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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 150

THE ASSOCIATED PRESS,
*Petitioner,*

*—against—*

EDWIN A. WALKER,
*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS OR, IN THE ALTERNATIVE, TO THE SUPREME COURT OF TEXAS

## CITATIONS TO OPINIONS BELOW

The unreported opinion of the Trial Court, contained in a letter to counsel dated July 29, 1964, is printed in the Record, pp. 69-72.

The opinion of the Texas Court of Civil Appeals, dated July 30, 1965, reported at 393 S. W. 2d 671, is printed in the Record, pp. 1527-1551.

## JURISDICTION

The judgment of the Texas Court of Civil Appeals was entered on July 30, 1965 (R. 1551).* An application for rehearing was denied on September 17, 1965 (R. 1552).

*All citations to "(R. )" are to the printed Transcript of the Record.

Petitioner's application to the Supreme Court of Texas for a writ of error was denied on February 9, 1966 (R. 1553). Petitioner's motion for a rehearing on its application for a writ of error was denied by the Supreme Court of Texas on March 23, 1966 (R. 1554).

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3). This Court granted certiorari on October 10, 1966 ( U. S. , 87 S. Ct. 40).

## 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.

## QUESTIONS PRESENTED

1. Whether the doctrine enunciated by this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, is limited

to public officials or applies to other persons or circumstances:

A. Whether, consistent with the First and Fourteenth Amendments to the Federal Constitution, state libel laws may be applied to news reports, made without actual malice, respecting events of profound political and social importance and national public interest, such as the enforcement by the United States Government of judgments of United States courts, and suppression of the riots resulting from the confrontation between Federal and State power in connection therewith which occurred at Oxford, Mississippi, on September 30, 1962, particularly at the behest of one who, like General Edwin A. Walker, wilfully, aggressively and defiantly thrust himself into the vortex of the controversy.

B. Whether, consistent with the First and Fourteenth Amendments to the Federal Constitution, state libel laws may be applied to news reports made without actual malice concerning the public activities of persons like General Walker in connection with controversies of profound political and social importance and national public interest, such as those presented by the Oxford confrontation, where such persons are actively attempting to influence the outcome of such controversies and where such persons are, or are generally regarded as being, by virtue of their stature and activities, in a position significantly to influence the resolution of the issues thus presented.

2. Whether an award of general damages of $500,000 for the publication, without actual malice or any proof of pecuniary or other loss, of reports of newsworthy events is so oppressive that it inhibits freedom of expression to an extent which violates the First and Fourteenth Amendments to the Federal Constitution.

3. Whether the defense of "fair comment," as construed and applied by the Texas courts in this case, is so limited as to violate the First and Fourteenth Amendments to the Federal Constitution.

4. Whether the record in this case on the issues of "substantial truth" and "fair comment" is so lacking in evidentiary support for the judgment below that that judgment constitutes a denial of due process in violation of the Fourteenth Amendment to the Federal Constitution.

## STATEMENT OF THE CASE

On the night of September 30, 1962, there occurred in Oxford, Mississippi, a fateful confrontation between Federal and State power which arrested the attention of the entire nation, and which has become a milestone in the century-long battle for racial equality.

This confrontation was the culmination of events arising out of an attempt by a single Negro—James Meredith—to gain admission to the then all-white student body of the University of Mississippi and the attempt by the State of Mississippi and its highest elected officials to prevent such admission through invocation of the historically and judicially discredited doctrine of interposition (R. 564-565).*

The events surrounding this confrontation, now an important chapter in the nation's history, directly involved, at one time or another, the President of the United States (R. 598), the Justices of this Court (R. 537-538), the Judges

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**Meredith* v. *Fair,* 199 F. Supp. 754 (S. D. Miss. 1961), *aff'd.* 298 F. 2d 696 (5th Cir. 1962); 202 F. Supp. 224 (S. D. Miss. 1962), *motion denied* 305 F. 2d 341 (1962), *rev'd* 305 F. 2d 343 (5th Cir. 1962), *stay vacated* 306 F. 2d 374 (5th Cir. 1962), *cert. denied* 371 U. S. 828, *stay vacated* 83 Sup. Ct. 10; 313 F. 2d 532 (5th Cir. 1962), 313 F. 2d 534 (5th Cir. 1962), *cert. denied* 372 U. S. 916.

of the Court of Appeals for the Fifth Circuit and the Southern District of Mississippi (R. 541), the Attorney General of the United States (R. 543), the Governor and Lieutenant Governor of Mississippi (R. 542), the Trustees of the University of Mississippi (R. 539-540), the United States Army (R. 546-547), the Mississippi National Guard (R. 600), a massive force of United States Marshals (R. 282), the Mississippi State Highway Patrol (R. 223), and local law enforcement officials (R. 219-220).

A central figure in the confrontation was General Edwin A. Walker, Respondent here. General Walker—a former General Officer of the United States Army (R. 439-440), the commander of the troops at a similar confrontation in Little Rock in 1957 (R. 439), a man who had resigned his commission in order to be free to engage in political controversy (R. 519, 520) and who thereafter lectured widely on public issues (R. 521-523), a man who had but recently been a candidate for nomination for Governor of Texas (R. 527), a man who had achieved national status and was a self-admitted person of political prominence with an organized political following all his own named the "Friends of Walker" (R. 526)—deliberately and with as much fanfare as he could trumpet thrust himself into the very vortex of the confrontation at Oxford. Yet General Walker now seeks to collect an award of $500,000 in general damages (although he proved no actual damages at trial) because—according to the Texas state courts—the Petitioner, Associated Press, acting in good faith, reported in two respects inaccurately* General Walker's public activities on the occasion of that confrontation (R. 59-61; 69-72; 74-76; 1530-1532).

---

*The finding that the article was inaccurate is not supported by the evidence. To the contrary, the evidence affirmatively and conclusively establishes that the statements complained of were substantially true.

The news reports upon which this action is based were prepared by Petitioner* on the basis of information supplied to Petitioner by Van Savell, a local employee of Petitioner (R. 720-721).

The dispatches read in full text (Pl. Exh. 1-A, 1-B, R. 119-123):

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

*Petitioner is a nonprofit, membership corporation engaged in the gathering and dissemination of news to its membership, which consists of newspapers and broadcasting stations.

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?"

" '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.

" '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 statements in the foregoing dispatches which were ultimately asserted to have been libelous of Walker were:

1. "Walker, who Sunday night 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).

As could reasonably be anticipated, the record presents considerable conflict as to what transpired on the campus at Ole Miss during the dark, bloody, riot-filled night of September 30, 1962. But even the testimony of General Walker and his witnesses, for whose credibility he has vouched, establishes beyond question and without reference to the testimony of the witnesses called by Petitioner that the conclusory statements of which Walker complains are substantially true and constitute fair comment upon his activities.

Underlying all of the events which transpired is the naggingly persistent question: Why was General Walker of Dallas, Texas at the campus of the University of Mississippi on the night of September 30, 1962?

The answer, we submit, may be found in General Walker's own words and actions at the time:

On September 26, 1962, over radio station KWKH at Shreveport, Louisiana, General Walker issued the following call to arms:

> "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 flags, your tents, and your skillets. It is 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." (R. 545; Def. Ex. 7).

Walker reiterated his call the next morning in a television broadcast from Dallas, during which the following colloquy took place:

Unidentified Voice:

> "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 Ross 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." (R. 550).

The next evening, on September 28, 1962, General Walker took to the air from New Orleans (R. 559-560):

> "INTERVIEWER: Do you have plans, sir, for rallies, if and when the Federal troops are entered

into Mississippi, of a certain point in the state where all your followers will then meet with you to protest the integration if it does come about?

"GENERAL WALKER: I intend to join the movement. There are thousands of people, I am sure, already in Mississippi—probably hundreds of thousands there—that are already standing beside their Governor Barnett. The best place to do this would, of course, be at the capitol or at Oxford, at the University, since that is where the issue is involved, and I am sure that that is where most of the movement will move to, to show the grass roots of movement in this issue."

On September 29, 1962, the day before the riots, and with full knowledge that Governor Barnett had then been held in contempt by the Court of Appeals for the Fifth Circuit (R. 533-534) but was continuing his course of opposition to the admission of James Meredith (R. 583), Walker proceeded to Jackson, Mississippi, where he held yet another press and television conference and 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." (R. 551; Def. Ex. 8).

The next day—September 30, 1962—General Walker arrived at Oxford, and, consistent with his stated purpose to "stand beside Governor Barnett," volunteered his services to the County Sheriff (R. 582). At the time he made this offer, he knew that the Sheriff was under the jurisdiction of the Governor; that the Governor had previously used the police forces of the state, including the Sheriff, to prevent the admission of Meredith to the University; and that the Governor had not since changed his position (R. 582-583).

Late on the afternoon of September 30, 1962, at the Ole Miss Motel in Oxford, General Walker held still another press conference, during which he once again urged defiance of the orders of the Courts and of the Federal Government:

> "As the forces of the New Frontier assemble to the north, let history be witness to the courage 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 their way to join you at Oxford." (R. 554-555).*

---

*The General has also admitted that, during the week preceding his expedition to Oxford, he "probably" made the following statement when asked if he recommended that his volunteers go armed:

> "The Administration has indicated that it will do whatever is necessary to enforce this unconstitutional action. I have stated that whatever is necessary to oppose that enforcement and stand behind Govenor Barnett should be done." (R. 575).

