

Governor Gets Full Immunity From Suits Over Acts in Office

CA Rejects \$15 Million Fraud Action Against Mandel

By Jef Feeley

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The Maryland Court of Appeals ruled Friday that Marvin Mandel has absolute immunity from civil suits for his actions as governor involving the "legislative function" of his office, including vetoes of proposed laws.

The unanimous decision in *Marvin Mandel v. James F. O'Hara, III et al.*, No. 33, Sept. Term 1990, makes Maryland the first state in the nation to officially bar lawsuits against its chief executive that are spawned by the exercise of his veto power.

The President of the United States is the only other chief executive to have such immunity conferred on him by American courts, according to constitutional law experts.

The 38-page Court of Appeals ruling dismissed a \$15 million fraud suit filed against Mandel by two Prince George's County businessmen, brothers James and Michael O'Hara, who claimed Mandel used his veto power to defraud them out of their interest in the Marlboro Racetrack.

It was Mandel's involvement in the sale of the racetrack that ultimately led to his conviction on federal mail fraud and racketeering charges. The U.S. Supreme Court later overturned those convictions, saying that Mandel's actions did not constitute mail fraud.

However, the opinion does not prevent the O'Haras from proceeding with their fraud action

against a group of Mandel's political supporters, who allegedly conspired with the governor to have him veto extra racing days for the track to depress the value of the stock and allow them to purchase it.

The Court of Appeals ruling, authored by Associate Judge Lawrence F. Rodowsky, also emphasized that the absolute immunity extended to the state's governors does not protect them from criminal prosecutions and suits over violations of citizens' constitutional rights.

"[A] governor of Maryland enjoys an absolute immunity from liability for damages for nonconstitutional torts based on the approval or veto of legislative enactments," Rodowsky wrote for the court.

But the judge pointed out in a footnote that "our holding, therefore, does not address criminal prosecutions, claims for equitable relief, for declaratory judgment, for restitution or for damages based on an alleged constitutional violation."

Decision 'delights' Mandel

Mandel, who argued briefly on his own behalf before the court when the case was heard on June 21, said last week that he was delighted that absolute immunity had been recognized for all of Maryland's governors.

"I think this decision will bring to an end a long period of problems for the state," said Mandel, who has a private practice in Annapolis.

"This reaffirms that a veto is part of the legislative
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process and that it was at the core of this case," the former governor added. "We asked for full immunity on this issue and we got it."

But the O'Haras' lawyer, Baltimore litigator Roy M. Mason, countered that he is considering asking the U.S. Supreme Court to review the immunity decision for potential violations of the Fifth Amendment Due Process rights guaranteed to Maryland citizens.

"Here we had a governor clearly acting under color of state law depriving private citizens of their rights to fair treatment," said Mason, a name partner in Baltimore's Montedonico & Mason. He added that he is also considering amending the O'Haras' lawsuit to add a constitutional claim against Mandel.

Baltimore lawyer H. Thomas Howell, who along with Mandel argued for the extension of gubernatorial immunity, brushed aside Mason's arguments that the Supreme Court should review the case.

"My belief is that when the court holds something as a matter of Maryland common law, it is hard to concoct a federal question out of that," added Howell, a partner in Baltimore's Semmes, Bowen & Semmes.

Howell added that his search of legal precedent shows that the *Mandel* case is the first to address the issue of a governor's immunity from suit over the use of his veto power.

Michael Meyerson, a professor at the University of Baltimore Law School, said last week that one of the reasons the gubernatorial immunity has not been addressed in other states is because challenges on the issue are very rare.

"I think it's well-recognized that if something is part of the job of governor, then the officeholder should be free of all claims," said Meyerson, who teaches constitutional law.

"Courts don't rule on these issues very much because cases involving them just aren't brought all that often," the professor explained. "It's hard to prove a veto was part of a fraud and it's just so ingrained that the veto is protected, it's just not raised as an issue."

Meyerson added that constitutionally, the governor of a state stands in the same position as the president does to the entire country.

