

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 1387 (Limón)
Version: March 10, 2022
Hearing Date: April 19, 2022
Fiscal: Yes
Urgency: No
TSG

SUBJECT

Gubernatorial appointments: report

DIGEST

This bill requires the office of the Governor to convene a working group to make recommendations on the most effective way to ensure the state's leadership on boards and commissions reflects a diversity in race, gender identity, class, region, and creed, among other things, that is reflective of the state's population as a whole. The bill also requires the office of the Governor to create and deliver to the Legislature a report containing specified information about the demographic makeup of current gubernatorial appointees.

EXECUTIVE SUMMARY

California is rich in demographic diversity. Existing law makes it state policy that the composition of state boards and commissions should broadly reflect the general public, including ethnic minorities and women. Presently, however, the state does not collect data to determine whether this policy is being achieved. Since the Governor appoints many of these positions, this bill would require the office of the Governor to collect data regarding the demographic makeup of all gubernatorial appointees and to report it in aggregate form. At the same time, the bill would direct the office of the Governor to convene a working group tasked with providing guidance to the Governor on effective ways to ensure that the state's public boards and commissions are reflective of the rich demographic diversity that characterizes California's population as a whole.

The bill is sponsored by Hispanas Organized for Political Equity. Support is from advocates for greater representation of Latinx individuals and people with disabilities. There is no opposition on file. The bill passed out of the Senate Governmental Organization Committee by a vote of 10-3.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that no State shall deny any person within its jurisdiction the equal protection of the laws. (U.S. Const., Amend. XIV, § 1.)
- 2) Provides that a person may not be denied equal protection of the laws. (Cal. Const., Art. 1, § 7(a).)
- 3) Requires the Governor to appoint every office whose mode of appointment is not prescribed by law. (Gov. Code § 1300.)
- 4) Provides that in making appointments to state boards and commissions, the Governor and every other appointing authority shall be responsible for nominating a variety of persons of different backgrounds, abilities, interests, and opinions. (Gov. Code § 11141.)
- 5) Existing law provides that it is the policy of the State of California that the composition of state boards and commissions shall be broadly reflective of the general public including ethnic minorities and women. (Gov. Code § 11140.)
- 6) Specifies that it is not the intent of the Legislature that formulas or specific ratios be utilized in complying with (4) and (5), above. (Gov. Code § 11141.)

This bill:

- 1) Requires, on or before June 1, 2023, the office of the Governor to convene a working group to discuss and make recommendations on the most effective way to ensure the state's leadership on boards and commissions reflects the diversity in age, ethnicity, gender, gender identity, disability status, region, veteran status, and sexual orientation, among other things, that are representative of the state.
- 2) Requires the working group be composed of 11 members appointed by the Governor, including, but not limited to, representatives of all of the following:
 - a) up to three representatives of nonprofit organizations focused on empowering communities through training and advocacy; and
 - b) ethnic studies, women's studies, or other similar departments of the University of California and California State University systems.
- 3) Requires the working group to evaluate and provide recommendations regarding all of the following:
 - a) improved ways to market the availability of the appointment process to state boards and commissions;

- b) identification and discussion of potential barriers for applicants to state boards and commissions and ways to alleviate these barriers; and
 - c) plans to increase the diversity of the state's leadership on boards and commissions.
- 4) Requires the working group to hold its first meeting no later than July 1, 2023 and complete its work no later than August 1, 2024.
 - 5) Requires the recommendations developed by the working group to be completed and published on the Governor's website no later than August 1, 2024.
 - 6) Terminates the working group on December 31, 2024.
 - 7) Requires the Governor, on or before December 1, 2024 and every December 1 thereafter, to create a report that contains all of the following information:
 - a) the demographic information, to the extent available, of each appointment by the Governor to date and from January 1 of the prior year to November 15 of the reporting year, inclusive;
 - b) the aggregate demographic information for individuals who applied for an appointment with the office of the Governor in any period from January 1 to November 15 of the reporting year, inclusive, but were not appointed;
 - c) the demographic information of the gubernatorial appointees on each state board and commission as of November 15 of the reporting year; and
 - d) a list of every state board and commission, the stated objective of every state board and commission, meetings held by each state board and commission in the prior year, and any openings in the membership of each state board and commission.
 - 8) Requires the Governor to report the demographic information of the gubernatorial appointees on each state board and commission on the Governor's website on or before December 1, 2024 and on or before every December 1 thereafter.
 - 9) Provides that the demographic information shall only be included to the extent that the individual agrees to disclose such information in the report.
 - 10) Defines "demographic information" to mean the age, ethnicity, gender, gender identity, disability status, region, veteran status, and sexual orientation of the appointed individual.

