

AMERICAN FOREIGN POLICY AND THE SEPARATION OF POWERS. By Daniel S. Cheever and H. Field Haviland, Jr. Boston: Harvard University Press, 1952. Pp. viii, 243. \$3.75.

THE central theme of this admirably brief study of executive-legislative relations is that the *sine qua non* of national survival is the creation of a close and effective collaboration between the two branches of government in the formulation of foreign policy. The United States must, to the extent possible in a democracy, speak with one voice in world affairs, and that voice must carry the authority born of widely shared conviction. Given our peculiar political system of checks and balances, we must develop a high degree of cooperation and agreement, mutual respect and confidence, between the president and the Congress.

Obviously, obtaining such cooperation is not a problem which admits of a mechanical solution. Its resolution will always be influenced in greatest measure by the policies put forward and the personalities involved, not to mention "politics." Messrs. Cheever and Haviland emphasize that cooperation is always a product of a desire to cooperate—of a basic attitude which, under the circumstances, accords a positive value to mutuality. But, conceding the obvious, the authors believe that a thorough understanding of the problems posed, the necessity of their resolution, the techniques available, and the more obvious mechanical deficiencies, can contribute to the development of a more satisfactory institutional framework within the existing constitutional system.

American Foreign Policy and the Separation of Powers is, therefore, both a study in proper historical perspective of the mechanics of foreign policy formulation and a plea for executive-legislative cooperation on a bi-partisan basis. When read against the backdrop of the bitter and extreme accusations of an election year, this plea seems to assume an Olympian tone more appropriate in the classrooms of Cambridge than the cloakrooms of the Capitol. So to judge it would be unfair. The authors do not underestimate political realities; in fact, they carefully chronicle them, devoting the bulk of their book to a series of case studies of success and failure. Thus they found their appeal not only upon necessity and reason, but upon experience—the fact that the United Nations, the Marshall Plan, and the North Atlantic Treaty were all products of the cooperation they advocate and, as a result, have been effective abroad and relatively immune from extravagant and irresponsible criticism at home.

In the Constitution the authors find a doctrinal foundation for executive-legislative collaboration. Foreign affairs is a "fourth branch" of government, being both legislative and executive. Formal initiative, as well as considerable power and discretion, rests with the president. Nevertheless, the Congress possesses important powers and checks. Traditionally these have been largely confined to foreign commerce regulation and to the Senate's treaty and confirmation powers. Today, however, the general legislative power—particularly, of course, control over appropriations—directly affects politico-military policy.

This fact has served to raise the House, relatively unconcerned in the past, to a status virtually equal to that of the upper chamber.

In the face of this shared power, few will dispute the proposition that no foreign policy (not even President Hoover's) can long be sustained without the support of at least a firm congressional majority. The consequences of a failure to maintain proper congressional ties are amply demonstrated by past experience. *A fortiori*, complete executive independence is impossible today when the conduct of our foreign affairs shapes the conduct of national affairs, when what we do and are able to do abroad is the principal determinant of domestic policy—of budgets, taxes, and public works. If in the past we could afford the luxury of hurt congressional sensibilities and petty bickering, it is clear beyond argument that, at present, these incidents of discord beckon national disaster. Constitutional lawyers and political partisans may have enjoyed the Truman-Taft debate over presidential power to dispatch military forces abroad, but the dispute gave little comfort or confidence to the American people, much less our allies. We can expect to gain support abroad only for policies supported at home. If the executive cannot be sure he speaks for us as a nation in fact as well as in theory, he would be well-advised to remain silent.

Under our peculiar division of the decision making process, no president can rely upon party discipline to carry his foreign program safely through the hazards of partisan politics in the Congress. Even though his party "controls" both houses—and as often as not even this slim reed is unavailable—he must venture across party lines to secure legislative sanction. His ability to court such votes successfully is, of course, enhanced by the same lack of discipline in the ranks of the opposition. As Messrs. Cheever and Haviland point out, this opposition is not a "responsible" one. It may attack from a variety of different viewpoints and embrace as many inconsistent premises as it has voices. Appeals to emotion and prejudice are conditioned only by conscience and votes.

The necessity for congressional coalition tends to support a concept of legislative-executive collaboration. Since the president cannot depend on party discipline, he and his principal lieutenants must resort to persuasion and compromise. The program must be defended on its merits and adjusted to suit congressional tastes. To the extent the executive can prepare the ground for his policies, anticipate attitudes on the Hill, avoid offending legislative sensibilities, and soften congressional opposition by bringing key members into the formulation of policy from the outset, he is only exercising political horse-sense in the interests of good government.

But the fact that a presidential program may entail a measure of legislative-executive collaboration does not guarantee that foreign policy will thereby become "bi-partisan"; that is, cease to be the target of partisan political criticism.

It is on this score that the authors believe a change in basic attitude is particularly crucial. It is to this end that an increased willingness to cooperate across party lines must be exhibited. And the executive must be willing to present his position fully and candidly. Even at the risk of "security," he must disclose the facts on which his policy is grounded. In addition, he must modify his program, where possible, to meet opposition views. In return for the absence of political criticism he must share political credit generously. The institutional framework of cooperation must be non-political on both sides of the street. And the authors' case studies show that, when given favorable prospects of the policy's success and an opportunity to participate, men of good will have proved their capacity to cooperate non-politically in the national interest.

