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NEW YORK TIMES v. SULLIVAN: A RETROSPECTIVE EXAMINATION

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John Bruce Lewis**
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It has been twenty years since the United States Supreme Court handed down its decision in *New York Times Co. v. Sullivan*.¹ The Court's opinion in that case has had an unprecedented and continuing impact both on the law of defamation and on first amendment rights.² Most of the literature dealing with the *New York Times* case has focused on the constitutional aspects of the decision or its implications for the development of future legal

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1. 376 U.S. 254 (1964). In *New York Times*, the Supreme Court held that the first amendment "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 reckless disregard of whether it was false or not." *Id.* at 279-80.

2. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Supreme Court extended the actual malice standard to defamatory statements concerning "public figures." *Id.* at 155. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Court said that persons suing the media for invasion of privacy must also meet the actual malice standard of *New York Times*. *Id.* at 387-88. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), marked the furthest expansion of the first amendment in defamation cases. In *Rosenbloom*, the Court held that plaintiffs must prove actual malice in defamation cases involving "matters of general public concern" regardless of the fame or anonymity of the participants. *Id.* at 43-44. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court reaffirmed its holdings in *New York Times* and *Butts* but said that *Rosenbloom* had gone too far. *Id.* at 342-43. The Court viewed *Rosenbloom* as an unacceptable encroachment on the legitimate state interest in the protection of reputation. *Id.* at 347-48. The Court based the application of the actual malice test on a distinction between public officials/public figures and private individuals. *Id.* at 351-52. The principal defamation cases since *Gertz* have been concerned with defining who is a public official or public figure. See *Wolston v. Reader's Digest*, 443 U.S. 157 (1979) (a man who had once been cited for contempt for refusing to appear before a grand jury investigating Soviet espionage was not a public figure when he sued a book which listed him as a Soviet agent); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (a scientist who received federal funds for research purposes was not a public figure for purposes of a libel suit against a United States Senator who ridiculed the research as a wasteful expenditure of public funds); *Time, Inc. v. Firestone*, 424 U.S. 153 (1976) (a wealthy Florida socialite involved in a divorce suit was not a public figure). The Court has held, however, that the plaintiff's attorney has the right to inquire about a reporter's state of mind in preparing a news story in order to establish actual malice. See *Herbert v. Lando*, 441 U.S. 153, 160 (1979).

principles.³ It is important to remember, however, that the case had its genesis in the tumult and controversy surrounding the civil rights movement of the early 1960's. Thus, the decision cannot be analyzed at the dispassionate level of first amendment theory alone but must be viewed as an extraordinarily significant product of the civil rights movement.

It is the position of the authors that the compelling facts surrounding the case, as much as pre-existing constitutional principles, led to the *New York Times* decision. Thus, an understanding of *New York Times* requires an examination of the case in its historical and procedural context.⁴ That con-

3. Few Supreme Court decisions have been the subject of as many law review articles as *New York Times*. For a general discussion of the constitutional and tort ramifications, see Berney, *Libel and the First Amendment*, 51 VA. L. REV. 1 (1965); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 8 COLUM. J. ART & L. 1 (1983); Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234 (1966); Nimmer, *The Right to Speak from Times to Time*, 56 CALIF. L. REV. 935 (1968); Pedrick, *Freedom of the Press*, 49 CORNELL L. REV. 581 (1964); Pierce, *The Anatomy of An Historic Decision: New York Times Co. v. Sullivan*, 43 N.C.L. REV. 315 (1965).

4. Shortly after *New York Times* was decided, Professor Harry Kalven commented: The *Times* case has to be read against the sociological reality which produced it. First the publication in Alabama was tenuous in the extreme; the advertisement was addressed to the normal audience of the *Times*; it appears that less than four hundred copies of the 650,000 circulation of the *Times* were circulated in Alabama and only thirty-five copies in the county in question. Second, other suits from the same advertisement were pending, threatening several million dollars more in damages. Third, there is, at least in Northern eyes, something disingenuous about the response of the Southern jury to the defamation involved; it involves the South in a showing of moral shock at vigorous conduct countering the Negro protest movement. In brief, although there was perhaps a technical libel involved, the impression is that the technicality was pounced on and exploited in Southern irritation over Northern interference in the civil-rights controversy.

H. KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 54-55 (1965). In his article entitled *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, Professor Kalven was also mindful of the connection between the Negro protest movement and the *New York Times* decision. He declared:

[E]ven a cursory examination of the case reveals that the decision was responsive to the pressures of the day created by the Negro protest movement and thus raises the question so frequently mooted whether the Supreme Court has adhered to neutral principles in reaching its conclusion. . . . [T]he case is a major instance of the important consequences of the civil rights issue and the apparatus of protest that accompanies it. The Negro movement is making significant constitutional law not only in the area of the Fourteenth Amendment's Equal Protection Clause but in unexpected sectors of First Amendment theory. Whatever the irritations and crises of 'the long hot summer,' the protest has maintained the dignity of political action, of an elaborate petition for redress of grievances. And no one has been more sensitive to this sociological reality than the Supreme Court itself.

Id. at 192-93. A similar view was echoed recently in an article by newspaper columnist and lecturer Anthony Lewis:

What was at stake on the facts of the *Sullivan* case was more than the fate of one newspaper. It was the ability, or the willingness, of the American press to

text linked the civil rights movement, the news media, and white Alabama officials in a struggle much larger than a single lawsuit. This article will examine the civil rights origins of the case, the participants, their motives, and the related litigation. It will then turn to a detailed analysis of the *New York Times* case itself as it progressed through the courts and culminated in the Supreme court decision.

I. THE ORIGINS OF A CONSTITUTIONAL CASE

A. Introduction

In March 1960, the Reverend Martin Luther King, Jr. was one of the leaders of the rapidly growing civil rights movement.⁵ Dr. King had first come to national prominence four years earlier when, as president of the Montgomery Improvement Association, he led the campaign to desegregate the Montgomery, Alabama bus lines.⁶ As the president of the Southern Christian Leadership Conference,⁷ he quickly rose to the forefront of the non-violent struggle for black civil rights in the South.

Because of his civil rights activities, Dr. King became the target of sporadic violence and harassment. His home was the subject both of bomb and gunshot attacks.⁸ In 1956 Dr. King was convicted of violating the Alabama

go on covering the racial conflict in the South as it had been doing. Those were very different times in Alabama and Mississippi and large parts of other states in the Deep South: Blacks could not vote, much less attend school or eat a restaurant meal or ride a bus on a nonracial basis. To challenge the racial system was dangerous; physical violence and threats were common. The national press, print and broadcast, played an extremely important part in bringing all this to the attention of the rest of the country, in arousing the federal government to corrective action and hence in changing the ways of the South. Of course those who wished to preserve what was then called "the Southern way of life" did not like the press when it intruded into that life. Justice Black, who was from Alabama, observed in his concurring opinion in the *Sullivan* case that white Southern feelings were especially hostile "to so-called outside agitators"—a term, Justice Black drily added, that "can be made to fit papers like the *Times*, when it is published in New York."

Lewis, *supra* note 3, at 3-4 (footnotes omitted). In *Hugo Black and the Judicial Revolution*, author Gerald Dunn also recognized the linkage between the civil rights movement and *New York Times*. G. DUNN, HUGO BLACK AND THE JUDICIAL PROCESS 384 (1977). When the Supreme Court decided the *New York Times* case, it was aware of the related cases which arose from media coverage of the black protest movement in Montgomery, Alabama. See *Petition for Writ of Certiorari to the Supreme Court of Alabama at 19, 6 Record, New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

5. The most comprehensive biography of Dr. Martin Luther King, Jr. is S. OATES, *LET THE TRUMPET SOUND* (1982). For a summary of Dr. King's career and of his confrontations with southern law enforcement officials, see C. KING, *THE WORDS OF MARTIN LUTHER KING, JR.* 7-13, 99-110 (1983).

6. For an account of the Montgomery bus boycott and Dr. King's role in it, see M. KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* (1958); S. OATES, *supra* note 5, at 68-109.

7. See S. OATES, *supra* note 5, at 147.

8. See *Minister Who Led Boycott in Montgomery Tells of Night Shotgun Attack*, N.Y.

criminal boycott statute because of his efforts in desegregating the Montgomery bus lines.⁹ That same year he was also arrested for speeding; two years later he was arrested for loitering.¹⁰

In February 1960, Dr. King was arrested on a charge of perjury in connection with the filing of his Alabama state income tax return.¹¹ Under Alabama law, this was a felony carrying a maximum penalty of ten years imprisonment.¹² The "Committee to Defend Martin Luther King and the Struggle for Freedom in the South" was formed and, on March 29, 1960, it published an appeal for funds in a full-page advertisement in the *New York Times (Times)* entitled "Heed Their Rising Voices".¹³

The first paragraph of that advertisement described the actions and goals of "Southern Negro students" demonstrating "in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights."¹⁴ It went on to charge that these students were "being met by an unprecedented wave of terror."¹⁵ The second paragraph claimed that when 400 students tried to integrate lunch-counters in Orangeburg, South Carolina, they were forcibly ejected, tear-gassed, arrested en masse, and herded into an open barbed-wire stockade.

The third paragraph in the advertisement declared:

In Montgomery, Alabama after students sang "My Country 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shot-guns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.¹⁶

The fourth paragraph spoke of student activity in "Tallahassee, Atlanta, Nasille, Savannah, Greensboro, Memphis, Richmond, Charlotte and a host

Times, Dec. 24, 1956, reprinted in 4 Record at 1501, *New York Times*. The January 30, 1956 bombing of King's home is discussed in S. OATES, *supra* note 5, at 86.

9. See *Court Holds Key to Bus Boycott*, N.Y. Times, Oct. 14, 1956, reprinted in 4 Record at 1618, *New York Times*; Answers of Defendant, New York Times Co., to Interrogatories, 5 Record at 1930, 1934, *New York Times*.

10. The arrest of King for speeding is discussed in S. OATES, *supra* note 5, at 83-84. See also Answers of Defendant, New York Times Co., to Interrogatories, 5 Record at 1930, 1934, *New York Times* (King was convicted and fined ten dollars).

11. See S. OATES, *supra* note 5, at 150-53. In May 1960, after a week's trial in Montgomery, Alabama, King was found not guilty of tax evasion by an all white jury. *Id.* at 153. For additional discussion, see Testimony of John R. Matthew, Transcript of Proceedings on Merits, 2 Record at 680, *New York Times*; Brief for the Petitioner at 9, 6 Record, *New York Times*; Motion of the Washington Post Company for Leave to File a Brief As Amicus Curiae And Brief Of The Washington Post Company As Amicus Curiae In Support Of Petitioner at 4, 6 Record, *New York Times*.

12. See Answers of Defendant, New York Times Co., to Interrogatories, 5 Record at 1930, 1937, *New York Times*.

13. N.Y. Times, Mar. 29, 1960, at 25, reprinted in *New York Times*, 376 U.S. at 292-93.

14. *Id.*

15. *Id.*

16. *Id.*

of other cities in the South” referring to the students as “protagonists of democracy.”¹⁷ The fifth paragraph praised Dr. King as a symbol and inspiration to the civil rights movement and stated that the “Southern violators of the Constitution”¹⁸ were determined to destroy him.

The sixth paragraph stated:

Again and again the Southern violators have answered Dr. King’s peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for “speeding,” “loitering,” and similar “offenses.” And now they have charged him with “perjury”—a felony under which they could imprison him for ten years.¹⁹

The remaining four paragraphs called upon “men and women of good will” to add their “moral support” and “material help . . . [to] those who are taking the risks, facing jail and even death in a glorious re-affirmation of our Constitution and its Bill of Rights.”²⁰ The names of the sixty-four persons who comprised the “Committee to Defend Martin Luther King and the Struggle for Freedom in the South” appeared directly below the text of the appeal.²¹ The list included the names of A. Philip Randolph, Eleanor Roosevelt, Ertha Kitt, Norman Thomas, Marlon Brando, and Harry Belafonte.²² Below these names was the statement: “We, in the South, who are struggling daily for dignity and freedom warmly endorse this appeal.”²³ Below this statement was a list of twenty names, primarily ministers who lived and worked in the South.²⁴ Among the names were four Alabama residents: Ralph Abernathy, Fred Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery.²⁵

Exactly two weeks after the publication of the advertisement, another event occurred which also resulted in litigation between southern officials and the news media. On April 12, 1960, the *Times* published a front page article written by Harrison Salisbury entitled “Fear and Hatred Grip Birmingham.”²⁶ In the article, Salisbury reported that as a result of the climate of racial fear in Birmingham, blacks and whites were afraid to talk freely, telephones were tapped, mail was opened (and some not delivered), and watchmen stood

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. N.Y. Times, Apr. 12, 1960, at 1, col. 1, reprinted in *New York Times v. Conner*, 365 F.2d 567, 577 (5th Cir. 1966). For an account of the article concerning Eugene Conner, see B. MUSE, TEN YEARS OF PRELUDE 261-63 (1964). The case law reflects some apparent confusion regarding the spelling of the name “Conner.” In some cases it is spelled “Conner” while in others it is spelled “Connor.” In order to avoid confusion, this article will consistently use the former spelling.

guard at black churches and Jewish temples.²⁷ Salisbury quoted blacks who called Birmingham "the Johannesburg of America."²⁸ The only person specifically named in the article was the Birmingham Police Commissioner, Eugene "Bull" Conner, to whom a number of unfavorable quotes were attributed.²⁹

Both the March 29th advertisement and the April 12th article resulted in editorial protests by the southern press.³⁰ On April 8, 1960, the three city commissioners of Montgomery individually wrote to the *Times* and the four Alabama ministers and demanded a retraction of the statements contained in the March 29th advertisement.³¹ On April 15 counsel for the *Times* assured them that the assertions were being checked and asked for further explana-

27. N.Y. *Times*, Apr. 12, 1960, at 1, col. 1, reprinted in *New York Times Co. v. Conner*, 365 F.2d 567, 577 (5th Cir. 1966).

