

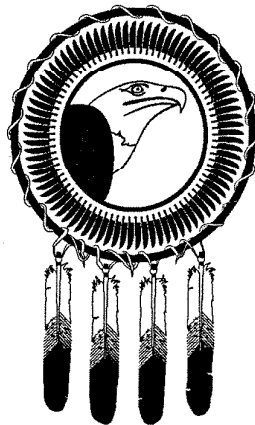
**Malcolm Wiener Center
for Social Policy**

*Constitutional Reform for the San Carlos Apache Tribe
A Report to the Apache Tribe of San Carlos, Arizona*

by

Richard Barerra

PRS89-8



**Harvard Project on
American Indian Economic Development**

**John F. Kennedy School of Government
Harvard University**

The views expressed in this paper are those of the author(s) and do not necessarily reflect those of past and present sponsors of the Harvard Project on American Indian Economic Development, the Malcolm Wiener Center for Social Policy, the John F. Kennedy School of Government, or Harvard University. Reports to tribes in this series are currently supported by the Christian A. Johnson Endeavor Foundation. The Harvard Project is directed by Professors Stephen Cornell (Department of Sociology, University of California, San Diego) and Joseph P. Kalt (John F. Kennedy School of Government, Harvard University). For further information and reproduction permission, contact the Project's Executive Director, Manley Begay, at (617) 495-1338.

Contents

Executive Summary	1
I. Formulation and Organization of Tribal Government	3
o. Origins of the San Carlos Government	3
1. Organization of Tribal Government	3
II. Government of the People: Greater Involvement for the Citizenry	5
o. Formulation of an Initiative Procedure	5
1. Expansion of Recall Provision	6
2. Reapportionment of Voting Districts	7
3. Election of Autonomous Ethics Committee	7
III. Government for the People: More Focus on Tribal Needs	9
o. Separation of Executive and Legislative Powers	9
1. Clarified Impeachment Procedures	10
2. Bill of Rights	11
IV. Government by the People: Truer Expression of San Carlos Autonomy	12
o. Limits of Department of Interior Supervision	12
1. Expansion of Tribal Courts Jurisdiction	13
2. New Constitutional Convention	14
Conclusion	16

Executive Summary

As the turn of the century approaches, the San Carlos Apache tribe of Arizona hopes to develop into an economically healthy, politically autonomous society. Not only does the Constitution discourage leadership by government officials, it leaves open opportunities for abuse of political power. In response, the level of motivation and faith in tribal government by the San Carlos people does not reach its full potential. A reformed Constitution can facilitate economic development by enhancing the prospects for leadership, while uniting the people behind government programs. With a united and motivated citizenry, tribal self-determination becomes a more meaningful goal.

I will discuss the need for a government more focused on the San Carlos people, and offer Constitutional options aimed at building such a government. Ultimately, all Constitutional reforms should strive to guarantee a government of, for, and by the San Carlos people. In practical terms, these reforms should serve three purposes.

A government of the people should involve citizens more directly in tribal decision-making, and thus should encourage an active citizenry. To create a government of the people, the Constitution might:

- Add an initiative procedure
- Extend recall power to the citizenry
- Reapportion voting districts to more adequately reflect population distributions
- Provide for the election of an autonomous ethics committee

A government for the people should focus more directly on the needs of the people, and should check the potential for corruption by tribal officials. To ensure a government for the people, the reformed Constitution could:

- Encourage leadership through the separation of executive and legislative powers
- Check abuses of power through clarified impeachment procedures
- Explicitly outline a bill of rights guaranteeing basic civil liberties to tribal citizens

A government by the people should express the will of San Carlos citizens, and should transfer responsibility from the United States federal government to the tribal government. To increase tribal autonomy, the new Constitution might:

- Define and clearly list those amendments and ordinances requiring approval by the United States Secretary of Interior
- Expand the power of tribal courts to resolve all civil and criminal cases occurring on the reservation
- Call for a new Constitutional Convention

Many of these options involve both pros and cons, and certainly the tribe will see some suggestions as more helpful than others. My role is simply to express the need for a more popularly-based constitution, and to suggest ways of creating such a document.

I. Formulation and Organization of Tribal Government

I.o. Origins of the San Carlos Government

The Federal Indian Reorganization Act of 1934 called for tribes across the United States to create constitutions and bylaws legitimizing tribal governments. The present San Carlos government takes its shape from a 1934 Corporate Charter, and from a 1954 amended Constitution - both ratified by a majority vote of tribal members.

