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# Constitutional Law -- The Right to Government Employment for Those Invoking the Fifth Amendment -- Loyalty Oaths -- Due Process

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a conflict of laws rule evolves which shapes some jurisdictional contours out of the custody tangle, retention of this rule appears to be the most advisable course.

JOHN L. DAVIDSON

### Constitutional Law—The Right to Government Employment for Those Invoking the Fifth Amendment—Loyalty Oaths—Due Process

*Slochower v. Board of Higher Education of New York City*<sup>1</sup> again brought before the United States Supreme Court one of the most controversial issues that has confronted our courts in recent years—the right to continued government employment for those persons who have not been charged with or convicted of any crime,<sup>2</sup> but whose government service has been terminated<sup>3</sup> because of security or loyalty reasons. Specific examples have involved situations where: (a) the employee's loyalty was questionable,<sup>4</sup> (b) his status as a security risk made his retention incompatible with the best interests of national security,<sup>5</sup> (c)

<sup>1</sup> 350 U. S. 551 (1956).

<sup>2</sup> "The charge of disloyalty or even of being a security risk has become in the setting of today so serious that it is almost like a charge of a crime." Garrison, *Some Observations on the Loyalty-Security Program*, 23 U. CHI. L. REV. 1, 2 (1955).

<sup>3</sup> The cases before the Supreme Court on this point have challenged both state and federal laws. Although the principles involved are similar, the federal and state policies that have given rise to the cases have not been the same. The federal government has established an elaborate and expensive system for investigating its employees, for conducting loyalty and security hearings and for reviewing the results of these hearings. The states, if they have acted at all, have tended to confine their loyalty measures to less expensive and more easily administered programs. Generally, with reference to those categories listed in the text, those cases under a, b, and d have concerned federal employees and those under c and e have concerned state employees. Both the federal and state cases should be considered in a discussion pointed primarily at either line of decisions.

<sup>4</sup> *Peters v. Hobby*, 349 U. S. 331 (1955); *Bailey v. Richardson*, 341 U. S. 918, (1951).

<sup>5</sup> By virtue of Executive Order 10450 of April 27, 1953, the loyalty cases, which were formerly categorized separately from the security risk cases, are merged with and are known as security risks.

The criterion for dismissal as established under the first loyalty program was "on all the evidence, reasonable grounds exist for the belief that the person involved is disloyal." Executive Order 9835 of March 21, 1947. This criterion was changed to "reasonable doubt as to the loyalty of the person involved." Executive Order 10241 of April 28, 1951. Executive Order 10450 of April 27, 1953, made the criterion "whether the . . . retention . . . is clearly consistent with the interests of national security." This order provides standards and procedures for the exercise by agency heads of their power under the Summary Suspension Act, 64 STAT. 476, 1950, to summarily dismiss employees in the interests of national security and establishes the criterion for dismissal as stated above. "There has thus been a change from loyalty to security. At the present time, a person discharged as a security risk may well be able to establish his unswerving loyalty. . . . Loyalty cases as such no longer exist; a disloyal person is now dismissed as a security risk." Sweeney, *People, Government and Security: An Analysis of Three Books and a Program*. 51 Nw. U. L. Rev. 79, 81 (1956).

Executive Order 10450 was held invalid to the extent that it authorizes an em-

his failure to take a loyalty oath disqualified him for government service,<sup>6</sup> (d) his past or present membership in or association with organizations or persons whose activities or ideals are suspect endangered the national security,<sup>7</sup> or (e) his exercise of the constitutional privilege against self-incrimination<sup>8</sup> was made sufficient cause for dismissal.<sup>9</sup> The *Slochower* case involved this last point. Even before the *Slochower* case the Supreme Court jealously guarded the privilege so as to prevent its limitation or complete abolition (which has been suggested at times<sup>10</sup>) by anything less than a Constitutional Amendment; and the Court will

ployee's dismissal "irrespective of the character of his job and its relationship to the 'national security.'" The Court held that the Federal Summary Suspension Act did not authorize the summary dismissal of a federal employee who occupied a non-sensitive job even though he is charged with disloyalty. *Cole v. Young*, 351 U. S. 536 (1956). This case recognized and eliminated one of the most serious objections to the program.

