
CHAPTER SIX

OPEN AND ACCOUNTABLE GOVERNMENT

1. Policy Recommendation: Provide remote testimony services for citizens

The 2019 legislative session brought significant progress on our goal to provide the use of remote testimony for Washingtonians. First, the Senate decided to make its trial use of remote testimony services permanent, while the House finally took steps towards embracing this commonsense transparency reform by authorizing a study.

Remote testimony services allow ordinary people from around the state to participate in a public hearing through a video hook-up, without the time and expense of traveling to Olympia. Remote testimony is popular with citizens and with lawmakers as well. Discussing the importance of providing remote testimony services, Senate Majority Leader Andy Billig said:

“Technology offers us an opportunity to open up the doors of government to more people across the state. Everyone should feel like they can have their voice heard in Olympia, regardless of where you live. Our democracy is stronger when more people are involved, and this offers another method to weigh in on pertinent issues without driving to Olympia.”¹

Making remote testimony available at all legislative hearings

Due to its success, Washington’s current remote testimony

¹ “Remote testimony is here to stay in Senate,” by Jason Mercier, Washington Policy Center, January 30, 2019, at <https://www.washingtonpolicy.org/publications/detail/remote-testimony-is-here-to-stay-in-senate>.

program should be extended to include House committee hearings and all Senate hearings. Allowing the public to give remote testimony from fixed locations around the state would give citizens greater opportunity to be part of the lawmaking process.

It would also help Washingtonians avoid difficult travel during the winter months when the legislature is in session, especially when the snowy Cascade Mountains sometimes cut Eastern Washington off from the state capitol.

Even in mild seasons, getting to Olympia to attend a public hearing requires a full day of travel for many Washingtonians. Consider the following driving distances under even the best traffic conditions:

- Spokane to Olympia.....320 miles
- Walla Walla to Olympia.....305 miles
- Kennewick to Olympia.....258 miles
- Bellingham to Olympia149 miles
- Vancouver to Olympia.....106 miles
- Everett to Olympia.....89 miles

Remote testimony can instantly overcome these distances and provide all Washingtonians the chance to be part of the legislative process. According to the National Conference of State Legislatures, several states already provide a remote testimony service for their citizens.

Although there is broad support for allowing remote testimony, there is concern that it would be disruptive to the current hearing process. To avoid disruptions, committees should establish pre-set rules for those wishing to provide remote testimony. The Washington state Senate provides the public with an online

resource that describes this process.²

2. Policy Recommendation: Improve public notice and ban the use of title-only bills

Washington’s 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.”³

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

² “Senate Remote Testimony Overview,” Washington state Senate, accessed September 6, 2019, at <http://leg.wa.gov/Senate/Committees/Pages/RemoteTestimony.aspx>.

³ “House Mission Resolution,” Washington State Legislature, passed January 18, 2006, at <http://leg.wa.gov/House/Documents/HouseResolution.pdf>.

hearing.”⁴

The rules also supposedly prohibit so-called title-only bills, a blank bill with a title and a number, but empty pages where text will 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 (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 the required two-thirds vote.

If lawmakers feel the state constitution is getting in the way of being transparent and providing adequate public notice, it would be better for them to 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;

4 “Permanent Rules of the Senate,” Washington State Legislature at http://leg.wa.gov/Senate/Administration/Pages/senate_rules.aspx, accessed April 2016.

- 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 promised goal, stated in their formal House Resolution, to “Increase public participation, understanding, and transparency of the legislative process.”

Efforts to increase legislative transparency

In 2013, lawmakers introduced proposals to implement these legislative transparency requirements (Senate Bill 6560 and its companion House Bill 2369), but these measures did not receive a public hearing.

The most blatant abuse of this process 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) was so poor that those subject to the tax were provided only a few hours’ notice of the details before the hastily called public hearing. Testifying on the bill, Trent House with the Washington Banking Association said:

“We found out about it (tax bill) 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.”⁵

Boosting public 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 coming back into public session to vote on them formally.

