In the

Supreme Court of the United States

JOHN J. GILLIGAN, Governor of Ohio, et al.,

Petitioners,

v.

CRAIG MORGAN, et al.,

Respondents.

No. 71-1553

Washington, D. C.
March 19, 1973

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v.	:	No. 71-1553
CRAIG MORGAN, et al., Respondents.	:	

Washington, D. C.
Monday, March 19, 1973

The above-entitled matter came on for argument at 10:05 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

THOMAS V. MARTIN, Esq., Assistant Attorney General, State House Annex, Columbus, Ohio 43215; for the Petitioners.

ERWIN N. GRISWOLD, Esq., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; for the United States as amicus curiae, supporting Petitioners.

MICHAEL E. GELTNER, Esq., 203 East Broad Street, Columbus, Ohio 43215; for the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 71-1553, Gilligan against Morgan.

Mr. Martin.

ORAL ARGUMENT OF THOMAS V. MARTIN, ESQ.,

ON BEHALF OF THE PETITIONERS

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

The question presented by this case is whether the propriety of the training, weapons, and orders should be determined by the federal court or by the other branches of the Federal Government.

Another question presented by this is whether injunctive relief against the use of the National Guard or against the use of certain training weapons or equipment of the Guard would constitute an unwarranted interference with the legitimate activity of the state.

This case arose out of the use of the National Guard to control syllabus orders which occurred at Kent State University in May of 1970. Respondents filed suit the following fall, claiming that the Governor had prematurely called the Guard to duty, that the conduct of the Guard while on duty at Kent State violated the students' constitutional rights and that Section 2923.55, which provides under limited circumstances immunity for members

of the National Guard, was unconstitutional.

Respondents also claimed that the continuance of the same operating methods and procedures of the National Guard, under the continued direction of defendants, constituted a threat of repetition of injury in the future.

The district court dismissed the complaint on the ground that it failed to state a claim upon which relief could be granted. The court of appeals unanimously affirmed the district court in its dismissal of two causes of action. However, it found that the complaint did state a claim with respect to the following question: Whether there was and is a pattern of training, weaponry, and orders of the National Guard which requires or makes inevitable the use of a lethal force in controlling civil disorders where such force is not reasonably necessary.

Petitioners, who are the successors in office to defendants below, filed a petition for writ of certiorari to this Court to review the portion of the judgment which reversed the district court.

The issue, as framed by the court of appeals, will require the Court to determine the propriety of the training, weapons, and orders of the National Guard. The resolution of this issue has been committed to the other branches of the Federal Government. Petitioners therefore contend that this issue presents a non-justiciable political

question. All of the factors or formulations which this Court has said may describe a political question are involved herein. There is a demonstrable constitutional commitment of the issue to Congress.

Article I, Section 8 of the Constitution gives Congress the power to provide for the training and equipment of the National Guard. The Congress, pursuant to this power, has enacted legislation which prescribes the proper training, weapons, and orders for the National Guard.

Congress has also enacted legislation which delegates to the President the authority to prescribe regulations and issue orders concerning these matters. The President has also acted pursuant to his authority and has prescribed mandatory riot control training requirements for the National Guard. Any relief which a federal court could give would express a lack of respect for the coordinate branches of the Government. Both Congress and the President have the authority and the responsibility to determine the proper methods of training and equipping the National Guard.

Any judicial relief which would control these matters would therefore indicate lack of respect by the Court for these coordinate branches to carry out their responsibilities.

Any judicial relief which controlled the training, weapons, or orders of the National Guard would also run the risk, create the risk, of conflicting pronouncements by the various departments on the same subject. Both Congress and the President have acted pursuant to their authority in the past. There is no reason to assume that they will not again so act in the future.

Any judicial relief as to these matters might create varying or even conflicting directives with future directives from either Congress or the President. These conflicting directives could cause confusion and delay responding to the syllabus orders. This delay could impede the ability of the state to control the disorders.

The proper method of training and equipping the National Guard and preparing them to carry out their responsibilities should be made by Congress or the President and not by the Court. The relief requested by respondents herein shows the need for expertise and specialized knowledge. The respondents have requested that the use of the National Guard to control disorders be enjoined until it is determined that the training of the members of the National Guard is competent and that they have been provided with the best available non-lethal equipment.

There is no ready criteria or standard for a court

to determine whether or not the training is competent and whether or not the equipment is the best available. The Department of the Army, because of its experience in the area, is better able to determine the amount of training that such troops need and the type of training.

The Department of the Army is also more likely to have knowledge of new developments in theories, in methods, on controlling syllabus orders and to have knowledge of new developments in new equipment. It is also better able to evaluate the effectivenss of such techniques and equipment not only because of its experience but because it has facilities whereby the techniques and equipment may be tested under simulated riot conditions.

In addition, a court cannot provide a continuing supervision and revision of the training and weapons of the National Guard, which is necessary to properly prepare them to perform their function. The court is limited. It must wait for litigants to bring a case or controversy in order for it to make its determination.

Petitioners also contend that the relief requested herein would be an unwarranted interference with a vital activity of the state, preparation for and control of civil disorders.

Q The relief requested is injunctive and declaratory relief only, is it not?

MR. MARTIN: Yes, Your Honor. I believe the main relief is to enjoin the use of the National Guard until it is determined that the training, weapons, and orders are proper.

Q That is, proper in the view of the court?

MR. MARTIN: Yes, Your Honor.

Q And was there ever here an action for damages as a result of what happened at Kent State in May of 1970?

MR. MARTIN: Not in this suit, Your Honor. I believe there are various suits pending for actions which involve what occurred at Kent State.

Q But this lawsuit does not involve anything, any damages, for what happened there; it is directed to the future entirely?

MR. MARTIN: Yes, Your Honor.

Q Mr. Martin, my understanding of the general rule is that the prayer for relief is not a part of the complaint. And, therefore, if the district court is going to dismiss the complaint, it would have to conclude not only that the particular relief sought is not warranted but that no conceivable type of equitable relief would be warranted.

MR. MARTIN: Yes, Your Honor. We contend that no type of relief is warranted. Petitioners are particularly

concerned with the release requested, which would enjoin the use of the National Guard until a court had determined the propriety of their training, weapons, and orders.

Q Would you say not even a declaratory judgment is warranted? That is a form of equitable relief, is it not?

MR. MARTIN: Your Honor, petitioners' interest in a declaratory judgment would be limited to whether the declaratory judgment would have the same disruptive effect upon the use of the National Guard as an injunction.

Q But your position is the political question would eliminate--

MR. MARTIN: Would eliminate all. That is right, Your Honor; that is our position.

