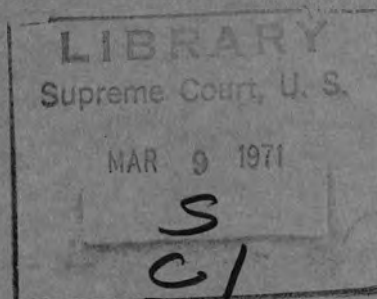


# Supreme Court of the United States

OCTOBER TERM, 1970



In the Matter of:

HERBERT PHILLIP SCHLANGER,

Petitioner,

vs.

ROBERT C. SEAMANS, JR.

SECRETARY OF THE AIR FORCE, ET AL.,

Docket No. 5481

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Date February 22, 1971

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C O N T E N T S

ARGUMENT OF:

P A G E

Herbert Phillip Schlanger,  
Appearing Pro Se

2

Erwin N. Griswold, Solicitor General  
of the United States, on behalf of  
Robert C. Seamans, Jr., Secretary  
of the Air Force, et al.

15

REBUTTAL:

Herbert Schlanger

30

\* \* \* \*

1 IN THE UNITED STATES SUPREME COURT

2 OCTOBER TERM, 1970

3 -----:  
4 HERBERT PHILLIP SCHLANGER, :

5 Petitioner, :

6 vs. :

No. 5481

7 ROBERT C. SEAMANS, JR., :

8 SECRETARY OF THE AIR FORCE, ET AL., :

9 Respondents. :  
10 -----:

Washington, D.C.,

Monday, February 22, 1971.

12 The above-entitled matter came on for argument  
13 pursuant to notice.

14 BEFORE:

15 HON. WARREN E. BURGER, Chief Justice  
16 HON. HUGO L. BLACK, Associate Justice  
HON. WILLIAM O. DOUGLAS, Associate Justice  
HON. JOHN M. HARLAN, Associate Justice  
17 HON. WILLIAM J. BRENNAN, JR., Associate Justice  
HON. POTTER STEWART, Associate Justice  
18 HON. BYRON R. WHITE, Associate Justice  
HON. THURGOOD MARSHALL, Associate Justice  
19 HON. HARRY A. BLACKMUN, Associate Justice

20 APPEARANCES:

21 FOR HERBERT PHILLIP SCHLANGER:  
Herbert Phillip Schlanger, Pro se.

22 FOR ROBERT C. SEAMANS, JR., SECRETARY OF THE AIR  
23 FORCE, ET AL.:  
Erwin N. Griswold, Solicitor General of the  
24 United States, Department of Justice,  
Washington, D.C.

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

2                    MR. CHIEF JUSTICE BURGER:   Mr. Schlanger, you may  
3 proceed whenever you are ready.

4                    ARGUMENT OF HERBERT PHILLIP SCHLANGER

5                    APPEARING PRO SE

6                    MR. SCHLANGER:   Thank you, Mr. Chief Justice, and  
7 may it please the Court.   This case comes to you on writ of  
8 certiorari to the Court of Appeals for the Ninth Circuit to  
9 review its affirmance of the District Court for Arizona's dis-  
10 missal of my petition for writ of habeas corpus for lack of  
11 jurisdiction over the Respondent.

12                   The question presented is whether a District Court  
13 lacks the power to inquire into the lawfulness of restraints  
14 exercised over a Petitioner who is present in its District,  
15 when the persons responsible for those restraints are else-  
16 where.   Stated in other words, can a Petitioner be in custody  
17 and within the jurisdiction of a District Court, but not be  
18 in custody within the jurisdiction?

19                   After 18 months of litigation, the allegations con-  
20 tained in my petition for writ of habeas corpus remain uncontro-  
21 verted.   Those are, that I enlisted over eight years ago in the  
22 United States Air Force, and in 1965 re-enlisted for a period  
23 of six years, in order to enter the Airman's Education and  
24 Commissioning Program and obtain a commission.

25                   At that time, I was assigned for duty to Arizona



1 State University, and enrolled there under the AECP. I  
2 attended the university from January of 1966 until June of  
3 1968, ten weeks before my scheduled graduation, at which time  
4 I was summarily removed, purportedly for having demonstrated  
5 a lack of officer potential by cutting some classes.

6 In fact, as alleged in my petition, I was removed  
7 because of my participation in the formation and leadership of  
8 the Arizona State University Civil Rights Board, a group which  
9 sought to quiet and adjudicate ethnic and racial grievances  
10 arising on campus by working with university and city officials.

11 The removal was unlawful both substantively, in that  
12 it violated First and Fifth Amendment rights, and procedurally,  
13 in that it violated regulation and due process requirements of  
14 the Fifth Amendment.

15 While attempting to obtain a hearing or reinstatement,  
16 or administrative remedy, I was reassigned to Moody Air Force  
17 Base in Georgia, and was relieved of duty as an officer trainee.  
18 I was denied access to the evidence that was used against me.  
19 I requested, but was denied, a hearing. I requested, but was  
20 denied, a discharge, first by the Chief of Staff of the Air  
21 Force, and later by the Air Force Board for Correction of  
22 Military Records and by the Secretary of the Air Force, Dr.  
23 Seamans.

24 During this entire period, of course, I was performing  
25 my duties as an enlisted man at Moody Air Force Base and was

1 promoted twice, first to sergeant, then to staff sergeant, both  
2 non-commissioned officer ranks. In May of 1969, I requested a  
3 temporary duty assignment to return to Arizona State University,  
4 so that I might complete my degree requirements for a Bachelor's  
5 Degree in mathematics in the summer session, since I was only  
6 ten weeks away from my degree.

7 Since I had apparently satisfied my superiors that I  
8 was doing my job in an outstanding manner, I was reassigned to  
9 Arizona State. The order said that I was to be assigned for  
10 70 duty days, and was permitted 15 days leave in conjunction  
11 with that temporary duty assignment.

12 After completion of my schooling in Arizona, while I  
13 was still in Tempe pursuant to those orders, I filed the  
14 instant action for habeas corpus. It was immediately dismissed  
15 by the Court, without issuance of a show cause order, and  
16 reconsideration was denied. I then appealed to the Ninth  
17 Circuit, and returned to Georgia to continue my duties.

18 I requested expeditious action, and in December of  
19 1969, the Court of Appeals scheduled the argument. I argued  
20 the case while on leave from Moody, and the case was remanded  
21 to the District Court for issuance of a show cause order. When  
22 it became apparent that the District Court would not regain  
23 jurisdiction prior to my removal to Georgia, Judge Browning of  
24 the Ninth Circuit entered the injunction.

