Without Presumption:
How Slochower v. Board of Higher Education of New York City Changed What it Meant to Plead the Fifth

When we recognize that we cannot achieve absolute security, when we recognize that there are other values to preserve while we are fighting communism if we are not to lose the very things we seek to protect when we oppose communism, then we can see the Fifth Amendment in a new perspective. – Erwin Griswald

Introduction:

On September 24, 1952, Professor Harry Slochower1 did not walk across Brooklyn College’s leaf-strewn quad or enter Boylan Hall to teach usual his cadre of students. Rather, he crossed Manhattan’s Foley Square, took thirteen steps up thirteen well-trod stairs, and entered into what was then called, simply, the United States District Court Building at Foley Square. This building, the oldest courthouse in the United States (pre-dating even the Supreme Court), had been operating since 1789.2 But on this temperate September day, the Professor was not entering the courthouse to avail it of its legal services or to pay homage to its storied history. Rather, he was responding to a federal subpoena issued by the importantly-titled Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Laws of the Committee on the Judiciary (“SISS” or “the Subcommittee”). The Senate’s equivalent to the better known House Un-American Activities Committee (“HUAC”), the SISS was in the process of investigating “Subversive Influence in the Education Process”3 and had sequestered Room 1305 of the Foley Square Courthouse in order to further this mission.

It was nearing late afternoon by the time Slochower was called in to testify before SISS representative Senator Homer S. Ferguson (R, MI) and Special Counsel Robert J. Morris. Slochower was the last educator to be questioned that day, and though none in the room could have known, his brief time before the Subcommittee would lead to the four year legal battle Slochower v. Board of Higher Education of New York City, a case which culminated in what many now view as the first major blow by the Supreme Court to the anti-communist fear-mongering of the 1950s.

At his SISS hearing, Slochower, then a professor of German and comparative literature at Brooklyn College, invoked his fifth amendment privilege “with regard to the question of whether

1 Pronounced, SLOCK-our
2 H. Paul Burak, History of the United States District Court for the Southern District of New York 1 (2003) (the Foley Square Court convened its first session on November 3, 1789 while the first proceedings at the Supreme Court did not occur until February 5, 1790).
[he] had been a member of the Communist Party in the years 1940 or 1941.” Dismissed by his school for taking this stand, Slochower and twelve other educators who had likewise been fired for taking the Fifth brought suit in a case then titled Daniman v. Board of Education of the City of New York. During the course of numerous appeals and for a variety of reasons by the time the case reached the Supreme Court Slochower was the sole remaining plaintiff. Finally, on April 9, 1956, almost five months after hearing oral arguments and almost four years after Slochower appeared before the SISS, the Supreme Court issued its opinion in the case now bearing Slochower’s name. After discussing the relevant facts and party positions, Justice Clark’s opinion for the 5-4 majority began by saying, “[a]t the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person’s constitutional right under the Fifth Amendment.” Continuing on this line, the opinion then said, “[t]he privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury.” In the end, however, the Court decided the case on the Fourteenth rather than the Fifth Amendment, holding that by penalizing Slochower for exercising his right against self-incrimination the Board of Education had violated his Due Process rights.

While this holding would shortly thereafter be interpreted so narrowly as to be fit through the eye of a needle, the story of Harry Slochower, of the stand that he took against the persecution of teachers and of his impact on the Fifth Amendment, is one that is as impressive in its boldness then as it is relevant today. It is a story that broaches any number of key, education-law inquiries—from issues of subject-matter control to questions on the constitutional rights of educators. In the end, however, it is a story of words, of the fear they can generate, the anger they can give rise to, and of the power they can garner as much when spoken as when left deliberately unspoken. For, while a holding may be overturned, while a case may be eclipsed by those that follow, it is sentences like the ones written by Justice Clark above that forever change the landscape of American history, and it is because of those sentences, those words, that we now delve into the events from which they were born.

The Key Figures in Room 1305

While Harry Slochower waited outside the doors of Room 1305 on that clear September day, inside the room Senator Ferguson and Special Counsel Morris were questioning the director of a New York private school about why it was that his school enrolled so many children whose parents were themselves public school teachers and were discussing public and private schooling more generally. Although the topic of public education itself would not come up in Slochower’s

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4 Id. at 201.
6 Technically Slochower brought suit with just two other Brooklyn College professors and their case was joined with one filed by nine public school teachers who had also been fired for similar reasons.
7 Slochower, 350 U.S. at 557.
8 Id.
9 This witness was Randolph B. Smith, the director of the unfortunately named Little Red Schoolhouse, a private middle and high-school which exists through today in Greenwich
hearing, his own education and life-devotion to teaching leave little doubt that this was a subject close to his heart. While he is best known in the legal world for his role in the groundbreaking Fifth Amendment case bearing his name, Slochower was, at his core, a staunch academic whose constitutional leanings were more a product of his history than of his academic interests.\textsuperscript{16} Born on an unconfirmed date in September of 1900, the young Hirschel Slochower and his family emigrated from their native province of Bukovina, a part of the Austro-Hungarian Empire which is now bisected by the Romanian-Ukrainian border. Narrowly avoiding the conflict that would soon engulf Europe, the Slochower Family arrived to New York in 1913, settled in the Bronx, and enrolled their son at the local school under his newly anglicized name, Harry.\textsuperscript{11}

Just twelve years later, after receiving a B.S.S. and an M.A. in both German and Philosophy, Slochower was awarded a Guggenheim Fellowship – an award which allowed him to travel to Europe in furtherance of the Ph.D. he was then pursuing at Columbia University. Upon his return, he began his career as an academic. His friend and colleague Benjamin Appel later described Slochower as a “visionary critic who was the first American to ‘dig’ Kafka long before the mad scramble to the Kafka bandwagon; and also the first or among the first to synthesize the thinking of Marx and Freud.”\textsuperscript{12} All this to say that he was truly an academic; a reader, a thinker, a philosopher, and eventually a key figure in psychoanalysis (after, of course, the completion of his four year foray into Supreme Court jurisprudence).

Morris and Ferguson, the two men sitting across the bench from Slochower that day in the Foley Square Courthouse, were not bereft of this same academic inclination. Morris, the younger of the two, was born in Jersey City, New Jersey, in 1914, just three years after the Hudson Tubes forever connected that manufacturing town with the metropolis of New York City. A graduate of Fordham Law School, the ambitious young Morris had been working as a

Village. In answer to the Senator’s question about the private school enrollment of public school teachers’ children, Smith responded:

\textbf{Mr. Smith:} We have quite a large number of public-school teachers who do [send their children to Little Red Schoolhouse], which I think, if I may interject this, is a rather extraordinary commentary. We are a private school, but essentially we don’t believe in private education. We believe [that] in a democracy the main scheme of education has to be public education. . . .

\textbf{Senator Ferguson:} Isn’t one of the things that you pride yourself on, the number of teachers in the public schools who send children to your school?

\textbf{Mr. Smith:} I don’t think we look on that as a matter of pride. It is a rather strange fact that here in the greatest city in a great public school system, that teachers who work in the public school . . . should be ready to pay $400 or $500 to a private school. I don’t think we are happy. Quite the opposite. We would prefer to have a public school system where every citizen would take pride. \textit{Hearings, supra} note XX, at 197-98 (testimony of Randolph Belmont Smith).

\textsuperscript{10} \textit{See, infra} notes 114-15.

\textsuperscript{11} \textit{Hearings, supra} note 3. at 206 (testimony of Harry Slochower).

lawyer for just one year when, during the “hot, sultry and heavy” summer of 1940 a chance job interview at Cravath, de Gersdor, Swain & Wood led not to the job he had applied for but instead to a position as an assistant counsel to the Rapp-Coudert Committee. Within a year of starting his new job, Morris would hear the testimony of Bernard Grebanier, an English professor at Brooklyn College and the man who first accused Slochower of being a communist. More importantly, however, for Morris’ life if not for this story, his time on this committee led him into a twenty-year stint in government service, the publication of numerous books, and to his being briefly appointed as President of the University of Dallas.

Senator Ferguson, for his part, was born in 1889 in a suburb of Pittsburgh, PA, and attended public schools from his enrollment in elementary school through his graduation from the University of Michigan Law School in 1913. After some time in private practice, he returned to the classroom in 1929, this time as a part-time professor at the Detroit College of Law. From that point and up until his election to the Senate in 1942 he split his time between educating future lawyers and presiding over a courtroom as a judge on the Circuit Court for Wayne County, MI. By the time Slochower appeared before him in 1952 Ferguson had established a reputation as a reasonable, even-keeled republican legislator who was a firm anti-communist but not a fear or fame-monger.

Senator Ferguson’s reputation and his background in education were not unknown to Royal W. France, a newly-prominent New York City civil rights attorney and Slochower’s legal representative at his appearance before the SISS. Coming into the courthouse that day, France brought with him an intent belief that “the test of a teacher’s fitness was his conduct in the classroom and not his political beliefs.” This was a contentious notion at the time, even among civil rights attorneys, and had caused a rift within the American Civil Liberties Union (“ACLU”) lawyers with whom France frequently worked. The majority within the ACLU were those who accepted the notion that schools were well within their rights to dismiss an educator who, like Slochower, exercised his “right under the Fifth Amendment to refuse to answer what had come to be known as the $64 question – whether he was or ever had been a Communist.” The minority, led by famed ACLU director Corliss Lamont, however, believed that the ACLU “should come to the defense of any and all, including those of the extreme left, whose rights were being invaded.” Even Lamont had originally subscribed to the majority position before France was able to convince him of the merits of the other side.

And so, with this stalwart position as well as his knowledge of Ferguson’s background, France took advantage of a moment’s break before Slochower’s testimony to, as he put it, “educate [Ferguson] in the principles of academic freedom and American democracy.” In the brief intermission, the two had the following exchange:

13 ROBERT MORRIS, NO WONDER WE ARE LOSING 3 (1958).
14 Id. at 4-5.
15 Author’s note: his name is practically onomatopoetic, the sound it describes: a litigator litigating.
16 ROYAL W. FRANCE, MY NATIVE GROUNDS 134 (1957).
17 Id.
18 Id.
19 Id. at 152.
France: Senator Ferguson, I am puzzled as to the purpose of this investigation. Surely the question of the fitness of teachers in New York is a local, not a national problem.

Ferguson: It is not a question of fitness. We are trying to expose Communists and to root them out of our educational system.

France: Is that a legitimate purpose for a Congressional investigation? . . .

Ferguson: Do you think they would let anyone teach in a Russian school who believed in capitalism?

