TABLE OF CONTENTS

APPENDIX A

Constitutional Provisions and Statutes Involved

U. S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Constitution, Amendment XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Vernon's Texas Civil Statutes, Article 5431

In any action for libel, in determining the extent and source of actual damage and in mitigation of exemplary or punitive damage, the defendant may give in evidence, if specially pleaded, all material facts and circumstances surrounding such claim of damage and the defense thereto, and also all facts and circumstances under which the libelous publication was made, and any public apology, correction or retraction made and published by him of the libel complained of, and may also give in evidence, if specially pleaded in

mitigation of exemplary or punitive damage, the intention with which the libelous publication was made. The truth of the statement, or statements, in such publication shall be a defense to such action.

Vernon's Texas Civil Statutes, Article 5432, Subsections 4 and 5

The publication of the following matters by any newspaper or periodical shall be deemed privileged and shall not be made the basis of any action for libel.

* * *

4. A reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern published for general information.

5. The privilege provided under Sections 1, 2, 3, and 4, of this article shall extend to any first publication of such privileged matter by any newspaper or periodical, and to subsequent publications thereof by it when published as a matter of public concern for general information; but any re-publication of such privileged matter, after the same has ceased to be a matter of such public concern, shall not be deemed privileged, and may be made the basis of an action for libel upon proof that such matter had ceased to be of such public concern and that same was published with actual malice.

APPENDIX B

Opinions of the Courts Below

Opinion of the Texas Court of Civil Appeals

IN THE

Court of Civil Appeals

FOR THE
SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

No. 16624

THE ASSOCIATED PRESS,

Appellant,

vs.

EDWIN A. WALKER,

Appellee.

FROM THE DISTRICT COURT OF TARRANT COUNTY

OPINION

This is a libel suit. The parties will be designated as they were in the court below or The Associated Press as the A. P. and Walker by name.

The following are the reports of which Walker complained:

"October 2, 1962 'Walker, who Sunday night led a charge of students against federal marshals on the Ole

Appendix B
Opinion of the Texas Court of Civil Appeals

Miss Campus, was arrested on four counts including insurrection against the United States.'

"October 3, 1962 (Editors Note: Former Maj. Gen. Edwin A. Walker, a key figure in the week-end battling over admission of a Negro to the University of Mississippi, was eating dinner Sunday night when he says he was told there was a 'scene of considerable disturbance' on the University of Mississippi Campus. He went there. Here is the story of Van Savell, 21, Associated Press newsman, who was on the scene and saw what happened.)

"By Van Savell: Oxford, Miss., October 3, 1962 (AP) 'Utilizing my youth to the fullest extent, I dressed as any college student would and easily milled among the several thousand rioters on the University of Mississippi Campus Sunday night.

" 'This allowed me to follow the crowd—a few students and many outsiders—as they charged federal marshals surrounding the century old Lyceum Building. It also brought me into direct contact with former Army Maj. Gen. Edwin A. Walker, who is now under arrest on charges of inciting insurrection and seditious conspiracy.

" 'Walker first appeared in the riot area at 8:45 p.m., Sunday near the University Avenue entrance about 300 yds. from the Ole Miss administration Building.

" 'He was nattily dressed in a black suit, tie and shoes and wore a light tan hat.

" 'The crowd welcomed Walker, although this was the man who commanded the 101st Airborne Division during the 1957 school integration riots at Little Rock, Arkansas.

" 'One unidentified man queried Walker as he approached the group. "General, will you lead us to the steps?"

Appendix B
Opinion of the Texas Court of Civil Appeals

" 'I observed Walker as he loosened his tie and shirt and nodded "Yes" without speaking. He then conferred with a group of about 15 persons who appeared to be the riot leaders.

" 'The crowd took full advantage of the near-by construction work. They broke new bricks into several pieces, took survey sticks and broken soft drink bottles.

" 'Walker assumed command of the crowd, which I estimated at 1,000 but was delayed for several minutes when a neatly dressed, portly man of about 45 approached the group. He conferred with Walker for several minutes and then joined a group near the front.

" 'Two men took Walker by the arms and they headed for the Lyceum and the federal marshals. Throughout this time, I was less than six feet from Walker.

" 'This march toward tear gas and some 200 marshals was more effective than the previous attempts. Although Walker was unarmed, the crowd said this was the moral support they needed.

" 'We were met with a heavy barrage of tear gas about 75 yards from the Lyceum steps and went a few feet further when we had to turn back.

" 'Before doing so, many of the rioters hurled their weapons—the bricks, the bottles, rocks and wooden stakes —toward the clustered marshals.

" 'We fled the tear gas and the charging marshals—the crowd racing back to a Confederate soldier's statue near the grove entrance below the Lyceum.

" 'I went to a telephone. A few minutes later I returned and found Walker talking with several students. Shortly thereafter, Walker climbed halfway up the Confederate monument and addressed the crowd.

Appendix B
Opinion of the Texas Court of Civil Appeals

" 'I heard Walker say that Gov. Barnett had betrayed the People of Mississippi. "But don't let up now," he said, "You may lose this battle, but you will have been heard."

" 'He continued: "This is a dangerous situation. You must be prepared for possible death. If you are not, go home now."

" 'There were cheers. It was apparent that Walker had complete command over the group.

" 'By this time, it was nearly 11:00 p. m. and I raced to the telephone again. Upon my return, Walker was calmly explaining the "New Frontier Government" to several bystanders. He remained away from the rioting throughout the next few hours, but advised on several tactics.

" 'One Ole Miss student queried the former General, "What can we use to make the tear gas bombs ineffective? Do you know of any way that we can attack and do some damage to those damn Marshals?"

" 'Walker suggested the use of sand to snuff out the tear gas.

" ' "This stuff works real well, but where can you get it?", he asked.

" 'At this time the rioters were using a University fire truck and fire extinguishers in an attempt to make the tear gas bombs ineffective.

" 'I left Walker and walked about 100 yards away where Molotov cocktails—gasoline, in bottles with a fuse—were being made.

" 'Again I left the area for a telephone. As I walked toward a Dormitory with George Bartsch of the Little Rock Associated Press Bureau, we were attacked by Marshals who mistook us for students. We were deluged

by tear gas, manhandled, handcuffed and beaten with clubs during a 200 yard walk back to the Lyceum Building.

" 'Thanks to recognition from Chief Marshal James P. McShane, we were quickly released and given freedom in the Marshals' Headquarters.

" 'Within minutes rifle and shotgun fire erupted from the rioting crowd and two men—one a French newsman—were killed. We considered ourselves lucky to have been arrested and glad to be behind closed, heavily guarded doors.' "

The only two statements of the above quoted reports which were complained of by Walker as being libelous and which form the basis of special issues submitted by the Court were: (1) "Walker, who Sunday led a charge of students against federal marshals on the Ole Miss Campus" (October 2, 1962 report), and (2) "Walker assumed command of the crowd" (October 3, 1962 report). For the sake of brevity these two statements will hereinafter be referred to as the "charge" and "command" statements respectively.

In answer to special issues one through four, the jury found that the "charge" statement was not "substantially true", did not constitute fair comment, was not made in good faith and was actuated by malice. It found to the same effect in response to similar issues five through eight concerning the "command" statement.

In answer to issue No. 9 the jury found damages in the sum of $500,000.00 and having found that A. P. was actuated by malice in answer to special issues Nos. four and eight the jury, in response to special issues Nos. ten and eleven found that exemplary damages should be awarded and in the amount of $300,000.00.

Appendix B
Opinion of the Texas Court of Civil Appeals

Based upon the verdict of the jury, judgment was entered for Walker and against the A. P. in the sum of $500,000. The judgment recited that there is no evidence to support the jury's findings of malice and $300,000 for exemplary damages.

Appellant contends that the court erred in rendering judgment for appellee rather than it because (1) as a matter of law the evidence conclusively established that the "charge" and "command" statements were substantially true; (2) each statement was a fair comment about a matter of public concern published for general information and thus privileged under the provisions of Art. 5432, V. A. C. S.; (3) such statements made without malice are protected by the First and Fourteenth Amendments to the Constitution of the United States; (4) over objection appellee was permitted to testify that he did not assume command; (5) it held as a matter of law that the "charge" and "command" statements were libelous rather than submitting issues as to each; (6) the evidence conclusively established as a matter of law that the "charge" and "command" statements were made in good faith with reference to matters it had a duty to report to its members and thence to the public; (7) the amount of damages found were so grossly excessive as to be patently wrong and unjust and the findings in response to the damage issue No. 9 and to special issues one, two, three, five, six and seven are so against the weight and preponderance of the evidence as to be manifestly wrong and unjust and thus insufficient to support such answers; and (8) the evidence conclusively established as a matter of law that the jury was guilty of material misconduct which probably resulted in injury to the defendant.

We affirm.

Appendix B
Opinion of the Texas Court of Civil Appeals

EVIDENCE

In discussing the points relating to the quantity and quality of the evidence we have examined the complaints of the appellant in the light of the Article by Chief Justice Robert W. Calvert entitled, " 'No Evidence' and 'Insufficient Evidence' Points of Error", 38 Tex. Law Rev. 361 and authorities therein cited.

The evidence considered in its most favorable light in support of the findings of the jury and the judgment of the court is in essence as follows: At approximately 4:00 P. M. of the day in question, a ring of Federal marshals had encircled the Lyceum Building. Walker arrived on the campus about 8:45 P. M. At that time a loud, violent riot was in progress in an area of the campus known as the Circle. A crowd assembled in the Circle area, began taunting and jeering the marshals. By 8:00 P. M. a full scale riot had erupted which was to continue all night, destroy 16 automobiles, kill two people, injure 50. The rioters would form into groups and charge toward the marshals, throwing bricks, bottles, rocks, sticks and other missiles. The rioters attempted to charge the marshals with a fire truck and then with a bulldozer. "Molotov cocktails" were hurled at the marshals. Finally rifle fire erupted. The next morning the campus looked like a battlefield. Soon after his arrival, Walker, after some urging to say a few words, spoke from the steps of the Confederate Monument. While there is some dispute as to what he said, there is testimony that he told the assembled groups that while they had a right to protest that violence was not the answer. He was "booed" or "jeered" at this time and again when urging a cessation of violence. He and others walked in the direction of the Lyceum Building where the marshals

were stationed but he never came closer to the marshals than the monument or the length of a football field. He was there to watch what happened. He wanted a peaceful demonstration as a protest. His presence there was not illegal or unlawful. He had the same right to come upon the campus and observe the activity as did the various members of the press who were there to observe and to report. He was one of the crowd. He was not in the forefront, never in front of the crowd. He never hurled any rock, brick or other missile in the direction of the marshals or otherewise. He did not participate in the riot. He never directed or suggested that others do so. He issued no directions nor did he counsel or suggest to others that they charge the marshals or take any other offensive action toward them. The crowd was disorganized. It was a leaderless group. Groups were milling aimlessly. No one, including Walker, made any effort to assume leadership. Walker did not run. He never got out of a slow walk, described as strolling, ambling, or "moseying" along. He never participated in the riot or violence in any manner. He made no effort to incite or move others to action or violence. When asked how to drive the marshals out, he said: "You don't."

Throughout the trial Walker maintained the firm position that because of his opposition to the use of Federal troops within a State, and his personal knowledge of the deviation between the occurrences at Little Rock where he was indeed in command and the newspaper stories of those occurrences, that he was at Oxford to see for himself at firsthand what was actually going on. He maintained that he did not assume command of the crowd, did not lead a charge, and did not participate in the rioting. He was present for the sole purpose of observing. The jury saw

him, observed his demeanor, heard what he said, and believed him.

" 'No evidence' points must, and may only, be sustained when the record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclusively the opposite of the vital fact." 38 Tex. Law Review, pp. 361, 362, supra.

Subdivisions (a) and (b) above have no application to the record or the facts in this case. As to (c) we have viewed the evidence in its most favorable light in support of the findings of the jury upon which the judgment of the Court is based, considering only the evidence and the inferences which support the findings and rejecting the evidence and the inferences which are contrary to the findings. In the application of this test we have determined that all of the findings of the jury, upon which the Court based its judgment, are supported by ample evidence. Having reached this conclusion it follows that we find no merit in the appellant's contention that the evidence establishes conclusively the opposite of what the jury found. We find that none of the situations discussed by Judge Calvert under (a), (b), (c) or (d) is disclosed by the record. Further we have concluded from our study and examination of the entire record that the findings of the jury upon which the Court based its judgment is not so contrary to the great weight and preponderance of the evidence as to be clearly wrong or unjust.

Appendix B
Opinion of the Texas Court of Civil Appeals

Jurors are the exclusive judges of the controverted issues of fact raised by the evidence, of the weight to be given the evidence, and the inferences to be drawn therefrom. They are the exclusive judges of the credibility of the witnesses. "The law does not attempt to tell jurors what amount or kind of evidence ought to produce a belief in their minds. They may believe a witness although he has been contradicted. They may believe the testimony of one witness and reject the testimony of other witnesses. They may accept part of the testimony of one witness and disregard the remainder." McCormick & Ray, Texas Law of Evidence, § 3; Austin Fire Ins. Co. v. Adams-Childers Co., 246 S. W. 365 (Tex. Com. App., 1923).

"The mere fact that a verdict is against the preponderance of the evidence will not authorize a reviewing court to set it aside, if there is some evidence to support it, or evidence that would support a verdict either way. The court of civil appeals will set aside the verdict and findings of a jury only in cases where they are so against such a preponderance of the evidence as to be manifestly unjust or clearly wrong, or where they show clearly that the finding or verdict was the result of passion, prejudice, or improper motive, or in such obvious conflict with the justice of the case as to render it unconscionable." 4 Tex. Jur. 2d, p. 395, § 838, and authorities cited therein.

