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In the

Supreme Court of the United States

LT. JOHN A. STRAIT,

Petitioner,

vs.

HON. MELVIN R. LAIRD,
Secretary of Defense, et al.,

Respondents.

No. 71-83

Washington, D. C.
March 22, 1972

Pages 1 thru 36

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Respondents.

Washington, D. C.,

Wednesday, March 22, 1972.

The above-entitled matter came on for argument at 11:40 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:

JOHN T. HANSEN, ESQ., 555 Polk Street, San Francisco, California 94102; for the Petitioner.

ERWIN N. GRISWOLD, ESQ., Solicitor General, Department of Justice, Washington, D. C. 20530; for the Respondents.

C O N T E N T S

[Afternoon session - pg. 18]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 71-83, Strait against Laird.

Mr. Hansen, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN T. HANSEN, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case involves the right of a Reserve member of the Armed Services to obtain prompt judicial review of a decision by the Army denying his request for conscientious objector discharge.

The case arises on its particular facts, which are typical of those facts found in unattached reservist cases. The facts have caused indecision below, and a conflict among the Circuits, with respect to certain unresolved questions of Federal Court jurisdiction.

Because the facts are so important, I'd like to elaborate a bit on them.

The petitioner in this case, Lieutenant John A. Strait, who was born and raised in San Francisco, California, was a member of the Army ROTC at the University of California at Davis, and he received a commission as a Reserve Second Lieutenant on his graduation, although his two-year active duty obligation was deferred in order that he could go to law

school, which he did over the next three years at Yale University.

After graduating from law school, he returned to his home in San Francisco in order to take the California bar exam, with Army permission.

And it was while he was at home, waiting to take the bar exam, that he had a series of personal events in his life, including suicide of a very close cousin, which caused him to realize that he held beliefs of conscience that made it impossible for him to fulfill his military obligation.

Accordingly, he requested that he be discharged from the Army Reserve on grounds of conscientious objection. And, pursuant to applicable Army Regulations, a series of interviews and a hearing were held at Fort Ord, California, a large Army base near San Francisco.

The results of those interviews and the hearing, which were favorable to Lieutenant Strait's claim, were forwarded to a board of officers at the Army Reserve Components Personnel Center in Indianapolis, Indiana, where the board concluded, after reviewing the record, that Lieutenant Strait did not meet the criteria of the regulations, and recommended against granting the discharge.

He was notified of that decision and informed that he would be required to proceed as previously ordered within the week to active duty at Fort Gordon, Georgia.

Q Who made the final decision, Mr. Hansen, or did anybody?

MR. HANSEN: Apparently, although the Regulation is not specifically clear on this, that decision is delegated to the commanding officer of the Reserve Components Personnel Center by the Secretary of the Army.

Q And that's at Fort Ben Harrison?

MR. HANSEN: Yes, that's correct. He's the commander, essentially, of that installation; that portion of that installation.

When he learned of the adverse decision, he immediately petitioned for review of that action in the Federal District Court in San Francisco. The government moved to dismiss on the grounds that the commanding officer at the reserve center was not present in the district, and therefore the court did not have jurisdiction.

That motion was denied, but the court ultimately, on the merits, denied relief to Lieutenant Strait. Consequently, he brought his appeal to the Court of Appeals for the Ninth Circuit.

The Ninth Circuit initially affirmed the District Court's jurisdictional finding, but reversed it on the merits, finding unanimously that there was no basis in fact in the record to support the Army's denial of Lieutenant Strait's request for discharge.

But, shortly thereafter, this Court, last term, decided the case of Schlanger v. Seamans; and on that basis the government petitioned the Court of Appeals for rehearing; and that petition was granted; the Court of Appeals,on the authority of Schlanger, ordered the entire proceedings dismissed.

And that is the decision that's now before this Court.

It raises a number of questions. There are two principal questions. The first is whether, in order for a district court to have habeas corpus jurisdiction, both the petitioner and his custodian must be physically present in that district.

The second question is whether habeas corpus is the only remedy available to a serviceman seeking to obtain judicial review of a denial of the request for discharge. That question, of course, includes several aspects; but that is the primary second issue.

