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## The American Law of Treason. By Bradley Chapin.

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intrinsic worth than comment, influential as it may have been, upon a case. Undeniably, section 301(d)(4) of the Foreign Assistance Act of 1964 indicates that at least temporarily the horse that Professor Falk has ridden has proved a bit unruly. Furthermore, in the longer run it could well turn out that a rule of judicial abstention, unaffected by executive desires, is not as desirable as judicial assertion, with or without the possibility of invocation of the act of state doctrine upon executive suggestion—a reversal of the practice of applying the doctrine unless the executive suggested otherwise as in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*.<sup>6</sup> However debatable the merits of judicial abstention as contrasted with judicial assertion, it is essential that probes toward depoliticizing national treatment of international law be made. Depoliticized law, or even relatively depoliticized law, may seem impossible, particularly since so much of law is produced through political processes and is a communication from political authorities. Yet the struggle for the law attained to date is in part the story of efforts to embed in the life of a community ethical standards surviving the whimsy of politics. That this story is not dichotomous only emphasizes for both scholar and practitioner the contrast between analysis and the labor of making, applying, and enforcing law.

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THE AMERICAN LAW OF TREASON. By Bradley Chapin. Seattle: Univ. of Washington Press. 1964. Pp. viii, 172. \$6.00.

Professor Chapin, in this tightly constructed monograph, traces the development of our law of treason from its medieval roots to early nineteenth century American practices. Looking backward from the treason clause of the United States Constitution, it is apparent that the fourteenth century statute, 25 Edward III, is clearly antecedent to the provision that "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." Similarly, 7 & 8 William III, a product of the English revolutionary settlement, set the standard for the minimum procedural safeguard that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." How eighteenth century republican statesmen, drawing upon their common heritage as Englishmen, established a law of treason for the recently freed North American colonies is the central theme of this study.

Although it is somewhat beyond the scope of Professor Chapin's interest, it is not inappropriate to point out that by the time of Magna Carta treason

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6. 173 F.2d 71 (2d Cir. 1949), *mandate amended*, 210 F.2d 375 (2d Cir. 1954) (*per curiam*).

was distinguished from felony in one important respect: the lands of a person convicted of treason were forfeit to the crown; a felon's lands escheated to his lord. The lord whose tenant was convicted of treason suffered along with the guilty party, albeit a less discomfoting penalty; for the vassal's misdeed the lord was deprived of his seignorial dues. This gave the magnates strong reason to attempt to limit the number of acts punishable as treason. It helps to explain why the statute of Edward III was popular with the powerful landed families. Early attempts to restrict the law of treason did not necessarily reflect the more modern concern with individual liberties.

The legislation of Edward III limited punishment for treason to seven proscribed acts. Subsequent Parliaments extended the scope of this law under the impetus of national emergencies and strong willed monarchs. In addition, Tudor and Stuart rulers achieved a successful expansion of the law of treason through the courts and used these judicially constructed treasons to crush political opposition. Following the revolution of 1688 the law of treason continued to be used as a bulwark against foreign threats and as a convenient weapon against rival political factions. The revolutionary settlement, however, did bring forth important procedural protections for those accused of treason. In addition to the requirement that the testimony of two witnesses was necessary for conviction, the accused was entitled to a copy of the indictment before trial and he was privileged to be represented by counsel and to compel attendance of witnesses for his defense. Hence forward, whatever Parliament and the courts might do to expand the substantive law of treason, these procedural safeguards offered some measure of protection to the accused.

Legislation in the American colonies converged, after some early experimentation, on the familiar pattern of the English law of treason. As in the mother country, in time of threat or emergency the number of substantive offenses identified as treason was enlarged markedly. In time of calm and quiet, the list contracted. But through both turmoil and peace the procedural traditions remained steadfast.