28. *Id.*

29. The following statements were made about Eugene Conner in Salisbury's article:

By Birmingham custom, persons charged with vagrancy are not admitted to bail. They are held incommunicado for three days. In actual practice, such a prisoner is sometimes permitted to make one telephone call. But not always. A person arrested on a vagrancy warrant simply disappears for three days. His friends and family may not know what has happened to him.

This is a favorite technique of Birmingham's Police Commissioner, Eugene Conner. Mr. Conner is a former sports broadcaster known as "Bull" because of the timbre of his voice. He served as Birmingham Police commissioner for sixteen years in the late Nineteen Thirties and Nineteen Forties. His administration was a stormy one.

He went into eclipse for several years but made a comeback in 1958 running on a platform of race hate.

"Bull is the law in Birmingham, like it or not," a businessman said.

Mr. Conner is the author of many widely quoted aphorisms. He once said:

"Damn the law — down here we make our own law." On another occasion he declared:

"White and Negro are not to segregate together."

N.Y. *Times*, Apr. 12, 1960, at 1, col. 1, reprinted in *New York Times Co. v. Conner*, 365 F.2d 567, 579 (5th Cir. 1966).

30. Among the critical editorials were: *The Times and Salisbury*, Alabama Journal, May 7, 1960, reprinted in 5 Record at 2151, *New York Times*; *Birmingham Statements Published in the Times*, Montgomery Advertiser, May 4, 1960, reprinted in 5 Record at 2023, *New York Times*; *(Reply to N.Y. Times) Not a City of Race Terror*, Alabama Journal, Apr. 22, 1960, reprinted in 5 Record at 2145, *New York Times*; *Unworthy Newspaper Policy*, Alabama Journal, Apr. 18, 1960, reprinted in 5 Record at 2139, *New York Times*; *The Abolitionist Hellmouths*, Montgomery Advertiser, Apr. 17, 1960, reprinted in 5 Record at 2013, *New York Times*; *'The Big Lie' Editor—Wonders Where The New York Times Got Its News*, Montgomery Advertiser, Apr. 15, 1960, reprinted in 5 Record at 2008, *New York Times*; *Not The First Lie About South*, Alabama Journal, Apr. 9, 1960, reprinted in 5 Record at 2134, *New York Times*; *Will They Purge Themselves?* Montgomery Advertiser, Apr. 7, 1960, reprinted in 5 Record at 2127, *New York Times*.

31. Sullivan's letters to the *New York Times* (*Times*) and the four Alabama ministers are set out in 5 Record at 1949, 1962, 1964, 1965, 1967, *New York Times*. For media coverage of these events see *Commissioners Demand Retraction*, Montgomery Advertiser, Apr. 9, 1960, reprinted in 5 Record at 2000, *New York Times*; *City Demands Retraction of Ad in Times*, Alabama Journal, Apr. 9, 1960, reprinted in 5 Record at 2131, *New York Times*.

tion as to why the commissioners believed the statements applied to them.³² The city commissioners did not reply, but on April 19 filed the first of a series of civil suits which were brought in federal and state courts in Alabama against the *Times*, four Alabama ministers, the Rev. King and the Columbia Broadcasting System.³³ In addition, on September 6, 1960, a grand jury in Bessemer, Alabama indicted Harrison Salisbury on forty-two counts of criminal libel arising out of his article in the *Times*.³⁴

To the various Southern officials, these suits against the *Times* were "test cases," not in the usual legal sense in which that term is used, but rather as one means of striking back at the outside criticism and pressure for change that was mounting against the South.³⁵ At the time of these publications in the *Times*, the civil rights movement was at a critical stage. The economic boycott of 1957-58 in Montgomery had been one of the first tests of strength for the growing civil rights movement, and its success, along with the emergence of the leadership of Dr. King, foretold of bolder steps into new areas.

The year 1960 marked the beginning of new efforts at desegregation symbolized by the lunch-counter sit-ins, the first of which occurred in Greensboro, North Carolina in February.³⁶ To many white southerners, the civil rights movement was viewed as part of a communist inspired and dominated conspiracy.³⁷ Articles and advertisements such as those published by the *Times* in the early months of 1960 confirmed the view that, at the very least, outside agitation was the source of these disturbances.

The stakes involved on both sides of the resulting controversy were very high. The plaintiffs saw themselves as representatives of the South and

32. The letter from Lord, Day & Lord, counsel for *Times*, to L.B. Sullivan is set out in 5 Record at 1951, *New York Times*. The letter stated in part:

We have been investigating the matter and are somewhat puzzled as to how you think the statements in any way reflect on you. So far, our investigation would seem to indicate that the statements are substantially correct with the sole exception that we find no justification for the statement that the dining hall in the State College was "padlocked in an attempt to starve them into submission."

Id.

33. For a discussion of the suits filed in Montgomery County Circuit Court, see *infra* text accompanying notes 42-61. For a discussion of the suits brought in federal court, see *infra* text accompanying notes 62-97.

34. See *Jefferson Jury Indicts Times Writer For Libel*, Montgomery Advertiser, Sept. 7, 1960, reprinted in 5 Record at 2054, *New York Times*; *Salisbury Is Indicted For Times Articles*, Alabama Journal, Sept. 7, 1960, reprinted in 5 Record at 2195, *New York Times*.

35. See *The Abolitionist Hellmouths*, Montgomery Advertiser, Apr. 17, 1960, reprinted in 5 Record at 2013, *New York Times*; *'The Big Lie' Editor—Wonders Where The New York Times Got Its News*, Montgomery Advertiser, Apr. 15, 1960, reprinted in 5 Record at 2008, *New York Times*.

36. For accounts of the 1960 lunch-counter sit-ins, see M. KONVITZ, A CENTURY OF CIVIL RIGHTS 137-38 (1961); B. MUSE, *supra* note 26, at 204-06.

37. See B. MUSE, *supra* note 26, at 40. For King's response to charges that the civil rights movement was led by communists, see S. OATES, *supra* note 5, at 94.

believed that their power, position, and way of life were under attack. If they won, newspapers would hesitate to publish critical articles out of fear of potential libel suits. Illustrative of this view is an editorial in the *Montgomery Advertiser* on May 22, 1960, which stated: "The Advertiser has no doubt that the recent checkmating of the Times in Alabama will impose a restraint upon other publications which have hitherto printed about the South what was supposed to be."³⁸ The plaintiffs hoped that these suits would create a serious obstacle to those demanding further change. If the plaintiffs lost, the press would be free to publish and circulate critical articles and the pressure for change would inevitably increase.

The issues at stake for the *Times* were of a much broader significance than simply its own defense in a libel action. If it lost, there was not only the threat of a sizeable judgment,³⁹ but the news media's ability to criticize government officials would be severely hampered. In addition, the *Times* argued that the threat of libel actions arising out of reporting highly controversial issues might force it to reduce its Alabama circulation in order to avoid the state's "long-arm" statute.⁴⁰ This issue was later converted into a constitutional argument that despite the state's interest in protecting libeled individuals, the threat of a libel suit in such cases might constitute an infringement of first amendment rights.⁴¹

B. Suits Filed in Montgomery County Circuit Court

Although the suit filed by Montgomery City Commissioner L. B. Sullivan against the *Times* was eventually decided by the United States Supreme Court, a review of related litigation is required to put the case in its proper historical and procedural contexts. On April 19, 1960, Earl James, Frank Parks, and L. B. Sullivan, the three city commissioners of Montgomery, Alabama, individually filed suits in the Montgomery County Circuit Court against the *Times*, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery seeking damages of \$500,000 against each of the defendants.⁴²

38. *Fall-Out From Ad Error*, *Montgomery Advertiser*, May 22, 1960, reprinted in 5 Record at 2025, *New York Times*.

39. The total amount of damages sought by the plaintiffs from the *Times* was \$5,600,000.

40. ALA. CODE tit. 7, § 199(1) (1960) provided in part that,

[a]ny . . . corporation not qualified under the Constitution and laws of this State, who shall do any business or perform any character of work or service in this State shall, by the doing of such business or the performing of such work, or services, be deemed to have appointed the Secretary of State, to be the true and lawful attorney or agent of such nonresident, upon whom process may be served in any action accrued or accruing from the doing of such business, or the performing of such work, or service, or as an incident thereto by any such nonresident or their agent, or servant or employee.

Id.

41. This argument was made by the *Times* both in the suit brought by Conner and in the action by Sullivan. See *New York Times Co. v. Conner*, 291 F.2d 492, 494 (5th Cir. 1961); Brief for Petitioner at 88-90, 6 Record, *New York Times*.

42. See *Commissioners Sue Newspaper*, *Montgomery Advertiser*, Apr. 20, 1960, reprinted

On May 30, 1960, Alabama Governor John Patterson filed a similar suit against the *Times*, the four Alabama ministers, and Dr. King asking for one million dollars in damages.⁴³ The suit filed by Sullivan was tried first in November 1960, and after an appeal to the Alabama Supreme Court,⁴⁴ was argued before the United States Supreme Court in January 1964 and decided the following March.⁴⁵ In January 1961, the suit filed by Earl James was tried before a jury in Montgomery and resulted in a verdict of \$500,000 for James.⁴⁶ The decision of the United States Supreme Court in the *New York Times* case, however, was equally applicable to the fact situation in the *James* case and, in effect, reversed it as well.⁴⁷

There was little the four Alabama ministers could do about the city commissioners' choice of the Montgomery County Circuit Court as a forum because the ministers were Alabama residents. The *Times*, however, was a New York corporation and could argue that, on the basis of diversity jurisdiction, the suits against it should be heard in federal court.⁴⁸ The principal barrier to this argument was the joinder of the four Alabama ministers with the *Times* as co-defendants. Under the federal removal statute,⁴⁹ diversity cases are removable to federal court only if "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."⁵⁰ The city commissioners attempted to prevent the *Times* from taking advantage of the removal provision by joining the four Alabama ministers and alleging that they were "parties in interest."⁵¹

in 5 Record at 2003, *New York Times; City Officials Sue N.Y. Times*, Alabama Journal, Apr. 20, 1960, reprinted in 5 Record at 2141, *New York Times*.

43. See *Five Negroes, Times Sued By Patterson*, Montgomery Advertiser, May 31, 1960, reprinted in 5 Record at 2030, *New York Times; Patterson Files Suit: Claims Libel of Million*, Alabama Journal, May 30, 1960, reprinted in 5 Record at 2160, *New York Times*.

44. *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962).

45. *New York Times*, 376 U.S. at 254.

46. For accounts of the *James* trial, see Montgomery Advertiser, Feb. 2, 1961, reprinted in 5 Record at 2114, *New York Times*; Montgomery Advertiser, Feb. 1, 1961, reprinted in 5 Record at 2118, *New York Times; Witnesses Feel James Target of Ad In Times*, Montgomery Advertiser, Jan. 31, 1960, reprinted in 5 Record at 2103, *New York Times; Mayor's Suit Against Times Opens Today*, Montgomery Advertiser, Jan. 30, 1961, reprinted in 5 Record at 2102, *New York Times*.

47. Because the jury verdict in the *James* case was never reviewed by an appellate court, there is no written opinion in the case.

48. 28 U.S.C. § 1332(a) (1982) gives federal district courts original jurisdiction in civil actions where the matter in controversy exceeds \$10,000 and is between citizens of different states.

49. 28 U.S.C. § 1441(b) (1982) provides that,

[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United State shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Id.

50. *Id.*

51. *Id.*

In April 1961, after damages had been awarded by juries against the *Times* in the both the *New York Times* and *James* cases, the *Times* succeeded in removing the actions brought against it by Parks and Patterson. The actions were removed to the United States District Court for the Middle District of Alabama based on diversity of citizenship jurisdiction.⁵² Parks and Patterson, however, filed motions in the same court to remand their cases to the Alabama state court.⁵³ The basis of their motions was that the district court lacked jurisdiction to hear the cases because the *Times's* petition for removal had not been filed in federal court within twenty days of the commencement of the suits.⁵⁴ In addition, Parks and Patterson contended that, with the exception of Dr. King in Patterson's case, the four ministers were Alabama residents and thus there was no diversity.⁵⁵ The *Times* argued that it was a corporation organized under New York law and that the joinder of the four Alabama defendants was fraudulent because it was done for the sole purpose of preventing it from removing the case to federal court.⁵⁶ The *Times* claimed that the joinder was fraudulent because at the commencement of the action there was no reasonable basis of liability under Alabama law for the four Alabama defendants.⁵⁷ District court Judge Frank Johnson, in upholding the removal to federal court, agreed with the *Times* and stated that: "[N]o liability on the part of the four resident defendants existed under any recognized theory of law. . . . The joinder in each of these cases therefore was fraudulent as that term is used in removal cases."⁵⁸

Parks and Patterson appealed Judge Johnson's decision to uphold removal to the United States Court of Appeals for the Fifth Circuit. The appellate court, by a two to one vote, reversed Judge Johnson.⁵⁹ Writing for the

52. *Parks v. New York Times Co.*, 195 F. Supp. 919 (M.D. Ala. 1961), *rev'd*, 308 F.2d 474 (5th Cir. 1962).

