

The Burger Court Opinion Writing Database

Lugar v. Edmondson Oil Co.

457 U.S. 922 (1982)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

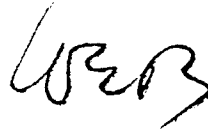
February 14, 1982

Re: 80-1730 - Lugar v. Edmondson Oil Co.

Dear Byron:

I voted to affirm in this case and that is there I am now. I will very likely join Lewis or possibly dissent separately.

Regards,



Justice White

Copies to the Conference

To: Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: The Chief Justice

Circulated: MAR 18 1982

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 80-1730

GILES M. LUGAR, PETITIONER, *v.* EDMONDSON OIL
 COMPANY, INC. AND RONALD L. BARBOUR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE FOURTH CIRCUIT

[March —, 1982]

CHIEF JUSTICE BURGER, dissenting.

I agree with JUSTICE POWELL in his analysis, but differ as to his interpretation of the pleadings in this case. Even a generous reading of petitioner's complaint cannot yield an allegation that respondent willfully and maliciously invoked a state procedure knowing that procedure to be unlawful under the Constitution and laws of the United States. Petitioner has cited no case in which the validity of the Virginia attachment statute was drawn into question. The "unlawful" actions on the part of respondent were no more than respondent's "conclusory allegations,"¹ respondent's absence of a "factual basis" for attachment,² and respondent's absence of "good cause to believe facts which would support" attachment.³

Even when "most generously construed," *ante*, at 10 (concurring opinion), these allegations do not remotely satisfy the "under color of law" requirement under *Adickes*. I would therefore affirm dismissal of petitioner's complaint.

¹Joint App. 5

²Joint App. 10

³Joint App. 19

To: Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **The Chief Justice**

Circulated: JUN 2 1982

Recirculated: h

all new
 1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1730

GILES M. LUGAR, PETITIONER *v.* EDMONDSON OIL
 COMPANY, INC. AND RONALD L. BARBOUR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE FOURTH CIRCUIT

[June —, 1982]

CHIEF JUSTICE BURGER, dissenting.

Whether we are dealing with suits under § 1983 or suits brought pursuant to the Fourteenth Amendment, in my view the inquiry is the same: is the claimed infringement of a federal right fairly attributable to the State. *Rendell-Baker v. Kohn*, No. 80-2102, Slip op. at 8. Applying this standard it cannot be said that the actions of the named respondent are fairly attributable to the State.* Respondent did no more than invoke a presumptively valid state prejudgment attachment procedure available to all. Relying on a dubious "but for" analysis, the Court erroneously concludes that the subsequent procedural steps taken by the State in attaching a putative debtor's property in some way transforms respondent's acts into actions of the State. This case is no different from the situation in which a private party commences a lawsuit and secures injunctive relief which, even if temporary, may cause significant injury to the defendant. Invoking a

* The pleadings in this case amply demonstrate that the challenged conduct was directed solely at respondent's acts. The unlawful actions alleged were that respondent made "conclusory allegations," joint app. at 5, respondent lacked a "factual basis" for attachment, joint app. at 10, and respondent lacked "good cause to believe facts which would support" attachment. Joint app. at 19. There is no allegation of collusion or conspiracy with state actors.

✓
 Supreme Court of the United States
 Washington, D. C. 20543

CHAMBERS OF
 JUSTICE Wm. J. BRENNAN, JR.

January 7, 1982.

No. 80-1730 -- Lugar v. Edmondson Oil Company.

Dear Byron,

Let me add mine to the tentative reactions flooding in upon you in the above:

(1) Like Lewis, I question the need for a discussion of the "state action" line of cases -- Sniadach, W.T. Grant Co., and North Georgia Finishing -- except to support the holding in Flagg Brothers that state action is a prerequisite to all §1983 claims, and to say that that prerequisite is satisfied here. My analysis of our precedents in this area would focus only on the issue raised in this §1983 suit: whether the deprivation in this case took place "under color of state law." Of our two precedents that directly raise this issue -- Flagg Brothers and Fuentes -- the present case is plainly more analogous to the latter, because in the former no actions by public officials were implicated: The only relationship between the private-party defendants and any "state action" was the use by those defendants of a recognized state statutory procedure. I would simply hold that in the present case, in which actions by public officials are clearly implicated, Flagg Brothers is inapposite, and Fuentes stands as authority for the principle that when a private party engages the active assistance of state officials in order to deprive another person of his property, then that private party's actions occur "under color of state law" by virtue of their inextricable connection with the actions of the state officials called upon by the private party. This is hardly a novel principle: Indeed, I believe that it is stated in the majority opinion in Adickes, which you quote on page 17 of

your draft. A reaffirmation of that principle would suffice to dispose of the present case.

