What can we learn from Justice Leondra Kruger's arguments before the U.S. Supreme Court?

California's newest Supreme Court Justice, Leondra R. Kruger, served from 2007 to 2012 as an Assistant to the Solicitor General of the United States. Hired initially by Republican Solicitor General Paul Clement, Kruger served under six different confirmed or acting Solicitors General. When Neal Katyal was elevated to Acting Solicitor General in 2010 he appointed Kruger as his Acting Principal Deputy, the second-highest position in that office. Kruger's appointment as Principal Deputy in 2010 capped an unusually fast rise, indicative of Kruger's innate skills as well as her ability to command respect from peers and, indeed, experienced colleagues much older than she.

While in the Solicitor General's office, Kruger argued twelve cases in front of the U.S. Supreme Court (and of course participated in the briefing of many more). In five of these cases, Kruger appeared for the principal party (as Petitioner or Respondent); and in seven, she argued as an Amicus or "friend of the Court," a position that the Solicitor General is often granted to present the federal interest in a case where the federal government is not the direct party. One of the unique aspects of the Solicitor General's role is how regularly the Court invites or allows that office to participate in oral argument, even as amicus, and how often the SG's amicus positions actually predominate in the Court's final decisions!

This post will not survey all of Kruger's oral arguments; you can find a complete list and links to the audio of the arguments themselves here. (Interestingly, Kruger's recent appointment was apparently so speedy that the Oyez audio file site doesn't even display a photo of her, as it does for most regular SCOTUS arguers.) However, by listening to a few of Kruger's arguments, I think you can pick up some signals of what Justice Leondra Kruger will be like when sitting on the California Supreme Court's bench.

What comes across most consistently and immediately in the audio files of Kruger's

arguments is a remarkable ability to stay calm in the face of intense questioning. Indeed, her rare talent is to sound not just calm, but actually sensible and understanding, as she confronts a Justice or two known to be hostile to the government's position.

In her very first argument, Kruger defended the application of a federal statute, the Armed Career Criminal Act, to a defendant convicted of multiple drunk-driving offenses (*Begay v. United States*). The question was whether a drunk-driving felony conviction should qualify as a "violent felony" under the ACCA (thereby leading to a very long imprisonment term). Justice Scalia, no shrinking violet, was already known to be skeptical regarding Congress's vague language in the violent felony provision. (In fact, the Court just recently announced that it will reconsider the constitutionality of the language this coming April). In the face of repeated, incredulous-sounding questions and remarks from the Justice, Kruger repeatedly used phrases like "well, what this Court said [in precedents]," and "well, indeed, as the Court said . . . ." Her introductory "well" plainly softened what followed, expressed a willingness to consider the question, and slowed down the hard-charging Justices. (Start listening at about 29 minutes into the recording.) A patient, even pedagogic, but never condescending, tone served Kruger well over the course of four years of building relationships with the Justices (one of whom, Elena Kagan, had been her boss at the SG's office).

Another fun moment in that first 2008 argument was the moment when Justice Stevens asked Kruger his first question. In 2003–04, Kruger had served as a law clerk to Justice Stevens. Now, only four years later, she was appearing as an advocate before her old boss. About fifteen minutes into her argument, Justice Stevens, in his normal gentle style, prodded Kruger on a difficult point raised by Justice Breyer (listen at 39 minutes into the recording). Kruger just as gently pointed out an obvious distinction that centered on the language of the statute (beginning with "it is difficult to see," not "you are wrong"). And with that, Kruger crossed what is a monumental bridge in the life of any lawyer: confronting a former and highly respected boss.

Kruger also showed an unusual ability to respond to Justice Breyer's characteristically long, and sometimes obscure, questions. Twice she began her

answer with "one way to begin answering that question," immediately conveying that a full response would take longer than the fifteen seconds the Justices characteristically give an advocate and indicating the respect that Kruger had for Justice Breyer's thoughts, even if some listeners might find his questions convoluted or unrevealing of their point.

Kruger's first argument before the U.S. Supreme Court was otherwise unremarkable—itself a remarkable and characteristic aspect of all of her appearances: no rough edges or difficult or hostile emotional moments. On the most high-profile stage an oral advocate can appear, Kruger never made a misstep and always displayed patience and calm.

