Congressional-Executive Agreements

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The recent demand for a return to the constitutional balance in the realm of foreign affairs has manifested itself in a sharp attack on the use of the executive agreement. In 1972, in an attempt to exercise greater control in this area, Congress passed the Case Act, which requires the Secretary of State to transmit to Congress within sixty days "the text of any international agreement, other than a treaty, to which the United States is a party."1 In November 1974, the Senate went a step further and passed the Ervin Bill, according to which an executive agreement would enter into force only after it had been tabled in Congress for sixty days and only if Congress had not disapproved of the agreement by means of a simple concurrent resolution.2 The House failed to act on this bill before the Ninety-third Congress adjourned. It is assumed that the measure will be reintroduced.

The underlying assumption in all this legislative activity is that congressional assent to an executive agreement will cure the agreement of any constitutional disability. Similarly, the National Commitments Resolution, adopted by the Senate in 1969, equates congressional-executive agreements with formal treaties as a means of accepting national commitments. Yet in constitutional terms, the authority of Congress to join with the President by majority vote in giving force to an executive agreement is as novel as the "pure" executive agreement. Neither procedure is mentioned in the Constitution and neither, of course, fulfills the constitutional requirement that the treaty-making power of the President be dependent on the advice and consent of two-thirds of the Senate.

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In the case of an agreement on a particular subject falling within the scope of one or more of the enumerated legislative powers, such as international trade or postal matters, it might be suggested that Congress is qualified to cure such executive agreements of any possible constitutional defect. It is assumed by the authors of the aforementioned bills, however, that joint congressional-executive action would impart the full force of a treaty to agreements not falling within this category.

In his recent definitive study, *Foreign Affairs and the Constitution*, Professor Louis Henkin notes various arguments which have been invoked for validating congressional-executive agreements. One of these runs as follows:

Before the Constitution all international agreements were made by Congress. The Constitutional Convention considered proposals to require the advice and consent of both houses to the making of treaties, and rejected them largely because they would have made the process too difficult and cumbersome. The requirement of consent of the Senate only can be seen, then, as “settling for less,” and the two-thirds requirement in the Senate as a lesser substitute for the consent of the House of Representatives also. If so, the consent of both houses (even if only by simple majority) is an even greater safeguard and should surely be no less effective that the consent of the Senate alone (even by two-thirds).

In general, the possible arguments suggested by Henkin are premised on the assumption that the legislative history of the treaty-

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4. *Id.* at 422. Other arguments appear in *id.* at 173-76, 85 n.9. Support for this thesis would appear, at first glance, to arise from the remarks of convention delegate George Mason, who criticized the final Constitution in these terms:

By declaring all treaties supreme laws of the land, the executive and the Senate have, in many cases, an exclusive power of legislation which might have been avoided by proper distinctions with respect to treaties and requiring the assent of the House of Representatives, where it could be done with safety.

*Pamphlets on the Constitution of the United States* 331 (P. Ford ed. 1888) [hereinafter cited as *Pamphlets*]; 2 *The Records of the Federal Convention of 1787*, at 639 (M. Farrand, rev. ed. 1937) [hereinafter cited as *Records*]. However, as will be seen below, both the context of Mason's remarks and his subsequent remarks in the Virginia Ratifying Convention, make it clear that he was arguing for a two-thirds, rather than majority, vote in both Houses of Congress. See note 43 infra.
making clause is not clear, or at least that it lodges the treaty-making power in the Senate on the basis of technical considerations such as the need for secrecy and dispatch, the greater size of the House, and the frequent changes in House membership. According to these arguments, however, the Founding Fathers would have preferred to vest the power in both Houses of Congress if that had been feasible. Various other authorities, including Quincy Wright, and Myres McDougal and Asher Lans, have likewise maintained that no clear picture emerges from the Constitutional Convention concerning the motives behind the formulation of the treaty-making clause, and that policy considerations were not determinative. They conclude, therefore, that "an executive agreement ratified by joint resolution differs from a treaty largely in name only." It is respectfully submitted that when taken together with evidence supplementary to the debates, the full record of the Constitutional Convention (the "Convention") demonstrates quite convincingly that the underlying consideration prompting the delegates to vest the treaty-making power in the Senate was the desire of the States to retain maximal control over foreign affairs. The final clause on the treaty-making power emerged as the prod-

5. Certain delegates, both during and after the Convention mentioned these considerations. See 2 RECORDS, supra note 4, at 538 (remarks of Wilson and Sherman); 3 id. at 251-52 (remarks of Pinckney); THE FEDERALIST No. 75 (A. Hamilton). It might also be noted that Mason, in advocating inclusion of the House in the treaty-making process, see note 4 supra for a discussion of this point, made such inclusion conditional on the "safety" factor. None of this, however, detracts from the clear-cut evidence of fundamental policy considerations in the formulation of the provision.


