IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA and NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICI CURIAE* IN SUPPORT OF APPELLANT
v.	)	
Airman First Class (E-3) **CHARLES M. LANE** U.S. Air Force, *Appellant.*	)	USCA Dkt. No. 05-0260/AF Crim. App. No. S303339

BRIEF ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA and NATIONAL INSTITUTE FOR MILITARY AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUE PRESENTED

Whether a United States Senator's Participation on a Panel of the Air Force Court of Criminal Appeals Violates Article I, Section 6 the Constitution or the Separation of Powers Doctrine.

INTEREST OF AMICI

Amicus American Civil Liberties Union of the National Capital Area is the Washington-area affiliate of the American Civil Liberties Union (ACLU), a non-profit membership organization with more than 500,000 members nationwide that has striven for 85 years to protect the civil liberties and civil rights of all Americans. In pursuit of that goal, the American Civil Liberties Union of the National Capital Area ("ACLU-NCA") has filed *amicus* briefs in many cases presenting significant

civil liberties questions, including cases in this Court or its predecessor.[1]

Amicus The National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ's advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers, several and flag and general

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[1] *See, e.g., United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004) (whether Supreme Court ruling that private sexual conduct between consenting adults cannot be criminalized applies to military servicemembers); *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992) (whether due process requires a fixed term of office for military judges); *United States v. Overton*, 24 M.J. 309 (C.M.A. 1987) (whether members of the Fleet Reserve are subject to court-martial jurisdiction or must be tried in civilian courts); *United States v. Johanns*, 20 M.J. 155 (C.M.A. 1985) (whether consensual, private, "nondeviate" sexual intercourse between officer and enlisted member not under his command or supervision constitutes conduct unbecoming an officer); *United States v. Roettger*, 17 M.J. 453 (C.M.A. 1984) (whether military prosecution must abate upon the death of the accused); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983) (whether servicemember's use of marihuana while on extended leave is a service-connected offense and whether a suspicionless, compelled urinalysis upon his return to base is an unreasonable seizure); *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982) (whether charges against accused must be dismissed with prejudice where staff judge advocate led accused to believe that he would not be prosecuted if he provided certain information, and accused thereafter provided such information).

officers. NIMJ appears regularly as *amicus curiae* before the United States Court of Appeals for the Armed Forces.

The question presented in this case is significant. It calls upon this Court to give teeth to a principle so important to the protection of ordered liberty that the Framers included it in the original Constitution: that a person may not simultaneously hold office as a Member of Congress and an official in the Executive Branch. That principle has a particularly pointed civil liberties application in this case, where a Member of Congress sat as an Executive Branch judge on the military court that affirmed Appellant's conviction. The ACLU-NCA and NIMJ submit this brief in support of Appellant's claim that Senator Graham was constitutionally prohibited from participating on the appellate panel that decided his case.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

In November 2003, the Judge Advocate General assigned Lt. Col. Lindsey Graham to the Air Force Court of Criminal Appeals. Mr. Graham was at that time, and is today, a United States Senator. In January 2004, President George W. Bush nominated Senator Graham to the rank of colonel in the United States Air Force Reserve. The Senate confirmed Senator Graham to that position by voice vote on February 27, 2004, and Senator Graham

received his promotion from President Bush during a White House ceremony on April 29, 2004. (Appellant's Br. at 4.) Senator Graham sat on the panel that reviewed Appellant's criminal case and, on December 17, 2004, affirmed Appellant's conviction.

Senator Graham's participation as a military judge on the panel that decided Appellant's case violates Article I, section 6, clause 2 of the Constitution. That provision, commonly referred to as the Incompatibility Clause, provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const. art. I, § 6, cl. 2. Under the plain language of that provision, and general separation of powers principles, Senator Graham is constitutionally disqualified from serving as a military judge or commissioned officer in the Air Force Reserve. Airman Lane was injured by virtue of Senator Graham's impermissible participation on the Court of Criminal Appeals panel that affirmed his conviction. Accordingly, the judgment below must be vacated.

