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From Cherokee Nation v. Georgia to the National Museum of the American Indian: Images of Indian Culture

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ADDRESS

FROM *CHEROKEE NATION V. GEORGIA* TO THE NATIONAL MUSEUM OF THE AMERICAN INDIAN: IMAGES OF INDIAN CULTURE

*W. Richard West, Jr.**

Thank you for the extremely gracious introduction. I always am delighted—truly—to be back in Oklahoma for even brief periods of time.

When I am the beneficiary of such generous introductions, I am reminded of a story. The Pope, resplendent in white robes, and a Washington lawyer (which I have been for most of my life), equally resplendent in navy pinstripes complete with a power red tie, arrive at the pearly gates at the same time. St. Peter ushers in both and indicates that he will see each to his respective heavenly abode. They reach the Washington lawyer's house first, and it turns out to be a splendid forty-five-room mansion that sits on twenty meticulously manicured acres. This raises the Pope's sights considerably. He thus is staggered when St. Peter directs him, a bit farther down the road, to a two-bedroom bungalow. Quite literally aghast, the Pope sputters, "But with all due respect, how can this be?" Responds St. Peter with great earnestness, utter sincerity, and probably complete truth, "I'm terribly sorry, but you must understand that, when a Washington lawyer arrives, we have to treat him especially well—because so few of them ever make it up here."

So be forewarned about my creditability today. In defense of my former profession, however, I emphasize that I have met a few museum directors who could be substituted fairly easily for the Washington lawyer in my story.

Let me describe briefly and by way of introduction where I intend to take us this morning. I have had the unique opportunity to view Indian culture from two quite different perspectives—I have seen it from the vantage point of this country's legal system and of its museums. What has surprised me the most is the relative sameness of the way Indian culture is viewed

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by those two institutions. Having thought about the matter more, however, I have decided this conclusion should not have been such a surprise to me after all. Both those institutions reflect the views and notions of the larger society concerning Indian culture, and that view is decidedly "western" and rarely includes anything approaching a *Native* interpretation of Indian culture.

So here, specifically, is what I plan to do this morning. First, I want to discuss and hopefully substantiate the proposition just mentioned by looking to the area of Indian law. Second, I will turn to the world of museums that deal with Indian culture. I will again try to substantiate that the very same set of problems frequently exists there concerning the treatment of Indian culture. Finally, I will discuss what we hope to do at the National Museum of the American Indian to change forever the way in which non-Indians view the culture of this nation's first citizens.

In discussing this last point I am mindful of a respected colleague's admonition when another colleague and I were waxing lyrical about all that the Museum could mean in transforming once and for all how people view Indians and their culture. In essence she said, "Rick, before you get carried away by your own oratory, remember that television probably will have far more to say about images of Indian culture than the Museum ever will." She may be right. But at this point I will say only that we Cheyennes did not become the "spartan" of the Plains acting on that kind of advice.

So let me turn now to the area of Indian law for a look, through some telling case law illustrations, at images of Indian culture. I did not just drift into this area of law. I went to law school with a very specific set of social and career goals in mind. I was a child of the 1960s. I saw the law, just as those in the civil rights movement did at the time, as a vehicle for producing social change and legal reform in Indian communities. They sat, undeniably, at the bottom of every measure of social well-being devised by man. As the United States itself conceded in its 1979 report on American's compliance with the intentional human rights accords:

> Native Americans, on the average, have the lowest per capita income, the highest unemployment rate, the lowest level of educational attainment, the shortest lives, the worst health and housing conditions and the highest suicide rate in the United States. The poverty among Indian families is nearly three times greater than the rate for non-Indian families and

> Native people collectively rank at the bottom of every social and economic statistical indicator.[1]

To the best of my knowledge not one of these statements has ceased to be true during the past decade.

I believed that the law represented a unique opportunity to redress many of these almost incredible societal wrongs. I also believed that it offered the chance to paint a far more honest and accurate picture of Indian culture itself. I believed this because I had been told a number of things about the law by some very dedicated souls. I had been told that the law generally, and Indian law more specifically, represented a completely neutral set of legal principles that judges and courts would apply to cases before them irrespective of what societal views and politics might be.