Now, with respect to the habeas corpus issue, this Court, in this context, is called upon to balance the greatness of the writ of habeas corpus, which lies in its prompt availability, against the territorial restriction which Congress has placed on the district courts to grant writs of habeas corpus; a restriction that is included in the statute in the following phrase: the district courts may grant writs of

habeas corpus within their respective jurisdictions.

It is the government's contention here that that phrase means that both the petitioner and the custodian must be physically present in the district in order for the court to grant the writ.

Whereas petition contends that as long as he is physically present in the district, it is only necessary that the custodian be present jurisdictionally, through contacts that he has had with the petitioner in the district; and it is not necessary, at least in this context and the limited context that arises, that the custodian be physically present.

Now, to support this contention, we look first to the history of the habeas corpus statute in this particular phrase, which was inserted into the statute, and it's remained unchanged, in 1867.

The purpose of its insertion into the statute at that time was to avoid a situation where petitioners in habeas corpus proceedings might have to be transported around the country.

Ironically, the government's contention here is that petitioner must do that very thing, he must travel long distances across this country before he can invoke the habeas corpus jurisdiction of a district court.

The problem that we have in this case with respect to this particular phrase, though, arises because there is a

new class of habeas corpus petitioners in this country now, as a result of the series of decisions of this Court, which has expanded the availability of the writ of habeas corpus to include persons who are not in actual physical confinement, are not actually held behind bars. And this class of petitioners may indeed be in district and the custodian be in another. A situation that previously was highly unlikely to arise.

Now, this Court has interpreted this phrase in the past, in the case of Ahrens v. Clark, and has there concluded that the petitioner must indeed be physically present in the district for the district court to have jurisdiction; and it has not changed this ruling, apparently, in view of the new class of petitioners that exists. But, of course, that requirement is not here.

But there is no question that if the custodian must also be physically present in the district that this will greatly restrict the availability of the writ of habeas corpus, certainly to the particular class of petitioners that we have before the Court today.

It is our contention that this is contrary to the purpose behind the phrase in the statute; it's contrary to the purposes of the Great Writ, and that it be promptly available. It advances no policy interest of the government, the government benefits in no particular way from this rule; and it does create substantial hardships to the petitioner.

Q What would be your view, Mr. Hansen, of this hypothetical situation that I'll put to you, outside the context of a military case: A prisoner, let's say, in the confinement of the State of Georgia, receives a special release to go to California to attend the funeral of some member of his family -- a situation that sometimes arises -- and then while he's in California brings a suit against the warden of the prison in Georgia.

It would follow from your argument that the district in California would have jurisdiction?

MR. HANSEN: Not necessarily, and there are a number of reasons why that would be true. First of all, as we pointed out in our brief, the petitioner must always meet, himself, the jurisdictional and venue requirements before he can invoke the jurisdiction of the district court. Although he may be physically present, he may not be a resident of the district, and therefore the district court may not have venue over the action, or may find that there is a more convenient forum where the action can be heard.

And then there is a second question as to whether the custodian in that particular case that you mention is jurisdictionally present in the district, because, from the hypothetical that you pose, I don't see any contacts that the warden would have had with petitioner while he was in the district where he had been allowed to go. Even if he had had

some nominal contacts, they certainly would not relate to the subject matter of the action that he brought.

Third, I think the court might have some difficulty serving process -- I'm not sure if you were talking about a federal prisoner or a State prisoner -- and that we must keep in mind that that's an important distinction that arises in these cases, and makes the rule that we urge limited in its application. Because it really could arise only in situations where the prisoner is a -- where the issues are federal issues, and the custodian is a federal officer.

Q Well, then, narrowing it, add to my assumption that the Georgia prison is the federal establishment at Atlanta, and --

MR. HANSEN: Then I --

Q -- the United States Government, the Attorney General, who is technically the custodian, is he in California for purposes of this habeas corpus?

MR. HANSEN: Well, that is the question before this Court in this case; that is --

Q Well, in your view; from your view, he is?

MR. HANSEN: From the facts as you stated it, I would say that he is not, because he did not have contact with the petitioner while the petitioner was in the distant district, and had not, in a sense, entered that district.