Lawmakers should enact legislation like SB 6560 to enhance transparency and bolster public confidence in the law-making process.

3. Policy recommendation: 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. The exemption has been challenged in court, but regardless of the outcome, the legislature should follow the same disclosure and transparency requirements that the law places on county and local government officials.

5 HB 2167, relating to tax revenue,” House Finance Committee, Washington Legislature, April 26, 2019, TVW.org, and quoted in “Governor asked to veto stealth tax increase due to transparency concerns,” by Jason Mercier, Washington Policy Center, at <https://www.washingtonpolicy.org/publications/detail/governor-asked-to-veto-stealth-tax-increase-due-to-transparency-concerns>.

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 emails 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.

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.

4. Policy Recommendation: Adopt constitutional reform to 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 259,622 valid signatures.⁶

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 amending initiatives and attaching an emergency clause to the changes is denying the people an opportunity to stop the legislature from quickly gutting voter-passed laws.

Respecting basic constitutional powers

Article 2, Section 1 should be amended to remove the two-

6 “Frequently Asked Questions about Circulating Initiative and Referendum Petitions,” Elections and Voting, Office of the Secretary of State, Olympia, Washington, at <https://www.sos.wa.gov/elections/initiatives/faq.aspx>, accessed September 2019.

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.

Alternatively, if the legislature cannot secure a two-thirds vote to amend an initiative, lawmakers by a simple majority could 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.

5. Policy Recommendation: Reduce the number of statewide elected offices

At present the people of Washington elect officials to nine statewide offices (not counting justices to the state supreme court). These offices are Governor, Lieutenant Governor, Secretary of State, Treasurer, Auditor, Attorney General, Superintendent of Public Instruction, Commissioner of Public Lands and Insurance Commissioner. 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 state-wide offices and that elected

officials are subject to greater public scrutiny when there are fewer of them.

All statewide elected offices, except for Insurance Commissioner, are established by the state constitution. The Insurance Commissioner is also the only one for which the legislature, not the constitution, has 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.

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.

6. Policy Recommendation: Amend the constitution to 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 appointment. Had Justice Debra Stephens not won election, *all* of the state's supreme court justices would be from the Puget Sound region.

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.

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.

7. Policy Recommendation: 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.

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.”⁷

As noted by the National Council of State Legislatures,

7 “Polls point to weeks of waiting for election results,” by Jason Mercier, Washington Policy Center, October 24, 2012, at <https://www.washingtonpolicy.org/publications/detail/polls-point-to-weeks-of-waiting-for-election-results>

“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.”⁸

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.

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. Those wishing to send in their ballots after that date could use a secure ballot drop box before the election period ended. This is exactly what occurs for Oregon, Colorado and those counties in California that use all vote-by-mail.

Additional Resources

“It is impossible to analyze a title-only bill, because the text is blank,” by Jason Mercier, Legislative Memo, Washington Policy Center, April 2019

“House proposes remote testimony resolution,” by Jason Mercier, Washington Policy Center, March 11, 2019

“Timeline: Legislative public records debate,” by Jason Mercier, Washington Policy Center, February 23, 2018

“District elections for supreme court gets public hearing,” by Jason Mercier, Washington Policy Center, January 29, 2015

“And the election winner is...to be determined,” by Jason Mercier, Washington Policy Center, November 3, 2014

⁸ “All-Mail Elections (aka Vote-By-Mail),” by Dylan Lynch, National Council of State Legislatures (NCSL), June 27, 2019, at <http://www.ncsl.org/research/elections-and-campaigns/all-mail-elections.aspx>

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“Time to add to the nearly two-dozen supermajority requirements currently in the state constitution,” by Jason Mercier, Washington Policy Center, March 1, 2013

“Reducing Washington’s ‘long ballot’ for elections, time to restructure statewide elected policy offices,” by Jason Mercier, Policy Notes, Washington Policy Center, August 2008