"Where evidence is conflicting, a reviewing court will not disturb the jury's verdict or findings if there is evidence of probative value to support them, unless the evidence is so overwhelming against the verdict or findings as to shock the conscience or show clearly that the conclusion reached was wrong or was the result of passion, prejudice or improper motive.

Appendix B
Opinion of the Texas Court of Civil Appeals

"The findings on conflicting evidence are usually regarded as 'conclusive,' 'binding,' or 'decisive,' and will be 'adopted' or 'accepted' as the findings of the appellate court, unless some good reason is presented that would justify the court in taking some other view.

"A jury finding on facts will not be set aside because it does not appear to be clearly right; it must appear to be clearly wrong before the appellate court will disturb it.

"The fact that the appellate court would not have found as the jury did is not the test to be applied on appeal. The true test is that made by the jury, on firsthand evidence, adduced before them from living witnesses whose credibility and the weight to be given their testimony were determinable by the jury. Where the jury's findings are in accord with the testimony of different disinterested witnesses, the fact that there is other testimony to the contrary does not authorize the appellate court to overturn the verdict. . . ." 4 Tex. Jur. 2d 390, § 837, and authorities cited therein.

In the application of the rules of law and the authorities above referred to, we overrule all points of error relating to the quantity or quality of the evidence supporting the findings of the jury upon which the Court based its judgment.

We find no error on the part of the Court in permitting Walker to testify that he did not assume command of the crowd.

He testified that he became a professional soldier upon completing four years at West Point in 1931 when he was commissioned as a Second Lieutenant. He had combat experience in the Mediterranean, European and Asiatic Theatres during World War II and in Korea. He finally

attained the rank of Major General. During the course of the trial Walker testified on several occasions without objection that during the Little Rock matter he took command of the troops, was assigned as commander or that the troops were under his command. In connection with the occasion in question at Ole Miss he was asked if he, "participated in any way in any activity of the crowd that was throwing things at the Marshals?" He answered without objection that he had not participated in any way. He was then asked if he assumed "any command over this crowd." Objection was made on the ground that the answer would be a conclusion on the part of the witness. The Court permitted Walker to answer and he stated, "I certainly did not" and in response to another question he answered without objection that he certainly knew what it meant to assume command. The news item in question had identified Walker as the former Major General who commanded the 101st Airborne Division at Little Rock followed by the statement, "Walker assumed command of the crowd."

The Article in question stated as a fact that Walker had "assumed command of the crowd." We think that Walker, subject of this remark, had the right to deny or affirm the truth of it. We think that the opinion in Goode v. Ramey, 48 S. W. 2d 719 (El Paso Civ. App., 1932, refused), is applicable. Therein it was stated, "We are not prepared to say under the record, as presented here, that it was error to admit the statement of the witness. The issue sought to be proved was not a mixed question of law and fact, but purely a fact question. We think the issue was one upon which a witness in possession of all the facts may properly state his opinion or conclusion to which such facts would fairly lead, notwithstanding the

witness' answer may embrace the very issue to be submitted to the jury. The conclusion of the witness is then testified to like any other fact to be considered by the jury for what they may believe it to be worth. Scalf v. Collin County, 80 Tex. 514, 16 S. W. 314; Adkins-Polk Co. v. John Barkley & Co. (Tex. Civ. App.) 297 S. W. 757; International & G. N. R. Co. v. Mills, 34 Tex. Civ. App. 127, 78 S. W. 11."

If we are mistaken in holding that the testimony of Walker was admissible we nevertheless overrule the point of error because we are of the opinion that the error, if any, in admitting the testimony, was harmless within the meaning of Rules 434 and 503, T. R. C. P.; Dallas Railway & Terminal Co. v. Bailey, 250 S. W. 2d 379, 151 Tex. 359 (Sup. Ct., 1952).

Fair Comment

The appellant contends that the "charge" and "command" statements constituted fair comment and thus were privileged under the provisions of Art. 5432, V. A. C. S. We find and hold that both the "charge" and the "command" statements were statements of fact and not of comment. *"Walker, who Sunday night led a charge of students against federal marshalls . . . ."* and *"Walker assumed command of the crowd . . . .",* (emphasis added) are positive statements of fact. Truth of the statements would constitute a complete defense. Appellant failed in its effort to establish this defense to the satisfaction of the jury which found that neither of the statements were substantially true.

Appendix B
Opinion of the Texas Court of Civil Appeals

In an article on "Fair Comment" by John E. Hallen, 8 Tex. Law Review 41 (1929-30), the author in discussing Art. 5432, V. A. C. S., states: "The 1927 Libel Law provides:

" 'The publications of the following matters by any newspaper or periodical shall be deemed privileged and shall not be made the basis of any action for libel . . . .

" '4. A reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern published for general information.'

"Paragraph 4 was in no way changed by the 1927 amendments and has appeared exactly in that form since 1901.

". . . the right of fair comment was not created by the statute. It is well recognized by the common law. Every one has the right to comment on matters of public interest and general concern and within limits is not liable for stating his real opinion on such subjects, however severe the criticism may be. It is immaterial whether or not the criticism is sound, or whether the court or jury would agree with it, so long as it represents the honest opinion of the speaker upon a matter of recognized public interest.

"The statute expressly declares that fair comment by newspaper and periodicals is privileged. But since this right was enjoyed by everyone at common law, the statute gives the newspaper no added privileges. Nor is it to be construed as taking away the common law defense of individuals. . . . (p. 41)

"It should be remembered that there is a distinction between comment or criticism, which is the opinion of the

speaker or writer upon certain facts, and the facts upon which that opinion is based. A misstatement of fact cannot ordinarily be justified by a plea of fair comment. . . . (p. 43)

"It has already been said that fair comment is a criticism, discussion, or expression of opinion upon existing facts and does not protect against a misstatement of the facts themselves. The question of what should be called fact and what comment is difficult. . . ." (p. 53)

"Texas has swung from its early holding in the Copeland Case (Express Printing Co. v. Copeland, 64 Tex. 354 (1885) that an untrue charge of crime, honestly and reasonably made, about a public officer, is privileged, to its present position that such a charge cannot be justified by a newspaper. In following its present doctrine Texas is supported by the weight of authority, and there are strong reasons for its holding." (p. 99)

An article under the heading of "Libel and Slander—Fair Comment—Statements of Opinion" by Tom J. Mays appears in 16 Tex. Law Review 87 (1937-38). He commences with, "A judicial warning to the press with respect to comment and criticism upon matters of public interest is discernable in the recent decision of Houston Printing Co. v. Hunter." 105 S. W. 2d 312 (Fort Worth Civ. App., 1937), affirmed 106 S. W. 2d 1043 (Tex. Sup., 1937). The article continues, "That fair comment and criticism upon such matters is qualifiedly privileged is quite generally recognized both at common law and in Texas by statute. On the other hand, where false allegations of fact are made regarding matters of public concern, the courts are not in accord. Perhaps a majority of the courts hold that false allegations of fact are not entitled to immunity even though

made in good faith and without malice. . . . . Texas is clearly in line with the majority, holding that falsification of the facts is never privileged.

"Although the distinction between statements of fact and statements of opinion or comment has been freely recognized, it is generally conceded that distinguishing the two becomes a difficult problem in many cases." (p. 88)

"Most of the cases, it seems, wherein the words are held actionable as statements of fact, have found imputation of malfeasance, misconduct, or corruption in office, or imputations of evil or corrupt motives in the administration of duties. These being treated as statements of fact, then certainly a false imputation of crime committed by a public officer or candidate would be actionable as a statement of fact in Texas. (pp. 89-90) . . .

"It is manifest that some method is needed by which to distinguish between statements of fact and comment; and it is equally certain that no absolute test can be laid down. But it is submitted that more desirable and satisfactory results can be reached." (p. 90)

The author suggests the following test by which to distinguish statements of fact from comment, "Where the statements alleged to be libelous can be reasonably construed by the reader as an expression of opinion only, on the basis of facts either already known to the reader or else reasonably assumed by the person writing the statement to be known to the reader, then it should be regarded as fair comment. Where, however, the statement alleged to be libelous, as reasonably construed, conveys to the reader not only an expression of the writer's opinion, but also certain supposed information, and this information conveyed does not accord with the true facts, it is not comment, but should be treated as a statement of fact.

Appendix B
Opinion of the Texas Court of Civil Appeals

"Under this test, whether a publication will be treated as a statement of fact and libelous, if untrue, will depend upon the surrounding circumstances of each particular case. Under such a guidance, even an imputation of crime might be held to be merely an expression of opinion and not actionable." (p. 91)

In, "The Press and the Law in Texas" by Norris G. Davis, University of Texas Press, Austin, 1956, it is stated that, ". . . the right of fair comment is a weak defense in most libel suits. It is subject to so many limitations that it is seldom completely applicable. There are three groups of limitations. First, the comment must be limited to matters of public concern. Second, the article must be a statement of opinion—or comment—rather than a statement of fact, a very difficult distinction to make. Finally, the comment must be reasonable and fair and made in good faith, and this limitation is also difficult to define." (p. 65)

"Even if the subject matter and the person concerned are clearly matters of public concern, there remains two severe limitations. One of these, the requirement that the story or article must be comment, not a statement of fact, has caused by far the most trouble. The separation of comment from factual statements in most stories and articles is extremely difficult, and Court decisions have shown confusion on the point." (p. 67) "One important rule developed for separation of fact and comment is the theory that imputation of dishonest motives to a public official or imputation of an act constituting a crime under the law is a statement of fact and cannot be considered fair comment." (p. 68) San Antonio Light Pub. Co. v. Lewy, 113 S. W. 574 (CCA of Texas, 1908, Ref.); Forke v. Homann, 39 S. W. 210 (CCA of Texas, 1896, ref.). The author in reference to the article by Mays in 16 Tex. Law Review 87

Appendix B
Opinion of the Texas Court of Civil Appeals

(1937-38), states: "One writer who has studied the fair-comment cases in Texas and has found the same confusion illustrated here has offered the following definitions of 'opinion statements' and 'fact statements.'" (p. 73) He then quotes the test suggested by Mays and continues: "Certainly the courts should become aware of the need to distinguish statements of fact from opinion on a less arbitrary basis than is now customary. If the Supreme Court would adopt such a definition as the one quoted above, it would do much toward creating such an awareness. Actual differentiation of fact and opinion would still be difficult, but court decisions would be more just. (p. 74)

"Actually, it is clear that almost any story, editorial, or other type of news article must be a mixture of statements of fact and comment, even though the writer attempts to confine himself to comment. Any type of comment, in implication at least, must be based on fact; and newsmen know that the most effective comment is that based on startling and important statements of fact. Newsmen should therefore be prepared to prove the truth of any statement of fact and to rely on fair comment as defense only for the conclusions drawn from these true facts. They should strongly urge the courts also to make the distinction between fact and opinion rather than, as they so often do, plead all defenses to all parts of a story alleged to be libelous." (p. 74)

In our opinion the test suggested by Mr. Mays and favorably commented on by Mr. Davis is a good one. We think that its application to the facts in this case support our holding that the statements involved were statements of fact and that the appellant was not prepared to prove the truth of either statement. The information conveyed was not in accord with the true facts. Reference is made to the

complete text of the articles above referred to and the authorities cited therein. See also 36 Tex. Jur. 2d, Libel and Slander, §§ 87, 89, 92 and 171 together with cases cited under each.

We find no merit in appellant's contention that the reports, made without malice, are protected from the claim of libel by the First and Fourteenth Amendments to the United States Constitution. These Amendments prohibit Congress from making laws abridging freedom of speech and of the press and the State from making or enforcing laws of similar nature.

"The interest of the public in obtaining information about public affairs and of the defendant in discussing such matters is often brought directly in conflict with the plaintiff's claim to his own good name, and the law must draw a line between them. . . . (8 Tex. Law Rev. 41, p. 98)

"It is not true that false and derogatory statements about a man's character are today always actionable. If they were, the whole defense of privilege would be swept away. Nor is it true that everything may be justified under a defense of free speech or press. These rights as embodied in constitutions and statutes, were designed primarily to prevent interference by the government with a man's talking or writing, and not to do away with responsibility for what was said. If 'Freedom of the Press' always furnished a complete defense there could be no such tort as libel. . . ." (8 Tex. Law Rev. 56)

"It is submitted that any decision based entirely upon the right to an inviolate character or freedom of speech is unsound. Either doctrine given full sway would annihilate the other. . . ." (8 Tex. Law. Rev. 61)

"Articles 5430, 5431, 5432, and 5433, Vernon's Texas Civil Statutes, 1948, clearly declare the policy of this State

regarding the question of libel. The law protects the right of a citizen to defend his reputation and good name from libelous publications, and this right is zealously guarded. Bell Pub. Co. v. Garrett Engineering Co., 141 Tex. 51, 170 S. W. 2d 197; Belo & Co. v. Looney, 112 Tex. 160, 246 S. W. 777; Express Pub. Co. v. Keeran, Tex. Com. App., 284 S. W. 913." Fitzjarrald v. Panhandle Pub. Co., 228 S. W. 2d 503 (Tex. Sup., 1950).

We find no application of the authorities cited by the appellant to the facts of this case.

LIBELOUS PER SE

Did the Court commit error in holding as a matter of law that the "charge" and "command" statements were libelous per se, rather than to submit same to the jury for its determination? We think not. The language contained in the statements is not ambiguous. There can be no doubt as to the meaning of either.