7. McDougal and Lans, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy, Parts 1 and 2, 54 YALE L.J. 181, 534 (1945). This two-part article was written toward the end of World War II, on the eve of the drafting of the United Nations Charter. The views of the authors reflected the widespread fear that a small number of Senators might block United States membership in a world organization as had occurred previously in the case of the League of Nations. This article was designed to establish the validity of ratification by means of a congressional-executive agreement or an executive agreement alone.

For a contrary view, see Borchard, Shall the Executive Agreement Replace the Treaty, 53 YALE L.J. 664 (1944); Treaties and Executive Agreements—A Reply, 54 YALE L.J. 616 (1945). On the topic generally, see W. McClure, INTERNATIONAL EXECUTIVE AGREEMENTS (1941).

8. Statement of Representative J. William Fulbright in October 1943, cited by Wright, supra note 6, at 341.
uct of several basic conflicts which had beset the Constitutional Convention: clashes between "nationalists" and "federalists," between large and small States, and between North and South. By means of a compromise, the President was given a role in the treaty-making process, while the vote required in the Senate was raised from a simple majority to two-thirds. Against this background, it becomes evident that the latter requirement was a deliberate policy decision designed to ensure protection of factional interests, rather than merely a less stringent alternative to a majority vote in both Houses.

Neither the Virginia Plan\(^9\) nor the New Jersey Plan\(^10\) proposed any change in the treaty-making arrangements made operative by the Articles of Confederation. Each would have retained the power for Congress.\(^11\) Even when the Committee of the Whole accepted the revised Virginia Plan, which provided for a select upper chamber, no change was proposed regarding the situs of the treaty-making power.\(^12\) The foreign affairs power, \textit{i.e.}, the competence to make treaties and to appoint ambassadors, became lodged exclusively in the Senate only upon adoption of the Connecticut Compromise, which introduced the principle of equal State representation in the upper House.\(^13\) This circumstance permits the inference that the States, and perhaps the smaller States in particular, were jealous of the authority accorded the national government over foreign affairs and therefore sought to retain control over foreign relations through the Senate. The remarks of William Davie, delegate to the North Carolina Ratifying Convention, lends weight to this inference:

The extreme jealousy of the little states, and between the commercial and non-importing states, produced the necessity of giving an equality of suffrage to the Senate. The same causes made it indispensable to give to the senators, as representatives of states, the power of making, or rather ratifying, treaties. . . . The small states would not consent to confederate without an equal voice in the formation of treaties. Without the equality, they apprehended that their interest would be neglected or sacri-

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9. 1 Records, supra note 4, at 20-22.
10. Id. at 242-45.
11. Under the Articles of Confederation, nine votes out of a possible thirteen votes were required for treaty ratification. Articles of Confederation, art. IX.
12. 1 Records, supra note 4, at 228-32.
13. See the various drafts of the Committee of Detail, 2 id. at 143, 155, 169.
faced in negotiations. This difficulty could not be got over. . . . [Because] of the inflexibility of the little states in this point it . . . became necessary to give them an absolute equality in making treaties.\textsuperscript{14}

As Farrand concludes:

In place of allowing congress to appoint ambassadors [and] to make treaties . . . as had been the case under the confederation, those functions were now transferred to the senate, the body which most nearly corresponded to the old congress as the representative of the states.\textsuperscript{15}

At this point, the President had not been accorded any role in the making of treaties. It apparently was assumed that the Senate itself, in collective form, would both negotiate and ratify treaties. The relevant provision, as reported by the Committee of Detail, read as follows: “The Senate of the U.S. shall have power to make treaties, and to appoint Ambassadors. . . .”\textsuperscript{16}

