

Date of Hearing: July 13, 2021

ASSEMBLY COMMITTEE ON JUDICIARY  
Mark Stone, Chair  
SB 702 (Limón) – As Amended July 1, 2021

**SENATE VOTE:** 33-0

**SUBJECT:** GUBERNATORIAL APPOINTMENTS: REPORT

**KEY ISSUES:**

- 1) IN ORDER TO PROVIDE MORE TRANSPARENCY TO THE PUBLIC ABOUT THE DEMOGRAPHIC COMPOSITION OF STATE BOARDS AND COMMISSIONS IN CALIFORNIA, SHOULD THE GOVERNOR BE REQUIRED TO GATHER INFORMATION REGARDING THE DEMOGRAPHIC COMPOSITION OF BOARDS AND COMMISSIONS AND REPORT THE RESULTS TO THE LEGISLATURE AND TO THE PUBLIC THROUGH PUBLICATION ON THE INTERNET?
- 2) SHOULD THE OFFICE OF THE GOVERNOR CONVENE A WORKING GROUP TO DISCUSS AND MAKE RECOMMENDATIONS ON THE MOST EFFECTIVE WAY TO ENSURE THAT THE STATE'S LEADERSHIP ON BOARDS AND COMMISSIONS REFLECTS THE DIVERSITY IN TERMS OF AGE, ETHNICITY, GENDER, GENDER IDENTITY, DISABILITY STATUS, REGION, VETERAN STATUS, AND SEXUAL ORIENTATION IN A MANNER THAT IS REFLECTIVE OF THE STATE?

**SYNOPSIS**

*Since 1976, it has been the official 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. (Government Code Section 11140.) However, the demographic composition of state boards and commissions is not compiled by a single entity or made available to the public in a single location and is therefore largely unknown. In order to provide more transparency to the public about the demographic composition of state boards and commissions, this bill requires the Governor to gather information regarding the demographic composition of boards and commissions in California and report the results to the Legislature and to the public through publication on the internet. It also requires the Governor to convene a working group to make recommendations for how to ensure that state boards and commissions reflect the diversity of the state.*

*The analysis reviews the constitutional and statutory limitations in providing preferences in government hiring under both the Equal Protection Clause and Proposition 209. It concludes that despite Proposition 209's clear prohibition on the consideration of race and other protected characteristics in hiring, neither Prop 209 nor the Equal Protection Clause of the 14<sup>th</sup> Amendment prohibit the activities at issue in this bill. Neither gathering demographic data nor convening a working group to make recommendations for how boards and commissions could better reflect the diversity of the state violates these provisions. The bill is supported by a number of civil rights organizations and advocates, college student organizations, and business groups. It has no opposition on file.*

**SUMMARY:** Requires the Governor to (1) gather information regarding the demographic composition of boards and commissions in California and report the results to the Legislature and to the public through publication on the internet; and (2) convene a working group to make recommendations for how to ensure that state boards and commissions reflect the diversity of the state. Specifically, **this bill:**

- 1) Finds and declares that it is the intent of the Legislature to ensure the state's leadership is reflective of the communities, which are diverse in race, gender identity, class, region, creed, and religion, among other things, that make up the state.
- 2) Requires on or before March 1, 2022, 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, among other things, the age, ethnicity, gender, gender identity, disability status, region, veteran status, and sexual orientation, in a manner that is representative of the state.
- 3) Requires the working group to include up to 11 members and shall include, but shall not be limited to, representatives from all of the following who are all appointed by the Governor, except that the President pro Tempore of the Senate and Speaker of the Assembly shall each designate one representative to serve on the working group:
  - a) The Commission on the Status of Women and Girls.
  - b) Nonprofits focused on empowering communities through training and advocacy. Only up to three representatives from nonprofits fulfilling this category shall be appointed to the working group.
  - c) Ethnic studies, women's studies, or other similar departments of the University of California and California State University systems.
- 4) Requires the working group to hold its first meeting no later than April 1, 2022 and to determine at the meeting a schedule to have five additional meetings completed no later than May 1, 2023.
- 5) Requires the working group to evaluate and provide recommendations on 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.
  - c) Plans to increase the diversity of the state's leadership on boards and commissions.
- 6) The recommendations developed by the working group pursuant to 5) shall be completed and delivered to the Legislature, pursuant to Section 9795, no later than June 1, 2023.
- 7) Provides that the working group shall be terminated on January 1, 2024.

- 8) Requires, on or before August 1, 2022, and on or before every August 1 thereafter, the Office of the Governor to create and deliver to the Legislature, in accordance with Section 9795, a report that contains all of the following information:
  - a) The demographic information, to the extent available, of each appointment by the Governor from July 1 of the prior year to June 30 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 July 1 of the prior year to June 30 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 June 30 of the reporting year.
  - 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.
- 9) Provides that the demographic information required in a) – c) of 8), above, inclusive, shall only be included to the extent that the individual agrees to disclose such information in the report.
- 10) Requires, on or before August 1, 2022, and on or before every August 1 thereafter, the Office of the Governor to publish on its internet website the demographic information of the gubernatorial appointees on each state board and commission as of June 30 of the reporting year.
- 11) Defines, for purposes of this subdivision, “demographic information” to mean the age, ethnicity, gender, gender identity, disability status, region, veteran status, and sexual orientation of the appointed individual.

