

# THE BOSTON PHOENIX

## The DOJ's shopping trip pays off

BY HARVEY A. SILVERGLATE

Not even Kafka could have made this stuff up. Last Friday, the US Court of Appeals for the Fourth Circuit ruled that an American citizen can be picked up anywhere in the country and never heard from again. In so doing, the three-judge panel, in Richmond, Virginia, granted the president unprecedented powers to declare anyone an "enemy combatant," and hold that person in military custody until he has decided that the war on terror is over. This assault on civil liberties is even more disturbing because the opinion rewards the government's cynical forum-shopping.

The status of two American citizens — Jose Padilla and Yasser Hamdi — is central to the debacle. After being arrested in May 2002 at Chicago's O'Hare Airport, Padilla was declared a "material witness" in a terrorism investigation and taken to New York. (See "[When the 'Enemy' Is Us](#)," Freedom Watch, News and Features, February 6, 2003.) When Padilla's lawyers filed a petition with the New York federal court seeking release, the president designated Padilla an "enemy combatant," whereupon the feds moved him to a naval brig in South Carolina, within the Fourth Circuit's jurisdiction. The New York court recognized the feds' blatant forum-shopping maneuver (the Fourth Circuit is notoriously deferential to the executive) and declared Padilla's detainment unlawful. Nonetheless, the Supreme Court ruled last summer that Padilla fell within the jurisdiction of the Fourth.

The Fourth Circuit earlier had claimed jurisdiction over another American citizen designated an "enemy combatant," but who was captured on the battlefields of Afghanistan — Yasser Hamdi. The president asserted, and the Fourth Circuit affirmed, power to hold Hamdi indefinitely, with neither formal charges nor trial, reasoning that a legal distinction exists between foreign-captured American citizens (Hamdi) and citizens captured on US soil (Padilla). The Supreme Court intervened in Hamdi's case during the summer of 2004 but declared merely that "enemy combatants" are entitled to some semblance of a hearing, a decision which this column predicted — correctly, unfortunately — would prove a Pyrrhic victory for civil liberties. (See "The Enemy Within," Freedom Watch, News and Features, July 9.)

Matters only get worse. The hypocritical Fourth Circuit ignored its own earlier geographical distinction, holding that "the locus of [Padilla's] capture" — Chicago — was irrelevant. More egregiously, the court claimed that indefinite detention of a citizen with *neither charge nor trial* is a *lesser* imposition on liberty than placing him or her on trial! And here's the kicker: the opinion was written by J. Michael Luttig, who is on President Bush's short list to replace retiring Justice Sandra Day O'Connor.