Suffice it to say that, in my youth, I had not developed that finely honed sense of cynicism that I did as a Washington lawyer. I should have taken my clue from one of my first-year courses called "Legal Process," which supposedly would tell us, the uninitiated, how this splendid system of neutral principles worked. The materials presented to us on the first day of that class were authored by Professors Hart and Sachs of the Harvard Law School. Being a student at the Stanford Law School, that fact alone did not necessarily commend them, but I was prepared to be respectful. I did wonder, however—since I could see that the copyright date on the materials was years before I entered law school—why this particular wealth of knowledge was still in looseleaf binder form. Apparently West Publishing Company and others had not yet decided that these materials represented the last word on the legal process. By the end of that semester I had concluded, with a definite sense of lost innocence, that Hart and Sachs not only were *not* the last word — they were not even correct.

The notion that Indian law—or any other area of law, for that matter—was comprised of principles that operated "neutrally" and fundamentally apart from the larger social context was, simply, wrong. To state the same conclusion another way, the larger society's views of Indians, their rights, and their culture inevitably imposed themselves on Indian law. They did it in one of two ways. They might do it directly by influencing the specific outcomes that formed Indian legal jurisprudence.

1. U.S. COMM'N ON SECURITY & COOPERATION IN EUROPE, FULFILLING OUR PROMISES: THE UNITED STATES AND THE HELSINKI FINAL ACT 156 (1979).

Or they might do it indirectly by ignoring, politically, the legal results produced by the courts.

Let me discuss several Indian law cases that illustrate these points. The first two are *Cherokee Nation v. Georgia*[2] and *Worcester v. Georgia*.[3] In a nutshell both of these cases raised the question of whether the State of Georgia had any legal authority over the territory and affairs of the Cherokee Nation, which was located at that time within Georgia's boundaries. Chief Justice Marshall made a valiant effort to do that which was right and that which comported fully with accepted principles of international law. He held in the *Worcester* case that:

> The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. . . . The act of the State of Georgia, under which the plaintiff . . . was prosecuted, is consequently void, and the judgment a nullity.[4]

Society's views, however, were far more clearly reflected in the various concurrences filed in these two cases. In the *Cherokee Nation* case, for example, Justice Johnson complained:

> Where is the rule to stop? Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state? We should indeed force into the family of nations, a very numerous and very heterogeneous progeny.[5]

Significantly, the dictionary offers, as one of the definitions of the word "kraal," the following: "an enclosure for cattle and other domestic animals in southern Africa."

In the *Worcester* case, Justice McLean made the same point in a somewhat different way. He opined in his concurring opinion that:

> The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary.
>
> . . . .

2. 30 U.S. (5 Pet.) 1 (1831).
3. 31 U.S. (6 Pet.) 515 (1832).
4. *Id.* at 560-61.
5. *Cherokee Nation*, 30 U.S. (5 Pet.) at 25.

> At best they can enjoy a very limited independence within the boundaries of a state, and such a residence must always subject them to encroachments from the settlements around them; and their existence within a state, as a separate and independent community, may seriously embarrass or obstruct the operation of the state laws. If, therefore, it would be inconsistent with the political welfare of the states, and the social advance of their citizens, that an independent and permanent power should exist within their limits, this power must give way to the greater power which surrounds it, or seeks its exercise beyond the sphere of state authority.[6]

History records that Justices Johnson and McLean read President Jackson's—and probably America's—mind far more accurately than Chief Justice Marshall. Upon hearing of the Chief Justice's ruling in the *Worcester* case, Old Hickory said, to paraphrase him, "Chief Justice Marshall has made his decision; now let him enforce it." And, of course, Marshall was not able to enforce his decision. The Cherokees, along with numerous other tribes then located in the southeastern part of the United States, were removed, involuntarily and with the loss of thousands of lives, to Oklahoma over the infamous Trail of Tears. In Indian law, these cases represent perhaps the most stunning example of how society influenced the law by ignoring it.

