

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: EDWARD SOLDAL, ET UX., Petitioners

v. COOK COUNTY, ILLINOIS

CASE NO: 91-6516

PLACE: Washington, D.C.

DATE: October 5, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EDWARD SOLDAL, ET UX., :

4 Petitioners :

5 v. : No. 91-6516

6 COOK COUNTY, ILLINOIS :

7 - - - - - X

8 Washington, D.C.

9 Monday, October 5, 1992

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 1:00 p.m.

13 APPEARANCES:

14 JOHN L. STAINTHORP, ESQ., Chicago, Illinois; on behalf of
15 the Petitioners.

16 KENNETH L. GILLIS, ESQ., First Assistant State's
17 Attorney, Chicago, Illinois; on behalf of the
18 Respondent.

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 91-6516, Edward Soldal v. Cook County,
5 Illinois.

6 Mr. Stainthorp.

7 ORAL ARGUMENT OF JOHN L. STAINTHORP

8 ON BEHALF OF THE PETITIONERS

9 MR. STAINTHORP: This case involves the issue of
10 whether the Fourth Amendment to the United States
11 Constitution protects the law abiding against unreasonable
12 seizure of their home and effects by state officers. If
13 we look at the history of the enactment of the Fourth
14 Amendment and the historical events that gave rise to its
15 enactment over 200 years ago, if we look at the text of
16 the amendment itself, and if we look at the decisions of
17 this Court construing the Fourth Amendment, then the
18 answer is unequivocally yes, the Fourth Amendment does
19 apply in situations such as my clients' and a seizure
20 unaccompanied by a search must nevertheless satisfy the
21 Fourth Amendment's command that it be reasonable.

22 The Seventh Circuit decision from which this
23 petition for certiorari is taken is therefore wrong in
24 saying first of all that the law enforcement context of
25 the case is relevant in terms of whether the Fourth

1 Amendment applies, and also is wrong in saying that the
2 Fourth Amendment does not protect possessory interests of
3 persons, and also is wrong in saying that the Fourth, that
4 the privacy rights of my clients in this particular
5 situation were not violated.

6 QUESTION: You know just that the Fourth
7 Amendment protects possessory rights in a piece of
8 personal property just anywhere, do you?

9 MR. STAINTHORP: The Fourth Amendment would
10 protect possessory rights in the type of property which is
11 protected by the Fourth Amendment. Yes, that would be my
12 contention.

13 QUESTION: Let's assume the officers enter an
14 open field and run off with a mowing machine. Do you
15 think that's a Fourth Amendment violation?

16 MR. STAINTHORP: I think if that is a seizure --

17 QUESTION: Well, it's an effect, isn't it, and
18 it's a seizure.

19 MR. STAINTHORP: If it is a seizure, if it is an
20 effect, and if in fact that seizure is unreasonable, then
21 it would apply. And this Court has held that it would
22 apply in that situation in cases such as G.M. Leasing
23 where there was a seizure of cars that were on the public
24 street yet nevertheless that was analyzed as a possible
25 Fourth Amendment violation, conceptually no different than

1 the case that you are proposing here.

2 If you look at Jacobsen, United States against
3 Jacobsen, there you had seizure of a, what turned out to
4 be cocaine, an effect, and yet that was again analyzed as
5 a possible Fourth Amendment violation.

6 QUESTION: Well, there's no doubt that if you
7 seize something incident to an invasion of privacy in the
8 home or some other protected place like a car, why the
9 Fourth Amendment does, is implicated.

10 MR. STAINTHORP: But the point of those places
11 was that there was no invasion of privacy. In fact in
12 Jacobsen the court only got to the possible invasion of
13 possessory rights after concluding that there was no
14 invasion of privacy because of the involvement of, in that
15 case of the private parties and for various other reasons.

16 QUESTION: So a law enforcement officer walks up
17 to a person on the street, grabs his briefcase out of his
18 hand and walks off with it, and then gets a warrant to
19 open it?

20 MR. STAINTHORP: Yes.

21 QUESTION: And he had probable cause to have it
22 opened. But you think just seizing the briefcase on the
23 street is a Fourth Amendment violation?

24 MR. STAINTHORP: Yes. Yes, I do.

25 QUESTION: Even if it's never opened?

1 MR. STAINTHORP: Even if it is never opened
2 because this Court has consistently held that the Fourth
3 Amendment does protect possessory rights as well as in
4 addition to privacy rights. In many cases those two types
5 of rights are intertwined, as I submit they clearly were
6 in this particular situation. But a mere violation or a
7 sole violation of possessory rights brings the Fourth
8 Amendment into play.

9 If that is not so then the whole line of cases
10 of this Court which are known as the plain view seizure
11 cases make no sense.

