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## NOTE

### THE OKLAHOMA GOVERNOR AND EXECUTIVE BRANCH: THE POTENTIAL IMPACT OF POLICY CHOICES BY THE 2019 LEGISLATURE

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#### I. INTRODUCTION: THE ORIGINS AND FORM OF OKLAHOMA'S PLURAL EXECUTIVE

Plainly stated, Oklahoma's Executive Branch is weak compared to other states. But in 2019, a complement of bills was signed into law that caused people in the know to prick up their ears. These bills altered the appointment structure of several state agencies in a couple of ways. First, they vested the Governor with the power to appoint the majority of members of the governing bodies of these state agencies. Second, they took the power to appoint the executive officer of each agency from the

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governing body of the agencies and vested it in the Governor. These bills represent a significant departure from Oklahoma's typically fractious method of structuring its executive entities—a theory that some call the plural or unbundled executive.

In Part I of this Note, we will examine the origins and present form of Oklahoma's Executive Branch. In Part II, we will look at a few other states whose Executive Branches reflect a more unitary system. From Part II onward, comparisons will be made between Oklahoma and states with more unitary executive systems. In Part III, we will familiarize ourselves with the basics of two competing theories of executive power that have already been alluded to: the unitary theory of executive power and the theory of unbundled executive power. We will identify the elements of each theory present in the discussed states along the way. In Part IV, we will review the “notable” pieces of legislation that spurred the writing of this Note and discuss their features. Finally, in Part V, we will explore the possibility of using similar legislation to move Oklahoma toward a more unitary executive system like those that other states currently possess.

#### *A. Brief Account of Oklahoma's Formation*

The State of Oklahoma (as any ninth-grade student enrolled in an Oklahoma public school should be able to tell you) is the product of a union between a number of distinct territories: the Indian Territory in the east, the Unassigned Lands in what would become central Oklahoma, the Oklahoma territory in the west, and the Neutral Strip (which would become the Oklahoma panhandle).<sup>1</sup> The area that became the State of Oklahoma had been inhabited or otherwise used by the Caddo, Osage, Wichita, and other native nations since time immemorial.<sup>2</sup> These nations formed complex systems of government, most of which looked very different from governments common to Western societies.<sup>3</sup> That began to

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1. See ROY GITTINGER, *THE FORMATION OF THE STATE OF OKLAHOMA: 1803-1906* (1917). For a more recent treatment of Oklahoma's formation which draws largely on earlier sources, see KATHY JEKEL, *THE ORIGINAL CONSTITUTION OF THE STATE OF OKLAHOMA 1907 & THE ROAD TO STATEHOOD* (2007).

2. *Removal of Tribes to Oklahoma*, OKLA. HIST. SOC'Y, <https://www.okhistory.org/research/airemoval#:~:text=1830%20The%20Indian%20Removal%20Act,Tribes%20to%20be%20forcibly%20removed>. (last visited Mar. 6, 2021); See also *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (identifying Native American nations as the “undisputed possessors of the soil, from time immemorial”).

3. See MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* 1-18 (2d ed. 2020).

change in the early part of the nineteenth century; for example, in 1827 the Cherokee Nation enacted a constitution that provided for an elected executive and a bicameral legislature.<sup>4</sup> It was during this time that the United States began the process of removal, whereby native nations were forcibly deprived of their land and relocated farther west.<sup>5</sup> Thus, Western-style government arrived in what would become Oklahoma.<sup>6</sup>

In the wake of the Civil War, the United States resolved to organize proto-Oklahoma into territories.<sup>7</sup> To that end, the federal government coerced the native nations residing in the area to accept treaty provisions acknowledging the right of Congress to legislate for the organization of a territorial government.<sup>8</sup> Treaties made with the Five Tribes in particular contained provisions in which said tribes agreed to the creation of an inter-tribal council.<sup>9</sup> This council would regulate relations among individual tribes and between all of the tribes and non-native persons who resided in the area, and could exercise such other powers consented to by the tribes and approved of by the President of the United States.<sup>10</sup> The inter-tribal council was to have a president appointed by the federal government, and who, in the treaties between the United States and the Chickasaw and Choctaw Nations, was styled as the “governor of the Territory of Oklahoma.”<sup>11</sup> Though this governmental entity was intended to help prepare the area for incorporation as a territory of the United States, it actually became a platform to oppose that goal.<sup>12</sup>

Despite the strenuous objections of the Five Tribes, Congress passed the Oklahoma Organic Act on May 2, 1890.<sup>13</sup> About a year and a half later,

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4. Will Chavez, *1939 Cherokee Constitution Born From Act of Union*, CHEROKEE PHOENIX, Aug. 26, 2014, [https://www.cherokeephoenix.org/news/1839-choerokee-constitution-born-from-act-of-union/article\\_5621e3f8-f65c-5990-8af2-c889b21b0abc.html#:~:text=On%20July%2012%2C%201839%2C%20a,both%20of%20the%20tribal%20organizations](https://www.cherokeephoenix.org/news/1839-choerokee-constitution-born-from-act-of-union/article_5621e3f8-f65c-5990-8af2-c889b21b0abc.html#:~:text=On%20July%2012%2C%201839%2C%20a,both%20of%20the%20tribal%20organizations) (last visited Mar. 6, 2021).

5. See DAVID L. GETCHES ET AL., *FEDERAL INDIAN LAW* 116-53 (7th ed. 2017).

6. JEKEL, *supra* note 1, at 3 (citing ALBERT H. ELLIS, *A HISTORY OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OKLAHOMA* 5 (1923)).

7. *Id.*

8. *Id.*

9. *Id.*; see also GITTINGER, *supra* note 1, at 83-84.

10. GITTINGER, *supra* note 1, at 84.

11. *Id.*

12. *Id.* at 85.

13. Oklahoma Organic Act, ch. 182, 26 Stat. 81 (1890) (“An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes.”).

the first meeting calling for statehood was held in Oklahoma City.<sup>14</sup> At that point, proto-Oklahoma was divided roughly in two. Relying on modern landmarks as points of reference, imagine drawing a line from the northeast corner of the State of Oklahoma, through Tulsa, Oklahoma City, and to Frederick in the southwest corner. Roughly everything to the west of that line, including the panhandle, was the Oklahoma Territory. Roughly everything to the east of that line was the so-called, but never formally organized, Indian Territory.<sup>15</sup> Calls for statehood began to take one of two forms: the first advocating for statehood for the Oklahoma Territory and Indian Territory individually, and the second advocating for the creation of a unitary state from both territories.<sup>16</sup>

The federal government had long puzzled over how best to deal with the “Indian problem,” and it was thought that removal would be the solution.<sup>17</sup> But with an ever-increasing demand for land, reserving certain lands for the communal use of native nations fell out of fashion.<sup>18</sup> As the policy of creating reservations wound down, the federal government looked to assimilation as the next method for dealing with native nations.<sup>19</sup> As early as 1853, the Bureau of Indian Affairs began the practice of proposing allotment provisions in treaty negotiations, and shortly thereafter Congress began to legislate allotments.<sup>20</sup> Allotment had the effect of taking title of reservation lands, breaking it up, and distributing parcels to individuals.<sup>21</sup> Of course, it also had the incidental (or, more likely, ulterior) effect of opening remaining unallotted reservation land for settlement by non-native persons.<sup>22</sup> In 1887, President Grover Cleveland signed the General Allotment Act (“GAA”) into law.<sup>23</sup> Rather than continue to manage allotment policy piecemeal, Congress provided the President with the power to allot the land of any tribe when he thought it would be in the tribe’s best interest.<sup>24</sup>

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14. JEKEL, *supra* note 1, at 5.

15. *Id.* at 4. See *id.* at 5 for a map that details what I have attempted to describe.

16. *Id.* at 5; see also GITTINGER, *supra* note 1, at 196-214.

17. GETCHES ET. AL., *supra* note 5, at 116.

18. *Id.* at 194.

19. See *id.* at 214-16.

20. *Id.* at 194.

21. *Id.*

22. *Id.*

23. *Id.*; GITTINGER, *supra* note 1, at 140.

24. General Allotment (Dawes) Act of 1887, 25 U.S.C. § 1331 (repealed by Pub. L. No. 106-462, § 106(a)(1), 114 Stat. 2007 (2007)); see also GITTINGER, *supra* note 1, at 140-41.

The GAA was drafted to exclude the Five Tribes (among others) from its applicability.<sup>25</sup> The Five Tribes were rightfully “bitterly opposed to any change in their organization.”<sup>26</sup> Unfortunately, the Five Tribes’ exclusion from the GAA did not translate to sustained integrity of their lands in Indian Territory. Unpermitted non-native persons flocked to lands held by the Five Tribes.<sup>27</sup> Demand for land continued to climb, and in 1893 a rider was attached to an appropriations bill establishing an executive commission that would be named for Senator Henry L. Dawes.<sup>28</sup>

The now infamous Dawes Commission was tasked initially with negotiating with the Five Tribes for the purposes of terminating their governments and allotting their lands.<sup>29</sup> It became the dubious opinion of the Commission that “the tribal governments and all their branches were ‘wholly corrupt, irresponsible, and unworthy to be trusted,’” and the Commission reached the conclusion that it was “the imperative duty of Congress to assume at once political control of the Indian Territory.”<sup>30</sup> Congress listened, and in 1898 passed the Curtis Act.<sup>31</sup> The Curtis Act authorized the Dawes Commission to proceed with the allotment of the Five Tribes’ land,<sup>32</sup> and “tribal courts were abolished, and all cases were transferred to the United States courts. Tribal laws were done away with, and the Indians were brought under the laws of the United States.”<sup>33</sup> Three years later, in 1901, Congress made all native persons residing in Indian Territory citizens of the United States.<sup>34</sup>

It was then inevitable that Indian Territory, though still technically unorganized and nominally under the control of the governments of the Five Tribes and others, would be admitted to the Union along with the Oklahoma Territory. The precise nature of that admission remained in flux.<sup>35</sup> A detachment of the Senate Committee on Territories began a tour of several territories beginning in November of 1902.<sup>36</sup> At one of their

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25. GITTINGER, *supra* note 1, at 140.

