

CONTINUITY COMMISSION WEIGHS PRESIDENTIAL SUCCESSION

By Suzanne Nelson

Roll Call

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The Continuity of Government Commission held a hearing Monday on presidential succession, the second phase in its efforts to ensure that the federal government could be immediately reconstituted in the event of a terrorist attack.

Before former Sen. Alan Simpson

(R-Wyo.) and former presidential adviser Lloyd Cutler, the co-chairmen of the commission, questioned panel members about potential structural and constitutional problems with the 1947 Presidential Succession Act, however, they got a status report on the progress of how their first initiative - continuity of the legislative branch - is proceeding through Congress.

Thomas Mann, a senior counselor to the commission in his capacity as scholar at the Brookings Institution (which jointly runs the commission with the American Enterprise Institute), said he wished he "could give a positive report that Congress is moving expeditiously and inexorably" toward a solution, but in fact the issue is stalled in the House because key leaders oppose temporary appointments.

"There are some encouraging signs in the Senate," he added, as Judiciary subcommittee on the Constitution Chairman John Cornyn (R-Texas) is in the process of drafting a constitutional amendment as well as implementing legislation that would specify how and when House Members would be temporarily appointed. In characteristic

fashion, Simpson took the opportunity to rail on House Members - specifically Judiciary Chairman Jim Sensenbrenner (R-Wis.) and Rules Chairman David Dreier (R-Calif.) - for their "stubbornness" on the issue.

(The 17th Amendment provides for the appointment of Senators to fill vacancies by death or resignation. The Constitution requires that House seats be filled by special election.)

Referring to the position that appointments would fundamentally alter the character of a body whose Members have always been directly elected, Simpson asked: "Has anyone ever asked what the character of the House would be if death and incapacitation shredded the capacity to get a quorum? I thought hubris was reserved for the Senate ... There is a stubbornness there that I just don't understand."

He later stated his intention to meet with the two Members to discuss the issue.

If Monday's four-hour hearing made anything clear, however, it's that while the presidential succession issue is complicated and most panel experts view the current statute as inadequate to cover a host of catastrophic scenarios, the solutions are more easily workable than is the far more divisive issue of legislative branch continuity.

Cornyn sponsored the hearing and testified as a witness, along with Reps. Brian Baird (D-Wash.) and Brad Sherman (D-Calif.). (As an outside group, the Continuity of Government Commission held the hearing in a Senate hearing room with permission of the Rules and Administration Committee and Cornyn's endorsement.)

Indeed, although testimony by two separate panels of experts identified a host of issues that the commission must consider before issuing its report, expected sometime next spring, there is broad consensus in both chambers that presidential succession needs to be reworked.

Perhaps the biggest issue with presidential succession as the statute is currently written is Members' prominent position in the chain of successors, which many scholars maintain is unconstitutional. The panel heard from Akhil Amar, a constitutional law professor at Yale University who has studied the issue for more than a decade, and argued that the reference in Article II, Section 1 to Congress' ability to declare by law what "Officer" shall act as president precludes House and Senate leaders because they are not officers, with a capital 'O', as the framers intended within the succession clause. Rather, he said, the clause "clearly contemplated that a Cabinet officer would be named acting president."

"This is not merely my personal reading of Article II," Amar said. "It is also James Madison's view, which he expressed forcefully while a Congressman in 1792."

Other expert witnesses pointed out, however, that Madison lost that debate when Congress enacted the first presidential succession act, which placed the President Pro Tem and the Speaker in line (in that order) to take over the executive branch (they were later removed and replaced by Cabinet members in 1886, only to be added again, in the opposite order by the 1947 statute).

Many scholars believe that Congress put themselves in line to succeed the president largely to avoid a highly political, and personal, issue in the early 1790s. Choosing

the order of Cabinet officers would entail making a determination as to whether bitter rivals who were both instrumental in the formation of the republic - Secretary of State Thomas Jefferson or Treasury Secretary Alexander Hamilton - should be first in line to succeed George Washington.

Among the myriad constitutional problems raised by the witnesses, none seemed as salient as the 1947 Presidential Succession Act's so-called "bumping provision," which would allow a newly elected Speaker to bump the Secretary of State (who would serve as president if the president, vice president, Speaker and President Pro Tem were killed or incapacitated).

Under current law, presidential succession becomes even more unclear if there was an attack during an inauguration and the incoming vice president, along with Congress' two top leaders, were killed along with the president-elect.

"The presidential term is fixed. It ends Jan. 20 at noon," testified John Fortier, executive director of the commission.

Who then becomes president? The new administration's Cabinet would not yet have been confirmed. And it's customary for outgoing Cabinet members to resign before inauguration, leaving acting secretaries in charge, usually second- and third-tier agency officials who are virtually unknown.

Monday's witnesses agreed that situation would leave the country without a president who could claim unquestioned constitutional legitimacy.

John Wilkes Booth led a partially successful conspiracy to assassinate President Abraham Lincoln and those who stood first, second and third in line to

succeed him, Sherman told the panel.

"Are we sure that al Qaeda can do no worse?"