No. 15-1257

IN THE

Supreme Court of the United States

HASAN K. AKBAR,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Armed Forces

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct.

NACDL was founded in 1958. Its approximately 9,200 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files numerous *amicus* briefs each year in the Supreme Court and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

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[1] In accordance with Supreme Court Rule 37, *amicus curiae* state that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. Due to late retention of counsel, notice was given seven days prior to the filing date, but the parties have consented to this filing.

NACDL has an interest in ensuring the integrity of the administration of justice in criminal cases, including those before military tribunals. NACDL believes that this case presents an ideal vehicle to define the limits of executive power in capital cases and resolve tensions between civilian and military prosecutions.

SUMMARY OF THE ARGUMENT

In *Loving v. United States*, this Court upheld the capital sentencing factors set out in Rule for Courts-Martial ("R.C.M.") 1004 as the product of a proper delegation of congressional power to the President. 517 U.S. 748, 768-70 (1996). This holding followed from the principle, announced in *Walton v. Arizona*, 497 U.S. 639, 648-49 (1990), that capital sentencing factors are "sentencing 'considerations'" rather than "elements of the offense." More recently, however, *Ring v. Arizona* overruled *Walton* and made clear that such aggravating factors are the "functional equivalent of an element of a greater offense." 536 U.S. 584, 609 (2002) (citation omitted). This case asks whether *Loving* remains good law after *Ring* and, consequently, whether the President may choose the capital sentencing factors in R.C.M. 1004—as he now does—or whether Congress must define these factors.

Well-established separation-of-powers principles answer this question, and this case offers an ideal vehicle to hold—as these principles require—that only Congress may determine the factors used to impose a capital sentence. And there is no constitutional or other ground for depriving U.S.

service members of the same safeguards afforded their civilian counterparts.

ARGUMENT

I. The Court Should Overrule *Loving v. United States*, Which Is No Longer Good Law In Light Of *Ring v. Arizona*.

Affirming Mr. Akbar's death sentence by a 3–2 vote, the U.S. Court of Appeals for the Armed Forces held that it was bound by *Loving v. United States*, 517 U.S. 748 (1996), which upheld the capital sentencing factors in R.C.M. 1004 as the product of a proper delegation from Congress to the President. *See* Pet. App. 81a. The holding in *Loving*, in turn, relied implicitly but squarely on the Court's earlier ruling in *Walton v. Arizona*, 497 U.S. 639 (1990), that capital sentencing factors (like the ones in R.C.M. 1004) were not "elements" of the offense of capital murder. Indeed, *Loving* itself implies that, had the factors in R.C.M. 1004 been offense *elements* rather than mere sentencing factors, separation-of-powers principles would have required Congress, not the President, to promulgate them. *See* 517 U.S. at 769-72 (relying on *United States v. Curtis*, 32 M.J. 252, 260 (C.M.A. 1991) ("If 'aggravating factors' used in channeling the discretion of the sentencing authority in death cases were elements of the crime" rather than sentencing factors, the court "would have no choice but to hold that they must be set forth by Congress and cannot be prescribed by the President.")). In short, the holding in *Loving* follows from *Walton*'s ruling that capital sentencing factors are not elements of the offense of capital murder.

But *Walton* is no longer good law. In 2002, the Court held in *Ring v. Arizona* that "enumerated aggravating factors [for imposing a capital sentence] operate as 'the functional equivalent of an element of a greater offense.'" 536 U.S. at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000), and expressly overruling *Walton*). And since *Ring*, this Court has repeatedly reaffirmed that any fact that increases the penalty for a crime is an "element" of that offense. *See, e.g.*, *Hurst v. Florida*, 136 S. Ct. 616, 620-21 (2016) ("[A]ny fact that 'exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." (citation omitted)); *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013) ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt.").

Accordingly, the rule in *Loving* can no longer stand, and that decision should be overturned. *See Hurst*, 136 S. Ct. at 623-24 ("[I]n the *Apprendi* context, we have found that *stare decisis* does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law." (citation omitted)).