26. *Id.*

27. *Id.* at 176-77.

28. JEKEL, *supra* note 1, at 5-7.

29. *Id.* at 7.

30. GITTINGER, *supra* note 1, at 190 (quoting DAWES COMMISSION, REPORT OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES FOR 1895 78 (1895)).

31. Act of June 28, 1898, ch. 517, 30 Stat. 495 (“Curtis Act”).

32. *Id.* at 497; *see also* GITTINGER, *supra* note 1, at 191-92.

33. GITTINGER, *supra* note 1, at 191.

34. *Id.* at 194 (citing Act of Mar. 3, 1901, ch. 868, 31 Stat. 1447).

35. *See id.* at 196-207; *see also* JEKEL, *supra* note 1, at 7-8.

36. AMOS D. MAXWELL, THE SEQUOYAH CONSTITUTIONAL CONVENTION 32 (1952).

stops in the Oklahoma Territory, the committee took testimony from groups representing towns in both the Oklahoma Territory and the Indian Territory.<sup>37</sup> Nearly all of the testimony heard by the committee was in favor of admission of both Oklahoma Territory and Indian Territory as a single state.<sup>38</sup> This was contrary to the wishes of the Five Tribes, the leaders of which took up the banner of separate statehood for the Oklahoma and Indian Territories.<sup>39</sup> On July 18, 1905, chief executives (or their designees) of four out of the Five Tribes met in Muskogee, and formalized a plan to appoint delegates to attend a convention calling for separate statehood for the Indian Territory; the only one not present, Chief John F. Brown of the Seminole Nation, sent a dispatch indicating his wish to further separate statehood.<sup>40</sup> The stage had been set for what would later come to be known as the Sequoyah Constitutional Convention.

*B. The Executive as Envisioned by the Sequoyah Constitutional Convention*

The Sequoyah Constitutional Convention opened August 21, 1905.<sup>41</sup> It remained in session until September 8 of that year.<sup>42</sup> It was attended by many of the big personalities of the day, including General Pleasant Porter, Charles N. Haskell, and William H. "Alfalfa Bill" Murray (who would become the first Governor of the State of Oklahoma).<sup>43</sup> Debate and discourse became contentious at times, but by the time the convention adjourned, the delegates had a finished product to propose to the residents of the Indian Territory.<sup>44</sup>

The Sequoyah Constitution's section on the Executive is found in Article IV.<sup>45</sup> But before that, in Article II, entitled "Distribution of

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37. *Id.* (citing, inter alia, *The Senators in Oklahoma*, THE DAILY OKLAHOMAN, November 25, 1902, at 1).

38. *Id.*

39. *Id.* at 33; see also GITTINGER, *supra* note 1, at 207-09; JEKEL, *supra* note 1, at 9.

40. MAXWELL, *supra* note 36, at 51-52.

41. *Id.* at 62.

42. *Id.* at 89.

43. See *id.* at 62-88. Maxwell cites extensively to articles published in the Muskogee Phoenix in this section. Those especially interested in browsing primary sources may wish to access the archives of the paper and view the articles published for the months of August and September of 1905.

44. *Id.* at 62-88.

45. SEQUOYAH CONST. art. IV.

Powers” and consisting of a single section, appears the following language:

The powers of the government shall be divided into three distinct departments—The Legislative, the Executive and the Judicial—each of which shall be confined to a separate magistracy, and no person or collection of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly authorized.<sup>46</sup>

The placement of Article II intimates an important sentiment of the drafters of the Sequoyah Constitution: suspicion toward the exercise of governmental power by governmental entities lacking the enumerated authority to exercise that power.

Turning back to Article IV, it is immediately apparent that the drafters of the Sequoyah Constitution envisioned a plural executive. Unlike the Constitution of the United States’ Article II, which leads off with the notorious Vesting Clause,<sup>47</sup> the Sequoyah Constitution’s Article IV begins by naming the chief officers of the Executive Department.<sup>48</sup> Those officers were the “Governor, Secretary of State, Attorney General, Treasurer of State, Auditor of State, and Superintendent of Public Instruction.”<sup>49</sup> The term of each of these offices was four years; interestingly, however, a proviso at the end of the section made these officers ineligible for reelection “for the next succeeding term.”<sup>50</sup> Only after laying out the blueprint for a plural Executive Department did the drafters include a Vesting Clause, using language similar to Article II of the U.S. Constitution.<sup>51</sup> The drafters then made provision for the election of the named officers, and vested the power to break ties in the legislature by majority vote of the total membership of the legislature.<sup>52</sup> Populist sentiment reemerges in the next section, which gave “exclusive

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46. *Id.* art. II.

47. U.S. CONST. art. II, § 1, cl. 1.

48. SEQUOYAH CONST. art. IV, § 1.

49. *Id.*

50. *Id.*

51. *Compare id.* art. IV, § 2, with U.S. CONST., art. II, § 1, cl. 1.

52. *Id.* art. IV, § 3.

jurisdiction” to try contested elections for Executive Department offices to the legislature sitting in joint session.<sup>53</sup>

In the sections that followed, the drafters: provided a minimum age for the office of Governor; made the Governor the commander-in-chief of the armed forces of the state; included a clause permitting the Governor to require reports from the other Executive Department officers; mandated state-of-the-state reports from the Governor to the General Assembly; provided for a line of succession to the office of Governor; and addressed sundry other matters such as presentment of legislation.<sup>54</sup> Language more characteristic of a stronger executive appears in section 17; it confers on the Governor a line-item veto subject to legislative override.<sup>55</sup> The pendulum swings back toward a plural executive in the following section 18, however, which initially vests the pardon power in the Governor, but subjects it to modification at the behest of the legislature.<sup>56</sup> And it swings back again in permitting the Governor to fill vacancies in offices by granting commissions when other methods are not provided for.<sup>57</sup>

The election to ratify the Sequoyah Constitution was held on November 7, 1905.<sup>58</sup> On November 18, the “Supreme Election Board” certified the results as 56,279 votes in favor of ratification, and 9,073 opposed to ratification.<sup>59</sup> Unfortunately, despite the thoroughness of the Sequoyah Constitution, Congress expressed nearly no interest in admitting Sequoyah to the Union. When the Fifty-Ninth Congress convened the following spring, four bills were submitted affecting the admission of the Oklahoma and Indian Territories; only one of the four called for the admission of the State of Sequoyah.<sup>60</sup> The day after the bill was introduced, President Theodore Roosevelt delivered the annual State of the Union address and expressed his view that the Oklahoma and Indian Territories should be admitted as one state.<sup>61</sup>

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53. *Id.* art. IV, § 4.

54. *Id.* art. IV, §§ 5-16.

55. *Id.* art. IV, § 17.

56. *Id.* art. IV, § 18.

57. *Id.* art. IV, §§ 23-24.

58. MAXWELL, *supra* note 36, at 101.

59. *Id.* at 102.

60. *Id.* at 103.

61. *Id.* at 104 (citing 10 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 7400 (1913)).



*C. The Oklahoma Constitutional Convention and its Product*

January of 1906 saw the House of Representatives pass what would become the Enabling Act of 1906.<sup>62</sup> After some light amendment in the Senate, President Roosevelt approved the bill on June 16, 1906.<sup>63</sup> Elections for delegates were to be held on November 6, 1906.<sup>64</sup> A contest was already brewing between the Democratic and Republican parties for who would dominate the convention. The Sequoyah Constitutional Convention had largely been a Democratic affair, while the then-Governor of the Oklahoma Territory, Frank Frantz, was a staunch Republican.<sup>65</sup> The Republican Party also controlled both houses of Congress and the Presidency.<sup>66</sup>

Unfortunately for the Republicans, the fervor of the Sequoyah Convention had not died down. Actors of the Sequoyah Convention and a number of labor organizations used the channels left over from the Sequoyah Convention to animate the “skeletal Democratic organization and establish their primacy within the party.”<sup>67</sup> The Democrats swept the delegate election: out of 112 available seats, Democrats would occupy 99, Republicans would hold 12, and a single Independent was thrown in the mix.<sup>68</sup> Of the 99 Democrats, 34 had attended the Sequoyah Convention.<sup>69</sup> This began an epoch of Democratic control in Oklahoma that would not truly come to an end until after the turn of the twenty-first century.

The two parties had very different visions of what the Oklahoma Constitution would look like:

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62. JEKEL, *supra* note 1, at 11.

