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CONSTITUTIONAL PROVISIONS AND STATUTES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM 1965

THE ASSOCIATED PRESS,
Petitioner,
—*against*—
EDWIN A. WALKER,
Respondent.

No. .....

PETITION FOR A 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

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas which was entered in the above entitled case on July 30, 1965, or, in the alternative, the order of the Supreme Court of Texas which denied a writ of error on February 9, 1966.

CITATIONS TO OPINIONS BELOW

The unreported opinion of the trial court, contained in a letter to counsel dated July 29, 1964, is printed in Appendix B, pp. 31-35.

The opinion of the Texas Court of Civil Appeals dated July 30, 1965, reported at 393 S. W. 2d 671, is printed in Appendix B, pp. 3-30.

JURISDICTION

The judgment of the Texas Court of Civil Appeals was entered on July 30, 1965 (Appendix D, p. 118). An application for rehearing was denied on September 17, 1965 (Appendix D, p. 119).

Petitioner's application to the Supreme Court of Texas for a writ of error was denied on February 9, 1966 (Appendix D, p. 120). 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 (Appendix D, p. 121).

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3).

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 riots resulting from the confrontation between Federal and State power 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 that confrontation.

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, respecting events of public interest and importance, such as the enforcement by the United States Government of judgments of United States courts and suppression of defiance thereof, particularly at the behest of one who, like General Edwin A. Walker, wilfully, aggressively and defiantly thrust himself into the vortex of the controversy.

C. 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 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.

4. 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.

5. Whether the application of state libel laws to the publications here complained of and in the circumstances disclosed by this record constitutes a denial of the freedoms of speech and press guaranteed by the First and Fourteenth Amendments to the Federal Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are Amendment I and Amendment XIV, Section 1 to the United States Constitution and Vernon's Texas Civil Statutes, Title 88, Article 5431 and subsections 4 and 5 of Article 5432, the texts of which are reprinted in Appendix A, pp. 1-2.

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 (S.F. 9),* and the attempt by the State of Mississippi and its highest elected officials to

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*All citations designated "S.F." are to the Statement of Facts, which consists of the minutes of the trial.

prevent such admission through invocation of the historically and judicially discredited doctrine of interposition (S.F. 810-811).*

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 (S.F. 866), the Justices of this Court (S.F. 767-768), the Judges of the Court of Appeals for the Fifth Circuit and the Southern District of Mississippi (S.F. 769), the Attorney General of the United States (S.F. 776), the Governor and Lieutenant Governor of Mississippi (S.F. 775), the Trustees of the University of Mississippi (S.F. 771), the United States Army (S.F. 782-783), the Mississippi National Guard (S.F. 870), over 150 United States Marshals (S.F. 368), the Mississippi State Highway Patrol (S.F. 276), and local law enforcement officials (S.F. 271).

A central figure in the confrontation was General Edwin A. Walker, Respondent here. General Walker—a former General Officer of the United States Army (S.F. 612-613), the commander of the troops at a similar confrontation in Little Rock in 1957 (S.F. 89, 612), a man who had resigned his commission in order to be free to engage in political controversy (S.F. 741) and who thereafter lectured widely on public issues (S.F. 743-746), a man who had but recently been a candidate for nomination for Governor of Texas (S.F. 752), 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" (S.F. 751)—delib-

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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.

erately 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 incorrectly* General Walker's public activities on the occasion of that confrontation (Tr. pp. 59-60; Supp. Tr. pp. 1-4, Appendix B, pp. 31-35; Appendix B, pp. 7-8).**

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 (S.F. 1069).

The dispatches read in full text (Pl. Ex. 1a and 1b, Tr. pp. 11-14):

> "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

*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.

**Citations designated "Tr." are to the Transcript. Citations designated "Supp. Tr." are to the Supplemental Transcript, which consists of the trial court's opinion.

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

Van Savell, 21, Associated Press newsman, who was on the scene and saw what happened.)