When the Convention commenced consideration of the provision on August 23, Madison criticized the exclusive Senate control over treaty-making, “observ[ing] that the Senate represented the States alone, and that for this as well as other obvious reasons it was proper that the President should be an agent in Treaties.”\textsuperscript{17} The complaint reflected not only a more “national” perspective on the foreign affairs power, but also the dissatisfaction of the larger States over the disproportionate authority in national management which had been made available to the smaller States by means of the Senate. Madison therefore suggested that the President, the only truly national figure in the framework of government, be included in the treaty-making process. Gouverneur Morris went a step further, proposing that under certain circumstances the lower House be brought into the picture. On the same day, the Convention had adopted the Supremacy Clause, which made treaties the supreme law of the land.\textsuperscript{18} Apparently with that clause in mind, Gouverneur Morris proposed an amendment of the treaty-making provision to avoid binding the United States

\textsuperscript{14} 3 id. at 348. \textit{See also} id. at 342 (remarks of Spaight). \textit{But see} Pamphlets, \textit{supra} note 4, at 356 (remarks of Iredell) for an answer to Mason’s objections.

\textsuperscript{15} M. Farrand, The Framing of the Constitution of the United States 131 (1913).

\textsuperscript{16} 2 Records, \textit{supra} note 4, at 392.

\textsuperscript{17} Id. Nevertheless, Madison refrained from submitting a formal proposal.

\textsuperscript{18} Id. at 389.
by any treaty “not ratified by a law.” Wilson and other nationalists supported the motion. The significance of the amendment was revealed by Mr. Dickinson of Delaware, who “concurred in the amendment, as most safe and proper, tho’ he was sensible it was unfavorable to the little States; which would otherwise have an *equal* share in making Treaties.” Gouverneur Morris’s motion, however, was defeated by a wide margin, being supported only by the delegation from his home State, Pennsylvania (the most “national” of the delegations). The States, and particularly the smaller States, obviously were not anxious to share the foreign affairs power with the popularly-elected branch of the legislature.

The ultimate form of the treaty-making provision was a product of the last stages of the Convention. Madison’s earlier suggestion for Presidential participation in the treaty-making process was revived by the Committee of Postponed Parts, which also instituted the two-thirds voting requirement in the Senate. With these two major revisions, the final product was presented to the plenum and approved. The considerations which had prompted these changes are not readily apparent, since that committee’s deliberations were not preserved, and the Convention itself approved the changes “with surprising unanimity and surprisingly little debate.” Comments made by George Mason, however, both at the Convention and immediately thereafter shed light on the motives behind the formulation of the final provision.

In the first place, a written note entered by Mason at the Convention reveals a link between the treaty clause and the Conven-

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19. *Id.* at 320.
20. *Id.* at 393.
21. *Id.* at 394.
22. In theory, once the Senate was granted a veto in the treaty-making process, the inclusion of the House in the implementation of treaties should have been unobjectionable to those concerned with ensuring the equality of States. Similarly, it might have been assumed that the nationalists, anxious to make treaties automatically binding upon the States, would oppose burdening the treaty-making process with an additional requirement of legislative implementation. Yet, strangely enough, the positions in this debate were reversed: only the nationalists favored such a step. The delegates obviously felt that the conferral upon the House of any role in relation to treaties, even a legislative role, represented a corresponding diminution of Senate (*i.e.*, State) control. (Additionally, some delegates undoubtedly hesitated to encumber the treaty-making process with a legislative requirement.)
23. 2 *Records*, *supra* note 4, at 498-99. The appointment of ambassadors was likewise transferred to the President, subject to the advice and consent of the Senate, but in this case, the simple majority requirement was not changed.
tion debate on navigation laws. This comment, uncovered by Farrand in his 1937 supplement to the *Records of the Federal Convention of 1787*, was written by Mason in the margin of a printed copy of the *Report of the Committee of Detail*, which had vested the treaty-making power in the Senate. Mason noted:

> As treaties are to be the Laws of the Land & commercial Treaties may be so framed as to be partially injurious, there seems to be some necessity for the same Security upon this Subject as in the 6th Section of the 6th Article.