**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, Section 1.)
- 2) Provides that a person may not be denied equal protection of the laws. (Cal. Const., Art. 1, Section 7 (a).)
- 3) Provides that 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. (Cal. Const., Art. 1, Section 31.)
- 4) Requires the Governor to appoint every office whose mode of appointment is not prescribed by law. (Government Code Section 1300.)
- 5) 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. (Government Code Section 11141.)

- 6) 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. (Government Code Section 11140.)
- 7) Specifies that it is not the intent of the Legislature that formulas or specific ratios be utilized in complying with 5) and 6), above. (Government Code Section 11141.)

**FISCAL EFFECT:** As currently in print this bill is keyed fiscal.

**COMMENTS:** In order to provide more transparency to the public about the demographic composition of state boards and commissions, this bill requires the Governor to gather information regarding the demographic composition of boards and commissions in California and report the results to the Legislature and to the public through publication on the internet. The bill also requires that the Governor convene a working group to make recommendations for how to ensure that state boards and commissions reflect the diversity of the state.

Since 1976, it has been the official 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. (Government Code Section 11140.) However, the demographic composition of state boards and commissions is not compiled by a single entity or made available to the public in a single location and is therefore largely unknown. 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 shed light 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.

***Equal Protection and Proposition 209 considerations.*** Both the U.S. and California Constitutions contain Equal Protection Clauses. 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, Section 1.) Very similarly, the state Constitution states that: "[a] person may not be... denied equal protection of the laws." (Cal. Const., Art. 1, Section 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.

In November of 1996, California's voters passed Proposition 209, which added Section 31 to Article I of the California Constitution. 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.

The measure's language prohibiting "discrimination" was largely superfluous, given that state and federal law, as well as the Equal Protection Clause of the 14<sup>th</sup> Amendment, already prohibit such discrimination. What was new about Proposition 209, therefore, was the prohibition on "preferential treatment." While the measure did not define "preferential treatment," the courts

generally hold that a constitutional amendment "should be construed in accordance with the natural and ordinary meaning of its words." To give a preference, the courts reason, means to give "priority or advantage to one person . . . over others." (*Hi-Voltage Wire Works v. San Jose* (2000) 24 Cal. 4<sup>th</sup> 537, 559, quoting *Webster's New World Dictionary* (3d Ed. 1988).) While a dictionary is a good place to start, it often defers rather than settles the meaning of a word. To replace "preference" with "priority or advantage" eliminates only a few head scratches. Clearly, *awarding* public contracts *solely* on the basis of race or gender, according to "quotas," "set-asides," or fixed numerical formulas, violates Proposition 209 and, indeed, quite likely violates the Equal Protection Clause of the 14<sup>th</sup> Amendment as interpreted by the United States Supreme Court over the past quarter century. But it was not the intent of Proposition 209, the courts have held, to eliminate *all* forms of "affirmative action." What is permitted, however, by Proposition 209, is less certain.

Historically, equal protection analyses of racial classifications distinguished between "invidious" classifications that discriminate *against* minority groups or women, on the one hand, and "benign" classifications that seek to benefit minorities or women, on the other hand. (See e.g. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (3d Ed. 2006), Section 9.3.) While Proposition 209 ostensibly sought to prohibit both types of classifications, its primary targets were those classifications that sought to benefit minorities and women. 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., supra*, 24 Cal.4<sup>th</sup> at 567.) Proposition 209 thus asserted the state's prerogative to prohibit what the 14<sup>th</sup> Amendment otherwise allows.

***The 14th Amendment 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 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.4<sup>th</sup> 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 the state's boards and commissions. Such reports may provide the Legislature and Governor with more information about which communities need more outreach to be aware of opportunities to serve on boards and commissions. As a result of Proposition 209, however, the prospective appointees (at least to positions that constitute public employment) could not be given any preferential treatment on the basis of a protected characteristic.

***The 14th Amendment 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 appear to raise any 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*, *supra*, 92 Cal.App.4th at 46.)

While complying with this rule may present challenges for the working group proposed to be formed under this bill and its recommendations, it is not a problem with the formation of the working group itself.

***ARGUMENTS IN SUPPORT:*** Courage California writes that, "We support SB 702 (Limón) because we believe that communities are best served when their government and leadership are truly reflective of those being served." ACLU California Action observes that, "SB 702 is the first step to increasing the number of appointees who come from groups that are currently underrepresented in gubernatorial appointed positions." The Campaign for College Opportunity observes that, "This bill would not only provide transparency but ensure that California's leadership truly represents its diverse population."

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

ACLU California Action  
 API Equality-LA  
 Association of California State Employees with Disabilities  
 California Black Chamber of Commerce  
 California League of United Latin American Citizens  
 Campaign for College Opportunity  
 Center for Asian Americans United for Self Empowerment (CAUSE)  
 Courage California  
 Estrategia LLC  
 Hispanas Organized for Political Equality (HOPE)  
 Latina Coalition of Silicon Valley

Latino Corporate Directors Association  
Latino Donor Collaborative, Inc.  
Latino Network  
Los Angeles Urban League  
The Unity Council  
University of California Student Association

**Opposition**

None on file

**Analysis Prepared by:** Alison Merrilees / JUD. / (916) 319-2334