63. *Id.*; *see also* Oklahoma Enabling Act of 1906, Ch. 3335, 34 Stat. 267 (“An Act To enable the people of Oklahoma and of the Indian Territory to form a constitution and State government and be admitted into the Union on an equal footing with the original States; and to enable the people of New Mexico and of Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original States.”).

64. ALBERT H. ELLIS, *A HISTORY OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OKLAHOMA* 39 (1923); *see also* IRVIN HURST, *THE 46TH STAR: A HISTORY OF OKLAHOMA’S CONSTITUTIONAL CONVENTION AND EARLY STATEHOOD* 3 (1957).

65. HURST, *supra* note 64, at 2-3.

66. ELLIS, *supra* note 64, at 40.

67. DANNEY GOBLE, *PROGRESSIVE OKLAHOMA: THE MAKING OF A NEW KIND OF STATE* 193 (1946); *see also* JEKEL, *supra* note 1, at 13.

68. JEKEL, *supra* note 1, at 13.

69. *Id.* at 13 (citing HURST, *supra* note 64, at 4).

The Democrats demanding a progressive Constitution that would protect the individual and give the people a larger share in the State government; while the Republicans were the advocates of a short Constitution along regular conservative lines, that would minimize the part the individual would have in State government, and place many safeguards about the rights of corporate property; leaving much latitude to the Legislature and much to the discretion of the Courts.<sup>70</sup>

The progressive vision prevailed and gave rise to the first iteration of the Constitution of the State of Oklahoma. Offering a full account of that sprawling document is beyond the scope of this Note. We are mainly concerned with Article VI of the Oklahoma Constitution—the Executive Department.

Like the Sequoyah Constitution, the original Oklahoma Constitution contains a distribution of powers provision—the phrasing differs, but the idea that the three distinct branches of government should not exercise each other’s powers remains the same.<sup>71</sup> Also like the Sequoyah Constitution, the Article dealing with the Executive Department begins by listing the officers to hold Executive power.<sup>72</sup> These are the Governor, Lieutenant Governor, Secretary of State, State Auditor (later merged with the State Examiner and Inspector), Attorney General, State Treasurer, Superintendent of Public Instruction, State Examiner and Inspector, Chief Mine Inspector, Commissioner of Labor, and Commissioner of Charities and Corrections (later abolished), Commissioner of Insurance, among other officers established elsewhere in the Constitution and by law.<sup>73</sup> The number of named executive officers doubled from the Sequoyah Constitution to the original Oklahoma Constitution, making it readily apparent that the idea of a plural executive carried over from the Sequoyah Constitutional Convention.

Immediately following the list of executive officers is a Vesting Clause, which provides that the Governor shall be the “Chief Magistrate.”<sup>74</sup> Like the Sequoyah Constitution, the Oklahoma

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70. ELLIS, *supra* note 64, at 40.

71. OKLA. CONST. art. IV, § 1.

72. *Id.* art. VI, § 1 (amended 1979, 1986, and 1988).

73. *Id.*

74. *Id.* art. VI, § 2.

Constitution gives the Governor a line-item veto.<sup>75</sup> Also like the Sequoyah Constitution, the Oklahoma Constitution gave the Governor pardon power subject to modification by law.<sup>76</sup> That provision has been subject to much amendment, however, and the Governor now shares the pardon power with a Pardon and Parole Board.<sup>77</sup> And finally, like the Sequoyah Constitution, the Oklahoma Constitution permits the Governor to fill vacant offices when other methods are not provided for.<sup>78</sup> After some commotion regarding the adoption of the Oklahoma Constitution, President Roosevelt issued an executive proclamation formally welcoming the State of Oklahoma into the Union on November 16, 1907.<sup>79</sup>

#### *D. The Present Form of Oklahoma's Executive*

Of course, the enumerated executive officers would be unable to administer the functions of the state without assistance. Since the advent of the modern administrative state,<sup>80</sup> executive branches have evolved at a break-neck speed. Oklahoma's Executive Branch has not been an exception. There are no constitutional restrictions on the size and shape of Oklahoma's Executive Branch unlike some other states, which we will discuss later. In fact, there are many constitutionally mandated executive entities. According to one publication by the Oklahoma Department of Libraries, there are almost 200 executive entities in the State of Oklahoma.<sup>81</sup> In this Note, we will focus primarily on how the members of their administration are sourced, and more specifically how much control the Governor has over their selection. For the purposes of this Note, "administration" refers to the governing body (or person) of an executive entity. Administrative members are chosen in several ways: 1) they are appointed by the Governor; 2) they are appointed by some other official or entity; 3) they are designated as a member by law or by virtue of holding some other office ("ex officio"); or 4) they are elected. Note well that

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75. *Id.* art. VI, § 12.

76. *Id.* art. VI, § 10 (amended 1943, 1977, 1985, 1994, and 2012).

77. *Id.*

78. *Id.* art. VI, § 13.

79. JEKEL, *supra* note 1, at 158-163.

80. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

81. See OFF. OF PUB. INFO., OKLA. DEP'T OF LIBR., OKLAHOMA AGENCIES, BOARDS, AND COMMISSIONS: ELECTED OFFICERS, CABINET, LEGISLATURE, HIGH COURTS, AND INSTITUTIONS 57-122 (2021).

gubernatorial appointment is only one of four ways for administrative members to be chosen.

It is also worth noting the variety of ways executive entities are administered in Oklahoma. Each entity is administered in one of three ways: 1) they are controlled by a board (“board-control”); 2) they are controlled by an officer and a board (“split-control”); or 3) they are controlled by an officer only (“officer control”). Of the second “split-control” category, there are two sub-categories: 1) officers designated as officers by the corresponding board (“inside officer”); and 2) officers designated as officers by some other entity or some other source (“outside officer”).

Let’s consider a few examples to illustrate the features discussed above. The Oklahoma Corporation Commission is subject to board-control, being comprised of three Commissioners; these Commissioners are each independently elected.<sup>82</sup> The State Board of Education is subject to split-control with an outside officer, being comprised of six gubernatorial appointees and the Secretary of Education (who is independently elected).<sup>83</sup> The Oklahoma Council on Law Enforcement Education and Training (CLEET) is subject to split-control with an inside officer (an Executive Director) and a thirteen-member board; two members of the board are gubernatorial appointees, three members are ex officio members (or their designees), and the remaining eight members are appointed by other officers or entities.<sup>84</sup> The composition of CLEET’s governing board is a prime example of just how convoluted Oklahoma’s method of structuring its executive entities can be, and we will revisit it in Part V. An example of an executive entity controlled solely by an officer is the Oklahoma Department of Commerce. The Department of Commerce’s governing officer is a director appointed by the Governor.<sup>85</sup>

The most obvious measure of how diffuse state executive power is how much control the state’s governor can exercise over the rest of an executive branch. The most easily quantifiable measure of a governor’s control over the rest of the executive branch is how much sway a governor holds over the selection and retention of administrative members of other executive entities. As we will see, in some other states the governor has substantial power to select administrative members. This is not the case in

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82. OKLA. CONST. art. IX, § 15.

83. *Id.* art. XIII, § 5; OKLA. STAT. tit. 70, § 3-101(A).

84. tit. 70, § 3311(A).

85. tit. 74, § 5003.5(A).

Oklahoma. The attached Appendix contains a selected list of 171 of Oklahoma's executive entities, their textual sources in Oklahoma law, the composition of their governing body, and a statement of whether or not the Governor has "control" over the entity. For the purposes of this Note, "control" means that the Governor appoints the majority of the administrative members of an entity. Of the 171 entities surveyed (which is not exhaustive of all of Oklahoma's executive entities), the Governor enjoys control over eighty-eight entities. The composition of three entities' governing bodies were not specified in their textual sources. The Governor does not appoint the majority of members, and in some cases appoints no members, to the governing body of eighty of the surveyed entities. Based on this information, we see that Oklahoma's Governor enjoys control of barely more than half of the surveyed executive entities.

## II. AN ALTERNATIVE: THE UNITARY STATE EXECUTIVE

As discussed above, Oklahoma's executive entities can have a multiplicity of forms and features, with the Governor exercising substantial, little, or even no control over them. Is the same true in other states? Since Oklahoma's executive power is diffused amongst such a wide variety and number of executive entities, Oklahoma's Executive Branch must necessarily be weaker than states whose executive power is more concentrated. As was discussed above, the measure of a governor's power is a good indicator of how diffuse the state's executive power is—particularly the amount of control a governor can exercise over the rest of the executive branch of a particular state.

A research document offered to the Connecticut General Assembly when that state was considering executive reform in 2005 identified a list of several states thought to have "strong" governors.<sup>86</sup> The following states were selected from that list on the basis of their population and geographic locations as compared to Oklahoma: New York is a Northeastern state with a large population, Michigan is a distant Midwestern state with a moderate population, and Kansas is a proximate Midwestern state with a population smaller than Oklahoma's. The population of each state for the 2020 Census was: 3.96 million for

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86. Gregory Joiner, *Gubernatorial Powers*, OFF. OF LEGIS. RSCH. (May 18, 2000), <https://www.cga.ct.gov/2000/rpt/2000-R-0505.htm>.

Oklahoma,<sup>87</sup> 20.20 million for New York,<sup>88</sup> 10.08 million for Michigan,<sup>89</sup> and 2.94 million for Kansas.<sup>90</sup> In this Part, we will analyze the constitutional provisions governing each state's executive department and compare and contrast the same features of their executive entities as those noted about Oklahoma's executive entities in Part I(C). In doing so, we will draw out the distinctions between a diffuse state Executive like Oklahoma's and more unitary state Executives.