25 The Air Force immediately terminated my pay and

1 allowances, an act which I consider unlawful but which is not  
2 of issue at this time.

3 Q This second period of attendance at the  
4 university was under a program quite different from the first  
5 one, was it not?

6 A Yes, sir, it was.

7 Q Under Operation Bootstrap?

8 A Yes, sir.

9 Q During this second interval, you were therefore  
10 in a different status from a military point of view, weren't  
11 you, on permissive temporary duty, something like that?

12 A Your Honor, the Government's brief makes this  
13 distinction between a permanent assignment and a temporary  
14 duty assignment. I felt that having been issued the orders; and  
15 having left Georgia under those orders, if I went anyplace except  
16 to Arizona State University to enroll in school and attend  
17 classes and get my degree that summer, I would have been  
18 prosecuted as being AWOL.

19 There is this difference, in that my permanent duty  
20 station in the AECP was Wright-Patterson Air Force Base, Ohio,  
21 with duty at Arizona State University; and under Bootstrap, I  
22 was paying my own expenses. My permanent duty station was in  
23 Georgia, and I was assigned for duty at Arizona State.

24 I think the distinction is minimal; certainly the  
25 orders existed authorizing my travel to Arizona and attendance

1 at the university there.

2 Q Well, one directed your travel, the other  
3 permitted your travel. Is that right?

4 A Yes, sir, but both were voluntary programs. I  
5 had applied for entrance into the Airman's Education and  
6 Commissioning Program because I wanted both the degree and the  
7 commission.

8 Q But your claim on the merits is that that was  
9 a condition of your re-enlistment, isn't it?

10 A Yes, sir.

11 Q But this second attendance at the university  
12 was one, well, Operation Bootstrap, at your own expense?

13 A Yes, sir. It was necessitated because there  
14 was no other way for me to get my degree prior to my discharge.

15 Q Haven't you got also a habeas corpus proceeding  
16 pending in Georgia now?

17 A No, sir. No longer. That had been on appeal  
18 to the Fifth Circuit on an issue of exhaustion of remedies, and  
19 all the remedies suggested by the Government have since been  
20 exhausted. I believe I submitted to the Clerk papers from the  
21 Fifth Circuit containing their order entering a voluntary  
22 dismissal, since the question of exhaustion is moot now.

23 Furthermore, if indeed this Court upholds the Govern-  
24 ment's position concerning jurisdiction, the Fifth Circuit and  
25 the District Courts of Georgia no longer have jurisdiction in

1 the matter, since I have been removed and reassigned to Iceland.  
2 If, on the other hand, the Court holds for my position contend-  
3 ing that the District Court of Arizona does have jurisdiction,  
4 then it should properly be remanded to Arizona rather than  
5 Georgia, since that was the first filed action and that is  
6 where the cause of action arose.

7 The Court of Appeals never reached the question that  
8 the District Court reached. The District Court dismissed the  
9 action, pointing out that there were no Respondents restraining  
10 my liberty within the jurisdiction, within the district. The  
11 Court of Appeals simply affirmed on the basis of an earlier  
12 decision which held that a serviceman on leave voluntarily at  
13 a place other than a duty station is not in custody at that  
14 point.

15 The Government now takes up this argument, and argues  
16 that custody -- you can be in custody, since I was concededly  
17 in custody on the day I filed, and that I can be lawfully in  
18 Arizona, which I was on the day that I filed, but that I was  
19 not in custody in Arizona, under the meaning of 2241. It is my  
20 conviction, Your Honor, that this makes an artificial distinction.

21 I am not attacking Colonel Baker or Dr. Seamans  
22 personally. What I am attacking is the effects of their  
23 authority, which are manifested upon me wherever I am. In this  
24 case, they were manifested upon me at a place I had been  
25 assigned for duty for the three months prior to my filing of



1 the action. That is in Arizona, at the place where all of the  
2 actions which gave rise to the habeas corpus action occurred.

3 That is Arizona State University, at which all the  
4 witnesses for a hearing, if it should ever be held, are present,  
5 except those officers of the Air Force who might be needed to  
6 be called; and at which any evidence, outside that under the  
7 control of the Respondent, is, that is, university records,  
8 professors' records, and things like this.

9 I cannot see that there is any bore in the statute,  
10 and indeed, Ahrens v. Clark, in which Mr. Justice Douglas wrote  
11 the opinion in 1948, held that it was the presence of the  
12 Petitioner which was the threshold requirement to filing the  
13 habeas corpus action. In this case, it was the effects of  
14 Air Force authority on me in Arizona that I was contesting.  
15 It was obviously custody, since I was forced to return to  
16 Georgia.

17 Q Mr. Schlanger, in that connection straighten  
18 me out on one fact.

19 A Yes, sir.

20 Q Had your leave expired when you instituted the  
21 habeas corpus action?

22 A No, sir. What happened was, I filed the action  
23 -- well, all of the indications in the affidavit of Lieutenant  
24 McDonald, which appear in the Appendix and are referred to in  
25 the Government's brief, were made without any consultation with

1 me, in terms of what days I was attending school and what days  
2 were leave. They are substantially accurate, but there is a  
3 two-day discrepancy.

4           However, when I filed my action it was on my next to  
5 the last day of leave. I immediately called my commander and  
6 requested an extension of leave, which was verbally granted.  
7 Subsequently, written orders were issued confirming that verbal  
8 extension of the leave. There was no question that I was any-  
9 where near being AWOL or running a fine line. This was all done  
10 with the knowledge of my superiors in the Air Force, my  
11 immediate superiors.

12           Q       The next question is the reason for your  
13 instituting the action in Arizona rather than Georgia, and  
14 perhaps you have answered it, the presence of witnesses there,  
15 records, and so forth?

16           A       Yes, sir. I really feel that should a hearing  
17 be held anyplace else, in any District except Arizona, and  
18 should we ever have to the substantive issues of whether I  
19 was cutting classes, whether cutting classes demonstrates a lack  
20 of officer potential, whether the proceedings did follow Air  
21 Force regs., that it would be necessary to call these witnesses.  
22 Without them, I cannot prove my case.

23           Q       Of course, even if you were venued in Georgia,  
24 maybe the case could be transferred to Arizona.

25           A       Well, sir, the way I understand 1404(a), which

1 is what I assume is being referred to, Arizona would have to  
2 have had jurisdiction originally. It would have had to have  
3 been able to have been brought in Arizona in order for it to be  
4 transferred by the Georgia court to Arizona, and yet if this  
5 Court now finds that Arizona could not have jurisdiction because  
6 I was not permanently stationed there, then it could not be  
7 transferred.

