

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 702 (Limón)
Version: March 20, 2023
Hearing Date: April 18, 2023
Fiscal: Yes
Urgency: No
AM

SUBJECT

Gubernatorial appointments: report

DIGEST

The bill requires the office of the Governor to maintain on its internet website a list of each state board or commission, as well as the board or commission's membership list, stated purpose, duties, meeting frequency, internet website, and any vacancies in its membership. The bill also requires the office of the Governor to publish on its internet website a report containing aggregate demographic information, to the extent available, of appointments by the office of the Governor from January 1 to December 31, inclusive, of the previous year.

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 post certain information about each state board or commission and data regarding the demographic makeup of gubernatorial appointees and to report it in aggregate form. This bill is substantially similar to last year's SB 1387 (Limón, 2022) and SB 702 (Limón, 2021), both of which passed this Committee but were ultimately vetoed by the Governor.

The bill is sponsored by Hispanas Organized for Political Equity. There is no opposition on file. The bill passed out of the Senate Governmental Organization Committee by a vote of 15 to 0.

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 the office of the Governor, commencing on January 1, 2025, to maintain on its website a list of each state board or commission, as well as the board or commission's membership list, stated purpose, duties, meeting frequency, internet website, and any vacancies in its membership.
- 2) Requires the office of the Governor, on or before December 1, 2025 and each January 1 thereafter, to create and publish on its internet website a report that contains aggregate demographic information, to the extent available, of appointments by the office of the Governor from January 1 to December 31, inclusive, of the previous year.
- 3) Defines "demographic information" for the first annual report as the voluntarily self-reported age, ethnicity, gender, region, and party affiliation of the appointed individual. Defines "demographic information" for any subsequent annual report as the voluntarily self-reported age, ethnicity, gender, gender identity, disability status, race, region, party affiliation, veteran status, and sexual orientation of the appointed individual.

COMMENTS

1. Stated need for the bill

The author writes:

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.

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.

A report by the UCLA Latino Policy and Politics Institute from 2022 found that Latinos make up 39.1% of the state population but only 18.4% of executive appointees. The report notes that Latinas remain the most underrepresented in executive branch appointees among all women. The report also found a lack of Central and Southern California voices on executive boards and commissions noting that "the absence of their voice in developing strategy, regulations, and policy priorities for the future of California's environment, education, economy, and criminal justice systems perpetuates historical regional inequities across our state." The report noted that Latinos who do serve on these bodies tend to be more recent appointments: 70.7% of Latino appointees were appointed in the last four years, while non-Hispanic white appointees are more likely to be legacy appointments carried over from a previous administration. Additionally, Latinas make up 19% of female appointees but only 8.5% of total executive appointees. This report can be found here.¹

¹ <https://latino.ucla.edu/research/ca-appointments-report/#:~:text=As%20of%20March%202022%2C%20presiding,other%20state%20and%20local%20officials.>

3. Existing models for this bill

Since 2006, California has required its Judicial Council to collect and release aggregate demographic data about 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.²

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.³

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 2022 report, Equality Illinois noted that "Illinois now has the highest number of out LGBTQ+ people serving on State Boards and Commissions in the state's history."⁴ They further states that "Governor Pritzker and his team [have] placed a broad diversity of talent" on boards and commissions by more than doubling the number of Black and Latino board members and commissioners, with women now making up 46% of people serving on state boards and commissions.⁵

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

² <https://www.courts.ca.gov/13418.htm>.

³ <https://www2.illinois.gov/sites/bac/Pages/Reports.aspx>.

⁴ *Equality Illinois celebrates Governor JB Pritzker for the diversity of leaders appointed to state Boards and Commissions in FY2022*, (Oct. 5, 2022), Equality Illinois, available at <https://www.equalityillinois.us/17387-2/>.

⁵ *Ibid.*

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:

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.)

At least some of the demographic data that would be reported under 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.

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 the information is self-reported. Accordingly, the bill does not raise significant privacy concerns.

6. Prior related bills vetoed by the Governor

This bill is substantially similar to last year's SB 1387 (Limón, 2022) and SB 702 (Limón, 2021), both of which passed this Committee but ultimately were vetoed by the Governor.

In his veto message for SB 1387 the Governor wrote:

[...]I am deeply committed to making appointments at every level of government that reflect California's diversity. My office makes an intentional, transparent effort to build a diverse and qualified pool of candidates for these positions.

However, implementing this bill is estimated to cost millions of dollars not accounted for in the budget to update the appointments application system to track and report additional data points. With our state facing lower-than-expected revenues over the first few months of this fiscal year, it is important to remain disciplined when it comes to spending...

The Governor wrote in his veto message for SB 702 that:

... I applaud the author and stakeholders' desire to ensure diversity in California's board and commission members. I too am deeply committed to making appointments that reflect California's diversity at every level of government. 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.

7. Statements in support

Hispanas Organized for Political Equity (HOPE), the sponsor of the bill, writes in support stating:

HOPE strongly believes that democracy and governance are more robust when everyone has a seat at the table, and SB 702 is an essential step toward that goal. Supporting the diversity of all Californians in government will ensure more communities have a role in the policy-making process at the state and local levels. California is committed to providing diverse state boards and commissions that reflect the state. Yet, no formal mechanisms exist to evaluate this commitment or progress toward it. [...]

Regardless of the state's leadership, this bill establishes long-overdue guidance, transparency, and accountability in the gubernatorial appointment review process. Collecting gubernatorial appointee demographic data is a critical step to achieving gender, racial, and ethnic equity on boards and commissions. Ultimately, the report would serve as a tool to highlight progress and where more outreach and resources are needed to ensure that boards and commissions reflect California's diversity.

SUPPORT

Hispanas Organized for Political Equity (sponsor)

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 1387 (Limón, 2022) was substantially similar to this bill. This bill was vetoed by the Governor. *See* Comment 6 above for Governor's veto message.

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. This bill was vetoed by the Governor. *See* Comment 6 above for Governor's veto message.

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; app. pending B321726.)

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. On May 13, 2022, a Los Angeles County Superior Court ruled that SB 826 is unconstitutional. (*Crest v. Padilla*, Docket No. 19STCV27561; app. pending B322276).

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 15, Noes 0)