The practical effect of Executive Order 10450 seems to be diametrically opposed to the one desired. By placing the loyalty case in the same category as the security risk the latter is tainted with the more serious stigma of disloyalty and merely serves as a smoke screen for those who are suspected of actual disloyalty. At the same time there is little actual benefit to the loyalty case since he is still subject to the same public ostracism. See Garrison, *supra* note 2, at 2.

<sup>6</sup> *Garner v. Board of Public Works*, 341 U. S. 716 (1951); Notes, 50 MICH. L. REV. 467 (1952), 20 U. CIN. L. REV. 514 (1951).

<sup>7</sup> "In many instances, it is his associations or character faults which compel the conclusion that his retention is not clearly consistent with national security." Sweeney, *supra* note 5, at 81. Also, see Garrison, *supra* note 2, at 3.

<sup>8</sup> U. S. CONSR. amend. V. See 8 WIGMORE, EVIDENCE, 3rd ed., §§ 2250, 2251 (1940) for a discussion of the history and policy of the privilege.

All states have included similar provisions in their constitution, except the states of New Jersey and Iowa, and in those states it is held to be a part of the existing law. *Twining v. New Jersey*, 211 U. S. 78, 91 (1908). Also, see Note, *Self-Incrimination—Historical Background of the Doctrine*, 44 KY. L. J. 124 (1955).

"As to the type of proceedings in which the privilege against self-incrimination may be used, the court has said; 'the object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.' . . . In a later case, it said, 'the privilege is not ordinarily dependent upon the nature of the proceedings in which the testimony is sought or is used. It applies alike to civil and criminal proceedings wherever the answer might tend to subject to criminal responsibility him who gives it.'" Trimble, *Self-Incrimination and Congressional Investigations*, 44 KY. L. J. 333, 335 (1956).

This note does not attempt to deal with the Fifth Amendment in all of its many ramifications since it is not disputed that the privilege was properly invoked; but, merely with those aspects surrounding Professor Slochower's summary dismissal as a result of his use of the privilege.

<sup>9</sup> For discussions of this problem see: STUDIES ON PRIVILEGE AGAINST SELF-INCRIMINATION—A SYMPOSIUM. *Historical Background and Implications of the Privilege Against Self-Incrimination*, R. Moreland; *Scientific Evidence in the Law*, J. R. Richardson; *The Privilege Against Self-Incrimination—Policy Pro and Con*, C. L. Calk; *The Investigating Power of Congress—Its Scope and Limitations*, J. R. Richardson; *Self-Incrimination and Congressional Investigations*, E. G. Trimble. 44 KY. L. J. 267 (1956). Also, see PROBLEMS OF THE FIFTH AMENDMENT IN MODERN TIMES—A SYMPOSIUM. *The Right to Silence*, J. R. Connery; *The Fifth Amendment Today*, E. N. Griswold; *The Fifth Amendment in Non-Criminal Proceedings*, C. C. Williams. 39 MARQ. L. REV. 179 (W 1955-56).

<sup>10</sup> This is discussed in two recent articles. Inbau, *Should We Abolish the Constitutional Privilege Against Self-Incrimination*, 2 U. CIN. L. REV. 28 (1955); Calk, *supra* note 9, at 303.

not permit any unfavorable inference to be drawn from the fact that the privilege has been invoked in a federal proceeding.<sup>11</sup> However outside the court, suspicions, questions, and imputations continue to rise and surround those claiming the privilege.<sup>12</sup> Frequently, it has resulted in the loss of that person's job,<sup>13</sup> which in turn has caused numerous appeals to the courts as the employees attempt to retain their positions<sup>14</sup> or, more important in many cases, remove that "badge of infamy"<sup>15</sup> with which they have been branded.

