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Intangible Wrong

The Mandel case is becoming The Case That Will Not Die. Maybe what is needed is a wooden stake, or a silver bullet. Otherwise, lawyers and judges may be arguing this case that began with indictment in 1975 into the Twenty-first Century.

Yesterday, U.S. District Judge Frederic Smalkin ruled that the 1977 convictions of former Gov. Marvin Mandel and five co-defendants were defective. Governor Mandel was convicted of mail fraud on the basis of a clever but then standard interpretation of the law against fraud in which the "intangible right" of the people to honest government was considered the equivalent of property. But Judge Smalkin now says that since something tangible such as property was not involved, the law does not — and did not — apply.

Conspirators like the governor and his cronies were defrauding Marylanders of honest government by schemes aimed at increasing the value of race tracks from which they secretly profited. We continue to believe that anyone reading the indictments, paying attention to the trial, the convictions, the two circuit court appeals and the Supreme Court appeal would have concluded that whatever the technical meaning of the applicable statute, something despicable had been going on.

Your average observer would have concluded that what the defendants did was not just wrong *but a crime*. After all, in 1980 the Supreme Court refused even to hear the case, allowing the convic-

tions to stand. This was true even though the defense made much of the fact in its appeals that the trial judge insisted over defense objections on instructing the jurors that "faithful and loyal service" are "things of value."

But last June the Supreme Court ruled in another case that "property rights" were all that counted when determining if someone had been defrauded under federal law. What changed the court's mind in seven years is anybody's guess. It had two new members in 1987. The new case presented the issue in slightly different terms.

Following the Supreme Court's lead, Judge Smalkin has ruled that the ex-governor and his friends did not commit a crime and their convictions must be vacated. He said their "moral" guilt or innocence must be left to the judgment of history. It is unlikely the matter will end here, though.

The U.S. attorney says he will appeal because the ruling would cripple federal prosecution of state and local governmental corruption. He's probably right. Often the feds are the only ones who can dig into this sort of corruption. The targets control the other prosecutors. If the Smalkin decision stands up, and if federal prosecutors decide they can no longer prosecute the kind of activity Governor Mandel and his friends engaged in, Congress ought to rewrite the mail fraud laws. Otherwise, intangible wrongs will surely be inflicted in the future on citizens of many states.