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State Legislative Oversight: **West Virginia**



Capacity and Usage Assessment

Oversight through Analytic Bureaucracies:	Moderate
Oversight through the Appropriations Process:	Moderate
Oversight through Committees:	Moderate
Oversight through Administrative Rule Review:	Limited
Oversight through Advice and Consent:	Limited
Oversight through Monitoring Contracts:	Minimal
Judgment of Overall Institutional Capacity for Oversight:	Moderate
Judgment of Overall Use of Institutional Capacity for Oversight:	Moderate

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Legislative Oversight in West Virginia

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Summary Assessment

West Virginia’s legislative auditor seems effective, not just in terms of the number and scope of the performance audits it conducts, but also in generating legislative action on the basis of those audits. The action taken in response to the performance audits discussed in this summary indicates serious efforts to improve government accountability. Finally, the state is unusual in that it has both sunrise and sunset laws, both of which increase the accountability of agencies and the regulatory regime. The legislature is also seemingly capable of extracting concessions from the governor through its advice and consent powers vis-à-vis gubernatorial appointments.

Despite these positive institutional features, evidence does not indicate that West Virginia is among the strongest examples of effective oversight of the executive by the legislature, largely because the executive branch is so powerful, especially with respect to the state’s budget. Although there are instances, like the 2017 budget battle, in which the legislature has successfully prevailed over the governor, the governor typically seems to exert a great deal of influence over state politics. The legislature has no real role in oversight of state contracts, which are in the hands of a separately elected executive.

Major Strengths

All audits in West Virginia must, by law, be filed as public record, so information is widely available. Generally, West Virginia’s legislature responds to its oversight agencies with substantive action. The Senate Finance Committee’s Post Audits Subcommittee’s investigation into misuse of public funds by the state Supreme Court produced action by the legislature. Statewide crises, such as the 2018 teacher’s strike, have led to action from the West Virginia legislature to increase teacher’s pay, an example of successful fire alarm oversight.

Challenges

A relatively small staff at the Legislative Auditor's Office means that the West Virginia legislature performs audits by prioritizing problematic agencies and agencies that have not been recently audited -- a fire alarm approach. The legislature's lack of committees specifically tasked to monitor state contracts is a weakness of West Virginia's oversight capabilities, leaving the responsibility instead to the State Auditor's Office in the executive branch.

Relevant Institutional Characteristics

The National Conference of State Legislatures (NCSL) classifies West Virginia's legislature as a part-time body with low pay, though it is ranked as more professionalized than a pure citizen legislature.²⁵⁴³ Squire, meanwhile, ranked West Virginia's legislature as 38th out of 50 in terms of legislative professionalism (2017). This means that the West Virginia legislature has a "limited ability to research policy alternatives independently from the executive" (Haider-Markel, 2009). Legislative work is not full-time, and the pay typically requires a second job; legislators' salary is \$20,000, plus a daily \$131 per diem set by the compensation commission while the legislature is in session.²⁵⁴⁴ The legislature has a total staff size of 352 members, 201 of whom are permanent.²⁵⁴⁵ House members serve two year terms, while senators serve four year terms. There are no limits on the number of terms, consecutive or otherwise. However, there tends to be a great deal of turnover among lawmakers (Haider-Markel, 2009). Legislative sessions last for 60 calendar days, with the limit being set by the constitution.²⁵⁴⁶ West Virginia's legislature is not especially polarized, with the house ranking 40th out of 50 states and the senate ranking 42nd (Shor & McCarty, 2015).

West Virginia's governor has been ranked by some as being one of the most powerful in the country, though there is some disagreement among authors. "In the legislative arena, the governor is influential because of controls over discretionary funding and access carried out by the eight-member cabinet of 'supersecretaries,'²⁵⁴⁷ and because of the institutional capacity offered by the bureaucracy" (Haider-Markel, 2009). Much of this assessment is based upon the substantial budgetary powers that are granted to the governor, as West Virginia is one of seventeen states that give the governor the full responsibility for creating the budget. The governor can also call the legislature into special sessions and choose a successor for any legislator who leaves office before the end of their term, though the replacement must be of the same party as the outgoing lawmaker.

