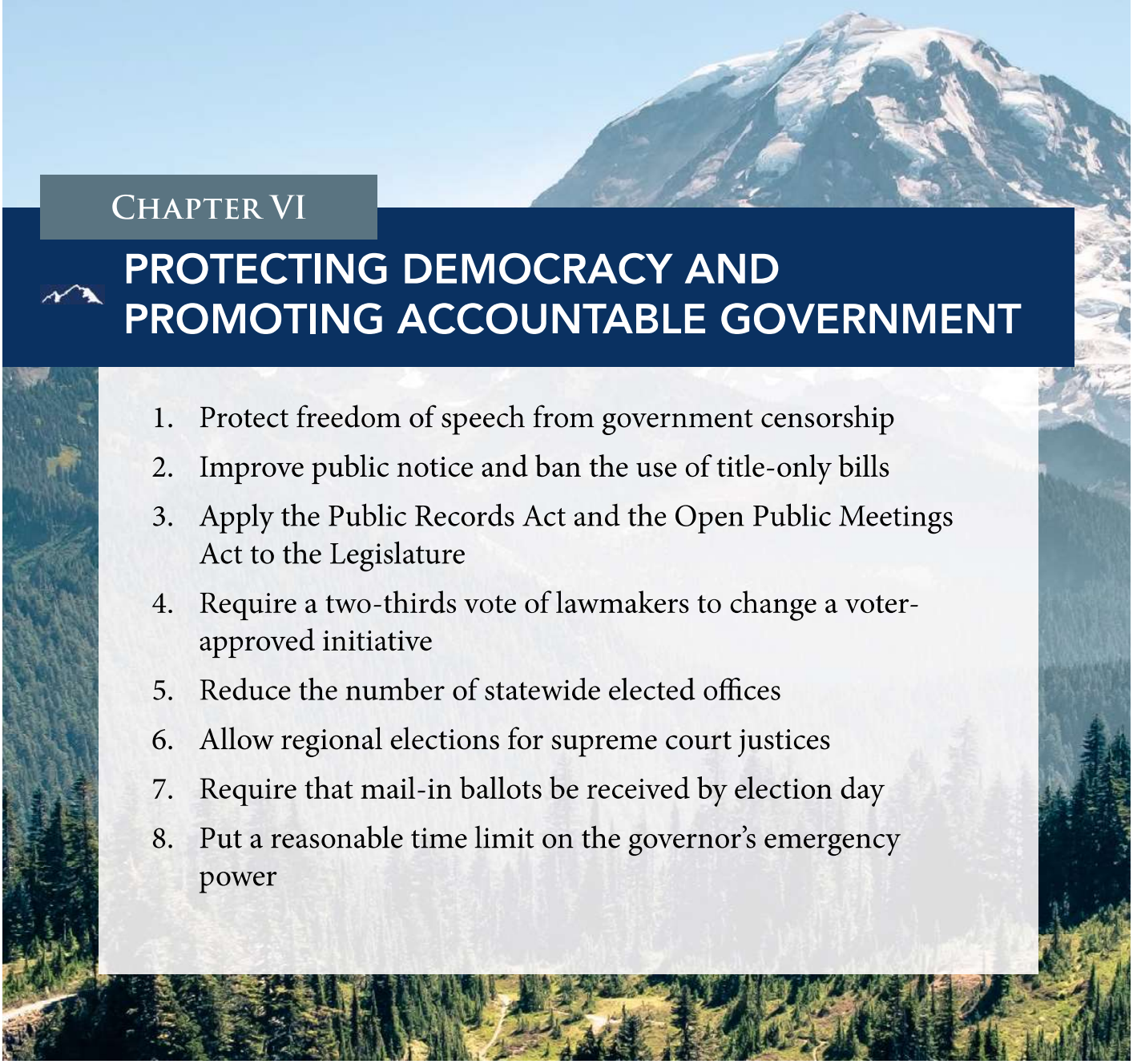
CHAPTER VI

PROTECTING DEMOCRACY AND PROMOTING ACCOUNTABLE GOVERNMENT



CHAPTER VI

PROTECTING DEMOCRACY AND PROMOTING ACCOUNTABLE GOVERNMENT

1. Protect freedom of speech from government censorship
2. Improve public notice and ban the use of title-only bills
3. Apply the Public Records Act and the Open Public Meetings Act to the Legislature
4. Require a two-thirds vote of lawmakers to change a voter-approved initiative
5. Reduce the number of statewide elected offices
6. Allow regional elections for supreme court justices
7. Require that mail-in ballots be received by election day
8. Put a reasonable time limit on the governor's emergency power