Now, here, and this is why I --

Q Well, let's assume for the moment that he was convicted in the same district court in California where his family, his principal residence, is located.

MR. HANSEN: He would probably have jurisdiction in that district court under Section 2255, and the question would not arise. He was convicted in that district and he was challenging his conviction.

Now, if he was challenging the conditions of his custody in Georgia, then that would be a different question. But there he would have to show that the warden in Georgia had somehow entered the district, the Northern District of California, in order to be subject to its jurisdiction. And it has never been -- I shouldn't say never; but for a long time this Court has held that it is not necessary for a person to be physically present in a district to be subject to its jurisdiction in other contacts.

And I see no reason, considering the purposes behind the Great Writ, the policies to be served, including the fact that the government is not injured here and the petitioner is injured, why we cannot rely upon the contacts theory in this case.

Q You're referring to International Shoe --

MR. HANSEN: On that theory, that's correct.

Q -- you mean business type of thing?

MR. HANSEN: That's right. And I think --

Q Mr. Hansen, --

MR. HANSEN: Yes.

Q -- you say that your client would have been substantially prejudiced had he not been able to bring this action in the Northern District of California. As I understand the government's contention, had he not brought the action in the Northern District he would shortly have been transferred at Army expense to some camp in Georgia; and I take it he then would have been free to proceed in Georgia?

MR. HANSEN: That's correct.

Q Well, what would the hardship of that instance be?

MR. HANSEN: Well, there are a number of problems that arise from that. Of course we've treated these extensively in our brief, but I'll review them very briefly here.

The first is that in this case, where you have a military reservist who has never been on active duty, it is important to him that he obtain a ruling before he has to go on active duty. That's essentially the subject matter of the case.

Q Well, the draftee doesn't have that, does he?

MR. HANSEN: But the draftee has not yet exhausted his administrative remedies. And the draftee always has the option of refusing to submit to induction and never becoming subject to the harshness of the military domain.

Q At the risk of criminal prosecution?

MR. HANSEN: Yes. But if he feels he has a strong case, and that his case is one that he's likely to win, the risk may be minimal.

Secondly, although Lieutenant Strait would go to Georgia presumably at government expense, his counsel would not be paid for his expenses in going to Georgia. Moreover, his counsel would not be familiar with the Georgia courts, and it may be necessary to obtain other counsel in Georgia, in addition to which there is the time involved here. Traveling back and forth across country in order to litigate cases.

All the administrative procedures took place here in San Francisco, and that's also where local counsel are most familiar with the case. It's not easy to litigate these matters in federal court if you have to start afresh in a place that's thousands of miles from your home and counsel. These are not, as the government seems to indicate, minor problems. They would probably be insurmountable problems to a certain number of people.

That's the problems that we see with that suggestion on the part of the government.

Again, emphasizing, as the Second Circuit did in the case of Arlen v. Laird, which is cited in our brief, it is in direct conflict with the Ninth Circuit decision here, and

expressly disagrees with that.

The Second Circuit said it's illogical that a man must go on active duty in order to contest the Army's right to force him to go on active duty. It's sort of putting the cart before the horse.

That's what the petitioner wants and why he wants prompt review, he doesn't want to have to go on active duty, as the matters we discuss in our brief indicate.

The Court, of course, must reconcile this case with its decision last term in Schlanger v. Seamans, and we feel that it is possible to decide this case in favor of the petitioner without doing violence to Schlanger.

First of all, as I read the reservation of the question in Schlanger, that the Court did not there reach the question of whether this contacts theory could be used to obtain jurisdiction, and therefore that that is the question --

Q Well, Schlanger was on active duty, on his way to Georgia. Isn't that right?

MR. HANSEN: He had been on active duty for several years, and --

Q He was on leave and was on his way back to Georgia; isn't that right?

MR. HANSEN: I believe -- yes; he filed his petition in the district of Arizona something like the day before he was supposed to be back in Georgia.

Q And Strait has never been in Indiana in his life, is that right?