The *Slochower* case is typical of the situations encountered in these cases. It raised the question of the constitutionality of a statute that provided for the automatic dismissal of any city employee invoking the privilege against self-incrimination in order to avoid answering a question relating to his official conduct.<sup>16</sup> The appellant was serving as an associate professor at Brooklyn College, an institution operated by the City of New York, when he was called to testify before a Congressional investigating committee.<sup>17</sup> He invoked the Fifth Amend-

<sup>11</sup> *Twining v. New Jersey*, 211 U. S. 78 (1908); *Ullman v. United States*, 350 U. S. 422 (1956); See, Note, *Constitutional Law—Privilege Against Self-Incrimination—Immunity*, 9 Sw. L. J. 474 (1955).

<sup>12</sup> Elson, *People, Government and Security; An Analysis of Three Books and A Program*, 51 Nw. U. L. Rev. 83, 85 (1956); Garrison, *supra* note 2, at 1.

<sup>13</sup> Note, *Constitutional Law—Due Process—Automatic and Permanent Dismissal of Public School Teachers for Invoking the Privilege Against Self-Incrimination*, 54 MICH. L. Rev. 126 (1955). For a presentation of the reasons favoring dismissal see, Note, 34 NEB. L. Rev. 88 (1954).

<sup>14</sup> "Thirteen other individuals brought suit for reinstatement after their dismissal for pleading the privilege against self-incrimination in the same federal investigation." 350 U. S. 551, 555 and n. 2.

<sup>15</sup> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy.'" *Wieman v. Updegraff*, 344 U. S. 183, 190-91 (1953).

<sup>16</sup> Section 903 New York City Charter states, "If any . . . employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any . . . body authorized to conduct any hearing . . . , or having appeared shall refuse to testify, or to answer any question regarding . . . affairs of the city . . . on the ground that his answer would tend to incriminate him, . . . his term or tenure of . . . employment shall be vacant and he shall not be eligible to . . . employment under the city. . . ."

This section was not aimed at communists but was designed to help in the elimination of graft and corruption. In the past, numerous public employees had refused to testify as to criminal acts on the ground of self-incrimination and New York wished to remove these persons from public employment. See, IN THE MATTER OF THE INVESTIGATION OF THE DEPARTMENTS OF THE GOVERNMENT OF THE CITY OF NEW YORK, FINAL REPORT BY SAMUEL SEABURY, December 27, 1932, pp. 9-10.

<sup>17</sup> The investigation was being conducted on a national scale by the Internal Security Subcommittee of the Committee on the Judiciary of the Senate and related to subversive influences in the American Educational system. Recognizing education to be primarily a state function, the chairman stated that the inquiry would be limited to "considerations effecting national security, which are directly within the purview and authority of the subcommittee." 350 U. S. 551, 553.

ment while testifying before that committee. Although he had twenty-seven years' experience; was entitled to tenure under state law; and could only be dismissed for cause, after notice, hearing and appeal;<sup>18</sup> he was summarily discharged from his position.<sup>19</sup> The New York Court of Appeals upheld the dismissal as constitutional but the United States Supreme Court reversed the finding of that Court and held that the summary dismissal of the appellant, Slochower, violated due process of law.<sup>20</sup>

The appellant, in addition, had attacked the constitutionality of the act on the ground that it abridged the privileges and immunities of a citizen of the United States since it in effect imposed a penalty on the exercise of the privilege against self-incrimination. The Court did not decide the privilege and immunity question<sup>21</sup> but held it unconstitutional as a violation of due process.<sup>22</sup>

The principal case does not involve a loyalty oath; nevertheless, an examination of the loyalty oath cases and their background should be undertaken since the Court relied largely upon those cases for authority to support its decision. The examination will provide a better understanding of the use of this authority in the present case and will help explain the basis on which the majority placed its opinion, an opinion which the minority felt struck deep into the authority of a state "to protect its local governmental institutions from influences of officials whose conduct does not meet the declared state standards for employment."<sup>23</sup>

The problems concerning the right to employment in the federal government are more complex than those concerning state government, as already indicated<sup>24</sup> and the discussion of the former<sup>25</sup> will be limited to those aspects of the federal problem as are necessary to the dis-

<sup>18</sup> McKinney's New York Laws; Education Law § 6206(2).