COMMENTS

1. California's rich demographic diversity

In its analysis of this bill, the Senate Governmental Organization Committee compiled the following overview of California's current demographic composition:

With a population of roughly 40 million people, California is the most populous state in the United States with no race or ethnic group constituting a majority of California's population. According to the Public Institute Policy of California, 39 percent of state residents are Latino, 36 percent are white, 15 percent are Asian or Pacific Islander, six percent are African American, fewer than one percent are Native American or Alaska Natives, and three percent are multiracial or other. In terms of gender, California has a higher number of women, 50.2 percent compared to men, 49.2 percent.

According to Williams Institute at UCLA, roughly 5.3 percent, or a little over two million people in California are a member of the LGBTQ+ community. In addition, the Centers for Disease Control and Prevention predicts that roughly 23 percent of California's adult population has some kind of disability. California is also home to 1.8 million veterans.

2. The issue the bill is intended to address

Existing law makes it the policy of the State of California for the composition of state boards and commissions to broadly reflect the general public, including ethnic minorities and women. (Gov. Code § 11140.) However, the demographic composition of state boards and commissions is not compiled and is therefore largely unknown. This bill seeks to address this lack of data by requiring the Governor to gather information regarding the demographic composition of boards and commissions in the State of California and report the results to the Legislature and to the public through publication on the internet.

3. Existing models for this bill

Since 2006, California has required its Judicial Council to collect and release aggregate demographic data about to the ethnicity and gender of California state court justices and judges, by jurisdiction, each calendar year. In more recent years, the report has been expanded to include aggregate information about how many of Californians judges are people with disabilities or veterans, as well as how they identify in terms of gender identity and sexual orientation. The reports can be found here:

<https://www.courts.ca.gov/13418.htm>

These reports have enabled the Legislature and the public to track California’s progress toward a bench that is more reflective of the state’s overall diversity. This bill intends to do for California’s state boards and commissions the same thing that these Judicial Council reports have done for the California judiciary.

The author also points to the State of Illinois as another source of inspiration for this bill. In 2014, Illinois enacted the Gubernatorial Boards and Commissions Act with the goal of increasing transparency about the demographic makeup of that state’s gubernatorial appointments. (15 Ill. Comp. Stat. Ann. 50/25.) The Illinois statute requires Illinois’ governor to publish aggregate, self-reported data regarding the ethnicity, gender, sexual orientation, and disability status of gubernatorial appointees statewide. These reports can be found here:

<https://www2.illinois.gov/sites/bac/Pages/Reports.aspx>

The reports offer the people of Illinois an opportunity to examine and comment on the current demographic composition of their state boards and commissions as well as to get a sense of whether openings on those boards and commissions are drawing applications from across the full spectrum of the state’s demographic makeup. For example, in response to publication of the 2021 report, Equality Illinois declared that: “[t]he bottom line of the report is that a wider cross section of Illinoisans are applying and being appointed to serve on state Boards and Commissions.”¹

This bill shares the basic intent and framework of the Illinois statute.

