

## MEMO

To: Sault Tribe Members

From: Sault Tribe Legal Department

RE: Pro and Con of Separation of Power – Constitutional Reform

### For Public Release

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#### Introduction

The Board of Directors through Resolution 2025-164 has requested the Legal Department to create a Pro and Con list of each type of separation of powers and a draft Survey for Board approval to send to the membership. Included with this memo is a survey asking you, as a tribal member, to vote on the type of separation of powers you would want in a constitutional amendment. The Board of Directors will use the data gathered from the surveys to guide the next steps toward constitutional reform of the Sault Tribe Constitution.

A successful separation of powers requires that each branch of government be permitted to exercise its duties without undue interference from the other branches of government. There is a fine line between creating successful checks and balances and creating a system that gets bogged down by the separate branches playing politics with each other. It is important for the Tribe and its citizens to thoroughly analyze the different ways to structure its government for the benefit of an efficient government and one that works for its citizens and not against it. This list is not exhaustive and Tribal Members are encouraged to do their own research to make the most informed decisions.

#### Branches of Government

The following will be a Pro and Con list of the current One Branch Government, a Two Branch Government and a Three Branch Government.

**One Branch Government (Board of Directors):** This is a government structure comprised of a single entity that writes, interprets, and enforces the law. The single branch government can delegate as little or as much authority as it wants, but ultimately inherently retains the power to control all aspects of government. There are little to no checks and balances on the one branch government with the Referendum process being the only way for citizens to challenge the government's actions.

- **Pros:**

- Can be an efficient form of Government. Creates a simple and rather streamlined process to governing where the Board of Directors has complete control over the direction of the Tribe and its entities.
- Clear expectations and authority. The Board of Directors is at the top of the Tribe and its various entities and dictates law and policy. No authority is conferred except through Board action.
- Works with the current Tribal Code.
- Current Tribal Budget would remain more or less the same.

- **Cons:**
  - Power is concentrated with the Board and no other entity or individual can assert authority except as delegated to the Board.
  - No reason to give up the political power.
  - Micromanagement of Tribe inevitable.
  - No Check or Balance.
  - No independent Judiciary.
  - With Board Member turn over comes the possible rescinding of policies and law.
  - Any separation of power is be done through tribal code which can be more easily changed by a later Board.

**Two Branch Government (Legislative and Judicial):** This is a government structure comprised of two independent government entities. One is the Legislature that writes, enforces and implements the law. The second is the Judicial that interprets the law. Each branch is able to provide a check and balance so no single branch retains all the power. Independent Judicial branch provides way for citizens to challenge the government's actions.

- **Pros:**
  - Separate Judiciary creates a Check and Balance on the Board's actions.
  - The understanding that an independent Judiciary keeps a check on the legislative branch encourages negotiation and compromise which can lead to more balanced and inclusive policies and laws.
  - Encourages more careful consideration of law and policy to limit potential legal opposition in the courts which leads to a more transparent and accountable government.
    - More transparency and accountability can foster more trust
  - Clear Responsibilities of each branch keeps each branch in its lane.
  - Tribal Members have avenues of potential recourse for Board malfeasance
    - Protects Tribal Citizen rights
    - Tribal Members can seek redress when rights are violated or laws violate the constitution
    - Better Due Process and Access to Justice for Tribal Members
  - Judicial Independence can insulate the Justice System from the Politics of the Legislative Branch.
  - Prevents a single concentration of power in one branch.
  - More Balanced Government.
  - Creates a more long-term stable government by potentially preventing rapid extreme policy shifts and code changes.
  - Likely that the amount of code changes necessary to be consistent with new constitution would be minimal.
- **Cons:**
  - Judicial Activism.
    - Politics can creep into the Court System
    - Judicial Overreach where courts start exercising excessive influence over policy
  - Friction between Legislative and Judicial Branch.
    - Legislative Branch can defund the Court