#### A. New York

New York's constitutional provisions governing its Executive are divided into two articles—Articles IV and V.<sup>91</sup> The New York Constitution lacks a distribution of powers section. Unlike Oklahoma, which has a total of thirty “active” (i.e., non-repealed) sections in its Executive Article,<sup>92</sup> New York has a total of fourteen active sections between its two Executive Articles.<sup>93</sup> The constitutionally enumerated executive officers of New York are the Governor, Lieutenant Governor, Comptroller (analogous to Oklahoma's Auditor and Inspector), and Attorney General, all of which are elected.<sup>94</sup> Compare those four to Oklahoma's eleven enumerated executive officers. Like Oklahoma's Governor, the Governor of New York derives their power from a Vesting Clause,<sup>95</sup> and enjoys a line-item veto.<sup>96</sup> Unlike Oklahoma's Governor, the Governor of New York enjoys a pardon power that is largely unqualified.<sup>97</sup> Also unlike Oklahoma's Governor, the Governor of New York does not have a constitutional prerogative to fill vacant offices.

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87. U.S. CENSUS BUR., *QuickFacts – Oklahoma*, <https://www.census.gov/quickfacts/OK> (last visited Apr. 18, 2022).

88. U.S. CENSUS BUR., *QuickFacts – New York*, <https://www.census.gov/quickfacts/fact/table/NY,newyorkcitynewyork/PST045219> (last visited Apr. 18, 2022).

89. U.S. CENSUS BUR., *QuickFacts – Michigan*, <https://www.census.gov/quickfacts/MI> (last visited Apr. 18, 2022).

90. U.S. CENSUS BUR., *QuickFacts – Kansas*, <https://www.census.gov/quickfacts/KS> (last visited Apr. 18, 2022).

91. N.Y. CONST. art. IV, art. V.

92. OKLA. CONST. art. VI.

93. N.Y. CONST. art. IV, art. V.

94. *Id.* art. IV, § 1; *Id.* art. V, § 1.

95. *Id.* art. IV, § 1.

96. *Id.* art. IV, § 7.

97. *Id.* art. IV, § 4. The power is subject to “such regulations as may be provided by law relative to the manner of applying for pardons.” *Id.*

The size of New York's Executive is subject to some constitutional limitations. More specifically, there is a provision in New York's constitution that expressly limits the number of "civil departments" to twenty.<sup>98</sup> According to the New York Division of the Budget, there are currently nineteen departments.<sup>99</sup> Aside from the Department of Audit and Control, the Department of Law, the Department of Education, and the Department of Agriculture and Markets, the Governor of New York enjoys broad power to select and remove "the heads of [] other departments and the members of all boards and commissions."<sup>100</sup> This is in incredibly sharp contrast to Oklahoma's maze of sourcing administrative members of executive entities. In fact, the New York Constitution provides that the only exceptions to this general rule are those specifically enumerated therein.<sup>101</sup> Unlike in Oklahoma (where we like to legislate with our Constitution) the New York Constitution is a relatively brief document. A review of the New York Constitution reveals only three exceptions to the Governor's broad appointment power: 1) the Comptroller is the ex officio head of the Department of Audit and Control; 2) the Attorney General is the ex officio head of the Department of Law; and 3) the Regents of the University of the State of New York as a board is the head of the Department of Education.<sup>102</sup> The Department of Education is subject to board-control with an inside officer (titled the Commissioner of Education) who serves at the pleasure of the Regents.<sup>103</sup> Other than these three exceptions, the Governor of New York enjoys control over nearly all of the New York Executive Branch.

### *B. Michigan*

Michigan's constitution has a distribution of powers section titled "Separation of powers of government."<sup>104</sup> Michigan's executive power is vested in the Governor, subject to some exceptions.<sup>105</sup> Michigan's

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98. *Id.* art. V, § 2.

99. N.Y. DIV. OF THE BUDGET, *State Government Structure*, <https://www.budget.ny.gov/citizen/structure/structure.html> (last visited Apr. 18, 2022).

100. N.Y. CONST. art. V, § 4.

101. *Id.*

102. *Id.*

103. *Id.*

104. MICH. CONST. art. III, § 2.

105. *Id.* art. V, § 1.

constitutional article has thirty active sections.<sup>106</sup> The Governor of Michigan enjoys a line-item veto,<sup>107</sup> a largely unqualified pardon power,<sup>108</sup> and the power to fill vacancies except those occurring in the legislature.<sup>109</sup> The constitutionally enumerated executive officers of Michigan are the Governor, Lieutenant Governor, Secretary of State, and Attorney General, all of which are elected.<sup>110</sup> We see again that a state with a significantly larger population than Oklahoma has approximately a third the number of enumerated executive officers.

Like New York, Michigan has a constitutional limit on the number of departments that may comprise the Executive Branch, which is set at twenty (not counting the offices of the Governor and Lieutenant Governor and the “governing bodies of institutions of higher education”).<sup>111</sup> According to the Michigan state website, there are presently eighteen departments.<sup>112</sup> Michigan has an interesting provision unlike anything in the Oklahoma or New York constitutions: unless otherwise expressly provided for in the Michigan Constitution, the heads of all departments are required to be single officers.<sup>113</sup> Additionally, unless otherwise expressly provided for in the Michigan Constitution, all of those officers are appointed by the Governor.<sup>114</sup> Any time a board or commission is the head of a department, all of the members of the board are appointed by the Governor unless otherwise provided for in the Michigan Constitution.<sup>115</sup> A review of the Michigan Constitution shows that the only exceptions to these general rules are the Michigan State Board of Education (the members of which are elected and which appoints the Superintendent of Public Instruction),<sup>116</sup> and the governing boards of state institutions of higher education, which are appointed by either the State Board of Education or the Governor.<sup>117</sup> Like New York, the Governor of Michigan enjoys control over most of the Michigan Executive Branch.

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106. *Id.* art. V.

107. *Id.* art. V, § 19.

108. *Id.* art. V, § 14.

109. *Id.* art. V, § 7; *see also id.* art. V, § 13.

110. *Id.* art. V, § 21.

111. *Id.* art. V, § 2.

112. STATE OF MICH., *State Departments*, [https://www.michigan.gov/som/0,4669,7-192-29701\\_29702\\_30045--,00.html](https://www.michigan.gov/som/0,4669,7-192-29701_29702_30045--,00.html) (last visited Apr. 18, 2022).

113. MICH. CONST. art. V, § 3.

114. *Id.*

115. *Id.*

116. *Id.* art. VIII, § 3.

117. *See id.* art. VIII, §§ 6-7.



*C. Kansas*

Of the surveyed states, Kansas's Executive Branch is most similar to Oklahoma's. Kansas's constitution possesses no distribution of powers provision; neither does it possess any structural limitations on the size and shape of the Kansas Executive Branch. It vests the executive power of Kansas in the Governor.<sup>118</sup> The constitutionally enumerated officers of Kansas are the Governor, Lieutenant Governor, Secretary of State, and Attorney General, all of which are elected.<sup>119</sup> The Kansas Governor enjoys a line-item veto,<sup>120</sup> a largely unqualified pardon power,<sup>121</sup> and the authority to fill vacancies occurring in the Executive Branch.<sup>122</sup> Unlike New York and Michigan, but like Oklahoma, Kansas does not have a constitutional provision which gives the Governor a blanket power to appoint the heads of executive entities. Despite the lack of this provision, the Governor appoints the majority of administrative members of about 71% of Kansas's executive entities.<sup>123</sup> This appears to be the result of legislative norms more so than the influence of the Kansas Constitution.

## III. COMPETING THEORIES OF EXECUTIVE POWER

Now that we have a grasp of some of the different structures of state executive branches, let's consider two different theories of executive power. It is important to note that, at their hearts, theories of executive power are really about how to address the problems associated with the separation of powers of government. Professor Andrew Spiropoulos succinctly summarizes the underlying motivation for the separation of powers as follows:

Because human beings cannot be trusted, it is imprudent to allow any of them unlimited power over the lives of

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118. KAN. CONST. art. I, § 3.

119. *Id.* art. I, § 1.

120. *Id.* art. II, § 14(b).

121. *Id.* art. I, § 7.

122. *Id.* art. I, § 11.

123. See KAN. OFF. OF THE GOVERNOR, *Learn more about the boards, commissions, and advisory groups*, <https://governor.kansas.gov/boards-and-commissions/> (last visited Apr. 18, 2022). Out of the 112 executive entities identified on the Kansas Governor's website, the Kansas Governor has control (i.e., appoints the majority of administrative members) over eighty. *Id.* The Governor does not have control over twenty-eight entities. It is unclear how much control the Governor of Kansas has over four entities. *Id.*

others. In order to render government safe, one must divide the authority of government in a way that ensures that no single part of the government accumulates enough power to threaten liberty.<sup>124</sup>

But, an airtight, vacuum-sealed separation of powers was rejected by the Framers of the Constitution of the United States in favor of a blended system of checks and balances.<sup>125</sup> Contrast that with the distribution of powers provisions mentioned in some of the state constitutions above. Clearly, there are a number of theories that deal with how the Executive should fit into the separation of powers scheme. In this Part, we will cover the most ubiquitous first: the theory of the unitary executive. Following that, we will explore the lesser-theorized opposite of the unitary executive, the unbundled executive.

