

7-6-1987

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National Law Journal

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Recommended Citation

Journal, National Law, "Justice Powell's Resignation Reignites Speculation" (1987). *News Articles*. Paper 2.
<http://digitalcommons.nyls.edu/news/2>

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Justice Powell's Resignation Reignites Speculation

THE RETIREMENT of Justice Lewis F. Powell Jr. last week reignited speculation that Judge Robert H. Bork of the U.S. Circuit Court of Appeals for the District of Columbia and Judge J. Clifford Wallace of the 9th Circuit will be on President Reagan's list of possible replacements.

But the key question surrounding any nominee to the high court will be his or her ability to be confirmed in the Democrat-controlled Senate, court and congressional observers said last week.

"You're going to have a host of politics here, with [Senate Judiciary Committee Chairman Joseph R. Biden Jr., D-Del.] in the middle," said Bruce Fein of the Heritage Foundation. "The question is how Joe Biden wants to exploit the confirmation hearings."

Justice Powell's surprise announcement came on June 26, the last day of the Supreme Court's October 1986 term. His retirement provides President Reagan with his first opportunity to have a conservative majority on the high court.

"Justice Powell has played a pivotal role on the court, often being the key swing vote in many decisions," said H. Bartow Farr III of Onek, Klein & Farr in Washington, D.C., who has an extensive Supreme Court practice. "That may be the reason that whoever is nominated will receive particular scrutiny."



■ Court rules on sex, religion, money.

Other possible nominees mentioned immediately after Justice Powell's announcement were Sen. Orrin G. Hatch, R-Utah; White House Chief of Staff Howard H. Baker Jr.; Judge Frank H. Easterbrook and Judge Richard A. Posner, both of the 7th Circuit; and Judge Roger J. Miner of the 2d Circuit.

"What the resignation means, assuming Reagan can get his nominee confirmed, is that we may finally begin to see the Rehnquist court emerge," said

Michael P. McDonald, president of the Washington Legal Foundation's legal studies division in D.C. "Powell was clearly the swing vote in the last five years; and more and more frequently, especially in the criminal area, he was using his vote to give advantage to the liberal bloc."

Nan Aron, who chairs the liberal Judicial Selection Project, agreed the resignation will have a "significant impact."

"It will be a very detrimental if the appointee is someone who follows in [William H.] Rehnquist and [Antonin] Scalia's shoes in terms of their respect of individual rights," she said.

Although Mr. McDonald said he could see the possibility of the Senate Democrats trying to "spin out the background investigations until the next election is upon us," Ms. Aron said such a strategy seemed infeasible. Senator Biden, she noted, has said nominees should not be opposed solely for their judicial philosophy.

Judge Bork or Senator Hatch, Mr. McDonald said, would solidify the conservative block on the high court.

However, both Judge Bork and Senator Hatch would carry some "baggage" if nominated, accord-

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ing to some lawyers. Questions have been raised about whether Senator Hatch can be appointed to the court because of the constitutional limitations on members of Congress assuming an office for which they have voted to set the salary. Judge Bork, one lawyer added, may face some political fallout from his association with the Watergate scandal.

Mr. Baker, formerly a partner in Houston's Vinson & Elkins, is well-respected in the Senate by both political parties, some observers note, and his political stock is high again since he assumed his White House job. But whether he is philosophically palatable, being known more as a moderate, is not certain.