8 The concern with this kind of question, it seems to  
9 me to be more a question of venue, as Mr. Justice Blackmun  
10 pointed out, than really a question of jurisdiction. I don't  
11 think that there is any question but that I was in custody,  
12 and within the jurisdiction lawfully, and for a purpose con-  
13 nected with my service.

14 That District is not incidental to either the action  
15 or my military duties.

16 Q Mr. Schlanger?

17 A Sir.

18 Q You are now stationed in Iceland, or supposed  
19 to be?

20 A On the Air Force's bookkeeping, yes, sir. I  
21 was transferred Iceland on the 5th of January.

22 Q Let's assume you were physically now in Iceland.

23 A Yes, sir.

24 Q And wanted to bring this kind of a habeas corpus  
25 action. Where, under your theory, could you bring it?

1           A       I believe, unfortunately, Your Honor, that I  
2 could only bring it in the District of Columbia.

3           Q       Only there, because that is where the Secretary  
4 of the Air Force is?

5           A       Well, apparently, Your Honor, it has been held  
6 by this Court -- never directly, but at least implicitly -- that  
7 the District Court for the District of Columbia has jurisdiction  
8 over American citizens outside any other District Court, and  
9 therefore the District of Columbia would be a proper district.

10          I would like to see, Your Honor, an eventual develop-  
11 ment of habeas corpus so that a Petitioner could file either  
12 in the district where he is feeling the effects of the custody,  
13 or in which ---

14          Q       Well, you would be feeling the effects of the  
15 custody in Iceland.

16          A       Yes, sir. There is no doubt about that.

17          Q       And that is no U.S. District, there.

18          A       Yes, sir, but for purposes of habeas corpus,  
19 that would be the District of Columbia. In civil litigation,  
20 it appears that, following International Shoe, the courts have  
21 developed a contact doctrine, a contact theory, and where we  
22 extend this right to civil litigants, I really cannot see that  
23 it would be of tremendous inconvenience to any party to extend  
24 it to military petitioners for habeas corpus.

25          Here we are relatively free to travel at certain

1 times, when we are off duty or when we are on leave. There are  
2 incidents which occur, such as my removal from the program in  
3 Arizona, which, if the military is allowed to remove me at their  
4 will or whim, thus depriving that Court of jurisdiction, we are  
5 sanctioning what is, in essence, foreign shopping by the  
6 military.

7 I really do not believe, sir, that it was a coinci-  
8 dence that following my removal for civil rights activities  
9 from Arizona State University, I was assigned to southern  
10 Georgia, with all due respect to the South, sir. I feel that  
11 the Government felt that any further proceedings would be looked  
12 upon more dimly in the Middle District for Georgia than, perhaps,  
13 in the Southern District of New York.

14 Q Viewing that, if one should accept your theory  
15 all the way, if you had a week's leave you could just look  
16 around at any one of the 50 states, and fly up to North Dakota  
17 and bring your habeas corpus action up there.

18 A No, sir, I do not believe so. I think that  
19 Judge Lazansky from Massachusetts had a case similar to the one  
20 you describe, where a gentleman from Indiana came wandering  
21 into Massachusetts with nothing but a suitcase and a petition.

22 Q Right.

23 A In McKay v. Secretary of the Air Force. Judge  
24 Lazansky looked at the facts and circumstances of the case, and  
25 said you have no contact in this district. This is the first



1 time you have ever been in Massachusetts. You have no reason  
2 for filing it here. Go elsewhere.

3 I feel that the District Courts are more than com-  
4 petent to decide whether there is sufficient contact between  
5 the District and the issues involved in the case.

6 Q Of course, International Shoe contact has to do  
7 with personal service, as you know.

8 A Yes, sir.

9 Q What limits would you put on it, what test?  
10 Would you just leave it to the discretion of the District Judge?

11 A I would say, sir, that broadly, for those  
12 people contesting their induction, let's say, which I am not,  
13 this is an enlistment, but the induction of conscientious  
14 objectors, for instance. Much of their evidence, to prove their  
15 claim, might, in fact, be where their local draft board is.

16 If a person is inducted in New York City and then sent  
17 to Fort Benning, Georgia, the Army may hold a hearing, and it  
18 may just be perfunctory, as has happened in several cases; if  
19 he is then forced to bring the action in Georgia he has the  
20 choice of either expending huge sums to transport his witnesses  
21 down to Georgia, if indeed they are willing to come, or, in fact,  
22 not being able to demonstrate in fact that he has a basis for  
23 his claim, which would preclude his winning his action.

24 Q So you say he should at least be able to file  
25 his habeas corpus action in the place where he lived when he

1 was inducted. Is that it?

2 A Yes, sir, because that is the District with the  
3 most significant impact on the facts of the case.

4 Q Well then, would you confine it to the District  
5 with the most significant impacts on the case?

6 A I am searching for some way to simply say that  
7 I would like to be fair and equitable.

8 Q I don't mean to be.

9 A Yes, sir.

10 Q Undoubtedly, you have thought a great deal  
11 more about this case than we have so far, and ---

12 A Yes, sir. Well, I have been grappling with the  
13 same questions, at what point do you say you cannot file. I  
14 would say that where the contacts within the District are  
15 immaterial to the case, then it obviously should not be brought  
16 there. If the contacts are crucial to the case, then that is  
17 obviously a permissible District, and as in most of the rest of  
18 the law, there is a small gray area in between, which I think  
19 should be left to the discretion of the District Courts  
20 individually.

21 Your Honor, unless the Court has some further  
22 questions on this issue, I would like to reserve the rest of my  
23 time for rebuttal.

24 MR. CHIEF JUSTICE BURGER: Very well, Mr. Schlanger.

25 MR. SCHLANGER: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General?

ARGUMENT OF ERWIN N. GRISWOLD, SOLICITOR  
GENERAL OF THE UNITED STATES, ON BEHALF  
OF ROBERT C. SEAMANS, JR., SECRETARY OF  
THE AIR FORCE, ET AL.

THE SOLICITOR GENERAL: May it please the Court.

This is an important, though from some points of view  
a somewhat exotic, case. It is important because it involves  
the writ of habeas corpus, the importance of which, and its  
proper preservation and utilization, cannot be exaggerated. It  
is exotic because the present case seems so foreign to the true  
function of the writ.