<sup>19</sup> The Court of Appeals of New York has held § 903 to mean that "the assertion of the privilege against self-incrimination is equivalent to a resignation." *Daniman v. Board of Education*, 306 N. Y. 532, 538; 119 N. E. 2d 373 (1954).

<sup>20</sup> 350 U. S. 551, 559.

<sup>21</sup> U. S. CONST. amend. XIV, § 1. Considering the Court's past approach to the privilege and immunities question, it is doubtful that there would be any relief forthcoming under this provision. *Twining v. New Jersey*, 211 U. S. 78 (1908); *Barron v. Mayor, ETC., of Baltimore*, 7 Pet. 243, 8 L. Ed. 672 (U. S. 1830); *Slaughter House Cases*, 16 Wall. 36, 21 L. Ed. 394 (U. S. 1873).

<sup>22</sup> Although two different types of statutes are involved, the Court finds that their effect is similar. It states, "the heavy hand of the statute fall alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive. Such action fall squarely within the prohibition of *Wieman v. Updegraff* . . . there has not been the protection of the individual from arbitrary action. . . ." 350 U. S. 551, 558.

<sup>23</sup> 350 U. S. 551, 559-60.

<sup>24</sup> See note 3 *supra*.

<sup>25</sup> Shapiro, *Government Employment and the Loyalty-Security Program*, 15 LAW GUILD REV. 131 (1955); Garrison, *supra* note 2, at 1.

cussion of the loyalty oath cases; which primarily, in recent years, have concerned state statutes.<sup>26</sup>

The principle of the loyalty oath is not new and has been used in this and other countries in earlier times in attempts to determine or test loyalty.<sup>27</sup> In the past known as the test oath, the loyalty oath is its modern counterpart.<sup>28</sup> The United States Supreme Court struck down attempts by the states<sup>29</sup> and by Congress<sup>30</sup> to establish test oaths and thereby prevent former Confederates from practicing certain professions. These oaths were held to be unconstitutional both as ex post facto laws and as bills of attainder. The loyalty oaths have been attacked on the same grounds, but in most instances the Court has held the modern oaths to be valid.

In the current series of loyalty oath cases, four leading decisions had laid the foundation for the opinion in the *Slochower* case. They are *Gerende v. Board of Supervisors*,<sup>31</sup> *Garner v. Board of Public Works*,<sup>32</sup> *Adler v. Board of Education*,<sup>33</sup> and *Wieman v. Updegraff*.<sup>34</sup> The first of these, the *Gerende* case, questioned the constitutionality of a Maryland statute<sup>35</sup> which apparently required every candidate for public office to swear that he was not engaged in nor advocated any activity the purpose of which was to overthrow the government by force or violence and that he was not a member of any organization which did so. However, the Maryland Supreme Court had interpreted the statute and stated that the oath was intended to apply to those engaged "in one way or another in the attempt to overthrow the government by force or violence" or who are "knowingly" members of organizations that do so.<sup>36</sup> The United States Supreme Court interpreted this Maryland decision to mean that the candidate need not only take an oath that he is not "knowingly" a member of an organization engaged in an attempt to overthrow the government by force or violence and this interpretation was made only on the assurance of the Maryland Attorney General that affidavits stating that the candidate was not ". . . knowingly a member of an organization engaged in such an attempt"<sup>37</sup> would meet

<sup>26</sup> See note 8 *supra*.

<sup>27</sup> Koenigsberg and Stavis, *Test Oaths: Henry VIII to the American Bar Association*, 11 LAW GUILD REV. 111 (1951).

<sup>28</sup> Fraenkel, *Law and Loyalty*, 37 IA. L. REV. 153 (1951).

<sup>29</sup> *Cummings v. Missouri*, 4 Wall. 277 (U. S. 1866).

<sup>30</sup> *Ex Parte Garland*, 4 Wall. 333 (U. S. 1866).

<sup>31</sup> 341 U. S. 56 (1951).

