offenses against the United States is an executive function, now the prerogative of the Attorney General. See *United States v. Cox*, 342 F.2d 167, at 190 (5th Cir. 1956), cert. denied, 381 U.S. 935. In its apparent intention to make the National Security Solicitor independent of the Chief Executive, H.R. 8388 offends the constitutional separation of powers, first by redistributing the powers, and then by making the new officer removable at the pleasure of Congress. *Myers v. United States*, 272 U.S. 52 (1926); contrast *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

In any event, we cannot perceive a sound justification for creating a new officer to prosecute the offenses set out in the bill. Furthermore, until any such time as the United States becomes engaged in warfare, there would be little for the new official to do. Moreover, his jurisdiction would overlap that particularly of the Department of Defense, with its courts-martial system for the trial of violations of the Uniform Code of Military Justice.

The requirement that the National Security Solicitor hold public hearings at least twice yearly to entertain complaints of violations under this bill would also be an anomaly in our system of justice. In ordinary circumstances, a prosecutor proceeds, after screening complaints, by using professional investigators and then by making secret presentations of evidence to a grand jury; the evidence against an individual is not publicized unnecessarily. Only after formal charges have been made can a defendant be called upon to answer to the charges or to put the government to its burden of proof. This bill, in providing for public airings of complaints of violations, even if provision were made to guarantee an accused a right to respond to the potentially amorphous charges, would impose upon the Solicitor serious problems, not the least of which would be to accord those complained against basic considerations of fair play.

Apart from the matter of enforcement by an independent prosecutor, H.R. 8388 is objectionable because it incorporates by reference so much that is not in a form appropriate to the new setting. Incorporating the body of international law into a new framework invites untold difficulties. For example, the 1949 Geneva Conventions obligate the parties to provide effective penal sanctions for grave breaches of the conventions. See Greenspan, *The Modern Law of Land Warfare*, 503 (1959). By contrast, the present legislation prohibits any violation of the laws and customs of war as derived from international treaties to which the United States is a party. A great many such difficulties may lie hidden because of the incorporation by reference.

One expert has said that: "[I]f International law is the weakest point of all law then the Law of War is virtually its vanishing point," Draper, *The Ethical and Juridical Status of Constraints in War*, 55 *Military Law Review* 169, 177 (1972). The criticism has also often been made that international conventions on the laws of warfare are designed to govern the last war rather than a future one.

It is not enough to say that, if these difficult principles are binding in any event, then they can be incorporated by reference in a bill like H.R. 8388. This bill contains its own special statement of prohibitions and defenses that cannot always be squared with what is incorporated.

To illustrate the problems, it is noted that the bill denies a defense based simply on "superior orders" or status as a responsible governmental official. The bill also incorporates the "standards, principles, and precedents" of the war crimes trials. The significance of these trials, however, is open to serious dispute. Legal commentators disagree as to the scope of the Nuremberg judgments, specifically whether their principles extend to persons not part of the inner circle of leadership. See Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 Military Law Review 99, 165 (1972). If the Nuremberg precedents do indeed excuse some government officials not in the inner circle of leadership from penalty for certain violations of international law, then the precedents seem in conflict with the statement in the bill that a man cannot be excused because he is a responsible government official. This, again, illustrates the difficulties that can arise out of an incorporation by reference of such a heterogeneous body of law as is here involved.

In making the National Security Solicitor responsible for developing a complete code of war crimes and of recommending the updating of the laws and customs of war, this bill reflects its own uncertainty about the content of what it incorporates and perhaps even about its present-day validity. We must then oppose this bill because its precise applications are simply not discernible.

The Department is also of the view that this legislation is largely unnecessary. Article 18 of the Uniform Code of Military Justice (10 U.S.C. 818) gives general courts-martial jurisdiction to try and to punish any person who could by the law of war be tried by military tribunal. Under its provisions, persons may be penalized for actions involving violations of international law, such as the murder of prisoners or disobedience of orders against looting. This Department has taken the position in the past that existing legislation is sufficient for purposes of meeting our international obligations. See, among other statements, *Hearings before the Committee on Foreign Relations on the Geneva Conventions for the Protection of War Victims*, U.S. Senate, 84th Cong., 1st Sess., June 3, 1955, at 58; Paust, *op. cit.*, 123. Furthermore, it may be preferable to utilize military tribunals instead of civilian courts as the machinery for enforcing international law. The rules of land warfare, for example, are dominated by the principle of military necessity, see Greenspan, *op. cit.*, 313-315; and a military tribunal may be better able to judge a set of facts involving military operations than would be a civilian tribunal.

Mr. Chairman, that concludes my prepared statement, and if you or the other members of the Subcommittee have any question, I will be pleased to attempt to answer them at this time.

Mr. KEUCH. In the view of this Department, the Department of Justice, H.R. 8388 contains basic constitutional defects in the machinery it would provide for enforcing its prohibitions. There are, moreover, other reasons for our opposition to the legislation. These stem from the incorporation by reference into H.R. 8388 of the body of international law relating to warfare. That body of international law is simply a too heterogeneous mass to be incorporated into our Federal Criminal Code.

