

# ORIGINAL

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IN THE SUPREME COURT OF THE UNITED STATES

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GILES M. LUGAR, :  
:  
Petitioner :  
:  
v. : No. 80-1730  
:  
EDMONDSON OIL COMPANY, INC. and :  
RONALD L. BARBOUR, :  
:  
Respondent :  
:  
- - - - - x

Washington, D.C.  
Tuesday, December 8, 1981

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 11:07 o'clock a.m.

APPEARANCES:

ROBERT L. MORRISON, ESQ., 317 Patton Street,  
Suite B, Danville, Virginia 24541;  
on behalf of the Petitioner.  
  
JAMES W. HASKINS, ESQ., 60 West Church Street  
Martinsville, Virginia 24114; on behalf of  
the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Lugar against Edmondson Oil Company, #80-1730. Mr. Morrison, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT L. MORRISON, JR.  
ON BEHALF OF THE PETITIONER

MR. MORRISON: Mr. Chief Justice, and may it please the Court:

The case before the Court today is another challenge of the pre-judgment seizure, somewhat on the order of the Fuentes case and its various progeny. It bears a rather unusual past history which I would like to go into just a little bit because it bears on where we are today.

Mr. Lugar, the petitioner, was the lessee/operator of Lakewood Truck Stop in Pittsylvania County, Virginia, down near the North Carolina border. He was its sole proprietor. Mr. Barbour is the President of Edmondson Oil Company who sold fuel to Mr. Lugar for resale, and Mr. Lugar had an open account with him. That was the only relationship between Edmondson Oil Company and Mr. Lugar.

On the 31st of May, 1977, Mr. Barbour as President of Edmondson Oil Company swore out a pre-judgment attachment petition in the Circuit Court of Pittsylvania County, which is the trial court of general jurisdiction in Virginia.

The petition in question alleged that Mr. Lugar



1 was, I believe, assigning, concealing, disposing or  
2 converting his assets with the intent to hinder or delay his  
3 creditors. No fraud was alleged in the petition.

4           This, as I said, was sworn out on the 31st of  
5 March, 1977. On the 1st of April, 1977, it was filed in the  
6 clerk's office of the Circuit Court of Pittsylvania County.  
7 The clerk, upon receipt of the petition for pre-judgment  
8 attachment, as mandated by the Code of Virginia, issued a  
9 writ of attachment to the Sheriff of Pittsylvania County  
10 directing him to levy on Mr. Lugar's goods.

11           The sheriff did levy, as is shown in the Appendix,  
12 in his return on the 1st, the 2nd and the 4th of April on  
13 Mr. Lugar at Lakewood Truck Stop and also on his bank  
14 accounts. At that point, his business assets were frozen,  
15 his bank accounts were frozen and he was prevented from  
16 doing business.

17           In Virginia, the pre-judgment attachment petition  
18 process is materially different from the detinue process.  
19 We have both. For a pre-judgment attachment petition you  
20 need only appear before the clerk with a sworn petition  
21 alleging that the defendant debtor is concealing, disposing,  
22 assigning or converting his assets with intent to hinder,  
23 delay or defraud his creditors. Now, there are other  
24 grounds but they are not applicable here; they deal with  
25 out-of-state defendants.

1 QUESTION: But you filed a suit either  
2 simultaneously or suit had been filed either simultaneously  
3 or before that, hadn't it?

4 MR. MORRISON: The petition for an attachment is  
5 the filing of the suit.

6 QUESTION: They are combined in one document?

7 MR. MORRISON: Yes, sir. If the attachment  
8 petition is dismissed -- if the levy is dismissed, I should  
9 say, the action proceeds as a motion for judgment, which is  
10 the same thing as a complaint in Virginia by federal  
11 procedure. So even though in this case the levy was  
12 dismissed, it went on as a motion for judgment and ended in  
13 a judgment against Mr. Lugar.

14 The writ issues by the clerk under the law as a  
15 ministerial act on the filing of the petition. He issues a  
16 writ to the sheriff, no bond is required for the levy,  
17 although a bond for an actual physical seizure would be  
18 required. The sheriff goes and levies and really shuts them  
19 down, because the bank was not about to allow him the use of  
20 the money with a levy attached to it.

21 QUESTION: Do you say this is just like Fuentis  
22 against Shevin, then?

23 MR. MORRISON: I would say it's very similar to  
24 Fuentes v. Shevin, Your Honor. The difference that I would  
25 make between this and Fuentes v. Shevin is that in Fuentes v.

1 Shevin you had various items of personal property such as, I  
2 believe, a stove, seized. In this case we had everything  
3 seized, or everything levied upon.

4 QUESTION: So you think it's an even stronger case  
5 than Fuentes.

6 MR. MORRISON: Yes, sir, I do. I think that this  
7 is also very easily comparable to the North Georgia  
8 Finishing case.

9 Then, when the sheriff levies, the defendant may  
10 then come in and file an affidavit of substantial defense.  
11 When he files that, the creditor has ten days in which to  
12 post a bond to protect his levy. The levy will be dismissed  
13 if the bond is not filed. And in this case, a bond was  
14 filed after the affidavit of substantial defense was filed  
15 by Mr. Lugar.

16 The statute provides that when the petition is  
17 issued, there will be a return date on it, and in this case,  
18 the date of the hearing was set for one day after the return  
19 date; the return date was the 18th of April, the hearing  
20 date was set for the 19th, and a hearing was held on that  
21 date.

22 No decision with respect to the levy was  
23 received. A second hearing was held, I believe, on the 1st  
24 or the 4th of May, I am not sure which. And on the 4th of  
25 May, 1977, at the Circuit Court of Pittsylvania County

1 finally dissolved the levy finding that no grounds  
2 whatsoever had been proven which would support the  
3 attachment.