The General also admits that he "may" have said:

> "The decision for force will be made in Washington. Evidently it has not been made yet. When and if it is, it's their decision to make. We will move with the punches." (R. 575).

While eating dinner that evening in a restaurant in downtown Oxford, General Walker listened to President Kennedy's speech announcing that James Meredith was in residence on the campus of the University and calling upon the people of Mississippi to preserve law and order (R. 599-602). General Walker's reaction: "Nauseating, nauseating" (R. 603).

Promptly on learning that there was "trouble" on the campus, Walker hurried there (R. 470-471).

"Trouble" was, to say the least, an understatement. By the time the General arrived at the campus, violent, widespread rioting was in progress (R. 150, 155, 170, 179-180, 234-237, 314, 351). The riot, which was to rage throughout the night, resulted in the deaths of two persons and injuries to at least 50 others, the destruction of 16 automobiles, and the arrest of 160 rioters (R. 236, 645, 894, 895).

The crowd, which at times had the earmarks of a lynch mob (R. 213), engaged in an almost continuous series of furious physical attacks on the Federal marshals who were guarding the Lyceum, the school's administration building (R. 235-237). The marshals were attacked with sticks, bricks, bottles, stones, rocks, pieces of concrete benches and even "Molotov cocktails" (R. 147, 176, 285, 358, 401, 636, 858, 859) and were forced to defend themselves with tear gas. Gunfire eventually broke out (R. 353, 386, 402, 896, 897) and the campus, in the words of one of Walker's witnesses, became "a battlefield" (R. 215).

Later that evening, as the rioting and wild confusion intensified, the mob attempted to charge the marshals with a firetruck and then a bulldozer (R. 495-496).

It was into this melee that General Walker voluntarily thrust himself, as he had promised he would (R. 558). So anxious was General Walker to be present in an official capacity, if possible, that, even after he had seen for him-

self the catastrophic results of the defiance of the Federal Government, he requested a Deputy Sheriff, whom he met on the campus by chance, to deputize him on the spot (R. 238, 611).

Is it any wonder, in the light of his widely publicized and highly intemperate and inflammatory statements, that the rioting students believed Walker had come to assist them and hailed him as their leader: "We have a leader" . . . "General, will you lead us up to the steps?" . . . "Will you get us organized, will you lead us?" (R. 608, 609).*

And is it any wonder, when General Walker delivered a speech from the Confederate Monument to the assembled mob (R. 484) and offered expert advice on how to combat the tear gas with which the Federal marshals were then defending themselves (R. 632), that Van Savell concluded that Walker had indeed "assumed command of the crowd" which had so assiduously sought his leadership?

At the trial, General Walker purported to justify his speech as an attempt to calm the crowd (R. 485). Yet the General himself admits that when an Episcopalian minister, the Reverend Duncan Gray, pleaded with him to help stop the riot, he declined, telling Reverend Gray to his face that the minister's attitude made him ashamed to be an Episcopalian (R. 481).

General Walker also admits that, in his speech, he congratulated the students on their "protest" (R. 632), telling them they had a right to "protest" (R. 628), could continue to "protest" (R. 621), and should "stand by your Governor" (R. 631)—all this at a time when Walker well knew that the "protest" consisted of a series of violent physical attacks on the Federal marshals (R. 631). He also admits telling the rioters that Colonel Birdsong, head

*It is conceded that General Walker was an object of attention (R. 313, 422, 477-478), and that, wherever he went, the crowds followed him and sought his advice (R. 285).

of the Mississippi Highway Patrol, had betrayed them—a sentiment clearly calculated to incite and inflame his audience. Walker even went so far as to absolve the mob from responsibility for the havoc they were then creating. He told them that Governor Barnett had not abandoned them (R. 623), thus creating an aura of legality for their actions under the so-called interposition doctrine; that the responsibility for the violence was "on the hands of the Federal Government" (R. 621); and that the forces carrying out the mandate of the Federal Court should have been sent to Cuba, not Oxford (R. 315, 336, 352, 485).

Respondent's own witnesses further testified that General Walker also said "Protest, protest, all you want to, you have a right to protest and they may run out of gas" (R. 284); that he urged the crowd to continue their protest at a time when they were throwing Molotov cocktails and setting cars on fire (R. 285-286); and that he said "You may not win but you will be heard" (R. 692) and "Help is on the way, thousands are coming" (R. 284).*

We need not speculate as to whether other portions of the speech deprecating violence were merely *pro forma* statements for the record or "aesopian" restatements of Walker's claim that responsibility for the violence rested with the Federal Government. Overall, at least, Walker's statements—even his version of them—could reasonably have been interpreted as a call to renewed and increased violence, and many of those present obviously considered them such.

By virtue of his status as a former United States Major General who had commanded the Federal troops at Little Rock and because of the inflammatory nature of his widely publicized statements in support of Governor Barnett, General Walker, simply by his presence on the campus,

*Presumably the "thousands" to whom Walker referred were those whom Walker himself had previously summoned to Oxford with their "flags, tents and skillets" to stand beside Governor Barnett.

became a central figure to whom the rioters looked for leadership. For this reason, the delivery of a speech such as that which even General Walker concedes he made, whether treated separately or taken in conjunction with his admitted conduct before and afterwards, establishes, we believe, the substantial truth and fairness of the conclusion that Walker "assumed command" of the crowd.

The second statement on which the $500,000 jury verdict was predicated was the statement that "Walker . . . led a charge" against the marshals. The trial court defined the term "charge" to mean "A movement toward the marshals, or a group or body of people moving toward an objective", and the term "led" to mean "Activities by a person who directs, moves to action, or encourages in some action or movement" (R. 58).

Measured by these definitions and giving to General Walker the benefit of every reasonable inference, the evidence in this case plainly establishes that on more than one occasion General Walker led a charge.*

General Walker himself concedes that on at least two occasions during the evening he moved in a westerly direction from the area of the Confederate Monument toward the area of the flagpole (R. 478-479, 489-490). Since the Lyceum (where the Federal marshals were gathered) is west of the flagpole, it is obvious that on at least two occasions General Walker advanced toward the Federal marshals.

General Walker denied at trial (R. 490-491) that he was on either occasion "leading a charge", but here is what his own witnesses had to say on that subject:

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*There are almost as many versions of the "charge" as there are witnesses. But this is to be expected in a situation where, as here, numerous witnesses attempt to recollect events which occurred in murky darkness, and in the midst of violence, bloodshed, tear gas and general confusion.

Talmage Witt, a Deputy Sheriff who was called by the Plaintiff and who was with Walker substantially all of the time Walker was on the campus (R. 284, 285), testified that Walker advanced toward the flagpole on two occasions. On the first occasion, prior to the speech, a small crowd followed him until they were dispersed by tear gas (R. 265-266).

The second occasion is succinctly described in Witt's written statement, which reads in relevant part (Def. Ex. 1, R. 282, 285):

> "After some in the crowd had asked Walker if he would lead them, he stepped down from the side of the monument and said: 'Keep protesting and see if we can get closer.' He then started towards the marshals and the crowd of at least a thousand by that time, followed him. This crowd was armed with sticks, rocks, coca cola bottles and other things, as I have heretofore stated. They seemed to have anything that they could get their hands on, and when they got close enough, they would throw towards the marshals. When the front of this crowd, which General Walker was with, got in about 200 feet of the marshals, they fired another blast of tear gas, and the crowd ran back, with General Walker with them. At all times during this, I was near or in sight of General Walker and stayed in sight of him until about 5 a.m. the next morning."

And further (*ibid.*):

> "On a number of occasions Walker would walk towards the marshals, or in that general direction, and whenever he did, a large crowd would fall in behind and follow him. In fact, wherever Walker

went, the crowd followed. During the time after the first march towards the marshals with Walker in or near the lead, I heard different statements, many of which I cannot remember, but at one time, in talking with a group about the protest they were making, he said, 'good, good, keep it up.' I heard people asking how to snuff out or counteract the tear gas, and Walker told them to use water, and right after that they got a fire truck and hose and began to try to use that to stop the gas."

Charles May, another of Plaintiff's witnesses, testified that he saw Walker walking toward the flagpole with a crowd surrounding him (R. 819-820).

Danny Lee Hunter, who was called on behalf of the Plaintiff, testified that when Walker finished the speech at the Confederate Monument he exhorted his listeners: "Come on, let's go," or "Let's go up and see," and started walking toward the flagpole with practically the entire crowd—estimated at approximately 200 people—following him (R. 708-709).

Plaintiff's witness Edwin Leon Jackson testified that the General walked to the vicinity of the flagpole; that ten or fifteen people followed him; that twenty-five were with him; and that those in front of him were throwing rocks (R. 688-690).

Plaintiff's witness Henry Edwards testified that Walker approached the flagpole, accompanied by some fifty or sixty people (R. 429).

Plaintiff's witness Cecil Cox testified that Walker was in the middle of a group of about twenty-five or thirty people who walked up towards the marshals, some waving a flag of truce and demanding "we want that nigger" (R. 206, 208, 213). Following the speech at the Confederate Monument, Cox saw the General and fifteen or twenty others start toward the Lyceum building (R. 212).

Richard Harvey Sweat, another witness for the Plaintiff, testified that Walker walked toward the Lyceum building before his speech with students around him (R. 154-156) and that he walked toward the flagpole a second time after his speech with about fifteen people, including some who had missiles in their hands (R. 189-196).