A number of cases that address the legal status of the Pueblos of New Mexico use the alternative tack. There society's views of Indians and their culture are reflected directly in the courts' determinations and, indeed, serve as the factual rationale for the legal decisions reached. In the nineteenth century, the Territorial Court of New Mexico, in its wisdom, had concluded that the Pueblos could not possibly be Indians. Why? Because, as the Territorial Court had declaimed in *United States v. Lucero*,[7] they were not "savages" but rather some of the "most law-abiding, sober, and industrious people of New Mexico."[8] In *United States v. Joseph*,[9] the Supreme Court hastened to agree. It said that while the "history" and "domestic habits" of American Indians were "matters of public notoriety," the Pueblos, on the other hand, were "peaceable, industrious, intelligent, honest, and virtuous people. They are Indians only in

6. *Worcester*, 31 U.S. (6 Pet.) at 593-94.
7. 1 N.M. 422 (1869).
8. *Id.* at 441.
9. 94 U.S. 614 (1876).

feature, complexion, and a few of their habits . . . ."[10] Mind you, this extolling of the Pueblo culture was used by the Supreme Court as the basis for its holding that the federal government was not obligated to assist the Pueblos in getting a non-Indian trespasser off their land.

The more honest expression and reflection of the Supreme Court's view of Pueblo culture came over forty years later in *United States v. Sandoval.*[11] The transformation of Pueblos and their culture which supposedly had occurred during the intervening forty years was remarkable and, in candor, incredible. Stated the Supreme Court:

> The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and [fetishism], and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uniformed and inferior people . . . .

With one accord the reports of the superintendents charged with guarding their interests show that they are dependent upon the fostering care and protection of the Government, like reservation Indians in general; that, although industrially superior, they are intellectually and morally inferior to many of them; and that they are easy victims to the evils and debasing influence of intoxicants. We extract the following from published reports of the superintendents: [The reports from the Indian service officials in the field indicated, among other things, "debauchery," "intemperance," and "heathen customs" among the Pueblo Indians.][12]

The picture of Indian culture painted by these case law passages is both bewildering and offensive to anyone who is Indian or who truly knows and understands Indian culture. At best Indians are viewed, even among many of their defenders, as a gallant cultural anachronism that inevitably will pass from history's stage. At worst the picture, in its utter inaccuracy, is simply racist—with adjective like "simple," "inferior," "unin-

10. *Id.* at 616.
11. 231 U.S. 28 (1913).
12. *Id.* at 39-43.

formed," "superstitious," "crude," and "primitive" characterizing the text.

I wish I could say that all of this was only a bit of Victorian residue from another age and time that has little to do with the manner in which Indians and their culture are viewed, jurisprudentially, at the present time. But that is simply not the case. I am convinced that at the very heart of some of the Supreme Court's most recent decisions is the notion, perhaps even unconscious, that the authority of Indian nations over their own affairs is not to be taken seriously, because Indian culture is transitory and ultimately must vanish before the judgment of Western society and technology.

A brief reference to two Supreme Court decisions, both decided within the past decade, will illustrate my point. In *Rice v. Rehner*,[13] handed down by the Court in 1983, the basic jurisdictional question was whether the State had regulatory authority over certain liquor distribution and sale activities on the Pala Reservation in southern California. The Court, based upon a legal analysis that can only be characterized as startling and unprecedented, held that the State had such jurisdiction. The Court's reasoning flew in the face of every established jurisdictional principle of Indian law. I remember staring at that opinion in shock, trying to decipher how the Court could possibly have rationalized this decision. In my bemusement, I could not escape the thought that much of what drove the holding was a particular vision of the state of contemporary Indian society—namely, a judicial mind's eye picture of inebriated Indians staggering down Reno in Oklahoma City or the streets of Gallup or other, similar byways of this country.

The second case that stands for the very same point is the Supreme Court's even more recent *Brendale* decision.[14] There the question was again jurisdictional—whether the Yakima Indian Nation or a local county had jurisdiction over non-Indian activities in an area that was conceded by all to be located within the boundaries of the Yakima Reservation as established by Treaty. The Supreme Court, reminiscent of the *Rehner* decision, ignored, in my view and in the opinion of many legal scholars, established principles of Indian law and held that the county rather than the Yakima Nation had authority in the disputed area.

13. 463 U.S. 713 (1983).

14. Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 109 S. Ct. 2994 (1989).

The basis of the swing notes on the Supreme Court was even more disturbing. It can be described only as "jurisdiction by the numbers," which is not a principle of Indian law of which many others or I have ever heard. The question, in the minds of these swing votes, appeared to be whether Indians or non-Indians, and their landholdings, were numerically superior in the disputed area of the reservation. Forget the established legal principle that the Yakima Nation's Treaty should determine the borders of the reservation and who has authority within them. Forget the legal principle of almost two centuries' standing that, absent federal law explicitly so providing, the states and their subdivisions lack jurisdiction over Indian reservations. Instead, the operative principle, albeit implicit, seemed to be that where Indians and non-Indians come into conflict, Indians and their political life and culture must give way.