Each of the statements imputed to Walker the crime of insurrection against the United States. It is undisputed that the crowd on the Ole Miss Campus was engaged in rioting and by force intefering (*sic*) with the efforts of U. S. marshals to enforce an executive order of the President of the United States issued under sanction of law and of applicable statutes. Insurrection is punishable by fine or imprisonment or both.

The statements further imputed to Walker responsibility for the death of two men and of the wanton destruction of property, all accomplished by students and others under his leadership and direction. The onslaught of the riotous crowd "led" by Walker who had "assumed com-

mand" was such that Van Savell considered he was, "lucky to have been arrested and glad to be behind closed, heavily guarded doors."

It imputed that Walker, who "advised on several tactics," none of which were ever specified, directed or advised on the making and use of the molotov cocktails (gasoline bombs) and other offensive weapons used by the rioters.

"The court should construe the meaning of unambiguous language, pass on its defamatory character, and instruct the jury accordingly. But where the language is ambiguous or of doubtful meaning there is a question for the jury." 36 Tex. Jur. 2d 496, § 166; p. 482, § 156 of the same text and cases cited under each. Fitzjarrald v. Panhandle Pub. Co., supra.

"To charge a person with or impute to him the commission of any crime for which punishment by imprisonment in jail or the penitentiary may be imposed is slanderous or libelous per se." 36 Tex. Jur. 2d 288, § 7; H. O. Merren & Co. v. A. H. Belo Corp., 228 F. Supp. 515.

"Any written or printed language tending to degrade a person in the estimation of honorable people, or imputing to him disgraceful or dishonorable acts, is libelous per se." 36 Tex. Jur. 2d 297, § 13.

"The language claimed to be defamatory must be taken as a whole. Thus, a newspaper article must be considered in its entirety in determining the sense in which its language is used, and whether the article, or a particular statement therein, is libelous." 36 Tex. Jur. 2d 313, § 27.

" 'Libelous per se' means that written or printed words are so obviously hurtful to person aggrieved by them that

they require no proof of their injurious character to make them actionable." Rawlins v. McKee, 327 S. W. 2d 633 (Texarkana Civ. App., 1959, ref., n.r.e.).

"Defamatory language may be actionable per se, that is, in itself, or may be actionable per quod, that is, only on allegation and proof of special damages. The distinction is based on a rule of evidence, the difference between them lying in the proof of the resulting injury. Language that necessarily, in fact or by a presumption of evidence, causes injury to a person to whom it refers is actionable per se. In other words, the defamatory words must be of such a nature that the court can presume as a matter of law that they will tend to disgrace and degrade the person or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided. Where the language is actionable per se damages are conclusively presumed and need not be proved." 36 Tex. Jur. 2d 280, § 2.

"To be libelous a publication must be defamatory in its nature, and must tend to injure or impeach the reputation of the person claimed to have been libeled. The language used, taken in connection with the facts and circumstances alleged by way of innuendo, must be reasonably calculated to produce one or more of the results mentioned in the statutory definition; that is, it must have the effect of injuring or tending to injure the person to whom it refers to the extent of exposing him to public hatred, contempt, ridicule, or financial injury, or to impeach his honesty, integrity, or virtue.

"It is not necessary, however, that the language have all the injurious or pernicious tendencies enumerated in the statute; it is actionable if it has any of them. . . .

Appendix B
Opinion of the Texas Court of Civil Appeals

"A publication that tends to subject the plaintiff to public contempt, or that impeaches his integrity or reputation, is libelous though it does not charge him with a crime.

"The term 'public hatred,' as found in the statutory definition, signifies public or general dislike or antipathy." 36 Tex. Jur. 2d 285, § 6.

DAMAGES

In connection with special issue No. 9 the jury was instructed that it may take into consideration such damages, if any, to the reputation of the plaintiff and such mental anguish, if any, and humiliation, if any, and embarrassment, if any, which plaintiff may have sustained as a direct and proximate result of the statements inquired about. The jury awarded $500,000.00.

From our investigation and study of the record we are unable to find any legal justification to disturb the award of damages. If any improper influences were present they do not appear from the record. Under the pleadings the appellee sought damages, including exemplary damages, in the sum of $2,000,000.

"Mental suffering on the part of the person defamed is one of the direct results of a libel or slander. Accordingly, injury to the feelings, humiliation, and anguish of mind are proper elements of compensatory damages, provided they are the direct and proximate result of the defamation. This suffering is classed as general damages, that are presumed to have been sustained, and that, in actions for libel, are recoverable under a general averment, without specific proof that they were incurred, and, by virtue of statute, regardless of whether there was any other injury or damage,

even though the publication was not libelous per se." 36 Tex. Jur. 2d 402, § 98.

"The plaintiff is entitled to compensation for injury to his character or reputation caused by the defamation. . . . It follows that the jury, in fixing the amount of recovery, may consider the loss of, or injury to, character or reputation, even though there is no proof thereof nor any proof of good character. . . ." 36 Tex. Jur. 2d 400 § 97.

"In other words, a general allegation of damages will admit evidence of those damages naturally and necessarily resulting from the defamation charged. It is unnecessary to itemize the elements of general damages; rather, the amount may be alleged in the aggregate. Thus, the plaintiff need not aver the nature, character or extent of the mental suffering caused, or even that he thereby suffered any agony, but it is sufficient to aver the damages he sustained by reason thereof. . . ." 36 Tex. Jur. 2d 445, § 126.

"Generally speaking, the damages resulting from a libel or slander are purely personal and cannot be measured by any fixed standard or rule. The amount to be awarded rests largely in the discretion of the jury, or the court in a case tried without a jury, and an appellate court will not disturb the verdict or award unless it appears from the record to be excessive or the result of passion, prejudice, or other improper influence. . . .

"In fixing the amount the jury may take into consideration the motives of the defendant, and the mode and extent of publication. . . ." 36 Tex. Jur. 2d 405, § 102.

EXEMPLARY DAMAGES

By counter-points the appellee contends the court erred in setting aside the findings of the jury in response to

special issues Nos. 4, 8, 10 and 11, which related to malice and exemplary damages.

Issues Nos. 4 and 8 inquired if appellant was actuated by malice, and malice was defined, "you are instructed that by the term 'malice' is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it."

The appellee had the burden of proving that the appellant's act or acts were such as to fall within the above definition before he was entitled to a finding of malice and exemplary damages.

The statement of facts consists of eleven volumes and 2126 pages. The entire record has received our close and sustained attention.

In view of all the surrounding circumstances, the rapid and confused occurrence of events on the occasion in question, and in the light of all the evidence, we hold that appellee failed to prove malice as defined, and the trial court was correct in setting aside said findings.

We think there is yet another reason to support the Court's action in disregarding the jury's answers to the issue relating to malice and exemplary damages, namely, the lack of necessary pleadings and proof required under the holdings in Western Union Tel. Co. v. Brown, 58 Tex. 170 (Tex. Sup., 1882); Wortham-Carter Pub. Co. v. Littlepage, 223 S. W. 1043, p. 1046 (Fort Worth Civ. App. 1920, no writ hist.), and Fort Worth Elevators Co. v. Russell, 70 S. W. 2d 397 (Tex. Sup., 1934).

The record leaves some doubt as to whether A. P. is an incorporated or an unincorporated association. It does

appear, however, that its composition, the manner in which it functions, and its organizational set-up is more akin to a corporation than not and that the holdings in the above cited cases would be applicable.

We think the record in this case will support our view. Certainly, A. P. is not an individual. Having no mind and being an entity only by a fiction of law, it must be held incapable of entertaining actual or express malice unless the requirements of the holdings in Fort Worth Elevators Co. v. Russell, Western Union Tel. Co. v. Brown and Wortham-Carter Publishing Co. v. Littlepage, supra, are complied with. A. P. is referred to as a corporation in the appellee's brief.

Jury Misconduct

We find no error in the action of the Court in overruling the appellant's amended motion for new trial because of alleged misconduct of the jury.

During a general discussion of the case a juror remarked that the A. P. (or news media generally) was always hurting someone by the printing of false or malicious reports or words to this effect. There was considerable discrepancy in the testimony of the five jurors called to testify on the motion for new trial as to whether the reference was to the A. P. or to news media generally. It was a casual statement. "Nobody made any comment at all" about it. It is undisputed that it was quickly dropped. Who made the statement, which jurors or how many probably heard it or specifically at what stage in the proceedings the statement was made was not shown. It was dropped and not again mentioned. The jury discussed and answered the

issues in order. They were 11 to 1 on the issues preceding those relating to malice and exemplary damages. While discussing these issues a remark was made that the full amount should be awarded because the A. P. had plenty of money and it was mentioned "about the Georgia football coach (Wally Butts) collecting." The jurors were in dispute as to whether the statement concerning Butts was ever made. It is without dispute that the statements were made after the jury had already found damages in the sum of $500,000 and were considering the issues on malice and exemplary damages.

The juror who was the last to agree on the $500,000 was the juror who stopped the discussion as to how much money the Press had. He pointed out that it did not make any difference and was out of order. The matter was promptly dropped. The only answers which could have been influenced or affected by such statements, if any, were those to the issues on malice and exemplary damages and these findings of the jury were disregarded by the Court on other grounds in the rendition of judgment.

In order to justify a new trial under Rule 327, T. R. C. P., the movant has the burden of establishing to the satisfaction of the Court that it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted by reason of the alleged jury misconduct. The appellant failed to meet its burden under this rule.

The trial court in its findings of fact and conclusions of law found that none of the statements singly or collectively induced any juror to change an answer or vote differently than he would otherwise have done. That there

was no showing of probable injury to the appellant because of such statements.

"When a trial court hears the testimony of jurors on an issue of misconduct, alleged to have occurred during the jury's deliberation upon its verdict, he is accorded the same latitude in passing upon the credibility of the witnesses and of the weight to be given to their testimony as the jury had upon the trial of the original cause. If there be any inconsistencies or contradictions in the testimony of a witness upon the hearing of a motion for new trial, it rests within the sound discretion of the trial court to harmonize and reconcile such conflicts so far as possible. A juror's testimony upon such hearing may be so contradictory and inconsistent that the trial court in exercising its privilege to pass upon the credibility of the witness may be justified in disregarding his entire testimony. Carl Construction Co. v. Bain, 235 Ky. 833, 32 S. W. (2d) 414." Monkey Grip Rubber Co. v. Walton, 122 Tex. 185, 53 S. W. 2d 770 (1932).

In our opinion the alleged improper statements, when viewed in the light of the evidence on the motion for new trial and on the trial of the case and on the record as a whole, did not probably result in injury to defendant. Rules 327 and 434 T. R. C. P.

Having considered each of the appellant's points of error and the cross-points raised by the appellee and having concluded that each should be they are each and all accordingly overruled, and the judgment of the trial court is affirmed.

Per Curiam

July 30, 1965

APPENDIX B

Opinion of the Trial Court

CHAS. J. MURRAY
District Judge
17th Judicial District of Texas
Civil Courts Building
Fort Worth 2, Texas

July 29, 1964

Mr. C. J. Watts, Attorney
219 Couch Drive
Oklahoma City, Oklahoma

Mr. William Andress, Jr., Attorney
627 Fidelity Union Life Building
Dallas 1, Texas

Mr. J. A. Gooch, Attorney
1800 First National Bank Building
Fort Worth, Texas

Gentlemen:

I am entering judgment for the plaintiff on the jury verdict as to special issues one, two, three, five, six, seven and nine, and judgment for the defendant as to issues four, eight, ten and eleven.

At the time the charge to the jury was being prepared, you will recall I expressed the opinion that the alleged libelous statements contained in special issues one and five were statements of fact and not opinion, and, at least as to the statement set out in issue number one, was a charge of a commission of a crime. I submitted the defense of truth as to the statements, and the jury found that they were not substantially true. I believe there is evidence to support these findings. I now have some doubt as to whether I should

have submitted the statement, "Walker assumed command of the crowd," because it does not accuse Walker of the commission of a crime. However, in view of my decision as to special issue number one, this is immaterial.

I submitted issues as to fair comment and good faith (despite my then expressed opinion that they did not constitute defenses to a statement of fact charging the plaintiff with commission of a crime) so as to get jury findings and thus avoid a new trial in the event an appellate court disagreed with my conclusions. Since the jury answered issues two, three, six and seven as they did, I concur with these answers as a matter of law.

Turning now to issues four, eight, ten and eleven, I find there is no evidence to support the jury's answers that there was actual malice by Associated Press in publishing the stories of October 2 and 3, 1962. As you will recall, I also expressed doubt when the charge was being prepared as to whether I should even submit malice and did so only to get a jury finding as I did on the defendant's claimed defenses of fair comment and good faith.

Under Texas Law, the news stories complained of are not of themselves evidence of malice without further proof. Plaintiff claims that malice is shown by the failure of the Associated Press to check the story written by its young reporter, Van Savell, because there was a conflict between the story as written, and as related by Savell to Thomas, an AP employee in its Atlanta office. This alleged conflict related only to whether General Walker led a charge against the federal marshals *before* rather than *after* his speech to the students on the Confederate Monument. I fail to ascertain how the failure to check such a minor discrepancy could be construed as that *entire want of care* which would

amount to a *conscious indifference* to the rights of plaintiff. Negligence, it may have been; malice, it was not. Moreover, the mere fact that AP permitted a young reporter to cover the story of the riot is not evidence of malice. Wisdom and good judgment do not necessarily come with age, nor are they necessarily denied youth. In my opinion New York Times vs. Sullivan, 11 L. ed. 2nd 686; Wortham-Carter Publishing Company vs. Littlepage, 223 SW 1043 and Fitzjarrald vs. Panhandle Publishing Company, 228 SW 2nd 499, support these conclusions.

