



**TO:** INTERESTED PARTIES  
**FROM:** Demand Progress and Revolving Door Project  
**RE:** The Legal and Political Context for a Biden Transition  
**Date:** 11/6/20

## **No, Mitch McConnell is Not the 46th President**

A false narrative, undergirded by self interest and misguided assumptions, is dominating early transition coverage. **Key voices are already insisting that Joe Biden’s presidency will fail to deliver on any of its promises.** According to this view, with Mitch McConnell in the Senate, Biden will not only be impelled to abandon his legislative vision, but also any hope of delivering for the American people via his power over the executive branch. They say that to wrest confirmations from McConnell’s hands, Biden will have no choice but to appoint moderates who will not rock the boat.

### **This is wrong.**

Over 80 million voters [will have](#) cast their ballots for change. A reversion to a business-as-usual centrism that enjoys no such mandate, at the behest of a Senate majority representing a minority of the country’s citizens, would be a betrayal. **President Biden will be under no obligation to hand Mitch McConnell the keys to his Cabinet.**

In the wake of the 2008 financial crisis, McConnell defiantly and proudly asserted that he would “make Obama a one-term President” by blocking a meaningful federal response. The insufficiency of the federal response led to a midterm bloodbath for Democrats. **Biden must not allow McConnell veto power over how he constructs his administration.**

If McConnell refuses to confirm a Cabinet that reflects the country’s desire for an aggressive response to the pandemic and economic crisis, **Joe Biden [has tools](#) to ensure he still fulfills his presidential mandate:**

- **Biden can use [the Vacancies Act](#).** The Vacancies Act provides an indisputably legal channel to fill Senate-confirmed positions on a temporary basis when confirmations are delayed. The Act has been used extensively by presidents of both parties, including by Trump to an unprecedented degree, despite facing a friendly Senate.
- **Biden can adjourn Congress and make [recess appointments](#).** Section 3 of Article II of the U.S. [Constitution](#) gives the President the power to adjourn Congress “to such time as he shall think proper” whenever the House and Senate disagree on adjournment. And after 10 days of recess, the President may make recess appointments to fill positions requiring Senate confirmation.

With acting or recess appointees in place, Biden can make good on his promise to bring the pandemic under control in the short run and “build back better” over the long-term.

**Failure to use these powers, however, will spell political doom.** In a new poll, 67% of respondents and 75% of Democratic respondents agreed that “Biden should build his administration without relying on executives and lobbyists from big corporations.” A McConnell-approved Cabinet will be nothing but a continuation of the government by and for corporate America that American voters have just rejected.

**If Biden fails to use the powers available to him, Democrats up and down the ballot will suffer for it in 2022 and beyond.**