Finally, there is the testimony of Alfred Kuettner, a reporter for United Press International. Kuettner's testimony is particularly significant because Respondent, at the trial, sought to contrast the alleged unfair treatment accorded to him by Petitioner with the supposed fair treatment accorded him by UPI (R. 1221-1223). Yet the UPI reporter, testifying for Plaintiff, said that Walker was "more than an interested observer" when he came onto the campus (R. 858); that he gave advice to the rioters and was the focal point of student activity (R. 859); and that he, Kuettner, personally saw Walker advance on the Lyceum with two men, one on each side of him (R. 846-847).

The inescapable conclusion which emerges from the welter of testimony is this: Whether Walker advanced toward the marshals with a small group or a large one, whether the mob was hurling missiles at the marshals or demanding "that nigger" under a flag of truce, whether the advance proceeded at slow march or double-time, it is beyond dispute, even on the testimony offered by the Plaintiff, that Walker, during the four to five hours he was on the campus (R. 225), did, in fact, lead at least two charges on the Federal marshals.

We have so far adverted only to the testimony of Respondent's witnesses, since even this evidence establishes conclusively that General Walker did indeed "assume command of the crowd" and "lead a charge." These conclusions are, however, not only corroborated but amplified by the testimony of Petitioner's witnesses.

That testimony discloses, for example, that General Walker not only agreed to lead the rioters in protesting (R. 1082), but also called upon them to "riot, riot" (R. 932). The evidence also discloses that, at a time when a violent, bloody riot was already in progress, General Walker told the students that "You can continue to protest until Meredith is not admitted" (R. 937). There was further testimony that General Walker exhorted the rioting students to "Give them protest, give them casualties" (R. 1136).

Petitioner's evidence further showed that the General repeatedly sought to incite and encourage the rioters by promising that they would receive reinforcements. For example, there was testimony that General Walker told the students to "keep it up all night," and, using pronouns which identified him with the rioters, said that "We have got more people coming" (R. 1059). There was testimony too, that the General told the rioters that the volunteers he had promised were "around town" and would be "available when they are needed" (R. 1134), and that "We can bring them in if we need them" (*Id.*). Defendant's witnesses also testified that General Walker told the students, "Stand fast, firm. There are thousands behind you. You will win in the end" (R. 1022).

Other testimony offered by Petitioner strongly confirms that General Walker in fact "assumed command" and "led a charge". Tom Gregory, a staff writer for the *Meridian Star* and a native of Mississippi, testified, for example, that a large group formed around the General with cries of "He's going up to the Marshals", "General Walker won't let the Marshals stop him" and "Gas won't stop General Walker", after which the General advanced toward the Lyceum Building "at a rather fast clip" with a crowd of about 200 following him (R. 1134-1135).

Doy Gorton, an Ole Miss student, testified that "General Walker went straight toward the Lyceum Building" while "the students and everybody around them started moving in behind General Walker", "yelling rebel yells and cursing and screaming", and that the crowd thereupon advanced, throwing rocks and bricks, until turned back by a volley of tear gas (R. 1097-1098).

Travis Buckley, an attorney from Louin, Mississippi, testified that, in response to cries of "Lead us on, General Walker" and "Be our leader", the General nodded and said "All right, all right, I will", and that the students then gathered around Walker and advanced about 250 yards towards the Lyceum, many of them throwing rocks (R. 1112-1113).

John Charles Hill, a student at Ole Miss, testified that, after the mob shouted "Tell us what to do" and "You are our leader", the General walked toward the Lyceum Building "at a steady pace", and the crowd "sort of fell in behind him" (R. 1059-1061).

The reporter Kingsby Kingsley, a native of Mississippi and an Ole Miss graduate not connected with the Associated Press, saw General Walker walk toward the Lyceum Building, wave his arms and motion to a large group of students to come with him (R. 1122, 1124).

General Walker's attitude toward the violence is reflected in the testimony of Tom Gregory, the *Meridian Star* staff reporter, who testified that the General called the riot "A splendid protest" and exhorted the crowd to "Give them protest, give them casualties." (R. 1136).

Finally, there is Gregory's contemporaneous report for the *Meridian Star,* which was written wholly independently of the Associated Press dispatches and at a time when Gregory had not discussed with Savell the events in ques-

tion. This report, which was published in the *Meridian Star* on October 1, 1962, reads, in full text (Def. Ex. 29; R. 1138, 1490-92):

"WALKER CHARGES, THEN FALLS BACK

*Outsiders Take Part In Campus Rioting*

By TOM GREGORY

Star Staff Writer

OXFORD, Miss.—Into the mob walked Edwin C. Walker, former major general of the United States Army.

Around him swirled a whirlpool of humanity and human emotion. Two hundred yards away, a line of gas-masked, club and tear gas-armed federal marshals had turned the ancient Lyceum building into a federal fort.

'Now we have a leader,' screamed somebody. 'Rally to General Walker!'

Walker, wearing a Texas hat and a dark blue suit, walked toward the Lyceum, with perhaps 200 men following him.

'Tear gas won't stop him,' another person yelled. 'Follow General Walker.'

About 50 yards from the federal line, tear gas bombs began falling around the group.

General Edwin Walker (retired), who wouldn't retreat, did.

One of Many

The former Army officer was just one of the number of outsiders—how many will probably never be known—who egged and aided a hard core of Ole Miss students into a rock flinging, destructive riot that left two dead, 75 to 100 injured, at least

31 arrested and seriously damaged the reputation of a university.

I walked through that howling, passionately unthinking mob for more than four hours during the violence here last night. I saw the rock throwers and the agitators.

I stood under a Confederate flag hoisted on the flag pole before the stately Lyceum and watched students and outsiders rush the marshals' line, retreat before tear gas, regroup and charge again—all without any attempt at control.

Most of the rioters were students—although the number of Ole Miss men steadily decreased through the night. The number of outsiders—nonstudents—steadily increased.

Denim-trousered adults, and teenagers from nearby towns furnished the impetus that kept the college boys at their job of injury and destruction.

One Reference to Meredith

"Do you think they'll leave that nigger here now?" a young student asked nobody in particular shortly after the riot began. In each hand he held a brick.

That was the only direct reference to Negro James Meredith I heard after the rioting began.

Earlier the crowd had attacked at least two newsmen and destroyed a number of cameras and tape recorders, but during the height of the riot, they practically ignored writers taking notes. No cameramen dared take a picture once the situation got out of control.

I wore no identification and was dressed in a short-sleeved white shirt and tie. I was never questioned. Late in the evening, there were so many

non-students that nobody questioned anybody who did not have a camera or recorder.

Only a few of the students—I would estimate 200—actually participated in the violence and destruction.

There were incidents of violence almost as soon as the newsmen started arriving on the campus about 7 p.m. But then, almost without warning, the marshals began firing tear gas into the crowd. After that it was a mob scene.

### Walker Enters Scene

About an hour after the rioting started General Walker entered the scene.

After his abortive attempt to reach the marshals' line, he confined his activity to speech-making and watching. A crowd gathered around him at the edge of the grove and he finally said, 'All right, I'll speak to them.'

Just prior to that, an Episcopal priest, Rev. Duncan Gray, Jr., had tried to talk him into leaving and taking the crowd with him.

'They'll follow you,' Gray said.

But Walker stood at the foot of the old Confederate monument and began speaking.

He told the crowd there had been a 'sellout.' He said a representative of the governor's office had told him that Gov. Ross Barnett's orders were not to let the marshals on the campus.

After an impromptu whispered conference with a blue-coated follower, Walker said, that a member of the Highway Patrol had been responsible for the sellout.

Again there was a conference and Walker said:

'The name is Birdsong.'

> Col. T. B. Birdsong is the head of the Highway Patrol and was in the car that led the first group of marshals to the campus during the afternoon.
>
> Then, referring to the Episcopal priest who had asked him to leave:
>
> 'I am ashamed that I am an Episcopalian.'
>
> At this point Rev. Gray appeared in front of the crowd and was forceably taken from the area by men who feared that he would be injured.
>
> Later a group of students attempted to arrange a truce, but were unable to make the deal (it was: no rocks, no tear gas) because of shouts from the crowd that had inched toward the building. Among the truce-triers were members of the Ole Miss football squad.
>
> One of the shouters was a fat, middle aged man who quite obviously was not a student.
>
> 'No truce! No truce!' he shouted.
>
> There was no truce. After a while the troops arrived."

Notwithstanding the foregoing, the jury returned a verdict for Respondent for $500,000 in general damages and $300,000 in punitive damages (R. 62-63).

The definition of "malice" contained in the trial court's charge to the jury (R. 60, 61) was more favorable to General Walker than the definition of "actual malice" required by *New York Times Co.* v. *Sullivan.* Even so, the trial court found that there was no evidence of malice, set aside the jury's verdict so far as related to punitive damages and entered judgment in favor of Respondent for $500,000 (R. 78).*

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*Upon the facts, the Texas courts were clearly correct in holding that there was no evidence to support a finding of malice. Moreover no reason was adduced at trial why Van Savell, a native of Mississippi (R. 719) formerly employed by the segregationist *Jackson*

An appeal to the Texas Court of Civil Appeals followed, where the judgment was affirmed *per curiam* (R. 1551, 393 S. W. 2d 671) (1965), and an application for rehearing was denied (R. 1552, 393 S. W. 2d 671) (1965).

An application for a writ of error was thereafter filed with, and duly denied by, the Supreme Court of Texas, the court finding no reversible error (R. 1553). An application for rehearing in the Supreme Court of Texas was also denied (R. 1554).