Plaintiff's (*sic*) urge that this case is comparable to United Press International, Inc. vs, Mohs (Eastland Court of Civil Appeals—unreported) decided on June 26, 1964. I do not agree. In the UPI case, Miller, the night editor of UPI, *knew* that another story had been written at and sent from his UPI office the same night as the second story found to be libelous. The first story contained no statement that Mohs had been ordered arrested and handcuffed; that Mohs had been caught lying or that he had been charged with any offense for landing his plane on White Rock Lake in Dallas. Between the time this first story was written and sent from UPI's office, someone in this office called the police headquarters and learned that as far as the police knew, Mohs had not been charged with any offense. Miller himself, nor anyone in his office, made any attempt to verify the facts of the landing on the lake, other than the call to police headquarters, yet Miller then distributed the second story which said that Mohs had been arrested, handcuffed and charged with violation of a city ordinance for landing on the lake. None of this was true. This second story was based on information received from one DeHarrow. Miller knew the story (the first one) previously written in his office was materially different from the story related by

DeHarrow (the second story). He had many reasons to question the truth of the story attributed to DeHarrow, but made no attempt to check it. The Eastland Court found that these facts raised jury issues "as to whether there was such a want of care as could raise the belief that his acts (and thus the acts of UPI) were the result of a conscious indifference to the rights of Mohs."

As I have stated above, in the Walker case the only discrepancy was whether Walker led a charge before or after his speech on the monument, and not whether he did or did not lead a charge at all. This evidence falls short of that set out in the UPI vs. Mohs opinion.

Since I have determined that there is no actual malice in this case, the question arises as to whether the rule of New York Times vs. Sullivan (which prohibits a public official recovering damages for libel when there is no actual malice) should apply to a public figure such as plaintiff. If it does, then the entire jury verdict must be set aside, and judgment entered for defendant.

The evidence is undisputed that General Walker was a public figure at the time of the riot on the Old Miss Campus.

Freedom of the Press is perhaps the most important protection against tyranny that we find in a free society. Without it, the public could not know whether one's right to speak, to worship his creator as he chooses or to enjoy a fair trial had been abridged. Americans everywhere depend on news media of all types to provide accurate information on the daily affairs of men and nations. This imposes a great duty and responsibility on the news gathering and distributing agencies of this country, and they should be protected to the extent necessary for them to properly function.

Appendix B
Opinion of the Trial Court

However, I see no compelling reasons of public policy requiring additional defenses to suits for libel. Truth alone should be an adequate defense. The Sullivan case is limited, and I feel it should be limited, in its application to public officials. It does not apply to this case.

Jury findings as to issues four, eight, ten and eleven are set aside, and judgment will be entered for the plaintiff in the amount of $500,000.00 and costs.

Very truly yours,

/s/ CHAS. J. MURRAY
Charles J. Murray, Judge
17th District Court

CJM: oec

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APPENDIX C

Portions of Record Raising Constitutional Questions Below

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

IN THE

DISTRICT COURT OF

TARRANT COUNTY, TEXAS

17TH JUDICAL DISTRICT

No. 31741-C

EDWIN A. WALKER

vs.

THE ASSOCIATED PRESS

SECOND AMENDED ORIGINAL ANSWER OF DEFENDANT, THE ASSOCIATED PRESS

Now comes defendant, The Associated Press, and makes and files this its Second Amended Original Answer directed to Plaintiff's Second Amended Petition, and says:

* * *

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Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

III.

By way of further answer herein, and without waiving any of the foregoing pleas, defendant, The Associated Press, would respectfully show to the Court and the jury that the plaintiff is not entitled to recover damages in this cause of any nature for each and all of the following reasons considering all the material facts and circumstances surrounding the plaintiff's alleged claim of damage:

(1)

Plaintiff by his own statements in pleadings filed in this cause has alleged that he resigned his Army Commission in order to speak out and install himself as a leader and public figure. Plaintiff, Edwin A. Walker, voluntarily injected himself into a situation of turmoil, resentment and excitement in Mississippi and of great national publicity and interest everywhere at the time he uttered certain public statements, more fully hereinafter alleged, on television, radio and to newsmen and by his subsequent trip to Jackson, Mississippi, and Oxford, Mississippi, at the very height of such tension and turmoil between September 10 and October 1, 1962.

(2)

The publications complained of in this action insofar as the same consist of comments were and are fair comments made in good faith upon facts which related to matters that were and are affairs of public interest, importance and concern and related to acts and utterances of plaintiff, a public figure, in public places and at public meetings.

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

(a) The background and events into which Walker injected himself are set forth in the following paragraphs.

(b) On or about May 31, 1961, one James H. Meredith, a colored person, filed a complaint in the United States District Court, Southern District of Mississippi, and on behalf of himself and all other colored students in the State of Mississippi similarly situated, against Charles D. Fair, President of the Board of Trustees of the State Institutions of Higher Learning in the State of Mississippi, and others connected with the University of Mississippi, seeking admission to said University. Thereafter, and on or about February 3, 1962, the United States District Court for the Southern District of Mississippi rendered a decision reported in 202 F. Supp. 224, denying Meredith rights of admission to the University of Mississippi.

Thereupon Meredith appealed to the United States Court of Appeals for the 5th Circuit, at New Orleans, and on or about June 25, 1962, said Court rendered a decision (*305 F. 2d 343*) in which said Court reversed the decision of the United States District Court, thereupon remanding said action, with directions to the United States District Court for the Southern District of Mississippi to grant forthwith the relief prayed for by Meredith and to issue a permanent injunction against each and all of the defendants in said suit and all persons acting in concert with them, as well as all persons having knowledge of said decree, and directing and compelling admission of the said Meredith to the University of Mississippi as a student.

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

(c) Thereafter, and on or about July 26, 1962, the United States Court of Appeals, 5th Circuit, at New Orleans, vacated certain stay orders signed by Federal Judge Ben F. Cameron, and further directed the U. S. District Court for the Southern District of Mississippi to enter the judgment and the injunction as theretofore ordered (306 F. 2d 374). On July 28, 1962, the said United States Court of Appeals for the 5th Circuit, at New Orleans, also entered a certain interim order to the same effect.

(d) Subsequently Judge Ben F. Cameron issued three other successive stays of execution of the mandate of the United States Court of Appeals, 5th Circuit, which ordered the admission of Meredith to the University of Mississippi, said stays to operate pending an appeal to the Supreme Court of the United States. On or about September 10, 1962, Mr. Justice Black of the U. S. Supreme Court entered an order (1) to vacate the orders of Judge Ben F. Cameron, and (2) that the judgment and mandate of the Court of Appeals for the 5th Circuit at New Orleans should be obeyed and immediately carried out, and (3) that pending any appeal, the parties were enjoined from taking any steps to prevent enforcement of the Court of Appeals, 5th Circuit, judgment and mandate.

(e) On or about September 13, 1962, the United States Court for the Southern District of Mississippi as directed by the U. S. Court of Appeals, 5th Circuit, at New Orleans, issued an injunction and ordered that the said Meredith be admitted to the University of Mississippi forthwith.

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

(f) On or about September 20, 1962, the said Meredith appeared on the campus of the University of Mississippi accompained by U. S. Marshals for the purpose of registering as a student pursuant to the orders of the United States Courts above set forth, but the Governor of Mississippi, the Honorable Ross Barnett, then and there rejected the application of the said Meredith to the University of Mississippi.

(g) Again, and on or about September 25, 1962, the said Meredith appeared at the offices of the Board of Trustees of State Institutions of Higher Learning, at Jackson, Mississippi, for the purpose of registering as a student pursuant to the prior orders of the United States Courts. When Meredith sought to enter the offices, as aforesaid, the Honorable Ross Barnett, Governor of the State of Mississippi, and certain officers acting under his direction, again barred the said Meredith and denied him admission to the University of Mississippi. On or about September 26, 1962, the said Meredith sought to enter the campus of the University of Mississippi where he was barred from so entering by the Honorable Paul B. Johnson, Jr., Lieutenant Governor of the State of Mississippi, and certain state police acting under his orders, thereby denying the aforesaid Meredith admission to the University of Mississippi. On September 25, 1962, the United States Court of Appeals for the 5th Circuit, at New Orleans, entered another restraining order against the Honorable Ross Barnett, Governor of the State of Mississippi, and other named officials in said State, and all persons in active concert or in partic-

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

ipation therewith, from interfering with or obstructing in any manner the admission of the said Meredith to the University of Mississippi.

(h) Thereafter, on the same day, the United States Court of Appeals for the 5th Circuit issued its orders requiring the aforesaid Ross Barnett, Governor of the State of Mississippi, and the Honorable Paul B. Johnson, Jr., Lieutenant Governor of the State of Mississippi, to appear before said Court and show cause why they should not be held in civil contempt for willfully disobeying the orders of the United States Courts and barring the admission of Meredith to the University of Mississippi, and on or about September 28 the said Court entered its judgment and order adjudging the said Ross Barnett and Paul B. Johnson, Jr. guilty of civil contempt and levied fines to continue on a daily basis unless on or before October 2, the said Governor and Lt. Governor should show to the Court that they had fully complied with all restraining orders of all the United States Courts, and that they had notified enforcement officers in the State of Mississippi to cease and desist from interfering with the orders of the aforesaid Courts and to cooperate with the officers and agents of the United States in the execution of all orders and injunctions to the end that Meredith would be permitted to register as a student at the University of Mississippi.

(i) That the attempts of the said James H. Meredith to enter the University of Mississippi and the actions of the authorities in Mississippi preventing his entry, and the actions of the various United States Courts in making and

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

entering said injunctions and mandates, as above set forth in the preceding paragraphs, had all been given wide publicity throughout the United States by newspapers, radio and television, and were matters of general knowledge and affairs of great public interest and concern prior to September 30, 1962. The plaintiff in this cause knew, or reasonably should have known of the court orders, injunctions and mandates herein pleaded based on knowledge acquired from an ordinary reading of the newspapers and reports from other news media and he also knew of the defiance of Governor Ross Barnett, Governor of the State of Mississippi, and of the Lt. Governor towards the fulfillment of the court orders of the United States Courts above set forth.

(3)

The plaintiff, the former Major General of the Army of the United States, following his resignation therefrom for the stated purpose of speaking out in protest as a private citizen, had made frequent public statements and had made an unsuccessful venture into politics as a candidate for Governor of the State of Texas.

Plaintiff was a well known public figure because of his long military career, his commands and duties with the Army of the United States, his role as Commanding General of the troops in the Little Rock, Arkansas, integration crisis in 1957, his resignation from the Army of the United States with the rank of Major General with the avowed statement and purpose of being able to protest and take a

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

stand and position in matters of public interest and affairs, and his candidacy for Governor of the State of Texas in 1962. With such background as a public figure, the plaintiff, during the critical times involved herein, between September 10, 1962 and October 1, 1962, injected himself into the Mississippi crisis with the request and/or notice for frequent press releases or conferences, from Dallas, Texas, Jackson and Oxford, Mississippi, and thereby invited comment as to his activities. His public utterances and statements were all in protest and opposition to duly constituted governmental and judicial authority and relating to the admission of Meredith to the University of Mississippi, and were in violation of the injunctive decrees issued by the United States Courts, as herein set forth, and in favor of the positions then being taken by Governor Ross Barnett and other officials in Mississippi who were seeking to obstruct Meredith's entry as a student at the University of Mississippi.

Notwithstanding such knowledge, the plaintiff by radio and other news media, beginning on or about September 27, 1962, and thereafter, called for Americans 10,000 strong from every State in the Union to go to Mississippi and rally behind Governor Barnett in his stand against admitting Meredith, saying, among other things, "It is now or never. Bring your flag, your tent and your skillet."

The plaintiff, Edwin A. Walker, further injected himself into the crisis in Mississippi by proceeding to Jackson, Mississippi, on or about September 29, 1962, when he made further press releases and statements, and by then proceed-

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

ing to Oxford, Miss., where he held a further press conference on September 30, 1962, at all of which he reiterated his previous position.

At about 4:30 P. M. on the afternoon of September 30, 1962, the U. S. Marshals under orders to enforce the judgments, injunctions and mandates of the United States Courts for the enrollment of Meredith as a student at the University of Mississippi, proceeded on to the campus at Oxford, setting up a ring substantially around or in front of the Lyceum Building on the campus. At about the same time, Meredith was escorted to another part of the campus. Immediately after the arrival of the Marshals, students and others began to congregate in the Circle and in the streets adjacent to the Lyceum Building, facing the Marshals, at first taunting them with jeers and remarks, subsequently throwing lighted cigarettes and missiles at the Marshals and at the vehicles in which they arrived. The temper of the crowd became worse and more unruly, and at about 8:00 o'clock P. M. tear gas was fired. Thereafter, the rioting increased by the hour as the night progressed, resulting in injuries to many persons and much property damage to personal property, automobiles and to the campus itself.