MR. HANSEN: Well, I can't say that he's never passed through, flown over it in an airplane; but that's true, he's never been in Indiana for any military purpose. Or in Georgia. Or in any other State, really, for any military purpose, except if you count his attendance at Yale Law School; but for military purpose.

But the cases are distinguishable. First, the points that Mr. Justice Marshall has made, there's quite a difference between the status of the two petitioners at the time they brought the action. In fact, there's some question as to whether Sergeant Schlanger could even be said to have been a resident of Arizona; he was only there on a very temporary leave, he maintained a permanent residence elsewhere. He had been a member of an active military unit in Georgia for several months, where he had an actual commanding officer. And that commanding officer, moreover, unlike Lieutenant Strait's commanding officer, really had very little to do with him while he was in Arizona.

That was not the commanding officer that was his commanding officer when the subject matter of his suit arose, that had occurred some year or more before. He had been under a different command at that time.

And therefore his current commanding officer, the

commanding officer of the unit in Georgia where he had performed functions for a nine-month period, had really no contact with him in Arizona.

That's more analogous to the situation that the Chief Justice previously posed. He had been allowed temporarily to go there for purposes totally unrelated to that action that he was bringing at that time.

But more importantly, I think, and the overriding question in this case, is that where you have this new class of only nominally restrained, if at all, really, petitioners who are in a very highly technical form of custody, it's not necessary for the court to have that close a contact with the custodian, because there's no turnkey in this case. The court does not send a writ down to the jail, the jailer looks at it and then turns a key and lets the man out of the jail.

In these cases all you need is some kind of a judicial determination that then becomes res judicata with respect to this man's status.

Q Mr. Hansen, why wouldn't it be equally logical, in view of this new class of, as you say, technically restrained, if at all, for this Court to simply say that habeas corpus won't lie until the restraint becomes more than technical?

MR. HANSEN: Because I think the Court answered that question only last term, or last month, excuse me, in the

Parisi case, where it said that a member of the military, by virtue of his restraint as a member of the military, is entitled to prompt judicial review in habeas corpus. And there are a number of circuit cases that have found that a reservist is in custody and restrained for that purpose.

After all, he can be subjected to an order of the military at any moment in time. And the question, I think, has already been answered by this Court, that these new petitioners are in custody for habeas corpus jurisdiction. The question in this case is where are they in custody.

I would like to turn to some of the alternative remedies that we urge are available at this time, however, in answer to your question, and also because, of course, we're pushing them quite strongly in this case.

In addition to pleading habeas corpus jurisdiction in the district court, Lieutenant Strait urged that the district court had jurisdiction under the Federal Mandamus statute, in Title 28, Section 1361; the Federal Question statute, in Title 28, Section 1331(a); the judicial review procedures of the Administrative Procedure Act.

And I would like, after the recess, to discuss this.

MR. CHIEF JUSTICE BURGER: We will take it up then.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Hansen, you may proceed.

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

I was about to big discussing our alternate theories to jurisdiction other than habeas corpus. I'd like to first speak about the Federal Mandamus section, Title 28, Section 1361, which was passed by Congress to alleviate a problem very similar to that here. The problem where persons who sought to challenge federal administrative actions would have to travel across the country in order to do so.

The government contends, however, that Section 1361 is not available here, because the decision under review is discretionary. That, of course, merely begs the question. The question is: What is a discretionary decision? And it is our contention that an officer of the federal government does not have discretion to fail to follow his own regulations and to render an administrative decision contrary to those regulations. And that the discretion referred to is that discretion contained in decisions of a policy-making or political nature, not the kind of operational decision that is present here.

Now, it's true that the agency here has to make some

fact-finding and perhaps apply those facts to the law. And if that is a certain amount of discretion, that's fine. But Section 1361 still reaches that action for review, as Chief Justice Taft told us in the case of Work v. Rives over 50 years ago: that although the officer's duty may be discretionary within limits, he can't transgress those limits, and if he does so, he may be controlled by mandamus.

Or, to put it another way, as this Court more recently said in the Panama Canal case in 1958, cited by the the respondents: A decision which cannot be reached is one which is so wide open in that launch as to be left entirely to agency discretion.