The latter provision, relating to navigation laws, required a two-thirds majority for adoption. Ever since the United States had declared independence, the Southern States had been concerned that the North, like pre-revolutionary Great Britain, might adopt legislation restricting the shipment of export or import goods to American ships, thus benefitting the commercial and ship-building States of the North, but adversely affecting the South by raising the price of finished goods imported from abroad and by restricting the free dispatch of produce in any ship available. Throughout the Convention, the Southern States successfully retained a clause in the draft constitution which required a two-thirds majority in both Houses of Congress for the adoption of any navigation law. Since the Northern States alone could not command such a majority, the interests of the South were made secure. It was in this context that Mason had entered the comment on the treaty-making provision. The conclusion of commercial treaties clearly could disadvantage the South no less injuriously than the adoption of navigation laws; hence it was necessary to extend the two-thirds requirement to treaty-making as well. Indeed, if, as Mason suggested, the safeguards applicable to treaties were to be equalized with those adopted for navigation laws,

25. *See note 16 supra.*

26. *4 Records, supra* note 4, at 52-53. Since this material first came to light in 1937, it was not noted in earlier works on the treaty power. For examples of such works see C. Butler, *The Treaty Making Power of the United States* (1902); S. Crandall, *Treaties—Their Making and Enforcement* (1904). However, it is surprising that later writers also have failed to note the significance of Mason's marginal comment and the other documents uncovered by Farrand in his 1937 revision.

27. *2 Records, supra* note 4, at 183.

then Mason would seem implicitly to have advocated a two-thirds requirement for treaties in both Houses of Congress. Yet despite his comment in the margin, there is no indication that Mason raised the issue in the debates. Nonetheless, there are signs that Mason was not alone in thinking that special interests needed as much protection against adverse treaties as against adverse laws. In one of the earlier drafts of the Report of the Committee of Detail, the provisions on navigation laws and treaties were juxtaposed as follows:

Restrictions

I. A navigation act shall not be passed, but with the consent of (eleven states in) [2/3d. of the Members present of] the senate and (10 in) [the like No. of] the house of representatives.

    (3. the lawful territory To make treaties of commerce (qu: as to senate) Under the foregoing restrictions)

    4. (To make treaties of peace or alliance (qu: as to senate) under the foregoing restrictions, and without the surrender of territory for an equivalent, and in no case, unless a superior title.)

The link between the treaty clause and navigation law questions appears in fact to have been caught up in a broader debate involving North-South differences at the Convention. On August 23, at the same time that the Convention was considering the treaty-making clause, it was also grappling with three other difficult items: importation of slaves, taxes on exports, and the vote required for the adoption of navigation laws. These latter questions were moved to a special committee of eleven. The hope expressed by Gouverneur Morris that the three items might "form a bargain among the Northern and Southern States" was realized by means of one of the well-known compromises of the Convention: the two-thirds requirement for navigation laws was dropped in return for the right to continue the importation of

29. 2 Records, supra note 4, at 143. Farrand indicates that this document is in the handwriting of Edmund Randolph of Virginia, with corrections by John Rutledge of South Carolina. Those portions in parentheses were crossed out in the original, while those in brackets represent Rutledge's amendments.

30. Id. at 392-94.

31. Id. at 359-75.
slaves for a further twelve years (which ultimately became twenty years) and a prohibition on the imposition of export taxes. It is less well-known, however, that the treaty clause was affected directly by this overall compromise, and may well have been one of the elements of it. The testimony of George Mason during the course of the debates at the Virginia Ratifying Convention is illuminating in this regard:

Mr. Chairman—With respect to commerce and navigation . . . I will give you, to the best of my recollection, the history of that affair. This business was discussed at Philadelphia for four months . . . and I assert, that eight states out of twelve, for more than three months, voted for requiring two-thirds of the members present in each house to pass commercial and navigation laws. True it is, that afterwards it was carried by a majority, as it stands. If I am right, there was a great majority for requiring two-thirds of the states in this business, till a compromise took place between the northern and southern states; the northern states agreeing to the temporary importation of slaves, and the southern states conceding, in return, that navigation and commercial laws should be on the footing on which they now stand. . . . The Newfoundland fisheries will require that kind of security which we are now in want of: The eastern states therefore agreed at length, that treaties should require the consent of two-thirds of the members present in the senate.33

It is not clear whether Mason was suggesting that the two-thirds requirement for treaties actually had been part of the quid pro quo in the compromise, or whether in the case of treaties, in contrast to the situation regarding navigation acts, the South had won on a qualified majority, since the fisheries interest of the East had coincided with the South’s interest in staples. Yet it is clear that the fear of adverse effects of commercial treaties on sectional interests had prompted the raising of the majority vote to two-thirds. When the treaty-making clause came up for discussion on September 7, the delegates overwhelmingly rejected proposals made by Wilson, the Pennsylvania nationalist, to include the House in the treaty-making process34 and to eliminate the two-

32. Id. at 400 et seq.
33. 3 id. at 334-35.
34. 2 id. at 538. Wilson contended: “As treaties . . . are to have the operation
thirds voting requirement. An understanding between South and East had been reached, and the delegates, not prepared to forego any of the safeguards incorporated into the provision, were committed to the preservation of the treaty power in the Senate and to guaranteeing that no treaty injurious to sectional interests be adopted.