12 QUESTION: But if that is so how do you explain
13 that there hasn't been, that this is the first time that a
14 case like this should have come up in a couple of hundred
15 years? I mean, sheriffs have been seizing and
16 repossessing goods since the beginning of the Republic and
17 we don't have a case in which it has been asserted there's
18 a violation of the Fourth Amendment. Why not?

19 MR. STAINTHORP: I think that's not accurate,
20 Justice Scalia.

21 QUESTION: Okay. Why not?

22 MR. STAINTHORP: Because the G.M. Leasing case,
23 which was a seizure for tax purposes, in that case by IRS
24 agents, did analyze the seizure itself, not any search but
25 the seizure itself as a possible Fourth Amendment

1 violation, held that it must satisfy the command of the
2 Fourth Amendment that it be reasonable and held eventually
3 that it was reasonable.

4 QUESTION: What was the date of that?

5 MR. STAINTHORP: The G.M. Leasing was --

6 QUESTION: 1977.

7 MR. STAINTHORP: Okay, 1977.

8 QUESTION: So it's not 200 years. 190 or --

9 MR. STAINTHORP: Well, Judge, I don't think
10 that's true too, either. Excuse me, Justice Scalia. In
11 fact if you look at the history as laid out in the, in my
12 brief, in my opening brief there is a consistent line of
13 cases which hold that the Fourth Amendment first of all is
14 applicable in a non-criminal context and is --

15 QUESTION: I'm talking about sheriff seizures.
16 These things have been going on all the time and very
17 often the person says no, that property was wrongly taken,
18 that they shouldn't have had it.

19 MR. STAINTHORP: Well, most --

20 QUESTION: I assume that there's a state remedy
21 and it seems to me the reason has probably been that there
22 is a state remedy for those seizures. If they are wrong
23 you'll get your money back, and therefore the state hasn't
24 taken anything without due process of law.

25 MR. STAINTHORP: And for that reason I have not

1 brought a procedural due process claim before this Court,
2 and it is a Fourth Amendment claim that is before this
3 Court and not a procedural due process claim.

4 QUESTION: How do you, how does the Fourth
5 Amendment apply to the states?

6 MR. STAINTHORP: Through the Fourteenth
7 Amendment.

8 QUESTION: Which reads --

9 MR. STAINTHORP: Which is due process.

10 QUESTION: -- no one shall be deprived of life,
11 liberty, or property without due process of law.

12 MR. STAINTHORP: Correct.

13 QUESTION: Right. So you are ultimately
14 bringing a due process claim before this Court.

15 MR. STAINTHORP: In that sense, but this Court
16 has always been clear that civil rights actions, there are
17 basically three types. There is, Zinermon points out that
18 there are actions based upon a violation of a substanded
19 provision of the Bill of Rights such as the Fourth
20 Amendment, actions based upon --

21 QUESTION: Which is what you're claiming here,
22 isn't it?

23 MR. STAINTHORP: Yes.

24 QUESTION: I mean, you're bringing an
25 incorporation argument, not a procedure argument. You're

1 claiming corporation due process.

2 MR. STAINTHORP: That is correct, Justice
3 Souter, yes. But that issue has really not been raised
4 about whether a Fourth Amendment claim is somehow nixed if
5 the state were in fact to provide some process for
6 violation of that right.

7 QUESTION: Well, should we address that question
8 here in answer to this case?

9 MR. STAINTHORP: Justice O'Connor, I really
10 think you have addressed it at great length in any number
11 of cases, from Monroe against Pape to more recently
12 Zinermon against Burch.

13 QUESTION: Well, the state in this instance does
14 give your client a civil damages action for the trespass,
15 I assume?

16 MR. STAINTHORP: That is correct. There's no
17 question about that.

18 QUESTION: So you could have filed that claim.
19 And why didn't you?

20 MR. STAINTHORP: I didn't because under Section
21 1983 the Congress has very clearly, in my view, given me a
22 Federal remedy for this type of action. I therefore
23 choose to have this Federal remedy.

24 QUESTION: Well, do you think that the action of
25 the officers was basically random and unauthorized in the

1 sense the court talked about in Parratt or Williamson
2 County?

3 MR. STAINTHORP: In terms of it not being
4 pursuant to an established state procedure?

5 QUESTION: Right.

6 MR. STAINTHORP: Yes. Yes, that is correct. In
7 fact there is a state procedure --

8 QUESTION: So perhaps then that's all the
9 process that is due.

10 MR. STAINTHORP: If I were bringing a procedural
11 due process claim that would be true.

12 QUESTION: But then you're making the law turn
13 just on the technicality of pleading. You create a gaping
14 hole in Parratt because it's just how you allege the
15 violation, and Parratt becomes pretty much a dead letter,
16 doesn't it?

