The Burger Court Opinion Writing Database

Gilligan v. Morgan

413 U.S. 1 (1973)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

February 26, 1973

Re: No. 71-1553 - Gilligan v. Morgan

MEMORANDUM TO THE CONFERENCE:

As this case was put over to March, some Members of the Court have deferred examination of the briefs.

The brief filed by Ohio does not, in my view, meet the minimum standards for any case -- to say nothing of an important constitutional case.

This case affords us an opportunity to reject the briefs on an Order List with a brief comment:

> The briefs filed by the State of Ohio do not meet the minimum standards for adequate consideration of a case presenting important constitutional issues. Accordingly, the briefs filed by Ohio are stricken and the case will be calendared when adequate briefs are filed. The time to file briefs is extended to _____.

Regards,

WEB

B

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

CHAMBERS OF
THE CHIEF JUSTICE

May 9, 1973

Re: No. 71-1553 - Gilligan v. Morgan

MEMORANDUM TO THE CONFERENCE:

The enclosed is my "solidified" work draft of an opinion for this case. After one good try I found a brief Per Curiam was not feasible. Given the onrush of July 1, I circulate it in this form so that you can indicate either general agreement or disagreement with this approach.

It is more than ordinarily open to comment and suggestion -- apart from the result.

Regards,

WEB

cc:

I am in agreement with part 1 of your proposed opinion and for the same reason can not agree with Part 2. I think part 1 effectively precludes part 2.

HAB.

Draft I
5/7/73

Draft II

attached
to 19730509 cover letter

Re: No. 71-1553 - Gilligan v. Morgan

Respondents, alleging that they were full-time students and officers in the student government at Kent State University in Ohio, filed this action[1/] in the District Court on behalf of themselves and all other students on October 15, 1970. The essence of the complaint is that, during a period of civil disorder on and around the University campus in May, 1970, the National Guard, called by Governor Gilligan of Ohio to preserve civil order and protect public property, violated students' rights of speech and assembly and caused injury to a number of students and death to several, and that the actions of the National Guard were without legal justification. They sought injunctive relief against the Governor to restrain him in the future from prematurely ordering National Guard troops to duty in civil disorders and an injunction to restrain leaders of the National Guard from future violation of the students'

1/ The complaint was brought under 42 U.S.C. § 1983 (1970) with jurisdiction asserted under 28 U.S.C. 1343 (3) (1970).

Draft II
5/7/73
5/15/73
5/31/73 (Revised)

Return
WEB

Re: No. 71-1553 - Gilligan v. Morgan

Respondents, alleging that they were full-time students and officers in the student government at Kent State University in Ohio, filed this action[1/] in the District Court on behalf of themselves and all other students on October 15, 1970. The essence of the complaint is that, during a period of civil disorder on and around the University campus in May, 1970, the National Guard, called by Governor Gilligan of Ohio to preserve civil order and protect public property, violated students' rights of speech and assembly and caused injury to a number of students and death to several, and that the actions of the National Guard were without legal justification. They sought injunctive relief against the Governor to restrain him in the future from prematurely ordering National Guard troops to duty in civil disorders and an injunction to restrain leaders of the National Guard from future violation of the students'

1/ The complaint was brought under 42 U.S.C. § 1983 (1970) with jurisdiction asserted under 28 U.S.C. 1343 (3) (1970).

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

CHAMBERS OF
THE CHIEF JUSTICE

June 5, 1973

Re: No. 71-1553 - Gilligan v. Morgan

MEMORANDUM TO THE CONFERENCE:

I enclose a revised draft of opinion in the above case. It is structured much like the initial memorandum to facilitate "joins" by those who believe that the case ought to be disposed of on mootness. My view is that mootness and standing are questionable and hence should be treated as elements of non-justiciability. This is the prescription of non-justiciability in both Flast v. Cohen and Baker v. Carr.

For my part, I am unwilling to allow the CA 6 opinion to stand because it ignores the most elementary standards of what this Court has said -- and repeated -- that it takes to make a justiciable issue.

Although my concluding line in Part I is somewhat ambiguous, I believe Part I affords a basis for those who would dispose of the case on mootness.

Part II treats mootness and standing, as I suggested, in terms of their being components of non-justiciability.

Regards,

WEB

To: Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]

From: [illegible]

Circulated: [illegible]

Recirculated: JUN 5 1973

Re: No. 71-1553 - Gilligan v. Morgan

Respondents, alleging that they were full-time students and officers in the student government at Kent State University in Ohio, filed this action[1/] in the District Court on behalf of themselves and all other students on October 15, 1970. The essence of the complaint is that, during a period of civil disorder on and around the University campus in May, 1970, the National Guard, called by the Governor of Ohio to preserve civil order and protect public property, violated students' rights of speech and assembly and caused injury to a number of students and death to several, and that the actions of the National Guard were without legal justification. They sought injunctive relief against the Governor to restrain him in the future from prematurely ordering National Guard troops to duty in civil disorders and an injunction to restrain leaders of the National Guard from future violation of the students' constitutional rights. They also sought a

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1/ The complaint was brought under 42 U.S.C. § 1983 (1970) with jurisdiction asserted under 28 U.S.C. 1343 (3) (1970).