Like Lewis and Bill, I have difficulty squaring your discussion of the relationship between "state action" and "action under color of state law" with our recent opinion in Polk County v. Dodson. Moreover, since you conclude that both "state action" and "action under color of state law" are present on the record before us, a thorough discussion of the relation between the two does not seem to me to be strictly necessary here, and I see no profit in pursuing the matter. "Sufficient unto the day is the evil thereof."

(2) I also have some difficulty with your distinction, at pages 16-17 of your draft, between counts one and two of petitioner's complaint. I quite agree that if count two simply alleged purely private actions, it would not state a cause of action under §1983. But I do not think that count two can be so narrowly read. On the other hand, I do not believe that count one by itself states a proper cause of action, either.

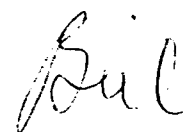
With respect to count two, your quotation from that count is drawn from its paragraph 34, J.A. at 17. You go on to suggest that count two did no more than allege that "respondents invoked the statute without the grounds to do so." But in count two's paragraph 31, J.A. at 16, petitioner alleged that respondents "were willing participants with the State of Virginia" in the deprivation complained of. Count two thus cannot be seen as challenging only private action. Also, count two's lengthy recitation of the state procedures relied upon by respondents in effecting the deprivation, in paragraphs 4-12, 18-22, and 24-25, J.A. at 8-11 and 13-14, includes virtually the same allegations, regarding the prejudgment attachment and subsequent dismissal, that you hold sufficient to state a §1983 claim in count one.

I would not even attempt to distinguish between counts one and two. Aside from the difficulty in making such a distinction, I think that the two counts would be better seen as together stating a single valid §1983 claim. I believe that in order for a §1983 plaintiff to prevail against a private party who engaged the active participation of the state in order to deprive the plaintiff of his property, the plaintiff should have to show both (i) the private party's use to that end of an unconstitutional state law, and (ii) a less-than-innocent intent on the part of the private party -- perhaps malice, bad faith, or the like, such as is alleged in count two of the complaint before us. (I draw this latter neces-

sary element of the claim from my view, expressed in Adickes, 398 U.S., at 231-232, that "where the wrong under §1983 is closely analogous to a wrong recognized in the law of torts" -- here the tort of malicious prosecution -- "it is appropriate for the federal court to apply the relevant tort doctrines as to the bearing of particular mental elements on the existence and amount of liability.") In the present case, petitioner's count one alleges element (i), while count two addresses element (ii). Therefore I would conflate the counts and hold both elements necessary to the stating of a valid §1983 claim in this context.

Do these views appeal to you? If not, I may eventually reflect them in a separate writing.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Justice White.
Copies to the Conference.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 19, 1982

PERSONAL

Re: 80-1730 - Lugar v. Edmondson Oil Co.

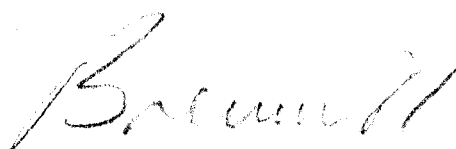
Dear Lewis:

Thank you for your note to me. I've read your concurrence and appreciate your consideration of my views. I am afraid, however, our views are just too far apart. I will go ahead on my own.

Sincerely,



Justice Powell



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 19, 1982

Re: 80-1730 - Lugar v. Edmondson Oil Co.

Dear Byron:

In light of your stated intention to make some revisions in your opinion and John's letter to you which seems to me to misapprehend some of my views, as well as some additional consideration that I have given to the problems presented, I hope you will forgive this second attempt to state some of my concerns in this rather difficult case. I apologize for taking so long to communicate with you regarding this. I delayed to see what Lewis had in mind and now that I have seen it, I can't agree with it.

1). I agree with John that Polk County is relevant, but I do not agree that it explains why Count II does not state a cause of action. It seems to me that Polk County states a narrow exceptional circumstance in which there is state action--due to the presence of a state actor--but where there is no action under color of state law because that actor is acting in an adversarial role on behalf of a private party in an action against the state. Therefore it seems to me that Polk County could fit in your footnote 15 as an additional but narrow circumstance in which state action and color of state law denote two separate areas of inquiry.

2) I have another problem with footnote 15. You suggest that in some instances state action may require a greater showing than conduct that satisfies the under color of state law requirement. While that places a limit on the reach of Flagg Brothers, it causes me some difficulty since it is clearly inconsistent with my position in Adickes. I think your second point that §1983 is applicable to constitutional and statutory provisions which contain no state action requirement as well as the point regarding Polk County, if you agree with it, are sufficient.