According to Haider-Markel (2009), West Virginia's governor's influence "is moderated only by five separately elected executive positions: the secretary of state, commissioner of

²⁵⁴³ http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx#side_by_side, accessed 4/27/18.

²⁵⁴⁴ <http://www.ncsl.org/research/about-state-legislatures/2017-legislator-compensation-information.aspx>, accessed 4/27/18.

²⁵⁴⁵ <http://www.ncsl.org/research/about-state-legislatures/staff-change-chart-1979-1988-1996-2003-2009.aspx>, accessed 5/8/18.

²⁵⁴⁶ <http://www.ncsl.org/research/about-state-legislatures/legislative-session-length.aspx>, accessed 5/8/18.

²⁵⁴⁷ "Supersecretaries" are the "heads of cabinet departments such as commerce, education and the arts, and public safety" (Haider-Markel, 2009).

agriculture, attorney general, auditor, and treasurer.” Unlike the governor, who is limited to two four-year terms, these other executive positions are not term-limited. By the end of the 1960s, “West Virginia had jumped from 45th in the nation in terms of relative strength of the governor to a position where no state was ahead of this one in veto or budgetary powers.”²⁵⁴⁸ By contrast, Ferguson (2013), who does not give as much weight to budgetary powers as Haider-Markel, ranks West Virginia at only 33rd in terms of gubernatorial power. Some of the difference in scores might also be attributed to the absence of gubernatorial power for government reorganization. The explanation for this difference also appears to involve the emphasis Ferguson (2015) places on the governor’s control over the political party.

An above-average percentage of West Virginia’s population, 13%, is employed in the state or local government, with a disproportionate share of that number, 7.1%, in the education sector. By contrast, the public safety, welfare, social services, and other sectors each account for less than 2% (Edwards, 2006).

Political Context

Historically, West Virginia has been characterized as “politically radical but socially conservative” (Haider-Markel, 2009), and in the last 30 years, Democrats have controlled the state’s legislature.²⁵⁴⁹ However, “West Virginia seems to have turned a corner from being a Democratic-dominated state to a Republican one. The switch started years ago, when Republican presidential candidates were able to win the state by appealing to its socially conservative voters, regardless of their party affiliation.”²⁵⁵⁰ As a result, the Democrats’ control over state politics was broken in the 2014 elections, when Republicans took control of both the house and the senate. Currently, the House of Delegates contains 36 Democrats and 64 Republicans, while the senate has 12 Democrats and 22 Republicans.

The period of Democratic control over the legislature also coincided with that party’s domination of the governorship. There have been three exceptions to this trend: from 1985-1989, from 1997-2001, and during the current administration of Gov. Jim Justice.²⁵⁵¹ Interestingly, Gov. Justice was elected as a Democrat in January 2017, but switched his party affiliation to Republican seven months after taking office. He announced his decision at a rally for President Trump and switched parties the next day. As a result of Justice’s defection from the Democratic Party, Republicans gained a trifecta in West Virginia for the first time since 1930.²⁵⁵²

²⁵⁴⁸ <https://www.wvencyclopedia.org/articles/2218>, accessed 5/2/18.

²⁵⁴⁹ <http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx#Timelines>, accessed 5/8/18.

²⁵⁵⁰ https://www.nytimes.com/2014/11/25/upshot/election-was-rough-for-democrats-it-was-worse-for-west-virginia-democrats.html?_r=2&abt=0002&abg=1, accessed 4/27/18.

²⁵⁵¹ https://www.nga.org/cms/home/governors/past-governors-bios/page_west_virginia.html, accessed 4/27/18.

²⁵⁵² <http://time.com/4886765/west-virginia-rally-jim-justice-republican-trump/>, accessed 4/27/18.

Dimensions of Oversight

Oversight Through Analytic Bureaucracies

West Virginia's legislative auditor is appointed by the Joint Committee on Government and Finance (WV Code §4-2-3) and is "solely responsible to the legislature." The legislative auditor oversees the work of about 60 employees in two divisions: the Performance Evaluation and Research Division (PERD) and the Post Audit Division (PAD). Between these divisions, three types of audits are conducted: full performance evaluations, financial post audits, and preliminary performance reviews, the latter of which exist "to determine for an agency whether or not the agency is performing in an efficient and effective manner and to determine whether or not there is a demonstrable need for the continuation of the agency" (WV Code §4-2-2). The decision to audit a particular agency is made by the legislative auditor, the president of the senate, and the speaker of the house.