While the plaintiff was in Oxford, Mississippi, and on or about September 30, 1962, at about 8:00 o'clock P. M., a proclamation was made by the then President of the United States to the effect that the Governor of the State of Mississippi and certain other officials and other persons had been and were willfully opposing and obstructing the enforcement of the injunctions, orders and judgments of the United

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

States Courts and the President thereupon commanded all persons engaged in such obstruction of court orders to cease and desist and to disperse and retire peaceably forthwith. In addition, the President of the United States made a TV and radio appearance on the same date at about 8 o'clock P. M. in which he sought in substance the same compliance with court orders. Notwithstanding said proclamation of the President of the United States and the appeal of the President, the said plaintiff immediately thereafter proceeded to the campus of the University of Mississippi, at Oxford, arriving there at approximately 8:45 P. M. on the night of September 30 and stayed on said campus for a period of several hours thereafter. Following the widespread dissemination of plaintiff Walker's statements in the press, TV and radio, not only in Mississippi but elsewhere, the plaintiff's very presence on the campus tended to increase the emotional excitement, the explosive condition, the courage, fervor and rage of the mob, thereby increasing the dangers and damage from what at first had been a demonstration, to a riot, mob violence, and to more organized and determined attacks upon the U. S. Marshals. At the time of the arrival of the plaintiff on the campus, there had already been violence and injury to persons and property, all of which was known to the plaintiff or should have been known in the exercise of ordinary observation on the campus. On the occasion in question, the plaintiff was welcomed by the crowd as its leader and he then and there made a speech which further excited and enraged the mob and, at least on one occasion, the plaintiff did proceed as a part of a

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

generalized movement towards the Marshals at the Lyceum Building accompanied or followed by a crowd of students and others shouting and yelling defiance, some of whom when close enough to the Marshals hurled missiles toward them. On many occasions during the night in question, plaintiff would move back and forth through the Circle (an area in the vicinity of and near the front of the Lyceum Building where the Marshals were stationed). He also offered advice on how to make the tear gas bombs ineffective, and otherwise complimented, encouraged and urged on the crowd of rioters to further protest and to keep up what they were doing, all of which resulted in continual opposition to duly constituted governmental and judicial authority including violation of the injunctive decrees heretofore referred to.

Therefore, each and all of the statements complained of by plaintiff herein are fair comment and are privileged.

* * *

V.

By way of further answer herein and adopting all the allegations heretofore made herein, this defendant, The Associated Press, denies that any malice was involved or intended on the part of this defendant in the publication of any one or all of the articles or dispatches complained of, but was occasioned only by an effort in good faith—actuated solely by a sense of duty growing out of the occasion—to report to its members and to the public what this defendant believed to be an accurate report of the plaintiff's activities in the Mississippi crisis, and to make fair comment thereon, all of which is privileged.

Appendix C

Paragraphs III, V and VI of the Second Original Amended Answer of Defendant, The Associated Press, pp. 1 and 6-15 (Transcript, pp. 21 and 26-35)

VI.

By way of further answer herein and adopting all of the allegations heretofore made herein, this defendant denies that it was or is guilty of any conduct which would authorize the allowance of any damages, punitive or otherwise, but would further say that the allowance of any damages herein would amount to a restraint and deterrent to the publication of news and the freedom of the press as required by the First and Fourteenth Amendments to the Constitution of the United States. The publications complained of were published and circulated by the defendant among the general public; the information contained therein is true; it concerns the plaintiff, a public figure, and was related to public affairs and matters of great public concern, and the publication was made so that the public should be informed, and the same was made in good faith and without malice, so that the same is privileged. Further, the allowance of any damages under and by virtue of any rule of law as applied by the courts of the State of Texas would be in violation of the foregoing Constitutional safeguards and would be constitutionally deficient for failure to permit freedom of speech and press which are guaranteed by the Constitution of the United States. The allowance of any damages herein also would be violative of the Constitution of the State of Texas which prohibits the abridgement of the freedom of the press in Article I, Paragraph 8 thereof.

APPENDIX C

Defendant's Motion to Disregard the Jury's Verdict, and for Judgment Notwithstanding Said Verdict, pp. 1 and 4 (Transcript, pp. 63 and 66)

IN THE

DISTRICT COURT OF

TARRANT COUNTY, TEXAS

17TH JUDICAL DISTRICT

No. 31741-C

EDWIN A. WALKER

vs.

ASSOCIATED PRESS

DEFENDANT'S MOTION TO DISREGARD THE JURY'S VERDICT AND FOR JUDGMENT NOTWITHSTANDING SAID VERDICT

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the defendant, Associated Press, and moves the Court to set aside and disregard the verdict of the jury and each and every finding therein, and to render judgment for the defendant and against the plaintiff notwithstanding such verdict, and as grounds therefor would respectfully show as follows:

* * *

Appendix C

Defendant's Motion to Disregard the Jury's Verdict, and for Judgment Notwithstanding Said Verdict, pp. 1 and 4 (Transcript, pp. 63 and 66)

16.

Notwithstanding the verdict of the jury, the Court should render judgment for the defendant because any judgment awarding money damages to plaintiff against defendant would constitute a restraint and deterrent to the publication of news and a restraint, deterrent and denial of the freedom of the press as guaranteed to defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

APPENDIX C

Defendant's Original Motion for New Trial, p. 1
(Transcript, p. 73)

IN THE

DISTRICT COURT OF
TARRANT COUNTY, TEXAS
17TH JUDICIAL DISTRICT
No. 31741-C

EDWIN A. WALKER

vs.

THE ASSOCIATED PRESS

DEFENDANT'S ORIGINAL MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the defendant Associated Press, after entry of judgment herein on August 3, 1964, and makes and files this its Orginal Motion for New Trial, and moves the Court to set aside the judgment heretofore rendered against it and to grant a new trial herein, upon the following grounds, to-wit:

1.

The Court erred in overruling the motion for instructed verdict made by defendant after plaintiff had rested.

2.

The Court erred in overruling the motion for instructed verdict made by defendant after both sides had rested.

3.

The Court erred in overruling Grounds 1, 2, 3, 5, 6, 7, 8, 9, 11, 12, 13, 16 and 17 of defendant's motion to disregard the jury's verdict, and for judgment notwithstanding said verdict.

APPENDIX C

Defendant's Amended Motion for New Trial, pp. 1 and 3 (Transcript, pp. 78 and 80)

IN THE

DISTRICT COURT OF

TARRANT COUNTY, TEXAS

17TH JUDICIAL DISTRICT

No. 31741-C

EDWIN A. WALKER

vs.

THE ASSOCIATED PRESS

DEFENDANT'S AMENDED MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes defendant, The Associated Press, and with leave of the Court first had and obtained makes and files this its Amended Motion for New Trial, and would respectfully show as follows:

I.

The Court erred in overruling Grounds 1, 2, 3, 5, 6, 7, 8, 9, 11, 12, 13, 16 and 17 of Defendant's Motion to Disregard the Jury's Verdict and for Judgment Nothwithstand-

Appendix C

Defendant's Amended Motion for New Trial, pp. 1 and 3 (Transcript, pp. 78 and 80)

ing such Verdict for each and all of the reasons therein set forth, which said Grounds read as follows:

* * *

(16) Notwithstanding the verdict of the jury, the Court should render judgment for the defendant because any judgment awarding money damages to plaintiff against defendant would constitute a restraint and deterrent to the publication of news and a restraint, deterrent and denial of the freedom of the press as guaranteed to defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

APPENDIX C

Brief of Appellant The Associated Press in the Texas Court of Civil Appeals, pp. 1, 9 and 73-85

No. 16,624

IN THE

COURT OF CIVIL APPEALS

FOR THE SECOND SUPREME JUDICAL DISTRICT OF TEXAS
AT FORT WORTH

THE ASSOCIATED PRESS, *Appellant*

vs.

EDWIN A. WALKER, *Appellee*

FROM THE 17TH DISTRICT COURT OF
TARRANT COUNTY, TEXAS

APPELLANT'S BRIEF

* * *

POINTS OF ERROR

* * *

5.

The trial court erred in rendering judgment for plaintiff because defendant's news reports, made without malice, are protected from the claim of libel by the First and Fourteenth Amendments to the Constitution of the United States, and such judgment therefore abridges defendant's rights thereunder.

Appendix C

Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

(Page 73-85)

* * *

FIFTH POINT OF ERROR (Restated)

The trial court erred in rendering judgment for plaintiff because defendant's news reports, made without malice, are protected from the claim of libel by the First and Fourteenth Amendments to the Constitution of the United States, and such judgment therefore abridges defendant's rights thereunder. (Germane to Ground I(16) of the Amended Motion for New Trial).

ARGUMENT AND AUTHORITIES

Wide-Open Debate—A Profound National Commitment

In a series of public statements, already quoted in this brief, General Walker appealed to the world at large to rise and stand by Governor Barnett in Mississippi. When we are thus solicited by radio and television to help defy a court order and are informed that the Supreme Court of the United States consists of anti-Christ conspirators who have betrayed the Nation, we are not to suppose that this is double-barreled insurrection and calumny of the most dangerous and irresponsible sort. It is only General Walker exercising his constitutional rights to say what he pleases about others.

Appendix C

Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

But any comment on his activities provokes the indignant cry of "foul", and it is then that we are to forget and ignore the public battle of national controversy into which he charged, calling with caustic invective for others to follow, and are to concentrate instead on the wounds with which he says he emerged from it.

And it is just such a claim to unilateral privilege of expression that is repugnant to, and underscores the wisdom of, our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . ." *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R. 2d 1412; *Garrison* v. *Louisiana,* ..... U. S. ....., 13 L. Ed. 125, 85 S. Ct. .....

In the *Times* and *Garrison* cases, supra, the Supreme Court of the United States in 1964 held that truth may not be the subject of either civil or criminal sanctions where a discussion of public affairs is concerned. The court recognized that erroneous statement is inevitable in free debate, that it must be protected if the freedoms of expression are to survive, and that only false statements made with a high degree of awareness of their probable falsity may be the subject of either civil or criminal sanctions.

In the *Garrison* case, the Supreme Court, in applying its decision in the *Times* case to a criminal libel conviction, said, at page 133:

> ". . . Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since '. . . erroneous statement is inevitable in free debate, and . . . it must be pro-

Appendix C
Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

> tected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive" . . .,' 376 U.S. at 271-272, 11 L. ed. 2d at 701, 95 ALR 2d 1412, only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government."

In the case at bar, there is no evidence of malice, and the trial court correctly so held. The court erred, however, in refusing to apply the *Times* rule and render judgment for defendant regardless of the jury findings as to the truth of the statements in question. The trial judge was of the view that the *Times* rule is limited to statements about public officials, and hence did not apply to the case at bar (Supp. Tr.). In this conclusion, we respectfully submit, the court erred.

The decision of the Supreme Court in *Garrison* v. *Louisiana,* rendered in November of 1964, was not before the trial court when it rendered judgment in the present action.

To be sure, the actual holding of the *Times* and *Garrison* cases applied to public officials since the persons alleged to have been libeled in those cases were public officials. It is manifest, however, from the reasoning underlying the decisions that they cannot be so limited. Moreover, to so restrict the *Times* and *Garrison* rule would create constitutional anomalies of the most serious kind and would, indeed, engender the very dangers that the rule was intended to avoid.

Appendix C

Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

The touchstone of the *Times* and *Garrison* decisions was the premise that it is the purpose and philosophy of the First Amendment to insure free and uninhibited exchange of ideas on issues of public importance, even though such a freedom, like others, will result in some abuses. Quoting from Judge Learned Hand, the court in the *Times* case said that the First Amendment " 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' " The court then quoted the "classic formulation" of the principle:

> " 'Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing

Appendix C
Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

> majorities, they amended the Constitution so that free speech and assembly should be guaranteed.' "

Recognizing that "some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press," the court then quoted from an earlier opinion as follows:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of democracy."

In short, the holding of *Times* and *Garrison* is that, in the long run, freedom of expression on public matters is of overriding public importance regardless of the excesses and abuses that may occasionally result; and that the individual's claim for libel is pre-empted by the paramount public need for uninhibited debate on public issues.

Moreover, the court's heavy emphasis in the *Times* case on the opinion of the Kansas Supreme Court in *Coleman* v. *MacLennan,* 98 P. 281, leaves no doubt that the decision ex-

Appendix C

Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

tends to all matters of great public concern. The court quoted with approval the following from the Supreme Court of Kansas:

> "In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes *matters of public concern, public men,* and candidates for office." 78 Kan. at 723.

In *Pauling* v. *News Syndicate Co.,* 335 F. 2d 659 (2 Cir. 1964), an action for libel, the court said, as an alternative ground for its holding, that although the public official is the strongest case for the constitutional compulsion of the *Times* privilege with respect to the discussion of matters of public importance and concern, a candidate for public office would seem an inevitable candidate for extension, and that once that extension was made, the participant in public debate on an issue of grave public concern would be next in line.

In its opinion, the court said, at page 671:

> "Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension; if a newspaper cannot constitutionally be held for defamation when it states without malice, but cannot

Appendix C
Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

> prove, that an incumbent seeking re-election has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent. Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line; thus, as applied to the case in hand, if a newspaper could not be held for printing Dr. Pauling's charges that a member of the Atomic Energy Commission had 'made dishonest, untrue and misleading statements to mislead the American people' and that a United States Senator is 'the greatest enemy . . . the United States has,' as the New York Times case decided, one may wonder whether there would be sound basis for forcing it to risk a jury's determination that it was only engaging in fair criticism rather than misstating facts if it printed, falsely, but without malice, that in saying all this Dr. Pauling was following the Communist line."

In *Gilberg* v. *Goffi,* 251 NYS 2d 823, an action for libel, the rule of the *Times* case was applied to a mayor's law partner, who was neither an officeholder nor a candidate for office, but who had entered a public controversy as to whether a municipal code of ethics was needed to bar the mayor and his law firm from practicing law in the city court.