Even in this cooperative process of policy formulation, it is reasonably clear that leadership and initiative must come in greatest measure from the executive. Quite apart from constitutionally implied functions, there can be no question that Congress cannot hope to compete with the executive in terms of information, experience, and expertise. Even committee members with the assistance of competent staffs are hard pressed to absorb more than the broad outlines of the problems put to them. As a result, Congress generally must confine itself to the role of informing, criticizing, approving, and reviewing. But even these functions, narrowly conceived, can be but haphazardly performed without major surgery. Too little organization, too much duplication, too much concentration upon insignificant detail, too little willingness to coordinate and cooperate among themselves, too little attention to relevant criteria in committee appointments—these are among the ills to be cured. Numerous books by commentators and forward-looking congressmen since the 1946-reorganization evidence a general awareness of the problems. *American Foreign Policy* adds little of substance to suggestions already made by others, but it does add emphasis; it points out that no amount of legislative liaison by the executive can hope to overcome the handicap which members inflict upon themselves by their failure to get their own house in order, to abandon tradition in favor of common sense.

The last chapter of the book is devoted to a number of suggestions for improvements in the mechanics of executive-legislative collaboration. There is little that is new, much that is sound, and some that is doubtful—though most readers will disagree as to which of the latter two categories apply to particular suggestions. It is probably for this reason, as well as to focus attention on a vital problem area, that the authors conclude by advocating a privately financed "Hoover Commission" to review and recommend upon the problems they raise.

I think anyone who reflects upon the major theme of this book will conclude that what is termed "executive-legislative cooperation" in the field of foreign policy is not only sound but inevitable—unless, of course, we should suffer a

genuinely disastrous failure of executive leadership. For what the authors actually advocate is nothing more than the politics of leadership, the art of governing in our democracy.

Terminology such as "cooperation" and "bi-partisan," however, seems to offend our political myths. We cannot accept it readily because we like to think in terms of controversy, issues, and alternatives. We are inclined to view ours as a government of "separate powers"—not as one great power jointly exercised. Yet that is what, in reality, it is. Checks and balances operate well only when they are inoperative. The purpose of opposition, criticism, discussion, and debate—all of our free institutions—is to arrive at the largest possible area of agreement. We encourage diversity in order to create unity. That is the democratic dialectic.

To diminish political chaos in America and to encourage cooperation, most political observers—including Messrs. Cheever and Haviland—look wistfully to the English concept of party responsibility. They advocate more party authority and responsibility within our system and suggest ways and means for overcoming the limitations imposed by organization and tradition. I am not, however, convinced that party discipline and authority is possible under our governmental system, and I am by no means convinced that it should be encouraged.

I confess this heresy hesitatingly. It is not that of the authors of this book, and I am convinced they would dissent. Yet I think the central theme of their book supports me.

If, for a century and a half, separation of powers has misfired as a device for creating responsible government, it is, I believe, at long last coming into its own, but in a new form and with an altered mission. Inevitably, we shall have government by executive. In this structure, Congress, acting more and more through "watchdog" and investigating committees, will be the president's conscience. Congressmen will play the roles of inspectors general. Their task will increasingly tend to be that of keeping the executive responsible. And this is a task, I submit, which will be but poorly performed if party discipline is invoked to rubber stamp programs or whitewash mistakes.

Once the Congress casts aside its traditional role—and it is daily being compelled by the pressure of work to do so—it will be free to concentrate on the role I suggest. Frustrations born of a sense of inadequacy, and irresponsibility born of ignorance will cease. Congress will become vital and functional. It will make itself felt—as it is already doing—by its "brooding omnipresence," by the consciousness of every executive policy maker and administrator that he may have to justify his next step before a congressional committee.

But Messrs. Cheever and Haviland engage in no such speculations. They have confined their study to facts, and they perform their analytical task com-

petently and objectively, exhibiting a restraint derived not only from scholarship but from experience. Little is said that has not been said before, but they have said it in an interesting and useful context. Their book deserves to be more widely read than, in all probability, it will be.

NICHOLAS DEB. KATZENBACH†

ADVERTISING AT THE CROSSROADS: FEDERAL REGULATION VS. VOLUNTARY CONTROLS. By MAX A. Geller. New York: The Roland Press Company, 1952. Pp. xi, 335. \$5.00.

THIS is a surprising book about the regulation of advertising. From the publisher's handouts and from the stuff on the jacket, and from the author's background too (he is a fabulous combination of advertising man-lawyer-Ph.D.-business executive), you expect an angry blast at the wicked bureaucrats. You know before you start where the signposts at those well-worn cross-roads point. One—the one labelled "Federal Regulation"—is the road to regimentation and socialism. The other—the one labelled "Voluntary Controls"—leads to free enterprise, gently and beneficently guided by trade associations.

No such thing. Dr. Geller is in favor of free enterprise all right. And he wishes advertisers would restrain themselves. But he demonstrates dispassionately that there are persistent strains of untruth and deception and bad taste in advertising. They are not entirely the product of fly-by-night operators either. The author points out that the Federal Trade Commission in one year, 1951, issued orders to refrain from deceptive practices against "such major advertisers as Sterling Drug, Bristol-Myers, Emerson Drug, P. Lorillard Company, Reynolds Tobacco Company, Miles Laboratories, American Tobacco Company, and many others."¹

Far from denouncing the FTC, which has the heaviest responsibilities of the various federal agencies engaged in regulating advertising, he urges that its appropriations be increased so that its staff can be enlarged. He notes that the lapse of time between the beginning of a proceeding and the effective date of an order (six months at least, and much longer if an appeal is taken) makes it possible for an advertiser to embark on a deceptive campaign with every prospect of winding it up before he is caught. Indeed, the FTC reminds you of the police in a stereotyped murder mystery, always one body behind the killer. To eliminate this kind of paper-chase, Dr. Geller suggests some substantial extensions of the FTC's authority, notably rule-making power backed up by penal sanctions, and a right to temporary injunctive relief in the District

†Associate Professor of Law, Yale Law School.

1. P. 258.