#### *A. The Theory of the Unitary Executive*

The theory of the unitary executive is thought to be rooted chiefly in the Vesting Clause of Article II of the U.S. Constitution.<sup>126</sup> Professors Calabresi and Rhodes summarize the theory thusly:

Unitary executive theorists read [the Vesting Clause] . . . as creating a hierarchical, unified executive department under the direct control of the President. They conclude that the President alone possesses *all* of the executive power and that he therefore can direct, control, and supervise inferior officers or agencies who seek to exercise discretionary executive power.<sup>127</sup>

They also identify three categories of unitary executive, ranked from strongest to weakest: 1) the chief executive with the power to override and replace an action undertaken by a subordinate executive officer; 2) the chief executive with the power to “nullify or veto” a subordinate executive

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124. Andrew C. Spiropoulos, *The Garvee Bonds Case and Executive Power: Breakthrough or Blip?*, 56 OKLA. L. REV. 327, 329 (2003).

125. *Id.* at 330-31.

126. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992).

127. *Id.*

officer's actions; and 3) the chief executive who, at the very least, has the power to fire subordinate executive officers.<sup>128</sup>

Let's consider some illustrations. In the first and strongest type of unitary executive system, suppose the following: a subordinate executive officer, exercising discretionary executive authority, enters into an agreement with a private entity for some public purpose. If the chief executive disagrees with the terms of the agreement, the chief executive can not only abrogate the old agreement, but can also propose new terms and negotiate an entirely new agreement. Now suppose the same situation, but in the middling strength unitary executive system. The chief executive may abrogate the agreement, but it is still the prerogative of the subordinate executive officer to renegotiate it. Though the subordinate executive officer is not bound to factor in the wishes of the chief executive, they would be wise to do so. Finally, suppose the same situation in the weakest type of unitary system. In this system, the chief executive has no authority to alter the action of the subordinate executive officer in making the agreement. The chief executive may, however, fire the subordinate executive officer, and appoint a replacement who will be more disposed to pursue the policy goals of the chief executive.

It should be immediately evident that this is not the type of Executive that the Framers of the Oklahoma Constitution had in mind. Recall that there are *eleven* officers enumerated in the Oklahoma Constitution, each with separately assigned powers and duties. This fact makes Oklahoma's Vesting Clause, found in Article VI, section 2, ring somewhat falsely. On the other hand, the express language in the New York and Michigan constitutions vesting the Governors of those states with the authority to appoint all administrative members not otherwise provided for in those constitutions paints a different picture. The power to appoint is generally also accompanied by the power to remove.<sup>129</sup> It is therefore reasonable to conclude that the New York and Michigan constitutions create Executives which fall into the third category of unitary executive. Kansas does effectively the same by statute.

### *B. The Unbundled Executive*

While the unitary executive theory is probably the most prominent of the theories of executive power, it is by no means the only one; nor is it

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128. *Id.* at 1166.

129. *See, e.g., Myers v. United States*, 272 U.S. 52 (1926).

even widely accepted.<sup>130</sup> On the other end of the spectrum of theories of executive power, there is the less-prominent-but-more-popular unbundled executive theory.<sup>131</sup> The “bundling” that the theory refers to is the bundling of executive power in a single executive, as in the federal government where executive power is bundled in the President. “Unbundling” refers to the process of splitting executive functions into several executive offices. This is an approach that was rejected during the drafting of the Constitution of the United States.<sup>132</sup> Nevertheless, many states have embraced some form or another of an unbundled executive.<sup>133</sup>

It is safe to say that the Oklahoma Constitution’s scheme of executive power is unbundled. Oklahoma independently elects the following statewide executive officers: Governor, Lieutenant Governor, Attorney General, State Auditor and Inspector, State Treasurer, three Corporation Commissioners, Commissioner of the Department of Labor, the Insurance Commissioner, and the State Superintendent.<sup>134</sup> In addition to those elected officers, the Oklahoma Legislature further dilutes executive power by vesting morsels of it in the multiplicity of agencies, boards, and commissions mentioned in Part I(D).<sup>135</sup> Critics of the theory of the unbundled executive and of Oklahoma’s specific application thereof identify accountability as a major issue in unbundled executive systems.<sup>136</sup> The gist of this accountability issue is this: when something goes wrong, who out of all of these officials and administrative members do voters hold accountable, and can they be held accountable at all?

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130. In point of fact, despite its persistence in legal theory for roughly the last half-century, no argument grounded in the unitary executive theory prevailed in any United States Supreme Court case up until 2020. See David M. Driesen, *The Unitary Executive Theory in Comparative Context*, 72 HASTINGS L.J. 1 (2020).

131. See Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008).

132. See THE FEDERALIST NO. 70 (Alexander Hamilton).

133. Berry and Gersen, *supra* note 131, at 1399-1400.

134. OKLA. DEP’T OF LIBR., *Elected Officials*, <https://libraries.ok.gov/state-government/elected-officials/> (last visited Apr. 18, 2022).

135. See Spiropoulos, *supra* note 124, at 342-43.

136. See, e.g., Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1712-16 (2009), and Andrew C. Spiropoulos, *It All Starts at the Top: Reforming Oklahoma’s Executive Branch*, <https://www.ocpathink.org/post/it-all-starts-at-the-top-reforming-oklahomas-executive-branch> (Jan. 22, 2019).

## IV. SENATE BILLS 456, 457, AND 458: HERALDS OF CHANGE?

It is readily apparent that Oklahoma has utilized a plural or unbundled executive since statehood. With this in mind, one might be surprised to learn that in the 2019 Legislative Session several bills were introduced (four of which became law) that made some alterations to the status quo. Though the changes these bills introduced may appear small, they could have big implications for Oklahoma public policy. In this Part, we will analyze the pieces of legislation to determine how they alter the structure of some of Oklahoma's Executive entities. We will then discuss how they may be used as vehicles for moving Oklahoma away from the unbundled executive system and toward a more unitary executive system.

*A. Overview*

The illustrative piece of legislation we will examine is S.B. 456.<sup>137</sup> This bill made two changes to the structure of the Oklahoma Health Care Authority ("OHCA"), the state agency responsible for administering Medicaid.<sup>138</sup> First, it altered the appointment scheme for members of the OHCA Board. Previously, the Board consisted of two members appointed by the President Pro Tempore of the Senate, two members appointed by the Speaker of the House of Representatives, and three members appointed by the Governor for a total of seven members.<sup>139</sup> The bill upped the number of the Governor's appointees to five, while keeping the appointees for the legislative leaders at two each, for a total of nine members.<sup>140</sup> Second, the bill stripped the Board of the authority to appoint the Administrator of the OHCA, and gave that power to the Governor.<sup>141</sup> The other four pieces of legislation have virtually the same effects. First, they alter the appointment schemes of the members of the governing body of the executive entity they cover. Then, they remove the power to appoint an executive officer from the governing body of the entity and vest that power in the Governor. The other bills each apply to the Department of

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137. Okla. Stat. tit. 63, §§ 5007, 5008 (2011 & Supp. 2020).

138. OKLA. HEALTHCARE AUTH., *About Us*, <https://oklahoma.gov/ohca/about.html> (last visited Apr. 18, 2022).

139. S.B. 456, 57th Leg., 1st Sess. § 1, at p. 2 (Okla. 2019), § 1, p. 2.

140. *Id.* §1, at p. 4.

141. *Id.* §§ 1-2, at pp. 5-6.

Transportation (“DOT”),<sup>142</sup> the Department of Corrections (“DOC”),<sup>143</sup> the Department of Mental Health and Substance Abuse Services (“DMHSAS”),<sup>144</sup> and the Office of Juvenile Affairs (“OJA”),<sup>145</sup> respectively.

*B. As Vehicles for Moving Toward a More Unitary Executive*

What is notable about how the appointment schemes are altered is that the Governor is granted five appointees out of the nine members of each of the governing bodies. This, coupled with the vesting of the power to select the executive officer of each of the entities, gives the Governor “control” over the governance of the agency as that term has been used throughout this Note.

Recall the weakest type of unitary executive system identified by Professors Calabresi and Rhodes discussed above in Part III(A)—the one in which the chief executive may not be able to substitute their judgment for that of their subordinates, or even veto their subordinates’ actions, but in which they can at least dismiss their subordinates who do not pursue agreeable policy objectives. The way that the discussed legislation restructures the affected executive entities in Oklahoma illustrates that third category of unitary executive system. Suppose that the Director of DOC goes rogue and begins to prescribe policies that the Governor disagrees with. Now, instead of waiting for the State Board of Corrections to take action to remove the Director (if the Board was even inclined to do so), the Governor may do so directly and replace the Director with someone whose policy goals align with the Governor’s. Likewise, suppose that the State Board of Corrections begins to promulgate rules with which the Governor disagrees. The Governor now has the power to remove and replace five of the nine members of the Board, thereby allowing the Governor to virtually guarantee that the Governor will always control a majority of the Board. In either case, the Governor’s new appointee(s) would be able to reverse the course of their predecessors and ensure that the policy goals of the agency were at least agreeable to (if not matching) the policy goals of the Governor.

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142. S.B. 457, 57th Leg., 1st Sess. (Okla. 2019).