4           Then, after the state proceedings were concluded,  
5 Mr. Lugar filed a complaint in federal court seeking damages  
6 for deprivation of rights guaranteed under the Constitution  
7 under 42 U.S. Code Section 1983. The creditor filed a  
8 motion to abstain, alleging that a decision of the Virginia  
9 Supreme Court might eliminate the need for a decision on  
10 federal grounds. That was the only thing that was contained  
11 in that motion.

12           We briefed the issue of abstention. The district  
13 court turned around and ignored the abstention issue and  
14 dismissed on the authority of Flagg Brothers, describing the  
15 conduct in Flagg Brothers as more flagrant than the conduct  
16 in this case.

17           Lugar sought to amend the judgment or to have it  
18 modified, was unsuccessful in doing so on appeal. In the  
19 Fourth Circuit Court of Appeals, the parties addressed the  
20 issue of whether or not the reliance on Flagg Brothers was  
21 appropriate.

22           The court of appeals decided that the district  
23 court's reliance on Flagg Brothers was not appropriate, but  
24 affirmed dismissal on a different ground that was, again,  
25 not addressed by the parties, there being a requirement in



1 suits of this sort for a -- either an allegation or a  
2 finding of a direct conspiracy, a corruption, if you will,  
3 of state power between the private party and the state  
4 officials, or, in the alternative as I understand their  
5 opinion, such an abdication of control over state power is  
6 to make the state merely agents or the state just gives the  
7 power to the creditor.

8           QUESTION: Well, this goes to a fairly fundamental  
9 point, doesn't it? Is there a difference between the  
10 Fourteenth Amendment's prohibition which is addressed only  
11 to states, and the language under color of state law in  
12 1983? Do those mean the same thing?

13           MR. MORRISON: I believe they do, Your Honor. But  
14 I believe that this Court has put a gloss on the meaning of  
15 under color of state law to include actions by private  
16 parties which are joint and with the state. And in this  
17 situation here, the state acts as an agent of the private  
18 party.

19           The point that I have made in the court of appeals  
20 and that I tried to make to the district court was that in  
21 the situation that we have here where there is no  
22 pre-attachment property interest whatsoever in the property  
23 that is going to be seized, that the creditor has no  
24 self-help remedy whatsoever. If he was to act for a  
25 self-help remedy, he would be liable for criminal penalties

1 and we wouldn't be here today if that's what had happened.

2 But instead, what happens is the state, so to  
3 speak, on a silver platter says here, you may use us to take  
4 sides in your dispute with your defendant debtor initially;  
5 we're going to seize his property for you.

6 QUESTION: Would you take the same position if it  
7 were a garnishment?

8 MR. MORRISON: If it was a pre-judgment  
9 garnishment, yes, sir.

10 QUESTION: Most garnishments are pre-judgment, are  
11 they not?

12 MR. MORRISON: I have not seen any in my practice,  
13 Your Honor. I have filed a good many post-judgment  
14 garnishments against debtors when I was conducting  
15 collection cases, but I have not, that I can recollect, seen  
16 a pre-judgment garnishment in Virginia, although it is  
17 allowed by this statute.

18 QUESTION: Mr. Morrison, the court of appeals said  
19 that it was not clear to it whether you were alleging or  
20 asserting that the Virginia statute is unconstitutional.  
21 What is your position? Are you attacking the  
22 constitutionality of the Virginia statute?

23 MR. MORRISON: At this point I am, Your Honor, and  
24 the reason for their statement is -- I have been trying --

25 QUESTION: It wasn't briefed, so it was hard to

1 know if that was your position.

2 MR. MORRISON: No, it wasn't briefed and we never  
3 even addressed the issue because we were addressing the  
4 question of whether or not Flagg Brothers applied.

5 QUESTION: Mr. Morrison, I thought the issue of  
6 constitutionality of the Virginia procedure was not here.

7 MR. MORRISON: Your Honor, I think the Fourth  
8 Circuit Court of Appeals has brought it here. They have  
9 said that the arguments made by Lugar -- and the district  
10 court has said the same thing -- amount to an attack on the  
11 statute and that that is what they are deciding; whether or  
12 not the statute is constitutional.

13 QUESTION: I thought the court of appeals said it  
14 was not deciding that because it was unclear what your  
15 position was.

16 MR. MORRISON: It said it was not deciding it  
17 because under the circumstances it didn't have to decide  
18 it. It found that there was no action under color of state  
19 law by the private parties. But what it said was, in its  
20 opinion and I don't know the exact page reference, was that  
21 Lugar had said that he was not attacking it, but in fact,  
22 that is what he was doing.

23 But what I was attempting to do, and I didn't  
24 articulate it very well, was say to both the district court  
25 and the court of appeals there is no need to decide the

1 constitutionality of a statute because the state and the  
2 creditor acted without conforming to the state statute. In  
3 other words, there is no need for this Court or any other  
4 court to decide the constitutionality of the statute if the  
5 creditor and the state break their own law, just as in  
6 *Monroe v. Pate*.

7           QUESTION: That wouldn't be a 1983 suit anyway,  
8 then.

9           MR. MORRISON: Yes, Your Honor, I believe it  
10 would, because in *Monroe v. Pate* and in *Adickes v. Kress* and  
11 the others, if the state is acting even in violation of its  
12 law, it is still action under color of state law.

13           QUESTION: Well, it may be under color of state  
14 law, but what's the constitutional violation?

15           MR. MORRISON: The denial of due process, Your  
16 Honor, under color of state law. The power and authority of  
17 the state under the alleged attachment statute, the  
18 attachment statute we are dealing with, are what brought the  
19 levy on the Mr. Lugar's assets. The state acted. The state  
20 acted at the sole behest of the creditor, but it acted  
21 without the fraud that the statute requires being present or  
22 even alleged.