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

CHAMBERS OF
THE CHIEF JUSTICE

June 8, 1973

Re: No. 71-1553 - Gilligan v. Morgan

MEMORANDUM TO: Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

I address this only to those joining the disposition on justiciability.

Byron put his finger on a "flaw" in the last sentence of Part I. It was calculated ambiguity when I wrote it and I was waiting for an inspiration as to how to write a Part I that four could join and a Part II that five would support.

Subject to suggestions, I now propose to have the final sentence of Part I read as follows:

> "Respondents assert, nevertheless, that these changes in the situation do not affect their right to a hearing on their entitlement to injunctive and supervisory relief. Some basis therefore exists for a conclusion that the case is now moot; however, on the record before us we are not prepared to resolve the case on that basis and therefore turn to the important question whether the claims alleged in the complaint as narrowed by the Court of Appeals remand are justiciable.

Regards,

WEB

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st PRINTED DRAFT

From: The Chief Justice

Circulated:

Recirculated: JUN 13 1973

SUPREME COURT OF THE UNITED STATES

No. 71-1553

John J. Gilligan, Governor of Ohio, et al., Petitioners, v. Craig Morgan et al.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Respondents, alleging that they were full-time students and officers in the student government at Kent State University in Ohio, filed this action [1] in the District Court on behalf of themselves and all other students on October 15, 1970. The essence of the complaint is that, during a period of civil disorder on and around the University campus in May 1970, the National Guard, called by the Governor of Ohio to preserve civil order and protect public property, violated students' rights of speech and assembly and caused injury to a number of students and death to several, and that the actions of the National Guard were without legal justification. They sought injunctive relief against the Governor to restrain him in the future from prematurely ordering National Guard troops to duty in civil disorders and an injunction to restrain leaders of the National Guard from future violation of the students' constitutional rights. They also sought a declaratory judgment that § 2923.55

[1] The complaint was brought under 42 U. S. C. § 1983 (1970) with jurisdiction asserted under 28 U. S. C. § 1343 (3) (1970).

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

Circulated:

Recirculated: JUN 1 0 1973

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1553

John J. Gilligan, Governor of Ohio, et al., Petitioners, v. Craig Morgan et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Respondents, alleging that they were full-time students and officers in the student government at Kent State University in Ohio, filed this action [1] in the District Court on behalf of themselves and all other students on October 15, 1970. The essence of the complaint is that, during a period of civil disorder on and around the University campus in May 1970, the National Guard, called by the Governor of Ohio to preserve civil order and protect public property, violated students' rights of speech and assembly and caused injury to a number of students and death to several, and that the actions of the National Guard were without legal justification. They sought injunctive relief against the Governor to restrain him in the future from prematurely ordering National Guard troops to duty in civil disorders and an injunction to restrain leaders of the National Guard from future violation of the students' constitutional rights. They also sought a declaratory judgment that § 2923.55

[1] The complaint was brought under 42 U. S. C. § 1983 (1970) with jurisdiction asserted under 28 U. S. C. § 1343 (3) (1970).

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

CHAMBERS OF
THE CHIEF JUSTICE

June 14, 1973

PERSONAL

Re: No. 71-1553 - Gilligan v. Morgan

Dear Harry:

If your opinion is a join in the Court's opinion, I will gladly drop the preliminary phrase of footnote 15 so that it will read "At oral argument a Justice asked . . ."

I do not see any difference at all between what Part II holds and what you say but I am happy to have your "buttress."

Regards,

WEB

Mr. Justice Blackmun

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

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1973

Re: Cases held for No. 71-1553 - Gilligan v. Morgan

MEMORANDUM TO THE CONFERENCE:

There are two cases presently held for the above:

(a) No. 72-914 - Scheuer v. Rhodes, and

(b) No. 72-1318 - Krause, et al v. Rhodes.

Originally, three cases were before the District Court for the Northern District of Ohio, each filed by the parents of one student killed at Kent State. The three cases were dismissed by the District Court. The Court of Appeals for the 6th Circuit affirmed in one opinion (Weick, O'Sullivan; Celebrezze dissenting).

I. The Complaints: All three complaints are reprinted at the back of the briefs:

(a) The Krause Complaint -- The defendants are Rhodes (Governor of Ohio), Del Corso (Commander of Ohio National Guard) and Canterbury (Assistant Commander of Ohio National Guard). The complaint alleges that the defendants, acting under color of state law, ordered troops into Kent State (a) with loaded weapons, (b) without cause, (c) knowing that they were not properly trained, and (d) knowing that under the circumstances, the troops created an unreasonable danger of imminent death. (28 U.S.C. § 1983) The complaint charges that the defendants' actions were "culpable, gross, wanton and reckless misconduct under the circumstances" and arbitrarily denied the decedent her rights. The complaint also alleged that such actions were the result of a conspiracy and were done with a specific intent to deprive the decedent of her rights.