Policy Recommendation:

1. PROTECT FREEDOM OF SPEECH FROM GOVERNMENT CENSORSHIP

In 2022 Governor Jay Inslee proposed a bill to make it illegal to criticize the outcome of an election by making statements that state officials judge to be "false" or "a lie".[1]

The proposal sought to make criticism of the election process or election outcomes a gross misdemeanor. The bill was drafted to apply to elected officials and to candidates for public office. It provided that any official convicted of "a gross misdemeanor for knowingly making false statements

regarding the election process or results" would be removed from office.[2] The bill was introduced by Senator Frockt and Senator Kuderer as SB 5843.

The governor said he sought to criminalize speech because of perceived "threats to democracy" linked to "knowledge of potential to create violence."[3] "It should not be legal...for elected officials or candidates for office to willfully lie about these election results," Inslee said.[4]

Defeated in the senate

The governor's bill received a public hearing in the Senate State Government and Elections Committee on January 28th and was passed by the full committee on a partisan vote with a "do pass" recommendation. The senate's Democratic leadership had doubts about the bill, however, and it was later killed in the Rules Committee.[5]

Violating the First Amendment

The primary concern about the bill was its impact on core civil liberties. Free speech advocates argued the bill violated the First Amendment's free speech protections. They said it was drafted to impose viewpoint discrimination and to silence the voices of the governor's political opponents.[6]

The courts consistently uphold political free speech rights

Under the First Amendment the courts have recognized limits on specific types of speech based on neutral standards that apply equally to everyone. Libel, slander, defamation, obscenity, criminal conspiracy, public endangerment and commercial fraud are all areas in which speech rights can be limited by law.

The courts treat political speech differently. Recognizing the need for voters to have the widest possible access to information, and for the public to judge for themselves the truth of what politicians say, the courts have struck down several attempts to limit political speech.

For example, in *Citizens United v. Federal Elections Commission* the U.S. Supreme Court struck down a law passed by Congress as imposing unconstitutional restrictions on speech during political campaigns.[7] In *Cohen v. California* the U.S. Supreme Court ruled that even political speech

that is considered disturbing, obscene or offensive is protected under the First Amendment.[8]

In 1998, the Washington State Supreme Court ruled in favor of political advertising against a ballot measure to legalize doctor-assisted suicide, even though the ad's opponents claimed the ad was materially false and done with malice.[9]

In 2007, the Washington State Supreme Court struck down a law that gave state agencies the power to impose censorship on political statements. In that case the court said the law:

> "...wrongly presupposed the state possesses an independent right to determine truth and falsity in political debate."[10]

The court rightly concluded that the people, not the government, should "be the final arbiter of truth in political debate."[11]

Raising past election controversy

The effort to control speech critical of an election result recalls the months-long controversy over the 2004 gubernatorial election, when one candidate won on election night, and won on a recount, but a month later was declared defeated by 129 votes on a third ballot count.[12]

If the proposed Inslee bill had been law at the time many of those who were engaged in the public debate would have been charged with a crime. Since the sitting governor had endorsed one of the candidates, there would have been questions about imposing a two-tier system of justice.

The assumption was that the law would be directed mostly against Republicans. The bill's prohibition, however, could be directed against members of both parties. For example, Democrats have questioned or rejected the results of the 2000, 2004 and 2016 national elections.[13] In 2018, the losing Democratic candidate in another state said the election was "stolen from the voters."[14] If these statements had been made about Washington state elections the speakers would have been subject to prosecution under a bill like SB 5843.[15]

Conclusion

Critics of free speech and open debate frequently call for new laws to restrict political expression. Such proposals are designed to silence political opponents. A confident society based on self-government has no need of such laws. In a healthy democracy the public has a right to hear all viewpoints, regardless of party or of no party.