17 MR. STAINTHORP: It doesn't at all, Justice
18 Kennedy, and if you look at the cases that have construed
19 Parratt, for instance if you look at Daniels against
20 Williams, where the prisoner slipped and fell, that
21 clearly would not, which was dismissed on Parratt grounds,
22 that clearly would not be a Fourth Amendment case. There
23 was no seizure that occurred in that case.

24 In the limited number of cases in which a
25 seizure within the Fourth Amendment has occurred the

1 existence of the possibility of state process has always
2 been held to be irrelevant and should be irrelevant
3 because the Fourth Amendment itself does not concentrate
4 on the process. The Fourth Amendment itself concentrates
5 on the seizure or the search itself. If that seizure or
6 search is termed unreasonable, then there is a violation
7 of the Fourth Amendment.

8 It does not create gaping holes in the Parratt
9 line of cases, which is a very precise holding in those
10 cases which is that when there is a procedural due process
11 case if the state gives post deprivation process then in
12 several instances that is all that you are entitled to.

13 QUESTION: But I take it the procedural
14 violation is necessarily hypothesized on some substantive
15 constitutional violation having occurred.

16 MR. STAINTHORP: Well, under a procedural due
17 process claim you would obviously have to show some
18 deprivation of life, liberty, or property. That is
19 certainly true. But when you're dealing with the much
20 narrower question of a Fourth Amendment violation which
21 deals only with searches and seizures and deals only with
22 searches and seizures of a small category of things,
23 persons, houses, papers, and effects, when you are dealing
24 with that there is no requirement that you, that you first
25 file in state court and find that you have no remedy in

1 state court or that your Federal remedy is diminished by
2 the existence of state remedies.

3 And indeed it really makes no sense that that
4 should be so. The Fourth Amendment itself has no
5 provision which in itself provides for there must be
6 process. The Fourth Amendment looks to a seizure. It
7 doesn't look to process. And it looks to whether that
8 seizure or search is reasonable.

9 So -- and then if you look at Section 1983,
10 through which obviously I am seeking to vindicate the
11 Fourth Amendment rights of my client, that also has no
12 provision that it is applicable only in the absence of a
13 state remedy.

14 QUESTION: That's what Monroe v. Pape held,
15 wasn't it?

16 MR. STAINTHORP: Yes it was, Chief Justice.

17 QUESTION: But that dealt with a statutory
18 question basically, not a constitutional one.

19 MR. STAINTHORP: Well, Monroe v. Pape was, my
20 understanding of Monroe v. Pape was that it was they were
21 alleging a Fourth and Fourteenth Amendment violation.

22 QUESTION: Yes. And I think the argument on the
23 other side was that since there were state remedies 1983
24 wasn't really apt, and then the court said no, that the
25 existence of state remedies doesn't prevent as a matter of

1 statutory construction the application of 1983. You don't
2 have to exhaust.

3 MR. STAINTHORP: That is correct, Chief Justice.
4 So certainly with respect to the, yes, the interpretation
5 of 1983, there is no such provision.

6 QUESTION: But 1983 doesn't create any
7 substantive rights and so there was a Fourth Amendment,
8 was that the basis there?

9 MR. STAINTHORP: Monroe v. Pape I think alleged
10 both Fourth and Fourteenth, although I'm not going to
11 swear to that.

12 QUESTION: Yes.

13 QUESTION: Well, the Fourth was there.

14 MR. STAINTHORP: Yeah. As it is here.

15 QUESTION: And of course if the Fourth, if the
16 Fourth Amendment required first resort to state remedies
17 there wouldn't be a 1983 action.

18 MR. STAINTHORP: Well, that, for all practical
19 effects that would be true because in a vast majority of
20 situations where you have violations of civil rights that
21 also does amount in some sense to a violation of state
22 law. So yeah, if you had that provision in 1983 that it
23 was only operative if there was no state remedy, first of
24 all I would expect to find that in the wording of Section
25 1983 and it just isn't there, and secondly that would mean

1 that the vast majority of Section 1983 cases would not be,
2 you could not litigate them with Section 1983 cases.

3 But this Court has really consistently held that
4 that just is not the provision, as the Chief Justice
5 recognizes.

6 QUESTION: Yes, but the holding in Monroe
7 against Pape was a statutory one. It said 1983, as I
8 recall, 1983 does not require that before you resort to it
9 you must resort to state remedies that might have given
10 you the same relief.

