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In the

Supreme Court of the United States

OCTOBER TERM 1965

THE ASSOCIATED PRESS,

Petitioner,

against

EDWIN A. WALKER,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully responds to the Petition for Writ of Certiorari by The Associated Press as follows:

JURISDICTION

Jurisdiction under 28 U.S.C. 1257(3) should not permit re-examination of questions of fact decided by a jury in the trial court as to the truth or falsity of Petitioner's publication that Respondent had committed a crime, and as to measure of damage. *Norton Company v. Department of Revenue*, 340 U.S. 534, 538, 95 L. Ed. 517; *Pennekamp v. Florida*, 328 U.S. 331, 345, 90 L. Ed. 1295.

Petitioner published, as an "eye-witness report" by its Newsman ("who was on the scene and saw what happened"), a report that Respondent "assumed command of

a mob" and "led a charge against U. S. Marshals" * * * criminal acts, in violation of Federal Statutes. A jury has specifically found that the report was false. The jurisdictional question is whether such a false report, **knowingly made** by an eye-witness, is privileged under Constitutional Freedom of the Press, and whether Texas Law may be applied to redress the wrong.

STATEMENT OF CASE

As part of its reporting of events involved in the riot upon the campus of Mississippi University on the night of September 30, 1962, Petitioner published, over its world wide wire service, reports that Respondent had committed criminal acts * * * assuming command of a riotous mob and leading a charge against U. S. Marshals. These reports by a self-styled eye-witness, employee of Petitioner, were found by the jury to be false.

The defamatory reports, quoted in full in the Associated Press Petition herein, included detailed, sensational and dramatic statements, as follows:

> "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, * * * was eating dinner Sunday night * * * was told there was a 'scene of considerable disturbance' on the University of Mississippi Campus. He went there. Here is the story of Van Savell, 21, Associated Press newsman, **who was on the scene and saw what happened.)**

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

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

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

* * * * *

"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** half-way 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."

* * * * *

"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."**

After hearing all evidence of Petitioner as to the truth of the above reports, and the evidence of Respondent as to the falsity thereof, the jury returned its verdict as follows (Respondent's Appendix A):

> Special Issue No. 1:
>
> "Question: Do you find from a preponderance of the evidence that the statement 'Walker, who Sunday led a charge of students against Federal Marshals on the Ole Miss Campus' was substantially true?
>
> Answer: No.
>
> Special Issue No. 2:
>
> "Question: Do you find from a preponderance of the evidence that the statement 'Walker, who Sunday led a charge of students against Federal Marshals on the Ole Miss Campus', complained of by plaintiff, constitutes fair comment describing the plaintiff's activities on or about September 30, 1962, at the places described in the evidence and under the then attendant circumstances?
>
> Answer: No.
>
> Special Issue No. 3:
>
> "Question: Do you find from a preponderance of the evidence that the statement inquired about in special issue No. 1 was made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public?
>
> Answer: No.
>
> Special Issue No. 5:
>
> "Question: Do you find from a preponderance of the evidence that the statement 'Walker assumed command of the crowd' was substantially true?
>
> Answer: No.

Special Issue No. 6:

"Question: Do you find from a preponderance of the evidence that the statement 'Walker assumed command of the crowd' complained of by plaintiff, constitutes fair comment describing plaintiff's activities on or about September 30, 1962, at the places described in the evidence and under the then attendant circumstances?

Answer: No.

Special Issue No. 7:

"Question: Do you find from a preponderance of the evidence that the statement inquired about in special issue No. 5 was made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public?

Answer: No.

I. The lengthy background and intemperate statements which Petitioner includes in its petition, for the twenty pages of its "Statement of the Case", do not present a constitutional issue; and merely show that the trial jury, charged with final determination of disputed facts, could have believed the Associated Press witnesses. But the jury did **not** believe the Associated Press. They were not presented with all the facts by the Associated Press, which elected to try the case without Van Savell, who wrote the false story, or any other of its employees appearing before the jury; and the supported decision of the jury on the facts is final under our ancient right of Trial by Jury, as cherished constitutionally as Freedom of Speech and Freedom of the Press.

Petitioner's somewhat extravagant "Statement of the Case," at page 20 of its Petition, includes the following:

> "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."

There was practically nothing undisputed in this lengthy record, replete with eye-witness accounts of a hectic night. Throughout the Petition, the Associated Press makes continuous use of the terms "unequivocal", 'uncontradicted," and "undisputed". Respondent challenges every such use of the terms, because very little was undisputed and the jury with ample evidence to decide found that Petitioner's report was **false,** that it was not **fair** comment, that it was **not** published in good faith.

The great weight and preponderance of the evidence is that:

(1) Walker was on the Campus on the night in question;

(2) He was an "observer", not a "participant" in the riots;

(3) On the few occasions when he mingled with the crowd, he did not "lead a charge";

(4) He did not "assume command of the crowd";

(5) The jury's findings were based upon evidence reasonably supporting its verdict;

(6) Petitioner's claim that "it is beyond dispute that Walker did, in fact, lead at least two charges on the Federal Marshals" is not supported by the evidence. In fact, a view of the evidence will overwhelmingly repel

such a conclusion. In order to conclude that Walker "assumed command" and "led a charge", completely overturning the jury's verdict, this Honorable Court, on Petition for Certiorari must disregard evidence as follows:

> (a) Walker (S.F. 605-976): Testified in great detail as to his every action on the campus; and, in answer to repeated questions as to whether he "led anybody" his answers were, "No, I certainly did not". His answers to extensive questions on direct, and piercing cross-examination, were consistently that he was on the campus only to observe, and not to participate in the activities of the crowd. He refused requests of the students to "be our leader". He never got out of a walk during the entire night. In his language, "I never have had anything to do with the activities of the students toward the Marshals". (S.F. 706). When the Highway Patrol started to leave, the students became excited, with cries, "Barnett has sold us out". At this point, he agreed, for the first time, to speak, and advise the crowd that Barnett had not sold them out, that the Highway Patrol Chief, Birdsong, had let Meredith on the campus. He further advised them that "Nobody came to Mississippi for violence, No violence was intended." (At which time, the students began to 'boo'.) He further told them "You can protest, you have a right to protest, but this is not the place for violence" (All of which was in accord with the United Press report). After the speech, the crowd dispersed, and he moved slowly up near the flagpole in the center of the University Circle. (S.F. 684-700). He specifically described the "sporadic" activity of the crowd at the times when Petitioner contends that "it is beyond dispute that Walker did, in fact, lead two charges"; and, when asked, "Did you participate in any activities of the crowd", his answer was, "I certainly did not". (S.F. 700.) In order to accept Petitioner's assertion that Walker, **beyond dispute** led two charges, this Honorable

Court must assume that he deliberately lied, under oath, in the presence of the jury, and that the testimony of defendant's witnesses, which included neither Savell nor any other employee of Petitioner, "corroborated and amplified the conclusion that Walker did, in fact, lead a charge and assume command of the crowd, as argued at Page 21 of the Petition, and this, without hearing such witnesses, observing their demeanor, and feeling the impact of conflicts in their evidence.

(b) Gwinn Cole: Assistant Director, Miss. Highway Patrol, testified that there was no violence until the U. S. Marshals fired tear gas into the backs of the Highway Patrol, who were separating students from the Marshals, and into the face of the students; and that, thereafter, there was no "organized charge", but only sporadic activity, with small groups, not more than 7 or 8, coming out of the crowd and throwing missiles toward the Marshals, until the time he left at 9:50, which was coincident with the timing of Walker's speech from the Monument. (S.F. 1332, 1333).