Our position is, if it is not a political question, even if it is not a political question, we do not believe that injunctive relief against either the use of the National Guard or which would specify certain training, weapons, and orders is warranted.

Q Did you challenge standing below?

MR. MARTIN: No, Your Honor, we did not.

Q Do you here?

MR. MARTIN: We do not.

Q Is it open?

MR. MARTIN: The court below expressly reserved that question for the district court.

Q May I ask why you do not challenge standing?

MR. MARTIN: Part of it, Your Honor, is since we failed to do it below, we may not have realized that we could have and we believed that even if plaintiffs or respondents did have standing, there was still no relief which could be granted.

Q On the other hand, if there was no standing, you would not have to reach all those questions, would you?

MR. MARTIN: That is true, Your Honor.

Q And that would avoid these important constitutional questions.

MR. MARTIN: That is true, Your Honor.

Q Is not standing a constitutional question itself, but is it not a threshold one in the sense that it is jurisdictional? This is case or controversy type standing that you are talking about.

MR. MARTIN: Yes, Your Honor.

Q Is that not sort of a threshold question before you get to a lot of other things?

MR. MARTIN: It is a threshold question, and it may be we should have raised that issue, but we did not.

Q You did not, but is not that always open?

MR. MARTIN: Yes, Your Honor.

Q What about it right now?

MR. MARTIN: All right, Your Honor, I believe that there is no allegation in the complaint that the respondents were even students at the time the disorders occurred. The complaint was filed the following fall. Plaintiffs at that time contended they were students and sought injunctive relief.

We also believe that any question as to the propriety of injunctive relief is now moot. Plaintiffs-respondents base their claim for injunctive relief and a continuing threat of injury on the continuance of the same rules and operating procedures of the National Guard under the continued supervision and direction of the defendants. Neither condition now obtains. The rules of conflict or rules of engagement of the Ohio National Guard have been changed, and Ohio has now adopted the federal rules of engagement.

None of the defendants who were in control of the National Guard at the time of the Kent State disorders now have any responsibility with respect to the National Guard.

Q How is that change evidenced by a directive or by a statute or by a regulation or what?

MR. MARTIN: It was changed by--I am not sure of the proper term--a directive or order of the adjutant general.

Q I take it the record does not show that, the

record before this Court, but is it subject to judicial notice? Is it in a form that--

MR. MARTIN: The only way it may show up is we filed a memorandum suggesting mootness which contained these rules. The title is Op Plan Two for Control of Civil Disorders. We filed a copy of that with our memorandum suggesting--

Q That is another issue besides standing, I take it. That is mootness in the sense that there has been some new law that has intervened, is it not? But are these plaintiffs in any different position to make the challenge than any other citizen? Would any other citizen in the community have the same right, if any, to maintain this complaint, to file and maintain this complaint?

A As I construe their complaint, Your Honor, they claim a different interest in that they are students, and the National Guard could again be called to the university, to Kent State University, to control disorders.

Q What about a student in another state, in another university, where the regulations governing the National Guard were the same as existed at the time of the Kent State episode? Would they have standing on the theory of respondents?

MR. MARTIN: [No response]

Q Perhaps I will ask your friend to address

himself to that later on.

MR. MARTIN: I am sure he could better address himself to that, Your Honor.

Petitioners contend that the same consideration which required denial of injunctive relief against the Governor from prematurely calling the Guard to duty should also require denial of injunctive relief against the use of the National Guard until there is a judicial determination as to the propriety of the training, weapons, and orders. In order to control civil disorders, the state must be able to act immediately. If it is required to await a judicial determination before it can act, the harm to be prevented could occur without any opposition.

Petitioners also contend that any relief which would require or prohibit the use of certain training weapons or orders of the National Guard would also unduly impair the ability of the state to prepare for and control disorder.

No one can predict the time, place, size, or type of disorders, and no one can predict what measures will be necessary to control them.

The state officials must, therefore, be given broad discretion to prepare for any eventuality, and the state officials must also be given discretion to determine under emergency conditions just what methods or techniques

should be used to control the disorder. Any relief by a court which would control the training or weapons or orders of the court would restrict this discretion and thereby impair their ability to prepare for and control disorders. We believe the instant case is readily distinguishable from the cases relied upon by respondents and cited by the court below, which granted injunctive relief against illegal police activity.

None of those cases required the court to review the training, weapons, or orders of the police department. None of those cases enjoined or required the use of certain training, weapons, or orders.

The injunctive relief in those cases was very narrow. It was limited to conduct which could not be constitutional or could not be valid under any circumstances. There was, therefore, little risk that injunctive relief would inhibit beneficial and lawful police conduct as well as unconstitutional police conduct.

Q What line of cases are you talking about?

MR. MARTIN: Hague v. C.I.O., Your Honor, and the cases where a federal court has granted injunctive relief against certain conduct of a police department.

In the instant case, on the other hand, the training, weapons, and orders of the National Guard are not illegal in themselves and not illegal under any circumstances.

The basis for the claim that they may be illegal or may be unconstitutional is that alleged unconstitutional conduct by the Guard resulted therefrom. Injunctive relief against the training, weapons, or orders of the National Guard could therefore also inhibit lawful conduct by the state and beneficial conduct in controlling disorders.

Petitioners contend that the issue of the training, weapons, and orders of the National Guard has been committed to the other branches of the Federal Government and that these branches of the Federal Government are better able to deal with the problem.

Petitioners, therefore, respectfully submit that this case presents a non-justiciable political question. Petitioners also contend that any injunctive relief which could be granted against the use of the National Guard or against its training, weapons, and orders would constitute an unwarranted interference with the ability of the state to protect itself against disorders.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Martin.

MR. MARTIN: Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GRISWOLD: May it please the Court:

The United States is not a party to this case

and had no direct role in the events which occurred at Kent in May, 1970. The actors there were officers and members of the Ohio National Guard, a state organization, acting at that time under state authority.

However, the United States Army is responsible for the training of the National Guard. Consequently, the United States is much concerned about this case and the possible impact of the decision below and the complications which would inevitably ensue if the federal court should undertake to exercise oversight of the training of the National Guard.

Under the system established by Congress, National Guard units are ordinarily under state command and operational control. They receive federal financial support though only if they maintain "federal recognition" by meeting prescribed federal standards. The state is free to support its own National Guard any way it wants to. But to obtain federal support, they must meet federal standards.

Q There is no state that does not.

MR. GRISWOLD: There is no state that does not now meet federal standards. There have been in the past, in the distant past. And, indeed, the present National Guard organization only dates from the early part of this century. The whole business of trying to handle the Civil War was largely done through state-raised troops.