<sup>32</sup> 341 U. S. 716 (1951); See note 6 *supra*.

<sup>33</sup> 342 U. S. 485 (1952); See Notes, 66 MARQ. L. REV. 111 (1952), 100 U. PA. L. REV. 1244 (1952), 36 MINN. L. REV. 961 (1952).

<sup>34</sup> 344 U. S. 183 (1952); See note 49 *infra*, for a citation of LAW REVIEW notes commenting on this case.

<sup>35</sup> MD. LAWS c. 86, § 15 (1949).

<sup>36</sup> *Shub v. Simpson*, 76 Atl. 2d 332 (Md. 1950).

<sup>37</sup> 344 U. S. 183, 189.

the requirements of the oath. Thus, in a brief per curiam decision without a discussion of any of the other basic issues involved, the Court pointed out a fundamental requirement for any valid loyalty oath—scienter.<sup>38</sup>

The *Garner* case questioned the constitutionality of a City of Los Angeles ordinance of 1948 requiring an oath that the employee had not advocated or belonged to an organization advocating the overthrow of the government by force or violence during the five preceding years.<sup>39</sup> The Court assumed that scienter was implicit in each clause of the oath and that there was no denial of due process.<sup>40</sup>

The oath was attacked as a bill of attainder and as an ex post facto law in that it denied government employment to persons because of an affiliation that might have been terminated at the time the oath was enacted into law. The majority of the Court held that it was not ex post facto since it did not punish past lawful conduct<sup>41</sup> and that in the absence of punishment, neither was it a bill of attainder.<sup>42</sup> The Court cited *U. S. v. Lovett*<sup>43</sup> for a definition of a bill of attainder<sup>44</sup> and apparently limited its holding in that case by its decision in the *Garner* case.

In *Adler v. Board of Education*, the issue was the constitutionality

<sup>38</sup> Note, *The Scienter Requirement and Retrospective Clauses in Loyalty Oaths*, 3 D. B. J. 93 (1953).

<sup>39</sup> The ordinance was passed pursuant to a 1941 Amendment to the City of Los Angeles Charter which provided that no person should hold public office who had within 5 years of the adoption of the amendment advocated, or belonged to a organization which advocated the overthrow of the United States Government or the Government of the State of California by force or violence. The amendment gave the city council authority to pass an ordinance effecting it.

<sup>40</sup> The Court stated, "We have no reason to suppose that the oath is or will be construed by the City of Los Angeles or the California Courts as affecting adversely those persons who during their affiliation with a proscribed organization were innocent of its purpose, or those who severed their relations with any organization when its character became apparent. . ." 341 U. S. 716, 723.

<sup>41</sup> The 1941 Amendment had been in force for the 5 years preceding the enactment of the oath. For that reason, the conduct involved was not lawful at the time it was engaged in and the subsequent act did not punish prior lawful conduct. Therefore, it was not ex post facto. See notes 29 and 30 *supra*. The dissenting judges would hold it to be a bill of attainder and hold *Cummings v. Missouri*, note 29 *supra*, and *Ex Parte Garland*, note 30 *supra*, to be applicable.

<sup>42</sup> The Court pointed out that punishment is a prerequisite to a bill of attainder and stated, "We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment." 341 U. S. 716, 722.

<sup>43</sup> 328 U. S. 303 (1946). Congress had provided in the Urgent Deficiency Appropriation Act of 1943, § 304 that the appropriation for the Interior Department would lapse if it was used to pay the salaries of certain named employees. The Court stated, "this permanent proscription from any opportunity to serve the government is punishment and of a most severe type. . . . Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial." *Id.* at 316.