The Indian Reorganization Act gave the tribe specified powers of self-government, while mandating a supervisory role for the Department of Interior's Bureau of Indian Affairs (BIA). The tribal government can pass ordinances managing the internal affairs of tribe members as well as the resources on the reservation. All ordinances must, however, stay within federal guidelines, and are subject to revocation by a U.S. federal court. Amendments to the tribal Constitution along with the Constitution itself require ultimate approval by the Secretary of Interior. This approval usually depends on the recommendations of the San Carlos BIA Superintendent. The BIA is charged with advising the tribe of federal guidelines, as well as providing technical assistance for internal management. On the San Carlos reservation, the BIA office sits next to the offices of the tribal government.

I.1. Organization of the Tribal Government

The Tribal Council forms the root of the San Carlos government. The Council consists of a Chairman, Vice-Chairman, and nine Council members. The Chairman and Vice-Chairman are elected by the citizenry as a whole, while each Council member represents one of four districts.

Politically, the reservation is divided into four districts outlining the population centers of the reservation. Corresponding to 1954 census data, the Bylas district elects three Council members, while the Gilson, Peridot, and Seven Mile districts each elect two members.

The Council has power to appoint additional government officials, including a Council Treasurer and Secretary. Further, the Council enforces its ordinances through the appointment of Tribal Judges and through the creation of a Tribal Police Force. The Council employs additional personnel to manage the economic, educational, legal, health, and cultural affairs of the tribe.

Land and resources on the tribe are tribally owned, and are therefore controlled by the Tribal Council. This becomes particularly relevant because very little private enterprise exists on the reservation, and few tribal members work outside the reservation. Most working members of the tribe, therefore, are ultimately employed by the Tribal Council.

All tribal members at least 18 years old are allowed to vote for the Chairman, Vice-Chairman, and representatives of their district. Tribal membership is restricted to those residents and non-residents of the reservation possessing at least one-quarter San Carlos Apache blood. 1988 census data estimates that 9,000 members live on the reservation, and that 3,000 members live outside the reservation¹.

II. Government of the People: Greater Involvement for the Citizenry

Newly elected Gilson Councilman Ernest Victor, Jr., attempting to legitimately represent his constituents, instituted a monthly town hall meeting in his district. Victor hoped to hear the clear voice of his constituents at the meeting, and to return to the Council advocating the needs of his people. To Victor's surprise, nobody attended the first district meeting.²

Victor's story suggests a more general problem. According to an elder citizen of the tribe, government officials simply serve their own personal needs, not the needs of the people. Regardless of this statement's validity, as long as the tribal government suffers from allegations of corruption and political patronage, it will not enjoy the full trust and support of the San Carlos people. The Constitution can encourage a more motivated citizenry in two ways. In the next section, I will offer options that could check the potential for official corruption. In this section, I suggest that by placing more direct power in the hands of the citizenry, the Constitution can build a government more representative of the popular will. A people entrusted with political responsibility will likely take greater interest and action in the affairs of government. The following suggestions aim to create a more active citizenry.

II.o. Formulate an Initiative Procedure

Currently, the Tribal Council enjoys sole power to pass ordinances. A citizenry entrusted with legislative power can correct for the oversights of the Council, and when necessary can occupy the vacuum of political leadership created by visionless politicians.

The experience of Montana's Crow tribe, however, suggests the potential for disaster in giving legislative power to the people at large. The Crow tribal

government actually consists of all adult citizens on the reservation, and is paralyzed by factions and internal dissention.³ An initiative procedure would not turn San Carlos government into an absolute democracy, but might lead to some of the problems currently faced by the Crow tribe.

II.1. Expand Recall Provision

Of government officials, only the Chairman, Vice-Chairman, and Council members are currently subject to recall, and only the Council itself can recall its own members. By giving citizens recall power, the amended Constitution can help ensure high standards of integrity and performance on the part of government officials.

This accountability should extend to appointed officials who might influence citizens' lives as much as or more than elected officials. A police chief who permits brutality by his officers, for instance, or an economic development commissioner who wastes the tribe's resources should be replaced. These officials, however, might occupy their positions because of some personal relationship with the Council members, and thus could probably avoid recall by the Council. A citizenry with recall power could remove poor or corrupt officials currently protected by the Council.