(c) Louis Leman: A responsible young businessman, of Houston, Texas, who was with Walker the entire evening, and testified, positively, that Walker, at no time, participated in the activity of the crowd, assumed command, or led a charge. He covered the speech on the Monument, and described Walker's actions, both before and after, including his refusal to "lead the students," and his demeanor, which included at no time any movement faster than a slow walk. (S.F. 394-468).

(d) Cecil Holland: A reporter for the Washington Star, with 30 years experience. Testified that he was in the vicinity of the Campus Circle, and near the Marshals. He described sporadic activity of the crowd. He saw Walker at one time southwest of the Monument. He saw him lead no charge, or

participate in any other activity of the crowd. In fairness, however, the witness did not testify that his visibility was such that he must necessarily have seen him. (S.F. 491-549).

(e) Al Kuettner: Testified that he was United Press newsman, at a point east of the Monument on University Avenue, as Walker was entering the Campus about 9:00 p.m. He saw him again on the Monument, and heard his speech. After hearing the speech, he reported, over the United Press Wire Service that, "during a lull in the rioting, General Edwin A. Walker mounted a Confederate Statue on the Campus and begged the students to avoid their violence." He also stated that Walker's speech was met with jeers. He described the events involved in the riot, but saw Walker take no part therein. (Again, he was not keeping a constant watch; but it is significant that, if anything so sensational as a charge having been led by a former Major General in the United States Army had occurred, no such report appeared upon the wire service of United Press.) (S.F. 1242-1304). When he saw Walker come on the Campus, with two men abreast, it was when he first arrived, and the witness did not say that the other persons, ahead of him and behind him, appeared to be in his party. (S.F. 1303-1304).

(f) Talmage Witt: A Deputy Sheriff of Pontotoc County, Mississippi, was with Walker practically all of the time involved. He testified postively that Walker took no part in any of the violence. (S.F. 383). He also described Walker's activities, as walking slowly about the Campus, without leading the charges on the Marshals or participating in the activities of the crowd. He refuted a portion of a written statement that had been given to one of the AP counsel, at a time when that counsel was representing him in a legal matter, and testified,

positively, under oath, that Walker never did lead a charge, or participate in any act of violence. (S.F. 270-382).

(g) Ben Thomas: An AP newsman, who took the original telephone report from Savell. He testified postively that Savell had reported only sporadic activity **before** Walker's speech from the Monument, and that Walker got down from the Monument **after completing his speech,** and then led a charge against the Marshals. (S.F. 121-138).

(h) Other witnesses: Plaintiff offered the testimony of witnesses, Sweatt (S.F. 140), Cox (S.F. 245) May (S.F. 1198) Hunter (S.F. 1027) Carrington (S.F. 549), MacFarland (S.F. 554), Watkins (S.F. 564), McRae (S:F. 576), Snyder (S.F. 582), Edwards (S.F. 584), whose testimony completely accounted for all of the time that Walker was on the Campus, and effectively refuted defendant's contention that Savell was "substantially" telling the truth when he reported that he had seen Walker assume command of the crowd and lead a charge. Although the Savell report, and his testimony by deposition, fixed the time of the charge as before Walker's speech from the Monument, the witnesses all testified positively that Walker led no charge and had no command over the crowd, either before or after the speech.

II. Associated Press did not bring to Court its "eyewitness" Van Savell, so that the jury could compare, from the witness stand, his sincerity, demeanor, and candor with that of the respondent, Walker, as part of its necessary evaluation as to who was telling the truth. He was not there to tell the jury by way of explanation that perhaps he was excited and upset during the midst of the riot, that he did the best that he could, and that if he misinterpreted what

General Walker did, it was an honest misinterpretation on his part. It is generally held that when a party fails to produce a witness who is under its control, that failure may be considered as evidence against it, and the jury may properly infer that he was not produced because his testimony would have been harmful, and that general rule prevails in Texas. *Davis v. Etter & Curtis,* (Tex. Civ. App., no writ. history), 243 S.W. 603. With "malice" defined as **"knowingly false"** or in "reckless disregard of the truth" if Savell, claiming to have been less than six feet from Walker, reported that he saw "two men take him by the arms and they headed for the federal marshals", the report was either true or **knowingly false.** Without Savell having appeared, the jury found the report false. Petitioner claims a Constitutional right to publish the false report, accusing Respondent of a crime."

III. At page 10 of its Petition the Associated Press asks the "naggingly persistent" question: "Why was General Walker of Dallas, Texas, at the campus of the University of Mississippi?" and thereupon proceeds to recite public statements of Respondent on prior occasions which were used before the jury in an obvious attempt to prejudice the Respondent's case to the point of obscuring the real issues. These statements, though appearing intemperate in retrospect, provide no proof, as a matter of law, that Respondent assumed command of the mob or led a charge. Furthermore, they are not pertinent to any defense of "fair comment", which was found against the Associated Press, because the deposition of the youth who wrote the story admits that he

was not familiar with what had been going on, did not even know about Walker's prior statements, and so he could not be actuated by them at all (S.F. 1072, 1125).

The "question" as propounded by Petitioner at page 2 is "whether State libel laws may be applied to this case * * * **particularly at the behest of General Walker.**" The answer is that this Honorable Court, committed by tradition and precedent to equal justice under the law, will ignore this emotional appeal to prejudice and consider solely the legal issue as to whether Petitioner has been deprived of its Constitutional Freedom of the Press, whether Associated Press is immune from liability for publishing as a fact this false report of its newsman that he saw Walker committing a crime, which the jury has found that Walker did not commit.

Walker himself explained why he was there, and without contradiction. He said that before he resigned from the Army he had been in command of the troops at Little Rock, and that the news stories of the events up there were so distorted and bore so little resemblance to the facts, that he wanted to see for himself what was actually occurring in Mississippi rather than relying upon the press. If the public statement should be considered as debate, "uninhibited, robust and wide open", and if Walker's presence in Mississippi should be considered, as obviously intended, as his "demonstration" against the use of troops in Mississippi, then in fairness to the record his sworn testimony as to this purpose in going to Mississippi becomes material:

> "Q. (by Mr. Gooch) Now, General, just what was your purpose in going to Mississippi?

> "A. I thought it was absolutely wrong to use military forces, troops, American troops in a strictly civilian problem.
>
> "Q. All right.
>
> "Mr. Watts: Let him finish.
>
> "A. And I wanted to see for myself exactly what happened. I wanted to know from first hand information. And I did not trust the press reporting of it in any form, since I had been at Little Rock and seen that exaggerated out of all proportions, and I intended to see for myself." (S.F. 805).

It is respectfully suggested that, except for the purpose of slanting the evidence, Walker's "purpose" in going to Mississippi is not material and provides no basis for overturning the verdict of the jury, which specifically found that: 1) Walker did not "assume command of the crowd" or "lead a charge against federal marshals"; 2) the statements were not fair comment; 3) such statements were not made in "good faith" by petitioner.