Proposing a special law directed at certain people is intended to have a chilling effect on free speech, making targeted groups afraid to express their true opinions. Threatening free speech blocks voters from getting honest information about where officials and candidates stand on the issues.

Free speech is at the core of democracy. The public should always be allowed to hear what officials and candidates have to say about elections, politics and policy ideas. For that reason lawmakers should ensure that the people's ability to express their views, and to hear the views of others, is always free from government censorship.

Policy Recommendation:

2. IMPROVE PUBLIC NOTICE AND BAN THE USE OF TITLE-ONLY BILLS

Washington lawmakers have adopted rules on paper that let the public participate in the legislative debate, but the casual way they routinely waive the rules undercuts these important public protections.

The state House of Representatives says one of its official goals is to "increase public participation, understanding, and transparency of the legislative process ...," and to, "enact high quality legislation through debate and collaboration that is thoughtful and responsive, and honors our diverse citizenry."[16]

This commonsense principle reflects a fundamental premise of our democracy: Citizens should be able to comment on the proposed laws we have to live under to ensure lawmakers are informed about the public's opinions and expectations.

Notice for public hearings

The Legislature's rules require that:

> "At least five days' notice shall be given of all public hearings held by any committee other than the rules committee. Such notice shall contain the date, time and place of such hearing together with the title and number of each bill, or identification of the subject matter, to be considered at such hearing."[17]

The rules supposedly prohibit so-called title-only bills, a blank bill with a title and a number, but empty pages where text will be be filled in later.

Lawmakers have a practice, however, of introducing title-only bills that have all the attributes of formal legislation – an assigned bill number, sponsor names, date of introduction, referral to committee – but no text.

Title-only bills are not a transparent way to introduce changes to state law; they are essentially used by lawmakers to circumvent the state constitution. New bills are not supposed to be considered in the last ten days of the legislative session, unless two-thirds of lawmakers agree, as provided under Article 2, Section 36 of state constitution.

Title-only bills as placeholders

To get around this constitutional restriction, some lawmakers introduce title-only bills late in the session as a placeholder, so they can put in the real text later without having to secure a two-thirds vote.

If lawmakers feel the state constitution is getting in the way of being transparent and providing adequate public notice, they should propose repeal of Article 2, Section 36 and replace it with meaningful legislative transparency protections that would:

- Provide mandatory public notice and waiting periods before legislative action;
- Ban title-only bills, and;
- Subject the Legislature to the same transparency requirements that are placed on local governments.

Adopting these transparency protections and ending the practice of title-only bills would help lawmakers fulfill their promise, as noted above, to

"increase public participation, understanding, and transparency of the legislative process."

Efforts to increase legislative transparency

The most blatant abuse occurred during the 2019 legislative session when lawmakers used the device to impose a massive last-minute tax increase on financial institutions. The measure imposed new costs across the economy and, because it targeted out-of-state banks, was of questionable constitutionality. The public had almost no chance to comment on the bill before it became law.

The lack of public process on that tax increase (HB 2167) meant that those subject to the tax had only a few hours notice before a hastily-called public hearing. Testifying on the bill, Trent House with the Washington Banking Association said:

> "We found out about it [HB 2167] about three-and-a-half hours ago. That's very difficult to process even with the best staff, it's hard to get information back on a bill of this nature that raises this kind of money in that period of time… We haven't seen a fiscal note. We don't know exactly what this bill does or who it applies to. It's very difficult to even understand how to testify on this bill not knowing that information."[18]

Boosting public confidence in how laws are made

There is a way lawmakers can increase the public's confidence in how laws are made. SB 6560, introduced in 2013, would have improved notice of public hearings and banned title-only bills. It would have forced the Legislature to make public decisions the same open way that city and county officials across the state do. It would have prevented committees from going into recess, as members negotiate secret agreements on amendments, then returning to public session to vote on them formally.

Conclusion

SB 6560 did not pass. Lawmakers should enact legislation like it to enhance transparency and bolster public confidence in the law-making process.

Policy Recommendation:

3. APPLY THE PUBLIC RECORDS ACT AND THE OPEN PUBLIC MEETINGS ACT TO THE LEGISLATURE

All state and local government agencies in Washington are subject to the Public Records Act and the Open Public Meetings Act. The Legislature, however, claims it is exempt from full disclosure. As a matter of fairness and open government the Legislature should follow the same disclosure and transparency requirements that the law requires of county and local government officials.