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

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

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

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

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

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

" '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 Walker ultimately asserted were libelous of him 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. However, for purposes of this petition, we rely solely on the testimony of General Walker and testimony of the witnesses called on his behalf and for whose credibility he has vouched. They establish, 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." (S.F. 779-780; 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." (S.F. 787-788).

The next evening, on September 28, 1962, General Walker took to the air from New Orleans (S.F. 803):

> "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 (S.F. 762-763) but was continuing his course of opposition to the admission of James Meredith (S.F. 841), 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." (Def. Ex. 8, S.F. 789, 790)

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 (S.F. 839-840). 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 (S.F. 840-841).

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." (Def. Ex. 11, S.F. 794-795).*

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 (S.F. 868 *et seq.*). General Walker's reaction: "Nauseating, nauseating" (S.F. 874-875).

Promptly on learning that there was "trouble" on the campus, Walker hurried there (S.F. 663-664).

"Trouble" was, to say the least, an understatement. By the time the General arrived at the campus, violent, widespread rioting was in progress (S.F. 162, 169, 192, 206, 294, 295-297, 420, 477). 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 (S.F. 296, 939, 1349, 1350).

The crowd, which at times had the earmarks of a lynch mob (S.F. 258), engaged in an almost continuous series of furious physical attacks on the Federal marshals who were guarding the Lyceum, the school's administration building (S.F. 295-297). The marshals were attacked with sticks, bricks, bottles, stones, rocks, pieces of concrete benches and

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*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 Governor Barnett should be done." (S.F. 828).

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." (S.F. 829).

even "Molotov cocktails" (S.F. 158, 201, 373, 488, 555, 925, 1291) and were forced to defend themselves with tear gas. Gunfire eventually broke out (S.F. 480-481, 531, 556, 1352-1353) and the campus, in the words of one of Walker's witnesses, became "a battlefield" (S.F. 261).

Later that evening, as the rioting and wild confusion intensified, the mob attempted to charge the marshals with a firetruck and then a bulldozer (S.F. 703-705).

It was into this melee that General Walker voluntarily thrust himself, as he had promised he would (S.F. 800). So anxious was General Walker to be present in an official capacity, if possible, that, even after he had seen for himself 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 (S.F. 299-300, 886).

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?" (S.F. 882-883)*

And is it any wonder, when General Walker delivered a speech from the Confederate Monument to the assembled mob (S.F. 686) and offered expert advice on how to combat the tear gas with which the Federal marshals were then defending themselves (S.F. 919-920), 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 (S.F. 687). Yet the General himself admits that when an Episcopalian minister, the Reverend Duncan Gray, pleaded with him to help

*It is conceded that General Walker was an object of attention (S.F. 419, 586, 675), and that, wherever he went, the crowds followed him and sought his advice (S.F. 373).

stop the riot, he declined, telling Reverend Gray to his face that the minister's attitude made him ashamed to be an Episcopalian (S.F. 680, 897).

General Walker also admits that, in his speech, he congratulated the students on their "protest" (S.F. 918), telling them they had a right to "protest" (S.F. 913), could continue to "protest" (S.F. 902), and should "stand by your Governor" (S.F. 917-918)—all this at a time when Walker well knew that the "protest" consisted of a series of violent physical attacks on the Federal marshals (S.F. 917). He also admits telling the rioters that Colonel Birdsong, head 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 (S.F. 905), 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" (S.F. 902); and that the forces carrying out the mandate of the Federal Court should have been sent to Cuba, not Oxford (S.F. 422, 455, 479, 687).

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" (S.F. 371); that he urged the crowd to continue their protest at a time when they were throwing Molotov cocktails and setting cars on fire (S.F. 373); and that he said "You may not win but you will be heard" (S.F. 1025-1026) and "Help is on the way, thousands are coming" (S.F. 371).*

We need not speculate as to whether other portions of the speech deprecating violence were merely *pro forma*

*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.

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 it 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, 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" (Tr. p. 59).

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.*

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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.

