A Right Without a Remedy

In a landmark case three years ago, the Supreme Court ruled that detainees at Guantánamo Bay, Cuba, who are not American citizens have “the constitutional privilege of habeas corpus.” It gives them the right to have a federal judge decide promptly whether their detention is illegal and, if so, order their release because the United States controls the place they are held. The 5-to-4 decision in what is known as the Boumediene case was a repudiation of the Bush strategy of imprisoning the detainees outside American territory so the Constitution would not apply. Or so many thought.

The United States Court of Appeals for the District of Columbia Circuit, the only circuit where detainees can challenge their detention, has dramatically restricted the Boumediene ruling. In its hands, habeas is no longer a remedy for the problem the Boumediene majority called “arbitrary and unlawful restraint.”

The sole recourse is for the Supreme Court, once again, to say what the Constitution requires judges to do in habeas cases. Fortunately, a case is at hand for the justices to do so in an appeal from the District of Columbia Circuit. In the Kiyemba case recently, five Uighur, or Chinese Muslim, detainees filed a brief with the Supreme Court in support of their petition for it to restore the power of federal trial judges to free them.

This appeal in no way threatens national security. The government has admitted that the Uighurs are not enemies, let alone enemy combatants. Refugees from China, they were mistakenly imprisoned during the Afghanistan war and sent to Guantánamo Bay in 2002. Other Uighurs accepted release to the island of Palau, 500 miles from the Philippines, but these five declined the offer because they have no connection to the island.

The appeal is about judicial power and the duty to use it. In 2008, a District of Columbia trial judge ordered the government to bring the Uighurs to his court to resolve how they should be released. The appeals court ruled that the judge lacked authority to free them in the United States because the “political branches” have “exclusive power” to decide which non-Americans can enter this country.
Judge Raymond Randolph of the District of Columbia Circuit wrote the key Kiyemba opinion. The Uighurs’ brief says, “The constant in this case is the court of appeals’ refusal to apply, or even acknowledge,” the Boumediene ruling.

Judge Randolph also wrote the opinion for the District of Columbia Circuit that the Supreme Court overturned in Boumediene. In a speech called “The Guantanamo Mess” last fall, he said that the justices were wrong to do so and all but expressed contempt for the holding. As the basis for the speech’s title, he compared the justices who reached it to characters in “The Great Gatsby.” “They were careless people,” he read. “They smashed things up ... and let other people clean up the mess they had made.”

In Kiyemba and related cases, however, it is Judge Randolph and others on the District of Columbia Circuit who are making the mess. Respected lawyers say they are subverting the Supreme Court and American justice. Of 140 challenging their detentions in the face of this hostility, dozens who should have been freed will likely remain in prison.

Alexander Hamilton called “arbitrary imprisonments” by the executive “the favorite and most formidable instruments of tyranny.” In Boumediene, Justice Anthony Kennedy stressed that habeas is less about detainees’ rights, important as they are, than about the vital judicial power to check undue use of executive power.

The appellate court has all but nullified that view of judicial power and responsibility backed by Justice Kennedy and the court majority. The Supreme Court should remind the appellate court which one leads the federal judicial system and which has a solemn duty to follow.