Full disclosure of public records

Nearly all local government records and internal communications are subject to public disclosure, but members of the Legislature and their staff claim special treatment and do not routinely release e-mails and other internal policy-related records to the public.

This double standard understandably irritates local government officials, who must operate under a different standard of disclosure. It is also a disservice to citizens, who are denied the fullest disclosure of the records and activities of their state lawmakers.

Conclusion

As the most powerful representative body in the state, the Legislature should lead by example and subject itself to all the requirements of the Public Record Act and Open Public Meetings Act, on the same basis as other public entities in Washington.

Policy Recommendation:

4. REQUIRE A TWO-THIRDS VOTE OF THE LEGISLATURE TO CHANGE A VOTER-APPROVED INITIATIVE

Article 1, Section 1 of the state constitution says:

> "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."

The clear authority of the people over their government means that, before any legislative powers are granted, the people reserve for themselves co-equal lawmaking authority. This sovereign authority is explained in Article 2, Section 1:

> "The legislative authority... shall be vested in the legislature, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature. (a) Initiative: The first power reserved by the people is the initiative."

Despite reserving this power to enact laws, it is very difficult for citizens to qualify an initiative for consideration. The number of valid signatures needed to put an initiative on the ballot is eight percent of the votes cast for governor in the most recent general election, or 324,516 signatures.[19]

Protecting voter-passed laws

To ensure these laws enacted by the people are not immediately discarded by the Legislature, Article 2, Section 41 of the constitution requires a two-thirds vote of lawmakers to amend a voter-approved initiative within the first two years of passage. After two years, only a simple majority vote in the Legislature is required to amend or repeal a popular initiative.

The two-year protection for voter-passed initiatives may have been sufficient at one time, but the Legislature's frequent practice of gutting voter-passed laws as soon as the time limit is up works against the will of the people.

Respecting basic constitutional powers

Article 2, Section 1 should be amended to remove the two-year expiration of the two-thirds vote requirement, and to require permanently a two-thirds vote for lawmakers to change laws enacted by the people.

Conclusion

If the Legislature cannot secure a two-thirds vote to amend an initiative, lawmakers by a simple majority should propose a ballot referendum

seeking voter ratification of the proposed changes. This would allow the voters a final say on the Legislature's desired changes and would respect the people's basic constitutional power as co-equal lawmakers.

Policy Recommendation:

5. REDUCE THE NUMBER OF STATEWIDE ELECTED OFFICES

The people of Washington elect officials to nine statewide offices (not counting justices to the state supreme court), more than almost any other state. These statewide offices are Governor, Lieutenant Governor, Secretary of State, Treasurer, Auditor, Attorney General, Superintendent of Public Instruction, Commissioner of Public Lands and Insurance Commissioner.[20] Yet for many years there has been a debate about whether this is the most effective way to structure our state government.

One view holds that the best approach is using the "long ballot" to institute the greatest amount of direct democracy, by requiring election of a large number of high-level state officials. This reasoning dates from views held during the Progressive Era of the early 1900s.

Short ballot promotes public accountability

Others argue a "short ballot" approach is better because the people choose a limited number of top officials, who are then held uniquely responsible for the proper functioning of government. Proponents of this view say that in practice most people don't know who is elected to minor statewide offices and that elected officials are subject to greater public scrutiny when there are fewer of them.

All statewide elected offices, except Insurance Commissioner, are established by the state constitution. The Insurance Commissioner is also the only one for which the Legislature, not the constitution, established the elective nature of the office.

Duties of many elected offices are just like appointed positions

In contrast to the nine elected positions, all other senior officials in the executive branch are appointed by the governor. They make up the governor's cabinet and include many important positions. Here are some examples:

- Secretary of Social and Health Services;
- Director of Ecology;
- Director of Labor and Industries;
- Director of Agriculture;
- Director of Financial Management;
- Secretary of Transportation;
- Director of Licensing;
- Director of General Administration;
- Director of Revenue;
- Director of Retirement Systems;
- Secretary of Corrections;
- Chief of the State Patrol.