PAD conducts financial post audits and "also performs audits or reviews at the direction of the legislative auditor of the disbursement of state grant funds to volunteer fire departments."²⁵⁵³ PAD reports its findings and recommendations to the Legislative Post Audit Subcommittee of the Joint Committee on Government and Finance. According to the legislative auditor, most of the issues that are identified by PAD are "the result of poor judgment rather than outright malfeasance."²⁵⁵⁴ PAD appears to produce about 15 post-audits per year.

The Performance Evaluation and Research Division (PERD), created in 1994, has a staff of 18. Its role is to provide useful information to the legislature, to hold government accountable by measuring key performance indicators (outputs, outcomes, compliance, and impact in relation to purpose), to determine whether there still exists a need for an agency, and to measure the impact of agencies on the citizens of the state.²⁵⁵⁵ Under the authority of West Virginia Code §4-2-5, PERD conducts performance audits and agency and board reviews. NCSL survey data indicate that PERD dedicates 90% of their activity to performance audits, program evaluations, and policy analyses while the remaining 10% is dedicated to best practice review and 5% to short-term policy research for members and committees.²⁵⁵⁶ Since its inception, PERD has produced 607 reports. PERD appears to produce about 10 program evaluations per year. Not all of these focus on state agencies; some appear to be sunset reviews of boards and commissions. PERD's website also contains very short "letter reports," such as one addressed to the Joint Committee on Government and Finance detailing the Division of Labor's lack of compliance with the West Virginia Jobs Act.²⁵⁵⁷ Despite being only a three page letter, the report offers a short analysis of the Division of Labor's failure to comply with the Jobs Act and recommendations to the legislature to address the issue. PERD audits are typically presented to the Joint Committee on Government Operations and the Joint Committee on Government

²⁵⁵³ <http://www.wvlegislature.gov/Joint/postaudit.cfm>, accessed 4/30/18.

²⁵⁵⁴ http://www.register-herald.com/news/state_and_region/west-virginia-legislative-auditor-is-state-watchdog/article_93e04f91-3bce-514c-9ea6-663ba0c3a2f6.html, accessed 5/4/18.

²⁵⁵⁵ www.legis.state.wv.us/joint/PERD/perd.cfm, accessed 4/30/18.

²⁵⁵⁶ In this case, the numbers add up to 105%. This anomaly exists in the NCSL data, but it is unclear from whence it derives.

²⁵⁵⁷ http://www.wvlegislature.gov/legisdocs/reports/perd/Labor_January_2018.pdf, accessed 4/30/18.

Organization. A review of posted agendas reveals that presentations of these reports consume a fair amount of these committees' time.²⁵⁵⁸

The decision by the legislative auditor and the leaders of the two legislative chambers to audit an agency or division is made in accordance with the Performance Review Act (WV Code §4-10). According to the law, at least once every seven years, "an agency review shall be performed on one or more agencies under the purview of each department." In 2017, this included agencies under the Department of Revenue and the Department of Commerce, in 2018 the Department of Environmental Protection and the Department of Military Affairs and Public Safety, in 2019 the Department of Health and Human Resources, including the Bureau of Senior Services, and so forth (WV Code §4-10-8). Regulatory boards are reviewed once every 12 years, with some boards scheduled for 2017, others for 2018 and 2019, etc. However, the legislative auditor noted in 2010 that "without a large staff . . . West Virginia's office was unable to respond if someone called about serious problems in another agency that wasn't up for regular review." Consequently, the West Virginia legislature decided instead "to focus on acute problems, which meant that audits became shorter and more focused."²⁵⁵⁹ According to a representative from the Legislative Auditor's Office, what this means in practice is that when departments come up for their seven-year review, not every agency within that department will necessarily be subject to audit in a given cycle. Rather, potentially problematic agencies and agencies that have not been recently audited will be subject to review. Meanwhile, legislative leadership and the Joint Standing Committee on Government Organization may request an agency or board review at any time, but currently West Virginia code (WV Code §3-4-3) establishes the Joint Committee on Government and Finance as the overarching entity responsible for supervising the legislative auditor in order to provide continuity during interim sessions. Thus, recordings of the Joint Committee on Government and Finance include presentation of audit reports.