It reminds me of the course I once took in advanced  
equity from Professor Chaffey, where we learned much about  
bills of interpleader, and then we learned more about another  
bill called a bill in the nature of a bill of interpleader.

Perhaps this case can be better understood if it is  
thought of as a case involving an application in the nature of  
habeas corpus, rather than habeas corpus itself.

We recognize, of course, that habeas corpus is not  
limited now, as it once was, to persons who are actually  
imprisoned. It has been made available to persons whose liberty  
is significantly restrained, and thus has been held applicable  
to persons who are denied admission to the country, to persons  
on parole or probation, and to servicemen.

1 I think I might safely say, though, that there has  
2 never been a serviceman case like this one in the history of  
3 the writ or its analogs.

4 It is important to get the facts clearly. Sergeant  
5 Schlanger was not hijacked or impressed, he was not inducted  
6 into the service. As he, himself, alleges in his petition in  
7 the District Court, paragraph 8, page 4 of the Appendix, he  
8 enlisted in the Air Force on December 9, 1965, for a period of  
9 six years, a period which has not expired.

10 He makes no claim of conscience, and does not suggest  
11 that he is entitled to discharge under any regulation of the  
12 Department of Defense, or of the Air Force, as is the case,  
13 for example, of the man who seeks discharge on the basis of  
14 conscientious objection to participation in war in any form.  
15 There is a specific regulation that provides a procedure, and  
16 says that such a man is entitled to discharge.

17 He does allege a breach of contract, but I suggest  
18 that it is a distortion of the Great Writ to say that it can  
19 appropriately be used to review the military determinations  
20 involved here. As the Petitioner alleged, he re-enlisted in the  
21 Air Force for the purpose of entering the Airman's Education  
22 and Commissioning Program, and he was, pursuant to that program,  
23 assigned to the Arizona State University in a program designed  
24 to lead to a degree.

25 He entered the university in December, 1965, with his

1 tuition paid, and received an enhanced Air Force salary. He  
2 continued in this program until June, 1968, when he was re-  
3 moved from the program by his superior officers for failure to  
4 attend classes regularly.

5 He was then reassigned to Moody Air Force Base in  
6 Georgia, where he returned in July, 1968. It is important to  
7 note that if there had been a breach of contract, and if that  
8 breach of contract was, for some reason now unknown, sufficient  
9 to relieve him of his responsibilities to the Air Force, that  
10 had occurred by June or July, 1968.

11 All of the events of which the Petitioner complains,  
12 whatever their effect may be, occurred before July, 1968. The  
13 Petitioner then returned to Georgia where, as far as we know,  
14 he performed well in the duties which were assigned to him.

15 In May, 1969, nearly a year after the events of which  
16 he complains, and pursuant to his application to the Air Force,  
17 he was given an opportunity to return to Arizona State Univer-  
18 sity for the approximately two months needed to complete his  
19 work for a degree. This was under what is called "Operation  
20 Bootstrap, which is a voluntary program. He went on his own  
21 expense on what is called "permissive TDY," TDY being Air  
22 Force for "temporary duty. This means that he was not ordered  
23 to go. He was permitted to go.

24 He could have terminated his participation in Opera-  
25 tion Bootstrap, and returned to his permanent duty station at



1 any time. The Petitioner did go to Arizona State University.  
2 He completed the work for his degree and he received it. This  
3 was on August 22, 1961. He still had four days of leave  
4 available.

5 Q What degree did he receive?

6 A What?

7 Q What degree did he receive?

8 A I do not know, Mr. Justice.

9 MR. SCHLANGER: Bachelor of Science in mathematics,  
10 sir.

11 THE SOLICITOR GENERAL: A Bachelor of Science, Mr.  
12 Schlanger advises me.

13 He still had four days of leave available, plus a  
14 day of travel for Georgia. The last day of leave, as I figure  
15 it, would have been August 26, and August 27 would have been  
16 the day assigned for travel to the base in Georgia.

17 It was on August 27 that he filed the petition for  
18 habeas corpus in the United States District Court for the  
19 District of Arizona.

20 On September 15, 1969, his 15 days of leave was  
21 retroactively extended to 45 days, so as to avoid carrying him  
22 in Absent Without Leave status after August 27th. He advises  
23 us today that that was pursuant to telephonic arrangements made  
24 at the time, and so far as I know that is entirely accurate,  
25 though it is not in the record.

1           The 45-day period expired on September 27, 1969, but  
2 he actually returned to Moody Air Force Base on September 21 of  
3 1969. It is significant, I think, that thereafter he filed a  
4 petition for habeas corpus in the Middle District of Georgia.

5           This petition was denied by the District Court.  
6 Sergeant Schlanger took an appeal to the Fifth Circuit Court of  
7 Appeals, but that appeal was recently dismissed on his own  
8 motion. As far as I know it is still pending before the United  
9 States District Court for the District of Georgia. The issue  
10 on which the Court previously decided the case, that of exhaus-  
11 tion of administrative remedies, Sergeant Schlanger says is now  
12 disposed of.

13           That does not mean that the habeas corpus petition is  
14 not still pending for hearing in the District Court in Georgia.

15           Q       There was some talk that we have been supplied  
16 with something with respect to those proceedings, and I do not  
17 seem to have it.

18           A       I believe it was filed with the Clerk by  
19 Sergeant Schlanger. A copy was furnished to us. He did move  
20 for a dismissal of the appeal in the Fifth Circuit Court of  
21 Appeals, on the ground that it was moot because the administra-  
22 tive remedies had in the interval been exhausted, on the further  
23 ground that he had been transferred to Iceland so that, in some  
24 way, the Georgia Court had lost jurisdiction, though I do not  
25 believe that is true if it had jurisdiction when the proceeding

1 began, and the Fifth Circuit Court of Appeals did dismiss the  
2 appeal from the District Court's decision on Sergeant  
3 Schlanger's motion.

4 Q And the District Court's decision had been to  
5 deny the application for failure to exhaust administrative  
6 remedies?

7 A The District Court's decision had been to deny  
8 the application for failure to exhaust administrative remedies.  
9 If that Court is now satisfied that the administrative  
10 remedies have been exhausted, the petition is still pending  
11 before the District Court for the Middle District of Georgia.