At the same time, however, the delegates were not averse to modification of the two-thirds requirement where vital interests were not affected. Thus Madison’s proposal to exclude peace treaties, “allowing these to be made with less difficulty than other treaties,” was accepted unanimously. Immediately upon adoption, however, certain delegates began to entertain second thoughts. Mr. Gerry of Massachusetts argued that:

[I]n treaties of peace a greater rather than less proportion of votes [is] necessary, than in other treaties. In Treaties of peace the dearest interests will be at stake, as the fisheries, territory & c. In treaties of peace also there is more danger to the extremities of the Continent, of being sacrificed, than on any other occasions.

Gerry’s remarks undoubtedly served to remind the delegates, and particularly the southern delegates, if a reminder were in fact necessary, of the rather sharp controversy which had racked the Confederacy only a year earlier. In 1786, Secretary of Foreign Affairs John Jay had proposed the conclusion of a treaty with Spain according to which the United States would relinquish the right to sail the Mississippi to its outlet for some 25 to 30 years, in return for certain diplomatic and economic benefits. The suggestion had aroused a storm of protest from the South which charged that the North and the East were intent on gaining commercial advantages at its expense. Initially, it would

of laws, they ought to have the sanction of laws also.” The vote was one to ten against the inclusion of Wilson’s proposals. Id.

35. Id. at 540, 549. Wilson argued: “To require the concurrence of [two-thirds] . . . puts it in the power of the minority to controul the will of a majority.” Id. at 540. The vote was one to nine with one vote divided. Id. at 549.

36. Id. at 540. Madison also moved to empower two-thirds of the Senate “to make treaties of peace without the concurrence of the President.” The President, Madison argued, “would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace.” Id. The motion was rejected by a vote of three to eight. Id. at 541.

37. Id. at 540.

38. For further discussion of this episode, known as the Jay-Gardoqui negotiations, see S. Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES 78-80 (4th ed.
seem, the delegates had not perceived that the terms of a peace treaty could be as harmful to their interests as commercial treaties, if not more so. But Gerry's remarks alerted them to the dangers, and they now moved to ensure that the exception from the two-thirds rule, applicable to peace treaties, would not serve as an avenue for the conclusion of agreements affecting essential States' rights. Before the end of the day's session, Mr. Williamson and Mr. Spaight moved the following amendment: "But no treaty of peace shall be entered into, whereby the United States shall be deprived of any of their present Territory or rights without the concurrence of two-thirds of the Members of the Senate present." In his 1937 supplement, Farrand presented a different version of this proposal which specifically links the two interests—navigation (of the Mississippi, presumably) and fishery—which had so engaged the delegates:

But no treaty (of peace) shall be made without the concurrence of the House of Representatives, by which the territorial boundaries of the U.S. may be contracted, or by which the common rights of navigation or fishery recognized to the U. States by the late treaty of peace, or accruing to them by virtue of the laws of nations may be abridged.

The motion was not voted upon in either form and Mr. King moved the next morning "to strike out the 'exception of Treaties of peace' completely from the general clause requiring two-thirds of the Senate for making Treaties." After short deliberation, the Convention readily agreed, and all treaties without exception were made subject to the advice and consent of two-thirds of the Senate.


39. 2 Records, supra note 4, at 534, 543.

40. 4 id. at 58. McDougal and Lans do not mention this document in their historical analysis.

The proposal to include the House represented an attempt to institute a minimal additional safeguard in lieu of the two-thirds rule, which had been lifted from provisions relating to peace treaties. The modified form of protection for sectional interests, however, apparently was not regarded as adequate. Thus, as noted in the text it was moved, on the following day, to eliminate the peace treaties exception completely by reinstating the two-thirds requirement for all treaties.