53. *Id.* at 921.

54. *Id.*

55. *Id.*

56. *Id.* at 921-22.

57. *Id.*

58. *Id.* Since the Montgomery County Circuit Court held in the *New York Times* and *James* trials that there was sufficient evidence against the four Alabama ministers not only to make them parties to the action in state court but also to hold them liable, Judge Johnson appeared to have been prevented by *Erie v. Tompkins*, 304 U.S. 64 (1938), from reaching an opposite conclusion. However, since the United States Supreme Court decision in *King v. Order of United Commercial Travelers of America*, 333 U.S. 153 (1948), decisions of nisi prius courts have been entitled to "some weight" but are not controlling on a federal court. *Id.* at 161-62. Since the question of the liability of the four Alabama ministers had, at that point, been decided only by the Montgomery County Circuit Court, Judge Johnson was free to make his own determination of the issue.

59. *Parks v. New York Times Co.*, 308 F.2d 474 (5th Cir. 1962). The appeal in the case was taken pursuant to 28 U.S.C. § 1292(b) which provides that,

[w]hen a district judge, in making in a civil action, an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate

majority, Judge Griffin Bell reviewed the substance of the claims by Parks and Patterson against the Alabama residents. He gave considerable weight to the fact that the trial courts in the *New York Times* and *James* cases had permitted the question of the ministers' liability to go to the jury. Judge Bell wrote:

A claim of fraudulent joinder must be pleaded with particularity, and supported by clear and convincing evidence. . . .

. . . [T]here can be no fraudulent joinder unless it be clear that there can be no recovery under the law of the state on the cause alleged, or on the facts in view of the law as they exist when the petition to remand is heard.⁶⁰

Although the court of appeals reversed and remanded the cases,⁶¹ the Parks and Patterson suits were effectively nullified by the United States Supreme Court decision in the *New York Times* case.

C. Suits Filed in Federal Court

As a result of Harrison Salisbury's article in the *Times*, in addition to the four suits filed in Alabama state courts, seven suits were filed in Birmingham in the United States District Court for the Northern District of Alabama. On May 7, 1960, the three city commissioners of Birmingham, James W. Morgan, Eugene Conner, and J. T. Waggoner, individually filed suit against the *Times* and Salisbury seeking \$500,000 in damages.⁶² On May 27, 1961, the three city commissioners of Bessemer, Jess Lanier, Raymond Parsons, and Herman Thompson, each filed similar suits asking damages of \$500,000.⁶³ On July 20, 1960, a Birmingham detective, Joe Lindsey, filed suit against the same defendants for \$100,000.⁶⁴ Finally, five libel suits were brought against the Columbia Broadcasting Company for its coverage of the March 29th advertisement and April 12th article in the *Times*. Three of these suits, each asking \$500,000 in damages, were filed by the Birmingham

termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings to the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b) (1982).

60. 308 F.2d at 478.

61. *Id.* at 481.

62. See *Suits Filed Against Times*, Montgomery Advertiser, May 7, 1960, reprinted in 5 Record at 2026, *New York Times*.

63. See Montgomery Advertiser, June 1, 1960, reprinted in 5 Record at 2035, *New York Times*; 3 *Officials of Birmingham File Times Suit*, Alabama Journal, May 31, 1960, reprinted in 5 Record at 2159, *New York Times*.

64. See *Detective's Suit Charges Times*, Montgomery Advertiser, July 20, 1960, reprinted in 5 Record at 2041, *New York Times*; *Birmingham Officer Sues N.Y. Times*, Alabama Journal, July 20, 1960, reprinted in 5 Record at 2168, *New York Times*.

city commissioners in federal court in Birmingham.⁶⁵ Two other suits, each seeking \$100,000 in damages, were filed in the Montgomery federal court by two members of the Board of Registers.⁶⁶

Soon after these seven suits were filed, the *Times* and Salisbury moved to quash service of process in Alabama which had been made under the Alabama substituted service statute.⁶⁷ Federal district court Judge Harlan Grooms consolidated the seven actions for hearing on this motion. In an unreported opinion, he upheld service based on the Alabama "long-arm" statute.⁶⁸

An interlocutory appeal was then taken to the United States Court of Appeals for the Fifth Circuit.⁶⁹ The *Times* and Salisbury argued that substituted service was not authorized under the Alabama statute because the cause of action alleged did not arise from the defendants' activities in Alabama.⁷⁰ They also alleged that if the Alabama statute was applied to them, it would violate the due process clause of the fourteenth amendment by interfering with freedom of the press and thus would abridge the rights of citizens guaranteed under the first amendment.⁷¹

Chief Judge Elbert Tuttle, writing for an unanimous court, reversed the district court and held that under the Alabama "long-arm" statute, service was improper because of the requirement that "the cause of action must have accrued . . . from some business or service performed in Alabama or from some act incidental to the performance of such business or service there."⁷² Judge Tuttle wrote that under Alabama law, libel constitutes a cause

65. The three suits filed in federal court in Birmingham were brought by the three city commissioners of Birmingham, Eugene Conner, J.D. Waggoner, and James W. Morgan.

66. The two suits filed in federal court in Montgomery were brought by Samuela Willis and George Penton, members of the Board of Registers. A stipulation of the parties for dismissal resulted in the complaints being dismissed with prejudice in December 1963.

During the period of the *New York Times* litigation, other defamation cases arising out of the black civil rights movement were also before the courts. See *Associated Press v. Walker*, 39 S.W.2d 671 (Tex. App. 1965), *rev'd*, 388 U.S. 130 (1967). The *Walker* case arose out of the Associated Press's reporting of rioting on the University of Mississippi campus when James Meredith, a black, sought entry to the University on September 30, 1962. 388 U.S. at 140. Walker, a retired general, was described by the Associated Press as having taken command of the crowd and as having led a charge by students on federal marshals sent to gain Meredith's admission and to preserve order. *Id.* Walker filed suit claiming that the Associated Press coverage was libelous, and sought \$2,000,000 in compensatory and punitive damages. *Id.*

67. The decision of the district court on this motion is unreported. For a brief discussion of it, see *New York Times Co. v. Conner*, 365 F.2d 567, 568-69 (5th Cir. 1966) and *New York Times v. Conner*, 291 F.2d 492, 493 (5th Cir. 1961).

68. See *U.S. Judge Deals Times Legal Blow*, *Montgomery Advertiser*, Sept. 3, 1960, *reprinted in* 5 *Record* at 2048, *New York Times*.

69. See *New York Times Co. v. Conner*, 291 F.2d 492 (5th Cir. 1961). The basis of this appeal was 28 U.S.C. § 1292(b) (1982). For the text of this section, see *supra* note 59. See also *Times Appeals Ruling Allowing Alabama Suits*, *Montgomery Advertiser*, Sept. 10, 1960, *reprinted in* 5 *Record* at 2062, *New York Times* (newspaper report of *Times's* appeal).

70. 291 F.2d at 494.

71. *Id.*

72. *Id.* at 496.

of action only where publication occurred.⁷³ In this case, the cause of action did not arise in Alabama because Salisbury's article was published in New York. Furthermore, the article was not "incident to" the five days Salisbury spent in Alabama collecting material for the article.⁷⁴ Judge Tuttle did not reach the constitutional question raised by the *Times* and Salisbury, stating only that "were we to construe the statute differently the court would be faced with a serious constitutional question."⁷⁵

The court of appeals remanded the case to the district court with directions to enter a judgment for the defendants on the motion to quash the service of process.⁷⁶ The district court, however, continued the defendants' motion to dismiss the case in order to give the plaintiffs time to amend the complaint and to attempt new service.⁷⁷ The plaintiffs then dropped their actions against Salisbury and amended their complaints to allege a cause of action arising out of the distribution of the *Times* in Alabama.⁷⁸ Nevertheless, the district court held that this amendment was not legally sufficient and dismissed the actions on the grounds that the amended complaints presented "no new matter not heretofore ruled on, and embraced in the appeal heretofore taken in this cause."⁷⁹ Some of the plaintiffs then appealed the dismissal to the court of appeals.⁸⁰ Before the court of appeals had an opportunity to consider this appeal, however, the Alabama Supreme Court decided the appeal in the *New York Times* case⁸¹ and upheld service under the Alabama "long-arm" statute. The Alabama Supreme Court stated: "It is clear under our decisions that when a non-resident prints a libel beyond the boundaries of the State, and distributes and publishes the libel in Alabama, a cause of action arises in Alabama, as well as in the State of the printing or publishing of the libel."⁸²

In response to the Alabama Supreme Court's decision, the Fifth Circuit vacated its earlier decision quashing service of process.⁸³ Judge Richard Rives, writing for an unanimous court, stated that "[g]rave constitutional questions should not . . . be passed on on motions to dismiss when 'there is a reasonable likelihood that production of evidence will make the question clearer.'"⁸⁴ Thus, the court remanded the case so that the constitutional questions raised by the parties could be decided after a trial on the merits.⁸⁵

By the time these cases came to trial in September 1964, Conner was the

73. *Id.* at 494.

74. *Id.* at 495-96.

75. *Id.* at 496.

76. *Id.*

77. *New York Times Co. v. Conner*, 365 F.2d 567, 569 (5th Cir. 1966).

78. *Id.*

79. *Id.*

80. *Id.*

81. 273 Ala. at 670, 144 So. 2d at 25.

82. *Id.*

83. *Conner v. New York Times Co.*, 310 F.2d 133, 135 (5th Cir. 1962).

84. *Id.*

85. *Id.*

only remaining plaintiff. During the trial, Conner sought to prove that four statements made by Salisbury in his April 12, 1960 article were defamatory of him. These were: first, that under Birmingham custom, persons charged with vagrancy are not admitted to bail and are held incommunicado for three days and that "this is a favorite technique" of Conner; second, that Conner made a political comeback in 1958, "running on a platform of race hate;" third, that Conner once said "[D]amn the law—down here we make our own law;" and finally, that the Reverend Fred L. Shuttlesworth "has been a frequent target of Mr. Conner's men."⁸⁶

After the jury returned a verdict in the case for Conner, awarding him \$40,000 in compensatory damages, the case came back before the Court of Appeals for the Fifth Circuit for the third time.⁸⁷ In its argument before the court of appeals, the *Times* again raised the issue that jurisdiction based on the Alabama "long-arm" statute violated due process and the first amendment.⁸⁸ The *Times* also contended that there was insufficient evidence to support a showing of "actual malice" as required by the Supreme Court decision in *New York Times*.⁸⁹ By a two to one vote, the court of appeals reversed the decision of the district court.⁹⁰

In deciding whether the *Times* had "sufficient minimum contacts" with Alabama to support the application of the state's substituted service statute, Judge Homer Thornberry was faced with two apparently contradictory holdings of the Fifth Circuit. In *Buckley v. New York Times Co.*,⁹¹ the court of appeals held that the alleged commission of the tort of libel plus newspaper circulation and advertising solicitation within Louisiana did not constitute sufficient minimum contacts under the due process clause.⁹² In *Elkhart Engineering Corp. v. Dornier Werke*,⁹³ however, the Fifth Circuit held that the tortious damage caused by a single airplane crash within Alabama fulfilled the minimum contacts requirement. Judge Thornberry succeeded in "harmonizing" these two positions by holding that "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity."⁹⁴

On the issue of whether the evidence supported a finding of "actual

86. *Conner*, 365 F.2d at 573-74.

87. *Id.*

88. *Id.* at 569-73.

89. *Id.* at 569.

90. *Id.* at 577.

91. 338 F.2d 470 (5th Cir. 1964).

92. *Id.* at 474. Judge Thornberry found that the contacts in *Conner* were "virtually identical" with those in *Buckley*. *Conner*, 365 F.2d at 570. In *Buckley*, the court of appeals said that "mere circulation of a periodical through the mails to subscribers and independent distributors" and "sporadic news gathering by reporters on special assignment and the solicitation of a small amount of advertising do not constitute doing business nor engaging in business activity." *Buckley*, 338 F.2d at 474.

93. 343 F.2d 861, 868 (5th Cir. 1965).

94. *Conner*, 365 F.2d at 572.

malice," Judge Thornberry considered the background of the allegedly defamatory statements. According to the court, since Conner was "clearly a public official," the case was governed by the Supreme Court's decision in *New York Times*.⁹⁵ Judge Thornberry thus held that Conner was prohibited from recovering damages for defamatory statements unless he could prove "actual malice."⁹⁶ The court found that the evidence presented by Conner "[did] not even approach the stringent requirements for showing actionable libel of a public official."⁹⁷ The court remanded the case to the trial court for further proceedings.

II. *SULLIVAN V. NEW YORK TIMES*

A. *The Preliminaries*

On April 19, 1960, the three city commissioners of Montgomery, Alabama, individually filed suit in the Montgomery County Circuit Court against the *Times*, Ralph Abernathy, Fred Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery.⁹⁸ Each plaintiff asked for \$500,000 in damages against the defendants.⁹⁹ The complaints filed by each of the city commissioners were identical and were based on alleged defamatory statements in the third and sixth paragraphs of the advertisement which had appeared in the *Times* on March 29, 1960.¹⁰⁰

At the time the three Montgomery city commissioners filed their suits, the *Times* had not qualified to do business in Alabama and had not designated anyone to receive service of process there. Thus, the plaintiffs relied on two sections of title seven of the Code of Alabama for service. Section 188 of title seven provided for service upon a corporation by deliver-

95. *Id.* at 576.

