

President Biden, Look West to Replace Justice Breyer

Appointing Justice Kruger, who has executive branch experience and currently sits on a western state high court, would be a victory for diversity on several important fronts, says David Carrillo and Brandon Stracener of the California Constitution Center at Berkeley Law.

By David A. Carrillo and Brandon V. Stracener | July 02, 2021

Should U.S. Supreme Court Justice Stephen G. Breyer announce his retirement, President Joe Biden could consider appointing California Supreme Court Justice Leondra R. Kruger to replace him. The high court needs diverse perspectives to rule justly on issues that affect the entire nation. And the court once was so, with justices bringing a wealth of state and federal legislative, executive, and judicial experience.

Yet in the past half-century those varied backgrounds have waned in favor of justices with increasingly similar biographies: a law degree from Yale, Columbia, or Harvard; a high court clerkship; and federal appellate bench service. Appointing Justice Kruger, who has executive branch experience and currently sits on a western state high court, would be a victory for diversity on several important fronts.

Once upon a time justices came from all walks of life and brought a diverse set of perspectives to the court. Justices served as cabinet officials, in Congress and state legislatures, and served on state courts. Black, Burton, Byrnes, Ellsworth, Edward Douglass White, and Woodbury were serving U.S. Senators when appointed, and Taft had been U.S. President. Sutherland served in the Utah Senate and both houses of Congress. McReynolds and Murphy served as the U.S. Attorney General. Hughes was governor of New York, Murphy of Michigan, and Warren of California.

A number of justices (Frankfurter, Holmes, and Stone) were law professors. Holmes in particular exemplifies a life of varied public service before joining the high court: soldier in the Civil War, law practice, Harvard Law professor, and justice of the Massachusetts state high court.

But the U.S. Supreme Court's modern history lacks state high court experience, as over the past 50 years justices have more frequently been appointed from the federal bench. No sitting justice has served in a federal or state cabinet position, or a state or federal legislature, and none served on a state court. Instead, the high court's current members all have comparable federal appellate court experience. This focus on federal bench tenure, and the absence of state court service, is a recent trend. Before 1952, the proportion of justices with state court experience never went below 40%—but it now stands at zero.

The last justice who served on a state court was David Souter (retired in 2009), who served seven years on the New Hampshire Supreme Court. Before that, Sandra Day O'Connor (retired in 2006) served six years on the Arizona bench. A 2009 Congressional Research Service study found that of the justices appointed since 1953, only three (8.3%) had any state court experience. That pairs with a reverse trend for a federal court background: in 1953 only one justice had prior federal court experience, while all nine current justices came from the federal bench.

Geographic diversity in a nation this large is important, yet historically the justices overwhelmingly hail from the eastern states. Of the 115 individuals who have served on the high court, just fifteen (13%) were from west of the Mississippi River. Two sitting members do have west coast connections: Justice Breyer was born in San Francisco and was a Stanford undergraduate, and Justice Gorsuch is from Colorado and taught there. But once Justice Breyer retires, only one of the nine justices will have ever lived or worked in the western two-thirds of the nation.

Doubtless President Biden has a long list of exceptionally well-qualified choices who would serve the country with distinction. But the strongest case is for Justice Kruger. She has executive branch service in the Solicitor General's office. She is brilliant, progressive, practical, and consensus-driven. And she is a California native who has the state high court experience that's absent on the current court and has been waning in its recent history.

Overlooking the deep bench of state court talent wrongly devalues the states and their interests; after all, they form the nation. State court judiciaries arguably process the majority of the nation's legal matters, and the combined number of state court judges vastly outnumbers their federal counterparts. The California judicial branch alone has 1,868 positions—over double the 890 federal judgeships. California's high court would miss Justice Kruger, but it's what's best for the nation.

California is arguably the nation's most significant state: largest population, largest economy in the nation (fifth in the world), the country's most important agricultural region, and leads in big earthquakes. Yet only four U.S. Supreme Court justices were Californians. Stephen J. Field was the first justice from west of the Mississippi and the only member of the California Supreme Court ever to join the U.S. Supreme Court. His replacement Joseph McKenna was born in Pennsylvania, but we'll count him because he attended school in California, was admitted to the California bar in 1865, served as district attorney for Solano County, and served in the California Assembly for two years.

Earl Warren served as California's attorney general and governor, then became the nation's chief justice. Anthony M. Kennedy, born in Sacramento and professor at McGeorge School of Law, was the last Californian to serve on the nation's high court. Justice Breyer's career was primarily on the east coast, but he at least has west coast origins. And when Justice Breyer retires the west coast will have no voice at One First Street.

As President Biden knows from his service on the Senate Judiciary Committee, there are few choices as consequential as selecting a U.S. Supreme Court justice. Diversity of experience and geography can bring an essential perspective that is missing on the current court. Justice Kruger would be a strong step toward righting the balance.

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