- Legislative Branch will change laws to get around Judicial Rulings.
    - Can create inefficient cat and mouse games.
- Judicial Inefficiencies
  - Backlogs or delays can hinder efficient governance as things get bogged down in multiple court proceedings.
- The potential threat of lawsuits on actions of the legislative Branch can lead to gridlock with a Board unwilling or unable to reach agreement.
  - This decision paralysis can lead to a stagnant government
- Cost will increase compared to 1 branch government
  - More Lawsuits means more legal costs
  - Will need to increase staff across the government side and the courts
  - Will need to increase attorney capacity
  - More costs on litigation could negatively impact membership services

**Three Branch Government (Executive, Legislative, Judicial):** This is a government structure comprised of three independent government entities. One is the Legislature that writes the law. The second is the Judicial that interprets the law. The Third is the Executive Branch that enforces and implements the law. Each branch is able to provide a check and balance so no single branch retains all the power. Independent Executive Branch provides a check against the legislature and can veto actions. Independent Legislature provides a check against overreach of the Executive or the Courts. Independent Judicial branch provides way for citizens to challenge both the legislature and the executive's actions.

- **Pros:**
  - Prevents abuse/concentration of power by distributing authority
  - Clear Responsibilities of each branch keeps each branch in its lane.
  - Each Branch specializes in its function instead of trying to be all functions. Legislative focuses on law and policy; executive focuses on administration and enforcement; judiciary focuses on interpreting laws.
  - Increased Accountability and transparency foster more trust and confidence in the system
  - The understanding that there are multiple checks and balances encourages negotiation and compromise which can lead to more balanced and inclusive policies.
  - Encourages more careful consideration of law and policy by the legislature to limit potential legal opposition in the courts which leads to a more transparent and accountable government.
  - Encourages more careful implementation of law and policy by the executive branch to limit potential political and legal opposition in the legislature and courts which leads to a more transparent and accountable government.
  - Distribution of Power increases accountability
  - No single branch can dominate decision-making
  - Can foster more collaboration between Legislative and Executive to find common ground
  - Independent Judiciary
    - Tribal Members have avenues of potential recourse for Board malfeasance
    - Protects Tribal Citizen rights

- Tribal Members can seek redress when rights are violated or laws violate the constitution
    - Better Due Process and Access to Justice for Tribal Members
    - Judicial Independence can insulate the Justice System from the Politics of the Legislative Branch.
  - Executive Branch can run the Day to Day of the Tribal Government to reduce micro-management from the Legislative Branch.
    - Allows the Legislative Branch to focus solely on law and policy decisions.
- **Cons:**
  - Can lead to an inefficient Government
    - Three branches create a slower process where each branch can slow the other down, sometimes unnecessarily.
    - Creates Political Gridlock more than a one or two branch government especially if the Executive Branch and Legislative Branch are at odds.
    - Government can be bogged down by lawsuits, vetoes, judicial decisions at odds with legislative intent.
    - Innovation and change may be stifled for fear of lawsuits, vetoes, or judicial activism.
  - Each branch constantly checking the others can create friction
    - This friction leads to more lawsuits, more vetoes, more judicial activism.
    - Power Imbalances if one branch is consistently overstepping its power.
    - Tribes with three branches have seen a large increase in lawsuits brought both by tribal members and lawsuits brought by executive branch vs legislative branch especially in the beginning of separation.
  - Complexity in Coordination between the three branches where each branch has its own priorities and agendas may lead to inefficient government.
  - Cost will increase the most compared to a 1 or 2 branch government
    - Even More Lawsuits means more legal costs
    - Will need to increase staff across the government side and the courts.
    - Will need to increase attorney capacity
      - Most Tribes that have the three branches have a legislative attorney for the legislative branch and a General Counsel for the Executive branch (rest of government departments).
    - Each branch has its own staff, bureaucracy, and infrastructure which can lead to much higher costs.
    - Drastically Increased Election Costs if more and more positions are elected positions.
  - Can create blurred accountability where tribal members are unable to hold the government accountable for its actions leading to less transparency
    - Each branch can blame the other for failures or problems and can make it difficult for members to hold government accountable.
  - Legislative Branch tries to manage the Executive branch through the budget process
    - Placing conditions on funds appropriation, funds use, or actually reducing funding.
  - Much bigger overhaul of current Tribal Codes needed to make sure compliance and consistency with new constitution.