23           QUESTION: You say -- didn't you have some  
24 appellate remedy in Virginia if the state broke -- or the  
25 private party broke his Virginia's law?



1           MR. MORRISON: Well, Your Honor, I don't think the  
2 private party broke Virginia's laws in the sense of a -- for  
3 instance, a criminal violation. What happened was the  
4 private party filed a petition for attachment which didn't  
5 meet the full requirements of the Virginia law, and the  
6 clerk looked at it and issued a writ anyway.

7           QUESTION: And it was set aside as improvident  
8 later, wasn't it?

9           MR. MORRISON: Yes, Your Honor, it was.

10          QUESTION: In the Virginia court.

11          MR. MORRISON: In the Virginia court, it was  
12 dismissed as being improvidently --

13          QUESTION: Do you feel the constitutional issue is  
14 covered in your questions presented?

15          MR. MORRISON: Yes, Your Honor, I do.

16          QUESTION: Where? I didn't see it.

17          QUESTION: I just read them over and I share  
18 Justice Marshall's reaction.

19          QUESTION: It said federal law, and I guess that  
20 includes the Constitution, also the Declaration of  
21 Independence.

22          MR. MORRISON: Yes, sir, I stand corrected. The  
23 initial question is whether there was joint participation or  
24 engagement by private litigants with state officials, which  
25 is what the court of appeals decided, but it --

1 QUESTION: Yes, but that's not a constitutional  
2 issue.

3 MR. MORRISON: No, sir, it's not.

4 QUESTION: How far would you carry this concept of  
5 state action? Suppose a divorce decree is entered  
6 erroneously in some way. Is that decree of the court state  
7 action in the sense that you're arguing it here today?

8 MR. MORRISON: Yes, sir, it is under Shelly v.  
9 Kramer, but I am not quite sure how the erroneous divorce  
10 decree is going to affect the person that it's entered  
11 against.

12 QUESTION: It might affect a person in the sense  
13 that it might expose one or both of the parties to a  
14 criminal charge of bigamy if, in fact, the divorce was not a  
15 divorce, a valid divorce.

16 MR. MORRISON: I believe theoretically it might,  
17 but I know that Virginia has procedures for dealing with  
18 that.

19 QUESTION: Mr. Morrison, my comments about the  
20 constitutional issue, don't regard them as undercutting your  
21 case. I think your case is here, but I thought the issues  
22 were other than the constitutional ones.

23 MR. MORRISON: I agree with Your Honor. The issue  
24 is whether or not the court of appeals should be reversed  
25 and this case should be sent back to the district court for

1 finding of facts. We are here on a very, very skimpy record.

2           What is being attacked in the district court is  
3 the action of the creditor with the state under color of  
4 state law.

5           QUESTION: Does that mean, Mr. Morrison, if you  
6 prevail and there's a reversal on the ground that indeed,  
7 this was action under color of state law, then your  
8 allegations of unconstitutionality are still to be  
9 determined in the district court or the trial?

10          MR. MORRISON: If they have to be made, yes, Your  
11 Honor.

12          QUESTION: What do you mean if they have to be  
13 made? You don't have a cause of action under 1983 unless  
14 you allege either a federal constitutional violation or a  
15 violation of federal law, do you?

16          MR. MORRISON: Your Honor, the original complaint  
17 alleged a denial of due process under the color of state law.

18          QUESTION: And that's your constitutional  
19 violation?

20          MR. MORRISON: That's the constitutional violation.

21          QUESTION: And that hasn't yet been determined.

22          MR. MORRISON: No, sir, it has not.

23          QUESTION: But if you prevail, this conduct was  
24 under color of state law, then you'll have that issue  
25 determined. Is that it?

1 MR. MORRISON: Yes, sir, we'll have to get --

2 QUESTION: But we don't have to determine it here.

3 MR. MORRISON: No, sir.

4 QUESTION: That's why I don't want to complicate  
5 your case with determining it in any way.

6 MR. MORRISON: No, sir, and I don't want to  
7 determine it here because we don't have the sufficient facts.

8 QUESTION: But, Mr. Morrison, we do have  
9 sufficient facts if I understand the problem correctly. The  
10 court of appeals said the "under of color of state law" or  
11 state action issue, however you describe it, is quite  
12 different if you are alleging a failure to follow the  
13 Virginia statute which resulted in the deprivation of due  
14 process on the one hand, or are you alleging that the  
15 Virginis statute, if followed to its letter, would be  
16 unconstitutional. And the court of appeals said you are  
17 makign the latter kind of contention.

18 It's on that assumption that the color of state  
19 law issue must be addressed. And they assume that if you  
20 merely allege deprivation of due process because you didn't  
21 follow the Virginia law, clearly you have no 1983 case.

22 MR. MORRISON: Well, Your Honor, --

23 QUESTION: I don't know if I made that clear or  
24 not, but they were quite clear, it seemed to me, in saying  
25 that they, despite your ambiguity in the trial court, they



1 read your complaint as an attack on the constitutionality of  
2 the Virginia statute.

3 MR. MORRISON: Yes, sir.

4 QUESTION: But they didn't decide it because they  
5 said even as so read, there's no state action or color of  
6 state law.

7 QUESTION: Well, as the court of appeals asked me  
8 in argument, do you think the statute is unconstitutional,  
9 and I said yes, and I do think the statute is  
10 unconstitutional.

11 QUESTION: And if you don't so contend, they also  
12 indicated you wouldn't have any basis for a 1983 claim. We  
13 don't have to decide the constitutionality of the statute;  
14 but I think we must decide the state action issue on the  
15 assumption that you seek to challenge the Virginia statute.