And this decision is not wide open. There is a substantial law of conscientious objection that is to be applied here.

Now, the findings and conclusions of the Review Board almost on their face violate the law and the regulations. In fact, the government conceded below error in those conclusions in all respects except one, and that was the conclusion that Lieutenant Strait was insincere.

But The Army had found a wide variety of failure to meet the regulatory criteria which are under the decisions of this Court recently in Welsh v. United States, Clay v. United States; clearly erroneous.

And even with respect to the sincerity question,

there is a law to be applied. A conclusion that a person is insincere on a conscientious objector claim must be based on facts in the record. Moreover, those facts must be objective and rational, to reach that conclusion.

And it was the unanimous opinion of the three-judge Court of Appeals that there were no such facts in this record; that the decision was without a basis in fact, in addition to being legally erroneous.

So, accordingly, it's quite clear in this case that the Army failed to follow the law, found in its own Regulations and interpretative judicial decisions. It can hardly be denied that Lieutenant Strait is entitled to have his claim reviewed according to the law, and that the federal agents in this case had a duty, perhaps a clear duty, one of a ministerial nature, to base their decision on the law, and according to the facts in the record.

The government falls back from that position, then, and argues that, well, in any event, Section 1361 can't be utilized because there's another remedy, habeas corpus, which can be invoked in Indiana or Georgia.

We have analyzed the cases where that approach has been taken to mandamus jurisdiction and have found that where that has been done, it has been done only where the other remedy is one that is created by statute and is the exclusive remedy for the particular aggrieved action.

Moreover, the courts have always referred to the other remedy as an adequate remedy, and of course, as our discussion under habeas corpus pointed out, there's serious question as to whether habeas corpus in a distant State is an adequate remedy.

There is even some question whether, in this case, at the time that Lieutenant Strait filed this petition, if we are to accept the government's contentions, that it was even available at that time, for they contend that Lieutenant Strait had to perform certain conditions precedent before habeas corpus jurisdiction even existed.

Moreover, their suggestion defeats the very purposes behind Section 1361, because their result requires petitioner to travel to a distant State rather than to be able to bring the action where he resides, which is what Congress hoped to provide for in Section 1361.

In addition, we pleaded jurisdiction under the Administrative Procedure Act, which we feel does confer independent jurisdiction on this Court, on the district courts, and that this Court's decision last term in the Overton Park v. Volpe case so held.

Again the discretionary jurisdiction question comes up, and I think that our answer under mandamus applies as well.

Finally, with respect to Section 1331, the question

that would have to be resolved here, the only remaining question, is the meaning of the $10,000 jurisidctional amount; and we feel that a claim of agency action that violates due process of law, per se, meets the $10,000 jurisdictional amount in question.

So what we are asking this Court to do today is to approach this case realistically, according to the facts, policies underlying these decisions, and not to needlessly restrict prompt judicial review after the Army has denied a request for discharge on conscientious objection.

I would like at this time, if I may, to reserve the remaining minutes for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Hansen.

Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

The question presented here is a very narrow one, simply whether there was a custodian within the jurisdiction of the district court, and whether the presence of a custodian within the jurisidction is a prerequisite to relief under habeas corpus or any of the other statutory provisions to which Mr. Hansen has referred.

We do not contend here that Lieutenant Strait was

not "in custody", although it is clear that to say that he was in custody represents a considerable enlargement of the habeas corpus concept over what it has had traditionally and historically.

Because there is a conflict of decision, we have briefed the question rather fully. It is clear, of course, that historically the writ of habeas corpus was based on territorial considerations, and that has been particularly true in its history in the United States, where the form of the statute is one directed to a person who is required to produce the person of the applicant.

After all, it is "ha-be-as corpus", in the second person: "you have the body". And the whole force of the writ is that it is directed against somebody who is the custodian of the person who is in custody.

We recognize that the Great Writ has been expanded and extended in decisions of the Court. We find it somewhat difficult to think that it should be so attenuated and so diluted that the basic purpose of the writ becomes forgotten. I would hope we would not come to the place where we talk about a remedy and say it finds its origin in the writ of habeas corpus, which was very important in the early days. It seems to me that the Great Writ should be retained with its traditional limitations, in so far as that remains appropriate, and in so far as it is required by the statute enacted by Congress.