The statute passed by Congress authorizes the President to--again I quote--"prescribe regulations and issue orders necessary to organize, discipline, and govern the National Guard." And this is pursuant to the provision of the Constitution which gives to Congress the power to provide for organizing, arming, and disciplining the militia and reserves to the states the authority of training the militia according to the discipline prescribed by Congress.

The provision for uniform training or discipline insures that the militia can be effectively integrated into the regular army if the need arises. The Constitution contemplates that the Federal Government will prescribe the training program, but the state actually administers the training as long as the Guard has not been federalized.

Q Mr. Solicitor General, did I understand Mr. Martin correctly that they just adopted these federal standards while this case was pending?

MR. GRISWOLD: They have adopted the federal standards since this case was begun, and I will come to the details in just a moment.

The Army is naturally primarily concerned with insuring that the Guard is qualified to serve as a part of the Army if called into active federal duty. But the Army has also promulgated detailed instructions for civil defense

control training, and this training program is for National Guardsmen as well as for members of the regular army.

Beginning in 1971, the army began to give National Guard recruits 15 hours of additional special civil disturbance control training. This special training was initiated in recognition of the fact that Guard units are more likely to be called to suppress civil disturbance than are regular army units.

An important aspect of civil disturbance control training is the rules governing the use of force. When the Guard is in state status, it is subject to the state's use of force regulations. The National Guards of all states, including Ohio, have now voluntarily adopted the federal standards on use of force as their own. At the time of the Kent State incident, however, in May, 1970, the Ohio rules were substantially different from the federal rules and different from what they are today.

The army rules, which have been in effect since March, 1968, are set forth in the appendix of the Government's brief, beginning on page 29. And the relevant portions are stated on pages 33 and 34 of the Government's brief. I read from the top of page 33. These are the federal regulations now adopted by the Ohio National Guard and all other national guards.

Q And adopted since May of 1970.

MR. GRISWOLD: By Ohio late in 1970. Since the events and since this suit was brought.

I read from the top of page 33:

"The presence of loaded weapons"--well, let me change to pages 13 and 14 of our brief where they are summarized, rather than the full text.

The rules provide detailed regulations for the use of deadly force, and it is authorized only where--just above the middle of page 13--"lesser means have been exhausted or are unavailable, the risk of death or serious bodily harm to innocent persons is not significantly increased by its use, and the purpose of its use is one or more of the following: Self-defense to avoid death or serious bodily harm; prevention of a crime which involves a substantial risk of death or serious bodily harm (for example, setting fire to an inhabited dwelling or sniping), including the defense of other persons; prevention of the destruction of public utilities or similar property vital to public health or safety; or (d) detention or prevention of the escape of persons who have committed or attempted to commit one of the serious offenses referred to in (a), (b), and (c) above."

And then with respect to live ammunition, the present rules of force provide, as quoted at the top of page 14.

"Task force commanders are authorized to have live ammunition issued to personnel under their command. Individual soldiers will be instructed, however, that they may not load their weapons except when authorized by an officer or, provided they are not under the direct control and supervision of an officer, when the circumstances would justify their use of deadly force. Retention of control by an officer over the loading of weapons until such time as the need for such action is clearly established is of critical importance in preventing the unjustified use of deadly force. Whenever possible, command and control arrangements should be specifically designed to facilitate such careful control of deadly weapons."

It is obviously a difficult and delicate situation. You might have an individual soldier out alone where he might have to use his judgment, but it is placed under the control of an officer.

Q At the time that this suit was filed, the complaint was, as I understand it, that the Ohio rules allowed them to carry loaded weapons.

MR. GRISWOLD: Yes, Mr. Justice.

Q That is what the suit was about.

MR. GRISWOLD: The Ohio rules, which were then in force are set out on pages 41 to 45 of the Government's brief. And I would call attention to what they were and the

complete change between that and the present rules. This appears on page 43 in the Appendix B to the Government's brief under the heading "f. Weapons."

"When all other means have failed or chemicals are not readily available, you are armed with a rifle and have been issued live ammunition."

That is pretty much encouragement, I should think.

"The following rules apply in the use of firearms: (1) Rifles will be carried with a round in the chamber in the safe position." They are to carry loaded weapons.

"Exercise care and be safety minded at all times." That is not much suggestion about safety as to the other people.

And then "(2) Indiscriminate firing of weapons is forbidden. Only single-aimed shot at confirmed targets will be employed. Potential targets are:"--and then I will turn to "(c)" at the top of page 44.

"In any instance where human life is endangered by the forcible, violent action of a rioter, or"--and it is or--"when rioters to whom the Riot Act has been read cannot be dispersed by any other reasonable means, then shooting is justified."

Mr. Chief Justice, I understand I am to have some of Mr. Martin's time of which he some left.

MR. CHIEF JUSTICE BURGER: You may continue.

MR. GRISWOLD: In December, 1970, some seven months following the shooting at Kent State, the Ohio National Guard issued a new operational plan which adopted the army use of force rules verbatim. This appears on orders of the Adjutant General of Ohio, which have been filed with the Clerk of this Court. I think that such orders ought to have the status of regulations and ought to be capable of being taken judicial notice of by the Court.

Now I would like to turn to the legal position where, it seems to me, that first we have a good old question quite apart from political question, quite apart from standing, simply of equitable jurisdiction. The only prayer in this complaint is for equitable jurisdiction. This appears on page 10.

"Wherefore, plaintiffs request that this Court enter judgment as follows: (a) Enjoining Defendant Rhodes... (b) Enjoining Defendant Rhodes... (c) Enjoining Defendant Rhodes... (d) Enjoining Defendants, and their successors"--and finally (e) declaring a section of the Ohio Revised Code to be unconstitutional and void. That is a declaratory judgment, but the court below decided that against the respondents here, and they did not file any petition and it is not before the Court.

I recognize that one is not completely bound by the prayer, but there is not the slightest doubt that this

suit was not brought and cannot be brought because of the wrong that was done to anyone at Kent State in 1970. This is not a tort suit and there will not be federal jurisdiction of this case as a tort suit.

There is no basis for this suit except as a suit to enjoin a violation, a threatened violation, under the Civil Rights Act, and I would suggest that the mere showing that there was an event once in the past does not provide a basis for equitable jurisdiction.

A recent case which is fairly close to that is Laird v. Tatum.

Q Mr. Solicitor General, you say only equitable relief was sought. Are you including within equitable relief a possibility of a declaratory judgment?

MR. GRISWOLD: There is no prayer for a declaratory judgment except with respect to this one section of the Ohio statute which they lost below and did not seek to bring here.

Q How about subparagraph (f)?