4. Equal Protection and Proposition 209 considerations

Both the U.S. and California Constitutions contain an Equal Protection Clause. The federal Constitution says: “[n]o State shall... deny to any person within its jurisdiction the equal protection of the laws.” (U.S. Const., Amend. XIV, § 1.) Very similarly, the state Constitution states that: “[a] person may not be... denied equal protection of the laws.” (Cal. Const., art. 1, § 7(a).) Courts applying the constitutional concept of equal protection have ruled that laws drawing suspect classifications between people and treating them differently on that basis are subject to heightened judicial scrutiny.

Section 31 of Article I of the California Constitution is frequently known by the ballot initiative from which it came: Proposition 209, passed by the California voters in 1996. The relevant part of Proposition 209 reads as follows:

¹ *Equality Illinois Celebrates Governor JB Pritzker for the Increased Number of LGBTQ Leaders Appointed to State Boards and Commissions in FY2021* (Oct. 18, 2021) Equality Illinois <https://www.equalityillinois.us/15836-2/> (as of Apr. 4, 2022).

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

In contrast to an equal protection analysis, which permits classifications based on race or gender provided they can meet heightened scrutiny, Proposition 209 is a nearly absolute bar on the use of such classifications. Unless the federal Constitution *requires* the implementation of a remedial program that takes race or gender into account, Proposition 209 forbids it. (*Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 567.)

a. As applied to the collection and reporting of demographic data

At least some of the sorts of characteristics that would be subject of the report required by this bill, such as gender, race, and ethnicity, are constitutionally suspect classifications. However, the courts have been clear that the mere collection and reporting of data regarding otherwise suspect classifications such as race and gender is perfectly constitutional:

Respondents contend that monitoring programs which collect and report data concerning the participation of women and minorities in governmental programs do not violate equal protection principles. We agree. [...] Accurate and up-to-date information is the sine qua non of intelligent, appropriate legislative and administrative action. Assuming that strict scrutiny is required, a monitoring program designed to collect and report accurate and up-to-date information is justified by the compelling governmental need for such information. So long as such a program does not discriminate against or grant a preference to an individual or group, Proposition 209 is not implicated. (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 46-47.)

Here, the data collection and reporting program does not discriminate and merely provides the Governor, the Legislature, and the public with accurate up-to-date information about the demographic composition of gubernatorial appointees.

b. As applied to the formation of a working group to recommend ways for public boards and commissions to reflect the demographic makeup of the state's population

The formation of a working group to recommend ways for the composition of public boards and commissions to reflect the state's demographic makeup also does not raise Equal Protection or Proposition 209 concerns. The working group would only produce recommendations. Even if those recommendations happened to involve policies that

raise Equal Protection or Proposition 209 concerns, a constitutional problem would only arise if those recommendations were adopted into law or policy. Additionally, as potentially relevant to this bill, Proposition 209 only applies to public employment. It is not clear whether appointment to a state board or commission would constitute public employment, particularly if the appointment does not include a salary or wages.

As to the more general purpose behind the bill, the courts have been clear that promoting a broad pool of applicants for a position does not raise constitutional concerns:

[T]he cognizable interest of a competitor is in being able to compete on an equal footing without regard to the race or gender of other competitors. A competitor does not have a constitutionally cognizable interest in limiting the pool of applicants with whom he or she must compete. Therefore, outreach or recruitment efforts which are designed to broaden the pool of potential applicants without reliance on an impermissible race or gender classification are not constitutionally forbidden. (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 46.)

While hewing to this rule may at times present challenges for the recommendations the working group is tasked with coming up with under this bill, it is not a problem with the formation of the working group itself.

5. Privacy considerations

Anytime demographic data is collected and reported, there is a risk of publicizing private, personal information about individuals without their consent. This bill specifies that demographic data about gubernatorial appointments shall only be included in the annual report to the extent that the individual agrees to disclose such information. Accordingly, the bill does not raise significant privacy concerns.

6. Arguments in support of the bill

According to the author:

To ensure California's leadership reflects its greater population, the collection of gubernatorial appointee demographic data is a critical step to achieving gender, racial, and ethnic equity on boards and commissions. The annual report will serve as a tool to show where gaps in representation exist, encourage outreach to communities of interest, and address any barriers. Increasing the diversity of California's board and commission members will ensure we reflect

the rich diversity of California's population, creating a stronger state, and more equitable communities.

