Democrats' procedural decisions produced Republican "domination"
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In "Trump and my affection for the legal profession," (November 23), Professor Reuel Schiller blames a "broken system" because Republican electoral victories "will result in the domination of all three branches of government." Republicans won all three branches due to the choices of voters, but may "dominat[e]" due to the decisions of Democratic party leaders.

Since 1975, Senate Rule XXII has required an affirmative vote from "*three-fifths* of the Senators duly chosen and sworn" to end a filibuster. (Italics added.) Under this rule, the majority party could almost never confirm a nominee without some support from the minority party, so the minority retained some political relevance. But Senate Democrats withdrew that relevance by eroding the opportunity to filibuster. They did not actually remove the three-fifths requirement of Rule XXII, they just reinterpreted it to permit cloture of filibusters by majority vote.

Now the Democrats are the Senate minority party, and will be impotent in opposing President Trump's judicial nominees. Like many in his party, Delaware Senator Chris Coons wistfully regrets altering the three-fifths rule, because "it would have been a terrific speed bump, potential emergency brake, to have in our system to slow down the confirmation of extreme nominees."

Something similar, though less dramatic, occurred in the House. Representatives have long been able to move to "recommit" a bill to seek amendment or further analysis. Known as the "minority's motion," this tool had traditionally amplified the minority party's voice in the legislative process. Like the three-fifths filibuster requirement, the motion to recommit fostered more centrist decisions by the majority. But after their 2008 triumph, the Democrats weakened the procedure.

Nowhere has electoral victory so transformed into "domination" as the Executive Branch, where there is no minority bloc. Rather than follow the constitutionally prescribed legislative process and its implicit need for compromise, President Obama often preferred to exclude Congress and make law though execution actions. Domestically, judicial scrutiny has delayed or defeated many of these unilateral acts. (*Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427 (2016); *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014); *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427 (2014); *In re EPA*, 803 F.3d 804 (6th Cir. 2015); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015); *Texas v. United States*, 2016 WL 4426495 (Aug. 21, 2016).)

But no such remedy was available for the President's signing international agreements in violation of the Constitution's Article II, Section 2, Treaty Clause. Alexander Hamilton prescribed over 200 years ago that the President and Senate should exercise "joint possession" of treatymaking power. (Federalist No. 75) As a Democratic Senator, Joe Biden agreed: "The essence of the treaty power is that the President and the Senate are partners in the process by which the United States enters into, and adheres to, international obligations."

President Obama jettisoned that partnership because he could not convince two-thirds of the Senate to support his nuclear deal with Iran. Not only did he flip the supermajority burden onto the agreement's opponents, he then voted in favor of it at the United Nations — without having yet received the approving vote of a single United States Senator.

Some of us have already documented how a political victory can thus improperly become an unconstitutional domination. [Trick or Treaty: Process of Iran nuclear deal needs scrutiny (Daily Journal, Sept. 11, 2015)]. I welcome Professor Schiller to the cause of constitutionally limited government.