LFB

A second cause of action, under diversity jurisdiction, charges the defendants under state wrongful death statutes.

(b) The Miller Complaint: The complaint names the same defendants as above, but in addition, charges as defendants all of the enlisted men in the Ohio National Guard who (I believe) were in the group which fired at Kent State.[1/] It also names Robert White, the President of Kent State University.

The complaint alleges under 28 U.S.C. § 1983 that the decedent, Jeffrey Miller, was shot and killed, and that he at no time engaged in any aggressive, provocative, or criminal activity. The complaint specifically alleges that the defendants "intentionally, recklessly, wilfully and wantonly" fired at Miller and permitted the troops to use live ammunition and ordered them to fire.

The second cause of action contends that the defendants' above actions were reckless, careless and negligent, that there were no circumstances which permitted the firing of arms or the carrying of loaded weapons. The complaint also charges that the defendants failed to promulgate proper regulations and standards for the use of firearms, and that the troops were improperly trained.

(c) The Scheuer Complaint: This complaint names the same defendants as in the Miller complaint (the individual guardsmen are not named). The first cause charges under 28 U.S.C. § 1983 that the defendants deprived the decedent of her constitutional rights. Rhodes is charged with "intentionally, recklessly, willfully and wantonly" ordering the Guard to Kent State, making comments which increased the possibility of violence, permitting the Guard to carry loaded weapons, and ordering the Guard to break up constitutionally protected assemblies, all in excess of the scope of his lawful duties. Del Corso is charged with intentionally and recklessly causing "inadequately trained" guardsmen to carry loaded guns, and to shoot at persons without justification. The charges against Canterbury are similar. Two National Guard captains are charged with having intentionally and recklessly ordered the guardsmen to shoot without legal justification and with failing to restrain guardsmen from firing.

1/ These individuals are not named. While it is unclear, I would assume petitioners wished to have discovery to determine which specific guardsmen to name, prior to service.

WR

The individual guardsmen are accused of having intentionally fired without orders or legal justification, or alternatively, if they had orders, with following patently illegal orders.

The remaining causes of action add a claim that the defendants acted negligently.

II. The CA 6 Opinion: First, Judge Weick held that since the unnamed national guardsmen were not served, the District Court had no jurisdiction over them. Second, he dismissed all claims of a conspiracy on the grounds that there were no supporting facts alleged in the complaints. Third, he held that the suits against the Governor, the officers of the guard and the president of the university were "in substance and effect" actions against the state and were barred by the Eleventh Amendment. Last, he held that the above individuals all had executive immunity.[2/] In answer to the dissent, Judge Weick stated that executive immunity could not be evaded by alleging that the officers acted wantonly. He also stressed an Ohio statute, providing:

> "When a member of the organized militia is ordered to duty by state authorities during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of wilful or wanton misconduct." (Emphasis added).

According to Judge Weick, the officers were not responsible for the enlisted men and the enlisted men were never served with process.

Judge O'Sullivan concurred. He admitted that the defendants had all been sued in their individual capacities but felt that such suits would place a great burden on the administration of public offices. Judge O'Sullivan went on to say that the complaints failed to mention the reasons for sending out the guard. He takes judicial notice of the events which took place at Kent State.

2/ In arriving at this determination, Judge Weick reasoned that such protection was necessary to allow these individuals to perform their duties without fear of suit.

Judge Celebrezze filed a long dissent. In short, he makes the following points:

(a) The finding that the defendants were immuned from suits under § 1983 by the Eleventh Amendment is inconsistent with Ex Parte Young, 209 U.S. 123 (1908). The suits here were filed against the defendants as individuals and asked no damages from the State, hence the Eleventh Amendment does not apply.

(b) The majority extended the doctrine of immunity far past where this Court has taken it. This Court approved immunity for some individuals from § 1983 liability on the grounds that such immunity was well established in law. See Tenney v. Breedlove, 341 U.S. 367 (1951). By extending this doctrine to new classes of individuals, never contemplated by Congress, the majority had effectively repealed § 1983. Judge Celebrezze also contends that, although within the sphere of discretionary duties, a court cannot second-guess a member of the executive, a court can determine what are the limits of the executive's powers. Finally, Judge Celebrezze notes that the Court of Appeals majority failed to state why the wrongful death suits were precluded. The question of immunity should have been decided as to those claims under state law but was not. The complaint alleged intentional actions, hence the state law quoted above has no application (see p. 3 of memo). Last, Judge Celebrezze notes that the Governor's decisions to call up the guard if NOT subject to judicial review. As to this part of the complaint, he would agree with the majority.

III. Contentions: The cases raise the following questions:

(a) They each claim that the Court of Appeals majority refused to accept as true the allegations in the complaint that there was no reason to call up the guard and to allow them to go on campus with loaded weapons. They note that both judges in the majority drew heavily from their knowledge of the events at the university.