The duties and responsibilities of these appointed officials are similar to, and often more important than, those of minor elected officials, like the Secretary of State, Superintendent of Public Instruction, Commissioner of Public Lands or Insurance Commissioner.

Ending policy conflicts within the executive branch

Today, Washington's eight other statewide elected officials are independent of the governor. They lobby the Legislature independently, and even work against what the governor is trying to accomplish. Any such conflict is easily resolved in departments that are administered by appointees. If a policy disagreement arises among cabinet officers, the governor settles it by formulating a single, unified policy for his administration, or by dismissing the offending cabinet officer.

Similarly, if the Legislature is unable to reach agreement with a cabinet official over important legislation, the dispute can be taken "over his head" to the governor. The governor may or may not agree with the position the cabinet appointee has taken, but at least the Legislature will get a final answer. The Legislature would know that, through the governor, the executive branch speaks with one voice.

Increasing the accountability of the governor

The reason this works is that the governor has direct authority over the performance of appointed officials. They serve at his pleasure and are answerable to him. The governor in turn must report to the voters for the overall performance of the administration.

Conclusion

The state constitution should be amended to abolish the Secretary of State, Superintendent of Public Instruction and Commissioner of Public Lands as independently-elected statewide officials. The way the Insurance Commissioner is selected can be changed by the Legislature.

These four positions should then be restructured as cabinet agencies headed by appointees, making the governor fully accountable to the people for the actions of these departments of the executive branch.

Policy Recommendation:

6. ALLOW DISTRICT ELECTIONS FOR SUPREME COURT JUSTICES

Under the constitution all state supreme court justices are elected statewide. This increases the costs of these races and in practice means that most candidates come from the Puget Sound region. As currently conducted, supreme court elections do not provide geographic and cultural representation on the state's highest court.

To improve geographic representation on the supreme court, elections should be changed to district elections. This would provide more regional diversity and help reduce the cost of running for office, while providing candidates more time to focus on voter outreach, debates and forums in their area of the state.

Only one of the nine justices on the court once lived in Eastern Washington at the time of taking office. Had Justice Debra Stephens not won election, *all* of the state's supreme court justices would be from the Puget Sound region.[21]

In recent years, any justices who did come from Eastern Washington got their start on the court through appointment. Justice Stephens was

appointed by Governor Gregoire. Justice Richard P. Guy was appointed by Governor Gardner. Recent practice shows that unless a governor makes an appointment, Eastern Washington is unlikely to be represented on the state supreme court.

Improving geographical representation on the court

Justices are not elected as representatives, but they are charged with making impartial decisions, and the life experiences of those who serve on the court are important in making those decisions. Many people argue that gender and ethnicity diversity should be represented on the court. The same could be said of geographic and cultural diversity across Washington state.

Election by district is a well-established system for choosing justices. Ten states use districts for the election or appointment of justices:

- Four states, Illinois, Louisiana, Kentucky and Mississippi, elect justices by district;
- Six states, Florida, Maryland, Nebraska, Oklahoma, South Dakota and Tennessee, appoint justices by district.

Conclusion

Changing to district elections for supreme court justices would make the highest court fully reflective of "One Washington," rather than a part of state government dominated by the Puget Sound region. District elections would create more choices for voters, reduce election costs, and encourage more qualified people to run for public office.

Policy Recommendation:

7. REQUIRE THAT MAIL-IN BALLOTS BE RECEIVED BY ELECTION DAY

Because Washington requires ballots only to be postmarked, not delivered, by election day, it is difficult to declare winners on election night.

Instead of an election day, we have an election month. A month of campaigning, followed by a month of waiting. The problem with holding a month-long election is the public cynicism and distrust it unnecessarily

breeds in the state's election results, as vote-leading candidates shift position days and weeks after the election.

A better system

Other states use a better system. Oregon has all-mail voting too but, unlike Washington, state ballots must be received by 8:00 p.m. on election day to be counted.

According to Oregon election official Brenda Bayes, this process is working just as voters intended when they adopted this requirement in 1998. Bayes notes:

> "Our office typically does not receive complaints regarding a voter feeling like they are disenfranchised solely based upon the 8:00 p.m. restriction... Oregon voters appear to appreciate that they are able to have unofficial results quickly after the 8:00 p.m. deadline regarding candidates and measures. If Oregon were to go to a postmark deadline it would delay these unofficial results."

