

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
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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 when he becomes President.

The Chief Justice has steadfastly declined to comment on the whole question of his seat on the Supreme Court since the nomination of Associate Justice Abe Fortas to succeed him was withdrawn. But his position is thus understood by his friends and colleagues and can be authoritatively stated.

Those close to Chief Justice Warren say also that he deprecates talk of any ill feeling between him and Mr. Nixon. He expects, if asked, to swear the new President in on Jan. 20.

From the point of view of the Supreme Court, the Chief Justice is known to think it best that any Justice time his retirement for the end of a term in June. If he leaves in the middle of a term, he cannot take part in cases that have been argued but not yet decided.

It may be, therefore, that President Nixon will choose to accept the Warren retirement effective at the end of the present term in June. But that will be completely up to the new President, since the Chief Justice does not intend to amend his retirement letter.

Warren's View Unchanged

He wrote President Johnson last June 13. It was a brief letter—just one sentence—invoking the provision of law under which Federal judges may retire. The letter said:

"My dear Mr. President:

"Pursuant to the provisions of 28 U.S.C., Section 371 (B), I hereby advise you of my intention to retire as Chief Justice of the United States effective at your pleasure."

Evidently the Chief Justice included that last phrase as a matter of courtesy to President Johnson, and to give him time to consider a replacement before announcing that Mr. Warren was retiring.

But President Johnson accepted the retirement in an unusual, conditional way. He replied on June 26 that he would make the Warren retirement "effective at such time as a successor is qualified."

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

With all the bitterness directed at the Supreme Court

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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 13 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 so 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.



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Chief Justice Earl Warren in his chambers. He expects, if asked, to swear in the new President on Jan. 20.

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 cut 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 Lorton at age 65 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. Breitel, 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 impeccable 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 E. 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 renomination by Max Rafferty, who in turn lost to Alan Cranston, Democrat. But a Kuchel nomination might seem to Nixon supporters critical of the Supreme Court's continuation of the Warren tradition.