ARGUMENT

I. THE INCOMPATIBILITY CLAUSE OF THE CONSTITUTION EXPRESSLY PROHIBITS SENATOR GRAHAM FROM SERVING SIMULTANEOUSLY AS A MILITARY JUDGE AND COLONEL IN THE U.S. AIR FORCE RESERVE.

A. Senator Graham's Service as a Military Judge Violates the Incompatibility Clause.

The Constitution states in unambiguous terms that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."[2] U.S. Const., art. I, § 6, cl. 2. That provision means precisely what it says: it "prohibits Members of Congress from holding other offices." *Schlesinger v. Reservists Committee*, 418 U.S. 208, 210 (1974). As Senator Graham is obviously a Member of Congress, the only question regarding the operation and effect of the

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[2] Described by George Mason as "the cornerstone on which our liberties depend," the Incompatibility Clause articulates a fundamental component of constitutional separation of powers that the Framers were unwilling to leave to the structural guarantees of the Constitution. 1 Farrand's Records of the Federal Convention of 1787, 381 (June 22, 1787); *see also Buckley v. Valeo*, 424 U.S. 1, 124 (1976)("The further concern of the Framers of the Constitution with maintenance of the separation of powers is found in the so-called 'Ineligibility' and 'Incompatibility' Clauses contained in Art. I, [section] 6."). *See generally Signorelli v. Evans*, 637 F.2d 853, 859-63 (2d Cir. 1980) (history and meaning of the Clause); Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 Cornell L. Rev. 1045 (1994) (same). "From the very outset, provision was made to prohibit members of Congress from holding office in another branch of the Government while also serving in Congress." *Buckley*, 424 U.S. at 272 (White, J., concurring and dissenting) (discussing the Incompatibility Clause).

Incompatibility Clause in this case is whether he also holds an "Office under the United States" within the meaning of the Constitution. And the answer to that question clearly is yes, as the Supreme Court has expressly held that military judges are considered "Officers" of the United States. *See Ryder v. United States*, 515 U.S. 177, 179 (1995); *Weiss v. United States*, 510 U.S. 163, 169 (1994), *aff'g* 36 M.J. 224, 227 (C.M.A. 1992). It could not be more clear that Senator Graham's service as a military judge violated the plain text of Article I, section 6 of the Constitution.

B. Senator Graham's Service as a Commissioned Officer Also Violates the Incompatibility Clause.

Moreover, Senator Graham's service as a commissioned officer in the Air Force Reserve - first as Lieutenant Colonel, later as Colonel - compels the same result. Like military judges, commissioned reserve officers hold "Offices under the United States." *Reservists Committee v. Laird*, 323 F. Supp. 833, 837-839 (D.D.C. 1971), *rev'd on other grounds*, 418 U.S. 208 (1974); *see also* 418 U.S. at 231 n.1 ("a commission in the national guard is an 'office' in the constitutional sense. A commission in the Reserves is not distinguishable.") (Douglas, J., dissenting); *Right of a Representative in Congress to Hold Commission in National Guard*, H.R. Rep. No. 64-885 (1916)

(collecting precedents and concluding that holding that a commission in the National Guard is incompatible with House membership). Recognizing and confirming this fact, Congress itself has provided that commissioned reserve officers must be "appoint[ed]" by and serve at the pleasure of the President, *see* 10 U.S.C. §§ 12203(a),(c)(2000), and, for grades of colonel and above, appointments must be made by and with the advice and consent of the Senate. *Id.* Stated differently, Congress intended that the procedural requirements of the Appointments Clause apply to the appointment of reserve officers. *See* U.S. Const. art. II, § 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States . . ."); *see also Buckley*, 424 U.S. at 126 ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore be appointed in the manner prescribed by [the Appointments Clause]."). There is, therefore, no question that commissioned reserve officers and, in particular, officers appointed to the grade of colonel or above, such as Colonel Graham, are "Officers" for purposes of the Incompatibility Clause. As such, Senator Graham violated the plain text of the Incompatibility

Clause by holding office as a commissioned reserve officer and colonel in the United States Air Force.

II. THE STRUCTURAL SEPARATION OF POWERS LIKEWISE PROHIBITS SENATOR GRAHAM FROM SERVING AS A MILITARY JUDGE AND AS A COLONEL IN THE U.S. AIR FORCE RESERVE.