A principal defect in the bill is its creation of an "independent" office apart from the executive branch of the Government. In distributing the powers of Government among the three branches, the Constitution of the United States refers to the power to prosecute criminal violators in the general injunction in article II, section 3, that the President "shall take care that the laws be faithfully executed."

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officer removable at the pleasure of Congress. See *Myers v. United States*, 272 U.S. 52; contrast *Humphrey's Executor v. United States*, 295 U.S. 602 as pertinent to this observation.

In any event, we cannot perceive a sound justification for creating a new officer to prosecute the offenses set out in the bill. Furthermore, until any such time as the United States became engaged in warfare, there would be little for the new official to do.

Moreover, his jurisdiction would overlap that particularly of the Department of Defense, with its courts-martial system for the trial of violations of the Uniform Code of Military Justice.

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One expert has said that: "If the international law is the weakest point of all law, then the Law of War is virtually its vanishing point," referring to Mr. Draper, in "The Ethical and Juridical Status of Constraints in War," at 55 *Military Law Review* 169. The criticism has also often been made that international conventions on the laws of warfare are designed to govern the last war rather than a future one. It is not enough to say that, if these difficult principles are binding in any event, then they can be incorporated by reference in a bill like H.R. 8388. This bill contains its own special statement of prohibitions and defenses that cannot always be squared with what is incorporated.

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ity," at 57 Military Law Review 99, 165. If the Nuremberg precedents do, indeed, excuse some governmental officials not in the inner circles of leadership from penalty for certain violations of international law, then the precedents seems in conflict with the statement in the bill that a man cannot be excused because he is a responsible Government official. This, again, illustrates the difficulties that can arise out of an incorporation by reference to such a heterogeneous body of law as is here involved.

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Furthermore, it may be preferable to utilize military tribunals instead of civilian courts as a machinery for enforcing international law. The rules of land warfare, for example, are dominated by the principle of military necessity. See Greenspan, as cited previously. And a military tribunal may be better able to judge a set of facts involving military operations than would be a civilian tribunal.

Mr. Chairman, that concludes the prepared statement, and if you or other members of the subcommittee have any questions, I'll be pleased to attempt to answer them at this time.

Mr. KASTENMEIER. Thank you, Mr. Keuch. Let's see, if I understand your reservations. First of all, one of them is the incorporation by reference to the body of international law relating to warfare. We could remove one objection you have by, in fact, codifying that part of the body of international law relating to warfare which one would feel ought to be applicable and which could be, in fact, written into our own Code. Supposing that would be done—how large a mass that would be, I do not know. Presumably, it could be reduced, culled, and, as even section 2252, in part, attempts to do, that would be possible. We could meet your objection to that.

Let me ask about point 2—and this, again, is the *Cox* case reargued.

Supposing, the office was created as part of the Justice Department's Office of National Security Solicitor, say, on a par with the Solicitor of the United States, but under the Attorney General. Do you think such an office would be prepared to prosecute the crimes that we

culled from international law and codified? Do you have any problem with it?

Mr. KEUCH. I think there would still be some problems, sir, depending upon what provisions were made for the supervision and oversight of the Solicitor. First let me say in responding somewhat to the first comments you made, there can be no doubt that the Congress has the power to define and punish offenses against the law of nations. As a matter of fact, that is specifically provided for by article 1, section 8, clause 10, of our Constitution. And one of the comments or one of the cases referred to briefly by prior testimony, *Ex parte Quirin*, which is at 317 U.S. 1 and also a similar case, *In re Yamashita*, which is at 327 U.S. 1, makes clear that the Congress has the power to provide for the trial and punishment of offenses against the laws of war. I think it's important to note that in those cases the punishment was being conducted by military tribunals within the executive branch.

Should the Solicitor be, for organizational purposes, within the Department of Justice, but still be accountable, not to the people, or not to the Executive, but solely to the Congress of the United States, so he could only be removed by resolution of the Congress, I believe we would have the same basic separation of powers problems that we do with the present legislation.

Mr. KASTENMEIER. Yes. That's a separate problem. I can see presumably we would not have that provision in. If, just for the purpose of argument, we were agreeable to trying to meet your objections, I'm trying to determine what we would have left.

Of course, we understand that there is a Code of Military Justice and that the Code of Military Justice sued Lieutenant Calley and so forth. Obviously, that is not exactly what we're talking about. We're talking about something beyond that and that's why I object to your reference to that Code as a cure-all, as a thing to be relied upon. We do rely, in certain specific instances, on it. We're talking about obviously a greater accountability, one that even may involve policymaking. And there is the rub, it seems to me.

Mr. KEUCH. Mr. Chairman, at this point it might be useful, I'd like to, if I may, refer to a document I'm sure you are familiar with and one which I think deals in this area with much greater skill certainly than I can. The previous resolution, H.R. 9214, in the previous Congress, the Department of State's comments on the international and national law that are applicable in this area, which were addressed to you, sir, as chairman, I would like to refer to. And if the committee does not have those available, I would like to make that statement or letter to you a part of the record. I think that describes some of these matters in greater detail than I feel qualified to do.