16 MR. MORRISON: Yes, sir, I understand your point.

17 The complaint as filed does allege a denial of due  
18 process, and it alleges that the parties acted under the  
19 color of state law, acted jointly. There is a specific  
20 paragraph in the complaint alleging that Mr. Barbour and  
21 Edmondson Oil Company were joint participants with the state  
22 and that they acted under color of state law.

23 QUESTION: But that question is not here; at least  
24 it is not in the questions presented, is it?

25 MR. MORRISON: The question presented is whether

1 on the facts alleged, there was no joint participation or  
2 engagement by private litigants with state officials,  
3 amounting to action under color of state law.

4 QUESTION: But it says nothing about the due  
5 process.

6 MR. MORRISON: No, sir, we never reached the due  
7 process.

8 What is -- at least, I don't believe we reached  
9 the question of due process there.

10 What we are arguing here is that the case should  
11 be returned for a decision on the factual and legal  
12 positions taken by the parties. We are here in part because  
13 the lower courts have changed the grounds of the decision  
14 from what the parties were arguing each time they made a  
15 decision, so that the questions I'm arguing now never were  
16 really addressed in the court of appeals, as I understood  
17 it, because we were addressing the question of the  
18 applicability of Flagg Brothers.

19 But the question of color of state law --

20 QUESTION: Well, how does it get here? If you say  
21 the court of appeals didn't consider it at all, how does it  
22 get here?

23 MR. MORRISON: The court of appeals considered the  
24 question of the color of state law, but we were arguing  
25 about is whether or not the Flagg Brothers decision, which

1 said that a private warehouseman's lien does not amount to  
2 action under color of state law, was dispositive of this  
3 case.

4           QUESTION: Then isn't your real complaint that the  
5 court of appeals so far departed from normal usage; you  
6 argued a claim to it that you had raised in the district  
7 court and it refused to pass on it?

8           MR. MORRISON: Well, it passed on it. It said  
9 that it did not find Flagg Brothers to be dispositive. That  
10 was in the first page or two of its opinion. It  
11 specifically made that statement, and then it said that it  
12 was going to affirm on other grounds.

13           QUESTION: Counsel, I'm still uncertain what your  
14 claim is. Do you now concede that you are not here on a  
15 claim that the creditor and the state acting with the  
16 creditor simply violated Virginia's statutory law and  
17 procedure?

18           MR. MORRISON: Your Honor, we are here with the  
19 initial complaint which was not drafted by me, and I might  
20 say that it was drafted by my then-employer and was given to  
21 me as it stood after it had been filed when I left his  
22 employment, so I was stuck with that.

23           The complaint attacks the action of the creditor,  
24 and the state with the creditor, on the basis of being a  
25 denial of due process under color of state law. We've never

1 --

2 QUESTION: Is that on the theory that the creditor  
3 and the state simply improperly applied Virginia's law?

4 MR. MORRISON: No, Your Honor.

5 QUESTION: Or improperly applied the facts to  
6 Virginia's law?

7 MR. MORRISON: No, Your Honor. The claim is that  
8 the action as taken, even if it were just line by line in  
9 accordance with Virginia law -- whether or not they did it  
10 right, the claim is that it was in violation of Lugar's  
11 constitutional rights. I don't care if they alleged fraud;  
12 we would still claim --

13 QUESTION: It's just that I'm still confused as to  
14 whether you're relying on constitutionality of the statute  
15 or on some erroneous allegation of facts by the creditor.

16 MR. MORRISON: We are relying on the involvement  
17 of the state of Virginia in a process which we believe is,  
18 on the face of it, unconstitutional.

19 QUESTION: Why didn't you raise that in your  
20 questions presented?

21 MR. MORRISON: I don't know, Your Honor. I tried  
22 to draft the questions presented to meet the force and  
23 effect of the Fourth Circuit Court of Appeals' opinion.

24 QUESTION: Well, you lost your case in the Fourth  
25 Circuit, they said your case is over because there's no



1 color of state law involved.

2 MR. MORRISON: Yes, sir, that's what they said.

3 QUESTION: And you're saying they were absolutely  
4 wrong in saying there was no color of state law in this case.

5 MR. MORRISON: Yes, sir.

6 QUESTION: That's one of the things you're arguing  
7 anyway. And you want whatever the court of appeals decided  
8 reversed, and what they decided was that there was no color  
9 of state law.

10 MR. MORRISON: Yes, sir.

11 QUESTION: That's what you answered me earlier.  
12 If you prevail as to that, and what you want is a trial on  
13 your allegations that the Virginia statute is  
14 unconstitutional.

15 MR. MORRISON: Yes, Your Honor.

16 QUESTION: And one of the reasons is Shelly v.  
17 Kramer, right? Didn't you say that?

18 MR. MORRISON: No, Your Honor. That was in  
19 response --

20 QUESTION: You don't rely on Shelly v. Kramer.

21 MR. MORRISON: I have not relied directly on  
22 Shelly v. Kramer; I cited --

23 QUESTION: Because I notice it's not in your brief.

24 MR. MORRISON: No, sir. The Chief Justice asked  
25 me about an erroneous divorce decree as being an action

1 under color of state law, and I said that I would assume  
2 that it would be based on the Shelly v. Kramer case, that a  
3 judicial act is an act under color of state law.

4           We submit to the Court that in this situation  
5 there is action under color of state law. The state is  
6 fully involved up to its neck, figuratively speaking, with  
7 the private party. As I said, to do for the private party  
8 what the private party cannot do for itself, by any means,  
9 without the private party even having the basic requirement  
10 that was found to be important in the Mitchell case of a  
11 prior property interest which must be protected and  
12 prevented from being depreciated.

