



**PREFACE to TURTLE GOES TO WAR:
Of Military Commissions, The Constitution,
and American Indian Memory
by Jace Weaver
©2002**

Three days after September 11 (a date that like December 7 no longer needs to be identified by events), I walked with one of my colleagues at Yale as he went to a memorial service at the university's chapel. As we made our way slowly through campus, I said to him that I feared for the Republic. I feared the rise of a culture of scrutiny and grave damage to our civil liberties. My fellow professor, a social historian, said that he did not worry so much for the Republic as about the immediate future. I didn't ask what he meant, and he didn't offer. Perhaps we were talking about the same thing, but I doubt it.

In my book *Other Words*, I included an essay entitled "Original Simplicities and Present Complexities," which dealt with Reinhold Niebuhr's analysis of the ironical aspects of the country's self-image and what has been called "American exceptionalism," the belief that the United States is unique and special, different and set apart from all other nations of the earth. I wrote that after the end of the Vietnam War, people "longed for the America of Charles Ives and Aaron Copeland tone poems—a brash, young nation of limitless possibilities. Many 'remembered' America as a Gary Cooper kind of country, too big for its youth and too gentle for its size. That America was

slow to anger but mighty when aroused. It never started a war, but if some decadent, corrupt European power did, it would finish it for them.”¹ The piece was originally published in the *Journal of the American Academy of Religion* in 1995, and by the time *Other Words* appeared in October 2001, it felt somehow dated. After all, the central argument of the article was that the Vietnam debacle had represented an end of American innocence and that the myth of American exceptionalism waned with it, resuscitated only briefly by Ronald Reagan and George Bush. The events of September 11 seemed to render it remote. This was not the United States intervening in some remote war not of its own making. Instead America itself had been attacked, and the nation roused itself to strike back against the terrorist organization responsible.

Yet political winds can shift as quickly as their meteorological namesakes. Less than a month later, the essay seemed all too current. The need for a Niebuhrian examination of the actions and motivations of American government never seemed more necessary and relevant. In the aftermath of the World Trade Center attack, a confused, angry, and scared government, certainly enamored of the might of its armed forces but no doubt somewhat baffled by its own impotence in the face of such horrendous acts, announced a global “war” on terrorism. Using the rhetoric of America’s mythic frontier, President George W. Bush declared that those responsible were “Wanted: Dead or Alive.” The administration moved aggressively and, in so doing, threatened to curtail some of our most important civil rights and liberties.

And the Taliban were barely in retreat when we began lecturing their would-be successors on women's rights. American exceptionalism it seems is alive and well.

Philosopher Richard Rorty, in his book *Achieving Our Country*, writes in Niebuhrian fashion:

National pride is to countries what self-respect is to individuals: a necessary condition for self-improvement. Too much national pride can produce bellicosity and imperialism, just as excessive self-respect can produce arrogance. But just as too little self-respect makes it difficult for a person to display moral courage, so insufficient national pride makes energetic and effective debate about national debate unlikely. Emotional involvement with one's country – feelings of intense shame or of glowing pride aroused by various parts of its history, and by various present-day national policies – is necessary if political deliberation is to be imaginative and productive.²

I hope that my historian colleague with whom I spoke is ultimately correct. At this juncture, however, he seems hopelessly naïve, even Pollyannaish. In the face of what I believe are dangerous words and unconstitutional actions on the part of the president and Attorney General John Ashcroft, and others in government, I have been appalled at the lack of dissent and the overall level of discourse. In her November 25, 2001 column in the *New York Times*, Maureen Dowd expressed a similar view. She wrote that a liberal editor friend had been trying to interest his staffers in writing about "whether the Bush team's anti-terrorism measures are scorching our civil liberties." Their response is instructive. As set forth by Dowd, their reply was:

"As good liberals, we feel we ought to be upset but somehow we're not.... But why not? In part because we were really attacked this time. Before when the president talked about national security, it was in the

abstract. Now you say, 'Oh, *this* is national security.'