11 MR. STAINTHORP: Okay.

12 QUESTION: But 1983 did not, rather Monroe
13 against Pape did not address the contours of the Fourth
14 Amendment.

15 MR. STAINTHORP: Yes, I understand the
16 distinction that you're making there. If however you look
17 at the Parratt, the Daniels, that line of cases, Zinermon
18 against Burch, the Court has been quite clear that there
19 is, for a Fourth Amendment violation the existence of
20 possible state remedies is generally irrelevant. And once
21 more that makes a lot of sense because how can a state
22 statute authorize a violation of the Constitution? How
23 can a, the existence of a state statute make
24 retrospectively a constitutional violation okay? It
25 can't. The only --

1 QUESTION: Well, in Parratt, in that line of
2 cases, and Hudson against Palmer, tend to cut against that
3 argument, perhaps in a rather limited field.

4 MR. STAINTHORP: Well, they cut against that
5 argument in a procedural due process case, there's no
6 question about that, and set forth that in such a case
7 post deprivation process may be all the process to which a
8 person is due.

9 QUESTION: But that just means there's no
10 constitutional violation. There's no violation of
11 procedural due process if due process is provided, whether
12 it's before or after the deprivation.

13 MR. STAINTHORP: That's correct. But there's
14 all the difference in the world between that case, where
15 you are attacking the process and whether or not you are
16 given process, and this case, where you are attacking the
17 seizure itself of a home, a home which comes within the
18 express wording of the Fourth Amendment, which is given
19 heightened protection by the Fourth Amendment.

20 QUESTION: Are you just, are you basing your
21 primary argument on the fact that this was a seizure of
22 property which would qualify as an effect or as of a
23 house? Just property?

24 MR. STAINTHORP: No. House. It's house and
25 effect, but I think --

1 QUESTION: Well, I know, but house and effects,
2 they're all property. They're all property.

3 MR. STAINTHORP: That's correct.

4 QUESTION: Are you indicating there was any
5 invasion of privacy in this case?

6 MR. STAINTHORP: Yes. There was an invasion of
7 privacy if you view privacy as broader than secrecy, which
8 this Court has historically done.

9 QUESTION: Well, they got thrown out of their
10 house, didn't they?

11 MR. STAINTHORP: That's right. And their lives
12 were disrupted, they couldn't --

13 QUESTION: Isn't that a fairly egregious
14 invasion of privacy, to get thrown out of your own house?

15 MR. STAINTHORP: It always seemed to me, Justice
16 White, that it was.

17 QUESTION: So you don't need to really rely on
18 just the fact that this was a seizure of a piece of
19 property, do you?

20 MR. STAINTHORP: I don't need to rely on that
21 but I think I have an extremely strong case based upon
22 that also.

23 QUESTION: Is that your strongest? Is that your
24 strongest?

25 MR. STAINTHORP: I would say they're both

1 extremely strong. But I certainly rely upon the invasion
2 of privacy in here in disrupting these people's lives,
3 preventing them from living their everyday lives, making
4 them go live somewhere else --

5 QUESTION: And what did the Seventh Circuit say
6 about that aspect of the case?

7 MR. STAINTHORP: It said there was not an
8 invasion of privacy here, that this type of activity did
9 not invade the privacy because it didn't invade my
10 clients' secrecy. And there's no question, I'm not saying
11 that anyone looked into the trailer home or did this as
12 part of an investigation. That is not part of my case.
13 I'm quite clear that this was an invasion of privacy
14 because it disrupted their life, because it prevented them
15 from pursuing their lawful activities. And certainly this
16 Court has previously held --

17 QUESTION: When somebody stops me from doing a
18 lawful activity do I say you're invading my privacy?

19 MR. STAINTHORP: In certain situations --

20 QUESTION: I mean, I don't know what that, that
21 doesn't mean anything to me unless by privacy you mean the
22 right to be let alone, I suppose, and then everything
23 invades the right of privacy.

24 MR. STAINTHORP: And this Court has analyzed and
25 defined the right of privacy in much narrower terms than

1 that, notably in United States against Place where it held
2 that the detention of baggage for 90 minutes was an
3 invasion of privacy of the defendant in that case. So,
4 no, I'm not saying that any, any involvement or any
5 disruption of lawful activities is an invasion of privacy.

6 In the fact situation here, however, the prior
7 holdings of this case and I would submit the history of
8 the Fourth Amendment and the words of the Fourth Amendment
9 would say that there is such an invasion in this
10 situation. That is it's an extremely grievous --

11 QUESTION: The words of the First Amendment
12 don't say anything about invasion of privacy, do they?
13 They say search or seizure.

14 MR. STAINTHORP: And they also say secure. And they
15 don't say a right not to be arrested, but they say the
16 right of the people to be secure in their persons, houses,
17 papers, and effects. And it is certainly my contention
18 here that the action of the sheriff's police in throwing
19 them out of their house and making them move to a motel
20 for several days, disrupting their life, was a great
21 violation of their right to be secure.

