FP's Quick Look at Top 3 Potential Supreme Court Picks

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At some point in the coming days or weeks, President Biden will announce his nominee to replace retiring Supreme Court Justice Stephen Breyer, and the Court will be transformed like never before. The president seems intent on fulfilling his campaign promise to nominate the first Black woman to sit on the SCOTUS bench, and the consensus is that he has whittled his choice down to one of three possible choices. Once his pick is made, Fisher Phillips will provide a deep dive to let employers know what they can expect from the newest member of the highest court in the land – just as we did for Justice Sotomayor in 2009, Justice Kagan in 2010, Justice Gorsuch in 2017, Justice Kavanaugh in 2018, and Justice Barrett in 2020. But for now, here's a quick snapshot look at the most likely three finalists for the position.

Judge Ketanji Brown Jackson

The early favorite in many people's eyes is Judge Ketanji Brown Jackson – and a quick glimpse at her background shows why she appears eminently qualified for the role. Her educational pedigree is outstanding: she graduated from Harvard University and Harvard Law School, where she served as an editor of the Harvard Law Review. And her work history is also impressive. She served as a law clerk at every level of the judiciary, including for Justice Breyer himself, while also working at several law firms in Washington, D.C. and Boston in defense-minded roles.

In 2009, she was nominated by President Barack Obama to serve as a Commissioner on the bipartisan United States Sentencing Commission, where she eventually rose to the position of Vice Chair. She also served as an Assistant Federal Public Defender in D.C. for several years before returning to private practice and honing her appellate litigation skills, a common practice for attorneys hoping to rise to the role of judge in their careers.

In 2012, she got her wish when President Obama nominated her to become a federal judge of the United States District Court for the District of Columbia. The Senate unanimously confirmed her in early 2013. During her seven years as a district court judge, she had her hand in many high-profile cases, including several involving then-President Trump and many significant workplace law matters.

In 2021, President Biden nominated Judge Jackson to the U.S. Court of Appeals for the District of Columbia Circuit. This court is often referred to as the "second-highest court" in the country due to

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the many cases of national importance heard there – and because it often serves as a launch pad for those who will eventually be nominated to the Supreme Court (a fact that many have interpreted as a signal that she could be Biden's top choice).

Judge Jackson received several letters supporting her nomination, including from former Supreme Court law clerks as well as the National Education Association and the AFL-CIO — the largest federation of unions in the country. The Senate confirmed Judge Jackson to the Court of Appeals in June 2021 by a 53-44 vote – with three Republicans (Senators Collins, Graham, and Murkowski) voting in her favor – which bodes well for a potential confirmation hearing at the Supreme Court.

But one possible concern involves a left-leaning advocacy group called Demand Justice, which is known for opposing the confirmations of Supreme Court Justices Brett Kavanaugh and Amy Coney Barrett and proposing "court packing," or adding seats to the SCOTUS. During her confirmation hearings, several senators questioned Judge Jackson about her affiliation with the group. They noted that she was added to the organization's "Supreme Court Shortlist" following her November 2019 opinion that rejected the Trump administration's effort to prevent senior White House aides from testifying before Congress, and notably stated that "the primary takeaway from the past 250 years of recorded American history is that Presidents are not kings." Although Judge Jackson has stated that she is not affiliated with the organization, some senators maintained concerns that she would effectively be nominated by an organization and not the President of the United States.

One common thread between Judge Jackson and the other two perceived finalists is that any of them would most likely serve on the Supreme Court for decades to come. At age 51, Judge Jackson would be the second youngest Supreme Court Justice in history if she were nominated and confirmed.

Judge Leondra Reid Kruger

Speaking of potential nominees with youth on their side, Judge Leondra Reid Kruger would be the youngest SCOTUS Justice if nominated and confirmed, as she is only 45 years old. Although she is young, Judge Kruger has packed plenty of activity in her relatively short legal career, and is seen as eminently qualified for the role. She was born in Glendale, California, and graduated from Harvard University before completing her law degree at Yale Law School in 2001. While at Yale, Judge Kruger was the first Black woman to hold the position of Editor in Chief of Yale Law Review.

Like Judge Jackson, Judge Kruger spent the first few years out of law school with a mix of roles in private practice in Washington D.C., and judicial clerkships. The capstone of her early legal career was her role as a law clerk at the Supreme Court for Justice John Paul Stevens during the 2003-2004 term.

She continued her climb by returning to D.C. as an assistant to the U.S. solicitor general, and while working in that office argued 12 cases at the Supreme Court on behalf of the federal government – including one high-profile workplace law dispute. It is this experience that separates her from the other two perceived finalists and perhaps gives her a leg up on her competition.

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In 2013, Judge Kruger left that office to serve as a deputy assistant attorney general in the Department of Justice: Office of Legal Counsel. This role, which involved her providing legal advice to the president and other executive agencies, is also often seen as an incubator for future Supreme Court nominees. During her stint there, Judge Kruger received the Attorney General's Award for Exceptional Service twice, the highest award for employee performance in that department.