12 Q Or, in that event, a new petition should be  
13 filed, in your representation.

14 A Or a new application could be filed.

15 Q Or not filed, now that he is in Iceland. Could  
16 it be? Could a new one be filed?

17 A It might be doubtful whether a new application  
18 could be filed in the Middle District of Georgia, but the one  
19 that is pending there undoubtedly remains within the juris-  
20 diction of the Georgia Court.

21 Q But he could always file in the District of  
22 Columbia, if there is some infirmity in the Georgia proceeding.

23 A He could file in the District of Columbia, I  
24 believe, Mr. Chief Justice, if he is outside of the United  
25 States. If he is inside the United States, it would still be

1 our position that he could not file in the District of  
2 Columbia unless there was some contact with the District of  
3 Columbia.

4 Q I am assuming that his presence in the United  
5 States now is by the grace of the Air Force in letting him  
6 come here to present his case.

7 A Yes, Mr. Chief Justice, by the grace of the  
8 Air Force and at the request of the Solicitor General's office.

9 Q I suppose he could file one over there today,  
10 couldn't he? He is here. He is here in custody of the Air  
11 Force.

12 A He certainly can file; whether the District  
13 Court for the District of Columbia has jurisdiction in that  
14 situation, I would not want to be completely clear on, but I  
15 suspect it has, if he is no longer under any duty to report to  
16 the base in Georgia.

17 If he is under a duty to report to the base in  
18 Georgia, then I would contend that the jurisdiction is in  
19 Georgia.

20 In preserving the Great Writ for its all-important  
21 function, and in extending it to new areas in the light of  
22 modern conditions, it is important, I submit, that it not be  
23 diluted by being used to review all the various controversies  
24 which may arise between the armed forces and their members.  
25 Historically, there can be no doubt that the writ of habeas

1 corpus had clear geographical limitations. There must be a  
2 body within the jurisdiction of the court, and there must be a  
3 person likewise within the jurisdiction of the court who could  
4 produce that body. Habeas corpus -- you have the body.

5 Those conditions are lacking here. It is true that  
6 Sergeant Schlanger was physically within the jurisdiction of  
7 the Arizona Court on the day he filed his petition, but in our  
8 view he was not in custody there, and there was no one in  
9 Arizona having jurisdiction over him and he did not allege that  
10 there was.

11 The relevant allegation is on page 3 of the Appendix,  
12 paragraph 4 of the petition:

13 "The Honorable Robert Seamans, Jr., Secretary of the  
14 Air Force, and Colonel Homer Baker, Commander, Moody Air Force  
15 Base, Georgia, are the persons who are at present unlawfully  
16 restraining applicant of his liberty, as is more fully partic-  
17 ularized herein."

18 Then he goes on to say, "Colonel Reddrick is the  
19 ROTC Commander at ASU," and there is no doubt that Colonel  
20 Reddrick was the ROTC Commander at ASU, but there is no alle-  
21 gation that he had or was exercising any authority over  
22 Sergeant Schlanger. I think the nature of the issue was quite  
23 clearly put in the Petitioner's petition in this Court when he  
24 said that the question presented was, does a District Court  
25 lack the power to inquire into the lawfulness of restraint



1 exercised over a Petitioner within its District, when the  
2 person responsible for the restraint is in another state. That  
3 we submit, is the situation which is involved here.

4 Moreover, Sergeant Schlanger was not ordered to be in  
5 Arizona. He was there in a permissive status, by his own  
6 choice, for his own purpose, and was on leave when the petition  
7 was filed. No one was confining or restraining him in Arizona.  
8 He was free to go to California, or Ohio, or anyplace else,  
9 Mexico, on his way back to Georgia, as long as he got back to  
10 Georgia by the time specified.

11 Q Irrespective of the question of venue, do you  
12 claim that the writ doesn't apply at all?

13 A Yes, Mr. Justice. It seems to me that this is  
14 not an appropriate case for the exercise of the writ. This is  
15 essentially a contract controversy, a controversy relating to  
16 the internal operation of the military. It may be that  
17 Sergeant Schlanger has cause of action under the Tucker Act, in  
18 the Court of Claims, or in some United States District Court.

19 I know of no basis whatever for his suggestion that  
20 because of a breach of contract, if there is one, he is entitled  
21 to discharge from the Air Force.

22 Q How do you parse that down? That he is not in  
23 custody?

24 A No, that he is in custody, and rightfully in  
25 custody, and that a breach of contract would not entitle him to

1 release from custody.

2 Q Well, that question is not before us. That is  
3 the merits ---

4 A That is the question on the merits, but it  
5 arises on the face of the petition and is, I submit, a further  
6 ground to support the judgment of the District Court in dis-  
7 missing the petition. Now, it is true that the District Court  
8 dismissed it for lack of jurisdiction, and that was affirmed  
9 by the Ninth Circuit Court of Appeals, but I should think that  
10 by a general demurrer it could be found that the petition itself  
11 does not state a cause of action, even if there were juris-  
12 diction, and we are entitled to present any ground which will  
13 support the judgment of the Court below.

14 Q Although this is not a question that you oppose  
15 in your brief?

16 A No, Mr. Justice, it is not directly stated in  
17 the brief.

18 Q And that does go to the merits of his appli-  
19 cation for habeas corpus?

20 A Yes, Mr. Justice.

21 Q And we are concerned here with a question of  
22 jurisdiction, aren't we?

23 A Only in case the Court found there was juris-  
24 diction, it would be our position that the judgment ought  
25 nevertheless to be affirmed, because it does not state a cause

1 of action properly founding in habeas corpus.

2 The case here is very much like that in Jarrett v.  
3 Resor, a decision of the Ninth Circuit Court of Appeals on  
4 which the decision below was based. In the Jarrett case, an  
5 officer went to Berkeley, California, on leave. While there,  
6 he sought habeas corpus, naming no Respondents in the District,  
7 although they were within other Districts in California.

8 The Court held that, being on leave, Jarrett was not  
9 under restraint. He was under orders to go to Viet Nam, but he  
10 was at the time on leave. He was not in the District under  
11 orders, and it held that there was no jurisdiction to grant  
12 habeas corpus.

13 We recognize fully that the Great Writ should be kept  
14 flexible. Cases have already arisen where a serviceman was  
15 overseas and habeas corpus jurisdiction has been found in the  
16 District of Columbia when the relevant service Secretary is  
17 made the respondent.

18 And it is possible to conceive of situations where a  
19 man is stationed in a place where he has no commanding officer,  
20 some remote island in Alaska, or something of that kind. But  
21 that is not this case, for the Petitioner here was not stationed  
22 in Arizona. He went there at his own request, at his own  
23 expense, and for his own purposes.