Petitioner's constitutional claims were uniformly rejected below. Since the Supreme Court of Texas rendered no opinion, we briefly advert, so far as relevant to the constitutional questions here presented, to the opinions of the trial court and the Texas Court of Civil Appeals.

The opinion of the trial court is set forth in a letter to counsel dated July 29, 1964, and poses the constitutional questions as follows (R. 72):

> "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."

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*Clarion-Ledger* (R. 720), should have had any malice toward General Walker.

In an effort to create an issue of malice without supporting evidence, Respondent has engaged in captious attacks on peripheral details of the Van Savell story, such as the allegedly false statement that two men took General Walker by the arms during one of the charges. Even as to that detail, the evidence is conflicting (R. 269-271). But, even if the contrary testimony on such an inconsequential detail is accepted, no malice is established; similar conflicts occur among General Walker's own witnesses (Compare, e.g., R. 242 with R. 708), and such conflicts were obviously inevitable in the darkness and confusion of the Oxford riots.

In holding the *Sullivan* doctrine inapplicable, the trial court said (*ibid.*):

> "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.
>
> "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."

The Texas Court of Civil Appeals affirmed, relying, as to the constitutional issues, solely on the authority of a thirty-seven year old law review article and some cases cited to support the proposition that the right of a citizen to defend his reputation "is zealously guarded". The Court said (R. 1542-1543):

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

Moreover, the Court held inapplicable the defenses of "substantial truth" and "fair comment", characterizing the latter defense as a "weak defense . . . subject to so many limitations that it is seldom completely applicable." (R. 1540).

The Supreme Court of Texas declined even to hear the case, finding no reversible error in any of the rulings below (R. 1553).

## SUMMARY OF ARGUMENT

The doctrine enunciated by this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, should be extended to public men of political prominence, such as Respondent, who deliberately thrust themselves into the vortex of important public events. The essential policy behind *Sullivan,* that of protecting and promoting free and unfettered discussion of public issues and those who are in a position to influence the resolution of such issues, cannot be implemented by a privilege which extends only to "public officials". Many prominent public figures who hold no public office have the power, to a much greater extent than many "public officials", to influence public thinking on important political and social issues. The application of *Sullivan* is especially appropriate here, since General Walker deliberately and voluntarily participated centrally in the events at Oxford, Mississippi to such an extent that it would have been impossible to report the facts regarding that fateful

confrontation between Federal and State power without describing the General's activities.

The award of $500,000 in general damages, with no proof of actual damages, is, in the circumstances of this case, itself so excessive as to be violative of the First and Fourteenth Amendments. If such awards are under such circumstances permitted to stand, free discussion of major public events will necessarily be substantially and unconstitutionally inhibited. The inhibiting effect is magnified where, as here, the complainant institutes suits in a large number of jurisdictions based on the same dispatches.

The Texas courts, in holding that the statements here complained of were not "fair comment", have so truncated the defense of fair comment as to render it meaningless, thus violating the First and Fourteenth Amendments. To exclude from the scope of the defense of fair comment the conclusory statements that Walker "assumed command" and "led a charge", on the ground that they were "statements of fact", is to impose an unconstitutional restriction upon discussion of public events.

Finally, the record in this case conclusively establishes that the statements here complained of were true or substantially true. The findings of falsity by the jury and the holdings to the same effect by the Texas courts are so totally unsupported by the evidence as to constitute a denial of due process.

## ARGUMENT

### POINT I

### THE SULLIVAN DOCTRINE IS APPLICABLE TO THIS CASE AND PRECLUDES RECOVERY BY RESPONDENT

It plainly appears from the Record that the statements complained of by General Walker are either true or constitute fair comment upon facts which are essentially undisputed. Accordingly, it is possible for this Court to dispose of

this case without reaching the broader Constitutional questions here presented (See Points III and IV, *infra* pp. 48-51).

Those Constitutional questions are, however, of such vital importance to protection of the freedoms of speech and press which are guaranteed by the First Amendment that we believe it appropriate to discuss them at the very outset.

In this connection, the fundamental question here presented is whether the doctrine enunciated by this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, is applicable to Respondent, who, though not a "public official," is a self-proclaimed person of political prominence and influence who chose voluntarily, aggressively and defiantly to thrust himself into the very center of what was perhaps the most fateful confrontation between Federal and State power since the Civil War. We submit that the doctrine is applicable in the circumstances disclosed by this record.

The Texas courts held squarely that there was no evidence of "malice," actual or otherwise, present here. They nevertheless refused to apply the *Sullivan* doctrine on the sole ground that General Walker was not, at the time of the Oxford riots, a "public official". We submit, however, that the *Sullivan* doctrine cannot, consistent with the First Amendment, be so limited.

In *Sullivan* itself, this Court said that its holding was based upon a "profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open" (376 U. S. at 270) and that "freedom of expression upon *public questions* is secured by the First Amendment" (376 U. S. at 269).*

The controlling significance of this emphasis upon "public issues" and "public questions" has been confirmed by subsequent decisions of this Court.

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*Except as otherwise indicated, the emphasis supplied to quotations from the language of this Court's opinions is our own.

Thus, in *Garrison* v. *Louisiana,* 379 U. S. 64, this Court said (pp. 74-75):

> "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 protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive" . . .,' 376 U. S. at 271-272, 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."

More recently, in *Rosenblatt* v. *Baer,* 383 U. S. 75, this Court said (p. 85):

> "There is, first, a strong interest in debate on *public issues,* and, second, a strong interest in debate *about those persons who are in a position significantly to influence the resolution of those issues.*"

And further (p. 86):

> "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of *New York Times* is that when interests in *public discussion* are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation."

Finally, as recently as December 5, 1966, in *Bond* v. *Floyd*, U. S. , 87 S. Ct. 339, 349 (not yet officially reported), this Court again emphasized:

> "The central commitment of the First Amendment, as summarized in the opinion of the Court in New York Times v. Sullivan, 376 U. S. 254, 270, 84 S. Ct. 710, 721, 11 L. Ed. 2d 686 (1964), is that 'debate on *public issues* should be uninhibited, robust, and wide-open.' "

The basic issue here presented, therefore, is whether the profound national commitment to free and open discussion of public issues can or should be limited to discussions of the activities of "public officials" or whether such commitment must extend to matters of grave public interest and importance and to participants therein. Petitioner believes there can be no true freedom of discussion concerning such matters unless the Constitutional doctrines enunciated in *Sullivan* apply, at the very least, to voluntary participants in public controversies, particularly where, as here, such persons have assumed positions of leadership.

In a pluralistic society such as the United States, decisions of far-reaching political and social importance are continuously and significantly influenced by the views and activities of persons who, though public men, are not "public officials." Many persons—including General Walker—with myriad points of view on public issues have the ability far beyond the power of many "public officials" to influence public thinking on such issues. If the participation of such public men in affairs of pressing public importance and concern cannot be the subject of unfettered discussion and comment, then the process of decision, and dissemination of the facts and views necessary to formulate

decision, must necessarily be inhibited to a degree utterly incompatible with that open discussion which rests at the heart of our system of government.

Specifically with respect to the case at bar, we ask: How can the story of Oxford be told without free and full discussion of the activities of General Walker? Any attempt to describe the events at Oxford without discussing the activities of this central figure would be not only frustrating, but futile.

It is of obvious national interest and significance when General Walker, a person of self-proclaimed national political prominence, a former General officer of the United States Army still addressed as "General" by Court and counsel, calls upon ten thousand of his fellow citizens from every state in the Union to "bring your flags, your tents and your skillets" to defy the executive and judicial power of the Federal Government and thereafter, when generally acknowledged by the mob to be its leader, plays an active role in a violent and bloody assault upon duly constituted officers of the Federal Government then performing their official duties. Such conduct is particularly ironic, and therefore particularly newsworthy, when that same person, while a public official, had been in his own words "on the wrong side" in a similar confrontation in Little Rock.

Indeed, one could scarcely imagine a factual situation which would fit more precisely the very question which this Court expressly left open in *Rosenblatt* v. *Baer,* 383 U. S. 75, 86 (n. 12), namely:

> ". . . whether there are other bases for applying the *New York Times* standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern."

Not only did General Walker "thrust himself into the vortex" of the Oxford confrontation through widely publicized, intemperate statements and actions immediately preceding the bloody riots; he became, in effect, a catalyst for the tragic events which occurred there.

If the actions of every public official from the President of the United States and the Governor of Mississippi to the most junior United States Marshal or Mississippi Deputy Sheriff can freely be discussed and commented upon within the ambit of *Sullivan,* it would indeed be paradoxical to exclude from that discussion the actions and statements of General Walker who, voluntarily, and with as much publicity as he could muster, traveled from Texas to Mississippi to "stand beside Governor Ross Barnett" in the cause of diehard segregation.

It is no answer to the foregoing to assert, as does General Walker in this case, that the defense of "truth" is sufficient protection for one who seeks to report and comment upon the activities of such persons as Respondent. The basic fallacy of this contention has often been recognized by this Court, most recently in *Bond* v. *Floyd,* where the Court once again reiterated that "erroneous statements must be protected to give freedom of expression the breathing space it needs to survive. . . ." 87 S. Ct. at 349. *Accord, Garrison* v. *Louisiana,* 379 U. S. 64 at 74. *See, also, Cantwell* v. *Connecticut,* 310 U. S. 296 at 310.

