

On August 20, 2014, David Hicks filed a motion asking the U.S. Court of Military Commission Review (“CMCR”) to lift the stay entered in his case on March 7, 2014, and summarily vacate his conviction for a single charge of providing material support for terrorism. He argues that his conviction must be vacated based on the D.C. Circuit’s *en banc* decision in *Bahlul v. United States*, which holds unanimously that it is unlawful to try a defendant by military commission for material support based on pre-2006 conduct.

On July 14, 2014, the D.C. Circuit issued its long-awaited *en banc* decision in *Bahlul*, consisting of five separate opinions totaling 150 pages, which were entirely clear on one point: all seven judges agreed that providing material support for terrorism is not a war crime triable by military commission based on conduct occurring prior to 2006, even for a defendant who gave up that argument at trial. The court overruled a prior decision in *Hamdan v. United States*, which had concluded that the Military Commissions Act of 2006 was not intended by Congress to apply retroactively. The *Bahlul* court held that the Act did authorize retroactive prosecution of material support, but also held unanimously that material support is not an international war crime, or an offense historically triable by military commission under domestic precedent, and thus was a “plain” constitutional violation as applied to conduct before 2006. The court vacated Mr. Bahlul’s material support conviction accordingly.

*Bahlul* is dispositive and requires vacatur of Mr. Hicks’s material support conviction, which is based on his alleged conduct occurring more than a decade ago. Mr. Hicks argues that it is beyond any dispute that he was convicted of an offense that was not actually a crime at the time of his alleged conduct. The substantive basis for his conviction no longer applies, and his conviction must be vacated. There is also no serious dispute that the CMCR has the power to vacate his conviction despite the fact that he pled guilty to the material support charge. As set

forth in his prior filings, it is undisputed that Mr. Hicks did not waive his right to appeal his conviction as required by statute. Even if he had waived his right to appeal the CMCR would have authority to void his plea agreement and set aside his guilty plea (including any waiver) because it was not knowing and voluntary. Mr. Hicks was not properly advised about the nature of the material support charge or that he was pleading guilty to something that was not a crime, which is a non-waivable challenge. Mr. Hicks simply could not be haled before a military commission in the first instance upon the material support charge because it was not an offense triable by military commission at the time of his alleged conduct. No matter how the issues in his case are framed, Mr. Hicks is entitled to relief as a matter of law because he is actually innocent of the material support charge in the sense that he could not be convicted of that offense under any set of facts or theory of law. To uphold his conviction would violate due process and result in a miscarriage of justice, particularly given the extraordinary circumstances – indeed, horror – of his prior detention and prosecution at Guantánamo.

Mr. Hicks's "guilt" is illusory, and he asks the CMCR to lift the stay and vacate his conviction because there is no point in further delaying this inevitable result.