24 The habeas corpus statute requires that the applicant  
25 be in custody within the District. In no true or substantive

1 sense was the Petitioner here in custody in Arizona on the day  
2 he filed his petition, after his education was over and he was  
3 on leave.

4 Q Mr. Solicitor General, he didn't have to report  
5 to anybody in Arizona? Any military person?

6 A No. No person whatever.

7 Q No supervision?

8 A No supervision, Mr. Justice.

9 Q Well, how did they find out that he didn't  
10 attend classes?

11 A That is at a different time. When he was  
12 there under the Airman's Training Program before 1968, he was  
13 there under orders, and he was under an obligation to report,  
14 and they apparently did not like the way he acted and they  
15 removed him from that program. He then went back to Georgia,  
16 and a year later he came back to Arizona at his own expense,  
17 at his own request, on leave, to complete his education under a  
18 different program, Operation Bootstrap.

19 Q So that even if there was a possibility he  
20 could bring habeas within the first period, you say that is  
21 certainly not true of the second period?

22 A Yes, Mr. Justice, that is precisely our position.  
23 This might have been a different case had habeas corpus been  
24 brought in 1968, although I would still say, as I suggested to  
25 Mr. Justice Stewart, that this is not the kind of issue that



1 ought to be undertaken to be resolved in habeas corpus.

2       It is crucially important that the habeas corpus  
3 power be protected, and that it remain fully available for its  
4 proper purposes, but it is equally true that the habeas corpus  
5 powers should not be converted into a means of general review  
6 of intra-military decisions. As this Court pointed out in  
7 *Orloff v. Willoughby*, that, and I quote, "would be a disruptive  
8 force as to affairs peculiarly within the jurisdiction of the  
9 military authorities."

10       In this case, Sergeant Schlanger was admittedly  
11 enlsted for a period of six years. That was more than five  
12 years ago. During that period he has received a college educa-  
13 tion, nearly all of which was at public expense including his  
14 salary. Since he filed this petition for habeas corpus, he has  
15 been on leave status from December 9, 1969, much of it by order  
16 of the United States Court of Appeals, until July 8, 1970, when  
17 Mr. Justice Black refused to continue his leave. That was for  
18 a period of nearly seven months.

19       Shortly after this Court granted the writ of  
20 certiorari he was again granted various periods of leave, and  
21 finally he was granted leave on December 25 until the present  
22 time, for nearly two months. Thus, there have been more than  
23 nine months, nearly ten months of leave connected with this  
24 case.

25       Sergeant Schlanger was ordered to Iceland in January



1 and as I have indicated that was deferred at the request of my  
2 office, until after the hearing today.

3 By great energy and persistence, Sergeant Schlanger  
4 has held the Air Force at bay for nearly 19 months. It may be  
5 that this is not within the legitimate purpose and function  
6 of the Great Writ of habeas corpus.

7 Even if it be held that it is not a prerequisite to  
8 habeas corpus jurisdiction that there be someone within the  
9 District who has custody of the Petitioner, it is still our  
10 contention that the District Court here properly held that it  
11 did not have jurisdiction of this petition. Habeas corpus  
12 petitions are not avenues to advisory opinions. It still  
13 remains a Constitutional truism that Federal Courts have juris-  
14 diction only over cases or controversies.

15 A case or controversy requires two parties, both of  
16 whom are properly before the Court. Here there is only one  
17 party before the Court in Arizona, and that is Sergeant  
18 Schlanger. The Secretary of the Air Force and Colonel Homer  
19 Baker are the only persons alleged to be restraining the  
20 Petitioner of his liberty, and neither one is within the Dis-  
21 trict of Arizona.

22 District Courts do not have nationwide jurisdiction  
23 in habeas corpus, and there are manifest reasons why Congress  
24 has never provided that they should have such jurisdiction.  
25 There is the problem of transportation, and there is the

1 problem of forum shopping. If there is jurisdiction in  
2 Arizona in Sergeant Schlanger's case, then any serviceman on  
3 leave can file a petition for certiorari in any court he  
4 chooses by simply going there, or perhaps by filing such a  
5 petition by mail or through local counsel.

6 That seems obviously undesirable, and in no sense is  
7 it required by any legitimate concern to make the Great Writ  
8 available when it is needed. There is, of course, Section  
9 1391(e) of Title 28, which provides for nationwide service of  
10 process on Government officers in civil actions. We would  
11 contend first that Section 1391(e) does not apply to habeas  
12 corpus, that it was not intended to apply to habeas corpus, and  
13 need not be found to apply to habeas corpus, to keep that writ  
14 effective.

15 Even if Section 1391(e) does apply in habeas corpus,  
16 it is not applicable here, since the cause of action did not  
17 arise in Arizona, and since it appears clearly on the face of  
18 the petition that Sergeant Schlanger is not resident in  
19 Arizona, that is, domiciled there, which is the proper construc-  
20 tion of that word in the statute as a number of courts have  
21 held.

22 Finally, we would contend that even if there is  
23 jurisdiction in Arizona, this is a case which should be trans-  
24 ferred to the Middle District of Georgia or to the District of  
25 Columbia. Sergeant Schlanger suggests that the witnesses and

1 the evidence are in Arizona, but that simply highlights the  
2 fact that this is essentially a breach of contract suit, not  
3 a habeas corpus matter, and as a breach of contract suit it is  
4 very clear that there is no jurisdiction in the District Court  
5 in Arizona under this petition.

6 Unless this case is brought to a conclusion, it is  
7 obvious that there will be endless further proceedings. The  
8 Court below was correct in holding that the District Court for  
9 Arizona does not have jurisdiction, and its judgment should be  
10 affirmed.

11 Q When does the Petitioner's present enlistment  
12 expire? Sometime this year, doesn't it?

13 A Well, it would have expired late in 1971,  
14 except that there is provision that when certain types of  
15 permissive leave are granted, such as that for which he went to  
16 the University of Arizona in 1969, not only is that added on  
17 but triple is added on. So that, I understand that somewhat  
18 more than a year still remains on his enlistment, but I do not  
19 know the exact time of expiring.

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

22 Mr. Schlanger, You have about 12 minutes left.

23 ARGUMENT OF HERBERT PHILLIP SCHLANGER,

24 APPEARING PRO SE -- REBUTTAL

25 MR. SCHLANGER: Thank you, Your Honor.

1 I hardly know where to begin in rebuttal, Your Honor.  
2 I was not expecting an attack on the subject matter of the  
3 petition at this point. I had been advised by Mr. Reynolds  
4 that that was not going to be a subject of the brief for  
5 argument; however, I will get to that.