When England and the colonies came into open conflict after 1763, the British made several unsuccessful attempts to control dissidents among the colonials by invoking the treason law. Prosecutors were unable to secure the necessary witnesses to convict Americans of treason when the trials were held in the colonies, and the effort to transfer these trials to the mother country was met with bitter colonial hostility; local control of judicial proceedings was a fundamental right of Englishmen and not to be surrendered peaceably.

The novelty of Professor Chapin's study lies in his extensive use of local court records covering the period from the beginnings of revolt in the colonies to the adoption of the Constitution. These were tumultuous times; old loyalties were torn asunder and new ones were slow to develop. The states were charged with the dual task of fighting a major war with a powerful foreign enemy and at the same time solidifying the domestic population behind a new government.

Divided loyalties were commonplace, and many citizens appeared indifferent to the outcome of the fighting. The law of treason was expanded to include many new acts and prosecutions were numerous, but throughout the entire period Professor Chapin's research unfolds an amazing fidelity to fair procedural standards.

Legislatures frequently authorized special proceedings by civilian and military authorities to try accused traitors. But Professor Chapin concludes that the sheer number of these statutes gives a misleading impression. While many persons accused of treason were brought under the jurisdiction of military tribunals and special commissioners, the great majority of cases were handled in the regular courts. Where local conditions had so disrupted the judicial machinery that court trials were not available, the findings of military tribunals and commissioners were reviewed regularly by legislative authorities. The record discloses that sentences meted out by nonjudicial bodies frequently were reduced or set aside and pardons were also common.

This is not to say that the new government failed to invoke the treason laws with vigor. The records of judicial bodies reflect a stern commitment to the revolutionary cause; yet in conclusion Professor Chapin is deeply impressed with the respect shown for the procedural rights of defendants, and under the circumstances, the law acted with restraint. As Professor Chapin summarizes his findings:

. . . the procedure here described exhibits a law of diminishing returns. The policy in regard to traitors became more cautious as the process approached execution. Wholesale arrests and commitments were common. The pace slowed perceptibly at the stage of grand jury indictments. Judges and juries showed great reserve in dealing with the lives of accused traitors. Even after conviction, pardons prevented most executions. Only a tiny minority of those charged with treason ever experienced the terror of the gallows and the hangman's noose. Drastic purges and violent assizes were not a part of the Revolution. There was no reign of terror. The record is one of substantial justice done.

In attempting to account for the procedural restraint which accompanied American treason trials and for the relatively small number of executions which followed conviction, Professor Chapin suggests that one important explanation lies in the ready availability of alternative methods of effectuating government policy. Most states made frequent recourse to confiscation statutes in dealing with disloyal subjects. Outlawry and attainder were used to strip Tories of their property. Through direct legislative action or simplified judicial proceedings the government was able to secure funds to fight the war and was not forced to take recourse in the treason laws. The fact that many disloyal persons fled the country frequently eliminated any need for choice.

Whatever temptation we may have to suggest that confiscation of one's property by legislative fiat is hardly distinguishable from a reign of terror should

be tempered by viewing these alternatives from the guilty man's perspective: at least the victim of a confiscatory statute lived to complain of the injustice. The prospective implications of the government's restrained treason policy were also important. The decision of the Constitutional Convention that treason prosecutions were not to be a legitimate means of silencing political opposition, as expressed in the very restrictive language of Article III, section 3, should not be overlooked. That the country was able to survive the revolutionary crisis without recourse to the frightening potentialities of widespread treason trials must have been apparent to the founding fathers.

Professor Chapin has done a distinct service in depicting the fidelity to standards of procedural fairness which characterized treason trials during the early years of the American republic. This study describes an important episode in the evolution of our modern concepts of due process of law. The awesome power of the state and the possibility of its misuse by agents of the people—be they sincere or self-serving—has been an ever present consideration in the attempt to define fair criminal procedure. The author's imaginative use of local court records to supplement the legislative record is a heartening demonstration that the professional historian has an important role in reconstructing the history of American law.

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