

9TH CIRCUIT REJECTS OBAMA/BUSH STATE SECRETS ARGUMENT IN MOHAMMED

✖ Marcy must have ESP or something, she was just talking about heinous state secrets claims earlier this morning. A three judge panel of the Ninth Circuit Court of Appeals, Chief Judge Mary Schroeder, William Canby and Michael Hawkins, has firmly rejected the vile cover up attempted against several detainees/former detainees led by Binyam Mohamed.

The full decision is here.

I would like to note two things quickly; first off this is a wonderful panel (they are all from Arizona and I have known all of them) and I really expected no less from them. Secondly, it appears from a skimming of the decision that they did not dismiss the ability of the government to assert state secrets, rather indicated the time was not ripe for it. Do not be mistaken, however, this is a big blow to the government and a win for the rule of law.

Here is the operative paragraph of the decision:

On remand, the government must assert the privilege with respect to secret evidence (not classified information), and the district court must determine what evidence is privileged and whether any such evidence is indispensable either to plaintiffs' prima facie case or to a valid defense otherwise available to Jeppesen. Only if privileged evidence is indispensable to either party should it dismiss the complaint.

The key language here is "Only if privileged evidence is indispensable". I think in light of

the process that Vaughn Walker is adopting in al-Haramain, and that has been already utilized in the DC Circuit in detainee cases, this is going to be an increasingly hard burden for the government to make. Very good news indeed.