96. *Id.*

97. *Id.*

98. See *Commissioners Sue Newspaper*, *Montgomery Advertiser*, Apr. 20, 1960, reprinted in 5 *Record* at 2003, *New York Times*; *City Officials Sue N.Y. Times*, *Alabama Journal*, Apr. 20, 1960, reprinted in 5 *Record* at 2141, *New York Times*; *supra* text accompanying note 42. Throughout the litigation, the three city commissioners were represented by the Montgomery law firm of Steiner, Crum & Baker. See *Transcript of Proceedings on Merits*, 2 *Record* at 567, *New York Times*. The *Times* was represented by its New York counsel, the firm of Lord, Day & Lord, which counted among its members former U.S. Attorney General Herbert Brownell and William P. Rogers. *Id.* at 570. Although the *Times* had difficulty in finding local counsel in Alabama, it was finally represented by a Birmingham firm, Beddow, Embry & Beddow, which was prominent in criminal defense work. *Id.* at 568; see also *Times Challenges Libel Suit Here New York Newspaper Retains B'ham Firm of Bedlow, Embry, Beddow As Counsel*, *Alabama Journal*, May 20, 1960, reprinted in 5 *Record* at 2156, *New York Times* (newspaper account of the *Times*'s retention of Birmingham counsel). Eric Embry, who represented the *Times* before the Alabama courts, was later appointed to the Alabama Supreme Court.

99. See *Commissioners Sue Newspaper*, *Montgomery Advertiser*, Apr. 20, 1960, reprinted in 5 *Record* at 2003, *New York Times*.

100. See *City Officials Sue N.Y. Times*, *Alabama Journal*, Apr. 20, 1960, reprinted in 5 *Record* at 2141, *New York Times*. For the text of the third and sixth paragraphs of the advertisement, see *supra* text accompanying notes 16 and 19.

ing a copy of the summons and complaint to any one of a number of different officers or employees of the corporation, including "any . . . agent thereof."¹⁰¹ Using this section, the plaintiffs served Don McKee, a "stringer"¹⁰² for the *Times* in Montgomery, claiming that he was an "agent" for the purposes of section 188.¹⁰³

In addition to service on an agent of the *Times*, service was also made on the Alabama Secretary of State pursuant to Alabama's substituted service statute.¹⁰⁴ This statute provided that a nonresident who had not qualified to do business in Alabama, but did business or performed work or services in Alabama, would be deemed to have appointed the Secretary of State to be his lawful agent.¹⁰⁵ Service could then be made upon the Secretary of State in any action arising out of the nonresident's business, work, or services in Alabama.

The *Times* made no attempt to remove the *New York Times* and *James* cases to federal court. The reason the *Times* did not raise the joinder issue was articulated in *Parks v. New York Times*,¹⁰⁶ a case in which the *Times* finally decided to raise the issue of fraudulent joinder. The *Times* argued that it was not until after the *New York Times* and *James* cases that it became clear that the plaintiffs had no reasonable theory of liability upon which to base their claims against the four Alabama ministers.¹⁰⁷ Thus, the *Times* said, it had no way of knowing how tenuous the claims were until these cases were heard.

B. Pretrial Strategy

When the *Times* received the complaints filed by the three Montgomery city commissioners, it made a special appearance¹⁰⁸ to move to quash the

101. Section 188 of title seven of the Alabama Code provided:

When an action at law is against a corporation the summons may be executed by the delivery of a copy of the summons and complaint to the president, or other head thereof, secretary, cashier, station agent or any other agent thereof. The return of the officer executing the summons that the person to whom delivered is the agent of the corporation shall be prima facie evidence of such fact and authorize judgment by default or otherwise without further proof of such agency and this fact need not be recited in the judgment entry.

ALA. CODE tit. 7 § 188 (1960).

102. During the hearing on the *Times*'s motion to quash service, Harold Faber, the National News Editor of the *Times*, defined a "stringer" as "a person who works for another newspaper or news agency upon whom we call for news occasionally or who calls us to offer news occasionally." See Transcript of Proceedings on Motion to Quash, 1 Record at 136, *New York Times*.

103. See Motion to Quash Service of Process, 1 Record at 39-40, *New York Times*.

104. See *supra* note 40.

105. See *id.*

106. 195 F. Supp. 919 (M.D. Ala. 1961).

107. *Id.* at 922.

108. Prior to the federal rules, the practice was to appear specially to challenge the jurisdiction of the court. See 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1344 (1969). In federal court it is no longer necessary to make a special appearance to challenge personal jurisdiction. *Id.*

service of process on the grounds that the Montgomery Circuit Court lacked both personal jurisdiction over the *Times* and subject matter jurisdiction over the action.¹⁰⁹

Prior to hearing arguments on the motion, Judge Walter B. Jones ordered the *Times* to produce books, documents, back issues, telegrams, and letters from its Alabama correspondents to help determine whether it was doing business in the state.¹¹⁰ The *Times* filed a petition of mandamus to the Alabama Supreme Court challenging this order and asking that it be set aside. The court however, denied the petition.¹¹¹

A three day hearing was held before Judge Jones on the motion to quash during which the *Times* presented two arguments.¹¹² First, the *Times* argued that the Alabama substituted service statute was not applicable to the case because even though the *Times* was a nonresident corporation, it was not doing business in Alabama.¹¹³ The *Times* supported its position by showing that it had no office, property, or employees located in Alabama. Its staff did visit the state occasionally for the purpose of news gathering, but it relied principally on "stringers" who sent in stories and received payment only if they were used.¹¹⁴ The *Times* further maintained that both its circulation and advertising revenue in Alabama were negligible. Of the 650,000 daily copies of the *Times*, 394 were sent to Alabama and only thirty-five of these went to Montgomery County.¹¹⁵ Of the 1,300,000 copies of the Sunday *Times*,

109. See Motion to Quash Service of Process, 1 Record at 39, *New York Times*; Amendment to Motion to Quash Service of Process, 1 Record at 47, *New York Times*. For newspaper accounts of this event, see *Times Asks Court To Quash Damage Suits*, Montgomery Advertiser, May 21, 1960 reprinted in 5 Record at 2017, *New York Times*; *Times Challenges Libel Suit Here*, Alabama Journal, May 20, 1960, reprinted in 5 Record at 2156, *New York Times*.

110. See *Times Told To Show Record*, Alabama Journal, June 30, 1960, reprinted in 5 Record at 2161, *New York Times*.

111. *N.Y. Times Loses In Move To Have Records Closeted*, Montgomery Advertiser, July 1, 1960, reprinted in 5 Record at 2033, *New York Times*.

112. See Transcript of Proceedings on Motion to Quash, 1 Record at 130-486, 2 Record at 487-567, *New York Times*. For newspaper accounts of this event, see *Jones Hears Arguments in N.Y. Times Suit*, Alabama Journal, Aug. 1, 1960, reprinted in 5 Record at 2176, *New York Times*; *Times Suit Ends, Arguments Set*, Montgomery Advertiser, July 28, 1960, reprinted in 5 Record at 2038, *New York Times*; *Important Precedent At Stake In "Times" Case before Judge Jones*, Alabama Journal, July 28 1960, reprinted in 5 Record at 2173, *New York Times*; *Lawyers Add To Documents In Libel Suit*, Montgomery Advertiser, July 27, 1960, reprinted in 5 Record at 2035, *New York Times*; *Times Hearing on Libel Suit In Third Day*, Alabama Journal, July 27, 1960, reprinted in 5 Record at 2172, *New York Times*; *Tempers Flare at "Times" Hearing*, Alabama Journal, July 27, 1960, reprinted in 5 Record at 2178, *New York Times*; *200 Times Stories About Alabama Put Into Evidence In Court*, Alabama Journal, July 26, 1960, reprinted in 5 Record at 2170, *New York Times*; *State Has No Jurisdiction in Libel Suit, "Times" Says*, Alabama Journal, July 25, 1960, reprinted in 5 Record at 2169, *New York Times*.

113. See *Attorneys Contend N.Y. Times Didn't Do Business In State*, Montgomery Advertiser, July 26, 1960, reprinted in 5 Record at 2041, *New York Times*.

114. See Testimony of Harold Faber, National News Editor of the *Times*, in Transcript of Proceedings on Motion to Quash, 1 Record at 136-47, *New York Times*.

115. See Colloquy re and Introduction of Exhibits, Transcript of Proceedings on Merits, 2 Record at 601-02, *New York Times*.

only 2,455 went to Alabama.¹¹⁶ The *Times* also presented testimony that of its total advertising revenue of \$37,500,000 for the first six months of 1960, only \$18,000 came from Alabama.¹¹⁷ The second argument made by the *Times* was constitutional in nature: If the court asserted jurisdiction under the substituted service statute, the lack of sufficient minimum contacts would deny the *Times* due process, violating the first, fifth, and fourteenth amendments.¹¹⁸

Judge Jones denied the motion to quash.¹¹⁹ He stated that although the motion papers filed by the *Times* purported to constitute a "special appearance for the sole purpose of quashing service of process," one of the grounds of the prayer of the motion was a request to "dismiss this action as to the *New York Times* . . . for lack of jurisdiction over the subject matter of said action."¹²⁰ Judge Jones found that this went beyond the question of personal jurisdiction over the *Times* and constituted a general appearance.¹²¹ He said that the *Times* could not assert that it was before the court solely on a question of personal jurisdiction and, "in the same breath," argue that "this Court has no jurisdiction of the subject matter of the action."¹²² Judge Jones said that "a party's appearance in a suit for any other purpose other than to contest the Court's jurisdiction over the person of such a party, is a general appearance."¹²³

After holding that the *Times* had made a general appearance and waived its special appearance, Judge Jones stated that the *Times* "was amenable to process and suit in Alabama courts regardless of its general appearance."¹²⁴ He found that the *Times* was doing business in Alabama based on "an extensive and continuous course of Alabama business activity—news gathering; solicitation of advertising; circulation of newspapers and other products."¹²⁵ In such a case, Judge Jones said, due process did not require that the cause of action arise out of business done in Alabama.¹²⁶

116. *New York Times Co. v. Conner*, 365 F.2d 567, 570 (5th Cir. 1966).

117. See Testimony of Joseph B. Wagner, National Advertising Manager of the *Times*, Transcript of Proceedings on Motion to Quash, 1 Record at 330, *New York Times*.

118. See Statement of Eric Embry, attorney for the *Times*, Transcript of Proceedings on Motion to Quash, 1 Record at 462-64, *New York Times*.

119. See Order And Opinion On Motion To Quash, 1 Record at 49, *New York Times*. For newspaper accounts of this ruling, see *Judge Rules Times Suit Legal Here*, Montgomery Advertiser, Aug. 6, 1960, reprinted in 5 Record at 2043, *New York Times*; *N.Y. Times Can Be Sued Here*, Alabama Journal, Aug. 6, 1960, reprinted in 5 Record at 2179, *New York Times*.

120. See Order and Opinion on Motion to Quash, 1 Record at 49, *New York Times*.

121. *Id.* at 51.

122. *Id.* at 49.

123. *Id.* at 50.

124. *Id.* at 51.

125. *Id.* at 56.

126. *Id.* at 55.

C. The Trial

I. Publicity and the Trial Environment

The jury trial in *New York Times* began on November 1, 1960, and lasted for three days.¹²⁷ Neither the pre-trial publicity nor the courtroom environment were favorable to the *Times* or the four ministers. The case was tried before Judge Walter B. Jones and an all white jury chosen from Montgomery County.¹²⁸

Newspaper articles which were critical of the defendants and of the March 29, 1960 advertisement in the *Times* appeared in local papers prior to and during the trial of the case.¹²⁹ In an April 9, 1960 article entitled "Not The First Lie About South," the *Alabama Journal* declared:

It must be very disappointing to regular readers of the New York Times, one of the world's really great newspapers, to find it has been willing to lend its columns for such a page of falsehood as that published the other day and signed by money-beggars who want to defend such a despicable character as Martin Luther King in the courts and save him from the penalties of his derelictions.¹³⁰

The April 18, 1960 edition of the same paper was even more vituperative regarding the advertisement. It stated:

[The New York Times'] full page advertisement signed by Eleanor Roosevelt, Ralph Abernathy et al, to raise \$200,000 for M. L. King to defend himself against income tax fraud in Alabama is a pack of lies from beginning to end. Without some sinister purpose, no newspaper would print such libelous and scandalous material without confirming its contents.¹³¹

On September 25, 1960, a writer for the *Montgomery Advertiser* expressed sentiments which must have concerned the *Times* when he reported: "State and City authorities have found a formidable legal bludgeon to swing at out-of-state newspapers whose reporters cover racial incidents in Alabama."¹³²

The courtroom atmosphere became an issue as the trial progressed and was raised again in the appeals filed by the four ministers and in their briefs and arguments before the Supreme Court. The black ministers argued that

127. The Transcript of the jury trial in *New York Times* is reprinted in 2 Record at 567-862, *New York Times*.

128. The case was tried to a jury of 12 white men. The jury was chosen from a panel of 36, including two blacks. The blacks, however, were stricken by Sullivan's counsel. See *Lawyers Clash at Times Trial*, N.Y. Times, Nov. 2, 1960, at 33, col. 1.

129. See *supra* note 30.

130. *Not First Lie About South*, *Alabama Journal*, Apr. 9, 1960, reprinted in 5 Record at 2134, *New York Times*.

131. *Unworthy Newspaper Policy*, *Alabama Journal*, Apr. 18, 1960, reprinted in 5 Record at 2139, *New York Times*.