Such an amendment might backfire by further politicizing the roles of government officials. Honest, competent officials might be subjected to the personal whims of individual citizens or popular factions. Facing the threat of recall, public officials might more likely pursue policies aimed at satisfying short-term public opinion than long-term tribal needs. In truth, political considerations will always influence the actions of government officials. The tribe must decide which body exerts a more productive influence on officials - the Council or the general populous.

II.2. Reapportion Voting Districts

The reservation population has shifted to make Peridot, and no longer Bylas, the largest political district. If representation remains truly proportional, Bylas must lose a Council seat to Peridot. Even though a reapportionment process might entail a lengthy battle between Council members, the popular will is best expressed by true proportional representation.

The Council should consider, however, whether tribal interests are most clearly separated and defined by geographical distinctions. The theoretical basis for representative democracy comes from the notion that people in different locations have distinct interests, and thus a body of leaders claiming to serve the overall public good cannot adequately represent the heterogeneity of interests within society. If homogeneity actually characterizes the San Carlos tribe, or if interests tend to spread across district barriers, then a reformed Constitution could call for election of all Council members by the entire tribe. A number of Indian tribes across the United States elect Council members in this fashion as an expression of the commonality of interests on the reservation.

II.3. Provide for the Election of an Autonomous Ethics Committee

According to the 1954 amended Constitution, the Tribal Council presently enjoys the ability "to regulate its own procedures."⁴ An elected body separate from the Council could give the citizenry more power to enforce ethics by government. Among other duties, this ethics committee could investigate and invalidate fraudulent elections, and could regulate corruption by elected officials as well as patronage in the appointment of government jobs by the Tribal Council.

Again, members of this committee would face re-election, and thus would not be free from political influences. Ideally, however, the greatest political force influencing committee members would be citizens' desire for an honest, productive government. If committee members catered to this interest, popular trust and support for the tribal government would likely increase.

III. Government for the People: More Focus on Tribal Needs

At a recent Tribal Council meeting, a teenage girl stood before elected officials and spoke of an alcohol and drug abuse epidemic threatening San Carlos youth. Tribal teenagers seem to look forward to lives of either poverty and unemployment on the reservation, or hardship and social ostracism outside. For those able to leave the reservation and attend college, little incentive exists to return home.⁵ Overall, unemployment, hopelessness, and substance abuse provide all too common threads uniting San Carlos citizens.

The tribal government must institute policies aimed at improving the future quality of life on the reservation. By defining and limiting the powers of public officials, a reformed Constitution can encourage a government working for the public good. The following suggestions aim toward this goal.

III.o. Separate the Executive and Legislative Branches

No distinct powers currently separate the duties of the Chairman and Vice-Chairman from those of Council members. If the Chairman's responsibility shifts from voting on legislation to setting an agenda for the tribe, government can embark on a long-term course of improving the reservation. No such course presently exists. Instead, the tribal government primarily operates by responding to requests and complaints from citizens, rather than by directing the tribe towards long-term goals. By charging the executive with setting an agenda, the Constitution would also allow citizens on election day to consider their own long-term vision for the tribe. In essence, the Constitution could institutionalize leadership with the creation of a real executive branch.

The executive's agenda would be checked by the Council, with sole power to vote on proposed ordinances. Council members could also introduce

laws, but their primary role would be to legislate or modify the Chairman's agenda. Legislative power could be checked by an executive veto, but more importantly by popular support for the executive vision mandated on election day.

Under such a scheme, both the Chairman and Council members would sacrifice current powers in favor of new ones. The Chairman might oppose surrendering his power to vote, but if he can concurrently propose a tribal agenda and then vote to ensure the implementation of that agenda, his power could go unchecked.

Council members might not wish to focus the course of tribal government on the Chairman's decisions, but they must see that as a representative of the entire tribe, the Chairman sits in a better position to set an agenda for the overall public good. While a clear separation of powers also involves defined limitations of power, it offers both the Chairman and Council members the opportunity to pursue more productive, long-term policies.

III.1. Clarify Impeachment Procedures

Even though the recall power should be extended to the citizenry, the Council should not lose responsibility for regulating itself. With set procedures establishing impeachment as a real threat to Council members, elected officials will have greater incentive to concentrate on serving the public rather than themselves.

The current Constitution allows Council members to remove a colleague from office, but does not provide for pro-tempore replacements. If the Chairman is removed, the Vice-Chairman should automatically assume Chairmanship until a new election can be held. The Chairman should have the power to appoint a temporary replacement for Vice-Chairman, and the runner-up vote

getter in Council elections should temporarily replace removed Council members.