The issue that was decided by the jury, upon sharply conflicting evidence, involved Walker's **actions**, not his **purpose** in going to Mississippi. His purpose could involve a right or freedom, equally important, under the Constitution, as the Freedom of the Press. His actions, however, if in violation of the criminal statutes, as falsely charged by Associated Press, could result in arrest and imprisonment. The Constitutional question herein presented, and the only one, is whether the Press is immune from liability under state law for falsely reporting that "I saw Walker commit a crime," which a jury of 12 American Citizens has found that he did not commit. In

short, the Press has a Constitutional right to **report the news,** but **not to make the news.** Inaccuracy in good faith in reporting the news is protected. A known falsehood in making the news is not. Savell "was there and saw what happened." His report was either true or **knowingly** false. At six feet an "honest mistake" is incredible.

QUESTIONS PRESENTED

At pages 2 through 4 of its Petition, Associated Press presents purported questions involved in this proceeding. Respondent respectfully suggests that the questions, themselves, are slanted to be "self-answering" and are not decisive of the real issues in this case. Respondent suggests alternate questions conforming to the record as follows: (Petitioner's questions are in regular type, Respondent's suggested questions are in heavier type)

> 1. Whether the doctrine enunciated in * * * Sullivan, is limited to public officials or applies to other persons or circumstances:
>
> **1. This Question is Proper.**
>
> A. Whether, consistent with * * * constitution, state libel laws may be applied to news reports, made without malice, respecting events of profound * * * importance * * *, such as riots * * * at Oxford 1 , particularly at the behest of one who, like General Walker, wilfully, aggressively, and defiantly thrust himself into the vortex of that confrontation.
>
> **A. Whether the common law of libel may be applied in a State Court to a news agency which sells knowingly false stories imputing**

treasonable activities to a private citizen who is exercising his same right to informed observation of events of public interest as is the news agency.

B. Whether, consistent with * * * constitution, state libel laws may be applied to news reports, made without actual malice, respecting events of public * * * importance, such as enforcement * * * of judgments of U. S. Courts * * *, particularly at behest of one who, like General Walker, wilfully, aggressively and defiantly thrust himself into the vortex of the controversy.

B. Does the Constitution relieve the press from liability for libel, where a jury has found that the defamatory statement accusing Respondent of a crime was false, was not fair comment, and was not made in good faith?

C. Whether, consistent with the * * * constitution, state libel laws may be applied to news reports made without actual malice concerning public activities of persons like General Walker in connection with controversies of profound * * * national interest * * *, where such persons are actively attempting to influence the outcome of such controversies and * * * are regarded * * * by virtue of their stature and activities, in a position significantly to influence the resolution of the issues thus presented.

C. Whether, when a jury has found that Walker did not lead a charge nor assume command of the mob, and that such charges were false, not fair comment, and not made in good faith, the Associated Press can use disputed fact issues found against it to misrepresent to this Court that Walker was actively attempting to influence the outcome of such controversies.

2. Whether an award of general damages of $500,000.00 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 * * * constitution.

2. Is a $500,000.00 verdict for damages for libel constitutionally oppressive, where the defendant the largest and most powerful news media on earth has knowingly and falsely charged Respondent with sedition and insurrection against the government that he had sworn to defend, which resulted in his arrest and imprisonment in a mental prison, and the creation of a false public image around the world as a lunatic and criminal, after having risen to the rank of Major General in the U. S. Army, with background as an effective combat Commander.

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.

3. Whether the record contains competent evidence supporting the jury's verdict that the defamatory statements were false, not fair comment, and not made in good faith.

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 Constitution.

4. Under the guise of "fair comment", can the Press publish with immunity a false report that a person had been actually seen committing a crime?

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 * * * Constitution.

5. Does the constitutional freedom of the press to "report the news" permit it, with immunity to "make the news" by publication of an alleged eyewitness report that a person committed a crime that he did not commit?

REASONS FOR DENYING THE WRIT

I.

The Constitution, as interpreted by this Honorable Court, does not extend to the Press immunity from the Law of Libel for defamatory invasion of the Civil Rights of a citizen to his good reputation, by falsely and in bad faith accusing him of a crime, even though he may be a "public figure", involved in matters of public concern.

II.

The jury's verdict and the trial court's judgment in this case are supported by the evidence in the record.

III.

The verdict was reasonable under the circumstances, and certainly does not violate the Constitution.

IV.

The Sullivan rule does not apply when the defamed individual falsely accused of crime is not a public official, but is a private citizen, even though he is a figure of public interest.

ARGUMENT

I

The Constitution, as interpreted by this Honorable Court, does not extend to the Press immunity from the Law of Libel for defamatory invasion of the Civil Rights of a citizen to his good reputation, by falsely and in bad faith accusing him of a crime, even though he may be a "public figure", involved in matters of public concern.

The Petition in the instant case seeks to extend the perimeter of two vital decisions by this Honorable Court.

New York Times v. Sullivan, (1964) 376 U.S. 254, 11 L. Ed. 2d 686

"* * debate on public issues should be uninhibited, robust, and wide open, and it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on Government and public officials

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

Garrison v. Louisiana, (1964) 379 U.S. 64, 13 L. Ed. 2d 125

"The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not

> follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity.
>
> "Hence the **knowingly false statement** and the false statement made with reckless disregard of the truth, **do not enjoy constitutional protection.**"

In simple and stark reality, the Associated Press pleads for a Constitutional Right to publish with impunity, and around the world, a statement that its newsman had seen Walker commit a crime that he did not commit, according to the verdicts of two juries.* In the instant case, after an extended trial involving sharply conflicting evidence, the jury found that the Associated Press report, that Walker assumed command of the crowd and led a charge against U.S. Marshals" was: 1) False, 2) Not fair comment, 3) Not made in good faith.

The Associated Press, dealing in a highly salable commodity * * * NEWS, published, for hire and around the world, the sensational report of its newsman, Van Savell, 21, "who was on the scene and saw what happened". Savell, who, as we have said, did not appear in Court to testify, wrote a dramatic, sensational and detailed report that Walker, under arrest for insurrection and seditious conspiracy, had entered the campus, assumed command of the crowd, led a charge against U.S. Marshals, and then made an inflammatory speech to the crowd.

Under the trial court's instructions, which fully protected Petitioner from liability for an "honest mistake" of its reporter, the element of "malice" is implicit in the jury's verdict.

* See p. 25, of Petition for Writ, referring to Louisiana Case.

If the report was false, as the jury found, it was also, by definition and of necessity, **knowingly false.**

Either Savell saw Walker "assume command of the crowd and lead a charge", or he did not * * * there is no middle ground for this newsman of the Associated Press, who purports to have reported what he had actually seen, from a distance of six feet. If the report was false, neither Savell, nor his employer, Associated Press, who for profit was willing to malign around the world the reputation of an outstanding American soldier and citizen upon the unsupported statement of its inexperienced 21 year old newsman, can contend that the statements therein were other than **knowingly false.** Under the circumstances presented by the record in this case, either Walker assumed command of the crowd and led a charge, or Savell and Associated Press have falsely and deliberately accused him of a crime. If, as the jury found, Walker had not assumed command of the crowd and had not led a charge, and Savell and Petitioner falsely reported that he had done so, the Court is confronted with a deliberate misstatement * * * not an "erroneous" misstatement, within the protection of the First Amendment, as construed by this Honorable Court, hereafter discussed.

In addition to the issue as to whether the report was "knowingly false", the record supports a finding that the publication by Associated Press of the Savell report was in reckless disregard of the truth. Testimony of the Associated Press newsman, B. R. Thomas, by deposition, was that Savell had first reported to him, at the newsroom in New Orleans, that Walker had made a speech to the students from the

monument, stating that "if they retreated and went home, they would be cowards, that they should stand up and fight", and that Walker **then** got down from the monument and "led the group of yelling, screaming, brick throwing" (S.F. 134, 138) students as close to the marshals as they could get, until they were turned back by tear gas.