143. H.B. 2480, 57th Leg., 1st Sess. (Okla. 2019).

144. H.B. 2483, 57th Leg., 1st Sess. (Okla. 2019).

145. H.B. 2479, 57th Leg., 1st Sess. (Okla. 2019).

## V. DISCUSSION: MOVING TO A MORE UNITARY EXECUTIVE

Thus far we have: identified the origins of Oklahoma's Executive Branch; provided a look at how Oklahoma's Executive Branch is currently structured; compared that structure to the structure of Executive Branches in other states; discussed two opposing theories of executive power; and explained how legislation passed in Oklahoma's 2019 Legislative Session could represent a shift away from one theory of executive power to another. In this Part, we will first compare the legislation covered in Part IV to the policies of states with more unitary executives. Then, we will discuss how similar legislation could be used to reshape the remainder of Oklahoma's Executive Branch.

*A. Comparisons to Analogous Policies from Unitary Executive States*

One thing that New York, Michigan, and Kansas have in common is that their governors each enjoy control over a substantial portion of their state's executive entities. Even though each of these states could be said to have a plural executive (because they have several independently elected executive officers), the independently elected executive officers are confined to specific areas within their state's executive branch. Despite the plurality of their executive branches, these states' governors still have substantial power to appoint the administrative members of the state's executive entities. But, as we saw in Part II, this power derives from different sources. New York and Michigan have constitutional provisions that effectively provide that the Governor of the state is responsible for appointing all of the administrative members of all of the executive entities of the state (except as otherwise provided for in the state's constitution). Michigan even goes so far as to require that the "heads" of all executive entities (unless otherwise provided for in the Michigan Constitution) must be single officers directly responsible to the Governor.

Kansas and Oklahoma, on the other hand, lack any constitutional provision giving their governors blanket appointment power over administrative members of executive entities. In fact, there are no textual contours for the Kansas or Oklahoma executive branches provided for in those states' constitutions other than the enumeration of the various elected executives and their duties. This stands in contrast to New York and Michigan, which both have constitutional provisions limiting the size of their executive branches to twenty departments. Despite this lack of constitutional guidance, the Kansas Legislature still chooses to vest the

appointment of the majority of administrative members of executive entities in the Governor of Kansas.<sup>146</sup> The Oklahoma Legislature, however, has not consistently made that same choice.

Take the Oklahoma Council on Law Enforcement Education and Training (“CLEET”), mentioned in Part I(D), for example. As alluded to there, of the thirteen members of CLEET’s board, only two are direct gubernatorial appointees. Of the remaining members, three are other officials who are members of CLEET’s board by virtue of their other offices, two are appointed by legislative leadership, one is appointed by the Chancellor of Higher Education, and the remaining members are appointed by special interest groups.<sup>147</sup> CLEET’s board then appoints an Executive Director.<sup>148</sup> “A mess” would be a charitable way of describing the appointment scheme of CLEET’s board—and CLEET is not atypical of appointment schemes in Oklahoma.

### *B. Implications for Other Laws Shaping Oklahoma’s Executive*

Could S.B. 456 and its complement represent a method of cleaning up the mess that is Oklahoma’s Executive Branch? The short answer is yes. The legislation discussed above demonstrates that the Oklahoma Legislature is not afraid to undertake restructuring of specific Oklahoma executive entities. Take H.B. 2480 for example: it raises the number of members on the State Board of Corrections from seven to nine members.<sup>149</sup> Previously, all seven members of the Board had been gubernatorial appointees.<sup>150</sup> The bill gives the Governor five appointees, and the other four are halved between the Speaker of the House and President Pro Tempore of the Senate.<sup>151</sup> But, on the other hand, this reduction in gubernatorial appointees is offset by the Governor gaining the power to appoint the Director of Corrections.<sup>152</sup>

Even though legislative leadership gets a slice of the appointment power, the Governor still maintains the lion’s share. Since there was

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146. See KAN. OFF. OF THE GOVERNOR, *Learn more about the boards, commissions, and advisory groups*, <https://governor.kansas.gov/boards-and-commissions/> (last visited Apr. 18, 2022).

147. OKLA. STAT. tit. 70, § 3311(A).

148. *Id.*

149. Enrolled H.B. 2480, 1st Sess. of the 57th Leg. (Okla. 2019).

150. *Id.*

151. *Id.*

152. *Id.*



enough legislative consensus for four bills like this to clear the Legislature and be signed into law by the Governor, this method of restructuring represents a viable way of reforming Oklahoma's Executive Branch without the need to call a constitutional convention. Perhaps, if the Legislature were to undertake such a series of reforms, it would have the added benefit of calling attention to potential unnecessary overlap, leading to further consolidation of Oklahoma's labyrinthine Executive. It would also partially solve the accountability issue mentioned above in Part III: when executive entities controlled by a majority of the Governor's appointees implement unpopular policies, voters can express their displeasure at the next gubernatorial election.

## VI. CONCLUSION

Oklahoma's Executive Branch is rooted in the distrust of centralized government. One may trace a direct line from the mistreatment of the Five Tribes by the United States and a healthy amount of populist progressivism, to the Sequoyah Constitutional Convention, to the Oklahoma Constitutional Convention, to the current mire that is the Oklahoma Executive Branch. Oklahoma always envisioned a plural, unbundled executive, and that's precisely what we have. There is very little uniformity in how Oklahoma's executive entities are administered, and in how their administrative members are selected. The Governor is only one among a wide variety of other government officials, special interest groups, and the public at large who get to choose administrative members of the Executive Branch. The Governor of Oklahoma enjoys comparatively little control over the Oklahoma Executive Branch. This is not the case in at least some other states. States like New York and Michigan have enumerated constitutional provisions vesting their Governors with blanket appointment power over all administrative members of all executive entities, absent express constitutional exceptions. Even Kansas, a state with no such provision, seems to follow the legislative norm of vesting its Governor with appointment power over a substantial amount of its Executive Branch by statute.

The difference in policy choices between Oklahoma and the other states we have examined in this Note comes down to different ideas about how to address the separation of powers in democratic systems. The theory of the unitary executive favors a more hierarchical system where one chief executive is answerable for exercises of executive power. New York, Michigan, and Kansas are approximations of a weak form of the theory of

the unitary executive; their chief executive has the power to exercise control over subordinate officers by appointing subordinates who will follow their policy goals, and by edging out subordinates who won't. On the other hand, the theory of the unbundled executive favors a broader distribution of executive power. Oklahoma, with its eleven separately elected executive officers and its multiplicity of other executive agencies, boards, and commissions, is a stereotypical unbundled executive system.

Even though Oklahoma has historically preferred the unbundled executive, a complement of bills passed in 2019 cut the other way—toward a more unitary executive system. These bills each restructured a different state agency in two ways. They reapportioned the appointment of the administrative members of the governing bodies of the agencies such that the Governor now appoints a majority of the members (and legislative leaders appoint the remaining members). And they removed the authority to appoint the chief executive officer of each agency from the governing body of the agency, giving that authority to the Governor. These bills create a power dynamic closely resembling one of the weaker forms of the theory of the unitary executive, where the chief executive can exercise executive power by controlling who their subordinate executive officers are. By exercising this control, the Governor is able to ensure that the members of the governing bodies of the affected agencies follow the Governor's policy goals.

The Governors of New York and Michigan derive their appointment powers from constitutional provisions that give them blanket authority to appoint administrative members of their Executive Branches. Kansas and Oklahoma both lack these provisions. But Kansas, despite lacking such a constitutional provision, still follows a legislative norm of vesting the power to appoint administrative members of executive entities primarily in its Governor. The passage of the restructuring legislation discussed in this Note indicates that the Oklahoma Legislature is willing to do the same in at least some situations. Passing similar legislation for other Oklahoma state executive entities that are not enumerated in the Oklahoma Constitution is a viable alternative to calling a constitutional convention for reforming Oklahoma's Executive. It may spur further consolidation through the discovery and resolution of overlap. It is also a way of holding executive entities accountable at the polls through voting for a gubernatorial candidate who will make changes to the administrative members of executive entities.

