

SHORTER DC CIRCUIT: YEAH, ROGERS BROWN AND KAVANAUGH ARE EXTREMISTS

Charlie Savage noted an interesting part of yesterday's DC Circuit ruling upholding the detention of Ghaleb Nassar al-Bihani: it explicitly disagreed with earlier assertions made by Janice Rogers Brown and Brett Kavanaugh that international law could not bind presidential authority.

On Tuesday, all nine judges on United States Court of Appeals for the District of Columbia Circuit rejected a request by Mr. Bihani to rehear his case. But seven of the nine judges issued an unusual one-paragraph note saying that they viewed Judge Brown's and Judge Kavanaugh's discussion of international law as irrelevant to deciding Mr. Bihani's fate.

Stephen I. Vladeck, an American University law professor who filed a friend-of-the-court brief asking the court to rehear the case, said the note amounted to a nullification of the more sweeping parts of the January ruling without the court bothering to rehear it. The paragraph, he said, tells the world that the section of the January ruling about international law should be treated like what lawyers call "dicta" – editorializing about issues that are not necessary to decide the matter at hand, which has little controlling authority for other cases.

"They've basically removed the single biggest complaint people had with that opinion," Mr. Vladeck said. "They said, 'We don't think we need to rehear the

whole case just to limit the opinion – we can just say it, and going forward this is how we understand it.’ That matters a lot.”

Click through to read about Rogers Brown and Kavanaugh’s whiny response.

So the lesson here? The Court upholds the government’s claim it needs to hold Osama bin Laden’s cooks like Bihani in custody to keep us all safe. But it does so on the logic that holding cooks is accepted under the rules of war.