41. 2 id. at 547.

42. Id. at 549. The vote was eight to three in favor.
The importance of the Mississippi in this episode is highlighted by the following account of the discussions by Hugh Williamson, delegate from North Carolina, in a letter to James Madison:

It is said that some antifed in Maryland on the last Winter fastened on the Ear of Genl Wilkinson . . . and persuaded him that in case of a new Govt. the Navigation of the Mississippi would infallibly be given up. Your Recollection must certainly enable you to say that there is a Proviso in the new Sistem which was inserted for the express purpose of preventing a majority of the Senate or of the States which is considered as the same thing from giving up the Mississippi. It is provided that two-thirds of the Members present in the senate shall be required to concur in making Treaties and if the southern states attend to their Duty, this will imply 2/3. of the States in the Union together with the President, a security rather better than the present 9 States especially as Vermont & the Province of Main may be added to the Eastern Interest and you may recollect that when a Member, Mr. Wilson objected to this Proviso, saying that in all Govts. the Majority should govern it was replied that the Navigation of the Mississippi after what had already happened in Congress was not to be risqued in the Hands of a meer Majority and the Objection was withdrawn.43

When the treaty-making clause was taken up in the State ratifying conventions, criticism was directed mainly at the ease with which treaties could be adopted and at the vulnerability of critical sectional interests. Various amendments were

43. 3 id. at 306-07. The letter was dated June 2, 1788. C. Warren, supra note 28, at 657-58, cites this letter and concludes that the provision for a two-thirds, rather than a majority, vote of the Senate was inserted for the express purpose of calming the fears of Virginia, North Carolina and the West lest the North and East should relinquish the navigation right on the Mississippi. See generally S. Bemis, supra note 38, at 80; J. Pratt, supra note 38, at 65 n.7. The conclusion seems to disregard the other factors that were involved. The coincidence of the Eastern interest in fisheries, it would appear, was crucial in gaining adoption of the two-thirds rule. See in this regard McLendon, Origin of the Two-thirds Rule in Senate Action Upon Treaties, 36 Am. Hist. Rev. 768 (1931). Moreover, Warren fails to take account of the straightforward commercial interests of the South—aside from Mississippi—which had moved it to fight for a qualified majority in the making of treaties involving even navigation laws.
proposed for tightening the treaty-making procedure. The Virginia Convention subsequently voted on the following amendment, which, incidentally, highlights each of the specific interests discussed above—commercial, fishery, and Mississippi navigation—as well as calling, in certain cases, for a qualified majority in both Houses.\textsuperscript{44}

That no commercial treaty shall be ratified without the concurrence of two-thirds of the whole number of the members of the Senate; and no treaty, ceding, contracting, restraining or suspending, the territorial rights or claims of the United States, or any of them, or their, or any of their rights or claims to fishing in the American seas, or navigating the American rivers shall be made, but in cases of the most urgent and extreme necessity; nor shall any such treaty be ratified without the concurrence of three-fourths of the whole number of the members of both Houses respectively.\textsuperscript{45}

In assessing the intentions of the Founding Fathers, it is also relevant to recall President Washington’s message to the House of Representatives regarding the Jay Treaty.\textsuperscript{46} In refusing to convey the background papers to the House, Washington stressed that the function of advice and consent had been vested exclusively in the Senate, since in this body large and small States had equal representation. “For, on the equal participation of those powers [of the Senate], the sovereignty and political safety of the smaller States were deemed essentially to depend.”\textsuperscript{47} Washington also noted that a proposal to include the House in the treaty-making process was explicitly rejected.\textsuperscript{48}

\textsuperscript{44} Mason’s call for inclusion of the House in the treaty-making process, for a discussion of this point see note 4 supra, also represented a demand for a qualified majority in both Houses, as illustrated by the following comment made by him at the Virginia Convention: “The Senate alone ought not to have this power [to dismember the empire]; much less ought a few states to have it. No treaty to dismember the empire ought to be made without the consent of three fourths of the legislature in all its branches.” 3 J. Eliot, Debates on the Federal Constitutions 509 (2 ed. 1876) [hereinafter cited as Eliot’s Debates].

\textsuperscript{45} Id. at 660. It is interesting to observe that Warren, in accordance with his de-emphasis of the commercial factor in the drafting of the treaty-making provision, cites this proposal for an amendment, but omits the first sentence regarding commercial treaties. C. Warren, supra note 28, at 658.