"We're all in this haze of indifference. I don't want to get into it enough to have to make a decision about how bad it is. What if I reached the conclusion that this is all terrible? Would I have to start protesting in the streets? I'm not in the mood for a big civil libertarian crisis."³

Dowd concludes, "With supreme ambivalence, we are embarking on the Ashcroft era in American justice. The Economist writes that the attorney general's assault on evil has 'a Cromwellian feel,' noting dryly: 'England's Lord Protector also disapproved of drinking, dancing and smoking.'"⁴

One of the strongest dissonant voices has been not liberal but that of Dowd's reliably conservative colleague at the *Times* William Safire. In column after column, he inveighed against "kangaroo courts" and decried "as a seizure of dictatorial power Bush's cockamamie order to deny the rule of law and public trial to those accused of terrorism," claiming that the President must have been "suckered into going overboard by gung-ho Ninth Street power crazies." If the President's directive were implemented according to its strictest reading, warned Safire, the Constitution would be set aside by Cicero's famous dictum, "*inter arma silent leges*"—"in time of war, the law falls silent."⁵

This relative silence by White liberals, wracked by the self-doubt and fair-minded ambivalence that Rorty says makes fruitful oppositional debate impossible, is nothing new. They are too often trimmers and compromisers. In reading Dowd's words and reflecting on the lamentable silence thus far of the Left, I recall an exchange between Chinese scholar He Minzhi and

American historian Robert Johnston in the *Yale-China Journal of American Studies*. In her essay, "Individual Freedom as an American Value and Contemporary American Cultural Debates," He sets herself the arduous task of defining American core values.⁶ Uncovering this paideuma—the "grisly roots of ideas"⁷ embodied in the culture—is an impossible task, as He herself tacitly admits. She identifies democracy, freedom (particularly individual freedom), respect for the law, and family values as traditional American ideals. Yet, though she acknowledges that these concepts may be understood differently by different persons, she underestimates, in the context of the so-called "culture wars" that have raged in the United States during the last two decades, just how varying these concepts are interpreted and how sincerely and deeply felt and heatedly contested are these differing views. Does respect for the law preclude or compel civil disobedience? Do "family values" include or exclude an acceptance of homosexuality? Does respect for individual freedom ensure a woman's right to choose, or does a belief in the sanctity of life require a ban on the exercise of that choice?

In his response, "Capitalism and American Freedom," Robert Johnston demonstrates again why I value him so much as both a colleague and a scholar. He points out the excellent job she does in "connecting the many kinds of freedom and authority in America."⁸ At the same time he raises crucial questions about her conclusions.

Minzhi He concludes that in these culture wars, “individualism will eventually win out, and the sphere of acceptable values will continuously expand, leading to greater tolerance and pluralism.” In the end, I share Johnston’s suspicions. Timothy Powell, in his recent Ruthless Democracy, points out that the problematic nature of liberal pluralism, which “maintains that the nation can acknowledge its ethnic [or other] differences and yet retain its central coherence through ideological consensus about what it means to be an ‘American.’”⁹ I fear that He has been snared in that trap. Peter L. Berger, in his article “The Liberal as Fall Guy,” asks us satirically to pity the poor liberal, noting that “white liberals had barely succeeded in convincing themselves and a good many other people that Negroes were just like everybody else, when they were told in tones of vehement denunciation that blacks were like nobody else under the sun (and least of all like white liberals).”¹⁰ In like fashion, Women’s Liberation for them meant that women were just like men, and they only later discovered that “women are not like men in the least.”¹¹ Berger concludes, “Racial liberalism yesterday becomes racism today; sexual emancipation at 2:00 has turned into sexism by cocktail time.”¹² The wheel turns too fast for anyone to stay on top of the curve, and any attempt to define or delimit “American” values is doomed ultimately to failure. But both He’s article and Johnston’s response demonstrate “that Americans have always debated these issues vigorously,” and as Johnston concludes, “That tradition of debate—of contention and controversy—is something not to fear but to

celebrate.”¹³ Out of fatigue or fear of terrorism or simply of not being able to stay on top of the curve, today’s liberals have thus far largely thrown up their hands and acquiesced while the ground is laid for the destruction of American constitutional rights. In one of the great quotes (and, like all great quotes, possibly apocryphal) of American history, Millard Fillmore, upon hearing that James Knox Polk had been elected president, is said to have remarked, “God save the country. It is evident the people will not.”