As this Court said in *Sullivan,* 376 U. S. 254, at 279:

> "Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. * * * Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and

> even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' *Speiser* v. *Randall, supra,* 357 U. S., at 526. . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments."

Events, activities and decisions which become the subject of political controversy are often so complex that the whole truth concerning them can never fully be known or proved. And when, as here, the statements complained of are essentially conclusory in nature, the difficulty of establishing their "truth" is infinitely magnified. Particularly is this true in matters of public controversy involving highly emotional issues, where the dividing line between fact and comment is often difficult to draw.

The press will not be free, unfettered, or, in the case of smaller enterprises, even capable of survival* if the *Sullivan* doctrine is not extended to persons of political prominence such as General Walker and the "truth" of an article concerning such persons is to be determined by those strongly opposed to its thrust.

Overwhelmingly, the developing law in both state and lower Federal courts supports the extension of *Sullivan* to persons who, though not public officials, are prominent in the public arena and have taken part in the resolution of issues of public importance. *See, e.g., Walker* v. *Associated Press,* Colo. , P. 2d (1966); *Walker*

*For example, Hodding Carter, publisher of *The Delta-Democrat Times,* has personally been sued for slander by General Walker on the basis of remarks made about Walker and his cause in a speech made at the University of New Hampshire on October 11, 1962, as a part of that University's "Distinguished Lecture Series". Damages of $2,000,000.00 are sought. *Edwin A. Walker* v. *Hodding Carter,* Cause No. 6182, Circuit Court of Washington County, Mississippi.

v. *Courier-Journal and Louisville Times Co.,* 246 F. Supp. 231 (W. D. Ky. 1965), *rev'd on other grounds,* F. 2d (6th Cir. 1966)*; *Pauling* v. *Globe-Democrat Publishing Company,* 362 F. 2d 188 (8th Cir. 1966), *app. pend'g; Pauling* v. *News Syndicate Company,* 335 F. 2d 659, 671 (2d Cir. 1964), *cert. denied,* 379 U. S. 968; *Gilberg* v. *Goffi,* 21 App. Div. 2d 517, 251 N. Y. S. 2d 823 (2d Dep't 1964), *aff'd,* 15 N. Y. 2d 1023, 207 N. E. 2d 620, 260 N. Y. S. 2d 29 (1965); *State* v. *Browne,* 86 N. J. Super. 217, 206 A. 2d 591, 598-599 (App. Div. 1965); *Pauling* v. *National Review,* 49 Misc. 2d 975, 269 N. Y. S. 2d 11 (Sup. Ct. N. Y. Co. 1966), *app. pend'g.***

Of particular interest here are those cases in which the courts have applied the *Sullivan* doctrine to General Walker himself with respect to the very news reports complained of in this case.*** Thus, in *Walker* v. *Courier-Journal and Louisville Times Co.,* 246 F. Supp. 231 (W. D. Ky. 1965), *rev'd on other grounds,* F. 2d (6th Cir. 1966), the District Court reached the "inescapable conclusion" that *Sullivan* applied, saying (246 F. Supp. at 233-234):

> "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

*For the convenience of the Court, the as yet unreported opinions of the Supreme Court of Colorado and of the Court of Appeals for the Sixth Circuit are annexed hereto as an appendix.

***See, also,* Brennan, *The Supreme Court and the Meikeljohn Interpretation of the First Amendment,* 79 Harv. L. Rev. 1 (1965); Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation,* 49 Cornell L. Q. 581 (1964); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment",* 1964 Sup. Ct. Rev. 191; Berney, *Libel and the First Amendment—A New Constitutional Privilege,* 51 Va. L. Rev. 1 (1965); Comment, *The Scope of First Amendment Protection for Good Faith Defamatory Error,* 75 Yale L. J. 642 (1966); 19 Sw. L. J. 399 (1965); 9 Vill. L. Rev. 534 (1964); 16 Syracuse L. Rev. 132 (1964).

***Omitted from this discussion is *Walker* v. *Associated Press,* La. App. , So. 2d , (1966) *app. pend'g,* discussed below at pages 43-45.

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.

"I therefore reach the inescapable conclusion that the protective 'public official' doctrine of 'actual malice' announced in New York Times v. Sullivan 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.' "

And further (246 F. Supp. at 234):

". . . I am perhaps 'plowing new ground' in legal effect, but also with the accompanying con-

viction that not to do so would negate the spirit of the 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 District Court's holding that *Sullivan* applied was sustained by the Sixth Circuit, which said (Appendix, p. 12a):

"It is apparent, and Appellant alleges in his petition, that he is a person of political prominence, and is a person in a position significantly to influence the resolution of issues of national importance. It is also apparent that Appellant involved himself dramatically into the racial crises in Oxford,

> Mississippi; that he 'thrust himself into the vortex of the discussion of a question of pressing public concern.' The motivating force of the Times decision compels its applicability here."

*Walker* v. *Associated Press*, Colo. , P. 2d (1966) was another of Respondent's many libel actions against Petitioner. The Supreme Court of Colorado held squarely and unanimously that *Sullivan* was applicable to General Walker upon the very facts involved in this case. The Colorado Court said (Appendix, p. 7a):

> "The problem is whether the rule announced in the *New York Times Company* case, where a public official was involved, applies with equal force to a public figure who has voluntarily thrust himself into the vortex of the public discussion of an issue which is of pressing public interest and concern. Plaintiff in the instant case is not a public official, but he admittedly is a public personage who did voluntarily go from his home in Texas to Mississippi at the time when James Meredith, a colored person, was being enrolled in the University of Mississippi, and under such circumstances he most certainly did thrust himself into the vortex of the discussion of a matter of great public concern.
>
> "We now hold that the rule of *New York Times Company* v. *Sullivan, supra,* applies to the instant controversy to the end that even though the news release be libelous per se, plaintiff still cannot recover unless he is able to show actual malice, as defined in the *New York Times Company* case, on the part of Associated Press."

The case before this Court represents one of the most serious—and to date successful—attacks ever made on freedom of the press. What is here at stake is nothing less than the fundamental right of news media to publish and

disseminate, without fear or favor, good faith reports and comment concerning events of national significance and persons of political prominence who are involved or involve themselves in such events.

This is but one of at least fifteen cases brought by General Walker against the Associated Press, its members, or both, arising out of news reports identical to or substantially the same as those now before this Court. In those fifteen cases, Respondent seeks damages aggregating some $33,250,000.*

These cases were for the most part filed in forums in Southern or border states where it could reasonably be anticipated that juries would share the belief, widely held in the South, that the South's position in the segregation controversy had been grossly falsified and maliciously reported by national news media, and might therefore be influenced, in determining the issues of liability and damages, by the widespread regional feeling that "irresponsible outsiders" should be taught a lesson.

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| * Name of case | Court in which filed and docket number | Damages demanded in complaint |
|---|---|---|
| | I CASES NAMING ASSOCIATED PRESS AS A DEFENDANT | |
| Walker v. The Associated Press | District Court, Tarrant County, Texas, No. 16624 | $2,000,000 |
| Walker v. The Associated Press | Circuit Court of Duval County, Florida, Civil Action No. 64-246-L; removed to U. S. District Court, Middle District of Florida, No. 64-267-Civil-J | $2,000,000 |
| Walker v. The Associated Press | Circuit Court of Pulaski County, Arkansas, No. 58859; removed to U. S. District Court, Eastern District of Arkansas, No. LR-65-C-178 | $1,000,000 |
| Walker v. Associated Press and Times-Picayune Publishing Corporation | District Court, Caddo Parish, Louisiana, Number 160,536 | $2,250,000 |
| Walker v. The Denver Post, Inc. and The Associated Press | District Court, City and County of Denver, Colorado, Civ. No. B66072 | $1,000,000 |
| Walker v. The Kansas City Star Company and The Associated Press | Circuit Court, Jackson County, Missouri, No. 133,768 | $1,000,000 |

That this is what in fact occurred is demonstrated by this very case, in which the jury awarded some $300,000 in punitive damages on a record which the Texas courts thereafter held, as a matter of law, was wholly devoid of any evidence of malice and by the further award of some $500,000 in general damages, although not one penny of actual damages was established or even claimed.

In the only other case heretofore tried—that in the Louisiana state courts—the jury returned a verdict of $3,000,000, although Respondent himself had only sought damages of $2,250,000 and punitive damages are not allow-

| * Name of case | Court in which filed and docket number | Damages demanded in compliant |
|---|---|---|
| Walker v. Savell and The Associated Press | Circuit Court, Lafayette County, Mississippi, No. 7137; removed to U. S. District Court, Northern District of Mississippi, No. W-C-34-62; Subsequently dismissed as to Associated Press for lack of jurisdiction. | $2,000,000 |
| II Cases Not Naming Associated Press as a Defendant | | |
| Walker v. Courier-Journal and Louisville Times Company, Inc. and WHAS, Inc. | U. S. District Court, Western District of Kentucky, Civil Action 4639 | $2,000,000 |
| Walker v. Times Publishing Company | Circuit Court, Pinellas County, Florida, No. 17,694-L | $2,000,000 |
| Walker v. The Pulitzer Publishing Company | U. S. District Court, Eastern District of Missouri, Eastern Division, No. 63 C 361(1) | $2,000,000 |
| Walker v. Atlanta Newspapers, Inc. and Ralph McGill | U. S. District Court, Northern District of Georgia, Civ. No. 8590 | $10,000,000 |
| Walker v. The Journal Company | U. S. District Court, Eastern District of Wisconsin, Civ. No. 64-C-270 | $2,000,000 |
| Walker v. The Journal Company | U. S. District Court, Eastern District of Wisconsin, Civ. No. 64-C-276 | $2,000,000 |
| Walker v. The Gazette Publishing Company, Inc. | Circuit Court, Pulaski County, Arkansas, Civ. No. 58857 | $1,000,000 |
| Walker v. Arkansas Democrat Company | Circuit Court, Pulaski County, Arkansas, Civil No. 58858 | $1,000,000 |
| | Total | $33,250,000 |

able in a civil action in Louisiana.* On appeal, although the judgment was reduced to $75,000, the Louisiana Court of Appeals held as a fact that actual malice had been established and thus avoided a determination as to the applicability of *Sullivan.***

These cases are striking examples of the effectiveness of the technique of converting the libel laws into weapons to punish those disseminating information about public controversies which arouse deep emotions—in this case the attempts by hard-core segregationists, in public office and out, to perpetuate a system of racial segregation which is patently unconstitutional.***

The resultant threat to fundamental freedoms of speech and press is self-evident. As this Court said in *Sullivan,* 376 U. S. 254, 278, in speaking of a libel award against the New York Times in Alabama, also for half a million dollars:

> "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."