France: Not if they knew it. But do we wish to imitate Russia or set a good example to Russia by living up to our own principles of freedom. 20

Though the record from Ferguson’s subsequent questioning of Slochower does not suggest that the Senator’s position was changed by this exchange, there is something heartwarming in the civility of the discourse between these two men, each occupying a near polar political position to the other. 21

**Communist Threat Rising**

What had led to this polarized national environment was the rise of, the U.S. governmental and societal responses to this rise, and the reaction to these responses. Communism itself was seen as in diametric opposition to the notion of American democracy, but

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20 *Id.*
21 While it would be nice to wax poetic about civility in this era as compared to our own, one need look no farther than the writings of Robert Morris to see the same partisan attacks, sensationalism, and fear-mongering that have become the lingua franca of most cable news channels today. As an example, Morris would later cite the advent of international law as “the end of our thrilling heritage for which our forefathers and fathers fought. It is the direct opposite of that for which two million Americans gave their lives and blood in World War II and in Korea.” **ROBERT MORRIS, DISARMAMENT: WEAPON OF CONQUEST** 71 (1963). In similar fashion, of the launch of Sputnik he said: “[the Soviet] success has strengthened their hand for diplomatic and political offenses which are taking shape. But there is time left little though it is. If we really avail ourselves of it, we can save our nation and our way of life. It must be clear that we are in a situation which calls for drastic action, and not the appallingly routine reactions of the past. And surely it is a time when the same complacent voices which have been lulling us cannot now urge upon the nation the steps it must take. Nor can those complacent voices long suppress the rising cries of justified alarm.” **MORRIS, supra** note 9, at 204-05. France, while more tempered in his rhetoric, was as ardent about his positions and his place on the right side of history, he had only this to say when later reflecting on his first meeting with Morris: “I have since met a number of younger members of the bar, like this pleasant enough young counsel, who have lent their services to what they called the crusade against communism. Decent-appearing though they were, I have found it hard to believe that they did not realize they were playing a dirty part in a highly un-American activity for their own hope of advancement. This one, in particular, sought that advancement in the next election in New York, in which he won a judgeship.” **FRANCE, supra** note 15, at 152-53.
the tools that were used to fight it were equally in opposition to many tenants of that same
democratic ideal. While the majority of the discussion herein will focus on how this conflict
played out in the education sphere, some background about communism will help contextualize
this discussion.

Generally speaking, the birth of communism in the United States is considered to have
occurred in the late 1910s, in the period immediately following the First World War. This was
a period of unrest at home—the end of the war brought with it an economic depression, labor
strikes, and ideological clashes. These conditions, coupled with the Bolshevik Revolution in
Russia, in turn led to the First Red Scare where between 1919-1920, thousands of foreigners
were arrested and over 550 alleged-communist aliens were deported amidst heated anti-
communist rhetoric. Despite the best efforts of opportunistic politicians of the time, this anti-
communist din was in large part drowned out by the roaring ‘20s and a period of American
prosperity.

With the Great Depression of the 1930s came the resurgence of many of the fears and
preoccupations of the period that had given rise to the First Red Scare. Ironically, during the
Depression, as in the 1910s, the same forces driving anti-communism were also driving an
increase in Communist Party membership. Namely, factors like unemployment, labor
organization, and New Deal politics led to reactionary fear and to revolutionary zeal. While the
communist party saw its ranks balloon in the latter half of 1930s they remained a small minority
in America, far outnumbered by those who viewed communism as a dire threat to the “American
way of life,” “its Christian heritage,” and “American democracy.” This tension came to a head
in 1939 with the Nazi-Soviet Pact – a non-aggression treaty between Nazi Germany and Soviet
Russia—the signing of which solidified the previously amorphous communist threat and gave
rise to the second serious wave of anti-communist sentiment and policy-making.

**The Rapp-Coudert Committee:**

One of the most notable responses to this second wave of anti-communism – both for
education and more generally as well – was New York State’s creation in 1940 of the Joint
Legislative Committee to Investigate the Educational System of the State of New York. This
committee was chaired by and named for Herbert A. Rapp and Frederic R. Coudert, Jr., a
Republican State Assemblyman and State Senator, respectively. Ostensibly created to address

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26 Christine K Erickson, “I have not had One Fact Disproven”: Elizabeth Dilling’s Crusade
Against Communism in the 1930s, 36 J. AM. STUD. Dec. 2002 473, 476-77.
issues in school finance, the Rapp-Coudert Committee quickly changed its focus to detecting and disposing of communists at higher education institutes in New York – in particular at Brooklyn College, City College of New York, Hunter College, and Queens College. This Committee was noteworthy on a number of levels. First and foremost, it “pioneered the techniques that later state and congressional investigating committees would employ. It developed evidence, elaborated arguments, and even trained personnel that its successor committees would appropriate, unchanged.”

Free of the judiciary’s strict rules and procedures – evidentiary standards and the presumption of innocence, prime among these – the Committee “pressured witnesses to name names, and designed their public sessions to expose the presumably subversive behavior of the people who would not inform.” By taking this approach, the Committee can be credited for the prosecutorial or at least quasi-judicial element of later hearings as well as for normalizing the concept that silence in the face of accusations was tantamount to a tacit admission of guilt. It can also be credited with establishing the cooperation between the legislature and the Board of Education. This cooperation was essential because the Committee itself (as with the SISS later) lacked the authority to actually fire educators it exposed as communists. The Board meanwhile had the power to fire educators for cause but lacked the legislature’s power and resources to investigate alleged communists. Only together then could they both expose and dispose.

More narrowly, the Committee is noteworthy in that it was the location where Slochower was first called to testify and where he was first accused of being a communist. In the fall of 1940, just months after Morris had been asked to join it, the Committee began using its subpoena power to call a number of educators to testify at “closed hearings before a one-man subcommittee.” For the most part, these educators – a younger and more taught-jawed Slochower among them – each followed a similar script upon appearing before the Committee as the subpoena demanded. This script had been approved by the Teachers Union and individual counsel, both feeling that the Committee’s inquiry was unconstitutional and the former opposed to what it saw as a disturbing legislative attack on academic freedom. As laid out in the script,

28 The late 1930s in New York had seen a number of clashes over public education funding between Republican state politicians and the Teachers Union. While no one on the right would admit to these clashes as being an impetus for the events that followed, it is almost impossible to disaggregate them from the establishment, in 1940, of the Committee. Perhaps demonstrative of the level of group-think at the time, or at least the unwillingness of most legislators to speak up against this type of intrusion into the schools, only one Assemblyman, Eugene Zimmer, even raised his voice to question its creation. Louis Lerman, WINTER SOLDIERS: THE STORY OF A CONSPIRACY AGAINST THE SCHOOLS, 4.
31 Id.
32 Flare-Up is Due in Teacher Inquiry, N.Y. Times, Dec. 1, 1940, at 64.
33 This script, described as a two part strategy, was designed by the legislative director of the Teachers Union, Bella Dodd and involved “a conventional legal defense which challenged every
the subpoenaed educators signed waivers of immunity and were sworn in but refused to testify. Rather, they demanded that the hearings be done in public or that the witnesses at least be provided with transcripts of their testimony.  

But the teachers were not the only ones with a guided plan of action. The Committee itself had a plan by which it hoped to expose communists within these universities and the closed-door hearings were only the first part of that plan. Their hope during these initial hearings was that because they were off the record the professors would be more willing to testify against their colleagues. Having elicited some responses during this initial round – and knowing that because these statements were off the record the Board could not use them to bring charges – in part two they would re-call all those who had provided names, get their testimony on the record, and then call those who had been named. Procedurally, only once either two witnesses had named an individual or an individual had admitted to being a communist could the Board bring charges against him.

The Committee’s plan relied on cracking a witness during the first round, and they found that witness in the form of Brooklyn College’s Bernard Grebanier. Professor Grebanier, an “overweight, unkempt, scholarly assistant professor of English,” crossed union lines, raised his right hand to be sworn in, and then began pointing his finger at fellow teachers. He was the only one of the twenty-three Brooklyn College professors to do so.

At his initial hearing, Grebanier identified over thirty Brooklyn College professors as members of the communist party. Suffering from regret or simply less cavalier while on the record, when called back he “identified only eight or nine of the most active leaders,” among them Harry Slochower. These individuals, as well as others from Grebanier’s original list, were called in again and questioned at public hearings. This time, before their hearings the Board – under the urging of Brooklyn College President Harry D. Gideonse – had informed the teachers appearing that they had to testify or face “disciplinary action.” When called for a second time, the Brooklyn teachers each denied that they had been or were communists and each denied knowledge when asked to supply names of fellow faculty who they believed to be communists. Because there was no one to act as a corroborating witness to Grebanier, the Board did not bring charges against any of the Brooklyn professors named at the Rapp-Coudert hearings.

aspect of the committee’s procedures and a propaganda campaign which accused the committee of undermining public education and, after it subpoenaed the Union’s membership lists, the labor movement as well.” ELLEN W. SCHRECKER NO IVORY TOWER 78 (1986).

34 Teachers Balk at State Inquiry, N.Y. Times, Nov. 14, 1940, at 25.

35 See, SCHRECKER, supra note 33 77-83; REDISH supra note 30, at 172-73.

36 SCHRECKER, supra note 33, at 78.

37 Id.

38 At the time, Gideonse a handsome man with a pair of horn-rimmed glasses that would be the object of hipster-envy in present-day Brooklyn. Of interest, in the 1930s while teaching at a school in upstate New York, Gideonse himself had been the subject of a communist inquiry.

39 Author’s Note: I tried to find out what this disciplinary action entailed, but could not find any source that laid it out or described how it would differ from the regular “charges” that the Board could bring.
While they were not fired, they were also not free from ongoing suspicion. Years later, for instance, Slochower would note at his SISS hearings: “Since 1940, 12 years, this question [if I was a communist] has been asked again and again – by the Rapp-Coudert, by the board and faculty and so on, and I have had 12 years of the utmost difficulty of living, in trying to live down the accusation that was made.”40 That said, while Slochower may have been facing pressure at school, after 1941 his name had at least been out of the news, first resurfacing in 1942 in a brief blurb published by his new mother-in-law. This blurb, announcing Slochower’s marriage to Muriel Cecile on November 5, 1942,41 was followed as they are wont to by a notice of the birth the Slochowers’ daughter, Joyce Anne, on May 6, 1950.42

The only other mention of Slochower was in 1945 when a number of publications printed reviews of his new book, “No Voice is Wholly Lost . . .” The New York Times literary critic, Mark Schorer, described it as a book which attempts to “chart patterns of intellect and aspiration in an age notable for its chaos and its sorrow.”43 Reviewing it for the journal Ethics, meanwhile, Theodore Brameld, a professor at the University of Minnesota, said, “In a time when the twin frailties of intellectuals – negativism and static absolutism – are both still everywhere prevalent, books like this are much too rare.”44 While these glowing reviews highlight Slochower’s intelligence, what is perhaps most notable is that none of them makes even the slightest allusion to his previous cause célèbre.