6 Q Who is Mr. Reynolds?

7 A The Assistant Solicitor General, sir, who  
8 briefed the case.

9 Q I see.

10 A Initially, sir, Mr. Griswold now claims that I  
11 was not in custody at the time the petition was filed, and I  
12 would like to respectfully call your attention to page 12 of  
13 the Government's brief, at which the Government asserts that  
14 under 28 U.S.C. 2241, "he was clearly 'in custody' in the  
15 United States Air Force at the time he sought habeas corpus  
16 relief."

17 Q I think you must have misunderstood him. I  
18 did not understand the Solicitor General to say that you were  
19 not in custody for purposes of jurisdiction, but only that he  
20 was questioning the existence of the use of the writ for this  
21 purpose.

22 A No, sir. That was the initial part of the  
23 argument. Later in the argument, I believe the Solicitor  
24 General did say, in response to a question, that he did not  
25 think that I was in custody at the time I filed the case.

1           However, I would like to call the Court's attention  
2 to ---

3           Q       He was directing that to the period when you  
4 were on leave, free from military discipline and free from any  
5 obligation to report.

6           A       Yes, sir. That is the time at which I filed  
7 the case.

8           Q       He was not questioning the military duty as a  
9 basis for the writ, but only that you were not reporting to  
10 anyone and not on military duty, but on leave at your own  
11 request.

12          A       Yes, sir, but the way I understood the  
13 Solicitor General's point was that habeas corpus would not lie  
14 at such a time because of the tenuous nature of restraints at  
15 that particular point in time, and that the restraints were  
16 only potential, to be imposed when I had to return to Georgia.  
17 Yet, in the brief they can see that it was properly filed,  
18 since I was in custody under the statute.

19               I think that that really is clear. I think the more  
20 important question is on subject matter jurisdiction, which at  
21 least I would like to clear up a little bit. It is claimed that  
22 exercise of this Court's jurisdiction, or a District Court's  
23 jurisdiction in cases of this nature would dilute the writ,  
24 would distort its purpose.

25               I would like to point out that in Orloff v.



1 Willoughby, which the Government cites in support of this  
2 position, the Court said that they would not interfere in  
3 military duty assignments, and I concur wholeheartedly. I do  
4 not think that it is a proper judicial function to determine  
5 what assignment a man in the military should be put to work in.  
6 However, Your Honor, the Air Force could use me as whatever they  
7 wanted. They could have kept me as an aircraft instrument  
8 repairman, if they had commissioned me.

9 I might have been the only Second Lieutenant aircraft  
10 instrument repairman in the Air Force, but it would have been  
11 lawful. However, what we are discussing here is a status  
12 difference, between that of an enlisted man and that of a com-  
13 missioned officer, which I was entitled to expect under the  
14 program for which I re-enlisted.

15 Failing to commission me, I submit, entitles me to a  
16 discharge just as it entitled Dr. Nelson, in Nelson v. Peckham,  
17 where the Fourth Circuit ordered his discharged because the  
18 Army refused to commission him. Following this Court's decision  
19 in Orloff, the Congress revised the Doctors' Draft Act to  
20 require commissioning of doctors drafted under its provisions.  
21 The Army did to Dr. Nelson what it did to Dr. Orloff, in that  
22 it just refused to commission him and still held him.

23 He brought habeas corpus, and he won. There was  
24 another case, which I do not have the cite of, in California,  
25 citing Nelson v. Peckham. It is not that unusual to contest

1 status differences. Admittedly, this is the first case I have  
2 seen of an enlistment status question, but I do not think that  
3 the fact that I enlisted dilutes my claim any more. If the  
4 Air Force did, in fact, unlawfully change my status, then the  
5 contract is void and there is absolutely no basis in fact for  
6 the custody now being exercised over me.

7 Your Honors, I submit that habeas corpus is the  
8 proper vehicle to challenge a breached and void enlistment  
9 contract.

10 Going to the jurisdictional issue, it seems to me  
11 there is a contradiction in the Government's position. On the  
12 one hand, they say that this District Court for Arizona lacks  
13 jurisdiction because there is no Respondent within the District.  
14 On the other hand, they maintain that the District Court in  
15 Georgia retains jurisdiction, even though there is no Respondent  
16 within the District now.

17 Colonel Baker, I submit, sir, is no longer a proper  
18 Respondent, since he is no longer in any way, shape or form  
19 controlling or having custody of me. I was relieved from  
20 assignment to his unit.

21 Q I think what the Solicitor General said was  
22 that your original petition that remained there would still be  
23 a good petition, even though you have subsequently been moved.

24 A Even though there remains no Respondent in the  
25 District?

1 Q I think the Solicitor General did not suggest  
2 that it was all that clear that you could not file a petition  
3 in Georgia.

4 A No, sir, even on the point that that one is  
5 still pending, let's assume that argument just for the moment.  
6 Colonel Baker has no control over me. He is now in the same  
7 position that Colonel Reddrick was at the time that I filed the  
8 petition.

9 He is an officer in the United States Air Force. He  
10 is commanding a military unit at a place at which I have been  
11 stationed. He has no direct control over me.

12 My Commander in Iceland -- I filed a motion with the  
13 Clerk to amend my petition for habeas corpus, and presumably  
14 for certiorari also, to add my Commander in Iceland as a  
15 Respondent. He and Dr. Stevens have the custody now.

16 Q Aren't you merely arguing that there was a  
17 breach of contract, which the Solicitor General says you are  
18 arguing?

19 A Yes, sir. That underlies the habeas corpus  
20 petition. That gave rise to the action.

21 Q What else do you have, other than an alleged  
22 breach of contract?

23 A To rest my habeas corpus on, sir?

24 Q Yes, sir.

25 A Nothing at all, sir. Basically, there are a

1 number of reasons why I contend the contract was breached.

2 Q Do you think that you want to establish a  
3 precedent that if a man enlists and they give him a commission  
4 as a sergeant, then he has a breach of contract action that he  
5 can bring by habeas corpus?

6 A Your Honor, I would think that if an enlistment  
7 is anything but carte blanche to the military, if promises to  
8 induce an enlistment into the military are to mean anything,  
9 then we have to guard against an arbitrary use of power by the  
10 military authorities. Should we give them license ---

11 Q If you grant all of that in habeas corpus, the  
12 proper dative is to attack it.

13 A Yes, sir. I believe so.

14 Q Well, suppose the Air Force promised that you  
15 could go to school for three months, and they only let you go  
16 for two months. That would void the enlistment?