MR. GRISWOLD: Subparagraph (f), granting such other and furthur relief as this Court deems just and proper, and I assume that this Court will grant such further relief as it deems just and proper; I do not think that really adds to the scope of the claim, which is solely for an injunction, and I also have considerable feeling that the

same rules as to equitable jurisdiction are applicable to a declaratory judgment which is really a kind of injunction which does not have quite the immediate teeth that an injunction has, but it is res judicata, and you can then come in and apply to the Court for an order to comply with it.

Something was done at Kent State which was unfortunate. Firm action was taken to correct the regulations and instructions and training of the Ohio National Guard. This may well have been due to federal influence, though that does not appear affirmatively in the record.

In this situation, it is my contention that it is not appropriate for the courts to intervene and to undertake to prescribe or supervise the training of the National Guard.

Q Should we limit it to the new regulation?

MR. GRISWOLD: Is the Court limited to the new regulation?

Q Yes.

MR. GRISWOLD: I would think with respect to the determination of the propriety of equitable relief, it was.

Q And we would not have to approve of those old ones, would we?

MR. GRISWOLD: No, certainly not. I do not approve

of the old ones--

Q Well, I hope so.

MR. GRISWOLD: --and I gather that neither does Ohio now. But that leads me to the next question, the question of standing. The respondents here would appear to have no personal standing. They were not injured at Kent State. I am advised that they are no longer students at Kent State. That would appear from the offices they held and the lapse of nearly three years. They purport to bring the suit as a class action. There is at least a problem as to whether a class action can be maintained by persons who are no longer members of the class.

They allege that a wrong was committed in May of 1970, but they do not sue because of the wrong, and the district court below would not have jurisdiction of a suit based on that wrong.

Because of the one event, they say that their rights are threatened. But their claim of future harm is only speculative. They base their claim upon the single incident at Kent State in May, 1970, and ignore the substantial revisions that have since been made. There is here no ongoing event or program which the respondents will inevitably confront. They allege merely that such an event may occur at some unspecified time in the unstated future. Courts of equity should not exercise their injunctive power

at large in the absence of a more specific threat of potential harm than is alleged here.

Indeed, the case is here in a rather odd and highly artificial posture. The sole relief here claimed is prospective, equitable, and injunction. But, one, the plaintiffs are no longer students. Two, the original defendants are no longer in office. There is a new governor, a new adjutant general, both of whom have made it plain that they do not support the rules upon which action was taken before. I well remember when in filing a motion to substitute new government officers, you had to get a declaration from them as to whether they proposed to continue to follow the same policy.

Now we do it automatically as a matter of course, which is probably an improvement; but it is perfectly plain that the present officers, against whom the injunction is sought, do not propose to follow the same policy. The training regulations have been changed and the statute as to which a declaratory judgment was sought has been repealed.

Much of the talk in the respondents' brief is about the wrongs that the governor and the adjutant general did. But this is not a tort suit. It is, as I have said, solely a suit for an injuntion.

To proceed with this case, it seems to me, is to make it a sort of phantom case, and I have sometimes thought

that when I have more time available, I may try to write an article about phantom cases in the Supreme Court. For example, Bivvens, decided two years ago, is a phantom case. The actual facts there bear no relation to the issue which was decided by the Court. And similarly last term, Mandel was a phantom case; for we knew facts which were not in the record, which made it a very different case than it was. These arise because people file motions to dismiss in the lower courts as the quickest way to get rid of a case, and it seems to me perhaps doubtful and perhaps questionable under the case in controversy standard of the Constitution whether the Court should undertake to decide issues in cases which have become so removed from reality as this one has.

Q When you write that article, have in mind Robinson v. California.

MR. GRISWOLD: Thank you, Mr. Justice. I will be glad to add that to my notes. My notes have largely been based on cases through my office, and I will look for that.

Q Are you open to other suggestions?

MR. GRISWOLD: And accordingly we--Mr. Justice? Sorry?

Q Are you open to other suggestions?

MR. GRISWOLD: Yes. I would like them very much, and I will give credit in a footnote.

Accordingly, we submit that the judgment below should be reversed, with directions that the complaint should be dismissed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Geltner.

ORAL ARGUMENT OF MICHAEL E. GELTNER, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. GELTNER: Mr. Chief Justice, and may it please the Members of the Court:

Before I go into my argument, I would just like to clarify two points which came up in the preceding arguments and about which I might be able to clear the record.

The first is the claim for declaratory relief. Since I am the draftsman of the complaint, I guess I have got to stand by it. In sub-parts--I am reading from page 11 of the appendix--in sup-parts (b), (c), and (d) on page 11 of the prayer for relief, after requesting injunctive relief, the paragraph then proceeds to recite the words "and declaring the use of the Ohio National Guard troops contrary to those requirements to be unlawful." It is that portion which is intended to be the request for declaratory as well as injunctive relief.

Q Can you give me any form book that you got this out of? Every one I have evdr seen said you ask for

a declaratory injunction and then you ask for the injunction; right?

MR. GELTNER: I have not learned it that way, Your Honor.

Q If you get an injunction, do you need a declaratory judgment?

MR. GELTNER: You might, yes, Your Honor. You might as to some aspects.

Q If you properly drew your injunction, would you need a declaratory judgment?

MR. GELTNER: No, you would not.

Q Why do you ask for an injunction and you claim this last thing, you also want a declaratory judgment after that?

MR. GELTNER: That is right, Your Honor. It was anticipated that the injunctive aspect of the relief, if gotten, need not simply be a recital of past events being wrong and enjoining future events. Rather, it might be directed at specific items. For example, specifically ordering the Guard no longer to carry loaded weapons into an engagement.

It was believed, then, that certain aspects of the injunction could be specific, whereas certain aspects of the declaratory judgment might be more general in terms.

Q You would never ask for a declaratory

judgment.

MR. GELTNER: It was anticipated that that was the request.

Q Going along that line a little bit and relating it to the relief that you were seeking, Mr. Geltner, suppose there had been no appeal here. This is obviously hypothetical. No appeal here and you had gone back to the district, and the district court after hearings, taking extra testimony and what not, had decreed a set of rules for the National Guard which were the same as those, essentially the same as those, which are now in force by virtue of the army regulations. Would you think that was the kind of relief that would be appropriate for a court of equity to give you?

MR. GELTNER: Among the possible appropriate reliefs might be that.

Q What more would you want beyond that?

MR. GELTNER: At the time of the filing of the complaint, as the Solicitor General has pointed out, the rules of engagement in Ohio were highly objectionable. It was anticipated that we would seek either a specific order, directed at specific items, or that the court would order the defendants, in the event that it found wrongdoing, to come forward with a plan for rectification of the conditions and then enter the plan as part of its order, if it found the

plan to be adequate. It was anticipated in part that it might well be the army's rules of engagement or those noted by Judge Edwards in his opinion below.

