

Executive Session on American Indian Constitutional Reform  
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## **Report on Best Practices in Developing Effective Processes of American Indian Constitutional Reform**

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*The Executive Session on American Indian Constitutional Reform is a national working group of constitutional reformers from 12 American Indian nations and leading academics. The Executive Session meets twice a year to rethink strategies for strengthening tribal constitutions and constitution-making processes. This report is aimed at Indian nations planning constitutional revision. It highlights best practices in developing effective processes of constitution-making and revision, an issue of pressing concern to a growing number of American Indian nations reexamining their constitutions. The ideas and conclusions in this report emerged from the May 9-11, 2002 meeting of the Executive Session at Harvard University, “Launching Effective Processes of Reform and Maximizing Citizen Participation and Education.”*

Tribal governments confront a crisis of governance. For some Indian nations struggling with constitutional standoffs among different branches of government, dual governments, or other forms of heightened political instability, the crisis is tangible and immediate. For others, the crisis is more subtle and stems from a deep and growing realization that their constitutions lack the institutional capacity and cultural compatibility necessary to facilitate the full exercise of governmental powers. Across the United States, dozens of American Indian nations are amending and replacing their constitutions. The goals of these reforms include strengthening the capacity and stability of government institutions, rethinking membership criteria in response to demographic and economic changes, and incorporating traditional understandings of the source, scope and structure of political authority.

Increasingly, Indian nations are focusing on the *process* of reform as the key challenge in realizing these goals. Indian nations seeking to reformulate the foundations of their governments must develop reform processes that manage political disagreements, resolve conflict, and maximize citizenship participation and understanding of new constitutions.

There is, of course, no “silver bullet” for engaging in an effective process of constitutional and governmental reform. However, a common set of best practices are emerging throughout Indian Country to guide constitutional reformers as they wade through some of these challenges. These best practices are grounded in the realization that reform processes must be legitimate and inclusive. A legitimate reform process is led by a constitutional committee or commission that citizens trust to turn their goals and aspirations into reality. An inclusive reform process provides citizens with the education, information and opportunity to fully participate in shaping

the future of their government. Together, legitimate and inclusive reform processes are best able to create effective governing institutions that are “owned” by citizens of the community themselves. This ownership provides citizens with the understanding and personal investment necessary to use constitutions to defend individual interests and promote collective goals.

The following represents the distilled “best practices” of 12 Indian nations that recently have engaged in constitutional reform and are offered as a contribution to a larger conversation.

### **Structuring a Legitimate and Effective Reform Body**

The development of constitutions does not result from abstract discussion of the rule of law, separation of powers and checks and balances. Raw political power and deeply held cultural beliefs infuse the process of constitution-making with human emotions and frailties. Managing the politics of reform and successfully incorporating diverse and competing views of good governance into new or revised constitutions demand a process of reform that can balance the desires of competing stakeholders. In short, it demands a process viewed as legitimate in the eyes of the community.

Perhaps the most important procedural aspect of constitutional reform is the creation of the reform body – the entity that will manage and lead the reform process. The reform body must not only be legitimate in the eyes of the people, it must also be organizationally effective and competent at navigating the politics of reform. Some of the key components of a credible and effective reform body include:

***Independence.*** There is a natural tendency among incumbent governments, including tribal councils, to control the process of reform. Given the large role responsibility tribal councils possess in governing their nations, the inclination of council members to drive the reform process is reasonable. However, council control can lead to the perception of a politicized reform process or the very real possibility that proposed reforms will be quashed by the incumbent government. Ideally, constitutional reform commissions should be able to go about their work independently. This might entail, as it did with the Cherokee Nation Constitution Commission, having the Commission obtain enabling legislation from the Tribal Council granting it independent authority and adequate funding to do its work. The Cherokee Nation succeeded in having the Council grant this authority by reserving space on the Commission for Council appointees.