As a general matter, after a brief flurry of back-and-forth legal skirmishes during the two year span of the Rapp-Coudert Committee’s investigation and after a number of Board hearings, the issue of communism in the education system had momentarily died down with the United State’s entry into World War II. In his book, No Wonder We Are Losing, a frustrated Robert Morris describes this homeland-détente as a period between legislative committees during which both the FBI and “the distinguished Harry D. Gideonse”45 knew that the teachers at the New York colleges were communists but were “handcuffed by administrative red tape.”46 Morris lamented that “[u]nfortunately, a whole generation of Brooklyn College students were subjected to some Communist teachers in the process.”47

Despite Morris’ concerns, during no point at the Rapp-Coudert investigation, the subsequent Board hearings, or later at the SISS hearings did anyone ask whether, regardless of personal belief, these educators were actually indoctrinating students to the communist

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40 Hearings, supra note 2, at 200 (testimony of Harry Slochower).
44 Theodore Barmeld, Review: No Voice is Wholly Lost: Writers and Thinkers in War and Piece by Harry Slochower, 57 Ethics 148, 149 (1947).
45 MORRIS, supra note 9, at 138; compare, FRANCE, supra note 15, at 155 (describing Gideonse as “a zealous little me-too-er” and “an example of educators who have proved unworthy of their responsibilities.”).
46 MORRIS, supra note 9, at 138.
47 Id.
viewpoint.\textsuperscript{48} One theory for this lacuna is that the concern was not in fact that these teachers were going to attempt to directly influence their students, but rather, that they would use their wiles to present everyday curricular material in a way that over time would lead the students to the communist way of thinking. Gideonse explained this concept of subtle indoctrination at a Senate Judiciary Committee hearing. As he put it:

Open Communist propaganda in the classroom is exceedingly rare. The real hazards are far more subtle and indirect . . . they use student’s book reviews as vehicles for clarifying the issues between the workers and the ruling classes . . . slyly advis[ing] science teachers not to put as much emphasis on the design and operation of the dynamo, telephone, airplane, and radio as he does on the roles these instruments have played in uniting workers within each country and throughout the world.\textsuperscript{49}

As thus framed, once a teacher was identified as a communist actual proof of indoctrination was unnecessary because it was assumed that their membership was both enough proof and all the proof they were likely to be able to find.

Had Slochower in fact wanted to indoctrinate his students either explicitly or subtly, the reach of his ability to do so had extended during the years following the publication of his book as he continued teach at Brooklyn College but had also begun to teach part-time at the New School, in Manhattan. However, while he did have the chance during his time at the New School to teach a man who would become a critical voice for his generation, it appears unlikely that Jack Kerouac was affected by Slochower given that Kerouac described him as “a bore with a Marxist viewpoint who treated myth like merchandise.”\textsuperscript{50} Yet, while Kerouac may have been unimpressed by Slochower at the time, it is hard to imagine that a man of his literary talent would not have been impressed by just how prophetic the title of Slochower’s book would soon become. For, while things had appeared to have calmed down, as the full title, and the central thesis, of Slochower’s book asserts, “No voice is wholly lost that is the voice of many men.” Unfortunately for Slochower, the voice that was not lost was that of Bernad Grenbanier, the man who had accused him of being a communist, and the period following World War II saw his become the voice of many.

\textbf{The Genesis of the Case: Section 903}

The years following World War II saw another resurgence of anti-communism – this one the most famous and the one which led to the creation of the SISS. In that way, it was this anti-communist resurgence which led to Slochower being fired and bringing suit. However, the actual source of the legal conflict in Slochower was far removed anything having to do with communism. The real source was New York City Charter § 903 which in relevant portion, as explained and excerpted by the Supreme Court, provided that “whenever an employee of the city utilizes the privilege against self-incrimination to avoid answering a question relating to his

\textsuperscript{48} \textsc{France}, \textit{supra} note 15, at 158; \textsc{Redish}, \textit{supra} note 30, at 16.
\textsuperscript{49} \textit{Hearings}, \textit{supra} note 3, at 580 (internal quotations omitted).
\textsuperscript{50} \textsc{Kerouac and the Beats: A Primary Sourcebook} 172-73 (Arthur Knight and Kit Knight eds.1988).
official conduct, ‘his term or tenure of office or employment shall terminate . . .’.”51 It was this provision which the Board used to dismiss educators who pled the Fifth during their SISS hearings, and it was the application of this provision to Slochower that was found to be unconstitutional by the Supreme Court.

Section 903 was not, however, drafted or ratified with this sort of application in mind. The section was originally passed as part of Mayor Fiorello La Guardia’s attempt to ferret out the so-called “tin-cup brigade,” corrupt city officials who up to that point had, without recourse, been invoking the Fifth Amendment as a “shield designed to conceal actual theft or graft.”52 The lilliputian La Guardia, images of whom cannot help but draw comparison to Danny DeVito, had created a legislative net with an intent towards and capable of capturing the corrupt but, as nets are wont to be, guided by the hand wielding it rather than by a purpose of its own.

The true intent of this section is perhaps best explained in a letter from Paul Blanshard published in the New York Times on October 14, 1955 (just four days before oral arguments in Slochower). In this letter, Blanshard, La Guardia’s head of the Department of Investigations and Accounts when the section was passed and a close friend of the by-then deceased Mayor, expressed his outrage at the use of § 903 against educators. As Blanshard explained, “Mayor La Guardia originally suggested such a section to me one day in his office when I reported to him that some county and city employes [sic], after being subpoenaed for graft inquiries conducted by my department, were refusing to discuss their huge, unexplained bank accounts on the ground that to answer might incriminate them.”53 It went on, saying that if La Guardia, a Republican, “were alive today he would be quite horrified by its use as a punitive weapon against Left-Wing intellectuals,” and that “in originally suggesting such a punitive section, [La Guardia] had no thought that it would ever be used to punish men for past political opinions or to compel them to become informers against their associates in ideological matters.”54

This argument and, more generally, coming out against laws like § 903, was not en vogue at the time Blanshard wrote his letter. The majority of Americans at that time saw the invocation of the Fifth Amendment in response to the $64 question as an act of cowardice utilized primarily

51 Slochower v. Bd. of Higher Ed. of N.Y. City, 350 U.S. at footnote 1 (citing § 903 of the Charter of the City of New York, “If any councilman or other officer or employee of the city shall, after lawful notice or process, willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.”).
53 Id.
54 Id.
by communists and communist sympathizers. A representative political cartoon, for instance, shows a sketchy looking man wearing a dark hat, holding a sign saying, “U.S. Subversive,” and hiding behind a pillar engraved with “5th Amendment.” Opinion notwithstanding, a quick look at the record from the Rapp-Coudert era provides support for Blanshard’s view that, at least as the code’s drafters had intended, § 903 was not meant to apply to educators. That is that the section was on the books at the time of the Rapp-Coudert hearings but was neither used to dismiss those educators who refused to testify at their initial hearings nor was it even part of the “disciplinary action” which the Board used to compel teachers to testify at the on-the-record Committee hearings. However, original intent notwithstanding, by the time Slochower was appearing for his SISS hearing, the Board had started using § 903 to dismiss educators.

The SISS Committee Hearings

Returning once again to the Foley Square Courthouse, to the warm, September day in 1952, and to Room 1305 where Slochower’s hearing was about to take place, it is worth pausing to remember who was present and in what capacity. The records from the proceedings only provide that those in attendance were Senator Ferguson, Robert Morris, Harry Slochower, and Slochower’s attorney, Royal France. What they leave out, and what has in many ways been left out from this account up until now, was that there were people everywhere.

Walking up those thirteen steps into the Foley Square Courthouse, Slochower’s well-polished shoes had not made thirteen audible clicks as they landed. Rather, their sound was drowned out by the chants of Brooklyn College student-protestors, Teachers Union members, and other interested parties who had not managed to get a seat inside but who wanted to show their support for the accused. Though less well documented, it is unlikely, that these supportive voices were the only ones in attendance. While public universities had in many regards remained a bastion of support for academic freedom and so called “anti-anti-communism”, the American public as a whole was deep in the grips of the Red Scare. This was a time when backyard-bomb shelters were advertised in TIME magazine, when school children regularly conducted air-raid drills, and when the career of Senator Joe McCarthy was on a meteoric rise. But it was also a time when the civil rights movement (in particular as it related to education) was picking up almost annual victories at the Supreme, where college students were beginning to clash with administrators over subject matter control, and where college professors across the country were pushing back against loyalty oaths and anti-communist inquisitions.

Given the salience of this issue, it is unsurprising that not a seat was open inside Room 1305. The crowd in the room was comprised of those students, union members, and Brooklyn College teachers who had been lucky enough to snatch open seats after the press corps, politicians, and members of the Board of Education — including Gideonse — had taken their seats. The room itself sat over one hundred, with people coming and going throughout the day—a far cry from the securitized zone of a modern Federal Courthouse.

It was in this chaotic environment where Royal France had managed to catch Senator Ferguson for their momentary chat. While France had been practicing and teaching law in a

56 FRANCE, supra note 15, at 158.
variety of contexts for forty-six years by this point, he had only recently embarked on his new career as a civil liberties lawyer and this was his first time representing someone at an SISS hearing. At sixty-nine, France had thinning hair and thin lips but zeal and wit in spades. He had been butting heads with judges in various New York State Courts over the course of the year and recounts with joy, for instance, the story of a like-minded jurist whom, after being fined $50 for contempt of court, said, “Please make it $100, your Honor. Fifty dollars is not sufficient for the contempt I feel for you.” This humorous aside notwithstanding, looking back on the day of Slochower’s hearing France, who had been seated in the crowded pews, recalled the experience as nothing short of humiliating for Slochower and, in turn, for himself.58

France is no doubt entitled to his own interpretation of the event, and there is little doubt that appearing before the Subcommittee must have felt disempowering, however, to say that Slochower was humiliated does a disservice to the thoughtfulness, eloquence, and humorousness of his responses to the Subcommittee’s questions. Of course, one’s view of Slochower’s answers is subjective. Even four years later, in the days following the Supreme Court’s decision in *Slochower*, *TIME* magazine recalled him as “an evasive, smart-aleck witness.”59 To be fair, however, *TIME* magazine during that time was as criticized for its partisan editorializing as it was itself critical of Slochower for his responses to the Subcommittee’s questions.