Savell's "eye-witness" report, and his testimony by deposition, outlined in striking detail the actions of Walker in assuming command of the crowd and leading a charge **before the speech on the monument.**

In addition to the above notice to Associated Press that Savell was at least mixed up in the timing of his report, Associated Press also had access to the report of United Press that, "during a lull in the rioting, General Edwin A. Walker mounted a Confederate statue on the campus and begged the students to avoid their violence. He was met with one massive jeer." (S.F. 1249).

After the Associated Press senior newsman, Relman Morin, arrived in Oxford on the day after the riots, he, also, wrote a dramatic story about Walker leading a charge against the marshals. (S.F. 1113). He was forced to admit that the only source of his information was Savell. (S.F. 1108).

The question as to whether this performance by the most powerful news media in America would amount to "reckless disregard for the truth" seems self-answering.

The far flung and powerful facilities of the Associated Press are supported by the American people at a cost approximating forty million dollars per year to provide a source

of current and reliable news. Its mission is to assemble, collate and disseminate accurate information. Its resources have extended almost to the point of monopoly. *Associated Press v. Taft-Ingalls Corporation,* (6 Cir. 65), 340 F. 2d. 753, 766.

Such power implies an equivalent duty, with commensurate standards of accuracy and integrity. It should not be a violation of the Constitution that reasonable standards, which would preclude falsely charging a citizen with commission of a crime, should be recognized by law, rather than left to the whim of Associated Press. In fact, such a legal duty may enhance public confidence in the Associated Press, which may have been shaken by recent events.

In *Clark v. Drew Pearson (USDC, Dist. of Col. 1965),* 248 Fed. Supp. 188, District Judge Holtzoff, has presented a most scholarly analysis of the importance of the Law of Libel as a safeguard of the civil rights of a citizen as against an all powerful press. Pertinent language is as follows:

> "The arguments * * * included a plea for drastic changes in the law of libel, in a manner that would radically devitalize and impair the protection that it affords against defamatory publications. In view of this circumstance, it seems appropriate to make a few observations on the basic status of the law of libel in Anglo-American jurisprudence.
>
> "The common law sedulously guarantees to every individual various civil rights, such as the right of personal freedom, the right of personal safety, and the right of property. Another civil right safeguarded by the common law is the right to one's reputation. * * * (248 F. Supp. 190-191)

> "The current trend in the law is to enhance and augment the protection of individual civil rights. No reason appears for making an exception as to the right to reputation. * * Most civil actions relate only to money, while actions for libel or slander involve honor and reputation, which are to be considered on a higher level. . . . (248 F. Supp. 191)
>
> "Counsel for the defendants in this case urge the Court, however, *to apply the principle of the Sullivan case to all public figures* or public persons, including those in private life, *and* to abrogate the limitation to public officials. *In effect, they seek to transform two specific exceptions carved out by a process of erosion into an extensive demolition and destruction of the law by an act of avulsion. This Court perceives no reason in principle or in justice for radically undermining the law of libel,* in this manner, nor does it find any precedents for doing so. *The law of libel, as has been shown, is a vital and important aspect of the law of torts. It is one of the branches of law that safeguard individual civil rights. It should not be whittled away.* (Emphasis added) * * *

If the wire services, Associated Press and United Press engage in open competition, with salability of their news product related to its sensational and dramatic content, and with no legal responsibility to those victimized by false defamation, the efforts of competing newsmen will inevitably be directed more to sensation than to accuracy, with the result that public confidence in the news would eventually be undermined.

It does not seem an undue hardship, and certainly not deprivation of a constitutional right, that a wire service should be required to defend, in Court, a report that its newsman had actually seen a citizen committing a crime.

The reciprocal hardship upon the citizen, facing criminal prosecution because of such false reports, without legal remedy, would involve the loss of his most precious rights, his liberty and good reputation, without due process of law.

Such Freedom of the Press, without legal responsibility, could deteriorate into a license to destroy reputations and careers and rigidly control the development of political and governmental leadership.

It would appear that, in the instant case, the submission to the jury by the trial court of the question of substantial truth, fair comment, and good faith should have been amply sufficient to protect the constitutional freedom of Petitioner from responsibility for false statements that were not knowingly made or made in reckless disregard for the truth.

It is respectfully submitted that Petitioner's constitutional rights were protected in the trial of this case, and that it has not been held liable for a good faith comment upon facts which were substantially true.

II.

The jury's verdict and the trial court's judgment in this case are supported by the evidence in the record.

Under Question No. 3, Petitioner raises the issue as to whether the record before the trial court involving "substantial truth" and "fair comment" is so lacking in evidentiary support that the trial court's judgment constitutes a denial of due process of law. Under "Reasons for Granting

the Writ", Petitioner asserts that Respondent's case represents one of the most "serious and successful attacks ever made on the freedom of the press," with the fundamental right of the 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".

At the start of this issue, it is respectfully suggested to the Court that the State procedure involves not only the answering of special issues by unanimous verdict of a jury, but review of the jury's verdict by a Court of Civil Appeals, which is required to search and review the record to ascertain if the verdict is "against the weight and preponderance of the evidence and is manifestly unjust". See *in re King's Estate*, 150 Tex. 662, 244 S.W. 2d 660; *Burt v. Lochhausen*, 151 Tex. 289, 249 S.W. 2d 194.

In *Associated Press v. Walker*, 393 S.W. 2d 671, the Court of Civil Appeals, Second Supreme Judicial District of Texas, reviewed and affirmed the findings of fact by the jury and the trial court. Even a casual review of the record which was available to that Court will reveal that these appellate courts did not lightly put their stamp of approval upon a judgment and verdict so lacking in evidentiary support as to constitute a denial of due process of law.

As set forth in Respondent's summary of evidence, supra, there is massive evidence in the record that Respondent was, at most, an observer of the events upon the campus, and did not participate in the violent activities of the crowd. Comparison of the purported summary of evidence

under Petitioner's "Statement of the Case" with the citations to the record will reveal that, when the statements are read in their true perspective, without slanting and in proper sequence and the context, the overwhelming weight of the evidence is that Walker did not assume command of the crowd, and did not lead a charge, and that the jury's finding that such statements by Petitioner were not "substantially true" is supported by the record.

The purported summary of the evidence at pages 11-24 of the Petition for Writ leads off with Walker's public statements, obviously providing no proof as to his actions on the campus, and, at most, providing a prejudicial background for the subsequent summary of the facts and evidence.

At pages 14 and 15, the background of the riot is summarized from the witness Cox as including violence, in which the evidence referred to in the record conclusively establishes Walker had no participation (S.F. 258; Petition, page 14). But this same witness, Cox on re-direct examination testified.

> "Q. During the time you saw him, did you see him lead a charge?
>
> "A. No, sir."

Another typical example of distortion of the evidence appears at page 19 of the Petition, where the statement of the witness, Charles May (S.F. 1231), that he saw Walker "walking toward the flag pole with a crowd surrounding him" is presented as indicating that Walker was leading a charge. A review of the complete testimony of this witness reveals that his testimony was specific that Walker did not

lead a charge. Typical is the statement of this witness (S.F. 1213): "A. I asked him, I said, 'General Walker, do you think if you were in charge here, you could stop the riot?' and he said, 'hell, if I had been in charge here we wouldn't have had a riot'. Well, anyway, he was moving around at this time, **sort of moseying back and forth** in front of the statue." A fair appraisal of the entire testimony of this witness is that he described Walker as merely "walking around the area, shaking hands, and observing."