(b) Both cases question whether the Eleventh Amendment can bar suits against individuals under § 1983 for intentional deprivations of constitutional rights.

WP

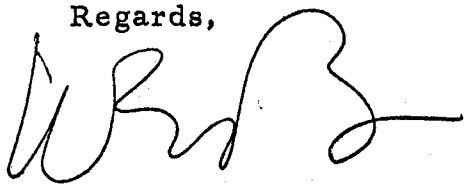
(c) Both cases ask whether the doctrine of executive immunity can bar suits against all the individuals named as set out above.

(d) In the Krause case, petitioners also ask why their diversity action under state law was dismissed.

(e) The Krause case also asks whether the Court of Appeals was correct in stating that the United States was a necessary party.[3/]

IV. Discussion: Although some parts of the claim are clearly non-justiciable, the complaints each allege intentional deprivation of constitutional rights. As to this claim, which asks damages from the individuals for their individual actions, does the Eleventh Amendment preclude a suit? The import of the Court of Appeals majority opinion is to state that, in order to allow free discretion to government officials, those officials must be immune from all suits, even those charging that they used their governmental authority to deprive others of constitutional rights, with knowledge that their actions were illegal. Such a suit would seem arguably to fall in the reach of § 1983. This case therefore raises a novel interpretation of the Eleventh Amendment and of executive immunity.

Regards,



3/ Judge Weick held that the United States was a necessary party insofar as a challenge was raised as to the training and weaponry of the guard. I do not think this question would affect the suits against individuals for intentional acts depriving others of constitutional rights.

4/ According to petitioners, these come from the Congressional Record.

WP

B

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 28, 1973

Dear Chief:

I do not think I would reject the brief of Ohio in 71-1553.

WOD
William O. Douglas

The Chief Justice

cc: The Conference

8

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 21, 1973

Dear Thurgood:

I could not go along with your suggestion as to standing and mootness in No. 71-1553, Gilligan v. Morgan. There is a more basic clean cut problem that in my view will dispose of the case.

William O. Douglas

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 9, 1973

Dear Chief:

In 71-1553, Gilligan v. Morgan I agree to your draft of May 7, 1953 down to the end of the second line on p. 9. In other words I agree with your (1); and I think it unnecessary (contrary to my original view) to reach your (2).

WOD

William O. Douglas

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 7, 1973

Dear Chief:

In 71-1553, Gilligan v. Morgan please note that I concur in the result for the reasons stated in Part I of the opinion viz that the case is moot.

William O. Douglas

The Chief Justice

cc: The Conference

P.S. I hope we do not have to get into the question of the constitutionality of federalizing the National Guard. The question has not been truly argued; and it poses considerable problems in my mind.

WOD

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 7, 1973

Dear Chief:

Since writing you about my notation in 71-1553, Gilligan v. Morgan I have seen Potter's dissent. So I am asking him to add my name to it.

William O. Douglas

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 13, 1973

Dear Harry:

I'd be happy to join your concurring opinion in 71-1553, Gilligan v. Morgan if you dropped the last full paragraph of page 2.

William O. Douglas

Mr. Justice Blackmun

WD

(B)

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 28, 1973

RE: No. 71-1553 -Gilligan v. Morgan

Dear Chief:

I do not think I would reject the brief of Ohio in the above case.

Sincerely,

The Chief Justice

cc: The Conference

B
M

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 21, 1973

RE: No. 71-1553 Gilligan v. Morgan

Dear Thurgood:

I agree with your Memorandum of March 20 in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 10, 1973

RE: No. 71-1553 - Gilligan v. Morgan

Dear Chief:

I voted at conference to vacate as moot under the Munsingwear formula. I could join your (1) to the end of the second line on page 9 if the opinion ended at that point and concluded with an order vacating as moot. I could not join your (2) both because, believing the case to be moot, that is an advisory opinion only and because I'm not inclined to agree with your analysis on the merits.

Sincerely,

Bill

The Chief Justice

cc: The Conference

M

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 6, 1973

RE: No. 71-1553 Gilligan v. Morgan

Dear Potter:

I would appreciate your adding my name to the dissent you've requested the Chief to add at the foot of his opinion in the above.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 28, 1973

No. 71-1553, Gilligan v. Morgan

Dear Chief,

At the risk of seeming parochial as a former Ohioan, I write to express my disapproval of the suggestion that Ohio's brief in this case should be rejected. So far as I am aware, the brief was timely filed and complies in all respects with our rules as to form.

The objections to the brief seem to be based upon the fact that it is quite short, and that some who have read it think it is not very good. In my experience some of the best briefs I have seen have been quite short. This brief seems to cover all the relevant issues. The ultimate quality of any brief is, I suppose, a matter of subjective evaluation.

