

# Handicapping California’s next chief justice

## Overview

In this article we speculate about possible scenarios and candidates for California’s next chief justice. We have no inside knowledge and advocate for no one.

Our historical analysis identifies three scenarios: most likely, less likely, and least likely. The most likely scenario is a sitting associate justice being elevated to chief justice, and in this scenario a Court of Appeal justice probably gets nominated to fill the empty seat. The less likely scenario is a Court of Appeal justice being nominated to both fill the empty seat and to serve as chief justice. The least likely scenario is a truly new appellate appointment: someone with at most trial court experience or no judicial experience at all. We detail a pro/con analysis of some potential nominees in the most likely and less likely scenarios. And as we explain below, the least likely scenario is such an outlier that we discount it entirely.

As we were finalizing this, Governor Newsom announced that he will go with the less likely scenario: he plans to nominate Justice Patricia Guerrero as the new chief justice, and Alameda Superior Court Judge Kelli Evans to the open associate justice seat.

## Analysis

### The most likely scenario: a sitting justice is elevated

Our historical review shows that, based on past performance, a sitting associate justice being elevated to chief justice is the most likely scenario. Two-thirds of all past chief justices were elevated while serving as associate justices on the court.

	28	Total number of CJs
Elevated	19	67.86%
New	9	32.14%

Of the nine chief justices in the “new” category there are just two true brand-new appellate appointments: Bird, who had no prior judicial service; and Sullivan, who was appointed as five-month placeholder by Governor Hiram Johnson after Beatty died in office. The other seven in this category are more complex. Chief Justice Cantil-Sakauye and Wright were appointed from the Court of Appeal, a middle ground of elevating a sitting appellate justice versus creating a completely new appellate justice. Searls was serving as one of the court’s commissioners — functionally already a justice. Three new chief justices won direct popular elections: Searls lost his direct re-election in 1888 to Beatty, Morrison won a new direct election in the 1879 contest that established the new seven-member court, and Sanderson won a new direct election in the 1863 contest that established the new five-member court.<sup>[1]</sup> And Hastings was selected by the legislature to lead the new three-member court established by the 1849 constitution.

The proportions of new-to-sitting are closer to parity if we look only to the post-1934 period when the current appointment-and-retention-election system began: four chief justices were elevated (George, Lucas, Traynor, Gibson), and three were new to the court (Cantil-Sakauye, Bird, Wright).

	7	Total number of CJs since 1934
Elevated	4	57.14%
New	3	42.86%

The chronology shows alternating new-to-sitting appointments:

Elevated (Gibson, Traynor) — new (Wright, Bird) — elevated (Lucas, George) — new (TCS)

This makes for a choice of perspectives. The full view of history strongly favors the likelihood of a sitting justice being elevated. That’s so on the bare numbers, and especially so considering that for the court’s first 84 years justices could be challenged in open elections, making it both more precarious to hold a seat and enabling campaigns to beat a sitting chief justice. The seven chief justices in the second half of the court’s history present a more nuanced picture. Sitting justices versus new appointments since 1934 is about a 60-40 split, so elevating a sitting

justice remains more likely than a Court of Appeal justice being appointed, but that's less than the nearly 68% elevation track record over the full history.

Finally, six of the seven chief justices since 1934 were elevated from existing appellate seats, making a truly new appointment with no judicial experience unlikely. Other than Bird, the only truly new chief justice (with no prior appellate experience) in the last century was Sullivan (a five-month placeholder in 1914) — the next was 134 years ago when Beatty beat the incumbent chief justice in the 1888 election. Given that change over time, the fact that Governor Newsom shows no signs of sharing former Governor Jerry Brown's interest in appointing people with no prior judicial experience, and the disastrous example of Rose Bird, we think it so unlikely that a governor would appoint someone with no appellate judicial experience to be the state's chief justice that we do not analyze that least likely scenario.