13           In this situation, the creditor simply started the  
14 lawsuit with a petition for pre-judgment attachment, which  
15 the court of appeals characterized as submission to the  
16 neutral arbiter, and then the neutral arbiter turned around  
17 and took sides immediately and seized the property. And  
18 when it seized the property, it shut the man down so that  
19 you have the same sort of effect as you do with a  
20 pre-judgment garnishment of wages in both Lynch and Sniadach.

21           And we submit to the Court that under the  
22 circumstances, where the state is going to involve itself to  
23 that extent, that in fact, there is action under color of  
24 state law, sufficient at least for an evidentiary hearing.  
25 And as a result, we would ask that the Court reverse the

1 court of appeals and send it back for trial.

2 I'd like to reserve any time I have left for  
3 rebuttal, if the Court has no more questions.

4 CHIEF JUSTICE BURGER: Very well, Mr. Morrison.  
5 Mr. Haskins?

6 ORAL ARGUMENT OF JAMES W. HASKINS, ESQ.

7 ON BEHALF OF THE RESPONDENT

8 MR. HASKINS: Mr. Chief Justice, and may it please  
9 the Court:

10 One thing that the respondents specifically  
11 disagree with as stated by the petitioner -- and this was  
12 subject to comment by the district court in his opinion and,  
13 of course, as this Court has already pointed out, subject of  
14 some comment by the court of appeals. When the initial  
15 complaint under Section 1983 was filed in the district  
16 court, the respondents filed a motion to abstain on the  
17 theory that the complaint had to be, in effect, to be a 1983  
18 action it had to be some sort of challenge to the  
19 constitutionality of the Virginia attachment statutes.

20 The respondents, in filing the motion to abstain,  
21 requested the district court to abstain so that this issue  
22 could be properly determined by the Supreme Court of  
23 Virginia.

24 Now, in arguing the motion to abstain from the  
25 outset of this case, the petitioner has affirmatively

1 disavowed any challenge of a constitutional nature to the  
2 Virginia attachment statutes. On page 5 of the district  
3 court record, he specifically wrote the district court in  
4 memorandum -- this is cited in our brief -- saying there's  
5 no question of the constitutionality of the statute being in  
6 issue.

7           Now, as the court of appeals pointed out, this  
8 ambivalence, this lack of any sort of clear challenge to the  
9 constitutionality of the statute persisted in the Fourth  
10 Circuit Court of Appeals.

11           On page 53 of the Petition for Writ of Certiorari,  
12 which contains the opinion of the court of appeals, it's  
13 obvious that the decision of the Fourth Circuit is premised  
14 in part on the presumptive, valid state judicial  
15 proceedings. The opinion of the Fourth Circuit, taking the  
16 narrow issue as presented to the district court and, of  
17 course, to the court of appeals, is that the attachment  
18 statutes of the state of Virginia are constitutionally sound.

19           The petitioner, in answer to Justice Rehnquist's  
20 question, seems to assume and has assumed throughout this  
21 case, that state action and acting under color of state law  
22 for purposes of a 1983 action are the same thing. Now  
23 clearly, the Fourth Circuit Court of Appeals says they are  
24 not the same thing.

25           The Fourteenth Amendment, and, of course --



1 QUESTION: Mr. Haskins, they did allege in their  
2 complaint due process.

3 MR. HASKINS: Yes, sir. The complaint --

4 QUESTION: You said that they didn't ever raise  
5 the constitutional point. They did raise it in their  
6 complaint.

7 MR. HASKINS: Well, Justice Marshall, it is the  
8 opinion of the district court and the opinion of the Fourth  
9 Circuit that the only constitutional challenge at that  
10 point, as in all of the cases from Fuentes v. Shevin, right  
11 through Flagg Brothers, whether the case was a 1983 case or  
12 whether it came up through an appeals process from a state  
13 supreme court, there has been a direct attack on --

14 QUESTION: This says on page 6 of the Appendix,  
15 Giles M. Lugar has been deprived of his property by state  
16 action without due process of law, as guaranteed under the  
17 Fifth and Fourteenth Amendments to the United States  
18 Constitution.

19 MR. HASKINS: Yes, sir, now --

20 QUESTION: That's kind of direct, isn't it?

21 MR. HASKINS: Justice Marshall, what the  
22 petitioner --

23 QUESTION: Well, I ask you how you would be more  
24 direct.

25 MR. HASKINS: To say that the state of Virginia,

1 sir, is responsible in some way -- the Fourteenth Amendment  
2 and the Fifth Amendment, and specifically the Fourteenth  
3 Amendment, deal with deprivations of property by the state.  
4 The Fourteenth Amendment, as I understand it -- and I would  
5 stand corrected very quickly I'm sure, -- but it offers no  
6 protection from deprivations of property from citizen by  
7 citizen.

8           In the entire complaint, the three counts, sir,  
9 the petitioner is that Edmondson Oil and Mr. Barbour, its  
10 President, deprived him of these constitutional rights.  
11 Nowhere in this complaint is it alleged -- in fact, the  
12 petitioner, as I said, in the district court specifically  
13 disavows any challenge to state action.

14           QUESTION: But, Mr. Haskins, I know he did that in  
15 the district court. But in the court of appeals on page 45  
16 of the Cert Petition, the court recognizing this problem, as  
17 a footnote says, "We construe Lugar's claim to include a  
18 constitutional challenge to the statute itself." Now, we  
19 must so interpret the claim, must we not?

20           MR. HASKINS: Justice Stevens, I'll be quite frank  
21 with you, sir. I don't understand that footnote in relation  
22 to the statement of the issue on page 53, some five or six  
23 pages over.

24           QUESTION: Well, this is rather unambiguous, and  
25 the court of appeals did make it quite clear that if they

1 thought he was merely alleging a misapplication of the  
2 Virginia statute, that there would be no 1983 claim at all.