132. *State Finds Formidable Legal Club To Swing At Out-Of-Sate Press*, *Montgomery Advertiser*, Sept. 25, 1960, reprinted in 5 Record at 2064, *New York Times*.

their rights to equal protection, due process, and a fair and impartial trial under the fourteenth amendment had been violated.¹³³ A recitation of some of the facts contained in the record and the Supreme Court briefs will give an indication of the trial environment.

The media focused attention on the jurors and made certain that their identities were known to the Montgomery populace. Photographers in the courtroom took pictures of all the jurors for Montgomery's two local newspapers, and television cameras followed the juries to the door of the jury room.¹³⁴ The names of the jurors were printed by the Montgomery newspapers; one paper reported the names on its front page.¹³⁵

Judge Jones made his feelings on segregation and his beliefs concerning the Constitution clear in a statement from the bench in a companion case to *New York Times*. In the action brought by Montgomery Mayor Earl James against the *Times* and the four ministers based on the March 29th advertisement, Judge Jones stated in open court: "[T]here will be no integrated seating in this courtroom. Spectators will be seated in this courtroom according to their race, and this for the orderly administration of justice and the good of all people coming here lawfully."¹³⁶ He then turned his thoughts to the fourteenth amendment:

Much has been said at the Bar, and out of the hearing of the trial jury, as to the supposed requirements of the XIV Amendment directing the Trial Judge of the Court of a sovereign state how he will conduct a trial before a jury in the courts of Alabama.

I would like to say for those here present, and for those who may come here to litigate in the future, that the XIV Amendment has no standing whatsoever in this Court, it is a pariah and an outcast, if it be construed to hold and direct the Presiding Judge of this Court as to the manner in which proceedings in the court . . . shall be conducted.

.
The judge presiding here today knows that it is quite the fashion in high judicial place to work the XIV Amendment overtime, to put it above every other part of the Constitution, and to deliberately forget and neglect the more important parts of the federal constitution

.
We will now continue with the trial of this case under the laws of the State of Alabama, and not under the XIV Amendment, and in the belief and knowledge that the white man's justice, . . . will give the parties at the Bar of this Court, regardless of race or color, equal justice under law.¹³⁷

133. Brief For The Petitioners at 52-62, *Abernathy v. Sullivan*, 376 U.S. 254 (1964), 6 Record, *New York Times*.

134. The photographs of the jurors, published in the *Alabama Journal*, are reprinted in 2 Record at 951, 955, *New York Times*. See also Transcript of Proceedings on Defendant's, The New York Times Company, Motion for a New Trial, 2 Record at 889-90, *New York Times* (pictures offered into evidence during proceedings on motion for new trial).

135. *Jurors Selected For Times Suit*, Montgomery Advertiser, Nov. 1, 1960, reprinted in 5 Record at 2079-80, *New York Times*.

136. Jones, *Court Room Segregation*, 22 ALA. LAWYER 190, 191 (1961); *Courtroom Segregated in Times Suit*, Alabama Journal, Feb. 1, 1961, reprinted in 5 Record at 2213, *New York Times*.

137. Jones, *supra* note 136, at 191-92.

Judge Jones's sentiments were also apparent from the manner in which he addressed the various trial lawyers. When he questioned prospective jurors concerning their knowledge of, or relationship with, the attorneys trying the case, he referred to the attorneys for Sullivan and the *Times* as "Mister," but dispensed with this title when he made reference to the ministers' black lawyers.¹³⁸ The Judge spoke of the black attorneys as "Fred Gray of Montgomery" or "V. Z. Crawford of Mobile."¹³⁹ The trial transcript further reflects different forms of identification for the lawyers, with the black attorneys being referred to as "Lawyer Gray" or "Lawyer Crawford" while the white attorneys were referred to as "Mister."¹⁴⁰

On one occasion, Sullivan's counsel, while reading a portion of the March 29th advertisement, mispronounced the word "negro" as "nigra" and "nigger" in the presence of the jury and without admonition by the court.¹⁴¹ Furthermore, in his summation, Sullivan's counsel declared: "In other words, all of these things that happened did not happen in Russia where the police run everything, *they did not happen in the Congo where they still eat them*, they happened in Montgomery, Alabama, a law-abiding community."¹⁴² Again no rebuke was made by Judge Jones for that statement.¹⁴³

2. Plaintiff's Case

The basis of Sullivan's case was the allegation that the third and sixth paragraphs of the March 29th advertisement, "Heed Their Rising Voices," were defamatory to him.¹⁴⁴ As to the third paragraph, dealing with a series of events which occurred at Alabama State College, Sullivan introduced evidence to show that although police were stationed near the campus on three occasions, they did not "ring" the campus; that student leaders were not expelled for singing on the Capitol steps but rather for their participation in lunch-counter sit-ins; that less than the "entire student body" protested by not re-registering; and that the dining hall had not been padlocked in an effort to starve the students into submission.¹⁴⁵ Sullivan also contended that the sixth paragraph was defamatory because Dr. King had been arrested four times instead of seven times and because the police were not responsible for the assaults or bombings against Dr. King.¹⁴⁶

138. Transcript of Proceedings on Merits, 2 Record at 568, *New York Times*.

139. *Id.*

140. *Id. passim.*

141. *Id.* at 579-80.

142. *Id.* at 930 (emphasis added).

143. Another example of the discriminatory trial atmosphere was the fact that during the trial, the court was adjourned on the day that "Court Square" was renamed "Confederate Square" in conjunction with the celebration of the Civil War centennial. See *Delay is Denied in Times Trial*, Alabama Journal, Jan. 30, 1961, reprinted in 5 Record at 2221, *New York Times*.

144. See *Times' Libel Suit Opens Today*, Montgomery Advertiser, Nov. 1, 1960, reprinted in 5 Record at 2077, *New York Times*.

145. See *L.B. Sullivan Testifies in Times Suit*, Alabama Journal, Nov. 2, 1960, reprinted in 5 Record at 2203, *New York Times*.

146. *Id.*

In addition to establishing that the statements in the two paragraphs were incorrect, Sullivan presented testimony that the statements referred to him.¹⁴⁷ Sullivan called six witnesses who testified that the actions in the two paragraphs would tend to be associated with the city commissioners generally and with Sullivan in particular.¹⁴⁸ The six witnesses testified that *if* they had believed the statements in the advertisement regarding the police department's actions, they would have thought that Sullivan was improperly carrying out the duties of his office and would have believed that the police were guilty of serious misbehavior.¹⁴⁹ None of the six witnesses, however, testified that he believed the advertisement.

3. Defendants' Case

The *Times* based its defense on three arguments. First, since neither Sullivan nor any of the Montgomery city commissioners were mentioned by name, Sullivan had not met his burden of proving that the advertisement paragraphs published were "of or concerning" him.¹⁵⁰ Second, although Sullivan had responsibility for supervision of the Montgomery Police Department, he was normally not responsible for the day-to-day operations of the department, including those during the demonstrations at Alabama State College.¹⁵¹ Because all of these operations were under the supervision of the Montgomery Chief of Police, Sullivan did not show that the advertisement charged him with any misconduct in office.¹⁵² Finally, even if the jury found that the allegedly defamatory matter referred to Sullivan, the *Times* maintained that it did not publish the advertisement maliciously and thus was not liable.¹⁵³

147. The basis of Sullivan's claim was the "feeling" that the advertisement "reflects not only on me but on the other Commissioners and the community." Testimony of L.B. Sullivan, Transcript of Proceedings on Merits, 2 Record at 724, *New York Times*. Sullivan felt that the statements referring to "police activities," or "police action" were associated with him, impugned his "ability and integrity" and reflected on him "as an individual." *Id.* at 712, 713, 724. He also claimed that the statements in the advertisement which alluded to the bombing of Dr. King's home referred to the commissioners, to the police department and to him because they were contained in the same paragraph as the statements mentioning police activities. *Id.* at 717-18.

148. See Transcript of Proceedings on Merits, 2 Record at 602-52, *New York Times*; *Witnesses Say Ad Reflected on Sullivan*, *Montgomery Advertiser*, Nov. 2, 1960, reprinted in 5 Record at 2081, *New York Times*. The witnesses called by Sullivan were Grover C. Hall, the editor of the *Montgomery Advertiser*; Arnold D. Blackwell, a member of the Water Works Board appointed by the commissioner and a businessman engaged in real estate and insurance; Harry W. Kaminsky, the sales manager of a clothing store and a close friend of Sullivan; H.M. Price, Sr., the owner of a small food equipment business; William M. Parker, Jr., a service station owner who was a friend of Sullivan; and Horace W. White, the owner of a trucking company and a former employer of Sullivan. 2 Record at 602-69, *New York Times*.

149. See *Witnesses Say Ad Reflected on Sullivan*, *Montgomery Advertiser*, Nov. 2, 1960, reprinted in 5 Record at 2081, 2084, *New York Times*.

150. See Oral Charge and Exceptions Thereto, 2 Record at 821-22, 829-36, *New York Times*.

151. See Testimony of L.B. Sullivan, Transcript of Proceedings on Merits, 2 Record at 703, 720, *New York Times*.

152. See Oral Charge and Exceptions Thereto, 2 Record at 834, *New York Times*.

153. *Id.* at 836.

Although joined as co-defendants with the *Times*, the defensive strategy of the four Alabama ministers was to separate themselves from the substantive question of whether the advertisement was defamatory. Leaving that issue to the *Times*, the ministers completely disassociated themselves from the advertisement by maintaining that they did not sign it, were not members of the committee which published it, were never approached by the committee for permission to use their names, and did not even know that the advertisement was being published.¹⁵⁴

4. *The Trial Court Decision*

In his charge to the jury, Judge Jones stated that the third and sixth paragraphs of the advertisement were "libelous per se,"¹⁵⁵ and withdrew from the jury the question of whether the text was defamatory.¹⁵⁶ He instructed the jury that "general damages need not be alleged or proved but are presumed,"¹⁵⁷ and that Sullivan was entitled to recover both "presumed" and punitive damages if the jury decided that the words referred to him.¹⁵⁸ Although Judge Jones held that no actual damages had to be proved, under Alabama law punitive damages could not be claimed unless a retraction had been requested and refused.¹⁵⁹ Because Sullivan had written to the *Times* and the other defendants requesting a retraction, and because the retraction was not immediately given, the court allowed the jury to assess punitive damages.¹⁶⁰

After only two hours of deliberation, the jury returned a verdict for Sullivan in the amount of \$500,000.¹⁶¹ The amount was not specified as either actual or punitive damages.¹⁶² The *Times* immediately filed a motion for a new trial based on alleged errors made by the trial court and on the ground that the excessive verdict violated the Constitution.¹⁶³ In addition, the four ministers claimed that they did not receive a fair trial and that this violated both the Alabama and federal Constitutions.¹⁶⁴ Judge Jones denied the *Times's* motion. Further, he stated that the four ministers had allowed the time for their motions for a new trial to lapse and thus he could not consider them.¹⁶⁵

154. See Transcript of Proceedings on Merits, 2 Record at 787-804, *New York Times*.

155. See Oral Charge and Exceptions Thereto, 2 Record at 819, 823-24, *New York Times*.

156. *Id.* at 824.

157. *Id.*

158. *Id.* at 825.

159. *Id.* at 821.

160. *Id.* at 821, 824-26.

161. See Final Judgment, Jury and Verdict, 2 Record at 862, *New York Times*.

162. *Id.*

163. Motion of Defendant, The New York Times Co., for New Trial, 2 Record at 896, *New York Times*.

164. Motion of Defendant, Ralph D. Abernathy, For New Trial, 2 Record at 970, *New York Times*.

165. Order of Court Denying Motion of New York Times Co. for A New Trial, 2 Record at 970, *New York Times*. In order to stay the execution of the trial court's judgment to allow

III. *NEW YORK TIMES CO. v. SULLIVAN*

A. *The Alabama Supreme Court*

When the federal courts declined to review the Montgomery County Circuit Court decision in *New York Times* via a collateral injunctive action, the only alternative for the *Times* and the four Alabama ministers was a direct appeal to the Alabama Supreme Court. In August 1962, that court handed down its decision, upholding the circuit court as to its jurisdiction, the merits of the case, and the amount of the damages.¹⁶⁶

In the Alabama Supreme Court, the *Times* again raised the issue of personal jurisdiction. The court, however, held that the activities of the *Times's* stringers in Alabama, the revenue realized by the newspaper from Alabama advertisers, and its circulation in the state were "amply sufficient to more than meet the minimal standards required for service upon its representative" under section 188.¹⁶⁷ In addition, the court upheld substituted service on

for an appeal to the Alabama Supreme court, the four Alabama ministers were required under Alabama law to post "supersedeas bonds" of \$500,000, which they were financially unable to do. See *Abernathy v. Patterson*, 295 F.2d 452, 454 (5th Cir. 1961), cert. denied, 368 U.S. 986 (1962). When the state began levying on their property to satisfy the judgment, the four ministers filed a complaint in federal district court seeking injunctive relief. *Id.* The basis of their motion was 28 U.S.C. § 1343(3)-(4) which provides that

[t]he district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. § 1343(3)-(4) (1982). The complaint was directed not only to Sullivan but to the suits filed by the other city commissioners and the suit brought by Alabama Governor John Patterson. Since the request was for equitable relief, the ministers alleged they would suffer irreparable harm and that they had no adequate relief at law. *Abernathy*, 295 F.2d at 454-55.