In *Pearson* v. *Fairbanks Publishing Co., Inc.,* (Superior Court of Alaska. Fourth District, No. 10,209), the action was to recover damages for libel. The alleged libel was the charge that the plaintiff, a newspaper and radio columnist, was the "Garbage Man of the Fourth Estate."

Appendix C
Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

The court, in taking note of the *Times* decision and holding that the publication complained of was not actionable, said, in an opinion not yet published, that "Drew Pearson, a public figure and internationally known newspaper and radio columnist of no mean proportion, should occupy the same standing in the law of libel as Senator Gruening whose cause he was publicly supporting."

In the case at bar, there can be no doubt that the question of school integration that came to a head in the Mississippi crisis was a matter of grave national controversy and concern. It was one of the most dominant and widely debated issues of this century. In the *Times* case, the Supreme Court referred to the integration question as "one of the major public issues of our time . . .", (at 701). This is also conclusively established in the record. The plaintiff was a national public figure (S.F. 331, 486, 516) and a recent candidate for public office. He knew that the question of integration was a matter of national controversy and interest (S.F. 759); he knew that his going to Mississippi would create considerable publicity (S.F. 922); he sought that publicity; he knew that there was an explosive situation on the campus and that feelings were high in Mississippi (S.F. 922); and that the Chief Executive of the State was openly obstructing the mandate of the Fifth Circuit Court. His repeated television and radio addresses called attention to himself and solicited support for the cause that he championed. That he deliberately and publicly became part and parcel of the controversy is not open to question.

Appendix C
Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

If the *Times* decision applies at all to matters of public concern and participants in debate on public issues, it clearly applies to plaintiff and his conduct in Mississippi. The publications complained of in the case at bar were not mere gossip about the plaintiff in some private capacity. The defendant was reporting the crucial events at Oxford, and plaintiff's voluntary presence brought him within the area of national controversy. As we have pointed out on pages 18-20 of this brief, prior to September 30, 1962 the U.S. Court of Appeals had rendered its judgment ordering the admission of James H. Meredith to the University of Mississippi. In furtherance thereof an injunction had been issued enjoining the school officials and all persons acting in concert with them, as well as all persons having knowledge of such decree, from interfering with Meredith's admission.

Despite these restraining orders, Governor Barnett continued to oppose the admission of Meredith to the University.

The plaintiff's declared purpose on the night of the riot —September 30, 1962—was to stand shoulder to shoulder with Governor Barnett in opposing the orders of the courts. He was in Oxford to support the Governor's position, and he occupied the same position from the standpoint of the law of libel as Governor Barnett, whose cause he was publicly supporting.

It would be a constitutional anomaly having neither substance nor shadow of basis in reason to hold on the one hand that Governor Barnett is within the *Times* rule, which

Appendix C
Brief of Appellant The Associated Press in the Texas Court of Appeals, pp. 1, 9 and 73-85

he clearly is, and yet to hold on the other hand that those who publicly rise to stand beside him, seeking with equal vigor and effect to rally public support for his cause, are not. Logically, the Constitutional protection, if it is to exist at all and have any fairness about it, must extend to the *area of public debate and to those who participate in it.*

If the *Times* rule were to be limited to public officials, a national press columnist or TV commentator could state falsely, but without malice, that a public official was a thief and clearly come within the ambit of the rule, but anyone who dared to enter the debate by publicly suggesting that the columnist or commentator was a liar in so stating, would be denied the same protection. This is scarcely wide-open debate. A defeated presidential candidate could spend the ensuing four years rallying public support by defamatory statements about the incumbent and enjoy the protection of the rule, but those who would criticize the challenger would have to do so without it. Such an anomaly can hardly be said to comport with the principle of uninhibited debate.

The Court can well imagine other examples, such as labor leaders, political party leaders, campaign managers, national magazines, and countless others who wield broad public power and have wide public support for themselves and those that they champion, but who hold no public office. Surely it would be unthinkable to hold that utterances made *about* them are to enjoy less protection than the clamor that *they* are free to utter about public officials under the *Times rule*. If the people are to be free to criticize the Government and those who comprise it, they must be free to

criticize the critics within the same latitude and under the same rule of law. To hold otherwise would create an imbalance of the freedom of expression and could conceivably result in an atmosphere in which an administration could be toppled by a rising Castro who, by virtue of holding no office, enjoyed freedoms of expression about the Government that were denied to those who would criticize him.

The repressing effect of a half million dollar award upon freedom of expression is so patent, the inhibiting effect upon the presentation of conflicting and controversial political argument so plain, and the punishment for such presentation so burdensome and oppressive that this Court may not, consistent with the First Amendment, permit its imposition. As the court said in the *Times* case:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."

Cf. *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963); *Marcus* v. *Search Warrant,* 367 U.S. 717 (1961); *Shelton* v. *Tucker,* 364 U.S. 470 (1960); *Speiser* v. *Randall,* 357 U.S. 513 (1958).

Finally, on this point, the import of the trial court's opinion is that though free press is important, so is accuracy, and that the need for accuracy "imposes a great duty and responsibility" on the press, in default of the discharge of which it forfeits its constitutional protection. (Supp. Tr.) We were unable to ascertain any rational basis for distingu-

ishing between "irresponsibility"—short of actual malice—in reporting on public officials and in reporting on other participants in public debate on public issues.

Moreover, while accuracy and responsibility of reporting are unquestionably desirable, they are not prerequisites to First Amendment protection. As the court said in *New York Times*:

> "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth, whether administered by judges, juries, or administrative officials—and especially not one that puts the burden of proving truth on the speaker. * * * The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' "

The trial court's thesis would be persuasive if the press operated by license of the Government. The argument, however, overlooks the fact that we are concerned here with basic and fundamental constitutional rights that may not be forfeited, like a taxicab franchise, upon a supposed showing that a "great duty and responsibility" have not been discharged.

APPENDIX C

Reply Brief of Appellant The Associated Press, pp. 1, 6-8 and 19-24

No. 16,624

IN THE

COURT OF CIVIL APPEALS

FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

AT FORTH WORTH

THE ASSOCIATED PRESS, *Appellant*

vs.

EDWIN A. WALKER, *Appellee*

REPLY BRIEF FOR APPELLANT

May It Please the Court:

* * *

Among other irrelevances, plaintiff seeks to bolster his argument on this and other points by revealing to the Court that defendant is a corporation that makes money, a state of affairs something less, we believe, than sinister, even if it were accurate, which it is not. Should the Court be interested in the organization and financial situation of the defendant, the cases in the margin explain that it is a member-

Appendix C
Reply Brief of Appellant The Associated Press,
pp. 1, 6-8 and 19-24

ship corporation, whose members are the newspapers that subscribe to its services, and that it is not operated for profit.[1]

The point is really immaterial, however, because even if The Associated Press were a profit making corporation, that would have absolutely no bearing on any of the points involved in this litigation. Although the point plaintiff is trying to make is admittedly fuzzy in this regard, apparently plaintiff is attempting to infer that anyone who makes a profit from distributing news must be denied both the fair comment defense and the constitutional protection. Though, of course most everything that is written or published, including most of plaintiff's speeches, is for profit and, indeed, some publications even enjoy copyright protection, those facts have never had any bearing on the fair comment defense and the constitutional protection. Newspapers are sold like any other commodity, yet even plaintiff concedes that they are protected by Article 5432 and the Constitution. Just how or why it is the plaintiff regards The Associated Press as being in some unique category we cannot understand, and plaintiff does not explain. As the Supreme Court of the United States said in *New York Times* v. *Sullivan,* 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710:

> "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."

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[1] *National Labor Relations Board* v. *Associated Press,* 85 F. 2d 56, affirmed 301 U. S. 103, 81 L. Ed. 953; *KVOS, Inc.* v. *Associated Press,* 299 U. S. 269, 81 L. Ed. 183; the Opinion of the District Court in *United States* v. *Associated Press,* 52 F. Supp. 362, which was affirmed in 326 U. S. 1, 89 L. Ed. 2013; and *International News Service* v. *Associated Press,* 248 U. S. 215, 63 L. Ed. 211.

Appendix C
Reply Brief of Appellant The Associated Press,
pp. 1, 6-8 and 19-24

So, in the instant case, the fact, if it be a fact, that The Associated Press was paid for its news releases is as immaterial as is the fact that newspaper reporters are paid by the newspaper, or that the author of a magazine article is paid by the magazine.

If, as plaintiff would have it (Brief 3), defendant is in the same category as the supplier of printing ink to the newspaper, then of course defendant, like the ink supplier, would not be responsible for the publication by the newspaper of which plaintiff complains.

* * *

The Constitutional Protection

In his argument on the constitutional question, plaintiff continues his insistence that the defendant is without the scope of the First and Fourteenth Amendment protection because it receives compensation for its news releases. This point has already been discussed earlier in this reply, and we will not here elaborate on it beyond pointing out that the fact that news may be treated as a commodity, for some purposes at least, is as irrelevant here as is the fact that newspapers, books, and magazines are also commodities.

At page 47 of his brief, appellee reminds us again that The Associated Press is not engaged in the publication of anything, which again is completely irrelevant to the constitutional protection that is afforded to free expression of thought. That The Associated Press is the author, rather than the publisher, of the two reports in question has nothing to do with the constitutional questions involved.

Appendix C
Reply Brief of Appellant The Associated Press,
pp. 1, 6-8 and 19-24

In our main brief, we attempted to analyze the *Times* and *Garrison* cases[2], and we predicated our argument upon the *reasoning* employed by the court in both cases. As we there pointed out, the underlying basis for both decisions was the premise that the purpose and philosophy of the First Amendment was to insure free and uninhibited exchange of ideas on issues of public importance and concern.

In response, plaintiff merely extracts from each opinion every reference to public officials and official conduct and parrots them in his brief. Plaintiff, of course, is entitled to argue that both decisions are inapplicable here, but the argument finds no support in the fact that the phrases "public officials" and "official conduct" appear frequently in the opinions. Such an argument is roughly analogous to contending that a case involving a super market has no application to a department store because of the frequent references in the opinion to super markets. We respectfully submit that one must at least examine the *reasoning* in any case to determine its applicability in another, and that plaintiff in this case has done nothing more than emphasize that public officials were involved in both the *Times* and *Garrison* cases, which hardly requires the three pages of brief that plaintiff devotes to it.

Plaintiff not only utterly ignores the rationale and the basis for the holdings in both cases, he affirmatively misstates the holding in *Garrison* when he states on page 51 of his brief that the court there held that "neither the court nor

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[2]*New York Times Co.* v. *Sullivan*, 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A. L. R. 2d 1412; *Garrison* v. *Louisiana*, ... U. S. ...., 13 L. Ed. 125, 85 S. Ct.

Appendix C
Reply Brief of Appellant The Associated Press,
pp. 1, 6-8 and 19-24

the Constitution protected libelous publications, even in the case of public officials." It is obvious from a cursory inspection of either opinion that the court in each case held that the Constitution does protect libelous publications made about public officials, and indeed that that was the precise holding in each case. The only limitation suggested by the majority in both cases was that the Constitution does not protect *malicious* false statements, i.e., "false statements made with the high degree of awareness of their probable falsity demanded by *New York Times . . .*"; *Garrison* at page 133.

Moreover, in neither case did the court "draw the line" at public officials, as plaintiff tells us at page 53 of his brief, nor was the constitutional protection "strictly limited" to public officials, as plaintiff asserts at page 52 of his brief. Obviously, the court was not required to draw any lines because only public officials were involved in both cases. Courts draw lines in cases that involve situations determined to be beyond the scope of the concept involved.

We respectfully submit that this Court cannot read the opinions in *Times* and *Garrison,* and particularly the thorough and painstaking analysis of the historical background of free speech and press, without being deeply impressed with the Supreme Court's zealous determination to insure the preservation of one of the most fundamental and sacred safeguards that forms part of the very bedrock of this Republic. It is scarcely conceivable that one could study those opinions and find no more substance, no more depth, and no more principle in them than plaintiff professes in his brief to have discovered. That which plaintiff has missed

Appendix C
Reply Brief of Appellant The Associated Press,
pp. 1, 6-8 and 19-24

has not escaped the attention of the courts in *Pauling v. News Syndicate Co.,* 335 F. 2d 659 (2 Cir. 1964), *Gilberg v. Goffi,* 251 NYS 2d 823, and *Pearson v. Fairbanks Publishing Co., Inc.* (not yet reported), all cited in our main brief.

The *Times* and *Garrison* opinions expound the Supreme Court's recognition of the absolute necessity for free and uninhibited exchanges of ideas on matters of public concern, particularly those involving government and the conduct of government, no matter how erroneous the ideas may be, in the absence of the known and deliberate lie. Stable self-government depends upon the freedom to comment on matters of public concern and persons who attempt to influence the course and destiny of the government, whether they be public officials or public interlopers. Such a concept does not and could not embrace baseball players, Beatles, and Fat Stock Show winners, as plaintiff suggests at page 52 of his brief. Being merely in the public eye, as plaintiff puts it, is not the same at all as attempting publicly to rally public support in a controversy involving the very essence of the respective powers and authorities of the United States, a State and the Federal Courts.

Obviously, a public official by virtue of his office can and does have a direct influence upon the government, but to contend that public officials are the only ones in that position is to ignore reality.

As the Second Circuit Court of Appeals observed in the *Pauling* case, it would be anomalous to hold that a newspaper which reported falsely, but without malice, that a public official had been bribed would not be liable for de-

Appendix C
Reply Brief of Appellant The Associated Press,
pp. 1, 6-8 and 19-24

famation to the official, but would be liable to the person who reportedly bribed him.