If ever there was a case which, in the interest of free speech and the public good, requires the extension of the *Sullivan* doctrine, this is that case.

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**See, e.g., Gugert* v. *New Orleans Independent Laundries,* 181 So. 653 (La. Ct. App., 1938) (not officially reported); *Heeb* v. *Codifer & Bonnabel,* 162 La. 139, 110 So. 178 (1926); *Brian* v. *Harper,* 144 La. 585, 588, 80 So. 885, 886 (1919); *Universal C. I. T. Credit Corp.* v. *Jones,* 47 So. 2d 359 (La. Ct. App. 1950) (not officially reported).

**Petitioner has applied to the Supreme Court of Louisiana for a writ of error.

***This technique is not novel. It is patterned, apparently, on that adopted by Alabama and its officials in attempting to punish the New York Times for criticizing Alabama's conduct in the desegregation controversy (*New York Times Co.* v. *Sullivan,* 376 U. S. 254, 278, 292).

In this, the first to be tried of the fifteen lawsuits brought by Respondent against Petitioner, its members or both, the Texas courts have all expressly held that Respondent failed to prove malice, actual or otherwise, and the record demonstrates beyond doubt that there could have been none. Yet, in the second of the suits to be tried, a Louisiana trial court and the Louisiana Court of Appeals, on precisely the same operative facts, have sustained a finding by a jury that Petitioner's publication was motivated by "actual malice". It may reasonably be anticipated that, in the remaining suits, Respondent will attempt again and again to circumvent any holding that *Sullivan* applies to him by urging in each of those cases that dissemination of the dispatches here involved was motivated by "actual malice".

We believe, therefore, that a holding which extends *Sullivan* to Respondent may neither fully resolve the constitutional issues presented by this and Walker's other suits, nor, as a practical matter, relieve Petitioner of the great expense and effort of defending, with whatever ultimate success, the many other actions now pending. This Court has already recognized, in *Sullivan* (376 U. S. 254, 279), that the "fear of the expense" of proving truth might deter publication and restrict discussion of questions of public importance. How much greater is the deterrent when it is magnified, as here, by a multiplicity of suits arising out of the same dispatches. The threat inherent in the pendency of these suits, and the burden of defense thus placed upon Petitioner is, we submit, as unconstitutionally inhibiting a restraint on free discussion as a single extravagant award. *See, e.g.,* Painter, *Republication Problems in the Law of Defamation,* 47 Va. L. Rev. 1131, 1138 (1961); Prosser, *Interstate Publication,* 51 Mich. L. Rev. 959, 968-970 (1953); *Hartmann* v. *Time,* 166 F. 2d 127, 134 (3rd Cir.

1948), *cert. denied,* 334 U. S. 838; *Nagoya Associates, Inc.* v. *Esquire, Inc.,* 191 F. Supp. 379, 382 (S. D. N. Y. 1961).*

General Walker's multi-state, multi-million dollar attack on Petitioner and its members is a striking illustration of the dangers which led a minority of this Court to question the efficacy of the actual malice qualification. As Mr. Justice Douglas said, in his concurring opinion in *Garrison* (379 U. S. 64 at 81):

> "If malice is all that is needed, inferences from facts as found by the jury will easily oblige."

Or in the words of Mr. Justice Black, in his concurring opinion in *Rosenblatt* (383 U. S. 75 at 95):

> "Half-million-dollar judgments for libel damages like those awarded against the New York Times will not be stopped by requirements that 'malice' be found, however that term is defined. Such a requirement is little protection against high emotions and deep prejudices which frequently pervade local communities where libel suits are tried. And this Court cannot and should not limit its protection against such press-destroying judgments by reviewing the evidence, findings, and court ruling only on a case-by-case basis."

For all these reasons, we ask this Court not only to hold that the *Sullivan* doctrine is applicable to Respondent, but, in fulfillment of its governing role in the administration of justice in cases involving constitutional issues, to rule, also, that Respondent, in failing to prove actual malice in this case, is hereafter precluded from unconstitutionally restricting free speech and press by raising the issue of actual malice in any of his other actions against Petitioner which are based on the same or substantially the same facts.

*Indeed, the expenses incurred by Petitioner and its members in defending Respondent's pending actions has already greatly exceeded the judgment in this case.

## POINT II

**THE AWARD OF $500,000 GENERAL DAMAGES IN THIS CASE ITSELF CONSTITUTES AN ABRIDGMENT OF CONSTITUTIONAL PROTECTION.**

One of the most shocking features of this case is the inordinate and unconscionable size of the award—half a million dollars in "general" damages where no actual pecuniary or other damage was or could be shown.

The enormous award was plainly intended, not to compensate, but to punish and deter; to wreak vengeance on Petitioner for disseminating over its news service good faith reports of the Oxford riots and the related activities of General Walker, and to deter Associated Press, its member newspapers and other news media from gathering and disseminating news on the integration issue deemed unfavorable to the segregationist cause or critical of prevalent Southern views.

Permitted to stand, the award will indeed deter and perhaps entirely preclude news gathering and disseminating institutions from performing a function vital to any free society—the disclosure and discussion of controversial public issues and personalties. What newspaper, what magazine, what wire service would, as a practical matter, disseminate a report unfavorable to General Walker or any other controversial public or political figure if there were substantial risk of a judgment for half a million dollars? Or if that news medium could be forced to defend—perhaps successfully, but nevertheless at great cost and effort—libel suits, however specious, brought wherever the plaintiff believes he has found a forum friendly to himself or antagonistic to the news medium involved?

We respectfully submit that, in and of itself, the inexplicably high award for compensatory damages alleged to

have been suffered in Texas alone presents a substantial constitutional question under the First and Fourteenth Amendments.* The repressive effect of such an award upon freedom of expression is so patent, the inhibiting effect upon the presentation of conflicting and controversial political argument and discussion so plain, the punishment for such a presentation so burdensome and oppressive that this Court should not, consistent with the First Amendment, permit its imposition. Cf. *New York Times Co.* v. *Sullivan,* 376 U. S. 254; *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58; *Marcus* v. *Search Warrant,* 367 U. S. 717; *Shelton* v. *Tucker,* 364 U. S. 479; *Speiser* v. *Randall,* 357 U. S. 513.

## POINT III

### THE DEFENSE OF "FAIR COMMENT" AS CONSTRUED AND APPLIED BY THE COURTS BELOW IS SO LIMITED AS TO BE UNCONSTITUTIONAL.

Petitioner contended throughout the proceedings below that the conclusory statements which were held libelous constituted "fair comment" on the activities of General Walker at Oxford. The Texas courts, however, held otherwise. In so holding, those courts so truncated the doctrine of fair comment as to leave it meaningless, and thus violated the First Amendment to the Federal Constitution.

The Texas Court of Civil Appeals rejected the fair comment defense on the ground that the statements that Walker "assumed command" and "led a charge" were not

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*Although the judgment is civil in form, we believe an award which is two hundred and fifty times the maximum statutory fine for criminal libel (see Vernon's Texas Penal Code, § 1270) is, in the circumstances of this case, a classic case of "cruel and unusual punishment." The "cruel and unusual punishment" provisions of the Eighth Amendment, applicable to the states by virtue of the due process provisions of the Fourteenth Amendment (*Robinson* v. *California,* 370 U. S. 660) relate, by analogy at least, to civil actions and proceedings. *Toepleman* v. *United States,* 263 F. 2d 697, 700 (4th Cir. 1959), *cert. denied sub nom. Cato Bros., Inc.* v. *United States,* 359 U. S. 989; Cf. *Trop* v. *Dulles,* 356 U. S. 86.

"fair comment," but "statements of fact" (R. 1537). The danger of a holding based on so illusory a distinction has long been recognized. In *Coleman* v. *MacLennan,* 78 Kan. 711, 98 Pac. 281 (1908), the Court, after emphasizing the "insensible gradations" which often exist between comment and fact, said (98 Pac. at p. 291):

> "In keeping plain the distinction between comment and statements of fact, the courts of some of the states leave the law very much in the attitude of saying to the newspaper: 'You have full liberty of free discussion, provided, however, you say nothing that counts.' "

The dangers envisaged by the Kansas court could scarcely be better illustrated than by this case. The relevant facts as set forth above, despite some conflict as to the details, are essentially undisputed. If on the basis of those facts a news medium cannot make the comment in good faith that General Walker "assumed command of the crowd" and "led a charge" of students on the Federal marshals without risking a libel judgment of $500,000 then the freedoms of press and speech guaranteed by the Federal Constitution become illusory.