In support, the Campaign for College Opportunity writes:

The overwhelming lack of racial and gender equitable representation in gubernatorial appointments is not due to a lack of qualified diverse applicants, but a lack of intentional guidance and transparency in the appointment process. Among our higher education governing boards, the California Student Aid Commissions remains a bright spot in representation with a strong membership of women and Black and Latinx Californians. Unfortunately, the Student Aid Commission is an exception to the status quo, not the standard. SB 1387 would work to ensure the demographic diversity of the Student Aid Commission remains consistent across all governing boards and commissions in our state.

SUPPORT

Hispanas Organized for Political Equity (sponsor)
Campaign for College Opportunity

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: AB 1840 (Nazarian, 2022) expands the definition “underrepresented communities,” for purposes of the existing requirement for corporations headquartered in California to diversify their boards of director, to include anyone who self-identifies as Armenian, Assyrian, Greek, Jewish, Muslim, or Sikh, or who is an individual with a disability. This bill is pending consideration in the Assembly Banking and Finance Committee.

Prior Legislation:

SB 17 (Pan, 2021) would have established an Office of Racial Equity (ORE) within state government as an independent public entity and tasks the ORE with, among other things, coordinating, analyzing, developing, evaluating, and recommending strategies for advancing racial equity across state agencies, departments, and the Office of the Governor. SB 17 died in the Assembly Appropriations Committee.

SB 655 (Bradford, Ch. 390, Stats. 2021) decreased the reporting threshold for required participation in the California Department of Insurance’s governing board diversity

surveys, specifically lowering the threshold from \$100 million in California written premiums to \$75 million, and required submission of a board diversity policy statement, as defined.

SB 702 (Limón, 2021) was substantially similar to this bill. In his message vetoing SB 702, governor Newsom wrote: “My office already makes an intentional, transparent effort to engage with the Legislature, community partners, nonprofits, and a variety of stakeholders to build a diverse and qualified pool of candidates for appointed positions, and will continue to strengthen and build these partnerships. Further, the demographic information specified for reporting under this bill is optional and self-reported by candidates. For these reasons, such a report required by SB 702 would not accurately reflect the diversity of appointees.”

AB 979 (Holden, Ch. 316, Stats. 2020) required publicly held corporations to fill their board seats with a minimum number of directors from underrepresented communities, as specified. On April 1, 2022, a Los Angeles County Superior Court ruled that AB 979 is unconstitutional. (*Crest v. Padilla II*, Docket No. 20 STCV 37513.)

AB 931 (Boerner Horvath, Ch. 813, Stats. 2019) prohibited the membership of appointed boards and commissions in cities with a population of 50,000 or more from having more than 60 percent of the same gender identity on or after January 2, 2030 and specifies that smaller boards and commissions must not be compromised of members having the same gender identity.

SB 826 (Jackson, Ch. 954, Stats. 2018) required publicly held corporations with principal executive offices in California to have specified numbers of female board members, depending on the size of the board, and required the Secretary of State to levy fines on businesses that do not comply.

SB 984 (Skinner, 2018), would have required state boards and commissions to have at least one female member if the board is four or fewer members, or at least 40 percent female membership on boards or commissions with five or more members. SB 984 died in the Assembly Appropriations Committee.

AB 1005 (Alejo, Ch. 113, Stats. 2013) expanded the collection and release of demographic information about California state court justices and judges to include disability and veteran status.

SB 128 (Corbett, Ch. 720, Stats. 2011) expanded the collection and release of demographic information about California state court justices and judges to include gender identity and sexual orientation.

SB 56 (Dunn, Ch. 390, Stats. 2006) required the Judicial Council to collect and release aggregate demographic data relative to the ethnicity and gender of California state court justices and judges, by specific jurisdiction each calendar year.

PRIOR VOTES:

Senate Governance and Finance Committee (Ayes 10, Noes 3)