If we are to reject a brief on the Order List, I would await one that is not filed in time, fails to comply with our rules as to form, is scurrilous, or is otherwise conspicuously deficient by some wholly objective standard.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 20, 1973

71-1553 - Gilligan v. Morgan

Dear Thurgood,

I would gladly join the disposition of this case in accord with your memorandum.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 10, 1973

Re: No. 71-1553, Gilligan v. Morgan

Dear Chief,

I think this case has become moot, and I could join your (1) that so holds. If the case is to be dismissed as moot, I would see no need for the discussion contained in (2) of your circulation.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 6, 1973

No. 71-1553, Gilligan v. Morgan

Dear Chief,

I should appreciate your adding the following at the foot of your opinion for the Court in this case:

MR. JUSTICE STEWART dissents. For many of the reasons stated in Part I of the Court's opinion, he is convinced that this case is now moot. Accordingly, he would vacate the judgment of the Court of Appeals and remand the case to the District Court with directions to dismiss it as moot. See United States v. Munsingwear, Inc., 304 U. S. 36.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 14, 1973

Re: No. 71-1553, Gilligan v. Morgan

Dear Chief,

Now that three others have joined the addendum I asked you to put at the end of your opinion for the Court in this case, I suggest that in the interest of verbal economy it should be amended to read as follows:

> MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL dissent. For many of the reasons stated in Part I of the Court's opinion, they are convinced that this case is now moot. Accordingly, they would vacate the judgment of the Court of Appeals and remand the case to the District Court with directions to dismiss it as moot. See United States v. Munsingwear, Inc., 340 U. S. 36, 39.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 11, 1973

Re: No. 71-1553 - Gilligan v. Morgan

Dear Chief:

I join your proposed disposition of this case.

Sincerely,

Byron

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 1, 1973

Re: No. 71-1553 - Gilligan v. Morgan

Dear Chief:

I am sorry but I cannot agree with the proposed Order.

In the first place, I do not think we should establish the policy of passing on the merits of briefs duly filed which comply with the technicalities of our rules. Secondly, I do not think the State of Ohio should be given a second chance to do its job.

Sincerely,

T.M.

The Chief Justice

cc: Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 20, 1973

MEMORANDUM TO THE CONFERENCE

Re: No. 71-1553 - Gilligan v. Morgan

We granted certiorari in this case to review the judgment of the United States Court of Appeals for the Sixth Circuit, holding justiciable respondents' contention that inadequacies in the training and operation of the Ohio National Guard threatened them with deprivation of life without due process of law. At the time this suit was brought the three respondents were students at Kent State University. Following the tragic events at that University in the spring of 1970, this action was instituted by respondents on behalf of themselves and "also on behalf of all persons who are students of Kent State University and are, as a consequence, similarly situated." 1/ At oral argument we were informed that since the commencement of this litigation, one of the respondents has voluntarily withdrawn from the University and the other two have completed their studies and been graduated. These developments, if true, would appear to moot respondents' individual stake in this litigation which is specifically directed at obtaining injunctive relief to protect the lives of the students at Kent State from further possible harm because of allegedly unconstitutional action by the Ohio National Guard. And, if the individual claims of the class representatives are now in fact moot, there would also exist a serious question as to the continuing viability of the class suit, at least in the absence of the intervention of new representative parties. Compare Watkins v. The Chicago Housing Authority, 406 F.2d 1234 (CA7 1969), with Cypress v. Newport News General & Nonsectarian Hospital Assn., 375 F.2d 648, 657-658 (CA4 1967).

1/ Complaint, App., at 4.

For these reasons, I think we should vacate the judgment below and remand the case to the United States District Court for the Northern District of Ohio to consider whether it has become moot. 2/

T.M.

2/ In addition, the Solicitor General appearing as amicus curiae has informed us that the Ohio National Guard has adopted new and substantially different "use-of-force" rules than were in effect when this suit was initiated. See Brief for the United States as Amicus Curiae 14-15 & n. 8. Whether the adoption of these new rules has eliminated the dangers alleged to exist under the rules in force at the time this action was brought and has thereby effectively resolved any controversy between these parties would also be appropriate for the District Court to consider on remand. Cf. Johnson v. New York State Education Dept., 409 U.S. ____ (1972).

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 10, 1973

Re: No. 71-1553 - Gilligan v. Morgan

Dear Chief:

I am in agreement with Part 1 of your proposed opinion, and for the same reason cannot agree with Part 2. I think Part 1 effectively precludes Part 2.

Sincerely,

T.M.

The Chief Justice

cc: Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 11, 1973

Re: No. 71-1553 - Gilligan v. Morgan

Dear Chief:

Please add my name to the dissent Potter asked to be added to your opinion.

Sincerely,

T.M.

The Chief Justice

cc: Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 21, 1973

Re: No. 71-1553 - Gilligan v. Morgan

Dear Thurgood:

At the moment I feel I could not agree with your suggestion that we remand this case for the Court of Appeals to determine whether it is moot.

Sincerely,

H.A.B.

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 14, 1973

Re: No. 71-1553 - Gilligan v. Morgan

Dear Chief:

I am able to go along with your proposed disposition of this case.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

From: Blackmun, J.