22 In terms of whether or not that disruption, that
23 invasion of their privacy was reasonable or not, that
24 isn't before the Court at this time.

25 QUESTION: It doesn't say secure from

1 everything. It says secure from unreasonable searches and
2 seizures, right?

3 MR. STAINTHORP: That's correct.

4 QUESTION: And you say this is a seizure, which
5 makes sense to me.

6 MR. STAINTHORP: Okay. So my argument obviously
7 then is that I come right down the middle on the Fourth
8 Amendment, that this, the language of the Fourth Amendment
9 applies precisely to this type of situation, and that if
10 you look at the history of the Fourth Amendment -- what
11 was the history of the Fourth Amendment? It wasn't
12 criminal investigations that gave rise to the Fourth
13 Amendment. To a large extent it was writs of assistance
14 and it was revenue offices going out and seizing
15 uncustomed goods, I think notably cider, and taking it
16 away. And as my reply brief points out, those seizures
17 did not occur in the context of an arrest of the person
18 involved.

19 So in fact my situation here is very analogous
20 to the history that gave rise to the enactment of the
21 Fourth Amendment. So it's not, it's not some extension of
22 the Fourth Amendment that was un contemplated by history.
23 It's not some extension of the Fourth Amendment that was
24 un contemplated by the words of the Fourth Amendment. I
25 come right down the middle of the Fourth Amendment. And

1 also it is not an extension in view of this Court's prior
2 holdings. And the decision of the Seventh Circuit is a
3 very marked departure from the prior holdings of this
4 Court.

5 QUESTION: Do you agree with the Seventh
6 Circuit's analysis on the takings issue? Was this a
7 taking in your view?

8 MR. STAINTHORP: I don't think it was a taking
9 because it -- and certainly I didn't plead that in the
10 complaint. I think it wasn't a taking.

11 QUESTION: Your pleading was confined to the
12 Fourth Amendment aspect of the case?

13 MR. STAINTHORP: No, my pleading, my original --

14 QUESTION: You pled a conspiracy to deprive of
15 property, didn't you?

16 MR. STAINTHORP: I'm sorry, I couldn't hear.

17 QUESTION: You pled a conspiracy to deprive of
18 property, didn't you?

19 MR. STAINTHORP: Well, no, I don't think in so
20 many words. I pled violations of the Fourth and
21 Fourteenth Amendments and alleged that it was an
22 unreasonable seizure. I also alleged that it was a
23 violation of substantive due process. I believe the
24 original complaint alleged a violation of procedural due
25 process, but that, I did not pursue that claim in light of

1 this Court's --

2 QUESTION: Would a taking in violation of the
3 takings clause be a substantive due process violation
4 under the Fourteenth Amendment?

5 MR. STAINTHORP: Judge, I really don't --
6 Justice, I really don't feel equipped to answer that
7 question. That was not a part of my lawsuit here. It's
8 not a part of my complaint and not part of the
9 constitutional violation that I pled, that I pursued in
10 front of the Seventh Circuit or in this Court. The
11 constitutional violations that I have pursued are
12 primarily a Fourth Amendment seizure.

13 And you are correct, the Seventh Circuit did
14 discuss whether it was a takings. It always appeared to
15 me that the problem with that was that it was not a taking
16 by Government for its own purpose.

17 QUESTION: If the Government demolishes a house
18 and puts a public school on it, but without compensating,
19 is that a seizure?

20 MR. STAINTHORP: Is that a seizure? I think in
21 certain situations that might be a seizure, yes. That
22 certainly could be. But historically that, my
23 understanding, has usually been analyzed as under the
24 takings clause.

25 QUESTION: And under the takings clause your

1 remedy is an action for inverse condemnation usually. I
2 don't know the remedies in Illinois, but certainly under
3 the Federal system. Under your theory could a person
4 bring a Fourth Amendment action to recover damages for
5 what is basically an inverse condemnation?

6 MR. STAINTHORP: If there were a, what could be
7 construed as a seizure, and if that seizure was
8 unreasonable, yes, I think it could be.

9 QUESTION: Well then you really are broadening
10 the Fourth Amendment considerably because there's a whole
11 class of cases where some agent of the Government goes out
12 and purports to take or occupy private property that
13 really he wasn't authorized to do. And those things have
14 been traditionally recompensed by inverse condemnation.
15 If a Fourth Amendment action is available to vindicate
16 that, that's a use of the Fourth Amendment we haven't seen
17 before.

18 MR. STAINTHORP: Yeah, well, I think you would
19 need to look at whether the taking itself was, came within
20 the definition of a seizure, and then look at whether the
21 seizure was unreasonable.

