

Genesis of Mandel's successful appeal was evident in July queries of 2 judges

By STEVEN M. LUXENBERG
and TIMOTHY M. PHELPS

The seeds of last week's 2-to-1 court opinion overturning Governor Mandel's conviction were sown last July in Abingdon, Va., some 400 miles from his home in Annapolis.

"Was there no direct evidence that Governor Mandel wanted his veto overridden?" asked Judge H. Emory Widener, Jr.,

Analysis

the federal appeals judge who wrote the majority opinion that has spared Marvin Mandel, at least for now, from a four-year prison term.

"I don't believe there is a direct quote," Daniel J. Hurson, a federal prosecutor,

conceded at the appeal hearing.

From there Judge Widener—who was born in that historic little town 55 years before—and Judge Donald S. Russell, of South Carolina, went on to take apart the case that had taken the federal government almost three years to prove. The third judge, John D. Butzner, Jr., said little.

When the two judges finally issued their opinion, their earlier skepticism came through loud and clear.

The Mandel jury, the judges said, heard and read impermissible evidence and had not been given a clear enough definition of bribery. Moreover, the central part of the case—whether Mr. Mandel pushed racing legislation in return for more than \$350,000 in gifts—was based on "damaging hearsay statements repeated by longtime political enemies of the Governor."

Judge Butzner, on the other hand, praised the judge who presided at the 12-week trial, and said that he wanted to affirm the convictions of Governor Mandel and five other men on political corruption charges.

Both Judge Widener and Judge Russell, appointed to the United States Fourth Circuit Court of Appeals by former President Nixon, are considered conservative judges based on their past decisions. Judge Butzner, a Lyndon Johnson appointee, is said to be more liberal.

Some lawyers thought last summer that that judicial lineup would work against Mr. Mandel and his co-defendants. The conservatives, they reasoned, would not be likely to overturn the criminal convictions.

It worked the other way. Now, some
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lawyers wonder whether Judge Russell's background in politics might have been a deciding factor.

Born in Mississippi in 1906, Judge Russell moved to South Carolina and became governor in 1963. Two years later, he resigned as governor and immediately was appointed by the new governor to a vacant seat in the United States Senate.

Only a year later, he lost that seat after a hotly contested Democratic primary battle in which his opponent, Ernest F. Hollings, charged that Mr. Russell had, in effect, appointed himself to the Senate.

There were some indications at the oral arguments last summer that Judge Russell's political career may have made him sympathetic to Governor Mandel, or at least aware of his problems.

"I've been a governor and have experienced vetoes being overridden," he said in response to a statement by Mr. Hurson that Mr. Mandel's veto was seldom overridden.

"I was just curious about a state that always respected what a governor had done," Judge Russell said, drawing a laugh from the courtroom listeners.

Last week's opinion, although written by Judge Widener, seemed to reflect the experiences of a veteran state politician like Judge Russell. Judge Widener, 55, a graduate of the Naval Academy and a federal judge for 10 years, does not list any state offices in his biography.

In ruling that testimony by a number of state senators about conversations or events they had not participated in themselves should not have been permitted at the trial, the opinion betrayed an appreciation for the way politics work.

"Important also is the whole setting from which this testimony is drawn," the judges said. "We are dealing with a purely legislative political scene. . . we are not dealing with an objectively observable factual event. We are dealing with circumstantial proof of the position a Governor took on two pieces of legislation."

Some persons also perceive a political rationale in the timing of last week's decision, although experienced Baltimore lawyers said it was unlikely that the court had either held back—or rushed—the release of the opinion.

The ruling was announced just six days before the inauguration of Mr. Mandel's successor, Governor-elect Hughes, preventing Mr. Mandel from taking power in time to do anything with it, but with enough time to allow him to go out in a blaze of glory before Mr. Hughes takes over.

Acting Governor Lee said last week that "it's a shame" that the court did not announce its decision earlier, letting Mr. Mandel off the tenterhook and letting him resume power for a meaningful period. Others suggested the judges should have waited an extra five days to avoid the transition problem.

William K. Slate 2d, clerk of the appeals court in Richmond, said Friday that the opinion was handled like any other, except that it was released immediately instead of being sent to the printers.

"Business as usual," he commented. Mr. Slate said the opinion was given to

the clerk's office about 4.30 P.M. Thursday by Judge Widener's secretary, who said she had just finished typing it. The judges met in Richmond last week to hear appeals.

Like most complicated political corruption trials, the Mandel case spawned legal offspring.

And while these secondary cases were born because of the Mandel investigation, they have taken on a life of their own.

For example, the Internal Revenue Service has been combing through the tax returns of the defendants in the trial, looking for income that was not reported—and, therefore, not taxed.

A few months ago, the IRS notified W. Dale Hess that he owed an additional \$474,000 in taxes for the years 1972 to 1975. In papers filed in the U.S. Tax Court in Washington, the IRS charged that Mr. Hess participated in a "fraud with intent to evade taxes."

Not only did Mr. Hess dispute the IRS's contentions, he countercharged that he has miscalculated his taxes and that the U.S. government owes him a tax refund.

Much of the IRS's case revolves around an alleged "bribe" that Mr. Hess gave Mr. Mandel, supposedly in return for the Governor's agreement to use his influence in pushing legislation favorable to the Marlboro Race Track, a Prince Georges county track owned by Mr. Hess and at least two co-defendants.

However, enough of the IRS's allegations deal with other matters, making it likely that the IRS will pursue the case and take it to trial.

The appeals court opinion also has implications for the race track industry in Maryland. Three of the defendants—Mr. Hess, Harry W. Rodgers 3d and William A. Rodgers, hold considerable stock in the corporation that owns Bowie Race Course, one of the major tracks in the state.

The three men acquired their financial interest in Bowie when the Marlboro track merged with Bowie in December, 1972. A fourth man, Irving T. Schwartz, also owns stock in Bowie—although the prosecutors charge (and the jury agreed) that the stock is actually owned by Irvin Kovens, Mr. Mandel's political mentor.

While the case has been on appeal, the stock has been in escrow—subject to forfeiture because the jury found that Mr. Kovens, Mr. Hess and the Rodgers brothers operated Marlboro through a "pattern of racketeering."

But that is all changed now. The stock is theirs and, presumably, they can become more involved in racing affairs if they desire. But until the issue of a another retrial is settled, the prosecutors will oppose any move to sell the stock.

For Marvin Mandel, the reversal means that he can earn a living as a lawyer if he chooses.

After the conviction, Mr. Mandel voluntarily surrendered his license to practice law—a move he took after the state Attorney Grievance Commission filed a request that Mr. Mandel be suspended.

Mr. Mandel asked that his license be held in limbo until the outcome of the appeal became known.

Although he did almost no legal work during his years as governor, Mr. Mandel

had an active part-time practice while he was serving in the state legislature during the 1950's and 1960's.

Perhaps the most significant legal result of the opinion is that the judges who overturned Mr. Mandel's conviction did not agree with the argument emphasized most by his lawyer, Arnold Weiner.

Mr. Weiner had told the judges that the federal prosecutors had overextended the mail fraud laws to intrude upon what he said is rightly the state's prerogative to regulate its own political process. Mr. Mandel is charged with using the U.S. mails to carry out a "scheme to defraud."

The court said: "We think [the defendant's] contention that their convictions were based on an unwarranted over-extension of the mail fraud statute is without merit."