3) I certainly agree with John and you that Lugar cannot prevail without demonstrating that the Virginia statute is unconstitutional. I continue to believe, as I stated at the bottom of page 2 of my earlier letter to you, that to prevail the plaintiff will have to show "the

Brennan

private party's use...of an unconstitutional state law, and (ii) a less-than-innocent intent on the part of the private party." I am not sure whether you find the second requirement--of some kind of bad faith--unnecessary or if you are instead of the opinion that the mental state requirement (whether it is an affirmative defense or a part of the cause of action) is independent of the state-action and under-color-of-state-law inquiries and may be appropriately dealt with in the first instance by the district court. If it is the latter, it seems to me it might be helpful to give the courts below some guidance on this issue. More importantly, it may be that, as the dissent below suggested, Pet. for Cert. at 122, n. 4, when the courts below reach this question the allegation that the defendants acted maliciously, which is contained only in Count II, will be found to be a necessary element of petitioner's claim. Accordingly I much prefer that we view Counts I and II together as stating a claim.

I write again and at such length only because it seems to me that you and I are not really that far apart in our views in this case. If you think that you can accomodate these views, please let me know. In all candor I should add that although I agree completely that under your definition of state action--set out at p. 13 of your draft opinion--conduct which constitutes state action is also action under color of state law for purposes of §1983, I am not sure that I can completely accept your definition of state action. It may be that I view your "second requirement" that the party charged must be a state actor as necessary only in federal §1983 suits where the plaintiff must establish that the action was under color of state law. Even if we are unable to resolve this disagreement, it seems to me that, if we can resolve other differences, I should be able to join your opinion and write a short seperate concurrence.

Sincerely,



Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 15, 1982

RE: No. 80-1730 Lugar v. Edmondson Oil Company

Dear Byron:

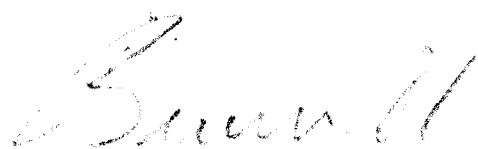
Knowing how anxious you are to get this off the dime, and as always being very supportive of your desires to get your opinions behind you, I have decided I can join your latest opinion in the above if at some appropriate place you can insert that part of the last paragraph of your letter of January 6 to Bill Rehnquist which reads as follows:

"As for Polk County there was no 1983 cause of action because the Public Defender was not carrying out state decisions or state directions in his day to day defense of his client."

As the Chief Justice would say,

"Regards!"

Justice White



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 5, 1982

Re: 80-1730 - Lugar v. Edmondson Oil Co.

Dear Byron:

I am for the most part quite comfortable with the changes you made in your opinion in response to Justice Powell's dissent. I continue, however, to be troubled by the proper manner for distinguishing Polk County.

I would feel more comfortable if you substituted for your discussion of Polk County beginning with "We concluded there ... " at n. 18 on page 13, something along the following lines:

We concluded in Polk County that a public defender, although a state employee, acted in the day to day defense of his client in a role adversarial to the state. Accordingly, although state employment is generally sufficient to render the defendant a state actor under our analysis, infra at 14-15, it was "peculiarly difficult" to detect any action of the State in the circumstances of that case. Id., at ____ (Slip. Op. at 8). Thus, our decision today does not suggest a different outcome in Polk County.

I apologize if I led you astray with my prior suggestion for distinguishing Polk County, borrowed from your letter to Bill Rehnquist. I hope you can find this acceptable, and have me at least out of your hair.

Sincerely,

Bill

Justice White

Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 12, 1982

RE: No. 80-1730 Lugar v. Edmondson Oil Co.

Dear Byron:

Please join me in your circulation of May 12.

Sincerely,

Bill

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 11, 1981

RE: No. 80-1730 Lugar v. Edmonson Oil, et al.

Dear Byron:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Byron", is written in dark ink.

Justice White

cc: The Conference

To: The Chief Justice
 Justice Brennan
 ✓ Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: Justice White

Circulated: JAN 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1730

GILES M. LUGAR, PETITIONER *v.* EDMONDSON OIL
 COMPANY, INC. AND RONALD L. BARBOUR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE FOURTH CIRCUIT

[January —, 1982]

JUSTICE WHITE delivered the opinion of the Court.

The Fourteenth Amendment of the Constitution provides in part:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Because the amendment is directed at the states, it can be violated only by conduct that may be fairly characterized as “state action.”