When these events began to transpire, I was in the middle of the semester at Yale. I was also halfway through a manuscript that I was writing on Native American eschatology and apocalyptic messianism. While I spoke out both publicly and privately about these matters, that seemed insufficient. I put aside the religion manuscript and made time in my schedule to write this book. The time lag between completing a book or an article is generally 10 to 12 months. Because the matters discussed herein are not only deeply consequential but, I believe, also urgent, I decided to go with having a small number immediately printed and distributed where I felt (or, at least, hoped) they could do some good. There will be time enough for other forms of publication in the future.

My primary specialty is Native American Studies. As odd as it may sound, that was the springboard for my thinking about these matters. I take the title for this slim volume from a story in the Blackfoot tradition which I see as a metaphor for the covert attack, not upon the nation by terrorists, but upon our

rights by those constitutionally sworn to uphold them. More importantly, American Indians are the only group that knows firsthand (and on a large scale) military justice—and that when they, like those for whom President Bush would convene military tribunals, were not citizens. They make up some of the precedents upon which I rely in my discussion, and generally the outcomes are not pretty. These examples are part of the memory of every Native. In the movie “Patton,” George C. Scott, portraying the war-loving general, takes a fellow officer to the battlefield at Carthage and tells him that he—Patton—has been there before in a past life. Though I am not suggesting reincarnation, every Native American has been in this dock before.

Besides a professor of Native American Studies, I am, however, also a lawyer and a legal scholar. I teach federal Indian law, but I also teach constitutional law. The law is an important part of all my scholarship, and I have regularly explored with students the cases discussed herein.

This work is passionate rather than dispassionate. I write as an advocate. I have not, however, sacrificed either scholarship or scholarly rigor. I do not believe that there is any scholarship that is value-neutral. All scholarship, every academically attested to “fact,” serves some political agenda. I must put my pen and my intellect (such as it is) in the service of Native Americans, who have almost always been ill-served by the workings of American law. I have been accused in my work of “pluralist separatism.” I’m not really sure what such a term means. It evokes “Let a thousand separatisms bloom” or “Let

there be two, three, many separatisms.” Despite my incomprehension, I embrace it. Rorty suggests that productive deliberations about policy will probably not occur unless pride in one’s country outweighs shame.¹⁴ The separatism I supposedly espouse is *pluralist*. I assume the coinage means that I point out the sovereignty of Native nations (which is often embarrassing for the contemporary United States). But these are “nations within a nation,” within the framework of the United States. In the present situation, advocating for Native peoples requires a rigorous defense of the U.S. Constitution and the freedoms it purports to ensure, even if Indians have been denied its full protection on so many occasions. The legal profession is a scholarly one. That is what attracted me to it in the first place. At its best, it has something to do with justice. That is what keeps me there.

As in much of my writing, I may seem angry. That emotion may easily slip into victimization and guilt. I have written that these latter feelings are not only pedagogically unsound but ultimately unhealthy and self-defeating.¹⁵ Anger, however, can be a powerful motivator. This small work was produced in a burst of energy in only a few weeks. Though I may have deprived myself of some much needed sleep, I hope I have not denied my students my best effort in the classroom.

I did find the time to go to Florida on a research mission. I went to the Castillo de San Marcos National Monument in St. Augustine. When that fortress was garrisoned American troops and known as Fort Marion, it housed

Native American “detainees” from the Indian Wars in the West. I walked where they walked and, standing on the parapet, saw at least something akin to what they saw when they were drawn by fellow inmate Zotom as they caught their first glimpse of the Atlantic Ocean (Zotom’s picture is on the cover of this volume). I also journeyed to Ponte Vedra Beach, to the spot where German saboteurs landed in 1942. The incident led to the Supreme Court decision in *Ex Parte Quirin*. The area is developed now, chockablock with luxury housing. I traveled up the coast a little to a more natural beach to get a feel for what the land was like that dark night in June sixty years ago.