***Composition.*** The membership of the reform body also plays a role in its legitimacy – and ultimately its effectiveness. The Navajo Commission on Government Development includes representatives of all three branches of government as well as school officials, a women’s group representative, a traditional medicine man, and a youth representative. The Cherokee Nation Constitution Commission included appointees from all three branches of government. In smaller Indian nations, family representation may be the crucial component. The Mashantucket Pequot Tribal Nation’s newly-formed constitutional reform committee is comprised of appointees from the Nation’s 11 families. Finding specific individuals to serve

on the reform body generally is less important than guaranteeing that the body collectively represent different community constituencies.

***Openness and Transparency.*** The credibility of the reform body's work can easily be damaged by a lack of openness and transparency in its work. The Hopi Tribe and the Lummi Nation publicize their scope of work, their schedule of meetings and hearings, and related deadlines. The Chair of the Hopi Tribe Constitutional Reform Committee makes a special point of opening committee meetings to all interested parties, even non-members and officials from the BIA. This transparency makes it difficult for "power brokers" to unduly influence the integrity of the reform process behind closed doors.

***Weigh Advantages of Constitutional Convention or Public Hearing Process.*** The reform body cannot write a constitution alone. A legitimate constitution – and constitution-making process – requires the input and consent of the people. Different mechanisms exist for translating the people's desires into a new or revised constitution. Two well-tested approaches include constitutional conventions and public hearing processes.

- ***Constitutional Convention.*** A constitutional convention comprised of elected or appointed delegates provides a sovereign forum where a cross-section of citizens can legitimately decide important and often controversial issues. The advantage of organizing a constitutional convention is that it involves the people directly in formulating the foundation of their government. Of course, a convention doesn't work in every circumstance. For instance, organizing a constitutional convention may be difficult if the current constitution doesn't contain provisions authorizing its formation.
- ***Public Hearing Process.*** Instead of a constitutional convention, some Indian nations have relied instead on a thorough public hearing process. Public hearings provide reform leaders with invaluable information and vest citizens with a critical opportunity to be heard. However, unlike delegates to a convention, citizens providing testimony at a public hearing don't have the opportunity to participate directly in contributing to the content of a new or revised constitution. Indian nations opting for public hearing approaches should think through mechanisms for best translating public input into a new constitution and addressing controversial issues.

## **Maximizing Citizen Education and Participation**

After 70 years of governing under the Indian Reorganization of 1934 (“IRA”) and IRA-influenced constitutions, Indian nations want their governing documents to represent their individual desires, values and institutional needs. Tailoring constitutions to specific community needs requires the input and participation of all citizens. As noted above, widespread citizen participation strengthens the likelihood that proposed reforms will be approved by the electorate and vests individual citizens with an interest in holding their governments accountable to its provisions.

Perhaps the greatest difficulty in launching a successful process of reform – or even getting one underway – is overcoming a perceived lack of interest among tribal citizens. There are many reasons why citizens may not participate fully in efforts to strengthen constitutions; strategies for increasing citizen participation should therefore be tailored to the specific causes of non-participation.

The following are some suggestions for maximizing citizen participation, understanding and ownership:

***Create Space to Discuss Purpose of a Constitution:*** Constitutional governments often fundamentally conflict with underlying authorities, understandings and political structures within Native communities. Many tribal governments adopted written constitutions only at the prodding of the United States and private parties in the 1920s and 1930s. The unique cultures and histories of American Indian nations demand that the purpose of tribal constitutions be discussed extensively. Some Indian nations may be amending their constitution to strengthen the stability and capacity of their governing institutions or to better confront the demands of globalization. At the same time, they still may not view the constitution as a fundamental reflection of who they are as a people.

The Yurok Tribe provides an example of the benefits of creating the space for these discussions. When writing the Tribe’s constitution several years ago to formalize and structure its government, tribal members built into the new constitution a portion of their history and creation story to link the modern, written document with members’ traditional understanding of themselves. Ultimately, some Indian nations, especially small ones, may decide that their traditional understandings and structures of authority are perfectly adequate and they don’t need a written constitution at all.