While third-party, post hoc interpretations of the testimony vary in their conclusions, the record leaves little doubt that both Ferguson and Morris were in agreement with *TIME*’s assessment. In response to the second question of the afternoon, “What do you do, Mr. Slochower?” Slochower set the tone of the hearing by responding, “You mean: What is my occupation?”60 This type of cagey, clarifying question became a theme of the proceedings. In this way, Slochower made it clear to the Subcommittee that he was not present by choice and that he would be answering the questions as he saw fit. The following exchange, mere minutes into his testimony, acts as an apt example:

**Mr. Morris:** Were you at that time [when called before the Rapp-Coudert Committee] a member of the communist party?  
**Mr. Slochower:** Well now, Mr. Morris, if you allow me to answer this question fully, I will have to begin with a literary allusion.  
**Mr. Morris:** Well, it calls for a “yes” or “no” answer, unless you want to invoke some kind of privilege.  
**Mr. Slochower:** This is a very serious matter and I think you ought to allow me a little leeway. I beg your indulgence.

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57 *FRANCE*, *supra* note 15, at 148  
58 *Id.* at151  
59 *Supreme Court: Undue Process*, *TIME*, Apr. 23, 1956, available at http://www.time.com/time/magazine/article/0,9171,865271,00.html; *but see*, DAVID HALBERSTAM, *The Powers That Be* 355-56 (1975) (noting that the 1950’s were marked as a period during which *TIME* magazine was considered a highly partisan publication, in particular during election years, like 1956).  
60 *Hearings*, *supra* note 2, at 199 (testimony of Harry Slochower).
Senator Ferguson: I might ask this: Are you going to answer the question?

Mr. Slochower: I am going to answer, in my own way.61

As it turned out, and in accord with his history as an academic and literary critic, Slochower’s “own way” to answer this question was to compare his current situation to the one faced by the lead character in Franz Kafka’s famous unfinished novella, The Trial.

The Trial is a frightening allegory wherein the main character, “K.,” finds himself accused of an unknown crime, enmeshed in an unknowable legal system, investigated and reinvestigated, until, finally, he is unceremoniously and extra-legally executed in a dark quarry, never having learned the genesis of his alleged misdeed. While Slochower misremembered certain details during his testimony,62 like that K. is choked and knifed through the heart rather than starved to death,63 the connection which he draws is no less keen for it.

Another scene from The Trial, directly preceding K.’s execution, provides a notable comparison to the situation Slochower was in that day in front of the Subcommittee. In the scene, K. has been dragged to the quarry, stripped from the waist up, and seated against a stone ledge by his two captors. At this point, “[t]he repulsive courtesies began again, one of them passed the knife over K. to the other, who then passed it back over K. to the first. K. now knew it would be his duty to take the knife as it passed from hand to hand above him and thrust it into himself.”64 Like K., Slochower was in a position at his hearing where he was helpless but to execute his own demise, in one way or another, by one means or another.

In effect, when choosing to reply to the question of whether or not he had ever been a Communist, Slochower had three options each of which could have legal and employment consequences. Before getting to his options, however, it is worth clarifying what we now know about Slochower’s actual relationship to the communist party. Amazingly, even today this is not very clear. On the one hand, the most Slochower would ever admit to was that he had at some point attended a number of meetings which in hindsight may have been if not actual communist party meetings then at least meetings comprised largely of communist party members. He would not, however, ever admit to having been an actual “card-carrying” member. On the other hand, the Board of Education claimed to have uncovered – but never released or made public – documents which proved conclusively that Slochower was an actual party member, that his code name was “Flint,” and that his membership number was 689.65 While this does not help us determine the truth of the matter, it can at least provide some insight into what Slochower understood his options to be as Ferguson began pressing him to answer the $64 question.

His first option: admit everything. Slochower could admit openly, publically, and on the record that he had been a communist during the period from 1940-41. As to legal consequences, this path would leave Slochower liable to perjury charges given that his two denials of such

61 Id. at 200.
62 Id.
64 Id. at 60.
65 See, infra notes 143-44.
membership at the Rapp-Coudert hearings would be irreconcilable with such an admission. There is a chance that he would have been outside of the statute of limitations, but were he within these limits he would face jail time. In terms of employment consequences, choosing this option would also have almost guaranteed his being fired from his position at Brooklyn College. As an initial matter, the Board of Education had by this point established a clear standard that perjury, as a crime of dishonesty, was also “conduct unbecoming of a teacher” and grounds for termination upon Board review of the relevant facts and information. Furthermore, issues of criminality aside, because Slochower had made numerous and signed declarations to the Board and to faculty committees that he was not a communist, an admission at the SISS would in all likelihood also have been “conduct unbecoming of a teacher” for which he could be terminated. This of course without even broaching the question of whether the school would have allowed an admitted communist to continue teaching regardless of perjury or false statements to the Board.

His second option: deny everything. Slochower’s next option was to take the same stand he had taken at the Rapp-Coudert hearings and state that he had never been a member of the communist party. There are some inconsistencies and reporting deficiencies which make analyzing the legal consequences of this position a bit tough, but what is clear is that Slochower himself believed that were he to take this position “they will prove perjury on me.” Why he believed this to be the case is not completely clear and may have related to the evidence the Board would later claim to have uncovered about his association with the party. Regardless of the basis for this belief, it nonetheless played into his decision process. With regard to employment, were he correct about perjury in this instance it would have again led to his being dismissed. In that way then, both his first and second option carried at least some chance of a later perjury prosecution as well as a decent probability of losing his job. But beyond the repercussions, each of these positions involved making a definitive, sworn statement about his political or ideological affiliation, something that he and many of the educators saw as legitimizing congressional interference in academic freedom. This concept, and Slochower’s personal opinion will be discussed in more depth below, but should nevertheless not be discounted when analyzing his choices and eventual decision.

His third option, then: say nothing. This last option, and the one he chose, was to refuse to answer on constitutional grounds: more specifically, he could refuse to answer claiming it violated the First Amendment, claiming that the SISS lacked jurisdiction, or claiming that it violated the Fifth Amendment. Having been duly apprised of his constitutional rights and the likely repercussions by France, when pressed as to his membership, Slochower first responded by saying, “I came here as an immigrant and I came from a country which knew oppression. I have the hope and expectation that the higher courts will declare that this questions is not proper. I should like to protest on that basis of the first amendment [sic].” Senator Ferguson, surprising

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66 New York Code § 210.15 describes perjury in the first degree as follows: A person is guilty of perjury in the first degree when he swears falsely and when his false statement (a) consists of testimony, and (b) is material to the action, proceeding or matter in which it is made.

67 Hearings, supra note 2 588-89 (testimony of Harry Gideonese).

68 Id. at 560-61.

69 Id. at 561.

70 Hearings, supra note 2, at 201 (testimony of Harry Slochower).
no one, refused to recognize this objection. The reason that this came as no surprise was that four years prior to Slochower’s hearing the Supreme Court had denied cert in the so-called “Hollywood Ten” case where a federal appeals court had held that the “HUAC did not violate the First Amendment by asking suspected Communists about their political activities” and upheld one year convictions for contempt of congress.\textsuperscript{71} Slochower knew then that if he maintained this his First Amendment objection he would likely be held in contempt and face jail time. He was also aware that the Board of Education had begun interpreting § 903 as applying to people in his position and that he would face “instant dismissal under [§ 903] of the New York City Charter.”\textsuperscript{72}

Unwilling to face the twin threat of jail time and loss of employment when he had a two-year old at home but undeterred in his determination to not answer the question, Slochower again refused Senator Ferguson. This time, Slochower protested on the basis of a lack of jurisdiction, saying: “The other thing is that I am hoping also that the time may come when it will be declared that this Federal body has no jurisdiction in a matter which concerns a city or State educational system. This is another ground on which I should like to protest the question.”\textsuperscript{73} Ferguson likewise denied refusal on this ground – again to no one’s surprise. Just as the court had denied cert in the Hollywood Ten case it had likewise denied review of a D.C. Circuit case, \textit{Barsky v. U.S.}, which had upheld the contempt charge of a suspected communist who refused to answer a HUAC question because it was outside the scope of the investigation.\textsuperscript{74} Again then, sustained silence on these grounds could have led to his being held in contempt and, with regard to employment, facing dismissal under § 903.

Slochower was then left with just one option if he was going to maintain his silence on this issue: he would have to plead the Fifth. He was not the first witness at the SISS hearings to have taken this route and knew that even though he would likely be fired under § 903 he would at least not be held in contempt for a refusal on Fifth Amendment grounds. Thus possessed with a full understanding of the consequences of what he was about to say and believing this to be the only route where he would only face employment not criminal consequences, Slochower finally spoke the words that would define the next four years of his life: “O.K., sir. In that case I am left with only one answer, and that is I have to invoke the fifth amendment with regard to the question of whether I had been a member of the Communist Party in the years 1940 or 1941.”\textsuperscript{75}

\textbf{The Fifth Amendment:}

In relevant portion, the Fifth Amendment of the United States Constitution says, “No person . . . shall be compelled in any criminal case to be a witness against himself.”\textsuperscript{76} A facial reading of this portion of the Fifth, known as the “self-incrimination clause”, would appear to

\textsuperscript{71} Schrecker, supra note 33, at 128;
\textsuperscript{72} Hearings, supra note 2, at 549-550 (testimony of Harry Gideonses); France, supra note 15, at 153.
\textsuperscript{73} Hearings, supra note 2, at 201 (testimony of Harry Slochower).
\textsuperscript{74} See, Barsky v. U.S., 167 F.2d 241(1947) While not the exact same argument, a refusal for scope and a refusal for jurisdiction are similar enough to have provided a good sense of what would come from a sustained position of this kind.
\textsuperscript{75} Hearings, supra note 2, at 201.
\textsuperscript{76} U.S. CONST. amend. V, § 3.
suggest that would not apply at a legislative hearing. And, in fact, this was an argument that many at the time were making. In large part as a result of hearings like those of the Rapp-Coudert, HUAC, and SISS, the 1950s saw a vast increase in the number of books being published about what had been a relatively un-discussed portion of the Bill of Rights prior to that point. In books like Common Sense and the Fifth Amendment and Shall We Amend the Fifth Amendment, legal scholars of the time were engaging with the self-incrimination clause and concluding that it was not intended to protect individuals like Slochower because they were not involved in a criminal case and because they were not being asked to bear witness against themselves, at least in the literal sense of the term.\footnote{77 See generally, SIDNEY HOOK, COMMON SENSE AND THE FIFTH AMENDMENT (1957); LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT (1959).}

While these authors support this claim through reference to any number of canons of statutory interpretation and appeals to logic, as Justice Frankfurter reiterated in the 1955 case \textit{Ullmann v. United States}, “The privilege against self-incrimination is a specific provision of which it is peculiarly true that ‘a page of history is worth a volume of logic.’”\footnote{78 Ullmann v. United States, 350 U.S. 422, 438 (1956) (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)(Holmes, J., majority opinion)).} Given that Justice Frankfurter was a man known for advocating judicial restraint and legislative deference and was blamed for the Court’s slow response to the anti-communist excesses, his appeal to the Clause’s history can perhaps be seen as bearing extra weight.