The witness, Hunter, (P. 19, Petition) is referred to as having testified that Walker 'exhorted his listeners: 'come on, let's go' or 'let's go up and see,'. The actual testimony of the witness was:

> "A. Yes, sir, right after making a speech, he stepped down and people were still shaking hands with him and talking to him and he talked to a few of them and came over in the direction where I was and he says, 'let's walk up here and see what's going on' or something like that." (S.F. 1040, 1050)

(This is typical of the evidence relied upon by Petitioner to establish that Walker "led a charge".)

The testimony of the witness, Jackson, is also cited (Petition, 19) as indicating that Walker "led a charge". The statements relied upon being that "the General walked to the vicinity of the flag pole; that 10 or 15 people followed him; that 25 were with him; and that those in front of him were throwing rocks."

The witness actually testified that he and other students had requested Walker to lead them, that Walker had re-

fused to answer, and walked with them, at a very slow gait, to the vicinity of the flag pole in the center of the circle (S.F. 1007-8). The witness was asked if Walker participated in the riot in any way, and answered "no, sir." (S.F. 1010-1011). He also testified that Walker "stood there and looked several minutes, just at the marshals. He stood there." (S.F. 1008). He testified that the students around Walker were not close enough to throw a missile at the marshals (S.F. 1011). From the entire testimony of this witnes, it is obvious the reference in the Petition, "that those in front of him were throwing rocks" did not involve any one close to Walker, and that this statement is made by Petitioner, completely out of context.

Again, at page 20, Petitioner referred to the testimony of the witness, Edwards (S.F. 597) as establishing that "Walker approached the flag pole, accompanied by some fifty or sixty people." The testimony of this witness, immediately following that referred to by the Petitioner was:

> "Q. Did that fifty or sixty go with him?
>
> "A. They weren't following him. He wasn't leading any group."

This witness testified (S.F. 588) that Walker remained near the monument for some ten/twenty minutes, after his speech, which squarely contradicted testimony of several of the Petitioner's witnesses, that Walker moved toward the Lyceum immediately after the speech. He described Walker's movement as a "slow casual walk up there". The tenor of the entire testimony of this witness was that Walker participated in no way in the violent activities of the crowd.

Also at page 20 of the Petition, testimony of the witness, Cox, is summarized as having Walker in the middle of a group walking toward the Marshals, some waving a flag of truce and demanding, "we want that nigger". A review of the actual testimony of this witness (S.F. 247) will reveal that this movement toward the marshals had nothing whatever to do with Walker, and that the students who went on forward were endeavoring to talk with the marshals, but were not in any way associated with Walker. The comment about the "nigger" is obviously another attempt to inject a sly element of prejudice against Respondent, in no way supported by the evidence.

Again, at page 20 of the Petition, the testimony of the witness, Sweat, is referred to as supporting the conclusion that Walker "led a charge," in that he "walked toward the flag pole a second time after his speech with about fifteen people, including some who had missiles in their hands." Without further encumbering this already lengthy discussion, Respondent respectfully suggests that, if the entire testimony of this witness, Sweat, can reasonably be construed to establish that Walker actually led a charge or charges against the U. S. marshals, the argument of Petitioner is sound. On the other hand, if the testimony of this typical witness can reasonably be construed as evidence that Walker did not assume command of the crowd or lead a charge against the marshals, there must, of necessity, be sufficient evidence after review of the entire record to support the verdict of the jury, and the judgment of the trial court, affirmed by the Court of Civil Appeals. We respectfully invite

the attention of the Court to the entire testimony of this witness, (S.F. 140-244) as typical of the evidence offered by Respondent to refute the charges by Petitioner that Respondent had assumed command of the crowd and led a charge.

Respondent respectfully submits that the evidence in the record supports the verdict of the jury that: 1) the publication of Petitioner that Walker assumed command of the crowd and led a charge against U. S. marshals was not substantially true, 2) that the publication did not constitute "fair comment", 3) that the publication was not made in good faith.

III.

The verdict was reasonable under the circumstances, and certainly does not violate the Constitution.

As pointed out in the trial of this case, the issues involved are even bigger than the parties. The largest news media on earth published, around the world, a false statement that Respondent, a man of international reputation, had committed an act of sedition and insurrection against the government which he had sworn to defend, as a Major General in the United States army. The Respondent, as a result of the false charge, will bear to his grave a public image as a criminal and a lunatic. In addition, he suffered for six dismal days and nights imprisonment in a mental prison hospital, amid an atmosphere of criminal insanity. His long-time comrade in arms, Colonel Dornblaser testified that, when he read of Walker leading

a charge of students against U. S. marshals, he thought he had "really lost his marbles" and that "an army officer that had been trained as he, with his reputation, could not possibly have led a bunch of unarmed students against armed marshals."

The Associated Press had gambled, by releasing the report of its newsman, before Walker had been charged by federal authorities with a crime, for the highest stakes known to human conflict * * * human reputation and liberty. They lost, when their premature publication was not later supported by an arrest, trial, and conviction of Walker.

The frustration, degradation and humiliation incident to this publication was a proper element of consideration by the jury.

The amount of damages to an individual similarly situated to Respondent is almost beyond measure in dollars and cents. It is the end of Justice that no one shall suffer wrong. Respondent has suffered. Petitioner has properly been required to compensate.

Certainly, for an organization as wide spread and powerful as the Associated Press, the damages do not represent a ruinous amount.

As to the contention that such an award of damage would preclude the news media from fairly and accurately reporting the news, it is respectfully submitted that the Associated General Walker, simply, thoroughly, and accurately that Press could have reported the events at Oxford involving

* * * 1) Walker issued public statements, 2) he came to the campus during the riot, 3) he mingled with the crowd, 4) he made a speech, 5) he remained in the area after the speech.

If Walker had actually assumed command of the crowd and led a charge, as reported by the Associated Press, and if the government had charged him with a crime, the Petitioner could have reported such facts, after the charge, with immunity and privilege. Where they elected, however, to publish upon the unsupported statement of a 21 year old boy, whose reports were conflicting in time and fact as they came into the New Orleans news room, that Walker had committed a crime, they gambled human liberty and reputation against a highly sensational and salable news story. Had the government indicted and convicted Walker, their gamble would have paid off. Without such indictment and conviction, however, the Associated Press was properly required to answer in a Court of Justice and Law as to the accuracy and good faith of its reporter.

That the jury has returned a verdict of $500,000.00, affirmed by two appellate courts, is no ground for a judicial determination that the hasty, irresponsible and improvident action of Associated Press should be protected by a constitutional shield to be created for its benefit, at the expense of the rights of an American citizen. If verdicts of this size for defamation will hamper free dissemination of the news, the answer is very simple—don't lie.

It is respectfully submitted, that the verdict of the jury in this case, in amount, does not invade the constitutional rights of Petitioner.

IV.

The Sullivan rule does not apply when the defamed individual falsely accused of crime is not a public official, but is a private citizen, even though he is a figure of public interest.