17 A Well, sir, I think ---

18 Q Would it? Why is it different from yours?

19 A Because in my case, sir, we have a status  
20 difference. Upon my re-enlistment, orders which designated me  
21 an officer trainee became effective, and the statute under  
22 which the Air Force Institute of Technology operates provides  
23 for professional training and education of officers. It says  
24 nothing about enlisted men.

25 Now, obviously something happened to my status at my

1 re-enlistment. It was something different from just that of a  
2 plain old, ordinary enlisted man who happens to be a nice guy  
3 and so they decide to send me to school. Your Honor, I  
4 re-enlisted so that I might make the Air Force a career.

5 Q Could they have prevented you from going the  
6 second time?

7 A Yes, sir, that was a wholly discretionary  
8 decision on their part.

9 Q And so, they let you go?

10 A Yes, sir. That was a local decision.

11 Q And then, they revoked it?

12 A The second time?

13 Q Yes.

14 A No, sir. The second time, when I was going at  
15 my own expense, I was allowed to complete my degree requirements.

16 Q And then what happened to violate the contract?

17 A The contract had already been violated, sir.  
18 It had been violated while I was in school the first time,  
19 under the Airman's Education and Commissioning Program.

20 Q Well, why didn't you bring habeas then?

21 A Because at that point there was an impediment to  
22 filing. I had to at least attempt to exhaust my administrative  
23 remedies prior to filing, and I considered that my administra-  
24 tive remedies were exhausted in November of 1968, when the  
25 Chief of Staff of the Air Force denied my discharge and request



1 for a hearing.

2 Q Couldn't it also have ended by your  
3 re-enlisting?

4 A Pardon, sir?

5 Q Couldn't it also have ended by your re-  
6 enlisting? Couldn't your administrative remedy have stopped  
7 when you re-enlisted?

8 A No, sir. I had re-enlisted in 1965, and then  
9 the alleged breach occurred in June of 1968. My remedies from  
10 that breach were not exhausted until after I was removed from  
11 Arizona and flown to Georgia. And so, what we are faced with  
12 is the question of whether the military authorities can take  
13 action which gives rise to a claim for habeas corpus, then  
14 remove the serviceman from that jurisdiction prior to his being  
15 able to initiate action because of some impediment or other.

16 Q Well, I think the Solicitor disagrees with that.  
17 He hasn't even agreed that you have ever had a right of action  
18 by habeas corpus.

19 A Yes, sir, but assuming that we did have habeas  
20 jurisdiction, subject matter jurisdiction.

21 Q All right.

22 A I cannot truly imagine, sir, any other theory  
23 under which to bring this case. I am not saying that the Air  
24 Force has to make me an officer. Certainly, if they made me  
25 an officer with suitable adjustments in pay and rank, I would

1 probably be required to drop the action and serve out my  
2 enlistment, because every application has been in the alterna-  
3 tive, either a discharge or reinstatement and commissioning.

4           However, we are talking about a status difference,  
5 and if the Air Force, within itself, refuses to even grant me a  
6 hearing at any time, which they have for three years now, on  
7 my claims that I was unfairly eliminated from this program,  
8 unlawfully eliminated, and denied the status of a commissioned  
9 officer for which I had re-enlisted, I can see no other theory  
10 under which to bring it than habeas corpus, which challenges  
11 unlawful restraints by Governmental authorities.

12           Your Honor, if you have no further questions ---

13           Q     May I ask you exactly what it is you are after?

14           A     At this point, sir, I would like to be dis-  
15 charged from the Air Force. I cannot see that even if the Air  
16 Force commissioned me, I could make it a career successfully  
17 after the publicity that has been attendant to the case, and  
18 very truthfully, since my initiation of the proceedings I have  
19 discovered that I have, hopefully, some aptitude for the law  
20 and would like to make the law a career.

21           Q     Do you want to get released from the Air Force  
22 for breach of contract?

23           A     Sir?

24           Q     Is your pleading with the Government a breach  
25 of contract pleading?

1           A       That underlies it, that at the moment that  
2 contract under which I was re-enlisted is void.

3           Q       Which part of it was breached?

4           A       The entire contract, since it was a contract  
5 based upon my ---

6           Q       What did they agree to do that they have not  
7 done?

8           A       Commission me, sir.

9           Q       Commission you?

10          A       Yes, sir.

11          Q       And you want to get that tried under habeas  
12 corpus?

13          A       Yes, sir. I think the Government conceded in  
14 Orloff v. Willoughby that had he been entitled to a commission  
15 this would have been a proper action in habeas corpus, but then  
16 they denied that he was entitled to a commission and the Court  
17 agreed with them.

18               The facts in this case, since we have no evidence on  
19 my entitlements under the enlistment agreement, since we have  
20 never been able to have an evidentiary hearing, remain from my  
21 allegations in the petition. That is, that I was entitled,  
22 sir.

23          Q       You think that is a reason to bring a suit  
24 against the Government in habeas corpus?

25          A       In this particular action?

1 Q Breach of contract.

2 A In this particular action to effect my release  
3 from custody, yes, sir, I do.

4 Q To effect your release from custody?

5 A Yes, sir.

6 Q If they breach any part of the contract with  
7 you, you can get out of the Air Force completely?

8 A No, sir, not any part. The material, central  
9 point which goes to my status. On that point, I think, when  
10 the Air Force refuses to honor the central part of the contract,  
11 I think that yes, sir, I am entitled to ask to be discharged.

12 Q And you have asked it in the alternative,  
13 either they make you an officer or they let you out.

14 A Yes, sir.

15 Q Is that correct?

16 A Yes, sir.

17 Q And you don't want money damages?

18 A I have been thinking about it of late, with  
19 the expenses, but no, sir, as far as the record is concerned,  
20 up until this point I have never asked.

21 Q At least as far as this lawsuit goes, you do  
22 not want money damages, you want either to be commissioned or  
23 let go.

24 A Yes, sir, and I contend that the courts have  
25 no power to order my commissioning.

1 Q Right.

2 A Yes, sir. Thank you, Your Honor.

3 MR. CHIEF JUSTICE BURGER: Mr. Schlanger, Mr.

4 Solicitor General, the case is submitted.

5 (Whereupon, at 11:00 o'clock a.m., argument in the  
6 above-entitled matter was concluded.)

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