REFORMS NEEDED TO ADDRESS DEFICIENCIES IN THE NATIONAL EMERGENCIES ACT OF 1976

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Chairman Cohen, Ranking Member Johnson, and distinguished members of the subcommittee, thank you for the opportunity to testify today.

It is an honor to join Ms. Goitein on this panel. She is an important national leader on presidential emergency powers and the reforms needed to The National Emergencies Act.

I am not a legal scholar. Thus, Ms. Goitein and the cofounder of Keep Our Republic, Mark Medish, have been my invaluable legal and constitutional advisors on these matters.

Two defining experiences have brought me here today to discuss concerns regarding presidential emergency powers.

In 1979, I was included as a White House staffer to fly on Air Force One to attend Vice President Nelson Rockefeller's funeral. On the flight I sat around a table with President Carter, National Security Advisor, Brzezinski, and Attorney General Bell. Sitting close by was the man with the nuclear suitcase, which of course contained the top-secret launch codes and the menu of target options required for the President to launch a counterattack.

The President had only minutes to select a nuclear counterattack option determining which of the thousands of targets within the Soviet Union and its allied countries would be turned to ashes in a counterattack. Only the president, if alive after the launch of a first strike, can still make such split decisions once a nuclear attack is detected.

During the flight I listened to a conversation between Carter and Brzezinski regarding these options. Since 1977 Carter had been working with Brzezinski on alternative response options. Some were designed to give him greater

flexibility so he might limit the dimensions of a nuclear apocalypse. Their views where later enshrined in the controversial Presidential Directive 59.

As they discussed these issues I noted in Carter's face and body language the weight of his responsibilities. This snapshot engraved in me the nightmare reality a president alone faces in matters of nuclear weapons and now regarding the existential threats of biological weapons.

Consequently, there has never been a question for me whether a president should be given or should assume such extraordinary existential powers for these realities. The question is on what authorities are these powers granted or assumed and with what conditions and with what oversight, if any?

Over the years I have grown to not only appreciate the weight of a president's decisions on these matters, but equally the weight of the decisions Congress or the Courts must weigh in granting or approving such powers. There is fault in not granting the powers needed by a president in a cataclysmic crisis. There is equal fault in granting such powers without guidelines and oversight. The potential for abuse or overreach is far too tempting and consequential.

This second consideration was brought home to me in the summer of 2019, when former Ambassador William Miller invited Mark Medish and me to his home.

Miller was ill and died a few months later. He called to request we co-author an op-ed to address his concerns regarding the weaknesses in The National Emergencies Act and to raise still unanswered questions regarding the assumptions of inherent presidential powers.

As staff director of the U.S. Senate's Special Committee on National Emergencies and Delegated Emergency Powers, he had overseen the drafting of the 1976 Act. His insights and concerns on these matters were and are still invaluable.

Over time, Miller had realized the flaws in his committee's legislation. Those flaws were compounded by the Supreme Court's 1983 Chadha decision.

The op-ed was to be his final call to arms for reform of the 1976 Act and for the need to address the issues surrounding the assumed inherent powers of a president.

His death came before we could draft the op-ed.

At that meeting Miller also ask us to dedicate ourselves to the mission he was unable to finish. We agreed, having no idea the consequences of our consent and the enormity of the task.

It is in the context of these two experiences I appear today to voice support for the Committee's leadership and reform efforts.

In closing let me reiterate that Miller's views on presidential emergency powers were not naïve or simplistic. His aim was always two-fold. One: to empower in times of crisis the president with the full might of our nation. But also, to ensure that Congress, in granting these powers, had the transparency and oversight required and is now lacking.

Through decades of Congressional service and oversight, especially regarding the intelligence community, he knew the potential for executive abuse and overreach. He never tired of warning of the latent dictatorial powers a president had and might be tempted to abuse. His mantra was that a president had the power to blow up the world with the push of a button and the power to blow up the Constitution with not even a stroke of the pen.

He warned that "hundreds of emergency statutes confer enough authority on the President to rule the country without reference to normal constitutional process."[1]

The question before us remans how to best balance these concerns with legislation and oversight regarding statutory authorities. I am confident much progress can be made.

[1] Special Committee on National Emergencies Source Book

The question for tomorrow is how to address the second elephant in the room: issues raised regarding the assumed inherent powers of a president.

The Supreme Court has been asked multiple times to define the scope of inherent presidential powers. It has not given clear and consistent guidance.

> "...the courts failure to articulate a standard for when the President may act without the express constitutional or statutory authority has significantly lessened the judicial checks on the Chief Executive. The Court's inconsistence has left the President with no guidance as to when he may act or even what will determine whether his actions will be upheld or declared unconstitutional. As a result, the President may take almost any action under the guise of 'inherent' authority."[2]

The Committee should consider the need to establish a record on this matter. Silence or lack of a clear Congressional view on inherent presidential powers, powers assumed but not explicitly granted by statute or the Constitution, might well be interpreted by the Court and the President as implicit consent.

We should not rule out the possibility that a president might one day use the claims to these inherent powers to avoid the transparency and oversight now being considered in the reform of the 1976 Act.

Thank you.

[2] "Controlling Inherent Presidential Power: Providing a framework for Judicial Reform.", Southern California Law Review (1983), Erwin Chemerinsky