<sup>44</sup> "Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the constitution." 328 U. S. 303, 315.

of the New York Feinberg Law<sup>45</sup> which barred from employment in the public schools persons who advocate or belong to organizations which advocate the overthrow of the government by force or violence. Membership in certain listed organizations was made prima facie evidence of the person's ineligibility to teach. This act was upheld on the basis of a New York decision which had interpreted the law to require knowledge of the purpose of such organizations before the law was applicable.<sup>46</sup> The Court reiterated its past approach to the question of right to government employment, stating, "it is equally clear that they have no right to work for the state in the school system on their own terms. *United Public Workers v. Mitchell*, 330 U. S. 75 (1947). They may work for the school system upon the reasonable terms laid down by the proper authorities of New York."<sup>47</sup> In the past, government employment had been treated as a privilege rather than a constitutional right.<sup>48</sup>

However, in the last case of the series, the *Wieman* case,<sup>49</sup> the Court with reference to the above quotation from the *Alder* case stated "that to draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue."<sup>50</sup> But the Court further stated, "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."<sup>51</sup>

The *Wieman* case questioned the constitutionality of an Oklahoma statute<sup>52</sup> requiring public employees to take an oath similar to those in *Gerende* and *Garner*. However, in *Wieman*, there was no requirement of scienter in the language of the statute itself nor was there a state court decision that made "knowledge" of the purpose of the organization a part of the oath.<sup>53</sup> The statute was attacked on the usual grounds that the

<sup>45</sup> N. Y. EDUC. LAW §§ 3021-22.

<sup>46</sup> *Thompson v. Wallin*, 301 N. Y. 476, 95 N. E. 2d 806 (1950).

<sup>47</sup> 342 U. S. 485, 492.

<sup>48</sup> *Bailey v. Richardson*, 182 F. 2d 46 (D. C. Cir. 1950); aff'd by an equally divided Court, 314 U. S. 918 (1951).

<sup>49</sup> For discussions of this case, see: Note, *Constitutional Law: Oklahoma Loyalty Oath Unconstitutional as a Denial of Due Process*, 39 CORNELL L. Q. 188 (1953); Note, *Constitutional Law—Fourteenth Amendment—Validity of Statutes Requiring Loyalty Oaths*, 22 U. CIN. L. REV. 243 (1953); Note, *Oklahoma Loyalty Oath Void*, 25 ROCKY MT. L. REV. 395 (1953); Note, *Constitutional Law—Due Process—Validity of State Statutes Requiring Public Employees to Take Loyalty Oath*, 51 MICH. L. REV. 1076 (Mar.-Ju.-1953).

<sup>50</sup> 344 U. S. 183, 191.

<sup>51</sup> *Id.* at 192.

<sup>52</sup> 51 OKLA. STAT. §§ 37.1-37.8 (1951).

<sup>53</sup> The Supreme Court of Oklahoma had limited the organizations forbidden by the statute to those listed as subversive by the attorney general prior to the effective date of the statute and had upheld the constitutionality of the oath.

oath is denial of due process, an ex post facto law, and a bill of attainder.<sup>54</sup> The Court distinguished the *Wieman* case from *Gerende*, *Garner*, and *Adler* with the following statement, "Yet under the Oklahoma Act the fact of association alone determines disloyalty and disqualification, it matters not whether association existed innocently or knowingly. . . . Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process."<sup>55</sup> In each of these cases, it had been emphasized that the state must conform to the requirement of due process.<sup>56</sup>

The Court does not go so far as to hold that one has a constitutional right to public employment, but it makes it clear that one will be protected from exclusion by a statute which operates in a patently arbitrary or discriminatory manner<sup>57</sup> and that any such oath, to be constitutional, must require scienter.<sup>58</sup>

Although the decision in the principal case will probably be of little practical value to Professor Slochower in his attempt to retain his tenure rights and job, the more liberal interpretation of the due process clause, as contrasted to that advocated by the dissent,<sup>59</sup> was desirable.