I know that Minton said that "the forms of action ruleth from the grave", but, nevertheless, our position is that the writ of habeas corpus is not merely a device for righting a wrong.

For example, as I sat here on Monday listening to the argument in the Flood case, and thinking about the argument today, I found myself wondering whether the Flood case could not have been presented to this Court as a habeas corpus case. There you had a person in custody, because obviously his freedom was restrained, he could not play baseball any place in the United States, Mexico, or Japan; you had a custodian.

I should think it would be highly undesirable to approach that case in terms of habeas corpus, and I think it is equally undesirable here in the absence of action by Congress to eliminate by judicial action the requirement in the statute that there be a custodian within the territorial jurisdiction of the court.

This may seem technical, but our concern is, in part, the question of forum shopping. It's perfectly true that Lieutenant Strait is a long-time resident of the Northern District of California, but the Northern District of California is statistically a good place for seeking discharge on the grounds of conscientious objection, and it can be understandable why he would prefer to sue there rather than in some other

jurisdiction.

The statute itself, as I have said, which is quoted on pages 41 and 42 of our brief, provides: "The writ, or order to show cause shall be directed to the person having custody of the person detained."

And then it proceeds, further down on the page:

"The person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."

As we read the statute and understand the case, the issue before the Court is squarely and directly covered by this Court's decision in Schlanger v. Seamans, which was announced just a year ago tomorrow, March 23rd, 1971, where the Court denied Sergeant Schlanger's effort to get habeas corpus through a court in Arizona by saying that the district court in Arizona has no custodian within its reach, against whom this writ can run.

The officer in Georgia is an officer of the United States. He could be served outside the jurisdiction under Section 1391(a), just as much as the Colonel in Indianapolis can be served here, but the Court decided just a year ago that the court in Arizona has no custodian within its reach against whom this writ can run, and then continued: "the absence of his custodian is fatal to the jurisdiction of the Arizona court."

Incidentally, I may say that Sergeant Schlanger is now out of the Air Force and has been in touch with me about getting admitted to a law school.

The decision which is in conflict with the present cases is the decision of the Second Circuit Court of Appeals in Arlen v. Laird. We think that the basis of the conflict is rather patently on the face of the opinion due to a misunderstanding. The Court said: The Supreme Court reserved decision on this precise question. But I think if the opinions are examined, it is apparent that the issue which was reserved was whether the special type of reservist in this situation, who is not assigned to any unit, is "in custody".

That was what was really involved in the Donigian case, and that is the issue which is conceded here. The question is whether the custodian is within the jurisdiction of the court, and whether that is required; and our position is that that is exactly the issue which was cased in Schlanger, and exactly the issue which the Court decided in, what seemed to us to be, unequivocal terms.

Now, here there are what seem to me to be reasonable alternatives for Lieutenant Strait. He can do what Sergeant Schlanger did. Following this Court's decision, Sergeant Schlanger filed suit for habeas court in the District Court in Georgia, and then when he had been transferred to Iceland he started a suit in the courts of the District of Columbia.

Lieutenant Strait can wait until he reports for active duty in Georgia, where, as has been indicated, his transportation costs to Georgia will be paid and he can then immediately file a petition for habeas corpus.

There is a suggestion that there's a terrible burden, a very brief distinction between his being in the inactive reserve and his being on active duty; the fact is, however, that he is in the Army now and has been in the Army for a number of years, and he can raise in the Georgia courts, in completeness, all the questions which he seeks to raise.

However, if it is really important for him that he not go on active duty, and I repeat I find it difficult to see why it is really is important, I can understand why some kinds of conscientious objectors might say, "I cannot be in the Army at all, and therefore I cannot take the alternative of accepting induction and then applying for habeas corpus"; but Lieutenant Strait is in the Army and has been in the Army four years.