In the words of James Madison: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 324 (James Madison) (Jacob E. Cook, ed., 1961). In rejecting the centralization of government power that characterized the English parliamentary system and, in particular, the influence wielded by the King over elected members of Parliament, the Framers sought to disperse the new powers of the Republic across three independent branches of government.

The basic separation of powers principle is apparent in the basic structure of the Constitution, which sets forth the various powers assigned to the Executive, Legislative and Judicial branches. *See Buckley*, 424 U.S. at 120. Although the Constitution does not require a "hermetic seal" to isolate the branches of government, *see id.*, the exercise of the core executive function of military discipline by a sitting Member of Congress, the exercise of the core legislative functions of a United States Senator by a military officer who is subject to

presidential command, the exercise of legislative oversight of the military by a military officer who is himself subject to military discipline, and the exercise of adjudicative power by a legislator whose future career depends upon popular approval, all pose acute and insurmountable separation of powers concerns. Even putting aside the express prohibition of the Incompatibility Clause, Senator-Colonel-Judge Graham's simultaneous service as a Member of Congress, military judge and commissioned reserve officer violates the constitutional separation of powers that serves as the organizing principle of our government.[3]

A. Senator Graham's Exercise of Executive Power as a Colonel Violates Constitutional Separation of Powers.

Senator Graham exercises executive power as an "officer" in the Air Force Reserve, where in addition to his responsibilities as a colonel he performs judicial duties as a military judge. As an executive official, he is subject to supervision, promotion, demotion and even punishment by other executive officials who, in turn, answer to the President. *See* 10 U.S.C. § 12203(b) (appointments of reserve officers in commissioned

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[3] *Amici* do not question whether prior military service is relevant or even beneficial to subsequent federal government service. *See generally* Donald N. Zillman, *Where Have All the Soldiers Gone? Observations on the Decline of Military Veterans in Government*, 49 Me. L. Rev. 85 (1997).

grades are "held during the pleasure of the President"). In short, by serving simultaneously as an executive officer and Member of Congress, Senator-Colonel-Judge Graham serves two masters: the people of South Carolina he represents in the Senate, and the President as his Commander in Chief. The Constitution clearly does not permit such a result. Suppose, for example, that as a Member of Congress, Colonel Graham was called upon to consider the impeachment of the President. In that case:

> [H]is duty as a Representative may require of him to impeach the President, his Commander in Chief, if he be a major general, while his duty as a soldier may at the same time require of him unquestioned obedience . . . to the order of that same Commander in Chief to absent himself from his seat and report in person a thousand miles from the Capital.

H.R. Rep. No. 64-885 (1916), at 6. While the impeachment scenario is perhaps the most extreme example of the dangers presented by Senator-Colonel-Judge Graham's simultaneous service of two masters, the practical consequences are legion. *Colonel* Graham's disobedience of a Presidential order -- or an order from the Secretary of Defense or the Air Force Chief of Staff -- could land him in the stockade. Simultaneously, *Senator* Graham exercises core legislative powers when he exchanges his Air Force blue for pinstripes and ascends Capitol Hill. There, he

exercises direct oversight of the military -- including supervision of his own military superiors -- through legislation that he drafts and votes on (*e.g.*, amendments to the UCMJ), through hearings (at which his own superior officers can be called as witnesses and examined by him), through the "power of the purse," and through the senatorial power of advice and consent to the appointments of military officers.[4] A single Senator, for example, can place a "hold" on a presidential appointment, thereby delaying it indefinitely.[5] If *Colonel* Graham were unhappy with the vote of another Air Force Colonel

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[4] Although unnecessary to our constitutional argument, these conflicts are highlighted by Senator Graham's membership on the Senate Committee on Armed Services, given the Committee's oversight of the military justice system, *see* UCMJ Art. 146(c)(1)(A), 10 U.S.C. § 946(c)(1)(A) (2000), enactment of military justice legislation, *see* Standing Rules of the Senate, Rule 25(c)(1), confirmation of presidential nominations for the promotion of serving officers such as the other judges of the Court of Criminal Appeals, *id.* Rule 31(1), and indeed, confirmation of nominees to this Court itself. *Id. Cf. Pabla Ky v. Finland*, 47221/99 [2004] ECHR 279 (European Court of Human Rights 2004)(also available at http://www.worldlii.org/eu/cases/ECHR/2004/279.html)(Borrego Borrego, J., dissenting) (discussing conflicts inherent in an expert member of the Helsinki Court of Appeal simultaneously serving in the Finnish Parliament).

