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Opening Remarks

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THE CONTINUITY OF GOVERNMENT

OPENING REMARKS

*Lloyd N. Cutler**

We are not going to be able to prevent all successful terrorist attacks on the American homeland or on American forces or citizens abroad, but there is at least one step we can and must take to defend ourselves against such attacks. Stated simply, we must ensure that the United States Government can continue to function in the event of a catastrophic attack.

The Federal Government's ability to function depends on a little-known constitutional provision that defines the quorum necessary for Congress to do business as a majority of those elected to each House.¹ If a future attack killed or incapacitated 218 of the 435 representatives or 51 of the 100 senators, Congress could not declare war, make treaties, appropriate funds, or borrow money—the United States could not engage in any kind of prolonged combat with any government or terrorist group.² This paralysis would prevail at least until new elections could be held to fill the vacancies.³

As a practical matter, about a century ago, the problem was resolved for the Senate by the Seventeenth Amendment, which provides for state-wide popular elections for the Senate instead of selection by the state legislatures.⁴ Pending such an election, a state legislature can authorize its governor to fill vacancies with temporary appointees, who would serve until the election is held.⁵ But there has been no such amendment dealing with vacancies in the House, and to date, the House has not been willing to pass one. Instead, the House relies on a dubious century-old parliamentary ruling that it can act by a majority of its members who

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1. U.S. CONST. art. I, § 5, cl. 1.
2. *See id*; *see also* U.S. CONST. art. I, § 8 (listing Congressional powers).
3. Howard M. Wasserman, *The Trouble with Shadow Government*, 52 EMORY L.J. 281, 301 (2003) (describing what might happen if either house of Congress could not summon a quorum).
4. U.S. CONST. amend. XVII, cl. 1 (enacted in 1913); U.S. CONST. art. I, § 3, cl. 1.
5. U.S. CONST. amend. XVII, cl. 2.

have been elected and are still alive.⁶ Because Congress can only act bicamerally, post-attack paralysis of the Federal Government will remain a danger until the House joins in resolving the problem. Sooner or later, as a matter of sheer political necessity, the House must face this problem and join the Senate in adopting a constitutional solution. How and when this will happen is what we are here to discuss today.

6. CHARLES W. JOHNSON, H.R. RULES AND MANUAL § 53, H.R. DOC. NO. 107-284, at 22.