The Court in considering the question of a person's right to government employment in the *Slochower* case points out that "To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and non-discriminatory terms laid down by the proper authorities."<sup>60</sup> It appears from these decisions that the Court does not consider government employment to be a constitutional right but it will give constitutional protection to those already employed. It will not permit the summary dismissal of an employee by operation of statute without opportunity for a hearing. The extent of the protection in the future may be broadened but at the present time the statute providing for dismissal must require evidence of the employee's unfitness. In the case of loyalty

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*Board of Regents v. Updegraff*, 205 Okla. 301, 237 P. 2d 131 (1951). The Oklahoma Court refused to permit the teachers to take the oath as thus construed and it denied petition for rehearing which was partly based on the ground that this refusal was a denial of due process. The United States Supreme Court felt that this refusal meant that the Oklahoma statute did not require scienter and was faced with the question of whether innocent membership was sufficient basis for removal from public employment.

<sup>54</sup> See notes 31, 32, and 33 *supra*.

<sup>55</sup> 344 U. S. 185, 191.

<sup>57</sup> 344 U. S. 185, 192.

<sup>56</sup> 350 U. S. 551, 556.

<sup>58</sup> See note 38 *supra*.

<sup>59</sup> "For this Court to hold that state action in the field of its unchallenged powers violates the Due Process . . . demands that this Court say . . . that the action of the Board . . . was inconsistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. A denial of due process is 'a practice repugnant to the conscience to mankind.' Surely no such restriction exists here." 350 U. S. 551, 562-3.

<sup>60</sup> 350 U. S. 551, 555.

oaths, that evidence must show scienter on the part of the employee and in the case of dismissal for use of the privilege against self-incrimination in a federal investigation or proceeding, a proper inquiry that would show the employee's retention to be inconsistent with the best interest of the state. This is a minimum of protection for the employee but it is a recognition that some constitutional protection is necessary and shows some tendency on the part of the Court to liberalize its past interpretations of the Fourteenth Amendment in the area of loyalty oaths and statutes such as the one in the *Slochower* case.

CHARLES J. NOOE

### Criminal Law—Burglary in North Carolina

At common law, burglary was a felony punishable by death;<sup>1</sup> it was regarded as an infamous offense against the habitation and not against the property,<sup>2</sup> or, as expressed at an early date, ". . . man's house is his castle, and its security must not be lightly invaded."<sup>3</sup> To preserve this security the law created safeguards imposing severe penalties on their infringement. From the common law concept of burglary, however, a number of statutory crimes associated with burglary have evolved, each one extending the original scope further into the area of property protection. Illustrative of this expansion is a recent amendment<sup>4</sup> to G. S. § 14-54,<sup>5</sup> which states where non-burglarious breaking or entering ". . . shall be wrongfully done *without intent to commit a felony or other infamous crime,*" (Emphasis added) a misdemeanor has been committed. This amendment virtually completes the statutory modification of crimes associated with the elements of common law burglary. A brief examination of the development of these related crimes within the framework of the North Carolina statutes and decisions is the purpose of this note.

Burglary was defined originally as the breaking and entering, in the night time, of a dwelling house of another,<sup>6</sup> with intent to commit a felony therein.<sup>7</sup> Since 1889, the offense has been divided into two degrees. The gravamen of first degree burglary is that the crime is

<sup>1</sup> 4 BLACKSTONE, COMMENTARIES \*228.

<sup>2</sup> 12 C. J. S., *Burglary* § 1b (1944).

<sup>3</sup> 9 AM. JUR., *Burglary*, 240 (1937); *State v. Williams*, 90 N. C. 728 (1884). See also *State v. Surles*, 230 N. C. 272, 52 S. E. 2d 880 (1949).

<sup>4</sup> N. C. Sess. Laws 1955, c. 1015; see also 33 N. C. L. REV. 538 (1955).

<sup>5</sup> N. C. GEN. STAT. § 14-54 (Supp. 1955).

<sup>6</sup> Under common law, it was immaterial that the occupant of the dwelling house was not present. *State v. Foster*, 129 N. C. 704, 40 S. E. 209 (1901); 4 BLACKSTONE, COMMENTARIES \*225.

<sup>7</sup> *State v. Langford*, 12 N. C. 253 (1827). Under common law, it was immaterial that the felony intended was not committed, *State v. Morris*, 215 N. C. 552, 2 S. E. 2d 554 (1939); *State v. Allen*, 186 N. C. 302, 119 S. E. 504 (1923).