3 MR. HASKINS: That's correct, sir.

4 QUESTION: So in order to have something to write  
5 this rather long opinion about, apparently the court of  
6 appeals said we at least read the complaint to include a  
7 challenge to the statute itself. And therefore, the state  
8 action issue is whether the Virginia legislature's statute,  
9 plus the involvement of the clerk and the sheriff, is enough  
10 state action to trigger 1983.

11 MR. HASKINS: That's correct, sir, I agree with  
12 that. But certainly, the basis of the court of appeals's  
13 opinion, again as they call it the dispositive issue, the  
14 reasoning that follows certainly assumes that the petitioner  
15 has invoked presumptively valid state judicial proceedings.  
16 There's no question about that.

17 QUESTION: Mr. Haskins, in your brief you -- I  
18 think you do anyway -- you disavow the rationale of the  
19 court of appeals. Do you adhere to that position here?

20 MR. HASKINS: Yes, sir. Justice Blackmun, our  
21 position is -- and I think the position of the court of  
22 appeals is, following up Justice Stevens' question -- that  
23 state action and acting under color of law are not the same  
24 thing. If state action is all that was involved, certainly  
25 the state of Virginia in this case, through the actions of

1 the clerk and through the actions of the sheriff who issued  
2 the attachment and levied the attachment, certainly there  
3 was state action.

4           Now, the question is where the state judicial  
5 proceedings are presumptively valid, as in this case, as the  
6 court of appeals stated, where there is no even insinuation  
7 that the clerk and the sheriff did anything wrong, anything  
8 out of the ordinary, in fact the petitioner clearly states  
9 that they acted only according to law -- he states that in  
10 the statement of facts to the brief on the merits in this  
11 Court. The question then, as the court of appeals  
12 formulated it, is granted there's state action; but for  
13 purposes of a 1983 action, is that action under color of  
14 state law to sustain a complaint filed under the 1983  
15 section. And of course, the court of appeals, and I think  
16 properly so, held that it was not.

17           Now, Justice Blackmun, I don't agree -- or I think  
18 probably the language of the court of appeals may be too  
19 severe to say that in a 1983 action, the plaintiff has got  
20 to show corruption of the state official in such a manner  
21 that it, in effect, reduces the state's power to a joint  
22 concert and joint action between the private defendant.

23           I think --

24           QUESTION: Mr. Haskins, it's obvious that there is  
25 some confusion as the case progressed through the courts,



1 and perhaps further questioning is not a satisfactory way of  
2 resolving it, but what do you make of the pen ultimate  
3 paragraph of the footnote 1 of the court of appeals on page  
4 44 where they say, "As will appear, it has not been  
5 necessary in our disposition of the appeal to address the  
6 question of whether the property seizure was  
7 constitutionally invalid on either ground. We therefore note  
8 this confusion only to observe that had the challenge been  
9 limited to a claim of unconstitutional application of the  
10 statute in the course of the state attachment proceeding, we  
11 would have had a clear alternative basis for affirmance of  
12 the dismissal. It is well settled that no cause of action  
13 lies under Section 1983 to redress deprivations of  
14 procedural due process occurring during state court  
15 litigation between private parties."

16 MR. HASKINS: Yes, sir? What is my reaction to  
17 that?

18 QUESTION: Yes.

19 MR. HASKINS: I think what the court of appeals is  
20 saying, Justice Rehnquist, as pointed out by Justice Stevens  
21 in his dissent to Flagg Brothers, that a petitioner, if what  
22 he is saying is simply that the clerk or the sheriff in  
23 issuing or levying the attachment, that there were just  
24 certain procedural defects in the Virginia law, certainly  
25 that would provide an alternative basis for dismissal of the

1 complaint.

2           To have any sort of challenge, again to paraphrase  
3 Justice Stevens' dissent in the Flagg Brothers case, for a  
4 jurisdictional basis of 1983, there has to be a challenge to  
5 the constitutionality of the statute itself.

6           As I read all of the cases, Fuentes, Sniadach,  
7 North Georgia Finishing, Mitchell v. Grant, in each of these  
8 cases there's been an unquestioned constitutional attack on  
9 the statute itself in order to give the required state  
10 action or acting under color of state law.

11           QUESTION: Well, Mr. Haskins, I gather from the  
12 citations in that footnote that my brother Rehnquist  
13 referred to, there's no decision of this Court that no cause  
14 of action lies under 1983 to address deprivations of  
15 procedural due process. And those citations indicate that  
16 the circuits are in conflict over it. That the Fifth and  
17 Second so hold, perhaps also the Tenth, but the First  
18 apparently -- note the "But see Kermit" -- apparently goes  
19 the other way.

20           MR. HASKINS: Yes, sir. But I think these  
21 circuits are in conflict. Justice Brennan, in regard to the  
22 opinions of the circuit court of appeals which the  
23 petitioner has cited in his brief, -- there are some five or  
24 six from the various circuits throughout the country --  
25 again, in each of these cases as well as the cases that I've

1 mentioned by this Court, each case involves a direct  
2 challenge to the constitutionality of a state statute.

3 QUESTION: Not a procedural default --

4 MR. HASKINS: Rights through the substance of the  
5 statute itself. That, in our opinion, sir, is what is  
6 lacking in this case as far as giving the district court any  
7 jurisdiction under 1983.

8 QUESTION: Again, though, apparently court of  
9 appeals, as Justice Stevens suggested earlier to Mr.  
10 Haskins, going on with that footnote 1, "Therefore  
11 constitute this complaint as a constitutional challenge to  
12 the statute itself", and not merely a procedural default.  
13 Did they not?

14 MR. HASKINS: Again, I will try to respond to  
15 Justice Stevens. I think that is somewhat in conflict with  
16 the statement on page 53 of the issue they framed. They  
17 definitely assumed on page 53 of the Petition for Writ of  
18 Certiorari, that the statute was certainly presumptively  
19 valid. And the judicial proceedings were valid --

20 QUESTION: But really, all that means is that if  
21 you get to the merits of the statute, the burden is on the  
22 person challenging the statute to overcome the presumption  
23 of validity. That's all that means.