22 QUESTION: I don't know why you would have to
23 proceed in that order. Why don't you ask, why can't we
24 ask first whether or not it's a taking, indicating that
25 takings are usually exclusive of seizures, particularly

1 because it's not for a law enforcement or investigative
2 purpose? It's to exercise the rights that an owner
3 generally exercises, which it seems to me is what's
4 happening here.

5 MR. STAINTHORP: Well, this is not a taking for
6 a governmental purpose. This shares more of the
7 attributes of a seizure in the course of some kind of law
8 enforcement work by these agencies. Certainly that's the
9 way they perceived it. But the fact that it was not --
10 that is the way that the sheriffs perceived it. The fact
11 that it was not in the course of a criminal law
12 enforcement should not serve to bar the Fourth Amendment
13 from this, and this particular seizure has much more in
14 common with those, that type of activity by the
15 governmental agency.

16 QUESTION: We take this case on the hypothesis
17 that the sheriff stands in the shoes of the trailer park
18 owner.

19 MR. STAINTHORP: Correct, Judge. Justice,
20 excuse me.

21 QUESTION: If this had been a state run trailer
22 park and the sheriff had wrongfully evicted and removed
23 the trailer pad wouldn't you say that that was a taking?

24 MR. STAINTHORP: If it -- no. If it had
25 occurred in this type of context, wherein there was a

1 towing away of the trailer, it seems to me that it should
2 be more aptly analyzed as a Fourth Amendment seizure and
3 fits very firmly within that line of cases.

4 QUESTION: But why? What is, I guess I'm not
5 following you in the sense of understanding what your
6 criterion is. How do you think we should distinguish in a
7 doubtful case between a compensable taking under the Fifth
8 Amendment and a seizure under the Fourth?

9 MR. STAINTHORP: Certainly one thing to look at
10 would be whether the taking was for the, for a
11 governmental purpose. Like if the Government was taking
12 it for their own purpose that would seem to fit more
13 accurately within the taking line of cases.

14 QUESTION: When the Government takes evidence it
15 is taking it for its own purpose. Or do you mean its own
16 purpose in the sense of as a property user?

17 MR. STAINTHORP: Yes, more the latter.

18 QUESTION: Well, what do you do then in this
19 case? The Government was not taking it as a property
20 user, and the Government wasn't taking it as evidence or
21 as contraband either. I mean, it doesn't fit neatly in
22 any category.

23 MR. STAINTHORP: Well, it does fit within the
24 line of cases that say that the non-criminal context of a
25 seizure is irrelevant to whether the Fourth Amendment

1 applies, and also the fact, as this Court held in O'Connor
2 against Ortega, the non-investigatory context of the
3 seizure is irrelevant in terms of the application of the
4 Fourth Amendment.

5 QUESTION: Well, I'll grant you that, which gets
6 you to the point in effect of demonstrating that there is
7 nothing in the purpose, in the civil nature of this that
8 precludes a Fourth Amendment application, but it doesn't
9 get to the point of saying how do we distinguish between a
10 case appropriately brought under the Fourth Amendment and
11 one that should be brought under the Fifth for
12 compensation.

13 MR. STAINTHORP: Yeah, then I am left with the
14 distinction that I drew initially there, that if it was
15 for the Government to actually do something with the
16 trailer or in some way convert it into something for their
17 own use, then it would appear that the takings clause
18 would be more appropriate.

19 QUESTION: But why does it have to --

20 QUESTION: It's fair to say then that you
21 neither pled below nor contend here that there was a
22 taking?

23 MR. STAINTHORP: Correct. Yes, that is correct,
24 Justice Kennedy.

25 QUESTION: Why does it have to fall into one or

1 the other?

2 MR. STAINTHORP: Why couldn't it fall into both?

3 QUESTION: You concede that it cannot fall into
4 both?

5 MR. STAINTHORP: No, I don't concede that at
6 all. In fact it seems to me that there are several cases
7 where this Court has analyzed actions under several
8 possible constitutional provisions, and it seems to me it
9 could certainly fall under both. I had pled it and
10 litigated it as a Fourth Amendment claim in that it
11 appeared to be very precisely within that amendment.

12 Mr. Chief Justice, if I have any time remaining
13 could I reserve it?

14 QUESTION: Yes, Mr. Stainthorp.

15 MR. STAINTHORP: Thank you.

16 QUESTION: Mr. Gillis, we'll hear from you.

17 ORAL ARGUMENT OF KENNETH L. GILLIS

18 ON BEHALF OF THE RESPONDENT

19 MR. GILLIS: Thank you, Mr. Chief Justice, and
20 may it please the Court:

21 The county officers here do not waive their
22 state action argument. On that the trial judge found that
23 there was no evidence of conspiracy and dismissed the
24 lawsuit on that basis. However, we move onto the issues
25 that have been --

1 QUESTION: (Inaudible) thought there was plenty
2 of state action?

3 MR. GILLIS: They advanced a number, I think two
4 or three positions. One, they said that they would look
5 at light, in the best light favorable to the petitioners
6 here, which I think is the standard --

7 QUESTION: Well anyway they didn't decide the
8 case on the basis that there was not state action?

9 MR. GILLIS: That's right. Under one theme or
10 another they went, they assumed there was state action and
11 then went to the issue of whether the Fourth Amendment is
12 implicated by the conduct here and secondly whether there
13 was a violation of the due process clause.