Fast forward to 2012, when Kruger made her last argument before the Court (later that year she moved to the Office of Legal Counsel within the U.S. Department of Justice, a spot that has in fact yielded an unusual share of prominent federal judges and Justices over the past half century. Kruger was clearly a "judge in training," we just didn't know which court!). This time, representing Attorney General Eric Holder in a high-profile immigration matter, Kruger chose a case where she would open the argument, speaking first, as the Petitioner (*Holder v. Martinez Gutierrez*). Asking that the Ninth Circuit be reversed, Kruger began by announcing, calmly but directly, that the Circuit court had been "wrong for at least two reasons." She then patiently wove the Justices through an extremely complicated thicket of statutory and agency rules, as well as *Chevron* administrative deference doctrine.

The Justices ultimately agreed unanimously with Kruger's position in *Gutierrez*, a position that did not favor the immigrant child in that case. But remember, it would be a naïve mistake to attribute any particular political or policy views to whatever positions Kruger argued in her years with the Solicitor General. Your job in the SG's office (like any lawyer's) is to represent your client, not advocate your own opinions on the topic at hand.

As for the quality of her last argument, it is remarkably similar to her first. While perhaps sounding a bit more poised or confident—not surprising after eleven arguments before the Court—Kruger's same calm, patient, and open-minded approach was evident. There are also some moments where Kruger's lightning-quick

(as well as undoubtedly well-moot-courted) mind is showcased—quickly seeing where a Justice's question is going and just as quickly offering precedent-based responses that politely terminate a fruitless line of inquiry.

One other somewhat unusual aspect of Kruger's arguments perhaps bears notice: there is seldom if ever "laughter" generated by her remarks. Some skilled advocates use humor to lighten the tone of a difficult argument or fend off questions that seem too pointed. But Kruger's style is uniformly serious—not somber, just not resorting to humor—as she gives serious attention to every concern that the Justices raise. She laughs with the Justices in *Gutierrez* (listen at 13 minutes into the recording). But she pointedly does not seek out laughter on her own. It is possible that this is an aspect of working for the government, and that Kruger's natural sense of humor will find more exhibition as she matures as a Justice. But the seriousness with which she approached her oral advocacy work at all times is, I think, a true indicator of her approach to serious legal issues. Justices Scalia and Breyer often seem to be almost looking for laughs (often when sparring with each other). Leondra Kruger showed nothing like that in her arguments before the Court.

Of course, one can only snatch at slim straws regarding a California Justice's future from listening to only a few minutes of oral advocacy as a lawyer in the past. And these are only my own idiosyncratic impressions based on listening—other listeners might well take note of other aspects. But I don't think there are any hidden eccentricities or obvious personality flaws in Leondra, now Justice, Kruger. What you see, or hear, is who she really is. Patient. Calm. Piercingly intelligent and quick but without any hint of arrogance. (Disclaimer: I have known Kruger for a number of years, not deeply but with admiration, both as a fellow ex-Justice Stevens clerks and as a co-panelist for the ABA.) Last week Kruger spoke for the first time as a Justice of the California Supreme Court; thus any predictions based on the past will quickly fade as the present overwhelms us. Still, listening to Supreme Court oral arguments can be fun as well as educational—in fact, one might well ask when will SCOCA catch up and start posting its own argument audio files?

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Professor Little chairs and serves on various committees in the American Bar Association and Federal Bar Association; annually publishes a Review of the Supreme Court's Term: Criminal Cases for the ABA; and serves as Reporter to the ABA's Task Force to Revise the Criminal Justice Standards, Prosecution and Defense Functions. He also occasionally serves as an expert witness in litigation matters; provides commentary on current legal issues for various print and electronic media; and maintains an Of Counsel position for appellate matters with the international law firm of McDermott, Will & Emery.

After graduating from Yale Law School, Professor Little served as law clerk to U.S. District Judge Louis F. Oberdorfer (Washington DC); Justice Potter Stewart (ret.), working on matters before the First, Third and Sixth Circuit Courts of Appeal; and Justice William J. Brennan, Jr. Professor Little also clerked for Justices Powell, Stevens, and Chief Justice Burger—a unique one-year experience.

Professor Little then practiced privately at Miller, Cassidy, Larroca & Lewin in Washington D.C. In 1987, he joined the U.S. Department of Justice's Organized Crime & Racketeering Strike Force as a Trial Attorney. In 1989, he became the Appellate Chief for the U.S. Attorney's Office in the Northern District of California, and has now argued over 60 federal and state appeals while briefing many more. In 1996 to 1997, Professor Little took a leave of absence from UC Hastings to serve as an Associate Deputy Attorney General in Washington D.C. under Attorney General Janet Reno and Deputy AG Jamie Gorelick.



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