Q Are there some beyond the army regulations that you would seek in the district court, if you go back there?

MR. GELTNER: There are numerous alternatives--

Q Better alternatives?

MR. GELTNER: At this point, the rules which are present in the appendices produced by the army are sufficient. But we believe that they deal only with certain aspects of the case and, in addition, that it may well be necessary to have them entered as an order at this time for that specific purpose.

Q Would it satisfy you if a court of equity ordered, irrevocably ordered, the State of Ohio to maintain the army rules in force?

MR. GELTNER: Maintain the existing army rules in force.

Q That is the new ones, yes.

MR. GELTNER: That would satisfy us as to the bulk of our case. But we perceive a substantial difference between the question of whether or not the rules are in force and the questions of whether or not the rules are actually in force and enforced over a continuous period of

time by adequate training of the troops, by continuous training of the troops. Ohio, prior to the time in question, did not have these rules. Ohio might well go back to its old rules in the future.

There is nothing in the record which indicates that Ohio has made an irrevocable decision for these rules. The rules are not law. They are not law in Ohio, and they are not law in the United States. In addition to which, as I have said, it is basically a district court function to determine whether or not the laguage of the rules is actually conveyed to the troops by instruction and by order.

Q If you have standing and if this is a justiciable question and all the other barriers are satisfied and the State of Ohio went back to its old rules, couldn't you always on your theory start a new suit in equity?

MR. GELTNER: I suppose we could. It has taken us over two years now to have an adjudication, and we still have not yet had a district court enter an order or decide. I would assume that what with the complicated procedural problems involved in a prospective course of action directed against the Government, the district court might well see dismissal as the logical way to act. It is important, I believe, to have these questions decided now, assuming as you say, Your Honor, that this is a proper case, it is

justiciable and the parties do have standing.

Q How many of your clients are in school now?

MR. GELTNER: The three plaintiffs have all graduated. The action was brought as a class action at--

Q Who in the class is now at Kent?

MR. GELTNER: The entire class--the Kent State University student body is thus represented. None of the three named plaintiffs are now members of the Kent stduent body.

Q Have you sought to intervene any new plaintiffs?

MR. GELTNER: We have not sought, but will seek at the district court level. We have been requested by--

Q What do we have now? Do we not need a named plaintiff with an interest as of this moment in order to have jurisdiction?

MR. GELTNER: I do not believe so, Your Honor.

Q Why not?

MR. GELTNER: I believe at this point the complaint stands on itself. At the appropriate time--

Q Suppose they all dropped dead.

MR. GELTNER: Well, Your Honor--

Q Suppose all the named plaintiffs dropped dead. Would you still be here?

MR. GELTNER: I see no provision in the rules for

substituting at this point. The district court can substitute, and we have been requested by the present president of the student body to intervene him when we have the opportunity.

Q Have you asked this Court to be permitted?

MR. GELTNER: We have not, Your Honor. We have not asked this Court for an order. As I have said, it is our plan to seek substitution at the district court level, and I believe that the cases support the proposition that that is the appropriate place.

Rule 25 speaks to substituting defendants at any stage rather than substituting plaintiffs at any stage of the proceedings.

Q Mr. Geltner?

MR. GELTNER: Yes, Your Honor.

Q I think it was Mr. Justice White who inquired of counsel for the state whether there was any more reason why a student, a former student, of Kent State would have standing to bring this case than any other citizen of Ohio, and I do not think the question was answered. What would your answer be?

MR. GELTNER: Yes, Your Honor, I have a rather lengthy answer to that question, because it requires an exploration of the entire standing doctrine. Basically this case is a live justiciable case because of the specific

events. The complaint alleges, and we believe we can prove, that there were specific deprivations of constitutional rights. There were peopled killed, there were people shot, there were beatings administered, there were detentions, there were lawful assemblies broken up. We believe we can prove all that and we have alleged all of that.

There is, then, a specific concrete controversy. It is an event which was explored at great length by numerous commissions. But we believe it is highly justiciable in nature in that it relates to specific wrongdoing on the part of Government in the past.

The key to the prospective aspect of the case is this specific wrongdoing. It is in that sense that this case is different from several of the cases in recent years in which the Court has found no standing because of an absence of a past event. That is, we are not seeking merely guidance for the future. We are seeking guidance for the future arising out of a specific event.

The next question is, What is the nexus as to these particular plaintiffs to this past event? The answer to that is complex, but basically the past event forms a factual basis out of which we conclude in the complaint that a very real risk exists of repetition in the event of future demonstrations and future lawful assemblies. The plaintiffs are exposed to that as any other person on the

Kent State University campus. But students at the Kent State University campus at the time of the filing of this complaint were peculiarly exposed to that risk because of what had happened and because of the nature of the relationship of the local police and the National Guard to that community.

It was therefore felt, and it is still felt, that they are peculiarly susceptible to the same kind of conduct and that the factual basis on which a court can act has got to be this past conduct in which we seek to prove that certain things were done as alleged and were results of the inadequacies which we allege to have led to them. That is what makes it a specific controversy as opposed to a lawsuit in which a plaintiff walks into the court and says, "I hear the Government is doing something. I think it may affect me. Therefore, I'd like to bring an action."

Q Could it have been brought by a student, say, of Ohio State University?

MR. GELTNER: I do not believe so, Your Honor.

Q You would have had to have this background of disorder and action by the Guard?

MR. GELTNER: This is a very specific background. There was very specific conduct, and it is very specific conduct that we are aiming at. And it is only a Kent

State University student who is subjected to this risk.

By the same token, though, a Kent State University student is as much exposed to these particular risks in the future and was at the time of the filing of the complaint as people who had actually been subjected. We have complained about a bunch of diverse constitutional deprivations, one of which is shooting.

It is hard to see, for the purposes of prospective relief, why the Court would want to require somebody who was actually shot to be the plaintiff when the key to prospective relief is preventing future shooting. We say similar things about beatings and about detentions.

As to the breakup of lawful assemblies, the complaint does not allege that these plaintiffs were participating in the assemblies which were broken up. As to that, we believe the complaint does not preclude us from proving that they were in fact participants in those lawful assemblies. In fact, we read the rule of Conley v. Gibson as holding that unless your complaint establishes that you are not in fact capable of proving that which entitles you to relief, then you may not be dismissed.

We think that the question of disentitlement as to that item is properly a defensive matter or a matter for a summary judgment.

Q Is that aspect in the complaint before us

here?

MR. GELTNER: Yes, Your Honor.