It is no answer to assert, as have the courts below, that a news medium need have no fears if it but accurately reports the "facts." In this case, there was no finding that any of the underlying facts set forth in the articles were false, but rather that Petitioner's conclusion or opinion of Walker's role, based on the facts contained in the articles and developed at trial, was not "fair comment." Obviously, any comment critical of Walker would not have been considered "fair" by a jury under all the circumstances of the trial.

Where, as here, the defense of "fair comment" is rejected by the Texas Court of Civil Appeals as a "weak defense . . . subject to so many limitations that it is seldom completely applicable" (R. 1540), and where, as

here, such limitations are invoked to impose a liability of half a million dollars, it is obvious that the libel laws have been used to achieve a result which the Federal Constitution prohibits.

If this decision is permitted to stand, the only prudent course open to the press will be to refrain from commenting on events—however significant and newsworthy—where such comments may reflect unfavorably upon a participant in a public controversy arousing deep emotional responses which differ in the various regions of our country. For all practical purposes, the doctrine of fair comment would be of no avail and useless as a protection to news media involved in such controversies.

This Court has already indicated that there are Federal Constitutional boundaries limiting the extent to which the states can circumscribe the availability and applicability of the defense of "fair comment." See *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 292, n. 30. Petitioner submits that those boundaries have here been violated.

## POINT IV

### THE STATEMENTS COMPLAINED OF ARE TRUE, AND THE JURY'S CONTRARY FINDING AND CONSEQUENT AWARD CONSTITUTE A DENIAL OF DUE PROCESS.

When all is said and done, and apart from the other constitutional questions which permeate this case, the fact remains, as we observed at the very outset of this discussion, that there is no more support for the jury's finding of falsity than there was for its finding of malice.* To award half a million dollars where there is no evidence establish-

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*It is, of course, firmly settled that this Court may examine independently the factual record to insure that principles of Federal constitutional law are correctly applied. *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 285; *Edwards* v. *South Carolina,* 372 U. S. 229, 235; *Blackburn* v. *Alabama,* 361 U. S. 199, 205, n. 5; *Spano* v. *New York,* 360 U. S. 315, 316. "Were it otherwise the constitutional limits of free expression in the Nation would vary with state lines." *Pennekamp* v. *Florida,* 328 U. S. 331, 335.

ing the underlying cause of action is, of course, a denial of due process—indeed, one of the most obvious denials of due process that can be imagined. *Shuttleworth* v. *Birmingham,* 382 U. S. 87; *Garner* v. *Louisiana,* 368 U. S. 157; *Thompson* v. *Louisville,* 362 U. S. 199. We respectfully submit that this Court, as the ultimate guardian of the rights guaranteed by the Constitution, should correct this grave injustice by holding that the record establishes the truth or substantial truth of the publications complained of and that the jury's contrary finding and consequent award constitute a denial of due process in violation of the Fourteenth Amendment.

## CONCLUSION

For each of the foregoing reasons, Petitioner asks this Court to reverse the judgments of the Texas courts upon the verdict with respect to special issues Nos. 1, 2, 3, 5, 6, 7 and 9; to vacate the $500,000 award; to direct that the complaint herein be dismissed with prejudice; and to award costs to Petitioner.

Petitioner further requests that this Court expressly hold that Respondent is precluded from raising the issue of "actual malice" in any of his other actions against Petitioner which are based on the same or substantially the same facts.

Respectfully submitted,

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# APPENDIX

# APPENDIX

## Texts of Unreported Opinions

1. ***Walker* v. *Associated Press*, Colo. , P. 2d (1966)**

**No. 21732**

EDWIN A. WALKER,
*Plaintiff in Error,*

*v.*

THE ASSOCIATED PRESS,
*Defendant in Error.*

ERROR TO THE DISTRICT COURT OF THE CITY AND COUNTY OF DENVER

HON. SAUL PINCHICK, *Judge*

EN BANC

**JUDGMENT AFFIRMED IN PART AND REVERSED IN PART**

EARL J. HOWER,
CLYDE J. WATTS,
*Attorneys for Plaintiff in Error.*

WINNER, BERGE, MARTIN & CAMFIELD,
*Attorneys for Defendant in Error.*

MR. JUSTICE MCWILLIAMS DELIVERED THE OPINION OF THE COURT.

Edwin A. Walker, hereinafter referred to as the plaintiff, brought a libel action against the Associated Press, a

New York corporation, and the The Denver Post, Inc., a Colorado corporation. In this writ of error we are concerned only with plaintiff's three claims for relief against the one defendant, Associated Press.

After permitting the plaintiff to amend his complaint on several occasions, the trial court eventually granted a motion to dismiss filed by the Associated Press, and judgment of dismissal followed. It is this judgment of dismissal which the plaintiff now seeks to have reversed.

In order to better understand this matter it becomes necessary to analyze with some degree of particularity the several complaints, and amendments thereto, filed by the plaintiff. This action was commenced by the plaintiff on September 30, 1963 with the filing of a complaint. In his original complaint the plaintiff claimed to have been libeled in the following publications: (1) an editorial appearing in The Denver Post on October 1, 1962; (2) a news article appearing in The Denver Post on October 2, 1962; and (3) an Associated Press news release of October 3, 1962, which was forwarded by the Associated Press to the Denver Post.

Our examination of the original complaint leads us to conclude that by the words used in this complaint plaintiff intended to charge, and did charge, the Associated Press with only one allegedly libelous publication, i.e., its news release of October 3, 1962, and that it was The Denver Post which was said to have libeled plaintiff in its editorial of October 1, 1962 and in its news article of October 2, 1962. Be that as it may, in our view on November 14, 1963 plaintiff cleared up any possible doubt on this particular matter by quite definitely charging Associated Press with only one libelous publication, namely its news release of October 3, 1962.

Thereafter, on February 17, 1964, the trial court granted the motion to dismiss filed by Associated Press,

and the plaintiff was granted time within which to file a second complaint. This the plaintiff did on March 11, 1964, in what he chose to denominate as an "Amended Complaint." This amended complaint contained what plaintiff labeled as counts one, two and three. Count one related to The Denver Post editorial of October 1, 1962, but in this pleading *both* The Denver Post and the Associated Press were charged with this particular publication.

Count two of the amended complaint related to The Denver Post news article of October 2, 1962, and again in this amended complaint *both* the Associated Press and The Denver Post were charged with this publication.

Count three of the amended complaint was directed solely against the Associated Press, and it concerned the press release of October 3, 1962.

To this amended complaint Associated Press again filed a motion to dismiss alleging, as to counts one and two, that "such alleged claims . . . did not accrue within one year prior to the filing of the amended complaint."

The trial court agreed with this contention of Associated Press, and dismissed these particular counts on the ground that they were barred by the one year statute of limitation. C. R. S. 1963, 87-1-2. In our handling of this writ of error we shall first concern ourselves with the propriety of this particular ruling, laying aside for a moment a consideration of the third count in the amended complaint.

Counsel apparently agree that *if* counts one and two represent "new" claims against Associated Press, then each is barred by the applicable statute of limitation. Plaintiff argues, however, that counts one and two are not really new claims, but on the contrary relate back to the original complaint. Being, then, merely an enlargement upon the averments in the original complaint, plaintiff urges that counts

one and two are therefore not barred by the one year statute of limitation. See *Platte Valley Motor Co.* v. *Wagner,* 130 Colo. 365, 278 P. 2d 870; *Smith* v. *La Forge,* 170 Kans. 677, 228 P. 2d 509, and *Doyle* v. *Okla. Press Pub. Co.,* 206 Okla. 254, 242 P. 2d 155.

Associated Press argues, to the contrary, that counts one and two represent *new* claims as to it, even though not to The Denver Post. In other words, it is pointed out that the Associated Press, as opposed to The Denver Post, was never charged with the publication of The Denver Post editorial of October 1, 1962 or The Denver Post news article of October 2, 1962 until March 11, 1964, the date when the amended complaint was filed.

In the original complaint it would appear that The Denver Post was charged with two libelous publications, i.e., its editorial of October 1, 1962 and its news article of October 2, 1962, and that the Associated Press was charged with only one libelous publication, i.e., its news release of October 3, 1962, which it is observed occurred subsequent to the dates of the allegedly libelous publications of The Denver Post.

If, however, there be doubt as to which defendant was charged with libelous publication, the matter in our mind was, as already mentioned, fully cleared up by the plaintiff himself when he filed his Amendment to Complaint on November 14, 1963. In that pleading it is quite evident that Associated Press is charged with only one libelous publication, namely its press release of October 3, 1962. Hence, when plaintiff in his Amended Complaint of March 11, 1964 avers that the Associated Press also published the allegedly libelous editorial and news article appearing in The Denver Post, he truly is setting forth "new" claims, "new" at least as to the one defendant, the Associated Press.

These three separate publications, of course, constitute separate and distinct claims. See *Hartmann* v. *Time, Inc.,* 60 N. Y. S. 2d 209. Accordingly, we conclude that counts one and two in the amended complaint constitute "new" claims against the Associated Press, and not having been asserted against Associated Press within one year after the cause of action accrued, are now barred by the provision of C. R. S. 1963, 87-1-2. See *Evans* v. *The Republican Publishing Company,* 20 Colo. App. 281, 78 Pac. 311 and *Spears Free Clinic* v. *Maier,* 128 Colo. 263, 261 P. 2d 489.