The history to which Frankfurter makes reference is one that can be traced all the way back to the twelfth century where a similar provision applied during disputes between the King of England and the bishops.\footnote{79 Erwin Griswald, Speech at the Massachusetts Bar Association Mid-Winter Meeting (Apr. 5, 1954), \textit{in THE 5TH AMENDMENT TODAY: THREE SPEECHES} 2 (1955) (Erwin Griswald ed.).} Without trying to sound trite, this means that the privilege against self-incrimination pre-dates the Enlightenment, the Renaissance, and even the Black Death. This is not to say that its application was constant or that its path was unhindered. Rather, most historians credit its continued existence to a single man: “Freeborn John” Lilburne.\footnote{80 Id. at 3; see also, Editorial, \textit{The Ethics of Taking the Fifth}, LIFE, Jun. 10, 1957, at 36.} Speaking to the Massachusetts Bar Association on February 5, 1954, Harvard Dean and future U.S. Solicitor General Erwin Griswald described Lilburne as follows: “He was a cantankerous person, the sort to whom we owe much for many of our basic rights. One of his contemporaries said that ‘if all the world was emptied of all but John Lilburne, Lilburne would quarrel with John and John with Lilburne.’”\footnote{81 GRISWALD, supra note 67, at 3.} As legend has it, Lilburne, a man who only a litigator could love, was charged with importing heretical books and withstood a number of whippings prior to having the Long Parliament uphold his right to refuse to testify against himself; thereby reviving a defunct legal principle and securing his place in history.\footnote{82 \textit{Ethics of Taking the Fifth}, supra note 68, at 36.}

Lilburne may have revived the privilege, but it is James Madison who saw to its inclusion in the Bill of Rights. Madison’s original version of the self-incrimination clause “was part of a miscellaneous article that read . . . nor shall [he] be compelled to be a witness against himself . . .
The critical qualifier “in any criminal case” was added through a last minute amendment suggested by John Laurence, a Federalist lawyer from New York. Oddly, there is no evidence that either Madison’s version or Laurence’s amendment were ever discussed by the drafters of the Bill of Rights prior to its ratification.

It is doubtful that Frankfurter was recalling all of this when alluding to the storied history of the clause. Rather, as he goes on to say, “the history of the privilege establishes not only that it is not to be interpreted literally, but also that its sole concern is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of ‘penalties affixed to the criminal acts . . . .’” What this shows is that by the 1950s when Frankfurter was writing his opinion in *Ullman*, the jurisprudence on the Fifth Amendment had, in a way, split the difference between Madison’s original version and the Laurence-amended one which made it into the Bill of Rights: while still nominally confined by the word “criminal,” early courts made clear that “to be effective at all it must be given a comprehensive application, and thus must prevent compulsory self-incrimination in any proceeding.”

However, its history and jurisprudence could neither dissuade the stark ideological lines that were being drawn regarding the self-incrimination clause nor provide the Court with clear guidance on how to interpret its nuances. As a result, when Slochower invoked his Fifth Amendment privilege, he provided fodder for both sides of the ideological divide and forced the Court to address one of the crucial ongoing questions about the self-incrimination clause – namely, what inferences could be drawn from its invocation.

**Fuel For the Fire**

As mentioned above, the legislative intent behind the inaction of New York City’s § 903 was grounded in a liberal backlash to the perceived misuse of the Fifth Amendment as a tool for corrupt officials to avoid prosecution. This same liberal distrust of the self-incrimination clause was the dominant theme nationwide in the first part of the twentieth century. By the time Slochower invoked it, however, the partisan lines had been switched. Liberals who had decried the Fifth Amendment as a shallow haven for the corrupt now elevated it to unprecedented levels of import while conservatives had taken up the charge against it. At an October, 1954 speech, Griswold, who by this point had become the voice of the new liberal view of the Fifth Amendment, confronted those for whom the self-incrimination clause had fallen out of favor. He began by saying, “I have come to feel that [the clause] is important not only for itself, but also as a symbol of our best aspirations and our deep-seated sense of justice.” In line with this vision of the Fifth Amendment, both Griswold and liberals generally, had begun an attempt to define it not with reference to its criminal aspect but rather as a tool the purpose of which was to protect the innocent. The other side, with whom popular media appeared to have sidled-up, whether for

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86 Id. at 53.
87 GRISWALD, supra note 67, at 9.
cause or for comfort, maintained that because it is human nature for a person wrongly accused to speak up in his defense, one who stays silent is not innocent. For instance, LIFE Magazine, in an editorial printed opposite a Campbell’s Soup advertisement for Cold Soup (“Why not get out a tray and set a new fashion – Soup Cocktails, for cool, cool sipping!”), asserted that “every man is entitled to protect himself with the Fifth Amendment but let him bear in mind in doing so that he opens his integrity to public question . . . .” 88

Harry Gideonse, Brooklyn College’s President, certainly fell into this latter camp when it came to this issue. Of course, for him Slochower’s integrity or lack there of had never been a question, and Slochower’s taking the Fifth had been, if anything, a reason to celebrate. Exhibiting characteristic temerity, Gideonse effectively ran out of Room 1305 on September 24, 1952, and immediately instituted proceedings against Slochower with the Board of Education. By October 3, Slochower and two fellow Brooklyn College professors had been suspended without pay. Three days later, Slochower appeared before the Board which unanimously voted for his removal. Importantly, in making its decision, the Board made explicit that Slochower was being dismissed under § 903, that his teaching record had not been taken into account, and that while it felt it could have brought charges for conduct unbecoming a teacher, §903 made such action unnecessary. In a last ditch attempt to hold onto his position, Slochower requested that the Board hold a full public hearing – a request made with the support of both the Teachers Union and representatives from a number of student organizations.

It was these student organizations who had arranged for the protests in Foley Square on the day of Slochower’s hearings, whose members had packed the courtroom day after day during the SIS hearings, and whose laughter encouraged Slochower to respond to questions like “Do you know now any individual now living who was in the past a member of the communist party,” by saying, “I am sure Joe Stalin is a member.”89 In fact, Brooklyn College students had been supporting since the 1940s what on the one hand they saw as Slochower’s stand against the unpopular Gideonse but what they also viewed more broadly as a direct infringement on the academic freedom of their campus.90 Known for their liberal bent, these students took numerous risks to show this support. For instance, shortly after Grebanier had accused Slochower of being a communist, Gideonse placed on probation seven of the school’s student-leaders. Their charge: “subterfuge and misrepresentation.”91 The students, including the head of the student council, the editor or the student newspaper, and the president of the Menorah Society, had been handing out leaflets, some of which singled out both Gideonse and Grebanier, requesting that they “substantiate [the] charges” they made before the Rapp-Coudert Committee. And others comparing the Committee to male genitalia; they were college students after all.

During the relatively quiet years between the Rapp-Coudert hearing and the SISS hearings, while Slochower was busy publishing No Voice is Wholly Lost, Gideonse continued to rule the student body with what they saw as an iron-fist. To that end, as World War II was coming to a close and life was returning to normal, Gideonse redoubled his effort to curb dissident voices on campus. To that end, 1950, he summarily shut down the Vanguard, Brooklyn

88 Ethics of Taking the Fifth, supra note 68, at 36.
89 Hearinga, supra note 2, at 202 (testimony of Harry Slochower).
90 Brooklyn College Disciplines Seven, N.Y. Times Jan. 13, 1941, at 17.
91 Id.
College’s student newspaper, in response to a story written about “internal politics in the College’s Department of History that embarrassed [him].”92 In silencing the student’s at his school, Gideonse in effect laid the groundwork for their later activism. And so, two years later, when their teachers were called before the SISS, the students at Brooklyn were organized, incensed, and ready for a fight.

However, neither the support of these students nor that of the Teachers Union was enough to persuade the Board to provide Slochower his requested public hearing. In fact, touching though it must have been for Slochower to see his students continue to rally for his cause, in hindsight, this same support may have been doing more harm than good as it confirmed the very fears and concerns that had led lawmakers to investigate those within the education field in the first place.

**Why Investigate Educators?**

A single question has lingered behind each part of the discussion to this point is: why had educators been singled out as deserving such intense and prolonged investigation? To answer this question requires analyzing two interconnected and amorphous fears. The first, communism, the second, schools and education more generally. It almost goes without saying that the internal communist threat was a defining element of the decades in question. While its level of influence ebbed and flowed, it nevertheless held continuous pull. Understanding the threat posed by educators, on the other hand, goes to what is in effect the driving force behind the vast majority of the seminal education law cases – namely, that American youth spend at school most of their waking day, five days a week, three quarters of the year, at their most impressionable age, and that parents have no real sense of or control over what happens during that time.93 That issues of curriculum control, religion in the classroom, segregation, and teacher loyalty came to bear in the early-to-mid twentieth century speaks to this fear and traces in large part urbanization and the resultant increases in both school enrollment and in the importance of a good education.94

Given the increasing influence that schools played on an increasing number of students, parents’ concerns about, or at least interest in, the content of the curriculum and the character of the teachers at the schools are at least in their most basic form understandable. Judge Johnson, who heard Slochower’s original case, does a good job articulating the parents’ fear of teachers. He asks how else “any intelligent parent whose child is to be enclosed in a classroom with [teachers] day by day” should feel given that teachers have “opportunities for, apparently, casual remarks and destructive comments, which are not only unlimited, but cannot be disproved or undone.”95

On the school administration side, (and for space and relevancy reasons confining the inquiry to public schools) this issue is a bit more complex. In theory, in New York, as in most of

93 REDISH, supra note 30, at 16.
95 Daniman v. Bd. of Ed. of the City of N.Y., 118 N.Y.S.2d at 489. This subtle indoctrination was again unrelated to actual communist propagandizing.
the country, teachers were technically employed by their school district rather than by the state
government itself. However, both because the school boards in control of the districts were
elected and to an even greater degree because in New York, at least, a teacher was considered to
be a government “officer or employee,” these positions were not outside of or free from
influence by the political system. As such, issues affecting the government had the potential to
leak into areas like schools.