Q Why is that? You did not file a petition for certiorari, I gather, did you?

MR. GELTNER: That is right, Your Honor. We did not.

Q And the district court or the court of appeals just upheld your complaint insofar as it alleged the theory of inadequate training?

MR. GELTNER: The theory of inadequate training, the theory of improper orders, the theory of improper arming of the troops.

Q I did not know that the issue here was whether or not the complaint stated a good cause of action insofar as it alleged the actual breakup of assembly.

MR. GELTNER: I do not think, Your Honor, that that question can be avoided. What happened in the district court, the district judge dismissed without an opinion. As a result, we have really no guide as to what his thinking was.

Judge Edwards wrote the controlling opinion, the majority opinion, for the panel in the Sixth Circuit. Judge Edwards split the complaint in three parts, properly so. One part of the complaint deals with the claim that a section of Ohio law, which the National Guard had read as

giving it an immunity was unconstitutional on its face. Judge Edwards construed that narrowly and dismissed it.

The other claim deals with the power of the court to enjoin the governor of Ohio from future use of the National Guard prematurely. Judge Edwards dismissed that on the grounds that it was in effect a prior restraint and not justified. In our brief we point out the reasons why certiorari was not filed on that. Which leaves the rest of the complaint, which Judge Edwards ordered dismissed, and he quotes in his opinion from the relevant paragraphs, which he concludes stated a cause of action.

I am reading now from page 15 of the petition for writ of certiorari which contains the opinion of the court below. The portion of the complaint which he finds subject to remand are sub-parts (a), (b), (c) and (d) of the controlling paragraph describing the wrongs. Those are the ones which describe the separate wrongs which are in issue. And, as I have said, they are basically the shootings, the beatings, the detentions without arrest, and the breakup of assemblies, which we allege.

Q Mr. Geltner, referring to Judge Edwards' opinion, if you turn over to page 18, you see his summary of the question which he deduces from the paragraphs you have just mentioned. Do you accept his statement of the question as the substantive question before this Court, assuming we

get over the preliminary questions of standing and justiciability?

MR. GELTNER: I accept that as one of the four substantive questions which I believe his remand puts in issue, Your Honor.

Q As one of--

MR. GELTNER: One of the four. His statement of that portion of the complaint which deals with the unjustifiable killings and shootings is perfectly adequate, and I fully accept that statement. The other sub-paragraphs of the complaint which he had just quoted from include claims of unlawful and unjustified beatings, unlawful detentions, and breakup of lawful and peaceable assemblies. In each of those instances Judge Edwards in his opinion italicized the key language. When he caming to framing the question, he framed only the question as it related to the shootings, that is, the use of lethal force when non-lethal force was reasonably necessary.

Q Is that the only question that is remanded to the district court?

MR. GELTNER: It seems to me he has remanded all the questions because he goes on to hold that relief is appropriate as to those portions of the complaint, that the key question in part is the entitlement of one's having judicial forum--here one's claim for relief--and that those

aspects of the complaint are distinguishable from those portions which he split off, dealt with separately, and dismissed those two.

Q He says at the top of page 18--the language that my Brother Powell has just referred to--he says, "The question which we think these paragraphs serve to pose." That is all the paragraphs, (a), (b), (c), (d). Then he makes a compendius summary of his understanding of all the paragraphs. I had thought and I understood and I gather your brothers on the other side have understood, that what was remanded to the district court and all that was remanded to the district court was this question summarized here by Judge Edwards, his opinion on page 18. Am I all wrong about that? You say there are three other questions?

MR. GELTNER: I think that Your Honor fairly read the complaint raises three questions which are admittedly--

Q There are four in all.

MR. GELTNER: Four in all. They are subsidiary to that matter and that may be dealt with independently.

Q On page 20 it says, "Further, if the District Court after evidentiary hearing were to find from the facts developed before it that an affirmative answer should be made to the summary question previously phrased in this opinion."

And then on 21: "As to this phase of this complaint, the case is remanded for further proceedings consistent with this opinion."

I can certainly understand why the other italicized language seemed very relevant. But I thought the issue was limited here to that phase of the case.

MR. GELTNER: It may well be that Judge Edwards saw those matters as subsidiary to the question of the actual use of deadly weapons. In the proposal that he sets forward in the appendix to his opinion, he deals with matters which relate to much more than merely the use of deadly force. He deals with batons. He deals with the way in which a mob ought to be engaged, et cetera.

It is possible to see the question of whether or not the National Guard is authorized to detain people, to beat people, and more specifically to break up assemblies, as subsidiary to the question of whether or not the way in which it conducts itself is integral to an unreasonable risk creation as to death or shooting. It is possible to see them as subsidiary. It is also possible to see them as separable.

It is our position that the complaint should fairly be read as treating them as separable, although I understand that Judge Edwards' opinion tends to see them as subsidiary.

Q Mr. Geltner, help me out on this breaking up

of unlawful assembly. Under your ideas of what you want, who decides whether it is lawful or unlawful?

MR. GELTNER: The court issues an order. Thereafter, the--

Q And the order says what?

MR. GELTNER: The order enjoins the defendants from ordering or permitting their troops to break up lawful and peaceable assemblies.

Q Are they not already under that injunction by the laws of the land?

MR. GELTNER: Not for purposes of the contempt power of the court, Your Honor. It is our position, for example, that the defendants did in fact break up at least two lawful and peaceable assemblies. I know of no mechanism other than the contempt power of a United States district court which would give any of the plaintiffs or their representatives the ability to call the defendants to task for that. It is our belief that the injunction is necessary.

Q Then the governor and all of his authorities have to make a judgment as to whether this is lawful or unlawful, subject to the contempt priorities of the court?

MR. GELTNER: On the ground, Your Honor, that they have in fact broken up lawful assemblies in the past, that is, acted unlawfully.

Q May I tarry on the suggestion of your friends there; what case do you have for that point?

MR. GELTNER: Hague v. C.I.O., Your Honor.

Q Hague v. C.I.O.? Which opinion?

MR. GELTNER: The opinion of the Supreme Court which incorporated in part the opinion--

Q Which one?

Q There was no opinion of the Supreme Court in that case.

MR. GELTNER: There were four opinions of the Court.

Q Yes, no opinion of the Court.

MR. GELTNER: My recollection is that--at one point in my brief I have traced down the--I have got it in a footnote here, have I not? I see six notes on the Court for the proposition that the assembly--that the breakup of an unlawful assembly is a deprivation of a constitutional right and that a court may act in its equity jurisdiction to enjoin that future conduct. And, if I can find the appropriate page, Justice Roberts for himself and Justice Black; Justice Stone for himself and Justice Reed and Chief Justice Hughes. Five of them, I am sorry, Your Honor. Justice Douglas and Justice Frankfurter did not participate, and I guess that leaves us with three dissenters. So, I see five votes, two dissenters. I see five votes for that

proposition, all of whom were agreed, although I recognize that Justice Stone got there a different way. And that is the basis for our proposition.