Museums dedicated to the study and exhibition of Indian culture, unfortunately, have often marched to a very similar drummer. I remember, as a small boy, visiting the American Museum of Natural History in New York City with my family. The Museum has an excellent Indian collection, and it has an equally excellent natural history collection. After we had spent several hours viewing both, I posed a question that had been on my mind for much of the visit. I turned to my father and asked, "Why do they show Indians with all the mammoths and dinosaurs?" My father replied, in a comment that came as close to a sardonicism as his usually gentle nature permitted, "I believe they must think we, too, are dead."

I have concluded since that my father was absolutely correct, but that he did not go far enough in assigning error. The distinguished author of Indian history, Alvin Josephy, relates a story that is extremely telling in making my additional point. When he began publishing his works almost a generation ago, he spent a great deal of time walking up and down Bookstore Row on Fifth Avenue in Manhattan arguing with bookstore owners that his histories should be placed in the history section of the store rather than, as apparently was inevitably the case, in the "nature" section. My point is simple: not only do many museums treat Indians and their culture as though they were dead. They also treat Indians as though they occupy a part of the animal kingdom that is less than human. For a culture that is so profoundly humanistic, this treatment is a tragedy and a disgrace.

The controversy surrounding the repatriation of Indian human remains and associated funerary objects also demonstrates com-

pellingly why many museums must change fundamentally the way they view humanity of Natives. Some of you may already be familiar with this issue. It is whether human remains and associated funerary objects that are held by museums—and that number in the tends of thousands—should be returned to tribes and Indian individuals who can show a linkage to them and who want them.

I am willing to concede that these remains may have scientific value to the anthropological community. That, to me, is not the issue. The matter of Indian human remains also has a profoundly moral, human, and cultural dimension. Many of the remains in the Smithsonian Institution's collections quite literally were swept from battlefields by the United States cavalry as part of a nineteenth century cranial studies project. Cheyenne bodies at the infamous Sand Creek Massacre, for example, were dismembered, as the Army collected skulls while leaving behind other parts of those slain. I know that these facts are unsettling and horrifying to many, and they should be. This denigration of the humanity of Indians, in the end, must be seen for what it is—an inhumane act of disturbing proportions.

I am gratified to say that the Smithsonian Institution, pursuant to legislative provisions that it helped draft, is in the process of implementing a program that will result in the return of substantial numbers of Indian human remains and associated funerary objects to their tribal and individual family descendants. Many of us at the Smithsonian, including the Director of the Museum of Natural History whose collection contains most of these remains, are working very hard to see that this legislation is implemented as promptly as possible.

In explanation of why this Indian lawyer has become a museum director, I guess the most accurate thing to say is that I have given up, at least for the moment, on the Supreme Court. But I have not given up on the National Museum of the American Indian. Indeed, I have the highest hopes for the impact I believe it can have on the way all non-Indians view Indians and Indian culture.

In announcing the National Museum of the American Indian, the head of the Smithsonian Institution, Secretary Bob Adams, referred to it as the "museum different." I would like to explain how we think the Museum should be different and what impact that can have on images of Indian culture.

First I will discuss briefly some basic principles that must guide the development of this Museum. The Museum must put the lie, once and for all, to the notion of America as a "melting

pot." To begin with, the concept probably is historically inaccurate. If American history demonstrates anything, it is that Indian culture has not "melted"—even in the face of great "heat." And neither, notwithstanding all of their socio-economic adversity, have any of the other non-European racial minorities in this country. But the idea of a "melting pot" is not only historically inaccurate. It also is wrong in principle. America should embrace and celebrate its cultural diversity for the richness and depth this diversity brings to our cultural life. I have never been able to understand why some perceive as so attractive the reduction of our culture to some kind of common cultural gruel—tasteless and gray.

The Museum also must show Indian culture as the vital, living, breathing phenomenon that it is. So much of our cultural image problem is created by the fact that many believe that we, along with our culture, are dead, gone, relegated to history. As Oklahomans surely can appreciate and confirm, we are not dead. We are alive, and so is our culture. We have had more than our share of adversity, and so has our culture. But we define the term "survivor." Our culture today also may have evolved in certain respects from what it was one hundred years ago. But that does not make it less Indian. What other cultural group has been expected to remain utterly static for a century?