It is now determined by all of the Courts in Texas, that under the common law rules of libel, which were not codified into statutes until 1901, the Associated Press is guilty per se in charging Walker, a private citizen, a resigned Major General drawing no government retirement pay, with insurrection and inciting a riot against the United States marshals, statutory crimes under the Acts of Congress sounding in treason. Unless that determination of the Texas Courts under common law libel is in conflict with the constitution of the United States, that sovereign determination should not be disturbed, and this Court should not exercise its jurisdiction to overturn the Texas construction of the common law as adopted in Texas.

Under 18 U.S.C. §§2383 and 2384, the chapter pertaining to rebellion, insurrection, and seditious conspiracy, one guilty of opposing by force the authority of the federal government or using force to prevent, hinder, or delay the execution of the laws of the United States, is subject to fines ranging from $10,000.00 to $20,000.00, or imprisonment ranging from 10 to 20 years, or both, and becomes incapable of holding any office under the United States.

The libelous story of the Associated Press, after accusing Walker of assuming command of a mob rioting against the marshals, and leading a charge, mentions his arrest on charges of inciting insurrection and seditious conspiracy.

Imputation of crime is libel per se in almost every English speaking jurisdiction, and the cases are collated in 33 Am. Jur. 44, Libel & Slander, §11. The rule was recognized by this Court in *Pollard v. Lyon*, 91 U.S. 225, 23 Law Ed. 308, and *Washington Post Company v. Chaloner*, 250 U.S. 290, 63 Law Ed. 987.

The libel laws of Texas were first enacted into statute in 1901, and did no more than codify the historical definitions of libel under the common law, which had been adopted in Texas on 20 January 1840, by Article 1 of the Statutes. *Renfro Drug Company v. Lawson*, 144 S.W. 2d 417 (Tex. Civ. App., no writ history).

In other words, the respondent here does not rely upon any statute peculiar to Texas, but only upon the common law, which creates a distinction, as we shall hereinafter point out, with such cases as the Sullivan case relied upon by the petitioner.

The petitioner presents five questions for review, but then relies almost entirely upon imploring this Court to change its construction of *New York Times Company v. Sullivan*, 376 U.S. 254, 11 Law Ed. 2d 686, as repeated in *Garrison v. Louisiana*, 379 U.S. 64, 13 Law Ed. 2d 125, and *Rosenblatt v. Baer*, 383 U.S. 75, 15 Law Ed. 2d 597.

But there are at least four major distinctions between this case and *Sullivan*, distinctions which by their nature would inhibit rather than enlarge *Sullivan*. Let us state them, and then return to argue them.

First and foremost, *Sullivan* was confined to public officials exclusively, and this respondent is a private citizen who, by his outstanding military career and his outspoken convictions and principles, is concededly a figure of public interest.

Second, *Sullivan* did not impute a crime, a libel per se under general principles of law, but here a resigned Major General was charged with insurrection against his country.

Third, in *Sullivan* the defendant was a newspaper, with the normal privileges of the press. Here, the Associated Press is not a newspaper, but a merchant of news selling its commodity, its stock in trade, and not producing a periodical for public persual within the definition of a newspaper or the press.

Fourth, and finally, in *Sullivan* the statutes of Alabama inhibited the Freedom of the Press by the creation of presumptions and changing the burden of proof facilitating recovery by plaintiff. No such situation exists here, and there is no action by the State of Texas in any manner infringing the Fourteenth Amendment, but the Texas Courts simply follow the common law of libel.

With regard to the fact that the respondent is not a public official, and therefore not within the scope of *Sullivan*, we must reluctantly impose upon the Court's patience by

repeating what it has seen many times before: excerpts from *Sullivan, Garrison, and Rosenblatt.* The emphasis has been added by us throughout.

> "We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to avoid damages in a libel action brought by a **public official against critics of his official conduct.**" 376 U.S. 256.
>
> "We hold that the rule of law applied by the Alabama Courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a **public official against critics of his official conduct.**" Page 264.
>
> "The question before us is whether this rule of liability, as applied to an action brought by a **public official against critics of his official conduct,** abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments." Page 268.
>
> "The right of free public discussion of the **stewardship of public officials** was thus, in Madison's view a fundamental principle of the American form of government." Page 275.
>
> "A rule compelling the **critic of official conduct** to guarantee the truth of all of his factual assertions * * *" Page 279.
>
> "Under such a rule, would be **critics of official conduct** may be deterred from voicing their criticism * * *" Page 279.
>
> "The constitutional guarantees require, we think, a federal rule that prohibits a **public official** from recovering damages for a defamatory falsehood relating to his **official conduct** unless he proves that the state-

ment was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Page 279.

"Such a privilege for criticism of **official conduct** is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen." Page 281.

"It would give **public servants** an unjustified preference over the public they serve, if critics of **official conduct** did not have a fair equivalent of the immunity granted to the officials themselves." Page 282.

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

"We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposess of this rule, or otherwise to specify categories of persons who would or would not be included. Nor need we here determine the boundaries of the 'official conduct' concept. **It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official,** and that the allegations in the advertisement concerned what was allegedly his official conduct as commissioner in charge of the police department." Page 283.

Shortly thereafter Mr. Justice Brennan wrote the opinion in *Garrison*, and reiterated the *Sullivan* doctrine, expressly stating that it was limited to a public official:

"In New York Times Company vs. Sullivan, * * * we held that the Constitution limits State power in a civil action brought by a **public official** for criticism of his **official conduct,** to an award of damages for the false statement 'made with actual malice—that is

> with knowledge that it was false or not.' At the outset, we must decide whether in view of the differing history and purposes of criminal libel, the New York Times rule also limits State power to impose criminal sanctions for criticism of the **official conduct of public officials.** We hold that it does." 379 U.S. 67.
>
> "We held in New York Times that a **public official** might be allowed the civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true." Page 74.

Then, in order to cover a situation just exactly like the instant case, Justice Brennan repeated what the Supreme Court had already said some time before, saying:

> "For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be affected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality * * *" Chaplinsky vs. New Hampshire, 315 U.S. 568, 572, 86 L. Ed. 1031, 1035, 62 S. Court 766. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." Page 75.

In *Rosenblatt* Mr. Justice Brennan speaking for the Court once again reiterated the limitation of *Sullivan* to public officials:

> "We there held that under the First and Fourteenth Amendments a State cannot award damages to a **public official** for defamatory falsehood relating to his **official conduct** unless the official proves actual malice." 15 Law Ed. 600.

In this case "we granted certiorari and requested the parties to brief and argue, in addition to the questions presented in the petition for certiorari, the question whether respondent was a **'public official'** under New York Times and under our decision in Garrison vs. Louisiana." Page 601.

"The question is presented, however, whether that theory of recovery is precluded by our holding in New York Times that in the absence of sufficient evidence that the attack focused on the plaintiff, an otherwise impersonal attack on **government operations** cannot be utilized to establish a libel of those administering the operations." Page 602.

"To allow the jury to connect the statements with Sullivan on that presumption alone was, in our view, to invite the spectre of prosecutions for **libel on government,** which the Constitution does not tolerate in any form." Page 603.

"A theory that the column cast indiscriminate suspicion on members of the group responsible for the conduct of this **governmental operation** is tantamount to a demand for recovery based on libel of government, and therefore is constitutionally insufficient." Page 604.

"Even accepting respondent's reading, the column manifestly discusses the conduct of **operations of government.**" Page 604.

"The question is squarely presented whether the **'public official'** designation under New York Times applies." Page 604.

" 'We held in New York Times that a **public official** might be allowed the civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true.' Garrison." Page 604.