Circulated: 6/11/73

Recirculated: _____

No. 71-1553 - Gilligan v. Morgan

MR. JUSTICE BLACKMUN, concurring.

Respondents brought this action in 1970 seeking broad-ranging declaratory and injunctive relief. But the issue presently before the Court relates only to a portion of the relief sought in 1970. Under the Court of Appeals' remand order the district court was limited in its review to determining the existence of a pattern of "training, weaponing and orders in the Ohio National Guard which singly or together require or make inevitable" the unjustifiable use of lethal force in suppressing civilian disorders. 456 F. 2d 608, 612. The Ohio use-of-force rules have now been changed, and are identical to the Army use-of-force rules. Counsel for respondent stated at oral argument that the use-of-force rules now in effect provide satisfactory safeguards against unwarranted use of lethal force by the Ohio National Guard. Tr. of Oral Arg. 31. And as of 1971 special civil disturbance control training had been provided for the various National Guard units.

It is in this narrowly confined setting that we are asked to decide the issues presented in this case. Respondents have informed us that they seek no change in the current National Guard regulations;

4

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Blackmun, J.

Circulated: _____

Recirculated: 6/12/73

SUPREME COURT OF THE UNITED STATES

No. 71-1553

John J. Gilligan, Governor of Ohio, et al., Petitioners, *v.* Craig Morgan et al.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1973]

MR. JUSTICE BLACKMUN, concurring.

Respondents brought this action in 1970 seeking broad-ranging declaratory and injunctive relief. But the issue presently before the Court relates only to a portion of the relief sought in 1970. Under the Court of Appeals' remand order the District Court was limited in its review to determining the existence of a pattern of "training, weaponing and orders in the Ohio National Guard which singly or together require or make inevitable" the unjustifiable use of lethal force in suppressing civilian disorders. 456 F. 2d 608, 612. The Ohio use-of-force rules have now been changed, and are identical to the Army use-of-force rules. Counsel for respondent stated at oral argument that the use-of-force rules now in effect provide satisfactory safeguards against unwarranted use of lethal force by the Ohio National Guard. Tr. of Oral Arg. 31. And as of 1971 special civil disturbance control training had been provided for the various National Guard units.

It is in this narrowly confined setting that we are asked to decide the issues presented in this case. Respondents have informed us that they seek no change in the current National Guard regulations; rather, they wish to assure their continuance through constant judicial sur-

June 14, 1973

Re: No. 71-1553 - Gilligan v. Morgan

Dear Chief:

You preface footnote 15 on page 9 of your opinion with the phrase "Although we do not hold counsel to concessions made in oral argument . . . ." I would not like to commit myself to that statement. There have been, I think, a number of instances this very term where we have accepted at face value certain concessions made in the courtroom. Actually, I think the phrase might be omitted entirely.

I am having a little conceptual trouble with the opinion. It is for this reason that I circulated my concurrence. I shall adhere to that concurrence and add at the end "On the understanding that this is what the Court's opinion holds, I join that opinion."

Sincerely,

HAB

The Chief Justice

3 p.3
file

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Blackmun, J.

Circulated: _____

Recirculated: 6/18/73

No. 71-1553

John J. Gilligan, Governor of Ohio, et al., Petitioners, v. Craig Morgan et al.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1973]

MR. JUSTICE BLACKMUN, concurring.

Respondents brought this action in 1970 seeking broad-ranging declaratory and injunctive relief But the issue presently before the Court relates only to a portion of the relief sought in 1970. Under the Court of Appeals' remand order the District Court was limited in its review to determining the existence of a pattern of "training, weaponing and orders in the Ohio National Guard which singly or together require or make inevitable" the unjustifiable use of lethal force in suppressing civilian disorders. 456 F. 2d 608, 612. The Ohio use-of-force rules have now been changed, and are identical to the Army use-of-force rules. Counsel for respondent stated at oral argument that the use-of-force rules now in effect provide satisfactory safeguards against unwarranted use of lethal force by the Ohio National Guard. Tr. of Oral Arg. 31. And as of 1971 special civil disturbance control training had been provided for the various National Guard units.

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1553

John J. Gilligan, Governor of Ohio, et al., Petitioners, *v.* Craig Morgan et al.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 21, 1973]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE POWELL joins, concurring.

Respondents brought this action in 1970 seeking broad-ranging declaratory and injunctive relief. But the issue presently before the Court relates only to a portion of the relief sought in 1970. Under the Court of Appeals' remand order the District Court was limited in its review to determining the existence of a pattern of "training, weaponing and orders in the Ohio National Guard which singly or together require or make inevitable" the unjustifiable use of lethal force in suppressing civilian disorders. 456 F. 2d 608, 612. The Ohio use-of-force rules have now been changed, and are identical to the Army use-of-force rules. Counsel for respondent stated at oral argument that the use-of-force rules now in effect provide satisfactory safeguards against unwarranted use of lethal force by the Ohio National Guard. Tr. of Oral Arg. 31. And as of 1971 special civil disturbance control training had been provided for the various National Guard units.