\textsuperscript{46} 5 Annals of Cong. 760 (1796) [1789-1824].

\textsuperscript{47} Id. at 761.

\textsuperscript{48} Id. McDougal and Lans stress the fact that the Senate, as part of its func-
In light of the foregoing review, and especially the material furnished by Farrand, it is hard to accept the conclusion of McDougal and Lans that it is "difficult to assay the exact extent to which transient sectional considerations may have been persuasive in the framing of the treaty-making clause." 49 It would seem that conferral of the treaty-making power on the Senate exclusively was very much a deliberate policy decision, as was the institution of the two-thirds rule. The denial by McDougal and Lans that sectional interests played any role is premised inter alia, on the following evidence. After the two-thirds rule had been extended to embrace all treaties, Mr. Sherman of Connecticut moved that "no Treaty be made without a majority of the whole number [of the Senate]." 50 Mr. Gerry seconded the motion, which was narrowly defeated by a vote of 5 to 6. McDougal and Lans state that the five supporters of the motion were two small States (Connecticut and Delaware), the great fishing State of Massachusetts, and two Southern States (South Carolina and Georgia), which should have been concerned about the Mississippi and the West. On the basis of this evidence, the authors conclude that neither "protection of small states [n]or protection of sectional interests" underlay the two-thirds requirement in the Senate. 51

Immediately preceding the vote to which they refer, however, the Convention overwhelmingly defeated a motion by Wilson to eliminate the two-thirds requirement. 52 This action might serve as a more reliable measure of the sectional interests of such States as Massachusetts, Virginia, the Carolinas, and Georgia, all of which voted against the Wilson proposal. Similarly, all of the above States joined in striking the peace treaty exception from the treaty clause. 53 The 5 to 6 vote can be explained by the fact that according to the treaty clause, no treaty could be made "without the consent of two-thirds of the members present." Since a

49. McDougal and Lans, supra note 7, at 543.
50. 2 RECORDS, supra note 4, at 549.
51. McDougal and Lans, supra note 7, at 542-43. See also id. at 541.
52. 2 RECORDS, supra note 4, at 549.
53. Id. at 548-49.
majority of fourteen constituted a quorum, this meant that ten Senators alone could adopt a treaty. Under a proposal for a majority of the entire Senate, at least fourteen votes would be needed. Furthermore, the requirement based on the entire number would enable members of the Senate to defeat consideration of a treaty simply by absenting themselves from the session. This indeed had happened frequently in the Confederate Congress.\textsuperscript{54} Thus the move of Mr. Sherman of Connecticut and Mr. Gerry of Massachusetts to replace “two-thirds of the Senate present” with “a majority of the whole Senate” was simply a better means of safeguarding the interests which they yearned to protect. As to the effectiveness of the means, however, the delegates, despite sectional interests, were quite naturally divided.\textsuperscript{55} The following exchange occurring after submission of the Sherman-Gerry proposal, confirms the significance of the issue:

Mr. Williamson. This will be less security than 2/3 as now required.

Mr. Sherman—It will be less embarrassing.\textsuperscript{56}

The key word is “security,” the gist of the entire battle. The episode, then, far from discrediting a “sectional interests” thesis in the origin of the treaty-making clause, lends further credence to it.\textsuperscript{57}

In conclusion, formulation of the treaty-making clause constituted a three-step process at the Constitutional Convention. Once the Senate was established as the repository of State power, the smaller States, intent on ensuring an equal role, shifted the treaty-making power to the Senate. The dissatisfied nationalists, representatives of the large States, succeeded in bringing into

\textsuperscript{54} See C. Warren, \textit{supra} note 28, at 655. During the South Carolina Ratifying Convention, General Pinckney stated:

It was frequently difficult to obtain a representation from nine states; and if only nine states were present, they must all concur in making a treaty. A single member would frequently prevent the business from being concluded . . . This actually happened when a treaty of importance was about to be concluded with the Indians; and several states, being satisfied, at particular junctures, that the nine states present would not concur . . . were indifferent whether their members attended or not.

\textit{4 Eliot's Debates, supra} note 44, at 280.

\textsuperscript{55} It should be noted that a move made by Madison for a two-thirds Senate quorum to consider treaties was narrowly defeated by a vote of five to six. \textit{2 Records, supra} note 4, at 549.