42 U. S. C. § 1983 provides a remedy for deprivations of rights secured by the Constitution and laws of the United States when that deprivation takes place “under color of any statute, ordinance, regulation, custom or usage, of any State or Territory. . . .”¹ This case concerns the relationship be-

¹42 U. S. C. § 1983 provides:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

To: The Chief Justice
 Justice Brennan
 Justice Marshall ✓
 Justice Stevens
 Justice O'Connor
 Justice Souter
 Justice Ginsburg
 Justice Breyer

Stylistic changes only

2nd DRAFT

Recirculated: 6 JAN 1982

SUPREME COURT OF THE UNITED STATES

6 JAN 1982

No. 80-1730

GILES M. LUGAR, PETITIONER *v.* EDMONDSON OIL
 COMPANY, INC. AND RONALD L. BARBOUR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE FOURTH CIRCUIT

[January —, 1982]

JUSTICE WHITE delivered the opinion of the Court.

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✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 6, 1982

Re: 80-1730 - Lugar v.
Edmondson Oil Co.

Dear Lewis,

We are far apart, and you may well have
a better sense of the conference votes than I
have.

Sincerely yours,

Byron

Justice Powell

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

January 6, 1982

CHAMBERS OF
JUSTICE BYRON R. WHITE

Re: 80-1730 - Lugar v. Edmondson Oil Co.

Dear Bill,

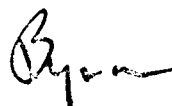
My initial vote in this case was to affirm, since I was willing to read the complaint as resting on a misuse of the statute and since I did not believe such a claim stated a §1983 cause of action. But as I understood the ensuing discussion -- although it was somewhat scrambled -- I thought there was a majority for reading the complaint as the lower courts did and for holding that there was no §1983 cause of action based on the creditor's failure to satisfy the statute but that there was one insofar as the creditor followed the state-prescribed procedures with the significant help of state officials, as in Fuentes and other cases. Although I was somewhat surprised, I thought I heard you agree to the latter proposition. Of course, I could be mistaken, as I frequently am.

I was also somewhat surprised when the assignment fell to me, and I am quite prepared to have someone else have a go at it. For myself, I am not of a mind to abandon the Sniadach and Fuentes line of cases with respect to §1983 causes of action.

As for Polk County, there was no §1983 cause of action because the public defender was not carrying out state decisions or state directions in his day-to-day defense of his clients and because the Court was unwilling to ascribe his alleged violation of the Sixth Amendment to the state merely because he was a state employee. As I understand that case, it implies that if the claimed violation of the defendant's Sixth Amendment rights had been pursuant to some state policy or decision, there would have been a §1983 cause of action. I thus do not understand Polk to be inconsistent with the section of my circulating draft to which you refer.

I appreciate your comments.

Sincerely yours,



Justice Rehnquist

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 16, 1982

Re: 80-1730 - Lugar v. Edmondson Oil Co.

Dear Bill,

Thank you for your note in this case. I am making the revision you suggested along with several others that respond to Lewis. I hope these additions do not bother you.

Sincerely yours,

Byr-

Justice Brennan

cpm

Brennan

To: The Chief Justice
 Justice Brennan
 ✓ Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

- pp. 4-5, 10, 11, 13-14, 20

From: **Justice White**

Circulated: _____

Recirculated: 19 APR

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1730

GILES M. LUGAR, PETITIONER *v.* EDMONDSON OIL
 COMPANY, INC. AND RONALD L. BARBOUR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE FOURTH CIRCUIT

[April —, 1982]

JUSTICE WHITE delivered the opinion of the Court.

The Fourteenth Amendment of the Constitution provides in part:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Because the amendment is directed at the states, it can be violated only by conduct that may be fairly characterized as “state action.”

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¹ 42 U. S. C. § 1983 provides:

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To: The Chief Justice
 Justice Brennan
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

pp. 13-14 & Stylistic

From: **Justice White**

Circulated: _____

Recirculated: 12 MAY 1982

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1730

GILES M. LUGAR, PETITIONER *v.* EDMONDSON OIL
 COMPANY, INC. AND RONALD L. BARBOUR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE FOURTH CIRCUIT

[April —, 1982]

JUSTICE WHITE delivered the opinion of the Court.

The Fourteenth Amendment of the Constitution provides in part:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

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To: The Chief Justice
 Justice Brennan
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: Justice White

Circulated: _____

Recirculated: 6-17-82

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1730

GILES M. LUGAR, PETITIONER *v.* EDMONDSON OIL
 COMPANY, INC. AND RONALD L. BARBOUR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE FOURTH CIRCUIT

[June —, 1982]

JUSTICE WHITE delivered the opinion of the Court.