The results of all audits must be filed as public record (WV Code §4-2-4). There is evidence, moreover, that audits do sometimes form the basis for legislative action. For example, Senate Bill 2003, which was passed in October 2017, refers specifically to an audit performed on the Division of Highways. This audit was performed by an independent firm, Deloitte, as required by WV Code §17-2A-6a. One of the issues identified in the audit was that many construction and maintenance positions were going unfilled due to a complex hiring process. Senate Bill 2003 sought to address this problem by streamlining the hiring process and directing the commissioner of highways to "implement special employment procedures," including making it easier to evaluate applicants and providing more discretion for determining compensation, in order to facilitate hiring and retention. The bill also addressed similar staffing issues in the Tax Division of the Department of Revenue.

West Virginia also has an elected state auditor, separate from the legislative auditor. The state auditor is "the chief inspector and supervisor of local government offices." The state auditor performs financial compliance audits, provides training for county officials, reviews budgets, approves levy rates, and other such duties for West Virginia's counties, boards of education, municipalities, boards, commissions, and other such entities (WV Code §6-9-11). The state auditor is part of the executive branch of West Virginia's government, but does not report to the governor. Rather, this is an independently elected member of the executive branch of

²⁵⁵⁸ No audio transcript or other minutes are posted on the committee website.

<http://www.wvlegislature.gov/committees/interims/agenda.cfm?recordid=3480&abb=GOVORG>, accessed 6/4/18.

²⁵⁵⁹ http://www.register-herald.com/news/state_and_region/west-virginia-legislative-auditor-is-state-watchdog/article_93e04f91-3bce-514c-9ea6-663ba0c3a2f6.html, accessed 5/8/18.

government, along with the agriculture commissioner, the attorney general, secretary of state, and the treasurer—none of whom report to the governor and all of whom are elected independently. Moreover, the state auditor, during a January 15, 2018, Senate Finance Committee hearing, objected to a budget line item in the governor’s proposed budget labeled “salary enhancement” providing raises for his staff saying that those increases should come from the state auditor’s office budget “not as a line item in the governor’s budget.”²⁵⁶⁰ In his opinion, this preserves the independence of his office and the state government’s system of checks and balances.

Oversight Through the Appropriations Process

The 1968 Modern Budget Amendment gave West Virginia’s governor extensive power over the budget, which had previously been lacking: “Starting in 1969 . . . [t]he governor as chief executive decided how much tax revenue to put in the fiscal year estimate, and then recommended how it was to be spent. The legislature could disagree on the expenditures but could not alter the estimates of revenue made by the governor.”²⁵⁶¹

The governor does have a line-item veto power, but in 2017, he vetoed the legislature’s budget outright. Blaming what he described as extremely deep budget cuts and lawmakers’ refusal to raise taxes to increase revenues, he said, “I’m not going to put my name on this mess.”²⁵⁶² Instead, he publicly rebuked the legislature by holding a press conference, during which he uncovered a silver platter containing a copy of the budget covered in cow manure.²⁵⁶³ In the wake of the veto, lawmakers were forced to deplete the state’s “Rainy Day Fund” and “squeeze cash out of state agencies” to cover more than \$100 million budget shortfall. Although they were able to pass a budget, it nevertheless still contained an \$11 million funding gap.²⁵⁶⁴ The governor ultimately declined to veto this second budget on the grounds that he wished to avoid a government shutdown.²⁵⁶⁵ At the same time, he also refused to sign it, calling it a “travesty” and stating “I can’t sign this. I can’t possibly sign this.”²⁵⁶⁶

Despite such controversies, however, the fact that the West Virginia legislature was able to pass a budget over the governor’s strident objections stands as evidence of its ability to prevail over the executive in the domain of appropriations. The audio recordings of budget hearings held by the joint committee show multiple government officials and others present at hearings, a committee that works systematically through bills related to items in the budget and testimony given by other government officials, such as the legal counsel’s office.²⁵⁶⁷ As a part of the showdown between the governor and the legislature the senate and house both voted on

²⁵⁶⁰ <http://sg001-harmony.sliq.net/00289/Harmony/en/PowerBrowser/PowerBrowserV2/20180115/-1/17747>, minute 3:23 of the video tape, accessed 6/5/18.