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 (S.F. 676, 693-695). 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 (S.F. 696) that he was on either occasion "leading a charge", but here is what his own witnesses had to say on that subject:

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 (S.F. 371-372), 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 (S.F. 341).

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

> "After some of 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 (S.F 1231).

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 (S.F. 1050-1052).

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 (S.F. 1020-1023).

Plaintiff's witness Henry Edwards testified that Walker approached the flagpole, accompanied by some fifty or sixty people (S.F. 597).

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" (S.F. 247, 250, 258). Following the speech at the Confederate Monument, Cox saw the General and fifteen or twenty others start toward the Lyceum building.

Richard Harvey Sweat, another witness for the Plaintiff, testified that Walker walked toward the Lyceum building before his speech with students around him (S.F. 168-170) 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 (S.F. 221-231).

Finally, there is the testimony of Alfred Kuettner, a reporter for United Press International. His testimony is particularly significant because Respondent, at the trial, sought to contrast the "unfair" treatment accorded to him by Petitioner with the "fair" treatment accorded him by UPI (S.F. 1872; Tr. p. 19). Yet the UPI reporter, testifying for Plaintiff, said that Walker was "more than an interested observer" when he came onto the campus (S.F. 1289); that he gave advice to the rioters and was the focal point of student activity (S.F. 1292); and that he, Kuettner, personally saw Walker advance on the Lyceum with two men, one on each side of him (S.F. 1272-1273).

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 (S.F. 279-280), did, in fact, lead at least two charges on the Federal marshals.*

Notwithstanding the foregoing, the jury returned a verdict for Respondent for $500,000 in general damages and $300,000 in punitive damages (Tr. pp. 61-62).

The trial court, however, finding 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 (Tr. p. 71).

An appeal to the Texas Court of Civil Appeals followed, where the judgment was affirmed *per curiam* (Appendix D, p. 118), 393 S. W. 2d 671 (1965), and an application for rehearing was denied (Appendix D, p. 119), 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 (Appendix D, p. 120). An application for rehearing in the Supreme Court of Texas was also denied (Appendix D, p. 121).

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*In view of the resolution of the factual issues in the Plaintiff's favor, we have not heretofore adverted to the testimony of the Defendant's witnesses; but we note, in passing, that this testimony not only corroborates but amplifies the conclusion that General Walker did, in fact, "lead a charge" and "assume command of the crowd" (See e.g. S.F. 1615, 1620-1623, 1669-1670, 1692).

This testimony discloses, for example, that Walker, on arriving at the campus, agreed to lead the rioters in protesting (S.F. 1646-1647); that he called upon them to "riot, riot" (S.F. 1406-1407); and that he told them reinforcements were on the way to help them, and said there was "no stopping point" (S.F. 1414-1415). Defendant's witnesses also testified that Walker, using pronouns which would identify himself with the rioters, assured the mob that "we have got more people coming" (S.F. 1612), and that the reinforcements he had promised were "around town" and "we can bring them in if we need them" (S.F. 1726). Walker also told the rioters that there were "thousands" behind them and that they would "win in the end" (S.F. 1548), and that they should "give them protest" and "give them casualties" (S.F. 1729). Walker's general attitude on the occasion of the riots is evidenced by his comment on learning of the beating of a newspaper man: "Good, good" (S.F. 1612).

Throughout the proceedings, Petitioner has asserted its rights under the First and Fourteenth Amendments to the Federal Constitution. Petitioner first raised the constitutional issues in its pleading (Tr. p. 35; Appendix C, pp. 36-47). It reasserted its rights in motions to the trial court for judgment notwithstanding the verdict (Tr. p. 66; Appendix C, pp. 48-49) and for a new trial (Tr. pp. 73, 78, 80; Appendix C, pp. 50-52); on appeal to the Court of Civil Appeals (Br. pp. 9 and 73-85 and Rep. Br. pp. 6-8 and 19-24; Appendix C, pp. 53-72); in its application for writ of error to the Supreme Court of Texas (Appl. pp. 1-46; Appendix C, pp. 75-115); and in the applications for rehearing (Appendix C, pp. 73-74 and 116-117). Those portions of the record wherein such questions were raised are set forth in Appendix C.

