Warren Firm on Retiring; Leaves Date Up to Nixon

Is Said to Deprecate Talk of Ill Feeling Between Him and President-Elect and Expects to Swear Him In if Asked

By ANTHONY LEWIS
Special to The New York Times

WASHINGTON, Nov. 14—Chief Justice Earl Warren’s intention to retire has not been affected by the election. His letter stating his intention will remain on the table, ready for action by Richard M. Nixon, who becomes President.

But President Johnson accepted the retirement in an announcement made on June 20 that he would make the Warren retirement effective at such time as a successor could be appointed.

This conditional date of retirement was resisted by some Senators as a form of pressure on the President. It became one factor in the controversy over the President’s nomination of Justice Fortas to succeed Mr. Warren.

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During the confirmation fight, some critics seemed to associate the Chief Justice with the conditional retirement idea. But it is now clear that he did not intend anything but a definite retirement.

An accompanying personal letter to President Johnson on June 12 gave the reason—his feeling that at the age of 77 he should make way for a younger man. That feeling is known not to have changed.

The vacancy will give Mr. Nixon an immediate opportunity for one of the most important appointments a President can make. It has been said that, in terms of effect on American history, President Eisenhower did few things more important than his choice of Earl Warren to be Chief Justice in 1953.

During the recent Presidential campaign, Mr. Nixon gave so much emphasis to law and order, and was critical of Supreme Court decisions extending protections for criminal defendants, that his choice for Chief Justice might be expected to reflect these feelings.

One possible choice who has been mentioned is Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit, covering New York, Connecticut and Vermont, who has an outstanding scholarly reputation at the bar.

Judge Friendly has sometimes been critical of the trend of Supreme Court decisions in the criminal law field. Just last week, in a series of lectures, he proposed a constitutional amendment to put back on the Supreme Court’s recent expansive interpretations of the guarantee against forced self-incrimination.

Age May Be Obstacle

On the other hand, age may be an obstacle to Judge Friendly’s promotion to the high court. He is 65 years old, and no one that old has been appointed to the Court for the time since Justice Horace L. Lurton at age 60 in 1910.

Judge Stanley H. Fuld of New York’s highest court, the Court of Appeals, who might be a possibility, is also 65. Another highly regarded member of that court, Charles D. Breslin, will turn 60 next month.

One course the new President could take would be promotion from within the Supreme Court. In that event, the choice would probably fall on Associate Justice Potter Stewart.

A Republican Background

Justice Stewart is 53 years old, has served on the Court for 10 years and has an impecable Ohio Republican background. He has been a middle-of-the-road member of the Court, taking a notably liberal-minded position in some areas, such as freedom of artistic expression.

In the criminal law field, Justice Stewart has dissented from some of the most controversial recent decisions. One, for example, was the Miranda case of 1966, giving criminal suspects the right to counsel before being questioned by the police.

There may be a historical argument against a promotion from within. Neither of the two previous examples, Edward D. White’s elevation to Chief Justice in 1910 and Harlan F. Stone’s in 1941, worked out very well. And the bad taste of the Fortas controversy could influence Mr. Nixon away from such an appointment.

Some have spoken of Thomas H. Dewey, the Republican nominee for President in 1944 and 1948, but he is 66 and seemingly satisfied as a Wall Street lawyer. Herbert Brownell, first Attorney General under President Eisenhower, has also been mentioned. He is 64.

Among political possibilities, one would be Senator Thomas H. Kuchel, Republican of California. A leading member of his party’s liberal wing, he was defeated for reappointment by Max Bafferty, who in turn lost to Alan Cranston, Democrat. But a Kuchel nomination might seem to Nixon supporters critical of a Supreme Court’s continuation of the Warren tradition.