### **What considerations apply to the sitting justices?**

In the most likely scenario described above the governor elevates a sitting justice. Add to the historical analysis the fact that elevating a sitting associate justice to chief justice still leaves an open seat to fill. That creates the appearance of making two appointments: one as chief and one as associate justice. That appearance makes this scenario even more likely.

One general factor here is Governor Newsom's tendency to highlight the first-of-category feature of judicial appointees. And political considerations are most acute in an election year, for example in choosing between representatives of various voting blocs. Yet filling the associate justice seat with a "first-of-something" has become increasingly difficult, with many categories already filled. Rose Bird was the first woman, and the first female chief justice. Wiley Manuel was the first Black person, Joyce Kennard was the first Asian (and first person with a physical disability), and Cruz Reynoso was the first Hispanic. Janice Rogers Brown was the first Black woman, Justice Liu was the first Asian male, and Justice Guerrero was the first Hispanic female. Justice Jenkins is the first out gay man on the court, and Henry A. Lyons was the first Jewish man and first Jewish chief justice.

A new oldest or youngest justice (associate or chief) is hard to imagine: Hugh

Campbell Murray was the youngest when seated at 26, and Walter Van Dyke was the oldest when seated at 76. The average age of a chief justice when seated is 51.5 years old — almost exactly Chief Justice Cantil-Sakauye’s age when she took office at 52.

Some firsts remain available. A Black, Hispanic, or Asian chief justice of any gender would be a first. An out gay woman, a trans person, a Native American, a South Asian or Southeast Asian, and a person of non-Abrahamic faith all would be firsts as either an associate justice or the chief justice.

Next we present some pro/con points a governor might weigh about the sitting justices. These are objective facts and none are meant disparagingly — we hold the entire court in the highest regard.

<b>Corrigan</b>	
<b>Pro</b>	<b>Con</b>
<ul style="list-style-type: none"> <li>• As the most senior member on the court she has chronological seniority and the most experience.</li> <li>• Served at all levels of the California judiciary: Municipal, Superior, Court of Appeal, Supreme Court.</li> </ul>	<ul style="list-style-type: none"> <li>• The most senior member on the court, at just shy of her 74th birthday she far exceeds the average CJ age of 51.5, and would nearly tie the oldest person ever to become chief justice: Lucien Shaw at 76.</li> <li>• Unlikely to serve more than 10 years.</li> <li>• She would not be the first female chief justice.</li> </ul>
<b>Liu</b>	
<b>Pro</b>	<b>Con</b>

<ul style="list-style-type: none"> <li>• He would be the first Asian male chief justice.</li> <li>• Eminently well-qualified: shortlisted for the Ninth Circuit and California attorney general, over a decade of experience as a sitting justice, long record of legal scholarship.</li> <li>• Second-most-senior by service years after Justice Corrigan. <ul style="list-style-type: none"> <li>• In the average chief justice age zone at 51.</li> </ul> </li> <li>• He could serve as chief justice for 15-20 years.</li> </ul>	<ul style="list-style-type: none"> <li>• Jerry Brown appointee: Governor Newsom may want to install his own person.</li> </ul>
<b>Kruger</b>	
<b>Pro</b>	<b>Con</b>
<ul style="list-style-type: none"> <li>• She would be the first Black chief justice of any gender.</li> <li>• Eminently well-qualified: shortlisted for SCOTUS, highly regarded by others on the court.</li> <li>• Even younger than Justice Liu and under the average CJ age at 46.</li> <li>• She could serve as chief justice for 20-25 years.</li> </ul>	<ul style="list-style-type: none"> <li>• Jerry Brown appointee: Governor Newsom may want to install his own person.</li> </ul>
<b>Groban</b>	
<b>Pro</b>	<b>Con</b>
<ul style="list-style-type: none"> <li>• At 48 years old he's between Justice Liu and Justice Kruger, and under the average chief justice age.</li> <li>• Former governor's legal adviser.</li> <li>• He could serve as chief justice for 20-25 years.</li> </ul>	<ul style="list-style-type: none"> <li>• Jerry Brown appointee: Governor Newsom may want to install his own person.</li> <li>• Not a clear first-of-something.</li> </ul>
<b>Jenkins</b>	
<b>Pro</b>	<b>Con</b>