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 question as follows (Appendix B, p. 34):

> "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."

In holding the *Sullivan* doctrine inapplicable, the trial court said (Appendix B, pp. 34-35):

"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 tryanny 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 (Appendix B, pp. 21-22):

"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." (Appendix B, p. 19).

The Supreme Court of Texas declined even to hear the case, finding no reversible error in any of the rulings below (Appendix D, p. 120).

It is in this posture that the case comes to this Court.

REASONS FOR GRANTING THE WRIT

1. This case 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 of persons of political prominence who are involved and who 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 or similar to those now before this Court. In those fifteen cases, listed in Appendix F, 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 would therefore be inclined, in determining the issues of liability and damages, to be influenced by the general feeling that "irresponsible outsiders" should be taught a lesson.

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 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 allowable in a civil action in Louisiana.**

Thus, these cases are shocking 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 *New York Times Co.* v. *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:

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*The judgment, reduced to the amount demanded, has been appealed.

**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).

***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 and the Columbia Broadcasting System for criticizing Alabama's conduct in the desegregation controversy (see *New York Times* v. *Sullivan,* 376 U. S. 254, 292).

> "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."

2. The fundamental constitutional holding of the courts below is that *Sullivan* (376 U. S. 254) is "limited in its application to public officials." There is thus presented for decision the very question which this Court left open in *Rosenblatt* v. *Baer,* 383 U. S. 75, 86 (fn. 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."

One can scarcely imagine a factual situation which would present more clearly than this case the question thus left open. Here, not only did General Walker "thrust himself into the vortex" of the Oxford confrontation; by his intemperate statements and actions immediately preceding that confrontation, he became, in fact, a catalyst for the tragic events which occurred there.

It is of great national interest and significance—for many reasons—that a person of nationwide political prominence, a former general officer of the United States Army, still addressed as "General" even by court and counsel (See e.g. S.F. 7, 56, 87, 391, 973, 1244, 1509), had publicly called upon his fellow citizens to register their defiance of the Federal Government and had thereafter attended and encouraged violent acts of defiance. If the activities of General Walker in such a situation can be "blacked out" through an application of the libel laws, then the unconsti-

tutionally inhibiting effects upon freedom of speech and press are, we believe, self-evident.

Finally, we observe that, since Governor Barnett and virtually all of the other principal participants in the Oxford confrontation are clearly within the ambit of the *Sullivan* doctrine, it would be a constitutional paradox to hold that a public figure* like General Walker, who openly rose to stand beside Governor Barnett in that same controversy, seeking with equal vigor and effect to rally public support for the Governor's cause, was not.

Such an anomaly could hardly be said to comport with the principle of "uninhibited, robust and wide-open" debate which, in *Sullivan,* this Court sought to assure. Accord, *Garrison* v. *Louisiana,* 379 U. S. 64, 75. As the Court of Appeals for the Second Circuit said in *Pauling* v. *News Syndicate Company,* 335 F. 2d 659, 671 (2d Cir. 1964), *cert. denied* 379 U. S. 968:

> "Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension; if a newspaper cannot constitutionally be held for defamation when it states without malice, but cannot prove, that an incumbent seeking reelection has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent. Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line; thus, as applied to the case in hand, if a newspaper could not be held for printing Dr. Pauling's charges that a member of the Atomic Energy Commission had

*The trial court observed that General Walker's status as a public figure at the time of the riots was "undisputed" (Supp. Tr. p. 3).