III.2. Highlight a Bill of Rights

The 1978 Indian Civil Rights Act guarantees to members of Indian reservations the civil liberties of all U.S. citizens, while the San Carlos Constitution protects the basic freedoms of its citizens. Still, a bill of rights highlighted at the beginning of the Constitution, explicitly listing the freedoms guaranteed to San Carlos citizens, could enlighten both citizens and government officials to individual rights.

Complaints of civil rights violations often come before the Council, but action is rarely taken.⁶ Highlighting a bill of rights in the Constitution would not guarantee an end to civil rights abuses, but could simply increase awareness of civil rights throughout the reservation. As a result, perhaps individuals would more likely carry through on complaints and protect themselves from abusive officials. At the same time, more aware officials might less likely abuse individuals' rights.

IV. Government by the People: Truer Expression of San Carlos Autonomy

"Most minorities in the U.S. want a bigger piece of the American pie," says Steve Titla, staff attorney for the Tribal Council. "We don't want more inclusion. What we want is sovereignty, the ability to determine our own lives."⁷ Unlike most poor people in this country, San Carlos citizens do not see economic development and improved material and physical well-being as ends in themselves. If this were true, many more citizens would likely leave the reservation in search of greater economic opportunity. To the people of San Carlos, economic success provides a means for the preservation of their own society. Autonomy as a people marks the ultimate end for which the tribal government must strive.

The current Constitution, however, expresses not the society which San Carlos citizens wish to preserve, but the society which the federal government agrees to permit. The Constitutions arising on tribal lands after the 1934 Indian Reorganization Act appear extremely similar, and were based on models provided by BIA officials.⁸ Generally, federal bureaucrats in the 1930's saw tribes as devoid of government, and felt it their responsibility to teach democracy to Indians.⁹ Out of this ignorance and close-mindedness came the form of government that still presides over the San Carlos people. The time has come for San Carlos citizens to choose their own system of government, and to exercise greater autonomy over the affairs of the reservation. The following suggestions seek to move San Carlos towards autonomy and self-determination.

IV.o. Define Clearly the Limits of BIA Supervision

Although federal law requires the Secretary of Interior's approval for

certain ordinances and constitutional amendments, the tribe need not go through the cumbersome process of federal approval for all change it wishes to implement. A federal court recently outlined the limits of supervisory responsibility for the BIA in a case involving a New Mexico tribe. Tribal attorneys should use this case as a reference for specifying the limits of BIA approval required under federal law. The tribe can then list these limits in its reformed Constitution. The tribe might currently be surrendering autonomy to the BIA in areas it legally controls, and by defining the limits of federal jurisdiction, the new Constitution can guide the tribal government towards independent action.

IV.1. Expand the Jurisdiction of Tribal Courts

In two areas, the lack of tribal autonomy denies justice to citizens of the reservation. Civil disputes between a tribe member and a non-member occurring on the reservation can only be settled with the consent of the non-member. Since non-members rarely give such consent, tribal courts are often stripped of the ability to define justice on the reservation. By removing the consent stipulation for non-members from the Constitution, disputes on the reservation will be forced to fall under tribal justice. The tribe currently cooperates with the state of Arizona by forcing tribal members to appear before Arizona courts in off-reservation disputes. For on-reservation disputes, the tribe should expect similar cooperation from Arizona.

Perhaps more seriously than civil disputes, tribal courts have no jurisdiction over felonies occurring on the reservation. Federal prosecutors are responsible for investigating and trying felony suspects, but for a variety of reasons often ignore reservation cases. As a result, felony crimes on the reservation generally go unsettled and unpunished.¹⁰ The new Constitution should claim for tribal judges jurisdiction over felonies on the reservation. This

provision would conflict with the Federal Major Crimes Act, but this act arises from a nineteenth century U.S. Congress. By lobbying Congress or by pursuing legislation through the Supreme Court, the tribe should fight this outdated mentality to gain sovereignty over a vital issue.

IV.2. Call for a New Constitutional Convention

This suggestion should be set apart from the others in this report, because it deals more with a process for change than with actual substantive changes. All previous suggestions have offered potential methods of improving the current Constitution. This proposal calls into question the legitimacy of the current Constitution, and suggests that the San Carlos people might wish to create an entirely new document.