On the same day the ministers filed their federal court action, they also moved for a preliminary injunction to prevent the levy upon and sale of their property in satisfaction of the \$500,000 judgments. *Id.* at 455. District court Judge Frank Johnson denied the request for the preliminary injunction on the grounds that the ministers had failed to seek any relief from the Circuit Court of Montgomery County or from any of the defendants. *Id.* When the defendants then filed a motion to dismiss the injunction action, Judge Johnson granted it in an unreported decision. *Id.* at 456.

The dismissal was appealed to the United States Court of Appeals for the Fifth Circuit where Judge Rives, writing for an unanimous court, upheld the dismissal on the grounds that if plaintiffs felt their constitutional rights were not adequately protected in the state courts of Alabama, they could appeal the case to the United States Supreme Court. *Id.* at 457-58. Rather than wait for the Alabama Supreme Court to decide their appeal in the *New York Times* case, the ministers sought review of the court of appeals's dismissal by a petition for a writ of certiorari to the United States Supreme Court. The petition was denied without comment. *Abernathy v. Patterson*, 368 U.S. 986 (1962).

166. *New York Times Co. v. Sullivan*, 273 Ala. 670, 144 So. 2d 25 (1962).

167. *Id.* at 669, 144 So. 2d at 29-33.

the Alabama Secretary of State under section 199(1).¹⁶⁸ The court concluded not only that a cause of action arose in Alabama from printing a libelous statement in New York and distributing it in Alabama, but also that the solicitation of advertising and circulation of the newspaper in the state constituted doing business or performing services for purposes of section 199(1).¹⁶⁹ Finally, the Alabama Supreme Court upheld Judge Jones's refusal to quash service of process for lack of personal jurisdiction, agreeing with Judge Jones's holding that the *Times's* motion to dismiss for lack of subject matter jurisdiction constituted a general appearance.¹⁷⁰

In addition to the question of jurisdiction, the Alabama Supreme Court affirmed the trial court's holding on the merits of the case. The court stated that where "the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt," they are "libelous per se."¹⁷¹ The court then applied this test to the third and sixth paragraphs of the advertisement and found "the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning plaintiff."¹⁷² As to the *Times's* argument that there was insufficient evidence to connect the statements with Sullivan, the Alabama Supreme Court stated:

We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body.¹⁷³

The Alabama Supreme Court then summarily dismissed the *Times's* remaining constitutional arguments on the grounds that "the First Amendment . . . does not protect libelous publications" and "the Fourteenth Amendment is directed against State action and not private action."¹⁷⁴

On the question of the award of damages, the Alabama Supreme Court first held that, since the jury found that the words referred to Sullivan, he was entitled to recover without "proof of pecuniary injury . . . such injury being implied."¹⁷⁵ In reply to the *Times's* argument that the amount of damages was excessive, the court found that the *New York Times* "in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement."¹⁷⁶ Since the newspaper did

168. *Id.*

169. *Id.* at 669-70, 144 So. 2d at 33-35.

170. *Id.* at 671, 144 So. 2d at 35.

171. *Id.* at 673, 144 So. 2d at 37.

172. *Id.*

173. *Id.* at 674-75, 144 So. 2d at 39.

174. *Id.* at 676, 144 So. 2d at 40.

175. *Id.* at 676, 144 So. 2d at 41.

176. *Id.* at 686, 144 So. 2d at 50.

not retract the statements as to Sullivan when requested to do so and did not deny the falsity of the advertisement at the trial, the court concluded that "the jury could not have but been impressed with the bad faith of the *Times*, and its maliciousness inferable therefrom."¹⁷⁷

The Alabama Supreme Court's decision was not unexpected. But while the decision went against the *Times* it was tactically favorable because, in upholding the trial court on every ground, it made a successful challenge in the United States Supreme Court possible.

B. *Writ of Certiorari to the United States Supreme Court*

The initial question faced by the *Times* in deciding how to prepare its case for review by the United States Supreme Court was whether to base its arguments on the substantive law of libel or the procedural issues of the Alabama court's jurisdiction over the *Times*. An appeal to the United States Supreme Court can be made when a state court upholds a state statute against a constitutional challenge.¹⁷⁸ If the jurisdictional question was to be the basis of review, the approach would be by appeal since the argument would be that the application of the Alabama statutes was unconstitutional. Review by writ of certiorari is available where a state statute is challenged on constitutional grounds or where a right is claimed under the Constitution.¹⁷⁹ If the *Times* was to base its argument on the Alabama courts' application of the law of libel, the approach would be by certiorari. Even though a state statute was not under challenge, the interpretation of the law of libel in this case conflicted with a first amendment right claimed under the Constitution.¹⁸⁰ The decision to make the libel question the central thrust of the case was made by Columbia University Law School Professor Herbert Wechsler, the principal draftsman of the petition for certiorari for the *Times* and the *Times's* counsel in oral argument before the Supreme Court.

177. *Id.* at 686, 144 So. 2d at 51.

178. 28 U.S.C. § 1257(2) (1982) provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . .

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Id.

179. 28 U.S.C. § 1257(3) (1982) provides that a final judgment of the highest court of a state may be reviewed by the Supreme Court:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Id.

180. *Id.*

Counsel began the petition for writ of certiorari with the argument that the decision of the Alabama Supreme Court violated the first amendment by construing the law of libel in a manner that was overly restrictive of the right to protest and criticize public officials.¹⁸¹ The *Times* stated that by relying on a "common law concept of the most general and undefined nature,"¹⁸² the Alabama court made criticism of public officials indistinguishable from seditious libel, which the court had long held violated the first amendment.¹⁸³ According to the *Times*, speech should only be punished when there is a "clear and present danger of perversion of the course of justice."¹⁸⁴ These grounds were not present, according to the *Times*, when a person based his claim solely on damage to reputation.¹⁸⁵

The *Times* went on to maintain that even if freedom of the press could be constitutionally subordinated to the protection of reputation, the evidence in this case did not establish injury, or even threat of injury, to Sullivan's reputation that would provide an interest greater than the first amendment.¹⁸⁶ While admitting that there were exaggerations and inaccuracies in the advertisement, the *Times* claimed that "these statements cannot rationally be regarded as tending to injure the respondent's reputation."¹⁸⁷ As to the declaration by the Alabama Supreme Court that "the Fourteenth Amendment is directed against State action not private action," the *Times* asserted that this was not private action since the *Times* was challenging a state rule of law applied by a state court to a judgment.¹⁸⁸

Even though the *Times* stressed the constitutional issues involved in the application of the law of libel, it also attacked the Alabama courts' assumption of jurisdiction. The *Times* challenged the trial court's dismissal of its motion to quash, arguing that the motion raised only the issue of personal jurisdiction.¹⁸⁹ The *Times* maintained that its "peripheral relationship" to Alabama did not involve "continuous corporate operations" which were so "substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."¹⁹⁰ In addition, the *Times* argued that the Alabama court did not have in personam jurisdiction based on the service of process.¹⁹¹ Finally, the *Times* raised the issue of primary concern to the newspapers: that the assumption of jurisdiction in such cases would place a burden on interstate commerce pro-

181. Petition For A Writ of Certiorari To The Supreme Court Of Alabama at 12, 6 Record, *New York Times*.

182. *Id.*

183. *Id.* at 12-13.

184. *Id.* at 14.

185. *Id.*

186. *Id.* at 16.

187. *Id.* at 17.

188. *Id.* at 20-21.

189. *Id.* at 21-24.

190. *Id.* at 24-25.

191. *Id.* at 24-29.

hibited by the commerce clause.¹⁹² The *Times* argued that if minuscule state circulation of a paper published in another state was sufficient to establish jurisdiction, newspapers would limit distribution and correspondents would be inhibited from inter-state travel.¹⁹³

In the opposing brief for the respondent, counsel for Sullivan began by arguing that the *Times* did not have a constitutional privilege to defame an elected city official in a paid newspaper advertisement. According to Sullivan, the *Times* "knew that the charges were uninvestigated and reckless in the extreme" and did not plead truth, fair comment, or privilege at trial, thus precluding the issue on appeal.¹⁹⁴ Sullivan further maintained that neither libel nor commercial advertisements were constitutionally protected free speech.¹⁹⁵

Sullivan also disputed the *Times's* contention that a federal question was presented "because the jury was wrong in finding that the advertisement was 'of and concerning' respondent; and, because, even if the reference were sufficient, 'the whole libel rests on two discrepancies' which are mere 'exaggerations or inaccuracies.'" ¹⁹⁶ Since the case had been tried before a jury "according to admittedly proper court procedure," Sullivan argued that the United States Supreme Court could not exercise its certiorari jurisdiction to review jury verdicts affirmed by a state supreme court.¹⁹⁷

Finally, Sullivan contended that the *Times's* news gathering activities, solicitation of advertising, and distribution of newspapers in Alabama were incident to the cause of action for libel and were sufficient contacts with the state to give the trial court personal jurisdiction.¹⁹⁸ Sullivan dismissed the *Times's* concern about the effect of the jury verdict on the commerce clause by pointing out that none of the cases cited by the *Times* were decided after 1932 and therefore did not address the expanded scope of jurisdiction over foreign corporations granted by the Supreme Court since that time.¹⁹⁹

In their petition for a writ of certiorari, the four Alabama ministers raised three issues in addition to the constitutional arguments concerning the law of libel and the fourteenth amendment. The ministers contended that there was ample evidence that the suits against them had been instituted in an effort to prevent black citizens from obtaining their full civil rights.²⁰⁰ They also claimed that the trial was conducted in an atmosphere of racial hostility and racial segregation by a judge who had been elected in a manner which prevented black citizens from voting—all in violation of the fourteenth

192. *Id.* at 29-30.

193. *Id.*

194. Brief for Respondent in Opposition at 18, 6 Record, *New York Times*.

195. *Id.* at 18-27.

196. *Id.* at 27.

197. *Id.* at 27.

198. *Id.* at 35-42.

199. *Id.* at 42.

200. Petition For Writ of Certiorari To The Supreme Court of Alabama at 16-19, 6 Record, *New York Times*.

amendment.²⁰¹ Finally, the four Alabama ministers maintained that there was no evidence in the record to hold them liable for the content or publication of the advertisement.²⁰²

In the brief for respondent in opposition to the ministers' petition for writ of certiorari, counsel for Sullivan raised only two issues: first, that the Court should not consider federal questions not raised at trial and not appearing in the record;²⁰³ and second, that there was sufficient evidence presented by Sullivan of the ministers' authorization of the use of their names in the advertisement.²⁰⁴

In the petitions for writ of certiorari, the Supreme Court was presented with guideposts which marked the course of the subsequent briefs and oral argument. The issues presented can be broadly divided into three groups. First, the *Times* took the position that the interpretation of the law of libel by the Alabama courts was so broad as to constitute seditious libel. Sullivan, however, argued that the statements in the advertisement presented a classic case of defamation which was not protected by the first amendment. Second, the *Times* maintained that despite the exaggerations in the advertisement, it did not injure or threaten Sullivan's reputation. Sullivan contended that the seventh amendment precluded the Supreme Court from reviewing a jury verdict and that the Court could not reexamine the evidence. Finally, the parties disagreed on whether the nature and extent of the *Times*'s activities in Alabama were sufficient to meet the constitutional standards for minimum contacts.

C. Briefs to the Supreme Court

The petition for the writ of certiorari was granted by the United States Supreme Court without comment.²⁰⁵ In its brief for the petitioner, counsel for the *Times* presented the same four questions that it raised in its petition for a writ of certiorari.²⁰⁶ The *Times*, however, sharpened the focus of the constitutional argument relating to the law of libel and indicated to the Court the scope of the ruling it sought.

While arguing that the Alabama Supreme Court "entirely misconceived the constitutional issue,"²⁰⁷ the *Times* took a narrow approach and did not maintain that the first amendment should be interpreted so as to give an absolute privilege against recovery. Instead, the *Times* took the position that the Alabama Supreme Court had revived the law of seditious libel by overstating the traditional law of libel in interpreting it to cover the facts of this case.²⁰⁸

201. *Id.* at 19-22.

202. *Id.* at 22-23.

203. Brief For Respondent in Opposition at 12-14, 6 Record, *New York Times*.

204. *Id.* at 14-19.

205. 371 U.S. 946 (1963).

206. Brief For Petitioner at 2, 6 Record, *New York Times*.

207. *Id.* at 29.

208. *Id.* at 30.

According to the *Times*, even if the protection of the official reputations of government officials was a valid state interest, the means adopted by the Alabama courts to further this interest was too extreme.²⁰⁹ Even if the lower court's interpretation was valid, its application to the facts of the case was unconstitutional.²¹⁰ As in the petition for a writ of certiorari, in its brief, the *Times* reviewed the facts in the case and found nothing in the evidence to support a finding of injury or threat to Sullivan's reputation.²¹¹ Finally, the *Times* again raised its objection to the circuit court's assumption of jurisdiction. It argued that jurisdiction violated the territorial limits of due process, imposed a burden on interstate commerce, and threatened freedom of the press.²¹²

In the brief for respondent, counsel for Sullivan also made the same arguments as in the brief in opposition to the petition for writ of certiorari.²¹³ One point stressed in the opposition brief, however, is critical. Counsel for Sullivan interpreted the *Times's* arguments as calling for an absolute privilege to defame public officials.²¹⁴ To counter these arguments, he cited numerous decisions of the Supreme Court and other federal courts.²¹⁵ Yet this was not what the *Times* was seeking from the Court. The brief for the *Times* was framed to allow the Court to fashion a decision no broader than required by the facts in this particular case: that the first amendment does not permit a conclusion that a statement is libelous per se when the plaintiff, a government official, has not been named and there is no intent to injure him.²¹⁶

In their brief to the Supreme Court, the four Alabama ministers stressed four points: that the civil libel prosecution was really a scheme to surpress the constitutional rights of Negro citizens;²¹⁷ that the verdict of the Alabama courts violated the due process clause since there was no evidence on the record to support their liability;²¹⁸ that the Alabama rule requiring "retraction" even when a person has not authorized a publication violated the first amendment;²¹⁹ and that the segregated courtroom, the all-white jury, and the trial before a judge elected on the basis of discrimination in voting rights violated the fourteenth amendment.²²⁰ Sullivan presented the same arguments

209. *Id.* at 31.