Thereafter, of course, the district courts and the circuit courts have expanded to a great extent on that power.

Q Suppose you were sitting as a court and you had an assembly of a thousand people, one of them threw a rock; would that be an unlawful assembly? And before you answer, I am going to ask you the next one: How many rocks?

MR. GELTNER: Your Honor, I can grant you one rock, Your Honor, which will mean a crime. That would not be a riot under Ohio law--

Q We are not talking about riots under Ohio law. We are talking about a very nice phrase called "lawful assembly." And would lawful assembly be one in which one rock was thrown?

MR. GELTNER: The Constitution does not protect an assembly in which rocks or a rock are thrown.

Q So, if one rock was thrown, it would not be protected?

MR. GELTNER: That is right.

Q So, then, the Government issues an order that if anybody throws one rock, shoot.

MR. GELTNER: You have changed the facts on me.

Q Do you want that law?

MR. GELTNER: No, we do not want that law. The question is: May the assembly be broken up as a consequence of one act of violence? I think that is a fair question, and I think it can be. But the other side of the question is: May the assembly be broken up as a result of no acts of violence? I think the answer to that one has got to be no.

Q It is a factual point.

MR. GELTNER: Exactly. It is purely a factual point.

It is likewise true that we allege as a factual matter that defendants did break up a lawful assembly and we plan to prove that the assemblies were in fact wholly lawful and wholly peaceful at the time the National Guard did break them up.

Q And that assembly, so far as you know, will never occur again.

MR. GELTNER: The conditions--

Q Has it?

MR. GELTNER: That particular assembly? Other assemblies have occurred.

Q Has any other lawful assembly occurred on Kent State?

MR. GELTNER: Yes, Your Honor.

Q And has it been disturbed?

MR. GELTNER: Yes, Your Honor.

Q It has been disturbed?

MR. GELTNER: Yes, Your Honor.

Q Where is that in the complaint?

MR. GELTNER: I left it out, Your Honor.

Q Why did you leave that out?

MR. GELTNER: It occurred after the date of the complaint, Your Honor. It is not our fault--I have taken the position--

Q What do we have in the record in this case that entitles the class--and what is the class as of now?

MR. GELTNER: The class as of now consists of all students at Kent State University.

Q Which is a different class from when it was filed.

MR. GELTNER: Which consists of different persons from when it was filed.

Q And if we take a year to decide it, it will be still another class.

MR. GELTNER: Different persons, same class.

Q Different persons, same class.

MR. GELTNER: It is in the nature of the class. The key to class action under Rule 23(b)(2) is prospective relief. Is it likely the defendants will act toward the entire class in a way such as to justify prospective relief?

That is the key to the whole complaint.

Q You do agree that two-thirds of what both sides have told us or 80 percent of things that were not before the district court--

MR. GELTNER: Your Honor, we are in a difficult position here because of the fact that all we have got is a bare complaint. It would be much preferable if we had a record to deal with but we do not. And, therefore, what we have got to do is deal with inferences. We are willing to rest on the sufficiency of the complaint. I do not think it is terribly proper for me to come here and try to tell the Court that we can prove things which are beyond the face of the complaint, but--

Q Why are you not willing to rest on these new regulations?

MR. GELTNER: That is the contrary point. We believe, first of all, as a matter of law, that because of the wrongdoing, because of the very specific acts, even if these regulations are legitimate, they should be entered as an order and an order or declaratory judgment should be entered so as to preclude any return to the old ways. In that sense, controversy is not mooted.

Q Would that satisfy you?

MR. GELTNER: That would go very far to satisfying us.

Q That is not my question.

MR. GELTNER: The other aspect of it--

Q You are asking, then, if you say it should be entered as an order of the district court in the form of a declaratory judgment--if that were to be done, that would require that we decide all of these constitutional issues, standing, justiciability, and so forth.

MR. GELTNER: That is absolutely right, Your Honor. Standing, justiciability, the absence of mootness are prerequisites to this Court's acting or it is a continuation in the action by the district court.

Q I understood, Mr. Geltner--and you tell me if I misunderstood--you to answer the question my Brother Marshall just asked you a while ago, and the question was phrased in a somewhat different way by the Chief Justice, that, assuming that you are right, that these threshold issues are not obstacles and get over them, get to the merits, that you really would not be satisfied even then by an order of a court putting in permanently the present directives to the National Guard because, while that might be all right on paper, you are concerned with the actual pattern of training. Is not that what you said to the Chief Justice?

MR. GELTNER: That is absolutely right, Your Honor.

Q And, therefore, you would say that the

district court has to get out there every week for two hours and watch--

MR. GELTNER: The district court has got to enter an order. Thereafter, the district court has to make itself available for counsel to bring to its attention any matters, including the counsel for the defendants in the event that they seek to modify the--

Q How are counsel going to know without getting out there with the National Guard on their weekends of training? Or is the court to send a master out there?

MR. GELTNER: No, I believe that counsel can be authorized to marshal periodically the nature of the training and to make available to the Court whatever evidence is necessary.

Q How is this going to be done?

MR. GELTNER: It could be done by access. It could be done by permitting counsel to come forward and produce witnesses. A motion for contempt is ordinarily subject to proof before the court, or a motion for modification can be similarly subject. Courts have traditionally, and increasingly over the last few years, given injunctive relief which requires the injunction to be administered. It has been done in bankruptcy practice for many years. Several of the circuit courts in the last few years have upheld the issuance of relatively broad decrees

dealing with the conduct of prisons and the conduct of other administrative functions of the state.

Q I am a little curious as to how it is that the court or you as counsel for the plaintiffs or the plaintiffs individually, any members of the class, can really know what the content is of the training when the National Guard goes on its training weekends, unless the court sends a master or a referee out there.

MR. GELTNER: The court could send a master. The court could authorize the attorneys or their representatives to appear and observe.

Q Is that what you think would be required? Otherwise, all you would have would be something on paper that you say is insufficient.

MR. GELTNER: It would not be required. It would be one of the ways to do that. All I would say, Your Honor, is that over the past few years, I have come to know an awful lot about what the Ohio National Guard is doing on a relatively ongoing basis as the result of the availability of witnesses. It is not the CIA. It is not a secret organization. Its people are part-time soldiers. They are soldiers on weekends and for a couple of weeks during the summer. And during the rest of the time--they are not sworn to any oath of secrecy.