If the tribe truly pursues self-determination, it must first define the society it wishes to preserve. A Constitution does not serve merely as a list of laws or an operating manual for government. A free people's Constitution expresses the ideal society within which people agree to live. To truly express the people's vision, the Constitution must come from the people.

Although a slight majority of tribal citizens ratified the current Constitution, they essentially agreed to establish a system of government envisioned for them by federal bureaucrats. As a first step towards sovereignty, the San Carlos people should now work to define their own ideal governmental system through a Constitutional Convention.

The convention could take a number of forms. Citizens could elect representatives to the convention, either by district or across the reservation. These representatives would then meet, negotiate, and eventually offer a document to the people for ratification. Alternatively, the new Constitution could

be created amendment by amendment, through popular initiative and majority vote. The convention could also incorporate some compromise between popular representation and straight popular decision-making.

A convention of any form promises to be a cumbersome, lengthy process. Should the tribe decide to call for a Constitutional Convention, it might choose that form which minimizes the time and effort required for the process. If the citizenry fails to take interest in the convention, it will simply waste the tribe's time and energy.

Ideally, a Constitutional Convention would serve two primary needs. First, it would allow and demand the citizenry to envision its ideal government. The political apathy that generally pervades the reservation could be replaced by a motivated citizenry determining its own future. Second, the Constitution arising from a new convention would legitimately express the ideal society of the San Carlos people, not the paternalism of the United States government. This new document would act as a powerful declaration of San Carlos sovereignty.

Conclusion

In evaluating the worth of this analysis and its suggestions, the tribe must remember that it comes from an outsider. I have no knowledge or understanding of the traditions, culture, and way of life which form the history of the San Carlos people. At their root, however, these recommendations attempt to shift responsibility for government from outsiders or a few tribe members to the citizenry as a whole. To preserve and improve their society, the San Carlos people must actively participate in their tribal government. Any positive reform in the Constitution, whether it comes from outside or within the reservation, should strive to encourage an activist citizenry.

Footnotes

- 1 Interview with James Dehaas, Tribal Operations Director, San Carlos Branch of the United States Bureau of Indian Affairs, San Carlos, Arizona, May 3, 1989.
- 2 Interview with Ernest Victor, Jr., San Carlos, Arizona, May 3, 1989.
- 3 Purkey, Andrew, "The Crow Tribal Government and Economic Development." (The Harvard Project on American Indian Economic Development, Cambridge, MA, 1988).
- 4 Article V, Section O, Amended Constitution and Bylaws of the San Carlos Apache Tribe of Arizona, Effective February 24, 1954.
- 5 Presentation before the San Carlos Tribal Council, May 2, 1989.
- 6 Interview with Steve Titla, Staff Attorney for San Carlos Tribal Council, San Carlos, Arizona, May 1, 1989.
- 7 Interview with Steve Titla, San Carlos, Arizona, May 1, 1989.
- 8 Interview with James Dehaas, San Carlos, Arizona, May 3, 1989.
- 9 Deloria, Jr., Vine & Clifford Lytle, The Nations Within : The Past and Future of American Indian Sovereignty. (Pantheon Books, New York, New York, 1984), Chapter 3.
- 10 Interviews with Steve Titla, May 1, 1989 and James Dehaas, May 3, 1989, San Carlos, Arizona.

Bibliography

- Dehaas, James, Tribal Operations Director, Bureau of Indian Affairs, San Carlos Branch. Interview with, San Carlos, Arizona, May 3, 1989.
- Deloria, Jr., Vine & Clifford Lytle, The Nations Within : The Past and Future of American Indian Sovereignty. Pantheon Books, New York, New York, 1984.
- Kitcheyan, Buck, Chairman, San Carlos Tribal Council. Interview with, San Carlos, Arizona, May 3, 1989.
- Purkey, Andrew. "The Crow Tribal Government and Economic Development", The Harvard Project on American Indian Economic Development, Cambridge, MA, 1988.
- Titla, Steve, Staff Attorney for San Carlos Tribal Council. Interview with, San Carlos, Arizona, May 1-3, 1989.
- San Carlos Apache Tribe of Arizona. Amended Constitution and Bylaws. 1954.
- San Carlos Apache Tribe of Arizona. Corporate Charter. 1934.
- Victor, Jr., Ernest, Council Member, San Carlos Tribal Council. Interview with, May 1 & 3, 1989.