The Fourteenth Amendment of the Constitution provides in part:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

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pp. 4, 11, 13, 17, 19
 & stylistic

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 1, 1982

Re: No. 80-1730 - Lugar v. Edmondson Oil Co.

Dear Byron:

Please join me.

Sincerely,

T.M.

T.M.

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 7, 1982

Re: No. 80-1730 - Lugar v. Edmondson Oil Company

Dear Byron:

Please join me.

Sincerely,

Harry

Justice White

cc: The Conference

Supreme Court of the United States
 Washington, D. C. 20543

CHAMBERS OF
 JUSTICE LEWIS F. POWELL, JR.

January 6, 1982

80-1730 Lugar v. Edmondson Oil

Dear Byron:

According to my notes, your opinion circulated yesterday reflects a substantial change in the views you expressed at Conference - if I understood them.

I recognize, of course, your dilemma. The divergent views expressed among us gave you little guidance. Having said this, it seems to me that your opinion goes well beyond any prior decision of this Court in imposing - or inviting the imposition on remand - of damage suit liability under §1983 on a private citizen.

First, I comment briefly on some of the cases you cite. I agree that Flag Bros. can be distinguished, though it does point in a different direction from the Fuentes line of cases. Fuentes itself, involving both a state attorney general and a private creditor, is factually close but does not address the question that concerns me. As I stated at Conference, Sniadach, Di-Chem, and Mitchell v. W.T. Grant were not brought in federal court under §1983. No question was presented, therefore, as to whether there was action under color of state law. I therefore question your reliance on those cases.

I am also troubled by the omission from your opinion of some recent cases in which we have dealt explicitly with the question when action occurs "under color of state law." The analytical framework of your opinion is very different from that applied in Polk County v. Dodson. Neither does it discuss Dennis v. Sparks, or the possible implications of the assertion in that case that "Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party ... a joint actor with the judge."

In one sense, Dennis v. Sparks seems to me the closest authority to the present case, as your opinion for the Court upheld liability both of private parties and a state judge who corruptly conspired to deprive persons of constitutional rights. But Sparks makes clear why I think

your opinion would announce new doctrine. In Sparks, the private defendants knowingly participated in the corrupt and unlawful action of the judge. Here the private party acted precisely in accord with a Virginia statute that had been on the books for decades and never questioned by a Virginia court. Few if any lawyers would have advised the defendant that the attachment statute was invalid. To be sure, as you suggested at Conference, since the attachment was dismissed the debtor may well have had a state law damage suit for malicious prosecution. But in the absence of a showing that he knew, or reasonably should have known, that the statute was invalid, it would be unjust - and I think unprecedented - to subject him to §1983 liability.

I emphasize that the plaintiff in this case seeks a damages remedy, not declaratory or injunctive relief. If damages were sought from the clerk or the sheriff, either would be entitled to good faith immunity. Thus, we would have the anomalous situation of the only state actor avoiding liability whereas presumably - under your opinion - the private defendant could be held liable for §1983 damages.

In my view, §1983 was never intended to apply to a case such as this. I would hope that the Court would so hold in this case. In any event, a private defendant should enjoy immunity - by whatever name it may be called - comparable to that afforded officials in a §1983 action. As stated above, at common law the defendant could be sued only for malicious prosecution - a tort against which "good faith" would constitute a defense. And certainly the underlying policy of immunity is one of fairness to plaintiffs who in good faith believe they are acting in accordance with law.

This is a hurried and incomplete summary of my reaction to your opinion. But if I read it correctly, it would create a new federal tort: liability of private citizens without fault. In due time, I will dissent.

Sincerely,

Lewis

Justice White

Copies to the Conference
LFP/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 13, 1982

80-1730 Lugar v. Edmondson

Dear Byron:

In due time, I will circulate a dissent.

Sincerely,

A handwritten signature in cursive script, appearing to read "L. Powell", written in dark ink.

Justice White

lfp/ss

cc: The Conference

January 18, 1982

PERSONAL

80-1730 Lugar

Dear Bill:

I am circulating this afternoon a first draft of an opinion concurring in the judgment in this case.

My initial view was that the allegations of the complaint did not sufficiently allege "color of state law", and I still have considerable doubt whether this is present when a citizen simply files a law suit under a state statute fairly entitled to a presumption of validity. My recollection is that the Virginia attachment and garnishment statute has been on the books at least since I came to the bar in 1931.

Nevertheless, after considering your letter and thinking further about the case, I have concluded that the allegations of this complaint - when read most generously - sufficiently aver action "under color of" law, as that term is used in Adickes. Your letter emphasizes that case and - as you will see - I have relied on it, although it is distinguishable.