"The basic functions of the job are the same: to act as the chief executive, with many of the same rights and responsibilities, just on a smaller scale for governors," Meyerson added. "The idea behind the immunity is that we don't want to force the governor to prove his motives every time he signs or vetoes a bill."

The Supreme Court recognized that the president has total immunity from civil lawsuits for damages in its 1982 decision in *Nixon v. Fitzgerald*, 457 U.S. 731.

But University of Maryland Law School torts professor Oscar Gray warned Friday that the immunity granted to Maryland governors in the *Mandel* decision only extends to legislative activity.

"The opinion is limited, as Judge Rodowsky says, to the very narrow issue of the intersection of executive and legislative roles . . . It does not apply to any other actions by the governor, and it does not apply to claims of a violation of constitutional rights. It applies only to state common law claims."

Gray stressed that common law torts that are outside the legislative realm, such as a suit for negligent driving, "ha[ve] nothing to do with it. [Such torts are] absolutely outside this opinion. It's limited to the governor's approval or disapproval of legislation. [It's] very narrow."

Gray added that he was unaware of other state courts extending comparable immunity to their governors, although he noted that Judge Rodowsky's opinion cited several cases immunizing local officials from liability under federal civil rights law.

At the heart of the *Mandel* case was

whether Mandel could be held civilly liable for allegedly using his veto power in 1971 to affect the price of the Marlboro racetrack.

The O'Haras claimed the General Assembly approved extra racing days for the track, which would have increased its value by millions of dollars.

But the businessmen claimed Mandel then vetoed the measure just prior to the sale of the track to a group of the governor's confidantes, including Irv Kovens, Dale Hess, Ernest Cory Jr., Harry and William Rodgers, Irving T. Schwartz and Eugene B. Casey.

After the sale was completed, Mandel then quietly encouraged lawmakers to override his veto and approve more racing days for the track, thereby increasing its value, according to the O'Haras' lawsuit.

The lawsuit, originally filed in 1978, had dragged on for nearly 12 years before Mandel raised the issue of potential gubernatorial immunity at a hearing earlier this summer.

Baltimore City Circuit Court Judge Elsbeth Bothe denied Mandel's motion to dismiss the case based on the immunity claim and ordered the case to go to trial in June.

The ex-governor appealed to the Maryland Court of Special Appeals, but before the intermediate court could hear the case, the Court of Appeals granted *certiorari*.

In another twist, five of the regular members of the Court of Appeals recused themselves from hearing the case because they were appointed to the court by Mandel.

At oral arguments in late June, only two regular Court of Appeals judges, Rodowsky and Associate Judge Harry A. Cole, presided over the case. The rest of the court was made up of retired Court of Appeals judges and several present members of the CSA bench.

Immunity tied to 'function' of job

In his analysis of the immunity issues, Rodowsky noted that the Supreme Court has adopted a "functional" view of what type of officials should be protected from civil liability.

Legislators, judges and prosecutors have traditionally received such protection to protect them from suits over the discretionary acts that are inherently part of the functions of their jobs, the judge wrote.

Quoting the *Nixon* case, Rodowsky pointed out that the high court has found that "the scope of immunity is determined by function, not office."

Rodowsky contended that legal commen-

tators have long recognized that vetoes are part of the legislative process and therefore may qualify for immunity.

"Whether a function qualifies for absolute immunity is made objectively and not subjectively," the judge added. The Supreme Court decided the issue, he added, by looking at whether the matter that spawned the suit fell under an official's "control or supervision," or if the acts "were within the outer perimeter" of the official's responsibility.

"We need not define any perimeter in this case before us because the legislative veto/approval power of a Governor is at the very core of gubernatorial duties," Rodowsky wrote.

"The discretion exercised by a Governor in deciding whether to veto or approve legislation does not differ from that to be exercised by legislators in deciding whether to vote for or against a bill," the judge continued.

"There is no policy reason why legislators should enjoy absolute immunity for their legislative acts but that a Governor should have only a qualified immunity for his or her legislative function of vetoing or approving legislation," Rodowsky concluded.

Editorial intern Rudy Pyatt contributed to this story.