Mr. KASTENMEIER. What I'm attempting to do is to see if the needs of the Justice Department were somehow met in the abstract, whether we would still have a viable bill and whether we could get your endorsement.

Mr. KEUCH. I understand.

Mr. KASTENMEIER. Supposing I were to ask you this, Mr. Keuch, to, given the objectives of the bill, to have the Justice Department write in general form—I wouldn't ask them to do what it did to the United States Code, title 18—but in general form to suggest a bill to accomplish the objectives with which it itself could live institutionally, not

worrying too much about the State Department or the Defense Department.

But would that be possible as a sort of an exercise?

Mr. KEUCH. I think it would be possible, sir, but I think it would be in the context of amendments to the present Criminal Code and to perhaps the present Uniform Code of Military Justice. Again, there is no question of the power of Congress, as a legislative branch, to define and punish certain offenses. And if we're talking about an attempt to describe and draw up those types of offenses or the intent or the obvious kinds of offenses that this type of legislation wants to reach, and incorporate them in our present Criminal Code, of course, the Department would make every attempt to be helpful to the committee.

I think as you've already alluded to, there are some sections of S. 1 that do have some of these provisions. I might also note, as an aside, that I believe that in some of the matters that were touched on by previous witnesses—of course, there is some parallelism here—that there are two select committees who are dealing with some of the problems that have been raised and I'm sure would also have legislative comments.

Mr. KASTENMEIER. Yes. They'll have legislative comment; they don't have legislative responsibility. Legislative responsibility largely, though, would reside in the Judiciary Committee.

Well, let me, then, ask you that, Mr. Keuch, if you will—assuming one premise only: that is, to view affirmatively, for the purpose of this exercise, the goals attempted to be accomplished by this bill—to have to put something together which would achieve a measure of that which would be in the context of the way the Justice Department would see it.

Mr. KEUCH. I certainly will attempt so.

Mr. KASTENMEIER. I yield to the gentleman from New York.

Mr. PATTISON. Thank you. I'll be very brief. Conceding all of the difficulties with this particular legislation, would it not be helpful to have—to members of the executive department who are confronted with the problem of having superiors give them instructions—would it not be helpful to have some kind of law to which they could point and say: "I think that what you have asked me to do raises some questions in relation to that law. You're asking me to do something that may well have implications for myself in terms of being prosecuted after the thing is done."

Would that not—I mean, I realize there are great difficulties in defining the particular kinds of offenses—but would that not be a helpful thing in terms not only of those people, but in terms of the restraining influence on national policy that that might have?

Mr. KEUCH. I would think the answer to that, sir, would have to be "yes," if, indeed, such standards on violations be drawn to the necessary specificity. I think there is obviously a certain tension between the views presented by the Department in commenting, on one hand, that there is a difficulty of embodying into our law a great heterogeneous mass of international law and the law of war and then, on the other hand, talking about the fact that since it is already incorporated, in

fact, in certain portions of our law, that that, in a sense, makes some of this legislation unnecessary.

And I think the problem there is to develop those concepts to the point where they can be understood. Some of the previous testimony has commented on some of the attempts in this draft, the draftsmanship here. And my only reservation, in answering the Chairman's request, would be whether or not, consistent with military necessity and the national interest and the concepts of international law and the Law of War, the fact that we have constantly advised the United Nations, for example, and other international bodies that the Law of Nations is part of our law—we are bound by the Law of War—whether or not those concepts can be specifically described is a serious problem.

Mr. PATTISON. I recognize the seriousness of that problem. It just seems to me that there are, in fact, many provisions of positive law contained in a variety of places which are really not available in any real sense to anybody but real scholars of that field. And the problem is that that person who feels that maybe what he is being suggested to do is not quite right has no place to turn except to those very, very abstruse and difficult-to-find provisions of international law.

And so that having a place where he could turn, it would seem to me—and then setting up a procedure, perhaps, to determine whether or not his instinct is backed up by law—might very well be helpful.

Mr. KEUCH. Yes, sir. I think an attempt to distill those principles would be helpful. Without being too pessimistic, I think that we would probably come to the conclusion that there are certain very clear areas that can be defined. But I think, as some of the disagreements of the learned gentlemen who appeared before me indicate, that in this area there are a broad range of opinions and discussions.

One gentleman may wish to exempt, for example, a retaliatory nuclear strike, and someone else might believe that poisoning a grain-field or poisoning a sugar crop might be a less serious act to take in the face of possible aggression, than only of nuclear deterrents.

So I'm afraid that what we will wind up with—and we'll certainly make every effort to comply with the chairman—would be a distillation and a codification of those matters in which there is very little doubt and probably those in which even today—particularly the military know that they are bound by the laws of war and are probably within the knowledge of people who are active. But we'll certainly make the attempt.

Mr. PATTISON. Well, I think that will be a useful, at least, first step. No further questions.

Mr. KASTENMEIER. Thank you very much, Mr. Keuch, for appearing with us this morning.

Mr. KEUCH. Thank you, Mr. Chairman.

Mr. KASTENMEIER. That concludes our testimony today.

[Whereupon, at 2:50 p.m., the subcommittee adjourned, subject to the call of the Chair.]



