

TRIBAL CONSTITUTION HANDBOOK



A PRACTICAL GUIDE TO WRITING OR
REVISING A TRIBAL CONSTITUTION

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I. INTRODUCTION

Nation Building. Those words define the relentless efforts of tribal peoples to build a solid foundation for their tribal governments. A tribal constitution can provide the bedrock upon which to build a strong and prosperous tribe, both as a peoples and a government. This Practical Guide is intended to guide the user through a number of considerations when writing or revising a tribal constitution in order to foster and generate ideas on the kinds of mechanisms that may work for the particular tribe's governance structure.

I encourage you, in the process of figuring out what will work, to consider the legacy of colonialism, IRA constitutions, the federal policies of warfare, assimilation and termination, or other such historical events and their effect on tribes and how it ultimately changed how tribes governed themselves. From my perspective, it is important to understand those events, especially federal efforts in the 1930s when many tribes adopted a constitution under the Indian Reorganization Act (IRA), in order to gain an understanding of the reasons why those constitutions contain certain provisions and why they may no longer be relevant in contemporary times. This understanding may also help you to avoid replicating those problematic areas if your tribe is adopting a constitution or revising its existing constitution.

As a backdrop to your work on a tribal constitution, the most fundamental act of tribal sovereignty is the adoption of a form of government that is an expression of your tribe's cultural identity, values and beliefs. Formation of a government that is a reflection of your tribal community's understanding of the fundamental laws that inform its world view, the community's system of decision making and allocation of authority is an arduous task. There are two parts to understanding the process for undertaking the creation or reformation of a tribal governance system under a tribal constitution. One is a community based process that ensures the legitimacy of the result. The other involves the nuts and bolts of assuring that the governance structure incorporates all the essential elements necessary to perform the functions of an operable government.

Community process and input for adoption or reformation of a constitution or other system of governance must ensure legitimacy in the results. Structuring a tribal governance system that is a genuine reflection of a tribe's culture, language and values requires incorporating ample input, review and accord with the result by all the various constituents of the community. It may be more difficult where the process must overcome historical animosities or rivalries within the community. Thus, a process that has a neutral arbiter to convene meetings and manage the integrity of the process may be desired. It is, however, far better for the community to institute its own process for consensus that incorporates the core cultural traditions and values of that community that will likely be reflected in the final governance structure. An extensive community process that assures opportunity for involvement and the assurance of legitimate feedback may be seen as a three step process:

1. Accept that adoption of reform of a governmental structure needs to be done, and such reform must have legitimacy in the eyes of the community, rather than a few individuals. The community must see it as an opportunity to explore the possibilities for a better tomorrow through the adoption and implementation of a strong constitution reflecting the values of the tribal community.

2. Adopt a community-authenticated process that will assure legitimacy of the result.
3. Emphasize community review, comment, edits and approval from start to finish.

I offer a few practical considerations. At the outset, a group of interested individuals from the community must be assembled to prepare recommendations to the tribal community. This group often will call itself such names as a constitution committee, taskforce or commission. The constituents of the group will vary, depending on the inclinations and needs of your tribe. Sometimes it may be the governing body of the tribe, a committee of the governing body, a group of tribal members or a combination of various individuals representing different parts of tribal government and the community. You should be sure to include individuals who are prepared to devote a considerable amount of time to the process for a long time, even years. In some ways, it is disruptive to the process to have individuals come and go since it takes time to educate new individuals about what has already been discussed and decided. It makes it easier when presenting your recommendations to the tribal community to have individuals who have knowledge of the process from beginning to end.

From beginning to end, I recommend including every segment of your tribal community in the process. This inclusive process may involve inviting groups such as the elders, women's groups, medicine people, youth groups, clan leaders, traditional leaders such as a chief, tribal governmental officials or entities such as a representatives from the tribe's gaming enterprise, police and fire departments, housing entities, ICWA program officials and tribal leaders. This inclusive process can be done at appropriate times. For example, if you're considering the judiciary, then you may want to invite individuals from the community that serve the role of traditional peacemakers, judges and other personnel from the courts, police officers, probation officers, juvenile justice program staff, ICWA staff, social workers, the judiciary committee of the governing body, youth groups and any other interest group that interacts, or would interact, with the tribal judiciary.