[5] *See* A BIPARTISAN PLAN TO IMPROVE THE PRESIDENTIAL APPOINTMENTS PROCESS (2001), testimony of former Senator Nancy Kassebaum Baker, at http://hsgac.senate.gov/040501_kassebaumbaker.pdf (describing the Senatorial "hold" process); Robert D. Novak, "The Senate's Rule of One," Wash. Post, Oct. 13, 2004 at A23 (describing single-Senator holds then in place on two presidential nominations).

on a military appellate panel, *Senator* Graham would have the power to ensure that the other Colonel would never receive a promotion.[6] These sorts of invidious entanglements among the branches present precisely the scenario the Framers wished to avoid when they designed a Constitution whose fundamental structure requires the separation, rather than the agglomeration, of powers.

B. Senator Graham's Simultaneous Service as a Military Judge Also Violates the Constitutional Separation of Powers.

Although military judges act under the authority of Article I rather than Article III, the fundamental principles that led the Founders to separate the judicial function from the legislative function are equally applicable in the military

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[6] *Amici* do not mean to suggest that Senator Graham ever has or ever would use his power in such a manner. The purpose of the structural separation of powers in the Constitution is to remove the *possibility* of such abuses. As James Madison famously explained in Federalist 51:

> [W]hat is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

The Federalist No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

context, because the responsibilities of a judge and a legislator are fundamentally incompatible. In Federalist No. 78, Hamilton noted that "though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean *so long as the judiciary remains truly distinct from both the legislature* and the Executive. For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" The Federalist No. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (quoting Montesquieu, "Spirit of Laws") (emphasis added). Thus the Framers recognized that the separation of judicial and legislative functions was just as essential as the separation of executive and legislative functions.

A judge, whether in the civilian or the military courts, must decide cases based only on the facts in the record and the law. As then-Judge Roberts put it just the other day, "Judges are like umpires. Umpires don't make the rules; they apply them." Opening statement, Senate Judiciary Committee Hearing, Sept. 12, 2005 (available at www.cnn.com/2005/POLITICS/09/12/roberts.statement/). A judge's decision must not be influenced by political considerations extrinsic to the case. A legislator, by contrast, is *supposed* to be influenced by every

imaginable kind of extrinsic influence, short of bribery. In a democracy, politics is all about trying to satisfy the competing interests of countless constituencies. Everything a legislator does, or doesn't do, is fair game for political support or opposition come the next election. That fact disqualifies a sitting legislator from serving simultaneously as a judge. Just imagine a legislator sitting as a judge on a "hot button" case in the public eye -- whether the Terri Schiavo case, *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223 (11th Cir. 2005), *stay denied by* 125 S. Ct. 1692, or *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004) (the Pledge of Allegiance "under God" case), or *United States v. Padilla*, 542 U.S. 426 (2004) (the alleged al-Qaeda "dirty bomber"), or any case involving abortion rights. A legislator would know that his future electability could depend on how he ruled. No legislator could properly sit on such a case.[7]

While such high-profile cases are uncommon, the military appellate courts certainly see their share of cases in which

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[7] *Cf. Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (mayor of village may not sit as judge on petty cases because village's income from fines presents "'possible temptation . . . not to hold the balance nice, clear, and true between the state and the accused'" (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)). The case of a legislator is *a fortiori*, because his entire future career may depend upon how he rules in a given case.

public opinion may conflict with the disinterested administration of justice. Indeed, even a garden-variety criminal case may involve, for example, a politically unpopular motion to suppress evidence, or alleged sexual misconduct for which the public seeks severe punishment, or -- as in this very case - allegations of drug use for which the public demands "zero tolerance." A sitting legislator ignores the political ramifications of his decisions at his political peril. Separation of powers principles therefore require the disqualification of sitting legislators from the bench.[8]

III. APPELLANT'S CHALLENGE TO THE CONSTITUTIONALITY OF SENATOR GRAHAM'S PARTICIPATION ON THE PANEL THAT AFFIRMED HIS CONVICTION DOES NOT RAISE A POLITICAL QUESTION.