Both this political influence as well as the view of teachers as public employees went
against the basic premise behind the use of school boards to make employment decisions as well
as against the idea that schools are intended to be places of learning, of scholarship, and of the
mixing of ideas. In conception at least, educators were intended to be free from outside
influence, a fact particularly true at the university level. With the end of American isolationism,
however, came the entry of new and competing political theories; setting the scene for a clash
between the already non-complimentary concepts of government funded (and influenced)
education and what came to be known as academic freedom. This clash pitted politically
beholden school boards and administrators against unionized, proletariat or proletariat-friendly
educators. And it was this already bubbling issue which came to a full boil with the rise of
communism.

What the fear of communism and the fear of the education system had in common, and
what made them so dangerous in tandem, was that they, like so many human fears, were born
from the unknown and unknowable. An unknown, hidden threat is the scariest of all, a monster
whose form is based on fact but whose features are provided by the very mind it is meant to
frighten. These fears also cut at the human desire for control, order, and knowledge, without
which one is left, like Kafka’s character K., incapable of self-defense or determination. This rule-
less environment of amorphous fears creates a vacuum, open to exploitation by savvy, power-
hungry politicians.

Such a vacuum was created in the early 1930s and into it stepped Congressman Hamilton
Fish III, a conservative New Yorker with brooding eyes and nonchalant good looks. In 1930,
Fish introduced a resolution “to appoint a committee of five members of the House to investigate
Communist propaganda in the United States and ‘particularly in our educational institutions.’”
The Fish Committee, as it came to be known, was largely ineffectual in comparison to the
subsequent committees; primarily drafting recommendations based on testimony it took from
public officials and known communists. Of course, at that time being a member of the
Communist Party was legal, so the Fish Committee’s efforts were directed instead at
strengthening the Department of Justice’s ability to deport non-citizen communists and at
drawing attention to what Fish called “the most important, most vital, and most far-reaching
issue in the world,” communism. However, while the Fish Committee had few tangible results,
it did turn the eyes of the nation to the schools and onto educators. Writing about his findings,
Fish, while professing to be neither a radical nor an alarmist said:

98 Hamilton Fish Jr., The Menace of Communism, 156 ANNALS AM. ACAD. POL. & SOC. SCI., Jul.
1930, at 54.
You would probably like to know how the Communists operate. They are well organized, although few in number. They have twenty districts, each with its local manager. They take their orders direct from Moscow and glory in taking those orders. They are the most skilled propagandists in the world. They realize that the way to develop their cause is to reach the children.\(^9\)

But of course, Fish was only one of the multitudes of loyal Americans in politics, on the radio, and later on television, who were stoking the nations red-hot fear that, in dropping their son or daughter off at school, parents were handing over to potential communists not just their child but the very future of the United States. As a result of the combined fear of communism and education, between 1930 when the Fish Committee was first imagined and 1952 when Slochower was called before the SISS, schools and educators became the single most persecuted group by the anti-communists, at least in terms of numbers.\(^10\) Across the country legislatures passed bills requiring teachers to take loyalty oaths as a pre-condition of their employment, issued declarations that laws keeping communists from finding and retaining positions at schools be rigorously enforced, and created any number of other “security measures”\(^11\) of dubious legality.

**The Trial Court Opinion and New York’s Approach to Communist Educators**

New York was, if anything, the central locus of the fight to keep communists out of the classroom, and the December 5, 1952, opinion of the New York State Supreme Court\(^10\) in *Daniman v. Board of Education of New York*, aptly and succinctly summarizes the State’s position. This decision, ruling both on the case filed by Slochower and his two Brooklyn College counterparts as well as a separate suit filed by similarly dismissed public school teachers, not only provides the basis for the case which would eventually be heard by the Supreme Court but also provides insight into the societal and legal view of communism at the time.

Rather than beginning with a discussion of the relevant legal standards or their application to the case at bar, Judge F.E. Johnson instead began as follows:

> The world events that have been common knowledge for years past require this court to judicial notice that the [communist] party . . . is not only preaching the destruction of non-communist governments, but by espionage, sabotage, oppression and murder are, and have been, busily and successfully undermining the freedom of other disarmed nation . . . . Their agent, the New York Communist Party, is continuously following the program here; the[] success among certain

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\(^9\) *Id.* at 57.

\(^10\) Note that one of the main controversies during relating to schools and educators was the use of mandatory loyalty oaths as prerequisites for state teaching positions. While this was a serious issue through the 1960s, given that it does not directly bear on the case at hand it will not be covered. This in no way suggests that it was not at least as invasive of a control tactic as any of the others utilized during this time.


\(^12\) Note: New York State Courts do not follow typical naming conventions. The New York Supreme Court is in fact the court of first review rather than the highest court as it would be in most other states.
Americans, who have sold out their own government, is too well known to be further dwelt upon.\textsuperscript{103}

From the U.S.-position generally, Judge Johnson’s opinion then zooms in one level to the state position: reiterating a 1949 New York Legislative policy-declaration stating that to “protect the children” the state must rigorously enforce laws preventing communists from “obtaining or retaining employment in the public schools.”\textsuperscript{104} Focusing in one level further, the opinion cites a Board member asserting, among other things, that “Party members engaged in education have the special task of using education” to further the Party goals: “destruction of the bourgeois state” and creation of a “so-called dictatorship of the proletariat.”\textsuperscript{105}

It is only after thus contextualizing his decision that Judge Johnson goes on to discuss § 903 and the Fifth Amendment. As to the first, he concludes that public school teachers are “employee[s] of the city” for purpose of the section and that refusal to testify on self-incrimination grounds at the SISS hearings, especially when viewed in light of the subject matter, was a legitimate cause for termination based on information relevant to employment.\textsuperscript{106} While there is a strong possibility that he could have concluded his determination here without getting into the constitutional question, and that had he stopped here the case would never have made its way to the Supreme Court, he obviously did not choose this path.

Instead, Judge Johnson found it necessary—without a single citation to existing precedence—to discuss the Fifth Amendment, under what context it could be invoked, and the acceptable inferences that could be drawn when it was invoked. A lofty, self-imposed mandate, to say the least. He began by discussing his views on what must have been going through the plaintiffs’ heads when faced with the $64 question—a journey into psychology and conjuncture unnecessary to repeat here. Addressing next context and inferences, he asserted that the Fifth Amendment only protects an individual from being “compelled to tell the truth about himself if it will do him criminal harm or be used against him criminally.”\textsuperscript{107} From this base, he reasoned that the plaintiffs here were either 1) not Communists, in which case their invocation of the Fifth was “intellectually dishonest” or 2) that they were or had been Party members, in which case they properly invoked the Fifth Amendment thereby shielding themselves from self-incrimination but opening themselves up for inferences of guilt. He thus concluded that regardless of which of these alternatives was in fact true, the Board members “surely were not guilty of arbitrary and capricious conduct when they decided that these petitioners were either intellectually dishonest, or were, in fact, members of the party and so committed to everything that would be involved in

\textsuperscript{103} Daniman v. Bd. of Ed. of the City of N.Y., 118 N.Y.S.2d at 489. Author’s Note: Judge Johnson appears to have not been a fan of subject–verb agreement. The excerpted portion has been corrected where possible without manipulating the text unnecessarily.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 494 (questioning, rhetorically, “Is not the cleansing of the city’s school system of such foulness and danger one of the ‘affairs of the city’ mentioned in section 903 . . . ?”)
\textsuperscript{107} Id. at 493 (emphasis in original).
a party attempt to destroy by force the government existing here, and the Constitution upon which it is based.”

Judge Johnson’s view of the Fifth Amendment can fairly be described as being squarely in line with purported popular opinion and in direct contradiction with the view of Griswald and his ilk who maintained that “[a]part from its expression of our view of civilized governmental conduct, another purpose of the Fifth Amendment is to protect the innocent.” Slochower, whatever his actual relationship with the Communist party, made clear in his testimony at the SISS that he was invoking the protections of Griswald’s Fifth Amendment, saying, “I want to add that I am not implying I am guilty. I understand the fifth amendment has been put into the Constitution for the purpose of protecting the innocent. I am availing myself of that privilege.”

Ideological arguments notwithstanding, though Judge Johnson’s opinion perhaps over emphasized the importance of criminal application of the compelled speech, it was in line with two Supreme Court trends of the time—deferring to the legislature and protecting democracy at the expense of individual rights. However, as hard as it would be to divine by looking at what the Justices wear, Supreme Court trends can change, and, in the three years it took for Slochower’s case to travel from the City of New York Supreme Court at Kings County to the U.S. Supreme Court, much had changed, not just inside the Court but also in the country as a whole.

**The Political and Judicial Environment of the 1950s**

Heading into the 1956 decision in *Slochower*, the predominant subject of Supreme Court jurisprudence on the issue of communism within the education system had been First Amendment challenges to loyalty-oath requirements – and so it would remain after the *Slochower* decision as well. At this time, there was also nothing in the winds except the words of France to suggest that the Court or the country would be receptive to a Fifth Amendment challenge of this sort. Why then would Slochower, a non-legal academic, an immigrant, and a new father, choose to undertake such hardship in order to pursue such a dubious legal challenge? To answer this question, one need look no farther than the record from his hearing before the SISS; to this exchange, described in part above, that took place just before Slochower first expressed his reluctant need to invoke his Fifth Amendment privilege:

**Mr. Morris:** What is your answer?

**Mr. Slochower:** I am not a member of the Communist Party.

**Mr. Morris:** That is not the question: . . . were you at that time a member of the Community Party?

**Mr. Slochower:** I hope that the time is coming when the higher courts are going to declare that a question of this sort is in violation of those traditions of America which I have learned to cherish. I came here as an immigrant and I came from a country which knew oppression. I have the hope and expectation that the higher courts will declare that this question is not proper. I should like to protest on that basis of the first amendment.

**Senator Ferguson:** I cannot recognize the first amendment, as a lawyer and a

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108 *Id.* at 493.
109 *See, Daniman, supra,* notes 90-95; *but cf.,* GRISWALD, *supra,* note 67, at 9.
110 *Hearings,* *supra* note 2, at 200 (testimony of Harry Slochower).
member of the United States Senate. I cannot allow you to invoke that as a reason.

Mr. Slochower: There is a possibility that the high courts might reverse you.

Senator Ferguson: I do not believe they will or I would rule otherwise.  