24 MR. HASKINS: Well, I think it could mean this  
25 also, Justice Stevens. Of course, this case was dismissed

1 on the complaint for lack of any federal jurisdiction under  
2 1983. What they are saying, as I understand it, due to the  
3 petitioner's constant disavowal that he is making any attack  
4 on the Virginia statutes, we must therefore assume the  
5 statute is valid.

6 QUESTION: Well, if that's true you don't have to  
7 worry about state action or anything else. They wouldn't  
8 have written this long opinion if that was their rationale.  
9 I think he's saying it's presumptively a valid statute and  
10 therefore, you've got to have something more than the action  
11 of the clerk and the sheriff in order to say that it was a  
12 deprivation by the state. And that is that half of the  
13 two-pronged inquiry.

14 MR. HASKINS: Well, I think this. That you can  
15 assume the Virginia statute is valid, and you can assume, as  
16 the court of appeals points out, that there is state action  
17 involved by the Virginia court clerk and the Virginia  
18 sheriff. Now, that does not mean or does not necessarily  
19 preclude that the defendants, the respondents, were not  
20 acting under color of state law if some way there was some  
21 sort of concerted action between as they call him the  
22 private actor/respondent, Edmondson Oil and Mr. Barbour,  
23 with a state official.

24 The statute can be perfectly valid, and they say  
25 that we assume it's a valid statute. We assume that there



1 is state action. There's no question there was state  
2 action. But a 1983 action requires a third element, and  
3 that element is that the private respondent act under color  
4 of state law to deprive the petitioner of a federal  
5 constitutional right.

6 QUESTION: That's like analyzing the case in terms  
7 of the bribery of the judge in that case.

8 MR. HASKINS: In Dennis v. Sparks.

9 QUESTION: That would be one theory and they  
10 reject that theory. But I really don't think it's a fair  
11 reading of the complaint to say that he has alleged that  
12 kind of corruption in this case.

13 It seems to me, given the gloss that the court of  
14 appeals puts on it in its footnotes, it seems to me we  
15 should analyze the case as though he made a clearcut attack  
16 on the constitutionality of the statute. And then ask on  
17 that assumption, is there sufficient state involvement.

18 QUESTION: And shouldn't we also ask as to whether  
19 the court was proper in denying a motion to abstain?

20 MR. HASKINS: Yes, sir. I think under this  
21 Court's decision in Carey v. Sugar, the New York case, that  
22 if the constitutionality of the Virginia statute, the  
23 substantive constitutionality is to be challenged, then the  
24 district court should have abstained and this case should  
25 have been referred back or dismissed --

1 QUESTION: Why should he abstain? There's no  
2 ambiguity in the Virginia statute, is there?

3 MR. HASKINS: No, sir, I don't think there's any  
4 ambiguity in it. I think the Virginia statute, as far as --

5 QUESTION: Why would he abstain then? I don't  
6 understand.

7 MR. HASKINS: Well, he did not abstain, sir.

8 QUESTION: I know, but you're suggesting now that  
9 he should have.

10 MR. HASKINS: No, I thought Justice Rehnquist said  
11 if the constitutionality of the statute was an issue. Of  
12 course, when that issue came up, the petitioner clearly  
13 wrote the district court a memorandum saying he was not  
14 challenging the constitutionality, so what else could he  
15 do? In the trial if the man says this is not an issue,  
16 Judge, I'm not challenging the statute --

17 QUESTION: Once again, give the case of this Court  
18 that said that in order to maintain an action under 1983,  
19 you must attack the statute.

20 MR. HASKINS: I don't know of any case that says  
21 that, Justice Marshall.

22 QUESTION: Well, isn't that your point?

23 MR. HASKINS: No, sir. My point is this: in  
24 order to maintain a 1983 action, you have got to file a  
25 complaint that states in some way clearly that the state has

1 deprived the petitioner of a federal constitutional right.  
2 In this case, if there's no --  
3 QUESTION: Cite me a case that says that. Because  
4 1983 --  
5 MR. HASKINS: I think Flagg Brothers says that. I  
6 think --  
7 QUESTION: Well, quote it to me, let me see it.  
8 MR. HASKINS: On page 6 of my brief, the red  
9 brief, Justice Marshall, "A plaintiff must meet two  
10 requirements to show a valid cause of action under 1983..."  
11 and this, of course, is from Flagg Brothers. "The  
12 deprivation --"  
13 QUESTION: I don't see any quote on this page at  
14 all.  
15 MR. HASKINS: Well, this is what Flagg Brother  
16 says.  
17 QUESTION: Well, I asked for the quote.  
18 QUESTION: Well, with all respect to my colleague,  
19 Justice Marshall --  
20 QUESTION: Well, with all due respect to you, I  
21 have a right to ask the question.  
22 QUESTION: Well, with all respect to you, I was  
23 just going to suggest that certainly, the requirement --  
24 QUESTION: Go right ahead, I don't want to delay  
25 anything.

1 QUESTION: -- that the constitutional issue be  
2 raised --

3 QUESTION: If he doesn't want to convince me, it's  
4 all right.

5 QUESTION: And you're suggesting I won't either.

6 (Laughter.)

7 -- at its earliest possible moment and preserved  
8 throughout, doesn't date from Flagg Brothers. It dates from  
9 cases like Holbrook v. Chicago and cases that go back to the  
10 nineties and eighties, it is my recollection.