## VII. APPENDIX

SURVEY OF OKLAHOMA GOVERNOR'S CONTROL OVER  
EXECUTIVE ENTITIES

<b>Name</b>	<b>Textual Source(s) (Public Domain)</b>	<b>Administration</b>	<b>Governor Control</b>
1. 911 Management Authority	63 O.S. § 2863	23-member board, 7 appointed by Governor	No
2. Agricultural Mediation Program	2 O.S. § 2-30	5-member board appointed by special interests	No
3. Board of Tests for Alcohol and Drug Influence	47 O.S. § 759	8-member board appointed by special interests	No
4. State Anatomical Board	63 O.S. § 91	Variable number board, 1 appointed by Governor	No
5. Archeological Survey	74 O.S. § 241	Officer appointed by Board of Regents	No
6. State Attorney General	Const. art. VI, § 1	Elected	No
7. Bar Association	5 O.S. § 1, Appendix 1-3A	17-member board, none appointed by Governor	No
8. Biological Survey Office	70 O.S. § 3314	Officer, appointed by Board of Regents	No
9. Boll Weevil Eradication Organization	2 O.S. § 3-50.7	5-member board, elected by special interests	No
10. Bond Commissioner	62 O.S. § 11	Attorney General is ex-officio Bond Commissioner	No

11. Council of Bond Oversight	62 O.S. § 695.11A	5-member board, 2 appointed by Governor	No
12. Building Bonds Commission	62 O.S. § 57.302	7-member board, 3 appointed by Governor	No
13. Business License Information Office	74 O.S. § 5058.4	Officer appointed by Director of Department of Commerce	No
14. Capitol Improvement Authority	73 O.S. § 152	8-member board consisting of other officials	No
15. Capitol-Medical Center Improvement and Zoning Commission	73 O.S. § 83.1	11-member board, 2 appointed by Governor	No
16. State Capitol Preservation Commission	74 O.S. §§ 4102-4103	15-member board, 3 appointed by Governor	No
17. State Capitol Repair Expenditure Oversight Committee	73 O.S. § 345	9-member board, 3 appointed by Governor	No
18. Cash Management and Investment Oversight Commission	62 O.S. § 71.1	5-member board, all other officials or appointed by other officials	No
19. Cerebral Palsy Commission	63 O.S. § 485.5	5-member board, all appointed by Governor	No
20. Office of the Chief Medical Examiner	63 O.S. § 934	Officer appointed by Board of Medicolegal Investigations	No

21. State Commission on Children and Youth	10 O.S. § 601.1	19-member board, 8 appointed by Governor	No
22. State Climatological Survey	74 O.S. § 245	Officer appointed by Board of Regents	No
23. Oklahoma College Savings Plan Board of Trustees	70 O.S. § 3970.4	7-member board, 1 appointed by Governor	No
24. State Community Hospitals Authority	63 O.S. § 3240.5	13-member board, 1 appointed by Governor	No
25. State Department of Consumer Credit	14A O.S. § 6-501	11-member board, appointed by special interests	No
26. Cooperative Extension Service Commission	19 O.S. § 130.2	5-member board, all other officials	No
27. Corporation Commission	Const. art. IX, § 15	3-member board, all elected	No
28. State Board of Examiners of Certified Courtroom Interpreters	20 O.S. § 1701	5-member board, all appointed by Chief Justice of the Supreme Court	No
29. State Board of Dentistry	Const. art. V, § 39 59 O.S. § 328.7	11-member board, 2 appointed by Governor	No
30. Comprehensive Diabetes Center	70 O.S. § 3318	Administered by Board of Regents	No

31. District Attorneys Council	19 O.S. § 215.28	5-member board composed of other officials or their appointees	No
32. Emergency Drought Commission	27A O.S. § 2251	3-member board composed of other officials	No
33. School Finance Review Commission	70 O.S. § 3-117.2	8-member board, 1 appointed by Governor	No
34. State Energy Resources Board	52 O.S. §§ 288.3, 288.4	18-member board, 6 appointed by Governor	No
35. State Board of Equalization	Const. art. X, § 21 68 O.S. § 2864	7-member board, all other officials	No
36. State Ethics Commission	Const. art. XXIX, § 1	5-member board, 1 appointed by Governor	No
37. State Fire Extinguisher Industry Committee	59 O.S. § 1820.6	7-member board, all appointed by other officers	No
38. Firefighters Pension and Retirement System	11 O.S. § 49-100.3	13-member board, none appointed by Governor	No
39. Food Service Advisory Council	63 O.S. § 1-106.3	14-member board, all appointed by special interests or other officials	No
40. State Council of Geographic Information	82 O.S. §§ 1501-205.1, 1501-205-3	19-member board, 3 appointed by Governor	No
41. State Board on Geographic Names	70 O.S. § 3310	Administered to by Board of Regents	No

42. State Geological Survey	Const. art. V, § 38 70 O.S. § 3310 74 O.S. § 231	3-4-member commission (ambiguous)	No
43. Grand River Dam Authority	82 O.S. §§ 861, 863.2	7-member, 3 appointed by Governor	No
44. State Hazard Mitigation Team	63 O.S. 683.6	21-member board, composed of other officials	No
45. Health Care Workforce Resources Board	74 O.S. § 3200.2	19-member board, 7 appointed by Governor	No
46. Healthy and Fit School Advisory Committee	70 O.S. § 24-100A	6-member boards unique to each public school	No
47. Oklahoma Historical Society Board	53 O.S. § 1.6	25-member board, 12 appointed by Governor	No
48. University Hospitals Authority	63 O.S. § 3207	6-member board, 1 appointed by Governor	No
49. Incentive Approval Committee	68 O.S. § 3603	3-member board, all other officials	No
50. Board of Directors of Individual Health Insurance Market Stabilization Program	36 O.S. § 6530.4	9-member board, all appointed by Insurance Commission	No

51. Board of Judicial Compensation	20 O.S. § 3.2	7-member board, 2 appointed by Governor	No
52. Council on Judicial Complaints	20 O.S. §§ 1652, 1653	3-member board, none appointed by Governor	No
53. Judicial Nominating Commission	Const. art. VI(B), § 3	15-member board, 6 appointed by Governor	No
54. Commissioners of the Land Office	Const. art. VI, § 32 64 O.S. § 1	5-member board composed of other officials	No
55. Council on Law Enforcement Education and Training	70 O.S. § 3311	13-member board, 2 appointed by Governor	No
56. Law Enforcement Retirement System Board	47 O.S. § 2-303	13-member board, 3 appointed by Governor	No
57. Bipartisan Commission on Legislative Apportionment	Const. art. V, § 11A	7-member board, 2 appointed by Governor	No
58. Legislative Service Bureau	74 O.S. § 450.1	Administered to by the Speaker of the House of Representatives and the President Pro Tempore of the Senate	No
59. State Linked Deposit Review Board	62 O.S. § 88.4	Administered to by State Treasurer	No



60. Voluntary Market Assistance Program Association	36 O.S. § 6420	Administered to by Commission of Insurance	No
61. OSU Medical Authority	63 O.S. § 3275	7-member board, 1 appointed by Governor	No
62. Board of Medicolegal Investigations	63 O.S. § 931	8-member board, all other officials or appointed by special interests	No
63. State Municipal Power Authority	11 O.S. § 24-103	7-11-member board, elected by special interest	No
64. Native American Cultural and Educational Authority	74 O.S. § 1226.2	17-member board, 3 appointed by Governor	No
65. Sam Noble Museum of Natural History	70 O.S. § 3309.1	Administered to by OU Regents	No
66. State Opioid Abatement Board	HB 4138 (2020)	9-member board, 1 appointed by Governor	No
67. Commission on Opioid Abuse	74 O.S. § 30.2	13-member board, 2 appointed by Governor	No
68. State Pension Commission	74 O.S. § 941	7-member board, 2 appointed by the Governor	No
69. State Board of Examiners of Perfusionists	59 O.S. § 2053	9-member board, all appointed by Board of Medical Licensure	No

70. State Board of Pharmacy	Const. art. V, § 39 59 O.S. § 353.3	6-member board, all appointed by Governor	No
71. State Police Pension and Retirement System	11 O.S. § 50-103.1	13-member board, one appointed by Governor	No
72. Port Authorities	82 O.S. § 1103	Variable number of directors, appointed by county commissioners	No
73. State Public Employees Retirement System	74 O.S. § 905	14-member board, 3 appointed by Governor	No
74. State Commission on Rehabilitation Services	74 O.S. § 166.2	3-member board, 1 appointed by Governor	No
75. State Commission on Revenue Apportionment Evaluation	62 O.S. § 46.5	9-member board, 2 appointed by Governor	No
76. Route 66 Centennial Commission	69 O.S. § 4020.2	21-member board, 3 appointed by Governor	No
77. Commission on School and County Funds Management	60 O.S. § 177.2	3-member board, all other officials	No
78. Board of Trustees of OSSM	70 O.S. § 1210.401(B)	25-member board, 5 appointed by Governor	No

79. State Board of Examiners of Shorthand Reporters	20 O.S. § 1501	5-member board, all appointed by CJ of SC	No
80. Tobacco Settlement Endowment Trust Fund	Const. art. 10, § 40	7-member board, 1 appointed by Governor	No
81. 211 Coordinating Council	56 O.S. § 3021 OAC 165:55-7-2.1	Unspecified	Unknown
82. Statewide Independent Living Council	29 U.S.C. § 796d	Unspecified	Unknown
83. State Jazz Hall of Fame Board of Directors	74 O.S. § 1910	Unspecified	Unknown
84. Abstractors Board	1 O.S. § 22	9-member board, all appointed by Governor	Yes
85. Accountancy Board	59 O.S. § 15.2	7-member board, all appointed by Governor	Yes
86. Aeronautics Commission	3 O.S. § 84	7-member board, all appointed by Governor	Yes
87. State Board of Agriculture	Const. art. 6, § 31 2 O.S. § 2-1	5-member board, all appointed by Governor	Yes
88. Board of Licensed Alcohol and Drug Counselors	59 O.S. § 1873	7-member board appointed by Governor	Yes
89. ABLE Commission	37A O.S. § 1-104	7-member board, all appointed by Governor	Yes