In the instant case, plaintiff summoned the world at large to join plaintiff in rising to a stand beside Governor Barnett. There could be no possible reason or consistency whatever, and plaintiff suggests none, for holding that statements about Governor Barnett are within the *Times* rule, but that statements about those who rise to stand beside him are not. The object in either case is the same, the solicitation of public support is the same, the impact upon public opinion is the same, and the potential influence and effect on the outcome of the controversy is the same.

To illustrate the point we are making, suppose that the Governor of a State should determine that the State would secede from the Union. Surely private citizens who publicly solicited and sought to raise armies in support of such a movement would be subject to the same law of libel as the Governor.

Perhaps we have overlabored the point, but we trust that this Court will recognize that there is more involved here than plaintiff's assertion that we are contending for some sort of license to "peddle prevarication with impunity" (Brief 56), or that "anyone can be vilified for free". We are urging this Court's serious consideration of the constitutional thesis which applies the same law of libel to those who actively and publicly assist public officials as is applied to the public officials.

APPENDIX C

Motion of Appellant The Associated Press for Rehearing in the Texas Court of Civil Appeals, pp. 1 and 3

No. 16,624

IN THE

COURT OF CIVIL APPEALS

FOR THE SECOND SUPREME JUDICIAL

DISTRICT OF TEXAS

AT FORT WORTH

THE ASSOCIATED PRESS,
Appellant,

vs.

EDWIN A. WALKER,
Appellee.

From the 17th District Court
of Tarrant County, Texas

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF CIVIL APPEALS:

Now comes The Associated Press, the appellant in the above entitled and numbered cause, and respectfully moves the Court to set aside its judgment and opinion rendered herein on the 30th day of July, 1965, and to grant appellant

Appendix C

Motion of Appellant The Associated Press for Rehearing in the Texas Court of Civil Appeals, pp. 1 and 3

a rehearing, and upon such rehearing to reverse the judgment of the District Court and render judgment for appellant in all respects, or, in the alternative, to remand the case for a new trial, and as grounds therefor respectfully says:

* * *

The Court of Civil Appeals erred in overruling Appellant's Fifth Point of Error, which reads as follows:

> "The trial court erred in rendering judgment for plaintiff because defendant's news reports, made without malice, are protected from the claim of libel by the First and Fourteenth Amendments to the Constitution of the United States, and such judgment therefore abridges defendant's rights thereunder."

APPENDIX C

Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

No. A-11,069

IN THE

SUPREME COURT OF TEXAS

THE ASSOCIATED PRESS,
Petitioner,

vs.

EDWIN A. WALKER,
Respondent.

APPLICATION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner, The Associated Press, respectfully submits this Application for Writ of Error to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Forth Worth, to correct errors of law in the judgment and opinion of said Court in Cause No. 16,624, styled The Associated Press, Appellant v. Edwin A. Walker, Appellee, wherein the Court of Civil Appeals affirmed the judgment of the 17th District Court of Tarrant County, Texas.

Nomenclature

In this Application the parties will be designated either by name or as they appeared in the trial court.

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

Statement of The Case

The *per curiam* opinion of the Fort Worth Court, affirming a half million dollar judgment against defendant, correctly states the nature and the result of this libel suit, and it accurately quotes from *Texas Jurisprudence* and the *Texas Law Review.* It ignores virtually all of the facts, most of which are undisputed, and in so doing fails even to recognize, much less analyze, the serious Federal Constitutional question that was presented. The length of this Application is due in large part to the necessity for setting out the undisputed facts that are omitted in the opinion of the court below.

The two news stories in question are correctly set forth in the opinion below. They were prepared by defendant and published by the Fort Worth Star-Telegram. They described plaintiff's participation in a riot of several thousand persons that occurred during most of the evening of Sunday, September 30, 1962, and the pre-dawn hours of the following Monday, on the campus of the University of Mississippi, at Oxford, in opposition to the efforts of United States marshals to secure the enrollment of a Negro in that university, pursuant to the mandate of the United States Court of Appeals for the Fifth Circuit.

The plaintiff's presence in the midst of the riot for more than four hours is undisputed, as is also the incessant radio and television appeal with which he heralded his coming and summoned 500,000 volunteers to help protect the Nation against enforcement of the law of the land by assisting the Governor of Mississippi in pursuing a course

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

that had already led him, to plaintiff's knowledge, in contempt of the Fifth Circuit Court for having personally and physically obstructed the execution of its mandate.

In this Application we shall demonstrate, among other things, that the evidence conclusively established, as a matter of law, (1) that both statements* were substantially true; (2) that both were fair comment, and thus privileged by applicable Texas statutes; and (3) that in any event the defendant's news releases describing, as they did, a state of affairs in Mississippi that was of grave national interest and concern, involving issues of the utmost public importance, are protected by the First and Fourteenth Amendments to the Constitution of the United States against the claim of libel by this particular plaintiff, who the evidence conclusively establishes was, and for considerable time had been, a vociferous, publicity-seeking, prominent political figure and who, with clamorous public fanfare in advance, deliberately injected himself and his sentiments into the fray in Mississippi and into the limelight of public scrutiny that he knew was focused upon it.

* * *

Points of Error Relied Upon

1.

The News reports here involved, made without malice, concerning matters of grave national concern, are protected from the claim of libel by the First and

*i.e., the "charge" and "command" statements as quoted in the opinion below.

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

Fourteenth Amendments to the Constitution of the United States, and the judgment herein therefore abridges defendant's rights thereunder; and the Court of Civil Appeals erred in holding to the contrary.

* * *

First Point of Error Restated

1.

The news reports here involved, made without malice, concerning matters of grave national concern, are protected from the claim of libel by the First and Fourteenth Amendments to the Constitution of the United States, and the judgment herein therefore abridges defendant's rights thereunder; and the Court of Civil Appeals erred in holding to the contrary. (Germane to Ground 5 of Defendant's Motion for Rehearing.)

Preliminary Statement

Ordinarily, accepted briefing practice would dictate that a resume of the pertinent facts should precede the argument and authorities, because the Court, being generally familiar with the law, can readily determine the nature of the contention from the point of error, and should first have the facts in mind before attempting to apply the law.

Here, however, the point of error raises questions involving Federal Constitutional limitations in the field of libel under the First and Fourteenth Amendments that have

Appendix C

Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

been announced only recently by the Supreme Court of the United States, and accordingly this is a case of first impression in this Court. In addition, we have here the rare instance in which the same point has been decided by another court in a case involving the same plaintiff and the same subject matter.

We believe, therefore, that the Constitutional issue that we presented in the courts below, and are raising here, can best be demonstrated at the outset by quoting substantial portions of the opinion of the United States District Court, Western District of Kentucky, in *Walker* v. *Courier-Journal et al,* . . . F. Supp. . ., decided September 23, 1965.* We think more extensive quotation than usual is warranted here and will be helpful, because the case is not yet reported, and also because it is more than directly in point—it is virtually the same case, except insofar as the question of actual malice is concerned. The defendant here was not a party to that case, but the news reports are substantially the same. We respectfully ask the Court's indulgence in this departure from ordinary practice, believing it will be helpful to the Court in understanding the issue. Argument and additional authorities will follow.

The following is quoted from the opinion of the Court in *Walker* v. *Courier-Journal et al:*

> "This cause comes on before the Court on the Defendants' Motion to Dismiss the Plaintiff's Complaint, as amended.

*The entire opinion is reproduced in the Appendix.

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

"On September 30, 1963, the Plaintiff, Edwin A. Walker, a former Army Major General, filed this action for actual and punitive damages for libel in the sum of Two Million Dollars, against the Defendants, Courier-Journal and Louisville Times Company and WHAS, Inc., Kentucky corporations, with their principal places of business in Louisville, Kentucky. Jurisdiction of the Court over this action is fixed by USC Title 28, Paragraph 1332.

"The Defendant corporations, on October 1, 1962, October 2, 1962 and October 3, 1962, published in their newspapers and/or broadcast over their radio and television facilities, various news items or stories concerning the rioting on the campus of the University of Mississippi, in the City of Oxford, Mississippi, which said published matter had been received by Defendants from national news gathering agencies to which Defendants were subscribers.

"The news items or stories so published and complained of by the Plaintiff stated in substance, that the Plaintiff, Walker, had led a charge of rioters against United States Marshals who were present on the University of Mississippi campus carrying out the orders of the United States Courts requiring integration of enrollment of whites and negroes at said University. Plaintiff, Walker, alleged that such items imputed to him that he was a 'trouble maker', that he was 'participating' in the occurrences taking place in Oxford, all in the context

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

used of inciting of the students to riot, and that the publication reflected libelously on the honor, character and reputation of the Plaintiff.

"This Court has considered the briefs and memoranda submitted by counsel for the parties and taking judicial notice of the public events relating thereto which were widely reported throughout the Nation and are matters of common knowledge, and further treating as true (for the purpose of passing upon this Motion to Dismiss) the factual allegations of the Complaint, as amended, arrives at the following conclusions which are the basis of its final Order entered herein.

"Following the filing of this action the Supreme Court of the United States handed down its Opinion in *New York Times Company* v. *Sullivan,* 376 U.S. 254 (October Term, 1963) wherein said Court in legal effect federally preempted the law of libel in matters of 'grave national concern' involving 'public officials' with the announced doctrine that

> '. . . Constitutional guarantees require, we think, a Federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was or not.'

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

"There can be no question but that the serious occurrences at the University of Mississippi wherein the State of Mississippi and the Federal Government were locked in conflict as to the educational integration of the races was a matter of 'grave national concern.' The Supreme Court of the United States has classified the integration struggle as 'one of the major political issues of our time.'

"Thus, it can be seen that had the Plaintiff, Walker, been a 'public official' at the time of this occurrence, this Court's task would have been automatically relegated to a decision *only* of the *one issue* of whether or not the Defendants herein had published the statements attributed to them with 'actual malice', that is, with knowledge that the statements were false or with reckless disregard of whether or not they were false.

"However, the matter is not so simple, for this Court notes with significance that in laying down the doctrine of 'actual malice' in the *Times* case, the Supreme Court quoted with approval from the case of *Coleman* vs. *McLennan,* 78 Kans. 711, 98 P. 281 (1908) as follows:

> 'This privilege extends to a great variety of subjects and includes matters of public concern, *public men* and candidates for office.' (Emphasis added)

and in conclusion the Court stated:

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

> 'We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable.' (Page 283)

"In connection with the last above quoted language, the Supreme Court included a footnote to its Opinion (Footnote 23) in part, as follows:

> 'We have no occasion here . . . to specify categories of persons who would or would not be included.'

"From this language I believe the Supreme Court of the United States has served clear notice that the broad Constitutional protections afforded by the First and Fourteenth Amendments will not be limited to 'public officials' only, for to have any meaning the protections must be extended to other categories of individuals or persons involved in the area of public debate or who have become involved in matters of public concern. If the Supreme Court intended to limit its holdings to 'public officials' only, *then why Footnote 23?* I subscribe that Footnote 23 is of vast importance in understanding the intended scope of the Supreme Court's Opinion, for it is a departure from the Court's traditional rule of basing its decision on the narrowest Constitutional grounds and is interpreted by this Court as

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

giving special significance to the broad language adopted in arriving at its decision.

"The Plaintiff, Walker, is of course not a 'public official' within the commonly accepted meaning of the words. However, he was, as he identifies himself in his own Complaint, a person of 'political prominence.' This Court takes judicial notice that Plaintiff Walker's public life is generally well known to the people of this Nation, that he was the subject of nationwide news reports while on duty as an Army General and also as a candidate for Governor of Texas, and that he has in the past made vigorous public announcements on matters of public concern. Plaintiff was, by his own choosing, present in Oxford, Mississippi, on the occasion of the turmoil after announcing on radio and television his intention to be present there and having called upon others to join with him there in support of his publicly stated position on the matters of public concern there in issue.

"Had not Plaintiff thereby become a 'public man'? Could he not have reasonably foreseen that his being a person of 'political prominence' his presence in Oxford would be taken cognizance of by the press? Had not Walker interwoven his personal status into that of a public one whereby he would become the subject of substantial press, radio and television news comment; thus magnifying the chance that his activities would be 'erroneously' reported? This Court so believes.

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

"I therefore reach the inescapable conclusion that the protective 'public official' doctrine of 'actual malice' announced in *Sullivan* v. *New York Times* is in common reason and should be applicable to a 'public man' as well, and that the Plaintiff, Walker, was such a 'public man' under the circumstances involved here. 'Public men are, as it were, public property.'

"My application of the doctrine of *New York Times* v. *Sullivan* to the facts here in issue finds authority not only in the logical dictates of Footnote 23 discussed above, but in the reasoning and philosophy underlying the Times Opinion and in the critical discussion in legal commentaries and recent decisions of other courts. The decision of Judge Friendly in *Pauling* v. *News Syndicate Company,* 335 F. 2d 659 at 671 (2d Cir. 1964), favorably presages the result here. See also *Gilberg* v. *Goffi,* 251 N.Y.S. 2d 823 (1964); *Pearson* v. *Fairbanks Publishing Co.,* (Unreported, Superior Ct. of Alaska, 4th District, Nov. 25, 1964); and Pedrick, *Freedom of the Press and the Law of Libel,* 49 Cornell L.Q. 581, at 592 (1964); 9 Vill. L. Rev. 534 (1964).