²⁵⁶¹ <https://www.wvencyclopedia.org/articles/2218>, accessed 5/2/18.

²⁵⁶² <https://www.usnews.com/news/best-states/west-virginia/articles/2017-06-21/west-virginia-governor-wont-sign-budget-amid-tax-impasse>, accessed 5/1/18.

²⁵⁶³ <http://wvmetronews.com/2017/04/13/justice-vetoes-budget-by-unveiling-bull-manure/>, accessed 5/1/18.

²⁵⁶⁴ <https://www.reuters.com/article/us-west-virginia-budget/west-virginia-starts-fiscal-2018-with-11-million-budget-gap-idUSKBN19X324>, accessed 5/1/18.

²⁵⁶⁵ <http://www.governing.com/topics/finance/tns-justice-west-virginia-budget.html>, accessed 5/1/18.

²⁵⁶⁶ <http://wvpublic.org/post/2018-budget-will-become-law-without-justices-signature#stream/0>, accessed 5/1/18.

²⁵⁶⁷ <http://sg001-harmony.sliq.net/00289/Harmony/en/PowerBrowser/PowerBrowserV2/20180109/-1/17730>, accessed 6/4/18.

legislation to increase teacher pay in response to this public protest. Given that this action by the legislature was precipitated by a teacher walk-out,²⁵⁶⁸ it could be interpreted as the Senate Finance Committee responding to a crisis--fire alarm oversight.

The Senate Finance Committee's Post Audits Subcommittee responded to another "fire alarm" during its May 20 meeting. This subcommittee used this meeting to investigate alleged evidence of fraud and misuse of public funds by state Supreme Court justices, who were using court vehicles for personal use and other abnormalities. The PERD published a four-part evaluation of the court. Another matter involved misuse of gift cards for drug court participants. This report was presented by staff from the legislative auditor's office. These issues appear to have been triggered by an IRS investigation. The chief justice of the Supreme Court testified and brought her court administrator with her, who also spoke at the hearing. The audit manager of the Post Audit Division (PAD), one of the analytic bureaucracies described earlier in this discussion, made an extensive presentation on the State Fleet Commuting Audit. He pointed out the lack of available data and weak reporting on the use of state vehicles. His report included a series of recommendations for improving reporting requirements and limiting misuse of vehicles. Committee members expressed a desire to have violators reimburse the state for the thousands of dollars that were misused. The committee mentioned the need to tweak a fleet management bill that passed the previous year, but the committee adjourned without taking any further action. The existence of the earlier bill improving vehicle fleet management indicates that the committee does take action based on evidence of government mismanagement.

Oversight Through Committees

There is some ambiguity about which legislative committees are working most closely with the legislative auditor's office. Minutes and transcripts for senate committee meetings are available, and include joint chamber committees such as the Joint Committee on Government and Finance. There are some recordings of the meetings of the Senate Government Organization Committee, but the agendas for this committee concentrate on bills from the legislative chambers rather than audit reports. Yet, published agendas indicate that oversight committees do meet to consider proposed legislation and performance audit reports. Recordings of the Joint Committee on Government and Finance feature audit report presentations. This further demonstrates that this committee is the relevant agent with respect to legislative oversight. What is clear is that standing committees in general are actively engaged in oversight.

When audit reports are submitted to standing committees (which is required by statute), agencies are asked to respond. While these responses may appear in writing as part of the final audit report, it is often typical for agency representatives to give testimony before the substantive standing committee that oversees the agency's policy domain in order to address any specific questions or concerns that members of that committee may have. This was the case with the vehicle fleet management audit hearings described above.