"Turning, then, to the question whether respondent was a **'public official'** within New York Times, we reject at the outset his suggestion that it should be

answered by reference to State law standards." Page 604.

"Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for **government operations** must be free, lest criticism of government itself be penalized. It is clear, therefore, that the **'public official'** designation applies at the very least to those among the hierarchy of **government employees** who have, or appear to the public to have, substantial responsibility for or control over the conduct **of governmental affairs.**" Page 605.

Because the case was tried before *Sullivan*, it was remanded to determine whether the plaintiff was a public official, and whether there was a jury question of malice.

In a concurring opinion Mr. Justice Stewart said that the *Sullivan* rule should not be applied "except where a State's law of defamation has been unconstitutionally converted into a law of seditious libel. The First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars." He then went on to make clear, that "the preventive effect of liability for defamation serves an important public purpose, for the rights and values of private personality far transcend mere personal interests. Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society."

To use Mr. Justice Stewart's language, the Associated Press just plain lied about Respondent. When they said that he led a charge, that was false, and the jury found it was false. When they said that he assumed command of

a rioting crowd in insurrection against the authority he had respected all of his life, that was false, and the jury found it was not even substantially true.

The Associated Press says that the First and Fourteenth Amendments gave them a license to tell these lies about Respondent, because he was in the public eye, even though their mendacious reporter didn't know it. The Associated Press says that unless they are free to "criticize" Walker by making false statements about him, the public policy will be destroyed and the purpose of the First and Fourteenth Amendments will fail. This suit does not inhibit fair criticism of Edwin A. Walker or of any other person. It does prohibit the Associated Press from making false statements of fact about Walker and other persons, but not their criticism or fair comment on the true facts. The First and Fourteenth Amendments do not give the Associated Press a license to lie, and they never have. Falsification of the facts is never privileged. The statement in the Associated Press story that Savell, claiming to have been less than six feet from Walker, reported that he saw "two men take him by the arms and they headed for the federal marshals" was either true or knowingly false. It is not comment—it is a statement of facts, and it could not be accidentally made.

The fallacy of the contention that *Sullivan* should be extended to all persons in the public eye is very obvious when its logical extreme is considered. Could the Associated Press defend charging Willie Mays falsely with taking a bribe to throw a baseball game because he is constantly in the press as a public figure and each new home run adds to a National

League record? Could they defend on a charge that Zsa Zsa Gabor was compelled to get married quickly, merely because, although she is a private citizen, she is such a public figure that her marital status is of such tremendous public interest that she can be lied about with impunity? The fallacy reveals itself promptly.

With reference to the second distinction, in neither *Sullivan* nor *Rosenblatt* was the plaintiff mentioned by name. In each instance the reference was to the holder of an official position, and the ancient innuendoes came into play to show who was meant. The defamatory statements did not charge the plaintiff with having committed any kind of crime specifically, but again by innuendo charged them with malfeasance in office.

But in the instant case, Walker by name and by the courtesy title of General still appurtenant after his resignation, was specifically charged with crimes defined in the federal statutes, 18 U. S. C., §§2383-4, Insurrection & Seditious Conspiracy. These constitute libel per se at common law, and do not require any State statute to implement them. Under almost universal principles of law, damages are presumed to flow from libels per se, and they are compensable as such without the necessity of showing malice. Respondent's right of recovery, then, was not dependent upon any State action or State statute. It is the action of the State that is inhibited under the Fourteenth Amendment.

Regarding our third distinction, in *Sullivan* the defendant was the New York Times, undoubtedly one of the outstanding newspapers in the country. While that fact did not appear to have much bearing upon the decision, it was pointed out

that, in a large newspaper, management and the editorial staff could have no great knowledge of the contents of advertising offered to the business office, which was the substance of the libel. In Texas, by statute, certain additional privileges are granted to newspapers, the Texas statute as enacted in 1901 being substantially the *Sullivan* rule. Article 5432, Vernon's Annotated Civil Statutes of Texas, provides that "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."

The Associated Press is not a newspaper nor is it a periodical. As its long time general manager, Kent Cooper, said in his book *Barriers Down*, "the prime business of news agencies is to collect and distribute news to newspapers."

This Court has discussed at length the nature of the corporate business of the Associated Press and the selling of its commodity, news. *International News Service v. Associated Press*, 248 U.S. 215, 63 Law Ed. 211; *Associated Press v. United States*, 326 U. S. 1, 89 Law Ed. 2013.

As a merchant of news, therefore, although that is one of the components essential to its customers, and also its member newspapers, the Associated Press has no greater right to falsify about outsiders than would the merchants supplying newspapers with their rolls of newsprint, or the manufacturers of type-setting machines and printing presses, and the

Associated Press has no greater exemption from defamation or negligence in the sale of its products than would they.

When the Associated Press sent out false statements over the entire world, as it did on June 6 of this year, reporting that James Meredith had been shot and murdered in Mississippi, or as it did in October of 1962, reporting to the entire world that "General Walker had led a charge against the marshals and assumed command of a "rioting mob," it is responsible for those injured as a result. The Associated Press prides itself upon the fact that the world depends upon it for news, but the world depends upon it for true news, and there is an obligation of accuracy. Otherwise, we are susceptible to the Big Lie technique perfected by Goebbels when he managed a similar news agency for Hitler in the Third Reich. A responsible press is as essential to a democracy as a free press, and the way to keep it responsible is to make it answerable for its falsehoods.

The fourth distinction is that in *Sullivan* there was considerable reliance upon the fact that the Alabama law created presumptions and burdens of proof in favor of the plaintiff and against the defendant which inhibited open criticism of official conduct. In the instant case we have no State action at all. None of the respondent's right to recovery here is based upon any State statute which alters the ancient common law rules fundamental in almost every American jurisdiction. The only State action was the furnishing of a court room and a judge for the determination of the rights, and even the definitions given to the jury were those requested by the Associated Press and not necessarily prescribed by Texas law. (See Appendix A.)

The Fourteenth Amendment applies to action by a State, and there has been no action by the State in this case other than the providing of a forum for trial and appeal.

The second, third, fourth, and fifth questions presented at pages 3 and 4 of the petition in an attempt to bring this case within the Procrustean bed of the *Sullivan* case rather remind us of the physician who superinduced pneumonia in his cold patient because he could cure pneumonia but couldn't cure a cold. It would be a novel construction indeed of the Fourteenth Amendment if the action of twelve citizens comprising a jury without instruction limiting their determination of damages could constitute a violation of the Fourteenth Amendment.

As a practical matter, this Court has set up the only sane line of demarcation: that between public official and private citizen. If the contention of the Associated Press is sustained, and if the *Sullivan* rule is extended to private citizens merely because they are figures of public interest, we have wiped out any fixed rule of law, any firm standard by hich one may know in advance what his rights are, and substituted instead a fluid and fluctuating basis. How much public interest must a figure excite before he can be lied about with impunity. If the Associated Press can lie about a national figure as it did in 1962 about Walker and again in 1966 about Meredith, can the Possum Hollow Weekly lie about the winner of a spelling bee at the school house because she is a figure of public interest in the village? That way madness lies!

We respectfully submit that this Court should stand its ground and limit the *Sullivan* doctrine to public officials.

CONCLUSION

The Petition should therefore be denied, because there is no true constitutional question. No portion of the Constitution protects the perpetrator of the known falsehood from financial responsibility for his wrongdoing. There is no State action infringing the Constitution when a State Court upholds the common law, and a jury verdict pursuant to the constitutional right of trial by jury does not infringe the Constitution. The decisions of this Court do not protect knowingly false statements about a private citizen neither holding nor offering for public office.

