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Justice Powell's Continued Conservatism

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WASHINGTON, Jan. 13—The liberal lawyers and judges who have been hopefully predicting for the last two years that President Nixon would come to regret his appointment of Lewis F. Powell Jr. to the Supreme Court was strangely silent last week.

From the time of his nomination for the high court, Mr. Powell has been the single Nixon selection who was regarded by courtwatchers as a potential Hugo L. Black, a Southern conservative who might evolve into a liberal Justice during his years on the bench.

But Mr. Powell all but obliterated such wishful speculation last week with two strokes of his pen when he wrote, on consecutive days, opinions contending as follows:

¶That suppression of illegally obtained evidence is not a constitutional right of the person against whom it may be used but merely a court-imposed rule to discourage law enforecment officers from unlawful raids and unauthorized wiretaps. Such evidence, Justice Powell said, can be used as a basis for indictments.

¶That a loyalty oath renouncing advocacy of the forcible overthrow of the Government could arguably be required of Presidential and other Federal and state political candidates as long as it was applied evenhandedly to all parties.

Limitation on Old Rule

In the first case, Mr. Powell was the author of the majority opinion in a 6-to-3 decision substantially limiting the "exclusionary rule." That rule, in effect since 1914, holds that illegally obtained evidence cannot be used against a criminal suspect without tainting the entire law enforcement system.

Applying the rule to grand jury investigations as well as to criminal trials, the Justice declared, would not necessarily increase the deterrent against unlawful police searches and seizures. Such an effect, he said, would be "uncertain at best."

In the second case, Justice Powell wrote a concurring opinion in which the other three Nixon appointees—Chief Justice Warren E. Burger and Associate Justices Harry A. Blackmun and William H. Rehnquist—joined.

In a series of past loyalty oath cases, the high court has distinguished between advocacy of Government overthrow as an abstract principle and actual inciting of lawless action. Requiring citizens to renounce abstract advocacy, the Court consistently held is an unconstitutional limit on free speech.

But Justice Powell suggested on Wednesday that he and his

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three colleagues might uphold a loyalty oath required of political candidates, on the general theory that the Constitution itself requires the President and state and Federal officers to swear to support its principles.

In the case before the Court the four Nixon Justices agreed in the Court's unanimous decision that Indiana could not keep the Communist party off its ballot in 1972 for refusal to sign such an oath. The Nixon appointees based their votes on the fact that the state had never enforced such a requirement for the Republican and Democratic parties.

The five other Justices based their votes against the Indiana statute on the theory that it was an unconstitutional interference with speech, voting and free political association.

When Justice Powell came to the Court late in 1971, a number of legal observers were convinced that his long and distinguished career at the bar and in public service in Virginia presaged the development of a judicial outlook that would be open to the civil liberties and civil rights causes.

The Washington Post said that the new Justice "embodies to many here the type of cultured responsible white leadership the upper classes of the South have so often promised and so often failed to produce."

Few legal authorities believed that Chief Justice Burger or Justices Blackmun or Rehnquist would stray far from the "strict constructionist" posture that President Nixon has publicly praised. But Mr. Powell, it was argued, was going to surprise his sponsor.

During the 1972-73 term of the Supreme Court, however, Justice Powell joined the Court's three-man liberal bloc—Justice William O. Douglas, William J. Brennan Jr. and Thurgood Marshall—in the minority on just two of 153 cases.

One was a condemnation case involving land values, the other a restriction on party registration in the New York election law.

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Lewis F. Powell Jr.