One example of effective oversight by standing committees pertains to the existence of West Virginia's eight Regional Education Service Agencies (RESAs). According to a representative from PERD, when West Virginia Senator Joe Manchin was governor of the state, he had attempted to have the RESAs de-funded on several occasions, and they had been audited

²⁵⁶⁸ <https://www.nytimes.com/2018/03/06/us/west-virginia-teachers-strike-deal.html>, accessed 5/30/18.

multiple times going as far back as 2006. However, in his words, previous audits “did not hit the nail on the head,” since they sought ways of fixing the RESAs (interview notes, 2018). However, a 2016 PERD audit²⁵⁶⁹ that was requested by legislative leadership had a different charge: to determine whether the RESAs were even necessary in the first place. The audit found that the RESAs were wasteful and unnecessary, since their staffs were already working closely with the Department of Education, while their directors were drawing large salaries while mostly tending to day-to-day operations. The legislative auditor, therefore, recommended stripping them of their autonomy and placing them fully under the Department of Education.²⁵⁷⁰ This recommendation resulted in two separate bills being introduced containing language that would dissolve the agencies.²⁵⁷¹ The bills were referred to the House and Senate Education Committees, and, although progress was slow,²⁵⁷² a bill was eventually passed that abolished the RESAs and would replace them with “Educational Service Cooperatives between county school systems.”²⁵⁷³ The end result was a savings of approximately \$3.7 million, \$1.5 million of which consisted of salaries for the directors and their executive staff, and a streamlining of the state educational bureaucracy.

The coordination between PERD and the legislature points to a reasonable degree of oversight being exercised by standing committees in West Virginia. This is confirmed by interviews with a source familiar with the Legislative Auditor’s Office, who noted that substantive standing committees often specify particular questions or concerns that they hoped that PERD would address during the auditing process (interview notes, 2018). As in the case of the RESAs, the results of these investigations then inform the legislative process.

Oversight Through the Administrative Rules Process

When an agency determines the need for a new rule, the new regulation must first undergo a public comment period, after which the agency may approve or amend the rule. After an agency approves the regulation, the proposed rule is submitted to the Legislative Rule-Making Review Committee (LRMRC), which is composed of six members each from the house and the senate. The LRMRC’s purpose “is to review all legislative rules proposed by state agencies, boards and commissions and to make recommendations regarding the proposed rules to the legislature, which has the authority to approve or disapprove the promulgation of the proposed rules.”²⁵⁷⁴

Once a rule has been filed with the LRMRC, the committee may opt to hold public hearings on the rule and also evaluates criteria like the scope of a rule, its complexity, its conformity with legislative intent, its impact on “the convenience of the general public” (WV Code §29A-3-11). The committee can then recommend that the legislature (a) authorize the rule;

²⁵⁶⁹ <https://www.documentcloud.org/documents/3232197-RESA.html>, accessed 5/1/18.

²⁵⁷⁰ https://www.wvgazette.com/news/education/audit-recommends-shifting-authority-of-resas-to-state/article_ce53e5b6-9c02-51a8-9c1b-3d70861e438f.html, accessed 5/1/18.

²⁵⁷¹ <http://www.theintelligencer.net/news/top-headlines/2017/03/west-virginia-legislature-yet-to%E2%80%88consider-resa%E2%80%88bill/>, accessed 5/1/18.

²⁵⁷² <http://www.theintelligencer.net/news/top-headlines/2017/03/west-virginia-legislature-yet-to%E2%80%88consider-resa%E2%80%88bill/>, accessed 5/1/18.

²⁵⁷³ <http://wvmetronews.com/2018/01/17/paine-elimination-of-resas-performance-audits-has-slashed-jobs/>, accessed 5/1/18.

²⁵⁷⁴ http://www.wvlegislature.gov/Joint/rule_making.cfm, accessed 5/2/18.

(b) authorize part of the rule; (c) authorize the rule with amendments; or (d) recommend that the proposed rule be withdrawn. Whether or not the LRMRC recommends the adoption of a rule, or part of it, committee staff or the Office of Legislative Services will then prepare a draft bill authorizing the result and submit it to the whole legislature. If a recommendation is made that a rule be withdrawn, then a recommendation to that effect is submitted along with the draft bill. The legislature must then “pass a bill in order to bar adoption of a rule after (a) Supreme Court’s decision, which found that there was a separation of powers issue if this was done in any other manner” (Tharp, 2001). The governor may then sign or veto the legislation. Per WV Code §29A-3-16, existing rules may also be reviewed by the committee, which may then issue recommendations to the legislature or the appropriate agency.