But if it is important to him that he not have to be in the Army on an active-duty status, he can sue in -- it was Indiana, it is now Missouri. The suggestion is made that this will swamp the courts in that State because there are, it is said, seven million reservists; the overwhelming proportion of those, however, are men who have completed their military service, who are subject to call only in the event of

the greatest national emergency and, as stated in our brief, there are only 13,000 altogether of these unattached reservists in the Army during the year 1971, they produced a total of 84 conscientious objector claims, of which 39 were decided adversely, which seems to be the total pool from which the potential number of habeas corpus cases of this kind can be drawn on an annual basis.

With respect to his suing in Georgia, I think it can appropriately be pointed out that he entered the Army voluntarily. It is said that it is a hardship to him to have to sue in Georgia; but hardship is a relative matter. He has obtained many years of draft exemption by being in the ROTC and then having it extended for law school education. If he had been drafted and found to be a conscientious objector, he would have had two years of alternative service. I assume that he is now over 26 years old, and that that risk would not be applicable.

And so on the road which he has followed, he has had the best of both ways; he's had benefits from military service, but he would not have to perform on active duty or the alternative service, which a conscientious objector ordinarily has to perform.

With respect to habeas corpus, we think the sole issue is the question with respect to the presence of the custodian within the jurisdiction of the courts and that that

issue is squarely covered by this Court's decision in the Schlanger case.

Now, it is suggested that the petition in the District Court in this case was very broadly drawn, and presents numerous other bases of jurisdiction, other than that of habeas corpus. For example, the Administrative Procedure Act is advanced.

But there, it seems to me that the Act itself contains the answer to its applicability, quite apart from other questions The Act is quoted on page 39 of our brief. It's Title 5 United States Code, Section 704, and it begins:

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court" -- and here we submit that there is a clear and adequate remedy in the court, now in Missouri, or in the court in Georgia after Lieutenant Strait responds to his orders to report for active duty.

We would further submit that the Administrative Procedure Act is not itself a basis for federal court jurisdiction. I toyed with that thought myself, or thought seriously about it in connection with the preparation of this case, but it is, I am sure, a Pandora's box. If the Court starts down that road, then any serviceman who is ordered transferred from Fort Meade, Maryland, to some place in Texas, can present the question to the court whether that

transfer was proper, any serviceman who is ordered to undergo training to become an auto mechanic could equally raise the same issue in court, and that, it seems to me, quite clearly would not be an appropriate construction of the Administrative Procedure Act.

With respect to a suit for a declaratory judgment, the jurisdictional basis in the court would be Section 1331(a). There is there a $10,000 jurisdictional amount. I know that the courts have not been very happy about that, and have found ways to decide cases without dealing with that. But, after all, that is the jurisdictional limitation which Congress put into the statute. It seems to me that it should not be simply overlooked or ignored.

Here habeas corpus is available, it is the appropriate remedy, and it should be the exclusive remedy.

And finally, it is contended on behalf of Lieutenant Strait, that the mandamus would be a remedy. Mandamus to do what isn't entirely clear to me, or who should do what. The Colonel at Fort Benjamin Harrison is the only officer of the Army who has issued an order to Lieutenant Strait, and, incidentally, we have tendered as the final appendix of our brief the Army Regulation which deals with the persons in the inactive reserve, and which provides explicitly that the officer in command of the Reserve Officer Personnel Center should be the officer in command of these people.

All that the Court can do with mandamus is to order the government officer to do his duty. But here the duty of the officers was to decide the question with respect to Lieutenant Strait's conscientious objection, and the officers have decided. They may have decided it wrong, but it is not the function of mandamus to review and revise decisions which people have made in performance of their duties.

That was precisely the decision of this Court in the case of Miguel v. McCarl, in 291 U.S. 442, where the chief of finance of the Army had sought an advance ruling from the Comptroller General, and the Comptroller General had made that ruling. Mandamus was then sought against the Comptroller General, and the Court decided that mandamus would not lie, because the Comptroller General's duty was to rule, and he had ruled.

The Court also decided that mandamus could lie against the Chief of Finance of the Army because they concluded that the ruling was wrong and that the Chief of Finance of the Army was not justified in complying with the Comptroller General's decision.