Accordingly, this Court should not exercise any jurisdiction, and we therefore respectfully pray that the writ sought be denied.

Respectfully submitted,

WILLIAM ANDRESS, JR.,
627 Fidelity Union Life
Building,
Dallas, Texas,

CLYDE J. WATTS,
219 Couch Drive,
Oklahoma City, Oklahoma.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing reply was served by depositing a copy of the same in a United States mail box with air mail postage prepaid addressed to William P. Rogers, Leo P. Larkin, Jr., and Stanley Godofsky, 200 Park Avenue, New York, New York 10017, and to Arthur Moynihan, 50 Rockefeller Plaza, New York, New York 10020; and with first class postage prepaid addressed to J. A. Gooch and Sloan B. Blair, 1800 First National Building, Fort Worth, Texas 76102, Counsel of record for Petitioner on June ....., 1966.

.....

Of Counsel

APPENDIX A
Charge and Verdict of the Jury

No. 31,741-C

In the

DISTRICT COURT OF TARRANT COUNTY, TEXAS,
17th JUDICIAL DISTRICT.

EDWIN A. WALKER

v.

ASSOCIATED PRESS

CHARGE OF THE COURT

Ladies and Gentlemen of the Jury:

This case is submitted to you in the form of questions which are called special issues. You are to answer these questions by unanimous consent.

Do not let bias, prejudice, sympathy, resentment, or any other such emotion play any part in your deliberations.

During your deliberations be careful not to mention or discuss any personal knowledge you may have about the facts in the case. *Your duty is to answer these questions from the evidence you have heard in this trial and from that alone.*

Do not speculate on matters not shown by the evidence, and about which you are not asked any questions. Remember that you cannot guess your way to a just and correct verdict.

Do not return a quotient verdict, by adding together figures, dividing by the number of jurors, and agreeing to be bound by the result.

Do not do any trading on your answers—that is, some of you agreeing to answer certain questions one way if others will agree to answer other questions another way.

Do not decide who you think should win and then try to answer the questions accordingly. If you do this your verdict will be worthless.

You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law you must be governed by the instructions in this charge.

The following definitions are given you by the Court. Whenever any of the terms so defined are used in any of the special issues, you will refer to the appropriate definition and be guided thereby in considering your answer:

By the term PREPONDERANCE OF THE EVIDENCE is meant the greater weight and degree of the credible evidence before you.

DEFINITIONS

In answer to Special Issue No. 1 you are instructed that by the term "led" is meant activities by a person who directs, moves to action, or encourages in some action or movement, and that by the term "charge" is meant a movement toward the marshals, or a group or body of people moving toward an objective.

In answering the issues in this charge in which the term "substantially true" is used, you are instructed that in order for a statement to be "substantially true" it is not necessary that the exact facts or the most minute details of the plaintiff's activities be completely accurate. Mere inaccuracies not affecting the substance of the report of plaintiff's activities are immaterial. You are further instructed that in answering special issues in which the term "substantially true" is used that the publication must be considered as a whole, giving to all the words contained therein (except those hereinabove defined for you) their ordinary meaning as read and understood by the average reader.

In answering the issues in these instructions in which the term "fair comment" is used, you are instructed that the interest of the public requires that all acts and matters of a public nature, and of public concern published for general information may be freely published and discussed with reasonable comments thereon. You are further instructed that by said term is meant a statement which represents the

honest opinion of the writer and constitutes reasonable inferences to be drawn from the attendant facts and circumstances whether literally true or not, or whether all reasonable persons would agree with the opinions or conclusions based thereon.

Special Issue No. 1:

Question: Do you find from a preponderance of the evidence that the statement "Walker, who Sunday led a charge of students against Federal marshals on the Ole Miss campus" was substantially true?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 2:

Question: Do you find from a preponderance of the evidence that the statement "Walker, who Sunday led a charge of students against Federal marshals on the Ole Miss Campus", complained of by plaintiff, constitutes fair comment describing the plaintiff's activities on or about September 30, 1962, at the places described in the evidence and under the then attendant circumstances?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 3:

Question: Do you find from a preponderance of the evidence that the statement inquired about in special issue No. 1 was made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 4:

Question: Do you find from a preponderance of the evidence that in publishing the statement set forth in special issue No. 1 the defendant, Associated Press, was actuated by malice as that term is hereinafter defined.

In connection with the above issue, you are instructed that by the term "malice" is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it.

Answer "Yes" or "No".

Answer: Yes.

Special Issue No. 5:

Question: Do you find from a preponderance of the evidence that the statement "Walker assumed command of the crowd" was substantially true?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 6:

Question: Do you find from a preponderance of the evidence that the statement "Walker assumed command of the crowd" complained of by plaintiff, constitutes fair comment describing plaintiff's activities on or about September 30, 1962, at the places described in the evidence and under the then attendant circumstances?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 7:

Question: Do you find from a preponderance of the evidence that the statement inquired about in special issue No. 5 was made in good faith in reference to a matter in which the defendant had a duty to report to its members and thence to the public?

Answer "Yes" or "No".

Answer: No.

Special Issue No. 8:

Question: Do you find from a preponderance of the evidence that in publishing the statement set forth in special issue No. 5 the defendant, Associated Press, was actuated by malice as that term is hereinafter defined?

In connection with the above issue, you are instructed that by the term "malice is meant ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it.

Answer "Yes" or "No".

Answer: Yes.

Special Issue No. 9:

Question: If you have answered either special issue No. 1 or special issue No. 5 "No", then answer:

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff for the damages, if any, sustained by him as a direct and proximate result of the statements inquired about in special issues Nos. 1 and 5?

In connection with this issue you are instructed that you may only award damages, if any, for statements, if any, inquired about herein which you have found to be false.

In connection with the foregoing issue you are instructed that you may take into consideration such damages, if any, to the reputation of the plaintiff and such mental anguish, if any, and humiliation, if any, and embarrassment, if any, which plaintiff may have sustained directly and proximately solely as a result of the statements hereinabove set forth, if you have found the same to be false.

Answer in dollars and cents, if any.

Answer: $500,000.00.

Special Issue No. 10:

If you have answered either special issue No. 4 or special issue No. 8 "yes", then answer:

Question: Do you find from a preponderance of the evidence that this is a case in which exemplary damages should be awarded to plaintiff?

In connection with the above issue you are instructed that the term "Exemplary damages" as used herein means a sum of money awarded as a punishment for any malice, if any, you have found to exist in this case. "Exemplary damages", if any are allowed, are to be no part of the damages which may be allowed as compensation (if compensation has been allowed) but only in the nature of a penalty allowed by law at your discretion, and any amount which you find hereunder, if you see fit to make such a finding, should be reasonably proportionate to the actual damages, if any, you may allow plaintiff herein.

Answer "Yes" or "No".

Answer: Yes.

Special Issue No. 11:

If you have answered the above special issue No. 10 "Yes", and only in that event, then answer:

Question: From a preponderance of the evidence, what amount of money, if any, do you find should be awarded to plaintiff as exemplary damages?

Answer in dollars and cents, if any.

Answer: $300,000.00.

/s/ CHARLES J. MURRAY

Judge presiding.

VERDICT OF THE JURY

We, the jury, have answered the above and foregoing special issues, as herein indicated, and herewith return same into court as our verdict.

.....

Foreman