The specific things we must do to implement these principles at the National Museum of the American Indian are several, and I will talk about the most important. First, we must approach the representation and interpretation of Indian culture without paternalism and without condescension. This approach means that Indians must be involved at all stages and in all phases of our planning. We must talk with the Indian community about what we are doing. More importantly, we must talk with the Indian community about what they think about what we are doing. I am not suggesting this course of action because it is polite. I am suggesting it because our listening to Indian voices will vastly improve the quality of what we do.

Here I am reminded of a story. It may be apocryphal, but, no matter, it makes a very valid point. One day an elderly Indian woman and her grandchildren were viewing the collection of an established Indian museum. Standing before one of the exhibit cases the grandmother suddenly began to laugh—in that Indian way, where there is no sound but the body begins to shake ever so gently. One of her grandchildren looked up and asked what was so funny. The grandmother replied that the text for the exhibit case seemed to indicate that the object displayed

was ceremonial in nature, but that it was really, as the grandmother well knew, a serving implement. My point is simply this: viewing the artifacts and objects of the collection of the National Museum of the American Indian through the eyes of those descended from the creators of the artifacts and objects has immense benefits for everyone.

Second, in this Museum we must be sure that all the elements that make up Indian culture are represented. For too long we have been represented and interpreted primarily through the eyes of the anthropologist and the ethnologist. This shortcoming has much to do with our status in museums as the "dead" and the "studied" rather than as full members of the contemporary human family. Our arts so clearly reflect our humanity. So this Museum must be sure that they are reflected in all that it does—music, painting, sculpture, dance, and drama—and, I would emphasize, performed by some live bodies, which leads to my third point.

We must get away from what I call the "buffalo and war bonnet" syndrome. Indian culture is dynamic. It is a continuum. It did not end in the nineteenth century. Its further development and evolution continues as I stand here today. The National Museum of the American Indian must represent and interpret Indian culture as the contemporary living and breathing phenomenon that it is—from its roots in a glorious pre-European contact past to a difficult but vital present.

Finally, the National Museum of the American Indian has very special responsibilities to the descendants of those who created the incomparable objects in its collection. The first responsibility is to ensure that the Natives of this Hemisphere play a real and not token role in governing the Museum, in developing its policies, and in administering its programs and exhibits.

The second responsibility is even more profound. The Museum must reach out to the Indian community in service—in ways that few museums have seen fit to do. We have a compelling moral obligation to make sure that the descendants of those who created the objects and artifacts in our collection are able to draw upon the tremendous material and human resources of the Museum. They must be able to do this in order to build their present-day communities and lives and to plan the viable, productive future they so richly deserve.

In the end, the National Museum of the American Indian is not just about the past. It certainly is not about the dead or the dying. It is about the here and the now. It is about the

living. It is about our effort to preserve a way of life against great odds. It is about our success in doing so. It offers us an unprecedented opportunity to change the way all non-Indians hear our story. It offers America a chance to comprehend its present by understanding, as it never has before, its past.

In all of this I am reminded of the compelling eloquence of Chief Joseph, that courageous warrior-philosopher of the Nez Perce Tribe. He made this statement some two years ago after he barely failed in his gallant and legendary effort to lead his people from what is now Idaho to Canada in search of freedom. This is what he said: "If the white man wants to live in peace with the Indian, there need be no trouble. Treat all men alike. Give them all the same laws. Give them all an even chance to live and grow. All men were made by the same Great Spirit. They are brothers."[15]

The National Museum of the American Indian can and will contribute to the profound human reconciliation for which Chief Joseph appealed so eloquently. It will do so by giving Indians the opportunity to show the world who and what we really are. It will do so by giving us "an even chance to live and grow." It will do so, finally and most importantly, by demonstrating that all of us are, after all, "brothers" and, I should emphasize in this day and age, sisters.

15. Chief Joseph, *An Indian's View of Indian Affairs*, 128 N. AM. REV. 412 (1879). *See also* A. JOSEPHY, JR., THE NEZ PERCE INDIANS AND THE OPENING OF THE NORTHWEST (1965).