In Part III of the draft I am circulating, I address the "mental elements" required in a case of this kind. You discussed the importance of this factor in your opinion in Adickes and also in your letter stating your position in this case. I believe our views on this are consistent.

I appreciate your deferring writing until you could see how I would address the issues in this case.

Sincerely,

Justice Brennan

lfp/ss

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Rehnquist
 Justice Stevens
 Justice Souter
 Justice Thomas

Justice Powell
 JAN 18 1982

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1730

GILES M. LUGAR, PETITIONER *v.* EDMONDSON OIL
 COMPANY, INC. AND RONALD L. BARBOUR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE FOURTH CIRCUIT

[January —, 1982]

JUSTICE POWELL, concurring in the judgment.

A plaintiff must satisfy two jurisdictional requisites to state a claim actionable under 42 U. S. C. § 1983.¹ First, he must allege the violation of a right “secured by the Constitution and laws” of the United States. Because “most rights secured by the Constitution are protected only against infringement by governments,” *Flagg Brothers, Inc. v. Brooks*, 436 U. S. 149, 156 (1978), this requirement generally compels an inquiry into the presence of “state action.” Second, a § 1983 plaintiff must show that the alleged deprivation occurred “under color of” state law. In *Flagg Brothers, supra*, 436 U. S., at 156, this Court affirmed that “these two elements denote two separate areas of inquiry.”²

This case demonstrates why separate inquiries are re-

¹ 42 U. S. C. § 1983 provides:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

² See *Parratt v. Taylor*, 101 S. Ct. 1909, 1913 (1981) (citing “two essential elements to a § 1983 action”); *Adickes v. S.H. Kress Co.*, 398 U. S. 144, 150 (1970) (listing inquiries separately).

January 25, 1982

80-1730 Lugar v. Edmondson Oil Co., Inc.

Dear Sandra:

Thank you for your note of January 21, enclosing a possible revision of my draft opinion that would summarize pages 7-12. As we agreed in our brief discussion Friday, it is desirable for us to talk. It may advance discussion if I state briefly and tentatively my reaction to your suggestion.

There may be a rather important difference between your suggestion and my circulated draft opinion - if I correctly understand your memo. At page 5, your memo says:

"In this case, Petitioner alleged that Respondents did not have good cause to believe the facts which they allege upon oath to obtain attachment of Petitioner's goods (Complaint, Count III, ¶ 4; JA 19). Interpreted broadly, the complaint alleges Respondents knew, or should have known, they did not have a valid basis for seeking to attach Petitioner's goods, which sufficiently alleges the lack of probable cause."

This would meet the common law requirements of a damage suit for malicious prosecution. In this case, for example, such a suit may well lie, as the attachment was dismissed on the ground that respondents could not prove the statements in their attachment affidavit. I would require more than this in a constitutional tort action under §1983 - an action that already is used frequently to displace common law state court jurisdiction.

The additional element should be an averment that respondents knew or reasonably should have known that the

Virginia Attachment Statute was unconstitutional. (See p. 12, my draft). In the absence of this requirement (which could be tested on a summary judgment motion), a plaintiff in a §1983 suit could simply aver that the defendant had acted "maliciously" under an "unlawful statute", and the case would have to go to trial to determine the validity of the statute. Thus, the presumption of validity of a heretofore unchallenged state statute would be meaningless until the case reached the litigation stage. We therefore would have the same situation that has become so burdensome to defendants in cases like Nixon and Butterfield, where protracted trials become necessary to litigate the affirmative defense of good faith.

I enclose an outline of my opinion that I dictated over the weekend. You are quite right that the opinion is on the long side, and perhaps Part II could be condensed a good deal. My thinking has been that this opinion might serve a useful purpose in the long run to clarify, for lower courts' analysis, the issues presented in this type of case.

I am, however, still open to discussion and look forward to our getting together.

Sincerely,

Justice O'Connor

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 21, 1982

80-1730 Lugar v. Edmondson Oil

MEMORANDUM TO THE CONFERENCE:

I will make some changes in my circulation of January 18 in response to Byron's recirculation. It may be a while.

L. F. P.
L.F.P., Jr.

SS

April 30, 1982

80-1730 Lugar v. Edmondson Oil

Dear Sandra:

In view of the brief discussion at Conference this morning as to the status of this case, I write to reaffirm that I expect to revise my dissent.

As Byron now has a Court for his view that there is no distinction between "state action" and "under color of state law", I will focus my dissent primarily on this holding. When I wrote initially (see draft of January 18), I still had some hope that a majority would agree that there is a distinction between the two. I therefore was willing to construe (generously) the complaint in this case as possibly alleging "under color of state law". I certainly do not agree that the mere filing of a civil action under a presumptively valid statute constitutes state action. Indeed, the only averment in the complaint is that there was action "under color of state law."