11 MR. HASKINS: Yes, sir, correct, sir. This just  
12 came to mind. Justice Marshall, I do have the direct  
13 quote. It's on page 436 of the U.S. Reports, page 157, and  
14 the quote is this: "A claim upon which relief may be  
15 granted to respondents against Flagg Brothers under 1983  
16 must embody at least two elements. Respondents are first  
17 bound to show that they have been deprived of a right  
18 secured by the Constitution and the laws of the United  
19 States. They must secondly show that Flagg Brothers  
20 deprived them of this right acting under color of any  
21 statute of the state of New York."

22 And in footnote 4, Justice Rehnquist said on the  
23 same page, "Even if there is state action..." -- and I think  
24 this hits the nail on the head in this case -- "...the  
25 ultimate inquiry in a Fourteenth Amendment case is of course



1 whether that action constitutes a denial or deprivation by  
2 the state of rights that the amendment protects."

3 I think clearly, the petitioner in this case is  
4 basically alleging deprivation of his property by these  
5 malicious creditors, the respondents, not by the state of  
6 Virginia. And for that reason, I think the district court  
7 and the court of appeals was correct in dismissing this  
8 complaint for lack of any 1983 jurisdiction. Thank you.

9 CHIEF JUSTICE BURGER: Do you have anything  
10 further, Mr. Morrison?

11 ORAL ARGUMENT OF ROBERT L. MORRISON, JR., ESQ.

12 ON BEHALF OF THE PETITIONER -- Rebuttal

13 MR. MORRISON: Yes, Your Honor. To address the  
14 last point made by Mr. Haskins first, I would submit to the  
15 Court that the complaint clearly states what the plaintiff  
16 alleges; that the creditors maliciously and jointly with the  
17 state deprived him of his rights. And that's what is  
18 alleged.

19 The Flagg Brothers opinion in footnote 10  
20 specifically accepts that from the effect of that opinion,  
21 the pre-judgment seizure cases which this Court has decided  
22 in Fuentes, Lynch, Sniadach, North Georgia Finishing and in  
23 Mitchell.

24 QUESTION: Mr. Morrison, you don't quarrel with  
25 the proposition, do you, that if one is attacking the

1 constitutionality of a state statute, that issue must be  
2 raised at its earliest possible moment and preserved  
3 throughout the case?

4 MR. MORRISON: I think the issue has to be raised  
5 when the complaint is filed, Your Honor.

6 QUESTION: And preserved?

7 MR. MORRISON: Preserved as best possible. As I  
8 have said to the Court, the problem in the district court  
9 and in the court of appeals rose from perhaps my  
10 misapprehension of the holding in *Monroe v. Pathe* among  
11 others that action taken because of state authority and  
12 power, whether or not legal under state law, still amounts  
13 to state action under color of state law because the state's  
14 power and authority is what makes the act possible.

15 And that is exactly what has happened here. The  
16 state's power and authority is what has made the deprivation  
17 possible; not the individual acts of the private defendants,  
18 taken outside of the context of the state. The state  
19 provided -- and under the decisions of this Court in  
20 *Fuentes*, the state statute effectively abdicates its  
21 control. The state provided --

22 QUESTION: Mr. Morrison, let me put it another  
23 way. Could either have done it alone?

24 MR. MORRISON: Could the state hve done it alone?  
25 The state could have done it alone if the state had the

1 necessary pressing reasons that this Court has found in  
2 cases relating to health or drugs or cases like --

3 QUESTION: This whole thing wouldn't have happened  
4 without the filing with the clerk.

5 MR. MORRISON: No, sir. It took them both to do  
6 it.

7 QUESTION: Exactly.

8 MR. MORRISON: It took them both to do it, and the  
9 creditor could not have done it by itself without being  
10 subject to criminal penalties, because it had no self- --

11 QUESTION: Well, the state wouldn't grant a  
12 divorce, presumably, if no one asked it to.

13 MR. MORRISON: Yes, Your Honor, I concede the  
14 point. But the thing is that when the state grants a  
15 divorce, it does so after a hearing. It does so as a  
16 neutral arbiter. That's what is lacking here.

17 The state does not act as a neutral arbiter; the  
18 state comes in and immediately takes sides and freezes one  
19 man's complete livelihood and assets. And does it under  
20 color of state law.

21 The creditor here acted with knowledge of the  
22 statute and with intent to take advantage of it, as this  
23 Court has found to be a requirement. And he took advantage  
24 of it, and Mr. Lugar's assets --

25 QUESTION: And certainly a divorce claimant or

1 anybody else invoking the judicial process of the state, if  
2 he's trained in the law, is presumably invoking some state  
3 procedure that is recognized by the courts of that state.

4 MR. MORRISON: Yes, sir, I have no quarrel with  
5 that.

6 I would also like to address the point that was  
7 discussed by Mr. Haskins concerning presumed validity of  
8 state judicial proceedings. As I understand it, any act by  
9 the legislature is presumptively valid, no matter what  
10 attack is made on it until proven otherwise. And I submit  
11 to the Court that Justice Stevens has hit the nail on the  
12 head there, that that is what the Fourth Circuit meant.  
13 That has been my understanding of the presumption of  
14 validity of legislative enactments.

15 If the Court has no further questions, that's all  
16 I have.

17 CHIEF JUSTICE BURGER: Thank you, gentlemen, the  
18 case is submitted.

19 (Whereupon, at 11:55 a.m., the oral argument in  
20 the above-entitled matter ceased.)

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CERTIFICATION

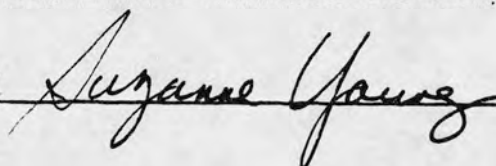
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GILES M. LUGAR, vs. EDMONDSON OIL COMPANY, INC. AND RONALD L. BARBOUR  
NO. 80-1730

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