Schwartz (2010) criticizes the resulting rule review process as highly politicized and subject to undue influence by interest groups. The legislature on the other hand, claims that the control elected legislators exert over the process is preferable to allowing state agency bureaucrats, who have never been elected by the voters, to make law through the rule-making process. He bases this assessment on the comments of the West Virginia Senate Judiciary Committee General Counsel, Rita Pauley, who states that “[t]he Legislature is a political creature not a scientific peer review group.”²⁵⁷⁵ Schwartz (2010) provides a list of several carefully crafted administrative rules that were based on a compromise between science and industry interests that were replaced by the legislature with rules that favored industry over the safety of West Virginia’s citizens—for example a rule on water purity crafted by the agency, environmental groups, and industry that was replaced by the legislature with a rule drafted by the Chamber of Commerce and the West Virginia Coal Association.

Oversight Through Advice and Consent

The ability of West Virginia’s governor to issue executive orders with the force of law is established in Article VII, Section 5 of the West Virginia Constitution.²⁵⁷⁶ A source in the West Virginia Senate noted that executive orders are not used in the same way as they often are at the federal level—that is, to circumvent the legislature (interview notes, 2018). Instead, they are typically used to declare days of commemoration when flags will fly at half-staff or to declare emergencies. Since taking office in January 2017, Gov. Justice has promulgated 23 executive orders. The West Virginia legislature does not have any ability to block or rescind executive orders. However, if an executive order would require appropriations, the legislature would be called into special session in order to authorize that spending.

West Virginia’s governor has the power to appoint “executive agency heads, members of boards, commissions, task forces and councils, positions authorized by the legislature for specific reasons, and persons to fill vacancies in certain federal, state, legislative and judicial offices.” At the beginning of the governor’s term, seven “super-secretaries,” which are cabinet-level positions, are appointed and answer only to the governor. These agency heads “work with the

²⁵⁷⁵ http://www.wvlegislature.gov/Joint/Bill_Drafting/seminar/LEGISLATIVE%20RULEMAKING%20WHERE%20A%20WE%20NOW%20.pdf, accessed 1/6/19.

²⁵⁷⁶ <https://sos.wv.gov/public-services/execrecords/Pages/ExecutiveOrdersandProclamations.aspx> , accessed 5/2/18.

governor to select division directors and commissioners and their deputies or assistants who will manage the ongoing operations.”²⁵⁷⁷

According to a member of the West Virginia Senate, the governor does have the power to reorganize state agencies; however, in many cases governors choose to do so through the legislative process (interview notes, 2018). A recent example is when the legislature was called into special session in early 2018 by the governor in order to pass legislation that would disband the Department of Education and the Arts and reorganize it into the Division of Culture, History, and Arts.

For most of the past 20 years, gubernatorial appointments have not been contentious, being described by one member of the senate as a “rubber stamp” process: “if that’s who the government wants, then we’ll go ahead and give it to him.” Even after current Gov. Justice took office (but before he changed party affiliation), the senate confirmed 81 out of 83 of the proposed appointees, with the remaining two being withdrawn by the governor. After the vote, the governor signed a piece of legislation that exempted certain hospitals from particular administrative procedures. News reports suggested that “[s]ome political observers had said the senate might not confirm Justice’s DHHR secretary pick . . . if Justice didn’t sign the certificate of need measure.”²⁵⁷⁸ So while appointments may not always be controversial, confirmation has occasionally been used as political leverage to extract concessions from the executive.

In the past year, however, senatorial confirmations have become much more contentious, with the Republican capture of the legislature after 83 years. According to a member of the senate, once this happened, the previous “rubber stamp” confirmation process was abandoned and a more serious look was taken at appointees. However, this was not a strictly partisan development, as many senate Democrats also supported the changes (interview notes, 2018). Nominations happen on an ongoing basis, even when the legislature is not in session. One of the problems that has been addressed is that when the senate receives a nominee, they are required to act on that nomination the next time they are in regular or special session. Since nominees were required to fill out a survey about their qualifications and background, and since many nominees did not fill out these surveys in a timely fashion, it became problematic when the governor submitted several nominees and then called the senate into special session for confirmation on the next day. With the changes to the process, much of the work of researching nominees has been placed in the executive branch, which is now required to submit the nominees’ information prior to confirmation. Marking a change from previous practices, in the past year several nominees have been rejected as being unqualified, either statutorily or according to the rules of the board to which they were being nominated.