Former Washington Secretary of State Sam Reed was a strong supporter of requiring that mail-in ballots arrive by election day. Reed said:

> "I have long supported a requirement that ballots be returned to the county elections offices, by mail or drop box, by election day. Neighboring Oregon, which pioneered vote-by-mail via a citizen initiative more than a decade ago, has found that good voter education and steady reminders of the return deadline have produced excellent results."[22]

As noted by the National Council of State Legislatures,

> "All-mail elections may slow down the vote counting process, especially if a state's policy is to allow ballots postmarked by election day to be received and counted in the days and weeks after the election."[23]

According to the National Association of Secretaries of State, the vast majority of states require mail-in ballots to actually be received by election day. In fact, the other all vote-by-mail states (Oregon and Colorado) require ballots to be received by election day.

Conclusion

To avoid concerns about possible voter disenfranchisement, military ballots could be exempted from the election day deadline, along with any ballots postmarked the Friday before the election. Voters who don't put their ballots in the mail in time could use secure drop boxes to deliver their ballots directly on election day. This is exactly what occurs for Oregon, Colorado and those counties in California that use all vote-by-mail.

Policy Recommendation:

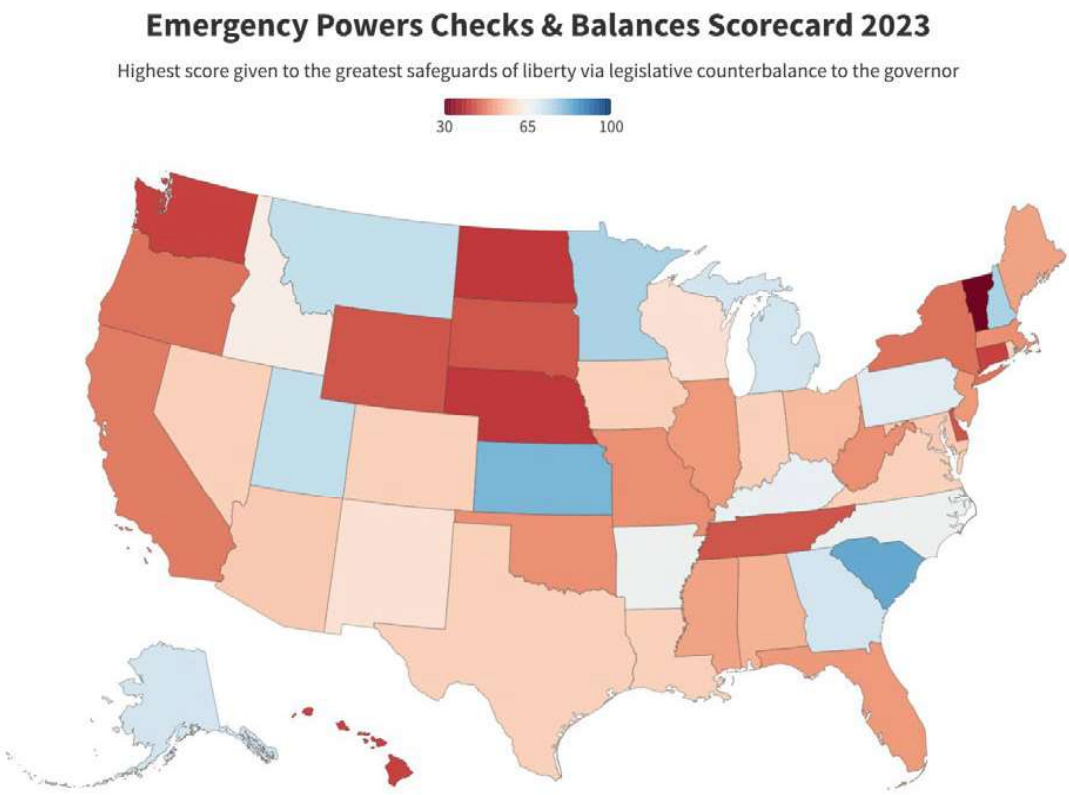
8. PUT A REASONABLE TIME LIMIT ON THE GOVERNOR'S EMERGENCY POWERS

On February 29, 2020 Governor Inslee announced he was assuming full emergency powers. He provided no time limit on how long he would suspend democracy and exercise sole executive authority, primarily because state law does not require one.