210. *Id.* at 32.

211. *Id.* at 32-34.

212. *Id.* at 34.

213. Brief For Respondent at 2-3, 6 Record, *New York Times*.

214. *Id.* at 33.

215. *Id.* at 28-38; see, e.g., *Konigsberg v. State Bar*, 366 U.S. 36, 50 (1961) (certain forms of speech are considered outside the scope of constitutional protection); *Roth v. United States*, 354 U.S. 476, 483 (1957) (unconditional phrasing of the first amendment does not prevent the Court from concluding that libelous utterances are not within constitutionally protected speech).

216. Brief for Petitioner at 60-66, 6 Record, *New York Times*.

217. Brief For Petitioners at 26-43, 6 Record, *New York Times*.

218. *Id.* at 8-9.

219. *Id.* at 44-52.

220. *Id.* at 52-61.

that were made in the brief in opposition to the petition for writ of certiorari.²²¹

D. Oral Argument

After submitting the briefs in the case, a consolidated oral argument in *New York Times* and *Abernathy v. Sullivan* was held on the 6th and 7th of January 1964. Professor Wechsler began oral argument for the *Times* by taking the Court through the advertisement paragraph by paragraph, and conceding certain "inaccuracies" in the third and sixth paragraphs.²²² In response to a question by Justice Brennan as to whether libel was claimed for "every statement and every sentence" of the third and sixth paragraphs,²²³ Professor Wechsler replied: "The pleadings do not separate out any particular statement . . . so that we are at a loss . . . to know precisely in what respect the Respondent claims that he was libeled."²²⁴ He emphasized that Sullivan's name did not appear anywhere in the advertisement and that even the word "police" could not be taken to refer to Sullivan because the department was under the day-to-day control of the Montgomery police chief.²²⁵ Justice White appeared to accept this argument when he asked if "police" could refer to state as well as city police, to which Professor Wechsler replied: "It could be the state police. It could be."²²⁶

Professor Wechsler also contended that the advertisement had been judged in Alabama by an unconstitutional rule of law which violated the first amendment.²²⁷ Following the line of argument laid out in the brief, Professor Wechsler said that the same criticisms could be made against the Alabama courts' interpretation of the rule of libel as Madison and Jefferson made against the Sedition Act of 1789.²²⁸

While Professor Wechsler raised the issue of absolute immunity, he alternatively sought a narrow holding from the Court based solely on the facts of the case. In a dialogue with Justice Goldberg, he developed his position and presented the Court with a number of possible alternative holdings. The dialogue proceeded as follows:

Justice Goldberg: Mr. Wechsler, your basic position, if I understand it correctly, is that under the First and Fourteenth Amendment no public official can sue for libel constitutionally and get a verdict with respect to any type of false or malicious statement made concerning conduct, his official conduct?

221. Brief For Respondent at 2-3, 6 Record, *New York Times*.

222. The transcript of oral argument in *New York Times* is reprinted in 58 LANDMARK BRIEFS AND ARGUMENTS OF THE UNITED STATES SUPREME COURT: CONSTITUTIONAL LAW 683 (P. Kurland & G. Kasper eds. 1975) [hereinafter cited as LANDMARK BRIEFS AND ARGUMENTS].

223. *Id.* at 689.

224. *Id.*

225. *Id.* at 689-90.

226. *Id.* at 690.

227. *Id.* at 693-96.

228. *Id.* at 696.

Mr. Wechsler: That is the broadest statement that I make. But I wish in my remaining time to indicate what the lesser submissions are, because there are many that I think must produce a reversal in this case.²²⁹

As an alternative to the sweeping extension of the first amendment suggested by Justice Goldberg, Professor Wechsler offered four possibilities: first, a qualified privilege could be given to a person who falsely and maliciously libels a public official;²³⁰ second, a public official suing for an alleged libelous statement regarding his official conduct could be required to prove actual damage;²³¹ third, the Supreme Court could review the facts in such libel cases to ensure that they did not infringe upon the first amendment;²³² and finally, limits could be placed on the power of the jury to assess damages in such libel cases.²³³

As to the *Times's* argument that its contacts with Alabama were insufficient to justify the jurisdiction of that state's courts, Professor Wechsler rested on the brief and did not raise the matter during oral argument.

Roland Nachman, Jr. of Montgomery appeared for Sullivan in oral argument.²³⁴ He began by repeating his twin arguments that not only was there "ample and indeed overwhelming evidence to support the jury verdict" but "we are here after a jury trial, with all that means in terms of the Seventh Amendment."²³⁵ This prompted the following exchange with Justice Goldberg:

Justice Goldberg: You made a rather provocative statement I would like to ask you about. You said a jury trial in terms of the Seventh Amendment. . . . Is it your idea that the Seventh Amendment applies to states by the Fourteenth?

229. *Id.* at 700.

230. *Id.* at 701.

231. *Id.*

232. *Id.*

233. *Id.* at 702.

234. Although counsel to Sullivan throughout the proceedings, Mr. Nachman had long represented Montgomery's two newspapers, the *Montgomery Advertiser* and the *Alabama Journal*. Mr. Nachman has stated that he took the *New York Times* case with the blessing of the two newspapers but jokes that his clients "think the best thing I ever did was lose the case." See *Landmark Ruling On Law of Libel Turns 20 Today*, L.A. Daily Journal, Mar. 9, 1984, at 16, col. 4.

235. See LANDMARK BRIEFS AND ARGUMENTS, *supra* note 222, at 707. In *Bose Corp. v. Consumers Union of the United States, Inc.*, 104 S. Ct. 1949 (1984), the Supreme Court commented on the seventh amendment issue raised in *New York Times*:

In *New York Times v. Sullivan*, we were reviewing a state court judgment entered on a jury verdict. Respondent had contended that the Seventh Amendment precluded an independent review. Recognizing that the Seventh Amendment's ban on re-examination of facts tried by a jury applied to a case coming from the state courts, . . . we found the argument without merit, relying on our statement in *Fiske v. Kansas*, . . . that review of findings of fact is appropriate "where a conclusion as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."

Id. at 1964 n. 27 (citations omitted).

Mr. Nachman: C.B.&Q. v. Chicago . . . and many other cases, say the protections of the Seventh Amendment which surround the re-examination of jury verdicts apply equally to state jury verdicts as they do to federal jury verdicts.²³⁶

Later in oral argument, the question of the deference required by the seventh amendment to state jury verdicts was raised again, this time by Justice White, in connection with Mr. Nachman's contention that libel was outside the protection of the first amendment:

Justice White: I suppose if it's your assertion . . . that libel falls outside the protection of the First Amendment, that someone has to finally decide what libel is that falls outside the protection of the First Amendment?

Mr. Nachman: Now, we would certainly concede that if a statement was made that somebody had blond hair and a state court held this statement was libelous *per se*, well, of course this Court could review it. But, . . . we say that when this kind of conduct is charged this is within the normal usual, rubric framework of libel.²³⁷

The basis of Mr. Nachman's argument was the same as that relied on by Sullivan at trial. He maintained that the statements in the advertisement were false, "not just in some particular but completely false."²³⁸ This prompted Justice Goldberg to ask: "Are you arguing to us the case went to the jury on the posture that this ad was from beginning to end totally false?"²³⁹

Mr. Nachman: Yes sir.

Justice Goldberg: You are?

Mr. Nachman: What I am saying, sir, is that there was evidence from the *New York Times* itself, from the pleadings, from statements of its counsel, from evidence in the case, in addition to this, which could justify a jury verdict that the entire ad was false.²⁴⁰

Justice Douglas, however, quickly pointed out that the jury did not decide the issue of truth or falsity of the advertisement because the trial judge charged the jury that the statements were libelous *per se*.²⁴¹

Justice Goldberg, obviously intrigued by Mr. Nachman's statement that everything in the advertisement was false, then asked Mr. Nachman about his second argument, that the statements in the advertisement referred to Sullivan. When asked what in paragraph three referred to Sullivan, Mr. Nachman replied that everything did except the expulsion of the students.²⁴²

236. See LANDMARK BRIEFS AND ARGUMENTS, *supra* note 222, at 707.

237. *Id.* at 711.

238. *Id.* at 709.

239. *Id.*

240. *Id.* at 709-10.

241. *Id.* at 711.

242. *Id.* at 715.

As to paragraph six, Mr. Nachman stated that the repeated use of the word "they" would be connected with the "they" who arrested Dr. King: the police.²⁴³

Justice Goldberg was concerned by the possible scope of Mr. Nachman's argument and questioned how far he was prepared to take it:

Justice Goldberg: Since the advertisement as a whole refers to southern violators, and since your client testified that the community itself was libeled, since there are many, many law abiding citizens in the South as well as some who are not law abiding, as in all sections of the country, what would prevent under your theory of the case any citizen in the South saying that "I am libeled by this ad of the *Times*," and by innuendo then allege and go to the jury on the assumption that I am a southern citizen, this refers to southern violators, the "they" means I bombed, that I did all these things?

Mr. Nachman: The thing that would prevent it in Alabama . . . is Alabama jurisprudence . . . which requires a group be sufficiently small so that the identification can readily be made, and that a person in an entire community under Alabama law would not have standing to sue because the diffusion of the attack, and the diffusion of the invidious remarks, would be so great that under Alabama law it could not be applied to this man as a member of the community with no other individual as a plaintiff in the lawsuit.²⁴⁴

Finally, Mr. Nachman concluded by disputing Professor Wechsler's view of the law of libel:

We think that the defendant, in order to succeed, must convince this Court that a newspaper corporation has an absolute immunity from anything it publishes If a newspaper charges, say, a mayor or police commissioner with taking a bribe, that there is an absolute immunity against a libel suit in that regard. We think that is something brand new in our jurisprudence. We think that it would have a devastating effect on this nation.²⁴⁵

The four Alabama ministers were represented in oral argument before the Supreme Court by former Attorney-General William P. Rogers and by Samuel R. Pierce. Rogers and Pierce concentrated on the four arguments that they presented in their brief.²⁴⁶

Roland Nachman appeared again in oral argument for Sullivan. Justice Black began by asking him whether there was sufficient evidence on which the jury could find that the ministers were responsible for their names appearing on the advertisement.²⁴⁷ Mr. Nachman replied that first, the

243. *Id.*

244. *Id.* at 716-17.

245. *Id.* at 721-22.

246. For a summary of oral argument in *Abernathy v. Sullivan*, see 32 U.S.L.W. 3251 (Jan. 14, 1964).

247. *Id.*

ministers' names appeared in the advertisement; second, that they failed to reply to a request to retract the advertisement, and third, that under Alabama law such a "failure to break silence indicates they did what we said they did."²⁴⁸ Justice Goldberg then asked: "Is it your contention that if my name appears on an advertisement without my consent, I must pay \$5000 to get the benefit of the Alabama retraction statute?"²⁴⁹ Mr. Nachman replied that a letter to the editor of the newspaper would be sufficient.²⁵⁰ Justice Goldberg, however, then wanted to know: "Suppose the newspaper didn't publish the letter?"²⁵¹ Mr. Nachman replied that in such a case the person would have done all he could and would meet the requirements of the statute.²⁵² But Justice Goldberg then asked why there should be any obligation to deny something that a person has not published.²⁵³ Mr. Nachman responded by saying that this is a rule of evidence: a failure to reply to an inculpatory statement is an admission of guilt.²⁵⁴

However strong Mr. Nachman's case may have been, his position was weakened by Justice Goldberg and Chief Justice Warren, if not all the Justices, in the following exchange:

Justice Goldberg: I get a lot of mail every day I don't answer. Without a prior relationship between the parties, I can't conceive a rule of law that says you must reply.

Mr. Nachman: We submit that it is, your Honor.

Chief Justice Warren: It is not unknown to at least one member of this Court that he has received letters from various parts of the country accusing him of making libelous statements. If he made no such statement, must he reply and retract or suffer a one-half million dollar libel judgement?

Mr. Nachman: I'm not familiar with the contents of the letters.

Chief Justice Warren: They're far worse than this one.

Mr. Nachman: When it becomes important later in a law suit, then we submit his failure to reply may be evidence that he made it.²⁵⁵

For the *Times* and the four Alabama ministers, oral argument was a chance to highlight the arguments from their briefs in a sympathetic forum. This was not the case, however, with counsel for Sullivan. Given the dimensions of the jury's verdict in the particular fact situation, coupled with counsel's argument that the seventh amendment precluded Supreme Court review of such a jury decision, it is not surprising that the questions from the bench were less than sympathetic.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 3251-52.

255. *Id.* at 3252.

E. The Supreme Court Decision

The Supreme Court that heard and decided the *New York Times* case in early 1964 was both an "activist" court and a divided court. While involved in giving an expanded meaning to the Constitution, the Court was often deeply divided over the role it should play in the political process.