It is in this narrowly confined setting that we are asked to decide the issues presented in this case. Respondents have informed us that they seek no change in the current National Guard regulations; rather, they wish to assure their continuance through constant judicial sur-

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 27, 1973

Re: No. 71-1553 Gilligan v. Morgan

Dear Chief:

I am happy to join in the suggestion that the Court reject the Ohio brief in the above case.

It is a minimal effort, of relatively little assistance - certainly to me. It compares most unfavorably with the full and careful treatment in the briefs on the other side.

Perhaps the greatest merit in our entering an order along the lines you suggest is to have it published on the Order List, which might result in responsible officials around the country becoming more conscious of the generally inadequate representation on behalf of the states.

Sincerely,

L. Lewis

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 20, 1973

No. 71-1553 Gilligan v. Morgan

MEMORANDUM TO THE CONFERENCE:

This refers to Thurgood's suggestion that we remand for consideration of mootness.

I would like to hear the discussion at the Conference before coming to rest, but I incline strongly to the view that we should dispose of this case here and not remand it for another round of futile litigation.

I possibly could go along with Thurgood's view that the case is moot on the conceded facts, provided we made the decision and ended the case.

My inclination, however, would be to hold in a brief Per Curiam that the plaintiffs lacked standing or that no justiciable issue was raised. I am convinced that some of our decisions are being construed by lower courts and the bar (wrongly, I hope) as opening the door far too widely, inviting resort to the Federal courts for what in effect are advisory opinions on social, economic and political issues and in the absence of genuine standing or a bona fide case or controversy.

A brief Per Curiam in this case might serve a useful purpose in prompting some much needed restraint in this type of litigation.

Sincerely,

Lewis

lfp/ss

May 10, 1973

No. 71-1553 Gilligan v. Morgan

Dear Chief:

I am in accord with the substance of your memorandum on the above case.

I will defer a formal "join" note until you circulate a draft opinion.

Sincerely,

LFP

The Chief Justice

cc: The Conference

May 10, 1973

No. 71-1553 Gilligan v. Morgan

Dear Chief:

This supplements my note to you as of this date, in which I expressed my concurrence in the substance of your memorandum circulated May 9.

I do have these general impressions which I pass on for your consideration:

1. The Court has gone very far in finding "justiciability" in circumstances never contemplated, in my opinion, either by the Constitution or by any court until recently. This case may give you an opportunity to move the Court back toward a more rational position, requiring - in accord with the Constitution - a genuine case or controversy.

2. The National Guard which, as you note, is authorized by the Constitution and is the functional equivalent of a ready Reserve for the U.S. Army.

I agree that specific tortious or unlawful conduct of the National Guard is, indeed, subject to judicial review. But this is quite different from a suit by citizens asking the federal courts to assume a continuing responsibility for overseeing the training, equipment and tactics of what in effect is a significant element of our national defense structure. We might with equal irrationality be requested to assume supervisory powers over the Secretary of Defense and the training, equipment and tactics of the Army, Navy and Air Force. In my view, if a federal court undertook such an

intrusion upon the constitutional powers of the Legislative and Executive Branches they would be justified in ignoring the court order.

3. The threshold question, of course, is mootness. I suppose the answer to this - at least arguably - is the insistence by respondent to the contrary and that continuing supervision over the Guard should be decreed.

Sincerely,

The Chief Justice

lfp/gg

May 12, 1973

No. 71-1553 Gilligan v. Morgan

Dear Chief:

In thinking further about this case, I must say that it is difficult to justify going beyond your Part I (ending at the top of page 9).

My every impulse personally is to include, even in stronger language, the substance of your Part II. As I have previously written, I do not think the judiciary has the authority under the Constitution to assume continuing supervisory powers over the Armed Services or any element thereof. But I now lean toward disposing of this case without addressing the substantive issue.

Your quotation from Flast (p. 5 of your draft) indicates that there are four grounds for finding an absence of "justiciability": (i) a political question, (ii) an advisory opinion, (iii) when mooted by subsequent developments, and (iv) absence of standing.

Each of these grounds is probably present in this case, although I am not sure that a majority of the Court would agree that the question is a "political" one. Accordingly, if you elect to make some revisions, I suggest that you might - relying on Flast - emphasize that justiciability is absent here for at least three of the reasons specified in Flast: parties who no longer have an interest have no standing; this is especially true where all that is sought is "an advisory opinion"; and, in any event - subsequent developments have rendered the case moot even if some of the parties remained at Kent State. I would like especially to return to more traditional concepts of standing and justiciability.

These defects would not be relieved if additional parties were admitted to the class, as they would still be seeking an advisory opinion and one that had been mooted.

The truth is, of course, that a Kent State student (who claims no damage or injury) really has no more standing to sue than a student at any other university in Ohio or indeed any other citizen who claimed he might be shot at some future demonstration in a public square of downtown Cleveland. There is no showing of a likelihood of a reoccurrence of a shooting anywhere.