Washington ranks near the bottom of states in providing democratic safeguards for the public.[24] A national study found that Washington ranks 45th worst for legislative oversight of the governor's emergency power. This analysis was not tied to any particular public issue, like responding to COVID-19, but made a neutral assessment based on executive power and limits on democracy.

As the study authors state:

> "...in this 50-State Emergency Powers Scorecard, states were not graded on how their governor exercised emergency powers during the COVID-19 pandemic. Rather, this scorecard judges the legal environment under which a governor may exercise executive power during a state of emergency.
>
> "While some governors' actions (and resulting legislative or judicial action) during the pandemic helped determine a more exact interpretation of various state laws, the purpose of this scorecard was, and continues to be, to provide context and a point of comparison related to the extent of legislative oversight of the executive branch in times of emergency."[25]



Washington ranks among the worst states in safeguarding democracy during the governor's use of emergency power

In Washington a State of Emergency can be declared only by the governor, and a State of Emergency can be terminated only by the governor. There is no time limit on how long the governor can exercise power without legislative or public oversight.

> "The governor may suspend any law or regulation related to the emergency that does not interfere with First Amendment right to speech or assembly, or with prerequisite conditions for federal funds."[26]

In 2020, 2021 and 2022 Governor Inslee choose to retain sole executive authority for a record 975 days. As noted, he announced he was taking emergency power on February 29, 2020. He did not relinquish this power until October 31, 2022.[27]

COVID-related emergency orders imposed lasting harm

During that period many business owners, workers, students and other ordinary citizens reacted with dread and confusion whenever the governor announced he was holding another press conference. No one knew what

draconian order he would issue next. Governor Inslee closed schools, cancelled all public gatherings, banned religious services, forced the wearing of face masks in public and imposed an experimental vaccine mandate, even on people who already had medical immunity.

As a result thousands of neighborhood businesses closed for good, millions of workers lost income and employment, communities and families were divided, and over one million schoolchildren suffered lasting academic, social and emotional harm.

The worst uncertainty was that no one knew when the governor's arbitrary use of emergency power would end. Contacting the governor's office was useless – the governor's staff frequently ignored questions from the public. Petitioning elected lawmakers was equally futile. The governor made it clear he would not accept legislative review or consult with lawmakers before issuing fresh orders to the public.

Governor Inslee rejects compromise

In the fall of 2020 there were bipartisan discussions about holding a special session to review the governor's executive actions and his willingness to suspend state laws.[28] Lawmakers of both parties made it clear they would likely support most of the governor's executive actions but they felt a commitment to democracy required an accounting to the public.

Elected legislators also wanted to show their constituents that they were engaged in the crisis and were representing the community's interests. Even so, Governor Inslee rejected the proposal and refused to call lawmakers into a special session.

Emergency powers reform

There is a simple reform the Legislature can adopt to restore balance to the governor's emergency power in Washington state. The law should be amended so that all emergency executive actions that suspend state law or impose restrictive orders expire automatically after 30 days of the declared date of a State of Emergency.

If within that time the Legislature confirms an emergency order, it would remain in place for another 30 days.[29] In this way the governor could still act quickly in cases of true public emergency. At the same time the public could be assured that their democratic rights are being protected.

A reasonable time limit on the exercise of emergency power is the standard in almost all other states. Harmonizing Washington's law so that restrictive proclamations expire after 30 days unless the Legislature votes to continue them should not be controversial. There is no logical reason to give any governor unlimited emergency power and still claim we live under an accountable, democratic system of government.

Requiring affirmative legislative approval would not remove a single tool from the governor's emergency toolbox. All existing executive authority would remain unchanged. The only change would be that secretive policymaking would have to be justified to the people's elected representatives.

Conclusion

Democracy is not meant to be the arbitrary rule of one man operating behind closed doors. No emergency order should last more than two-and-a-half years unless it has received review and confirmation from the legislative branch. The Legislature should act to align Washington with the standard used in nearly all other states to avoid future abuses of the governor's emergency power.

ADDITIONAL RESOURCES

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