The West Virginia legislature has also advanced a constitutional amendment that would make seats on the state’s Board of Education elected positions. Currently, they are appointed by the governor. The activities of the board, moreover, would be further subordinated to the legislature, which would henceforth have to approve any policies proposed by the Education Board.²⁵⁷⁹ Such a move would be fairly momentous, since “the board is the chief (education) policy maker for the state. Whatever policy passes has the effect of law, unless the legislature changes it.” This has led some to characterize Education Board members as “some of the most

²⁵⁷⁷ <https://sos.wv.gov/public-services/execrecords/appointments/Pages/default.aspx>, accessed 5/4/18.

²⁵⁷⁸ <http://wvpress.org/breaking-news/senate-approves-nearly-justices-appointments-justice-pledges-sign-hospital-bill/>, accessed 5/4/18.

²⁵⁷⁹ https://www.wvnews.com/news/wvnews/west-virginia-could-join-minority-of-states-to-elect-state/article_48d31038-d57c-5992-88f7-5ebb64c67025.html, accessed 5/4/18.

influential people in state government.”²⁵⁸⁰ While the House passed the amendment, a corresponding senate bill, which would have subordinated the Board of Education to the legislature, did not make it out of committee.²⁵⁸¹ Nevertheless, these efforts to control the Board of Education indicate an attempt to increase legislative oversight of an important state board.

Oversight Through Monitoring of State Contracts

Contracts in West Virginia are monitored by the State Auditor’s Office. The state auditor is an executive position that is elected separately from the governor. The Contract Audit section of the Auditing Division of the State Auditor’s office “is responsible for processing payments against contracts requiring encumbrance through the State Purchasing Division or West Virginia Code and approval by the attorney general as to form. These contracts and any change orders thereto are reviewed for compliance with State Purchasing and Higher Education guidelines; as well as the attorney general’s approval, if applicable.”²⁵⁸² The legislature does not have any committees specifically devoted to contract review, and the finance committees do not seem to exercise any oversight in this domain either.

Oversight Through Automatic Mechanisms

West Virginia has both sunrise and sunset laws. Section §30-1A of the West Virginia Code deals with sunrise reviews. Such reviews are conducted by the Joint Standing Committee on Government Organization, which evaluates whether lack of regulation “clearly harms or endangers the health, safety or welfare of the public, and whether the potential for the harm is easily recognizable and not remote or dependent upon tenuous argument,” whether regulation is necessary because of the need for specialized training, whether more cost-effective means of protecting the public exist, and whether the professional group applying for regulation should be regulated at all. The committee may also conduct public hearings regarding the proposed regulation.

Baugus and Bose (2015) characterize West Virginia as having selective sunset review laws, which only reviews certain agencies and regulatory boards. Section §4-10-1 of the West Virginia Code governs sunseting. According to this law, new rules expire after five years unless they are reauthorized. However, “expiration dates do not apply to rules enacted before April 1, 2016, unless those rules are modified in the future, meaning old rules won’t receive the same level of scrutiny as new rules.”²⁵⁸³ West Virginia’s sunseting rules also exempted the Department of Environmental Protection. Agencies terminate rules, pending either a preliminary or full review, depending on the agency, on dates specified in statute. Regulatory boards must be evaluated at least once every 12 years, or otherwise cease operation. If an agency or board

²⁵⁸⁰ <http://www.wvea.org/content/west-virginia-board-education-doesn%E2%80%99t-get-much-attention-its-members-are-some-most>, accessed 5/4/18.

²⁵⁸¹ https://www.wvgazette.com/news/legislative_session/bills-to-elect-state-school-board-members-let-lawmakers-reject/article_c742a8fb-81e9-55eb-84b6-74ce186f5a71.html, accessed 5/8/18.

²⁵⁸² <https://www.wvsao.gov/Auditing/Default>, accessed 5/4/18.

²⁵⁸³ <https://www.mercatus.org/publications/regulatory-landscape-west-virginia>, accessed 5/4/18.

terminates, it ceases to exist on July 1 of the following year. Any agency not terminated can be continued by the legislature for no more than six years.

Methods and Limitations

In West Virginia, we conducted a total of 3 interviews. West Virginia's legislature also provides public and online access to audio and video, minutes, and agendas for its committee meetings. Overall, the West Virginia legislature provides access to many archived recordings, as well as agency reports, post audits, and other publications.

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