I am sending copies of this note to the Chief and Bill Rehnquist.

Sincerely,

Justice O'Connor

lfp/ss

cc: The Chief Justice
Justice Rehnquist

Entirely Revised

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Powell**

Circulated: JUN 9 1982

Recirculated: _____

1st DISSENTING DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1730

GILES M. LUGAR, PETITIONER *v.* EDMONDSON OIL
 COMPANY, INC. AND RONALD L. BARBOUR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE FOURTH CIRCUIT

[June —, 1982]

JUSTICE POWELL, dissenting.

Today's decision is a disquieting example of how expansive judicial decisionmaking can ensnare a person who had every reason to believe he was acting in strict accordance with law. The case began nearly five years ago as the outgrowth of a simple suit on a debt in a Virginia state court. Respondent—a small wholesale oil dealer in Southside, Virginia—brought suit against petitioner Lugar, a truckstop owner who had failed to pay a debt.¹ The suit was to collect this indebtedness. Fearful that petitioner might dissipate his assets before the debt was collected, respondent also filed a petition in state court seeking sequestration of certain of Lugar's assets. He did so under a Virginia statute, traceable at least to 1819, that permits creditors to seek prejudgment attachment of property in the possession of debtors.² No court

¹ The state action, filed in the name of the Edmondson Oil Co., alleged that Lugar owed \$41,983 for products and merchandise previously delivered. App. 22. In the present suit Lugar has named as defendants both the Edmondson Oil Co. and its president, Ronald Barbour. As the respondent Barbour is the sole stockholder of Edmondson Oil Co., App. 2, and appears to have directed all its actions in this litigation, see App. 26, I refer throughout to Barbour as if he were the sole respondent.

² See Va. Code § 8.01-533 *et. seq.* (Repl. Vol. 1977). At the time of the attachment in this case, the applicable provisions were Va. Code §§ 8-519

1, 7, 8, 12
Stylistic Changes Throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 11 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1730

GILES M. LUGAR, PETITIONER *v.* EDMONDSON OIL
COMPANY, INC. AND RONALD L. BARBOUR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[June —, 1982]

JUSTICE POWELL, with whom JUSTICE O'CONNOR joins, |
dissenting.

Today's decision is a disquieting example of how expansive judicial decisionmaking can ensnare a person who had every reason to believe he was acting in strict accordance with law. The case began nearly five years ago as the outgrowth of a simple suit on a debt in a Virginia state court. Respondent—a small wholesale oil dealer in Southside, Virginia—brought suit against petitioner Lugar, a truckstop owner who had failed to pay a debt.¹ The suit was to collect this indebtedness. Fearful that petitioner might dissipate his assets before the debt was collected, respondent also filed a petition in state court seeking sequestration of certain of Lugar's assets. He did so under a Virginia statute, traceable at least to 1819, that permits creditors to seek prejudgment attachment of property in the possession of debtors.² No court

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²See Va. Code § 8.01-533 *et. seq.* (Repl. Vol. 1977). At the time of the

1, 6, 9, 10

Stylistic changes throughout

Footnotes renumbered

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: **JUN 21 1982**

3rd DISSENTING DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1730

GILES M. LUGAR, PETITIONER *v.* EDMONDSON OIL
 COMPANY, INC. AND RONALD L. BARBOUR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE FOURTH CIRCUIT

[June —, 1982]

JUSTICE POWELL, with whom JUSTICE REHNQUIST and
 JUSTICE O'CONNOR join, dissenting.

Today's decision is a disquieting example of how expansive judicial decisionmaking can ensnare a person who had every reason to believe he was acting in strict accordance with law. The case began nearly five years ago as the outgrowth of a simple suit on a debt in a Virginia state court. Respondent—a small wholesale oil dealer in Southside, Virginia—brought suit against petitioner Lugar, a truckstop owner who had failed to pay a debt.¹ The suit was to collect this indebtedness. Fearful that petitioner might dissipate his assets before the debt was collected, respondent also filed a petition in state court seeking sequestration of certain of Lugar's assets. He did so under a Virginia statute, traceable at least to 1819, that permits creditors to seek prejudgment attachment of property in the possession of debtors.² No court

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²See Va. Code § 8.01-533 *et. seq.* (Repl. Vol. 1977). At the time of the attachment in this case, the applicable provisions were Va. Code §§ 8-519

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 6, 1982

Re: No. 80-1730 Lugar v. Edmondson Oil Co., Inc.