The court below concluded that "[t]he enforcement of the Incompatibility Clause is a political question reserved to Congress." 60 M.J. 781, 790; *see also Baker v. Carr*, 369 U.S. 186, 217 (1962) (describing "political question" doctrine). That conclusion is demonstrably incorrect; it mistakes a

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[8] Once again, *amici* hasten to emphasize there is no reason to believe that Senator Graham's action in this case or any other case has been influenced by politics. Likewise, there was probably no reason to believe that the judges in *Tumey v. Ohio* or *Ward v. Monroeville* were actually influenced by the small fines they assessed in petty offense cases. It is not a question of proof but of principle: the constitutional separation of powers operates as a prophylactic device to prevent even the possibility or appearance of politically-motivated judgments.

justiciable challenge to the Constitutional separation of powers requirements for an attempt to police the doors of the Senate. While the Constitution exclusively commits to Congress the task of judging the "Qualifications of its own Members," U.S. Const. art. I, § 5, there is nothing in this case which requires the Court to assess Senator Graham's fitness for legislative office. Appellant does not seek to expel Senator Graham from the Senate; Senator Graham's status as member of the Senate is not at issue in this case. (*See* Appellant's Br. at 32-33.) Rather, the violation of the Incompatibility Clause and constitutional separation of powers principles resulting from Senator Graham's simultaneous service as a military judge and commissioned reserve officer is relevant solely in determining the constitutional validity of Senator Graham's actions as an Executive official - namely, his participation in the review of Appellant's criminal conviction.[9]

Moreover, the conclusion by the court below that only Congress may enforce the Incompatibility Clause contradicts all

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[9] It is indisputable that Appellant has standing to challenge the qualifications of the judges on the panel that heard his case, and that he suffered a cognizable injury when his criminal appeal was heard by an improperly constituted panel. *See Ryder*, 515 U.S. at 182-83 ("[O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred.").

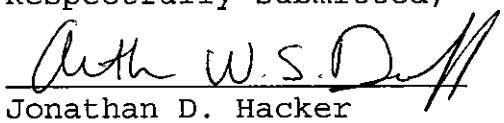
constitutional logic. The Incompatibility Clauses promotes the separation of powers and provides an important check against corruption and self-dealing. *See Buckley*, 424 U.S. at 124. Allowing Congress the exclusive power to enforce this provision is like asking the fox to guard the henhouse. "This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution *when its application has proved necessary for the decisions of cases or controversies properly before it.*")(emphasis added). *Id.* at 123. Unsurprisingly, the courts repeatedly have enforced general separation of powers principles upon the Legislative Branch, so long as the issue is properly presented by a plaintiff with standing. *See, e.g., INS v. Chadha*, 462 U.S. 919 (1983) (invalidating legislative veto); *Bowsher v. Synar*, 478 U.S. 714 (1986) (Congress cannot remove executive officers); *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991)(holding that veto provisions of Metropolitan Washington Airport Act violated the separation of powers).

CONCLUSION

For the foregoing reasons, the decision of the court below should be vacated and the case remanded to the Court of Criminal Appeals for further proceedings before a proper panel.

Date: October 17, 2005

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH RULE 24(D)

This brief complies with the type-volume limitation of Rule 24(d) because the brief contains 3,948 words.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original and seven copies of the foregoing American Civil Liberties Union of the National Capital Area and National Institute of Military Justice Brief as *Amici Curiae* in Support of Appellant were delivered to the Court on October 17, 2005, and that a copy of the foregoing was delivered to the Court and mailed this 17th day of October, 2005, via first-class mail, postage prepaid on the following:

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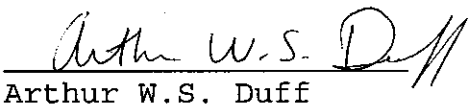

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