14 We believe that the Fourth Amendment, protecting
15 liberty and privacy interests, was not implicated by what
16 occurred here. The --

17 QUESTION: How about its protection of property?

18 MR. GILLIS: The Fourth Amendment's protection
19 of property?

20 QUESTION: Yes.

21 MR. GILLIS: We do not think the Fourth
22 Amendment protects basic property interests. The Katz
23 decision states that those interests are largely to be
24 left to the states. Here there is an adequate state
25 remedy.

1 QUESTION: So that seizure basically is a dead
2 letter unless it's accompanied by a privacy violation on
3 your view?

4 MR. GILLIS: Yes.

5 QUESTION: To me it's one thing to say that, as
6 we have in Katz and later cases, that a violation of
7 privacy constitutes a search and a seizure, or a seizure,
8 even if there isn't any physical violation of property
9 rights. But it's quite another proposition to say that
10 when there is a violation of property rights there is not
11 a search and seizure, that privacy, in other words an
12 invasion of privacy is an essential condition for a
13 violation of the Fourth Amendment. We have never said
14 that before, have we?

15 MR. GILLIS: I admit that to put any type of
16 ceiling on that conduct would be risky, but on the facts
17 we have here where there is no prying or snooping,
18 invading or inspecting, we think the Fourth Amendment is
19 not involved. It may be difficult to say --

20 QUESTION: Well, what about the classic English
21 case challenging general warrants, which is what this
22 provision of our Constitution was all about, was a case
23 alleging trespass, a violation of property interests. I
24 don't know how you can say that mere violation of property
25 interest has nothing to do with the Fourth Amendment.

1 It's its whole background.

2 MR. GILLIS: I think it was trespass to gain
3 information that should be kept private, that persons have
4 a right to keep private. If it were just merely --

5 QUESTION: Yes, but that was no part of the old
6 trespass action, was it?

7 MR. GILLIS: I'm sorry.

8 QUESTION: That was no -- I mean the intention
9 to gain information was not part of the cause of action in
10 Entick and Carrington, and there's no indication that that
11 was, that that policy was somehow narrowed when the Fourth
12 Amendment got adopted, was there?

13 MR. GILLIS: I think you have to look at the
14 objective acts of the police officers or sheriffs. Did
15 they go there with an intent to gain evidence in some
16 broad sense to use against the house holder? And I say
17 broad sense, I mean to include the health cases like
18 Camara v. Municipal Court and Yee v. Seattle, as well as
19 the more typical law enforcement case. But I think in
20 each instance the Fourth Amendment is protecting the --

21 QUESTION: Mr. Gillis, could I give you an -- we
22 had an argument this morning arising out of a drug seizure
23 in that the law enforcement agency took possession of a
24 home that had been purchased with the proceeds of,
25 allegedly, of drug transactions. Supposing you had a

1 yacht sitting in a harbor that was just bought with
2 proceeds of crime and the Government wanted to go out and
3 seize it to forfeit, and forfeit it. Would you say there
4 was a seizure or not when they go on board and take over
5 the boat?

6 MR. GILLIS: I think that could be a Fourth
7 Amendment seizure if the Government is following through
8 on some interest. The early Fourth Amendment cases
9 substantiate that.

10 QUESTION: Even though there is no criminal
11 proceeding, just that it's the proceeds of criminal
12 conduct?

13 MR. GILLIS: I think that it, the Fourth
14 Amendment should not be limited to the strict --

15 QUESTION: To evidentiary searches, right?

16 MR. GILLIS: Right. But it should be viewed
17 more in the sense of a Government end or a Government
18 mission.

19 QUESTION: So if this precise seizure we have in
20 this case, to use the colloquial term rather than the
21 constitutional term, had been for the purpose of
22 forfeiting the trailer you would agree that would have
23 been a seizure?

24 MR. GILLIS: Yes, or any typical police
25 activity.

1 QUESTION: So taking the trailer for the
2 Government to keep does constitute a Fourth Amendment
3 violation, but taking the trailer in order to give it back
4 to the, well, they're taking it to get it off of the
5 property --

6 MR. GILLIS: We think this is like the Cardwell
7 case where the police car was parked on the public lot and
8 then the police officers took paint scrapings from it and
9 used those. That was held not to be a search because
10 there was nothing about that that invaded the privacy. No
11 peeking within it, no inspecting it. The trailer here was
12 sitting in plain view. It was moved. No officer looked
13 inside it or attempted to introduce anything into evidence
14 in any type of proceeding.

