

From the perspective of environmental law, one of the most important questions is whether full Republican control of Congress and the White House would lead to fundamental changes to significant environmental laws. These are the kinds of changes that would be most important over the long-run, from a legal perspective. Laws are hard to pass in our system, and thus any changes made by the GOP now might not be undone for a long time, if ever.

However, while the Republicans do have majorities in the Senate and the House, they only have 52 votes in the Senate. That is important because, in general, passing substantive legislation in the Senate requires 60 votes. That is because at least 60 votes are required to cut off debate on any piece of legislation – otherwise opponents can require debate to continue in perpetuity (the “[filibuster](#)”). (See [this Congressional Research Service report](#) for a thorough but concise review (pdf).) Thus, for the passage of most substantive legislation, at least 8 Democratic votes (or 6-7 Democrats plus 1-2 of the Democratic-aligned independent Senators) would be required to move the legislation forwards.

In January, it was conceivable that the GOP might get those 8 Democratic votes. [Ten Democratic Senators come from states](#) that Trump carried in the [2016 election](#). For four of those Senators (Manchin from WV, Donnelly from IN, McCaskill from MO, and Tester from MT), Trump carried the state by at least double-digits. For many of the others, Trump barely carried the state (WI, MI, PA, FL). Nonetheless, if Trump was a popular president, then these Democratic Senators might have no choice but to endorse GOP legislation supported by Trump.

Trump [has not turned out to be a popular president so far](#). Thus, these Democratic Senators have had little pressure to go along with the President. Even Manchin, from a state that Trump carried by 40 (!) points, has stuck with his Democratic colleagues on health care legislation, for instance. It seems highly unlikely that the GOP will get enough Democratic votes to override the filibuster on substantive legislation. As a result, so far there has been [very little significant legislation enacted in 2017](#), and the legislation that has been enacted has primarily been bipartisan, low-profile consensus legislation on veterans affairs and space policy.

That leaves two alternatives. First, Senate Republicans might try to eliminate the filibuster in the Senate entirely. Democrats eliminated it for confirmation of nominations to executive branch positions and lower federal courts in 2013; Republicans just eliminated it for Supreme Court nominations. As with the prior changes, this likely could be done with a

simple majority vote. However, a clear majority of Senators recently came out eliminating the filibuster for legislation.

Second, Senate Republicans might use a tool called reconciliation, which allows the passage of certain types of legislation through the Senate with a simple majority. (See [this CRS article](#) (pdf).) Reconciliation is a process by which the Senate enacts fiscal legislation (taxes, spending, debt limit changes) to reconcile existing law with instructions in a budget resolution. Budget resolutions are passed by the House and Senate (without the President). Reconciliation bills are not subject to the filibuster in the Senate. Reconciliation is the method the Republicans are currently trying to use to pass health care legislation through the Senate.

What are the changes that reconciliation could be a vehicle for changing significant environmental laws? The most important difficulty is that the legislation can't contain provisions that are not germane to spending, taxes, or debt limits, and such provisions can be struck out of a reconciliation bill in the Senate (this is the [Byrd Rule](#)). Thus, changing the underlying substance of environmental laws through reconciliation can be difficult.

That does not mean that temporary changes to substantive law can't effectively be made through reconciliation through what are often called "appropriations riders." These are provisions that would prevent the expenditure of funds to undertake certain activities - by defunding those activities, an appropriations rider can effectively terminate a program at least temporarily. For instance, in the mid 1990s, Republicans in Congress prohibited the listing of additional species for protection under the Endangered Species Act for over a year through a rider.

What is the border between a legislative provision that is not germane to fiscal matters, and an acceptable provision that relates to spending? That's a tough call, and here having a majority in the Senate can provide some leverage since majority votes can have a role in making that call. For instance, does opening up the Alaska National Wildlife Refuge to oil and gas development constitute fiscal legislation? On the one hand, it's about environmental protection and land-management, so no. On the other hand, that oil and gas production will produce revenue that has fiscal impacts, so yes. Expect to see a bunch of these fights happen in the next few months. However, using reconciliation as a tool for significant overhaul of major environmental laws is unlikely to qualify.

One last challenge, however, for the Republicans in using reconciliation for these tools is that there may be significant challenges in even using reconciliation at all to avoid getting Democratic votes in the Senate. More on that in the next blog post.