Her career made an unexpected and unusual turn in 2015 when she joined the California Supreme Court, becoming just the second Black woman to serve there. Her nomination was not universally praised at the time given that she had not lived in her home state since starting college and had no prior judicial experience. However, California's Commission on Judicial Appointments – a three-member body including then-state Attorney General Kamala Harris – backed her nomination after holding a hearing and examining her background.

Judge Kruger has served on that court with distinction for the past seven years, accumulating the kind of experience that would serve her well on SCOTUS. She is well familiar with workplace law disputes given the high-profile cases that come through that court with regularity. There are some who would assume that her California roots and current position would make her a controversial nominee, but early reviews about her judicial temperament and personality include such quotes as:

- "She's not bombastic. She's not confrontational. She's not highly ideological."
- "She is a moderate. She's an incrementalist."
- Her opinions "are the opposite of radical. They are careful and limited in scope."
- She is "cautious in her use of judicial power."
- "If you're looking for a firebrand who is going to kind of ignore law in order to achieve certain specific policy outcomes, Justice Kruger is not the one for you."

One of the signs that indicates she is on Biden's short list is the report that the president twice asked Judge Kruger to serve as the U.S. Solicitor General – a role that many consider to be the nation's "tenth" Supreme Court Justice. Though she turned down those offers, it seems a relatively safe bet that she would not be able to refuse an offer to return to the east coast to serve on the Supreme Court.

Judge J. Michelle Childs

Perhaps seen as the long-shot of the three just a few weeks ago, Judge J. Michelle Childs might be seen as the candidate with the most momentum and the potential favorite as we get closer to an official announcement. Her biggest advantage may be that she doesn't fit the profile of a typical SCOTUS Justice – and has the public backing of the highest ranking Black member of Congress, Democratic Representative James Clyburn, whose support was critical to President Biden's election. Support from several other prominent Republican lawmakers may smooth the path for an uneventful confirmation process. And her background demonstrates that she is one of the nation's

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most foremost experts when it comes to workplace law knowledge, which should be of interest to employers across the country.

Born in Detroit, Michigan, she and her mother moved to South Carolina due to rising crime in the city after her father – a Detroit police officer – was killed in the line of duty. She was the first person in her family to attend college, earning scholarships for both college and law school. Her undergraduate degree came from the University of South Florida in 1988 and she earned her Master's degree in Personnel and Employment Relations from the University of South Carolina School of Business in 1991 – meaning she perhaps understands workplace disputes better than any other potential nominee (and perhaps more than any sitting SCOTUS Justice). At the same time she was studying for that degree, she also earned her J.D. from the University of South Carolina School of Law in 1991. While she later received an LLM in Judicial Studies from Duke University School of Law in 2016, her formative educational background is unlike just about any potential SCOTUS nominee in history.

At age 55, she is also relatively young when it comes to SCOTUS nominees and could serve on the bench for decades to come. She started her legal career as an associate attorney at one of Columbia, South Carolina's largest firms and worked there from 1992 to 2000. She became the firm's first Black partner in 2000 and developed a reputation for being an expert in workplace law. In this position, she defended employers against allegations of racial discrimination, civil rights violations, and gender discrimination.

She then served as a public employee for the next six years, first as the Deputy Director of the state's Department of Labor, Licensing and Regulation, from 2000 to 2002. There she administered programs involving wage and hour law, child labor, workplace safety, labor-management mediation, and migrant labor. Next, she served as Commissioner on the South Carolina Worker's Compensation Commission from 2002 to 2006.

For the past 16 years, Judge Childs has served on the bench in various capacities. At first, she sat on South Carolina's Fifth Judicial Circuit Court from 2006 to 2010, but was then appointed by President Obama to serve as a federal trial court judge for the District of South Carolina. She remains there to this day – though she was nominated by President Biden for the United States Court of Appeals for the District of Columbia Circuit in December 2021 (remember, that's the court seen as the nation's second-most powerful court and the spot where many judges are plucked to join SCOTUS). Those confirmation proceedings were placed on hold a few weeks ago due to the potential SCOTUS nomination.

So why is Judge Childs – the judge with the most unconventional background – all of a sudden considered a possible leader as the candidates head down the home stretch? The fact that Republicans such as South Carolina Senators Lindsey Graham and Tim Scott have announced their support for Judge Childs could hand President Biden a gift in the form of a smooth confirmation process. Meanwhile, House Majority Whip Clyburn has indicated that Judge Childs would have the

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support of several Republicans if nominated. That could be just what the doctor ordered for an administration eager to score some wins, as avoiding a controversial or confrontational nomination process is high up on the president's wish list.

Conclusion

While we can't predict with certainty which of these three judges will be nominated as the next Supreme Court Justice – or if we'll be thrown a curveball and see another nominee emerge – we can guarantee you that we'll publish a thorough analysis of whichever candidate is announced (not to mention same-day alerts when SCOTUS releases workplace law opinions). Make sure you subscribe to Fisher Phillips' Insight system to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney or the authors of this Insight.

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