***Create Space to Discuss Value of Constitutional Revision:*** Except in rare instances, a written constitutional government is a foreign concept to Indian nations. Many individuals don’t see how a constitution can impact their daily lives. Without this appreciation of a written constitution’s importance, tribal members aren’t likely to attend public hearings, respond to surveys, or otherwise participate in reform processes. The Lummi Nation provides an example of how to make tangible the importance of a constitution. A representative from the constitutional reform committee regularly attends weekly meetings of

a community group concerned about public safety on the reservation. At the end of the meeting, he delivers a presentation in which he demonstrates how these community concerns may be alleviated by restructuring the Nation's institutional structure to provide for more local decision-making. By tying constitutional reform to community concerns, the constitutional reform committee is able to reach 30 citizens at a single meeting, as opposed to the handful of citizens who attend regularly scheduled public hearings.

***Implement Long-Term Civic Education Programs.*** Without a grounding in the history and importance of tribal constitutions, citizens will be less likely to value and participate in reform initiatives. Knowledge of the purposes and contents of tribal constitutions – as well as tribal government, tribal history and federal Indian law – fosters awareness of the importance of tribal constitutions and increases the likelihood of broad-based citizen participation in reform processes. This, in turn, strengthens community ownership in new or revised constitutions and promotes greater understanding of new constitutional provisions. Citizens who understand and “own” their constitutions are better equipped to use it to defend their individual and collective interests. Across Indian Country, American Indian constitutional reformers stress the need to begin these programs of civic education as early as possible. Digesting and internalizing new concept and terminologies doesn't happen overnight.

Examples of successful long-term programs of civic education include:

- ***Tribal College and High School Programs of Civic Education:*** The UCLA American Indian Studies Center's Peacemaker Program works with four tribal colleges to develop curricula examining the sources and origins of various constitutional provisions. These classes have provided a valuable forum where constitutional reformers and interested citizens can discuss how their constitution is or is not facilitating community goals. Northern Cheyenne's Lama Deer High School is one of several secondary schools that teaches tribal government and tribal history. There is a growing consensus that the importance of these programs be upgraded from elective to required coursework.
- ***Youth councils:*** Youth councils present an effective way to introduce the next generation of leaders to issues of tribal government. At Fort Peck, members of the youth council attend meetings of the tribal council and interact regularly with tribal government officials. The youth obtain first-hand knowledge of the structure and functioning of their government. The community benefits by gaining a new generation with an increased appreciation and understanding of government institutions, including constitutions.

***Create A Safe Environment For Citizen Input.*** Citizens won't share their ideas and aspirations for a better government without a safe environment. Reform leaders must act as listeners – not advocates – and create an atmosphere free of ridicule. Agreeing to ground rules for taking citizen testimony at public hearings helps citizens feel comfortable participating in the reform process.

***Develop Strategies for Reaching the Busy and Hard to Reach.*** Simple time and logistical constraints prevent many interested tribal citizens from participating in public hearings and related meetings. Holding public hearings in off-reservation or out-of-state sites with high populations of tribal members, as the Cherokee Nation Constitution Commission did in 1999, is one way to reach people. Going door-to-door with information has proved to be an effective method for reaching rural residents. Partnering with schools, senior centers or other community groups allows reform leaders to piggyback onto community resources and reach larger segments of the population.

If there is one final thought to walk away with, it is “take your time!” Developing a legitimate and inclusive reform process is just that – a process. Although there will be pressure to quickly adopt or amend a constitution and move on to more “important” matters, a constitution that the people don’t trust or “own” will only serve to derail and frustrate all future collective endeavors. Given the difficulty of re-writing and amending constitutions once they are in place, setting aside a year or more for this process is a small investment for preventing decades of remorse.

*This document represents the consensus view of the Executive Session on American Indian Constitutional Reform, but the totality of the ideas and recommendations included herein do not necessarily reflect the views of each participant.*

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