Q What guidelines do you use for adequacy of

the training?

MR. GELTNER: We believe that we can produce expert witnesses to testify as to the training as to whether or not it is adequate, whereupon the court can become convinced whether there is or is not adequate training.

Q Do you know what would be adequate?

MR. GELTNER: I personally am not an expert. We have consulted with experts--

Q Do you think the district court would be an expert?

MR. GELTNER: The district court can be made an expert to the extent that it is in any other context by expert witnesses.

Q That is a district judge who does not know the difference between a bazooka and a pea shooter?

MR. GELTNER: Your Honor, courts hear medical expert witnesses on a daily basis. District judges decide patent cases involving complicated problems of organic chemistry without having taken a chemistry course in college.

Q In the meantime, the National Guard has got all of you all over the lot watching everything they do and at the same time they are trying to train somebody for combat.

MR. GELTNER: Your Honor, it does not strike me as

a very substantial interference with the National Guard conduct in the context of the fact that we have alleged and hope to prove that the National Guard in Ohio has been responsible for some very serious deprivations of constitutional rights. We believe that in that context the interference would be justified.

Q And the officers of the National Guard have been responsible for it?

MR. GELTNER: Some of them have.

Q They are all being changed, right?

MR. GELTNER: The unit remains the same--

Q Right? Are they not?

MR. GELTNER: The particular defendants have been changed.

Q Do you know as of now that they are not following the military regulations to the letter?

MR. GELTNER: If you want me to go beyond the record, Your Honor, the answer is that--

Q I did not ask you to go beyond the record. I asked you a question. Do you know it or not?

MR. GELTNER: Do I know it for a fact? I have some evidence to indicate that the quality of training as to these matters--

Q Is it hearsay? Is it hearsay?

MR. GELTNER: Yes, Your Honor. That is absolutely

right.

Q Does that not sort of persuade you not to talk about it?

MR. GELTNER: Yes. You asked me the question, Your Honor. I feel very uncomfortable going beyond the record. The fact was--

Q I did not ask you to go beyond the record. That is the trouble with this record. Anything you have said since you have been on your feet has been outside of the record. Everything everybody at this table has said in this case has been outside of the record. And we are supposed to decide the case on the record.

Q I suppose, Mr. Geltner, you would feel that had not the petitioner here moved to dismiss the complaint and succeeded, that you would have had an opportunity to compile some sort of a record. It is not really at your behest that you are here without any more of a record.

MR. GELTNER: Your Honor, I believe it is the district judge's fault. You cannot criticize a defendant for making the motion to dismiss. The rules authorize the defendant. You can criticize a district judge for improperly granting a motion to dismiss.

Q Some motions to dismiss obviously should be granted by the federal rules. So, there will be some cases that simply come up on the complaint.

MR. GELTNER: Yes, Your Honor. And this, I do not believe, is one of them. At the time this complaint was filed, it stated a good cause of action. I believe up to this day the only question before this Court is whether it states a good cause of action. If this case were remanded and a factual record made, then this Court would have before it questions of the adequacy of the training, questions which relate to the standing of the plaintiffs, specifically a factual record on the question of imminence.

Q If the district judge concluded either that there was no standing or that there was no justiciable question presented or that the issue was moot or all three, then he should not take any evidence, should he?

MR. GELTNER: That is right, Your Honor, except for the fact that the question of mootness--as the Court framed the issue of mootness in the W. T. Grant case, there are really two senses in which a case can become moot. The first sense is a pure, outright change of law. Hall v. Beals is an example of that kind of case, in which the Court concluded that the law had changed and therefore the controversy no longer existed.

The second situation is a situation in which the claim is put forth that that which was highly likely at a preceding time is no longer highly likely because of a change in circumstance. That is a factual issue. It is an

issue to be decided by a district judge. A district judge, as we all know, has discretion in granting injunctive relief, and can very well deny injunctive relief on the ground that while he has found wrongdoing, he now finds that the circumstances are not such as to warrant the entry of an injunction. That is a district judge's function.

Q Would it be a fair characterization of your position that if the case goes back to the district court, you do not quarrel with the specific regulations now in force but (a) you want them made permanent and (b) you want a continuing surveillance to see that they are carried out; is that a fair statement of your case?

MR. GELTNER: Yes, Your Honor, that is a fair statement of what we are seeking at this point, understanding that at the time the complaint was filed we were seeking a more specific change in what then existed.

There is one further point which has come up on a couple of occasions that I have never really specifically addressed myself to, and that is the relationship of Laird v. Tatum to this case. The Solicitor General in his brief has gone to some length to demonstate the way in which this case is like Laird. We think this case is different from Laird in several respects.

Laird was basically a case in which the conduct of the defendants was not in itself unlawful and did not in

itself involve a deprivation of a constitutional right, but it was alleged that the chilling effect of the defendant's conduct created a deprivation of a constitutional right. So, what it was was an attempt to bootstrap from an injury into a deprivation of a right.

Irrespective of what I personally may think about that in the privacy area, this case is crucially different. First of all, it is different in the sense that the people that are subjected to the kinds of injury that occurred here and which we see as possibly occurring in the future are the opposite of people who are going to be chilled. They are the people who actually participate in the assemblies. And so we believe that, first of all, chilling effect as to these people is really not pertinent to the question of injury here or to the question of whether or not the complaint states a wrong. That is the first way in which the case is different from Laird.

The second way in which the case is different from Laird lies in the fact that this case alleges injury which is very specific in nature and which has been held by preceding cases to give rise to a constitutional deprivation. That is, one who is unjustifiably killed by government action is in fact subjected to a deprivation of a constitutional right. So that the inquiry into the defendant's conduct stems from a specific constitutional

right as opposed to the Laird case in which there is no specific constitutional right but the subjective feeling of injury is said to be enough to lead to the finding of the constitutional deprivation. I think that is a very substantial difference.

One further aspect of Laird to which I would like to call the Court's attention, and that is the assumption that the--the assumption present in this case, which we have come to on a couple of other occasions--that the nature of the training will be adequate to assure that the new rules of engagement are in fact brought forth to the troops. We have heard a good deal in the way of assurances from the defendants--there is more in the briefs. And what we see in Laird about this is that very similar kinds of assurances were made to the Court at that time. Specifically they were assurances with respect to the retention of documents and et cetera. It was then found by a Senate committee that the documents had not in fact been retained.

We believe that all of these matters, matters with respect to what the orders are and how they are implemented, are purely matters of truth and therefore specifically functions of a district rather than an appellate court.

I thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Geltner.

Does the petitioner have anything further?

MR. MARTIN: I have nothing further, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:25 o'clock a.m., the case was submitted.]

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