

THE WEEK

The 1st big test of Biden's return to normalcy

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Bonnie Kristian

Rumors of President-elect Joe Biden's Cabinet picks are trickling out — Obama administration alumni, former campaign rivals (Labor Secretary Bernie Sanders?), members of Congress, and the odd mayor or union chief dot the list of reported prospects. But once Biden makes his selections, the question remains: Will the Senate consent?

With both Georgia seats still waiting on January runoff votes, we don't know for sure what the Senate balance of power will be when Biden takes office. Though conceivably it could be a 50-50 tie broken by Vice President-elect Kamala Harris, the likeliest outcome is a narrow GOP majority of 51 or 52 votes. That would put Senate Majority Leader Mitch McConnell (R-Ky.) back at the helm, and McConnell has reportedly made clear to the Biden transition team he'll "work with Biden on centrist nominees but no 'radical progressives'" — like, say, Labor Secretary Bernie Sanders — "or ones who are controversial with conservatives."

Declining to approve "radical progressives" is one thing. I suspect the Biden administration can work with that (and may even be privately glad for an excuse to avoid taking some direction from their party's progressive wing which could hurt them in 2024). But there's a *lot* to the left of "controversial with conservatives," and if McConnell is determined to hew to that line, Cabinet appointments will be the first big obstacle in Biden's delivery on his primary campaign promise of getting back to normalcy.

Suppose McConnell insists on giving Biden more advice than consent. Perhaps more moderate Republican senators like Mitt Romney (R-Utah) or Susan Collins (R-Maine) might break ranks and give Biden some wins. And perhaps Biden could adjust his list to include options palatable to McConnell: "I take McConnell at his word," he told reporters last week. "I understand he said that he will make it clear who he's prepared to support and not support, and that's a negotiation that I'm sure we'll have." Maybe those negotiations will reach a mutually acceptable conclusion.

But none of that is guaranteed. That's why Biden is reportedly considering a workaround employed by Presidents Trump and Obama before him: nominating acting secretaries who aren't subject to Senate confirmation, thus filling seats by bypassing Senate machinations altogether.

This is not the simple solution it may sound. One problem is that acting nominations are subject to significant legal constraints. As constitutional scholars Ilya Shapiro and Thomas A. Berry of the Cato Institute explained in 2016 when Obama employed this strategy, "acting officers serve under a strict 210-day time limit" and typically "a person may not serve as an acting officer' if that person is nominated to be the *permanent* officer."

That means Biden cannot, for example, create acting Labor Secretary Sanders and retain him in that role indefinitely while submitting doomed nominations for Sanders to be officially confirmed to the role. (The Supreme Court explicitly prohibited that dual relationship in 2017.) Or, at least, he can't do it legally — the Trump administration has violated the law surrounding these temporary selections apparently without significant consequence.

Biden might not suffer legal repercussions for doing the same. But then again, he might: That 2017 ruling didn't exist the last time we had a Democratic president, and acting appointments could well become a new site of partisan battles if McConnell deems himself illegitimately bypassed.

As hypocritical as that would be, McConnell would be legally in the right. The Constitution gives the Senate real influence over these nominations. As conceived, at least, it's a means of balancing power and increasing accountability; public scrutiny is a good prerequisite for positions of immense authority. An acting appointment is worse than a real nomination by the mere fact that such scrutiny hasn't happened.

Yet we all know this system won't operate as conceived come January. Traditionally the president received considerable deference from the Senate for his own Cabinet picks. There was a sense that the president generally should be able to select these close advisers without interference regardless of party control of the Senate. That deference is now dying, if not already dead, in this age of procedural extremism. Such tradition has lost all its strength to constrain.

Biden may feel he's being forced into the acting officer workaround by the intolerable alternatives of nominating advisers he does not want or never getting his nominations confirmed. In a sense that feeling is correct, if McConnell indeed blocks any nomination to which conservatives might object. The problem is that the workaround, even if it feels unavoidable for Biden, is still another step toward procedural extremism, if not further violation of the rule of law. That is, it's a step away from the comparative normalcy and stability a Biden presidency is supposed to bring. It's doubling down on Trump-style governance, not undoing it. It's another escalation when what we desperately need is a ceasefire.

Unhappily, another escalation may suit McConnell just fine. There's a chance, I think, he might content himself to regroup post-Trump and focus on the ordinary obstruction of an opposition presidency for the next few years.

But there's also a chance — maybe a better one — McConnell isn't interested in a relatively bearable truce when a new battle front is on offer and he spies a way to keep Biden from even staffing his own platoon. The Cabinet nominations will give us a preview of the next two to four years of divided government, a standoff that could resemble attrition or détente.