Dear Byron:

In view of the traditional rule, as I have understood it, that one who seeks to challenge the constitutionality of a state law must plainly state his purpose and specifically articulate the basis of his challenge from the beginning of the litigation onwards, I have great difficulty in subscribing to your reading of the complaint on pages 16-17 of your present proposed opinion. But even if that reading be accepted, it seems to me that the remainder of your draft poses some difficulties when one tries to reconcile it with cases such as Polk County v. Dodson, decided this Term. If no one else has any inclination to write to this effect, I will do so in due course.

Sincerely,



Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 20, 1982

Re: No. 80-1730 Lugar v. Edmondson Oil Co., Inc.

Dear Lewis:

Please join me in your separate concurrence in this case.

Sincerely,

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 11, 1982

Re: No. 80-1730 Lugar v. Edmondson Oil Co.

Dear Lewis:

Please join me in your revised dissent.

Sincerely,



Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 11, 1982

Re: 80-1730 - Lugar v. Edmondson Oil Co.

Dear Byron:

After reviewing the written responses to your opinion, my somewhat unintelligible Conference notes, and restudying your draft, I have concluded that your analysis is exactly what I thought the consensus to be when I left the Conference. I therefore join your opinion.

On the question of how the pleadings should be construed, I think you are quite right in adopting the Court of Appeals' construction even though, as Bill Rehnquist and Bill Brennan both demonstrate, a different reading is permissible. The problem I see in Bill Brennan's approach is that he does not answer the question whether the plaintiff could prevail without demonstrating that the Virginia statute is unconstitutional; I agree with you that he may not.

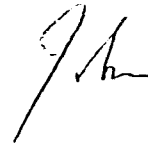
I also think you must include the references to Sniadach, DI-CHEM, and Grant, because the Court necessarily held that state action was present in all of those cases; otherwise there would have been no federal question to support this Court's appellate jurisdiction.

Incidentally, I would see no objection to including a reference to Dennis v. Sparks toward the end of Part III, possibly as a footnote on page 15, or to a discussion of Polk County v. Dodson on page 16 in connection with the explanation of why Count II does not state a cause of action. Again, a footnote should

-2-

suffice and I am content with the opinion whether you include such an addition or not.

Respectfully,

A handwritten signature, likely of Justice White, consisting of a stylized 'J' followed by a surname.

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 6, 1982

No. 80-1730 Lugar v. Edmondson Oil Co., Inc.

Dear Byron,

I have some concerns about the draft opinion in the referenced case. I will await other writing, or will circulate something else in due course.

Sincerely,



Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 21, 1982

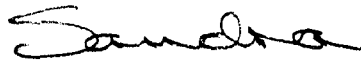
No. 80-1730 Lugar v. Edmondson Oil Co., Inc.

Dear Lewis,

I am delighted to see your draft of a concurrence in the judgment in Lugar. It does a fine job of resolving a very confusing set of cases and issues.

I hesitate to recommend changes but decided to forward the attached draft for your consideration for two reasons: it attempts to follow somewhat more closely Bill Brennan's previous writing on the subject, and it attempts to simplify Part II of your draft. It would replace Part IIB beginning on page 7, through page 12 of your draft. I would be happy to simply discuss it informally if you have a moment. I have not shared it with anyone else.

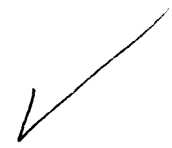
Sincerely,



Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR



May 3, 1982

No. 80-1730 Lugar v. Edmondson Oil

Dear Lewis,

I will await your revisions. Byron's revised draft is an improvement but still inadequate to meet the problem in my view.

Sincerely,

A handwritten signature, appearing to read "Sandra", is written below the word "Sincerely,".

Justice Powell

cc: The Chief Justice
Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

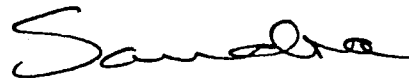
May 3, 1982

No. 80-1730 Lugar v. Edmondson Oil

Dear Byron,

I shall await further writing on this
case.

Sincerely,



Justice White

Copies to the Conference

cc: [illegible]

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 9, 1982

No. 80-1730 Lugar v. Edmondson Oil Co.,
Inc. and Barbour

Dear Lewis,

Please join me in your dissent.

Sincerely,



Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 9, 1982

No. 80-1730 Lugar v. Edmondson Oil Co.,
Inc. and Barbour

Dear Lewis,

Please join me in your dissent.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

P.S. I really like the new dissent.
The Court's opinion is perhaps one
of the most unfortunate of the entire
Term. How I wish we could swing
another vote your way!
S.