\textsuperscript{56} \textit{Id}.

\textsuperscript{57} One noted scholar apparently accepts the McDougal and Lans theory. J. Pratt, \textit{supra} note 38, at 65 n.7.
the picture the President, the only truly national figure in government. Finally, sectional interests from both the Northeast and the South prevailed upon the Convention to raise the voting requirement from a simple majority to two-thirds. The end result was a composite compromise reflecting the wishes of each of the three groups: small States, nationalists, and sectional interests.

Thus, if indeed the protection of small States and sectional interests was a crucial factor, if not the crucial factor, in the formulation of the treaty-making provision, it appears highly unlikely that a majority vote in both Houses of Congress would represent a superior title to a two-thirds vote in the Senate alone, for the safeguards originally built into the latter provision would be obliterated. Yet, while the attempt to equate congressional-executive agreements with treaties on the basis of the Framers' intentions is shaky at best, the same cannot be said of validation of congressional-executive agreements by reference to subsequent constitutional practice. As Henkin notes: "Neither Congress nor Presidents nor courts have been troubled by . . . conceptual difficulties. Whatever their theoretical merits, it is now widely accepted that the congressional-executive agreement is a complete alternative to a treaty."58

58. L. HENKIN, supra note 3, at 175. This theory is undoubtedly aided by the fact that the Constitution itself contemplates congressional approval of certain categories of international agreements (e.g., those concluded between States and foreign powers, art. I, § 10) coupled with the fact that the subject matter of certain international agreements (e.g., international postal, trade, and copyright agreements) came within the purview of the enumerated powers of Congress. The Supreme Court early held that the postal conventions have equal standing with treaties as the law of the land. Cotzhausen v. Nazro, 107 U.S. 215 (1882). With the extension of international trade and communications, more and more items came to be dealt with by means of congressional-executive agreements, and the distinction between such agreements and treaties became quite blurred. For a discussion of this evolution, see C. BUTLER, supra note 26, at 88-98; L. HENKIN, supra note 3, at 173-76, 420-25. Moreover, disregarding the enumerated powers of Congress, the vast twentieth-century expansion in the implied foreign affairs power has further modified the distinction between the subject matters of congressional-executive agreements and full-fledged treaties. See Henkin, The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations, 107 U. PA. L. REV. 903 (1959). Nonetheless, there yet remain certain categories of international agreements, e.g., those providing for United States participation in some international organizations, which do not fall within the scope of congressional powers, enumerated or implied, see L. HENKIN, supra note 3, at 174. If the intentions of the Founding Fathers had been adhered to, these would require the advice and consent of two-thirds of the Senate. But, as noted, practice has modified the original assumptions.
This development undoubtedly was aided by the Constitution's contemplation of congressional approval of certain categories of international agreements, those concluded between States and foreign powers, coupled with the inclusion of the subject matter of certain international agreements in areas such as international postal service, trade, and copyrights, within the purview of the enumerated powers of Congress.\(^59\) With the extension of international trade and communications, more and more items were handled by means of congressional-executive agreements so that the distinction between such agreements and treaties ultimately became quite blurred.\(^60\) Moreover, the enumerated powers of Congress aside, the vast expansion in the implied foreign affairs power which occurred during this century has further tended to modify the distinction between the legitimate subject matter of congressional-executive agreements and of full-fledged treaties. In other words, if Congress's legislative power over matters bearing on foreign affairs is broad enough today to encompass any area which can be made the subject-matter of a treaty, then it may be argued that by implication, through the interaction of its broadened substantive powers and the necessary and proper clause, Congress can authorize agreements on a host of subjects previously considered outside the scope of congressional authority.\(^61\) Nevertheless, there still remain various categories of international agreements which do not fall within the scope of congressional powers, whether enumerated or implied.\(^62\) If the intentions of the Founding Fathers were adhered to, these matters would require the advice and consent of two-thirds of the Senate. But, as noted, practice, by and large, has modified this assumption of the Founding Fathers.

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59. The Supreme Court early held that postal conventions have equal standing with treaties as the law of the land. Gotzhausen v. Nazro, 107 U.S. 215 (1882).

60. For a discussion of this evolution, see C. Butler, supra note 26, at 88-98; L. Henkin, supra note 3, at 173-76, 420-25.