The Supreme Court would never, in fact, hear arguments on the legality of Slochower’s First Amendment challenge, but the exchange above is no less enlightening of his motivations for that minor detail. Perhaps it is true that to feel true pleasure one must first experience pain, that to fully appreciate the American traditions which Slochower invokes one must have experienced life apart from them. Whether either of these is in fact true is, of course, beside the point. What is remarkable in this brief exchange is that even while witnessing what he – and history – recognized to be the legislative branch run amok, Slochower’s belief in the U.S.-system as a whole was strong enough that instead of turning to an extra-governmental power or ideology he instead turned to another branch of that government. The fact that he saw the Supreme Court as a bastion of hope in 1952 only serves to reinforce the depth of his belief.

As mentioned above, 1952 was, if anything, the high water mark of this second coming of the red-scare and the atmosphere within the Supreme Court – though tempered, perhaps, as the judiciary is wont to be – more or less reflected this same political bent. Fred Vinson was the Chief Justice of the Supreme Court at the time Slochower appeared before the SISS, and while he was appointed by a Democrat and is known for having unified a Court which Justices Black and Frankfurter had divided, Slochower could hardly have taken comfort in looking at the decisions of his Court.

While Chief Justice Vinson suffered a fatal heart attack less than a year after Slochower’s SISS hearing and was replaced by Earl Warren, the beat of the Court remained largely consistent in its treatment of communism-related matters during the years leading up to oral arguments in Slochower’s case. Within the Court, Justice Black maintained a minority, textualist coalition which attempted to preserve civil liberties from legislative encroachment. But, by and large, Justice Frankfurter’s legislative-deference approach ruled the day, and “[t]he result of these views during the McCarthy Era was that the Court simply rubber stamped congressional and state laws that interfered with the freedom of speech and expression.” With the untimely death

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111 Id.
112 Two points: First, it is worth recalling that at the time of his hearing in 1952, it was well understood and established that had he refused to answer a question at the SISS hearing on First Amendment grounds he would have been held in contempt and would still have been subject to dismissal under section 903. Second, though he did not raise the First Amendment issues relating to this type of inquiry, many of the subjects that would likely have addressed in such an inquiry were later addressed in the loyalty oath cases.
113 Fred M. Vinson was appointed by Dwight D. Eisenhower and, as a matter worth noting, is the last Chief Justice to be appointed by a democrat through today.
114 Justices Black and Frankfurter had driven a wedge between the rest of the Justices on the Court and both actively “recruited” new Justices to their respective sides as they were appointed. See generally, Michael R. Belknap, The Supreme Court Under Earl Warren, 1953-1969 51-60 (2005).
115 See, supra notes 70-73.
in 1954 of Judge Jackson,\textsuperscript{117} a champion of both civil liberties and education, and the appointment of Justice Harlan (a quick ally of Frankfurter) the Court appeared even less likely to be sympathetic to Slochower’s cause.

However, though the Court continued to rule in favor of anti-communist legislation, public opinion was beginning to change. In 1952, the response of a fear-driven public to the SISS and HUAC hearings had been if not positive than at least along the lines of “I don’t like the methods, but . . . .”\textsuperscript{118} By early 1954, though the Cold War was no less cold and the threat of nuclear war still loomed heavy on the public consciousness, gone was the blind acceptance that communism had to be ferreted out by any means necessary.

A number of factors contributed to this shift and to the decline of McCarthyism during the course of 1954. In March of that year, the news anchor Edward R. Murrow broke with his peers and (famously) began questioning McCarthy’s actions. Just months later, the nation bore witness to hours of televised testimony from the McCarthy-Army hearings – and the 20 million viewers who tuned-in were turned-off by what was generally viewed as the Senator’s overly aggressive and haughty inquisition of members of the armed forces. And, while there is no doubt that these events played their part, the diminishing vitriol can also perhaps also be attributed to what Erwin Griswald called the “sober second judgment of the people.” Speaking from a still-aspirational point in early 1954, he described this second judgment, saying:

The immediate reaction of the people, like that of any individual, may be hasty, emotional, irrational, or unsound. But when that phase is past, when we have had a real chance to think through our problems, I have confidence that the people will demand a better standard of conduct in legislative investigations than has been evidenced in the recent past.\textsuperscript{119}

Whatever the cause, between January and August of 1954, the percentage of those polled who viewed McCarthy favorably fell from 50 to 36 while the percentage who viewed him unfavorably increased from 29 to 51—a net change of 46 percent.\textsuperscript{120} By years end, McCarthy would face a Senate censure investigation, and while 1954 would by no means mark the end of the Cold War or anti-communism, it was an unmistakable shift away from the aggressive legislative posture of the immediate post-war period.\textsuperscript{121}

Fickle though public sentiment may be, the laws that were passed and the charges that were brought during the height of the Red Scare remained unchanged. If one were to imagine anti-communism as the ball on a pendulum, 1954 would best be described as the bottommost point in its arc, where no potential energy remains but kinetic energy is at its highest. Events had

\textsuperscript{117} You may also remember Justice Jackson from such legal precedence as his famous concurrence in \textit{Youngstown} in which he established the now-accepted three tiered approach towards judicial deference of executive decisions.

\textsuperscript{118} Erwin Griswald, Phi Beta Kappa Address at Mount Holyoke College (Mar. 24, 1954), \textit{in The 5th Amendment Today: Three Speeches} 38 (1955) (Erwin Griswald ed.).

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} Nelson W. Polsby, \textit{Towards an Explanation of McCarthyism}, 8 Pol. Stud. 252.

been set in motion, fingers had been pointed, lives disrupted, cases filed, and so it was that riding the pendulous upswing Slochower arrived at the Supreme Court for oral arguments on October 18, 1955.

**Slochower and the Supreme Court:**

A classic Washington fall drizzle spat from motionless clouds as Slochower and his attorneys ascended not thirteen but rather forty-four steps en route to oral arguments.\(^{122}\) Crossing through the portico\(^{123}\) that day and under the Cass Gilbert designed pediment bearing the words “Equal Justice Under the Law,” it must have been hard for Slochower to not place more credence in the second half of that phrase.\(^{124}\) Each court during his numerous appeals over the preceding three years had affirmed Judge Johnson’s original decision. Furthermore, while Judge Johnson’s ruling had applied to Slochower and twelve other similarly situated educators, only Slochower’s case was deemed to have presented a valid federal question on appeal to the Court. Whether this was a result of bad lawyering on the part of the other plaintiffs’ counsel, particularly fine lawyering by London, or of there actually being enough of a factual difference between Slochower’s case and those of the other plaintiffs is unclear. What is clear, however, is that of these plaintiffs’ cases only Slochower’s would be heard that October day – or, as it would turn out, ever.\(^{125}\)

With Slochower at the Court were his lawyer Ephraim London and Osmond Fraenkel, the Chief Counsel of the ACLU. London, who took over where France had left off,\(^{126}\) was and would remain better remembered for his numerous First Amendment media-censorship victories before the Court.\(^{127}\) In 1952, he had won a decisive victory in *Joseph Burstyn, Inc. v. Wilson*, the so-called *Miracle Case*,\(^{128}\) whose holding was heralded by the New York Times as “extending to

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\(^{123}\) As an interesting aside, in 2010, Chief Justice Roberts issued a procedural rule closing to public access the front door of the Court for the first time in the building’s storied history. In statement concerning this rule change, which for lack of an appropriate existing term was generally referred to as a “dissent,” Justice Breyer described this change by saying: “the Court has decided that . . . visitors to the Court – including the parties whose cases we decide, the attorneys who argue those cases, and the members of the public who come to listen and to observe their government in action – will have to enter through a side door.”


\(^{126}\) I see London, I see France . . .


motion pictures the constitutional guarantees of free speech and a free press.”

Expertise notwithstanding, London (a socialist himself and financially backed by a wealthy legal-partner) felt compelled to represent a number of defendants, like Slochower, who had run afoul of McCarthy-era legislation.

Fraenkel, the ACLU’s chief counsel from 1954 until 1977, would likewise go down in the annals of history for his First Amendment work rather than for his role in this case. That said, though he was present as an amicus curiae rather than as co-counsel, and while the majority of his brief tracked with London’s, noteworthy within his brief was the statement of the interest the New York Civil Liberties Union had in the matter:

The New York Civil Liberties Union is interested in the instant case because it believes this Court’s reversal of the decision here in issue would erect an important bulwark against the attack impinging from all sides on the privilege against self-incrimination. We believe that the maintenance of this privilege in its full statute is essential to the dignity and liberty of the individual in his relations with his Government and to his protection from oppression and injustice at the hands of over-eager, but under-conscientious, officials.

In effect what Fraenkel did with this statement was reframe the discussion of the Fifth Amendment and in so doing reframe the relationship between this Amendment and § 903. The State would have had the Court view this relationship as it was depicted in the cartoon described above—the Amendment itself as a strong pillar, Slochower as the subversive, and § 903 as a necessary tool to get him out from behind the pillar. Fraenkel forced the court to reconceptualize this image. He removed Slochower from the picture, asking the court instead to protect the pillar itself. This was in line with his general position with regard to civil liberties: that they are “granted for the sake of society rather than for the sake of the individual.”

As compelling as this Fifth Amendment argument may have been, the Court’s opinion based its holding in Slochower on Fourteenth Amendment Equal Protection Clause grounds instead. Chief Justice Warren, though agreeing with the majority’s decision, maintained a preference for the alternative. While the Warren Court had not yet become the Warren Court of legend, Earl Warren himself had long been a vocal advocate of free and open public education. A graduate of the University of California, Berkeley, and the proud father of six graduates from various University of California schools, Warren, both as the Governor of California and as the Chief Justice, openly and publically vocalized this position. For instance, in a speech at his Alma Mater in March of 1954 he said:

We cannot lower our sights in these troublesome times. We must never run short of intellectual ammunition. American universities everywhere must continue to strengthen their programs. They must also strengthen their zeal. There should be

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130 See, supra note 123.
renewed vigor in all of them for free investigation and faithful research by the unfettered minds of free American scholars.\textsuperscript{133}

His interest in and respect for academic freedom does not, however, account for the Chief Justice’s desire “to rule that New York had impermissibly burdened the [Fifth Amendment] privilege by treating its use as an admission of guilt . . . .”\textsuperscript{134} Rather, it appears that Warren subscribed to a view of civil liberties that was similar to the one advocated by Fraenkel. However, where Frankel was concerned with the question, “To whom are civil liberties granted,” Warren was concerned with the question, “Who is responsible for protecting civil liberties and who is harmed when they are eroded.” For both men, the answer to their question: society as a whole. In an article published in Fortune magazine in the November following oral arguments in \textit{Slochower}, Warren chastised individual groups for only reacting to encroachment of their own group’s liberty interest(s). “Too seldom,” he said, “do all of these [groups] become militant when ostensibly the rights of only one group are threatened. They do not always react to the truism that that when the rights of any individual or group are chipped away, the freedom of all erodes.”\textsuperscript{135}

The majority’s decision to not hold in Slochower’s favor on Fifth Amendment grounds was not, however, based on a lack of empathy for his position. Rather, the five person coalition that Justice Frankfurter managed to corral agreed that as applied to Slochower, § 903 was so unreasonable that it violated Due Process.\textsuperscript{136} The Court reasoned that because § 903 did not call for any type of individualized review of the situation or circumstances in which a public employee was invoking his Fifth Amendment privilege and because the Board had not in fact undertaken any such review prior to firing him, Slochower’s Due Process rights had been violated. Though the opinion itself was assigned to Justice Clark in exchange for his vote, it was designed and outlined by Justice Frankfurter. Thus, while the opinion facially reads as a rebuke of both the SISS and the Board, the narrow holding kept intact and unchanged § 903 and maintained Frankfurter’s guiding principles of judicial non-intervention and legislative deference.