"I adopt this position with full understanding of the fact that by such extension of the scope of word meaning I am perhaps 'plowing new ground' in legal effect, but also with the accompanying conviction that not to do so would negate the spirit of the

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

> *Times* Opinion which I believe to be a '. . . profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open . . .' Public debate cannot be 'uninhibited, robust and wide open' if the news media are compelled to stand legally in awe of error in reporting the words, and actions of persons of national prominence and influence (not 'public officials') who are nevertheless voluntarily injecting themselves into matters of grave public concern attempting thereby through use of their leadership and influence, to mold public thought and opinion to their own way of thinking. If any person seeks the 'spotlight' of the stage of public prominence then he must be prepared to accept the errors of the searching beams of the glow thereof, for only in such rays can the public know what role he plays on the stage of public concern—often, regretfully, a stage torn in the turmoil of riot and civil disorder, whereon error in reported occurrence is more apt to become the rule rather than the exception.
>
> "This is particularly so here where open riot and turmoil with accompanying destruction of property, injuries and death turned portions of the University of Mississippi campus into a strife beset no man's land through the dark hours of the night."

The Federal Court then proceeded to consider the question of the existence of actual malice on the part of the defendants and, concluding that there was none, dismissed the complaint with prejudice.

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

In marked contrast to the logical and analytical treatment of this serious, and we believe determinative, Constitutional question by the Federal Court in the above case is the opinion of the Fort Worth Court, wherein that court, presented with the same argument, authorities and set of facts, took no apparent notice of the significant, recent holdings of the Supreme Court of the United States, but resurrected instead, as the basis for its summary disposal of the question, a 1929 Law Review article written by a tort professor on the subject of fair comment. The critical facts of which the Federal Court took judicial notice upon motion to dismiss were not noticed at all by the Fort Worth Court, though they were undisputed in the record before it. This signal failure of the Texas intermediate court to come to grips with a crucial and timely Constitutional question requires, we respectfully submit, that this Court grant the writ of error upon the basis of the undisputed facts and the authorities that now follow.

The Undisputed Evidence

Background of the Mississippi Crisis

On June 25, 1962, the United States Court of Appeals for the Fifth Circuit, reversing the District Court for the Southern District of Mississippi, directed the lower court to issue an injunction compelling the admission of James H. Meredith, a Negro, into the University of Mississippi. *Meredith* v. *Fair,* 305 F. 2d 343. The history of that litigation is set out in some detail in the opinion by Judge Wisdom. On July 17 the mandate of the Circuit Court issued,

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

and on July 18 Judge Cameron of that Court signed an order staying the execution and enforcement of the mandate. (Def. Ex. 3).

On July 27, 1962, the Fifth Circuit Court entered an order vacating the stay order theretofore signed by Judge Cameron, and recalling the mandate for the purpose of clarifying it by amending it to provide that the injunction be issued *forthwith* by the District Court compelling the immediate admission of Meredith to the University (Def. Ex. 3).

On September 10, 1962, Associate Justice Hugo L. Black of the Supreme Court of the United States entered an order which (1) vacated Judge Cameron's stay order of July 18, as well as subsequent stay orders of July 28, July 31, and August 6, 1962, by the same circuit judge, and (2) ordered that the school officials be enjoined from preventing the enforcement of the Fifth Circuit's mandate (Def. Ex. 4). On September 13, 1962, the District Court for the Southern District of Mississippi, pursuant to the mandate of the Fifth Circuit and the mandate of Mr. Justice Black, granted permanent injunction commanding the immediate admission of Meredith into the University and enjoining the school officials from interfering with his admission (Def. Ex. 5).

On September 28, 1962, the Fifth Circuit Court, sitting *en banc,* rendered a judgment holding Ross R. Barnett, the Governor of Mississippi, in civil contempt of that court, and in the judgment recited findings of fact to the effect (1) that since the issuance of the injunction on September 13,

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

1962, Ross R. Barnett, as Governor of the State of Mississippi, had issued a series of proclamations calling upon all officials of the State to prevent and obstruct the carrying out of the court orders; (2) that on September 25, 1962, the Fifth Circuit Court had entered temporary restraining orders restraining Barnett from interfering with or obstructing the court's order and the injunction of the District Court; (3) that at approximately 4:30 P.M. on September 25, 1962, the said Barnett, having full knowledge of the Fifth Circuit Court's temporary restraining orders, had confronted Meredith when he sought to enter the office where he was to enroll, had deliberately prevented him from entering, and had told him that his application for enrollment was denied by Barnett; and (4) that on September 26, 1962, Meredith sought to enter the campus of the University of Mississippi at Oxford, where he was denied entry by the Lieutenant Governor of the State of Mississippi, acting pursuant to the instructions and under the authorization of Governor Barnett (Def. Ex. 6).

According to the plaintiff's testimony and that of his witnesses, Governor Barnett, despite the restraining orders and the contempt judgment, was continuing to oppose the entry of Meredith into the University at the time of the riot on the campus, and his instructions to that effect, directed to the local sheriffs and the Mississippi Highway Patrol, continued in force (S.F. 840-841). According to plaintiff's evidence, the orders of the Fifth Circuit and the actions of Governor Barnett in opposition thereto were widely discussed (S.F. 759) and were known to plaintiff (S.F. 760-762, 809-810), and the integration question was a subject of national interest and national controversy (S.F. 759).

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

Background of General Walker

According to the testimony of the plaintiff: He is a graduate of the United States Military Academy (S.F. 730, 734), and, until his resignation from the Army in 1961, he was a career soldier, having risen to the rank of Major General (S.F. 734). In 1957 he commanded the federal troops that were called into Little Rock, Arkansas, by President Eisenhower to enforce the integration of the Little Rock High School, as ordered by the Federal Courts (S.F. 611, 739). In 1959 he was ordered to Germany to assume command of the 24th Infantry Division (S.F. 617). While in Germany he was involved in an incident that resulted in his receiving national publicity (S.F. 617). He was relieved of command, and an investigation was conducted, which resulted in neither charges nor punishment (S.F. 620). Thereafter, the Army wanted him to retire, but ininstead he resigned (S.F. 740). By resigning, instead of retiring, he forfeited benefits amounting to approximately $15,000 per year (S.F. 626, 740). His purpose in resigning, thereby losing his retirement benefits, was to be able to speak out on matters of public importance and to be free to say whatever he chose without any strings attached (S.F. 741). At the time of his resignation in the fall of 1961 he received considerable publicity concerning his resignation and the events leading up thereto (S.F. 743). He decided to speak and talk to people, and he expected to receive some kind of remuneration for his speaking engagements (S.F. 743).

Appendix C

Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

His first speech after leaving the Army was in Dallas in December, 1961, for which he received remuneration (S.F. 744, 745). Since then he has been making speeches all over the country and there is a constant demand on his time for speaking engagements (S.F. 745).

He has been a member of the John Birch Society since 1958 or 1959 (S.F.749). Since his resignation from the Army he has also done a good deal of writing, and he sells what he writes (S.F. 749). He and another person operate the American Eagle Publishing Company in Dallas, which has some 250 or 300 regular subscribers, and the publications are sent to others who plaintiff feels might be interested (S.F. 750-751). His followers include an organization known as "Friends of Walker" throughout the Nation, and some of these groups make financial contributions to him (S.F. 751-752).

In the spring of 1962 he announced his candidacy for Governor of Texas and made an extensive campaign, receiving broad press coverage concerning his ideologies and ideas about the governorship (S.F. 752-753). Although the news media does not always print everything he has to say, he has been able, basically, to get press conferences whenever he wanted them. (S.F. 758).

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

General Walker and the Mississippi Crisis

(The Crisis Did Not Come to Him)

In the latter part of September, 1962, as it became apparent that a crisis was developing over the admission of Meredith to the University, General Walker began to move. From his home in Dallas on Wednesday, September 26, 1962, he issued over Radio Station KWKH at Shreveport, Louisiana, the following statement to the world at large:

> **"It is time to move. We have talked, listened, and been pushed around far too much by the anti-Christ Supreme Court. Rise . . . to a stand beside Governor Ross Barnett at Jackson, Mississippi. Now is the time to be heard. Ten thousand strong from every State in the Union. Rally to the cause of freedom. The Battle Cry of the Republic. Barnett, Yes! Castro, No! Bring your flag, your tent, and your skillet. It's time. Now or never. The time is when and if the President of the United States commits or uses any troops, Federal or State, in Mississippi.**
>
> **"The last time—in such a situation—I was on the wrong side. That was in Little Rock, Arkansas in 1957 and 1958. This time I am out of uniform and I am on the right side. And I will be there." (S.F. 778-780; Def. Ex. 7).**

His selection of the Shreveport station was no happenstance. Broadcasts from the station reached over into Mississippi. (S.F. 834).

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

The next night, September 27, 1962, General Walker appeared on television at his home in Dallas and reiterated substantially the same statement as quoted above (S.F. 787). On that occasion, in addition to the prepared text the following colloquy occurred between General Walker and the interviewer:

Interviewer:

"General, if forces go, will you lead this force?"

General Walker:

"This is a cause for freedom. This is Americans, patriotic Americans, from all over the Nation. It is a movement for freedom. And I will be there. Rise to a stand beside Governor Barnett at Jackson, Mississippi. Now is the time to be heard. Thousands strong from every State in the Union. Rally to the cause of freedom." (S.F. 787-788)

The next evening, September 28, 1962, over Radio Station WNOE of New Orleans, Louisiana, he asserted that there is no law that requires integration (S.F. 801), and he reported that he had been swamped with telephone calls from persons offering help and assistance and notifying him that people were moving to Mississippi to assist in any way possible (S.F. 802). Asked if there was a particular point in Mississippi where all of his followers would meet he replied that he intended to join the movement; that there are thousands of people, probably hundreds of thousands,

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

in Mississippi standing beside Governor Barnett, and that the best place to assemble would be at the Capitol at Jackson, or at the University of Mississippi in Oxford (S.F. 803).

The next day, September 29, 1962, with full knowledge that Governor Barnett by then had been held in contempt of the Fifth Circuit Court (S.F. 762), but was continuing his course of opposition to its mandate (S.F. 841), General Walker proceeded by private plane to Jackson, Mississippi, where he held another press and television conference at the Sun & Sands Motel*. There, over television for all to hear who cared to listen, he said:

> **"I am in Mississippi—beside Governor Ross Barnett.**
>
> **"I call for a national protest against the conspiracy from within.**
>
> **"Rally to the cause of Freedom in righteous indignation, violent vocal protest and bitter silence under the Flag of Mississippi at the use of Federal troops.**
>
> **"This today is a disgrace to the Nation in 'Dire Peril'—a disgrace beyond the capacity of anyone except its enemies.**
>
> **"This is the conspiracy of the crucifixion by the anti-Christ conspirators of the Supreme Court in their denial of prayer and their betrayal of a Nation." (Def. Ex. 8, S.F. 789, 790)**

*He was not staying at the motel, but went there to meet the press.

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

At the same press conference he was asked if he had been in contact with Governor Barnett, and he replied that he had been in contact with the Governor's office and hoped to see the Governor while in Jackson (S.F. 790-791).

That afternoon, General Walker began to hear reports that Meredith was being moved into the campus that day, and that military forces were being committed (S.F. 640). He canceled his plans to attend a football game that night in Jackson (S.F. 640), and proceeded by automobile to Oxford, Mississippi, with his fan Louis Leman, where he was registered in a motel under the name John Waters after a midnight drive through the campus (S.F. 648-649).

The next day, Sunday September 30, 1962, he went to the Sheriff's office in Oxford and offered to assist the Sheriff in any way he could (S.W. 839). At that time he knew that the Sheriff was under the jurisdiction of the Governor (S.F. 840); that the Governor had used the police forces of the State, including the Sheriff, to prevent the entrance of Meredith into the University, and that the Governor had not changed his position (S.F. 841).

At lunch that day in downtown Oxford, several reporters asked him for a statement, and he finally agreed to hold a press conference late that afternoon at the Ole Miss Motel where the reporters were staying (S.F. 656). As fortune would have it, he happened to have lying around an old speech that he had prepared by 9 o'clock that morning (S.F. 849), and it suited the occasion perfectly. That afternoon he delivered it to the press conference. Short and to the point, he said:

> **"As the forces of the New Frontier assemble to the North, let history be witness to the cour-**

Appendix C
Application for Writ of Error of Petitioner The Associated Press in the Supreme Court of Texas, pp. 1-46

> **age and determination that calls us to Oxford to support a courageous Governor. His lawful stand for State Sovereignty is supported by thousands of people beyond the State borders now on the way to join you at Oxford." (Def. Ex. 11, S.F. 794).**

At the same press conference he learned that U. S. Marshals and Meredith were on the campus (S.F. 658, 865).

Thus, for several days down to and including the day of the riot, General Walker had been quite vocal in the press, and was anxious to get his message out to those who cared to listen (S.F. 833-834).

That evening, September 30, 1962, about 8 o'clock, he and Louis Leman ate dinner in a downtown Oxford cafe, where they listened to President Kennedy's speech (S.F. 850) in which the President announced that Meredith was in residence on the campus of the University, and called upon the people to preserve law and peace. The President also stated that he had federalized the Mississippi National Guard as the most appropriate instrument to preserve law and order, if needed, to back up the United States marshals (S.F. 868, et seq.). Upon the conclusion of the President's speech, General Walker's comment was "Nauseating, Nauseating" (S.F. 874), which expressed his feelings toward the Federal Administration (S.F. 875).

He had finished dinner and was leaving the restaurant with Leman when he heard that there was trouble on the campus (S.F. 663-664). He and Leman then drove to the campus (S.F. 664).