90. Board of Governors of the Licensed Architects, Landscape Architects, Registered Interior Designers	59 O.S. § 46.4	11-member board appointed by Governor	Yes
91. State Arts Council	53 O.S. § 163	15-member board appointed by Governor	Yes
92. State Athletic Commission	3A O.S. § 604.1	9-member board appointed by Governor	Yes
93. Banking Department	Const. art. XIV, § 1 6 O.S. §§ 201-202	Commissioner appointed by Governor, 7-member board appointed by Governor	Yes
94. State Board of Behavioral Health Licensure	59 O.S. § 6001	11-member board, all appointed by Governor	Yes
95. State Board of Career and Technology Education	70 O.S. § 14-101	9-member board, all appointed by Governor	Yes
96. Board of Chiropractic Examiners	59 O.S. § 161.4	9-member board, all appointed by Governor	Yes
97. State Department of Commerce	70 O.S. § 5003.5	Officer appointed by governor	Yes
98. Oklahoma Conservation Commission	27A O.S. § 3-2-101	5-member board, all appointed by Governor	Yes

99. State Construction Industries Board	59 O.S. § 1000.2	7-member board, all appointed by Governor	Yes
100. Commission on Cooperative Sovereignty	Executive Order 2020-24	Unspecified, all appointed by Governor	Yes
101. State Board of Corrections	57 O.S. § 503	9-member board, 5 appointed by Governor	Yes
102. State Board of Cosmetology and Barbering	59 O.S. § 199.2	11-member board, all appointed by Governor	Yes
103. State Credit Union Board	6 O.S. § 2001.1	5-member board, all appointed by Governor	Yes
104. Crime Victims Compensation Board	21 O.S. § 142.4	3-member board, all appointed by Governor	Yes
105. J.M. Davis Memorial Commission	53 O.S. § 201A	5-member board, all appointed by Governor	Yes
106. State Developmental Disabilities Council	Executive Order 1993-20, amend. 2002, retained by Executive Order 2019-07	27-member board, all serve at the pleasure of Governor	Yes
107. Office of Disability Concerns	74 O.S. § 9.21	Officer appointed by Governor	Yes
108. State Board of Education	Const. art. XIII, § 5 70 O.S. § 3-101	7-member board, 6 appointed by Governor	Yes

109. Commission for Educational Quality and Accountability	70 O.S. § 3-116.2	7-member board, all appointed by Governor	Yes
110. Oklahoma Educational Television Authority	70 O.S. § 23-105	13-member board, 7 appointed by Governor	Yes
111. State Election Board	26 O.S. § 2-101	3-member board, 2 alternates, all appointed by Governor	Yes
112. Department of Emergency Management	63 O.S. § 683.4	Officer appointed by Governor	Yes
113. State Employment Security Commission	40 O.S. § 4-102	5-member board, all appointed by Governor	Yes
114. Secretary of Energy and Environment, Department of Environmental Quality	27A O.S. § 1-2-101	Officer appointed by Governor	Yes
115. State Board of Licensure for Professional Engineers and Land Surveyors	59 O.S. § 475.3	7-member board, all appointed by Governor	Yes
116. Department of Environmental Quality Board	27A O.S. § 2-2-101	13-member board, all appointed by Governor	Yes
117. State Fire Marshall Commission	74 O.S. § 324.1	7-member board, all appointed by Governor	Yes

118.Forensic Review Board	22 O.S. § 1161	7-member board, all appointed by Governor	Yes
119.State Funeral Board	59 O.S. § 396	7-member board, all appointed by Governor	Yes
120.State Department of Health Board	Const. art. 5, § 39 63 O.S. § 1-103	9-member board, all appointed by Governor	Yes
121.Oklahoma Healthcare Authority Board	63 O.S. § 5006	9-member board, 5 appointed by Governor	Yes
122.Highway Construction Materials Technician Certification Board	69 O.S. § 1953	11-member board, all appointed by Governor	Yes
123.State Historic Preservation Review Committee	53 O.S. § 353	5-member board, all appointed by Governor	Yes
124.State Office of Homeland Security	74 O.S. § 51.1	Officer appointed by Governor	Yes
125.Horse Racing Commission	3A O.S. § 201	9-member board, all appointed by Governor	Yes
126.Department of Human Services	56 O.S. § 162.1	Officer appointed by Governor	Yes
127.Oklahoma Indigent Defense System	22 O.S. §§ 1355, 1355.1	5-member board, all appointed by Governor	Yes

128. Insurance Department	Const. art. 6, § 22 36 O.S. §§ 301, 302	Officer, appointment unspecified, presumably defaults to Governor	Yes
129. State Bureau of Investigation Commission	74 O.S. § 150.3	7-member board, appointed by Governor	Yes
130. Office of Juvenile Affairs Board	10A O.S. § 2-7-101	9-member board, 5 appointed by Governor	Yes
131. Department of Labor	Const. art. VI, § 20 40 O.S. § 1	Officer, appointment unspecified, presumably devolves to Governor	Yes
132. Board of Trustees for Langston University	70 O.S. § 3431	9-member board, 7 appointed by Governor	Yes
133. Board on Legislative Compensation	Const. art. V, § 21 74 O.S. § 291.2	9-member board, 5 appointed by Governor	Yes
134. Oklahoma Department of Libraries Board	65 O.S. §§ 2-101, 3-101	7-member board, all appointed by Governor	Yes
135. State Liquefied Petroleum Gas Board	52 O.S. § 420.3	7-member board, appointed by Governor	Yes
136. State Board of Examiners for Long-Term Care Administrators	63 O.S. § 330.52	15-member board, 12 appointed by Governor	Yes



137.Lottery Commission	3A O.S. § 705	7-member board, all appointed by Governor	Yes
138.Office of Management and Enterprise Services	62 O.S. § 34.6	Officer appointed by Governor	Yes
139.State Board of Medical Licensure and Supervision	59 O.S. § 481	11 members, all appointed by Governor	Yes
140.Department of Mental Health and Substance Abuse Services Board	43A O.S. §§ 2-101, 2-103	Commissioner and 9 members, commissioner and 5 members appointed by Governor	Yes
141.Merit Protection Commission	74 O.S. § 840-1.7	9-member board, 5 appointed by Governor	Yes
142.Military Department	44 O.S. § 21	Administered to by the Governor through Adjutant General	Yes
143.State Strategic Military Planning Commission	74 O.S. § 5401	9-member board, 5 appointed by Governor	Yes
144.Department of Mines	Const. art. VI, § 25 45 O.S. § 3	Officer appointed by Governor	Yes
145.Oklahoma Mining Commission	45 O.S. § 1	9-member board, all appointed by Governor	Yes
146.State Motor Vehicle Commission	47 O.S. § 563	9-member board, all appointed by Governor	Yes

147.State Bureau of Narcotics and Dangerous Drugs Control	63 O.S. § 2-104.1	7-member board, all appointed by Governor	Yes
148.State Board of Nursing	59 O.S. § 567.4	11-member board, all appointed by Governor	Yes
149.State Board of Examiners in Optometry	59 O.S. § 582	5-member board, all appointed by Governor	Yes
150.State Board of Osteopathic Examiners	59 O.S. § 624	8-member board, all appointed by Governor	Yes
151.Pardon and Parole Board	Const. art. VI, § 10 57 O.S. § 332.2	5-member board, 3 appointed by Governor	Yes
152.Physician Manpower Training Commission	70 O.S. §§ 697.2, 697.3	7-member board appointed by Governor	Yes
153.State Board of Podiatric Medical Examiners	59 O.S. § 137	5-member board, all appointed by Governor	Yes
154.Board of Polygraph Examiners	59 O.S. § 1455	5-member board, all appointed by Governor	Yes
155.Board of Trustees of University Center at Ponca City	70 O.S. § 3213.1	9-member board, all appointed by Governor	Yes
156.Board of Private Vocational Schools	70 O.S. § 21-102	9-member board, six appointed by Governor	Yes

157. Board of Examiners of Psychologists	59 O.S. § 1354	7-member board appointed by Governor	Yes
158. Real Estate Appraiser Board	59 O.S. § 858-705	8-member board, all appointed by Governor	Yes
159. State Real Estate Commission	59 O.S. § 858-201	7-member board, appointment not specified, presumed Governor	Yes
160. State Regents for Higher Education	Const. art. XIII(A), § 2 70 O.S. § 3202	9-member board appointed by Governor	Yes
161. Department of Public Safety	47 O.S. § 2-101	Officer appointed by Governor	Yes
162. State Partnership for School Readiness Board	10 O.S. § 640.1	32-member board, 17 appointed by Governor	Yes
163. State Center for Advancement of Science and Technology	74 O.S. § 5060.6	21-member board, 13 appointed by Governor	Yes
164. Secretary of State	Const. art. VI, § 1(B)	Appointed by Governor	Yes
165. State Securities Department	71 O.S. § 1-101	4-member board, all appointed by Governor	Yes
166. State Board of Licensed Social Workers	59 O.S. § 1253	7-member board, appointment not specified, presumably the Governor	Yes

167.State Space Industrial Development Authority and Board	74 O.S. §§ 5203, 5207	7-member board, all appointed by Governor	Yes
168.State Board of Examiners of Speech-Language Pathology and Audiology	59 O.S. § 1607	5-member board, all appointed by Governor	Yes
169.Oklahoma Tax Commission	68 O.S. § 102	3-member board, all appointed by Governor	Yes
170.Teacher's Retirement System Board of Trustees	70 O.S. § 17-106	7-member board, majority appointed by Governor	Yes
171.State Textbook Committee	Const. art. XIII, § 6; 70 O.S. § 16-101	13-member board, all appointed by Governor	Yes