We shall now proceed to a consideration of count three in the amended complaint. In all of his various pleadings the plaintiff alleged only general—as opposed to special—damages. And this was so even though he was given more than adequate opportunity by the trial court to amend his several complaints in this regard. However, he chose not to so do, and the trial court eventually dismissed count three of the amended complaint for this failure on the part of plaintiff to allege special damages. The reasoning of the trial court was that the allegedly libelous press release was only libelous per quod, and that in such event the plaintiff had to allege special damages, and the mere allegation of general damages was legally insufficient.

Plaintiff admits that he only alleged general damages, but contends that such is sufficient because, contrary to the determination made by the trial court, the news release—he claims—was libelous per se. So, this particular problem narrows down to a determination as to whether the press release of Associated Press under the date of October 3, 1962 is libelous per se, or per quod.

Plaintiff's overall position in this regard is that the Associated Press release of October 3, 1962 falsely charges him with the commission of a crime, namely a violation of 18 U. S. C. A. 111, which provides that he who "assaults,

resists, opposes, intimidates or interferes" with, among other persons, a United States Marshal while engaging in the performance of his official duties shall be fined not more than $5,000 or imprisoned for not more than three years, or both.

Plaintiff and Associated Press agree that *if* the latter in its press release of October 3, 1962 falsely charged the plaintiff with the commission of a crime, then the publication is libelous per se. See *Cinquanta* v. *Burdett,* 154 Colo. 37, 388 P. 2d 779, 1 A. L. R. 3rd 840 and *O'Cana* v. *Espinosa,* 141 Colo. 371, 347 P. 2d 1118. Associated Press contends, however, that its press release of October 3, 1962 does *not* charge plaintiff with having committed a crime, and that it is only by innuendo that such could ever be "read into" this particular release .

Our study of this news release of October 3, 1962 leads us to the conclusion that this particular publication is libelous per se in that it does charge the plaintiff with the commission of a crime. At the very least this news release charges plaintiff with taking the "command" of a theretofore unorganized mob which was resisting and interfering with United States Marshals who were about their official business by "charging" them, by hurling "bricks, bottles, rocks and wooden stakes toward the clustered marshals." One can, of course, be charged with the commission of a crime even though it is not done in the exact language of the statute. From our reading of the news release plaintiff was clearly charged with resisting and interfering with U. S. Marshals who were about their official business, and was also charged with aiding and abetting others who were similarly engaged in various acts constituting resistance and interference. If the language used in this press release doesn't equate to "resistance" and "interference", then it would be difficult to know what would. Hence, we hold the press release in quesiton as libelous per se.

The Associated Press goes on to argue that even though its press release be deemed libelous per se, count three of the amended complaint is still subject to a motion to dismiss on the basis of *New York Times Company* v. *Sullivan,* 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A. L. R. 2d 1412. In our view of this matter the rule laid down in the *New York Times* case does have application to the instant controversy, but, as will be developed, such does not justify an outright dismissal of count three of the amended complaint on a motion to dismiss.

In the *New York Times Company* case the Supreme Court of the United States rather severely limited the right of *public officials* to recover for libelous newspaper articles by holding that the constitutional safeguards regarding freedom of speech and press require that a public official in a libel action against a critic of his official conduct must show actual malice on the part of such critic before the public official can make any recovery, and that such is true even though the statements are libelous per se.

The problem is whether the rule announced in the *New York Times Company* case, where a public official was involved, applies with equal force to a public figure who has voluntarily thrust himself into the vortex of the public discussion of an issue which is of pressing public interest and concern. Plaintiff in the instant case is not a public official, but he admittedly is a public personage who did voluntarily go from his home in Texas to Mississippi at the time when James Meredith, a colored person, was being enrolled in the University of Mississippi, and under such circumstances he most certainly did thrust himself into the vortex of the discussion of a matter of great public concern.

We now hold that the rule of *New York Times Company* v. *Sullivan, supra,* applies to the instant controversy to the end that even though the news release be libelous per se,

plaintiff still cannot recover unless he is able to show actual malice, as defined in the *New York Times Company* case, on the part of Associated Press.

We recognize that there is authority from other jurisdictions which looks away from such a holding. See, e.g., *Fignole* v. *The Curtis Publishing Company,* 247 F. Supp. 595. But in our considered view the rationale of *New York Times Company* v. *Sullivan, supra,* clearly suggests that the rule announced therein should apply to one in the position of this plaintiff. And there is authority from other jurisdictions which supports our conclusion in this regard. Accordingly, we subscribe to the reasoning found, for example, in *Walker* v. *Courier-Journal & Louisville Times Co.,* 246 F. Supp. 231. See, also, *Pauling* v. *National Review, Inc.,* 269 N. Y. S. 2d 11; *Pauling* v. *News Syndicate Company, Inc.,* 335 F. 2d 659 and *Rosenblatt* v. *Baer,* 383 U. S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597.

Even though the rule of *New York Times Company* v. *Sullivan, supra,* does have applicability to the instant matter, such determination does not justify a dismissal of count three of the amended complaint on a motion to dismiss. Plaintiff in count three of his amended complaint alleges that the Associated Press published its press release of October 3, 1962 with actual malice, and his pleading in this regard is, therefore, sufficient to bring him even within the narrow rule announced in *New York Times Company* v. *Sullivan, supra.*

Associated Press finally argues that plaintiff has made a judicial admission that the Associated Press acted without actual malice by amending his pleading so as to incorporate by reference plaintiff's libel action brought in Texas against the Associated Press, which action was apparently based on the same press release of October 3, 1962. See *Associated Press* v. *Walker,* Tex. App. , 393 S. W. 2d 671.

Without belaboring this point, we are of the view that the position of Associated Press in this regard is not well-taken and that this matter cannot be injected in this manner into the instant proceeding.

The judgments of dismissal as to counts one and two of the amended complaint are affirmed. The judgment of dismissal as to count three of the amended complaint is reversed and the cause is remanded with directions that further proceedings in connection therewith be consonant with the views herein expressed.

Mr. Chief Justice Sutton not participating.

**2. *Walker* v. *Courier-Journal and Louisville Times Co.*, F. 2d (6th Cir. 1966) *rev'g.* 246 F. Supp. 231 (W. D. Ky. 1965)**

**No. 16999**

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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| EDWIN A. WALKER,<br>*Plaintiff-Appellant,*<br>*v.*<br>COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, INC. AND WHAS, INC.,<br>*Defendants-Appellees.* | Appeal from the United States District Court for the Western District of Kentucky at Louisville. |

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Decided October 28, 1966.

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Before: WEICK, Chief Judge, PHILLIPS and CELEBREZZE, Circuit Judges.

PER CURIAM: This is an appeal from an order sustaining a motion to dismiss a libel action instituted by Appellant, retired Major General Edwin Walker. In his complaint, Appellant alleged that the defendants Courier-Journal, Louisville Times Company and WHAS, Inc., falsely and maliciously reported that Appellant participated in riots in Oxford, Mississippi by leading a charge of brick throwing students against United States Marshals. The riots occurred as a result of the integration of white and

negro students at the University of Mississippi. Appellant alleges in his complaint that he:

> "... was ... a person of political prominence who had in public announcements vigorously asserted his adherence to accepted and constitutionally defined limitations upon the powers of the central government and to principles of separation of powers as between the central government and the several States."

On the basis of *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 83 S. Ct. 710, 11 L. Ed. 2d 686 (1964), the District Court dismissed Appellant's complaint. We agree with the District Court as to the applicability of New York Times. Applying the doctrine of New York Times, however, we disagree with the District Court in not giving an opportunity to Appellant to offer evidence to show malice.

The Supreme Court said in *Rosenblatt* v. *Baer,* 383 U. S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966):

> "The motivating force for the decision in New York Times was twofold. We expressed a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. (Citation omitted). There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. * * *

> "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of New York Times is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation."

In footnote 12, the Court said:

> "We are treating here only the element of public position, since that is all that has been argued and briefed. We intimate no view whatever whether there are other bases for applying the New York Times standards—for example that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern."

It is apparent, and Appellant alleges in his petition, that he is a person of political prominence, and is a person in a position significantly to influence the resolution of issues of national importance. It is also apparent that Appellant involved himself dramatically into the racial crises in Oxford, Mississippi; that he "thrust himself into the vortex of the discussion of a question of pressing public concern." The motivating force of the Times decision compels its applicability here. In a thorough analysis of the Times decision, and subsequent decisions, the Court, in *Pauling* v. *Globe-Democrat Publishing Company,* 362 F. 2d 188 (C.A. 8, 1966), applied the Times doctrine to Dr. Linus Pauling. There the alleged libel grew out of a controversy over Dr. Pauling's efforts to promote a nuclear test ban treaty.

However, there is no constitutional protection for a false statement "made with actual malice, that is with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times* v. *Sullivan,* 376 U. S. 279-280.

Unlike *New York Times* v. *Sullivan, supra,* and *Pauling* v. *Globe-Democrat Publishing Company, supra,* Appellant was prevented from adducing proofs which could present a jury question on the issue of malice. Whether there was malice was a fact question placed in issue by the complaint, and no affidavits or depositions were filed which may have removed this issue from the case.

The judgment of the District Court is reversed and the case remanded for further consideration consistent with this opinion.