<ul style="list-style-type: none"> <li>• He would be the first Black person and the first out gay person to serve as chief justice.</li> <li>• Served at all levels of the California judiciary: Municipal, Superior, Court of Appeal, Supreme Court.</li> <li>• Well-loved by everyone who knows him.</li> </ul>	<ul style="list-style-type: none"> <li>• The second-most-senior member by age on the court, at age 68 he exceeds the average CJ age of 51.5.</li> <li>• Unlikely to serve more than 10 years.</li> </ul>
<b>Guerrero</b>	
<b>Pro</b>	<b>Con</b>
<ul style="list-style-type: none"> <li>• She would be the first Hispanic chief justice of any gender.</li> <li>• At 50 years old she is close to the average age of 51 for becoming chief justice.</li> <li>• She could serve as chief justice for 20-25 years.</li> </ul>	<ul style="list-style-type: none"> <li>• Although she has a long record of prior judicial service, she arrived at the high court just a few months ago. But that proved to be no impediment to her nomination.</li> <li>• There's the risk of repeating the Bird-Mosk dynamic, of a younger and comparatively less experienced person being elevated over a more senior-and-experienced sitting justice.</li> </ul>

### **The less likely scenario: a new appointment**

In the less likely scenario the governor nominates a bench officer currently serving outside the California Supreme Court as the new chief justice. And if the more likely scenario above occurs an empty seat still needs filling. Either way, based on past experience that new person probably comes from the Court of Appeal. But the field of potential candidates is obviously much wider here, and the definition of “appellate justice” must be expanded to include Ninth Circuit judges.

Some possible names:

- First District Court of Appeal Justice Therese M. Stewart would be the first out gay woman.

- First District Court of Appeal Justice Jim Humes would be the first out gay white male.
- First District Court of Appeal Justice Carin T. Fujisaki would be the first Asian-Pacific Islander.
- Los Angeles Superior Court Judge Rupa Goswami would be the first South Asian American justice.
- Ninth Circuit Judge Lucy Koh would be the first Korean American, and the first person married to another (former) justice.
- Third District Court of Appeal Justice Elena J. Duarte was in the mix to replace Justice Cuéllar.
- Ninth Circuit Judge Paul Watford clerked for Judge Alex Kozinski and Justice Ruth Bader Ginsburg and was in the mix to replace Justice Antonin Scalia.
- Ninth Circuit Judge Jacqueline Nguyen would be the first Southeast Asian (Vietnamese) justice.
- Ninth Circuit Judge Holly Thomas is the first black woman from California to serve on the Ninth Circuit and was mentioned in the search for Justice Stephen Breyer's replacement.

As with the most likely scenario above, among these highly-qualified possible choices the political considerations likely tip the scales. Any of them would be good, maybe even great choices — the final factor is who makes the best political choice in an election year.

## **Conclusion**

Again, we are speculating about possible scenarios and candidates here; we have no inside knowledge and advocate for no one. Given our analysis here, the safest positions to take in your betting pool are: the new chief justice is most likely to be a sitting associate justice, the second most likely new chief justice choice is from the Court of Appeal, if a sitting justice is elevated the new justice very likely comes from the Court of Appeal or the Ninth Circuit, and the 100:1 long odds are on a person with no appellate judicial experience.

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to this article.

1. Sanderson drew the shortest two-year term and so became chief justice. The law for the new court elections in 1863 set staggered terms for the seats; as the term of the chief justice expired, the one that had drawn the next shortest term automatically became the chief justice. J. Edward Johnson, *History of the Supreme Court Justices of California 1850-1950* (1963) at 90. Shafter, who drew the longest ten-year term, is the only one of the five-person slate elected in 1863 who did not serve as chief justice — he resigned just three years into his term “because of failing health.” *Id.* at 102. ↑