In summary, what I am saying is this: I incline now to limiting our opinion to Part I, but with some strengthening of the view that there is a total absence of justiciability for the reasons above stated (and as set forth in Flast).

Sincerely,

The Chief Justice

lfp/ss

May 31, 1973

No. 71-1553 GILLIGAN v. MORGAN

Dear Chief:

In accordance with our discussion, I have taken a look at the draft memorandum from your Chambers dated 5-15-73 and have attempted to reframe it along the lines here enclosed.

The more I look at this case the more inclined I am to view it as follows:

Flast indicated that, in determining justiciability, various grounds have been relied upon and that a conclusion as to justiciability is "the resultant of many subtle pressures", indicating that one or more of these grounds - singularly or in combination - may produce the answer.

Ind. Emp. Sec. Remand

There was a good deal of feeling at the Conference discussion that the case is now moot. But respondents refute this, with a good deal of reason I think, by making two points: (i) that the "recent developments" may or may not be true, and an evidentiary hearing is necessary to ascertain the facts; (ii) even if true, the relief sought is a continuing surveillance of the National Guard to be sure that it conforms to whatever procedures, weaponing, etc., may be found appropriate. Thus, I am inclined to doubt that the issues raised are moot.

On the other hand, it seems to me that the essential vice in the case is an absence of standing, and this results from the political and advisory nature of the relief sought. I thus incline to the view that the last three factors mentioned in Flast (standing,

political nature, and advisory nature) combine here to require a dismissal.

Perhaps the case could be dismissed on the ground that none of the original parties remains a student at Kent State. But in view of the relief sought, I think it is quite immaterial whether the plaintiff is a student or not. If a student can maintain this action, I would think any citizen of Ohio could. Disorders, and the consequent use of the National Guard, have not been confined to campuses and they occur at quite unpredictable times and places.

Let me emphasize, in concluding, that I have had no opportunity to study the authorities; nor have I had a clerk available to put to work on this. My draft revision obviously is conclusory and undocumented, and a close look at the cases might indicate that it is unsound. In other words, it reflects my judgment based on general principles, although I would be the first to confess a good deal of uncertainty as to the contours of this slippery question of justiciability.

Ind. E. R.

I do think it is important not to "reach out" to decide the case more broadly than is necessary. I think this question needs to be examined critically, and I will await a more definitive circulation before deciding where I "come down".

I do hope, meanwhile, that my very rough effort will be helpful.

Sincerely,

The Chief Justice

lfp/gg

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1553

From: Powell, J.

Circulated: JUN 6 '73

Recirculated: _____

John J. Gilligan, Governor of Ohio, et al., Petitioners, v. Craig Morgan et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1973]

MR. JUSTICE POWELL, concurring.

In review of the relief sought by respondents, I do not think the instant case is moot. Respondents would still have a federal district court assume and exercise a continuing surveillance over the National Guard to assure compliance with whatever "training, weaponry and [operational] orders" such court may approve. None of the "changes in the factual situation" in this case moot this portion of the relief sought. I therefore think it necessary to reach the question of whether a justiciable controversy is presented. I agree with the Court that no such controversy exists and join Part II of the Court's opinion.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 11, 1973

No. 71-1553 Gilligan v. Morgan

Dear Harry:

As your concurring opinion states more fully why the case is moot, I will join your concurrence and withdraw my own.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

June 11, 1973

No. 71-1553 Gilligan v. Morgan

Dear Harry:

As your concurring opinion states more fully why the case is moot, I will join your concurrence and withdraw my own.

Sincerely,

Mr. Justice Blackmun

lfp/ss

cc: The Conference

Dear Chief:

My only reason for writing a concurring opinion was to make it clear that I did not think the case was moot. Possibly you and Harry could get together on this and obviate the necessity for concurrences.

L. F. P., Jr.

CORRECTED COPY

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 11, 1973

No. 71-1553 Gilligan v. Morgan

Dear Harry:

As your concurring opinion states more fully why the case is not moot, I will join your concurrence and withdraw my own.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 16, 1973

No. 71-1553 Gilligan v. Morgan

Dear Chief:

I have reviewed your latest draft in Gilligan (first printed draft), and remain in my previous posture of joining both the Court's opinion and Harry's concurring opinion.

I agree with Harry that, in view of the relief requested by respondents, this case is not moot. I therefore reach the justificability issue as do both of you.

Sincerely,

Lewis

The Chief Justice

cc: The Conference

lfp/ss

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 24, 1973

Re: No. 71-1553 - Gilligan v. Morgan

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 6, 1973

Re: No. 71-1553 - Gilligan v. Morgan

Dear Chief:

Please join me in your recirculation of June 5th.

Sincerely,

The Chief Justice

Copies to the Conference

June 8, 1973

Re: No. 71-1553 - Gilligan v. Morgan

Dear Chief:

Your proposed revision of the last paragraph in Part I of your opinion for the Court in this case is agreeable to me.

Sincerely,

The Chief Justice