Philip Kurland, in his "Foreward" to the *Harvard Law Review's* summary of the 1963 Supreme Court term,²⁵⁶ referred to that term as the climax of "the egalitarian revolution,"²⁵⁷ which was characterized by equality as a guide for constitutional decisions, and a subordination of the federal system. Certainly the decisions of the Court during that term indicate that it was deeply committed to continuing the revolution. Desegregation,²⁵⁸ reapportionment,²⁵⁹ and the first of the "sit-in" cases²⁶⁰ were all issues that came before the Court during the 1963 term.

While many of these cases were decided by narrow votes with vigorous dissents, the Court had no trouble agreeing on the *New York Times* case. On March 9, 1964, by an unanimous vote, the Supreme Court reversed the decisions of the Alabama Supreme Court in both the *New York Times* and *Abernathy* cases.²⁶¹ Speaking through Justice Brennan, in shaping its decision the Court not only rejected all of Sullivan's arguments but went beyond what the *Times* had urged in its brief and oral argument.

Justice Brennan began by rejecting Sullivan's argument that the fourteenth amendment did not apply to the case since it was meant to apply only to state action.²⁶² Although this was a civil suit between private persons, the Court said that state action was involved because the Alabama state courts had applied a state rule of law which the *Times* claimed placed unconstitutional restrictions on its freedoms of speech and press.²⁶³

Sullivan's principal argument, both in his brief and oral argument, had been that the advertisement was not protected by the first amendment. This argument was premised on the narrow ground that the advertisement was "commercial advertising," and on a broader contention that the first amendment does not protect libel.²⁶⁴ The Court rejected both of these arguments.²⁶⁵ The Court said that it did not consider the advertisement "commercial" in the sense that the term was used in *Valentine v. Chrestensen*,²⁶⁶ a case involving the distribution of handbills containing a commercial message on

256. Kurland, *Foreward: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143 (1964).

257. *Id.* at 145.

258. *See, e.g.*, *Griffin v. County School Board*, 377 U.S. 218 (1964).

259. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964).

260. *See, e.g.*, *Bell v. Maryland*, 378 U.S. 226 (1964).

261. *New York Times*, 376 U.S. at 292.

262. *Id.* at 265.

263. *Id.*

264. Brief for Respondent at 28-38, 6 Record, *New York Times*.

265. 376 U.S. at 266.

266. 316 U.S. 52 (1942).

one side and a protest against certain government action on the other side. Here, the Court said the *Times* advertisement “communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.”²⁶⁷

Although counsel for Sullivan cited numerous cases for the proposition that the first amendment does not protect libel, the Court rejected these cases, concluding that none dealt with “the use of libel laws to impose sanctions upon expressions critical of the official conduct of public officials.”²⁶⁸ The Court said that it was thus free of precedent in deciding the question and held that like “the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.”²⁶⁹

With the first amendment as its test, the Court then looked at the Alabama courts’ application of the rule of libel to the facts in the case. After comparing the Alabama law of criminal libel with the civil law,²⁷⁰ the Court concluded that the state was trying to use its civil law to exact a punishment forbidden by its criminal law.²⁷¹ This, the Court said, violated the first and fourteenth amendments. Specifically, the Court stated that,

[t]he 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.²⁷²

It is this “actual malice” test that has often been considered the basis of the Court’s criteria for recovery by public officials in defamation cases. Although the term “actual malice” had been used by the *Times* in its brief,²⁷³ it was used in the sense of actual intent to cause the harmful result. The Court, however, expanded this meaning to include not only knowledge of the falsity of the statement but “reckless disregard” of the truth.²⁷⁴

Because the Alabama courts had not applied this test of actual malice to the facts, the Supreme Court reversed the decision of the Alabama Supreme Court and remanded the case.²⁷⁵ The Court, however, then took the unusual step of reviewing the facts itself to determine whether the evidence would support a verdict of libel. The Court concluded that while the *Times* might have been negligent in not discovering the misstatements in the advertise-

267. 376 U.S. at 266.

268. *Id.* at 268.

269. *Id.* at 269.

270. *Id.* at 277-78.

271. *Id.* at 277.

272. *Id.* at 279-80.

273. Brief for Petitioner at 31, 55, 6 Record, *New York Times*.

274. 376 U.S. at 280.

275. *Id.* at 292.

ment, the evidence was not sufficient to meet the test of "actual malice."²⁷⁶ As to the four Alabama ministers, the Court found that even if they had authorized the use of their names in the advertisement, there was no evidence to show "actual malice" on their part.²⁷⁷ Thus, even if Sullivan wished to pursue the cases again on remand, the Court effectively precluded it by finding no constitutional basis.

The question of the Alabama courts' jurisdiction over the *Times*, which had consumed so much time and theory, was disposed of by the Court in a footnote.²⁷⁸ The Court said that the *Times's* claim that the assumption of jurisdiction overreached the limits of the due process clause was foreclosed from review by the ruling that the *Times* had entered a general appearance and waived its jurisdictional objections.²⁷⁹

276. *Id.* at 286.

277. *Id.*

278. *Id.* at 264 n.4. The Court said in part:

Since we sustain the contentions of all the petitioners under the First Amendment's guarantees of freedom of speech and of the press as applied to the States by the Fourteenth Amendment, we do not decide the questions presented by the other claims of violation of the Fourteenth Amendment.

Id.

279. *Id.* In two unanimous decisions in March 1984, the Supreme Court held that the due process clause of the fourteenth amendment does not bar a suit against a publication in a state based on regular circulation of the publication in the state. In *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1481 (1984), the Court held that a publication may be sued for libel in any state in which it widely circulates, regardless of where the plaintiff lives. In *Keeton*, the plaintiff, a New York resident, filed suit against *Hustler* magazine, an Ohio corporation, in New Hampshire because the statute of limitations had expired in every other state. *Id.* at 1477. In holding that defendant's circulation of 15,000 copies per month of its magazine was sufficient contact with the state to permit the suit to proceed there, the Court said that neither the plaintiff's lack of contact with New Hampshire nor her tactical reasons for choosing the state were relevant. *Id.* at 1481. According to the Court, where *Hustler* "has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine. . . . There is no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed." *Id.* at 1481-82.

In a companion case, the Court ruled that individual reporters and editors may be sued for libel in the courts of a distant state, even one they have never visited, when the plaintiff lives in the state and the publication is widely circulated there. *Calder v. Jones*, 104 S. Ct. 1482, 1487 (1984). In *Calder*, the Court upheld California's jurisdiction over a Florida based newspaper premised upon the distribution of 600,000 copies of the newspaper in the state per week. *Id.* The Court said that it was not relevant that defendants did not do any work on the allegedly libelous article in California or whether, in fact, they had ever been there. *Id.* According to the Court, the article

concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and the harm suffered.

Id. at 1486-87 (footnote omitted).

Both in *Keeton* and *Calder*, the Court emphasized the defendants' large circulation in New

The concurring opinions of Justice Black and Justice Goldberg, both of whom were joined by Justice Douglas, argued that the majority did not go far enough to provide adequate protection for critics of official conduct.²⁸⁰ These Justices would have created an absolute privilege, whereas the majority had created a qualified privilege which could be overcome by proof of actual malice. Justice Goldberg, however, would have retained an area of private life in which public officials would have the benefits of the ordinary rules of defamation.²⁸¹

IV. CONCLUSION

For the *Times* and the four Alabama ministers, the decision of the Supreme Court had the immediate effect of relieving them of the burden of a \$500,000 damage judgment. But the decision also had far broader implications. It assisted the civil rights movement by removing the threat of large libel judgments against those who criticized and acted against racial segregation. It also defined the ambit of constitutional protection generally in libel actions brought by public officials against critics of their official conduct. At a seminar commemorating the twentieth anniversary of the Supreme Court's decision in *New York Times*, Sullivan's attorney, Roland Nachman, recounted the strengths and fatal weaknesses of his case:

I had felt at the time of the presentation of this case that the law of libel and the facts of record were very much with us; and that extrinsic circumstances over which the lawyers in the case had no control—including the amount of the verdict, the unfortunate political and social climate, and the proliferation of contemporaneous law suits brought by others—made this a very hard case for the plaintiff.²⁸²

At the same seminar Mr. Nachman also explained that "I fear—so long as I continue to represent media publishers—I am in constant danger of losing the *New York Times* case twice."²⁸³ The history of the Court's treatment of media defendants in defamation cases since 1964, however, indicates that the decision which arose out of the blacks' struggle for civil rights in the South in the early sixties has produced a rare and continuing consensus on the Court that the first amendment requires that the media be given special protection in defamation cases.²⁸⁴ The parameters of that protection are the subject of continuing debate.²⁸⁵

Hampshire and California. Since the *Times* was not widely circulated in Alabama, it is unclear whether these decisions answer completely the jurisdiction question left open by the Court.

280. 376 U.S. at 293 (Black, J., concurring); 376 U.S. at 297 (Goldberg, J., concurring in result).

281. *Id.* at 301-02 (Goldberg, J., concurring).

282. *Losing Landmark Case "Greatest Thing" For Libel Lawyer*, *The Birmingham News*, Apr. 15, 1984, at 6A, col. 1.

283. *Id.*

284. For a discussion of the Supreme Court decisions in defamation cases against the media since the *New York Times* case, see *supra* note 2.

285. *See War, TV and Truth*, 70 A.B.A.J. 25 (Sept. 1984) (discussing *Westmoreland v. CBS*,

Mr. Nachman's concerns centered around the scope of the protection to be given media publishers in libel suits brought by public officials. The members of the Supreme Court and of the Bar have also been concerned with the application of the *New York Times* decision to divergent factual situations, although for different reasons. First, the Court has attempted to define who is a public official or a public figure. Since no definition applicable to all cases can be developed, the Court has had to proceed on a case-by-case basis. The result has been that, in all of the cases in which this has been an issue, the Court has held that the plaintiffs were not public figures or public officials.²⁸⁶ Thus, the Court has not taken an expansive view of who must prove actual malice in order to recover in a defamation suit against the media. Second, the Court has also been concerned with clarifying the procedural aspects of proving actual malice and litigating a defamation case. Here again, the Court has sided with plaintiffs by making it easier for them to discover the information necessary to prove actual malice²⁸⁷ and to bring defamation suits against the media.²⁸⁸ These cases, however, do not alter the substantive law under which defamation cases against the media must actually be tried.

Despite the concern created by these decisions, the most recent media defamation case decided by the Supreme Court indicates that not only are Mr. Nachman's fears of losing the *New York Times* case a second time not well founded, but that the decision is being expanded to cover areas never envisioned by the litigants or the Court that decided it. In *Bose Corp. v. Consumers Union of United States, Inc.*²⁸⁹ the Court upheld the right of an appeals court to overturn a trial court's finding that a magazine had acted with actual malice when it published critical comments about loudspeakers manufactured by Bose Corporation.

The Court in *Bose* began by reaffirming the protection for the media set out in the *New York Times* decision.²⁹⁰ According to the Court, the first amendment values protected by that decision "make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied."²⁹¹ In order to do this, the Court held that an appellate court should review a trial court's factual, as well as legal, conclusions about

No. 82 C 7913 PNL (S.D.N.Y. filed Nov. 30, 1982); *Can Generals Waging War Be Wounded By the Press?*, N.Y. Times, Nov. 25, 1984, at 18E, col. 1; *Westmoreland's Suit Against CBS Begins Today With Jury Selection*, N.Y. Times, Oct. 9, 1983, at 1; *Westmoreland's Suit Against CBS Raises Unusual Libel Issues*, Wall St. J., Oct. 1, 1984, at 1, col. 1; Labunski, *Trial Will Test Law*, Plain Dealer, Sept. 14, 1984, at 11B, col. 1.

286. See *Wolston v. Reader's Digest*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

287. See *Herbert v. Lando*, 441 U.S. 153 (1979).

288. See *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984); *Calder v. Jones*, 104 S. Ct. 1482 (1984). For a discussion of these cases, see *supra* note 279.

289. 104 S. Ct. 1949 (1984).

290. *Id.* at 1959.

291. *Id.* at 1960.

whether the media acted with actual malice.²⁹² Because an appellate court in other types of lawsuits must accept the trial court's view of the facts unless it is "clearly erroneous,"²⁹³ this gives an appellate court the freedom to conduct a "de novo" review in defamation cases. The *Bose* case thus provides the media with added procedural protection against trial court decisions which often favor plaintiffs.²⁹⁴

The Court in *Bose* also held that the actual malice requirement was applicable to cases of product disparagement. The Court stated that "this case represents the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies."²⁹⁵ Although the dissent questioned the application of "a constitutional principle which originated in *New York Times v. Sullivan* because of the need for freedom to criticize the conduct of public officials . . . to a magazine's false statements about a commercial loudspeaker system,"²⁹⁶ it did not elaborate on this concern.

Thus, the *Bose* case indicates that the continued vitality of the *New York Times* decision will not be the issue in the future. Instead, the Court will continue to debate the meaning of its test of actual malice and how far this requirement should be expanded.

292. *Id.* at 1965.

293. Rule 52(a) of the Federal Rules of Civil Procedure provides:

Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

FED. R. CIV. P. 52(a).

294. A study conducted by the Libel Defense Resource Center of libel actions between 1981 and 1984 against media defendants found that while news organizations eventually prevail in more than 90% of the cases, they lost 83% of the initial jury trials. See *Of Reputations and Reporters*, TIME, Mar. 19, 1984, at 64; see also Franklin, *Suing the Media for Libel*, 1981 AM. B. FOUNDATION RESEARCH J. 795 (summarizing the results of a study of 291 libel cases brought against the media).

295. 104 S. Ct. at 1966.

296. *Id.*