Because of the rapidity with which I have written the text you hold in your hands, I have not followed my usual practice of sharing it as a work-in-progress with the network of friends and colleagues whom I ask normally to comment upon my writing. Nevertheless, some of that cadre have not been able to escape, and I value them all the more for their input. First and foremost, I must thank two of our foremost Native legal scholars, Vine Deloria, Jr., and Robert Williams to whom I sent part of the manuscript. In my work, they have always been an inspiration to me. I must also acknowledge George Robinson, Alan Velie, Robert Warrior, and Jeff Zeitlin, all of whom helped goad me in one way or another into this project. Finally, I must give special thanks to Gina Allery, my former student at Columbia Law School and my research assistant on this project, without whom it could not have been completed so quickly.

After the central essay of this volume, I include President Bush's order of November 13, 2001 that established military commissions to try non-citizens he believes have engaged in terrorism as an appendix.

In a November 30, 2001 column in the *New York Times*, entitled "Wake Up, America," Anthony Lewis noted that thus far the leadership of the Congress had "been afraid to challenge anything labeled antiterrorist, however dangerous. It is time they showed some courage, on behalf of our constitutional system."¹⁶ Since then, fortunately, some members of Congress have reacted to the question of military tribunals and the more egregious aspects of the administration's anti-terrorist campaign. The Senate Judiciary Committee has held hearings. At them, Attorney General Ashcroft and Assistant Attorney General Michael Chertoff faced sharp questioning about the administration's actions. On the whole, however, Lewis point remains true. The behavior of most in Congress is unlikely to inspire a new chapter in *Profiles in Courage*.¹⁷ And, whatever the rise in his personal standing since September 11, President's Bush's actions are unlikely to mark him for a place in that book's little-known sequel, *Six Brave Presidents*.¹⁸

-0-

-
- ¹ Jace Weaver, Other Words: American Indian Literature, Law, and Culture (Norman: University of Oklahoma Press, 2001), p. 142.
- ² Richard Rorty, Achieving Our Country: Leftist Thought in Twentieth-Century America (Cambridge: Harvard University Press, 1998), p. 3.
- ³ Maureen Dowd, “Uncivil Liberties?” New York Times (Nov. 25, 2001), p. 11.
- ⁴ Ibid.
- ⁵ William Safire, “Voices of Negativism,” New York Times (Dec. 6, 2001), p. A35; William Safire, “State of the Pundit,” New York Times (January 7, 2002), p. A19.
- ⁶ Minzhi He, “Individual Freedom as an American Value and Contemporary American Cultural Debates,” Yale-China Journal of American Studies 2 (Summer 2001), p. 40.
- ⁷ James Cowan, Mysteries of the Dream-Time: The Spiritual Life of Australian Aborigines (Dorset, GB: Prism Press, 1989), p. 30.
- ⁸ Robert Johnston, “Capitalism and American Freedom,” Yale-China Journal of American Studies 2 (Summer 2001), p. 47.
- ⁹ Timothy B. Powell, Ruthless Democracy: A Multicultural Interpretation of the American Renaissance (Princeton: Princeton University Press, 2000), p. 8.
- ¹⁰ Peter L. Berger, “The Liberal as Fall Guy,” in Don’t Just Do Something (Santa Barbara: Center for the Study of Democratic Institutions, 1972), p. 64.
- ¹¹ Ibid.
- ¹² Ibid.
- ¹³ Johnston, p. 50.
- ¹⁴ Rorty, p. 3.
- ¹⁵ Weaver, p. xii.
- ¹⁶ Anthony Lewis, “Wake Up, America,” New York Times (Nov. 30, 2001), p. A27.
- ¹⁷ John F. Kennedy, Profiles in Courage (New York: Harper & Row, 1955).
- ¹⁸ Bill Davidson, President Kennedy Selects Six Brave Presidents (New York: Harper & Row, 1962). The book, written by Davidson, was based on interviews with Kennedy.