II. R.C.M. 1004 Violates Constitutional Separation-Of-Powers Principles.

A. Only Congress May Define The Elements Of A Criminal Offense.

At the heart of our constitutional structure is a simple dichotomy: Congress enacts laws, and the President executes them. *Cf. Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866). As James Madison explained, "'When the legislative and executive powers are united in the same person or body, . . . there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.'" THE FEDERALIST No. 47 (C. Rossiter ed. 1961) (quoting Montesquieu) (internal capitalization omitted). Dividing these powers ensured that "[a]mbition [would] be made to counteract ambition." THE FEDERALIST No. 51 (J. Madison).

In step with this principle, this Court has long held that Congress, not the President, must define the elements of federal crimes. "[T]he legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress." *Whalen v. United States*, 445 U.S. 684, 689 (1980). In fact, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community," *United States v. Bass*, 404 U.S. 336, 348 (1971), it is particularly important that Congress—as the branch of government with "an immediate dependence on, and an intimate sympathy with, the people," THE

FEDERALIST No. 52 (J. Madison)—alone defines what constitutes criminal conduct. Even Congress' usual ability to leave certain details of implementation open to executive discretion diminishes in the criminal context, for "[t]he area of permissible indefiniteness" of congressional delegation should "narrow[ ] . . . when the regulation invokes criminal sanctions and potentially affects fundamental rights." *United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring).

These considerations assume even greater import in the trial and punishment of capital crimes. "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). Further, "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-99 (1983).

B. The Foregoing Separation-Of-Powers Principles Apply Equally In The Military Justice System.

The President's role as Commander in Chief does nothing to upset application of the Constitution's separation-of-powers doctrine in military courts. The Constitution grants Congress the "primary responsibility for the delicate task of balancing the

rights of servicemen against the needs of the military," *Solorio v. United States*, 483 U.S. 435, 446-47 (1987), and Congress thus retains "plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline," *Chappell v. Wallace*, 462 U.S. 296, 301 (1983).

More specifically, as this Court has long recognized, "[i]f the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." *Reid v. Covert*, 354 U.S. 1, 38-39 (1957).

Already, as Commander in Chief, the President exercises extraordinary power over the military justice system. He oversees those who decide which military personnel to prosecute and on what charges. He supervises the authorities that both convene the courts-martial tribunals and select the service members who determine guilt or innocence. *See* 10 U.S.C. §§ 822, 825. He has authority over the Judge Advocate General, who appoints military judges at the trial and appellate level. *See* 10 U.S.C. §§ 826, 866; *Weiss v. United States*, 510 U.S. 163, 180 (1994). And he must review and approve any capital sentence before it is carried out. *See* 10 U.S.C. § 871(a).

In short, the President controls the executive and judicial functions in our military justice system. Combining this extraordinary authority with the legislative power to define offenses is undoubtedly the sort of "objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." *Reid*, 354 U.S. at 39.

Servicemen and servicewomen are no less entitled to protection from the consolidation of government powers than their civilian counterparts. *See Middendorf v. Henry*, 425 U.S. 25, 63 (1976) (Marshall, J., dissenting) ("[D]enial[] of traditional rights to any group should not be approved without examination, especially when the group comprises members of the military, who are engaged in an endeavor of national service, frequently fraught with both danger and sacrifice."); *see generally United States v. Matthews*, 16 M.J. 354, 379 (C.M.A. 1983) (holding that civilian capital punishment decision, *Furman v. Georgia*, 408 U.S. 238 (1972), applied to capital courts-martial). Allowing the President to choose the elements of the crimes the government prosecutes is no more appropriate in our courts-martial than in our civilian courts, and the Court should grant review of the question presented here to harmonize these two systems of justice.

CONCLUSION

For the foregoing reasons, *amicus curiae* National Association of Criminal Defense Lawyers requests that the petition for a writ of certiorari be granted.

May 9, 2016 Respectfully submitted,

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