15 QUESTION: They didn't succeed in carrying it
16 off either, did they?

17 MR. GILLIS: No, they -- it was moved
18 temporarily and given back to the petitioners in this
19 case.

20 QUESTION: Well, how was it moved? It was not
21 moved by mental telepathy or anything. They seized it and
22 moved it, didn't they?

23 MR. GILLIS: The trailer park people put a hook
24 on it with a tractor, moved it off on its wheels to a
25 nearby lot where it was kept safe.

1 QUESTION: Isn't the theory of this case and
2 wasn't the theory of the judgment below that it was in the
3 possession of the police officers, that they took
4 possession of it and moved it out of there?

5 MR. GILLIS: If you adopt the theory of the
6 Seventh Circuit it was temporarily in their possession,
7 but turned over again to the plaintiffs, unlike --

8 QUESTION: I understand, but it seems to me
9 that's at least a temporary seize. I mean, you know, if
10 words mean anything they seized it and moved it.

11 MR. GILLIS: I think you could, using the common
12 meaning of words it was a temporary seizure. But what, we
13 do not believe it was a Fourth Amendment seizure because
14 it doesn't implicate the purposes of the Fourth Amendment.

15 We also believe that this is not a violation of
16 the cases that this Court has handed down on substantive
17 due process. There is nothing about this activity that
18 was fulfilling any Illinois policy, and we think the case
19 cited by petition, Moore v. the City of East Cleveland, is
20 far from the situation here.

21 Illinois had an adequate remedy for this. In
22 its forcible detainer and entry act, an eviction that goes
23 ahead without a proper court order can be the subject of a
24 damage action. That remedy was always available, as was
25 pointed out earlier.

1 If there are no other questions we would ask
2 this honorable Court to affirm the conviction.

3 QUESTION: In Texas against Brown Justice
4 Stevens said that the Fourth Amendment protects two
5 interests of the citizen, the interest in retaining
6 possession of property and the interest in maintaining
7 personal privacy. You disagree with that?

8 MR. GILLIS: I think we do. We would say that
9 it should be --

10 QUESTION: You have to, I suppose.

11 MR. GILLIS: Yes. We contend it should be
12 limited to privacy interests and to liberty interests such
13 as those involved in United States v. Place.

14 QUESTION: Thank you -- excuse me. Have you got
15 something?

16 QUESTION: Horton against California, that was
17 something said by the court, wasn't it?

18 MR. GILLIS: Horton against California was the
19 search where they were, the search warrant said rings and
20 they also took guns.

21 QUESTION: Well, the court said the right to
22 security and person and property protected by the Fourth
23 Amendment may be invaded in quite different ways by
24 searches and seizures.

25 MR. GILLIS: Yes, we agree with that. But that,

1 the question is whether that involves cases where things
2 are moved and implicating just the property or possessory
3 interest rather than the typical motives behind the Fourth
4 Amendment.

5 QUESTION: Thank you, Mr. Gillis.

6 Mr. Stainthorp, you have 1 minute remaining.

7 REBUTTAL ARGUMENT OF JOHN L. STAINTHORP

8 ON BEHALF OF THE PETITIONERS

9 MR. STAINTHORP: Thank you, Your Honor, Mr.
10 Chief Justice.

11 The respondents have now acknowledged that this
12 was a seizure which occurred in this case but have held
13 that it was, but have argued to Your Honors that it was
14 not a Fourth Amendment seizure. This is a wholly
15 unnecessary gloss to put on the Fourth Amendment and the
16 type of gloss which has never been placed on the Fourth
17 Amendment before, that some seizures are Fourth Amendment
18 seizures, other seizures are not Fourth Amendment
19 seizures. And it will further complicate a lot of Fourth
20 Amendment litigation if this is allowed, if this kind of
21 differentiation is allowed to continue.

22 Clearly the seizure in this case did violate the
23 possessory interests that this Court has previously held
24 are protected by the Fourth Amendment, and I think equally
25 as clearly violated the privacy interests. Therefore we

1 would ask that the decision of the Seventh Circuit be
2 overturned and this case remanded for trial on whether it
3 was reasonable.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
5 Stainthorp.

6 The case is submitted.

7 (Whereupon, at 1:40 p.m., the case in the above-
8 entitled matter was submitted.)

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CERTIFICATION

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Edward Soldal, et ux., Petitioners v. Cook County, Illinois

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BY Ann Marie Federico

(REPORTER)