Aside from receiving input from the tribal community, you may want to seek the advice of professionals such as lawyers, even to consider a single issue such as election law, especially if you're creating or re-evaluating districts. Other possible experts you may want to consult include an anthropologist or sociologist who can help in the area of defining social contact issues related to evaluating whether a person is a member of the tribal community under a proposed membership criteria that uses that standard or local judges to explain the role of a judicial branch of government and a judge's day-to-day activity in order to give perspective. These are a just few examples.

In the end, when presenting to the community, there are options to consider. The group that invested their time and effort may want to present their findings and recommendations to the community. The governing body may want to undertake the task. If disagreements of whatever nature exists in the community, the group and/or governing body may feel that a neutral party is needed to moderate the community presentation. In this way, any hostilities related to long-standing controversial issues or personality differences between individuals or groups are minimized and the process can progress more easily. There may be other options for the presentation to the community depending on your tribe.

Turning to the handbook, it has been compiled to assist a tribe in reviewing and revising its constitution and bylaws or in drafting its first constitution. The handbook presents information and ideas on

each article for a tribe to consider so it can make informed decisions. Based upon such considerations, a tribe can identify existing sections of its constitution and bylaws needing revision and/or consider a suggested provision in its new constitution, proceed to revise old sections or tailor the language in its new constitution, and coordinate them into a complete document for public comment by its tribal members. It also gives examples for each article from a variety of tribal constitutions to present a comprehensive view of possibilities, to present information on tribal government, to summarize information, and to present information generally on tribal constitutions.

An Indian tribe can be defined in two ways: (1) as a society of people bound together by a common history and culture, and (2) as a government.

At the outset, a tribe must recognize that many of the constitution provisions that will be revised, or adopted, will be based upon the form of government it adopts. This handbook assumes that a separation of power exists, or will exist, in the tribal government. In particular, it focuses on the constitution required in the establishment of a two-branch government. Thus, certain articles contained in this handbook might change significantly if a form of government based on a three-branch government, a government with no separation of powers, theocracy, or other forms are adopted by it.

The task of revising or drafting a constitution is an act of self-governance, an exercise of inherent tribal sovereignty. It is a difficult task. The tribe must decide on a framework of its government and then it must decide on the many details, the constitutional provisions that will form the structure of the government. The tribe must at all times consider how its plan will operate in reality and long into the future. Thus, the task requires a great deal of foresight and creativity, as well as the time to make the many detailed decisions required. Hopefully, the efforts of the tribe will ultimately result in a tribal constitution that will serve it well for a long time.

I wish you the best in your endeavors.

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Research Help is Available from the National Indian Law Library . The National Indian Law Library at the Native American Rights Fund is available for research assistance relating to drafting tribal law. Visit the library's Tribal Law Gateway at: <http://www.narf.org/nill/triballaw/index.htm> or contact the library for free assistance:

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MARK C. TILDEN (Navajo) was formerly with a private law firm from September, 1990 to September, 1994 when he then joined the Native American Rights Fund (NARF) as a staff attorney. He worked at NARF for 15 years prior to forming Tilden McCoy + Dilweg, LLC. He represents tribal governments on federal acknowledgment, general counsel matters, administrative law, water law, environmental law, Indian housing law, Indian gaming law and economic development, legislative advocacy at the state and federal level, Indian child welfare and protection services law and tribal governance. He writes, lectures and trains in some of these areas of federal Indian law.

He was awarded the Environmental Achievement Award by the U.S. Environmental Protection Agency for Outstanding Work with the Oglala Sioux Tribe on developing a Tribal Environmental Code. He was the Lead Attorney and Project Manager on the development and publication of "A Practical Guide to the Indian Child Welfare Act," as well as a contributing author. He is the author of an upcoming book titled "Tribal Constitution Handbook, A Practical Guide to Writing or Revising a Tribal Constitution" and co-author of "Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children" published by the American Bar Association.

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