\textbf{The Effects of the Ruling}

In outlining the logic behind this narrow holding, Justice Frankfurter hoped to use the Fourteenth Amendment to express that he was “outraged by Slochower’s termination,”\textsuperscript{137} while avoiding some of the messier Fifth Amendment issues. Ironically, though Justice Clark’s opinion appears to have followed Frankfurter’s outline, history has yielded opposite results on both counts. On the one hand, this narrow holding coupled with subsequent events and rulings did not in fact demonstrate the Court’s view that Slochower was wrongfully terminated or act as any type of rebuke against the Board of Education or the anti-communist movement more generally. On the other hand, while the Court avoided any direct Fifth Amendment holding, the language of

\begin{footnotes}
\footnote{133 \textsc{Earl Warren}, The Public Papers of Chief Justice Earl Warren, 62 (Henry M. Christman, Ed.)(1959). Author’s Note: as a humorous aside, at this same speech he also referred to the flight from Washington, D.C. to San Francisco as entailing “no more than a ten-hour airplane trip . . . .” at 59.}
\footnote{134 \textsc{Bellknap}, supra note 101, at 60.}
\footnote{135 \textsc{Warren}, supra note 120, at 231.}
\footnote{136 \textit{Slochower v. Bd. of Higher Ed. of City of N.Y.}, 350 U.S. at 558-59.}
\footnote{137 \textsc{Bellknap}, supra note 101, at 60.}
\end{footnotes}
this case has become among the most cited of any Fifth Amendment case prior or subsequent and the case itself has, in many ways, as Fraenkel hoped, become an “important bulwark against . . . the attack on the privilege against Self Incrimination.”

To understand the first part of the case’s legacy requires a brief foray into the days immediately following the Court’s announcement of its opinion on April 9, 1956. This opinion, narrow though its future application would prove to be, had two immediate benefits for Slochower, only one of which he would ever receive. First, as the Court had found that he had been wrongfully terminated, Slochower was entitled to full compensation for the period between his suspension in 1952 and the date of the order. In real terms this amounted to about $40,000 (no small figure at a time when the mean annual income was under $4,000), and Slochower would eventually receive this sum.

The second supposed benefit of the Court’s holding was an order reinstating Slochower in his former faculty position. Brooklyn College President Harry Gideonse was not, however, willing to see this happen and wasted as little time re-suspending Slochower after the Court’s announcement as he had in first suspending him back in September of 1952. This time, however, the Board essentially looked to the exact procedural deficiencies cited by the Court in its decision, remedied them providing individual review of the termination based on a broader set of criteria than simple non-compliance with § 903, and moved forward with gathering information and scheduling a full hearing. The day before that hearing, however, Slochower opted to simply resign and forfeit retirement benefits rather than face another Board trial. As explanation, he stated that while he had originally been “stand[ing] by the Constitution,” it was not worth contesting the current charges because they involved “only myself, that is, my particular job.” Slochower’s personal, tangible yield was thus $40,000.

Because Slochower resigned, the actual constitutionality of the “individualized-review” loophole in the Slochower holding remained untested. Not two years later, however, in Belian v. Board of Education, the Supreme Court held that there was no Due Process violation in a Pennsylvania case with nearly identical background facts. The Court distinguished Slochower, however, saying that whereas his dismissal had been immediate, in Belian the dismissal was based not on the invocation of the Fifth Amendment but on that school board’s determination that the teacher was incompetent as a result of his unwillingness to self-incriminate. And, in a companion case from New York decided the same day, the Court likewise affirmed a school board decision “dismissing for ‘doubtful trust and reliability’ an employee who fail[ed] to

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138 See, ACLU Amicus Brief, supra note 131.
140 Id.
141 Id. The Board of Education came out the day after Slochower’s resignation and claimed that had the hearing gone forward, it was “prepared to prove that Slochower was in the Communist party under the party name of ‘Flint’ and that his party membership book was No. 689.”
respond to proper inquiry.” In effect, while the Court maintained that the holding in Slochower was still good law, it was good law of which no educator could actual avail themselves.

Meanwhile, despite Justice Frankfurter’s attempt to avoid drawing the Fifth Amendment into the fold of the Court’s decision, as a result of both the publicity Slochower’s case generated and of Justice Clark’s powerful and florid language regarding the Amendment, the case had immediate and ongoing influence in this area. As mentioned previously, in the years leading up to the Slochower decision, the theretofore minimally discussed Fifth Amendment and its implications became a hot topic for Americans from every wake of life. And, whether it intended to influence this discussion or not, two phrases from this decision were quickly disseminated and have since attained a permanent position in the history of the Fifth Amendment, alongside John Adams and the cantankerous John Lilburne.

Conclusions

“At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person’s constitutional right under the Fifth Amendment.”

“The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury.”

These two phrases are in large part the reason why this case is remembered though today. Without even intending to address the Fifth Amendment, Justice Clark affirmed that the Fifth Amendment was and remained a protection of the innocent and established that no inference of guilt could be drawn from its invocation. Within the next decade, these phrases would be reiterated in any number of key decisions – both those relating to education as well as more broadly. Even through today, not a month goes by where the Slochower opinion is not cited either in judicial opinions or court filings. This alone is impressive and speaks to the continuing vitality of Justice Clark’s position – but looking at the direct citations does not even begin to scratch the surface. Perhaps because Slochower was not, in the end, a landmark case with wide application, many courts now cite to actual landmark opinions which themselves cite to

144 See, supra, notes 60-64.
145 Slochower v. Bd. of Higher Ed. of City of N.Y., 350 U.S. at 557 (italics in original).
146 Id.
147 See, inter alia, Keyishian v. Board of Regents of University of State of N.Y., 385 U.S. 589 (1967) (holding that school loyalty oaths were illegal); Spevack v. Klein, 385 U.S. 511 (1967) (citing Slochower as the fulcrum case for discussions about proper and improper Fifth Amendment presumptions).
By incorporation then, the language of this decision has had a much broader impact than is immediately apparent when searching through citing references.

But beyond the more amorphous Fifth Amendment jurisprudence, the case also signaled a turning of the tides at the Supreme Court. While things did not change over night, the case was nonetheless a signal that the Court was perhaps ready to begin ruling on academic freedom cases and on anti-communist cases and that they were not going to be granting the same legislative deference that they had used for the decade prior. In that way too, this decision stands on the precipice between the Warren Court of the 1950s and the Warren Court that became a symbol of the power of an active judiciary. While temporally falling outside the storied Warren Court, the bold assertion of personal rights could perhaps now be seen as a portent. And while the political and ideological viewpoints of our nation’s teachers are still as contentious an issue today as they were in the 1940-50s – although perhaps with less of a singular focal point – I am at least hopeful that through reference to events like these we can gain an understanding of how similar our struggles today are and hopefully move forward.

Follow-Ups and Obituaries:

Harry Slochower: After his famous trial Slochower largely disappeared from the public eye for quite some time. He devoted himself to a career in the practice of psychoanalysis, taught at the New School for Social Research for twenty-five years between 1964-1989, and was the President of the Association for Applied Psychoanalysis for several years. During that time he maintained his home in the same Brooklyn neighborhood he had lived in since his arrival to the United States in 1913. His daughter Joyce – born in the period between the Rapp-Coudert and the SISS hearings – is now also a distinguished psychoanalyst and prolific author.

Senator Homer Ferguson: Senator Ferguson only served in the Senate for two more years after the SISS hearings, losing re-election in 1954. After that he served for two years as the U.S. Ambassador to the Philippines before being appointed to a seat on the United States Court of Appeals for the Armed Forces—the same court where the author of this story will be clerking beginning in September, 2011. He served on that court from 1956 through 1976 before returning to Michigan where he died in 1982.

Robert F. Morris: Morris went on to write a number of books criticizing the soft approach that was being taken to combat communism and eventually started the Defenders of American Liberties as a counterweight to the ACLU. In addition to these and the abovementioned facts, Morris would be remembered as a highly influential if low-profile or back-stage voice of the anti-communist movement, even credited by some as being the one who “really accomplished much of what [Senator McCarthy] is credited with.”

Harry D. Gideonse: Gideonse served as the President of Brooklyn College until 1966 and while remembered fondly by some, the oral histories of some of Brooklyn College students during

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Slochower’s hearing show another view. One student recalls: “And he was known as a liberal and an anti-Communist. Right? He was a Fascist, the worst kind of Fascist. What’s the worst kind of Fascist? A hidden Fascist.” Another: “He called us, at one point, midget Malachs, I think. Do you know who Malach was? Malach was the Soviet Ambassador to the United Nations. So that was his orientation.” And last: “He was the enemy. Always he was the enemy.” In one last odd twist of fate, after leaving Brooklyn College, Gideonse went on to serve as the chancellor of the New School for Social Research – the very same school where Slochower had begun working just two years prior.

Bernard Grebanier: Grebanier went on to have a successful career at Brooklyn College – despite the fact that he “was not remembered fondly by some of his colleagues at Brooklyn College.” He died on March 17, 1977, remembered by most as a respected Shakespearean scholar.151

Royal W. France: By the time of the final decision in Slochower’s case, France had all but retired from the practice of law and would pass away in 1962.

Ephraim London: Best known for his First Amendment defense of censored films like “The Miracle” and “Lady Chatterley’s Lover,” Ephraim would eventually argue nine cases before the Supreme Court – Slochwer among those – and win all of them.

The Foley Court House: What was then the Foley Court House is now the Daniel Patrick Moynihan Court House – named, with some irony for this particular story, after the New York Senator perhaps best known for the Commission on Government Secrecy which launched a full investigation into the Cold War Government practices.

150 See, http://oralhistory.ashp.cuny.edu/PresidentHG.html