> 'made dishonest, untrue and misleading statements to mislead the American people' and that a United States Senator is 'the greatest enemy * * * the United States has,' as the New York Times case decided, one may wonder whether there would be sound basis for forcing it to risk a jury's determination that it was only engaging in fair criticism rather than misstating facts if it printed, falsely but without malice, that in saying all this Dr. Pauling was following the Communist line. The 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' now applied to confer immunity on 'vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,' 376 U. S. at 270, 84 S. Ct. at 721, may some day be found to demand still further erosion of the protection heretofore given by the law of defamation."

The question whether the holding of this Court in *Sullivan* (376 U. S. 254) is limited in application to public officials or applies to other persons or circumstances is of vital importance and should, we submit, now be resolved by this Court.

3. The decision below is in direct conflict with the following decisions of Federal and state courts: *Walker* v. *Courier-Journal and Louisville Times Co.,* 246 F. Supp. 231 (W. D. Ky., 1965), *app. pend'g; Gilberg* v. *Goffi,* 21 App. Div. 2d 517, 251 N. Y. S. 2d 823 (2nd Dept., 1964), *aff'd.* 15 N. Y. 2d 1023, 207 N. E. 2d 620 (1965); *Pauling* v. *National Review, Inc.,* Misc. 2d , N. Y. S. 2d (Sup. Ct. N. Y. Co. 1966) (not yet reported); *Pearson* v. *Fairbanks Publishing Co.* (Super Ct., Alaska, 4th Dist., 1964) (unreported), *aff'd. on other*

grounds, Alaska (April 28, 1966) (not yet reported), and *Brennan* v. *Associated Press,* F. Supp. (D. Conn. 1966) (not yet reported).*

A more direct conflict between the decisions below and the decision of the District Court in the *Courier-Journal* case, *supra,* is almost impossible to imagine. Both cases involve the same plaintiff—General Walker—and the same subject matter, reports of General Walker's activities at Oxford, Mississippi, during the night of September 30, 1962. While the courts below rejected the *Sullivan* doctrine as wholly inapplicable, the District Court in the *Courier Journal* case reached the "inescapable conclusion" that *Sullivan* did, in fact, apply, saying (246 F. Supp. 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 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

*Since three of the five opinions are unpublished and may not, therefore, be readily available, we have for the convenience of the Court annexed hereto as Appendix E the texts of all five opinions.

> 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. 234):

> ". . . I am perhaps 'plowing new ground' in legal effect, but also with the accompanying conviction that not to do so would negate the spirit of the 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 'unhibited, 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 constitutional issues here presented have been the subject of widespread speculation and debate by bench and bar alike,* and this fact attests to the vital importance of those issues and the urgency of their resolution. This Court is the only tribunal which ultimately can resolve the conflict.

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

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*See, *e.g.*, 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).

They thus violated the First Amendment to the Federal Constitution.

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 a "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," 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 for the press to follow would 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. This case clearly raises the question whether those boundaries have here been violated.

5. Apart from the other constitutional questions which permeate this case, the fact remains 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 establishing 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. *Shuttlesworth* v. *Birmingham,* 382 U. S. 87; *Garner* v. *Louisiana,* 368 U. S. 157; *Thompson* v. *Louisville,* 362 U. S. 199. There is only one tribunal which can now restore to petitioner the constitutional rights which the Texas courts have so clearly denied it. We respectfully submit that this Court, as the ultimate guardian of the rights guaranteed by the Constitution, should grant certiorari to correct this grave injustice.

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

Obviously, the $500,000 verdict was intended, not to compensate, but to punish and deter. Permitted to stand, it will, indeed, deter and prevent news gathering and disseminating institutions from performing the function,

vital to any democratic form of government, of disclosure and discussion on controversial public issues and personalities. For what newspaper, what magazine, what wire service would, as a practical matter, disseminate a report unfavorable to General Walker or any other controversial political personality if the risk involved is a judgment for half a million dollars?

We respectfully submit that the inexplicably high verdict itself presents a substantial constitutional question under the First and Fourteenth Amendments. For 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 may 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.

CONCLUSION

For each of the foregoing reasons, it is respectfully submitted the petition for writ of certiorari should be granted.

Respectfully submitted,

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