With respect to the justiciability of an issue like this in mandamus, it seems to me that this Court's decision yesterday in the Fine case is highly relevant. That of course was not a mandamus case; that was a question whether there could be an injunction under Section -- against the restraint

of 10(b)(3), that field has become somewhat complicated between the Oestereich and Breen and Gutknecht cases on the one side, and Clark v. Gabriel and now the Fine case, and the Ehlert case on the other.

But the line, it seems to me, is the same as the line involved with respect to the applicability of mandamus; that is, where there is a controversial issue of fact which needs to be decided.

But in the Fine case, as in Clark v. Gabriel, involving conscientious objection, it was held that that was such an issue, that it was not appropriate to disregard Section 10(b)(3), and I should think that by a parallel line of argument it was such an issue as should not be held to be a basis for that summary order to do a clear duty; which is the underlying basis for the grant of a writ of mandamus.

And for these reasons, we submit that the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

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

Mr. Hansen, you have about four minutes left.

REBUTTAL ARGUMENT OF JOHN T. HANSEN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HANSEN: Thank you. I would like to reply to several things that the Solicitor General raised.

First, with respect to the custodian bringing the body before the court, I find this to be a very strange requirement, to be elevated in this case to preclude the district court from jurisdiction, where the petitioner is already in the jurisdiction of the district court and the custodian here has for years been ordering him around and producing his body by orders communicated to him by mail in this very same district.

I don't see how it would help the government to have the custodian now physically present in the district.

Moreover, under one of their suggestions, that he go to Indiana for a scintilla of time, establish jurisdiction there and then apparently go back home to San Francisco, we'd have the same problem.

This Court has long recognized that it is not necessary that the custodian be physically able to produce the body because he's in the district. I think the Endo case says that when the petitioner has left the district and he's in custody, actual physical custody, of some other person, a custodian can still, by long distance, produce the result desired. And that is what we urge here.

I regret that the Solicitor General has raised the question of forum shopping in this case for the first time, at this level. It has never been raised before. There's never been a hint of it in this case. And the government has never suggested that this case could be more better brought in another

district, for any reason relating to forum shopping.

The Second Circuit, in the Arlen case, rather summarily disposed of that suggestion and found it somewhat frivolous that the government had any interest in having these cases tried in the district other than that where the petitioner is residing. There just was no forum shopping here, and if forum shopping arises in these cases in the future, they can be controlled by venue and forum non conveniens rulings, not by artificial jurisdictional rulings.

Likewise, the suggestion that Lieutenant Strait enjoys some kind of draft exemption because of having accepted an ROTC commission was raised and rejected by the Court of Appeals. Had Lieutenant Strait not gone through ROTC, not accepted this commission, he would have been exempt from the draft just the same, with the 2-S deferments through college and law school, and that he would have been entitled to.

As to the APA on its face, eliminating jurisdiction where there's another remedy, the Solicitor General did not mention this Court's decision of Brownell v. We Shung in 1948 where the Court permitted an immigrant to use the APA in declaratory relief, even though he could have submitted himself to custody and brought habeas corpus. They held that either remedy was available.

I also find some inconsistency in the suggestion that the APA is not a jurisdictional statute, and yet also arguing

that if jurisdiction independently exists, the Court should not exercise APA jurisdiction. If APA jurisdiction is not an independent jurisdictional grant, then there would always be another remedy and never any need to use APA.

I don't see any problem, either, of the Court having to reach the kinds of issues suggested by the Solicitor General with respect to servicemen wanting to challenge their duty assignments or the type of training they're getting. Those are, indeed, policy decisions of the Army that do not necessarily relate to facts that have been found in administrative proceedings that have been held, and there may be, indeed, in those areas, complete discretion. And this Court has long held that the courts do not control assignments of servicemen to specific duty assignments, but has repeatedly affirmed the right to a man claiming that he's illegally held in the Army, to challenge the Army's right to continue to hold him.

That is what is asked here. The court in mandamus could issue an order in combination with the declaratory judgment action.

My time is up, and I thank you gentlemen very much, and urge you to rule for the petitioner.

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

Thank you, Mr. Solicitor General.

The case is submitted.

[Whereupon, at 1:33 o'clock, p.m., the case was submitted.]

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